

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1067

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

MARIA TERESA PALMER,
GUARDIAN AD LITEM FOR
J. CARMEN FUENTES,
Employee-Plaintiff,

v.

Sampson County
No. 00 CVS 1462

W. BRENT JACKSON, d/b/a
JACKSON'S FARMING COMPANY,
Employer-Defendant,

(N.C. Industrial Commission
File No. 859146)

and

COMPANION PROPERTY AND
CASUALTY,
Carrier-Defendant.

Appeal by defendants from an order dated 18 January 2005 by Judge Russell J. Lanier, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 10 April 2006.

White and Allen, P.A., by Thomas J. White, III, and The Bricio Law Firm, P.L.L.C., by Francisco J. Bricio, for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by John F. Morris and Keith B. Nichols for defendant-appellants.

BRYANT, Judge.

W. Brent Jackson and Companion Property and Casualty (defendants) appeal from an order dated 18 January 2005, awarding plaintiff's counsel additional attorneys' fees equal to twenty-five percent of all medical expenses paid by defendants for those

expenses incurred by plaintiff from 10 July 1998 through 22 February 2000. We affirm the order of the trial court.

Facts and Procedural History

On 10 July 1998, while working as a farm worker for defendant-employer, J. Carmen Fuentes (plaintiff) suffered a severe heat stroke. Plaintiff brought a claim for workers' compensation benefits against defendants. Defendants denied the compensability of plaintiff's claim and the action was heard by Deputy Commissioner Lorrie Dollar. On 22 February 2000 Deputy Commissioner Dollar entered an Opinion and Award finding defendants had denied plaintiff's claim without reasonable grounds and in bad faith, and ordered defendants to pay plaintiff's attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. The award of attorneys' fees was based solely upon the plaintiff's indemnity compensation, and excluded any fees based on plaintiff's medical compensation. This Opinion and Award was reviewed by the Full Commission and was affirmed in an Opinion and Award entered on 29 November 2000. Defendants never appealed from the 29 November 2000 Opinion and Award of the Full Commission.

Plaintiff appealed the award of attorneys' fees to the Senior Resident Superior Court Judge of Sampson County, pursuant to N.C. Gen. Stat. § 97-90(c). On 10 July 2001, the Honorable Russell J. Lanier, Jr. entered an Order determining the attorneys' fees of plaintiff's counsel. The trial court held that plaintiff's counsel was due fees based upon both components of compensation obtained for plaintiff, wage indemnity and medical compensation. The trial

court ordered that attorneys' fees based upon accrued medical compensation be paid from any payment made by defendants to plaintiff's medical providers and that defendants could collect reimbursement from plaintiff's medical providers for the fees paid. Both defendants and UNC Hospitals, one of plaintiff's medical providers, appealed the order of the trial court.

On appeal, this Court held that the trial court did not have the authority to award attorneys' fees out of the reimbursement to be paid the medical providers. *Palmer v. Jackson*, 157 N.C. App. 625, 635-37, 579 S.E.2d 901, 908-09 (2003), *disc. review improvidently allowed*, 358 N.C. 373, 595 S.E.2d 145 (2004). (*Palmer I*). This Court further found that:

[w]hen an insurance carrier is responsible for attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1, the trial court may award attorneys an amount based on a percentage of the medical compensation recovered to be paid by the bad faith carrier over and above what they have already been ordered to pay to the medical providers and the claimant.

Id. at 637, 579 S.E.2d at 909. The order of the trial court was vacated and the matter was remanded for a determination of an appropriate attorney fee. *Id.*

Defendants subsequently filed a Petition for Discretionary Review, pursuant to N.C. Gen. Stat. § 7A-31(c), to the North Carolina Supreme Court on 24 June 2003. Defendant's petition was granted and oral arguments were held on 16 March 2004. On 7 May 2004, the North Carolina Supreme Court filed a *per curiam* opinion finding discretionary review had been improvidently allowed; thus holding that there was no error in the record and proceedings of

this Court. *Palmer v. Jackson*, 358 N.C. 373, 595 S.E.2d 145 (2004).

