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Johnson v. Brewington

N.C.App., 2004.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Appeals of North Carolina.

Gayla B. **JOHNSON**, Individually and as Guardian Ad Litem for Rachel E. **Johnson**, a minor, Plaintiffs,
v.

Irvin Wayne **BREWINGTON**, Defendant.

No. COA03-505.

May 4, 2004.

*1 Appeal by defendant from supplemental judgment entered 15 January 2003 by Judge John W. Dickson in Cumberland County Civil District Court. Heard in the Court of Appeals 28 January 2004.

Murray, Craven & Inman, L.L.P., by [Richard T. Craven](#) and [Thomas W. Pleasant](#) for plaintiff appellees.

Walker, Clark, Allen, Grice, & Ammons, L.L.P., by [Jerry A. Allen, Jr.](#), and Gay P. Stanley, for defendant appellant.

[McCULLOUGH](#), Judge.

This case arises out of an automobile accident which occurred on 26 March 1997 in Fayetteville, North Carolina. Defendant Irvin Wayne Brewington failed to reduce the speed of his vehicle and caused a collision with plaintiffs' van. Plaintiffs Gayla B. Johnson and Rachel E. Johnson were injured in the wreck and sued for negligence. In his answer, defendant admitted negligence, but denied that his negligence was the proximate cause of any injuries sustained by plaintiffs. On 12 October 2000, a court-ordered, non-binding arbitration hearing was held. The parties stipulated that no claims representative from defendant's liability carrier, Allstate Insurance Company, was present.

On 23 October 2000, defendant filed and served a request for a jury trial *de novo*. On 28 November 2000, plaintiffs filed a motion to enforce the arbitration award and to deny defendant's request for a trial. On

24 January 2001, the trial court entered an order which granted plaintiffs' motion to enforce the arbitration award and denied defendant's request for a jury trial because defendant's liability carrier failed to appear at the arbitration hearing.

Defendant appealed to this Court, and we held that "the trial court erred in determining that Allstate was required by Rule 3(p) to have a representative present at the arbitration hearing." [Johnson v. Brewington](#), 150 N.C.App. 425, 427, 562 S.E.2d 919, 921 (2002). We also reversed the trial court's order and remanded the case for trial. *Id.*

The case was tried before a jury on 28 October 2002. The jury found in favor of plaintiff, Gayla B. Johnson, in the amount of \$1,000.00, and in favor of the plaintiff, Rachel E. Johnson, in the amount of \$345.00. Judgment was entered on 4 November 2002.

Plaintiffs then filed a motion for costs and attorney fees. The plaintiffs' motion was supported by an affidavit which requested payment for 178.5 hours of attorney work.

On 15 January 2003, the trial court entered a supplemental judgment awarding plaintiffs costs in the amount of \$1,507.18 and attorney fees in the amount of \$30,000.00. The court exercised its discretion and based the fee on 150 billable hours, rather than the 178.5 hours requested by plaintiffs. Defendant appeals.

On appeal, defendant argues that the trial court erred by: (I) abusing its discretion in awarding attorney fees, (II) granting attorney fees that were excessive, (III) failing to consider the prior appeal in this case, and (IV) taxing the costs of the prior appeal to defendant where this Court had previously taxed those costs to plaintiffs. Plaintiffs contend that defendant should pay attorney fees resulting from this second appeal, and the case should be remanded to allow another discretionary award. The decision of the trial court is affirmed in part, reversed in part, and remanded.

I. Abuse of Discretion

*2 Defendant first argues that the trial court abused its discretion in awarding attorney fees. In personal injury cases where the recovery of damages is \$10,000.00 or less, the presiding judge has discretion to grant attorney fees. [N.C. Gen.Stat. § 6-21.1 \(2003\)](#). The decision to allow attorney fees rests with the trial judge, and that decision may only be reversed for abuse of discretion. [Washington v. Horton, 132 N.C.App. 347, 351, 513 S.E.2d 331, 334 \(1999\)](#). The amount of attorney fees is also discretionary. [Black v. Insurance Co., 42 N.C.App. 50, 53, 255 S.E.2d 782, 784, cert. denied, 298 N.C. 293, 259 S.E.2d 910 \(1979\)](#). A trial court abuses its discretion where its ruling is “ ‘ ‘manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.’ ” ‘ ‘ [Blackmon v. Bumgardner, 135 N.C.App. 125, 130, 519 S.E.2d 335, 338 \(1999\)](#) (citations omitted).

