NO. COA05-693

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

ELIZABETH TANDY LAFELL,
Plaintiff

v.

Moore County
No. 01 CVD 327

ALAN SCOTT LAFELL,
Defendant

Appeal by plaintiff from orders entered 11 February 2005 by Judge Lee W. Gavin in Moore County District Court. Heard in the Court of Appeals 7 December 2005.

Richard Ducote & Associates, PLC, by Becki Truscott for plaintiff-appellant.

Arthur M. Blue Law Office, P.A., by Arthur M. Blue for defendant-appellee.

CALABRIA, Judge.

Elizabeth Tandy LaFell ("plaintiff") appeals orders denying her motion for entry of recusal, objection to remand proceedings, motion for new trial or, alternatively, motion for consideration of new evidence and orders holding her in contempt of court and modifying child custody. We affirm.

On 11 and 12 September 2003, the trial court heard Alan Scott LaFell's ("defendant") motion to show cause and motion to modify custody. The trial court entered an order on 3 November 2003 to

which plaintiff appealed to this Court. This Court reversed and remanded for entry of a new order supported by appropriate findings of fact. On 11 February 2005, the trial court filed an order with the following pertinent findings of fact.

> 5. The parties were formerly married and are now divorced.
> 6. The parties are the parents of three minor children, [names redacted] ASL, Jr., born April 1, 1994, RAL, born July 15, 1999 and SBL, born July 15, 1999. Presently the custody of the minor children is governed by a custody order entered on August 14, 2002 and signed October 7, 2002 by the Honorable Michael A. Sabiston, District Court Judge.
> 7. The custody order provides that the plaintiff and the defendant shall have joint custody of the minor children with the plaintiff having the primary physical custody of the minor children and the defendant having secondary custody of the minor children every weekend from 5:00 PM Friday until 5:00 PM Sunday. The custody order is incorporated herein by reference. On February 13, 2003 the undersigned district court judge heard...and dismissed the defendant's Motion To Modify Custody at the close of the defendant's evidence because there had not been a substantial change in circumstances [a]ffecting the minor children.
> 8. During the weekend preceding the February 13, 2003 hearing the minor children had been visiting in the home of the defendant and had been returned to the plaintiff on February 9, 2003.
> 9. On February 10, 2003 the plaintiff took the minor children RAL and SBL to a physician for an examination because of concerns regarding possible sexual abuse of the minor children.
> 10. The plaintiff did not testify in detail regarding circumstances regarding possible abuse of the minor children. At the February 13, 2003 hearing neither the plaintiff nor her attorney asked the court for any type of emergency modification of the custody order because of any abuse of the minor children. On February 15, 2003 the undersigned district court judge was approached by Stephan Lapping and Arthur Blue with Mr. Lapping requesting an

Emergency Ex Parte Order suspending the Defendant's visitation with the minor children because of alleged sexual abuse of RAL and SBL.

11. On February 15, 2003 the undersigned District Court Judge did not grant the plaintiff's Motion for an Ex Parte Order suspending visitation because of the fact that the parties were both present in court the day before and the plaintiff offered no evidence at that time regarding the nature of any abuse of the minor children and did not ask for any modification of the defendant's visitation at that time.

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14. On February 9, 2003 when the minor children returned from a visit from the defendant's home the plaintiff testified that [RAL's] vaginal area and her anus were swollen. The plaintiff further testified that RAL stated that [defendant] put his finger in her anus again and again until it bled. The plaintiff testified that RAL said that the defendant did this to punish RAL because she had made a mess. The plaintiff testified that she saw no blood at that time. The court does not find these matters to be a fact. The Court includes the plaintiff's testimony here to compare it to the facts found in paragraph seventeen.

15. The plaintiff took SBL and RAL to Mint Hill Family Practice on February 10, 2003 where RAL was seen by Doctor Michael Hoben. Doctor Hoben's notes which were admitted into evidence reflect that RAL told the plaintiff "I got in trouble and Papa put his finger in my butt until it bled." The plaintiff further stated that RAL told her that he had touched her "pee pee area and that he put his finger there too and it hurts to pee." Doctor Hoben's notes further reflected the plaintiff reported the child seems to urinate without difficulties. Dr. Hoben's notes further stated that "according to [plaintiff], the children refer to the paternal grandfather as Papa." Doctor Hoben's notes reflect that he interviewed RAL and RAL said "Daddy put his finger in my butt and blood came out" and "he did it as an accident." The court does not find the statements by the minor child and the plaintiff to be facts. The court does find as a fact that these statements were made to

