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NO. COA14-643
NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

DANA MARIE RIBELIN (fka Creel),
Plaintiff,

v.

Rowan County
No. 06 CVD 1646

PHILLIP RAY CREEL,
Defendant.

Appeal by plaintiff from orders entered 12 November 2013 and 24 January 2014 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 5 November 2014.

Arlaine Rockey for plaintiff-appellant.

No brief was filed for defendant.

BRYANT, Judge.

Where plaintiff sought child custody in 2006, but waited until 2013 to pursue a claim for child support, the trial court was within its discretion to award child support beginning January 2013. Where the trial court lacked sufficient findings of fact to support its determination of defendant's income, we remand for further findings of fact. And, where the trial court failed to set out findings of fact in support of its denial of plaintiff's

request for attorney fees, we reverse and remand for further findings of fact.

On 7 June 2006, plaintiff Dana R. Creel (now Dana Marie Ribelin) filed a complaint against Phillip R. Creel seeking temporary and permanent custody of the parties' minor child, born 22 May 2006. That same day, the trial court entered an order granting plaintiff temporary custody of said minor child. In an order entered 11 July 2006, the trial court granted defendant visitation with the minor child for one hour every Monday, Wednesday, Friday, and Saturday. On 11 July 2007, the trial court entered an order granting defendant longer periods of visitation on Saturdays, provided that the visits were to take place at the residences of and be supervised by defendant's parents or by his brother. On 1 October 2008, plaintiff and defendant entered into a "Parenting Agreement/Order" wherein, defendant would be allowed visitation with his minor child every Saturday for one hour. On 28 October 2009, plaintiff filed a motion to continue and reply to defendant's motion for a protective order wherein defendant sought an enlargement of his visitation rights. In her motion to continue, plaintiff asserted that she had been involved in a serious car accident on 21 September 2009. On 14 October 2010, the trial court entered an order declaring the action "inactive

and removed from the active calendar . . . [as] no action has been taken in this lawsuit since October 2009.”

On 15 September 2011, defendant filed a motion for visitation with his minor child, asserting that he had remarried, that he lived with his wife in South Carolina, and that he had been sober for more than a year. In a consent order entered 19 January 2012, defendant was granted visitation with his minor child every other weekend to be supervised by his wife. The trial court noted that “[t]he issue of child support is reserved for further orders[.]”

On 4 January 2013, plaintiff made a motion to calendar a hearing on permanent child support. Then, on 13 May 2013, plaintiff filed a motion in the cause seeking, and for the first time showing a basis for seeking, child support. In her motion in the cause, plaintiff acknowledges that defendant “voluntarily paid some child support” but that the support was inconsistent and inadequate. Plaintiff sought to obtain an order of child support that would be “retroactive”¹ to the minor child’s birth.

¹ Plaintiff uses the terminology “retroactive” to designate the period of time between the filing of the original complaint, 7 June 2006, and the filing of the motion to calendar the complaint for child support, 4 January 2013. The trial court also refers to this period of time as the retroactive period. The majority opinion does likewise. Compare *Loosvelt v. Brown*, ___ N.C. App. ___, ___, 760 S.E.2d 351, 355 (2014) (“Retroactive child support encompasses child support awarded prior to the time a party files a complaint.” (citation and quotations omitted)).

On 12 November 2013, the trial court entered an order *nunc pro tunc* 3 September 2013 in which it found that “[p]laintiff’s support claim has been pending since June 7, 2006, a period of seven years during which [] Plaintiff, until recently, made no effort to prosecute.” “Plaintiff’s failure to prosecute her support claim for this extended period of time constitutes a waiver of this claim and a basis for the Court to deny [] Plaintiff’s claim for retroactive child support in this matter.” The trial court ordered defendant to pay temporary child support in the amount of \$183.00 per month retroactive to 1 January 2013.² Plaintiff’s claim for retroactive child support from the minor child’s birth up to 1 January 2013 was denied as was plaintiff’s request for attorney fees. The trial court ordered that the matter be reviewed in November 2013, at which time, defendant was to present proof of full time employment or proof of his searches for full time employment.

On 23 January 2014, the trial court entered an order in which it found that plaintiff earned \$1,500.00 gross income per month

² The trial court calculated that “Defendant should have paid the sum of \$1,647.00 between January 2013 and September 2013[, the month of the hearing based on the temporary rate of \$183.00 per month]. He has paid in fact the sum of \$2,350.00 giving Defendant a credit towards future child support in the amount of \$703.00.”

and defendant earned \$1,677.00 gross income per month. Defendant was ordered to pay \$419.00 per month as permanent child support. Plaintiff appeals from the trial court's 12 November 2013 temporary child support order and the 24 January 2014 permanent child support order.

