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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-417-2

Filed 21 May 2025

New Hanover County, No. 21 CVS 776

JACQUELINE AMATO, Plaintiff,

v.

KARL W. MILLER and EQUITY TRUST COMPANY, Defendants.

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

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.

GRIFFIN, Judge.

Defendant Karl W. Miller appeals from the trial court's order granting Plaintiff Jacqueline Amato's motion for summary judgment, arguing the trial court erred by:

(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. As a cross-appellant, Plaintiff contends 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 North Carolina Rule of Civil Procedure 37(c). After careful review, we affirm the trial court's judgments on all matters but reverse and remand the trial court's order on Plaintiff's claims for abuse of process and Rule 37(c) sanctions for further action.

I. Factual and Procedural Background

In 2004, Defendant purchased the property that is the subject of the present litigation. Defendant later placed the property into a self-directed IRA with Defendant Equity Trust Company (Defendant Equity Trust)¹ and 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 subsequently erected a mechanized gate at the entrance of the entire property that could be opened by either code or remote.

On 4 February 2021, Plaintiff purchased the property located at 243 Beech

¹ We use Defendant to refer to Defendant Miller throughout the opinion and refer to Defendant Equity Trust as such when needed.

Street out of foreclosure, as it had been severely damaged by a hurricane and required extensive renovations to become habitable again. Plaintiff and her son, Jeff Amato, ran a business where she would provide financing for the purchasing of houses that he would then renovate and sell. After purchasing the property, Plaintiff and Jeff requested a gate access passcode so that they could access the property at 243 Beech Street, but Defendant refused to provide the passcode unless Plaintiff deeded him a portion of her property and assumed financial responsibilities related to the surrounding land.

Defendant ultimately drafted a document memorializing his demands, titled “Heads of Agreement” which, if signed by Plaintiff, would have required her to transfer part of her land at 243 Beech Street to Defendant, establish an easement across 243 to access 245 Beech Street, forego construction activities at Plaintiff’s new property, and assume financial responsibility for the surrounding area. On 22 February 2021, just seventeen days after Plaintiff purchased the property, Defendant called Jeff Amato, 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 the demands, and Defendant did not provide either Plaintiff or her son with the passcode so that they could access her property.

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

On 12 February 2022, Defendant filed an answer and counterclaims, alleging that Plaintiff had breached the “Heads of Agreement” document, and that Plaintiff had “verbally and/or in writing accepted that offer,” despite Plaintiff never consenting to the agreement and the document failing to comply with the statute of frauds. In his counterclaims, Defendant sought “transfer of the section of real property at 243 Beech Street that [Plaintiff], or her agent, previously agreed to transfer to him. . . .” Defendant also filed a lis pendens on 243 Beech Street. In turn, Plaintiff filed an amendment and supplemental pleading based upon Defendant’s litigation tactics, adding a claim for malicious prosecution and abuse of process.

Discovery ensued, and, as part of his responses to Rule 34 requests for admission, Defendant admitted there was not a written agreement to support his contention that Plaintiff or her son promised to transfer any portion of her property. 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 moved for partial summary judgment on

Defendant's liability for Plaintiff's claims and for summary judgment in her favor for all of Defendant's counterclaims. Plaintiff also voluntarily dismissed her claim against Defendant Equity Trust for private nuisance. At the hearing on the matter, Defendant moved to dismiss Plaintiff's claims because she transferred the property to her son on 16 May 2023. On 6 June 2023, the trial court entered a written order granting Defendant's motion to dismiss Plaintiff's claims for declaratory judgment against Defendant and Defendant Equity Trust.

On 9 June 2023, Plaintiff filed a motion for reconsideration to amend the 6 June 2023 order, which the trial court denied. On 13 June 2023, the trial court entered an order dismissing Plaintiff's claim for permanent injunctive relief because Plaintiff no longer owned the property, as well as her claim for abuse of process. In that order, however, the trial court also entered summary judgment against Defendant on his counterclaim for breach of contract and on his liability to Plaintiff for her private nuisance claim. The order also dismissed Plaintiff's remaining claim for injunctive relief against Defendant Equity Trust; ultimately ending Defendant Equity Trust's involvement in the matter. Also, on 13 June 2023, the trial court entered an order canceling the lis pendens.

After entering the 13 June 2023 order, the only issues remaining for trial were damages on the private nuisance claim, and Defendant's counterclaim for quantum meruit. Defendant 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 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 Plaintiffs, despite Defendant's, 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 12 September 2023, the jury returned a verdict awarding Plaintiff compensatory damages in the amount of \$8,940, and \$300,000 in punitive damages. 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 filed timely written notice of appeal.

After the jury verdict, Plaintiff moved for an award of sanctions against Defendant pursuant to Rules 11 and 37(c) and section 6-21.5 of the North Carolina General Statutes, alleging that Defendant, 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 [s]tatute of [f]rauds" and "filed a lis pendens against [Plaintiff's] property on the basis

of an unsupportable quantum meruit theory.”

