[Cite as *Fisher v. Fisher*, 2009-Ohio-4739.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
MERRI LINN FISHER	:	John W. Wise, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2008 CA 00049
	:	
	:	
GREGORY LYNN FISHER	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Fairfield County Court of Common Pleas, Domestic Relations Division, Case No. 05 DR 351
JUDGMENT:	Affirmed In Part and Reversed In Part
DATE OF JUDGMENT ENTRY:	September 1, 2009

APPEARANCES:

For Plaintiff-Appellee

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Edwards, J.

{¶1} Appellant, Gregory Lynn Fisher, appeals a judgment of the Fairfield County Common Pleas Court, Domestic Relations Division, overruling his motion to modify spousal support, finding him in contempt of court for failing to provide COBRA benefits for appellee Merrie Lynn Fisher and finding that appellee was not in contempt of court for making telephone calls to appellant.

STATEMENT OF FACTS AND CASE

{¶2} The parties were married for over 27 years. During the marriage, appellee was primarily a stay-at-home mom for the parties' five children. Appellee obtained a certificate to enable her to substitute teach and did some substitute teaching during the marriage. Appellant worked as an over-the-road truck driver, earning an average of $56,793.00 over the last three years of the marriage. During this time, appellant's employer assigned him a designated run to Georgia twice a week. In mid-2006, ownership of the company where appellant worked changed from the father to the son. The employer changed the method of paying drivers from a percentage of a run to 39 cents a mile. Appellant was informed in November of 2006 that his run to Georgia would likely be discontinued in the future.

{¶3} The parties were divorced on December 4, 2006. Pursuant to a separation agreement, appellant was ordered to pay spousal support to appellee in the amount of $1,250.00 per month. He was ordered to provide COBRA health insurance coverage for appellee, who has been diagnosed with bipolar disorder.

{¶4} On May 10, 2007, appellant filed a motion to terminate or modify spousal support and COBRA coverage based on a change of circumstances not contemplated

at the time of the divorce. Appellant asserted that in January, 2007, his run to Georgia was cut, and as a result his income had been reduced by 20% because he no longer had a dedicated run and had to take daily assignments. Appellant further argued that while appellee was not employed at the time of the divorce, she had since obtained employment at The Lunch Box restaurant.

{¶5} Appellant also filed a motion on May 10, 2007, for a temporary restraining order. The court issued an order restraining each party from harassing the other, including telephone harassment.

{¶6} On May 22, 2007, appellee filed a motion for contempt alleging that appellant had failed to comply with the COBRA provision of the divorce decree. A check appellant wrote for appellee's COBRA coverage was returned for insufficient funds, and because the grace period had passed before the problem was discovered, her coverage was terminated.

{¶7} Appellant filed a motion on June 14, 2007, alleging that appellee violated the restraining order by leaving six messages on his answering machine, two of which were less than seven minutes apart.

{¶8} In September of 2007, appellant took a position "in the yard" of the company for which he worked. Appellant made $1,100.00 - $1,200.00 a week when he had a dedicated run, $700.00 - $800.00 a week taking assigned runs, and now made $850.00 - $900.00 a week at the position in the yard. Appellant remarried, and his new wife earns $400.00 a week and receives rental income from property she owns in Tennessee.

{¶9} The case proceeded to trial before Magistrate Bender on November 29, 2007. The magistrate found that the change in circumstances was contemplated by the parties at the time they entered the separation agreement and overruled appellant's motion to modify spousal support. The magistrate found appellant in contempt of court for failing to maintain COBRA coverage for appellee. The order of contempt sentenced appellant to 10 days in jail but provided that appellant could purge the contempt by reimbursing the Department of Job and Family Services (DJFS) for health and medical expenses paid on appellee's behalf between January 1, 2007, and November 30, 2007, reimbursing appellee for out-of-pocket health expenses in the same time period, paying appellee's legal fees in the amount of $1,500.00 for prosecution of the contempt motion, paying court costs for prosecution of the contempt motion, and maintaining his spousal support payments for one year. The court did not find appellee in contempt for calling appellant because she was attempting to help him by acting as a go-between with an annoying neighbor.

