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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA21-155

Filed 04 April 2023

Mecklenburg County, No. 18 CVD 10038

CARRIE H. O'BRIEN, Plaintiff,

v.

KEVIN A. O'BRIEN, Defendant.

Appeal by Defendant from orders entered 21 January 2020 and 24 September 2020 by Judge Sean P. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 16 November 2021.

*Leonard G. Kornberg for plaintiff-appellee.*

*Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for defendant-appellant.*

MURPHY, Judge.

A summary exhibit under North Carolina Rule of Evidence 1006 is admissible when it accurately summarizes the underlying materials. Underlying exhibits to a summary exhibit need not be admitted; however, if they are admitted they must otherwise comply with our Rules of Evidence and be authenticated. Here, the summary exhibit was admissible absent any objection as to its accuracy, and Father

fails to demonstrate the admission of the underlying exhibits, if erroneous, was prejudicial.

In a child support and child custody case, a party may receive attorney fees under N.C.G.S. § 50-13.6 if he or she is an interested party acting in good faith who has insufficient means to defray the expense of the suit. Where the findings of fact supporting a trial court's conclusion of law are unsupported by competent evidence such that it undermines our ability to review whether the court's conclusion is erroneous, we must remand for further fact finding. Here, because the trial court's finding of fact relating to whether Mother had insufficient means to defray the expense of this suit was not supported by competent evidence, we vacate and remand for further proceedings as consistent herein.

In a child support and child custody case, a party may receive attorney fees under N.C.G.S. § 50-13.6 where the trial court finds the supporting party has frivolously filed an action or other proceeding. However, the trial court here improperly determined that several proceedings were frivolous justifying attorney fees, but only one proceeding was frivolous. We remand to the trial court to determine what amount of attorney fees to award based on the proceedings properly considered frivolous.

The imposition of attorney fees as a sanction for a party's failure to comply with local rules was improper where our General Statutes do not permit their imposition, as there was no signed paper implicating Rule 11 and no discovery order

implicating Rule 37. We reverse the attorney fees award on this basis.

### **BACKGROUND**

In May 2018, Plaintiff Carrie O'Brien ("Mother") filed a complaint for child custody, child support, divorce from bed and board, and attorney fees. At the time, Mother and Defendant Kevin O'Brien ("Father") were married with two children. Father filed an answer asserting counterclaims for child custody, child support, divorce from bed and board, and attorney fees. This appeal arises out of the trial court's award of attorney fees for child custody, child support, and sanctions to Mother, in the total amount of \$89,003.00. As a result, we focus on the facts relevant to the attorney fees award, including the evidence upon which it was based.

Before a resolution on the merits, on 24 September 2019, Mother filed a *Motion for Sanctions* in which she moved the trial court to grant her sanctions, including attorney fees, due to Father's failure to provide an accurate financial affidavit prior to the parties' scheduled permanent child support trial, as required by the 26th Judicial District Local Rule 8.

On 21 January 2020, the trial court entered a *Temporary Child Support Order* in which it ordered Father to pay \$2,925.36 per month to Mother in temporary child support and \$35,104.32 in temporary child support arrears for January through December 2019. The trial court also indicated that it would "consider[] attorney's fees to [M]other, as a sanction against [F]ather, at a later hearing" and that "[it would] determine the amount of [Mother's] attorney's fees award related to her

Motion for Sanctions and her claim for child support in 2020.”

The following day, the trial court entered a *Permanent Child Custody Order* in which it granted primary legal custody of the children to Mother, as well as primary physical custody of one child and sole physical custody of the other. The order established visitation for the child of whom Father has secondary physical custody.

On 21 April 2020, the trial court entered a *Permanent Child Support Order* in which it ordered Father to pay \$4,502.65 per month to Mother in permanent child support as of January 2020, \$13,022.57 in temporary child support arrears to Mother for August through December 2018, and \$9,234.52 in permanent child support arrears for October 2019 through January 2020.

On 23 June 2020, the trial court held an attorney fees hearing. At the hearing, Mother introduced Exhibit 1000 and Exhibits 1 through 40. Exhibit 1000 was a summary exhibit of a timeline of the case that was supported by, and created from, Exhibits 1 through 40. When Mother offered these exhibits into evidence, Father objected, and the following exchange occurred:

[FATHER'S COUNSEL]: Your Honor, thank you. Your Honor, for Exhibit 1000 – here's my problem with it is they touched on very quickly on some parts of this for illustrative testimony. But it's a 12-page document. If we were doing a text affidavit, I would have been able to see this in advance.

I don't think I'd have a problem with the parts that they touched on coming in. I don't know how you do that. But the rest of it, I would object to. I don't have time to read all this. And—

THE COURT: So it may be something that I want to give you time to look at and tell me what's objectionable.

[MOTHER'S COUNSEL]: And Your Honor, I would just refer [Father's counsel] and Your Honor to Rule 1006, which talks about summaries. And the whole point of the summary is because we don't have time to go through every—I certainly think if [Father's counsel] wants to look at it and ask questions about anything in there, he has the right to do that. I'm not trying to blindside him.

But with respect to the admission of the exhibit, which is a summary, I think that, along with supporting documentation, meets the criteria that's set forth in the Rule.

THE COURT: Yes. I understand. I just think he's objecting as a precaution, insofar as perhaps one of these summary notices, not as it is reflected in the documents in 1 through 40. Is that fair to say?

[FATHER'S COUNSEL]: That is fair to say. And I did want to—I don't want to jump ahead of you, because I know we're on 1000, but I have a separate objection with the exhibits that were not testified about. I mean—

THE COURT: So, for example, say one of the entries, the notation is—has some names transposed or the date is incorrect. And you don't want me looking at this summary because, well, that mistake was made. You want to go and you want to check the underlying supporting documents to see if that is, in fact, as it states.

The quotes, for example, are reflected. Maybe there's a—something that's just left out that you want to check on. Is that kind of what you're getting at?

[FATHER'S COUNSEL]: Right. There is—well, there's—would be absolutely no time for me, and would be a poor use of my time, to cross-examine her on this 12-page, or whatever, of substance they put in here.

And then secondly, the—I think—well, I've been—may have been taught wrong, that if you're going to do a summary, you're entitled to have some backup docs. But you usually have to introduce the backup docs and identify the backup docs.

And, you know, when I heard [Mother's counsel] and [Mother] talk, I heard Exhibit 2, 6, 10, 11, 12 and then A and B.

THE COURT: Well, then also we're making this attorney's fees hearing into something much more than it needs to be, I'm afraid—

[FATHER'S COUNSEL]: Right—

[MOTHER'S COUNSEL]: And—and to be clear, I offered Exhibits 1 through 40 as the supporting documentation for the summary charts. And I think if you look at Rule 1006, it says that the backup documents, the originals or duplicates, can be made—shall be made available for examination or copying or both by other parties. So we've done that.

I mean, you used—in the old days, you could just hand up a summary chart. And people would just take the summary chart. And then people started to say, “Well, wait a second. Where's the supporting documentation for the summary chart?”

So now we've got the supporting documentation, which I understand is voluminous, but it's all correspondence that [Father], at least, and his previous counsel have had access to and seen and been a part of. So I don't—

THE COURT: So yes. So not to hide the ball, but what I'm most likely not going to rule at the end of this hearing. What I would be doing is I'd be taking the summary document, Exhibit 1000, and reviewing it, reading it and trying to understand the big picture of [Mother's counsel's] run over of [Father's] testimony.

But if there's some honest mistakes where something's included -- the name is transposed, like I said, or something else, [Father's counsel], you have a chance to go through that. And you want a chance to do that. So I suppose I'll give you some time to go and check the 1000 against 1 through 40 to see if that is, in fact, a fair representation of the quotes and the dates and the names and the motions as they're described.

How much time do you need to do that?

[FATHER'S COUNSEL]: The—I don't know, Your Honor. I mean, I'm not trying to hide the ball—you know, it's just—I would obviously want my client to be able to go through that with me and look at it. I mean, I'm not sure of your turnaround time on something like this. If I could have a day or two to get through it.

THE COURT: Sure.

[MOTHER'S COUNSEL]: And I'm okay with that. The only thing I would object to is that if it turns into him putting together his own—I think you have the right to verify that the contents are accurate.

THE COURT: Right. That's what I'm talking about—

[MOTHER'S COUNSEL]: But that's it. You're not putting together a written argument in response.

THE COURT: Right. Exactly. Yes. So if, like I said, if there's a quote that's incorrect, it's not written up by Mother's counsel's] office as it is in the motions, filings, et cetera, well, you'll tell [Father]—

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THE COURT: All right. That's fine. Friday at five o'clock. You can let me know where, if anywhere, [Mother's counsel's] timeline, Exhibit 1000, is incorrect.

Otherwise, 1 through 40 is admitted. And preliminarily,

Exhibit 1000 is admitted, pending further review.

