

OHIO SUPREME COURT
COLUMBUS OHIO

14-0707

Trial Court Case # 1998-480-DR

Court of Appeals # 13-HA-1

Supreme Court # _____

Lawrence E. Tuckosh,
Plaintiff-Appellee

v.

Carol A. Cummings,
Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

John C. Fazio, Esq. #0005746
Attorney for Carol Cummings
843 N. Cleveland Massillon Rd Up-11A
Bath Township, Ohio 44333
330-665-3000 / fax 330-665-3004

Lawrence E. Tuckosh, Pro Se
3121 Plymouth Ave.
Middletown, OH 45044

FILED
MAY 05 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
MAY 05 2014
CLERK OF COURT
SUPREME COURT OF OHIO

3. The Court of Appeals decision threatens fundamental precedent because it decides a question of legal substance relating to the *law of res judicata* contrary to decisions of the Ohio Supreme Court and Courts of Appeals.
4. The three issues of this case are of significant public interest, and involve legal principles of major significance to the jurisprudence of Ohio.
5. The issues have been preserved for appeal.
6. The Ohio Supreme Court's review and determination of the three basic issues is likely to result in judicial economy because of a clarification of such issues.
7. The issues are likely to be presented frequently, considering the ever-increasing volume of decisions regarding the law of evidence, the law of waiver, and the law of res judicata.
8. The simple issues in the instant case present a straightforward method of resolving the issues.
9. The issues are of broad applicability to cases throughout Ohio.
10. The Supreme Court's decision will provide necessary guidelines to the lower courts.

III. Statement of Relevant Facts

The parties were married in July 1991 and divorced in Oct 2000. In 2002, visiting judges Richard Marcus and Richard Lile held appellee in contempt of court for his failure and refusal to pay court-ordered spousal support; child support; child medical insurance payments; marital residence payments; credit card debt payments; attorneys fees; and family business spousal payments to appellant from the time of the first court award, despite the fact that in 2001 he was earning more than \$44,000 annually.

Appx 1, Exh C.

On Sept 13, 2012 appellant filed her "Verified Motion for Lump Sum Judgment" praying for a lump sum judgment award of \$410,582 based upon appellee's continuous failure and refusal to pay the above-specified delinquencies for a dozen+ years. Appx 1.

Due to clerical error, the caption of the Motion was not printed on its face. The language of the Motion made it clear, however, that it was a "Verified Motion," stating: "Now comes [appellant], being first duly sworn under oath, and moves this honorable Court for a lump sum judgment against [appellee] regarding all delinquencies on Court

Orders for family law payments over the past 14 years." Appx 1, p 1.

The Verified Motion was signed by appellant and attested to by the signature and notary seal of an Ohio notary public, verifying that appellant "executed this Verified Motion of her own free act and will." Appx 1, p. 7.

The trial court's Dec 28, 2012 Order also acknowledges that appellant's Motion consists of "Defendant's Verified Motion for a Lump Sum Judgment." Appx 2, p. 1.

On Nov 5, 2012 appellee in response filed his unsworn "Motion for Reconsideration of Previous Court Orders and Reply to Defendant's Motion for Lump Sum Judgment," requesting the trial court to re-litigate and "adjust the support and alimony." Appellee also contended in his response that he had "filed personal bankruptcy" [in 2002], while simultaneously admitting that [in 2002] the trial court had found that "there was no evidence of [appellee] having a personal bankruptcy."

Appellant's Verified Motion and Exhibits calculated a dozen years of delinquencies from 2000 to 2012 for child support; spousal support; marital business spousal payments; marital credit card debt; marital residence payment; children's medical ins. payments; and attorneys fees, totaling the sum of \$410,582. Appx 1, p. 7.

The trial court's Dec 28, 2012 Order was for a \$69,495 lump sum judgment, denying appellant an award for the additional \$341,087 delinquencies. Appx 2 , p. 511.

On Jan 8, 2013 appellant filed her "Rule 60 (b) (5) Motion for Relief from Judgment." It addresses the *Rule of Waiver*, pointing out that the trial court admits that for over a decade "neither party sought a further order from this Court regarding [the value of the family business which issue the Court of Appeals in 2002 remanded to it to "determine if necessary"]," and that such determination is "not now necessary" a dozen years later, because "a decade of delay without any action by either party renders such matter moot and irrelevant under the Rule of Waiver and/or the Rule of Forfeiture."

Appellant's Rule 60 Motion also addresses *the Doctrine of Res Judicata*, and the trial court's finding that it can not grant a lump sum judgment for the entire \$410,582 in delinquencies because between 2002 and 2013 neither party "provided this Court with evidence" regarding [appellee's 2002 contention of personal bankruptcy] and that "without such evidence this Court is unable to address [the issue of 'appellee's alleged bankruptcy]. Appellant points out that such belief is misplaced because Judge Lile's Dec 28, 2012 Order constitutes *res judicata* that there is "no evidence of personal

bankruptcy" by appellee." Appx 1, Exh C, p. 92, para 2

The trial court overruled appellant's contentions regarding the *Rule of Waiver* and the *Doctrine of Res Judicata*, holding that such rules of law are inapplicable to the instant case and do not result in a lump sum judgment to appellant of the entire \$410,582 in delinquencies accrued on the trial court orders for over a dozen years.

The Court of Appeals affirmed the trial court judgment denying appellant the additional \$341,087 in delinquencies, specifying its reason for affirming the denial that *the Verified Motion is "a naked statement which cannot be considered as evidence."* The Court of Appeals "naked statement" reason for the denial of the additional \$341,087 arrearages award was made sua sponte and not raised by the parties or the trial court. Appx 3, p. 6.

IV. Arguments in Support of Propositions of Law

The fundamental principles of law controlling the issues in this case date back two centuries to the year 1818.

Proposition of Law No. 1 regarding the *Rule of Evidence* is resolved by the 200-year-old precedent of the U. S. Supreme Court in The Friendschaft, 16. U.S. 14 (1818) that "an affidavit . . . verifies all the facts stated in it," directly contrary to the Court of Appeals' decision in this case.

Proposition of Law No. 2 regarding the *Rule of Waiver* is resolved by the Ohio Supreme Court's decision in Wallace v. State, 89 Ohio St.3d 431, 435 (2000): "Persons may either expressly or impliedly waive legal provisions intended for their own benefit," directly contrary to the Court of Appeals' decision in this case.

Proposition of Law No. 3 regarding the *Doctrine of Res Judicata* is resolved by the United States Supreme Court's decision in Hart Steel v. Railroad Supply (1917) 244 U.S. 294, 299: "The doctrine of res judicata . . . is a rule of fundamental and substantial justice, of public policy and peace, which should be cordially regarded and enforced by the courts," directly contrary to the Court of Appeals' decision in this case.

A. Proposition of Law No. 1

The Court of Appeals Committed Reversible Error by Affirming the Trial Court Order Based Upon the Court of Appeals' Finding that Appellant's Verified Motion for Lump Sum Judgment is "a Naked Statement Which Cannot Be Considered as Evidence," Because the Unequivocal and Uncontroverted Evidence Verifies that the Verified Motion is Sworn to by Appellant and Notarized by an Ohio Notary Public

Appellant's "Verified Motion for a Lump Sum Judgment," due to clerical error, failed to have its caption printed on its face. Appx 1, p. 1. Nevertheless, the specific language of the Motion makes it clear that it is a Verified Motion, stating: "*Now comes appellant being first duly sworn under oath, etc.*" Appx 1, p. 1.

The Verified Motion is signed under oath by appellant and attested to by the signature and notary seal of an Ohio notary public. Appx 1, p. 7.

The trial court's Dec 28, 2012 Order also acknowledges that appellant's Motion consists of "Defendant's Verified Motion for a Lump Sum Judgment." Appx 2, p. 506.

Nevertheless, the Court of Appeals affirmed the trial court's order for its stated reason that the Verified Motion is "a naked statement which cannot be considered as evidence." The Court of Appeals (Appx 3, p. 6) finds that:

"There is nothing in the September 13, 2012 motion that states that Appellant swore to anything in the motion . . . If Appellant intended the motion to serve as an affidavit, she should have captioned it as an affidavit, prepared it as an affidavit, and have it sworn and notarized as an affidavit."

In truth, that is exactly what appellant did.

