

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

DOROTHY WEATHERSPOON	:	
	:	Appellate Case No. 23393
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-DR-311
v.	:	
	:	(Civil Appeal from
FRANK B. WEATHERSPOON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 9<sup>th</sup> day of July, 2010.

.....

DOROTHY L. WEATHERSPOON, 646 Oakleaf Drive, Dayton, Ohio 45408  
Plaintiff-Appellee, *pro se*

CHERYL R. WASHINGTON, Atty. Reg. #0038012, One First National Plaza, Suite  
1600, 130 West Second Street, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

.....

FAIN, J.

{¶ 1} Appellant Frank Weatherspoon appeals from an order of the Montgomery County Court of Common Pleas, Domestic Relations Division, denying his Civ.R. 60(B) motion to set aside a final decree and judgment of divorce entered by that court on June 9, 2006. Mr. Weatherspoon contends that the trial court erred

in denying the motion because the evidence demonstrated that his ex-wife had failed to establish that she was entitled to service by publication, and that the trial court therefore lacked jurisdiction to enter judgment.

{¶ 2} We conclude that the trial court's findings of fact and findings of witness credibility are not supported by this record. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I

{¶ 3} Frank and Dorothy Weatherspoon were married in October, 1964. On June 25, 2002, Ms. Weatherspoon filed a complaint for divorce. That complaint was eventually dismissed in April, 2003.

{¶ 4} Some time thereafter, Ms. Weatherspoon moved out of the marital residence located at 646 Oakleaf Drive, Dayton. Approximately four or five months thereafter, Mr. Weatherspoon also moved out of the residence. The residence was not sold. It appears that other members of the family resided in the home for a time, but that the home was essentially abandoned.

{¶ 5} On March 10, 2006, Ms. Weatherspoon again filed a complaint for divorce. Service by certified mail was attempted at the parties' marital residence. However, the attempt was unsuccessful. At the same time she requested service by certified mail, Ms. Weatherspoon also filed a request for service by publication. Ms. Weatherspoon submitted an affidavit in support of her request. In that affidavit she averred, in pertinent part, the following:

{¶ 6} " \* \* \* \* "

{¶ 7} “3. That defendant’s last known address was 646 Oakleaf Drive, Dayton, Ohio 45408 (and he no longer lives as that address);

{¶ 8} “4. That service of summons cannot be made upon the defendant because the residence of the defendant is unknown to [Ms. Weatherspoon];

{¶ 9} “5. That [Ms. Weatherspoon] has made reasonable and diligent efforts to ascertain the residence of the defendant by making numerous inquiries of defendant’s family, friends, and past work associates;

{¶ 10} “6. That [Ms. Weatherspoon] has been unable to serve [Mr. Weatherspoon] with summons at his place of employment because she has been unsuccessful in ascertaining his employment status.

{¶ 11} 7. That the residence of [Mr. Weatherspoon] cannot be ascertained with reasonable diligence[.]”

{¶ 12} Thereafter, a proof of publication was filed on May 6, 2006. A final judgment and decree of divorce was filed on June 9, 2006, in which Ms. Weatherspoon was “granted any and all interest [Mr. Weatherspoon] may have in [Ms. Weatherspoon’s] retirement/pension benefits (including 401K accounts) connected with her employment with Dayton Power & Light Company as and for permanent spousal support.” Ms. Weatherspoon was also awarded the marital residence.

{¶ 13} Some time shortly thereafter, Ms. Weatherspoon “was going to [her] mom’s [home] on Shoup, and [observed Mr. Weatherspoon] sitting on Miss Johnson’s porch.” At that time, she stopped and gave him a copy of the decree.

{¶ 14} On August 4, 2006 Mr. Weatherspoon filed a Civ.R. 60(B) motion to set

aside the judgment, in which he claimed that he had not received notice “despite the fact that at all pertinent times herein [Ms. Weatherspoon] knew his correct address.” He further argued that he was entitled to a portion of Ms. Weatherspoon’s pension benefits.

{¶ 15} A hearing was conducted on March 14, 2008, and continued on March 13, 2009, during which the following evidence was adduced.

