IN THE COURT OF APPEALS OF NORTH CAROLINA

Nos. COA17-1119, 17-1120

Filed: 15 May 2018

Caldwell County, No. 01-CVD-1391

JOHN FLETCHER CHURCH, Plaintiff,

v.

JEAN MARIE DECKER (formerly Church), Defendant.

Appeals by defendant from orders entered 10 and 11 January 2017 and 9 May 2017 by Judge David W. Aycock in Caldwell County District Court. Heard in the Court of Appeals 3 April 2018.

John Fletcher Church, pro se defendant-appellant.

W. Wallace Respess, Jr., and Marshall Hurley, PLLC, by Marshall Hurley, for plaintiff-appellee.

BRYANT, Judge.

In this consolidated appeal,[1] where the time for filing notice of appeal in COA17-1119 was not tolled, we find plaintiff's appeal to be untimely. We therefore grant defendant's motion to dismiss plaintiff's appeal in COA17-1119 and deny plaintiff's petition for writ of certiorari. Where the time for filing notice of appeal in

[1] Although plaintiff pursued two separate appeals, given the similarity of the legal issues and factual circumstances, we have consolidated the appeals and file a single opinion.

COA 17-1120 was tolled, we find plaintiff's appeal was timely filed. We therefore deny defendant's motion to dismiss, dismiss plaintiff's petition for writ of certiorari, and address the merits of plaintiff's appeal. In COA17-1120, where the trial court's findings of fact are supported by competent evidence and those findings in turn support the trial court's conclusion of law, we affirm the orders awarding attorney's fees to defendant.

Procedural Background

Plaintiff John Fletcher Church appeals from the Caldwell County District Court's 9 May 2017 order denying his Rule 52, 59, and 60 Motions. Plaintiff also appealed the underlying orders issued on 10 and 11 January 2017 by that court on remand from this Court regarding, *inter alia*, the issue of attorney's fees awarded to defendant Jean Marie Decker (formerly Church) and related to the parties' child custody and support action which commenced in 2001.

The parties were married on 23 December 1992, separated on 31 August 2001, and divorced on 22 November 2002. The parties' children (a son, born on 23 October 1993 and a daughter, born on 18 March 1998), whose welfare and support have been thoroughly and extensively litigated before the trial court and this Court (mostly as to the issue of attorney's fees), have long since reached the age of majority.

The records on appeal submitted in these two cases, COA17-1119 and COA17-1120, "set forth a complex procedural history which stretches over a period of several

years and includes several needlessly repetitive and overlapping appeals before this Court." *Church v. Decker*, Nos. COA10-1422, COA10-1502, 2011 WL 2462754, at *1 (N.C. Ct. App. June 21, 2011) (unpublished) (affirming in part and reversing and remanding in part the trial court's orders, and dismissing in part plaintiff's appeal).[2]

On 3 and 4 November 2016, in Caldwell County District Court, the Honorable David W. Aycock, Judge presiding, held remand hearings related to all of the appeals outlined above. Those hearings resulted in three orders entered on 10 January 2017 (at issue on appeal in No. COA17-1119) and another two orders on 11 January 2017 (at issue on appeal in No. COA17-1120) (collectively, "the January orders").

