IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-504

No. COA20-511

Filed 21 September 2021

Wake County, No. 19 CVS 5875

CAROLINA CHIROCARE & REHAB, INC. and JEFFERY GERDES, D.C., Plaintiffs,

v.

NATIONWIDE PROPERTY & CASUALTY INSURANCE CO., Defendant.

Appeal by Plaintiffs from judgment entered 16 March 2020 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 23 March 2021.

Brent Adams & Associates, by Brenton D. Adams, for Plaintiffs-Appellants.

Bailey & Dixon, LLP, by Philip A. Collins, for Defendant-Appellee.

WOOD, Judge.

¶ 1 Plaintiffs Carolina ChiroCare & Rehab, Inc. ("ChiroCare") and Jeffery Gerdes, D.C. ("Dr. Gerdes") (collectively "Plaintiffs") appeal an order granting a motion for summary judgment in favor of Nationwide Property and Casualty Insurance Co. ("Defendant"). On appeal, Plaintiffs contend the trial court erred by (1) denying their motion for summary judgment on the issue of Defendant's commission of unfair and deceptive trade practices and in granting Defendant's motion for summary judgment

regarding Plaintiffs' bad faith claim for punitive damages; (2) limiting Plaintiffs' recovery to two hundred and fifty dollars; (3) failing to conduct an inquiry into whether Plaintiffs are entitled to attorney fees under N.C. Gen. Stat. § 6-21.1; and (4) failing to grant Plaintiffs' attorney fees and treble damages pursuant to N.C. Gen. Stat. §§ 75-16 and 75-16.1. After careful review of the record and applicable law, we affirm the order of the trial court.

I. Factual and Procedural Background

¶ 2 On November 12, 2015, Inez Holmes ("Holmes") was a passenger on a group home bus that was sideswiped by a vehicle, driven by James Eades ("Eades") and insured under a liability policy issued by Defendant. Approximately three weeks later, Holmes began treatment with Plaintiffs. The reasonable value of Holmes' chiropractic services with Plaintiffs arising from this accident was approximately $2,444.00.

¶ 3 On or about April 14, 2016, after Holmes' treatment with Plaintiffs concluded, Plaintiffs sent Assignment/UCC lien documents and a Verification Form to Defendant.

¶ 4 The next day, August 15, 2016, Holmes, who was not represented by counsel, called Darlene Riley ("Riley"), a claims adjuster for Defendant, and stated she would accept Defendant's offer of five hundred dollars to settle her claim. Riley then informed Holmes that the settlement check would be made payable to Holmes and

Plaintiffs because Plaintiffs had asserted a lien.

¶ 5 On August 28, 2016, Holmes visited Defendant's office, signed a release, and was issued a check for five hundred dollars made payable to both Holmes and Plaintiffs.

¶ 6 After this meeting, Holmes went to Plaintiffs' office with the settlement check. Plaintiffs made a copy of the check. Dr. Gerdes refused to endorse the check because he believed it would be inappropriate for him to go to the bank with his patient. Dr. Gerdes later received a phone call from a manager of a bank who informed him that Holmes was trying to cash the check and asked whether Dr. Gerdes had signed the check. Dr. Gerdes informed the bank manager that he had not signed the check. Plaintiffs did not inform Defendant that Dr. Gerdes would not endorse the check, or that Holmes attempted to cash it without Dr. Gerdes' endorsement.

¶ 7 On September 2, 2016, Holmes contacted Defendant to inform Riley's manager, Timothy Aldrich ("Aldrich"), that Plaintiffs would not accept a handwritten check. Aldrich tried to contact Plaintiffs' office but only got ChiroCare's answering service. Holmes wanted payment that day, so Aldrich advised Holmes to speak to Riley when she returned to the office.

¶ 8 The settlement check was subsequently cashed, and two signatures, one allegedly Holmes' and the other Dr. Gerdes', appeared on the back of the cashed check.

¶ 9 On April 29, 2017, Riley reviewed a letter addressed to adjuster Milton Gonzales from attorney Brenton Adams ("Attorney Adams"). Attorney Adams stated he was writing on behalf of Plaintiffs who served a valid lien on Defendant for services rendered to Holmes. He further stated that it was his understanding that Defendant had paid Holmes, but that Holmes had failed to pay Plaintiffs. On May 2, 2017, Riley responded to Attorney Adams by letter and attached a copy of both sides of the cashed settlement check issued to both Holmes and Plaintiffs. Dr. Gerdes did not review the endorsements on the settlement check and testified at his deposition that the first time he saw the endorsements was March 3, 2020, the day of his deposition.

