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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2009-2010

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**Madison County Department of Human Resources**

**v.**

**T.S., by her mother and next friend F.M.,  
and F.M., individually**

**Appeal from Limestone Circuit Court  
(CV-08-292)**

STUART, Justice.

Madison County Department of Human Resources ("DHR"), the legal guardian of T.S., appeals the trial court's judgment approving the settlement of a personal-injury claim involving

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T.S. and approving an attorney fee in the amount of \$262,500, plus litigation expenses. We remand with directions.

#### Facts and Procedural History

In November 2006, DHR had temporary legal custody of T.S., a 13-year-old, hearing impaired, mute quadriplegic who resided at Ability Plus, Inc., a group home. Being severely mentally disabled and suffering from cerebral palsy, T.S. was unable to dress herself, bathe herself, feed herself, or perform any basic living skills without substantial assistance. On November 14, 2006, an employee of Ability Plus left T.S. unattended, in a bathtub filled with water the temperature of which was approximately 140 degrees Fahrenheit. T.S. sat in the tub of hot water until another employee noticed some of T.S.'s skin floating around her in the tub and removed her. T.S. suffered second- and third-degree burns to both her feet and ankles, her buttocks, and her bilateral posterior upper thigh and bilateral medial thigh area.

On August 4, 2008, F.M., T.S.'s mother, entered into a contingency-fee contract with Doug Fees, a lawyer with The Cochran Firm, to recover damages on claims against any and all

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parties for the injury to T.S. The contingency-fee contract provided:

"[F.M.] agrees that said attorneys shall receive for their services a sum equal to thirty-three and one-third percent (33 1/3 %) of the total recovery so obtained.

"It is understood that the attorney's fee is computed based upon 33 1/3 % of the total recovery. It is also understood that the expense necessarily incurred by said attorneys in the investigation and preparation of this claim will be deducted from the balance of the proceeds after payment of attorney fees."

On August 22, 2008, Fees filed a complaint on behalf of T.S., a minor suing by and through her mother and next friend F.M., and F.M., individually (hereinafter referred to collectively as "F.M."), against Ability Plus, the group home where T.S. was injured; Cora, Inc., d/b/a/ Mr. Rooter, the plumbing company that installed a heater in the bathtub a week before T.S. was injured; and various officers and employees of Ability Plus. The complaint included claims of negligence/wantonness, negligence/wantonness per se, vicarious liability, negligent hiring/retention, negligent/wanton supervision, product liability, breach of implied warranty, violation of the Alabama Extended Manufacturer's Liability

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Doctrine, failure to warn, and loss of consortium. DHR was not a party to the lawsuit.

In November 2008, the parties agreed to participate in mediation, and, in a one-day session, the parties agreed upon a confidential settlement. A settlement summary indicates that the total settlement was in the amount of \$787,500. After the deduction of litigation expenses (\$29,315.99), the attorney fee (\$262,500), Alabama Medicaid's subrogation lien (\$85,628.81),<sup>1</sup> and F.M.'s loss-of-consortium award (\$50,045.20), the remainder was to be used to purchase an annuity to fund a special-needs trust paying T.S. \$1,780 a month for her care for her life. The annuity was guaranteed for 30 years.<sup>2</sup>

At the hearing to approve the settlement, the trial court viewed DHR as an indispensable party and refused to approve the settlement without DHR's consent. When DHR was contacted, it refused to consent to the settlement. F.M. then filed a motion to add DHR as an indispensable party. In a response to

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<sup>1</sup>The record indicates that Medicaid's lien has been reduced to \$72,426.

<sup>2</sup>The \$12,732.50 fee of the attorney who created the special-needs trust was included in the litigation expenses.

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the motion to add it as an indispensable party, DHR argued, in pertinent part:

"The attorney fee request is unreasonable, excessive, and may violate the prohibition of Rule 1.5(e)(4) of the Alabama Rules of Professional Conduct against charging an excessive attorney fee. The \$262,500 attorney fee requested represents 33 1/3 % of the total settlement amount of \$787,500 (if the settlement summary [provided to DHR] reflects the total settlement amount correctly). Such a large fee amount and percentage is excessive and unreasonable in a case that was settled in the first year of litigation, before conducting extensive discovery. An attorney fee award of approximately 15% is more reasonable, especially considering the needs of [T.S.] for long-term financial assistance due to her injuries."