By order entered 26 September 2023, the trial court denied Plaintiff’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.” On 2 October 2023, Defendant moved for a new trial pursuant to Rule 59, tolling the time limit for noticing appeals. The court entered an order on 18 October 2023 denying Defendant’s Rule 59 motion. Defendant filed a notice of appeal on 18 October 2023. Plaintiff filed her notice of cross-appeal on 24 October 2023.

II. Analysis

Defendant alleges the following issues on appeal:

1. Did the trial court err in granting summary judgment in favor of Plaintiff 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 Defendant’s Motions for Continuance?
3. Did the trial court err in instructing the jury on the damages it could award Plaintiff on her private nuisance claim?
4. Did the trial court err in denying Defendant’s [] motion for judgment notwithstanding the verdict on punitive damages of \$250,000 on Plaintiff’s private nuisance claim?
5. Did the trial court err in denying Defendant’s motion for a new trial?

Plaintiff, as cross-appellant, alleges the following issues on cross-appeal:

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 address each issue appealed by Defendant below in Section A. We then turn to Plaintiff's appeal in Section B. We address Defendant Equity Trust's cross-appeal in section C.

A. Defendant's Appeal

Defendant argues the trial court erred by granting summary judgment on Plaintiff's claim for private nuisance and by denying his motion for a continuance. Defendant also appeals several issues related to the jury trial determining damages for private nuisance. We affirm the trial court on all issues Defendant argues.

1. Private Nuisance

Defendant contends the trial court erred by granting Plaintiff's motion for summary judgment on her claim for private nuisance. Specifically, Defendant argues the question of whether his interference with the use and enjoyment of Plaintiff's property was substantial and unreasonable is a question of fact for the jury.

We review a trial court’s decision on a motion for summary judgment de novo. *MidFirst Bank v. Brown*, 386 N.C. 103, 106, 900 S.E.2d 876, 879 (2024) (citation omitted). Summary judgment is proper “where the pleadings, depositions, and other documentary evidence show that no genuine issue of material fact exists and that any party is entitled to judgment as a matter of law.” *Pierson v. Cumberland Cnty. Civic Ctr. Comm’n.*, 141 N.C. App. 628, 630, 540 S.E.2d 810, 812 (2000) (citation omitted). “An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action. . . . The issue is denominated ‘genuine’ if it may be maintained by substantial evidence.” *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Herring*, 385 N.C. 419, 423, 894 S.E.2d 709, 712 (2023) (citation and internal marks omitted). “On a motion for summary judgment, the evidence is to be viewed in the light most favorable to the nonmoving party.” *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006) (cleaned up).

“A private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one’s neighbor.” *Evans v. Lochmere Recreation Club, Inc.*, 176 N.C. App. 724, 727, 627 S.E.2d 340, 342 (2006) (citation and internal marks omitted). To establish liability on a claim for private nuisance, “a plaintiff must prove: (1) that the defendant’s use of its property, under the circumstances, unreasonably invaded or interfered with the plaintiff’s use and enjoyment of the plaintiff’s property; and (2) because of the unreasonable invasion or interference, the plaintiff suffered substantial injury.”

Elliott v. Muehlbach, 173 N.C. App. 709, 712, 620 S.E.2d 266, 269 (2005) (citations and internal marks omitted). Stated differently, “[t]o recover for nuisance, a plaintiff must show an unreasonable interference with the use and enjoyment of his property.” *BSK Enters., Inc. v. Beroth Oil Co.*, 246 N.C. App. 1, 24–25, 783 S.E.2d 236, 252 (2016) (citation omitted).

In *BSK Enterprises*, a somewhat procedurally similar case, “the trial court granted [the] plaintiffs’ partial summary judgment motion on [their] claims for nuisance and trespass, but not on damages, and denied [the] defendant’s motion for summary judgment.” 246 N.C. App. at 7, 783 S.E.2d at 242. There, the trial court granted summary judgment on the issues of trespass and private nuisance where oil from the defendant’s business leaked over into the plaintiff’s groundwater but left the issue of damages for trial. *Id.* at 4–7, 783 S.E.2d at 240–42. Following the trial on damages, the defendant moved for judgment notwithstanding the verdict, claiming there was not real and substantial interference. *Id.* at 24, 783 S.E.2d at 252. We held “testimony regarding substantial annoyance and some interference with comfort and *use of the property*” was sufficient to constitute the “scintilla of evidence” threshold supporting JNOV and thus supporting the entry of summary judgment. *Id.* at 26, 783 S.E.2d at 253.

Defendant argues the reasonable use rule we adopted in *Pendergast v. Aiken* forecloses summary judgment on private nuisance claims. In *Pendergast*, recognizing our law did not accommodate developing societal interests, our Supreme

Court surveyed how other jurisdictions addressed disputes over the disposal of surface waters; ultimately adopting the “reasonable use rule” in which the question of reasonableness is for the jury. 293 N.C. 201, 207–16, 236 S.E.2d 787, 790–97 (1977). For the reasons explained below, this rule is inapplicable where the private nuisance arises out of clearly defined property rights contained in a written agreement.

