

ORIGINAL

In the
Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI
ENQUIRER,

Appellee,

vs.

HONORABLE TRACIE M. HUNTER

Appellant.

Case No. 13-1171

On Appeal from the Court of Appeals
for the First Appellate District

MERIT BRIEF OF APPELLEE THE CINCINNATI ENQUIRER

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STATEMENT OF FACTS

A. Introduction

This appeal concerns a collateral order of the Court of Appeals for the First Appellate District (“First District”) holding Appellant, the Honorable Tracie M. Hunter (“Appellant”) in contempt. (Appellant’s Supp. at A1-A2). The appeal does not require this Court to address the underlying merits of The Cincinnati Enquirer’s (“Appellee”) Complaint for Writ of Prohibition (“Complaint”) against Appellant, which the First District has not yet decided.

Despite the fact that the First District has not yet ruled on the merits of Appellee’s Complaint, Appellant nevertheless asks this Court to proceed as if it had. To this end, Appellant presents this Court with an eleven-page “Statement of Facts” reciting events that relate mostly to Appellant’s defense of waiver, and that have nothing to do with whether the First District abused its discretion in holding Appellant in contempt of its March 29, 2013 Alternative Writ of Prohibition. Moreover, many of the facts Appellant relies on in her Merit Brief are disputed issues of fact on which the court below has not had made a finding. For this reason, Appellee does not respond to Appellant’s “Statement of Facts” to the extent it contains factual assertions that have nothing to do with the collateral issue presented here. Only the facts recited by the First District in its July 23, 2013 Entry of Contempt are pertinent to this appeal.¹

B. Factual Background

The facts pertinent to this appeal begin with Appellant’s entry of March 15, 2013, by which she revoked Appellee’s “permission to broadcast, televise, photograph, or record courtroom proceedings in [Hamilton County Juvenile Court] case number 12-7366” (“March 15

¹ Appellant also includes in her Supplement her “response” to the First District’s decision holding her in contempt at A38-A62. This document is not part of the record, and therefore, the Court should not consider it for purposes of this appeal.

Entry”). (Appellant’s Supp. at A-19.) According to her March 15 Entry, Appellant revoked Appellee’s permission to attend proceedings in case number 12-7366 based upon her finding that Appellee violated her September 17, 2012 order (“September 17 Order”). (Appellant’s Supp. at A-33.) The September 17 Order purported to prohibit Appellee from publishing the names of juveniles, and the parents of those juveniles, involved in certain juvenile delinquency proceedings. (*Id.*) The parties refer to the cases purportedly covered by Appellant’s September 17 Order as the North College Hill Cases.² (Appellant’s Merit Br. at 1 n.1.)

Pursuant to her March 15 Entry, Appellant’s court personnel refused Enquirer reporter Jennifer Baker entry to attend a hearing in case number 12-7366 in her courtroom on March 18. (*See Baker Aff.* at ¶¶ 10; Entry of Contempt, Appellant’s Supp. at A-6.) The hearing Ms. Baker attempted to cover was otherwise open to the public and other media outlets. (*See Baker Aff.* at ¶ 11; Entry of Contempt, Appellant’s Supp. at A-6.)

On March 25, after Appellant’s courtroom personnel refused to permit Ms. Baker to attend a hearing in another of the North College Hill Cases, The Enquirer filed its Complaint for Writ of Prohibition (“Complaint”). (Compl. in Prohibition.) By its Complaint, The Enquirer seeks, in part, to prohibit Appellant from imposing her name-publication restriction, and to prohibit Appellant from denying Enquirer reporters access to her courtroom in retaliation for such publication. (*Id.*) Appellee accompanied its Complaint with a motion for preliminary injunction to enjoin Appellant from barring Enquirer reporters from hearings in the North College Hill Cases. (Mot. for Prelim. Injunction.)

² The North College Hill Cases consist of the following actions pending in the Hamilton County Court of Common Pleas, Juvenile Division: *In Re: T.M.*, Case Nos. 12-7285; 12-7305; *In Re: T.M.*, Case Nos. 12-7288, 12-7306; *In Re: M.J.*, Case Nos. 12-7279, 12-7308; *In Re: A.H.*, Case Nos. 12-7366, 12-7367; *In Re: L.C.*, Case Nos. 12-7278, 12-7307; *In Re: D.C.*, Case Nos. 12-7304, 12-7303.

The First District granted Appellee's motion and issued its Alternative Writ on March 29,

2013. (Appellant's Supp. at A-17.) The journalized entry provided as follows:

This came to be considered upon the complaint for writ of prohibition, the motion for preliminary injunction, and the memorandum in opposition to the motion. The court construes the motion for preliminary injunction as a request for an alternative writ. The court grants an alternative writ of prohibition ordering the respondent to stay enforcement of the documents dated March 15, 2013 and March 25, 2013, revoking The Cincinnati Enquirer's permission to broadcast, televise, photograph, or record courtroom proceedings. Representatives of the Enquirer shall be permitted in the courtroom.

