ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION II

CA 06-244

October 4, 2006

CONNIE SPANHANKS	APPELLANT	APPEAL FROM THE PIKE COUNTY CIRCUIT COURT [NO. DR2005-41]
V.		HONORABLE TED. C. CAPEHEART, JUDGE
CECIL RAY SPANHANKS	APPELLEE	AFFIRMED

The parties in this case, appellant Connie Spanhanks and appellee Cecil Spanhanks, were married in December of 2001 but separated in April of 2005. No children were born of the marriage. The division of marital property was the focus of the divorce litigation. Connie raises six issues in this appeal from an amended decree of divorce. We affirm.

The final hearing in this matter was held on September 19, 2005. At the hearing, it was revealed that the parties had been living in a mobile home on three acres of land deeded to them as tenants by the entirety by Cecil's mother. Connie's parents had given them $24,500 as a down payment on the mobile home that was purchased for $43,566, plus taxes of $1,434.31. The mobile home was titled in Connie and Cecil's names, and the loan balance as of the day of the hearing was $18,302. Connie's parents had also given them $5,000 associated with hook-up costs for the trailer, and her parents had made other monetary gifts to purchase such things as a riding lawn

mower, a power washer, concrete steps for the mobile home, and a meat grinder. Connie's parents had also bought Connie's son a vehicle that had been titled in Cecil and Connie's names. All told, Connie testified that her parents had given them $33,500 in gifts.

Connie further testified that she removed from the marital home the mower, the concrete steps, the power washer and meat grinder, as well as other items of personal property that either had been given to her by members of her family or she had owned prior to the marriage. She also said that Cecil had been driving a 2000 Chevrolet Impala that she had owned before the marriage, and that she was driving a 2000 Chrysler LHS that was purchased during the marriage. Connie testified that Cecil had bought farming equipment during the marriage and that he ran a cattle operation. She said that Cecil had sold some of the cattle and that the income from the operation had been reported as joint income on their tax return.

In their testimony, Connie and her mother asked the trial court to award Connie, dollar for dollar, the $33,500 that Connie's parents had contributed to the marital estate. They said, however, that Cecil should be credited with $4,448, representing the sum he had paid to retire the debt on the Chrysler LHS, if Connie were to receive this vehicle in the divorce. Thus, according to Connie and her mother, Connie should receive $29,052 from Cecil. She requested that the three acres and mobile home be sold and the proceeds divided, but she said that the $29,052 should come "off the top." She also wanted to keep all of the personal property that she had in her possession, saying "I want my gifts and my half of the marital property." Introduced into evidence was a sheet of paper that Connie referred to as a "settlement agreement," which she claimed reflected her proposed disposition of the marital property. The "agreement" consists of a handwritten tally of the monetary gifts made by Connie's parents, and a list of personal property. In the midst of the

personal-property list, it says "payoff of Chrysler, 4,432 (you keep Chevy Impala)." Otherwise, there are no terms stated, and it does not mention either the mobile home or the three acres of land. At the top of this piece of paper, it is written "I Cecil Spanhanks, Do Agree to the Following Terms for Settlement of Property."

Cecil testified that he worked at the Briar Plant of BPB Gypsum and that he had a farming operation for raising beef cattle. He estimated that he had eighty-six head of cattle and said that he had sold some cattle in the ordinary course of business for $3,500. Cecil testified that he had financed the purchase of a new tractor during the marriage and that he still owed money on it. The purchase price of the tractor was $29,924, reduced by a $10,000 trade-in, and the payoff was currently $11,457. He had also purchased a fifteen-foot bushog that had a loan balance of $5,423. Cecil said that it was their practice for Connie to take the state income tax refund, while he kept the federal tax refund. The past year Connie had received the state refund of $1,429, and he had received the federal refund in the amount of $4,985.

Cecil testified that he had signed the "agreement" because Connie's father had threatened to "hire the dirtiest, crookedest lawyer" that could be found and because he wanted to keep the house, the three acres, and cattle operation. He said, however, that the gifts from Connie's parents had been made to them as a married couple, not just to Connie. He said that he did not believe that paying Connie's parents back dollar for dollar all the money they had put into the marital estate was fair. He asked the trial court to decide what was an equal and fair amount. He testified that he had offered Connie $20,000 to settle the case. Cecil further testified that the three acres his mother had deeded them had an assessed value of $2,100.

