No. 198P19 TWENTY-TWO-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ASKALEMARIAM YIGZAW	)	
	)	From Davidson County
v	)	No. 12CVD257
	)	No. COA19-12
ALEHEGN ASRES	)	

****

PETITION FOR WRIT OF CERTIORARI
TO REVIEW ORDER OF N.C. COURT OF APPEALS
(Filed 30 May 2019)

****

INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Rules:

Other Authorities:

No. 198P19 JUDICIAL DISTRICT TWENTY-TWO-B

SUPREME COURT OF NORTH CAROLINA
****

ASKALEMARIAM YIGZAW,
Plaintiff,

v.

ALEHEGN ASRES,
Defendant.

From Davidson County
COA 19-12

****
PETITION FOR WRIT OF CERTIORARI
****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, Plaintiff-Petitioner Askalemariam Yigzaw ("Ms. Yigzaw") petitions this Court to issue its writ of certiorari to direct the Court of Appeals to review the final child support order that was timely appealed by Ms. Yigzaw on 29 August 2018.

On 13 May 2019, the Court of Appeals issued two perfunctory orders dismissing Ms. Yigzaw's appeal and denying her alternative petition for writ of certiorari. (Attachments pp 1-2). Although the basis for these orders was not

explained, one of the orders stated that the Court of Appeals was granting Appellee's previously filed motion to dismiss Ms. Yigzaw's appeal.

As explained more fully below, Appellee's motion to dismiss advanced hyper-technical (and substantively incorrect) interpretations of the North Carolina Rules of Appellate Procedure that are inconsistent with the principles enunciated in *Dogwood Development & Management Co. v. White Oak Transportation Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

STATEMENT OF THE CASE AND FACTS RELEVANT TO THE PETITION

A. Events Leading to Entry of the District Court's 31 July 2018 Final Child Support Order

In December 2011, after eight years of marriage, Askalemariam Yigzaw and Alehegn Asres separated. (R p 10). Their two boys, then ages seven and five, remained with Ms. Yigzaw. At the time of the separation, Ms. Yigzaw was a stay-at-home mother. While she was taking classes to earn a nursing degree, she had no income of her own. (R p 11). In contrast, Dr. Asres earned $23,307.24 per month as a physician. (R pp 11).[1]

Shortly after the separation, Ms. Yigzaw filed a complaint seeking, among other things, custody, child support, equitable distribution, and alimony. (R pp 3-9). With the complaint, Ms. Yigzaw filed a form financial

[1] Citations designated by (R p __) are to the settled printed record on appeal previously filed in the Court of Appeals.

affidavit reflecting that she had no income and that Dr. Asres paid her expenses, including those incurred for the children. (R pp 52-58). At that time, she listed the itemized needs for the two children at $1,172.00 per month. (R pp 55-56). That number did not include any portion for shared family expenses, such as house payment, utilities, telephone, groceries, car payments and maintenance, gas, or internet. The affidavit listed shared expenses separately. (R p 55).

Applying the North Carolina child support guidelines to the parties' incomes, the trial court ordered Dr. Asres to pay Ms. Yigzaw $2757.14 per month and maintain health insurance on the children as temporary child support. (R pp 10-12) Because Ms. Yigzaw was not working, the worksheet reflected no adjustment for work-related childcare costs. (R p 13).

In July 2013, the parties returned to court and agreed to a comprehensive settlement of child support, post-separation support, alimony, and attorneys' fees. In a hand-written memorandum that made no reference to either the child support guidelines or the children's reasonable needs, Dr. Asres agreed to pay Ms. Yigzaw $3000.00 per month as alimony for a term of thirty-six months and $2000.00 per month as child support. (R pp 14-17). The parties agreed that the child support could be reevaluated after thirty-six months. (R p 16).

In December 2013, Ms. Yigzaw sought the services of Davidson County Child Support Enforcement ("CSE") to represent her as to child support. (R pp 18-19). The court entered an order allowing CSE to intervene, and, thereafter, CSE represented Ms. Yigzaw in all child support matters. (R pp 20-22).

In July 2015, the parties agreed that moving forward, they would share joint legal and physical custody of their boys, with the boys rotating between their parents each Friday afternoon. (R pp 23-35). In July 2016, Dr. Asres' alimony obligation terminated. Without delay, he filed a motion to modify his child support obligation. (R pp 36-37). Citing Ms. Yigzaw's newly earned nursing degree and employment as a registered nurse at High Point Regional, along with the parties' joint custody arrangement, Dr. Asres moved the court to set child support pursuant to worksheet B (the joint custody worksheet) of the child support guidelines. (R pp 36-37).

The matter came on for hearing before the Honorable Wayne L. Michael on 14 March 2017. In an order entered fifteen months after the hearing, the court decreased Dr. Asres' child support obligation to only $750.00 per month, dating back to Dr. Asres' July 2016 motion. (R pp 41-44, Attachments pp 3-6). The resulting order required Ms. Yigzaw to repay Dr. Asres $27,823.08 for child support he paid under the prior order. (Attachments p 6).

B. Ms. Yigzaw's Appeal of 31 July 2018 Child Support Order

On 29 August 2018, Ms. Yigzaw timely filed and served a notice of appeal from the 31 July 2018 child support order. (Attachments pp 7). At the time the notice of appeal was filed, Ms. Yigzaw's counsel of record in the trial tribunal was the Davidson County CSE. (R pp 20-22). On information and belief, CSE's practice is not to represent parties in the appellate courts.

Because trial counsel of record would not be representing her on appeal, Ms. Yigzaw personally signed the notice of appeal. On the same date, Ms. Yigzaw's newly retained appellate counsel, the undersigned, filed a "Notice of Limited Appearance." That document noted that undersigned counsel would be representing Ms. Yigzaw "on direct appeal of the 31 July 2018 order only." The notice of limited appearance was filed behind Ms. Yigzaw's notice of appeal.

The parties settled the record on appeal by agreement. (R p 71). After the record on appeal was docketed, Ms. Yigzaw, through counsel, filed and served her opening appellant's brief on 11 January 2019. On 15 January 2019, Dr. Asres, through counsel, electronically filed Defendant-Appellee's motion to dismiss Ms. Yigzaw's appeal. *Yigzaw v. Asres,* No. COA 19-12, Court of Appeals Docket Sheet, *available at* https://appellate.nccourts.org/dockets.php?court=2&docket=2-2019-0012-001&pdf=1&a=0&dev=1.

The motion asserted that dismissal of Ms. Yigzaw's appeal was required for three reasons:

- The notice of appeal was signed by Ms. Yigzaw—rather than her trial or appellate attorney.
- The electronically submitted Appeal Information Statement had not been served by Appellant on Appellee.
- Ms. Yigzaw had allegedly violated Appellate Rule 7 by failing to designate the specific proceedings that were transcribed by the court reporter.

On 16 January 2019, Ms. Yigzaw's appellate counsel filed a response to the motion to dismiss. *Yigzaw v. Asres,* No. COA 19-12, Court of Appeals Docket Sheet, *available at* https://appellate.nccourts.org/dockets.php?court=2&docket=2-2019-0012-001&pdf=1&a=0&dev=1. The response explained why none of the issues raised by counsel for Appellee were violations of the North Carolina Rules of Appellate Procedure that could warrant sanctions of any type. In the alternative, Ms. Yigzaw proactively filed in the Court of Appeals a conditional petition for certiorari.

The appeal was assigned to a panel and noticed for hearing without oral argument on 7 May 2019. By orders dated 13 May 2019, the Court of Appeals

dismissed Ms. Yigzaw's appeal and denied her alternative petition for writ of certiorari.

REASONS WHY WRIT SHOULD ISSUE

I. The Court of Appeals Erred in Dismissing Ms. Yigzaw's Appeal.

A. Ms. Yigzaw's signing of her own notice of appeal did not mislead Appellee.

The district court's final order determining child support was appealable as of right pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 50-19.1. It is undisputed that Ms. Yigzaw filed and served a timely notice of appeal from that order as required by Appellate Rule 3(a) and (c).

Ms. Yigzaw's notice of appeal also complied with the following form requirements of Appellate Rule 3(d):

- Specified the party taking the appeal [Ms. Yigzaw];
- Designated the order from which appeal was taken [*i.e.,* the 31 July 2018 final child support order];
- Identified the appellate court to which appeal was taken [North Carolina Court of Appeals];
- Was signed by the party taking the appeal [Ms. Yigzaw]

Even so, Appellee's motion to dismiss contended that Ms. Yigzaw's appeal was *required* to be dismissed because Ms. Yigzaw (rather than her trial or appellate counsel) had signed her own notice of appeal.

Appellee's interpretation is incorrect. Appellate Rule 3(d) requires that a notice of appeal "be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record." Not specified by Appellate Rule 3(d) is what is meant by "counsel of record."

In *Connor v. Connor,* -- N.C. App. --, 812 S.E.2d 202 (2018) (unpublished) (Attachments pp 10-12), the Court of Appeals noted that "many lawyers undertake trial-level representation with the understanding that the client engagement does not extend to an appeal." Trial counsel in this situation are often unwilling to sign a notice of appeal because they do not wish to inadvertently enter a notice of appearance for purposes of the appeal.

On the other hand, new counsel engaged to represent a party on appeal may similarly desire to limit its representation to proceedings before the appellate division. A notice of appeal is a pleading filed only in the trial courts. *See* N.C. R. App. P. 3(a). It is unclear whether a new attorney can sign a notice of appeal without entering an appearance in the trial tribunal. Thus, the undersigned counsel's practice is that when she is not trial counsel of record and trial counsel is unwilling to sign the notice of appeal, the appellant will sign his or her own notice of appeal.

In this case, CSE continued to represent Ms. Yigzaw in the district court, but declined to represent Ms. Yigzaw on appeal. When the notice of appeal was filed, the undersigned appellate counsel had not entered an appearance in

the Court of Appeals or the district court. Thus, Ms. Yigzaw was authorized to sign her own notice of appeal under Appellate Rule 3(d).

But irrespective of whether it was technically proper for Ms. Yigzaw to sign her own notice of appeal, Appellee's characterization of this issue as a "jurisdictional" defect is inconsistent with Supreme Court precedent—including *Dogwood Development & Management Co. v. White Oak Transportation Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

In the Court of Appeals, a growing trend has developed to assign *jurisdictional* labels to procedural requirements found *only* in the North Carolina Rules of Appellate Procedure. *See, e.g., State v. Biddix*, 244 N.C. App. 482, 486–88, 780 S.E.2d 863, 866–67 (2015); *Edwards v. Foley*, -- N.C. App. --, 800 S.E.2d 755, 756 (2017) (the briefing requirement of Appellate Rule 28(b)(4) is jurisdictional); *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77–78, 772 S.E.2d 93, 96 (2015) (same); *Majerske v. Majerske,* 247 N.C. App. 245, 785 S.E.2d 782, 2016 N.C. App. LEXIS 410 (2016) (unpublished) (Attachments pp 13-15) (dismissing appeal for jurisdictional defect under Rule 3(d) where notice identified the intermediate order being challenged on appeal, but not the final judgment). The dismissal of Ms. Yigzaw's appeal based on a purported "jurisdictional" signatory defect is another example of this trend.

Both Appellate Rule 1 and several recent Supreme Court opinions have stated that the North Carolina Rules of Appellate Procedure cannot create

jurisdictional barriers to an appeal. *See* N.C. R. App. P. 1(c) ("These rules shall not be construed to extend or limit the jurisdiction of the court of the appellate division as that is established by law."); *State v. Stubbs*, 368 N.C. 40, 43–44, 770 S.E.2d 74, 76 (2015) ("The [Appellate] Rules cannot take away jurisdiction given to [the Court of Appeals] by the General Assembly in accordance with the North Carolina Constitution."); *State v. Thomsen*, 369 N.C. 22, 27, 789 S.E.2d 639, 643 (2016) (*overruling State v. Starkey*, 177 N.C. App. 264, 628 S.E.2d 424 (2006) to the extent that it suggested that the grounds for review listed in Appellate Rule 21 were exclusive); *cf. State v. Ledbetter*, -- N.C. --, 814 S.E.2d 39, 42 (2018) (Court of Appeals "mistakenly concluded that the absence of a specific 'procedural process' in the Rules of Appellate Procedure left the court without authority to invoke that jurisdiction.").

