NO. COA11-496
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

GINGER A. MCKINNEY,
Plaintiff,

v. Guilford County
No. 02 CVD 8173

JOSEPH A. MCKINNEY,
Defendant.

Appeal by Defendant from orders entered 29 December 2009 and 3 November 2010 by Judge Susan E. Bray in the District Court Division of the General Court of Justice of Guilford County. Heard in the Court of Appeals 13 October 2011.

Wyatt Early Harris Wheeler, LLP, by A. Doyle Early, Jr. and Lee C. Hawley, for Plaintiff-appellee.

Cranfill Sumner & Hartzog, LLP, by Michelle D. Connell, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Joseph A. McKinney ("Defendant") appeals from orders awarding attorney's fees to Ginger A. McKinney ("Plaintiff") (now Ginger A. Sutphin). Defendant argues the trial court erred by (1) admitting an affidavit into evidence despite Defendant's hearsay objection and (2) awarding attorney's fees. For the

following reasons, we affirm in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Plaintiff and Defendant married on 23 May 1998. They had one child, born 6 April 1999. The couple separated 24 May 2002 and entered into a Separation Agreement and Property Settlement 2 October 2002 (the "2002 Separation Agreement" or the "Separation Agreement"), which provided that Defendant would pay child support in the amount of $2,250.00 per month plus insurance coverage, prescription drug expenses, private school tuition, extracurricular activities, and $300.00 per month for clothing. The Separation Agreement further provided that if Plaintiff sought an increase in child support payments, the child support portion of the Separation Agreement would become void.

In a Consent Order for Custody dated 2 October 2002, Plaintiff and Defendant agreed to share joint legal and physical custody of their minor child with each having him every other week and sharing holiday time equally. However, Defendant failed to exercise equal visitation with the child, spending substantially less time with him than Plaintiff. As a result,

Plaintiff incurred additional expenses on behalf of the child, and the trial court held this constituted a material change of circumstances regarding the issue of child support. Plaintiff and Defendant divorced on 25 August 2003.

Beginning in 2006, Defendant offered and Plaintiff agreed that Plaintiff and the child should move from Plaintiff's home into a home owned but not occupied by Defendant. Defendant felt this home was in a safer area. By verbal agreement, Defendant voluntarily allowed Plaintiff and the minor child to live in the residence in a rent-free arrangement. In addition to paying the mortgage at the home, Defendant also paid a majority of the household bills, including yard maintenance and electricity. Both parties believed that it would be beneficial for the child for Plaintiff to be a stay-at-home mother and a "classroom mom" at the child's private school. This enhanced and raised both Plaintiff's and the child's standard of living. Plaintiff was a "classroom mom" for one year. Defendant thereafter continued to allow Plaintiff to remain at the residence and to work at home in her at-home hair-salon, which Plaintiff could not otherwise afford to do. In effect, Defendant provided support for Plaintiff in the form of rent-free housing and transportation although he had no legal obligation to do so.

From April 2006 to July 2008, Defendant increased his direct cash payments to Plaintiff from $2,550.00 (which included the $300.00 clothing allowance for the child) to an average of $4,750.00 per month. Plaintiff claimed this increase was partially to account for her loss of income due to their joint decision for her to be a stay-at-home mom. The trial court noted, "Times were good for the Defendant and he generously shared his good fortune with Ms. Sutphin and with [the child], sometimes paying more than twice the agreed-upon $2,550." Defendant even provided private air travel for the child and a leased BMW for the benefit of both Plaintiff and the child.

In the spring of 2008, Defendant requested Plaintiff and their child leave his provided residence due to a downturn in business and a need to reduce his overall overhead. This request occurred shortly after Defendant learned Plaintiff had started dating someone and after he texted her that, "I am not going to pay for some man to put his feet up on my coffee table." Defendant offered to let Plaintiff stay in the home until it was sold and offered to co-sign a note in finding another home, but he was unwilling to continue any financial assistance. Plaintiff asked if she could stay in the house for two more years or until she remarried. Defendant denied her

request and told her she and their child could stay at the home until the summer of 2009 at which time he would sell the residence. During the summer of 2008, Defendant informed Plaintiff he would no longer be providing her with use of the BMW. In August 2008, the lease on the BMW terminated, and the vehicle was turned in, leaving Plaintiff without a car.