On appeal, plaintiff raises the following issues: whether the trial court erred (I) in its temporary child support order by allowing defendant to rely on an equitable defense of waiver to relieve him from the responsibility of paying child support; (II) by not imputing income to defendant at his previous pay rate; and (III) by failing to award plaintiff attorney fees in the temporary child support order.

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. 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.

Shipman v. Shipman, 357 N.C. 471, 474–75, 586 S.E.2d 250, 253–54 (2003) (citations and quotations omitted); see also *Meehan v.*

Lawrance, 166 N.C. App. 369, 381, 602 S.E.2d 21, 29 (2004) ("Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." (citation and quotations omitted)).

I

First, plaintiff argues that the trial court erred by allowing defendant to rely on an equitable defense to relieve him of the responsibility of paying child support back to 7 June 2006, the date plaintiff's complaint was filed. Specifically, plaintiff contends that the trial court's findings of fact in its 12 November 2013 order are unsupported by the evidence and further argues that a parent cannot use an equitable defense to avoid paying child support. We disagree.

"The trial court is given broad discretion in child custody and support matters. Its order will be upheld if substantial competent evidence supports the findings of fact. . . . 'Substantial evidence' is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Meehan*, 166 N.C. App. at 375, 602 S.E.2d at 25 (citations and quotations omitted).

In the 12 November 2013 order awarding temporary child support, plaintiff challenges five of the trial court's findings of fact as not supported by substantial evidence. Plaintiff's main challenge concerns the trial court's basic finding that plaintiff failed to prosecute her claim for child support prior to January 2013. Plaintiff points to the trial court's 14 October 2010 order that placed the action between the parties on inactive status and stated "[a]ny action or issue that has been discontinued or removed by this order may be reinstated, without prejudice, upon motion if further action by the court becomes necessary." We note that while there were pending motions before the trial court at the time the case was declared inactive, none of the motions raised the issue of child support.

Plaintiff also points to the parties' 19 January 2012 consent order which states in the paragraph 17 of the decretal portion of the order that "[t]he issue of child support is reserved for further orders[.]" Plaintiff urges that "the issue of permanent child support has not been addressed and said issue was explicitly held open in the Consent Order entered on or about January 19, [2012]." However, according to the record, it was not until 4 January 2013 that plaintiff moved to calendar for hearing the issue of permanent child support.

Despite the language of the consent order regarding the issue of child support, we find substantial evidence in the record to support the trial court's finding that plaintiff did not prosecute her claim for child support until January 2013. Therefore, plaintiff's challenges to the trial court's findings of fact are overruled.

Plaintiff next contends that defendant cannot use an equitable defense to avoid paying child support. Plaintiff contends that the trial court order finding that she waived her right to seek child support for the seven years between filing her complaint and moving the court for permanent custody "appears to be an equitable defense akin to laches or equitable estoppel." Plaintiff cites *Griffin v. Griffin*, 96 N.C. App. 324, 385 S.E.2d 526 (1989), wherein the plaintiff-father was ordered to pay \$200.00 per month in child support. Subsequently the plaintiff-father stated to the defendant-mother that he could not afford the child support payment and, thus, reduced his payment to \$80.00 per month and then \$40.00 per month. *Id.* at 325, 385 S.E.2d at 527. The plaintiff-father did not apply to a court for a modification of his child support obligation. The defendant-mother moved for judgment seeking arrearages after the eighteenth birthday of the plaintiff-father's youngest son, when the plaintiff-father stopped

making child support payments. The plaintiff-father argued that defendant-mother accepted his reduced child support obligation without objection and, therefore, equitable estoppel precludes the defendant-mother from seeking arrearages. *Id.* at 326, 385 S.E.2d at 527. This Court held that the plaintiff-father was legally obligated to support his minor children in accordance with the divorce decree entered by the trial court and as the defendant-mother did not change her position in reliance on the plaintiff-father's reduced child support payment the doctrine of equitable estoppel, which requires a showing of reliance, was not applicable. *Id.* at 328, 385 S.E.2d at 529.

