An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-137

No. COA20-700

Filed 1 March 2022

Durham County, No. 19 CVD 247

TAMIKA HARRIS, Plaintiff,

v.

MARCUS HARRIS, Defendant.

Appeal by Defendant from orders entered 12 March 2020 by Judge Clayton J. Jones, Jr., in Durham County District Court. Heard in the Court of Appeals 20 October 2021.

Karen Griffin Law, PLLC, by Logan H. Shipman, for Plaintiff-Appellee.

Scott Allen for Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant appeals from an Order on Modification of Child Custody and Contempt and an Order on Attorney's Fees, both entered 12 March 2020.

I. Background

¶ 2 Plaintiff Tamika Harris ("Mother") and Defendant Marcus Harris ("Father")

are parents to minor child Christopher.[1] In 2016, the parties entered into a consent order regarding custody of Christopher. In 2018, the trial court modified the consent order.

¶ 3 Both parties filed motions seeking modification of the 2018 order. Specifically, each filed motions to modify custody and for the other party to show cause as to why the other party should not be held in contempt of the 2018 order. Mother also filed a motion seeking attorney's fees.[2]

¶ 4 In March 2020, the trial court entered two separate orders: one order modified custody and held Father in contempt of the 2018 order; the other order granted Mother attorney's fees. In the modification portion of the first order, the trial court specifically found that there was *not* a substantial change in circumstances from the 2018 order, but modified paragraphs 1, 2, 3, 4, and 6 of the 2018 order primarily relating to the parties' communication about Christopher. In the second March 2020 order, the trial court awarded Mother $4,730 in attorney's fees from Father but did not detail which portions were attributable to litigation costs, child custody, or criminal contempt.

¶ 5 Father appealed the criminal contempt issue to the superior court for a trial

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[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

[2] The trial court entered an order transferring venue in this action from Wake County to Durham County.

de novo. Father appealed the child custody and attorney's fees issue to our Court.

II. Analysis

¶ 6 The portion of the trial court's orders finding Father in contempt was properly appealed to the superior court. The portions modifying custody and awarding attorney's fees were properly appealed to our Court.

A. Custody Modification

¶ 7 Father argues that the trial court erred in entering an order modifying child custody after it found and concluded that there had not been a substantial change of circumstances. We agree.

¶ 8 Our Supreme Court has held that a trial court may not modify child custody where there has not been a substantial change of circumstances which has affected the welfare of the child, stating as follows:

> The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). Our Court has recognized that the trial court may not, "on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order." *Lewis v. Lewis*, 181 N.C. App. 114, 120, 638 S.E.2d 628, 632 (2007). Other

than to resolve clerical errors pursuant to Rule 60 of our Rules of Civil Procedure, "[t]here are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified." *Hibshman v. Hibshman*, 212 N.C. App. 113, 124, 710 S.E.2d 438, 445 (2011) (citation omitted).

¶ 9 Here, the trial court determined that "[t]here has not been a substantial change in circumstances since the entry of the [2018 order] that would warrant a modification at this time." Notwithstanding, the trial court modified the parties' responsibilities, particularly regarding communication. This was error. We, therefore, reverse the custody modification portion of the trial court's 12 March 2020 Order.

B. Attorney's Fees

¶ 10 Father argues that the trial court erred in awarding Mother attorney's fees. It is unclear which portion of the award related to the contempt issue and which portion related to the issues before us. Also, it appears from an attachment to Mother's brief that the contempt charge was dismissed when the matter was appealed to the superior court. However, this exhibit is not part of the record. *See Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 551, 577 S.E.2d 154, 156 (2003) (striking from consideration an appendix to appellant's brief which was not part of the record). We, therefore, conclude that the best course is for our Court to vacate the attorney's fees award and remand to the district court for a new hearing, taking into consideration

our resolution of the appeal from the portion of the orders modifying custody and the apparent dismissal of the contempt charge against Father.

III. Conclusion

¶ 11 We reverse the portion of the trial court's 12 March 2020 Order relating to modification of child custody. We vacate the 12 March 2020 Order on Attorney's Fees and remand for further proceedings not inconsistent with this opinion.

REVERSED IN PART, VACATED AND REMANDED IN PART.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).