

Cite as 2010 Ark. App. 604

ARKANSAS COURT OF APPEALSDIVISION I
No. CA10-167

RICKEY HENRY

APPELLANT

V.

QHG of SPRINGDALE, Inc.,
NORTHWEST MEDICAL CENTER of
BENTON COUNTY and WELLCARE
HEALTH INSURANCE of ARIZONA,
Inc., et al.

APPELLEES

Opinion Delivered September 15, 2010APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CV-09-422-5]HONORABLE XOLLIE MARIE
BUFFER DUNCAN, JUDGE

REMANDED

KAREN R. BAKER, Judge

This case involves breach-of-contract and breach-of-fiduciary-duty claims against a patient's health-insurance company that is not a party to this appeal and appellee QHG of Springdale, Inc. d/b/a Northwest Medical Center of Benton County (QHG), one of the health-care providers, for charges incurred as a result of injuries appellant Rickey Henry sustained in an automobile accident. On appeal, appellant's sole argument preserved before this court is whether the trial court erred in its decision to award attorney's fees to QHG. Because the circuit court did not make findings consistent with the statutory requirements in awarding attorney's fees, we remand.

On February 19, 2008, appellant was injured in an automobile accident and was treated by Bentonville Ambulance, QHG, Benton Emergency Group, and Bentonville

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Radiology Consultants. The aggregate charges for appellant's medical services on this date totaled \$14,350.40. At the time of treatment, appellant had health insurance with Wellcare Health Insurance Company of Arizona, Inc. and/or Wellcare Health Insurance Company of Illinois, Inc. (collectively, Wellcare). On March 11, 2008, QHG filed a notice of lien against appellant for \$12,277.40 in medical charges related to the motor-vehicle accident.

On February 11, 2009, appellant brought a suit against Wellcare for breach of contract. On March 31, 2009, QHG filed a second notice of lien against appellant for unpaid medical bills in the amount of \$12,277.40. On April 21, 2009, appellant filed a second amended complaint, adding QHG as a defendant and asserting that pursuant to its contract with Wellcare, QHG should have taken an agreed-upon reduction in charges instead of attempting to collect the full bill from appellant, and that in breaching its contractual obligations to Wellcare by improperly submitting appellant's charges to Wellcare, QHG also breached its fiduciary duty to appellant.

On May 7, 2009, QHG wrote off the remaining \$12,216.40, but adjusted the account on May 14, 2009, to reflect a payment of \$869.67 from Wellcare. On May 21, 2009 (a little over three months after appellant's suit was initially filed and one month after appellant amended his complaint to add QHG), QHG wrote off the remaining co-pay amount of \$146.09, fully settling appellant's account. Thereafter, QHG filed a motion to dismiss, or alternately, a motion for summary judgment.

By order dated August 31, 2009, the circuit court denied QHG's motion to dismiss because the court considered matters outside the pleadings, granted QHG's motion for

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summary judgment as to appellant's breach-of-fiduciary-duty claim against QHG, and denied Wellcare's motion to dismiss. On November 6, 2009, the circuit court denied QHG's motion for sanctions, but, stating that the award was pursuant to Ark. Code Ann. § 16-22-309(a)(1)(Repl. 1999), the court granted QHG's request for attorney's fees in the amount of \$1,500 (out of the \$4,477.74 requested). Appellant filed a motion for reconsideration, or in the alternative, motion for findings of fact and conclusions of law on November 21, 2009, and a motion for clarification on November 24, 2009, both of which were deemed denied pursuant to Ark. R. Civ. P. 52(b)(1). Appellant filed a motion to dismiss his claims against Wellcare with prejudice, so that there would be a final, appealable order, and the circuit court granted the motion.

Appellant appeals the November 6 order awarding attorney's fees and purports to appeal the deemed denial of the motion for reconsideration and motion for clarification. The notice of appeal, however, is incomplete with respect to the motions appealed in both the addendum and the record. The court only has pages 1 and 3 before it. From these two pages, it is clear that appellant appeals the award of attorney's fees. Further, the notice of appeal was filed on December 4, 2009. Under Ark. R. Civ. P. 52(b)(1), a motion is deemed denied only if the trial court fails to act on it within thirty days of its filing. Accordingly, appellant's motions for reconsideration and clarification were not deemed denied until December 20 and December 23, respectively. An appeal from the denial of these motions that is taken prior to these dates where the notice is not amended after these dates is not timely and will not be considered, leaving the sole issue on appeal whether the circuit court

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erred in awarding attorney's fees to QHG under Ark. Code Ann. § 16-22-309(a)(1). Ark. R. App. P.—Civ. 4(b)(1), (b)(2).

As a general rule, attorney's fees are not granted in the absence of a statute permitting their allowance; however, in a civil action in which a trial court finds a complete lack of a justiciable issue of either law or fact raised by the losing party, the court may award limited attorney's fees. *Artman v. Hoy*, 370 Ark. 131, 257 S.W.3d 864 (2007); *Wynn v. Remet*, 321 Ark. 227, 902 S.W.2d 213 (1995); Ark. Code Ann. § 16-22-309.

An award of attorney's fees will not be disturbed on appeal absent an abuse of discretion. *Artman*, 370 Ark. at 137, 257 S.W.3d at 869. Arkansas Code Annotated section 16-22-309(d) requires that we review the trial court's decision to grant attorney's fees de novo on the record of the trial court alone.

