

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JONATHAN W. HARVEY

Appellant

v.

LORALEE R. HARVEY

Appellee

C. A. Nos. 09CA0052 & 09CA0054

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 06-DR-0227

DECISION AND JOURNAL ENTRY

Dated: September 7, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} A few months after Jonathan Harvey and Lorelee Myers divorced, Ms. Myers moved the trial court to hold Mr. Harvey in contempt for not making his spousal support payments in the manner required. A month later, Mr. Harvey moved to reduce his spousal support obligation, arguing that Ms. Myers had had a change in income. A magistrate recommended that Mr. Harvey not be held in contempt because he had not willfully disregarded the decree. He also recommended that the court reduce Mr. Harvey’s support obligation by \$1000 per month, but did not recommend making that reduction retroactive. Both parties objected to the magistrate’s decision. The trial court sustained Ms. Myers’s objections because it concluded that Mr. Harvey was in contempt and that his motion to reduce spousal support should be denied. It ordered him to pay a fine of \$250 and serve three days in jail, but suspended his sentence “on the condition that [he] fully comply with the orders of this court with regard to

spousal support.” It overruled Mr. Harvey’s objection as to whether the reduction in spousal support should be retroactive. Mr. Harvey moved for relief from judgment, but the court denied his motion. He has appealed the trial court’s order holding him in contempt and denying his motion to reduce spousal support. He has also appealed the denial of his motion for relief from judgment. This Court affirms because the trial court’s sentence imposing a fine and jail term is a nullity, Mr. Harvey has already paid Ms. Myers’s attorney fees, and he failed to demonstrate that the spousal support award should be reduced.

CONTEMPT ORDER

{¶2} Mr. Harvey’s first assignment of error is that the trial court incorrectly found him in contempt for failing to pay spousal support as ordered. The divorce decree ordered him to pay Ms. Myers \$33,600 annually for eight years. It also ordered him to make the payments “in advance in equal bi-monthly installments no later than the first and fifteenth of each month by direct wire transfer into the bank account of [Ms. Myers’s] choosing.”

{¶3} The parties agree that, under the terms of the decree, Mr. Harvey must pay Ms. Myers \$1400 twice a month. Mr. Harvey admitted that he usually paid her \$2800 once a month. He also admitted that he did not make the payments “by direct wire transfer.” The magistrate determined that the question to be answered was “whether . . . [Mr. Harvey was] willful[ly] disregard[ing] [the] court’s order.” The trial court, however, disagreed. It found that Ms. Myers had “made, by clear and convincing evidence, a prima facie case of contempt.” It ordered Mr. Harvey to pay a \$250 fine and serve three days in jail. It suspended the fine and jail sentence, however, on the condition that he comply with the decree’s conditions regarding the payment of spousal support. It also ordered him to pay Ms. Myers’s attorney fees.

{¶4} “Contempt is either direct or indirect, depending on where it happens.” *Forrer v. Buckeye Speedway Inc.*, 9th Dist. No. 07CA0027, 2008-Ohio-4770, at ¶14. “Direct contempt is ‘disruptive or disrespectful behavior committed in the presence of the court or so near the court’s presence as to disrupt the administration of justice.’” *Id.* (quoting Margit Livingston, *Disobedience and Contempt*, 75 Wash. L. Rev. 345, 349 (2000)). Indirect contempt occurs outside the court’s presence. *Cincinnati v. Cincinnati Dist. Council 51*, 35 Ohio St. 2d 197, 202 (1973).

{¶5} Although contempt proceedings are neither civil nor criminal, we must classify the sanctions ordered by the trial court as either “civil” or “criminal” to determine whether it provided due process. See *Denovchek v. Bd. of Trumbull County Commr’s*, 36 Ohio St. 3d 14, 16 (1988); *Cincinnati v. Cincinnati Dist. Council 51*, 35 Ohio St. 2d 197, 202 (1973). “The distinction between civil and criminal contempt is based on the character and purpose of the contempt sanctions.” *Denovchek*, 36 Ohio St. 3d at 16. “If sanctions are primarily designed to benefit the complainant through remedial or coercive means, then the contempt proceeding is civil.” *Id.* “Remedial civil contempts serve to compensate plaintiffs for damages suffered because of the defendant’s disobedience of a court order.” *Forrer v. Buckeye Speedway Inc.*, 9th Dist. No. 07CA0027, 2008-Ohio-4770, at ¶16 (quoting Margit Livingston, *Disobedience and Contempt*, 75 Wash. L. Rev. 345, 351 (2000)). The plaintiff must prove her loss as she would in any legal action for damages. *Id.* “Coercive civil sanctions are imposed when the defendant is engaged in an ongoing violation of a court’s order.” *Id.* at ¶17. “[Their] purpose . . . is to induce the defendant to stop the ongoing contemptuous behavior.” *Id.* Defendants imprisoned under a coercive civil sanction are said to “carry the keys to [their] prison in [their] own pocket.” *Brown v. Executive 200 Inc.*, 64 Ohio St. 2d 250, 253 (1980). “As soon as they purge the contempt by

stopping the ongoing violation, they are released.” *Forrer*, 2008-Ohio-4770, at ¶17. “Criminal contempt, on the other hand, is usually characterized by an unconditional prison sentence or fine.” *Denovchek*, 36 Ohio St. 3d at 16. “Its sanctions are punitive in nature, designed to vindicate the authority of the court.” *Id.*

