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NO. COA11-198
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

TONY D. GUPTON,
Plaintiff

v.

Harnett County
No. 07 CVS 01172

SON-LAN DEVELOPMENT CO., INC.,
LANNY K. CLIFTON, JAMES W.
JOHNSON, III, ROBERT P. WELLONS,
and FRED L. STANCIL,
Defendants

Appeal by plaintiff from order entered 4 November 2010 by Judge Robert H. Hobgood in Harnett County Superior Court. Heard in the Court of Appeals 31 August 2011.

Akins/Hunt, P.C., by Donald G. Hunt, Jr., and Kristen G. Atkins, for plaintiff-appellant.

Bain, Buzzard & McRae, LLP, by Edgar R. Bain, for defendant-appellee.

ERVIN, Judge.

Plaintiff Tony Gupton appeals from an order granting a motion by Defendants Son-Lan Development Co., Inc.; Lanny K. Clifton; James W. Johnson, III; Robert P. Wellons; and Fred L. Stancil seeking an award of costs, including expert witness fees. On appeal, Plaintiff argues that the trial court lacked

the statutory authority to award Defendants the type of expert witness fees at issue in this case. After careful consideration of Plaintiff's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order must be reversed and that this case should be remanded to the Harnett County Superior Court for further proceedings, including additional findings of fact concerning the type of expert witness fees, if any, to which Defendants are entitled.

I. Factual Background

"This action arises out of a series of contracts for the purchase and sale of a tract of land and [a] business operated thereon . . . located in southern Wake County." *Gupton v. Son-Lan Development Co., Inc.*, __ N.C. App __, 695 S.E.2d 763, 765 (2010) (*Gupton I*). On 15 June 2007, Plaintiff filed a complaint against Defendants asserting claims sounding in malicious prosecution, tortious interference with contract, unlawful interference with prospective economic relationships, unfair and deceptive trade practices, and civil conspiracy. On 5 March 2008, the trial court granted summary judgment in favor of Defendants with respect to all of Plaintiff's claims. *Gupton I*, __ N.C. App at __, 695 S.E.2d at 766-67. We affirmed the trial court's summary judgment order on 6 July 2010. *Gupton I*.

On 12 July 2010, Defendants filed an Amended Motion for Costs pursuant to N.C. Gen. Stat. §§ 6-1, 6-20, and 7A-305(d). In their motion, Defendants sought, among other things: "(10) [e]xpert witness fee of Gerald Hayes [\$]500.00" and "(11) [e]xpert witness fee of Joe Tart [\$]900.00." Although Defendants' motion did not include any text addressing the nature of the services or expenses for which Defendants sought reimbursement, Defendants' motion was accompanied by copies of checks made out to Joe Tart and Gerald Hayes, respectively, in the amount of \$500.00 and a copy of an invoice from the Tart Law Group, P.A., billing Defendants for the following services: (1) "pick up package; sign affidavit" - \$337.50; (2) "review documents" - \$337.50; and (3) "review file" - \$225.00. In addition, the records attached to Defendants' motion contain a check drawn to the Tart Law Firm in the amount of \$400.00 relating to a separate invoice specifying that an unpaid prior balance of \$400.00 for "[e]xpert witness" services remained due.¹

¹ The documents contained in the record suggest that the total cost of Mr. Tart's services amounted to the \$900.00 figure shown on the invoice which refers to the picking up of a package, the signing of an affidavit, the review of certain documents, and the review of the file and that the total cost of his services was paid by means of the \$500.00 and \$400.00 checks discussed in the text. If that is, in fact, the case, the trial court may well have erred by allowing an expert witness fee in the amount of \$900.00 stemming from Mr. Tart's services. However, there is sufficient ambiguity in the record to preclude

The record contains no information concerning the nature of the services for which Mr. Hayes billed Defendants.

On 4 November 2010, the trial court granted Defendants' motion by means of an order finding, in pertinent part, that "the Defendants are entitled to all costs set forth in the motion," so that "the Defendants are entitled to have costs assessed in the sum of \$8,622.65." Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

On appeal, Plaintiff challenges the trial court's expert witness fees award. In essence, Plaintiff argues that the trial court erred by awarding expert witness fees in the absence of proper statutory authorization. As a result, a proper resolution of the issue that is before us in this case requires a determination of the extent, if any, to which the trial court had the statutory authority to award the challenged expert witness fees. "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal," although "[t]he reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters v. Pennington*, __ N.C. App. __, __, 707 S.E.2d 724, 741 (2011)

a conclusive determination that the series of events set out in this footnote is, in fact, what occurred.

(citing *Jarrell v. Charlotte-Mecklenburg Hosp.*, __ N.C. App. __, __, 698 S.E.2d 190, 191 (2010)). Thus, since the issue that Plaintiff has raised for our consideration involves a question of law, we will review the relevant portions of the trial court's order on a *de novo* basis.

B. Legal Principles Governing Expert Witness Fee Awards

"The court's power to tax costs is entirely dependent upon statutory authorization." *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 658 (1972) (citing *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E. 2d 179, 185 (1972)). According to N.C. Gen. Stat. § 6-20, "[i]n actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court," with "[c]osts awarded by the court . . . subject to the limitations on assessable or recoverable costs set forth in [N.C. Gen. Stat. §] 7A-305(d), unless specifically provided for otherwise in the General Statutes." N.C. Gen. Stat. § 7A-305(d) provides, in pertinent part, that:

The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to [N.C. Gen. Stat. §] 6-20 . . .

(11) Reasonable and necessary fees of expert witnesses solely for actual time

spent providing testimony at trial, deposition, or other proceedings.

In addition, N.C. Gen. Stat. § 7A-314 provides, among other things, that:

(a) A witness under subpoena . . . shall be entitled to receive five dollars (\$ 5.00) per day, or fraction thereof, during his attendance[.] . . .