A. The 10 January 2017 Orders

[2] *See Church v. Decker*, No. COA13-771, 2014 WL 2155360, at *5 (N.C. Ct. App. May 20, 2014) (reversing the trial court's order and remanding the case for entry of a new order containing adequate findings of fact concerning the extent of defendant's ability to defray the costs of litigation where there were no findings detailing defendant's gross income and employment, even if there was evidence of such present in the record); *see also Church v. Decker*, No. COA13-456, 2013 WL 6669119, at *3 (N.C. Ct. App. Dec. 17, 2013) (unpublished) (reversing the trial court's order awarding attorney's fees for failing to include in its order any findings to support its determination that "[d]efendant [was] an interested party acting in good faith who ha[d] insufficient means with which to defray the costs" of the litigation and remanding for entry of adequate findings of fact); *Church v. Decker*, No. COA13-455, 2013 WL 6235291, at *4 (N.C. Ct. App. Dec. 3, 2013) (unpublished) (reversing the trial court's order for failing to articulate its basis for the amount of attorney's fees awarded and remanding for a determination of the proper amount to be awarded); *Church v. Church,* No. COA11-222, 2011 WL 5237126, at *3 (N.C. Ct. App. Nov. 1, 2011) (unpublished) (reversing the trial court's order awarding defendant attorney's fees incurred in connection with a criminal contempt proceeding against plaintiff that had been invalidated); *Church v. Decker*, No. COA11-25, 2011 WL 3299849, at *5 (N.C. Ct. App. Aug. 2, 2011) (unpublished) (reversing and remanding the trial court's orders dismissing plaintiff's motions pursuant to Rule 41(b) and holding plaintiff in contempt); *Church v. Church*, No. COA10-993, 2011 WL 2231558, at *9 (N.C. Ct. App. June 7, 2011) (unpublished) (concluding that the trial court did not err by holding plaintiff in contempt or by requiring plaintiff to undergo a psychological evaluation as a precondition for restoration of his visitation rights and reaffirming the dismissal of plaintiff's appeal from the interim attorney's fees order).

The following 10 January 2017 orders were based on remands from this Court: (1) No. COA13-771, which in turn addressed orders entered in relation to Nos. COA10-993, 11-25, and 11-222 related to the issue of appellate attorney fees; (2) No. COA13-456, related to an order for lower court fees; and (3) Nos. COA10-422 and COA10-1502, from a consolidated appeal relating to an order also on the issue of attorney fees.[3]

B. The 11 January 2017 Orders

The following 11 January 2017 orders were as follows: 1) based on a remand in No. COA13-455 where this Court reversed and remanded the trial court's order for a determination of the proper amount of expenses to be awarded, including attorney's fees. In that order, plaintiff was directed to pay $5,885 and $4,386.15 in attorney's fees to Marshall Hurley; and 2) based on direct appeal from the trial court which ordered plaintiff to pay $4,543.21 in attorney's fees to W. Wallace Respess, Jr., following defendant's motion for a show cause order of contempt and attorney's fees.[4] *See infra* §§ I & II.

C. Plaintiff's Rule 52, 59, and 60 Motion(s) and Notices of Appeal

[3] Because we determine that plaintiff's combined Rule 52, 59, and 60 motion was not timely served on defendant as to the 10 January orders, which in turn rendered plaintiff's appeal from those underlying orders untimely, we decline to grant plaintiff's petition for writ of certiorari in COA17-1119 to address the merits of his appeal, *see infra.* Therefore, we do not describe in further detail the 10 January orders underlying the appeal in COA17-1119.

[4] Plaintiff references two orders dated 11 January 2017; one order is in the record proper for COA17-1120, and the other order is in an Addendum to the Record on Appeal.

Following entry of the January orders, plaintiff filed a combined motion pursuant to Rules 52, 59, and 60, requesting the trial court to "recall/quash all [previous] bench Orders" "to reduce costs to the [p]arties and to avoid further appeals/remands." This motion included a certificate of service which indicated the motion was served on counsel for defendant the following day on 24 January 2017. Strangely, plaintiff also filed an "(Amended) Certificate of Service – Motion Rule 52, 59 and 60," stating that "on January 23, 2017, he served a copy of Plaintiff's **Motion for Rule 52, 59, and 60** on the Defendant's counsel of record by depositing as stated below: **Wallace Respess Courthouse mailbox. Caldwell County Courthouse.**"

Meanwhile, on 6 February 2017, plaintiff filed: 1) a separate Motion for Rule 60 Relief, requesting the trial court to set aside the January Orders and declare them null and void, and 2) an Amended/Supplemental Motion for Rule 59 Relief, requesting a new hearing on all matters contained in the January Orders. In response, Defendant moved to dismiss plaintiff's motions for improper purpose and moved for sanctions against plaintiff.