Doctor Hoben.
16. On March 28, 2003, one of the minor children's babysitters reported to Doctor Stewart that RAL's vaginal area was swollen. The court does find as a fact that the babysitter reported this to Doctor Stewart. The court finds as a fact that on March 28, 2003 RAL's tissue and vagina was pink and normal appearing with no [bruising] or laceration. The court further finds that on March 28, 2003 RAL made an unprompted statement that "my daddy didn't do it he didn't put his finger in." Doctor Stewart's notes do not reflect that RAL's vaginal area was swollen as described by the babysitter. The court makes a finding that Doctor Stewart's notes were made available to the plaintiff. Doctor Hoben's notes regarding RAL on February 10, 2003 did find some vaginal irritation and Doctor Hoben focused on the cause of the irritation as possible reaction to the detergent (soap) exposure. The court does find as a fact that on February 10th RAL had some vaginal irritation. The court does find as a fact that Doctor Hoben focused on the cause of irritation as a possible reaction to a detergent (soap) exposure. The court further finds that these facts were included in Doctor Hoben's notes which were made available to the plaintiff.
17. Doctor Hoben's notes regarding RAL on February 10, 2003 did not reflect any swelling or bleeding of the anus and stated "anus is patent without evidence of laceration, trauma, irritation or ulceration discharge." The court finds as a fact that on February 10, 2003 RAL had no swelling or bleeding at the anus and that her anus was patent without evidence of laceration, trauma, irritation, ulceration or discharge. The court further finds as a fact that the above stated facts regarding RAL were included in Doctor Hoben's notes which were made available to the plaintiff.
18. The plaintiff also had SBL examined on February 10, 2003 by Doctor Hoben. At this time the plaintiff reported to Doctor Hoben that the child said that the paternal grandfather had rubbed "my butt." The minor child denied that anyone had touched her anywhere to Doctor Hoben. The court finds as a fact that on February 10, 2003, SBL had no

evidence of trauma, laceration, ulceration discharge of vaginal introitus. The court further finds as a fact that on February 10, 2003 SBL's anus was patent without evidence of laceration, trauma, irritation, ulceration or discharge. The court further finds as a fact that Doctor Hoben made notes on February 10, 2003 that SBL had no evidence of trauma, laceration, ulceration or discharge of the vaginal introitus and that SBL's anus was patent without evidence of laceration, trauma, irritation, ulceration or discharge and these notes [were] made available to plaintiff.

19. The plaintiff reported what she perceived as abuse to the Mecklenburg County Department of Social Services on February 10, 2003.

20. This court has no evidence that any juvenile petition was filed by Mecklenburg County Department of Social Services alleging that the minor children are abused, neglected or dependent. Nor is there evidence that the Mecklenburg Department of Social Services has an active case involving the minor children.

21. On March 10, 2003 Margaret Gatlin, the plaintiff's sister, took the minor children to Mint Hill Family Practice where the children were examined by Doctor Michael Hoben. Ms. Gatlin provided Doctor Hoben with a written statement that on March 10, 2003 SBL stated to her that "daddy put his finger in my butt again, and again, and again and it bled." Ms. Gatlin also said that SBL stated that Alisha, (the Defendant's girlfriend) had put her finger in SBL's "butt" as well. Ms Gatlin also stated that Alisha said that it had happened three times. Ms. Gatlin also stated that RAL said that "Alisha put her finger in my butt." The court does not find as fact any of the statements provided to Doctor Hoben. However the court does find as a fact that these statements were made to Doctor Hoben.

22. Doctor Hoben's examination of SBL on March 10, 2003 did not note any bleeding or cuts regarding the child's anus. The court finds as a fact that Doctor Hoben did not find sufficient or physical evidence to suggest abuse on March 10, 2003. The court further finds as a fact that Doctor Hoben's reported "I do not find sufficient physical evidence to suggest abuse at this time" and that Doctor Hoben's report was made available to the plaintiff.

23. Doctor Hoben in his report of March 10, 2003 regarding SBL, says that SBL stated "daddy punched me all over in the face and all over." Doctor Hoben asked SBL if that was all daddy did and she replied "no he stuck his finger in my butt three times." SBL said that it hurt and bled. The court does not find as a fact any of the statements made by SBL to Doctor Hoben. However the court does find as a fact that these statements were made by SBL to Doctor Hoben.

24. SBL stated that RAL had put her finger in her, SBL's vaginal area.

25. During Doctor Hoben's examination of RAL on March 10, 2003 RAL stated that "Daddy punched me all over two times" and that daddy "stuck his finger in my butt too." The court does not find as a fact that these statements are true, however the court does find that these statements were made to Doctor Hoben. RAL did not report any bleeding. RAL's examination on March 10, 2003 was a normal physical exam and there was no significant physical evidence to suggest abuse on that date. Doctor Hoben's report, which was made available to the plaintiff, indicated a normal physical examination and further stated "I do not find any significant physical evidence to suggest abuse at this time." Doctor Hoben recommended to Ms. Gatlin that "the children be evaluated by a child abuse specialist."