{¶10} Appellant filed objections to the magistrate's report. The judge removed the condition of purge which required appellant to reimburse DJFS for appellee's health expenses, and in all other respects adopted the decision of the magistrate. Appellant assigns three errors on appeal:

{¶11} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO MODIFY OR TERMINATE SPOUSAL SUPPORT WHEN THE EVIDENCE PRESENTED CLEARLY DEMONSTRATED CHANGES IN CIRCUMSTANCES OF THE PARTIES NOT CONTEMPLATED AT THE TIME OF THE ORIGINAL ORDER.

{¶12} "II. THE TRIAL COURT MADE AN IMPROPER FINDING THAT APPELLANT FAILED TO COMPLY WITH ARTICLE 6(C) OF THE DIVORCE DECREE AND SEPARATION AGREEMENT; AND ISSUED IMPROPER ORDERS TO PURGE.

{¶13} "III. THE TRIAL COURT ERRED IN NOT FINDING APPELLEE IN CONTEMPT FOR VIOLATION OF THE RESTRAINING ORDER."

I

{¶14} In his first assignment of error, appellant argues that the court abused its discretion in failing to modify spousal support when the evidence demonstrated a change in the circumstances of the parties not contemplated at the time of the original order.

{¶15} Modifications of spousal support are reviewable under an abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 541 N.E.2d 1028. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶16} R.C. 3105.18(E) governs the trial court's consideration in modifying an existing spousal support order. The statute provides in relevant part:

{¶17} "(E) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after May 2, 1986, and before January 1, 1991, or if a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action that is determined on or after January 1, 1991, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the

alimony or spousal support unless the court determines that the circumstances of either party have changed and unless one of the following applies:

{¶18} "(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.

{¶19} "(2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support."

{¶20} R.C. 3105.18(F) defines a change in circumstances as including any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.

{¶21} Although R.C. 3105.18(F) sets forth a partial listing of what can be considered as a change in circumstances for purposes of establishing trial court jurisdiction, it does not alter the requirement that a trial court must find a substantial change in circumstances before modifying a prior order for spousal support. *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 905 N.E.2d 172, 2009-Ohio-1222, ¶ 1 of the syllabus. A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree expressly reserved jurisdiction to modify and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree. Id. at syllabus 2.

{¶22} The burden of establishing the need for modification of spousal support rests with the party seeking modification. *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 676 N.E.2d 1249.

{¶23} Appellant first challenges several of the court's findings of fact. The court found that the company appellant worked for changed ownership from father to son three years ago, and the son had been making a concerted effort to move the business to Mexico. Appellant argues that the evidence at trial demonstrated that the change in ownership was in the middle of 2006, and not three years prior to trial. He also argues that he testified that the company in Georgia which was the destination of the dedicated run gradually began moving production to Mexico, not the company which employed him.

{¶24} The magistrate's findings on this issue, adopted by the court, had no effect on the outcome of the case. While the change in ownership was two years prior to the court's judgment rather than three, the change occurred prior to the time appellant entered the separation agreement which was the time period the court focused on to determine what the parties contemplated at the time they entered the agreement. Regarding the move to Mexico, appellant testified, "I had a dedicated run for three years that would stop down to Georgia and back twice a week and it was a steady income, it was in the auto industry and they - - in the process of three years they were moving to Mexico, and the company that we were dealing with went to a different company." Tr. 10-11. Appellant's testimony was not entirely clear regarding which company was moving to Mexico, and once again the judgment does not reflect that this finding of fact, even if mistaken, had any effect on the outcome of the case.

{¶25} Appellant next argues that the court erred in finding that other employees left the company for other employment, while appellant chose to stay with his current employer. Appellant testified that when the son took over the business, a lot of people left the company because the son brought in an analyst and they started "chopping us up." Tr. 79-80. Appellant testified that when the father owned the company people were staying, and when the son took over people were not staying. Tr. 81. The magistrate's finding of fact is supported by the testimony.

{¶26} Appellant next argues that the court erred in finding that he did not present a current itemization of expenses. The record does not reflect that appellant presented in written form a complete itemization of his expenses. He did testify as to some of his expenses, including a payment on a mortgage he took out to pay the property settlement and other costs associated with the divorce, but the record does not reflect that appellant presented the court with a complete itemization of his expenses.