We find the matter before us distinguishable. Here, plaintiff filed her complaint which sought child custody and also contained a claim for child support on 7 June 2006. However, despite the many custody hearings held over almost seven years, plaintiff did not prosecute her claim for child support. Plaintiff's first motion seeking child support was filed 4 January 2013. Plaintiff's first motion presenting a basis for the award of child support was filed 13 May 2013. Plaintiff also sought retroactive child support. However, plaintiff provides this Court with no authority which would compel a trial court to impose a child support obligation on a party retroactive to a specific date, and we find

none. Unlike in *Griffin*, where the plaintiff-father was legally obligated to provide child support based on a prior court order, here, defendant-father was under no prior court order to provide child support. The trial court's order imposing for the first time a child support obligation on defendant effective January 2013 was within its discretion and proper under the circumstances. See *Meehan*, 166 N.C. App. at 381, 602 S.E.2d at 29.

The dissent states its belief that the trial court erred in its characterization of the award as "retroactive" rather than "prospective" where our case law has distinguished that an award of child support from the filing of the complaint going forward is prospective whereas an award of support prior to filing of the complaint is considered retroactive. Even if the terminology used by the trial court, and subsequently by the majority opinion, is misused, the basis of the trial court's award (or lack thereof) is apparent from this record. As we noted in *State ex rel. Miller v. Hinton*, 147 N.C. App. 700, 556 S.E.2d 634 (2001), notwithstanding the presumption that an award of child support should begin on the date the complaint was filed, if the trial court finds that beginning child support payments on the date the complaint was filed would be "unjust or inappropriate" and evidence in the record supports such a finding, the trial court may order child support

payments to begin on a date other than the date the complaint was filed. *Id.* at 706, 556 S.E.2d at 639.

Here, the trial court refused to order child support from the date the complaint was filed and instead, ordered child support from the date the claim for child support was prosecuted. Evidence in the record supports the trial court's finding that to award child support effective from the date the complaint was filed would be inappropriate, as plaintiff waited almost seven years to prosecute the child support claim. The evidence showed that during that seven year period of time other claims involving these parties, mainly involving child custody—including numerous changes to defendant's visitation rights—were before the trial court. Based on this evidence in the record, we do not believe the trial court abused its discretion in awarding child support payments effective from the date the claim for child support was prosecuted. Because we do not believe the trial court erred in the effective date of its award of child support, there would be no need, as the dissent suggests, for the trial court to make findings of fact to justify a deviation from the child support guidelines when it properly denied "retroactive" child support. As we are remanding for findings of fact to justify the award of child support effective from January 2013, see *Issue II infra*, we do not further

address the application of the child support guidelines to the award of child support.

Accordingly, plaintiff's arguments are overruled.

II

Next, plaintiff argues that the trial court erred in its permanent child support order. Plaintiff contends it was error to use defendant's current wage of \$7.25 per hour instead of imputing income to defendant at a rate of \$15.00 to \$17.00 per hour which was the income used by the trial court in its award of temporary child support. Although it inures to plaintiff's detriment, we agree in part.

[T]he trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law.

Loosvelt, ___ N.C. App. at ___, 760 S.E.2d at 355 (citation omitted).

In the January 2014 child support order, the trial court stated that "Defendant earns \$1,677 per month gross income (based on \$13/hour at an average of thirty (30) hours per week)[.]" "According to Worksheet A of the N.C. Child Support Guidelines,

\$419 per month is a fair and equitable amount of child support for [] Defendant to pay [] Plaintiff for the support of the minor child"

As plaintiff points out, the evidence before the court showed that defendant had worked at Dollar General from May 2013 until the December 2013 hearing on child support and worked on average 10 hours per week earning \$7.25 per hour. This would result in a gross income of \$290.00 per month. Defendant testified that in 2012 through May 2013, he worked as a painter for Appearances First, then Eagle Interiors, for \$15.00 per hour, and after that at Green Pro for \$17.00 per hour. Defendant testified that in May 2013, Green Pro downsized and he began working at Dollar General. Defendant further testified that he had inquired about several painting jobs but had either not gotten the job or had not heard back from them.

We can find no correlation between the evidence in the record of defendant's income and the trial court's determination that defendant earned \$1,677.00 per month or \$13.00 per hour working an average of 30 hours per week. Without sufficient findings of fact to determine the basis of the trial court's conclusion regarding defendant's income, and the award based thereon, we cannot say the trial court's decision was a reasoned one. Accordingly, we remand

the trial court's order for further findings of fact and conclusions of law as to the determination of defendant's income to be used in setting an amount of child support. *See id.* (citation omitted).

III

Lastly, plaintiff argues that the trial court erred by failing to award plaintiff attorney's fees. Specifically, plaintiff argues that the trial court made insufficient findings to support its conclusion to deny plaintiff's request for attorney fees. We agree.

