NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CU 0701

JANEL ANTOINETTE CARR

VERSUS

CHRISTOPHER TERRELL GIBBENS

Judgment Rendered: SEP 1 8 2015

Appealed from the
Family Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number F195551

Honorable Annette Lassalle, Judge Presiding

****

Mary Katherine Shoenfelt **Baton Rouge, LA**	**Counsel for Plaintiff/Appellee,** **Janel Antoinette Carr**
Christopher B. Lear **Pride J. Doran** **Quincy L. Cawthorne** **Opelousas, LA**	**Counsel for Defendant/Appellant,** **Christopher Terrell Gibbens**

****

BEFORE: WHIPPLE, C.J., WELCH AND DRAKE, JJ.

WHIPPLE, C.J.

In this appeal, the father of a minor child challenges the family court's judgment, rendered after a hearing at which the father did not appear, that established paternity, determined custody, and ordered the father to pay child support. For the following reasons, the May 29, 2015 "Motion for Sanctions and to Strike Appellant Brief for Failure to Comply with Uniform Rules and Motion for Attorneys' Fees for Frivolous Appeal" are denied, and the June 16, 2015 "Motion to Supplement Appellee Brief and Supplement the Record" is granted in part and denied in part. Moreover, the family court's judgment on child custody and support is affirmed in part and vacated in part, and the matter is remanded for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellant, Christopher Terrell Gibbens, and appellee, Janel Antoinette Carr, are the parents of Hayden Carter Gibbens, who was born on March 9, 2006. On July 30, 2014, Carr filed a Petition to Establish Paternity, Child Custody and Child Support, seeking, *inter alia*, an adjudication that Gibbens was Hayden's father, an award of joint custody with Carr being named as the domiciliary parent, and an award of child support. A hearing in the matter was set for September 2, 2014.

However, when the sheriff was unable to serve Gibbens, the hearing was reset for September 30, 2104, and a private process server was appointed to serve him. Despite thereafter being served with the petition by the private process server, Gibbens failed to appear at the September 30, 2014 hearing. Following the hearing, at which the trial court heard testimony from Carr and received evidence, the trial court signed a judgment on October 22, 2014, which: declared Gibbens to be the father of Hayden; awarded joint custody of Hayden to Carr and Gibbens and designated Carr

as the domiciliary parent; set periods of physical custody for Gibbens of every other weekend; ordered Gibbens to pay Carr child support in the amount of $893.12 per month; ordered Gibbens to pay 62.5% of Hayden's health/medical, dental and vision insurance coverage, which policies were to be maintained by Carr, 62.5% of all extraordinary medical expenses, and 62.5% of Hayden's school tuition and child care costs; awarded Carr the right to claim Hayden as a dependent for federal and state income tax purposes each year; and issued an injunction prohibiting Gibbens from harassing or threatening Carr or from communicating with her unless it involved child care issues.

On October 27, 2014, the same date that notice of the trial court's October 22, 2014 judgment was issued, Gibbens filed an Answer to Gibbens's petition and a Motion for Rehearing or New Trial. Despite acknowledging in the motion that he had been served with the petition in this matter, Gibbens contended that he had "incorrectly assumed that his presence in court was waived because counsel would handle the matter," but that "counsel never received the pleadings [which Gibbens was supposed to have faxed to counsel] and was unaware the court date was missed until after it had already passed." Thus, Gibbens sought a new trial.

Following a hearing on the motion, the trial court rendered judgment on January 29, 2015, denying Gibbens's Motion for Rehearing or New Trial. (R. 36). Gibbens then filed the instant appeal, listing seven assignments of error. Thereafter, Carr filed in this court various motions, including a May 29, 2015 pleading entitled "Motion for Sanctions and to Strike Appellant Brief for Failure to Comply with Uniform Rules and Motion for Attorneys' Fees for Frivolous Appeal Pursuant to C.C.P. 2164 and Uniform Rule 2-19" and a June 16, 2015 "Motion to Supplement Appellee Brief and Supplement

the Record." These motions were referred to the panel deciding the merits of this appeal by orders dated June 9, 2015 and July 2, 2015 respectively and, accordingly, will be addressed herein.