{¶ 16} At the first hearing date, Ms. Weatherspoon initially testified that all six of Mr. Weatherspoon’s siblings lived in Dayton at the time she filed the second complaint for divorce. She also testified that she knew the addresses and phone numbers for these siblings. She then contradicted herself and indicated that she only knew this information for “some \* \* \* but not all of them.”

{¶ 17} Ms. Weatherspoon testified that she asked Frank’s brother, Floyd Weatherspoon, whether he knew where Frank lived, but that Floyd stated that he did not want to get involved. She testified that she did not talk to any of Frank’s other siblings.

{¶ 18} When asked what friends and co-workers she made “numerous inquiries” of regarding Frank’s address, she responded that she had run into William Fontaine, but that he had no information.

{¶ 19} Ms. Weatherspoon also testified that she contacted the post office and the social security office, but was unable to obtain any information. She then testified that she took no other steps to locate Frank. However, a few minutes later she testified that she asked two of her children, Sheronica and Frankie, to help find Frank’s address. She also testified that she knew that her husband was not living at

the marital residence when she was attempting service.

{¶ 20} Mr. Weatherspoon testified that he had lived at 2517 Carnegie Street with Cordelia Senters since 2004. He testified that his grandsons knew where he was living. He also testified that all but one sibling had his telephone number. He testified that his brother Floyd knew how to contact him. He also testified that he had contact with the parties' third child, Katrina, and that she knew where he was living. Finally, he testified that he was self-employed doing yard work for various customers.

{¶ 21} The hearing was continued until 2009, at which time Floyd Weatherspoon testified that he had "always" been in contact with his brother and knew where he lived. Floyd also testified that he had maintained a good relationship with Ms. Weatherspoon, and that they had continued to have contact during all times relevant to this action. Floyd testified that Ms. Weatherspoon did not ask him how to contact Frank. He admitted that he would indicate to her that he did not want to get "involved," but indicated that he said that when she began to talk about personal issues between herself and Frank. Floyd insisted that had she asked him, he would have told Ms. Weatherspoon how to contact Frank.

{¶ 22} The parties' daughter, Sheronica Smith, then testified. She stated that she and her father did not have a relationship and that she did not know how to contact him. She stated that she had contacted her dad's relatives in order to try to locate him for her mother, but indicated that they would not tell her anything. She testified that she talked to her paternal aunts and to her uncle Floyd. She later contradicted herself and testified that she did not talk to the aunts.

{¶ 23} At three points in her testimony, Ms. Smith testified that she did not ask her sister, Katrina, for contact information on their father. Later in her testimony, she stated that she did ask her sister for contact information, but that Katrina did not provide any. Thereafter, Mr. Weatherspoon's counsel engaged in the following colloquy with Ms. Smith:

{¶ 24} "Q: Now, when I asked you a few minutes ago whether you asked your sister for an address for your father in 2006, you told me you didn't.

{¶ 25} "A: Like the whereabouts of my father, like the telephone number and whereabouts. She don't have – she don't – she don't – she didn't have it.

{¶ 26} "Q: All right. That's not my question. My question is: A few minutes ago I asked you did you ask Katrina for an address or telephone number for your sister, and you told – I mean for your father, and you told me no.

{¶ 27} "A: I did ask her.

{¶ 28} "Q: Okay. So now you're changing your testimony?

{¶ 29} "A: No. I mean – I'm sorry. Look I'm – this has nothing to do with the court, but I'm – I'm – my son is, you know, just got out the hospital with schizophrenia. So my mind is like – I'm you know, dealing with my son. I'm serious. I know it has nothing to do with court, but I'm under a lot of stress right now because of him and my son is going through some issues. He just got back from the war. So we have to – I have to focus – I have to really focus, and the vets what they're going through.

{¶ 30} "Q: Okay. Well, then focus on 2006.

{¶ 31} "A: Okay.

{¶ 32} “Q: And your conversations with your sister. You agree with me that you never asked for a telephone number for your dad. Did you? Yes or no.

{¶ 33} “A: Yeah, I asked Trina do she have a telephone number for my dad. She won’t – she said no. I mean, I – oh, my God. I can’t remember the – I’m sorry, your Honor. I’m just thinking about my son right now.