Fees, on behalf of F.M., responded, arguing that the attorney fee of 33 1/3 % of the settlement, plus expenses, was reasonable in light of both the standard contingency fee in a personal-injury case and the fact that when he accepted the case he had only three months before F.M.'s claim would be barred by the statute of limitations. In support of his fee, Fees executed an affidavit, stating:

"1. I reside in Huntsville, Alabama. I graduated from the University of Alabama School of Law in 1983, and was licensed to practice in Alabama in September 1983. For the past 25 years, my practice has focused exclusively in representing victims of serious injury or death due to the wrongful conduct of others.

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"2. On August 4, 2008, I was retained to represent [F.M. and T.S.]. We agreed upon a 33-1/3 [%] contingency fee, plus expenses, with the fee for services to be paid only if there was a recovery.

"3. The expenses incurred in bringing about a successful recovery are the usual and customary expenses my firm advances on cases involving serious injury or death.

"4. The total recovery in this case was \$787,500.00. Pursuant to the Professional Service Agreement executed by myself and [F.M.], my fee constitutes 33-1/3% of that recovery or \$262,500.00, plus expenses."

Fees also submitted affidavits from two attorneys who practice in Huntsville and who stated that, in their opinions, the attorney fee of \$262,500 (33 1/3 % of \$787,500), plus expenses, was reasonable.

The trial court added DHR as a party and conducted a hearing to determine whether to approve the settlement. No testimony was taken or evidence admitted at the hearing. At the hearing DHR challenged the reasonableness of the attorney fee. Fees acknowledged that the only evidence in support of the reasonableness of the attorney fee was the affidavits attached to his response and the case file. The trial court entered an order on March 6, 2009, approving the settlement. With regard to the attorney fee, the order stated:

"The Court has been advised that out of the proceeds of the settlement, plaintiff's attorney, Douglas J. Fees, is requesting to be paid an attorney's fee in the amount of \$262,5000.00 plus reimbursement of litigation expenses in the amount of \$29,315.99. Based upon the evidence, the Court concludes that the attorney fees and expenses sought by counsel are just, fair and equitable for the service he has rendered."

In April 2009, DHR filed a motion to alter, amend, or vacate the judgment insofar as it approved the attorney fee and expenses, stating:

"COMES NOW, Madison County Department of Human Resources (hereafter DHR) legal custodian of [T.S.] and moves this court to alter, amend, or vacate its final order filed March 6, 2009, approving attorney fees and expenses in the settlement of this case. For cause, DHR avers as follows:

"1. The final order filed March 6, 2009, after a pro[chein] ami hearing approved attorney fees and expenses for plaintiff counsel totaling \$291,815.99 (\$262,000 fees and \$29,815.99 expenses) or 37% of the settlement total of \$787,500.

"2. The court's order fails to meet legal requirements regarding a determination of reasonable attorney fees and expenses. '[A] trial court's order regarding an attorney fee must allow for meaningful appellate review by articulating the decision made, the reasons supporting those decisions, and how it calculated the attorney fee.' Pharmacia Corp. v. McGowan, 915 So. 2d 549 (Ala. 2004) (quoting City of Birmingham v. Horn, 810 So. 2d 667, 681-82 (Ala. 2001)); see also Love v. Hall, 940 So. 2d 297 (Ala. Civ. App. 2006) (reversing an attorney fee award where the order 'contain[ed] no findings').

"3. The court order failed to discuss or comply with the requirements of Peebles v. Miley, 439 So. 2d 137 (Ala. 1983), for determination of the reasonable attorney fees.

"4. The approved attorney fees and expenses are unreasonable and excessive. Rule 1.5(e)(4), Ala. R. Prof. Cond.; Reynolds v. First Alabama Bank of Montgomery, N.A., 471 So. 2d 1238 (Ala. 1985); Malone v. Malone, 491 So. 2d 932 (Ala. 1986).

"5. The approved attorney fees and expenses are not in the best interest of the child. Abernathy v. Colbert County Hospital Board, 388 So. 2d 1201 (Ala. 1980); Large v. Hayes, by and through Nesbitt, 534 So. 2d 1101 (Ala. 1988)."

Fees, on behalf of F.M., filed a motion in opposition to DHR's motion to alter, amend, or vacate the judgment insofar as it approved the attorney fee and expenses. In the motion, Fees argued that DHR had prevented Fees from obtaining records to support the litigation against Ability Plus and its officers and employees.<sup>3</sup> He states:

"Had DHR devoted even a fraction of the effort and energy obtaining recovery for [T.S.] that it has spent opposing fair reimbursement for those who did so, it would have reduced the work required and thus lessened the fees commensurate with that work."

