

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

Megan L. Newcomer

Court of Appeals Nos. L-10-1299
L-10-1357

Appellee

Trial Court No. DR2007-0929

v.

Michael G. Newcomer, et al.

DECISION AND JUDGMENT

Appellants

Decided: December 16, 2011

* * * * *

Paul E. Accettola, for appellant Michael Newcomer.

Sheldon S. Wittenberg, for appellant Stephanie Emch.

* * * * *

SINGER, J.

{¶ 1} This is a consolidation of two appeals from judgments issued by the Lucas County Court of Common Pleas, Domestic Relations Division, denying a Civ.R. 60(B) motion, finding appellants guilty of contempt, and imposition of sanctions. Because we conclude that the trial court's rulings were not supported by the record, we reverse.

{¶ 2} Appellant, Michael Newcomer ("appellant") and appellee, Megan L. Newcomer ("appellee"), are parties to a divorce action¹ filed in September 2007. Incident to that action, temporary court orders regarding child and spousal support, and payment for marital debts were issued. On December 31, 2009, a magistrate's decision found appellant in contempt for failure to pay certain debts of the parties, and set purge conditions. Appellant timely filed objections to the findings of fact and conclusions of law in the magistrate's decision.

{¶ 3} On August 2, 2010, the court overruled appellant's objections and found that clear and convincing evidence was presented to support the magistrate's finding of contempt for failing to abide by the court's orders. The court adopted the magistrate's decision, "all as if specifically rewritten herein," i.e., the finding of contempt was "for failing to pay the installment payments and the expenses for the mortgage, utilities, taxes, and insurance of the marital property as ordered." The adopted purge conditions state that appellant was sentenced to up to 30 days in the local county jail, and that "the sentence and finding of contempt shall be purged by [appellant] who shall pay, within thirty (30) days of the file stamped date of this decision, to bring current the mortgage, taxes, insurance on the marital property as well as to bring current the monthly installment payments for all of the debts listed on the schedules of the [appellee] and [appellant]." No appeal from that judgment was filed.

¹At the time the appeal was filed, the divorce proceedings were still pending in the trial court.

{¶ 4} On September 14, 2010, appellant filed a Civ.R. 60(B) motion to vacate the December 31, 2009 and August 2, 2010 judgments finding him in contempt, on the basis that a mistake of fact had been made regarding his income, i.e., the amount of loans made to appellant by his company, which formed the basis for the initial child and spousal support orders and for payment of marital expenses. On September 17, 2010, the court heard oral arguments on the motion to vacate and also conducted a hearing as to the purge conditions on the contempt finding. By judgment entry on September 20, 2010, the court denied appellant's Civ.R. 60(B) motion, stating that it was inapplicable to the temporary orders upon which the contempt finding was based. The court also found no basis under Civ.R. 60(B) to vacate the contempt finding in the August 2, 2010 judgment entry, stating that the bookkeeping error was not "newly discovered evidence." The court then found appellant had not complied with the purge conditions, and imposed the 30 day jail sentence, which appellant served.

{¶ 5} On December 8, 2010, another hearing was held, relative to the divorce proceedings. During that hearing, appellee called appellant's girlfriend, Stephanie Emch ("Emch"), pursuant to a subpoena duces tecum, to testify regarding her business, a teen nightclub. Emch had brought some business records, but it was determined during her testimony that other records were missing which were covered by the subpoena. At the court's instruction, Emch returned the next morning, bringing additional business documents and continued her testimony. It was discovered that one month's bank statement was missing, despite her efforts to comply with the subpoena.

{¶ 6} Appellee's attorney then questioned Emch about alleged text messages between her and appellant, in court the previous day. Emch acknowledged that she had texted appellant, but that it had been during a break in the proceedings, when both attorneys were in chambers with the judge, not during her actual testimony.

