

NORTH CAROLINA COURT OF APPEALS

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GAYLA B. JOHNSON, Individually )  
 and as Guardian Ad Litem for )  
 RACHEL E. JOHNSON, minor, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 IRVIN WAYNE BREWINGTON, )  
 )  
 Defendant. )

From: Cumberland County

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 BRIEF FOR PLAINTIFF-APPELLEES  
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INTRODUCTION

A trial court's award of attorney fees under N.C. Gen. Stat. § 6-21.1, including the amount of such attorney fees, is utterly discretionary. The trial court's award of attorney fees to the Plaintiffs in this case followed the clear purpose of the statute -- to ensure that plaintiffs in automobile accident cases are not deterred from bringing their claims where damages are relatively small and litigation costs predictably high. This discretion should be, and was in this case, exercised based on an evaluation of the entire record, and in conjunction with adequate findings that included the circumstances surrounding Defendant's first appeal.

The Defendant, in brief, suggests the trial court's failure to consider the "whole record." Yet, Defendant's brief itself focuses primarily on isolated parts of the record. The trial

court did consider the "whole record," and properly exercised its discretion here. Its award of attorney fees to the Plaintiffs should be affirmed, and the case remanded for further proceedings to determine the appropriate award of further attorney fees associated with this, Defendant's second appeal in this minor automobile accident case.

**ARGUMENT**

**THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING PLAINTIFFS' ATTORNEY FEES, INCLUDING THE FEES AND COSTS ASSOCIATED WITH THE DEFENDANT'S FIRST COSTLY APPEAL.**

The trial court properly awarded attorney fees to Plaintiffs in this case. "The allowance of attorney fees [pursuant to N.C. Gen. Stat. § 6-21.1] is in the discretion of the presiding judge, and may be reversed only for abuse of discretion." Washington v. Horton, 132 N.C.App. 347, 351, 513 S.E.2d 331, 334 (1999) (citing McDaniel v. N.C. Mutual Life Ins. Co., 70 N.C.App. 480, 483, disc. review denied, 312 N.C. 84, 321 S.E.2d 897 (1984)). The amount of attorney fees awarded in accordance with N.C. Gen. Stat. § 6-21.1 is also discretionary. Black v. Standard Guaranty Ins. Co., 42 N.C.App. 50, 53, 255 S.E.2d 782, 784 (1979) (citing Hill v. Jones, 26 N.C.App. 168, 215 S.E.2d 664 (1975)).

A trial court abuses its discretion only in the rarest of cases, where its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" Davis v. Kelly, 147 N.C.App. 102, 106, 554

S.E.2d 402, 405 (2001) (quoting Blackmon v. Bumgardner, 135 N.C.App. 125, 130, 519 S.E.2d 335, 338 (1999)).

In determining the appropriateness of attorney fees under N.C. Gen. Stat. § 6-21.1, the trial court must consider the whole record, including, but not limited to, the following factors

("Washington Factors"):

- (1) Settlement offers made prior to the institution of the action;
- (2) Offers of judgment made and whether the judgment finally obtained was more favorable than such offers;
- (3) Whether defendant unjustly exercised superior bargaining power;
- (4) In the case of an unwarranted refusal by an insurance company, the context in which the dispute arose;
- (5) The timing of the settlement offers; and
- (6) The amounts of the settlement offers as compared to the jury verdict;

Washington v. Horton, 132 N.C.App. 347, 351, 513 S.E.2d 331, 33 (1999). Defendant's brief sets forth these factors with substantial accuracy, but fails to include the second Washington factor's important requirement that the offers of judgment be compared to the amount of the "judgment finally obtained." (Def. Br. p. 7)<sup>1</sup> Additionally, the fourth Washington factor is

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<sup>1</sup>The "Brief for Defendant Appellant" on this appeal is abbreviated throughout as "Def. Br." for the purpose of citation.

inapplicable. "A finding of unwarranted refusal to pay a claim is required only in suits brought by an insured . . . against an insurance company defendant." Davis, 147 N.C.App. at 106, 554 S.E.2d at 405 (citations omitted).

