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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001400-MR

THOMAS L. BRANNAN

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE PAMELA K. ADDINGTON, JUDGE  
ACTION NO. 06-CI-00971

TAMMY C. BRANNAN (NOW ZELLER)

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Thomas L. Brannan appeals from two post-dissolution orders entered by the Hardin Circuit Court in 2008. The first order awarded his former wife, Tammy C. Brannan (now Zeller), damages in the amount of \$9,385.00 in unpaid medical expenses for their children. The second order denied Thomas's motion to alter, amend or vacate the first order. Having reviewed the record, the briefs and the law, we reverse and remand.

The single focus of this case is Tammy's decade-long quest for more than \$18,000.00 in restitution from Thomas in unpaid medical expenses and insurance premiums for the divorced couple's two minor children. The challenge, which flummoxed a Florida court for six years before it entered an order stating Kentucky is now the children's home state and Kentucky courts have jurisdiction over all child support and visitation issues, has been Tammy's inability to substantiate the amount of medical expenses incurred by the children and Thomas's share of those expenses. Resolving the appeal requires us to determine whether Kentucky courts have jurisdiction over the entire matter, specifically bills incurred in Florida and over which the Florida court initially reserved jurisdiction, and whether Thomas satisfied his burden, if any, in challenging Tammy's calculations.

### **FLORIDA EVENTS**

We begin with a statement of the facts and procedural history of the case. Thomas and Tammy were married in Florida in 1990. Their union produced two children, a son born in 1993 and a daughter born in 1995. The couple separated in 1998 and their marriage was dissolved by a Florida court in 1999 on Thomas's petition. Thomas remains a Florida resident while Tammy has lived in Kentucky for many years. Both have since remarried.

The marital settlement agreement (MSA) executed by the parties in 1999, and incorporated into the Florida divorce decree, gave Thomas and Tammy joint custody of their son and daughter and named Tammy the primary residential

custodian. The MSA required Thomas to pay \$400.00 in monthly child support, but only when the children were in Tammy's physical custody. It also required both parents to share equally the cost of all uninsured medical, dental, ophthalmological and orthodonture bills. Depending upon who paid, the cost of insurance premiums was to be added to or subtracted from the child support award/obligation.

In 2003, Tammy moved the Florida courts to hold Thomas in contempt for failing to pay his share of the children's medical bills. In preparation for a hearing on the motion, Tammy prepared a spreadsheet of medical expenses with help from her sister-in-law and her attorney. In November of 2003, the Florida court entered an order: (1) finding Thomas owed an *undetermined* amount in medical expenses; (2) reserving jurisdiction to set the amount of medical bills owed if the parties could not reach an agreement; (3) directing Thomas to pay \$400.00 in child support *every* month, even when the children were with him, until Tammy was reimbursed in full; (4) directing the parties to determine how much Thomas had paid in insurance premiums for the children so he could be credited with said payments; and finally, (5) specifying the procedure for submitting a claim for payment as:

[t]he party who incurs a medical, dental, ophthalmological (sic), orthodontic, or health insurance expense for the minor children shall submit to the other party in writing, within 30 days of incurring such expense and receiving the necessary paperwork, the following: the statement; proof of payment by the party seeking reimbursement;

and, the health insurance explanation of benefits.<sup>1</sup> Upon receipt of a proper written request for reimbursement, containing the documentation set forth above, the other party shall make such reimbursement within 30 days of receipt of the request, or shall reach a mutually acceptable arrangement with the other party for payment of the same.

The parties never agreed upon Thomas's share of the children's medical expenses, and despite reserving jurisdiction to do so, the Florida court never quantified the amount owed or Thomas's share of the children's medical expenses.

According to the record before us, nothing more happened in the case until 2006 when Thomas sought relief in the Florida courts alleging his children had been abused in Kentucky. In April of 2006, following a limited hearing, the Florida court denied Thomas's "Emergency Supplemental Petition to Modify Custody or Visitation and Other Relief" stating in relevant part:

1. The home state of the minor children is now the Commonwealth of Kentucky.
2. The acts alleged by the Petitioner/Father occurred in Kentucky.
3. The Petitioner/Father has filed with Kentucky a report alleging abuse of the children which will be investigated by Kentucky authorities.
4. Proper venue of any custody matter now lies in the Commonwealth of Kentucky.

The order, which Thomas registered in the Hardin (Kentucky) Circuit Court on May 25, 2006, is the opening document in the record before us.

