

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

LISA J. FOPPE,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-056
- vs -	:	<u>OPINION</u>
	:	1/10/2011
LAWRENCE FOPPE,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 06DR29938

Wood & Lamping, LLP, Anne B. Flottman, Jeffrey Rollman, Suite 2500, 600 Vine Street, Cincinnati, Ohio 45202, for plaintiff-appellee

Moskowitz & Moskowitz, LLC, James H. Moskowitz, 2900 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Lawrence Foppe (Husband), appeals from the decision of the Warren County Court of Common Pleas, Domestic Relations Division, dividing marital assets following his divorce from plaintiff-appellee, Lisa Foppe (Wife), as well as its decision granting Wife's Civ.R. 60(B) motion for relief from judgment, and its decision ordering him to pay Wife \$2,500 in attorney fees upon remand. For the

reasons outlined below, we affirm.¹

{¶2} Husband, an engineer, and Wife, a special education teacher, were married on November 26, 1983. The couple, who were involved in several business enterprises during their nearly 22-year marriage, separated in early 2005. On February 6, 2006, Wife filed for divorce. The marriage produced three children.

{¶3} On August 13, 2008, following a four-day trial, the trial court issued a decision dividing the parties' marital property, which included, among other assets, their ownership interest in Foppe Technical Group, Inc., Midwest Environmental Drilling, Inc., Sonoran Hospitality Group, Inc., PCJ Properties, Inc., and East-West Properties, LLC. Husband and Wife subsequently filed motions to reconsider on September 2, 2008 and September 8, 2008, respectively. Thereafter, on September 19, 2008, Wife filed "Supplemental Memorandum and Response to Husband's Motion to Reconsider," alleging she had discovered new evidence indicating, among other things, that Husband had improperly transferred money from PCJ Properties, a company she received as part of the trial court's property division.

{¶4} On October 2, 2008, after holding a hearing on the matter, the trial court denied both parties' motions to reconsider, but retained jurisdiction over the issues raised by Wife in her supplemental memorandum, including, most notably, Husband's alleged improper transfers from PCJ Properties. The trial court then instructed Wife to file a post-decree motion since "no evidence of these matters [was] presented at the property trial."

{¶5} On October 6, 2008, the trial court filed its judgment entry and final divorce decree. Husband subsequently filed a notice of appeal with this court on October 20,

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

2008.

{¶16} On October 29, 2008, in accordance with the trial court's prior instructions, Wife filed a post-decree "Motion for Accounting." The motion, which, although not explicit, was apparently brought pursuant to Civ.R. 59, reiterated Wife's claims against Husband regarding his alleged improper transfers from PCJ Properties. On November 14, 2008, Husband filed a motion to dismiss Wife's "Motion for Accounting."

{¶17} On November 19, 2008, after holding another hearing on the matter, the trial court filed an entry, which stated, in pertinent part, the following:

{¶18} "The second issue for the Court to decide is Wife's Motion for an Accounting. [sic] The Court agrees with Husband that this is likely improperly designated. As set forth in this Court's Decision of October 2, 2008, there were matters occurring after trial, and prior to Decree, that may affect Wife's entitlement. Obviously, Wife had no opportunity to present those matters at trial. The Court agrees that this is not a Rule 59 Motion as that motion affects those matters occurring at trial. Rule 60(B) covers those matters occurring subsequent to trial. The Court assumes Wife's Motion for Accounting is an improperly designated request for Rule 60(B) relief. It is strongly suggested that Wife file an amended motion for the relief sought."

{¶19} On January 6, 2009, pursuant to the trial court's suggestion, Wife filed a "Motion to Amend Motion for Accounting to Rule 60(B) Motion for Relief from Judgment." Husband again objected to Wife's motion.

{¶10} On January 22, 2009, after holding yet another hearing on the matter, and after acknowledging that it "agreed to allow such amendment," the trial court concluded that Wife "properly reserved her issues for subsequent consideration." The trial court then found Husband improperly transferred a total of \$10,942 from PCJ Properties "on the eve of trial * * * with the sole purpose to divert monies from Wife," and, as a result,

ordered him to repay that amount to PCJ Properties. The trial court also ordered Husband to pay Wife a total of \$2,500 in attorney fees she incurred in bringing her motions. A short time later, and while his original appeal was still pending, Husband filed another notice of appeal with this court on February 17, 2009. Husband's appeals were subsequently consolidated by this court on March 31, 2009.

{¶11} On December 30, 2009, this court issued a decision remanding this matter "to the trial court to consider the embedded tax consequences in the property valuation and subsequent division" pursuant to R.C. 3105.171(F)(6). See *Foppe v. Foppe*, Warren App. Nos. CA2008-10-128, CA2009-02-022, 2009-Ohio-6926, ¶29 (*Foppe I*). In addition, this court found the trial court lacked jurisdiction to consider Wife's Civ.R. 60(B) motion for relief from judgment, and therefore, vacated its January 22, 2009 entry granting the same. *Id.* at ¶58-59.

