

## ATTORNEY FEES IN SMALL-VERDICT CASES (G.S. 6-21.1)

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*Note: This guide incorporates statutory changes made by S.L. 2011-283 and S.L. 2013-159. Except as noted in subsection II.B. below, it applies to causes of action arising on or after October 1, 2011.*

- I. **Applicability.** G.S. 6-21.1 applies to the following types of actions:
  - A. Personal injury or property damage suits (e.g., car accident, slip and fall); and
  - B. Suits by an insured/beneficiary against an insurance company under a policy issued by the defendant insurance company.
  
- II. **When Attorney Fees Permitted.** In the two types of actions above, the court may award attorney fees to the prevailing party's attorney(s) upon finding *all* of the following:
  - A. That there was an unwarranted refusal by the defendant to negotiate or pay the claim constituting the basis of the suit,
  - B. That the amount of damages recovered is twenty-five thousand dollars (\$25,000) or less (\$20,000 or less for causes of action arising on or after October 1, 2011, and filed on or before July 31, 2013), **and**
  - C. That the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of trial.

G.S. 6-21.1(a).
  
- III. **Award in Judge's Discretion.** Whether to award a fee is "in the judge's discretion." G.S. 6-21.1(a). The judge's discretion is "not unbridled," however, and the judge should consider relevant factors before making a decision. *Messina v. Bell*, 158 N.C. App. 111, 114 (2003) (citing *Washington v. Horton*, 132 N.C. App. 347, 351 (1999)); *Furmick v. Miner*, 154 N.C. App. 460, 462 (2002) (same). Some factors that should be considered, where relevant, include but are not limited to:
  - Settlement offers made prior to the institution of the action
  - Offers of judgment pursuant to N.C. R. Civ. P. 68, and whether the judgment finally obtained was more favorable than such

- Whether defendant unjustly exercised superior bargaining power
- In the case of an unwarranted refusal by an insurance company, the context in which the dispute arose
- The timing of settlement offers
- The amounts of the settlement offers as compared to the jury verdict; and
- The whole record.

*Washington*, 132 N.C. App. at 351 (citation omitted).

**IV. Maximum Fee.** The amount of the fees may not exceed \$10,000. G.S. 6-21.1(a).

**V. Fee as Court Cost.** The attorney fees are taxed as part of court costs. G.S. 6-21.1(a).

**VI. Required Findings of Fact.** Upon deciding to award fees, the court must make a written order with findings of fact:

- A.** Detailing the factual basis for finding an unwarranted refusal to negotiate or pay the claim;
- B.** Setting forth the amount of the highest offer made 90 days or more before commencement of trial;
- C.** Stating the amount of damages recovered; and
- D.** Stating the factual basis for and amount of attorney fees.
  1. An award of a “reasonable” attorney fee is within the judge’s discretion. The standard of review is abuse of discretion. *House v. Stone*, 163 N.C. App. 520, 525 (2004).
  2. The order should demonstrate the reasonableness of the fees by addressing (1) time and labor expended; (2) skill required; (3) customary fee for like work; and (4) experience and ability of attorney. *Parker v. Hensley*, 175 N.C. App. 740, 742 (2006) (“The mere recitation that the fees are ‘reasonable’ without further findings is inadequate”); *Furmick v. Miner*, 154 N.C. App. 460, 462 (2002); *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378 (2000); *Barbee v. Atlantic Marine Sales and Serv., Inc.*, 115 N.C. App. 641, 648 (1994).

G.S. 6-21.1(b).

**VII. Calculating “amount of damages recovered”:**

- A. Add together:**
  1. Amount of verdict for compensatory damages; and
  2. Prejudgment interest on amount of compensatory damages verdict (G.S. 24-5).

If the sum is \$25,000 or less, attorney fees may be awarded.

**B. Do not include in the calculation:**

1. Statutory costs.

[Note: Even under the less direct, prior language of the statute (“judgment for the recovery of damages”), the Supreme Court appeared to exclude statutory costs from the calculation. *Brown v. Milsap*, 358 N.C. 212 (2004), *reversing per curiam*, 161 N.C. App. 282 (2004) (for reasons

stated in dissenting opinion). The statute's current language makes the exclusion of costs more apparent by including only the "amount of damages" in the equation.]

2. Punitive damages. *Boykin v. Morrison*, 148 N.C. App. 98, 105–06 (2001).

C. **Example 1:** Plaintiff sues defendant for damages sustained in slip-and-fall case. Jury's verdict for compensatory damages is \$22,500. Prejudgment interest on the compensatory damages is \$3,500. "Amount of damages recovered" is \$26,000. Court *may not* award attorney fees under G.S. 6-21.1.

D. **Example 2:** Plaintiff sues defendant for injury to knee in car accident. Jury awards \$24,000 in compensatory damages, \$8,000 in punitive damages. Prejudgment interest on compensatory damages is \$950. Statutory costs are \$350. "Amount of damages recovered" is \$24,950. Court *may* award attorney fees under G.S. 6-21.1.

VIII. **May prejudgment interest be waived to keep damages recovered to \$25,000 or less?**

A. **Answer is Unsettled.** No published case has addressed the specific question. Waiver is probably more likely to be upheld on appeal if the interest is waived in a settlement or prior to the verdict.

B. **Some Guidance:**

- *Brown v. Milsap*, 358 N.C. 212 (2004), *reversing per curiam*, 161 N.C. App. 282 (2004) (for reasons stated in dissenting opinion). States that pre-judgment interest is mandatory under G.S. 24-5, but the case did not involve a waiver issue.
- *Winrow v. Discovery Ins. Co.*, 189 N.C. App. 212 (2008) (unpublished). Analyzes *Brown* and concludes that it is not against public policy to allow such waiver in a settlement agreement or stipulation.

IX. **Attorney Fees on Counterclaim(s):**

A. **When Permitted.** Attorney fees may be awarded to counterclaimant if claim meets criteria in G.S. 6-21.1. *Mickens v. Robinson*, 103 N.C. App. 52, 58–59 (1991).

B. **Practical Note:** The court generally should limit the award to fees incurred in prosecuting counterclaim and should not award fees incurred solely in defending against plaintiff's claims. *Mishoe v. Sikes*, 115 N.C. App. 697, 701–02 (1994), *aff'd per curiam*, 340 N.C. 256 (1995). The Court of Appeals has, however, declined to require that the trial court make specific findings of fact allocating the time spent between prosecuting and defending. *Mickens*, 103 N.C. App. at 59.

X. **Attorney Fees for Appellate Work.** On remand, trial court may award reasonable attorneys' fees under G.S. 6-21.1 to the prevailing party for services performed during appeal. *Messina v. Bell*, 158 N.C. App. 111, 116 (2003); *Furmick v. Miner*, 154 N.C. App. 460, 465 (2002).

- XI. Attorney Fees Where Judgment Reduced to Zero or Less.** When the claimant's jury verdict of \$25,000 or less in damages against the defendant (\$10,000 or less at the time of the decision) is reduced pursuant to G.S. 1B-4 by the amount paid by a third-party defendant, and thus results in an order of zero compensation from the defendant, the court still has authority to award plaintiff's attorney fees to claimant's attorney under G.S. 6-21.1. *Reinhold v. Lucas*, 167 N.C. App. 735, 740–41 (2005).