[Cite as *Grundey v. Grundey*, 2015-Ohio-1469.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph W. Grundey,	:	
Plaintiff-Appellee,	:	
		No. 14AP-420
v.	:	(C.P.C. No. 10DR-0631)
Christine L. Grundey,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 16, 2015

Elizabeth N. Gaba, for appellee.

Isaac Wiles Burkholder & Teetor, LLC, Danielle M. Skestos, Christopher J. Geer, and *Dale D. Cook*, for appellant.

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

SADLER, J.

{¶ 1} Defendant-appellant, Christine L. Grundey, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce and terminating her marriage to plaintiff-appellee, Joseph W. Grundey. For the reasons that follow, we reverse.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant and appellee were married on September 23, 2000. Two children were born of the marriage, Payton Grundey and Max Grundey. On February 18, 2010, appellee filed a complaint for divorce and motion for temporary orders. On February 19, 2010, appellant filed an answer, a counterclaim for divorce, and a request for temporary orders. Over the next three years, the trial court issued numerous temporary orders

regarding spousal support and marital expenses, as well as several restraining orders regarding financial matters. On January 19, 2011, the parties filed a joint shared parenting plan regarding the couples' two children.

{¶ 3} The case was tried to the court in June 2014, and on March 10, 2014, the trial court issued a Decree of Divorce. On April 4, 2014, appellant filed a motion for a new trial pursuant to Civ.R. 59. The trial court denied the motion on April 22, 2014 as untimely filed. The trial court decision reads in relevant part as follows:

> This Court's *Judgment Entry/Decree of Divorce* was originally issued on March 10, 2014. Civ.R. 59(B) provides that "[a] motion for a new trial shall be served no later than fourteen days after the entry of judgment." Civ.R. 59(B). Defendant's Motion for a New Trial was not timely filed."
>
> Therefore, Defendant's *Motion for a New Trial* pursuant to Civ.R. 59 filed April 4, 2014, is hereby DENIED.

(Emphasis sic.)

{¶ 4} Appellee filed a notice of appeal to this court on May 16, 2014. Appellant filed her notice of appeal on May 21, 2014. In an entry dated October 17, 2014, this court acknowledges that appellee dismissed his appeal in case No. 14AP-407, but that appellant's appeal in case No. 14AP-420 remains pending.

II. ASSIGNMENTS OF ERROR

> [I.] The trial court erred in denying the motion for new trial on the basis of an outdated version of Civil Rule 59.
>
> [II.] The trial court abused its discretion in failing to award any spousal support to Christine Grundey.
>
> [III.] The trial court abused its discretion in its calculation of child support and in failing to impute day care expenses to Christine Grundey.
>
> [IV.] The trial court abused its discretion in its division of property and valuation of the marital residence as Joseph Grundey improperly dissipated marital assets in violation of court orders.
>
> [V.] The trial court erred in considering the testimony of John Grundey that was not part of the record.

III. STANDARD OF REVIEW

{¶ 5} "The decision to grant or deny a motion for a new trial, pursuant to Civ.R. 59, generally lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." *Coleman v. R&T Invest. Property*, 10th Dist. No. 13AP-863, 2014-Ohio-2080, ¶ 9, citing *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312 (1995). However, where the motion raises an issue of law, our review is de novo. *Sully v. Joyce*, 10th Dist. No. 10AP-1148, 2011-Ohio-3825, ¶ 8.

{¶ 6} In her appeal to this court, appellant alleges that the trial court erred when it relied on a former version of Civ.R. 59 in denying her motion for a new trial as untimely filed. Accordingly, we will apply a de novo standard of review.

