An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1003

Filed: 7 August 2018

Durham County, No. 15-CVS-3869

MIRZA RANGEL LANE, Plaintiff,

v.

SHAMEYA NICOLE GRAFTON, Defendant.

Appeal by Defendant from judgment entered 6 January 2017 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 6 February 2018.

Holt Longest Wall Blaetz & Moseley, PLLC, by W. Phillip Moseley, for plaintiff-appellee.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Kenneth B. Rotenstreich and Joshua C. Rotenstreich, for defendant-appellant.

MURPHY, Judge.

At issue is whether an award of attorney fees for unwarranted refusal to negotiate or pay a claim is an abuse of discretion by the trial court when two offers of judgment were made by Defendant.

Awarding attorney fees is within the discretion of the trial court. *See Bryson v. Cort*, 193 N.C. App. 532, 539-40, 668 S.E.2d 84, 89-90 (2008). Here, Defendant made two offers of judgment. The first offer was for $2,500.00, and the second offer was made only 10 days before trial in the amount of $10,325.00. The jury returned a verdict of $13,500.00 for Plaintiff, and, after a hearing, the trial court awarded Plaintiff attorney fees of $10,000.00.

After careful consideration, we conclude that it was not an abuse of discretion for the trial court to award attorney fees based on the facts of this case.

BACKGROUND

The underlying case was the result of a two-car accident in Durham on 25 July 2012. Plaintiff filed a complaint on 21 July 2015. After receiving Plaintiff's complaint, Defendant served Plaintiff an Offer of Judgment in the amount of $2,500.00 on 28 September 2015. On 9 November 2016, Plaintiff moved to dispense with mediation and proceed to trial. Defendant consented to this motion. Defendant sent a second Offer of Judgment in the amount of $10,325.00 on 18 November 2016. The trial commenced on 28 November 2016. The jury returned a verdict of $13,500.00 for Plaintiff. On 6 December 2016, Plaintiff's counsel mailed Defendant's counsel a statement of attorney fees ($17,400.00) and costs ($3,667.35). On 20 December 2016, Plaintiff filed a motion for costs and attorney fees pursuant to N.C.G.S. § 6-21.1. On

8 May 2017, the trial court awarded Plaintiff $10,000.00 in attorney fees. Defendant timely appealed the award of attorney fees.

ANALYSIS

"The case law in North Carolina is clear that to overturn the trial judge's determination [of attorney fees and costs], the defendant must show an abuse of discretion." *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 587 (2008) (alteration in original) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . [Or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The statute allowing attorney fees in this situation states:

> 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.G.S. § 6-21.1(a) (2017).

Defendant argues that awarding attorney fees was improper because there was not "an unwarranted refusal by the defendant to negotiate or pay the claim." N.C.G.S. § 6-21.1(a)(i). The trial court found in relevant part:

> 1. There was an unwarranted refusal by the Defendant to negotiate or pay the claim which constitutes the basis of such suit.
> 2. The amount of damages recovered is less than $25,000.00.
> 3. The amount of damages recovered exceeded the highest offer made by the Defendant no later than 90 days before the commencement of trial.
> 4. The amount of damages recovered exceeded the highest offer made by Defendant approximately 10 days prior to the commencement of trial.

Defendant compares the facts of this situation to an unpublished opinion of this Court. *Morales v. Garcia*, 234 N.C. App. 116, 761 S.E.2d 753, 2014 WL 2155392 (2014) (unpublished). In *Morales*, we did not allow attorney fees under the unwarranted refusal requirement when there was "competent evidence in the record that '[t]he settlement offers were offered throughout the period of even before the filing of the suit' and that the biggest difference between the offer of judgment and the amount awarded by the jury was less than $1,000.00." *Morales*, 2014 WL 2155392 at *4. While not binding authority, we can consider an unpublished opinion as persuasive. *Zurosky v. Shaffer*, 236 N.C. App. 219, 234, 763 S.E.2d 755, 764 (2014)

("[A]n unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point."). However, since the facts here are dissimilar, we are not persuaded by *Morales* and do not consider it further.

Defendant argues that "settlement offers were made throughout the course of the lawsuit." The record on appeal does not support that claim. The record and trial court's findings only show that Defendant's initial Offer of Judgment of $2,500.00 was submitted on 22 September 2015 and the second Offer of Judgment of $10,325.00 was submitted on 18 November 2016, 10 days before the trial started. The record and order are silent as to any other attempts to resolve this matter. Additionally, the second Offer of Judgment was not submitted "*more than 10 days before the trial beg[an]*." N.C.G.S. § 1A-1, Rule 68 (emphasis added). Finally, Plaintiff had already undertaken significant costs in anticipation of trial by the time of Defendant's second offer. This evidence supports the trial court's finding that Defendant's refusal to negotiate or pay the claim was unwarranted, and the trial court did not abuse its discretion.

CONCLUSION

The trial court's findings support a determination of an unwarranted refusal to negotiate. Accordingly, the trial court's award of attorney fees was not an abuse of discretion.

AFFIRMED.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).