26. The plaintiff took the minor children RAL and SBL to Doctor William Stewart at Sandhills Pediatrics in Southern Pines for an examination on March 3, 2003. Doctor Stewart examined RAL on March 3, 2003 and testified at trial that there was no physical evidence of abuse on the vaginal exam and that while there was not a full exam of the anus his report noted that in regard to the anus there was no laxity or lesion noted. The court finds as a fact that on March 3, 2003 there was no physical evidence of abuse to RAL's vaginal area. The court finds as a fact that on March 3, 2003 that in regard to RAL's anus there was no laxity or lesion noted. On March 3, 2003 Doctor Stewart made a note of possible sexual abuse. Doctor Stewart recommended that visitation be suspended until a full evaluation including a child mental health evaluation could be accomplished. Doctor Stewart examined RAL again on March 28, 2003.

RAL was brought to Doctor Stewart's office by Melanie Cooper and Victoria Ford, who were babysitters. On March 28, 2003 one of the minor children's babysitters reported to Doctor Stewart that RAL's vaginal area was swollen. The court does not find as a fact that the vaginal area of RAL was swollen. The court does find as a fact that the babysitter reported this to Doctor Stewart. The Court finds as a fact that on March 28, 2003 RAL's tissue or vaginal was pink and normal appearing with no bruise or laceration. The court further finds on March 28, 2003 RAL made an unprompted statement that "my daddy didn't do it he didn't put his finger in." Doctor Stewart's notes do not reflect that RAL's vaginal was swollen as described by the babysitter. The court makes a finding that Doctor Stewart's notes were made available to the plaintiff.

27. Doctor Stewart examined SBL on March 28, 2003. During the examination Victoria Ford one of the minor child's babysitters claimed that SBL had scratches around her anus. The court does not find that as a fact. However, the court finds as a fact that Victoria Ford made that statement to Doctor Stewart. The court does find as a fact that on March 28, 2003 there was no bruising or swelling and no anal lesion or laxity in regard to SBL. The court finds as a fact that on March 28, 2003 that SBL had a normal physical examination and there was no physical [sign] of abuse. The court further finds as a fact that Doctor Stewart's notes on the examination of SBL on March 28, 2003 were made available to the plaintiff.

28. Doctor Stewart's notes of March 28, 2003 reflect that SBL announced "daddy stuck his finger in my butt." Doctor Stewart's notes also state "SBL says according to babysitter that they are not suppose to tell." The court does not find that the statements made by SBL are fact. The court does find that the statements were made to Doctor Stewart.

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37. The court takes notice, at the request of the defendant's attorney, that [plaintiff], in her complaint or any reply to the Defendant's counterclaim for custody in this action raised no issue regarding [defendant's] fitness and no allegation of [defendant's] alleged use of

pornography or deviant sexual acts. The court further notes that the parties entered into a consent order which states that [defendant] is a fit and proper person to have visitation with the minor children.

38. By consent of all parties the LaFell family including all of the minor children, the parties, [plaintiff's] sister and the babysitters engaged in a child mental health evaluation at the UNC School of Medicine in Chapel Hill.

39. During the course of the mental health evaluation visitation was suspended by agreement of the parties between the minor children and [defendant]. Between March 2003 and September 2003 the defendant . . . was allowed by agreement to have telephone contact with the minor children. [Defendant] attempted to call the minor children ninety two (92) times between January 24, 2003 and August 20, 2003. The vast majority of these calls lasted only one to two minutes and only on two occasions was [defendant] successful in speaking with the minor children for more than five minutes. The court finds as a fact that the plaintiff . . . limited the defendant's . . . telephone communications with the minor children. The court finds as a fact that beyond a reasonable doubt the plaintiff . . . limited the defendant's . . . telephone communication with the minor children. The court finds as a fact that beyond a reasonable doubt the plaintiff . . . has willfully and knowingly violated paragraph 11 of Judge Sabiston's Order filed October 10, 2002 which orders as follows, "Each party agrees the other party access to telephone communications with the children and to in no way prohibit, hinder, interfere with or discourage the children from calling the party."

40. As reflected in previous orders, the plaintiff moved from Moore County to Charlotte in the summer of 2002 and did not inform the defendant of the move nor inform the defendant of her residence or telephone number. The court finds as a fact that during the summer of 2003 the plaintiff moved to a new residence in Mecklenburg County. The plaintiff did not inform the Defendant of her move nor did she provide him with a new telephone number. The court finds beyond a reasonable doubt that the plaintiff's actions in moving to a new

residence and not informing the defendant of the whereabouts of the minor children or how to locate the minor children, or how to telephone the minor children was a willful and knowing violation of Judge Sabiston's Order filed October 10, 2002. Specifically, paragraph one, in which the Defendant has joint custody of the minor children, and in paragraph five, in which the Defendant is allowed to telephone the minor children at least twice a week and in paragraph nine, in which the parties are to make every reasonable effort to promote the love, affection and respect that the children should have for each of their parents and paragraph eleven, in which each party agrees to allow the other party access to telephone communication with the minor children, and paragraph [twelve], in which each party is obligated to consult with the other regarding non-emergency medical, dental and orthopaedic treatment for the minor children and paragraph thirteen in which each party is obligated to notify the other as to all activities the children are involved with and consult with one other about these activities.

