[Cite as *Metcalf v. Kilzer*, 2014-Ohio-4713.]

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

Jamie L. Metcalf,	:	Case No. 14CA13
Plaintiff-Appellee,	:	**ENTRY**
v.	:	
Paul L. Kilzer, II, et al.,	:	**RELEASED: 08/27/2014**
Defendants-Appellants.	:	

{¶1} Appellants Kerensa A. Kilzer and Paul L. Kilzer II filed a motion to certify a conflict pursuant to App.R. 25 based upon our decision and judgment entry dismissing their appeal because the trial court's order was not a final appealable order. Because our entry dismissing their appeal is not in conflict with a judgment or order of another court of appeals, we **DENY** their motion to certify a conflict.

{¶2} Appellants appealed the trial court's Judgment Entry on Charges of Contempt and Motion to Show Cause entered April 11, 2014. We dismissed the appeal on the grounds that the entry was not a final appealable order. In the entry, the trial court found that Kerensa Kilzer was in contempt of court for giving false testimony at her deposition. However, the trial court had not determined the appropriate penalty or sanction for her contempt. Specifically, the trial court stated,

> Having considered these principles and the record, the Court finds beyond a reasonable doubt that defendant Kerensa Kilzer is in contempt of court for giving false testimony at her deposition. The Court shall conduct a hearing to determine the appropriate penalty including plaintiff's attorney fee claims.

Entry, p.2.

{¶3} We dismissed Kilzers' appeal because, "in order for there to be a final order in contempt in court proceedings, there must be both a finding of contempt and the imposition of a sanction or penalty." Decision and Judgment Entry, June 27, 2014, p. 3. While there was a finding of contempt, the trial court had not yet determined the appropriate sanction or penalty for Kerensa Kilzer's contempt.

{¶4} The trial court also made a determination that Paul Kilzer testified falsely but that his behavior did not constitute contempt. However, the court found that both Paul and Kerensa Kilzer actively participated in a cover-up of Kerensa's falsities for over thirteen months. As a result, the court sanctioned both defendants by excluding the affidavit of forfeiture, which was the document that was the subject of the deceptive behavior, from admission at trial except in support of plaintiff's complaint. The trial court's order stated that this exclusion was a sanction for both Kerensa and Paul Kilzer's deceptive actions:

> The Court finds that defendants' false depositions about the affidavit signatures, their cover-up of this falsity and the inaccuracies and the inconsistencies within the affidavit justify its exclusion from trial evidence.
>
> Accordingly, the Court orders as follows:
> 1. Defendant Kerensa Kilzer is in contempt of court.
> 2. Defendant Paul L. Kilzer, II, is not in contempt.
> 3. As a sanction for Kerensa's contempt and defendants' cover up described above, the affidavit of forfeiture and testimony about it are not admitted at trial except in support of plaintiff's complaint.
> 4. As an additional sanction, Plaintiff shall schedule a hearing for the Court to consider an award of attorney fees.

Entry, pp. 5-6. Because the trial court had not made a final determination as to the appropriate penalty for Kerensa Kilzer's contempt and had not decided whether it would award attorney fees, a prison sentence, or fines, we determined that the trial court's contempt of court entry was not a final appealable order. *Clyburn v. Gregg*, 4th Dist. Ross App. No. 11CA3211, 2011-Ohio-5239.

{¶5} In order to qualify for certification to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, a certifying court must find that its judgment conflicts with the judgment of a court of appeals of another district and the asserted conflict must be upon the same question of law. See *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993); *State v. Wheeler*, Washington App. No. 04CA1, 2005-Ohio-479 (4th Dist.).

{¶6} In *Whitelock*, the Supreme Court of Ohio held, pursuant to Section 3(B)(4), Article IV, Ohio Constitution and S.Ct.Prac.R. III, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Id*. at ¶ 1 of the syllabus. The court further stated:

> [A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. at 596.

{¶7} Additionally, factual distinctions between cases are not a basis upon which to certify a conflict. *Id*. at 599. "For a court of appeals to certify a case as being in conflict with another case, it is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict." *State v. Hankerson* (1989), 52 Ohio App.3d 73, 557 N.E.2d 847, ¶ 2 of the syllabus.

{¶8} Appellants propose the following question to be certified:

> A trial court's judgment or order (i) finding a party to be in contempt of court, (ii) imposing one or more definite, substantial sanctions on that party, and (iii) awarding the opposing party attorney's fees to be determined at some future date is a final appealable order from which an immediate appeal can be taken to the court of appeals.

Motion to Certify Conflict, p. 2. However, as we stated in our decision dismissing the appeal, the trial court did not award attorney fees for Kerensa Kilzer's contempt. The trial court specifically stated, "The Court shall conduct a hearing to determine the appropriate penalty including plaintiff's attorney fees claims." Entry, p. 2. Although the trial court sanctioned both Paul and Kerensa Kilzer for their deception and cover-up by excluding the affidavit of forfeiture at trial, the trial court did not make a determination of the appropriate sanctions for Kerensa Kilzer's contempt and the court did not determine whether or not it would award attorney fees as part of her sanctions.

