

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
MEIGS COUNTY

PAULINE GAY LABONTE,	:	
	:	
Plaintiff-Appellee,	:	Case No. 07CA15
	:	
vs.	:	<b>Released: September 29, 2008</b>
	:	
CLELL LABONTE, SR.,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

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APPEARANCES:

Adam J. Baker, Athens, Ohio, for Defendant-Appellant.

Linda R. Warner, Little, Sheets & Warner, Pomeroy, Ohio, for Plaintiff-Appellee.

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McFarland, J.:

{¶1} Defendant-Appellant, Clell Labonte, Sr., appeals the decision of the Meigs County Court of Common Pleas awarding Plaintiff-Appellee, Pauline Gay Labonte, \$218,000 under the terms of the parties' divorce decree. Appellant argues the trial court erred in: 1) adjudicating a money judgment without sufficient, credible evidence as to the proper amount of the award and; 2) holding trial proceedings while Appellant was unable to attend due to medical reasons. Because the trial court did not abuse its discretion, either in awarding the money judgment or in refusing to grant a

continuance at the final hearing, we disagree. As such, Appellant's assignments of error are overruled and the decision of the trial court is affirmed.

### I. Facts

{¶2} The parties herein were previously married. Prior to their divorce in 1987,<sup>1</sup> Appellant was injured in an industrial accident which resulted in a lawsuit against his employer, Foote Mineral Company. Both Appellant and Appellee asserted legal claims as a result of the accident, and the action was ongoing at the time of the divorce. The terms of the divorce decree made the following provision for the lawsuit's outcome: "Plaintiff is entitled to the first \$20,000.00 she receives from any claim she might have as a result of said industrial injury. It is further ordered that the Defendant is entitled to the first \$20,000.00 he receives from any claim he might have as a result of said industrial injury. Thereafter all monies received as a result of said lawsuit and/or injury shall be divided equally between the parties."

{¶3} Appellee received no direct proceeds as a result of her claims in the lawsuit. Further, she never received any money from Appellant as a result of his claims. After the divorce, Appellant moved frequently and Appellee had difficulty locating his whereabouts. Appellee made inquiries

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<sup>1</sup> The divorce was finalized by amended decree in 1990.

as to whether Appellant received any proceeds as a result of his action against Foote Mineral, but was unable to determine if he had. In 1992, Appellee filed a motion to compel Appellant to produce all documents relating to the lawsuit. The trial court granted the motion, but Appellant failed to produce the requested documents.

{¶4} Years later, in 2006, Appellant accompanied the parties' daughter to Appellee's home. Appellee testified that, at that time, she and Appellant discussed his income. "He told me just about everything. You know, about what he had, how much he got and what he gave his attorney and what he'd been doing all these years." Appellant told Appellee that, as a result of the settlement of his injury claim, he had received a lump sum of \$60,000 and additional payments of \$1,650 a month, which he continued to receive. Appellee testified that Appellant did not tell her exactly when he started receiving the payments; he did not state a specific number of years.

{¶5} Subsequent to Appellant's disclosure, Appellee filed a motion to compel him to comply with the terms of the parties' divorce decree, specifically the provision concerning proceeds from the industrial accident. Appellant failed to appear in the numerous pre-trial proceedings, stating he did so under advice of his psychiatrist. Appellant was found in contempt for failing to comply with discovery requests and ordered to immediately begin

paying Appellee one-half of the monthly proceeds he received as a result of his settlement.

{¶6} At the final hearing, in which Appellant again failed to appear, the trial court entered judgment for Appellee in the amount of \$218,000, plus statutory interest from the date of the entry. The court arrived at this figure by applying the terms of the divorce decree and determining Appellant owed Appellee \$20,000 from the initial \$60,000 lump sum payment<sup>2</sup> and \$198,000 for back payments.<sup>3</sup> Appellant subsequently filed the current appeal.

## II. Assignments of Error

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADJUDICATING A MONEY JUDGMENT WITHOUT SUFFICIENT, CREDIBLE EVIDENCE THAT ESTABLISHED WHEN THE DEFENDANT BEGAN TO RECEIVE THE ALLEGED PAYMENTS THAT WERE THE BASIS OF THE MONEY JUDGMENT.
2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY HOLDING A TRIAL WHILE THE DEFENDANT WAS MEDICALLY-EXCUSED BY DEFENDANT'S TREATING PSYCHIATRIST.

{¶7} Initially, we note though Appellant's brief starts with a statement of the standard of review for contempt, the trial court's finding of contempt was not properly assigned as error and we decline to address it.

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<sup>2</sup> Half of the \$40,000 remaining after Appellant received the first \$20,000.

