**REL: October 16, 2020**



# ALABAMA COURT OF CIVIL APPEALS

**OCTOBER TERM, 2020-2021**

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**2190391**

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**Steve Nord**

**v.**

**Maude V. Nord**

**Appeal from Tuscaloosa Circuit Court**
**(DR-01-1082.01)**

MOORE, Judge.

Steve Nord ("the former husband") appeals from a judgment of the Tuscaloosa Circuit Court ("the trial court") directing him to transfer $81,783.28 from his individual retirement account to Maude V. Nord ("the former wife"), in accordance

with a 2003 judgment divorcing the parties. We affirm the trial court's judgment.

Procedural History

The parties were divorced by a May 7, 2003, judgment of the trial court; that judgment included the following provision:

> "The [former wife] is awarded 50% of the [former husband's] 401(k) account valued as of the date of this judgment. The [former husband] and [the former] wife shall cooperate in preparing a Qualified Domestic Relations Order to carry out the terms of this paragraph. The Court reserves jurisdiction to enter and/or amend any Qualified Domestic Relations Order to effectuate this retirement account division."

Additionally, the trial court made a factual finding in the judgment of divorce that, at that time, the former husband's 401(k) retirement account had a value of $62,000.

On April 12, 2018, the former wife filed a complaint in the trial court asserting, among other things, that neither party had prepared a Qualified Domestic Relations Order ("QDRO") as directed by the divorce judgment and that the administrator of the former husband's 401(k) retirement account had contacted her and offered her $31,000 as her share of the retirement account. The former wife argued, among

other things, that the language in the divorce judgment is inherently ambiguous and that she should be awarded a sum from the former husband's retirement account "commensurate with $31,000 and the pro rata appreciation in value" of that amount. The former husband filed an answer to the former wife's complaint on May 23, 2018, and an amended answer on August 10, 2018.

A trial was conducted on October 21, 2019. At the outset of the trial, the former husband's attorney made an oral motion to dismiss the former wife's complaint based on the trial court's alleged lack of subject-matter jurisdiction. The former husband had filed a "brief as to why the trial court lacked subject matter jurisdiction to divide [his] retirement account" on October 7, 2019, asserting therein that the former wife lacked "standing" to enforce that portion of the divorce judgment. The former wife had filed a reply brief on October 15, 2019. On October 21, 2019, the trial court entered a final judgment that, among other things, denied the former husband's oral motion to dismiss for lack of subject-matter jurisdiction; awarded the former wife the amount of $81,783.28, representing her 50% share of the former husband's

401(k) account, pursuant to the judgment of divorce; and directing the former husband's attorney to prepare a QDRO directing that the amount of $81,783.28 be transferred to the former wife from the former husband's individual retirement account to effectuate the division of the 401(k) account.[1] The trial court reserved jurisdiction to, among other things, enter and/or amend the QDRO, and denied any remaining requests for relief. The former husband filed a motion to alter, amend, or vacate the judgment on November 19, 2019; the trial court entered an order denying that motion on January 7, 2020. The former husband filed his notice of appeal to this court on February 7, 2020.

Facts

The former wife testified that a QDRO was never entered following the entry of the divorce judgment. According to the former wife, the first time she was contacted about the division of the former husband's 401(k) account was in March 2018, when the former husband retired and his retirement administrator telephoned her. The former wife testified that

[1]The former husband testified that he had transferred the funds from his 401(k) account into an individual retirement account.

she had been provided paperwork to sign to have her share of the funds in that account transferred to her but that she had not signed the paperwork because she did not know how to fill it out and because she wanted to have it reviewed by an attorney.

The former husband testified that he had taken a copy of the divorce judgment to his employer's personnel office, that he had highlighted the portion of the judgment speaking to his retirement benefits, and that he had instructed that $31,000 be placed in a low-risk account. He stated that what he believed was the former wife's share -- $31,000 -- had been placed into a money-market account because, he said, he knew that he could lose the money if the market went sour and, he believed, he was required to pay $31,000 to the former wife. He stated that he had asked his daughter to inform the former wife to contact his employer regarding the retirement funds, but, he said, the former wife had not transferred any money from his retirement account.