{¶12} On March 31, 2010, upon remand from this court, the trial court heard testimony from Husband's accountant, Joseph Paulin, C.P.A., regarding the tax consequences of the property division as it relates to parties' respective property awards. The trial court also heard evidence pertaining to Wife's Civ.R. 60(B) motion for relief from judgment.

{¶13} On April 2, 2010, the trial court issued a decision finding, once again, that Husband had improperly transferred \$10,942 from PCJ Properties. Furthermore, as it relates to embedded tax consequences in its property valuation and subsequent property division, the trial court stated, in pertinent part, the following:

{¶14} "[I]n making a division of marital property this Court has considered all the relevant factors set forth in Ohio Revised Code §3105.171 including the tax consequences of the property division upon the respective awards to be made to each spouse. Because this Court considers the tax consequences to be highly speculative,

and a sale of properties was neither contemplated nor ordered, the Court declines to make any adjustment in valuation or allocation. Even if the Court accepted [the accountant's] testimony, the difference in tax consequences would be approximately \$57,000 * * *. Given Husband's substantially greater potential income than Wife, the Court finds that this allocation of property to be equitable even if not exactly equal."

{¶15} On June 10, 2010, the trial court incorporated its April 2, 2010 decision, as well as its decision ordering Husband to pay Wife \$2,500 in attorney fees, into a final judgment entry. Husband now appeals from the trial court's final judgment entry, raising four assignments of error for review. For ease of discussion, Husband's second and third assignments of error will be addressed together.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO MAKE ANY ADJUSTMENTS IN THE VALUATION OF THE PARTIES FIVE COMPANIES OR THE ALLOCATION OF ASSETS."

{¶18} In his first assignment of error, Husband argues that the trial court erred by failing to amend its previous property valuation and subsequent property division after examining the evidence presented upon remand regarding the impact, if any, the embedded tax consequences could have on the parties' respective awards. We disagree.

{¶19} As this court has previously stated, pursuant to R.C. 3105.171(F)(6), "in making a division of marital property, and in determining whether to make and the amount of any distributive award, a trial court is required to consider the tax consequences of the property division upon the respective awards." *Gould v. Gould*, Butler App. No. CA2004-01-010, 2005-Ohio-416, ¶48; *Herrmann v. Herrmann* (Nov. 6, 2000), Butler App. Nos. CA99-01-006, CA99-01-011, at 16. Furthermore, as we

instructed the trial court in *Foppe I*, "after considering the tax consequences of the award on both parties, a trial court may then exercise its discretion in deciding whether or not to amend the value of the award." *Id.*, 2009-Ohio-6926 at ¶12, citing *Hingsbergen v. Kelley*, Butler App. Nos. CA2003-09-215, CA2003-09-218, 2003-Ohio-5714, ¶14. An abuse of discretion is more than an error of law; it implies the trial court acted unreasonably, arbitrarily or unconscionably. *Allgeier v. Allgeier*, Clinton App. No. CA2009-12-019, 2010-Ohio-5313, ¶11; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶20} In this case, it is undisputed that the trial court undertook a painstakingly thorough examination of the evidence presented upon remand regarding the impact, if any, the embedded tax consequences could have on its property valuation and subsequent property division. However, after hearing such evidence, the trial court declined to make "any adjustment in valuation or allocation" since the embedded tax consequences were "highly speculative." After a thorough review of the record, as well as an extensive review of the law of the case, we find no error in the trial court's decision. It is clear that the trial court heeded our instructions on remand, and yet, despite hearing evidence on the potential tax consequences, still found no justification to amend the value of the award due to its speculative nature. See *Wilkerson v. Wilkerson*, Butler App. Nos. CA2002-12-315, CA2002-12-318, 2004-Ohio-1191, ¶44; *Poptic v. Poptic*, Butler App. Nos. CA2002-09-215, CA2002-09-218, 2003-Ohio-7211, ¶44; *Kelley v. Kelley*, Butler App. No. CA2001-04-087, 2002-Ohio-2317, ¶12. Therefore, based on the facts and circumstances of this case, we find no abuse of discretion in the trial court's decision not to amend its previous property valuation, and subsequent property division, after examining the evidence presented upon remand. Accordingly, Husband's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED [WIFE'S] CIV.R. 60(B) MOTION."

{¶23} Assignment of Error No. 3:

{¶24} "THE TRIAL COURT ERRED IN THE AMOUNTS IT ORDERED [HUSBAND] TO PAY [WIFE]."

{¶25} In his second and third assignments of error, Husband argues that the trial court erred by granting Wife's Civ.R. 60(B) motion for relief from judgment and ordering him to repay \$10,942 to PCJ Properies. We disagree.

{¶26} In order to prevail on a Civ.R. 60(B) motion, the movant must demonstrate: (1) a meritorious claim or defense to present if relief is granted; (2) entitlement to relief under one of the enumerated grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion. *Moe v. Moe*, Butler App. No. CA2004-03-057, 2005-Ohio-1681, ¶13; *Veidt v. Cook*, Butler App. No. CA2003-08-209, 2004-Ohio-3170, ¶15, citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150-151. A trial court's decision to grant a Civ.R. 60(B) motion for relief from judgment will not be reversed on appeal absent an abuse of discretion. *Owen v. Owen*, Butler App. No. CA2009-10-260, 2010-Ohio-2708, ¶13, citing *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107. As noted above, an abuse of discretion is more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore*, 5 Ohio St.3d at 219.

