

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0473

DOCKS VENTURE, LLC, )  
 Appellant, )  
 -vs- )  
 DASHING PACIFIC GROUP, )  
 LTD., )  
 Appellant. )

Case No.: )  
 C.A. Case No.: :L-12-1312 )  
 C.P. Case No.: CR12-1340 )

APPEAL FROM THE LUCAS  
 COUNTY COURT OF APPEALS

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NOTICE OF CERTIFIED CONFLICT

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*On Behalf of Appellee*

*On Behalf of Appellant*

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 SUPREME COURT OF OHIO

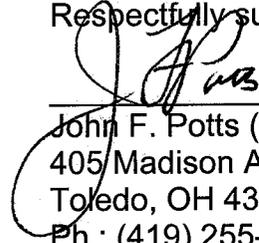
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**NOTICE OF CERTIFIED CONFLICT**

Appellant, Docks Venture, LLC, hereby gives notice that on February 25, 2013, the Lucas County Court of Appeals, Sixth Appellate District, issued a Decision and Judgment Entry in Docks Venture LLC vs. Dashing Pacific, Ltd., 6<sup>th</sup> Dist. No. L-12-1213, finding said decision to be in conflict with the decision of the Eleventh District Court of Appeals in Davis vs. Davis, 11<sup>th</sup> Dist. No. 2004-G-2572, 2004-Ohio-2572, and certifying the matter to the Ohio Supreme Court for review and final determination pursuant to Section 3(B)(4), Article IV of the Ohio Constitution.

The Decision and Judgment Entry of the Sixth District Court of Appeals dated February 25, 2013, certifying the conflict and constituting the certifying Court's opinion is attached hereto as EXHIBIT A. The Memorandum Opinion of the Eleventh District Court of Appeals in Davis vs. Davis, 11<sup>th</sup> Dist. No. 2004-G-2572, 2004-Ohio-2572 is attached hereto as EXHIBIT B.

Respectfully submitted,

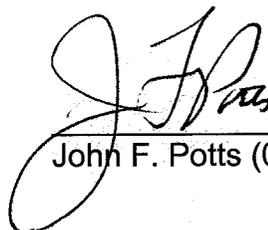


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*Attorney for Appellant*

**CERTIFICATION**

This is to certify that a copy of the foregoing was served by ordinary U.S. Mail this 21<sup>st</sup> day of March, 2013, upon: Byron S. Choka, *Spengler Nathanson, P.L.L.*, Four Seagate, Suite 400, Toledo, OH 43604.



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John F. Potts (0033846)

# **EXHIBIT A**

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COURT OF APPEALS  
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COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURTS

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

Docks Venture LLC

Court of Appeals No. L-12-1312

Appellee

Trial Court No. CI0201201340

v.

Dashing Pacific Group LTD

DECISION AND JUDGMENT ENTRY

Appellant

Decided: FEB 25 2013

\* \* \* \* \*

This case is before the court on the motion of appellee, Docks Venture, LLC ("Docks"), to dismiss the appeal. Appellant, Dashing Pacific Group, Ltd. ("Dashing"), has filed a motion in opposition to appellee's motion to dismiss.

On October 31, 2012, Dashing appealed a judgment of the Lucas County Court of Common Pleas which granted Docks' motion to show cause. The trial court found Dashing to be in contempt of a prior order dated April 19, 2012, and ordered Dashing to correct the distribution lines within the premises leased by Docks. The trial court ordered

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FEB 25 2013

the work to be completed within 30 days from the date of the order, or Dashing would be fined \$1000 per day until the work is complete.

In Docks' motion to dismiss the appeal, it argues that Dashing's appeal is not taken from a final and appealable order. Specifically, Docks cites decisions of the Seventh and Eleventh District Courts of Appeals and argues that a contempt citation is not a final and appealable order if it imposes a conditional punishment coupled with an opportunity to purge. See *Davis v. Davis*, 11th Dist. No. 2004-G-2572, 2004-Ohio-4390, ¶ 6. See also *Bd. of Trustees of Chester Twp. v. Baumgardner*, 11th Dist. No. 2002-G-2430, 2003-Ohio-4361, ¶ 12. However, this court has previously determined that a contempt citation is final and appealable if it includes both a finding of contempt and pronouncement of a penalty or sanction, even though the order contains purge conditions. See *In re J.Z.*, 6th Dist. No. H-11-003, 2012-Ohio-1105, ¶ 7; *Strong v. Strong*, 6th Dist. No. L-01-1464, 2002-Ohio-2693. Accordingly, Docks' motion to dismiss is found not well-taken and is denied.

