IN THE SUPREME COURT OF OHIO

Deborah Ayers Appellee, vs. David Ayers Appellant,	Case No. 2022-0560 On Appeal from the Sixth District Court of Appeals Case No. WD-21-10

MERIT BRIEF OF APPELLEE, DEBORAH BELLEVILLE

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Certified Conflict Question: Does a trial court have to expressly find that a parent is voluntarily unemployed or underemployed as a condition precedent to imputing income for child support calculation purposes, or can the trial court's silence be construed as an implied finding that is sufficient to impute income?

Brief Answer: While R.C. 3119.01(C) requires a determination be made; this Court has held that it is within the trial court's discretion to make that determination by applying the statutory factors within R.C. 3119.01(C). Therefore, the trial court in its written decision, making an application of the relevant facts against the factors of R.C. 3119.01(C) is making a determination and is not remaining silent within the order, conclusions of law, or judgment entry.

Statement of the Case and Facts

Appellee Deborah Belleville, f.k.a. Deborah Ayers, and Appellant David Ayers were married on July 1, 2006 in Bowling Green, Ohio. The parties separated in June 2019 and Appellee Belleville filed a complaint for divorce on July 8, 2019. The parties have three minor children, to wit: G.A. d.o.b. 03/13/2008; A.A. d.o.b. 03/5/2010 and L.A. d.o.b. 05/24/2013. At the time of the filing of the Complaint for Divorce, Appellee Belleville filed for temporary orders, which were granted following a contested hearing. This matter came for trial before the Wood County Court of Common Pleas, Domestic Relations division in 2020. The trial was held over the course of three days, with the trial being held of August 17, 2020, September 16, 2020 and October 5, 2020.

During the three days of trial, testimony and exhibits were presented on all matters involving the marriage; however, relevant to the issue on appeal was the testimony and evidence presented regarding Appellant Ayers and whether his unemployment was voluntary. Appellant Ayers, until February 2020, had been employed at CSX Transportation. (See Defendant Ex. 2 and

3 and Trial Court's December 9, 2020 Order Pg. 19). During the trial considerable evidence was presented regarding Appellant Ayer's substantial previous employment history, including nine years at CSX Intermodal in Detroit, Michigan (See Trial Transcript (T.Tr) VOL II, Page 194, Lns. 16-18 and 20-24)); his education, which included graduate degrees (See T. Tr. VOL II, Page 215, Lns. 21-22); his lack of application for a new job, nor actively seeking employment (See T. Tr. VOL II, Pg. 201, Lns. 20-23); his infrequent use of the employment "coach", or other resources, supplied by CSX Transportation (See T. Tr. VOL II, Pg. 201, Lns. 23-25; Pg. 65); and his earnings while at CSX Transportation (Plaintiff's Ex. 1, 2, 3, 4 and 8);

At trial, Appellant Ayers offered no corroborating testimony to suggest his inability to obtain similar employment; a lesser prevailing wage in their geographic area; that he was under a disability that prevented him from working; or any other factor that would reasonably prevent him from being gainfully employed in a similar field and with similar income. (Trial Court Order, December 9, 2020, Pg. 19). Appellant Ayers testified that in the nine months since his furlough from CSX Transportation and the second day of trial, in September 2020, he had not filed a single job application nor submitted a single resume to a prospective employer. (See T. Tr. VOL II, Pg. 65, Lns 23-25; Pg. 66, Lns. 2-3).

Following the conclusion of the trial, trial counsel for both parties were ordered to submit individual proposed findings of fact and conclusions of law. Those proposed findings of facts and conclusions of law were submitted on November 5, 2020 and November 6, 2020. On December 9, 2020, Judge Reeve Kelsey, sitting by assignment for the Wood County Court of Common Pleas, issued an Order making findings of facts and decisions on the outstanding matters of the case. Trial Judge Kelsey then directed counsel for Plaintiff/Appellee Belleville to incorporate those

findings into a Judgment Entry. The Judgment Entry was then journalized by the Wood County Court of Common Pleas on January 22, 2021.

