

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-970  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

CYNTHIA DARLENE BRAMBLETT,  
Plaintiff,

v.

Forsyth County  
No. 09 CVD 8611

RAYMOND BERNARD BRAMBLETT,  
Defendant.

Appeal by defendant from order entered 17 February 2011 by  
Judge George A. Bedsworth in Forsyth County District Court.  
Heard in the Court of Appeals 10 January 2012.

*Davis Harwell & Biggs, P.A., by Loretta C. Biggs and Anna  
Warburton Coffin, for plaintiff appellee.*

*Metcalf & Beal, L.L.P., by W. Eugene Metcalf, for defendant  
appellant.*

McCULLOUGH, Judge.

Defendant Raymond Bernard Bramblett ("defendant") appeals  
from an order entered by the trial court in the present child  
custody and child support action awarding attorney's fees to  
plaintiff Cynthia Darlene Bramblett ("plaintiff") pursuant to

N.C. Gen. Stat. § 50-13.6 (2010) in the amount of \$30,000.00.

We affirm.

### I. Background

Plaintiff and defendant were married on 20 August 1994 and subsequently separated on 13 August 2008. Two children were born of the marriage.

On 2 October 2009, plaintiff commenced the present action by filing a complaint seeking absolute divorce, child custody and child support. On 2 November 2009, defendant filed an answer and counterclaim, also seeking absolute divorce, child custody and child support.

On 24 May 2010, the trial court granted an absolute divorce to plaintiff. The remaining issues of child custody and child support were heard by the trial court on 15 November 2010, and continued on 16 November 2010. The parties resolved certain issues by agreement and resolved the remaining issues after discussion with the trial court judge in chambers.

Following the hearing, on 16 November 2010, plaintiff filed a verified motion for attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6 and a supporting affidavit, requesting attorney's fees in the amount of \$35,210.00 for services

performed through 14 November 2010. On 31 January 2011, plaintiff filed a supplemental affidavit, requesting attorney's fees in the amount of \$42,020.00 for services performed through 31 December 2010.

Plaintiff's motion for attorney's fees was heard by the trial court on 1 February 2011. At the hearing, both parties presented testimony as well as documentary exhibits. On 17 February 2011, the trial court entered an order awarding attorney's fees to plaintiff in the amount of \$30,000.00. Thereafter, on 2 March 2011, the trial court entered its final written order for child custody and child support in the present case. Neither party appealed the final child custody and child support order. However, on 18 March 2011, defendant filed written notice of appeal from the trial court's order awarding attorney's fees.

II. Award of attorney's fees under N.C. Gen. Stat. § 50-13.6

N.C. Gen. Stat. § 50-13.6, governing the award of attorney's fees in actions for custody and support of minor children, provides in relevant part:

In an action or proceeding for the custody or support, or both, of a minor child, . . . 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.

*Id.* Thus, in a custody action or a custody *and* support action, like the present case, "the trial judge, pursuant to the first sentence in G.S. 50-13.6, has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980). "The facts required by the statute must be alleged and proved to support an order for attorney's fees." *Id.*

Whether these statutory requirements have been met is a question of law and is reviewed *de novo* on appeal. *Id.* at 472, 263 S.E.2d at 724. "When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Id.*

#### *A. Timeliness of request*

In the present case, defendant's primary argument is that the trial court erred in awarding attorney's fees to plaintiff under N.C. Gen. Stat. § 50-13.6 because plaintiff failed to file such a request including the requisite statutory allegations prior to the "conclusion" of the matter. Defendant argues

plaintiff failed to include such a request in her complaint and waited more than a year to file her motion seeking attorney's fees, thereby implicating his due process rights. We disagree.

First, this Court has expressly held that "[a] request for attorney's fees may be properly raised by a motion in the cause *subsequent* to the determination of the main custody action." *In re Baby Boy Searce*, 81 N.C. App. 662, 663, 345 S.E.2d 411, 413 (1986) (emphasis added). Although defendant acknowledges the above statement made by this Court in *Searce*, defendant argues the statement was dicta and that in making the statement, this Court erroneously relied on a prior case involving the award of attorney's fees in an alimony action rather than a child custody and child support action. Contrary to defendant's assertions, however, the above statement is not merely dicta. The facts in *Searce* reveal that a motion requesting attorney's fees pursuant to section 50-13.6 was filed approximately four months after the trial court had entered its custody order, and approximately four months after notice of appeal had been filed in the case. *Id.* Because notice of appeal had already been filed prior to the motion for attorney's fees, this Court held the trial court lacked jurisdiction to consider the issue. *Id.* Nonetheless, this Court held the trial court could properly consider the

motion for attorney's fees upon resolution of the appeal. *Id.* ("With the appeal of the custody order having been resolved . . . , the trial court can now properly consider intervenors' motion, pursuant to G.S. 50-13.6, for attorney's fees."). Thus, the above statement reflects this Court's holding that a party may properly request attorney's fees by filing a motion following the determination of the custody and support action.

