[Cite as *In re Summers*, 2010-Ohio-5993.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: WILLIAM LAWRENCE SUMMERS	C. A. No. 24981 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. MISC. 2009-0-0084

DECISION AND JOURNAL ENTRY

Dated: December 8, 2010

Per Curiam.

{¶1} Appellant, William Summers, appeals from the decision of the Summit County Court of Common Pleas, finding him in contempt of court. This Court reverses.

I

{¶2} On August 10, 2009, the court held a jury trial in the matter of *All Seasons Contracting and Landscaping, Inc. vs. John Deere Landscapes, Inc.*, which concluded on August 18, 2009. Summers served as co-counsel with attorney Aaron Baker and represented the plaintiff in the matter. The court held a final pretrial conference in the matter on July 27, 2009, which Summers was unable to attend. Baker attended the final pretrial hearing instead. On the day of the trial after discussions that were not on the record, the court informed Summers that, because he was not present at the final pretrial conference, he could not serve as trial counsel pursuant to Loc.R. 8.01(B). Upon further discussions on the first day of trial, the court determined that Baker was to act as lead counsel in presenting plaintiff's main case, which included delivering

the opening argument and presenting plaintiff's witnesses. Baker became licensed to practice law in 2007 and had no trial experience. Summers was permitted to conduct the voir dire questioning, perform cross-examination of defense witnesses, and present plaintiff's closing argument. The court found Summers in direct contempt of court on the last day of the proceedings and assigned his contempt case to its miscellaneous docket. The trial court imposed a $500 fine upon Summers, but suspended $250 of the fine on the condition that Summers attend two hours of accredited legal ethics and professionalism courses. Summers has appealed from the trial court's decision to find him in contempt and asserts one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT ERRED WHEN IT FOUND ATTORNEY WILLIAM L. SUMMERS GUILTY OF DIRECT CONTEMPT OF COURT."

{¶3} In his sole assignment of error, Summers argues that the trial court erred in finding him in direct criminal contempt of court. Instead, he asserts that his actions at trial were the result of his attempts to zealously advocate on behalf of his client.

{¶4} This Court reviews a finding of contempt for an abuse of discretion. *Boston Hts. v. Cerny*, 9th Dist. No. 23331, 2007-Ohio-2886, at ¶17. See, also, *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11. An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "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, at

¶33. Such conduct, however, "will only be considered direct contempt if it constitutes an imminent, not merely a likely, threat to the administration of justice." Id.

{¶5} Summary contempt is an awesome power of the judiciary that must be used sparingly and cautiously. *Cincinnati v. Cincinnati Dist. Council 51, Am. Federation of State, County and Municipal Emp., AFL-CIO* (1973), 35 Ohio St.2d 197, 213 (Brown, J., dissenting). "That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." *Sacher v. United States* (1952), 343 U.S. 1, 12. 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*, 10th Dist. Nos. 07AP-186 & 07AP-350, 2008-Ohio-2952, at ¶44. Notably, conduct which may be personally insulting to the judge, but which does not actually constitute an imminent threat to the administration of justice, cannot justify the trial court's employment of its summary contempt powers. *In re Little* (1972), 404 U.S. 553, 555, quoting *Craig v. Harney* (1947), 331 U.S. 367, 376 ("'The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.'"). Further, in some instances, where it is apparent that the interaction between the court and the alleged contemnor has reached a certain pitch such that it may compromise the appearance of justice, it is incumbent upon the trial court to defer the contempt proceedings to another judge. See, e.g., *Mayberry v. Pennsylvania* (1971), 400 U.S. 455, 465, quoting *Offutt v. United States* (1954), 348 U.S. 11, 17 ("At times a judge has not been the image of 'the impersonal authority of law' but has become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit

in judgment on the contempt charge. 'The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.'").

{¶6} "The summary contempt power is an exception to normal due process requirements, and must be confined to circumstances in which '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.'" *In re Contempt of Gregg*, 8th Dist. No. 85679, 2005-Ohio-4996, at ¶11, quoting *In re Oliver* (1948), 333 U.S. 257, 275. In light of the due process concerns inherent in summary contempt, it is critical for the reviewing court to be able to examine the precise facts upon which the trial court based its summary contempt finding. We have previously stated that "[a] direct contempt order must contain a clear and complete recital of the facts upon which the finding is based to allow an appellate court to judge its lawfulness." *State v. Sindell* (Dec. 13, 1978), 9th Dist. No. 2745, at *3 (reversing and remanding contempt matter to trial court where journal entry did not contain a clear and complete recital of the facts upon which the finding of contempt was made). See, also, *In re Wuliger* (May 7, 1976), 8th Dist. No. 34240, at *1 ("Upon any adjudication of contempt the trial court must, in order to afford the appellate court a basis for review, enter a written order specifically and completely setting forth the facts upon which the finding is based[.]"); *State v Butler* (Feb. 26, 1976), 8th Dist. No. 34574, at *2, citing *People v. Koniecki* (1961), 28 Ill. App.2d 483, 487 ("From a review of the cases, it is clear that the duty imposed upon the trial court is to 'enter a written order, setting forth fully, clearly, and specifically the facts out of which the contempt arose, so that the reviewing court may determine

