

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-742

Filed: 7 April 2015

Greene County, No. 11 CVD 147

CHARLES DANIEL ROBBINS, Plaintiff,

v.

KAREN THOMAS ROBBINS, Defendant.

Appeal by defendant from order entered 8 January 2014 by Judge Tim Finan in Greene County District Court. Heard in the Court of Appeals 18 November 2014.

Garrens, Foster & Sargeant, P.A., by Jonathon L. Sargeant, for plaintiff.

W. Gregory Duke for defendant.

McCULLOUGH, Judge.

Defendant appeals from an equitable distribution order entered 8 January 2014. Based on the reasons stated herein, we affirm in part, and reverse and remand in part, the order of the trial court.

I. Background

On 31 May 2011, plaintiff Charles Daniel Robbins filed a complaint against defendant Karen Thomas Robbins for equitable distribution and interim equitable distribution. Plaintiff and defendant were married on 1 June 1987 and separated on or about 5 February 2011. Plaintiff argued that it would be equitable for plaintiff to

Opinion of the Court

receive more than fifty percent of the marital property. Plaintiff alleged that after the parties' separation, the parties' marital residence had been damaged by recent storms in Greene County. Plaintiff further alleged that defendant had filed claims with the parties' insurance carrier for said damage and "is not using said insurance proceeds to repair the marital property of the parties and is spending said funds for her personal gain." Plaintiff argued that the trial court should require defendant to provide an accounting for insurance proceeds received and spent by plaintiff.

On 8 August 2011, defendant filed an answer and counterclaims for post-separation support and alimony, equitable distribution, and attorneys' fees.

Following a hearing held on 5 July 2011, the trial court entered an order for interim equitable distribution on 6 September 2011. The trial court found that defendant was in sole possession of the marital residence, that storms had damaged the marital residence, and that defendant had filed claims with the insurance carrier for the damages. Based upon the foregoing, the trial court ordered the following:

1. That within sixty (60) days from today, July 5, 2011, the defendant, Karen Thomas Robbins, shall provide a written accounting to counsel for plaintiff with documents showing the following:
 - a. All insurance claims of any kind made with regard to the marital residence or any personal property of either party from January 1, 2011 to the present;
 - b. All insurance proceeds received by the defendant, including the amount and date received;
 - c. All insurance proceeds dispersed [sic] or spent for any reason prior to July 5, 2011 including a

Opinion of the Court

specific list of items or services purchased; and

d. The current balance of all insurance proceeds which are being held by the defendant pursuant to this order.

2. That effective July 5, 2011, the defendant, Karen Thomas Robbins, be and the same is hereby restrained and enjoined from trading, spending or otherwise transferring any insurance proceeds in her possession or control until further order of the Court.

On 13 August 2012, plaintiff filed a motion for contempt against defendant arguing that although defendant had the ability to comply with the 6 September 2011 order for interim equitable distribution, she had wrongfully, willfully, and intentionally failed and refused to do so. Plaintiff asserted that:

a. The defendant failed to produce any documents or records by the court ordered deadline of September 3, 2011;

b. On or about February 14, 2012, the defendant produced several documents to counsel for plaintiff which included statements handwritten by various persons which were dated in November of 2011. Said documents failed to comply with the Order of the Court in that the documents:

1. Did not include any documents showing the amount of insurance proceeds received;

2. Did not include the dates insurance proceeds were received;

3. Did not include the dates any insurance proceeds were dispersed [sic];

4. Did not include any detailed itemization of the items or services purchased with the insurance money; and

5. Did not include any contact information which would allow counsel for plaintiff to verify any of the information provided.

Opinion of the Court

c. In open court on June 12, 2012, the defendant produced an additional insurance document.

Plaintiff also prayed that the court order defendant to pay plaintiff's attorneys' fees.