IV. LEGAL ANALYSIS

{¶ 7} In her motion for a new trial, appellant challenges nearly every major component of the trial court's Decree of Divorce, including spousal support, child support, and division of marital property. The motion for a new trial also challenges various trial court rulings regarding appellee's alleged financial misconduct and contempt of prior court orders. The stated grounds for the motion are accident or surprise, pursuant to Civ.R. 59(A)(3), newly discovered evidence, pursuant to Civ.R. 59(A)(8), and errors of law occurring at the trial and brought to the attention of the trial court, pursuant to Civ.R. 59(A)(9). The newly discovered evidence consists of appellant's claim that, subsequent to trial, she was diagnosed with a benign brain tumor that required surgical intervention. According to appellant, the condition and surgical treatment disqualified her from the work force for a period of time. Appellant's claim of legal error arises out of alleged mistakes by the trial court in the allocation of marital debt and expenses.

{¶ 8} In July 2013, Civ.R. 59(B) was amended to extend the time for serving a motion for a new trial from 14 days after the entry of the judgment to 28 days after the entry of the judgment. *In re J.M.*, 10th Dist. No. 14AP-431, 2015-Ohio-184, ¶ 7. Civ.R. 59(B) now provides that "[a] motion for a new trial shall be *served* not later than twenty-eight days after the entry of the judgment." (Emphasis added.) Civ.R. 5(A) provides that *"[e]xcept as otherwise provided in these rules*, * * * every written motion other than one which may be heard ex parte, * * * shall be served upon each of the parties." (Emphasis added.) Pursuant to Civ.R. 5(B)(1), "[i]f a party is represented by an attorney, service

under this rule *must be made* on the attorney unless the court orders service on the party." (Emphasis added.)

{¶ 9} The trial court entered judgment on March 10, 2014. The record shows that the trial court accepted appellant's motion for electronic filing on April 4, 2014. The certificate of service filed with appellant's motion provides as follows:

> The foregoing document was submitted for electronic filing on April 4, 2014, the service date. Per administrative order, notification of filing sent by the court's electronic filing system constitutes service upon all registered users. Upon the undersigned's receipt of notification that the document is accepted for e-filing, a copy of the filed document has or will be served upon non-registered parties and counsel by regular U.S. mail.

{¶ 10} Appellee concedes that the trial court committed an error of law when it determined that appellant was required to serve her motion within 14 days of the entry of the judgment. However, in defense of the trial court's decision, appellee argues appellant's April 4, 2014 motion should be treated as a motion for continuing jurisdiction pursuant to Civ.R. 75(J). Civ.R. 75(J) provides as follows:

> The continuing jurisdiction of the court shall be invoked by motion filed in the original action, *notice of which shall be served in the manner provided for the service of process under Civ.R. 4 to 4.6.* When the continuing jurisdiction of the court is invoked pursuant to this division, the discovery procedures set forth in Civ.R. 26 to 37 shall apply.

(Emphasis added.)

{¶ 11} Civ.R. 75 is applicable in all divorce, annulment, and legal separation actions. Under Civ.R. 75(J), service on a party's attorney, but not the party, is inadequate to invoke the trial court's continuing jurisdiction on a modification of spousal support. *Szymczak v. Szymczak*, 136 Ohio App.3d 706 (8th Dist.2000) (decided under former Civ.R. 75(I)). Where the notice requirements under Civ.R. 75(J) are not met, the court's continuing jurisdiction is not invoked, the court lacks personal jurisdiction over the nonmoving party, and it may not consider a motion for modification of custody, child support or spousal support. *See Hamad v. Hamad*, 10th Dist. No. 08AP-53, 2008-Ohio-4111, ¶ 3; *Rondy v. Rondy*, 13 Ohio App.3d 19, 21-22 (9th Dist.1983); *Szymczak* at 711;

Carson v. Carson, 62 Ohio App.3d 670, 673 (12th Dist.1989); *Hansen v. Hansen*, 21 Ohio App.3d 216, 219 (3d Dist.1985).

{¶ 12} Appellee contends that when appellant's motion is treated as a motion for continuing jurisdiction under Civ.R. 75(J), it is evident that the trial court lacked jurisdiction to consider the motion due to the failure of service on appellee. Accordingly, appellee urges us to affirm the trial court's decision, albeit for a different reason. We disagree with appellee's characterization of appellant's motion.