"A trial judge is permitted considerable discretion in determining whether or not attorney's fees should be allowed in child support or custody cases. A decision to disallow attorney's fees is limited only by the abuse of discretion rule." *Cohen v. Cohen*, 100 N.C. App. 334, 348, 396 S.E.2d 344, 352 (1990) (citations omitted).

In 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. Before ordering payment of a fee in a support action, the court must find as a fact that 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 (2013). "Where an award of attorney's fees is prayed for, but denied, the trial court must provide adequate findings of fact for this Court to review its decision." *Gowing v. Gowing*, 111 N.C. App. 613, 620, 432 S.E.2d 911, 915 (1993) (finding error in the trial court's failure to make finding of fact to support its denial of attorney fees).

Here, plaintiff testified that she lacked the financial means to pay the expenses of the lawsuit. Plaintiff provided the trial court with her tax returns from 2006 through 2012 and testified that she had to borrow money from her father to initiate her lawsuit. Plaintiff submitted a fee affidavit from her attorney listing a total expense of \$9,625.00.

In its 12 November 2013 order, the trial court found only that it "considered [] Plaintiff's request for attorney fees and in its discretion denies the same." As such, the trial court failed to provide findings of fact for this Court to review its decision to deny plaintiff an award of attorney fees. Because we find error in the trial court's failure to provide findings of fact, we remand this issue to the trial court to make findings of fact to support its denial of plaintiffs request for attorney fees.

The trial court's 23 January 2014 order of support is remanded for findings of fact and conclusions of law to support the determination of defendant's income, and the award of child support based thereon. We affirm the trial court's ruling on the issue of retroactive child support. The trial court's 12 November 2013 order regarding attorney fees is remanded for findings of fact to support the denial of plaintiff's request for attorney fees.

Affirmed in part; and remanded in part.

Judge DIETZ concurs by separate opinion.

Judge DILLON concurs in part and dissents in part.

Report per Rule 30(e).

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NORTH CAROLINA COURT OF APPEALS

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v.

Rowan County
No. 06 CVD 1646

PHILLIP RAY CREEL,
Defendant.

DIETZ, Judge, concurring.

I join the majority opinion and write separately solely to note that my dissenting colleague's thoughtful points concerning the mandatory fact findings required under *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001) are not arguments asserted by the Appellant in her brief. We have held that "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Eaton v. Campbell*, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) (citation and internal quotation marks omitted). I see no reason to depart from this general rule in this case.

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PHILLIP RAY CREEL,
Defendant.

DILLON, Judge, concurring, in part, and dissenting, in part.

I concur in Sections II and III of the majority's opinion. However, because I believe that the trial court did not make sufficient findings to support its conclusion that Defendant is relieved of his obligation to provide for his child's support prior to 2013, I respectfully dissent from Section I of the majority's opinion affirming that conclusion.

It is axiomatic that parents have a primary duty to provide for the support of their minor children. *See Plott v. Plott*, 313 N.C. 63, 68, 326 S.E.2d 863, 867 (1985); N.C. Gen. Stat. § 50-13.4 (b) (2013). This "obligation to support his child arises when the child is born, not when the courts order a specific amount to be paid." *Loosvelt v. Brown*, ___ N.C. App. ___, ___, 760 S.E.2d 351,

356 (2014) (quoting *Freeman v. Freeman*, 103 N.C. App. 801, 803, 407 S.E.2d 262, 263 (1991) (emphasis omitted)).

In the present case, Plaintiff filed her complaint for child custody *and* child support shortly after the birth of the parties' daughter in 2006. Beginning in late 2006, the trial court began entering orders concerning child custody. However, Plaintiff did not attempt to prosecute her claim *for child support* until January 2013 when she filed a calendar request for a hearing concerning child support. In November 2013, the trial court entered an order awarding Plaintiff monthly child support dating back to January 2013, the month she filed the calendar request. However, the trial court awarded no child support from the period from the filing of the complaint in 2006 to January 2013, determining that "Plaintiff's failure to prosecute her [child] support claim for this extended period of time constitutes a waiver of this claim and a basis for the Court to deny the Plaintiff's claim for retroactive child support in this matter." I believe the trial court erred in characterizing the portion of the award from the filing of the complaint in 2006 to January 2013 as "retroactive" rather than "prospective." Further, I believe the trial court erred in awarding zero dollars in child support for this period of time from the filing of the complaint to January 2013 without

making any findings why it was deviating from the guidelines ("Guidelines") promulgated pursuant to G.S. 50-13.4 (c1).