if the committing court had jurisdiction to enter the order.'"); *State v. Treon* (1963), 188 N.E.2d 308, 316 ("The general rule in cases of direct contempt is that the trial court's judgment or order of direct contempt must itself contain a complete and clear statement of the facts upon which the conviction is based[.] Thus, an appellate court, by merely inspecting the judgment or order, may readily determine whether contempt was in fact committed and whether the trial court had jurisdiction to punish it.").

{¶7} In this case, the trial court's order does not reflect what conduct led to its summary contempt finding. The order for contempt merely states that Summers was in "direct and willful contempt of [the trial court]" and imposes a $500 fine against him, a portion of which could be suspended if Summers completed specified courses in legal ethics and professionalism. It does not, however, contain a recitation of the factual findings that served as the basis for the trial court's imposition of such a sanction. Without such information, this Court is unable to determine the lawfulness of the trial court's order. See *Sindell*, at *3. Because the trial court's judgment of contempt failed to contain a complete recitation of the facts upon which its finding of contempt is based, this Court cannot reach the merits of Summers' appeal. Accordingly, this matter is remanded to the trial court so that it may "enter a written order, setting forth fully, clearly, and specifically the facts out of which the contempt arose[.]" *Butler*, at *2. Summers' first assignment of error is well taken.

III

{¶8} Summers' sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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 Summit, 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 Appellee.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

WHITMORE, J.
DISSENTS, SAYING:

{¶9} I respectfully dissent, because I would affirm the trial court's decision to hold Summers in contempt of court based on his conduct throughout the underlying trial in this matter. In his appellate brief, Summers does not assert that he was unclear of the facts upon which the trial court based its contempt finding, nor does he assert any argument in support of the position taken by the majority opinion. Instead, he acknowledges in his brief to this Court that he was argumentative, loud, and that the trial took longer than expected, but asserts that

what the trial court considered contemptuous conduct, was merely the result of his attempt to zealously represent his client at trial. Summers also admits that there was "substantial argument" throughout the trial between him and the trial court, based on the trial court's decision to limit his participation at trial.

{¶10} My review of the transcript reveals that it is permeated with exchanges documenting Summers' refusal to abide by the court's limitation on his participation at trial, exchanges which significantly protracted the length of the trial. In my opinion, no formal recital of summary facts in the order of contempt could adequately explain the circumstances faced by the trial court. The record is the best evidence on this issue. I would not, therefore, remand for such a summary statement.

{¶11} The transcript of the proceeding begins with the trial court noting that there had been an hour delay in starting the trial based on discussions related to Summers' role during trial. Challenges to that decision continued to resurface throughout the trial as is evidenced by multiple and prolonged side bar discussions on this same topic. Summers not only inserted himself into portions of the proceeding in which the trial court had expressly prohibited him from participating, but he was disrespectful to the court in doing so. For example, on the third day of trial, during a side bar discussion about an exhibit being introduced by the plaintiff, Summers asked if he could make a record of an issue, which the court permitted. In turn, the following exchange occurred:

> "[Summers]: I'd professionally ask the Court to stop with the terse tone of voice and the negative looks to Mr. Baker. And I would remind the Court that this young man is trying his very, very first case and that we realize there is a potential bias and prejudice here, but I would ask you personally and professionally to stop it.
>
> "[Court]: Let me say for the record that there is absolutely no bias here to this young man. And I have not used a terse tone of voice with him, nor have I given

> him any looks that are any different than I've used in overseeing the Court's rulings while this case has proceeded. This is indeed a figment of [Summers'] imagination that he has said this, so we'll just stop right there.
>
> "***
>
> "[Summers]: If that is not the truth, I will supply affidavits from people in the courtroom.
>
> "[Defense counsel]: Just one comment for the record. I've been paying close attention to the trial, all comments and all looks that have been made by the Judge towards Mr. Baker and I personally have observed no such terse looks or any type of inappropriate behavior towards Mr. Baker."

Summers continued in this theme, later addressing the court by stating he would "ask [the judge] very, very, nicely to please, Judge, curtail [her] obvious bias, please." In response, the court noted that there was "nothing obvious here about that in [her] view" to which Summers replied "[i]n over 250 criminal trials, I've never had somebody say, 'Yeah, I shot him.'"

