

**APPELLATE TRAINING:
NEW & EMERGING LEGAL ISSUES**

DECEMBER 16, 2016

COMMUNICATING WITH THE TRIAL COURT

**A. ELIZABETH KEEVER
EMERGENCY DISTRICT COURT JUDGE**

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
10 CVD 4524

HARVEY LYNWOOD MONTAGUE, JR.,
Plaintiff,

v.

TERESA MONTAGUE,
Defendant.

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PRE-TRIAL ORDER

THIS MATTER coming on to be heard during the regular district court civil session in Wake County District Court on May 22, 2015 before the undersigned judge presiding upon the Court's convening of a pre-trial conference in this matter.

IT APPEARING that Plaintiff's attorney, Rachel C. Campbell, appeared at the conference on behalf of Plaintiff, and that Defendant and her attorney, Andrew S. Brendle, appeared at the conference.

UPON A REVIEW OF THE FILE AND HEARING THE ARGUMENTS OF PLAINTIFF AND DEFENDANT, THE COURT MAKES THE FOLLOWING FINDINGS OF FACT:

1. On August 15, 2013, the undersigned Judge entered an Equitable Distribution Judgment/Order in this matter. Hereinafter this Judgment/Order shall be referred to herein as "the ED Judgment".
2. Defendant appealed the ED Judgment to the Court of Appeals.
3. On December 16, 2014, the Court of Appeals issued its opinion on Defendant's appeal, *Montague v. Montague*, ___ N.C. App. ___, 767 S.E.2d 71 (N.C. App. 2014). Although addressing several assignments of error, the Court of Appeals reversed and remanded only one issue, otherwise affirming the ED Judgment.
4. The one issue on which the Court of Appeals reversed and remanded concerns two post-separation distributions¹ made to Plaintiff by L.T. Montague Properties, LLC. As to these two post-separation distributions, the Court of Appeals "[struck] the trial court's finding that [Plaintiff] was paid for his efforts in managing the LLC, reverse[d] the portion of the judgment treating the post-separation distributions from the LLC to [Plaintiff] as his separate property, and remand[ed] the matter to the trial court to classify them as divisible property and to distribute *this* property." (*Emphasis added*)

¹ In 2009 and 2010, Plaintiff received two distributions from the LLC, which totaled \$31,210 (\$5,010 in 2009 and \$26,200 in 2010).

5. The parties have been unable to reach agreement as to a resolution of the distribution of the \$31,210. The undersigned Judge has determined that although the Court of Appeals has not specifically directed that a hearing be held, in order to properly distribute the \$31,210 at issue, it would be appropriate to conduct a hearing.
6. The parties have differing interpretations of the duty of the Court with regard to the purpose and scope of the hearing on remand in this case.
7. Plaintiff contends that the mandate from the Court of Appeals limits the Court's authority to only changing the classification of the two LLC distributions to "divisible property" and then distributing the two LLC distributions, leaving all other portions of the ED Judgment undisturbed.
8. Defendant contends that in order to follow the mandate of the Court of Appeals, the trial court will have to redistribute the marital and divisible estate, taking into account all relevant distributional factors that may have changed and "any new evidence that may be relevant to those factors, the assets, or the parties."

Based on the above facts, the Court makes the following conclusions of law

1. The Court has jurisdiction of the parties and the subject matter of this action
2. The mandate from the Court of Appeals in *Montague v. Montague*, ___ N.C. App. ___, 767 S.E.2d 71 (N.C. App. 2014), is binding upon the undersigned Judge and must be strictly followed without variation or departure.
3. The mandate from the Court of Appeals specifically directs the trial court to reclassify as "divisible" the two LLC distributions made to Plaintiff and to distribute these two LLC distributions.
4. The distribution of all marital and divisible property in this case (other than the LLC distributions totaling \$31,210) has been affirmed by the Court of Appeals.
5. The mandate from the Court of Appeals does not give the trial court any authority to modify or change the distribution of any marital or divisible asset already distributed in this case.
6. Evidence relating to the distributional factors found in N.C. Gen. Stat. 50-20(c) that are not static in nature (as specifically outlined in the decree below) is relevant in the hearing on the distribution of the two LLC distributions totaling \$31,210.
7. It is appropriate for the Court to establish an abbreviated discovery schedule and set this issue for trial.

