301 N.C. App.—No. 3 Pages 262-416

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 25, 2026

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

CHRIS DILLON

Judges

DONNA S. STROUD
JOHN M. TYSON
VALERIE J. ZACHARY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
JULEE T. FLOOD
MICHAEL J. STADING
THOMAS O. MURRY
CHRISTOPHER A. FREEMAN

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES JR.
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL JR.
WILLIS P. WHICHARD[1]
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS JR.
CLARENCE E. HORTON JR.
ROBERT H. EDMUNDS JR.
JAMES C. FULLER
RALPH A. WALKER
ALBERT S. THOMAS JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN IV
SANFORD L. STEELMAN JR.
MARTHA GEER
LINDA STEPHENS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER JR.
WANDA G. BRYANT
PHIL BERGER JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK
RICHARD D. DIETZ
LUCY INMAN
DARREN JACKSON
ALLISON J. RIGGS
HUNTER MURPHY
CAROLYN J. THOMPSON

[1] Died 18 November 2025.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

Staff Attorneys
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes

COURT OF APPEALS

CASES REPORTED

Filed 5 November 2025 (first half)

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory order—substantial right—legal malpractice claim—underlying breach of contract claim—ability to defend—no risk of inconsistent verdicts—An appeal by defendants (an attorney and his law firm) seeking review of the trial court's order denying their motion to dismiss plaintiffs' legal malpractice claim was dismissed for lack of appellate jurisdiction. Defendants failed to demonstrate that a substantial right would be lost absent immediate review of the interlocutory order where plaintiffs still had to prove the merits and damages of the underlying breach of contract claim as part of the malpractice claim—a "case within a case"—prior to the determination of any legal malpractice, and defendants' ability to defend the malpractice claim was not limited by the court's order. Further, there was no risk of inconsistent verdicts where, even if a jury found for plaintiffs on the breach of contract claim, defendants could still be liable to plaintiffs for damages and attorney's fees; to the extent any inconsistencies occurred, defendants could seek resolution through post-judgment motions. Finally, the appellate court exercised its discretion to deny defendants' petition for writ of certiorari. **Capitol City Homes, LLC v. Starlight Homes N.C., L.L.C., 309.**

Motion to strike in reply brief—Appellate Rule 37—not proper—In a dispute between two sports management businesses over the termination of their agreement to form a comprehensive football sports agency, defendant improperly asked the Court of Appeals to "disregard" the transcript filed by plaintiff in defendant's reply brief, rather than by filing a motion to strike pursuant to Appellate Rule 37; accordingly, the motion to strike was dismissed. **Premier Athlete Advisors LLC v. EnterSports MGT LLC, 405.**

ARBITRATION AND MEDIATION

Arbitration clause—forum-selection clause—validity—plain language—public policy—In a dispute between two sports management businesses over the termination of their agreement to form a comprehensive football sports agency, the trial court properly concluded that, given the clear and unambiguous language of the agreement's arbitration clause—which encompassed "any Dispute for any reason"; defined "Dispute" as "any dispute, controversy, or claim arising out of or relating to th[e] Agreement, or the breach, termination or invalidity thereof"; and gave the bringer of the dispute the right to choose either Atlanta or Charlotte as the location

CHILD CUSTODY AND SUPPORT

CIVIL PROCEDURE

Rule 37 sanctions—attorney's fees—amount supported by unchallenged findings of fact—In a child support proceeding where the trial court properly awarded attorney's fees as a sanction for defendant's failure to respond fully to plaintiff's first request for the production of documents, the amount of the award was not unreasonable or an abuse of discretion; defendant did not argue that any of the trial court's findings of fact were unsupported by evidence, and the court's detailed findings supported the amount of its award. **Kincheloe v. Kincheloe, 342.**

Rule 63—child support hearing following remand—substitute judge—discretion to grant a new hearing—In a child support proceeding where a 2019 order was reversed and remanded, the chief district court judge—who, after the original trial judge recused, presided at a 2022 rehearing on plaintiff's 2017 motion to modify child custody and support, as well as her 2021 amended and supplemental motion to modify child support (and motion for attorney fees) pursuant to Civil Procedure Rule 63—did not abuse her discretion in denying defendant's proffer of transcripts and exhibits from a 2018 hearing on the 2017 motion to modify. Since the chief district court judge found that she could not "make findings of fact, conclusions of law or declare a judgment based upon evidence presented at a trial over which she did not preside," she properly exercised the discretion afforded by Rule 63 to hold a new hearing rather than rely on the proffered material. **Kincheloe v. Kincheloe, 342.**

DIVORCE

Alimony—amount—dependent spouse's income, estate, reasonable expenses, and earning capacity—In a divorce matter involving marital misconduct by defendant husband, the trial court's order awarding permanent ongoing alimony to plaintiff wife—based on fifteen single-spaced pages of detailed factual findings—was affirmed where the court did not abuse its discretion in determining the alimony amount. Importantly, the court found no credible evidence that plaintiff had depressed her income in bad faith; thus, it properly declined to impute additional income to her despite defendant's argument that plaintiff should have been required to take early IRA withdrawals or Social Security benefits, which would have gone against the parties' marital practice of saving for retirement and would have unnecessarily depleted her estate. Further, the court's extensive findings supported its valuation of plaintiff's estate and of her reasonable monthly expenses based on the parties' high standard of living during the marriage. Finally, the court properly declined to consider plaintiff's potential earning capacity when determining her income, since plaintiff's long absence from the workforce—to serve as a stay-at-home wife and mother—was not a result of bad faith. **Allport v. Allport, 262.**

Alimony—dependent spouse determination—challenged on appeal but admitted in pleadings and trial—The trial court in a divorce case did not err in determining that plaintiff wife was the dependent spouse for purposes of awarding alimony where its extensive findings of fact—all of which remained unchallenged, and therefore binding, on appeal—regarding plaintiff's estate, income, and expenses supported its determination. Despite defendant husband's arguments on appeal that plaintiff's expenses were grossly inflated and that she had the capacity to earn enough income to support herself, defendant had already admitted to plaintiff's dependent status in his verified answer to her complaint and while testifying at trial. **Allport v. Allport, 262.**

Alimony—duration—indefinite—statutory factors—marital misconduct—In a divorce matter involving marital misconduct by defendant husband, the trial court's order awarding permanent ongoing alimony to plaintiff wife—based on fifteen single-spaced pages of detailed, unchallenged factual findings—was affirmed where the court did not abuse its discretion in setting the duration of alimony. The court's extensive findings adequately addressed all relevant statutory factors concerning duration of alimony, including: defendant's extramarital affair; the parties' earning capacities, ages, and health; plaintiff's long absence from the workforce; and the parties' high standard of living during the marriage. Further, the court was not required to consider how the parties' incomes would change over time, especially where the law would allow either party to seek modification of alimony in the event of changed circumstances. Finally, in awarding indefinite alimony, the court did not "punish" defendant for having an affair during the marriage but rather gave proper consideration to defendant's marital misconduct as a mandatory factor under N.C.G.S. § 50-16.3A. **Allport v. Allport, 262.**

JURISDICTION

Motion to dismiss—lack of standing—county's removal of Confederate statue from courthouse—In a lawsuit filed by a group of Pitt County residents along with two nonprofit organizations commemorating Confederate Civil War soldiers (plaintiffs), where the complaint requested declaratory and injunctive relief after Pitt County (defendant) removed a statue of a Confederate soldier from the county courthouse, the trial court properly granted defendant's motion to dismiss for lack of jurisdiction where plaintiffs failed to establish standing to sue: (1) under N.C.G.S. § 143-318.16, since they did not assert this basis for standing before the trial court and, at any rate, the statute was an "open meetings law" that did not apply to plaintiffs' claims; (2) as taxpayers, since plaintiffs did not sufficiently allege a specific demand on—and refusal by—the county board of commissioners, or that such a demand would have been useless; (3) through representational standing, where both nonprofits failed to satisfy the requirement that its individual members otherwise have standing; (4) under N.C.G.S. § 100-2.1 (the Monument Protection Act), where plaintiffs asserted no ownership interest in the statue or other legal injury under the statute, which itself did not create a private right of action; or (5) under the state constitution, where plaintiffs' conclusory statements failed to demonstrate that defendant's conduct deprived them of any constitutional right. **McRoy v. Pitt Cnty., 384.**

JURY

Juror misconduct—no prejudice shown—new trial granted—abuse of discretion—In a civil case, the trial court abused its discretion in allowing plaintiff's motion for a new trial pursuant to Civil Procedure Rule 59, based on juror misconduct, where a witness averred that, shortly after she testified at trial, a juror (who was already a social media "friend" of the witness) contacted the witness and asked for a date. At the motion hearing, the witness testified that she declined the date and deleted the juror as a social media "friend" for the duration of the trial; after the jury verdict was reached, there was some further contact between the witness and the juror, during which the juror stated that the jury's decision was unrelated to the witness's rejection of a date. Because the improper contact between the witness and the juror did not affect the verdict, it was nonprejudicial and therefore did not entitle plaintiff to a new trial. **Giles-Jones v. Robinson, 315.**

STATUTES OF LIMITATION AND REPOSE

Declaratory judgment action—county's removal of Confederate statue from courthouse—In an appeal from an order dismissing an action for declaratory and injunctive relief arising from defendant county's decision to remove a statue of a Confederate soldier from the county courthouse, where the dismissal order was upheld on the ground that plaintiffs lacked standing, the Court of Appeals noted that, even if plaintiffs had sufficiently established standing to bring their claims, they had filed their complaint almost four years after the statue's removal; therefore, the applicable statute of limitations had already run before plaintiffs brought their action. **McRoy v. Pitt Cnty., 384.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—neglect—likelihood of future neglect—sufficiency of findings and evidence—After respondent-mother's two minor children were adjudicated neglected and removed from respondent-mother's custody on account of her marijuana use, mental health issues, and lack of stable housing and employment, the trial court properly terminated respondent-mother's parental rights on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)). Competent evidence supported the court's factual findings, including that respondent-mother used marijuana throughout her pregnancies—causing both children to test positive for marijuana at birth—and that, before the department of social services first got involved, the family had been living in a van after being evicted. Furthermore, despite some evidence showing that respondent-mother had eventually secured stable housing, other evidence showed that she inconsistently followed her case plan, had not adequately addressed her marijuana usage or unstable employment, and had only recently begun following clinical recommendations concerning her mental health despite it being an issue throughout the life of the case. Therefore, the record established a likelihood of future neglect if the children remained in respondent-mother's care. **In re A.T., 331.**

Guardian ad litem—appointed to parent without notice—abuse of discretion—review under Appellate Rule 2—In an appeal from an order terminating both parents' rights in their two minor children, the portion of the order terminating respondent-father's rights was vacated—and the matter was remanded as to respondent-father—because the trial court had abused its discretion in appointing respondent-father a guardian ad litem (GAL) without providing him prior notice and an opportunity to be heard, thereby depriving him of his constitutional right to conduct his own litigation. Notably, although respondent-father had not preserved this constitutional issue for appellate review, exceptional circumstances existed warranting review under Appellate Rule 2 where—because the trial court appointed the GAL sua sponte in a continuance order—respondent-father was never given an opportunity to object to the GAL's appointment. **In re A.T., 331.**

N.C. COURT OF APPEALS
2026 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	12 and 26
February	9 and 23
March	9 and 23
April	20
May	4 and 18
June	1
August	10 and 24
September	14 and 28
October	12 and 26
November	16
December	1

Opinions will be filed on the first and third Wednesdays of each month.

ALLPORT v. ALLPORT

[301 N.C. App. 262 (2025)]

PTOLEMY T. ALLPORT, Plaintiff
v.
SIMON J. ALLPORT, Defendant

No. COA24-369

Filed 5 November 2025

1. Divorce—alimony—dependent spouse determination—challenged on appeal but admitted in pleadings and trial

The trial court in a divorce case did not err in determining that plaintiff wife was the dependent spouse for purposes of awarding alimony where its extensive findings of fact—all of which remained unchallenged, and therefore binding, on appeal—regarding plaintiff's estate, income, and expenses supported its determination. Despite defendant husband's arguments on appeal that plaintiff's expenses were grossly inflated and that she had the capacity to earn enough income to support herself, defendant had already admitted to plaintiff's dependent status in his verified answer to her complaint and while testifying at trial.

2. Divorce—alimony—amount—dependent spouse's income, estate, reasonable expenses, and earning capacity

In a divorce matter involving marital misconduct by defendant husband, the trial court's order awarding permanent ongoing alimony to plaintiff wife—based on fifteen single-spaced pages of detailed factual findings—was affirmed where the court did not abuse its discretion in determining the alimony amount. Importantly, the court found no credible evidence that plaintiff had depressed her income in bad faith; thus, it properly declined to impute additional income to her despite defendant's argument that plaintiff should have been required to take early IRA withdrawals or Social Security benefits, which would have gone against the parties' marital practice of saving for retirement and would have unnecessarily depleted her estate. Further, the court's extensive findings supported its valuation of plaintiff's estate and of her reasonable monthly expenses based on the parties' high standard of living during the marriage. Finally, the court properly declined to consider plaintiff's potential earning capacity when determining her income, since plaintiff's long absence from the workforce—to serve as a stay-at-home wife and mother—was not a result of bad faith.

3. Divorce—alimony—duration—indefinite—statutory factors—marital misconduct

In a divorce matter involving marital misconduct by defendant husband, the trial court's order awarding permanent ongoing alimony to plaintiff wife—based on fifteen single-spaced pages of detailed, unchallenged factual findings—was affirmed where the court did not abuse its discretion in setting the duration of alimony. The court's extensive findings adequately addressed all relevant statutory factors concerning duration of alimony, including: defendant's extramarital affair; the parties' earning capacities, ages, and health; plaintiff's long absence from the workforce; and the parties' high standard of living during the marriage. Further, the court was not required to consider how the parties' incomes would change over time, especially where the law would allow either party to seek modification of alimony in the event of changed circumstances. Finally, in awarding indefinite alimony, the court did not "punish" defendant for having an affair during the marriage but rather gave proper consideration to defendant's marital misconduct as a mandatory factor under N.C.G.S. § 50-16.3A.

Chief Judge DILLON dissenting.

Appeal by defendant from order entered 23 May 2023 by Judge Paige B. McThenia in District Court, Mecklenburg County. Heard in the Court of Appeals 29 January 2025.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and G. Russell Kornegay, III, for plaintiff-appellee.

Sellers Ayers Dortch & Lyons, PA, by Dorian H. Gunter, for defendant-appellant.

STROUD, Judge.

Simon J. Allport ("Husband") appeals from an Order Regarding Permanent Alimony ("Alimony Order") directing him to pay $14,767.52 per month to Ptolemy T. Allport ("Wife").

Husband introduced his case on appeal in this manner:

> This case is about a trial judge erroneously concluding that a woman with an estate worth approximately $4 million, who has three degrees and three bar memberships, could not make a substantial contribution to her own support. The trial court ignored Wife's available income

> and ordered Husband to indefinitely fund her artificially inflated lifestyle as punishment for his extramarital affair.

No doubt this is an accurate reflection of Husband's personal feelings about this case, but the courts do not decide cases based on the personal feelings of either party. Trial courts decide cases based on the facts as presented in the evidence and on the law. This Court reviews the trial court's orders based on the appropriate standards of review as applied to the trial court's order and law and evidence in the record.

Husband's introduction overlooks the standards applied by this Court, so with these standards in mind, we will introduce Husband's appeal as follows: This case is about a trial judge carefully considering four days of testimony and voluminous evidence, making determinations of the credibility and weight of all the evidence, preparing an order with over 15 single-spaced pages of detailed findings of fact addressing each fact necessary to determine alimony – none of which are challenged on appeal as unsupported by the evidence – and concluding that Husband can and should pay alimony to Wife. The trial court fully considered the incomes of both parties, their established standard of living during the marriage, and the factors stated in North Carolina General Statute Section 50-16.3A, including Husband's "illicit sexual behavior," a factor which requires an award of alimony if the supporting spouse has the ability to pay and the dependent spouse needs alimony. *See* N.C. Gen. Stat. § 50-16.3A(a) (2023).

I. Factual and Procedural Background

This summary of the factual background is based on the trial court's unchallenged findings of fact. The parties first met in April 1986 while they both were working as engineers for Shell International in the Middle East and began dating shortly thereafter in June of that year. Husband was dissatisfied with his career as an engineer. Wife encouraged him to apply to medical school and assisted him in completing and submitting his applications. Ultimately, Husband was accepted and began attending Westminster Medical School at the University of London. Wife resigned from her position at Shell and moved with Husband to London in 1987.

While in London, Wife completed a two-year program to obtain a master's degree from the London School of Economics. Wife then enrolled at Tulane University School of Law in Louisiana. The parties got married on 19 October 1989, while Husband was still in medical school and Wife was in law school.

Husband graduated medical school in 1992 and began his internship and residency at the University of Arizona in 1993. Wife moved to

Arizona with Husband, passed the Arizona bar exam, and began practicing at a large firm before accepting a job at a district attorney's office to gain trial experience.

In July 1996, Husband accepted a Fellowship in Gastroenterology in Atlanta, Georgia. Wife moved to Georgia with Husband, passed the Georgia bar exam, and began working for a boutique law firm while Husband completed his fellowship. During their time in Georgia, Wife gave birth to the parties' first child in August 1998. Wife returned to full-time employment following her maternity leave. During the years of Husband's medical training in both Arizona and Georgia, Wife was the primary income earner for the family.

After his fellowship, Husband accepted a position at Gastroenterology Associates, PA in Hickory, North Carolina. The parties and their child moved to North Carolina for Husband's new job, and Wife began working for a law firm in Hickory after passing the North Carolina bar exam. In May of 2000, Wife gave birth to the parties' twins and later returned to work at the law firm at a reduced caseload to ensure flexibility to care for their children. In 2009, the parties agreed it would be best for Wife to quit her job at the law firm to become a full-time stay-at-home wife and mother. Wife resumed employment as an assistant district attorney in 2014 but resigned after about nine months because it was "unmanageable[ ]" to support the children and a career due to Husband's demanding work schedule. After leaving the district attorney's office, Wife became inactive from the North Carolina Bar and remained a stay-at-home wife and mother.

After moving to North Carolina, the parties began enjoying a high standard of living due to Husband's income as a physician. During their marriage, the parties acquired several properties and real estate interests throughout North and South Carolina. The parties also drove "luxury" vehicles, owned a boat and jet ski, and "routinely spent over $50,000" annually on vacations.

In fall of 2012, Husband began having a secret romantic affair with a nurse colleague, Darla. During the time of their affair, Husband and Darla had an intimate sexual relationship, often spending nights together at one of the parties' homes while Wife and the children remained at one of their other homes. This clandestine affair continued for about three years, until September 2015, when Wife discovered text messages between Husband and Darla on Husband's laptop. The parties ultimately separated on 25 September 2015, shortly after Wife discovered this affair.

On 30 May 2017, Wife filed a Complaint and Motion for Interim Distribution in District Court, Mecklenburg County, asserting claims for child custody and child support, postseparation support ("PSS"), alimony, attorney fees, and equitable distribution. After the parties divorced on 9 November 2017, Husband proposed to Darla on 24 December 2017 and they married on 23 June 2018.

On 2 November 2017, a hearing was held before Judge Sean P. Smith. In an order entered 5 February 2018 ("PSS Order"), Judge Smith made findings of fact and conclusions of law addressing PSS, temporary child support, temporary support arrears, attorney fees, and interim equitable distribution. At the time of this hearing, the parties had two minor children: one who remained in the custody of Wife, and the other who remained in the custody of Husband.

In the PSS Order, Judge Smith found Husband's "total gross monthly income from all sources is $65,984.67[,]" and Wife's reasonable monthly expenses were $17,500.00 per month. The estimate of Wife's monthly expenses included both her own individual needs and "shared family expenses[ ]" such as house payments and utilities, but did not include any costs for childcare. Expenses for the minor child in Husband's custody were included in his reasonable monthly expenses. The trial court found Husband had "total monthly expenses of $7,100.89 for himself and [the minor child in his custody], a child support obligation . . . of $3,135.00 [for the minor child in Wife's custody], and a net monthly income of $38,942.94[.]" Judge Smith ordered Husband to pay Wife $24,788.00 per month in PSS. This PSS was ordered retroactive to 1 December 2016.

On 16 July 2019, Husband filed a Motion to Modify his PSS obligations. Husband alleged that "[d]ue to circumstances outside of his control, . . . Husband's income has substantially decreased since the entry of the [PSS] Order." On 16 August 2019, Wife filed a Motion for Contempt alleging Husband "willfully violated" the PSS Order by paying "only $12,000.00 in [PSS] for the month of August 2019." Both Wife's Motion for Contempt and Husband's Motion to Modify were heard 6 November 2019. In an order filed 17 December 2019, the trial court concluded Husband "has had, and continues to have, the ability to comply with the [PSS] Order[,]" and his "failure to comply with the [PSS] Order is willful." The trial court adjudicated Husband to be "in civil contempt . . . for his failure to comply" with the PSS Order and ordered Husband to pay $51,152.00 in PSS arrearages or face imprisonment.

Regarding Husband's Motion to Modify, in an order ("Modified PSS Order") entered 2 March 2020, the trial court found that "[s]ubsequent to the entry of the [PSS] Order, [ ]Husband's medical practice experienced turmoil and economic volatility." "Poor management[ ]" of the practice "resulted in a decrease in [ ]Husband's annual income, specifically regarding his quarterly bonus." The court further found "[n]o evidence tend[ing] to suggest that [Husband] acted in bad faith in earning, nor has he made efforts to suppress his income." The court ordered, "[e]ffective . . . [16 July 2019], [ ]Husband shall pay $17,500.00 per month in ongoing [PSS]." Husband did not appeal either the PSS Order or the Modified PSS Order.

As to child custody and child support, the trial court determined this issue to be "moot" as of 16 November 2020 since the youngest child had graduated high school and reached the age of majority. On 25 May 2021, the parties resolved their equitable distribution claim in a Consent Judgment and Order ("Consent Order"). In the Consent Order, the trial court determined the equitable distribution of assets such as property, vehicles, retirement and investment accounts, and business interests. In the Alimony Order, the trial court relied on the Consent Order in finding that "[f]ollowing entry of said [Consent Order], each party has an estate of between two and three million dollars."

The trial court heard Wife's claim for alimony in a four-day trial starting on 13 March 2023. The trial court entered the Alimony Order on 23 May 2023. The trial court ordered Husband to pay Wife $14,767.52 per month in "permanent ongoing alimony[.]" This obligation would continue until the death of either party, or Wife's cohabitation and/or remarriage under North Carolina General Statute Section 50-16.9(b). *See* N.C. Gen. Stat. § 50-16.9(b) (2023). The trial court also determined Wife's claim for attorney fees would remain "open for hearing at a later date." Husband was served with the Alimony Order on 31 May 2023 and timely filed Notice of Appeal to this Court on 27 June 2023.

II. Jurisdiction

Husband's appeal from the Alimony Order is properly before this Court under North Carolina General Statute Section 50-19.1, which provides:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement . . . , child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment . . . , but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2023). The Alimony Order is not a final order as "[ ]Wife's claim for attorney[] fees related to alimony" was an issue "held open for hearing at a later date." The issue of alimony was adjudicated and decided by the trial court and "would otherwise be a final order" if not for the remaining open issue of attorney fees. *See id.* This Court has jurisdiction under North Carolina General Statute Section 50-19.1. *See id.*

III. Analysis

Before we address the arguments Husband makes on appeal, we will note those he did not make. He did not challenge any of the trial court's findings of fact as unsupported by the evidence, so they are all binding on appeal. *See Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012). Husband did not argue that the findings of fact fail to support the trial court's conclusions of law, although he does present arguments about some conclusions of law. Instead, he argues that the trial court abused its discretion because it should have made different or more findings, that the trial court should have found his evidence more credible than Wife's evidence, and that based on his alternative version of the facts, the trial court should have made different findings and conclusions of law. While we agree that an alternative version of the facts would perhaps lead to different legal conclusions, our standard of review requires that we rely on the unchallenged facts as found by the trial court.

Husband presents two main arguments on appeal regarding the Alimony Order. First, Husband argues the trial court erred in concluding that Wife is a "dependent spouse" for purposes of alimony. Next, Husband argues the trial court "abused its discretion in determining the amount of alimony[,]" and further "abused its discretion in setting the duration of alimony."

A. Dependent Spouse

[1] Husband first argues the trial court "erred in concluding that Wife is a dependent spouse." Husband contends, in making its dependency determination, the trial court failed to consider all income sources available to Wife and her earning capacity. He also contends Wife's "reasonable needs were grossly inflated." Husband then contends the trial court "impermissibly considered marital misconduct" in making its dependency determination. Wife argues Husband did not preserve the trial court's dependency determination for this Court's consideration since he admitted to Wife's status as a "dependent spouse" and his own status as a "supporting spouse" in his verified answer to Wife's 30 May 2017 Complaint.

The trial court's determination of whether Wife is entitled to alimony is a question of law we review *de novo*:

> As our statutes outline, alimony is comprised of two separate inquiries. First is a determination of whether a spouse is entitled to alimony. Entitlement to alimony requires that one spouse be a dependent spouse and the other be a supporting spouse. If one is entitled to alimony, the second determination is the amount of alimony to be awarded. We review the first inquiry de novo . . ., and the second under an abuse of discretion standard[.]

Romulus v. Romulus, 215 N.C. App. 495, 520-21, 715 S.E.2d 308, 324-25 (2011) (citations, quotation marks, and emphasis omitted).

Husband does not specifically challenge any of the trial court's findings of fact as unsupported by competent evidence. "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and are binding on appeal.' " *Mussa*, 366 N.C. at 191, 731 S.E.2d at 409 (brackets omitted) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Under North Carolina General Statute Section 50-16.3A, a party may be entitled to alimony if the trial court determines the party is a "dependent spouse" and "the other spouse is a supporting spouse[.]" N.C. Gen. Stat. § 50-16.3A(a). A " '[d]ependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2023). Further, a " '[s]upporting spouse' means a spouse, . . . upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." N.C. Gen. Stat. § 50-16.1A(5). "A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett v. Barrett*, 140 N.C. App. 369, 373, 536 S.E.2d 642, 645 (2000) (citation omitted).

In her Complaint, Wife alleged that "[she] is the dependent spouse and [ ]Husband is the supporting spouse of the parties' marriage [as] defined by [North Carolina General Statute Section] 50-16.1A (2) and (5), respectively." In his verified answer, Husband admitted to this allegation. And at trial, Husband further testified to these admissions. Specifically, the following interaction occurred when questioned by his attorney:

> Q. Now, [Husband], you would agree that [Wife] was dependent on you for maintenance and support during the course of marriage, wouldn't you?
>
> A. Yes, she was.
>
> Q. Now, looking at [Wife]'s Exhibit 59, that is the summons and complaint that we talked about earlier this morning. Can you turn to Paragraph 18? You see that Page – do you see Paragraph 18?
>
> A. Yes.
>
> Q. And the allegation is that . . . Wife is [the] dependent spouse and . . . Husband is the supporting spouse of the part[ies'] marriage, as defined by [North Carolina General Statute Section 50-16.1A] (2) and (5), respectively. You see that allegation, correct?
>
> A. I do.
>
> . . . .
>
> Q. Now let's go to your answer and counterclaim and see how you responded to Paragraph[ ] 18 . . . . And that's [Wife]'s Exhibit 60. And look at your response. Your answer to Paragraph 18 is admitted, correct?
>
> A. Correct.

The trial court found "[ ]Husband admitted in [his] pleadings that [ ]Wife was a dependent spouse and that he was the supporting spouse of the parties['] marriage." In addition, Husband did not argue at trial that Wife was not a dependent spouse—his arguments to the trial court, as on appeal, focused on Wife's "unreasonable" and "excessive" expenses, the value of her estate, and that "it's not fair" to say that "he makes a lot of money" and "she shouldn't have to work." But even if we were to ignore Husband's admissions in the pleadings and his failure to make an argument to the trial court that Wife was not a dependent spouse, the trial court also made detailed extensive findings which are binding on this Court about each parties' employment, income, and reasonable monthly needs and expenses, and based on those findings, concluded that "[ ]Wife is actually and substantially dependent upon [ ]Husband" and further "in need of financial contribution from [ ]Husband to maintain her accustomed standard of living." Husband does not challenge any of these findings made by the trial court as unsupported by the evidence, so these findings are binding on appeal. *See Mussa*, 366 N.C. at

191, 731 S.E.2d at 409. Husband argues mostly about his contentions regarding Wife's potential income sources but the trial court essentially addressed these contentions in Finding of Fact No. 17: "No credible evidence was presented that [ ]Wife has depressed her income in bad faith and there is, therefore, no basis to impute income to [ ]Wife." Even if we were to overlook Husband's admission of Wife's status as a dependent spouse, the unchallenged findings of fact abundantly support the trial court's conclusion that Wife is a dependent spouse.

Husband essentially conceded the issue of Wife's status as a dependent spouse before the trial court in his pleadings and in his arguments to the trial court, and on appeal he makes the same arguments that Wife's expenses are excessive and that she could and should earn an income to support her needs. Husband has not challenged the trial court's findings of fact as to Wife's expenses, income, and estate on appeal, and those findings of fact support the trial court's conclusions as to Wife's dependency status.

B. Alimony Award

Husband also argues the trial court abused its discretion in determining both the amount and duration of alimony. Regarding amount, Husband specifically contends the trial court "failed to consider all potential sources of income for Wife[,]" failed to assess and consider Wife's earning capacity, and that Wife's monthly expenses were "artificially inflated[.]" Regarding duration, Husband contends the trial court did not include any specific reasoning as to its determination of alimony duration and failed to consider how the parties' incomes and expenses would change over time. Husband further contends the trial court abused its discretion in determining the duration of alimony because the duration "was intended to punish Husband" for his extramarital affair. We disagree.

We review the trial court's determination of both the amount and duration of alimony for abuse of discretion. *See Collins v. Collins*, 243 N.C. App. 696, 700, 778 S.E.2d 854, 856 (2015). "The trial court's decision constitutes an abuse of discretion where it 'is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (brackets omitted) (quoting *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000)). The determination of the amount and duration of alimony is "left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272 (2013) (citation and quotation marks omitted). North Carolina General Statute Section 50-16.3A specifically directs that a trial court "shall exercise its discretion in determining the amount, duration, and manner of payment of alimony." N.C. Gen. Stat. § 50-16.3A(b).

> [T]he findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case. The findings of fact need not set forth the weight given to the factors in section 50-16.3A(b) by the trial court when determining the appropriate amount, duration, and manner of payment, as the weight given the factors is within the sound discretion of the trial court.

Friend-Novorska v. Novorska, 143 N.C. App. 387, 395-96, 545 S.E.2d 788, 794 (2001) (footnote omitted).

North Carolina General Statute Section 50-16.3A(b), entitled "Amount and Duration[,]" requires the trial court to consider certain factors to determine the amount and duration of alimony:

> The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:
>
> > (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
> >
> > (2) The relative earnings and earning capacities of the spouses;
> >
> > (3) The ages and the physical, mental, and emotional conditions of the spouses;
> >
> > (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

> (5) The duration of the marriage;
>
> (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
>
> (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A(b).

1. Amount of Alimony

[2] On appeal, Husband argues "Wife has several sources of income available to her which would have lowered the alimony amount had the trial court properly considered them." Specifically, Husband contends the trial court should have considered: (1) "*all* sources of income available to Wife, including but not limited to her IRA funds, Social Security, and the growth in her investment accounts, pursuant to [North Carolina General Statute Section] 50-16.3A[;]" (2) Wife's "sizable" estate, which Husband contends is larger than found by the trial court; and (3) Wife's potential earning capacity. Husband also contends Wife's reasonable needs, as stated in the trial court's findings of fact, were "grossly inflated."

a. Wife's Income and Estate

Husband is correct in his assertion that North Carolina General Statute Section 50-16.3A provides that trial courts, in determining alimony, "shall consider all relevant factors, including: . . . [t]he amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others[.]" N.C. Gen. Stat. § 50-16.3A(b)(4). The trial court's Alimony Order includes detailed and extensive findings addressing all these factors, and he has not challenged any of the findings as unsupported by the evidence. Regarding some aspects of Wife's income Husband addresses on appeal, the trial court made these findings of fact:

> 15. [ ]Wife maintains a Charles Schwab Investment account and earns dividends and interest from this asset. [ ]Wife has a gross monthly income of $1,991.28 in dividend and interest income.
>
> 16. [ ]Husband's expert witness, Mr. Densel Fleming, CFP served an Affidavit on February 27, 2023 and also provided testimony at the trial of this matter.
>
> 17. No credible evidence was presented that [ ]Wife has depressed her income in bad faith and there is, therefore, no basis to impute income to [ ]Wife.
>
> 18. [ ]Wife's gross monthly income for alimony purposes is $1,991.28 per month.
>
> . . . .
>
> 43. The relative earnings and earning capacities of the spouses:
>
>> a. As set forth in detail above, [ ]Wife has a monthly gross income of $1,991.28. Given [ ]Wife's absence from the workforce since 2009 (other than her brief employment as an Assistant District Attorney in

> 2014), [ ]Wife does not have the ability to become re-employed and to support herself financially.
>
> . . . .
>
> 45. The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others:
>
> a. [ ]Wife has passive investment income of $1,991.28 per month. [ ]Wife does not have any income from employment.

Regarding Husband's income, the trial court found he has "a net monthly income of $30,263.19[.]" This income valuation consists of Husband's salary and wages from his job as a gastroenterologist, bonuses, interest and dividends from his brokerage account, less the amount deducted for federal and state income tax, health insurance, and retirement contributions.

It is uncontested that the $1,991.28 Wife receives each month is from a brokerage account and was properly considered by the trial court as passive income. Husband, however, argues the trial court should have also considered potential income from Wife's IRA, which he contends "had a cash flow of approximately $2,451.33 per month," along with $1,316.00 per month Wife could receive in Social Security if she elected for early retirement.[1]

i. Failure to require early IRA withdrawals

Husband's argument regarding the alleged $2,451.33 per month Wife could theoretically receive from her IRA is based upon an estimate by Husband's financial expert witness, Densel Fleming. Mr. Fleming's evidence regarding Wife's potential early IRA withdrawals was presented to support Husband's contention that the trial court should include these amounts in Wife's income.[2] In estimating this amount, Mr. Fleming ran a "Monte Carlo" simulation, assuming a 5.08 percent rate of return on the total value of Wife's IRA as of 31 December 2022. Husband also

---

1. At the time this case was called for trial on 13 March 2023, and subsequent entry of the Alimony Order on 23 May 2023, Wife was 63 years old. Wife is not eligible to receive the full amount of her potential Social Security benefits until she is 67 years old.

2. Our dissenting colleague accepts Mr. Fleming's projection of potential income as fact, but the trial court did not make this finding, although it did consider Mr. Fleming's evidence.

argues that "[a]t Wife's age, there is no penalty for her to withdraw from her IRA."

We first note that the trial court specifically found in Finding No. 16 that Mr. Fleming had presented an affidavit and testimony during the trial. The next finding, No. 17, states "no credible evidence was presented that [ ]Wife has depressed her income in bad faith and there is, therefore, no basis to impute income to Wife." Mr. Fleming's evidence focused on Wife's potential income and Husband used this evidence to argue that the trial court should essentially impute the income to her, as it was undisputed that Wife had never received any early IRA withdrawals.

It is well-established that for purposes of alimony, the trial court should consider each party's actual income "at the time of the order" unless there is evidence of bad faith depression of income:

> Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith. In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation. Bad faith for the dependent spouse means shirking the duty of self-support[.]

Works v. Works, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citations, quotation marks, and emphasis omitted).

The trial court found Wife was not acting in bad faith by continuing her usual practice of not taking early withdrawals from her IRA. Early withdrawals would require Wife to deplete her estate to meet her current expenses and would prevent her from being able to continue to save for retirement in a tax-advantaged account.

In support of Husband's argument the trial court should have imputed income to Wife, based upon Mr. Fleming's hypothetical projections of what Wife might be able to withdraw from her IRA and his assumptions of the future performance of the assets in her IRA, Husband cites to this Court's opinion in *Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007). In *Phillips*, this Court vacated and remanded an alimony order because the lack of findings left the Court unsure of whether the trial court considered the plaintiff's "medical benefits" or income from her IRA, where the evidence showed that the plaintiff was receiving IRA income:

> With regard to [the] defendant's contention that the trial court erred in failing to make findings regarding [the] plaintiff's health insurance benefits, we agree. [North Carolina General Statute Section] 50-16.3A(b)(4) requires the court to consider the amount and sources of both spouses' income including benefits such as medical, retirement, insurance, social security or others. The court made no findings with respect to [the] plaintiff's medical benefits or potential income from her IRA, *although evidence of the sources of income was presented at the hearing.* Without such findings, we cannot be sure that the trial judge properly considered the factor. Therefore, we vacate the award of alimony and remand for additional findings on all income, including medical benefits and any other benefits that function as income, of which evidence was presented at the hearing.