While certain minimal factual findings by the trial court are necessary, the trial court generally does not abuse its discretion where it clearly considers the Washington factors and the relevant portions of the record. See Furmick v. Miner, 154 N.C.App. 460, 573 S.E.2d 172 (2002). Further, where it is apparent that the trial court has reviewed the "whole record," detailed, express findings relating to every Washington factor are not required. Messina v. Bell, No. COA02-1028, 581 S.E.2d 80 (N.C.Ct.App. 2003) (findings regarding bargaining power not required where adequate findings on consideration of whole record); Davis, 147 N.C.App. at 108, 554 S.E.2d at 406 (absence of finding of bargaining power not required); Hardesty v. Alridge, 147 N.C.App. 776, 557 S.E.2d 136 (2001) (citing Tew v. West, 143 N.C.App. 534, 546 S.E.2d 183 (2001)).

A trial court's proper review of the "whole record" can be evidenced by the incorporation of testimony, affidavits, and other evidence into its findings, by reference. Furmick, 154 N.C.App. 460, 573 S.E.2d 172. Davis, 147 N.C.App. at 108, 554 S.E.2d at 406.

Defendant suggests the trial court failed to consider the

"whole record;" (See Def. Br. pp. 7, 8). This suggestion is unfounded. The trial court expressly set forth its consideration of the Washington factors, the entire record, the affidavit of Plaintiffs' counsel ("Affidavit") and the related hearing arguments of counsel. (R p. 49) The trial court's findings were sufficiently detailed as to this prior appeal and otherwise.

Those findings included references to:

- (1) settlement offers made by Defendant, both before and after the commencement of the action; (R pp. 49-50)
- (2) offers of judgment made by Defendant; (R p. 49)
- (3) the fact that Plaintiffs charged Defendant with failure to comply with the arbitration rules; (R p. 50)
- (4) the enforcement of the arbitration award against Defendant; (R p. 50)
- (5) the trial court's denial of a trial de novo to Defendant; (R p. 50)
- (6) Defendant's appeal from the arbitration award; (R p. 50)
- (7) Defendant's success on that appeal; (R p. 50)
- (8) Plaintiffs' attorney fees related to the first appeal; (R pp. 42 -45) and
- (9) the jury's verdict; (R p. 50)

Defendant micro-analyzes the trial court's findings and decision, and misses the point. The point is that the trial court properly considered the Washington factors in light of its factual findings, which included all relevant parts of the record

by reference. The existence and consideration of certain facts in the record favorable to Defendant did not compel the denial of an attorney fee award. The trial court considered the entire record, and, in its discretion, reasonably awarded Plaintiffs' attorney fees.

It is implausible to suggest that the trial court failed to make adequate findings, or that it failed to consider the whole record. While the trial court's findings do not contain every detail, they reference all the occurrences relevant under the Washington factors, and all occurrences relevant to the award of attorney fees in this case.

Aside from critiquing the trial court's findings related to the events of the case in general, Defendant suggests that the trial court's findings relating to the actual attorney fees awarded were not sufficiently specific. Defendant cites Porterfield v. Goldkuhle, 137 N.C.App. 376, 378, 528 S.E.2d 71, 73 (2000) in support of this argument. In Porterfield, this Court did express a requirement that the court make findings relating to the "time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." Id. (Citations omitted). The Porterfield Court did also reverse and remand the appeal of the attorney fee award to the trial court for further proceedings.

Porterfield, though, is easily distinguishable from this

case. In Porterfield, there were no findings relevant to attorney fees in the trial court's written judgment. Id. at 378. Likewise, the trial court hearing transcripts contained no evidence regarding attorney fees. Id. at 378-379. Further, there were factual disputes left unresolved by the trial court's judgment in Porterfield which directly implicated certain of the Washington factors. Id. at 379.