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<sup>1</sup> Commonly referred to as EOBs. (Footnote added).

## KENTUCKY EVENTS

In June of 2006, Tammy moved the Family Court Division of the Hardin Circuit Court to modify visitation and child support to allow her to have telephone contact with her children while they were visiting their father in Florida. Tammy did not specify a desired child support change. A month later, Thomas filed his own motion to modify custody and child support alleging Tammy's current husband had abused the children and therefore, Thomas should be awarded sole custody of his son and daughter.

After a brief lull, in October of 2006 Tammy moved the court to award her unpaid medical expenses and health insurance premiums amounting to \$18,771.59.<sup>2</sup> In an accompanying affidavit, she claimed Thomas had made no effort to pay any amount of said expenses. The court heard the matter that same month. In an agreed order executed in January of 2007, the parties agreed to, among other items, mediate the billing and visitation controversies if they could not come to an agreement within thirty days, and they would base child support on income and make it retroactive to the filing of the request for modification.<sup>3</sup>

Tammy renewed her original motion for judgment in March of 2007. One month later, the Hardin County Attorney moved to intervene to recover from Thomas a child support arrearage of \$2,420.00 for 2006 and 2007. In June of 2007

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<sup>2</sup> According to Tammy, Thomas owed \$5,683.42 in insurance premiums through 2007. She attributed the remaining \$13,088.17 to co-pays on uncovered medical and dental bills as well as pharmaceutical expenses.

<sup>3</sup> Tammy filed her motion for modification on June 12, 2006.

an agreed order was entered *increasing* Thomas's monthly child support obligation to \$642.00.

After an unsuccessful attempt at mediation in August of 2007, the Hardin Circuit Court heard the medical bill issue on May 9, 2008. Soon after the hearing began, the court questioned whether the Florida court had ever entered an order relinquishing jurisdiction and whether the Kentucky court could properly hear the case. Upon locating the Florida order entered on April 27, 2006, identifying Kentucky as the children's home state and the proper venue for any custody issue, the Kentucky court announced it would exercise jurisdiction.

At the hearing, Tammy introduced the spreadsheet prepared by herself, her sister-in-law and her Florida attorney for the 2003 hearing in Florida. She did not introduce or discuss individual medical bills. When explaining the spreadsheet, Tammy acknowledged duplicate bills were probably included in her figures and she could not recall whether Thomas had been given credit for child support overpayments. Tammy's case consisted solely of her testimony and that of her sister-in-law as well as the spreadsheet prepared in 2003.

At the close of Tammy's proof, Thomas asked the court to enter an order finding Tammy had failed to meet her burden of proof. The court denied the motion because the Florida court had admitted the evidence and relied upon it. The court went on to say Tammy had shown an arrearage but had not established that she had credited Thomas with child support overpayments.

Thereafter, Thomas presented his case. He disputed Tammy's figures claiming she did not credit him for child support overpayments and she included numerous duplicate bills. Thomas's current wife, Renee, testified she had spent days pouring over the stack of bills provided by Tammy. After eliminating the duplicate bills from consideration, and matching the EOBs to statements from physician offices and paid receipts, she determined that Thomas owed about \$6,700.00 in medical expenses. However, because he was due a credit of \$6,357.62.00 in child support overpayments and insurance premiums, Renee calculated that Thomas owed Tammy just \$337.00. Renee testified many of the documents received from Tammy were simply handwritten notes from her stating an amount she had paid, but there were no receipts from doctor's offices showing the amounts Tammy had actually paid. Additionally, the documentation required for reimbursement of medical expenses, as specified in the 2003 Florida court order, was never provided and certainly not in a timely fashion. Thomas testified the maximum amount he owed was \$1,200.00.

At the end of Thomas's proof, the court stated from the bench that the burden of proof was shouldered by Tammy and while she had not carried her burden, Thomas had not proved he had paid any amount towards the children's medical expenses. Acknowledging that "nobody presented one shred of evidence [except the worksheet no one can fully explain]," and characterizing Thomas's claim that he owed only \$1,200.00 as "completely not believable," the court divided Tammy's request in half and ordered Thomas to pay \$9,385.80 in expenses

plus attorney's fees at a rate of \$100.00 per month. After further discussion, the court eliminated the award of attorney's fees.

