

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-904

Filed 15 August 2023

Wake County, No. 21CVD5867

JOHN SCOTT MCMURRAY, Plaintiff,

v.

DEBORAH JOANN MCMURRAY, Defendant.

Appeal by Plaintiff and Cross-Appeal by Defendant from Order entered 29 July 2022 by Judge Julie L. Bell in Wake County District Court. Heard in the Court of Appeals 12 April 2023.

*Mark L. Hayes for Plaintiff-Appellant.*

*Constance M. Ludwig and Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for Defendant-Appellee.*

HAMPSON, Judge.

**Factual and Procedural Background**

John Scott McMurray (Husband) and Deborah Joann McMurray (Wife) both appeal from an Order entered 29 July 2022 denying both parties' claims for breach of contract and attorneys' fees and ordering the entry of a Qualified Domestic Relations Order (QRDO). The Record before us—including the trial court's unchallenged

MCMURRAY V. MCMURRAY

*Opinion of the Court*

Findings of Fact—reflects the following:

Husband and Wife were married on or about 22 May 1982 and were separated on or about 16 March 2003. During the marriage, Husband was employed by IBM; he was hired by IBM on 14 June 1982, and he retired on 28 February 2021. The parties entered into a Separation Agreement and Property Settlement (Separation Agreement) on 11 August 2003. The Separation Agreement included post-separation support, child support, division of marital property, mutual releases, and relinquishment of rights. The Separation Agreement included the following disposition with respect to Husband's retirement with IBM:

The parties agree that the Wife's marital share of the Husband's IBM pension or retirement shall be divided by QDRO pursuant to N.C.G.S. §[ ]50-20 et seq[.], on or before the absolute divorce is final. Said Qualified Domestic Relations Order shall be filed with the Court after being approved by the plan administrator.

The parties divorced on 18 February 2005. The Separation Agreement does not state who is responsible for drafting the QRDO; however, the trial court acknowledged “traditionally the alternate payee would prepare or have counsel prepare the same.” Neither party signed a QDRO prior to the parties' divorce.

Prior to the divorce, Wife contacted IBM to inquire about the “details of the retirement distribution” and was advised she could not get any information because she was not an IBM employee. Wife contacted Husband, but Husband did not provide any “information about getting the QDRO done.”

MCMURRAY V. MCMURRAY

*Opinion of the Court*

On 3 February 2021, Wife, through counsel, sent a draft QDRO to IBM, seeking the division of the IBM pension. On 11 February 2021, IBM replied to the draft QDRO with corrections and comments. On 15 February 2021, Husband retired from IBM. On 8 March 2021, Wife's counsel was notified by IBM that Husband had begun collecting his pension, but they were holding 50 percent, presuming a valid QDRO would be entered within 18 months from the date of the letter.

On 28 April 2021, Husband filed a Complaint: seeking declaratory relief that Wife had no claim on his IBM pension; alleging breach of contract, the Separation Agreement, by not executing the QDRO prior to the parties' divorce; and seeking attorney fees. On 26 July 2021, Wife filed a Motion to Dismiss, Answer, Affirmative Defenses, and Counterclaims. Wife's Counterclaims sought relief and enforcement of the QDRO under N.C. Gen. Stat. § 50-20.1(j), alleged various breaches of the Separation Agreement, and sought attorney fees.

Regarding attorney fees, the Separation Agreement provides:

If either party must proceed to action in court regarding breach of the provisions of this Agreement, it is agreed that the judge presiding may, *in his discretion*, award the relief sought as well as costs of court and reasonable attorney's fees to the prevailing party if the action is brought in good faith. (emphasis added).

The trial court did not hear evidence regarding Husband's ability to pay Wife's attorney fees. The trial court entered an Order on 29 July 2022 concluding, in relevant part:

2. [Wife] has not breached any agreement with [Husband].

MCMURRAY V. MCMURRAY

*Opinion of the Court*

3. [Husband] is not entitled to attorney fees.
4. [Wife] has not waived the right to have the QDRO entered.
5. The QDRO being entered before the divorce decree was not a condition precedent to [Wife] being entitled to receive 50% of the marital share of [Defendant]'s pension.
6. [Wife] is entitled to receive 50% of the marital share of [Husband]'s pension.