In the same entry, the First District ordered the parties to file a stipulated record and set a deadline for Appellant to answer the Complaint. (*Id.*)

On June 24, 2013, a disposition hearing in case number 12-7366 took place before Appellant, the same case for which Appellant issued her March 15 Entry. (Submission of Evidence, Tr. of June 24, 2013 Hearing in Case No. 12-007366 ("June 24 Tr.")). Enquirer counsel John C. Greiner attended the hearing. (Greiner Aff. ¶ 3.)

At the beginning of the hearing, Appellant announced that she had journalized an entry granting Appellee's application to attend the hearing ("June 24 Entry"). (June 24 Tr. at 5:14-5:21.) She then proceeded to read the entry into the record. (June 24 Tr. at 5:20-8:12.) Those parts of the June 24 Entry found relevant by the First District provided:

This applicant was previously barred from attending all future proceedings in this matter after violating this Court's conditions in a previous hearing, whereby this Court granted permission to broadcast. This Entry neither alters nor amends this Court's previous Orders of this Court's pending or future Orders, which shall be decided upon proper Motion to this court on a case by case basis.

The Court, upon consideration of the above request, pursuant only to the First District Court's Order, while a lawsuit litigating these issues, is pending, hereby grants its authorization to broadcast, televise, photograph, or otherwise record judicial proceedings in the above captioned matter, subject to the following conditions:

...

Names of the Defendants and their parents are barred from publication or broadcast for all current and future proceedings regarding this matter.

If media applicant violates this order, the Judge may revoke violator(s) permission to broadcast, videotape, photograph, or record all future courtroom proceedings; and additionally may take any other actions available under law.

(*Id.*; Entry of Contempt, Appellant's Supp. at A-7.)

The First District found that "despite acknowledging [the First District's] order, [Appellee] nonetheless placed of record an entry that she maintained 'neither alter[ed] nor amend[ed] [her] previous Orders.'" (*Id.* at A-14.) The First District further found that Appellee's June 24 Entry "again imposed the name-publication restriction as a condition of access in violation of [the First District's] Alternative Writ staying, or suspending the effect of, the March 15 entry, and ordering that [Appellant] be admitted to the juvenile proceedings." (*Id.*) Appellee also denied The Enquirer representatives present during her recitation of the June 24 Entry the opportunity to object to that entry. (*Id.* at A-14-A-15; June 24 Tr. 8:14-9:3.)

C. Procedural History

Immediately following the June 24 hearing, Appellee filed its motion requesting that the First District hold Appellant in contempt of its Alternative Writ ("Motion for Contempt"). (Pet'r's. Motion for Contempt, June 24, 2013.) After affording both parties the opportunity to brief the issues raised by Appellee's Motion for Contempt, the First District held an evidentiary hearing on July 22. (Entry of Contempt, Appellant's Supp. at A-11.) Appellant, who was present at the hearing, did not offer testimony or other evidence in opposition to Appellee's Motion for Contempt. (*Id.* at A-5.) The following day the First District journalized its Entry of Contempt ("Decision"). (*Id.*)

ARGUMENT

Proposition of Law No. I:

This Court reviews the First District's Decision holding appellants in contempt of its Alternative Writ only for abuse of discretion.

This appeal involves a decision of a court of appeals in a civil contempt proceeding. The Court reviews a lower court's decision in a civil contempt proceeding only for abuse of discretion. *See State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St. 2d 10, 11, 417 N.E.2d 1249 (stating that the Court "will not reverse the decision of the court below in a contempt proceeding in the absence of a showing of an abuse of discretion"). "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State ex rel. Hillyer v. Tuscarawas City Bd. of Comm'rs* (1994), 70 Ohio St. 3d 94, 97, 637 N.E.2d 311. A corollary of this review standard is that when this Court reviews a lower court's decision for abuse of discretion, it will not substitute its own judgment for that of the lower court. *Id.*

Appellant incorrectly characterizes the issue before this Court as "whether the Court of Appeals *erred* in finding Judge Hunter in contempt," rather than whether it abused its discretion. (Appellant's Br. at 11 (emphasis added).) Consequently, Appellant offers no argument supporting the conclusion that the errors she identifies in her Merit Brief rise above a mere "error of law or judgment." To the contrary, Appellant claims only that the "the Court of Appeals *erred* in finding Judge Hunter in Contempt [sic] of its Alternative Writ of March 29, 2013." (Appellant's Br. at 16 (emphasis added).) The Court may therefore reject its arguments in support of reversal on this basis alone. Nevertheless, the record below shows that the First District's Decision was sound, and certainly does not rise to the level of an abuse of discretion.