Following this hearing, on 24 September 2020, the trial court entered an attorney fees order in which it granted Mother's *Motion for Sanctions* by ordering Father to pay Mother attorney fees. Pursuant to N.C.G.S. § 50-13.6, under the provision regarding interested parties acting in good faith with insufficient means to defray the costs of litigation and the provision regarding frivolous proceedings, the trial court ordered attorney fees in the amount of \$42,141.50 related to legal fees for child custody and \$20,889.50 related to legal fees for child support. Additionally, pursuant to North Carolina Rules of Civil Procedure 11 and 37(b)(2) and 26th Judicial District Local Rules 8 and 22, the trial court ordered attorney fees in the amount of \$25,972.00 as sanctions covering Mother's attorney fees incurred due to Father's delay in providing an appropriate financial affidavit. In total, the trial court awarded Mother \$89,003.00 in attorney fees.

Father timely appeals the *Temporary Child Support Order* granting Mother's *Motion for Sanctions* and the attorney fees order.<sup>1</sup>

### ANALYSIS

On appeal, Father argues the trial court (A) "erred in admitting [Mother's]

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<sup>1</sup> "Our Supreme Court has . . . ruled that, if an interlocutory order is entered during the pendency of litigation, a party can later seek appellate review of that interlocutory order under the provisions of [N.C.G.S.] § 1-278, which provides that, 'upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.'" *Inman v. Inman*, 136 N.C. App. 707, 710 (emphasis omitted), *cert. denied*, 351 N.C. 641 (2000) (quoting *Charles Vernon Floyd, Jr. and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51 (1999) (quoting N.C.G.S. § 1-278 (1996))).



exhibits during the attorney fee hearing on 23 June 2020”; (B) “erred in awarding attorney fees to [Mother] relating to [Mother’s] child custody and child support claims”; (C) “erred in awarding attorney fees to [Mother] relating to [Mother’s] child custody claim”; (D) “erred in awarding attorney fees to [Mother] as a sanction for [Father’s] failure to update his financial affidavit”; and (E) “erred in that its award of attorney fees is not reasonable and is not supported by the evidence.”

**A. Admissibility of Exhibits at Attorney Fees Hearing**

On appeal, Father contends he had inadequate time to review the materials supporting Exhibit 1000 to effectively cross-examine Mother regarding it. Father also contends the trial court erred in admitting those exhibits underlying Mother’s Summary Exhibit 1000 without proper authentication.

We review the trial court’s determination as to authentication de novo. *See State v. Clemons*, 274 N.C. App. 401, 409 (2020). However, we review the admission of summary exhibits for an abuse of discretion. *See, e.g., Broadbent v. Allison*, 176 N.C. App. 359, 366 (2006) (citation omitted) (“[North Carolina] Rule[] of Evidence [1006] allow[s] for voluminous recordings to be presented in summary form. . . . We [therefore] hold that the trial court did not abuse its discretion in admitting this evidence at trial.”), *disc. rev. denied*, 361 N.C. 350 (2007).

Under Rule 1006,

[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or

calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

N.C.G.S. § 8C-1, Rule 1006 (2021). As we explained in a prior case,

[t]he official comment to Rule 1006 states that North Carolina Rule 1006 is identical to Rule 1006 of the Federal Rules of Evidence. Under decisions of the federal courts, summaries are admissible if they are an accurate summarization of the underlying materials involved. However, a “summary” is properly excluded from evidence if it does not fairly represent the underlying document. In particular, a “summary” should be excluded if the basis for the summary is a party’s unsupported speculation.

*Coman v. Thomas Mfg. Co.*, 105 N.C. App. 88, 90-91 (cleaned up), *disc. rev. denied*, 331 N.C. 284 (1992).

To the extent Father attempts to collaterally attack the admission of Exhibit 1000 on the basis of the underlying exhibits being improperly admitted, we are unpersuaded. Father has presented neither caselaw suggesting any underlying evidence must be admitted at trial nor an argument to suggest that Exhibit 1000 was an inaccurate summarization of the underlying materials involved or that it did not fairly represent the underlying documents. *See id.* at 91.

Next, Father bases his challenge regarding the lack of an opportunity to cross-examine Mother regarding Exhibit 1000 upon *United States v. Strissel*, 920 F.2d 1162 (4th Cir. 1990). In *Strissel*, the Fourth Circuit stated,

[the] [a]ppellant also claims that these charts were based upon fraudulent and incorrect information, and are

therefore inadmissible. This is despite [the] appellant's opportunity to review the underlying documents and cross-examine the witnesses and the preparer of the charts. Many of the underlying documents that were introduced were never objected to by the defendant. However, adopting the position of the Fifth Circuit, which we do, we require only that the underlying evidence be admissible and *available to the opponent so that a proper cross-examination may be had*.

*Strissel*, 920 F.2d at 1164 (citation omitted) (emphasis added). However, *Strissel* has not been adopted by any North Carolina appellate court. Although the decision interprets the federal rule, which is identical to North Carolina's rule, *Strissel* is not binding on us until we adopt it.<sup>2</sup> Instead, our binding caselaw holds that "summaries are admissible [under Rule 1006] if they are an accurate summarization of the underlying materials involved." *See Coman*, 105 N.C. App. at 91 (emphasis omitted).

Additionally, as required by Rule 1006, "[t]he originals, or duplicates, [were] made available for examination or copying, or both, by [Father] at a reasonable time and place" when the trial court gave Father's counsel the amount of time that he requested to review the materials underlying Exhibit 1000. *See* N.C.G.S. § 8C-1, Rule 1006 (2021). We also note Father's counsel seemingly had access to the documents prior to the hearing.<sup>3</sup> Relatedly, Father's counsel also was explicitly directed that he

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<sup>2</sup> Indeed, despite having been decided more than a year earlier, *Strissel* was *never* mentioned in *Coman*. *See Coman*, 105 N.C. App. at 91.

<sup>3</sup> As the underlying documents were accessible to Father and his previous counsel, they should have been available to his new counsel as well. The documents underlying Exhibit 1000 take up approximately 446 pages.

could object to any inaccuracies in Exhibit 1000 following his requested review of the underlying materials. An e-mail from Father's counsel stated that "it was [his] understanding that [he] was permitted to review [Mother's Exhibit 1000] to determine if [it] referenced/described her exhibits but not to offer additional argument about the contents or their admissibility." Based on the transcript from the attorney fees hearing, it is clear Father's counsel could have objected on the basis of authentication or admissibility then, and Father's newly-retained counsel's potential misunderstanding on this point after the hearing and before the trial court entered the attorney fees order is not an error we can attribute to the trial court. Following the preliminary admittance of Exhibit 1000, after reviewing the underlying materials, Father did not indicate he had any objections to Exhibit 1000, but instead reported to the trial court that several of Mother's exhibits were not referenced in her summary. Based upon binding caselaw and Rule 1006, we find Father's argument unpersuasive as he had a reasonable time and place to review the underlying documents for Exhibit 1000 and does not assert it was not an accurate summation of the underlying documents. Furthermore, we decline to adopt *Strissel* on the facts before us where our caselaw has not done so in the past, and where Father was provided a reasonable time and place to consider the underlying documents for Exhibit 1000.

### **B. Authentication**

Even assuming Father's argument concerning the lack of authentication of the

underlying documents for Exhibit 1000 is preserved for appellate review, we do not conclude the trial court erred in admitting any documents on this basis. “[W]e conduct de novo review of whether the evidence at issue here was properly authenticated.” *Clemons*, 274 N.C. App. at 412.

Rule 901 states, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C.G.S. § 8C-1, Rule 901(a) (2021). Father takes issue with the trial court having admitted each of the underlying exhibits, Exhibits 1 through 40, despite Mother only testifying about Exhibits 2, 6, 8, 10, and 11.

Even assuming, without deciding, that the trial court erred in admitting the remaining documents as they had not been properly authenticated,<sup>4</sup> we conclude any error in admitting these exhibits is inconsequential. These exhibits were admitted only as the underlying documentation for Exhibit 1000. Their admittance does not impact the admissibility of Exhibit 1000. *See* N.C.G.S. § 8C-1, Rule 1006 (2021) (containing no requirement regarding the admittance of underlying documentation for a summary exhibit); *see also Coman*, 105 N.C. App. at 91 (emphasis omitted) (stating “summaries are admissible [under Rule 1006] if they are an accurate summarization of the underlying materials involved”). Furthermore, our review of

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<sup>4</sup> We note some of these documents are arguably self-authenticating.

the attorney fees order does not reflect the trial court relied on any of the Exhibits 1 through 40, as opposed to Exhibit 1000 or the orders and motions the trial court had previous access to that were included within Exhibits 1 through 40, in its order. As a result, any inadmissibility of Exhibits 1 through 40 does not impact our review on appeal nor would it necessitate remand to the trial court on evidentiary grounds. *See In re Huff*, 140 N.C. App. 288, 301 (citation and marks omitted) (2000) (“The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the [trial] court relied on the incompetent evidence in making its findings. Where there is competent evidence in the record supporting the court’s findings, we presume that the court relied upon it and disregarded the incompetent evidence.”), *disc. rev. denied*, 353 N.C. 374 (2001).<sup>5</sup>

**C. Challenge to Attorney Fees Award Under N.C.G.S. § 50-13.6 for  
Insufficient Means to Defray the Cost of the Suit**

Next, Father challenges the attorney fees order, contending that Findings of Fact 12, 14, 15, 16, and 23 are unsupported by the evidence, as well as contending

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<sup>5</sup> Father fails to explicitly assert in his brief that the admission of these exhibits prejudiced him and does not show the trial court relied on the unauthenticated exhibits. *See* N.C. R. App. P. 28 (2021). Father contends for the first time in his Reply Brief that the trial court relied on the exhibits in determining he filed motions with little to no merit.

