

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MARIBETH BADERTSCHER nka BURNS

C.A. No. 14AP0019

Appellant

v.

ERIC K. BADERTSCHER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 11-DR-0312

Appellee

DECISION AND JOURNAL ENTRY

Dated: June 8, 2015

CARR, Judge.

{¶1} Appellant Maribeth Badertscher, nka Burns (“Wife”) appeals the judgment of the Wayne County Court of Common Pleas, Domestic Relations Division, that found her in contempt and ordered her to pay her former husband’s (“Husband”) attorney fees, litigation costs, and court costs. This Court affirms.

I.

{¶2} Wife and Husband were divorced after more than a decade-long marriage. Wife was awarded the marital residence and was required to refinance the mortgage and hold Husband harmless for any liability thereon, except that Husband would be responsible for “one half of the closing costs that would be the responsibility of a seller according to the practice and procedure usually followed in Wayne County, Ohio.” Because both parties had separate property claims in the marital residence and other property, the domestic relations court ordered an equalization of the division of assets and debts as follows:

In order to equalize the division of marital assets and debt, [Wife] shall pay to the [Husband] \$35,364 within 90 days of the final journalization of the DECREE OF DIVORCE. In order to reimburse the [Husband] for the excess separate property claim that he has in the marital residence, the [Wife] shall pay to the [Husband] \$4725 within 90 days of the final journalization of the DECREE OF DIVORCE.

{¶3} The decree contained no provisions allowing Wife to offset any amounts owed to Husband with amounts Husband might owe to Wife.

{¶4} Almost five months after the journalization of the divorce decree, Husband filed a motion to hold Wife in contempt for failing to pay him \$1,477.22, the alleged “balance of the equalization payment ordered by th[e] court.” Husband further requested an order requiring Wife to reimburse him for his attorney fees and costs incurred in prosecuting this contempt motion, the third Husband filed during the pendency of the action. The magistrate held a hearing on Husband’s contempt motion and found Wife in contempt for “failing to tender the proper amount to the [Husband] within the required 90 day time limit from the date of finalization of the [divorce decree].” The trial court adopted the magistrate’s decision the same day it was issued. The domestic relations court found Wife in contempt and fined her \$250, suspending the fine on the conditions that, within 30 days, she (1) pay Husband all amounts owed pursuant to the divorce decree, and (2) pay Husband’s attorney fees (\$2008), litigation costs (\$195), and court costs (\$85), totaling \$2288.

{¶5} Wife filed objections to the magistrate’s decision. In her preliminary objections, Wife asserted that the magistrate’s contempt finding and order that she pay Husband’s attorney fees, litigation costs, and court costs were against the manifest weight of the evidence and contrary to law. She supplemented her objections after the hearing transcript was filed. Husband responded in opposition. The domestic relations court overruled Wife’s objections and adhered to its earlier order. Wife appealed and raises two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT FOUND [WIFE] IN CONTEMPT FOR FAILING TO TENDER THE PROPER AMOUNT TO [HUSBAND] WITHIN THE REQUIRED NINETY (90) DAYS.

{¶6} Wife argues that the domestic relations court erred by finding her in contempt for failing to timely tender the proper amount owed to Husband pursuant to the parties' divorce decree. Specifically, Wife argues that she did not intend to violate the court's order and that, in any event, she rectified her mistake prior to the contempt hearing. This Court is not persuaded by Wife's arguments.

{¶7} R.C. 2705.02 governs acts in contempt of court and provides, in relevant part: "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer[.]" Contempt may be criminal or civil, as generally evidenced by the character and purpose of the sanction imposed. *In re C.M.*, 9th Dist. No. 21720, 2004-Ohio-1984, ¶ 9, citing *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253 (1980). There is no dispute that the trial court found Wife guilty of civil contempt.

{¶8} Husband's motion was premised on Wife's deducting too great a sum for Husband's share of closing costs arising out of Wife's refinancing of the marital home, and her alleged failure, therefore, to comply with the order in the divorce decree to pay him the sum of \$40,089 (\$35,364 + \$4725) within 90 days of journalization of the decree. Wife deducted \$1812.10 from her payment to Husband as his share of the closing costs, when he was only responsible for \$334.88.

