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NO. COA10-1176  
NORTH CAROLINA COURT OF APPEALS

Filed: 21 June 2011

VADA WYNTER,  
Plaintiff,

v.

Wake County  
File No. 10 SP 1018

COUNTY OF WAKE,  
Defendant.

Appeal by plaintiff from order entered 11 June 2010 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 9 February 2011.

*Tanner and Romary, PA, by Jeremy Tanner, for Plaintiff-appellant.*

*Office of the Wake County Attorney, by Scott W. Warren, Roger A. Askew, and Bryan W. Batton, for Defendant-appellee.*

ERVIN, Judge.

Plaintiff Vada Wynter appeals from an order refusing to reduce the amount of a lien held by Defendant Wake County under the Workers' Compensation Act against the proceeds of a settlement received by Plaintiff stemming from injuries which he received in an automobile accident. On appeal, Plaintiff argues

that the trial court erred in deciding not to reduce the amount of Defendant's lien and by failing to apportion the costs he incurred in connection with his litigation against the third-party tortfeasor whose negligence allegedly caused the accident in which Plaintiff was injured. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court did not commit any error of law in refusing to reduce the amount of Defendant's lien. On the other hand, we also conclude that the trial court erred by failing to address the cost apportionment issue in its order. As a result, we affirm the trial court's order in part, reverse the trial court's order in part, and remand this case to the Wake County Superior Court for further proceedings not inconsistent with this opinion.

#### I. Factual Background

On 8 November 2008, Plaintiff was involved in an automobile accident while driving a vehicle owned by his employer, Defendant. After the accident and prior to the completion of the necessary investigation, Defendant paid Plaintiff \$22,210.59 in medical benefits pursuant to the relevant provisions of the Workers' Compensation Act. As soon as Defendant concluded that the injuries Plaintiff sustained in the automobile accident were not work-related, it denied any liability to Plaintiff for additional workers' compensation benefits. Eventually,

Plaintiff settled his personal injury claim against the third-party tortfeasor by accepting \$30,000.00 from the tortfeasor's liability carrier and an additional \$20,000.00 from his own underinsured motorist carrier, resulting in a total settlement of \$50,000.00.

On 17 February 2010, Plaintiff instituted a special proceeding pursuant to N.C. Gen. Stat. § 97-10.2(j) in which he asserted that Defendant had claimed a lien against his personal injury settlement and requested the trial court to enter an order "setting or extinguishing the Workers['] Compensation Lien with regard to the fifty-thousand dollar (\$50,000.00) settlement." In its response, Defendant "admit[ted] that it [had] a self[-]insured workers['] compensation lien against any third party settlement proceeds in the amount of \$22,210.59" and "respectfully move[d] that the Court grant the County of Wake its full lien for recovery of tax payer dollars[.]"

After providing the parties with an opportunity to be heard, the trial court entered an order on 8 June 2010 determining that "it is just and reasonable for [Defendant] to retain a lien in the amount of \$22,210.59, and that [Plaintiff's] motion to eliminate or reduce the lien should be . . . denied." Plaintiff noted an appeal to this Court from the trial court's order.

## II. Legal Analysis

### A. Standard of Review

"Under North Carolina law '[a]n employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature. . . .' However, '[a]fter notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien." *Cook v. Lowe's Home Ctrs., Inc.*, \_\_ N.C. App \_\_, \_\_, 704 S.E.2d 567, 570 (2011) (quoting *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (internal citation omitted), and N.C. Gen. Stat. § 97-10.2(j) (2009)). Defendant's "mandatory right to reimbursement under N.C. [Gen. Stat.] § 97-10.2 . . . is not waived by failure to admit liability or obtain a final award prior to distribution of the third-party settlement proceeds." *Radzisz*, 346 N.C. at 88, 484 S.E.2d at 568. "In exercising its discretion, 'the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review.'" *Kingston v. Lyon Constr., Inc.*, \_\_ N.C. App \_\_, \_\_, 701 S.E.2d 348, 354 (2010) (quoting *In re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72, *disc. review denied*, 352 N.C. 674, 545 S.E.2d

418 (2000) (alteration in original) (quotation marks and citation omitted). We will now examine the trial court's order utilizing the applicable standard of review.

