An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-582

Filed: 6 February 2018

Haywood County, No. 09 CVD 589

BILL MESSER d/b/a MESSER'S EXCAVATING, Plaintiff,

v.

ROY POLLACK and wife, ADRIENNE POLLACK, Defendants.

Appeal by Defendants from an order entered 6 February 2017 by Judge Kristina Earwood in Haywood County District Court. Heard in the Court of Appeals 18 October 2017.

McLean Law Firm, P.A., by Russell L. McLean, III, for Plaintiff-Appellee.

Scott Taylor, PLLC, by J. Scott Taylor, for Defendants-Appellants.

INMAN, Judge.

A trial court's award of attorney's fees, pursuant to N.C. Gen. Stat. § 1D-45, to a party who successfully defended against punitive damages claims must include findings of fact sufficient to determine that the punitive damages claims were, in fact, frivolous or malicious.

Roy and Adrienne Pollack ("Defendants") appeal from an order awarding Bill Messer d/b/a Messer's Excavating ("Plaintiff") attorney's fees, pursuant to N.C. Gen. Stat. § 1D-45, after a jury found in Plaintiff's favor on Defendants' counterclaims for punitive damages. Defendants argue that the trial court abused its discretion by awarding the attorney's fees without finding that the claims were, in fact, frivolous, and by failing to apportion the award only to those costs incurred in defense of the punitive damages claim. After careful review, we vacate the trial court's order and remand for additional findings of fact.

Factual and Procedural History

Plaintiff brought this breach of contract and *quantum meruit* action in 2009 alleging, *inter alia*, that Defendants had refused to pay him for various services including grading a house pad, removing rocks, and removing brush and trees from Defendants' property. Plaintiff initiated this action as a means of collecting and perfecting a claim of lien he filed against Defendants' property pursuant to N.C. Gen. Stat. § 44A.

Defendants responded to the complaint with an answer denying the allegations and asserting counterclaims for "defamation of title" and "trespass and/or interference with contract." Plaintiff moved to dismiss Defendants' counterclaims, and Defendants amended their counterclaim by adding claims for negligence, negligence *per se*, and breach of implied warranty of workmanlike construction.

Defendants' counterclaims also sought punitive damages "for plaintiff's intentional and wanton conduct."

Following a trial, the jury returned a verdict awarding Plaintiff $9,605 in damages for Defendants' breach of contract. The jury also found in Plaintiff's favor on all of Defendants' counterclaims.

On 21 April 2015, the trial court entered a judgment against Defendants in the amount awarded by the jury. The judgment assessed the cost of filing against Defendants and permitted Plaintiff to submit a motion for attorney's fees pursuant to N.C. Gen. Stat. § 1D-45. Following an unsuccessful appeal by Defendants to this Court, *see Messer v. Pollack*, No. COA 15-1351, __ N.C. App. __, 790 S.E.2d 754, 2016 WL 3676015 *1, 2016 N.C. App. LEXIS 719 *1 (N.C. Ct. App. July 5, 2016) (unpublished), Plaintiff filed an amended motion for attorney's fees.

The matter was heard before the trial court on 12 November 2016, and the trial court entered an order awarding Plaintiff $13,251.48 in attorney's fees. Defendants timely appealed.

Analysis

1. Standard of Review

A trial court's award of attorney's fees pursuant to N.C. Gen. Stat. § 1D-45 is reviewed for an abuse of discretion. *Philips v. Pitt Cty. Memorial Hosp., Inc.*, 242 N.C. App. 456, 458, 775 S.E.2d 882, 884 (2015). In evaluating whether a trial court

abused its discretion, we must determine whether the trial court's findings of fact are supported by competent evidence, and if so, whether those findings support the trial court's conclusions of law. *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 242, 752 S.E.2d 634, 654 (2013).

2. Frivolous or Malicious

Defendants argue that the trial court's findings of fact were insufficient to support the conclusion that Defendants' punitive damages claims were frivolous or malicious. We agree.

Section 1D-45 of the North Carolina General Statutes provides in pertinent part that a "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." N.C. Gen. Stat. § 1D-45 (2015). A punitive damages claim is deemed frivolous when its " 'proponent can present no rational argument based upon the evidence or law in support of it[,]' " and malicious when it is " 'wrongful and done intentionally without just cause or excuse or as a result of ill will.' " *Philips*, 242 N.C. App. at 458, 775 S.E.2d at 884 (quoting *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)).

Defendants here sought punitive damages on two counterclaims: for "defamation of title" and for "trespass and/or interference with contract." The trial

court found as fact that "Plaintiff filed a Notice of 44A lien under North Carolina law to which the Plaintiff was entitled under the statutory authority to file such a claim." The trial court also found that "Plaintiff's Complaint to enforce the claim of lien was filed 183 days after the date services were last rendered, outside of the statutory period allowed under [N.C. Gen. Stat. §] 44A." The trial court's only other relevant finding of fact regarding the punitive damages claims states: "The Defendants continued to pursue its [sic] punitive damages claim, which was frivolous, without justification or any factual allegation given rise to an intentional wrongful or malicious act on behalf of the Plaintiff against the Defendants." This finding does not indicate which of Defendants' two punitive damages claims was frivolous and without justification, or why one or both of those claims was frivolous or malicious. The trial court's findings do not address whether Defendants knew or should have known that their punitive damages claims were frivolous or malicious. While the findings of fact made are unchallenged, and therefore presumed to be supported by competent evidence and binding on appeal, the findings are insufficient to support the trial court's conclusion that attorney's fees were appropriate pursuant to N.C. Gen. Stat. § 1D-45. Accordingly, we vacate the trial court's order and remand for additional findings.

3. Apportionment of Fees

Defendants also argue that the trial court abused its discretion by awarding attorney's fees for the entirety of the proceedings as opposed to only those expenses incurred as a result of defending against the punitive damages claims.

N.C. Gen. Stat. § 1D-45 does not provide a statutory basis for an award of attorney's fees to Plaintiff for the costs incurred in the pursuit of his claims against Defendants. However, our Court has held that "where attorneys' fees are not recoverable for defending certain claims in an action but are recoverable for other claims in that action, fees incurred in defense of both types of claims are recoverable where the time expended on defending the non-recoverable and the recoverable claims overlap and the claims arise 'from a common nucleus of law or fact.' " *Philips*, 242 N.C. App. at 459, 775 S.E.2d at 884 (quoting *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 595, 525 S.E.2d 481, 486-87 (2000)). Apportionment of fees is therefore unnecessary "when all the claims in an action arise from the same nucleus of operative facts such that each claim is inextricably interwoven with the other claims." *Id.* at 459, 775 S.E.2d at 884 (internal quotation marks, alterations, and citations omitted). Nevertheless, once a trial court has concluded that it is statutorily authorized to award attorney's fees, "the trial court must make findings regarding the reasonableness of the award." *GE Betz*, 231 N.C. App. at 244, 752 S.E.2d at 655 (citing *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993)).

Here, the trial court found that "the counterclaims are inseparable from the claim of punitive damages" and that "the time billed and the costs set forth . . . are fair and reasonable within the Haywood County Community." The trial court's finding that the compensatory damages and punitive damages claims are "inseparable" lacks any explanation regarding how or whether Plaintiff's claims and Defendants' counterclaims seeking punitive damages are "inextricably interwoven" and "arise from a common nucleus of operative fact."

In sum, the trial court failed to make the necessary findings of fact to support its award to Plaintiff of attorney's fees and failed to make the necessary findings of fact to support the amount of its award.

Conclusion

For the foregoing reasons, we vacate the trial court's award of attorney's fees and remand for additional proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).