Based on the foregoing facts and conclusions of law, IT IS THEREFORE ORDERED ADJUDGED AND DECREED that:

1. Other than to classify the two post-separation distributions from the LLC as "divisible property" and to distribute these assets, no portion of the ED Judgment entered in this case will be affected by the hearing following remand.
2. Evidence at the hearing following remand shall be limited to the following: Evidence as to the distributional factors found in N.C. Gen. Stat. §§50-20(c)(1); (c)(3); (c)(11a), but specifically limited to evidence relating to the LLC distributions; and (c)(12), but specifically limited to evidence relating to the LLC distributions.
3. Discovery, including depositions, shall be limited to the distributional factors listed in paragraph 2 above. The parties shall adhere to the following discovery schedule:
 - a) All discovery shall be served no later than July 3, 2015.
 - b) There shall be no extensions of time to respond to discovery except as may be allowed by the undersigned judge presiding.
 - c) All depositions must be completed by July 3, 2015.
 - d) Experts must be identified no later than July 3, 2015, and this identification must be shared with opposing counsel no later than July 3, 2015.
 - e) Legal briefs or memorandums shall be filed and served on opposing counsel no later than the day of trial.
4. The case shall be set for a hearing to carry out the mandate of the Court of Appeals on August 21, 2015 at 2:00 pm in Courtroom 5B, Wake County Courthouse. This case will be time-limited to three (3) hours, with each party having no more than 90 minutes for opening, closing, and examinations of witnesses.
5. Defendant shall timely submit a calendar request to the Trial Court Administrator setting this matter for hearing on August 21, 2015 at 2:00 pm.

Debra S. Sasser

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the PRE-TRIAL ORDER on all parties to this cause by depositing a copy of the same via U.S. Mail postage paid, addressed as follows:

Ms. Rachel Campbell
2000 Regency Parkway, Suite 260
Cary, NC 27518

Mr. Andrew Brendle
2300 Seventh Street, Suite 101
Charlotte, NC 28204

This the ___ day of June, 2015.

Sara Fisher, Deputy Clerk of Court

~~FOX v FOX~~
~~SIDNEY v ALLEN~~

~~114~~ N.C. App. ~~128~~ (1994)]

125

Disposition

In summary, we hold erroneous only the treatment of post-separation appreciation and thus vacate both the QDRO and that portion of the judgment addressing what constitutes an equitable distribution of the marital assets and the consequent award thereof.

On remand, the trial court should enter a new judgment consistent with this opinion, relying upon the existing record (since a full-blown trial is unnecessary) and receiving additional evidence and entertaining argument only as necessary to correct the errors identified herein. See *Smith*, 111 N.C. App. at 517, 433 S.E.2d at 230.

Affirmed in part, vacated in part, and remanded.

Judges JOHNSON and LEWIS concur.

SHIRLEY A. SIDNEY v. CYRIL A. ALLEN, M.D., RALEIGH MEDICAL ASSOCIATES, AND WAKE COUNTY HOSPITAL SYSTEM, INC.

No. 9310SC568

(Filed 5 April 1994)

1. Limitations, Repose, and Laches § 24 (NC14th) — medical malpractice — continued course of treatment — claim barred by statute of repose

Plaintiff's forecast of evidence was insufficient to show that defendant doctor treated her during her 25 November 1988 hospital stay for the condition created by the doctor's failure to administer radiation therapy to plaintiff in 1982, and summary judgment was properly entered for defendants on the ground that plaintiff's medical malpractice action was barred by the four-year statute of repose set forth in N.C.G.S. § 1-15(c), where plaintiff filed her complaint on 20 November 1992; defendants presented affidavits by the doctor and by a hospital records technician that the doctor did not provide care or treatment to plaintiff after 21 October 1988; and plaintiff presented evidence that the 25 November 1988 hospital record listed defendant doctor's name as her personal physician and that, although she did not see defendant doctor during this hospital stay, she received a Medicare statement indicating

UHLIG V. CIVITARESE

Opinion of the Court

Finally, Wife contends that the trial court erred by not making the necessary findings of fact or conclusions of law to justify its grant of the distributive award in favor of Husband. Because we reverse the judgment and remand for further findings, which will be fundamental to the trial court's calculation of the distributive award, we do not address this argument.

III. Conclusion

For the reasons described above we reverse the trial court's order classifying Items 1-7 on Schedule D as marital property and Item 8 on Schedule D as Husband's separate property. We remand for further proceedings consistent with this opinion. It is unclear from the record whether there is sufficient evidence to support additional necessary findings and conclusions. We leave it to the discretion of the trial court to decide whether additional evidence should be presented on remand.

REVERSED AND REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).

