

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

Deanna Horn

Court of Appeals No. S-12-015

Appellee

Trial Court No. 06DR000949

v.

James R. Horn

**DECISION AND JUDGMENT**

Appellant

Decided: September 20, 2013

\* \* \* \* \*

Joseph F. Albrechta and John A. Coble, for appellee.

Lisa M. Snyder, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} James R. Horn appeals a May 14, 2012 judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division. The judgment is a final judgment of divorce. Appellant asserts two assignments of error on appeal and contends the trial court erred in its awards of spousal support and attorney fees:

Assignment of Error No. I. The trial court abused its discretion in finding that appellee is entitled to an award of spousal support in the amount of \$1,600 per month for 60 months.

Assignment of Error No. II. The trial court abused its discretion in finding that appellee is entitle to an award of attorney fees in the amount of \$15,000.

{¶ 2} Appellee brought suit with the filing of a complaint for divorce on September 22, 2006. By consent of the parties, on November 15, 2006, the trial court ordered appellant to pay appellee temporary spousal support of \$1,000 per month. Appellant filed his answer and a counterclaim for divorce on March 26, 2007.

{¶ 3} The case proceeded to a final hearing on March 9, 2010. At the hearing, the parties reported to the court that they had reached an agreement resolving all issues arising from the marriage other than spousal support. The parties read their agreement into the record. At the hearing the parties also agreed to submit the issue of spousal support to the court for determination on briefs with agreed stipulations of fact. The parties agreed that a stipulation of facts would be submitted to the court within seven days. Fourteen days later briefs on spousal support were due. The parties agreed to waive the filing of any reply briefs.

{¶ 4} On July 8, 2011, appellee filed a motion for an award of attorney fees against appellant due to claimed deliberate and repeated delays allegedly caused by appellant to prevent the case from proceeding to final judgment. Delaying tactics

allegedly included unwarranted refusal to prepare or sign a consent judgment entry setting forth agreements read into the record on March 9, 2010, and intentional delays with respect to submitting a stipulation of facts for court determination of spousal support.

{¶ 5} On September 29, 2011, the parties filed a joint stipulation of facts for use by the court in determining spousal support. The parties submitted briefs on both spousal support and the motion for attorney fees.

{¶ 6} The trial court announced awards of spousal support and attorney fees in a decision filed on November 23, 2011. The court awarded appellee spousal support of \$1,600 per month for 60 months commencing in January 2012 and attorney fees in the amount of \$15,000. The court directed counsel to prepare a final judgment entry of divorce incorporating the awards. The final judgment was journalized on May 14, 2012.

### **Spousal Support**

{¶ 7} Under Assignment of Error No. I, appellant argues first, that the trial court judgment is deficient because it does not state reasons for the award of spousal support. Second, appellant argues that the trial court abused its discretion both as to the amount and duration of the award.

{¶ 8} R.C. 3105.18 governs spousal support. A trial court must consider the factors listed in R.C. 3105.18(C)(1)(a) through (n) when determining whether spousal support is appropriate and in determining the amount, terms of payment, and duration of

an award. *Tallman v. Tallman*, 6th Dist. Fulton No. F-03-008, 2004-Ohio-895, ¶ 43-57; R.C. 3105.18(C)(1).

{¶ 9} Appellant argues that under *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988) and this court's decision in *Tallman* that the trial court's judgment awarding spousal support was deficient and must be reversed because it failed to state reasons for the award. We disagree.

{¶ 10} In *Tallman* we recognized:

A trial court's decision granting spousal support will not be reversed on appeal unless the trial court abused its discretion in making the award.

*Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. Its decision must provide sufficient detail to enable a reviewing court to determine the award is fair, equitable, and in accordance with law. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97, 518 N.E.2d 1197. The trial court is not required to comment on each statutory factor. Instead, the record only needs to show that the court considered each factor in making its award.

*Carman v. Carman* (1996), 109 Ohio App.3d 698, 703, 672 N.E.2d 1093.

*Tallman* at ¶ 58.

{¶ 11} The trial court stated in its decision that the award of spousal support was made “[a]fter due consideration of the stipulation of facts submitted by the parties, the affidavits submitted by the plaintiff, and the memoranda of counsel.”

{¶ 12} The stipulated facts are extensive and work step by step through the R.C. 3105.18(C)(1) factors. The parties stipulated:

{¶ 13} 1. to a listing of income of the parties from all sources for the years 2006 through 2009. The data discloses that appellant averaged approximately twice the income of appellee during the period, averaging a yearly income from all sources of over \$76,000 a year.

{¶ 14} 2. to facts concerning the relative earning abilities of the parties. Both parties currently work and their future employment will depend on medical care and treatment. Appellee has worked as a palletizer operator at H.J. Heinz Company since 1984, but due to a tear and bulging discs in her neck and lower back her future work capacity is unknown. Appellee underwent surgery in August 2010 for the conditions in an effort to alleviate pain caused by the conditions.

