

[Cite as *Northern v. Northern*, 2010-Ohio-1389.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Bryan K. Northern,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-887
	:	(C.P.C. No. 05DR-10-4057)
Sarah N. Northern (nka Williams),	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 31, 2010

Ketron Legal, LLC, and Douglas L. Ketron, for appellee.

Innis & Barker Co., L.P.A., and Richard L. Innis, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

TYACK, P.J.

{¶1} Sarah N. Northern (nka Williams), is appealing from a contempt finding entered against her from the sentence imposed, and from the purge order which was entered following her being found to be in contempt of court. She assigns three errors for our consideration:

[I.] The trial court erred in finding Appellant in contempt for her actions relative to the Sallie Mae Loan.

[II.] The trial court erred in awarding excessive attorney fees in this case.

[III.] The trial court erred in imposing a ten day jail sentence in this case unless the Appellant paid the Appellee \$3,577.61 within ninety days of the decree.

{¶2} Sarah N. Northern and Bryan K. Northern terminated their brief marriage with a dissolution in November 2005. As part of the separation agreement journalized at that time, Sarah was to pay and hold Bryan harmless on a student loan payable to Sallie Mae and on a car loan payable to Park Community Federal Credit Union. Sarah fell behind on paying the loans, which led to Bryan filing a contempt of court action in July 2007 in which he alleged Sarah had failed to indemnify him and hold him harmless on her debts. The motion itself did not allege a failure to pay the debts as a basis for a contempt. The motion also did not allege contempt based upon Bryan's loss of quiet enjoyment of life after his divorce.

{¶3} A hearing on the contempt motion was conducted before a magistrate on March 13, 2008. The parties were permitted to file written closing arguments and memoranda regarding the applicable law. The magistrate issued a magistrate's decision in March 2009.

{¶4} Counsel for Sarah filed objections to the magistrate's decision. The trial judge assigned to the case adopted the findings of fact and conclusions of law contained in the magistrate's decision. As a result, Sarah was found to be in contempt, she was sentenced to ten days in jail and given an opportunity to purge her contempt by complying with her initial obligation with respect to the loans, paying a portion of Bryan's attorney fees within 90 days and paying the court costs.

{¶5} The evidence before the trial court clearly indicated that Sarah went through periods of time when she did not pay either loan. She apparently was able to put the student loan with Sallie Mae into deferment by going back to school, but not before months of it being unpaid. She also went for months without paying the car loan. The evidence was clear and convincing that she did not pay on time, resulting in damage to Bryan's credit score and numerous telephone calls seeking collection on the loans from him as a co-signer of the loan. However, the evidence did not show that Bryan was ever sued on either debt or ever had to pay funds himself to either Sallie Mae or Park Community Federal Credit Union.

{¶6} Holding a person harmless on a debt has traditionally and consistently meant to repay the person for any sums expended to defend against a lawsuit filed as the result of nonpayment and to pay the court costs and attorney fees incurred as a result of such a lawsuit. In *Jeffers v. Jeffers*, 7th Dist. No. 07 BE 36, 2008-Ohio-3339, ¶18, as part of a divorce decree the husband agreed to hold harmless the wife on a tax obligation. The court construed the hold harmless provision as a duty to protect the wife from any action to enforce a tax obligation incurred by the husband. Here, no civil lawsuit was ever filed against Bryan Northern, so no clear and convincing evidence supported a finding that Sarah failed to hold him harmless on the Sallie Mae debt.

{¶7} Likewise, indemnification involves paying someone back for funds expended as a result of the debt. "Indemnity arises from contract, either express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement." *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238, 240. Bryan never expended any funds to Sallie Mae. Because the

issues raised in the motion for contempt were not proven, no contempt finding should have been made with respect to the Sallie Mae loan.

