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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1125

Filed: 15 May 2018

Buncombe County, No. 09 CVD 4748

CHARLES JEFFREY HILL, Plaintiff,

v.

DAWN S. HILL, Defendant.

Appeal by defendant from judgment entered 3 April 2017 by Judge Julie Kepple in Buncombe County District Court. Heard in the Court of Appeals 4 April 2018.

Mary Elizabeth Arrowood for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, for defendant-appellant.

ARROWOOD, Judge.

Dawn S. Hill ("defendant") appeals from judgment ordering the equitable division of the martial estate that she shares with Charles Jeffrey Hill ("plaintiff"). For the reasons stated herein, we affirm the judgment.

I. Background

On 19 August 2009, plaintiff filed a complaint for custody of his and defendant's two children, and equitable distribution of their marital property. Defendant answered and counterclaimed for child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. On 18 February 2010, a temporary custody order was entered. On 19 February 2010, an order for temporary child support and post-separation support was entered. On 5 March 2012, the trial court entered its judgment on equitable distribution. Plaintiff appealed the equitable distribution order. Thereafter, an order for permanent child support was filed on 24 May 2012.

This Court considered plaintiff's appeal from the 5 March 2012 equitable distribution judgment in *Hill v. Hill* ("*Hill I*"), 229 N.C. App. 511, 748 S.E.2d 352 (2013). In *Hill I,* we vacated portions of the judgment and remanded the matter to the trial court because the trial court "erred in failing to classify property, in the valuation of property, and in considering a distributional factor that was based on an erroneous finding." *Hill I,* 229 N.C. App. at 513, 748 S.E.2d at 355.

Pursuant to our remand, the trial court heard this matter on 25 June 2014, and entered an amended equitable distribution judgment on 11 September 2014. The trial court concluded that an unequal division of the marital estate was equitable, distributing twenty-five percent of the marital estate to plaintiff and seventy-five

percent of the marital estate to defendant. The trial court ordered plaintiff to pay defendant a $20,968.63 distributive award. Plaintiff appealed.

This Court considered plaintiff's appeal from the amended equitable distribution judgment in *Hill v. Sanderson ("Hill II")*, 244 N.C. App. 219, 781 S.E.2d 29 (2015). The judgment was affirmed in part, and vacated and remanded in part. *Hill II*, 244 N.C. App. at 242, 781 S.E.2d at 45. We remanded for the trial court's consideration of five issues. *Id.* at 241-42, 781 S.E.2d at 44-45.

First, we vacated "the portion of the trial court's judgment pertaining to the equity line debt," remanding "for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented, and to classify, value, and distribute the equity line debt in accordance with its findings." *Id.* at 241, 781 S.E.2d at 44. Second, we vacated "the portion of the trial court's judgment pertaining to the valuation and distribution of the Fairway Drive property." *Id.* at 242, 781 S.E.2d at 45. Third, we vacated "the portion of the trial court's judgment pertaining to the valuation and distribution of the Water Rock properties," and remanded "for further consideration of this issue in light of this opinion." *Id.* at 242, 781 S.E.2d at 45. Fourth, we remanded for "the trial court to classify, value, and distribute the one-half interest in the Gaston Mountain property acquired by the parties after the date of separation." *Id.* at 242, 781 S.E.2d at 45. Fifth, we instructed the trial court to correct a

mathematical error with regard to the amount to be distributed to plaintiff from his 401(k). *Id.* at 242, 781 S.E.2d at 45.

On remand, the matter came on for hearing before the Honorable Julie Kepple in Buncombe County District Court on 3 January 2017. At the outset of the hearing, the trial court considered the remanded issues that were related to the classification and valuation of certain property as follows.

With regard to the equity line debt, the parties stipulated that the debt was marital; thus, further ruling on the equity line debt became unnecessary prior to its distribution. In considering the Fairway Drive property's valuation, the trial court did not offer the opportunity for the parties to offer evidence. Then, finding no credible evidence as to the property's value, the trial court concluded it would not be distributed. The trial court also considered the valuation and distribution of the Water Rock properties. Recognizing our narrow mandate, the trial court only took "evidence regarding the value and the distribution of the Water Rock properties, passive loss only." The trial court also resolved the valuation issue of the Water Rock properties. Turning to the Gaston Mountain property acquired by the parties after their separation, the trial court concluded it was not marital property. Defendant did not object, and informed the trial court that the non-marital half of the Gaston Mountain property would be a distributional issue. Last, the trial court corrected the

mathematical error from the 11 September 2014 judgment with regard to the amount to be distributed to plaintiff from his 401(k).

