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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-417

Filed 31 December 2024

New Hanover County, No. 21 CVS 776

JACQUELINE AMATO, Plaintiff,

v.

KARL W. MILLER, Defendant.

Appeal by defendant from judgment entered 19 September 2023 by Judge Stephan R. Futrell in New Hanover County Superior Court. Heard in the Court of Appeals 8 October 2024.

Reiss & Nutt, PLLC, by W. Cory Reiss, for plaintiff-appellee/cross-appellant Jacqueline Amato.

Waldrep Wall Babcock & Bailey PLLC, by Chris W. Haaf, for defendant-appellant/cross-appellee Karl W. Miller.

Womble Bond Dickinson (US) LLP, by Ripley Rand and Zachary N. Bernstein, for defendant-cross appellee Equity Trust Company.

THOMPSON, Judge.

Karl W. Miller (defendant Miller) appeals from the trial court's order granting summary judgment to plaintiff, alleging that the trial court erred in (1) granting summary judgment to plaintiff on the issue of private nuisance, (2) denying

defendant's motions to continue, (3) providing instructions to the jury on damages for the private nuisance claim, (4) denying his motion for judgment notwithstanding the verdict, and (5) denying his motion for a new trial. Moreover, as cross-appellant, plaintiff alleges that the trial court (1) erred by ruling the claim for declaratory judgment was moot; (2) erred by dismissing plaintiff's claim for abuse of process; (3) erred by denying the motion for sanctions on the ground of "novelty"; and (4) abused its discretion by denying the motion for sanctions under Rule 37(c). After careful review, we vacate in part, affirm in part, and remand for further proceedings.

I. Factual Background and Procedural History

In 2004, defendant Miller purchased the property that is the subject of the present litigation. Defendant Miller and Equity Trust Company (defendant Equity Trust) subdivided the property into three lots, one of which had an easement for "utilities, ingress, regress, egress, driveway construction, maintenance, replacement and repair across" a portion of the property. Defendant Miller subsequently erected a mechanized gate on the property.

On 4 February 2021, Jacqueline Amato (plaintiff) purchased the property located at 243 Beech Street out of foreclosure, as it had been severely damaged by a hurricane and required extensive renovations to become habitable again. After purchasing the property, plaintiff requested a gate access passcode (passcode) so that she could access her property at 243 Beech Street, but defendant would not provide the passcode unless the parties came "to some understandings about the property,

maintenance, and other matters before any contractors or others can get access.”

Defendant Miller ultimately drafted a document pursuant to his demands, titled “Heads of Agreement” which, if signed by plaintiff, would have required plaintiff to transfer part of the land at 243 Beech Street to defendant Miller, established an easement across 243 to access 245 Beech Street, and restricted construction activities at plaintiff’s new property.

Pursuant to his demands, on 21 February 2022, just seventeen days after plaintiff purchased the property, defendant Miller called plaintiff Amato’s son Jeffrey (plaintiff Jeffrey), and left a voicemail saying:

[l]et me be blunt. I’d hate to see us go into a legal dispute because it’s going to cost you and your mother hundreds of thousands of dollars and it’s going to lead to very bad blood, and you’re probably not going to want to live on the property if we get into a legal dispute. So my advice is to call me and we’ll see what we can do but my position is pretty clear.

Plaintiff did not concede to defendant Miller’s demands, and defendant Miller did not provide plaintiff with the passcode so that plaintiff could access the property she had purchased.

On 2 March 2021, plaintiff brought this action against defendant Miller and defendant Equity Trust, asserting claims for private nuisance, injunctive relief, and a declaratory judgment. A temporary restraining order was entered on 4 March 2021, requiring defendant Miller to open the gate or provide plaintiff with the passcode to the gate.

On 12 February 2022, defendant Miller filed an answer and counterclaims, alleging that plaintiff Amato had breached the “Heads of Agreement,” that plaintiff had “verbally and/or in writing accepted that offer,” despite that document’s failure to comply with the statute of frauds. In his counterclaims, defendant Miller sought “transfer of the section of real property at 243 Beech Street that [plaintiff] Amato, or her agent, previously agreed to transfer to him” Defendant Miller also filed a *lis pendens* on 243 Beech Street. In turn, plaintiff Amato filed an amendment and supplemental pleading based upon defendant Miller’s litigation tactics, adding a claim for malicious prosecution and abuse of process.

