[Cite as *Windland v. Windland*, 2017-Ohio-9039.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

JAMES GREGORY WINDLAND,	:	
	:	Case No. 17CA1
Plaintiff-Appellant,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
KATHLEEN SUE WINDLAND,	:	
	:	
Defendant-Appellee.	:	**Released: 12/08/17**

APPEARANCES:

William L. Burton, Burton Law Office, Marietta, Ohio, for Appellant.

Michael D. Lowe, McConnelsville, Ohio, Appellee.[1]

McFarland, J.

{¶1} James Gregory Windland appeals the December 2, 2016 entry of the Washington County Common Pleas Court, which adopted the Magistrate's Decision dated August 18, 2016. Kathleen Sue Windland, n.k.a. Kathleen Sue McKinniss, is Appellant's former spouse. The parties were divorced in 2014. The parties came before the magistrate for hearings on various contempt motions in March 2016.

[1] While Attorney Lowe represented Appellee in the underlying contempt proceeding, neither Attorney Lowe nor Appellee pro se entered an appearance or otherwise participated in the appellate proceedings.

{¶2} The magistrate subsequently filed a written decision to which Appellant filed an objection. The trial court independently reviewed the decision and, in the appealed-from entry, found Appellant to be in contempt of court for: (1) entering the marital residence without providing proper notice to Appellee, and (2) failing to make repairs to the marital home. Appellant was fined accordingly.

{¶3} Appellant's sole assignment of error challenges the sufficiency of the evidence the magistrate, and later the trial court, relied upon in making the contempt determination. Based upon our review of the record, we find the magistrate's decision is supported by clear and convincing evidence. Accordingly, the trial court did not err and abuse its discretion by adopting the magistrate's decision. Appellant's sole assignment of error is without merit and is hereby overruled. The judgment of the trial court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

{¶4} The record reveals Appellant and Appellee were married in 2007, divorced in 2011, and remarried in 2012. On October 1, 2013, Appellant filed a second divorce complaint. Appellee filed an answer and counter-claim. The parties' second divorce was granted in February 2014.

{¶5} The judgment entry final decree of divorce contained several provisions relevant to this appeal. First, the decree granted Appellee exclusive rights to use and occupy the marital residence known as 961 Braun Road, Belpre,

Ohio for two years, after the final decree, beginning March 8, 2014. While Appellee had exclusive rights for two years, she was also ordered to "maintain the property in a 'broom clean' condition and * * * not commit waste." The entry also provided as follows:

> "If the property requires small (less than $250.00) day-to-day repairs, Defendant shall pay for same. However, if a larger problem exists with a major component of the residence (more than a $250.00 repair), Plaintiff shall repair such larger problem. Defendant shall notify Plaintiff in writing of the problem and Plaintiff shall promptly repair said problem. * * * While Plaintiff has the duty to repair, the duty and responsibility to discover and report disrepair is solely that of Defendant."

{¶6} The decree provided that Appellee accepted the premises, which she had been residing in at the time of the divorce, "as is." It further ordered Appellant not to harass or annoy Appellee during her exclusive use of the residence. However, Appellant was permitted to inspect the property with at least a 24-hour advanced notice of inspection.

{¶7} On August 9, 2015, Appellant filed a Verified Motion for an Order to Show Cause and Eviction. Appellant alleged Appellee had engaged in various acts which were specifically prohibited by the restraining order contained in the parties'

final divorce decree.[2] Appellant argued Appellee was acting intentionally to harm Appellant, his business, and his family.

{¶8} On September 18, 2015, Appellee filed a Motion to Show Cause. In the motion, Appellee alleged Appellant was in violation of the court's entry and final decree of divorce for failure to repair extensive water damage in the basement of the 961 Braun Road residence after repeated requests to do so.

{¶9} On October 27, 2015, Appellee filed another Motion to Show Cause. In it she alleged that during the month of September 2015, Appellant had entered her residence without giving the requisite notice. Appellee argued the entry was in violation of the judgment entry and final decree of divorce.

{¶10} On March 8 and 25, 2016, the magistrate held a hearing on all three motions. On August 18, 2016, the magistrate issued a decision dismissing several of the counts contained in the motions.[3] Ultimately, the magistrate found Appellant in contempt for entering Appellee's residence where Appellee resided without providing proper notice. The magistrate also found Appellant to be in

[2] Appellant specifically alleged that Appellee had: (1) interfered with a business relationship between Appellant and his employee; (2) contributed to an article on social media regarding Appellant; and, (3) participated in attempting to arrange of meeting of Appellant's ex-wives to discuss him.

