[Cite as *McNamara v. McNamara*, 2015-Ohio-2707.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102330

NICOLE M. MCNAMARA

PLAINTIFF-APPELLEE

vs.

JOHN T. MCNAMARA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-08-823262

BEFORE: Boyle, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: July 2, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, John McNamara, appeals from the trial court's judgment denying his Civ.R. 60(B) motion for relief from judgment. He raises four assignments of error for our review:

> 1. The trial court abused its discretion by denying appellant's motion for relief from judgment.
>
> 2. The trial court abused its discretion by denying appellant a hearing on operative facts presented in his motion for relief.
>
> 3. The trial court abused its discretion by dismissing documents attached to appellant's motion for relief as "moot."
>
> 4. Trial court abused its discretion by calling the argument, contained in the motion for relief, an objection to magistrate's decision.

{¶2} Finding no merit to his arguments, we affirm.

Procedural History and Factual Background

{¶3} Appellant and plaintiff-appellee, Nicole McNamara, were divorced in 2009. They had two children during their marriage — a boy born on October 9, 1999, and a girl born on November 13, 2003. Nicole was named residential parent and legal custodian of the children. Nicole filed her first motion to show cause on November 6, 2009, and the parties have been filing post-decree motions in court since that time.[1]

[1]Nicole's November 2009 motion was resolved in February 2010. Four months later, Nicole filed another motion to show cause, which was resolved by agreed judgment entry in July 2010. In May 2011, Nicole again filed a motion to show cause, which was resolved when John paid Nicole the

{¶4} As relevant to this appeal, the parties filed several post-decree motions in 2013. Nicole filed motions to show cause and to suspend John's parenting time, as well as for attorney fees. John filed a motion to show cause, a motion for tax exemption, a motion for equitable relief, and a motion for attorney fees.

{¶5} A magistrate held a hearing on the competing motions in March 2014. The following facts and findings are taken from the magistrate's decision.

{¶6} The parties agreed at the hearing that the outstanding medical expenses were the only thing in dispute. At the time of the hearing, John was the designated health insurance obligor, and was responsible for 77.45 percent of uncovered medical expenses. Nicole was responsible for 22.55 percent of uncovered medical expenses.

{¶7} The magistrate found that there were five vision claims that had never been submitted to John's insurance. John claimed that he did not submit them because Nicole did not provide him with the proper documentation. But the magistrate found that John made no attempt to obtain the proper documentation to submit the claims to his insurance. The magistrate ordered John to submit the remaining claims to his insurance company,

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remaining balance due from a July 21, 2010 court order. In October 2011, John filed a motion to show cause, and in November 2011, Nicole filed another motion to show cause. In November 2011, Nicole also filed a motion to modify John's parenting time, which the parties resolved by agreed judgment entry on December 9, 2011. In March 2012, John filed a motion for tax exemption, a motion to modify child support, a motion to show cause, a motion for attorney fees, and a motion for sanctions. In March 2013, the parties entered into a stipulated and agreed dismissal, dismissing all outstanding motions without prejudice. In this order, the parties were to refile any of the dismissed motions "as they deem appropriate." The parties then filed the motions at issue in this appeal that led to John's Civ.R. 60(B) motion.

and that any expenses not paid by the insurer should be split by the parties according to their share of the uncovered medical costs.

{¶8} The magistrate further found John in contempt for failing to reimburse Nicole for the vision care of the children. The magistrate noted that John offered no defense as to why he did not pay his share of the expenses, only that he claimed that daily contact lenses were not necessary. But the magistrate found that John offered no proof that daily contact lenses were not necessary. Further, the magistrate found that John made no attempt to reimburse Nicole for those vision expenses that "were separate and apart from those items he questioned."

{¶9} The magistrate further found that Nicole was entitled to attorney fees for her motion to show cause for the unpaid medical expenses, awarding her $1,000 in attorney fees for that motion. The magistrate denied John's motion for attorney fees because she did not find Nicole in contempt of court of any prior court orders.