On 25 June 2004, plaintiff filed a "Motion for Determination of Additional Attorneys Fees" in the Superior Court of Sampson County. On 18 January 2005, the trial court issued an Order granting plaintiff's counsel attorneys' fees which include an amount of twenty-five percent of the plaintiff's accrued medical compensation, to be paid by defendants. Defendants appeal. On 20 January 2006 plaintiff filed a motion with this Court to dismiss defendants appeal for violations of Rule 34 of the North Carolina Rules of Appellate Procedure.

Defendants raise the issue of whether the trial court erred in awarding attorneys' fees to plaintiff's counsel in an amount based upon a percentage of medical benefits paid by defendants to plaintiff's medical providers. An order of the trial court setting plaintiff's attorneys' fees pursuant to Section 97-90(c) of the North Carolina General Statutes is reviewed by this Court under an abuse of discretion standard. *Priddy v. Blue Bird Cab Co.*, 2 N.C. App. 331, 335-36, 163 S.E.2d 20, 23 (1968) (affirming the attorney fee set by the trial court because the appellant failed to show an abuse of discretion); *Palmer I*, 157 N.C. App. at 630-32, 579 S.E.2d at 905-06.

The dispositive issue before this Court is whether our decision in *Palmer I* is controlling under the doctrine of the law of the case.

Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Creech v. Melnik, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001), *disc. review denied*, 355 N.C. 490, 561 S.E.2d 498 (2002).

Defendants argue the issue of whether an insurance carrier should be responsible for payment of additional attorneys' fees based upon accrued medical compensation was not before this Court in *Palmer I*. In that appeal, defendants assigned the following as error:

The trial court erred by ordering defendants to pay plaintiff's counsel's fee to plaintiff's counsel and then to seek reimbursement from UNC Hospitals.

Defendants then argued in their brief that:

Plaintiff's counsel sought attorney's fees directly from the medical providers and not from Carrier-Defendant. The findings of fact of the trial court support payment of such fees by the medical providers. However, the Findings do not support an Order for payment of these fees by the Carrier-Defendant. The Order requiring payment of Plaintiff's counsel's fees by the Carrier-Defendant and the requirement that Carrier-Defendant then seek reimbursement from the medical providers is not the relief requested by the Plaintiff, but rather the trial court's attempt to sanction Defendants for a second time. The trial court, under N.C. Gen. Stat. § 97 *et. seq.*, did not have the authority to issue such an Order and clearly abused its discretion.

Further, in its brief to this Court in *Palmer I*, appellant UNC Hospitals argued not only that it was error for plaintiff's

attorneys' fees to be paid out of the medical compensation due UNC Hospitals, but also that "[t]he Trial Court erred in awarding additional attorneys' fees to appellees based on reimbursement amounts due the medical providers derived from the medical compensation awarded the employee in this case where disability compensation was awarded." (Emphasis added.)

Defendants and UNC Hospitals, as appellants in *Palmer I*, did not limit their arguments to whether or not the trial court erred in ordering fees to be paid out of plaintiff's medical compensation and that defendants must seek reimbursement from UNC Hospitals. In their appeal to this Court in *Palmer I*, the appellants clearly raised the issues of whether an insurance carrier should be responsible for payment of additional attorneys' fees based upon accrued medical compensation and whether the trial court had the authority under Section 97-90(c) to award such fees. As these issues were properly before the Court in *Palmer I*, the statements made by this Court regarding them are not *dicta* and were necessary for a complete decision on all the issues presented by the appellants in *Palmer I*.

In its opinion in *Palmer I*, this Court found as follows:

While we have held that the trial court cannot reduce the amount of medical compensation by diverting a portion of such compensation to attorneys' fees, that does not mean that it has no authority to review the adequacy of the Industrial Commission's decision regarding legal fees.

In determining the meaning of N.C. Gen. Stat. § 97-90(c), we follow traditional rules of statutory construction:

"Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently."