MOTION FOR SANCTIONS AND TO STRIKE APPELLANT BRIEF AND MOTION FOR ATTORNEYS' FEES FOR FRIVOLOUS APPEAL

In these combined motions, Carr first contends that Gibbens's brief should be stricken because it fails to comply with several subsections of Rule 2-12.4(A) of the Uniform Rules—Courts of Appeal. Specifically, she contends that the brief: (1) does not contain the date of the judgment appealed and the dates of the motion and order for appeal; (2) fails to assert whether the appeal is from a final appealable judgment or interlocutory judgment or to assert whether this court has jurisdiction on some other basis; (3) fails to include "the action of the trial court and the disposition of the case" in the concise statement of facts; (4) does not contain a statement of the applicable standard of review; (5) does not contain a statement of the standard of review for any assignment of error; and (6) fails to reference the specific page numbers of the record and citations to the authorities on which Gibbens relies to support his contentions. See Uniform Rules—Courts of Appeal, Rule 2-12.4(A)(3), (A)(4), (A)(9)(a), & (A)(9)(b). Thus, she asks this court to strike Gibbens's appellate brief or, alternatively, "to strike those specific sections" of the brief that fail to comply with Rule 2-12.4.

Uniform Rule 2-12.4(A) lists the items that the appellant's brief shall contain. Uniform Rule 2-12.13 further provides that the court **may** strike non-compliant briefs in whole or in part. Thus, the sanction to be imposed for a non-conforming brief is left to the discretion of the court. Richardson v. North Oaks Hospital, 2011-1258 (La. App. 1st Cir. 2/13/12), 91 So. 3d 361, 364.

A review of Gibbens's brief reveals that it does set forth the date of the family court's judgment and the dates of the motion and order of appeal (although contained within the Statement of Facts rather than the Jurisdictional Statement), and it further sets forth the action of the family court and disposition of the case (although also within the Statement of Facts rather than the Concise Statement of the Case). Moreover, we find no merit to Carr's assertion that Gibbens's brief fails to set forth the applicable standards of review or page references. While his brief does not contain page references to the fifty-three-page record (of which the hearing transcript is only eleven pages), we do not find this oversight to be of such significance that it compels us to strike his brief. See Northshore Regional Medical Center, L.L.C. v. Dill, 2011-2271 (La. App. 1st Cir. 6/8/12), 94 So. 3d 155, 160, writ denied, 2012-1494 (La. 10/8/12), 98 So. 3d 862, and Richardson, 91 So. 3d at 364-365. Accordingly, under the circumstances of this case, and considering Gibbens's brief as a whole, we conclude that striking the brief, or any portions thereof, would be an unreasonably harsh remedy to impose on Gibbens. Accordingly, we deny Carr's Motion for Sanctions and to Strike Appellant Brief.[1]

Carr next contends in her combined motions that Gibbens's appeal "is frivolous, as it lacks legal merit." Accordingly, she seeks "damages, including reasonable attorney fees" pursuant to LSA-C.C.P. art. 2164 and

[1]However, we do note that the appellate court has no authority to consider facts referred to in argument of counsel, such as in memoranda or briefs, that are outside of the record on appeal. See Niemann v. Crosby Development Company, L.L.C., 2011-1337 (La. App. 1st Cir. 5/3/12), 92 So. 3d 1039, 1044, 1045. Accordingly, to the extent that Gibbens mentions in his brief any facts that are not in the record on appeal, we will disregard those statements.

Uniform Rule 2-19 for frivolous appeal.

An appellee may not demand damages for frivolous appeal against the appellant unless the appellee either answers the appeal or files an independent appeal. See LSA-C.C.P. art. 2133(A); Interdiction of Marco, 2009-1791 (La. App. 1st Cir. 4/7/10), 38 So. 3d 417, 430-431. An answer to appeal must be filed not later than fifteen days after the return day or the lodging of the record, whichever is later. LSA-C.C.P. art. 2133(A).

Moreover, while the Louisiana Supreme Court in Bouzon v. Bouzon, 532 So. 2d 1386 (La. 1988), concluded that a motion to dismiss an appeal as frivolous, in which the appellee requested damages and attorney's fees, was sufficient to support such an award for frivolous appeal, the motion therein was filed within the fifteen-day period to answer the appeal.