[3] The entry stated:

> "1. Count one of the [Appellant's] Motion, filed August 10, 2015, is dismissed for mootness.
> 2. Count two of the [Appellant's] Motion, filed August 10, 2015 is dismissed in part due to res judicata, and in part due to failing to meet his burden of proof.
> 3. Count three of the [Appellant's] Motion, filed August 10, 2015 was previously dismissed due to lack of jurisdiction."

contempt for failing to make repairs to the marital home. Appellant was fined $250.00 each for the two incidents of contempt.

{¶11} On August 31, 2016, Appellant filed an objection to the magistrate's decision. On December 6, 2016, the trial court issued a ruling denying the objection. The trial court also issued a final entry, finding that the decision of the magistrate was sufficient for the court to make an independent analysis of the issues. The trial court adopted the magistrate's decision finding Appellant in contempt.

{¶12} Appellant filed a timely notice of appeal. However, Appellant failed to prosecute the appeal and on March 17, 2017, the magistrate of this court ordered the appeal to be dismissed unless within 10 days of the filing of the order, Appellant filed a motion for good cause for enlargement of briefing time. On April 11, 2017, Appellant filed a motion for leave to file Appellant's brief out of rule. On April 17, 2017, the magistrate ordered that the brief was deemed submitted as of April 11, 2017.

{¶13} Where necessary, additional facts will be supplemented below.

ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION IS AGAINST THE SUFFICIENCY OF THE EVIDENCE."

A. STANDARD OF REVIEW

{¶14} Appellate review of a contempt order is under the highly deferential

abuse-of-discretion standard; therefore, we will not lightly substitute our judgment for that of the issuing court. *Wall v. Wall,* 4th Dist. Pike No. 14CA848, 2015-Ohio-1928, ¶ 6; *Robinette v. Bryant,* 4th Dist. Lawrence No. 14CA28, 2015-Ohio-119, ¶ 31; *State v. Graham,* 4th Dist. Highland No. 13CA11, 2014-Ohio-3149, ¶ 24, citing *State ex rel. Cincinnati Enquirer v. Hunter,* 138 Ohio St.3d 51, 2013-Ohio-5614, ¶ 29. A trial court abuses its discretion when it is unreasonable, arbitrary, or unconscionable. *Robinette, supra*; *Cullen v. State Farm Mut. Auto. Ins. Co.,* 137 Ohio St.3d 373, 2013–Ohio–4733, 999 N.E.2d 614, ¶ 19.

{¶15} Nevertheless, although the abuse of discretion standard usually affords maximum [deference] to the lower court, no court retains discretion to adopt an incorrect legal rule or to apply an appropriate rule in an inappropriate manner. *2- J Supply Co., Inc. v. Garrett & Parker, LLP*, 4th Dist. Highland No. 13CA29, 2015-Ohio-2757, ¶ 6. "Such a course of conduct would result in an abuse of discretion." *See Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals,* 2013-Ohio-5610, 5 N.E.3d 694, ¶ 16.

B. LEGAL ANALYSIS

{¶16} Appellant's appeal is directed solely to the finding that Appellant entered Appellee's residence without providing proper notice to Appellee. Appellant contends the trial court's decision is against the sufficiency of the evidence. In particular, Appellant argues that the evidence regarding a dispute

between a police officer's opinion and Appellant was not sufficient to establish a finding that Appellant, or his new wife, was in the marital residence formerly shared by Appellant and Appellee. Therefore, the trial court's decision finding Appellant in contempt of court was in error.

{¶17} Contempt is "conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Wall, supra,* at 9; *Robinette, supra,* at ¶ 45, quoting *Windham Bank v. Tomasczyk,* 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), paragraph one of the syllabus; *State v. Graham,* 4th Dist. Highland No. 13CA11, 2014–Ohio–3149, ¶ 25. Contempt proceedings are classified as civil or criminal based on the purpose to be served by the sanction. *Robinette, supra*; *State ex rel. Corn v. Russo,* 90 Ohio St.3d 551, 554–555, 740 N.E.2d 265 (2001). "Civil contempt sanctions are designed for remedial or coercive purposes and are often employed to compel obedience to a court order." *Id.* at 555. The purpose of a civil contempt motion is to compel compliance with the court's order rather than to punish disobedience. *Robinette, supra,* at ¶ 47. *See Sheridan v. Hagglund,* 4th Dist. Meigs No. 13CA6, 2014–Ohio–4031, ¶ 22.

