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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-92

Filed: 15 December 2015

New Hanover County, No. 12 CVS 190

FEDERAL POINT YACHT CLUB ASSOCIATION, INC., Plaintiff,

v.

GREGORY MOORE, Defendant.

Appeal by Defendant from order entered 22 August 2014 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 12 August 2015.

*G. Grady Richardson, Jr., for Plaintiff-appellee.*

*Shipman & Wright, LLP, by W. Cory Reiss and Gary K. Shipman, for Defendant-Appellant.*

HUNTER, JR., Robert N., Judge.

Gregory Moore (“Defendant”) appeals following an order awarding Plaintiff, Federal Point Yacht Club Association, Inc. (“FPYC”), attorneys’ fees and costs. On appeal, Defendant argues the trial court abused its discretion in awarding FPYC attorneys’ fees and costs, arising from litigation for injunctive relief and one prior appeal to this Court. FPYC has requested that we affirm the trial court and sanction

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Defendant for a frivolous appeal. For the following reasons we affirm the trial court's order and decline to sanction Defendant for this appeal.

**I. Factual and Procedural History**

Our Court previously reviewed this case. *Fed. Point Yacht Club Ass'n v. Moore*, \_\_\_ N.C. App. \_\_\_, 758 S.E.2d 1 (2014). The relevant facts are in our earlier opinion and do not bear repeating here.

In the first appeal, we affirmed the entry of the trial court's injunction but remanded the order so the trial court could limit it to a reasonable time and specify what persons and geographic boundaries were protected by the injunction. *Id.* at \_\_\_, 758 S.E.2d at 11. Further, we held that the trial court acted within its discretion by balancing the equities of the parties and granting a permanent injunction and summary judgment in favor of FPYC. *Id.* at \_\_\_, 758 S.E.2d at 13. As matters stood at the end of the first appeal, FPYC had prevailed on its claims in general and Defendant was not successful in obtaining any relief based on his counterclaims. Although Defendant was successful in having the permanent injunction limited, this relief was only incidental to the litigation.

On remand, the trial court followed our direction and entered an amended injunctive order on 5 June 2014. In spite of the amended injunction, Defendant continued his boorish behavior toward FPYC's members and employees, by having

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violent outbursts, using profanity, derogatory names, and obscene gestures, all of which were enjoined.

On 23 June 2014, FPYC filed two motions: (1) for an order finding Defendant in civil contempt of the amended injunction; and (2) for an award of attorneys' fees and court costs. In support of the motion for civil contempt, FPYC filed affidavits of witnesses testifying to Defendant's continued boorish behavior and surveillance videos allegedly showing Defendant in acts of mischief.

Before FPYC's motions were heard, counsel for Defendant, Christopher A. Chleborowicz, withdrew from the case and was replaced by current counsel on appeal, Gary K. Shipman. On 21 July 2014, the trial court *ex mero motu* converted FPYC's contempt motion into a motion to "show cause for why Defendant should not be held in civil contempt." This conversion shifted the burden of proof from FPYC to show that Defendant had violated the injunction, to Defendant to show why he had not violated the injunction. At the show cause hearing, Defendant appeared *pro se*, while his former counsel, Christopher A. Chleborowicz, appeared as a friend of the court, and his current counsel, Gary K. Shipman, appeared by a limited notice of appearance.

Defendant filed over twenty affidavits from character witnesses and others attesting to his good faith and ability to conform his conduct to the requirements of the injunction. Defendant filed an affidavit at the hearing stating, "I admit to having

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engaged in the communications, confrontations and conduct as set forth in ‘Exhibit A,’ entitled Timeline of Defendant Moore’s Admitted Actions. I deny having engaged in any of the conduct set forth in ‘Exhibit B,’ entitled Timeline of Defendant Moore’s Alleged Actions That Are Denied.” In Exhibit A, Defendant admitted to sending 49 emails to the FPYC board, 31 of which complained about FPYC’s dock master. He also admitted to confronting the dock master in person and posting signs on the FPYC clubhouse, all of which was recorded on video. In Exhibit B, Defendant denied being depicted in several FPYC surveillance videos, which showed a person posting derogatory signs on FPYC property, entering a FPYC bathroom before leaving a fecal mess in it, throwing a Christmas tree, and cutting the wires on a surveillance camera.

At the hearing, Defendant addressed the court, “[I]f I had knew [sic] that I was breaking your order, I would have never done it.” He discussed his feud with FPYC’s former dock master, “Mr. Simon’s gone. To me that was my biggest area of trying to stay out of trouble because every time I turned around he was either following me, taking pictures of us, or coming up with some story that I done [sic].”