Discovery ensued in the litigation, and as part of his responses to Rule 34 requests, defendant Miller admitted that there was *no written agreement*, no “Heads of Agreement” document to support his contention that, “Amato, or her agent, previously agreed to transfer to [defendant Miller].” The matter was calendared for trial on 24 April 2023; however, on 29 March 2023, defendant moved for a continuance due to an ongoing medical issue, to which plaintiff consented.

On 26 May 2023, plaintiff Amato moved for partial summary judgment on liability and all of defendant’s counterclaims. The matter came on for hearing on 6 June 2023; at the hearing, defendant Miller moved to dismiss plaintiff Amato’s claims because she had transferred the property to her son, plaintiff Jeffrey, on 16 May 2023. By order entered that day, the trial court granted defendant Miller’s motion to dismiss plaintiff Amato’s claim for declaratory judgment.

On 9 June 2023, plaintiff Amato filed a motion for reconsideration to amend the 6 June 2023 order granting defendant's motion to dismiss the declaratory judgment claim, which the trial court denied. By order entered 13 June 2023, the trial court dismissed plaintiff Amato's claim for permanent injunctive relief because plaintiff Amato no longer owned the property, as well as her claim for abuse of process. In the same order, however, the trial court *also* entered summary judgment against defendant Miller on his counterclaim for breach of contract *and* on his liability to plaintiff Amato for private nuisance.

After entry of the order, the only issues remaining for trial were compensatory and punitive damages pursuant to the private nuisance claim, and defendant Miller's counterclaim for quantum meruit. In turn, defendant Miller voluntarily dismissed his claim for quantum meruit, leaving the issue of damages as the only issue for trial.

The trial was scheduled to begin on 11 September 2023; however, in August of 2023, defendant again moved for a continuance, asserting that his medical condition prevented him from attending the trial. Plaintiff objected to defendant's continuance, and subsequently submitted photographs of defendant *in North Carolina*, working on the property adjacent to plaintiff's, despite his, and his attorney's, contentions that he was unable to leave Florida due to his medical condition. This time, the trial court denied defendant's motion for a continuance and the matter came on for a jury trial, as scheduled, on 11 September 2023 in New Hanover County Superior Court.

On 13 September 2023, the jury returned a verdict awarding plaintiff

compensatory damages in the amount of \$8,940, and \$300,000 in punitive damages. Pursuant to the jury verdict, the trial court reduced the amount of punitive damages to \$250,000, as required by statute, and made findings of fact and conclusions of law to support the award of punitive damages. From this order, defendant Miller filed timely written notice of appeal.

After the jury verdict, plaintiff Amato moved for an award of sanctions against defendant Miller pursuant to Rules 11 and 37(c) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-21.5, alleging that defendant Miller, *inter alia*, “filed an [a]nswer and [c]ounterclaim that denied the allegations in plaintiff’s complaint, resisted plaintiff’s requested relief, and alleged the existence of a contract for the conveyance of real property *that did not exist in a form that could be enforceable under the Statute of Frauds*” and “filed a *lis pendens* against plaintiff’s property on the basis of an unsupportable *quantum meruit* theory.” (Emphasis added).

By order entered 26 September 2023, the trial court denied plaintiff Amato’s motion for sanctions, determining that, although defendant’s quantum meruit claim had no basis in, and was contrary to, North Carolina law, “this [c]ourt should not impose sanctions in a matter of first impression.” From this order, plaintiff Amato filed written notice of appeal.

II. Discussion

On appeal, as to plaintiff, defendant Miller alleges the following issues:

1. Did the trial court err in granting summary judgment in favor of [p]laintiff on liability on her claim for private nuisance because genuine issues of material fact preclude summary judgment?
2. Did the trial court abuse its discretion in twice denying [d]efendant's Motions for Continuance?
3. Did the trial court err in instructing the jury on the damages it could award [p]laintiff on her private nuisance claim?
4. Did the trial court err in denying [d]efendant Miller's motion for judgment notwithstanding the verdict on punitive damages of \$250,000 on [p]laintiff's private nuisance claim?
5. Did the trial court err in denying [d]efendant's motion for a new trial?