{¶9} Appellants cited two cases that they argue are in conflict with our decision: *Jacobson v. Starkoff*, 8th Dist. No. 80850, 2002-Ohio-7059 and *Smith v. Smith*, 10th Dist. Franklin App. No. 93AP-958, 1994 WL 9055 (Jan. 13, 1994). We find both cases to be factually distinguishable from our decision here and, therefore, not in conflict. In *Smith*,

the trial court had already awarded attorney fees as sanction for the contempt, but had not yet determined the amount of the attorney fees to be awarded. The appellate court in *Smith* decided that the entry was a final appealable order even though the amount of attorney fees had not yet been determined. Thus, *Smith* is factually different because in this case, the trial court had not made a determination as to what the sanctions would be, or whether the sanctions would include attorney fees.

{¶10} We also note that the precedential value of *Smith* is questionable because the Tenth District Court of Appeals has issued decisions since *Smith* that appear not to have followed the holding in *Smith* as it relates to the issue of a final appealable order in contempt proceedings. See *AXS Opportunity Fund, LLC v. Continent French Quarter*, 10th Dist. App. No. 07AP-568, 2008-Ohio-1047 (finding that where a trial court makes a finding of contempt and awards attorney fees but has not yet ruled on the amount of attorney fees, the trial court entry is not a final appealable order, citing favorably to *Lawson v. Lawson*, 4th Dist. Lawrence App. No. 01CA31, 2002-Ohio-409). *Smith, AXS Opportunity Fund* and *Lawson* are all distinguishable from this appeal on the grounds that here, the trial court has not yet decided to award attorney fees or otherwise determined the appropriate sanctions for Kerensa Kilzer's contempt.

{¶11} We also find the decision in *Jacobson v. Starkoff*, supra, to be distinguishable. In *Jacobson*, Jacobson filed three motions in the trial court: a motion to show cause why Starkoff should not be held in contempt, a motion to require Starkoff to transfer his equitable interest in certain property, and a motion for attorney fees under the then existing R.C. 3105.18(H) governing awards of attorney fees in domestic

relation proceedings. The trial court granted the motion to show cause and found Starkoff to be in contempt and imposed a penalty of ten days in jail with the opportunity to purge the contempt by complying with the trial court's order. The trial court also decided the motion to compel Starkoff to transfer certain property interests, but scheduled the motion for attorney fees for a hearing on a later date. Starkoff immediately appealed the trial court's order finding him in contempt, but failed to perfect his appeal and it was dismissed. He did not file a motion to reinstate the appeal. Later, after the trial court ruled on the separate motion for attorney fees, Starkoff appealed the attorney fees order and the earlier contempt order.

{¶12} The *Jacobson* court stated the general rule governing finality of contempt orders: "A contempt ruling is a final order once there is a finding of contempt and the imposition of a penalty or sanction such as a jail sentence or fine." Because the trial court had found Starkoff in contempt and had imposed a jail sentence, the appellate court held that the contempt order was final. *Jacobson,* at ¶16 ("Therefore, the December 1999 order was final as to the contempt action.").

{¶13} After the court found the contempt order was final, it then responded to an argument Starkoff raised in oral argument that the trial court's failure to rule on the motion for attorney fees under R.C. 3105.18 at the time it issued the contempt order affected the finality of the contempt order. The appellate court stated, in dicta, "when a penalty has been imposed for contempt, separate from the attorney fees, the contempt motion is final even though the attorney fees incurred in bringing the motion were to be determined at a future date." The court cited to the Tenth District Court of Appeals

decision in *Smith*, supra. The court went on to review the trial court's entry awarding attorney fees under R.C .3105.18(H) and found that the trial court did not fail to take into consideration Starkoff's ability to pay the fees as required in the statute and overruled Starkoff's assignment of error concerning the attorney fees award.

{¶14} We do not find *Jacobson* to be in conflict with our decision because the trial court's contempt order in *Jacobson* decided both the contempt and the penalty or sanction for the contempt -- the ten day jail sentence. Here, the trial court's entry determined the contempt, but reserved for future hearing "the appropriate penalty including plaintiff's attorney fees." Additionally, the attorney fees awarded in *Jacobson* were made pursuant to the then existing section of R.C.3105.18(H), which allowed a trial court to award attorney fees to either party at any stage of domestic relations proceedings, if it determined that the other party had the ability to pay. Thus, as the appellate court acknowledged, the motion for contempt was separate from the motion for attorney fees and did not affect the finality of the court's earlier determination that Starkoff was in contempt and should be sanctioned with a jail sentence.

{¶15} Due to these different factual circumstances, we find the present case to be factually different from both *Jacobson* and *Smith*, supra, and thus distinguishable. Because our determination is based upon factual distinctions, and because factual distinctions are not a basis for certification of a conflict, there is no basis here for certifying a conflict.

{¶16} Accordingly, we find no merit in the Appellants' motion to certify a conflict and it is hereby **DENIED.**

{¶17} The clerk shall serve a copy of this order on all counsel of record at their last known addresses by ordinary mail. **IT IS SO ORDERED.**

Harsha, J. & McFarland, J.: Concur.

FOR THE COURT

_____
Marie Hoover
Administrative Judge