

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002391-MR

DARRELL WAYNE BURBERRY

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 03-CI-00255

JANE WOZNICK BURBERRY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KELLER, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Darrell Wayne Burberry appeals from an order of the Bourbon Circuit Court dividing his marital property and sustaining an earlier ruling precluding Darrell from introducing evidence except in rebuttal. Because the trial court's rulings were supported by substantial evidence and did not constitute an abuse of discretion, we affirm.

Darrell and Jane were married on October 26, 1996. On August 19, 2003, Darrell filed a petition for the dissolution of the marriage. On November 14, 2003, the circuit court issued a bifurcated decree dissolving the marriage and reserving the division of marital property.

On March 30, 2005, the trial court issued a discovery order requiring lists of witnesses and exhibits to be disclosed and exchanged by May 23, 2005. The order further provided that “[n]o discovery shall be propounded that will be due after May 23rd and no discovery shall be attempted after May 23rd.” The final hearing was scheduled for June 6, 2005. Subsequently, this hearing was rescheduled due to Darrell’s failure to comply with the discovery order.

On June 6, 2005, Jane filed a motion requesting the trial court to prohibit Darrell from producing evidence and calling witnesses at the final hearing due to his failure to comply with the discovery order. On July 11, 2005, the DRC issued a report and recommendation to the trial court sustaining Jane’s motion to prohibit Darrell’s introduction of evidence not disclosed prior to the discovery deadline. The DRC found that Darrell’s failure to comply prejudiced Jane.

On July 15, 2005, Darrell filed exceptions to the DRC’s report and a motion to reopen or extend discovery due to his excusable neglect in failing to comply with the discovery order. He contended that the discovery sanction was inappropriate because he did not act in bad faith, had no history of being dilatory, and no prejudice occurred. He cited a printer malfunction and a misunderstanding

with opposing counsel as his reasons for failing to provide Jane with the requested discovery.

On September 26, 2005, the trial court issued an order closing discovery pursuant to its order entered on March 30, 2005. The matter was referred to the DRC for a final hearing on the division of the parties' marital property. On January 13, 2006, the DRC held the final hearing. During the hearing, Jane and Darrell stipulated to the value and marital interest of many of their assets but disagreed about other assets. Darrell was not permitted to introduce evidence or witnesses except for the purpose of rebuttal.

The significant point of contention concerned the number and value of the parties' cattle. Jane introduced a spreadsheet and other documentation listing the value of the cattle at \$98,728.74 on the date of the parties' divorce decree. She calculated that this value included 53.5 stock cows¹ and 124 heifers and steers. She further introduced a financing statement signed by Darrell in which he claimed ownership of Black Angus cattle valued at \$75,000. However, Darrell testified that the parties owned only forty cows constituting a value of \$20,000 and were subject to a \$13,000 marital debt. However, he did not offer expert testimony against Jane's valuation evidence.

After the hearing, the DRC was replaced by another DRC who, in turn, was replaced after the establishment of a family court in Bourbon County. After these various changes, on October 23, 2007, the trial court issued its findings

¹ This reflects a fractional ownership in the stock cows.

of fact, conclusions of law, and order. In its findings of fact, the trial court valued the parties' marital estate at \$262,986.93 which it equally divided. Prominently, the trial court adopted Jane's valuation of the cattle, which added over \$90,000 to the marital estate. Further, Jane was awarded rehabilitative maintenance at a rate of \$1,000 a month for a period of two years and attorney's fees of \$18,000. This appeal followed.

Darrell contends that the trial court erred when it imposed sanctions against him for failing to comply with the discovery deadline. He contends that the trial court abused its discretion by prohibiting him from introducing evidence disclosed subsequent to the discovery deadline. Because the trial court's discovery sanction was reasonable, we disagree.

Kentucky Rules of Civil Procedure (CR) 37.02(2)(b) provides that a trial court may refuse to admit a party's evidence to support or oppose a claim if the party has failed to comply with a discovery order. This provision permits courts to ensure that legal actions are not impeded by delay tactics which inevitably impose injustices on citizens. *Baltimore & O. R. Co. v. Carrier*, 426 S.W.2d 938, 941 (Ky. 1968). The principal purpose of our rules of civil procedure is to provide litigants with an opportunity for simple and speedy relief. *Id.*

When a trial court issues sanctions pursuant to CR 37.02(2), an appellate court reviews the decision for abuse of discretion. *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 360 (Ky.App. 1999). The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable, unfair,

or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

After reviewing the record, we conclude that the trial court's order sustaining the recommendation of the DRC prohibiting Darrell's introduction of evidence not disclosed prior to the discovery deadline was not erroneous. Darrell's central contention was that a printer malfunction prevented him from providing discovery to Jane. While technological glitches may justify the temporary failure to comply with a discovery order, Darrell completely failed to comply with the discovery order, including through the conclusion of the hearing, which occurred over seven months after the discovery deadline.

Darrell's failure to comply with the discovery order is more troubling considering that the final hearing scheduled for June 6, 2005, was canceled and continued due to his failure to comply with discovery. A printer malfunction cannot justify an almost eight-month delay and total failure to comply with discovery requests. This delay required Jane to subpoena numerous documents from third-party sources to obtain the quantity and value of the parties' marital assets. Put simply, Darrell's discovery violation impeded Jane from obtaining a simple and speedy conclusion of her case, which is the hallmark purpose of our civil rules. *Baltimore & O. R. Co. v. Carrier*, 426 S.W.2d at 941.

Finally, with regard to sanctions, Darrell did not attempt to call any experts to refute Jane's evidence regarding the valuation of the cattle. While Darrell's evidentiary options were limited by the discovery sanction, he was more

than free to introduce expert testimony to rebut Jane's vast evidence regarding the valuation of the cattle. Because he failed to introduce any expert rebuttal evidence, he was not prejudiced regarding the cattle valuation. Accordingly, we cannot conclude that the trial court abused its wide discretion. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 118 (Ky.App. 1998).

Beyond its discovery sanction, the trial court's factual findings and order were supported by substantial evidence. Jane's evidence regarding the cattle included spreadsheets, bills of sale, copies of checks, deposit slips, and Darrell's prior estimate valuing their cattle at \$75,000. While Darrell disputed Jane's numbers and valuation, the trial court was free to adopt her valuation of the cattle, which was within the range of the values stated during the hearing. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky.App. 2007). Further, the other findings regarding the valuation of the parties' marital estate were supported by substantial evidence. *Id.*

Finally, although mentioning the attorney's fees and maintenance awards, Darrell's brief contains no sufficient argument to permit us to conclude that the trial court abused its broad discretion in these areas. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 514 (Ky. 1975) (in divorce cases, the awarding of an attorney's fee is discretionary); and *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987) (maintenance decisions are within the sound discretion of the trial court). Thus, the trial court's decision was not erroneous.

For the foregoing reasons, the Bourbon Circuit Court's findings of fact, conclusions of law, and order is affirmed.

ALL CONCUR.

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