Woodward v. Cloer similarly provides guidance. There, the defendants filled in a ditch at the front of their property redirecting rainwater onto the plaintiff’s property which caused flooding in the plaintiff’s house. 68 N.C. App. 331, 333, 315 S.E.2d 335, 336. Both properties were subject to restrictive covenants which contained “prohibitions against any obstruction or interference with the flow of water through drainage channels within the easement[.]” *Id.* At trial, the court applied the reasonable use test adopted in *Pendergrast*. *Id.* On appeal, we analyzed the history and logic of the reasonable use rule, concluding the rule “is applicable to determine the rights and duties of landowners *in the absence* of another source for these reciprocal rights and obligations.” *Id.* at 334, 315 S.E.2d at 337 (emphasis added). Consequently, we held the test inapplicable because “the *rights* and *duties* established by the restrictive covenants governing the subdivision supersede the *principle* or *doctrine* of reasonable use articulated in *Pendergrast*.” *Id.* at 336, 315 S.E.2d at 338 (emphasis added). Simply put, we find this logic determinative with respect to landowners’ reciprocal rights and duties created by a properly recorded

easement.

Here, Plaintiff had a legally cognizable right to do what Defendant prevented her from doing—exercising her easement rights. “An easement appurtenant is incident to an estate, and inheres in the land, concerns the premises, pertains to its enjoyment, and passes with the transfer of the title to the land[.]” *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185–86 (1963) (citation omitted). An owner of a “servient estate may make any use of their property and road not inconsistent with the reasonable use and enjoyment of the easement granted.” *Id.* at 457, 133 S.E.2d at 187 (citing *Carolina Power & Light Co. v. Bowman*, 299 N.C. 682, 687, 51 S.E.2d 191, 195 (1949)). But, “[a]ny activity by the [servient] owner which would result in increased cost or inconvenience to the easement holder in exercise of his rights . . . amounts to a material impairment of the easement interest.” *Falkson v. Clayton Land Corp.*, 174 N.C. App. 616, 618, 621 S.E.2d 215, 217 (2005) (citation and internal marks omitted).

Generally, “the owner of a servient estate may erect gates across an easement when necessary to the reasonable enjoyment of his estate, provided they are not of such nature as to materially impair or unreasonably interfere with the purpose of the easement to the dominant estate.” *Taylor v. Hiatt*, 265 N.C. App. 665, 670, 829 S.E.2d 670, 673 (2019) (citations and internal marks omitted). Thus, it follows that the owner of a servient estate may not erect a gate across an easement if doing so is not necessary for the reasonable enjoyment of his estate. *Id.* The servient estate owner

also may not erect a gate if it materially or unreasonably interferes and impairs the dominant estate owner's use of the easement. *Id.* Accordingly, we conclude doing so "amounts to a material impairment of the easement interest." *Falkson*, 174 N.C. App. at 618, 621 S.E.2d at 217.

Here, there is no genuine issue of material fact about whether Defendant unreasonably interfered with Plaintiff's use of her property causing substantial injury by materially impairing her ability to use the easement. As a threshold matter, neither party disputes whether both Defendant and Plaintiff had rights in the easement allowing for ingress, regress, and egress to the properties. The easement "for utilities, ingress, regress, egress, driveway construction, maintenance, replacement and repair across a portion of" Defendant's property was created in 2007 by a deed of easement granted from Defendant Equity Trust, on behalf of Defendant's IRA, to Defendant and his ex-wife, which stated the easement "is appurtenant to and runs with the land[.]" Plaintiff later purchased the dominant estate out of foreclosure, thus the easement remained with the land and Plaintiff was entitled to make use of it. *See Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992) ("An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." (citation omitted)).

Having established the existence of an easement benefiting 243 Beech Street and Plaintiff as owner, we must now determine whether the trial court correctly

determined there was not a genuine issue of material fact as to whether: “(1) [] [Defendant’s] use of [his] property, under the circumstances, unreasonably invaded or interfered with [P]laintiff’s use and enjoyment of [P]laintiff’s property; and (2) because of the unreasonable invasion or interference, [Plaintiff] suffered substantial injury.” *Elliott*, 173 N.C. App. at 712, 620 S.E.2d at 269 (citations and internal marks omitted).

Here, Defendant argues there was a genuine issue of material fact about whether his actions were reasonable, citing to the record for evidence that “Defendant’s assertions that he had invested in environmental and infrastructure maintenance for 243 Beech Street and that Plaintiff had promised to share the financial burden.” The record document he cites is his counterclaim for breach of contract, despite that claim being dismissed at summary judgment. Moreover, the record reflects Defendant’s expenditures on infrastructure were made following numerous letters from the North Carolina Department of Environment and Natural Resources providing notice and leveraging fines against Defendant for unauthorized development on his properties. These letters were dated between 15 October 2004 and 1 May 2009, well before Plaintiff had any interest in 243 Beech Street and well before Plaintiff could have been responsible in any way for Defendant’s expenditures. Additionally, in response to Plaintiff’s requests for admissions, Defendant admitted “Plaintiff’s purchase of 243 Beech Street did not create an obligation for [him] to maintain whatever infrastructure or environmental liability mitigation

infrastructure[.]” As such, this evidence could not support the reasonableness of Defendant’s actions.

