NO. COA01-904

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

ELIZABETH TRIVETT McKINNEY,
Plaintiff,

v.

Mitchell County
No. 99 CVS 227

RICHARD DAVID STAFFORD and
SUSAN PRESNELL STAFFORD,
Defendants.

Appeal by defendants from order entered 10 April 2001 by Judge Ronald K. Payne in Mitchell County Superior Court. Heard in the Court of Appeals 22 April 2002.

Frank J. Contrivo, P.A., by Andrew J. Santaniello, for defendant-appellants.

Dennis L. Howell for plaintiff-appellee.

HUDSON, Judge.

Defendants appeal from the order awarding attorney's fees to plaintiff pursuant to N.C. Gen. Stat. § 6-21.1 (1999). Defendants claim the trial court abused its discretion in awarding an excessive fee through its analysis of the factors set forth in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999).

Plaintiff filed a complaint seeking damages for personal injuries allegedly sustained in an automobile accident with defendants. The jury returned a verdict in favor of plaintiff in

the amount of $5,158.10. Plaintiff then moved for litigation costs and attorney's fees under N.C. Gen. Stat. § 6-21.1.

Defense counsel stated he had no objection to the hours expended by plaintiff's counsel or his hourly rate. Counsel did not oppose the award of a fee to plaintiff, but asked the court to keep in mind the factors outlined in *Washington v. Horton* in setting the fee amount. He noted defendants had made a pre-settlement offer and "a series of offers of judgment." The court asked defense counsel about a $6,000 offer of judgment made to plaintiff on behalf of defendants' insurance carrier, Nationwide, following mediation. Counsel asserted that plaintiff's acceptance came more than ten days after the offer was made. He conceded, however, that the parties' attorneys had agreed to the $6,000 amount, but that Nationwide had subsequently sent plaintiff a settlement check for only $5,875, which plaintiff refused. When asked whether Nationwide acted in good faith in unilaterally reducing the agreed-upon amount, defense counsel responded, "I can't speak for the adjuster, but no, it does not appear to be at least on the surface an action of good faith." Counsel asked the trial court to "award a reasonable fee" in light of the *Washington v. Horton* factors. The court stated that "if we're going to get down to this business of awarding reasonable fees, to me the question of reasonable is the time reasonable and you said you didn't take issue with that." Defense counsel replied, "I'm not going to contest [counsel]'s time."

The court calculated plaintiff's total fee request at $19,305,

based upon the number of hours expended by plaintiff's counsel and his $130 hourly rate. The court then reduced the amount to $15,000, finding this a "fair and reasonable fee considering the amount of time expended . . ., considering the offers made in this case and the timing of such offers and the conduct of Nationwide in . . . the attempted acceptance of the offer in May 2000." The court's written order contains detailed findings of fact and conclusions of law.

In their lone assignment of error, defendants claim the fee awarded by the trial court was "excessive on the basis of all of the circumstances and evidence." They argue the court improperly applied the factors listed in *Washington v. Horton*. They fault the court for not setting the fee amount in relation to the jury verdict, since generally "a plaintiff's attorney can expect to receive his or her fee only as a portion or customarily as a percentage of the settlement or judgment." Finally, defendants claim the court held the parties to different standards of conduct and improperly used the fee amount as a means of punishing Nationwide for its litigation tactics.

An award of attorney's fees under N.C. Gen. Stat. § 6-21.1 is reviewed for abuse of discretion and will be reversed only when it is completely arbitrary or "'manifestly unsupported by reason.'" *See Davis v. Kelly*, __ N.C. App. __, __, 554 S.E.2d 402, 405 (2001) (quoting *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999)). In exercising its discretion, however, the trial court must enter findings of fact on the following factors, based

on the entire record:

> (1) settlement offers made prior to the institution of the action ...; (2) offers of judgment pursuant to Rule 68, and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict.