On 24 April 2017, the trial court held a hearing to discuss the pending motions. On 9 May 2017, the trial court entered its order denying: 1) plaintiff's Rule 52, 59, and 60 motions; 2) defendant's motion to dismiss; and 3) defendant's motion for sanctions. On 26 May 2017, plaintiff entered notices of appeal from the 9 May order as well as the January orders.

Petitions for Writ of Certiorari & Motions to Dismiss

Plaintiff filed petitions for writ of certiorari with this Court for the January orders in Nos. COA17-1119 and 17-1120. Defendant filed motions to dismiss plaintiff's appeals contending that because plaintiff's Rule 52 and 59 motions were not timely served on defendant and where a Rule 60 motion does not toll the time for filing notice of appeal, plaintiff's appeals entered on 26 May 2017 were untimely and should be dismissed. We agree as to 17-1119, and for the following reasons, we grant defendant's motion to dismiss plaintiff's appeal and deny plaintiff's petition for writ of certiorari.

Pursuant to Rule 52, "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59." N.C. Gen. Stat. § 1A-1, Rule 52 (2017).

"A [Rule 59] motion for a new trial shall be *served* not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(b) (2017) (emphasis added). "Thus, the relevant action the movant must make within 10 days of entry of judgment under Rule 59(a) is service, not filing." *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 221, 606 S.E.2d 907, 909 (2005) (citation omitted).

> According to the clear language of Rule 58, the moving party is entitled to three additional days to file a motion for a new trial pursuant to Rule 59 *if service of the judgment was made by mail*. Therefore, the moving party is allowed

> a total of *thirteen days* from the date that the judgment is entered *to serve by mail* a motion for a new trial, rather than the ten-day period provided in Rule 59(b).

Stem v. Richardson, 350 N.C. 76, 78, 511 S.E.2d 1, 2 (1999) (emphasis added). Rule 58 states that "the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. . . . If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59." N.C. Gen. Stat. § 1A-1, Rule 58 (2017).

In *Stem*, our North Carolina Supreme Court held that because the defendants *served* their Rule 59 motion nine days after receiving the judgment *in the mail* and twelve days after it was entered, their Rule 59 motion was timely, and this Court erred in dismissing their appeal. *Stem*, 350 N.C. at 78, 511 S.E.2d at 2.

In the instant case, the January orders were entered on 10 and 11 January 2017, respectively. Three orders were entered on 10 January and each order was accompanied by a certificate of service, signed by counsel for defendant, certifying that each order had been served upon plaintiff *on 10 January 2017* "[b]y depositing a copy of the same in the United States mail, first class postage prepaid . . . ." The two orders entered on 11 January were also accompanied by certificates of service, certifying that the 11 January orders had each been served upon plaintiff *on 11 January 2017* "[b]y depositing a copy of the same in the United States mail, first class postage prepaid . . . ."

The record clearly shows that defendant served the trial court's orders on plaintiff by mail on 10 and 11 January. Plaintiff, however, argues that he "could not obtain a true copy of [the January orders] until **Monday, 23 January 2017**," for various reasons. We are not persuaded. The record shows that service was achieved on plaintiff on 10 and 11 January and contains the following affidavit (with accompanying exhibits) sworn by defense's counsel's paralegal, Elizabeth Gibbons:

> 3. I have routinely prepared certificates of service in the Church matters to be signed by Mr. Respess. *However, due to the persistent misrepresentations by Plaintiff John Church over the years, falsely claiming that he has not been served with filed documents, I began the practice of keeping a photocopy of each envelope, bearing a postage meter marked with date of mailing, for each item mailed to John Church, together with my own handwritten notation of the contents of each mailing*.
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> 4. In this case, on January 10, 2017, I personally prepared an envelope, properly addressed with postage affixed, and mailed two corrected draft court orders to John Church, as shown by the photocopy of an envelope attached hereto and marked as "Exhibit 1." The envelope contained a letter from Wallace Respess dated January 10, 2017, regarding the two corrected draft court orders. The letter and corrected draft orders were also emailed to John Church. On January 10, 2017, John Church responded to my email with the following email "Fine with me". John Church's email is attached hereto and marked as "Exhibit 2".
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> 5. In this case, also on January 10, 2017, I personally prepared an envelope, properly addressed with postage affixed, and mailed three filed court orders bearing the filing date of January 10, 2017, to John Church, as shown by the photocopy of an envelope attached hereto and marked as "Exhibit 3."