On 7 September 2012, the trial court entered a civil contempt order against defendant. The trial court found that defendant had failed to produce any documents or records by the court ordered deadline of 3 September 2011 and that the information produced by defendant was incomplete, late, and not in compliance with the trial court's 6 September 2011 order. The trial court also found that defendant suffered from severe anxiety, clinical depression, multiple seizures, and short-term memory loss. After considering defendant's medical condition and current medications, the trial court concluded that defendant should be given a means to purge herself of contempt and ordered that she could purge herself by fully complying with the 6 September 2011 order on or before 14 September 2012 by filing the required information with the Clerk of Court of Greene County and serving a copy on plaintiff's counsel; coming to the office of the Clerk of Court of Greene County on 7 September 2012 to be served with the civil contempt order by acceptance or by a sheriff's deputy; and, paying plaintiff's attorneys' fees in the amount of \$1,25.00 by 1 December 2012.

Following hearings held during the 9 January 2013 and 6 February 2013 terms of Greene County District Civil Court, the trial court entered an equitable distribution order on 25 February 2013. The trial court noted that although defendant was present at the 9 January 2013 hearing, she was not present and not

Opinion of the Court

represented by counsel at the 6 February 2013 hearing. Nevertheless, the trial court completed the equitable distribution hearing and found that an equal distribution of the net marital estate was not equitable in the parties' case based on defendant's neglect of the marital residence. Plaintiff was awarded more than one-half of the net marital estate. The marital residence was awarded to plaintiff and defendant was ordered to vacate the marital residence within thirty days of the filing of the order.

On 8 March 2013, defendant filed a motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Defendant argued that she missed the 6 February 2013 equitable distribution hearing based on a medical illness.

On 8 May 2013, the trial court entered an order setting aside the 25 February 2013 equitable distribution order and allowing defendant an opportunity to complete the presentation of her evidence. The equitable distribution hearing was completed on 18 November 2013.

On 8 January 2014, the trial court entered an equitable distribution order making the following pertinent findings of fact:

15. Following the parties' separation, the house was damaged by a tornado on April 16, 2011. Homeowners insurance was in effect on April 16, 2011, paid for by the defendant, when a tornado damaged the marital residence of the parties. This insurance coverage was paid for by the Defendant and the proceeds checks were made payable to the Defendant. As a result of the tornado, the homeowners' insurance company, Nationwide Insurance Company, paid the Defendant several claim installments which totaled \$16,572.00.

Opinion of the Court

....

17. With regard to the Insurance Proceeds, the court finds that said insurance proceeds were paid for damages to a marital asset that being the marital residence located at 571 Central Drive in Snow Hill, North Carolina. The parties purchased and owned this asset jointly during the marriage, and both parties have an equitable interest in the insurance proceeds from the damage to this asset. As such, the court finds that the Insurance Proceeds received by the defendant for the damages to the marital residence are classified as marital property and should be divided by the court in Equitable Distribution.

....

19. In her testimony to this court on November 18, 2013 and November 19, 2013, the defendant admitted under oath that she had violated the July 5, 2011 Order of the Court as follows:

- a. The defendant was not truthful in her previous accounting to the court in that the defendant paid \$900.00 to Henry Manning from the insurance proceeds which was not listed in her accounting to the court;
- b. The defendant was not truthful in her previous accounting to the court in that the defendant paid money from the insurance proceeds to four (4) other individuals who were not listed in her accounting to the court;
- c. The defendant was not truthful in her previous accounting to the court in that the defendant calculated the total cost of materials which were allegedly purchased with the insurance proceeds by simply deducting the cost of labor from the total amount of the insurance proceeds and assuming that the remaining amount was spent entirely for materials;
- d. The defendant spent and dispersed [sic] insurance proceeds after July 5, 2011 when she was under the

Opinion of the Court

Order of this court not to spend or disperse [sic] insurance proceeds. The defendant presented multiple receipts for materials into evidence which are dated after July 5, 2011, and the defendant specifically testified that she paid multiple individuals for labor and repairs to the marital residence with insurance money after July 5, 2011 and without the permission of the court.

....

21. The failure of the defendant to comply with the July 5, 2011 Order of the Court has created an [sic] number of problems for the court in attempting to determine which repairs to the marital residence were made with the insurance proceeds. In addition, due to the defendant's failure to comply with the July 5, 2011 court order, the plaintiff was not involved in any decision making with regard to the repairs to the marital residence and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.

