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NO. COA05-796

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

JERRY GIBBS, LARRY GIBBS, GARY
BARNETTE, ROLAND STOTESBERRY,
MATTIE BERRY, ANNA MAE GIBBS,
CHARLES GIBBS, REBECCA GIBBS,
REGINA GIBBS, ALISON ELLIS,
GARY ELLIS, BARBARA MEEKINS,
MACLYN GIBBS, ELLIS GIBBS,
JAMES GIBBS, MARK DODGE,
MARY GIBBS, BARBARA SPENCER,
SHERLIN SPENCER, JOHN HERINA,
PEGGY GRANT, GLENN JARVIS, ODESA
JARVIS, and CALVIN B. DAVIS,
individually and on behalf
of HYDE COUNTY,
Plaintiffs,

v.

Hyde County
No. 00 CVS 85

TROY LANE MAYO, D. SCOTT COBLE,
WAYNE TETTER, BARBARA DEESE, WILLIE
GIBBS, CALVIN GIBBS, JR. And NORTH
CAROLINA COUNTIES LIABILITY AND
PROPERTY INSURANCE POOL FUND,
Defendants.

Appeal by plaintiffs from judgment entered 13 January 2005 by
Judge William C. Griffin, Jr., in Hyde County Superior Court.
Heard in the Court of Appeals 7 February 2006.

*Carter, Archie, Hassell & Singleton, LLP, by Sid Hassell, Jr.;
and Davis & Davis, by George Thomas Davis, Jr., for
plaintiffs-appellants.*

*The Twiford Law Firm, P.C., by Edward A. O'Neal, for
defendant-appellee Mayo.*

Wayland Sermons, Jr., for intervenor Hyde County.

LEVINSON, Judge.

Plaintiffs appeal from an order entered 13 January 2005, denying their post-trial motion for attorneys' fees. We reverse and remand.

In November 2000, plaintiffs filed a complaint against defendant and several others, alleging in pertinent part that the defendant, an elected Commissioner for Hyde County, had entered into illegal contracts to repair the county courthouse and health center, for which he was paid more than \$285,000. Plaintiffs sought a judgment declaring the subject contracts to be void, and requiring defendant to return to Hyde County all monies he received under the contracts. Plaintiffs also asked for attorneys' fees. Following trial, the jury on 19 August 2002 returned a verdict against all defendants in the amount of \$41,675.45. Plaintiffs appealed the denial of their motion for Judgment Notwithstanding the Verdict (JNOV) or for a new trial on the issue of damages; defendant cross-appealed from the judgment.

This Court filed its opinion 17 February 2004, in *Gibbs v. Mayo*, 162 N.C. App. 549, 591 S.E.2d 905, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 45 (2004) (*Gibbs I*). In *Gibbs I*, the Court reviewed North Carolina's conflict of interest law, N.C. Gen. Stat. § 14-234 (2005), which provides in pertinent part that "[n]o public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract[.]" G.S. § 14-234(a). The Court held that because "Mayo was an elected county commissioner when he entered into these contracts, his actions fell within the purview of North

Carolina's conflict of interest law." *Gibbs I*, 162 N.C. App. at 557, 591 S.E.2d at 911. Based on this conclusion, the Court stated:

We hold Mayo 'must suffer the loss incident upon his breach' and is required to return to Hyde County the full amount of monies he received from both contracts as he was an elected commissioner and entered into these contracts for his own benefit in direct violation of the conflict of interest law of North Carolina. The trial court erred in failing to grant plaintiffs' motion for JNOV on the issue of damages towards Mayo individually.

Id. (quoting *Insulation Co. v. Davidson County*, 243 N.C. 252, 255, 90 S.E.2d 496, 498 (1955)). Accordingly, this Court remanded the case to the trial court and instructed it to, *inter alia*, "grant plaintiffs' motion for a JNOV on the issue of damages against Mayo only and enter judgment against him for the full amounts . . . that he received on both contracts." *Gibbs I*, 162 N.C. App. at 568, 591 S.E.2d at 917. Following remand, the trial court on 12 July 2004 entered judgment against defendant in the amount of \$281,245.25, which defendant was ordered to pay to Hyde County. On 18 August 2004 this judgment was paid in full. On 30 August 2004 plaintiffs filed a motion for attorneys' fees, which the trial court denied by order dated 13 January 2005. From this order plaintiffs timely appeal.

Plaintiffs appeal the trial court's denial of their motion for attorneys' fees. "The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an

allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding." *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972) (citations omitted). Plaintiffs herein do not assert a statutory basis for attorneys' fees on the facts of this case.

Under a long-standing exception to this rule, however, "a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property[.]" *Horner v. Chamber of Commerce*, 236 N.C. 96, 97-98, 72 S.E.2d 21, 22 (1952) (citation omitted).

At the time *Horner* was decided, the "common fund" doctrine had "been recognized and applied by this Court in various classes of cases, most common among which are those involving . . . services furnished by attorneys to (1) next friends of infants or others under disability and (2) fiduciaries such as receivers, trustees, and those administering estates of decedents, respecting litigation involving either the creation or protection of the common fund or common property." *Horner*, 236 N.C. at 98, 72 S.E.2d at 22. In such cases, the "common fund" at issue generally exists for the benefit of a small, determinate group of heirs or other beneficiaries.

