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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000902-MR

PHILLIP DWAYNE GOFF — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE EDWIN M. WHITE, SPECIAL JUDGE
ACTION NO. 04-CI-00408

JOY D. GOFF (NOW KASSINGER) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: Phillip Dwayne Goff appeals from the April 13, 2009 order of the Ohio Circuit Court. The order, *inter alia*, denied his motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 to "Amend, Alter or Vacate that

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

portion of the Court's Order entered January 8, 2009 which denies [Phillip's] Motion for Relief from Judgment Pursuant to CR 60.02." (Motion to Alter, Amend or Vacate a judgment Pursuant to CR 60.02; Record 848). For the following reasons, we affirm the circuit court.

Facts and Procedure

In a previous appeal to this Court in 2006, Phillip pursued reversal of the circuit court's final decree culminating in this Court's opinion captioned *Goff v. Kassinger*, Slip Opinion, 2008 WL 745171 (No. 2006-CA-001086-MR)(Ky. App., March 21, 2008)(hereafter, *Goff I*). We refer the reader to that opinion generally for facts and procedure leading up to that first appeal. However, for purposes of this appeal, it is necessary that we set forth certain facts and procedural steps taken, some of which predate the opinion in *Goff I*.

In June 2005, the Social Security Administration determined that Phillip became disabled on November 18, 2004 but, in accordance with federal law, he was not entitled to receive benefits until May 2005. (Letter from Social Security Administration, exhibit to Motion for Determination of Child Support Arrearage; R.802). Phillip's social security disability benefits are not in issue.

However, a separate retirement plan that Phillip agreed to divide equally with Joy and which the circuit court so ordered, *see Goff I*, p. 2, allowed him to begin immediately receiving supplemental benefits prior to his normal retirement age if he became disabled. After the Social Security Administration determined Phillip's disability, Phillip "elected to begin receiving disability

benefits under the Plan." (Letter from legal counsel for Lower Ohio Valley District Council Pension Trust Fund, exhibit to Verified Motion for Contempt; R.794). The date of Phillip's first disability payment under his defined benefit plan was May 1, 2005. (Letter and Schedule, exhibit to Motion for Relief from Judgment; R.832-833). The record appears not to reflect the date on which Phillip actually made that election; however, the Plan's Board of Trustees approved Phillip's election of disability benefits on September 21, 2005. (Id.).

Approval of Phillip's election to immediately initiate benefit payments predated the second of two hearings conducted by the circuit court's domestic relations commissioner (DRC) on January 27, 2006, and the DRC's February 17, 2006 recommendation that "Phillip's defined benefit plan shall be divided equally between the parties[.]" (Recommendations, February 17, 2006; R.304). Phillip filed exceptions to this finding but only because "[t]he Commissioner did not elicit testimony as to the values, if any, of the [defined benefit] plan, and made the finding that 'vesting' is not relevant." (Exceptions; R.318). He presented no objection that the recommendation, if adopted by the circuit court, would result in Joy's receipt of half of all benefits under the plan, including disability benefits. Phillip also made no reference to his defined benefit plan in the supplemental exceptions he filed shortly after his initial exceptions.

When the circuit court entered the decree on April 6, 2006, it reserved ruling on Phillip's exceptions; on April 10, 2006, the court overruled the

exceptions making that order and the decree itself final and appealable. The decree and the order were the subjects of Phillip's first appeal.[2]

On May 2, 2006, the circuit court entered three orders. (R.695-702). The first and second of the May 2, 2006 orders were separate QDROs dividing Phillip's defined contribution plan and defined benefit plan, respectively. Phillip never appealed the entry of these QDROs. The third order denied Phillip's April 3, 2006 pre-decree motion "to reconsider [the circuit court's] decision and Order [entered March 28, 2006] overruling [Phillip's] Motion to refer the matter to [sic] back to the Domestic Relations Commissioner for taking of additional evidence, and to alter, amend or vacate the order, permitting additional testimony and evidence be offered by [Phillip] before the Commissioner[.]" (Motion; R.349). Phillip filed his Notice of Appeal in *Goff I* from this order only.