> 6. In this case, on January 11, 2017, I personally prepared an envelope, properly addressed with postage affixed, and mailed the two court orders as set out in paragraph 4 above bearing the filing date of January 11, 2017, to John Church, as shown by the photocopy of an envelope attached hereto and marked as "Exhibit 4."

(emphasis added).[5] For the forgoing reasons, we remain unpersuaded by plaintiff's argument.

Because we have determined that the record shows that defendant served court orders on plaintiff "by mail" on 10 and 11 January, *see* N.C.G.S. § 1A-1, Rule 58, it follows that plaintiff had an additional three days to *serve* defendant with his Rule 52 and Rule 59 motions. As such, plaintiff was required to serve defendant *by 23 January 2017* regarding the 10 January orders and *by 24 January 2017* regarding the 11 January orders.

Plaintiff's certificate of service attached to his combined Rule 52, 59, and 60 motion indicated the motion had been served on counsel for defendant on 24 January 2017—fourteen and thirteen days after entry of the orders, respectively. Accordingly, plaintiff's motion was not timely served as to the 10 January orders, as it was served fourteen days after he was served with those orders by mail. Plaintiff's Rule 52 and

[5] More than two months after the date he claims he "actually" received the January orders (23 January), on 17 April 2017, plaintiff filed an "(Amended) Certificate of Service – Motion Rule 52, 59 and 60." We are not aware of any rule or case law which permits a party to file an amended certificate of service, particularly where the record clearly contains copies of the documents served with their original accompanying certificates of service listing the date of service as *24 January 2017*.

59 motions were untimely. As a result, plaintiff's time for taking an appeal as to the 10 January orders was not tolled pursuant to Rules 52, 59, *see Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006) ("Upon *timely* motion under Rule 59, the thirty day period for taking an appeal is tolled until an order disposing of the motion is entered." (citing N.C. R. App. P. 3(c)(3)), or pursuant to Rule 60, *see Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008) ("Motions entered pursuant to Rule 60 *do not* toll the time for filing a notice of appeal." (emphasis added)), and his appeal from the 10 January orders entered on 26 May 2017 was untimely. Accordingly, we grant defendant's motion to dismiss plaintiff's appeal in COA 17-1119, and we also deny plaintiff's petition for writ of certiorari.

Plaintiff's Rule 52 and Rule 59 motions as to the 11 January orders, however, were timely served on defendant on 24 January 2017. As a result of timely service, the time for noticing his appeal from the 11 January orders was tolled until the entry of the trial court's order denying his Rule 52 and 59 (and 60) motions on 9 May 2017. *See Davis*, 360 N.C. at 526, 631 S.E.2d at 120. Accordingly, plaintiff's notice of appeal therefrom entered on 26 May 2017 was timely filed, and his appeal of the 9 May order and the underlying 11 January orders in COA17-1120 is properly before us. Thus, we deny defendant's motion to dismiss plaintiff's appeal in COA17-1120, and, as

plaintiff's appeal is timely, we dismiss plaintiff's petition for writ of certiorari. We address the merits of plaintiff's appeal in COA17-1120.

Though plaintiff's notice of appeal in COA17-1120 references both the underlying 11 January orders and the trial court's 9 May order denying his combined Rule 52, 59, and 60 motion, all of plaintiff's assignments of error on appeal are based on the trial court's findings of fact and conclusions in the 11 January orders. We will therefore review only the 11 January orders. N.C. R. App. P. 28(b)(6) (2017) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

On appeal from the trial court's orders entered 11 January 2017 (relating to the underlying order re: No. COA13-455), plaintiff argues the trial court erred (I) in finding that defendant was acting in good faith and in ordering plaintiff to reimburse defendant for attorney fees in the amount of $4,543.21; (II) in finding that defendant had insufficient means to defray the expense of the suit; and (III) by issuing orders that are inconsistent with the mandate of this Court by adopting defendant's methodology for determining the total number of hours billed by defendant's attorney in calculating attorney fees plaintiff was ordered to pay.