It is unknown whether the Court of Appeals believed that the missing caption disqualified it as an affidavit, or whether it simply did not review the language of the Verified Motion itself or the trial judge's verification of it as a Verified Motion.

In any event, "the caption of a pro se pleading does not definitively define the nature of the pleading." State v. Kelley, 2014-Ohio-1020 (3-17-2014) (p. 4). Moreover, a court "does not look to the label or caption [of a pleading], but rather, at the substance [of a pleading]." New Hope v. Patriot, 2003-Ohio-5882 (12-20-2013). Furthermore, "the caption [of a pleading] is not regarded as containing any part of [the substance of the pleading]." Blanchard v. Terry, 331 F.2d 467, 469 (6th Cir. 1964).

Almost two centuries ago, the United States Supreme Court held that "an affidavit . . . verifies all the facts stated in it." The Friendschaft, 16 U.S. 14 (1818). The United States Sixth Circuit holds that "notarization serves an important governmental interest . . . when a notary public certifies a document, he attests that the document has been executed, that he is confronted by the subscriber, and that the subscriber is asserting the fact of his execution." Bartholomew v. Blevins, 679 F.3d 497, 502 (6th Cir. 5-17-2012). The Ohio Court of Appeals holds that "an affidavit constitutes evidence." Leppa v. Sprintcom, 156 Ohio App.3d 498, 510 (2004). The Supreme Court holds that an "affidavit . . . constitutes evidence which is properly before the court" Alben v. State, 76 Ohio St.3d 133, 135 (1966).

As noted, neither the trial court nor the parties raised any issue whether appellant's Verified Motion was a verified motion or an unverified motion. The Court of Appeals raised the issue sua sponte on its own volition and based its ruling on its erroneous-on-its-face "naked statement" finding.

The Doctrine of Uncontroverted Evidence provides:

"Uncontroverted Evidence: Evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or gratuitously discredited, disregarded, or rejected *and is to be taken as conclusive, and binding on the triers of fact.*" 32A C.J.S. 734, Evidence, s. 1641

As a matter of law, appellant's Verified Motion for Lump Sum Judgment (a) consists of "evidence," (b) such evidence is uncontroverted, and (c) the Doctrine of Uncontroverted Evidence mandates that it "is to be taken as conclusive and binding on the triers of fact."

Thus, the appellate court should reverse the trial court and enter a lump sum judgment to appellant of the entire \$410,582 in delinquencies accrued on the trial court orders for over a dozen years

B. Proposition of Law No. 2

The Court of Appeals Committed Reversible Error by Affirming the Trial Court Order Holding the Rule of Waiver to be Inapplicable, Because Neither the Parties Nor the Court Took Any Legal Action for a Decade from the Court of Appeals' Remand in 2002 for the Trial Court to Determine the 2002 Value of the Family Business "If Necessary," Constituting Waiver by the Parties, And thus the Appellate Court Should Reverse the Trial Court and Enter A Lump Sum Judgment to Appellant of the Entire \$410,582 in Delinquencies Accrued on the Trial Court Orders for Over A Dozen Years

The trial court's denial of the additional \$341,087 in delinquencies was the result of its finding that in 2002 the Court of Appeals' remanded "to determine, *if necessary*, the value of the family business [in 2002]," and that between 2002 and 2013 "neither party sought a further order from this court regarding [the value of the family business in 2002]." Appx. 2, p. 508.

Appellant pointed out that "a decade of delay without any action by either party renders such matter moot and irrelevant under the Rule of Waiver and/or the Rule of Forfeiture," and thus the appellate court should reverse the trial court and enter a lump sum judgment to appellant of the entire \$410,582 in delinquencies accrued on the trial court orders for over a dozen years.

But the trial court rejected appellant's "rule of waiver" argument, holding that it to be inapplicable.

The law is unequivocal that a "waiver" is defined as the "voluntary relinquishment of a known right." QSI v. Gen. Elec., 389 Fed.Appx. 480, 487 (6th Cir. 2010); Stacy v. Batavia, 97 Oho St.3d 269 (2002). The law also is unequivocal that a "persons may either expressly or impliedly waive legal provisions intended for their own benefit." Wallace v. State, 89 Ohio St.3d 431, 435 (2000).

Thus, the appellate court should reverse the trial court and enter a lump sum judgment to appellant of the entire \$410,582 in delinquencies accrued on the trial court orders for over a dozen years.

C. Proposition of Law No. 3

The Court of Appeals Committed Reversible Error by Affirming the Trial Court Order Holding the Doctrine of Res Judicata to be Inapplicable to Appellee's 2012 Contention that He Filed Personal Bankruptcy in 2002, Because Judge Lile's Dec 28, 2002 Order Specifying that There is "No Evidence of Personal Bankruptcy" by Appellee Constitutes Res Judicata, and the Appellate Court Should Reverse the Trial Court and Enter a Lump Sum Judgment to Appellant of the Entire \$410,582 In Delinquencies Accrued on the Trial Court Orders for Over a Dozen Years

Appellee also contended in his 2012 response memo that he had "filed personal bankruptcy" [in 2002], while simultaneously admitting that [in 2002] the trial court found that "there was no evidence of [appellee] having a personal bankruptcy."

The certified copy of Judge Lile's Dec 3, 2002 Order [Appx 1, Exh C, p. 92, para 2] negates appellee's contention by specifically holding that: "There is no evidence of the filing of [appellee's] personal petition [for bankruptcy.]," constituting Res Judicata. Hart Steel v. Railroad Supply (1917) 244 U.S. 294, 299. "The doctrine of res judicata is not a mere matter of practice or procedure. It is a rule of fundamental and substantial justice, of public policy and peace, which should be cordially regarded and enforced by the courts."

Thus, the appellate court should reverse the trial court and enter a lump sum judgment to appellant of the entire \$410,582 in delinquencies accrued on the trial court orders for over a dozen years.

V. Conclusion

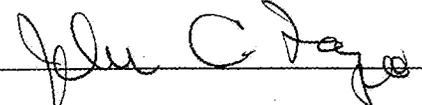
In summary, the Court of Appeals decision gravely threatens the universal and time honored *rules of law regarding evidence, waiver, and res judicata*, and for any and all of the reasons cited in the section entitled: "Reasons Why this Case is a Case of Public and Great General Interest" this Ohio Supreme Court should grant this Motion In Support of Jurisdiction.

Respectfully submitted,


John C. Fazio, Esq. #0005746

Certificate of Service

Service of this document was made by Priority Mail of the United States Postal Office, Delivery Confirmation Requested, on the 2nd day of May 2014 upon Lawrence E. Tuckosh, 3121 Plymouth Ave., Middletown, OH 45044.


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843 N. Cleveland Massillon Rd Up-11A
Bath Township, OH 44333
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APPENDIX

APPX 1 - Verified Motion for Lump Sum Judgment (Sept 13, 2012)

APPX 2 - Trial Court Order (Dec 28, 2012)

APPX - Court of Appeals Judgment Entry (March 28, 2014)

Copy mailed
to Judge
Lewis 9/13/12

THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO

FILED
12 SEP 13 AM 10:59

LESLIE A. MILLIKEN
CLERK OF COURTS
HARRISON COUNTY, OHIO
The State of Ohio
Case # 1998-480-D
County of Harrison
Judge L. Lewis, Jr.

Lawrence Tuckosh,
Plaintiff

v.
Carol Cummings,
Defendant

I, Leslie A. Milliken, Clerk of Courts
do hereby certify that the annexed writ
is a true copy of the original

LESLIE A. MILLIKEN - Clerk of Courts

By Jessica N. Mason Deputy

NOW COMES Carol Cummings ("Cummings"), being first duly sworn under oath,
and moves this honorable Court for a lump-sum judgment against Lawrence Tuckosh
("Tuckosh") regarding all delinquencies on Court Orders for family law payments over
the past 14 years, reducing the delinquent court-ordered payments to a lump-sum
judgment, for the reasons more fully set forth herein and sworn to under oath.