Washington v. Horton, 132 N.C. App. at 351, 513 S.E.2d at 334-35 (internal quotation marks and citations omitted). Detailed findings as to each factor are not necessary. *See Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001). The court's findings of fact are binding on appeal if supported by competent evidence. *See Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000).

On the first factor, the trial court found that defendants' insurance carrier made a settlement offer of $4,500 before plaintiff filed her suit. The court noted this offer was "less than the jury award to the [p]laintiff." On factor two, the court found defendants' insurer had made an offer of judgment of $4,005 on 19 October 1999, which was less than the "judgment finally obtained" under N.C.R. Civ. P. 68. The court also cited Nationwide's 12 May 2000 offer of judgment of $6,000, but questioned whether this offer was valid, in light of Nationwide's act of tendering a check for only $5,875 after the parties had agreed upon the $6,000 amount. Even if valid, the court concluded that the $6,000 offer of judgment is less favorable than the

judgment finally obtained, which includes the $5,185 jury verdict plus costs. *See Roberts v. Swain*, 353 N.C. 246, 249, 538 S.E.2d 566, 568 (2000) (citing *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995)). Although defendants claim the court failed to consider plaintiff's settlement tactics, the court found that plaintiff offered to settle the case for $8,000 on 29 September 1999, but received no response.

On factor three, the court found Nationwide "did unjustly exercise 'superior bargaining power' in this matter." The court noted Nationwide's reduction in settlement position from $4,500 to $4,005 upon plaintiff's filing of her complaint. It further cited Nationwide's attempt to unilaterally reduce a settlement offer from $6,000 to $5,875 after plaintiff's acceptance and its "refus[al] to make any further offers or to comply with the terms of settlement as agreed upon by counsel." Defendants challenge these findings, arguing that plaintiff's purported acceptance came after the ten-day deadline for accepting an offer of judgment. Defendants ignore that their attorney had, in fact, agreed to the $6,000 amount and conceded at the fee hearing that Nationwide's conduct did "not appear to be at least on the surface an action of good faith." These facts are more than adequate to support a finding of superior bargaining power. *See Stilwell v. Gust*, __ N.C. App. __, __, 557 S.E.2d 627, 629-30 (2001).

No findings were needed for factor four, "unwarranted refusal by an insurance company," because plaintiff's suit was not brought against an insurance company. *See Robinson v. Shue*, 145 N.C. App.

60, 66, 550 S.E.2d 830, 834 (2001) (citing *Crisp v. Cobb*, 75 N.C. App. 652, 331 S.E.2d 255 (1985)).

On factor five, the timing of settlement offers, the court found that defendant offered $4,500 prior to the institution of plaintiff's action, and reduced the offer to $4,005 after the suit was filed. The court found plaintiff's counsel wrote a letter attempting to initiate settlement negotiations, but this letter "was ignored." In addition, defendants made no further attempt "to settle the matter until mediation . . . on May 11th 2000 and after extensive work had been performed by [p]laintiff's counsel." The court repeated its findings related to the $6,000 offer of judgment and Nationwide's subsequent "refus[al] to comply with the settlement agreed upon" by the parties' attorneys. In addition, the court found that no further offers were made. Although defendants cast these findings as one-sided, we believe they are adequate.

In assessing factor six, the amount of settlement offers compared to the jury verdict, the court found the verdict of $5,158.10 was greater than defendants' initial offer of judgment of $4005 but less than their $6,000 offer of judgment on 12 May 2000. However, the court found that the second offer of judgment came "after the [p]laintiff had expended substantial costs and expenses for taking of depositions and . . . only after [p]laintiff's counsel had expended over [thirty-eight] hours of time in representing the [p]laintiff in the matter." Defendants again criticize the court's failure to consider their litigation costs.

However, they offered no evidence of such costs during the hearing. The court's findings are adequate.

Defendants' assertion that the court failed to fully consider the entire record is patently without merit. In addition to addressing each *Washington v. Horton* factor, the court's order contains extensive findings recounting with great particularity the full history of the litigation.