I & II

Plaintiff first argues the trial court erred as a matter of law in finding that defendant (I) was acting in good faith and (II) had insufficient means to defray the expense of the suit when it ordered plaintiff to pay defendant's attorney fees in the amount of $4,543.21. The Show Cause Order of Contempt was, in turn, issued because of plaintiff's failure to pay child support to defendant between 2014 and 2016 totaling $12,483,18. Specifically, plaintiff challenges the trial court's Findings of Fact Nos. 3–6, 8–10, and 12, as not supported by the evidence and Conclusions of Law Nos. 1 and 2 as not supported by the findings of fact.

> 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; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen Stat. § 50-13.6 (2017). "Whether these statutory requirements have been met is a question of law, reviewable on appeal. Only when these requirements have been met does the standard of review change to an abuse of discretion for an examination of the amount of attorney's fees awarded." *Schneider v. Schneider*, ___

N.C. App. ___, ___, 807 S.E.2d 165, 166 (2017) (quoting *Doan v. Doan*, 156 N.C. App. 570, 575, 577 S.E.2d 146, 150 (2003)). "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Brewer v. Hunter*, 236 N.C. App. 1, 8, 762 S.E.2d 654, 658 (2014) (citation omitted).

In ordering plaintiff to pay $4,543.21 in attorney fees related to the Show Cause Order of Contempt, the trial court found and concluded (and plaintiff challenges on appeal) the following:

> 3. The Court entered an order dated April 28, 2010, requiring the Plaintiff to pay the sum of $462.34 per month for child support. The Plaintiff generally complied with the Order until September 2013; thereafter, the Plaintiff routinely failed to comply in 2014. The Plaintiff failed to pay child support during the entire calendar year of 2015 and into 2016, which failure necessitated the filing of this Motion for Contempt by the Defendant's counsel.
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> 4. Following the filing of Motion in April of 2016, the Plaintiff paid the arrearage and purged himself of any possible contempt of the child support order before any hearing was held or return hearing was held with respect to that Motion. . . .
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> 5. The Court finds that the Defendant retained W. Wallace Respess, Jr., to assist in obtaining the arrearage and past due child support and that both the Defendant and her counsel spent a significant amount of time in pursuit of that object including complying with extensive written discovery requests that were served upon them by the Plaintiff.
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> 6. The Court has received into evidence Defendant's

> Exhibit 5, which is a financial affidavit of the Defendant for the year of 2016, which tends to show her gross income from her contract employment during the timeframe of March of 2016 and July of 2016. The Defendant has presented documentation of gross income from her employment, the amount of deductions that she takes as a contract employee to pay taxes and related expenses and, her fixed monthly expenses. The Court finds the majority of the fixed expenses listed is one half of the actual household expense which is shared with her husband. Those expenses are derived from receipts, ledgers, bank statements, and other reliable sources.
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> . . . .
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> 8. The total amount of [defendant's] fixed and individual expenses were reasonably incurred and properly accounted for. The fixed and individual expenses did exceed the total amount of the Defendant's income, and she incurred debt as a result of that shortfall.
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> 9. The Court finds as a result of the shortfall that the Defendant has been unable to pay for legal services incurred in 2016 in pursuit of the past due child support.
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> 10. The Court finds that the Defendant is an interested party acting in good faith, who is without the means and ability to defray the costs of this action including a reasonable attorney fees. The attorney's fees were incurred due to Plaintiff's failure to pay the child support as ordered.
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> . . . .
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> 12. The Court finds that those fees are reasonable in the nature and scope that were rendered and reasonably allocated.

The trial court concluded as a matter of law that defendant was an interested party acting in good faith who had insufficient means to defray the expense of the lawsuit

(Conclusion of Law No. 1), and defendant is entitled to an award of attorney's fees (Conclusion of Law No. 2).