Undersigned counsel does not dispute that under the plain language of Appellate Rule 27, the Supreme Court has decided that the *time* for filing a notice of appeal should essentially be treated as a "constructive" jurisdictional requirement—forgivable only by issuance of a writ of certiorari. *See* N.C. R. App. P. 27(c) (prohibiting trial and appellate courts from extending either statutory or rule-based deadlines for filing a notice of appeal). But rule-based notice of appeal requirements unrelated to the time for filing a notice of appeal do not carry the same constructive jurisdiction label. *See* Beth Scherer, "When is a Deadline or Other Requirement for Filing a Notice of Appeal

Jurisdictional? (State Edition)" (May 3, 2018), *available at* https://www.ncapb.com/2018/05/03/when-is-a-deadline-or-other-requirement-for-filing-a-notice-of-appeal-jurisdictional-state-edition/.

For example, in *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993), this Court held that the service requirements of Appellate Rule 3 are subject to equitable defenses, including waiver. *See also Blevins v. Town of W. Jefferson*, 182 N.C. App. 675, 681–82, 643 S.E.2d 465, 469 (2007) (Geer, J. dissenting) (appellate courts should not raise notice of appeal service concerns *sua sponte* because the defect may be waived), *rev'd for the reasons stated in the dissent*, 361 N.C. 578, 653 S.E.2d 392 (2007) (per curiam).

Similarly, the official commentary that accompanied the 1975 adoption of the Appellate Rules noted that Rule 3(d)'s form requirements were adopted to save "against occasional confusion" as to what order was being appealed. The commentary noted the "[f]ederal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal." *See* N.C. R. App. P. 3, Drafting Committee Note (1975), *reprinted at* 287 N.C. 671, 684.

Based on these principles, numerous appellate court opinions have collectively recognized that when a timely notice of appeal is defective only as to a form requirement, an appeal should not be dismissed so long as:

(1) the notice of appeal satisfies the functional equivalent of a rule-based requirement,

(2) a party's intent to appeal can be fairly inferred from the notice of appeal, and

(3) the noncompliance is neither a substantial nor gross violation of the Appellate Rules.

See, e.g., Dogwood at 197–201, 657 S.E.2d at 364–67; *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 277, 536 S.E.2d 349, 353–54 (2000) (Defendants' counsel's failure to name themselves in the body of the notice of appeal was a procedural rather than a jurisdictional error, and accomplished a functional equivalent.); *Dafford v. JP Steakhouse LLC*, 210 N.C. App. 678, 681–82, 709 S.E.2d 402, 405–06 (2011) (fairly inferred); *State ex rel. Utilities Comm'n v. MCI,* 132 N.C. App. 625, 631,514 S.E.2d 276, 281 (1999) (Although the notices of appeal do not designate an appeal from the Original Order, it "can be fairly inferred" from the notices that Joint Appellants intended to appeal from the Original Order, and because there is no indication in this record that the appellees were misled by the notices, we construe the notices as appeals from the Original Order.); *Von Ramm v. Von Ramm,* 99 N.C. App. 153, 392 S.E.2d 422 (1990) (If a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the

"*functional equivalent.*"); *cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 317 (1988) (when "a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires).

Ms. Yigzaw's intent to appeal can be fairly inferred from her timely filed notice of appeal. Moreover, appellate counsel's signature on the notice of limited appearance constituted the functional equivalent of filing a single document signed by both counsel and Ms. Yigzaw giving notice that Ms. Yigzaw would be appealing the child support order. Quite simply, because Ms. Yigzaw's signature on her own notice of appeal could not have misled Dr. Asres or his counsel, the appeal should not have been dismissed.

Finally, even if the form requirements of Appellate Rule 3(d) were jurisdictional, Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure provides that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" *Id.* Certiorari should be allowed "on a reasonable show of merits" when the "ends of justice will be . . . promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924).

Under Appellate Rule 21, the Supreme Court has the power to direct the Court of Appeals to issue a writ of certiorari to review the merits of an appeal even when the Court of Appeals initially denied the petitioner's request. *E.g.*, *State v. Coxton*, 368 N.C. 905, 794 S.E.2d 801 (2016) (mem. order).

This Court has noted that rules of practice and procedure are devised "to promote the ends of justice, not to defeat them." *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). At all times, Ms. Yigzaw and her appellate counsel have proceeded in good faith in pursuing her appeal. Through no fault of her own, Ms. Yigzaw has been denied her appeal of right of the trial court order. Thus, this case falls squarely within the parameters of Appellate Rule 21. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (acknowledging this Court's authority to issue writ of certiorari to cure a defective notice of appeal); *see also In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) ("Given the serious consequences of the adjudication order, the lack of any evidence that respondent contributed to the error, and the need to resolve the ambiguity in the order's disposition . . . we believe that review pursuant to writ of certiorari is appropriate.").

B. There is no requirement under amended Appellate Rule 41 that an Appeal Information Statement be served.

The two other alleged defects raised by Appellee's motion to dismiss in the Court of Appeals were groundless.

Undersigned appellate counsel electronically submitted an Appeal Information Statement ("AIS") for Ms. Yigzaw on 11 January 2019. This AIS was governed by this Court's 1 January 2019 amendments to Appellate Rule 41. *See* Order Amending the Rules of Appellate Procedure (effective Jan. 1, 2019) (publication forthcoming).

Under amended Appellate Rule 41, parties can no longer submit a paper or printable AIS form. *See* https://www.nccourts.gov/documents/forms/appeal-information-statement. Rather, an appellant must complete the AIS by answering a series of web-based questions on the electronic-filing website. *See generally* Beth Scherer, "Appellate Rules Amendments Bring Modifications to E-filing System" (Feb. 6, 2019), *available at* https://www.ncapb.com/2019/02/06/appellate-rules-amendments-bring-modifications-to-e-filing-system.

Under amended Rule 41, an appellant is not required to file or serve this web-based AIS—only to "complete" it by using the electronic-filing website. N.C. R. App. P. 41. Indeed, the website provides no method for an appellant to

print or serve a completed AIS. Therefore, Appellee's motion to dismiss for failure to serve the AIS was baseless.

C. Because the entire March 2017 child support hearing transcript was designated for inclusion in the record on appeal, Appellate Rule 7 was satisfied.

Appellee's motion to dismiss also sought to fault counsel for Appellant for not "designat[ing] the specific proceeding to be transcribed, other than a generic reference to 'proceedings in the above captioned case at a hearing held before the Honorable Wayne Michael in the Davidson County District Court.'" It is unclear what provision of Appellate Rule 7 counsel for Appellee is contending was violated.

On 7 September 2018, Appellant timely filed in the district court a signed "Contract and Notice of Arrangement for Production of the Transcript." (Attachments pp 16-17). Ms. Angela M. Eisenhardt, an AOC-approved transcriptionist, specified the terms for this transcript documentation (*Id.*) The settled record notes that Ms. Eisenhardt "transcribed the 14 March 2017 proceedings of the Davidson County District Court" hearing and provided both parties with a certificate of delivery of that transcript on 22 October 2018. (R pp 1, 68). Ms. Eisenhardt also promptly filed the transcript of the entire hearing after the appeal was docketed. (*See* R p 1; *see also Yigzaw v. Asres,* No. COA 19-12, Court of Appeals Docket Sheet, *available at* https://appellate.nccourts.org/dockets.php?court=2&docket=2-2019-0012-

001&pdf=1&a=0&dev=1). In short, appellate counsel complied with Appellate Rule 7. Thus, Appellee's motion to dismiss on this ground was also baseless.

II. There are Meritorious Issues for Review.

In most North Carolina cases, courts determine child support by applying the presumptive guidelines to the parents' adjusted gross incomes. N.C. Gen. Stat. § 50–13.4(c). The guidelines are intended to provide "adequate awards of child support that are equitable to the child and both of the child's parents." N.C. Child Support Guidelines, 2016 Ann. R. N.C. at 1. However, when the parents' combined adjusted gross income is more than $25,000.00 per month ($300,000.00 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule. N.C. Child Support Guidelines, 2016 Ann. R. N.C. at 50.

In such cases, North Carolina law provides that:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the childcare and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c).

This Court has explained that "an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the

relative ability of the parties to provide that amount." *Coble v. Coble,* 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quoting N.C. Gen. Stat. § 50-13.4(c)). These conclusions must in turn be based on factual findings "specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents." *Id.* (internal quotation marks omitted).

In Ms. Yigzaw's case, the child support guidelines did not apply. Although the trial court heard testimony from both parents, the court determined the children's current reasonable needs by relying on a financial affidavit filed five years before the hearing and six years before entry of judgment. (R pp 52-58).

The 2012 affidavit was, at most, evidence as to the children's individual expenses minus food, household expenses, and childcare in 2012. At that time, the parties had been separated for less than six weeks. Ms. Yigzaw had no job or income of her own. Neither party had childcare costs. The boys were five and seven years old. (R pp 10-13)

Five years later, at the 2017 hearing, Ms. Yigzaw had earned her nursing degree and moved out of the marital residence. The boys were active in extracurricular pursuits. (Attachments p 4) Based on figures the parties provided to CSE, each party spent approximately one thousand dollars per month for childcare. (R pp 49-50) Because the trial court relied on the 2012

affidavit, however, the resulting order made no allowance for childcare expenses or the cost of activities. (Attachments pp 3-6)

The court's own findings showed that the affidavit did not accurately reflect the children's accustomed standard of living at the time of the order. (R p 42) In addition, the court failed to make findings as to the parties' net income available for support of the children. (R p 42)

Nonetheless, based on unsupported and inadequate findings, the trial court erroneously concluded that Ms. Yigzaw was capable of providing for the children's accustomed needs without assistance from Dr. Asres and reduced Dr. Asres' child support by over 50 percent. The trial court also applied the reduction retroactive to the filing of Dr. Asres' motion for modification. Consequently, Ms. Yigzaw—who makes significantly less that Dr. Asres—has been ordered to repay $27,823.08 in child support to Dr. Asres. (R pp 43-44). The order, which reflected an arbitrary application of principles of law governing child support in North Carolina, presents for review the issue of whether a non-guidelines child support order that is not based on the children's current needs and the parents' abilities to meet them constitutes reversible error.

CONCLUSION

For all the reasons stated above, counsel for Appellant respectfully requests that this Court issue its writ of certiorari to reverse the order of the Court of Appeals dismissing Ms. Yigzaw's appeal.

Respectfully submitted this the 30th day of May 2019.

Electronically submitted
Mary McCullers Reece
N.C. State Bar No. 21260
Post Office Box 2747
Smithfield, NC 27577
Telephone: (919) 300-1249
Maryreece14@gmail.com

Attorney for Plaintiff-Petitioner

VERIFICATION

Mary McCullers Reece, being first duly sworn, deposes and says that she has read the foregoing Petition for Writ of Certiorari and that the same is true to her own knowledge except as to matters alleged upon information and belief, and as to these matters, she believes them to be true.

Mary McCullers Reece

Sworn to and subscribed before me,
this 30 day of May 2019.

NOTARY PUBLIC

My commission expires: 12-06-21

LOUISE L. CARTER
NOTARY PUBLIC
JOHNSTON CO., NC

CERTIFICATE OF SERVICE

I certify that on the date listed below I filed the foregoing **Petition for Writ of Certiorari** with the Office of the Clerk of the Supreme Court of North Carolina by electronically filing a PDF version of the document using the Court's internet-based, computerized, electronic filing system.

I further certify that on the date listed below I served the foregoing **Petition for Writ of Certiorari** on the other parties to this appeal by electronically mailing PDF versions to the addresses of the attorneys for the other parties listed below:

Shawn L. Fraley
shawnfraley@bgbflawoffice.com

This the 30th day of May 2019.

Electronically Submitted

Mary McCullers Reece
N.C. State Bar No. 21260
Post Office Box 2747
Smithfield, NC 27577
Telephone: (919) 300-1249
Maryreece14@gmail.com

Attorney for Plaintiff-Petitioner

No._____ JUDICIAL DISTRICT TWENTY-TWO B

SUPREME COURT OF NORTH CAROLINA
****

ASKALEMARIAM YIGZAW,

Plaintiff,

v.

ALEHEGN ASRES,

Defendant.

From Davidson County
COA 19-12

****

ATTACHMENTS TO PETITION FOR WRIT OF CERTIORARI

****

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk

Fax: (919) 831-3615
Web: https://www.nccourts.gov

Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

From Davidson
(12CVD257)

No. 19-12

ASKALEMARIAM YIGZAW,
Plaintiff,

v.

ALEHEGN ASRES,
Defendant.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
BY _____ DEPUTY CLERK
5-30 2019

ORDER

The following order was entered:

The motion filed in this cause on the 15th of January 2019 and designated 'Defendant-Appellee's Motion to Dismiss' is allowed. Appeal dismissed. Plaintiff-Appellant to pay costs.