Uncontroverted evidence supporting the unreasonableness of Defendant’s actions is ample. For instance, the document entitled “Heads of Agreement” and dated 11 February 2021, which Defendant drafted and sent to Plaintiff, states:

[Plaintiff] acknowledges that [Defendant] as developer of “The Preserve” installed, owns, controls and maintains all of the infrastructure.

1. [Plaintiff] wishes to utilize and enjoy the use of The Preserve Infrastructure and agrees to pay 1/3 (33%) of the Annual Operating Cost, and any required maintenance. The infrastructure includes the private access gates (on Beech Street frontage), the private access road . . . and supporting infrastructure along the private access road, among others.

So, by his own admission per the document, Defendant controlled the gate preventing access to the easement which Plaintiff was legally entitled to use. Supporting this fact, and the fact that Defendant was aware of Plaintiff’s right to access the easement, is Defendant’s other statement that “[t]he current ‘as is’ gravel access road was established for 243 and 245 Beech Street Properties.” Moreover, evidencing his intent to prevent access prior to his demands being met, the document provides “[Plaintiff] agree [*sic*] that no contractor or utility work can be conducted on the 243 parcel until the binding legal agreement, surveys and other documents are signed and recorded, to avoid any conflicts or disputes.” Plaintiff responded on 22 February 2021 via email stating in part:

Finally, but most importantly, we require immediate access to our [p]roperty via the access easement so that we can begin the rehabilitation process. Any delay may result in increased costs of the project, which we will not bear. This can be accomplished in one of two ways: (1) cease lowering the gate at the entrance entirely, or (2) provide me with a controller that permits us to enter and exit freely.

This response evidences Plaintiff's inability to access the property, despite having a legal right to per the easement, solely because Defendant refused to provide her or her son the code or a remote.

Further evidence provided to the trial court included a text message from Defendant to Plaintiff, stating "[a]s I discussed with you and your mother prior, we will have to meet and come to some understandings about the property, maintenance, and other matters before any contractors or other[s] can get access." This uncontroverted evidence, again, shows Defendant unilaterally prevented Plaintiff from accessing the property in order to coerce Plaintiff into signing his agreement. Again, this evidence could only support one conclusion—Defendant's actions were unreasonable because he prevented Plaintiff from exercising her rights provided for by the recorded easement.

Accordingly, we hold Defendant preventing Plaintiff from utilizing the easement benefitting her land was unreasonable as a matter of law. *See Falkson*, 174 N.C. App. at 618, 621 S.E.2d at 217 ("Any activity by the fee owner which would result in increased cost or inconvenience to the easement holder in exercise of his rights or

which would create a safety hazard should those rights be exercised amounts to a material impairment of the easement interest.” (citation omitted)); *Benson v. Prevost*, 277 N.C. App. 405, 413, 861 S.E.2d 343, 349 (2021) (“[The p]laintiffs, as the owners of the servient estate, ‘may still use the land in any manner and for any purpose *which does not interfere with the full and free use of the easement.*’” (cleaned up)).

Next, we must address whether there was a genuine issue of material fact as to whether Defendant’s unreasonable interference with Plaintiff’s easement rights was substantial. A “substantial interference” for purposes of a private nuisance claim is “an invasion that involves more than slight inconvenience or petty annoyance.” *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 619, 124 S.E.2d 809, 815 (1962).

Here, the record shows Defendant blocked Plaintiff’s access to the easement for at least a one-week period. This was in contravention of well-established law. *See Strickland v. Shew*, 261 N.C. 82, 85, 134 S.E.2d 137, 140 (1964) (“One, who by his deed has specifically granted to another an easement of access, may not obstruct the easement in such manner as to prevent or to interfere with its reasonable enjoyment by his grantee.”); *Taylor*, 265 N.C. App. at 670, 829 S.E.2d at 673 (“[T]he owner of a servient estate ‘may erect gates across an easement when necessary to the reasonable enjoyment of his estate, provided they are not of such nature as to materially impair or unreasonably interfere’ with the purpose of the easement to the dominant estate.” (cleaned up)). Accordingly, where, as here, the owner of a servient estate prevents the owner of a dominant estate from accessing their land without reason, they have

materially impaired the dominant estate's easement interest and therefore caused substantial injury to that owners' rights. *Falkson*, 174 N.C. App. at 618, 621 S.E.2d at 216.

In sum, we hold the trial court properly granted summary judgment in favor of Plaintiff because there did not exist a genuine issue of material fact about whether Defendant unreasonably and substantially interfered with Plaintiff's easement rights and, by doing so, created a private nuisance.

2. Motion for continuance

Next, Defendant contends the trial court "abused its discretion in denying [his] motion for continuance." We disagree.

"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, 628, 381 S.E.2d 156, 161 (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 2023, Defendant sought another continuance, again asserting that the same medical condition would prevent him 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 review, we conclude that the trial court did not abuse its discretion in denying his second motion for a continuance in light of Defendant's disingenuous representations to the court about his ability to travel.

3. Jury Instructions

Defendant alleges the trial court "erred in instructing the jury on damages it could award Plaintiff on a private nuisance claim." Specifically, Defendant contends it was error to allow the jury to consider comparable rental properties when determining damages for the amount of time Plaintiff was unable to access the property because of the private nuisance Defendant created. Plaintiff argues Defendant failed to preserve this issue for appeal and, even if Defendant did preserve the issue, the instructions were a correct statement of law.

Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure provides the rule for preserving an alleged error in jury instruction for appeal:

A party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the

presence of the jury.

N.C. R. App. P. 10(a)(2).

Here, during the charge conference, Defendant objected to including the portion of the jury instructions referencing comparable rental properties:

[DEFENSE COUNSEL]: I would submit that sort of the actual damages evidence, which really is limited to the rental schedule, is circumstantial with regards to the damages, particularly for the context, the fact that it was short-term rental, Airbnb-type evidence rather than Mr. Amato wasn't able to testify –

THE COURT: I don't think it hurts you if I include it.

. . .

THE COURT: Right. So let's just say if the property could not be used by the nuisance at a reasonable cost – the owner may recover from the loss of its use. A measure of such damages can be the cost of renting similar property, similar real property . . . whether or not the owner actually rented such a similar property.

[DEFENDANT'S COUNSEL]: Your honor, [D]efendant would object to this portion of the instruction.

. . .

THE COURT: . . . Any other additions, deletions, or changes that you think we need to do?

[DEFENDANT'S COUNSEL]: Not on behalf of [D]efendant, other than the one objection with regards to the rental income instruction.

As such, Defendant properly preserved this issue for appeal by objecting to the proposed instruction and stating that the grounds for the objection was the fact that

the evidence was circumstantial.

Having concluded Defendant properly preserved this issue for appeal, we now address whether the jury instructions given were erroneous. “When reviewing challenges regarding the appropriateness of jury instructions, we must first determine ‘whether the trial court abused its discretion, and, second, whether such error was likely to have misled the jury.’” *Chahdi v. Mack*, 288 N.C. App. 520, 522, 886 S.E.2d 900, 904 (2023) (quoting *Goins v. Time Warner Cable Se., LLC*, 258 N.C. App. 234, 237, 812 S.E.2d 723, 726 (2018)). Then, “we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence.” *Id.* (citation and internal marks omitted). When “reviewing jury instructions for error, they must be considered and reviewed in their entirety.” *Chisum v. Campagna*, 376 N.C. 680, 708, 855 S.E.2d 173, 193 (2021) (citation and internal marks omitted). An abuse of discretion occurs “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.” *Watauga Cnty. v. Beal*, 255 N.C. App. 849, 852, 806 S.E.2d 338, 340 (2017) (citation and internal marks omitted).

“Once liability is established for an abatable or temporary nuisance, the remedy includes money damages.” *Whiteside Ests., Inc., v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 461, 553 S.E.2d 431, 440 (2001) (citing *Phillips v. Chesson*, 231 N.C. 566, 569–70, 58 S.E.2d 343, 346 (1950)). Where liability is established “[f]or an abatable nuisance, plaintiff[s] may only recover damages up to the time of the

complaint or trial.” *Whiteside*, 146 N.C. App. at 461, 553 S.E.2d at 440. (citation omitted). But, the kind of damages recoverable “include: diminished rental value . . . and other added damages for incidental losses.” *Id.* at 462, 553 S.E.2d at 440. (citation and internal marks omitted).

Here, the instructions Defendant challenges stated:

If the property at 243 Beech Street could not be used at a reasonable cost within a reasonable time because of the nuisance of another, the owner may recover for the loss of its use. The measure of such damages is the cost of renting similar real property for a reasonable repair period during the period of nuisance, whether or not the owner actually rented such a similar real property.

The trial court did not abuse its discretion in providing these jury instructions because the bulk of Plaintiff’s argument regarding damages focused on the delay in their ability to rent the property caused by Defendant’s conduct. Moreover, we cannot say the trial court’s decision was manifestly unsupported by reason where recoverable damages include “diminished rental value[.]” *Id.* at 461, 553 S.E.2d at 440. Defendant contends “the cost of renting similar property for a reasonable repair period during the period of nuisance” is not sufficient to support damages for “diminished rental value[.]” We disagree as Plaintiff’s ability to rent the property for value, i.e. its rental value, was diminished for the period that Defendant prevented them from accessing the property and therefore beginning reconstruction efforts. Moreover, the instructions were supported by the evidence because Plaintiff provided a rental survey showing rates for three comparable properties within the Wilmington

area.

Accordingly, we hold the trial court did not err by instructing the jury that it could measure damages based upon the cost of renting comparable property.

4. Judgment Notwithstanding the Verdict

Defendant argues the trial court erred by denying his motion for judgment notwithstanding the verdict. However, Defendant does not argue a lack of statutory grounds for the award, only that the \$250,000 award is excessive and violates his due process rights because there was insufficient evidence of reprehensible conduct and the disparity between the compensatory and punitive damages was too high.

Our Supreme Court has limited our review when analyzing a trial court's ruling in this procedural context:

[W]e hold that in reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, our appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating factors required by [N.C. Gen. Stat. § 1D-15(a)] and that that aggravating factor was related to the injury for which compensatory damages were awarded.

Scarborough v. Dillard's, Inc., 363 N.C. 715, 721–22, 693 S.E.2d 640, 644 (2009).