{¶27} Initially, Husband argues that the trial court erred by granting Wife's Civ.R. 60(B) motion because neither her October 29, 2008 "Motion for Accounting," nor her January 6, 2009 Civ.R. 60(B) motion for relief from judgment, "contained any factual materials to support her allegations." However, while it may be true that Wife initially

failed to provide any additional materials to the trial court in support of her underlying claims, "[n]either Civ.R. 60(B) nor any decision from the Supreme Court of Ohio requires a movant to submit evidentiary materials in support of the motion." *Bank One, N.A. v. Gibson*, Franklin App. Nos. 03AP-930, 03AP-1215, 2004-Ohio-3989, ¶6, quoting *Your Financial Community of Ohio, Inc. v. Emerick* (1997), 123 Ohio App.3d 601, 608-609; see, also, *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 19, 1996-Ohio-430. Accordingly, Husband's first argument is overruled.

{¶28} Next, Husband argues that the trial court erred by granting Wife's Civ.R. 60(B) motion pursuant to Civ.R. 60(B)(3) or (5), the two grounds upon which her amended motion was based, when her motion was, according to him, actually based on either Civ.R. 60(B)(2) or Civ.R. 59. However, regardless of the designation, the trial court found Wife "properly reserved her issues for subsequent consideration," and that "Husband's actions of paying himself, or entities under his control, almost \$11,000 on the eve of trial was fraudulent in nature and done with the sole purpose to divert monies from Wife." We find no error in the trial court's decision. Therefore, based on the facts and circumstances of this case, which indicate, among other things, that the trial court "strongly suggested" Wife to amend her "Motion for Accounting" to a Civ.R. 60(B) motion for relief from judgment, Husband's second argument is overruled.

{¶29} Finally, Husband argues that the trial court erred by ordering Husband to repay \$10,942 to PCJ Properties. In support of this argument, Husband alleges, among other things, that there is "nothing inherently wrong about an owner who manages his corporation from taking money as compensation." However, while we may agree with Husband's broad assertion regarding an individual's right to receive just compensation for one's labor, the trial court, which is in the best position to weigh the testimony and observe the witnesses' demeanor in order to gauge their credibility, determined that his

actions were "a mere subterfuge to redirect money" to himself, "fraudulent in nature," and "done with the sole purpose to divert monies from Wife." Therefore, because there was competent, credible evidence that Husband improperly transferred \$10,942 from PCJ Properties, a company awarded to Wife as part of the trial court's property division, we find no error in the trial court's decision ordering Husband to repay such funds. Accordingly, Husband's third argument is overruled.

{¶30} In light of the foregoing, Husband's second and third assignments of error are overruled.

{¶31} Assignment of Error No. 4:

{¶32} "THE TRIAL COURT ERRED WHEN IT ORDERED [HUSBAND] TO PAY [\$2,500] IN ATTORNEY FEES RELATED TO [WIFE'S] CIV.R. 60(B) MOTION."

{¶33} In his fourth assignment of error, Husband argues that the trial court erred by ordering him to pay Wife \$2,500 in attorney fees. In support of this claim, Husband argues that "[s]ince it was inappropriate for the trial court to grant [Wife's] Civ.R. 60(B) motion, it was error to grant her attorney fees." We disagree.

{¶34} It is well-established that "an award of attorney fees is within the sound discretion of the trial court." *Wolf v. Wolf*, Preble App. No. CA2009-01-001, 2009-Ohio-3687, ¶39, quoting *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359. A trial court's decision to award attorney fees will be reversed only if it amounts to an abuse of discretion. *Burkhart v. Burkhardt*, Clermont App. No. CA2008-04-042, 2009-Ohio-1307, ¶37.

{¶35} Pursuant to R.C. 3105.73(B), "in *any* post-decree motion or proceeding that arises out of an action for divorce, * * * the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable." (Emphasis added.) In determining whether an award is equitable, the court

may consider "the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets." R.C. 3105.73(B); *Theurer v. Foster-Theurer*, Warren App. Nos. CA2008-06-074, CA2008-06-083, 2009-Ohio-1457, ¶57.

{¶36} After a thorough review of the record, we find no abuse of discretion in the trial court's decision ordering Husband to pay Wife \$2,500 in attorney fees. As noted above, the trial court found Husband engaged in "fraudulent" actions by "diverting money" from Wife, thereby making it necessary for her to incur additional attorney fees in order to bring both her October 29, 2008 "Motion for Accounting," as well as her January 6, 2009 Civ.R. 60(B) motion for relief from judgment. See *Owca v. Owca*, Medina App. No. 08CA0006-M, 2008-Ohio-6939, ¶6. Therefore, because we find no abuse of discretion in the trial court's decision ordering Husband to pay Wife \$2,500 in attorney fees, Husband's fourth assignment of error is overruled.

{¶37} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.