

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000490-MR

CHERYLL FORD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 10-CI-06073

WAYNARD DARRELL FORD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Cheryll Ford (“Wife”) appeals from the February 13, 2013, findings of fact, conclusions of law and order entered by the Fayette Circuit Court partially denying her motion to compel Waynard Darrell Ford (“Husband”) to return property missing from the marital business or compensate her for same, and denying her motion for attorneys’ fees. Following a careful review, we affirm.

Husband and Wife entered into a Separation Agreement on July 9, 2012, as part of their pending divorce action. Pursuant to their agreement, Wife was to receive the marital business known as Buy-Rite¹ along with all inventory, real estate, financial accounts and receivables. Husband, who ran the daily operations of the business, agreed to turn over control to Wife on July 14, 2012. Husband agreed to refrain from taking any action outside the normal course of business from the date of the agreement to the date of the transfer of possession.

Upon transfer of control of the business, a dispute arose as to whether Husband had, in fact, taken actions outside the normal course of business. Wife alleged she “discovered that [Husband] had removed the checkbook from Buy-Rite; charge slips for June and July were missing; invoices for July were missing; there was no money in the cash drawer except coins; most inventory was missing; paperwork was missing and found shredded in the dumpster.” Based on these discoveries and additional allegations of wrongdoing, Wife moved the trial court on July 16, 2012, to find Husband had violated the terms of the Separation Agreement, compel return of the missing items or compensate her for such items, and award a reasonable fee for her attorney.

Two days later, on July 18, 2012, Husband returned the business checkbook and company records in his possession to Wife. The following day, Husband filed his response to Wife’s motion denying her assertions and alleging violations of the Separation Agreement by Wife. The trial court scheduled a

¹ Buy-Rite is an oil change and vehicle repair business.

hearing on Wife's motion for September 11, 2012. In its February 13, 2013, order, the trial court summarized the testimony and evidence adduced at the hearing which we shall set forth verbatim in the interest of judicial economy.

At the September 11, 2012 hearing, the Wife presented her case, calling witnesses to show that the Husband had acted outside the ordinary course of business. Steve Whiles, the wife's cousin, testified that he believed paperwork (including invoices) to be missing from the business, along with trailer hitches and air filters. Mr. Whiles is now employed as a manager, and he had previously worked as a laborer at Buy-Rite. However, he had taken significant time off prior to the transition of the business. He could not estimate precisely which items he believed to be missing, nor the exact quantity that were missing, and he admitted not ever counting them. He did attempt to provide estimates. Nor was he able to give a value of the air filters, trailer hitches, and missing paperwork. Finally, he admitted that it was possible the Husband mailed out many of the charge invoices to customers.

The Wife testified that she had worked at the business before breaking her arm in 2008. She too testified that oil and air filters were missing. She also speculated that cash was missing from the cash drawer. However, she admitted not having been present in Buy-Rite between January 2011 and the date the Husband turned the business over to her.

The Wife also testified that the Husband cashed a counter-check from the business account. The Husband, in his testimony, countered that he had no checking account of his own, and regularly cashed checks from the business to pay expenses.

Justin West, an employee of Buy-Rite also testified that about ten trailer hitches were junked by the Husband. He testified that the trailer hitches were without value. He also said that he did not observe the Husband remove any inventory.

Mitchell Blankenship, an employee of Buy-Right (sic), largely corroborated Mr. West's testimony that the Husband did not remove inventory from the business.

The Husband testified that he did remove some paperwork from the business for tax purposes, which was returned on the advice of his attorney except for certain documents necessary to prove he had paid taxes. He also removed a checkbook and a ledger which were returned after the motion was filed.

The Husband admitted to calling his accounts receivable to tell them that he was going out of business and they needed to settle up. He also said he settled other accounts by paying debts the business owed. Finally, he admitted removing items from the business, which he characterized as junk, in order to clean up before the transition.

Based on this testimony, the trial court concluded Husband had violated the terms of the parties' Separation Agreement by acting outside the normal course of business by removing the checkbook and ledger, removing "junk" from the business, and settling business accounts. However, the trial court found Wife had failed to carry her burden of proving that between July 9th and 14th Husband took cash from the registers, used the counter check for his own purposes, removed invoices, removed inventory, or took substantial cash from the business. Citing *Gibson v. Kentucky Farm Bureau Mut. Ins. Co.*, 328 S.W.3d 195, 205 (Ky. App. 2010), the trial court found the right to recover for a party's wrongdoing is cut off unless the existence of damages is clearly proven. Further, in reliance on *Commonwealth, Dept. of Highways v. Jent*, 525 S.W.2d 121, 122 (Ky. 1975), the trial court concluded it was not permitted to engage in speculation as to the amount

of probable damages. The trial court held Wife had failed to prove the existence of damages or the alleged amount thereof and was therefore not entitled to the relief she sought. The trial court also declined to award Wife attorneys' fees. This appeal followed.

Wife now contends the trial court abused its discretion in refusing to grant her an award of damages and her requested legal fees. She contends the trial court erred in its assessment of the evidence by permitting Husband to defeat her claims by simply asserting he "paid bills" without specific documentation of what debts were paid or the source of the funds used to satisfy these alleged obligations of the business. Wife appears to contend she carried her burden of proof and the trial court erred in not so concluding. We disagree.

The standard of appellate review of questions regarding a trial court's findings of fact is well-established. Questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness' credibility. CR² 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)). Factual determinations made by the circuit court will not be disturbed on appeal unless clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Sherfey*, 74 S.W.3d 777. Substantial evidence is defined as "that which, when taken alone or in light of all the evidence, has

² Kentucky Rules of Civil Procedure.

sufficient probative value to induce conviction in the mind of a reasonable person.”

Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994). When the testimony before the trial court is conflicting, as in this case, we may not substitute our decision in place of the judgment made by the trial court. *R.C.R. v. Commonwealth Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998). With these standards in mind, we now turn to the case before us.

A careful review of the record reveals the existence of substantial evidence to support the trial court’s decision, and we discern no abuse of discretion. It is not for us to determine whether we would have reached a different conclusion if faced with the same evidence. *See Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321 (Ky. 1992). It is axiomatic that even where the evidence presented is conflicting, we may not substitute our judgment for that of the trial court. *Truman v. Lillard*, 404 S.W.3d 863, 868-69 (Ky. App. 2012). Mere doubt as to the correctness of a trial court’s finding is insufficient to justify reversal. *Moore v. Asente*, 110 S.W.3d 336, 355 (Ky. 2003). Wife’s disagreement with the trial court’s assessment of the evidence and the weight to be given thereto constitutes an insufficient basis upon which to grant reversal. Thus, as the trial court’s ruling was based on substantial evidence and was neither clearly erroneous nor manifestly against the weight of the evidence, we will not disturb it on appeal. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986); *Harry*

Harris, Inc. v. Quality Const. Co. of Benton, Ky., Inc., 593 S.W.2d 872 (Ky. App. 1979).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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