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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-220

Filed: 7 April 2015

Buncombe County, No. 11 CVS 6168

RONALD M. SCHOTT, Plaintiff,

v.

TIMOTHY SCOTT STIWINTER, Defendant.

ACHIEVE GLOBAL, Defendant Employer, And THE HARTFORD INSURANCE CO., Defendant Workers' Compensation Insurance Carrier.

Appeal by plaintiff from order entered 1 October 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 4 June 2014.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Zachary V. Renegar, for defendant-appellee.

GEER, Judge.

Plaintiff Ronald M. Schott appeals an order partially reducing the workers' compensation lien of defendants The Hartford Insurance Co. and Achieve Global that attached to plaintiff's recovery from defendant Timothy Scott Stiwinter. On appeal,

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plaintiff argues that the trial court did not comply with N.C. Gen. Stat. § 97-10.2 (2013) before adjusting the lien because it did not make written findings pertaining to statutorily-required considerations. Because the trial court was required to make specific findings as to all of the enumerated factors under N.C. Gen. Stat. § 97-10.2(j) and failed to do so, we remand for further findings of fact.

Facts

On 24 June 2010, plaintiff was 69 years old and had just returned to Asheville, North Carolina by plane from a work trip in the District of Columbia where plaintiff, as an employee of defendant Achieve Global, was training military recruiters. As plaintiff left the Asheville airport, his vehicle was struck by a vehicle driven by Mr. Stiwinter, an off-duty North Carolina highway patrolman who had a blood alcohol content of 0.15. Plaintiff was treated for broken ribs, a traumatic brain injury, and a lacerated spleen that was surgically removed. Plaintiff suffered a 20% permanent impairment to his back and the permanent loss of his senses of taste and smell.

On 9 December 2011, plaintiff filed suit against Mr. Stiwinter in Buncombe County Superior Court. Subsequently, plaintiff reached a settlement with Mr. Stiwinter in the amount of \$101,000.00. Plaintiff then pursued a workers' compensation claim against defendants Achieve Global and The Hartford, which the parties ultimately settled with an agreement that The Hartford had paid or would pay a total of approximately \$486,000.00. That amount included \$70,000.00 in past

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and future medical expenses, together with lost wages. Consequently, pursuant to N.C. Gen. Stat. § 97-10.2(h), Achieve Global acquired the right to a lien against plaintiff's recovery from Mr. Stiwinter, and, pursuant to N.C. Gen. Stat. § 97-10.2(g), The Hartford was subrogated to that right.

Plaintiff subsequently filed a "MOTION TO REDUCE OR EXTINGUISH WORKER'S COMPENSATION LIEN" pursuant to N.C. Gen. Stat. § 97-10.2(j), which Judge Downs heard in Buncombe County Superior Court on 25 September 2013. On 1 October 2013, Judge Downs entered an order that provided the following:

IT APPEARS to the undersigned that Plaintiff brought a lawsuit for injuries against Defendant Stiwinter arising from a motor vehicle accident on June 24, 2010; that liability in this accident was clear; and, that Plaintiff received a settlement in the amount of \$101,000.00 from Timothy Scott Stiwinter arising from personal injuries sustained in said motor vehicle collision.

IT FURTHER APPEARS to the undersigned that Plaintiff pursued a workers' compensation claim related to the June 24, 2010, motor vehicle collision; that The Hartford Insurance Co. was the applicable workers' compensation carrier and has paid or agreed to pay total benefits of approximately \$486,000.00; that pursuant to N.C. Gen. Stat. § 97-10.2, The Hartford has a lien against Plaintiff's recovery from Defendant Stiwinter to the full extent to which it has paid benefits to Plaintiff; that the total amount of benefits paid by The Hartford Insurance Co. includes a prospective settlement agreement of \$300,000.00 of which \$30,000 is to be set-aside for future medical treatment; and, that prior to the settlement, The Hartford Insurance Co. had paid roughly \$40,000.00 for Plaintiff's medical treatment.

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IT FURTHER APPEARS, upon consideration of Plaintiff's injuries and the nature thereof, his subsequent settlement with Defendant Stiwinter, and the prospective settlement of his workers' compensation claim with The Hartford Insurance Co., that it is reasonable to reduce The Hartford Insurance Co.'s lien on the proceeds of Plaintiff's settlement with Defendant Stiwinter to \$40,000.00.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that The Hartford Insurance Co's [sic] lien on the proceeds of Plaintiff's settlement with Defendant Stiwinter be reduced to \$40,000.00 and that The Hartford Insurance Co. is hereby allowed a net recovery of \$40,000.00 to be paid from the proceeds of Plaintiff's settlement with Defendant Stiwinter.

Plaintiff timely appealed to this Court.

Discussion

N.C. Gen. Stat. 97-10.2(j) which authorizes a trial court to modify the amount of an employer's lien upon either the employee's or tortfeasor's application to the superior court, provides in pertinent part:

After notice to the employer and the insurance carrier, after an opportunity to be heard[,] . . . the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

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“A trial judge has discretion under [subsection (j)] to adjust the amount of a workers’ compensation lien, even if the result is a double recovery for the plaintiff.” *In re Estate of Bullock*, 188 N.C. App. 518, 525, 655 S.E.2d 869, 874 (2008). “However, the discretion granted [to the superior court judge] under G.S. § 97-10.2(j) is not unlimited; the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . by findings of fact and conclusions of law sufficient to provide for meaningful appellate review.” *Id.* at 525-26, 655 S.E.2d at 874 (internal quotation marks omitted).