1. Overview of Delinquencies

Over the past approximately 14 years, since Jan 1999, Tuckosh has failed to pay
to Cummings the overwhelming bulk of the sums which this honorable Court ordered
him to pay for child support, spousal support, and other family law payments, despite
being held in Contempt of Court by Judge Marcus and Judge Lile and incarcerated for
his continuous payment delinquencies. Exhibit "F" - Judge Marcus Jan 10, 2001 Order
Holding Lawrence Tuckosh in Contempt (failure to pay child support; child med-ins
payments; attorneys fees; marital residence payments; credit card debt payments);
Exhibit "G" - Judge Lile Jan 17, 2003 Judgment/Order holding Lawrence Tuckosh in
contempt of court and sentencing him to incarceration.

Tuckosh has been delinquent in his family law payments continuously from the
time of the first Court Order in this case almost a decade-and-a-half ago, despite the
undisputed fact that he was earning more than \$44,000 annually back in 2001. Exhibit
"D" - Judge Lile Dec 3, 2002 Order, p. 2 ^{C.C.}

" / " 1

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BY Jm DATE 9/13/12

This Verified Motion attaches the Court Orders upon which the delinquencies are based, sets forth detailed summaries of such delinquencies, and requests that such delinquencies be combined in a lump-sum judgment.

The sums which this Court ordered Tuckosh to pay in its Court Orders for child support and spousal support are specified herein, and Harrison County CSEA has provided an accounting of payments for child support and spousal support. Exhibit "E" - CSEA Aug 30, 2012 Notice to Court.

In general, Tuckosh made most of the child support payments ordered by the Court, although at some times he was delinquent many thousands of dollars. Whatever temporary child support payments were actually made as verified by CSEA must be provided by CSEA so the Court can deduct such sum from the delinquency sum specified herein for child support in order for the Court to determine the accurate child support delinquency. Likewise with temporary spousal support.

In general, Tuckosh has failed to make about half of the spousal support payments ordered by the Court.

In general, Tuckosh has paid almost none of the payments ordered by the Court regarding other family law payments to be paid.

Tuckosh's delinquencies total in the hundreds of thousands of dollars!

The evidence provided herein will allow this Court to determine an accurate lump sum representing all such delinquencies.

2. Child Support Payment Delinquencies

On Jan 8, 1999 this Court ordered Tuckosh to pay temporary child support in the sum of \$250 per child per month (\$500 total). Exhibit "A" - Jan 8, 1999 Agreed Entry.

On Oct 31, 2000 Judge Richard Marcus issued Findings of Fact, Conclusions of Law, and Final Judgment ("Final Judgment") which awarded custody of the two minor children [Megan Lynn Tuckosh, d.o.b. 5/21/94, and Alan Lee Tuckosh, d.o.b. 3/28/96] to Cummings, and ordered Tuckosh to pay to Cummings the sum of \$424.54 per child per month [total \$849.07 per month]. Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 6.

Over the past 14 years, Tuckosh has made most of his child support payments.

Exhibit "B-1" calculates the sum of the child support payments ordered by the Court from Jan 8, 1999 including interest through Sept 1, 2012 in the sum of \$108,317 and \$74,324 in payments made as verified by CSEA, with net delinquencies of \$33,933.

As noted, CSEA has not verified any temporary child support payments made, and if it can do so, they must be deducted from the \$33,933 delinquency in order for this Court to arrive at an accurate determination as to child support delinquencies.

3. Spousal Support Payment Delinquencies

On Jan 8, 1999 this Court ordered Tuckosh to pay temporary spousal support in the sum of \$250 per month. Exhibit "A" - Jan 8, 1999 Agreed Entry.

On Oct 31, 2000 Judge Richard Marcus issued his Final Judgment which ordered Tuckosh to pay to Cummings the sum of \$900 per month for spousal support. Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 6. On Dec 3, 2002 Judge Lile re-ordered Tuckosh to pay to Cummings \$900 per month for spousal support through Dec 2, 2007. Exhibit "C" - Judge Lile Dec 3, 2002 Findings of Fact, Conclusions of Law, and Judgment, p. 4, para 12. Over the period of spousal support payments, Tuckosh made about half of such payments.

Exhibit "B-2" calculates the sum of the spousal support payments ordered by the Court in the sum of ^{61,894 C.C.} ~~\$88,096~~ from Jan 8, 1999 through Dec 2, 2007, with interest accruing on the unpaid balance through Sept 1, 2012.

As noted, CSEA has not verified any temporary spousal support payments made, and if it can do so, they must be deducted from the ^{61,894 C.C.} ~~\$88,096~~ delinquency in order for this Court to arrive at an accurate determination as to spousal support delinquencies.

4. Marital Business Payments Delinquencies

On Oct 31, 2000 Judge Richard Marcus issued his Final Judgment which ordered Tuckosh to pay to Cummings the sum of \$12,000 per year for 10 years (without interest for such period) for her one-half interest in the marital business. Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 16. ^{C.C.}

Tuckosh has not made any of such payments to Cummings.

Exhibit B-3 calculates the sum of the delinquent marital business payments from Oct 31, 2000 to Sept 1, 2012 including interest after giving credit for zero interest through the first 10 years, in the sum of \$197,000.

5. Marital Credit Card Debt Delinquencies

On Oct 31, 2000 Judge Richard Marcus issued his Final Judgment which ordered Tuckosh to pay the marital credit card debt in the sum of \$20,000 and on Dec 3, 2002 Judge Lile re-ordered such payment "in the nature of spousal support." Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 8; Exhibit "C" - Judge Lile Dec 3, 2002 Judgment.

Exhibit "B-4" calculates the sum of the delinquent marital credit card payments from Oct 31, 2000 to Sept 1, 2012 including interest in the sum of \$34,200.

6. Marital Residence Payment Delinquencies

On Oct 31, 2000 Judge Richard Marcus issued his Divorce Order which ordered an equal distribution of the proceeds from the sale of the marital residence. Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 10.

On May 7, 2002 Judge Richard Marcus and the parties executed Agreed Judgment Entry Regarding Marital Residence which provided that Tuckosh pay Cummings the sum of \$10,000 beginning July 1, 2001 with 6% per annum interest on the unpaid balance. Exhibit "D" - May 7, 2001 Agreed Judgment Entry. Tuckosh paid Cummings the sum of \$2,500 on the \$10,000 due and has failed to make any further payments.

Exhibit "B-5" calculates the sum of the delinquent marital residence payments from July 1, 2001 to Sept 1, 2012 including interest in the sum of \$12,625.

7. Attorneys Fees Payment Delinquencies

On Oct 31, 2000 Judge Richard Marcus issued his Divorce Order which ordered Tuckosh to pay Cummings the sum of \$5,000 in attorneys fees. Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 8.

On Dec 3, 2002 Judge Lile ordered Tuckosh to pay an additional \$8,000 in attorneys fees to Cummings. Exhibit "C" - Judge Lile Dec 3, 2002 Judgment, p. 4.

Tuckosh has paid none of such delinquent attorneys fees.

Exhibit "B-6" calculates the sum of the delinquent attorney fees payments including interest in the sum of \$21,230.

8. Children's Medical Insurance Payment Delinquencies

On Oct 31, 2000 Judge Richard Marcus issued his Divorce Order which ordered Tuckosh to pay medical, dental, optic, and prescription insurance expenses for the children. Exhibit "B" - Judge Marcus Oct 31, 2000 Final Judgment, p. 7.

Tuckosh made none of such payments for the children's medical insurance expense, reasonably estimated at \$350 per month, for such insurance coverage.

Exhibit B-7 calculates the sum of the delinquent children's medical expense payments in the sum of \$49,700.

9. Total Delinquency Payments Due

The above-specified calculations for Tuckosh's family law payment delinquencies total the sum of \$410,582, as follows:

1. Child Support Payment Delinquencies (Exh B-1)	\$33,933
2. Spousal Support Payment Delinquencies (Exh B-2)	61,894
3. Marital Business Payments Delinquencies (Exh B-3)	197,000
4. Marital Credit Card Debt Delinquencies (Exh B-4)	34,200
6. Marital Residence Payment Delinquencies (Exh B-5)	12,625
7. Attorneys Fees Payment Delinquencies (Exh B-6)	21,230
8. Children's Med-Ins Payment Delinquencies (Exh B-7)	49,700

Total \$410,582

As noted, this honorable Court must make deductions from the above- specified delinquencies for any temporary child support and temporary spousal support payments actually made as verified by CSEA in order to arrive at an accurate figure for lump-sum deficiencies.

