NO. COA14-314

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

DAVID COX,
Plaintiff/Father

v. Iredell County
No. 12 CVD 1940

MICHELLE COX,
Defendant/Mother

v.

BETTY JO LAYNE,
Intervenor/Paternal
Grandmother

Appeal by defendant from order entered 19 November 2013 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals 9 September 2014.

Arnold & Smith, PLLC, by Matthew R. Arnold and Kyle A. Frost, for plaintiff-appellee.

Church Watson Law, PLLC, by Kary C. Watson and Seth A. Glazer, for defendant-appellant.

Weaver, Bennett & Bland, P.A., by William G. Whittaker, for intervenor-appellee.

BRYANT, Judge.

Where defendant-mother raises a constitutional argument for the first time on appeal, we dismiss the argument. Where the trial court's findings of fact are adequately supported by the

record, we uphold the findings of fact. Where the trial court's order includes language establishing what would amount to a preemptive modification to custody of the minor children, we remand for the trial court to strike the improper language from the order. And, where defendant-mother's argument of judicial bias was not raised before the trial court, we dismiss this argument on appeal.

On 14 August 2012, in Iredell County District Court, plaintiff-father David Cox filed a verified complaint for child custody and motion for an emergency *ex parte* custody order. The complaint named as defendant the children's mother, Michelle Cox. In his allegations, plaintiff-father stated that from December 2010 to 3 June 2012, he and defendant-mother resided in Mooresville, North Carolina with their two minor children. Plaintiff-father alleged that on 3 June 2012, defendant-mother and their two minor children (born in 2008 and 2009) flew to California under a pretext of attending a family wedding. Defendant-mother had been scheduled to return to North Carolina on 10 June but failed to do so. On 3 August 2012, plaintiff-father was served with defendant-mother's request for a domestic-violence restraining order and a petition for

separation and request for child custody and visitation order.[1] In her request for a domestic violence restraining order, defendant-mother alleged that plaintiff-father struggled with thoughts of suicide. In his complaint, plaintiff-father acknowledged that he was under the treatment of a therapist and a psychiatrist, and he attended weekly group therapy sessions. However, plaintiff further asserted that he never told defendant-mother or either of the minor children he had thoughts of hurting them. Plaintiff-father sought a temporary order compelling defendant-mother to return the children to North Carolina. Defendant-mother filed a motion for *ex parte* temporary emergency custody relief as well as her answer, counterclaims, and a response to plaintiff-father's motion for an emergency *ex parte* custody order.

On 24 August 2012, the trial court entered a memorandum of judgment/order memorializing a temporary agreement between the parties wherein defendant-mother would have temporary custody of the minor children and plaintiff-father would have supervised visitation. A consent order regarding temporary child custody was entered 18 October 2012.

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[1] The California court declined to exercise jurisdiction over child custody under the UCCJEA and no custody order was ever entered in California.

On 1 October 2012, the minor children's paternal grandmother Betty Jo Layne filed a motion for permission to intervene and for visitation. Intervenor-paternal grandmother requested that she be granted visitation with the minor children and that she be the minor children's day-care provider. On 3 January 2013, the trial court granted intervenor-grandmother's motion to intervene.

On 19 November 2013, following a hearing during which all parties were present and represented by counsel, the trial court entered an order on permanent child custody and grandparent visitation. The trial court concluded that both plaintiff-father and defendant-mother were fit and proper persons to share joint legal and physical custody and that the intervenor-grandmother had a substantial relationship with the minor children. The trial court awarded defendant-mother permanent primary joint custody and plaintiff-father secondary joint physical custody which he could exercise through visitation. If plaintiff-father could not exercise his parenting time, intervenor-grandmother could exercise time in his stead. Further, the trial court ordered that plaintiff-father's custodial schedule was to be dependent on his residing with intervenor-grandmother.

Defendant-mother appeals.

On appeal, defendant raises the following issues: whether the trial court (I) violated defendant's due process rights; (II) entered an order establishing permanent custody and grandparent visitation not supported by adequate findings of fact; (III) erred in issuing an order waiving analysis for future modifications of the order; and (IV) abused its discretion in awarding joint custody to plaintiff.

I

Defendant first argues that the trial court violated her constitutional right to due process by failing to allow her a full opportunity to be heard at trial. Specifically, defendant contends the trial court failed to intervene when plaintiff's counsel effectively limited her testimony. We dismiss this argument.

Despite defendant's contention that she was denied her constitutional due process rights, we note that defendant did not raise such an objection or argument at trial. Defendant is raising her constitutional argument for the first time on appeal.