Here, the trial court did consider and make findings regarding Plaintiffs' attorneys' hourly rates, time expended, skill, experience, learning, and the prevailing standards in the relevant legal community. (R pp. 50-51) The trial court diligently evaluated these factors in light of the entire record, the arguments of counsel, and the Affidavit. (R pp. 50-51)

The completeness of the trial court's analysis is evidenced by its reduction of the hours for which it agreed to award attorney fees. The Affidavit includes time records indicating a total of 178.5 hours expended on the case. (R p. 48) Yet, the trial court only awarded fees for 150 hours of service, expressly finding that this award was reasonable. (R p. 50)

Defendant specifically attacks the trial court's award of attorney fees for services related to Defendant's first appeal. (Def. Br. p. 11) Again, the trial court expressly set forth its reliance on the entire record, the Affidavit, and arguments at hearing, (R p. 49) The Affidavit even included an itemized and

detailed attorney fee and court cost statement that included fees and costs for this appeal.

Defendant makes much of his success on his first appeal, and the trial court expressly found, and clearly considered, the same. (R p. 50) Defendant's victory, though, did not preclude the trial court from reasonably concluding in its discretion -- based on the entire record -- that a fee award to Plaintiffs was proper. Defendant correctly states that this Court held, on that first appeal, that the trial court erred in its finding that Defendant violated the arbitration rules. (Def. Br. p. 5) But the award of attorney fees in this case did not, and does not now, hinge on whether the trial court erred in its enforcement of the arbitration award. Again, the whole record must be, and was here, consulted in justifying a fee award.

Defendant focuses on the amount of the jury verdict in this case as compared to the amount of his offers of judgment. This analysis relates to only one Washington factor, and fails to consider the "whole record." Numerous other cases decided by this Court have affirmed trial courts' discretionary awards of attorney fees where defendants' offers of judgment were refused by plaintiffs, and where the juries' awards were less than those offers of judgment. See, e.g., Messina, No. COA02-1028, 581 S.E.2d 80; Furmick, 154 N.C.App. 460, 573 S.E.2d 172; Davis, 147 N.C.App. 102, 554 S.E.2d 402.

In Davis, the defendant tendered a \$500.00 offer of judgment to the injured plaintiff. Davis, 147 N.C.App. at 104, 554 S.E.2d at 403. Plaintiff rejected the \$500.00 offer, but was awarded only \$204.10 by the jury. Id. The "judgment finally obtained" in Davis exceeded the defendant's offer of judgment, and this Court affirmed the trial court's discretionary fee award based in significant part on the second Washington factor.

Under the second Washington factor - the consideration of offers of judgment and whether the "judgment finally obtained" was more favorable than such offers - "judgment finally obtained" is not just the jury's verdict, but the final amount awarded to a plaintiff, including attorney fees awarded under N.C. Gen. Stat. § 6-21.1. Davis, 147 N.C.App. at 107, 554 S.E.2d at 406 (citing Poole v. Miller, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995), reh'g denied, 342 N.C. 666, 467 S.E.2d 722 (1996), and Roberts v. Swain, 353 N.C. 246, 538 S.E.2d 566 (2000)). See also Hardesty, 147 N.C.App. 776, 557 S.E.2d 136; Tew v. West, 143 N.C.App. 534, 546 S.E.2d 183 (2001). Also included are other, traditional costs. Id.

In this case, the trial court expressly found the jury verdict (\$345.00) and appropriate attorney fee amounts (\$30,000.00) indicating its proper consideration of the second Washington factor. (R p. 50-51) The judgment finally obtained clearly exceeded the amount of the jury verdict, and the trial

court acted reasonably in awarding Plaintiffs their attorney fees.

**THE AMOUNT OF ATTORNEY FEES AWARDED TO PLAINTIFF WAS REASONABLE.**

Defendant's argument that \$30,000 in attorney fees is excessive is unfounded. Defendant's concern over the attorney fee amount here underscores the precise reason why N.C. Gen. Stat. § 6-21 exists. The statute contemplates minor accidents, involving minor injuries, with low monetary damages. In these cases, litigation costs and attorney fees can, and frequently do, exceed plaintiffs' damages. The statute provides relief for a person who will likely have to pay his attorney from his recovery, and thus might otherwise conclude that pursuing the claim is not financially feasible. Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40 (1973). The instant case is a potent example of why the legislature adopted this statutory remedy. Without this statutory protection, the Plaintiffs here would likely have been deterred from pursuing their valid claim.

