[Cite as *Alderman v. Alderman*, 2011-Ohio-3928.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stacey A. Alderman,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1037
v.	:	(C.P.C. No. 09DR01-316)
Wade M. Alderman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 9, 2011

Kemp, Schaeffer & Rowe Co., L.P.A., *Harold R. Kemp*, and *Andrew P. Schabo*, for appellee.

Tyack, Blackmore, Liston & Nigh Co., L.P.A., and *Thomas M. Tyack*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

KLATT, J.

{¶1} Defendant-appellant, Wade M. Alderman, appeals judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, that: (1) granted him and plaintiff-appellee, Stacey A. Alderman, a divorce and (2) denied his motion for a new trial. For the following reasons, we affirm both judgments.

{¶2} The parties married on April 15, 1994. In late January 2009, Stacey left the marital home and filed for divorce. On June 11, 2010, the trial court conducted a one-day trial on the matter, during which both Wade and Stacey testified and presented evidence.

{¶3} In a decision and judgment entry decree of divorce issued July 9, 2010, the trial court set January 30, 2009 as the date on which the parties' marriage ended. The trial court also classified Wade's and Stacey's property as either marital or separate property and divided the marital property between the spouses. In doing so, the trial court found that, during the marriage, Wade operated a business that provided snow-removal and lawn-care services. Wade conducted his business as a sole proprietorship. While Wade did 90 percent of the work required to operate the business, Stacey assisted Wade with the administrative aspects of the business. The trial court concluded that the assets and liabilities of the business were marital assets and liabilities.

{¶4} After Stacey filed for divorce, Wade received and deposited in his banking account checks from customers for whom Wade performed snow-removal and/or lawn-care services. The trial court found that these checks, which totaled $79,537, paid off accounts receivable[1] that qualified as marital assets.

{¶5} Wade failed to produce any evidence of the expenses that he incurred to generate the accounts receivable. Nevertheless, in the interest of achieving equity, the trial court accepted the expenses that Wade claimed in the couple's 2007 federal tax return as evidence of the expenses that Wade likely incurred in 2009. Thus, the trial court deducted from the $79,537 the costs for fuel ($12,005), material supplies ($5,762), and

[1] An account receivable is "[a]n account reflecting a balance owed by a debtor; a debt owed by a customer to an enterprise for goods or services." Black's Law Dictionary (9th ed.1990).

insurance ($2,915), and it determined that the $58,885 remaining was a marital asset. The trial court used the expenses claimed in the 2007 federal tax return because that tax return was the only documentary evidence submitted that reflected the business's expenses.

{¶6} After dividing all the marital assets and liabilities between Wade and Stacey, the trial court determined that a distributive award to Stacey was necessary to effectuate an equal division of the marital property. To equalize the property distribution, the trial court ordered Wade to pay Stacey $30,000.

{¶7} On July 23, 2010, Wade moved for a new trial on the issue of the allocation of marital assets and liabilities. In his motion, Wade argued that the trial court acted inequitably when it assigned a $58,885 value to the accounts receivable. Wade contended that the evidence adduced at trial did not prove that his business produced $58,885 in net profit in 2009. In support of this argument, Wade pointed to his trial testimony that he invested all his profits back into the business, and thus, he "never made a dime." (Tr. 18.) To further buttress his argument, Wade asserted that his 2009 federal tax return, which his accountant had just completed, showed that his business's 2009 net income was only $74. In a decision and judgment entry issued October 1, 2010, the trial court denied Wade's motion, finding that Wade failed to establish any of the Civ.R. 59(A) grounds for relief.

{¶8} Wade now appeals the July 9, 2010 divorce decree and the October 1, 2010 denial of his motion for a new trial, and he assigns the following errors:

> [1.] THE TRIAL COURT ERRED IN FAILING TO GRANT THE NEW TRIAL REQUESTED PURSUANT TO CIVIL RULE 59 AND CORRECT ITS ERROR WITH REGARD TO THE FINDING OF ACCOUNTS RECEIVABLE AS OF

> JANUARY 2009 PREMISED ON PAYMENTS MADE MONTHS LATER WHEN NO EVIDENCE WAS PRESENTED TO SHOW THAT, IN FACT, THEY WERE RECEIVABLES.
>
> [2.] THE TRIAL COURT ERRED IN THE MARITAL BALANCE SHEET BY FINDING THAT THE ACCOUNTS RECEIVABLE TOTALED OVER $58,000.00 AND FAILED TO TAKE INTO ACCOUNT THE BUSINESS EXPENSES FOR THE YEAR 2009.

{¶9} By his first assignment of error, Wade argues that the trial court erred in denying his motion for a new trial. We disagree.