An order containing findings of fact and conclusions of law was entered on September 5, 2008, wherein the court found: Tammy was requesting reimbursement of \$18,771.59 based on a spreadsheet she submitted to the court; Thomas stated he had not paid any amount<sup>4</sup> toward the children's medical expenses; Thomas testified child support overpayments he had made were to be credited toward the medical expenses owed but because he did not provide proof of the overpayments, the court found he had failed to meet his burden of proof; Thomas's motion for summary judgment was denied because Tammy proved unpaid medical expenses were owed although the precise amount owed was disputed; and, finally, because neither party proved the actual amount owed, the court used its powers of equity to divide Tammy's request in half and set that amount, \$9,385.80 plus interest at a rate of twelve percent per annum from the date of judgment, as Thomas's share of the unpaid medical expenses, to be repaid at a rate of \$100.00 each month. The court also ordered in part:

Hereafter, [Tammy] shall provide to [Thomas] a statement from the doctor, an Explanation of Benefits (EOB), and receipt of payment for collection on [Thomas's] one-half of parties minor children's medical bills. [Thomas] shall thereafter provide payment of his one-half of minor children's medical bills to [Tammy]

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<sup>4</sup> This appears to be a matter of semantics. Thomas admits he did not write specific checks for medical expenses, but argues the extra child support he paid acted as an offset against the medical expenses. Thus, in his view, while he did not make payments for specific medical expenses, he did contribute toward the payment of those expenses.



within forty-five (45) days. [Thomas] shall receive credit for any periods of summer visitation he pays child support while the children are in his care (provided there is a prior Order to such effect as we have been unable to locate an Order at this time).

Thomas timely moved to alter, amend or vacate the foregoing order asking that (1) the award of interest be eliminated because the court had established a payment schedule; and (2) that his child support credit be recalculated. After hearing more testimony in March of 2009, an order was entered on July 2, 2009, containing findings of fact and conclusions of law stating, neither party contests the amount of the arrearage set by the court; the court has jurisdiction pursuant to KRS 403.211 and KRS 23A.100; both parties provided new evidence at the hearing which the court will consider; Thomas presented proof of payments he had made and credit he was due; Thomas admitted some of his claimed credit was inaccurate; Tammy admitted Thomas was entitled to twenty-one weeks of credit prior to the modification of the child support amount in 2006; neither party presented “credible proof . . . regarding the unpaid medicals or health insurance”; “its (sic) almost impossible for the parties to recreate what actually happened and for the Court to know for sure who has incurred what bill or paid which amounts;” the 2006 modification of child support changed only the monthly amount to be paid and no other terms; the court considered Thomas’s claimed credits in its order entered on September 5, 2008; and, the award of interest will remain because Tammy paid the medical bills for a period of years and is entitled to repayment with interest. Hence, the motion to alter, amend or vacate was denied

and the court clarified that Thomas will continue receiving credit for child support payments, as specified in the MSA, when the children are in his care. This appeal followed.

## ANALYSIS

Before reaching the merits of the appeal we note deficiencies in the briefs of both parties. Because Thomas's brief does not state with specificity how and where in the record the alleged errors of which he complains were preserved in the trial court, it does not conform to CR<sup>5</sup> 76.12(c)(v). When a brief does not comport with the requirements of the rule we are authorized to strike the brief entirely, refuse to consider those claims that do not comply with the rule, or review the non-compliant allegations of error for manifest injustice rather than considering them on the merits. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990); *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006); CR 61.02.

Tammy's brief is also flawed. She placed in the appendix to her brief several documents from the Florida court that were not included in the appellate record designated and certified for our review. CR 76.12 does not allow the inclusion of extra-judicial documents in the appendix. *See Commonwealth v. Crum*, 250 S.W.3d 347 (Ky. App. 2008).

Neither party has pointed out these deficiencies nor requested sanctions. We have chosen to consider Thomas's claims on the merits and will

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<sup>5</sup> Kentucky Rules of Civil Procedure.

consider only those documents in the Appendix to Tammy's brief that are properly before us as we are not authorized to consider items outside the record.

Thomas raises four issues on appeal. 1) Did Kentucky courts have jurisdiction to determine the amount of damages incurred in Florida prior to registration of the Florida order in Kentucky? 2) Did Tammy bear the burden of proof, and if so, should the case have been dismissed when she failed to carry her burden? 3) Did the court abuse its discretion by requiring Thomas to prove the payments for medical expenses he had made and thus impermissibly shift the burden from Tammy to Thomas? 4) Did the trial court abuse its discretion in determining an arrearage that was wholly unsupported by the evidence. For the reasons that follow, we reverse and remand.