In determining the appropriateness of attorney fees, the trial court must consider “the entire record.” [Washington, 132 N.C.App. at 351, 513 S.E.2d at 334](#). The court’s review includes, but is not limited to: (1) settlement offers made before the action was instituted, (2) offers of judgment and whether the judgment finally obtained was more favorable than such offers, (3) whether defendant improperly exercised superior bargaining power, (4) where there is an unwarranted refusal by an insurance company, the context in which the dispute arose, (5) the timing of settlement offers, and (6) the amounts of the settlement offers in comparison to the jury verdict. [Id. at 351, 513 S.E.2d at 334-35](#).

Defendant argues that the trial court’s award should be reversed because it could not have been the result of a reasoned decision. We disagree with this contention. As to the first *Washington* factor, the trial court did consider the settlement offer made before the action was instituted. In its first finding of fact, the court noted that prior to the filing of the lawsuit, defendant offered \$288.00 to settle the claim of Rachel E. Johnson and \$1,055.00 to settle the claim of Gayla B. Johnson.

The court also considered the second *Washington*

factor. Finding of fact 2 states: “After suit was filed, the Defendant filed an Offer of Judgment in the amount of \$288.00 for Rachel Elise Johnson and \$1,055.00 for Gayla B. Johnson on August 22, 2000.” More importantly, this offer of judgment is less than “the judgment finally obtained.” This Court has indicated that in calculating the judgment finally obtained, “the attorney’s fees for work done both before and after defendant’s offer of judgment should be added to the jury verdict....” [Davis v. Kelly, 147 N.C.App. 102, 108, 554 S.E.2d 402, 406 \(2001\)](#). In this case, plaintiffs’ total jury verdict was \$1,345.00, and the award of attorney fees was \$30,000.00. Since the judgment finally obtained (\$31,345.00) is greater than defendant’s offer of judgment (\$1,343.00), the trial court acted reasonably and in accordance with the second *Washington* factor.

*3 With regard to the third *Washington* factor, the trial court did not make any findings as to whether defendant improperly exercised superior bargaining power. However, the absence of such a finding is not reversible error because the trial court made adequate findings on the whole record. [Washington, 132 N.C.App. at 351, 513 S.E.2d at 334](#). Similarly, the trial court did not need to make a finding on factor four because this case does not involve an unwarranted refusal by an insurance company. *Id.*

The final two factors were also sufficiently evaluated. Factor five, which deals with the timing of the settlement offers was addressed. [Id. at 351, 513 S.E.2d at 335](#). Finding of fact 1 describes a settlement offer made *before* the filing of the suit; finding of fact 4 mentions a settlement offer that occurred *after* the arbitration award and the first appeal. Finally, it is clear that the court considered factor six, a comparison of the settlement offers to the jury verdict, because both the settlement offers and the jury verdict were discussed in the court’s findings. *Id.* In sum, we believe that the trial court adequately considered the entire record and acted within its discretion in awarding attorney fees.

II. Excessive Fees

Defendant argues that \$30,000.00 is excessive because plaintiffs’ injuries arose out of a minor auto-

mobile accident, and plaintiffs' total award was only \$1,345.00. This argument fails because [N.C. Gen.Stat. § 6-21.1](#) was drafted to address situations like the one in the case at bar:

The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to bring suit on his claim.

[Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 \(1973\)](#). The instant case is a potent example of why the legislature adopted this provision. Without this statutory remedy, plaintiffs may have been deterred from pursuing their valid claims. This assignment of error is rejected.