Having considered the remanded issues that were related to the classification and valuation of certain property, the trial court then entered the distributional phase of the hearing, explaining:

> The Court will go ahead and take evidence regarding distributional factors to be considered by the trial court, in light of the current values of assets and debts. I'm going to instruct the parties to please go slowly. We need to make very specific and detailed findings with regards to the evidence presented to the Court, so I can take ample notes and the parties can take ample notes. Just make sure you're very clear about the amounts that you're alleging as your evidence.

Neither party objected, and both parties offered evidence of distributional factors.

On 3 April 2017, the trial court entered a third equitable distribution judgment that concluded that an equal division of the marital and divisible estate was equitable and ordered defendant to pay a $55,690.39 distributive award.

Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court committed reversible error by exceeding the mandate and directives of our Court in *Hill II*.

It is well settled that a mandate from an appellate court is binding on the court below, "and must be strictly followed without variation or departure." *D & W, Inc. v.*

Charlotte, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966). "However, it is equally clear that '[e]xpressions contained in an appellate court decision must be interpreted in the context of the factual situation under review, or the framework of the particular case.' " *Crocker v. Roethling*, 217 N.C. App. 160, 164, 719 S.E.2d 83, 87 (2011) (quoting *Campbell v. Church,* 51 N.C. App. 393, 394, 276 S.E.2d 712, 713 (1981)).

When a lower court fails to comply with an appellate court's opinion, "whether through insubordination, misinterpretation or inattention," the appellate court will, "in the exercise of its supervisory jurisdiction, *ex mero motu* if necessary, enforce its opinion and mandate in accordance with the requirements of justice." *Collins v. Simms*, 257 N.C. 1, 10, 125 S.E.2d 298, 304 (1962) (citations omitted).

A. Division of the Marital Estate and Distributive Award

On appeal, defendant argues that the trial court exceeded its mandate by reconsidering whether an equal division of the marital and divisible estate was equitable, and readjusting the distributive award. We do not agree. Our remand instructions necessarily authorized the trial court to take these actions.

"[E]quitable distribution is a three-step process." *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005). Pursuant to N.C. Gen. Stat. § 50-20 (2017), "the trial court must (1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Id.* at 555, 615 S.E.2d at 680 (citation and internal

quotation marks omitted). "Each step [of equitable distribution] is a prerequisite to the performance of the next, and failure to follow the prescribed order will result in a fatally flawed trial court disposition." *Wall v. Wall*, 140 N.C. App. 303, 308, 536 S.E.2d 647, 650 (2000).

"With regard to the distribution phase, there is generally a presumption in favor of equal distribution." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d 495, 498 (2010) (citing N.C. Gen. Stat. § 50-20(c)). However, the trial court has the discretion to determine that an "unequal distribution is equitable after considering the factors listed in N.C. Gen. Stat. § 50-20(c) and making sufficient findings of fact to support its conclusion." *Id.* at 277, 695 S.E.2d at 498 (citation omitted).

When our Court remands an equitable distribution order, the trial court is necessarily authorized to recalculate related portions of the award that are impacted by the findings made on remand. *See Bodie v. Bodie*, 239 N.C. App. 281, 285, 768 S.E.2d 879, 882 (2015) (holding the trial court was authorized to recalculate portions of its award that were impacted by its new findings on remand without violating the mandate rule); *see also Shope v. Pennington*, 231 N.C. App. 569, 574, 753 S.E.2d 688, 691 (2014) (holding that "[b]ecause the trial court failed to make findings regarding the source of the funds defendant used to pay the marital debt and refused to give plaintiff any consideration for those payments even though the source of those funds may have come from marital property," it was proper to reverse and remand the

matter to make such findings, redistribute "if necessary[,]" and, in light of this holding, to determine "whether an unequal distribution in favor of defendant is still equitable"); *Cooper v. Cooper*, 143 N.C. App. 322, 328, 545 S.E.2d 775, 779 (2001) (holding the trial court must "reconsider the distribution of the marital estate" where it "must reassess the identity of the assets and liabilities as separate or marital property" on remand); *Hunt v. Hunt*, 85 N.C. App. 484, 489, 355 S.E.2d 519, 522 (1987) (explaining that upon remand the trial court could reconsider its holding that an equal distribution was equitable, in light of the court's holding that plaintiff's separate property became marital when placed in the entireties).