In this case, the lower court awarded attorney's fees under Ark. Code Ann. § 16-22-309(a)(1), which allows for attorney's fees in cases where the lower court "finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party." Subsection (a)(1) provides as follows:

In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars (\$5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

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Subsection (b) of this statute sets forth what is required to find that an issue is nonjusticiable:

In order to find an action, claim, setoff, counterclaim, or defense to be lacking a justiciable issue of law or fact, the court must find that the action, claim, setoff, counterclaim, or defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Subsection (d) provides, "On appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone." See *Drummond v. Shepherd*, 97 Ark. App. 244, 247 S.W.3d 526 (2007); see also *Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001). A finding of a complete lack of a justiciable issue is a prerequisite to awarding attorney's fees under this provision of the Code. See *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005). Our case law requires that we not reverse the trial court's factual findings unless they are clearly erroneous. *Drummond*, 97 Ark. App. at 247, 247 S.W.3d at 528; see also *Stanley v. Burchett*, 93 Ark. App. 54, 216 S.W.3d 615 (2005).

Although the *Drummond* court examined a claim of adverse possession, it offered this guidance with respect to the requirements necessary for awarding attorney's fees under the statute before us now:

Arkansas Code Annotated § 16-22-309 provides that an attorney's fee shall be awarded in any action where the trial court finds that there was a complete absence of a justiciable issue of either law or fact. *In order to support a determination that no justiciable issue exists, the court must determine that a complaint was filed in bad faith solely for purposes of harassing or maliciously injuring another, or delaying adjudication without just cause or that an attorney or party signed a pleading not grounded in fact, not*

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warranted by existing law or a good faith argument for a change in the law, or filed for an improper purpose. *See State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989).

In this case, although the trial court expressly held that there was an absence of a justiciable issue, it made no factual findings supporting its legal conclusion. Therefore, we are left with the singular task of determining whether – as a matter of law – Drummond presented a justiciable claim. Further, contrary to appellees' assertion that the trial court did not abuse its discretion in making the fee award, which is generally the ultimate test for the propriety of an award of attorney's fees, we do not review matters of law under an abuse-of-discretion standard.

Although Drummond fell short of his ultimate burden, proving seven years of adverse use, he did present a valid claim and offered some evidence that he had used the roadway over the course of many years. Indeed, his claim had sufficient merit that the trial court twice refused to dismiss the claim before its ultimate decision to dismiss. Therefore, based on our *de novo* review of the trial record, we conclude that Drummond presented a weak but justiciable claim. The trial court is reversed on this point.

Drummond, 97 Ark. App. at 246–47, 247 S.W.3d at 528 (emphasis added).

The November 6 order does not set forth any findings of fact or law upon which the court might base either its denial of Rule 11 sanctions or its grant of attorney's fees, other than its citation to Ark. Code Ann. § 16-22-309(a)(1). In order to award the attorney's fees to QHG, as the prevailing party, the statute dictates that the circuit court must find a complete lack of a justiciable issue. QHG prevailed in this case by virtue of the court's August 31 order, granting QHG's motion for summary judgment. In pertinent part, the court states the following in its order:

There is no issue of material fact as to the [appellant]'s breach of fiduciary relationship claim against QHG. The Court finds that the undisputed facts as presented do not rise to the level to state a claim for breach of fiduciary responsibility. The Court specifically finds that [appellant]'s claim cannot survive the motion for summary judgment due to his failure to establish any damages for his claim. Therefore, the

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claim of [appellant] as against the separate defendant, QHG, should be and hereby is dismissed with prejudice.

In the foregoing findings, the circuit court does not state that the claim is dismissed for complete lack of a justiciable issue. Going to the record on our de novo review, the lower court states in the hearing on the motion to dismiss,

My take on this is that the issue of whether there is a fiduciary duty between a patient and a hospital is much closer than what [QHG] argues, but much closer still doesn't get there, and I don't think there has been a fiduciary duty established. The reason I had some question in my mind about it is because the hospital does take on the role of give us your insurance card, and we are going to pursue all this, and you have to assign the insurance proceeds to us. I think they take a much more active and greater role in dealing with the insurance company than just simply you are our patient, and we are your hospital, and that's the end of it. I think it is much more than that. But that being said, I still don't believe that it rises to the level of a fiduciary duty. At least I am not convinced in this case it did.

The other issue is the lack of damages, and I think that is absolutely the death knell to this case between [appellant] and [QHG] because I don't think he can establish damages that the entire amount that was not paid in excess of \$11,000 has been written off, and I just don't see how he could possibly claim damages. So for those two reasons together I am going to grant [QHG]'s motion for summary judgment.

The circuit court determined that appellant failed to establish that a fiduciary duty existed between appellant and QHG and failed to prove damages. The question for this court is whether the above findings adequately meet the requirements of section 16-22-309. Examining the statute as a whole, as we must, subsection 309(b) states that in order to be awarded attorney's fees, it is necessary to prove that the plaintiff was acting in bad faith. We hold that the trial court's findings of fact fail to demonstrate that appellant brought, used, or continued the breach-of-fiduciary-duty claim in bad faith. The statutory obligation to make

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such findings lies with the trial court, and we remand the case to the lower court for findings to support the award under this statute.

Remanded.

GLADWIN and ROBBINS, JJ., agree.