**[Cite as *Dario v. Colliver*, 2011-Ohio-4342.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| LISA B. DARIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2010-12-347 |
| | : | O P I N I O N |
| - vs - | | 8/29/2011 |
| | : | |
| THOMAS L. COLLIVER, | : | |
| Defendant-Appellant. | : | |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR05-01-0025

Lisa B. Dario, 4245 Pheasant Trail Court, Hamilton, Ohio 45011, plaintiff-appellee, pro se

Thomas L. Colliver, 7186 Lakota Ridge Drive, Hamilton, Ohio 45011, defendant-appellant, pro se

**POWELL, P.J.**

**{¶1}** Defendant-appellant, Thomas L. Colliver (Husband), appeals the decision of the Butler County Court of Common Pleas, Domestic Relations Division, modifying his day-care and child support obligations on remand from this court's decision dated November 1, 2010. *Dario v. Colliver*, Butler App. No. CA2010-03-047, 2010-Ohio-5310 ("*Colliver I*").

**{¶2}** This case has a long and arduous history. As outlined in *Colliver I*, the

marriage between Husband and his ex-wife, Lisa B. Dario (Wife), produced two children. Following their divorce in 2005, the parties had numerous disputes regarding Husband's financial obligations on behalf of the children. The dispute most pertinent to this appeal centers on Husband's day-care and child support obligations. In 2009, Husband requested to become solely responsible for the children's day-care costs as a result of Wife's alleged inability to make her share of the payments. On October 14, 2009, a Butler County magistrate granted Husband's request, at which time the magistrate ordered Husband to pay $8,865 in annual day-care costs.[1] To compensate Husband for paying all day-care costs, the magistrate reduced Husband's child support payments from $969 per month to $663.85 per month.

**{¶3}** On October 28, 2009, Husband filed a lengthy objection to the magistrate's decision, arguing the magistrate "incorrectly calculated annual [day-care] costs" and therefore failed to reduce his child support obligation by an amount sufficient to cover Wife's half of the day-care expenses. Specifically, Husband argued day-care costs were $274.20 per week during the school year and $351 per week during the summer, which totaled $15,180 annually. Using these figures, Husband calculated each party owed $7,590 per year, or $632.50 per month, for day-care. As such, Husband argued the $305.15 reduction in child support from $969 to $663.85 failed to compensate him for 100 percent of Wife's share of the day-care expenses. In a decision filed February 1, 2010, the trial court overruled Husband's objection and adopted the magistrate's decision.

**{¶4}** On March 2, 2010, Husband appealed the trial court's February 1, 2010 decision to this court. On November 1, 2010, this court found the trial court erred in its

1. In her calculations, the magistrate found day care costs were $206 per week during the school year and $625 per week during the summer, but failed to explain how she settled upon $8,865 as the annual cost of day-care or $663.85 for monthly payments. However, because this figure is irrelevant to our decision, we decline to speculate further on the magistrate's computation.

calculations regarding the parties' annual day-care expenses. As such, we remanded the matter for the trial court to recalculate annual day-care expenses using $224.20 per week during the school year and $351 per week during the summer. *Colliver*, 2010-Ohio-5310 at ¶21. On November 9, 2010, the matter was referred back to the magistrate, who found annual day-care expenses totaled $13,180 using this court's figures. As a result of the increase in annual day-care expenses (from $8,865 to $13,180), the magistrate reduced Husband's child support obligation to $566.07 per month.

**{¶5}** On November 16, 2010, Husband filed objections to the magistrate's decision, again arguing the weekly cost of day-care during the school year was $274.20, rather than $224.20. Thus, pursuant to Husband's calculations, annual day-care costs were $15,180.

**{¶6}** On December 2, 2010, the trial court overruled Husband's objections and adopted the magistrate's decision based upon a finding that the magistrate's recalculations complied with this court's remand instructions. On December 8, 2010, Husband filed several additional motions with the trial court, including a "Motion to Establish Child Support - Overpayment," which was overruled on December 23, 2010. Husband timely appeals, raising three assignments of error.

**{¶7}** Assignment of Error No. 1:

**{¶8}** "JUDGE KENNEDY ABUSED HER DESCRETION [sic] BY USING $13,180.00 AS THE TOTAL ANNUAL COST OF WORK-RELATED CHILDCARE; PER HER OWN RULING, THE TOTAL ANNUAL COST IS $15,180. ADDITIONALLY, THE VALUE USED BY JUDGE KENNEDY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**{¶9}** In his first assignment of error, Husband argues the trial court abused its discretion in calculating his annual day-care and child support expenses.