{¶10} The magistrate ordered that John could purge his contempt by paying Nicole $796.23 for medical expenses submitted to insurance. Further, the magistrate ordered John to submit the five remaining claims to his insurance, and that he must inform his insurance provider that any reimbursement for those claims should be sent to Nicole. The magistrate also stated that if John chose not to submit the claims to his insurance provider, that he pay Nicole an additional $327.20.

{¶11} John filed objections to the magistrate's decision. On August 26, 2014, the trial court overruled John's objections and adopted the magistrate's decision in its entirety.

{¶12} John did not appeal the trial court's judgment. Rather, on September 23, 2014, John filed a motion for a new trial. The trial court denied his motion as untimely.

{¶13} On October 22, 2014, John moved for relief from judgment pursuant to Civ.R. 60(B), which the trial court denied without a hearing on November 14, 2014.

Civ.R. 60(B)

{¶14} In his first assignment of error, John argues that the trial court abused its discretion by denying his motion for relief from judgment.

{¶15} The trial court is vested with discretion in determining whether to grant a motion for relief from judgment under Civ.R. 60(B), and the court's ruling will not be disturbed on appeal absent an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Nese v. State Teachers Retirement Bd. of Ohio*, 136 Ohio St.3d 103, 2013-Ohio-1777, 991 N.E.2d 218, ¶ 25.

{¶16} Civ.R. 60(B) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation

> or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

{¶17} To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that

> (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

GTE Automatic Elec., Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶18} A failure to establish any one of the foregoing circumstances is ordinarily fatal to a Civ.R. 60(B) motion. *See Rose Chevrolet, Inc*., 36 Ohio St.3d at 20, 520 N.E.2d 564 (stating that the trial court should overrule a Civ.R. 60(B) motion if the movant fails to meet any one of the foregoing three requirements); *GTE* at 151, (stating that the three requirements are "conjunctive").

{¶19} There is no dispute that John's motion for relief from judgment was timely. Thus, turning to the second prong of the *GTE* test, we must determine whether John has demonstrated that relief is available under one of the grounds stated in Civ.R. 60(B). On

appeal, John contends that he is entitled to relief from the August 26, 2014 judgment pursuant to Civ.R. 60(B)(2), (3), and (5).[2]

{¶20} John's arguments on appeal focus mainly on Civ.R. 60(B)(2), which grants the trial court authority to vacate a judgment based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B)."

{¶21} To warrant the granting of a new trial on the grounds of newly discovered evidence:

> "it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence."

State v. Barnes, 8th Dist. Cuyahoga No. 95557, 2011-Ohio-2917, ¶ 23, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶22} John contends that the August 2014 judgment should be vacated because in attempting to purge his contempt by submitting the claims to his insurance company, he discovered that "none of the claims submitted for the minor child were necessary, vision expenses." John attached copies of insurance claims to his Civ.R. 60(B) motion, purportedly from his insurance company.

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[2]In his Civ.R. 60(B) motion, he also argued that he was entitled to relief from judgment based upon Civ.R. 60(B)(1) ("mistake, inadvertence, surprise, or excusable neglect"), but he has abandoned that argument in his brief on appeal.

{¶23} This evidence, however, does not constitute "newly discovered evidence" as set forth in the rule. "Relief from judgment may be granted based on newly discovered evidence, but similar to Civ.R. 59, evidence that could have been discovered prior to trial by the exercise of due diligence does not qualify as newly discovered evidence." *Riesbeck v. Indus. Paint & Strip*, 7th Dist. Monroe No. 08 MO 11, 2009-Ohio-6250, ¶ 18.

{¶24} Through the exercise of due diligence, John would have discovered this information prior to the magistrate's hearing on the matter. Indeed, the magistrate found that John "offered no evidence that daily contact lenses were not required," and that he made no attempt to gather the proper documentation to submit the vision claims to his provider — as he was required to do even without the magistrate ordering him to do it. Accordingly, John was not entitled to relief pursuant to Civ.R. 60(B)(2).