Furthermore, while this Court was considering the merits of that first appeal, Joy learned that Phillip had already "elected to begin taking disability benefits through the Plan" and that, in accordance with the May 2, 2006 QDRO,

[2] *Goff I* treated Phillip's first appeal as though it were "from a final decree of the Ohio Circuit Court which dissolved his marriage to Joy [and he was allowed to] that the circuit court erred in its characterization, valuation, and division of marital property." *Goff I*, p. 1. A closer look at the procedural history of this case reveals that Phillip was not entitled to such a broad review by this Court as he received. His Notice of Appeal in that case was filed May 23, 2006 – too late to appeal the April 6, 2006 decree or the April 10, 2006 order denying his exceptions. The Notice of Appeal identified only the first May 2, 2006 order as the order being appealed. (R.703). A copy of that order alone is attached to the Notice of Appeal. Therefore, none of the errors Phillip claimed were contained in the decree or order denying exceptions were properly before this Court in *Goff I*. Nothing more then was properly before this Court than the circuit court's denial of Phillip's motion to reconsider that court's denial of his motion to have the DRC take additional evidence. The correct procedural posture was not brought to the Court's attention; the parties' briefing and the Court's consideration of *Goff I* proceeded as though all the issues addressed by the decree were properly before this Court. To the extent they were not, the error inured to the benefit of Phillip.

the plan administrator had "retained 50% of the disability payments as [Joy's] portion of this retirement plan." (Motion; R.727). Therefore, Joy moved the circuit court to amend the May 2, 2006 QDRO relating to the defined benefit plan to reflect that she "will receive all of the funds held by the Plan for her behalf, beginning when [Phillip] first began receiving disability benefits." (Motion; R.727-728). She agreed to wait "until such time as the appeal [in *Goff I* became] final, to insure [sic] that the percentage that [Joy] receives d[id] not change." (Motion; R.728). Phillip did not respond to that motion and, on October 5, 2006, the circuit court entered an order granting it. (Order; R.731). Phillip did not take an appeal from that order.

When *Goff I* was rendered on March 21, 2008, neither party filed a petition for rehearing.[3] *Goff I* became final on May 9, 2008. In that opinion, this Court affirmed the circuit court's equal division of Phillip's retirement and pension benefits based on his agreement. *Goff I*, p. 4. Once *Goff I* was final, Joy sent the May 2, 2006 QDRO to the plan administrator, apparently with the approval of Phillip's counsel. (Verified Motion for Contempt; R.791).

[3] Kentucky Rules of Civil Procedure (CR) 76.32, Petitions for Rehearing, provides a means of relief to a party adversely affected by an appellate court's opinion when "the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto." CR 76.32(1)(b). The Rule, among other things, also provides parties with the means by which they may "point out and have corrected any inaccuracies in statements of law or fact contained in an opinion of the court[.]" CR 76.32(1)(c). Although Phillip would later characterize this Court's decision in *Goff I* as containing a "palpable error," he did not seek relief under CR 76.32 or pursue discretionary review of our decision by the Kentucky Supreme Court.

On July 3, 2008, Phillip contacted the plan administrator commenting that Joy "only receives $21,662.52" under the QDRO.[4] (Letter Exhibit to Motion for Relief from Judgment; R.832). The plan administrator disagreed and pointed out that "Paragraph 6 [of the QDRO] states "*That the amount or percentage of the Participant's* [Phillip's] *benefits are to be awarded, assigned and paid by the Plan to the Alternate payee* [Joy] *is as follows: One-half (50%) of said plan amount, as of April 6, 2006."* (Id.; emphasis in original). On April 6, 2006, Phillip's plan benefits included disability benefits.

On August 29, 2008, the plan's legal counsel wrote to Joy's counsel, with a copy to Phillip's counsel, recommending language that would satisfy federal requirements embodied in 26 U.S.C. § 414 that was not included in the May 2, 2006 QDRO. The recommended language included the following.

> This Order assigns to the Alternate Payee [Joy] a benefit equal to fifty percent (50%) of the accrued vested benefit attributable to the Participant's [Phillip's] Plan participation as of April 6, 2006. . . . Pursuant to the Court's previous Order entered on October 5, 2006, [Joy] shall commence payment of her benefit as of the same date that [Phillip] elected to begin receiving disability benefits under the Plan.

(Letter, exhibit to Verified Motion for Contempt; R.794-795). This language was entirely consistent with the October 5, 2006 order. Consequently, Joy's counsel prepared an amended QDRO incorporating these changes. Phillip's counsel would

[4] Phillip's position was based on his view that "[i]f the present value method of distribution had been used by [the circuit court, Joy] would have received the sum of $21,662.54 as her entire share. However, the deferred distribution method was used[.]" (Motion to Alter, Amend or Vacate Judgment Pursuant to CR 59.05; R.849).

not agree to amend the language and so, on November 6, 2009, Joy moved the circuit court to enter the QDRO as drafted. (Verified Motion for Contempt; R.791).