But, because Defendant only argues the amount of the award was excessive and does not contest whether there was sufficient evidence to submit the issue of punitive damages to the jury, we address this contention below as part of his argument that the trial court erred by failing to grant his motion for a new trial, in

part, because of excessive damages. *See generally Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 683 S.E.2d 728 (2009) (addressing whether there was evidence of the section 1D-15(a) factors when reviewing the trial court's ruling on the defendant's motion for judgment notwithstanding the verdict but addressing whether the punitive damages were excessive when reviewing the trial court's ruling on the defendant's motion for a new trial).

5. New Trial

Lastly, Defendant argues the trial court erred by denying his motion for a new trial. Defendant contends—incorporating his other arguments about jury instructions, excessive damages, and the denial of his motion for a continuance—he “presented sufficient evidence of three of the grounds in Rule 59” so his motion should have been granted. As we have already held Defendant's arguments on jury instructions, *see* N.C. R. Civ. P. 59(a)(8) (allowing for a new trial based on an error of law which was objected to), and the denial of his motion for a continuance, *see* N.C. R. Civ. P. 59(a)(1) (allowing for a new trial based on an irregularity which prevented a party from having a fair trial), are without merit and therefore cannot support a new trial, we only address whether the punitive damages of the jury award were excessive.

We review a trial court's ruling on a Rule 59 motion to determine “whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.” *Haarhuis v. Cheek*, 255 N.C. App. 471, 474, 805 S.E.2d 720, 724 (2017) (citation and

internal marks omitted). An abuse of discretion occurs if the trial court’s ruling “is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.” *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 776, 898 S.E.2d 732, 736 (2024) (citations and internal marks omitted). We will not reverse a “discretionary Rule 59 order unless [we are] reasonably convinced [] that the trial judge’s ruling probably amounted to a substantial miscarriage of justice.” *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982).

Rule 59(a) states in part that “[a] new trial may be granted” for “[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]” N.C. R. Civ. P. 59(a)(6). Punitive damages are “consistently awarded [] solely on the basis of [the] policy [of] punish[ing] intentional wrongdoing and to deter others from similar behavior.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 166, 594 S.E.2d 1, 8 (2004) (citations and internal marks omitted). We address whether an award of punitive damages is unconstitutionally excessive de novo as it is a question of law. *Everhart*, 200 N.C. App. at 157, 683 S.E.2d at 740.

We have three guideposts to aid in our analysis of whether an award is excessive: “(1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the compensatory and punitive damages awards; and (3) available sanctions for comparable conduct.” *Id.* at 157–58, 683 S.E.2d at 740. The first factor embodies the principle “that some wrongs are more blameworthy than others. . . . Similarly, ‘trickery and deceit,’ are more reprehensible than negligence[.]” *BMW of*

North America, Inc. v. Gore, 517 U.S. 559, 576 (1996) (citations and internal marks omitted). The second factor reflects that there ought to be a reasonable relationship between compensatory and punitive damages. *Id.* at 580. But, we reject that a “mathematical formula” demarcates the line of constitutionality because “low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages.” *Id.* at 582.

Here, the jury initially awarded Plaintiff \$300,000 in punitive damages, which the trial court reduced to the statutory maximum of \$250,000; resulting in a 1 to 28 compensatory to punitive damages ratio. See N.C. Gen. Stat. § 1D-25(b) (2023) (“Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater.”). Defendant’s primary contention is there was insufficient evidence of his actions being reprehensible enough to support this award as “Plaintiff was unable to access a dilapidated property to begin renovations for one month[.]” This summation severely understates the scope and extent of Defendant’s actions and fails to appreciate the pattern of behavior Defendant’s actions constituted.

The matter began after Defendant threatened litigation, which would cost Plaintiff “hundreds of thousands of dollars,” before allowing Plaintiff to exercise her easement rights. The trial court found, and we agree, “that the message, especially in conjunction with Defendant’s prior demands, was a threat to increase the cost of

litigation over the easement[.]” We also agree this action could have subjected Defendant to criminal liability under section 14-118.4, which provides that “[a]ny person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion[.]” N.C. Gen. Stat. § 14-118.4 (2023). Further, Defendant prevented access until a court order required him to grant it and then filed a lis pendens on Plaintiff’s property until the trial court canceled it—all while insisting a contract and associated writing existed when it did not. Defendant falsely claimed Plaintiff’s children were trespassing on his land while it was actually Defendant trespassing on Plaintiff’s land. In sum, this pattern of behavior is reprehensible because Defendant unreasonably, on numerous occasions, attempted to gain a property interest in Plaintiff’s land while frivolously threatening and attempting to use legal mechanisms to force her into acceding to his demands.

As to the second factor, this award fits into the category of awards given for “particularly egregious act[s] [which have] resulted in only a small amount of economic damages.” *BMW*, 517 U.S. at 582. We agree with the trial court’s conclusion that the compensatory damages were low because Plaintiff took quick action to mitigate damages resulting from Defendant’s actions. Thus, the high punitive reward in relation to the compensatory damages is a result of Plaintiff actually helping to limit Defendant’s exposure. Moreover, we have upheld punitive damages where the ratio of compensatory to punitive damages was 30 to 1 and 23 to 1. *Rhyne*

v. K-Mart Corp., 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002). The ratio here of 1 to 28 fits squarely within the range we previously described as “relatively low.” *Id.*

Finally, “[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct[.]” we hold this factor supports upholding the jury’s award. *BMW*, 517 U.S. at 583. As mentioned previously, Defendant’s conduct could have exposed him to criminal liability for extortion. Moreover, as we “accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue[.]” the trial court only had to lower the award by \$50,000 to comply with the statutory mandate in section 1D-25(b).