Plaintiff's main argument in challenging the above findings and conclusions is that, *inter alia*, the parties had "an agreement" to let these "issues drop" and that the trial court's order for attorney's fees relates to defendant's "improper attempts to compel discovery . . . and [plaintiff] should not be required to pay for such legal services. As a result, plaintiff argues, defendant was not acting in good faith when she requested reimbursement for attorney's fees for "bad/unnecessary Legal Services." He also argues that defendant "should not be allowed to force [plaintiff] to pay her legal bills so that she can give $804.16/month in religious contributions." On all points, we disagree.

First, there is no evidence of any such "agreement" plaintiff references in the record before this Court. Indeed, plaintiff acknowledges that "if 'it' is not in the record 'it' never happened and [plaintiff] has no evidence of an agreement between the parties other than the parties' behavior relating to same during the relevant time." Therefore, as plaintiff acknowledges, we have nothing to review, and this argument is without merit.

Second, we note that in making the above arguments, plaintiff has cited to no relevant case law or other authority to support his more specific arguments on appeal beyond citing to the U.S. Constitution to support plaintiff's broad First Amendment

constitutional challenge to defendant's charitable religious contributions.[6] *See* N.C. R. App. P. 28(b)(6); *see also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal."). To the extent plaintiff failed to support his argument with any authority and failed to raise the constitutional issue at the trial court level, we review the trial court's order solely to determine whether the findings of fact are supported by competent evidence and whether those findings in turn support the conclusions of law. *See Shipman v. Shipman*, 357 N.C. 471, 474–75, 586 S.E.2d 250, 253–54 (2003).

"When the trial court sits as the trier of the facts, its findings of fact that are supported by competent evidence become binding on this Court." *Kuttner v. Kuttner*, 193 N.C. App. 158, 160, 666 S.E.2d 883, 885 (2008). In the instant case, the trial court's findings of fact are supported by competent evidence in the record, namely, defendant's financial affidavit, and are therefore binding on this Court.

Here, the evidence in the record shows that plaintiff failed to pay child support from 2014 until 2016, which resulted in defendant filing the Show Cause Order of Contempt. Plaintiff owed defendant a total of $12,483.18 in child support arrears. Thereafter, he purged himself of contempt by writing a check to defendant on 23 May 2016 in the amount of $12,483.18.

[6] Plaintiff cites to relevant case law explaining the standard of review and to N.C. Gen. Stat. § 50-13.6, but cites to no other authority relevant to the specific arguments he makes on appeal.

Defendant retained attorney Respess to assist her in obtaining the arrearage and past due child support from plaintiff. At the hearing on the Show Cause Order of Contempt, defendant submitted a comprehensive financial affidavit regarding her finances, resources, and expenditures which was duly received into evidence by the trial court. The affidavit listed her total income available after deductions as $6,387.16, with fixed household expenses of $1,992.67 and individual expenses as $2,071.65 (for defendant) and $3,115.59 (for the children). Her total expenses equaled $7,180.91, which exceeded her income of $6,387.16. The trial court's findings of fact are supported by competent evidence. *See Savani v. Savani*, 102 N.C. App. 496, 504, 403 S.E.2d 900, 905 (1991).

"An award of attorney's fees is proper in a contempt proceeding for willful failure to pay child support." *Belcher v. Averette*, 152 N.C. App. 452, 454, 568 S.E.2d 630, 632 (2002).[7] Because the trial court's findings of fact are supported by competent evidence, which findings in turn support the trial court's conclusions of law that defendant was an interested party acting in good faith who was without the means and ability to defray the costs of the suit, the trial court did not abuse its discretion

[7] *See Belcher v. Averette*, 152 N.C. App. 452, 458–60, 568 S.E.2d 630, 634 (2002) (Bryant, J., dissenting) (where "the trial court failed to make findings as to [a parent's] ability to defray costs," as opposed to a child's ability to defray costs, the trial court should be ordered to make findings regarding "[a parent's] financial ability to pay [their] attorney's fees"). **NOTE**: Judge Bryant's dissent in *Belcher v. Averette* addressed the issue of awarding attorney's fees in the absence of discovery.

in awarding defendant attorney fees. *See Taylor v. Taylor*, 343 N.C. 50, 57-58, 468 S.E.2d 33, 37–38 (1996). Plaintiff's argument is overruled.