Construing G.S. 50-13.4, for purposes of computing child support, we have characterized the portion of the award representing that period of time a *complaint is filed* going forward as "prospective child support," *Cole v. Cole*, 149 N.C. App. 427, 433, 562 S.E.2d 11, 14 (2002), and the portion of the award for the period *prior to the filing of the complaint* as "retroactive child support," *Zurosky v. Shaffer*, ___ N.C. App. ___, ___, 763 S.E.2d 755, 771 (2014). In other words, a parent's obligation to provide "prospective child support" is triggered by the filing of the complaint. It is error for the trial court to use any other date as the trigger *unless* it "finds that beginning the prospective child support payments on the date the complaint was filed would be 'unjust or inappropriate' and there is evidence in the record to support this finding[.]" *State v. Hinton*, 147 N.C. App. 700, 706, 556 S.E.2d 634, 639 (2001).

A trial court must generally apply the Guidelines to calculate the portion of the award characterized as prospective child support and is not required to "take any evidence or make findings of fact or conclusions of law, so long as it imposes the presumptive amount of child support pursuant to the Guidelines." *Cole*, 149 N.C. App.

at 433, 562 S.E.2d at 14. However, if a trial court deviates from the Guidelines in calculating the prospective child support portion of the award, it must make findings why deviation from the Guidelines is appropriate. *Sain v. Sain*, 134 N.C. App. 460, 466, 517 S.E.2d 921, 926 (1999).

In the present case, the portion of the child support award from the filing of the complaint to January 2013 is presumed to be in the nature of prospective child support. The trial court made no findings as to why using that date would be "unjust or inappropriate[.]" See *Hinton, supra*. Further, the trial court made an award of \$0.00 for this period - obviously deviating from the Guidelines - without making the requisite findings to justify this deviation.

It appears that the trial court was, in effect, dismissing Plaintiff's claim for child support for the period prior to January 2013 pursuant to Rule 41(b) of the Rules of Civil Procedure for failing to prosecute. Assuming that a Rule 41(b)-type analysis is appropriate in the context of child support, I believe, again, that the trial court failed to make the necessary findings to support a determination that the minor child in this case is not entitled to any support from her father for the first seven years of her life.

In a case involving an equitable distribution claim, we have held it was error for a trial court to dismiss a claim pursuant to Rule 41(b) without addressing three factors:

- (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter;
- (2) the amount of prejudice, if any, to the defendant; and
- (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Wilder v. Wilder, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001).

With respect to the first *Wilder* factor, the trial court, here, made no finding as to why Plaintiff's delay in prosecuting her claim was "deliberate and unreasonable," but only pointed to the fact that she waited seven years. See *Eakes v. Eakes*, 194 N.C. App. 303, 309, 669 S.E.2d 891, 895 (2008) (stating that under Rule 41(b), the "mere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence, but instead is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion" (citation and quotation marks omitted)). With respect to the second factor, the trial court did not make any finding that Defendant suffered prejudice by Plaintiff's delay in prosecuting the child support

claim. With respect to the third factor, the trial court made no findings to demonstrate why sanctions short of dismissal - such as reducing Defendant's child support obligation or allowing Defendant to pay his obligation over time - would not have sufficed. In any event, I believe a trial court should move cautiously in dismissing a child support claim; that is, where equitable distribution concerns only the rights of husband and wife, child support also concerns the rights of the minor child. *See Griffin v. Griffin*, 96 N.C. App. 324, 328, 385 S.E.2d 526, 529 (1989) (one parent cannot evade his obligation to provide for his child "by citing the failure of the other parent to insist immediately on such support").

In conclusion, my vote would be to affirm the trial court's order, in part, but to reverse the portion of the order awarding \$0.00 in child support for the period of time from the filing of the complaint to January 2013 and remand the matter to the trial court to make additional findings and conclusions based on the evidence that was presented at the prior hearing.³

³ I understand the concern raised in the concurring opinion that Plaintiff failed to preserve her arguments. While I agree that the brief could have been better focused on the proper basis for her argument, I believe that the brief is sufficient to preserve her argument. Specifically, Plaintiff does argue that the trial court erred in concluding that she waived her child support claim for the period between 2006 and 2013; that the trial court erred

in characterizing the child support obligation (or lack thereof) from 2006 to 2013 as "retroactive," rather than "prospective;" and that waiver should not apply, in part, because there was no "evidence of any detriment or prejudice to the Defendant."