{¶12} Summers continued to express his dissatisfaction with the trial court's rulings, as illustrated through the following exchange, which occurred on the record, outside of the presence of the jury, on the fourth day of trial:

> "[Summers]: Your Honor, at this time I would move for a mistrial. Your dealings with the objections could be read by a first-year law student –
>
> "[Court]: Let's close the door.
>
> "[Summers]: Okay. I'm not allowed to walk around. I'm not going to go close the door. Excuse me, I have to talk to my client.
>
> "[Court]: You may be seated in the back.
>
> "[Summers]: At this time I move for a mistrial. A first-year law student could read the exchange that was going on yesterday, the way – the way that you were –
>
> "[Court]: A first-year law student could what?
>
> "[Summers]: I will begin again. During the presentation of the cross-examination of our case yesterday wherein you allowed defense counsel to ride hard, a first-year law student could see the way you have ruled on our objections and the way you have ruled on [defendant's]. And I'm asking you to declare a

mistrial for the most improper and egregious, one-handed, heavy-handed relation to one side of a lawsuit that I have seen in 40 years and 500 jury trials.

"I will handle the ancillary stuff at the conclusion of the trial, but you need to – you really do need to stop with the way you talk to me in front of the jury, the way you look at me in front of the jury and the way that you make rulings that are so obvious that I would bet anything there is – that if you went in and talked to those jurors when its over, 'Gee, could you tell I didn't like Mr. Summers and he didn't like me,' you will get eight yeses.

"Please give us a fair trial hence out. I was trying to move this along. I was trying to say 'Sir, I'm going to ask you a question. I'm going to say please just answer that question.' And then out of fairness, totally unlike what you have allowed him to do, 'you may explain it,' and you were overruling me. You were sustaining objections.

"Yesterday I was trying to let that happen to cut the time in front of the jury and you rode hard. You know you rode hard on cross. You let him go with the just yes or no. I never did that one time. I tried to move this thing along and you still even chastised me in front of the jury for having the poker in my hand.

"Judge, we declare a mistrial. Whatever you think of me and whatever I think of you is not supposed to enter into this record. That will be dealt with with a judicial complaint. I am saying to you please, please give us a fair trial. You are not doing it. He's going to get up and say, yes, you are. You are going to get up and say, oh, yes, you are.

"But a first-year law student can read the objections the way you dealt with them from him and the opposite way that you are dealing with them from me[.] ***

"*** You are sworn to give fairness. If you believe in your heart you are, then treat us this way or rule on my motion for a mistrial.

"[Court]: Do you want to respond on the record?

"[Defense counsel]: Judge, I think the record speaks for itself. My actions were appropriate yesterday. I conducted myself in an appropriate tone of voice. Was I aggressive? Yes. But was it done in a respectful tone of voice to the witness? Yes. Was [Summers] just screaming to the Court? Yes. Is he stating his case with a loud voice, typical high that has been demonstrated throughout this litigation, at depositions which the Court did not have he benefit of being at? Yes.

"The grounds for a mistrial are completely unfounded. And as [Summers] has anticipated, I would say that Your Honor has completely conducted herself in an appropriate manner and the case is being tried in a fair way. Thank you.

> "[Court]: I am doing my best to oversee what has been one of the most challenging trials I've overseen because of the dynamics with counsel and particularly I'm referring to the behavior of Attorney Summers. And here in this portion of the trial I made the rulings that were necessary to keep consistent with rules, consistent with the required decorum of the Court. The difference between the two days, if there is any, is the demeanor of counsel that was presenting, the method of counsel's presentation, the way [Summers] proceeded here this morning, made rulings challenging no doubt because of his overly-aggressive style at times.
>
> "I made every effort to try to be able to bring this trial to conclusion, to be fair in doing so. This trial has been overly-extended because of difficulty in gaining accordance with proceedings and I won't go further with that.
>
> "But my point is I'm trying to give plaintiff their day in [c]ourt so they can present their case. I believe I've been generous in allowing plaintiff's case to be presented. *** Motion [for a mistrial] is denied."

The trial resumed, and shortly thereafter in the presence of the jury while Summers' was cross-examining a witness, the following exchange occurred:

> "[Summers]: Okay. Now you have given me an explanation. Sir, I'm letting you – unlike your counsel, I'm letting you answer the question, but I only ask that you answer it yes or no and then take all the time you want to explain.
>
> "[Witness]: Yes, sir.
>
> "[Defense counsel]: Objection.
>
> "[Court]: And the same ruling as before with regard to framing your questions. Just be reminded of that counsel. Go on.
>
> "[Summers]: When I ask a direct question, should it be answered yes or no? All I'm asking the witness to do, unlike yesterday, is to just say yes or no and that --
>
> "[Court]: I think on my --
>
> "[Summers]: You can't cut me off --
>
> "[Court]: My – the phrase 'unlike yesterday' is the major issue here. That was the warning. Let's not have this dialogue back and forth. You are to accept my ruling on --
>
> "[Summers]: Are you ruling --
>
> "[Court]: -- an objection.

