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NO. COA11-1128
NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2012

CHRISTOPHER SEAN MILLER and
HEATHER BARNWELL MILLER,
Plaintiffs

v.

Wake County
No. 08 CVS 20745

JOHN T. ORCUTT, the LAW
OFFICES OF JOHN T. ORCUTT,
PC, and JOSH HILLIN,
Defendants

Appeal by plaintiffs and defendants from judgment entered
19 May 2011 by Judge Howard E. Manning, Jr. in Wake County
Superior Court. Heard in the Court of Appeals 23 January 2012.

Stephen Barnwell for plaintiffs.

*Stevens Martin Vaughn & Tadych, PLLC, by K. Matthew Vaughn,
for defendants.*

CALABRIA, Judge.

Both parties appeal the trial court's judgment following a bench trial. The trial court found John T. Orcutt ("Orcutt"), the Law Offices of John T. Orcutt ("the firm"), and Josh Hillin ("Hillin") (collectively "defendants") liable for legal malpractice and awarded Christopher Sean Miller ("Christopher")

and Heather Barnwell Miller ("Heather") (collectively "plaintiffs") \$1,000 in damages. We affirm.

I. Background

On 15 November 2006, plaintiffs purchased a home in Raleigh, North Carolina. Countrywide Home Loans provided the financing for the home, secured by a deed of trust. In addition, plaintiffs borrowed a down payment of \$56,000 for their home from Heather's father, Stephen Barnwell ("Barnwell"). In conjunction with this down payment, Barnwell, a real estate attorney, drafted a deed of trust ("the Barnwell deed of trust") which plaintiffs were instructed to execute. However, plaintiffs failed to execute and file the Barnwell deed of trust for six months, ultimately filing it with the Wake County Register of Deeds on 30 May 2007.

Months later, plaintiffs engaged defendants to represent them in filing for bankruptcy. Plaintiffs expected that all of their unsecured debt would be discharged, but that the deed of trust from Countrywide and the Barnwell deed of trust would not be affected. Defendants reviewed the Barnwell deed of trust and failed to recognize that it would be vulnerable to being set aside in bankruptcy as a preferential transfer. As a result, when defendants assisted plaintiffs in filing for bankruptcy on

21 September 2007, plaintiffs' filings listed the Barnwell deed of trust as exempt.

The bankruptcy trustee, Joseph Callaway ("Callaway"), filed an objection to plaintiffs' proposed exemption because it was considered a preferential transfer under § 547 of the Bankruptcy Code. After researching the matter, defendants recommended that Barnwell cancel his deed of trust, which Barnwell did after investigating the matter.

Callaway believed that Barnwell's action constituted a violation of the automatic stay, and as a result, he filed an action against plaintiffs objecting to their discharge in bankruptcy as well as an action against Barnwell to void the cancellation.

Defendants attempted to resolve the dispute with Callaway. Callaway eventually made an offer to settle the matter for a payment of \$15,000. Plaintiffs were willing to accept this offer, but informed defendants that they expected them to pay that amount. Plaintiffs also informed defendants that they intended to initiate a malpractice action against them. As a result, defendants withdrew from representing plaintiffs.

Plaintiffs then retained a new attorney to handle the remainder of their bankruptcy case. They paid \$1000 for this

new representation. When plaintiffs emerged from bankruptcy, they were no longer legally obligated to pay the \$56,000 Barnwell deed of trust.

Plaintiffs initiated an action against defendants for professional malpractice in Wake County Superior Court. After a bench trial, the trial court determined that defendants were negligent and that plaintiffs were damaged in the amount of \$1000. Plaintiffs and defendants appeal.

II. Standard of Review

In a bench trial in which the [trial] court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (internal quotations and citation omitted).

III. Plaintiffs' Arguments

Plaintiffs raise four issues on appeal: (1) that the trial court erred by making prejudicial statements from the bench during trial; (2) that the trial court erred in finding as fact that plaintiffs were \$41,000 better off due to defendants'

actions; (3) that the trial court erred in awarding plaintiffs only \$1,000 in damages; and (4) that the trial court erred in failing to tax costs against defendants.