{¶ 15} Appellant is a packaging supervisor at H.J. Heinz Company and it is anticipated that appellant will continue to work for the foreseeable future in that position.

{¶ 16} 3. to the fact that appellant was age 58 at the time of the stipulation and appellee, age 47.

{¶ 17} 4. to the fact that the parties agreed to divide equally between them all retirement benefits accumulated during the course of their marriage.

{¶ 18} 5. to the fact that the parties were married on May 25, 1990, have lived separately beginning in November 2006 and have two children, both of whom are emancipated.

{¶ 19} 6. to the fact that both parties graduated from high school and neither has obtained a college degree. The parties also stipulated that further education of appellee will depend on treatment of her back condition.

{¶ 20} 7. to the fact, with respect to assets and liabilities of the parties, that there is no mortgage on appellant's home but a mortgage debt of \$106,000 on appellee's home, with mortgage payments of \$595 due each month.

{¶ 21} 8. to the fact that the parties have agreed to an allocation of marital assets and debts as part of the final settlement agreement. The parties also stipulated that pending final judgment, the appellant continues to pay \$1,000 per month, plus processing fee, for temporary spousal support under a November 15, 2006 judgment.

{¶ 22} With respect to non-marital assets, that appellant has non-marital assets that include proceeds from a family business through an inheritance. In 2009, the income from the family business to appellant was \$934. Income from other non-marital assets was approximately \$150. Appellee received non-marital interest income of \$527 in 2009.

{¶ 23} 9. to the fact that neither party has contributed to the other's education and training.

{¶ 24} 10. to the fact that spousal support will be taxable income to appellee and a tax deduction to appellant after a final judgment of divorce. The parties filed joint returns prior to judgment and there were no tax consequences resulting from spousal support payments under the temporary order of November 2006.

{¶ 25} 11. and to the fact that appellee limited her employment to raise the children of the parties and to provide a family home.

{¶ 26} The stipulation also provided that the parties were permitted to submit affidavits and exhibits to affidavits for court consideration on the issue of spousal support. Appellee filed her own affidavit. Appellee states in the affidavit that she works 12 hour shifts doing heavy factory work and continues to receive medical treatment for her neck and back. According to the affidavit, appellee receives injections for neck and back pain under a medical pain management program. She states her physical condition impairs her ability to work.

{¶ 27} Appellee submitted a July 6, 2010 written report by Edmund P. Lawrence, Jr., M.D., a neurosurgeon, providing a medical assessment of the condition of her neck and back. The assessment was prepared before appellee underwent neck surgery on August 17, 2010.

{¶ 28} According to Dr. Lawrence's assessment, appellee "has C5-C6 and C6-C7 cervical radiculopathy" and "degenerative disc disease at L4-L5 and L5-S1 with a disc herniation at L4-L5." Dr. Lawrence recommended neck surgery (anterior cervical decompression at C5, C6, and C7 with placement of a plate and a cage). Dr. Lawrence stated in the assessment that whether appellee would need back surgery (an L4-L5 discectomy) in the future remained to be determined.

{¶ 29} Civ.R. 52 provides a procedure to request findings of fact and conclusions of law when questions of fact are tried by the court without a jury. Appellant made no

request for findings of fact and conclusions of law under the rule of the trial court's determination of spousal support.

{¶ 30} In our view, the record provides a detailed factual basis for the spousal support award and is sufficient to permit appellate review of whether the award is fair, equitable and in accordance with law. The stipulated facts demonstrate that the trial court considered the R.C. 3105.18(C)(1) factors in determining the spousal support award.

{¶ 31} We find appellant's challenge to the spousal support award on *Kaechele* and *Tallman* grounds to be without merit.

{¶ 32} The remaining issue under Assignment of Error No. I is whether the trial court abused its discretion in making the spousal support award. The evidence in the record demonstrates appellee's continuing ability to work is at risk due to the condition of her neck and low back. At the time of judgment, appellee was 47 years of age and had worked as a palletizer since 1984. Appellant was age 58. Appellee's work is characterized as heavy factory work on a 12 hour shift. It is stipulated that medical conditions of the neck and back make appellee's future work capacity unknown.

{¶ 33} Appellee underwent neck surgery in August 2010. Whether she will need additional low back surgery is undetermined. Appellee receives injections to the neck and back six times a year for pain management. Appellee states that neck and back discomfort affects her ability to work.

{¶ 34} Appellee has a high school education.



{¶ 35} Appellant's income from all sources is twice that of appellee. Considering assets and liabilities of the parties, appellant has no mortgage debt on his residence. Appellee has \$106,000 in mortgage debt. Appellee has no pre-marital assets.

{¶ 36} Considering the statutory factors as a whole, we find no abuse of discretion by the trial court in its award of spousal support to appellee in the amount of \$1,600 per month for 60 months.