After evaluating the evidence, the trial court entered a civil contempt order, finding that Defendant violated the injunction by willfully:

- a. Communicating profanities at or towards persons known to the Defendant to be Association members, Board of Director Members and/or the Association's employees;
- b. Calling persons known to the Defendant to be Association members, Board of Director Members and/or Association employees derogatory names;

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c. Making profane and/or obscene gestures towards persons known to the Defendant to be Association members, Board of Director Members and/or the Association's employees;

d. Engaging in harassing conduct towards persons known to the Defendant to be Association members, Board of Director Members and/or the Association's employees.

FPYC's counsel, G. Grady Richardson, Jr., submitted exhibits at the hearing, including invoices for court costs and an affidavit for attorneys' fees. The court costs included deposition fees, transcript production costs, and mediation fees, dating back to 24 February 2012, and as recent as 1 August 2014. In total, the costs amounted to \$3,871.36. The affidavit for attorneys' fees stated that attorney Richardson had been licensed to practice law in North Carolina since 1998, and that he represented FPYC for five years, since April 2009. It further listed three years of legal services rendered, and the legal fees charged to FPYC, adding up to a total of \$195,603.49 in attorneys' fees.

At the hearing for attorneys' fees, attorney Richardson addressed the court:

I've been representing [FPYC] . . . since around April . . . 2009. The lion's share of my efforts have all been in response to Mr. Moore's . . . [actions, antics, behavior, and conduct]. I have all the invoices, but I would prefer not to reveal all the itemized entries for attorney-client privilege. . . . I started to run out of time . . . trying to go back five and a half years of invoices and efforts is not an easy task. . . . Now as you look back in my affidavit . . . I have carved out clearly [sic] efforts related solely to the 50(c) complaint. And the reason for that is, there were ultimately dismissals taken of those . . . [a]nd as a part of that settlement, the parties agreed to forego attorney fees and costs. . . . I would

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be the first to admit to you that I'm sure there is still some time that is interrelated [between the 50(c) complaint and this lawsuit] . . . but the bulk of that time was to this lawsuit.

He also cited statutory support for FPYC's motion for attorneys' fees and costs, citing N.C. Gen. Stat. §§ 1D-45, 6-20, 6-21.1, 6-21.5, 7A-305, and § 75-16.1. He concluded by submitting all of the attorney fee invoices to the court, asking that they be sealed and reviewed by the court *in camera*.

After an *in camera* review of attorney Richardson's affidavit, FPYC's court costs, and the "actual invoices for professional services rendered [to FPYC]," the court awarded \$100,000.00 in attorneys' fees and \$3,871.36 in costs to FPYC. In support of the award, the trial court found:

1. The actions and conduct of Defendant in repeated violation of Plaintiff's First and Second Hearing Decisions, rules, regulations, and covenants, and this Court's Original and Amended Orders, Defendant's general and naked denials in his pleadings without any competent evidence or arguments to support said denials, have been without basis in law or fact and, accordingly, did not present a justiciable controversy to the Court, as evidenced by, *inter alia*, Defendant's later admissions to Plaintiff's claims and allegations both in the Complaint and Plaintiff's Motion for Order Finding Defendant in Civil Contempt of Court.
2. Defendant's claims in this action against Plaintiff were dismissed a second time, with prejudice, which "*operates as an adjudication upon the merits.*" *Id.*, \_\_ N.C. App. \_\_, 758 S.E.2d at 8, *citing*, N.C. Gen. Stat. § IA-1, Rule 41(b) (2013) (emphasis in original).
3. Defendant's claims and defenses in this action against Plaintiff were frivolous and malicious and known to

Defendant to be frivolous and malicious.

Defendant filed his written notice of appeal on 19 September 2014, contesting the trial court's 22 August 2014 order awarding attorneys' fees and costs to FPYC. Defendant filed his appellant brief 19 March 2015, and FPYC filed its appellee brief 12 May 2015. Defendant filed a reply brief on 26 May 2015, seeking to vacate the trial court's order for attorneys' fees.

On 12 May 2015, FPYC filed a N.C. R. App. P. 34 motion seeking sanctions against Defendant for pursuing a frivolous appeal. Defendant filed a reply brief 22 May 2015. The Clerk of the North Carolina Court of Appeals referred FPYC's motion to this panel on 27 May 2015.

On appeal, Defendant contests the award of attorneys' fees which are best segmented into three statutory groups: (1) section 1D-45 fees incurred in defending against a punitive damages claim; (2) section 75-16.1 fees incurred in a frivolous and malicious unfair or deceptive trade practices ("UDTP") claim; and (3) section 6-21.5 fees related to a non-justiciable pleading.

