B227626

In the Court of Appeal of the State of California
Second Appellate District
Division 8

BRYAN D. BLAIR
Appellant

vs.

BONNIE SUE BLAIR
Respondent

RESPONDENT'S BRIEF

Appeal from the Superior Court of the State of California
County Los Angeles County
Hon. Patricia Ito, Commissioner

PD 039087

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STATEMENT OF NATURE OF ACTION

This is an appeal from a judgment of dissolution (CT 121) entered July 27, 2010, which includes orders for spousal support and property division. Bryan[1] claims that the trial court had no authority to make a pre-trial order excluding his witnesses and exhibits at trial based upon his trial counsel's failure to timely file witness and exhibit lists.

STATEMENT OF APPEALABILITY

A party may appeal from a final judgment. (Code of Civ. Proc. § 904.1, subd. (a)(1).)

STANDARD OF REVIEW

An order excluding evidence is reviewed for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10 [82 Cal.Rptr.2d 413].) Factual findings are reviewed for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632 [80 Cal.Rptr.2d 378].)

STATEMENT OF FACTS

Bryan filed his Petition for Dissolution on June 3, 2005 (CT 9) and made a request for trial on April 14, 2006 (CT 17). The Court scheduled a Mandatory Settlement Conference ("MSC") for July 3,

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[1] As is customary, for convenience and clarity, Respondent will refer to the parties by their first names.

2006, to be followed by a two-day trial starting August 17, 2006, if the case did not settle. (CT 24.) Los Angeles Superior Court local rule 14.14 requires that parties exchange witness lists or exhibit lists at least seven days for an MSC or face sanctions, such as the exclusion of any unlisted witnesses or exhibits.[2]

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[2] Los Angeles Superior Court local rule 14.14 provides:

Pre-MSC Requirements.

(1) Not less than seven (7) calendar days before the scheduled MSC, witness lists shall have been exchanged identifying all non-party, non-impeachment lay and expert witnesses to be called at trial to prove their case in chief. A brief written summary of each proposed witness' testimony shall be provided. [¶] Failure, without good cause, to identify any such witness shall preclude calling that witness at time of trial. Failure, without good cause, timely to provide a witness list shall be sanctioned; such sanction(s) may include, but not necessarily be limited to, precluding the noncomplying party from calling any non-party, non-impeachment witness.

(2) Not less than seven (7) calendar days before the scheduled MSC, exhibit lists shall have been exchanged identifying all non-impeachment exhibits to be offered at trial to prove their case in chief. Within five (5) calendar days of receipt of the list of exhibits, the receiving party may request in writing that the offering party provide a copy of any listed exhibit(s). [¶] Failure, without good cause, to make a timely written request for any exhibit(s) shall preclude claiming surprise at the time of trial, but shall be without prejudice to any other appropriate evidentiary objection. Failure, without good cause, to comply with a party's timely request for any listed exhibit within five (5) calendar days of receipt of such a written request shall preclude admission of any such exhibit at the time of trial. Failure, without good cause, timely to provide an exhibit list and/or to list any particular exhibit shall be sanctioned; such sanction(s) may include, but not necessarily be limited to, precluding the noncomplying party from offering any unlisted non-impeachment exhibit(s) at the time of trial.

Bryan did not provide an exhibit list or witness list at the MSC. (CT 61.) The MSC was continued eight times over the next two years as follows:

- July 3, 2006: MSC continued to October 16, 2006, by stipulation of the parties, and the trial date was taken off calendar. (CT 26.)
- October 11, 2006: MSC continued to February 13, 2006. (CT 27.)
- January 8, 2007: MSC continued to March 5, 2007. (CT 31.)
- February 13, 2007: MSC continued to August 6, 2007 at Bryan's request. (CT 34.)
- August 6, 2007: MSC continued to September 25, 2007. (CT 51.)
- September 25, 2007: MSC continued to October 31, 2007. (CT 51.)
- October 31, 2007: MSC continued to November 16, 2007. (CT 51.)
- January 8, 2008: MSC continued for the final time to March 17, 2008, at Bryan's request. (CT 44 & 52.) The court set a six-day trial to start April 23, 2008. (CT 44.) The court ordered that "[m]andatory settlement documents are to be exchanged on or before 3/4/08." (CT 44.)