At the conclusion of the hearing, the trial court stated to the attorneys:

> I want each of you to submit a proposed decree, stating why if you want something divided other than fifty, and that's assuming that this $25,000 and all this money given, the Court is finding that's marital, but that doesn't mean it can't be divided one hundred percent back or any other degree, percentage. Get it to me in two weeks on the 30th. You know that if the Court divides it any other way than fifty fifty, you have to state the reasons set forth in the statute for division other than fifty fifty. You can't just say I divide it this way and that's the end of it. There has to be a reason stating.

On October 26, 2005, the trial court entered the divorce decree that had been prepared by Connie's attorney. The decree recited in pertinent part:

> Subsequent to the separation of the parties, they entered into property settlement negotiations, and did make and enter into an agreement, a copy of which was introduced as Plaintiff's Exhibit 3, without objection by the defendant [Cecil]. The defendant testified this was the "original agreement" of the parties. Under the terms of that agreement, the plaintiff [Connie] was to have as her sole and separate property the items lists on P-3, a Chrysler automobile purchased during the marriage by the parties, upon which was still owed approximately $4,400.00, which the defendant agreed to pay, and the defendant was to refund to the plaintiff the sum of $33,500, being the sum of the gifts given to plaintiff by her parents, that sum to be reduced by the amount of the pay off made on the Chrysler by the defendant.
>
> In consideration of plaintiff's receipt of the aforesaid items and sums, the plaintiff agreed the defendant should have the manufactured home, subject to the remaining $20,000.00 indebtedness thereon, 3 acres, cattle operation and equipment, and the 2001 Chevrolet Impala.

The decree, however, divided the property as follows:

> Therefore, while the Court finds that $25,000.00 of the gifts made to plaintiff by her parents are marital property, the Court further finds the plaintiff is entitled to a Dollar for Dollar reimbursement for the sum of Twenty Nine Thousand Fifty Two & no/100's Dollars ($29,052.00) from the defendant, giving the defendant credit for the pay off he made on the Chrysler automobile, pursuant to the "original agreement."

> That the Plaintiff is entitled to be, and she hereby is, granted ownership, free of any claim from the defendant, of those items of personal property, including the Chrysler automobile, in her possession which she took and which were surrendered to her by the defendant pursuant to the terms of the "original agreement."
>
> That the defendant is entitled to be, and hereby is, vested with the ownership of the 80 head of cattle, tractor, bushog and farm equipment, subject to any indebtedness thereon, and the Chevrolet Impala.
>
> That the marital home is to be sold at public sale by the Clerk of the Court acting as Commissioner, in the time and manner specified by Arkansas law, and the proceeds of said sale are to be distributed as follows: 1. To the costs of the sale; 2. To paying any remaining indebtedness on the manufactured home; 2[sic]. $29,052.00 to the plaintiff as reimbursement for her property received as gifts and expended for the benefit of the marital relationship; 3. the balance to be divided between the parties ½ and ½.

On October 31, 2005, Cecil filed a pleading styled "Motion for Reconsideration or Alternatively For New Trial." In this motion, Cecil complained that his counsel had never received a copy of Connie's proposed decree and that he, therefore, had no opportunity to offer any objections prior to the time the decree was entered. Cecil further complained that the decree was unjust and unfair because it provided that Connie's parents were to be reimbursed dollar for dollar the gifts they had made, whereas the real property given to the parties by Cecil's mother had not been given the same treatment or consideration.

The trial court heard argument of counsel during a hearing held on November 7, 2005. The court made no ruling at that time, but later the court entered an amended decree on November 22, 2005. In the amended decree, the trial court found that the division of property outlined by the parties' settlement negotiations was inequitable. The court further found that the division of property contained in the original decree was not equitable. As in the original decree, Connie was

awarded those items of personal property which she had taken, including the Chrysler automobile. Also as in the original decree, Cecil was awarded the cattle, tractor, farm equipment, and Chevrolet Impala. The amended decree provided, however, that Cecil was awarded the three acres of land and the mobile home. Connie was awarded $22,000 for her interest in the home, real property, and all other marital property. If Cecil failed to pay this amount in thirty days, then the home and real property were to be sold.

Connie's first argument on appeal is that the trial court erred by failing to dismiss Cecil's motion for reconsideration. Connie contends that the trial court should have dismissed the motion because it contained a certificate of merit, but not a certificate of service as required by Rule 5(e) of the Rules of Civil Procedure. Connie, however, has not demonstrated any prejudice flowing from this technical defect. She was in fact served with a copy of the motion five days before the hearing, or two days after the motion was filed. We do not reverse absent a showing of prejudice. *See Hall v. Summit Contractors, Inc.,* 356 Ark. 609, 158 S.W.3d 185 (2004).