Our holding in *Scearce* has not been overturned and is still valid law on this point. See *Surles v. Surles*, 113 N.C. App. 32, 44, 437 S.E.2d 661, 667-68 (1993) (citing *Scearce* as "dispositive" where party filed motion for attorney's fees at the close of custody hearing); *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) ("Following the determination of child custody and support actions, the trial court is permitted to award attorney's fees among the parties according to G.S. § 50-13.6." (emphasis added)); see also *Edwards v. Edwards*, 118 N.C. App. 464, 473, 456 S.E.2d 126, 131 (1995) (citing multiple cases, including *Scearce*, for the proposition that "in dealing with claims for attorneys' fees brought pursuant to various statutory entitlements, our courts have consistently rejected efforts to disallow awards not pursued in the earlier principal action"). Accordingly, *Scearce* is controlling in the present

case. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Defendant's arguments to the contrary are misplaced.

Here, plaintiff filed her request for attorney's fees by motion following the conclusion of the child custody and child support hearing on 16 November 2010. Notably, plaintiff filed her motion, and the trial court both heard and ruled on the motion, prior to the entry of an order in the principal child custody and child support action and prior to any appeal being taken. Thus, the trial court properly had jurisdiction to hear the motion. Our research reveals no case law imposing a time limitation for the filing of a motion for attorney's fees in a child custody and child support action pursuant to N.C. Gen. Stat. § 50-13.6, other than that a proper notice of appeal divests the trial court of jurisdiction to hear a motion filed after notice of appeal has been given in the case. See, e.g., *Scearce*, 81 N.C. App. at 663, 345 S.E.2d at 413. Such is not the case here.

Finally, we note that although defendant correctly asserts that statutory authority providing for attorney's fees in child custody and child support actions under N.C. Gen. Stat. § 50-13.6 "does not override a party's basic constitutional rights to notice and due process considerations," *Spencer v. Spencer*, 133 N.C. App. 38, 44-45, 514 S.E.2d 283, 288 (1999), we fail to see how such considerations were implicated under the facts in the present case. Here, unlike the facts in *Spencer*, plaintiff filed a proper motion requesting attorney's fees with the trial court on 16 November 2010, which was properly served on defendant on that same day, and the trial court heard arguments by counsel and testimony by the parties and received documentary exhibits during a hearing on the motion on 1 February 2011. Defendant was clearly given adequate notice and an opportunity to be heard on the motion at the hearing, such that his due process rights were not implicated. Accordingly, plaintiff's motion requesting attorney's fees under N.C. Gen. Stat. § 50-13.6 was timely filed with the trial court, and the trial court had proper jurisdiction to hear the motion.

*B. Sufficiency of the evidence*

As noted previously, "[a]ttorneys' fees can be properly awarded in custody, child support and alimony cases upon

adequate findings of fact that the moving party acted in good faith and had insufficient means to defray the expense of the suit." *Cox v. Cox*, 133 N.C. App. 221, 231, 515 S.E.2d 61, 68 (1999). Here, plaintiff's motion specifically alleged that "[p]laintiff is, and has always been, a party acting in good faith without sufficient means to defray the cost of this action," the trial court made these requisite findings, and defendant does not challenge these findings on appeal. We therefore conclude these two statutory requirements have been met and support the order for attorney's fees in the present case.

In addition to these two statutory findings, "the record must contain additional findings of fact upon which a determination of the requisite reasonableness [of the attorneys' fees] can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers.'" *Smith v. Barbour*, 195 N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (alteration in original) (quoting *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986)); see also *Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981) ("To support an award of

attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent."). Here, defendant contends the trial court's findings of fact on these matters are not supported by sufficient evidence, and therefore, the trial court's award of attorney's fees constitutes an abuse of discretion. We are not persuaded.

