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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM LANCASTER COUNTY
Court of Common Pleas**

Deandrea G. Benjamin, Circuit Court Judge

**Case. No. 2018-CP-001127
Appeal No. 2022-001589**

**Morphis Pediatric Group of Lancaster, PA and
Elizabeth J. Morphis M.D, Appellants-Respondents**

v.

Paul David HessRespondent-Appellant

APPELLANTS' REPLY BRIEF

Charles F. Thompson, Jr.
Malone, Thompson, Summers & Ott
339 Heyward Street
Columbia, S.C. 29201

Ryan Beasley, Esq.
Ryan Beasley Law
416 E. North St. Level 2
Greenville, SC 29601

Attorneys for the Appellants

Other counsel of record:

David E. Rothstein, Esq.
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605

Attorney for the Respondent

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion in setting Hess's attorney rate recovery at \$300 per hour?

STATEMENT OF THE CASE

Hess, who was an employee of Dr. Morphis, claimed he was underpaid bonuses allegedly promised pursuant to employment contracts. Hess asserted claims under the South Carolina Wage Payment Act, for breach of contract, and related torts. Hess also asserted claims against Defendants' accountant¹ for tortious action related to the alleged underpayment. This matter was tried before Judge DeAndrea Benjamin from January 26 through February 2, 2023. The jury returned a verdict against all defendants on all causes of action and on punitive damages. Following this, with respect to Dr. Morphis and MPG, Hess elected to recover solely under Wage Payment Act. Defendants filed motions for judgment notwithstanding the verdict (JNOV) and remitter. Plaintiff filed a motion for attorney fees and trebling under the Wage Payment Act as well as a motion to recover prejudgment interest. Defendants opposed these motions. Judge Benjamin denied the motions for JNOV and Remittitur on November 2, 2022, and granted the motions for fees, trebling, and interest, also on November 2, 2022. Defendants Morphis and MPG filed a motion on November 4, 2022 to correct under S.C. R. Civ. P. 59 on the grounds that some arguments regarding prejudgment interest had not been addressed. The court denied the

¹ During pendency of the appeal, Hess settled with Defendants Alexander and Moore, Beauston, & Woodham, and they are not parties to the appeal.

motion on November 8, 2022. Defendants filed a notice of appeal on November 10, 2022. Plaintiff filed a cross-notice of appeal with regard to attorney's fees on December 5, 2022.

STANDARD OF REVIEW

Attorney's fees, as a matter within the trial court's discretion, can be reversed only if the trial court abused its discretion. *See, e.g., Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "The decision to award or deny attorney[']s fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

FACTUAL BACKGROUND

As noted in Hess's cross-appeal brief, he requested that the trial court award him at a rate of \$450.00 per hour. Hess's agreement with his counsel was to pay him at a rate of \$125.00 per hour plus 25% of the total amount recovered.² (R.86, Motion for Fees, p. 8) ("Plaintiff is seeking a modest increase to \$450 .00 per hour based on the contingent nature of the fee . . .").

In setting the rate of the award, the trial court began with the reduced rate of \$125.00 per hour plus contingency and increased it to \$300 per hour based on the contingent nature of the agreement and the commensurate risk that Hess's counsel might receive only the \$125.00 per hour had the litigation not been successful. The court reached this conclusion after evaluating all the Lodestar fee award factors under *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997)

² The Fee Agreement is not in the record.

“(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.”). The court noted the extensive litigation of the matter and complexity of the case and examined evidence of fees normally awarded or earned. (R.25, Order of Court re Fees and Trebling pp. 10-13).

Notably, all the cases cited by Hess of his counsel’s prior attorney fee awards list a rate of \$350.00 per hour. These cases were noted by the trial court in this case on pages 12-13 of its order. *Id.*

ARGUMENT

As noted, Hess’s counsel requested \$450.00 per hour, but cited no evidence or prior order indicating he had received any higher than \$350 per hour in any other matters.³ Obviously, the court awarded a rate very close to this, at \$300.00 per hour.