In cases where the trial court has given proper consideration to the Washington factors, this Court has routinely affirmed the award of attorney fees where, like here:

- (1) the attorneys' fees substantially exceeded the juries' verdicts;
- (2) the juries' verdicts were extremely low;
- (3) the amounts of defendants' offers of judgment and/or settlement offers exceeded the juries'

verdicts; and

- (4) the collisions, injuries, or medical expenses were relatively minor;

See, e.g., Messina, No. COA02-1028, 581 S.E.2d 80; Furmick, 154 N.C.App. 460, 573 S.E.2d 172; Hardesty, 147 N.C.App. 776, 557 S.E.2d 136; Davis, 147 N.C.App. 102, 554 S.E.2d 402. The instant case fits this typical profile, and the trial court's award should be affirmed.

Further, the fees awarded in this case included fees for services required to defend against Defendant's costly first appeal. (R pp. 43-45) Plaintiffs' attorney fee burden was increased dramatically by this first appeal, and the trial court had the discretion to award appellate attorney fees under N.C. Gen. Stat. § 6-21.1. Furmick, 154 N.C.App. at 465, 573 S.E.2d at 176. The trial court here properly exercised that discretion based on the whole record.

The fact that Defendant filed and won an appeal is of no consequence, except to the extent that Defendant's first appeal aggravated the costs and fees incurred by all parties. Defendant could have paid the arbitrator's award, which the trial court found Plaintiffs ready to accept. (R p. 50)

Significantly, the record in this case contains no evidence contradicting the hours expended or the reasonableness of the rate charged by plaintiffs' counsel as indicated in the Affidavit. Objections to the hours and rates of Plaintiffs'

counsel should have been made and preserved at the trial level, and presented on this appeal in the Record on Appeal.

The jury determined the Plaintiffs' claims to be valid. The trial court considered the whole record, and made a just award. Defendant has not shown any abuse of discretion here.

**THE TRIAL COURT PROPERLY INCLUDED PLAINTIFFS' APPELLATE COSTS IN ITS DISCRETIONARY ATTORNEY FEE AWARD.**

It is true, as Defendant contends, that this Court taxed certain costs of Defendant's first appeal to the Plaintiffs. Defendant argues that the Plaintiffs should not be allowed to recover these costs, but cites only irrelevant authority dealing with a trial court's inability to modify orders of this Court. The district court did not modify any order of this Court.

The discretionary award of attorney fees is designed to compensate a plaintiff for all costs incurred in pursuing his claim. This Court's taxation of costs to the Plaintiffs on the first appeal resulted in just that: a cost to the Plaintiffs required by the pursuit of their claims. The trial court simply took the Plaintiffs actual costs resulting from the entire case, considered the Washington factors in light of the whole record and the outcome of the case, and made its proper discretionary award. Defendant cites no authority suggesting this award was a modification of this Court's order, or that it was in any way inappropriate.

**DEFENDANT SHOULD PAY PLAINTIFFS' ATTORNEY FEES AND COSTS RESULTING FROM THIS, HIS SECOND APPEAL, AND THE CASE SHOULD BE REMANDED TO ALLOW ANOTHER DISCRETIONARY AWARD.**

This Court has the authority under N.C. Gen. Stat. § 6-21.1 to remand this case for an additional discretionary attorney fee award based on fees incurred for appellate services. Davis, 147 N.C.App. at 109, 554 S.E.2d 402, 406-407 (citing Hill v. Jones, 26 N.C.App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975)). In Davis, the appeal of the fee award to the plaintiff caused the plaintiff to incur further attorney fees for appellate services. The Davis Court remanded the case for further proceedings to allow the trial court to determine -- in its discretion -- whether the plaintiff's additional appellate fees and costs were proper. In the case sub judice, Plaintiffs' ultimate victory on the merits of this case at trial warrants a remand to allow the award of further discretionary attorney fees.

**CONCLUSION**

The trial court considered the whole record here, and made additional express findings adequate to support its discretionary award of Plaintiffs' attorney fees. Defendant has shown no abuse of discretion here. For these and the other reasons set forth herein, this Court should affirm the trial court's award of attorney fees to Plaintiffs.

Additionally, the Plaintiffs respectfully request that this Court remand this case to the trial court for the purpose of