185 N.C. App. at 243, 647 S.E.2d at 485 (emphasis added) (citations, quotation marks, brackets, and ellipses omitted). But here, unlike *Phillips*, we can be sure that the trial court properly considered this evidence, because the detailed and well-organized Order addresses it. Here, there was no evidence that Wife was actually receiving any income from her IRA and the trial court clearly considered and rejected Husband's evidence that Wife should be required to begin taking early IRA withdrawals. At trial, the evidence showed Wife had continued to reinvest the interest and dividends from her IRA, intending to live off the accrued value when she reaches retirement age and she has never relied on distributions from the IRA as a source of income. The trial court's findings also indicate that requiring her to take early IRA distributions would require Wife "to deplete her estate to meet her reasonable needs and expenses."

A financial expert for Wife, Victoria Coble, who estimated Wife's passive income to be $1,991.28, testified about why the interest and dividends from Wife's IRA were not included in her income determinations. Specifically, she testified as follows:

> Q. Did you do any analysis of how much income and capital gains and so forth, appreciation, she could expect to get on a monthly or yearly basis from her Charles Schwab investment account and from Charles Schwab?
>
> A. So we pulled and we included in the written affidavit and on her financial affidavit, all of the interest, dividends,

> and capital gain distributions. So for 2022, all of that would have been disclosed.
>
> Q. But it didn't include interest and capital gains and dividends accumulated in her individual retirement account, did it?
>
> A. It did not. She's not taking any money out of the IRA right now, so it did not.
>
> Q. Well, you didn't reflect any income in that account in her IRA account because I guess . . . she didn't -- this is not taxable or it's not on the tax return as long as it's not taken out. Is that correct?
>
> A. Well, I didn't pick it up. She's not 72, so she's not taking the distributions out of the IRA. So all those things kind of stay in the IRA, where the investment account is just an investment account. It's not locked up under the --
>
> Q. But there's income being made in it.
>
> A. For sure. Yes.
>
> Q. And there's -- her net estate is increasing because of the dividends and interest and appreciation and capital gains that are accruing within that account, aren't they?
>
> . . . .
>
> A. If the IRA is invested in the market. So the market goes up, it goes up. If the market goes down, it goes down. I can't tell you off the top of my head. I would guess it does have interest and dividend income as well. But you're right that it will follow the market.

Further, Ms. Coble also noted that Mr. Fleming's estimate of $2,451.33 per month from Wife's IRA was only hypothetical, stating:

> Again, we didn't consider whether or not [her investment returns were] actually being retrieved or being claimed. We just looked at access to those and then made that adjustment to the current need amount as this is income that is being -- that we know that has -- that's accessible today[.]

Husband's expert witness, Mr. Fleming, presented evidence of estimates of Wife's potential income based on hypothetical projections of what

Wife might be able to withdraw from her IRA based on his assumptions of the future performance of the assets in her IRA, but the evidence showed Wife had never received any distributions from her IRA, only reinvesting interest and dividends for her future retirement. And the trial court's unchallenged findings indicate that during their marriage, the parties had established a practice of making "significant retirement savings contributions each year, budgeting a sizable portion of their income to savings. The parties had an established category of expense called 'savings' and budgeted for this expense every month. Their historical custom of savings was an important part of their accustomed standard of living."

The trial court's findings also address Husband's own substantial contributions to his 401(k) account, both during the marriage and after, and considered his 401(k) contributions as a reasonable deduction from his gross income. As Wife correctly notes, Husband did not "fault the trial court for excluding dividends and interest derived from his retirement accounts in calculating his net monthly income for alimony purposes. Such incongruity is telling." The trial court treated both parties the same in this regard. The trial court considered Husband's own 401(k) contributions as proper deductions from his gross income, and the trial court did not require Husband to reduce his contributions to his 401(k) to enable him to pay more alimony to Wife. Likewise, the trial court did not abuse its discretion by allowing Wife to allow her IRA to continue to grow instead of requiring her to deplete her estate by beginning to take distributions from the account, and the trial court did not abuse its discretion by not treating potential income from Wife's IRA account as income under Section 50-16.3A(b)(4).

Apparently based on *Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (2000),[3] our dissenting colleague accepts Husband's argument that the trial court erred by not imputing income to Wife based on the potential for early withdrawals from her IRA for purposes of determining her need for alimony. However, the dissent would apparently allow Husband to continue to benefit from a reduction of his net income by making his own contributions to his 401(k) plan and reinvestment of any income in the plan. The "logical" error in *Bryant* was that the trial court treated the spouses differently for purposes of determining their incomes and

---

3. Husband did not present any argument based on *Bryant*, nor did his brief cite this case, perhaps because the trial court treated both parties the same; it did not treat the retirement investments of the parties differently, as did the trial court in *Bryant*. *See* 139 N.C. App. at 619, 534 S.E.2d at 233.

expenses, *id.* at 619, 534 S.E.2d at 233; here the trial court treated both parties the same, although Husband's retirement contributions are done through his 401(k) plan and Wife's are done through her IRA, and these two types of plans work differently.

In *Bryant*, an equitable distribution judgment had previously divided "the parties' investment accounts, which they established during the course of the marriage to provide funds for their retirement[.]" *Id.* at 616, 534 S.E.2d at 231. "It was the practice of the parties during the marriage to reinvest all dividends and interest earned on these investment accounts." *Id.* The accounts were equally divided, and each party was "receiving an identical amount of investment income from them, averaging $1981.75 per month in 1997." *Id.* In the alimony order, for the plaintiff-wife, the trial court included $1,981.75 per month as monthly investment income and included the same amount as one of her expenses, to "enable the plaintiff to continue to reinvest fully the investment income." *Id.* (internal quotation marks and brackets omitted). But for the defendant-husband, the trial court included the $1,981.75 investment income as part of his income and did not treat this as an expense for him. *Id.* On appeal, the defendant-husband argued that the trial court should not have considered the investment amount as one of plaintiff-wife's expenses. *Id.* at 617, 534 S.E.2d at 231. This Court noted that "given that the trial court's calculation of an alimony award necessarily involves a comparison of the income and expenses of both spouses . . . , in order to provide adequate review of the court's alimony award, we must necessarily review the trial court's calculations as they relate to both spouses." *Id.* (citation and emphasis omitted).

Here, the trial court made detailed findings of fact regarding the income, expenses, and retirement contributions made by both parties, including Wife's expense of "[r]etirement savings" and Husband's deductions from his gross income for 401(k) plan contributions as well as "401(k) [p]lan [c]atch [u]p" contributions. The trial court's findings regarding Husband's income includes a table listing thirteen "[d]eductions" from his monthly gross income, including taxes, several types of insurance, and his 401(k) contributions. Since Husband is still employed and contributing to his 401(k) plan, the findings do not treat his 401(k) deductions as an "expense" but as a deduction from his gross income. These deductions from his gross income allow Husband to continue contributing to his estate, increasing its value while also reducing his taxable income. Ultimately, the trial court found Husband had monthly deductions of $26,761.28 from his gross monthly income of $57,024.47, for a "net monthly income of $30,263.19 for alimony purposes."

Wife was not employed and did not have a 401(k) plan; she had an IRA. The IRA was part of Wife's *estate*. The trial court found that each party "has an estate of between two and three million dollars." The trial court's Consent Order entered 25 May 2021 determined equitable distribution of assets, but did not set out detailed findings on the assets included in the marital estate or distributed to each party. However, the evidence at trial showed that Wife' estate included a "Schwab IRA rollover account" and when the parties separated, Wife's IRA was valued at about $205,000. By May of 2021, the value of her IRA had increased to $388,358.84. All the appreciation in the IRA came from growth within the account. Because it was an IRA, Wife would only be able to make contributions from earned income, and Wife had no earned income, so the only way she could continue to have appreciation in her IRA was from appreciation of the assets in the account or reinvestment of any earnings. Based on this evidence, in part, the trial court made an ultimate finding that "[a]bsent an award of alimony, [ ]Wife would have to deplete her estate to meet her reasonable needs and expenses."

Husband's argument, and our dissenting colleague, conflate the concepts of current income and depletion (or avoiding depletion) of Wife's estate. Husband has earned *income* from employment and can continue to contribute to his 401(k) plan as he did during the marriage; Wife does not have earned income and cannot contribute to her IRA from her earned income. Husband contributes to his retirement savings and increases his estate by contributions to his 401(k) plan and these contributions are deductions from his gross income. Alimony helps Wife to avoid *depletion* of her estate by premature withdrawals from her IRA and allows her IRA to continue to increase in value – assuming her investments do well – until she reaches full retirement age.

The IRA plan is part of Wife's estate, which is not to be depleted for her current support since Husband had adequate ability to pay alimony to meet her needs. The trial court found Husband had a monthly surplus of $24,642.21 left after deductions and his own reasonable expenses. The IRA will be a source of income for Wife in the future, when she begins to take distributions from the plan, but at this time, it is an investment which is part of her estate, not income. Husband's argument was that Wife should be required to deplete her estate to convert the IRA from an asset to current income to fund her current needs, even though she had never taken any contributions from the IRA. Or the trial court would have to impute income to Wife based on potential early withdrawals from the IRA to include this as part of her income for purposes of alimony, but the trial court found no bad faith to support imputing income. *See Works*, 217 N.C. App. at 347, 719 S.E.2d at 219.

Our dissenting colleague views the evidence as showing that Wife already has the income to substantially fund her reasonable expense of investing in her IRA and that under the trial court's Order her retirement is being funded by about $5,000 per month, including the $2,451.33 she could hypothetically withdraw from her IRA (based on Mr. Fleming's estimate) and the $2,500 Wife listed as an "expense" for retirement savings. But based on the trial court's findings of fact, this is not correct. This approach would require either imputing income to Wife of $2,451.33 based on Mr. Fleming's estimate or ordering depletion of Wife's estate to fund her current expenses. Contrary to the dissent's assumption that Wife has IRA income in this specific amount, Wife does *not* have a current *income* of $2,451.33 from any source to invest in her IRA. The evidence showed and the trial court found Wife had not received any distributions from her IRA. The amount of $2,451.33 was Mr. Fleming's projection of what Wife might be able to withdraw from the IRA—and if she began withdrawing this amount from the IRA, this would be a change to the long-established practice of re-investing any income in the IRA for her retirement. She would be depleting her retirement assets in her IRA to fund her current living expenses. Thus, the effect of our dissenting colleague's proposal would be to require the trial court to impute *income* of $2,451.33 to Wife, despite the fact that the trial court did not find Mr. Fleming's projections to be credible. Requiring Wife to stop reinvestment in her IRA would also be contrary to the parties' established practice of retirement savings as found by the trial court.

The trial court's findings regarding the established practices of retirement savings during the marriage, and the findings of the expenses and net incomes of both parties were consistent with their practices during the marriage. In *Bryant*, the "more difficult issue" was

> the effect of the trial court's characterization of investment income as an expense in this case. Given the distinction between the marital standard of living and reasonable expenses in setting alimony awards, the *Glass* Court's holding relating to the standard of living leaves open the question of whether the trial court below properly characterized investment income as an expense in this case. *See also Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000) (holding that, in determining entitlement to alimony, as opposed to the amount of alimony, trial court erred in disregarding evidence pertaining to the established pattern of savings in considering defendant's accustomed standard of living).

139 N.C. App. at 618, 534 S.E.2d at 232 (emphasis omitted) (citing *Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998)). This Court held that the trial court did not abuse its "discretion by characterizing the funds reflecting a marital pattern of savings as a reasonable expense in this case" because "[the] defendant is still employed and has a comfortable and significantly higher income than [the] plaintiff, who is not working." *Id.* at 619, 534 S.E.2d at 232-33. But this Court did find an abuse of discretion from "the trial court's inclusion of this investment income amount *as an expense for the plaintiff but not for the defendant*." *Id.* at 619, 534 S.E.2d at 233 (emphasis added). This Court stated that

> [i]t is not logical that the trial court could properly characterize this investment income, earned and reinvested during the course of the marriage, as an expense for one spouse but not for the other. The court's calculation in this respect effectively promotes the manipulation of funds to affect the support obligation, which this Court has often sought to prevent.

Id. (citations omitted). Ultimately, this Court in *Bryant* held that the trial court would logically have to include the investment income amount as an expense for the defendant-husband since it was treated as an expense for the plaintiff-wife and remanded for entry of new findings of fact with regard to reasonable expenses of both parties. *See id.*

Here, the trial court allowed both parties to continue their marital practice of investing in or, for Wife, not depleting their retirement accounts. In *Bryant*, the parties each had identical investment accounts, since one account had been divided and each received half. *See id.* at 616, 534 S.E.2d at 231. Under those facts, treating the very same earnings from the account differently for each party was the "manipulation of funds to affect the support obligation" this Court disapproved. *Id.* at 619, 534 S.E.2d at 233. But here, the parties did not have identical investment accounts. Husband was saving for his retirement using deductions from his current income into his 401(k) plan, while Wife had no earned income and was maintaining her funds in her IRA. During the marriage, they had established these methods and patterns of retirement savings. The trial court did not treat their investments differently, nor did it characterize either party's investments improperly, as happened in *Bryant*, *see id.* at 619, 534 S.E.2d at 232-33, but it made findings addressing the income and retirement contributions of each party.

If we were to remand for the trial court to include Wife's potential income from early IRA distributions, this would effectively require the trial court to impute income to Wife for purposes of calculating her need for alimony, but the trial court found that there was no credible evidence to support imputing income to Wife. And based on this Court's logic in *Bryant*, if we were to remand, we would also have to require the trial court to make new findings as to Husband's income by reconsidering whether Husband should be permitted to reduce his net income and ability to pay alimony by the amount of his 401(k) contributions or whether any earnings within his 401(k) plan should be treated as income. *See id.* at 619, 534 S.E.2d at 233. This change would increase his income for purposes of his ability to pay alimony as well. This result is not supported by any legal authority, and Husband has not demonstrated any abuse of discretion in the trial court's treatment of Wife's IRA as part of her estate and not current income.

ii. Failure to require Wife to elect early Social Security benefits

Husband also argues the trial court should have considered the $1,316.00 a month Wife could receive from Social Security benefits if she elected for early retirement before the age of 67. Husband contends that if Wife is not going to be required to work to support herself, she should at least be required to begin to draw upon her retirement benefits, including Social Security. His argument regarding Social Security is similar to his argument regarding imputation of income based on potential early withdrawals from Wife's IRA. Again, his argument would require imputing income to Wife. Wife counters that the trial court

> made findings sufficient to show it considered—but ultimately rejected—including any as-yet-unelected social security benefits or undistributed IRA-derived funds as potential income to Wife. Specifically, the trial court did so via Findings of Fact 15, 17-18, 43a, 45a, and 49a, . . . which collectively determine that counting anything other than the $1,991.28 amount from Wife's brokerage account as income to her would require her "to deplete her estate to meet her reasonable needs and expenses."

Wife is correct; the trial court considered but rejected Husband's evidence and his contention that she should be required to elect to receive early Social Security benefits.

Wife notes that her expert witness, Ms. Coble, determined "that if Wife elected to take early retirement social security benefits at age 62 and reached the life expectancy Fleming projected (age 82), she would lose approximately $40,000.00 per year from then on." Husband's expert witness, Mr. Fleming, acknowledged that Wife would receive "an increased amount of $1,464 per month[ ]" if she elects to withdraw her Social Security benefits "at her full retirement age of 66 years and 10 months[.]"

Our dissenting colleague would remand for the trial court to make additional findings on whether to impute income to Wife based on her potential early Social Security benefits based on the view that the trial court's finding of "no credible evidence" that Wife had depressed her income in bad faith "in context" was referring to Wife's choice not to seek a new job at 63 years of age. We disagree, since that finding in the context of the Order is in the section entitled "[ ]Wife's Employment and Income" *and* the finding immediately follows Finding No. 16 regarding Husband's expert witness, Mr. Fleming, who presented expert testimony and evidence as a certified financial planner about Wife's investment income and potential social security benefits. He did not present evidence about Wife's failure to obtain new employment. In addition, the Order includes detailed findings about Wife's employment history and earning capacity in Findings No. 43, 44, 45, 47, and 48 which address the alimony factors under North Carolina General Statute Section 50-16.3A(b).

The dissent also notes that there is no specific finding addressing Wife's eligibility to elect early Social Security benefits. But in Findings No. 41 and 43,[4] the trial court made "specific findings as to each factor set forth in [North Carolina General Statute Section] 50-16.3A(b) upon which evidence was presented at trial:"

> 45. The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, *social security*, or others:
>
> > a. [ ]Wife has passive investment income of $1,991.28 per month.[5] [ ]Wife does not have any income from employment.

(Emphasis added.)

It is well established that the trial court need not make a finding about every fact shown by the evidence presented as long as the findings

4. Finding No. 41 serves as an introduction to numbered findings addressing each statutory factor and applies equally to Findings No. 42 through 52.

5. Findings 13 through 18 also address Wife's income and Finding 15 addresses her income of $1,991.28 from dividends and interest from her Charles Schwab Investment Account.

support the trial court's conclusions. *See Medlin v. Medlin*, 64 N.C. App. 600, 603, 307 S.E.2d 591, 593 (1983) ("The court is not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment." (citations omitted)). Here, that evidence was voluminous – the record is 1471 pages, there are 789 pages of transcript from the hearing, and 7,566 pages of record supplement of documentary exhibits. The trial court also made many findings of fact we have not quoted here addressing the parties' financial situation. The trial court specifically noted Husband's evidence urging the trial court to include Wife's potential income based upon electing to receive early Social Security benefits by noting Mr. Fleming's testimony and affidavit so it is clear the trial court considered this evidence.

We have been unable to find any legal authority to require the trial court to consider imputing income to a spouse based on eligibility to elect *early* Social Security benefits or limiting the trial court's discretion in how to address the potential income from early Social Security benefits. The trial court had the discretion to accept Husband's evidence on Wife's potential Social Security benefits as credible and to make findings based on that evidence, but it also had the discretion not to. Thus, contrary to our dissenting colleague's suggestion, the trial court's Order does demonstrate that it considered Wife's potential to elect early Social Security benefits because it specifically noted Mr. Fleming's evidence. As noted above, the trial court noted its consideration of Mr. Fleming's affidavit and testimony and then found that "no credible evidence was presented" to support imputing income to Wife.

Mr. Fleming was an expert witness for Husband who presented extensive testimony regarding his analysis of

> the income factors, all of the factors that affected [Wife]'s -- the income. It was also to determine -- to evaluate those income levels and the amounts and document them over the time period by which they would occur, and also identify if there were any current or future income that would impact the scenario, as well as how sustainable those income levels were, based upon the sources that they would be coming from, and compare those also, to the statutory mortality, as well.

Mr. Fleming's testimony and documentary exhibits are the primary source of Husband's argument regarding Wife's potential income from her IRAs and from early election of Social Security. The trial court evaluated that evidence and determined that there was "no credible evidence" to support imputing income to Wife. *See Watkins v. Watkins*, 228 N.C. App. 548, 558, 746 S.E.2d 394, 400-01 (2013) ("[T]he trial court is the judge of the credibility of the witnesses who testify and . . . the trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom." (citation and quotation marks omitted)). Here, we need not speculate as to whether the trial court considered Husband's evidence about Wife's potential Social Security benefits or what weight it had. This Court has no authority to reassess the credibility or weight of the evidence. And as noted below, in the future, either party may file a motion to modify alimony, as the trial court is not required or expected to predict either parties' changes in income or expenses as they get older, retire, and begin receiving Social Security benefits or other retirement income.

Husband has failed to demonstrate any abuse of discretion by the trial court's rejection of his argument that Wife should be required to elect a reduced amount of Social Security benefits to support her own financial needs, even though he is fully capable of providing support for her by paying alimony while still contributing to his own retirement accounts. The trial court found that "[n]o credible evidence was presented that [ ]Wife has depressed her income in bad faith and there is, therefore, no basis to impute income to [ ]Wife."

iii. Valuation of Wife's estate

Husband argues that "Wife actually has an estate worth approximately $4 million, including cash assets of approximately $3 million[,]" and he contends that this alleged greater value of Wife's estate should decrease Husband's alimony obligations.

As noted by our Supreme Court in *Williams v. Williams*, estate valuations serve merely as a single guidepost for trial courts to determine each party's earning capacity, ensuring a fair alimony award:

> If the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain any standard of living.
>
> We think, therefore, that the trial court consideration of the "estates" of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not

> for the purpose of determining capability of self-support through estate depletion.

299 N.C. 174, 184, 261 S.E.2d 849, 856 (1980) (emphasis in original).

Here, regarding the parties' estates, the trial court found that "each party has an estate of between two and three million dollars. Absent an award of alimony, [ ]Wife would have to deplete her estate to meet her reasonable needs and expenses." But again, Husband does not argue, nor could he, that the trial court's finding about potential depletion of Wife's estate is not supported by the evidence. The trial court based its finding regarding the value of Wife's estate on the 25 May 2021 Consent Order regarding equitable distribution. In the Alimony Order, the trial court noted the entry of this Consent Order and found that "following entry of said [Consent Order], each party has an estate of between two and three million dollars. Absent an award of alimony, [ ]Wife would have to deplete her estate to meet her reasonable needs and expenses." The only evidence cited by Husband in support of his contention that Wife's estate value should be higher is Wife's deposition taken on 11 January 2022. During questions about her estimated net worth, Wife was asked if adding the total value of her assets "would be in excess of three million dollars[?]" Wife responded in the affirmative. However, to the contrary, competent evidence was presented to support the trial court's finding as to Wife having an estimated net worth of around $3 million, such as the value of her homes, vehicle, brokerage account, and IRA, less the value of her debts, including mortgages.

The primary goal of ensuring fairness in alimony awards was emphasized by this Court in *Hill v. Hill*, which noted that

> [a]lthough some cases from our Supreme Court
>
> > appear to disfavor alimony awards that result in estate depletion for one party or the other, those decisions by no means prohibit such awards. Rather, all of these cases cite fairness and justice to all parties as the principle to which an alimony award must conform. Thus, we consider whether the court's award in the present case is fair to all of the parties.

261 N.C. App. 600, 619-20, 821 S.E.2d 210, 225 (2018) (citations and quotation marks omitted). Under this standard of fairness, the trial court did not abuse its discretion in considering the value of Wife's estate and by not requiring Wife to deplete her estate to support her reasonable needs.

b. Wife's reasonable needs

On appeal, Husband argues "Wife's monthly expenses, as found by the trial court, were artificially inflated and not 'reasonable' considering the parties' marital standard of living." Specifically, he argues that the trial court abused its discretion in finding that "Wife's expenses . . . are not extravagant and are within the means and lifestyle [ ]Husband's income provided." He argues "the trial court . . . found [his] reasonable monthly expenses to be $5,638.98[,]" contending that "[t]his immense discrepancy in standards of living showcases Wife's egregious spendthrift nature, even considering Husband's income and the parties' marital standard of living." We disagree.

In determining alimony, "the trial court can accept or reject the alleged expenses on any financial affidavit, based upon its evaluation of the credibility of the evidence and the reasonableness of the expenses alleged." *Rea v. Rea*, 262 N.C. App. 421, 426, 822 S.E.2d 426, 431 (2018) (citation omitted). At trial, Wife presented a financial affidavit prepared by her financial expert, Ms. Coble, estimating her total monthly expenses to be $24,042.06. The trial court did not fully accept Wife's estimates and instead found her reasonable total monthly expenses to be $16,758.80 per month, about 30% less than what Wife alleged in her financial affidavit.

Husband's argument mostly addresses his contentions regarding Wife's expenses and findings the trial court could have made instead of those it did make. But Husband does not challenge the trial court's findings as to Wife's current reasonable expenses or as to the parties' lifestyle during the marriage as unsupported by the evidence, so they are binding on appeal. The trial court made extensive and detailed findings of fact about the parties' accustomed standard of living established during the marriage. For example, the trial court found:

> m. The parties established a very high standard of living during the course of their marriage.
>
> n. At the time of their separation, the parties owned a 5,420 square foot mountain home in Boone, NC . . ., a 7,082 [square foot] lake-front primary residence in Hickory, NC . . ., and a lake lot held as an investment[.] During their marriage, the parties also owned a residence located at . . . Blowing Rock, NC and an interest in a beach home located at . . . Fripp Island, SC, although both of these properties were sold just prior to the parties' separation.

> o. Throughout the marriage the parties drove luxury vehicles, including cars manufactured by Porsche, BMW, Mercedes, and the like. The parties also owned . . . a Cobalt 252 boat and a Yamaha jet ski.
>
> p. During the marriage, the parties took frequent vacations, including sailing trips in the Bahamas, Bermuda, Aruba, Grenada, Turks and Caicos, and various other islands; skiing trips to Snowmass, CO and Vancouver, Canada; international trips to Europe and Africa; and domestic travel to New York, NY, Charlottesville, VA, and the like. The family routinely spent over $50,000 in vacations each year.
>
> q. The family held memberships at Lake Hickory Country Club, Yonahlossee Racquet Club, and Spa Athletic Club. [ ] Wife worked out with a personal trainer as frequently as five times per week.
>
> r. The parties employed an *au pair* to assist with childcare, cooking, and cleaning.
>
> s. The parties made significant retirement savings contributions each year, budgeting a sizable portion of their income to savings. The parties had an established category of expense called "savings" and budgeted for this expense every month. Their historical custom of savings was an important part of their accustomed standard of living.
>
> . . . .
>
> u. [ ]Wife is entitled to continue living as the wife of a wealthy man, which she would have otherwise done but for [ ]Husband's illicit sexual affair and the resulting separation and divorce [of the parties].
>
> v. The parties' high standard of living was made possible from the income earned by [ ]Husband.

Our Supreme Court in *Williams* noted:

> We think usage of the term "accustomed standard of living of the parties" completes the contemplated legislative meaning of "maintenance and support." The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was

> intact. *It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.* For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do.

299 N.C. at 181, 261 S.E.2d at 855 (emphasis added). A prevailing purpose of an alimony award is to support the dependent spouse, allowing her the opportunity to enjoy the "accustomed standard of living" the parties enjoyed during their marriage. *Id.* In light of our Supreme Court's holding in *Williams*, this Court in *Rea* further explained that

> [f]or some families, the economic standard, and lifestyle established during the marriage includes expenses for golf, vacations, boats, hobbies, and entertainment, and these types of expenses can be included as part of the reasonable expenses for purposes of alimony. For example, in *Rhew*, this Court determined the trial court properly considered evidence of the parties' standard of living during the marriage, which included frequent travel and major vacations to Canada, New Orleans, Hawaii and Cancun; a boat they used regularly; contributions to their church; playing golf; arts, crafts and making jewelry; going out every Friday evening; going dancing and to movies; going out to lunch every Sunday; entertaining friends in their home; and engaging the services of a housekeeper. Here, instead of pursuing expensive leisure activities, [the h]usband and [the w]ife established a lifestyle of caring for foster children; this economic choice is certainly worth at least the same consideration as golf and vacations. The trial court did not abuse its discretion by including these expenses in [the w]ife's needs.

262 N.C. App. at 428-29, 822 S.E.2d at 432 (quotation marks and brackets omitted) (citing *Rhew v. Felton*, 178 N.C. App. 475, 484, 631 S.E.2d 859, 865-66 (2006)).

Here, the trial court made detailed findings as to the extravagant lifestyle the parties enjoyed during their marriage, and these findings were supported by the evidence. And the parties enjoyed this lifestyle without incurring excessive debt; Husband's income was sufficient to provide this lifestyle. It is not relevant that Husband's reasonable monthly expenses are now less than Wife's. What matters is the trial court's unchallenged findings regarding the established lifestyle of the parties during their marriage and Wife's current reasonable needs. Wife was able to enjoy this lifestyle during the marriage thanks to Husband's substantial income and is entitled to continue this lifestyle following the dissolution of their marriage, at least to the extent Husband has the ability to support it. The trial court did not abuse its discretion in determining Wife's reasonable monthly expenses based upon the lifestyle both parties enjoyed during the marriage. Husband's argument regarding Wife's expenses being "grossly inflated" is overruled.

c. Wife's Earning Capacity

Finally, regarding the alimony amount, Husband argues "[t]he trial court failed to assess Wife's earning capacity." Specifically, Husband contends Wife "has a bachelor's degree . . ., a masters in economics, . . . a law degree[,] . . . passed the bar on the first attempt in three states[,]" and has voluntarily remained unemployed since 2014 "and has instead chosen to travel the world, never once submitting an application for work." Further, Husband argues that because Wife holds several advanced degrees and was the "primary breadwinner" during the early years of the parties' marriage, income should have been imputed to Wife contending she should be required to find at least *some* form of employment. We disagree.

"Ordinarily, alimony is determined by a party's actual income at the time of the alimony order. It is well established that a trial court may consider a party's earning capacity *only if the trial court finds the party acted in bad faith*." *Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) (emphasis added) (citations omitted). "In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation. Bad faith for the dependent spouse means shirking the duty of self-support[.]" *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219 (citation and quotation marks omitted).

> However, evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith.
>
> Bad faith may be found from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; or intentionally depressed income to an artificial low.

Walton v. Walton, 263 N.C. App. 380, 386-87, 822 S.E.2d 780, 785 (2018) (citations, quotation marks, and brackets omitted).

"We review the trial court's bad faith determination for abuse of discretion[ ]" and will "upset" such determination "upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Cash v. Cash*, 286 N.C. App. 196, 208, 880 S.E.2d 718, 728 (2022) (citation and quotation marks omitted).

Here, the trial court found "[n]o credible evidence was presented that [ ]Wife has depressed her income in bad faith and there is, therefore, no basis to impute income to [ ]Wife." This finding alone is sufficient to overcome Husband's argument, since only the trial court can assess the credibility of the evidence. *See Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("[I]t is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial."). Although Husband argued Wife should be required to work and presented evidence about her ability to do so at trial, the trial court found no credible evidence to support Husband's position. But in addition to the trial court's finding of "no credible evidence" that Wife had depressed her income in bad faith, the trial court also made extensive findings regarding Wife's employment history and circumstances at the time of trial. For example, the trial court also found Wife "left the workforce [in 2009] to become a full-time stay-at-home wife and mother[,]" "does not have the ability to become re-employed and to support herself financially[,]" and "is now close to retirement age and does not have the skills or work history to allow her to find employment as an attorney at this point in time and at this stage of her life." The trial court also found that Wife had in August 2021 "suffered catastrophic injuries" from a fall, including "multiple broken bones and a torn knee" and she "is still recovering from these injuries."

We conclude the trial court did not abuse its discretion in finding that Wife had not suppressed her income in bad faith and therefore not imputing income to Wife. The trial court properly considered Wife's near retirement age, her long-term status as a stay-at-home wife and mother, her inability to seek employment as an attorney due to her inactive status from the bar, and her recent injury.

The trial court did not abuse its discretion in determining the alimony amount. The trial court considered all the factors as required by North Carolina General Statute Section 50-16.3A, including all available income sources to Wife she was currently and *actually* receiving, the relative size of each parties' estate, the reasonable needs of Wife, and her present inability to rejoin the workforce.

2. Duration

[3] Husband makes three main arguments regarding the duration of alimony set by the trial court: (1) "[t]he trial court failed to include its reasoning for the alimony duration"; (2) the trial court failed to consider how the parties' needs and incomes would change over time; and (3) the "duration set by the trial court was intended to punish Husband for his marital misconduct."

Again, we review the trial court's determination of the duration of alimony for abuse of discretion. *See Kelly*, 228 N.C. App. at 601, 747 S.E.2d at 272. Here, the trial court set an indefinite alimony duration that would cease only upon the occurrence of any of the following events: (1) "[ ]Wife's death"; (2) "[ ]Husband's death"; (3) "[ ]Wife's cohabitation (as . . . defined by [North Carolina General Statute Section] 50-16.9(b))"; or (4) "[ ]Wife's remarriage."

a. Rationale for the duration of alimony

Regarding justification for the duration of alimony, Husband argues "[a] trial court is required to include its reasoning, based upon competent evidence, for the alimony duration, and failure to explain what competent evidence justifies the duration requires remand." Husband specifically contends, here, "[t]he trial court's only mention of the alimony duration appears in the decretal section, stating, '[ ]Husband shall pay permanent ongoing alimony to [ ]Wife in the sum of $14,727.52 per month.' " But again, Husband's argument about the absence of explanation for the duration of the alimony award ignores most of the six single-spaced pages of findings of fact included in the entire section of the Alimony Order entitled "Factors related to Amount, *Duration*, and Manner of Payment ([North Carolina General Statute Section] 50-16.3A(b)." (Emphasis added.) All these findings regarding the "factors" were part of the trial court's explanation of its decision regarding the duration of the alimony award.

In making this argument, Husband cites to this Court's opinion in *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003). In *Fitzgerald*, this Court reversed and remanded an alimony award where, though the trial court "made sufficient ultimate findings of fact to support its award of alimony[,]" it "did not make required findings as to the reasons for making the duration of the alimony continuous until [the] defendant dies, remarries, or cohabits[.]" *Id.* at 421, 588 S.E.2d at 522 (citations omitted). Under North Carolina General Statute Section 50-16.3A, "[t]he [trial] court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c).

> This Court has held that a trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates [North Carolina General Statute Section 50-16.3A(c)]. In *Williamson*, as in this case, the trial court, without making any findings as to its reasoning for the duration of the alimony or manner in which it was to be paid, ordered alimony to be paid until the death of a party or the dependent spouse's remarriage or cohabitation and that it be paid directly to the clerk of court.

Fitzgerald, 161 N.C. App. at 421, 588 S.E.2d at 522-23 (citing *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000)).

Wife, however, argues the findings made by the trial court here mirror the detailed findings in *Yeun-Hee Juhnn v. Do-Bum Juhnn*, 242 N.C. App. 58, 775 S.E.2d 310 (2015). In *Juhnn*, this Court affirmed an order setting an alimony duration of eighteen years where the trial court made "seventy-six findings of fact" relating to the defendant's marital misconduct, substantial ability to support the family financially, and his decision to "provide[ ] for his paramour and her children while refusing to provide support to [the] plaintiff and his children[.]" *Id.* at 63, 775 S.E.2d at 314. The seventy-six findings in *Juhnn* also addressed the plaintiff's absence from the workforce for many years to support her family, her inability to rejoin the workforce, and her having "significantly less earning potential or earning capacity than [the d]efendant[.]" *Id.* at 65, 775 S.E.2d at 315 (internal quotation marks omitted).

Further, in *Rea*, this Court also affirmed the duration of an alimony order where

> the trial court did not simply recite that it had considered this list of factors [in North Carolina General Statute Section 50A-16.3]; it made findings of fact regarding the relevant factors. Other findings in the order . . . specifically address many of these factors in detail, including marital misconduct; the relative earnings and earning capacities of the parties; the duration of the marriage; the good health and ages of the parties; the standard of living established during the marriage; the relative assets and liabilities of the parties; and the relative needs of the parties. The trial court properly considered the required factors

> and set the duration of the alimony in its discretion. We discern no abuse of discretion in the trial court granting 10.5 years of alimony.

262 N.C. App. at 431, 822 S.E.2d at 433 (citation omitted).

Here, as in *Juhnn* and *Rea*, the trial court made extensive, detailed findings under North Carolina General Statute Section 50A-16.3 in support of its indefinite award including, but not limited to: marital misconduct by Husband; his remarriage and financial support of his new family; the earning capacities of the parties; their age and physical health; Wife's role in supporting her family while Husband completed his medical education and training; her later absence from the workforce to support her family at home; her present inability to practice law again; and the parties accustomed standard of living during their marriage. Given these findings, the trial court concluded that "[c]onsidering all of the facts and circumstances of this case, including the acts of marital misconduct . . . , an award of alimony is mandatory and equitable."

b. Failure to consider future changes

Husband further contends the trial court abused its discretion in setting an indefinite alimony award because it failed to consider how the reasonable needs and incomes of both parties would change in the future. Specifically, Husband contends Wife's income will increase once she begins drawing Social Security benefits, and that his income "will drastically be reduced within five . . . years[ ]" as he is currently 62 years old and will not be collecting income from his employment once he retires. However, Husband cites no case law, nor any language in Section 50-16.3A, suggesting the trial court is required to consider the *future* needs and incomes of the parties in determining proper alimony amount and duration. Indeed, we are quite certain that neither Husband nor the trial court has the ability to predict the future.

But since no one can predict the future, our alimony law does have a way to deal with later changes in circumstances. Under North Carolina General Statute Section 50-16.9(a), "[a]n order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-16.9(a) (2023). The trial court did not abuse its discretion by not considering possible future changes in the parties' financial circumstances.

c. Effect of illicit sexual behavior on the duration of alimony

Finally, Husband argues the indefinite duration of the alimony award "was intended to punish Husband for his marital misconduct." Specifically, he contends "[t]he trial court's ruling was clearly intended to punish Husband . . . by forcing him to work for the rest of his life in order to allow Wife 'to continue to live as the wife of a wealthy doctor,' while refusing to support herself in any way." But again, Husband overlooks most of the trial court's extensive findings regarding the Section 50-16.3A factors which were part of the trial court's discretionary decision to award alimony until death or remarriage.

