

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-20-528

PAUL REESNES

APPELLANT

V.

BRIDGET REESNES

APPELLEE

Opinion Delivered November 9, 2022

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT
[NOS. 73DR-09-437 AND 73DR-
15-489]

HONORABLE CRAIG HANNAH,
JUDGE

SUBSTITUTED OPINION UPON
DENIAL OF REHEARING;
AFFIRMED IN PART AND
REVERSED IN PART AND
REMANDED ON DIRECT APPEAL
AND ON CROSS-APPEAL

KENNETH S. HIXSON, Judge

Appellant Paul Reesnes and appellee Bridget Reesnes were married in 1986 and were divorced pursuant to a divorce decree entered on August 13, 2009. This case is a postdivorce dispute pertaining to the distribution of marital property that was omitted in the parties' property settlement agreement (PSA) in 2009 and not divided upon their divorce. The trial court in this postdivorce proceeding found that Paul had committed constructive fraud in failing to disclose the property upon divorce and endeavored to award Bridget her equal share of the marital property. We affirm the trial court's jurisdiction to modify the decree and award Bridget her one-half interest in the property, but for the reasons expressed herein,

we hold that the trial court's distribution was inequitable and must be reversed and remanded for further proceedings.

In the divorce, Paul was represented by counsel; Bridget was not. The parties entered into a PSA that was incorporated, but not merged, into the divorce decree. The PSA contained various provisions for the division of the parties' marital property. One of the items that was addressed in the PSA was Paul's 50 percent ownership interest in a closely held corporation, Custom Aircraft Cabinets, Inc. (CA Cabinets). CA Cabinets is a company that builds and refurbishes aircraft interiors. The PSA provided that that Bridget would receive 50 percent of Paul's dividend distributions from CA Cabinets and that her right to receive these dividends would terminate in the event the business was sold. In the event of a sale of the business, Bridget would receive 50 percent of the sales proceeds of Paul's ownership interest. The PSA contained a detailed description of a formula to calculate this distribution. The PSA also provided that Paul would furnish Bridget annual computations from CA Cabinets showing distributions and income tax liability. Paul made distribution payments to Bridget from 2009 through 2016.

On February 4, 2019, Bridget filed a motion for contempt against Paul, alleging that Paul had not paid any dividend distributions from CA Cabinets since 2016 and that Paul was in contempt for his failure to provide annual computations related to CA Cabinets as required by the parties' PSA. During Paul's deposition in the contempt proceedings, Bridget discovered the identity of another entity, CAC Properties, LLC (CAC Properties). CAC Properties owns property and a building from which CA Cabinets operates its business pursuant to a lease agreement. Bridget discovered that Paul acquired a 50 percent ownership

interest in CAC Properties during their marriage, which would render Paul's ownership interest in CAC Properties marital property at the time of the divorce. Bridget also discovered that only four months after the PSA was negotiated and the divorce decree was filed, Paul received a \$100,000 dividend distribution from CAC Properties.

After discovering that Paul owned, and still owns, a 50 percent ownership interest in CAC Properties, Bridget filed a second amended motion to modify the divorce decree. In that motion, Bridget alleged fraud and asked, inter alia, that Paul be ordered to pay her one-half of the distributions he had received from CAC Properties since the divorce in 2009, that the property be divided at its present value, or for an equitable division of the marital property including CAC Properties. Paul filed a response wherein he denied all material allegations.

