

RENDERED: OCTOBER 2, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000996-MR
AND
NO. 2014-CA-001021-MR

JOSEPH JEWELL CARVER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 12-CI-502261

STACEY ANN CARVER

APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING

** ** * * * * *

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Joseph Jewell Carver appeals, and Stacey Ann Carver cross-appeals, from Findings of Fact, Conclusions of Law and Decree rendered in Jefferson Circuit Court in their dissolution of marriage proceeding. Appellant and Cross-Appellee Joseph Carver argues that he was entitled to a new trial because he was unable to discharge his trial counsel despite significant tension and outright

animosity with counsel at trial. Appellee and Cross-Appellant Stacey Carver maintains that the trial court erred when it accepted the parties' stipulated formula for dividing their marital assets, and then failed to divide them pursuant to that formula. For the reasons stated below, we find no error and AFFIRM the Judgment and Order on appeal.

The parties married on September 9, 2000, in Jefferson County, Kentucky, and separated on July 18, 2012. The marriage produced two children. Appellee later filed the instant action in Jefferson Circuit Court, Family Division, seeking dissolution of the marriage and the resolution of related issues.

On November 2, 2012, the parties executed an Agreed Order addressing custody and parenting time. This agreement was accepted by the court, which reserved for later adjudication the disposition of property, allocation of debt, child support and attorneys' fees. The matter proceeded to trial on November 21, 2013, which resulted in an Order rendered on January 13, 2014, disposing of the remaining issues.

Shortly thereafter, Appellant filed a Motion pursuant to Kentucky Rule of Civil Procedure (CR) 59.01 and CR 59.07 asking the court to grant him a new trial, or in the alternative a new trial on the sole issue of the value of the parties' business called Carver Lawn Care. Specifically, Appellant argued that several unusual circumstances occurred at trial, including Appellant's dissatisfaction with his trial counsel and his desire to discharge his counsel and continue the trial at a later date. Also, the court precluded Appellant from making

any nonmarital claim at trial because of his failure to comply with pretrial procedure regarding these claims. At the time of trial, the court noted that if it continued the trial, it would likely award to Appellee her costs and attorney fees incurred by the continuance. As such, Appellant maintained that he was in an untenable position of either retaining the trial counsel with whom he was arguing, or incurring Appellee's substantial costs and attorney fees if the matter were continued. After oral arguments were heard, the court overruled Appellant's Motion for a New Trial by way of an Order rendered on May 28, 2014. This appeal and cross-appeal followed.

Appellant now argues that the trial court committed reversible error in denying his Motion for a New Trial pursuant to CR 59.01 and 59.07. He notes that the video record clearly reveals that there was significant tension and even outright animosity between himself and his counsel, and that this tension arose because counsel did not properly prepare for trial and was not properly protecting Appellant's rights. According to Appellant, and through no fault of his own, he was faced with the prospect of either moving forward to trial with a counsel he did not trust, continuing to trial without counsel, or in the alternative seeking a continuance with the likelihood that he would be held responsible for Appellee's costs and fees. Appellant contends that this was an impossible situation that denied him a fair trial. In support of this argument, Appellant goes on to maintain that counsel was not prepared to argue at trial that Appellant had a nonmarital interest in the lawn care business, that it is counsel's duty and not that of Appellant

to prepare for trial, and Appellant had no opportunity to address the situation as it occurred on the day of trial. While he acknowledges that he cannot cite any case law factually similar to the matter before us, Appellant directs our attention to the general proposition set out in *Gray v. Sawyer*, 247 S.W.2d 496, 498 (Ky. 1952), that the court must order a new trial where it appears reasonably certain that injustice would result absent the new trial. He seeks an Opinion reversing the Order on appeal, and remanding the matter for a new trial.

