

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MARY WEITZEL, )  
 )  
Appellant, )  
 )  
 v. ) C.A. No. S15A-11-001 MJB  
 )  
STATE OF DELAWARE, )  
 )  
Appellee. )

**OPINION**

**Submitted:** May 23, 2016

**Decided:** August 9, 2016

*Upon Appeal from the Industrial Accident Board, **AFFIRMED.***

Mary Weitzel, *pro se*, 12370 Vivian Street, Bishopville, Maryland 21813.

Andrew M. Lukashunas, Esquire, Tybout, Redfearn & Pell, 750 Shipyard Drive, Suite 400, P.O. Box 2092, Wilmington, Delaware 19899, *Attorney for Appellee.*

**BRADY, J.**

## **I. INTRODUCTION**

This is an appeal from a decision of the Industrial Accident Board (“Board”) dated October 19, 2015.<sup>1</sup> On March 26, 2015, Mary Weitzel (“Appellant”) filed a Petition to Determine Compensation Due against Indian River School District (“Appellee”). Appellee alleged that she injured her neck, back, and left shoulder on August 25, 2014, when she fell while working for Appellant. A hearing on the merits took place before the Board on September 25, 2015. Appellee denied that the injury occurred and that any treatment or work restrictions were reasonable, necessary, and related if a fall had occurred.

On October 19, 2015, the Board denied Appellant’s petition, holding that the evidence did not support a finding that Appellant was injured as she claimed.<sup>2</sup> On November 6, 2015, Appellant filed a timely appeal of the Board’s decision.<sup>3</sup> On April 18, 2016, Appellant filed an Opening Brief<sup>4</sup> and on May 9, 2016, Appellee filed a response.<sup>5</sup> On May 23, 2016, Appellant filed a reply to Appellee’s response.<sup>6</sup>

For the reasons outlined below, the Board’s decision is **AFFIRMED**.

## **II. FACTS**

### **A. The Incident in Question**<sup>7</sup>

Appellant was an employee of Indian River School District, working at Howard T. Ennis School (“Howard T. Ennis”) on the date of the alleged incident. Appellant testified that she was injured when she was standing on a chair, decorating a bulletin board, and the chair slipped on its left side causing her to fall. Appellant further testified that she hit her shoulder and scraped her

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<sup>1</sup> See Notice of Appeal, Item 1 (Nov. 6, 2015).

<sup>2</sup> See *Weitzel v. State*, IAB Hearing No. 1417799 (Oct. 19, 2015).

<sup>3</sup> See Notice of Appeal, Item 1 (Nov. 6, 2015).

<sup>4</sup> Appellant’s Opening Br., Item 14 (Apr. 18, 2016).

<sup>5</sup> Appellee’s Answering Br., Item 17 (May 9, 2016).

<sup>6</sup> Appellant’s Reply Br., Item 18 (May 23, 2016).

<sup>7</sup> Unless otherwise noted, the following facts are taken from the Board’s Opinion. See *Weitzel*, IAB Hearing No. 1417799 (Oct. 19, 2015).

right ankle on the chair when she fell. That same day, following the fall, Appellant saw the school nurse who made a report of the incident. According to Appellant, the entire event lasted about fifteen seconds. On the date of the injury, Appellant was wearing a boot on her left ankle because she had sprained it two months earlier. Approximately four days after the alleged fall, Appellant began to feel pain and went to an emergent care facility for treatment, where she received medication and x-rays.

Dawn Passwaters (“Passwaters”), a job coach and para-educator for Appellee, testified at the hearing. Passwaters stated that the morning of the incident Appellant informed her that she could not move furniture because of a prior car accident that injured her back. During the time of the alleged incident, Passwaters was helping Appellant set up a classroom. Passwaters testified that at the time of the alleged fall she had her back to Appellant, only heard Appellant make a profane exclamation, and turned around and saw Appellant holding her knee while bent over a chair that was laying on the floor. Passwaters testified that she did not hear the chair hit the floor.

Margie Showard (“Showard”), a special education teacher for Appellee, testified at the hearing. Showard testified that at the time of the incident she was working with Passwaters and Appellant in the classroom and explained that the classroom was disorganized because it was an in-service day preceding the first day of school for students.<sup>8</sup> Showard indicated that she remembered that on the day of the incident Appellant was wearing a boot on her foot for a sprained ankle. Showard testified that during the time of the alleged incident she was standing facing a cabinet with both doors open and heard Passwaters say “oh, are you okay?”. Showard further testified that she saw Appellant standing by a desk with the teacher’s chair lying on the

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<sup>8</sup> The Board incorrectly states the incident occurred on the first day of school, but clearly it occurred on an in-service day to prepare for students’ arrival another day. *See Weitzel v. State*, IAB Hearing No. 1417799 (Oct. 19, 2015) (“Ms. Showard explained that the classroom was disorganized because it was the first day of school.”).

floor beside her. Showard did not hear the chair hit the floor and explained that she had heard the chair hit the ground before and that it made a noise loud enough to wake someone who was sleeping. Showard described the chair as the “teacher’s chair” which was a heavy wooden chair without arms.