In the present case, the trial court made the following pertinent findings of fact:

34. Plaintiff's attorney submitted two Attorney's Fees Affidavits, one dated November 14, 2010, and one dated January 31, 2011. Plaintiff's attorney Loretta C. Biggs is an experienced attorney with almost 30 years of experience. She is certified as a Family Law Specialist by the North Carolina State Bar. She is also a former District Court and North Carolina Court of Appeals Judge. The Court, *ex mero motu*, takes judicial notice that the average hourly rate for attorneys handling domestic cases in Forsyth County is approximately \$225.00. The Court bases this on over 24 years of private practice and almost 6 years on the bench in Forsyth County. Ms. Biggs' hourly rate of \$300.00 is higher than the average; however, given her qualifications, skill, and the depth and breadth of her experience, it is reasonable.

35. The rate charged for the services of paralegals Carol G. Howell and Bud R. Thomas, \$100.00 per hour, is reasonable for

paralegals with the experience and qualifications they possess. . . .

36. The Court notes that the original Attorney's Fee Affidavit contained only hours expended by Ms. Biggs and Ms. Howell through November 14, 2010. The updated Affidavit, filed on January 31, 2011, contains an additional 15.6 hours for Ms. Biggs, 7.7 hours for Ms. Howell (and/or Mr. Thomas), and time for Ms. Bradshaw (.60 hours) and Ms. Coffin (7.20 hours). The Court finds that it would be reasonable to include the time spent by Ms. Biggs and Ms. Howell (and/or Mr. Thomas) on November 15, 2011, which the Court believes, and so finds, was 7 hours each, and the time spent on the morning of November 16, 2010, which the Court believes, and so finds, was approximately 2 hours each. . . . The Court in its discretion will not include those hours, the additional hours after November 16, 2010 of Ms. Biggs, or Mr. Thomas' hours in its determination. Accordingly, the Court will consider the following hours and fees, and out of pocket costs:

Ms. Biggs:	84.00 hours x \$300.00=	\$25,200.00
Ms. Howell	133.00 hours x \$100.00=	13,300.00
Out of pocket costs:		136.42
Total:		\$38,636.42

The foregoing findings of fact adequately specify plaintiff's lawyer's skill, her hourly rate, and its reasonableness in comparison with that of other lawyers, as well as the total hours spent providing legal services to plaintiff in the present action. As Finding of Fact 34 reflects, plaintiff's attorney submitted two attorney's fees affidavits to

the trial court. Both affidavits filed by plaintiff support the foregoing findings of fact. The affidavits show that plaintiff's attorney, Ms. Biggs, has been a licensed attorney since 1982, is a "former district court and appellate judge," and is "certified as a Specialist in family law by the North Carolina State Bar." In addition, the affidavits show that Ms. Biggs' hourly rate is \$300.00 per hour, that she had spent 75.5 hours on the representation of plaintiff through 14 November 2010, and that she had spent an additional 15.6 hours on the representation of plaintiff through 31 December 2010.

The affidavits further show that Ms. Biggs' paralegal, Carol G. Howell, charged an hourly rate of \$100.00 per hour and spent 125.6 hours through 14 November 2010 and an additional 7.7 hours through 31 December 2010. The affidavits reflect that Howell "is a North Carolina State Bar Certified Paralegal since 2006, and has 23 years of experience in family law matters." Thus, the affidavits adequately support the trial court's findings of fact as to the attorney's expertise, hours spent, and hourly rate. In addition, "a district court, considering a motion for attorneys' fees under N.C. Gen. Stat. § 50-13.6, is permitted . . . to take judicial notice of the customary hourly rates of local attorneys performing the same services and having

the same experience." *Simpson v. Simpson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 703 S.E.2d 890, 895 (2011). Thus, the trial court's findings and conclusions as to the reasonableness of the hourly rate of plaintiff's attorney are likewise proper.

Further, the trial court made other findings of fact reflecting the nature and scope of the work performed by plaintiff's attorney during the course of the representation. Specifically, the trial court made the following pertinent findings of fact:

16. On May 7, 2010, plaintiff filed a Motion for Summary Judgment on defendant's claim for Absolute Divorce.

. . . .

19. The plaintiff at all times did whatever she could to keep her legal expenses at a minimum. At the outset of her attorney-client relationship with Ms. Biggs, she asked Ms. Biggs to not work on her case, but to try to settle it. . . .

. . . .

22. The parties made discovery requests of each other. Notwithstanding the fact that he was seeking Custody, the defendant fought the production of certain of his mental health records, which caused the plaintiff to incur additional legal expenses. And even though he was asking for Child Support, he refused to provide his 2008 tax return. . . .

23. Apparently, the attorneys came close to

resolving the matter before a hearing was necessary. However, the defendant insisted on having unsupervised visitation with the children, even though his visitations since the separation had been sporadic, at best.  
. . . .