Bryan failed to file a witness list or exhibit list for any of the nine dates set for the MSC. (CT 61.) Bryan was present at the final (March 17, 2008) MSC, but his attorney did not appear. (CT 45.) The court kept the trial dates on calendar and made the following order on March 17, 2008: "Failure to list witnesses on the witness list shall result in the exclusion of non listed witnesses. Failure to list exhibits on the exhibit list shall result in the exclusion of non listed exhibits." (CT 45.) Bryan was present in court when the orders were made. (*Ibid.*) The court stated that exclusion order would go into effect if the witness and exhibits lists were not filed by the end of the day. (2 RT A-4:16-22.) An Order After Hearing was entered containing the same orders. (CT 96.)

On March 25, 2008, Bryan's attorney made an ex parte application to extend the time to file the witness and exhibit lists. (CT 45A.) The court denied the request without prejudice because Bryan's attorney did not file a supporting declaration. The court ordered that any further application include a supporting declaration, the witness and exhibit lists prepared in accordance with local rule 14.14, and the other pre-trial documents required by such rule. (CT 63.)

Bryan's attorney filed an exhibit list (CT 67) and a witness list (CT 69) on April 2, 2008. An ex parte application was made the same day by Bryan, which the court denied with prejudice. (CT 95.) The application (if one was filed) is not part of the Clerk's Transcript. Bonnie's opposition to the ex parte application indicates that Bryan

was seeking leave of court to file the tardy witness and exhibit lists. (CT 75.) The explanation why the court denied the ex parte application appears in a later ruling imposing monetary sanctions against Bryan and his attorney based on their pre-trial conduct. The court found that "[m]ost of the documents eventually and tardily submitted [by Bryan's counsel] did not comply with requirements. For example, [Bryan's counsel] submitted an exhibit list which did not identify specific exhibits but only general categories of exhibits." (CT 116.) The court found that Bryan's attorney had failed to explain his failure to timely file the exhibit and witness lists. (*Ibid.*) The court also stated that it had conditioned any relief from the exclusionary order upon medical evidence of the condition which Bryan's attorney claimed prevented him from complying the order to file the witness and exhibit lists prior to dates set for the MSC. (*Ibid.*) The court noted that Bryan's counsel did not "explain his repeated failure to submit pleadings, settlement and trial documents when due for a period of over a year." (CT 115-116.)

Despite the exclusion order, the court allowed Bryan to testify over the course of two days at trial. (CT 102-103.) No transcripts of the trial were designated by Bryan, so it is not clear whether the court set aside the exclusion order in its entirety, or whether Bryan asked for permission to call any other witnesses or introduce any exhibits.

The court entered a Statement of Decision on June 17, 2008. (CT 107.) The court sanctioned Bryan and his attorney in the amount

of $1,000 each pursuant to Family Code section 271 based on their failure to cooperate in the pre-trial exchange of the witness and exhibit lists. (CT 115.) The court ruled: "Having chosen to hire and to continue to retain Mr. Lambert, [Bryan] must share in the responsibility for the increased attorney fees incurred by [Bonnie] as a result of Mr. Lambert's representation of [Bryan]." (CT 116-117.)

DISCUSSION

Bryan failed to designate a complete appellate record which affirmatively shows that the trial court made an error. Bryan only designated two pre-trial transcripts. The minute orders from the trial, which are part of the record, show that Bryan was allowed to testify at trial. It should be assumed, in the absence of the trial transcripts, that the court set aside the exclusion order in its entirety at time of trial and that Bryan did not make an offer of proof to call any additional witnesses or introduce exhibits. Bryan has a burden on appeal to affirmatively show that the trial court made an error which resulted in a miscarriage of justice. This cannot be established without a transcript of the trial. Therefore, the judgment should be affirmed.