In the instant case, however, even assuming arguendo that Carr's motion was equivalent to an answer to the appeal, Carr did not file her motion to dismiss and for sanctions for frivolous appeal within the time delays for answering Gibbens's appeal. The return date for this appeal was May 4, 2015, and the record was lodged on May 1, 2015. Notably, Carr's motion to dismiss and for sanctions for frivolous appeal was not filed until May 29, 2015, well beyond the fifteen days allowed for by LSA-C.C.P. art. 2133(A). Accordingly, because Carr's request for damages for frivolous appeal was not made in the method or time required by our procedural law, we likewise deny the Motion for Attorneys' Fees for Frivolous Appeal without expressing any opinion concerning the merits of appellee's argument therein. See National Equity Life Insurance Company v. Eicher, 93-0611 (La. App. 1st Cir. 3/11/94), 633 So. 2d 1351, 1356, and Walker v. Creech, 509 So. 2d 168, 172 (La. App. 1st Cir.), writ denied, 512 So. 2d 464 (La. 1987).

MOTION TO SUPPLEMENT APPELLEE BRIEF AND SUPPLEMENT THE RECORD

In her next motion, Carr seeks to file a supplement to her appellee brief, contending that the copy of Gibbens's appellant brief that was sent to her did not contain five pages of the brief he actually filed with this court, as well as missing a paragraph on another page. Thus, she requests that this court allow her to file a supplement to her original appellee brief to address the arguments made by Gibbens in the pages of his brief omitted from the copy sent to Carr.

However, Carr also seeks to have the appellate record supplemented with a stipulated judgment rendered in this matter after the order of appeal was signed and the record was lodged with this court. Carr acknowledges in her motion that she refers to this judgment, which is not a part of the record on appeal, in both her original appellee brief and the supplement to that brief which she moves to file in this court.

Turning first to Carr's request to supplement the appellate record with a stipulated judgment rendered after the appeal in this matter was perfected, we note that an appellate court is obligated to render any judgment which is just, legal, and proper upon the *record on appeal*. LSA-C.C.P. art. 2164; Niemann v. Crosby Development Company, L.L.C., 2011-1337 (La. App. 1st Cir. 5/3/12), 92 So. 3d 1039, 1044. The *record on appeal* is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions (if applicable), judgments and other rulings, unless otherwise designated. LSA-C.C.P. arts. 2127 and 2128; Tranum v. Hebert, 581 So. 2d 1023, 1026 (La. App. 1st Cir.), writ denied, 584 So. 2d 1169 (La. 1991). An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. Lee v. Twin

Brothers Marine Corporation, 2003-2034 (La. App. 1st Cir. 9/17/04), 897 So. 2d 35, 38. Moreover, while the lower court retains jurisdiction over certain matters while an appeal is pending in the appellate courts, see LSA-C.C.P. art. 2088, any subsequent actions taken by the lower court pursuant to its retained jurisdiction of the matter do not constitute a part of the *record on appeal.* Accordingly, for these reasons, we deny Carr's motion to supplement the record with a judgment rendered by the family court after the appeal in this matter was perfected and the record on appeal lodged with this court.

With regard to Carr's motion to file a supplement to her appellee brief to address arguments made in those portions of Gibbens's brief that were not furnished to her, Carr's motion is granted. However, to the extent that Carr makes any references in the supplement (or in her original appellee brief) to the consent judgment rendered in this matter after the appeal was perfected and the record on appeal was lodged, the appellate court has no authority to consider facts referred to in argument of counsel, such as in briefs, that are outside of the record on appeal. Niemann, 92 So. 3d at 1045. Accordingly, we will disregard any reference to the consent judgment, which is not a part of the record on appeal.

DISCUSSION

In his assignments of error, Gibbens contends that the family court erred in denying his Motion for Rehearing or New Trial where procedural rules are more relaxed in family court and where he was unrepresented at the time of the hearing. He further contends that the family court erred in denying his Motion for Rehearing or New Trial, as the award of joint custody with Carr as domiciliary parent was not in Hayden's best interests

and the award of child support was not supported by verifying evidence as required by LSA-R.S. 9:315.2(A).