B. Attorney's Fees under N.C. Gen. Stat. § 97-10.2(f)

First, Plaintiff argues that the trial court erred by "failing to give the Plaintiff a statutory reduction of 10% . . . from the Defendant/Employer's lien in accordance with N.C. Gen. Stat. § 97-10.2(f)." Plaintiff's argument lacks merit.

N.C. Gen. Stat. § 97-10.2(f) provides, in pertinent part, that:

- (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority . . . .

According to its literal language, N.C. Gen. Stat. § 97-10.2(f) only applies when the employer of a workers' compensation claimant "has filed a written admission of liability for [workers' compensation] benefits" or when "an award final in nature in favor of the employee has been entered by the Industrial Commission." Neither of these events has occurred in

the present case.<sup>1</sup> N.C. Gen. Stat. § 97-10.2(f) is simply not applicable to Plaintiff's claim, a fact which precludes acceptance of Plaintiff's argument in reliance on that statutory provision.

### C. Allocation of Costs

Next, Plaintiff argues that the trial court erred by "failing to address in the order how the costs of the third party litigation would be allocated between the employee and the employer." This argument has merit.

According to N.C. Gen. Stat. § 97-10.2(j):

Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that

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<sup>1</sup> As we understand the record, the time within which Plaintiff might have filed an Industrial Commission Form 33 seeking a hearing on Defendant's denial of his claim for workers' compensation benefits has expired. According to N.C. Gen. Stat. § 97-24(a), "[t]he right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement . . . is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement . . . is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article." The accident in which Plaintiff was injured occurred on 8 November 2008. On 19 November 2008, Defendant denied the compensability of Plaintiff's claim for workers' compensation benefits by filing an Industrial Commission Form 61 and has made no benefit payments to Plaintiff since that date. Thus, if Plaintiff failed to file a claim for workers' compensation benefits by 19 November 2010, then N.C. Gen. Stat. § 97-10.2(f) cannot have any relevance to a future claim by Plaintiff for workers' compensation benefits.

a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge . . . to determine the subrogation amount. . . . [T]he judge shall determine, in his discretion, . . . the amount of cost of the third-party litigation to be shared between the employee and employer. . . .

Although the record clearly establishes that Plaintiff incurred \$692.36 in costs while litigating his claim against the third-party tortfeasor, the trial court failed to make any findings or conclusions regarding the allocation of these costs between the parties in its order. As we have already noted, the relevant statutory provision states that the trial court "shall determine, in his discretion . . . the amount of cost of the third-party litigation to be shared between the employee and employer." "It is well established that the word 'shall' is generally imperative or mandatory.'" *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). As a result, we have no choice except to reverse the trial court's order to the extent that it fails to address the cost apportionment issue and to remand this case to the trial court for further proceedings not inconsistent with this opinion, including the making of appropriate findings and conclusions addressing the cost apportionment issue.

D. Consideration of Statutory Factors

Finally, Plaintiff argues that the trial court erred by "failing to properly consider and apply the applicable law regarding the statutor[ily] enabled factors when it denied the Plaintiff/Appellant's petition for a statutory lien reduction under [N.C. Gen. Stat. §] 97-10.2." This argument lacks merit.

A trial court requested to reduce the amount of a workers' compensation lien must

determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. . . .

N.C. Gen. Stat. § 97-10.2(j). In its order, the trial court found as a fact that:

1. Petitioner was involved in an automobile accident on November 8, 2008 while driving a vehicle owned by Respondent.
2. At the time of the accident Petitioner was an employee of Respondent and the accident and Petitioner's injuries



[were] initially reported as a work injury.

3. After reporting the injury but before investigation of the accident was complete, Respondent paid \$22,210.59 in medical expenses under its self-insured workers' compensation benefits program. After investigation of the accident Respondent determined that Petitioner had taken a work vehicle to return to his home and retrieve his wallet, which he had left at home. Thereafter, Respondent denied further benefits.

. . .