{¶ 7} In response to this information, the court stopped the divorce hearing at approximately 9:30 a.m. The court then ordered appellant and Emch to appear at 1:00 p.m. for a contempt hearing regarding the text messaging, "visual communication" during the hearing that morning, and "issues relative to the question of whether the subpoena has been honored." Emch was able to retain counsel for that hearing, who requested a continuance so that a defense could be prepared. Over counsel's vigorous objections, the court denied the request for continuance and immediately held a hearing as to the "direct contempt" of appellant and Emch. The court also addressed Emch's failure to bring certain business documents with her to court, including the missing bank statement and "potentially, other documents."

{¶ 8} During the contempt hearing, Emch testified that she had no business background and was not an accountant or bookkeeper. She stated that her father, also not an accountant, kept the books for her business and had provided the records requested in the subpoena. After it was determined that the records were still incomplete, she had called her father that morning to bring whatever remaining records he had. When she had attempted to tender those to appellee's counsel prior to the contempt hearing, he had refused them. Emch testified that, at 23 years old, she had never been subpoenaed

before, had never testified or been in court before, and had thought she had complied with the subpoena when she brought the documents provided by her father. For her alleged failure to bring the requested documents, Emch was found in contempt, was fined \$200, and was ordered to pay \$250 to appellee's attorney, for legal fees.

{¶ 9} Regarding the text messaging, the court immediately found Emch in "direct contempt," without permitting her to give any further testimony, except in mitigation. Emch then testified that, although she was still "on the stand," she had texted appellant during a break in the proceedings. She stated that she had not texted during her actual testimony, but did not realize that it might be inappropriate because it was during a break. Emch stated that she was nervous about testifying and feared saying anything that might harm appellant.

{¶ 10} For her "direct contempt" for the alleged text messaging, Emch was then sentenced to two days in the local county jail, to begin immediately at the close of her testimony. Emch's attorney and the court had a lengthy, animated discussion regarding the propriety of the proceedings with no notice given, Emch's relative naiveté regarding legal proceedings, and the unintentional nature of her actions. The court denied a request for a stay and dismissed the attorney's objections, stating, "You may take it to the Court of Appeals."

{¶ 11} The court then also summarily found appellant to be in direct contempt for engaging in texting with Emch. Appellant also confirmed that the messaging was while Emch was on the stand, but the court was not in session, and the attorneys and judge were

in chambers. Appellant stated that no texting occurred during Emch's testimony and that he was also unaware that messaging was not permitted during the break. Appellant was sentenced to serve five days in the local county jail. The judgment entries for the contempt findings were signed on December 9, 2010, but journalized on December 13, 2010.

{¶ 12} Appellant Newcomer now appeals from the September 20, 2010 judgment, denying his Civ.R. 60(B) motion, arguing the following six assignments of error:

{¶ 13} "ASSIGNMENT OF ERROR NO. 1

{¶ 14} "The trial court erred by failing to follow the notice and hearing requirements of R.C. 2705.03.

{¶ 15} "ASSIGNMENT OF ERROR NO. 2

{¶ 16} "There was insufficient evidence to find contempt.

{¶ 17} "ASSIGNMENT OF ERROR NO. 3

{¶ 18} "The finding of contempt was against the manifest weight of the evidence.

{¶ 19} "ASSIGNMENT OF ERROR NO. 4

{¶ 20} "The trial court erred in failing to consider inability to perform.

{¶ 21} "ASSIGNMENT OF ERROR NO. 5

{¶ 22} "The trial court erred in applying the appropriate burden of proof.

{¶ 23} "ASSIGNMENT OF ERROR NO. 6

{¶ 24} "The trial court engaged in a violation of appellant's equal protection rights as guaranteed by the Fourteenth Amendment of the U.S. constitution, as appellant was incarcerated based upon his inability to comply with a monetary order."

{¶ 25} Newcomer also appeals from the December 9, 2010 judgment finding him in contempt for text messaging, arguing the following four assignments of error:

{¶ 26} "1. The trial court erred by failing to follow the notice and hearing requirements of R.C. 2705.03.