Even if this Court finds that the record on appeal is sufficient, the trial court had the authority to make an order for the exchange of witness and exhibit lists in advance of trial, and to exclude from evidence any unlisted witness or exhibit. Family law trials are not meant to be trials by ambush. Each party should be afforded the opportunity to know what witnesses and exhibits the other side plans

to use at trial, other than for purposes of impeachment, in sufficient time to prepare for trial. The court acted properly in holding Bryan accountable for his attorney's failure to file the witness and exhibit lists. Bryan was aware of the requirement to file the witness and exhibit lists, and knew of his attorney's repeated failure to comply, yet chose to have that attorney continue to represent him.

I.

BRYAN FAILED TO DESIGNATE A PROPER RECORD ON APPEAL

The cardinal rule of appellate review is that an appealed judgment is presumptively correct. (*Denham v. Super.Ct.* (*Marsh & Kidder*) (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65].) "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Ibid*.)

To overcome this presumption, it is Bryan's burden, as the appellant, to provide the Court with a record sufficient to demonstrate that he is entitled to prevail. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46 [8 Cal.Rptr.3d 614].) "The party seeking to challenge an order on appeal has the burden to provide an adequate record to assess error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [240 Cal.Rptr. 872].) Where the party fails to furnish an adequate record of the challenged proceedings, his claim on appeal must be resolved against him." (*Ibid.*)

In the present case, Bryan is attempting to show that he was prejudiced by not being allowed to present witnesses and exhibits at trial. The Reporter's Transcript he designated only includes transcripts from two pre-trial hearings: March 17, 2008, and April 2, 2008. The record does not include any transcripts from the trial. Clearly, the court modified the exclusion order during the trial because it allowed Bryan to testify. (CT 102-103). Since Bryan is appealing from the effects of the pre-trial exclusion order, it was incumbent upon him to designate the trial transcripts because that order was modified or set aside during trial. Without the trial transcripts, it is unclear whether the court vacated the exclusion order in its entirety or just as to Bryan's testimony. It is also unclear whether Bryan made an offer of proof to call other witnesses or introduce any exhibits. The minute orders from the trial do not mention any exhibits introduced by Bryan at trial. (CT 99-106.)

A Court of Appeal will not find error on a silent record, and will infer substantial evidence supports the trial court's conclusions on the disputed issue. (*Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.) This Court should affirm the judgment based on Bryan's failure to designate a proper record on appeal.

II.

THE TRIAL COURT HAD AUTHORITY TO MAKE THE EXCLUSION ORDER

"Every judicial officer shall have power . . .[t]o preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty. . . ." (Code Civ. Proc., § 177, subd. (1); see also, § 128.5, subd. (a) [same].) Except as provided by statute, the California Rules of Court, or case law:

> " 'It is ... well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citation.] ... '... That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation ... in order to insure the orderly administration of justice. [Citation.]' " [Citation.]

(*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351 [63 Cal.Rptr.3d 483] [overturning local court rule which placed onerous requirements on litigants and allowed for the introduction of inadmissible hearsay at trial in lieu of live testimony].)

"The court's inherent power to curb abuses and promote fair process extends to the preclusion of evidence. Even without such

abuses the trial court enjoys 'broad authority of the judge over the admission and exclusion of evidence.' [Citation.]" (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288 [245 Cal.Rptr. 873] [affirming order precluding defendant from controverting plaintiffs' evidence on certain elements of a malpractice claim].)

Evidence Code section 352 provides courts with discretion to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues or of misleading the jury." (Evid. Code, § 352.) The failure to disclose trial witnesses and exhibits in violation of a court-ordered exchange could result in "undue prejudice" justifying exclusion of that evidence.

