Conference of Superior Court Judges
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Costs and Attorneys Fee Scenarios

#1: *Civil suit involving motor vehicle accident; mandatory mediation lasted two days but results in impasse with defendant offering $75,000 and plaintiff insisting on $200,000; plaintiff and defendant each retain expert witnesses and both sides engage in deposing the opposing experts; the day before trial defendant makes a settlement offer of $85,000 plus costs as provided by law; plaintiff accepts the offer in open court. Plaintiff now moves the court to award the following costs:* ***(a)*** *plaintiff's share of the cost of the mandatory mediation, including the related travel expenses of the plaintiff;* ***(b)*** *plaintiff's deposition costs, including attorney's travel expenses;* ***(c)*** *cost of plaintiff's experts, including time spent in depositions, time spent preparing for depositions and for trial;* ***(d)*** *cost of preparing exhibits, i.e., enlarged photographs, posters, and video reenactment. Defendant responds that court has authority to deny such costs in its discretion and that in this case the court should do so, and that, in any event, some of these costs are not authorized by law.*

- "At common law neither party recovered costs in a civil action and each party paid his own witnesses. Today in this State, ... costs may be taxed solely on the basis of statutory authority." *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179 (1972).

- "The '*complete and exclusive*' listing of assessable costs is set forth in Article 28. N.C.G.S. § 7A-320 (1995). Section 7A-305, contained within Article 28, specifically enumerates the costs to be assessed in civil actions. N.C.G.S. § 7A-305 (1995). In addition to these specifically enumerated costs, the trial court is to assess 'costs as provided by law.' N.C.G.S. § 7A-305(e)." *Sara Lee Corporation v. Carter*, 129 N.C. App. 464, 474, 500 S.E.2d 732 (1998), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999)(*emphasis added*). G.S. 7A-305(e) has been interpreted to allow an award of costs not specifically enumerated in subsection 7A-305(d).[1]

[1] *Lewis v. Setty*, 140 N.C. App. 536, 538, 537 S.E.2d 505 (2000))("In addition, costs which are not allowed as a matter of course under G.S. § 6-18 or § 6-19 . . . may be allowed in the discretion of the court under G.S. § 6-20. . . ." Estate of Smith, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815."); s*ee also Sara Lee Corporation v. Carter*, 129 N.C. App. 464, 474, 500 S.E.2d 732 (1998)("It follows that deposition expenses are 'costs as provided by [case] law'"), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999); *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680, 468 S.E.2d 513, *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996), which interprets G.S. 6-20 (which states: "costs may be allowed or not, in the discretion of the court, unless otherwise provided by law") to allow expanding the list of allowable costs to include any and all unenumerated cost that the judge decides should be assessed--rather than as simply allowing the court to grant or deny otherwise allowable costs in its discretion. *See also Jones v.*

- "An expert witness, . . ., shall receive such compensation and allowances as the court, ... in its discretion, may authorize." G.S. 7A-314(d). Expert witness fees are awarded or declined, not as a matter of law, but in the discretion of the court. Williams v. Boylan-Pearce, 69 N.C. App. 315, 321, 317 S.E.2d 17 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985).

- G.S. 7A-314 allows compensation of an expert witness if the witness has been subpoenad--if not subpoenad the trial court must deny the request as a matter of law. Holtman v. Reese, 119 N.C. App. 747, 752, 460 S.E.2d 338 (1995).[2] If properly subpoenaed, there is no requirement that the expert witness actually testify. Kinlaw v. N.C. Farm Bureau Mutual Ins. Co., 98 N.C. App. 13, 22, 389 S.E.2d 840 (1990).[3] If properly subpoenad, the court can also assess the cost of the expert witness' deposition testimony. Town of Chapel Hill v. Fox, 120 N.C. App. 630, 632, 463 S.E.2d 421 (1995).[4] It may also be within the court's discretion to compensate the subpoenad expert witness for time spent preparing for the testimony. Lewis v. Setty, 140 N.C. App. 536, 539, 537 S.E.2d 505 (2000)(upholding awards of costs of expert witnesses for time spent outside of trial).[5]

- Despite the the Supreme Court's pronouncement and the language of G.S. 7A-320, case law has approved of assessing some costs that are not expressly authorized by statute.[6] Deposition expenses are assessable costs. Dixon, Odom & Co. v. Sledge, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982).[7] Expenses for taking depositions, traveling for the deposition, videotaping depositions, obtaining copies of depositions from a reporting service, and court reporting services for taking depositions are included within the scope of "deposition expenses,"[8] although one case suggests that

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Wainwright, __ N.C. App. __ (4-16-2002)("N.C. Gen. Stat. § 6-20 (1999) permits the trial court to award costs in its discretion.").

[2] *See also* Whiteside Estates v. Highlands Cove, 146 N.C. App. 449, 470, 553 S.E.2d 431 (2001)(Without the witnesses being subpoenaed, the trial court had no authority to award expert witness fees.).

[3] Kinlaw states: "Here by defendant's own admission, Norman Cope attended trial and was listed as a potential expert witness. Since the statute does not state that the expert must testify, the trial court did not abuse its discretion by awarding costs which included a fee for a nontestifying expert witness.").

[4] *See also* Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 713, 518 S.E.2d 551 (1999).

[5] *See also* Campbell v. Pitt County Memorial Hosp., 84 N.C. App. 314, 328, 352 S.E.2d 902, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987), *overruled on other grounds*, Johnson v. Ruark Obstetrics, 327 N.C. 283, 395 S.E.2d 85, *rehearing denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)("Defendant contends the "the trial court's awarding of part of plaintiff[s'] costs was improper . . . ." Specifically, defendant contends that plaintiffs could not recover as costs charges of expert witnesses for time spent outside trial .... However, defendant here has not shown that the court exceeded its discretionary authority to award such costs pursuant to N.C. Gen. Stat. 6-20.").

[6] See cases cited in footnote 1.

[7] S*ee also* Sara Lee Corporation v. Carter, 129 N.C. App. 464, 474, 500 S.E.2d 732 (1998)("It follows that deposition expenses are 'costs as provided by [case] law'"), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999). For an interesting discussion on the Court of Appeals' basis for this holding, *see* Joe Wall, *"Assessable Costs" in Civil Actions*, Campbell Law Observer, Vol. 23, No. 1 (January 2002). *See also* Alsup v. Pitman, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990)(rejecting contention that enactment of G.S. 7A-320 legislatively overruled Dixon, Odom.).