Proposition of Law No. II:

The First District did not abuse its discretion in holding Appellant in contempt of its March 29 Alternative Writ.

The First District's Decision holding Appellant in Contempt of its March 29 Alternative Writ was not unreasonable, arbitrary or unconscionable, and therefore, was not an abuse of discretion.

A. The First District applied the correct legal standard in deciding Appellee's Motion for Contempt.

First, the written opinion accompanying the First District's Decision demonstrates that it applied the correct legal standard with respect to both the scope of its contempt power, and the evidentiary standard applicable to a finding of contempt. As for the scope of its contempt power, the First District correctly observed that "a person guilty of the disobedience of, or resistance to, a lawful writ . . . may be punished for contempt." (Entry of Contempt, Appellant's Supp. at A-9 (quoting R.C. 2705.02(A) (internal quotations omitted)). The First District further held that Appellant was not exempt from compliance with the First District Alternative Writ as a party to Appellee's original action. The First District also applied the correct evidentiary standard in reviewing the evidence presented to it, finding "by clear and convincing evidence" that Appellant disobeyed its Alternative Writ. (*Id.* at A-9 (citing *Brown v. Executive 2000, Inc.* (1980), 64 Ohio St.2d 250, 253, 416 N.E.2d 610)). Appellant offers no argument to the contrary on either point.

B. The First District's finding that Appellant violated its Alternative Writ was not unreasonable, arbitrary or unconscionable.

Second, with respect to a First District's evidentiary finding, this Court will not find an abuse of discretion "[a]s long as some competent, credible evidence exists to support the court of appeals' judgment." *State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs* (2010), 127

Ohio St. 3d, 202, 204, 2010-Ohio-5073, 937 N.E.2d 1274. The record in this case shows that the First District's decision rested upon competent and credible evidence for its finding.

Central to the First District's Decision here was its finding that Appellant "placed of record an entry that she maintained 'neither alter[ed] nor amend[ed] [her] previous Orders,' and thereby "again imposed the name-publication restriction as a condition of access in violation of [its] Alternative Writ staying, or suspending the effect of, the March 15 entry, and ordering that The Enquirer be admitted to the juvenile proceedings." (Entry of Contempt, Appellant's Supp. at A-8.) The record supports these findings.

Consequently, Appellant does not dispute the fact that she imposed the name-publication restriction in her June 24 Entry. Instead, Respondent argues: (1) that Appellee waived its First Amendment rights by allegedly entering into an agreement in August 2012; and (2) that the First District's Alternative Writ did not sufficiently "spell out the details of compliance in clear, specific and unambiguous terms the exact duties and obligations imposed by the [Alternative Writ]." (Appellant's Merit Br. at 12-18.)

1. Appellant's waiver defense is irrelevant to the factual issue whether she violated the First District's Alternative Writ.

The "waiver" argument (on which Appellant focuses most of her brief), relates to a defense Appellant asserted in her Answer to Appellant's Complaint. Whether Appellant waived its First Amendment rights to publish the names of the juveniles is wholly irrelevant to the issue whether Appellant violated the Alternative Writ's directive that she permit Enquirer reporters to attend proceedings until the resolution of the lawsuit, irrespective of whether it published the juveniles' names. The First District specifically dispensed with this argument in its Decision, holding that "[a]n order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceeding." (Entry of

Contempt, Appellant's Supp. at A-9 (citing *Bd. of Educ. of Hamilton County Sch. Dist. v. Hamilton Classroom Teachers Ass'n*, 5 Ohio App.3d 51, 53, 449 N.E.2d 26 (12th Dist. 1982)).

Moreover, the question whether a person or entity has waived its First Amendment rights is a question of fact. See *Sambo's Restaurants, Inc. v. Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) (holding that the party asserting a waiver of First Amendment rights must introduce "clear and compelling" evidence that a waiver occurred). The court below never made a finding that Appellee waived its First Amendment rights for purposes of Appellant's "waiver" defense, and Appellee disputes both the relevance of this issue in the court below, as well as Appellant's factual assertion that a waiver occurred. (Pet'r's. Resp. in Opposition to Resp.'s Motion for Summ. J.) This Court must therefore decline Appellant's invitation to resolve this disputed fact issue (whether relevant or not) for the first time here.

2. Appellant's act of journalizing the June 24 Entry was a clear violation of the First District's Alternative Writ.

Appellant's second argument is that the Court erred in finding that its Alternative Writ sufficiently spelled out Appellee's duties and obligations concerning her ability to place conditions on Appellee's access to proceedings in the North College Hill Cases. (Appellant's Merit Br. at 15-18.) This argument is likewise meritless.

