NO. COA08-1008

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

LAURA THOMAS,
Plaintiff,

v. Wake County
No. 00 CVD 10157

BILLY DANIEL THOMAS,
Defendant.

Appeal by defendant from judgments entered 6 November 2006 by Judge Donna Stroud and 4 June 2008 by Judge Vinston Rozier, Jr. in Wake County District Court. Cross-appeal by plaintiff from judgment entered 4 June 2008 by Judge Vinston Rozier, Jr. in Wake County District Court. Heard in the Court of Appeals 31 August 2009.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellee/cross-appellant.

B. Daniel Thomas, pro se, defendant-appellant.

MARTIN, Chief Judge.

Laura Thomas ("plaintiff") and Billy Daniel Thomas ("defendant") were married 19 October 1996 and separated on 3 September 2000. Two minor children were born of the marriage. A consent order for child custody and support was entered 5 December 2001, pursuant to which plaintiff was required to pay defendant $363 per month in child support. The consent order also provided

that plaintiff was to pay 75% and defendant was to pay 25% of medical and other childcare related expenses.

On 23 March 2004, defendant filed a motion to modify child support seeking an increase in plaintiff's child support obligation. In support of this motion, defendant alleged that plaintiff's income had increased "by more than 50% while, concurrently defendant's income has fallen by more than 50%." The matter was heard on 30 March 2005 and 4 May 2006. At the 4 May 2006 hearing, defendant's attorney moved for sanctions pursuant to N.C.G.S § 1A-1, Rule 37 alleging plaintiff had failed to timely provide financial disclosures. Defendant additionally asked the court to grant a continuance in the event sanctions were denied. The trial court proceeded with the hearing and postponed its ruling on the issue of sanctions until after the hearing.

On 6 November 2006, the trial court entered an order modifying child support and required defendant to pay plaintiff $311 per month *nunc pro tunc* to 4 May 2006. In reaching this award, the trial court imputed $4000 per month in income to defendant. Additionally, it found plaintiff's monthly income amounted to $4,746 per month, the health insurance premiums for the children were $500 per month, and the other childcare related needs were $2,124 per month.

Subsequently, on 9 November 2006, defendant paid $1866 to plaintiff in child support. On 15 November 2006, defendant filed motions pursuant to N.C.G.S. § 1A-1, Rule 52, 59, 60 and 62. A hearing on these motions was held on 10 September 2007. On 5

October 2007, the trial court entered an order partially granting defendant's motions filed pursuant to N.C.G.S. § 1A-1, Rules 59 and 60 and allowed a new hearing on the issues of "[t]he amount of Credit to be given to Defendant for Plaintiff's non-payment, . . . plaintiff's accurate amount of work-related child care expenditures for the determination of Defendant's child support obligation, and . . . the amount of child support Defendant owes in arrears for his failure to pay child support." After the hearing, the trial court entered a final child support order on 4 June 2008. This order modified defendant's child support obligation to $308 per month and awarded plaintiff attorney's fees in the amount of $1000. Defendant appeals from the 6 November 2006 and the 4 June 2008 orders. Plaintiff cross-appeals from the 4 June 2008 order.

The issues on appeal are: (I) whether filing of competing narratives by the parties requires this Court to dismiss the appeal; (II) whether the trial court abused its discretion in denying defendant's motion for a continuance; (III) whether the trial court erred in imputing $4000 per month in income to defendant; (IV) whether there is substantial evidence to support the trial court's finding that the children's health insurance premium was $500 per month; and (V) whether the trial court erred in ordering defendant to pay $1000 in attorney's fees.

I.

Both parties to the appeal have submitted differing narratives of the evidence presented before the trial court. The trial court,

in purporting to settle the record on appeal, left the determination of "any accuracies/inaccuracies in the narrative and counternarrative" to this Court. This method of settling the record on appeal is in direct contradiction to Appellate Rule 11(c), which requires the trial judge to settle by order any factual inaccuracies in the challenged record. N.C.R. App. P. 11(c). Since the discrepancies in the narratives were not resolved by the trial judge, this Court must dismiss the appeal unless other evidence in the record can adequately assist in determining the issues presented. *Napowsa v. Langston*, 95 N.C. App. 14, 19, 381 S.E.2d 882, 885 (1989), *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 460 (1989); *see also* N.C.R. App. P. 9(a)(1)(e) ("The record on appeal in civil actions and special proceedings shall contain . . . so much of the evidence . . . as is necessary for an understanding of all errors assigned . . . ."). We conclude that the questions presented by defendant in this case are adequately addressed from other documents and unchallenged evidence in the record. "Under these limited circumstances, a narrative of evidence or a verbatim transcript is not necessary to understand defendant's assignments of error." *Napowsa,* 95 N.C. App. at 20, 381 S.E.2d at 885.

