

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nina Garritano

Court of Appeals No. L-09-1256

Appellee

Trial Court No. DR2003-0833

v.

Robert Pacella and
Thomas P. Goodwin, Esq.

DECISION AND JUDGMENT

Appellant

Decided: April 16, 2010

* * * * *

Donna M. Engwert-Loyd, for appellee.

Henry B. Herschel, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Robert Pacella, appeals the August 31, 2009 judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which, following a remand from this court, found that appellee, Nina Garritano, was entitled to a \$26,382 credit against the property settlement for spousal support overpayments.

Appellee has filed an App.R. 23 motion for sanctions arguing that the instant appeal is frivolous.

{¶ 2} The underlying facts of this appeal are set forth in *Garritano v. Pacella*, 6th Dist. No. L-07-1171, 2009-Ohio-2928. (*Garritano I.*) In *Garritano I*, this court determined that appellee was entitled to a credit for her overpayment of spousal support during the pendency of the divorce. *Id.* at ¶ 106. We remanded the matter for the limited purpose of calculation of the overpayment amount. *Id.* at ¶ 107.

{¶ 3} On remand, pursuant to the trial court's order, the parties each submitted a proposed recalculation of the spousal support overpayments. Appellee asserted that the overpayments totaled \$26,382 and that the full amount should be credited against the total lump sum property settlement that appellee was ordered to pay appellant in the final entry of divorce. Conversely, appellant claimed that appellee should only be credited with 1/3 of the temporary spousal support payments made and, thus, not be entitled to a credit.

{¶ 4} On August 31, 2009, the trial court, agreeing with appellee's calculation, ordered that appellee be credited with \$26,382 in spousal support overpayments. This appeal followed.

{¶ 5} Appellant raises the following assignment of error for our review:

{¶ 6} "The court erred in its decision that plaintiff-appellee be credited in the amount of \$26,382.00 against the property settlement awarded to defendant-appellant in the final judgment entry of divorce."

{¶ 7} In his sole assignment of error, appellant argues that the trial court erred by crediting appellee with a \$26,382 overpayment of spousal support. Appellant appears to argue that the trial court erred by ordering spousal support for only three years at \$4,000 per month. Appellant also contends that he is somehow being punished by the court.

{¶ 8} As we stated in *Garritano I*:

{¶ 9} "Appellate review of a court's decision to grant or deny requested spousal support is limited to a determination of whether the court abused its discretion. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 626. Absent an abuse of that discretion, a reviewing court may not substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. An abuse of discretion is more than an error of law or judgment; it implies that the trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* [1983], 5 Ohio St.3d at 219." Id. at ¶ 79.

{¶ 10} We note that any argument appellant has made relating to the amount of spousal support awarded in the trial court's April 12, 2007 judgment entry of divorce was considered and rejected by this court in *Garritano I*. Appellant further contends that the temporary spousal support order should have been continued as a final order. Again, this court has already considered the propriety of the spousal support order in *Garritano I* and appellant cites no authority in support of his contention.

{¶ 11} On remand, in their respective "recalculation" memoranda, the parties agreed on the sum of \$170,382 which represented the temporary spousal support paid by

appellee to appellant from 2003 until 2007. The parties also did not dispute that in the final judgment entry of divorce, the trial court awarded appellant spousal support totaling \$144,000. Accordingly, we find that the trial court did not abuse its discretion in ordering that appellee be awarded a \$26,382 credit to be offset from the property settlement. Appellant's assignment of error is not well-taken.

{¶ 12} We will now address appellee's motion for sanctions pursuant to App.R. 23. App.R. 23 provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs." A frivolous appeal is one that presents no reasonable question for review. *Talbott v. Fountas* (1984), 16 Ohio App.3d 226. Sanctions imposed under App.R. 23 serve to provide compensation for the non-appealing party for the defense of spurious appeals, and to deter frivolity and preserve the appellate calendar for cases truly worthy of consideration. *Tessler v. Ayer* (1995), 108 Ohio App.3d 47, 58, quoting *Nwabara v. Willacy* (May 6, 1994), 8th Dist. No. 65450.

{¶ 13} As set forth above, on remand the parties did not dispute the amount of temporary spousal support paid during the pendency of the divorce or the amount owed under the judgment entry of divorce. On appeal, appellant attempted to reargue his dissatisfaction with the spousal support order; an argument we rejected on direct appeal. Accordingly, we find that appellant's appeal was frivolous and that appellee's motion for sanctions is well-taken. Appellee is directed to submit documentation indicating her attorney's time spent defending this appeal. Appellant has ten days following appellee's

filing of the documentation to respond. Thereafter, the court will consider the documentation and any arguments relating thereto in arriving at a determination on the amount of the fees to be awarded.

{¶ 14} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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