

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 11-849

MYRON LANCE

APPELLANT

V.

CATHY SCOTT

APPELLEE

Opinion Delivered FEBRUARY 1, 2012

APPEAL FROM THE POLK COUNTY
CIRCUIT COURT,
[NO. CV-06-161-1]

HONORABLE TED CAPEHEART,
JUDGE

REVERSED AND REMANDED

JOHN B. ROBBINS, Judge

This is a second appeal to our court regarding the return of certain cattle owned by appellant Myron Lance and wrongfully kept by his neighbor appellee Cathy Scott. We reverse and remand.

This litigation started in 2005 when Lance filed a replevin suit against Scott accusing her of wrongfully keeping two of his cows, beginning in the spring of 2004, and profiting from their offspring. The cause was heard in Polk County Circuit Court in 2007, and the trial court's findings were reflected in an order filed on June 4, 2007.

In the order, Lance was awarded return of the two cows (Goldie and Andi) plus possession of the most recent calf born to one of the cows, but he was denied any damages "for the offspring generated by his two cows" because these claimed damages "are approximately equal" to Scott's claim for expenses she incurred for keeping and maintaining



Goldie, Andi, and their offspring.¹ Scott was ordered “to engage someone to return” Lance’s two cows and the most recently born calf to his property, and Lance was ordered “to pay the cost of the person hired to move the cattle.”

Lance appealed, contending in the first appeal that the trial court erred (1) in crediting Scott with expenses where Scott lacked sufficient evidence of the expenses claimed, and (2) in denying him money damages for conversion and sale of Goldie and Andi’s offspring. Our court affirmed the trial court’s order by unpublished decision, handed down on March 19, 2008, *Lance v. Scott*, CA07-976, holding in conclusion that:

[T]he trial court did not err in refusing to award damages for the offspring produced during Ms. Scott’s control of the cows. During this time, there is no evidence that the cows would have been bred but for the cows’ presence on Ms. Scott’s property and the servicing of her bull. Indeed, the testimony showed that prior to the spring of 2004 Mr. Lance had been using Ms. Scott’s bull to breed his cattle. And during this time, Ms. Scott fed and cared for the cows and their offspring, thus relieving Mr. Lance of any responsibilities or expenses related to his cows. While it may be difficult to calculate Ms. Scott’s expenses precisely, it cannot be disputed that they were considerable. In this case Mr. Lance was owed either the value of his cows, or the cows themselves, and he was awarded the cows. The trial court further ordered possession of one of the calves to be placed with Mr. Lance, which is not at issue in this appeal. Any further relief in the form of damages was not warranted by the proof, and therefore we hold that the circuit court’s decision was not clearly erroneous.

Thereafter, Scott did not return Goldie or Andi, nor did she provide Lance the calf. Lance filed a Motion for Contempt and For Judgment on August 12, 2010. In January 2011, Lance filed a Petition for Contempt and for Sanctions due to Scott’s failure to provide

¹At the time of the 2007 trial, there were seven known offspring of Goldie and Andi, and Scott paid Lance \$450 for one of the calves she sold. Whether Scott had sold the remainder was in dispute. Scott said her bull serviced Goldie and Andi with no compensation from Lance. Scott claimed additional expenses such as feed, vaccinations, worming, and fence repairs.



discovery responses. The issues were heard on April 18, 2011. Scott did not appear at the hearing.

During the hearing, Lance testified that he had tried through discovery to determine the amount of any relevant expenses or revenue experienced by Scott since 2007, but Scott had not responded to discovery. Lance estimated that Goldie, Andi, and the calf would or should have produced about ten calves between June 2007 and the present, so he wanted their current market value, \$700 each (\$7000). Lance wanted the return of Goldie, Andi, and possession of the calf identified back in 2007. Because Goldie or Andi had died, Lance asked for the value of the dead cow. He acknowledged that cattle were valued at approximately \$500 each in 2007 or 2008. Lance asked for five percent prejudgment interest. Lance also sought fees, costs, and penalties for Scott's contemptuous behavior and for her failure to abide by discovery rules.

The Polk County Circuit Court entered an order in May 2011 that awarded Lance his court costs, an attorney fee for pursuing the contempt citation, plus an additional attorney fee and monetary penalty for Scott's failure to respond to pre-hearing discovery requests. The trial court further found that the June 4, 2007 order, affirmed by our court in 2008, which held that "the cost of raising the cattle roughly equals the value of the offspring," was the law of the case so that Lance was not entitled to judgment for additional offspring. The trial court concluded that Lance would receive judgment for \$1500 and not "the return of his animals," along with five-percent pre-judgment interest accruing from the June 4, 2007 order.



Lance appeals the May 2011 order contending that the trial court erred by not ordering Scott to return the three cows as originally decided in 2007 and further erred by applying the law-of-the-case doctrine to prevent collection of damages for ten additional offspring. We agree that the trial court erred.

The doctrine of law of the case prohibits a court from reconsidering issues of law and fact that have already been decided on appeal. *Green v. George's Farms, Inc.*, 2011 Ark. 70, 378 S.W.3d 715. A decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Id.* It serves to effectuate efficiency and finality in the judicial process, and its purpose is to maintain consistency and avoid reconsideration of matters once decided during the course of a single, continuing lawsuit. *Id.* It is conclusive only where the facts on the second appeal are substantially the same as those involved in the prior appeal; it does not apply if there was a material change in the facts. See *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999); *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997).

The June 2007 order, now law of the case after our decision affirming it, required Scott to return Goldie and Andi and to give possession of the most recent calf to Lance. We hold that the trial court erred in not ordering Scott to return the surviving cow (Goldie or Andi) and to provide Lance the calf identified in 2007. We hold that the trial court did not err when it gave Lance his estimated value of the deceased cow, \$500-per-head, because it was impossible to implement return of that animal.



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Moving to the issue of additional offspring generated between the 2007 order and the 2011 hearing, we hold that the trial court erred. The trial court concluded that law-of-the-case precluded Lance from making a claim to any additional offspring because the prior appeal decided that “the cost of raising the cattle roughly equals the value of the offspring.” This was wrong. The law-of-the-case doctrine is not conclusive where the facts of the second appeal are materially changed from the first appeal. *Weiss v. McFadden*, 360 Ark. 76, 199 S.W.3d 649 (2004). Lance argues, and we agree, that the facts of the 2011 claim were substantially different, relating to a different period of time and different offspring. The trial court did not reach the merits of Lance’s damage claim regarding offspring generated between the 2007 order and the 2011 hearing. We, therefore, also reverse that portion of the trial court’s order and remand for it to decide this claim based upon the proof adduced at the 2011 hearing.

The trial court’s order is reversed and remanded.

PITTMAN and GLOVER, JJ., agree.

Verkamp & Ladd, P.A., by: *John P. Verkamp*, for appellant.

Orvin W. Foster, for appellee.