{¶9} Before the trial court could find Wife guilty of civil contempt, it had to find by clear and convincing evidence that Wife violated the orders in the decree relative to her obligation to timely pay certain sums to Husband. *See Olson v. Newhouse*, 9th Dist. Summit No. 24755, 2010-Ohio-1349, ¶ 14. It is well established that a reviewing court will not overturn the trial court’s finding in that regard absent an abuse of discretion. *Id.*, citing *Doerfler v. Doerfler*, 9th Dist. Wayne No. 06CA0021, 2006-Ohio-6960, ¶ 15, citing *State ex rel. Delco Moraine Div., Gen. Motors Corp. v. Indus Comm.*, 48 Ohio St.3d 43, 44 (1990). *But see State v. Lavery*, 9th Dist. Summit No. 17297, 1995 WL 641130 (Nov. 1, 1995) (wherein this Court applied the civil manifest weight of the evidence standard of review to a challenge to a finding of civil contempt). An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). Accordingly, this Court will not overturn Wife’s contempt judgment where the trial court reasonably found that Husband supported his motion by clear and convincing evidence.

{¶10} The Ohio Supreme Court has long recognized that “[p]roof of purposeful, willing or intentional violation of a court order is not a prerequisite to a finding of contempt.” *Pugh v. Pugh*, 15 Ohio St.3d 136 (1984), paragraph one of the syllabus. In fact, the plain language of R.C. 2705.02(A) supports as much. The *Pugh* court, recognizing the importance of the “uninterrupted and unimpeded administration of justice[.]” elaborated:

The purpose of sanctions in a case of civil contempt is to compel the contemnor to comply with the lawful orders of a court, and the fact that the contemnor acted innocently and not in intentional disregard of a court order is not a defense to a charge of civil contempt. * * * The absences of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or

damages sustained by reason of noncompliance. * * * The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey * * *. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions.

Pugh, 15 Ohio St.3d at 140, quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55 (1971), paragraph three of the syllabus; and *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

{¶11} At the hearing on Husband's motion, Wife testified that, as she had no experience in real estate transactions, she sought the advice of professionals at the lending institution handling the refinancing to determine the amount of closing costs. She then deducted half that amount from the money she knew she owed Husband. Wife testified that she believed she was following the court's orders when she calculated Husband's portion of the seller's closing costs and deducted that amount from her payment to Husband. She did not further consult with any other professional regarding the proper amount of closing costs until after Husband filed his motion for contempt and after a pretrial on that motion during which the magistrate indicated what he believed to be the correct amount. Even then, instead of giving Husband a check for the amount required to fully compensate him, Wife admitted that she merely delivered such a check to her attorney with instructions to deliver it to Husband's attorney to hold in trust and release only if Husband dismissed his contempt motion and agreed not to seek attorney fees relating to the contempt proceedings. Accordingly, as of the date of the contempt hearing, Husband still had not received the money owed to him by Wife. Nevertheless, Wife insisted that she had resolved the matter. She moreover asserted that she does not believe she should have to pay Husband's attorney fees and costs arising out of the contempt proceedings because she has paid a

lot of money throughout the divorce process and does not believe that she is at fault for failing to pay Husband the total amount she owed him.

{¶12} Husband requested payment in the amount of \$1477.22, the difference between what Wife withheld and the amount Husband should have paid as his share of closing costs. Wife's attorney stipulated that was the amount of the check she forwarded to Husband's attorney on the condition it be released only if Husband dismissed his contempt motion and agreed to waive Wife's payment of his attorney fees. Husband further requested that the court order Wife to pay his attorney fees incurred relative to the contempt proceedings, his expert's fee, and court costs, because he would not have incurred any of those costs if Wife had timely paid him what she owed him pursuant to the decree. Husband testified as to the amount of money he had paid in attorney fees, expert fees, and court costs arising out of the contempt proceedings.

{¶13} Husband's expert witness, an attorney who had been practicing real estate law for over 13 years and was familiar with Wayne County practices and procedures, testified regarding the calculation of seller's closing costs. Her assessment comported with the amount Husband was seeking from Wife. The expert further testified as to her hourly rate and how much time she expended in regard to the contempt proceedings.

