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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1412

Filed: 18 August 2015

Northampton County, No. 11 CVS 147

BETTY NEWELL, personal representative of the ESTATE OF JENNIFER ALEXANDER, and in her individual capacity, and MITCHELL LAW OFFICES, PLLC, Plaintiffs,

v.

JAMES E. ROGERS, P.A. and JAMES E. ROGERS, Defendants.

Appeal by Plaintiffs from orders entered 3 February 2014, 12 March 2014, 15 May 2014, and 18 June 2014, and from judgment entered 12 March 2014, by Judge Wayland J. Sermons, Jr. in Superior Court, Northampton County. Heard in the Court of Appeals 18 May 2015.

The Mitchell Law Group, by Grant S. Mitchell, for Plaintiffs-Appellants.

The Banks Law Firm, P.A., by Bryan G. Nichols, for Defendants-Appellees.

McGEE, Chief Judge.

Jennifer Alexander died on 6 December 2006, three days after being discharged from Halifax Regional Medical Center. Later that same month, attorney James E. Rogers ("Defendant") met with Betty Newell ("Newell"), Jennifer Alexander's mother and personal representative of Jennifer Alexander's estate, to discuss the potential for a medical malpractice action ("the action"). Newell entered into an agreement

with Defendant on 24 January 2007 ("the agreement"), retaining Defendant to represent her in the action against Halifax Regional Medical Center and other medical professionals and institutions. Pursuant to the agreement, Defendant would receive thirty-three percent of any settlement prior to the institution of litigation, and forty percent of any settlement occurring after litigation had been instituted.

Pursuant to Defendant's suggestion, Newell agreed to hire Ronnie M. Mitchell of Mitchell Law Offices, PLLC[1] ("Plaintiff") to assist in the prosecution of the action. Plaintiff and Defendant agreed to evenly share the benefits and obligations of the action ("the attorney association agreement"), pursuant to Defendant's agreement with Newell. A settlement was reached in July 2010 with all but two of the defendants in the action, and Plaintiff and Defendant split the contingency fee equally, pursuant to the attorney association agreement. In December 2010, while negotiations with the remaining two defendants were ongoing, Newell fired Defendant. A settlement was reached with the remaining defendants in April 2011 ("the April 2011 settlement"). Pursuant to that settlement, $250,865.29 was to go to Plaintiff as "attorney's fees and costs for services[.]" Newell filed the declaratory judgment action before us on 26 May 2011, seeking judgment "[d]eclaring the rights

[1] At the time Plaintiff was initially hired, Ronnie M. Mitchell was part of the firm of Mitchell Brewer Richardson. He left Mitchell Brewer Richardson in 2009 to form Mitchell Law Offices, PLLC (Plaintiff), and Plaintiff continued to represent Newell.

and liabilities of the respective parties" with respect to the fees obtained pursuant to the April 2011 settlement.

Defendant filed an amended answer, amended counterclaim, and crossclaim on 26 June 2012, seeking payment for his services in helping to obtain the April 2011 settlement. This matter was heard on 3 and 4 February 2014. Pursuant to an order entered 12 March 2014, Newell was dismissed as a party in the declaratory judgment action because the trial court found she "no longer possessed any standing to continue in this action[.]" The trial court entered its declaratory judgment on 18 June 2014 in which it ordered Plaintiff to "disperse from its Trust Account the sum of $100,000.00 to James E. Rogers, P.A." Plaintiff appeals.

I.

In Plaintiff's first argument, it contends the trial court erred in denying its motion for summary judgment. We disagree.

We first note that Plaintiff fails to indicate which of its denied motions for summary judgment it is contesting, as there are two included in the record. However, because Plaintiff may not appeal from denial of either of its motions for summary judgment, we do not attempt to determine which order it is attempting to challenge. Our Supreme Court has held:

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served.

> Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (citation omitted). Plaintiff cites three opinions in support of its argument. However, none of these opinions establishes any right of appeal from the trial court's denial of either of Plaintiff's motions for summary judgment. Plaintiff first cites *Goins v. Puleo*, 350 N.C. 277, 512 S.E.2d 748 (1999) (*Goins II*). It is true that in *Goins II* our Supreme Court reversed this Court's holding that the trial court did not err in denying the defendants' motion for summary judgment based upon the plaintiff's failure to respond to requests for admission. *Id*. However, our Supreme Court was reviewing this Court's opinion as an appeal of right "pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals." *Goins II*, 350 N.C. at 277, 512 S.E.2d at 749. This Court recognized the plaintiff had no right of appeal:

> [The] [d]efendants cross-assigned as error the trial court's denial of summary judgment. We conclude that this issue is not properly before us. "[T]he *denial* of a motion for summary judgment is not appealable." . . . . The appeal as to defendants' cross-assignment of error is dismissed.

Goins v. Puleo, 130 N.C. App. 28, 32, 502 S.E.2d 621, 623-24 (1998) (*Goins I*) (citation omitted), *rev'd*, 350 N.C. 277, 512 S.E.2d 748 (1999). The majority in *Goins I* decided that "[a]lthough defendants have no right of appeal, we will treat their appeal as a petition for certiorari which we grant so that we may address the substantive issue,

as it appears to raise a novel question under North Carolina law." *Goins I*, 130 N.C. App. at 32, 502 S.E.2d at 624. The dissent in *Goins I* seems to have addressed the defendants' cross-assignment of error on a different basis:

> N.C.R. App. P. 10(d) permits appellees to cross-assign as error an act or omission of the trial court which deprives them of an alternative legal ground to support the judgment in their favor, where there is a possibility the appellate court will find error, as is the case here, on the ground upon which the trial court granted the judgment.

Id. at 35, 502 S.E.2d at 625, *J. Martin dissenting* (citation omitted). Neither of these potential avenues of appeal apply in the present case. Furthermore, in *Goins* the plaintiff appealed the order granting the defendants summary judgment based upon the applicable statute of limitations, and the defendants cross-appealed the denial of that part of their motion based upon the plaintiff's failure to respond to their requests for admissions. This was not an appeal from a judgment following a trial. *Harris*, 314 N.C. at 286, 333 S.E.2d at 256. The other opinions cited by Plaintiff, *J.M. Parker & Sons, Inc. v. William Barber, Inc.*, 208 N.C. App. 682, 704 S.E.2d 64 (2010), and *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637 (1982) do not involve appeals from the denial of a summary judgment. Because Plaintiff has no right to appeal denial of either of its motions for summary judgment, we dismiss this argument. *Harris*, 314 N.C. at 286, 333 S.E.2d at 256.

II.

In Plaintiff's second argument, it contends the trial court abused its discretion in its rulings on multiple motions made by Plaintiff. We disagree.

Though Plaintiff references numerous motions in its argument, it only argues the trial court's denial of its motion made pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. We limit our review to the argument presented in Plaintiff's brief. N.C.R. App. P. 28(b)(6) (2015). Plaintiff's argument is mostly focused on what the appropriate standard of review should be on these facts, and whether Plaintiff was permitted to address issues already decided by the trial court pursuant to Rule 59. Plaintiff argues that "[r]eversal is required here[.] [Plaintiff was and is] entitled to a determination of an entitlement to judgment in favor of [Plaintiff]." Plaintiff's argument, however, fails to address why reversal is required on the facts and law before us. This argument is abandoned. *Id*.

In addition, Plaintiff's motion pursuant to Rule 59 was granted by the trial court. Plaintiff was granted the relief asked for in that motion. The following occurred at the end of the hearing on Plaintiff's Rule 59 motion:

> [THE TRIAL COURT:] We are going to proceed again under these following rules: that I am going to entertain any motions prehearing; that I'm going to adopt all of the evidence in the first hearing as evidence in the second hearing; and that then we are going to schedule a date for the parties to present any further evidence they wish to do after I rule on any pretrial motions that come before me.
>
> I believe that is the relief you sought, Mr. Mitchell.