After a hearing on the matter, on May 4, 2020, the trial court entered an order finding that Paul was in contempt for failing to provide the annual computations regarding CA Cabinets as required by the parties' PSA. The trial court ordered Paul to pay Bridget \$2500 in attorney's fees as a sanction for contempt.¹ Regarding CAC Properties, the trial court found that Paul had committed constructive fraud for failing to disclose the existence of CAC Properties in 2009 and divide it in the divorce. As a result of Paul's constructive fraud, the trial court awarded Bridget the following relief: (1) \$180,000 for her marital interest in Paul's ownership interest in CAC Properties as of the time of divorce; (2) \$33,333 for her interest in the \$100,000 distribution paid from CAC Properties to Paul on December 8, 2009, four months after the divorce; and (3) “. . . as sanction for failing to disclose the

¹Paul does not appeal this finding of contempt.

existence of CAC Properties, LLC at the time of the divorce and as a remedy for [Bridget's] loss of use of those funds for 10 plus years," the court awarded prejudgment interest at 4 percent per annum on the \$213,333 judgment.² Both parties filed posttrial motions seeking various forms of relief. With the exception of a minor point not relevant to this appeal or cross-appeal, the trial court denied these motions.

Paul appealed. On direct appeal, Paul's primary argument is that the trial court lacked jurisdiction to modify the divorce decree. Alternatively, Paul argues that the trial court erred in valuing Bridget's interest in CAC Properties without applying the fair market value; erred in awarding her one-third of a distribution he received four months after the divorce; and erred in awarding prejudgment interest.

Bridget cross-appealed. On cross-appeal, Bridget argues that the trial court erred in excluding evidence related to Paul's postdivorce income and earnings; erred in its inequitable award of relief; and erred in valuing CAC Properties as of the date of divorce and excluding Bridget's expert's present-day valuation.

Because our ultimate disposition of this case affects the relevance of the parties' arguments on appeal, we set forth our disposition as follows: The trial court had jurisdiction to modify the divorce decree. Bridget is awarded a 50 percent interest in Paul's ownership of CAC Properties, and this matter is remanded to the trial court for proceedings consistent with this opinion.

²Prejudgment interest at 4 percent on \$213,333 from August 13, 2009—the date of the divorce—to the date of the May 2, 2020, order calculates to approximately \$95,000.

I. Discussion

A. The Standard of Review

Our standard of review in domestic-relations cases is well settled. This court reviews domestic-relations cases de novo, but we will not reverse the trial court's findings unless they are clearly erroneous. *Doss v. Doss*, 2018 Ark. App. 487, 561 S.W.3d 348. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* Due deference is given to the trial court's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Id.* As to issues of law, however, we give no deference to the trial court; rather, we review issues of law and statutory construction de novo. *Hargrove v. Hargrove*, 2015 Ark. App. 45, 453 S.W.3d 683.

B. The Trial Court's Jurisdiction to Modify the 2009 Divorce Decree

A bench trial was held on Bridget's motion to modify the divorce decree and distribute Paul's previously undisclosed 50 percent interest in CAC Properties. The PSA was incorporated, but not merged, into the August 13, 2009, divorce decree. Paragraph 9(A) of the PSA provides:

Husband and Wife agree that it is the intention of the Husband and Wife that this Agreement constitutes a full and complete settlement of *all property rights*, both real, personal and mixed, occurring to them by reason of said marriage.

(Emphasis added.) Further, paragraph 15 of the divorce decree provides:

That each party hereby warrants and affirms that each of them has disclosed *any and all property*, whether marital or not marital, to the other party, that each of them has had ample opportunity to investigate the property of the other, that each of them is satisfied as to all of the property so disclosed and that each of them does not demand of their counsel any further investigation or discovery of assets belonging to the other party.

(Emphasis added.) And the concluding paragraph in the divorce decree provides:

And the *court retains jurisdiction* of this cause for the purpose of adjudging and awarding to the parties their respective interests and rights to and in the property and property rights owned by the parties for the purpose of ascertaining or enforcing all rights and obligations of the parties under this decree, and for other purposes. IT IS SO ORDERED.

(Emphasis added.)

In the May 4, 2020, order being appealed, the trial court found that it had continuing jurisdiction over the matter pursuant to the reservation-of-jurisdiction clause contained in the divorce decree cited above. In the May 4, 2020, order, the trial court further found:

3. [Paul] failed to disclose the existence of CAC Properties, LLC (the “LLC”), and his fifty percent (50%) interest in the LLC to [Bridget] or his attorney, Gary Rogers, at the time of the divorce.