{¶27} Appellant argues that the court's finding that the court did not have jurisdiction to modify the duration of spousal support is an incorrect interpretation of the separation agreement. Appellant asked the court to modify the amount or terminate spousal support in its entirety. Because the court found no change in circumstances to justify modification of spousal support, the court would not have terminated spousal support even if the court found it had jurisdiction to do so. This issue is therefore moot.

{¶28} Appellant argues that the court erred in finding the change of circumstances was contemplated by the parties at the time of the separation agreement. Appellant's income had decreased from about $56,000.00 in 2006 to $38,000.00 as of the date of trial in November, 2007. Appellant argues that he testified

that while he was informed in November of 2006 that his run would likely be discontinued in the future, he did not know when the route would be discontinued. He argues that the evidence demonstrated the run was cancelled in January, 2007, which was not in the contemplation of the parties at the time they entered the agreement.

{¶29} Appellant acknowledged that prior to signing the separation agreement, he was aware that his company was undergoing significant changes and that the truck runs were gradually slowing down. Tr. 42. While appellant testified at one point that he didn't know if his Georgia run would be discontinued in a year, six months or five years, he admitted that he told his attorney prior to signing the separation agreement that he anticipated a pay reduction in January. Tr. 41-42. Based on appellant's admission that he informed his attorney that he expected a pay reduction in January of 2007, we cannot find that the court abused its discretion in finding that the change in circumstances was in the contemplation of the parties at the time they entered the agreement.

{¶30} Appellant next argues that the finding that appellee is not underemployed is improper because she is capable of working more hours than she claimed she is able to work. The evidence reflects that appellee would make less money as a substitute teacher than she makes at the Lunch Box, even if she had a substitute teaching job every day of the school year. Tr. 134-35. Appellee testified that her mental problems affect her ability to work, and about 25-30 hours a week is all she can handle. Tr. 95. She testified that the manager of the Lunch Box was very flexible with her hours given her condition. Tr. 95. While appellant requested a vocational assessment of appellee, he presented no expert evidence that she was underemployed. Appellant testified that

he personally didn't believe her bipolar diagnosis limited her in any way or had any impact on her ability to work. Tr. 39. While he conceded that her treating physician had expressed the opinion that she might have trouble working, appellant testified that, the way the doctor worded it, "you can't go wrong." Tr. 40. Appellant testified:

{¶31} "Well, it says anxiety, depression where she might be able to work, might not be able to work. Just like the weatherman saying it will be sunny today unless it's cloudy. I mean, he couldn't' be wrong with the recommendation letter that he wrote." Tr. 41.

{¶32} Based on the evidence presented, the court did not err in finding that appellee was not underemployed.

{¶33} Appellant next argues that the court erred in making a "phantom determination" that he was underemployed. Appellant argues that the magistrate's finding that appellant is "an established over-the-road truck driver with a CDL who has decided to accept a different position with his prior employer for a set schedule and pay" amounts to a determination that he is voluntarily underemployed or results in a higher income being imputed to him. We disagree. The court did not suggest that appellant was underemployed, and the court's finding concerning appellant's new position is consistent with the evidence presented at trial.

{¶34} Appellant's next argument is that the court erred in considering his new wife's income. Appellant argues that she does not contribute to household expenses other than her own personal expenses.

{¶35} While a new spouse's income cannot be considered in determining an obligor's ability to pay spousal support, the court may consider the fact that the obligor

directly benefits from sharing living expenses with his new wife. *Manzella v. Manzella*, Montgomery App. No. 20618, 2005-Ohio-4519, ¶12, citing *McNutt v. McNutt*, Montgomery App. No. 20752, 2005-Ohio-3752.

{¶36} Although appellant testified that none of his new spouse's income was used for joint household expenses and he paid all household bills himself, the court did not abuse its discretion in considering that her income was available for living expenses.

{¶37} Finally, appellant argues that the court erred in admitting appellee's Exhibit A, as it was a summary of information compiled by appellee's attorney.

{¶38} Even if the admission of the exhibit were error, appellant has not demonstrated prejudice. The court stated as follows when appellant objected to the exhibit:

{¶39} "MS. SMITH: Well, Your Honor, with regard to Exhibit A, there was testimony with regard to the actual income, but other than that there has been no testimony with regard to the notes or analysis that was purged into this system. So, therefore I would object to Exhibit A with regard to its submission. I have no objection to the remaining exhibits.