{¶25} John next argues that he is entitled to relief under the "catchall provision" of Civ.R. 60(B)(5), which "reflects the inherent power of a court to relieve a person from the unjust operation of a judgment." *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983), paragraph one of the syllabus. John asserts that the judgment puts him "in an impossible situation in the future" because the daily contact lenses are not necessary under his insurance.

{¶26} We disagree that the judgment puts John in an impossible situation. The judgment anticipated that the insurance provider may not pay for some, or all, of the expenses. It covered that situation by ordering that if the insurance company did not pay

for some or all of the expenses, John was responsible for 77.45 percent of the costs of the expenses according to his responsibility for uncovered medical expenses.

{¶27} Accordingly, John was not entitled to relief pursuant to Civ.R. 60(B)(5).

{¶28} Finally, John argues that the August 2014 judgment should be vacated under Civ.R. 60(B)(3), which provides for relief from a judgment if there is "a fraud, misrepresentation or other misconduct of an adverse party." Generally, the party seeking relief bears the burden of proving such fraud, misrepresentation, or misconduct by clear and convincing evidence. *Noble v. Noble*, 10th Dist. Franklin No. 07AP-1045, 2008-Ohio-4685, ¶ 19.

{¶29} John argues that Nicole presented "material false testimony at trial" because she testified that the contact lenses were necessary. After review, we find that John did not prove that Nicole committed fraud, misconduct, or deceit by clear and convincing evidence. Nicole testified that when she took their son to the eye doctor, the doctor recommended two types of contacts for the child, both of which were daily contact lenses. She stated that she opted for the cheaper of the two. Nicole testified that she told John about the doctor's recommendation. Nicole, as residential parent and legal custodian, decided that the child would wear daily contact lenses.

{¶30} After review, we conclude that John did not establish that Nicole presented false testimony at trial. The fact that John learned after the hearing that his insurance company would not pay the claims does not establish that Nicole committed fraud on the court. Accordingly, John was not entitled to relief pursuant to Civ.R. 60(B)(3).

{¶31} Based on the foregoing, we find that John has failed to satisfy the second prong of the *GTE* test because he has not shown that he is entitled to relief under one of the grounds stated in Civ.R. 60(B). Therefore, the trial court did not abuse its discretion in denying his motion for relief from judgment.

{¶32} John's first assignment of error is overruled.

Failure to Hold Evidentiary Hearing

{¶33} In his second assignment of error, John argues that the trial court abused its discretion by failing to hold an evidentiary hearing on his motion for relief from judgment.

{¶34} A party who files a Civ.R. 60(B) motion for relief from judgment is not automatically entitled to a hearing on the motion. Instead, the movant bears the burden of demonstrating that he or she is entitled to a hearing on the motion. To warrant a hearing on a Civ.R. 60(B) motion, the movant must allege operative facts that would warrant relief under Civ.R. 60(B). *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 19, 665 N.E.2d 1102 (1996).

{¶35} In this case, John presented a sworn brief and purported copies of documents from his insurance company. On review of those materials, the trial court concluded that he failed to present evidence sufficient to warrant a hearing on the motion for relief. We agree. Appellant failed to satisfy his burden of showing operative facts that would entitle him to relief under Civ.R. 60(B). The trial court, therefore, was not required to hold a hearing on the motion.

{¶36} Accordingly, John's second assignment of error is overruled.

{¶37} John's remaining two assignments of error are moot because they challenge the trial court's judgment overruling his motion for relief from judgment, which we have already determined was proper under the standard set forth in *GTE*. Accordingly, John's third and fourth assignments of error are overruled.

{¶38} Judgment affirmed.

It is ordered that appellee recover from appellant the 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 common pleas court, domestic relations division, to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
SEAN C. GALLAGHER, J., CONCUR