{¶10} Civ.R. 59 specifies multiple grounds on which a trial court may grant a new trial. Wade, however, neglected to indicate to the trial court which of these grounds justified the grant of a new trial in his case. After reviewing Wade's motion, we determine that his argument correlates with two of the enumerated grounds: (1) Civ.R. 59(A)(6), which allows the grant of a new trial if "[t]he judgment is not sustained by the weight of the evidence," and (2) Civ.R. 59(A)(8), which allows the grant of a new trial if a party submits "[n]ewly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial."

{¶11} As a general matter, Civ.R. 59 does not require that a trial court grant a new trial, but rather, the rule allows a trial court the discretion to decide whether a new trial is appropriate. *Frazier v. Swierkos*, 183 Ohio App.3d 77, 2009-Ohio-3353, ¶8. By providing a mechanism by which a trial court may permit the parties to try their case anew, Civ.R. 59 prevents miscarriages of justice. *Malone v. Courtyard by Marriott Ltd. Partnership*, 74 Ohio St.3d 440, 448, 1996-Ohio-311.

{¶12} When presented with a Civ.R. 59(A)(6) motion, a trial court weighs the evidence and considers the credibility of the witnesses to determine whether the manifest

weight of the evidence supports the judgment. *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶61; *Cunningham v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶43. In the vast majority of cases, trial courts invoke Civ.R. 59(A)(6) to overturn jury verdicts that are against the manifest weight of the evidence. *Cunningham* at ¶43. " 'When a trial court reviews its own judgment in the case of a bench trial, weight-of-the-evidence reversal is nearly unheard of.' " Id. (quoting *Boyer v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 07AP-742, 2008-Ohio-2278, ¶24).

{¶13} An appellate court reviews a trial court's ruling on a Civ.R. 59(A)(6) motion under an abuse-of-discretion standard. *Mannion v. Sandel*, 91 Ohio St.3d 318, 321, 2001-Ohio-47; *Malone* at 448. This standard requires an appellate court to defer to a trial court's ruling because "the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the 'surrounding circumstances and atmosphere of the trial.' " *Malone* at 448 (quoting *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 94).

{¶14} Here, Wade's argument that the evidence does not sustain the judgment depends on the credibility of his testimony that he "never made a dime" from his snow-removal and lawn-care business. (Tr. 18.) If the trial court believed this testimony, then the value of the accounts receivable should have been zero, instead of $58,885, because Wade's 2009 expenses would have equaled or exceeded his gross profit. The trial court, however, rejected Wade's testimony.

{¶15} In the divorce decree, the trial court recognized that, when the business's income was calculated for tax purposes, the business appeared to suffer losses each year. But, the trial court's analysis of the parties' 2007 federal tax return reveals the court's skepticism that the business never realized an actual profit. The trial court found

that, after excluding depreciation expenses, the business's annual gross receipts exceeded its expenses. Also, the trial court noted that Wade claimed significant expenses for utilities, his cellular telephone, and legal services. The trial court implicitly indicated its suspicion that not all of these expenses related to the business. Because the trial court disbelieved Wade, it rejected his motion for a new trial based on the weight of the evidence. We conclude that the trial court did not abuse its discretion in doing so.

{¶16} The decision to grant a new trial based on newly discovered evidence rests within the sound discretion of the trial court. *Drake Ctr., Inc. v. Ohio Dept. of Human Servs.* (1998), 125 Ohio App.3d 678, 706; *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410. Thus, an appellate court reviews such a decision for an abuse of discretion. *Gregory v. Kottman-Gregory*, 12th Dist. No. CA2004-11-039, 2005-Ohio-6558, ¶25; *In the Matter of C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶74.

{¶17} To warrant the granting of a Civ.R. 59(A)(8) motion, the moving party must show that the newly discovered evidence: (1) will probably change the outcome if a new trial is granted, (2) was discovered after the trial, (3) could not have been discovered with the exercise of due diligence before the trial, (4) is material to the issues, and (5) is not merely cumulative or offered solely to impeach or contradict trial testimony. *Sheen v. Kubiac* (1936), 131 Ohio St. 52, 58; *Jackson v. Jackson* (2000), 137 Ohio App.3d 782, 798. In general, evidence qualifies as "newly discovered evidence" if it was in existence at the time of trial, but the moving party was excusably ignorant of it. *In the Matter of C.C.* at ¶75. The purpose of Civ.R. 59(A)(8) is not to allow a party a second opportunity to present evidence that it should have presented at the first trial. *Riesbeck v. Indus. Paint and Strip*, 7th Dist. No. 08 MO 11, 2009-Ohio-6250, ¶16.

