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NO. COA13-455
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

JOHN FLETCHER CHURCH,
Plaintiff,

Vs.

Caldwell County
No. 01-CVD-1391

JEAN MARIE DECKER (formerly
Church),
Defendant.

Appeal by Plaintiff from orders entered 23 October 2012 by Judge J. Gary Dellinger in Caldwell County District Court. Heard in the Court of Appeals 24 September 2013.

John Fletcher Church, pro se.

Respass & Jud, by Wallace Respass, Jr., and Marshall Hurley, PLLC, by Marshall Hurley, for Defendant.

DILLON, Judge.

John Fletcher Church (Plaintiff) appeals from the trial court's 23 October 2012 orders awarding attorneys' fees to Jean Marie Decker (Defendant). For the following reasons, we reverse and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Plaintiff and Defendant were married on 23 December 1992

and subsequently divorced on 22 November 2002. The parties have litigated extensively against one another since the dissolution of their marriage, including numerous appeals before this Court. We have previously articulated the complex factual and procedural history involving the parties, and, thus, we limit our recitation of the facts to those relevant for purposes of disposing of the instant appeal.¹

In *Church v. Decker*, No.COA10-1502 (June 21, 2011) (unpublished), this Court addressed Plaintiff's appeals in cases COA10-1422 and COA10-1502. Defendant moved for sanctions against Plaintiff in connection with the aforementioned appeals pursuant to N.C.R. App. P. 34(a)(1), which provides that this Court may impose sanctions against the appealing party where the appeal is "frivolous" in that it is "not well grounded in fact and [is] not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]" Addressing Defendant's motion for sanctions, we held as follows:

Although we do not believe that all of the issues that Plaintiff has presented for our consideration in this consolidated appeal were frivolous, we conclude that Plaintiff's challenge to the trial court's order dismissing his 3 September 2009 notice of

¹ For a more comprehensive background of the ongoing litigation between the parties, see *Church v. Church*, No.COA10-993 (June 7, 2011) (unpublished).

appeal, his challenge to the order denying his request for the reinstatement of visitation rights, his challenge to the trial court's order holding him in contempt for violating the interim attorney's fees order, and his challenge to the trial court's order sanctioning him pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 were "not well grounded in fact and [were] not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]" N.C.R. App. P. 34(a)(1). As a result, we conclude that Plaintiff should be required to pay Defendant's "reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding[.]" N.C.R. App. P. 34(b)(2) c, and that this case should be remanded "to the trial division for a hearing to determine" the amount of expenses, including attorney's fees, which Plaintiff should be required to pay to Defendant in connection with the frivolous portions of this appeal. N.C.R. App. P. 34(c).

Id.

On remand, the trial court held an evidentiary hearing on 26 July 2012, for the purpose of determining the appropriate amount of attorneys' fees to award Defendant in accordance with our mandate, *supra*. At the hearing, Defendant's counsel submitted his affidavit, which purported to reflect Defendant's attorneys' fees incurred in connection with appeals COA10-1422 and COA10-1502. Defendant's counsel indicated to the court that he had had difficulty distinguishing the time he had spent working on the frivolous portions of Plaintiff's appeals from

the time that he had spent working on the non-frivolous portions of Plaintiff's appeals, stating, "I think I would be very disingenuous if I said, well, I had 84 percent of my time devoted to a frivolous appeal." Counsel further stated that the court could impose its own, additional sanctions, in order to bring the total amount of attorneys' fees up to 100 percent of the attorneys' fees incurred by Defendant. Plaintiff, however, vehemently argued that an award of 100 percent attorneys' fees would be contrary to this Court's mandate, asserting that "the Court [of Appeals had] found sanctions as to only portion of" the relevant appeals.

The trial court expressly declined to impose its own, additional sanctions. Nevertheless, by order entered 23 October 2012, the trial court ordered Plaintiff to pay Defendant's attorneys' fees in the amounts of \$7,851.25 and \$8,772.50 for consolidated appeals COA10-1422 and COA10-1502, respectively, representing 100 percent of the attorneys' fees incurred by Defendant in defending against those appeals. Plaintiff timely filed his notice of appeal with this Court on 20 November 2012.

II. Analysis

Plaintiff's sole contention on appeal is that the trial court erred in ordering him to pay 100 percent of Defendant's attorneys' fees incurred in connection with consolidated appeals

COA10-1422 and COA10-1502. Plaintiff argues that the trial court's decision contravened this Court's 21 June 2011 mandate, which, as previously stated, instructed the trial court to award Defendant "the amount of expenses, including attorney's fees, which Plaintiff should be required to pay to Defendant in connection with the frivolous portions of this appeal." We agree.