6. Petitioner injured his shoulder in the accident but has returned to work without restrictions. As of the date of the hearing of this matter, Petitioner had not filed a Form 33 Request for Hearing to contest the denial of his claim. Respondent inquired of Petitioner whether he planned to file a request for hearing and Petitioner did not and has not indicated whether he plans to contest the denial. During arguments in open court, counsel for Petitioner did not confirm whether Petitioner plans to file a Request for Hearing, but stated that Petitioner was still considering proceeding with the prosecution of his workers' compensation claim.
7. The Court has considered the need for finality in the litigation and finds that given the limited amount of insurance coverage available in the third-party claim as well and the improbability of collecting an excess judgment against the actual tortfeasor, proceeding with the third-party litigation would be futile. However, Petitioner has not made a determination about whether to continue with his

workers' compensation claim, and the Court finds that reduction or elimination of the lien would not bring finality to this matter given this uncertainty.

8. The Court has considered the net recovery to Petitioner. After payment of attorney's fees, costs, outstanding medical bills and liens, Petitioner will receive an amount less than \$10,000.00. However, the Court finds that Petitioner has returned to full time duty without restrictions.
9. The Court has considered the likelihood of Petitioner prevailing at trial and finds that the liability of the tortfeasor was clear and the likelihood of success at trial was highly probable.
10. The Court has considered the amount of prospective compensation the Respondent is likely to pay in the future and finds that this amount is unknown given the uncertainty of Petitioner's prosecution of his workers' compensation claim. The Court finds that over one and one half years have passed since the accident and, had Petitioner pursued his claim, there might have been a determination by now on compensability of his claim which, if successful, could require Respondent to pay back benefits of over \$30,000.00, including a PPI rating of 15% and some temporary total indemnity payments.

The trial court's order contains findings of fact addressing each of the statutorily required factors, and Plaintiff has not identified any "other factors" that the trial court should have considered. As a result, we conclude that the trial court's

findings of fact address each of the factors that the trial court was required to consider pursuant to N.C. Gen. Stat. § 97-10.2(j).

In his brief, Plaintiff claims that, in deciding not to reduce Defendant's lien, the trial court improperly considered the possibility that he would receive future workers' compensation benefits. More particularly, Plaintiff contends that, despite the language in N.C. Gen. Stat. § 97-10.2(j) directing the trial court to consider future workers' compensation benefits that are "likely to [be] pa[id to the] employee in the future," the trial court based its decision on benefits that, while "possible," were not "likely" to be paid. In attempting to persuade us of the validity of this assertion, Plaintiff points to two of the trial court's findings of fact.

First, Plaintiff takes issue with the trial court's finding that "the amount of prospective compensation the Respondent is likely to pay in the future . . . is unknown given the uncertainty of Petitioner's prosecution of his workers' compensation claim" and that, "had Petitioner pursued his claim, there might have been a determination by now on compensability of his claim which, if successful, could require Respondent to pay back benefits of over \$30,000.00, including a PPI rating of 15% and some temporary total indemnity payments." According to Plaintiff, this language "clearly show[s] that the Court, when

determining the final lien amount, looked at the possibility that the Employer might have to pay benefits in the future which is inconsistent with the requirement of likely to pay." However, Plaintiff does not explain how the trial court's observation that, if Plaintiff had pursued his workers' compensation claim, the amount of benefits that Plaintiff was entitled to receive might have been resolved by the time of the hearing in any way suggests that the trial court based its decision on improper speculation concerning the possibility that Plaintiff would receive additional workers' compensation benefits in the future. On the contrary, the quoted language constitutes an explanation of the reason that the trial court could not calculate the amount of future benefits Plaintiff would likely receive. As a result, this portion of the trial court's order does not demonstrate that the trial court based its decision to refuse Plaintiff's request for a reduction of Defendant's workers' compensation lien on an improper consideration of "possible," as compared to "likely," future workers' compensation benefit payments.