### **B. Medical Testimony**

The transcript of the deposition of Dr. Ganesh Balu (“Dr. Balu”), a board certified pain management and physical medicine and rehabilitation specialist, was read into the record at the hearing on behalf of Appellee. Dr. Balu testified that he had reviewed Dr. Gelman’s deposition testimony transcripts, records from Salisbury Immediate care, numerous imaging studies both before and after the alleged work injury, and Shore, Foot and Ankle, as well as Dr. Stepic’s report.<sup>9</sup> Dr. Balu started treating Appellant on March 30, 2015, after Appellant went to an emergent care facility which recommended pain medication.<sup>10</sup> Dr. Balu reported he determined, after an examination, that Appellant had paraspinal spasms, trapezius muscle myofascial trigger points, decreased motor strength in her left upper extremity, and tenderness overlying the rotator cuff tendon.<sup>11</sup> Dr. Balu diagnosed Appellant with cervical strain, shoulder strain, and lumbar strain, and prescribed her non-narcotic pain medication and muscle relaxers.<sup>12</sup>

On April 28, 2015, Dr. Balu again saw Appellant who was complaining of more neck pain, which Appellant was concerned was exacerbated by physical therapy.<sup>13</sup> On June 2, 2015, Appellant saw Dr. Balu and reported that she was able to work full-time with some difficulty and that she continued to have neck and shoulder pain.<sup>14</sup> At this meeting, Appellant explained that

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<sup>9</sup> Dep. of Dr. Balu, App. to Appellee’s Answering Br., Item 17, at B018 (May 9, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at B019.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

participation in physical therapy was helping her pain.<sup>15</sup> On July 2, 2015, Appellant saw Dr. Balu for a shoulder injection<sup>16</sup> and on July 27, 2015, Appellant informed Dr. Balu that the shoulder pain had improved following the injection.<sup>17</sup> On August 3, 2015, after a recommendation from Dr. Balu, Appellant received bilateral lumbar facet joint injections in the lower three facet joint levels (L3-4, L4-5, and L5-S1).<sup>18</sup> On September 1, 2015, Appellant saw Dr. Balu and reported that the bilateral lumbar facet joint injections did help her lower back pain and provided her with approximately sixty percent relief.<sup>19</sup> Dr. Balu continued to treat Appellant on medication and physical therapy on a need basis.<sup>20</sup>

Dr. Balu testified that Appellant's MRI results from her lumbar spine in 2011 and an MRI following the alleged work injury showed lumbar spondylolysis.<sup>21</sup> Dr. Balu further testified that Appellant's MRI done before the alleged work injury, on December 23, 2014, of her shoulder showed supraspinatus tendinopathy and the results of her cervical spine MRIs done before and after the alleged injury showed no changes.<sup>22</sup> Although Dr. Balu testified that Appellant suffered from left shoulder pain following the alleged work accident, he noted that there was no indication on the physical findings from the Immediate Care records of a contusion, something Dr. Balu testified that he would expect to see if such an injury had occurred.<sup>23</sup>

Dr. Balu concluded that he believed Appellant had sustained a work injury on August 25, 2014, which aggravated some preexisting symptomatology.<sup>24</sup> Dr. Balu placed Appellant on a

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at B020.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at B021.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at B029.

<sup>24</sup> *Id.* at B022.

sedentary eight hour work day restriction which he believed, along with the accompanying medical expenses, were reasonable, necessary, and related to her alleged work injury.<sup>25</sup>