In totality, we hold this award did not violate Defendant’s due process rights and therefore the trial court did not abuse its discretion by denying Defendant’s Rule 59 motion for a new trial.

B. Plaintiff’s Cross-Appeal

Plaintiff appeals the trial court’s decision ruling her claim for declaratory judgment moot. Plaintiff also alleges the trial court erred by dismissing her claim for abuse of process and denying her motion for sanctions. We affirm in part and reverse in part.

1. Declaratory Judgment

Plaintiff alleges the trial court erred by dismissing her claim for declaratory judgment as moot. Specifically, Plaintiff argues the trial court should have joined her

son Jeff as a plaintiff pursuant to Rule 25(d) and the trial court's failure to do so upon her motion for reconsideration constitutes an abuse of discretion. Plaintiff also contends the trial court's subsequent dismissal of her related claim for injunctive relief, premised upon the easement rights she sought to protect through declaratory judgment, was also in error.

We review a trial court's decision to dismiss an action for declaratory judgment as moot de novo. *Alexander v. N.C. State Bd. of Elections*, 281 N.C. App. 495, 499, 869 S.E.2d 765, 769 (2022) (citing *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 242 N.C. App. 524, 528, 776 S.E.2d 329, 332 (2015)).

In the declaratory judgment context, our Supreme Court has held "a declaratory judgment action must involve an 'actual controversy between the parties[.]'" *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (citation and internal marks omitted). The "judgment should issue when: (1) it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Id.* (cleaned up). But, "[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n., Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (citation omitted).

Here, because Plaintiff transferred her interest to Jeff prior to declaratory judgment being entered, the trial court properly dismissed this, and the related claim

for injunctive relief, as moot. As “[e]very claim shall be prosecuted in the name of the real party in interest[.]” N.C. R. Civ. P. 17, Plaintiff ceased to be the proper party for the trial court to adjudicate the rights of after she transferred the property to her son. Accordingly, the trial court’s entry of declaratory relief would not have served to clarify the rights between Plaintiff and Defendant as Plaintiff no longer owned the property in contention.

Plaintiff attempts to rely on Rule 25(d) as the mechanism by which Jeff could have stepped into her shoes and contends the trial court abused its discretion in denying her motion for the same. But, as Rule 25(d) uses the permissive “may,” it was not required to do so. N.C. R. Civ. P. 25(d); *see also Buie v. High Point Assocs. LTD. P’ship.*, 119 N.C. App. 155, 162 458 S.E.2d 212, 217 (1995) (“Since joinder of the transferee *is not mandatory*, an action continued in, and a judgment entered in, the name of the original party alone is valid.”).

As such, we hold the trial court did not err in dismissing Plaintiff’s claims for declaratory judgment, and the related claim for injunctive relief, as moot. Being so, we also hold the trial court properly denied Plaintiff’s motion to reconsider the same.

2. Abuse of Process

Next, Plaintiff contends the trial court erred by granting summary judgment in Defendant’s favor on her claim for abuse of process. Defendant argues the trial court’s grant of summary judgment was proper because he filed his claims for breach of contract and quantum meruit, as well as the *lis pendens*, prior to proceedings

beginning.

We review de novo a trial court’s decision granting “a motion for summary judgment to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.” *Fox v. City of Greensboro*, 279 N.C. App. 301, 313, 866 S.E.2d 270, 283 (2021) (cleaned up). A movant is entitled to summary judgment “upon demonstrating that ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits’ show that ‘they are entitled to judgment as a matter of law’ and ‘that there is no genuine issue as to any material fact.’” *Gary v. Wigley*, 271 N.C. App. 584, 586, 845 S.E.2d 448, 450 (2020) (quoting N.C. R. Civ. P. 56(c)). A “genuine” issue is one which “can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *Fuhs v. Fuhs*, 245 N.C. App. 367, 374, 782 S.E.2d 385, 390 (2016) (citation omitted). We consider the evidence “in the light most favorable to the non-moving party.” *Cranes Creek, LLC. v. Neal Smith Eng’g, Inc.*, 291 N.C. App. 532, 534, 896 S.E.2d 273, 275 (2023).