Plaintiff argues that the trial court’s findings of fact do not address each of the factors set out in N.C. Gen. Stat. § 97-10.2(j). We must, however, first address defendants’ contention that plaintiff’s argument is precluded because he failed to offer evidence relevant to all of the required considerations. *See, e.g., Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003) (holding in equitable distribution case that “[t]he trial court must, however, make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50-20(c) (2001) *on which the parties offered evidence*” (emphasis added)).

At the beginning of the hearing, plaintiff’s counsel explained that he “ha[d] Mr. Schott here this morning prepared to testify with respect to certain aspects of the case, and we’re asking the court to then reduce or eliminate the lien.” However, instead of holding an evidentiary hearing, Judge Downs simply made inquiries of

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counsel. He asked questions and received unsworn answers relevant to some but not all of the specific statutory considerations: the extent of The Hartford's assistance in the litigation against Mr. Stiwinter, the amounts of plaintiff's settlements, and the certainty of Mr. Stiwinter's liability. Later in the hearing, after Judge Downs asked if there was "anything else to be heard[,]” plaintiff's counsel again offered to present evidence, but Judge Downs replied he was only interested in plaintiff's injuries. Plaintiff's counsel then noted that plaintiff would come out drastically undercompensated as a result of the settlements.

Although plaintiff failed to offer evidence on the necessary considerations supporting his motion, the record reveals that this omission was due to Judge Downs' disinterest in holding an evidentiary hearing and his focus on certain considerations to the exclusion of others. Based on our review of the record, we do not believe, under the circumstances of this case, that plaintiff can be deemed to have waived his contention that the order failed to make the statutorily-required findings.

Specifically, plaintiff argues that the trial court failed to make findings of fact regarding the “‘net recovery to plaintiff’” and the “‘amount of cost of the third party litigation to be shared between the employee and the employer.’” Defendants do not argue that the trial court made any findings on those factors, but instead urge that a trial court has complied with N.C. Gen. Stat. § 97-10.2(j) if the record indicates that the trial court “considered” the factors set out in the statute.

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However, this Court has explained that “the trial court, in considering a request for disbursement under subsection (j), must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review.” *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990). *Accord Levasseur v. Lowery*, 139 N.C. App. 235, 243, 533 S.E.2d 511, 516 (2000) (in setting out standard of review of order reducing employer’s lien, quoting *Allen*, 100 N.C. App. at 495, 397 S.E.2d at 333, as requiring that trial court “ ‘must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review’ ”), *aff’d per curiam*, 353 N.C. 358, 543 S.E.2d 476 (2001).

This Court has expressly held, applying *Allen*, that a trial court’s failure to make findings of fact with respect to the factors set out in N.C. Gen. Stat. § 97-10.2(j) requires reversal:

In the instant case, there are no findings of fact in the trial court’s order for the following mandatory statutory factors: (1) the net recovery to plaintiff; (2) the likelihood of plaintiff prevailing at trial or on appeal; and (3) the need for finality in the litigation. The findings provided in the trial court’s order are insufficient to determine “whether the court properly exercised its discretion or if it acted under a misapprehension of law” when it reduced the amount of defendants’ lien. [*Bullock*, 188 N.C. App.] at 527, 655 S.E.2d at 875. As a result, the trial court’s order must be reversed and remanded for additional findings.

Alston v. Fed. Exp. Corp., 200 N.C. App. 420, 425, 684 S.E.2d 705, 708 (2009).

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Defendants nonetheless point to *Bullock*, 188 N.C. App. at 526, 655 S.E.2d at 874 (emphasis added), and this Court's reversal of the trial court's order under N.C. Gen. Stat. § 97-10.2(j) on the grounds that "the court made no findings *nor is there any indication in the record to show that it considered the . . . mandated statutory factors . . .*" However, the Court also held in *Bullock*, consistent with *Allen*, *Levasseur*, and *Alston*, that remand was necessary because "[b]ased upon these findings," which did not address all of the statutorily required factors, the Court was "unable to determine whether the [trial] court properly exercised its discretion[.]" 188 N.C. App. at 527, 655 S.E.2d at 875 (emphasis added).

Nonetheless, to the extent that *Bullock* can be read as conflicting with *Allen* and *Levasseur's* requirement that an order reducing an employer's lien include "findings of fact and conclusions of law sufficient to provide for meaningful appellate review," *Allen*, 100 N.C. App. at 495, 397 S.E.2d at 333, *Allen* and *Levasseur* control. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Here, as plaintiff argues, the trial court's order contains no findings of fact regarding plaintiff's net recovery and the amount of cost of the third party litigation to be shared between the employee and the employer. Under *Allen*, *Levasseur*, and

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Alston, we must, therefore, reverse and remand the order for further findings of fact. “[O]n remand, the trial court must receive additional evidence as to matters which must be considered” under N.C. Gen. Stat. § 97-10.2(j). *Hill v. Hill*, ___ N.C. App. ___, ___, 748 S.E.2d 352, 365 (2013) (addressing remand in equitable distribution when trial court failed to make statutorily-required findings of fact).

REVERSED AND REMANDED.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).