Alternatively, on appeal, plaintiff, as a cross-appellant, alleges the following issues:

1. The trial court erred by ruling the claim for declaratory judgment was moot[;]
2. The trial court erred by dismissing [plaintiff]'s claim for abuse of process[;]
3. The trial court erred by denying the motion for sanctions on the grounds of 'novelty'[;]
4. The trial court abused its discretion by denying the motion for sanctions under Rule 37(c).

We will address each of these issues, as necessary, in the analysis below.

A. Private nuisance

1. Standard of review

The “standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quotation marks and citation omitted). “When considering a motion for summary judgment, the trial judge must view the presented evidence in the light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). Therefore, “[s]ummary judgment is only appropriate when the “pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023).

2. Unreasonable interference

First, defendant contends that the trial court erred in granting summary judgment to plaintiff on the issue of private nuisance because, “[w]hether [d]efendant Miller’s conduct was unreasonable is a question of fact for a jury.” We agree.

“In order to establish a claim for nuisance, a plaintiff must show the existence of a substantial and unreasonable interference with the use and enjoyment of its property.” *Wagner v. City of Charlotte*, 269 N.C. App. 656, 670, 840 S.E.2d 799, 808

(2020). In determining whether an interference is unreasonable, “[t]he question is not whether a reasonable person in plaintiffs’ or defendant’s position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.” *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 124 S.E.2d 809, 814 (1962).

Consequently, “[t]he unreasonableness of intentional invasion is a problem of relative values *to be determined by the jury in the light of the circumstances of the case.*” *Id.* (emphasis added). Indeed, our Supreme Court has held that “[r]easonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant.” *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977). This Court has reaffirmed that “the balancing of the gravity of harm to [the] plaintiffs with the utility [of the conduct of the defendant] that *must* be conducted under the reasonable use test adopted in *Pendergrast* was *not appropriate for summary judgment.*” *Brown v. Lattimore Living Tr.*, 264 N.C. App. 682, 691, 826 S.E.2d 827, 833 (2019) (emphases added).

In her appellate brief, plaintiff presents lengthy, persuasive, arguments that summary judgment is appropriate in this case because defendant “Miller has shown absolutely no utility of his conduct in preventing [plaintiff] from accessing her property other than his illicit use of threats and continued obstruction to procure collateral benefits[,]” that “[c]omplete and willful obstruction decisively establishes

liability[.]” and therefore “[s]ummary judgment on the issue of liability was proper.”

However, our Court has held that the “reasonable use test adopted in *Pendergrast* was not appropriate for summary judgment.” *Id.* Therefore, we conclude that the trial court erred in granting summary judgment to plaintiff on her claim for private nuisance; the question of reasonableness in a private nuisance action is one *for the jury*, and we are bound by our precedent on this issue. For this reason, we conclude that the trial court erred in granting summary judgment to plaintiff on the issue of private nuisance.

Consequently, we reverse the order of the trial court granting summary judgment on the issue of private nuisance to plaintiff, and remand for further proceedings on this claim. In light of our disposition, we need not address the arguments set forth in Sections III, IV, and V of defendant’s appellate brief, as the alleged issues are now moot and may not be repeated in subsequent proceedings. We will address defendant’s remaining argument regarding his motion for a continuance below.

B. Motion for continuance

Next, defendant Miller contends that the trial court “abused its discretion in denying defendant[’s] motion for continuance.” We do not agree.

“Our standard of review for a trial court’s denial of a motion to continue is abuse of discretion.” *Kimball v. Vernik*, 208 N.C. App. 462, 466, 703 S.E.2d 178, 181 (2010). Moreover, our Court has held that the trial court did not abuse its discretion

in denying a motion to continue despite the “defendant’s health problems and resultant inability to travel from [out of state] to North Carolina.” *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 623, 381 S.E.2d 156, 158 (1989).

Here, defendant asserted that he had a medical condition that would prevent him from attending the trial on 24 April 2023. Plaintiff and the trial court agreed to the continuance, and the trial was rescheduled for 11 September 2023. In August of 2023, defendant sought *another* continuance, again asserting that the same medical condition would prevent defendant from attending the trial. However, at the hearing on the motion to continue, plaintiff presented photographs of defendant *in North Carolina*, despite his representations before the court that his medical condition prevented him from leaving *Florida*.

