[Cite as *Furlong v. Davis*, 2009-Ohio-6431.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

MICHAEL E. FURLONG	C.A. No. 24703
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BERNADETTE DAVIS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. 2000-11-11413

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

CARR, Judge.

{¶1} Appellant, Michael Furlong, appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms.

I.

{¶2} Mr. Furlong and Bernadette Davis were divorced on February 21, 2003. The judgment entry of divorce included a shared parenting plan, which included a child support order requiring Mr. Furlong to pay Ms. Davis $947.15 per month, plus poundage, for child support for the parties' two children. The shared parenting plan further required Mr. Furlong to pay 84% of the children's extraordinary, non-covered medical, dental, optical, hospital, pharmaceutical and psychological expenses. In addition, the parties entered into an agreement regarding all other issues relevant to their divorce, which agreement was read into the record at a hearing on October 31, 2002. The parties agreed that the transcript of the October 31, 2002 hearing would

be attached to and incorporated into the judgment entry of divorce in lieu of delineated orders regarding all other issues relevant to the parties' divorce.

{¶3} The parties agreed that Mr. Furlong would pay Ms. Davis spousal support in the amount of $800.00 per month for a non-modifiable period of 63 months. The trial court retained jurisdiction, however, to modify the amount of spousal support in the event that Mr. Furlong's disability pension was converted into a retirement pension, at which time "QDRO Consultants" would prepare an order dividing those funds. The parties acknowledged that Mr. Furlong had a "police and fire pension" and that the marital portion of that pension would be divided equally between the parties pursuant to the prepared order of "QDRO Consultants." The parties agreed that the trial court would "retain jurisdiction as necessary to see that the marital portion of that plan is being divided equally ***."

{¶4} On April 14, 2004, Mr. Furlong filed a motion for the reallocation of parental rights and responsibilities and for a modification of child support. On June 22, 2004, the magistrate issued provisional orders after a post-decree settlement conference. The magistrate referred the issue of the termination of the shared parenting plan to Family Court Services. The magistrate further ordered the parties to exchange financial information for guideline child support calculation and to expedite the pension division. Neither party filed a motion to set aside the magistrate's June 22, 2004 order.

{¶5} On January 5, 2005, Mr. Furlong filed a motion to adopt his proposed shared parenting plan. His proposed plan named him as the residential parent, and Ms. Davis as the non-residential parent. The plan accorded Ms. Davis visitation with the children on alternate weekends and overnight every Tuesday. In addition, the proposed plan named Ms. Davis as the obligor for child support purposes, and directed that she pay $579.23, plus poundage, to Mr.

Furlong each month. The proposed plan also divided unreimbursed healthcare costs for the children equally between Mr. Furlong and Ms. Davis.

{¶6} On January 14, 2005, Mr. Furlong filed a motion to correct an error in the child support computation worksheet which was filed on October 31, 2002, to reflect his payment of spousal support and Ms. Davis' receipt of spousal support. On the same day, Mr. Furlong filed an amended motion to adopt his proposed shared parenting plan.

{¶7} The magistrate held a hearing on February 10, 2005. On April 22, 2005, both the magistrate and the domestic relations judge signed an "agreed judgment entry" stating that the parties had reached an agreement at the hearing. The court ordered Ms. Davis to pay Mr. Furlong $1500.00 in full satisfaction of any claims for medical payment reimbursement through January 31, 2005, and of all utility payment and personal property issues arising prior to January 31, 2005. In addition, the trial court modified Mr. Furlong's child support obligation, the tax dependency exemption schedule, and the parties' respective obligations to pay unreimbursed medical expenses for the children. Finally, the court ordered Mr. Furlong to "execute the QDRO document(s) in accordance with the Divorce Decree" so that the parties could "follow the provisions of the Decree regarding the QDRO's effect on the payment of spousal support with the Court retaining jurisdiction in that matter."

{¶8} On May 3, 2005, the magistrate issued a decision, also stemming from the February 10, 2005 hearing, dismissing Mr. Furlong's motion to correct an error in the child support calculation of October 31, 2002, which was attached to the parties' divorce decree. The magistrate concluded that Mr. Furlong could only raise the issue by way of a motion for relief from judgment pursuant to Civ.R. 60(B).