41. Nancy Berson, a clinical instructor at the University [of] North Carolina Department of Psychiatry, and Diana Meisburger, PHD with the University [of] North Carolina Psychology Department conducted the child mental health evaluation and testified regarding their report.

42. The University [of] North Carolina School of Medicine report of child mental health evaluation was accepted and entered into evidence.

43. Doctor Meisburger and Ms. Berson concluded that RAL and SBL have not been sexually abused. Rather their statements and behavior can likely be explained by the following: (a) Over interviewing by multiple care givers and professionals. (b) suggestive questioning combined with their young age and suggestibility. (c) Their need to prove their loyalty to their mother. (d) An over focus on health concerns (particularly their genitalia).(e) Child care changes and instability in [plaintiff's] household composition.(f) The misinterpretation of statements and behaviors that had other explanations.(g) The dynamic of a high

conflict of divorce. The evaluators based their conclusions on several factors included in their report which is incorporated herein by reference. Based upon the evidence received at the trial of this matter the court finds as a fact the defendant, . . . has not sexually abused the minor children.

44. During the course of the evaluation process the evaluators interviewed SBL; SBL stated that her father "didn't hurt me at all[,]" "I really want to go back to daddy's." SBL then repeated that her daddy didn't hurt her and denied that he had put a pin in "her butt." In a second interview, SBL was asked what she had told the evaluator about daddy last time. She replied "he didn't do nothing"; she denied having told her mommy that her daddy had touched her and hurt her "butt." Again SBL denied that her daddy broke touching rules, denied he touched pee pees or bottoms and denied she had problems with her daddy.

45. In the evaluators' interview with RAL, RAL stated that her mother worried that "daddy hurt me if I go back there." RAL was asked how her daddy, Scott, bothered her, she responded "I don't know." She was asked what he did that bothered her and she stated "I just don't know." RAL stated that her father said bad things, but when asked, she did not know what her daddy said that was bad. RAL was asked if daddy bothered any parts of her body. She nodded yes and pointed to her buttocks. RAL indicated that her daddy had bothered her pee pee spot and her "body" (buttocks). She couldn't remember what her daddy had done to bother those parts of her body. RAL denied having fun with her daddy and did not want to see him. RAL stated that her mother would say "no no no" about [RAL's] seeing her father. RAL denied knowing Alisha.

47. Ms. Berson interviewed ASL, Jr. During the interview, ASL, Jr. told Ms. Berson that the plaintiff told him that [defendant's] parents did not love him and that [defendant] was leaving the family for another woman. The court finds beyond a reasonable doubt that the plaintiff . . . has willfully and knowingly violated paragraph nine of Judge Sabiston's Order filed October 10, 2002 which orders as follows, "The parties have further agreed that neither of them should make any disparaging

remarks concerning the other in the presence of the children, that they will each make every reasonable effort to promote the love, affection and respect that the children should have for each of their parents."

48. In July 2003 Ms. Berson told the Guardian Ad Litem, Mr. Alley that she thought the visitation with the minor children should resume. The plaintiff . . . would not allow the visitation to resume.

49. The court finds as a fact that the maternal family members, including the plaintiff . . . failed to acknowledge that there were factors other than sexual abuse that contributed to the onset of the minor children's behavioral problems.

50. The court finds as a fact that [plaintiff] disagrees with the University of North Carolina School of Medicine's conclusion that the children were not sexually abused. The court finds as a fact that the plaintiff . . . cannot even accept the possibility [emphasis added] that the children were not abused. The evaluation recommended that [plaintiff] and her family must accept the possibility that they have erred in their perspective and interpretation regarding the issue of sexual abuse. [T]he plaintiff testified that she believes that the defendant molested the children and she disagrees with the UNC opinion that the children were not sexually abused. When asked if she could accept the possibility that the children were not abused, [plaintiff] stated that someone would have to convince her.

51. On July 31, 2003 the minor children SBL and RAL were at UNC for part of the evaluation. After the interview RAL and SBL had an unannounced visitation with the defendant. Neither SBL or RAL nor any member of the plaintiff's family knew that [defendant] would be there for a supervised visit. RAL and SBL were happy to see their father and were excited to visit with him. The girls also had a good visit with [defendant's] new wife, Alisha. ASL, Jr. also had a good visit with the Defendant although he was initially guarded. During this visit RAL and SBL showed no fear of their father nor any hesitation to be with him.

52. Although the plaintiff . . . had taken the minor children to Carolina Medical Center for

sex abuse evaluation, [plaintiff] denied having any knowledge of Mr. Ragsdale's conclusion or report until early September of 2003. The court does not find this to be a fact.

53. On March 14, 2003 RAL and SBL were hospitalized in Charlotte. The defendant went to the hospital to visit with the minor children and was met by a security guard who stated "If you cause trouble I will escort you out." [Defendant] had never seen the security guard before nor had any contact with him. [Defendant] presented a copy of his custody order and stated that he wanted to visit with the minor children. [Defendant] was allowed to visit with his children for five minutes with the security guard and a nurse present in the room along with [plaintiff].