Horner, however, presented a new type of fact pattern, wherein plaintiff filed suit on behalf of all the taxpayers of defendant

City of Burlington, in order to challenge certain expenditures by the City. Plaintiffs successfully recovered the subject funds, which were returned to the City. Thereafter, the plaintiff sought attorneys' fees, which the trial court denied, on the grounds that there was no legal basis for the award of attorneys' fees. The Supreme Court of North Carolina set out the issue thus raised as follows:

The question for decision is this: Can the plaintiff in a taxpayers' action, who has recovered for the benefit of a municipality public moneys unlawfully disbursed and otherwise lost, be awarded from the amount recovered and restored to the municipality a reasonable sum to be used in paying the fees of his attorney, without a statute expressly so providing?

Horner, 236 N.C. at 97, 72 S.E.2d at 22. Following a review of the relevant jurisprudence of other jurisdictions, the Court held:

[W]e conclude that where, as in the present case, [1] on refusal of municipal authorities to act, [2] a taxpayer successfully prosecutes an action to recover, and [3] does actually recover and [4] collect, funds of the municipality [5] which had been expended wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance, from the funds actually recovered, to be used as compensation for the plaintiff taxpayer's attorney fees.

Id. at 101, 72 S.E.2d at 24. We conclude that, under *Horner* and related cases, the trial court has discretion to award attorneys' fees when the criteria discussed above are met.

A trial court's discretionary ruling on a motion for attorneys' fees is reviewed for abuse of discretion. See *McDaniel v. McBrayer*, 164 N.C. App. 379, 381, 595 S.E.2d 784, 786 (2004)

(under applicable statute, "trial court's decision to award attorneys' fees is discretionary"; accordingly, court's ruling "will not be overturned absent a showing of abuse of discretion") (citation omitted). However, the trial court's conclusion of law, that it has no discretion to award attorneys' fees, is reviewed *de novo*. See *Friend-Novorska v. Novorska*, 163 N.C. App. 776, 777-78, 594 S.E.2d 409, 410 (2004) (although "requirements for awarding attorney's fees" are set out in statute, "[w]hether the moving party meets these requirements is a question of law fully reviewable *de novo* on appeal") (citation omitted). And, "[w]here a trial court erroneously concludes that it lacks discretion to award costs, the matter should be remanded to permit the trial court to exercise its discretion." *Cosentino v. Weeks*, 160 N.C. App. 511, 513, 586 S.E.2d 787, 788 (2003) (citing *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982)).

In the instant case, the trial court made the following findings of fact in its order:

1. Although the complaint alleges it was brought on "behalf of Hyde County", there is nothing before the undersigned to indicate that the suit was brought by more than the named plaintiffs.
2. Based on the decision of the Court of Appeals in this case, the named plaintiffs are entitled to no part of the money paid into Hyde County by defendant Troy Lane Mayo.
3. The North Carolina Court of Appeals dismissed the claims made by the plaintiffs.
4. The money paid into Hyde County as a consequence of the appellate decision went to

the County's general fund and inured to the benefit of all the taxpayers of Hyde County.

5. No finite benefits flowed to the named plaintiffs.
6. The money paid in did not constitute a pre-existing fund.
7. The money paid in does not represent a determinate fund in which the plaintiffs are entitled to share.
8. No citizen of Hyde County has any claim to the money paid in.
9. The plaintiffs have not created a fund at their own expense or brought into court a fund in which others may share with them.
10. This was not a class action lawsuit.

The trial court concluded the following:

1. There is no statutory basis for the award of fees.
2. The money paid into the county resulted from an appellate court decision based on a legal theory that was not specifically pled.
3. This action was not equitable in nature, but punitive, thereby limiting the Court's discretion to award attorney fees.
4. The money paid into Hyde County by the defendant Mayo does not represent a "common fund" as defined by prior decisions of our appellate courts.

Here, the trial court erroneously concluded that, as a matter of law, its discretion to award attorneys' fees was "limited," based on the court's belief that the case was "not equitable in nature." See, e.g., *Horner*, 236 N.C. at 100, 72 S.E.2d at 24 ("in this jurisdiction a taxpayers' action like this one is considered equitable in nature") (citing *Waddill v. Masten*, 172 N.C. 582, 586,

90 S.E. 694 (1916)). In addition, the trial court erroneously concluded that, as a matter of law, the funds recovered for Hyde County could not be considered a "'common fund' as defined by prior decisions of our appellate courts."

When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error. Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter. In such cases, this Court may remand the case or take such other actions as the rights of the parties and applicable law may require.

State v. McAvoy, 331 N.C. 583, 591, 417 S.E.2d 489, 494-95 (1992) (citations omitted).

We conclude that the trial court's denial of plaintiffs' motion for attorneys' fees was based on misapprehension of the law, and that the trial court does have discretion to award attorneys' fees. However, we express no opinion on whether the trial court should, in the exercise of its discretion, award attorneys' fees to plaintiffs, or on the dollar amount of any such fees. The trial court's order is reversed and the case remanded for entry of a new order on plaintiffs' motion for attorneys' fees. It is left to the court's discretion whether to take additional evidence on this matter.

Reversed and remanded.

Judges McCULLOUGH and ELMORE concur.

Report Per Rule 30(e).