{¶ 13} In *Szymczak,* appellant/ex-husband appealed from a trial court order holding him in contempt for failure to pay spousal support and denying his motions for modification of spousal support. The trial court determined that it did not have jurisdiction of appellant's motion to modify support due to appellant's failure to serve his ex-wife. On appeal, the ex-husband argued that his motion should have been treated as a motion to vacate the trial court's prior judgment brought pursuant to Civ.R. 60(B), rather than a motion for modification brought pursuant to Civ.R. 75(J). As such, he claimed that Civ.R. 5(B)(1) required service of the motion on the ex-wife's attorney.

{¶ 14} In holding that the trial court lacked jurisdiction to consider the ex-husband's motion, the *Szymczak* court reasoned as follows:

> Civ.R. 75(I) [now Civ.R. 75(J)] provides that the continuing jurisdiction of the court shall be invoked by motion filed in the original action and notice of such shall be served in accordance with Civ.R. 4 to 4.6. Civ.R. 75(I) is used to seek a change in a domestic relations order on the ground that circumstances have changed since the original order was entered. *McKinnon v. McKinnon* (1983), 9 Ohio App.3d 220, 221, 459 N.E.2d 590. *On the other hand, Civ.R. 60(B) involves a procedure for granting relief from a judgment not otherwise modifiable. Id. This rule does not speak to the amendment of a final judgment, but to the vacation of that judgment. Therefore, the choice of which rule applies depends on the particular reasons for the motion.* Where a change of circumstances justifies a different result, the court may modify a decree when its continuing jurisdiction is properly invoked pursuant to Civ.R. 75(I). A Civ.R. 60(B) motion would be used in the event of inadvertence, mistake, newly discovered evidence, fraud or neglect which existed at the time of the original judgment.

(Emphasis added.) *Id.* at 712.

{¶ 15} Here, appellant styled her motion as one brought pursuant to Civ.R. 59, and the stated grounds for the motion are consistent with a motion for a new trial. Appellant's motion does not seek a "modification" of the trial court entry of judgment, as would be the case under Civ.R. 75(J). Rather, appellant seeks a new trial of issues previously determined by the trial court, but not yet subject to an appeal. Applying the logic of *Szymczak*, it is not appropriate to treat appellant's motion as a motion for continuing jurisdiction under Civ.R. 75(J) because it does not seek to amend a judgment that has become final. The relief sought is an immediate retrial of certain factual and legal issues prior to an appeal.

{¶ 16} Moreover, we note that, unlike a motion for continuing jurisdiction under Civ.R. 75, which has no specified time limit, a motion for a new trial, pursuant to Civ.R. 59, must be served within 28 days after the *trial court* has entered judgment. Pursuant to App.R. 4(A)(1), "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." Exceptions to this appeal time period are listed in subsection (B) and include a motion for a new trial under Civ.R. 59. *Fluitt v. Fluitt*, 5th Dist. No. 14 CAF 04 0026, 2014-Ohio-4442, citing App.R. 4(B)(2)(b). App.R. 4(B)(2)(f) further provides as follows:

> If a party files a notice of appeal from an otherwise final judgment but before the trial court has resolved one or more of the filings listed in this division, then *the court of appeals, upon suggestion of any of the parties, shall remand the matter to the trial court to resolve the post-judgment filings in question and shall stay appellate proceedings until the trial court has done so.* After the trial court has ruled on the post-judgment filing on remand, any party who wishes to appeal from the trial court's orders or judgments on remand shall do so.

(Emphasis added.)

{¶ 17} Based upon the plain language of Civ.R. 59 and App.R. 4(B), a trial court retains jurisdiction to consider a motion for a new trial where the motion is timely served before a notice of appeal is filed. *Geauga Sav. Bank v. Rivera*, 11th Dist. No. 2011-G-3011, 2011-Ohio-3755, ¶ 4; *Ford v. Tandy Transp., Inc.*, 86 Ohio App.3d 364, 375 (4th

Dist.1993). Thus, a party in a divorce action need not invoke the continuing jurisdiction of the trial court in order to obtain review of a timely filed motion for a new trial.