54. The plaintiff . . . testified that it was hospital policy for the security guard to be present during [defendant's] visitation. The court does not find that to be a fact. The court does find as a fact that the plaintiff . . . insisted that the security guard remain in the room during [defendant's] visitation.

55. [Plaintiff] is currently employed as a nurse and she testified that she works three days a week currently: Tuesday, Wednesday and Sunday. That her shifts are for twelve hours and that she has approximately one to one and one-half hours commute each way. While she is working, [plaintiff] employs various babysitters to care for the children and during some days the children are dropped at the babysitters early in the morning and [plaintiff] does not return until 10:OO P.M.

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58. The defendant . . . has remarried and his current wife is Alisha LaFell. [Defendant] works 36 hours a week in 12 hour shifts. Alisha works 2 days a week for 12 hours a days. [Defendant] and Alisha's work schedules may overlap occasionally. During this work overlap, [defendant's] mother would care for the minor children.

59. That [plaintiff] has a history and pattern of interfering with the visitation between [defendant] and the minor children. [Plaintiff] has engaged in a pattern of behaviors that have interfered with and damaged the relationship between [defendant] and the minor children and these actions have

harmed the children. [Plaintiff] has previously been found in contempt of this court by Judge Sabiston for failing to allow [defendant] to visit and call the minor children. The court further finds as a fact that [plaintiff's] behavior and actions regarding the orders of this court providing for the best interest of the minor children will continue and [plaintiff] will do everything in her power to prevent the Defendant from exercising this court order of custody, visitation and access to his children. The court further finds that [plaintiff's] behavior and actions regarding false abuse allegations and denial of access to the children pursuant to the court ordered custody and visitation will continue to harm the minor children. The plaintiff's behavior and actions regarding the custody orders in this case will further alienate the minor children from the defendant and will discourage the natural love and affection that they have for the defendant.

60. That, with the consent of all parties, this court appointed Robert L. Ally as Guardian Ad Litem for the minor children due to the evaluation at UNC and the need for an impartial person to facilitate the travel and appointments with UNC. Mr. Ally arranged transportation for the children, spoke with the children, attempted to arrange supervised visits at the direction of the UNC Evaluators, and observed them during the times he was with them. Because of his involvement in the matter, Mr. Ally was allowed to make a closing argument and he presented a written report which was admitted without objection. The court reviewed the report but did not consider the report in making any findings of fact or conclusions in this matter.

61. That Arthur M. Blue has represented the defendant in this matter and the court incorporates the Affidavit of Arthur M. Blue as to the expenses and time involved in the representation of the defendant in this matter since the filing of the Rule 59 Motion in February, 2003. The court finds that Mr. Arthur M. Blue has practiced law since August of 1990 and devotes a substantial amount of time to the practice of domestic law in Moore County. The court further finds that an hourly rate of $175.00 per hour for an attorney with

> the experience of Arthur M. Blue is reasonable.
> 62. [T]he defendant in this case brings these motions as an interested party and . . . has acted in good faith in bringing these motions as evidenced by the court's findings that [defendant] has not sexually abused the minor children and that [plaintiff] has beyond reasonable doubt willfully and knowingly violated the court's orders in this matter. The court further finds that [defendant] has insufficient means to defray the expense of this suit in that his savings account has been depleted and after paying approximately six thousand dollars for attorney fees, Guardian Ad Litem fees and the University of North Carolina School of Medicine the defendant still owes a substantial sum of money in attorney fees to Mr. Blue. [T]he plaintiff has remained employed since previous orders established her monthly income to be in excess of $5,000.00 and there has been no evidence that her income has decreased at the time of this hearing. The plaintiff . . . has the means and ability to compensate the defendant for the attorney fees and cost awarded herein.

Based upon the above findings of fact, the court concluded the following: a substantial change in circumstances occurred affecting the welfare of the minor children; both defendant and plaintiff are fit and proper persons to have the care, custody, and control of the minor children; it is in the best interests of the minor children that their primary physical custody be placed with defendant; it is in the best interests of the minor children to have regular visitation with plaintiff; and, plaintiff has beyond a reasonable doubt willfully and knowingly violated the terms of the preceding custody order filed 10 October 2002 and consequently, is in criminal contempt of court. Plaintiff appeals.

I. *Recusal*:

Plaintiff first argues the trial court erred when it failed to either grant her motion for recusal or to refer the matter for hearing before another judge. Plaintiff contends she was "clearly prejudiced" by the trial court's refusal to order its recusal. We disagree.