(b) A witness entitled to the fee set forth in subsection (a) of this section . . . shall be entitled to receive reimbursement for travel expenses[.] . . .

. . . .

(d) An expert witness . . . shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize.

. . .

"Our Supreme Court has held that '[a]s to expert witnesses, Section (d) modifies Section (a),' which means 'Sections (a) and (d) must be considered together.' Thus, '[t]he modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation.'" *Jarrell*, ___ N.C. App. at ___, 698 S.E.2d at 192 (quoting *Johnson*, 282 N.C. at 27-28, 191 S.E.2d at 659).

In *Springs v. City of Charlotte*, ___ N.C. App ___, 704 S.E.2d 319 (2011), we considered the interplay of N.C. Gen. Stat. § 6-20, which limits costs to those set out in N.C. Gen. Stat. § 7A-

305 “unless specifically provided for otherwise in the General Statutes,” and N.C. Gen. Stat. § 7A-314 with N.C. Gen. Stat. § 7A-305(d), which provides that the enumerated costs “are complete and exclusive and constitute a limit on the trial court’s discretion.” At the conclusion of the required analysis, we “agre[ed] with defendants that, given the unambiguous language used in the relevant statutory language, N.C. Gen. Stat. § 7A-305(d)(11) refers to an expert witness’ actual time testifying and not any other time.” However, we also concluded that N.C. Gen. Stat. § 7A-305(d) “must be ‘read in conjunction with’ N.C. Gen. Stat. § 7A-314 (2009), which governs fees for witnesses.” *Springs*, __ N.C. App at __, 704 S.E.2d at 327 (quoting *Morgan v. Steiner*, 173 N.C. App. 577, 583, 619 S.E.2d 516, 520 (2005), *disc. review denied*, 360 N.C. 648, 636 S.E.2d 808 (2006)). In addition, we noted that acceptance of “defendants’ contention that a trial court may only include within an award of costs expert witness compensation for time spent actually testifying . . . would effectively render meaningless N.C. Gen. Stat. § 7A-314(d)” and pointed out that “N.C. Gen. Stat. § 6-20 (2009) specifically anticipates that N.C. Gen. Stat. § 7A-305(d) will not necessarily be the only statute addressing a trial court’s authority to award costs.” Ultimately, we held that:

N.C. Gen. Stat. § 7A-305(d)(11) and N.C. Gen. Stat. § 7A-314 can both be given effect. . . . [U]nder N.C. Gen. Stat. § 7A-305(d)(11), a trial court is required to include within an award of costs expert fees for time spent by the witness actually testifying. In addition, however, under N.C. Gen. Stat. § 7A-314(d), the trial court has discretion to award expert fees for an expert witness' time in attendance at trial even when not testifying. Further, the trial court has discretion to award travel expenses for experts as provided under N.C. Gen. Stat. § 7A-314(b). Nevertheless, we find no authority in the current statutes authorizing the trial court to assess costs for an expert witness' preparation time.

Springs, __ N.C. App at __, 704 S.E.2d at 328 (quoting *Priest v. Safety-Kleen Sys., Inc.*, 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008)). "In sum, before a trial court may assess expert witness testimony fees as costs, the testimony must be (1) reasonable, (2) necessary, and (3) given while under subpoena." *Peters*, __ N.C. App. at __, 707 S.E.2d at 741. "In addition, however, under N.C. Gen. Stat. § 7A-314(d), the trial court has discretion to award expert fees for an expert witness' time in attendance at trial even when not testifying. Further, the trial court has discretion to award travel expenses for experts as provided under N.C. Gen. Stat. § 7A-314(b)." *Springs*, __ N.C. App. at __, 704 S.E.2d at 328. Thus, any expert witness fee amounts allowed by the trial court in this case were required to be consistent with the limitations set out above.

C. Lawfulness of Trial Court's Expert Witness Fee Order

The challenged costs at issue in this case are described in Defendants' motion as follows:

(10) Expert witness fee of Gerald Hayes
500.00

(11) Expert witness fee of Joe Tart 900.00

The description of these cost amounts that Defendants provided to the trial court does not suffice to permit a determination of the extent, if any, to which Defendants had requested the trial court to assess statutorily-allowable expert witness fees. Similarly, the checks made out to Mr. Hayes, Mr. Tart, and the Tart Law Group contain no information concerning the nature of the services associated with the challenged fee amounts. Finally, an invoice included in the record indicates that payment was made to the Tart Law Group, P.A., for non-compensable services described as picking up a package, signing an affidavit, and reviewing documents. Although Plaintiff has requested leave to amend the record on appeal to include copies of an additional check, this document provides no information concerning the extent to which the payment reflected by this check was related to an allowable item of costs, leading us to conclude that Plaintiff's amendment motion should be denied and Defendants' related motion to strike should be allowed. Finally, the trial court's order awarding costs is devoid of any

findings concerning the type of expenses that are included in the requested expert witness fees. Simply put, given the contents of the record, we are unable to determine whether the challenged costs were or were not properly assessed against Plaintiff in the trial court's order. As a result, we conclude that "[t]he trial court's order pertaining to costs lacks findings as to how these costs were incurred. Therefore, we vacate the [order awarding costs to Defendants] insofar as it awards \$[1,400.00] in [costs for expert witness fees] and remand [this case to the Harnett County Superior Court] for a hearing to determine how these litigation costs were incurred and whether they are authorized by statute." *Peters*, __ N.C. App. at __, 707 S.E.2d at 741-42. On remand, the trial court may, in the exercise of its discretion, take additional evidence to the extent necessary to resolve the dispute between the parties.

REVERSED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).