

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA03-1264

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

OLD REPUBLIC SURETY COMPANY,  
Plaintiff

v.

Guilford County  
No. 00 CVS 8477

RELIABLE HOUSING, INC.,  
d/b/a OAKCREEK VILLAGE, and  
RICHARD M. PEARMAN, JR.,  
Defendants,  
Third Party Plaintiffs

v.

DAVID L. MINTZER, JR.,  
WILLIE HARGROVE d/b/a  
WILLIE HARGROVE ELECTRIC,  
and JAMES PENDERGRASS,  
Third Party Defendants.

Appeal by defendant Richard M. Pearman, Jr. from order filed 30 June 2003 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 June 2004.

*Moore & Van Allen, P.L.L.C., by Kevin M. Capalbo, for plaintiff-appellee.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Katherine A. Murphy, for defendant-appellant Richard M. Pearman, Jr.*

CALABRIA, Judge.

Richard M. Pearman, Jr. ("defendant") appeals an award of attorney fees granted to Old Republic Surety Company ("Old

Republic"). We modify the amount of attorney fees but affirm in all other respects.

The relevant facts are as follows. Defendant was the President of Reliable Housing, Inc. d/b/a Oakcreek Village ("Reliable Housing"), a corporation engaged in the sale of mobile homes. Old Republic was in the business of issuing manufactured housing dealers bonds. As an inducement to Old Republic to issue Reliable Housing a bond, defendant signed an indemnity agreement both as president of Reliable Housing and individually in favor of Old Republic. The indemnity agreement provided that if Old Republic should

execute the said bond(s), the undersigned [Reliable Housing and defendant] agree . . . [t]o indemnify the Company and hold it harmless against all loss, liability, costs, claim damages, and expense, internal or external or whatever kind and nature including but not limited to investigative, accounting, engineering, the fees and disbursement of counsel whether on salary, retainer or otherwise which the Company may sustain or incur for or by reason of said Company writing said bond(s).

Old Republic subsequently paid out \$5,650.00 on bond claims to individuals who had purchased manufactured housing from Reliable Housing. After a demand for reimbursement was made, Old Republic wrote to defendant in a letter dated 17 May 2000 and offered to settle its claims. Among other things, Old Republic agreed to waive its right to recover attorney fees under the indemnity agreement if defendant reimbursed Old Republic in the amount of \$5,650.00, the principal amount due. The defendant failed to reply to Old Republic's settlement offer. Old Republic again wrote

defendant concerning the settlement offer on 12 June 2000. Defendant again failed to respond.

When Old Republic's letters failed to elicit a response, Old Republic instituted this lawsuit on 12 July 2000. Nonetheless, Old Republic's counsel continued to try to settle the matter by writing to defendant's counsel on 30 October 2000 with an offer to allow defendant to pay his debts in monthly installments rather than in a lump sum. The defendant rejected this offer and filed an answer to the complaint on 21 November 2000.

Old Republic subsequently moved for summary judgment, and on 4 June 2001, the Superior Court heard arguments on Old Republic's motion for summary judgment. The Superior Court granted Old Republic's motion and awarded Old Republic "reasonable and proportionate" attorney fees. Defendant appealed the trial court's grant of summary judgment but not the award of attorney fees. This Court, in a decision filed 3 December 2002, affirmed the order of the Superior Court. Subsequently, on 30 June 2003, after hearing oral arguments, the Superior Court awarded attorney fees in the amount of \$8,852.25 and costs in the amount of \$1,092.49.

On appeal, defendant asserts the trial court's award of attorney fees under the indemnity agreement was improper because it was not authorized by statute. However, in his previous appeal to this Court, defendant neither assigned error to that portion of the order entitling Old Republic to "reasonable and proportionate attorney's fees" nor presented any argument to that effect in his brief. In so doing, defendant abandoned any assignment of error

regarding that portion of the order in that appeal. See N.C. R. App. P. 28(b)(6) (2004) (noting that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). Defendant now attempts to revive that issue in this subsequent appeal. We are not persuaded to consider an issue defendant failed to raise or argue the merits of in his previous appeal to this Court.

The sole remaining issue concerns the amount of attorney fees awarded by the trial court. North Carolina General Statutes § 6-21.2 (2003) states, in relevant part, as follows:

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt . . . .

Subsection (2) further provides, in relevant part, as follows:

If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Defendant asserts any award of attorney fees pursuant to N.C. Gen. Stat. § 6-21.2 in excess of fifteen percent of \$5,650.00, or the debt at issue in this case, is unreasonable. Based on the plain language of the statute, we must agree. This Court has previously reformed a judgment that included an award of attorney fees in excess of fifteen percent of the amount owed at the time of suit to

make it reflect the appropriate amount. *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. 655, 660, 233 S.E.2d 687, 690 (1977). Reforming the award of attorney fees in the instant case to reflect fifteen percent of the amount owed results in an award of attorney fees in the amount of \$847.00. We modify the order of the trial court accordingly.

Affirmed as modified.

Judges WYNN and LEVINSON concur.

Report per Rule 30(e).