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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-80

Filed 2 January 2024

Clay County, No. 20 CVD 81

LANE SCHREIBER LOWE, Plaintiff,

v.

MATTHEW BUTLER LOWE, Defendant.

Appeal by Defendant from order entered 1 November 2022 by Judge Kaleb Wingate in Clay County District Court. Heard in the Court of Appeals 29 November 2023.

The Collins Law Firm, by Gerald R. Collins, Jr., for Plaintiff-Appellee.

Arnold & Smith, PLLC, by Ashley A. Crowder, for Defendant-Appellant.

GRIFFIN, Judge.

Defendant Matthew Buttler Lowe appeals from the trial court's order awarding Plaintiff Lane Schreiber Lowe attorney fees, costs, and expenses to be paid by Defendant. Defendant contends the trial court erred as there was not competent evidence to support the trial court's findings of fact, or in the alternative, the trial court abused its discretion in determining the amount to be awarded to Plaintiff.

Defendant also contends the trial court erred in denying his motion to dismiss at the close of Plaintiff's evidence. Upon review, we dismiss Defendant's contention regarding his motion to dismiss and affirm the order of the trial court.

I. Factual and Procedural History

On 18 May 2013, Plaintiff and Defendant were married. One child was born of the marriage on 8 March 2016.

On 7 May 2019, Plaintiff and Defendant separated and executed a separation agreement and property settlement which included child custody provisions. On 22 July 2020, the court entered a judgment of absolute divorce which included a permanent child custody order by way of incorporating the separation agreement.

On 19 January 2021, Defendant filed a motion to modify custody. On 10 January 2022, subsequent to a hearing on the matter, the trial court entered an order denying Defendant's motion to modify. On 17 February 2022, Plaintiff filed a motion for costs and attorney fees associated with the hearing on Defendant's motion to modify custody. On 14 April 2022, Plaintiff filed an amended motion for costs and attorney fees.

On 27 April 2022, the matter came on for hearing in Clay County District Court. On 1 November 2022, the trial court entered an order awarding Plaintiff \$47,414.65 in attorney fees, costs, and expenses.

On 4 November 2022, Defendant timely filed notice of appeal.

II. Analysis

Defendant contends the trial court erred in its order as there was not competent evidence to support the findings, or in the alternative, abused its discretion in determining the amount to be awarded to Plaintiff. Defendant also contends the trial court erred in denying his motion to dismiss at the close of Plaintiff's evidence.

A. The Trial Court's Order

Defendant argues there was not competent evidence to support the trial court's findings, or in the alternative, the trial court abused its discretion in determining the amount to be awarded.

Under North Carolina General Statutes, section 50-13.6, in an action or proceeding for the custody of a minor child, the trial court "may in its discretion order payment of reasonable [attorney] fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2023). Before these attorney fees can be taxed, the trial court must make statutory findings of fact "that (1) the interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action and further, that (2) the supporting party refused to provide adequate support under the circumstances existing at the time of the institution of the action or proceeding." *Brower v. Brower*, 75 N.C. App. 425, 429, 331 S.E.2d 170, 174 (1985) (internal marks and citation omitted). Further, the trial court must also make specific findings of fact concerning "the nature and scope of the legal services, the skill and time required, and the

relationship between the fees customary in such a case and those requested.” *Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011) (citation omitted); *see also Cox v. Cox*, 133 N.C. App. 221, 231, 515 S.E.2d 61, 68 (1999) (citation omitted). Once the trial court determines the statutory requirements of N.C. Gen. Stat. § 50-13.6 have been met, “whether to award [attorney] fees and in what amounts is within the sound discretion of the trial judge[.]” *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905–06 (1991).

Issues concerning whether these statutory requirements have been met are “question[s] of law, reviewable on appeal.” *Sherrill v. Sherrill*, 272 N.C. App. 532, 534, 846 S.E.2d 336, 338 (2020) (internal marks and citation omitted). We review the trial court’s findings of fact to determine whether they are supported by competent evidence. *Id.* Where the findings are supported by competent evidence and therefore meet the statutory requirements, “the standard of review change[s] to abuse of discretion for an examination of the amount of [attorney] fees awarded.” *Id.* (internal marks and citation omitted). “A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

1. Finding of Fact 12

Defendant argues the trial court erred in awarding attorney fees as there was not competent evidence to support Finding of Fact 12 and therefore to conclude Plaintiff was an interested party acting in good faith, who had insufficient means to

defray the expenses of defending against Defendant’s motion to modify custody.

