

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-173

Filed: 18 September 2018

Wake County, No. 17 CVD 600783

KAYLYN MICHELLE SCRUGGS MITMAN, Plaintiff,

v.

LYMAN CHARLES SHIPLEY, III, Defendant.

Appeal by defendant from order entered 27 July 2017 by Judge Margaret P. Eagles in Wake County District Court. Heard in the Court of Appeals 21 August 2018.

No brief filed for plaintiff-appellee.

Curtis R. High for defendant-appellant.

ARROWOOD, Judge.

Lyman Charles Shipley, III (“defendant”), appeals from a “Domestic Violence Order of Protection” (“DVPO”) that includes an award of attorney’s fees to Kaylyn Michelle Scruggs Mitman (“plaintiff”). For the following reasons, we reverse the award of attorney’s fees.

I. Background

MITMAN V. SHIPLEY

Opinion of the Court

On 30 May 2017, plaintiff filed a “Complaint and Motion for Domestic Violence Protective Order” alleging acts of domestic violence by defendant. A “Notice of Hearing on Domestic Violence Protective Order” and an “Ex Parte Domestic Violence Order of Protection” were issued on 30 May 2017. Thereafter, “Order[s] Continuing Domestic Violence Hearing and Ex Parte Order” were entered when the matter came on for hearing on 6 June 2017 and 7 July 2017.

The matter was eventually heard in Wake County District Court before the Honorable Margaret P. Eagles on 27 July 2017. In addition to evidence concerning domestic violence between plaintiff and defendant, plaintiff testified that she incurred the attorney’s fees specified in an “Affidavit for Attorney’s Fees” completed by her counsel on 26 July 2017, the day before the hearing. Plaintiff’s counsel then requested an attorney’s fee award in the closing argument. In response to plaintiff’s request for attorney’s fees, defense counsel stated, “I’m not even sure it’s allowed by statute, but I don’t think in this case it’s appropriate.” Defense counsel did not present any further argument concerning attorney’s fees.

The trial court announced its decision to grant a DVPO and attorney’s fees at the conclusion of the hearing and entered a DVPO against defendant. In the standard form DVPO completed by the trial court, the trial court included among the additional requirements in the “Other” section that “[d]efendant shall pay [p]laintiff’s attorney[']s fees in this matter in the amount of \$8,386.90 within 90 days.”

Defendant indicated that he wanted to appeal the award of attorney's fees in open court and later filed notice of appeal from the DVPO on 7 August 2017.

II. Discussion

The sole issue on appeal is whether the trial court erred in ordering defendant to pay plaintiff's attorney's fees in the amount of \$8,386.90.

This Court has explained that

“[t]he award of attorney's fees is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion.” *Town of N. Topsail Beach v. Forster-Pereira*, 194 N.C. App. 763, 766, 670 S.E.2d 590, 592 (2009). However, “the trial court's discretion [in awarding attorney's fees] is not unrestrained.” *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001), *disc. review denied*, 355 N.C. 500, 563 S.E.2d 191 (2002). For example, attorneys' fees may not be awarded in the absence of express statutory authority. *Smith v. Smith*, 121 N.C. App. 334, 338, 465 S.E.2d 52, 55 (1996). If the trial court decides to award a reasonable attorneys' fee, it must make findings of fact that support the award, including the “‘time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.’” *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629 (quoting *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989)). In addition, a trial court is entitled to examine a number of other factors in the course of determining the reasonableness of an attorneys' fee award, including “the nature of litigation[,] nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success or failure of the attorney's efforts.” *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592 (citation and quotation omitted). As a result, “our review [of an order awarding attorneys' fees] is ‘strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent

evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'” *Id.* (quoting *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (citation omitted)).

Lacey v. Kirk, 238 N.C. App. 376, 398-99, 767 S.E.2d 632, 648 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 321 (2015).

We first acknowledge, as does defendant on appeal, that attorney's fees are statutorily authorized in DVPOs. N.C. Gen. Stat. § 50B-3 specifically provides that an “[a]ward [of] attorney's fees to either party” is among the types of relief that may be included in a protection order. N.C. Gen. Stat. § 50B-3(10) (2017).

However, defendant argues the trial court's award of attorney's fees in this case was error because the trial court failed to issue findings of fact to support the award and because plaintiff's motion for attorney's fees failed to comply with Rule 6 of the North Carolina Rules of Civil Procedure. We agree.

It is clear from the record that the trial court failed to issue any findings of fact or conclusions of law concerning attorney's fees. As stated above, the trial court simply included a single sentence in the decretal portion of the DVPO under “Other” that orders “[d]efendant shall pay [p]laintiff's attorney's fees in this matter in the amount of \$8,386.90 within 90 days.” While the affidavit for attorney's fees may support the trial court's award, without the requisite findings of fact and conclusions of law, the trial court's award of attorney's fees in this case is error.

Additionally, we note that plaintiff did not seek attorney's fees in her complaint and, although plaintiff's counsel completed an affidavit for attorney's fees the day before the hearing, that affidavit was not attached to a motion for attorney's fees filed prior to the hearing. It appears from the record that the issue of attorney's fees was first raised during the 27 July 2017 hearing when plaintiff testified about the fees she incurred while referencing the affidavit completed by her counsel on the day prior. Plaintiff's counsel then requested an award of fees during the closing arguments. Because plaintiff never moved for attorney's fees prior to the hearing and plaintiff's counsel only completed the affidavit the day before the hearing, the issue was not properly before the trial court at the time of the hearing. *See* N.C. Gen. Stat. § 1A-1, Rule 6(d) (2017) (requiring notice of hearing for a motion and supporting affidavits to be served at least five days before hearing).

III. Conclusion

For the reasons discussed, we reverse the trial court's award of attorney's fees in the DVPO.

REVERSED.

Judges BRYANT and HUNTER, JR., concur.

Report per Rule 30(e).