[8] Sealey v. Grine, 115 N.C. App. 343, 347, 444 S.E.2d 632 (1994).

preparation costs (including travel expenses) must be *directly related* to the deposition.[9] Expenses for copies of x-ray films and copies made of records related to depositions are not necessarily includable deposition expenses.[10] Nevertheless in Lewis v. Setty,[11] the Court of Appeals held the trial court rightly exercised its discretion and allowed the costs for exhibits prepared for trial finding them reasonable and necessary.[12]

- Mediator's fees are an assessable cost.[13] Sara Lee Corporation v. Carter, 129 N.C. App. 464, 476, 500 S.E.2d 732 (1998), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999). But the filing fee paid by a party demanding trial de novo after a court-ordered arbitration award is not an assessable cost.[14]

- Travel expenses are not allowable for a party,[15] are allowable for a witness as provided by statute,[16] and may be allowable for an expert witness.[17]

#2: *Civil suit involving motor vehicle accident; early in the case defendant files an offer of judgment pursuant to Rule 68 for $15,000 plus "costs then accrued"*[18] *(plaintiff's costs*

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[9] Muse v. Eckberg, 139 N.C. App. 446, 447, 533 S.E.2d 268 (2000)(The trial court erred by allowing defendants to recover costs that were incurred in preparation for depositions because the taxing of deposition expenses as costs is limited to expenses that are directly related to the taking of depositions.).
[10] *Id*.
[11] 140 N.C. App. 536, 540, 537 S.E.2d 505 (2000).
[12] *But see* Sara Lee Corporation v. Carter, 129 N.C. App. 464, 475, 500 S.E.2d 732 (1998), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999)(fees charged to a party by a bank to assemble records and provide testimony pursuant to a subpoena are not assessable costs enumerated under section 7A-305, or as otherwise "provided by law." Sealey v. Grine, 115 N.C. App. 343, 347, 444 S.E.2d 632 (1994) (disallowing an award of costs for "copies of x-ray films . . . and records" because these expenses did not relate to depositions and were not enumerated costs under section 7A-305); Wade v. Wade, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271 (disallowing an award of costs for appraisal fees because "[c]osts are awarded only pursuant to statutory authority"), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).
[13] Sara Lee Corporation v. Carter, 129 N.C. App. 464, 476, 500 S.E.2d 732 (1998), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999).
[14] Jones v. Wainwright, __ N.C.App. __ , 561 S.E.2d 594 (4-16-2002)(The trial court was required to dispose of the $75.00 fee in the manner set forth in Arbitration Rule 5(b)).
[15] Crist v. Crist, 145 N.C. App. 418, 424, 550 S.E.2d 260 (2001)("Travel expenses of a party are not an assessable cost enumerated in section 7A-305 and are not otherwise an assessable cost "as provided by law." ... Accordingly, as the trial court lacked the authority to assess plaintiff's travel expenses as a cost, we reverse on this issue and remand to the trial court to modify its award of costs to exclude travel expenses.").
[16] G.S. 7A-314(b) and (c).
[17] G.S. 7A-314(d); Brown v. Flowe, 128 N.C. App. 668, 671 and 674, 496 S.E.2d 830, *rev'd on other grounds*, 349 N.C. 520, 507 S.E.2d 894 (1998)(Following the jury verdict, the trial court ordered defendant to pay costs to plaintiff ... for expenses incurred for such things as depositions, expert witness fees, travel expenses, counsel fees and the production of certain medical records. On appeal, defendant contended the trial court erred by taxing certain costs that were not recoverable by plaintiff. Although not expressly addressing the propriety of awarding travel expenses, the Court stated that defendant had "failed to demonstrate that the trial court exceeded its discretionary statutory authority in awarding costs," and cited G.S. 6-20 as the stautory basis for this discretionary authority.). *Compare* Muse v. Eckberg, 139 N.C. App. 446, 447, 533 S.E.2d 268 (2000)(travel expenses disallowed because not directly related to deposition).

then accrued are determined to be $500); plaintiff does not accept this offer of judgment and the case proceeds to trial; the trial results in a jury verdict for plaintiff of $12,000; plaintiff moves the court for costs of $3,600, which include the pre-offer costs of $500 and post-offer costs of $3,100 (included in this figure is $110 for post-offer prejudgment interest). Defendant responds that pursuant to Rule 68 the court has no authority to award plaintiff the post-offer costs. Defendant moves for its post-offer costs. Alternatively, defendant argues that the court should exercise its discretion and deny the motion for costs based on the offer of judgment and the jury verdict.

- Although in *Purdy v. Brown*, 307 N.C. 93, 296 S.E.2d 459 (1982), the Supreme Court compared the offer of judgment to the jury verdict to determine whether Rule 68 controlled the awarding of costs, in *Poole v. Miller*, 342 N.C. 349, 464 S.E.2d 409 (1995), the Court expressly held that the offer of judgment was to be compared with the jury verdict plus all costs awarded--including those costs *incurred after* the offer of judgment.[19] Thus Rule 68's "judgment finally obtained" means the amount ultimately entered as the final judgment, i.e., the jury's verdict plus costs incurred (and assessed) both before and after the offer of judgment. *Robinson v. Shue*, 145 N.C. App. 60, 67, 550 S.E.2d 830 (2001).[20]

- In *Phillips v. Warren*, __ N.C.App. __ (filed 3 September 2002), the trial court denied plaintiff's request for post offer prejudgment interest, and the Court of Appeals indicated this would be permitted in an appropriate case.[21]

- ***A conundrum***: Based on *Poole v. Miller*'s insistence that the offer of judgment must be compared to the jury verdict plus all assessed post-offer costs (which may include attorneys fees), the trial court cannot know whether a Rule 68 offer of judgment is effective to shift costs until the trial court assesses these costs after the trial.[22] But the assessment of these costs--and in particular the *discretionary* refusal to assess certain costs--can result in the conclusion that a Rule 68 offer of judgment was effective, in

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[18] A defendant who makes an offer of judgment has three options: 1) to specify the amount of the judgment and the amount of costs, 2) to specify the amount of the judgment and leave the amount of costs open to be determined by the court, or 3) to make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs. *Aikens v. Ludlum*, 113 N.C. App. 823, 825, 440 S.E.2d 319, 321 (1994).

[19] *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000).

[20] Judgment finally obtained consists of the verdict, costs, fees, interest and any other cost assessed to defendant for plaintiff's benefit, such as attorneys' fees. *Tew v. West*, 143 N.C. App. 534, 538, 546 S.E.2d 183, 186 (2001).

[21] In *Phillips*, the language used in the offer of judgment did not support the judge's decision to deny prejudgment interest based on the rule that accrual of interest is tolled when defendant makes a valid tender of payment for the full amount of plaintiff's claim, plus interest to date.

