

ASKING FOR ATTORNEY'S FEES
IS NOT AS HARD AS YOU THINK
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These are “trying” times. I mean that literally and figuratively. We live in a society where it has become extremely difficult to get good verdicts in our small cases. However, the case law is in our favor regarding attorney’s fees, and it is now economically feasible to “try” those cases.

N.C.G.S. §6-21.1 was enacted to allow the trial court to award reasonable attorney’s fees (taxed as part of the costs) where the verdict for recovery of damages is less than \$10,000.00.¹ The legislature intended this statute to “provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim.”²

Why is the law so good? First, note that the trial court’s ruling will not be disturbed on appeal absent a showing of abuse of discretion.³ An abuse of discretion occurs when the trial court’s ruling “is so arbitrary that it could not have been the result of a reasoned decision”.⁴ The key to getting attorney’s fees is to make sure your trial court makes a “reasoned decision”. This has been helped along by *Washington v. Horton*⁵, which, in 1999, became the seminal case on attorney’s fees under 6-21.1 (ironically upon appeal of an award of attorney’s fees by none other than Allstate Insurance Company).

In *Washington v. Horton*, the Court listed six factors to be considered by the trial court as follows:

- (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 unwarranted refusal by an insurance company, the context in which the dispute arose (although the Court also noted that this factor is only to be considered in cases where the insurance company was a named defendant and will not be further addressed in this article).
- (5) The timing of the settlement offers;

(6) The amounts of the settlement offers as compared to the jury verdict [citation omitted]; and the whole record.

Factor #1 (settlement offers made prior to the filing of the lawsuit) is the first factor the Court considers. It has been held that reasonable attorney's fees can be awarded even where the jury verdict is less than the pre-suit offer. In *Hardesty v. Aldridge*, in a published opinion, the Court of Appeals held that even where the jury verdict was \$350.00 and the pre-suit offer was \$1,887.50, or more than five (5) times the jury verdict, attorney's fees were still allowed as long as the Court made a finding as to Washington factor number 1.⁶ This means that you don't have to "win" every factor, just that the trial court has to make a finding as to that factor.

Factor #2 (comparing Offer of Judgment to Judgment Finally Obtained) receives perhaps the most attention because this is the factor that enables an attorney to get a verdict less than the Offer of Judgment, yet still get an award of attorney's fees. The Judgment Finally Obtained (JFO) is the "amount ultimately entered representing final judgment (ie, verdict as modified by any applicable adjustments...)"⁷ In calculating the JFO, you add together the verdict, interest, attorney's fees (that you are requesting) and costs. In calculating this amount, you can claim both attorney's fees and costs incurred both before and after the Offer of Judgment.⁸

Example:

Offer of Judgment: \$5,000.00	Verdict:	\$2,000.00
Verdict: \$2,000.00	Interest:	\$ 160.00
	Attorney's Fees:	\$9,105.00
	Costs:	\$1,448.00
	Judgment Finally Obtained:	\$12,713.00

In this example, even though the verdict was substantially less than the Offer of Judgment, the actual JFO is two and a half times greater than the Offer of Judgment. This seems to be an important factor to the trial court and allows it to award attorney's fees in cases where the Offer of Judgment has prevailed.

Since *Washington v. Horton* was filed on February 16, 1999, thirteen cases have been handed down from our Court of Appeals and Supreme Court addressing whether attorney's fees awarded pursuant to NCGS §6-21.1 were reasonable.⁹ Out of the thirteen cases evaluated, seven of those cases had Verdicts less than the Offer of

Judgment, but the JFO exceeded the Offer of Judgment. The Courts are saying that when the “judgment finally obtained” exceeds the Offer of Judgment, even where the jury verdict standing alone was less than the offer, the trial court’s granting of attorney’s fees motions would be upheld.¹⁰

