[Cite as *Tucker v. Tucker*, 2011-Ohio-2417.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Donnie F. Tucker,	:	
Plaintiff-Appellant,	:	Nos. 10AP-960 and 11AP-89 (C.P.C. No. 08CVF-08-12288)
v.	:	
Sharon S. Tucker (nka Wiley),	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on May 19, 2011

Tyack, Blackmore, & Liston Co., L.P.A., and *Thomas S. Tyack*, for appellant.

Christopher Minnillo, for appellee.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations.

BROWN, J.

{¶1} In these consolidated cases, Donnie F. Tucker, plaintiff-appellant, appeals from two judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations. In one judgment, the trial court found him in contempt of court. In the other judgment, the trial court approved a division of property order ("DOPO").

{¶2} On September 2, 1998, Donnie and Sharon S. Tucker (nka Wiley), defendant-appellee, were divorced pursuant to an agreed judgment entry decree of

divorce ("decree"). The decree had an effective date of June 22, 1998. Paragraph six of the decree provided for the following:

> Plaintiff shall retain 78% of his retirement benefits through PERS and Defendant is awarded 22% of Plaintiff's retirement benefits available through PERS. Said 22% award represents the marital property settlement due to the Defendant in the amount of One Hundred Seven Thousand One Hundred Seventy Seven Dollars and no/100 ($107,177.00). Plaintiff shall maintain the present spousal election of benefits through PERS for the benefit of the Defendant. Commencing on June 22, 2007, Plaintiff shall pay to the Defendant Twenty Two Percent (22%) of his monthly benefit received from the Public Employees Retirement System (PERS), hereinafter referred to as the Plan, ~~including any cost of living adjustments or other economic improvements made to Plaintiff's benefits~~ or shall arrange for said payments to be directly to Defendant from PERS. The Court shall retain jurisdiction to the extent required to maintain the original intent of the parties as stipulated herein.

In the quote above, the words bearing the strike-through indication were crossed out on the original decree using a handwritten line. At the end of the stricken passage are the handwritten letters "KSL," which the parties agree are the initials of the then trial court judge, who retired prior to the commencement of the present contempt proceedings.

{¶3} Donnie's monthly benefit from PERS was $2,399.58 per month, plus a cost of living adjustment ("COLA"). In June 2007, Donnie began making monthly payments to Sharon pursuant to paragraph six in the amount of $696.97. This sum represented 22 percent of the total monthly PERS benefit Donnie was receiving, including the additional monies for COLA. Beginning in April 2009, Donnie, without prior notice or any explanation, stopped paying Sharon $696.97 per month. Donnie paid Sharon $400 in April 2009, $300 in May 2009, $696.97 in June 2009, and zero dollars from July through December 2009. Beginning in January 2010, Donnie started paying Sharon $530 per

month. This sum approximates 22 percent of the $2,399.58 base amount of Donnie's PERS benefit, rounded up from $527.91. It does not include any amount for the COLA portion of the monthly amount Donnie was receiving from PERS.

{¶4} On December 10, 2009, Sharon filed a motion for contempt alleging Donnie failed to make the appropriate payments to her pursuant to paragraph six. A hearing on the motion for contempt was held on August 25, 2010. At the hearing, Donnie indicated that he made decreased payments in April and May 2009 due to health issues, and he made no payments from July through December 2009 in order to make up for overpayments he had made since June 2007. Donnie maintained that, pursuant to paragraph six, he was only to pay Sharon 22 percent of the base amount of his PERS benefit and not 22 percent of his total benefit received, which included COLA. Donnie claimed that, because the trial judge struck the portion of paragraph six in the decree that related to COLA, he did not have to pay Sharon 22 percent of the entire monthly PERS benefit he received, which included an additional amount for COLA, but only had to pay Sharon 22 percent of the base amount of his monthly PERS benefit.

{¶5} On September 20, 2010, the trial court issued a judgment finding Donnie in contempt of court. The court found that paragraph six of the decree required Donnie to pay Sharon 22 percent of the entire PERS benefit he received, including the amount for the COLA, which would make the total amount $697 per month. The court sentenced Donnie to three days in jail, which he could purge by making future payments to Sharon equal to 22 percent of his entire monthly PERS benefit. The court also ordered Donnie to pay Sharon $1,600 in attorney fees. On December 28, 2010, the trial court issued a DOPO, which ordered PERS to pay Sharon $697 per month from Donnie's PERS benefit.

{¶6} Donnie appeals the September 20 and December 28, 2010 judgments of the trial court, asserting the following assignments of error which we have combined and renumbered due to the consolidation of the cases:

> [I.] THE TRIAL COURT ERRED IN FINDING THE PLAINTIFF GUILTY OF CONTEMPT WHEN THE PLAINTIFF HAD COMPLIED WITH THE TERMS OF THE DIVORCE DECREE AND PAID 22% OF HIS BASE MONTHLY BENEFITS TO THE DEFENDANT CONSISTENT WITH THE TERMS OF THE DECREE GIVEN THE FACT THAT THE DECREE SPECIFICALLY STRUCK ANY REFERENCE OR ANY INCLUSION OF COST OF LIVING BENEFITS BEING INCLUDED IN THE AMOUNT TO BE PAID.
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> [II.] THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO THE DEFENDANT IN THE WITHIN CAUSE.
>
> [III.] THE TRIAL COURT ERRED IN APPROVING A DIVISION OF PROPERTY ORDER (DOPO) ON DECEMBER 28, 2010 THAT CALLED FOR A MONTHLY PAYMENT OF $697.00 PER MONTH. SAID AMOUNT IS CONTRARY TO AND CONFLICTS WITH THE PROVISIONS OF THE AGREED JUDGMENT ENTRY DECREE OF DIVORCE.