{¶18} For civil contempt, a trial court needs to find that an alleged contemnor has violated a court order by clear and convincing evidence. *Freeman v. Freeman,* 4th Dist. Lawrence No. 16CA14, 2016-Ohio-7565, ¶ 7; *Sheridan, supra,*

at 20. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Haviza v. Haviza*, 2nd Dist. Darke No. 2017-CA-1, 2017-Ohio- 5615, ¶ 16, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. We must first determine whether the magistrate had clear and convincing evidence to support the finding that Appellant entered Appellee's home without proper notice.

{¶19} Appellant argues the evidence adduced at the contempt hearings demonstrates Appellee had a game camera in her house, and she claimed a picture form the game camera showed someone in her house in September 2015. She subsequently called the Belpre police and first reported Appellant had entered her house. The next day, Appellee again called the Belpre police and reported that Appellant's wife, Melissa Windland, was in her house.

{¶20} We have reviewed the hearing transcripts. Appellee was questioned about her report to the police and the pictorial evidence. Essentially, Appellee admitted the pictorial evidence did not support the allegation that Appellant was in her home. And, even if Appellant's wife was in her home, the pictorial evidence did not support a clear identification.

{¶21} The other evidence in the matter was Appellant's statement to a Belpre police officer investigating Appellee's report. Appellant argues that based upon Appellee's claim, a Belpre police officer contacted him while he was on vacation at Myrtle Beach, actually sitting on the beach. Appellant advises he misunderstood which Belpre officer he was speaking to, and the officer misunderstood Appellant's statement to him. The transcript reveals as follows:

> A: In fact, I thought I was talking to Sergeant Fields when they called me at the beach.
>
> Q: Right. But as it turned out, you weren't. * * * Okay, but did he ask you about the allegation that you'd been in the house?
>
> A: Absolutely. * * * He said that- - that she said I was in the house, and I said, I've never been in the house. * * * I said, "look, I'm on vacation and I - - I haven't been in the house since the flood." And I thought that it was Fields, and he- - and he - - and he never made any indication that he wasn't. In fact, I told him, I said - - I said, you know "You were there. I have not been up there since you and I were up there at the - - at the flood, * * * because I thought it was Fields calling me. I didn't find out till later that it was a different officer. And when I told him that - - that, well, you and I haven't been there since the flood, he didn't even correct me. He didn't say, well, that must have been some other police officer.* * *
>
> Q: And it turned out that he put in his report that you told him you were in the house a couple weeks ago.
>
> A: Yeah.
>
> Q: Which - -
>
> A: Not true.
>
> Q: And what did you do, when you saw that in the report?

A: I - - I was freaked out. * * *

Q: What'd you do?

A: I got a hold - - I made arrangements to find out, well, why would you put that in there? That's not what I said.

Q: And we had a meeting.

A: Because I - - I know – we had a meeting with him right.
***
Q: From March of the flood, when you were there with [Janisource] - -

A: Right.

Q: - - from that time until now, were you ever in the house?

A: No.

Q: Were you in the front yard?

A: Yes.

Q: What were you doing in the front yard?

A: Talking to Jimmy.[4]

{¶22} Appellant further testified:

Q: You testified on direct * * * you told Officer Hall-Holiday on the phone about the flood incident, didn't you?

A: Yes.

Q: And that you'd been up there for that purpose?

[4] "Jimmy" is Herman James Fickisen, Appellee's brother. Jimmy also testified and verified this incident of talking to Appellant in the front yard.

A: Yes.

Q: When you went up there for that purpose, at one point you received a text from Kathy Windland, didn't you?

Q: Yes.

Q: It said, come up alone.

A: Yes.

Q: And that was after you text back and forth, to make sure she meant what she said, you went up alone?

A: Right.

Q: Did you give 24 hours' notice?

A: No.

Q: Did you talk about that with the police officer, that you'd done that?

A: That I had went up there, yeah, because I thought he was the one that was with me.