An abuse of process claim requires a plaintiff to establish two elements: “(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceeding.” *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 99–100, 618 S.E.2d 739, 747 (2005) (citing *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E.2d 223, 227–28 (1955)). The torts of abuse of process and malicious

prosecution are similar, but “[t]he distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued.” *Fox*, 279 N.C. App. at 326, 866 S.E.2d at 290 (quoting *Chidnese v. Chidnese*, 210 N.C. App. 299, 304, 708 S.E.2d 725, 731 (2011); see *Fuhs*, 245 N.C. App. at 376, 782 S.E.2d at 390 (explaining the second element of an abuse of process claim requires a showing that “the defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.” (citation omitted)). But, where a party “wantonly, maliciously, [and] without cause, commences a civil action and puts upon record a complaint and a *lis pendens* for the purpose of injuring and destroying the credit and business of another’ warrants the court to grant relief to the victim of such coercion through the tort of abuse of process.” *Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (quoting *Austin v. Wilder*, 26 N.C. App. 229, 233, 215 S.E.2d 794, 797 (1975)).

Here, the parties only dispute whether there was an improper act after the commencement of the proceeding. Defendant contends that because the *lis pendens* states “[t]his [l]is [p]endens gives notice of counterclaims being filed contemporaneously herewith in New Hanover County Superior Court bearing the caption above[,]” it was not filed *after* the commencement of the action. Section 1-116, the statute authorizing filings of *lis pendens*, provides that “[n]otice of pending

litigation may be filed [] [a]t or any time after the commencement of an action[.]” N.C. Gen. Stat. § 1-116 (2023). Defendant filed the notice one minute after filing his counterclaims, thus constituting an action *after* the commencement of proceedings. While only a minute passed between the filings, our review of precedent provides no guidance as to the amount of time necessary and we do not attempt to draw that line here. *Cf. Whyburn v. Norwood*, 47 N.C. App. 310, 313–14, 267 S.E.2d 374, 376–77 (1980) (failing to address any issue of timing when the complaint and notice of lis pendens were filed the same day). This disposition is also consistent with our precedent holding the use of a lis pendens for improper purposes, based upon frivolous lawsuits, warrants relief through a claim for abuse of process. *See Hewes*, 74 N.C. App. at 614, 330 S.E.2d at 19.

As such, we hold the trial court erred by granting Defendant’s motion for summary judgment on Plaintiff’s claim for abuse of process and reverse and remand the trial court’s order on this issue.

3. Rule 11 Sanctions

Next, Plaintiff contends that “the trial court erred in denying the motion for sanctions on the ground of ‘novelty.’” We disagree.

“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). We

“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 we make “these three determinations in the affirmative, [we] must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions under Rule 11(a).” *Id.* (cleaned up).

Rule 11 provides, *inter alia*, 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. R. Civ. P. 11 (emphasis added). However, “Rule 11 sanctions are inappropriate where the issue raised by a plaintiff’s complaint is one of first impression.” *Herring v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 188 N.C. App. 441, 453, 656 S.E.2d 307, 315 (2008)

Here, the trial court determined that “Defendant 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 [section] 22-2[,]” and “when [D]efendant 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 [P]laintiff, 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, [] [D]efendant’s attorney knew or reasonably should have known that there was no contract meeting the requirements of [section] 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.” 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 [we] makes these three determinations in the affirmative, [we] must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions under Rule 11(a).” *Id.*

After review, we conclude “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.* (cleaned up), 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.

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”).

4. Rule 37(c) Sanctions

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

“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

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).

Rule 37(c) provides that:

If 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. 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.

N.C. R. Civ. P. 37(c) (2023). “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 [P]laintiff’s discovery requests, [D]efendant inter alia denied the existence of an agreement that would satisfy the [s]tatute of [f]rauds for the transfer of real property. However, [D]efendant referred to a variety of texts and emails (with attached proposals) between [P]laintiff’s son and himself as describing the

agreement described in his pleadings.

....

6. In opposing the TRO and [p]reliminary [i]njunction, [D]efendant contended, in part, that [P]laintiff likely could not show that her easement rights existed or had been impaired. Also, [D]efendant's answer to the [v]erified [c]omplaint 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 [c]ourt in its discretion should deny [P]laintiff's motion under [Rule] 37(c)."

Based upon our 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 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:

[D]efendant's answer to the [v]erified [c]omplaint 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

Thus, the trial court ultimately concluded that, "[b]ased upon the foregoing findings and prior rulings in this case, the [c]ourt in its discretion should deny plaintiff's motion under [N.C. R. Civ. P.] 37(c)."

Absent 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.

C. Equity Trust

Defendant Equity Trust argues the trial court properly dismissed Plaintiff's declaratory judgment claim as moot and that they are independently entitled to summary judgment on all claims because there was no evidence of their involvement

in the dispute.² Because we agree Plaintiff's claim for declaratory judgment and the related claim for injunctive relief are moot, no remaining claims exist against Defendant Equity Trust.

III. Conclusion

For the aforementioned reasons, we hold Defendant's arguments are without merit. Additionally, we hold the trial court erred by dismissing Plaintiff's claims for abuse of process and sanctions pursuant to Rule 37(c) of the North Carolina Rules of Civil Procedure and remand for further action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURRY and FREEMAN concur.

Report per Rule 30(e).

² We note here that Defendant Equity Trust represents to the Court it is no longer the custodian of Defendant's self-directed IRA because it resigned from its position after settling the record on appeal. This fact also supports the mootness of Plaintiff's claim for declaratory judgment as Defendant Equity Trust has no rights in the property. *See Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 ("A declaratory judgment action must involve an actual controversy between the parties." (cleaned up)).