CSEA has in its possession accurate figures for such temporary child support and spousal support payments actually made, and it is submitted that CSEA should submit such figures to this Court within 15 days from date of filing of this pleading so the Court can make the final calculations and issue a lump sum judgment.

10. Prayer on Lump-Sum Judgment

WHEREFORE, Carol Cummings prays this honorable Court to issue a Court Order as follows:

"Based upon the prior Orders of this Court dated Jan 8, 1999; Oct 31, 2000; Jan 10, 2001; May 7, 2001; Dec 3, 2002; Jan 17, 2003; and Jan 5, 2009, as well as CSEA's Notice dated Aug 30, 2012 the Court finds that Lawrence Tuckosh is delinquent in court-ordered family law payments in the following sums:

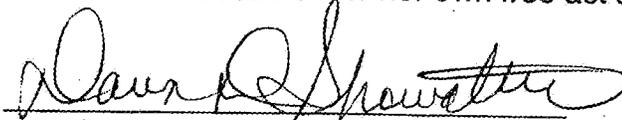
1. Child Support Payment Delinquencies (reduce sum by CSEA-verified sums paid for temporary child support)	\$33,933
2. Spousal Support Payment Delinquencies (reduce sum by CSEA-verified sums paid for temporary spousal support)	61,894
3. Marital Business Payments Delinquencies	197,000
4. Marital Credit Card Debt Delinquencies	34,200
6. Marital Residence Payment Delinquencies	12,625
7. Attorneys Fees Payment Delinquencies	21,230
8. Children's Medical Expense Payment Delinquencies	49,700

A lump-sum judgment is hereby issued in favor of Carol Cummings against Lawrence Tuckosh in the sum of \$410,582 [minus temporary child and spousal support payments made as verified by CSEA in the sum of \$_____], for total delinquencies of \$_____. Execution may issue thereon, and such judgment shall bear 10% annual interest until paid in full."

Carol Cummings so prays.

Jurat

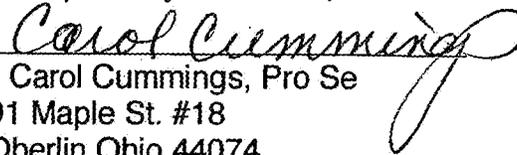
Carol A. Cummings came before me, a Notary Public in and for the State of Ohio on the 11 day of Sept 2012, and signed the herein document of her own free act and will, at Oberlin, Ohio.


Notary Public



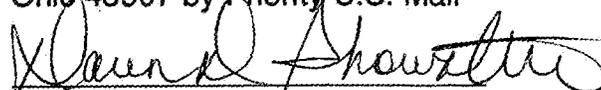
DAWN D. SHOWALTER, NOTARY
STATE OF OHIO
MY COMMISSION EXPIRES: 10/18/14

Respectfully submitted,


Carol Cummings, Pro Se
91 Maple St. #18
Oberlin Ohio 44074
440-935-6918

Verification and Service

Carol Cummings appeared before me this 11 day of Sept 2012 and verified that she executed this Verified Motion of her own free act and will, and that she instructed the Clerk of the Harrison County Common Pleas Court to have the Sheriff of Butler County, Ohio, Sheriff's Office, 705 Hanover St., Hamilton, Ohio 45011 (1-513-785-1000) serve this document upon Lawrence Tuckosh, 3121 Plymouth Ave., Middletown, OH 45044; and to CSEA attorney Rhonda Greenwood, Asst. Harrison County Prosecutor, 538 N. Main St. #E, PO Box 273, Cadiz, Ohio 43907 by Priority U.S. Mail


Notary Public



DAWN D. SHOWALTER, NOTARY
STATE OF OHIO
MY COMMISSION EXPIRES: 10/18/14

Tuckosh v. Cummings

Court Order Delinquencies
As of Sept 1, 2012

1. Child Support Payment Delinquencies (Exh B-1)	\$33,933
2. Spousal Support Payment Delinquencies (Exh B-2)	61,894
3. Marital Business Payments Delinquencies (Exh B-3)	197,000
4. Marital Credit Card Debt Delinquencies (Exh B-4)	34,200
5. Marital Residence Payment Delinquencies (Exh B-5)	12,625
6. Attorneys Fees Payment Delinquencies (Exh B-6)	21,230
7. Children's Med-Ins Payment Delinquencies (Exh B-7)	49,700

Total \$410,582

I

Being advised in the premises and pursuant to O.R.C. §§ 3105.01, 3105.18, 3109.04, 3109.05, 3109.051, and/or 3113.251 the Court makes the following findings of fact and conclusions of law upon the issues remanded to this court and those matters presented pending appeal or post-appeal:

1. While Lawrence Tuckosh testified on November 6, 2002 that had previously signed petitions seeking voluntary bankruptcy on behalf of himself, and Cadiz Tool & Machine, Inc. which he served as corporate president, there is no evidence of the filing of his personal petition with the United States Bankruptcy Court, Southern District of Ohio. Without proof that such petition has in fact been filed with the bankruptcy court, this court need not acknowledge any automatic stay such filing would require under federal bankruptcy law; see **Davenport v. Davenport**, (December 5, 1984) Summit County Court of Appeals(9th), C.A. NO. 11713, unreported, 84-LW-3535. The court has received constructive notice that on November 12, 2002, a petition in bankruptcy was filed on behalf of Cadiz Tool and Machine Company, Inc. under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio, and that such petition has been assigned Case No. 02-64938.

2. As of October 31, 2002, Lawrence Tuckosh is in arrears as and for payment of child and spousal support in the total amount of \$11,309.91 representing delinquent spousal support of \$7,519.05, and delinquent child support of \$3,271.15. The Harrison County Support Enforcement Agency has poundage due on such delinquencies in the amount of \$519.75. Such substantial arrearages have accumulated in spite of Lawrence Tuckosh's consistent income over the past three years.

3. During the last three years and pursuant to Plaintiff's Exhibit 2 (11/06/02) which exhibit was presented as true and correct by Lawrence Tuckosh, he has earned from employment and/or operation of his business, Cadiz Tool & Machine, Inc.:

2000	\$36,000
2001	\$44,200
2002	\$37,400 (to 10/31/02)

Lawrence Tuckosh testified that Cadiz Tool and Machine, Inc. has closed its doors and is not operating at the present time..

4. The mother, Carol (Tuckosh) Cummings, pursuant to the prior judgment entered in this lawsuit on October 31, 2000, has primary parental rights and responsibilities regarding the minor children: Megan Lynn Tuckosh (d.o.b. 5/21/94) and Alan Lee Tuckosh (d.o.b. 3/28/96). Lawrence Tuckosh has visitation rights with his children as provided by the Harrison County Common Pleas Court Visitation Guidelines. The mother is presently enrolled in the Registered Nursing program at the Lorain Community College (LCC) and she is seeking certification as a nurse anaesthetist. Lawrence Tuckosh has failed to demonstrate that Carol (Tuckosh) Cummings has or will have earnings during the time she remains a full time student at LCC and has primary custody of the minor children. It is not appropriate that the mother should seek employment outside of the home at this time nor should income be imputed to her.

5. Regarding the SBA business loan obtained in 1998, Carol (Tuckosh) Cummings acknowledged by brief filed October 16, 2002, and through counsel in open court on November 6, 2002, that she mistakenly believed that such loan was an unallocated marital debt when, in fact, it is not a joint obligation. The SBA obligation was signed by Lawrence Tuckosh only. Counsel states that there is no jointly signed SBA business loan and, therefore, no unallocated marital debt to be considered upon remand. The court takes no further action on the SBA obligation which is legally assumed by Lawrence Tuckosh only.

6. The Court finds that its prior order that Lawrence Tuckosh pay all the credit card debt remains appropriate in view of his income and his failure to pay a substantial amount of support, ordered attorney fees for Carol (Tuckosh) Cummings, all of which places her in a perilous financial situation. Also, the court finds that in spite of the business difficulties which are faced by Lawrence Tuckosh, he has, to the date of hearing on November 6, 2002, been able to earn as much or a substantial part of the yearly income he previously enjoyed. The court finds that such credit card payments are in the nature of maintenance or support.