As an initial matter, we recognize Defendant challenges all of Finding of Fact 12 which includes subparts (a) through (rr). However, all the subparts are not necessary to support the ultimate conclusion: Plaintiff was an interested party acting in good faith, who had insufficient means to defray the expenses of defending against Defendant’s motion to modify custody. Therefore, we do not address all of the subparts as “any error in them would not constitute reversible error.” *In re A.L.T.*, 241 N.C. App. 443, 449, 774 S.E.2d 316, 319–20 (2015) (citing *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006)).

Our Courts have long recognized, “the trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony[.]” *Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011) (citation and internal marks omitted). Thus, where the record contains “competent evidence to support the trial court’s findings, such findings are conclusive and binding upon this Court, even though there is evidence contra to sustain other findings.” *Goodson v. Goodson*, 145 N.C. App. 356, 362, 551 S.E.2d 200, 205 (2001) (internal marks and citation omitted).

Relevant here, Defendant challenges Finding of Fact 12(qq) and (rr) which state:

qq. Plaintiff was and is an interested party in these proceedings, and she has acted, at all times[,] in good faith in her defense of Defendant’s motion to modify custody and

in bringing her Motion to recover costs and attorney fees.

rr. Plaintiff has insufficient means to defray the expenses of defending Defendant's motion to modify custody.

While Defendant contends there was not competent evidence to support these Findings, Plaintiff testified on cross-examination:

Q: In filing your motion for [attorney] fees, [Plaintiff], have you—did you do this in good faith?

A: Yes.

Q: And do you feel like you are an interested party in this proceeding?

A: Yes.

Q: Okay. And with regards to the hourly rate of your attorney at three hundred an hour, is it your opinion that that's a reasonable hourly rate?

A: Yes. I originally sought to have [] Beck be my attorney in this matter, because he is who had represented me in my divorce case, and his hourly rate is four hundred dollars an hour, or it was when he represented me in the divorce. And so three hundred dollars an hour was very reasonable compared to that.

Q: And for the services provided to you by Mr. Beck leading up to the original custody decree of July 22nd, 2020, it's your testimony you paid him four hundred an hour?

A: Yes.

Q: And with regards to the total charge in this case of your attorney of forty-six thousand eight hundred and thirty dollars, do you have an opinion as to

whether that was reasonable?

A: Yes. I think it was very reasonable[.]

Q: Okay. And with regards to the costs that you incurred in the amount of five hundred and eighty-four dollars and sixty-five cents, do you have an opinion as to whether those costs were reasonable?

A: Yes.

Q: And what is your opinion?

A: They were reasonable.

Q: And so adding the costs of five hundred and eighty-four dollars and sixty-five cents to the forty-six thousand eight hundred and thirty dollars, do you have an opinion as to whether the total cost of forty-seven thousand four hundred and fourteen dollars and sixty-five cents is reasonable?

A: Yes.

Q: All right. Are you requesting the [c]ourt today to order that you be reimbursed for those expenses that you had?

A: Yes.

Q: And that you currently owe to your dad who loaned you the money to pay that?

A: Yes.

Further, Plaintiff testified similarly in her affidavit stating:

31. I am an interested party who has acted in good faith in my defense of Defendant's Motion to Modify Custody and in my efforts to retain primary physical custody of my son as granted to me by the permanent custody Order of 22 July 2020.

32. At the time said permanent Order was entered, I was the owner of a restaurant business, []; my business closed its doors on 20 October 2021.

33. At the time of the hearing on Defendant's Motion to Modify Custody, I was no longer employed outside the home, and remain unemployed outside my home. I am a "stay-at-home mom".

34. At all times since Defendant filed his Motion to Modify Custody on 19 January 2021, I have had insufficient means to defray the expenses of defending Defendant's Motion to Modify.

Plaintiff's testimony here is competent evidence to support the trial court's Finding of Fact 12 subparts (qq) and (rr). Further, because Findings of Fact (qq) and (rr) are sufficient to support the court's conclusion, the trial court did not err.

2. Abuse of discretion

Defendant contends the trial court abused its discretion in awarding attorney fees, costs, and expenses in the amount of \$47,414.65. Defendant argues the amount awarded was not reasonable as there was not competent evidence to support the trial court's Findings of Fact 22(j), 23(1) and (2), 30, and 35-40. Further, Defendant argues the trial court, in determining reasonableness, erroneously applied the lodestar method rather than the *Robinson* method.

a. Findings of Fact 22(j), 23(1) and (2), 30, and 35-40

Defendant argues the amount awarded was not reasonable as there was not competent evidence to support the trial court's Findings of Fact 22(j), 23(1) and (2), 30, and 35-40. Each of these Findings concerns the court's determination as to the

reasonableness of the attorney fees.