24. When it became apparent that a hearing would be necessary, plaintiff's attorneys began preparing in earnest. The matter was set for hearing on November 15, 2010. The parties negotiated most of the day, with some assistance from the Court, and ultimately reached an agreement as to Child Support, Custody and Visitation.

We first note that these findings of fact reflect that many of Ms. Biggs' hours were spent either in front of the trial court judge or in close proximity to court processes, e.g., preparing and filing motions, participating in discovery, and negotiating. Thus, the hours spent on such activities are necessarily ones of which the trial court judge was aware. In addition, the affidavits submitted by plaintiff's attorney represent that she also "consulted with [her] client, counseled and advised [her] client, prepared pleadings and other documents, evaluated voluminous documents, and otherwise prepared for the hearing of this matter." Although these affidavits do not detail the nature and scope of each specific task performed and the hours dedicated to each individual task, the affidavits reveal the general nature and scope of the work

performed, and the record reveals defendant raised no objection before the trial court as to the sufficiency of the affidavits to support an award of attorney's fees.

We also note the trial court's findings of fact on this issue in the present case are similar to those upheld by this Court in *Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999). In *Cox*, the trial court determined that

the plaintiff's attorney has expended at least 50 hours in this matter which should be reimbursed. Plaintiff's attorney is a Board Certified specialist in family law. He has more than 20 years of experience in family law matters. The rate of \$150.00 per hour is a reasonable rate considering the charges by attorneys in the community and the several affidavits received without objection into evidence by this court.

*Id.* at 231, 515 S.E.2d at 68. Given this determination, this Court held both that "the trial court's findings of fact supported its conclusion of law," and that the "trial court did not abuse its discretion in awarding plaintiff attorneys' fees."

*Id.* at 232, 515 S.E.2d at 68.

Similarly, given that the affidavits submitted by plaintiff support the trial court's findings of fact as to each of the requisite findings, that many of plaintiff's attorney's hours were spent in close proximity to the trial court judge, and that defendant raised no objection to the sufficiency of plaintiff's

attorney's affidavits before the trial court admitted the second affidavit into evidence, we believe there is sufficient evidence in the record to support the trial court's determination as to the reasonableness of the hours and work performed by plaintiff's attorney in the present case.

"A trial judge is permitted to exercise considerable discretion in allowing or disallowing attorney's fees in child custody or support cases," *Warner v. Latimer*, 68 N.C. App. 170, 176, 314 S.E.2d 789, 793 (1984), and "[a]n award of attorneys' fees will be stricken only if the award constitutes an abuse of discretion." *Cox*, 133 N.C. App. at 227, 515 S.E.2d at 66. Given this standard of review and our precedent in *Cox*, we are not prepared to hold the trial court abused its discretion in awarding attorney's fees to plaintiff in the present case. We also note that, although the trial court found and concluded that plaintiff's attorney's fees in the amount of \$38,500.00 "were necessary and reasonable," the trial court judge nonetheless reduced the amount awarded to \$30,000.00. Accordingly, we find no abuse of discretion by the trial court under the facts of this case, and we affirm the trial court's order awarding attorney's fees to plaintiff in the amount of \$30,000.00.

Nonetheless, we stress the better practice in child custody and child support actions is for the party requesting attorney's fees under N.C. Gen. Stat. § 50-13.6 to submit a detailed affidavit delineating the specific services rendered and the time attributable to each task. We implore the trial court to request such detailed affidavits in support of an award of attorney's fees and to likewise reflect such details in its findings of fact. *See, e.g., Rogers v. Rogers*, 39 N.C. App. 635, 637, 251 S.E.2d 663, 665 (1979) (trial court "requested and received a detailed affidavit from plaintiff's counsel setting forth the nature of the legal services and the scope of the services"). We also emphasize that the opponent of such a motion, such as defendant in the present case, bears some responsibility in ensuring the affidavit submitted is sufficient by making a timely objection.

### III. Conclusion

We hold plaintiff timely filed her motion for attorney's fees in the present matter, and the trial court properly had jurisdiction to hear the motion. In addition, the trial court's findings of fact as to the statutory requirements for an award of attorney's fees under N.C. Gen. Stat. § 50-13.6 are supported by sufficient evidence, and the trial court did not abuse its

discretion in awarding attorney's fees to plaintiff in the present case. The trial court's order awarding attorney's fees is therefore affirmed.

Affirmed.

Judges HUNTER (Robert C.) and THIGPEN concur.

Report per Rule 30(e).