MR. MITCHELL: Yes, Your Honor.

Plaintiff can demonstrate no prejudice related to the trial court's granting its motion pursuant to Rule 59.

III.

In Plaintiff's third argument, it contends "the trial court erred in determining *quantum meruit* where there were insufficient evidentiary facts" to support the trial court's conclusions of law and ruling. We disagree.

Concerning a trial court's order granting attorneys' fees, the "trial court's findings of fact are binding upon appeal if they are supported by competent evidence, even when there may be evidence to the contrary." *Printing Servs. of Greensboro, Inc. v. American Capital Grp., Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006).

> [An attorney] who has provided legal services pursuant to a contingency fee contract and is terminated prior to a resolution of the case and the occurrence of the contingency upon which the fee is based, has a claim in *quantum meruit* to recover the reasonable value of those services from the former client, or, where the entire contingent fee is received by the former client's subsequent counsel, from the subsequent counsel.

Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 219 N.C. App. 615, 619, 730 S.E.2d 763, 766 (2012) (citations omitted). "[D]eterminations of the reasonable value of services rendered by an attorney, in situations such as the one before us, is the duty of the trial court, reviewable on appeal only for abuse of discretion." *Guess v. Parrott*, 160 N.C. App. 325, 332, 585 S.E.2d 464, 469 (2003). To establish an abuse of

discretion, "the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (citations omitted).

> This Court [has] held that "a claim by an attorney who has provided legal service pursuant to a contingency fee agreement and then [been] fired has a viable claim in North Carolina in *quantum meruit* against the former client or its subsequent representative[.]" We further concluded that
>
> > [t]he apportionment of attorneys' fees among the various lawyers who have represented a party has not been regulated by statute and is therefore within the province of the trial court. Accordingly, appellant had no right to have the reasonable value of appellee's services determined by a jury, as this issue is committed to the sound discretion of the trial court.
>
> Indeed, the *Guess* court observed that the trial judge in the underlying matter is "in the best position to make the determination of ability and skill of the parties, as well as to the difficulty of the case."

Robertson v. Steris Corp., __ N.C. App. __, __, 760 S.E.2d 313, 318 (2014), *disc. review denied*, __ N.C. __, 768 S.E.2d 841 (2015) (citation omitted). "[C]ase law from this Court and our Supreme Court makes clear that 'an agent or attorney, [even] in the absence of a special contract, is entitled to recover the amount that is reasonable and customary for work of like kind, performed under like conditions and circumstances.'" *Robertson,* __ N.C. App. at __, 760 S.E.2d at 321.

> [T]he trial court has broad discretion in awarding attorneys' fees in the present situation, capped only by the principle that a client cannot be required to pay more than the contingent fee to which he agreed with his current counsel (35%). . . . . Further, the trial court could have adjusted the award up or down, considering what the true value of the services to the client amounted to in its opinion.

Guess, 160 N.C. App. at 337, 585 S.E.2d at 472 (citation omitted).

The trial court should consider, *inter alia*: (1) "the terms of the percentage agreement," (2) "the nature of the litigation," (3) the "difficulty of the case," (4) the "amount of money involved," (5) "the benefits resulting to the client," (6) the "time and labor required," (7) "the attorney's skill and standing," (8) "the novelty and difficulty of the subject matter [and questions of law]," (9) "the attorney's degree of responsibility in managing the case," (10) "the usual and customary charge for that type of work in the community," (11) "difficulty of the problems faced by the attorney, especially any unusual difficulties," and (12) further, "[t]he court may also in its discretion consider and make findings on the services expended by paralegals and secretaries acting as paralegals if, in [the trial court's opinion], it is reasonable to do so." *Guess*, 160 N.C. App. at 335-36, 585 S.E.2d at 470-71 (citations and some quotation marks omitted). These factors are "guidelines for the trial courts to follow when determining the reasonable value of a discharged attorney's services." *Guess*, 160 N.C. App. at 336, 585 S.E.2d at 471. It is not required that the trial court make findings for every enumerated factor. *See id.* at 336-37, 585 S.E.2d at 471-72. The