4. [Paul’s] 50% interest in the LLC was a marital asset that was not divided at the time of the divorce.

5. The Court finds sufficient proof of constructive fraud by [Paul] for failure to disclose the existence of his ownership interest in the LLC and divide it at the time of the divorce. [Paul] had a legal and ethical duty to disclose the ownership of the LLC pursuant to Paragraph 15 of the Decree.

Paul argues that the general reservation of jurisdiction in the divorce decree did not grant the trial court jurisdiction to modify the decree and that no exception to the ninety-day rule in Arkansas Rule of Civil Procedure 60(a) is applicable. We find his arguments unpersuasive and disagree. Ark. R. Civ. P. 60(c) provides in pertinent part: “The court in which a judgment . . . has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order: . . . (4) For misrepresentation or fraud . . . by an adverse party.” The supreme court in *Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229

(2005), held that, under Rule 60(c)(4), constructive fraud or the breach of a legal or equitable duty to another warrants setting aside or modifying a judgment. Here, the trial court specifically found that Paul committed constructive fraud by failing to disclose his ownership interest in CAC Properties during the negotiations of the parties' 2009 PSA. Such a finding by the trial court clearly empowered it to vacate or modify the 2009 divorce decree herein under Rule 60(c)(4). Having said that, we do not address Paul's other argument that the reservation provision in the 2009 divorce decree is insufficient to grant the trial court jurisdiction in this matter. The trial court did not err in determining that it had jurisdiction to modify the 2009 divorce decree.

C. Constructive Fraud

Paul argues that there is no basis to support the trial court's finding of constructive fraud because he had no duty to disclose CAC Properties, and Bridget failed to investigate the circumstances to protect her own interests. We, however, do not agree. Paragraph 9(A) of the parties' PSA stated that the PSA purported to constitute a full and complete settlement of all the property rights, and paragraph 15 of the divorce decree provided that each party warranted the disclosure of all property to the other party.

Attorney Gary Rogers was the first witness to testify. Rogers testified that he represented Paul in the divorce but that he did not represent Bridget, who was pro se and signed a waiver and entry of appearance. Rogers stated that he had never spoken with or had any contact with Bridget. Rogers drafted the parties' PSA. Rogers stated that at that time, he was unaware that a separate entity known as CAC Properties existed and that had he been aware, he would have included that entity in the PSA.

Bridget testified that during her negotiations with Paul about the PSA, she thought attorney Rogers was representing them both because that is what Paul had told her. Bridget stated that she trusted Paul and that he convinced her that having separate attorneys would pit them against each other and result in disadvantageous consequences in dividing the marital property. Bridget stated that consistent with paragraph 15 of the divorce decree, she relied on Paul to disclose all of the marital property during their negotiations and did not feel that any further investigation was necessary. Bridget stated that she knew about Paul's interest in CA Cabinets but thought everything associated with CA Cabinets was a single entity. Bridget did not know that Paul had a separate interest in CAC Properties and stated that, had she known, she would not have agreed for him to keep that entity with nothing in return.

Paul testified that he did not disclose his ownership interest in CAC Properties until his deposition in the present litigation. When asked why he failed to disclose CAC Properties when negotiating the PSA, Paul stated, "I don't know how it happened, but I didn't even think about it." Paul stated further that Bridget could trust him to disclose all of their property and that he did not intentionally fail to disclose CAC Properties during their negotiations. Paul also acknowledged receiving a \$100,000 dividend distribution from CAC Properties only four months after the divorce decree was entered.