{¶40} "THE COURT: Well, the remaining exhibits, I presume, comes from the exhibits, basically. I did the math.

{¶41} "MS. SMITH: Well, there was no testimony correlating that, Your Honor.

{¶42} "MR. OGILVIE: Well, Your Honor, my client has identified the numbers as being accurate and her client identified the numbers as they relate to him as being accurate.

{¶43} "THE COURT: Well, I sat and did the math, anyway, so I'll admit A through J." Tr. 137-138.

{¶44} Because the magistrate did the math on his own underlying the compilation in Exhibit A, appellant has not demonstrated prejudice from the admission of this exhibit.

{¶45} The first assignment of error is overruled.

II

{¶46} In his second assignment of error, appellant argues that the court erred in finding him in contempt of court for failing to maintain appellee's COBRA coverage, and the court issued improper orders to purge the contempt.

{¶47} We will not reverse a contempt sanction absent an abuse of discretion by the trial court. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11, 417 N.E.2d 1249. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶48} Failure to pay court-ordered spousal support is classified as a civil contempt. See *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 139-40, 472 N.E.2d 1085. Because the nature of the contempt is civil, "willful disobedience" (i.e. intent) is not a necessary element. *Pugh*, 15 Ohio St.3d at 140.

{¶49} Appellant argues that he did not intentionally fail to pay for appellee's COBRA coverage because he was not aware that the check had bounced and her coverage was cancelled until the grace period had passed and it was too late to reissue the check. However, intent is not a necessary element of civil contempt. Appellant was

ordered to maintain COBRA coverage for appellee for the time period allowed by COBRA. Appellant maintained coverage for only one month. The court did not abuse its discretion in finding appellant in contempt of court.

{¶50} Appellant next argues that the court erred in modifying spousal support by requiring that he pay an extra $160.00 a month spousal support based on the costs appellee now incurs to pay for insurance due to appellant's failure to maintain her COBRA coverage.[1]

{¶51} The court correctly noted that appellee failed to file a motion to modify spousal support, and the language of the decree gave the court jurisdiction to review the health insurance issue but did not provide a trigger mechanism for modification of the spousal support order.

{¶52} Civ. R. 15(B) provides in pertinent part:

{¶53} "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or

[1] Appellant argues that the court increased spousal support as a purge condition. The modification of spousal support based on appellee paying for her own insurance is not listed as a condition of purge in the judgment.

defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

{¶54} In the instant case, appellee did not file a motion seeking an increase in spousal support. Further, the issue was not tried by the express or implied consent of the parties, as appellant maintained throughout that in the absence of a motion to modify, the court could not increase spousal support to cover the cost to appellee of maintaining insurance coverage. As noted by the trial court, the result may have been equitable in light of appellant's failure to maintain COBRA coverage, resulting in appellee paying for her own insurance coverage. However, at the time the issue was before the court, the court lacked authority to increase spousal support to compensate for appellee's increased insurance cost.

{¶55} Appellant argues that the purge order directing him to reimburse appellee within 30 days after presentation of expenses for any out of pocket health, medical, or pharmaceuticals paid by her between January 1, 2007, and November 30, 2007, is not for purposes of compliance and is inconsistent with the evidence presented at trial.

{¶56} Appellant argues that the court's finding that appellee has prescription costs of $525.28 per month is inconsistent with the evidence because appellant presented receipts of her prescription costs for only one month. Appellant further argues that the COBRA plan would not have covered prescription costs. Appellant also argues the time period should be limited to March, 2007, the time in which COBRA coverage was terminated.

{¶57} We find no abuse of discretion in the court's purge order. The court did not order appellant to pay a determined amount in prescription costs and out-of-pocket

health costs. Therefore, any claim that the amount appellee is requesting is not supported by the evidence is premature. Further, appellant was required by court order to provide COBRA coverage for appellee until her eligibility for such coverage expired, and cannot now claim that he should not be responsible for any expenses incurred after the COBRA coverage was terminated by his failure to pay in accordance with the divorce decree.

{¶58} In addition, while appellant represents that appellee testified that the COBRA plan did not provide prescription coverage, appellee testified:

{¶59} "Q. So isn't it true that the Cobra Coverage would not have provided coverage for the medication?

{¶60} "A. I don't know. That, I don't know.

{¶61} "Q. But isn't it true that the Cobra Coverage would not have provided coverage for the medication?