III

Lastly, plaintiff argues that in entering its 11 January order awarding attorney's fees to Hurley, the trial court erred by failing to follow the mandate of this Court in *Church v. Decker*, Nos. COA10-1422, COA10-1502, 2011 WL 2462754 (N.C. Ct. App. June 21, 2011).

In that appeal, this Court

> f[ound] that the trial court's order requiring Plaintiff to pay a portion of Defendant's attorney's fees [was] not supported by sufficient findings of fact, requiring us to reverse that order and remand the attorney's fees issue to the Caldwell County District Court for further proceedings not inconsistent with this opinion, including the entry of a new order containing adequate findings of fact.

Id. at *1. This Court also concluded that "[t]he trial court abused its discretion when it ignored the plain language of [this Court's] mandate and ordered Plaintiff to pay all of Defendant's attorneys' fees incurred by Defendant in connection with appeals COA10-1422 and COA10-1502." *Id.* This Court's mandate "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 [consolidated appeals COA10-1422 and COA10-1502]." *Id.* at *2.

On remand, the trial court found, *inter alia*, that the methodology suggested by defendant's attorney was the most reliable for determining the amount of attorney fees plaintiff owed and ordered plaintiff to pay defendant's attorney $5,885.00 "for Court of Appeals File Number 10–1422" and $4,386.15 "for Court of Appeals File Number 10–1502," for a total of $10,271.15.

Now, on appeal, plaintiff challenges the trial court's adoption of defendant's counsel's method in calculating the above figures. Instead, plaintiff argues the trial court "should have instead derived its own method." While plaintiff again cites to no authority which states that a trial court must "derive its own method" for calculating attorney's fees, plaintiff nevertheless argues that the trial court's Findings of Fact Nos. 3 – 9 and 12 – 14 are not supported by competent evidence, and thus does not provide support for its Conclusions of Law Nos. 1 and 2. For the reasons articulated in Sections I & II, *supra*, we address only the latter argument. Those challenged findings and conclusions are as follows:

FINDINGS OF FACT:

> 3. There were two different methodologies used [to calculate the reasonable amount of attorney's fees owed by plaintiff to defendant]. The primary way in which the Plaintiff suggests is based on the number of pages that was submitted in the Appellant briefs dealing with those particular issues. The affidavit submitted by Mr. Hurley explains in detail exactly which issues that the Court of Appeals found were frivolous and then discussed the amount of time that he spent with respect to each of those issues in preparing the appeals.

4. The Court found that Mr. Hurley's affidavit fairly points out that a lot of those issues overlap and the Plaintiff admitted in court there was no perfect way to make this kind of determination.

5. The Court finds that the method suggested by Mr. Hurley is a more reliable method for making these determinations. In considering the total number of hours that were reported and his review of his billing records as to what was apportioned to each issue as was set forth in Exhibit 2 which the Court incorporates by reference.

6. In Court of Appeals 10-[1]422, the Plaintiff-Appellant's Brief addressed four (4) issues. Issues 1, 2 and 3 were deemed frivolous by the Court of Appeals. Therefore, seventy-five percent (75%) of the issues presented were deemed frivolous. Mr. Hurley devoted 28.55 hours at an hourly rate of $275.00 per hour for total billing of $7,851.25. the compensable claim for addressing the frivolous issues is therefore reduced by twenty-five percent (25%) to 21.14 hours at an hourly rate of $275.00 resulting in an award of attorney's fees of $5,885.00 in Court of Appeals File Number 10-[1]422.