Phillip never responded directly to Joy's motion to amend the QDRO. Instead, on November 26, 2009, he filed his own motion, ostensibly "for Determination of Child Support Arrearage"; in fact, the purpose of that motion was "to provide relief to [Phillip] under CR 60.02(a)[.]" (Motion; R.799). In his motion, Phillip said "[t]he Court of Appeals incorrectly" stated the start date of his disability payments, calling the mistake "a palpable error." (Motion; R.799-800). Beseeching the circuit court to correct this Court's ruling, Phillip said he "is in need of relief from the Court of Appeals' incorrect finding" of the date on which his disability payments began.[5] (Motion; R.800). In any event, Phillip's CR 60.02(a) motion did not challenge the equal division with Joy of his disability benefits. It only challenged the amount to be credited against his child support arrearage, based on his children's receipt of social security payments attributable to Phillip's disability.

On December 8, 2009, Phillip filed a "Motion for Relief from Judgment Pursuant to CR 60.02." In this motion, he cited CR 60.02(f) and urged the circuit court "to relieve him from the judgment requiring him to divide equally his disability pay with [Joy]." (Motion; R.827). We conclude the judgment to

[5] As noted, *infra*, when *Goff I* was rendered, Phillip failed to petition this Court for rehearing or for modification as provided for by CR 76.32. And, of course, the circuit court lacks the authority to grant such relief as Phillip requested.

which Phillip refers is the April 6, 2006 final decree made final by the April 10, 2006 order denying his exceptions which he appealed in *Goff I*. We have considered the possibility that Phillip uses the term "judgment" broadly and may be referring to the circuit court's QDRO entered May 2, 2006 which included language requiring "[t]hat the amount or percentage of [Phillip's] benefits to be awarded, assigned and paid by the Plan to [Joy] is . . . One-half (50%) of said plan amount, as of April 6, 2006." (R.700). We also considered that Phillip may be referring to the October 5, 2006 order "adjug[ing] that the effective date that [Joy] shall begin receiving benefits under [Phillip's] defined benefit plan shall be the same date as [Phillip] elected to begin receiving disability benefits under said Plan." (R.731). Both orders, however, were merely the means by which the decree itself was enforced. Phillip's CR 60.02(f) motion collaterally attacked the decree.[6]

On January 8, 2009, the circuit court denied Phillip's CR 60.02(a) motion as well as his CR 60.02(f) motion. (R.846-847). On the same date, the

[6] When the circuit court denied Phillip's exceptions with its April 10, 2006 order, the April 6, 2006 decree and the April 10, 2006 order itself became final. Because no motion pursuant to CR 52.02 or CR 59 was filed between April 10 and April 20, 2006, finality was not suspended and the time for filing a notice of appeal expired on May 10, 2006. CR 73.02(1)(e); *Kidwell v. Mason*, 564 S.W2d 534, 535 (Ky. 1978)("The decree of dissolution of marriage, including the assignment of property, like other civil judgments became final ten days after its decree." Internal quotation marks and citation omitted.). Nevertheless, in *Goff I* this Court reviewed the decree as though an appeal from the decree had been perfected. *See* footnote 2, *supra*. The QDROs and the circuit court's October 5, 2006 order amending the QDRO were not interlocutory as Phillip suggests. These were orders entered upon "the authority of a court to enforce its own judgments and remove any obstructions to such enforcement." *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky.1970). If these orders had run contradictory to the final judgment, Phillip could have taken an appeal from each on the ground that they effectively modified a final judgment that the circuit court, except upon CR 60.02 motion, lost the jurisdiction to amend. This Phillip did not do. Ten days after their entry, they became final; thirty days after their entry they were no longer appealable.

circuit court also entered an amended QDRO incorporating the language required by the plan administrator. (R.843).

On January 16, 2009, Phillip filed a motion pursuant to CR 59.05 asking the circuit court to "REVERSE its decision denying [Phillip's] CR 60.02 motion[.]" (Motion; R.851). The circuit court summarily denied that motion in its April 13, 2009 Order. Phillip did not seek relief from the QDRO entered on the same date. Phillip takes his appeal only from the circuit court's order refusing to alter, amend or vacate the previous order denying CR 60.02(f) relief.