....

23. Mr. Outlaw [(qualified appraiser)] visited the property on April 3, 2012 and found the property to be in need of a roof replacement, floor covering, drywall repair, as well as subfloor and ceiling repair from water damage.

24. All these issues were observed by Mr. Outlaw on April 3, 2012 after the defendant had supposedly already used the insurance proceeds to make repairs to the residence.

....

28. With regard to the marital residence located at 571 Central Drive in Snow Hill, North Carolina, the Court

Opinion of the Court

finds that while the defendant has made cosmetic repairs to the marital residence – new Pergo flooring, painting walls and ceilings, new carpet, new bathtub, new toilet and changing locks, the only structural repairs to the property were made to repair certain floors and only to patch, and not replace, a hole in the roof.

29. The defendant made the unilateral decision not to replace the entire roof of the structure which was the primary purpose of the insurance proceeds.

30. The decisions of the defendant as to what repairs to make to the property were further complicated by the defendant's total and complete lack of maintaining any records of the work conducted and the fact that the defendant extensively co-mingled the insurance proceeds with her personal funds.

31. Even after the court's order of July 5, 2011, the defendant continued to pay all expenses in cash and maintained no records to be reviewed by the Court.

....

37. In determining whether an equal division by using the net value of all marital property would be equitable in this case, the plaintiff presented several factors which the Court finds to be as follows:

a. Under section 50-20(c)(9), the liquid or non-liquid character of the marital estate, the Court finds that the major asset in this matter, the marital residence is non-liquid in nature and due to its present condition can not be sold or liquidated without substantial work and improvements;

b. Under section 50-20(c)(11a), acts of either party to maintain or preserve marital property, the Court finds that the plaintiff paid marital debts to Spring Leaf Financial, North Carolina Department of Revenue and Greene County Property Taxes

Opinion of the Court

which preserved the marital residence during the period of separation.

c. Under section 50-20(c)(11a), acts of either party to waste, neglect or devalue marital property, the Court finds that the defendant failed to provide a complete and detailed accounting for all insurance proceeds received on the marital residence as ordered by the Court multiple times, and during the separation of the parties the defendant failed to properly maintain and repair the marital residence of the parties at 571 Central Drive in Snow Hill, North Carolina such that the value of the marital residence has decreased substantially from the date of separation to the date of trial. The Court finds that the defendant has not provided sufficient evidence to find that the insurance proceeds issued for storm damage to the marital residence were actually spent on the marital residence. The defendant has neglected the maintenance of the marital residence during the period of separation to the detriment of the plaintiff and the marital estate.

...

38. In considering the distributional factors set forth above, the Court puts substantial weight on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence and finds that an equal distribution of the net marital estate is not equitable in this case, and that it would be equitable for the plaintiff to receive more than one-half of the net marital estate.

In making an unequal distribution, the trial court awarded plaintiff, among other things, the marital residence. Defendant appeals.

II. Standard of Review

[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was

Opinion of the Court

competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citations omitted). “Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties’ marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.” *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations and quotation marks omitted).

III. Discussion

On appeal, defendant argues that the trial court erred by (A) entering findings of fact numbers 17, 19, 21, 28, and 29; (B) making an unequal distribution of the parties’ marital property, marital debt, and divisible property in favor of plaintiff; and, (C) distributing the marital residence to plaintiff.

A. Findings of Fact

1. Classification of Insurance Proceeds

In her first issue on appeal, defendant argues that the trial court erred by entering findings of fact numbers 17, 19, 21, 28, and 29, where there was no competent evidence in the record to support these findings.

Finding of fact number 17 provides as follows:

With regard to the Insurance Proceeds, the court finds that said insurance proceeds were paid for damages to a marital asset that being the marital residence located at 571

Opinion of the Court

Central Drive in Snow Hill, North Carolina. The parties purchased and owned this asset jointly during the marriage, and both parties have an equitable interest in the insurance proceeds from the damage to this asset. As such, the court finds that the Insurance Proceeds received by the defendant for the damages to the marital residence are classified as marital property and should be divided by the court in Equitable Distribution.