Plaintiff filed a Motion in the Cause to Modify Custody and Establish Child Support on 29 August 2008. Although Plaintiff's filing the motion to increase child support nullified the provisions of the 2002 Separation Agreement, Defendant continued making reduced payments of $2,550.00 per month along with insurance, educational, extracurricular, and travel expenses. This was the child support amount agreed to in the 2002 Separation Agreement. He also continued to pay to maintain his home in which Plaintiff and the child were living.

On 3 September 2008, Plaintiff filed for a Temporary Restraining Order and Preliminary Injunction, seeking to maintain possession of the house and to prevent Defendant from selling or entering that property. On 8 October 2008, Defendant sent a Notice to Vacate to Plaintiff, notifying Plaintiff that she should leave the residence by 1 January 2009. Plaintiff's Motion was ultimately denied in part and allowed in part, and

she left the residence in late January 2009 pursuant to a court order and moved into a home provided by her current husband, John Sutphin.

In response to Plaintiff's Motion for Modification for Custody and Establishment of Support filed 29 August 2008, the trial court entered a Consent Order for Custody and Visitation on 9 September 2009, ordering continued joint custody of the child with the child residing primarily with Plaintiff and scheduling specific times for Defendant to see the child. In a separate child support order entered 17 November 2009, the court held that the child support amount agreed upon in the 2002 Separation Agreement was no longer reasonable. After careful review of all the circumstances, the court ordered Defendant to pay $3,796.10 per month in child support, finding this amount reasonable with regard to the needs and actual expenditures for the child. In addition to this amount, Defendant was ordered to continue to pay costs for the child's insurance, medical care, private school tuition, extracurricular activities, and personal trainer and nutritionist's fees. The court held the issue of attorney's fees open for hearing at a later date.

On 17 December 2009, Plaintiff moved for attorney's fees. During the hearing, the court admitted into evidence an

affidavit signed 31 March 2009 by Mike and Katherine Weaver (the "Weaver Affidavit"), in which the Weavers stated they had loaned Plaintiff $30,000.00 to date to pay for this litigation. In an order entered 29 December 2009, the court found that Plaintiff had insufficient means to defray the expenses of the litigation and that Defendant refused to provide support that was adequate under the circumstances existing at the time of the institution of this action. After considering the experience, skill, expertise, and competence of Plaintiff's attorneys, paralegal, and expert witness as well as the scope and complexity of the financing issues in the case, the court awarded Plaintiff $60,000.00 in attorney's fees.

Plaintiff then filed a supplemental motion in the cause for additional attorney's fees, and the court heard the matter on 11 October 2010. In its order entered 3 November 2010, the court took judicial notice of the findings of fact in the 29 December 2009 order supporting the previous allowance of attorney's fees. For work performed after 28 September 2009, the court awarded Plaintiff attorney's fees in the amount of $8,166.25. Defendant entered timely notice of appeal to this Court on 22 November 2010.

II. Jurisdiction

As Defendant appeals from the final judgments of a district court, an appeal lies of right with this court pursuant to N.C. Gen. Stat. §7A-27(c) (2009).

III. Analysis

Defendant contends the trial court committed reversible error by (1) allowing the Weaver Affidavit into evidence over Defendant's objection; (2) awarding attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6 where the child support order did not find nor conclude that Defendant refused to provide adequate child support or that the child support was inadequate; (3) ordering supplemental attorney's fees after entering a final attorney's fees order; and (4) awarding expert witness fees pursuant to N.C. Gen. Stat. § 50-13.6 under the guise of attorney's fees. We affirm in part and vacate in part, remanding for further proceedings consistent with this opinion.

A. The Weaver Affidavit

Defendant argues the trial court committed prejudicial error by allowing the Weaver Affidavit into evidence over his hearsay objection. Assuming without deciding the Weaver Affidavit constituted inadmissible hearsay, Defendant falls short of demonstrating the kind of prejudice necessary for this

Court to reverse the trial court's order. *See In re M.G.T.-B.*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006) ("[E]ven when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal.").

Defendant contends the error was prejudicial error because the Weaver Affidavit was the only evidence at the attorney's fees hearing to support finding of fact 29, which states:

> The Plaintiff was fortunately able to obtain a loan from Mike and Catherine Weaver to pay her retainer and to advance her attorney's fees and expenses throughout this litigation and that without their financial assistance, the Plaintiff would not have been able to meet the Defendant on equal grounds and litigate this matter properly and effectively.

Defendant argues that, without finding of fact 29, the trial court did not make adequate findings of fact to support its conclusion of law two that Plaintiff had "insufficient means to defray the expenses of this litigation." We disagree. "Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial." *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (2001). In a bench trial, the judge's findings "are conclusive on appeal if supported by any competent evidence, notwithstanding the fact

that evidence to the contrary may have been offered." *Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co.*, 271 N.C. 662, 668, 157 S.E.2d 352, 356-57 (1967).