Finding of Fact 22(j) states:

[] Defendant called [Christy] as a witness to testify during Defendant's case in chief during the Motion hearing on 27 April 2022. Based upon the sworn testimony of [Christy], the [c]ourt also finds:

. . .

j. The total charge of \$46,830.00 for attorney fees in this case is reasonable and is well within the prevailing fee structure for this type of case.

Findings of Fact 23(1) and (2) state:

[] Based upon the sworn testimony of [McKinney], the [c]ourt also finds:

1. [McKinney] reviewed time sheets contained in Plaintiff's Exhibit 1, and he did not find any service that in his opinion was unreasonable.

2. In the context of all work performed by Plaintiff's attorney for Plaintiff, the total time spent by Plaintiff's attorney in the amount of 156.1 hours was reasonable.

Further, Findings of Fact 30 and 35-40 similarly state, in relevant part, Plaintiff's attorney worked efficiently without an unreasonable expenditure of time; the time spent by Plaintiff's attorney was necessary; and the total amount of \$47,414.65 was reasonable.

At the hearing on the motion to modify, Plaintiff offered Exhibit 1 which was admitted into evidence and contained an itemized statement of the services rendered by her attorney in preparing for the motion hearing, as well as affidavits from

numerous attorneys vouching for the reasonableness of the services rendered and the fees associated with those services. This evidence, together with the trial court’s unchallenged findings, which are binding on appeal, is sufficient to support the above challenged Findings as to the reasonableness of the services and the amount of fees incurred by Plaintiff.

b. Standard for determining reasonableness

Defendant contends the trial court applied the wrong standard in determining the reasonableness of the fees by using the lodestar method rather than the *Robinson* method.

In *Robinson v. Robinson*, our Court laid out findings of fact which it required the court to make in support of its award for attorney fees—not a method of calculating attorney fees. These findings include, “the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested.” *Robinson*, 210 N.C. App. at 337, 707 S.E.2d at 798. On the other hand, the lodestar method is an actual method of calculating fees. The lodestar theory requires the court to make “an initial determination as to an appropriate hourly rate[.]” *Williams v. Randolph*, 94 N.C. App. 413, 423, 380 S.E.2d 553, 559 (1989). Then, the rate determined is “multiplied by the number of hours expended and then adjusted upwards or downwards to reflect all other relevant factors, yielding a reasonable attorney fee.” *Id.* Thus, regardless of whether the trial court used the lodestar theory to calculate fees, doing so cannot be considered an

abuse of discretion where the court still made the required findings under *Robinson*.

Here, the court made the required findings under *Robinson* as the trial court's order contained findings, not challenged by Defendant, detailing the documents contained within Plaintiff's Exhibit 1 and the nature and scope of the legal services rendered. Further, the trial court's order contains findings concerning time required to defend against such a motion, the customary fees in such a case, and those requested in the present case.

Because the trial court made the proper findings, it did not abuse its discretion in awarding attorney fees in the amount of \$47,414.65 where such an amount was found to be reasonable.

B. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss at the close of Plaintiff's evidence. However, Defendant failed to preserve this argument.

Our Courts have long recognized that where a defendant makes a motion to dismiss at the close of the plaintiff's evidence and that motion is denied, the defendant, in electing to present evidence, waives his right to appeal the denial of his motion to dismiss. *See Karger v. Wood*, 174 N.C. App. 703, 706, 622 S.E.2d 197, 200 (2005); *see also Hamilton v. Hamilton*, 93 N.C. App. 639, 642, 379 S.E.2d 93, 94 (1989) ("As the [movant] presented evidence after his motion to dismiss was denied, he has waived any right to appeal from the denial of that motion.").

Here, Defendant moved to dismiss at the close of Plaintiff's evidence.

Defendant then elected to present evidence, but failed to renew his motion to dismiss at the close of all evidence. Thus, Defendant waived his right to appeal the denial of his motion to dismiss.

Because Defendant waived his right to appeal the denial of his motion to dismiss, Defendant's contention here is not properly before this Court and is hereby dismissed.

III. Conclusion

For the aforementioned reasons, we dismiss Defendant's contention as to the trial court's denial of his motion to dismiss and affirm the order of the trial court.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).