Bridget testified that after twenty-seven years of marriage, she trusted Paul to disclose all of their property when negotiating the PSA, and in Paul's testimony, he confirmed that she could rely on his representations. Paul was clearly aware of his interest in CAC Properties at the time of the parties' divorce, and he neglected to disclose his interest to either his

counsel or to Bridget. In fact, Paul received a \$100,000 dividend distribution from CAC Properties a mere four months after the divorce decree was entered. Paul had no explanation for his failure to disclose and testified, “I don’t know how it happened, but I didn’t even think about it.” Even assuming Paul’s omission and misrepresentation was unintentional, this presented grounds under Rule 60(c)(4) to modify the decree after ninety days. *See Dickson, supra*. Accordingly, we find no abuse of discretion in the trial court’s modification of the decree based on constructive fraud. *See Linn v. Miller*, 99 Ark. App. 407, 261 S.W.3d 471 (2007) (stating that a trial court’s findings under Rule 60 are reviewed under an abuse-of-discretion standard).

D. The Trial Court’s Remedies

The trial court awarded Bridget \$180,000 for her interest in CAC Properties, \$33,333 for her part of the \$100,000 dividend distribution from CAC Properties, and “. . . as sanction for failing to disclose the existence of CAC Properties, LLC at the time of the divorce and as a remedy for [Bridget’s] loss of use of those funds for 10 plus years,” the court awarded prejudgment interest at 4 percent per annum on the \$213,333 judgment.

E. Prejudgment Interest

It is clear that when the order is viewed as a whole, in an attempt to make Bridget whole for the loss of use of the money from CAC Properties for ten plus years, the court awarded Bridget prejudgment interest on the \$213,333 judgment. This was error in that we can find no legal authority to award prejudgment interest in this situation.

Paul argues that the trial court erred as a matter of law in awarding prejudgment interest on the \$213,333 judgment awarded to Bridget. In the May 4, 2020, order being

appealed, the trial court ordered the judgment to accrue 4 percent interest per annum from the date of divorce until entry of the order. Although we are setting aside this judgment and remanding for further proceedings, we agree with Paul that this award of prejudgment interest was erroneous as a matter of law. And, importantly, the fact that prejudgment interest is not allowable is relevant to our decision on cross-appeal that the trial court erred in awarding Bridget a one-half interest in the value of the company as of the divorce date instead of distributing the CAC Properties stock one-half to each party in that such a distribution constitutes an inequitable division of property as discussed more fully hereinafter.

Prejudgment interest is intended to be compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. *Dorsett v. Buffington*, 2013 Ark. 345, 429 S.W.3d 225. However, prejudgment interest is allowable only when the amount of damages is definitely ascertainable by mathematical computation or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion. *Walther v. Wilson*, 2020 Ark. 194, 600 S.W.3d 554. The award of prejudgment interest is a question of law to be decided by the appellate court on a de novo review. *DWB, LLC v. D&T Pure Tr.*, 2018 Ark. App. 283, 550 S.W.3d 420.

The trial court determined that the value of CAC Properties at the time of the divorce was \$360,000 and awarded Bridget \$180,000 for her marital interest. However, prejudgment interest on this amount was not allowable because the amount of damages was not definitely ascertainable by mathematical computation without reliance on opinion or discretion. The damages amount was based on the *opinion* of Paul's valuation expert. In fact,

in response to Paul's direct appeal, Bridget concedes that prejudgment interest was improper.

Bridget, however, suggests that this should not be considered prejudgment interest but rather a permissible sanction for Paul being held in contempt. In a posttrial order entered on May 29, 2020, the trial court stated, "Regarding the award of prejudgment interest, the court has the equitable power to do so as a sanction for failing to disclose the existence of CAC Properties, LLC at the time of the divorce and as a remedy for [Bridget's] loss of use of those funds for 10 plus years." However, in neither its May 4, 2020, order nor its May 29, 2020, order did the trial court find Paul in contempt in relation to CAC Properties. The only finding of contempt was in the May 4, 2020, order where the trial court found Paul in contempt and ordered him to pay \$2500 in attorney's fees for failing to provide annual computations related to a different entity—CA Cabinets. The trial court made no finding of contempt regarding CAC Properties. Thus, there was no legal basis to support the award of prejudgment interest; therefore, the award of prejudgment interest was in error.