As such, the trial court ordered the following:

1. [Wife] may submit a Qualified Domestic Relations Order to the IBM Personal Pension Plan administrator to effect her entitlement to receive 50% of the marital share of the [Husband]'s vested IBM pension.
2. [Wife] is entitled to receive 50% [ ] of the marital share of [Husband]'s IBM Personal Pension Plan. [Husband] is already in receipt of his monthly pension benefit. The marital share shall be determined by application of the following fraction to [Husband]'s monthly benefit: [Husband]'s total number of months of benefit service earned during the marriage to [Wife], (May 22, 1982 to March 16, 2003) divided by the total number of months of benefit service earned under the Plan. This award shall be effectuated by entry of a shared interest QDRO directed to IBM Personal Pension Plan. Any benefits segregated by IBM shall be paid to [Wife] (Alternate Payee) to the extent of her marital share as specified herein and in the QDRO.
3. [Husband] shall timely and fully cooperate with the plan administrator, [Wife]'s counsel and anyone else and provide any information, clarification, authorization and sign whatever is necessary to allow the QDRO to be issued before the deadline.
4. [Husband]'s claims for Breach of Contract, Specific Performance[,] and Attorney's Fees are denied.
5. [Wife]'s claim for Division of the IBM Pension pursuant to

N.C.G.S. §[ ]50-20.1(j) is granted.

6. [Wife]’s claim for attorney’s fees is denied.

Husband timely filed written Notice of Appeal on 1 August 2022. Wife timely filed written Notice of Appeal on 26 August 2022.

### **Issues**

The dispositive issues on appeal are whether the trial court: (I) erred in concluding Wife did not waive the right to have the QDRO entered; (II) erred in concluding Wife’s claim is not barred by the statute of limitations; and (III) erred in denying Wife’s claim for attorney fees.

### **Analysis**

As an initial matter, neither party challenges the trial court’s Findings of Fact. “[W]here a trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 313 (2015) (citation omitted). These Findings of Fact are thus binding on appeal. We review the trial court’s conclusions of law de novo. *Bradshaw v. Bradshaw*, 264 N.C. App. 669, 672-73, 826 S.E.2d 779, 783 (2019).

#### **I. Wife’s “Right” to Submit the QDRO**

First, both parties contend they did not have the “burden” of having the QDRO prepared. As the trial court noted in its Findings, the Separation Agreement does not specify who should draft the QDRO. Husband contends the burden should fall to Wife as Wife “was the sole beneficiary of the QDRO provision.” Indeed, Wife is the

MCMURRAY V. MCMURRAY

*Opinion of the Court*

sole beneficiary of the QDRO; however, the QDRO is merely one provision within the Separation Agreement dividing the marital property. Both Husband and Wife benefit from the Separation Agreement. Further, as reflected in the trial court's Findings, the execution and drafting of a QDRO requires the cooperation of both parties. As such, in the absence of an express provision assigning the duty of preparing the QDRO, both parties share the duty. Therefore, the trial court did not err in ordering Husband to: "timely and fully cooperate with the plan administrator, [Wife]'s counsel and anyone else and provide any information, clarification, authorization and sign whatever is necessary to allow the QDRO to be issued before the deadline."

Husband next contends Wife "both waived and forfeited any rights she previously had to the QDRO." Husband contends this is so because: (A) "the court misapprehended the doctrine of waiver and ignored [Husband]'s argument regarding forfeiture"; and (B) "the court found that the express time limit for having the QDRO prepared was meaningless." We disagree.

*A. Waiver*

"Waiver is the intentional relinquishment of a known right, either express or to be implied[.] . . . It is one where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right.'" *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 683, 544 S.E.2d 807, 810 (2001) (quoting *Danville Lumber & Mfr. Co. v. Gallivan Bldg.*, 177 N.C. 103, 107-08, 97 S.E. 718, 729 (1919)). However,

a party cannot “waive a right before he or she is in a position to assert it.” *Id.* (citation and quotation marks omitted). Here, Wife was not in a position to assert her right as Husband’s cooperation was necessary to obtain the information required to prepare the QDRO. Indeed, Wife contacted IBM to inquire about the details of the retirement distribution, and when she was advised Husband, as the IBM employee, was the only party who could access the necessary information, Wife contacted Husband. Husband did not provide Wife with the necessary information to prepare the QDRO. Thus, Wife could not waive her right to have a QDRO entered because, without Husband’s cooperation, she was not in a position to assert such a right. Therefore, the trial court did not err in concluding Wife has not waived the right to have the QDRO entered.