{¶ 34} “Q: So you can’t remember whether you asked her. Is that your testimony now?

{¶ 35} “A: I did talk to my sister.

{¶ 36} “Q: I’m not asking if you talked to your sister. I’m asking whether you asked her for a telephone number.

{¶ 37} “A: I believe I did ask her did she know the whereabouts and how to contact my father. And she did not give that information. She did not give me any information.

{¶ 38} “Q: Okay. You changed your testimony about three or four times. Do you – have any idea whether you asked your sister for a telephone number or not?

{¶ 39} “MS. HOBSON: Objection, your Honor.

{¶ 40} “THE COURT: Okay, I think we’ve had enough.

{¶ 41} “THE WITNESS: Thank you.

{¶ 42} “THE COURT: Let’s get Katrina in here.

{¶ 43} “MS. WASHINGTON: Katrina lives in Delaware. She’s not here.

{¶ 44} “THE COURT: It’s time she came home to visit. Step down. Is your son Ty?

{¶ 45} “THE WITNESS: Yes, ma’am.

{¶ 46} “THE COURT: Good luck with that.”

{¶ 47} The parties’ son, Frank Weatherspoon, Jr., testified that he lost contact with his father after Mr. Weatherspoon moved out of the marital residence, that he did not know how to contact his father, and that he did not try to do so. He testified that during 2006 friends would tell him that they had run into his father, but he made no attempt to ask them for contact information. He also testified that he never asked his sister Katrina whether she had his dad’s contact information.

{¶ 48} Jesse Watson, Ms. Weatherspoon’s brother, testified that she had asked him on at least four occasions to go with her to the marital residence during 2006. He testified that he knew Mr. Weatherspoon was living there, because he had seen him in the yard on prior occasions. Mr. Watson testified that Ms. Weatherspoon left notes at the marital residence for Mr. Weatherspoon.

{¶ 49} Mr. Watson also testified that he often saw Mr. Weatherspoon in the Westwood area where Frank was cutting grass. He testified that his and Dorothy’s mom lived in the Westwood neighborhood. He admitted that he never asked Mr. Weatherspoon for his number or address, and that he did not tell his sister that he had seen Mr. Weatherspoon.

{¶ 50} Another of Ms. Weatherspoon’s brothers, Larry Watson, also testified that she had asked him to help locate her husband. He testified that the two of them went to the marital house “several times,” and that he knew Mr. Weatherspoon was living in the marital residence. Mr. Watson testified that he had a close relationship with Mr. Weatherspoon and that he often saw him in the Westwood area “doing yards and stuff like that.” Mr. Watson testified that he ran into Mr. Weatherspoon

while “downtown,” and that Mr. Weatherspoon offered him a ride. Finally, Mr. Watson testified that despite all these encounters, he never asked Mr. Weatherspoon for his telephone number.

{¶ 51} Finally, Ms. Weatherspoon testified during the 2009 hearing. When asked about her efforts to find her husband, she again testified that she had contacted the post office and social security administration office, and William Fontaine. When her counsel suggested that she might have contacted the company that held the mortgage on the marital residence, she answered affirmatively. She again testified that she had asked Floyd for information. She then contradicted her earlier testimony and testified that she had also asked Mr. Weatherspoon’s other brothers and sisters. Ms. Weatherspoon also contradicted her earlier testimony by stating that not only had she spoken to Sheronica and Frank, Jr., but that she had asked Katrina for information. She then added that she had talked to “Aaron,” a “guy in the neighborhood.”

{¶ 52} Ms. Weatherspoon also admitted that she knew Mr. Weatherspoon “did lawns and stuff in the different neighborhoods.” She added that she would ride through the Westwood neighborhood with her brother to look for her husband. When asked why her brother did not testify to riding through Westwood with her, she was unable to offer an explanation.