F. The Valuation of CAC Properties, LLC

Bridget retained an accountant, Raymond Tracy Fox, to testify about the present-day value of the omitted marital property, CAC Properties. The trial court, however, excluded any testimony about the present-day value, stating that what controlled was the value of the entity at the time of the divorce. In Bridget's cross-appeal, she argues that this was error. Fox, however, was permitted over objection to testify that, since the time of the divorce, Paul had been paid a total of \$825,000 in dividend distributions from CAC Properties, the first of which was a \$100,000 distribution received on December 8, 2009.

However, the trial court sustained Paul's objection to testimony about the total income received by Paul since the parties' divorce. Fox did not testify to the value of CAC Properties at the time of the divorce.

Paul retained an accountant, Curtis Winar, to testify about the value of CAC Properties as of the date of the parties' divorce. Winar testified that the value of CAC Properties before discounts was \$720,000, which would make Paul's 50 percent interest \$360,000. Winar then discounted this value by 30 percent, or \$108,000, for lack of control and marketability. This resulted in Winar's opinion that Paul's interest in CAC Properties was \$252,000, which, if divided equally, would equate to Bridget receiving \$126,000.

The trial court reviewed the two accountants' differing opinions as to the value of CAC Properties. Bridget's accountant was asked to testify to the present-day value of CAC Properties but did not testify to the value of CAC Properties at the time of divorce. Paul's accountant testified to the value of CAC Properties at the time of divorce, but he discounted the value due to the lack of marketability of the stock. The trial court reviewed the evidence and determined the value of CAC Properties at the time of the divorce was \$360,000 and divided this marital asset accordingly, awarding Bridget \$180,000.

As one of his points on appeal, Paul contends that the trial court erred in its valuation of CAC Properties at the time of the parties' divorce. However, because we are holding that Bridget is entitled to 50 percent of Paul's interest in CAC Properties, the discussion of the value of CAC Properties at the time of the divorce is moot in this proceeding, and we do not address it.

G. The \$33,333 Award for Partial Distribution

We next address Paul's contention that the trial court erred in awarding Bridget one-third of a dividend distribution he received four months after the divorce decree was entered. The trial court awarded Bridget \$33,333 for her interest in a \$100,000 distribution paid to Paul by CAC Properties on December 8, 2009, and Paul asserts that this was error. Because we are reversing on cross-appeal the trial court's methodology for distributing CAC Properties, this issue is also moot, and we need not address whether this distribution should have been included in the trial court's judgment that is now being set aside. However, in arriving at its judgment on remand, the trial court should consider all evidence relevant to the value of Bridget's interest in CAC Properties, including the distributions generated by CAC Properties after the parties' divorce.

H. The Distribution of the Ownership of CAC Properties, LLC

In her cross-appeal, Bridget raises three arguments.³ Of particular importance is Bridget's argument that, under the circumstances of this case, the methodology implemented by the trial court in arriving at her share of CAC Properties as of the time of divorce resulted in an inequitable division of marital property. Under this point, Bridget cites Ark. Code Ann. § 9-12-315(a)(4) (Repl. 2020), which provides:

When stocks, bonds, or other securities issued by a corporation, association, or government entity make up part of the marital property, the court shall designate in its final order or judgment the specific property in securities to which each party is entitled, or after determining the fair market value of the securities, may order and

³We need not address two of Bridget's arguments in light of our disposition of this appeal. In particular, we do not address Bridget's argument that the trial court erred in excluding evidence related to Paul's postdivorce income and earnings, nor do we address her argument that it erred in valuing CAC Properties as of the date of divorce and excluding Bridget's expert's present-day valuation.

adjudge that the securities be distributed to one (1) party on condition that one-half (1/2) the fair market value of the securities in money or other property be set aside and distributed to the other party in lieu of division and distribution of the securities.