"A constitutional issue not raised at trial will generally not be considered for the first time on appeal. Furthermore, the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citations omitted). Therefore, we will not address defendant's constitutional argument.

Defendant also contends the trial court failed to fulfill its statutory duty to control the presentation of evidence during trial in violation of our Rules of Civil Procedure, Rule 611.

Pursuant to our Rules of Civil Procedure, "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, . . . and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2013). As noted previously, defendant failed to note an objection or preserve this argument before the trial court. *See* N.C. R. App. P. 10(a) (2014) ("In order to preserve an issue for appellate review, a party must have presented to

the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005) ("This subsection of Rule 10 is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." (citation omitted)). Accordingly, because defendant's constitutional and statutory arguments were not properly preserved for our review, they are hereby dismissed.

II

Next, defendant argues that the trial court's 19 November 2013 permanent custody and visitation order is not supported by adequate findings of fact. We disagree.

> In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported

by adequate findings of fact.

Peters v. Pennington, 210 N.C. App. 1, 12—13, 707 S.E.2d 724, 733 (2011) (citations and quotations omitted).

A.

As to findings of fact 23, 24, 28, and 30, defendant contends that these are mere recitations of testimony and cannot be used to support the trial court's conclusions of law. Pursuant to Civil Procedure Rule 52, "[i]n all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2013). Defendant cites *Long v. Long*, for the proposition that "findings that merely recapitulate the testimony or recite what witnesses have said do not meet the standard set by the rule." 160 N.C. App. 664, 668, 588 S.E.2d 1, 3 (2003) (citation omitted).

Finding 23 summarizes some testimony from plaintiff's witnesses regarding his demeanor prior to and after the parties' separation, but essentially the same information is included in detail in other findings of fact which defendant has not challenged, so to the extent that this finding is simply a "recitation," it is not necessary to support the trial court's

conclusions of law. Defendant also challenges Finding 24, which is odd, since this finding is entirely favorable to her. It states that "all of the plaintiff's and defendant's witnesses testified as to the fact that the Defendant is a very good mother who takes very good care of the minor children. There is no dispute that the Defendant has been the minor children's primary caregiver." But again, this finding is simply a summary of evidence which has been set forth in more detail in other findings of fact and even if it is a recitation, it is not necessary to support the trial court's conclusions. Finding 28 is not a recitation of evidence but is a finding regarding the Intervenor's assistance and care for the minor children which is supported by the testimony of several witnesses. Finding 30 is a summary of testimony of Plaintiff's step-father, but again, other extensive and detailed findings of fact which are not challenged support the trial court's conclusions of law.

In addition, despite defendant's assertion that these findings of fact cannot be used to support the trial court's conclusions of law or decree, defendant fails to identify or argue what, if any, particular conclusion of law would be unsupported if findings of fact 23, 24, 28, and 30 were stricken. Regardless, these findings provide a summary of

witness observations which give background information about plaintiff and defendant that is valuable in a determination of child custody and visitation. Defendant's argument is overruled.

B.

Defendant contends that findings of fact 8, 10, 25, 27, and 28 are not supported by evidence presented at trial. These findings indicate that after the birth of plaintiff and defendant's first child, other than feedings, plaintiff "share[d] in all other child rearing aspects, such as bathing, diaper changing, etc. [] Plaintiff was also primarily responsible for cooking the family meals." The findings also indicate that while plaintiff and defendant lived in North Carolina, the intervenor aided in the care of the minors: babysitting during plaintiff's "numerous doctor visits," reading to them, taking them to the movies, and taking them on outdoor adventures. A review of the record provides ample support for the trial court's findings of fact. *See Peters*, 210 N.C. App. at 12—13, 707 S.E.2d at 733. Therefore, defendant's arguments are overruled.

C.

Defendant challenges the trial court's findings of fact 12, 16, 17, 21, 22, and 25. These findings of fact revolve around plaintiff's treatment for his mental health issues.

As to finding of fact 16, defendant contends the trial court's findings failed to reflect the severity of plaintiff's suicidal ideation. Defendant contends the trial court found plaintiff was admitted to the hospital on two occasions but that plaintiff testified it was at least three occasions. Defendant contends that the trial court found that plaintiff was "simply seeking attention from [defendant] by stating he had a 'bad day.' However, . . . [plaintiff] repeatedly expressed detailed suicide plans, including driving off a bridge and shooting himself." We note that the trial court's finding of fact 16 acknowledges that plaintiff felt despondent "and had racing thought patterns and thoughts of suicide." The trial court also found that the evidence disclosed a pattern of behavior: "Plaintiff would seek attention from the Defendant by saying he was 'having a bad day' and thinking of harming himself. The Defendant would then insist that [plaintiff] check himself into a psychiatric facility or have his [psychiatrist] change his medications." We note testimony that prior to one commitment to a psychiatric center plaintiff informed defendant he was "having

a real bad day"; plaintiff then swallowed four magnesium pills. Upon review, the trial court's finding of fact 16 appears to focus on plaintiff's pattern of conduct. Also, throughout the order, it is clear the trial court acknowledged plaintiff's history of suicidal ideation; therefore, we find defendant's contention that the trial court minimized the significance of this unsustainable. Thus, as to this contention, defendant is overruled.

Defendant further challenges finding of fact 17. Defendant argues the trial court's findings indicate that plaintiff's mental illness was "manufactured by [defendant]." Finding of fact 17 states that defendant accompanied plaintiff to the majority of his psychiatric appointments and "tended to do most of the talking," and when plaintiff's psychiatrist failed to diagnose plaintiff in accordance with defendant's conclusions as to plaintiff's illness, "Defendant found another psychiatrist . . . to treat [] Plaintiff." The record provides testimony that defendant noted events that led her to believe plaintiff was bi-polar "[a]nd she was looking for this sort of diagnosis . . . ." There was also testimony that defendant attended almost all of plaintiff's psychiatric counseling sessions. However, in the context of the trial court's order, this finding was less

relevant to a diagnosis of plaintiff's mental illness than it was illustrative of the relationship between the parties. We overrule defendant's contention.

Defendant also challenges the trial court's finding of fact number 22 which states that after plaintiff and defendant separated, plaintiff and intervenor "decided to start weaning [] Plaintiff off his psychiatric medications. By December 2012, [] Plaintiff reported feeling like his old self, and with the concurrence of Dr. Masters, he discontinued all medications." We note that the record does not reflect any testimony by Dr. Masters. Plaintiff testified that the general consensus in intervenor's family was that plaintiff was over-medicated. Plaintiff further testified that during a conversation with his mother, intervenor informed him that she had been stepping down his medication. Plaintiff admitted to being shocked and reluctant, but testified "she would say: Just try it. Just do it for this amount of time. If it works, it works. If it doesn't, we'll go back on it, whatever. Just do this." Plaintiff testified that he began seeing Dr. Masters for treatment in December 2012, after this weaning process had begun. By July 2013, plaintiff had stopped taking medication. He testified absent objection that Dr. Masters was aware of this and did not

object but rather wanted to see how plaintiff was managing without the medication. We hold that the evidence of record sufficiently supports the trial court's finding of fact. *See Peters*, 210 N.C. App. at 12—13, 707 S.E.2d at 733. Thus, defendant's argument is overruled.

As to the remaining findings of fact listed in this subsection of defendant's argument, defendant does not specifically support her challenge with any contention, and we deem those arguments abandoned. *See* N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

D.

Defendant challenges the trial court's finding of facts 13, 14, and 31 which generally state that plaintiff and defendant's move from California to North Carolina was intended to be permanent. Defendant contends the evidence establishes this move was intended to be temporary. Plaintiff's testimony, however, supports the trial court's findings of fact.

> Q. Now, when y'all decided to move to North Carolina was that intended to be a temporary thing?
>
> A. No, not at all.

Testimony from plaintiff also states that he and defendant looked at several houses. The house they selected to purchase was right down the street from both an elementary and middle school and within three miles of a high school. "And we thought that would be a great location because [the elder child, (age 5 at the time of trial)] wouldn't have to drive far to school and – when she did get her license." As the record provides substantial evidence in support of the trial court's finding, we overrule defendant's argument. *See Peters*, 210 N.C. App. at 12—13, 707 S.E.2d at 733.

E.

Next, defendant contends that finding of fact 38 is not supported by evidence. Finding of fact 38 includes five subparagraphs and over a page of single-spaced text. Defendant challenges only one small portion of this finding, which addresses the *Ramirez-Diaz* factors in considering the best interests of the children as to defendant's relocation to California. Defendant challenges the trial court's finding that she is "manipulative and controlling" and that there is little likelihood that she would comply with the trial court's order if allowed to relocate her family to California. In essence, defendant's argument attacks the trial court's assessment of her

credibility and weighing of the evidence of both parties. However, there is abundant evidence in the record to support the trial court's findings and numerous unchallenged findings which also support the trial court's characterization of plaintiff as unlikely to comply with the court's orders.

We note that defendant does not challenge the trial court's finding that she "took the minor children to California on the false pretense of attending a wedding. . . . Defendant kept her intentions to divorce a secret for several months after she left for California, and did not admit her intentions until [] Plaintiff was served with the paperwork from California." Moreover, defendant failed to challenge the trial court's finding that "Defendant refused to return the minor children to North Carolina, despite [the trial court's order], until [] Plaintiff agreed to sign a Consent Order [regarding temporary child custody granting plaintiff only supervised visitation.]" We also note the trial court's unchallenged finding that plaintiff's therapist testified that after defendant left for California, she saw improvement in plaintiff: he lost weight, was more energetic, smiled more, and began looking for jobs. "[Plaintiff's therapist] attributed the change to the discontinuance of the medications, the change in Plaintiff's

environment, and [plaintiff] being able to take control over his own life rather than being controlled and manipulated by [] Defendant." This argument is overruled.

F.

Defendant next challenges the trial court's finding of fact 37.

> Both [] Plaintiff and [] Defendant are fit and proper persons to have the care and custody of their minor children, and at this time it is in the best interest and welfare of said children that their custody be granted jointly to both [] Plaintiff and Defendant with [] Defendant having the primary physical custody of the children, and [] Plaintiff having secondary joint custody of the children.

Defendant argues that the evidence does not support a finding that plaintiff is a fit and proper person to care for the minor children or that it is in their best interest for plaintiff to have joint legal and physical custody, since plaintiff suffers from an untreated bi-polar disorder and has been repeatedly hospitalized for suicidal ideation.

First, we note that finding 37 is actually a conclusion of law and, despite its label, we review it as such; so, we review it to determine if the findings of fact support this conclusion of law. *See In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) ("We note the trial court

classified multiple conclusions of law as 'findings of fact.' We have previously recognized the classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. Generally, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination made by logical reasoning from the evidentiary facts, however, is more properly classified a finding of fact. When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." (internal citations and quotations omitted)).

Again, defendant's argument attacks the trial court's assessment of the credibility of various witnesses and of the severity of plaintiff's mental illness and capacity to care for the minor children. The order's extensive findings, most of which are unchallenged, show that the trial court carefully considered plaintiff's history of mental illness and concluded that he has improved sufficiently enough to care for the children with Intervenor's assistance.

The trial court's unchallenged findings of fact indicate that plaintiff was not on medication at the time of the custody

proceeding and, based on defendant's testimony, he had improved appearance, communication skills, and interaction with his minor children. Based on the testimony of plaintiff's therapist, the trial court found that by January 2013, plaintiff was no longer reporting thoughts of suicide and the therapist "had no concerns about [] Plaintiff being a threat to himself or the minor children." As previously discussed, the trial court also found that there was evidence of a close, loving, and caring relationship between plaintiff and his minor children. We note that the trial court granted defendant primary physical custody and plaintiff secondary physical custody. The terms of plaintiff's secondary joint physical custody established visitation with the understanding that plaintiff was to reside with intervenor so that should plaintiff's mental condition deteriorate, intervenor would be present to monitor and care for the minor children. These unchallenged findings support the trial court's conclusion of law that its award of custody is in the best interest of the minor children. Therefore, we overrule defendant's argument.

G.

Defendant argues that absent the challenged findings of fact, the trial court had no basis to determine that plaintiff

is a fit and proper parent and that the minor children's best interests are served by granting him joint custody. As we have addressed and overruled defendant's challenges to the aforementioned findings of fact, including the trial court's determination there was a sufficient basis to find plaintiff was a fit and proper parent and that joint custody (within the restrictions placed upon plaintiff) was in the best interests of the minor children, we overrule defendant's argument.

III

Defendant argues that the trial court committed error by issuing an order waiving the requirement of further analysis before the order can be modified. Specifically, defendant contends the trial court erred by including a provision in its order wherein a showing that plaintiff's therapist "has no concerns about his mental health or his ability to care for the minor children if living on his own" is predetermined to be a substantial change in circumstances. We agree.

In paragraph 22 of the decretal portion of its order, the trial court stated the following:

> [Plaintiff] is presently residing with the Intervenor. The custodial schedule set forth herein is dependent upon [plaintiff] continuing to reside with Intervenor. [Plaintiff] shall reside with Intervenor and although [plaintiff] may take short outings

> during the day with the children (i.e., pool, movies, shopping, park) the Court wants to ensure that should Plaintiff's [sic] mental health deteriorate, that Intervenor is present to monitor and care for the minor children. [Plaintiff] may petition the Court for a hearing to lift this residency requirement thus permitting, him to continue this custodial schedule after no longer living with Intervenor, and it shall be lifted pursuant to an Order of the Court upon a showing by [plaintiff] that a therapist who has currently evaluated [plaintiff] has no concerns about his mental health or his ability to care for the minor children if living on his own. *If [plaintiff] makes such a showing then it is hereby deemed to be a substantial change in circumstances affecting the well-being of the minor children and warranting the lifting of this residency requirement.*

(Emphasis added).

Pursuant to General Statutes, section 50-13.7, "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2013). "A 'change of circumstances,' as applied to N.C. Gen. Stat. § 50-13.7 means such a change as affects the welfare of the child." *Balawejder v. Balawejder*, 216 N.C. App. 301, 308, 721 S.E.2d 679, 684 (2011) (citation and quotations omitted).

> This Court has held that the trial court commits reversible error by modifying child

> custody absent any finding of substantial change of circumstances affecting the welfare of the child. A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact.

Hibshman v. Hibshman, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443—44 (2011) (citations and quotations omitted). To predetermine that a future event will amount to a substantial change in circumstances warranting a modification of child custody is to predetermine a legal conclusion absent any findings of fact. *See generally Register v. Register*, 18 N.C. App. 333, 335, 196 S.E.2d 550, 551 (1973) ("It is error to modify or change a valid prior order with respect to support or custody absent findings of fact of changed circumstances."). The italicized portion of decretal paragraph 22 of the trial court's order in effect allows for a preemptive modification of custody. That portion of the order is contrary to law as it predetermines what amounts to a substantial change in circumstances. Therefore, we remand this order to the trial court to strike the aforementioned language.

IV

Defendant argues the trial court abused its discretion in awarding joint custody to plaintiff, in denying defendant's

request to return to California, and elevating intervenor to parental status. Defendant contends that the trial court "entered her order with a clear bias against [defendant]." She contends "[t]he presence of this bias, coupled with the numerous erroneous Findings and Conclusions discussed above, calls into question whether [the trial court's] decision was in fact the product of logical reasoning and the proper application of law to fact." We dismiss this argument.

Defendant's argument confuses the trial court's duty to weigh the credibility of the evidence and to resolve the disputes raised by the evidence with improper judicial bias. *See Carpenter v. Carpenter*, ___ N.C. App. ___, ___, 737 S.E.2d 783, 790 (2013) ("The findings should resolve the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state. *See Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) ("As is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. . . ."). The findings of fact should

resolve the disputed issues clearly and relate these issues to the child's welfare; the conclusions of law must rest upon the findings of fact.").

Defendant bases her argument of bias primarily on a colloquy that occurred between the trial court, counsel, and defendant during her testimony when the trial court overruled an objection by her counsel and directed her to answer a question. Defendant has not challenged the trial court's ruling on this evidentiary issue on appeal. Defendant also bases her argument on the fact that the trial court ruled against her by granting plaintiff primary custody and not permitting her to take the children to live in California. This is not the sort of "judicial bias" that is prohibited by law; in fact, trial judges are required to rule on evidentiary issues, to assess the credibility of witnesses, and to make rulings which will, in most cases, be adverse to one party or the other. The type of judicial bias which is considered to be improper is bias based upon the judge's "personal bias or prejudice concerning a party."

> Code of Judicial Conduct Canon 3(C), 2010 Ann. R. N.C. 518, specifically states that
>
> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may

> reasonably be questioned, including but not limited to instances where:
>
> > (a) The judge has a personal bias or prejudice concerning a party.

Sood v. Sood, ___ N.C. App. ___, ___, 732 S.E.2d 603, 608, *cert. denied, review denied, appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336, 339 (2012).

> This Court has held that an alleged failure to recuse is not considered an error automatically preserved under N.C. R. App. P. 10(a)(1). . . . Where appellant failed to move that the trial judge recuse himself, [she] cannot later raise on appeal the judge's alleged bias based on an undesired outcome.

Id. at ___, 732 S.E.2d at 608 (citation omitted).

Defendant has not argued that the trial court had any sort of personal bias or prejudice against her; she did not move for the trial court's recusal prior to the entry of the permanent child custody and the intervenor-grandparent visitation order. Defendant has failed to preserve her argument of judicial bias. Accordingly, this argument is dismissed.

The order of the trial court is affirmed in part and remanded in part.

Affirmed in part; remanded in part.

Chief Judge McGEE and Judge STROUD concur.