[Cite as *Young v. Young*, 2011-Ohio-5060.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kevin P. Young,	:	
Plaintiff-Appellant,	:	
		No. 11AP-114
v.	:	(C.P.C. No. 07DR-07-2744)
Janet E. Young (n.k.a. Ringhiser),	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 30, 2011

Pope Law Offices, LLC, and *Gregory S. Pope*, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

DORRIAN, J.

{¶1} Plaintiff-appellant, Kevin P. Young ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting defendant-appellee, Janet E. Young's, n.k.a. Ringhiser ("appellee"), motion to set aside judgment, pursuant to Civ.R. 60(B)(3). For the following reasons, we reverse.

{¶2} The parties were married on March 15, 1991, and two children were born of their marriage: a daughter born December 24, 1991, and a daughter born February 7, 1995. On December 20, 2007, the parties terminated their marriage via an agreed judgment entry and decree of divorce ("decree"). On December 20, 2007, the parties also entered into a shared parenting plan ("SPP"), which the trial court incorporated into

the parties' decree. In the SPP, the parties agreed that appellant would pay appellee child support in the amount of $291.44 per child, plus processing charge, for a total monthly obligation of $594.53.

{¶3} On May 28, 2008, upon appellant's request, the Franklin County Child Support Enforcement Agency ("FCCSEA") reviewed appellant's child support obligation, and, on June 3, 2008, FCCSEA recommended appellant pay a reduced total monthly obligation of $336.71, plus processing charge. On July 8, 2008, appellee filed a motion for an administrative adjustment court hearing, and on August 22, 2008, a magistrate of the trial court heard testimony from both parties regarding the issue of appellant's child support obligation.

{¶4} On October 20, 2008, the magistrate journalized a decision finding that appellee "presented no evidence that [FCCSEA] calculated [appellant's] child support obligation incorrectly," and, therefore, approved FCCSEA's adjustment recommendation which modified appellant's child support obligation to $336.71 per month, plus processing charge. (See Magistrate's Decision at 1.) In addition, the record indicates that the trial court adopted the magistrate's decision that same day. The record further indicates that appellee did not file objections to the October 20, 2008, magistrate's decision or appeal the matter to this court.

{¶5} On March 9, 2010, appellee, pursuant to Civ.R. 60(B)(3), filed a motion to set aside the order reducing appellant's child support obligation. In her motion, appellee argued that appellant committed fraud upon the court by misrepresenting his 2007 income to FCCSEA in order to obtain a reduction in his monthly child support obligation.

The record indicates that appellant did not file a memorandum contra to appellee's motion.

{¶6} On December 21, 2010, this matter came on for hearing before the trial court, whereupon appellee appeared pro se. Appellant failed to appear, although the record indicates that he was served via process server on March 11, 2010. On January 7, 2011, the trial court journalized its decision granting appellee's motion to set aside the October 20, 2008, order reducing appellant's child support obligation.

{¶7} On February 4, 2011, appellant filed a timely notice of appeal, setting forth a sole assignment of error for our consideration:

> THE TRIAL COURT ERRED IN GRANTING APPELLEE'S TIME-BARRED RULE 60(B)(3) MOTION TO SET ASIDE AN ORDER FILED MORE THAN ONE (1) YEAR AFTER THE JUDGMENT, ORDER OR PROCEEDING WAS ENTERED OR TAKEN IN VIOLATION OF RULE 60(B).

{¶8} In his assignment of error, appellant contends that the trial court erred in granting appellee's Civ.R. 60(B)(3) motion because it was filed more than one year after the October 20, 2008, order reducing appellant's child support obligation. We note here that appellee has not filed a brief in this matter.

{¶9} Civ.R. 60(B) states, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); *(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;* (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no

> longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and *for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken*.

(Emphasis added.) It is well-settled that, in order to prevail upon a motion pursuant to Civ.R. 60(B), a movant must demonstrate the following: "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec.*, *Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of syllabus.

{¶10} Further, "[t]he decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." *Richardson v. Richardson*, 10th Dist. No. 07AP-287, 2007-Ohio-6642, ¶7. "An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable." *Classic Bar & Billiards, Inc.*, *v. Samaan*, 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶10, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} In the present matter, the trial court granted appellee's motion to set aside judgment, pursuant to Civ.R. 60(B)(3), even though it was clearly untimely. The record indicates that the trial court adopted the magistrate's decision reducing appellant's child support obligation on October 20, 2008. Appellee filed her motion to set aside that judgment on March 9, 2010, more than one year later.

{¶12} However, the record indicates that appellant failed to raise the issue of timeliness with respect to appellee's Civ.R. 60(B)(3) motion in the trial court. Parties cannot raise any new issues for the first time on appeal, and the failure to raise an issue at the trial level waives it on appeal. *Gangale, III v. Bur. of Motor Vehicles*, 10th Dist. No. 01AP-1406, 2002-Ohio-2936, ¶58. Nevertheless, "[i]n some circumstances, the plain error doctrine can allow a court to address an issue that was otherwise waived." *Thomas v. Early*, 10th Dist. No. 05AP-236, 2005-Ohio-4551, ¶16.

{¶13} In *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, the Supreme Court of Ohio addressed the application of the plain error doctrine in civil matters, stating, "[i]n applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice." Therefore, "appellate courts must proceed * * * only '* * * where the error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself.' " *Skydive Columbus Ohio, L.L.C. v. Litter*, 10th Dist. No. 09AP-563, 2010-Ohio-3325, ¶13, citing *Unifund CCR Partners v. Hall*, 10th Dist. No. 09AP-37, 2009-Ohio-4215, ¶22, quoting *Goldfuss* at 121. "Indeed, the plain error doctrine implicates errors in the judicial process where the error is clearly apparent on the face of the record and is prejudicial to the appellant." *Skydive Columbus*, citing *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223.

{¶14} Because appellant waived this issue by failing to raise it in the lower court, we must now analyze whether the trial court's mistake amounted to plain error. For the reasons discussed below, we find that appellant meets the two criteria for plain error

outlined above. First, the plain error doctrine implicates judicial errors that are clearly apparent on the face of the record. See *Reichert* at 223. In the present matter, the trial court's error is clearly apparent on the face of the record as appellee filed her motion (based solely on Civ.R. 60(B)(3)), approximately 17 months after the trial court's order. Second, the judicial error must be prejudicial to appellant. Id. Here, as a result of vacating the October 20, 2008, order, appellant would now owe appellee a child support arrearage dating back to June 1, 2008. In addition, appellant has been paying a higher amount in child support to appellee since January 7, 2011. Therefore, the trial court's error in granting appellee's motion to set aside judgment is prejudicial to appellant. For the foregoing reasons, and considering that appellee may seek modification of appellant's child support obligation through the FCCSEA without imposing an arrearage, we find there exists exceptional circumstances in this particular matter, and we further find that the trial court committed plain error in granting appellee's motion to set aside judgment filed more than one year after judgment.

{¶15} For the foregoing reasons, appellant's sole assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is reversed, and this matter is remanded to that court to determine whether an arrearage or credit is owed to either party.

Judgment reversed; cause remanded with instructions.

KLATT and FRENCH, JJ., concur.

_____