The transcript of the deposition of Dr. Andrew Gelman (“Dr. Gelman”), a board certified orthopaedic surgeon, was read into the record at the hearing on behalf of Appellant. On June 26, 2016, Dr. Gelman examined Appellant with regard to her injuries relating to the alleged work injury.<sup>26</sup> Dr. Gelman testified that he reviewed medical records from Salisbury Immediate Care, Peninsula Regional Medical Center, Atlantic General Hospital, reports from Drs. Balu and Stepic, Tidewater Physical Therapy, Massage Center, and “some earlier chiropractic records and a variety of imaging studies.”<sup>27</sup> Dr. Gelman confirmed that the physical findings from the Immediate Care records did not include a contusion on the left shoulder.<sup>28</sup> In his deposition, Dr. Gelman discussed multiple imaging studies dating back to 2005 all of which predated the alleged work injury.<sup>29</sup> These studies were conducted as a result of a number of complaints by Appellant with regard to her cervical spine, lumbar spine, left-sided pain radiating into her legs and arms, and left should pain.<sup>30</sup> Dr. Gelman testified that during the examination of Appellant, following the alleged work injury, she “appeared to belittle [the pre-alleged work injury] level of care and the frequency for which she treated, including the massage treatment that she was receiving in the summer of 2014 [approximately one month prior to the alleged injury].”<sup>31</sup>

Dr. Gelman opined that, after comparing studies done before the alleged work accident to those done after the work accident, there were no interval changes of an acute nature that could

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<sup>25</sup> *Id.*

<sup>26</sup> Dep. of Dr. Gelman, App. to Appellee’s Answering Br., Item 17, at B003 (May 9, 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at B004.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at B005.

be attributable to the alleged fall.<sup>32</sup> Dr. Gelman further opined that Appellant had a chronic issue with relatively normal imaging with minor generative changes noted over the years of MRI testing (both before and after the alleged work injury) and that Dr. Balu’s treatment was likely addressing her chronic spinal complains and not injuries related to the alleged work accident.<sup>33</sup> Dr. Gelman testified that in his opinion the alleged work injury did not likely alter her work physical capability.<sup>34</sup>

### **III. PARTIES’ CONTENTIONS**

#### **A. Appellant’s Arguments**

Appellant, in her opening brief, raises no legal issues, but instead provides a lengthy recitation of the facts arguing that there are “several discrepancies” which warrant this Court to overturn the Board’s decision.<sup>35</sup> Specifically, Appellant argues that Passwaters and Showard did not see her fall even though their statements said they did;<sup>36</sup> that Passwaters testimony that Appellant said “[G]od damn” was false because she would never use the Lord’s name in vain.<sup>37</sup> Appellant contends it was a discrepancy for Dr. Pascucci’s report to be barely mentioned in the hearing.<sup>38</sup> Appellant argues that teachers do not have to lift heavy furniture because custodians are responsible for helping to move them and sometimes teachers utilize assistants to help move

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<sup>32</sup> *Id.* at B007.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Appellant’s Opening Br., Item 14 (Apr. 18, 2016).

<sup>36</sup> Although Appellee claims that Passwaters and Showard stated that they saw Appellant fall, the record before the Court does not support this allegation. Passwaters testified at the hearing that when she turned around she saw Appellant standing back from a chair that had fallen. *See* Passwaters’ Test, App. to Appellee’s Answering Br., Item 17, at B090 (May 9, 2016). Showard testified that she saw Appellant standing behind a desk next to a chair that was laying on the floor. *See* Showard Test., Test, App. to Appellee’s Answering Br., Item 17, at B102 (May 9, 2016). The Board’s opinion similarly makes no reference to either Passwaters or Showard claiming that they saw Appellant fall, rather the Board notes that both testified that they did not see Appellant fall. *See Weitzel v. State*, IAB Hearing No. 1417799 (Oct. 19, 2015) (“When [Passwaters] turned around she saw Claimant bending over a chair holding her knee . . . [Showard] saw Claimant standing by her desk and the chair was lying down on the floor and Claimant was standing beside it.”).

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 4.

heavy furniture, a discrepancy, Appellant argues, in Passwaters' testimony.<sup>39</sup> Appellant further argues that despite her spine injury being addressed extensively at the hearing that was not the real problem and that her demotion<sup>40</sup> had nothing to do with the work injury.<sup>41</sup> Appellant's response, again attempts to relitigate the facts of the case, but concludes by arguing that the Board's decision is not supported by substantial evidence.<sup>42</sup>

### **B. Appellee's Arguments**

Appellee argues that Appellant has stated no "legally cognizable argument for distributing the Board's decision."<sup>43</sup> Instead, Appellee argues, Appellant seeks to relitigate the facts of the case.<sup>44</sup>

Appellee argues that there is substantial evidence to support the Board's finding that Appellant failed to meet her burden of showing that a compensable work injury occurred.<sup>45</sup> Appellee notes that there were inconsistencies with regard to whether the chair fell.<sup>46</sup> No one in the room heard the chair fall, despite evidence that the chair makes a sound loud enough to wake someone who is sleeping, nor did the two witnesses see Appellant on the ground after she allegedly fell.<sup>47</sup> Appellee further argues that the medical evidence supports the Board's findings, as both medical experts concluded that there was no interval change on Appellant's imaging studies done before and after the alleged work injury.<sup>48</sup>

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<sup>39</sup> *Id.* at 5.