In conducting an equitable distribution hearing, the trial court goes through a three-step process: “(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner.” *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 421, 606 S.E.2d 164, 170 (2004) (citation omitted). “Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law.” *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993).

N.C. Gen. Stat. § 50-20 defines “marital property” as

all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection.

N.C. Gen. Stat. § 50-20(b)(1) (2014). “Separate property” is defined as “all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage.” N.C. Gen. Stat. § 50-20(b)(2) (2014). Our Courts have stated that “[v]esting is crucial in distinguishing

Opinion of the Court

between marital and separate property under N.C.G.S. §§ 50-20(b)(1) and (2).” *Boger v. Boger*, 103 N.C. App. 340, 344, 405 S.E.2d 591, 593 (1991).

Plaintiff relies on our holdings in *Locklear v. Locklear*, 92 N.C. App. 299, 374 S.E.2d 406 (1988), and *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), for his contention that the trial court was correct in its determination that the homeowner’s insurance proceeds received by defendant qualify as marital property.

In *Locklear*, the parties moved into a house owned by the husband’s parents after they married. The parties did not sign a lease nor did they pay rent. Nonetheless, the parties made substantial improvements to the home while they lived there. All improvements were made prior to separation, using marital funds. *Locklear*, 92 N.C. App. at 302-303, 374 S.E.2d at 408. Two homeowners’ insurance policies covered the house and improvements. After the parties separated, a fire completely destroyed the house. *Id.* at 303, 374 S.E.2d at 408. The issue before our Court was whether the trial court properly classified the portion of the insurance proceeds, representing the home improvements, as marital property. *Id.* The husband argued that since his mother was the owner of the house, the insurance belonged solely to her and could not be classified as marital property. Our Court disagreed. *Id.* at 304, 374 S.E.2d at 409. Our Court noted that the parties had expended marital funds in making the home improvements, and that each time the parties improved the property, the marital estate was depleted. Therefore, the

Opinion of the Court

insurance proceeds represented “an economic loss to the marital estate – the value of the improvements made to the marital residence.” *Id.* Our Court held that the home improvements were an asset acquired by the parties during their marriage and that the wife was entitled to her equitable share of that asset. *Id.* at 305, 374 S.E.2d at 409.

In *Johnson*, the husband was involved in a serious motorcycle accident during the parties’ marriage. *Johnson*, 317 N.C. at 440, 346 S.E.2d at 432. After the parties separated, the husband received a settlement for his personal injury claim in the amount of \$95,000. *Id.* The trial court concluded that the settlement was the husband’s separate property and the wife appealed. *Id.* Our Court adopted the “analytic” approach to the resolution of this case, which “asks what the award was intended to replace.” *Id.* at 446, 346 S.E.2d at 435.

Those courts which employ the analytic approach consistently hold that the portion of an award representing compensation for non-economic loss – i.e. personal suffering and disability – is the separate property of the injured spouse; the portion of an award representing compensation for economic loss – i.e. lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds – is marital property.

Id. at 447-48, 346 S.E.2d at 436. Our Court held that because the record was devoid of any evidence as to what elements of recovery were represented by the \$95,000 settlement, we remanded the matter to the trial court for further proceedings in order

Opinion of the Court

to determine what components were represented by the settlement. *Id.* at 453, 346 S.E.2d at 439.

After thoughtful review, we find the facts of the present case distinguishable from the circumstances found in both *Locklear* and *Johnson*. The *Locklear* case dealt with equitable distribution of active appreciation of non-owned real property during the parties' marriage, while in the case *sub judice*, we are dealing with insurance proceeds representing damage to the parties' marital asset, their marital residence. Unlike in *Locklear*, the parties' homeowner's insurance policy of the present case ended after the date of separation. Thereafter, defendant procured a new homeowner's insurance policy on the marital residence in her sole name and with her separate funds. In regards to the *Johnson* case, the husband's motorcycle accident occurred during the parties' marriage while the tornado that occurred in the present case took place after the parties had separated.