[22] *See Tew v. West*, 143 N.C. App. 534, 538, 546 S.E.2d 183 (2001), where defendant argued the "judgment finally obtained" was the Order and Judgment that was entered following the jury verdict but before the attorney fees were awarded as part of the costs in a post-trial hearing. The Court of Appeals held that the "post-trial order" entered after the hearing on attorneys fees, that included the awards of the jury verdict, attorneys fees and other costs, was "the final decision resolving the dispute and determining the obligations of defendant to plaintiff."

which case some of the assessed costs would actually be nonassessable as a matter of law.[23]

- "Taxing of costs is governed by Article 6 of the North Carolina General Statutes. N.C. Gen. Stat. §§ 6-18 and 6-19 (1986) detail certain actions where costs are allowed as a matter of course. Costs not allowed as a matter of course under sections 6-18 and 6-19 may be allowed in the court's discretion under N.C. Gen. Stat. § 6-20 (1986). The court's discretion under section 6-20 is not reviewable on appeal." Delta Env. Consultants v. Wysong & Miles, 132 N.C. App. 160, 166, 510 S.E.2d 690, *disc. rev. denied*, 350 N.C. 279, 536 S.E.2d 70 (1999).

- Rule 68 provides that if "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." If applicable, this language may require the plaintiff to pay *defendant*'s post-offer costs.[24]

#3: *Civil suit involving motor vehicle accident; early in the case defendant files an offer of judgment pursuant to Rule 68 for $2,000 plus "costs then accrued." Plaintiff refuses the offer and counter-offers for $25,000. At trial the jury returns a verdict of $2,100 for plaintiff. Plaintiff moves the court for attorneys fees pursuant to G.S. 6-21.1. Plaintiff's attorney fee affidavit specifies 64 hours of attorney time, and a reasonable hourly rate of $250/hour, for a total of $16,000. Defendant argues that the court should deny the fee in its discretion or reduce the amount sought for the following reasons: (a) the fee sought is disproportionate to the amount recovered; (b) the offer of judgment was only $100 less than the jury verdict; (c) plaintiff's attorney admitted that his actual contract with plaintiff was a contingent contract of 1/3 of the jury verdict; (d) plaintiff's attorney is new and inexperienced and was not organized or efficient at trial; (e) the total number of hours necessary to represent the plaintiff should have been no more than 40, and $250/hour is too high a rate for a new attorney.*

- "The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding." Hicks v. Albertson, 284 N.C. 236, 238, 200 S.E.2d 40 (1973). Many statutes, like G.S. 6-21.1, provide for attorney fee awards in specified circumstances. In addition to such statutory exceptions to the rule, there are also judicially fashioned exceptions. Judicially fashioned exceptions

[23] *See* Phillips v. Warren, __ N.C.App. __, __ S.E.2d __ (filed 3 September 2002), where the Court of Appeals remanded for a redetermination of whether attorneys' fees should be awarded, and noted that only after such determination could "the trial court make the final and correct determination as to whether defendant's offers of judgment prevail or fail." So the trial court could refuse to award attorneys fees based upon the defendant's reasonable offers of judgment, and then determine that without any award of attorneys fees the offer of judgment exceeds the judgment finally obtained so that plaintiff was never entitled to post-offer attorneys fees anyway.

[24] In Phillips v. Warren, __ N.C.App. __, __ S.E.2d __ (filed 3 September 2002), the trial court ordered plaintiff to pay defendant's post-offer costs pursuant to Rule 68.

include judicial responses to attorney misconduct in litigation, discussed in more detail in Scenario **#6**, and the common fund doctrine.[25]

- "By the express language of section 6-21.1, attorney's fees are allowed in the discretion of the trial court. The ruling of the trial court will not be disturbed on appeal absent a showing of abuse of discretion. ... 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *Culler v. Hardy*, 137 N.C. App. 155, 157, 526 S.E.2d 698 (2000).

- "The discretion accorded the trial court in awarding attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 *is not unbridled*. On remand, the trial court is to consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action ... (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers ... (3) whether defendant unjustly exercised " superior bargaining power" ... (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose." ... (5) the timing of settlement offers ... (6) the amounts of the settlement offers as compared to the jury verdict ." *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331 (1999) (*emphasis added*).

- In *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 528 S.E.2d 71 (2000), the trial court awarded attorney fees in the amount of $4,000. When defense counsel requested that an order be entered which contained findings of fact, the court denied the request, stating, "*It's all in my discretion, anyway*." The court's written judgment simply provided that "the presiding Judge, in his discretion hereby allows $4,000 as a reasonable attorney fee." The Court of Appeals found that the trial court abused its discretion in failing to make the required findings of fact to support the fee award.

- What findings of fact are required? The standard is evolving. Detailed findings as to each *Washington* factor are not required,[26] and some *Washington* factors may be ignored if the record shows they are not applicable to the case.[27] But "[m]ere recitation by the trial court that it has considered all *Washington* factors without

[25] Attorneys fees can also be awarded pursuant to the common fund doctrine, which requires non-litigants, who have benefited from a litigation, to help pay the attorneys fee incurred by the party who successfully litigated the action that produced the benefit. See discussion of common fund doctrine in *Bailey v. State of North Carolina*, 348 N.C. 130, 159-60, 500 S.E.2d 54 (1998). The common fund doctrine is based on an exception to the general rule that attorneys' fees may not be awarded to the prevailing party without statutory authority. *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 696, 483 S.E.2d 422, 430 (1997).

[26] *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183 (2001).

[27] *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 573, 548 S.E.2d 560 (2001)("The trial court listed only those facts matching those Washington factors apposite to the instant case."); *Stilwell v. Gust*, 148 N.C. App. 128, 131, 557 S.E.2d 627 (2001)(*Washington* factor four was not pertinent because "[o]ur appellate courts have uniformly held that a finding of unwarranted refusal to pay a claim is required only in suits brought by an insured or a beneficiary against an insurance company defendant."); *Hardesty v. Aldridge*, 147 N.C. App. 776, 778, 557 S.E.2d 136 (2001).

additional findings of fact would be inadequate and would not allow for meaningful appellate review. *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572-73, 548 S.E.2d 560 (2001). In reviewing attorneys fee awards the appellate courts will also look beyond the attorneys fee order to the record to determine whether the trial court properly considered the *Washington* factors.[28] The better practice may still be to specifically address each *Washington* factor in the order.