Connie's next two arguments are related. First, she contends that Cecil's motion for reconsideration was a motion for a new trial made under Ark. R. Civ. P. 59 and that the trial court erred by stating in the amended decree that it was acting pursuant to Ark. R. Civ. P. 60(a) "to prevent a miscarriage of justice." Connie further argues that, regardless of whether the motion is considered as one under either Rule 59 or Rule 60, the trial court erred in amending the decree to provide that the three acres of land was to be Cecil's sole and separate property because Cecil did not previously request that relief. In this regard, Connie points out that a motion pursuant to either rule cannot be used to consider arguments that were not raised prior to the entry of judgment. *See Pyron v. Office of Child Support Enforcement,* 363 Ark. 521, ___ S.W.3d ___ (2005) (trial court

does not abuse its discretion in denying a Rule 60 motion where the argument made in the motion was not raised prior to the entry of judgment); *Whisnant v. Whisnant,* 68 Ark. App. 298, 6 S.W.3d 808 (1999) (Rule 59 cannot be used to raise arguments not made to the trial court before the entry of judgment).

Motions are to be liberally construed, and courts should not be blinded by titles but should look to the substance of the motions to ascertain what they seek. *Slaton v. Slaton,* 330 Ark. 287, 956 S.W.2d 150 (1997). Cecil's motion in this instance asserted that the decree was contrary to the law and the evidence presented at the divorce hearing, and it asserted that the decree was unjust and unfair because the gift of land made by his mother was not given the same treatment as the gifts bestowed on the parties by Connie's parents. Even if we agreed with Connie's argument that the trial court mischaracterized Cecil's motion, no reversible error occurred. Connie does not question the trial court's authority to act pursuant to Rule 59, which provides in subsection (a) that in cases tried without a jury the trial court may amend its findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. Instead, the crux of her argument is that the trial court erred in awarding Cecil the land because he had not previously requested that relief. *See Whisnant v. Whisnant, supra.* However, Connie did not make this argument to the trial court, and we do not address issues that are raised for the first time on appeal. *Posey v. Bernard's Healthcare, Inc.,* ___ Ark. ___, ___ S.W.3d ___ (Feb. 2, 2006).

Connie's fourth argument is that there is no evidence to overcome the presumption that Cecil's mother had made a gift of the three acres that was deeded to them as tenants by the entirety. Connie also contends that the trial court erred in finding that Cecil had paid the debt on the Chrysler with money derived from the sale of cattle. We find no merit in these contentions. This

case was presented to the trial court in an unusual posture in that no regard was given to the law governing the division of marital property. We are mindful that it was Connie who asked the trial court to disregard the marital nature of the gifts that were made by her parents. It was also Connie who represented to the trial court that the "agreement" they had entered into, as shown by the recitals in the original decree, provided that she was to be reimbursed for the gifts her parents had made and that Cecil was to have the three acres. However, the original decree did not award Cecil the property; instead, it was ordered to be sold. It was also Connie who agreed in her testimony that Cecil was to be reimbursed for the money he spent to retire the debt on the Chrysler automobile. In our view, the trial court's award of the three acres to Cecil and the credit given for his payment of the debt on the Chrysler are akin to invited error. An appellant may not complain of an alleged erroneous action of the trial court if she has consented to or acquiesced in that action. *Harness v. Arkansas Public Service Comm'n,* 60 Ark. App. 265, 962 S.W.2d 374 (1998).

Connie's fifth point is that the trial court erred because the amended decree does not state any reasons for an unequal division of the marital property as required by Ark. Code Ann. § 9-12-315 (Repl. 2002). Connie concedes, however, that it cannot be determined from the record that there was an unequal division because numerous valuations are absent from the record. The burden of proving error on appeal is on the appellant. *Young v. Young,* 316 Ark. 456, 872 S.W.2d 856 (1994). It is appellant's burden to bring up a record sufficient to demonstrate error. *Id.* When an appellant fails to demonstrate error, we affirm. *Id.*

Connie's final point is that the trial court erred by failing to enforce the "settlement agreement" as set out in the original decree. It was, however, within the sound discretion of the trial court to approve, disapprove, or modify the agreement. *Rutherford v. Rutherford,* 81 Ark.

App. 122, 98 S.W.3d 842 (2003). The trial court found that the "agreement" was not equitable. We note also that, contrary to Connie's argument, the original decree did not abide by the "agreement" inasmuch as it did not provide that Cecil was to have the mobile home and the land. We find no abuse of discretion in the trial court's decision.

Affirmed.

HART and GLOVER, JJ., agree.