[Cite as *Westhoven v. Westhoven*, 2011-Ohio-3610.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Mary Ann Westhoven	Court of Appeals No. OT-10-037
Appellee	Trial Court No. 03-DRB-170
v.	
Thomas Westhoven	**DECISION AND JUDGMENT**
Appellant	Decided: July 22, 2011

* * * * *

Donna M. Engwert-Loyd, for appellee.

David F. Wiley, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a January 4, 2007 decision of the Ottawa County Common Pleas Court, Domestic Relations Division, which entered judgment granting a divorce between Thomas Westhoven and Mary Ann Westhoven. The judgment divided their assets and awarded Mary Ann Westhoven spousal support. Both parties appealed

that judgment. On June 13, 2008, we affirmed the trial court's judgment in part and reversed in part. See *Westhoven v. Westhoven*, 6th Dist. No. OT-07-003, 2008-Ohio-2875 ("*Westhoven I*"). We remanded the case to the trial court for further proceedings.

{¶ 2} Upon remand, the trial court issued its judgment on October 20, 2008. In making this judgment pertaining to the division of personal property, it adhered to the prior division of personal property outlined in the November 7, 2007 amended magistrate's decision.

{¶ 3} Appellant appealed the remand-judgment setting forth several assignments of error specifically challenging aspects of the division of marital assets. On January 22, 2010, we affirmed the judgment of the trial court. See *Westhoven v. Westhoven*, 6th Dist. No. OT-08-056, 2010-Ohio-177 ("*Westhoven II*"). No claims of mathematical errors in the calculation of values or the distribution of assets were raised.

{¶ 4} On May 27, 2010, Thomas Westhoven filed a motion to show cause for Mary Ann Westhoven to return items of personal property alleged to be in her possession. In its decision on June 14, 2010, the trial court ordered Mary Ann Westhoven to follow specific guidelines pertaining to locating Thomas Westhoven's personal property. On September 24, 2010, the trial court found that appellee was not in contempt of its court order.

{¶ 5} From that judgment, appellant now brings forth the following assignments of error:

{¶ 6} "1. THE TRIAL COURT ERRED IN FAILING TO CORRECT ITS MATHEMATICAL ERRORS IN ITS DECISION DATED OCTOBER 20, 2008, AND TO REDUCE THE AMOUNT OWED BY PLAINTIFF TO DEFENDANT TO A MONETARY JUDGMENT.

{¶ 7} "2. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND PLAINTIFF/APPELLEE IN CONTEMPT OF COURT."

{¶ 8} The following undisputed facts are relevant to this appeal. On January 4, 2007, the Ottawa County Common Pleas Court, Domestic Relations Division, entered judgment granting a divorce between Thomas Westhoven ("appellant") and Mary Ann Westhoven ("appellee"), dividing their assets, and awarding appellee spousal support. Both parties appealed. On June 13, 2008, we affirmed the trial court's judgment in part and reversed in part. *Westhoven v. Westhoven*, 6th Dist. No. OT-07-003, 2008-Ohio-2875 ("*Westhoven I*"). We remanded the case to the trial court for further proceedings.

{¶ 9} Upon remand, the trial court followed the November 7, 2007 amended magistrate's decision in its division of the marital assets. Appellant appealed. No claims of mathematical errors in the calculation of values or the distribution of assets were raised. We affirmed the trial court's decision on January 22, 2010, in *Westhoven v. Westhoven*, 6th Dist. No. OT-08-056, 2010-Ohio-177 ("*Westhoven II*").

{¶ 10} On May 27, 2010, appellant filed a motion to show cause and claimed appellee destroyed or failed to return several items of personal property belonging to him. Among these items are a slide projector, Vietnam slides, certain plates inherited by his

mother, and an acetylene torch set. On June 13, 2010, appellant went to appellee's residence and received the items identified in the motion to show cause. Appellant signed a receipt indicating he picked up the missing items.

{¶ 11} At the hearing for the motion to show cause on June 14, 2010, the trial court ordered appellee to follow specific guidelines to locate the remaining personal property items that appellant alleged were missing. Subsequently, she signed and served an affidavit indicating her attempt to locate the items, pursuant to the trial court order. On September 24, 2010, the trial court found that appellee was not in contempt of its court order. Thus, the motion was denied. A timely notice of appeal was filed.