A. Statements by the Trial Court

Plaintiffs contend that the trial court erred by making prejudicial statements from the bench during trial. However, plaintiffs failed to object to any of the trial court's statements at trial, and as a result, they cannot raise this issue for the first time on appeal. See N.C.R. App. P. 10(a)(1) (2012) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make"). This argument is overruled.

B. Finding of Fact 15

Plaintiffs argue that the trial court's finding of fact 15 was not supported by competent evidence. This finding states:

15. Plaintiffs received their discharge from the bankruptcy court. As they had anticipated at the start of their bankruptcy case, all of their unsecured debts were discharged. In addition, and contrary to the expectations at the start of the bankruptcy case, the deed of trust and \$56,000 debt in favor of Mr. Barnwell were extinguished. At trial, both Plaintiffs acknowledged that with the extinguishing of

the debt and deed of trust with Mr. Barnwell, they were \$41,000 better off at their end of the bankruptcy case than they had expected to be at the beginning.

In their brief, plaintiffs mischaracterize this finding as a finding that plaintiffs were definitively \$41,000 better off as a result of defendants' actions. However, the trial court's actual finding was that plaintiffs "acknowledged" at trial that they were \$41,000 better off at the end of their bankruptcy case, and this finding is supported by plaintiffs' testimony at trial. Christopher testified on cross-examination as follows:

Q. Now, in fact, the way things have worked out, you got more than you bargained for. In fact, it wiped out all of the debt we talked about, but it also extinguished the lien that Mr. Barnwell had; is that right?

A. Yes.

Q. If this was anybody but Mr. Barnwell, if this was Wells Fargo, for example, you'd have gotten a big old windfall here; is that right?

A. Yes.

Q. Okay. In fact, you'd be about \$41,000 ahead of the game.

A. Yes.

Heather testified similarly during cross-examination:

Q. So isn't it true that you ended up owing \$15,000 when you expected to owe \$56,000, didn't you come out \$41,000 ahead?

A. Because this was for my children this is still a debt that we intend to pay.

Q. Okay. That's your choice, in other words, you actually owe \$41,000 less than you expected to owe at the end of the bankruptcy?

A. Okay. Yes.

Q. Is that right?

A. Yes.

Plaintiffs' respective testimonies fully support the trial court's finding that they acknowledged at trial that they were \$41,000 better off when they emerged from bankruptcy. This argument is overruled.

C. Damages

Plaintiffs argue that the trial court erred in awarding them \$1,000 in damages. Specifically, plaintiffs contend that the undisputed evidence required the trial court to award them \$16,000 in damages. We disagree.

"The trial court's award of damages at a bench trial is a matter within its sound discretion, and will not be disturbed on appeal absent an abuse of discretion." *Helms v. Schultze*, 161 N.C. App. 404, 414, 588 S.E.2d 524, 530 (2003). "In order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could

not have been the result of a competent inquiry." *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988).

In the instant case, the trial court indicated that the court took into consideration defendants' failure to identify the Barnwell deed of trust as a preferential transfer, the adversary proceeding filed against plaintiffs after Barnwell attempted to discharge the deed of trust, the \$15,000 which plaintiffs borrowed to settle that adversary proceeding, plaintiffs hiring of new counsel at a cost of \$1,000, and the discharge of plaintiffs' debt to Barnwell at the conclusion of bankruptcy proceedings, and determined that \$1,000 was an appropriate damages award. Based upon the evidentiary record, we discern no abuse of discretion in the trial court's decision to award plaintiffs \$1,000 rather than the \$16,000 which plaintiffs sought. See *Sherrill v. Boyce*, 265 N.C. 560, 561, 144 S.E.2d 596, 598 (1965) ("Even though, upon plaintiff's evidence, reasonable minds might well differ as to the amount of damages to which she is entitled, yet an abuse of discretion is not manifest."). This argument is overruled.