Conclusion of Law 2 is unsupported by the findings of fact.<sup>6</sup> These portions of the order relate to the award of attorney fees on the basis of Mother lacking sufficient means to defray the cost of litigation pursuant to N.C.G.S. § 50-13.6.

In a custody and support action, once the statutory requirements of [N.C.G.S.] § 50-13.6 have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion. However, whether the statutory requirements of [N.C.G.S.] § 50-13.6 have been met is a question of law, reviewable on appeal. In addition, the trial court's findings of fact must be supported by competent evidence. Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded.

*Sherrill v. Sherrill*, 272 N.C. App. 532, 534 (2020) (citations and marks omitted).

N.C.G.S. § 50-13.6 provides,

[i]n 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*. 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.

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<sup>6</sup> Father does not elaborate on his challenges to Findings of Fact 14 or 23.

N.C.G.S. § 50-13.6 (2021) (emphasis added). We have held,

[t]here is a distinction between fee awards in proceedings solely for child support and fee awards in actions involving both custody and support:

[b]efore a court may award fees in an action solely for child support, the court must make the required finding under the second sentence of the statute: that the party required to furnish adequate support failed to do so when the action was initiated. On the other hand, when the proceeding or action is for both custody and support, the court is not required to make that finding. A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided.

Although typically labeled findings, these findings are in reality, conclusion[s] of law . . . .

*Sarno v. Sarno*, 255 N.C. App. 543, 551-52 (2017) (citations and marks omitted).

As both child custody and child support were contested before the trial court, the proceeding here was not an action solely for support, and N.C.G.S. § 50-13.6 only required the trial court to conclude Mother was an interested party acting in good faith and with insufficient means to defray the expense of the suit to support the attorney fees order. *Id.*; *see also* N.C.G.S. § 50-13.6 (2021).

Father does not challenge whether Mother was an interested party acting in good faith; thus, we do not reach this issue. *See* N.C. R. App. P. 28 (2021). Instead, we focus on whether Mother had sufficient means to defray the expense of the suit.



In addition to Father's challenges to Findings of Fact 12, 14, 15, 16, and 23 and Conclusion of Law 2, Father also challenges Findings of Fact 10(e), 10(g)(i)-(iii), and 17. We address these findings in turn and then consider Conclusion of Law 2 .

## **1. Findings of Fact**

Finding of Fact 10(e) states,

[a]s of the permanent child support hearing on [6 December 2019], []Father had not paid the \$35,104.32 in temporary child support arrears to []Mother, and claimed the check must have gotten lost in the mail.

Father contends this finding of fact is unsupported by competent evidence because “the trial court in its permanent child support order found that [Father] paid that arrearage on 6 December 2019.”<sup>7</sup> These provisions are not mutually exclusive, as Father could have paid this after the hearing, which is exactly what Mother contends occurred.

Findings of Fact 10(g)(i) states,

[]Father repeatedly advanced motions that had little to no merit and which unnecessarily increased []Mother's attorney's fees, including [Father's] Motion in Limine to Prohibit Mother from Introducing Documents Not Supplied in Discovery, which the [trial] [c]ourt found had been appropriately produced by []Mother in discovery . . . .

Father contends that, in Finding of Fact 10(g)(i),

the trial court cited [Father's] motion in limine as an example of advancing a motion that had little to no merit. However, the evidence showed that [Father] had requested

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<sup>7</sup> We note that this order was signed on 20 April 2020.

[Mother] to supplement her financial documents prior to trial, as [Mother] had not provided any additional documents after June of 2019. [Mother] did not dispute that she had not provided July and August and September statements, but instead argued she did not have an obligation to update her information. From the record, it does not appear that the trial court ever made a ruling on the motion.

When discussing the motion *in limine* at the hearing, the exchange below occurred:

[FATHER'S COUNSEL]: Despite the fact in November of 2018 and on September '19, we asked them to supplement [financial affidavits with credit card information].

[MOTHER'S COUNSEL]: Except [Father's counsel] isn't tell[ing] you that in December, in response to the November request, we did update it.

[FATHER'S COUNSEL]: No. You didn't give us the credit card part.

[MOTHER'S COUNSEL]: We updated it, and then ten days before the trial, we did not update it. [We are] pulling out what we gave them in December. So they did get that.

[FATHER'S COUNSEL]: We got statements through June. That was the longest we got statements.

[MOTHER'S COUNSEL]: Through June.

[FATHER'S COUNSEL]: Right. We don't have July, August, September statements.

....

THE COURT: And do you have that information?

[MOTHER'S COUNSEL]: No. We have through June. That's all we have. Of 2019.

THE COURT: Sounds pretty good.

[MOTHER'S COUNSEL]: What we didn't do is on [20 September] ---

THE COURT: *Give them July and August.*

[MOTHER'S COUNSEL]: --- give them -- give -- yes, because we don't have an obligation to do it. We're not going to stay and spend our ten days dealing with that, when -- if you want to -- if you want to get updated information, there's an appropriate way to do it and a not-appropriate way to do it. And I'm not going to run around to try to get information, if you don't ask for it the right way. It's that simple.

But when they asked for it in November, we gave it to them, and we gave it to them through June of 2019. I don't know that you could ask us to do much more than that.

(Emphasis added). The trial court then continued the matter after complex argument with counsel regarding the appropriate scope of discovery in this case, including the production of the August and July card statements. Father appears to be correct as to the lack of a formal ruling during this hearing; however, it appears from the attorney fees order that the trial court was then ruling or otherwise concluding the motion *in limine* lacked merit.

Next, Finding of Fact 10(g)(ii) referenced Father's "Motion to Quash Subpoena to Victoria Coble, Objections to Same, and Motion for a Protective Order, despite the fact that [Father had designated Victoria Coble as his testifying expert[.]]" Father argues, although "the trial court cited [his] motion and objections to [Mother's] subpoena to [his] expert Victoria Coble[.]" the Record "shows that [Mother's] subpoena requested the 'entire file[.]" which would have required the production of

information protected by the attorney client privilege and work product, and that [Father] rightfully objected to preserve such confidential information.” In the absence of the files being made part of the Record, we cannot conclude competent evidence supports there being little to no merit in Father’s motion concerning the subpoena to Coble. Finding of Fact 10(g)(ii) therefore is not supported by competent evidence.

Finding of Fact 10(g)(iii) referenced “A Motion to Strike Mother’s Venmo Expenditures, which was denied at the trial due to the information being available to [Father] through [Mother’s] previously provided bank statements.” Father takes issue with this finding, arguing “the evidence showed that [Father’s] counsel tried to work out that issue with [Mother’s] counsel for almost 2 months before filing his motion.” Father’s reference to his prior attempts to receive the Venmo expenditures does not address whether the finding of fact is supported by competent evidence. The documents Father cites mention that Mother’s bank statements reflect all Venmo transactions. Although Mother’s bank statements seem to reflect Venmo transactions to some extent, we do not appear to have all of the bank statements in the Record. In the absence of this information, we cannot conclude that there was competent evidence to support there being little to no merit in Father’s motion to strike the Venmo expenditures.

Finding of Fact 12 states, “Mother has a monthly deficit of (\$4,986.20).” Father contends this finding is inaccurate because it ignores that the trial court ordered

Father to pay \$4,502.65 per month in child support. Mother contends the finding was supported by the findings in the *Permanent Child Support Order*, which were not challenged. The *Permanent Child Support Order* included a finding that Mother had total reasonable monthly expenses in an amount of \$19,063.26.<sup>8</sup> The *Permanent Child Support Order* also included a finding that Mother's net monthly income is \$14,077.01. Mother's net income reduced by her reasonable monthly expenses results in a deficit of \$4,986.25. Had this been the end of the calculation, the finding of fact would be adequately supported.