{¶6} To determine whether the fine and jail sentence imposed by the trial court were criminal or civil sanctions, this Court must “determine the purpose behind each sanction: was it to coerce [Mr. Harvey] to obey the consent judgment decree, or was it to punish [him] for past violations?” *Brown v. Executive 200 Inc.*, 64 Ohio St. 2d 250, 254 (1980). They could not have been remedial civil sanctions because Ms. Myers testified that Mr. Harvey had paid her all of the spousal support he owed. Her only complaint was that he had not paid it as directed. They also could not have been coercive civil sanctions because Mr. Harvey does not have the ability to purge them if he complies with the decree. *Duffield v. Duffield*, 9th Dist. No. 01CA0002, 2001 WL 1044077 at *2 (Sept 12, 2001) (“Punishment imposed upon an adjudication of civil contempt must afford the contemnor an opportunity to purge himself of contempt.”). Furthermore, to avoid serving the suspended sentence, Mr. Harvey must do more than perform a simple identifiable act. The suspension order requires ongoing future adherence to each term of the support order. See *Estate of Harrold v. Collier*, 9th Dist. No. 07CA0074, 08CA0024, 2009-Ohio-2782, at ¶14.

{¶7} The fine and jail sentence were intended to punish Mr. Harvey for completed violations of the support order. Accordingly, they were criminal contempt sanctions. See *Estate of Harrold v. Collier*, 9th Dist. No. 07CA0074, 08CA0024, 2009-Ohio-2782, at ¶14. The court, however, suspended them “on the condition that [Mr. Harvey] fully comply with the orders of this court with regard to spousal support.” This Court has determined that contempt sanctions

that merely regulate future conduct are a nullity because they “simply amount[] to the court’s reaffirmation of its previous support order and can have no effect since any effort to punish a future violation of the support order would require new notice, hearing and determination.” *Forrer v. Buckeye Speedway Inc.*, 9th Dist. No. 07CA0027, 2008-Ohio-4770, at ¶55 (quoting *Marden v. Marden*, 108 Ohio App. 3d 568, 571 (1996)). Mr. Harvey’s sentence, therefore, is of no effect.

{¶8} The trial court also ordered Mr. Harvey to pay Ms. Myers’s attorney fees and costs. Mr. Harvey conceded at oral argument that he has paid Ms. Myers the \$1677 ordered by the trial court. “It is a well-established principle of law that a satisfaction of judgment renders an appeal from that judgment moot.” *Blodgett v. Blodgett*, 49 Ohio St. 3d 243, 245 (1990). Accordingly, because the trial court’s attempt to impose a fine and jail sentence on Mr. Harvey is a nullity and he has satisfied the remainder of its judgment, this Court concludes that any error by the trial court in holding Mr. Harvey in contempt was harmless (fine and sentence) or moot (attorney fees). See Civ. R. 61 (“[N]o error or defect in any ruling . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.”). Mr. Harvey’s first assignment of error is overruled.

SPOUSAL SUPPORT MODIFICATION

{¶9} Mr. Harvey’s second assignment of error is that the trial court incorrectly denied his motion to modify spousal support. He has argued that the court ignored multiple changes of circumstances that were not contemplated by the parties at the time of their divorce.

{¶10} Before a trial court can modify an award of spousal support under Section 3105.18 of the Ohio Revised Code, it must engage in a two-step analysis. *Tufts v. Tufts*, 9th Dist.

No. 24871, 2010-Ohio-641, at ¶8. “The first step is jurisdictional and requires the trial court to determine whether the original divorce decree provided continuing jurisdiction to modify the spousal support award, and if so, whether the circumstances of either party have changed.” *Id.* “A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly reserved jurisdiction to make the modification and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree.” *Mandelbaum v. Mandelbaum*, 121 Ohio St. 3d 433, 2009-Ohio-1222, at paragraph two of the syllabus). “Once jurisdiction is established, the second step of the analysis requires the trial court to determine whether the existing support order should be modified in light of the change in circumstances that has occurred.” *Tufts*, 2010-Ohio-641, at ¶8. “Such a determination is conducted in consideration of the factors set forth in R.C. 3105.18(C).” *Id.* “The burden of showing that a reduction of spousal support is warranted is on the party who seeks the reduction.” *Reveal v. Reveal*, 154 Ohio App. 3d 758, 2003-Ohio-5335, at ¶14.