## **II. Standard of Review**

The first statute for attorneys' fees, N.C. Gen. Stat. § 1D-45, provides, "The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious." *Id.* The

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trial court's decision to award or deny fees under this statute "will not be disturbed on appeal unless the trial court has abused its discretion." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 528, 586 S.E.2d 507, 513 (2003). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The second statutory grounds for attorneys' fees, N.C. Gen. Stat. § 75-16.1, allows a trial judge to award reasonable attorneys' fee to a prevailing party in a UDTP claim, if the judge finds "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." *Id.* An award under this section is also reviewed for an abuse of discretion, and the trial court must make findings that (1) Defendant knew, or should have known, the UDTP action was frivolous and malicious, and (2) the attorneys' fees awarded were reasonable. *McKinnon v. CV Industries, Inc.*, 228 N.C. App. 190, 199, 745 S.E.2d 343, 350 (2013) (citing to N.C. Gen. Stat. § 75-16.1(2)); *see also Barbee v. Atl. Marine Sales & Serv., Inc.*, 115 N.C. App. 641, 648, 446 S.E.2d 117, 122.

The third statute for attorneys' fees, N.C. Gen. Stat. § 6-21.5, provides, "In any civil action . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete



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absence of a justiciable issue of either law or fact raised by the losing party in any pleading.” *Id.* This statute requires a two-part standard of review.

First, “[i]n reviewing an order granting a motion for attorneys’ fees pursuant to N.C. Gen. Stat. § 6-21.5, [t]he presence or absence of justiciable issues in the pleadings is . . . a question of law that this Court reviews *de novo*.” *Wayne St. Mobile Home Park, LLC v. N. Brunswick Sanitary Dist.*, 213 N.C. App. 554, 561, 713 S.E.2d 748, 753 (2011) (citing *Free Spirit Aviation v. Rutherford Airport*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010)). A justiciable issue is one that is “real and present, as opposed to imagined or fanciful.” *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) (citations omitted). “In order to find a complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss.” *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989) (citations omitted).

Second, “[t]he [trial court’s] decision to award or deny attorney’s fees under [s]ection 6-21.5 is a matter left to the sound discretion of the trial court.” *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 67, 671 S.E.2d 23, 30 (2009). “An abuse of discretion occurs when a decision is ‘either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.’” *Exgelhof ex*

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*rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 668 S.E.2d 367 (2008) (citing *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 248, 563 S.E.2d 269, 280 (2002)).

**III. Analysis**

North Carolina follows the “American Rule” with regard to the award of attorneys’ fees. *Ehrenhaus v. Baker*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 776 S.E.2d 699, 704 (2015). This rule requires each litigant to pay his or her attorneys’ fees, win or lose, unless a statute or agreement between the parties provides otherwise. *Philips v. Pitt County Memorial Hosp., Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 775 S.E.2d 882, 883 (2015) (citing *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)). Also, North Carolina allows attorneys’ fees under the common fund doctrine. *Ehrenhaus*, \_\_\_ N.C. App. at \_\_\_, 776 S.E.2d at 705 (citation omitted). In this case, FPYC was awarded attorneys’ fees based upon, *inter alia*, N.C. Gen. Stat. §§ 1D-45, 6-21.5, 7A-305, and 75-16.1.

Section 1D-45 authorizes an award of attorneys’ fees to a party who defends against a frivolous or malicious punitive damages claim. N.C. Gen. Stat. § 1D-45. Section 6-21.5 authorizes an award of attorneys’ fees to a prevailing party who defends against any non-justiciable pleading, and section 7A-305 authorizes an award of compulsory court costs. N.C. Gen. Stat. §§ 6-21.5, 7A-305. Lastly, section 75-16.1 authorizes an award of attorneys’ fees to a prevailing party in a UDTP claim,

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namely a prevailing defendant who defends against a frivolous and malicious UDTP claim. N.C. Gen. Stat. § 75-16.1(2).

The transactions which form the basis for this appeal, and the previous appeal, arose from a single civil action in which FPYC obtained a permanent injunctive order. In its injunctive complaint, FPYC requested attorneys' fees and court costs in its claim for relief, however, it did not cite to any statutory basis for recovery in its complaint. In Defendant's counterclaim filed on 25 January 2012, he sought relief under the unfair and deceptive trade practices statutes, N.C. Gen. Stat. §§ 75-1.1, 75-51, 75-54, and sought attorneys' fees under the corresponding statute N.C. Gen. Stat. § 75-16.1. In addition, Defendant filed other causes of action which FPYC moved to dismiss, and later asserted that all of Defendant's claims were frivolous and malicious. Our statutes protect litigants from such claims by awarding them attorneys' fees as a sanction to prevent vexatious litigation. *Persis Nova Const.*, 195 N.C. App. at 66, 671 S.E.2d at 30 (citations omitted).