{¶9} On May 27, 2005, Mr. Furlong moved the trial court to interview the minor children. On June 10, 2005, he filed a motion for an emergency hearing on the reallocation of parental rights stemming from his motion filed April 14, 2004, and his motion to interview the children. After a hearing on June 30, 2005, and an interview with the children, the magistrate ordered that the elder child would attend the Hudson school system, while the younger child would attend the Stow school system. The magistrate left the issue of where the children would reside to the parties, but ordered that the children would reside with Ms. Davis if the parties could not otherwise agree. The magistrate did not name a primary residential parent for school purposes. Both Mr. Furlong and Ms. Davis filed objections to the magistrate's decision.

{¶10} On November 4, 2005, Mr. Furlong filed post decree motions for a reduction in his child support obligation and clarification of an order regarding medical bills. The magistrate heard the matter on January 10, 2006. On February 21, 2006, the magistrate issued a decision dismissing Mr. Furlong's April 14, 2004 motion for reallocation of parental rights and responsibilities, which had earlier been referred to Court Family Services, because "this issue is more than one year old[.]" The magistrate continued the hearing on Mr. Furlong's November 4, 2005 post decree motions. On February 22, 2006, Mr. Furlong filed a new motion for reallocation of parental rights and responsibilities. The trial court referred the matter to mediation. On January 26, 2007, the magistrate issued an interim order that Mr. Furlong would be the residential parent for school purposes and that he will enroll both children in the Hudson School District.

{¶11} A hearing was held on January 25, 2007, on the motion for reallocation of parental rights and responsibilities. The trial court's February 1, 2007 judgment entry stated that the parties had reached an agreement and that counsel would file an agreed judgment entry

within 30 days. On February 13, 2007, the parties filed an agreed order modifying the shared parenting plan, with such modifications described as "appearing to be fair and equitable," rather than in the best interest of the children. Mr. Furlong was named as the residential parent for school purposes only, and he maintained a child support obligation of $125.00 per month per child.

{¶12} Less than three months later, on May 8, 2007, Mr. Furlong filed several motions, including motions for contempt; to modify companionship; to modify or terminate child support; allowing the children to remove certain personal items from Ms. Davis' home; for the payment of medical expenses and school fees; and for attorney fees. On July 2, 2007, Ms. Davis filed a motion for attorney fees, given her inability to pay to defend Mr. Furlong's newly filed motions addressing issues the parties had recently resolved. Ms. Davis further moved for an order increasing Mr. Furlong's child support obligation. On September 10, 2007, Ms. Davis filed a motion for contempt premised on Mr. Furlong's alleged failure to abide by the parties' parenting schedule and his alleged interference with her companionship.

{¶13} On June 26, 2008, Ms. Davis filed a motion to adopt a division of property order ("DOPO") on Mr. Furlong's police and fire retirement benefits, and a motion to modify spousal support. On August 8, 2008, Mr. Furlong filed a motion to dismiss Ms. Davis' June 26, 2008 motions. He argued that there was full compliance with the DOPO read into the record for purposes of the divorce decree. He further argued that the period of spousal support had terminated in February 2008, rendering any motion for modification of spousal support moot. Also on August 8, 2008, Mr. Furlong filed motions for contempt; modification of companionship; modification or termination of child support; and judgment for failure to pay medical bills.

{¶14} On August 29, 2008, the magistrate issued a decision after hearing arguments on July 9, 2007; October 11, 2007; and August 19, 2008. The magistrate found, based on a review of "all the testimony and evidence presented at the hearing on October 11, 2007," that (1) there was no change of circumstances warranting (a) a change to the parties' February 13, 2007 agreed order modifying the shared parenting plan, or (b) a modification or termination of Mr. Furlong's child support obligation; and (2) Mr. Furlong did not comply with the local rules when filling out the required forms for reimbursement of out-of-pocket expenses. The magistrate further found the Mr. Furlong had signed a DOPO when the parties divorced, that the original had been lost, and that Ms. Davis was requesting that Mr. Furlong sign another original. This matter was addressed at the August 19, 2008 hearing. Finally, the magistrate found that Mr. Furlong's "new motion[s] filed on August 8, 2008," were "not new." Nevertheless, she "stayed" those motions pursuant to Mr. Furlong's request. The magistrate ordered as follows: (1) Mr. Furlong's motions are all denied and dismissed; (2) Ms. Davis' motion regarding the modification of spousal support is dismissed; (3) Mr. Furlong is not guilty of failing to facilitate parenting time; (4) Ms. Davis' motion to adopt the DOPO is granted because Mr. Furlong signed an original DOPO in open court, which mirrored the previously signed copy presented to the court; and (5) "[a]ll other pending motions are dismissed."