Secondly, Plaintiff notes that the trial court found that, following the accident in which Plaintiff was injured, Defendant "determined that [Plaintiff] had taken a work vehicle to return to his home and retrieve his wallet, which he had left at home," and "denied further benefits." According to Plaintiff, "[t]his

finding seems to also indicate that[, ] while certainly possible, it is not likely that the employer will pay any benefits to the employee in the future, much less \$30,000.00," so that the trial court's "ruling was clearly based on improper finding of facts." Plaintiff does not dispute the factual accuracy of this finding. Moreover, Plaintiff has not explained exactly how this finding demonstrates that the trial court considered an improper factor in the course of refusing to reduce Defendant's workers' compensation lien. After studying the trial court's order in its entirety, we conclude that this finding is merely a recitation of historical fact and does not in any way indicate that the trial court predicated its ultimate decision on any impermissible consideration of "possible," rather than "likely," future workers' compensation benefits.

In addition, Plaintiff contends that the trial court "improperly considered the 'net recovery' to the employee of only \$1,612.52 as a reason not to reduce the lien." Once again, Plaintiff does not dispute the accuracy of the trial court's statements concerning the net recovery that Plaintiff would receive in the event that Defendant's lien was not reduced or the fact that the amount of Plaintiff's net recovery is one of the factors the trial court was required to consider pursuant to N.C. Gen. Stat. § 97-10.2(j). Even so, Plaintiff claims that the trial court erroneously failed to make "findings of fact

regarding the Plaintiff's testimony regarding his injuries, how these injuries [affected] him, what an adequate amount . . . to compensate the Plaintiff would be, or that the \$50,000.00 was indeed adequate to compensate the Plaintiff for his third party claim." As an examination of the order at issue before us clearly reflects, however, the trial court made findings of fact noting that Plaintiff had outstanding claims for attorney's fees, costs, medical bills, and liens and that Plaintiff would have a net recovery of less than \$10,000.00 after required payments had been made. In addition, the trial court found that Plaintiff had returned to work without being subject to any restrictions resulting from the injuries he sustained in the accident. Plaintiff has neither challenged the accuracy of the trial court's findings concerning this issue nor asserted that he will incur future medical expenses as the result of his accident-related injuries. Moreover, the hearing stemming from Plaintiff's motion to reduce Defendant's workers' compensation lien was not recorded, so that no transcript of the proceedings leading to the entry of the trial court's order is available. For that reason, we are unable to review Plaintiff's testimony or to make any determination of whether the trial court should have made findings regarding portions of Plaintiff's testimony. Nothing in our review of the trial court's treatment of Plaintiff's "net recovery" reveals the existence of any error of

law. Thus, this aspect of Plaintiff's challenge to the trial court's order lacks merit as well.

At bottom, despite the fact that Plaintiff has argued in his brief that the trial court failed to properly consider the relevant factors enumerated in N.C. Gen. Stat. § 97-10.2(j), it appears that his basic dispute is with the content of the trial court's ultimate decision rather than with the manner in which the trial court made that decision. However, despite Plaintiff's implicit request that we reweigh or reconsider the evidence, we are not entitled to act in that manner. "When the trial judge is the trier of fact, 'he has the duty to pass upon the credibility of the witnesses who testify. He decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial judge in this task.'" *Tedder v. Hodges*, 119 N.C. App. 169, 174, 457 S.E.2d 881, 885 (1995) (quoting *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979)). "The appellate court is not allowed to substitute our judgment for that of the trial court on the grounds we may have arrived at a different conclusion and result based on the evidence presented and findings of fact." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 610, 617 S.E.2d 40, 50 (2005) (citing *Chavis v. Thetford Prop. Mgmt. Inc.*, 155 N.C. App. 769, 771, 573 S.E.2d 920, 921 (2003),

*aff'd* 360 N.C. 356, 625 S.E.2d 779 (2006). Acceptance of Plaintiff's arguments would, in essence, run afoul of those fundamental principles of appellate jurisprudence. Having examined the arguments that Plaintiff explicitly makes, we find no legal justification for disturbing the manner in which the trial court evaluated the statutory factors enumerated in N.C. Gen. Stat. § 97-10.2(j) or the trial court's conclusion, after considering the required factors, to reject Plaintiff's request for a reduction in Defendant's workers' compensation lien.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by refusing to reduce Defendant's lien against Plaintiff's settlement proceeds. However, we also conclude that the trial court erred by failing to address the proper allocation of costs between the parties. As a result, the court's order is affirmed in part and reversed and remanded for further proceedings not inconsistent with this opinion in part.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).