D. Costs

Plaintiffs argue that the trial court erred by failing to award them costs. We disagree.

"In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court." N.C. Gen. Stat. § 6-20 (2011). In the instant case, the trial court ordered each side to bear their own costs, and there is nothing in the record to suggest an abuse of discretion in this decision. This argument is overruled.

IV. Defendants' Arguments

Defendants raise two arguments on appeal: (1) that the evidence presented at trial was insufficient to establish the standard of care owed to plaintiffs by defendants; and (2) that plaintiffs' evidence only supported an award of nominal damages.

A. Standard of Care

Defendants contend that the trial court erred by finding them liable for legal malpractice. Specifically, defendants claim that plaintiffs failed to present competent evidence of the standard of care required of defendants. We disagree.

An attorney is . . . liable in damages for any injury to his or her client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or which proximately results from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in

attending to the litigation committed to his care.

Wood v. Hollingsworth, 166 N.C. App. 637, 640-41, 603 S.E.2d 388, 391 (2004) (internal quotations and citation omitted). When pursuing an action for legal malpractice, "[p]laintiffs [a]re required to show that defendants . . . failed to live up to the standard of care of members of the legal profession in their legal community or in a similar locality under similar circumstances." *Haas v. Warren*, 341 N.C. 148, 152, 459 S.E.2d 254, 256 (1995).

In the instant case, plaintiffs presented, via deposition, expert testimony from Bentley Leonard ("Leonard"), a bankruptcy attorney from Asheville, North Carolina. Leonard was a board-certified bankruptcy law specialist who practiced in the Western District of North Carolina. In his deposition, Leonard testified that the Barnwell deed of trust would clearly be considered a preferential transfer under 11 U.S.C. § 547(b)(4)(B) (2011), and thus was avoidable in bankruptcy.

Defendants contend that because Leonard practices bankruptcy law in the Western District, he could not competently provide expert testimony regarding plaintiffs' case, which was filed in the Eastern District of North Carolina. However, bankruptcy statutes are federal statutes which apply throughout

the United States. Thus, for the purposes of applying the bankruptcy statutes, there is no discernible difference between the Western and Eastern Districts of North Carolina. Accordingly, Leonard was qualified to testify regarding the standard of care owed by defendants in the instant case, and the trial court did not err by allowing his testimony. Moreover, Leonard's testimony was sufficient to support the trial court's conclusion that defendants had breached their duty of care to plaintiffs. This argument is overruled.

B. Damages

Defendants argue that the trial court erred by awarding \$1,000 in damages to plaintiffs. Specifically, defendants contend that the evidence presented by plaintiffs only supported an award of nominal damages. We disagree.

Defendants emphasize that the discharge of plaintiffs' debt to Barnwell gave plaintiffs a \$41,000 benefit. Thus, defendants contend, plaintiffs were required to show monetary damages above \$41,000 before they could recover. However, as previously noted, the damages awarded are in the trial court's sound discretion. *Helms*, 161 N.C. App. at 414, 588 S.E.2d at 530. In the instant case, the trial court's findings of fact demonstrate that it considered all of the evidence, including

the discharge of plaintiffs' debt to Barnwell, and determined that \$1,000 was an appropriate damage award. We once again find no abuse of discretion in this determination. This argument is overruled.

V. Conclusion

The trial court's finding of fact 15 was supported by competent evidence. Plaintiffs failed to object to any statements made by the trial court during their trial, and therefore, they waived any objection to these statements. The trial court properly allowed Leonard to testify regarding the standard of care for a bankruptcy attorney, and Leonard's testimony supported the trial court's conclusion that defendants breached their duty of care to plaintiffs. The trial court did not abuse its discretion in awarding plaintiffs \$1,000 in damages and in ordering each side to pay its own costs. The trial court's judgment is affirmed.

Affirmed.

Chief Judge MARTIN and Judge MCGEE concur.

Report per Rule 30(e).