When applying an award pursuant to a fee-shifting statute, a trial court is not bound by the contract between the prevailing party and his attorney, however, that contractual rate is appropriately a factor in the analysis. *See Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997) (noting a court is not limited to the contractual rate) (*citing Lanier v. Moore-Handley, Inc.*, 575 So. 2d 83, 87 (Ala. 1991) (“While we recognize Moore–Handley’s fee arrangement, that arrangement is not conclusive evidence of a reasonable attorney fee; it is but one factor for the trial court to consider in making its determination.”)). Thus, the trial court in this case appropriately began with Hess’s contractual rate. It is also appropriate for a court to utilize its own knowledge of the market rates within the court’s jurisdiction. *Mary Kay Inc. v. Ayres*, 827

³ His affidavit states that he had recently increased his standard hourly rate to \$400.00, but he submitted no evidence of this nor did he declare when his rate had increased.

F. Supp. 2d 584, 593 (D.S.C. 2011) (“The undersigned explained it used the \$200/hour rate based on findings in another matter”); *Marquez v. Caudill*, 376 S.C. 229, 246, 656 S.E.2d 737, 745 (2008) (“ . . . the fees he has charged are reasonable and within the norms of hourly rates in Horry County.”) *Ball v. Sullivan*, 754 F. Supp. 71, 73 (D.S.C. 1990) (“The court takes notice that the prevailing market rate for this type of representation in this district”); *Rum Creek Coal Sales, Inc v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (“ . . . the magistrate judge used his own personal knowledge of the prevailing rates in Charleston”).

Hess is arguing the trial court abused its discretion by denying him a rate in excess of the agreement he had with counsel and in excess of any rate that any court had previously given him. Hess cited the contingent nature of the case as the basis for his request. An enhancement for a contingent case is not made in the Lodestar analysis but might be done, after that stage, as a multiplier. A multiplier is, by definition, the remedy for a lawyer taking a contingency arrangement. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731 (1987) (O’Connor concurring). The *Delaware Valley* standard has been adopted by the South Carolina Supreme Court. *Bowen & Smoot v. Plumlee*, 308 S.C. 325, 327, 417 S.E.2d 855, 856 fn. 2 (1992). Therefore, Hess’s counsel is asking for a multiplier, which the trial court denied.⁴ Such a denial of an increase, or multiplier, cannot be said to be an abuse of discretion because a multiplier can only be given in exceptional cases. (Id.).

A fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall. In ‘exceptional circumstances,’ this presumptively fair lodestar figure may be adjusted [upward]. In determining a reasonable fee, the contingency factor should be considered in two separate instances. First, any risks associated with the contingent nature of a particular case should be considered in fixing the lodestar, as the district court did here. Further, to establish “exceptional circumstances” warranting an upward adjustment of the lodestar, an applicant must establish that without provisions for a contingency multiplier, the litigant “would have

⁴ Even if not considered as a multiplier, the rate of \$300 is still close to counsel’s awarded rate of \$350 in other cases and is not unreasonable.

faced substantial difficulties in finding counsel in the local or other relevant market. No showing of exceptional circumstances was made to support the requested 50 percent increase above the lodestar.

In re Hall, 854 F.2d 1317 (4th Cir. 1988).

No argument was made that Hess would have been unable to secure counsel nor does such appear to be the case. As such, the court did not commit an abuse of discretion in refusing to multiply Hess's attorney's beyond that which he had recovered in the recent past. In fact, Hess's failure to correctly frame his request, as a multiplier, and using the *Delaware Valley* analysis, is a waiver of the issue.

CONCLUSION

For all the foregoing reasons, Hess's cross-appeal on the attorney fee issue should be denied.

MALONE, THOMPSON, SUMMERS & OTT LLC

 /s/Charles F. Thompson Jr.
Charles F. Thompson, Jr. (64219)
Lake Summers
Michael D. Malone
Attorneys for Defendant
339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

Dated this 17th of July 2023