{¶15} Mr. Furlong filed objections to the magistrate's decision. Although he filed praecipes with the court reporter for the preparation of transcripts of both the October 11, 2007, and August 19, 2008 hearings, only a transcript of the August 19, 2008 hearing was filed, first, on September 15, 2008, and again on November 20, 2008. Mr. Furlong also filed a praecipe with the court reporter for preparation of a February 10, 2005 hearing before Magistrate Schneider. That transcript was also never filed with the trial court.

{¶16} Ms. Davis filed a motion to dismiss and reply to Mr. Furlong's objections. Mr. Furlong opposed the motion to dismiss. He later filed amended objections to the magistrate's decision. On December 2, 2008, the trial court issued a journal entry vacating the stay order; dismissing all of Mr. Furlong's motions; dismissing Ms. Davis' motion to modify spousal support; finding Mr. Furlong not guilty of interfering with parenting time; granting Ms. Davis' motion to adopt the DOPO, which Mr. Furlong signed at the August 19, 2008 hearing; and dismissing all of Mr. Furlong's August 8, 2008 motions because they merely raised issues which had been previously decided by the court.

{¶17} Mr. Furlong filed an appeal, but this Court dismissed his appeal by journal entry because the trial court had not explicitly ruled on his objections. On March 17, 2009, the trial court issued a journal entry explicitly overruling all of Mr. Furlong's objections and reiterating the orders in its December 2, 2008 order. Mr. Furlong filed a timely appeal, raising four assignments of error for review. This Court consolidates some assignments of error for ease of discussion.

{¶18} All of the assignments of error challenge the trial court's adoption of the magistrate's decision. When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. "Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093. An abuse of discretion is more than an error of judgment; it means that the trial court was

unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THE DISABILITY PAYMENTS RECEIVED BY APPELLANT TO BE MARITAL ASSETS DIVISIBLE BY A DIVISION OF PROPERTY ORDER, RATHER THAN NON-MARITAL ASSETS NOT DIVISIBLE BY A DIVISION OF PROPERTY ORDER, TO WHICH APPELLEE HAS NO LEGAL CLAIM."

{¶19} Mr. Furlong argues that the trial court erred by finding his disability benefits to be a marital asset subject to division by a DOPO. This Court disagrees.

{¶20} Mr. Furlong has consistently argued that the parties' agreement, which was read into the record and incorporated as part of their 2003 divorce decree, states that Ms. Davis is only entitled to part of his pension in the event that it reverts from a disability pension into a retirement pension. He relies on the following language from page 3 of the transcript incorporated into the decree:

> "With respect to spousal support, husband will pay to wife the sum of $800.00 per month. And we anticipate that spousal support will be for a period of 63 months effective November 1, 2002. The duration of spousal support will not be modifiable. The amount of spousal support will be modifiable by the Court upon the -- Mr. Furlong has a disability pension. At the event that that turns into a retirement pension and QDRO Consultants prepares an order which divides those funds. That is an anticipated change of circumstances which would necessitate the modification of spousal support."

{¶21} It is clear that the parties recognized that they could not consider Mr. Furlong's disability benefits as income for purposes of calculating his spousal support obligation. The

plain language of the agreement demonstrates that the parties further recognized that, in the event that Mr. Furlong's disability terminated, his retirement income should appropriately be considered for purposes of calculating spousal support.

{¶22} Page 4 of the transcript incorporated into the decree addresses a completely different matter, specifically the division of marital property. The agreement states:

> "There is a police and fire pension which is in husband's name. The marital portion of that pension will be divided equally between the parties. It is anticipated that QDRO Consultants will prepare the order dividing that plan. *** And that this Court will retain jurisdiction as necessary to see that the marital portion of that plan is being divided equally together with the (inaudible) and other benefits that go along with that. It is anticipated that there may be life insurance required to protect wife's interest in that plan. And that the parties will follow the recommendation of QDRO Consultants with respect to the necessity of life insurance and that they would divide the cost of that, if necessary."