{¶8} Contempt proceedings are quasi-criminal in nature. *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287, 293, 298. Fundamental due process rights apply. *Turner v. Turner* (May 18, 1999), 10th Dist. No. 98AP-999. A person who is accused of being in contempt of court faces potential jail time and potential monetary penalties. That person is entitled to know why they are facing a contempt finding. The alleged contemnor has a right to notice of the charges, a reasonable opportunity to defend against or explain such charges, to representation by counsel, and the opportunity to testify and to call other witnesses. *Id.*

{¶9} The vehicle for informing the person of the reasons for a potential contempt finding is the motion filed alleging a contempt of court. The party seeking a contempt finding and the judge addressing the merits of the contempt proceeding are not at liberty to insert other issues into the case while the hearing on contempt is proceeding or after the parties have conducted the hearing. Due process of law involves advance notice of the precise allegations being pursued and a fair opportunity to contest the merits of those allegations. *Id.*, citing *Rose v. Rose* (Mar. 31, 1997), 10th Dist. No. 96APF09-1150. “Notice is a prerequisite for a valid contempt finding.” *Id.*

{¶10} In the motion for contempt originally filed, the allegations against Sarah were that she failed to protect Bryan Northern financially, not that she disturbed his quiet enjoyment of life by setting a chain of events in motion which caused Bryan to get telephone calls from one or more collection agencies. Nor were the allegations in the actual motion filed that Bryan's credit report was rightly or wrongly affected.

{¶11} After a full evidentiary hearing was conducted, counsel for Bryan sought leave to and was allowed to amend his motion to allege a violation of a provision of the separation agreement entitled "Living Separate and Apart." The provision reads:

Each party shall herein after continue to live separate and apart from the other for the rest of their natural lives and shall not interfere with the others party's right to quiet enjoyment and peaceful living. Neither party will molest, harass, disturb, torment, interfere with or annoy the other in any manner, directly or indirectly, at home, place of employment or anywhere.

{¶12} The trial court should not have allowed the substantial modification of the issues after the evidence had been submitted. However, having allowed the modification, the trial court could not find clearly and convincingly that Sarah violated the provision. Sarah did not cause the collection people to call repeatedly. She took no action against Bryan or his quiet enjoyment/peaceful living.

{¶13} The first assignment of error is sustained.

{¶14} The second assignment of error seems to focus on the size of the award of attorney fees; but still presents the issue of whether or not attorney fees should have been awarded at all. Since Sarah was not in contempt of the court's order regarding indemnification and saving Bryan harmless with respect to the Sallie Mae loan, no award for attorney fees with respect to the Sallie Mae loan is appropriate.

{¶15} The motion actually filed likewise did not allege contempt for nonpayment of the car loan with Park Community Federal Credit Union, but for a failure to save Bryan harmless on that loan and failure to indemnify him with respect to that loan. Since Bryan was never sued on that loan and never made payments on that loan, he could not prove a contempt of court with respect to that loan. Since Sarah was not in contempt of court

on the theories actually alleged in Bryan's motions, no attorney fees could be awarded for contempt which was alleged but not proven.

{¶16} The second assignment of error is sustained.

{¶17} The third assignment of error is sustained for the same reason. No purge order is appropriate if a contempt is not proven.

{¶18} All three assignments of error having been sustained, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations is reversed and the case is remanded.

*Judgment reversed and remanded
for further proceedings.*

FRENCH, J., concurs.
BROWN, J., concurs in part and dissents in part.

BROWN, J., concurring in part and dissenting in part:

{¶19} I concur with the majority's resolution of appellant's first assignment of error, in which appellant appeals the contempt finding as to the Sallie Mae loan. However, having determined the trial court erred in allowing appellee to amend his motion after the evidentiary hearing had been concluded, to allege a violation of the "Living Separate and Apart" provision of the separation agreement, I would find we need not address the issue of whether the evidence supports a finding that appellant violated this provision.

{¶20} With regard to appellant's second assignment of error, I would remand the matter for a determination of the appropriate attorney fees related to the finding of contempt for non-payment of the Park Community Federal Credit Union loan. Appellant did not appeal that portion of the judgment finding appellee in contempt for failure to pay the Park Community Federal Credit Union loan, so that portion of the judgment must be

affirmed. As the record now stands before us, it is not clear which portion of the attorney fees award related to the Park Community Federal Credit Union loan.

{¶21} With regard to appellant's third assignment of error, given our treatment of appellant's second assignment of error, I would remand the matter to the trial court to re-determine the purge order.
