

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

Daniel O'Shields and Roger W.)
Whitley, A Partnership d/b/a)
O&W Cars,)

Civil Action No. 2013-CP-40-0319

Plaintiff

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v.)

SEP 08 2017

Columbia Automotive, LLC d/b/a)
Midlands Honda,)

SC Court of Appeals

Defendant.

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JEANETTE B. ...
C.C.P. & C.S.
SECURITY

ORDER ON PLAINTIFF'S MOTION FOR SUPPLEMENTAL ATTORNEY'S FEES FOR DECEMBER 2016 THROUGH MARCH 2017

Plaintiffs [hereinafter "O&W"] moved for an award of supplemental attorney's fees for work performed by C. Steven Moskos, from December 16, 2016 through March 29, 2017, and for work performed by Brooks R. Fudenberg, from December 15, 2016 through March 29, 2017. Having considered the motions and submissions of O&W's counsel, the Court DENIES the motion for the reasons set forth below:


- I. **The Court has previously ruled that Plaintiff may not recover for fees incurred after September 14, 2016 as there was no unwarranted refusal to settle by Midlands Honda after that date.**

O&W's claim for attorney's fees arises under the North Carolina Unfair Trade Practices Act, and specifically N.C.G.S. § 75-16.1. Before any fees may be awarded under this statute, there must be an unwarranted refusal to settle on the part of the defendant. N.C.G.S. § 75-16.1; *Llera v. Security Credit Systems, Inc.*, 93 F.Supp.2d 674 (W.D.N.C. 2000). The Court has previously ruled that since September 14, 2016, Midlands Honda has engaged in meaningful and reasonable

settlement efforts.¹ As a result, the Court previously ruled that there could be no recovery of attorney's fees for time incurred after September 14, 2016. For that reason, the Court is perplexed as to why this motion, seeking attorney's fees incurred after that date, was filed.

By this order, the Court incorporates and confirms its earlier ruling and denies O&W's petition for attorney's fees incurred between December 2016 and March 2017. The Court further notes that these repeated motions for attorney's fees illustrate that Plaintiff's counsels' primary incentive here is attorney compensation rather than recovery for their client.

O&W's citation to *Printing Servs. of Greensboro, Inc. v. Capital Group, Inc.*, 637 S.E.2d 230 (N.C.App. 2006) for the proposition that once fees are awarded in a case, fees continue to accumulate for post-trial is both an overstatement of the law (as discussed below) and inapplicable on the facts of this case. The Court has determined that there was no longer an unwarranted refusal to settle after a certain date. *Printing Servs.* states only the general principle that appellate attorney's fees may be included in a fee award under § 75:16-1. Neither *Printing Servs.*, nor any of the cases it cites, addresses the situation present in this case, where a defendant engaged in reasonable settlement activity following a jury verdict, and the plaintiff refused to negotiate. In the Court's view, construing § 75:16-1 to require supplemental awards of attorney's fees in the presence of subsequent reasonable settlement efforts by a defendant would permit a plaintiff who was successful at trial to use post-trial motions and appeals as a veritable attorney's fee printing press. Such a result is patently inconsistent with the statute.



¹ That Midlands Honda has continued its efforts to settle this case has no bearing on the Court's determination that there was not an unwarranted refusal to settle as of September 14, 2016. The Court has determined and remains convinced that the offer made as of that date was a reasonable effort to settle this case in its entirety. Subsequent settlement offers do not change that finding, but they do provide further evidence that there has not been an unwarranted refusal to settle on the part of Midlands Honda since that date.

Settlement negotiations can occur at any stage of litigation, and, should be considered when awarding attorney's fees under North Carolina law. For example, in *United Laboratories, Inc. v. Kuykendall*, 403 S.E.2d 104 (N.C. App. 1991), *aff'd*, 437 S.E.2d 374 (N.C. 1993), the North Carolina Court of Appeals reviewed a second request for attorney's fees. The trial court in that case initially issued an award of attorney's fees in the amount of \$47,522.23. *Id.* at 106. An appeal followed, which resulted in a second trial. In considering whether further attorney's fees should be awarded, both the trial court and the appellate court reviewed settlement negotiations which occurred after the first trial, after the first appeal, and prior to the second trial. *Id.* at 111. Additional attorney's fees were awarded because the trial court concluded, and the appellate court agreed, that there was an unwarranted refusal to settle in the *post-trial* negotiations. *Id.* In this case, the Court finds Plaintiff is not entitled to any fees after September 14, 2016 based on O&W's reasonable efforts to settle.

II. The Court, in Its Discretion, Elects to Deny Fees.

Additionally and alternatively, an award of attorney's fees under N.C.G.S. § 75-16.1 is always discretionary, even when the factors which would support an award are present. *Basnight v. Diamond Developers, Inc.*, 178 F.Supp.2d 589, 592 (M.D.N.C. 2001) (“[e]ven where the facts of a particular case will support a finding that the requirements of N.C.Gen.Stat. § 75–16.1 have been met and an award of attorney’s fees may be warranted, the Court retains the discretion to deny the award”); *Blankenship v. Town & Country Ford, Inc.*, 174 N.C.App. 764, 771, 622 S.E.2d 638, 643 (2005) (“[t]he decision whether or not to award attorney fees under section 75–16.1 rests within the sole discretion of the trial [court]. *And if fees are awarded*, the amount also rests within the discretion of the trial court.”) (emphasis added); *Evans v. Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. App. 1994) (“[W]e also recognize that the statute

has been designed to award attorney's fees in extreme cases, since even when the statutory requirements are met, an award of attorney's fees is within the trial court's discretion.").

The Court, in its discretion, declines to award attorney's fees for activity following September 14, 2016.

III. Attorney's Fees Are Not Recoverable After September 14, 2016 Because They Were Not Incurred to Obtain or Protect O&W's Status as a Prevailing Party.

North Carolina's statute allows a trial court to award attorney's fees for post-trial or appellate work by a prevailing party on an unfair trade practices claim where such work is expended in an "effort to protect the judgment." *See Faucette v. Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C.App. 2015); *Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C.App. 1989) ("[f]ees are authorized for the prevailing party and may be awarded for all time, including appeal, *reasonably expended in obtaining or sustaining the status of prevailing party.*") (emphasis added).

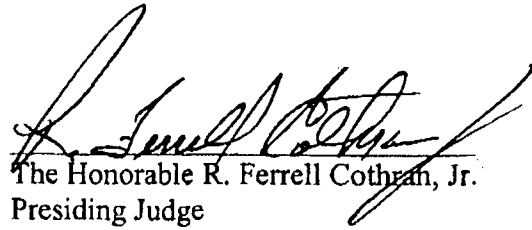
Plaintiff O&W prevailed on the unfair trade practices claim at trial. None of the work performed by Plaintiff's counsel to challenge or increase the Court's fee award was necessary to sustain Plaintiff's status as a prevailing party. Instead, Plaintiff's counsels' primary incentive here appears to be attorney compensation rather than recovery for their client. An award of fees for such purposes is not appropriate under North Carolina law.

For all of the reasons set forth here and the Court's prior orders addressing O&W's ever increasing and repeated demands for attorney's fees, the Court, in its discretion, declines to award attorney's fees for activity following September 14, 2016.


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[CONTINUED FROM PAGE 4 OF ORDER DENYING MOTION FOR SUPPLEMENT FEES]

IT IS SO ORDERED.


The Honorable R. Ferrell Cothran, Jr.
Presiding Judge

Aug. 10, 2017