We first remanded this case to the trial court to narrow the scope of the injunctive order against Defendant. The trial court amended the injunction, and Defendant violated the amended injunction, prompting FPYC to file motions for civil contempt and attorneys' fees and costs. In its motion for attorneys' fees and costs, FPYC sought fees in the amount of \$195,603.49 and \$3,871.36 in costs. The court, in its discretion, awarded \$100,000.00 in attorneys' fees and all of the costs based upon,

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*inter alia*, N.C. Gen. Stat. §§ 1D-45, 6-21.5, 7A-305, and 75-16.1. Defendant appeals only the attorneys' fee award, claiming that because he achieved some success on his initial appeal, his UDTP counterclaims against FPYC's injunctive complaint could not be considered frivolous or malicious, and thus the trial court had no statutory justification for awarding attorneys' fees to FPYC. In addition, Defendant asserts that FPYC's motion seeking fees lacks sufficient specificity regarding effort spent on legal tasks for a court to award fees.

On appeal, Defendant abandons his argument regarding an award of court costs to FPYC under N.C. Gen. Stat. § 7A-305. Section 7A-305 allows for compulsory court costs to fund the use of judicial facilities, among other expenses. *Id.* On appeal, we review “[w]hether a trial court has properly interpreted the statutory framework applicable to costs” as a question of law, and we do so *de novo*. *Khomyak ex rel. Khomyak v. Meek*, 214 N.C. App. 54, 57, 715 S.E.2d 218, 220 (2011) (internal quotation marks and citations omitted). Since Defendant has abandoned this issue on appeal, we need not review it any further.

For the remaining issue regarding attorneys' fees, we review the trial court's statutory justification for its award in three parts: (1) section 1D-45 fees incurred in defending against a punitive damages claim; (2) section 75-16.1 fees incurred in a frivolous and malicious UDTP claim; and (3) section 6-21.5 fees related to a non-justiciable pleading. Lastly, we review FPYC's motion for sanctions under N.C. R.

App. P. 34, to reimburse FPYC for attorneys' fees and costs incurred during this appeal.

## **A. Attorneys' Fees**

### **1. Section 1D-45 Attorneys' Fees**

Section 1D-45 provides a party with the following avenue for recovering attorneys' fees in a punitive damages suit:

The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious.

N.C. Gen. Stat. § 1D-45.

In evaluating whether the trial court abused its discretion, we review the court's findings that support the award. *Phillips*, \_\_\_ N.C. App. at \_\_\_, 775 S.E.2d at 884. We review the findings "to determine whether competent evidence supports them and whether they, in turn, support the court's conclusions." *Id.*

First, we look at the trial court's order awarding attorneys' fees, which included the following findings of fact:

7. At all times in the instant action from Plaintiff's filing of the Complaint against him through the date of the Original Order, Defendant never challenged the findings by Plaintiff in its First and Second [homeowners association] Hearing Decisions or disputed that he engaged in, and continued to engage in, actions and conduct in violation of

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Plaintiff's rules, regulations, covenants, and First and Second Hearing Decisions. Despite this, Defendant filed naked, general denials to Plaintiff's Complaint and persisted in defending against Plaintiff's action: (1) without offering any competent evidence or arguments to support his denials; (2) while continuing to engage in the same violative and/or contemptuous actions and conduct in derogation of Plaintiff's First and Second Hearing Decisions, rules, regulations and covenants, and this Court's Original and Amended Orders; and, (3) only to later stipulate and admit through his Affidavit, oral statements during the Show Cause Hearing, and representations of his present and former counsel of record, after Plaintiff had already incurred substantial attorneys' fees and costs, that he had, in fact, engaged in and continued to engage in such violative and contemptuous actions and conduct.

8. Despite the foregoing, Defendant still alleged and pursued claims and counterclaims against Plaintiff for "unfair and deceptive trade practices; abuse of process; negligent hiring, retention, and supervision of dock master; negligent infliction of emotional distress; intentional infliction of emotional distress; and punitive damages" in the instant action and his prior action against the Plaintiff in August of 2010. *Id.*, N.C. App. 758 S.E.2d at 2-3. Based upon all of the Findings herein, and certainly by the time of his counterclaims in this action, *Defendant knew or should have known his claims against Plaintiff were frivolous and malicious. . . .*

(emphasis added).

In addition, the trial court's order made the following conclusions of law:

1. The actions and conduct of Defendant in repeated violation of Plaintiff's First and Second Hearing Decisions, rules, regulations, and covenants, and this Court's Original and Amended Orders, Defendant's general and naked denials in his pleadings without any competent evidence or arguments to support said denials, have been without basis

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in law or fact and, accordingly, did not present a justiciable controversy to the Court, as evidenced by, *inter alia*, Defendant's later admissions to Plaintiff's claims and allegations both in the Complaint and Plaintiff's Motion for Order Finding Defendant in Civil Contempt of Court. . . .