The former husband presented as exhibits retirement-account statements that showed the percentage of his retirement account that was being held in a money-market

account and the percentage that was invested in the stock market at certain times. The former husband's retirement-account statement from January 1, 2004, through March 31, 2004, reflects that, at that time, 70% of the former husband's retirement account was in a money-market account and that 30% was invested in the stock market. The statement from October 2008 to December 2008 indicates that, at that time, 73% of his retirement account was held in a money-market account and that 27% was invested the stock market. The statement from October 1, 2011, through December 31, 2011, indicates that, at that time, 67% of his retirement account was held in a money-market account and that 33% was invested in the stock market. Finally, the statement from July 1, 2016, through September 30, 2016, indicates that, at that time, 61% of his retirement account was held in a money-market account and that 39% was invested in the stock market. The former husband testified that the majority of the funds in his retirement account was in a money-market account because he "knew [he] could not afford to lose it," because he was over 50 years old and could not make up any loss for his retirement, and because "[he] could not afford to lose it because [the former wife's]

$31,000 was trapped up in there." He stated that, in September 2016, he requested to roll his 401(k) account into a separate individual retirement account and that, at the time of the trial, he was drawing a set amount from his individual retirement account each month.

The former wife presented as a witness Robert Wesley McLeod, a professor of finance at the University of Alabama and a founding member of Financial Economics Consulting Group, a registered investment advisory firm, who testified as an expert pursuant to a stipulation of the parties. McLeod testified that the former husband's mix of investments had changed over time and that he had taken that into account in his analysis. McLeod explained that the S&P 500 Index is a stock-market index that includes 500 of the largest companies in the country, that it is used as a benchmark for evaluating investment performance, and that the purchase of an S&P 500 Index fund is considered to represent an average risk in terms of investments. He testified that, during certain periods, the former husband had had some investments that were riskier than an average investment. McLeod further testified that a money-market account is a very low-risk investment that

essentially keeps pace with inflation and rarely earns a positive rate of return.

McLeod stated that he had reviewed the retirement-account records that the former husband had produced and that, beginning on May 7, 2003, the date of the divorce judgment, he had calculated the future value of $31,000 as if it had been invested in an S&P 500 Index fund, which, he said, would have resulted in a value of $137,486.61 as of September 13, 2019. McLeod testified that he had also used the same starting date and ending date and looked at what $31,000 would have grown to if it had been invested in a money-market account, and, in that case, he said, it would have grown to $39,005.38. He stated that the S&P 500 Index fund would be appropriate for an average-risk investor and that a money-market account would be appropriate for a zero-risk investor.

According to McLeod, he then took an equally weighted balance between an S&P 500 Index fund and a money-market account, i.e., placing half of $31,000 in each, and concluded that the value of $31,000 as of September 13, 2019, would have been $88,246 if it had been split evenly between those investment options. He stated that, in terms of a weighted-

average approach, his methodology in reaching that amount is a generally recognized and accepted methodology in his field. McLeod testified that he had not looked at what had actually transpired with regard to the former husband's retirement account but, instead, had used an average index in making his calculations in order to avoid penalizing the former wife for poor investment selections or rewarding her for an exceptional investment return with regard to the former husband's investments. Thus, he admitted that the $137,486.61 figure is not representative of the investments that the former husband had chosen, but he reiterated that his premise was that the former wife should not be penalized for poor investments or rewarded for good investments that the former husband made. McLeod stated that, if the former wife had approached him and said she wanted a low-risk investment, he would not have recommended putting everything into a money-market account.

The former husband presented the testimony of Bobby Shaw, a certified public accountant and a certified bank auditor, who was qualified as an expert witness and testified that he had prepared a summary of the calculations that he had performed regarding the value of the former husband's

retirement account. His summary indicated that he had made two calculations as of September 15, 2019, based on an initial contribution of $31,000 on May 7, 2003. Shaw testified that the first calculation was based on the actual returns on all the funds held by the former husband in his 401(k) account, and he stated that applying those returns to an initial investment of $31,000 on May 7, 2003, resulted in a balance of $81,783.28 as of September 15, 2019. Shaw explained that that amount was based off of what $31,000 would be worth after taking the value of all the funds the former husband had invested, considering the beginning values, the contributions, some ending values over time, and the returns made during the period between May 7, 2003, and September 15, 2019, based on the initial value of $31,000 without any additional contributions. Shaw reiterated that that first calculation was based on the actual returns from the former husband's investments that were first within the 401(k) account and later in an individual retirement account using only an investment of $31,000.