This statute allows two alternate means for dividing securities and business interest:

(1) designation of the specific property in securities that each party is entitled to by dividing and distributing the property, or (2) determining the fair market value and ordering that the property be distributed to one party on the condition that half of the fair market value in money or property be set aside and distributed to the other party in lieu of division and distribution. Bridget asserts that instead of distributing the ownership in CAC Properties to Paul and attempting to distribute one-half of its value to her, the trial court should have distributed the ownership of CAC Properties one-half to each party. For the following reasons, we agree.

The parties' marital interest in CAC Properties should have been divided between the parties when they were divorced in August 2009. However, the property was not divided at that time because of Paul's constructive fraud in failing to disclose the property. This resulted in Bridget being deprived of her interest in CAC Properties for a period of more than ten years. In an attempt to make Bridget whole, the trial court awarded Bridget half the value of the property as of the time of divorce and also awarded Bridget 4 percent prejudgment interest as a remedy for her loss of the use of those funds for ten plus years. However, as we discussed in Paul's direct appeal, the prejudgment interest awarded by the trial court is not allowable under Arkansas law because the value of the company was not definitely ascertainable by mathematical computation without reliance on opinion or discretion. Therefore, were we to affirm the trial court's methodology in dividing the

property by awarding Bridget one-half of its value upon divorce, this would effectively deprive Bridget of her equal share in the property at the time of the divorce as a result of Paul's constructive fraud, and that would result in an inequitable division of marital property.

Instead of dividing CAC Properties in the manner that it did, Bridget contends that the trial court should have divided it in a manner consistent with how the parties agreed in the PSA to divide CA Cabinets. In the PSA, rather than awarding Bridget her one-half present interest in CA Cabinets, the *parties agreed* that Bridget would receive half of the postdivorce dividend distributions, which resulted in Bridget receiving a total of \$1,780,500 in distributions from CA Cabinets between 2009 and 2016. The PSA further provided that in the event CA Cabinets was sold, Bridget would receive half of the sale proceeds of Paul's interest. Bridget asserts that, had Paul disclosed the existence of CAC Properties when the parties divorced, it is reasonable to assume that they would have divided that property in a similar manner. Bridget argues that under Ark. Code Ann. § 9-12-315(a)(4), the trial court could have and should have distributed the CAC Properties stock one-half to each party.⁴

While we agree with Bridget's argument that Paul's ownership interest in CAC Properties should have been divided equally, we cannot agree that the trial court must devise a remedy consistent with the parties' agreement in the PSA concerning the division of CA Cabinets. Instead, we agree with Bridget's argument that the trial court's methodology in dividing CAC Properties by awarding her a one-half interest in the value of the property as

⁴Bridget presented evidence that, since the parties' divorce, Paul has received a total of \$825,000 in dividend distributions from CAC Properties.

of the parties' divorce resulted in an inequitable distribution to Bridget for the reasons stated herein.

II. *Conclusion*

We reverse the trial court's decision because we are left with a definite and firm conviction that a mistake has been committed in its property division. To allow Paul to receive all of his interest in CAC Properties—a \$360,000 value—in addition to ten plus years of dividend distributions totaling \$825,000—as compared to Bridget receiving only \$180,000 for her interest in CAC Properties would result in an inequitable division of marital property, which we hold was clearly erroneous. We affirm the portion of the trial court's order finding that it had jurisdiction to modify the 2009 decree and that Paul committed constructive fraud. The remaining findings and judgment of the trial court are set aside consistent with this opinion.

We therefore reverse and remand for the trial court to distribute the ownership of Paul's interest in CAC Properties one-half to each party as of the date of divorce and for further proceedings consistent with this opinion.

Affirmed in part and reversed in part and remanded on direct appeal and on cross-appeal.

HARRISON, C.J., and ABRAMSON, VAUGHT, MURPHY, and BROWN, JJ., agree.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Stan D. Smith* and *Clayborne S. Stone*, for appellant/cross-appellee.

James, House, Downing & Lueken, P.A., by: *Kayla M. Applegate* and *Patrick R. James*, for appellee/cross-appellant.