3. Defendant's claims and defenses in this action against Plaintiff were *frivolous and malicious* and known to Defendant to be *frivolous and malicious*.

(emphasis added).

Under section 1D-45, a claim for punitive damages is "frivolous" when "its proponent can present no rational argument based upon the evidence or law in support of it." *Phillips*, \_\_\_ N.C. App. at \_\_\_, 775 S.E.2d at 884 (citing *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004)). A punitive damages claim is "malicious" when "it is 'wrongful and done intentionally without just cause or excuse or as a result of ill will.'" *Id.* (citing *Rhyne*, 149 N.C. App. at 672, 562 S.E.2d at 94).

In the present case, Defendant confessed to acts which were specifically outlined in FPYC's complaint and motion for civil contempt. For example, FPYC's complaint alleged that Defendant intimidated, threatened, harassed, and acted disorderly towards the FPYC board of directors and the FPYC dock master. Defendant, in his affidavit, admitted to sending 49 emails to the FPYC board of directors, 31 of which complained about FPYC's dock master. At the contempt hearing, Defendant admitted to his conduct, stating:

I didn't have any idea that I was breaking your ruling

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saying—or I guess you could say complaining about how bad an area is, or things that are going wrong, and if I offended them, I'm sorry I did. But I mean, to me that looks like that's what they wanted to be on the [FPYC] board for, is to hear the members' complaints and make the area better-looking and making it right.

These admissions are contradicted by Defendant's 25 January 2012 answer and counterclaims, which denied such behavior.

A trial court is given deference for issues of credibility because it is in a better position to examine the evidence than simply reviewing a cold record on appeal. *See Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (“[The trial court has the] opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.”) (quotation marks omitted). We cannot say that a court examining Defendant's behavior and legal contentions could not reasonably find that Defendant's actions were frivolous or malicious. Based on Defendant's admissions and the evidence in the record, there is competent evidence to support the trial court's finding that Defendant's claims and defenses were frivolous and malicious. *See Phillips*, \_\_\_ N.C. App. at \_\_\_, 775 S.E.2d at 884.

## **2. Section 75-16.1 Attorneys' Fees**

Section 75-16.1 sets out the following grounds for recovering attorneys' fees:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1 [unfair or deceptive acts or practices], the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney



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representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit;

or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1.

Typically the prevailing party under this statute is the UDTP plaintiff, and the trial court has discretion to award them attorneys' fees under section 75-16.1(1). However, a defendant to a UDTP claim may also qualify as a prevailing party under section 75-16.1(2). *McKinnon*, 228 N.C. App. at 199, 745 S.E.2d at 350. A prevailing defendant does not need to be wholly successful against a UDTP claim at trial, as we have held a defendant is a prevailing party after success on partial summary judgment. *Birmingham v. H&H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 443, 658 S.E.2d 513, 519 (2008).

Defendant raised UDTP claims in his answer and counterclaims, making FPYC a section 75-16.1(2) defendant. FPYC successfully achieved dismissal of Defendant's UDTP claims through Rule 12(b)(7) motions for failure to join necessary parties. In the first appeal, we upheld FPYC's motion and the trial court's order dismissing the UDTP counterclaims with prejudice. *Fed. Point Yacht Club Ass'n*, \_\_\_ N.C. App. at \_\_\_, 758 S.E.2d at 7 ("Defendant next argues that the trial court erred

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in its second 18 September 2012 order dismissing defendant's counterclaim with prejudice pursuant to N.C. R. Civ. P. 12(b)(7). We disagree." On remand, the trial court amended the injunctive order, which Defendant continued to violate, prompting FPYC to file a motion for civil contempt and a second motion for attorneys' fees and costs. The trial court issued an order finding Defendant in civil contempt, and a second order awarding FPYC attorneys' fees and costs. Therefore, FPYC was the prevailing party defendant against the UDTP claims, in addition to being the prevailing party claimant for the injunctive and civil contempt actions.

Since FPYC is the prevailing party defendant, section 75-16.1(2) applies to the motion for attorneys' fees. *McKinnon*, 228 N.C. App. at 199, 745 S.E.2d at 350. To support a section 75-16.1(2) award, the trial court must make findings that (1) Defendant knew, or should have known, the UDTP action was frivolous and malicious, and (2) the attorneys' fees awarded were reasonable. *Id.* (citing to N.C. Gen. Stat. § 75-16.1(2); *Barbee*, 115 N.C. App. at 648, 446 S.E.2d at 122) (quotation marks omitted).