7. The request of Carol (Tuckosh) Cummings to have her health care expenses paid by Lawrence Tuckosh is not found to be reasonable in view of the fact that with the divorce ordered herein, she is no longer a legal dependant. Also, the court has ordered payment of spousal support below in the amount of \$900 per month, effective November 1, 2003, which although, not in the amount requested by the Defendant, is determined to be fair under all the facts herein, including the order for the Plaintiff to pay debts of the marriage, credit card balances, Defendant's attorney fees in the amount of \$8,000, the \$600 reimbursement from Plaintiff to Defendant for half the charge court reporter charges noted in the October 31, 2000 Judgment, and the failure of Cadiz Tool & Machine, Inc. as the primary source of Plaintiff's income. However, the Plaintiff is found to retain very marketable skills which should enable him to find employment at reasonable remuneration in a short time.

8. The Court does not find sufficient evidence to hold the Plaintiff in contempt of court for violation of visitation orders. Further, the court finds no evidence to determine that the HCCSEA erroneously calculated child support in this action.

9. There is substantial evidence to hold the Plaintiff in contempt of court for his non-payment of child or spousal support. The Court defers imposition of sanctions until January 10, 2003 at 9:00 a.m. The court also notes that the Plaintiff, Lawrence Tuckosh was found to be in contempt of court by Order filed in this action on January 10, 2001. At that time, sanctions were deferred and the Plaintiff was given the opportunity to purge such contempt by:

- a. Providing HCCSEA with identifying information and residence,
- b. Pay all support arrearages on or before January 1, 2001
- c. Securing payment of support by wage withholding order,
- d. Providing proof of health insurance for the minor children,
- e. Initiating payment of attorney fees before January, 2001,
- f. Paying ordered credit card debts.

At the hearing, court will consider whether the Plaintiff has purged all contempt found herein and determine what sanctions, if any, should be imposed.

10. The automatic stay provision provided for in Section 362, Title 11, U.S. Code, is not violative of the Tenth Amendment to the Constitution of the United States insofar as it stays a state court contempt action to enforce a divorce decree dividing marital property. Syllabus, *Barnett v. Barnett*, (1984), 9 Ohio St. 3d 47. “* * * Property settlement obligations to a former spouse are dischargeable in bankruptcy, (fn 5) while obligations to provide maintenance and support are nondischargeable.” (In re LaFleur [1981], 11 B.R. [Bankruptcy Reporter] 26, 28-29), cited in *Barnett*, supra, at page 50.

“Although, by specific inclusion in the [Federal Bankruptcy] Act, division and allocation of marital property have been considered along with bills and debts to be dischargeable, other aspects of state court divorce decrees, i.e., alimony, maintenance and support, have been excepted. In these latter areas the Bankruptcy Code leaves intact the state court’s ability to exercise its contempt powers in matters that have been traditionally left to the states.(fn8)” *Barnett*, supra, at page 53.

II

Upon the findings of fact and conclusions of law noted above, it is ORDERED, ADJUDGED and DECREED:

11. Spousal support, restated as of November 1, 2002, shall be paid in the amount of \$900 per month and shall be payable, with a processing fee of 2%, through the Harrison County Child Support Enforcement Agency (HCCSEA). Such spousal support shall continue for a total of five years from the date of this judgment, or until the Defendant dies, remarries, or cohabits with another man who is not a relative. The court retains jurisdiction to review the award of spousal support.

12. Subject to further Order of the court and in consideration of the factors included in O.R.C. § 3105.18 and those noted above at ¶ 7, Lawrence Tuckosh shall pay to Carol (Tuckosh) Cummings child support in the sum of \$424.54 per month per child, which sum includes the legal processing fee of 2%. The worksheet showing computation of such child support was attached to the court’s October 31, 2000 Judgment Entry as Exhibit “B” and is incorporated herein as noted above.

13. All support payments under this order shall be made pursuant to withholding order as provided by law (O.R.C. § 3113.21) or withdrawal directive issued under O.R.C. §3113.214. Plaintiff shall notify the court and the HCCSEA of his income source or sources, or amount of income, within five (5) days of receiving this notice, or within five (5) days of securing new employment. Failure of the Plaintiff to notify the court of any income or income source as ordered may be considered as a contempt of court and subject to sanctions. Any payment not made through HCCSEA shall not be considered as payment of support.

14. Carol (Tuckosh) Cummings has incurred attorney fees and expenses that exceed \$17,000. The Court finds it reasonable to order Lawrence Tuckosh to contribute \$8,000 to the payment of such fees as and for further spousal support.

15. Carol (Tuckosh) Cummings advanced \$1,200 for payment of cost of a transcript requested by Judge Richard Marcus. Lawrence Tuckosh shall reimburse her for one-half of such fee, to-wit \$600, as and for further spousal support.

16. Judgment for spousal and child support arrearages due in this action as of October 31, 2002, to-wit \$10,790.20 is awarded to Carol (Tuckosh) Cummings and against Lawrence Tuckosh, subject to assessment of an additional processing fee by HCCSEA of 2% upon payment through HCCSEA. Interest upon such judgment, or balance thereof, shall be assessed in favor of the Defendant as provided by O.R.C. §1343.03 at the rate of 10% per annum, effective on the date of this judgment.

17. Under the stay imposed in the bankruptcy case cited above at ¶ 1, the court makes no determination regarding the valuation of Cadiz Tool and Machine, Inc. The court retains jurisdiction, however, to determine property distribution or allocation of assets related to such business upon release of any automatic stay imposed herein, if necessary.

18. Within ten days of the filing of this judgment, Carol Ann (Tuckosh) Cummings and Lawrence Tuckosh will notify and/or confirm with the HCCSEA of their individual identifying information, including residence address, mailing address, residence telephone number, social security number, date of birth.

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE HCCSEA IN WRITING OF HIS/HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY CHANGES IN THE INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT. IF YOU ARE THE OBLIGOR UNDER THE CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS YOU MAY BE FINED UP TO \$50 FOR A FIRST OFFENSE, \$100 FOR A SECOND OFFENSE, AND \$500 FOR EACH SUBSEQUENT OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER AND SUPPORT ORDER AND YOU WILFULLY FAIL TO MAKE THE REQUIRED NOTIFICATIONS YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO \$1,000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.

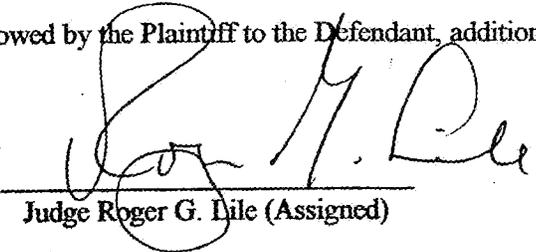
IF YOU ARE AN OBLIGOR AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU: IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONAL LICENSE, DRIVER'S LICENSE, OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION.

19. A copy of the former judgment, dated October 31, 2000, is attached to this entry and is incorporated herein for the purpose noted above at ¶ 3, page 1.

20. Additional Visitation Guidelines, attached as Exhibit "A"-1, are imposed herein.

21. In view of the substantial arrearages owed by the Plaintiff to the Defendant, additional costs in this case are taxed to the Plaintiff.

ORDERED.



Judge Roger G. Dile (Assigned)

Copies: Lawrence Tuckosh (*pro se*)
Stephen E. S. Daray, Esq.
HCCSEA

DOMESTIC RELATIONS JOURNAL
PAGE 18
95

IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO
GENERAL DIVISION

FILED
12 DEC 28 PM 12:37
LESLIE A. MILLER
CLERK OF COURTS
HARRISON COUNTY, OHIO

LAWRENCE E. TUCKOSH

CASE NO. 1998-480-DR

Plaintiff,

ORDER

v.

CAROL A. CUMMINGS

Defendant.

This matter having come on before this Court upon Defendant's Verified Motion For Lump-Sum Judgment Re All Delinquencies On Court Order For Family Law Payments having been filed pro se on September 13, 2012 without request for hearing. The Plaintiff filed a Motion For Reconsideration Of Previous Court Orders And Reply To Defendant's Motion For A Lump Sum Judgment pro se without request for hearing on November 6, 2012. Defendant filed a Reply Memorandum on December 6, 2012.