Based upon the relevant testimony and exhibits presented during the trial; the trial court made a finding as to Appellant Ayer's income, his bonus, and that he had lost his job in February 2020. (See Order dated December 9, 2020, Pg. 19). The trial court then went on to find:

> The court will review the applicable R.C. 3109.01(C)(17)(a) factors. David has substantial prior employment experience with CSX; he is well educated; he has no physical or mental disabilities; he does not have a felony conviction; and there is no evidence that David does not have the ability to hear the imputed income. The court does note that the availability of employment opportunities is tight due to the present virus pandemic but that a vaccine should be available with the next six months or so. Therefore, the court will impute a total gross annual income to David of $112,613.33. (See Order, dated December 9, 2020, pg. 19-20)

Therefore, the trial court is not silent in it's determination whether Appellant Ayers is voluntarily unemployed as the trial court made considerable application of the statutory factors of R.C. 3119.01(C) in imputed his income.

Appellant Ayers then timely appealed the decision to the Sixth District Court of Appeals. Appellant appealed the decision in regard to the imputation of his income and the finding that he was voluntarily under or unemployed. The Sixth District found that matters involving the computation of child support are factual determinations at the discretion of the trial court. *Ayers v. Ayers*, (6th Dist. Wood Co.) 2022-Ohio403 at ¶ 30. The Sixth District cited to the trial court's application of the relevant facts of the case to the statutory that Appellant Ayers was involuntarily unemployed, the Sixth District found that the trial court did not abuse its discretion in its application of the R.C. 3119.01(C) (*Id* at ¶ 26). Additional that Appellant's argument to the Sixth District Court, that certain factors within R.C. 3119.01(C) carry more weight than others, as well as his subjective motivations to his employment situation, were not found in his favor; thus, upholding the trial court's findings. (*Id*).

Appellant Ayers then filed a Motion to Reconsider the Sixth District's opinion; a Motion for Enblanc Consideration of the Sixth District's opinion; as well as a Motion to Certify a Conflict. The Sixth District Court of Appels denied the Motion to Reconsider, as well as the Motion for EnBlanc Consideration. The Sixth District granted the Motion to Certify a Conflict, which is the matter currently before this Court.

ARGUMENT

Certified Conflict Question: Does a trial court have to expressly find that a parent is voluntarily unemployed or underemployed as a condition precedent to imputing income for child support calculation purposes, or can the trial court's silence be construed as an implied finding that is sufficient to impute income?

Short Answer: While R.C. 3119.01(C) requires a determination be made; this Court has held that it is within the trial court's discretion to make that determination by applying the statutory factors within R.C. 3119.01(C). Therefore, the trial court in its written decision, making an application of the relevant facts against the factors of R.C. 3119.01(C) is making a determination and is not remaining silent within the order, conclusions of law, or judgment entry.

A Trial Court is within is discretion to make a factual determination if a parent is voluntary underemployed or unemployed and the that decisions should not be overturned absent an abuse of discretion finding.

"Whether a parent is 'voluntarily underemployed; within the meaning of R.C. 3113.215(A)(5), [currently R.C. 3119.01(C)(17)]. and the amount of 'potential income' to be imputed to a child support obligor, are matters to be determined by the trial court based upon the factors and the circumstances of each case. *Rock v. Cabral,* 64 Ohio St.3d 108 (1993) at 108. The

determination will not be disturbed on appeal absent an abuse of discretion." *Id*. When calculating child support, "a trial court must consider the 'potential income' as well as the gross income of a parent the court determines to be voluntarily unemployed or underemployed. *Id* at 111. "The question whether a parent is voluntarily unemployed or voluntarily underemployed is a question of fact for the trial court. Absent an abuse of discretion, that factual determination will not be disturbed on appeal." *Id.* at 112.

Here the question is what is a determination of the trial court and when is a trial court being silent. Appellant argues that Black's Law Dictionary defines "determination" as the act of deciding something officially, a final decision by a court or administrative agency.[1] This is done by any Court when it issues a final appealable order or judgment entry. The trial court makes a final determination as to the facts of the case. Additionally, Black's Law Dictionary goes on to define "determination" as to the act of finding the precise level, amount, or cause of something.[2] When a trial court, within its right as a fact finder, states the specific facts of the case as they relate to the statue and makes a precise finding, one way or another, the trial court is making a determination. This is regardless of whether a trial court first states "party x is voluntarily underemployed or unemployed."