Factor #3 (whether defendant unjustly exercised “superior bargaining power”) can be a difficult factor to meet, especially if your Verdict is less than the pre-suit offers and/or the Offer of Judgment. Defense attorneys will often argue that they are not using superior bargaining power, because the trend is for extremely small verdicts in these types of cases. Thus, they claim, they are merely offering what is becoming the norm in jury verdicts. However, one way in which an insurance company clearly uses unjust, superior bargaining power is when they make “take it or leave it” type offers.¹¹ Another example of unjust, superior bargaining power may be when an insurance company refuses to even respond to an offer, or makes only one offer throughout the entire litigation process without considering any type of movement to get the case settled. But also be aware, it is probably okay to concede to the court that you cannot meet this factor. In *Robinson v. Shue*, the Plaintiff’s attorney conceded that the insurance company had not exercised superior bargaining power. The Court of Appeals acknowledged this concession.¹² Remember, the key is to have the trial court consider the factor; you don’t have to actually win the factor.

Factors #5 and #6 can often be addressed together (timing of settlement offers and amount of offers compared to the verdict). The Court of Appeals in North Carolina has held that a judgment entered by the trial court granting the Plaintiff’s Motion for Attorney’s Fees would be affirmed on appeal, as long as the Court makes Findings of Fact regarding the timing of the offers, and considers the whole record.¹³ Several recent cases have held that attorney fees awarded by trial courts will be upheld even where the settlement offers were more than the jury verdict.¹⁴ As long as the Court reviews the record as a whole and cites within its Order the amount of the settlement offers and the jury verdict, the trial court’s discretion in granting the Plaintiffs Motion for Attorney’s Fees would not be disturbed on appeal.¹⁵

While it is important for the trial court to consider all of the factors, detailed findings are not required for each factor. It is not necessary that the Court enter a finding of fact on each and every factor outlined in *Washington v. Horton*.¹⁶ As long as there are adequate findings of fact based on the whole record, it is not

reversible error for the trial court to not make a specific finding of fact on each and every element as outlined in *Washington v. Horton*.¹⁷ In three of the cases handed down since *Washington*, the trial court did not make a Finding of Fact as it related to whether the defendant unjustly exercised superior bargaining power. The Court held that this was not reversible error, since the Court had entered Findings of Fact as it related to the other *Washington v. Horton* factors, and upheld the trial court's granting of the Plaintiff's Motion for Attorney's Fees.¹⁸

Once the Court is satisfied that the trial court reviewed the entire record, and in doing so, reviewed the *Washington v. Horton* factors, they will make a determination that attorney's fees should be awarded. If the trial court is inclined to award fees, it must determine whether the record supports a finding as to the amount to be awarded. "To determine if an award of counsel fees is reasonable, the entire 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."¹⁹ Be aware that many defense attorneys will argue that you should be awarded a contingent fee based upon the amount of the verdict. However, because the statute provides for "reasonable fees", the amount of the fees should be based upon the actual work performed by the attorney.²⁰ Therefore, it is important that you submit an accurate reflecting of the time that you expended on the case for the judge to consider the reasonableness of your fees.

In order to successfully argue a Motion for Attorney's Fees, you should file your Motion and ensure that it is calendared before the trial judge, as the legislature contemplated that the judge who presided at the trial would determine whether a fee for the attorney of the party recovering should be allowed and, if so, the amount. The judge presiding over the trial, would be in a better position than any other to make this determination.²¹ It is also very acceptable to have your Motion ready at the conclusion of the trial, and you can just plug in the amount of the verdict and the final amount of your hours expended. You can also agree with opposing counsel to file Motions and have the arguments considered by written Brief or Memorandum. Whichever way you choose to have your request for fees considered, it is important that the trial judge make the requisite findings of fact pursuant to *Washington*. In analyzing the cases handed down since *Washington*, the first four out of five cases were remanded back to the trial court to make findings of fact regarding the *Washington* factors. Since those first five cases, all other attorney's fees have been upheld because the trial courts made the necessary findings of fact, and the

Appellate court will not disturb said award absent abuse of discretion.²² Clearly, it took awhile for attorneys and trial judges to realize the necessity of addressing all of the Washington factors, but once this occurred at the trial court level, all of the attorney fees awarded has been consistently upheld.