However, the subsequent order of payment of child support should have been considered when the trial court determined Mother's monthly deficit.<sup>9</sup> Cf. *New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App. 208, 213 (2008) ("The trial court did not err by including as income the child support payments both parties received on behalf of children residing in their respective homes."). The payment of monthly permanent child support of \$4,502.65 should have been added to Mother's deficit to determine Mother's current financial status, resulting in the conclusion that Mother has a monthly deficit of \$483.60. Finding of Fact 12 therefore

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<sup>8</sup> We reach this amount by adding Mother's reasonable monthly expenses for the minors, \$11,242.79, and Mother's reasonable monthly expenses for herself, \$7,820.47.

<sup>9</sup> In Mother's brief, she implicitly concedes that the calculation of her monthly deficit should have included the permanent child support award, stating "[Mother's] monthly deficit was \$-4[, ]986.20 and, after applying the permanent child support amount of \$4,502[.00], [Mother] still had/has a total monthly shortfall of approximately \$-600[.00]." Although the calculations included in Mother's brief are not accurate, the principle of considering the monthly permanent child support payments nevertheless is relevant in this case.

is not supported by competent evidence.

Finding of Fact 14 states, “Mother’s disposable income has been inadequate to cover the full costs of her retained counsel during the pendency of this litigation.” Father challenges this finding by pointing to conflicting evidence, specifically focusing on Mother’s individual expenditures and her testimony that she maintained her standard of living during the litigation while she paid her attorneys. However, there was competent evidence that Mother had a monthly deficit prior to the provision of child support that did not include consideration of the payment of legal fees. Additionally, Father did not pay any child support from when the parties separated until 6 December 2019, so the size of the deficit was closer to \$4,986.25 during this time period. Finally, and most importantly, there was testimony from Mother that she was not always able to pay counsel on time and had to take “17 or 18 percent of her estate, and us[e] it” to pay for attorney fees, and that she did not pay taxes on her salary in 2018 or 2019 so she could afford to pay her lawyer. Finding of Fact 14 therefore is supported by competent evidence.

Finding of Fact 15 states,

[d]uring the attorney’s fees hearing, [M]other presented a chart showing the value of the bank accounts, retirement accounts, and other liquid assets in each party’s possession. The value of such assets in [M]other’s possession equaled approximately \$648,600.00, and the value of such assets in [F]ather’s possession equaled approximately \$1,330,981.00, not including [F]ather’s inherited separate accounts valued at approximately \$45,000.00.

Father contends this is not supported by “the actual evidence,” contending Mother’s estate and Father’s estate are inaccurately estimated. However, this challenge simply amounts to Father pointing to contradictory evidence. At the attorney fees hearing, the charts were introduced and admitted as Exhibits A and B without objection by Father. Nonetheless, Father was given an opportunity and directed to contest the accuracy of these specific exhibits should he find an error after being provided time to review them. Despite this, Father again did not challenge any aspect of Exhibits A or B. As a result, these were properly admitted, without objection, and we will not now on appeal question the accuracy of these exhibits for the first time. Exhibit A indicates that Mother’s assets were \$648,600.49, and Exhibit B indicates that Father’s assets were \$1,330,981.00. Finding of Fact 15 therefore is supported by competent evidence.

Finding of Fact 16 states,

[t]he [trial] [c]ourt compared the relative separate estates of the parties and finds it unreasonable for [M]other to deplete her separate estate beyond \$15,000.00 of attorney’s fees in pursuit of her claim for child support.

Father contends that this finding is unsupported by competent evidence and that any depletion of Mother’s separate estate to pay attorney fees was reasonable. In light of the “value of [liquid] assets in Plaintiff/Mother’s possession equal[ing] approximately \$648,600.00, and the value of such assets in Defendant/Father’s possession equal[ing] approximately \$1,330,981.00” and Mother’s monthly deficit of \$483.60, we conclude

there was competent evidence to support the trial court's finding that it was unreasonable for Mother to deplete her separate liquid estate beyond \$15,000.00. *See Van Every v. McGuire*, 348 N.C. 58, 60 (1998) ("The fact that N.C.G.S. § 50-13.6 does not *require* the trial court to compare the relative estates of the parties does not automatically mean that it does not *allow* or *permit* the trial court to do so in a proper case."); *see also Chused v. Chused*, 131 N.C. App. 668, 673 (1998); *Bookholt v. Bookholt*, 136 N.C. App. 247, 252 (1999).

Finding of Fact 17 states,

Father failed to properly disclose over \$40,000.00 in income on his most recent Financial Affidavit filed prior to the permanent child support trial. [Mother and the [trial] [c]ourt did not learn of this income until after the permanent child support trial, despite the fact that [Father] received the income prior to the permanent child support trial and prior to the filing of his Financial Affidavit.

Father contends,

in [Finding of Fact 17], the trial court found that [Father] had not disclosed over \$40,000 in income and that [Mother] did not learn about it until after the child support trial. However, the evidence revealed that [Father] exercised a stock option which was the sale of an asset. [Father's] stock options were always listed as "assets" on both parties' respective asset/debt charts as opposed to "income[.]" [Mother] also knew about those assets and treated it accordingly as an asset as opposed to income.

Father only challenges the technical status of the stock options prior to them becoming income. The fact that the stock options were an asset that were disclosed,



prior to being sold and becoming income, does not address or negate the substance of Finding of Fact 17. Furthermore, we have previously treated income and assets as separately considered categories for child custody purposes. *See Kaiser v. Kaiser*, 259 N.C. App. 499, 508 (2018) (emphasis added) (“Ms. Gerber *sold* her remaining *assets* in the Wells Fargo account in early 2016. From the record on appeal, we are unable to determine if the trial court’s calculation of regular dividend *income* as of November 2016 included dividend *income* from *assets* Ms. Gerber *sold* months earlier and thus cannot generate future dividend income.”). Father’s challenge therefore has no merit.

Finding of Fact 23 states,

[b]ased on the above, []Mother has insufficient means to defray the costs of the litigation in relation to her claims for child custody and child support and she is entitled to an award of attorney’s fees pursuant to N.C.G.S. [§] 50-13.6 and applicable North Carolina case law.

Finding of Fact 23 is properly characterized as a conclusion of law and is resolved by our discussion of Conclusion of Law 2. *See Wachacha v. Wachacha*, 38 N.C. App. 504, 507 (1978) (“What is designated by the trial court as a finding of fact . . . will be treated on review as a conclusion of law if essentially of that character.”); *In re Helms*, 127 N.C. App. 505, 510 (1997) (citation and marks omitted) (“[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.”).

## **2. Challenged Conclusion of Law**

Conclusion of Law 2 states,

[p]ursuant to N.C.G.S. § 50-13.6 and applicable North Carolina case law, []Mother is an interested party, acting in good faith, and lacks sufficient means to fully defray the costs of litigation in relation to her claims for child custody and child support, and she therefore is entitled to an award of attorney's fees incurred in connection with her claims for child custody and child support.

“A party has insufficient means to defray the expense of the suit when he or she is ‘unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.’” *Lawrence v. Tise*, 107 N.C. App. 140, 153 (1992) (quoting *Hudson v. Hudson*, 299 N.C. 465, 474 (1980)). This determination may be made without reference to the relative estates of the parties. *See Taylor v. Taylor*, 343 N.C. 50, 54, *reh'g denied*, 343 N.C. 517 (1996). When making this determination, we have considered whether a party has a monthly deficit (considering the effect of alimony and child support), the value of their estate and their debts, their expenditures, and the relative size of estates. *See, e.g., Hudson*, 299 N.C. at 474-75; *Lawrence*, 107 N.C. App. at 153-54; *Cobb v. Cobb*, 79 N.C. App. 592, 596-97 (1986).

Here, we conclude that remand for reconsideration in light of Finding of Fact 12 being unsupported by competent evidence is necessary. As discussed above, the trial court found that Mother's monthly deficit was \$4,986.20; however, this amount fails to account for the payment of monthly permanent child support in the amount of \$4,502.65. Additionally, the attorney fees order does not address the provision of permanent child support in any of its findings. When permanent child support is

properly considered, Mother's monthly deficit drops to \$483.60. This difference is significant enough to potentially change the determination of whether Mother had sufficient means to defray the costs of litigation. This determination is one that the trial court should make in the first instance, rather than one we should make on appeal. In *Coble v. Coble*, our Supreme Court explained,

[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal. . . .

It is true that there is evidence in the record from which findings *could be* made which would in turn support the conclusion that [the] plaintiff is in need of financial assistance from the defendant. For instance, the "affidavit of financial standing" submitted by [the] plaintiff indicates that his own monthly expenses, including those in support of the children, far exceed his average income. Additionally, there is evidence of record which could be interpreted to show that [the] defendant's income may often be more than sufficient to meet her own personal expenses. What all this evidence *does* show, however, is a matter for the trial court to determine in appropriate factual findings. . . .

Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain

of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

*Coble v. Coble*, 300 N.C. 708, 712-14 (1980) (citations omitted). As a result, we remand this issue to the trial court for proceedings consistent with this opinion based upon Mother's monthly deficit of \$483.60.