However, the record is not properly settled as to the first issue presented by plaintiff in her cross-appeal and, accordingly, we must dismiss her appeal on this issue. In her cross-appeal, plaintiff first challenged the trial court's finding of fact which states in pertinent part:

> On November 9, 2006, the Defendant paid the sum of $1866 to the Plaintiff for Child Support and contemporaneously filed motions under Rules 52, 59, 60, and 62. A hearing was held before this Court in January of 2007, at which time the Court allowed that under the Rules of Civil Procedure Rule 62(a) and the N.C. Rules of Appellate Procedure Article II, Rule 3(c)(3) that the issue of back and continuing child support would be deferred to the hearing on Defendant's Rule 52, 59, and 60 motions which was scheduled the following month.

Plaintiff argues that there is insufficient evidence to support this finding of fact. The only evidence before this Court with respect to the finding are two conflicting statements by the parties. In his narrative, defendant asserts the trial court granted a stay of his child support obligation under N.C.G.S. § 1-A, Rule 62(a) and the North Carolina Rules of Appellate Procedure Rule 3(c)(3). Plaintiff's narrative avers that no stay was ever granted by the trial court. The record shines no light on the issue. In fact, the only evidence related to a stay is an imprecise statement by the trial judge that he was "kind of still of that same mindset; that at least until there's been some resolution under prior requirement to pay, it would be somewhat difficult to find you in contempt for nonpayment." Without a settled record or a complete transcript, this Court is unable to determine whether this finding of fact is supported by the evidence. Accordingly, we dismiss plaintiff's cross-appeal as to this issue. However, we address the parties' remaining assignments of error on their merits.

II.

Defendant first argues the trial court erred in denying his request for a continuance. We review a trial court's decision to grant or deny a continuance under an abuse of discretion standard. *State v. Weimer*, 300 N.C. 642, 647, 268 S.E.2d 216, 219 (1980). Abuse of discretion is shown "only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). Defendant argues that plaintiff's failure to provide her financial disclosures in a timely manner placed him at a severe disadvantage. He reasons that the trial court, therefore, abused its discretion in denying his motion for a continuance. We disagree.

After a thorough review of the record, the only evidence in support of defendant's contention is one finding of fact dealing with plaintiff's financial affidavits. This finding states: "At the time of the May 2006 hearing, Defendant had not received all of the discoverable and requested financial information from Plaintiff. Additionally, much of what had been provided to Defendant had not been timely submitted by Plaintiff." From this record, we are unable to conclude that the trial judge's decision to hear the case was "manifestly unsupported by reason." *Id.*; *see also McDonald v. Taylor*, 106 N.C. App. 18, 22, 415 S.E.2d 81, 83 (1992) (finding the trial court did not abuse its discretion in denying the continuance where the only support for the motion was father's failure to provide financial affidavits, especially when the father testified as to his financial status and was available for cross). "An appellate court is not required to, and should

not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968).

III.

Defendant next argues the trial court erred in its decision to impute $4000 in income to him for child support purposes. We disagree.

In child support matters, this Court accords the trial court broad discretion. *Meehan v. Lawrance*, 166 N.C. App. 369, 375, 602 S.E.2d 21, 25 (2004). "Its order will be upheld if substantial competent evidence supports the findings of fact." *Id.* (citing *Shipman v. Shipman*, 357 N.C. 471, 474–75, 586 S.E.2d 250, 253–54 (2003); *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (internal quotation marks omitted) (quoting *State ex rel. Comm'r. of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)). If the findings of fact are supported by the evidence in the record, they are deemed "conclusive on appeal" and are examined to determine if they support the trial court's conclusion of law. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253–54.