Prior to addressing Defendant's Motion For Lump Sum Judgment, this Court will consider Plaintiff's Motion For Reconsideration. In the same, the Plaintiff requests this Court to revisit the prior orders of this Court issued by Judge Markus on October 31, 2000 and Judge Lile on December 3, 2002. Said orders, that the Plaintiff presently requests to modify, were not reversed on appeal and have become the law of this case and have been so for over a decade. Pursuant to the doctrine of res judicata this Court is without authority to revisit the issues as requested in Plaintiff's Motion In Reconsideration.

"2"

DOMESTIC RELATIONS JOURNAL 38
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BY Um DATE 12/28/12

As to Defendant's Motion For Lump Sum Judgment, the argument of the Defendant is broken down in seven separate areas. For purposes of clarity, this Court will consider each individually.

Child Support Payment Delinquencies

On November 6, 2002 Judge Lile considered the issue of Plaintiff's nonpayment of child support. He issued an order on December 3, 2002. In said order the Court determined that the Plaintiff was delinquent \$3,271.15 and ordered a judgment for the same plus interest at the rate of 10% per annum. This Court finds Judge Lile's determination of delinquency prior to November 6, 2002 to be binding upon this Court based upon the doctrine of res judicata. The Harrison County Child Support Enforcement Agency applied that delinquency to Plaintiff's account and pursuant to records as sworn to by David Watson determined Plaintiff's delinquency to be \$2,100.69 as of August 27, 2012. The same was filed with this Court on August 30, 2012. This Court determines said figure to be accurate and grants interest at the legal rate from August 27, 2012.

Spousal Support Payment Delinquencies

On November 6, 2002 Judge Lile considered the issue of Plaintiff's nonpayment of Spousal support. He issued an order of December 3, 2002. In said order the Court determined that the Plaintiff was delinquent \$7,519.05 and ordered a judgment for the same plus interest at the rate of 10% per annum. This Court finds Judge Lile's determination of delinquency prior to November 6, 2002 to be binding upon this Court based upon the doctrine of res judicata. The Harrison County Child Support Enforcement Agency applied that delinquency to Plaintiff's account and pursuant to their records as sworn to by David Watson determined Plaintiff's delinquency to be \$41,943.87 as of

August 27, 2012. The same was filed with this Court on August 30, 2012. This Court determines said figure to be accurate and grants interest at the legal rate from August 27, 2012.

Marital Business Payments

On October 31, 2000 Judge Marcus awarded the Defendant \$120,000 for half the value of Cadiz Tool & Machine Inc. payable without interest in \$12,000 annual installments beginning on January 1, 2002. Judge Lile ruled on December 3, 2002 that the Court had received constructive notice that on November 12, 2002 a petition in bankruptcy was filed on behalf of Cadiz Tool & Machine Company, Inc. and that such petition had been assigned Case No. 02-64938. The case at bar had been returned from the Court of Appeals for among other things, determinations regarding issues of support and property division. Having determined that Plaintiff's corporation was afforded bankruptcy protection, Judge Lile did not pursue the Plaintiff further regarding his nonpayment on the marital business debt when issuing his order of December 3, 2002 for Plaintiff to purge himself of contempt nor in his later contempt finding on January 17, 2003. Judge Lile retained Jurisdiction to determine property distribution or allocation of assets related to such business upon release of any automatic stay imposed herein. Neither party sought a further order from this Court regarding the same for over a decade. Neither the Plaintiff nor the Defendant has provided this Court with sufficient evidence as to what was the order of the Bankruptcy Court regarding this particular claim. Without such, this Court is unable to address this issue. Per the previous order of Judge Lile, this Court retains jurisdiction as to this issue only, but shall not revisit the other issues contained herein.

Marital Credit Card Debt Delinquencies

On October 31, 2000 Judge Markus ordered the Plaintiff to pay and shall hold Carol Tuckosh harmless for all credit card balances. (See Judge Markus Order of 10/31/00 at p. 11) Despite Defendant's assertion that \$20,000 was so stated as the total on said accounts, no dollar figure was stated. Additionally, no creditors were listed. On December 3, 2002 Judge Lile found that "The Court finds that its prior order that Lawrence Tuckosh pay all the credit card debt remains appropriate..." (See Judge Lile Order of 12/3/02 at p.3) Again, no amount is listed, no creditors are listed. Whether, any of the accounts were in the name of the Defendant is left to total speculation.

In the Defendant's Motion for Lump Sum Judgment this Court has received no proof that the Defendant was required to pay any of these debts nor that her credit was harmed in any way as the result of the Plaintiff's nonpayment. Without any such evidence having been presented, this Court is unable to assign any monetary figure proportionate to Plaintiff's nonpayment.

Marital Residence Payment Delinquencies

On October 31, 2000, Judge Markus ordered the parties to split the net proceeds from the sale of the marital residence. On May 7, 2001 the parties signed an Agreed Judgment Entry Regarding Marital Residence wherein the Plaintiff agreed to pay \$10, 000 to the Defendant in five hundred dollar (\$500.00) installments beginning July 1, 2001. The unpaid balance accrued interest at the rate of 6%. The Defendant received \$2,500 from the Plaintiff. The Plaintiff owes the Defendant \$12,450 including interest at 6% from July 1, 2012 until paid in full.

Attorney Fees Payment Delinquencies

On October 31, 2000 Judge Markus awarded the Defendant \$5,000 for attorney fees. On December 3, 2002 Judge Lile awarded the Defendant an additional \$8,000 in attorney fees. Neither order contained a provision for interest to be paid by the Plaintiff. The Plaintiff has failed to pay said fees. The Plaintiff is awarded \$13,000 for said fees with interest at the legal rate from the date of this order.

Children's Medical Insurance Payments Delinquencies

On October 31, 2000, Judge Markus ordered the Plaintiff to obtain and maintain health insurance coverage through Cadiz Tool & Machine Inc. for the parties two minor children. The Plaintiff was found in contempt of court by Judge Markus on January 10, 2001 for failing to provide said insurance. On January 5, 2009, Judge Martin ordered the Plaintiff and Defendant to share liability for the cost of the uncovered medical and health care needs of the parties minor children as health insurance was not currently available to either Plaintiff or Defendant at a reasonable cost.

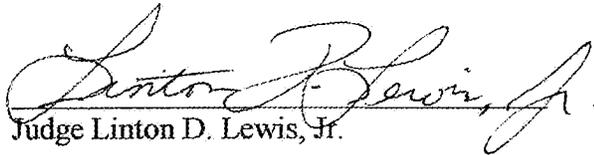
The Defendant estimates the monthly cost for said insurance to be three hundred fifty dollars (\$350.00) per month. The Defendant has provided this Court with no evidence of any insurance premiums nor out of pocket expenses incurred by her as a result of the Plaintiff's nonpayment. Without such, this Court finds that Plaintiff's nonpayment, though contemptible inaction, does not equate to a money judgment for the Defendant.

Having so found, this Court grants lump sum judgment in favor of the Defendant and against the Plaintiff in the following amounts:

Child Support Delinquencies	2,100.69
Spousal Support Payment Delinquencies	41,943.87
Marital Business Payments Delinquencies	0
Marital Credit Card Debt Delinquencies	0
Marital Residence Payment Delinquencies	12,450.00
Attorney Fees Payment Delinquencies	13,000.00
Children's Med-Ins. Payment Delinquencies	<u>0</u>
TOTAL	\$69,494.56

IT IS SO ORDERED.

This is a Final Appealable Order.


Judge Linton D. Lewis, Jr.

Within three (3) days of entering this Judgment upon the Journal, the Clerk shall serve notice of this Judgment and its date of entry upon all parties not in default for failure to appear. Service shall be made in a manner prescribed in Civil Rule 5 (B) and shall be noted in the Appearance Docket. Civil Rule 58.

The State of Ohio)
County of Harrison) SS.

I, Leslie A. Milliken, Clerk of Courts
do hereby certify that the annexed writ
is a true copy of the original

LESLIE A. MILLIKEN - Clerk of Courts

By  Deputy

Stamped copies:

Lawrence Tuckosh
Carol A. Cummings
Judge Linton D. Lewis JR.
CSEA

STATE OF OHIO)
HARRISON COUNTY)

IN THE COURT OF APPEALS OF OHIO

SS:

SEVENTH DISTRICT,
HARRISON COUNTY
COURT OF APPEALS

LAWRENCE TUCKOSH)
PLAINTIFF-APPELLEE)

CASE NO. 13 HA 1 MAR 28 2014

LESLIE A. MILLIKEN, CLERK

VS.)