Standard of review

The standard for review of the denial of a CR 59.05 motion was comprehensively expressed by our Supreme Court in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky. 2009). However, when we review the denial of a CR 59.05 motion filed successively to an unsuccessful CR 60.02 motion, we keep in mind that the target of the CR 59.05 motion is the order denying the CR 60.02 motion, not the final decree or judgment or the subsequent orders enforcing or amending the judgment such as the QDROs in this case or the October 5, 2006 order granting Joy's motion to amend a QDRO, each of which became final 10 days after entry although subject to attack in the circuit court on those grounds set forth in CR 60.02.[7]

[7] While our civil rules do not permit successive post-judgment motions, *Mollett v. Trustmark Ins. Co.*, 134 S.W.3d 621, 624 (Ky. App. 2003)(citing *Cloverleaf Dairy v. Michels*, 636 S.W.2d 894, 895-896 (Ky. App. 1982), the circuit court's "ruling on [Phillip's CR] 60.02 motion was a final judgment from which [he] could have taken an appeal. Having filed and served the CR 59.05 motion within 10 days of the court's 'final judgment' which denied the motion to set aside the" decree, the order denying the CR 60.02 motion did not become final and the circuit court

The CR 59.05 motion gave the circuit court the opportunity to reconsider whether it should have granted Phillip's CR 60.02 motion. *Mingey v. Cline Leasing Service, Inc*., 707 S.W.2d 794, 796 (Ky. App. 1986). Effectively, upon reconsideration, the circuit court denied Phillip's CR 60.02(f) motion a second time.

"[A] ruling on a CR 59.05 motion is not a final or an appealable order[,]" *id*., but it does make final the judgment it seeks to alter, amend or vacate. In cases such as this, "[t]he court's ruling on the . . . CR . . . 60.02 motion was a final judgment from which the appellant could have taken an appeal." *Id.* Therefore, the proper standard of review to be applied in this case is that applicable to the denial of a CR 60.02 motion.

Our standard of review of a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Phillip is entitled to our review of the denial of his CR 60.02(f) motion, but we disagree with his conclusory statement in the Notice of Appeal that the denial of his CR 59.05 made all prior orders final and appealable, including the circuit court's "orders entered 1-8-09 and 10-5-06[.]" His CR 59.05 motion sought relief only from "that portion of the Court's Order entered January 8, 2009 which

retained jurisdiction until it ruled on the CR 59.05 motion. *Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986).

denies [Phillip's] Motion for Relief from Judgment Pursuant to CR 60.02." He did not seek relief from the QDROs entered on January 8, 2009. Furthermore, his CR 60.02(f) motion did not seek relief from the October 5, 2006 order amending the QDRO, but "from the judgment requiring him to divide equally his disability pay with" Joy. That requirement was contained in the circuit court's April 6, 2006 decree, made final on April 10, 2006, when the circuit court overruled Phillip's exceptions to the DRC's February 16, 2006 recommendations regarding the equal division of Phillip's defined benefit plan between Phillip and Joy.

In sum, we are reviewing, under the abuse of discretion standard, the circuit court's denial of CR 60.02(f) relief from the requirement incorporated in the decree that Phillip divide his defined benefit plan equally with Joy.

Analysis

To be entitled to CR 60.02(f) relief, Phillip had to present to the circuit court a "reason of an extraordinary nature justifying relief." CR 60.02(f). "What constitutes a reason of extraordinary nature is left to judicial construction." *Commonwealth v. Spaulding*, 991 S.W.2d 651, 655 (Ky. 1999). In *Fortney v. Mahan*, 302 S.W.2d 842 (1957), the Kentucky Supreme Court said that two factors are to be considered a part of that judicial construction. They are: "(1) whether the moving party had a fair opportunity to present his claim at the trial on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties." *Id.* at 842. However, when a CR 60.02(f) motion is brought more than a year after the entry of the judgment being attacked as Phillip did, judicial

construction includes an additional consideration – the time-barred bases for relief under CR 60.02(a), (b), and (c) must be inapplicable. *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473, 478 (Ky. App. 2003)(citing *Spaulding* at 655 ("CR 60.02(f) is a catch-all provision that encompasses those grounds, which would justify relief pursuant to writ of *coram nobis*, that are not otherwise set forth in the rule.")). This is so because CR 60.02(f) was not intended to provide an alternative when relief for claims that are specifically addressed in subsections (a), (b), and (c) is time-barred. *See* CR 60.02 (The motion shall be made . . . on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken"); *Alliant Hospitals* at 479 ("subsection (f) was not intended to provide a means of evading the [time] strictures of the other subsections").