Again, a motion for a continuance is left to the sound discretion of the trial court, and upon our careful review, we conclude that the trial court did not abuse its discretion in denying defendant’s second motion for continuance in light of defendant Miller’s disingenuous representations to the court regarding his ability to travel.

We will now turn our analysis to plaintiff Amato, as cross-appellant, and her arguments.

C. Declaratory judgment

As cross-appellant, plaintiff argues that the trial court erred by ruling the claim for declaratory judgment was moot.

1. Appellate Jurisdiction

At the outset, we note that the argument posited by plaintiff is untimely. Rule 3 of the North Carolina Rules of Appellate Procedure provides, *inter alia*, that, “[a]ny party entitled by law to appeal from a judgment or order of a superior court or district court rendered in a civil action . . . may take appeal by filing notice of appeal with the clerk of superior court[,]” pursuant to N.C.R. App. P. 3(a), and the party “must file and serve a notice of appeal . . . within thirty days after entry of judgment” N.C.R. App. P. 3(a), (c) (2024). “In order to confer jurisdiction on the state’s appellate courts, appellants of lower court orders *must comply with the requirements of Rule 3.*” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (emphasis added). “The provisions of Rule 3 are jurisdictional, and failure to follow the rule’s prerequisites mandates dismissal of an appeal.” *Id.*

In *Slaughter v. Slaughter*, this Court observed a unique procedural posture, dispositive to the present case. There, our Court noted that, in order “to appeal from an order that husband did not challenge, it was incumbent upon [wife] to do so within the initial 30-day window available to all new appeals[;]” however, [h]er filing during the 10-day window for cross-appeals, inasmuch as it exceeded the initial 30-day window, limited her to address only those orders husband addressed in his appeal.” *Slaughter*, 254 N.C. App. 430, 444, 803 S.E.2d 419, 428 (2017). Ultimately, our Court held that “[i]n a matter in which multiple, separate orders issue, and one party appeals from *some, but not all*, of those orders, a cross-appellant who files her cross-appeal *outside* of the 30-day window contemplated by Rule 3(c), *but within the 10-day*

window for cross-appeals, shall be limited to appeal from *only those orders challenged in the original appeal*. *Id.* at 444, 803 S.E.2d at 428–29 (emphases added).

Here upon our careful review, we observe that the order plaintiff challenges as cross-appellant—the 13 June 2023 order of the trial court, ruling that plaintiff’s claim for declaratory judgment was moot—was entered well “outside of the 30-day window [for appeals] contemplated by Rule 3(c)”; moreover, plaintiff’s cross-appeal *was* entered “within the 10-day window for cross-appeals”, on 24 October 2023, and consequently, plaintiff’s (as cross-appellant) appeal “shall be limited to appeal from only those orders challenged in the original appeal.” *Id.* In other words, plaintiff’s appeal of orders outside of the thirty-day window pursuant to Rule 3(c), was limited to “those orders challenged in the original appeal”—the issues raised in defendant’s 18 October 2023 notice of appeal. After our careful review of the arguments set forth in defendant’s 18 October 2023 notice of appeal, we conclude that plaintiff’s argument regarding declaratory judgment was not challenged “in the original appeal,” defendant’s 18 October 2023 appeal, and are therefore untimely.

D. Abuse of Process

Next, plaintiff argues that the trial court erred by dismissing “[plaintiff]’s claim for abuse of process.”

However, upon our careful review, we observe, again, that plaintiff’s appeal of this issue is untimely pursuant to our prior holding in *Slaughter*. Here, the order of the trial court dismissing plaintiff’s claim for abuse of process was *also* entered 13

June 2023, therefore, for the reasons stated above, plaintiff's challenged order was "outside of the 30-day window contemplated by Rule 3(c), *but within the 10-day window for cross-appeals*," and therefore, "shall be limited to appeal from *only those orders challenged in the original appeal*." *Id.* (emphases added). For the reasons discussed above, we dismiss plaintiff's argument regarding abuse of process.

E. Motion for Sanctions under Rule 11

Next, plaintiff contends that "the trial court erred in denying the motion for sanctions on the ground of 'novelty.'" We do not agree.