And it is considered and adjudged further, that the Plaintiff-Appellant, Askalemariam Yigzaw, do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty Six Dollars and 25/100 ($56.25), and execution issue therefor.

By order of the Court this the 13th of May 2019.

WITNESS my hand and official seal this the 13th day of May 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Ms. Mary McCullers Reece, Attorney at Law, For Yigzaw, Askalemariam
Mr. Shawn L. Fraley, Attorney at Law, For Asres, Alehegn
Hon. Brian L. Shipwash, Clerk of District Court

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Fax: (919) 831-3615
Web: https://www.nccourts.gov

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. 19-12

ASKALEMARIAM YIGZAW,
Plaintiff,

v.

ALEHEGN ASRES,
Defendant.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
BY _____ DEPUTY CLERK
5-30 , 20 19

From Davidson
(12CVD257)

ORDER

The following order was entered:

The petition filed in this cause on the 16th of January 2019 and designated 'Petition for Writ of Certiorari' is denied.

By order of the Court this the 13th of May 2019.

The above order is therefore certified to the Clerk of the District Court, Davidson County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 13th day of May 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Ms. Mary McCullers Reece, Attorney at Law, For Yigzaw, Askalemariam
Mr. Shawn L. Fraley, Attorney at Law, For Asres, Alehegn
Hon. Brian L. Shipwash, Clerk of District Court

FILE NO. 12 CVD 257
IV-D 0006826847

NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISON

ASKALEMARIAM YIGZAW,
Plaintiff

versus

ORDER- CHILD SUPPORT

ALEHEGN ASRES,
Defendant

THIS CAUSE coming on to be heard before the Honorable Wayne L. Michael, Chief District Court Judge presiding over the Davidson County Child Support Term on March 14, 2017; Based upon the arguments of counsel and an examination of the court file, the Court makes the following:

FINDINGS OF FACT:

1. A Consent Memorandum of Judgment/Order was entered into by the parties on July 30, 2013, which dealt with, among other things, child support for the minor children, Dagmawi Asres, born January 31, 2004, and Caleb Asres, born August 18, 2006.

2. A Consent Order was entered in this matter by the Honorable J. Rodwell Penry on February 23, 2015, regarding, among other things, child support as follows:

> "31. As to child support, Defendant-father agrees that he shall continue to abide by the obligations regarding child support and alimony as set forth in the Memorandum of Judgment, filed on July 30, 2013. Child support shall not be modified or modification requested, until at least three (3) years have elapsed after the entry of the July 30, 2013, Order. Defendant may file a child support motion as early as the month of July of 2016 to address modification of child support, to be heard on or after July 30, 2016, if he so desires."

3. Since the entry of the Memorandum of Judgment/Order of July 30, 2013, the parties entered into a Consent Order on February 23, 2015, and were granted the joint legal and physical care, custody and control, by alternating the custody of the children on a 50/50 schedule. On February 20, 2014, Defendant was ordered to pay $ 2000.00 a month into NC Centralized Collections for the support of his minor children.

4. The defendant filed a Motion to Modify Child Support on July 22, 2016, based on the modified custodial arrangement as outlined in the February 23, 2015 Consent Order.

5. Since the entry of the Memorandum of Judgment/Order of July 30, 2013, regarding child support, the plaintiff has graduated from GTCC and has obtained a degree in the nursing field. The plaintiff also has a degree in which she earned while living in Ethiopia.

6. The plaintiff is currently employed by High Point Regional, UNC Health Care, as a registered nurse.

7. The plaintiff also receives monthly rental income.

8. The defendant is a physician with Cornerstone Healthcare in High Point, North Carolina.

9. The defendant also receives monthly income from Moonlight Solutions and from Thomasville Medical Properties.

10. The plaintiff's average monthly income is $6,436.33.

11. The Defendant's average monthly income is $22,276.00.

12. The parties' combined income does not fall within the North Carolina Child Support Guidelines and according to those guidelines, the child support obligation should be calculated based on the current reasonable needs of the minor children considering those factors set forth in NCGS 50-13.4(c).

13. The plaintiff is unable to provide detailed information or reliable testimony or corroborative documents concerning the current reasonable needs of the children for health, education, and maintenance. The plaintiff did testify that the children are involved in activities in addition to school, including soccer, piano lessons, YMCA activities, the Duke University TIP program, and a one-week to Washington, DS for AIG students. The Court finds that the children do in fact participate in all of these activities but the plaintiff was unable to show that she was the one who actually paid for any of these activities, or the actual cost of any of the activities. The Court is unable to determine the current reasonable needs of the children form evidence presented by the plaintiff at this hearing.

14. The only comprehensive reliable evidence presented by the parties as to the current reasonable expenses of the children is plaintiff's affidavit filed January 26, 2012, and received into evidence at this hearing as defendant's Exhibit 1, which placed the children's itemized expenses at $1,172.00 per month, but did not include any "shared" expenses for the operation of the household. Allowing a portion of the electricity, heat, cable and internet, to be apportioned to the children, would place the total reasonable

needs at about $1,500.00 per month (the assertion that the water bill is $200.00 per month is either not credible or not reasonable).

15. Presently, the plaintiff herself has a substantial income in excess of $77,000 per year, and the defendant has a much greater income in excess of $266,000 per year. Either party alone is capable of providing for the reasonable needs of the children without contribution from the other parent.

16. Under the totality of the circumstances in this case, considering that the parents share custody of the children on an equal time basis; that each of the parents is capable of providing for the needs of the children without contribution form the other parent; and that while plaintiff's income is substantial, defendant's income is three times greater; it is reasonable that the defendant pay to the plaintiff the sum of $750.00 per month for child support, and pay the medical insurance and uninsured medical expenses for the children.

17. The court heard testimony from each party, received evidence from each party, and heard arguments from counsel for each party, regarding the current needs of the minor children, and considered the affidavit contained in the court file and the previous court orders.

CONCLUSIONS OF LAW:

A. North Carolina has continuing jurisdiction over the parties and subject matter.

B. Child support should be modified as of July 22, 2016, based on the current needs of the minor children.

C. The combined income of the parties does not fall within the North Carolina Child Support Guidelines.

D. The child support obligation in this matter falls outside of the North Carolina Child Support Guidelines.

BASED UPON THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED THAT:

[1] The defendant's child support obligation is hereby modified in the amount of $750.00 per month, effective August 1, 2016.

[2] The defendant shall receive credit for any payment he has made above and beyond the sum of $750.00 per month as of August 1, 2016.

[3] The amount of overpayment is $27,823.08 as of July 11, 2018.

[4] The defendant presently pays the sum of $923.08 every two (2) weeks by wage withholding. Any overpayment the defendant makes above and beyond his $750.00 child support obligation for the month of June 2018 shall be refunded by North Carolina Child Support Collections to the defendant from his child support payments paid into the North Carolina Child Support Collections for the months of July and August 2018, until paid in full.

[5] The defendant shall receive credit for the overpayment of $27,823.08 as of July 11, 2018, according to the following formula:

[a]. At a rate of $150.00 per month off of his child support obligation beginning June 1, 2018, and until the parties' oldest child, Dagmawi Ares, turns 18 years of age for a total of $6,450.00 (June 1, 2018 until January 31, 2022 for a total of 43 months (43 months x $150.00 per month= $6,450.00). This will reduce his child support to $600.00 per month.

[b]. After the minor child, Dagmawi Asres, turns 18 years of age, (beginning January 31, 2022), the defendant will begin receiving credit at a rate of $500.00 per month from his child support obligation until the minor child, Caleb Asres turns 18 years of age for a total $15,500.00 (January 31, 2022 until August 18, 2024 for a total of 31 months (31 months x $500.00 per month=$15,500.00) of credit. This will reduce his child support obligation to $250.00 per month.

[c] After the child turns 18, the child support obligation of Defendant shall terminate pursuant to statute.

[d]. This will leave an outstanding balance on the arrears. This shall be handled by future orders of the Court after the children have reached majority age, or upon any time that Plaintiff shall seek a modification of this child support obligation.

[6] Should Plaintiff be ordered to pay child support to the defendant in the future, any credit remaining for Defendant's overpayment to Plaintiff, shall be added to the Plaintiff's child support obligation to Defendant at that time.

[7] This cause is retained for further orders of this Court.

Entered and signed this the 31st day of July, 2018.

Wayne L. Michael

Honorable Wayne L. Michael,
Chief District Court Judge Presiding

A TRUE COPY
CLERK OF SUPERIOR COURT
DAVIDSON COUNTY
BY
Assistant/Deputy Clerk/Deputy Court

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
12 CVD 257

2018 AUG 29 P 12:20

****

ASKALEMARIAM YIGSAW,
Plaintiff

Vs.

ALEHEGN ASRES,
Defendant

NOTICE OF APPEAL

****

NOTICE OF APPEAL

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS: NOW COMES Plaintiff Askelemariam Yigsaw and pursuant to N.C.R. App. P. 3 and N.C. Gen. Stat. § 7A-27(c), hereby gives Notice of Appeal to the North Carolina Court of Appeals from the child support order entered on 31 July 2018 by the Honorable Wayne L. Michael in the above-captioned file.

This, the 24 day of August 2018.

Askalemariam Yigsaw

Askalemariam Yigsaw,
Plaintiff

A TRUE COPY
CLERK OF SUPERIOR COURT
DAVIDSON COUNTY
BY
Assistant Clerk, Superior Court

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
12 CVD 257

****

ASKALEMARIAM YIGSAW, Plaintiff	)	
Vs.	)	NOTICE OF LIMITED APPEARANCE
ALEHEGN ASRES, Defendant	)	

The undersigned gives notice that she is making a limited appearance to represent Plaintiff Askalemariam Yigsaw on direct appeal of the 31 July 2018 order only.

Respectfully submitted, this, the 24th day of August 2018.

Mary McCullers Reece
Attorney for Plaintiff
N.C. State Bar No. 21260
P. O. Box 2747
Smithfield, NC 27577
(919) 300-1249
Marvreece14@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice was served on Defendant, through counsel, by deposit in the United States mail, first-class and postage prepaid to the following address:

Shawn L. Fraley
Post Office Box 476
Lexington, NC 27293

This, the 27 day of August 2018.

Mary McCullers Reece
Attorney for Appellant
N.C. State Bar No. 21260
P. O. Box 2747
Smithfield, NC 27577
(919) 300-1249
Maryreece14@gmail.com

812 S.E.2d 202 (Table)
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
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.
Court of Appeals of North Carolina.

Patrick Michael CONNOR, Plaintiff,

v.

Teresa Lynn CONNOR, Defendant.

No. COA 17-987

Filed: April 3, 2018

Appeal by defendant from order entered 13 February 2017 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 7 February *203 2018. Mecklenburg County, No. 11 CVD 12894

Attorneys and Law Firms

James, McElroy & Diehl, P.A., Charlotte, by Preston O. Odom, III, Jonathan D. Feit, and Caroline E. Daniel, for plaintiff-appellee.

Collins Family Law Group, Monroe, by Rebecca K. Watts, for defendant-appellant.

Opinion

DIETZ, Judge.

**1 Defendant Teresa Lynn Connor challenges the trial court's termination of alimony based on cohabitation. Ms. Connor argues that cohabitation requires a showing that the dependent spouse's new relationship has an "economic impact" that is "akin to the impact that would be created by remarriage."

As explained below, we reject this argument because our precedent requires us to apply a totality-of-the-circumstances test that eschews bright line rules in favor of a flexible, case-by-case analysis. *See, e.g., Setzler v. Setzler*, 244 N.C. App. 465, 472, 781 S.E.2d 64, 68 (2015). Although this Court has emphasized that economic impact is a key factor in the cohabitation analysis, we likewise have held that no single factor is controlling. *Id.* Thus, we must reject Ms. Connor's proposed economic impact test because it would, in effect, make a certain level of economic impact a controlling factor in every cohabitation case.

As explained below, applying this Court's totality-of-the-circumstances test established in our precedent, the trial court properly concluded that Ms. Connor engaged in cohabitation. Accordingly, we affirm the trial court's order.

Facts & Procedural History

In November 2010, Defendant Teresa Lynn Connor and Plaintiff Patrick Michael Connor separated after roughly seventeen years of marriage. At the time of separation, Ms. Connor was unemployed, and Mr. Connor worked as a surgeon, as team physician for the Carolina Panthers, and as a consultant. The couple had four children during their marriage, two of whom are minors. On 6 July 2011, Mr. Connor filed an action for custody and equitable distribution. Ms. Connor filed an answer and counterclaims for custody, child support, postseparation support, alimony, and equitable distribution.