Shaw stated that, for his second calculation, he had used the same factors but had taken into account only the money-

market information from the former husband's retirement-account statements and had applied those same rates to an initial investment of only $31,000. According to Shaw, the current value of a $31,000 initial investment, if it had been invested in only a money-market account, would be $39,442.83 as of September 15, 2019. Shaw noted that he did not see in the former husband's retirement-account statements that the former wife's share had been segregated from the former husband's share and that, based on what he had seen on the statements, it had appeared to him that everything was in the same pot. He testified, however, that there was at least $31,000 in a money-market account at all times.

Analysis

The former husband raises three arguments on appeal; we address those arguments out of turn. First, we consider the former husband's argument that, because he had not accumulated funds in his retirement account for 10 years during the parties' marriage, the trial court lacked subject-matter jurisdiction to award the former wife any portion of his retirement account and, thus, he says, the former wife lacked

"standing" to enforce that aspect of the divorce judgment. This court has stated that

> "[i]t is well settled that 'subject-matter jurisdiction may not be waived; a court's lack of subject-matter jurisdiction may be raised at any time by any party and may even be raised by a court ex mero motu.' C.J.L. v. M.W.B., 868 So. 2d 451, 453 (Ala. Civ. App. 2003); see, e.g., Ex parte Norfolk S. Ry. Co., 816 So. 2d 469, 472 (Ala. 2001) ('We are obliged to recognize an absence of subject-matter jurisdiction obvious from a record, petition, or exhibits to a petition before us.'). A judgment entered by a court that lacks subject-matter jurisdiction is void. See C.J.L., 868 So. 2d at 454; see also J.B. v. A.B., 888 So. 2d 528 (Ala. Civ. App. 2004)."

S.B.U. v. D.G.B., 913 So. 2d 452, 455 (Ala. Civ. App. 2005). Accordingly, we consider whether the provision of the trial court's divorce judgment awarding the former wife a portion of the former husband's retirement benefits was void such that the trial court lacked subject-matter jurisdiction to consider the former wife's claim for enforcement of that provision.

> "Jurisdiction is '[a] court's power to decide a case or issue a decree.' Black's Law Dictionary 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases. Woolf v. McGaugh, 175 Ala. 299, 303, 57 So. 754, 755 (1911) ('"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought."' (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316, 19 L.Ed. 931 (1870))). That power is derived from the Alabama Constitution and the Alabama Code. See

> United States v. Cotton, 535 U.S. 625, 630–31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) (subject-matter jurisdiction refers to a court's 'statutory or constitutional power' to adjudicate a case)."

Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006).

The former husband cites in support of his argument Colgan v. Colgan, 215 So. 3d 1109, 1112 (Ala. Civ. App. 2016), in which this court reversed an award of retirement benefits in a divorce judgment when the retirement benefits had not been accumulated for a period of 10 years during the parties' marriage at the time the wife filed her complaint for a divorce.[2] First, we note that, in Colgan, unlike in the present case, this court was adjudicating an appeal of the parties' divorce judgment itself. Moreover, this court did not suggest in Colgan that the award of an interest in the husband's retirement benefits to the wife was due to be reversed based on a lack of subject-matter jurisdiction.

[2]Section 30-2-51, Ala. Code 1975, no longer requires spouses to have been married for a period of 10 or more years for an award of retirement benefits to be made to either spouse. We acknowledge, however, that, at the time of the entry of the judgment divorcing the parties in the present case, § 30-2-51 directed that a court could award a spouse an interest in the other spouse's current or future retirement benefits only when the parties had been married for a period of 10 years during which the retirement benefits were being accumulated. See Colgan, 215 So. 3d at 1112.

Rather, we concluded only that the Lauderdale Circuit Court had erred as a matter of law in awarding any portion of the husband's retirement benefits in that case. 215 So. 3d at 1112.