**D. Attorney Fees Award Relating to Child Custody under N.C.G.S. § 50-13.6  
on the Basis of Frivolous Proceedings**

Father contends the trial court erred in concluding he advanced unreasonable and frivolous positions throughout the litigation, challenging Findings of Fact 6, 21, and 30 as unsupported by the evidence, and challenging Conclusion of Law 1 as unsupported by the findings.

N.C.G.S. § 50-13.6 states,

[i]n 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. 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.G.S. § 50-13.6 (2021).

Finding of Fact 6 states,

[w]ith regard to [M]other's claim for attorney's fees pursuant to N.C.G.S § 50-13.6 related to child custody, the [trial] [c]ourt finds that [F]ather consistently advances unreasonable and frivolous positions in pursuit and escalation of litigation, which cumulatively tended to unreasonably and unnecessarily increase the cost of litigation and exacerbated the spirit of animosity existing and growing between the parties. This includes, but is not limited to the following:

a. On [13 August 2018], [F]ather asserted a counterclaim for the sole legal custody and primary physical custody of the minor children, including [the older child], when no facts existing at any point since the inception of this litigation could have reasonably supported such an award, as shown by the detailed findings contained in the Permanent Child Custody Order, entered [22 January 2020], which awarded [M]other the sole custody of [the older child] and primary custody of [the younger child].

b. At all relevant times, [F]ather exhibited a repeated, unwavering unwillingness to accept Soberlink alcohol monitoring as a condition of his supervision of the minor children. The [trial] [c]ourt, in finding [F]ather's alcohol consumption to compromise and negatively affect his ability to responsibly parent and supervise the minor children, required Soberlink alcohol monitoring in the Permanent Custody Order after hearing and considering all of the evidence presented during the permanent custody trial.

c. [F]ather repeatedly rejected reasonable offers from [M]other to settle the custody claim, offers in which [M]other continually expressed her willingness to resolve custody by agreement rather than through litigation. [M]other's offers to resolve custody far exceeded the custody award [F]ather received at the permanent custody trial.

d. Additionally, [Mother made reasonable adjustments to her proposed custodial terms (though she remained steadfast in her insistence on Soberlink monitoring for [Father), to which [Father was dismissive or did not respond in good faith.

e. [Father repeatedly filed and advanced motions that had little to no merit and that unnecessarily increased the costs of litigation and [Mother's attorney's fees, including but not limited to:

i. [Father's Motion for Temporary Parenting Arrangement Necessitated By Mother Disallowing Father Parenting Time ("TPA Motion");

ii. A Motion to Quash a Subpoena to Maria Curran, who was providing family therapy to the O'Brien family;

iii. A Motion to Quash a Subpoena to Cindy Tice, who was providing individual therapy to [Father;

iv. A Motion to Quash a Subpoena to John Rowe, who had provided individual therapy to [Father; and

v. A Motion to Compel Mediation; Motion to Impose Sanctions for Obstructing Judicial Process Regarding Equitable Distribution and Custody, which was subsequently voluntarily dismissed.

f. [Mother filed [Mother's Response to [Father's Motion for Temporary Parenting Arrangement ("TPA Response"), in which she refuted [Father's claims that she had denied him parenting time and alleged that [Father had seen the minor children whenever he requested. [Mother also filed seven (7) witness affidavits in support of her TPA response. The [trial] [c]ourt denied [Father TPA Motion without a hearing.

Father challenges the finding as unsupported by the evidence. Father points to testimony from Mother that he was open to participating in Soberlink so long as she did as well. However, during Mother's testimony, the following exchange occurred:

[FATHER'S COUNSEL:] Did you agree with [Father], that you would agree to be monitored by Soberlink, if he would?

[MOTHER:] I would have agreed to anything to get him out of the house.

[FATHER'S COUNSEL:] So the answer to my question, yes?

[MOTHER:] Yes. I did.

[FATHER'S COUNSEL:] Did you, subsequently, do a take-back on that?

[MOTHER:] I did.

[FATHER'S COUNSEL:] So you agreed to SoberLink, if he would agree to SoberLink. Then you decided no, you won't.

[MOTHER:] That's not the way it was. There are numerous emails and numerous back and forth between attorneys as to what was being agreed to, and every time I thought we got close, there was then, [Father] would refuse to do SoberLink, or to go to counseling like he agreed to or to attend family counseling like he agreed to.

This testimony, at least, constitutes competent evidence of Father's repeated refusal to accept Soberlink. In conjunction with the additional testimony to a similar effect, the characterization of Father's unwillingness to accept Soberlink as unwavering is supported by competent evidence.

Father challenges Finding of Fact subparts 6(c) and 6(d)—that Father rejected

reasonable offers that far exceeded the ultimate custody decision and that he did not respond to custody terms in good faith—on the basis of what he believes is evidence that the parties were close to a joint parenting schedule, but Mother rejected doing Soberlink. Father also refers to several exhibits that suggest he wanted to engage in mediation or arbitration to save expense. However, whether Mother rejected any agreement and whether Father wanted to mediate or arbitrate the case to save expense is irrelevant to Finding of Fact subparts 6(c) and 6(d). Additionally, as outlined above, there was testimony to show Father would repeatedly refuse Soberlink once an agreement was nearing. Mother's testimony was competent evidence that Father refused offers and did not respond to the custody negotiations in good faith, especially in light of the testimony that every custody proposal required Soberlink.<sup>10</sup>

Father challenges Finding of Fact 6(e), which indicated Father filed motions with “little to no merit” and thereby “unnecessarily increased the costs of litigation.” He contends his motion for a temporary parenting arrangement was valid because Mother had sent him a text message stating, “Until there is a custody agreement and financial agreement the kids will not be with you. Be very clear about that.” Father

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<sup>10</sup> We do not address whether the actions described in 6(b)-(d) were “frivolous,” as these are factual descriptions of events and did not involve the initiation of a frivolous action or proceeding. *See* N.C.G.S. § 50-13.6 (2021) (“[S]hould the [trial] 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.”).



also contends his motions to quash the subpoena to Dr. Curran, Dr. Rowe, and Cindy Tice had merit, pointing to the trial court's issuance of a protective order as to each of them. Finally, Father contends the motion to compel mediation had merit, though he voluntarily dismissed the motion. We address the challenge to Finding of Fact 6(e) with the discussion of Conclusion of Law 1. *See infra*.

Finding of Fact 6(f) states,

[M]other filed [M]other's Response to [F]ather's Motion for Temporary Parenting Arrangement ("TPA Response"), in which she refuted [F]ather's claims that she had denied him parenting time and alleged that [F]ather had seen the minor children whenever he requested. [M]other also filed seven (7) witness affidavits in support of her [ ] response. The [trial] [c]ourt denied [F]ather TPA Motion without a hearing.

This finding of fact is mostly supported by Mother's response and affidavits as well as the trial court's order denying the motion. However, there is no competent evidence to suggest that Father's factual assertions regarding the denial of parenting time were disproved by Mother's response.<sup>11</sup> To the extent the use of "refuted" indicates this, it is not supported by competent evidence.

Finding of Fact 21 states,

[p]ursuant to N.C.G.S. § 50-13.6 and applicable North Carolina case law, [M]other is entitled to an award of attorney's fees related to her claim for child custody, due to [F]ather's unreasonable and frivolous positions and motions related to child custody as set forth above.

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<sup>11</sup> This motion was denied without a hearing per the trial court's order.

Father challenges this finding of fact generally; however, the finding is more properly characterized as a conclusion of law. *See Wachacha*, 38 N.C. App. at 507 (“What is designated by the trial court as a finding of fact . . . will be treated on review as a conclusion of law if essentially of that character.”); *In re Helms*, 127 N.C. App. at 510 (citations and marks omitted) (“[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.”). Accordingly, we discuss Finding of Fact 21 below with Conclusion of Law 1. *See infra*.

Finding of Fact 30 states,

the problems faced by []Mother were unusually difficult and far exceeded the customary demands attendant to a typical or run-of-the-mill child custody and support action. []Father’s conduct necessitated considerable additional efforts by []Mother’s attorneys, to protect and advance her legal interests – for example:

- a. []Father repeatedly took unreasonable and frivolous position in pursuit and escalation of the litigation and he filed numerous meritless motions to which []Mother then had to respond and defend herself;
- b. []Father refused to voluntarily accept Soberlink alcohol monitoring as a condition of his supervision of the parties’ children. Th[e] [trial] [c]ourt imposed such alcohol monitoring as a requirement for []Father’s visitation because of the negative effect that his alcohol consumption had on his ability to responsibly parent and supervise the children.
- c. []Father repeatedly rejected reasonable offers from

[]Mother to settle the child custody claim by consent;

d. []Father ignored or failed to respond in good faith to []Mother's numerous attempts to resolve by consent her child support claim; and

e. []Father failed to timely serve an updated, factually-based Financial Affidavit. His conduct required an otherwise unnecessary, additional hearing after the child support hearing in September 2019.

Father does not elaborate on his challenge to Finding of Fact 30, instead generally challenging the finding as unsupported by competent evidence.