CR 59.01 states that,

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

- (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
- (b) Misconduct of the jury, of the prevailing party, or of his attorney.
- (c) Accident or surprise which ordinary prudence could not have guarded against.
- (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
- (e) Error in the assessment of the amount of recovery whether too large or too small.
- (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

(g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

(h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

In his Motion for a New Trial, Appellant asserted entitlement to relief under CR 59.01(a), to wit, an "[i]rregularity in the proceedings of the court . . . by which the party was prevented from having a fair trial."¹ The question for our consideration, then, is whether the Jefferson Circuit Court properly concluded that no irregularities occurred at trial which prevented Appellant from having a fair trial. We must answer this question in the affirmative. Distilled to its essence, and though not asserted as such, the corpus of Appellant's claim is that he did not receive the effective assistance of counsel to which he was entitled. That is, the "irregularity" he asserts in support of CR 59.01(a) relief is his counsel's alleged lack of preparation and/or refusal to prosecute Appellant's case in a manner consistent with Appellant's wishes. However, it is well-established that the alleged "[n]egligence of an attorney is imputable to the client and is not a ground for relief" under CR 59.01. *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984); *see also, Childers v. Potter*, 291 Ky. 478, 165 S.W.2d 3 (1942), and *Gorin v. Gorin*, 292 Ky. 562, 167 S.W.2d 52 (1942).

¹ Appellant concurrently sought a new trial pursuant to CR 59.07, which provides: On motion for a new trial in an action tried without a jury, the court may grant a new trial or it may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

As noted by the trial court, Appellant chose his trial counsel and was represented by the same counsel for more than one year. Early on in the proceeding, Appellant's pleadings and disclosures indicated that Appellant intended to make an unspecified nonmarital claim. For reasons undisclosed by the record, counsel ultimately chose not to comply with pretrial procedure regarding these claims, or otherwise determined that a nonmarital claim was not warranted by the facts. The case law provides no basis for concluding that this decision, and the resultant animosity between Appellant and counsel, constitute an "irregularity" requiring relief under CR 59.01.

When reviewing the denial of a motion for a new trial, our sole function is to determine whether the trial court abused its discretion. *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky. App. 1996). The decision of trial judge is presumptively correct, and will not be reversed unless that decision is clearly erroneous. *Id.* The Jefferson Circuit Court's conclusion on this issue is supported by the record and the law. The alleged irregularity cited by Appellant does not support the relief sought under CR 59.01. The denial of Appellant's Motion for a New Trial did not constitute an abuse of discretion, and as such we find no error.

In her cross-appeal, Appellee argues that the trial court erred as a matter of law when it accepted the parties' agreement for dividing their marital assets, then failed to divide those assets in accordance with the agreement. The parties entered into a settlement agreement in this matter, in which they agreed to divide the marital assets evenly. This agreement was accepted by the court and

incorporated into the Judgment. Appellee now maintains that the court improperly failed to divide net proceeds from the sale of the marital residence and the value of Appellant's business. Appellee relies on a mathematical formula to conclude that the court improperly awarded her \$205,917.26 (representing \$175,765.50 or half the value of the business, plus \$30,151.76 representing half the equity of the marital residence) rather than the \$293,800.01 to which she was properly entitled. She maintains that the court's failure to enforce the parties' settlement agreement in the division of Carver Lawn Care, Inc. and the value of the marital residence was erroneous as a matter of law, and she seeks an Opinion reversing the court's Order on this issue.

Appellee has not complied with CR 76.12(4)(c)(v) on this issue, which requires her to state at the beginning of the written argument if this issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985). *Arguendo*, even if this matter were preserved, we would find no error. The trial court produced a comprehensive analysis of the business valuation in concluding that Carver Lawn Care, Inc. was valued at \$351,591.00 at the time of dissolution. The court then divided this asset equally between the parties in accordance with the separation agreement. Similarly, the court divided the home equity equally between the parties. As such, Appellee cannot reasonably

argue that the court failed to execute the express terms of the separation agreement requiring the equal division of marital assets. Appellee is in effect arguing that these assets were improperly valued, not that the determined value was improperly divided. As such, even if this matter were preserved, we would find no error.

For the foregoing reasons, we AFFIRM the Judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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