

[Cite as *Cicchini v. Crew*, 2002-Ohio-5467.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80723

GUY M. CICCHINI, :
 :
 Plaintiff-Appellee : JOURNAL ENTRY
 : and
 vs. : OPINION
 :
 MICHELLE A. CREW, ET AL., :
 :
 Defendants-Appellants :

DATE OF ANNOUNCEMENT :
 OF DECISION : OCTOBER 10, 2002

CHARACTER OF PROCEEDING: : Civil appeal from
 : Common Pleas Court
 : Juvenile Court Division
 : Case No. PR-9072331

JUDGMENT : AFFIRMED.

DATE OF JOURNALIZATION :

APPEARANCES:

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MICHAEL J. CORRIGAN, P.J.:

{¶1} Defendant-appellant Michelle A. Crew ("Crew") appeals the trial court's grant of the plaintiff-appellee Guy M. Cicchini's ("Cicchini") motion for a new trial. For the reasons set forth below, we affirm.

I.

{¶2} Crew and Cicchini are the parents of a minor child. The events leading to this appeal are as follows. Through a January 28, 1998 order, Cicchini was ordered to pay \$4,697 a month in child support. On July 11, 2000, Cicchini filed a motion to modify child support, arguing that his retirement resulted in changed circumstances. Crew filed her own motion to modify child support

on November 21, 2000, based on recent tax returns relating to Cicchini.

{¶3} The trial court held an evidentiary hearing on November 27-28, 2000 and consolidated the two motions for modification. On the first day of the hearing, the court heard from Pete Amendola, Cicchini's personal and business accountant, who testified as a fact witness. The court also heard from Bernard Agin, called by Crew as an expert witness. Cicchini himself testified.

{¶4} On the first day of the hearing, the court made a ruling to allow Cicchini to bring information regarding, as the court said, "the source of that money and what the payments are for." Counsel for Crew objected: "If Mr. Cicchini cannot explain the discovery that he provided to me months ago on the stand, I don't think it's appropriate to give him the opportunity to think of it overnight."

{¶5} The hearing resumed the following day and Cicchini brought with him the financial information. Initially, the court noted that the attorneys had been in conference with the court in an attempt to resolve certain issues. The court then mentioned the information brought by Cicchini and stated to Crew's counsel, "since it's quite voluminous, [do] you want to pass calling him to the stand until you have an opportunity to examine that?" Crew's counsel decided that, rather than wasting time going through all of the records, she would waive cross-examination at that time. The hearing was quickly ended.

{¶6} On that day, November 28, the court filed two journal entries. One read, "Cause continued, existing order remains in effect." The second read, "Parties shall submit Closing Arguments & Findings of Fact & Conclusions of Law by 1-29-01."

{¶7} The parties filed their proposed findings of fact and conclusions of law on January 29, 2001. On April 13, 2001, the trial court issued a judgment entry of modification of support with findings of fact and conclusions of law. Through this entry, the trial court found Cicchini's gross income to be \$1,127,610 and modified the child support he owed to \$9,753.26 per month.

{¶8} Cicchini filed a motion for new trial on April 27, 2001. The trial court held a hearing on the matter on December 20, 2001. It is clear from this hearing that the parties entered into settlement negotiations after the hearings of November 27-28, but that no agreement was reached. Through a journal entry dated December 20, 2001, the trial court granted his motion pursuant to Civ.R. 59(A) "for the particular purpose of the presentation of additional evidence and/or testimony relating solely to the determination of what constitutes the gross income of [Cicchini] ***." The trial court found "that there is good cause shown in order to present additional evidence and/or testimony in this regard."

{¶9} This appeal followed. Crew brings two assignments of error for review: (1) The Trial Court Abused its Discretion When it Failed to Articulate a Specific Reason for Granting Appellee's

Motion for a New Trial; and (2) The Trial Court Abused its Discretion Granting Appellee a New Trial on the Grounds that He Failed to Properly Present Evidence.

II.

A.

{¶10} In order to reverse the trial court's order granting a new trial, we must find that the trial court abused its discretion: "Whether to grant a motion for new trial is up to the discretion of the trial court. [Citation omitted.] Absent clear evidence that the trial court acted unreasonably, unconscionably, or arbitrarily and rendered a decision which was clearly wrong and without legal basis, the trial court's decision must be affirmed. [Citation omitted.]" *Dawson v. Metrohealth Ctr.* (1995), 104 Ohio App.3d 654, 656.

{¶11} Ohio Civ.R. 59 governs the granting of new trials. The rule lists nine specific grounds upon which a trial court may grant a new trial. Civ.R. 59(A). It then states,

{¶12} "In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

{¶13} "When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

{¶14} "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been

entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment." Civ.R. 59(A).

{¶15} The staff notes to the rule, discussing the bench trial provision above, states that "[i]n effect, the rule provides for a partial new trial in a non-jury action so that the complete retaking of testimony may be avoided."

B.

{¶16} Here, the trial court clearly did not contemplate re-trying the entire matter. Rather, the court granted a new trial "for the particular purpose of the presentation of additional evidence and/or testimony relating solely to the determination of what constitutes the gross income" of Cicchini. Crew's first argument that the trial court did not "articulate a specific reason for granting" the new trial, is therefore not well taken.¹

{¶17} C.