Whether Finding of Fact 30(a) is supported by competent evidence is, in part, dependent upon our resolution of Finding of Fact 6 and is discussed below. We do note that Mother had to defend herself by responding to Father's motions, including the motion for a temporary parenting arrangement referenced above. While there do not appear to be any other formal responses by Mother included in the Record, Mother nonetheless had to respond to the merits of these motions at hearings and over email. As a result, we conclude Finding of Fact 30(a) is supported by competent evidence, with the exception of whether or not the motions filed were frivolous, which we determine below. *See infra*.

Finding of Fact 30(b) is coextensive with Finding of Fact 6(b) and is supported by the same competent evidence that supports Finding of Fact 6(b). *See supra*. Similarly, Finding of Fact 30(c) is coextensive with part of Finding of Fact 6(c) and is supported by the same competent evidence that supports Finding of Fact 6(c). *See*

*supra*. Likewise, Finding of Fact 30(d) is coextensive with Finding of Fact 6(d), except that it adds that Mother made “numerous attempts” to resolve the custody dispute. This additional contention is coextensive with Finding of Fact 6(c) in part, and the Record and transcript reflect multiple attempts to resolve the custody dispute.<sup>12</sup> Finding of Fact 30(d) is supported by the same competent evidence supporting Finding of Fact 6(d). *See supra*.

Finding of Fact 30(e) states, “Father failed to timely serve an updated, factually-based Financial Affidavit. His conduct required an otherwise unnecessary, additional hearing after the child support hearing in September 2019.” Father fails to challenge Finding of Fact 7, which lists several findings of fact from the *Temporary Child Support Order* that initially determined sanctions were appropriate. Father only challenges Findings of Fact 19-23 and 50 from the *Temporary Child Support Order*. Findings of Fact 10 and 17 from the *Temporary Child Support Order* establish that Father did not file an updated financial affidavit for the permanent child support trial. *See Peters v. Pennington*, 210 N.C. App. 1, 13 (2011) (“Unchallenged findings of fact are binding on appeal.”). Additionally, Findings of Fact 19-20 and 22-23 of the *Temporary Child Support Order* are supported by competent evidence, as discussed below, *see infra*, and clearly show that the lack of an updated, accurate financial affidavit required an additional hearing. The evidence supporting those findings

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<sup>12</sup> This includes Exhibits 2 and 6, which were the subject of testimony.

establishes Father's conduct required an otherwise unnecessary support hearing for purposes of Finding of Fact 30(e) and thus constitutes competent evidence.

Conclusion of Law 1 states,

[p]ursuant to N.C.G.S. [§] 15-13.6 and applicable North Carolina case law, [M]other is entitled to an award of attorney's fees related to her claim for child custody and child support due to [F]ather's unreasonable and frivolous positions and motions related to child custody as set forth more particularly [in the above findings].

N.C.G.S. § 50-13.6 states, in relevant part,

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 fees to an interested party as deemed appropriate under the circumstances.

N.C.G.S. § 50-13.6 (2021).

“Whether these statutory requirements have been met is a question of law, reviewable on appeal.” *Cf. Hudson*, 299 N.C. at 472 (referring to elements of “acting in good faith” and “insufficient means to defray the expense of suit”). In *Doan v. Doan*, we stated that, where sanctions are awarded for the frivolous nature of a party's actions, we need not address whether the party seeking the award of fees was acting in good faith and had insufficient means to defray the expense of the suit. *See Doan v. Doan*, 156 N.C. App. 570, 575-76 (2003). We also expressly rejected the contention that the frivolous portion of N.C.G.S. § 50-13.6 was limited to support actions, as the “action [there] include[d] a claim for support, and the trial court's

findings on [the frivolous nature of the appeal] appl[ied] equally to that claim as to the claim for custody.” *Id.* at 576.<sup>13</sup>

The standard for determining whether a filing is frivolous under N.C.G.S. § 50-13.6 has not been clearly articulated. N.C.G.S. § 50-13.6 does not define “frivolous,” and we have not previously defined “frivolous” in this context. However, in such a scenario, we apply the plain meaning of the term, for which we can refer to dictionaries. *See Midrex Techs., Inc. v. N.C. Dep’t of Revenue*, 369 N.C. 250, 258 (2016) (“Undefined words are accorded their plain meaning so long as it is reasonable to do so.”); *see also State v. Webb*, 358 N.C. 92, 97 (2004) (consulting Black’s Law Dictionary to construe the plain meaning of statutory terms). Black’s Law Dictionary defines “frivolous” as “[l]acking a legal basis or legal merit; manifestly insufficient as

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<sup>13</sup> Father contends this is erroneous based on our Supreme Court’s statement that

the duty to make the required finding under the second part of [N.C.G.S. § 50-13.6] is imposed only in a support action. Consequently, these provisions fall within the purview of the maxim *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another. The General Assembly, having limited the second provision to support actions, apparently did not intend the requirement to apply to custody or custody and support actions. It follows, therefore, that the second provision of [N.C.G.S.] § 50-13.6 is inapplicable to this order since [the] defendant’s motion in the cause prays for modification of both the custody and support aspects of the previous judgment.

*Stanback v. Stanback*, 287 N.C. 448, 462 (1975) (citation omitted) (emphasis omitted). However, the statutory language at issue *sub judice* has been specifically interpreted by us in *Doan* and we are bound by *Doan*. *See Doan*, 156 N.C. App. at 575-76; *see also In re Civil Penalty*, 324 N.C. 373, 384 (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.”).

a matter of law.” *Frivolous*, Black’s Law Dictionary, (11th Ed. 2019); *see also Frivolous Claim*, Black’s Law Dictionary, (11th Ed. 2019) (“A claim that has no legal basis or merit, esp. one brought for an unreasonable purpose such as harassment.”).

In determining whether Finding of Fact 6(a) was proper, even if we assume Father’s counterclaim—that he was a fit and proper person to receive sole legal and primary physical custody—was frivolous, there was an alternative claim in his counterclaim for joint custody that was not frivolous. Further, we note that the assertion that a parent is fit and proper is a phrase associated with the entitlement generally to custody. *See* N.C.G.S. § 50-13.5(i) (2021) (“In any case in which an award of child custody is made in a [D]istrict [C]ourt, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.”). As a result, we decline to conclude that Father’s counterclaim for custody was frivolous.

In terms of Finding of Fact 6(e), we first determine that the three motions to quash all had some merit, as the trial court issued a protective order for Dr. Curran, Cindy Tice, and Dr. Rowe. The Record does not reflect what, if anything, was redacted as a result of these orders. As a result, the characterization of the motions

to quash as meritless is unsupported.<sup>14</sup>

However, we do believe Father's motion to compel mediation was frivolous. Although the voluntary dismissal of a motion, standing alone, is not sufficient to render a motion frivolous, here there was testimony that "[Father] took a dismissal of [the] motion to compel, after realizing that he was wrong." This seemingly refers to both the motion to compel mediation's inclusion of rules related to equitable distribution cases when an action for equitable distribution here had not yet been filed and the attempt to enforce the requirement of mediation through a private mediation rather than pursuant to N.C.G.S. § 7A-494. *See* N.C.G.S. § 50-13.1(b) ("Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter, where there is a program established pursuant to [N.C.G.S. §] 7A-494, shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation pursuant to subsection (c)."). As a result, this motion was filed without merit and was therefore frivolous.

Next, we conclude Father's motion for a temporary parenting arrangement was not frivolous. Finding of Fact 6(f), which is mostly supported by competent evidence,

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<sup>14</sup> Additionally, it is noteworthy that each of the protective orders indicated that "[e]ach party is responsible for his or her own fees and costs related to the [subpoena(s)] and as to the [Motion(s)] to Quash and [Motion(s)] for Protective Order."



indicates “[Mother] refuted []Father’s claims that she had denied him parenting time.” As discussed above, *see supra*, we specifically hold this portion to be unsupported by competent evidence. Additionally, the motion for a temporary parenting arrangement was filed pursuant to 26th Judicial District Family Law Local Rule 7A.11, which states,

[p]leadings for a Temporary Parenting Arrangement hearing pending a trial or other resolution of a claim for custody or visitation should be made only in rare situations which do not rise to the level of an emergency but which significantly affect the well-being of the children. Circumstances which may warrant a Temporary Parenting Arrangement include, but are not limited to, relocation; repeated “snatching” of children between parents; *one parent claiming the other parent is denying access to the child or is severely and unreasonably limiting access*; substance abuse or mental health issues which pose some risk for the children.

Local Rules of Domestic Court, Jud. Dist. 26 Family Court Division, Rule 7A.11 (2022) (citation omitted) (emphasis added). Father specifically claimed that “Mother [was] denying access to the children, and [was] severely and unreasonabl[y] limiting Father’s access and parenting time with the children.” In light of these specific allegations, the apparent resolution of the motion based solely on the competing facts alleged by the parties, and the standard established by Local Rule 7A.11, we conclude the motion was not frivolous.