Q: But he wasn't?

A: No.

Q: Okay, so did you ever tell him that you went in the house within two weeks of October 1st?

A: I didn't tell him that, no. I didn't say, in the house.

Q: Did you ever tell him that you went in the house without notice?

A: No, I didn't - -

Q: Other than the flood?

A: Right. That's what I said.

{¶23} Appellant's testimony further reveals he contacted the officer who took his statement to have the statement corrected. He testified as follows:

Q: Did you have a meeting with the officer after that?

A: Yes.

Q: And did he add a paragraph to his report.

A: Yes.

Q: And did that paragraph say that he added it, because you came and explained to him what you believed to be the truth.

A: Yes.

{¶24} Patrolman Adam Holiday of the Belpre Police Department also testified regarding the conflict in statements. Patrolman Holiday identified Exhibit A, the initial report he prepared on October 2, 2015. He testified there was a complaint that Mr. Windland had entered the house without permission and as a result, he discussed the matter with Appellant. Patrolman Holiday read verbatim from his report as follows:

> "It says, 'I called her ex-husband, who was on vacation out of town. He said he was in the house approximately two weeks ago, but could not give a - - give a - - give me an exact date. He said he was in the home to attempt to remove some of the mold[5] and to see how bad it

[5] The issue of mold in the Braun Road residence was also a great source of contention between these parties.

> was, so he could contact a professional. About cleaning the basement. He also said he did not abide by the 24 hour rule, because he thought Kathy was out of town and did not want to leave the mold unattended to * * *.' "

{¶25} Patrolman Holiday also identified Exhibit C, the final criminal report. He identified a heading on the report "Narrative Supplement." He read the supplement to the court and testified as follows:

> "It says, 'On October 16th, at 11:15, Mr. Windland and his attorney - - attorney came to the Belpre P.D. They requested that I change my report, as Mr. Windland did not feel that what I put in my report was exactly what he said. I advised I would not change my initial report, but would add what he said to the end of it. Mr. Windland advised he was not in the house a few weeks prior to Kathy making a complaint. He said he was only in the driveway, petting his former dog from his last marriage * * *.' After my initial report, both parties then wanted to change their stories some after reading it."

{¶26} We find no abuse of discretion in the trial court's entry which independently reviewed the evidence and adopted the magistrate's decision which found Appellant to be in contempt for entering Appellee's residence without giving the required 24-hour notice. When applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *Stapleton v. Holstein*, 4th Dist. Scioto No. 98CA2570, 1998 WL 880540, (Dec. 10, 1998), *1*; In re Jane Doe I*, 57 Ohio St.3d 135, 566 N.E.2d 1181 (1991), citing *Berk v. Matthews*, 53 Ohio St.3d 161, 559 N.E.2d 1301(1990). Furthermore, factual findings supported by some competent, credible evidence will not be reversed. *Sec. Pacific Natl. Bank v. Roulette*, 24 Ohio St.3d 17, 20, 492 N.E.2d 438

(1986); *C.E. Morris Constr. Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978). Here, we are mindful that the trial court is in the best position to judge credibility of testimony because it is in the best position to observe the witness's gestures and voice inflections. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984).

{¶27} It is plausible that Appellant, speaking on a telephone long-distance from the beach, might not have realized to whom he was speaking, or perhaps misunderstood the questioning. Under such circumstances, there could be confusion. However, Patrolman Holiday was clear about his recollection of the Appellant's statement contained in Exhibit A, that he "was in the home to attempt to remove some of the mold" and "did not abide by the 24-hour rule." When asked if it was possible he had made a mistake in preparing the report, Patrolman Holiday further testified:

> "Everybody makes mistakes at some point. Nobody's perfect. But what I put in my report, is what I heard from Mr. Windland. * * * The reason I would be putting in there, the supplement in here, is because you guys did in fact come to talk to me about it."

{¶28} Given the conflict in testimony, we find the magistrate was in the best position to view the witnesses and determine credibility. We find the magistrate had clear and convincing evidence that Appellant was in the residence without providing proper notice and thus, clear and convincing evidence that Appellant was in contempt of the final entry and decree of divorce. Therefore, the trial court

did not abuse its discretion by adopting the magistrate's decision. As such, we find no merit to the sole assignment of error and it is hereby overruled. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Costs are assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & Hoover, J.: Concur in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.