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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-648

Filed 5 March 2025

Brunswick County, No. 22 CVS 371

RICHARD MERRITT & LISA MERRITT, Plaintiffs,

v.

S&S MANAGEMENT GROUP, LLC d/b/a GUARDONE SECURITY, Defendant.

Appeal by Plaintiffs from an order entered 30 April 2024 by Judge Jason Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 28 January 2025.

*Randolph M. James, P.C., by Randolph M. James and Kyle W. Martin, for Plaintiffs-Appellants.*

*FordHarrison, LLP, by Benjamin P. Fryer, for Defendant-Appellee.*

GRIFFIN, Judge.

Plaintiffs Richard and Lisa Merritt appeal from the trial court's order granting Plaintiffs' Motion for Attorney Fees pursuant to section 6-21.5 of the North Carolina General Statutes but denying Plaintiffs' Motion under sections 75-16.1, 66-154(d), 6-20, and Rule 11(a) of the North Carolina Rules of Civil Procedure. Plaintiffs contend the trial court erred by awarding \$12,500 in attorney fees pursuant to section 6-21.5

without making the necessary findings of fact to support its conclusions of law. Plaintiffs also argue the trial court erred by denying attorney fees pursuant to sections 75-16.1, 66-154(d), and Rule 11(a). We affirm in part and vacate and remand in part.

### **I. Factual and Procedural Background**

Plaintiffs were employed by Defendant GuardOne Security. When Plaintiffs began working for Defendant, Plaintiffs signed an employment agreement on 27 October 2018 that, by its terms, was enforceable for one year.

In December 2021, Lisa Merritt resigned from her position. After Ms. Merritt resigned, on 24 January 2022, Defendant sent Richard Merritt a Manager Restrictive Covenant Agreement, which Mr. Merritt did not sign. On 14 February 2022, Mr. Merritt terminated his employment with Defendant. Shortly thereafter, Defendant sent Plaintiffs demand letters alleging they breached their employment agreements. As a result, Plaintiffs filed a Complaint against Defendant for Declaratory Judgment on 18 March 2022. Defendant filed its Answer and Counterclaims on 25 April 2022 alleging breach of fiduciary duty, breach of employment agreements, misappropriation of trade secrets, conversion, unfair and deceptive trade practices, and injunctive relief. Plaintiffs filed a Motion to Dismiss, Reply to Counterclaims, and Affirmative Defenses on 23 June 2022.

After discovery, Plaintiffs moved for summary judgment on 16 October 2023. Prior to the summary judgment hearing, Defendant dismissed all its counterclaims

except for the breach of employment agreements claim. On 16 November 2023, the trial court granted Plaintiffs' Motion to Dismiss and dismissed Defendant's remaining claim.

On 1 March 2024, Plaintiffs filed a Motion for Attorney Fees, Costs, and Sanctions. Plaintiffs moved under North Carolina's Trade Secret Protection Act ("TSPA"), N.C. Gen. Stat. § 66-154(d); North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-16.1; N.C. Gen. Stat. § 6-20; N.C. Gen. Stat. § 6-21.5; and Rule 11(a) of the North Carolian Rules of Civil Procedure. Plaintiffs sought to recover fees totaling \$61,237.50, and \$4,885.56 in costs.

On 8 April 2024, Plaintiffs' Motion was heard in Brunswick County Superior Court. The trial court entered an order on 30 April 2024, awarding Plaintiffs \$12,500 in attorney fees pursuant to section 6-21.5, but denying Plaintiffs attorney fees under TSPA, UDTPA, and Rule 11(a). Plaintiffs timely appeal from the trial court's order.

## **II. Analysis**

Plaintiffs contend the trial court erred by awarding the amount of attorney fees pursuant to section 6-21.5 without the necessary findings of fact to support its conclusions of law. Plaintiffs also contend the trial court erred by denying attorney fees pursuant to sections 75-16.1, 66-154(d), and Rule 11(a).