In light of our determination that only one of the motions discussed in Finding of Fact 6(f) was frivolous, we conclude that Finding of Fact 30(a) is also inaccurate.

Finding of Fact 30(a) states that “Father repeatedly took unreasonable and frivolous positions in pursuit and escalation of the litigation and he filed numerous meritless motions to which []Mother then had to respond and defend herself.” In light of our conclusion that Father’s filing of his motion to compel mediation was the only frivolous motion properly identified by the attorney fees order, the characterization of Father’s frivolous filings as numerous is unsupported by competent evidence.

However, because Father has initiated a frivolous proceeding, Mother is entitled to attorney fees. *See* N.C.G.S. § 50-13.6 (2021) (emphasis added) (“[S]hould the [trial] 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.”). In light of our determination that only one of the proceedings referred to by the trial court was properly characterized as frivolous, we remand to the trial court to determine what a reasonable award of attorney fees should be as it relates solely to this filing.

#### **E. Attorney Fees Award as a Sanction**

Father contends the trial court erred in awarding attorney fees for his failure to provide an updated financial affidavit. From the *Temporary Child Support Order*, he specifically challenges Findings of Fact 19-23 and 50 as unsupported by evidence and Conclusion of Law 5 as unsupported by the findings. From the subsequent attorney fees order, he challenges Findings of Fact 8, 9, and 24 as unsupported by evidence and Conclusion of Law 3 as unsupported by the findings of fact.

## **1. Temporary Child Support Order**

Finding of Fact 19 states,

[t]he income and expenses contained in [F]ather's [12 July 2019] Financial Affidavit are inaccurate by [F]ather's own account and cannot be reasonably relied upon by the Court to determin[e] permanent child support.

Finding of Fact 19 is supported by competent evidence. Findings of Fact 15-17 in the *Temporary Child Support Order* establish that the trial court did not find it credible that Father's income and all but three expenses remained the same for 13 months,<sup>15</sup> that Father acknowledged inaccuracies in his July financial affidavit, and that Father's counsel acknowledged he did not update his financial affidavit although he was required to do so. Findings of Fact 15-17 are unchallenged and binding; therefore, at least the first part of Finding of Fact 19 is supported by competent evidence. *See Peters*, 210 N.C. App. at 13 ("Unchallenged findings of fact are binding on appeal"). Additionally, evidence that Father's financial affidavit that was filed for the permanent child support determination did not reflect the actual financial status of Father is competent evidence that the trial court could not rely upon the financial affidavits to determine child support. Finding of Fact 19 is supported by competent evidence.

Finding of Fact 20 states,

[M]other and th[e] [trial court] have been prejudiced by [F]ather's failure to update his Financial Affidavit with

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<sup>15</sup> This is the period of time between the two affidavits he had filed.

current and accurate information.

Finding of Fact 20 is supported by competent evidence in light of the evidence supporting Finding of Fact 19. Mother would have been unable to effectively argue or respond to arguments from Father regarding an appropriate amount of child support absent an accurate accounting of Father's income and expenses. So too would the trial court have been unable to determine what child support should be. *See Ellis v. Ellis*, 126 N.C. App. 362, 364 (1997) ("It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified."). Father argues that he provided the supporting documentation later on that date, with updated information that Mother and the trial court could rely on. However, this approach would have left Mother's counsel with five to six days to review this information and create a comprehensive overview of the state of his expenses, which would have prejudiced Mother by only allowing her half the time that she would have had if Father had complied with the local rule requiring the filing of his financial affidavit. This also would have resulted in the trial court being unable to rely on a concise statement of both parties' financial information. There is competent evidence that Mother and the trial court were prejudiced by Father's failure to include an updated financial affidavit.

Finding of Fact 21 states,

[Mother's Motion for Sanctions should be granted. The [trial] [c]ourt will award attorney's fees to [Mother in an amount to be determined at the hearing on [5 December

2019]. Due to time constraints, pursuant to local rules, and the complicated nature of the case, the [trial] [c]ourt declined to entertain forensic expert testimony in the temporary child support hearing, instead considering solely the parties' testimony.

Father appears to only challenge this finding of fact in terms of the decision to award attorney fees, which we address in our discussion of Conclusion of Law 5. *See infra*.

Finding of Fact 22 states,

[t]he [trial] court is unable to determine permanent child support based on [F]ather's [12 July 2019] Financial Affidavit.

Finding of Fact 22 is supported by competent evidence. As stated above, "[i]t is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis*, 126 N.C. App. at 364. Without a timely, current, and accurate financial affidavit from Father at the time of the hearing, the trial court was unable to consider Father's current income in determining child support.

Finding of Fact 23 states,

[i]t is appropriate to continue the permanent child support trial to a later date so that the [trial] [c]ourt can determine permanent child support based on accurate income and expense information.

Finding of Fact 23 is supported by competent evidence. As indicated by the previous findings of fact, the previous financial affidavit filed by Father was inaccurate and could not be relied on to determine accurate income or expense information, and

Father did not file an updated financial affidavit at the appropriate time. Although Mother had access to the underlying documents for Father's then-current financial information with five to six days to review them, 26th Judicial District Family Law Local Rule 8.3 states that "[i]f a party does not file an amended [financial affidavit] and provide documentation of changes ten (10) days in advance of the hearing or trial, the [trial] [c]ourt may disallow evidence of any change or may continue the hearing/trial." Local Rules of Domestic Court, Jud. Dist. 26 Family Court Division, Rule 8.3 (2021). Based on this local rule's express allowance of continuances when a financial affidavit is not filed 10 days prior to a hearing or trial in conjunction with the prejudice to the court and Mother from the delayed provision of Father's financial documents, Finding of Fact 23 was supported by competent evidence.

Finding of Fact 50 states,

[t]he [trial] [c]ourt will determine the amount of attorney's fees to award [M]other at a date to be set in 2020.

Father does not explain his challenge to this finding of fact. To the extent this finding implies attorney fees will be awarded, it is a conclusion of law that is discussed below. *See infra*. To the extent it indicates a planned schedule, it appears improper to characterize this statement as a finding of fact. Even so, the Attorney Fees Order was entered in 2020, making this statement true.

Conclusion of Law 5 states,

[F]ather has the means and ability to pay the temporary child support award and temporary child support arrears

as ordered herein. The [trial] [c]ourt will consider awarding attorney's fees to Mother as a sanction against [F]ather, at a later hearing.

Father appears to challenge this conclusion of law based on the attorney fees portion only. Attorney fees were allowed by the trial court after granting Mother's *Motion for Sanctions* in Finding of Fact 21, which is properly considered a conclusion of law. See *In re Helms*, 127 N.C. App. at 510; *Wachacha*, 38 N.C. App. at 507. Mother's *Motion for Sanctions* was based on Father failing to file an updated financial affidavit and his prior financial affidavit being admittedly inaccurate for the child support trial. Mother's motion requested Father's prior financial affidavits be stricken, Father be prohibited from offering evidence of his expenses, Father pay attorney fees incurred related to the motion, and any other relief to which she was entitled.

Mother's *Motion for Sanctions* was filed pursuant to Rules 11 and 37(b)(2) of the North Carolina Rules of Civil Procedure and Rule 8 and 22 of the 26th Judicial District Family Law Local Rules. Rule 8 of the 26th Judicial District Family Law Local Rules only allows the trial court to "disallow evidence of any change or [] continue the hearing/trial." See Local Rules of Domestic Court, Jud. Dist. 26 Family Court Division, Rule 8.3 (2021). However, Rule 22 of the 26th Judicial District Family Law Local Rules states, "[f]ailure to comply with any section of these rules shall subject an action to dismissal or other sanctions allowed by law and deemed appropriate at the discretion of the Assigned Judge." See Local Rules of Domestic Court, Jud. Dist. 26 Family Court Division, Rule 22 (2021). Nonetheless, because "a

trial court may award attorney's fees only as authorized by statute," we may only uphold the award of attorney fees if a statute, not a local rule, permitted the award. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 729 (2020).

Father contends Rule 11 of the North Carolina Rules of Civil Procedure does not apply here because it only applies to signed documents and Father failed to file a signed paper. Rule 11 states,

[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C.G.S. § 1A-1, Rule 11(a) (2021).

Assuming Rule 11 applies to affidavits,<sup>16</sup> Rule 11 does not permit attorney fees

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<sup>16</sup> See *Brooks v. Giesey*, 334 N.C. 303, 319 (1993) ("There is little question that [the] plaintiffs' brief constituted a 'paper' within the meaning of the rule and, for purposes of this discussion, we will



here. Father was not being sanctioned for filing an inaccurate affidavit; instead, he was being sanctioned for failing to timely file an affidavit of financial standing as required by local rules.