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<sup>3</sup>It appears that Fees is referring to DHR's refusal to produce from its file, without specific direction from the court, a document created by counsel for Ability Plus about the incident resulting in T.S.'s injuries and marked "confidential."



Additionally, Fees argued in the motion that the findings of fact by the trial court adequately articulated why the requested attorney fee is just and equitable. In its order, the trial court stated:

"Having considered all matters material to the proposed settlement the Court finds as follows:

"A. [T.S.], a minor, brings this lawsuit by and through her mother and next friend, [F.M.], for injuries and damages allegedly sustained in an incident on November 14, 2006 in which she was burned in a bathtub.

"B. [F.M.] has asserted the individual claims for loss of consortium of her minor child arising from this same incident.

"C. The court expressly finds that [F.M.] as the mother and next friend of [T.S.] is the proper party to bring this claim for bodily injury allegedly sustained by [T.S.] in the incident of November 14, 2006.

"D. The court finds that as a proximate result of the incident of November 14, 2006, [T.S.] sustained burn injuries to her legs and buttocks that have left her permanently scarred. She was principally treated at UAB hospital where she incurred substantial medical expenses that have all been paid by Alabama Medicaid.

"E. The court finds that Alabama Medicaid claims subrogation in the amount of \$85,628.81<sup>[4]</sup> as to any recovery [T.S.] might make in this case and has been informed that a condition of this

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<sup>4</sup>See supra note 1.

settlement requires that this be satisfied from any judgment rendered in this matter.

"F. The court finds that [T.S.] has reached maximum medical improvement but will suffer from permanent scarring among other injuries in the future.

"G. The court finds that [F.M.] did suffer a loss of consortium of her minor daughter.

"H. The court understands that the defendants deny that they have liability to [T.S.] arising from the incident of November 14, 2006, and that they acted in any manner as alleged in the complaint or that any alleged wrongful conduct proximately caused injury to either [T.S. or F.M.]....

"....

"J. The court has been advised that out of the proceeds of the settlement, plaintiffs' attorney, Douglas J. Fees, is requesting to be paid an attorney's fee in the amount of \$262,500.00 plus reimbursement of litigation expenses in the amount of \$29,315.99. Based upon the evidence, the Court concludes that the attorney fees and expenses sought by counsel are just, fair and equitable for the service he has rendered."

The trial court denied DHR's motion to alter, amend, or vacate the judgment with regard to the approved attorney fee and expenses. DHR appeals.

"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).

"This Court has set forth 12 criteria 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.'

"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).

"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."

Pharmacia Corp. v. McGowan, 915 So. 2d 549, 552-53 (Ala. 2004) (emphasis added).

In this case, the trial court's order approving an attorney fee in the amount of \$262,500 plus litigation expenses in the amount of \$29,315.99 provides no indication as to whether the trial court considered the criteria set forth for determining the reasonableness of an attorney fee as detailed in Pharmacia, nor does it indicate how the trial court calculated the attorney fee. Although the trial court states that its decision is based on the evidence, it provides no detailed application of the facts regarding Fees's fee to the factors set forth in Pharmacia. Additionally, although the record is filled with explanation for the litigation expenses, the record contains no evidence detailing the attorney fee for Fees. For instance, it does not contain any document detailing the time Fees spent working on the case.

As we stated in Pharmacia, "[i]t 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. Additionally, we note that sole reliance on F.M.'s execution of the contingency-fee contract providing that the attorney fee would be 33 1/3% plus expenses to establish the reasonableness of the attorney fee is misplaced. See Ex parte Peck, 572 So. 2d 427 (Ala. 1990) (recognizing that although a parent can contract for payment of a reasonable fee for legal services on behalf of a minor, a trial court may review and reduce the agreed-upon attorney fee if it concludes that the attorney fee is unreasonable). Without some explanation by the trial court with regard to its consideration of the 12 factors set out in Van Schaack v. AmSouth Bank, N.A., 530 So. 2d 740, 749 (Ala. 1988), and discussed in Pharmacia and how it calculated the attorney fee, we cannot ascertain whether the trial court exceeded its discretion in awarding that fee. Therefore, we remand this cause to the trial court for the entry of an order explaining its decision and articulating its reasons for that

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decision. Due return shall be made to this Court within 42 days of the date of this opinion.

REMANDED WITH DIRECTIONS.

Cobb, C.J., and Lyons, Woodall, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.