{¶ 37} We find Assignment of Error No. I not well-taken.

### **Attorney Fees**

{¶ 38} Under Assignment of Error No. II, appellant argues that the trial court abused its discretion in finding that appellee is entitled to an award of attorney fees in the amount of \$15,000. Appellant contends that the claim for attorney fees is barred by the prior agreement of the parties that they each would pay their own attorney fees and that the parties would share court costs equally. Appellee does not dispute that the parties entered an agreement to pay their own attorney fees and that the agreement was read into the record at the final hearing on March 9, 2010, as part of a larger settlement agreement.

{¶ 39} Appellee contends that appellant breached the contract by deliberately delaying the filing of a consent judgment setting forth the March 9, 2010 agreement. In her affidavit filed in support of the motion for attorney fees, appellee states that a proposed judgment entry contemplated under the March 9, 2010 agreement was submitted to appellant for approval on September 9, 2010, but was not signed by appellant's counsel for submission to the court until September 29, 2011, more than one

year later. Appellee contends that appellant's delay in approving the consent entry caused the trial court to reschedule four pre-trials and to delay proceedings.

{¶ 40} Appellee claimed the delay also caused her to incur additional legal expenses. Appellee filed attorney fee invoices in support of her motion that disclose she incurred attorney fees of \$4,690.41 for the period from September 10, 2010 through August 31, 2011.

{¶ 41} Appellant argued that a certain period of time was necessary to review the judgment entry and to secure a transcript of the final hearing to aid in review of the entry. He denies he intentionally caused delays and denies that appellee incurred additional legal expenses due to the delay in filing of the consent entry.

{¶ 42} Settlement agreements are a type of contract “designed to terminate a claim by preventing or ending litigation.” *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996). “To establish a breach of a settlement agreement, the party alleging the breach must prove: 1) existence of the Settlement Agreement, 2) performance by the plaintiff, 3) breach by the defendant, 4) resulting damages or loss to the plaintiff.” *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. No. OT-09-026, 2010-Ohio-4714, ¶ 24, citing *Rondy, Inc. v. Goodyear Tire Rubber Co.*, 9th Dist. No. 21608, 2004-Ohio-835, ¶ 7. *Nippon Life Ins. Co. of Am. v. One Source Mgt., Ltd.*, 6th Dist. Lucas No. L-10-1247, 2011-Ohio-2175, ¶ 16.

{¶ 43} In its decision on attorney fees, the trial court made limited findings of fact:

The Court finds, based upon the defendant's misconduct during the pendency of this action, and the final situations of the parties, that plaintiff is entitled to an award of attorney fees in the sum of \$15,000; and that defendant should be required to pay the cost for preparation of necessary transcripts by the court reporter during these proceedings.

{¶ 44} We have reviewed the record and conclude that, while the facts may support a claim that appellant materially breached the March 9, 2010 settlement agreement by intentionally delaying preparation of the consent judgment entry contemplated under the March 9, 2010 settlement agreement, the trial court did not make such findings in its judgment. While the trial court did find misconduct by appellant in its decision, the court did not identify the nature of the misconduct and determine whether the misconduct constituted a material breach of the settlement agreement. The court also did not make findings as to damages caused by any material breach of the settlement agreement that would support an award substantially in excess of \$4,000 in attorney fees.

{¶ 45} The court finds that the trial court did not state sufficient facts to enable us to review its award of attorney fees. To the extent that such facts are necessary for our review, appellant's Assignment of Error No. II is well-taken.

{¶ 46} We find appellee's argument that appellant waived the right to challenge the attorney fee award on appeal to be without merit. While appellant did stipulate that

the court could rule on the motion for attorney fees without a hearing, the stipulation did not consent to an award of attorney fees. The entry specifically provided that the parties would submit briefs and affidavits to the court on the issue.

{¶ 47} The record shows that appellant objected to an award of attorney fees in a brief filed in the trial court on November 21, 2011. Appellant asserted as a defense in the brief that an award of attorney fees was barred under the March 9, 2010 agreement. The trial court filed its decision on the award of attorney fees and spousal support on November 23, 2011.

{¶ 48} We affirm the trial court judgment, in part, and remand, in part. We affirm the trial court judgment with respect to its award of spousal support. With respect to the award of attorney fees, we remand this action to the trial court for it to find whether appellant's actions constitute a material breach of the March 9, 2010 settlement agreement and the amount of any additional attorney fees incurred by appellee as damages caused by any breach. If the trial court does not find either a material breach of contract or damages, it is directed to vacate the award of attorney fees. If the court finds a material breach of the settlement agreement occurred and that additional attorney fees were incurred by appellee as damages caused by the breach, the court is directed to award attorney fees to appellee in the amount of those damages. Pursuant to App.R. 24, we order the parties to share the costs of this appeal.

Judgment affirmed, in part,  
and remanded, in part.

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

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, J.

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JUDGE

James D. Jensen, J.

CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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