Defendants insist the fee award is excessive in light of the whole record. To justify an award of attorney's fees, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney based on competent evidence." *Brockwood Unit Ownership Assn. v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) (quoting *West v. Tilley*, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995)). The trial court's findings of fact on these issues are extensive and are properly supported by affidavits submitted by plaintiff's counsel as well as Burnsville attorney, Ronald W. Howell. The court concluded that the 148.5 hours spent on the case by plaintiff's counsel and his $130 hourly rate were fair and reasonable. Defendants do not challenge these findings on appeal. Moreover, defendants' counsel agreed to the reasonableness of counsel's time and hourly rate during the fee hearing. Nevertheless, despite the trial court's decision to reduce the fee from $19,305 to $15,000, defendants offer several reasons why the fee is excessive. As discussed below, we find these arguments unpersuasive and contrary to established law.

Defendants' objection to the fee award on the ground that it is "almost three . . . times the jury verdict" is unavailing. In *Hardesty v. Aldridge*, __ N.C. App. __, 557 S.E.2d 136 (2001), we upheld as reasonable a fee award of $2,625, which was more than seven times the $350 jury verdict. Similarly, defendants' complaint that the award exceeds what a plaintiff's attorney would expect to receive under a typical contingent fee arrangement has been addressed and rejected by previous decisions of this Court. "This Court has . . . held . . . that a contingent fee contract does not control the trial court's determination and, when a statute provides for a 'reasonable' fee, the amount of the fee should be based upon the actual work performed by the attorney." *Epps v. Ewers*, 90 N.C. App. 597, 600, 369 S.E.2d 104, 105 (1988); *accord In re Estate of Tucci*, 104 N.C. App. 142, 155-56, 408 S.E.2d 859, 868 (1991), *disc. review improvidently allowed*, 331 N.C. 749, 417 S.E.2d 236 (1992). Having conceded that counsel's hours and hourly rate were reasonable for this case, defendants cannot show a fee award based on these factors is manifestly unreasonable.

Finally, defendants contend the court was motivated "at least in part" by its desire to punish defendants and their insurance carrier. As proof of this punitive intent, defendants note the court's reference to "the conduct of Nationwide" following plaintiff's attempt to accept the $6,000 offer of judgment. Defendants assert the fee statute does not authorize a court to use a fee award for "punitive purposes." Again, defendants have not shown any abuse of the trial court's discretion. In assessing the

reasonableness of an attorney's fee request, a court is entitled to consider conduct by the opposing party that thwarts an agreed-upon settlement and prolongs the litigation. The court's consideration of such conduct is particularly justified here, where defense counsel all but admitted that defendants' insurance carrier acted in bad faith. The trial court entered explicit findings, supported by affidavits from plaintiff's counsel and another attorney who practices in his community, that the fee request was reasonable. The trial court then reduced the fee amount from $19,735 to $15,000 in setting the award. Under these facts, the amount of the fee award is fully supported by the whole record and is not unfairly punitive. We affirm the fee award.

Plaintiff has moved this Court for sanctions against defendants pursuant to N.C.R. App. P. 34. In our discretion, we deny the motion.

Plaintiff also asks that we remand the cause to the trial court for an award of attorney's fees related to defendants' appeal. "This Court has held that the trial court has the authority under G.S. § 6-21.1 to award additional attorney's fees for an appeal." *Davis v. Kelly*, __ N.C. App. at __, 554 S.E.2d at 406-07 (citing *Hill v. Jones*, 26 N.C. App. 168, 215 S.E.2d 168, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975)). Accordingly, we remand to the trial court "for the limited purpose of allowing the . . . [c]ourt, in its discretion, and upon plaintiff's motion, to make findings of fact relevant to a determination of reasonable attorney's fees for services rendered on appeal and to enter an

award consistent with those findings." *Id.* at __, 554 S.E.2d at 407.

Affirmed and remanded; motion for sanctions denied.

Judges GREENE and TYSON concur.

Report per Rule 30(e).