We turn first to this last factor. There appears to be no basis for claiming relief under CR 60.02(b), newly discovered evidence, or CR 60.02(c), perjured or falsified evidence. However, we must consider why CR 60.02(a), "mistake, inadvertence, surprise or excusable neglect[,]" would not be applicable here. Phillip argues generally in his brief that neither he nor Joy, nor their legal representatives, intended that Phillip share his disability benefits. After quoting the DRC's recommendations adopted by the circuit court that "Phillip's defined benefit plan shall be divided equally[,]" Phillip states that he "remains unaware that this language would result in the effective surrender of his disability income." (Brief, p. 5). Clearly, having to share his disability benefits with Joy was not a consequence of the decree that Phillip expected. It appears to this Court that

Phillip actually pursued relief because of the "mistake, inadvertence, [and] surprise" attendant to that consequence, thereby making CR 60.02(a) and not CR 60.02(f) the proper ground for relief. To the extent the relief he sought should have been based upon CR 60.02(a), the one-year time restriction on the rule would have justified the circuit court's denial.

Turning next to the first of the two factors set forth in *Fortney*, we cannot conclude that Phillip was deprived of an opportunity to present his claim at the trial on the merits.

If Phillip desired that his disability payments be excluded from his agreement to divide the benefits of his defined benefit plan with Joy, he failed to assert that claim in either the first or second hearings before the DRC. Even if Phillip had not elected to receive disability payments from the defined benefit plan before the first hearing, he knew his disability had already been determined and that disability benefits were available under the plan. Six months before the DRC conducted the parties' second hearing, Phillip's election to receive disability benefits from one of those plans had been approved by the plan's trustees, although Joy did not learn of this until *Goff I* was pending before this Court. At the second hearing, Phillip could have revealed his receipt of these disability payments and qualified his agreement to equally divide his benefit plans by asserting his claim to the disability payments as nonmarital property. This he did not do. As we said in *Goff I* in a different context, "The party claiming property . . . as his/her nonmarital property . . . bears the burden of proof on that issue." *Goff I*, p. 2 (quoting *Hunter*

v. Hunter, 127 S.W.3d 656, 659-60 (Ky. App. 2003)); *see also*, *Gertler v. Gertler*, 303 S.W.3d 131, 134 (Ky. App. 2010)("party claiming that property, or an interest therein, acquired during the marriage is nonmarital bears the burden of proof."). Clearly, Phillip was not denied the opportunity to present his claim at the trial upon the merits.

Nor did Phillip avail himself of the opportunity to alert the circuit court prior to the decree of his position on the disability payments that he was actually receiving at that point in time. Phillip's exceptions to the DRC's recommendations failed to clearly assert a claim that his disability payments were nonmarital. But he did claim generally that the DRC erred in dividing his retirement plans. And while the circuit court may have been persuaded by a clearer exception, it chose to accept the DRC's recommendation which was based on Phillip's agreement.

Additionally, after the decree was entered and before Phillip filed his notice of appeal in *Goff I*, Joy moved the circuit court for entry of the original QDRO which made no provision for excepting the disability benefits from the equal division of the benefits under Phillip's defined benefit plan. Phillip did not oppose that motion. The circuit court granted Joy's motion and entered the QDRO on May 2, 2006. Phillip did not take an appeal from that QDRO. (See footnote 2, *supra*, explaining why the QDRO is not an interlocutory order but a final and appealable order). If Phillip believed this QDRO was inconsistent with the decree, he kept that belief to himself.

Furthermore, although he leads this Court to believe the contrary, when he took his appeal in *Goff I*, he specifically argued that his disability benefits were nonmarital and that no part of them should have been awarded to Joy. He stated in his brief in the prior case that

> had he been afforded the opportunity [of presenting additional evidence to the DRC, he] would have advised the Court [through the DRC] that his disability benefits are derived from one of the plans, rendering it indivisible [under] Holman v. Holman, (Ky. 2002) 84 S.W.3d 903 . . . .
>
> Thus the Commissioner erred in simply awarding [Joy] a one-half interest in the Appellant's retirement funds without due consideration of what amounts were or will be nonmarital[.]