- What non-*Washington* factors might be relevant? In *Williams v. Manus*, 142 N.C. App. 384, 542 S.E.2d 680 (2001), an automobile accident case, defendants made an offer of judgment for $501. Subsequently, at non-binding arbitration, plaintiff was awarded $3,500. The case proceeded to trial and the jury returned a verdict for plaintiff in the amount of $62. Following the trial, counsel for plaintiff made a motion for attorney's fees and costs pursuant to G.S. 6-21.1, submitting an affidavit chronicling 73.5 hours of time dedicated to plaintiff's case. A hearing was held, and the trial court entered an order awarding plaintiff's counsel $5,000 in attorney's fees and $848.72 in costs. Defendant appealed from the award of attorney's fees arguing that to allow an award of attorney's fees in this case where the jury verdict is so small and so far below the defendant's settlement offer, would be the equivalent of holding that the award of attorney's fees is guaranteed. Under these circumstances, defendant contended that plaintiffs and their counsel would be motivated to reject all reasonable settlement offers. Defendant additionally argued that the trial court failed to make findings of fact showing that it considered the several factors relating to the appropriateness of the award. The Court of Appeals agreed stating that the trial court erred in awarding attorney's fees without considering the guidelines established in *Washington v. Horton*. But the Court also stated: "*We also note that the attorney's fees award might be considered unreasonable in light of the jury verdict, the amount plaintiff sought to recover from defendants, and plaintiff's contract for legal services with counsel*."

- In *McKinney v. Stafford*, an unpublished decision of the Court of Appeals (filed 7 May 2002), the defendant argued that the trial court erred in awarding attorneys fees to plaintiff pursuant to G.S. 6-21.1. This was a traffic accident case where defendant had made an offer for judgment of $6,000, the jury verdict was for $5,158.10, and the trial court awarded attorneys fee in the amount of $15,000. The Court held, *inter alia*, as follows: ***(1)*** "Defendants' objection to the fee award on the ground that it is 'almost three ... times the jury's verdict is unavailing. In Hardesty v. Aldridge, __ N.C.App. __, 557 S.E.2d 136 (2001), we upheld as reasonable a fee award of $2,625, which was more than seven times the $350 jury verdict." ***(2)*** "[D]efendants' complaint that the award exceeds what a plantiff's attorney would expect to receive under a typical contingent fee arrangement has been addressed and rejected by previous decisions of this Court. 'This Court has ... held ... that a contingent fee contract does

[28] *Robinson v. Shue*, 145 N.C. App. 60, 66, 550 S.E.2d 830 (2001)(the Court of Appeals determined that the trial court had properly considered a *Washington* factor based on letters and statements of the defendant's attorney to the trial court rather than by reference to the attorneys fee order). *See also Davis v. Kelly*, 147 N.C. App. 102, 108, 554 S.E.2d 402 (2001), where the Court of Appeals concluded that "it is apparent that the trial court evaluated the whole record, in view of the hearing on the motion and its consideration of the affidavits submitted and the arguments of counsel."

not control the trial court's determination and, when a statute provides for a 'reasonable' fee, the amount of the fee should be based upon the actual work performed by the attorney.' Epps v. Ewers, 90 N.C.App. 597, 600, 369 S.E.2d 104, 105 (1988)." ***(3)*** Defendants contended the court was motivated "at least in part" by its desire to punish defendants and their insurance company. "In assessing the reasonableness of an attorney's fee request, a court is entitled to consider conduct by the opposing party that thwarts an agreed-upon settlement and prolongs the litigation." Although not the subject of this appeal, it should also be noted that McKinney states that the trial court expressly found plaintiff's fee request of $19,735 (149 hours @$130/hour) to be reasonable but "then reduced the fee amount from $19,735 to $15,000 in setting the award."

#4: *Plaintiff successfully prosecutes an unfair trade practice claim. Plaintiff's actual damages of $25,000 are trebled. Defendant does not appeal. Six months later plaintiff moves the court for attorneys fees pursuant to G.S. 75-16.1. The trial judge has rotated into a new district but agrees to hear the motion if both parties agree. They do. Defendant argues that plaintiff waited too long to move for attorneys fees. Defendant also argues that plaintiff should not be entitled to both treble damages and attorneys fees. Defendant argues that for these reasons attorneys fees should be denied as a matter of law, but that, in any event, these factors also support the court's denial of attorneys fees in its discretion.*

- In *Vance Construction Co. v. Duane White Land Corp*., 127 N.C. App. 493, 490 S.E.2d 588 (1997), the parties sought out the judge who had presided at the trial in Warren County to hear a Rule 60 motion in the matter in Edgecombe County where the judge was then assigned. With the parties' consent, the judge heard and determined the motion. The Court of Appeals vacated the order on its own motion, holding that the trial judge lacked jurisdiction to hear the matter because subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel.

- In *Okwara v. Dillard Dep't Stores, Inc*., 136 N.C. App. 587, 592, 525 S.E.2d 481 (2000), the trial court granted defendants' motion for attorneys fees and plaintiff appealed, arguing the attorneys fee motions should be time-barred because the motions were made two years after the trial court's initial resolution of the case, and that this delay was unreasonable. The Court of Appeals noted that the usual practice in awarding attorneys' fees is to make the award at the end of the litigation "when all the work has been done and all the results are known." In this case, although the trial court's ruling was two years in the past, the litigation was not actually ended until 8 July 1998 when plaintiff's petition for discretionary review was denied by the North Carolina Supreme Court. The attorneys fee motions were filed in August and September of 1998, and the Court found this to be within a reasonable time after the "results were known," and therefore not time-barred.[29]

[29] *Compare* *Rice v. Danas, Inc*., 132 N.C. App. 736, 739-42, 514 S.E.2d 97 (1999), where the Court of Appeals held that a motion for Rule 11 sanctions filed almost seven months after judgment was entered on the jury verdict, was not filed within a reasonable time of detecting the alleged improprieties.

- Award or denial of attorney fees under G.S. 75-16.1 is a matter within the sole discretion of the trial judge. However, if an award is made, the statute requires the award be reasonable. In order for this Court to determine if the award of attorney fees is reasonable, the record must contain findings of fact to support the award. *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120 (1987). In *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 539, 551 S.E.2d 546 (2001), the Court of Appeals upheld the trial court's discretionary denial of attorneys fees under G.S. 75-16.1.

- In *Boykin v. Morrison*, 148 N.C. App. 98, 103-05, 557 S.E.2d 583 (2001), the issue was whether it was error to award attorney's fees pursuant to G.S. 6-21.1 if, although the award for compensatory damages was less than $10,000, combining both punitive and compensatory damage awards exceeded $10,000. The Court concluded that including punitive damages to calculate the statute's applicability would reward a defendant's egregiously wrongful acts.

- "[T]he policies behind recovering attorneys fees and recovering punitive damages are wholly different. Punitive damages are designed to punish willful conduct and to deter others from committing similar acts. ... The purpose of attorneys fees in Chapter 75, however, is to "encourage private enforcement" of Chapter 75." *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 192, 437 S.E.2d 374 (1993).