We have previously certified this conflict to the Supreme Court of Ohio. *In re J.Z.* at ¶ 16-18. The Ohio Constitution, Article IV, Section 3(B)(4) states:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of this state, the judges shall

certify the record of the case to the supreme court for review and final determination.

In order to qualify for certification to the Supreme Court of Ohio pursuant to the Ohio Constitution, Article IV, Section 3(B)(4), a case must meet the following three conditions:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

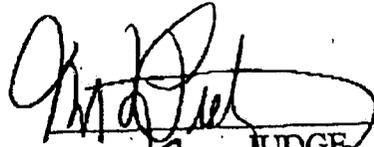
We find that our holding today is again in conflict with the Eleventh District Court of Appeals' decision in *Davis v. Davis*, 11th Dist. No.2004-G-2572, 2004-Ohio-4390. Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue: In a contempt of court action, is the trial court's judgment finding a party in contempt and imposing a sentence final and appealable when the sentence is imposed, albeit with purge conditions, or when the defendant has failed to purge his contempt and the sentence is executed?

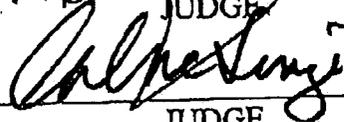
Appellee's motion to dismiss is denied. It is so ordered.

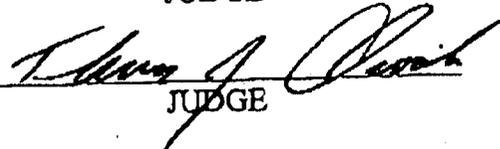
Mark L. Pietrykowski, J.

Arlene Singer, J.

Thomas J. Osowik, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

# **EXHIBIT B**

[Cite as *Davis v. Davis*, 2004-Ohio-4390.]

THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA, OHIO

LINNETTE DAVIS,	:	MEMORANDUM OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2004-G-2572
GARY DAVIS,	:	
Defendant-Appellee.	:	

Civil appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 87 D 854.

Judgment: Appeal dismissed.

*Roger L. Kleinman*, McDonald Hopkins Co., L.P.A., 2100 Bank One Center, 600 Superior Avenue, East, Cleveland, OH, 44114 (For Plaintiff-Appellant).

*Donald Navatsyk*, Thrasher, Dinsmore & Dolan, 100 Seventh Avenue, #150, Chardon, OH, 44024 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{¶1} On May 4, 2004, appellant, Linnette Davis, filed a notice of appeal from an April 5, 2004 judgment of the Geauga County Court of Common Pleas. In that judgment, the trial court found appellant in contempt and ordered her to serve five days

in the Geauga County Safety Center unless she purged herself of the contempt by paying appellee, Gary Davis, \$2,818.26 by July 1, 2004.

{¶2} On July 6, 2004, this court issued a judgment entry ordering appellant to show cause why this case should not be dismissed. Relying on *In re Smeed* (May 24, 1996), 11th Dist. No. 96-L-059 and *Eggett v. Eggett* (Feb. 3, 1995), 11th Dist. No. 94-L-090, this court stated that a contempt judgment is not a final appealable order when the contemnor still has an opportunity to purge by performing the required act.

{¶3} On July 22, 2004, one day past the deadline for filing a response, appellant filed a memorandum in support of jurisdiction. Thus, this appeal could be dismissed for failure to prosecute as outlined in this court's July 6, 2004 judgment. However, appellant's memorandum will be considered on its merits. No response has been filed by appellee.

{¶4} Appellant argues that she is caught between two impossible choices. If she purges herself of contempt, an appeal would then be moot. That is correct.

{¶5} In the alternative, if she refuses to purge herself of contempt, the trial court will likely refuse to stay its judgment because appellant has no funds to post a supersedeas bond and, therefore, she would end up serving her jail time before an appeal could be heard. That is pure speculation on appellant's part. Once her sentence is ordered to be imposed, she may then seek a stay from the trial court. If that is unsuccessful, she can seek a stay from this court.

{¶6} The law is clear: a contempt citation is not a final appealable order if it only imposes a conditional punishment coupled with an opportunity to purge the contempt. *Board of Trustees of Concord Twp. V. Baumgardner*, 11th Dist. No. 2002-G-

2430, 2003-Ohio-4361, ¶ 12. Until the opportunity to purge has been removed, there is no final appealable order.

{¶7} Accordingly, this appeal is sua sponte dismissed for lack of a final appealable order.

Appeal dismissed.

DONALD R. FORD, P.J.,

JUDITH A. CHRISTLEY, J.,

concur.