{¶23} The division of marital property is generally not subject to future modification by the trial court. R.C. 3105.171(I). There is an exception for the division of public retirement pensions. Specifically, "[n]otwithstanding [R.C. 3105.171(I)][, t]he court shall retain jurisdiction to modify, supervise, or enforce the implementation of an order [that provides for a division of property that includes a benefit or lump sum payment and requires one or more payments from a public retirement program to an alternate payee]." R.C. 3105.89(A).

{¶24} The parties agreed that Mr. Furlong's public retirement plan contained a marital portion in which Ms. Davis had an interest. The agreement regarding the division of marital property does not address Mr. Furlong's disability benefits and, therefore, does not order the division of such. Mr. Furlong never appealed from the final decree of divorce which recognized Ms. Davis' interest in the marital portion of his pension. Accordingly, his argument fails under the doctrine of res judicata.

{¶25} Under the doctrine of res judicata, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus. In addition, Ohio law has long recognized that "'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.'" *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69. The doctrine serves the valid policy of ultimately ending any given litigation and ensuring that no party will be "'vexed twice for the same cause.'" *Green v. Akron* (Oct. 1, 1997), 9th Dist. Nos. 18284/18294, quoting *LaBarbera v. Batsch* (1967), 10 Ohio St.2d 106, 113.

{¶26} In this case, the trial court concluded that "the issue of whether there should be a Division of Property Order was previously resolved." In fact, the parties themselves agreed in 2003 that Ms. Davis was entitled to the marital portion of Mr. Furlong's police and fire pension and that the plan was subject to a DOPO. No party appealed from the decree. Accordingly, the trial court did not abuse its discretion by adopting the magistrate's decision in this regard. Mr. Furlong's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE APPELLANT'S CLAIM FOR REIMBURSEMENT FROM APPELLEE OF MEDICAL BILL PAYMENTS FOR THE CHILDREN DUE TO FAILURE TO COMPLY WITH LOCAL COURT RULES."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT THE OPPORTUNITY TO TERMINATE CHILD SUPPORT AND REALLOCATE PARENTAL RIGHTS AND RESPONSIBILITIES."

{¶27} Mr. Furlong argues that the trial court abused its discretion by dismissing his claims for reimbursement of medical expenses and the reallocation of parental rights and responsibilities. This Court disagrees.

{¶28} In her August 29, 2008 decision, the magistrate found "[a]fter reviewing all the testimony and evidence presented at the hearing on October 11, 2007," that (1) Mr. Furlong did not fill out the forms required by the local rules for reimbursement of medical expenses, and (2) there was no change of circumstances warranting either a change to the parties' agreed entry of February 2007 regarding the shared parenting plan or a modification or termination of Mr. Furlong's child support obligation.

{¶29} Civ.R. 53(D)(3)(b)(iii) provides:

> "An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available."

The party who objects to the magistrate's decision has the duty to provide a transcript to the trial court. *Weitzel v. Way*, 9th Dist. No. 21539, 2003-Ohio-6822, at ¶17.

{¶30} When disposing of objections, the trial court pursuant to Civ.R. 53(D)(4)(b) "may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate." "When a party fails to file a transcript or an affidavit as to the evidence presented at the magistrate's hearing, the trial court, when ruling on the objections, is required to accept the magistrate's findings of fact and to review only the magistrate's conclusions of law based upon those factual findings." *Saipin v. Coy*, 9th Dist. No. 21800, 2004-Ohio-2670, at ¶9, quoting *Stewart v. Taylor*, 9th Dist. No. 02CA0026, 2002-Ohio-6121, at ¶11. Upon appellate review, this Court is limited to determining whether the trial court abused its discretion in adopting,

rejecting, or modifying the magistrate's decision, where the objecting party failed to provide a transcript or affidavit to the trial court in support of his objection. *Weitzel* at ¶19.

