

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-882

STEPHENS PRODUCTION
COMPANY

APPELLANT

V.

RITA YOUNG and J.R. YOUNG

APPELLEES

Opinion Delivered FEBRUARY 11, 2010

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. CV-2007-296]

HONORABLE GARY RAY COTTRELL,
JUDGE

REMANDED WITH INSTRUCTIONS

M. MICHAEL KINARD, Judge

Appellant, Stephens Production Company, appeals from the trial court's denial of its motion for attorney's fees. We remand to the trial court with instructions to consider whether to make an award of attorney's fees.

Appellant is the lessee under an oil and gas lease covering property that was purchased by appellees, Rita Young and J.R. Young, in 2003. On May 9, 1994, appellees' predecessor in title released appellant from any duty to restore the property to its pre-drilling state. In order to construct the site, the drilling company cut a road and erected a drilling pad. In 1998, appellant removed its property from the drilling pad and left the pad and roadway intact. In early 2007, appellant removed the pad and part of the roadway. On July 1, 2008, appellees filed an amended complaint. In the amended complaint, appellees allege breach of the lease agreement, trespass on their property by agents of appellant, and unjust enrichment

of appellant resulting in the creation of a quasi-contract between the parties for storage of appellant's property. On June 19, 2008, appellant filed a motion for judgment on the pleadings, which was denied. Following a two-day trial, the jury returned a general verdict in favor of appellant. The trial court entered a judgment containing the jury verdict and dismissing appellees' complaint on April 3, 2009. On March 20, 2009, appellant filed a motion for attorney's fees. In an order entered April 9, 2009, the trial court denied appellant's motion for attorney's fees. Appellant filed a timely notice of appeal to this court.

Appellant's sole point on appeal is that the trial court erred in denying its motion for attorney's fees. The decision to grant or deny attorney's fees lies within the sound discretion of the trial court, and we will not reverse the decision of the trial court absent a showing of an abuse of that discretion. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005). Generally, in Arkansas, an award of attorney's fees is not allowed, unless an award of fees is specifically permitted by statute. See *Seidenstricker Farms v. Doss*, 374 Ark. 123, 286 S.W.3d 142 (2008). Arkansas Code Annotated section 16-22-308 (Repl. 1999) allows the circuit court to award attorney's fees in actions for a breach of contract. Appellant requested fees under section 16-22-308. Appellees argue in their brief that section 16-22-308 does not apply because their action was one sounding in tort and not in contract. In their amended complaint, appellees alleged breach of the lease agreement, trespass, and an alternative quasi-contract theory. The trespass claim is obviously a tort claim and not a contract claim; however, the instructions submitted to the jury reflect that the trespass claim was never submitted to the jury for consideration. As the claims submitted to the jury sound in contract,

we hold that this case is one in which attorney's fees could be awarded under section 16-22-308.

In its order denying appellant's motion for attorney's fees, the trial court states, "After reviewing the Motion, the file, and other matters, the Court does hereby deny the Motion for Attorney's Fees." The trial court gives no further explanation for its denial of attorney's fees. In *Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995), the appellee moved for attorney's fees under section 16-22-308, and the motion was denied. The appellee in the case appealed that decision. The supreme court reversed and remanded the decision of the trial court to deny an award of attorney's fees, stating,

Here the court did not give an explanation, and we do not know whether the ruling was erroneously founded in law. . . . Since we do not know the reason the trial court declined to award attorney's fees, we remand for the trial court to consider whether to make such an award.

Little Rock Wastewater Util., 321 Ark. at 313, 902 S.W.2d at 766-67. This court has more recently utilized the same reasoning in a case involving the denial of a request for attorney's fees, stating, "When the trial judge's order gives no explanation that can be founded in the proper application of the law, it is necessary to remand for reconsideration." *Vereen v. Hargrove*, 80 Ark. App. 385, 395, 96 S.W.3d 762, 768 (2003) (citing *Little Rock Wastewater Util.*, *supra*). In the instant case, the trial court denied the motion for attorney's fees without any further explanation. Based upon the decisions in *Little Rock Wastewater* and *Vereen*, we remand this case back to the trial court with instructions to consider whether to make an award of attorney's fees.

Remanded with instructions.

HENRY, J., agrees.

HART, J., concurs.

HART, J., concurring. I agree with the majority that the supreme court's decision in *Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995), requires that we remand this case to the trial court. That case stands for the broad proposition that in an appeal of a trial court's refusal to award attorney fees without explanation, a trial judge is not presumed to have properly exercised discretion, and the case must be remanded for specific, written findings. There were, of course, no specific, written findings in this case, which otherwise would not be particularly remarkable due to the fact that the appellant did not request them in accordance with Rule 52 of the Arkansas Rules of Civil Procedure.

However, while it is the general rule that, absent specific findings, we presume that the trial court acted properly and made the findings necessary to support its judgment, *Tillery v. Evans*, 67 Ark. App. 43, 991 S.W.2d 644 (1999); *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998), our supreme court has apparently carved out an exception for attorney-fee cases. See, e.g., *Bailey v. Rahe*, 355 Ark. 560, 142 S.W.3d 634 (2004); *Little Rock Wastewater Util.*, *supra*.

I write separately, however, because I want to emphasize that our decision today does not hold that the appellees' lawsuit was definitely one that sounded solely in contract. We are only saying that, given the very incomplete record that the appellant has placed before us,

attorney fees “could” be awarded under Arkansas Code Annotated section 16-22-308 (Repl. 1999). “Could” is a particularly important word in this instance, because it connotes a measure of indefiniteness. Attorney fees “could” be awarded because section 16-22-308 makes an award of fees discretionary. It is also possible that section 16-22-308 does not apply if, despite the lease issues, this case sounded mostly in tort. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998). In the appellant’s brief in support of its fee petition, it asserts that breach of contract was the “primary claim” that went to the jury. Significantly, it does not state that it is the sole claim. However, given the limited record that appellant presented to us on appeal, we simply do not have enough information to make that call.

I note that in appellant’s notice of appeal, it only requested its case-in-chief, not the entire first day of the two-day trial during which the appellees/plaintiffs put on their proof. Limiting the transcript is unusual, particularly when the lease issue only arose as a type of affirmative defense to the appellees’ tort claims.