7. In Plaintiff-Appellant's Brief filed in Court of Appeals File Number 10-1502, Plaintiff-Appellant addressed five (5) issues. However, only (2) of the four (4) issues raised by the Plaintiff were deemed to be frivolous. Counsel for the Defendant devoted 31.9 hours at a compensation rate of $275.00 per hour for total billings of $8,772.50.

8. Counsel for the Defendant reasoned that his good faith estimate of the legal time devoted to the frivolous portion of Court of Appeals File Number 10-1502 is significantly more than fifty percent (50%). However, in order to be fair and cautious and err on the side of presenting a more conservative estimate, counsel for the Defendant, reduced the total number of hours by fifty

percent (50%) for a total of 15.95 hours at the then billing rate of $275.00 per hour for attorney's fees for the frivolous portions of the Plaintiff's Appeal in the amount of $4,386.26.

9. The Court specifically finds from Mr. Hurley's Affidavit that he has been engaged in the active practice of law and licensed in the State of North Carolina since 1981 and therefore has 35 years of experience. The rate of $275.00 per hour is in all respects reasonable and consistent with the hourly rates of compensation of other attorneys with similar and [sic] experience and expertise in Western North Carolina.

. . . .

12. The issues presented by the Plaintiff's appeals required special training and expertise possessed by Defendant's counsel.

13. The Court finds that the method submitted by Mr. Hurley is the more reliable of the two methods and the percentages devoted to frivolous issues in each of the two file numbers 10-1422 and 10-1502 are conservative on both estimates in a way that would favor the Plaintiff. As a result of that finding, the Court in its sound discretion adopts the recommendations in the affidavits submitted by Mr. Hurley and adopts the attorney's fee award in the amounts suggested therein.

14. The methodology for determining the award of fees as set out in Mr. Hurley's affidavit is fair and reasonable.

. . . .

BASED ON THE FOREGOING FINDINGS OF FACT THE COURT CONCLUDES AS A MATTER OF LAW:

1. That the methodology set forth in Mr. Hurley's affidavit is both reasoned, sound and conservative as to the

> apportionment of his time devoted to the frivolous issues presented in the appeals set forth hereinabove.
>
> 2. That the award of fees set forth hereinafter is fair, reasonable and equitable to both the Plaintiff and the Defendant.

Attorney Hurley's affidavit, on which the trial court relied in entering its order excerpted above, is detailed and comprehensive, outlining the amount of time spent on each underlying appeal related to the issue of attorney's fees and making sure to distinguish—as best he was able—between the hours billed towards the frivolous issues raised in plaintiff's consolidated appeal (COA10-1422/COA10-1502) and the nonfrivolous issues: "What follows, therefore, is my best and good faith effort to fairly and accurately describe the time allocated to those issues in support of the present attorney's fee request." Hurley also noted that "[t]he percentage of frivolous issues cannot serve as an automatic or accurate measuring stick for attorney time, because researching frivolous issues wastes attorney time to an extraordinary degree. The careful attorney must delve into a frivolous issue to reach some assurance that it, in fact, lacks merit." Ultimately, Hurley's affidavit averred that compensation should be awarded to defendant in the amounts of $5,885.00 in COA10-1422 and $4,386.26 in COA10-1502. Despite the negligible $ .11 discrepancy in the award averred to in Hurley's affidavit and the award ordered by the trial court in COA10-1502, in all other respects, the trial court's order is supported by the evidence in the record, namely Hurley's affidavit. Accordingly, the findings of fact in the trial court's order

is supported by competent evidence, which in turn supports its conclusions of law. We hold the trial court's order is in compliance with the mandate of this Court. Therefore, plaintiff's argument is overruled.

IV

In conclusion, in COA17-1119, plaintiff's petition for writ of certiorari is denied, and defendant's motion to dismiss plaintiff's appeal is granted. Accordingly, plaintiff's appeal is

DISMISSED.

In COA17-1120, plaintiff's petition for writ of certiorari is dismissed, and defendant's motion to dismiss plaintiff's appeal is denied. The trial court's 11 January orders on appeal in COA17-1120 are

AFFIRMED.

Judges CALABRIA and HUNTER, JR., concur.

Report per Rule 30(e).