- What if plaintiff had appealed the final judgment--could the trial court thereafter consider and determine the attorneys fees claim or would the trial court be *functus officio*? It isn't clear. In *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834 (1999), plaintiffs contended that the trial court erred in granting defendants' motion for fees because the court was without jurisdiction to proceed on the motion after appellants filed an appeal in this Court--and the Court of appeals agreed.[30] But in *Nohejl v. First Homes of Craven County, Inc*., 120 N.C. App. 188, 191, 461 S.E.2d 10 (1995), the Court found that notice of appeal did not deprive the trial court of jurisdiction over the issue of attorneys fees.[31]

#5: *Plaintiff and defendant entered into a contract for the sale of real property. Pursuant to the contract defendant agreed to hold plaintiff harmless from any liability*

[30] *See also* *Lowder v. Mills, Inc*., 301 N.C. 561, 579-81, 273 S.E.2d 247 (1981); *Condie v. Condie*, 51 N.C. App. 522, 529, 277 S.E.2d 122 (1981); *but see* *Overcash v. Blue Cross ND Blue Shield*, 94 N.C. App. 602, 617, 381 S.E.2d 330 (1989)(Defendant's filing of notice of appeal did not automatically deprive the court of jurisdiction to impose sanctions pursuant to Rule 11).

[31] The facts of *Nohejl* are as follows: On 28 January 1994, the trial court found defendant in civil contempt. Defendant filed notice of appeal from the contempt order on 23 February 1994. The contempt order was filed with the Clerk on 14 July 1994, and on 26 July 1994 plaintiffs made a motion for attorney fees. The trial court conducted a hearing on 15 August 1994 and ruled that the court lacked jurisdiction to enter an order regarding attorney fees because defendant had previously filed notice of appeal. The trial court further stated that if it did have jurisdiction, it would award attorney fees of $5,280.00 to plaintiffs' attorney. Plaintiffs filed notice of appeal from this order on 29 August 1994. Without elaboration, the Court of Appeals stated: "[W]e find the trial court maintained jurisdiction over the issue of attorney fees."

and expense, including reasonable attorney's fees and other litigation expenses, resulting from any breach by defendant of the agreement. Defendant breached contract and plaintiff sued. Plaintiff prevailed at trial and now moves the court for attorneys fees pursuant to the contract. Defendant argues that the court should not award attorneys fees.

- "As a general rule contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court in Stillwell Enterprises, Inc. v. Interstate Equipment Co., 300 N.C. 286, 266 S.E.2d 812 (1980)." Forsyth Municipal ABC Board v. Folds, 117 N.C. App. 232, 237, 450 S.E.2d 498 (1994).[32] *See also* Lake Mary Ltd. Part. v. Johnston, 145 N.C. App. 525, 539, 551 S.E.2d 546 (2001) (contractual provisions for attorney's fees are invalid in the absence of statutory authority).

- Even in the face of a carefully drafted contractual provision indemnifying a party for attorney's fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor. Lee Cycle Center v. Wilson Cycle Center, 143 N.C. App. 1, 11-12, 545 S.E.2d 745, *affirmed per curiam*, 354 N.C. 565, 555 S.E.2d 293 (2001).

- There are a few exceptions to the general rule. Gram v. Davis, 128 N.C. App. 484, 495 S.E.2d 384 (1998), allowed a legal malpractice plaintiff to recover as damages, attorney's fees for the cost of correcting the defendant attorney's negligence. And Bromhal v. Stott, 341 N.C. 702, 706, 462 S.E.2d 219, 222, *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995), upheld a provision in a separation agreement for the recovery of attorney fees incurred to enforce provisions of the agreement.[33]

#6: *In a legal malpractice action, plaintiff has refused to comply with certain discovery efforts of defendant. At several depositions and at hearings on defendant's motion to compel, plaintiff's attorney calls defendant and defendant's attorney liars, alludes to the defendant's attorney's personal history and peculiarities, and is generally abusive of the opposing side. Defendant moves the court to hold plaintiff's attorney in criminal contempt (for not obeying order compelling discovery), to find that plaintiff's attorney violated Rule 12 of the General Rules of Practice and for sanctions under Rule 37. Defendant asks that the court sanction plaintiff's attorney, including an award of attorneys fees, for each of these violations. A week before the hearing, plaintiff complies*

[32] *See also* Lake Mary Ltd. Part. v. Johnston, 145 N.C. App. 525, 539, 551 S.E.2d 546 (2001)(contractual provisions for attorney's fees are invalid in the absence of statutory authority).

[33] Bromhal stated that the general rule invalidating attorney's fees clauses not authorized by statute was derived from certain public policy considerations surrounding promissory notes, deeds of trust, guaranties on promissory notes, and commercial construction contracts, and did not apply to separation agreements--also noting the applicability of G.S. 52-10.1. For a discussion of other possible exceptions see Delta Env. Consultants v. Wysong & Miles, 132 N.C. App. 160, 167, 510 S.E.2d 690, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999).

with the discovery order. The day before the hearing plaintiff takes a voluntary dismissal. Plaintiff argues the court lacks jurisdiction to consider the sanctions, and, in any event, cannot award attorneys fees as a sanction for criminal contempt or a Rule 12 violation.

- The termination of an action by means of a Rule 41 dismissal does not deprive either the trial court, or the appellate court, of jurisdiction to consider collateral issues such as sanctions. *Johnson v. Harris*, __ N.C.App. __, 563 S.E.2d 224 (5-7-2002).

- The court has inherent power to discipline attorneys for unprofessional conduct. *In Re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230 (1977). "The superior court has the inherent power to discipline members of the bar." *In Re Delk*, 336 N.C. 543, 551, 444 S.E.2d 198 (1994).[34]

- Appropriate sanctions can range from censure or reprimand, to imposition of costs, to suspending the right to practice, to disbarment.[35] Although imposition of costs and attorneys fees in these cases clearly serve some punitive purpose, such awards are nevertheless based on the actual costs incurred as a result of the misconduct. Case law holds that such awards must include sufficient findings and conclusions to support such sanctions--including how the attorney's conduct violated the applicable rules and how the court arrived at the dollar figure awarded as cost.[36]

- Certain rules and statutes expressly provide for awards of costs and attorneys fees in response to particular kinds of attorney misconduct, *e.g.*: **Rule of Civil Procedure 11**, ***Signing and Verification Of Pleadings*** (if a pleading, motion, or other paper is signed in violation of this rule, the court shall order the person who signed it to pay the reasonable expenses incurred because of the filing, including a reasonable attorney's fee); **Rule of Civil Procedure 30**, ***Depositions Upon Oral Examination*** (judge may order reasonable attorney's fees for failure to attend a deposition); **Rule of Civil Procedure 37**, ***Failure To Make Discovery; Sanctions*** (judge may order

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[34] *See also* *Gardner v. N.C. State Bar*, 316 N.C. 285, 287, 341 S.E.2d 517 (1986); *In re Burton*, 257 N.C. 534, 542, 126 S.E.2d 581, 587 (1962); G.S. 84-36 provides: "Nothing contained in this Article [providing for the State Bar's regulation of attorneys] shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys."