The trial court's order awarding attorneys' fees is reviewable for abuse of discretion. *Runnels v. Robinson*, 212 N.C. App. 198, 203, 711 S.E.2d 486, 490-91 (2011). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

"A mandate of an appellate court 'is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. We have held judgments of [a trial court] which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of [the appellate court] . . . to be unauthorized and void.'" *McKinney v. McKinney*, __ N.C. App. __, __, 745 S.E.2d 356, 358 (2013) (citations omitted). "A trial court has 'no

authority to modify or change in any material respect the decree affirmed.'" *Id.* (citations omitted).

In *McKinney*, the defendant "appealed several orders of the trial court that awarded attorneys' fees to plaintiff in connection with plaintiff's motion for modification of child support." *Id.* at ___, 745 S.E.2d at 356. One such order awarded costs incurred in connection with the plaintiff's expert witness testimony. Upon review, this Court determined that the trial court had erroneously awarded costs for the time that the plaintiff's expert witness had spent preparing to testify, instead of only for the time that the witness had spent actually testifying in court, as prescribed by statute. *Id.* at ___, 745 S.E.2d at 358 (construing N.C. Gen. Stat. § 7A-305(d)(11) (2009)). We, accordingly, vacated the portion of the award representing the expert witness's *preparation* for trial and remanded to the trial court to enter a new order, deducting this portion from the total amount awarded. *Id.* at ___, 745 S.E.2d at 356. On remand, the trial court awarded \$390.00 in expert witness fees for the actual time spent testifying, but also awarded an additional \$2,990.00 "in the discretion of the court" under N.C. Gen. Stat. § 7A-314, stating in its order that "[d]ue to the complexity of the defendant's financial statements . . . it is reasonable that the plaintiff be reimbursed" for both the

time spent testifying and the time spent in court. *Id.* at ___, 745 S.E.2d at 358. However, on the second appeal of the matter, we vacated the \$2,990.00 component of the award representing the expert witness's time preparing for trial, concluding that it was "inconsistent" with our prior mandate.

As in *McKinney*, the trial court's order in the present case was inconsistent with a prior mandate of this Court. The plain language of our mandate instructed the trial court to award attorneys' fees only with respect to the frivolous *portions* of Plaintiff's appeal. We predicated our instructions on the fact that "we [did] not believe that all of the issues that Plaintiff [had] presented for consideration . . . were frivolous[.]" In other words, we considered and rejected Defendant's argument that she was entitled 100 percent attorneys' fees; and this decree stands as the law of the case. *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (providing that "[a] decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal"); see also *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). The trial court abused its discretion when it ignored the plain language of our mandate and ordered Plaintiff to pay *all* of Defendant's attorneys' fees

incurred by Defendant in connection with appeals COA10-1422 and COA10-1502.

Although the trial court held an evidentiary hearing and heard arguments from the parties concerning the proper amount of attorneys' fees awardable, the court failed to articulate in its 23 October 2012 order its basis for the amount ultimately awarded; nor does the record before us disclose any reasonable basis for the award. The trial court could have imposed additional sanctions on remand - as requested by Defendant at the 26 July 2012 hearing - but expressly declined to do so. The trial court evidently reached its decision to order 100 percent attorneys' fees upon accepting Defendant's counsel's assertion that it would be too difficult to apportion the fees between those incurred in connection with the frivolous portions of Plaintiff's appeals versus those incurred in connection with the non-frivolous portions of Plaintiff's appeals. The trial court's decision to award 100 percent attorneys' fees to Defendant on this basis was arbitrary and constituted an abuse of discretion.²

² Even assuming that the trial court faced a difficult task in apportioning the costs pursuant to our mandate, this fact in and of itself would not relieve the court of its duty to employ a reasonable methodology and apply its best efforts to do so as directed by our mandate. See *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 672, 554 S.E.2d 356, 366 (2001)

In light of the foregoing, we reverse the trial court's 23 October 2012 orders and remand to the trial court for a determination of the proper amount awardable as attorneys' fees.³

REVERSED AND REMANDED.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).

(providing that "an award of attorney's fees usually requires that the trial court enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence"). Further, and regardless of the difficulty inherent in the task, the court clearly exceeded the bounds of its discretion in awarding 100 percent attorneys' fees in light of our instructions to award costs, including reasonable attorneys' fees, with respect to only the frivolous *portions* of the appeal.

³ Plaintiff proposes that attorneys' fees be awarded based upon the percentage of pages in Defendant's brief allocated to the issues that we have deemed frivolous. We neither endorse nor reject Plaintiff's proposed methodology, but instead leave it to the trial court to employ a reasonable means of apportionment.