In the present case, the trial court made the following relevant findings of fact in support of its conclusion to impute income[1]:

> 23. The Defendant has failed to exercise his reasonable capacity to earn because he has been living on his separate investments. While it was reasonable to manage his investments during the marriage, because his accounts were estimated at five hundred thousand ($500,000) to nine hundred thousand ($900,000) dollars to maintain and invest, this enabled him to actually earn enough from his investments to live on . . . .
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> . . . .
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> 26. That the Defendant's part-time work in coaching and training has remained the same. The decline in income, which Defendant alleges, has come from the decline in his investment earnings. The Defendant testified that his investments are down about 92K (in non-retirement accounts).
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> . . . .
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> 28. The Defendant is actually spending about four thousand ($4,000.00) dollars per month and accordingly to his own Financial Affidavit.
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> . . . .

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[1]The trial court labeled its decision to impute income as a finding of fact. However, this Court is not bound by the trial court's label and may reclassify the statement where appropriate. *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008); *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646 (2000), *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). Because the decision to impute income is an "application of fixed rules of law," it is properly classified as a conclusion of law, and thus we address it as such. *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) ("Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.").

> 31. The decline in the Defendant's income is a result of the decline in his investment income. The Defendant has not increased his work in order to make up for the loss in income.
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> . . . .
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> 33. The Defendant cannot excuse the depletion of his assets to a level that he can no longer support himself and his children, as an excuse not to provide for his children.
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> . . . .
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> 35. The Defendant has acted in bad faith by refusing to seek gainful employment . . . . The Defendant considered management of his investments his primary "job" during the marriage and now he clearly cannot support himself with this income and he is unable to continue to live off the investments for very much longer at his current rate of spending.
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> 36. The Defendant prepared applications for employment in the fall of 2005, but he has not sincerely tried to find employment . . . .
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> . . . .
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> 39. The Defendant has willfully refused to secure or take a job.
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> 40. The Defendant deliberately did not apply himself to his business by managing his investments.

Defendant has not challenged Findings of Fact 23, 28, 33 or 36. It is well established that, "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Therefore, these assignments of error are deemed conclusive. Moreover, though defendant challenged Findings of Fact 26, 31 and 35 in his assignments of error, he has only brought forth arguments

as to portions of these findings. Additionally, defendant challenged Finding of Fact 40 but made no argument concerning this assignment of error in his brief. Therefore, we only address those assignments of error that are argued in defendant's brief. N.C.R. App. P. 28(b)(6); *State v. Sexton*, 153 N.C. App. 641, 651, 571 S.E.2d 41, 48 (2002), *aff'd in part and disc. review improvidently allowed in part*, 357 N.C. 235, 581 S.E.2d 57 (2003).

We must determine whether the remaining findings of fact, to which defendant has preserved his challenges, are supported by competent evidence. The record tends to show that, at the time of the hearing, defendant continued to work part-time as a physical trainer and athletic coach. Defendant also testified that he continued to supplement his income from these activities by managing his investments. From this combined income, defendant had been able to afford monthly expenses of $4000 per month. However, as a result of his spending, the evidence shows that defendant's investment assets have been significantly depleted. Yet, defendant had not increased his work load or sought additional employment to make up for the decrease in income from his investments. This is evidenced by the almost $3025 gap between defendant's monthly expenses and the $975 per month in current income to which he testified.

Based on this evidence it was proper for the trial court to find that defendant would be unable to support himself and his children if his investments continued to decrease. Additionally, the trial court did not err in finding that defendant willfully and

in bad faith refused to obtain "gainful employment" to make up for his investment losses. Thus, the remaining findings of fact are supported by substantial evidence and are binding on appeal.

We now turn to the defendant's argument that the trial court's findings of facts do not support its conclusion to impute income. Generally, a party's "[ability] to pay child support is determined by that person's income at the time the award is made." *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985). However, where a party "deliberately depressed his income or deliberately acted in disregard of his obligations to provide support," the trial court may use the party's earning capacity to determine the child support award. *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). This requires a showing that the party reducing their income did so in "bad faith to avoid family responsibilities." *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006). Though a showing of bad faith generally requires the "finder of fact [to] have before it sufficient evidence of the proscribed intent," this Court has held that a showing of a party's "naive indifference to [the children's] need for financial support" is a sufficient basis from which to impute income. *Roberts v. McAllister*, 174 N.C. App. 369, 379, 621 S.E.2d 191, 198 (2005) (internal quotation marks omitted), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006).

