

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRENDA J. AUGENSTEIN HOWARD	:	JUDGES:
	:	W. Scott Gwin, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 08 CA 00114
	:	
	:	
WEDNESDAY Y. PHARIS-RINE	:	<u>O P I N I O N</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Licking County Court of Common Pleas, Domestic Relations Division, Case No. 04 DR 00816 RAS
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JUDGMENT:	Reversed
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DATE OF JUDGMENT ENTRY:	August 10, 2009
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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TOM EISMON
112 Wing Street
Newark, Ohio 43055

JUSTIN T. RADIC
57 East Main Street
Newark, Ohio 43055

Edwards, J.

{¶1} Defendant-appellant, Wednesday Y. Pharis-Rine, appeals from the August 6, 2008, Judgment Entry of the Licking County Court of Common Pleas, Domestic Relations Division, denying her Rule 60(B)(5) Motion for Relief from Judgment for Lack of Jurisdiction over the Subject Matter.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 7, 2004, appellee, who is disabled, filed a Petition for a Domestic Violence Civil Protection Order against appellant, her daughter, pursuant to R.C. 3113.31. Appellee, in her petition, alleged that appellant had physically and mentally abused her. An ex parte civil protection order was issued on the same day.

{¶3} A hearing before a Magistrate was held on July 8, 2004 on the Petition for a Domestic Violence Civil Protection Order. The Magistrate, in a decision filed on July 15, 2004, recommended that the trial court enter a Civil Protection Order in favor of appellee. The Magistrate found, in part, that the evidence had established that appellant had converted a considerable amount of appellee's funds for her own use and benefit. The Magistrate recommended that an oral hearing be held to address appellee's request for an award of a monetary judgment against appellant "for funds that [appellant] improperly withdrew from [appellee's] bank account and converted for her own use and benefit." The trial court adopted the Magistrate's Decision pursuant to an Opinion filed on July 30, 2004.

{¶4} On August 3, 2004, a Domestic Violence Civil Protection Order was issued that was effective for a period of five years. The trial court, in such order,

scheduled an oral hearing on appellee's request for a monetary judgment against appellant "for funds improperly withdrawn from her bank account" on August 13, 2004.

{¶5} Thereafter, a hearing before a magistrate was held on August 13, 2004. The Magistrate, in a Decision filed on August 24, 2004, recommended that an order be entered awarding appellee a judgment against appellant in the amount of \$6,071.19, plus interest. As memorialized in a Judgment Entry filed on October 4, 2004, the trial court adopted the Magistrate's Decision and awarded appellee a judgment against appellant in the above amount. The trial court ordered appellant to reimburse appellee at the rate of \$300.00 a month until the judgment and interest were paid in full.

{¶6} On July 8, 2008, appellant filed a Rule 60(B)(5) Motion for Relief from Judgment for Lack of Jurisdiction over the Subject Matter. Appellant, in her motion, argued that the subject matter addressed at the hearing conducted on August 13, 2008 "exceeded the scope of the jurisdictional authority granted upon the Magistrate by Revised Code Section 3113.31(E)(1)(h)." Appellant argued, therefore, that the Magistrate's August 24, 2004 Decision and that trial court's October 4, 2004 Judgment Entry adopting the same were void and should be vacated.

{¶7} Pursuant to a Judgment Entry filed on August 6, 2008, the trial court denied appellant's motion. The trial court, in its Judgment Entry, stated, in relevant part, as follows:

{¶8} "Ohio Revised Code 3113.31(E)(1)(h) provides the Court may grant relief that the Court considers equitable and fair, including the apportionment of household and family personal property. Subsection (E)(1)(h) specifically provides this specific relief does not limit the Court's equitable relief powers...

{¶9} “Just as this Court had the equitable powers to order the respondent to return the personal property taken from petitioner, the court had equitable powers to order those personal funds [taken by appellee] returned to petitioner...

{¶10} “Since the Court finds it had the equitable powers to do so, it finds that Ohio Revised Code 3113.13(E) provides it with the necessary subject matter jurisdiction.”

{¶11} Appellant now appeals from the trial court’s August 6, 2008, Judgment Entry, raising the following assignment of error:

{¶12} “THE TRIAL COURT ERRED IN ITS DETERMINATION THAT IT POSSESSED THE SUBJECT MATTER JURISDICTION NECESSARY TO DETERMINE THAT APPELLANT CONVERTED APPELLEE’S MONEY, AND THUS OWED APPELLEE \$6,301.09.”

I

{¶13} Appellant, in her sole assignment of error, argues that the trial court erred in denying her Rule 60(B)(5) Motion for Relief from Judgment for Lack of Jurisdiction over the Subject Matter. Appellant specifically contends that the trial court erred in determining that it possessed jurisdiction to litigate a tort claim of conversion and to award damages to appellee for conversion.