{¶ 27} "2. There was insufficient evidence to find contempt.

{¶ 28} "3. The findings of contempt were against the manifest weight of the evidence.

{¶ 29} "4. The court erred in applying the appropriate burden of proof."

{¶ 30} Appellant Emch appeals the trial court's two December 9, 2010 judgments, finding her in contempt, asserting the following five assignments of error:

{¶ 31} "1. The trial court erred by failing to follow the notice and hearing requirements of R.C. 2705.03.

{¶ 32} "2. The trial court abused its discretion by denying the appellant's motion for continuance.

{¶ 33} "3. There was insufficient evidence to find contempt.

{¶ 34} "4. The findings of contempt were against the manifest weight of the evidence.

{¶ 35} "5. The fine imposed by the trial court was greater than permitted under R.C. 2705.05."

I.

{¶ 36} We will first address appellant Newcomer's fourth assignment of error as it relates to the September 20, 2010 denial of his Civ.R. 60(B) motion to vacate the August 2, 2010 judgment entry. Appellant essentially argues that the trial court failed to consider evidence regarding his inability to comply with the original orders, which was presented in his Civ.R. 60(B) motion for relief from judgment.

{¶ 37} Civ.R. 60(B) provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (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.*" (Emphasis added.)

{¶ 38} To prevail on a Civ.R. 60(B) motion, "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, paragraph two of the syllabus; *Covert Options, Inc. v. R.L. Young & Assocs., Inc.*, 2d Dist. No. 20011, 2004-Ohio-67, ¶ 7. All three elements must be established, and "the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174; *Fifth Third Bank of W. Ohio v. Shepard Grain Co., Inc.*, 2d Dist. No. 2003 CA 40, 2004-Ohio-816, ¶ 10. On review, an appellate court may reverse a court's ruling on a Civ.R. 60(B) motion only on a showing of an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. 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." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 39} A motion under Civ.R. 60(B) may not be used as a substitute for a direct appeal. *Risner v. Cline*, 2d Dist. No. 2003-CA-24, 2004-Ohio-3786, ¶ 5, citing *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128 (Civ.R.60(B) motion may not be based on change in decisional law after final judgment rendered). The type of mistake contemplated by Civ.R. 60(B)(1) is a mistake by a party or his legal representative, not a mistake by the trial court in its legal analysis. *Ford Motor Credit Co. v. Cunningham*, 2d Dist. No. 20341, 2004-Ohio-6226, ¶ 15, citing *Antonopoulos v.*

Eisner (1972), 30 Ohio App.2d 187 and *Carrabine v. Brown* (Aug. 13, 1993), 8th Dist. No. 92-G-1736.

{¶ 40} In this case, as a basis for his Civ.R. 60(B) motion, appellant asserted that a mistake made by his employer when documenting his income and loans from 2006 through 2009 had just recently been discovered by his employer's controller. Appellant submitted an affidavit by Velocity's controller, dated September 15, 2010, which stated that "a bad debt expense of \$103,019.72" had been added back to appellant's note in December 2008. A "duplicated entry of this amount in March 2009 was identified" and was to be corrected after the 2009 tax return has been completed.

Appellant claimed that this duplication had inflated the income attributable to him during the related time period. The gist of appellant's Civ.R. 60(B) motion was that this information was recently discovered, was not available at the time of the 2009 hearings, and could not by due diligence have been discovered since it was a mistake made by his employer. Because of this mistake, appellant argued that he should be granted relief from the original finding of contempt, since the evidence used to compute his income was incorrect. Appellant also argued that he should be granted a continuance as to the purge hearing, because appellee had not disclosed her trust income. The trust proceeds, according to appellant, should be imputed income to appellee, which could then alter the amounts of the temporary support and debt payment orders.

