NO. COA09-1672

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

CURTIS ISAIAH KEATON,
Plaintiff,

v. Rowan County
No. 08 CVD 410

LATRICE MARIE KEATON,
Defendant.

Appeal by defendant from order entered 13 July 2009 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 17 August 2010.

No brief filed on behalf of plaintiff-appellee.

Horack, Talley, Pharr & Lownders, P.A., by Kary C. Watson, for defendant-appellant.

HUNTER, Robert C., Judge.

Latrice Marie Keaton ("defendant") appeals from the trial court's 13 July 2008 order dismissing her motion to modify custody. After careful review, we affirm.

Background

Defendant and Curtis Isaiah Keaton ("plaintiff") were married on 19 July 2004 and separated on 2 November 2006. (R p. 152). The parties have one child, "S.K.," born on 30 March 2005.[1] The

[1] The initials S.K. will be used throughout the opinion to protect the identity of the minor.

parties entered into a Separation and Property Settlement Agreement on 30 November 2007, which established that defendant would have primary physical custody of S.K. and established the visitation rights of plaintiff. The parties were subsequently divorced on 10 April 2008 and the separation agreement was incorporated into the divorce judgment.

On 9 May 2008, defendant filed a complaint and motion for domestic violence protective order ("DVPO") in Mecklenburg County alleging that plaintiff sexually and physically assaulted S.K. On 13 May 2008, an *ex parte* DVPO was entered in which the trial court found that plaintiff had committed an act of domestic violence. Plaintiff was ordered to "stay away" from S.K. until expiration of the order on 21 May 2008.

On 14 May 2008, defendant filed a motion for modification of custody and/or visitation order in Rowan County in which she requested "[p]ermanent [f]ull custody with [no] visitation or contact." On 30 June 2008, defendant filed a motion for *ex parte* relief and an amended motion for modification of visitation. That same day, the trial court entered an *ex parte* order precluding plaintiff from having any contact or visitation with S.K.

On 1 July 2008, plaintiff filed a motion for contempt and show cause and a motion to change custody in which he requested, *inter alia*, that sole physical and legal custody of S.K. be granted to him. On 2 July 2008, defendant filed a notice of voluntary dismissal with regard to the complaint she previously filed in Mecklenburg County. On 2 July 2008, the District Court of Rowan

County vacated the *ex parte* order that had been entered on 30 June 2008 because jurisdiction over the matter was originally established in Mecklenburg County when defendant filed the 9 May 2008 complaint.

On 16 and 26 September 2008, a hearing was held on the parties' respective motions before Judge Marshall Bickett, Jr. in Rowan County District Court; however, the parties did not complete their presentation of evidence and an order was not entered. On 4 November 2008, defendant filed a motion to recuse the presiding judge claiming that Judge Bickett had "lost impartiality due to the Court's prior history in the case, specifically including the circumstances surrounding the securing of the *ex parte* Order by the Defendant's prior attorneys." On 13 November 2008, Judge Bickett entered an order recusing himself from the matter.

A hearing on the parties' motions was held before Judge Charlie Brown on 10-12, and 30 March 2009. At the hearing, defendant claimed that plaintiff had physically and sexually abused S.K. Judge Brown entered an order on 13 July 2009 in which he held that neither party had "proven by grater weight of the evidence that there has been a substantial change in circumstances affecting the welfare of the minor child. . . ." The trial court dismissed both parties' motions. Defendant appeals the trial court's order. Plaintiff has not filed a brief with this Court.

Discussion

"'[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a

substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances.'" *Pulliam v. Smith*, 348 N.C. 616, 618-19, 501 S.E.2d 898, 899 (1998) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)). "While the welfare of the child is always to be treated as the paramount consideration, wide discretionary power is vested in the trial judge. The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal". *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981) (internal citations omitted).

"The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If the trial court determines that a substantial change in circumstances affecting the minor child has occurred, the trial court then determines if the custody modification is in the child's best interest. *Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576, 579. However, "[i]f the party bearing the burden of proof does not show that there has been a substantial change in circumstances, the court does not reach the 'best interest' question." *Id.* (internal citation omitted).

"When reviewing a trial court's decision to grant or deny a motion for the 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254. "Accordingly, 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." *Id.* (internal quotation marks and citation omitted).