<sup>40</sup> Appellant was formerly a math teacher but was asked to step down to a para-professional at Howard T. Ennis. It appears from Appellant's opening brief that she believes Appellee contends that she made up the alleged incident in retaliation for her demotion.

<sup>41</sup> *Id.*

<sup>42</sup> Appellant's Reply Br., Item 18 (May 23, 2016).

<sup>43</sup> Appellee's Answering Br., Item 17, at 13 (May 9, 2016).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 14-16.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 14-15.

<sup>48</sup> *Id.* at 15-16.

#### **IV. BOARD'S DECISION**

On September 25, 2015, the Board conducted a hearing on Appellant's Petition to Determine Compensation due. In a decision dated October 19, 2015, the Board held that the testimony and evidence presented at the hearing "was inconsistent and does not support a finding that [Appellant] was injured at work as she alleges."<sup>49</sup> The Board noted that Appellant first testified that the chair she allegedly fell from had arms, but later testified that the chair did not have arms.<sup>50</sup> The Board further noted that Appellant testified that the chair hit the floor as she fell from it, but she did not hear the chair hit the floor.<sup>51</sup> Passwaters and Showard, who were both in the room at the time of the alleged incident, did not hear the chair hit the ground nor did they see Appellant on the ground.<sup>52</sup>

The Board also found that the medical evidence did not support a finding that Appellant sustained a compensable work injury to her neck, back, and left shoulder on August 25, 2014.<sup>53</sup> The Board noted that Dr. Gelman testified that Appellant's medical records indicated that she had been treating for extremity, neck, and lower back problems as recently as a month before the alleged incident.<sup>54</sup> The Board further noted that Dr. Gelman testified that when Appellant was questioned about her previous medical treatment she minimized it.<sup>55</sup> Dr. Gelman testified that Appellant had been actively treating for extremity and back problems since 2002 and that there was no difference in her condition prior to the alleged work accident than there was after it.<sup>56</sup> The Board noted that Appellant's treating physician, Dr. Balu, testified that many of Appellant's objective test results were unchanged prior to the alleged work injury and after the alleged work

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<sup>49</sup> *Weitzel*, IAB Hearing No. 1417799, at 11 (Oct. 19, 2015).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 12-13.

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

injury.<sup>57</sup> Based on both the evidence of the incident itself and the medical testimony, the Board found that the record before it did not support a finding that Appellant was injured as she claimed.<sup>58</sup>

## V. STANDARD OF REVIEW

The Court has a limited role when reviewing a decision by the Board. If the decision is supported by substantial evidence and free from legal error,<sup>59</sup> the decision will be affirmed.<sup>60</sup> Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion.<sup>61</sup> The Board determines credibility, weighs evidence, and makes factual findings.<sup>62</sup> This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the Board.<sup>63</sup> The Court must affirm the decision of the Board even if the Court might have, in the first instance, reached the opposite conclusion.<sup>64</sup> The Board has the discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon is supported by substantial evidence.<sup>65</sup> When reviewing an appeal from the Board, this Court must consider the record in a light most favorable to the party prevailing below.<sup>66</sup> When factual determinations are at issue, the Court must take due account of the

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<sup>57</sup> *Id.* at 12-13. The Board noted that Prior to the alleged work injury Appellant's MRI results for her lumbar spine showed lumbar spondylolysis and a bulging disc at L4-L5 and her most recent MRI, after the work accident, also showed lumbar spondylosis and inflammation changes at the facet joints. *Id.* The Board further noted that an MRI of Appellant's shoulder prior to the alleged work injury showed supraspinatus, tendinopathy and the results of her cervical spine MRIs done before and after the alleged work injury showed no change.

<sup>58</sup> *Id.* at 13.

<sup>59</sup> *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

<sup>60</sup> *Sirkin and Levine v. Timmons*, 652 A.2d 1079 (Del. Super. 1994).

<sup>61</sup> *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>62</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

<sup>63</sup> *Id.* at 66.

<sup>64</sup> *Brogan v. Value City Furniture*, 2002 WL 499721, at \*2 (Del. Super. March 27, 2002).

<sup>65</sup> *Conley v. Capitol Homes, Inc.*, 2006 WL 2997535, at \*5 (Del. Super. Ct. Aug. 31, 2006) (internal citations omitted).