{¶ 12} In the first assignment of error, appellant claims the trial court erred in its valuation and distribution of assets. Appellant relies on Civ.R. 60(A). Civ.R. 60(A) permits a trial court to modify a judgment if it contains a clerical error, but not a substantive error. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 100; *Londrico v. Delores C. Knowlton, Inc.* (1993), 88 Ohio App.3d 282, 285; *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 247. "The basic distinction between clerical mistakes that can be corrected under Civ.R. 60(A) and substantive mistakes that cannot be corrected is that the former consists of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner." *Kuehn* at 247, citing *Blanton v. Anzalone* (C.A.9, 1987), 813 F.2d 1574, 1577. Thus, a clerical mistake within the purview of

Civ.R. 60(A) must be "a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." *State ex rel. Litty*, at 100.

{¶ 13} The record of evidence reflects no mistakes or omissions when the trial court made its decision on the valuation and distribution of assets. The issue has been carefully reviewed in the trial court twice and there was not an inadvertent mathematical error that would require this court to order a correction to the trial court's determination under Civ.R. 60(A). In addition, the doctrine of res judicata applies.

{¶ 14} Ohio courts held that res judicata applies both to issues which were actually litigated and adjudicated in a divorce action and also to matters which could have been litigated and adjudicated. *Bean v. Bean* (1983), 14 Ohio App.3d 358, 361.

{¶ 15} Having previously affirmed the trial court's judgment of October 20, 2008, appellant is foreclosed from relitigating the division of marital assets by the doctrine of res judicata. See *Wiczynski v. Wiczynski* (Feb. 26, 1999), 6th Dist. No. L-98-1123; *Hatfield v. Hatfield* (Mar. 18, 1996), 4th Dist. No. 95-CA-2112. The record explicitly reflects the trial court and counsel for appellant concluded there was nothing left that could be entertained because the issues were already addressed by the trial court. Thus, we will not belabor ourselves on this point. Reframing the same issue under a different label does not avoid the res judicata implications. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 16} In the second assignment of error, appellant contends the trial court erred in its finding that appellee was not in contempt of a court order. The trier of fact is in the

best position to make factual findings, since it has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed on appeal through the written record. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80; *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. The record reflects there was no abuse of discretion as evidenced by the following exchange at the motion to show cause hearing:

{¶ 17} "The Court: * * * As to the personal property, I remember an exchange of property in this case where [appellee's former counsel] and Mr. Wiley were present, along with the parties, for an exchange of property, and it is not surprising to me that the plates, torch set, hoses, gauges may not have been delivered at this point. It has been sometime.

{¶ 18} "Now I will order the following. I am ordering [appellee] to, within the next ten days, make a very complete search of your home. If you have plates that match somewhat the description given by Mr. Westhoven, vague as it may be, but smaller plates, those must be delivered to your attorney within 20 days. Just wait.

{¶ 19} "The same with the torch set. If that is available at this point, if the hoses, you have heard the description, red hose, green hose, gauges, two torches, make a search in your residence for those devices.

{¶ 20} "If you have got them, deliver them to your attorney. If you don't, I am going to ask that your counsel prepare an affidavit saying that they are not in your possession, and that you have not disposed of them. If you have disposed of those items,

particularly, the hoses, the plates, I am sorry, the hoses the gauges or the torch sets, you make that up to Mr. Westhoven by paying $200.

{¶ 21} "I don't know if they were disposed of. I don't know if they are misplaced. I don't know if they were taken at some other time, but that is my order.

{¶ 22} "* * *

{¶ 23} "The Court: * * * I am specifically not making a finding of contempt at this time. If the orders of the Court in this matter are not followed, as just ordered from the bench, that would constitute a finding of contempt, but it appears that there was a reasonable difference in the amount of money owed between the parties, and the fact that it is so long in recovering these personal property items, I am not finding that to be contempt."

{¶ 24} A finding of an error of law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. As indicated in the record, if appellee was unable to locate the personal property belonging to appellant within ten days of the decision, she must sign an affidavit reflecting that fact. If she also included in that affidavit a statement that she has not disposed of these items of property, or intentionally misplaced them, the matter is resolved. If she signs an affidavit indicating she disposed of these assets, or misplaced them, she shall pay $200 to appellant for replacement of these items.

{¶ 25} Pursuant to the court order, appellee signed an affidavit attesting to the former which was filed and served upon appellant's counsel. The affidavit indicated she could not find the alleged missing items and did not dispose of or intentionally misplace them. The trial court found her statements to be credible. As a result, the matter is resolved. Appellee was not in contempt of the court order. We cannot find an abuse of discretion in the trial court's determination. Thus, appellant's second assignment of error is not well-taken.

{¶ 26} After review of the record, we find substantial justice has been done in this matter. The issue of a mathematical error in the valuation and distribution of assets raised before this court is barred under the doctrine of res judicata. Appellee was not in contempt of court. The judgment of the Ottawa County Common Pleas Court, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, P.J.
CONCUR.

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JUDGE