In presenting this argument, Husband cites to this Court's opinion in *Taylor v. Taylor* where we held "[t]he purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate." 26 N.C. App. 592, 595, 216 S.E.2d 737, 739 (1975) (citation and quotation marks omitted). It appears Husband cited this 1975 case mainly because it used the word "punish" in a portion of the opinion citing an even earlier case, *Schloss v. Schloss*: "The judgment is more in the nature of a division of [the] defendant's estate than it is an award of alimony, and this is wrong. 'The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate.' " *Id.* (quoting *Schloss v. Schloss*, 273 N.C. 266, 272, 160 S.E.2d 5, 11 (1968)). *Taylor* was decided in 1975, before North Carolina adopted equitable distribution, and the trial court had awarded a large lump sum to the wife in an apparent effort to distribute a portion of the value of the husband's business to her—something the trial court did not have the authority to do under the law at that time. *See id.* at 594-95, 216 S.E.2d at 739 ("It should also be noted that this is not a 'Community Property' state and only the Legislature could properly make it one. The lawmaking branch having declined to enact that or a similar concept, it should not come to be by judicial dictum, however well intentioned or fair-minded it may appear in a particular case."). Otherwise, neither *Taylor* nor *Schloss* tend to support Husband's argument:

> The wife of a wealthy man, who has abandoned her without justification, should be awarded an amount somewhat commensurate with the normal standard of living of a wife of a man of like financial resources.
>
> The fact that the wife has property of her own does not relieve the husband of the duty to support her following his unjustified abandonment of her. Nevertheless, the statute expressly provides that the earnings and means

> of the wife are matters to be considered by the judge in determining the amount of alimony to be awarded. It is a question of fairness and justice to both. The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate.

Schloss, 273 N.C. at 272, 160 S.E.2d at 11 (citations and quotation marks omitted).

We also note that both the equitable distribution and alimony statutes have changed substantially since *Schloss* and *Taylor* were decided. As Wife contends, "[North Carolina General Statute Section] 50-16.3A (enacted in 1995)[ ]" does "include[ ] some modicum of punishment[,]" citing to Reynolds on Family Law:

> The only way the 1995 legislation reflects the goal to punish is in the non-discretionary treatment of illicit sexual behavior by the supporting spouse. When the non-discretionary treatment applies, the court must award alimony to the dependent spouse without considering any marital misconduct by the dependent spouse, reflecting the view that the supporting spouse should be punished for the uncondoned illicit sexual behavior that occurred on or before the date of separation.

2 Suzanne Reynolds, *Reynolds on North Carolina Family Law* § 5.18(b)(2) (2024).

Section 50-16.3A, which was adopted in 1995, specifically directs that marital misconduct "shall" be considered by the trial court in making its alimony determinations, including amount and duration. *See* N.C. Gen. Stat. § 50-16.3A(b)(1). And for one particular form of "marital misconduct" by a supporting spouse, "illicit sexual behavior," alimony is mandatory:

> The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section. . . . *If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in [North Carolina General Statute Section] 50-16.1A(3)a., during the marriage and prior to or on*

> *the date of separation, then the court shall order that alimony be paid to a dependent spouse.*

N.C. Gen. Stat. § 50-16.3A(a) (emphasis added).

As this Court explained in *Romulus v. Romulus*, the marital fault of "illicit sexual behavior" is treated differently than the other seven potential types of "marital fault":

> "Illicit sexual behavior" is one of the eight forms of "marital misconduct" as defined by [North Carolina General Statute Section] 50-16.1A(3) . . . . "Illicit sexual behavior" is treated differently from all other forms of "marital misconduct," as the trial court has the discretion to weigh all of the other forms of "marital misconduct" and to determine what effect, if any, the misconduct should have upon the alimony award. *See* N.C. Gen. Stat. § 50-16.3A(b) ("The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including: (1) The marital misconduct of either of the spouses."). As to "illicit sexual behavior" only, [North Carolina General Statute Section] 50-16.3A(a) eliminates the trial court's discretion to weigh the marital misconduct of the parties unless both parties have committed "illicit sexual behavior."

215 N.C. App. at 521-22, 715 S.E.2d at 325 (ellipses and footnote omitted).

We recognize that the effect of "illicit sexual behavior" as a mandatory basis for either allowing or denying alimony may seem punitive to the unfaithful party, either the dependent spouse or the supporting spouse. *See id.* at 497, 715 S.E.2d at 310-11 ("As to the denial of alimony, we affirm the trial court's conclusion that [the] plaintiff is barred from alimony by her uncondoned 'illicit sexual behavior' during the marriage, despite the trial court's findings as to [the] defendant's physical abuse of [the] plaintiff and their children. Our legislature has decreed that even one fleeting incident of 'illicit sexual behavior' by a dependent spouse automatically bars her from an alimony award, even if the supporting spouse has committed serious, indeed criminal, physical abuse, against his wife and children throughout the marriage, and we have no authority to question the legislature's wisdom in adopting this rule.").

Here, the trial court made detailed findings about Husband's "especially egregious illicit sexual affair" with Darla, beginning about three years before the parties separated. As already discussed, the trial court did not abuse its discretion in setting the amount of alimony after considering both parties' reasonable expenses and incomes. Wife's income was far from enough to provide for her reasonable expenses as determined based on the accustomed standard of living during the marriage, and Husband has the ability to provide for her reasonable needs while still leaving him with the means to cover not only his own expenses, but also those of his new wife, Darla, and her adult child. In fact, the trial court found that in addition to supporting Darla and her adult child, Husband had spent $490,000.00 to renovate her home, paid off her daughter's student loan of about $55,000.00, and paid Darla's attorney fees of about $45,000.00. The trial court did not abuse its discretion by considering Husband's marital misconduct as a significant factor supporting the duration of the alimony award. Husband's argument is overruled.

IV. Conclusion

We affirm the Alimony Order as the trial court did not err by concluding that Wife is a dependent spouse and the trial court did not abuse its discretion in determining the amount and duration of the alimony. The trial court's findings thoroughly addressed the factors required under North Carolina General Statute Section 50-16.3A. Further, the trial court's order did not punish Husband for his illicit sexual behavior during the marriage but gave proper consideration to this factor as required under North Carolina General Statute Section 50-16.3A.

AFFIRMED.

Judge ZACHARY concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

I agree with most of the majority opinion. I agree the trial court made sufficient findings to justify Wife's entitlement to alimony. However, I agree with Husband that the trial court did not make adequate findings regarding certain evidence presenting about Wife's income available to fund for her own reasonable monthly expenses. Accordingly, my vote is to vacate the order and remand the matter for the trial court to make additional findings regarding Wife's income.

As noted by the majority, in determining the appropriate amount of alimony, the trial court "*shall* consider all relevant factors, including . . . [t]he amount of earned and unearned income of both spouses, including, but not limited to . . . dividends and benefits such as . . . retirement [and] social security[.]" N.C.G.S. § 50-16.3A(b)(7) (emphasis added).

The trial court found Wife to be 63 years of age. The trial court found – for purposes of calculating the appropriate award of alimony – the income Wife had available to pay for her own expenses was her non-retirement brokerage account earnings, totaling $1,991.28 per month. Indeed, there was evidence presented that Wife's assets include $1.445 million in that brokerage account.

There was also evidence, however, that Wife had another $1.214 million in an IRA account, earning $2,451.33 per month. I believe the trial court erred by failing to make findings showing it considered this evidence of Wife's income from her IRA, income which she chooses to allow to be reinvested in that IRA. *See Bryant v. Bryant*, 139 N.C. App. 615, 618 (2000) (interpreting first part of holding in *Glass v. Glass*, 131 N.C. App. 784, (1998), to require income invested in retirement accounts and dividends being automatically reinvested be included in income); *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 870 (1998) (must include investment income that is automatically reinvested); *Parsons v. Parsons*, 231 N.C. App. 397 (2013) (interest and dividend income, generated by investment account and distributed to wife monthly as her sole source of income, properly used to determine wife's gross monthly income).

At 63 years of age, Wife is eligible to pull this income from her IRA without penalty to satisfy her reasonable monthly expenses. I note that, as pointed out by Wife in her brief, the trial court did make findings Wife should not have to deplete her estate to take care of herself. However, requiring Wife to pull this income to support her lifestyle would not *deplete* her assets, i.e., her IRA corpus. Rather, allowing Wife to reinvest her IRA dividend/interest income serves only to *increase* Wife's estate.

The trial court found that Wife's reasonable monthly expenses include $2,500.00 per month to increase her retirement savings and that this reasonable expense must be funded by Husband through alimony. The trial court, though, should have made findings concerning the evidence that Wife is already earning about that amount which is being used to fund further increase (beyond mere appreciation) in her retirement savings. There is a possibility that – by not considering Wife's IRA dividend/interest income in its calculus – the trial court has double counted. That is, based on the alimony award ordered by the trial court, Wife's retirement is actually being funded by about $5,000.00 per month - $2,451.33 funded from dividends/interest earned in her IRA and $2,500.00 funded by Husband through the alimony award – being about double the amount the trial court found necessary to meet Wife's reasonable needs.

In sum, the trial court had discretion to determine it to be reasonable for Wife to allow the dividend/interest income which her IRA already generates to be reinvested in her IRA to increase her retirement estate and to require Husband to contribute additional sums each month towards Wife's retirement. But based on the trial court's finding that Wife's reasonable expenses included only $2,500.00 per month for retirement savings, it was perhaps error for the trial court to require Husband to pay an additional $2,500.00 per month in alimony to cover this reasonable expense, rather than just requiring Husband to pay $48.67 per month to cover this expense.

Further, at 63 years of age, Wife is eligible to collect social security. The trial court did not make any express finding regarding this potential income source. The trial court did find there was no credible evidence Wife has depressed her income in bad faith. But it appears from the context of this finding within the broader order that this finding was made in relation to Wife's choice not to seek employment at 63 years of age. There is no finding concerning the evidence offered regarding her eligibility to receive social security. It may be that the trial court would find it appropriate to allow Wife to wait a few more years to collect social security so she would receive a greater monthly benefit. But since there was evidence concerning Wife's eligibility to receive social security benefits now, the trial court must make findings showing it considered the evidence of this current source of income.

I understand the IRA income and the social security benefits may not be *taxable* income until pulled out, if at all. But just because an income source is not subject to taxation does not mean the trial court should not consider evidence concerning such income sources, where evidence has been presented these sources are available to the dependent spouse.

TOMIEGRACE BRUTUS, Plaintiff
v.
CHRISTOPHER BROIDO, Defendant

No. COA25-244

Filed 5 November 2025

Child Custody and Support—motion to modify custody—bench trial—directed verdict improper—lack of findings to support involuntary dismissal

In a child custody matter, the trial court's order dismissing defendant's motion to modify custody—as well as portions of his motion for order to show cause and motion for contempt—was vacated and remanded for further proceedings. The trial court erred by granting plaintiff's motion for directed verdict in a bench proceeding; even considering plaintiff's motion as one for involuntary dismissal pursuant to Civil Procedure Rule 41(b)—which would have been the proper procedural mechanism to seek dismissal in a non-jury trial—the court failed to make findings of fact pursuant to Civil Procedure Rule 52(a) and to state separately its conclusions of law in support not only of its bare determination that defendant had failed to meet his burden of showing that a substantial change in circumstances warranted custody modification but also to address any purported contempt, or lack thereof, by plaintiff.

Appeal by defendant from order entered 6 August 2024 by Judge Julie L. Bell in Wake County District Court. Heard in the Court of Appeals 15 October 2025.

No brief filed on behalf of the plaintiff-appellee, Tomiegrace Brutus.

Marshall & Taylor, PLLC, by Travis R. Taylor, for the defendant-appellant.

TYSON, Judge.

Christopher Broido ("Defendant") appeals an Order Dismissing his Motion to Modify Custody and Subparts 2(h), 2(i), and 2(j) of his Motion for Order to Show Cause, entered 6 August 2024. We vacate the trial court's Order and remand for further proceedings.

I. Background

Defendant and Tomiegrace Brutus ("Plaintiff") were married on 28 October 2017 and separated on 4 December 2021. Their divorce was finalized on 14 July 2023. They are parents of two children, both of whom are still minors.

Plaintiff filed a Complaint for Child Custody, Child Support, and Attorney's Fees on 17 February 2022. The parties entered into a Consent Order for Temporary Child Custody and Child Support on 31 March 2022. The Consent Order awarded "joint legal custody" and established a tiered custodial arrangement. Plaintiff and Defendant rarely agreed on any major issues involving the minor children and a parenting coordinator was appointed on 16 June 2022 to assist them in making decisions.

Following a Motion for Permanent Custody and a Motion for Permanent Child Support by Defendant, the trial court entered an Amended Permanent Custody Order. The Amended Permanent Custody Order awarded sole legal custody of both children to Plaintiff. Additionally, Plaintiff was awarded primary physical custody, and Defendant was given limited visitation rights on alternating weekends, Christmas, and the children's birthdays.

Defendant filed a Motion for Order to Show Cause and Motion for Contempt (hereinafter "MOTSC"), along with a Motion to Modify Custody, on 21 November 2023. The trial court entered an Order to Appear and Show Cause against Plaintiff based on allegations included in the MOTSC on 5 December 2023. The MOTSC was continued until 8 July 2024, when it was heard along with Defendant's Motion to Modify Custody at Plaintiff's request.

A hearing was held from 8 through 10 July 2023. At the close of Defendant's evidence, Plaintiff moved for a Directed Verdict. The trial court granted Plaintiff's directed verdict motion and entered an Order Dismissing Defendant's Motion to Modify Custody and Subparts 2(h), 2(i), and 2(j) of Defendant's MOTSC on 6 August 2024. The trial court announced in open court: "Defendant has failed to meet his burden of a substantial change of circumstances impacting the minor children's best interest." The trial court, however, found Plaintiff in contempt of Subparts 2(a)-(g) of Defendant's MOTSC on 10 July 2024.

Defendant filed written Notice of Appeal from the Order Dismissing Defendant's Motion to Modify Custody and subparts 2(h), 2(i), and 2(j) of Defendant's MOTSC.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Defendant argues the trial court: (1) improperly granted Plaintiff's Motion for Directed Verdict in a non-jury trial; (2) erred by making insufficient findings of facts and conclusions of law when granting the directed verdict in Plaintiff's favor; and, (3) abused its discretion by dismissing subparts 2(h), 2(i), and 2(j) of Defendant's MOTSC.

IV. Plaintiff's Motion for Directed Verdict

Defendant argues the trial court procedurally and prejudicially erred by granting Plaintiff's Motion for Directed Verdict. Defendant argues a Rule 41(b) motion was the appropriate procedural mechanism because the proceeding was a bench trial. We agree. Even considering Plaintiff's motion as one for involuntary dismissal, we hold the trial court's ruling on Defendant's Motion to Modify Custody and MOTSC is based on insufficient findings of fact and is vacated.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether [ ] competent evidence [ ] support[s] the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002) (internal quotation and citation omitted).

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254.

"In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978)).

B. Motion for a Directed Verdict Treated as a Motion for Involuntary Dismissal

"A motion for directed verdict under Rule 50(a) of the Rules of Civil Procedure is appropriate when trial is held before a jury." *Neff v. Queen City Coach Co.*, 16 N.C. App. 466, 470, 192 S.E.2d 587, 590 (1972) (referring to N.C. Gen. Stat. § 1A-1, Rule 50(a) (2023)). In contrast, during a bench trial, where a judge sits in the fact-finding role, a Rule 41(b) motion is the proper mechanism "to dismiss on the ground that upon the facts and the law the plaintiff has shown no right to relief." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 799 (1999) (citation and internal quotation marks omitted) (referencing N.C. Gen. Stat. § 1A-1, Rule 41(b) (2023)).

"The distinction is more than a mere formality, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before the court and jury than when the court alone is the finder of facts." *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 562, 402 S.E.2d 860, 861 (1991). When a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal, *id.*, by this Court in order to "pass on the merits of [the] appeal[,]" *Neasham v. Day*, 34 N.C. App. 53, 54-55, 237 S.E.2d 287, 288 (1977).

"In a nonjury case after the plaintiff (or defendant, if the motion is directed against a counterclaim) has presented his evidence and rested his case, defendant may move under Rule 41(b) for a dismissal on the ground that upon the facts and the law plaintiff has shown no right to relief." *Helms v. Rea*, 282 N.C. 610, 618, 194 S.E.2d 1, 6-7 (1973) (internal quotation omitted). In deciding a Rule 41(b) motion, the trial judge "may decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence." *In re Becker*, 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993).

If judgment is rendered on the merits of the Rule 41(b) motion, the trial court "shall make findings [of fact] as provided in Rule 52(a)." *Helms*, 282 N.C. at 618, 194 S.E.2d at 7. Rule 52(a) requires the trial court to "find the facts specially and state *separately* its conclusions of law thereon." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023) (emphasis supplied); *Mashburn*, 102 N.C. App. at 562, 402 S.E.2d at 862.

Specific and detailed findings of fact relating to and supporting conclusions of law made in deciding the Rule 41(b) motion are necessary to "afford this Court a clear understanding of the basis of the trial court's decision." *In re Lowery*, 65 N.C. App. 320, 325-26, 309 S.E.2d 469, 473 (1983). Failure by the trial court to make findings of fact is reversible error and necessitates a new trial. *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001) (citing *Hill*, 135 N.C. App. 515, 520 S.E.2d 797; *Mashburn*, 102 N.C. App. 560, 402 S.E.2d 860; and *Young v. Kuehne Chemical Co., Inc.*, 53 N.C. App. 806, 281 S.E.2d 742, *rev. denied*, 304 N.C. 590, 289 S.E.2d 566 (1981)).

In *Mashburn*, this Court examined a case procedurally similar to this case. During a bench trial, the defendant made a motion for directed verdict, claiming its rescission offer was statutorily valid, which was the grounds of plaintiff's suit. *Mashburn*, 102 N.C. App. at 561, 402 S.E.2d at 861. The trial court granted the directed verdict motion, finding only that "defendant First Investors tendered a valid rescission offer and[, t]herefore, plaintiff [was] barred from bringing suit." *Id.* at 561-62, 402 S.E.2d at 861-62.

On appeal, this Court held the trial court erred by granting defendant's directed verdict, because the appropriate motion was one for involuntary dismissal under Rule 41(b). *Id.* Even upon exercising discretion and considering the motion as one for involuntary dismissal, the Court found the judgment included nothing more than "bare conclusion[s]" and the trial court failed to make the mandated "separate findings of fact and conclusions of law." *Id.*

Here, the trial court improperly decided Plaintiff's Motion for Directed Verdict during a bench trial proceeding. The proper mechanism for dismissal would have been a Rule 41(b) Motion for Involuntary Dismissal. *Helms*, 282 N.C. at 618, 194 S.E.2d at 6-7. As the Court did in *Mashburn*, we examine Plaintiff's motion "as though it were made pursuant to Rule 41(b)." *Mashburn*, 102 N.C. App. at 562, 402 S.E.2d at 862.

1. Modification of Custody Order

Even considering Plaintiff's motion as one for involuntary dismissal, the trial court's ruling on Defendant's Motion to Modify Custody was based on insufficient findings of fact. The trial court provided the following oral ruling on Plaintiff's motion: "[H]aving seriously considered the arguments by both counsel in reviewing the evidence, the Court finds that Defendant has failed to meet his burden of a substantial change of circumstances impacting the minor children's best interest. The Court grants the motion to dismiss." The trial court's written order contained the following: "While there was evidence of a change of circumstances, the Court found that there was no nexus between a substantial change in circumstances and the welfare of the minor child as required by North Carolina law."

Neither the trial court's oral ruling on Plaintiff's motion, nor the written Order on Plaintiff's motion, supplies sufficient findings of fact to support the conclusions of law. The trial court's rulings offered nothing more than a bare conclusion Defendant had purportedly failed to meet the burden showing a substantial change in circumstances had occurred. Treating Plaintiff's motion as a Rule 41(b) motion, the trial court was required to "make findings [of fact] as provided in Rule 52(a)[,]" *Helms*, 282 N.C. at 618, 194 S.E.2d at 7, and to "find the facts specially and state *separately* its conclusions of law thereon[,]" N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023) (emphasis supplied). The trial court's failure to make detailed findings of fact is reversible error and necessitates a new trial. *Greensboro Masonic Temple*, 142 N.C. App. at 382, 542 S.E.2d at 678; *Mashburn*, 102 N.C. App. 560, 402 S.E.2d 860.

2. Contempt

The trial court similarly failed to make specific findings to support its decision to dismiss subparts (h), (i), and (j) of Defendant's MOTSC. The trial court concluded: "Plaintiff's Motion for Directed Verdict is meritorious and should be granted as it relates to the Motion to Modify Custody and paragraph 2(h), (i), and (j) of the Motion for Contempt and Motion for Order to Show Cause filed on November 21, 2023." While the trial court's "findings of fact are conclusive on appeal when supported by any competent evidence," the trial court failed to make any findings of fact related to any purported contempt, or lack thereof, by Plaintiff. *Clark*, 294 N.C. at 571, 243 S.E.2d at 139.

As explained above, treating Plaintiff's motion as a Rule 41(b) motion, the trial court was required to make specific findings of fact and to separately state its conclusions. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023); *Helms*, 282 N.C. at 618, 194 S.E.2d at 7. The trial court's failure to make detailed findings of fact on any purported contempt, or lack thereof, is reversible error, necessitating a new trial. *Greensboro Masonic Temple*, 142 N.C. App. at 382, 542 S.E.2d at 678; *Mashburn*, 102 N.C. App. 560, 402 S.E.2d 860.

V. Conclusion

Treating Plaintiff's motion as a Rule 41(b) motion, the trial court was required to "make findings [of fact] as [is] provided in Rule 52(a)[,]" *Helms*, 282 N.C. at 618, 194 S.E.2d at 7, and to "*find the facts specially and state separately its conclusions* of law thereon[,]" N.C. Gen. Stat.

§ 1A-1, Rule 52(a)(1) (2023) (emphasis supplied). We hold procedural and prejudicial errors occurred in the failure of the trial court to make sufficient and specific findings of fact to support its conclusions of law.

We vacate the Order dismissing Defendant's Motion to Modify Child Custody and Subparts 2(h), 2(i), and 2(j) of Defendant's MOTSC and remand for further proceedings not inconsistent with this opinion and precedents. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

CAPITOL CITY HOMES, LLC, JASON D. MORROW,
and CHARLES McDONALD, Plaintiffs
v.
STARLIGHT HOMES NORTH CAROLINA, L.L.C., JAMES M. SACK,
THE SACK LAW FIRM, P.C., and SAGE BUILT, LLC, Defendants

No. COA25-192

Filed 5 November 2025

Appeal and Error—interlocutory order—substantial right—legal malpractice claim—underlying breach of contract claim—ability to defend—no risk of inconsistent verdicts

An appeal by defendants (an attorney and his law firm) seeking review of the trial court's order denying their motion to dismiss plaintiffs' legal malpractice claim was dismissed for lack of appellate jurisdiction. Defendants failed to demonstrate that a substantial right would be lost absent immediate review of the interlocutory order where plaintiffs still had to prove the merits and damages of the underlying breach of contract claim as part of the malpractice claim—a "case within a case"—prior to the determination of any legal malpractice, and defendants' ability to defend the malpractice claim was not limited by the court's order. Further, there was no risk of inconsistent verdicts where, even if a jury found for plaintiffs on the breach of contract claim, defendants could still be liable to plaintiffs for damages and attorney's fees; to the extent any inconsistencies occurred, defendants could seek resolution through post-judgment motions. Finally, the appellate court exercised its discretion to deny defendants' petition for writ of certiorari.

Appeal by Defendants James M. Sack and The Sack Law Firm, P.C., from order entered 21 October 2024 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 23 September 2025.

Ward and Smith, P.A., by Christopher S. Edwards, Michael J. Parrish, and Mark S. Wigley, and MichieHamlett, PLLC, by Les S. Bowers, for Plaintiffs-Appellees.

Cranfill Sumner LLP, by Steven A. Bader and Ryan D. Bolick, for Defendants-Appellants James M. Sack and The Sack Law Firm, P.C.

COLLINS, Judge.

Defendants, James M. Sack and The Sack Law Firm (collectively, "Mr. Sack"), appeal from the trial court's order denying their motion to dismiss the legal malpractice claim brought by Plaintiffs, Capitol City Homes, LLC, and two of its owners, Jason D. Morrow and Charles McDonald (collectively, "Capitol City"). Mr. Sack argues that the legal malpractice claim cannot be pursued at the same time as the underlying breach of contract claim. Capitol City moves to dismiss this appeal due to lack of jurisdiction. Because Mr. Sack has failed to show we have jurisdiction to hear this appeal from an interlocutory order, we dismiss the appeal.

I. Background

Capitol City is in the business of building residential homes in North Carolina. On 19 January 2021, Capitol City entered into a purchase agreement with Green Hill Drive, LLC, wherein Green Hill agreed to sell 100 subdivision lots to Capitol City for $50,000 per lot ("January 2021 Green Hill Agreement").

In May 2021, Starlight Homes North Carolina, L.L.C., expressed an interest in purchasing lots from Capitol City. Capitol City and Starlight created a shared Dropbox folder, wherein Capitol City and Starlight could exchange and view pertinent documents. The Dropbox had a sub-folder specifically designated for Capitol City's contract with Green Hill and included documents relating to that contract. Capitol City retained Mr. Sack to represent it in its potential deal with Starlight.

In August 2021, Mr. Sack exchanged with Starlight's attorney a draft agreement and other related documents. Those documents included "a schedule of Capitol City['s] [] 'real estate contracts' to be assigned to Starlight." This schedule listed the January 2021 Green Hill Agreement.

In September 2021, Green Hill told Capitol City that it would no longer be able to sell lots for $50,000 and proposed a new agreement that included a price of $65,000 per lot. Capitol City told Starlight of Green Hill's new proposal. On 20 September 2021, Starlight approved "the change to the existing January 2021 Green Hill [] Agreement to increase the base price of lots to $65,000 without installation of concrete pads." An updated version of the agreement between Capitol City and Green Hill was signed on 28 September 2021 ("September 2021 Green Hill Agreement"). That same day, Capitol City uploaded a copy of the signed September 2021 Green Hill Agreement to its shared Dropbox folder with Starlight.

On 1 October 2021, Mr. Sack emailed Capitol City "a copy of the then-existing draft of the 'lot contract list' for review" by Capitol City. Capitol City responded and told Mr. Sack to include the "New Contract (revised lot purchase price) Attached for Green Hill" and attached a copy of the September 2021 Green Hill Agreement to its email. Accordingly, Mr. Sack updated the schedule of Capitol City's real estate contracts to reflect the September 2021 Green Hill Agreement.

Mr. Sack shared these documents with Starlight. On 24 November 2021, Starlight's counsel emailed back to Mr. Sack a "red-lined" version of the documents. This red-lined version deleted the reference to the September 2021 Green Hill Agreement and, in its place, added the following reference to the January 2021 Green Hill Agreement: "Purchase Agreement (Green Hill Subdivision) by and between Green Hill Drive, LLC, as seller, and Capitol City Homes, LLC, as buyer, dated January 19, 2021."

A week later, on 1 December 2021, Capitol City[1] and Starlight executed a purchase and sale agreement. According to Capitol City, the purchase and sale agreement "was jointly prepared by and was reviewed and approved" by Mr. Sack. The real estate contracts schedule referenced in the executed purchase and sale agreement lists the January 2021 Green Hill Agreement, not the September 2021 Green Hill Agreement.

Pursuant to the terms of the purchase and sale agreement, $800,000 was deducted from Starlight's purchase price and was deposited with an escrow agent. Capitol City was to receive $400,000 of these escrowed funds on 1 December 2023.

1. Sage Built, LLC, which owns an interest in Capitol City, was also a party to the December 2021 purchase and sale agreement but is not a party to this appeal.

On 30 November 2023, one day before the escrowed funds were to be released to Capitol City, Starlight issued a claim notice against the escrowed funds. Starlight asserted that it was not aware of any modification of the contract between Capitol City and Green Hill and that it expected to enforce the January 2021 Green Hill Agreement to purchase the lots for $50,000 each. Over Capitol City's objections, the escrow agent refused to release the funds.

Capitol City commenced this action by filing a complaint on 20 May 2024, seeking a declaratory judgment that "Starlight Homes' Claim Notice is without merit, that no breach or material breach of the Purchase and Sale Agreement has occurred, that Starlight Homes has suffered no damage or 'Indemnity Loss,' and that the Escrowed Funds should be released as though no Claim Notice were made." Also in its complaint, Capitol City brought a legal malpractice claim against Mr. Sack.

Mr. Sack filed a motion to dismiss pursuant to North Carolina Civil Procedure Rules 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. The trial court denied Mr. Sack's motion to dismiss on 21 October 2024. Mr. Sack timely appealed.

Capitol City moved to dismiss the appeal for lack of appellate jurisdiction.

II. Appellate Jurisdiction

Mr. Sack appeals from the trial court's interlocutory order denying his motion to dismiss. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733 (1995) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990).

A party may immediately appeal an interlocutory order, however, "when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379 (1994) (quotation marks and citations omitted). A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130 (1976) (citation omitted). It must affect those interests that a party "is entitled to have preserved and protected by law."

Id. (citation omitted). The substantial right test "is more easily stated than applied[;] . . . it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 219 (2016) (quotation marks and citation omitted).

Here, Mr. Sack argues that the denial of his motion to dismiss deprives him of his substantial rights "to defend a legal malpractice case using the 'case within a case' method of proof" and "to avoid the risk of inconsistent verdicts." We disagree.

A. Case within a case "method of proof"

A plaintiff in a legal malpractice action must prove the merits and damages of the underlying case or matter in which the lawyer represented them in addition to proving malpractice by the lawyer. *See Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 66 (2003) ("[A] legal malpractice plaintiff is required to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim."). "This has been referred to as having to prove 'a case within a case.' " *Id.* (*quoting Kearns v. Horsley*, 144 N.C. App. 200, 211 (2001)). Generally, a plaintiff must show that, but for the alleged malpractice, he or she would have prevailed or fared better in the underlying case. *Formyduval v. Britt*, 177 N.C. App. 654, 658 (2006).

The denial of Mr. Sack's motion to dismiss does not change Capitol City's burden "to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim," *Hummer*, 157 N.C. App. at 66, nor does it impact the methods through which Mr. Sack can defend the legal malpractice claim brought against him. The merits of and damages resulting from the underlying breach-of-contract case—even if the damages include only litigation costs—must be decided before any legal malpractice is determined. *See Kearns*, 144 N.C. App. at 208-09. The trial court can bifurcate the cases, trying the underlying case to a conclusion first and then, if necessary, trying the malpractice action. *See id.* (affirming the trial court's decision to bifurcate the trial of the underlying personal injury action from the legal malpractice action, noting that "the trying of both cases at once would likely have prejudiced the [legal malpractice] defendants in defending themselves"); *see also, e.g.*, *McMurty v. Wiseman*, 237 F.R.D. 167, 167 (W.D. Ky. 2006) (allowing plaintiff's motion to bifurcate: "[A]biding by the 'case within a case' format for legal malpractice actions, the underlying claims for fraud, negligence and negligent misrepresentation against [the original defendant] shall proceed first, followed by the professional negligence case against the [legal malpractice] [d]efendants for their alleged legal malpractice."). Accordingly, Mr. Sack has failed to show that his "right to defend a legal malpractice case using the 'case within a case' method of proof" is a substantial right that would be lost or jeopardized absent immediate appeal of the trial court's order denying is his motion to dismiss.

B. Inconsistent verdicts

"The right to avoid one trial on [a] disputed issue[] is not normally a substantial right that would allow an interlocutory appeal. . . ." *Green v. Duke Power Co.*, 305 N.C. 603, 606 (1982) (citation omitted). A party's right to avoid a risk of receiving inconsistent verdicts may, however, constitute a substantial right. *Woody v. Vickrey*, 276 N.C. App. 427, 434 (2021). A risk of inconsistent verdicts means that there is "a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 19 (2019) (citation omitted). To show that a trial court's order affects a substantial right based on a risk of inconsistent verdicts, the appellant must show "that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp.*, 119 N.C. App. at 736 (citation omitted).

Here, Mr. Sack's argument is not that he risks inconsistent verdicts before two different juries, but is instead that one jury would reach an internally inconsistent verdict, finding for Capitol City on both claims. But a jury's finding for Capitol City on both claims is not necessarily inconsistent. Mr. Sack's alleged malpractice does not stem from his representation of Capitol City in its breach-of-contract action against Starlight; it stems from Mr. Sack's alleged failure to properly prepare the purchase agreement. A finding for Capitol City in its breach-of-contract action against Starlight may not absolve Mr. Sack from legal malpractice liability where the alleged malpractice *resulted in* the breach-of-contract action, causing damages in the form of litigation and attorney's fees. Furthermore, to the extent a jury's finding for Capitol City on both claims is inconsistent, the appropriate way to address an inconsistency would be through post-judgment motions. *See* N.C. Gen. Stat. §§ 1A-1, Rule 50(b), Rule 59(a) (2025).

Accordingly, Mr. Sack has failed to show that he has a right "to avoid the risk of inconsistent verdicts" that would be lost or jeopardized if the trial court's order denying his motion to dismiss is not immediately appealed.

Mr. Sack has filed a petition for writ of certiorari, asking this Court to issue a writ of certiorari and address the merits of this appeal, should we determine we have no jurisdiction. In our discretion, we deny the petition for a writ of certiorari. *See* N.C. R. App. P. 21(a).

III. Conclusion

For the reasons stated herein, Mr. Sack has failed to show the interlocutory order denying his motion to dismiss is immediately appealable. We thus dismiss his appeal for lack of subject matter jurisdiction. We deny Mr. Sack's petition for writ of certiorari.

DISMISSED.

Judges STROUD and GRIFFIN concur.

MIYA GILES-JONES, Plaintiff
v.
THURSTON ROBINSON, Defendant

No. COA25-322

Filed 5 November 2025

Jury—juror misconduct—no prejudice shown—new trial granted—abuse of discretion

In a civil case, the trial court abused its discretion in allowing plaintiff's motion for a new trial pursuant to Civil Procedure Rule 59, based on juror misconduct, where a witness averred that, shortly after she testified at trial, a juror (who was already a social media "friend" of the witness) contacted the witness and asked for a date. At the motion hearing, the witness testified that she declined the date and deleted the juror as a social media "friend" for the duration of the trial; after the jury verdict was reached, there was some further contact between the witness and the juror, during which the juror stated that the jury's decision was unrelated to the witness's rejection of a date. Because the improper contact between the witness and the juror did not affect the verdict, it was nonprejudicial and therefore did not entitle plaintiff to a new trial.

Judge COLLINS dissenting.

Appeal by defendant from order entered 12 August 2024 by Judge George R. Hicks III in Cumberland County Superior Court. Heard in the Court of Appeals 9 September 2025.

Tin Fulton Walker & Owen, PLLC, by Zachary Ezor, for appellant-defendant.

Law Offices of Antonio F. Gerald, PLLC, by Antonio Gerald, and the Michael Porter Law Firm, by Michael R. Porter, for plaintiff-appellee.

FLOOD, Judge.

Defendant Thurston Robinson appeals from the trial court's granting of Plaintiff Miya Giles-Jones's motion for a new trial pursuant to Rule 59. On appeal, Defendant argues the trial court erred in granting a new trial where Plaintiff failed to show prejudice. Upon careful review, we conclude the trial court abused its discretion in granting a new trial where there was no showing of prejudice.

I. Factual and Procedural Background

In January 2023, Plaintiff filed a civil complaint against Defendant. A trial was held in 2024, and, prior to opening statements, the trial court instructed the jurors to "not talk or communicate in any way with any of the parties in this case[,]" including the witnesses. After the close of all evidence, the jury returned a unanimous verdict in favor of Defendant.

On 28 May 2024, Plaintiff filed a motion for a new trial pursuant to Rule 59(a)(2), requesting a new trial "based upon juror misconduct[.]" In her motion, Plaintiff explained that "shortly after [witness Sarrayyah Kennedy's] testimony" during the trial, a juror "initiated contact with [Kennedy] via [F]acebook messenger and propositioned her for a date[,]" which she declined. Kennedy's role in the trial lasted for about ten minutes, during which time she testified that she was "best friend[s]" with Plaintiff's mother and had a personal dispute with Defendant's wife.[1] Plaintiff contended that because Kennedy "turned [the juror] down for

1. According to the transcript, the jury entered the courtroom at 11:37 a.m., Kennedy was called to the witness stand, the jury heard Kennedy's testimony—both direct and cross-examination—and the jury then exited the courtroom at 11:53 a.m. During these fifteen minutes, the jury left the courtroom briefly between 11:41 a.m. until 11:46 a.m. while the parties discussed an evidentiary matter.

said date and deleted the message[,]" this incident "tainted the trial" and "prevented Plaintiff from having twelve unbiased and impartial jurors[.]"