Rather, we find our holding in *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988), to be instructive. In *Foster*, the parties had two children during the marriage. The husband purchased insurance policies on the life of each child and paid the premiums on the policies from his earnings. After the parties separated, their son died and \$20,000 in proceeds from the insurance policy were paid and held in a trust account. The trial court held that the \$20,000 in death benefits were the separate property of the husband and the wife appealed. Our Court noted that

Opinion of the Court

pursuant to N.C. Gen. Stat. § 50-20(b)(1), “in order for property to be considered marital property it must be ‘acquired’ before the date of separation and must be ‘owned’ at the date of separation.” *Id.* at 267, 368 S.E.2d at 27.

[A]t the time of [the parties’] separation there were no vested rights under the insurance policy on the life of [the parties’ son]. The rights only vested at the death of [the parties’ son], and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with plaintiff’s assets, and therefore the proceeds from the insurance policy were separate property of plaintiff.

Id. at 268, 368 S.E.2d at 28.

Similarly, in the present case, there were no vested rights under the homeowner’s insurance policy on the marital residence. The parties’ homeowner’s insurance policy lapsed subsequent to their separation. Defendant took out a new homeowner’s insurance policy on the marital residence in her sole name. It was only after separation that the rights under the homeowner’s insurance policy vested after a tornado damaged the marital residence. There was no evidence that defendant used marital funds to pay the insurance premiums. Because the premiums on the policy were paid with defendant’s assets, the proceeds from the homeowner’s insurance policy were the separate property of defendant. Based on the foregoing, we hold that the trial court erred by concluding that the insurance proceeds received by

Opinion of the Court

defendant for damage to the marital residence were marital property and concluding that it should be divided by the court in equitable distribution. Accordingly, we reverse and remand this case to the trial court with instructions to properly classify the proceeds of the homeowner's insurance on the marital residence as the separate property of defendant and to enter a new equitable distribution order reflecting this classification. We also note that the insurance proceeds were defendant's separate property which has now been invested in the marital residence which was distributed to plaintiff. The trial court must also consider on remand that if the marital home is ultimately distributed to plaintiff, he must also be required to reimburse defendant for this separate property.

Although we remand to the trial court to enter a new equitable distribution order, we also address defendant's other issues which are relevant to the trial court's consideration on remand.

2. Use of Insurance Proceeds

Next, defendant argues that there was no competent evidence in the record to support finding of fact number 19, which provides as follows:

19. In her testimony to this court on November 18, 2013 and November 19, 2013, the defendant admitted under oath that she had violated the July 5, 2011 Order of the Court as follows:

a. The defendant was not truthful in her previous accounting to the court in that the defendant paid \$900.00 to Henry Manning from the insurance proceeds

Opinion of the Court

- which was not listed in her accounting to the court;
- b. The defendant was not truthful in her previous accounting to the court in that the defendant paid money from the insurance proceeds to four (4) other individuals who were not listed in her accounting to the court;
- c. The defendant was not truthful in her previous accounting to the court in that the defendant calculated the total cost of materials which were allegedly purchased with the insurance proceeds by simply deducting the cost of labor from the total amount of the insurance proceeds and assuming that the remaining amount was spent entirely for materials;
- d. The defendant spent and dispersed [sic] insurance proceeds after July 5, 2011 when she was under the Order of this court not to spend or disperse [sic] insurance proceeds. The defendant presented multiple receipts for materials into evidence which are dated after July 5, 2011, and the defendant specifically testified that she paid multiple individuals for labor and repairs to the marital residence with insurance money after July 5, 2011 and without the permission of the court.

In regards to subsection (a) and (b) of finding of fact number 19, on 14 February 2012, defendant submitted an accounting to the trial court of how and to whom the homeowner's insurance proceeds were paid. At trial, however, defendant testified that she paid several individuals that were not listed in her accounting to the court. Defendant testified that she paid Henry Manning \$900.00 and paid "Cecil" \$125.00. Further, defendant testified that she paid "Jason," who was listed in her accounting, an "extra \$150[.00]." Based on the foregoing, we hold that subsection (a) was supported by competent evidence, while subsection (b) was not. There was no

Opinion of the Court

competent evidence in the record that defendant paid money from the insurance proceeds to four individuals who were not listed in her accounting to the court.

