Rel: July 31, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1180935

Ex parte Sandra Shinaberry

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: Sandra Shinaberry

v.

Mark Wilson, as guardian ad litem for G.G., H.G., N.P., and S.P., minors)

(Shelby Circuit Court, CV-14-900876; Court of Civil Appeals, 2180359)

BOLIN, Justice.

Sandra Shinaberry petitioned this Court for a writ of certiorari seeking review of the Court of Civil Appeals' no-opinion affirmance of the Shelby Circuit Court's judgment

awarding a fee to a guardian ad litem appointed to represent four minors for the sole purpose of making a recommendation to the circuit court on whether a proposed settlement was in the minors' best interest. See Shinaberry v. Wilson (No. 2180359, August 9, 2019), ___ So. 3d ___ (Ala. Civ. App. 2019)(table). We granted the petition to consider Shinaberry's arguments that the attorney fee was unreasonable.

Facts and Procedural History

In 2012, Shinaberry's automobile rear-ended an automobile being driven by Sherri Guy. Guy's three minor children and a minor stepchild were in her car. The children were treated for soft-tissue injuries. The children, by and through their parents, sued Shinaberry and her insurer. In April 2015, a settlement was reached between Shinaberry and her insurer and the four minor children. On May 6, 2015, Mark Wilson was appointed as guardian ad litem for the four children for the purpose of determining if the settlement was fair to the children. A pro ami hearing was scheduled for June 3, 2015. However, the hearing was canceled when one of the parties and Wilson did not appear. A second pro ami hearing was scheduled for June 29, 2015, but it was continued because Wilson asked

for time to interview the family physician of one of the children. It also appears that Wilson sought permission to have a physician examine one of the children to determine if the child's headaches were related to the car accident. Electronic mail exchanged between the attorneys for the parties indicates that Wilson failed to communicate with them for a nine-month period.

On October 6, 2016, Shinaberry filed a motion to enforce the settlement or, in the alternative, to appoint a new guardian ad litem. On January 23, 2017, the circuit court held a hearing on the motion, at which it decided to hold the motion in abeyance pending the rescheduling of the pro ami hearing. On January 29, 2018, a final pro ami hearing was held to approve the settlement and Wilson's fee for serving as guardian ad litem. On February 6, 2018, the circuit court entered an order approving the settlement, which awarded a total of $15,230 to the four minor children; after their counsel was paid his attorney fee of $4,470 and their medical expenses were satisfied, they received a total of $4,647.18. Wilson was awarded $8,000 for his services as guardian ad litem based on his affidavit that he worked 32 hours at a rate

of $250 an hour.[1] It is undisputed that Wilson never prepared a report with a recommendation as to whether the settlement was in the best interest of the minors. It also appears that this was the first case in which the circuit court had appointed Wilson as a guardian ad litem.

On February 7, 2018, Shinaberry filed an objection to the amount of Wilson's fee on the ground that there was no documentation, evidence, or itemization of his claimed 32 hours of work on the case. Shinaberry also argued that Wilson had unnecessarily delayed the settlement, had failed to provide the circuit court with a report, had increased costs of the litigation as a result of requiring multiple hearings and failing to communicate, and had exceeded the duty of a guardian ad litem in a pro ami proceeding. On February 26, 2018, the circuit court held a hearing on Shinaberry's objection. At the hearing, it was noted that Wilson had had chiropractic bills paid as part of the settlement. However, it was also noted that those bills were incurred subsequent to the parties' settlement agreement in April 2015. Shinaberry

[1]The circuit court determined that the hourly amount should be $250 based on payment for "work in circuit court."

also argued that the fee awarded the guardian ad litem was unreasonable when compared to the fees paid to the attorneys who had represented the parties in the underlying action and to the damages awarded the minors. The circuit court indicated that it was not concerned with the attorney fees paid to the parties' attorneys. That same day, the circuit court reduced Wilson's fee to $7,750 because Wilson appeared by telephone at one of the hearings.

Discussion

In Ex parte CityR Eagle Landing, LLC, [Ms. 1180630, Oct. 25, 2019] ___ So. 3d ___, ____ (Ala. 2019), this Court stated:

> "In a pro ami hearing, the guardian ad litem does not authorize or consent to the settlement. Instead, the guardian ad litem prepares a report with a recommendation on whether the proposed settlement is in the best interest of the minor based on the claims, injuries, and future needs of the minor and the guardian ad litem's experience in the area of personal injury."