**{¶10}** First, Husband argues the trial court should have calculated his annual child support obligation based on day-care costs of $15,180 per year, rather than $13,180. In

support of his argument, Husband relies on a series of events that occurred between February 2 and March 26, 2010. As previously discussed, on February 1, 2010, the trial court affirmed the magistrate's finding that Husband owed $663.85 per month in child support based on annual day-care expenses of $8,865. On March 2, 2010, Husband objected to the February 1 decision, challenging the court's calculations. However, unbeknownst to the trial court, Husband had appealed the February 1 decision to this court the very same day.

**{¶11}** Lacking knowledge of the pending appeal, the trial court received additional evidence and testimony on Husband's objections during a hearing held on March 26, 2010. The same day, the trial court issued a decision finding the costs of day-care were $274.20 per week during the school year and $351 per week during the summer, totaling $15,180 annually.

**{¶12}** In his current argument, Husband cites the March 26, 2010 decision as the "correct" costs of day-care and argues that in failing to use these figures in its final decision, the trial court "renege[d] on evidence presented" of day-care costs. Unfortunately, Husband patently misunderstands the effect of his first appeal, i.e., *Colliver I*.

**{¶13}** As a general rule, when a notice of appeal is filed, the trial court is divested of jurisdiction except to take action in aid of the appeal. *Webb v. Pewano, Ltd.*, Fayette App. Nos. CA2008-10-036, CA2008-12-042, 2009-Ohio-2629, ¶29. However, the trial court does retain jurisdiction over issues not inconsistent with the appellate court's power to review, affirm, modify, or reverse the appealed judgment. Id.; *Foppe v. Foppe*, Warren App. Nos. CA2008-10-128, CA2009-02-022, 2009-Ohio-6926.

**{¶14}** In the case at bar, when the trial court issued its March 26, 2010 decision, *Colliver I* had been pending before this court for roughly three weeks. Accordingly, while the issues of day-care and child support were before this court, the trial court lacked jurisdiction to receive additional evidence on, or modify, the same. Id. See, also, *Matter of Lyczkowski*

*v. Newcomb* (June 9, 1986), Butler App. No. CA85-06-067, 1986 WL 6474, at *2. Therefore, the trial court's March 26, 2010 judgment entry is void. See, e.g., *Mason v. Lawhorn*, Warren App. No. CA2006-05-060, 2007-Ohio-2289, fn.1 ("[i]t is settled that the filing of a notice of appeal divests the trial court of jurisdiction and that any subsequent ruling or order by the trial court is null and void"); *Story v. Price-Story*, Cuyahoga App. No. 94085, 2010-Ohio-4675, ¶7.

**{¶15}** Moreover, Husband cites no authority, nor are we aware of any, that requires a trial court to rely on a void order in issuing a later decision. Accordingly, the trial court did not abuse its discretion, or otherwise err, in failing to use its computations from its void March 26, 2010 order.

**{¶16}** Next, Husband argues that on remand, only the *magistrate* was limited to using the figures as ordered by this court, but that nothing in the remand mandated the *trial court* to use our figures. Instead, Husband argues it was within the trial court's "discretion to use the correct values as listed in [its] March 26th, 2010 order[.]" A consideration of Husband's argument requires a brief review of the "law of the case" doctrine. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3.

**{¶17}** "Briefly, the doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Id. The doctrine is considered to be a rule of practice rather than a binding rule of law and will not be applied so as to achieve unjust results. Id. However, "the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." Id.

**{¶18}** To achieve these goals, the law of the case doctrine functions to compel the trial court to follow the mandates of the reviewing court. Id. Therefore, following remand, if the trial court is "confronted with substantially the same facts and issues as were involved in

the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law." Id.

**{¶19}** In the case at bar, the basis for remand was the issue of Husband's day-care and child support obligations. Pursuant to the law of the case doctrine, the trial court, like the magistrate, was without authority to extend or vary the mandate given by this court. See *Nolan*, 11 Ohio St.3d at 4. In affirming the magistrate's decision, the trial court stated "[t]his court has reviewed the Magistrate's recalculation of the child support obligation and * * * finds that the court has complied with the remand of the Twelfth District Court of Appeals." Upon review, it is clear the magistrate calculated day-care costs in compliance with this court's mandate, using $224.20 per week during the school year and $351 per week during the summer, totaling $13,180.

**{¶20}** Accordingly, the trial court did not err in affirming the magistrate's calculations pursuant to the law of the case doctrine.