A motion for new trial **shall** be granted, upon contradictory motion of any party, when, among other grounds, the "judgment appears clearly contrary to the law and the evidence." LSA-C.C.P. art. 1972(1). Additionally, a motion for new trial **may** be granted where there is "good ground therefor." LSA-C.C.P. art. 1973. A trial court's decision to grant or deny a motion for new trial, whether on peremptory or discretionary grounds, is reviewed under the abuse of discretion standard. Drapcho v. Drapcho, 2005-0003 (La. App. 1st Cir. 2/10/06), 928 So. 2d 559, 565, writ denied, 2006-0580 (La. 5/5/06), 927 So. 2d 324.

Failure to Appear at Hearing
(Assignments of Error Nos. 1 & 2)

In these assignments of error, Gibbens contends that the family court erred in denying his motion for rehearing or new trial despite his failure to appear at the scheduled hearing given that family court procedures are more relaxed and he was unrepresented at the time of the hearing. He asserts that because the best interest of the child is an overriding factor in all child custody determinations, the family court erred in harshly upholding procedural rules to Gibbens's detriment.

Addressing Gibbens's first contention, we note that while the rules of *evidence* are more relaxed in custody proceedings, LSA-C.E. art. 1101(B)(2), there is no statutory authority for his assertion that the rules of *procedure* are relaxed in these proceedings. Moreover, regarding Gibbens's contention that he was unrepresented at the time of the hearing, we note that while a layman cannot be held to the same standards of skill and judgment which must be attributed to an attorney, he assumes responsibility for his

own inadequacy and lack of knowledge of both procedural and substantive law. Johnson v. Department of Health and Hospitals, 2000-0071 (La. App. 1st Cir. 2/16/01), 808 So. 2d 436, 437. Moreover, where a party decides not to attend trial, his ignorance of the law is not an excuse that warrants the granting of a motion for new trial. See Hebert v. C.F. Bean Corporation, 2000-1029 (La. App. 4th Cir. 4/25/01), 785 So. 2d 1029, 1031. Likewise, failure to appear due to mere human error does not constitute "good grounds" for the granting of a motion for new trial. See Hickman v. WM. Wrigley, Jr. Co, Inc., 33,896 (La. App. 2nd Cir. 10/4/00), 768 So. 2d 812, 816; also see generally Johnson v. Welsh, 334 So. 2d 395, 397 (La. 1976), and Kugle v. Hennessy, 480 So. 2d 849, 849-850 (La. App. 2nd Cir. 1985).

Accordingly, we find no merit to Gibbens's arguments that the family court abused its discretion in denying his motion for new trial on these grounds. These assignments of error are without merit.

Award of Joint Custody
(Assignments of Error Nos. 3, 4 & 5)

In these assignments of error, Gibbens contends that in denying his motion for new trial, the family court erred in failing to apply the best interest of the child standard. He further contends that application of the best interest of the child standard reveals that a miscarriage of justice has been done when the family court modified an extra-judicial shared custody agreement and awarded the parties joint custody of Hayden with Carr designated as the domiciliary parent and Gibbens awarded physical custody of Hayden every other weekend.

At the outset, we note that even though the best interests of the child is the overriding consideration of the family court in all child custody matters, LSA-C.C. art. 131, there is no separate statutory standard for the

granting of a new trial that specifically requires the application of the best interests of the child standard, in addition to the established statutory standards for the granting of a new trial, to the family court's determination of whether to grant or deny a motion for new trial. See generally Connelly v. Connelly, 94-0527 (La. App. 1st Cir. 10/7/94), 644 So. 2d 789, 793, 798 (wherein this court noted that the material change in circumstances and best interest of the child standard is to be applied by the trial court for modification of custody and the "clearly contrary to the law and evidence" or "good ground therefor" standards would apply to determination of a motion for new trial). Thus, to the extent that Gibbens asserts that the family court erred in failing to grant his motion for new trial on this ground, we find no merit to this argument.