JUDGMENT ENTRY

CAROL A. CUMMINGS)

DEFENDANT-APPELLANT)

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is affirmed. Costs to be taxed against Appellant.

C. L. White
John Fazio
Mary DeGenaro

JUDGES.

3

STATE OF OHIO)
HARRISON COUNTY)

IN THE COURT OF APPEALS OF OHIO

SS:

SEVENTH DISTRICT
HARRISON COUNTY
COURT OF APPEALS

LAWRENCE TUCKOSH)
PLAINTIFF-APPELLEE)

CASE NO. 13 HA 1 MAR 28 2014

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DEFENDANT-APPELLANT)

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C. L. White
John Fazio
Mary DeGenaro

JUDGES.

STATE OF OHIO, HARRISON COUNTY
 IN THE COURT OF APPEALS
 SEVENTH DISTRICT

HARRISON COUNTY
 COURT OF APPEALS
 FILED
 MAR 28 2014
 LESLIE A. MILLIKEN, CLERK

LAWRENCE TUCKOSH)	CASE NO. 13 HA 1
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
CAROL A. CUMMINGS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Harrison County, Ohio Case No. 98-480-DR

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Lawrence E. Tuckosh, Pro Se
 3121 Plymouth Ave.
 Middletown, Ohio 45044

For Defendant-Appellant: Atty. John C. Fazio
 843 N. Cleveland Massillon Rd Up-11A
 Bath Township, Ohio 44333

JUDGES:

Hon. Cheryl L. Waite
 Hon. Gene Donofrio
 Hon. Mary DeGenaro

Dated: March 28, 2014

WAITE, J.

{¶1} Appellant Carol A. Cummings appeals the ruling of the Harrison County Court of Common Pleas resolving a *pro se* motion she filed in her divorce case asking for all of Appellee Lawrence E. Tuckosh's prior delinquencies in paying child support, spousal support, and a variety of other items, to be reduced to a lump sum judgment of over \$410,000. The court granted a total lump sum judgment to Appellant of \$69,494.56, covering child support, spousal support, payments for the marital residence, and attorney fees. The court did not award any lump sum for credit card debt, the division of Appellee's business, or the children's medical costs.

{¶2} Appellant believes the court should have awarded judgment on each item listed in her motion, and that the total judgment should have been \$410,582.00. Based on our review of this record, Appellant is mistaken. The trial court carefully examined the arrearage delinquencies over the 15 years this matter has been active, and added them together into one judgment, using Appellant's own evidence. Some items sought by Appellant were never determined to be arrearages or delinquencies because the matters were stayed once Appellee filed for bankruptcy in 2002. Appellant also asked that credit card debt and medical payment delinquencies be included in the judgment, but the delinquency on these items was never reduced to an amount in any court order, and so was beyond the scope of Appellant's motion. There is no additional evidence in the record that would have allowed the court to make a lump sum judgment on these items. The court did exactly as Appellant asked in her motion by reducing to a lump sum judgment those arrearages and

delinquencies that could be determined from the record. The trial court's judgment is affirmed.

History of the Case

{¶3} This is the fourth time this case has been before this Court. Appellee and Appellant were married in July of 1991. In November, 1998, Appellee filed for divorce in Harrison County. At the time, Appellant was the mother and residential parent of two minor children. A visiting judge was assigned to the case and the divorce was granted on October 31, 2000. Appellee was ordered to pay child support, spousal support for five years, provide health insurance, and pay for a portion of unreimbursed health care costs of the children. He was further ordered to pay off the parties' credit card debt (although the amount of debt was not specified), and pay \$120,000 (in monthly installments of \$12,000) as half the value of the business owned by Appellee (the Cadiz Tool and Die Company). Both parties appealed the divorce decree.

{¶4} We ruled on the first appeal on March 15, 2002. *Tuckosh v. Tuckosh*, 7th Dist. No. 00 526 HA, 2002-Ohio-1154. The case was remanded to redetermine the division of marital property.

{¶5} While on remand, the trial court received notice that Appellee filed for Chapter 7 bankruptcy on November 12, 2002. The court issued its judgment entry on December 3, 2002, dealing with the remanded matters. Due to the automatic stay of proceedings resulting from the bankruptcy petition, the trial court decided not to value or divide Appellee's business as a marital asset. The record reflects that the

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business had closed since the original divorce decree was issued. The court reinstated spousal support and child support, which the court determined were proper matters to adjudicate despite the bankruptcy stay. The court reallocated the credit card debt as spousal support, and once again ordered Appellee to pay the debt without specifying the amount. The court found Appellee in contempt for failing to pay child and spousal support. The court entered judgment on the arrearages for spousal and child support in the combined amount of \$10,790.20. Without objection from the parties, the consolidated arrearages were entered back into Appellee's account at the Harrison County Child Support Enforcement Agency (CSEA). The court did not award or mention past due amounts for temporary spousal or child support. This judgment entry was not appealed.

{¶16} Further appeals in this case were litigated in 2007 and 2009 on matters dealing solely with child support. In neither appeal was the matter of temporary child support payments raised. *Tuckosh v. Cummings*, 7th Dist. No. 07 HA 9, 2008-Ohio-5819; *Tuckosh v. Cummings*, 7th Dist. No. 09 HA 4, 2009-Ohio-6401.

{¶17} Appellant filed a notice of discharge in bankruptcy on August 17, 2012.

{¶18} On September 13, 2012, Appellant filed an uncaptioned *pro se* document that purports to be a motion to reduce prior court-ordered delinquencies to lump sum judgments. Appellant demanded lump sum judgments in eight categories of alleged deficiencies, totaling over \$410,000. Appellee filed a *pro se* response on November 6, 2012. Neither party requested a hearing, so the matter was decided based on the record. The court issued its ruling on December 28, 2012. The court

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awarded lump sum judgments for past due child support and spousal support based on the prior judgment entries and the amounts on the CSEA reports. The court awarded no lump sum judgment for the marital business because the matter had been stayed during the bankruptcy and had never been resolved by the court. The court awarded no lump sum judgment for credit card debt because the amount of that debt had never been determined. The court awarded no lump sum judgment for the children's medical expenses because there was no evidence as to those expenses in the record.

{¶9} Appellant filed a notice of appeal on January 23, 2013.

{¶10} On January 7, 2013, Appellant, now represented by counsel, filed a Civ.R. 60(B) motion for relief from judgment. No evidence was attached to the motion. The trial court denied the motion on February 4, 2013. Appellant has filed only an appeal of the initial judgment entry of December 28, 2012, but she discusses the denial of the motion for reconsideration in her brief on appeal. Appellee has not responded to this appeal. Under App.R. 18(C): "If an appellee fails to file the appellee's brief within the time provided by this rule * * * the appellee will not be heard at oral argument except by permission of the court upon a showing of good cause submitted in writing prior to argument; and in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action."

{¶11} Appellant presents four assignments of error, but her argument really consists of a single assignment of error challenging five subsections of the lump sum judgment award. Thus, her assignments of error will be treated together.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1

Marital Family Business Purchase Delinquencies.

Assignment of Error No. 2

Children's Health Insurance Expense Delinquencies.

Assignment of Error No. 3

Marital Credit Card Debt Delinquencies.

Assignment of Error No. 4

Temporary Child Support and Spousal.

{¶12} Appellant contends that she presented unrebutted evidence on every item in her motion for lump sum judgment, and she asks us to grant her the judgment that she believes the trial court should have granted. A lump sum judgment for the amount of delinquent support payments is a type of relief available in a divorce action. *Smith v. Smith*, 168 Ohio St. 447, 457, 156 N.E.2d 113 (1959). The trial court's determination of arrearages and lump sum judgments in a divorce case is reviewed for abuse of discretion. *Goodman v. Goodman*, 144 Ohio App.3d 367, 374, 760 N.E.2d 72 (7th Dist.2001). Appellant contends that the trial court abused its discretion by not simply granting lump sum judgments for all the items in her *pro se*

-6-

motion because she included attachments to the motion stating what she considered to be the correct amount of each item. The attachments appear to be nothing more than separate prayers for relief in each of the five subcategories under review in this appeal. Although the original motion sought a lump sum award in eight subcategories, on appeal Appellant is asking for reversal in only five of those subcategories: one-half share of the value of Appellee's business; the value of medical expenses incurred for the children; payment of marital credit card debt; child support; and spousal support.