That same year, Ms. Connor began dating Reginald Brezeault, who is divorced and has three children of his own. Ms. Connor and Brezeault maintained separate homes, but they spent considerable time together, with Brezeault spending the night at Ms. Connor's house, on average, three to four nights a week. The couple also had dinner together nearly every night and took vacations together, sometimes bringing their respective children with them.

While together, Ms. Connor and Brezeault held themselves out as a "team," referring to each other as their "better half," their "partner," and their "family." Brezeault referred to Ms. Connor's house as his "home" and Ms. Connor referred to her bed as "our bed." The couple also attended social events and church services as a couple. Additionally, the couple discussed parenting decisions, advised each other on how to discipline their kids, and supported each other's children at games and events.

Brezeault regularly performed chores in Ms. Connor's home, including vacuuming; helping with the dishes; blowing off the back porch; cleaning out the outdoor fireplace; taking care of her pets; clearing out the garage; watering the flowers; cleaning around the home; picking up groceries; and taking out the trash. He also arranged for cleaning services and maintenance workers to service Ms. Connor's home, which he occasionally paid for.

**2 Ms. Connor and Brezeault have never shared bank accounts or credit cards. They have also never paid for each other's rent or utilities. The couple typically "pay[s] everything fifty/fifty." However, Brezeault has financially supported Ms. Connor in other ways. For example, Brezeault covered Ms. Connor on both his AAA account and his Costco membership. Brezeault also covered Ms. Connor and two of the Connor children on his monthly cell phone plan, and paid this monthly bill on Ms. Connor's behalf without seeking reimbursement from her. He has also been paying the insurance on each cell phone.

Brezeault sometimes provided Ms. Connor with cleaning supplies. He also gifted her a dishwasher, a refrigerator, a purse, and a diamond ring. At one point, Brezeault spent $300 on food and supplies for Ms. Connor's father's birthday party. As with the phone bills, Brezeault did not seek reimbursement from Ms. Connor for any of these items. Additionally, Brezeault provided Ms. Connor's children with extra spending money and allowed them to use his Netflix account without charge.

On 2 March 2012, the Connors divorced. On 27 January 2014, the trial court entered an order resolving equitable distribution and alimony. Then, on 29 March 2016, Mr. Connor filed a motion to terminate alimony, alleging that Ms. Connor was cohabiting with Brezeault. By the time Mr. Connor filed this motion, Ms. Connor had been dating Brezeault for five years.

On 13 February 2017, the trial court entered an order terminating Mr. Connor's alimony obligation, finding that Ms. Connor engaged in cohabitation. The order required Ms. Connor to reimburse Mr. Connor for the five alimony payments he made after he moved to terminate alimony. Ms. Connor timely appealed.

Analysis

I. Appellate jurisdiction

We first address this Court's jurisdiction to hear the appeal. Mr. Connor argues that Ms. Connor's notice of appeal, which Ms. Connor filed *pro se*, was defective and thus did not confer jurisdiction on this Court. Specifically, Mr. Connor argues that Ms. Connor was represented by counsel in the trial court and the notice of appeal was not signed by counsel in violation of Rule 3(d) of the Rules of Appellate Procedure, which requires that a notice of appeal "be signed by counsel of record of the party or parties taking the appeal[ ] or by any such party not represented by counsel of record." N.C. R. App. P. 3(d).

We reject Mr. Connor's argument. As Ms. Connor correctly observes, many lawyers undertake trial-level representation with the understanding that the client engagement does not extend to an appeal. The language in Rule 3(d) requiring the notice of appeal to be signed by "counsel of record" applies only if, at the time the notice of appeal is filed, the appellant is represented by counsel who will handle the appeal. Here, Ms. Connor's trial counsel did not represent Ms. Connor on appeal. Instead, new appellate counsel appeared later in the case. It was entirely appropriate for Ms. Connor to file a *pro se* notice of appeal in this circumstance. Therefore, we hold that Ms. Connor's notice of appeal conferred appellate jurisdiction on this Court.

II. Legal standard for cohabitation

We next turn to Ms. Connor's arguments on appeal. Ms. Connor first challenges the legal test for cohabitation applied by the trial court—a test created by this Court's precedent.

By law, a supporting spouse's court-ordered alimony obligation terminates when the dependent spouse engages in cohabitation. N.C. Gen. Stat. § 50–16.9(b). Cohabitation is defined as "the act of two adults dwelling together continuously and habitually" where the couple voluntarily assumes "those marital rights, duties, and obligations which are usually manifested by married people." *Id.*

**3 Ms. Connor, citing the legislative history and purported intent of the cohabitation statute, argues that

cohabitation requires a finding that the relationship has an "economic impact" on the dependent spouse. She asks this Court to articulate a rule that cohabitation exists only if the relationship creates an economic impact "akin to the impact that would be created by remarriage."

We decline to adopt this proposed holding because it is inconsistent with our precedent. When reviewing claims of cohabitation, this Court has instructed trial courts to consider "the totality of the circumstances" and "evaluate all the circumstances of the particular case, with no single factor controlling." *Setzler v. Setzler*, 244 N.C. App. 465, 472, 781 S.E.2d 64, 68 (2015) (citation omitted). The economic impact of the relationship is a factor in this analysis, but it is not the only factor, nor is it the controlling factor. *Id.* Were we to create a specific level of economic impact that must be shown in every case of cohabitation, it would undermine our holding that no single factor controls, and that trial courts must individually consider the totality of the circumstances in every case. *See, e.g., Smallwood v. Smallwood*, 227 N.C. App. 319, 325–26, 742 S.E.2d 814, 819 (2013).

Simply put, this Court implicitly has rejected Ms. Connor's argument by creating a totality-of-the-circumstances test that eschews any specific requirements in favor of a case-by-case analysis. This panel has no authority to overrule this line of cases and require a showing of a specific level of economic impact in every case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). If Ms. Connor believes this Court has misread the General Assembly's intent, and that some minimum level of economic impact must be shown in every cohabitation case, she must take up that issue with our Supreme Court.

III. Findings concerning cohabitation

Finally, Ms. Connor argues that the trial court's findings are insufficient to establish cohabitation. We review the trial court's findings to determine whether they are supported by competent evidence in the record and whether those findings, in turn, support the trial court's conclusions of law. *Smallwood*, 227 N.C. App. at 325–26, 742 S.E.2d at 820.

In its order, the trial court expressly found the following facts: that Ms. Connor and Brezeault have a "monogamous" dating relationship; that Ms. Connor and Brezeault "have dwelled together in a habitual and continuous fashion ... with Mr. Brezeault spending, on average, three to four (3–4) nights per week at [Ms. Connor's] home"; that Brezeault "regularly performs chores in and around [Ms. Connor's] home"; that Brezeault arranged for maintenance and cleaning services at Ms. Connor's home; that the couple "jointly parent one another's children"; and that the couple "routinely" attended church and "attended numerous social events together."

The trial court also found that the relationship had various economic impacts because Brezeault covered Ms. Connor on his AAA and Costco accounts; covered Ms. Connor and two of her children on his cell phone plan; and occasionally "provided cleaning supplies for [Ms. Connor's] home" and "paid for third parties to clean [Ms. Connor's] home on at least two (2) occasions." The court also found that Brezeault bought Ms. Connor goods, including a refrigerator and diamond ring, and "provided the Connor children with extra spending money."

**4 We hold that these findings are supported by competent evidence in the record and that they are sufficient to support the trial court's conclusion that, examining the totality of the circumstances, "[Ms. Connor] and Mr. Brezeault have voluntarily and mutually assumed those marital rights, duties, and obligations which are usually manifested by married people." Accordingly, we reject Ms. Connor's argument and affirm the trial court's order.

Conclusion

For the reasons described above, we affirm the trial court's order.

AFFIRMED.

Report per Rule 30(e).

Judges ELMORE and HUNTER, JR. concur.

All Citations

812 S.E.2d 202 (Table), 2018 WL 1597989

247 N.C.App. 245
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Cynthia W. MAJERSKE, Plaintiff,
v.
Timothy S. MAJERSKE, Defendant.

No. COA15–839.
|
April 19, 2016.

*1 Appeal by Plaintiff from order entered 15 July 2013 by Chief Judge A. Elizabeth Keever in District Court, Cumberland County. Heard in the Court of Appeals 25 January 2016. Cumberland County, No. 08 CVD 6664.

Attorneys and Law Firms

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for Plaintiff–Appellant.

No brief for Defendant–Appellee.

Opinion

McGEE, Chief Judge.

Cynthia W. Majerske (now Richards) ("Plaintiff") appeals from an order modifying her alimony payments to Timothy S. Majerske ("Defendant"). This Court does not have appellate jurisdiction to decide this matter, and Plaintiff's appeal is therefore dismissed.

I. Background

Plaintiff and Defendant were married in July 1995 and separated in December 2007. During the marriage, Plaintiff and Defendant had two children. The trial court entered a consent order on 19 February 2009, resolving the parties' claims relating to alimony and equitable distribution. The trial court entered an order on 26 August 2009, resolving the parties' claims relating to custody and extending a previously entered temporary child support order.

Plaintiff filed a motion to modify custody and child support on 3 June 2010. That motion appears to have not fully resolved until 31 December 2014, when the trial court entered two orders ("the December 2014 orders") "resolv[ing] all pending matters in this action." Defendant filed a motion to modify alimony on 3 October 2012. While Plaintiff's motion to modify custody and child support was still pending, the trial court entered an interlocutory order modifying alimony on 15 July 2013 ("the July 2013 alimony modification order"). Plaintiff filed a notice of appeal from the July 2013 alimony modification order on 13 January 2015.

II. Jurisdiction

Before reviewing the merits of Plaintiff's appeal, this Court must first determine whether we have jurisdiction. "A jurisdictional default ... precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Specifically, "[w]ithout proper notice of appeal, this Court acquires no jurisdiction." *Von Ramm v. Von Ramm*, 99 N.C.App. 153, 156, 392 S.E.2d 422, 424 (1990) (quotation marks omitted); *accord Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563–64, 402 S.E.2d 407, 408 (1991) (per curiam) ("If the [notice of appeal] requirements of [Rule 3 of the North Carolina Rules of Appellate Procedure] are not met, the appeal must be dismissed.").

In the present case, Plaintiff challenges the July 2013 alimony modification order. In her brief before this Court, Plaintiff acknowledges that the July 2013 alimony modification order "was interlocutory at the time it was entered [.]" However, she further contends that entry of the December 2014 orders "made [the July 2013 alimony modification order] a final judgment." This, however, is an incorrect statement of law.

*2 "An interlocutory order is one made during the pendency of an action, which *does not dispose of the case,* but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (emphasis added). Conversely, a "final judgment is one which *disposes of the cause* as to all the parties, leaving nothing to be judicially determined between them in the

trial court." *Id.* at 361–62, 57 S.E.2d at 381 (emphasis added). In the present case, final judgment was rendered when the December 2014 orders were entered. Although Plaintiff filed a notice of appeal within thirty days after entry of the December 2014 orders,[1] she appeals only "from the Order on Defendant's Motion to Modify Alimony entered on 15 July 2013" and, therefore, has not vested this Court with jurisdiction to her hear appeal.

As a general rule, an "appeal lies of right directly to the Court of Appeals ... [f]rom any *final judgment* of a district court in a civil action." N.C. Gen.Stat. § 7A–27(b)(2) (2015) (emphasis added). When appealing from a final judgment, however, an appellant must reference that judgment in its notice of appeal because an appellate court ordinarily "obtains jurisdiction *only* over the rulings specifically designated in the notice of appeal *as the ones from which the appeal is being taken.*" *See Chee v. Estes,* 117 N.C.App. 450, 452, 451 S.E.2d 349, 350 (1994) (emphasis added); *see also* N.C.R.App. P. Rule 3(d) (providing that a notice of appeal in a civil case must "designate the judgment or order from which appeal is taken"); *cf. State v. Miller,* 205 N.C.App. 724, 725–26, 696 S.E.2d 542, 542–43 (2010) (in the criminal context, dismissing a defendant's appeal because, he filed "a written notice of appeal 'from the denial of [his] motion to suppress,' but [the][d]efendant did not appeal from his judgment of conviction").