Moreover, we find no merit to his claim that "application of the best interest factors reveals that a miscarriage of justice has been done." To the extent that Gibbens is contending that the underlying custody judgment is contrary to the law and the evidence, see LSA-C.C.P. art. 1972(1) or that this "miscarriage of justice" constitutes "good ground" for granting his motion for new trial, see LSA-C.C.P. art. 1973, we likewise find no merit to his argument. The primary consideration in actions initially setting custody is the best interest of the child. LSA-C.C. art. 131; Mulkey v. Mulkey, 2012-2709 (La. 5/7/13), 118 So. 3d 357, 364. In determining the best interest of the child, LSA-C.C. art. 134 contains a list of twelve non-exclusive factors that the trial court must weigh and balance. However, the trial court is not bound to make a mechanical evaluation of all of the statutory factors listed in Article 134, but should decide each case on its own facts in light of those factors. Harang v. Ponder, 2009-2182 (La. App. 1st Cir. 3/26/10), 36 So. 3d 954, 963, writ denied, 2010-0926 (La. 5/19/10), 36

So. 3d 219. Additionally, LSA-C.C. art. 132 provides that, in the absence of agreement of the parents as to custody, the court shall award custody to the parents jointly, unless custody in one parent is shown by clear and convincing evidence to serve the best interest of the child. Every custody case must be considered within its own particular set of facts and circumstances, and the trial court is in the best position to ascertain the best interests of the child. Accordingly, the trial court's determination regarding child custody is entitled to great weight and will not be disturbed on appeal absent clear abuse of discretion. Harang, 36 So. 3d at 960.

At trial, Carr testified that for the four years prior to the hearing, she and Gibbens had attempted to work out a schedule with Hayden, who was eight years old at the time, wherein they each had physical custody of the child two nights during the week and on alternating weekends. However, Carr explained that Gibbens traveled so extensively that Hayden would stay with her most of the week. Additionally, Carr testified that she believed it would be in Hayden's best interest to be with her during the week so that his schedule during the school week would be consistent. Carr acknowledged that Gibbens is involved with Hayden in sports, and that accordingly, she believed that having Hayden spend time with his father on the weekends would best for Hayden.

After hearing this testimony, the family court awarded joint custody to the parties, designated Carr as the domiciliary parent, and awarded Gibbens physical custody of Hayden every other weekend.

Considering Carr's testimony regarding the need for stability in Hayden's schedule during the school week, as well as Gibbens's extensive traveling, we cannot conclude that the family court's award of joint custody to Carr and Gibbens with Carr designated as domiciliary parent was

"contrary to the law and the evidence," LSA-C.C.P. art. 1972(1), was "good ground" for the granting of a motion for new trial, LSA-C.C.P. art. 1973, or constituted a clear abuse of the family court's discretion. This court has previously held that a split custody arrangement, with a child spending some weeks at one parent's home and other weeks at the other parent's home, is not a practical schedule for a child who is of school age. See Shaffer v. Shaffer, 2000-1251 (La. App. 1st Cir. 9/13/00), 808 So. 2d 354, 357-358, writ denied, 2000-2838 (La. 11/13/00), 774 So. 2d 151. Accordingly, because Gibbens has failed to establish that the custody award was contrary to the law and the evidence or that there were other good grounds for the grant of a new trial as to custody, we find no abuse of discretion in the family court's denial of Gibbens's motion for new trial as to the custody award nor any abuse of discretion in the underlying custody decree. These assignments of error also lack merit.

Child Support Award
(Assignments of Error Nos. 6 & 7)

In these assignments of error, Gibbens challenges the family court's refusal to grant a new trial on the basis that the award of child support is unsupported by the record.

With regard to her request for child support, Carr testified at the hearing below that her take-home pay is approximately $1,400.00 every two weeks and that her gross monthly income is approximately $4,500.00. However, the record before us is devoid of any of the supporting documentation required by LSA-R.S. 9:315.2.[2]

[2]While counsel for Carr did offer and file into evidence an "obligation worksheet," that worksheet is not part of the record on appeal and could not be located by the family court. Further, there is nothing in the record before us to indicate that any of the documentation required by LSA-R.S. 9:315.2 was attached to that worksheet or offered or received into evidence.