{¶18} In the case at bar, Wade has never explained why he could not have discovered prior to trial evidence of his 2009 business expenses or net profit as calculated for tax purposes. Logically, Wade's business records contained the information necessary to calculate Wade's 2009 expenses and net profit. Without an explanation for Wade's failure to produce evidence from his own business records, the trial court acted appropriately in denying Wade a new trial based on newly discovered evidence. *Kranz v. Kranz*, 12th Dist. No. CA2008-04-054, 2009-Ohio-2451, ¶39-40 (finding no error in the trial court's denial of a new trial when the defendant in a divorce action provided no explanation for why he could not discover prior to trial that the distributions he received from his own business were actually loans); *GMS Mgt. Co. v. Coulter*, 11th Dist. No. 2005-L-071, 2006-Ohio-1263, ¶22 (holding that the trial court properly denied the plaintiff's motion for a new trial when the plaintiff failed to justify its failure to discover evidence originating from its own business records).

{¶19} Because Wade failed to demonstrate either that the judgment lacked evidentiary support or the existence of newly discovered evidence, the trial court did not err in denying his motion for a new trial. Accordingly, we overrule Wade's first assignment of error.

{¶20} By Wade's second assignment of error, he argues that the evidence does not support the trial court's determination that the parties' marital assets included accounts receivable amounting to $58,885. We disagree.

{¶21} In divorce proceedings, a trial court must classify property as marital or separate property. R.C. 3105.171(B). We review the classification of property as marital or separate property under the manifest-weight-of-the-evidence standard, and

consequently, we will affirm if competent, credible evidence supports the classification. *Hood v. Hood*, 10th Dist. No. 09AP-764, 2010-Ohio-3618, ¶13; *Colley v. Colley*, 10th Dist. No. 09AP-333, 2009-Ohio-6776, ¶17.

{¶22} Marital property includes "[a]ll real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i). R.C. 3105.171(A)(2)(a) establishes a presumption that "during the marriage" means the period of time between the date of the marriage and the date of the final hearing. *Meeks v. Meeks*, 10th Dist. No. 05AP-315, 2006-Ohio-642, ¶50. However, if the trial court determines that the use of those dates would be inequitable, the court may select alternative dates for the commencement and/or termination of the marriage. R.C. 3105.171(A)(2)(b); *Heyman v. Heyman*, 10th Dist. No. 05AP-475, 2006-Ohio-1345, ¶31. The duration of the marriage, and in particular the date of the termination of the marriage, plays an important role in distinguishing between marital and separate property, as well as determining the value of that property. *Oberst v. Oberst*, 5th Dist. No. 09-CA-54, 2010-Ohio-452, ¶31; *Alexander v. Alexander*, 10th Dist. No. 09AP-262, 2009-Ohio-5856, ¶35.

{¶23} When the parties contest whether an asset is marital or separate property, there is a presumption that the asset is marital property, unless proven otherwise. *Hood* at ¶15; *Colley* at ¶20; *Alexander* at ¶24. The spouse seeking to have certain property declared separate property bears the burden of proving that the property is separate, not marital, property. *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶28; *Beagle v. Beagle*, 10th Dist. No. 07AP-494, 2008-Ohio-764, ¶23; *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶20.

{¶24} In the case at bar, the trial court selected January 30, 2009 as the de facto termination date of the Aldermans' marriage. Stacey introduced into evidence a chart showing 13 separate payments that Wade's customers made to him between January 27, 2009 and July 6, 2009.[2] The trial court accepted that chart as evidence of accounts receivable that arose "during the marriage," i.e., before January 30, 2009.

{¶25} Wade asserts that some of the payments at issue satisfied debts for work that he performed after January 30, 2009. Wade contends that accounts receivable deriving from services rendered subsequent to the termination of the marriage are his separate property. As the party advocating that the accounts receivable constituted separate property, Wade had the burden to provide evidence proving that the debts at issue arose after the parties' marriage ended. Wade presented no such evidence, and instead, relies on mere speculation to support his contention that the accounts receivable are separate property. We, therefore, conclude that the trial court did not err in classifying the accounts receivable as marital property.

{¶26} By his second assignment of error, Wade also argues that the trial court erred in not taking into account his 2009 business expenses when valuing the accounts receivable. Wade, however, failed to adduce any evidence of his 2009 business expenses.[3] Logically, a trial court cannot consider evidence that a party neglects to introduce at trial. Accordingly, we overrule Wade's second assignment of error.

---

[2] Like the trial court, we disregard the checks that Wade deposited into the parties' joint checking account prior to the end of the marriage.

[3] We recognize that Wade testified that he still owes $17,000 for the purchase of salt. During trial, Wade failed to clearly specify when he incurred this business expense. Nevertheless, the trial court classified the debt as a marital liability and factored it into the division of the parties' marital property.

{¶27} Having overruled Wade's two assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgments affirmed.

BRYANT, P.J., and CONNOR, J., concur.