By contrast, there generally "is no right of immediate appeal from interlocutory orders or judgments[.]" *Van Engen v. Que Scientific, Inc.,* 151 N.C.App. 683, 686, 567 S.E.2d 179, 182 (2002). With some exceptions not relevant to the present case, "[a]n interlocutory decree ... is reviewable *only on appropriate exception* upon an appeal from *the* final judgment in the cause." *Love v. Moore,* 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982) (emphasis added) (citing *Veazey,* 231 N.C. at 362, 57 S.E.2d at 382). "The rule forbidding interlocutory appeals is designed to promote judicial economy by eliminating the unnecessary delay and expense of repeated fragmentary appeals and by preserving the entire case for determination in a *single* appeal from *a* final judgment." (emphasis added)). *Id.* at 580, 291 S.E.2d at 146; *accord Van Engen,* 151 N.C.App. at 686, 567 S.E.2d at 182. Our caselaw is clear that an otherwise unappealable interlocutory order does not become a "final judgement" merely because a case is fully resolved, but instead may be challenged only in connection with "an appeal from *the* final judgment in the cause." *See Love,* 305 N.C. at 578, 291 S.E.2d at 144; *see also* N.C. Gen.Stat. § 1–278 (2015) ("Upon an *appeal from a [final] judgment,* the court may review any intermediate order involving the merits and necessarily affecting the judgment.");[2] *but cf. Combs & Associates, Inc. v. Kennedy,* 147 N.C.App. 362, 367, 555 S.E.2d 634, 638 (2001) (holding that a party's "voluntary dismissal of [its] remaining claim [after entry of partial summary judgment] ... has the effect of making the trial court's grant of partial summary judgment a final order.").

***3** In the present case, Plaintiff gave notice of appeal on 13 January 2015, within thirty days after entry of the December 2014 orders, *see* N.C.R.App. P. Rule 3(c), but Plaintiff's notice of appeal states that she is appealing only from "the Order on Defendant's Motion to Modify Alimony entered on 15 July 2013[.]" Plaintiff's notice of appeal does not indicate that she was appealing from either of the December 2014 orders. Accordingly, we do not have jurisdiction to review Plaintiff's appeal as part of an appeal from a final judgment. *See* N.C.R.App. P. Rule 3(d); *accord Love,* 305 N.C. at 578, 291 S.E.2d at 144. Moreover, Plaintiff has not articulated any other grounds upon which this Court might have jurisdiction to hear her appeal. "It is not the role of the appellate courts ... to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.,* 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Plaintiff's appeal is dismissed. *See Dogwood,* 362 N.C. at 197, 657 S.E.2d at 365.

DISMISSED.

Report per Rule 30(e).

Judges GEER and McCULLOUGH concur.

All Citations

247 N.C.App. 245, 785 S.E.2d 782 (Table), 2016 WL 1566167

Footnotes

1 Generally, an appellant "must file and serve a notice of appeal ... within thirty days after entry of judgment[.]" N.C.R.App. P. Rule 3(c).

2 N.C.G.S. § 1–278 "provides another avenue by which an appellate court may obtain jurisdiction to review an interlocutory order" when the *interlocutory* order was not included in the notice of appeal from a final judgment, in violation of the notice of appeal requirements in Rule 3(d) of the North Carolina Rules of Appellate Procedure. *Brooks v. Wal–Mart Stores, Inc.*, 139 N.C.App. 637, 641, 535 S.E.2d 55, 59 (2000) (quotation marks omitted); *see* N.C.R.App. P. Rule 3(d) (providing that a notice of appeal must "designate the judgment or order from which appeal is taken"). However,

> [a]ppellate review pursuant to [N.C.G.S.] § 1–278 is proper [only] under the following conditions:
> (1) the appellant must have timely objected to the order;
> (2) the order *must be interlocutory* and not immediately appealable; and
> (3) the order must have involved the merits and necessarily affected the [final] judgment.

Brooks, 139 N.C.App. at 641–42, 535 S.E.2d at 59 (emphasis added). Moreover, *Von Ramm,* 99 N.C.App. at 156–57, 392 S.E.2d at 424, does hold that "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." (quotation marks omitted). However, *Von Ramm* also held that an appellant did not properly appeal from a final judgment when the appellant appealed only from an order denying the appellant's Rule 59 motion to set aside the final judgment. *Id.* at 157, 392 S.E.2d at 425.

End of Document

STATE OF NORTH CAROLINA

COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
12 CVD 257

IN THE MATTER OF:

YIGSAW v. ASRES

CONTRACT & NOTICE
OF ARRANGEMENT
FOR PRODUCTION OF TRANSCRIPT

.....

THIS IS AN AGREEMENT between Angela M. Eisenhardt, AOC Approved Transcriptionist (Transcriptionist) and Mary McCullers Reece, Attorney at Law (Requester) for the production of a transcript of proceedings in the above captioned case at a hearing held before the Honorable Wayne Michael in the Davidson County District Court. The transcript shall be produced in accordance with the guidelines established by the North Carolina Administrative Office of the Courts, and according to the following terms:

1. One original by e-mail and shall be provided to the Requester.
2. Estimated length of the transcript is 175 pages. Fee for the transcript is $4.00 per page. Estimated total cost for the transcript is $700.00.
3. No deposit or prepayment is made at the time of this contract, but the Requester is liable for payment in full of all costs relating to the production of the transcript (*Gualtieri v. Burleson,* 353 S.E. 2d 652)
4. Should the transcript requested herein no longer be desired by the Requester, the Requester may terminate this agreement only upon payment by the Requester for all work completed at the time of cancellation.
5. Upon completion of the transcript, the Transcriptionist will forward to the Requester an invoice for the total cost of the transcript. Upon payment of that invoice in full, the Transcriptionist will forward the transcript to the Requester, and Requester acknowledges that, if the invoice is

not paid in full at the time the transcript would be due, as prescribed in Rule 7, the Requester will be required to seek an extension of time for delivery of the transcript as the transcript will not be delivered until the invoice has been paid in full.

6. Requester may copy the transcript for use by the Requester only, and the Transcriptionist will, upon notification of an appellate court docket number, electronically file the transcript with the appropriate appellate court as prescribed in Rule 7 and Rule 9. No copy of the transcript shall be made by the Requester for another party and specifically shall not be provided by the Requester to any opposing party. Requester hereby agrees that the Transcriptionist shall remain the sole source for any other party obtaining a copy, in whole or in part, of the transcript and that, in keeping with policies regarding copies of transcripts set out in N.C.G.S. Chapter 1A, Rule 30(f)(2), upon payment of reasonable charges therefore, the Transcriptionist shall furnish a copy of the transcript to any other parties.

7. Requester agrees that the transcript shall not be included in the record on appeal in the form specified in Rule 9(c)(1) but rather shall be designated as provided in Rule 9(c)(2) and (c)(3) and therefore, will not be provided to any other party, opposing or otherwise, as a part of any proposed or final Record on Appeal.

8. In the event that a court of competent jurisdiction orders the Requester to provide the transcript to another person or opposing party, the Requester shall buy an additional copy from the Transcriptionist to provide to that other person or opposing party.

Angela M Eisenhardt

Angela M. Eisenhardt
AOC Approved Transcriptionist

9/4/2018
Date

Mary McCullers Reece
Attorney at Law

9-1-18
Date

When Is a Deadline or Other Requirement for Filing a Notice of Appeal Jurisdictional? (State Edition)

ncapb.com/2018/05/03/when-is-a-deadline-or-other-requirement-for-filing-a-notice-of-appeal-jurisdictional-state-edition/

May 3, 2018

A few weeks ago, the North Carolina Court of Appeals in *Connor v. Connor* rejected an argument that a notice of appeal signed by a *pro se* litigant was defective under Appellate Rule 3(d) "and thus did not confer jurisdiction." Appellate Rule 3(d) states that a notice of appeal must "be signed by counsel of record of the party or parties taking the appeal[] or by any such party *not represented by counsel of record*." N.C. R. App. P. 3(d) (emphasis added). While the appellant in *Connor* had trial "counsel of record," trial counsel did not sign the notice of appeal. Instead, the individual appellant, acting *pro se*, signed the notice and later obtained different appellate counsel. In rejecting the argument that the *pro se* notice of appeal did not confer appellate jurisdiction because the appellant had trial counsel of record, Judge Dietz wrote:

> Ms. Connor's trial counsel did not represent Ms. Connor on appeal. Instead, new appellate counsel appeared later in the case. It was entirely appropriate for Ms. Connor to file a *pro se* notice of appeal in this circumstance.

If you are unfamiliar with the history of Appellate Rule 3(d), the outcome in this case might seem fairly obvious. However, the jurisprudence surrounding Appellate Rule 3 could be called a "hot mess." By way of example:

- If trial counsel in *Connor* had continued to represent the appellant on appeal, would the *pro se* notice of appeal have conferred "appellate jurisdiction"?
- If the notice of appeal was not signed due to inadvertence, would the appellate court have had jurisdiction to hear the appeal?
- What if a notice of appeal mistakenly stated that plaintiff (rather than the defendant) was appealing, but the notice of appeal was signed by defendant or its counsel?
- What if the notice of appeal was not served, or improperly served by email?
- What if the notice of appeal has mistakenly said that appellant was appealing to the Supreme Court of North Carolina (or completely omitted the appellate court to which appeal was being taken)? Would it matter if everyone involved knew that the only appellate court with jurisdiction over the case was the Court of Appeals?

Numerous state court opinions state that the time for filing a notice of appeal is jurisdictional. Additional opinions state that the other requirements of Appellate Rule 3 unrelated to timing are jurisdictional. Still other opinions use jurisdictional labels to

describe some of the requirements of Appellate Rule 9 (appellate record) and Appellate Rule 28 (appellate briefs).

In contrast, other appellate opinions have applied equitable and pragmatic defenses to save notice of appeal defects from these same purported Appellate Rule 3 "jurisdictional" defects. Doctrines like "functional equivalence," "substantial compliance," "fairly inferred," and "waiver" are the terms usually used by these opinions. Indeed, two Supreme Court opinions have held that the service requirements of Appellate Rule 3 are subject to a waiver defense. *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993); *Blevins v. Town of W. Jefferson*, 361 N.C. 578, 653 S.E.2d 392 (2007), *reversing for reason states in dissent*, 182 N.C. App. 675, 681–82, 643 S.E.2d 465, 469 (2007) (Geer, J. dissenting) (appellate courts should not raise notice of appeal service concerns *sua sponte* because service defects may be waived).

How do these opinions fit together? Are they in conflict? What criteria is used to determine jurisdictional requirements? And does the phrase "jurisdictional requirement" describe a nuanced-filled concept?

Yesterday, I posted about the United States Supreme Court renouncing the federal courts' habit of attaching jurisdictional labels to rule-based notice of appeal requirements. Is a similar course-correction warranted in North Carolina?

To analyze this question under state law, one must first acknowledge *why* jurisdiction labels were historically assigned to the requirements of Appellate Rules 3 and 4. Before 1989, many (but not all) of the time and manner requirements for noticing an appeal were set by statute. In most instances, Appellate Rules 3 and 4 simply mirrored a statutory requirement as to *when* a notice of appeal was required to be filed. As long as there was parity between a statutory requirement and the Appellate Rules, statements that the requirements for noticing an appeal were jurisdictional appeared sound.

In 1989, however, a significant change in North Carolina's notice of appeal jurisprudence occurred. The General Assembly repealed § 1-279, adopted § 1-279.1, and amended several other appellate statutes to provide that the time, manner, and effect of noticing an appeal would be dictated by the Appellate Rules.

With its newfound authority, the Supreme Court quickly modified the time for noticing an appeal in civil cases from 10 days to 30 days. The Supreme Court also abolished oral notices of appeal in civil cases. *See* N.C. R. App. P. 3 (1989), *reprinted at* 92 N.C. App. 761. The Supreme Court made similar changes to Appellate Rule 4, but changed its mind and reinstated oral notices of appeal in criminal cases about six months later. 324 N.C. 585.

So, what is the basis for classifying a requirement found only in the Appellate Rules as jurisdictional? After all, the title of Appellate Rule 1(c) states that the Appellate "Rules *Do Not Affect Jurisdiction*," and "*shall not* be construed to extend or limit the jurisdiction of the courts of the appellate division *as that is established by law*." Id. (emphasis added). Recognize any parallels to the approach taken by the federal appellate courts in *Hamer* and *Oliver (*the two opinions I blogged on yesterday that hold that a requirement for noticing an appeal is jurisdictional only if it is found in a statute)? Unlike the United States Supreme Court, does the Supreme Court of North Carolina have the authority to adopt jurisdictional requirements?