{¶14} The magistrate found Wife in contempt for failing to timely pay the appropriate amount of money to Husband pursuant to the orders in the divorce decree. In her objections to the magistrate's decision, Wife admitted that she had deducted sums from her payment to Husband to offset what she believed he owed her. She further admitted that she erred in her calculation of the amount owed by Husband for one half of the seller's closing costs. She claimed, however, that she had rectified her mistake so that Husband was not harmed. The trial court overruled her objections.

{¶15} The orders in the parties' divorce decree set forth the amounts each party must pay the other and within what time frame. Wife's concession regarding the proper amount of closing costs and her admission that she did not pay the correct amount she owed Husband within 90 days of journalization of the decree supported the trial court's finding that she violated the court's order and could be found guilty of contempt. Wife admitted that she made a mistake in her calculations, although she denied doing so intentionally. Because the law does not require intentional or wilful disobedience of the court's order, only disobedience, Wife's argument that she did not intend to violate the order must fail. *See Pugh*, 15 Ohio St.3d at 140.

{¶16} Moreover, Wife's argument that she had rectified her violation and effectively "purged" any contempt prior to the hearing is not supported by clear and convincing evidence, as she admitted that she had refused to release the contested funds to Husband unless he dismissed his contempt motion and waived his pursuit of attorney fee and costs. Instead of rectifying her mistake once she became aware of it at the pretrial on Husband's contempt motion, Wife attempted to condition the release of monies she knew she owed Husband upon his dismissal of the motion. By failing to pay the sum she properly owed to Husband, Wife was in contempt of the orders in the parties' decree. Accordingly, based on a review of the record, this Court cannot say that the trial court abused its discretion by finding by clear and convincing evidence that Wife violated the court's orders established in the divorce decree. Wife's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEREIN IT AWARDED [HUSBAND] ATTORNEY FEES IN THE AMOUNT OF \$2008.00, LITIGATION FEES IN THE AMOUNT OF \$195.00 AND COURT COSTS IN THE AMOUNT OF \$85.00.

{¶17} Wife argues that the trial court erred by awarding Husband attorney fees, litigation (expert witness) fees, and court costs. This Court disagrees.

{¶18} Wife argues that the imposition of attorney fees, litigation fees, and court costs arising out of the contempt proceedings constituted an abuse of the trial court's discretion because she must be given an opportunity to purge her contempt. Wife misunderstands the law.

{¶19} This Court agrees that the purpose of civil contempt is to compel compliance with lawful orders. *Tomaszczyk*, 27 Ohio St.2d at paragraph three of the syllabus. Furthermore, a contemnor must have the opportunity to purge the contempt and avoid the sanction imposed. *See Brown*, 64 Ohio St.2d at 254. ("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."). The sanction imposed in this case, however, was not the imposition of attorney fees, litigation fees, and court costs. The trial court may impose a fine or jail time or both as a sanction. In this case, the trial court ordered Wife to pay a fine of \$250 as the contempt sanction. The trial court then provided that she could purge her contempt and avoid the sanction of the fine by complying with the decree's order to pay Husband what she owed him, and by paying his attorney fees, litigation fees, and court costs.

{¶20} It is well settled that the trial court retains discretion "to include reasonable attorney fees as part of the costs taxable to a party, whom the court has found guilty of civil contempt." *Willett v. Willett*, 9th Dist. Summit No. 22167, 2005-Ohio-342, ¶ 12, citing *White v. White*, 9th Dist. Wayne No. 2525, 1990 WL 27172, *3 (Mar. 7, 1990). Wife has cited no authority for the proposition that the trial court may not impose fees and costs reasonably expended by the moving party in the prosecution of his contempt motion only because the contemnor ultimately complies with the underlying order giving rise to the contempt. Husband was compelled to expend money for attorney fees, litigation fees, and court costs in order to

obtain money rightfully owed to him by Wife. Even when Wife became aware that she had not complied with the order in the decree, she failed to remit the money to Husband unconditionally. Under these circumstances, the trial court was not unreasonable in including the above fees and costs as part of the costs taxable to Wife. Wife's second assignment of error is overruled.

III.

{¶21} Wife's assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, Domestic Relations Division, 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(C). 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.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

ROSANNE K. SHRINER, Attorney at Law, for Appellant.

JOHN E. JOHNSON, JR., Attorney at Law, for Appellee.