{¶31} Mr. Furlong objected to the magistrate's factual findings, yet he failed to support his objections with a transcript. Although he requested the preparation of a transcript of the October 11, 2007 hearing, the transcript was never filed with the trial court. Nor did Mr. Furlong file an affidavit of the evidence in the case that a transcript was not available. As the trial court was obligated to accept the magistrate's findings of fact regarding the lack of a change of circumstances and Mr. Furlong's failure to use the proper forms for reimbursement of medical expenses, it did not abuse its discretion by overruling his objections. Mr. Furlong's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ABUSED ITS DISCRETION BY APPROVING THE MAGISTRATE'S ACTION IN ORDERING APPELLANT TO SIGN THE DOPO OR GO TO JAIL, WITHOUT FIRST ALLOWING HIM THE OPPORTUNITY TO FILE OBJECTIONS TO THE JUDGE."

{¶32} Mr. Furlong argues that the trial court abused its discretion when it effectively condoned the magistrate's action in ordering him to sign the DOPO or be held in direct contempt of court. This Court disagrees.

{¶33} This Court has stated:

> "Contempt of court is defined as the disregard for, or the disobedience of, an order of a court. *Thompson v. Thompson* (Aug. 22, 2001), 9th Dist. No. 00CA007747. 'It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.' *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus." *State v. Nelson*, 9th Dist. No. 03CA008242, 2003-Ohio-3922, at ¶5

We have further held that "conduct will only be considered direct contempt if it constitutes an imminent, not merely a likely, threat to the administration of justice." (Internal quotations omitted.) Id. at ¶6.

{¶34} In this case, Ms. Davis presented evidence at the August 19, 2008 hearing that Mr. Furlong had signed the appropriate DOPO years earlier but that the original order had been lost before it could be filed. Ms. Davis' Exhibit B, presented at the hearing, is a copy of the DOPO, signed by Mr. Furlong, and bearing a facsimile time-stamp of May 17, 2006, evidencing that he had signed the order by that time.

{¶35} Ms. Davis' attorney asserted that she was presenting Mr. Furlong with a DOPO which was identical to the one he had previously signed. She told Mr. Furlong to review and compare the two documents. When the magistrate asked Mr. Furlong whether he was "free to sign" the DOPO, he was evasive. He repeatedly asked for a continuance so he could bring in evidence and witnesses in support of his argument that his pension was not subject to division as marital property. Because he had agreed in open court on October 31, 2002, that the marital portion of his pension would be divided equally and because he had already signed the DOPO once before, the magistrate ordered Mr. Furlong to sign another original order. Mr. Furlong asked the magistrate what would happen if he refused to sign the DOPO. The magistrate informed him that he would be held in direct contempt of court. Mr. Furlong signed the DOPO.

{¶36} Mr. Furlong argues that he should have been allowed to file objections to the magistrate's threat that she would find him in direct contempt if he refused to sign the DOPO. This argument is without merit. Mr. Furlong had two choices. He could either sign as he did and file objections to the magistrate's decision granting Ms. Davis' motion to adopt the DOPO. Or he could have refused to sign and objected to the magistrate's finding him guilty of direct

contempt of court, if she ultimately made such a finding. Instead, he signed the DOPO and merely objected that the magistrate told him that he would be facing contempt sanctions if he failed to obey her order. "'Courts, in their sound discretion, have the power to determine the kind and character of conduct which constitutes direct contempt of court.'" *In re Contempt to Kafantaris*, 7th Dist. No. 07-CO-28, 2009-Ohio-4814, at ¶16, quoting *State v. Kilbane* (1980), 61 Ohio St.2d 201, paragraph one of the syllabus. The magistrate had the authority to instruct him that his disobedience of the order to sign the DOPO under these circumstances would be contemptuous.

{¶37} Because he had agreed to an equitable division of the marital portion of his pension and had previously signed a DOPO to that effect, Mr. Furlong's refusal to re-sign an original order after the prior order was lost could constitute conduct tending to impede or obstruct the court in the performance of its functions. See *Nelson* at ¶5. Based on those facts, the trial court, in ruling on the objections, concluded that "[Mr. Furlong's] refusal to sign a replacement Division of Property Order was without justification." Under these circumstances, this Court concludes that the trial court did not abuse its discretion when it adopted the magistrate's decision adopting the DOPO. Mr. Furlong's fourth assignment of error is overruled.

III.

{¶38} Mr. Furlong's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

GEORGE M. MILLER, Attorney at Law, for Appellant.

DREAMA ANDERSON, Attorney at Law, for Appellee.