If you do a Memorandum of Law in support of your Motion, you need to address each of the *Washington* factors as well as the case law supporting awards of attorney's fees. You should also include an Affidavit of Counsel (signed by yourself) attesting to the *Washington* factors and how they apply to your case, as well as information regarding specifically outlining the time and labor you expended, the skill required in handling personal injury cases, and your experience and ability in handling these types of cases. It is good to include the percentage of like cases you handle, how many cases per year you try, organizations you belong to, seminars you give, or other education you may have in the litigation arena.

In addition to an Affidavit of Counsel, you should file Affidavits of supporting attorneys (no more than three should be needed) from the same county in which you tried your case. Each of these attorneys should know the factual background of your case, the amount of hours you are submitting for consideration, the hourly rate you charge, and something about your skill and experience. This knowledge should be reflected in the Affidavit as well as a statement that the hourly rate requested is fair, just and reasonable and within the standard prevailing in the legal community for attorneys with like skill, learning and experience.

Remember, these are "trying" times. Because attorneys are now clearly able to be awarded attorney's fees in small cases (less than \$10,000), even when their verdicts are less than pre suit offers or the Offer of Judgment, it is now economically feasible (if not profitable) to try these cases when insurance companies are being unreasonable in their offers (as they so often can be).²³ Attorney fee awards are consistently being upheld by our Appellate courts, even when the verdicts are substantially less than pre suit offers or the Offer of Judgment, as long as the trial court considers and makes findings as to the Washington factors.

¹ N.C.G.S. §6-21.1

² *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973)

³ *West v. Tilley*, 120 N.C.App. 145, 461 S.E.2d 1 (1995)

⁴ *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C.App. 101, 109, 493 S.E.2d 797, 802 (1997), disc. Review denied, 347 N.C. 670, 500 S.E.2d 84 (1998)

⁵ *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999)

⁶ *Hardesty v. Aldridge*, 147 N.C. App. 776, 557 S.E.2d 136 (2001)

⁷ *Poole v. Miller*, 342 N.C. 349 464 S.E.2d 409(1995)

⁸ *Poole v. Miller, Id.*

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

Phillips v. Warren, 568 S.E.2d 230, 2002 N.C.App. LEXIS 959 (2002)

⁹ Chart of cases handed down since *Washington v. Horton*; 15 cases have been handed down; two are not included in the chart.

Blackmon v. Bumgardner, 135 N.C.App. 125, 519 S.E.2d 335 (1999) (not included because amount of verdict and Offer of Judgment were not included in the case); *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000) (not included as dealt with a federal statute awarding attorney's fees)

¹⁰ *Davis v. Kelly*, 147 N.C. App. 102; 554 S.E.2d 402 (2001); *Hardesty v. Aldridge, Id.*; *Thorpe v. Perry Riddick*, 144 N.C. App. 567; 551 S.E.2d 852 (2001)

¹¹ *Stillwell v. Gust*, 148 N.C. App. 128; 557 S.E.2d 627 (2001)

¹² *Robinson v. Shue*, 145 N.C.App. 60, 550 S.E.2d 830 (2001)

¹³ *Thorpe v. Perry-Riddick, Id.*

¹⁴ *Davis v. Kelly, Id.*

Thorpe v. Perry-Riddick, Id.

Hardesty v. Aldridge, Id.

¹⁵ *Hardesty v. Aldridge, Id.*

Olson v. McMillian, 144 N.C.App. 615; 548 S.E.2d 571 (2001)

¹⁶ *Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001).

¹⁷ *Hardesty v. Aldridge, Id.*

¹⁸ *Hardesty v. Aldridge, Id.*

Davis v. Kelly, Id.

Olson v. McMillan, Id.

¹⁹ *Brookwood Unit Ownership Association v. Deland*, 124 N.C. App. 446, 477 S.E.2d 225 (1996)

²⁰ *Epps v. Ewers*, 90 N.C. App 597, 369 S.E.2d 104 (1988)

²¹ *Hicks v. Alberston, Id.*

²² Chart of cases handed down since *Washington v. Horton*

²³ Chart of cases from NCATL Auto Torts Verdicts Database