{¶14} As an initial matter, we note that the defense of lack of subject matter jurisdiction can never be waived. *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 1996-Ohio-224, 661 N.E.2d 1097. Thus, objections based on lack of subject matter jurisdiction may be raised at any stage of the proceedings. *In re Byard*, 74 Ohio St.3d 294, 296, 1996-Ohio-163, 658 N.E.2d 735.

{¶15} At issue in this matter is whether the Domestic Relations Court had subject matter jurisdiction to find that appellee converted money from appellant and to award a monetary judgment to appellant. “The court of common pleas, including division of courts of domestic relations, has full equity power and jurisdiction appropriate to the determination of all domestic relations matters.” R.C. 3105.011. If the matter is not primarily a domestic relations matter, then the domestic relations court does not have jurisdiction under R.C. 3105.011. In re *Dunn* (1995), 101 Ohio App.3d 1, 5, 654 N.E.2d 1303.

{¶16} Generally, therefore, “a domestic relations forum is not the proper forum in which to litigate a tort claim.” *Koepke v. Koepke*, 52 Ohio App.3d 47, 49, 556 N.E.2d 1198 (1989). In such case, the husband sued his wife for intentional infliction of emotional distress after divorce proceedings had been initiated. In *Koepke*, the court held, in relevant part, as follows: “Clearly, it is inconsistent to combine intentional tort claims with divorce actions since a party to a divorce cannot recover damages. *Id.* See, also, *State, ex rel. Cook v. Cook* (1902), 66 Ohio St. 566, 573, 64 N.E. 567, 569. Whereas, the main objective behind tort litigation is the recovery of damages. *Gates v. Brewer* (1981), 2 Ohio App.3d 347, 349, 2 OBR 392, 394-395, 442 N.E.2d 72, 75.

{¶17} “Moreover, there is no right to a jury trial in a divorce proceeding. Civ.R. 75(C). Thus, spouses who wish to bring an action in tort separate from their divorce action inadvertently lose their right to a jury trial for the tort claim when a court chooses to combine the two causes of action.” *Id.* at 48.

{¶18} In *Gibson v. Gibson* (1993), 87 Ohio App.3d 426, 622 N.E.2d 425, after a complaint for divorce was filed, the trial court ordered the parties to exchange motor

vehicles in their possession and to refrain from encumbering, disposing of, or causing any loss of value to the vehicles. After the parties exchanged vehicles, the appellant filed a motion for appellee to show cause why she should not be found in contempt because of damage done to the appellant's pickup truck. The domestic relations court in the divorce action awarded an \$1,800.00 judgment in damages to the appellant.

{¶19} On appeal, the court concluded that R.C. 3105.011 gave the domestic relations court the equitable power to divide property and to consider the damage done to the vehicle in the court's property division, but not the power to award damages. The court held, therefore, that entering a judgment for damages was beyond the authority of the domestic relations court.

{¶20} We find, based on the foregoing, that the trial court did not have jurisdiction to litigate appellee's tort claim against appellee and to award damages. The trial court, in its August 6, 2008 Judgment Entry, stated that R.C. 3113.31(E)(1)(h) "provides it with the necessary subject matter jurisdiction." R.C. 3113.31 states, in relevant part, as follows: "(E)(1) After an ex parte or full hearing, the court may grant any protection order, with or without bond, or approve any consent agreement to bring about a cessation of domestic violence against the family or household members. The order or agreement may... (h) Grant other relief that the court considers equitable and fair, including, but not limited to, ordering the respondent to permit the use of a motor vehicle by the petitioner or other family or household member and the apportionment of household and family personal property."

{¶21} We do not find that R.C. 3113.31(E)(1)(h) provided the trial court with jurisdiction to act as it did. While the trial court, in its Judgment Entry, stated that such

section “provides the Court may grant relief that the Court considers fair and equitable, including the apportionment of household and family personal property” and” specifically provides this specific relief does not limit the Court’s equitable powers”, the trial court, in the case sub judice, did more than just apportion household and family personal property between the parties. The trial court went as far as to award damages to appellee. We concur with appellant that the trial court did not have jurisdiction to do so.

{¶22} Appellant’s sole assignment of error is, therefore, sustained.

{¶23} Accordingly, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is reversed.

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

JUDGES

JAЕ/d0403

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BRENDA J. AUGENSTEIN HOWARD

Plaintiff-Appellee

-VS-

WEDNESDAY Y. PHARIS-RINE

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 08 CA 00114

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is reversed. Costs assessed to appellant pursuant to Appellate Rule 24(A).

JUDGES