{¶13} Appellant contends that her motion, itself, constituted evidence and should have been relied upon as unrebutted by the trial court. It is obvious though, that "a naked statement in a motion is not evidence that can be considered." *Lisi v. Henkel*, 175 Ohio App.3d 463, 2008-Ohio-816, 887 N.E.2d 1209, ¶10 (6th Dist.). Appellant insists that her motion was sworn before a notary and should be treated as containing evidence. There is nothing in the September 13, 2012, motion that states that Appellant swore to anything in the motion, and none of the attachments are signed, sworn or notarized. If Appellant intended the motion to serve as an affidavit, she should have captioned it as an affidavit, prepared it as an affidavit, and have it sworn and notarized as an affidavit.

{¶14} Appellant also relies on attachments to her motion for lump sum judgment, even though some of those attachments clearly contradict the amounts that she requested. For example, Appellant asked for \$33,933 in past due child support based on supposed calculations by the CSEA, even though the attached

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documents from the CSEA show a delinquency of only \$2,100.69. Appellant also asked for either \$88,096 or \$61,894 in past due spousal support (it is not clear because the amount was crossed out and rewritten). The attached CSEA documents show \$41,943.87 in delinquencies. Appellant's motion contains no affidavits, no depositions, no transcripts, and no citation to any other properly admitted evidence that would contradict the CSEA reports. Therefore, the trial court was correct in relying on the evidence that was available when it made its determination.

{¶15} The express prayer for relief at the end of Appellant's motion is as follows: "Based upon the prior Orders of this Court dated Jan 8, 1999; Oct 31, 2000; Jan 10, 2001; May 7, 2001; Dec 3, 2002; Jan 17, 2003; and Jan 5, 2009, as well as CSEA's Notice dated Aug 30, 3012 the Court finds that Lawrence Tuckosh is delinquent in court-ordered family law payments in the following sums," and then Appellant listed the sums she desired for each category. (9/13/12 Motion, p. 6.) Appellant's own prayer for relief asks the court to take delinquencies already determined in prior court orders, in light of the CSEA report from August 30, 2012, and create a lump sum judgment. Appellant does not request that the court determine new delinquencies, look at new evidence (except for the CSEA report), or engage in any type of fact-finding. Appellant cannot now argue reversible error when the trial court did exactly what was asked in the motion. "Under the invited-error doctrine, a party is not permitted to take advantage of an error that she herself invited or induced the court to make." *Anderson v. Anderson*, 147 Ohio App.3d 513, 528, 771 N.E.2d 303 (7th Dist.2002). The following brief review of each of the five

categories of alleged delinquencies further demonstrates that the trial court's judgment is correct.

One-half the value of Appellee's business

{¶16} Appellant sought \$197,000 as the value of one-half of Appellee's business, which was valued at \$240,000 in the divorce decree. Appellee was ordered to pay Appellant \$12,000 per month for 10 months as part of the divorce decree.

{¶17} Both parties appealed the divorce decree. We resolved the appeal on March 15, 2002. The case was remanded to the trial court, in part, to redetermine the division of marital assets and debts, including the division of Appellee's business. On November 12, 2002, Appellee filed for bankruptcy. In light of the automatic bankruptcy stay of proceedings, the trial court did not value or divide Appellee's business, but retained jurisdiction to do so at a later date. (12/3/02 J.E.) There is nothing else in the record regarding Appellant's bankruptcy or any further attempt by the court to divide, value or determine delinquencies with respect to Appellee's business. As there is no evidence in the record pertaining to the value or division of the business, the trial court could not award the \$197,000 lump sum amount sought by Appellant.

Children's health insurance and health care costs

{¶18} The divorce decree ordered Appellee to maintain health insurance for the children, and he was found in contempt for failing to maintain this insurance. On January 5, 2009, the court ordered the parties to share liability for the cost of

uncovered health care needs of the children. In Appellant's motion, she estimated these costs to be \$49,700. Her estimate does not amount to evidence on this issue. The only evidence Appellant requested the court to consider were a variety of prior orders and judgment entries, and the CSEA report. As there is no evidence in the record regarding medical costs for the children, the trial court did not award any lump sum judgment for this item.

Credit Card Debt

{¶19} Appellant asked for \$34,200 in past due credit card debt. The divorce decree ordered, as part of the division of marital property, that Appellee pay any credit card debt held by either party that was incurred before January 18, 2000. The amount of this debt, however, was not specified. The court reallocated this credit card debt as spousal support when the case was remanded after the initial appeal. (12/3/12 J.E., p. 3.) Once again, no amount was specified. There is nothing in the record placing any dollar value on the credit card debt, hence, the trial court could not reduce this debt to a lump sum judgment. Again, Appellant's unsupported estimates in her motion do not constitute evidence. Appellant's argument regarding the credit card debt is unpersuasive.

Child Support

{¶20} Appellant sought a lump sum judgment for past due child support payments in the amount of \$33,933. Appellant attached Exhibit E to her motion, which contained the worksheets from the CSEA showing the past due amount for child support as of October, 2012. Monthly child support requirements actually

ended in August of 2012, after the children reached the age of majority. CSEA calculated an arrearage of \$2,100.69. This is the amount used by the trial court in its lump sum judgment.

{¶21} Appellant contends that the court should also have included past due temporary child support payments, but no such delinquency is mentioned in any of the judgment entries referenced in Appellant's motion, nor is it reflected in the CSEA documentation. Child support was resolved in the initial appeal in this case, and no objection was raised that the trial court failed to consider unpaid temporary support as part of the final divorce decree. Child support issues that could have been raised in a prior appeal but were not are *res judicata* in subsequent litigation between the parties. *Carpenter v. Carpenter*, 7th Dist. Nos. 11 NO 387, 11 NO 388, 2012-Ohio-4567, ¶22; *Cramblett v. Cramblett*, 7th Dist. No. 05 HA 581, 2006-Ohio-4615, ¶36.

{¶22} Furthermore, temporary child support orders merge with the final divorce decree and cannot be separately reviewed on appeal: "In a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce such interlocutory orders does not extend beyond the decree, unless they have been reduced to a separate judgment or they have been considered by the trial court and specifically referred to within the decree." *Colom v. Colom*, 58 Ohio St.2d 245, 389 N.E.2d 856 (1979), syllabus. For all these reasons, the judgment of the trial court regarding the lump sum amount for past due child support is correct.

Spousal Support

{¶23} Appellant asked for a lump sum judgment for past due spousal support in the amount of \$61,894. Appellant attached Exhibit E to her motion, which contained the worksheets from the CSEA showing the past due amount for spousal support as of October 2012. CSEA calculated an arrearage of \$41,943.87. This is the amount used by the trial court in its lump sum judgment. Appellant contends that the court should also have included past due temporary spousal support payments, but, again, no such delinquency is mentioned in any of the judgment entries referenced in Appellant's motion, nor is it contained in the CSEA documentation. As earlier discussed, temporary support payments merge with the final divorce decree and cannot be separately challenged on appeal. *Colom, supra*, 58 Ohio St.2d 245, syllabus. The evidence in the record supports the trial court's judgment.

Conclusion

{¶24} The record fully supports the conclusions reached by the trial court as to verifiable delinquencies in the divorce action that could be reduced to lump sum judgments. Appellant did not cite to any evidence in the record contradicting the factual conclusions of the trial court as to the amount of each part of the lump sum judgment. Appellant's unsupported statements in her motion do not constitute evidence. Further, Appellant specifically asked the court only to consider prior orders and judgment entries, as well as the child support and spousal support worksheet provided by CSEA. This is the exact evidence the court used to make its ruling. Appellant's argument that the trial court failed to enter lump sum judgments for

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temporary child and spousal support cannot be raised on appeal, as such temporary support payments merged with the final divorce decree, and the disposition of the temporary support arrearage could have been raised in prior appeals and is now *res judicata*. The trial court relied on the evidence in the record and reached its judgment accordingly. As there is no error in this case, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, P.J., concurs.

APPROVED:


CHERYL L. WAITE, JUDGE