<sup>3</sup> Half of 240 months of payments of \$1,650.

See App.R. 12(A). We address the two properly assigned errors out of order.

### III. Second Assignment of Error

{¶8} In his second assignment of error, Appellant argues the trial court erred by proceeding in his absence while he was medically unable to participate. Appellant argues that, by denying his motion for a continuance at the final hearing, the trial court did not afford him a reasonable opportunity to appear in court in his own defense.

{¶9} First we note that the standard of review of a trial court's decision to grant, or refuse to grant, a continuance is abuse of discretion. *State v. Clark*, 4th Dist. No. 07CA9, 2007-Ohio-6621, at ¶8; *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078, 21 O.O.3d 41. Abuse of discretion is more than an error of judgment. Rather, it indicates that a ruling was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, we may not substitute our judgment for that of the trial court. *Berk v. Matthews* (1993), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶10} Throughout the proceedings below, Appellant's participation has been irregular at best. In 1992, Appellee filed a motion to require

Appellant to produce all documents relating to the resolution of the lawsuit against his former employer. The trial court granted the motion, but Appellant failed to respond. Since contact was reestablished between Appellant and Appellee and this action was renewed in 2006, Appellant has again been found in contempt for failure to provide discovery. In fact, the only documentary evidence Appellee ever received was one monthly statement, from July of 2006, indicating that Worker's Compensation of the State of West Virginia had paid Appellant \$1650 for employer Foote Mineral. Further, Appellant has disregarded orders of the trial court, including an order to pay Appellee one-half of any proceeds he continues to receive as a result of his industrial accident claim.

{¶11} More pertinent to this assignment of error, Appellant has failed to appear at any of the hearings in this matter. At the initial pre-trial conference, held in January of 2007, Appellant's counsel presented a note from a psychiatrist, stating Appellant was unable to travel and that he was being referred to a specialist for further evaluation. Appellant's counsel requested a continuance. In March, at another pre-trial, in which the trial court found Appellant in contempt for failing to timely provide interrogatories, Appellant's counsel stated that his absence was again do to psychiatric advice. Again, Appellant's counsel requested a continuance. In

April, the trial court held a status conference. Appellant's absence continued. His counsel presented another doctor's note which stated that Appellant was not "mentally stable to attend court or handle any legal proceedings." Counsel again requested a continuance.

{¶12} Finally, the trial court ordered a final hearing for July, to determine the amount of back payments Appellant owed Appellee. The order stated: "Defendant's failure to appear will not delay or cancel this hearing." On the day of the expected final hearing, Appellant's counsel again presented a psychiatrist's note and, despite its previous order, the trial court granted a continuance until August 17, 2007. On August 17, though Appellant's counsel presented yet another psychiatrist's note, the trial court refused to grant any further continuances and proceeded with the hearing in Appellant's absence.

{¶13} Appellant cites case law, including *Puckett v. Puckett*, 4th Dist. No. 00CA03, 2000-Ohio-1985, for the proposition that the trial court should have postponed the final hearing and, once more, continued the case. In *Puckett*, we listed the Supreme Court of Ohio's criteria regarding continuances and a party's absence. "To constitute a sufficient ground for a continuance because of the absence of a party it must appear that the absence is unavoidable, and not voluntary; that his presence at the trial is necessary;

that the application is made in good faith; and that he probably will be able to attend court at some reasonable future time.” *Id.* at \*2. The Supreme Court has also noted that “unreasonable delays are intolerable, and continuances are justifiable according to the circumstances.” *Coats v. Limbach* (1989), 47 Ohio St.3d 114, 116-117, 548 N.E.2d 917, citing *State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 538, 24 O.O. 552, 45 N.E.2d 763.

{¶14} In the case sub judice, the numerous continuances granted by the trial court prior to the final hearing clearly establishes its efforts to accommodate Appellant. Appellant’s lack of involvement in the proceedings below, including his failure to provide necessary discovery and his failure to comply with court orders, could have reasonably led the trial court to believe that he was not acting in good faith. However, even assuming Appellant’s good faith, and assuming his mental state constituted a legitimate excuse for his many failures to appear, the trial court still had a reasonable basis for not granting yet another continuance.

{¶15} As we stated in *Puckett*, one of the criteria for sufficient grounds for a continuance is that the party will be able to attend court at some reasonable future time. Here, there was no such indication. Appellant made absolutely no appearances in court in this matter. Appellant’s consecutive failures to appear continued for more than half of a year.



Nothing in his numerous doctor's excuses indicated that Appellant was progressing or that his condition would abate in a reasonable amount time, thus allowing him to finally make an appearance. In such circumstance, the trial court could have legitimately determined that, since there was still no indication Appellant would be able to appear in the future, yet another continuance would serve only to further delay the proceedings.