In my humble, unpublished opinion, the answer to this last question is "no, but sort-of." A key distinction exists between the federal result in *Oliver* and the Appellate Rules' *timing* requirement for noticing an appeal. Appellate Rule 27(c) prohibits either the trial or appellate courts from "extend[ing] ***the time*** for taking an appeal . . . prescribed by ***these rules*** *or by law*"—including by utilizing Appellate Rule 2. N.C. R. App. P. 28(c) (emphasis added). In other words, the only tool that can save an *untimely* notice of appeal is a writ of certiorari.

Thus, Appellate Rule 27(c) makes any distinction between jurisdictional and rule-based requirements with respect to the *time* for noticing an appeal an academic inquiry. The deadline for noticing an appeal may not be a "true" jurisdictional requirement set by statute, but the Supreme Court has essentially told the inferior courts that they must *treat* the time for noticing an appeal as a "constructive" jurisdictional requirement that may not be extended or excused by any equitable defenses. Unlike true jurisdictional requirements set by statutes, the Supreme Court may delete, modify, or expand constructive jurisdictional requirements by amending Appellate Rule 27. The Supreme Court also has the authority to change the time and manner for noticing an appeal under Appellate Rules 3 and 4 by amending the Appellate Rules (just like it did in 1989).

But what about a *timely* notice of appeal that is defective only as to a *form* requirement of Appellate Rule 3? Are these constructive jurisdictional requirements or something else? The courts' authority to suspend or excuse deficiencies as to the *form* of a notice of appeal are not restricted by Appellate Rule 27 or Appellate Rule 2. Indeed, the Supreme Court's 1975 commentary to Appellate Rule 3 suggests that the Supreme Court never intended to assign jurisdictional significance to Appellate Rule 3(d)'s form requirements. *See* N.C. R. App. P. 3, Drafting Committee Note (1975), *reprinted at* 287 N.C. 671, 684. (stating that Appellate Rule 3(d) was intended to save "against occasional confusion" as to what was being appealed and noting that "Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal").

Might this explain why some appellate opinions have utilized equitable and pragmatic defense to overlook or excuse minor deficiencies as to the *form* of timely notices of appeal? *See, e.g., Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156–57, 392 S.E.2d 422, 424 (1990). After all, when was the last time a "waiver," "functional equivalent," "fairly inferred," or "not misled" argument was successfully applied to a true or constructive jurisdictional requirement? Has the Supreme Court already signaled that the non-timing requirements of Appellate Rule 3 are not really jurisdictional requirements? *See Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (untimely service of a notice of appeal under Appellate Rule 3 can be waived); *Blevins v. Town of W. Jefferson*, 361 N.C. 578, 653 S.E.2d 392 (2007). And if it has, what is the extent of a court's discretion to address these types of violations? Should a distinction be drawn between true and constructive jurisdictional requirements and rule-based requirements that simply *relate to jurisdiction*?

Remember the song, "The Things That Make You Go Hmmmm...."? Jam out your thoughts and theories in the comments below.

–Beth Scherer

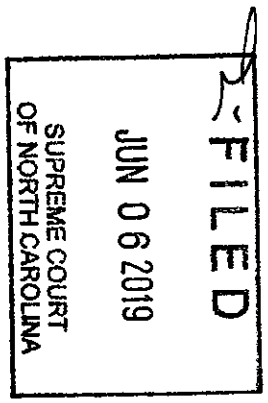
P.S. From time to time, statutes governing particular cases will specify a time or manner for noticing appeals. Most statutory requirements for noticing an appeal are true jurisdictional requirements. They will also trump any conflicting requirement for noticing an appeal found in Appellate Rule 3, 4, or 18. But that topic is for another day.

No. 198P19 DISTRICT TWENTY-TWO-B

NORTH CAROLINA SUPREME COURT

****

Askalemariam Yigzaw)
Plaintiff-Appellant)
)
) From Davidson County
v)
)
Alehegn Asres)
Defendant-appellee)



****

REPLY TO PLAINTIFF APPELLANT'S PETITION

****

TO:

THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF

THE NORTH CAROLINA SUPREME COURT

****

INDEX

TABLE OF AUTHORITIES

NO. _____ TWENTY-TWO-B JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ASKALEMARIAM YIGZAW	)	
Plaintiff	)	
	)	
	)	**From Davidson County**
V	)	**NO.** 12 CVD 257
	)	
ALEHEGN ASRES,	)	
Defendant-appellee	)	

****

REPLY TO PLAINTIFF APPELLANT'S PETITION

****

Now comes the Defendant-Appellee, by and through counsel, Shawn L. Fraley, moves this Honorable Court, pursuant to Rule 21 (d) of the North Carolina Rules of Appellate Procedure, to deny the Petition for Writ of Certiorari of the Plaintiff-Appellant in the above-referenced case. In support of this reply, Defendant-Appellee respectfully shows unto the Court:

1. On July 31, 2018, the Court entered an Order containing Findings of Facts and Conclusions of Law, and modifying the previous child support Order.
2. On August 24, 2018, attorney Mary McCullers Reece made a written notice of appearance "to represent Plaintiff

Askalemariam Yigsaw [sic] on direct appeal of the 31 July 2018 order only." This document is attached as Exhibit A-1. The certificate of service shows that it was served on August 28, 2018. This is Exhibit A-2.

3. Despite the claims of the Plaintiff-Appellant's Petition for Writ of Certiorari, the filings by appellate counsel clearly demonstrate that Mary McCullers Reece was the attorney of record before August 29, 2018.

4. According to the documents filed by Plaintiff-Appellant's appellate counsel, she submitted her Notice of Appearance four days before the Notice of Appeal was filed. *See* Exhibit A-1. Furthermore, Plaintiff-Appellant's counsel certified that she served this Notice of Appearance on opposing counsel the day before the Notice of Appeal was filed. *See* Exhibit A-1.

5. Therefore, assuming the veracity and reliability of the documents filed with the court by Plaintiff-Appellant's counsel, Mary McCullers Reece was the attorney of record at least one day before the Notice of Appeal was filed. Any reference to the Plaintiff's trial counsel is a red herring, as appellate counsel

made an appearance before the appeal was filed. This is undisputed by the written record.

6. In the Petition, Plaintiff-Appellant's counsel's claims that "At the time the notice of appeal was filed, Ms. Yigzaw's counsel of record in the trial tribunal was the Davidson County CSE." (Petition for Writ, p. 5). The documents filed by Mary McCullers Reece show that this claim is not accurate. (Petition for Writ, p. 5)

7. By the documents filed by counsel for Plaintiff-Appellant, it was obvious that Davidson CSE was not the counsel of record as of August 24, 2018. The Notice of Appearance by counsel for Plaintiff-Appellant, submitted four (4) days before the Notice of Appeal, specifically declares "The undersigned gives notice that she is making a limited appearance to represent Plaintiff Askalemariam Yigsaw on direct appeal of the 31 July 2018 order only. Respectfully submitted, this, the 24th day of August, 2018." *See* Exhibit A-1. Therefore, the appellate counsel for Plaintiff-Appellant, Mary McCullers Reece, was the attorney of record prior to the August 29, 2018 Notice of Appeal.

8. On August 29, 2018, Plaintiff-Appellant's counsel filed a document captioned as "Notice of Appeal." *See* Exhibit B. This document purported to appeal "the child support order entered on 31 July, 2018." This was filed one day after the notice of appearance was served on Defendant-Appellee, according to Plaintiff-Appellant's certificate of service.

9. This purported Notice of Appeal is signed only by the Plaintiff, Askalemariam Yigzaw. *See* Exhibit B.

10. While this document was purportedly signed on August 24, 2018, it was not filed until 12:28 pm on August 29, 2018. *See* Exhibit B.

11. Rule 3(c) of the North Carolina Rules of Appellate Procedure requires, "The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record." N.C.R. App. P. 3 (2019).

12. Certainly, Mary McCullers Reece had made an appearance as the attorney of record prior to August

29, 2018. However, Mary McCullers Reece did not sign the purported Notice of Appeal as required by the North Carolina Rules of Appellate Procedure.

13. Plaintiff Askalemariam Yigzaw is represented by counsel of record, so her signature is not sufficient to properly give Notice of Appeal. N.C.R. App. P. 3(c) (2019).

14. Plaintiff-Appellant failed to file a proper Notice of Appeal within 30 days after the Order was entered and served on the Plaintiff-Appellant. Therefore, the Court of Appeals correctly dismissed the appeal and denied certiorari.

15. In addition, Plaintiff-Appellant violated other sections of the North Carolina Rules of Appellate Procedure. Pursuant to Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure, Plaintiff-Appellant was to provide, in writing "a designation of the parts of the proceedings to be transcribed, the name and address of the court reporter or other neutral person designated to produce the transcript, and where portions of the proceeds have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal."

16. Counsel for Plaintiff-Appellant claimed "It is unclear what provision of Appellate Rule 7 counsel for Appellee is contending was violated." (Petition for Writ, p. 18) However, the Motion to Dismiss specifically quoted the relevant language of Rule 7(a)(1), and it is clear that Plaintiff-Appellant violated this specific rule.

17. In addition, Plaintiff-Appellant's Petition fails to demonstrate that they ever provided, in writing, "a designation of the parts of the proceedings to be transcribed, the name and address of the court reporter or other neutral person designated to produce the transcript, and where portions of the proceeds have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal." N.C.R. App. P. 7(a)(1) (2019). This is a very specific and obvious requirement of the Rules of Appellate Procedure, and no justification has been asserted for ignoring this Rule.

18. Plaintiff-Appellant filed a brief in this action referencing the transcript, but has never provided the information required by Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure. Specifically, Plaintiff-Appellate has not designated the specific

proceeding to be transcribed, other than a generic reference to "proceedings in the above captioned case at a hearing held before the Honorable Wayne Michael in the Davidson County District Court."

19. For these repeated violations of the North Carolina Rules of Appellate Procedure, the North Carolina Court of Appeals dismissed the appeal and denied the conditional Petition for Writ of Certiorari.

ARGUMENT

PLAINTIFF-APPELLANT'S APPEAL WAS PROPERLY DISMISSED DUE TO REPEATED VIOLATIONS OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

This appeal was properly dismissed pursuant to Rule 34(a)(1) and Rule 37 of the North Carolina Rules of Appellate Procedure for the repeated violations of the Rules, specifically Rule 3 and Rule 7, and a Writ of Certiorari should not issue.

"The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." Huebner v. Triangle Research Collaborative, 193 N.C. App. 420 (2008) *appeal dismissed and disc. review denied*, 363 N.C. 126, 673 S.E.2d 132 (2009); Currin-Dillehay Bldg. Supply v. Frazier, 100 N.C. App. 188, 189

appeal dismissed and disc. review denied, 327 N.C. 633 (1990).

Therefore, as Plaintiff-Appellant's purported Notice of Appeal was not properly filed with the required signature, as set forth in Rule 3 of the North Carolina Rules of Appellate Procedure, this appeal must be dismissed.

The time has passed for filing a proper Notice of Appeal. N.C.R. App. P. 3(c) (2019). The failure to properly file a Notice of Appeal within 30 days voids the appeal, and subjects the appeal to dismissal.

Despite the claims in the Petition for Writ of Certiorari, Plaintiff-Appellant has failed and refused to comply with Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure. Plaintiff-Appellant failed to file the writing as required by Rule 7 (a)(1), and has never provided a justification for this failure. As Plaintiff-Appellant has failed and refused to comply with Rule 7(a)(1) of the North Carolina Rules of Appellate Procedure, this appeal should be dismissed.

THERE ARE NO MERITS TO THE APPEAL, AS SHOWN BY THE TRIAL COURT ORDER AND THE TRANSCRIPT

Finally, the appeal by Plaintiff-Appellant has no merit. While Plaintiff-Appellant correctly asserted that the court determined the children's current reasonable needs by relying on a financial affidavit filed five years before the hearing and six years before entry of judgment, Plaintiff-Appellant failed to disclose why the trial court was forced to rely on this affidavit.

The trial court was forced to rely on an affidavit because the Plaintiff-Appellant did not provide credible and reliable testimony or evidence, which began when she was not fully honest with the Davidson County Child Support Enforcement Agency. *See* Exhibit C (the Order), specifically paragraphs 13 and 14 of the Order.