trial court may consider additional factors, and must only make sufficient findings to support its conclusions and award. This Court has recognized that what constitutes a "reasonable fee" in the contingency fee context may well differ from what constitutes a "reasonable fee" in other contexts. *See Covington v. Rhodes*, 38 N.C. App. 61, 66, 247 S.E.2d 305, 308-09 (1978). "Thus, the trial court could have awarded a fee based on charges for hourly work (X hours at X price = reasonable services). Further, the trial court could have adjusted the award up or down, considering what the true value of the services to the client amounted to in its opinion." *Guess*, 160 N.C. App. at 337, 585 S.E.2d at 472. However, the trial court was free to use a different method:

> In the present case, the trial court employed a method described by other jurisdictions as "quasi-quantum meruit" recovery.
>
> > [T]he court seemed to employ a "quasi-quantum meruit" approach in that it held that the attorney was entitled to a percentage of the amount awarded the client but that the percentage was to be determined by limiting the sum due from the client to that recovered by the successor attorney and apportioning it by comparing the nature and amount of the work done by the subject attorney to that performed by the successor attorney.
>
> We hold that in North Carolina, a trial court situated as the one in the present case may employ such a method if it believes, in its discretion, that such a method aptly characterizes what the discharged attorney is entitled, or is as much as he deserves.

Guess, 160 N.C. App. at 337-38, 585 S.E.2d at 472 (citations omitted).

The trial court made the following relevant findings of fact:

> 2. In late December of 2006, Defendant James Rogers met with Betty Newell at the Newell home. Rogers is a sole practitioner primarily handling automobile accident, medical malpractice cases, and other court claims. He has his office in Morrisville, NC in Durham County.
>
> 3. That at the initial December 2006 meeting, Mr. Rogers discussed with Betty and Haymond Newell the custody issue, and also discussed the possibility of a medical malpractice law suit as a result of the death of their daughter Jennifer Alexander.
>
> 4. That on January 5, 2007, Defendant Rogers transmitted a letter to Betty and Haymond Newell concerning correct guardianship papers.
>
> 5. . . . . That Defendant James Rogers drafted and provided Betty and Haymond Newell a custody agreement, which was ultimately signed by the Newells, Carlton Alexander, and Seafield Robinson, on or about the 9th day of January, 2007. . . . .
>
> 6. That on or about January 24, 2007, Betty and Haymond Newell and Carlton Alexander, who is the widower of Jennifer Alexander, executed a contract of employment with Defendant James Rogers to represent them in a malpractice action against the Regional Medical Center and Doctors as [ ] a result of the death of Jennifer Alexander. The agreement provided that James Rogers would receive a contingency fee of 33% of any settlement prior to the institution of litigation, and 40% of any settlement or verdict and recovery after litigation had been instituted. Further, the agreement provided that the clients would not make any settlement of the matter unless the attorney was present, and provisions were made for him to receive his share, in the terms of the contract.
>
> 7. That between January and July, 2007, Attorney Rogers

procured medical records, developed potential Defendants, consulted with medical experts, and consulted with an economist in connection with the contemplated filing of a medical malpractice lawsuit.

8. That on or before July 29, 2007, attorney Rogers consulted with Dr. William Murphy, emergency room Dr. for an opinion to satisfy the requirements of North Carolina Rules of Civil Procedure 9(j).

9. That on July 29, 2007, Defendant James Rogers submitted a notice of demand letter to Halifax Regional Medical Center concerning the claim of the Estate of Jennifer Alexander.