Here, even after excluding the Weaver affidavit signed 31 March 2009, there is competent evidence supporting finding of fact 29 that Plaintiff obtained a loan from the Weavers to pay her litigation expenses. On 10 September 2009 at the child support hearing, Plaintiff testified that she borrowed all the funds for attorney's fees to date. Defense counsel cross-examined Plaintiff about the Weaver loan extensively, and Plaintiff consistently testified that she had a verbal agreement with the Weavers to pay back $50,000.00 she had borrowed to cover litigation expenses. Additionally, Plaintiff's child support exhibit 17 specifically noted a $50,000.00 debt to the Weavers.

Defendant argues the trial court erred in using prior testimony from the child support hearing to support findings of fact in its attorney's fee order. This Court has held, however, that it is not improper for a trial court to take judicial notice of earlier proceedings in the same cause. *Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996). We acknowledge that *Hensey v. Hennessy* prohibits a trial court from

issuing an order based solely upon the court's own personal memory of another proceeding and requires the evidence to "be taken *in the case which is at bar*, not in a separate case which was tried before the same judge." 201 N.C. App. 56, 68, 685 S.E.2d 541, 549 (2009) (emphasis in original). However, in *Hensey*, the judge granted a domestic violence protective order after hearing no evidence at all. *Id.* at 67, 685 S.E.2d at 549. He based his decision on his knowledge of a *completely separate criminal case* he presided over in which charges stemming from the domestic violence incident were brought. *Id.* We find *Hensey* distinguishable from the case *sub judice* because the child support hearing Judge Bray took notice of was in the *same cause* as the attorney fee hearing she also presided over.

Moreover, we hold that finding of fact 23 also supported the trial court's conclusion that Plaintiff had insufficient means to defray the expenses of the suit. Finding of fact 23 is supported by the evidence and states:

> Plaintiff's personal estate is minimal and she does not own any real estate, does not own an automobile, and had a few hundred dollars in a bank account. She used an inheritance of approximately $10,000.00 to pay off a credit account and has some minimal jewelry and her clothing. The Plaintiff has earned income and she had been earning approximately between $400.00 and $800.00 per month as a hair stylist and has

> often bartered for women's apparel in exchange for her services.

In fact, at the attorney's fee hearing, defense counsel testified Plaintiff had no income at trial. Therefore, we find the trial court's conclusion that Plaintiff had insufficient means to defray the expenses of this litigation is supported by the evidence. Thus, admission of the Weaver Affidavit was not prejudicial error.

B. Attorney's Fees

Defendant next makes several arguments regarding the trial court's decision to award Plaintiff attorney's fees.

1. Provision of Adequate Support

Defendant argues the trial court erred by awarding attorney's fees and supplemental attorney's fees because Defendant never refused to provide, and in fact did provide, adequate support under the circumstances existing at the time of the institution of the child support proceeding.

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expenses of the suit. *Before ordering payment of a fee in a support action, the court must find as*

> *a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding*.

N.C. Gen. Stat. § 50-13.6 (2009) (emphasis added). "A finding of fact supported by competent evidence must be made on [the issue of refusing to provide adequate support] in addition to meeting the requirements of 'good faith' and 'insufficient means' before attorney's fees may be awarded in a support suit." *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E.2d 719, 724 (1980).

Here, the trial court made the required findings of fact based on competent evidence to support the award of attorney's fees to Plaintiff. Specifically, there is competent evidence to support the trial court's finding of fact that Defendant refused to provide adequate child support at the commencement of this action. The evidence shows that both parties and their child enjoyed a high standard of living. From 2002 until April 2006, in accord with the 2002 Separation Agreement, Defendant paid Plaintiff $2,250.00 per month (in cash or check) in child support plus payments for medical, dental and hospitalization coverage (both insured and uninsured), expenses for attending a private school, and $300.00 for the child's clothing purchases (the "additional payments"). From April 2006 to July 2008,

Defendant continued making the additional payments and also increased his cash/check payments to an average of $4,750.00 per month. He further allowed Plaintiff and his child to live in one of his homes and use a vehicle he was leasing. However, Defendant then experienced a downturn in business and also learned Plaintiff was in another relationship. Defendant told Plaintiff that she and the child must find a new residence, that she and the child would not have use of the car after August 2008, and that he was reducing his monthly child support payments back to $2,550.00. Defendant provided Plaintiff and their child with an average of $4,750.00 in child support for over two years, and then unilaterally reduced his payments to $2,550.00. Such an abrupt reduction in support left Plaintiff unable to maintain the minor child's standard of living, and Defendant refused to increase support even upon Plaintiff's requests. The trial court found that

> Plaintiff, individually, and by and through her attorney, had requested upon the Defendant for an increase in child support on several occasions prior to and during this litigation. On at least three occasions after receiving offers from Plaintiff attempting to settle this matter, the Defendant responded that he would only pay $2,500.00 per month. The Defendant, in fact, refused to mediate the issue of child support.