{¶11} Mr. Harvey has argued that there was a change in circumstances because Ms. Myers obtained regular employment after the decree was entered and is no longer disabled. According to him, at the time of their divorce, Ms. Myers was unemployed and was unlikely to obtain future employment because she claimed to be disabled. After the decree was entered, however, she obtained a job as a waitress and began competing in dance competitions.

{¶12} The reason the trial court denied Mr. Harvey’s motion to modify spousal support is not clear from its decision. It found that, at the time Mr. Harvey filed for divorce, Ms. Myers was working for an art gallery. She continued working for the gallery in 2007, which is the year the decree was entered. She earned \$5311 in 2007. It found that Ms. Myers could not remember

when she stopped working for the art gallery. It found, however, that she started working as a waitress in April 2008, that she earned minimum wage at her new job, and that she earned \$10,014 in 2008. It noted that, at the time Mr. Harvey moved to modify spousal support, she had only been working as a waitress for four months. It further found that she continued to suffer from a number of medical conditions.

{¶13} The trial court appears to have concluded that, even if there was a substantial change in circumstances that was not contemplated by the parties at the time of their divorce, Mr. Harvey did not demonstrate that the spousal support award should be modified. Among the factors that the trial court must consider in deciding whether to modify spousal support are the income of the parties, their relative earning abilities, and their physical, mental, and emotional conditions. R.C. 3105.18(C)(1)(a-c). In its decision, the trial court emphasized that Ms. Myers earns minimum wage while Mr. Harvey “enjoys a six figure income” and that Ms. Myers “continue[s] to suffer from a number of medical conditions.” It also emphasized in its order denying Mr. Harvey’s motion for relief from judgment that “[he] makes six figures” while “[she] makes minimum wage and suffers from a number of medical problems.”

{¶14} Mr. Harvey has conceded in his brief that, at her current job, Ms. Myers makes only approximately \$16,000 annually. He has not pointed to any evidence in the record that establishes that she no longer suffers from rheumatoid arthritis, fibromyalgia, asthma, and degenerative disc disease. He also has not denied that his income is in the six figures. Upon review of the record, this Court concludes that the trial court properly concluded that Mr. Harvey failed to show that he is entitled to a reduction in his spousal support payments. His second assignment of error is overruled.

TIMING OF REDUCTION

{¶15} Mr. Harvey's third assignment of error is that the trial court incorrectly failed to make the reduction in spousal support retroactive to the date of his motion. Considering that the trial court correctly determined that a modification of the spousal support award was not appropriate, it correctly refused to order a retroactive reduction in support. Mr. Harvey's third assignment of error is overruled.

MOTION FOR RELIEF FROM JUDGMENT

{¶16} Mr. Harvey's fourth assignment of error is that the trial court incorrectly denied his motion for relief from judgment. He has argued that Ms. Myers surprised him with false and misleading testimony about whether she was employed at the time of the divorce. According to him, a lawyer who used to represent Ms. Myers sent him an email on May 16, 2007, informing him that Ms. Myers was no longer working for the art gallery. Ms. Myers testified at the hearing, however, that she was employed by the art gallery at the time of the divorce, which was in December 2007.

{¶17} Under Rule 60(B) of the Ohio Rules of Civil Procedure, the trial court "may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged . . . ; or (5) any other reason justifying relief from the judgment." "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment . . . was entered or taken." Civ. R. 60(B). Interpreting Rule 60(B), the Ohio Supreme Court has held that, "[t]o prevail on a motion brought under [the rule], 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” *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976).

{¶18} As previously noted, the trial court’s decision to deny Mr. Harvey’s motion to modify spousal support was not based on whether Ms. Myers was employed at the time the divorce decree was entered, but on the fact that she has ongoing medical problems and that the parties continue to have significantly disparate incomes. Mr. Harvey, therefore, has failed to demonstrate that he had a meritorious claim or defense to present if his motion were granted. The trial court properly denied his motion for relief from judgment. Mr. Harvey’s fourth assignment of error is overruled.

CONCLUSION

{¶19} The trial court properly denied Mr. Harvey’s motion to reduce spousal support and motion for relief from judgment. Any error by the court in finding Mr. Harvey in contempt was harmless or is moot. The judgment of the Wayne County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶20} I concur in the judgment. To say that the classification of criminal and civil contempt is a confused area of the law is an understatement. See, e.g., *Internatl. Union, United Mine Workers of Am. v. Bagwell* (1994), 512 U.S. 821, 839-40 (Scalia, J., concurring) (“As the Court’s opinion demonstrates, our cases have employed a variety of not easily reconcilable tests for differentiating between civil and criminal contempts.”). Thus, although I might have analyzed Mr. Harvey’s first assignment of error differently, I nonetheless concur in the result. Accordingly, I concur in the judgment.

APPEARANCES:

R. J. HELMUTH, attorney at law, for appellant.

ROBERT W. ECKINGER, attorney at law, for appellee.