Documentation is essential to the setting of child support. Louisiana Revised Statute 9:315.2(A) is clear in its mandate of essential documentation. Drury v. Drury, 2001-0877 (La. App. 1st Cir. 8/21/02), 835 So. 2d 533, 539. That statute provides, in pertinent part, as follows:

> Each party **shall provide to the court a verified income statement** showing gross income and adjusted gross income, **together with documentation of current and past earnings.** Spouses of the parties shall also provide any relevant information with regard to the source of payments of household expenses upon request of the court or the opposing party, provided such request is filed in a reasonable time prior to the hearing. Failure to timely file the request shall not be grounds for a continuance. Suitable documentation of current earnings shall include but not be limited to pay stubs or employer statements. **The documentation shall include a copy of the party's most recent federal tax return.** A copy of the statement and documentation shall be provided to the other party.

(Emphasis added).

Here, because Gibbens failed to appear at the hearing or provide any documentation of his income as required by LSA-R.S. 9:315.2, counsel for Carr sought to impute income to Gibbens. Pursuant to LSA-R.S. 9:315.1.1(B), "[w]hen the income of an obligor cannot be sufficiently established, **evidence** of wage and earnings surveys distributed by government agencies for the purpose of attributed income to the obligor is admissible." (Emphasis added). With regard to Gibbens's income, Carr testified at the hearing that Gibbens is a franchise business district manager for the Raceway Division of Racetrac Petroleum. However, while counsel for Carr asserted at the hearing that the average income for a general manager in the Baton Rouge regional area was about $90,000.00 per year based on figures from the Workforce Commission, the record is devoid of any actual **documentary evidence** to support counsel's assertion.

Pursuant to LSA-R.S. 13:3712.1, "whenever a copy of a self-authenticating report from the Louisiana Workforce Commission, or from any state or federal reporting agency, is **offered in evidence** in any child or spousal support proceeding, it shall be received by the court as prima facie proof of its contents." (Emphasis added). In the instant case, without the introduction of the appropriate documentation needed to establish (or properly impute) income to Gibbens, the family court could not properly apply the guidelines of LSA-R.S. 9:315, *et seq.*, and establish child support in accordance with law. For the same reasons, neither can this court review the appropriateness of the award or render an award herein. See Drury, 835 So. 2d at 539; see also State Department of Social Services v. Reuther, 2006-842 (La. App. 5th Cir. 3/13/07), 952 So. 2d 929, 933.

Because the record does not contain the documentation required by LSA-R.S. 9:315.2 with regard to Carr's income, or any evidence as authorized by LSA-R.S. 9:315.1.1(B) and LSA-R.S. 13:3712.1 to support the imputation of income to Gibbens, the award of child support must be vacated. Accordingly, we vacate this portion of the judgment and remand this matter to the family court for the submission of the required documentary evidence and the proper calculation of the parties' respective child support obligations. See Drury, 835 So. 2d at 539; see also Montalvo v. Montalvo, 2002-1303 (La. App. 3rd Cir. 4/17/03), 854 So. 2d 902, 909.

CONCLUSION

For the above and foregoing reasons, Janel Carr's Motion for Sanctions and to Strike Appellant Brief for Failure to Comply with Uniform Rules and Motion for Attorneys' Fees for Frivolous Appeal are denied. Janel Carr's Motion to Supplement Appellee Brief is granted, and her Motion to Supplement the Record is denied.

The portion of the family court's October 22, 2014 judgment awarding the parties joint custody and designating Janel Carr as the domiciliary parent is hereby affirmed. The portion of the family court's judgment setting child support is vacated, and the matter is remanded to the family court for calculation of the child support obligation in accordance with the guidelines. Costs of this appeal are assessed one-half to Janel Carr and one-half to Christopher Gibbens.

MOTION FOR SANCTIONS AND TO STRIKE APPELLANT BRIEF DENIED; MOTION TO SUPPLEMENT APPELLEE BRIEF GRANTED; MOTION TO SUPPLEMENT RECORD DENIED; OCTOBER 22, 2014 JUDGMENT AFFIRMED IN PART AND VACATED IN PART; REMANDED FOR FURTHER PROCEEDINGS.