1. Standard of review

"Our standard of review for Rule 11 sanctions is well established: [t]he trial court's decision to impose or not to impose mandatory sanctions under Rule 11(a) is reviewable de novo as a legal issue." *Jonna v. Yaramada*, 273 N.C. App. 93, 108, 848 S.E.2d 33, 46 (2020) (internal quotation marks, ellipsis, and citation omitted). "An appellate court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment." *Id.* (brackets and citation omitted). "If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under Rule 11(a)." *Id.* (ellipsis and citation omitted).

2. N.C.R. Civ. P. Rule 11

Rule 11 of the North Carolina Rules of Civil Procedure provides, in pertinent part, that “[e]very . . . paper of a party represented by an attorney shall be signed by at least one attorney of record . . . to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument” and “[i]f a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall impose* upon the person who signed it, a represented party, or both, an appropriate sanction” N.C. Gen. Stat. §1A-1, Rule 11 (2023) (emphasis added). However, “Rule 11 sanctions are inappropriate where the issue raised by the plaintiff’s complaint is one of first impression.” *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 606, 544 S.E.2d 797, 802 (2001).

Here, the trial court determined that “[d]efendant failed to substantiate the existence of any ‘writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized[,]’ that would constitute a ‘contract, or some memorandum or note thereof’ that would satisfy the requirements of [N.C. Gen. Stat. §] 22-2[,]” and “when defendant submitted the Answer and Counterclaim herein, *he knew or reasonably should have known* that there was *no contract or memorandum or note thereof that was in writing and signed by []* plaintiff, or by some other person by her lawfully authorized to sign for her” (Emphases added). Similarly, the court found that “[w]hen he signed the [a]nswer and [c]ounterclaim, [] defendant’s attorney *knew or reasonably should have known that there was no*

contract meeting the requirements of [N.C. Gen. Stat. §] 22-2” to satisfy the statute of frauds. (Emphasis added).

However, the court ultimately determined Rule 11 sanctions were not appropriate because “neither counsel herein provided authority in which a North Carolina court ruled as to whether quantum meruit can provide a legally sufficient basis for filing a Notice of Lis Pendens, [and] this Court should not impose sanctions in a matter of first impression.” The court noted that it was “mindful of the admonition of this State’s intermediate appellate court that ‘Rule 11 “should not have the effect of chilling creative advocacy,” and therefore, in determining compliance with Rule 11, “courts should avoid hindsight and resolve all doubts in favor o[f] the signer.” ’ ”

Plaintiff argues that “[t]his Court should be clear that the conduct of a party and his attorney in contradiction to clearly established law may be frivolous and sanctionable *even when they are the first to attempt the obviously implausible.*” (Emphasis added). However, our standard of review requires us to “determine whether the findings of fact are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment.” *Jonna*, 273 N.C. App. at 108, 848 S.E.2d at 46 (brackets and citation omitted). “If the appellate court makes these three determinations in the affirmative, it must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions under Rule 11(a). *Id.*

Upon our careful review, we conclude that “the findings of fact are supported by sufficient evidence, [] the conclusions of law are supported by the findings of fact, and [] the conclusions of law support the judgment[,]” *id.* (brackets and citation omitted), that Rule 11 sanctions were not appropriate. Here, the trial court properly concluded, as a matter of law, that the issue argued by the parties—whether quantum meruit provides a legally sufficient basis for filing a notice of lis pendens—was a matter of first impression.¹ Therefore, we conclude that the trial court did not err in denying plaintiff’s motion for sanctions pursuant to Rule 11; to hold otherwise would have the undesirable effect of “chilling creative advocacy” warned against by this Court. *See Johnson v. Harris*, 149 N.C. App. 928, 938, 563 S.E.2d 224, 230 (2002) (cautioning that “Rule 11 should not have the effect of chilling creative advocacy”).

F. Motion for sanctions under Rule 37(c)

Finally, plaintiff argues that the trial court “abused its discretion by denying the motions for sanctions under Rule 37(c).” We agree.