See Pharmacia Corp. v. McGowan, 915 So. 2d 549 (Ala. 2004)(remanding case for entry of order explaining trial court's reasons for awarding fee when guardian ad litem had reviewed the settlement and had recommended to the court that the settlement was in the best interest of the minors); see also Burke v. Smith, 252 F.3d 1260 (11th Cir. 2001)(applying

Alabama law and holding that the district court, at the time of the settlement, should have conducted a fairness hearing to make the settlement binding on a minor party).

Rule 17(d), Ala. R. Civ. P., governs the use and compensation of guardians ad litem in civil cases and requires the assessment of a reasonable fee for the legal services rendered by a guardian ad litem. The rule, in pertinent part, provides:

> "(d) ... Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint to serve in that capacity some person who is qualified to represent the minor or incompetent person in the capacity of an attorney or solicitor .... In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for services rendered in such cause, to be taxed as a part of the costs in such action, and which is to be paid when collected as other costs in the action, to such guardian ad litem."

"The matter of the guardian ad litem's fee is within the discretion of the trial court, subject to correction only for abuse of discretion." Englund v. First Nat'l Bank of Birmingham, 381 So. 2d 8, 12 (Ala. 1980)(citing Commercial Standard Ins. Co. v. New Amsterdam Cas. Co., 272 Ala. 357, 362, 131 So. 2d 182, 186 (1961)).

Although Rule 17(d) does not provide guidance on how a guardian ad litem's fee is to be established, this Court has applied the criteria that a court might consider when determining the reasonableness of an attorney fee:

> "'(1) [T]he nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances.'"

McGowan, 915 So. 2d at 554–55 (quoting Van Schaack v. AmSouth Bank, N.A., 530 So. 2d 740, 749 (Ala. 1988)).

> "These criteria are for purposes of evaluating whether an attorney fee is reasonable; they are not an exhaustive list of specific criteria that must all be met. Beal Bank v. Schilleci, 896 So. 2d 395, 403 (Ala. 2004), citing Graddick v. First Farmers & Merchants Nat'l Bank of Troy, 453 So. 2d 1305, 1311 (Ala. 1984)."

McGowan, 915 So. 2d at 553.

McGowan involved toxic-tort actions against a manufacturer. After the parties entered into a settlement agreement, the trial court appointed an attorney to serve as

guardian ad litem for the minor plaintiffs and as administrator ad litem for the estates of those plaintiffs who had died during the course of the litigation. Her appointment as administrator ad litem was "'for the limited purpose of considering the Settlement Agreement and determining whether to execute (and if a determination to execute is made, then to execute) releases on behalf of the estates.'" 915 So. 2d at 551. The attorney reviewed the settlement and reported to the court that it was in the best interests of the minors and the estates. The trial court ordered the manufacturer to pay the attorney $284,000 as an attorney fee.

The attorney in McGowan did not submit to the trial court any records evidencing the actual time she had spent representing her wards. Instead, the attorney argued that a reasonable attorney fee would be $500 for each of the 568 plaintiffs she represented, or "at least $284,000." She also sought reimbursement of expenses. The attorney supported her petition for an attorney fee with the affidavits of two attorneys who purported to serve regularly as guardians ad litem and who stated their opinion that the fee was reasonable under the circumstances.

On appeal, this Court stated:

> "The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and its determination on such an issue will not be disturbed on appeal unless in awarding the fee the trial court exceeded that discretion. State Bd. of Educ. v. Waldrop, 840 So. 2d 893, 896 (Ala. 2002); City of Birmingham v. Horn, 810 So. 2d 667, 681–82 (Ala. 2001); Ex parte Edwards, 601 So. 2d 82, 85 (Ala. 1992), citing Varner v. Century Fin. Co., 738 F.2d 1143 (11th Cir. 1984).
>
> "....
>
> "We defer to the trial court in an attorney-fee case because we recognize that the trial court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in an attorney-fee determination. Horn, 810 So. 2d at 681–82, citing Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Nevertheless, a trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how it calculated the attorney fee. Horn, 810 So.2d at 682, citing American Civil Liberties Union of Georgia v. Barnes, 168 F.3d 423, 427 (11th Cir. 1999); see also Hensley, 461 U.S. at 437, 103 S.Ct. 1933.
>
> "In this case, the trial court's order awarding an attorney fee of $284,000 provides no indication as to whether the trial court considered any of the criteria outlined by this Court in Van Schaack [v. AmSouth Bank, N.A., 530 So. 2d 740, 749 (Ala. 1988)]. Indeed, the trial court provided no explanation for its award. It is particularly troublesome that McGowan provided the trial court with no records of the time she spent on behalf of the plaintiffs she represented in this matter. It is