{¶16} For the reasons stated above, the trial court did afford Appellant a reasonable opportunity to appear in court in his own defense. Accordingly, we find the trial court did not abuse its discretion in proceeding with the final hearing despite his absence. Appellant's second assignment of error is overruled.

#### IV. First Assignment of Error

{¶17} In his first assignment of error, Appellant argues it was error for the trial court to enter a money judgment for Appellee when there was insufficient credible evidence to establish a basis for the amount awarded. We note Appellant does not challenge that Appellee has established a right to damages, rather he asserts that the damages determined by the trial court were not supported by adequate evidence.

{¶18} As in Appellant's second assignment of error, our standard of review for this error is abuse of discretion. "We will not disturb a decision

of the trial court as to a determination of damages absent an abuse of discretion.” *Roberts v. United States Fidelity and Guarantee Co.*, 75 Ohio St.3d 630, 634, 1996-Ohio-101, 665 N.E.2d 664.

{¶19} Before a money judgment may be awarded, evidence of the damages must be established. “Ohio courts have found that, once a right to damages has been established, that right cannot be denied because damages are incapable of being calculated with mathematical certainty. (Internal citation omitted.) However, the amount of damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture or surmise.” *Pingue v. Pingue* (Nov. 6, 1995), 5th Dist. No. 95CAF02006, at \*10. See, also, *Barnhart v. Montgomery* (April 30, 1987), 4th Dist. No. 1821, at \*5. Therefore, in the case sub judice, we must determine if the trial court’s award was based only on speculation, conjecture or surmise.

{¶20} Appellee testified that Appellant told her the following regarding his injury claim when they met at their daughter’s home in 2006: 1) Appellant received \$60,000 in a lump sum; 2) he had been receiving \$1,650 a month since the lump sum payment; 3) he did not tell Appellee exactly when he started receiving the monthly payments; and 4) Appellant disappeared after the initial divorce in 1987 because he was “hiding out.” Additionally, Appellee presented the one item of documentary evidence

received through discovery, the check stub from West Virginia Worker's Compensation indicating Appellant had received, for the month of July, 2006, a \$1650 payment for the Foote Mineral claim.

{¶21} The trial court awarded judgment for Appellee in the amount of \$218,000. To reach this figure, the court, following the terms of the divorce decree, first awarded Appellee \$20,000 from reported \$60,000 lump sum payment. The trial court also awarded Appellee \$198,000 for back payments. The court arrived at this figure by deciding Appellee was owed half of Appellee's monthly payments for the twenty years since the 1987 divorce. In doing so, the trial court stated the following: "[T]his court has gone on and on with this and apparently this court has done everything even when Judge Cox was here, which was several years ago, to try to find out from the State of West Virginia what was going on. Apparently, [Appellant] is the only one that has records of what's happened and he is either not able to or refuses to appear and has not appeared in the past in this court. So, this court has very little alternative other than to grant judgment against him \* \*

\* ."

{¶22} We agree with the trial court. Appellee's testimony as to Appellant's statements regarding the injury claim provides a basis for the money judgment. Appellant argues that Appellee's testimony alone is

insufficient and that, because of the lack of documentary evidence, the amount of the money judgment, as calculated by the trial court, was mere speculation. However, this argument lacks force because of Appellant's own conduct. It is Appellant's failure to provide the necessary documentary evidence of the injury claim, not Appellee's, which prevents an exact, mathematical calculation of the amount owed. Additionally, the one item of documentary evidence available, the Worker's Compensation statement, strongly corroborates Appellee's testimony.

{¶23} Though not calculated with mathematical certainty, the trial court awarded the judgment in this matter based on the evidence presented and not on "mere speculation, conjecture or surmise." In light of that evidence and in light of Appellant's own actions in preventing a more precise calculation, we find the trial court did not abuse its discretion in awarding Appellee judgment in the amount of \$218,000. Accordingly, Appellant's first assignment of error is also overruled.

## V. Conclusion

{¶24} In our view, Appellant has failed to substantiate either of his assignments of error. The trial court did not abuse its discretion in refusing to grant a continuance at the final hearing. Appellant had failed to appear in more than six months of proceedings and there was no indication he would

appear in a reasonable future time. Further, the trial court did not abuse its discretion in rendering a money judgment because the award was based upon evidence adduced at trial and not mere speculation, conjecture or surmise. Accordingly, both of Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.  
Exceptions.

Abele, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: \_\_\_\_\_  
Judge Matthew W. McFarland

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**