1. Standard of review

“Determining which sanctions are appropriate under Rule 37 is within the sound discretion of the trial court.” *Baker v. Rosner*, 197 N.C. App. 604, 606, 677 S.E.2d 887, 889 (2009). “The court’s ruling on sanctions will not be reversed on appeal

¹ We instruct future litigants to be on notice and to avoid making the legal argument that a counterclaim for quantum meruit provides a legally sufficient basis for filing a notice of lis pendens—it does not—or risk running afoul of Rule 11 sanctions.

absent a showing of abuse of discretion.” *Id.* (internal quotation marks and citation omitted). “A trial court may be reversed for abuse of discretion *only* upon a showing that its ruling was so arbitrary that it *could not have been the result of a reasoned decision or was manifestly unsupported by reason.*” *Id.* at 606, 677 S.E.2d at 890 (citation omitted) (emphases in original).

2. Rule 37(c)

Rule 37(c) provides that, “[i]f a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay to him or her the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.” N.C. Gen. Stat. § 1A-1, Rule 37(c) (2023). “The court shall make the order unless it finds that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had a reasonable ground to believe that he or she might prevail on the matter, or (iv) there was other good reason for the failure to admit.” *Id.*

“The trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *Baker*, 197 N.C. App. at 608, 677 S.E.2d at 890 (internal quotation marks and citation omitted).

Here, the trial court found that:

4. In response to plaintiff's discovery requests, defendant inter alia denied the existence of an agreement that would satisfy the Statute of Frauds for the transfer of real property. However, defendant referred to a variety of texts and emails (with attached proposals) between plaintiff's son and himself as describing the agreement described in his pleadings.

....

6. In opposing the TRO and Preliminary Injunction, defendant contended, in part, that plaintiff likely could not show that her easement rights existed or had been impaired. Also, defendant's answer to the Verified Complaint denied that the easement 'runs with the land' even though the Deed of Easement (recorded at Book 5134 Page 468 of the New Hanover Registry) states: 'said right and easement to the said Grantees and their successors in title, it being agreed that the right and easement hereby granted is appurtenant to and runs with the land now owned by Grantees hereinabove referred to'

In turn, the trial court determined, as a matter of law, that "[b]ased upon the foregoing findings and prior rulings in this case, the Court in its discretion should deny plaintiff's motion under [N.C. Gen. Stat.] § 1A-1, Rule 37(c)."

Based upon our careful review, we conclude that the trial court *did* abuse its discretion in denying plaintiff's motion for sanctions pursuant to Rule 37(c). As an initial matter, Rule 37(c) uses the restrictive "shall," meaning that the trial court *must* "make the order" unless it finds one of the four grounds enumerated in N.C. Gen. Stat. § 1A-1, Rule 37(c) exists. In fact, the trial court denied plaintiff's motion for sanctions pursuant to Rule 37(c) *without making any determination* that one of the four enumerated grounds on which to deny the motion existed—in other words,

“that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had a reasonable ground to believe that he or she might prevail on the matter, or (iv) there was other good reason for the failure to admit.” *Id.*

Instead, the trial court observed that:

defendant’s answer to the Verified Complaint denied that the easement ‘runs with the land’ even though the Deed of Easement (recorded at Book 5134 Page 468 of the New Hanover Registry) states: ‘said right and easement to the said Grantees and their successors in title, it being agreed that the right and easement hereby granted is appurtenant to and runs with the land now owned by Grantees hereinabove referred to

In turn, the trial court ultimately concluded that, “[b]ased upon the foregoing findings and prior rulings in this case, the Court in its discretion should deny plaintiff’s motion under [N.C. Gen. Stat.] § 1A-1, Rule 37(c).”

Absent *any* conclusions of law demonstrating that one of the four grounds enumerated in Rule 37(c) was present, the trial court failed to comply with a statutory mandate, and in doing so, committed an abuse of discretion. Therefore, the order of the trial court denying plaintiff’s motion for sanctions pursuant to Rule 37(c) is vacated, and we remand the matter for a determination of whether one of the grounds enumerated in Rule 37(c) exists.

III. Conclusion

After careful review, we conclude that the trial court erred in granting

summary judgment to plaintiff on the private nuisance claim, and that the trial court erred in denying plaintiff's motion for sanctions pursuant to Rule 37(c). Therefore, we vacate in part, reverse in part, and remand for further proceedings consistent with this opinion.

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.

Judge MURPHY concurs.

Judge GRIFFIN concurs in result only.

Report per Rule 30(e).