{¶ 18} Furthermore, we disagree with appellee's suggestion that a motion for a new trial should be treated as a motion for continuing jurisdiction, and served accordingly, when it is filed in an action for divorce, dissolution or legal separation. In *Pulice v. Collins*, 8th Dist. No. 86669, 2006-Ohio-3950, the court explained the reason for the service requirements of Civ.R. 75(J) as follows:

> The reason for this requirement is practical. In a domestic relations case the trial court retains jurisdiction over certain issues, including child support and visitation, even though disputes in these areas may not arise for months or years after the initial divorce decree is entered. *Once the decree is final, it is unlikely that the parties would stay in contact with their attorneys.*
>
> * * *
>
> Because years can pass *between the final decree and changed circumstances motivating a motion for a change in custody or support*, therefore, practicality and due process require that the motion be served upon the original party, in the same manner as a newly filed case. Service other than according to Civ.R. 4 through 4.6, therefore, is not sufficient guarantee of notice to fulfill due process requirements.

(Emphasis added.) *Id.* at ¶ 10, 12. *See also Tuckosh v. Cummings*, 7th Dist. No. 07 HA 9, 2008-Ohio-5819, ¶ 29-32.

{¶ 19} Given the timing of the motion for a new trial, service upon the opposing party, pursuant to Civ.R. 4 through 4.6, would serve no practical purpose. *Pulice.* Appellant has suggested no reason why service upon the attorney of record provides an insufficient guarantee of notice under the due process clause. *See also Gould v. Gould*, 12th Dist. No. CA2004-01-010, 2005-Ohio-416, ¶ 6 (a post-decree motion for a new trial is timely served where the moving party mails the motion to the opposing counsel within time prescribe by Civ.R. 59(B)). "The reasoning for the requirement that an attorney of record be served is that a party represented by counsel usually speaks through his counsel. Counsel is in a better position to understand the legal import of any documents required to be served on his or her client and the nature of the action to be taken."

Swander Ditch Landowners' Assn. v. Joint Bd. of Huron & Seneca Cty. Commrs., 51 Ohio St.3d 131, 134 (1990); *see also Lakhi v. Healthcare Choices & Consultants*, 10th Dist. No. 07AP-904, 2008-Ohio-1378, ¶ 14. Requiring service of a motion for a new trial on the opposing party in a divorce action rather than the attorney of record would defeat the underlying purpose of Civ.R. 5(B)(1). We find nothing in the Ohio Civil Rules or the case law to support appellee's contention that appellant's April 4, 2014 motion for a new trial is subject to the heightened service requirements of Civ.R. 75(J).

{¶ 20} For the foregoing reasons, we hold that the trial court erred when it denied appellant's motion for a new trial as untimely filed, without first determining whether appellant served the motion no later than 28 days after entry of judgment.[1] Appellant's first assignment of error is sustained.

{¶ 21} Because the trial court erroneously denied appellant's motion for a new trial as untimely filed, the trial court did not consider the merits of appellant's claim of surprise and newly discovered evidence. A ruling on the merits of such a claim will necessarily require resolution of disputed factual issues. Therefore, we will not determine the merits of the stated grounds for new trial for the first time in this appeal. Similarly, because the newly discovered evidence proffered by appellant, if accepted by the trial court, may require recalculation of both child support and spousal support, and because the other allegations of trial court error made by appellant in her motion for a new trial mirror the arguments advanced by appellant in her remaining assignments of error, we will not consider those issues for the first time in this appeal.

{¶ 22} In short, given our resolution of appellant's first assignment of error, appellant's four remaining assignments of error are rendered moot.

V. CONCLUSION

{¶ 23} For the foregoing reasons, appellant's first assignment of error is sustained, and appellant's four remaining assignments of error are rendered moot. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas, Division of

[1] Civ.R. 5(D) states in relevant part: "All documents, after the original complaint, required to be served upon a party shall be filed with the court within three days after service."

Domestic Relations, and remand the case for further proceedings consistent with this decision.

Judgment reversed;
cause remanded.

KLATT and BRUNNER, JJ., concur.

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