The Court specifically held, "The plaintiff is unable to provide detailed information or reliable testimony or corroborative documents concerning the current reasonable needs of the children for health, education and maintenance." *See* Exhibit C, specifically paragraph 13 of the Order [emphasis added]. The unreliability of the Plaintiff-Appellant was obvious from the beginning, as the caseworker for the Davidson County Child Support Enforcement agency testified, "Sometimes I felt like she

[Plaintiff-Appellant] wasn't giving me all the information." *See* Exhibit D (T. p. 25).

The transcript contains several instances that show the Plaintiff-Appellant's lack of credibility and unwillingness to answer the questions posed. Plaintiff-Appellant claimed in her brief that Plaintiff-Appellant testified that she estimated $500.00 per season for each boy's clothing and a like amount for school supplies. *See* Exhibit D (T. p. 25), and Exhibit E (Appellant Brief, p. 8). However, a closer look at the transcript reveals that this was yet another time that the attorney for child support enforcement attempted to get information from Plaintiff-Appellant, and she refused to directly answer despite his leading attempts to get her to do so. The exchange was:

> Q: Do you buy things on a regular basis, or do you buy it like spring, winter
>
> A: Season. I buy them
>
> Q: Season. Okay. So, you think when you - first season, you spend, like, I don't know, $300 at one time, $500, some amount?
>
> A: $500

See Exhibit F, T. pp. 40-41.[1]

---

[1] Plaintiff-Appellant did reference "probably $500 a year" for something related to school supplies. But she did not

Unlike the claim in Appellant's brief that "she estimated $500.00 per son for each boy's clothing . . .", the actual testimony does not show this per season, or per child - as claimed by Appellant's brief. *Compare* Exhibit F (T. pp. 40-41) and Exhibit E (Appellant Brief, p. 8).

It is clear that the trial court simply believed the testimony of Defendant-Appellee, and did not believe the testimony of Plaintiff-Appellant. There are many instances that provide a factual basis for the finding by the trial court that "The plaintiff is unable to provide detailed information or reliable testimony or corroborative documents concerning the current reasonable needs of the children for health, education and maintenance." *See* Exhibit C, finding 13.

Although Plaintiff-Appellant did not offer competent and reliable evidence regarding the reasonable needs of the children, the trial court was properly tasked with determining those needs, if possible. Therefore, the Trial court went to the court file to examine the sworn affidavit of Plaintiff-Appellant. The trial court, making every effort to make some findings of fact based on information from the Plaintiff-Appellant, found that the 2012 affidavit

---

provide any corroborating documentation, as found by the trial court.

was "comprehensive, reliable" evidence--in fact the only "comprehensive, reliable" evidence--of the children's current reasonable needs and expenses in 2017. *See* Exhibit C, finding 14. No objection was made by Plaintiff-Appellant, at the trial level, to the consideration of this affidavit.

The trial court made assumptions to benefit Plaintiff-Appellant by including a value for electricity, heat, cable and internet, even though Plaintiff-Appellant failed to introduce evidence of these values. Even then, the trial court found that an assertion by Plaintiff-Appellant (in the affidavit) that her water bill was $200.00 per month was "not credible or not reasonable." *See* Exhibit C, finding 14.

In sum, the trial court's Order correctly determined that Plaintiff-Appellant did not provide reliable testimony and evidence. The trial court correctly determined that Plaintiff-Appellant's testimony merely established some payments, but did not assist the Court to determine the needs of the children. By contrast, Defendant-Appellee's testimony was direct, concise and explained his answers thoroughly.

It should be noted that the Plaintiff-Appellant failed to properly argue or properly assign error to the finding by

the trial court that "The plaintiff is unable to provide detailed information or reliable testimony or corroborative documents concerning the current reasonable needs of the children for health, education and maintenance." Therefore, any appellate court would be bound by this finding on appeal.

"Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal." Pascoe v. Pascoe, 183 N.C. App. 648, 651 (2007) *citing* Plott v. Plott, 313 N.C. 63, 69 (1985). Child support orders entered by a trial court are accorded substantial deference by appellate courts and review is limited to a determination of whether there was a clear abuse of discretion. Leary v. Leary, 152 N.C. App. 438, 441 (2002). White v. White, 312 N.C. 770, 777 (1985). "[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." White v. White, 312 N.C. 770, 777 (1985). A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision. . . . Only when the evidence fails to show *any* rational basis for the distribution ordered by the court

will its determination be upset on appeal. Nix v. Nix, 80 N.C. App. 110, 112 (1986).

Findings of fact to which no error is assigned "are presumed to be supported by competent evidence and are binding on appeal." Pascoe v. Pascoe, 183 N.C. App. 648, 650 (2007) *citing* In re A.S., 181 N.C. App. 706, 709 (2007). "Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary." Oliver v. Bynum, 163 N.C. App 166, 169 (2004).

Although Plaintiff-Appellant claims to have a meritorious appeal because of alleged facts that purportedly help Plaintiff-Appellant, the North Carolina appellate courts has previously held in child support cases that when, "the findings of fact are supported by evidence in the record introduced without objection, [these facts] are thus binding on appeal." Byrd v. Byrd, 62 N.C. App. 438, 441 (1983)

"The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." Coble v. Coble, 300 N.C. 708, 712-713 (1980).

Furthermore, "[e]videntiary issues concerning credibility, contradictions, and discrepancies are for the trial court — as the fact-finder — to resolve and, therefore, the trial court's findings of fact are conclusive on appeal if there is competent evidence to support them despite the existence of evidence that might support a contrary finding." Smallwood v. Smallwood, 227 N.C. 319, 322 (2013). The trial court's discretion in domestic matters "is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." Shipman v. Shipman, 357 N.C. 471, 474-475 (2003). Therefore, the trial court correctly determined what was, and was not, competent evidence of the needs of the children provided by the Plaintiff-Appellant. The trial court correctly determined that the Plaintiff-Appellant did not provide competent or reliable evidence. This finding is not contested by Plaintiff-Appellant in the original brief, or the Reply to Defendant-Appellee.

Furthermore, in utilizing the facts to establish child support, there is no set formula for high-income child support cases. Pascoe v. Pascoe, 183 N.C. App. 648, 651 (2007) *citing* N.C. Gen. State 50-13.4(c). Instead, the trial court is required to utilize the facts available to the trial court and determine child support on a case-by-case basis. This case-by-case standard for above-average income cases has been upheld repeatedly." Pascoe v. Pascoe, 183 N.C. App. 648, 651-652 (2007) *citing* Trevillian v. Trevillian, 164 N.C. App. 223, 225 (2004). The only competent facts available were provided by Defendant-Appellee.

CONCLUSION

Therefore, the Court of Appeals correctly dismissed this appeal and denied the conditional Petition for Writ of Certiorari. Further, there is no merit to Plaintiff-Appellant's appeal. Plaintiff-Appellant now claims that the trial court failed to do its job, when the Plaintiff-Appellant failed and refused to provide evidence to allow the trial court to making proper findings of fact. The findings of fact regarding the lack of credible evidence is binding on Plaintiff-Appellant, and there is no merit to

this appeal. Therefore a Writ for Certiorari should not issue.

WHEREFORE, Defendant prays the Court as follows:

1. The Court deny the Petition for Writ of Certiorari.
2. For such other and further relief as the Court may deem just and proper.

This, the 6th day of June, 2019.

Shawn L. Fraley,
Attorney for Defendant-Appellee
Barnes Grimes, Bunce & Fraley
PO Box 476 – 20 South Main Street
Lexington, NC 27293-0476
Telephone (336) 249-9128
Fax (336) 249-9129
shawnfraley@bgbflawoffice.com
NC Bar # 29939

VERIFICATION

Shawn L. Fraley, being duly sworn, deposes and says he has read the above Reply to Plaintiff-Appellant's Petition for Writ of Certiorari; the facts set out therein are true of his own knowledge except those matters and things stated on information and belief, and as to those, he believes it to be true.

Shawn L. Fraley,
Attorney for Defendant-Appellee

Subscribed and sworn to before me this, the 6th day of June, 2019.

Notary Public

Commission expires: 12/01/19

Dana Richardson
NOTARY PUBLIC
Guilford County, North Carolina
My Commission Expires 12/01/19

CERTIFICATE OF SERVICE

The undersigned attorney for the Defendant-Appellee hereby certifies that a copy of the Defendant-Appellee's Motion to Dismiss, filed in this matter on June 6, 2019 was served upon Plaintiff-Appellant's attorney by facsimile on June 6, 2019, prior to 5:00 p.m., directed to the known facsimile number of attorney Mary McCullers Reece at the following number:

919-300-1256

June 6, 2019 was a Thursday, and therefore a regular business day for the undersigned attorney. A transmission verification report was delivered to the facsimile machine at Barnes, Grimes, Bunce & Fraley, PLLC. on June 6, 2019, prior to 5:00 p.m.

A copy of this Motion was further served on Plaintiff-Appellant's attorney via US Mail, postage prepaid, on June 6, 2019, addressed to Plaintiff-Appellant's attorney as follows:

121 S. Third Street
P.O. Box 2747
Smithfield, NC 27577

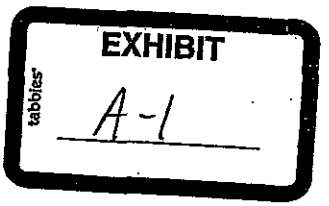
This was further submitted to Plaintiff-Appellant's counsel via email.

Respectfully submitted this, the 6th day of June, 2019

Shawn L. Fraley
Attorney for Defendant-Appellee
Barnes Grimes, Bunce & Fraley
PO Box 476 - 20 South Main Street
Lexington, NC 27293-0476
Telephone (336) 249-9128
Fax (336) 249-9129
shawnfraley@bgbflawoffice.com
NC Bar # 29939

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
12 CVD 257



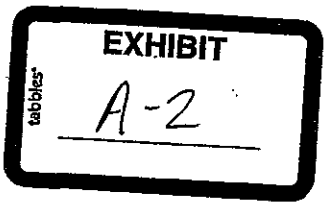
****

ASKALEMARIAM YIGSAW, Plaintiff	)	
	)	NOTICE OF LIMITED
Vs.	)	APPEARANCE
	)	
ALEHEGN ASRES, Defendant	)	

The undersigned gives notice that she is making a limited appearance to represent Plaintiff Askalemariam Yigsaw on direct appeal of the 31 July 2018 order only.

Respectfully submitted, this, the 24th day of August 2018.

Mary McCullers Reece
Attorney for Plaintiff
N.C. State Bar No. 21260
P. O. Box 2747
Smithfield, NC 27577
(919) 300-1249
Maryreece14@gmail.com



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice was served on Defendant, through counsel, by deposit in the United States mail, first-class and postage prepaid to the following address:

Shawn L. Fraley
Post Office Box 476
Lexington, NC 27293

This, the 28 day of August 2018.

Mary McCullers Reece
Attorney for Appellant
N.C. State Bar No. 21260
P. O. Box 2747
Smithfield, NC 27577
(919) 300-1249
Maryreece14@gmail.com

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
12 CVD 257

FILED
2018 AUG 29 P 2:20
DAVIDSON CO. C.S.C.
BY

****

EXHIBIT
tabbies
B

ASKALEMARIAM YIGSAW,
Plaintiff

Vs.

ALEHEGN ASRES,
Defendant

NOTICE OF APPEAL

****

NOTICE OF APPEAL

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS: NOW COMES Plaintiff Askelemariam Yigsaw and pursuant to N.C.R. App. P. 3 and N.C. Gen. Stat. § 7A-27(c), hereby gives Notice of Appeal to the North Carolina Court of Appeals from the child support order entered on 31 July 2018 by the Honorable Wayne L. Michael in the above-captioned file.

This, the 24 day of August 2018.

Askalemariam Yigzaw

Askalemariam Yigsaw,
Plaintiff

EXHIBIT
C

FILED
2018 JUL 31 P
DAVIDSON CO., C.S.C.

FILE NO. 12 CVD 257
IV-D 0006826847

NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISON

ASKALEMARIAM YIGZAW,
Plaintiff

versus

ORDER- CHILD SUPPORT

ALEHEGN ASRES,
Defendant

THIS CAUSE coming on to be heard before the Honorable Wayne L. Michael, Chief District Court Judge presiding over the Davidson County Child Support Term on March 14, 2017; Based upon the arguments of counsel and an examination of the court file, the Court makes the following:

FINDINGS OF FACT:

1. A Consent Memorandum of Judgment/Order was entered into by the parties on July 30, 2013, which dealt with, among other things, child support for the minor children, Dagmawi Asres, born January 31, 2004, and Caleb Asres, born August 18, 2006.