¹ {¶a} The trial court's order stated that the new trial was granted "for good cause shown." Civil Rule 59(A) requires that the court "specify in writing the grounds upon which such new trial is granted." None of the nine grounds specified by the rule, however, apply here. The grounds, therefore, for the granting of a new trial are permitted in the rule's catch-all provision, which allows "[i]n addition to the above [specific] grounds," a new trial "in the sound discretion of the court *for good cause shown.*" Civ.R. 59(A) (emphasis added).

{¶b} Had the grounds been, for example, that the original judgment was contrary to law, the court would have been required to specify that reason. Civ.R. 59(A)(7). Here, the grounds were "for good cause shown." Together with the trial court's statement regarding the "limited purpose" of the new trial, the court's statement "for good cause shown" satisfies Civ.R. 59(A). See, e.g., *Larry Murphy Dump Truck Serv. v. Sam Abdalla Enters.*, 114

{¶18} The issue of whether Cicchini owes child support was not before the trial court (it had already been determined that he did owe). What was before the trial court was the amount of child support he owed. To determine the amount owed, the amount of Cicchini's gross income had to be determined first.

{¶19} At issue, then, was whether certain deposits made to Cicchini's bank account constituted gross income. Cicchini argues that the deposits included, for example, reimbursements for expenses, which should not be considered in determining gross income. Crew counters, in her second argument, that Cicchini did not establish what the nature of the deposits was, that he had a sufficient opportunity to bring evidence at the original trial and that he should not be afforded another chance at a new trial.

{¶20} Civil Rule 59, however, grants that decision to the "sound discretion" of the trial court. Again, in an action tried without a jury, the trial court "may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment," Civ.R. 59(A), unless the court has abused its discretion.

{¶21} Here, the court granted a new trial for the limited purpose of determining Cicchini's gross income. Inasmuch as the determination of child support cannot be made without a determination of gross income, and as the trial court here was the

trier of fact, we hold that the trial court did not abuse its discretion by granting a new trial for the limited purposes of determining Cicchini's gross income. As the trial court said, it would have been better to get everything done at one time. It would also have been better had the parties settled. Instead, the issues of Cicchini's gross income and his resultant child support were not resolved. A more orderly resolution may have been hoped for, but the record does not show "clear evidence" that the trial court, by allowing a determination of Cicchini's gross income, acted "unreasonably, unconscionably, or arbitrarily and rendered a decision which was clearly wrong and without legal basis[.]" *Dawson* at 656.

Judgment affirmed.

{¶22} It is ordered that appellee recover of appellants his costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, PRESIDING JUDGE
TERRENCE O'DONNELL, J., CONCURS.

COLLEEN CONWAY COONEY, J., DISSENTSWITH SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶23} I respectfully dissent from the majority's decision because I find that the trial court abused its discretion in granting a new trial and therefore I would reverse.

{¶24} In order to fully comprehend the trial court's abuse of its discretion, it is necessary to give a broader history of the case at hand than is recited by the majority.

{¶25} Since 1990, Crew and Cicchini have been embroiled in numerous legal battles in juvenile court regarding custody, visitation, and support of their son. In fact, at the same time these motions were filed, *Cicchini v. Crew* (Dec. 18, 2000), Cuyahoga App. Nos. 74009, 76954, (*Cicchini I*) was pending before

this court. In *Cicchini I*, the January 28, 1998 support order was at issue, among other matters.

{¶26} As stated by the majority, on November 27 and 28, 2000, an evidentiary hearing was held on Cicchini's alleged change of circumstances and request to modify the support order.

{¶27} At the November 27 hearing, an issue arose regarding deposits into Cicchini's personal checking account. Between April and December 1999, \$1,257,455.44 was deposited into the account. When Crew's counsel inquired about these deposits, Cicchini was unable to identify the source of the deposits. At the request of Cicchini's attorney, the evidentiary hearing was continued and Cicchini produced a large stack of canceled checks the very next day. However, due to the large volume, Crew's attorney requested that she be given time to review them and requested a continuance for the cross-examination of Cicchini.

{¶28} The trial court issued an order as a result of the November 27 and 28 hearings, dated December 6, 2000, and journalized on February 9, 2001. In this order, the trial court declared that "all evidence was heard and submitted" and further stated "the Court shall issue an order after argument and findings of fact and conclusions of law are submitted. *** [T]he parties shall submit closing Argument and Findings of Fact and Conclusions of Law by January 29, 2001."

{¶29} On December 18, 2000, this court upheld the trial court's January 1998 support order. See *Cicchini I*. Pursuant to

this court's instruction, the trial court issued an order on January 22, 2001¹ regarding the *Cicchini I* decision. In this order, the trial court acknowledged the pending motions to modify child support by again ordering Cicchini and Crew to file final arguments and proposed findings of fact and conclusions of law on or before January 29, 2001.