> generally recognized that the 'first yardstick that is used by the trial judges [in assessing the reasonableness of an attorney-fee request] is the time consumed. Peebles v. Miley, 439 So. 2d 137, 141 (Ala. 1983). Further, we note that, in its order appointing McGowan as administrator ad litem for the estates of the deceased plaintiffs, the trial court stated that Pharmacia 'shall pay the administrator ad litem her customary rate for her time spent on this action.' Yet the trial court awarded McGowan $134,000 in fees for representing the 268 estates, without being provided any time records and without any explanation for the apparent deviation from the trial court's own prescribed method of calculating McGowan's compensation."

McGowan, 915 So. 2d at 552–53 (footnote omitted). We remanded the case for the trial court to enter an order explaining its decision and articulating reasons for that decision. On remand, the trial court entered an order articulating its reasons for the attorney-fee award. However, this Court, on return to remand, held that the trial court's award was excessive, stating:

> "In remanding the case to the trial court, we noted that we were particularly troubled by the fact that McGowan had provided the trial court with no records of the time she had expended representing her wards. We noted: 'It is generally recognized that the "first yardstick that is used by the trial judges [in assessing the reasonableness of an attorney-fee request] is the time consumed." Peebles v. Miley, 439 So. 2d 137, 141 (Ala. 1983).' 915 So. 2d at 553. On ... remand, the trial court responded to our concern as follows:

> "'[T]his Court notes that although attorneys may be paid on an hourly basis, other fee structures are common within ... the Bar. These include awards on a contingency basis and the use of "flat fees" for working specific tasks (for example, drafting a will, handling a criminal or domestic relations matter, etc.). Although time spent in a case has often been the first yardstick used by the trial judge in setting a fee, it is not the only measure of a fee, and indeed need not even be considered by the judge at all. See Peebles [v. Miley], [4]39 So. 2d [137] at 141 [(Ala. 1983)](emphasis added).'

"We do not agree with the trial court's assessment that Peebles v. Miley, 439 So. 2d 137 (Ala. 1983), stands for the proposition that a trial court, in determining an attorney-fee award, need not consider 'at all' the time spent on the matter. To the contrary, Peebles states that 'all of the [12 criteria] must be taken into consideration by the trier of the facts.' 439 So. 2d at 141. Peebles does state that 'we must beware of slavish adherence to the time criterion to the exclusion of other criteria.' 439 So. 2d at 141. But we cannot agree with McGowan and the trial court that the reasonableness of an attorney-fee award should be -- nor are we convinced that it can be -- assessed with complete disregard for the time spent on the matter. See, e.g., Clement v. Merchants Nat'l Bank of Mobile, 493 So. 2d 1350, 1355 (Ala. 1986) (reversing trial court's award of $200,000 to guardians ad litem who expended 373.55 hours, which was about $535 per hour, '[e]ven taking into consideration the large sum of money involved in this suit and the fact that the guardians ad litem were representing a minor').

"We proceed, nonetheless, to consider the manner in which the trial court did assess the

> reasonableness of McGowan's requested attorney fee. On original submission, we were unable to ascertain whether the trial court had based its award on McGowan's suggested calculation of $500 per plaintiff. The trial court's order on ... remand specifically states that McGowan 'is hereby awarded a fee of $500 per ward (300 minors and 268 estates) for a cumulative attorney's fee of $284,000.' In so concluding, the trial court considered affidavits of two attorneys who purported to serve regularly as guardians ad litem. The attorneys averred in those affidavits that the normal fee for a guardian ad litem or an administrator ad litem is 'between $400.00 to $1,000.00 per plaintiff, in a simple, uncomplicated domestic relations case' and that a reasonable fee for serving as a guardian ad litem is 'between $500 to $1,000 per ward in a simple Probate matter.' We do not doubt that a fee ranging from $400 to $1,000 per ward would be reasonable in an uncomplicated domestic-relations case or in a simple probate matter. However, in Peebles, this Court warned against determining the reasonableness of an attorney fee in a 'wooden inflexible manner,' stating that the determination instead 'should be done so that all factors will be given their proper interplay.' 439 So. 2d at 143. In that case, the Court submitted that a general concession that, in a collections matter, an attorney fee of 20% of the collected amount is reasonable would result in the 'anomalous situation' in which the routine collection of a $2,000,000 promissory note would allow for an attorney fee of $400,000. 439 So. 2d at 143. We submit that conceding that an attorney fee of $500 per ward is reasonable in a probate or domestic-relations matter does not necessarily lead to the conclusion that $500 per ward is a reasonable method of calculating a fee for a guardian ad litem with 568 wards in a mass-tort case. Thus, we cannot conclude that $500 per ward is a reasonable basis for calculating McGowan's fee.