(Appellants brief, p. 15-16, from *Goff I*); *Howard v. Commonwealth*, 240 Ky. 307, 42 S.W.2d 335, 339 (1931)("We have often held that courts take judicial notice of their own records."). In ruling on that argument, we said, "In view of his agreement of an equal division of this asset at the first hearing, we fail to see any basis upon which Goff was entitled to present further evidence of the kind he proposes. We find no error in the denial of his request to do so." *Goff I*, p. 4. Even if our decision in *Goff I* was wrong, Phillip waived the right to complain about it by failing to petition this Court pursuant to CR 76.32 and by failing to move the Supreme Court for discretionary review.

Finally, after Joy learned that the defined benefit plan was already making disability payment distributions to Phillip and, based on the plan administrator's interpretation of the decree and the May 2, 2006 QDRO, was

retaining a portion of the payments for her, she moved the circuit court to amend the QDRO so that those payments could be released. Phillip could have objected to that motion, but he did not. After the circuit court granted Joy's motion to modify the QDRO on October 5, 2006, Phillip could have taken an appeal from that order, but he did not.[8]

Phillip decries this Court's failure to address the authority he has continually claimed controls his case, *Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002). However, neither this Court nor the circuit court, so it appears, has ignored this authority. *Holman* stands for the proposition "that disability retirement benefits are properly classified as marital or nonmarital property according to the character of the property they replace." *Id.* at 904. Accordingly, Phillip's "future, post-dissolution disability retirement benefits, which replace his future nonmarital earnings . . . , constitute [his] separate nonmarital property." *Id.* However, nothing prevents a spouse from agreeing on the record to share his nonmarital property with the other spouse as Phillip did here. Of course, courts will set aside such agreements upon grounds of unconscionability. *See Cameron v. Cameron*, 2007 WL 29429, *3 (No. 2005-CA-001998-MR)(Ky. App., January 5, 2007) (husband "contested the Agreement because it divided all property, whether marital or nonmarital, equally between the parties" and "[w]hile the Agreement may be described as a bad bargain, we agree it does not rise to the level of

[8] A QDRO entered in accordance with the final decree obviously is not an interlocutory order but simply enforces the decree. See footnote 5, *supra*. A party who believes a QDRO fails in its purpose to enforce the judgment consistently with the judgment's terms may appeal that order to this Court. *See Perry v. Perry*, 143 S.W.3d 632, 632-33 (Ky. App. 2004).

unconscionable.").[9] Phillip argued in his CR 59.05 motion that to allow Joy to collect half his disability payments "while he scrapes by without sufficient funds to pay for his medications and other physical needs . . . would be unconscionable." (Motion; R.850). While such circumstances may be indicative of a bad bargain, we cannot say that they make Phillip's agreement unconscionable as a matter of law. Therefore, we cannot find that the circuit court abused its discretion by not finding this a "reason of an extraordinary nature justifying relief." CR 60.02(f).

In point of fact, the reason of extraordinary nature Phillip offered in his CR 60.02(f) motion was that "since he was declared disabled in November 2004, his mental health has deteriorated, and it is clear his disability is permanent [and] that he does not have enough money to pay his bills, including his medications." (Motion; R.827). He further states that Joy will receive a windfall if the judgment incorporating his agreement to divide his defined benefit plan is not set aside and all of his disability payments awarded to him as his nonmarital property. Perhaps if Phillip had never had the opportunity to present his claim at the trial on the merits, this might be reason for finding that granting Phillip relief would not be inequitable to Joy. Under these circumstances, we cannot say that the circuit court's denial of Phillip's CR 60.02(f) motion for these reasons constituted an abuse of discretion.

Joy presents an alternative argument for affirming the circuit court – the law of the case. She argues, with good reason, that this Court has already

[9] We do not cite *Cameron* as persuasive authority pursuant to CR 76.28(4)(c), but merely to demonstrate consistency with this Court's prior reasoning.

finally resolved the issue Phillip presented to the circuit court and now on appeal again. "[A] decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation[.]" *Inman v. Inman,* 648 S.W.2d 847 at 849 (Ky. 1982). When in *Goff I* we rejected Phillip's claim that *Holman*, *supra*, controlled and his disability payments were nonmarital and indivisible, we established the law of the case. Right or wrong, Phillip failed to challenge that decision in the proper forum and it became final, thereby closing the door on a resurrection of that argument here.

We find no abuse of discretion in this case and, therefore, for the foregoing reasons, the April 13, 2009 order of the Ohio Circuit Court denying Phillip's CR 59.05 motion to reconsider his CR 60.02(f) motion, and that court's January 8, 2009 order denying Phillip's CR 60.02(f) motion are affirmed.

ALL CONCUR.

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