[35] *In Re Robinson*, 37 N.C. App. 671, 676, 247 S.E.2d 241 (1978). Other sanctions are available--for instance a Rule 41(b) dismissal with prejudice for failure to comply with a court order--but this admittedly is a harsh sanction and will not always be appropriate. *Daniels v. Montgomery Mut. Ins. Co*., 81 N.C. App. 600, 604, 344 S.E.2d 847 (1986). *See also* Rule of Civil Procedure 37(2) for listing of other possible sanctions (e.g., striking out pleadings or parts of pleadings, staying proceedings until compliance, rendering a judgment by default, etc.).

[36] *Davis v. Wrenn*, 121 N.C. App. 156, 160, 464 S.E.2d 708 (1995), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996)("T]he court's findings and conclusions are insufficient to support an award of sanctions. ... Although the order recites that "[s]anctions are imposed against plaintiff for violation of the legal provision and improper purpose provision" of Rule 11, it contains no findings or conclusions explaining how plaintiff's conduct violated these provisions. Moreover, there is nothing in the order to explain the appropriateness of the sanction imposed ($6,692 in attorney's fees) or to indicate how the court arrived at that figure. Therefore, we reverse the trial court's imposition of sanctions against plaintiff and remand for additional findings consistent with this opinion.).

reasonable attorney's fees for failure to comply with order compelling discovery); **Rule of Civil Procedure 56(g)**, ***Summary Judgment*** (judge may order reasonable attorney's fees for affidavits made in bad faith); **G.S. 6-21.5**, ***Attorney's fees in nonjusticiable cases***. "In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee 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."

- Although commentators generally acknowledge the inherent authority of judges to award attorneys fees as a part of their contempt power, some North Carolina cases have rejected this authority.[37] It may be that North Carolina judges can include attorneys fees in their contempt orders only if authorized by statute. "Plaintiffs' appeal presents the single question whether a trial judge has authority to award remedial damages, costs, and attorneys fees resulting from defendants' conduct in violating a court order, the violation having been found by the court to constitute civil contempt. Plaintiffs contend that the power to grant indemnifying fines to a private plaintiff is inherent in the courts of North Carolina. We disagree." *Records v. Tape Corp. & Broadcast. Sys. v. Tape*, 18 N.C. App. 183, 185, 196 S.E.2d 598, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973).

- Nevertheless in one recent case, the trial court had authority to order plaintiff's attorney to pay attorney fees for her violations of the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct *even though no statutory authority exists* for the imposition of fees, because the trial court has inherent authority to sanction attorneys for misconduct including the imposition of attorney fees. *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 554 S.E.2d 356 (2001) *disc. review denied and appeal dismissed*, 355 N.C. 348, 563 S.E.2d 562 (2002).[38]

#7: *Plaintiff has prevailed in a civil action in which the court is authorized to award attorneys fees in its discretion and the court has decided to award such fees in its discretion. The only issue in each of the following hypothetical is the appropriate amount of the attorney fee award.*

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[37] *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667 (2000)(The trial court erred in awarding plaintiff $2,000 in attorney fees for a contempt action involving easements because there is no specific statutory authorization for the award of attorney fees in this type of action); *M. G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 102, 370 S.E.2d 431 (1988)("[T]he provision in the criminal contempt adjudication requiring defendant to pay plaintiff's attorney's fees is invalid; because under our law attorney's fees are taxable against a party only when authorized by statute, ... and no statute authorizes the taxing of attorney's fees under the circumstances recorded here."); *Green v. Crane*, 96 N.C. App. 654, 659, 386 S.E.2d 757 (1990)(A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding.); *but see Smith v. Smith*, 121 N.C. App. 334, 335, 465 S.E.2d 52 (1996)(In this civil contempt case where plaintiff alleged that defendant failed to comply with a consent order in which he agreed to pay for his child's higher education, maintain a life insurance policy, and provide health insurance, the trial court erred in concluding that it had no authority to award attorney's fees.); *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991); *accord Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001).

[38] *See also Bowman v. Ford Lincoln Mercury*, __ N.C.App. __ (6 August 2002).

- ***The general rule***: "An award of attorney's fees must be reasonable. 'If the court elects to award attorney's fees, it must also enter findings to support the amount awarded.' ... In order for the appellate court to determine that the award of counsel fees is reasonable, '. . . the record must contain 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." ... In the present case, the trial court made the following findings of fact with respect to reasonableness:

  Prior to the date of the offer of judgment, Plaintiff's attorneys had expended at least 11.25 hours prosecuting this action and were seeking to recover a fee of at least $350.00. By the end of the trial of this case, a total of 27.75 hours of attorney time had been expended by Plaintiff's counsel pursuing his claim. Given the experience and qualifications of Plaintiff's counsel and the fees charged by attorneys in Mecklenburg County of comparable skill and experience, a rate of $100.00 per hour is a reasonable fee applicable to the services of Plaintiff's counsel.

  We hold these findings sufficient to support the award." Davis v. Kelly, 147 N.C. App. 102, 108, 554 S.E.2d 402 (2001)(*emphasis added*).[39]

(a) *Plaintiff's attorney orally addresses the factors set out in Rule 1.5(b) of the Rules of Professional Conduct regarding excessive attorneys fees, states that North Carolina follows the factors approach[40] rather than the Lodestar approach, states that his fee agreement with the plaintiff is a contingent contract providing for 1/3 of the recovery, that this fee arrangement is both reasonable and the fee customarily charged in this locality; plaintiff's attorney asks the court to award 1/3 of the jury verdict as a reasonable attorney fee. Defendant protests.*

- Under the "lodestar" theory, when granting a fee award, a judge determines the number of hours a lawyer reasonably invested in litigation and multiplies that number by an hourly rate tailored in light of prevailing community standards to the lawyer's

[39] *See also* West v. Tilley, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995) (quoting United Laboratories, Inc. v. Kuykendall, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993)(to determine if an award of counsel fees is reasonable, the record must contain 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 based on competent evidence).

