DIVISION ONE
FILED: 03-16-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	1 CA-CV 08-0736
	)	
LORRIE COHEN,	)	DEPARTMENT A
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
ELLIOT COHEN,	)	
	)	
Respondent/Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR1990-006646

The Honorable R. Jeffrey Woodburn, Judge Pro Tempore

VACATED

Elliot Cohen, Respondent/Appellant — Scottsdale
In Propria Persona

Stevens & Van Cott, PLLC — Scottsdale
by Charles Van Cott
Attorneys for Petitioner/Appellee

P O R T L E Y, Judge

¶1 Elliot Cohen ("Father") appeals the family court's denial of his motion for a new trial and the order awarding

Lorrie Brownstone ("Mother"), formerly known as Lorrie Cohen, a judgment for child support arrearages and unreimbursed medical expenses. For the following reasons, we vacate the judgment.

BACKGROUND[1]

¶2 Father and Mother were divorced in 1991. The divorce decree ordered Father to pay child support for their three children. Mother filed a petition seeking child support arrearages in August 2004. The parties subsequently entered into a settlement agreement for back child support and medical expenditures. The family court also increased Father's child support obligation to $1229.12 per month beginning on November 1, 2004. The court also clarified that Mother would provide health insurance for the children and all uncovered medical expenses would be reimbursed fifty-seven percent by Father and forty-three percent by Mother.

¶3 Mother filed a petition for modification of child support on October 18, 2006, because the middle child, M.C., was older than eighteen and no longer entitled to child support.

[1] Preliminarily, Mother requests that we disregard Father's statement of facts because he fails to present his facts in accordance with the principles of viewing the facts "in the light most favorable to upholding the trial court's decision." *See Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 506, ¶ 9, 114 P.3d 835, 838 (App. 2005). This standard of review dictates how we review the facts, but is not applicable to Father. Therefore, we will not strike Father's statement of facts or statement of the case. However, any statements made by Father that do not contain a proper citation to the record are not considered.

Father filed a counter-petition on November 9, 2006, requesting his child support be modified because he sought the termination of his child support obligation for his eldest son, J.C. After a trial on January 2, 2008, the family court found that J.C. was no longer entitled to child support pursuant to Arizona Revised Statutes ("A.R.S.") section 25-320(E) (Supp. 2009), because he was not a severely mentally or physically disabled child.[2] *See* A.R.S. § 25-320(E)[3] (authorizing the court to award child support to continue past the age of majority if, among other requirements, "[t]he child is severely mentally or physically disabled as demonstrated by the fact that the child is unable to live independently and be self-supporting"). As a result, the court ordered Mother to reimburse Father $6796.45 for overpayment of child support for M.C.[4] and J.C.

¶4 Mother filed a "Motion to Amend Judgment or, in the Alternative, for New Trial." She argued, in part, that the judgment should be offset because Father owed child support arrearages of $2983.44 that accrued between November 1, 2004,

[2] At the time of the judgment, J.C. was twenty-four years old and no longer eligible for child support unless he met the requirements of § 25-320(E).
[3] We cite the current version of A.R.S. § 25-320(E) because the statute has not been amended in any way that substantially changes the relevant provision.
[4] The parties did not dispute that Father overpaid child support for M.C. for one year after her emancipation.

and June 30, 2006.[5] Her motion was denied on March 27, 2008, and she did not appeal.

¶5 When Mother did not voluntarily pay, Father filed an "Application for Issuance of Writ of Garnishment."[6] Mother then filed a petition for contempt and argued that Father had not paid child support arrearages and health related expenses for the children. After a hearing, the court awarded Mother $4869.54 for child support arrears and accumulated interest, and $3441.55 for unreimbursed medical expenses to be offset with sums remaining on Father's $6796.45 judgment.

¶6 Father filed an unsuccessful motion for new trial. He appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(E) (2003).

DISCUSSION

¶7 We review the decision to award child support arrearages for an abuse of discretion. *Ferrer v. Ferrer*, 138 Ariz. 138, 140, 673 P.2d 336, 338 (App. 1983). We accept the trial court's findings of fact unless clearly erroneous. *Alley v. Stevens*, 209 Ariz. 426, 428, ¶ 6, 104 P.3d 157, 159 (App. 2004).