{¶ 41} In our view, appellant met the threshold requirements to grant the Civ.R. 60(B) motion: the motion was timely filed, the newly discovered evidence, provided by

the third party employer, established a mistake, and such mistake established a meritorious defense to the contempt, i.e., inability to pay. Moreover, as noted by the trial court, the contempt was based upon interlocutory orders, which were modifiable by the court at any time. Since the divorce proceedings had not yet concluded, the trial court should have granted the motion, conducted a new hearing, taking such additional evidence and testimony presented by the parties as needed to enable it to determine the true financial status of each of the parties. Therefore, we conclude that the trial court erred in denying appellant's Civ.R. 60(B) motion.

{¶ 42} Accordingly, appellant's fourth assignment of error as to the September 20, 2010 judgment is well-taken. Assignments of Error Nos. 1, 2, 3, 5 and 6 are moot.

II.

{¶ 43} We will now address appellant Emch's first, second, and third assignments of error together. Emch asserts that the trial court denied her due process rights by not giving her sufficient notice of the contempt charge or granting a continuance and that there was insufficient evidence to find her guilty of direct contempt for alleged text messaging or indirect contempt for failure to provide documents. We agree.

{¶ 44} A trial court has inherent as well as statutory authority to enforce its prior orders through contempt. *Dozer v. Dozer* (1993), 88 Ohio App.3d 296, 302. See, also, R.C. 2705.02(A). "Contempt of court is defined as the disregard for, or the disobedience of, an order of a court. It 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." (Internal citations and quotations omitted.) *Furlong v. Davis*, 9th Dist. No. 24703, 2009-Ohio-6431, ¶ 33.

{¶ 45} Contempt may be classified as either criminal or civil in nature and is distinguished by the purpose and character of the punishment which is imposed upon the contemnor by the trial court. *City of Cleveland v. Geraci* (Dec. 16, 1993), 8th Dist. No. 64075, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250. A civil contempt citation is used to force compliance with a court order or judgment whereas a criminal contempt citation is imposed solely for the purpose of punishment. *Geraci*, supra.

{¶ 46} Although both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment. *Gompers v. Bucks Stove & Range Co.* (1911), 221 U.S. 418, 441; *State v. Kilbane* (1980), 61 Ohio St.2d 201, 205. "The purpose of civil contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 58. Punishment is remedial or coercive and for the benefit of the complainant in civil contempt. *Brown*, supra, at 253. Prison sentences are conditional. *Id.* The contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered. *Id.*, citing *In re Nevitt* (C.A.8, 1902), 117 F. 448, 461. Contempt can only occur, however, "where the contemnor has the power to perform the act listed in the court order but fails to do so." *Schaefer v. Schaefer*, 2d Dist. No.

2004-CA-65, 2005-Ohio-3063, ¶ 13, citing *Wilson v. Columbia Cas. Co.* (1928), 118 Ohio St. 319, 328-329.

{¶ 47} Criminal contempt, on the other hand, is usually characterized by an unconditional prison sentence. *Brown*, supra, at 254. Such imprisonment operates not as a remedy coercive in its nature but as punishment for the completed act of disobedience, and to vindicate the authority of the law and the court. *Id.*, supra, citing *Gompers*, supra; *Bd. of Edn. v. Brunswick Edn. Assn.* (1980), 61 Ohio St.2d 290, 294; *State v. Local Union 5760* (1961), 172 Ohio St. 75, 82-83. A defendant must be proven guilty beyond a reasonable doubt to be punished for criminal contempt. *Brown*, supra, at 251.

{¶ 48} In addition, contempt may be either indirect or direct. *Sano v. Sano*, 5th Dist. No. 2010CA00252, 2011-Ohio-2110, ¶ 13, citing *In re Purola* (1991), 73 Ohio App.3d 306, 310. Indirect contempt occurs outside the presence of the court and is defined by R.C. 2705.02, in pertinent part, as follows:

{¶ 49} "A person guilty of any of the following acts may be punished as for a contempt:

{¶ 50} "(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;

{¶ 51} "* * *

{¶ 52} "(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required; * * *."