I. The Trial Court's Findings of Fact

At the hearing in this matter, defendant claimed that plaintiff sexually and physically abused S.K. The trial court found as fact, *inter alia*:

> 13. The Departments of Social Services for Mecklenburg, Cabarrus, and Guilford County have investigated and/or studied numerous allegations of sexual abuse and physical abuse of the minor child. Every allegation of sexual abuse and physical abuse has been unsubstantiated. Detective Linker with the Kannapolis Police Department has completed her investigations on these allegations; however, the plaintiff has not been charged criminally regarding defendant's allegations of plaintiff physically and sexually abusing this minor child.

14. The minor child has been examined by Northeast Medical Center at the Child Advocacy Center on three occasions. She has been seen at Moses Cone Hospital. She has been seen at Brenner Children's Hospital. Her records have been reviewed by the University of North Carolina at Chapel Hill hospital. She has been seen by her primary care physicians at Suburban Pediatrics.

15. On two occasions, medical examinations revealed vaginal abrasions. These can be consistent with sexual abuse but can also be consistent with many other things including wiping with toilet paper.

16. The first of these occasions was on May 3, 2008 when the child was with the maternal grandmother in Chicago. On this occasion, the minor child left the Plaintiff and went with the maternal grandmother to Chicago on a Saturday evening. On Monday, the child complained of pain in her vaginal area. Dr. Stewart, a physician with Suburban Pediatrics, testified that the onset of pain would occur simultaneously with the development of the abrasions, not days later. These abrasions did not occur while the child was with the plaintiff.

17. The second was at Moses Cone Hospital by Dr. Suzana Martin on November 30, 2008. The minor child has been in the physical custody of plaintiff. Defendant brought minor child to Mooresville Hospital approximately five hours after visitation transfer. Defendant bathed the minor child before taking her to Mooresville Hospital. Defendant insisted that Dr. Martin not question or talk with the minor child. Defendant presented to Dr. Martin three or more photos she had taken of the minor child's vagina. Dr. Martin testified that these abrasions were not definitive of sexual abuse and could be consistent with wiping with toilet paper. The two abrasions were described by Dr. Martin as "shallow scrapes on the labia, not inside the vagina."

18. The other examinations were unremarkable without physical evidence of sexual molestation.

19. Dr. Conroy is a physician with Northeast Medical Center and is in charge of child medical examinations. She has testified in numerous court proceedings as an expert in child sexual and physical abuse.

20. Dr. Conroy was tendered and accepted as an expert witness in the field of child sexual and physical abuse. Dr. Conroy conducted child medical exams on the minor child in May, August, and December 2008.

21. Dr. Conroy testified that, as an expert, she could never say for a fact that a child had not been sexually abused or molested due to the fact that a child might give no history of abuse and have no physical findings of abuse but in fact could have been abused in the past.

21. [sic] Dr. Conroy's expert opinion was that it was not probable that the minor child had been sexually abused.

22. The minor child has made numerous inconsistent statements to various individuals.

23. The Defendant has not proven by the greater weight of the evidence, that the minor child has been sexually or physically abused by the Plaintiff.

. . . .

27. From the totality of the evidence, including the testimony from all witnesses and the exhibits introduced in this matter, the Court finds that the defendant movant has not proven by greater weight of the evidence that there has been a substantial change in circumstances affecting the welfare of the minor child.

Defendant argues that: (1) findings of fact 16, 18, 22, and 23 are not based on competent evidence; (2) finding of fact 17 is not an adequate finding because it is a mere recitation of testimony; and (3) findings of fact 23 and 27 are actually conclusions of law.

We first address defendant's claim that certain findings of fact are not based on competent evidence. With regard to finding of fact 16, defendant specifically argues that the evidence at the hearing does not support a finding that the "abrasions did not occur while the child was with the plaintiff." As the trial court stated, Dr. LaClaire Stewart testified that the abrasions would cause pain when they occurred, not days later. S.K. returned from plaintiff's home on Saturday, 3 May 2008, and did not complain of any pain in her vaginal area until Monday, 5 May 2008. S.K. was then seen by a pediatrician in Illinois on 9 May 2008. The medical report indicates that abrasions were seen on S.K.'s vagina during the examination. Defendant takes issue with the trial court's reliance on Dr. Stewart's testimony since Dr. Stewart did not examine S.K. until December 2008. The medical report written during the 9 May 2008 visit does not state when the abrasions first occurred and the physician who performed that examination did not testify at the hearing. Upon review of the transcript, it appears that Dr. Stewart's testimony was the only testimony presented concerning the onset of pain after the abrasions were sustained. Moreover, the evidence indicated that the abrasions were not necessarily the result of sexual abuse; rather, there are other causes of vaginal abrasions that can occur at any time, such as the