Defendant argues that because he never refused to pay anything less than $2,550.00 per month per the 2002 Separation Agreement, there is no evidence that he refused to provide adequate child support. However, paying the amount listed under a prior agreement is not necessarily "adequate." *See Sikes v. Sikes*, 330 N.C. 595, 600, 411 S.E.2d 588, 591 (1992) (Though the defendant paid child support in the amount consented to by the parties in a prior order, the Court found the defendant refused to provide adequate support because he refused to pay the new increased support amount set forth by the trial court until he was ordered to do so.).[1] Here, Defendant was paying $2,550.00 in child support from July 2008 until the trial court ordered him to pay $3,796.10 because it found the initially agreed upon child support amount of $2,550.00 unreasonable. Like in *Sikes*, Defendant's refusal to increase his child support payments until ordered to do so also supports the trial court's finding that Defendant refused to provide adequate child support.

We note that a payment of $2,550.00 per month may seem more than adequate to support a young child, however, the

[1] We recognize the *Sikes* opinion regards the application of retroactive increased child support payments, which is not the issue in the case at bar. However, the portion of *Sikes* we rely upon concerns the adequacy of the defendant's child support payments in determining whether to award attorney's fees.

determination of "adequacy" of child support is a subjective one based on the particular child and parents' circumstances, including the parties' "accustomed standard[s] of living." N.C. Gen. Stat. § 50-13.4(c1) (2009). Here, with Defendant having a very high income, the minor child was accustomed to a high standard of living. Defendant's abrupt reduction in support payments in July 2008 (from $4,750.00 to $2,550.00 per month) left Plaintiff unable to sufficiently provide for the child under the standard of living he was accustomed to. Therefore, we hold there is competent evidence supporting the trial court's finding that Defendant refused to provide adequate child support before this action was commenced.

Further, we note that Defendant was properly denied credit for the increased monthly child support payments he made from April 2006 to July 2008, which averaged $4,750.00 per month—approximately $2,200.00 more than he was required to pay under the Separation Agreement. We hold such payments were gratuitous ones made from one family member to another. *See Francis v. Francis*, 223 N.C. 401, 402, 26 S.E.2d 907, 908 (1943) ("[W]here certain family relationships exist, services performed by one member of the family for another, within the unity of the

family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation.").

Defendant next argues that even if there is evidence from the attorney's fees hearing to show he refused to provide adequate support, the trial court was collaterally estopped from relitigating the child support order. We disagree. Collateral estoppel precludes a court from relitigating issues in a later suit that were actually litigated and necessary to the outcome of a prior action involving a different cause of action between the parties or their privies. *Simms v. Simms*, 195 N.C. App. 780, 781-82, 673 S.E.2d 753, 755 (2009). The doctrine only applies when the following circumstances are present:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id. at 782, 673 S.E.2d at 755. "Where the doctrine is applicable, a court will be precluded from issuing findings of fact and conclusions of law contrary to the previous disposition." *Id.* Here, however, collateral estoppel does not apply because (1) the issues to be concluded were not the same

in the child support and attorney's fees orders and (2) the findings in both orders do not contradict one another.

For collateral estoppel to apply, the underlying issues of the matters actually litigated must be *identical*. *Beckwith v. Llewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990). In a child support hearing, the court must determine if the separation agreement is reasonable, presuming it to be so unless rebutted. *Pataky v. Pataky*, 160 N.C. App. 289, 297, 585 S.E.2d 404, 410 (2003). In an attorney's fees hearing, the court must find (1) the interested party is acting in good faith, (2) that she has insufficient means to defray the expenses of the suit, and (3) that the party ordered to pay attorney's fees was not providing adequate child support at the time of the commencement of the proceeding. N.C. Gen. Stat. § 50-13.6 (2009). While there is factual overlap in the determination of these issues, the elements Plaintiff was required to allege and prove to prevail in each hearing were significantly different.

