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NO. COA01-918

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

KELLY ELIZABETH FRALIN, by
her Guardian ad litem,
GERALDINE ANN FRALIN,

Plaintiff,

v.

Wake County
No. 00 CVD 1888

ALLSTATE INSURANCE COMPANY,

Defendant.

Appeal by defendant from order entered 17 April 2001 by Judge Alice C. Stubbs in District Court, Wake County. Heard in the Court of Appeals 24 April 2002.

E. Gregory Stott, for plaintiffs-appellees.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Paul A. Daniels, for defendant-appellant.

WYNN, Judge.

Defendant Allstate Insurance Company appeals from an award of attorney fees to plaintiff under N.C. Gen. Stat. § 6-21.1 and N.C. Gen. Stat. § 1A-1, Rule 37. We affirm the trial court.

On 26 March 1999, an automobile crashed into the rear of an automobile operated by Geraldine Ann Fralin with her daughter Kelly Elizabeth Fralin as a guest passenger. Allstate Insurance Company

insured the Fralin vehicle and initially paid a portion of Kelly's medical bills under the "Med Pay" provision of the policy. But after Ms. Fralin obtained an attorney who resubmitted the claim for medical expenses, Allstate Insurance Company refused to pay the total amount of the medical bills.

Resultantly, Ms. Fralin brought this action on behalf of her minor daughter to obtain reimbursement for the medical expenses incurred as result of the 26 March 1999 automobile accident. A default was entered against Allstate Insurance Company on 11 April 2000 but following the filing of an answer on that same date, the trial court vacated the entry of default by consent order on 14 April 2000.

On 28 July 2000, Allstate Insurance Company served an offer of judgment on plaintiff offering to allow judgment against it in the amount of \$1,751 which included principal, interest and court costs including attorney's fees. On 9 October 2000, the parties stipulated that plaintiff was entitled to recover from Allstate Insurance Company medical expenses in the amount of \$186 plus initial filing fees. However, the parties disagreed as to what amount plaintiff should recover in additional court costs.

On 11 October 2000, plaintiff's attorney submitted an affidavit and motion for attorney fees. By order dated 17 April 2001, the trial court entered judgment in the amount of \$186 for plaintiff, and taxed costs to Allstate Insurance Company including attorney fees of \$3,800. Dissatisfied with the award of attorney fees, Allstate Insurance Company appealed to this Court.

Allstate Insurance Company contends on appeal that the trial court erred in awarding attorney fees under N.C. Gen. Stat. § 6-21.1 and N.C. Gen. Stat. § 1A-1, Rule 37. We disagree.

Under N.C. Gen. Stat. § 6-21.1, in a suit against an insurance company in which the insured or beneficiary is the plaintiff, as is the case here:

upon a finding by the court that there was **an unwarranted refusal by the defendant insurance company to pay the claim** which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2001) (emphasis added). Allstate Insurance Company argues that the trial court erred in finding that there was an unwarranted refusal by it to pay the medical payment claim in this case.

To prevail on a defense against attorney fees under N.C. Gen. Stat. § 6-21.1, a defendant insurance company must show that the trial court's ruling was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In reviewing this assignment of error, we are also mindful that "the scope of appellate

review . . . is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law."

Id. (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

In *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334-35 (1999), this Court noting that the discretion of a trial judge in awarding attorney fees under N.C. Gen. Stat. § 6-21.1 is not unbridled, pointed out in the remand of that case that the trial judge should consider the entire record in exercising his discretion, including but not limited to the following factors: (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; and (6) the amounts of the settlement offers as compared to the jury verdict.

The record in this case reflects that the trial court complied with the guidance of *Washington v. Horton* and made the following pertinent findings: (1) Allstate Insurance Company made no offers of settlement in this case before civil action was filed; (2) On July 28, 2000, Allstate Insurance Company filed an Offer of Judgment in the amount of \$1,751 and on 9 October 2000, the parties

entered into a Stipulation, wherein the defendant agreed that plaintiff was entitled to recover the total amount of the medical bills, as she had demanded prior to the institution of this civil action; (3) Allstate Insurance Company attempted to unjustly exercise its superior bargaining power in the settlement negotiation process; (4) This matter arose upon the filing of a complaint on February 22, 2000, by the plaintiff requesting reimbursement, pursuant to the "Med Pay" coverage provisions of the automobile liability insurance policy of Geraldine Ann Fralin for medical expenses incurred by the minor child, Kelly Elizabeth Fralin, for treatment of injuries sustained in an automobile accident; (5) Allstate Insurance Company did not make any offer of settlement until after July 28, 2000 at which time the plaintiff's attorney had already been required to dedicate in excess of 30 hours of his time to the prosecution of this case.¹ These factors, supported by competent evidence in the record, support the trial court's conclusion that plaintiff was entitled to attorney fees under N.C. Gen. Stat. § 6-21.1.

Moreover, in *Epps v. Ewers*, 90 N.C. App. 597, 599-600, 369 S.E.2d 104, 105 (1988), this Court held that

[b]ecause G.S. 6-21.1 defines the circumstances under which attorney's fees may be awarded, the trial court is not required to make specific findings as to the plaintiff's entitlement to such an award At a minimum, however, the amount of the award must be supported by some findings as to the

¹Since the matter was settled without a trial, the trial court did not consider the sixth *Washington* factor of comparing the settlement offer with a jury verdict.

quality and quantity of services rendered by plaintiff's counsel.

See also Thorpe v. Perry-Riddick, 144 N.C. App. 567, 572, 551 S.E.2d 852, 856 (2001) (Holding that "If the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence.").

In this case, the trial court awarded fees only for the amount of time it determined was reasonably spent in prosecuting the claim, which was less than what plaintiff's attorney had billed, and at the rate it determined to be customary for the profession. We hold that Allstate Insurance Company has failed to show that the trial court abused its discretion in awarding attorney's fees in this case. *See Thorpe v. Perry-Riddick*, 144 N.C. App. at 570, 551 S.E.2d at 856 (holding that without a showing of abuse of the trial judge's discretion, the trial judge's determination to award counsel fees will not be overturned).

Furthermore, we uphold the trial court's award of attorney fees under Rule 37(c) of the North Carolina Rules of Civil Procedure which provides:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held

objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

N.C. Gen. Stat. § 1A-1, Rule 37(c) (2001).

In this case, the trial court found:

13. That on April 19, 2000, the plaintiff filed Requests for Admissions.

14. That the Company denied all of those Requests For Admission, which related to the Allstate Insurance Company's responsibility for the payment of the plaintiff's medical bills.

15. That because of the company's unwarranted and inappropriate denial of those Requests for Admissions, the plaintiff's attorney was required to expend a considerable amount of time to prove those facts.

16. That there was an unwarranted refusal by the Allstate Insurance Company, to pay the claim, which constitutes the basis of this suit.

"The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of discretion." *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992), *affirmed*, 334 N.C. 303, 432 S.E.2d 339 (1993).

In the order, the trial court pointed out that its findings were based on evidence showing that the requests for admission were denied by Allstate Insurance Company for no valid reason; and the order contained a list of the expenses incurred in establishing the

matters not admitted by Allstate Insurance Company. Moreover, Allstate Insurance Company fails to provide any authority for its contention that the trial court's order must distinguish N.C. Gen. Stat. § 1A-1, Rule 37 sanctions and attorney fees under N.C. Gen. Stat. § 6-21.1.

In sum, we find no abuse of discretion by the trial court in awarding attorney fees in this case; accordingly, the order is, Affirmed.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).