<sup>66</sup> *General Motors Corp. v. Guy*, 1991 WL 190491 (Del. Super. Aug. 16, 1991) (internal citations omitted).

experience and specialized competence of the Board and the purpose of the Worker's Compensation Act.<sup>67</sup> Questions of law are reviewed *de novo*.<sup>68</sup>

## VI. DISCUSSION

Appellant makes no legal argument regarding the Board's decision, except that the decision was not supported by substantial evidence. In making that argument, Appellant essentially relitigates the facts on appeal. It is outside this Court's standard of review to make factual findings. The Board determines credibility of witnesses, weights the evidence, and makes factual findings. This Court does not sit as the trier of fact and does not substitute its own judgment for that rendered by the Board. That position is left to the experience and specialized competence of the Board. Appellant's argument that this Court should make independent factual findings is without merit as is not proper on appeal.

To the extent Appellant argues that the Board's decision was not support by substantial evidence, that argument, although proper, is without merit. The Board held that the record before it did not support a finding that Appellant was injured as she claimed. There were substantial discrepancies in the testimony concerning whether Appellant actually fell from a chair in the classroom on the day in question. Two of Appellant's colleagues were present in the room at the time of the alleged fall, but neither of them heard the chair hit the ground nor did they see Appellant on the floor. Even Appellant admitted that she did not hear the chair hit the ground.<sup>69</sup> The Board heard testimony that the chair has previously fallen to the floor and makes a sound loud enough to wake someone who is sleeping. The only evidence presented to the

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<sup>67</sup> *Mangle v. Grotto Pizza, Inc.*, 1997 WL 358671, at \*4 (Del. Super. May 13, 1997).

<sup>68</sup> *Christiana Care Health Serv. v. Palomino*, 74 A.3d 627, 629 (Del. 2013).

<sup>69</sup> Appellant, however, argues that the chair did not make a sound when it hit the ground because her body softened the blow. However, as previously noted, this is an issue of fact not previously raised and not properly raised on appeal.

Board that the chair fell was the testimony of Appellant, which was also contained inconsistencies.<sup>70</sup>

The medical evidence further supported the Board's finding. Dr. Balu testified that Appellant suffered from left shoulder pain following the alleged work accident but noted that there was no indication on the physical findings from the Immediate Care records of a contusion, something he would expect to see if such an injury had occurred.<sup>71</sup> Dr. Gelman further indicated that the Immediate Care records did indicate a contusion on Appellant's left shoulder.<sup>72</sup> Both Dr. Balu and Dr. Gelman indicated that there was no change on Appellant's imaging studies done before the accident compared to those imaging studies conducted after the accident.<sup>73</sup>

There was medical, testimonial and circumstantial evidence before the Board to support the Board's determination that Appellant had failed to meet her burden of establishing, by a preponderance of the evidence, not only that she was injured at the time and date alleged, but also whether the accident in question ever occurred.

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<sup>70</sup> For example, Appellant gave inconsistent testimony with regard to whether the chair did or did not have arms. *Weitzel*, IAB Hearing No. 1417799, at 11 (Oct. 19, 2015).

<sup>71</sup> Dep. of Dr. Balu, App. to Appellee's Answering Br., Item 17, at B029 (May 9, 2016).

<sup>72</sup> Dep. of Dr. Gelman, App. to Appellee's Answering Br., Item 17, at B003 (May 9, 2016).

<sup>73</sup> Dr. Balu testified that Appellant's MRI results from her lumbar spine in 2011 and an MRI following the alleged work injury showed lumbar spondylolysis. Dep. of Dr. Balu at, App. to Appellee's Answering Br., Item 17, at B021 (May 9, 2016). Dr. Balu further testified that Appellant's MRI done before the alleged work injury, on December 23, 2014, of her shoulder showed supraspinatus tendinopathy and the results of her cervical spine MRIs done before and after the alleged injury showed no changes. *Id.* Dr. Gelman stated that "[Appellant] has been symptomatic maybe back to 2002 and clearly actively treating in the summer of 2014. So when I look at the records from prior to August of 2014 versus after 2014, from a documentation perspective, and, again, objectively speaking, there really is no difference. So if something occurred on August 25th, 2014 to the lower neck, upper back or the mid back, lower back, [Appellant's] likely at baseline." *Id.* at B007.

**VII. CONCLUSION**

The Court is satisfied that the Board's determinations were supported by substantial evidence. For the reasons stated above, the decision below is hereby **AFFIRMED**.

**IT IS SO ORDERED.**

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**M. Jane Brady**  
Superior Court Judge