Moreover, the findings in the child support and attorney's fees orders are not contradictory. The child support order finds Defendant often paid more than was required of him in child support, and the attorney's fees order repeatedly noted the additional child support Defendant paid Plaintiff before she

filed her motion for child support. Finding 10 of the child support order clearly states that "[f]rom the months of August 2008 through January 30, 2009, the Defendant paid $2,550.00 per month in cash payments." Finding 11 states that

> In the spring of 2008, Defendant requested that Plaintiff and the child leave the Meadowbrook residence due to a downturn in business and a need to reduce his overall overhead. However, this also occurred shortly after the Defendant learned the Plaintiff had begun dating someone and he texted the Plaintiff that "I am not going to pay for some man to put his feet up on my coffee table."

Finding 24 of the attorney's fees order is consistent with these findings and states:

> Prior to the filing [sic] the action for custody and child support on August 29, 2008, the Defendant was paying an inadequate amount of child support in that the Defendant had reduced his monthly cash child support to $2,250.00 cash plus approximately $300.00 in clothing allowance from the Trust. Additionally, Defendant had told the Plaintiff that she was going to have to move out of the Defendant's Meadowbrook home where she and the minor child had been living rent free and the Defendant had advised the Plaintiff that he was not going to renew the lease of her automobile which expired in August, 2008, which would leave the Plaintiff without a home or a vehicle of her own. In anticipation of losing these gratuitous benefits for herself individually and for the minor child, the reduction in cash child support and the increased expense resulting from the changed custody

> arrangement, the Plaintiff filed her Motion in the Cause to Modify Custody and Establish Child Support on August 29, 2008. The Plaintiff and the minor child were not forced to move out of Defendant's Meadowbrook residence until the end of January, 2009. However, the Defendant had made clear to the Plaintiff that she was not going to be able to continue to have the gratuitous use and benefit of his residence for an extended period of time. The amount of child support being provided by the Defendant as of August 29, 2008, was found by the trial court to be inadequate and the Court found that the Defendant had refused to provide child support which was adequate under the circumstances existing at the time of the institution of this action.

Therefore, Defendant's collateral estoppel argument is misplaced.

Defendant also argues the court erred by awarding attorney's fees where *the child support order* did not find nor conclude that Defendant refused to provide adequate child support or that the child support provided was inadequate under the circumstances existing at the filing of the action. However, there is no requirement that a child support order make such a finding. Instead, as discussed *supra*, a child support order must find whether the separation agreement is reasonable with regards to child support, *Pataky*, 160 N.C. App. at 297, 585 S.E.2d at 410, not whether child support is adequate. It is the attorney's fees order that must find, *inter alia*, that the party

ordered to pay attorney's fees was not providing adequate child support at the time of the commencement of the proceeding. N.C. Gen. Stat. § 50-13.6 (2009). Here, finding of fact 24 of the attorney's fees order clearly states, "Prior to the filing [of] the action for custody and child support on August 29, 2008, *the Defendant was paying an inadequate amount of child support* in that the Defendant had reduced his monthly cash child support to $2,250.00 cash plus approximately $300.00 in clothing allowance from the Trust." (Emphasis added). Therefore, the trial court did not err by finding in its attorney's fees order and not its child support order that that Defendant refused to provide adequate support.[2]

2. Supplemental Fee Order

Defendant next contends the trial court erred in ordering supplemental attorney's fees after entering a final attorney's fees order, claiming the supplemental order was precluded by res judicata. "We review a trial court's determination regarding entitlement to attorney's fees *de novo*." *Rhew v. Felton*, 178 N.C. App. 475, 485, 631 S.E.2d 859, 866 (2006).

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[2] Defendant also argues that because the trial court did not find in its child support order that Defendant failed to provide adequate child support, it could not, under collateral estoppel, subsequently find Defendant failed to provide adequate child support in its attorney's fees order. We discard this argument per our discussion *supra* of collateral estoppel.

Under the doctrine of res judicata, "a final judgment on the merits in a prior action by a court of competent jurisdiction operates as 'an absolute bar to a subsequent action involving the same claim, demand, and cause of action' between 'the parties and their privies.'" *Edwards v. Edwards*, 118 N.C. App. 464, 469, 456 S.E.2d 126, 129 (1995) (quoting *Gaither Corp. v. Skinner*, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955)). Res judicata applies "to every point which properly belonged to the subject in litigation and which the parties *exercising reasonable diligence*, might have brought forward at the time." *Painter v. Bd. of Ed.*, 288 N.C. 165, 173, 217 S.E.2d 650, 655 (1975) (quotation marks and citation omitted).