10. That between July of 2007 and February 2008, attorney James Rogers had conversations with the attorneys for the Regional Medical Center, who denied fault and directed blame on the emergency room Doctor, who they asserted was not their employee. Thereafter, attorney James Rogers identified all the Doctors and their practices, and sent settlement documents to those Doctors.

11. In late 2007 into early 2008 attorney James Rogers began to develop the complaint and knew he would need help in handling such a large Medical Malpractice action with eight separate medical providers. James Rogers had a cousin, Allen Rogers, practicing in Fayetteville. Allen Rogers suggested that James Rogers associate the firm of Mitchell Brewer Richardson in Fayetteville to assist in representation of the Estate of Jennifer Alexander.

12. That James Rogers discussed bringing in the Mitchell Brewer Richardson law firm with Betty Newell, by telephone. He then set up an initial meeting with Betty Newell and the Mitchell Brewer Richardson lawyers in Fayetteville.

. . . .

14. The Attorney Association Agreement also provided that the two firms would share equally in the benefits and obligations of James E. Rogers as set forth in the contract originally signed with James Rogers. The Association Agreement also provided that Mitchell Brewer Richardson agreed to obtain funding for and advance the costs associated with mediation and Mitchell Brewer Richardson would be reimbursed with settlement proceeds. That at that time, James [Rogers'] understanding with Mitchell Brewer Richardson was that Ronnie Mitchell would be the lead attorney. That after February 11, 2008, attorney Ronnie Mitchell began obtaining more medical records, evaluating and investigating the medical malpractice claim, and met with Betty and Haymond Newell and Carlton Alexander to familiarize himself with Ms. Alexander's family.

15. That in June of 2009, the parties continued taking depositions of parties, witnesses, and expert witnesses. Those depositions continued through the fall of 2009, and into March of 2010.

. . . .

17. That on March 2, 2010, the attorneys took the deposition of Dr. William Murphy, at the Defendant James [Rogers'] office in Morrisville, North Carolina.

18. That after the deposition of Dr. William Murphy, settlement discussions were moving more rapidly with the [Defendants'] attorneys in the medical malpractice case. In June 2010, all but two of the Defendants indicated they wished to settle the action and attorneys Rogers and Mitchell and Betty Newell, the personal representative of the estate of Jennifer Alexander, had come to an agreement on the settlement amount.

. . . .

20. That James Rogers was in contact with Betty Newell

and Carlton Alexander, and negotiated a Distribution of Settlement Funds that essentially provided a gift from Carlton Alexander of a portion of his settlement proceeds to Betty and Haymond Newell for the purchase of an adequate home to raise the children of Jennifer Alexander.

21. That after an agreement was reached, a Partial Family Settlement Agreement was drafted by attorney Ronnie Mitchell and was executed on or about July 19, 2010.

22. In late June 2010, attorneys Rogers and Mitchell exchanged numerous emails between them concerning the first settlement of attorney's fees and expenses and the Partial Family Settlement Agreement.

. . . .

24. That on July 20, 2010, the parties and their attorneys appeared in Halifax County Superior Court and obtained approval of the first settlement from Senior Resident Superior Court Judge Alma Hinton, as to all Defendants other than Dr. Thomas McDonald Jr. and Women's Health Specialists, P.A. That the settlement amounts were paid and the attorney's fees earned under both contracts for employment were distributed one-half to Ronnie Mitchell and one-half to James Rogers. Each received the sum of $259,000.00.

25. That Dr. Thomas McDonald Jr. and Women's Health Specialists P.A. had offered to settle with Plaintiffs prior to the first settlement, but the parties were unable to agree upon an amount.

. . . .

34. That on or about April 27, 2011, the second settlement was approved by Halifax County Senior Resident Superior Court Judge Alma Hinton. The settlement was ordered sealed, although Plaintiff's exhibit number 7 shows a redacted portion of the approved settlement to direct "the

sum of $250,865.29 to be paid to Mitchell Law Group as attorney's fees and costs for services . . ."

. . . .