Plaintiff attached Kennedy's affidavit to her Rule 59 motion. In Kennedy's affidavit, she explained that the juror "was a friend on [her] Facebook page prior to the beginning of the aforementioned trial, but [they] had never met each other before in person prior to the trial." Kennedy stated that "[o]n the day he message[d] me, [the juror] had asked me out on a date but I told him that I would not because the guy I was dating last year passed away." She then "told [the juror] that [they] needed to delete each other until after the trial[,]" which she did. She did not inform counsel until after the verdict was reached, claiming that she "did not come forward sooner . . . because the case was not discussed" in the brief communication during the trial.

The trial court conducted a hearing on the matter during which the trial court had the following relevant examination with Kennedy:

> THE COURT: All right. Did you provide any information to him about this case whether it be about the Plaintiff or family or anything else to him?
>
> THE WITNESS: No.
>
> THE COURT: Didn't give him any information at all?
>
> THE WITNESS: No information whatsoever.

The trial court then asked if Kennedy and the juror had communicated since then, to which Kennedy responded they had on 18 May 2024, after the verdict had been reached and the judgment was entered.

> THE COURT: Let's talk about the 18th. What happened?
>
> THE WITNESS: The 18th he just pretty much was asking me out. And then he said that he wished that the case could have went different [sic], and just saying what shortcomings on that side.
>
> THE COURT: Okay. So I don't want to get into the particulars of that necessarily, but he was providing the reasoning for the jury's decisions -- for at least some of it?
>
> THE WITNESS: Yes, yes, some -- somewhat, yes.
>
> THE COURT: Okay. And well, to the extent he told you, it didn't have anything to do with y'all not dating, did it?
>
> THE WITNESS: No.

The juror did not testify at the hearing. The trial court subsequently granted Plaintiff's motion for a new trial. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear this appeal from a superior court pursuant to N.C.G.S. § 1-277(a) (2023).

III. Standard of Review

This Court reviews a trial court's decision to grant a Rule 59 motion for abuse of discretion. *Batlle v. Sabates*, 198 N.C. App. 407, 423 (2009). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Davis v. Davis*, 360 N.C. 518, 523 (2006) (citation and internal quotation marks omitted). In order to grant a new trial pursuant to Rule 59(a)(2), the moving party must "demonstrate prejudice." *Sisk v. Sisk*, 221 N.C. App. 631, 635–36 (2012) ("New trials are not awarded because of technical errors. The error must be prejudicial."). "When the trial court grants or denies a motion for a new trial without making findings of fact, our review is limited to determining whether the record indicates that the ruling amounts to a manifest abuse of discretion." *Strickland v. Jacobs*, 88 N.C. App. 397, 399–400 (1988); *see also Elks v. Hannan*, 68 N.C. App. 757, 760 (1984) ("[T]he significant and controlling thing for the purposes of [] appeal is that the record does not show that the order was clearly erroneous or amounted to a manifest abuse of discretion." (citation omitted)); *State v. Jackson*, 77 N.C. App. 491, 502–03 (1985) (determining from the record, including the trial court's investigation, that there was no abuse of discretion where Plaintiff failed to show prejudice).

IV. Analysis

On appeal, Defendant argues the trial court erred in granting Plaintiff's Rule 59 motion for a new trial. Specifically, Defendant contends Plaintiff did not demonstrate that the incident between the witness and the juror prejudiced Plaintiff. We agree.

Under Rule 59(a)(2), "[a] new trial may be granted" based on the "[m]isconduct of the jury[.]" N.C. R. Civ. P. Rule 59 (a)(2). "Misconduct must be determined by the facts and circumstances of each case, and the circumstances must be such as not merely to put a suspicion on the verdict, because there was an opportunity and a chance for misconduct, but that there was in fact misconduct." *State v. Rutherford*, 70 N.C. App. 674, 677 (1984) (citation modified). "Where juror misconduct is alleged, it is incumbent upon the trial court to make such an investigation as is appropriate, including examination of the juror involved when warranted, to determine whether or not misconduct has occurred, and if so, whether such conduct has resulted in prejudice." *Jackson*, 77 N.C. App. at 502. "An examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous or where the witness did not overhear the juror or third party talk about the case." *Id.* at 503. Additionally, "[a] denial of motions made because of alleged juror misconduct is equivalent to a finding that no prejudicial misconduct has been shown[,]" and thus, in other words, a granting of motions made because of juror misconduct will be the equivalent to a finding that prejudicial misconduct has been shown. *Id.* at 502–03.

Our Supreme Court has held that "nonprejudical conversations between jurors and parties . . . will not vitiate the verdict." *O'Berry v. Perry*, 266 N.C. 77, 81 (1965) (citation omitted). In *O'Berry*, a juror, the plaintiff, and a witness met while leaving the courthouse for a lunch break, and "walked to lunch together, talking about fishing and corned herring." *Id.* at 80. "[T]hey thought the proprieties and the amenities were observed so long as they did not discuss the case." *Id.* at 81. One of the multiple defendants moved for a new trial, but the trial court denied the motion, finding that although the incident should not have taken place, "the questioned encounter was casual, and that [the juror] had not affected the verdict." *Id.* Our Supreme Court affirmed the denial for a new trial, and held that "brief, public, and nonprejudicial conversations between jurors and parties or their relatives will not vitiate the verdict or require that the jury be discharged, and a mistrial is properly denied where the conversation was conceived in innocence and related to a matter entirely foreign to the case." *Id.* (citation omitted); *see also Rutherford*, 70 N.C. App. at 677–78 (affirming no new trial was necessary where: "the conversation lasted only minutes" and "did not concern the defendants' case or [the juror's] jury service"; and "the trial court concluded that the conversation had no effect on the verdicts rendered against the defendants[,] and that the defendants had not been prejudiced thereby").

Although we give great deference to the trial court when reviewing under an abuse of discretion standard, *see Davis*, 360 N.C. at 523, here, we find no evidence in the Record to support a demonstration of prejudice. The conversation between the juror and Kennedy was brief and did not involve any information about the case; the parties ceased further communication until after the trial; Kennedy testified to the trial court that, based on what the juror later told her, the outcome of the case did not have to do with Kennedy declining a date with him while she was still dealing with the loss of her previous boyfriend's passing; and the juror did not testify at the hearing to show the communication created any prejudice towards Plaintiff. *See Sisk*, 221 N.C. App. at 636; *Jackson*, 77 N.C. App. at 502. Since the trial court made no findings of fact, our review of the Record here indicates that granting a new trial was an abuse of discretion where the evidence from the hearing shows only that the verdict was not affected by this conversation. *See Strickland*, 88 N.C. App. at 399–400; *see also O'Berry*, 266 N.C. at 81; *Rutherford*, 70 N.C. App. at 677.

We do not lightly conclude the trial court abused its discretion in granting a new trial:

> [W]e note that the trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. . . . Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.

Worthington v. Bynum, 305 N.C. 478, 487 (1982). Because the cold Record does not contain a showing of prejudice, *see id.* at 487, we find the trial judge's decision to grant a new trial to be unsupported by reason, *see Davis*, 360 N.C. at 523.

Plaintiff, arguing there should be a "presumption of prejudice in this instance[,]" requests this Court to "lay down a clear Rule that a Trial Court has the ultimate authority to regulate jurors reaching out to witnesses via social media or by other electronic means during the course of a trial." The dissent references portions of Plaintiff's argument, including: "the witness's rejection of the juror is 'prima [facie]' evidence that the contact *could* create juror bias" and that a "desire for dates and trying to get to know a woman *can* make you do irrational and things you shouldn't[.]" (emphasis added). The dissent likewise points out that Plaintiff requested the trial court to find that such "inappropriate contact . . . is prejudicial in nature" since "we'll never truly know what would have happened but for that[.]"

Establishing such a *per se* rule, however, would allow trial courts to grant a new trial for non-prejudicial, technical violations of its orders, which conflicts with our well-settled principles that hold "[n]ew trials are not awarded because of technical errors[,]" but rather only when the error is "prejudicial." *Sisk*, 221 N.C. App. at 636. To affirm the trial court would require creating a rule that inappropriate juror contact is *per se* prejudicial, or allowing the reviewing court to make inferences of prejudice not shown in the Record; we decline to do either. *See State v. Branch*, 306 N.C. 101, 105 (1982) ("In making our review and reaching our determination upon the facts of a particular case, we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record.").

Notwithstanding a juror violating the trial court's instruction to have no witness contact, the Record before us lacks a showing of *actual* prejudice. The witness explicitly answered "[n]o" when the trial court asked if the juror informed the witness whether the verdict had "anything to do with y'all not dating" and confirmed the two did not discuss the case. Further, the trial court disagreed with Plaintiff calling the witness's actions "rejection per se." Paraphrasing the witness's affidavit, the trial court explained the witness had told the juror she had lost someone to death in the past, "so maybe we should not do it now[,]" and "let's not talk until after the trial." The trial court then stated that such communication "doesn't seem to lead to a disgruntled juror."

We discern no evidence in the Record of Plaintiff establishing that the brief communication between a witness and a juror prejudiced the trial. *See Sisk*, 221 N.C. App. at 636. Accordingly, we hold the trial court abused its discretion in awarding Plaintiff's Rule 59 motion for a new trial. *See Davis*, 360 N.C. at 523.

V. Conclusion

Upon careful review, we conclude the trial court abused its discretion in awarding Plaintiff's Rule 59 motion for a new trial where Plaintiff failed to demonstrate prejudice.

VACATED AND REMANDED.

Judge CARPENTER concurs.

Judge COLLINS dissents in separate opinion.

COLLINS, Judge, dissenting.

A juror contacted a witness on Facebook Messenger, likely from the jury room, minutes after the witness had testified, flagrantly violating the trial court's prohibitions against using cell phones and internet devices and contacting witnesses. After a thorough investigation into the matter, the trial court granted Plaintiff's Rule 59(a) motion for a new trial. Because the record indicates to me no abuse of discretion by the trial court, I respectfully dissent.

A new trial may be granted to a party for "[m]isconduct of the jury." N.C. Gen. Stat. § 1A-1, Rule 59(a)(2) (2024). A motion under Rule 59(a) "is addressed to the sound discretion of the trial judge." *Frye v. Anderson*, 86 N.C. App. 94, 95 (1987) (citation omitted). "A ruling in the discretion of the trial judge raises no question of law." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 381 (1985) (citation omitted).

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Worthington v. Bynum, 305 N.C. 478, 482 (1982) (citations omitted). "The standard for review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention." *Pearce v. Fletcher*, 74 N.C. App. 543, 544 (1985). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487.

After the jury was impaneled in this case, the trial court instructed the jurors, consistent with North Carolina Pattern Instruction Crim. 100.25, in pertinent part as follows:

> Now I've got a few rules here, and some of these are quite repetitive -- can't hurt. *While you serve as a juror in this case, I want you to follow each of these rules.*
>
> . . . .

Third, *you must keep your cell phones and internet devices off when you're in the courtroom or in the jury room for that matter*. That assures us that you're not doing independent research in the jury room, and I've already told you you can't do that.

We've only had one violation so far which is amazing. I heard it very quietly back there, but while you're in the courtroom, keep them somewhere hidden, *keep them turned off*.

While the court -- *while we're in trial, you may only talk on a cell phone or use the device if you are outside of the jury room* preferably if you're on a break and go away somewhere. All right.

. . . .

Fifth, *you must not talk or communicate in any way with any of the parties in this case. That means the lawyers, the witnesses, anybody, and that rule applies as well as outside of the courtroom. It prohibits any type of conversation, again, whether it's about the weather or just to pass the time of day.*

You will see in the courtroom and about the courthouse lawyers, law enforcement, and others who may be involved in the case. *If you pass us or any of the witnesses in the elevator, in the hallway, whatever, ignore us, and we will also ignore you*. It's not being rude. *It's just important for you to understand it would be improper to engage in any kind of conversation*, and it just has an appearance of impropriety.

. . . .

Each of you must obey each of these rules to the letter. Unless you do, there's no way the Plaintiff or the Defendant can be assured of absolute fairness and impartiality.

It is your duty both while the trial is in progress or while it's even on a recess or while you're in the jury room to see that you remain a fair and impartial trier of the facts. Again, if you violate these rules, it could be

> contempt and subject you to punishment. We don't want to go there.

(Emphasis added.)

In direct violation of many of these instructions, a juror contacted one of Plaintiff's witnesses on Facebook Messenger, likely from the jury room, at around noon on the second day of trial, within minutes after the witness had testified. The juror was the witness's Facebook Friend, and he asked her out on a date. The witness declined. She told the juror they "needed to delete each other until after the trial[.]" Two days later, the jury returned its verdict in favor of Defendant. Two days after that, the juror again contacted the witness through Facebook Messenger to ask her out on a date; she declined and the two exchanged messages. Thereafter, the juror continued to contact the witness and ask her out.

The trial court held a hearing on Plaintiff's Rule 59(a) motion for a new trial. The juror could not be located; the witness testified, submitted an affidavit, and submitted screen shots of messages exchanged between the juror and herself after the trial. The witness testified that she had deleted the messages exchanged during trial. The trial court and both parties' attorneys questioned the witness extensively about the circumstances surrounding the juror's misconduct, and the trial court heard extensive arguments by the attorneys.

The trial court indicated that it was "concerned about the standard we set if we say this jury was a fair jury" and was specifically "concerned about juror contact" in light of its repeated instructions to the jurors not to have any contact with witnesses. The trial court considered Plaintiff's arguments as to prejudice, including: (1) the witness's rejection of the juror is "prima facie" evidence that the contact could create juror bias; (2) a "desire for dates and trying to get to know a woman can make you do irrational and things you shouldn't"; and (3) the "inappropriate contact . . is prejudicial in nature, and unfortunately, we'll never truly know what would have happened but for that[.]" The trial court also considered Defendant's arguments that there was no prejudice.

Toward the end of the hearing, the trial court recessed and spoke with the attorneys in chambers. Upon returning, the trial court announced:

> All right. Having discussed this with counsel, I – I'm going to take this under advisement. There are significant issues on both sides, and I want to make sure we get this right.

Ten days later, the trial court issued an order stating, "[T]he Court, after conducting an investigation into the alleged prejudicial juror misconduct, reviewing the record proper, hearing evidence, and considering arguments of counsel and relevant law, in the exercise of its discretion hereby ALLOWS the Plaintiff's Motion for a New Trial."

Although the majority recites an abuse of discretion standard of review, it then essentially applies a de novo standard to determine – on the cold record – that there was no prejudice from the juror misconduct. However, as this Court in *Elks v. Hannan* articulated in affirming the trial court's order allowing a new trial in that case:

> The order being discretionary, that the record does not positively show that the jury was prejudiced by the incident which occurred is unimportant; the significant and controlling thing for the purposes of this appeal is that the record does not show that the order was clearly erroneous or amounted to a manifest abuse of discretion.

Elks v. Hannan, 68 N.C. App. 757, 760 (1984) (citation omitted).

Defendant and the majority rely on *O'Berry v. Perry*, 266 N.C. 77, 81 (1965), to support the conclusion that the trial court in this case abused its discretion in awarding a new trial. I think this reliance is misguided.

First, that case is factually distinguishable. Unlike in *O'Berry* where a juror and a witness inadvertently came into contact in a public place when headed to lunch, the juror in this case privately initiated digital contact with the witness from the jury room within minutes of her testifying. Furthermore, the fact that the Court in *O'Berry* concluded that the trial court did not abuse its discretion does not *compel* a conclusion in this case that the trial court abused its discretion. That is the nature of the abuse of discretion standard.

In *O'Berry*, the trial court conducted a hearing on the matter, "found that the questioned encounter was casual, and that [it] had not affected the verdict[,]" and denied the motion for a new trial. *Id.* at 81. In affirming the trial court's order, we noted that the encounter did not "*require* that the jury be discharged," *id.* (emphasis added) (citations omitted), and we reiterated the discretionary nature of the trial court's decision: "The granting or denial of a motion for a mistrial or a new trial because of the alleged misconduct of a juror rests in the sound discretion of the trial judge, and his ruling will be upheld on appeal unless it is clearly erroneous[,]" *id.* (citation omitted). We concluded, "In the judge's refusal to set this verdict aside there is no evidence or suggestion of an abuse of discretion. His ruling will not be disturbed." *Id.*

We did not state in *O'Berry* that the encounter would not have *allowed* the jury to be discharged or that the trial court would have abused its discretion had it allowed the motion for a new trial. We simply refused to disturb the trial court's ruling because there was "no evidence or suggestion of an abuse of discretion." *Id.*

Here, as in *O'Berry*, there is "no evidence or suggestion of an abuse of discretion." *Id.* To be sure, the trial court in this case could have denied the motion for a new trial, and I would have affirmed that decision because the record does not "affirmatively demonstrate[] a manifest abuse of discretion by the judge." *Worthington*, 305 N.C. at 482 (citations omitted). Likewise, I would affirm the trial court's order granting a new trial because the record does not "affirmatively demonstrate[] a manifest abuse of discretion by the judge." *Id.*

HORIZON FOREST PRODUCTS, L.P. D/B/A HORIZON FOREST PRODUCTS, PLAINTIFF
v.
FLOWERS FLOORING, LLC, AND JEREMY WILLIAM FLOWERS, DEFENDANTS

No. COA25-171

Filed 5 November 2025

Civil Procedure—failure to state a claim—issuing check unsupported by sufficient funds—taking ownership of goods without payment—punitive damages

In a civil proceeding arising from the utterance (by the individual defendant) of a check in payment for wood products sold by plaintiff to defendant flooring company that was refused for insufficient funds—leaving plaintiff without those funds (or its goods) and with a bank service fee—the trial court erred in dismissing plaintiff's claims for fraud, conversion, and punitive damages against both defendants for failure to state a claim because: (1) attempting to pay by a check unsupported by sufficient funds can suffice to sustain a fraud claim (including by a corporate officer who participated in the fraud); (2) taking of control and ownership of products without proper payment can constitute conversion; and (3) punitive damages may be awarded where a defendant is liable for compensatory damages and actual fraud related to the injury occurred.

Appeal by Plaintiff from judgment entered 4 December 2024 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 27 August 2025.

Sands Anderson PC, by Joshua L. Rogers, for Plaintiff-Appellant.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for Defendants-Appellees.

GRIFFIN, Judge.

Plaintiff Horizon Forest Products, L.P., appeals from the trial court's dismissal of Plaintiff's alleged fraud, conversion, and punitive damages claims against Defendants Flowers Flooring, LLC, and Jeremy William Flowers. Plaintiff contends a single incident of writing a worthless check is sufficient for fraud and punitive damages claims. Further, Plaintiff asserts Jeremy Flowers can be individually liable because he actively participated in the wrongdoing. Finally, Plaintiff purports it properly alleged all elements of conversion. We agree with Plaintiff on all arguments, and reverse and remand.

I. Factual and Procedural Background

Plaintiff sold wood products to Flowers Flooring on 21 April 2023. Jeremy Flowers wrote a check in the amount of $17,498.78 on behalf of Flowers Flooring and Flowers Flooring delivered the check to Plaintiff. The check was not honored when Plaintiff tried to cash it, leaving Plaintiff without those funds and an additional bank service fee.

Less than a year later, Plaintiff filed a complaint and issuance of summons. Shortly after, Defendants moved to dismiss the action for failure to state a claim upon which relief can be granted.

On 3 September 2024, Judge Sasser entered an order dismissing Plaintiff's claims of fraud, conversion, and punitive damages while keeping its breach of contract and unjust enrichment claims as to Flowers Flooring; and dismissing the fraud, conversion, punitive damages, breach of contract, and unjust enrichment claims as to Jeremy Flowers. About a month afterward, Plaintiff and Flowers Flooring participated in arbitration for breach of contract and unjust enrichment, where the arbitrator found for Plaintiff.

On 4 December 2024, Judge Walczyk entered judgment on the arbitrator's decision and the September 3 order, finalizing the dismissal of fraud, conversion, and punitive damages claims. Plaintiff timely appeals.

II. Analysis

Plaintiff argues the trial court erred in its dismissal of fraud, conversion, and punitive damages claims against Flowers Flooring as well as in its dismissal of fraud, conversion, and punitive damages claims against Jeremy Flowers.

A. Standard of Review

This Court reviews an appeal from a Rule 12(b)(6) motion to dismiss order under a de novo standard of review to determine a pleading's legal sufficiency and to ensure the trial court ruled correctly on the motion to dismiss. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). We then determine whether the factual allegations of the complaint, when treated as true, sufficiently state a claim upon which relief may be granted. *Taylor v. Bank of America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022) (citation omitted). The complaint must be liberally construed. *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014). Rule 12(b)(6) dismissal is proper when a complaint's claim on its face is unsupported by law, the complaint on its face shows a lack of sufficient facts to make a claim, or the complaint discloses facts that undermine a claim. *Howe v. Links Club Condo. Ass'n, Inc.*, 263 N.C. App. 130, 137, 823 S.E.2d 439, 447 (2018) (citation omitted).

B. Fraud

Plaintiff alleges the trial court erred in its dismissal of fraud claims for both Flowers Flooring and Jeremy Flowers, as a corporate officer.

An actual fraud claim must include (1) a false representation, (2) that was reasonably designed to deceive, (3) made with intent to deceive, (4) that deceives, and (5) damages the party who was deceived. *Vanguard Pai Lung, LLC v. Moody*, 387 N.C. 376, 383, 912 S.E.2d 788, 794 (2025) (citation omitted); *Forbis v. Neal*, 361 N.C. 519, 526–27, 649 S.E.2d 382, 387 (2007) (citation omitted). Fraud must be plead with particularity, including the " 'alleg[ed] time, place, and content of the fraudulent representation,' " the identity of the person who made the representation, and the acquisition from the misrepresentation. *Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc.*, 385 N.C. 250, 263, 891 S.E.2d 100, 112 (2023) (citation omitted). Mere conclusory statements alleging fraud will be insufficient. *Sharp v. Teague*, 113 N.C. App. 589, 597, 439 S.E.2d 792, 797 (1994) (citation omitted); *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

Attempting to pay with checks unsupported by sufficient funds can qualify as a sufficient fraud claim. *Austin v. Tire Treads, Inc.*, 21 N.C. App. 737, 739, 205 S.E.2d 615, 616 (1974) (citation omitted). Plaintiff should show that the alleged insufficiently funded checks were not liquid when issued or collectable for a reasonable period after the checks were issued. *Id.* at 740, 205 S.E.2d at 617.

A corporate officer, even when acting as an agent of an entity, may be personally liable when he or she actively participated in fraud. *Palomino Mills v. Davidson Mills Corp.*, 230 N.C. 286, 292, 52 S.E.2d 915, 919 (1949); *see Austin*, 21 N.C. App. at 739–40, 205 S.E.2d at 616–17; *Taft v. Brinley's Grading Servs., Inc.*, 225 N.C. App. 502, 520, 738 S.E.2d 741, 752 (2013). For example, a corporate officer may face personal liability for fraud when misrepresenting a company's financial condition causing damage to another party. *Austin*, 21 N.C. App. at 739, 205 S.E.2d at 616–17 (citation omitted).

Here, Plaintiff alleges Flowers Flooring, through Jeremy Flowers, delivered Plaintiff a check not supported by sufficient funds, a plausible form of false representation when treated as true. Plaintiff declares Defendants knew that the amount in the check's account was insufficient to pay for the goods. Further, Plaintiff contends Defendants had no intention of paying Plaintiff. Moreover, Plaintiff asserts Defendants intended to induce Plaintiff to rely on the validity of the check, and that Plaintiff reasonably relied on their misrepresentation. Defendant's check was then dishonored, damaging Plaintiff by the check amount and the bank service fee. Plaintiff sufficiently addresses each element of a fraud claim. These allegations, when treated as true, sufficiently state a fraud claim upon which relief can be granted.

Plaintiff not only alleged a sufficient fraud claim against Flowers Flooring, but also sufficiently alleged a fraud claim against Jeremy Flowers, individually. It is alleged Jeremy Flowers, as a corporate officer, actively participated in fraud when misrepresenting Flowers Flooring's financial condition. The complaint on its face shows it is supported by law and facts and none of the facts defeat the claim; thus, dismissal was not proper.

Plaintiff pleaded the fraud claim with appropriate particularity including the time, place, and content of the misrepresentation as well as the identities of the culprits and the acquisition from the misrepresentation. In its complaint, Plaintiff includes the date of the occurrence to be 21 April 2023, recognizes the fraudulent representation content as the check not supported by sufficient funds, identifies Jeremy Flowers made the misrepresentation in endorsing and delivering the worthless check, and highlights that Defendants acquired Plaintiff's expensive wood products without proper payment. Plaintiff's allegations satisfy the particularity statement and meet the Rule 12(b)(6) standard.

C. Conversion

Conversion essentially consists of (1) a plaintiff's ownership and (2) a defendant's wrongful possession. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation omitted). In other words, conversion is a tort consisting of unsanctioned control over goods or chattel that belong to someone else, resulting in exclusion of the owner's rights or in the object's alteration. *Id.*

The "economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30 (2007) (citation omitted). Generally, a breach of contract does not amount to a tort claim by the promisee against the promisor, but there are many exceptions including "a conversion of the property of the promisee, which was the subject of the contract, by the promisor." *N.C. State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345, 351 (1978) (citation omitted) (receiving negative treatment for a different reason); *see Lake Mary Ltd. Partnership v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552 (2001) (showing that a conversion claim may coexist with a breach of contract claim); *Di Frega v. Pugliese*, 164 N.C. App. 499, 509, 596 S.E.2d 456, 463–64 (2004) (holding the trial court did not err in denying the plaintiff's motion to dismiss the conversion claim, even with the existence of a lease agreement).

Plaintiff's conversion claim arises from the same factual circumstance as described in the fraud section: Defendants took control and ownership of Plaintiff's goods, the wood products, and failed to properly pay Plaintiff, resulting in Plaintiff's exclusion of its ownership rights. When treated as true, this allegation sufficiently states a conversion claim upon which relief may be granted.

Defendants argue the economic loss rule bars Plaintiff's conversion claim. However, conversion claims are excepted from the general rule that a breach of contract does not amount to a tort claim by the promisee against the promisor. *Ports Authority*, 294 N.C. at 82, 240 S.E.2d at 351. Therefore, Plaintiff is not barred from pursuing a conversion claim and sufficiently pled a compensable claim for conversion, considering the complaint must be liberally construed.

D. Punitive Damages

Punitive damages may be awarded if a claimant proves a defendant is liable for compensatory damages where actual fraud was present and related to the injury. N.C. Gen. Stat. § 1D-15(a)-(b) (2023); *Est. of Long v. Fowler*, 378 N.C. 138, 142, 861 S.E.2d 686, 691 (2021).

Plaintiff's punitive damages claim turns on Defendants' actual fraud, as previously discussed, related to Plaintiff's injury of $17,498.78 plus the $35 bank fee. The punitive damages claims, when treated as true, are sufficiently stated such that relief may be granted. Therefore, this claim should not be dismissed under Rule 12(b)(6).

III. Conclusion

At this stage, the allegations in Plaintiff's complaint, when treated as true, sufficiently state claims of fraud, conversion, and punitive damages on which relief can be granted against both Defendants. We reverse the trial court's dismissal of each of those claims and remand.

REVERSED AND REMANDED.

Judges CARPENTER and MURRY concur.

IN THE MATTER OF A.T. & E.T.

No. COA25-99

Filed 5 November 2025

1. Termination of Parental Rights—guardian ad litem—appointed to parent without notice—abuse of discretion—review under Appellate Rule 2

In an appeal from an order terminating both parents' rights in their two minor children, the portion of the order terminating respondent-father's rights was vacated—and the matter was remanded as to respondent-father—because the trial court had abused its discretion in appointing respondent-father a guardian ad litem (GAL) without providing him prior notice and an opportunity to be heard, thereby depriving him of his constitutional right to conduct his own litigation. Notably, although respondent-father had not preserved this constitutional issue for appellate review, exceptional circumstances existed warranting review under Appellate Rule 2 where—because the trial court appointed the GAL sua sponte in a continuance order—respondent-father was never given an opportunity to object to the GAL's appointment.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—sufficiency of findings and evidence

After respondent-mother's two minor children were adjudicated neglected and removed from respondent-mother's custody on account of her marijuana use, mental health issues, and lack of stable housing and employment, the trial court properly terminated respondent-mother's parental rights on the ground of neglect (N.C.G.S. § 7B-1111(a)(1)). Competent evidence supported the court's factual findings, including that respondent-mother used marijuana throughout her pregnancies—causing both children to test positive for marijuana at birth—and that, before the department of social services first got involved, the family had been living in a van after being evicted. Furthermore, despite some evidence showing that respondent-mother had eventually secured stable housing, other evidence showed that she inconsistently followed her case plan, had not adequately addressed her marijuana usage or unstable employment, and had only recently begun following clinical recommendations concerning her mental health despite it being an issue throughout the life of the case. Therefore, the record established a likelihood of future neglect if the children remained in respondent-mother's care.

Appeal by Respondent-Parents from Order entered 13 September 2024 by Judge Adam S. Keith in Person County District Court. Heard in the Court of Appeals 24 September 2025.

Lisa Noda for Respondent-Appellant Father.

Patricia M. Propheter for Respondent-Appellant Mother.

No brief filed for Petitioner Person County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Reid C. Adams, Jr., and Caitlin T. Augerson, for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Parents appeal from an Order terminating their parental rights in Adeline and Elena.[1] The Record before us tends to reflect the following:

On 6 April 2023, pursuant to neglect petitions filed by Person County Department of Social Services (DSS), Adeline and Elena were adjudicated neglected juveniles.[2] In the Adjudication and Disposition Order, the trial court found DSS had received a report on 21 February 2023 alleging Respondent-Parents had been evicted from their home and were living in their vehicle with the juveniles. The trial court further found DSS had made contact with Respondent-Parents the following day and had taken the juveniles into custody after learning the family had "very limited income[,]" "did not have clothes for [Elena] and . . . only had dirty clothes for [Adeline][,]" and the children were sleeping in car seats which "were observed to be extremely dirty with old vomit on them with a very strong odor." Based on these findings, the trial court adjudicated the children neglected juveniles and ordered Respondent-Parents to develop a case plan with DSS.

As part of their case plan, DSS directed Respondent-Parents to undergo comprehensive psychological evaluations. Respondent-Mother's evaluation indicated "significant psychological problems" and diagnoses of borderline personality disorder, cannabis use disorder, and posttraumatic stress disorder. As to Respondent-Father, the evaluation indicated diagnoses of cannabis use disorder and either bipolar disorder or schizoaffective disorder. Respondent-Father, but not Respondent-Mother, was also administered an additional test to "gather information about his levels of academic functioning[.]" The results of this test indicated Respondent-Father was "not subject to cognitive limitations or learning disabilities that could complicate his case." The evaluating physician recommended "stable housing, mental health treatment, psychiatric medication" and discontinuing "abusing illicit substances[ ]" for both Respondent-Mother and Respondent-Father.

An initial permanency planning hearing was held on 1 June 2023. A permanency planning review hearing was scheduled for 16 November 2023. On that day, the hearing was continued until 7 December 2023. In the accompanying Continuance Order, the trial court indicated it

---

1. Pseudonyms agreed upon by the parties.

2. The trial court's Order was not entered until 19 October 2023.

had "reviewed [Respondent-Parents' psychological evaluations] . . . and finds that there is cause for a Rule 17 Guardian ad Litem to be appointed for both parents[.]" The Continuance Order was entered on 18 January 2024.

At the 7 December 2023 permanency planning review hearing, Respondent-Parents each appeared with their appointed Guardian ad litem. In the corresponding permanency planning review order, the trial court found Respondent-Mother had refused recommended mental health treatment and Respondent-Father did not have stable employment. The trial court identified mental health, housing, substance abuse, and employment as issues which presented barriers to reunifying Respondent-Parents with the juveniles.

On 24 January 2024, DSS filed Motions to Terminate Respondent-Parents' parental rights in Adeline and Elena. In the Motion, DSS alleged Respondent-Parents had not adhered to their case plan, had not consistently participated in the services it had made available to them to reunify with the juveniles, and had not consistently taken steps to become employed or sober. Pursuant to a permanency planning review hearing on 15 August 2024, the trial court found a "[l]ack of stable employment" and "mental health issues[ ]" remained as barriers to reunifying Respondent-Parents with the juveniles; however, the trial court no longer identified housing as an issue.

On 13 September 2024, the trial court entered an Order terminating Respondent-Parents' parental rights in Adeline and Elena pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Respondent-Father and Respondent-Mother respectively filed timely Notice of Appeal on 18 and 19 September 2024.

Issues

The issues on appeal are whether the trial court: (I) abused its discretion in appointing a Guardian ad litem for Respondent-Father without notice; and (II) erred in concluding grounds existed to terminate Respondent-Mother's parental rights in the minor children pursuant to N.C. Gen. Stat. § 7B-1111(a).

Analysis

I. Respondent-Father

[1] Respondent-Father's sole argument on appeal is that the trial court abused its discretion in appointing him a Guardian ad litem "without notice or conducting an inquiry." Respondent-Father contends this decision deprived him of his constitutional right to conduct his own litigation.

As a threshold matter, we note there is nothing in the Record to indicate Respondent-Father objected to being appointed a Guardian ad litem, and neither Respondent-Father nor the juveniles' Guardian ad litem has addressed preservation of this issue in their briefing to this Court.[3] "Our Courts have consistently stated, 'a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.' " *State v. Gardner*, 299 N.C. App. 251, 258, 917 S.E.2d 494, 500 (2025) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)); *see also In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022) (citations omitted); N.C. R. App. P. 10(a)(1) (2024).

However, in exceptional circumstances, our appellate courts may "consider constitutional questions not properly raised in the trial court[.]" *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citing N.C. R. App. P. 2) (other citations omitted). Based on the limited set of facts before us, we believe this is such an exceptional case. The Record tends to show the nature in which the trial court appointed Respondent-Father a Guardian ad litem—*sua sponte* in a continuance order—made it impossible for Respondent-Father to lodge a contemporaneous objection.[4] *See In re J.N.*, 381 N.C. at 135, 871 S.E.2d at 499 (Earls, J., concurring) ("[A] parent must actually have an opportunity to make the argument in the court below."); *cf. In re R.P.*, 252 N.C. App. 301, 305, 798 S.E.2d 428, 431 (2017) (holding that although a parent's right to findings regarding his constitutionally-protected status is waived if the parent does not raise the issue before the trial court, no waiver occurred where parent had not been afforded the opportunity to raise the issue). Thus, we, in our discretion, invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review Respondent-Father's argument.[5]

"On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2023). An incompetent adult is one who

---

3. Petitioner DSS did not file a brief.

4. It is, of course, possible—if not probable—there is more context to the trial court's determination Guardians ad litem were necessary for Respondent-Parents. However, we are constrained by the information in the Record before us.

5. N.C. R. App. P. 2 (2024) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.").

> lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.[6]

Id. § 35A-1101(7) (2023).

"[T]rial court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (citing *In re M.H.B.*, 192 N.C. App. 258, 261, 664 S.E.2d 583, 585 (2008)). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation, quotation marks, and alteration omitted). "The trial court should always keep in mind that the appointment of a guardian *ad litem* will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *In re J.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 48 (2005) (citing *Hagins v. Redevelopment Comm. of Greensboro*, 275 N.C. 90, 102, 165 S.E.2d 490, 498 (1969)).

In *Rutledge v. Rutledge*, the defendant-father's counsel filed a motion asking for a Guardian ad litem to be appointed for the defendant-father. 10 N.C. App. 427, 429, 179 S.E.2d 163, 164 (1971). The plaintiff-mother filed an affidavit in opposition of the motion; however, the defendant-father "did not appear in person or file answer[.]" *Id.* at 430, 179 S.E.2d at 164. The trial court denied the motion and this Court, on appeal, noted the denial was proper because it would have been erroneous for the trial court to appoint the defendant-father a Guardian ad litem where the record did not "indicate that the defendant had any knowledge or notice that such a motion was being made." *Id.* at 430-31, 179 S.E.2d at 165.

Here, there is no evidence on the Record that Respondent-Father had any knowledge prior to the entry of the trial court's Continuance Order that the trial court was considering appointing a Guardian ad litem for him. Thus, based on the Record before us, the trial court abused its discretion by appointing a Guardian ad litem for Respondent-Father

---

6. Notably, however, "an individual can simultaneously be found incompetent under Chapter 35A yet not require a GAL under Rule 17." *In re Q.B.*, 375 N.C. 826, 837, 850 S.E.2d 898, 905 (2020) (footnote omitted).

without providing Respondent-Father notice and an opportunity to be heard on the issue.[7] *See id.* at 431, 179 S.E.2d at 165 ("In the absence of notice to the defendant and opportunity granted him to be heard, appointment of a guardian for him would have been error." (citing *Hagins*, 275 N.C. at 101-02, 165 S.E.2d at 497-98)); *see also Hagins*, 275 N.C. at 101-02, 165 S.E.2d at 497-98 ("It is clear therefore that when a party's lack of mental capacity is asserted and denied—and he has not previously been adjudicated incompetent to manage his affairs—He is entitled to notice and an opportunity to be heard before the judge can appoint . . . a guardian ad litem for him." (citations omitted)).