### **A. Section 6-21.5**

A trial court may award "reasonable attorney fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or

fact raised by the losing party in any pleading.” N.C. Gen. Stat. § 6-21.5 (2023). “A justiciable issue is one that is ‘real and present as opposed to imagined or fanciful.’” *Lincoln v. Bueche*, 166 N.C. App. 150, 154, 601 S.E.2d 237, 242 (2004) (quoting *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991)).

In determining whether attorney fees should be awarded, section 6-21.5 “requires the trial court to review all relevant pleadings and documents.” *ACC Const., Inc. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 268, 769 S.E.2d 200, 211 (2015) (citation and internal quotations omitted). The court must “evaluate whether the losing party persisted in [litigation] after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue[.]” *Id.* Upon making that determination, the court must “make findings of fact and conclusions of law to support its award.” *Id.*

Plaintiffs do not contend the trial court erred by granting Plaintiffs’ Motion for Attorney Fees pursuant to section 6-21.5. Instead, Plaintiffs argue the trial court did not make the necessary findings to support the amount awarded. Plaintiffs contend the trial court erred by “arbitrarily reducing” the full amount of fees sought.

This Court “review[s] a trial court’s award of attorneys’ fees for abuse of discretion.” *ACC Const.*, 239 N.C. App. at 271, 769 S.E.2d at 213. For this Court to hold a trial court abused its discretion, the decision of the trial court must be “manifestly unsupported by reason or [] so arbitrary that it could not have been the result of a reasoned decision.” *Venters v. Albritton*, 184 N.C. App. 230, 234, 645

S.E.2d 839, 842 (2007) (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)).

In awarding attorney fees, trial courts are required to make “proper findings regarding the reasonableness of the attorney’s fees” considering “the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.” *Belcher v. Averette*, 152 N.C. App. 452, 457, 568 S.E.2d 630, 633 (2002) (citation omitted). When a statute such as section 6-21.5 “authorizes the award of only reasonable fees, these findings are necessary to support the reasonableness of the award.” *Brown’s Builders Supply, Inc. v. Johnson*, 240 N.C. App. 8, 13, 769 S.E.2d 653, 658 (2015) (citing *Cobb v. Cobb*, 79 N.C. App. 592, 595–96, 339 S.E.2d 825, 828 (1986)). Without these findings, this Court is “effectively precluded from determining whether the trial court abused its discretion.” *Id.* (cleaned up) (citation omitted).

Here, while the trial court made appropriate findings to support its decision to award attorney fees pursuant to section 6-21.5, the trial court’s findings regarding the reasonableness of the award are insufficient and deny us the ability for appropriate review. After listing ten findings explaining why it was awarding attorney fees pursuant to section 6-21.5, based on Defendant filing and persisting in litigation when Defendant knew or should have known that its allegations against Plaintiffs were non-justiciable, the trial court listed the following findings to show what it considered in determining the award:

33. In support of the request for fees, Plaintiff's submitted for review the following materials: (i) the invoices actually submitted to their clients; and (ii) a breakdown of hours for each timekeeper for which reimbursement is sought.

34. The Court finds that the hourly rates sought by Plaintiffs' counsel and support staff are reasonable. Those rates are: (i) \$350 for Randolph M. James with over forty years of experience; (ii) \$190 for Kyle Martin, an associate with six years of experience; (iii) \$70 for paralegals with five and three years of experience.

35. Plaintiffs support the reasonableness of these requested rates with affidavit testimony from James and Andrew Fitzgerald an experienced and well-regarded attorney with Fitzgerald Hanna & Sullivan, PLLC in Winston-Salem, North Carolina, who practices complex business litigation throughout North Carolina.

36. Defendant has not objected to the hourly rates Plaintiffs' attorney have charged.

37. Plaintiff's sought attorney fees in the amount of \$61,237.50 and costs in the amount of \$4,885.56.

38. Accordingly, based on the above, the [c]ourt concludes, in the exercise of its discretion, that Plaintiff should pay Plaintiffs reasonable attorneys' fees in the total amount of \$12, 500.00.