**i. Defendant Knew His Claims Were Frivolous and Malicious**

Regarding the first required finding, the trial court found, "Defendant's claims and defenses in this action against Plaintiff were frivolous and malicious and known to Defendant to be frivolous and malicious." The court framed its analysis by making findings that Defendant did not contest FPYC's allegations. The court cited to our

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first opinion in this case, adding emphasis:

The trial court then determined that [D]efendant continued to violate [Plaintiff's] rules and regulations, even after [Plaintiff] met with [D]efendant to discuss the violations and after fourteen individual members of [Plaintiff] obtained no-contact orders against [D]efendant. Defendant does not specifically contest these facts. He does not argue that they did not occur; nor does he contest that these actions violate the restrictive covenants.

(citing *Fed. Point Yacht Club Ass'n*, \_\_\_ N.C. App. at \_\_\_, 758 S.E.2d at 12–13). The court continued, “Defendant never challenged the findings by Plaintiff . . . or disputed that he engaged in, *and continued to engage in*, actions and conduct in violation of Plaintiff’s rules, regulations, covenants, and First and Second Hearing Decisions.” (emphasis in original).

We have held “[a] claim is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it].” *Blyth v. McCrary*, 184 N.C. App. 654, 663 n. 5, 646 S.E.2d 813, 819 n. 5 (2007) (internal citations and quotation marks omitted). After finding Defendant did not contest FPYC’s allegations, the trial court found Defendant’s claims were frivolous, stating, “Defendant’s continuing actions and conduct in violation of Plaintiff’s rules . . . and this Court’s Original and Amended Orders have been completely without any basis in law or fact . . . .” The court concluded that “Defendant’s general and naked denials in his pleadings . . . have been without basis in law or fact . . . .”

As to the issue of malice, “[a] claim is malicious if it is wrongful and done

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intentionally without just cause or excuse or as a result of ill will.” *Blyth*, 184 N.C. App. at 663 n. 5, 646 S.E.2d at 819 n. 5 (internal citations and quotation marks omitted). The trial court explained the malicious nature of Defendant’s claims, as follows:

Defendant filed naked, general denials . . . without offering any competent evidence or arguments to support his denials . . . while continuing to engage in the same violative and/or contemptuous actions and conduct . . . only to later stipulate and admit through his Affidavit, oral statements during the Show Cause Hearing, and representations of his present and former counsel of record, after Plaintiff had already incurred substantial attorneys’ fees and costs, that he had, in fact engaged in and continued to engage in such violative and contemptuous actions and conduct. . . . [only to] still allege[] and pursue[] [UDTP] claims and counterclaims . . . .

While the court did not use the exact language from *Blyth*, its findings make clear that Defendant’s claims were “wrongful and done intentionally without just cause or excuse or [were the] result of ill will.” *Blyth*, 184 N.C. App. at 663 n. 5, 646 S.E.2d at 819 n. 5 (internal citations and quotation marks omitted). Therefore, the trial court satisfied the first requirement of section 75-16.1(2), by finding that Defendant knew his UDTP actions were frivolous and malicious. *See McKinnon*, 228 N.C. App. at 199, 745 S.E.2d at 350.

Based on our review of the record, we agree with the trial court that the facts presented are sufficient to support an award of attorneys’ fees under section 75-16.1(2). We agree that “Defendant knew or should have known his claims against

Plaintiff were frivolous and malicious,” and the trial court’s findings are sufficiently specific to support such a conclusion. *Cf. McKinnon*, 228 N.C. App. at 199–200, 745 S.E.2d at 350 (citing *Birmingham*, 189 N.C. App. at 443, 658 S.E.2d at 519).

**ii. Reasonableness of the Attorneys’ Fees**

Our Supreme Court has set out reasonableness factors for trial courts to follow when awarding attorneys’ fees under section 75-16.1:

In addition to [the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney] . . . the trial court should make findings concerning the novelty and difficulty of the questions of law, the adequacy of the representation, the difficulty of the problems faced by the attorney, and especially any unusual difficulties, and the kind of case for which the fees are sought and the result obtained.

*United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-382 (1993) (citation and quotation marks omitted).

The trial court used the *Kuykendall* factors to scrutinize the reasonableness of the award for \$100,000.00 in attorneys’ fees and \$3,871.36 in costs:

11. The Plaintiff’s subject action was decided in favor of the Plaintiff and the Plaintiff has incurred substantial costs, including attorneys’ fees, in having to bring this action and related motions against Defendant to simply compel and coerce Defendant to comply with the Plaintiff’s rules, regulations, and First and Second Hearing Decisions, as well as this Court’s Original and Amended Orders. The Court finds from the Affidavit of Mr. Richardson (Plaintiff’s Exhibit 12), its in camera review of Mr. Richardson’s actual invoices for professional services rendered, the invoices for Defendant’s videotaped deposition and transcript, the parties’ mediation, and two hearing transcripts (Court

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Exhibit One), and from a review of the voluminous record proper in this case, *that the time and expenses incurred by Plaintiff's counsel are fully justified, reasonable and proper based upon the time and labor expended, the skill required to perform the services rendered, the customary fees for like work, and the experience and ability of Mr. Richardson and his firm.* After said review, the Court finds that the sum of \$100,000.00 for Plaintiff's attorneys' fees (Plaintiff's Exhibit 12), and the sum of \$3,871.36 for Plaintiff's costs (Court Exhibit One) are reasonable sums incurred in prosecuting this action against Defendant for which Plaintiff is entitled to by law.