Concerning subsection (c), we find competent record evidence to support the trial court's finding. Defendant testified to the following:

Q. And you listed on your accounting for insurance proceeds \$2,726 worth of materials?

A. That's I believe about -- I mean I didn't keep up with it. My main thing was to get that house livable.

Q. Well, how did you come up with that figure \$2,726?

A. Because of what I had to give -- what I had give [sic] Henry roughly. It was a rough estimate.

....

Q. Isn't it true, ma'am, that when you did this, you added up the numbers of what you paid these other people and then you just subtracted that from the total and put down the difference as what you must have spent on materials?

A. Yeah, probably.

In regards to subsection (d), defendant admitted paying multiple individuals after the 5 July 2011 Order by the trial court. Defendant also submitted multiple receipts for materials in defendant's exhibit number 30 which are dated after 5 July 2011. Thus, we find subsection (d) to be supported by competent evidence.

Next, defendant challenges finding of fact number 21, which provides as follows:

21. The failure of the defendant to comply with the July 5, 2011 Order of the Court has created an [sic] number of problems for the court in attempting to determine which

Opinion of the Court

repairs to the marital residence were made with the insurance proceeds. In addition, due to the defendant's failure to comply with the July 5, 2011 court order, the plaintiff was not involved in any decision making with regard to the repairs to the marital residence and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.

There is competent evidence in the record to support some portions of this finding, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. All of the conclusions of the order on appeal were premised upon the mistaken determination that the insurance proceeds were marital property, when in fact they were defendant's separate property. For example, the trial court might consider defendant's failure to consult plaintiff regarding repair decisions differently, despite the interim distribution order, since she was both residing in the home and spending her separate funds on the repairs.

It is true that at least some of the evidence in the record reveals that the insurance company paid the defendant's insurance claim primarily to repair the damage to the roof and exterior of the house. Instead, defendant testified that she "used the money to try to fix things like the hot water heater, the rotten floors." Defendant also testified as follows:

Q. So, the bottom line here is they paid you to replace the roof but you chose to use it for other items, isn't that right? Interior items that were not covered by the

Opinion of the Court

insurance.

A. Yes, because I was scared if they walked in the door, that it would be -- they would condemn the home. And the roof was fixed at that point and then the money was used to fix the other items.

Q. The insurance company didn't give you any money to replace your rotten floors, did they?

A. No, but they gave me the check and I chose to use it in the best manner that I knew how and in the best manner for [sic] to save the home.

Q. And the insurance company didn't pay you to replace your hot water heater, did they?

A. No, they didn't.

Both defendant and plaintiff testified that defendant did not consult with plaintiff on how to spend the insurance proceeds.

But one particularly salient portion of this finding is not supported by the evidence because there was no evidence regarding the current value of the marital home. Specifically, the trial court found that defendant's actions had a "substantial impact on the date of separation and current value of the property." Yet the sole appraisal in evidence addressed *only* the date of separation value of the home, and based on both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then. For example, plaintiff admitted that when he moved out of the home, there was already substantial water damage to several areas of the floor in several rooms; the refrigerator had been moved because of water damage to the floor under the refrigerator; the HVAC was not working; the carpet was in bad shape; and that the hot water heater had been nonoperational for about a year before

Opinion of the Court

he left. In fact, he admitted that they had to boil water on the stove to get hot water for a bath. He also testified that he had removed the toilet from the master bathroom about a year before he left because it overflowed and “completely soaked” the floors in the bedroom and bathroom with over an inch of water. He did not ever replace the master bath toilet. He had not repaired these things when he was living there because he had been unemployed for about two years before he left. The appraiser never saw the home until 3 April 2012, about a year after the date of separation, and based his appraisal upon the condition of the home as reported to him, and he noted that the home was in poor condition even before the storm damage.