While the court included an express finding regarding the experience of Plaintiffs' attorneys and paralegals along with their hourly rate in finding 34, the court did not expressly state how much time and labor was expended, the skill required, or a customary fee for like work. *See N.C. Dep't of Corr. v. Myers*, 120 N.C. App. 437, 442, 462 S.E.2d 824, 828 (1995) (reversing and remanding a trial court's award of attorney fees when the order merely stated to pay "the 'judicially recognized

lodestar fee’ of \$160.00 per hour,” because “the trial court did not make any of the findings necessary to arrive at the hourly attorney fee”); *Brown’s Builders Supply*, 240 N.C. App. at 13–14, n.1, 769 S.E.2d at 657–58, n.1 (interpreting *Myers* to require express findings in the order and holding the trial court failed to mention the “skill required to provide the services rendered[,] a customary rate for similar work in the area[,] or the experience or ability of [the] [p]laintiff’s attorney” even though the record revealed evidence in support of those findings); *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 201, 745 S.E.2d 343, 351 (2013) (remanding for the trial court to make appropriate findings regarding the reasonableness of the award because “the order [did] not address” the necessary findings).

The trial court’s order lacks reasoning as to why \$12,500 was reasonable instead of the full amount Plaintiffs are seeking. *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (“The requirement for appropriately detailed findings is [] not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.” (citations and internal quotations omitted)).

Just as this Court in *Myers*, *Brown’s Builders Supply*, and *McKinnon* remanded for more express “findings of fact ‘as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney’” to determine the appropriateness of the award, *Myers*, 120 N.C. App. at 442, 462 S.E.2d at 828 (quoting *United Lab. v. Kuykendall*, 335 N.C. 183, 195, 437

S.E.2d 374, 381 (1993)), we remand for the trial court to make express findings regarding the same.

We recognize a trial court is not required to award the full amount of attorney fees requested, as that is a determination within the trial court's discretion. However, the findings must support the amount awarded. *See ACC Const.*, 239 N.C. App. at 272, 769 S.E.2d at 213 (holding the trial court did not abuse its discretion in awarding more than double the amount of attorney fees sought as the amount was "well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged"). Here, because we do not have findings to support the amount awarded, we cannot determine how the Court reached its conclusion to award \$12,500 pursuant to section 6-21.5. Without additional findings we are "effectively precluded from determining whether the trial court abused its discretion." *Brown's Builders Supply*, 240 N.C. App. at 13, 769 S.E.2d at 658. Thus, we vacate this portion of the order and remand to the trial court.

**B. Sections 75-16.1, 66-154(d), and Rule 11(a)**

Plaintiffs contend the trial court erred by denying attorney fees pursuant to sections 75-16.1, 66-154(d), and Rule 11(a). We address Plaintiffs' arguments below.

**1. N.C. Gen. Stat. § 75-16.1**

Plaintiffs contend they are the prevailing party under section 75-16.1 because Defendant voluntarily dismissed its UDTPA claim on the eve of trial. Our Supreme



Court has held there can be a prevailing party even when there is a voluntary dismissal of a claim with or without prejudice. *Bryson v. Sullivan*, 330 N.C. 644, 664, n.5, 412 S.E.2d 327, 338, n.5 (1992).