With indirect contempt, the contemnor must be afforded certain procedural safeguards, including a written charge, entry on the court's journal, an adversary hearing, and an opportunity for legal representation. R.C. 2705.03; *City of Xenia v. Billingham* (Oct. 9, 1998), 2d Dist. No. 97-CA-124, citing *State ex rel. Seventh Urban, Inc. v. McFaul* (1983), 5 Ohio St.3d 120.

{¶ 53} Direct contempt, which may be summarily punished by a trial court, is defined by R.C. 2705.01 as follows:

{¶ 54} "A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." See, also, *In re Lands* (1946), 146 Ohio St. 589, 595. "It is said that direct contempt takes place in the presence of the court, and indirect contempt is all other contempt." *Cincinnati v. Cincinnati Dist. Council 51* (1973), 35 Ohio St.2d 197, 202. The significance of the location is directly related to the issue whether the judge has personal knowledge of the allegedly contemptuous act. Such conduct "will only be considered direct contempt if it constitutes an imminent, not merely a likely, threat to the administration of justice." *Furlong*, supra.

{¶ 55} Under R.C. 2705.01, due process does not require that the contemnor be granted a hearing. *State v. Kitchen* (1998), 128 Ohio App.3d 335, 341. However, for a court to exercise "the extraordinary but narrowly limited power to punish for contempt without an adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have

personal knowledge of it acquired by his own observation of the contemptuous conduct." *In re Oliver* (1948), 333 U.S. 257, 274-275 (only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public).

{¶ 56} Summary contempt is an awesome power of the judiciary that must be used sparingly and cautiously. *Cincinnati v. Cincinnati Dist. Council 51*, supra, at 213 (Brown, J., dissenting). It should be used only in cases where there is "an immediate threat that requires immediate correction." *Bank One Trust Co., N.A. v. Scherer*, 176 Ohio App.3d 694, 2008-Ohio-2952, ¶ 44.

{¶ 57} As noted previously, the burden of proof applicable to a criminal contempt, regardless of whether it is direct or indirect, is proof beyond a reasonable doubt. *Brown*, supra; *In re McGinty* (1986), 30 Ohio App.3d 219, 224. In addition, due process must be observed in both civil and criminal contempt proceedings. See, e.g., *In re Oliver*, supra, at 274-275. Whether the contempt is punishable summarily or otherwise, the accused should be given the fullest opportunity to show cause why he should not be punished for contempt, and his guilt should not be determined before such opportunity is given. *State ex rel. Hutchison v. Thompson* (Dec. 6, 1974), 6th Dist. No. 1121. Where all intention of disturbing the court is disclaimed, and the act is shown to have been more thoughtless

than willful, the defendant will be discharged on paying the costs. Id. (Citations omitted.)

{¶ 58} In this case, appellant Emch was found guilty of contempt for two actions: texting to appellant Newcomer and failure to bring certain documents to court. Both contempt findings were criminal, since no purge conditions were given and the court's clear purpose was to punish Emch for perceived wrongdoing. In this case, the court abused its discretion in its finding of contempt for several reasons.

{¶ 59} First, neither action constitutes direct contempt. Thus, the court was required and failed to give proper notice of its intent to hold Emch in contempt or to grant a continuance so a defense could be prepared. Moreover, even with such notice, however, the record fails to establish sufficient evidence that Emch's actions constituted criminal or civil contempt, direct or otherwise.