Regarding silence, Black's Law Dictionary defines "silence" as 1. a restraint from speaking; 2. A failure to reveal something required by law to be revealed.[3] Correlating to this is Black's Law Dictionary definition of "explicit" which is clear, open, direct, or exact.[4] Under these definitions, silence by a trial court is found only if it fails to reveal something required by law to be revealed. Additionally, a trial court is being explicit, if it is being clear and open and direct as

[1] Black's Law Dictionary, 11th Ed. Brian Garner, Ed.
[2] Id.
[3] Id.
[4] Id.

to the facts and its reasoning for making certain findings. This is the abuse of discretion standard in a nutshell – did the trial court make a determination that the appellate court can follow.

In the case at hand, the Sixth District held that in reviewing "the entire record [the Court] did not find the trial court's attitude was unreasonable, arbitrary or unconscionable when it imputed appellant's potential income and denied a deviation to zero. … We find the record contains some competent and credible evidence for the trial court to determine appellant's potential income. We do not find the trial court abused its discretion …" *Ayers* at ¶30. Here the Court made a determination as to the statutory factors. Her and pursuant to these definitions, the trial court was not silent as to whether Appellant was voluntarily underemployed or unemployed. The trial court was explicit in its finding.

In contract, the case that is raised on conflict, *Misleh v. Badwan,* is silent as to the relevant facts of the case. *Misleh v. Badwan*¸(9th Dist. Summit) 2007-Ohio-5677 (unreported). The Ninth District held that "while the trial court implicitly made this finding [imputing Father's income to $50,000.00] by imputing income, the trial court should have reiterated that finding in its judgment, for such a finding is necessary to justify an imputation of income. *Misleh*, at ¶ 5. In reviewing the facts of *Misleh*, the trial court imputed Father's income to $50,000.00 with no application of the statutory factors, no recital of the relevant facts presented at trial, no clear or precise explanation of why the trial court found Father voluntary unemployed. *Id.* At ¶ 2. The *Misleh* trial court was silent. The Ninth District's remedy was to reverse in part and remand for further proceedings as to the facts of Father's voluntarily underemployment or unemployment. *Id.* At ¶ 15.

Additionally, the Ninth District remanded a case that did make a direct finding that the parent was voluntarily unemployed; however, did not apply the statutory factors found in R.C. 3113.215 (which is now R.C. 3119.01). See *Marek v. Marek* (9th Dist. Summit) 2004-Ohio-5556

at ¶ 19. In the *Marek* case the trial court made a very detailed determination of the party's income and employment before finding that Father was voluntarily unemployed and imputing his income. *Id* at ¶16. The Ninth District, based upon the detailed relevant facts that were included in the judgment entry, found that the trial court did not abuse its discretion in finding that Father was voluntarily unemployed. *Id* at ¶ 17. However, the Ninth District did find that not applying the statutory factors of R.C. 31113.215(A)(5)(a) was an abuse of discretion and therefore remanded for further application of the statute. *Id.* at ¶ 19. (See also, *Huth v. Huth* (11th Dist. Portage) 2019-Ohio-2970 at ¶ 32-33.; holding that the trial court must consider the statutory requirements of R.C. 3119.01(C)(17)(a), or any other relevant fact or circumstance, when imputing income, even after a determination that a parent's unemployment or underemployed status is voluntary).

Trial courts are the determining courts of the facts of the case. (CITE). Absent an abuse of discretion, the trial court's determination, as well as and the application of the facts of the case to the statute is not to be disturbed. *Rock* at 112, citing *Booth v Booth* (1989) 44 Ohio St.3d 142. A determination, as required by the statute, is made by the trial court when it applies the facts of the case to the statutory factors. If the trial court is silent as to the facts regarding income or employment, or how it calculated the support, or how the statute applies to this case, then that is a problem. However, the Appellate courts are within their discretion to review those cases and remand for further proceedings and have done such. Therefore, no further order is needed from the Supreme Court regarding the definition of determination or silence, as it is already being applied by the Court.

The Appellate Courts are in agreement as to the application of the law and the holdings are not as varied or distinct as argued.