Therefore, the trial court abused its discretion by appointing a Guardian ad litem for Respondent-Father without providing Respondent-Father notice and an opportunity to be heard.[8] Consequently, we vacate the Order as to Respondent-Father and remand for a new hearing, including any further determination as to the necessity of appointing a Guardian ad litem for Respondent-Father.[9]

---

7. The juveniles' Guardian ad litem, in his briefing to this Court, makes no argument addressing whether Respondent-Father received adequate notice and opportunity to be heard on the issue of being appointed a Guardian ad litem. Rather, the juveniles' Guardian ad litem, conceding Respondent-Father was *not* adjudicated mentally incompetent, argues Respondent-Father has "diminished capabilities," and, thus, Respondent-Father's Guardian ad litem was acting merely in an assistive role, rather than a substitutive role—which, according to the juveniles' Guardian ad litem, did not deprive Respondent-Father of his right to conduct his litigation according to his own judgment. We note this is not the appropriate analysis, since our General Statutes were amended in 2013 to authorize the appointment of a Guardian ad litem only for an incompetent adult—not an adult with diminished capacity. Therefore, even presuming there is evidence Respondent-Father has diminished capacity, the trial court should not have appointed a Guardian ad litem for Respondent-Father on this basis. Further, there is no evidence in the Record to support the assertion Respondent-Father's Guardian ad litem acted only in an assistive capacity. *See In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455 (insufficient evidence of whether Guardian ad litem was appointed to act in a substitutive versus assistive capacity where the trial court did not specify so in its order).

8. Additionally, the trial court's decision appears to have been based solely on Respondent-Father's psychological evaluation. It is true, the evaluation indicated Respondent-Father suffers from "severe mental illness," but "evidence of mental health problems is not *per se* evidence of incompetence to participate in legal proceedings." *In re J.R.W.*, 237 N.C. App. 229, 234, 765 S.E.2d 116, 120 (2014) (citations omitted); *see also In re Q.B.*, 375 N.C. at 836, 850 S.E.2d at 905 ("[A]s our case law demonstrates, neither mental health limitations nor a low IQ constitute per se evidence of a lack of competency for purposes of Rule 17." (citing *In re T.L.H.*, 368 N.C. at 110, 772 S.E.2d at 457; *In re Z.V.A.*, 373 N.C. 207, 210, 835 S.E.2d 425, 429 (2019); and *In re J.R.W.*, 237 N.C. App. at 234, 765 S.E.2d at 120)).

9. We note the trial court appointed a Guardian ad litem for Respondent-Mother in the same manner as Respondent-Father. However, Respondent-Mother has not argued on

II. Respondent-Mother

[2] Respondent-Mother argues the trial court erred in determining grounds existed to terminate her parental rights in Adeline and Elena.

"At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists." *In re O.J.R.*, 239 N.C. App. 329, 332, 769 S.E.2d 631, 634 (2015) (citations omitted); *see also* N.C. Gen. Stat. § 7B-1109(f) (2023). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (citation and quotation marks omitted). Likewise, "[u]nchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020) (citation and quotation marks omitted). We review the trial court's conclusions of law de novo. *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014) (citation omitted).

Here, the trial court concluded Respondent-Mother's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), which authorizes the trial court to terminate a party's parental rights if "[t]he parent has abused or neglected the juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2023). A "neglected juvenile" includes one whose parent does either of the following:

> a. Does not provide proper care, supervision, or discipline.
>
> . . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

Id. § 7B-101(15) (2023).

In this case, at the time of the termination hearing, approximately eighteen months had passed since the juveniles entered DSS custody. "[I]f the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citation omitted). In determining the likelihood of future neglect, our Supreme Court has noted: "Because it lacks a crystal ball,

---

appeal this decision was erroneous, and "[i]ssues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a) (2024).

a trial court may consider many past and present factors to make this forward-looking determination." *In re M.B.*, 382 N.C. 82, 86, 876 S.E.2d 260, 264 (2022) (citation omitted). "For instance, a trial court 'must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.' " *Id.* at 86, 876 S.E.2d at 265 (quoting *In re Z.V.A.*, 373 N.C. at 212, 835 S.E.2d at 430). "However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect." *Smith v. Alleghany Cnty. Dep't of Social Servs.*, 114 N.C. App. 727, 732, 443 S.E.2d 101, 104 (1994) (quoting *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984)). Likewise, "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) (citation and quotation marks omitted).

In the case *sub judice*, Respondent-Mother argues the evidence did not establish a likelihood of future neglect. In doing so, Respondent-Mother challenges many of the trial court's Findings of Fact. As to Findings 19 through 23, which find that Respondent-Mother used marijuana throughout her pregnancies and the juveniles tested positive for marijuana at their respective births, Respondent-Mother argues "[a]ny allegations regarding the use of illegal marijuana by [Respondent-Mother] are without merit" because Respondent-Mother only uses "legal forms of marijuana products[.]" However, the Findings simply indicate Respondent-Mother used marijuana and do not make any assertions about its legality. Indeed, the Record shows Respondent-Mother testified she is a regular user of marijuana and repeatedly tested positive for marijuana; thus, the Findings are supported by competent evidence and are binding on appeal. *In re S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909 (citation omitted).

Respondent-Mother additionally argues these Findings are irrelevant to the present determination because DSS did not remove the juveniles from her care when they were born, even though the juveniles tested positive for marijuana at their respective births. Nonetheless, Respondent-Mother's substance use was identified as an issue at the time the juveniles were adjudicated neglected. As such, we cannot agree with Respondent-Mother that her substance use was irrelevant to the present determination. *See In re G.W.*, 286 N.C. App. 587, 594, 882 S.E.2d 81, 88 (2022) (explaining finding was relevant because it related to existence or nonexistence of conditions alleged in petition).

Next, Respondent-Mother argues Findings 26 through 44 are recitations of the evidence, rather than proper findings of fact. It is true, Findings 26 through 29 each begin with “The report alleged” and recite the allegations in the 21 February 2023 neglect report. Even so, the mere inclusion of such “findings” will not undermine an order which otherwise contains proper findings supporting its conclusions. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58-59 (2019) (“[W]e review only those findings necessary to support the trial court’s determination that grounds existed to terminate respondent’s parental rights.” (citation omitted)). In this case, the trial court’s Order contains ample specific, ultimate Findings which support its Conclusion that grounds existed to terminate Respondent-Mother’s parental rights. Moreover, the remaining Findings which Respondent-Mother challenges on this ground “appear to be based, at least in part, on testimony provided at the hearing[.]” *Id.* at 410, 831 S.E.2d at 60-61. This is “sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented.” *Id.* at 410, 831 S.E.2d at 61. Consequently, we reject Respondent-Mother’s arguments on this ground.

Lastly, Respondent-Mother challenges Finding of Fact 25, which states the family had been evicted “a few weeks prior” to DSS receiving the 21 February 2023 report of neglect. Respondent-Mother asserts the evidence shows the family had been living in their van for four days, rather than weeks. We agree with Respondent-Mother that to the extent the Finding indicates the family had been evicted “weeks” prior, it is unsupported by the Record. However, the crux of the Finding—that the family had been evicted and was living in their van when DSS received the neglect report—is supported by the Record and, as such, is binding on appeal. *In re S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909 (citation omitted).

Here, the juveniles were adjudicated neglected and removed from Respondent-Mother’s custody based on issues with Respondent-Mother’s housing, mental health, substance use, and employment. While there was evidence presented at the termination hearing that Respondent-Mother had found stable housing and had begun to comply with “some” of the clinical recommendations in regard to her mental health, the trial court found the other issues remained. *See In re D.W.P.*, 373 N.C. 327, 339-40, 838 S.E.2d 396, 406 (2020) (upholding trial court’s determination there was a likelihood of future neglect even though the respondent-mother had made progress on her case plan). These Findings are supported by competent evidence and are binding on appeal, even in light of any evidence Respondent-Mother had remedied her housing situation or had begun to take steps to address her mental health issues. *In re S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909 (citation omitted).

The trial court's Findings establish Respondent-Mother inconsistently followed her case plan and, at the time of the termination hearing, had not taken adequate steps to secure stable employment[10] or address her marijuana usage. Moreover, the Record shows Respondent-Mother had only recently begun to cooperate with some of the recommendations to treat her mental health, despite its presence as an issue throughout the life of this case. Thus, the trial court's Findings demonstrate both past neglect and a likelihood of future neglect. Therefore, the trial court's Findings, in turn, support its Conclusion that Respondent-Mother's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Consequently, the trial court did not err in terminating Respondent-Mother's parental rights.

Conclusion

Accordingly, for the foregoing reasons, we vacate the Order and remand for a new termination hearing as to Respondent-Father. At the hearing, the trial court may conduct an inquiry into the necessity of appointing a Guardian ad litem for Respondent-Father if there is a substantial question as to Respondent-Father's competency. *In re J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49 (citation omitted). We affirm the Order as to Respondent-Mother.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and WOOD concur.

---

10. The trial court's Finding regarding Respondent-Mother's employment is unchallenged and, consequently, binding on appeal. *In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738 (citation omitted).

CATHERINE KINCHELOE (now WILKINSON), Plaintiff
v.
JOHNATHAN KINCHELOE, Defendant

No. COA23-1147

Filed 5 November 2025

1. Child Custody and Support—scope of mandate on remand—requirement to receive additional evidence—obligation to consider current circumstances

In a child support proceeding where a 2019 order was reversed and remanded—with the mandate directing that the trial court receive additional evidence if any party so requested—the new order entered, in which the trial court calculated the parties' child support obligations and arrearages based on new evidence of the parties' incomes and expenses between 2017 and 2022, did not exceed the scope of the mandate on remand. Plaintiff requested a hearing, which required the receipt of additional evidence under the mandate; moreover, in child support matters, a trial court must consider the circumstances of the children and parents, including the parties' needs and ability to provide child support, at the time an order is made or modified.

2. Civil Procedure—Rule 63—child support hearing following remand—substitute judge—discretion to grant a new hearing

In a child support proceeding where a 2019 order was reversed and remanded, the chief district court judge—who, after the original trial judge recused, presided at a 2022 rehearing on plaintiff's 2017 motion to modify child custody and support, as well as her 2021 amended and supplemental motion to modify child support (and motion for attorney fees) pursuant to Civil Procedure Rule 63—did not abuse her discretion in denying defendant's proffer of transcripts and exhibits from a 2018 hearing on the 2017 motion to modify. Since the chief district court judge found that she could not "make findings of fact, conclusions of law or declare a judgment based upon evidence presented at a trial over which she did not preside," she properly exercised the discretion afforded by Rule 63 to hold a new hearing rather than rely on the proffered material.

3. Child Custody and Support—child support—modification—findings of fact supported

In a child support proceeding, the findings of fact in the trial court's order—regarding plaintiff's gross income and expenses, defendant's gross income, the children's monthly financial needs, arrearages, and agreed-upon children's activities—were supported by competent evidence and made in the court's discretion to account for: (1) plaintiff and the children living with her mother rent-free for one year but with plaintiff paying certain expenses for her mother and taking care of household chores; (2) plaintiff's shared household expenses while living with her mother and the children; (3) adjustments to defendant's gross income where defendant failed to provide complete and accurate information about his income and the court found his statements regarding his bonus income not credible; (4) the children's expenses and activities (including therapy, summer camp, and a swim club membership); and (5) the total amount of arrearages defendant owed to plaintiff.

4. Child Custody and Support—child support—amount of award—children's monthly financial needs—abuse of discretion

In a child support proceeding, the trial court did not abuse its discretion in determining the children's monthly financial needs—well above the amount that might be extrapolated from the Child Support Guidelines—where that amount was derived by summing each party's monthly shared family expenses attributable to the children and the children's monthly individual expenses.

5. Civil Procedure—child support—discovery violation—Rule 37 sanctions—attorney's fees awarded

In a child support proceeding, the trial court did not abuse its discretion in awarding attorney's fees as a sanction for defendant's failure to respond fully to plaintiff's first request for the production of documents; the court required the reimbursement to plaintiff as a lesser sanction after the court declined to either strike defendant's financial affidavits or prevent defendant from offering evidence of his and the children's needs and expenses.

6. Civil Procedure—Rule 37 sanctions—attorney's fees—amount supported by unchallenged findings of fact

In a child support proceeding where the trial court properly awarded attorney's fees as a sanction for defendant's failure to respond fully to plaintiff's first request for the production of documents, the amount of the award was not unreasonable or an abuse of discretion; defendant did not argue that any of the trial court's findings of fact were unsupported by evidence, and the court's detailed findings supported the amount of its award.

Appeal by defendant from orders entered on 8 March and 24 August 2022 and 31 January and 27 March 2023 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 11 June 2024.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Haley E. White, and Kristin J. Rempe, for plaintiff-appellee.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellant.

STROUD, Judge.

Defendant-father ("Father") appeals from an "Order Denying [Father]'s Motion to Dismiss and [Father]'s Motion for Protective Order; Motion to Quash/Amend Subpoena" ("Order Denying Motion to Dismiss"); an "Order (Re: Sanctions)" ("Sanctions Order"); an "Order for Attorney's Fees"; and an "Order Modifying Child Support" ("2023 Child Support Order"). Because the trial court complied with this Court's mandate in *Kincheloe v. Kincheloe*, 278 N.C. App. 62, 862 S.E.2d 28 (2021) ("*Kincheloe I*"), filed on 15 June 2021, as well as Rule 63 of our North Carolina Rules of Civil Procedure, the trial court did not err as a matter of law in holding a new hearing on all issues. The trial court's findings of fact in the 2023 Child Support Order are supported by competent evidence, and those findings support the trial court's conclusions of law and its determination of child support. We affirm the trial court's orders.

I. Procedural Background

This Court addressed a prior appeal in this matter in *Kincheloe I*. On 10 July 2019, Judge Aretha V. Blake entered an "Order Modifying Child Support, Establishing Wage-Withholding and Setting Arrears" ("2019 Child Support Order" or "2019 Order"). Mother appealed the 2019 Order to this Court. Our opinion provides the case history leading up to the 2019 Child Support Order addressed in that appeal:

> [Plaintiff-mother ("Mother")] and Father had two children during their marriage. In 2013, the parties separated. Mother filed a complaint with claims for child custody, child support, post-separation support, alimony, and equitable distribution. Father filed an answer and counterclaims for custody, child support, and equitable distribution. In December 2013, Mother and Father entered

into a consent order resolving their claims of child custody, child support, and equitable distribution ("2013 Consent Order"). The 2013 Consent Order did not include detailed findings regarding the parties' incomes and calculation of child support but noted the parties had agreed upon the calculation based upon their incomes and the costs of medical and dental insurance provided by Father. The parties stipulated that the child support of $820.00 per month was "a compromise and shall not be deemed to be a deviation from the Guidelines." Father was ordered to pay the child support "bi-weekly by bank transfer." The 2013 Consent Order also provided for Father to maintain medical and dental insurance for the children; to pay 60% of any uninsured expenses; and to pay 60% of "the costs of all agreed-upon extracurricular activities." The 2013 Consent Order also noted that the parties would enter into a separate agreement regarding post-separation support and alimony and Mother would dismiss these claims.

On 23 May 2017, Mother filed a motion to modify child custody, to increase child support, and to appoint a parenting coordinator. Mother alleged the existing child support order was over three years old and she believed child support would increase by more than 15% based upon "the parties' incomes and child-related expenses." Father filed a response, alleging upon information and belief that the child support amount should be decreased. The parties agreed to a temporary consent order modifying child custody and appointing a parenting coordinator. Father filed a motion to deviate from the child support guidelines, alleging that guideline child support "may exceed the reasonable needs of the children or would otherwise be unjust or inappropriate." Mother filed a motion for wage garnishment and to determine child support arrears and attorney's fees. She alleged Father had failed to pay the full amount of his child support in various months when he deducted "what he believes, Mother owes him for various medical and extracurricular expenses."

There were multiple hearings on the various motions before the trial court. The trial court heard the motions of both parties regarding child support, wage garnishment,

> determination of arrears, and deviation from the Child Support Guidelines on 26 June and 14 September 2018.

Kincheloe I, 278 N.C. App. at 63-64, 862 S.E.2d at 31-32 (brackets omitted).

In *Kincheloe I*, we reversed and remanded the 2019 Child Support Order for entry of a new order complying with North Carolina General Statute Section 50-13.4 ("Action for support of minor child"). *See* N.C. Gen. Stat. § 50-13.4 (2023). Our mandate directed as follows:

> [T]he trial court's order is reversed and remanded for entry of a new order which complies with North Carolina General Statute [Section] 50-13.4. If either party requests additional hearing after remand, the trial court shall receive additional evidence prior to entry of a new order. If neither party requests additional hearing, the trial court may enter a new order based solely upon the existing record.

Kincheloe I, 278 N.C. App. at 77, 862 S.E.2d at 39.

After remand, Father filed a motion for a "Protective Order (Rule 26(c)); Motion to Quash/Amend Subpoena" on 26 August 2021 to quash or amend a subpoena from Mother which sought financial information from periods after the trial court's last hearing date for Mother's 2017 motion to modify, which took place in September 2018. Father argued that on remand, the trial court was bound to consider the record as it existed before the 2019 appeal or to consider evidence as it existed before the last hearing date in September 2018.

Mother filed an "Amended and Supplemental Motion to Modify Child Support and Motion for Attorney's Fees" on 2 September 2021. She contended that Father's income had substantially increased between the entry of the 2013 Consent Order and the 2017 motion to modify child support since the 2017 motion to modify was last heard in September 2018. Mother also contended her expenses had increased. She had moved out of her mother's home into her own home, and the costs of the children's expenses had increased. Mother alleged that Father had not reimbursed her for his portion of the children's expenses and had refused to pay child support based on his allegedly increased income.

Father filed a "Motion to Dismiss (Rule 12)" on 16 September 2021. The motion was directed toward Mother's 2 September 2021 "Amended and Supplemental Motion to Modify Child Support and Motion for Attorney's fees." It alleged grounds under Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Father specifically alleged that the 2019 Child Support Order had been remanded for the trial court to make new findings of fact and conclusions of law to support the 2019 Order in compliance with North Carolina General Statute Section 50-13.4, not to address circumstances irrelevant to the 2019 Order. Essentially, Father argued that his income and expenses after September 2018 were irrelevant because the trial court only had the authority to enter an order addressing Mother's 2017 motion to modify child support, with an order based on evidence presented and circumstances existing as of the motion's last hearing date in September 2018.[1] Father also filed an answer to Mother's 2017 motion to modify child support.

Judge Blake voluntarily disqualified herself from presiding in the proceedings over the matter by order entered on 29 September 2021.

Mother filed a motion to modify child custody and a motion for a psychological evaluation of one of the minor children on 3 February 2022. Mother asked the trial court to (1) award her sole legal custody of the children with regard to mental health decisions, (2) order a psychological examination be conducted for one child, and (3) direct Father to pay for the examination.

On 16 December 2021, Mecklenburg County Chief District Court Judge Elizabeth Thorton Trosch held a hearing on Father's "Protective Order (Rule 26(c)); Motion to Quash/Amend Subpoena." The trial court entered an Order Denying Motion to Dismiss on 8 March 2022. The trial court made findings of fact regarding the procedural history of the case and determined that following remand from this Court, Mother had requested an additional hearing. Therefore, the trial court found that "an additional hearing must be held." The trial court found that

> [i]n *Kincheloe* [*I*], [this Court] reversed and remanded the 2019 Modification Order with instructions to hold an additional hearing if requested by either party. Th[is Court] did not otherwise specify or limit the scope of the evidence that may be received at the hearing on remand, leaving that decision entirely within the trial court's discretion.

The trial court ruled that it would consider additional evidence "including evidence which has arisen since the 2018 Evidentiary Hearings" and could "enter a new order based on the existing evidence or new evidence presented at the additional hearing." The court (1) denied Father's motion for protective order, (2) denied Father's motion to

---

1. Father's response to Mother's motion denied her factual allegations and asserted that "[a]ny allegation or evidence subsequent to the circumstances of the parties on [14 September] 2018 is outside the jurisdiction of the Court at this time."

dismiss Mother's amended and supplemental motion, and (3) allowed the parties to present evidence on the children's current needs. The trial court indicated that it would determine the parties' arrearages based on Mother's 2017 motion to modify and 2021 amended and supplemental motion to modify. The court decreed that "[w]ithin 60 days from the entry of th[e] Order, [ ]Father shall respond to [ ]Mother's [f]irst [r]equest for [p]roduction of [d]ocuments."

On 12 July 2022, Mother filed a motion for sanctions under "Rules 11 and Rule 37(b)(2) of the North Carolina Rules of Civil Procedure and Rule 8 and Rule 22" of Mecklenburg County's "Local Rules for Domestic Cases." She alleged that Father had produced financial documents from a six-month period between October 2021 (the month after Mother filed her amended and supplemental motion) through March 2022 but had otherwise "refused" to produce documents covering 1 January 2018 through the date of her motion. Mother asked the trial court to sanction Father by prohibiting him from presenting evidence of his expenses and requiring him to pay Mother's attorney's fees incurred in prosecuting the motion. The court heard the motion on 13 July 2022.

In the Sanctions Order entered on 24 August 2022, the trial court found that in Father's supplemental responses to Mother's request for production of documents, he had failed to produce bank statements and credit card statements from the period of 1 January 2017 through September/November 2021. Despite the trial court's rejection on 8 March 2022 of Father's argument in his motion to dismiss that the trial court could only consider evidence up to September 2018 in the hearing on remand, Father continued to assert his claim that evidence after that date was irrelevant, in support of his objections to Mother's discovery requests.

The remanded child support determination had been scheduled for 13 July 2022. The trial court made detailed findings of fact regarding the procedural history and Father's refusal to provide several years' worth of financial information. The trial court found that Father's failure to comply with the court's order to provide complete discovery responses prejudiced the court and Mother. Although Mother had requested that the trial court sanction Father by striking his 2018 and 2022 financial affidavits and "prohibiting him from offering evidence of his expenses," the trial court ordered the "lesser sanctions" of ordering Father to: (1) produce the requested documents to Mother, including bank account and credit card statements dated 1 January 2018 through August 2022 and (2) reimburse Mother's attorney's fees related to her motion for sanctions, with the amount of fees to be determined at the "remanded child support proceeding" scheduled for 30 August 2022.

Following hearings conducted on 13 and 14 July 2022 and 30 August 2022, the trial court entered the 2023 Child Support Order on 27 March 2023. The 2023 Child Support Order comprises 26 pages including detailed findings of fact, several tables summarizing findings of the parties and expenses of the children, conclusions of law, and decree provisions. Of note for this appeal, the trial court concluded that as Chief District Court Judge, she had authority to "act in substitution of Judge Blake pursuant to Rules Civ[il] Proc[edure], [North Carolina General Statute Section] 1A-1, Rule 63 to effectuate the directive of the North Carolina Court of Appeals and finalize the [2019 Child Support Order,]" but this authority "[wa]s limited to ministerial acts necessary to finalize an act already performed by a trial judge who has become unavailable." Because Chief Judge Trosch could not "make findings of fact, conclusions of law, or declare a judgment based upon evidence presented at a trial over which she did not preside," she was unable to "effectuate the directive of the Court of Appeals to enter more adequate findings of fact based on the evidence presented at the 2018 trial" based on the existing record. Instead, the parties had the opportunity to present all relevant evidence to establish child support.

There had been a substantial change in circumstances since the entry of the 2013 Consent Order for child support until the filing of the 23 May 2017 motion to modify child support. The trial court concluded that Mother's 2 September 2021 amended and supplemental motion to modify child support and motion for attorney's fees was premature as there was no final order of permanent child support (other than the 2013 Consent Order) to modify on 2 September 2021. Citing *Crews v. Paysour*, 261 N.C. App. 557, 821 S.E.2d 469 (2018) (*Crews II*), the trial court also concluded that the motion was moot. It was obligated to take evidence of the parties' current circumstances, and

> [a]n order establishing permanent child support effective the date of the last hearing after remand from the Court of Appeals [wa]s necessary and appropriate to ensure that the current reasonable needs of the minor children for support and maintenance [we]re met by the parties without the burden and expense of additional motions, hearings and delay.

The trial court determined that Father was responsible for child support of $1,902.40 per month, effective from 1 June 2017 through 30 August 2022, and ordered Father to pay Mother child support arrearages of $79,127.46 ($1,648.49 per month for 48 months). The court determined that Father was responsible for 60% of the uninsured medical, hospitalization, therapy, orthodontic, dental, and vision expenses for the minor children from 1 June 2017 through 30 August 2022 and Mother 40%; Father was responsible for 60% of costs for agreed-upon extracurricular activities and Mother was to pay 40%. For expenses incurred between 2015 and 2022, Father was ordered to pay Mother $6,548.96 in monthly payments of $136.44 for forty-eight months.

Beginning 1 September 2022, Father's child support obligation went up to $2,062.66 per month, and he was ordered to: maintain health insurance coverage for the children; pay 75% of the children's uninsured medical, therapy, dental, and vision expenses; and pay 75% of agreed upon extracurricular activity expenses. Mother was to pay 25% of the children's uninsured medical, therapy, dental, and vision expenses, and pay 25% of agreed upon extracurricular activity expenses.

Father appeals the Order Denying Motion to Dismiss entered on 8 March 2022, the Sanctions Order entered on 24 August 2022, the Order for Attorney's Fees entered on 31 January 2023, and the 2023 Child Support Order.

II. Appeal

A. Scope of Hearing on Remand

[1] We first address Father's challenges to the trial court's Order Denying Motion to Dismiss and the 2023 Child Support Order followed by challenges raised against the Sanctions Order and the Order for Attorney's Fees. We note that Father does not make any specific argument on appeal regarding the trial court's Order Denying Motion to Dismiss. Although Father's motion to dismiss was based on Rule 12(b)(1) and (6), he makes no argument as to why Mother's motion would be subject to dismissal under those Rules. Instead, his arguments are based on conclusion of law 6 in the 2023 Child Support Order. His primary argument on appeal, other than some challenges to particular findings of fact, is that the trial court did not comply with this Court's mandate in *Kincheloe I*, and on remand, it was required to enter an order for modification of child support based only on evidence presented during the 2018 child support hearing.

1. Trial Court's Compliance with Mandate of Kincheloe I

Father argues that the trial court erred by making findings of fact and conclusions of law based on "inadmissible" evidence in both the Order Denying Motion to Dismiss and the 2023 Child Support Order. Father contends this Court did not anticipate the lower court's consideration of evidence pertaining to any period beginning after the 2019 Child

Support Order was entered or even after the underlying evidentiary hearings concluded in September 2018. In its 2023 Child Support Order, the court calculated the parties' child support obligations and arrearages based on evidence of the parties' incomes and expenses between 2017 and 2022. According to Father, the trial court violated this Court's mandate to correct the 2019 Child Support Order. He also asserts that "[i]n [c]onclusion of [l]aw 6, the trial court went beyond the scope of what was to be considered on remand in order to correct the deficiencies in the order." We disagree.

We review the trial court's conclusions of law, including its compliance with this Court's mandate in *Kincheloe I*, *de novo*. *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016) ("[T]his Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*."). In its 2023 Child Support Order, the trial court's conclusion of law 6 states that it

> is obligated, after four years of litigation on the 2017 [m]otion to [m]odify, to take evidence during the hearing on remand to determine the current reasonable needs of the minor children for maintenance and support and the relative ability of the parties to provide support and to enter an order that addresses the current circumstances. [*Crews II*], 261 N.C. App[.] 557 (2018).

The trial court also addressed this issue in its conclusions of law in the Order Denying Motion to Dismiss:

> 3. It is well established in the [S]tate of North Carolina that "on the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) [(citation and quotation marks omitted)].
>
> 4. It is further established that when the Court of Appeals is silent on a particular matter, the Court of Appeals leaves that decision in the trial court's sound discretion. *See In re S.M.M.*, 374 N.C. 911, 914, 845 S.E.2d 8, 11-12 (2020). If the Court of Appeals vests discretion through silence, a trial court has the authority to conduct a hearing and take evidence on events and factual changes that have occurred since entry of the original, reversed order. *See* [*Crews II*], 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018)

> . . . . However, "if no additional evidence is presented on remand, the trial court can make its findings of fact and conclusions of law only based on the [*existing record*]." [*Id.*]
>
> 5. While the decision to receive additional evidence on remand is ordinarily left within the discretion of the trial court, the trial court may only exercise discretion to accept or refuse additional evidence "so long as the reviewing court's mandate does not specify otherwise." *In re R.L.O.*, 375 N.C. 655, 658, 850 S.E.2d 283, 287 (2020) [(citation omitted)].
>
> 6. Good cause does not exist to enter a Protective Order pursuant to Rule 26(c) of the North Carolina Rules of Civil Procedure.

(Emphasis added and brackets omitted.)

Father contends that the trial court did not follow this Court's mandate in *Kincheloe I*. "It is well established that the mandate of an appellate court is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." *In re S.M.M.*, 374 N.C. 911, 914, 845 S.E.2d 8, 11 (2020) (citation, quotation marks, and brackets omitted). Father notes that this Court mandated a new trial in *Crews II* but did not mandate a new trial in *Kincheloe I*. He argues that "[t]he mandate [in this case] would have allowed the trial court to make a ruling based on the existing record. This indicates that additional evidence of circumstances after 14 September 2018 was not anticipated by the panel of the Court when the case was remanded." He is partially correct. A new hearing was not mandated—although it was required if either party requested to present additional evidence. But he overlooks the reason this Court mandated a new trial in *Crews II* and the scope of discretion granted to the trial court in *Kincheloe I*. Here, the trial court's conclusions in both orders demonstrate that it understood our mandate and complied.

Kincheloe I did mandate a new evidentiary hearing on remand because Mother requested a hearing after remand; that option was part of the mandate. Father's argument is misguided as to what this Court may have "anticipated" upon remand. This Court can never anticipate what the circumstances at the time of remand will be. Many important circumstances may change while a case is on appeal; a party may lose their job, become totally disabled by an accident or illness, or a myriad of other unpredictable events may arise. Or circumstances may be essentially the same. The parties may agree to stipulate to facts on matters such as current incomes and expenses to avoid the time and cost of another hearing. The trial court is normally in a better position to determine how to proceed, so we generally leave the decision of whether to receive additional evidence to the trial court's discretion. Because this decision is in the trial court's discretion, the court may decide to receive additional evidence or not. *See Crews II*, 261 N.C. App. at 561, 821 S.E.2d at 472; *In re R.L.O.*, 375 N.C. 655, 658, 850 S.E.2d 283, 287 (2020) ("Whether or not to receive additional evidence on remand is a determination within the trial court's discretion so long as the reviewing court's mandate does not specify otherwise." (citation omitted)); *Holland v. Holland*, 169 N.C. App. 564, 572, 610 S.E.2d 231, 237 (2005) (same). But the need for additional evidence on remand will also depend on the reason for the remand and the facts and issues the trial court must address in its new order. *Crews II* presents a good illustration of the error the trial court here did *not* make.

In *Crews v. Paysour*, No. COA16-604, 252 N.C. App. 426 (2017) (unpublished) ("*Crews I*"), this Court had vacated the trial court's child support order and remanded without limiting the trial court's discretion on remand. Specifically, we stated that

> [o]n remand, the trial court is free to decide, in its discretion, whether additional evidence or a hearing is necessary, or whether the case may be decided based on the existing record.
>
> . . . .
>
> For the reasons discussed above, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

Crews I, slip op. at 3 (citation omitted). The first hearing to establish child support had been held on 30 September 2014. *See id.*, slip op. at 1. We noted in *Crews II* that the first hearing was "unusual, particularly for a non-guideline child support case, because . . . the parties presented little evidence regarding their living expenses, minimal evidence regarding the child's needs and expenses, and they were only allotted thirty minutes each." 261 N.C. App. at 562-63, 821 S.E.2d at 473. Based on the trial court's misapprehension of the law at the first hearing, it had apparently "limit[ed] the evidence presented at the hearing." *Id.* at 563, 821 S.E.2d at 473. The case had begun as a guideline child support case in 2012 when both parents had much lower incomes, but by 2014, the parties were both practicing physicians with joint incomes placing them above the child support guidelines. *See id.* The first child support order, based on the 2014 hearing, was entered over a year after the hearing in December 2015. The order on remand was entered three years after the hearing. We noted that

> much of the difficulty in this child support order was caused by the delay in entry of an order, and certainly the passage of more time for appeals has only made matters worse. The child support hearing was held on 30 September 2014; this was the only evidentiary hearing. On 22 October 2015, a hearing was held to address the fact that it was thirteen months after the hearing and no order had been entered. The first order was entered 7 December 2015, over a year after the hearing. The order on remand was entered almost three years after the hearing. At the time of this opinion, over four years have passed since the hearing.
>
> . . . .
>
> [T]he trial court did not receive any evidence on remand, but despite the lack of evidence, entered findings of fact regarding child support payments. [The m]other challenges these findings of fact as unsupported by the evidence, and since the only evidentiary hearing was in September 2014, any findings about any events after September 2014 are obviously unsupported by the record.

Id. at 560, 821 S.E.2d at 471.

Here, Father seems to make a similar argument as presented by the father in *Crews II*. In *Crews II*, the father argued “that *Crews I* left it in the trial court’s discretion as to whether to receive additional evidence on remand, so the trial court properly made findings addressing the time period after the evidentiary hearing.” *Id.* at 561, 821 S.E.2d at 472. This Court rejected the argument reasoning that “when this Court leaves the matter of receiving additional evidence to the discretion of the trial court, this does not mean that the trial court can make findings of fact regarding something not addressed by the evidence at the hearing.” *Id.* Because there was no evidence to support the trial court’s findings as to facts after the September 2014 hearing, we vacated the order, and in the second remand, we mandated a new trial to ensure there was no further confusion. *Id.* at 568, 821 S.E.2d at 476.

We mandated a new trial in *Crews II* because it would be impossible for the trial court to establish child support in accord with Section 50-13.6 without receiving evidence from September 2014 to the date of hearing on remand about changes to incomes and expenses. "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*." *Hartsell v. Hartsell*, 189 N.C. App. 65, 77, 657 S.E.2d 724, 731 (2008) (emphasis added) (citation and quotation marks omitted). Or, as we noted in *Crews II*,

> in any case, . . . if no additional evidence is presented on remand, the trial court can make its findings of fact and conclusions of law only based upon the existing record. The order on remand can address only the facts as of the last date of the evidentiary hearing because that is the only evidence in the record. Evidence is always required to support findings of fact, unless the parties have stipulated to the fact or the finding is subject to judicial notice, neither of which is present here.

261 N.C. App. at 562, 821 S.E.2d at 472-73 (footnote omitted). Thus, even if Mother had not requested to present additional evidence, the trial court here would still have the discretion under *Crews II* to determine that additional evidence would be required. Again, the trial court could not have made any findings about the parties' incomes or expenses or the children's needs after September 2018 without receiving new evidence on these facts.

In *Kincheloe I*, we reversed and remanded the trial court's 2019 Child Support Order

> for entry of a new order which complies with North Carolina General Statute [Section] 50-13.4. If either party requests additional hearing after remand, the trial court *shall* receive additional evidence prior to entry of a new order. If neither party requests additional hearing, the trial court *may* enter a new order based solely upon the existing record.

278 N.C. App. at 77, 862 S.E.2d at 39 (emphasis added). The mandate did not limit the trial court's consideration of evidence to the existing record but left the matter to the trial court's discretion, with the limitation that *if* either party requested "additional hearing after remand, the trial court" was required to "receive additional evidence prior to entry of a new order." *Id.* As a general rule, the word "may" is permissive, and the word

"shall" is mandatory. *See Silver v. Halifax Cnty. Bd. of Commissioners*, 371 N.C. 855, 863-64, 821 S.E.2d 755, 761 (2018) ("As used in statutes, the word 'shall' is generally imperative or mandatory. In contrast, 'may' is generally intended to convey that the power granted can be exercised in the actor's discretion, but the actor need not exercise that discretion at all." (citation, quotation marks, and footnote omitted)).

The words "may" and "shall" in the mandate in *Kincheloe I* defined the scope of the trial court's discretion on remand. The only limitation on that discretion was that if either party requested an additional hearing, the trial court had to allow an additional hearing to the extent necessary under the circumstances existing at the time. *See Kincheloe I*, 278 N.C. App. at 77, 862 S.E.2d at 39.

The trial court is in the best position to consider the existing circumstances of the parties after remand, which may include other pending matters, and to make the best use of the trial court's limited resources in a way that will address that particular case. And in child custody and child support cases, the trial court must consider the circumstances of the children and parties, as well as the parties' needs and ability to provide child support "at the time the order is made or modified" and often, as a practical matter, during the time between the filing of the motion to modify child support and the final date of the hearing on the motion to modify child support. *See Hartsell*, 189 N.C. App. at 77, 657 S.E.2d at 731.