Here, defendant argues that our remand did not authorize the trial court to reconsider whether an equal division of martial property was equitable, or to adjust the distributive award because *Hill II*: (1) did not consider whether the trial court erred by determining that an unequal division of property was equitable because plaintiff did not raise the issue on appeal, and (2) held that the trial court did not abuse its discretion by granting a distributive award in defendant's favor. Defendant takes this position on appeal despite her trial counsel having taken the opposite position before the trial court. On remand from this Court defendant took the position that *Hill II* mandated that the trial court correct the errors as to classification and valuation set out in the opinion, and should then consider the distribution of the martial estate in light of any revisions and most current values.

We are not convinced by defendant's argument on appeal. *Hill II* did not bar the trial court from considering whether an equal division was equitable and readjusting the distributive award. Our holding that the trial court did not abuse its discretion by granting defendant a distributive award was based on a net valuation that was altered by our directives in *Hill II*.

Hill II mandated that the trial court reconsider classification and valuation of certain assets. As a result, we necessarily authorized the trial court to recalculate the valuation and the distribution because they were impacted by the findings that we directed the trial court to make on remand. *See, e.g., Bodie*, 239 N.C. App. at 286-87, 768 S.E.2d at 883 (affirming a trial court's order that a distributive award should be reduced in light of findings made on remand when nothing indicated the distributive award was an abuse of discretion). We note that defendant's appeal does not contest the substance of the findings of fact made with regard to the classifications and valuations related to the equity line debt, the Fairway Drive property, the Water Rock properties, the Gaston Mountain property acquired after separation, or the amount distributed to the plaintiff from his 401(k). As the findings of fact related to this property altered the property to be distributed, and the overall net value, the trial court's redistribution of certain property and determination that an unequal distribution no longer remained equitable was authorized by our mandate in *Hill II*.

B. New Evidence on Distributional Factors

Defendant also argues that the trial court exceeded our mandate by admitting new evidence on distributional factors.

On remand of an equitable distribution order,

> the trial court is not required to admit new evidence as to all distributional factors. It would serve no purpose to admit additional evidence of factors static in nature, *i.e.*, those which are established at the date of separation or which otherwise remain unchanged at the time of a new equitable distribution hearing. The opportunity to present evidence as to any static distributional factors has passed.

Fox v. Fox, 114 N.C. App. 125, 136, 441 S.E.2d 613, 620 (1994). However, "new evidence as to any factor" should be allowed if "the existence, non-existence, or quantum thereof is likely to have changed by the time of the new hearing." *Id.* at 136, 441 S.E.2d at 620 (citation omitted).

Here, the trial court permitted the parties to offer evidence on all distributional factors, and then reconsidered the unequal division of property. The presentation of evidence on distributional factors was in accordance with the defendant's submission to the trial court prior to the hearing that "[t]he trial court must consider the distribution of the estate in light of any revisions and the most current values of the assets and debts as well as the distributional factors offered by the parties." Defendant also submitted filings with the trial court that specified the distributional factors defendant requested that the trial court consider. At the hearing, defendant

did not object to the submission of new evidence, and submitted evidence, including thirteen exhibits and accompanying testimony.

Despite defendant's contention at trial that the trial court should take evidence, defendant now takes the contrary position that *Hill II* did not direct the trial court to reopen the evidence on the distributional factors. Moreover, she argues she is not barred from taking a contrary position on appeal because she was not required to object to the trial court's alleged failure to follow the mandate. However, defendant did not consider whether her invitation and participation in presenting evidence on distributional factors constituted invited error.

> Invited error has been defined as
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> > "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining." The evidentiary scholars have provided similar definitions; e.g., "the party who induces an error can't take advantage of it on appeal", or more colloquially, "you can't complain about a result you caused."
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> > 21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841 (2d ed. 2005) (footnotes omitted); *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citations omitted)).

Boykin v. Wilson Med. Ctr., 201 N.C. App. 559, 563, 686 S.E.2d 913, 916 (2009), *disc. review denied,* 363 N.C. 853, 694 S.E.2d 200 (2010). Even if we were to assume *arguendo* that the trial court should not have taken evidence on the distributional

factors, defendant invited this error and cannot take advantage of it on appeal. Accordingly, defendant's argument that the trial court exceeded its mandate by considering new evidence is without merit.

III. Conclusion

In the case *sub judice*, defendant does not argue that the trial court's equitable distribution award was an abuse of discretion, or that any of the judgment's findings of fact or conclusions of law are unsupported by the evidence. She only argues, for the first time, that our *Hill II* mandate precluded the trial court from reconsidering whether an equal distribution was equitable and from readjusting the distributive award. For the reasons set forth above, we disagree. We reject defendant's argument that the trial court exceeded our mandate and affirm the trial court's judgment.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).