37. That Defendant James Rogers was an Attorney of Record for the Plaintiffs at the filing of the Complaint, and there was never an Order entered in that action for his withdrawal of representation of the Plaintiff's estate.

38. That the timeline for specific events related to this legal fee dispute are:

> Time from hiring Rogers until Associating Mitchell Brewer Richardson firm.
> 12/28/2006 – 02/11/2008 14 months
>
> Time from Associating Mitchell until Mitchell leaves firm in Fayetteville.
> 02/11/2008 – 08/19/2009 18 months
>
> Time from Mitchell leaving firm until first settlement.
> 08/19/2009 – 07/20/2010 11 months
>
> Time from hiring Rogers until firing him the first time.
> 12/28/2006 – Summer 2010 42 months
>
> Time from hiring Rogers until firing him the second time.
> 12/28/2006 – 04/27/2011 48 months
>
> Time from first settlement until second settlement approved.
> 07/20/2010 – 04/27/2011 8 months
>
> Time from second time Rogers was fired until second settlement.
> 12/22/2010 – 04/07/2011 3 ½ months

39. That the former plaintiff Betty Newell does not contend

> that any portion of the 40% contingency fee is unreasonable, excessive or unfair to the estate, and in fact takes the position that attorney Ronnie Mitchell should receive all of the fee in dispute, and that attorney James Rogers should receive none of the fee in dispute.
>
> 40. That regardless of the split between the attorneys, the client estate will not pay any more attorney's fees [than] if the dispute had not [arisen].
>
> 41. That Attorney Ronnie Mitchell estimated that 70 to 80 percent of the work on the case was done by the time of the first settlement on July 20, 2010.
>
> 42. That Attorney James Rogers estimated that 98% of the work on the case was done by the time of the first settlement on July 20, 2010.

The trial court then concluded:

> 13. That in its discretion, the Court concludes that a just and proper division of the disputed fee which honors each attorney's obligation to the client and to each other under their agreement, and based upon Quantum Mer[u]it is as follows:
>
> > a) The Plaintiff shall receive the sum of $865.29 as repayment for advanced costs and expenses.
> >
> > b) The Plaintiff shall receive the sum of $150,000.00 as reasonable attorney's fees, which consists of one half of the disputed fee, plus $22,500.00 of fee earned to locate the expert, develop, and prepare for the deposition in New York City, plus $2,500.00 in expenses for travel and lodging.
> >
> > c) The Defendant shall receive the amount of $100,000.00, which consists of one half of the disputed fee minus the amount of additional fee awarded Plaintiff, plus expenses.

We hold that the trial court's findings of fact support its conclusion of law in this regard, and that the trial court did not abuse its discretion in awarding Defendant $100,000.00 in attorney's fees based upon *quantum meruit*.

IV.

In Plaintiff's final argument, it contends the trial court erred in "dropping . . . Newell . . . as a party to this declaratory judgment action." We disagree.

Plaintiff claims Newell was a real party in interest and therefore should not have been dismissed from this action.

> The North Carolina Rules of Civil Procedure require that "[e]very claim shall be prosecuted in the name of the real party in interest." N.C.G.S. § 1A–1, Rule 17(a) (2003). "A real party in interest is 'a party who is benefited or injured by the judgment in the case' and who by substantive law has the legal right to enforce the claim in question." A party has standing to initiate a lawsuit if he is a "real party in interest."

Slaughter v. Swicegood, 162 N.C. App. 457, 463, 591 S.E.2d 577, 582 (2004) (citation omitted).

The trial court found as fact:

> 39. That the former plaintiff Betty Newell does not contend that any portion of the 40% contingency fee is unreasonable, excessive or unfair to the estate[.]
>
> 40. That regardless of the split between the attorneys, the client estate will not pay any more attorney's fees [than] if the dispute had not [arisen].

Plaintiff fails to show how Newell was benefited or injured by the trial court's declaratory judgment. This argument is without merit.

AFFIRMED.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).