Here, following remand, in the trial court's 8 March 2022 Order Denying Motion to Dismiss, the court concluded that it "ha[d] the authority to conduct a hearing and take evidence on events and factual changes that ha[d] occurred since entry of the original, reversed [2019 Child Support Order]" in considering the new child support order. In the 2023 Child Support Order, the court correctly concluded that after four years of litigation on the 2017 motion to modify, it was obligated "to take evidence during the hearing on remand to determine the current reasonable needs of the minor children for maintenance and support and the relative ability of the parties to provide support and to enter an order that addresses the current circumstances."

2. Trial Court's Compliance with Rule 63

[2] Father also argues that during the hearing conducted following remand in 2022, the trial court erred by not admitting those transcripts and exhibits admitted during the hearing on the 2017 motion to modify, which was held in 2018. We disagree.

"In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon[.]" N.C. Gen. Stat. § 1A-1, Rule 52(a) (2023). However, where the judge

> before whom an action has been tried or a hearing has been held is unable to perform the duties . . . , then those duties, including entry of judgment, may be performed:
>
> . . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C. Gen. Stat. § 1A-1, Rule 63 (2023). The "application of Rule 63 gives the 'substituted judge' discretion in determining how to proceed." *Lange v. Lange*, 357 N.C. 645, 648, 588 S.E.2d 877, 879 (2003).

Following the remand of the 2019 Child Support Order, Judge Blake recused from further hearings on the matter on 29 September 2021. Judge Trosch, then serving as District Court Chief Judge, presided over the hearing beginning on 13 July 2022 for the rehearing of Mother's 2017 motion to modify child custody and support and the 2021 amended and supplemental motion to modify child support and motion for attorney's fees. The record reflects that Father proffered the trial transcripts and exhibits from the hearing conducted on the 2017 motion before Judge Blake on 26 June and 14 September 2018.

In the 2023 Child Support Order, Judge Trosch made the following conclusions:

> 3. The undersigned cannot make findings of fact, conclusions of law or declare a judgment based upon evidence presented at a trial over which she did not preside. Therefore, the undesigned cannot effectuate the directive of the Court of Appeals to enter more adequate findings of fact based upon the evidence presented at the 2018 trial.
>
> . . . .
>
> 4. During the evidentiary hearings over which the undersigned presided, the parties had the opportunity to present all relevant evidence necessary to establish the 2018

> permanent child support obligation. This [c]ourt enters order [sic] of permanent support effective [1 June 2017] after hearing testimony of witnesses, receiving evidence and judging the credibility of the witnesses.

Acting within the discretion afforded by Rule 63, Judge Trosch—serving as a substitute judge—was within her authority to deny the proffer of transcripts and exhibits from the 26 June and 14 September 2018 hearings before Judge Blake and to rehear the evidence to make findings of fact and conclusions of law. *Id.*; *see also* N.C. Gen. Stat. § 1A-1, Rule 63.

If Judge Blake had not recused, the scope of the evidentiary hearing on remand would properly have been limited to evidence addressing facts after the first hearing. Judge Blake could have then considered both the evidence from the first hearing and from the evidentiary hearing after remand to enter the new order. But here, Judge Blake was unable to hold the hearing on remand or enter a new order as our mandate would normally require. Recusal, retirement, or death of a trial judge are circumstances this Court cannot anticipate when a case is remanded for entry of a new order. Chief Judge Trosch acted within her discretion under Rule 63 by excluding the transcripts from the September 2018 hearing and holding a new hearing.

B. Treatment of the 2021 Motion to Modify Child Support

[3] Father argues that in the 2023 Child Support Order, the trial court erred by ordering him to pay a monthly child support amount beginning in 2017 and a different child support beginning in 2022 under conclusions of law 5, 8, 9, 10, and 11, without identifying a substantial change in circumstances to support the 2022 change. Father contends that the trial court deprived the parties of notice and the opportunity to be heard on whether a substantial change in circumstances had occurred. We disagree.

Child support payments ordered by a court must

> be in such amount as to meet the reasonable needs of the child . . . having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2023). An order for child support may be modified at any time "upon [a] motion in the cause and a showing of changed circumstances." N.C. Gen. Stat. § 50-13.7(a) (2023). Upon the filing of the motion, "[t]he trial court . . . has the authority to enter a modification of court ordered child support, retroactive to the filing of the petition of modification." *Chused v. Chused*, 131 N.C. App. 668, 672, 508 S.E.2d 559, 562 (1998) (citation omitted).

For child support orders that are at least three years old, changed circumstances may also be evidenced by "proof of a disparity of fifteen (15) percent or more between the amount of support payable under the original order and the amount owed under North Carolina's Child Support Guidelines based upon the parties' current income and expenses." *Meehan v. Lawrence*, 166 N.C. App. 369, 380-81, 602 S.E.2d 21, 28-29 (2004) (citations and quotation marks omitted).

The parties entered into a 2013 Consent Order obligating Father to pay Mother $820.00 per month for child support beginning 1 December 2013. Mother filed the motion to modify child support in May 2017. The last date of the evidentiary hearing conducted on Mother's motion was 30 August 2022. In its 2023 Child Support Order, the trial court calculated Father's child support obligation to Mother to be $1,902.40 per month beginning in June 2017 through August 2022. The court made the unchallenged finding that Father's modified child support obligation beginning in 2017 was "greater than a 15% change from the obligation established by the 2013 Consent Order after the passage of four years," qualifying as a substantial change of circumstances supporting a modification of the child support agreed to in the 2013 Consent Order. *See id.*

The trial court found that in 2022, Mother started a new job and increased her earnings by over two times what she was credited with earning in 2018 (the year of gross income used to determine child support effective in 2017). The parties' combined gross annual income in 2018 was $331,301.10. In 2022, the trial court found their combined gross income increased to $432,878.33 (the year of gross income used to determine child support effective in 2022). The children's financial needs were also found to have gone up from $6,544.03 in 2018 to $9,881.86 in 2022. The court determined that effective 1 September 2022, Father's child support obligation payable to Mother increased to $2,062.66 per month.

Based on its findings of fact, the trial court made these conclusions of law:

> 5. The amount of support set forth herein to be paid effective [1 June 2017] was adequate to meet the reasonable needs of the minor children at that time and was within Father's ability to pay.
>
> . . . .

> 8. Both partes owe a duty of child support to be paid for the maintenance of the minor children. There had been a substantial change of circumstances since the entry of the 2013 Consent Order for child support until the filing of the [23 May 2017] [m]otion to [m]odify [c]hild [s]upport.
>
> 9. An order establishing permanent child support effective the date of the last hearing after remand from the Court of Appeals is necessary and appropriate to ensure that the current reasonable needs of the minor child for support and maintenance are met by the parties without the burden and expense of additional motions, hearings and delay.
>
> 10. It is in the best interests of the minor children that permanent child support be paid as outlined in this Order.
>
> 11. After considering the evidence, the amount of child support ordered effective [1 September 2022] is adequate to meet the current reasonable needs of the minor children and is within Father's ability to pay.

The trial court also addressed Mother's amended motion to modify in the conclusions of law, noting that there was no final order of permanent child support (other than the 2013 Consent Order) to modify on 2 September 2021. It also explained that the motion was moot because the court was obligated to take evidence of the children's current reasonable needs and the parties' current circumstances and their relative abilities to pay (citing to *Crews II*, 261 N.C. App. 557, 821 S.E.2d 469).

We hold that the trial court was within its authority to modify the 2013 child support obligation effective June 2017 through August 2022. In fact, the trial court was obligated to establish a modified child support obligation for this entire time period. Even if Mother had not filed her amended and supplemental motion to modify child support in 2021, the trial court would have had to consider the proper child support to be awarded based on the 2017 motion to modify and to enter an order addressing the entire period from 2017 to the order's entry date. As the trial court noted, there was only one existing order to modify, the 2013 Child Support Order. The trial court did not directly address Mother's 2021 motion to modify in the order modifying child support except to find that the motion was "moot" and to dismiss the motion in the final decree.

Father's argument that the trial court was required to make findings of a substantial change in circumstances to justify modification of the child support order, for both the 2017 and 2021 motions, has no legal basis. There was only one modification of the 2013 Child Support Order, despite this case's convoluted procedural history. Father had full "notice and opportunity to be heard" as to the circumstances affecting child support over the entire time period from 2017 to the date of the hearings in 2022. The trial court had already denied Father's motion to dismiss and for protective order before the child support hearing on remand. Father was well aware that the evidence to be considered at the hearing would include the entire period from 2017 to 2022. The trial court made more than sufficient findings and conclusions regarding the substantial changes in circumstances justifying the modification of the 2013 Child Support Order. The next relevant point in time is the date of entry of the order, since the new child support obligation is effective as of that date. If future modifications are needed, the baseline has been established by the 2023 Child Support Order. Father's argument is overruled.

C. Findings of Fact in the 2023 Child Support Order

Father challenges several findings of fact throughout the 2023 Child Support Order as unsupported by competent evidence. We have grouped the challenges into the following categories: (1) Mother's gross income and expenses; (2) Father's gross income in 2018 and 2022; (3) the children's monthly financial needs in 2022; (4) arrearages; and (5) the children's agreed upon extra-curricular activities in 2022.

1. Mother's Gross Income and Expenses

Father argues that the 2023 Child Support Order's findings of fact 22, 24, and 25, addressing Mother's gross income in 2017 and 2018, are not supported by competent evidence. Father contends that the trial court erred by crediting Mother with $1,400.00 toward her 2018 *annual* income due to cost-free living rather than crediting $1,400.00 *per month* (yielding $16,800.00 toward annual income). Father contends that findings of fact 33, 36, 43, 44, 45, 46, 49, and 79 rely on the determination of Mother's 2018 annual income and consequently, are incorrect.

Father also argues that findings of fact 38, 41, and 42, addressing Mother's expenses, are not supported by competent evidence. Father contends that because findings 41 and 42 are erroneous, parts of findings 43, 44, 45, 46, 49, and 79, which rely on findings 41 and 42, are also erroneous.

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C.

471, 474-75, 586 S.E.2d 250, 253-54 (2003) (citation omitted). "[U]nchallenged findings of fact are binding on appeal." *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 39, 843 S.E.2d 277, 281 (2020) (citation, quotation marks, and brackets omitted).

a. Findings of Fact 22, 24, and 25

In unchallenged findings of fact, the trial court found that Mother lived with her mother rent free from 2016 until 2019 when she "entered into a lease agreement with her mother to pay rent in the amount of $1,400.00 per month." The trial court also found Mother was "unable to pay this amount at that time[,]" but compensated her mother for the unpaid rent through paying her cell phone bill, purchasing groceries, and doing household chores. The trial court determined that "the unpaid rent conferred a benefit upon Mother and should be treated as income."

In child support cases where the parties' combined income exceeds incomes addressed by the North Carolina Child Support Guidelines, a trial court "must enter written findings of fact showing . . . the relative ability of each party to provide support." *Kincheloe I*, 278 N.C. App. at 72, 862 S.E.2d at 36 (citation and quotation marks omitted). Our Child Support Guidelines define "income" as "a parent's actual gross income from any source, including . . . maintenance received from persons other than the parties in the instant action." N.C. Child Support Guidelines, AOC-A-162, at 3 (2023). "Maintenance" has been defined, in part, as "[f]inancial support given by one person to another." *Maintenance*, Black's Law Dictionary (12th ed. 2024). In *Spicer v. Spicer*, this Court explained that "cost-free housing is a form of financial support that may be considered" in determining child support obligations. 168 N.C. App. 283, 288, 607 S.E.2d 678, 682 (2005) (citing *Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996); *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E.2d 522 (1975)).

Even before the Child Support Guidelines were adopted, our courts recognized that cost-free housing or other in-kind support from a third party may be considered as part of a party's income for purposes of a child support obligation. For example, in *Gibson v. Gibson*, 24 N.C. App. 520, 523, 211 S.E.2d 522, 524 (1975), this Court noted that the defendant's employer provided him an automobile and a "rent-free apartment," and these benefits reduced his living expenses, giving him the ability to comply with the child support and alimony order. It is well established that the value of in-kind benefits, such as cost-free housing, may be treated as income under the Child Support Guidelines, and the same is true for a case such as this one, where the amount of the parties' combined incomes exceeds the Guidelines. Here, the trial court included

Mother's in-kind support from living with her mother but not paying rent. Father contends the trial court did not include the correct amount of in-kind support.

Challenging finding of fact 22, Father contests the trial court's determination that Mother's total gross income in 2017, "including her gross income from employment and imputed income for the value of rent, was $49,938.00." However, the court determined that Mother's "2018 income should be used for purposes of establishing a child support amount[,]" not her 2017 income. Father does not argue how finding 22 influences another finding of fact, a conclusion of law, or the court's decree, and we see no effect. We do not further address this challenge.

It is unchallenged under finding of fact 23 that Mother's "total gross income from employment" in 2018 was $49,057.94. In finding 24, Father challenges the determination that "Mother received the benefit of unpaid rent in the amount of $1,400.00 in 2018[,]" and under finding 25, that "Mother's total income for the year 2018, including her gross income from employment and imputed income, was $50,457.94 [($49,057.94 + $1,400.00)]." Mother's rent was $1,400.00 per month; annualized, this amounts to $16,800.00 per year. Father proposes that Mother's cost-free living conferred a $16,800.00 benefit in 2018, though the trial court accounted for only $1,400.00 for the entire year.

The trial court found that Mother was not able to pay her mother $1,400.00 a month in rent, but Mother "paid her mother's cell phone bill, purchased groceries, and did household chores" to contribute with the resources that she had, instead of paying in cash. Based on the trial court's finding regarding Mother's other contributions to her mother's household, we are not convinced that the trial court made a mathematical error or failed to consider the additional months of cost-free housing. The court credited Mother with receiving the benefit of one month's cost-free housing ($1,400.00) in 2018, in its discretion, essentially finding that Mother's contributions to her mother's household, by paying bills and working to maintain the home, "paid" for the remaining months.

In *Knutton v. Cofield*, our Supreme Court explained that

> [w]hen trial by jury is waived and issues of fact are tried by the court, . . . [t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the

> evidence, he determines which inferences shall be drawn and which shall be rejected.

273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted). "The amount of each party's contribution to child support is generally determined by the judge on a case-by-case basis. The judge must evaluate the circumstances of each family[.]" *Plott v. Plott*, 313 N.C. 63, 68, 326 S.E.2d 863, 867 (1985) (citation omitted).

We hold that the trial court's determination that Mother received a cost-free living benefit of $1,400.00 in 2018 and that her total gross income for the year amounted to $50,457.94 was supported by the evidence and within its discretion as fact finder. Accordingly, findings 24 and 25 are upheld as supported by the evidence.

Father's challenges to findings 33, 36, 43, 44, 45, 49, and 79 were based on the proposition that the findings of Mother's 2018 annual income were in error. Because we uphold the court's findings of Mother's 2018 income under findings 24 and 25, we need not address his ancillary challenges.

b. Findings of Fact 38, 41, and 42

In challenged finding of fact 38, the trial court found that "Mother has shared family expenses that benefit both her and the minor children. These expenses are proportioned fifty percent to Mother and fifty percent to the minor children." Father contends that Mother's household expenses should have been allocated among Mother, the children, and Mother's mother, because they lived together, such that the children were allocated one-third of the expenses total. Father provides no authority or argument, nor are we able to find one of our own, compelling the trial court to find a three-way split in Mother's shared family expenses. Father's challenge to finding of fact 38 is overruled.

In challenged findings of fact 41 and 42, the trial court set forth an itemized list of each party's reasonable and necessary monthly expenses, as well as the children's individual expenses for 2018. The trial court listed itemized household expenses attributed to Mother and the children (rent, electricity, heat, cable TV, telephone, etc.). The court found that Mother's monthly "[h]ouse payment/rent" was $1,400.00. Father contends that the finding of Mother's rent expense lacks support because there was no evidence that Mother ever paid rent or that she paid other expenses such as utilities for which she was given credit. This argument mirrors Father's argument above regarding finding of fact 24.

Mother filed a financial affidavit with the trial court reflecting a $1,400.00 monthly rent expense as a shared family expense. Mother testified that she entered into a lease agreement to pay her mother $1,400.00 per month for rent. Though she "did not make enough money" to pay the rent in cash, she met her obligation to the household by paying other bills and performing chores. The record supports the court's finding that Mother's $1,400.00 rent expense was incurred each month. Father's challenges to findings of fact 41 and 42 are overruled.

Because Father's challenges to findings of fact 43, 44, 45, 46, 49, and 79 only depend on findings of fact 38, 41, and 42 being held erroneous, we need not address the remaining challenges.

2. Findings Regarding Father's Income

a. Findings of Fact 28, 31, and 47

Father challenges the 2023 Child Support Order's findings of fact 28, 31, and 47 (regarding his 2018 gross income) as not supported by competent evidence.

Father contests finding of fact 28 that he "failed to report his bonus income [on his 2018 financial affidavit]. Additionally, Father artificially reduced his net income by including $1,523.00 per month in [company] stock purchases." Father tries to undermine the court's finding that it "does not find Father's statements concerning his income to be credible."

On his 2018 financial affidavit filed with the trial court on 14 June 2018, Father provided an average monthly gross income attributable to wages or salary. Under the "[b]onuses" category, Father wrote, "TBD [('to be determined').]" Father points out the court found in unchallenged finding of fact 27 that "[s]ince at least 2013, Father's income from his employment has included a base annual salary and a discretionary performance bonus. The bonus amount has varied from year to year." Father contends "[b]y stating TBD, [he] left the trial court as the decider of the amount." Similarly, as to the trial court's finding that "Father failed to report his bonus" in 2018, he argues that "[a]s with the 2018 [f]inancial [a]ffidavit, [he] referenced his bonus by stating '[v]aries.' " This is not "fail[ing] to report the bonus." In other words, Father argues his refusal or failure to include *specific numbers* on his financial affidavit should not be held against him and should not impair his credibility. Mother correctly points out that Father's argument concedes not reporting a number on his financial affidavit, even though he knew the bonus amounts in 2017 and 2018.

Despite his choice not to state a number for his bonus income, Father still reported a deduction for his stock purchases. Judge Trosch appropriately noted this incredible discrepancy, and the trial court's discretionary credibility determinations in findings of fact 28 and 31 are supported by competent evidence. Mother is correct, and it is not difficult to understand why the trial court found Father not to be credible in his claims regarding his income.

Father is correct that the trial court is ultimately "the decider of the amount" of his income based on the evidence, but Father overlooks his own obligation to fully and honestly provide his income information in response to Mother's discovery requests and by completing his financial affidavits as required by the local rules. *See* Local Rules of Domestic Court, Jud. Dist. 26, Family Court Division, Rule 8 (2017). Father's failure to provide his bonus income information did not assist the trial court in being "the decider of the amount" of his income but instead made the trial court's job of making accurate findings regarding his income more difficult. The trial court determined Father's failure to provide this information in a clear and forthright manner impaired his credibility, and it was within the trial court's discretion to so determine.

Father makes various arguments about his stock purchases, bonus paystubs, and other matters, but overall, the trial court's findings were based on competent evidence. Father simply has a different view of the evidence and objects to the trial court's determination regarding his lack of credibility.

Under challenged finding of fact 31, Father does not raise a specific argument but predicates his challenge on the integrity of finding of fact 28. Under finding 31, the court found that

> [b]ecause the net income information provided by [F]ather is not reliable or complete, the court finds that the most appropriate way to determine Father's income for the purposes of determining child support in 2018 is to arrive at the average of his salary and bonus earnings from 2017 to 2018. Father's gross [annual] income for purposes of setting a child support amount in 2018 is, therefore, $280,843.16.

Under finding of fact 47, Father contests the trial court's finding that it "cannot determine Father's net monthly income because Father failed to provide evidence from which the court could make this determination."

Our Child Support Guidelines state that "[w]hen income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time" to determine gross income. N.C. Child Support Guidelines, AOC-A-162, at 3 (2023). The salary and bonus amounts the trial court attributed to Father for years 2017 and 2018, as set forth under findings of fact 29 and 30, are unchallenged and binding on appeal. *See Kleoudis*, 271 N.C. App. at 39, 843 S.E.2d at 281. Under unchallenged finding of fact 32, the average of these figures "is rationally related to and not a considerable departure from the amount of income that Father self-reports and that [the] records concerning his compensation in 2018 show."

The trial court's determination of Father's 2018 gross income is supported by the evidence. Therefore, we reject Father's challenge to the methodology and amount recited under finding of fact 31. To the extent Father contests the court's findings that his financial statements are not credible, reliable, or complete, we note that under finding of fact 48, it was unchallenged that "Father did not provide any tax returns or any other evidence to th[e] [trial] court to demonstrate his actual tax liability on his variable bonus income. Father provided [p]ayroll [j]ournals for [b]onus income with incomplete federal and state tax withholdings for years 2017 through 2021." The determination of credibility is the purview of the trial court. *See Crenshaw v. Crenshaw*, 296 N.C. App. 1, 15-16, 907 S.E.2d 743, 752 (2024) ("The trial court, as the fact finder, is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for that of the trial court." (quoting *In re H.B.*, 384 N.C. 484, 492-93, 886 S.E.2d 106, 112-13 (2023))). The record provides sufficient support for the trial court's findings and Father's challenges to findings of fact 28, 31, and 47 are overruled.

b. Findings of Fact 56 and 57

Father challenges the 2023 Child Support Order's findings of fact 56, 57, 59, and 60 (regarding his income considered for child support obligations effective 1 September 2022) as not supported by competent evidence. He contends that findings of fact 62, 65, 73, 74, 76, and 78 are consequently in error.

Under finding of fact 56, the trial court found that Father "failed to report his bonus" on his financial affidavit filed in July 2022 and under finding of fact 57, "Father did not produce evidence of his salary and earnings from employment in 2022. . . . [T]he gross income information provided by [F]ather is not reliable or complete[.]" Although Father produced some evidence of his income for 2022, those documents support the finding that the information he provided "was not reliable or complete." As noted above, Father's financial affidavit did not list any bonus income even though Father has had bonus income every year during his twenty-three years of employment. He produced only paystubs from 19 May through 16 June 2022. But one month's information is not complete evidence of income from 2022. This finding is supported by the evidence. "If the record discloses sufficient evidence to support the findings, it is not this Court's task to determine *de novo* the weight and credibility to be given the evidence contained in the record on appeal." *Plott*, 313 N.C. at 69, 326 S.E.2d at 867 (citation omitted).

c. Finding of Fact 59

Under finding of fact 59, the trial court found that in "2020, Father's bonus income was $191,688.66" and "[i]n 2021, Father's bonus income was $283,495.60." Father does not challenge the finding that his bonus income in 2019 was $144,214.74. Father contends that his pay stubs reflect the actual bonus paid to him in 2020 as $140,204.85, and $164,850.93 in 2021. In his brief submitted to this Court, Father states that "[t]he numbers used by the trial court are based on summaries from Father's employer which lists those amounts as [d]iscretionary [b]onus [i]ncome" in 2020 and 2021.

As Father acknowledges, the record provides competent evidence from his employer to support the challenged finding of fact. Thus, we overrule Father's challenge and uphold finding of fact 59. *See Plott*, 313 N.C. at 69, 326 S.E.2d at 867.

d. Finding of Fact 60

Under finding of fact 60, the trial court determined Father's "gross annual income for purposes of setting a child support amount in 2022 is $326,066.33." Father challenges this amount as in error by $56,709.49, contending that the trial court used an inaccurate source for finding his gross income based on finding of fact 59. In his brief submitted to this Court, Father acknowledges that "[t]he numbers used by the trial court are based on summaries from Father's employer which list those amounts as [d]iscretionary [b]onus [i]ncome." Before the trial court, Father testified to his belief that the discrepancy between what was listed on the employer's summaries and his actual paystubs may have been stock purchases he made. Father argues that "[t]he best evidence of [his] income is [his] actual paystubs that show his bonus amounts and year-to-date income."

Father's own argument illustrates that there was competent evidence to support the trial court's findings. Due to Father's own refusal to provide complete and accurate income information and his affidavits stating that his bonus income is "TBD" or "[v]aries[,]" the trial court determined the most credible evidence available was the summaries from Father's own employer. Father argues the trial court should have instead relied on "his actual paystubs"—although he produced only the paystubs from May 2022 to June 2022.

Per finding of fact 60, the court averaged Father's variable recurring bonus income from 2019 to 2021 (($144,214.74 + $191,688.66 + $283,495.60)/3 = $206,466.33) in contemplation of his bonus for 2022 and added his base salary from 2021 ($119,600.00) to estimate his 2022 gross annual income for calculating child support ($326,066.33). This method has been endorsed in several cases, particularly where the trial court has concerns regarding the reliability of the income information from a party, and the trial court had those concerns here. *See, e.g.*, *Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006) (holding that the trial court did not abuse its discretion by averaging figures from 2001 and 2002 tax returns to determine the defendant's 2003 income after finding the defendant's 2003 income tax return was "highly unreliable" and that he "had not presented adequate information as to his 2003 income" (internal quotation marks omitted)); *see also Zurosky v. Zurosky*, 236 N.C. App. 219, 243, 763 S.E.2d 755, 769-70 (2014) (holding that the trial court's consideration of the defendant's income as reported over several years—"before [the defendant] had reason to alter the reported figure"—after "[t]he trial court did not find [the defendant]'s reported income [for the year in question] to be credible" was not an abuse of discretion). We overrule Father's challenge and uphold finding of fact 60.

e. Findings of Fact 62, 65, 73, 74, 76, and 78

Father generally challenges findings of fact 62, 65, 73, 74, 76, and 78 based on the trial court's reliance on findings of fact 56, 57, 59, and 60. Because the previous findings of fact are supported by the evidence, we also uphold findings of fact 62, 65, 73, 74, 76, and 78 (addressing the parties' combined gross income in 2022, the percentage of the each party's individual income to the combined whole, and each party's proportionate financial responsibility for the children's financial needs).

3. Findings Regarding Financial Needs of the Children

Father challenges the 2023 Child Support Order's findings of fact 69 and 70 (addressing the financial needs of the children) as unsupported by the evidence. Father contends that, as a result, findings of fact 72, 73, 74, 75, 77, and 78 are also without evidentiary support.

a. Finding of Fact 69

Under finding of fact 69, the trial court stated that it had considered factors such as the 2019 and 2023 Child Support Guidelines, each party's total income, each party's expenses, and each party's condition and accustomed standard of living "in determining the minor children's reasonable and necessary needs which are consistent with the parties' evidence of the 'actual' expenses incurred by the parties." Other than stating the finding number, Father does not raise an argument contravening finding of fact 69, and it is abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

b. Finding of Fact 70

Under finding of fact 70, the trial court itemized the reasonable and necessary monthly expenses attributable to each party. Of the reasonable and necessary monthly expenses specific to the children (such as uninsured medical/dental expenses, clothing, and extracurricular activities, etc.) the trial court determined that $2,836.04 of those costs were paid by Mother and $3,087.24 were paid by Father. However, Father points out that the sum of the itemized children's expenses attributed to Mother does not equal $2,836.04 but $2,456.04 – a difference of $380.00. Father contends that this $380.00 correlates to an expense associated with uninsured therapy sessions for one of the children listed on Mother's financial affidavit. Father contends that there was no medical determination that the child needed therapy or that therapy was recommended, that no therapist had been selected, and that Mother provided no indication of the basis for the amount. If the uninsured therapy expense was a valid expense, Father contends that it should be split between the parties, but it was unclear whether the court had intended to include the expense in the list.

We note that the parties entered into a Consent Order for Psychological Evaluation of Minor Child before the trial court on 7 June 2022 in which the court ordered that one of the minor children would undergo a psychological evaluation. This order provided that "[t]he parties shall follow the treatment recommendations of the evaluation" and "share the expenses for such recommendations with [Mother] paying for forty percent (40%) or such expenses and [Father] being responsible for sixty percent (60%) of such expenses." Consistent with this consent decree, the trial court in its 2023 Child Support Order decreed that "[f]or the period from [1 June 2017] through [30 August 2022], Father shall pay 60% of . . . therapy . . . expenses for the minor children and Mother shall pay 40%" of the remaining uninsured expenses. Beginning 1 September 2023, Father was ordered to "[p]ay 75% of . . . therapy . . . expenses for the minor children and Mother shall pay 25%." The court's determination of the children's reasonable and necessary monthly expenses is sufficient to account for the cost of uninsured therapy sessions for the child. As the children's expenses with each party were combined and factored into the determination of each party's child support obligation, it appears that the court's order awards Father the "split between the parties" for which he advocates.

Father further challenges finding of fact 70 because in the list of children's expenses, under "[a]ctivities," Mother is credited with paying $1,213.28, while Father is credited with paying $136.18. Father contends that the trial court failed to indicate why Mother was credited with paying $1,213.28 monthly while he was credited with paying $136.18. Father states that "[e]ither the $1,213.28 should be removed or Mother should be assigned 25% of the cost and Father should be assigned 75%."

On her financial affidavit filed 6 July 2022, Mother listed $1,213.28 as a monthly expense for the children's activities. Before the trial court, she testified that the children's expenses were for attending Camp Seagull, golf, and a swim club membership. Under finding of fact 85, the court found Father responsible for 60% of the costs for sending one of the children to Camp Seagull in 2022 and in an unchallenged finding, that Father "refus[ed] to agree to this expense in 2022." The record evidence reflects that the expense for sending a child to Camp Seagull in 2022 was $5,339.00. The unchallenged portion of finding of fact 85, along with the record, supports the trial court's allocation of children's expenses to Mother. Father's challenges to findings of fact 69 and 70 are overruled.

c. Findings of Fact 72, 73, 74, 75, 77, and 78

Because we uphold findings of fact 69 and 70, we need not address those challenges dependent only on an unfavorable review of those findings as the basis for Father's general challenges to findings of fact 72, 73, 74, 75, 77, and 78.

4. Findings Regarding Arrearages

Father challenges the 2023 Child Support Order's finding of fact 81, addressing arrearages, as unsupported by the record evidence. Under finding of fact 81, the trial court found that Father paid Mother $378.46 bi-weekly from June 2017 through 1 October 2018, and Father paid $217.55 bi-weekly beginning in October 2018; "Father also made two 'bonus payments' to Mother for the years 2020 and 2021 totaling $6,101.10." Father challenges the finding he made only two bonus payments, contending he made bonus payments in 2019, 2020, and 2021 totaling $6,274.00 (a difference of $172.90). The record includes electronic money transfer records from Father to Mother, including three transfers described as bonus payments; however, no matter how the payments are identified, the unchallenged part of finding of fact 81 states that "Father paid [Mother] a total of $40,723.74." As this unchallenged amount reduces the amount Father owes Mother for arrearages, despite the payment descriptions attached to the itemized transfers, we need not further address Father's challenge to finding of fact 81.

5. Findings Regarding Children's Expenses

Father challenges the 2023 Child Support Order's findings of fact 85 and 87, addressing the children's expenses and the percentage attributable to each parent, as unsupported by the record evidence.

a. *Finding of Fact 85*

Under finding of fact 85, the trial court found that

> Father challenged his responsibility for 60% of the expense of sending [the eldest child] to Camp Seagull in 2022. [The eldest child] [ha]s participated in Camp Seagull every year since he was six years old and Father has paid his portion of this annual expense since at least 2017 without debate. Father's refusal to agree to this expense in 2022 is without reason or justification. Father is responsible for his portion of this expense.

Father argues that the expense of sending a child to Camp Seagull was not an "agreed-upon expense" because he did not agree in 2022, and it should not be included in the children's expenses to be divided between the parties. However, if the expense is deemed one allocated to both parties, he should be responsible and attributed his share. He asserts that where the trial court listed the cost of Camp Seagull as an expense of the children paid 100% by Mother and required Father to reimburse Mother 60% and then specifically ordered that he pay 60% of the children's expenses, a portion of the Camp Seagull expenses are being double counted against him. Mother responds to Father's argument contending that he

> sporadically argues certain expenses are double-counted against him because they are listed in []Mother's [f]inancial [a]ffidavit as expenses she pays—such that her share of the children's needs increases—while he is also required to reimburse a portion of such expenses in the future. Father thus asks this Court to either (1) ignore the existence of those actual expenses paid by []Mother because he wants a hypothetical credit for having to reimburse her for a portion of uninsured medical and extracurricular

> expenses in the future, or (2) reallocate to him a portion of those expenses paid by []Mother so she does not receive credit for those expenses she actually paid.

Mother's argument is an accurate characterization of Father's contentions as to the children's expenses. The trial court's extensive findings address both the past expenses and allocation for the future. For some past expenses, Mother paid in full and Father reimbursed her for some and not for others. The trial court received extensive evidence regarding the accounting for these years of expenses and which party paid or reimbursed what.

Per the 3 December 2013 Consent Order in effect, "[t]he parties shall share the costs of all agreed-upon extracurricular activities[.]" The record reflects that Father emailed Mother in February 2022 that their eldest child did not want to go to the camp that year, that Father did not have the money to send the child to camp, and that he was no longer in agreement about the extracurricular activity. Father testified that he "initially agreed for [the minor child] to go back [to the camp,]" but "rescinded that agreement prior to . . . when the final payment was done." Father stated he "d[id] not agree to this anymore."

The 2013 Consent Order required Father to pay for "agreed upon" expenses. Father acknowledged he initially agreed to these expenses but then later changed his mind. Despite Father's claim that the child did not want to go to camp, he actually went. The trial court was within its discretion to find that Father's ultimate refusal to pay this expense was unjustified *where he had initially agreed* to pay and which he had historically paid for years before 2022 with no dispute. The trial court's finding that Father is responsible for 60% of the expense for 2022 as to that child, as stated under finding of fact 85, is supported by the evidence.

b. Finding of Fact 87

Under finding of fact 87, the trial court stated:

> From 2018 to 2022, Mother paid for various extracurricular activities and uninsured medical expenses totaling $17,245.26. Pursuant to a court order entered in pending custody litigation, Father is not responsible for the cost of [the youngest child's] therapy . . . on June 12, 2020.
>
> . . . .
>
> Father is responsible for 60% of expenses paid by [M]other, excluding the cost of therapy, totaling $9,885.16.

Father contends that there are two errors. First, the children's golf expenses were used to calculate Mother's expenses, where she was given credit for 100% of the cost, and now, "Father is required to reimburse Mother 75% of such costs under the order" beginning 1 September 2022. Second, the court found that "Mother paid for various extracurricular activities and uninsured medical expenses totaling $17,245.26"; however, Father asserts that "[e]ven Mother did not contend that she paid that much."

As to the first contention, we note that all expenses supporting the $17,245.26 total were alleged to have accrued before September 2022. The trial court found that "Father is responsible for 60% of expenses paid by [M]other," accrued before August 2022, not 75%. As to the golf expenses, the hearing transcript, in conjunction with the exhibits submitted by both parties, indicate that Mother paid for the children's golf expenses—which Father did not reimburse. So we overrule Father's first argument.

As to his second assertion, Father challenges the trial court's finding that Mother paid $17,245.26 between 2018 through 2022 "for various extracurricular activities and uninsured medical expenses" as unsupported. Father claims that "[e]ven Mother did not contend that she paid that much." Mother submitted an itemized list of the expenses. The list includes a description of each activity, a date, the activity cost, which party paid for the expense, a percentage amount of the expense attributable to Father, a percentage amount of the expense attributable to Mother, and how much, if any, Father still owed Mother in reimbursement. Father points out that per Mother's list of expenses and the outstanding amounts owed, Mother only claims she is owed $5,157.84.

The trial court is the fact finder and must determine the outstanding reimbursement amount. *See generally Knutton*, 273 N.C. at 359, 160 S.E.2d at 33. Per the record, the court admitted into evidence Mother's spreadsheet presented as a list of itemized expenses for the children incurred between 2018 and 2022, which Father had not reimbursed. Consistent with the spreadsheet, the trial court found that Mother paid $17,245.26 in expenses for the children which Father had not reimbursed. The court found that for expenses incurred between 2018 and 2022 (without therapy expenses of $770.00), Father was responsible for 60% of the total expenses incurred. The court found that Father owed Mother $9,885.16 (($17,245.26-$770.00)*60%). The record supports the trial court's finding.

We briefly address Father's assertion that Mother sought reimbursement in the amount of $5,157.84, per her spreadsheet. The items listed on the spreadsheet included the expense amounts, who paid the expense, and what amount, if any, Father still owed Mother for reimbursement. The amounts listed as those Father owed Mother for reimbursement total $5,157.84. However, those amounts mostly correlate to the portion of expense totals attributable to Mother (though she had already paid the *total* expense) rather than amounts attributable to Father. The record supports the trial court's disregard of those amounts proposed as owed by Father. *See id.* Father's argument as to finding of fact 87 being unsupported by evidence is overruled.

D. Amount of Child Support Awarded

[4] Father argues that the trial court abused its discretion in setting his child support obligation applicable from 2017 through 2022 and from 2022 going forward. Father contends that the trial court erred in its determination of the children's monthly financial needs.