Mr. Herbert Outlaw, an appraiser, inspected the marital residence on 3 April 2012. Mr. Outlaw concluded in his appraisal report that

The subject is in poor condition and in need of repair in order to be habitable or marketable. . . . These needed repairs include: roof repair or replacement, floor covering, drywall repair, interior painting, hvac system replacement, subfloor and ceiling repair from water damage, replacement of fixtures, vinyl repair, etc. This list is meant to provide an example of needed repairs, not to be an exhaustive list. . . . Given the condition of the property, there are two feasible methods to estimate value. First, one could locate properties that were in a similar condition. This might include foreclosure properties, which would be in disrepair. . . . The other is to take similar properties in repaired condition, deduct the cost of repair and the expected profit of the investor.

. . . .

These methods combined show an adjusted value range

Opinion of the Court

from approximately \$49,000 to 70,000.

Based upon the trial court's findings, it appears that the court found that the value of the house was the same on the date of separation as on the date of distribution, but that it might have been increased if defendant had used the insurance proceeds in a different way. Actually, there was no evidence of the value of the home on any date other than the date of separation. The trial court also made "conclusions of law" regarding the value of the marital home as follows:

8. The Court finds that Mr. Outlaw's appraised fair market value of \$60,000 as of the date of separation is fair and accurate in this matter.

9. These decisions by the defendant resulted in the marital residence having numerous cosmetic changes which have not substantially *increased* the value of the property.

....

12. The defendant by her own intentional or grossly negligent actions has made it impossible for the court to review and determine whether the insurance proceeds were, in fact, used to improve the marital home and whether the improvements themselves ever *added* any value to the marital home.

(emphasis added).

The trial court specifically did not find any actual diminution in value, nor was there evidence of a decreased value of the home after the date of separation or as of the date of trial. Apparently, the trial court assumed that the house could have

Opinion of the Court

increased in value after the date of separation if defendant had made different repairs to the home, but there was no evidence and no findings of fact as to how particular repairs would have changed the value of the property. In any event, it is undisputed that the home was not in marketable, and barely livable, condition as of the date of separation, even considering only the lack of operational heating or air conditioning, a water heater, and a missing toilet in the master bathroom. Nor was there any evidence of the value of the home on any date except the date of separation.

Based on the abovementioned evidence, we reverse the final portion of the trial court's finding of fact number 21 which states that "and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property." The rest of finding of fact number 21 is supported by the record, although the relevance of the finding may be questionable.

Defendant also challenges finding of fact number 28, which states the following:

28. With regard to the marital residence located at 571 Central Drive in Snow Hill, North Carolina, the Court finds that while the defendant has made cosmetic repairs to the marital residence – new Pergo flooring, painting walls and ceilings, new carpet, new bathtub, new toilet and changing locks, the only structural repairs to the property were made to repair certain floors and only to patch, and not replace, a hole in the roof.

Opinion of the Court

We find that this finding of fact is supported by competent record evidence. First, the record demonstrates that defendant made the following cosmetic repairs to the residence: yard clean up; carpet removal and replacement; Pergo flooring for the dining room and hallway; painting walls and ceilings; replacing the toilet; replacing the bathtub; changing locks. In addition, defendant testified at trial that she used the insurance proceeds to fix the “rotten floors.” Defendant did not replace the roof, but repaired the roof by getting new shingles in the places where a tree broke through the roof of the marital residence. Thus, we uphold the trial court’s finding that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof. But again, on remand, the trial court should consider these repairs as defendant’s use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds.

Lastly, defendant challenges finding of fact number 29 which provides that “defendant made the unilateral decision not to replace the entire roof of the structure which was the primary purpose of the insurance proceeds.” This finding of fact is supported by the testimony of defendant herself. Defendant testified that although the purpose of the insurance proceeds was to replace the roof, she made the decision to use the proceeds for other purposes without consulting with plaintiff.

In conclusion, while we affirm portions of the trial court’s findings of fact numbers 19(a), (c), (d) and 21, 28, and 29, we find no competent evidence in the record

Opinion of the Court

to support finding of fact 19(b). We also hold that the trial court erred by concluding, in finding of fact number 17, that the homeowner's insurance proceeds were marital property, rather than the separate property of defendant, and dividing it in equitable distribution. Therefore, we reverse and remand this case to the trial court to enter a new equitable distribution order consistent with this opinion.