In this case, the court made it clear that the failure to file exhibit and witness lists by March 17, 2008, would result in an exclusion order. (2 RT A-4:16-22.) It was the failure to comply with the order which led to the sanction. The court did not act mechanically by making an automatic exclusion order when Bryan failed to file the witness and exhibit lists in advance of the first MSC. It was only after the MSC had been scheduled for the ninth time, and Bryan had still failed to comply with the order the court made to file the lists, that the court imposed the sanction.

The order to exchange witness and exhibit lists was not an onerous requirement which restricted Bryan's access to the courts. Pre-trial exchange orders are routinely made by trial courts. By time of trial, the court decided to allow Bryan to testify. (CT 102-103.) The fact that the court reconsidered its earlier ruling and allowed Bryan to testify shows that the court was not acting arbitrarily.

Excluding witnesses and exhibits is an extreme sanction, but the court was justified in imposing that remedy after the repeated failure to comply with the order to file the witness and exhibit lists. If courts could only impose monetary sanctions in such instances, some litigants would refuse to file witness or exhibit lists when the benefit of being able to introduce surprise evidence at trial outweighed the risk of monetary sanctions. Courts must have the authority to exercise reasonable control of the proceedings before them. In the circumstances of this particular case, the court acted properly in making the exclusion order.

III.

THE EXCLUSION ORDER WAS PROPERLY MADE AGAINST BRYAN EVEN THOUGH HE WAS REPRESENTED BY COUNSEL

Bryan argues that his attorney was solely at fault, so Bryan should not be punished. (AOB, p. 13.) He states: "There is nothing in the record to indicate that appellant Bryan Blair was personally at

fault for the failure to file and serve the required list of exhibits and witnesses." (AOB, p. 13.)

Code of Civil Procedure section 575.2, subdivision (b) states that "*if* a failure to comply with [local] rules is the responsibility of counsel *and not of the party*, any penalty shall be imposed on counsel and shall not adversely affect the party's cause of action or defense thereto." (Code of Civ. Proc., § 575.2, subd. (b) (emphasis added).)

Section 575.2 does not apply in this instance because the court did not impose the sanction pursuant to local rule 14.14. The court made the exclusion order based on the violation of its earlier order to file the witness and exhibit lists. (CT 97:12-14 [referring to the failure to file the "previously ordered" witness and exhibit lists].) There is a difference between excluding evidence simply because a local rule says that a court can do so versus excluding evidence based on a violation of a court order. To the extent section 575.2 is not applicable, the "general rule that the negligence of an attorney is imputed to the client" should prevail unless the attorney committed "positive misconduct" and the client is relatively free from fault. (See *State of California ex rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018, 1026 [228 Cal.Rptr. 576] [trial court erred in granting motion in limine based on counsel's late filing of appraisal report in violation of local rules].)

Even if applicable here, the prohibition in section 575.2 against holding a party responsible for an attorney's violation of a local rule only operates when the attorney is *solely* at fault for the breach. (Code of Civ. Proc., § 575.2, subd. (b).) The trial court made a finding that Bryan was at fault, along with his attorney, for the failure to file the witness and exhibit lists. (CT 116-117.) In its order assessing $1,000 in sanctions against Bryan and his attorney, the court found:

> Having chosen to hire and continue to retain Mr. Lambert, petitioner must share in the responsibility for the increased attorney fees incurred by respondent as a result of Mr. Lambert's representation of petitioner.

(CT 116-117.)

This case is distinguishable from *Marriage of Colombo* (1987) 197 Cal.App.3d 572 [242 Cal.Rptr. 100], where a trial court was reversed for excluding wife's evidence pursuant to her attorney's violation of local rules. Wife was in the process of changing attorneys when the rules violation occurred. (*Id.*, at p. 578.) The *Colombo* court held: "There is nothing in the record to support a conclusion that Wife was responsible for the delay of any of her attorneys in the filing of a responsive pretrial statement." (*Ibid.*) The court added that its opinion "should not be interpreted as precluding the trial court in a proper case from looking behind the conduct of an attorney to determine if responsibility for noncompliance rests with the client." (*Ibid.*)