The holdings of the various appellate districts are not as varied as the Appellate would have this Court to believe. Even in reviewing the cases submitted by Appellant, the holdings are substantially similar – did the trial court abuse its discretion in its determinations that a parent was voluntarily underemployed or unemployed. Similarly, the appellate courts did reverse trial court decisions, even if the trial court made an direct statement that a parent was voluntarily underemployed or unemployed, if the trial court did not apply the requisite statutory factors. This is seen in the following cases.

The Second District addressed the issue of voluntary underemployment or unemployment in *Robinson v. Robinson* (2nd Dist. Clark Co.) 168 Ohio App.3d 476, 2006-Ohio-4282. Holding: "The only reasons relevant to a finding of voluntary underemployment are those set out in R.C. 3119.01(C)(11)(i) through (x) [now 3119.01(C)(17)]. *Robinson* at ¶ 49. In *Robinson*, the appellate court sustained the trial court's finding that Father was not voluntarily underemployed when the trail court applied the facts of the case against the statutory requirements of R.C. 3119.01(C)(11), and as interpreted by *Rock* and refusing to impute Fathers income. *Robinson* at ¶ 51. The Second District, similar to the Sixth District, is holding that as long as the trial court is applying the factors of the statue to the facts of the case, the trial court has not abused its discretion in making a determination.

The *Leonard v. Erwin* decision of the Fourth District is very factually different than the issue of the *Ayers* case or the *Misleh* case. The *Leonard* case involves a referee deciding to impute an arbitrary amount of income to the parents that is not supported by the record. *Leonard v. Erwin* (4th Dist. Adams Co.) 111 Ohio App.3d 413 (1996) at 417. The trial court in the *Leonard* case made neither a determination that either party was voluntarily unemployed or underemployed, nor

applied the relevant facts of the case to statutory factors of R.C. 3113.215(A)(5)(a) [the relevant statute at that time]. *Id.* Therefore, the appellate court found that the trial court abused its discretion when it imputed the parties income. *Id.* at 418. This is supported by its holding that "a court may not simply find that 'there was no evidence' upon which to determine a party's income and then arbitrarily assign its own figures in determining child support." *Id* at 418 (citing *Bowen v. Thomas*, (1995) 102 Ohio App.3d 196, at 201).

The issue of the application of the Ninth District court's decision in *Misleh* is addressed above and will not be restated.

Williams v. Williams of the Twelfth District additionally is a case in which the trial court abused its discretion when failed to apply that statute to the facts of the case. *Williams v. Williams* (12th Dist. Warren Co.) 2007-Ohio-2996 at ¶ 29. The trial court found that Father was substantially underemployed and did make some factual findings; however, failed to cite to R.C. 3119.01. *Id.* at ¶ 25. Therefore, the trial court's ruling failed to provide the appellate court with the ability to review the decision to impute income because it did not apply the facts of the case to the statutory factors. *Id.* at ¶ 29. Thus, again, the appellate court made its finding based on whether or not the statutory factors were applied and whether or not the trial court abused its discretion.

As evidenced by these various findings, Ohio's Appellate Courts have been challenging the trial court's determinations as to whether a parent is voluntarily unemployed or underemployed when the trial court has not 1. included a statement of the relevant facts within the final decision of the trial court; or 2. when the trial court has not included an application of the statutory factors to the case. This is especially relevant to this argument when the Appellate Court's have revered the trial court despite a trial court making an "explicit" statement that parent is voluntarily underemployed or unemployed, yet did not apply the statute. (See the *Misleh, Leonard* and

Williams Cases). Therefore, the more important element in reviewing the determination of the trial courts is not regarding some arbitrary statement that parent is or is not voluntarily underemployed or unemployed, but whether or not the trial court made either (a). any statement as to the facts regarding income, potential income, employment history, etc…, and (b). if the trial court applied R.C. 3119.01(C)(17).

In the *Ayres* case, the Sixth District correctly found that the trial court made statements as to the facts of Appellant's income, potential income, employment history, education, lack of application for any new employment and applied those factors to R.C. 3119.01(C)(17). *Ayres at ¶ 20.* Thus, the Sixth District made a ruling that is in alignment with the other appellate districts, who have also held that the trial court has to abuse its discretion in order to overturn a finding that either party is unemployed or underemployed.