use of toilet paper. Clearly, the trial court deduced from Dr. Stewart's testimony that the abrasions did not occur while S.K. was with plaintiff since she did not complain of any pain until several days later — pain which could have been caused by something other than sexual abuse. Defendant claims that the only physical activity S.K. engaged in since leaving her father's house occurred when S.K. went on a walk with her grandmother and then complained of vaginal pain. However, defendant did not present any testimony at trial to suggest that vaginal abrasions would not cause pain until the individual engaged in physical activity. Dr. Stewart testified that the pain would begin immediately after the abrasions were inflicted without qualifications as to physical activity. Upon review of the evidence, we hold that there was competent evidence presented at the hearing to support the trial court's finding.

As to finding of fact 18, defendant claims that there was not substantial evidence for the trial court to find that "[t]he other examinations were unremarkable without physical evidence of sexual molestation." Defendant points to the 1 December 2008 examination by Dr. Stewart in which she noted that S.K. had "symmetrical erythema, redness, in the folds of the smaller labia." Dr. Stewart did not state that what she saw was evidence of sexual molestation. Dr. Stewart did state that it appeared that something may have rubbed S.K.'s vagina causing "hyervascularity[,]" an accumulation of blood vessels. When asked what could account for hypervascularity, Dr. Stewart stated: "Irritation or it can be a, I guess, a normal variance, just to how it always looks or in

certain people." Defendant also claims that Dr. Rosalina Conroy observed irritation of S.K.'s vagina during an exam in December 2008. Defendant misstates Dr. Conroy's testimony. Dr. Conroy testified that defendant showed her photographs that she had previously taken that showed some "mild redness," which could have been caused by "wiping too much[.]" When Dr. Conroy actually examined S.K., she had a "normal exam at that point." Dr. Conroy went on to say that "[t]here is nothing in the history that makes me concerned [that sexual abuse had occurred] and there is nothing in the physical exam that makes me concerned." Upon review of the evidence, we find it sufficient to support the trial court's finding that "[t]he other examinations were unremarkable without physical evidence of sexual molestation."

As to finding of fact 22, defendant claims that S.K. did not make inconsistent statements, as the trial court found. The evidence indicates that S.K. did make inconsistent statements. Dr. Conroy specifically testified that S.K.'s "inconsistent history" contributed to her conclusion that it was not probable that S.K. had been sexually abused. Dr. Conroy stated that S.K. would say "Daddy bites my tee-tee" or "Daddy hurts my booty[,]" but "none of them were consistent." Dr. Conroy testified that "kids, especially if they're coached, are going to be making statements like that. If they hear a parent say that statement, many times they will repeat it." Julie Bonds, a registered nurse and supervisor at the Children's Advocacy Center at Carolina's Medical Center, testified that at one point, S.K. stated that her father "'itched her booty

two times.'" During one interview, S.K. stated that "Armand and daddy bite her[,]" but she said she did not know where. S.K. also claimed that her mother was present when "'daddy put his hand in her booty.'" Accordingly, we hold that there was competent evidence to support the trial court's finding that S.K. made inconsistent statements.

As to finding of fact 23, defendant argues that there was not competent evidence to support the trial court's finding that "[t]he Defendant has not proven by the greater weight of the evidence, that the minor child has been sexually or physically abused by the Plaintiff." Defendant argues that there was evidence that plaintiff sexually and physically abused S.K. Defendant points to the medical documentation regarding the abrasions on S.K.'s vagina. Defendant also argues that plaintiff hit S.K. in the eye twice, spanked her with a wooden spatula, injured her lip, bruised her leg, and disciplined her by "fold[ing] [S.K.] in half until the point that she cannot breathe." While the injured eye and the cut lip were documented by photographs taken by defendant, most of the evidence pertaining to how these injuries occurred were provided by defendant and plaintiff during their testimonies. Plaintiff claimed that the eye injury occurred when S.K. hit herself in the eye with a shampoo bottle, but he was not in the room when it happened. Dr. Kimberly Seldon, S.K.'s primary care physician, testified that upon review of a photograph taken of S.K.'s eye, it was her opinion that the injury was not consistent with being hit in the eye with a shampoo bottle. As to the abrasions observed in