The legislature has placed no limitation on the superior court's discretion in awarding fees pursuant to § 97-90(c). It has merely provided the Industrial Commission and the trial court with guidance as to the factors to be considered when an attorneys' fees award is being decided. The trial court, pursuant to its discretion under § 97-90, appears to have the authority to fashion an attorneys' fees award that would take into account the special circumstances of a case such as the one at bar as the workers' compensation rules provide for doctors in the medical compensation realm. *When an insurance carrier is responsible for attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1, the trial court may award attorneys an amount based on a percentage of the medical compensation recovered to be paid by the bad faith carrier over and above what they have already been ordered to pay to the medical providers and the claimant.* For example, the facts in the present case were that the Industrial Commission awarded claimant indemnity compensation (including penalties). Further, it ordered that the medical providers be compensated for their bills, totaling approximately \$ 410,000.00. Both of these amounts were to be paid by defendant carrier. The Commission then awarded appellees attorneys' fees in an amount equal to 25% of the indemnity award. This amount was also to be paid by the defendant carrier as it had violated § 97-88.1. On appeal from the Industrial Commission, the trial court, in its discretion pursuant to § 97-90(c), could determine that the appellees should be further compensated. Upon the proper findings of fact as to the work and the special nature of the case, the trial court could order that the defendant carrier should further pay appellees

an amount based upon a percentage (be it 1%, 5%, 10% or so on) of the \$ 410,000.00 medical compensation. This amount would be over and above what was ordered by the Industrial Commission to be paid by defendant carrier. Such a result appears to be within the power of the trial court as prescribed by § 97-90(c) and reviewable only for an abuse of discretion.

This matter is therefore vacated and remanded to the trial court for a determination of an appropriate attorney fee. *The trial court is not prohibited from utilizing a percentage of the medical compensation as a basis for a fee.* The trial court may not, however, reduce the compensation paid to medical providers in order to fund the fee award. In making its determination, the trial court should be guided by the factors set forth in the N.C. Gen. Stat. § 97-90(c).

Palmer I, 157 N.C. App. at 636-37, 579 S.E.2d at 909 (emphasis added) (internal citations omitted).

Defendants place much emphasis on this Court's statements indicating that the superior court "appears" to have the authority under Section 97-90(c) to order defendant-carrier to pay attorneys' fees based on plaintiff's medical compensation. Defendants ignore the actual holding of this Court stating: "The trial court is not prohibited from utilizing a percentage of the medical compensation as a basis for a fee." *Id.* at 637, 579 S.E.2d at 909. Thus, *Palmer I* is the law of the case and controls our review of this matter.

In reviewing the order of the trial court awarding attorneys' fees we conclude the trial court has followed the mandate of this Court's decision in *Palmer I*. The trial court has awarded additional attorneys' fees to be paid by defendants in the amount

of twenty-five percent of all medical expenses paid by defendants for those expenses incurred by plaintiff from 10 July 1998 through 22 February 2000. These fees are not to be paid out of plaintiff's medical compensation and are over and above what was ordered by the Industrial Commission to be paid by defendant-carrier. In light of the specific facts of this case as set forth in *Palmer I*, we do not conclude the award of these additional attorneys' fees is an abuse of the trial court's discretion. This assignment of error is overruled.

Plaintiff argues, both in his brief and in a separately filed motion to dismiss this appeal, that defendants' appeal should be dismissed and they should be sanctioned for filing a frivolous appeal pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure. Rule 34 provides:

A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

- (1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or

grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

N.C. R. App. P. Rule 34(a). While we hold defendant's appeal is controlled by this Court's decision in *Palmer I*, considering the equivocal language in this Court's opinion in *Palmer I*, we do not find that defendant's appeal was brought in violation of Rule 34 such that sanctions are warranted.

The order of the trial court is affirmed. Plaintiff's motion for sanctions and to dismiss this appeal is denied.

Chief Judge MARTIN and Judge HUDSON concur.

Report per Rule 30(e).