{¶7} Donnie argues in his first assignment of error that the trial court erred when it granted Sharon's motion for contempt based upon his failure to pay the appropriate amount of his PERS benefit to Sharon. When reviewing a finding of contempt, including the imposition of penalties, we apply an abuse of discretion standard. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶12, citing *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479. The prima facie elements of contempt in this context include the existence of a court order and appellant's non-compliance with the terms of that order. See *LeuVoy v. LeuVoy* (May 25, 2000), 10th Dist. No. 99AP-737, citing *Morford v. Morford* (1993), 85 Ohio App.3d 50. The burden then shifts to appellant to establish any

defense he may have for non-payment. See *Morford* at 55, citing *Rossen v. Rossen* (1964), 2 Ohio App.2d 381. Intent is not a prerequisite to a finding of contempt, but a court may consider whether the party has attempted to comply or attempted to flout the court order. Id. at 55, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136.

{¶8} The issue before us is straightforward: Does the decree require Donnie to pay to Sharon 22 percent of his entire PERS monthly benefit, including any COLA, or just his base PERS benefit, not including any COLA. Donnie argues that the decree requires him to pay Sharon 22 percent of only his base PERS benefit without the inclusion of any COLA. His sole argument to support his interpretation is that the trial court judge struck the language in the decree that specifically provided that the payment would include any COLA or other economic improvements made to the benefits. We disagree with Donnie's interpretation of this provision in the decree. There is nothing to indicate that this was the reason the trial court sua sponte struck the provision. The copies of the parties' handwritten settlement agreement included in the record suggest that the portion of the decree the trial court struck was not included in the settlement agreement, and this was likely the reason the trial court struck it from the decree. Another later portion of the decree was also struck by the trial court, and that portion, likewise, was not included in the handwritten settlement agreement, thereby buttressing the conclusion that the trial court struck the portion at issue here for the same reason.

{¶9} Other circumstances also exist to support the view that the PERS payments to Sharon were to include COLA. Initially, the two passages in the decree that order Sharon to receive a portion of Donnie's PERS benefits are facially unambiguous. The first passage provides that Sharon is awarded 22 percent of Donnie's retirement benefits

"available through PERS." The second passage provides that Donnie shall pay to Sharon 22 percent "of his monthly benefit received from [PERS]." Neither of these passages contains any limiting or modifying language that would except the COLA portion of the benefit. Rather, both passages provide that Sharon's percentage was to be taken from the "received" and "available" benefits. The benefits "received" by and "available" to Donnie included COLA.

{¶10} In addition, at the contempt hearing, Kathleen Knisely, who represented Sharon during the drafting of the settlement agreement and decree, provided convincing testimony. Knisely testified that the inclusion of the COLA component of the PERS benefit payable to Sharon was negotiated by the parties. She testified with certainty that the 22 percent stated in the settlement agreement and decree was to include COLA.

{¶11} Furthermore, as Knisely also pointed out, the parties knew the amount of Donnie's base PERS benefit at the time they entered into the settlement agreement; thus, had they intended Sharon's payment to be a fixed monthly amount, they could have easily calculated that precise number and included it in the settlement agreement rather than using a percentage. Knisely indicated that the reason Sharon's share was expressed as a percentage was so that it could grow more quickly with the COLA and Sharon would be more likely to collect the total property settlement payout due of approximately $107,000 before the death of Donnie, who was in poor health.

{¶12} Also, the mere fact that Donnie paid 22 percent of the total monthly PERS benefit he was receiving, including the additional monies for COLA, for nearly two years suggests that Donnie also thought the 22 percent was to be of the entire sum he received from PERS. Although Donnie testified at the contempt hearing that the sum he was

paying for the first two years was wrongly calculated by the secretary of one of his attorneys, his claim that he never bothered to verify that this amount was in accord with his own understanding of the decree is dubious. Donnie testified at the contempt hearing that he worked for nearly 30 years for PERS, used math in his daily job, and knew how to calculate percentages. Therefore, for all of these reasons, we find the trial court did not err when it found Donnie in contempt for not paying Sharon consistent with the terms in the decree. Accordingly, Donnie's first assignment of error is overruled.

{¶13} Donnie's remaining assignments of error relate to the attorney fees the trial court awarded to Sharon and the trial court's DOPO and are based upon the premise that the trial court incorrectly found him in contempt. As we have found that the trial court properly found Donnie in contempt, the trial court's award of attorney fees, pursuant to R.C. 3105.73, and its issuing of the DOPO were proper. Therefore, Donnie's second and third assignments of error are without merit and overruled.

{¶14} Accordingly, Donnie's three assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, are affirmed.

Judgments affirmed.

FRENCH and DORRIAN, JJ., concur.

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