¶ 10 During the three-year period from August 26, 2013, to August 26, 2016, Defendant issued approximately thirty two-party checks nationwide to a *pro se* claimant and a medical provider. During that same time, Defendant issued in excess of sixty-thousand single party settlement checks.

¶ 11 On May 3, 2019, Plaintiffs filed suit against Defendant alleging Defendant failed to honor its assignment of benefits executed by Holmes and refused to honor its healthcare lien arising under the terms of N.C. Gen. Stat. §§ 44-49 and 44-50. Plaintiffs further alleged that Defendant committed an unfair and deceptive trade practice under Chapter 75 of our general statutes; willfully and purposefully withheld funds from both the treating doctors and its insured; and punitive damages for its willful and wanton and aggravated conduct. Plaintiffs also sought attorney fees.

¶ 12 On November 8, 2019, Plaintiffs moved for partial summary judgment with respect to Plaintiffs' unfair and deceptive trade practices claim. Plaintiffs sought the amount "the defendant is indebted to the plaintiff[s] in the amount of no less than $250.00" under N.C. Gen. Stat. §§ 44-49 and 44-50. On February 24, 2020, Defendant also moved for summary judgment asking the trial court to dismiss Plaintiffs' unfair and deceptive trade practices claim and Plaintiffs' punitive damages claim. On March 16, 2020, the trial court granted Plaintiffs' motion for partial summary judgment with respect to the claims under N.C. Gen. Stat. §§ 44-49 and 44-50 and denied it in all other respects. That same day, the trial court dismissed with prejudice Plaintiffs' following causes of action: unfair and deceptive trade practices under Chapter 75 of our general statutes; "bad faith for punitive damages"; and Plaintiffs' claim for the total assignment of the entire settlement proceeds. Thereafter, the trial court granted Defendant's motion for summary judgment. On April 14, 2020, Plaintiffs timely appealed the trial court's order.

II. Discussion

¶ 13 Plaintiffs raise several arguments on appeal. Each will be addressed in turn.

A. Summary Judgment

¶ 14 We review an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its

own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

¶ 15 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. 1A-1, Rule 56(c) (2020). "If a genuine issue of material fact exists, a motion for summary judgment should be denied." *Park East Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004)).

1. Unfair or Deceptive Trade Practices

¶ 16 Plaintiffs first contend the trial court erred in denying Plaintiffs' motion for summary judgment on the issue of Defendant's commission of unfair and deceptive trade practices under Chapter 75 of our general statutes. We disagree.

¶ 17 To prevail on an unfair or deceptive trade practices claim, a plaintiff must show that "[the] Defendant committed an unfair or deceptive act or practice" while engaged in commerce and that "the act caused injury to the Plaintiffs." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* (citations omitted). "[U]nfairness" includes the concept of "deception." *Overstreet v.*

Brookland, Inc., 52 N.C. App. 444, 279 S.E.2d 1 (1981) (citation omitted). "A trade practice is deceptive if it has the capacity or tendency to deceive." *Nash Hosps. Inc. v. State Farm Mut. Auto. Ins. Co.*, 254 N.C. App. 726, 739, 803 S.E.2d 256, 265 (2017) (citation omitted). Only practices that involve "[s]ome type of egregious or aggravating circumstances" are sufficient to violate the Unfair or Deceptive Trade Practice Act. *See Dalton*, 353 N.C. at 657, 548 S.E.2d at 711 (alteration in original) (citation omitted). "Even an isolated occurrence can constitute an unfair business practice." *Nash Hosps.*, 254 N.C. App. at 737, 803 S.E.2d at 264 (citation omitted).

¶ 18 In *Nash Hosps., Inc. v. State Farm Mut. Auto. Ins. Co.*, 254 N.C. App. 726, 803 S.E.2d 256 (2017), this Court affirmed a summary judgment order in which the trial court found the insurance company had committed an unfair or deceptive trade practice. *Id.* at 727, 803 S.E.2d at 258. There, the insurer issued a multi-party check and "repeatedly refused to reissue a check payable" solely to the plaintiff. *Id.* at 728, 736, 803 S.E.2d at 259, 263. The insurance company appealed the trial court's order finding the issuance of the check and refusal to reissue a settlement check constituted an unfair and deceptive trade practice. *Id.* at 727, 803 S.E.2d at 258-59. On appeal, this Court affirmed the trial court's order, noting "[w]hen 'an insurance company engages in conduct manifesting an inequitable assertion of power or position, that conduct constitutes an unfair trade practice.' " *Id.* at 737, 803 S.E.2d at 265 (citation omitted).

