NO. COA13-456
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

JOHN FLETCHER CHURCH,
Plaintiff,

Vs. Caldwell County
No. 01-CVD-1391

JEAN MARIE DECKER (formerly Church),
Defendant.

Appeal by Plaintiff from order entered 15 November 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.

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

DILLON, Judge.

John Fletcher Church (Plaintiff) appeals from the trial court's 15 November 2012 order 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 Background & Procedural History

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. For a comprehensive background of the ongoing litigation between the parties, *see Church v. Church*, No.COA10-993 (June 7, 2011) (unpublished). We limit our recitation of the facts to those relevant for purposes of disposing of the instant appeal.

In May 2010, Plaintiff filed various motions relating to previous orders entered in Caldwell County District Court. These motions were scheduled for hearing on 9 July 2010. Plaintiff failed to attend the 9 July 2010 hearing, however, and the court granted Defendant's motion to dismiss Plaintiff's claims with prejudice for failure to prosecute. The court also granted Defendant's request to "issue a criminal show cause order," requiring that Plaintiff appear before the court on 21 July 2010 to show cause as to why he should not be held in criminal contempt of court. Finally, the court entered an additional written order, in which it (1) found Plaintiff to be in civil contempt of court for failing to pay Defendant's attorneys' fees as required by a previous court order; and (2)

reserved for hearing the matter of attorneys' fees incurred by Defendant in prosecuting her motion for contempt.

At the conclusion of the 21 July 2010 show cause hearing, the court found Plaintiff to be in criminal contempt of court. The court entered a written order consistent with this determination on 17 September 2010. The court also awarded attorneys' fees to Defendant in the amount of $4,160.00, representing the amount reflected in an affidavit submitted by Defendant's counsel concerning fees incurred by Defendant in connection with the 9 July 2010 hearing, the 9 July 2010 show cause order, the 9 July 2010 and 12 July 2010 civil contempt orders, and the 21 July 2010 criminal contempt hearing.

Plaintiff appealed the criminal contempt order to the superior court, which ultimately invalidated the district court's finding of criminal contempt on grounds that the "District Court trial of [the] matter was prosecuted by someone not with the [District Attorney's] office [and without] a determination that the [District Attorney's] office had a conflict." *Church v. Church*, No. COA11-222 (Nov. 1, 2011) (unpublished).

Plaintiff then appealed the attorneys' fees portion of the 17 September 2010 order to this Court. Without reaching the

merits of Plaintiff's contentions on appeal, this Court reversed the attorneys' fees order on grounds that a portion of the fees awarded in the order represented fees incurred in connection with the now-invalidated criminal contempt proceeding. We thus remanded the matter to the trial court for entry of a new order on attorneys' fees, specifically declining to express any opinion on Defendant's entitlement, if any, to the balance of attorneys' fees awarded in the 17 September 2010 order (i.e., those fees *not* incurred in connection with the criminal contempt proceeding).

On remand, the trial court held a hearing on 26 July 2012, at which Defendant testified concerning her income and assets. On 15 November 2012, the trial court entered a new order on attorneys' fees, finding as fact that the attorneys' fees incurred by Defendant "exclusive of services devoted to criminal contempt [totaled] $4,035.99." From this order, Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred in ordering him to pay Defendant's attorneys' fees in the amount of $4,035.99. Plaintiff contends that Defendant's "income is at least 2.5 times" his own income, and, therefore, it "cannot be

true," as the trial court found, that he had "the means and ability to pay" Defendant's attorneys' fees, but that Defendant had "insufficient means with which to defray the costs of this action including the fees incurred in defending the Plaintiff's Motions[.]" We agree.

Our General Statutes provide that in the context of a child support proceeding, "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." N.C. Gen. Stat. § 50-13.6 (2011); *Diehl v. Diehl*, 177 N.C. App. 642, 653, 630 S.E.2d 25, 32 (2006) (remanding order for proper findings of fact where "[a]lthough the trial court denied [the appellant's] request for attorneys' fees, it made no findings relating to that denial, such as whether [the appellant] acted in good faith or whether she had insufficient means to defray the expense of the suit"). "Where attorneys' fees are properly awarded, the amount of the award rests within the discretion of the trial court and is reviewable on appeal only for an abuse of discretion." *Owensby v. Owensby*, 312 N.C. 473, 475, 322 S.E.2d 772, 774 (1984).