III. Consideration of the First Appeal

Defendant argues that the trial court “failed to make any findings of fact regarding the [first] appeal” and “failed to consider that the defendant prevailed on [the first] appeal.” Both of these contentions are utterly meritless because the trial court did make a specific finding on these issues:

3. On October 12, 2000, Court-ordered arbitration was conducted and the arbitrator entered a total award as to both Plaintiffs in the amount of \$5,426.19. The Plaintiffs were agreeable to accepting the arbitrator's decision. *The Defendant appealed the enforcement of the arbitration award to the North Carolina Court of Appeals and the Defendant ultimately prevailed* as to the trial Court's ruling that the Defendant was not entitled to a trial de novo for failing to comply with the arbitration rules.

*4 (Emphasis added.) This finding indicates that in spite of defendant's claims to the contrary, the trial court did consider the first appeal and acknowledged that defendant was the prevailing party.

We are also not persuaded by defendant's observation that many of the hours expended by plaintiffs' counsel occurred during the first appeal. Plaintiffs' ability to recover attorney fees does not hinge on whether defendant prevailed at one stage of the litigation. Rather, the trial court has discretion to grant an award

based on its consideration of *the whole record*. As we have stated, the trial court in this case fulfilled its duty by considering everything in the record and entering its award accordingly. Therefore, this assignment of error is overruled.

IV. Costs for the First Appeal

Defendant argues that the trial court erred in taxing the costs (as contrasted with attorney fees) of the first appeal to defendant where this Court previously taxed those costs to plaintiffs. ^{FN1} We agree.

^{FN1} The \$271.00 in appellate costs represented part of the trial court's order which required defendant pay \$1,507.18 in costs in addition to the \$30,000.00 in attorney fees. The \$271.00 total included \$57.75 for filing and printing a brief and \$213.25 for other costs.

Under [N.C. Gen.Stat. § 6-20 \(2003\)](#), the trial court has discretion to grant costs unless otherwise provided by law. Recently, this Court has held that this discretion is limited to whether a party can recover the costs specifically enumerated in [N.C. Gen.Stat. § 7A-305\(d\) \(2003\)](#). *DOT v. Charlotte Manufacturing Housing, 160 N.C.App. 461, 586 S.E.2d 780 (2003)*. The costs at issue in this case are not specifically authorized under the statute, even though other items, such as the cost of an original transcript when essential for an appeal taken to the appellate division, are mentioned. [N.C. Gen.Stat. § 7A-305\(d\)\(5\)](#). We believe that this omission demonstrates the legislature's intent to exclude the costs at issue in the present appeal.

We also note that this Court has already determined that the costs at issue must be paid by plaintiffs. We did so because [N.C.R.App. P. 35\(a\) \(2003\)](#) requires that when a trial court's judgment is reversed, the appellate costs must be assessed against the appellee. Affirming the trial court's order, insofar as it requires defendants to pay these costs, is tantamount to allowing trial courts to undo that which this Court has previously required. Therefore, defendants are not required to pay the costs associated with the first appeal (\$271.00).

V. Additional Fees for the Second Appeal

Plaintiffs argue that this case should be remanded because defendant should pay attorney fees resulting from this second appeal. “This Court has held that the trial court has the authority under G.S. § 1.1 to award additional attorney’s fees for an appeal.” [Davis, 147 N.C.App. at 109, 554 S.E.2d at 406-07](#). Since the trial court has discretion to grant an additional fee for services performed on appeal, we remand the case for this limited purpose. However, our ruling should not necessarily be construed as a recommendation for the granting of additional fees. We believe that plaintiffs’ attorneys have already received significant compensation for their services in this matter. Nevertheless, this decision is not ours to make; it is left to the sound discretion of the trial court. If plaintiffs make a motion for the additional award and the trial court decides to grant the motion, the trial court should make findings of fact and enter an award consistent with those findings. Finally, on remand, the trial court shall modify its order so that defendants are not required to pay the costs associated with the first appeal (\$271.00).

*5 For these reasons, the decision of the trial court is Affirmed in part, reversed in part, and remanded.

Judges [HUNTER](#) and [LEVINSON](#) concur.

Report per Rule 30(e).

N.C.App.,2004.

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164 N.C.App. 228, 595 S.E.2d 452, 2004 WL 943600

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