(emphasis added).

The record contains the trial court's findings regarding time and labor expended, skill required to perform the legal services rendered, the customary fee for like work, and the experience and the ability of attorney Richardson. *Blakeship v. Town and Country Ford, Inc.*, 174 N.C. App. 764, 771, 622 S.E.2d 638, 643 (2005) (citing *Barbee*, 115 N.C. App. at 648, 446 S.E.2d at 121–22). Based on our review, the trial court made the second required finding under section 75-16.1(2), finding that the attorneys' fees were reasonable. *Blakeship*, 174 N.C. App. at 771, 622 S.E.2d at 643. Using the trial court's findings, we are able to independently review the reasonableness of the award. *Cf. McKinnon*, 228 N.C. App. at 201, 745 S.E.2d at 351 (citing *Printing Serv. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 82, 637 S.E.2d 230, 237 (2006), *aff'd per curiam*, 361 N.C. 347, 643 S.E.2d 586 (2007)). After reviewing the court's findings and the evidence before the court, we hold that the award for attorneys' fees and costs is reasonable under *Kuykendall*.

### **3. Section 6-21.5 Attorneys' Fees**

Section 6-21.5 gives a trial court statutory authority to award attorneys' fees to a "prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5.

As previously discussed, FPYC was the prevailing party to Defendant's counterclaims, and in the contempt action. First, we note a distinction between section 6-21.5 and another statutory basis for attorneys' fees in the trial court's award, section 75-16.1. Section 75-16.1 gives a trial court statutory authority to award attorneys' fees incurred "at all stages of the litigation, including appeals." *McKinnon*, 228 N.C. App. at 199, 745 S.E.2d at 350 (citation and quotation marks omitted). In contrast, the scope of section 6-21.5 attorneys' fees has been limited to fees incurred at the trial level. *See Hill v. Hill*, 173 N.C. App. 309, 622 S.E.2d 503 (2005) (holding that the trial court committed reversible error by awarding section 6-21.5 attorneys' fees that were incurred by the prevailing party during a prior appeal), *appeal dismissed and disc. review denied*, 360 N.C. 363, 629 S.E.2d 851 (2006). However, this Court narrowed *Hill*, holding that *Hill* only applies to attorneys' fees imposed as a sanction under N.C. Gen. Stat. § 1A-1, Rule 11. *McKinney v. McKinney*, 228 N.C. App. 300, 305, 745 S.E.2d 356, 360 (2013), *disc. review denied*, 367 N.C. 288, 753 S.E.2d 679 (2014).

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In the instant case, FPYC requested \$195,603.49 in attorneys' fees, which included fees from the first appeal. Two entries on attorney Richardson's affidavit mentioned the first appeal, listing the following:

November 7, 2012–March 28, 2014: \$35,699.97  
November 4, 2012: Defendant's Notice of Appeal

April 1, 2014–July 31, 2014: \$30,759.91  
April 1, 2014: Court of Appeals Opinion  
June 5, 2014: Judge Cobb's Amended Order  
June 20, 2014: Association's Motions and Notice of Hearing  
July 8, 2014: Conference of Attorneys with Judge Cobb  
July 9, 2014: Motion Hearing

Defendant contends that the fees incurred during the first appeal are not a proper basis for section 6-21.5 attorneys' fees. However, the trial court reviewed all of the "actual invoices for professional services rendered [to FPYC]" *in camera*, and reduced the award of attorneys' fees to \$100,000.00. Moreover, reducing the requested fees, \$195,603.49, by the value of the two affidavit entries at issue does not account for the \$95,603.49 reduction the trial court imposed in its discretion. Therefore, we cannot readily hold the scope of attorneys' fees awarded was improper.

First, we review "[t]he presence or absence of justiciable issues in the pleadings . . . ." *de novo*, as a question of law. *Wayne St. Mobile Home Park*, 213 N.C. App. at 561, 713 S.E.2d at 753 (citing *Free Spirit Aviation*, 206 N.C. App. at 197, 696 S.E.2d at 563). Second, we review the trial court's discretionary "decision to award



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or deny attorney's fees under [s]ection 6-21.5 . . . ." *Persis Nova Constr.*, 195 N.C. App. at 67, 671 S.E.2d at 30.