First, the First District unequivocally stated in its Alternative Writ that "representatives of The Enquirer shall be permitted in the courtroom." (Appellant's Supp. at A-17.) The court placed no conditions on Appellee's access. (*Id.*) More important, the First District did not permit Appellant to condition Appellee's access on its compliance with Appellant's existing name-publication restriction imposed by the September 17 Entry. Hence, the First District found that by journalizing her June 24 Entry imposing that same restriction, Appellant violated the

Alternative Writ precluding her from further enforcement of the name-publication restriction enforced by her March 15 Entry.

Second, Appellant excluded Appellee's representatives from her courtroom because Appellee reported the publicly available names of the juvenile offenders "in violation" of her September 17 Order. Appellant's September 17 Order is plainly unconstitutional. *See, e.g., Smith v. Daily Mail Publ'g Co.* (1979), 443 U.S. 97, 99 S. Ct. 2667 (West Virginia statute imposing criminal sanctions for publication of juveniles' names held to be a violation of the First Amendment); *Oklahoma Publ'g Co. v. District Court of Oklahoma* (1977), 430 U.S. 308, 311-312, 97 S. Ct. 1045 (holding that court order enjoining press from "publishing, broadcasting, or disseminating" the name or picture of a juvenile was unconstitutional prior restraint on speech). *See also Wilkie v. Robbins* (2007), 551 U.S. 537, 555, 127 S. Ct. 2588 ("the Government may not retaliate for exercising First amendment speech rights"). Accordingly, the First District prohibited Appellant from enforcing her March 15 and March 25 orders, which Appellant issued based solely on the name-publication restriction set out in her September 17 Order. The language of the Alternative Writ is unequivocal on this point: "Representatives of the Enquirer *shall* be permitted in the courtroom." (Appellant's Supp. at A-19.) This was so, notwithstanding Appellant's allegation that The Enquirer published the names of the juveniles in violation of the name-publication restriction contained in her September 17 Order.

Despite the First District's clear directive on this point, Appellant imposed the same name-publication restriction as a condition on Appellee's access in her June 24 Entry. By doing so, Appellant placed Appellee under the very same threat of sanction prohibited by the First District's Alternative Writ. The First District recognized the intent of Appellant on this point, specifically noting that Appellant's June 24 Entry provided that it "neither alter[ed] nor

amend[ed] [Appellant's] previous Orders.” (*Id.* at A-8.) Appellant’s reinstatement of the name-publication restriction in violation of the Alternative Writ was, in effect, the same thing as excluding Appellee’s reporter from her courtroom again.

There is no difference between a court’s kicking a newspaper’s representatives out of a courtroom for publishing juveniles’ names, and announcing that it will kick its reporters out if it publishes the names. Both have the same chilling effect on the newspaper’s ability to exercise its free speech rights. Appellant’s act of journalizing a new entry imposing that same name-publication restriction was therefore a clear violation of the Alternative Writ, and the First District’s finding on this point was not unreasonable, arbitrary or unconscionable. Thus, Appellant’s argument that she did not violate the clear duties and obligations imposed upon her by the First’s District’s Alternative Writ lacks merit.

CONCLUSION

The sole question before this Court in this appeal is whether the First District abused its discretion in holding Appellant in contempt of its March 29 Alternative Writ. For a decision to constitute an abuse of discretion, this Court must find that the decision was unreasonable, arbitrary or unconscionable. Appellant offers no argument that the First District’s decision meets this standard, assigning mere “error” to the decision. Moreover, the record shows that the errors Appellant assigns to the decision are without merit. Accordingly, the Court should affirm the First District’s decision.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Merit Brief of Appellee The Cincinnati Enquirer* was served via regular U.S. Mail, postage prepaid, this 6th day of September, 2013, upon the following:

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APPENDIX

2705.02 Acts in contempt of court.

A person guilty of any of the following acts may be punished as for a contempt:

- (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer;
- (B) Misbehavior of an officer of the court in the performance of official duties, or in official transactions;
- (C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;
- (D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by the officer;
- (E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of the person's recognizance;
- (F) A failure to comply with an order issued pursuant to section 3109.19 or 3111.81 of the Revised Code;
- (G) A failure to obey a subpoena issued by the department of job and family services or a child support enforcement agency pursuant to section 5101.37 of the Revised Code;
- (H) A willful failure to submit to genetic testing, or a willful failure to submit a child to genetic testing, as required by an order for genetic testing issued under section 3111.41 of the Revised Code.

Effective Date: 03-22-2001