Here, the trial court properly refused to award supplemental attorney's fees to Plaintiff for work performed before the initial attorney's fees hearing was completed on 28 September 2009 because such fees should have been litigated during the initial hearing and were precluded by res judicata. However, supplemental fees incurred by Plaintiff after the initial attorney's fees hearing were not precluded by res judicata because Plaintiff could not have known of or litigated these fees at that time.[3] Thus, the trial court's award of

[3] We note that Plaintiff exercised "reasonable diligence" by

supplemental attorney's fees for work performed after 28 September 2009 was not error. We also note that multiple awards of counsel fees in the same domestic action are, in the proper circumstances, within the court's discretion to allow. *Patton v. Patton*, 78 N.C. App. 247, 258, 337 S.E.2d 607, 613-14 (1985), *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986). Accordingly, we hold the trial court did not abuse its discretion in allowing supplemental attorney's fees.

3. Expert's Fees as Attorney's Fees

Defendant finally argues the trial court erred in awarding attorney's fees for the time Plaintiff's expert took in preparation for trial. We agree. "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal." *Peters v. Pennington*, __ N.C. App. __, __, 707 S.E.2d 724, 741 (2011). N.C. Gen. Stat. § 7A-305 provides:

> (d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:
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filing for supplemental fees twenty days before the order for attorney's fees was entered on 29 December 2009.

> (11) Reasonable and necessary fees of expert witnesses *solely for actual time spent providing testimony at trial, deposition, or other proceedings*.

N.C. Gen. Stat. § 7A-305(d) (2009) (emphasis added). "If a category of costs is set forth in section 7A–305(d), the trial court *is required to assess the item as costs*." *Peters*, __ N.C. App. at __, 707 S.E.2d at 741 (citations and quotation marks omitted). "Subsection (d)(11) therefore requires a trial court to assess as costs expert fees for time spent testifying at trial." *Id.* "A trial court may not, however, assess as costs expert witness fees for preparation time." *Id.*

Here, Plaintiff needed assistance in understanding and determining Defendant's income in 2008 and 2009, as his financial data was complicated and complex, with Defendant's 2008 income related documents totaling 10,957 pages. Plaintiff hired Mike Boger, a certified public accountant with expertise in the area of construction accounting, to testify as an expert witness under subpoena at trial regarding Defendant's income *and* to assist in the review and preparation of Defendant's financial data. The trial court found that:

> [Mr.] Boger charges $260.00 per hour which is reasonable in consideration of his background experience, expertise and skill in that he spent approximately 11.75 hours

> reviewing documents, assisting the Plaintiff's counsel in the review and preparation of exhibits, and spent approximately 24 hours in preparing for trial, testifying in court as an expert witness, and in assisting the Plaintiff during the two day trial in anticipation of possibly being called as a rebuttal witness to financial information and documents presented by the Defendant. [Mr.] Boger's charges in the amount of $9,295.00 are reasonable expert and witness fees.

Thus, our review of the record indicates at least $3,055.00 of the total costs the trial court ordered Defendant to pay to Plaintiff's counsel is attributed to "reviewing documents[and] assisting the Plaintiff's counsel in the review and preparation of exhibits"—for which granting attorney's fees is expressly prohibited under *Peters*. With regard to the remaining $6,240.00, the trial court does not indicate exactly how much of this amount covers time Mr. Boger actually spent testifying versus time he spent preparing for trial. Therefore, we vacate the portion of the attorney's fees order insofar as it awards $3,055.00 for Mr. Boger's preparation time. We remand for a hearing to determine exactly how much of the remaining $6,240.00 included time Mr. Boger spent testifying and direct the trial court to deduct the appropriate resulting amount from the revised attorney's fees award.

IV. Conclusion

For the foregoing reasons, we find no prejudicial error in the trial court's decision to admit the Weaver Affidavit. We hold the trial court did not err in choosing to award attorney's fees and supplemental attorney's fees. We vacate, however, the portion of the attorney's fees order that awards Plaintiff $3,055.00 for time Mr. Boger spent preparing for trial. We remand to the trial court to determine how much of the remaining $6,240.00 attorney's fees award was awarded for time Mr. Boger spent preparing for trial. Any such amount shall be deducted from the new order.

Affirmed in part, vacated in part, and remanded.

Judges BEASLEY and THIGPEN concur.

Report per Rule 30(e).