Substantial evidence supports the trial court's ruling that Bryan was jointly at fault. The court made an order on January 8, 2008, that the witness and exhibit lists were to be exchanged by March 4, 2008. (CT 44.) Bryan was present in court on March 17, 2008, when the court said that it would impose the exclusion order unless the exhibit and witness lists were filed by the end of the day. (2 RT A-2:1.) The court gave this final opportunity to comply with the order to exchange witness and exhibit lists after Bryan's counsel had failed to do so nine times earlier. (CT 61, 115-116.) Bryan had the same counsel since at least April 14, 2006. (CT 17.) Bryan cannot sit idly by while his attorney repeatedly failed to file required documents for over a year (CT 116), then cast all the blame on his attorney.

Some parties in a divorce action are more interested in creating chaos than having an orderly determination of their rights. A reasonable party in these circumstances would have retained new counsel. Since the court found that Bryan was at fault, section 575.2 was not a bar to imposing the exclusion order on Bryan.

IV.

BRYAN DID NOT MAKE AN OFFER OF PROOF

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless . . . The substance, purpose, and relevance of the excluded evidence was made known to the court

by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354.)

Bryan has not established that he made an offer of proof explaining the "substance, purpose and relevance" of the excluded evidence. Bryan's Opening Brief does not even describe the witnesses and exhibits that Bryan wished to introduce at trial.

The record only contains the witness list (CT 67) and exhibit list (CT 69) which Bryan filed late. The court found that the exhibit list was insufficient because it only listed categories of documents. (CT 116.) The exhibit list does not explain the relevance of any of those documents. It is unknown based on the record whether Bryan ever sought to introduce any of the exhibits at time of trial. Since he was allowed to testify in spite of the order excluding witnesses, it is reasonable to assume that the court would have allowed Bryan to introduce relevant exhibits into evidence at time of trial as well.

The witness list is more specific, identifying the names of the proposed witnesses and the issue as to which they would testify. (CT 69.) The record does not show that any of the lay witnesses had personal knowledge or that the two experts had been retained to testify. Indeed, Bryan's attorney indicated that Bryan could not afford one of the experts, Jack Zuckerman, CPA. (2 RT B-5:26 to B-6:13.) Again, as Bryan was allowed to testify at trial, it is unclear whether the court set aside the exclusion order in its entirety or just as to Bryan's

testimony. It cannot be determined from the record whether Bryan ever made an offer at proof at trial as to any witnesses he wished to call in addition to himself.

Because of the lack of a trial record, this Court should assume that the trial court set aside the exclusion order and that Bryan did not call any witnesses other than himself or seek to introduce any exhibits at trial. Bryan failed to show compliance with Evidence Code section 354, so he should not be permitted to argue on appeal that the court improperly excluded evidence at trial.

V.

BRYAN DID NOT SHOW THERE WAS A MISCARRIAGE OF JUSTICE

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13; Evid. Code, § 354 [same].)

"There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475.) The appellant must show he or she "sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed." (*Ibid.*)

It is Bryan's burden to show that *but for* the trial court's exclusion of his evidence, he would have received a better outcome at trial. Bryan failed to met this burden because he did not designate a proper appellate record. Without the transcripts from the trial, it is impossible to know the details of the trial to determine if Bryan would have received a better outcome at trial had whatever evidence he proffered been admitted. Prejudice is not presumed, but must be affirmatively be shown.

Bryan could not have been prejudiced as to the outcome of the trial with respect to the community business, Valley Tile, since that business was awarded to Bryan at a zero value. (CT 125). Any exhibits or witnesses related to the business would, therefore, have been inconsequential. Bryan failed to demonstrate that a miscarriage of justice occurred with respect to any of the other rulings the court made at trial. Therefore, the judgment must be affirmed.

CONCLUSION

Bonnie requests that this Court affirm the judgment.

STATEMENT AS TO LENGTH OF BRIEF

This brief contains 4,363 words according to the program used to create this document.

Dated: May 26, 2011

Respectfully submitted,

_____

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