May 2008, plaintiff testified that it was his belief that S.K. "ended up hurting herself" when he left her in the bathtub alone while he was cooking and getting "everything together for the next day[.]" Plaintiff claimed that he had never noticed any abrasions on S.K.'s vagina, but had seen some "slight irritation." He claimed that he and defendant discussed the irritation and decided "to change shampoo and baby wash and things along those lines." When asked if he sexually or physically abused S.K. between 10 April 2008 and 9 May 2008, plaintiff responded: "No." Plaintiff claimed that he had never sexually molested or physically abused S.K. Plaintiff asserted that he had been cooperative with Social Services and law enforcement investigations. As of the hearing in this matter, DSS had determined that the allegations of physical and sexual abuse were "unsubstantiated," and no criminal charges had been brought against plaintiff. Dr. Conroy testified that sexual abuse can never be completely ruled out in any case, but that it was her expert opinion that it was not probable that S.K. had been sexually abused. There was no medical expert testimony to suggest that S.K. had been physically or sexually abused. Based on the record before us, we hold that there was competent evidence to support the trial court's 23rd finding of fact.

We reiterate that it is not the province of this Court to establish our own findings of fact and conclusions of law. We must strictly determine whether there was competent evidence to support the trial court's findings of fact and whether those findings support the conclusions of law. The trial court's findings must be

upheld if there is evidence to support them, even if there is evidence to the contrary. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. As our Supreme Court has established: "Our trial courts are vested with broad discretion in child custody matters. 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.* at 474, 586 S.E.2d at 253 (citation and quotation marks omitted). While the evidence in this case was conflicting, there was evidence to support the trial court's findings, and, therefore, they are considered binding on appeal. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). These findings in turn support the trial court's conclusion of law, that "[t]he defendant has not proven by greater weight of the evidence that there has been a substantial change in circumstances affecting the welfare of the minor child. . . ."

We now address defendant's remaining arguments pertaining to the trial court's findings of fact. Defendant claims that finding of fact 17 is a mere recitation of the testimony. "[R]ecitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n. 1, 313 S.E.2d 193, 195 n. 1 (1984). "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what

pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000). However, as long as the findings "show the trial court made its own determination with respect to the facts established by the evidence presented at trial," the findings will not be overruled merely because they may adopt or incorporate reports or recite evidence in parts. *In re C.M.*, 183 N.C. App. 207, 212, 644 S.E.2d 588, 593 (2007). Here, while the trial court recited some evidence in finding of fact 17, the trial court made multiple findings which demonstrate that it weighed the evidence, deduced certain findings from the various testimonies, and made its own determinations. Consequently, we reject defendant's argument.

Defendant also argues that findings of fact 23 and 27 are actually conclusions of law. Findings of fact are "determinations from the evidence of a case . . . concerning the facts averred by one party and denied by another." *In re Johnson*, 151 N.C. App. 728, 731, 567 S.E.2d 219, 221 (2002). "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties." *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 28-29 (1977). Here, finding of fact 23 is a conclusory statement pertaining to the evidence, but it is properly classified as a finding of fact. This finding — "that the minor child has [not] been sexually or physically abused by the Plaintiff" — supports the trial court's conclusion of law that a substantial change in circumstances had not occurred.

However, finding of fact 27 is erroneously labeled a finding of fact since it specifically relates to the ultimate determination based on the rule of law, namely, that the defendant had not met her burden of proving a substantial change in circumstances. Nevertheless, defendant has failed to show how this was material. The trial court did restate in conclusion of law 3 that defendant had not proven that a substantial change in circumstances had occurred. *See Starco, Inc. v. AMG Bonding & Ins. Serv., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) ("[T]o obtain relief on appeal, an appellant must not only show error, . . . appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action."). This assignment of error is without merit.

II. Hearsay

Defendant argues that the following statements were erroneously excluded by the trial court as inadmissible hearsay: (1) S.K.'s statements to her grandmother that her "tee-tee hurt" and "[m]y daddy bites my tee-tee"; (2) S.K.'s statements to her mother that "Daddy bites me," "Daddy hurts my tee-tee" and "Daddy touches my booty"; and (3) statements made by Marie Bankhead, S.K.'s grandmother, regarding statements made by S.K. to the treating physician in Chicago.