"A party has insufficient means to defray the expense of the suit when he or she is unable to employ adequate counsel in

order to proceed as litigant to meet the other spouse as litigant in the suit." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996). The trial court's findings concerning a party's ability to defray the costs of litigation must consist of more than a "bald statement that a party has insufficient means to defray the expenses of the suit." *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (vacating attorneys' fees order and remanding for sufficient findings of fact); *Atwell v. Atwell*, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985) (vacating attorneys' fees award where findings of fact were insufficient to support determination that wife had insufficient means to defray litigation costs). Merely rehashing the statutory language in this respect is insufficient because this "finding" concerning a party's ability to defray the costs of litigation is, in substance, a conclusion of law, *Atwell*, 74 N.C. App. at 238, 328 S.E.2d at 51 (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)); and, as such, it must be supported by findings of fact. *Atwell*, 74 N.C. App. at 238, 328 S.E.2d at 51.

Recently, in *Dixon v. Gordon*, __ N.C. App. __, 734 S.E.2d 299 (2012), *review denied*, __ N.C. __, 743 S.E.2d 191 (2013), we held that the order's recitation of "the bare statutory

language" that the father did "not have sufficient funds with which to employ and pay legal counsel" to "meet [the mother] on an equal basis" was insufficient to support the award of attorneys' fees. *Id.* at __, 734 S.E.2d at 305. We noted that "[a]lthough information regarding [the] father's gross income and employment was present in the record in [the] father's testimony, there are no findings in the trial court's order which detail this information." *Id.*

Here, the trial court received evidence concerning Defendant's means and her ability to defray the costs of litigation through Defendant's testimony at the 26 July 2012 hearing. Defendant stated the value of her home, personal vehicle, and retirement accounts, and indicated that she earned an annual salary of $68,000.00. Plaintiff asserts that this testimony demonstrated Defendant's ability to defray the costs of litigation; Defendant counters that Plaintiff introduced no evidence concerning his own means and that the court's ruling should be affirmed in light of the "considerable and substantial evidence" introduced concerning Defendant's means. We find it dispositive, however, that, regardless of the substance of Defendant's testimony, the trial court failed to include in its order any findings to support its determination in finding of

fact 6 that "[t]he Defendant is an interested party acting in good faith who has insufficient means with which to defray the costs of this action including the fees incurred in defending the Plaintiff's Motions . . . ." Absent such findings, the trial court's order cannot be sustained. *Dixon*, __ N.C. App. __, 734 S.E.2d 299; *Cameron*, 94 N.C. App. 168, 380 S.E.2d 121; *Atwell*, 74 N.C. App. 231, 328 S.E.2d 47. Accordingly, we remand this matter to the trial court for entry of adequate findings of fact, if any can properly be made, concerning Defendant's ability to defray the costs of litigation.[1]

III. Conclusion

For the foregoing reasons, we reverse the trial court's 15 November 2012 order and remand for additional proceedings consistent with this opinion.[2]

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[1] We express no opinion on the sufficiency of Defendant's testimony, in itself or in conjunction with any other record evidence, to sustain the trial court's determination in finding of fact 6. We merely conclude that the determination set forth in finding of fact 6 must itself be supported by adequate findings.

[2] We note Defendant's contention that this Court has previously addressed the issue of her ability to defray the costs of litigation and that the challenged 15 November 2012 order should, therefore, be affirmed under the law of the case doctrine, which holds that "an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the

REVERSED AND REMANDED.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).

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second appeal[,]" *Creech ex rel. Creech v. Melnik*, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001). This contention is without merit. Although Plaintiff raised this issue in *Church v. Church*, No. COA11-222 (Nov. 1, 2011) (unpublished), we explicitly declined to review the merits of any of Plaintiff's contentions relating to the trial court's 17 September 2010 attorneys' fees order at that time. Moreover, although we dismissed as untimely Plaintiff's appeal from an earlier, 30 April 2009 order addressing attorneys' fees in *Church v. Church*, No. COA10-993 (June 7, 2011) (unpublished), Defendant's ability to defray the costs of litigation at that time was not dispositive of Defendant's ability to defray such costs either at the time of the 15 November 2012 order under review in this case or at the time of the 17 September 2010 order, which served as the basis for our remand in No. COA11-222 which, in turn, resulted in entry of the 15 November 2012 order. Thus, the issue of Defendant's ability to defray the costs of litigation has not been "actually presented and necessarily involved in determining the case" in any of Plaintiff's prior appeals, and we conclude under these circumstances that the law of the case doctrine is inapplicable. *Tennesse-Carolina Transp. Inc v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). This argument is, accordingly, overruled.