The former husband argues that, because he had not contributed to his retirement account for 10 years during the parties' marriage at the time the former wife filed the divorce complaint, as well as when the trial court awarded a portion of his retirement benefits to the former wife in the divorce judgment, the divorce judgment was void as to that award. This court has stated, however, that

> "[e]rrors in the application of the law by the trial court do not render a judgment void. Halstead v. Halstead, 53 Ala. App. 255, 256, 299 So. 2d 300, 301 (Civ. App. 1974). 'It is claimed that the judgment is void because it does not comply with the law of the State of Alabama. The simple fact that a court has erroneously applied the law does not render its judgment void.' Halstead, 53 Ala. App. at 256, 299 So. 2d at 301; see also Neal [v. Neal], 856 So. 2d [766] at 781, 782 [(Ala. 2002)] ('John confuses legal error with want of subject-matter jurisdiction or want of due process of law.' 'However, the misinterpretations and misapplications of law that John ascribes to the aspects of the January 30, 1997[,] judgment ... did not deprive John of due process of law.')."

Bowen v. Bowen, 28 So. 3d 9, 15 (Ala. Civ. App. 2009). See also C.Z. v. B.G., 278 So. 3d 1273, 1286 (Ala. Civ. App. 2018)

("[M]ere errors in the application of the law by a lower court do not render a judgment void for lack of subject-matter jurisdiction.").

In the present case, although the trial court's award of a portion of the former husband's retirement account to the former wife in the divorce judgment might have been reversible error, see Colgan, any such error did not render the judgment void for lack of subject-matter jurisdiction. See Bowen, supra. Because any error committed by the trial court in awarding the former wife a portion of the former husband's retirement account was a question that was ripe for appeal upon the entry of the divorce judgment, the former husband's attempt to challenge that award in the present appeal amounts to an impermissible collateral attack upon the trial court's 2003 judgment of divorce. See Moorer v. Moorer, 487 So. 2d 947, 947-48 (Ala. Civ. App. 1986) (affirming the denial of a petition to modify a divorce judgment when the petitioner failed to appeal from the divorce judgment but, subsequently, sought an impermissible collateral attack upon the divorce judgment). Accordingly, the trial court was within its jurisdiction to consider the former wife's complaint seeking

to enforce the divorce judgment with regard to the division of the former husband's retirement benefits.

Having concluded that the former husband's jurisdictional attack is without merit, we proceed to consider his remaining arguments on appeal. The former husband next asserts that, because the trial court was presented with undisputed evidence indicating that he had placed $31,000 in a money-market account for the benefit of the former wife and that, according to his expert, the interest earned on that amount would have resulted in an award to the former wife of only $39,442.83, the trial court erred in awarding the former wife $81,783.28. The former husband posits that his argument raises an issue of first impression in the State of Alabama with regard to "a husband['s] safeguarding funds subject to a QDRO to not lose them in the anticipation of potential market losses." Former husband's brief, p. 24. He cites, among other cases, Travis v. Travis, 345 So. 2d 321, 322 (Ala. Civ. App. 1977), in which this court reversed a judgment denying a request to modify child support after finding that "the trial court could have denied modification only by disbelieving the competent and unimpeached evidence," which, this court concluded, "[i]t was

not at liberty to do." In the present case, however, unlike in Travis, the evidence presented by the former husband regarding his intentions in maintaining $31,000 in a money-market account for the former wife and his perception that any losses in his retirement account would not affect his obligation to pay to the former wife the amount of $31,000 are not conclusive and do not require a conclusion that the former wife's share of the former husband's retirement benefits are limited to $31,000 and the interest that would have been earned on that amount in a money-market account.

The former husband concedes that caselaw and § 30-2-51(b), Ala. Code 1975, which addresses the division and distribution of the marital estate, allow for a former spouse to share in market fluctuations when an order awarding retirement benefits is silent, but, he argues, "that is not the situation here." Former husband's brief, pp. 28-29. The former husband cites in his brief, among other cases, Buchanan v. Buchanan, 936 So. 2d 1084, 1085 (Ala. Civ. App. 2005), in which this court considered a judgment ordering Terry L. Buchanan to pay to Sally H. Buchanan the amount of $38,394 from his retirement account when a judgment divorcing the

parties approximately four years earlier had ordered that Sally was to receive one-half of the existing value of Terry's retirement account, which was valued at $76,784.71 at that time. In Terry's appeal, he argued that the Houston Circuit Court had erred in calculating its award because the value of his retirement account had decreased to approximately $43,000 at the time of the hearing. Id. This court noted that the circuit court had found that each party was responsible for the delay with regard to the failure to have a QDRO issued to effectuate the division of Terry's retirement account. Id. at 1086. In considering whether the award was proper, this court stated, in pertinent part:

> "A review of the previous decisions of this court and of cases from other jurisdictions indicates that when a divorce judgment awards a spouse a percentage share of a variable asset and the award is silent with respect to market fluctuations in the value of the asset before the time of distribution, the judgment is inherently ambiguous; if the spouses are equally responsible for the delay in distribution, each spouse assumes a proportionate share of any subsequent gains or losses in the asset until such time as the share is distributed, and that is true even if the judgment awards a spouse a percentage of the value of the asset on a specific date. See Jardine v. Jardine, 918 So. 2d 127, 129 (Ala. Civ. App. 2005) (holding that a judgment awarding the wife a sum equal to 45% of the collective total balances of the parties' tax-deferred retirement/profit-sharing accounts

> '"determined as of June 30, 2001"' required the wife to bear a pro rata share of the fluctuation in the market value of the retirement accounts after June 30, 2001). Accord Taylor v. Taylor, 258 Wis. 2d 290, 298, 653 N.W.2d 524, 528 (Wis. Ct. App. 2002)(holding that the wife's 35% share of the husband's 401k plan as of the date of the divorce, September 15, 2000, was subject to market gains and losses from that date until the wife received her share). Cf. Smith v. Smith, 866 So. 2d 588, 593 (Ala. Civ. App. 2003) (stating that '[t]he wife was awarded a percentage of the husband's retirement assets without regard to its value. Upon a reversal of the award, the wife would be required to return the same percentage of the assets to the husband, regardless of its current market value.')."

Id. at 1087. Accordingly, this court concluded that the circuit court had erred by awarding Sally one-half the value of Terry's retirement account on the date the divorce judgment was entered and remanded the case with instructions to the circuit court to allocate the loss in the value of Terry's retirement-account investments equally between the parties. Id. at 1090.

The former husband attempts to distinguish this case from Buchanan and other similar cases based on what he avers is undisputed evidence indicating that he had directed his employer's retirement-plan administrator to place the former wife's funds in a money-market account to protect them from loss. He asserts that "there is nothing in § 30-2-51(b) that

allows the receiving spouse to pick and choose which assets she is to receive." Former husband's brief, p. 30. Conversely, however, we note that there is nothing in § 30-2-51(b) that allows the owner of a retirement account to pick and choose which assets the receiving spouse is to receive. The former husband argues that, if the former wife had wanted to earn a higher interest rate on her share of his retirement benefits, "she was certainly free to obtain the QDRO at any time prior to 2018." Former husband's brief, p. 30. The trial court in the present case did not assign fault to either party with regard to the failure to have a QDRO issued, and the divorce judgment did not make either party responsible for ensuring issuance of a QDRO, directing instead that both parties were to cooperate in the preparation of a QDRO. Thus, in the present case, like in Buchanan, each spouse should assume a proportionate share of any subsequent gains or losses until such time as the share is distributed. 936 So. 2d at 1087.

The former husband cites Buchanan for the proposition that "'[d]isbursement of [the husband's] 401(k) plan according to [the wife's] interpretation would result in an unjust and

unreasonable allocation of the plan because [the wife] would receive a significant windfall, while [the husband] would be unfairly penalized.'" 936 So. 2d at 1089 (quoting Case v. Case, 794 N.E.2d 514, 518 (Ind. Ct. App. 2003)). We note, however, that, in that statement, the Indiana Court of Appeals was speaking to a proposed distribution pursuant to which the former wife in that case would receive $50,000 from her former husband's 401(k) plan as awarded in a divorce judgment, despite the decrease in value of the plan from $90,389.48 to $67,000. See Buchanan, 936 So. 2d at 1088. In the present case, the trial court directed that both the former husband and the former wife, like in Buchanan and Case, were to receive a proportionate share of the retirement benefits according to the gains and losses of the benefits as a whole and that neither party would receive a windfall.