Father points out that the Child Support Guidelines effective in 2018 provided guidance for combined gross incomes up to $25,000.00 per month and determined the presumptive amount of reasonable financial need for two children in such households was $3,141.00 per month. Here, the trial court found that the parties' combined monthly gross income in 2018 was $27,608.42. Though the parties' combined income was only 9.5% higher than the $25,000.00 maximum for the 2018 Guidelines, the court determined that the children's monthly financial needs were $6,544.03—more than double the presumptive financial need under the Guidelines.

Similarly, the Child Support Guidelines effective in 2022 (the year of the trial court's hearing to modify child support) considered a combined monthly income of $30,000.00 and determined the reasonable financial need of two children to be $3,654.00 per month. Here, the trial court found that the parties' 2022 combined monthly gross income was $36,073.19 ($6,073.19 over the combined monthly income under the 2022 Guidelines). The children's financial needs were found to be $9,881.86 per month. Father contends that the court's determination of the children's monthly financial needs in 2018 and 2022 is an abuse of discretion.

"[I]n cases above the child support guidelines, the trial court must make a discretionary determination based upon the factors set out in North Carolina General Statute [Section] 50-13.4(c)[,]" *Bishop v. Bishop*, 275 N.C. App. 457, 463, 853 S.E.2d 815, 820 (2020), such as the needs of the children "for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child[ren] and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (2023). "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Kleoudis*, 271 N.C. App. at 38, 843 S.E.2d at 281 (citation and quotation marks omitted). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682 (citation omitted).

Child support obligations set by the trial court well above the amount that might be extrapolated from the Guidelines does not mean the child support is an abuse of discretion if the findings of fact support the amount the trial court awarded. This Court has noted that the trial court should consider the financial circumstances and historical expenses in each individual case:

> Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. It is possible that a child with nothing more than a house to shelter him, a coat to keep him warm and sufficient food to keep him healthy will be happier and more successful than a child who has all the advantages, but most parents strive and sacrifice to give their children advantages which cost money. Much of the special education and training which will be of value to people throughout life must be given [to] them when they are young, or be forever lost to them.
>
> What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Things which might properly be deemed necessaries by the family of a man of large income would not be so regarded in the family of a man whose earnings were small and who had not been able to accumulate any savings. In determining that amount which is reasonable, the trial judge has a wide discretion with which this [C]ourt will not interfere in the absence of a manifest abuse.

Loosvelt v. Brown, 235 N.C. App. 88, 105-06, 760 S.E.2d 351, 362 (2014) (quotation marks omitted) (quoting *Williams v. Williams*, 261 N.C. 48, 57-58, 134 S.E.2d 227, 234 (1964)).

Here, the trial court's determination of the children's monthly financial needs in 2018 and 2022 was made by summing each party's monthly shared family expenses (household expenses, such as rent, electricity, heat, water, etc.) attributable to the children and the children's monthly individual expenses (uninsured medical/dental expenses, clothing, activities, etc.). Father has challenged some of the individual expenses which we have addressed. As we have explained, the trial court's findings were supported by the evidence. We do not see that the manner in which the trial court determined the children's financial needs was so arbitrary that it could not have been the result of a reasoned decision, and Father does not contend so. *See id.*; *see also Kleoudis*, 271 N.C. App. at 38, 843 S.E.2d at 281. We overrule Father's challenge to the court's determination of the children's monthly financial needs in 2018 and 2022.

E. Sanctions Order

[5] We now address Father's arguments as to the Sanctions Order and the Order for Attorney's fees. According to Father, the trial court's 24 August 2022 Sanctions Order violates North Carolina Rule of Civil Procedure 37 ("Failure to make discovery; sanctions"), and its 31 January 2023 Order for Attorney's Fees, which awarded Mother attorney's fees incurred related to her motion for sanctions against Father, is an abuse of discretion.

In the Sanctions Order, the trial court considered the appropriate sanctions under Rule 37 for Father's failure to respond fully to Mother's first request for production of documents. The trial court "decline[d] to strike []Father's Financial Affidavits and decline[d] to prevent . . . Father from offering evidence of his needs and expenses and the minor children's needs and expenses." Instead, the trial court imposed the "lesser sanction" of requiring Father to produce the discovery to Mother and to resume the trial after Mother and her counsel had an opportunity to review the discovery and prepare for the trial. The trial court also found that Father should be required to reimburse Mother for her "reasonable attorney's fees incurred related to her [m]otion for [s]anctions," with the amount of fees to be determined at the child support trial. Father addresses only the trial court's conclusion in the Sanctions Order that Mother was entitled to an award of attorney's fees under Rule 37.

Father argues that Rule 37(a) and 37(b) sets forth a two-step procedure for imposing sanctions. *See* N.C. Gen. Stat. § 1A-1, Rule 37(a), (b) (2023). First, the motion of a party moving to compel discovery must "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." N.C. Gen. Stat. § 1A-1, Rule 37(a)(2). Second, after a court compels discovery, sanctions may be imposed for failure to comply with the discovery order. *Id.* § 1A-1, Rule 37(b). Father contends that Mother did not file a motion seeking to compel discovery, so when the trial court imposed sanctions, it erred in doing so under Rule 37(b) without satisfying Rule 37(a).

Father argues that Mother's allegation about his failure to comply with Local Rule 8 "was the failure to provide the current principal balance and payment terms of debt." Local Rule 22 authorizes sanctions for failure to comply with other Local Rules. *See* Local Rules of Domestic Court, Jud. Dist. 26, Family Court Division, Rule 22. Father contends that Mother's motion did not support entry of the Sanctions Order.

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996) (citation omitted). "[T]he circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience." *Patterson v. Sweatt*, 146 N.C. App. 351, 357, 553 S.E.2d 404, 409 (2001) (citation omitted). "A party wishing to avoid sanctions for non-compliance with discovery requests has the burden of proving the non-compliance was justified." *Graham*, 121 N.C. App. at 465, 466 S.E.2d at 294 (citation omitted).

Under Rule 37(a),

> [i]f . . . a party fails to answer an interrogatory . . . or if a party . . . fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for . . . an order compelling inspection in accordance with the request.

N.C. Gen. Stat. § 1A-1, Rule 37(a)(2). Under Rule 37(b), "[i]f a party . . . fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just." *Id.* § 1A-1, Rule 37(b)(2).

Under Rule 26 of the North Carolina Rules of Civil Procedure, a party from whom discovery is sought may move for a protective order but if the motion "is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery." N.C. Gen. Stat. § 1A-1, Rule 26(c) (2023). Where a motion for a protective order under Rule 26 is denied, the result may be the same as "a motion to compel discovery under Rule 37(a): an order compelling discovery. We hold that violation of an order compelling discovery that results from a motion for a protective order may be the basis for sanctions under Rule 37(b)." *Lovendahl v. Wicker*, 208 N.C. App. 193, 200, 702 S.E.2d 529, 534 (2010); *see also* N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (Commentary) ("Various rules authorize orders for discovery . . . . Rule 37(b)(2) should provide comprehensively for enforcement of all these orders.").

As stated in the Sanctions Order, it is unchallenged that following remand from this Court in *Kincheloe I*, "Mother served []Father with [Mother]'s [f]irst [r]equest for [p]roduction of [d]ocuments seeking financial documents from []Father from 2017 (the date the initial [m]otion to [m]odify [c]hild [s]upport was filed) through the present." Father filed the "Motion for Protective Order (Rule 26(c)); Motion to Quash/Amend Subpoena," claiming to have a need for "a protective order which prevents [Mother] from seeking any financial documents after [14 September 2018]." On 8 March 2022, the court entered the Order Denying Motion to Dismiss and ruling that "[Father]'s Motion for Protective Order; Motion to Quash/Amend Subpoena . . . is DENIED" and "[w]ithin 60 days from the entry of th[e] Order, []Father shall respond to []Mother's [f]irst [r]equest for [p]roduction of [d]ocuments."

Mother filed a motion for sanctions under Rule 11 and Rule 37(b)(2) of our North Carolina Rules of Civil Procedure, as well as Rule 22 of the Local Rules of Domestic Court on 12 July 2022. She claimed that Father had "failed and refused to produce documents from the time period of [1 January 2018] through [July] 2022" and specifically, had failed to produce statements or documentation on four principal balances he acknowledged owing on a 2022 Financial Affidavit, as required by Local Rules. *See* Local Rules of Domestic Court, Jud. Dist. 26, Family Court Division, Rules 8 & 22.

In its Sanctions Order, the trial court found that following entry of the Order Denying Motion to Dismiss, Father "failed and refused to produce bank account statements and credit card statements from the time period of [1 January 2017] through in or around September/November 2021." The trial court noted that Father's claims that the requested information were "not relevant or reasonably calculated to lead to relevant evidence" were similar to those objections raised before the trial court prior to its entry of the Order Denying Motion to Dismiss. The court further noted that Father requested that Mother produce financial documents spanning 2017 to the present, and Mother timely complied.

The trial court concluded that Father had "failed to comply with Rule 37" and that Mother had been prejudiced by the failure. The trial court's Sanction Order directed Father to produce bank statements spanning 1 January 2018 through 10 September 2021, as well as credit card statements from 1 January 2018 forward. It also directed Father to reimburse Mother the reasonable amount of attorney's fees incurred related to the motion for sanctions under Rule 37 as well as Local Rules 8 and 22.

Because the trial court denied Father's motion for a discovery protective order made under Rule 26(c), ordered Father to respond to Mother's first request for production of documents within sixty days of its 8 March 2022 Order Denying Motion to Dismiss, and Father "failed and refused" to comply with said order, the trial court was authorized to sanction Father under Rule 37. *See* N.C. Gen. Stat. § 1A-1, Rule 37(b); *Lovendahl*, 208 N.C. App. at 200, 702 S.E.2d at 534. Father's argument is overruled.

Because we uphold the trial court's Sanctions Order under Rule 37(b), we need not address whether the Order is also supported by application of the Local Rules.

F. Order for Attorney's Fees

[6] We have already upheld the trial court's determination that Mother was entitled to recover attorney's fees as a sanction under Rule 37(b). Father believes that the trial court abused its discretion in establishing the amount of the attorney's fees related to Mother's motion for sanctions. Father's conclusory argument is that the fee amount was "unreasonable," but he cites no law in support of this claim. He contends that the trial court failed to make sufficient findings of fact to support its $4,459.50 attorney's fee award in favor of Mother and that the award was based on the attorney's timesheet, which "mostly contained time that was not related to the [motion for sanctions]." Father asserts that the "court failed to make findings as to how it determined that the amount of attorney's fees awarded was reasonable." Father points out that the attorney's fee affidavit had entries for billings related to a review of the requested documents and preparation for hearing: "[t]his time would have been spent no matter when the documents were provided." He contends that entries totaling three hours for drafting the Sanctions Order were unreasonable, as was a $2,800.00 entry for a half-day child support hearing. Father also contends that the assertion in the Sanctions Order that his failure to provide the documents required an additional day of hearing was incorrect: the child support modification hearing was originally scheduled to last two days; after the sanction hearing, the second day of the modification hearing was merely postponed.

We first note that Father has challenged none of the trial court's detailed findings addressing attorney's fees as unsupported by the evidence. The trial court addressed the fee amount in findings 6, 8, 9, 10, 11, 12, 13, 14, 15, and 16:

> 6. []Father's failure to provide complete discovery responses necessitated []Mother filing and prosecuting a [m]otion for [s]anctions, drafting an Order of Sanctions, initial review of documents produced to determine whether production was complete, and an additional hearing after the July 13, 2022 hearing. As a result, []Mother incurred $4,459.50 in reasonable attorney's fees.
>
> . . . .
>
> 8. On August 30, 2022, counsel for []Mother filed an Affidavit of Hailey E. White, detailing the attorney's fees incurred by []Mother in relation to her [m]otion for [s]anctions. The [c]ourt received the Affidavit of Haley E. White into evidence at the August 30, 2022 hearing.
>
> 9. []Mother incurred reasonable attorney's fees in the amount of $4,459.50 related to her [m]otion for [s]anctions.
>
> 10. The fees incurred by []Mother in connection with her [m]otion for [s]anctions are reasonable in nature, scope, skill, time, and rate.
>
> 11. Pursuant to Rule 37 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 [m]otion for [s]anctions due to []Father's failure to provide complete discovery responses, which necessitated an additional child support hearing, and caused []Mother to incur additional attorney's fees in the amount of $4,459.50.
>
> 12. [Mother] entered into an employment agreement with James, McElroy, and Diehl, P.A., under the terms of which she agreed to pay Ms. White and other attorneys at the firm at the regular hourly rate billed for her time by her firm, James, McElroy & Diehl, P.A., as well as to pay other attorneys and paralegals working on her case at their regular hourly rates.
>
> 13. Ms. White and her colleagues at James, McElroy and Diehl, P.A., have rendered valuable legal services to []

> Mother in connection with her [m]otion for [s]anctions. Those services and the time spent in providing those services are outlined in detail in the Affidavit of Haley E. White ("Ms. White's affidavit") offered and received into evidence during the hearing on the matter. The [c]ourt considered Ms. White's affidavit as to her time involvement and the involvement of her associates and paralegals, has examined this file, and is familiar with Ms. White's representation in this matter on behalf of []Mother.
>
> 14. Ms. White is an experienced domestic-relations practitioner in Mecklenburg County, who has practiced at James, McElroy & Diehl, P.A. since 2015. Ms. White has a current hourly rate of $350-$375, and in this matter, her hourly rate is $350. Ms. White's hourly rate is reasonable relative to attorneys of comparable experience and skill in the Mecklenburg County family bar.
>
> 15. Considering the applicable hourly rates and the time involved as set forth on Ms. White's affidavit, the nature and value of the services rendered, and the skill and ability called for, the [c]ourt finds that the reasonable value of the services rendered by Ms. White and her firm to []Mother in connection with her [m]otion for [s]anctions be $4,459.50. Such value is customary for like work performed by legal counsel of material similar qualifications and experience in Mecklenburg County, North Carolina.
>
> 16. Considering the circumstances of this particular case, it is reasonable and appropriate that []Father pay the sum of $4,459.50 to Ms. White's firm for the efforts on []Mother's behalf by Ms. White and her firm as set forth above.

These findings were not challenged as unsupported by the evidence and are binding on appeal. *See State on relation of City of Sanford v. Om Shree Hemakash Corp.*, 295 N.C. App. 372, 377, 905 S.E.2d 902, 906 (2024) ("Additionally, in reviewing the trial court's order imposing sanctions for discovery violations under the abuse of discretion standard, any unchallenged findings of fact are binding on appeal." (citation and quotation marks omitted)).

We review the amount of fees awarded for abuse of discretion. *See Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) ("When the statutory requirements have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." (citation and emphasis omitted)).

Although Father argues only that the amount of fees attributed to the motion for sanctions was "unreasonable," he does not, and cannot, argue that the trial court's findings fail to address the necessary facts to support an award of attorney's fees. *See Om Shree Hemakash Corp.*, 295 N.C. App. at 377, 905 S.E.2d at 905. Nor has Father argued that the findings are not supported by the evidence. The trial court did not award Mother all the attorney's fees she claimed she was entitled to recover but made detailed findings regarding the nature of the proceedings and the time required for the matters related to the motion for sanctions, as well as Mother's counsel's qualifications, representation in this matter, and comparable and customary rates for "like work performed by legal counsel of materially similar qualifications and experience in Mecklenburg County, North Carolina." Father has failed to demonstrate that the trial court abused its discretion in the amount of attorney's fees awarded.

III. Conclusion

We hold that the trial court did not violate this Court's mandate in *Kincheloe I* or abuse its discretion under Rule 63 by holding a new evidentiary hearing on remand. The trial court's findings of fact support its conclusions of law, and the trial court did not abuse its discretion in establishing Father's child support obligation. We also affirm the trial court's Sanctions Order and the Order for Attorney's Fees.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

JERRY W. MCROY; KENNETH A. JONES; MARCUS J. KARACHUN; JEFFREY S. THOMAS; SANDY K. PHILLIPS; NORTH CAROLINA DIVISION OF SONS OF THE CONFEDERATE VETERANS, INC.; ROSE L. QUASEBARTH; MARGARET G. WILSON; AND THE UNITED DAUGHTERS OF THE CONFEDERACY NORTH CAROLINA DIVISION, INC., PLAINTIFFS

v.

PITT COUNTY, NORTH CAROLINA, DEFENDANT

No. COA25-30

Filed 5 November 2025

1. Jurisdiction—motion to dismiss—lack of standing—county's removal of Confederate statue from courthouse

In a lawsuit filed by a group of Pitt County residents along with two nonprofit organizations commemorating Confederate Civil War soldiers (plaintiffs), where the complaint requested declaratory and injunctive relief after Pitt County (defendant) removed a statue of a Confederate soldier from the county courthouse, the trial court properly granted defendant's motion to dismiss for lack of jurisdiction where plaintiffs failed to establish standing to sue: (1) under N.C.G.S. § 143-318.16, since they did not assert this basis for standing before the trial court and, at any rate, the statute was an "open meetings law" that did not apply to plaintiffs' claims; (2) as taxpayers, since plaintiffs did not sufficiently allege a specific demand on—and refusal by—the county board of commissioners, or that such a demand would have been useless; (3) through representational standing, where both nonprofits failed to satisfy the requirement that its individual members otherwise have standing; (4) under N.C.G.S. § 100-2.1 (the Monument Protection Act), where plaintiffs asserted no ownership interest in the statue or other legal injury under the statute, which itself did not create a private right of action; or (5) under the state constitution, where plaintiffs' conclusory statements failed to demonstrate that defendant's conduct deprived them of any constitutional right.

2. Civil Procedure—motion to dismiss—Rule 12(b)(1)—lack of standing—granted without written findings—no error

In an action for declaratory and injunctive relief arising from defendant county's decision to remove a statue of a Confederate soldier from the county courthouse, the trial court did not err by granting defendant's motion to dismiss for lack of jurisdiction—filed pursuant to Civil Procedure Rule 12(b)(1) on the ground that plaintiffs lacked standing to sue—without entering written findings of fact in its dismissal order despite plaintiffs' request for such findings. Apart from the fact that orders granting Rule 12(b) motions are generally not required to include findings of fact, the lack of findings in this particular order neither prevented nor constrained appellate review of the primary issue in the case—whether plaintiffs had standing to pursue their claims—since it was resolved by plaintiffs' complaint, which failed to establish standing on any basis.

3. Statutes of Limitation and Repose—declaratory judgment action—county's removal of Confederate statue from courthouse

In an appeal from an order dismissing an action for declaratory and injunctive relief arising from defendant county's decision to remove a statue of a Confederate soldier from the county courthouse, where the dismissal order was upheld on the ground that plaintiffs lacked standing, the Court of Appeals noted that, even if plaintiffs had sufficiently established standing to bring their claims, they had filed their complaint almost four years after the statue's removal; therefore, the applicable statute of limitations had already run before plaintiffs brought their action.

Judge TYSON dissenting.

Appeal by plaintiffs from order entered 19 August 2024 by Judge Wayland J. Sermons, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 14 August 2025.

James B. Wilson & Associates, by James Barrett Wilson Jr., for plaintiffs-appellants.

Poyner Spruill LLP, by J. Nicholas Ellis, for defendant-appellee.

ARROWOOD, Judge.

Jerry W. McRoy, Kenneth A. Jones, Marcus J. Karachun, Jeffrey S. Thomas, Sandy K. Phillips, the North Carolina Division of Sons of Confederate Veterans, Inc., Rose L. Quasebarth, Margaret G. Wilson, and The United Daughters of the Confederacy North Carolina Division, Inc. (collectively "plaintiffs") appeal from the trial court's order dismissing their complaint against Pitt County ("defendant"). Plaintiffs contend the trial court erred in dismissing their complaint for lack of standing and subject matter jurisdiction. For the following reasons, we affirm the trial court.

I. Background

Plaintiffs McRoy, Jones, Karachun, Thomas, Phillips, Quasebarth, and Wilson are citizens and residents of Pitt County. The North Carolina Division of Sons of Confederate Veterans, Inc. ("SCV") and The United Daughters of the Confederacy – North Carolina Division, Inc. ("UDC") are nonprofit organizations organized and existing under the laws of North Carolina. These organizations are affiliated with the Sons of Confederate Veterans, Inc., originally organized in Virginia in 1896, and the United Daughters of the Confederacy, Inc., incorporated in the District of Columbia in 1919.

Plaintiffs initially filed a complaint and motion for temporary restraining order on 3 May 2024. Plaintiffs filed an amended complaint on 12 June 2024 seeking a declaratory judgment that defendant's removal of a statue depicting a Confederate soldier ("the monument") from the grounds of the Pitt County Courthouse was *ultra vires* and "beyond the course and scope of Defendant's authority under N.C. Gen. Stat. § 100-2.1" and in violation of North Carolina jurisprudence and other legal authorities. The amended complaint alleged that the monument was donated by the UDC in 1914, and was removed following a vote by the Pitt County Board of Commissioners on or about 22 June 2020. Plaintiffs also sought a temporary restraining order and preliminary injunction to prohibit defendant "from removing or otherwise relocating the Monument pending resolution of the issues arising from" the amended complaint. With respect to standing, plaintiffs asserted an interest in the property and events underlying the action which would be "injuriously affected" by defendant's actions, additionally asserting representational standing for SCV and UDC.

Defendant filed an answer and motion to dismiss on 28 June 2024. Defendant asserted in the pleadings that plaintiffs lacked standing, had no private cause of action under the Monument Act, and that the claims were barred by the statute of limitations. Defendant concurrently filed a notice of hearing on the motion.

The motion to dismiss was heard on 19 August 2024. Defendant's counsel began the hearing by noting that plaintiffs did not claim any ownership interest in the monument or any contractual relationship with defendant concerning how the monument was utilized or displayed. Defendant further argued plaintiffs had not made the required allegations for a claim of taxpayer standings, specifically by failing to "allege that there had been a demand on and refusal by proper authorities to institute proceedings for the protection of their interests." Regarding plaintiffs' claim under the North Carolina Constitution, defendant argued that plaintiffs had failed to allege and establish a legal or factual injury arising from defendant's actions.

Plaintiffs' counsel argued there was a geographical relationship and particularized interest in the monument through plaintiffs' ancestry and status as taxpayers. Plaintiffs asserted their case was distinguishable from the recently decided *Society for the Historical Preservation of the Twenty-Sixth North Carolina Troops, Inc. v. City of Asheville*, 385 N.C. 744, 745 (2024), as the pleadings added specific named plaintiffs challenging defendant's action as taxpayers. Plaintiffs further asserted a public policy argument under N.C.G.S. § 100-2.1 that the removal of monuments was under "strict limitations" and that monuments could only be relocated within the jurisdictional limits in a place of equal prominence and access.

Following the hearing, the trial court entered an order granting defendant's motion to dismiss pursuant to Rule 12(b)(1). Plaintiffs filed notice of appeal on 11 September 2024.

II. Discussion

Plaintiffs contend the trial court erred in dismissing their amended complaint under Rule 12(b)(1) for lack of standing and for denying plaintiffs' request to make findings of fact and conclusions of law. We disagree.

A. Standard of Review

We review the trial court's decision on a motion to dismiss for lack of standing under *de novo* standard of review. *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624 (2022) (citation omitted). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Brown v. N.C. Dep't of Pub. Safety*, 256 N.C. App. 425, 427 (2017) (citation omitted). Additionally, "we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644 (2008).

B. Standing

[1] Standing is a "necessary prerequisite to a court's proper exercise of subject matter jurisdiction," and may be challenged "at any stage of the proceedings, even after judgment." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561 (2018) (citations omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *McCrann v. Pinehurst, LLC*, 225 N.C. App. 368, 372 (2013) (citation and internal quotation marks omitted). "A party seeking to enjoin the removal of a monument owned by a political subdivision of this State through a private suit must, at minimum, allege a legal interest for their claims to survive a motion to dismiss under Rule 12(b)(1)." *Soc'y for the Hist. Pres. of the Twenty-Sixth*, 385 N.C. at 748 (citing *United Daughters*, 383 N.C. at 649).

Plaintiffs raise several arguments to assert they have standing to bring this action. We address each in turn.

1. N.C.G.S. § 143-318.16

Plaintiffs first contend they have standing pursuant to N.C.G.S. § 143-318.16, arguing "[t]his grant of standing provides that any person may seek a declaratory judgment, and that the plaintiff is not required to allege or prove any special damage different from that suffered by the public at large." However, plaintiffs failed to raise this argument before the trial court, and a party "cannot raise on appeal issues which were not pleaded or raised below." *Bethesda Rd. Partners, LLC v. Strachan*, 267 N.C. App. 1, 7 (2019); *see also* N.C. R. App. P. 10(a)(1). Accordingly, plaintiffs are unable to assert standing under this statute; we further note that even had this argument been presented to the lower court, the statute is an "open meetings law" and is inapplicable to plaintiffs' alleged causes of action.

2. Taxpayer Standing

Plaintiffs next argue they have standing to bring this action as taxpayers.

> Where a plaintiff undertakes to bring a taxpayer's suit . . . , his complaint must disclose that he is a taxpayer of the agency or subdivision, and allege facts that adequately establish either: (1) that there has been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision, or (2) that a demand on such authorities would be useless.

Pugh v. Howard, 288 N.C. App. 576, 581 (2023) (quoting *United Daughters*, 383 N.C. at 630–31) (cleaned up). In *Pugh*, although the complaint alleged the individual plaintiffs were taxpayers, it failed to allege there had been a demand on and refusal by proper authorities, or that such a demand would have been useless, and accordingly this Court overruled the argument. *Id.*

Similarly here, plaintiffs' amended complaint fails to sufficiently allege a demand on and refusal by the Pitt County Board of Commissioners, or that such a demand would have been useless. In their reply brief, plaintiffs characterize defendant's invocation of *United Daughters* and *Pugh* as a "fallacious attempt" to argue that plaintiffs lacked standing as taxpayers. Plaintiffs contend the following was sufficient to meet the elements for taxpayer standing: (1) the amended complaint alleged the monument had been removed; (2) the complaint was filed in response to the removal; (3) the amended complaint included a link to the minutes of a board meeting wherein one of the named plaintiffs stated his objection to the removal; and (4) plaintiffs' attorney sent a letter on 14 April 2024 objecting to the removal.

Plaintiffs do allege the Pitt County Commissioners violated the Monuments Act among other assertions of wrongful conduct; these contentions and the filing of the complaint indicate plaintiffs' objection to the relocation of the monument and their belief that defendant lacked the authority to do so. However, the four corners of the amended complaint do not meet the elements to establish taxpayer standing as set forth in *United Daughters* and *Pugh*. It is unclear from the amended complaint what specific demand was made on the Board of Commissioners, nor does the complaint indicate defendant's refusal to institute protective proceedings upon such a demand. The amended complaint similarly fails to establish that such a demand would have been useless.

Plaintiffs cite several other cases, including *Freeman v. Board of Commissioners*, 217 N.C. 2097 (1940), and *Goldston v. State*, 361 N.C. 26 (2006), which support "the proposition that individuals as citizens and taxpayers have standing to challenge actions of a county board of commissioners that involve the payment of public funds for unauthorized purposes[,]" and are necessarily implicated in this case as defendant's action required the expenditure of public funds which were obtained from taxes levied on plaintiffs. Plaintiffs also cite *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558 (2021) arguing they sustained a legal injury as taxpayers. Although it is true that taxpayers have standing to challenge actions in certain cases and upon sufficient allegations, plaintiffs again fail "to demonstrate that [they have] sustained a legal or factual injury arising from defendant's actions as a prerequisite for maintaining the present declaratory judgment action." *United Daughters*, 383 N.C. at 629. Plaintiffs' amended complaint does not sufficiently allege nor demonstrate a legal or factual injury to plaintiffs as taxpayers, and accordingly plaintiffs are unable to establish standing as taxpayers to maintain the declaratory judgment action.

3. Representational Standing

"Legal entities other than natural persons may have standing." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129 (1990). To establish standing, an organization "or one of its members must suffer some immediate or threatened injury." *Id.* Additionally, an association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130 (citation omitted). "When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.' " *Id.* (quoting *Warth*, 422 U.S. at 515).

As discussed previously and throughout this opinion, the individual plaintiffs are unable to establish taxpayer standing, and have failed to allege or establish standing on any other rights, injuries, or legally protected interests. Accordingly, the plaintiff associations fail to satisfy the first requirement that its individuals would otherwise have standing. Although we acknowledge the purpose of the plaintiff organizations are for historical, benevolent, memorial, and educational programs, plaintiffs have failed to identify a legally protected interest in the monument. The amended complaint was properly dismissed for lack of representational standing.

4. Standing Under N.C.G.S. § 100-2.1

Plaintiffs further contend, related to their arguments on taxpayer standing, that they have standing on the ground that defendant committed an *ultra vires* act, arguing "taxpayers of municipal corporations have the right and the duty to hold such entities accountable for their actions and to restrain them from undertaking actions which are unauthorized." Plaintiffs assert that defendant's action "is unlawful because it contravenes the express public policy of the State of North Carolina as enunciated in the Monument Protection Act[,]" and that "no municipal corporation has the authority to act in a manner which contravenes the requirements of a duly enacted statute."

If a party, whether an individual or organization, "fail[s] to allege the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, dismissal is appropriate." *Soc'y for the Hist. Pres. of the Twenty-Sixth*, 385 N.C. at 749. On the other hand, "if such parties establish standing by alleging an ownership, contractual, or other cognizable interest as described in our precedent, dismissal under Rule 12(b)(1) is error." *Id.*

> [W]hen the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate the legal right so long as he is in the class of persons on whom the statute confers a cause of action.

Comm. to Elect Dan Forest, 376 N.C. 558, 608 (2021).

In *United Daughters*, our Supreme Court answered this question with respect to N.C.G.S. § 100-2.1:

> We are unable to identify anything in N.C.G.S. § 100-2.1, particularly when read in conjunction with the allegations of the amended complaint, that explicitly authorizes the assertion of a private cause of action for the purpose of enforcing that statutory provision. The absence of explicit language authorizing the assertion of a private right of action based on N.C.G.S. § 100-2.1 stands in stark contrast to the statute at issue in *Committee to Elect Dan Forest*, which specifically authorized a candidate for elected office who had complied with the relevant campaign finance laws to sue an opposing candidate or candidate committee for an alleged violation of those same laws. . . . Instead, N.C.G.S. § 100-2.1 *prohibits* the removal or relocation of certain specified objects that are owned by the State or located on public property. Finally, even if N.C.G.S. § 100-2.1 could be interpreted to implicitly authorize the assertion of a private right of action, nothing in the relevant statutory language or the allegations contained in the amended complaint suggests that plaintiff would be "in the class of persons on which the statute confers the right[.]"

United Daughters, 383 N.C. at 638 (citations omitted).

As previously discussed, plaintiffs failed to establish standing as taxpayers on the pleadings. There is no alleged contractual relationship, nor have plaintiffs brought an action to quiet title or otherwise assert an ownership interest in the monument. Rather, as the amended complaint alleges, the monument was *donated* to Pitt County in 1914.

Although plaintiffs argue defendant's action was illegal under N.C.G.S. § 100-2.1, plaintiffs have asserted no legal or factual injury, or other legal interest, that establishes standing to pursue a private cause of action under the statute. Plaintiffs' amended complaint fails to establish standing to prosecute a claim under N.C.G.S. § 100-2.1 and was properly dismissed.

5. Standing Under the North Carolina Constitution

Finally, plaintiffs contend they have standing pursuant to Article I, Section 19 of the North Carolina Constitution:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19. Plaintiffs assert the exclusion of Southern identity and heritage by way of acting to relocate the monument "is quite simply a form of discrimination." Plaintiffs cite *North Carolina State Conference of National Association for the Advancement of Colored People v. Alamance County*, 293 N.C. App. 107 (2024), arguing that "[i]f the plaintiffs in *Alamance* were allowed to proceed in litigation intended to use the Monument Protection Act as justification for removing a monument from the grounds of a county courthouse, it logically follows" that plaintiffs should have an equal opportunity to do so to prevent the removal of a memorial.

"[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 782 (1992). "[T]he common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right." *Id.*

We again find our Supreme Court's analysis in *United Daughters* instructive on this argument. In that case, the plaintiffs asserted the defendant's actions "infringe[d] upon the freedom of speech" of the plaintiffs and citizens of the county, that these actions "violate[d] the right of equal protection pursuant to the [Fourteenth] Amendment," and that "[p]laintiff will be irreparably harmed if [d]efendants take affirmative action to remove or relocate the [monument] prior to a full adjudication of the respective rights and obligations of the [p]arties." *United Daughters*, 383 N.C. at 630. The Court rejected those assertions as "nothing more than conclusory statements devoid of any factual or legal support." *Id.*

Here, plaintiffs "allege and say that they have been deprived of their liberties and privileges in contravention of the law of the land[,]" and have "direct and significant interests to objects of remembrance which constitute public property," in addition to being "denied equal protection of the laws and that they have been subjected to discrimination by Defendant." These allegations are substantially the same as those rejected by the Supreme Court in *United Daughters*. Accordingly, we find this case to be analogous to *United Daughters* and hold that plaintiffs failed to identify any legal rights conferred by the North Carolina Constitution that were deprived by defendant's conduct.

Regarding plaintiffs' arguments on *Alamance*, we note that the opinion does not address the issue of standing, and it does not appear that the plaintiffs' standing to pursue their claim was challenged; the lower court heard cross-motions for summary judgment, rather than a motion to dismiss under 12(b). As it is unclear from the analysis in *Alamance* whether or not the plaintiffs presented sufficient allegations in their complaint to establish standing, we decline to adopt plaintiffs' view here that *Alamance* is sufficient authority to establish standing for any party challenging the presence of a monument under N.C.G.S. § 100-2.1.

C. <u>Request for Findings of Fact</u>

[2] Lastly, plaintiffs contend the trial court should have made findings of fact in granting the motion to dismiss because the court ruled that it lacked jurisdiction.

"The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact, to make clear what was decided for purposes of res judicata and estoppel, and to allow for meaningful appellate review." *Maynard v. Crook*, 289 N.C. App. 357, 367 (2023) (citations omitted). "As resolution of evidentiary conflicts is not within the scope of Rule 12 and findings of fact in a Rule 12 order are not binding on appeal," orders granting a Rule 12(b) motion to dismiss "generally should not include findings of fact." *Id.* (citing *White v. White*, 296 N.C. 661, 667 (1979)).

Pursuant to Rule 52(a)(2) of the Rules of Civil Procedure "the trial court is not required to make specific findings of fact unless requested by a party." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694 (2005) (citation omitted). "When the record contains no findings of fact, it is presumed . . . that the court on proper evidence found facts to support its judgment." *Id.* (cleaned up). A trial court may be required to make findings of "specific facts which support its ultimate disposition of the case . . . to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712 (1980). "The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " *Id.* (citation omitted).

Although plaintiffs' request for findings of fact was denied by the trial court, we do not find that this was error. As previously discussed, the primary question in this case and upon the motion to dismiss is whether plaintiffs had standing to pursue their claims. That question is resolved by plaintiffs' amended complaint, which failed to establish standing on any basis. The omission of written findings of fact from the trial court's order did not prevent or otherwise constrain our ability to conduct a *de novo* review of the amended complaint. Accordingly, the trial court did not err in failing to include specific written findings of fact in the order dismissing plaintiffs' complaint.

D. Statute of Limitations

[3] We lastly note that even had plaintiffs' amended complaint sufficiently established standing on any basis, the removal was effected on or about 22 June 2020, and the initial complaint was not served or filed until 3 May 2024, almost four years later. Accordingly, the statute of limitations had run prior to the action being brought.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge CARPENTER concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion incorrectly holds Plaintiffs' request for findings of fact being denied by the trial court was not prejudicial error, concludes Plaintiffs lack standing, and affirms the trial court's order. I vote to vacate and remand the order dismissing Plaintiffs' complaint. I respectfully dissent.

I. The Monument

The Pitt County Board of Commissioners (the "Board") voted on 22 June 2020 to remove a war grave memorial marker and monument dedicated to Pitt County's "Our Confederate Dead" located at the Pitt County Courthouse and depicting a representative and unidentified American Civil War soldier standing upon a pedestal (the "Memorial" or "Monument"). The cost of the Memorial was raised by families of war dead, veterans, and the United Daughters of the Confederacy and was dedicated on 13 November 1914 by Governor Locke Craig to memorialize the war dead and veterans and as a tombstone for the war dead who did not return home.

Defendant unlawfully removed the tombstone and Memorial and placed it in storage. The Board voted to donate the tombstone and Memorial to Commemorating Honor, Inc. on 15 April 2024. Commemorating Honor, Inc. stated the Monument will be relocated away from Pitt County only for display at Valor Memorial Park in Davidson County or Lee-Jackson Memorial Park in Rockbridge County, Virginia.