[40] The "factor method" applies the list of factors set out in Rule 1.5(b) to the facts of each case to determine a reasonable attorney fee. The factor method has been criticized because a mere list of factors, standing alone, cannot objectively translate into a specific dollar amount, and thus results in subjective and arbitrary awards. Randall Paul Sutton, *The Lodestar Method: An Objective Solution To The Unreasonable Way In Which Reasonable Fees Are Calculated in Oregon*, 29 Willamette Law Review 801, 802-03 (1993). The factors are: the time and labor required; the novelty and difficulty of the issues involved; the skill requisite to perform the legal service properly; the preclusion of other employment due to acceptance of the case; the customary fee for similar work in the community; whether the fee is fixed or contingent; the time limitations imposed by the client or the circumstances; and the amount involved and the results obtained. *Compare* Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

"experience, skill, and reputation." The product is the lodestar--the presumptively reasonable fee.[41] "[T]he "lodestar" theory of setting attorney's fees *has not been adopted by our courts*." *Williams v. Randolph*, 94 N.C. App. 413, 426, 380 S.E.2d 553, *disc. review denied*, 325 N.C. 437, 384 S.E.2d 547 (1989)(*emphasis added*).

- In *Thornburg v. Cons. Jud. Ret. Sys., N.C.*, 137 N.C. App. 150, 527 S.E.2d 351 (2000), all parties agreed that counsel for plaintiff was entitled to a "reasonable" attorney fee pursuant to G.S. 6-19.l, but defendants questioned whether the attorney fee awarded counsel for plaintiff was "reasonable" under the circumstances of this case. The trial court found that the skill, experience and ability of the attorney for Judge Thornburg was well above average; that the constitutional questions presented by this litigation were complex, difficult and time-consuming; and that $250.00 per hour would be a reasonable hourly rate for this type of litigation, considering the skill of the plaintiff's attorney. The trial court also found that 97.5 hours was a reasonable amount of time to expend on a case of this complexity. Based on the amount of time involved, the attorney for the plaintiff would be entitled to an award of $250.00 times 97.5 hours, or a total of $24,375.00. The heart of the controversy, however, was that the trial court did not award an attorney fee based on the calculation of the hourly rate times the hours expended, but found that a contingency fee ranging between 25% and 33-1/3% would be a "reasonable and customary fee" in Wake County for this type of case, and awarded plaintiff's counsel a fee of 25% of the amounts recovered, i.e., $42,239.92. Based on the testimony of several local attorneys, the trial court found, *inter alia*, (1) That this Court is aware that in Wake County contingency fee arrangements are a customary fee arrangement in many civil cases, including civil matters such as the one before this court; (2) That the risk of receiving no fee unless a successful result is achieved and that such achievements are always unpredictable, are a part of the basis of a contingency fee; and (3) That the complexity of this action, the complex constitutional issues involved, the formidable opposition this Defendant presented, the difficulty of filing winnable actions against governmental agencies, and the obligation of the said attorney to represent the Plaintiff until the conclusion of the case, further supports the Court's opinion that a contingency fee of 25 to 33 1/3 percent of the recovery is not unreasonable. The Court of Appeals held: "We cannot say, under the facts of this case, that the approach taken by the trial court was a clear abuse of its discretion. Contrary to the argument advanced by the State, the trial court was not making the State a party to the fee arrangement between plaintiff and his counsel, but was merely considering that a contingency fee is a customary fee in this type of litigation."

- In *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120 (1987), the trial court also awarded plaintiff an attorney fee of one-third of the total award of $21,925.83, or $7,308.61, but the judgment contained no findings of fact to support the court's conclusion that this was a reasonable fee--such as the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney. The Court of Appeals held that the

[41] Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 Texas Law Review 865, 867 (1992).

failure of the court to consider and set out the underlying factors rendered the findings of fact inadequate to support the amount of the award, and so vacated the fee award.

(b) *Plaintiff's attorney orally states that he spent 25 hours on the case and that he bills at the rate of $150/hour, and that the hours spent were reasonably necessary and his billing rate is reasonable. Defendant argues that plaintiff's attorney must submit this information in a written affidavit.*

- In Dyer v. State, 331 N.C. 374, 378, 416 S.E.2d 1 (1992), the defendant argued that the amount of the award of the attorney's fee was not supported by competent evidence. The evidence consisted of caveators' attorney's statement in open court that "he had spent over seventy hours on the case." In its order, the trial court found as a fact that the attorney had devoted in excess of 75 hours for the preparation and trial of the case and taxed an attorney's fee of $3,500 as a part of the costs. The Supreme Court held that "the court properly relied on the statement of the caveators' attorney as to the amount of time he devoted to the case. The attorney was an officer of the court. The court observed the attorney during the trial and could determine his skill in trying the case as well as the difficulty of the problems faced by the attorney. We assume the court took these factors into account in setting the attorney's fee. The amount of the fee was within the discretion of the court. The findings of fact are supported by the evidence and the findings of fact support the conclusion of the court. The court did not abuse its discretion in awarding the attorney's fee."[42]

(c) *Plaintiff's attorney submits a written affidavit stating that he spent 25 hours on the case and that he bills at the rate of $150/hour, and that the hours spent were reasonably necessary and his billing rate is reasonable. Plaintiff asks for an attorney fee award of $3,750. Defendant responds that in his opinion the case should have required only 15 hours of attorney work and that a reasonable hourly rate for an attorney of plaintiff's attorney's experience was $100, thus suggesting an award of $1,500. Alternatively, defendant argues that the court should reduce plaintiff's request by $2,250, to $1,500 because of plaintiff's intransigence in settlement negotiations prior to trial.*

- In Ollo v. Mills, 136 N.C. App. 618, 622, 525 S.E.2d 213 (2000), pursuant to the attorney fee affidavit, plaintiff requested a total award of $37,624.88 for attorney's fees and costs. The trial court found that: 1) plaintiff failed to appropriately relate the attorney's fees to her successful claim against defendant, as opposed to her claims against previously dismissed defendants and unsuccessful claims against defendant; 2) plaintiff failed to demonstrate the reasonableness of the attorney's fees; 3) plaintiff did not apply for witness fees and the requested fees were unsubstantiated; and 4) plaintiff's remaining claims for costs were inadequately substantiated, inadequately

[42] *See also* Institution Food House v. Circus Hall of Cream, 107 N.C. App. 552, 558, 421 S.E.2d 370 (1992), where, although no supporting attorney fee affidavit was presented, the Court of Appeals upheld the attorney fee award, noting that "the trial court had before it the pleadings, depositions, and interrogatories, enabling it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed."

related to her successful claims, or not routinely allowed as costs in civil superior court cases. The trial court awarded plaintiff $1,000.00 in attorney's fees and $140.00 in costs. The Court of Appeals stated that the record in this case, even considering plaintiff's attorneys fee affidavit, was lacking the information necessary for the trial judge to accurately allocate expenses. Since plaintiff failed to provide this information to the trial judge, he lacked the ability to trace her expenses to the successful claim against defendant. The Court therefore found no abuse of discretion in the trial judge's decision to deny plaintiff's request for the full $37,624.88 in fees and costs, and, instead, *to award only the nominal amount* of $1,140.