However, “[t]he decision whether or not to award attorney fees under [section] 75-16.1 rests within the sole discretion of the trial court.” *McKinnon*, 228 N.C. App. at 199, 745 S.E.2d at 350 (cleaned up) (citation omitted). If a trial court determines fees should be awarded, “the amount also rests within the discretion of the trial court.” *Id.* “However, when awarding fees pursuant to [section] 75-16.1, the court must make specific findings of fact.” *Id.*

While findings are required to support an award of attorney fees pursuant to section 75-16.1, the inverse is not true. This Court has previously held findings are not required when a trial court denies a motion for attorney fees pursuant to section 75-16.1. *See E. Brooks Wilkins Fam. Med., P.A. v. WakeMed*, 244 N.C. App. 567, 581, 784 S.E.2d 178, 187 (2016) (“We are aware of no prior appellate decision in this state expressly addressing the issue of whether a trial court that denies a motion to award attorneys’ fees is required to apply the factual analysis specified in [section] 75-16.1.”). As a result, this Court held that “[b]ased on the language of the statute, . . . the trial court is not required to make such findings in any order declining to award attorneys’ fees.” *Id.*

Here, the court declined to award attorney fees under section 75-16.1. Because the trial court was not required to make findings to support its decision, we “presume

that the order was correctly made, that is, in the discretion of the court.” *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 457, 337 S.E.2d 616, 620 (1985) (citation omitted). Thus, we affirm the trial court’s decision to deny attorney fees pursuant to section 75-16.1.

## **2. N.C. Gen. Stat. § 66-154(d)**

As with any other statute that permits an award of attorney fees, “to overturn the trial judge’s determination . . . the [moving party] must show an abuse of discretion.” *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 155, 647 S.E.2d 672, 674 (2007) (quoting *Hillman v. U.S. Liab. Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982)) (cleaned up). Pursuant to section 66-154(d), “in an action under the TSPA a trial court may only award attorneys’ fees to the prevailing party ‘if a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists[.]’” *Id.* at 157, 647 S.E.2d at 675 (quoting N.C. Gen. Stat. § 66-154(d) (2023)).

Here, as with Plaintiffs’ claim for attorney fees under section 75-16.1, Plaintiffs argue they are the prevailing party despite Defendant dismissing the TSPA claim on the eve of trial. However, the decision to award attorney fees is within the trial court’s discretion. *Id.* at 155, 647 S.E.2d at 674. While we recognize findings are required to support an award of attorney fees under section 66-154(d), we are aware of no North Carolina case that requires a trial court to make findings when the court denies attorney fees under section 66-154(d). However, a violation of the TSPA also

constitutes an unfair act or practice under the UDTPA. *See* N.C. Gen. Stat. § 66-146(b) (“The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.”). As a result, we employ the same line of reasoning as this Court did in *E. Brooks Wilkins Fam. Med., P.A.*, and hold that “[b]ased on the language of the statute, . . . the trial court is not required to make such findings in any order declining to award attorneys’ fees.” 244 N.C. App. at 581, 784 S.E.2d at 187. Thus, we affirm the trial court’s decision to deny attorney fees pursuant to section 66-154(d).

### **3. Rule 11(a)**

This Court reviews a trial court’s decision to grant or deny Rule 11 sanctions *de novo*. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). On review, we determine “(1) whether the trial court’s conclusions of law support its judgment or determination, (2) whether the trial court’s conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.” *Id.* If we make these “three determinations in the affirmative, [we] must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions under [] Rule 11(a).” *Id.*

“Although Rule 11 does not address whether findings are required by the trial court,” our Supreme Court has held “the decision to impose *or not to impose* sanctions must be supported by findings of fact.” *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (citing *Turner*, 325 N.C. at 165, 381 S.E.2d at

714) (emphasis added)). Generally, failing to include findings to support the trial court's determination on this issue is error, and requires this Court to remand "for the trial court to resolve any disputed factual issues." *Id.*

Here, Rule 11 sanctions may very well be unsupported, but there are insufficient findings to aid this Court in reviewing the trial court's decision to deny Rule 11 sanctions. Thus, we remand for further findings regarding the trial court's decision to not impose Rule 11 sanctions.

### **III. Conclusion**

We vacate and remand for additional findings regarding the amount of attorney fees awarded pursuant to section 6-21.5, and for findings regarding the trial court's decision to not impose Rule 11 sanctions. We affirm the trial court's denial of attorney fees pursuant to sections 75-16.1 and 66-154(d).

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).