Jerry W. McRoy, Kenneth A. Jones, Marcus J. Karachun, Jeffrey S. Thomas, Sandy K. Phillips, Rose L. Quasebarth, and Margaret G. Wilson are citizens and residents of Pitt County. The Daughters of the Confederacy-North Carolina Division is an active entity in good standing, chartered by the North Carolina Secretary of State as a North Carolina non-profit corporation on 16 September 1992. The Daughters of the Confederacy-North Carolina Division's stated purpose in its charter is for "historical, benevolent, memorial, educational and patriotic programs, plan events and scholarships[.]" The United Daughters of the Confederacy raised the funds and facilitated the construction and placement of the Memorial over 110 years ago.

The North Carolina Division of the Sons of Confederate Veterans, Inc. is also an active non-profit corporation existing under the laws of North Carolina which exists "for the purpose of honoring and remembering the sacrifices made by those who served in the armed forces of the Confederate States of America during the American Civil War."

II. N.C. Gen. Stat. § 100-2.1

The General Assembly enacted N.C. Gen. Stat. § 100-2.1(b) (2023) ("Monument Protection Law"), which mandates: "An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection." N.C. Gen. Stat. § 100-2.1(b) (2023). An "object of remembrance" is defined as "a monument . . . that commemorates an event, a person, or military service that is part of North Carolina's history." *Id.*

Our Court has held:

> In so concluding, we note our federal government recognizes that service in the Confederate Army qualifies as "military service." *See* 38 U.S.C. § 1501 ("The term 'Civil War veteran' includes a person who served in the military or naval forces of the Confederate States of America during the Civil War"); *Id.* § 1532 (allowing surviving spouses of Confederate soldiers to qualify as surviving spouses of Civil War veterans for receiving pensions). We further note that North Carolina recognizes "Confederate Memorial Day" as a legal public holiday. N.C. Gen. Stat. § 103-4(a)(5) (2023). Thus, we conclude as a matter of law that the Monument was of the type intended to be covered by the General Assembly when it enacted the Monument Protection Law.

N.C. State Conf. of the NAACP v. Alamance Cnty., 293 N.C. App. 107, 110, 900 S.E.2d 224, 227-28 (2024).

The record shows the Monument is a memorial and tombstone located on public property which commemorates military service that is part of North Carolina's history. The Monument is clearly the type of object intended to be protected by our General Assembly when it enacted the Monument Protection Law. *Id.*

III. Standing

A. Committee to Elect Dan Forest

Our Supreme Court extensively discussed the development and current status of our State's standing doctrine as it applies to the General Assembly's statutorily-granted rights in *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021) ("*Dan Forest*"):

> In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute. There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. *See*, *e.g.*, *Stanley* [*v. Department of Conservation and Development*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973)]. The existence of the legal right is enough. Having surveyed the relevant English, American, and North Carolina law of standing, we are finally in a position to determine whether . . . the North Carolina Constitution imposes an "injury-in-fact" requirement, as under the federal constitution. While our Court of Appeals has previously come to that conclusion, which was followed by numerous panels of that court, *see*, *e.g.*, *Neuse River Foundation*, *Inc. v. Smithfield Foods*, *Inc.*, 155 N.C. App. 110, 113-15, 574 S.E.2d 48 (2002) (holding North Carolina law requires "injury in fact" for standing and applying *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351 (1992)), we are not bound by those decisions and conclude our Constitution does not include such a requirement.

Id. at 599, 853 S.E.2d at 727-28.

Our Supreme Court further held, "we take this opportunity to reiterate that '[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing.' " *Soc'y for the Hist. Pres. of the Twenty-Sixth North Carolina Troops*, *Inc.*

v. City of Asheville, 385 N.C. 744, 751, 898 S.E.2d 760, 765 (2024) (citing *Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 698). Individuals and organizations, which have pleaded and articulated the interests they seek to protect are germane to their stated purposes, and which seek to vindicate and protect the interest of its members, can assert standing. *Id.*

In *Dan Forest*, the Supreme Court also expressly abrogated any portion of this Court's opinion in *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, inconsistent with their analysis therein. *Dan Forest*, 376 N.C. at 601 n.44, 853 S.E.2d at 729 n.44. The Court held North Carolina's Constitution does not impose a requirement for a plaintiff or petitioner to allege an "injury in fact" when challenging the validity of or asserting the applicability of a statute, and particularly against disturbing or removing a war grave marker, tombstone, memorial, or monument. *Id.* at 606-07, 853 S.E.2d at 732-33; *see* N.C. Gen. Stat. § 100-2.1 (2023).

The Supreme Court also held the language unrelated to standing in *Stanley v. Department of Conservation and Development* cited above in *Dan Forest*, was "an aberration and must be considered *dictum*[.]" *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 645-48, 386 S.E.2d 200, 207-08 (1989). Instead, cases challenging the constitutionality of government action impose "a rule of prudential self-restraint" to ensure our courts only address actual controversies. *Dan Forest*, 376 N.C. at 599, 853 S.E.2d at 728.

Our Supreme Court also clarified the requirements for a party to establish a specific claim under a statute:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. *The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.*" N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power *to create a cause of action* under a statute, *even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate the legal right* so long as he is in the class of persons on whom the statute confers a cause of action.

Id. at 608, 853 S.E.2d at 733 (emphasis supplied).

B. United Daughters of the Confederacy

In *United Daughters of the Confederacy*, our Supreme Court reviewed and stated the specific requirements needed to establish standing to challenge under similar facts, and the Court held the proper remedy for lack of jurisdictional standing issues is to dismiss without prejudice:

> A careful analysis of the amended complaint satisfies us that plaintiff has failed to identify any legal right conferred by the common law, state or federal statute, or the state or federal constitutions of which they have been deprived by defendants' conduct.
>
> . . . .
>
> Although the amended complaint claims that the local chapter was involved in raising funds to erect the monument and that it received permission from the County to place the monument outside the old county courthouse building in 1905, plaintiff does not allege that the local chapter or any of its members retained an ownership interest in the monument or had executed a contract with the County providing that the monument would remain upon the old courthouse property in perpetuity. As a result, even construing plaintiff's allegations concerning the funding for and erection of the monument as true, the mere fact that the local chapter "funded and erected the [monument]" does not suffice to establish standing in the absence of an affirmative claim to have some sort of proprietary or contractual interest in the monument. This is particularly true given that the plaintiff's allegations that the City's actions violated various state and federal laws, which we address in further detail below, assume that the *County*, rather than plaintiff, owns the monument.
>
> In addition, our taxpayer standing jurisprudence makes it clear that, "where a plaintiff undertakes to bring a taxpayer's suit on behalf of a public agency or political subdivision, his complaint must disclose that he is a taxpayer of the agency [or] subdivision," *Branch v. Bd. of Ed. of Robeson Cnty.*, 233 N.C. 623, 626 (1951) (citing *Hughes v. Teaster*, 203 N.C. 651 (1932)); *see also Fuller*, 145 N.C. App. at 395-96, and "allege facts sufficient to establish" either that "there has been a demand on and a refusal by the proper authorities to institute proceedings for the

protection of the interests of the public agency or political subdivision" or that "a demand on such authorities would be useless." *Id.* Although plaintiff has included such assertions in its brief before this Court, no such allegations appear in the amended complaint. *See Davis v. Rigsby*, 261 N.C. 684, 686 (1964) (noting that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader").

. . . .

In the same vein, we hold that the amended complaint fails to allege sufficient facts necessary to establish associational standing. Although plaintiff argues that it is a "legacy organization whose purposes include 'historical, benevolent, memorial, [In addition, given that plaintiff did not advance this argument before the Court of Appeals, it is not permitted do so for the first time before this Court. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309 (2001) (noting the longstanding rule that "issues and theories of a case not raised below will not be considered on appeal;" *see also* N.C. R. App. P. 10(a) (providing that issues not raised in a party's brief are deemed abandoned).] educational and patriotic programs;' " that its charter "clearly and [un]equivocally gives it an articulated interest in the status and preservation of objects of remembrance such as the [m]onument;" that it "has succeeded to the interests of those deceased members of an affiliated chapter who were responsible for designing, funding, and erecting the [monument];" and that it has "a specific requirement for membership . . . that one is a lineal descendant of an individual who served in the government or the armed forces of the Confederacy," none of these factual allegations are raised in the amended complaint. In addition, the amended complaint does not identify any of plaintiff's individual members or describe how the legal rights of any of plaintiff's individual members have been violated. As a result, the amended complaint fails to allege facts sufficient to show that "the interests [plaintiff] seeks to protect are germane to the organization's purpose" or that its members "would otherwise have standing to sue in their own right." *River Birch Assocs.*, 326 N.C. at 130, 388 S.E.2d at 538.

United Daughters of the Confederacy v. City of Winston-Salem, 383 N.C. 612, 629-32, 881 S.E.2d 32, 47-48 (2022).

Considering these precedents, and after the Supreme Court's decision in *Dan Forest*, a two-step test is used to determine whether plaintiffs have standing to challenge a county's legislative action to remove a tombstone, memorial or monument. First, as set forth by *Dan Forest*, we must first determine if the relevant statute, here the Declaratory Judgment Act ("DJA"), confers upon Plaintiff a cause of action. Plaintiffs must show the DJA confers a cause of action generally and Plaintiffs are among the class of persons upon whom the cause of action was conferred. *See id.* at 607-09, 853 S.E.2d at 733-34. Plaintiffs allegations clearly meet the first step.

The second question becomes whether Plaintiffs have satisfied the statutory requirements under the DJA or other statute to bring a claim. *See id.* at 599, 608 n.51, 853 S.E.2d at 727-28, 733 n.51. N.C. Gen. Stat. § 100-2 was amended in 2015 to add N.C. Gen Stat. § 100-2.1, "Protection of Monuments, Memorials, and Works of Art", which expands the protections and limits the removal of "an object of remembrance" located on public property. An "object of remembrance" is broadly defined and includes war grave markers, tombstones, memorials, and Confederate soldier and veteran monuments, and the statute protects and prohibits removal or relocation except in certain circumstances. *Id.*

Under *Dan Forest*, any alleged infringement of a legal right is sufficient to establish standing, and Plaintiffs need not allege any "injury in fact." *Id.* at 599, 853 S.E.2d at 728. "[T]o the extent it implicates the doctrine of standing, our [Constitutional] remedy clause should be understood as *guaranteeing* standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed." *Id.* at 607, 853 S.E.2d at 733; *see* N.C. Const. art. I, § 18.

C. *Cmty. Success Initiative v. Moore*

Our Supreme Court more recently applied both *Dan Forest* and *United Daughters of the Confederacy* in *Cmty. Success Initiative v. Moore*, holding:

> The standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 853 S.E.2d 698, 728 (2021) ("[T]he 'judicial power' provision

> [in Article IV] of our Constitution imposes no particular requirement regarding 'standing' at all."). This Court has developed standing requirements out of a "prudential self-restraint" that respects the separation of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches. *Id.*
>
> . . . .
>
> To ensure the requisite concrete adverseness, "a party must show they suffered a 'direct injury.' The personal or 'direct injury' required in this context could be, but is not necessarily limited to, 'deprivation of a constitutionally guaranteed personal right or an invasion of his property rights.' " *Forest*, 376 N.C. at 607-08, 853 S.E.2d at 733 (citations omitted).
>
> . . . .
>
> The direct injury criterion applies even where, as here, a plaintiff assails the constitutionality of a statute through a declaratory judgment action. *See United Daughters*, 383 N.C. at 629, 881 S.E.2d at 46-47 ([P]laintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action.").

Cmty. Success Initiative v. Moore, 384 N.C. 194, 206-07, 886 S.E.2d 16, 28-29 (2023).

D. Defendant's Rule 12(b)(1) Motion

"Jurisdiction is [t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (citation and internal quotation marks omitted). "The court must have personal jurisdiction and . . . subject matter jurisdiction [, which is] [j]urisdiction over the nature of the case *and* the type of relief sought, in order to decide a case." *Catawba Cty. v. Loggins*, 370 N.C. 83, 88, 804 S.E.2d 474, 478 (2017) (citation omitted) (emphasis supplied).

In *United Daughters of the Confederacy*, the trial court had granted the defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) (2021) *with prejudice*. 383 N.C. at 650, 881 S.E.2d at 60.

"[A] taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). In North Carolina, the status of taxpayer may confer standing to sue a governmental entity where the plaintiff's complaint alleges facts which establish either "there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of interests of the public agency or political subdivision," or that "a demand on such authorities would be useless." *United Daughters*, 383 N.C. at 630-31, 881 S.E.2d at 47-48. In such cases, standing to sue may require a showing of either "a demand on and a refusal by the proper authorities to institute proceedings or that a demand on such authorities would [have] be[en] useless." *Pugh v. Howard*, 288 N.C. App. 576, 581, 887 S.E.2d 734, 740 (2023) (quoting *United Daughters*, 383 N.C. 630-631, 881 S.E.2d at 47-48).

Here, Plaintiffs contend they made such a demand to and upon proper authorities and representatives of Defendant and the Board, noting the Amended Complaint asserts and contains a "link to the minutes of a BOCC meeting wherein Plaintiff Marcus J. Karachun among other citizens stated their objection to the removal." The record before this Court does not include a recording or transcript of the minutes from this meeting, and as a result we cannot determine whether the content and format of the objection comported with the requirements to establish taxpayer standing. This Court cannot determine whether the context and format of the objection comported with the requirements to establish taxpayer standing.

The majority's opinion baldly concludes the request for findings of fact being denied by the trial court was not error because "the primary question in this case and upon the motion to dismiss is whether the plaintiffs had standing to pursue their claims." The majority's assertion "[t]he omission of written findings of fact from the trial court's order did not prevent or otherwise constrain our ability to conduct a *de novo* review of the amended complaint" is wholly untrue in this case.

Our Court has long held: "A trial court, however, is not required to make findings of fact absent a party's request." *Brown v. Foremost Affiliated Ins. Servs., Inc.*, 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003) (citing *Gibson v. Mena*, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001)). Here, however, Plaintiffs made a valid request for findings pursuant to Rule 52. N.C. Gen. Stat. § 1A-1, Rule 52(a) (2023).

The order of the trial court is properly vacated and remanded to the trial court to review and make findings regarding these objections and conclusions on whether they are sufficient to confer taxpayer or other standing to Plaintiffs.

IV. Majority's Alternative Holding

The majority's opinion asserts as a purported alternative basis: "Accordingly, the statute of limitations had run prior to the action being brought." Presuming this waivable affirmative defense was properly asserted and preserved before the trial court, the trial court dismissed Defendant's Rule 12(b)(6) Motion to Dismiss as moot. Defendant did not appeal this dismissal to this Court and it is final.

The statute of limitations is neither an alternative basis to support the trial court allowing Defendant's Rule 12(b)(1) motion to dismiss for lack of standing, nor is this motion properly before this Court. Defendant did not advance this theory in their brief.

Our Supreme Court has recently explained the appellate courts cannot advance issues and arguments the parties have not preserved and advanced for themselves: "[I]t departs from the well-settled rule . . . that appellate courts may not address an issue not raised or argued by [the parties] for it is not the role of the appellate courts to create an appeal for an appellant." *In re E.H.*, 388 N.C. 100, 108, 919 S.E.2d 233, 239 (2025) (internal citation and quotation marks omitted).

V. Conclusion

All Plaintiffs clearly alleged sufficient facts and interests to establish standing to challenge Defendant's unlawful actions to remove a war grave marker and memorial under the statute. N.C. Gen. Stat. §§ 100-2, 2.1 (2023). The trial court failed to make requested and required findings and conclusions on the record. This failure prevents this Court from determining whether the content and format of Plaintiffs objections comported with the requirements to establish taxpayer standing. N.C. Gen. Stat. § 1A-1, Rule 52(a) (2023).

The order of the trial court is properly vacated and remanded to the trial court to make supported findings and conclusions regarding these allegations and objections and whether they are sufficient to confer standing to the individual and entity Plaintiffs. I respectfully dissent.

PREMIER ATHLETE ADVISORS LLC, Plaintiff
v.
ENTERSPORTS MGT LLC, Defendant

No. COA25-81

Filed 5 November 2025

1. Arbitration and Mediation—arbitration clause—forum-selection clause—validity—plain language—public policy

In a dispute between two sports management businesses over the termination of their agreement to form a comprehensive football sports agency, the trial court properly concluded that, given the clear and unambiguous language of the agreement's arbitration clause—which encompassed "any Dispute for any reason"; defined "Dispute" as "any dispute, controversy, or claim arising out of or relating to th[e] Agreement, or the breach, termination or invalidity thereof"; and gave the bringer of the dispute the right to choose either Atlanta or Charlotte as the location for arbitration—along with the strong public policy requiring that doubts concerning the scope of arbitrable issues be resolved in favor of arbitration, the parties' dispute was subject to arbitration in plaintiff's chosen locale of Charlotte.

2. Arbitration and Mediation—jurisdiction—scope—waiver—explicit terms

In a dispute between two sports management businesses over the termination of their agreement to form a comprehensive football sports agency, the trial court properly concluded that the National Football League Players Association (NFLPA) was without jurisdiction to arbitrate the underlying dispute where, while members and/or employees of each party might be controlled by NFLPA regulations, the parties were not. The NFLPA explicitly excluded business entities from the scope of its regulations, and, moreover, the agreement between the parties provided that no waiver of its terms (such as its arbitration clause) was valid unless it was explicitly set forth in writing and signed by the waiving party (which did not occur).

3. Appeal and Error—motion to strike in reply brief—Appellate Rule 37—not proper

In a dispute between two sports management businesses over the termination of their agreement to form a comprehensive football sports agency, defendant improperly asked the Court of Appeals to "disregard" the transcript filed by plaintiff in defendant's reply brief, rather than by filing a motion to strike pursuant to Appellate Rule 37; accordingly, the motion to strike was dismissed.

Appeal by Defendant from order entered 20 August 2024 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 2025.

Morrow, Porter, Vermitsky and Taylor, PLLC, by John C. Vermitsky, for Plaintiff-Appellee.

Rosenwood, Rose & Litwak, PLLC, by Ross J. Bromberger, for Defendant-Appellant.

COLLINS, Judge.

This appeal arises out of an "Alliance Agreement" between Plaintiff, Premier Athlete Advisors LLC, and Defendant, EnterSports MGT LLC, to combine their sports management businesses to create a comprehensive football sports agency. EnterSports appeals from the trial court's order concluding that the parties' Agreement contains a valid arbitration clause requiring private arbitration and that the National Football League Players Association ("NFLPA") does not have jurisdiction to arbitrate the underlying dispute. For the following reasons, we affirm.

I. Background

A. Alliance Agreement

Premier is a North Carolina limited liability corporation co-owned by Adam Seifer, who is an NFLPA-certified Contract Advisor,[1] and Matthew Flatow, who is not an NFLPA-certified Contract Advisor. EnterSports is a Georgia limited liability corporation; Hadley Engelhard, an NFLPA-certified Contract Advisor, is the president and CEO, and he employs Jim Ulrich and Chad Berger, who are also NFLPA-certified Contract Advisors. In May 2019, Premier and EnterSports entered into an "Alliance Agreement" to "combine their sports management businesses solely as it relates to the football industry to offer a comprehensive football sports agency to recruit and represent athletes currently playing or desiring to play in the National Football League ('NFL'). . . ."

---

1. NFLPA-certified agents are referred to as "Contract Advisors" in the NFLPA Regulations Governing Contract Advisors.

Under the Agreement, Premier and EnterSports together form “the Alliance.” Engelhard is the President and CEO of the Alliance, Ulrich the Legal Counsel, Seifer the Senior Vice President of Football, and Mathew Flatow the General Counsel.

The terms of the Agreement provided the following:

The Alliance will advise athletes in negotiating contracts with NFL teams and marketing agreements with third parties. The Alliance will “pursue the representation of identified [p]layers through cooperative agreements.” Upon the Alliance entering into an agreement to represent a player, the player and “Engelhard, Ulrich[,] and Seifer, collectively as ‘Contract Advisors’ ” shall enter into an NFLPA Standard Representation Agreement as well as a “marketing agreement.” If the player enters into a contract with an NFL team, “Engelhard, Ulrich[,] and Seifer, collectively, shall be named as such [p]layer’s Certified Agent.”

Premier and EnterSports will each “bear a fifty percent (50%) share of all costs and expenses incurred,” and will each earn “a fifty percent (50%) share of any and all proceeds, revenues, endorsement monies, fees, and commissions earned by [the] [p]layer during the course of the representation of [the] [p]layer.”

Section 6 of the Agreement governs dispute resolution and provides that Premier and EnterSports “shall resolve any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination or invalidity hereof (each, a ‘Dispute’)”, under the provisions of Section 6. (Emphasis omitted.) Section 6.2 provides for mediation and requires the parties to “use commercially reasonable efforts to resolve the Dispute in the mediation.” Section 6.3 is titled “Arbitration as a Final Resort” and provides:

> (a) If the Parties cannot resolve any Dispute for any reason, including, but not limited to, the failure of either Party to agree to enter into mediation or agree to any settlement proposed by the mediator, within ninety (90) days after the Mediation Date, either Party may initiate final and binding arbitration by delivering a notice of arbitration to the other Party setting out the nature of the claim(s) and the relief requested. . . .
>
> (b) The arbitral tribunal shall have the sole power to rule on any challenge to its own jurisdiction and all issues regarding arbitrability shall be decided by the arbitral tribunal. The place of arbitration shall be in either

> Atlanta, Georgia or Charlotte, North Carolina. The bringer of the Dispute may pick the forum.
>
> (c) The tribunal shall consist of one mutually agreed upon arbitrator.
>
> (d) Judgment may be entered upon the award by any court having jurisdiction.

Section 10 of the Agreement governs waiver and provides that no provision of the Agreement can be waived unless done explicitly in a writing signed by the parties:

> No waiver by either Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. No waiver by either Party shall operate or be construed as a waiver in respect of any failure, breach, or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

B. Termination of the Alliance Agreement

In August 2022, Premier sent a letter to EnterSports providing its Notice of Termination of the Agreement. Premier stated that during the three years of the Agreement, Premier had "successfully represented and/or brought to the Alliance the following players: Ron'Dell Carter[,] Shemar Jean-Charles[,] [and] Tre Herndon"; Premier requested an accounting of revenues and expenses for those players for the previous three years. Premier detailed costs and profits related to the representation of those three players and also asked for reimbursement for an additional expense related to Maxim Super Bowl party tickets. Based on Premier's calculations, EnterSports owed Premier $37,748.19.

A few days later, Seifer brought a grievance against Engelhard in the NFLPA, pursuant to the NFLPA Regulations Governing Contract Advisors. Seifer indicated on the NFLPA Section 5 Grievance Notification Form that the grievance was a "[d]ispute between two (2) Contract

Advisors." Attached to the grievance was the Agreement, Premier's Notice of Termination of the Agreement, and an email to the NFLPA Legal Department explaining the nature of the grievance. The email reiterated the information stated in the Notice of Termination of the Agreement: it quoted the Agreement's provisions requiring costs and profits related to player representation to be split equally between Premier and EnterSports; detailed costs and profits related to the representation of Ron'Dell Carter, Shemar Jean-Charles, and Tre Herndon; and noted an unreimbursed expense for a Maxim Super Bowl party ticket.

At a hearing before an NFLPA arbitrator in December 2022, Seifer and Engelhard reached a settlement. Seifer never signed the settlement, however. In May 2023, an NFLPA arbitrator ordered Seifer and Engelhard to sign the settlement reached during the December hearing. The record does not contain evidence that the settlement has been signed.

In July 2023, Engelhard brought a grievance in the NFLPA against Seifer, alleging that Seifer had failed to pay fees due under the settlement. Engelhard indicated on the NFLPA Section 5 Grievance Notification Form that the grievance was a "[d]ispute between two (2) Contract Advisors[.]" A hearing before an NFLPA arbitrator was scheduled for 22 February 2024.

Meanwhile, on 7 February 2023, Premier filed a demand for arbitration and a complaint against EnterSports in Mecklenburg County superior court. In its demand for arbitration, Premier asserted,

> 1. [Premier] and [EnterSports] made numerous attempts to resolve this matter over many months, without success and therefore mediation would be inefficacious. Therefore Section 6.2 of the [] Agreement dated May 9, 2019 . . . is satisfied.
>
> 2. Pursuant to Section 6.3 of the [] Agreement, this Complaint serves as notice of initiation of final and binding arbitration, the nature of [Premier]'s claims and relief requested.
>
> 3. As the bringer of the dispute under Section 6.3(b), [Premier] elects that the arbitration take place in Mecklenburg County, North Carolina.

Premier brought claims against EnterSports for breach of contract and unjust enrichment, alleging that, among other things, EnterSports failed to follow the terms of the Agreement when it signed contracts to represent approximately seventeen players.[2]

EnterSports did not answer, and Premier moved for entry of default. Premier's motion was allowed, and an order for entry of default was entered. Premier then moved for default judgment. In June 2023, default judgment was entered against EnterSports for $158,948.74 plus $5,000.[3] A writ of execution was issued in October 2023 for $160,948.74 plus interest. EnterSports filed a motion to quash the writ and vacate the default judgment, asserting that it had "not been served with a copy of the Complaint, Summons, Motion for Entry of Default or any other pleadings in this matter."[4] After a hearing, the trial court allowed EnterSports' motion and the judgment was vacated. An alias and pluries summons was issued, and EnterSports accepted service of the summons and complaint on 9 May 2024.

Premier and EnterSports filed a joint motion in June 2024 to stay the proceedings and for a declaratory judgment declaring the proper venue and applicable rules of arbitration for their agreed-upon arbitration. Premier alleged that the proper venue is a private arbitrator in Charlotte, North Carolina; EnterSports alleged that the proper venue and arbitration rules are in the NFLPA. After a hearing, the trial court entered an order on 20 August 2024 concluding that the Agreement's arbitration clause requiring private arbitration is valid and enforceable, and the NFLPA has no jurisdiction to arbitrate the underlying dispute.

EnterSports appeals.

II. Appellate Jurisdiction

EnterSports appeals from an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court

---

2. These players included: Kalif Raymond, Michael Hoecht, Drue Chrisman, Christian Benford, Velus Jones, Doug Costin, Kendall Coleman, Michael Barnett, Damon Hayes, Lamont McPhatter, Josh Pederson, Jequez Ezzard, Aaron Hackett, John Haggerty, John Lovett, Forrest Rhyne, and Parker White.

3. The record on appeal is missing the page of the Order for Default Judgment that details what the $5,000 is for.

4. The complaint, summons, and various pleadings had been sent by Premier and its attorney to EnterSports at "6000 Lake Forest Drive" and "6000 Lake Forrest Drive"; EnterSports' correct address is "600 Lake Forest Drive."

in order to settle and determine the entire controversy." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76 (2011) (citation omitted). There is generally "no right to appeal from an interlocutory order." *Darroch v. Lea*, 150 N.C. App. 156, 158 (2002) (citation omitted). This Court therefore must dismiss an appeal from an interlocutory order for lack of subject matter jurisdiction, "unless the appellant is able to carry its burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC*, 255 N.C. App. 8, 11 (2017) (quotation marks and citation omitted).

"[A] party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379 (1994) (quotation marks and citations omitted). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142 (2000) (quotation marks and citation omitted).

It is well settled that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime S. Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258 (1991) (citations omitted). "Likewise, orders addressing the validity of a forum-selection clause also affect a substantial right." *Earnhardt Plumbing, LLC v. Thomas Builders, Inc.*, 291 N.C. App. 1, 4 (2023) (citation omitted).

Here, EnterSports argues that the trial court's order affects a substantial right because it deprives it of its right to arbitrate the underlying dispute in its alleged proper venue—the NFLPA. We agree with EnterSports that the trial court's order involves a substantial right that "might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal." *Clements v. Clements*, 219 N.C. App. 581, 584 (2012) (quotation marks and citation omitted); *see Prime S. Homes, Inc.*, 102 N.C. App. at 258. Accordingly, this Court has jurisdiction to review the merits of EnterSports' appeal.

III. Discussion

EnterSports argues that the trial court erred by determining that the Agreement's arbitration clause is valid and enforceable and that the NFLPA has no jurisdiction to arbitrate the underlying dispute. We address each argument in turn.

A. Standards of Review

"[W]hether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by [this C]ourt." *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 61 (2016) (citation omitted). Similarly, "[i]ssues relating to the interpretation of terms in an arbitration clause are matters of law, which this Court reviews *de novo*." *Earnhardt Plumbing*, 291 N.C. App. at 4 (citation omitted). "Under a *de novo* review, the [appellate] court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Cnty. of Moore v. Acres*, 284 N.C. App. 250, 255 (2022) (citation omitted).

B. Arbitration Clause in the Agreement

[1] When parties have entered into an agreement, "[t]o determine if a particular dispute is subject to arbitration, this Court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope." *Fontana v. S.E. Anesthesiology Consultants*, 221 N.C. App. 582, 589 (2012) (citation omitted). This determination involves a two-step inquiry: "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Id.* at 588 (quotation marks and citation omitted).

"Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23 (1985) (citation omitted). "Strong public policy favoring settlement of disputes by arbitration requires us to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Servomation Corp. v. Hickory Const. Co.*, 316 N.C. 543, 546 (1986). Moreover, "[w]hen the language of the arbitration clause is clear and unambiguous, we may apply the plain meaning rule to interpret its scope." *Fontana*, 221 N.C. App. at 588-89 (quotation marks and citation omitted).

Here, the parties do not dispute that the Agreement contains an arbitration clause requiring the dispute between them to be arbitrated. Section 6 governs Dispute Resolution and provides for Arbitration as a Final Resort:

> 6. <u>Dispute Resolution</u>.
>
> 6.1 <u>Exclusive Dispute Resolution Mechanism</u>.
>
> The parties shall resolve any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination or invalidity hereof (each, a

> "Dispute"), under the provisions of this Section. The procedures set forth in Sections 6.2 and 6.3 shall be the exclusive mechanism for resolving any Disputes between the Parties.
>
> 6.2 Mediation.
>
> . . . .
>
> 6.3 Arbitration as a Final Resort.
>
> (a) If the Parties cannot resolve any Dispute for any reason, including, but not limited to, the failure of either Party to agree to enter into mediation or agree to any settlement proposed by the mediator, within ninety (90) days after the Mediation Date, either Party may initiate final and binding arbitration by delivering a notice of arbitration to the other Party setting out the nature of the claim(s) and the relief requested. . . .
>
> (b) The arbitral tribunal shall have the sole power to rule on any challenge to its own jurisdiction and all issues regarding arbitrability shall be decided solely by the arbitral tribunal. The place of arbitration shall be in either Atlanta, Georgia or Charlotte, North Carolina. The bringer of the Dispute may pick the forum.

(Emphasis omitted.)

The scope of the arbitration clause in the Agreement is broad and unambiguous; it encompasses "any Dispute for any reason" between Premier and EnterSports and defines a "Dispute" as "any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination or invalidity hereof[.]" The underlying dispute is a contract dispute; Premier and EnterSports engaged in a shared business venture pursuant to a written agreement. Premier terminated the Agreement and sued EnterSports for breach of contract and unjust enrichment for EnterSports' alleged failure to abide by the terms of the Agreement. The Agreement further provides that arbitration shall occur in either Atlanta, Georgia or Charlotte, North Carolina, with the location to be chosen by "[t]he bringer of the Dispute." As the party who filed the complaint, Premier selected Charlotte, North Carolina as the location for arbitration.

Therefore, the parties in this case "had a valid agreement to arbitrate," and the underlying dispute "falls within the substantive scope of that agreement." *Fontana*, 221 N.C. App. at 588 (quotation marks and citation omitted). Because the Agreement's terms are clear and unambiguous, the trial court did not err by concluding that the Agreement's arbitration clause is valid and enforceable, that the arbitration clause covers the underlying dispute, and that Charlotte, North Carolina is the proper arbitration venue.

C. Applicability of NFLPA Regulations Governing Contract Advisors

[2] EnterSports argues that, regardless of the validity and applicability of the Agreement's arbitration clause, the NFLPA has jurisdiction over the parties' dispute. Specifically, EnterSports argues that "[t]he NFLPA Regulations are clear that they govern NFLPA-certified agents/contract advisors with respect to the handling of intra-agent disputes over sharing fees." While this may be true, it does not support EnterSports' position that the NFLPA has jurisdiction over the particular dispute before us.

The Officers and Player Representatives of the NFLPA adopted the NFLPA Regulations Governing Contract Advisors in 2011 "for persons who desired to provide representation services to players (including rookies) by conducting individual contract negotiations and/or assisting in or advising with respect to such negotiations with the member Clubs of the National Football League ('NFL')." NFLPA Regulations Governing Contract Advisors, *Introduction* (August 2016). The NFLPA Regulations provide, "Persons serving or wishing to serve as the NFLPA's 'agent' pursuant to these provisions of the [Collective Bargaining Agreement], which persons are herein referred to as 'Contract Advisors,' shall be governed by these Regulations." *Id.*

To be eligible for certification as an NFLPA Contract Advisor, a person must file an application, file a release for a personal credit report, and pay an application fee. *Id.* § 2.A (August 2016). "Certification will be granted hereunder only to individuals and not any firm, corporation, partnership or other business entity." *Id.* The NFLPA Regulations' definition of a "Contract Advisor" does not incorporate the agent's employer or business entity.[5] *Id.* Instead, the NFLPA Regulations specifically state

5. The MLBPA Regulations Governing Player Agents, for example, provides, "The MLBPA will certify only individuals as Player Agents or Expert Agent Advisors and not firms or business entities, such as corporations, companies, partnerships, etc." MLBPA

that agent "[c]ertification will be granted hereunder only to individuals and not any firm, corporation, partnership or other business entity." *Id.*

The underlying dispute in this case is for "a full accounting for division of fees and expenses during a shared business venture" between Premier and EnterSports, two limited liability corporations. Furthermore, Premier is co-owned by Flatow, who is not an NFLPA-certified Contract Advisor. As the NFLPA Regulations govern Contract Advisors, and Premier, EnterSports, and Flatow do not fall within the definition of "Contract Advisors," the NFLPA Regulations do not govern the arbitration venue for the underlying dispute concerning fees and expenses between Premier and EnterSports. *See id.*

EnterSports argues that Premier, through Seifer's prior grievance under the NFLPA, "waived its right to rely on the arbitration clause" in the Agreement. This argument is without merit.

Here, the Agreement included a waiver provision that expressly provided, "No waiver by either Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving." The provision further provided, "No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof[.]" There is no evidence in the record that Premier and EnterSports agreed, in writing, to waive any of the Agreement's provisions concerning the arbitration of disputes. Furthermore, the Agreement's waiver clause discredits EnterSports' argument that Premier impliedly waived its right to resolve this dispute via private arbitration. *See Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 173 (2007) ("Waiver by implication is not looked upon with favor by the [C]ourt." (citation omitted)).

Unlike the grievances filed by Siefer and Engelhard in the NFLPA that were presented as "[d]ispute[s] between two (2) Contract Advisors," the underlying dispute in this case is between two limited liability corporations. As the NFLPA Regulations govern Siefer and Engelhard in their capacities as Contract Advisors but do not govern Premier and EnterSports as limited liability corporations, or Flatow as Premier's co-owner, Premier did not waive its right to rely on the arbitration clause of the Agreement by Seifer's prior grievance under the NFLPA.

Regulations Governing Player Agents, § 2(C) (February 2016). The MLBPA Regulations, however, expressly state that "where one or more Player Agents own or conduct business as, or are employed by, a business entity, the term 'Player Agent' includes the firm or business entity they own or with which they are employed or associated, unless the context clearly provides otherwise." *Id.* The NFLPA Regulations include no such language.

For the reasons above, the trial court did not err by concluding that the NFLPA is without jurisdiction to arbitrate the underlying dispute.

D. EnterSports' Reply Brief Motions

[3] In its Reply Brief, EnterSports urges this Court to "disregard" the transcript filed by Premier with this Court, citing Premier's "failure to follow procedure." EnterSports' request is a motion to strike, which has not been properly raised in accordance with North Carolina Appellate Procedure Rule 37.

"An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties." N.C. R. App. P. 37(a). "Motions to an appellate court may not be made in a brief but must be made in accordance with N.C. R. App. P. 37." *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268 (1996) (citation omitted).

Here, EnterSports failed to file a motion to strike in accordance with Rule 37 and instead brought this motion for the first time in its Reply Brief. Because EnterSports failed to abide by the requirements of Rule 37, we dismiss its motion.

In its Reply Brief, EnterSports also asks this Court to "disregard" Premier's factual assertions that lack record cites or record support.

EnterSports' request is a motion to strike, which has not been properly raised in accordance with Rule 37. Furthermore, our review is based solely on the record evidence and not on the parties' representations of the facts in their briefs. To the extent any factual allegations are not supported by the record evidence, they have not been considered. Accordingly, we dismiss this motion.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order concluding that the Agreement's arbitration clause is valid and enforceable and that the NFLPA has no jurisdiction to arbitrate the underlying dispute.

AFFIRMED.

Judges ARROWOOD and FREEMAN concur.

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS