IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-930

No. COA22-457

Filed 29 December 2022

Wake County, No. 19 CVD 15443

RYAN SMITH, *pro se*, Plaintiff,

v.

SUSAN WISNIEWSKI, *pro se*, and DAVID WISNIEWSKI, *pro se*, Defendants.

Appeal by plaintiff from order/judgment entered 29 October 2021 by Judge V. A. Davidian, III, in Wake County District Court. Heard in the Court of Appeals 16 November 2022.

Plaintiff-appellant Ryan Hayden Smith, pro se.

Defendants-appellees Susan and David Wisniewski, pro se.

ZACHARY, Judge.

¶ 1 This case arises out of the breakdown of the attorney-client relationship between Plaintiff Ryan Smith and Defendants Susan and David Wisniewski. Plaintiff appeals from the trial court's order/judgment denying his claims, denying Defendants' counterclaim, and imposing sanctions against him pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. After careful review, we affirm in part, reverse in part, and remand.

I. Background

¶ 2 Defendants hired Plaintiff to provide legal services to them following a car accident. On 30 May 2019, Defendants signed an engagement contract ("the Contract") prepared by Plaintiff. Pertinent to the present appeal, the Contract contains the following language regarding invoicing:

> The Firm will periodically send You invoices that include detailed descriptions of Fees, Costs and Expenses, and/or Disbursements. All invoices are subject to Your verification. Unless otherwise agreed by the Firm in writing, You shall be responsible for full payment of all invoices within seven (7) days of their issue date.

¶ 3 The relationship between Defendants and Plaintiff quickly devolved into disputes "over invoices, the quality and amount of work being performed, and advice being given and received." As the trial court detailed in its findings of fact:

> 7. [The Contract] clearly says, "*All invoices are subject to your verification.*" Plaintiff drafted his own contract. It is also of note, that . . . Defendants believed [that] Plaintiff was going to "help" them and . . . Defendants wanted to proceed in the car accident case *pro se*, but the executed contract is a full litigation contract. This also brings into question the "meeting of the minds" and contract formation. While all parties admitted that [the Contract] was signed, it did not state what . . . Defendants' [sic] wanted, but was the standard "full" contract provided by . . . Plaintiff.
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> 8. In fact, . . . Defendants did file a *pro se* complaint in the car accident case, but under the guidance of . . . Plaintiff. He erroneously or negligently told them to include the insurer (MetLife) in their complaint.

> According to . . . Defendants, Plaintiff told them, "they might get away with it because they were *pro se*." On the other hand, it was his lack of knowledge of how to handle any car accident/personal injury case where an insurance agency is involved because after the contract was signed, he "worked out a deal" with the other side to amend the complaint and add some claims. He either knew it was wrong for it to be in the complaint and sent a *pro se* litigant on their way with bad and harmful advice or he was not adequately prepared to handle this case per the Rules of Professional Conduct. . . .
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> 9. . . . Defendants clearly and unambiguously disagreed with the invoices in question and questioned the excessive "working of the file" and the redundant work billed by . . . Plaintiff. . . . Defendants had done much of the busy work themselves in an effort to lower costs, yet . . . Plaintiff billed for "working the file" which was excessive. This was brought to the attention of . . . Plaintiff.
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> 10. Both parties produced a cornucopia of text messages and emails between them concerning this case, the invoices, and their attorney-client representation. . . .
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> 11. . . . Defendants did not provide "verification" to . . . Plaintiff that they were agreeable with the billing and invoices presented to them. In fact, they conveyed the exact opposite. They were upset and unhappy with the representation and the excess/redundant billing.

(Emphasis added).

¶ 4 By November 2019, the billing impasse reached a point where Defendants' "past due account" with Plaintiff allegedly amounted to nearly $6,000.00. On 12

November 2019, Plaintiff filed a verified complaint ("the collection complaint") against Defendants and their minor child[1] in Wake County District Court, alleging breach of contract and breach of the implied covenant of good faith and fair dealing.

¶ 5 In January 2020, Defendants filed their combined answer and counterclaim for constructive fraud, which they subsequently amended twice. In response to each answer and counterclaim, Plaintiff filed a "counterclaim answer" and ultimately asserted 12 various affirmative defenses. Thereafter, Plaintiff moved for summary judgment, which the trial court denied on 10 November 2020. Plaintiff proceeded *pro se*; Defendants hired an attorney for the limited purpose of preparing and filing their second amended answer and counterclaim, but otherwise proceeded *pro se*.

¶ 6 This matter came on for a bench trial on 10 November and 8 December 2020. At the close of evidence on 8 December, the trial court invited the parties to submit written closing statements for the court's consideration. Both parties opted to submit closing statements to the trial court.[2]

¶ 7 On 4 February 2021, the trial court called the matter for hearing via videoconference to deliver its oral ruling. The trial court informed the parties that it

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[1] On 20 October 2020, Plaintiff took a voluntary dismissal of his action with regard to Defendants' minor child.

[2] These closing statements, like many other documents in the appellate record, are not file-stamped, but it is apparent from the 4 February 2021 transcript that the trial court received and considered the parties' statements.

would deny their respective claims by a written order to follow.[3] The trial court also informed Plaintiff that it intended to sanction him $2,000.00 pursuant to Rule 11 for "the complaint or the signed documents, or the action is done without factual sufficiency, legal sufficiency, or for an improper purpose, the [c]ourt is cobbling together all of those[.]" Recognizing that Plaintiff was entitled to an opportunity to be heard on the Rule 11 sanctions, and not wanting to "put [Plaintiff] on the spot now," the trial court permitted Plaintiff to submit a written response "to provide case law or something in an argument written, to change [the court's] mind" if Plaintiff wished.

¶ 8 After submitting a request for oral argument on the issue of the Rule 11 sanctions—which the trial court denied—as well as several requests for an extension of time, Plaintiff submitted his written response opposing sanctions. On 29 October 2021, the trial court filed its order/judgment denying Plaintiff's claims, denying Defendants' counterclaim, and sanctioning Plaintiff $2,000.00 pursuant to Rule 11. Plaintiff timely filed notice of appeal.[4]

II. Discussion

[3] In its oral ruling, the trial court stated that it was "dismissing" the parties' claims, but in its 16 February 2021 email to the parties, the trial court clarified that it was in fact denying their claims, rather than dismissing them.

[4] Defendants have not cross-appealed the trial court's denial of their claim for constructive fraud.

¶ 9 On appeal, Plaintiff first challenges the trial court's denial of his claims. Plaintiff also raises several arguments with regard to the trial court's imposition of Rule 11 sanctions: that the trial court violated his constitutional right to due process by denying him a meaningful opportunity to be heard; that the trial court's order was not based on competent evidence; and that the trial court abused its discretion in assessing sanctions of $2,000.00. Lastly, Plaintiff argues that the trial court's bias against him entitles him to a new trial before a different judge.

A. Denial of Plaintiff's Claims

¶ 10 First, Plaintiff challenges the trial court's denial of his claims, alleging that "the evidence introduced at trial does not support the order's findings of fact, and its findings of fact do not support the order's uncited conclusions of law." We disagree.

1. Standard of Review

¶ 11 "The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Farlow v. Brookbank*, 230 N.C. App. 179, 183, 749 S.E.2d 493, 496 (2013) (citation and internal quotation marks omitted). "Since the trial judge acts as the factfinder, the trial court resolves any conflicts in the evidence; any findings made by the trial judge are binding on appeal if supported by competent evidence." *Gribble v. Bostian*, 279 N.C. App. 17, 2021-NCCOA-423, ¶ 9, *disc. review denied*, 375 N.C. 685, 865

S.E.2d 870 (2021). "This is true even though the evidence may also sustain findings to the contrary." *Graham v. Martin*, 149 N.C. App. 831, 834, 561 S.E.2d 583, 585 (2002). Further, "[u]nchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Treadaway v. Payne*, 279 N.C. App. 664, 2021-NCCOA-535, ¶ 14 (citation omitted).

¶ 12 "Conclusions of law drawn by the trial judge from the findings of fact are reviewable de novo on appeal." *Gribble*, ¶ 9 (citation omitted). When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Stikeleather Realty & Invs. Co. v. Broadway*, 242 N.C. App. 507, 515, 775 S.E.2d 373, 378 (2015) (citation and internal quotation marks omitted).

2. The "Verification" Provision

¶ 13 Plaintiff argues that the trial court "materially misinterpret[ed]" the "verification" language in the Contract "by considering only one sentence." In its findings of fact, the trial court observed that "the breach of contract [claim] boils down to the verification of the invoices by . . . Defendants" and that under the terms of the Contract, "Defendants were required to verify the invoices PRIOR to being liable for paying them. Without this verification by Defendants, they cannot be in breach of the contract."

¶ 14 Plaintiff's argument that the trial court misinterpreted the Contract is rooted

in the sentence that immediately follows the "verification" provision: "Unless otherwise agreed by the Firm in writing, You shall be responsible for full payment of all invoices within seven (7) days of their issue date." Plaintiff alleges that "[f]acially, the next sentence requires [Plaintiff] to agree to invoice changes in writing." This argument strains the plain text of the Contract.

¶ 15 "It is well settled that a contract is construed as a whole. The intention of the parties is gleaned from the entire instrument and not from detached portions." *Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 316, 385 S.E.2d 553, 555 (1989). However, *International Paper*—upon which Plaintiff relies in his brief on appeal—concerned allegedly conflicting provisions; moreover, this Court further recognized "that contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible." *Id.* at 316, 385 S.E.2d at 556. Here, Plaintiff has not shown that the two provisions at issue are in conflict.

¶ 16 "[I]n cases where the language used is clear and unambiguous," this Court's "only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Computer Sales Int'l, Inc. v. Forsyth Mem'l Hosp., Inc.*, 112 N.C. App. 633, 634–35, 436 S.E.2d 263, 264–65 (1993), *disc. review denied*, 335 N.C. 768, 442 S.E.2d 513 (1994). The subject of the second sentence, the provision that Plaintiff contends the trial court failed to consider, is Defendants' responsibility to fully and timely pay invoices, not Plaintiff's conditional approval of changes to the

invoices. By its plain text, the Contract subjects all invoices to Defendants' prior verification, and requires full and timely payments within seven days unless Plaintiff (or his firm) agrees otherwise in writing. This construction of the Contract is reasonable, and enforces both provisions in harmony and without any conflict. Thus, the trial court properly understood and interpreted the Contract "as written." *Id.*

¶ 17 Further, to the extent that the contractual provisions are ambiguous, this construction easily reconciles the plain text of the Contract's terms. "Whether or not the language of a contract is ambiguous is a question for the court to determine. In making this determination, words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible." *Lynn v. Lynn*, 202 N.C. App. 423, 432, 689 S.E.2d 198, 205 (citations and internal quotation marks omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010).

¶ 18 Finally, insofar as Plaintiff posits that the terms of the Contract are ambiguous, it is well settled that "ambiguities in written instruments are to be strictly construed against the drafting party." *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 153, 555 S.E.2d 281, 291 (2001), *disc. review denied*, 356 N.C. 677, 577 S.E.2d 634 (2003). As the trial court found, and Plaintiff does not contest, Plaintiff drafted the Contract; therefore, any ambiguity is "to be strictly construed against" him. *Id.*

¶ 19 In sum: Plaintiff cannot show that the trial court "materially misinterpret[ed]"

the Contract as its terms are unambiguous, and the trial court's construction reasonably and harmoniously enforces the plain text of each provision. Additionally, if the terms of the Contract contain any ambiguity, such ambiguity is "to be strictly construed against" Plaintiff. *Id.* Therefore, because competent evidence in the record—principally, the Contract itself—supports the findings of fact, Plaintiff's challenges to the trial court's findings are without merit.

3. Condition Precedent

¶ 20 Plaintiff also challenges the trial court's statement in its finding of fact 17 that it "is clear from the evidence presented, that . . . Plaintiff knew . . . Defendants did not verify the invoices: *therefore, he did not have the factual sufficiency to file this lawsuit*." (Emphasis added). Plaintiff further challenges the following conclusions of law:

> 4. . . . Defendants did not breach the contract.
>
> 5. Defendants did not provide verification to . . . Plaintiff concerning their invoices.
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> 6. . . . Plaintiff was required to have verification from . . . Defendants prior to initiating a complaint against . . . Defendants.

¶ 21 Plaintiff argues that the trial court erred by considering the "verification" provision to be a condition precedent, and consequently, by failing to make any finding as to whether Defendants acted in good faith.

¶ 22 "Conditions precedent are those facts and events, occurring subsequently to

the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract[ual] duty, before the usual judicial remedies are available." *Farmers Bank, Pilot Mountain v. Michael T. Brown Distribs., Inc.*, 307 N.C. 342, 350, 298 S.E.2d 357, 362 (1983) (citation and internal quotation marks omitted). "The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event." *Id.* at 351, 298 S.E.2d at 362 (emphasis omitted) (citation omitted). "Use of the words 'whether' and 'if' obviously are words of 'the like' which give 'clear indication that a promise is not to be performed except upon the happening of a stated event,' the definition of a condition precedent." *Id.*

¶ 23 Citing *Farmers Bank*, Plaintiff argues that because the Contract's "verification" provision "does not contain 'when', 'after', 'as soon as', 'whether', 'if', or other 'words of the like[,]' " verification could not be a condition precedent. This overly lexical argument is unavailing.

¶ 24 The Contract provides that "[a]ll invoices *are subject to* [Defendants'] verification." (Emphasis added). This provision is verbally similar to the provision interpreted by this Court in *Cox v. Funk*, 42 N.C. App. 32, 34, 255 S.E.2d 600, 601 (1979) ("The crucial question in this case is whether the provision, 'Subject to closing of house at 900 Hawthorne Rd. Sept 15, 1977' is a condition precedent to the closing

of the contract to purchase the Coxes' house."). The phrase "subject to" clearly belongs to that category of "words of 'the like' which give 'clear indication that a promise is not to be performed except upon the happening of a stated event[.]' " *Farmers Bank*, 307 N.C. at 351, 298 S.E.2d at 362. Thus, this Court "f[ou]nd it unquestionable that this clause was a condition precedent to the closing of the Cox house. No other reason c[ould] be given for its presence in the contract." *Cox*, 42 N.C. App. at 35, 255 S.E.2d at 602.

¶ 25 So too with the "verification" provision in the Contract here. Although similarly lacking in the magic words to which Plaintiff points as "the definition of a condition precedent[,]" it is unquestionable that the phrase "subject to" in this provision "gives clear indication that a promise is not to be performed except upon the happening of a stated event." *Farmers Bank*, 307 N.C. at 351, 298 S.E.2d at 362 (emphasis omitted) (citation omitted).

¶ 26 "We find it unquestionable that [the 'verification' provision] was a condition precedent to" Defendants' liability for payment of the invoices. *Cox*, 42 N.C. App. at 35, 255 S.E.2d at 602. "No other reason can be given for its presence in the [C]ontract." *Id.* Accordingly, the trial court did not err in construing the "verification" provision as a condition precedent.

¶ 27 Plaintiff also argues, in essence, that Defendants did not act in good faith by failing to verify the relevant invoices, and that the trial court reversibly erred by

failing to make a finding of fact as to whether Defendants acted in good faith. We first note that Plaintiff does not challenge the trial court's findings of fact that Plaintiff abandoned his breach of the implied covenant of good faith and fair dealing claim below, and further that "[t]o the extent it was not abandoned, no credible evidence was put on for this claim and it is denied." As this finding is not challenged, it is binding on appeal. *Treadaway*, ¶ 14.

¶ 28 Moreover, to the extent that Plaintiff's good-faith argument also addresses his breach of contract claim, the argument is not preserved for appellate review. It is well established that "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). In the proceedings below, Plaintiff never argued that Defendants were not acting in good faith when they failed to verify the invoices. Indeed, *Defendants* were the only party to invoke the concept of "good faith" at the hearings below, when they argued that Plaintiff had not acted in good faith by not providing them with estimates of the costs of his services to them.

¶ 29 As Plaintiff did not argue to the trial court that Defendants failed to act in good faith, he cannot advance the argument for the first time on appeal.

B. Rule 11 Sanctions

¶ 30 Plaintiff next argues that the trial court's imposition of Rule 11 sanctions against him violated his constitutional right to due process because the matter was

neither heard in a meaningful time nor manner. Plaintiff also contends that the trial court's "findings of fact and conclusions of law [regarding the Rule 11 sanctions] are not based upon competent evidence," and that the trial court abused its discretion in sanctioning him $2,000.00.

1. Standard of Review

¶ 31 "It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated[,]" *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001), such as the due process right to notice and opportunity to be heard on the imposition of sanctions, *Megremis v. Megremis*, 179 N.C. App. 174, 178, 633 S.E.2d 117, 121 (2006).

¶ 32 Similarly, whether or not to impose mandatory sanctions under N.C. Gen. Stat. § 1A-1, Rule 11(a) is a question of law, reviewable de novo. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). When conducting this de novo review, this Court must "determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.* "If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions . . . ." *Id.*

¶ 33 In contrast to review of whether sanctions should have been imposed, "[i]n

reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper." *Durham Cty. ex rel. Adams v. Adams*, 258 N.C. App. 395, 399, 812 S.E.2d 884, 888 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 371 N.C. 340, 814 S.E.2d 106 (2018). "The abuse of discretion standard is intended to give great leeway to the trial court and a clear abuse of discretion must be shown." *Hill v. Hill*, 173 N.C. App. 309, 315, 622 S.E.2d 503, 508 (2005) (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 360 N.C. 363, 629 S.E.2d 851 (2006). "Nevertheless, it is fundamental to the administration of justice that a trial court not rely on irrelevant or improper matters in deciding issues entrusted to its discretion." *Id.* (citation and internal quotation marks omitted).

2. Analysis

¶ 34 Rule 11(a) requires, *inter alia*, that the signer of every pleading "certif[y] that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose." *Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 626, 677 S.E.2d 854, 861 (2009) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 11(a) (2021). "A violation of any one of these requirements mandates the imposition of sanctions under Rule 11." *Harbin Yinhai*, 196 N.C. App. at 626, 677

S.E.2d at 861 (citation and internal quotation marks omitted). In the present case, the trial court "entered Rule 11 sanctions against . . . Plaintiff for his initiation of this lawsuit against . . . Defendants" on both legal sufficiency and factual sufficiency grounds.

a. Due Process

¶ 35 "It is well established that due process requires that a party subject to sanctions under Rule 11 must be given timely notice of the bases for the sanctions and an opportunity to be heard prior to the imposition of sanctions." *Johns v. Johns*, 195 N.C. App. 201, 207, 672 S.E.2d 34, 38 (2009). "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution." *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438 (1998) (citation omitted).

¶ 36 Plaintiff first argues that he "received **absolutely no notice**" that the trial court's sanctions were based on the "verification" provision "until **after** submitting [his] Rule 11 Opposition." This is incorrect.

¶ 37 While announcing its intention to consider imposing Rule 11 sanctions against Plaintiff, the trial court explained:

> Rule 11 is the complaint or the signed documents, or the action is done without factual sufficiency, legal sufficiency, or for an improper purpose, the [c]ourt is cobbling together

> all of those, you don't need all of them, you just need one to do Rule 11. But I feel like this all really stems from and should not have gone this way, but it starts with that pro se complaint . . . .

¶ 38 Plaintiff thus received actual notice that the trial court was considering imposing sanctions on the grounds that the collection complaint lacked "factual sufficiency, legal sufficiency, or [was filed] for an improper purpose," the first two bases of which the trial court explicitly relied in findings of fact 17 and 18 of its order in support of its imposition of Rule 11 sanctions. Further, the trial court specifically clarified that it was imposing sanctions not as a result of the car accident case but rather "under this file, because this lawsuit should've never happened, because it just should not have happened." This statement similarly undergirds the trial court's notice to Plaintiff that the factual and legal sufficiency of the collection complaint would be the bases for potential sanctions.

¶ 39 Second, Plaintiff contends that the trial court's denial of his request for an extension of time to submit his response violated his constitutional right to due process by "meaningfully prevent[ing] developing responsive evidence by limiting the time available to gather such materials. For example, the [t]ranscript was necessary to refresh [his] recollection, provide facts, and guide evidentiary development[.]" However, Plaintiff did not raise any constitutional arguments below concerning the trial court's denial of these requests; accordingly, this issue is not properly before us.

See Rivenbark v. Southmark Corp., 93 N.C. App. 414, 418, 378 S.E.2d 196, 199 (1989) ("We note that no constitutional issue was raised below. We may not consider constitutional questions for the first time on appeal.").

¶ 40 On 8 February 2021, Plaintiff emailed to the trial court his first request for an extension of time, seeking almost an additional month and citing the need to obtain the transcript. On 10 February, the trial court replied, *inter alia*: "I appreciate the need to get the transcript as it might be necessary should you decide to appeal, as is the right of all parties to an order from the court, but I did not intend for your comment on the ruling concerning the Rule 11 to take until March." Plaintiff then sent a series of emails, reducing his requested extension to seven days, before ultimately submitting his response.

¶ 41 However, in these emails to the court, Plaintiff did not raise any arguments concerning his constitutional right to due process. As Plaintiff did not present any due process argument to the trial court below, "[w]e may not consider [this] constitutional question[ ] for the first time on appeal." *Id.*

b. Findings of Fact and Conclusions of Law

¶ 42 Plaintiff also specifically challenges the trial court's findings of fact 17–19, which set forth the bases for the sanctions:

> 17. The [c]ourt finds the Rule 11 sanctions against . . . Plaintiff for filing this lawsuit when it is not well grounded in fact and/or legal sufficiency. Despite the

> cornucopia of emails and text messages entered into evidence, it is unambiguously clear . . . Defendants did not provide any verification to the invoices and Plaintiff knew they did not agree with the billing. His attempts to justify the billing to . . . Defendants does not overcome their need to provide verification PRIOR to the payment being due. It is a finding of this [c]ourt and is clear from the evidence presented, that . . . Plaintiff knew . . . Defendants did not verify the invoices; therefore, he did not have the factual sufficiency to file this lawsuit.
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> 18. Furthermore, . . . Plaintiff drafted the [C]ontract . . . . He knew the verification language was in the [C]ontract. He overlooks this as a condition precedent to getting paid, yet he filed this lawsuit anyway. He knew he did not have the legal sufficiency to file this lawsuit for breach of contract.
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> 19. The sanction is $2,000.00. This figure is based on the billing required to undo the improper advice given to . . . Defendants at the outset of the car accident case where . . . Plaintiff advised . . . Defendants to leave the insurer's name in the original complaint. This bad advice was the beginning of the end of their attorney-client relationship. When then . . . Plaintiff sought to "bargain" with the other side concerning the bad advice he gave to . . . Defendants, this caused the relationship to sour and furthered the loss of trust. Plaintiff's attempt to tell . . . Defendants he used his error to get a deal to amend the complaint is not correct. This failure to admit this error soured the trust with his clients.

¶ 43 Plaintiff also challenges the trial court's conclusions of law 9–13:

> 9. . . . Plaintiff did not have the factual sufficiency to file this lawsuit.
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> 10. . . . Plaintiff did not have the legal sufficiency to file

> this lawsuit.
>
> 11.. . . Plaintiff had notice and an opportunity to be heard with regard to the Rule 11 sanctions.
>
> 12. Rule 11 [s]anctions are appropriate against . . . Plaintiff.
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> 13. $2,000.00 is a reasonable and appropriate sanction against . . . Plaintiff.