The former husband also argues that Thomas v. Thomas, No. 00AP-541, April 26, 2001 (Ohio Ct. App. 2001) (not reported in N.E.2d), is comparable to the present case. He asserts that, in Thomas, a QDRO that was issued following an award of retirement benefits to the wife in that case impermissibly added interest on a sum-certain amount awarded in the parties'

divorce judgment. Indeed, in Thomas, the wife was awarded the sum of $622,816.50 to be disbursed from the husband's pension and profit-sharing plan. Id. Later, the lower court approved a QDRO that awarded the wife interest on that award. Id. The Ohio Court of Appeals concluded that the inclusion of interest in the QDRO was in error, noting that, "[w]hile the trial court could have awarded the [wife] a percentage of the plan's value to be calculated at a time which would reflect any post-decree growth or decline, it did not do so," and affirming that, instead, the court had set the value of the plan and awarded the wife a specific sum as of the date of the judgment containing the award. Id. Clearly, the present case, in which the trial court awarded the former wife a percentage of the former husband's retirement plan as of the date of the divorce judgment, rather than a sum certain, is distinguishable from Thomas. Moreover, we note that "[n]o opinion from another state court is binding on the courts of Alabama." Stone v. Mellon Mortg. Co., 771 So. 2d 451, 456 n.1 (Ala. 2000).

The former husband also cites Thomas with regard to language added to the QDRO in that case that directed that the

wife's award should not contain any interest in limited partnerships or closely held business interests held by the husband. The Ohio Court of Appeals concluded that the lower court was without jurisdiction to make that change or addition to the property division, noting that "[t]here is nothing in the court's decree which might arguably allow the [wife] to pick and choose which types of assets she is to receive from the pension and profit sharing plan." Thomas, supra. Similarly, in the present case, there is no indication that the judgment divorcing the parties allowed the former husband to pick and choose which type of fund the former wife's share of his retirement benefits would accumulate under pending the entry of a QDRO. The trial court's judgment in the present case does not run afoul of the Thomas court's decision because the amount awarded to the former wife was in consideration of the actual investment earnings and losses affecting the whole of the former husband's retirement benefits, resulting in both parties sharing equally in gains and losses affecting those benefits.

The former husband last argues that the trial court erred in awarding the former wife $81,783.28 because, he says,

Shaw's first calculation "takes into consideration post-divorce contributions and interest in the 401(k) account to which [the former wife] is not entitled." Former husband's brief, p. 37. Specifically, the former husband asserts that Shaw used the actual rate of return on the funds in his 401(k) account, which, he says, is based on all the funds in the account, including those acquired after the date of the entry of the divorce judgment. The former husband cites Killingsworth v. Killingsworth, 925 So. 2d 977 (Ala. Civ. App. 2005), in which this court determined, among other things, that an award to the wife of a portion of the husband's retirement benefits representing contributions that would be earned after the commencement of the divorce action amounted to reversible error. 925 So. 2d at 982. He argues that, because the trial court's award to the former wife takes into consideration postdivorce contributions to, and interest on, the funds in the 401(k) account to which she was not entitled, the judgment is due to be reversed. We note, however, that Shaw's testimony was clear that he had used only the $31,000 awarded to the former wife in making his calculations. Specifically, he stated that his calculation of $81,783.28

used all of the data from the former husband's retirement account and was calculated based on an initial contribution of $31,000. Because the former husband's expert testified that the former husband's postdivorce contributions to his retirement account were not considered in calculating the former wife's share, the former husband's argument on this point is without merit.

Because the former husband's arguments on appeal do not merit reversal, the trial court's judgment is due to be affirmed. The former husband's request for an award of attorney fees on appeal is denied.

AFFIRMED.

Thompson, P.J., and Donaldson and Hanson, JJ., concur.

Edwards, J., concurs specially.

EDWARDS, Judge, concurring specially.

Although I have some questions regarding the rationale underlying Buchanan v. Buchanan, 936 So. 2d 1084, 1087 (Ala. Civ. App. 2005), and similar precedents, we have not been asked to overrule those precedents. Accordingly, I concur.