> "[Summers]: Are you ruling --
>
> "[Court]: Let's just stop this conversation now. Put your next question to the witness. No more argument.
>
> "[Summers]: I don't know how to now with that ruling.
>
> "[Court]: Rephrase. Put your question to the witness."

Exchanges of a similar nature continued to occur between counsel and the court throughout the six-day trial. Before the court recessed for the weekend, the judge stated that "[w]ell, I observed the behavior here during the trial and I want both sides, especially [Summers], to ratchet down his level of -- and I'm going to use the word again, histrionics. I don't want to see these kinds of behavior when we come back on Monday."

{¶13} Next, the following exchange occurred:

> "[Court]: I'm doing my best to ensure that [Summers'] client, [] get his case presented, has an opportunity to tell his story to the jury. I do not appreciate being yelled at. I do not appreciate having you bully witnesses. I am not going to stand for any more of it. I have taken far more than I should in the interest of getting this case settled and getting this case to the jury and completing it. I don't want to have any cataclysms during the trial. I want to get it done. But I also expect that you show due respect for not only the [c]ourt but the witnesses here.
>
> "Now, I didn't make the record reflect when you were raising your voice and in fact yelling at the last witness in a very bullying, combative fashion. I didn't stop it. I didn't require you to restate it. In hindsight I should have. I should have said let's stop and just restate that question in a reasonable tone.
>
> "That is the way we'll go on Monday. We're going to continue in this case in the way that I usually see counsel proceed. We're going to be civil. We're not going to yell at the witness, at the Judge, and that's the way it's going to be."
>
> "[Summers]: When this case is over, I will seek an affidavit from each and every one of these juror as to whether or not [defense counsel] got up in his cross examination of each and every one of our witnesses and cut them off, shot them down, raised his voice and everything else. I will file those with my judicial complaint and I guarantee you they will all say the same thing that -- even if you try to stop me -- 'This is not true. This man raised his voice incessantly. This man cut people off and said yes or no.'

> "When I tried to present a yes or no and then an explanation, you shot me down. It's all on the record. I'm very disalluded, yes, I'm."
>
> "[Court]: I look forward to reviewing the record.
>
> "[Summers]: It's going --
>
> "[Court]: So --
>
> "[Summers]: And it's not going to the Court of Appeals. That's not where it's going.
>
> "[Court]: Don't think you are threatening me.
>
> "[Summers]: I would never do such a thing with all due respect."

When the trial resumed the following week, Summers continued in the same vein, despite the court's admonishment just days ago. In turn, the court warned Summers that he was "perilously close *** to contempt" and was again warned not to argue with the court.

{¶14} Only seven questions later, Summers challenged the court, stating "[j]udge, you are limiting my cross-examination." After being twice reminded to "lower [his] voice," and told not to "blast into the microphone" but to instead "speak in a normal tone of voice" the court found Summers in direct contempt of court. In doing so, the court recounted Summers' behavior throughout the trial, a summarization which spanned ten pages of the trial transcript. In its summary, the trial court noted that, despite having been warned to refrain from such argumentative, disruptive, and disrespectful behavior, Summers was unable to do so.

{¶15} I believe that Summers' conduct went well beyond merely offending the judge's feelings or sensibilities, but did in fact, obstruct the orderly administration of justice. Trial counsel crossed the line from zealous advocate to contemnor when he repeatedly challenged, in an argumentative, mocking, and sometimes hostile manner, the trial court's authority. See *In re Contempt of English*, 8th Dist. No. 90417, 2008-Ohio-3671, at ¶10 (finding trial counsel in direct criminal contempt of court for "characterizing (and often mischaracterizing) the court's rulings

in dramatic, argumentative fashion" because it "repeatedly challenged the court's authority and effectively halted the proceedings"). Summers' disruptive and disrespectful conduct was not contained to one isolated event or ill-mannered comment, but rather, permeated the trial court proceedings, even after the court warned him about the consequences of continued misconduct. Compare *In re Lodico*, 5th Dist. No. 2003-CA-00446, 2005-Ohio-172, at ¶88-102 (reversing a criminal contempt conviction because the court relied on events not contained in the record). Because the record contains numerous and lengthy illustrations of Summers' contemptuous conduct and a recitation of the basis for the court's contempt finding at the time it was issued, I would affirm the trial court's decision to find Summers in criminal contempt. Accordingly, I dissent.

APPEARANCES:

AARON T. BAKER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.