¶ 19 The present appeal, however, is factually distinguishable from *Nash Hosps*. Here, the record reveals that the settlement check had been endorsed and cashed before Plaintiffs contacted Defendant to complain about the two-party check. Defendant was not notified that Holmes attempted to cash the check without endorsement by Dr. Gerdes, or that Dr. Gerdes' signature had been forged. After Attorney Adams contacted Defendant, Defendant forwarded a copy of the cashed check with endorsements to Attorney Adams. Defendant did not receive a response from Plaintiffs' attorney until over a year later. In that response, Plaintiffs' attorney did not inform Defendant that Dr. Gerdes had not signed the settlement check. Defendant sent a second copy of the settlement check but did not receive a response from Plaintiffs other than the filing of this lawsuit. As such, Defendant did not "repeatedly . . . refuse[] to reissue a check payable" solely to Holmes or Plaintiffs and its actions did not "amount[] to an inequitable assertion of Defendant's power as an insurer." *See id.* at 738, 803 S.E.2d at 265. Accordingly, we hold the trial court properly denied Plaintiffs' motion for partial summary judgment and granted Defendant's motion for summary judgment on the unfair and deceptive trade practices claim.

2. Bad Faith Claim for Punitive Damages

¶ 20 Next, Plaintiffs contend the trial court erred in granting Defendant's motion for summary judgment regarding Plaintiffs' bad faith claim for punitive damages.

We disagree.

¶ 21 "[T]o recover punitive damages for the tort of an insurance company's bad faith refusal to settle, the [P]laintiff[s] must prove (1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct." *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184 (1993) (citation omitted). "Bad faith" has been characterized as "not based on honest disagreement or innocent mistake." *See Dailey v. Integon General Ins. Corp.*, 75 N.C. App. 387, 396, 331 S.E.2d 148, 155 (1985) (citation omitted). The purpose of awarding punitive damages is "to punish a defendant for egregiously wrongful acts." N.C. Gen. Stat. § 1D-1 (2020). Plaintiffs must further show that (1) fraud, (2) malice or (3) willful or wanton conduct was present and was related to Plaintiffs' injury. N.C. Gen. Stat. § 1D-15(a) (2020).

¶ 22 "Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." N.C. Gen. Stat. § 1D-15(c). Punitive damages may be awarded against a corporation only if "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to the punitive damages." N.C. Gen. Stat. § 1D-15.

¶ 23 In the present appeal, there is no evidence Riley, as Defendant's representative, engaged in an unfair or deceptive trade practice. There is no evidence

that Riley acted with any intent to deceive or injure Plaintiffs. Further, Plaintiffs provided no evidence that an "officer[], director[], or manager[]" of Defendant participated in the complained of conduct. The record is devoid of any evidence that Defendant had a policy of issuing multi-party checks to *pro se* claimants and healthcare providers in an effort to prevent providers with liens from obtaining their share of settlement proceeds. While Defendant did not issue two-party checks often, there is no evidence Defendant issued the check in this instance fraudulently, maliciously, or without any regard to Plaintiffs' rights. *See* N.C. Gen. Stat. § 1D-5 (2020) (" 'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence."). Rather, the record reveals Defendant issued the multi-party check to settle Holmes' claim and allow payment to Plaintiffs. As such, we hold the trial court properly granted summary judgment with respect to Plaintiffs' bad faith cause of action.

B. Limitation of Plaintiffs' Recovery

¶ 24 Plaintiffs further contend the trial court erred in limiting Plaintiffs' recovery to two hundred fifty dollars when Defendant had notice of the assignment of all the proceeds of Holmes' settlement up to the value of Plaintiffs' services. We disagree.

¶ 25 In Plaintiffs' motion for partial summary judgment, the relief sought was

limited to "an amount of no less than $250.00 pursuant to the terms of North Carolina General Statute § 44-49 and § 44-50" and "pursuant to Chapter 75 . . . three times compensatory damages, $750.00 . . . ." In their motion, Plaintiffs did not alternatively seek recovery of five hundred dollars under the theory it was entitled to that amount pursuant to an "assignment of proceeds" as opposed to the applicable North Carolina lien statutes. "[I]ssues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citations omitted). Accordingly, this assignment of error is dismissed.

C. Attorney Fees and Treble Damages

¶ 26 Plaintiffs next argue the trial court erred in failing to grant Plaintiffs attorney fees under N.C. Gen. Stat. § 6-21.1 and attorney fees and treble damages pursuant to N.C. Gen. Stat. §§ 75-16 and 75-16.1. We disagree.