{¶ 53} Following the hearing, the trial court overruled Mr. Weatherspoon’s motion. The trial court stated that Ms. Weatherspoon had exercised reasonable diligence in attempting to locate Mr. Weatherspoon. The trial court further found that the “testimony strongly supported that [Mr. Weatherspoon] did not want to be

found.” The trial court incorrectly found that Mr. Weatherspoon had indicated that he had no relationship with any of his three children. The trial court also incorrectly indicated that Floyd Weatherspoon had testified that he had no contact information for his brother. Thus, the trial court found that Mr. Weatherspoon was not entitled to relief from judgment.

{¶ 54} From the denial of his motion, Mr. Weatherspoon appeals.

## II

{¶ 55} Mr. Weatherspoon’s First and Second assignments of error state:

{¶ 56} “THE TRIAL COURT ERRED IN OVERRULING APPELLANT’S MOTION TO VACATE JUDGMENT.

{¶ 57} “THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR DETERMINATION CONCERNING DEFECTIVE SERVICE OF THE COMPLAINT THROUGH INCOMPLETE OR INACCURATE EVIDENTIARY RULINGS.”

{¶ 58} Mr. Weatherspoon contends that the trial court erroneously overruled his Civ.R. 60(B) motion, because the evidence demonstrates that Ms. Weatherspoon “failed to exercise reasonable diligence in locating [him].”

{¶ 59} Pursuant to Civ.R.3 (A), “[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant.” If a defendant’s address is unknown, service by publication is governed by Civ.R. 4.4(A) which provides:

{¶ 60} “(A) Residence unknown.

{¶ 61} “(1) Except in an action governed by division (A)(2) of this rule, if the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, and that the residence of the defendant cannot be ascertained with reasonable diligence.”

{¶ 62} Service by publication in divorce cases is authorized by R.C. 3506.06, which provides that “[i]f the residence of a defendant in an action for divorce, annulment, or legal separation is unknown, or if the defendant is not a resident of this state or is a resident of this state but absent from the state, notice of the pendency of the action shall be given by publication, as provided by the Rules of Civil Procedure.”

{¶ 63} In interpreting Civ.R. 4.4, the Supreme Court of Ohio has stated that “[r]easonable diligence requires taking steps which an individual of ordinary prudence would reasonably expect to be successful in locating a defendant's address. Certainly a check of the telephone book or a call to the telephone company \* \* \* [or checking] the city directory, a credit bureau, county records such as auto title department or board of elections, or an inquiry of former neighbors [constitute probable sources to check]. These examples do not constitute a mandatory checklist. Rather, they exemplify that reasonable diligence requires counsel to use common and readily available sources in his search.” *Sizemore v. Smith* (1983), 6 Ohio St.3d 330, 332. The Court further stated that a plaintiff's averment in an

affidavit that a defendant's address cannot be ascertained with reasonable diligence creates a "rebuttable presumption that reasonable diligence was exercised." *Id.* at 331.

{¶ 64} Civ.R. 60(B) permits relief from final orders or judgments on the following grounds:

{¶ 65} "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶ 66} "To prevail on [a] motion under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150.

{¶ 67} The standard of review of a trial court's decision on a Civ. R. 60(B) motion is an abuse of discretion standard. *Aurora Loan Services, LLC v. Wilcox*, Miami App. No.2009 CA 9, 2009-Ohio-4577, at ¶ 16. An "abuse of discretion" is

defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87.

{¶ 68} This appeal depends heavily on the determination of witness credibility. The trial court chose to credit the testimony of Ms. Weatherspoon, Sheronica Smith, Jesse Watson and Larry Watson over that of Floyd and Frank Weatherspoon. However, our review of the transcript leads us to conclude that none of the testimony offered by Ms. Weatherspoon leads to the conclusion reached by the trial court. Both Ms. Weatherspoon and Ms. Smith contradicted themselves during their testimony. Indeed, the testimony of Ms. Smith appears to us to be entitled to little weight. After her disjointed testimony, the trial court dismissed her from the stand before Mr. Weatherspoon's counsel had ended her cross-examination.