**{¶21}** Husband's first assignment of error is overruled.

**{¶22}** Assignment of Error No. 2:

**{¶23}** "JUDGE KENNEDY ABUSED HER DESCRETION BY FAILING TO ADDRESS THE 2ND ASSIGNMENT OF ERROR UPHELD BY THE APPELLATE COURT; SPECIFICALLY, THE DEFENDANT'S CHILD SUPPORT WAS NOT LOWERED BY $632.50/month (PLAINTIFF'S 50% RESPONSIBILITY OF WORK-RELATED CHILDCARE COSTS) TO $336.50/month ($969-$632.50)." [sic]

**{¶24}** In his second assignment of error, Husband holds fast to his assertion that annual day-care costs are $15,180. Using this figure, Husband argues each party owes $7,590 per year, or $632.50 per month in day-care costs. Because Husband is solely responsible for day-care, he argues that on remand, the trial court should have reduced his monthly child support obligation by the exact same amount.

**{¶25}** However, our review of *Colliver I* indicates Husband once again misunderstands the effect of this decision. In *Colliver I*, Husband's second assignment of error stated:

**{¶26}** "THE TRIAL COURT DID NOT LOWER DEFENDANT'S MONTHLY CHILD SUPPORT BY AN AMOUNT SUFFICIENT TO COVER PLAINTIFF'S 50% RESPONSIBILITY OF THESE COSTS."

**{¶27}** It is true this court "sustained" Husband's assignment of error. However, our holding did not have the effect on remand that Husband desires. In *Colliver I*, we reversed the trial court's decision affirming the magistrate's calculations of annual day-care expenses based on a lack of evidence to support the findings. *Colliver*, 2010-Ohio-5310 at ¶21. However, nowhere in our decision did we order the trial court to reduce Husband's child support obligation by an amount equal to the increase in his day-care expenses. Simply because Husband wishes to have a dollar-for-dollar offset does not make it so.

**{¶28}** Moreover, as previously discussed, neither the magistrate nor the trial court was at liberty to deviate from this court's determination that day-care costs were $224.20 per week during the school year and $351 per week during the summer. Accordingly, we reaffirm our position that Husband's arguments relating to day-care and child support expenses are governed by the law of the case doctrine.

**{¶29}** Husband's second assignment of error is overruled.

**{¶30}** Assignment of Error No. 3:

**{¶31}** "JUDGE KENNEDY'S REASON FOR DENYING THE DEFENDANT'S MOTION TO ESTABLISH AN OVERPAYMENT IN HIS CHILD SUPPORT ACCOUNT IS COMPLETELY WITHOUT MERIT."

**{¶32}** In his third and final assignment of error, Husband argues the trial court erroneously denied his "Motion to Establish Child Support – Overpayment," filed December

8, 2010.

**{¶33}** On December 21, 2010, the trial court held a hearing on Husband's motion and denied it in an entry filed December 23, 2010. During the hearing, Husband introduced the testimony of Debra Hardix, an audit technician with the Butler County Child Support Enforcement Agency (CSEA). Hardix testified that as of November 30, 2010, Husband had overpaid $2,994.33 in child support. While not entirely clear, Husband appears to argue that in denying his motion, the trial court erroneously disposed of evidence proving an overage in child support.

**{¶34}** Ohio law recognizes that for any number of reasons, overpayment of child support can occur. See *J.R. v. N.M.*, Cuyahoga App. No. 95255, 2011-Ohio-2782. We review the trial court's decision regarding overages in child support under an abuse of discretion standard. See, e.g., *Sheperd v. Sheperd* (Apr. 10, 2000), Jefferson App. No. 97 JE 16, 2000 WL 459700, at *3. An abuse of discretion connotes action by the trial court that may only be characterized as unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶35}** In the case at bar, a review of the trial court's decision reveals an unclear message. On one hand, the trial court stated Husband's motion was "denied." However, in the very next paragraph, the trial court ordered the CSEA to "rectify the account and issue a new audit." Thus, it is unclear whether the trial court intended to deny Husband's motion as a final order, or instead, whether the court wished to continue Husband's motion until it received the re-audit. Cf. *Ossai-Charles v. Charles*, Warren App. Nos. CA2010-01-009, CA2010-02-011, 2010-Ohio-3558.

**{¶36}** In other words, we cannot tell whether the trial court determined an overage did (or did not) exist, or alternatively, whether it sought additional information prior to making this factual determination. According to the November 30, 2010 audit, Husband has overpaid

nearly $3,000 in child support. Absent a clearer indication as to the trial court's factual findings, we see no choice but to find the trial court's self-contradicting decision is arbitrary and unreasonable under the circumstances. See *Blakemore*, 5 Ohio St.3d at 219.

**{¶37}** Husband's third assignment of error is sustained.

**{¶38}** We reverse and remand this case for the limited purpose of clarifying the issue of Husband's child support overages and for further proceedings consistent with this opinion. In all other respects, we affirm the trial court's decision.

PIPER and HUTZEL, JJ., concur.