¶ 27 We review the trial court's decision whether to award attorney fees for an abuse of discretion. *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 234 N.C. App. 336, 339, 760 S.E.2d 750, 753 (2014). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Smith v. Beaufort Cnty. Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000) (citation omitted). "On appeal, the appellant has the burden to show the

trial court's ruling was unsupported by reason or could not be the product of a reasoned decision." *Frampton v. University of North Carolina*, 255 N.C. App. 15, 17, 803 S.E.2d 862, 864 (2017) (citing *High Rock Lake Partners, LLC*, 234 N.C. App. at 340, 760 S.E.2d at 753).

1. N.C. Gen. Stat. §§ 75-16 and 75-16.1

¶ 28 Under N.C. Gen. Stat. § 75-16,

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

N.C. Gen. Stat. § 75-16. N.C. Gen. Stat. § 75-16.1 provides, "the presiding judge may, *in his discretion*, allow a reasonable attorney fee . . . upon a finding . . . that: [the defendant] has willfully engaged in the act or practice, and there was an unwarranted refusal . . . to fully resolve the matter," or "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1.

¶ 29 Here, the trial court did not find "an unwarranted refusal . . . to fully resolve the matter." In fact, Defendant was not notified that Holmes had cashed the settlement check after Plaintiffs refused to endorse it. Further, after Defendant

provided Plaintiffs' counsel with a copy of the settlement check displaying two signatures, more than a year past before Plaintiffs informed Defendant that Dr. Gerdes' signature was forged. Thus, the trial court's decision to not allow attorney fees in the present case was not "manifestly unsupported by reason" so as to constitute reversible error. *See Southern Bldg. Maintenance, Inc. v. Osborne*, 127 N.C. App. 327, 335, 489 S.E.2d 892, 898 (1997) (finding no abuse of discretion where the trial court denied the plaintiff attorney fees in absence of an unwarranted refusal by defendant to fully resolve the matter).

2. N.C. Gen. Stat. § 6-21.1

¶ 30 Plaintiffs further contend the trial court erred in failing to conduct an inquiry into whether Plaintiffs are entitled to attorney fees under N.C. Gen. Stat. § 6-21.1. We disagree.

¶ 31 Under N.C. Gen. Stat. § 6-21.1(a),

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company in which the insured or beneficiary is the plaintiff, instituted in a court of record, upon findings by the court (i) that there was an unwarranted refusal by the defendant to negotiate or pay the claim which constitutes the basis of such suit, (ii) that the amount of damages recovered is twenty-five thousand dollars ($ 25,000) or less, and (iii) that the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of trial, the presiding judge may, *in the judge's discretion*, allow a reasonable attorneys' fees to the duly licensed

> attorneys representing the litigant obtaining a judgment for damages in said suit, said attorneys' fees to be taxed as a part of the court costs. The attorneys' fees so awarded shall not exceed ten thousand dollars ($ 10,000).

N.C. Gen. Stat. § 6-21.1 (emphasis added). Here, Plaintiffs did not seek recovery of attorney fees under N.C. Gen. Stat. § 6-21.1. In Plaintiffs' motion for partial summary judgment, the only reference to attorney fees was the following:

> And further, that the court set this matter on the next available trial calendar for trial on the issue of punitive damages and attorney fees.

While Defendant contends Plaintiffs are barred from seeking attorney fees under Section 6-21.1 because Plaintiffs did not brief any argument under this Section, Plaintiffs were not required to do so. *See Black v. Standard Guaranty Ins. Co.*, 42 N.C. App. 50, 53, 255 S.E.2d 782, 783-84 (1979) ("Defendant would require that a plaintiff seeking attorney fees under the statute affirmatively plead for such an award as a separate claim in the complaint . . . . This is not required by the statute." (citations omitted)).

¶ 32 However, as discussed *supra*, the trial court did not find "an unwarranted refusal" by Defendant to settle the present matter. Accordingly, we hold the trial court did not abuse its discretion in denying Plaintiffs' attorney fees under Section 6-21.1. *See Southern Bldg. Maintenance Inc.*, 127 N.C. App. at 335, 489 S.E.2d at 898.

III. Conclusion

¶ 33 After careful review, we hold the trial court did not err in its summary judgment order. We further hold the trial court did not abuse its discretion in denying Plaintiffs' recovery of attorney fees. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

Judges INMAN and GRIFFIN concur.

Report per Rule 30(e).