B. Distributional Factors

Defendant next argues that “the trial court erred in making an unequal distribution of the parties’ marital property, marital debt, and divisible property in favor of plaintiff.” Defendant contends that

the trial court's basis for making an unequal distribution, in essence, boils down to its findings that Defendant didn't properly spend, or account for, the insurance proceeds derived from the tornado which damaged the house in April of 2011, that Defendant neglected the residence, and that the residence was worth less on the date of the hearing than when the parties separated in February 2011.

As noted above, the trial court made a number of findings regarding the defendant's failure to comply with the court's 6 September 2011 order for interim distribution requiring defendant to account for her use of the insurance proceeds, which treated these proceeds as marital property, thus subject to interim distribution. Defendant has not appealed from the interim distribution order, nor from the later order holding her in contempt of that order, so we cannot review these on appeal, and they have no direct effect on the order of equitable distribution.

Opinion of the Court

However, the trial court made numerous findings of fact regarding defendant's failure to account for her use of these funds and concluded that:

16. In considering the distributional factors set forth above, the Court puts *substantial weight* on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence and finds that an equal distribution of the net marital estate is not equitable in this case, and that it would be equitable for the plaintiff to receive more than one-half of the net marital estate.

(emphasis added).

But the insurance proceeds were defendant's separate property which was not subject to interim distribution or equitable distribution by the trial court, so on remand the trial court must reconsider the distributional factors, in light of the fact that the insurance proceeds were defendant's separate property. The fact that she did use the funds for repairs may actually be a distributional factor in her favor.

Although the trial court considered several distributional factors, as discussed above, finding of fact number 38 notes that the trial court "put[] *substantial weight* on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence." (emphasis added). We have already determined that this and related findings were based upon the erroneous classification of the insurance proceeds as marital property when it was actually defendant's separate property. We must therefore reverse the unequal distribution in favor of plaintiff. We also note that

Opinion of the Court

[t]he trial court must . . . make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50–20(c) (2001) on which the parties offered evidence.” *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003) (citing *Rosario v. Rosario*, 139 N.C. App. 258, 260–61, 533 S.E.2d 274, 275–76 (2000)). A blanket statement that the trial court considered or gave “due regard” to the distributional factors listed in N.C. Gen. Stat. § 50-20(c) is insufficient as a matter of law. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

Peltzer v. Peltzer, __ N.C. App __, __, 732 S.E.2d 357, 360 (2012).

Although the weight given to any factor is in the trial court’s discretion, it is apparent that the trial court did not make findings on all of the distributional factors upon which evidence was presented. One example is the evidence of defendant’s medical problems. In fact, in the contempt order, the trial court earlier found that defendant suffered from “severe anxiety, clinical depression, multiple seizures and short-term memory loss[,]” and evidence was presented about these issues at the equitable distribution trial also, but the trial court did not make any findings of fact regarding the distributional factor of the “physical and mental health of both parties.” N.C. Gen. Stat. § 50-20(c)(3). On remand, the trial court should make findings of fact upon all of the distributional factors upon which evidence was presented and shall reconsider the distributional factors in a manner consistent with this opinion.

C. Distribution of Marital Residence

Defendant’s third argument is that the trial court erred in distributing the parties’ former marital residence to plaintiff. Based upon the disposition of issues (A)

Opinion of the Court

and (B), we need not discuss this in detail, as on remand the trial court must reconsider the entire distributional scheme. But since a new distribution order must be entered, there will be a new date of distribution. In addition, plaintiff has presumably been residing in the home based upon the trial court's order, and the condition of the home may have changed. On remand the trial court shall, if requested by either party, consider additional evidence and arguments regarding changes in the condition or value of the marital home since the date of the last trial and distributional factors since the date of the last trial or evidence relevant to the issues to be considered on remand arising after the last trial. However, the parties should not be permitted a "second bite at the apple" by presenting new evidence or argument as to the classification or valuation of marital or divisible property or debts up to 19 November 2013, the final day of the equitable distribution trial; the trial court should rely on the existing record to make its findings and conclusions on remand consistent with this opinion except as to evidence arising after 19 November 2013.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and STROUD concur.