{¶ 69} We also conclude that Ms. Weatherspoon's testimony was not very credible. Ms. Weatherspoon testified that she knew addresses for all of Mr. Weatherspoon's siblings; then she said she only knew that information for "some" of the siblings. At the first hearing she testified that the only sibling she talked to was Floyd Weatherspoon; a year later her testimony changed to indicate that she had talked to Mr. Weatherspoon's other brothers and sisters. At the first hearing, she testified that the only "friend and past co-worker" of whom she had made an inquiry was William Fontaine, a man she "just ran into." A year later she testified that she had also talked to a "neighborhood guy" named Aaron. When asked which of her children she had asked for the requested information, she initially testified she had only asked Sheronica Smith and Frank Weatherspoon, Jr. Later, she changed her testimony to indicate that she had also asked her other daughter, Katrina.

{¶ 70} Ms. Weatherspoon's brothers both testified that she had asked them to go to the marital residence with her to locate her husband, a fact which she did not, at first, relate to the court. However, even if they did take this step, Ms. Weatherspoon's own testimony demonstrates that she knew he did not reside there.

{¶ 71} At the second hearing date, Ms. Weatherspoon also indicated that she had driven through the Westwood area with her brother looking for her husband. She could not explain why her brother did not so testify. She also, at counsel's prompting, indicated that she had contacted the mortgage company that held the mortgage on the marital residence. Ms. Weatherspoon claimed that all of her husband's siblings refused to give her the requested information, despite having previously testified that she only spoke to one of the siblings.

{¶ 72} In contrast, Floyd Weatherspoon testified that he had a close relationship with Ms. Weatherspoon, given that he had known her for forty years. He also testified that he maintained contact with her. Ms. Weatherspoon did not refute either of these claims. Floyd also testified that he would have given her the information had she asked, but claimed that she did not ask. Ms. Weatherspoon refused, upon questioning, to state that Floyd's testimony was untruthful.

{¶ 73} We further note that the trial court erroneously found that Floyd had testified that he did not know how to contact Mr. Weatherspoon. The trial court further erroneously noted that Mr. Weatherspoon had testified that he had no contact with any of his children, when, in fact, he stated that he was in contact with Katrina. Finally, the trial court found that the evidence "strongly supported" a finding that Mr. Weatherspoon did not want his wife to locate him – a fact not borne out by the record

before us.

{¶ 74} As a general rule, an appellate court affords a trial court great discretion with regard to findings of fact and issues of witness credibility. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Further, we are aware that a reviewing court should not substitute its own judgment for that of the trial court. *Id.* In other words, a decision of a trial court should not be reversed, so long as it is supported by some competent, credible evidence going to each of the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. More recently, though, the Supreme Court of Ohio has held that a court of appeals has some, limited, ability to “sit as a thirteenth juror and disagree with the factfinder’s resolution of \* \* \* conflicting testimony.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The power to overturn a trial court’s findings of fact should only be exercised in exceptional cases where the finder of fact has lost its way, creating a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 75} Upon this record, we conclude that this is the exceptional case where a manifest miscarriage of justice can only be avoided by reversing the trial court and permitting the issues in this divorce case to be heard on their merits, with input from both parties. As noted, the hearing on the matter was held on two separate dates a year apart. Ms. Weatherspoon’s testimony differed significantly from the first to the second hearing date – a fact not commented upon by the trial court. Also, the testimony of Sheronica was not credible. Ms. Weatherspoon’s testimony did not mirror that of her brothers. Furthermore, she refused to testify that Floyd

Weatherspoon was being untruthful, or that he was simply wrong, when he testified that she had not asked him for contact information. Finally, the trial court made several erroneous findings of fact not supported by the record. All of the discrepancies in testimony and incorrect findings of fact lead us to conclude that the trial court's decision is not supported by the evidence in this case. We cannot find that Ms. Weatherspoon exercised reasonable diligence in her attempt to locate her husband, and therefore cannot conclude that service by publication was proper.

Mr. Weatherspoon's First and Second assignments of error are sustained.

III

{¶ 76} Both of Mr. Weatherspoon's assignments of error having been sustained, the order of the trial court denying Mr. Weatherspoon's motion for relief from judgment is Reversed, and this matter is Remanded for further proceedings.

.....

FROELICH and WILLAMOWSKI, JJ, concur.

(Hon. John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Dorothy L. Weatherspoon  
Cheryl R. Washington  
Hon. Judith A. King