"[A] judge should disqualify himself in a proceeding in which his *impartiality may reasonably be questioned*." North Carolina Code of Judicial Conduct, Canon (3)(c)(1) (2005) (emphasis added). "When a party requests such a recusal by the trial court, the party must demonstrate objectively that grounds for disqualification actually exist." *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002) (citation and internal quotation marks omitted). Thus, "[t]he *requesting party has the burden of showing through substantial evidence* that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially." *Id.* (emphasis added). Consequently,

> [I]f there is sufficient force to the allegations contained in a recusal motion to proceed to find facts, or if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge.

Id. (citations omitted).

In the instant case, plaintiff moved the court on 9 March 2004 for an emergency *ex parte* order for temporary custody regarding an alleged Federal Bureau of Investigation's search of defendant's home for child pornography. Plaintiff maintains Judge Gavin responded to this evidence by stating this was simply "more of the same" and

that in the future it would be best for another judge to hear issues in this case. Interpreting the comments from Judge Gavin to mean he would recuse himself, plaintiff submitted an order of recusal on 22 July 2004. This proposed order was not filed by plaintiff until 8 February 2005 and it was treated as a motion and denied three days later. Other than the alleged conversations taking place between plaintiff's counsel and Judge Gavin, plaintiff presented no other evidence and certainly no "substantial evidence" to support her motion for recusal. In fact, Judge Gavin expressly states in his order denying plaintiff's motion for recusal he "has never and does not believe that he could not engage in an unbiased review of the ongoing facts in this case and it is not his intention to be recused from this case." Thus, in accordance with *Faircloth*, *supra*, plaintiff, as the requesting party, failed to meet her burden to illustrate substantial evidence that Judge Gavin had a personal bias, interest or prejudice requiring him to recuse himself. This assignment of error is overruled.

II. *Motion for New Trial and Motion for Consideration of New Evidence*:

Plaintiff next argues the trial court abused its discretion by denying plaintiff's motion for a new trial or, alternatively, consideration of new evidence, regarding the best interests of the children. We disagree. First, as to plaintiff's motion for a new trial, "[a] trial judge's discretionary order made pursuant to Rule 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown." *City of Charlotte v. Ertel*, 170 N.C.

App. 346, 353, 612 S.E.2d 438, 444 (2005) (citation and internal quotation marks omitted). Moreover, "[d]uring review, we accord great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for new trial." *Id.* (citation and internal quotation marks omitted). In the instant case, however, though plaintiff presents an argument and cited authority for her "consideration of new evidence" contention, she fails to explicitly present any argument referencing her motion for a new trial. Thus, this argument is waived. *See* N.C. R. App. P. 28(b)(6) (2005) (stating "[a]ssignments of error...in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

As to plaintiff's alternative motion for consideration of new evidence, "[w]hether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 413 (2003); *see also Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001) (this Court observed that on remand "[i]t is left in the trial court's discretion whether the taking of additional evidence is necessary.")

This Court previously remanded this matter for the trial court to make additional findings of fact, *see LaFell v. LaFell*, 168 N.C. App. 240, 607 S.E.2d 56 (2005)[1] (hereinafter *LaFell I*), and, in

[1]This is an unpublished decision reported pursuant to N.C. R. App. P. 30(e).

doing so, stated "[a]s to all issues that are remanded, the trial court has discretion to determine whether it will accept additional evidence before entering its new order." *Id.* at *13. In his order denying plaintiff's motion for consideration of new evidence, Judge Gavin declared "[t]his [c]ourt, in the reasonable exercise of its discretion and in accordance with *LaFell I*... makes the determination that it will not receive new or additional evidence before entering its new order and the [c]ourt in its discretion relies upon the existing record and previous evidence submitted." Pursuant to *Hicks*, *supra*, it is within the trial court's discretion to determine whether additional evidence is necessary regarding the best interests of the children. On remand, the trial court reviewed the existing record and evidence presented at the previous hearing on 11 and 12 September 2003 and determined no new evidence was necessary. We discern no abuse of discretion by the trial court in its determination. This assignment of error is overruled.

III. *Competent Evidence:*

Plaintiff next argues the trial court erred in concluding SBL and RAL had not been sexually abused and that plaintiff made "false allegations" regarding the alleged sexual abuse because this determination was not warranted by competent evidence. Plaintiff contends the record contains substantial evidence SBL and RAL "are likely being sexually abused." We disagree.

"When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434,

439, 473 S.E.2d 393, 397 (1996). Here, because "the trial judge acts as both judge and jury...[and] resolv[es] any conflicts in the evidence[,] [i]f there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal *even in the presence of evidence to the contrary*." *Id.* 473 S.E.2d at 397-98 (emphasis added).