¶8 Father argues that the court erred because the court did not have jurisdiction to consider the issues in the contempt

[5] Father also filed an unsuccessful motion for a new trial, which was denied on May 14, 2008.
[6] A writ of garnishment was granted on May 19, 2008.

proceeding. Specifically, he argues that the issues raised were barred under the doctrine of *res judicata*.[7] Alternatively, he argues that the trial court erred in finding Mother had good cause to be reimbursed for medical expenditures that exceeded the statutory 180-day limitation.[8] *See* A.R.S. § 25-320 app. § 9(A) (2007) ("Except for good cause shown, any request for payment or reimbursement of uninsured medical, dental and/or vision costs must be provided to the other parent within 180 days after the date the services occur.").

¶9 *Res judicata* is a question of law we review de novo. *Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 298, ¶ 10, 53 P.3d 1139, 1142 (App. 2002). The doctrine of *res judicata* protects "litigants from the burden of relitigating an identical issue" and against needless litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). *Res judicata* "binds the same parties standing in the same capacity in the

[7] Father also argues the court lacked jurisdiction based on the doctrine of "horizontal appeal." A horizontal appeal or "lateral appeal" refers to a well-established rule that dictates a court should not reconsider a motion previously decided by another judge absent new circumstances. *See Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 272-73, 678 P.2d 453, 457-58 (App. 1983). The doctrine of horizontal appeal is not applicable here. Father's argument is based on an independent action and not the review of a motion from the same proceeding that was reassigned to another judge. As a result, we do not address the argument.

[8] We do not address this argument because we are vacating the order on other grounds.

subsequent litigation on the same cause of action, not only upon the facts actually litigated, but also upon those points which might have been (even though not expressly) litigated." *Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 448, 837 P.2d 1180, 1183 (App. 1992). "[A] party who has had one fair and full opportunity to prove a claim in a court of competent jurisdiction and has failed to do so, should not be permitted to go to trial on the merits of that claim a second time." *Di Orio v. City of Scottsdale*, 2 Ariz. 329, 332, 408 P.2d 849, 852 (App. 1965).

¶10 Here, the issue of child support arrearages and unreimbursed medical expenses which accrued through June 30, 2006, was raised during the 2008 child support modification action. The parties, in their joint pretrial memorandum for the 2008 action, asked the court to resolve "the total amount of the parties' respective child support obligations." More importantly, Father filed a separate pretrial memorandum and attached three exhibits that raised the issue of arrearages and unreimbursed medical expenses. Exhibit A was a letter from Mother's counsel to Father outlining child support arrearages that totaled $2983.44 as of June 30, 2006, and Father's share of unreimbursed medical expenses. Exhibit B was a letter from Father's former counsel in reply wherein he agreed with the child support arrearages, but maintained that the medical

expenditures claim was untimely. Exhibit C was a parent's child support worksheet for child support that included the alleged sums of arrearages and medical expenditures. Moreover, Exhibits A and B were also admitted at trial as Exhibits 6 and 7. Therefore, the issues were presented for resolution in the child support modification trial.

¶11 Although Mother argued, in her post-trial motion to amend judgment, or for a new trial, that Father's judgment should be offset with the arrearages and health expenses he owed, the court denied the motion. The court stated that, "[t]he [c]ourt accepted [Mother's] avowal in calculating child support paid or owing."[9] She did not appeal. Because the child support arrearages and unreimbursed medical expenses were presented in the 2008 action, Mother could not recover those sums through the contempt process. Her action was barred by the doctrine of *res judicata*. As a result, because the family court did not have jurisdiction to address the arrearages and health expenses, we vacate the judgment.

¶12 Father acknowledges he is not entitled to attorneys' fees on appeal because he is representing himself. He, however, requests an award of attorneys' fees for the contempt

[9] We do not consider the family court's minute entry in response to Father's "Motion for Clarification" because the earlier order was final and was not appealed, and thus the subsequent "Motion for Clarification" is irrelevant.

proceeding. Because he failed to cite any authority for his request, his request is denied. *See Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, 289, ¶ 26, 17 P.3d 790, 795 (App. 2000). We do, however, award Father his taxable costs on appeal to be determined upon his compliance with Arizona Rule of Civil Procedure Rule 21. Because Mother did not prevail and there is no evidence of financial disparity, we deny her request for fees.

CONCLUSION

¶13 Based on the foregoing, we vacate the judgment.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Judge

/s/
_____
ANN A. SCOTT TIMMER, Chief Judge