### **1. Jurisdiction**

This case began in Florida with entry of an order of dissolution in 1999 which incorporated an MSA specifying Tammy and Thomas were to equally share the costs of uncovered medical expenses for their two minor children. Despite several attempts, the parties never agreed upon the amount owed by each parent. In 2003, the Florida court entered an order specifically retaining jurisdiction to settle the medical bill dispute if the parties could not reach an agreement. In 2006, the amount was still in dispute when the Florida court entered an order recognizing Kentucky as the children's current home state and therefore, the appropriate venue for any questions regarding custody. Importantly, the

Florida order did not state an intention to retain jurisdiction over any aspect of the case as it had previously stated in its 2003 order.

Along with the parties, the Florida court had grappled with the medical expense controversy for six years without resolution. We read the 2006 order entered by the Florida court, and subsequently registered in Hardin County, Kentucky, as a surrender of *all* jurisdiction over the parties and the subject matter to Kentucky. As explained in *Honigsberg v. Goad*, 550 S.W.2d 471, 472 (Ky. 1976), the Florida court could not retain jurisdiction over the case indefinitely, especially after determining Kentucky was now the children's home state. Thomas has cited no authority for his proposition that Kentucky could not exercise jurisdiction over medical bills incurred while Florida had jurisdiction of the case absent an order from the Florida court relinquishing the jurisdiction it specifically retained in its 2003 order. The order entered by the Florida court evinced its desire for the Kentucky courts to exercise complete jurisdiction over all unresolved issues between the parties.

## **2. Burden of Proof**

CR 43.01 explains the burden of proof as follows:

(1) The party holding the affirmative of an issue must produce the evidence to prove it.

(2) The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

Based upon the foregoing, and consistent with the court's statements during the hearings, Tammy bore the burden of proof in establishing the amount of medical expenses owed by Thomas. Clearly, Tammy would have lost if neither party presented any evidence, and that is essentially what happened at the hearing on May 9, 2008.

Tammy attempted to prove the amount she expended for the children's medical bills through testimony from herself and her sister-in-law, and a spreadsheet prepared for a 2003 hearing in Florida. Importantly, she did not introduce any individual medical bills. As the trial court stated, Tammy did not carry her burden. Even Tammy, at page 9 of her brief, acknowledged she was unable "to clarify with particular specificity any records supporting her testimony[.]" Having failed to satisfy her burden, as the trial court stated at the hearing and in its written order, there was no reason to go forward with the hearing and the matter should have been dismissed as Thomas requested.

### **3. Thomas's Burden**

Thomas had no need to present any evidence until Tammy had satisfied her burden of proof. *See Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 137 S.W.2d 379, 384 (Ky. App. 1939). Because Tammy did not carry her burden, the trial court erred in finding Thomas had failed to prove the amounts he had paid for medical bills.

### **4. Determination of Arrearage**

Finally, Thomas alleges the trial court abused its discretion and committed clear error in setting his share of his children's medical expenses at one-half of the amount Tammy requested since it was not based upon the evidence.

We agree.

Pursuant to CR 52.01, “[f]indings of fact shall not be set aside unless clearly erroneous,” meaning they are unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). In its findings of fact, the trial court stated, “[n]either Petitioner nor Respondent proved an amount owed nor an amount already paid. Therefore, the court, using its powers of equity, used the figures given in Petitioner’s<sup>6</sup> Exhibit #1 and divided it in one-half (1/2) to determine the amount owed to Respondent for past unpaid minor children’s medical expenses.” Having found that Tammy failed to prove the amount owed by Thomas, there was no basis for the court to award any amount to Tammy. The court’s decision to halve Tammy’s request is closely akin to the type of action condemned in *Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009) which prompted the Supreme Court of Kentucky to state, “[u]sing an average to obtain a value, without some basis other than an inability to choose between conflicting and competing valuation methods, is nothing more than making up a number, for there is no evidentiary basis to support that *specific* number.” (Emphasis in original).

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<sup>6</sup> The trial court mistakenly referred to Petitioner. It should read Respondent’s Exhibit #1.

For the foregoing reasons, we find it necessary to reverse and remand the case in its entirety and direct the Hardin Circuit Court to enter an order dismissing the action.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barry Birdwhistell  
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

T. Renee McMahan  
Phyllis K. Lonneman  
Elizabethtown, Kentucky