Assuming, without deciding, that the statements were erroneously excluded, defendant was not prejudiced. Here, the record contains numerous references to S.K.'s assertions that

"Daddy bite my tee tee." Testimony from physicians, DSS investigators, and the parties, as well as a multitude of medical records and DSS reports, detail S.K.'s claims and the claims of defendant and defendant's mother. "'Where evidence of similar import to that which was improperly excluded is admitted at other times in the trial, the exclusion will not be held to be prejudicial error.'" *Leary v. Nantahala Power and Light Co.*, 76 N.C.App. 165, 174, 332 S.E.2d 703, 709 (1985) (quoting *State v. Smith*, 294 N.C. 365, 377, 241 S.E.2d 674, 681 (1978)). Defendant makes no showing that the exclusion of these particular statements prejudiced her in any way where the same evidence was provided in multiple other instances during the hearing. Consequently, we hold this argument to be without merit.

III. Testimony of Julie Beauchesne

At the hearing, Julie Beauchesne ("Ms. Beauchesne"), a child welfare nurse with the Department of Social Services in Guilford County, acknowledged that S.K. had undergone several child medical evaluations ("CMEs"). Over objection from defense counsel, the trial court allowed Ms. Beauchesne to testify as to what a CME typically entails. Defendant argues that "[n]othing in the record indicates that Judge Brown applied the balancing test required by Rule 403; therefore, he committed error in admitting the testimony." Defendant does not argue that the evidence was unduly prejudicial under Rule 403 of the North Carolina Rules of Evidence; rather, she argues that the trial court did not make a showing that he considered whether the probative value outweighed the

prejudicial impact of the testimony. Upon review of the transcript, it is clear that defense counsel did not object on Rule 403 grounds and made no argument that the testimony was unduly prejudicial. Consequently, we will not review this assignment of error. N.C. R. App. P. 10(a)(1) ("In order to preserve and issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

IV. Evidence Considered by the Trial Court

Finally, defendant argues that the trial court only considered evidence of abuse occurring after entry of the 10 April 2008 order in which the parties' separation agreement was incorporated into the divorce judgment. Defendant claims that multiple instances of physical abuse occurred between 30 November 2007, when the separation agreement was signed, and 10 April 2008. It is undisputed that the alleged acts of sexual abuse occurred after 10 April 2008. The case of *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E.2d 849 (1979), which was not cited by defendant, is on point regarding this issue. There, this Court held that "[w]hen, . . . facts pertinent to the custody issue were not disclosed to the court at the time the original custody decree was rendered . . . a prior decree is not res judicata as to those facts not before the court." *Id.* at 425, 256 S.E.2d at 854; *accord Wehlau v. Witek*, 75 N.C. App. 596, 598, 331 S.E.2d 223, 225 (1985) ("[w]hen facts pertinent to the custody issue existed at the time of the custody

decree but were not disclosed to the court, the prior decree is *res judicata* only to the facts that *were* before the court, and other pertinent facts may be considered in subsequent custody determinations."), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). We hold that the issue of physical abuse that allegedly occurred prior to entry of the divorce judgment is not *res judicata*; however, we are confident that the trial court did, in fact, consider evidence of physical abuse.

Defendant points to the trial court's conclusion of law that a substantial change in circumstances had not occurred "since entry of the prior order" to support her claim that the trial court did not consider evidence of physical abuse that allegedly occurred prior to entry of the divorce judgment. It is clear that the trial court was framing this conclusion of law to mirror the applicable standard of review. Upon examination of the entire record, the trial court in this case heard a considerable amount of evidence concerning physical abuse that allegedly occurred prior to April 2008, including the injury to S.K.'s eye. Testimony from the parties, photographic exhibits, and testimony from a medical expert were introduced. The trial court then found as fact that defendant had not met her burden of proving that physical abuse had occurred.

Defendant mentions in her brief that other testimony was provided that tended to establish that S.K. did not want to visit her father and that plaintiff was an unfit parent. Defendant argues that the trial court did not make findings concerning these

specific allegations and, therefore, the trial court must have ignored that testimony. The trial court is not required to make a finding regarding every allegation and every piece of evidence. "The facts found must be adequate for the appellate court to determine that the judgment is substantiated by competent evidence, however." *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981). We hold that the trial court's findings of fact were adequate to support its conclusions of law and we further hold that the trial court considered all of the evidence presented by the parties in making its determinations.

Conclusion

Based on the foregoing discussion, we hold that the trial court's findings of fact were supported by competent evidence which in turn support the trial court's conclusion of law that defendant did not meet her burden of establishing a substantial change in circumstances affecting the minor child. As to defendant's remaining assignments of error, we find no prejudicial error.

Affirmed.

Judges CALARBIA and ARNOLD concur.

Report per Rule 30(e).