In the instant case, in finding of fact number 43 the trial court states "based upon the evidence received at the trial of this matter the court finds as a fact the defendant...has not sexually abused the minor children." The following competent evidence substantiates the trial court's finding: Nancy Berson ("Berson"), a clinical instructor at the University of North Carolina ("UNC") Department of Psychiatry, and Dr. Diana Meisburger ("Dr. Meisburger"), with the UNC Psychology Department, both testified at the 11-12 September 2003 trial regarding their mental health evaluations of the minor children ("the report"). Berson testified "[o]ur conclusion was we did not believe the [minor] children were being sexually abused." Berson further testified this conclusion was "based on the review of the records...[and] interviews with...family members...[and] the [minor] children." In fact, when Berson interviewed SBL regarding the allegations defendant sexually abused her, SBL stated "[defendant] [di]d not hurt her and...she missed [defendant] and...she wanted to go back to [defendant]." Dr. Meisburger interviewed RAL and testified that when RAL was asked if "anyone ever touched her pee-pee spot," RAL responded "just my mom." Dr. Meisburger also confirmed the report written by herself and

Berson accurately reflected the conclusion SBL and RAL were not sexually abused by defendant.

In addition to the above testimony of both Berson and Dr. Meisburger, the trial court's findings regarding SBL and RAL's examinations performed by Dr. Michael Hoben and Dr. William Stewart documenting "no evidence of trauma, laceration, ulceration or discharge" and "no physical evidence of abuse on the vaginal exam" constitute competent medical evidence supporting the trial court's assertion plaintiff made "false allegations" regarding the alleged sex abuse. Other than plaintiff and plaintiff's family members assertions, there is no other evidence in the record to substantiate plaintiff's claims. As competent medical and psychiatric evidence supports the trial court finding that defendant did not sexually abuse SBL and RAL and plaintiff made false allegations regarding sexual abuse, this assignment of error is overruled.

IV. *Substantial Change in Circumstances:*

Plaintiff next argues the trial court erred in concluding a substantial change in circumstances existed affecting the welfare of the minor children. Plaintiff contends that conclusion is not based on findings of fact supported by competent evidence. We disagree.

"Our trial courts are vested with broad discretion in child custody matters." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to 'detect tenors, tones, and flavors that are lost in the bare printed

record read months later by appellate judges.'" *Id.* (quoting *Surles v. Surles*, 113 N.C. App. 32, 37, 437 S.E.2d 661, 663 (1993)). Further, "[w]hen reviewing a trial court's decision to grant or deny a motion for modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Consequently, "should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, *even if record evidence 'might sustain findings to the contrary*.'" *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253-54 (emphasis added) (quoting *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)).

In the instant case, defendant testified he went to the hospital to visit the minor children who were ill and security guards warned he would be escorted out if he caused any trouble. Further, defendant testified the security guard told him he could see the minor children for five minutes in the security guard's presence <u>only</u> or "you don't see em' at all." With respect to requiring defendant to have a security guard escort, plaintiff stated "that's hospital protocol." Defendant also testified he had limited duration telephone contact with the minor children. Only eight phone calls out of ninety-two made by defendant to the minor children from 24 January 2003 through 20 August 2003 lasted longer

than two minutes. The trial court determined this was a direct violation of Judge Sabiston's 10 October 2002 order requiring "[e]ach party...[to grant] the other access to telephone communications with the children and in no way...hinder [or] interfere with...the children from calling the party." Finally, plaintiff admitted she intentionally withheld visitation from defendant. "[W]here...interference becomes *so pervasive as to harm the child's close relationship* with [one parent], there can be a conclusion drawn that the actions of the [other] parent show a disregard for the best interests of the child, warranting a change of custody." *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) (emphasis added). Therefore, in accordance with *Shipman* and *Woncik*, *supra*, there was substantial evidence in the record plaintiff interfered with defendant's relationship with the minor children to support the trial court's conclusion a substantial change in circumstances occurred warranting a change in custody. Thus, we overrule this assignment of error.

V. *Best Interests of the Children and Fit and Proper Custodian*:

Plaintiff next argues the trial court erred in concluding a change in custody was in the best interests of the minor children and that defendant was a fit and proper custodian. Plaintiff contends that conclusion is not based on findings of fact supported by competent evidence. We disagree.

"In making the best interest decision, the trial court is vested with broad discretion and can be reversed only upon a showing of abuse of discretion." *Jordan v. Jordan*, 162 N.C. App. 112, 118,

592 S.E.2d 1, 4 (2004) (citation omitted). Further, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Here, the trial court concluded a change in custody was in the minor children's best interests, in part, after determining plaintiff has a pattern and history of interfering with visitation between defendant and the minor children to the extent she will prevent defendant from exercising his court ordered right to custody, visitation and access. We cannot say the trial court has abused its discretion in this determination. Lastly, because we agree abundant competent evidence existed warranting a change in custody and further, the trial court noted defendant and plaintiff agreed in a prior consent order that defendant was a "fit and proper person to have visitation with the minor children," we concur with the trial court's conclusion defendant was a fit and proper custodian. This assignment of error is overruled.

VI. *Reasonableness*:

Plaintiff next argues the trial court abused its discretion by failing to consider the "reasonableness" of plaintiff's beliefs and actions regarding the alleged sexual abuse of her children. We disagree. The trial court's findings of fact regarding no sexual abuse are supported by competent evidence as illustrated through Dr. Meisburger's and Berson's testimony. There is nothing in the record demonstrating any lack of "reasonableness" by the trial court and

moreover, nothing to constitute an abuse of discretion. This assignment of error is overruled.

