

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA09-908

CLEVELAND SMITH

APPELLANT

V.

SHERRY SMITH

APPELLEE

Opinion Delivered April 14, 2010

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[CV-05-1034-3]

HONORABLE THOMAS LYNN
WILLIAMS, JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Cleveland Smith appeals the May 4, 2009 order of the Garland County Circuit Court that granted appellee Sherry Smith’s motion to divide funds pursuant to a 2005 “litigation agreement” between the parties. The written agreement, signed by both Mr. and Ms. Smith, included the following statements: the parties, husband and wife, were living separate and apart; prior to their separation, they sold a jointly owned business; litigation ensued after the buyer, Jon Hardy, defaulted on his payments; and a single attorney represented both Smiths in the litigation. Under the agreement, Mr. and Ms. Smith each would receive half of any net sums collected as judgment or settlement in the litigation, and their attorney would escrow all sums and divide them equally after legal fees and costs.

In 2006 Mr. and Mrs. Smith were divorced from bed and board by order of the Garland County Circuit Court. In 2007 they received a \$209,341.65 judgment against

Hardy. The money was placed in their attorney's escrow account, and Ms. Smith filed a motion requesting division and disbursement of the funds pursuant to the litigation agreement. Mr. Smith answered the motion, asking that the funds remain in escrow pending resolution of "the audit issue currently taking place pursuant to the parties' divorce decree." He alleged that Ms. Smith had apparently stolen, embezzled, and converted hundreds of thousands of dollars to her own use and that recovery would be greatly diminished if remaining funds were disbursed to her. After conducting a hearing, the court ordered that the net funds be immediately divided and disbursed equally between the Smiths.

Mr. Smith contends on appeal that the trial court erred 1) in ruling that the testimony of his expert witness was irrelevant, and 2) in denying his request to retain funds in trust based upon his allegations that Ms. Smith had embezzled and misappropriated marital funds. Ms. Smith responds that neither of these points concern the issue that was before the court, whether to distribute the funds in the manner stated in the litigation agreement. For the reasons set forth in this opinion, we affirm.

The evidentiary ruling that Mr. Smith first appeals occurred when Ms. Smith raised a relevancy objection to testimony by Mr. Smith's expert, a certified public accountant, about "various marital accounts" accumulated during the parties' marriage. Mr. Smith stated in a colloquy with the court that the expert's testimony "will only be what he's audited and what he's found so far. If you don't think that's relevant today, we'll proceed and move on." The court ruled that the testimony was not relevant. Without proffering the testimony, Mr. Smith

informed the court that he had “nothing further.”

Mr. Smith argues that the excluded testimony was relevant to proving that Ms. Smith had misappropriated marital assets, which would support keeping the settlement funds in trust. He concludes that the trial court abused its discretion in determining that the testimony was not relevant.

When the ruling is one excluding evidence, the substance of the evidence must be made known to the trial court by offer or must be apparent from the context within which questions were asked. *Roop v. Cook*, 2009 Ark. App. 540, 334 S.W.3d 412; Ark. R. Evid. 103(a). Here, because there was no proffer of the testimony about what the audit revealed, and because the substance of the testimony was not readily apparent from the context, we cannot review the trial court’s ruling to exclude the evidence.

Mr. Smith also contends that the trial court erred in denying his request to retain the escrowed funds in trust despite his allegations of Ms. Smith’s embezzling and misappropriating marital assets. Citing case law on constructive trusts, he argues that the escrowed funds awarded in the Hardy judgment should have been held until such time as the divorce court could make a determination of his fraud allegations. Mr. Smith presents no convincing argument that a constructive trust must be imposed based upon a party’s mere allegations of fraud, nor does he show that he raised the question to the trial court.¹ It has long been held

¹Mr. Smith did not object at trial to a ruling by the trial court that it wanted no evidence “beyond the written agreement.” The ruling was made after Ms. Smith objected that testimony about whether she had given her mother cash was not relevant and was an improper attempt to litigate Mr. Smith’s petition for fraud.

Cite as 2010 Ark. App. 318

that the appellate courts will not address arguments unless they are sufficiently developed and include citation to authority. *Hatch v. Hatch*, 2009 Ark. App. 337, 308 S.W.3d 174. It is also well settled that arguments made for the first time on appeal will not be considered. *Id.*

Affirmed.

MARSHALL and BAKER, JJ., agree.