{¶62} "A. (Inaudible.) They paid for part of co-pay for the medicines." Tr. 116.

{¶63} Based on the evidence presented at trial, we cannot find that the court abused its discretion in requiring appellant to pay appellee for the out-of-pocket costs she incurred as a result of his failure to maintain COBRA coverage as required by the court's prior order.

{¶64} Appellant next argues that the court erred in ordering him to pay appellee's attorney fees and court costs in conjunction with the contempt finding. Appellant's sole argument concerning these conditions of purge is, "The contempt finding by the Magistrate is not supported by the evidence and inconsistent with Ohio law. Therefore, the Purge Order is moot." Brief of Appellant, p. 19. As we have found

the court did not abuse its discretion in finding appellant in contempt, appellant's claim is without merit.

{¶65} Finally, appellant argues that the condition of purge that he maintain his spousal support payments for a period of one year is improper because it regulates future conduct.

{¶66} A contempt order which regulates future conduct "simply amounts to the court's reaffirmation of its previous support order and can have no effect since any effort to punish a future violation of the support order would require new notice, hearing and determination." *Sexton v. Sexton*, Richland App. No. 2006CA0083, 2007-Ohio-4751, ¶55., citing *Matter of Grohoske* (June 16, 1983), Franklin App. No. 82AP-948, unreported, 1983 WL 3573. A purge order may provide for suspension of a jail sentence on condition that the contemnor pays an arrearage; however, it may not regulate future conduct by conditioning suspension of a jail sentence on making payments on current support obligations. Id.; *Brett v. Brett*, Knox App. No. 01CA000018, 2002-Ohio-1841.

{¶67} The court erred in setting a condition of purge requiring appellant to stay current on his spousal support for a period of one year.

{¶68} The second assignment of error is sustained as to the court's increase of spousal support and as to the condition of purge requiring appellant to stay current on his spousal support payments for one year. In all other respects, the assignment of error is overruled.

III

{¶69} In his final assignment of error, appellant argues that the court abused its discretion in failing to find appellee in contempt of the restraining order, which ordered no harassment, for making several phone calls to him.

{¶70} Appellant argues that appellee left five voicemail messages on his telephone over the course of several hours on May 31, 2007, and that such conduct was harassing.

{¶71} The magistrate's finding was supported by the testimony at the hearing:

{¶72} "The Defendant's position that he was harassed or annoyed by the Plaintiff when she called and left five messages concerning his neighbor's attempt to contact him is without merit. Both parties agreed that the neighbor is annoying and persistent. Proof of this is the fact that he came to Plaintiff's place of employment and insisted that the Plaintiff contact the Defendant even though they were divorced. In order to satisfy the neighbor she made several contacts because she could not reach him by phone. In fact, she was basically helping the Defendant by being a go-between with the annoying neighbor. He only had to listen to her messages at one time. This is not harassment and she was not annoying. His neighbor was being unreasonable and annoying by insisting that the Plaintiff made the contact and he came to her place of work. Defendant's contempt motion is overruled."

{¶73} Further, the judge found as follows on objections to the magistrate's report:

{¶74} "The court concurs with the Magistrate's Decision relating to the issue of whether the Plaintiff was in contempt for violating the restraining order. While the

Plaintiff did make several calls, leaving voice messages for the Defendant, relating to a neighbor, the Defendant listened to the messages at one time but instead of returning the call to the Plaintiff, and resolving her questions, he called his attorney. The Court finds no contempt on the part of the Plaintiff relating to the phone calls."

{¶75} The trial court did not abuse its discretion in finding that appellee's attempts to contact appellant on behalf of a neighbor, who both parties testified can be annoying, did not constitute harassment in violation of the restraining order.

{¶76} The third assignment of error is overruled.

{¶77} The judgment of the Fairfield County Common Pleas Court is reversed as to the purge condition requiring appellant to maintain his spousal support payments for a period of one year and as to the $160.00 increase in spousal support. In all other respects the judgment is affirmed.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur

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JUDGES

JAE/r0821

[Cite as *Fisher v. Fisher*, 2009-Ohio-4739.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MERRI LINN FISHER	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GREGORY LYNN FISHER	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00049

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. Costs to be paid 75% by appellant and 25% by appellee.

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JUDGES