A justiciable issue is "real and present, as opposed to imagined or fanciful." *Sunamerica*, 328 N.C. 254 at 257, 400 S.E.2d at 437 (citations omitted). "In order to find a complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss." *K & K Development Corp.*, 96 N.C. App. at 479, 386 S.E.2d at 229 (citations omitted).

"Under this deferential review of the pleadings, a plaintiff must either: (1) 'reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue'; or (2) be found to have 'persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.'" *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (2010) (citing *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993)); see also *Sunamerica*, 328 N.C. 254 at 258, 400 S.E.2d at 438. A trial court must make one or both of these findings to support its award of section 6-21.5 attorneys' fees. See *Sunamerica*, 328 N.C. 254 at 260, 400 S.E.2d at 439 ("[A trial court] shall make findings of fact and conclusions of law to support its award of attorneys' fees.").

In directing trial courts to make such findings, "[w]e have previously held that

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the sufficiency of a pleading is a question of law for the court and the trial court need not make its findings more detailed if it states the pleading raised no justiciable issue of law or fact.” *Bryant v. Short*, 84 N.C. App. 285, 288, 352 S.E.2d 245, 247 (1987) (citing *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 325, 344 S.E. 2d 555, 565 (1986)).

In the instant case, the trial court found “Defendant’s continuing action and conduct . . . have been completely without any basis in law or fact and did not present a justiciable controversy to the [trial] [c]ourt.” Based on this finding and the evidence in the record, the trial court concluded that Defendant’s claims and defenses against FPYC were frivolous and malicious, and Defendant knew they were frivolous and malicious.

“It is important to note . . . that the mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a [Rule] 12(b)(6) motion, nor the entry of summary judgment.” *Sunamerica*, 328 N.C. 254 at 259, 400 S.E.2d at 439 (citing N.C. Gen. Stat. § 6-21.5). However, granting a Rule 12(b)(6) motion or entering summary judgment may be evidence that a pleading lacks a justiciable issue. *Id.* Moreover, “action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of [section] 6-21.5.” *Id.*

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We have reviewed all of the pleadings and the evidence in the record *de novo*, including Defendant's admissions at the civil contempt hearing. After our review of Defendant's 25 January 2012 answer and counterclaims, it conclusively appears that no "real and present" issues existed in his counterclaims. *See K & K Development Corp.*, 96 N.C. App. at 479, 386 S.E.2d at 229; *see also Sunamerica*, 328 N.C. 254 at 257, 400 S.E.2d at 437. As the trial court noted, Defendant raised several claims in his 12 August 2010 complaint which were dismissed without prejudice for failure to join necessary parties. He failed to refile his complaint, but raised the same claims in the instant case through his answer and counterclaims, which were also dismissed, albeit with prejudice, and we affirmed their dismissal on the first appeal. *Fed. Point Yacht Club Ass'n*, \_\_\_ N.C. App. at \_\_\_, 758 S.E.2d at 8 (citations omitted). Defendant perpetuated the instant litigation by continuing to violate the trial court's amended injunction, which compelled the civil contempt action, motion for attorneys' fees, and now a second appeal to this Court. We hold Defendant's counterclaims contained a "complete absence of a justiciable issue of either law or fact." N.C. Gen. Stat. § 6-21.5. As the prevailing party, FPYC is entitled to section 6-21.5 attorneys' fees, at the discretion of the trial court. The court had statutory authority under, *inter alia*, section 6-21.5, to award attorneys' fees to FPYC, and made the required findings to support such an award. Therefore, we hold that the trial court did not abuse its discretion in deciding to award section 6-21.5 attorneys' fees to FPYC. *See Credigy*,

202 N.C. App. at 655, 689 S.E.2d at 895 (citation omitted).

### **B. Motion for Sanctions**

FPYC contends that Defendant is currently pursuing a frivolous appeal before this Court. As such, FPYC seeks sanctions against Defendant under N.C. R. App. P. 34, to reimburse FPYC for attorneys' fees and costs incurred during this appeal, to deter Defendant from harassing FPYC, and to impose any other relief that this Court deems proper.

Pursuant to Rule 34, this Court may impose sanctions against an appellant where "the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," or "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." *ACC Const., Inc. v. SunTrust Mortg., Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 769 S.E.2d 200, 213–14 (2015).

In *ACC Const.*, we awarded sanctions and attorneys' fees in favor of the appellee, when the appellant was taxed with attorneys' fees by the lower court and contested the award on appeal without citing to any legal authority. *Id.* In the instant case, Defendant makes a more supported argument, challenging FPYC's arguments as to the frivolity, malice, and justiciability of his pleadings with citation to legal authority. Therefore, in the exercise of our discretion under Rule 34, we deny

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FPYC's motion for sanctions.

**IV. Conclusion**

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).