¶ 44 Plaintiff's challenge to findings of fact 17 and 18 is entirely based on his supposed "complete lack of notice and opportunity to respond" to the "additional issue" of the factual and legal sufficiency of the collection complaint, specifically Plaintiff's misinterpretation of the "verification" provision in the Contract, which we have already addressed. Sufficient evidence in the record supports these findings.

¶ 45 As for finding of fact 19, Plaintiff claims that sanctions under Rule 11 are limited to "an award only of those expenses directly caused by the filing[.]" *Hill*, 173 N.C. App. at 317, 622 S.E.2d at 509 (citation omitted). Plaintiff argues that the trial court's use of "the billing required to undo the improper advice given to . . . Defendants at the outset of the car accident case" as a benchmark to calculate the sanctions award should be reversed "because amending the [car accident c]omplaint is not part of the instant matter's [c]omplaint[.]" We agree.

¶ 46 As the trial court made clear in its oral ruling, it was "not sanctioning under the [car accident case] file, [it was] sanctioning under this [collection case] file, because this lawsuit should've never happened, because it just should not have

happened." However, in finding of fact 19, the trial court explained that the basis for its $2,000.00 Rule 11 sanctions figure was its estimate of Defendants' expenses resulting from "the improper advice given to . . . Defendants at the outset of the car accident case." As such, this figure was self-evidently not a calculation "of those expenses directly caused by the filing" of *the collection complaint*. *Id.* (citation omitted). Therefore, the trial court improperly exceeded its authority under Rule 11 by calculating the sanctions award based upon the amount "required to undo the improper advice given to . . . Defendants at the outset of the car accident case" rather than those expenses incurred by Plaintiff's filing of the collection complaint—the complaint for which the trial court was imposing sanctions pursuant to Rule 11.

¶ 47 Although the trial court did not err in concluding that Rule 11 sanctions were warranted in this case, the trial court abused its discretion by finding that "$2,000.00 is a reasonable and appropriate sanction against . . . Plaintiff." The trial court's order is thus reversed and remanded for the calculation of "an award only of those expenses directly caused by the filing" of the collection complaint. *Id.* (citation omitted).

C. Judicial Bias

¶ 48 Finally, Plaintiff asserts that the trial court was biased against him, as evidenced by several comments that the trial court made to him, and contends that the trial court failed to "avoid even the appearance of bias." *In re Martin*, 295 N.C. 291, 306, 245 S.E.2d 766, 775 (1978). However, our careful review of the record on

appeal and the transcripts of the hearings below reveals that Plaintiff never objected to any of these comments, nor did Plaintiff ever move for recusal.

¶ 49 "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." N.C.R. App. P. 10(a)(1). Although the Code of Judicial Conduct "certainly encourages a judge to recuse himself or herself in cases where his or her impartiality may reasonably be questioned upon [his or her] own motion, [the judge is] not required to do so in the absence of a motion by a party." *Sood v. Sood*, 222 N.C. App. 807, 812, 732 S.E.2d 603, 608 (citation and internal quotation marks omitted), *appeal dismissed, disc. review and cert. denied*, 366 N.C. 417, 735 S.E.2d 336 (2012). "When a party does not move for a judge's recusal at trial, the issue is not preserved for our review." *Id.* (citation omitted). Further, "[t]his 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)." *Id.*

¶ 50 As Plaintiff "failed to move that the trial judge recuse himself, he cannot later raise on appeal the judge's alleged bias based on an undesired outcome." *Id.* Plaintiff has not preserved this issue for appellate review. Accordingly, this argument is dismissed.

III. Conclusion

¶ 51 For the foregoing reasons, that portion of the trial court's order denying the parties' respective claims is affirmed. However, the order is reversed with regard to the amount of the sanctions imposed on Plaintiff, and remanded for further proceedings at which the trial court may, in its discretion, take additional evidence for the purpose of calculating "an award only of those expenses directly caused by the filing" of the collection complaint. *Hill*, 173 N.C. App. at 317, 622 S.E.2d at 509 (citation omitted).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).