As noted in unchallenged Finding of Fact 7 in the *Temporary Child Support Order*, the original temporary child support hearing was rescheduled twice due to time constraints. Rule 8.3 of the 26th Judicial District Family Law Local Rules requires parties to

complete and file an updated [affidavit of financial standing] and serve the opposing party with a copy of same ten (10) days before the date of the rescheduled hearing; provided, if there is no change in a party's income or expenses, the party may file an affidavit so stating in lieu of a new [affidavit of financial standing].

Local Rules of Domestic Court, Jud. Dist. 26 Family Court Division, Rule 8.3 (2021).

This rule required Father to complete and file an updated affidavit of financial standing ten days before the scheduled hearing, which Father failed to do. Similarly, there is nothing in the Record demonstrating that Father filed an affidavit stating there was no change in his income or expenses as required by the rule. By failing to make any such filing, Father did not sign any document to which Rule 11 would apply.<sup>17</sup> While Father may have violated the local rules, Rule 11 does not apply to

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assume that the affidavits signed by [the] plaintiffs are papers within the meaning of [Rule 11] as well.”).

<sup>17</sup> According to Finding of Fact 10 in the *Temporary Child Support Order*, Father did notify Mother of his intention to use his earlier affidavit. However, there is nothing to suggest that this was

situations in which there are no “signed pleadings, motions or other papers.” *See, e.g., Williams v. Hinton*, 127 N.C. App. 421, 423-24 (1997) (finding no Rule 11 violation for the failure to timely notify the trial court and other party of a scheduling conflict); N.C.G.S. § 1A-1, Rule 11(a) (2021). As a result, Rule 11 is inapplicable here, and the findings of fact do not support Conclusion of Law 5 of the *Temporary Child Support Order* to the extent it concludes Rule 11 is applicable.

Similarly, Rule 37(b)(2) states,

[i]f a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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conveyed in a signed paper or that Father indicated there was no change in his income or expenses, and we cannot conclude this communication was subject to Rule 11 or in violation of Rule 11. Additionally, although his earlier affidavit also was shown to be inaccurate and was signed, its inaccuracy, at the time of its filing in July 2019, did not result in harm to Mother in the form of the permanent child support hearing being postponed from 30 September 2019 to 6 December 2019. Rule 11 would not entitle Mother to relief on this basis. *See* N.C.G.S. 1A-1, Rule 11(a) (2021) (“If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.”).

N.C.G.S. 1A-1, Rule 37(b)(2) (2021).

Rule 37 does not apply where a discovery order is not implicated. *See Stilley v. Auto. Enter. of High Point, Inc.*, 55 N.C. App. 33, 38 (1981) (citations omitted) (“Through this motion in limine [the] defendant sought imposition of a Rule 37(b)(2)(B) sanction. Such sanction may only be imposed for failure of a party to comply with a court order compelling discovery. [The] [d]efendant did not obtain an order compelling [the] plaintiffs to supplement their answers to the interrogatories referred to above. Because [the] plaintiffs had not failed to comply with a discovery order, the court improperly granted [the] defendant’s motion in limine.”). Here, although the local rules require parties to serve a financial affidavit and the underlying documentation on each other, there is not a discovery order in the Record, nor any other order, requiring that these documents be produced as part of discovery. Instead, the affidavit of financial standing is required only by the local rules. As a result, there was no violation of a discovery order and Rule 37(b)(2) is inapplicable to this situation, rendering Conclusion of Law 5 of the *Temporary Child Support Order* unsupported by the finding of facts to the extent it is based on Rule 37(b)(2).

Due to our conclusion that the local rules and Rules 11 and 37 of the North Carolina Rules of Civil Procedure do not permit the award of attorney fees as a sanction on the facts *sub judice*, there was no statute that permitted attorney fees on the basis of Father’s failure to file a financial affidavit, and the trial court abused its discretion in authorizing them as a sanction.

## **2. Attorney Fees Order**

Finding of Fact 8 states,

[a]s set forth above, []Father's failure to present an updated, factually based Financial Affidavit necessitated an extra hearing after the child support hearing in September 2019. But for []Father's negligent failure to timely provide a reliable and proper Financial Affidavit, the [6 December 2019] permanent child support trial would have been unnecessary. As a result, []Mother incurred \$25,972.00 in attorney's fees related to child support from October 2019 through December 2019.

Findings of Fact 19-20 and 22-23 of the *Temporary Child Support Order*, along with the evidence which supported them, support the first two sentences of this finding. Further, there was testimony that, after the end of September, when Father failed to provide an updated financial affidavit, Mother's attorney fees from October through December amounted to \$25,972.00 for child support. Finding of Fact 8 is supported by competent evidence.

Finding of Fact 9 states,

[p]ursuant to Rule 11, Rule 37(b)(2) of the North Carolina Rules of Civil Procedure and Rules 8 and 22 of the 26th Judicial District Local Rules for Domestic Cases, it is appropriate to sanction []Father by ordering him to pay the attorney's fees incurred by []Mother related to child support from October 2019 through December 2019, in the amount of \$25,972.00.

Finding of Fact 9 is more properly considered a conclusion of law and is largely coextensive with Conclusion of Law 5 from the *Temporary Child Support Order*. As a result, we conclude that Finding of Fact 9 is an unsupported conclusion of law that

attorney fees were appropriate.

Finding of Fact 24 states,

[p]ursuant to Rules 11 and Rule 37(b)(2) of the North Carolina Rules of Civil Procedure and Rule 8 and Rule 22 of the 26th Judicial District Local Rules for Domestic Cases, []Mother is entitled to attorney's fees related to her Motion for Sanctions due to []Father's failure to update his Financial Affidavit with current and accurate information, which necessitated an additional child support hearing and caused []Mother to incur additional attorney's fees in the amount of \$25,972.00.

Finding of Fact 24 has virtually the same content as Finding of Fact 9. Similarly, it is more properly considered a conclusion of law and is coextensive with Conclusion of Law 5 from the *Temporary Child Support Order*. As a result, we similarly conclude Finding of Fact 24 is an unsupported conclusion of law.

Conclusion of Law 3 states,

[p]ursuant to Rule[] 11 and Rule 37(b)(2) of the North Carolina Rules of Civil Procedure and Rule 8 and Rule 22 of the 26th Judicial District Local Rules for Domestic Cases, []Mother is entitled to attorney's fees related to her Motion for Sanctions due to []Father's failure to update his Financial Affidavit with current and accurate information, which necessitated an additional child support hearing and caused []Mother to incur additional attorney's fees in the amount of \$25,972.00.

Conclusion of Law 3 is virtually identical to Findings of Fact 9 and 24, as well as Conclusion of Law 5 from the *Temporary Child Support Order*. The same analysis employed in evaluating Conclusion of Law 5 from the *Temporary Child Support Order* is applicable here, and we come to the same conclusion that Conclusion of Law 3 is

unsupported by the findings of fact and is erroneous. We reverse the award of attorney fees inasmuch as it imposes sanctions under Rule 11 and Rule 37(b)(2) of the North Carolina Rules of Civil Procedure or under the local rules.

**F. Attorney Fee Reasonableness and Evidentiary Support**

Finally, Father contends the attorney fees award was unreasonable and challenges Findings of Fact 9, 19, 22, 28, 31, and 32 as unsupported by the evidence and Conclusion of Law 4 as unsupported by the findings. In light of our resolution of the preceding issues, which requires the trial court to enter a new attorney fees award consistent with this opinion, the reasonableness of the amount of attorney fees is moot. *See McVicker v. Bogue Sound Yacht Club, Inc.*, 257 N.C. App. 69, 73 (2017) (“A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”).

**CONCLUSION**

For the foregoing reasons, we affirm in part, vacate and remand in part, and reverse in part. As Mother’s summary exhibit was admissible under Rule 1006 absent any objection to its accuracy and Father fails to demonstrate the admission of the underlying exhibits was prejudicial, we affirm the trial court’s admission of Mother’s exhibits during the attorney fees hearing. However, we vacate the attorney fees award relating to Mother’s claims for child custody and child support because the trial court did not account for the \$4,502.65 in permanent child support that Mother receives monthly when it found Mother’s monthly deficit was \$4,986.20 and

consequently determined Mother had insufficient means to defray the expense of the suit. Accordingly, we remand for the trial court to consider the permanent child support payments Mother receives on a monthly basis when it determines whether Mother has insufficient means to defray the expense of the suit. We also vacate the attorney fees award imposed as a sanction for several frivolous proceedings justifying the fees where the trial court found only one proceeding was frivolous and remand for the trial court to determine the amount of fees to award based on the proceedings properly considered frivolous. Finally, we reverse the attorney fees award imposed as a sanction for Father's failure to comply with local rules because our General Statutes do not permit imposing such sanctions with respect to local rules and there is no signed paper implicating Rule 11 and no discovery order implicating Rule 37.

AFFIRMED IN PART; VACATED AND REMANDED IN PART; REVERSED IN PART.

Judges DILLON and GORE concur.

Report per Rule 30(e).