

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-475

Filed: 18 December 2018

Guilford County, No. 02 CVD 8173

GINGER A. McKINNEY, NOW GINGER L. SUTPHIN, Plaintiff,

v.

JOSEPH A. McKINNEY, JR., Defendant.

Appeal by defendant from order entered 12 January 2018 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 30 October 2018.

*Wyatt Early Harris Wheeler LLP, by A. Doyle Early Jr. and Katharine Y. Barnes, for plaintiff-appellee.*

*Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for defendant-appellant.*

DIETZ, Judge.

Defendant Joseph McKinney appeals an award of attorneys' fees in this child custody proceeding. He argues that the trial court, on remand from a previous appeal to this Court, violated this Court's mandate. As explained below, the trial court acted consistent with our mandate and its award of attorneys' fees is supported by fact findings which, in turn, are supported by the trial record. We therefore affirm the trial court's order.

### **Facts and Procedural History**

This appeal is part of a long-running, contentious family law proceeding that has spawned three earlier appeals to this Court. Most of the facts relevant to this case are summarized in the previous appeal, *McKinney v. McKinney*, \_\_ N.C. App. \_\_, \_\_, 799 S.E.2d 280, 282 (2017) (*McKinney III*). We will not repeat them here.

In *McKinney III*, this Court vacated an order finding Defendant in civil contempt and awarding corresponding attorneys' fees to Plaintiff, and remanded the case for further proceedings. *Id.* at \_\_, 799 S.E.2d at 285. On remand, the trial court entered a detailed order awarding attorneys' fees to Plaintiff under N.C. Gen. Stat. § 50-13.6, a statute that permits an award of attorneys' fees in a custody proceeding to "an interested party acting in good faith who has insufficient means to defray the expense of the suit." Defendant timely appealed the court's order awarding attorneys' fees.

### **Analysis**

Defendant argues that the trial court violated this Court's mandate when it awarded attorneys' fees on remand. Specifically, he contends that this Court's mandate only permitted the trial court to make additional willfulness findings concerning an award of attorneys' fees based on civil contempt, not to consider awarding fees based on other grounds. As explained below, we reject this argument and hold that the trial court did not violate this Court's mandate.

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## *Opinion of the Court*

We first provide some context concerning the award of attorneys' fees in this case. In a civil contempt proceeding in a child custody case, the trial court is authorized to award attorneys' fees on multiple grounds with differing legal standards. Under Section 50-13.6 of the General Statutes, a trial court in any child custody proceeding "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. This provision authorizes the trial court to impose attorneys' fees in a civil contempt proceeding that involves violation of an existing child custody order. *Wiggins v. Bright*, 198 N.C. App. 692, 695–96, 679 S.E.2d 874, 876–77 (2009).

Separately, this Court has held that a trial court's inherent authority to impose a remedy for civil contempt "includes the authority for a district court judge to require one whom he has found in willful contempt of court . . . to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt." *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514 (1970). To award attorneys' fees on this ground, the trial court must make a finding that the contempt of court was willful. *Id.*

Although the parties acknowledge that Plaintiff sought an award of attorneys' fees based on N.C. Gen. Stat. § 50-13.6 in the initial contempt proceedings below, this Court in *McKinney III* interpreted the trial court's order as awarding fees solely based on its inherent authority governing willful contempt of court. \_\_ N.C. App. at \_\_, 799

S.E.2d at 283–85. As a result, we vacated and remanded the attorneys’ fees award because it did not include a finding of willfulness. The Court noted that “[o]n remand, the district court is free to consider evidence and enter findings regarding whether [Defendant] acted willfully . . . .” *Id.* at \_\_\_, 799 S.E.2d at 285.

This statement in *McKinney III* authorized the trial court to once again impose attorneys’ fees based on civil contempt, if the court made appropriate findings concerning willfulness. But, importantly, that portion of the Court’s mandate did not prohibit the trial court from conducting additional proceedings in the case, or from considering other, alternative grounds on which to award attorneys’ fees.

On remand, the trial court chose not to make additional findings and award attorney’s fees based on civil contempt. Instead, after correctly noting that “[t]he Court of Appeals’ decision did not address Plaintiff Mother’s Motion for Attorney’s Fees pursuant to N.C. Gen. Stat. § 50-13.6,” the court made the findings required under that statute and awarded fees on that ground:

Plaintiff Mother is an interested party acting in good faith without sufficient funds to defray the necessary expenses of prosecuting the civil contempt and defending Defendant Father’s motion pursuant to Rules 59 and 60. The Court is awarding attorney’s fees pursuant to N.C. Gen. Stat. § 50-13.6 and said attorney’s fees of \$51,083.39 are reasonable.

The trial court’s ruling was entirely consistent with our mandate in *McKinney III*. “On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and

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departure from the mandate of the appellate court.” *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015). Here, the mandate provided only that the trial court’s civil contempt order and corresponding award of attorneys’ fees were vacated, that the case was remanded for further proceedings, and that, on remand, the trial court was free to enter a new attorneys’ fees award based on civil contempt if it made the necessary finding of willfulness. Nothing in that mandate prohibited the trial court from considering other appropriate grounds to award attorneys’ fees. Because the court’s attorneys’ fees award is consistent with our mandate, and because the trial court made findings on the statutory factors contained in N.C. Gen. Stat. § 50-13.6 and those findings are supported by competent evidence in the record, we affirm the trial court’s order.

AFFIRMED.

Judges BRYANT and INMAN concur.