{¶30} In this order, the court also made a series of findings which reveal that Cicchini engaged in delay tactics while the motions to modify were pending. As stated by the trial court, although discovery was requested by Crew prior to the November 27, 2000 hearing, Cicchini informed Crew that canceled checks and documents reflecting deposits into his personal account did not exist. However, after some discussion on the record at the November 27, 2000 hearing, Cicchini's counsel produced stacks of canceled checks the very next day. Also on November 28, 2000, the court verbally ordered Cicchini to provide copies of these documents to Crew's attorney for her review, but Cicchini failed to do so until a subsequent court hearing held on December 21, 2000.

{¶31} In concluding its January 2001 order, the court stated "that pursuant to agreement of counsel and the parties at the hearing held on November 28, 2000, counsel for Defendant may notify the court and all counsel of record that she desires to re-open her case based upon the submission of this new documentation."

¹This order was not journalized until February 9, 2001, but will be referred to as the January 2001 order.

The court ordered that such request to re-open Crew's case-in-chief after review of the documents shall be in writing and shall occur before January 28, 2001.

{¶32} On January 29, 2001, the parties filed proposed findings of fact and conclusions of law, which contained no mention of the source of the 1999 checking account deposits.

{¶33} On April 13, 2001, the trial court issued an order which modified the child support and, in reference to the disputed deposits, the trial court found that Cicchini could not identify the source of these deposits.

{¶34} In Cicchini's April 27, 2001 motion for new trial, he argued that the trial court erred by including the amount of the 1999 checking account deposits when he was not given an opportunity to testify as to the source of these deposits. He further explained the source of the deposits and the reason said deposits should be excluded from the gross income calculation.

{¶35} On December 20, 2001, the trial court held a lengthy hearing² on the motion for new trial. At the time of the December 2001 hearing, the financial documentation had already been produced and reviewed by all parties. Thus, since this matter was not tried to a jury, the trial court could have used this hearing as an opportunity to exercise its authority under Civ.R. 59 to "open the judgment *** take additional testimony, amend findings of fact and conclusions of law *** and enter a new judgment." Instead, the

²The transcript of the proceeding is 72 pages in length.

trial court engaged in lengthy, incoherent stories about law school professors, trips to New Orleans, his children, other cases he was trying or had tried, and trips to McDonald's with his wife.³ Often the trial court interrupted the attorneys⁴ to continue the stories instead of dealing with the issue at hand.

{¶36} On the same date, the trial court granted the motion. The trial court's justification for granting the new trial was "for good cause shown in order to present additional evidence and/or testimony ***."

{¶37} In the order granting a new trial, the court attempts to narrow the scope of the second trial by stating that only evidence regarding Cicchini's gross income is to be submitted.

However, this was the main issue in controversy at the first trial and the purpose of the November 27, 2000 hearing. Specifically, it was Cicchini who provided Crew with the evidence of the bank deposits during the discovery process prior to the evidentiary hearing. If he disputed that these deposits were part of his gross income he should have been prepared to argue the point at the hearing.

³ See pp. 5-6, 9, 10-12, 16-17, 30, 33, 37, 39-40, 42-43, 45-46, 60 (goes off the record to continue the discussion), 64, 70-72. See also, pp. 13-35 (A dispute exists between the parties regarding where their son should go to high school. Among addressing the legitimate factors to be considered, the trial court engages in lengthy personal opinions regarding distance between the child's home and school and the benefits of a Catholic education.)

⁴ See pp. 5, 71 (referring to the attorneys while the entry granting the new trial was being drafted, "You guys work on the that while I tell [Cicchini] a story about his McDonald's.")

{¶38} Even if we assume that Cicchini was surprised by Crew's attempt to include the 1999 deposits as part of his gross income, the trial court gave him ample opportunity to introduce evidence of the source of the deposits by continuing the hearing. Cicchini then brought the evidence to court on November 28, 2000.

{¶39} Although the trial court subsequently put the burden to introduce this evidence on Crew, at no time did Cicchini file a motion to re-open his case or attempt to introduce this evidence by way of proffer. Furthermore, when the trial court stated in its January 2001 order that all evidence had been submitted, Cicchini never objected.

{¶40} In addition, on January 29, 2001, Cicchini filed his proposed findings of fact and conclusions of law, and remained completely silent on the issue of the source of the 1999 checking account deposits. The first time that he explained the source of the 1999 deposits is in his motion for new trial filed on April 27, 2001, five months after the issue was initially raised and the evidence was "discovered."

{¶41} As stated by this court in *Tanton v. Zubkowicz* (1972), 43 Ohio App.2d 1, "[t]he granting of a new trial on the grounds that a party failed to properly present evidence to the trier of the facts is an abuse of discretion." *Id.*, see also, *Balwas v. Balwas* (Sept. 7, 2000) Cuyahoga App. No. 75946.

{¶42} Here, Cicchini failed to present the evidence at issue despite having ample opportunity to do so. Accordingly, the

trial court abused its discretion in providing him another chance to present this evidence by granting him a new trial. To hold otherwise serves only to reward Cicchini's use of delay tactics during the course of these proceedings.

{¶43} Accordingly, I would reverse the juvenile court's decision.