*B. Divorce Deadline*

Next, Husband contends Wife’s “failure to meet the divorce deadline and subsequent delay amounted to a forfeiture of her rights[,]” thus, rendering the “express time limit for having the QDRO prepared meaningless.” We, again, disagree.

The Separation Agreement provides “Wife’s marital share of Husband’s IBM pension or retirement shall be divided by QDRO pursuant to N.C.G.S. §[ ]50-20 et seq[.], on or before the absolute divorce is final.” Again, because the parties shared the burden of drafting the QDRO and Husband did not provide Wife with the necessary information to do so, Wife could not prepare the QDRO on or before the absolute divorce. Indeed, as Wife notes in her briefing to this Court, “[t]he heart of

the parties' agreement was not to have the QDRO entered by a particular date. It was to resolve their competing marital claims arising from their separation." As such, the divorce deadline was not the "heart" of the Separation Agreement, and the fact the QDRO was not entered by the date of divorce does not alleviate the parties from their contractual obligations under the Separation Agreement to divide the marital estate. *Cf. Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 706, 682 S.E.2d 726 (2009). Thus, the trial court did not err in concluding Wife did not breach the Separation Agreement.

## II. Statute of Limitations

Next, Husband contends the Separation Agreement's "'statute of limitations' still prevents [Wife] from having rights to the pension." This argument is misplaced. Rule 8 of the North Carolina Rules of Civil Procedure requires a defendant "set forth affirmatively" a statute of limitations defense in a responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2021). Our Court has repeatedly emphasized that "the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived." *Gragg v. W. M. Harris & Son*, 54 N.C. App. 607, 609, 284 S.E.2d 183, 185 (1981). Here, Husband, who filed the initial complaint in this action, is raising a statute of limitations defense for the first time on appeal. At best, this issue is not preserved for our review and is not properly before this Court. *See* N.C.R. App. P. 10(a)(1); *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015) (declining to suspend the Appellate Rules to permit a party to raise a

statute of limitations defense for the first time on appeal).

III. Attorney Fees

In her cross-appeal, Wife contends the trial court erred in denying her request for attorney fees. We disagree.

“A trial judge is permitted to exercise considerable discretion in allowing or disallowing attorney’s fees”, *Warner v. Latimer*, 68 N.C. App. 170, 176, 314 S.E.2d 789, 793 (1984) (citation omitted), and “[a]n award of attorneys’ fees will be stricken only if the award constitutes an abuse of discretion.” *Cox v. Cox*, 133 N.C. App. 221, 227, 515 S.E.2d 61, 66 (1999) (citation omitted). Regarding attorney fees, the Separation Agreement provides:

If either party must proceed to action in court regarding breach of the provisions of this Agreement, it is agreed that the judge presiding may, *in his discretion*, award the relief sought as well as costs of court and reasonable attorney’s fees to the prevailing party if the action is brought in good faith. (emphasis added).

As evidenced by the express language of the Separation Agreement, the trial court’s decision to award attorney fees is discretionary. When the governing language of a contract or statute provides the trial court “may, in its discretion” award attorney fees, the decision is entirely discretionary. *See MRD Motorsports, Inc. v. Trail Motorsports, LLC*, 204 N.C. App. 572, 577, 694 S.E.2d 517, 520 (2010) (remanding for the trial court to “consider whether to exercise its discretion to award attorney’s fees”). This discretion is not limited to determining the amount of fees; it also extends to *whether* to award attorney fees at all. *See id.*

MCMURRAY V. MCMURRAY

*Opinion of the Court*

Here, the trial court expressly made the following unchallenged Finding: “The [trial] [c]ourt did not hear evidence about [Husband]’s ability to pay [Wife]’s attorney fees.” This Finding supports the trial court’s discretionary decision to deny the award of attorney fees. Thus, the trial court did not abuse its discretion in denying Wife’s claim for attorney fees. Consequently, we affirm the trial court’s Order with respect to attorney fees.

**Conclusion**

Accordingly, for the foregoing reasons, we affirm the trial court’s Order entered 29 July 2022.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).