The findings of fact stated above demonstrate defendant's "naive indifference" to his ability to support his children on his meager salary as a trainer and coach, especially since he has

substantially exhausted his investments. Accordingly, we hold the trial court's conclusion to impute income was proper.

Defendant argues in the alternative that the trial court erred in computing the amount of defendant's potential income at $4000 per month. We disagree. The North Carolina Child Support Guidelines provide:

> The amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40-hour work week.

N.C. Child Support Guidelines 2006 Ann. R. N.C. 47, 49 (Rev. Oct. 2002). Defendant argues the trial court incorrectly looked to his prior employment as an engineer and concluded that an amount based on his previous salary, adjusted for his time spent away from the field, was appropriate. He contends instead that the amount should be based on his potential earnings as a trainer and coach.

In determining defendant's potential income, the trial court primarily considered the amount defendant spent monthly on expenses. Specifically, the trial court found that "[t]he Defendant is actually spending about four thousand ($4,000.00) dollars per month . . . ." This finding is further supported by defendant's own financial affidavit which indicates he made, among other things, monthly payments of $1643 for his mortgage, $100 for his car, and around $396 for his water, heat, cable, telephone and electricity. Defendant was able to afford this standard of living

from his recent work as not only a coach and trainer but as an investor. Therefore, it was not error for the trial court to conclude that defendant's probable earning level would equal the amount on which he was actually living. Accordingly, the trial court did not err in imputing this amount as potential income to defendant.

IV.

Defendant next argues there is insufficient evidence to support the trial court's finding of fact that the children's health insurance premium was $500 per month. We disagree.

When a finding of fact is challenged, this Court's review is limited to whether there is competent evidence to support the finding. *See Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C. App. 282, 285, 542 S.E.2d 324, 326-27 (2001). The trial judge, sitting as the finder of fact, is in the sole position to judge the credibility of the witnesses and her findings must be given great deference on appeal. *State v. Sessoms*, 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995), *aff'd*, 342 N.C. 892, 467 S.E.2d 243, *cert. denied*, 519 U.S. 873, 136 L. Ed. 2d 129 (1996). The record in this case indicates plaintiff testified at the 4 May 2006 hearing that the children's portion of the health care premium was $502 per month.

Defendant argues the financial affidavits produced by plaintiff contradict this conclusion. However, there is no indication in the record that this information was entered into evidence or ever presented to the trial court in any form. "This

Court is not a fact-finding court, and will not consider evidence, documentary or otherwise, that was not before the trial court. To allow such evidence would lead to interminable appeals and defeat the fundamental roles of our trial and appellate courts." *State v. Massey*, __ N.C. App. __, __, 672 S.E.2d 696, 699-700 (2009). Defendant had a full opportunity to cross plaintiff on her testimony concerning the health care premiums. The record does not indicate that he did so. Plaintiff's apparently unchallenged testimony provided competent evidence supporting the trial court's finding that the amount of the children's health insurance premiums was $500 per month. Accordingly, this assignment of error is overruled.

V.

Finally, both defendant and plaintiff challenge the trial court's award of attorney's fees. Defendant argues the trial court erred by failing to make the requisite findings of fact necessary to award attorney's fees. Plaintiff, in her cross-appeal, argues the trial court properly awarded attorney's fees but failed to make sufficient findings as to the appropriate amount. We agree with both parties' contentions.

In a child custody suit, attorney's fees are appropriate provided the trial court finds that (1) the party seeking attorney's fees was acting in good faith, (2) the party seeking attorney's fees had "insufficient means to defray" the costs of litigation, and (3) 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 (2007); *see also Hudson v. Hudson*, 299 N.C. 465, 472–73, 263 S.E.2d 719, 723 (1980). If these statutory requirements are met, the amount of attorney's fees awarded is in the sound discretion of the trial court. *See Stanback v. Stanback*, 287 N.C. 448, 462, 215 S.E.2d 30, 40 (1975). In awarding attorney's fees, the trial court must make findings regarding the "lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent." *Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558, *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). The record in this case is devoid of the statutorily required findings. Additionally, the trial court failed to make findings as to the reasonableness of attorney's fees. Accordingly, we reverse the trial court's award of attorney's fees and remand the issue for further findings consistent with this opinion.

Affirmed in part, dismissed in part, vacated and remanded in part.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).