- In *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 263-64, 390 S.E.2d 730, *disc. review denied*, 327 N.C. 137, 394 S.E.2d 169 (1990), the trial court found that $14,400 was a reasonable attorneys fee caused by respondent's Rule 11 violations, but nevertheless awarded only $4,800 as the attorneys fee because "the professional damages in this case have been mitigated considerably by the extremely honest, candid and competent representation of the respondent Moretz by his current counsel Mr. McNeill Smith of the Greensboro bar." Petitioners appealed, arguing that the trial court erred in reducing the attorneys' fees award for an irrelevant reason. While noting the "great leeway" that should be given to a trial court's exercise of its discretion, the Court of Appeals noted that "it is fundamental to the administration of justice that a trial court not rely on irrelevant or improper matters in deciding issues entrusted to its discretion." The Court observed that whatever the commendable qualities of respondent's attorney, there had been no showing that these qualities in any way affected the amount of time and money the petitioner was forced to devote to defending the action brought by respondent. Because this factor purportedly supporting the trial court's decision to reduce sanctions was wholly unrelated to determining the "reasonable expenses incurred because of the filing of the pleading," as stated in Rule 11 (a), the Court held that the trial court abused its discretion in basing its reduction on that factor. Petitioners also argued that "the court may have actually had other unarticulated reasons for reducing the amount of sanctions," but the Court declined to engage in such speculation.

(d) *The jury verdict was for $9,000. Plaintiff's attorney fee contract is a 1/3 contingency fee. Plaintiff's attorney fee affidavit states plaintiff's attorney worked 30 hours at $200 per hour. Before awarding attorneys fees in the amount of $6,000 (i.e., 30 x $200) should the trial court ascertain whether plaintiff's attorney also seeks to recover under the contingency fee contract? Should the attorney fee order direct payment to the plaintiff or directly to plaintiff's attorney?*

- Who "*owns*" the statutory attorney fee, the party or the party's attorney? In *Venegas v. Mitchell*, 495 U.S. 82 (1990), the Supreme Court held that a statutory fee that a defendant is required to pay, as determined under the Lodestar Method, does not limit or affect the amount arrived at privately in a contingency fee agreement between a plaintiff and her attorney. In *Venegas*, the court determined that 42 U.S.C. §1988, which provides that a prevailing party may recover reasonable attorney's fees, does

not constrain "the freedom of the civil rights plaintiff to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to the plaintiff." Furthermore, the Supreme Court stated that *"§1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer*." Thus, the legal fee awarded by the court should be applied against the fee due under the retainer agreement, but the total fee due should be as provided for in the retainer agreement.

- "[L]awyers use fee agreements to acquire the right to apply for fee awards on behalf of their clients, instead of allowing their clients to apply themselves. ... [S]ome lawyers fail to use fee agreements to acquire the right to apply for their clients' fee awards. These lawyers have no right to initiate fee award proceedings in their own name. ... [F]ee-shifting statutes place no rights in lawyers' hands. They entitle *parties* to recover fee awards."[43]

Proposed 2002 Formal Ethics Opinion 4
April 17, 2002

Collecting Contingent Fee and Court-Awarded Attorney Fee
Proposed opinion rules that a lawyer may collect a contingent fee on a judgment for damages or a court-awarded attorney fee but may not collect both fees.

Inquiry #1: Attorney has a contingent fee contract for representation of Plaintiff on injuries arising out an automobile accident. The contract provides for the payment to Attorney of one-third of any amount recovered for Plaintiff. The case is tried and the jury awards the Plaintiff $3,000 in damages. Attorney petitions the court for an attorney fee pursuant to N.C. Gen. Stat. Sect. 6-21.1. The statute gives the trial judge the discretion to award an attorney fee when a judgment in a personal injury or property damage suit is $10,000 or less upon a finding by the court that there was an unwarranted refusal by the insurance company to pay the claim which is the basis for the lawsuit. After examining the time Attorney spent representing Plaintiff, the court awards a $6,000 attorney fee to be taxed as a part of the court costs. May Attorney collect both the contingent fee and the attorney fee awarded by the court?
Opinion #1: No. Collecting both the contingent fee and the court awarded attorney fee would give Attorney a double recovery for the representation and would be clearly excessive in violation of Rule 1.5(a). Ethics Decision 97-3.
Inquiry #2: If Attorney keeps the fee awarded by the court, he will receive more from the representation than Plaintiff. May Attorney add the court-awarded attorney fee ($6,000) to the judgment ($3,000) and take a one-third contingent fee from the total? Is this prohibited fee sharing with a non-lawyer? Does it matter that this will give Plaintiff twice as much ($6,000) as the amount awarded by the jury?

[43] Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 Texas Law Review 865, 8677-78 (1992) (*emphasis added*).

Opinion #2: Attorney may only share the attorney fee in this manner if he informs the court of his intention at the time that he petitions the court for the attorney fee and the court consents. *See* Rule 3.3. N.C. Gen. Stat. Sect. 6-21.1 gives the judge the discretion to allow "a reasonable attorney fee." To determine what is a reasonable fee, the court must be advised of any subsequent plan by Attorney and Plaintiff to divide the total amount awarded by the jury and the judge. Moreover, the court must determine whether sharing the attorney fee award with the plaintiff in this manner undermines the policy behind the statute. *See, e.g., Martin v. Hartford Accident & Indemnity Company*, 68 N.C. App. 534, 316 S.E.2d 126, *cert. denied*, 311 N.C. 760, 321 S.E.2d 140 (1984) (policy behind this section is to provide relief for an injured party where it might not be feasible to bring suit if that party had to pay an attorney out of the proceeds). If the court authorizes the division of the judgment and the attorney fee between the lawyer and the plaintiff, it will not violate Rule 5.4(a) which otherwise prohibits a lawyer from sharing legal fees with a nonlawyer. As noted in comment [1] to the rule, the prohibition is meant to protect the exercise of a lawyer's independent professional judgment on behalf of a client from interference by a non-lawyer with a pecuniary interest in the outcome of the representation. Sharing an attorney fee award with the client will not interfere with the lawyer's professional judgment on behalf of the same client.

Inquiry #3: What provisions should be included in a lawyer's contingent fee contract to address this situation?

Opinion #3: The fee contract should explain the procedure for petitioning the court for an attorney fee pursuant to N.C. Gen. Stat. Sect. 6-21.1 in order that the client may make informed decisions about the representation. Rule 1.4(b). The contingent fee contract should clarify that the client is entitled to share in a court-awarded attorney fee only with the knowledge and consent of the court.