{¶ 60} During her testimony on the first day, Emch, a young person, clearly established that she was wholly unfamiliar with the legal system and extremely nervous about testifying. The record shows that the court's attitude towards her was overly stern from the outset, including multiple commands for her to "speak up" or be held in contempt, despite her obvious discomfort and anxiety. The record also indicates that the text messaging occurred the day before the court's directive regarding any "communication, visual or otherwise" between Newcomer and Emch while she was on the stand. The texting occurred during a break in the court proceedings, while the judge and attorneys were in chambers, not during her actual testimony or when the court was in

session. In addition, the substance of the texts was never disclosed nor shown to have had any effect whatsoever on Emch's testimony. Although we disapprove of texting during court proceedings, under the facts of this case, we conclude that appellant's actions during the court recess did not constitute proof beyond a reasonable doubt of criminal direct contempt. The judge himself did not witness the action, it did not interrupt or disrupt the proceedings, and there was no proof that it threatened the administration of justice. Therefore, the trial court erred in finding Emch in contempt for the texting.

{¶ 61} As for the failure to bring certain business documents on the first day of the hearing, Emch testified that she had relied on her father, who kept the financial records for her business, to supply whatever records had been asked for in the subpoena duces tecum. Her testimony clearly indicated that she knew nothing about accounting or how the books of her business, a teen nightclub, were kept. Emch acknowledged that she was unaware of the meaning of such terms as "due diligence statement," "purchase order," or "financing documents."

{¶ 62} During the hearing, appellee's counsel himself acknowledged that Emch "demonstrated just by her going through the documents in [appellee's] Exhibit 272 that she doesn't really fully understand what's going on in the business, doesn't fully understand the limited liability company, doesn't understand what – what her own documents – ." The court interjected, "Well, all of that is readily apparent to the Court and to everyone sitting in this courtroom – ." The court then merely "cautioned" her concerning "the contempt" without further notice or explanation. The next day, Emch

brought more records, and appellee's counsel questioned her about them. Still missing, however, was one month's bank statement, and other "unknown documents."

{¶ 63} After that, it was appellee's counsel who introduced the texting issue, even though no allegations were made that her testimony had been affected. The court then gave Emch and Newcomer only three hours to find counsel and prepare a defense to the contempt charges. Although Emch attempted to still comply with the subpoena, by supplying every remaining document related to her business, appellee's counsel refused them.

{¶ 64} When the testimony and produced documents failed to reveal that appellant Newcomer was deriving any income from the nightclub business, the court could have ended the search. Instead, the court chose to elevate Emch's business inexperience to the level of contempt. The record does not support a finding that Emch understood exactly what was requested and had intentionally or willfully failed to comply with the subpoena. Rather, she relied on her "bookkeeper" father, as any other company owner might, to supply the requested documents. The court, however, obviously frustrated with Emch and the parties in this case, simply overreacted. Since the court itself recognized that Emch knew nothing about the types of records requested, the record failed to support a finding of contempt, either by clear and convincing evidence or beyond a reasonable doubt.

{¶ 65} Accordingly, Emch's first, second, and third assignments of error are well-taken. Assignments of Error Nos. 4 and 5 are moot.

III.

{¶ 66} We will now address Newcomer's four assignments of error regarding the December 9, 2010 judgment, finding him guilty of direct contempt. In his second assignment of error, Newcomer argues that the court's finding of direct contempt for texting during the break was not supported by sufficient evidence. In his fourth assignment of error, he asserts that the trial court applied the wrong standard. We agree.

{¶ 67} For the reasons discussed in Emch's appeal of the texting issue, we conclude that no direct contempt was committed, and the trial court erred in finding appellant guilty by "clear and convincing" evidence. Since the sole purpose of the jail sentence was to punish appellant, the applicable standard for criminal contempt should have been used, i.e., beyond a reasonable doubt. The record does not establish that appellant's actions constituted contempt.

{¶ 68} Accordingly, Newcomers' second and fourth assignments of error as to the December 9, 2010 judgment entry are well-taken. Assignments of Error Nos. 1 and 3 are moot.

{¶ 69} The judgments of the Lucas County Court of Common Pleas, Domestic Relations Division, as appealed in this decision are reversed as follows. The September 20, 2010 judgment entry is reversed and remanded for proceedings consistent with this decision. The three December 9, 2010 judgment entries (journalized on

December 13, 2010) are reversed and vacated. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENTS REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.