The trickle down effect of this decision on the child support case docket could be cataclysmic.

If this Court is to determine that a trial court must first explicitly state that parent is found to be voluntarily underemployed or unemployed, then there is a larger implication and impact of reopening and recalculation of current child support cases. This has the potential to cause a cataclysmic cascade of child support challenges. Every case in which a parent's income was imputed, whether or not the trial court applied the statutory factors within R.C. 3119.01(C), would be subject to reconsideration. The Appellate Court have made the correct holdings when a trial court has, in its written decision, made a clear statement as to the facts of the case in relation to the statutory factors and found that the trial court did not abuse its discretion. (See *Ayers* at ¶30; *Rock* at 111-112; and *Robinson* at ¶ 49).

When a trial court has been silent on facts related to the calculation of support, the Appellate Courts have reversed those findings and remanded them for further testimony and

calculation. (*Huth* at ¶32-33; and *Leonard* at 417). Therefore, the cases in which the trial court was truly silent on the matter if a parent was voluntarily underemployed or unemployed has been addressed; and the discretion of the trial court as the fact-finding court has been upheld. Thus, the conflict is only a perceived conflict and is already being addressed by the Appellate Courts.

Relation of the evidence and argument to the *Ayers* case.

Here is the Sixth District, and the trial court, made the correct decisions. The Sixth Court upheld the trial court's discretion in making a determination that father was voluntary underemployed or unemployed when it imputed his income for child support purposes. *Ayers* at ¶ 30. During the three days of trial there was considerable evidence and testimony presented as to Appellant's employment history, income history, education, his lack of seeking any employment within the nine months from when he was furloughed until the second day of trial in September, 2020. (Trial Court Order, December 9, 2020, page 19). Appellant offered no rebuttal evidence as to these factors. *Id.* Offered no testimony as to any jobs he had applied for, or testimony as to the job market and income capabilities in the general area, did not present the "employment coach" he was supposedly working with to obtain employment. (T. Tr. VOL II, Pg. 65, Lns. 23-25, Pg. 66, Lns 2-3). These relevant facts were presented to the trial court, who took them into consideration when issuing its findings of facts and the final Order of the Court.

Therefore, the trial court was not "silent" regarding the Appellant's voluntary underemployment or unemployment. The trial court made direct statements as to the relevant facts and applied them to the factors within R.C. 3119.01(C)(17). The Sixth District, in reviewing the decision was correct in finding that the trial court did not abuse its discretion when it made its determination regarding Appellant's voluntary unemployment or underemployment. *Ayers* at ¶ 30 The Sixth District held that the trial "record contains some competent and credible evidence for

the trial court to determine Appellant's potential income." *Id*. Additionally, after reviewing the relevant cases argued by Appellant, the Sixth District's decision is in alignment with the other District's decisions. Therefore, the Sixth District's decision should be upheld and no conflict found.

Conclusion

Silence is deafening in a Court action. Trial courts are required to make determinations; however, they make those determinations by hearing the facts of the case, reviewing those facts and issuing a final finding, order, or judgment entry. A trial court is not silent when its decisions include an application of the relevant facts, an explanation of how it reached it decision, and applies the statute.

Ohio's Appellate Court's have followed the holding in *Rock v. Cabral* – which requires an Appellate Court uphold the trial court's determination absent an abuse of discretion by the trial court in its findings as to the facts and its application of those facts against R.C. 3119.01(C) [formerly R.C. 3113.215]. *Rock* at 112. In reviewing the cases argued by Appellant as being in conflict of the Sixth District's opinion, Appellee argues that no real conflict exists and when reviewing the depth of those decisions, all the Appellate courts have held that facts must be stated and R.C. 3119.01(C) must be applied.

Therefore, there is no real conflict between the Appellate Districts and the Sixth District decision should be upheld and Appellant's appeal found not well taken.

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Respectfully submitted,

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded by electronic Mail on the __11th___ day of October 2022, to: Karen Coble, 316 N. Michigan St., Suite 600, Toledo, Ohio 43604, at karinlcoble@gmail.com.

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