2. A Consent Order was entered in this matter by the Honorable J. Rodwell Penry on February 23, 2015, regarding, among other things, child support as follows:

> "31. As to child support, Defendant-father agrees that he shall continue to abide by the obligations regarding child support and alimony as set forth in the Memorandum of Judgment, filed on July 30, 2013. Child support shall not be modified or modification requested, until at least three (3) years have elapsed after the entry of the July 30, 2013, Order. Defendant may file a child support motion as early as the month of July of 2016 to address modification of child support, to be heard on or after July 30, 2016, if he so desires."

3. Since the entry of the Memorandum of Judgment/Order of July 30, 2013, the parties entered into a Consent Order on February 23, 2015, and were granted the joint legal and physical care, custody and control, by alternating the custody of the children on a 50/50 schedule. On February 20, 2014, Defendant was ordered to pay $ 2000.00 a month into NC Centralized Collections for the support of his minor children.

4. The defendant filed a Motion to Modify Child Support on July 22, 2016, based on the modified custodial arrangement as outlined in the February 23, 2015 Consent Order.

5. Since the entry of the Memorandum of Judgment/Order of July 30, 2013, regarding child support, the plaintiff has graduated from GTCC and has obtained a degree in the nursing field. The plaintiff also has a degree in which she earned while living in Ethiopia.

6. The plaintiff is currently employed by High Point Regional, UNC Health Care, as a registered nurse.

7. The plaintiff also receives monthly rental income.

8. The defendant is a physician with Cornerstone Healthcare in High Point, North Carolina.

9. The defendant also receives monthly income from Moonlight Solutions and from Thomasville Medical Properties.

10. The plaintiff's average monthly income is $6,436.33.

11. The Defendant's average monthly income is $22,276.00.

12. The parties' combined income does not fall within the North Carolina Child Support Guidelines and according to those guidelines, the child support obligation should be calculated based on the current reasonable needs of the minor children considering those factors set forth in NCGS 50-13.4(c).

13. The plaintiff is unable to provide detailed information or reliable testimony or corroborative documents concerning the current reasonable needs of the children for health, education, and maintenance. The plaintiff did testify that the children are involved in activities in addition to school, including soccer, piano lessons, YMCA activities, the Duke University TIP program, and a one-week to Washington, DS for AIG students. The Court finds that the children do in fact participate in all of these activities but the plaintiff was unable to show that she was the one who actually paid for any of these activities, or the actual cost of any of the activities. The Court is unable to determine the current reasonable needs of the children form evidence presented by the plaintiff at this hearing.

14. The only comprehensive reliable evidence presented by the parties as to the current reasonable expenses of the children is plaintiff's affidavit filed January 26, 2012, and received into evidence at this hearing as defendant's Exhibit 1, which placed the children's itemized expenses at $1,172.00 per month, but did not include any "shared" expenses for the operation of the household. Allowing a portion of the electricity, heat, cable and internet, to be apportioned to the children, would place the total reasonable

needs at about $1,500.00 per month (the assertion that the water bill is $200.00 per month is either not credible or not reasonable).

15. Presently, the plaintiff herself has a substantial income in excess of $77,000 per year, and the defendant has a much greater income in excess of $266,000 per year. Either party alone is capable of providing for the reasonable needs of the children without contribution from the other parent.

16. Under the totality of the circumstances in this case, considering that the parents share custody of the children on an equal time basis; that each of the parents is capable of providing for the needs of the children without contribution form the other parent; and that while plaintiff's income is substantial, defendant's income is three times greater; it is reasonable that the defendant pay to the plaintiff the sum of $750.00 per month for child support, and pay the medical insurance and uninsured medical expenses for the children.

17. The court heard testimony from each party, received evidence from each party, and heard arguments from counsel for each party, regarding the current needs of the minor children, and considered the affidavit contained in the court file and the previous court orders.

CONCLUSIONS OF LAW:

A. North Carolina has continuing jurisdiction over the parties and subject matter.

B. Child support should be modified as of July 22, 2016, based on the current needs of the minor children.

C. The combined income of the parties does not fall within the North Carolina Child Support Guidelines.

D. The child support obligation in this matter falls outside of the North Carolina Child Support Guidelines.

BASED UPON THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED THAT:

[1] The defendant's child support obligation is hereby modified in the amount of $750.00 per month, effective August 1, 2016.

[2] The defendant shall receive credit for any payment he has made above and beyond the sum of $750.00 per month as of August 1, 2016.

[3] The amount of overpayment is $27,823.08 as of July 11, 2018.

[4] The defendant presently pays the sum of $923.08 every two (2) weeks by wage withholding. Any overpayment the defendant makes above and beyond his $750.00 child support obligation for the month of June 2018 shall be refunded by North Carolina Child Support Collections to the defendant from his child support payments paid into the North Carolina Child Support Collections for the months of July and August 2018, until paid in full.

[5] The defendant shall receive credit for the overpayment of $27,823.08 as of July 11, 2018, according to the following formula:

[a]. At a rate of $150.00 per month off of his child support obligation beginning June 1, 2018, and until the parties' oldest child, Dagmawi Ares, turns 18 years of age for a total of $6,450.00 (June 1, 2018 until January 31, 2022 for a total of 43 months (43 months x $150.00 per month= $6,450.00). This will reduce his child support to $600.00 per month.

[b]. After the minor child, Dagmawi Asres, turns 18 years of age, (beginning January 31, 2022), the defendant will begin receiving credit at a rate of $500.00 per month from his child support obligation until the minor child, Caleb Asres turns 18 years of age for a total $15,500.00 (January 31, 2022 until August 18, 2024 for a total of 31 months (31 months x $500.00 per month=$15,500.00) of credit. This will reduce his child support obligation to $250.00 per month.

[c] After the child turns 18, the child support obligation of Defendant shall terminate pursuant to statute.

[d]. This will leave an outstanding balance on the arrears. This shall be handled by future orders of the Court after the children have reached majority age, or upon any time that Plaintiff shall seek a modification of this child support obligation.

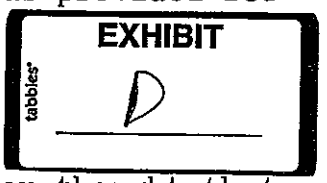
[6] Should Plaintiff be ordered to pay child support to the defendant in the future, any credit remaining for Defendant's overpayment to Plaintiff, shall be added to the Plaintiff's child support obligation to Defendant at that time.

[7] This cause is retained for further orders of this Court.

Entered and signed this the 31st day of July, 2018.

Wayne L. Michael

Honorable Wayne L. Michael,
Chief District Court Judge Presiding



Q. You've asked for information; it was provided for you with no problem?

A. That's correct.

Q. Was there ever a situation where you thought that Dr. Asres was trying to hide information from you from his income or anything like that?

A. No, never.

Q. In fact, even though Dr. Asres was represented by me, who's known to be ornery about things, at some point, I just directed for you and Dr. Asres to have conversation directly about any issues with regard to some things in child support?

A. Correct.

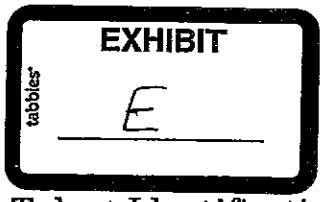
Q. And he was forthcoming with you during that time?

A. Yes, he was.

Q. Okay. Let's turn to Ms. Yigsaw. Is it fair to say that Ms. Yigsaw was not completely truthful and forthcoming with you about information she provided to you?

A. Sometimes I felt like she wasn't giving me all the information.

Q. Well, let's -- let me ask some more specific questions. With regard to the rental income that's been introduced as part of Defendant -- of Plaintiff's Exhibit 1, we talked about the rental income that we've agreed is set at $913.32 a month. That was not always something that



The younger child qualified to attend Duke Talent Identification Programs ("Duke TIP") and made plans to attend a summer session.[2] (T pp 35-36, 48) Ms. Yigzaw sent the Duke TIP paperwork to Dr. Asres. Ultimately, the child was not registered. (T p 48)

On a day-to-day basis, Ms. Yigzaw had paid $140.00 per week for the boys to take guitar and piano lessons, which they desired to continue. The boys were active members of the local YMCA, the membership for which cost $400.00 per year. Each season of soccer cost $180.00, just to join the team. (T p 37)

At the beginning of each school year, Ms. Yigzaw bought each boy three pairs of shoes at a cost of approximately $450.00. (T p 40) She estimated $500.00 per season for each boy's clothing and a like amount for school supplies. (T p 41)

In some areas, Ms. Yigzaw took steps that held down her expenses: during her weeks, unlike the weeks with Dr. Asres, the boys rode the school bus and ate lunches Ms. Yigzaw packed at home. (T pp

---

[2] Summer sessions at Duke TIP typically cost between $4300.00 and $4375.00. https://tip.duke.edu/programs/summer-studies/cost-and-financial-aid.

tabbies F

Nike eyeglasses," and really, they're A students, and I want to encourage them. So my encouragement is like, okay, if you get straight-A next -- if you are on A Honor Roll, I'll buy this. So I buy nice clothes, expensive clothes because I want my kids to keep their standard and to be proud of their parents' jobs. So, I buy shoes like $75 each, and in the school year, I buy them three pairs of shoes at the beginning of the year. They take the shoes to his house, because he's not buying them clothes and shoes. So I don't know the ballpoint money, how much it costs.

Q. Okay. So, shoes, that would be approximately $450 a year.

How much do you think you spend on just jackets? Do you buy them a certain amount of jackets? I know they're young children, so they grow all the time.

Do you have to buy them, like, clothes, like pants and things?

A. I -- I -- you know, I got sale, like, from Macy's, like good store. But I don't pay $100 for a jacket. But I buy -- I like to buy them good jackets, which will cost, like, $50, $60. And those are the things I buy.

Q. Do you buy things on a regular basis, or do you buy it, like spring, winter --

A. Season. I buy them --

Q. Season. Okay. So, you think when you -- first

season, you spend, like, I don't know, $300 at one time, $500, some amount?

A. $500.

MR. FRALEY: Your Honor, I do have to object to some of the leading.

THE COURT: Sustained.

Q. So, besides clothing, are there any educational needs, as far as school?

A. Yeah, I buy their school supplies every year. He doesn't help me. And I have, like, some of the receipts on that.

Q. Approximately how much is that?

A. For example, in one time -- in one market just for supplies at the beginning of the school, half of the supplies were $128.87. But they use more stuff, the way they grow, and like, in different grades. Like, my seventh grader uses more stuff than my fifth grade one. While I spend their school supplies, like, I have one more receipt here. And probably $500 a year.

Q. And does he provide any school supplies?

A. Not that I know of. They come and ask me everything, because they are scared of him. He -- they don't ask, like --

MR. FRALEY: Your Honor, I object to **[indiscernible]**.

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Fax: (919) 831-3615
Web: https://www.nccourts.gov

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

From Davidson
(12CVD257)

No. 19-12

ASKALEMARIAM YIGZAW,
Plaintiff,

v.

ALEHEGN ASRES,
Defendant.

ORDER

The following order was entered:

The motion filed in this cause on the 15th of January 2019 and designated 'Defendant-Appellee's Motion to Dismiss' is allowed. Appeal dismissed. Plaintiff-Appellant to pay costs.

And it is considered and adjudged further, that the Plaintiff-Appellant, Askalemariam Yigzaw, do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty Six Dollars and 25/100 ($56.25), and execution issue therefor.

By order of the Court this the 13th of May 2019.

WITNESS my hand and official seal this the 13th day of May 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Ms. Mary McCullers Reece, Attorney at Law, For Yigzaw, Askalemariam
Mr. Shawn L. Fraley, Attorney at Law, For Asres, Alehegn
Hon. Brian L. Shipwash, Clerk of District Court

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Fax: (919) 831-3615
Web: https://www.nccourts.gov

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. 19-12

ASKALEMARIAM YIGZAW,
Plaintiff,

v.

ALEHEGN ASRES,
Defendant.

From Davidson
(12CVD257)

ORDER

The following order was entered:

The petition filed in this cause on the 16th of January 2019 and designated 'Petition for Writ of Certiorari' is denied.

By order of the Court this the 13th of May 2019.

The above order is therefore certified to the Clerk of the District Court, Davidson County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 13th day of May 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Ms. Mary McCullers Reece, Attorney at Law, For Yigzaw, Askalemariam
Mr. Shawn L. Fraley, Attorney at Law, For Asres, Alehegn
Hon. Brian L. Shipwash, Clerk of District Court