> "Furthermore, as we stated in Peebles, we agree with the admonition of the American Bar Association that '"a fee is clearly excessive when after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."' 439 So. 2d at 143. After a review of the facts, we are convinced that an award of an attorney fee of $284,000 to McGowan is excessive.
>
> "We acknowledge the reasons the trial court offers to bolster the award it arrived at by multiplying $500 per ward by the 568 wards; however, we need not address the soundness of those reasons, because we conclude that the trial court's method of calculating the award at the outset -- that is, with complete disregard for the time expended by McGowan and in applying what might be a 'reasonable fee' in a completely different context -- was unreasonable.
>
> "We conclude that the trial court exceeded its discretion in awarding McGowan an attorney fee of $284,000. We, therefore, reverse the trial court's judgment and remand the case for proceedings consistent with this opinion."

McGowan, 915 So. 2d at 555–57 (footnotes omitted).[2]

---

[2]We recognize that the Court of Civil Appeals in Roberts v. Roberts, 189 So. 3d 79 (Ala. Civ. App. 2015), and T.C.M. v. W.L.K., 248 So. 3d 1 (Ala. Civ. App. 2017), affirmed fees awarded to guardians ad litem, applying the attorney-fee factors set out in Van Schaack v. AmSouth Bank, N.A., 530 So. 2d 740, 749 (Ala. 1988). However, Roberts involved a guardian ad litem appointed in a divorce case, and T.C.M. involved a guardian ad litem appointed in an adoption. Moreover, in Roberts, the guardian ad litem itemized his services, and in T.C.M. the record supports the actions taken by the guardian ad litem.

In the present case, the minors were involved in a rear-end collision as a result of which they suffered soft-tissue injuries. The parties entered into a settlement agreement, and the guardian ad litem was appointed to evaluate the settlement agreement and to determine whether it was in the best interest of the minors. Wilson failed to itemize the services he performed in his limited role in this personal-injury case in which there the minors suffered no long-term injuries. Wilson states that he spent 32 hours working on this case; however, he failed to provide the parties and the court with a report giving his recommendation, nor do we know how he spent those 32 hours or whom he talked to or what he reviewed as part of his evaluation. He delayed the parties' settlement by failing to communicate with the parties' attorneys for a nine-month period. It also appears that Wilson took on tasks that were either unnecessary or outside his limited role. It also appears that the circuit court arbitrarily chose $250 per hour as a reasonable hourly amount for "work in circuit court" without considering the guardian ad litem's limited role, the nature of the underlying action, or the guardian ad litem's experience (or lack thereof) in such matters. Additionally,

the fee awarded Wilson is almost twice the damages awarded the minor plaintiffs and almost twice the fee awarded the attorneys who represented the plaintiffs. As this Court stated in Peebles v. Miley, 439 So. 2d 137, 143 (Ala. 1983), we agree with the admonition of the American Bar Association that "'a fee is clearly excessive when after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.'" Such is the case here.

Conclusion

Based on the foregoing, we hold that the circuit court exceeded its discretion in awarding Wilson $7,750 as a fee because the record contains insufficient evidence to support that fee. We reverse the Court of Civil Appeals' affirmance of that award and remand this case to that court for it to reverse the circuit court's judgment and remand the case to the circuit court for it to reconsider the amount of reasonable and necessary fees in accordance with this opinion.[3]

[3]We note that, when an appellate court remands a case, the trial court's authority is limited to compliance with the directions provided by the appellate court; it does not have

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

---

the authority to reopen for additional testimony except where expressly directed to do so. Madison Cty. Dept. of Human Res. v. T.S., 53 So. 3d 38 (Ala. 2009).