VII. *Contempt of Court*:

Plaintiff next argues the trial court erred by finding plaintiff in contempt of court. Plaintiff contends the court addressed the provisions she violated in the prior custody order, but failed to address how those provisions were violated. We disagree.

Contempt of court can arise through a party's "[w]illful disobedience of, resistance to, or interference with a court's...order[.]" N.C. Gen. Stat. § 5A-11(a)(3) (2005). Importantly, "[i]f the person is found to be in contempt, the judge must make findings of fact and enter judgment [where] [t]he facts must be established beyond a reasonable doubt." N.C. Gen. Stat. § 5A-15(f) (2005). This Court has found "'implicit in the statute the requirement that the judicial official's findings should *indicate* that [the reasonable doubt] standard was applied to his findings of fact.'" *State v. Ford*, 164 N.C. App. 566, 569-70, 596 S.E.2d 846, 849 (2004) (emphasis in original) (quoting *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979)).

In the instant case, in finding of fact number 40, the trial court found beyond a reasonable doubt plaintiff willfully and knowingly violated paragraphs one, five, nine, eleven, twelve, and thirteen of Judge Sabiston's 10 October 2002 order. The provisions plaintiff violated in the 10 October 2002 order include: defendant had joint custody of the minor children (paragraph one); defendant

is permitted telephone contact at least twice per week (paragraph five); both parties are expected to make reasonable efforts to promote in the minor children love, affection, and respect for each parent (paragraph nine); each party is expected to allow for access to telephone communication with the minor children (paragraph eleven); each party is obligated to consult with the other regarding non-emergency medical, dental, and orthopaedic treatment for the minor children (paragraph twelve); and each party is obligated to notify the other as to all activities the minor children are involved with and consult with the other about these activities (paragraph thirteen). The following evidence from the 11-12 September 2003 trial supports the trial court's conclusion plaintiff willfully and knowingly violated Judge Sabiston's prior order: plaintiff admitted she failed to inform defendant she was moving thus violating paragraphs one, five, nine, and eleven; plaintiff admitted she failed to inform defendant ASL was out sick from school thus violating paragraph twelve; plaintiff admitted she failed to inform defendant ASL switched schools thus violating paragraph thirteen; plaintiff admitted that when both SBL and RAL were sick in the hospital, she attempted to limit their contact with defendant to five minutes and required the presence of a security guard thus violating paragraph nine; and, plaintiff admitted she later withheld visitation from defendant. Because evidence exists to support the trial court's finding that plaintiff was in contempt of court, this assignment of error is overruled.

VIII. *Attorney's Fees*:

Plaintiff lastly argues the trial court erred by awarding defendant attorney's fees. Plaintiff contends there is insufficient evidence to support the court's determination defendant acted in good faith and that she be held in contempt of court. Further, plaintiff contends there is no evidence in the record to support the court's finding she has the means to compensate defendant. We disagree.

N.C. Gen. Stat. § 50-13.6 (2005) provides

> [I]n 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 expense of the suit.

Our Supreme Court has interpreted this statutory language to require "that before attorney's fees can be taxed in an action for custody...the facts required by the statute--that the party seeking the award is (1) an interested party acting in good faith, and (2) has insufficient means to defray the expense of the suit--*must be both alleged and proved*." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996) (emphasis added).

In the instant case, the trial court found as fact that defendant "br[ought] these motions as an interested party and...has acted in good faith in bringing these motions as evidenced by the court's finding...that plaintiff has beyond a reasonable doubt willfully and knowingly violated the court's orders[.]" Further, the court also found that defendant

> has insufficient means to defray the expense of this suit in that his savings account has been depleted and after paying approximately six thousand dollars for attorney fees, Guardian Ad Litem fees and the University of North Carolina School of Medicine the defendant still owes a substantial sum of money in attorney fees to Mr. Blue. Plaintiff, the plaintiff, has remained employed since previous orders established her monthly income to be in excess of $5,000.00 and there has been no evidence that her income has decreased at the time of this hearing. The plaintiff...has the means and ability to compensate the defendant for the attorney fees and cost awarded herein.

First, we agree defendant acted in good faith because we previously held plaintiff was correctly found to be in contempt of court. Second, the trial court displayed competent evidence that defendant lacked the monetary means to handle the cost of representation and that plaintiff was equipped to do so. Consequently, and in accordance with *Taylor*, *supra*, because defendant, as the party seeking the attorney fee award, alleged and proved, and the trial court subsequently found as fact, he was an interested party acting in good faith and had insufficient means to defray the expense of the suit, the trial court properly granted him attorney's fees. This assignment of error is overruled.

Affirmed.

Judges BRYANT and JACKSON concur.

Report per Rule 30(e).