STATE OF MICHIGAN

COURT OF APPEALS

AUDREY EVELYN ERICKSON,

Plaintiff-Appellant,

v

MEIJER, INC,

Defendant-Appellee.

UNPUBLISHED
May 12, 2000

No. 215760
Grand Traverse Circuit Court
LC No. 97-016554-NO

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff's attorneys appeal as of right from an order sanctioning them for their failure to comply with the trial court's scheduling conference order. This case arises out of plaintiff's slip-and-fall accident in defendant's grocery store. The two attorneys, who are brothers, represented plaintiff in the lower court proceedings. Plaintiff's attorneys complain that the trial court committed certain procedural errors during the contempt proceedings, and that the court erred in finding that they violated the court's scheduling conference order. We disagree and affirm.

We review a trial court's issuance of an order of contempt for an abuse of discretion. *Dean v Dean*, 197 Mich App 739, 743; 496 NW2d 403 (1993). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). Plaintiff's attorneys also complain of procedural errors that entail questions of law. This Court reviews questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Trial courts are permitted by statute "to punish by fine or imprisonment" attorneys who disobey "any lawful order, decree, or process of the court." MCL 600.1701(g); MSA 27A.1701(g). Plaintiff's attorneys first contend that they were subject to proceedings for criminal contempt because their alleged contemptuous act altered the status quo so that it could not be restored; that is, the trial attorney having failed to attend the settlement conference, the conference having been held, and the trial having taken place with a verdict having been rendered, it was impossible for the alleged contemnors[1] to

rectify their failure to appear. Thus, the attorneys reason, the contempt proceedings were criminal in nature since they were invoked to punish the attorneys for their noncompliance with the court's order.

Our Supreme Court, in *In re Dougherty*, 429 Mich 81, 98; 413 NW2d 392 (1987), clarified that in addition to criminal contempt, "there are two types of civil contempt sanctions, coercive and compensatory." Thus, altogether

> there are three sanctions which may be available to a court to remedy or redress contemptuous behavior: (1) criminal punishment to vindicate the court's authority; (2) coercion, to force compliance with the order; and (3) compensatory relief to the complainant.

This Court's recent opinion in *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499; ___ NW2d ___ (2000), cited the above passage from *In re Dougherty* and explained:

> Proceedings for civil contempt are instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce those rights and administer the remedies to which the court has found the parties are entitled. *In re Contempt of Rapanos*, 143 Mich App 483, 496; 372 NW2d 598 (1985). A court may issue an order to pay compensation for actual loss or injury caused by a contemnor's misconduct. . . .
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> * * *
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> In the instant case, the contempt sanction and court order for repayment were compensatory, to defray defendant's child support arrearage to Walker. Therefore, the contempt sanction in the instant case is civil, not criminal, and a finding of wilful disobedience of a court order is not necessary. Rather, the circuit court had to find that respondent was neglectful or violated its duty to obey an order of the court. See MCL 600.1701; MSA 27A.1701. [*Id.*, at 500-501.]

In this case, the trial court imposed sanctions in the form of costs to compensate the county for the costs of the jury and to compensate the defendant for the wasted settlement conference. The contempt sanctions were therefore civil, not criminal, and there was no requirement that there be proof of willful noncompliance. *In re Contempt of United Stationers Supply Co, supra* at 501.

Plaintiff's attorneys next complain that the court did not comply with MCR 3.606(A)(1) and (2), because it did not commence the proceedings with an ex parte motion supported with affidavits. The subrules on which they rely state:

> (A) Initiation of Proceeding. For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either

(1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or

(2) issue a bench warrant for the arrest of the person.

Where a contempt is committed in the immediate view and presence of the court, it may be punished summarily. MCL 600.1711(1); MSA 27A.1711(1). Summary contempt need not be initiated by "a proper showing on ex parte motion supported by affidavits" because all the facts necessary to find the contempt are within the personal knowledge of the trial court. *In re Contempt of Robertson*, 209 Mich App 433, 440-441; 531 NW2d 763 (1995). The contempt allegedly committed by plaintiff's attorneys was the failure of the trial attorney to attend the settlement conference.[2] Failure to appear as ordered at a court proceeding is a contempt committed outside the presence of the court which may not be punished summarily. *Id.* at 438-441; *In re McRipley*, 204 Mich App 298, 301; 514 NW2d 219 (1994). That is because although the trial attorney's "absence was certainly within the personal knowledge of the [judge], the reason for his absence was not." *In re Contempt of Robertson*, *supra* at 440. Accordingly, "proceedings for contempt committed outside the presence of the court must be initiated pursuant to the procedure set forth at MCR 3.606." *In re McRipley*, *supra* at 301.

Nevertheless, we conclude that the trial court's apparent failure to comply with MCR 3.606(A) does not entitle plaintiff's attorneys to relief. MCR 3.606(A) provides a means of initiating proceedings for a contempt that occurs "outside the immediate view and presence of the court." Ordinarily such a contempt will be initiated by an ex parte motion filed by the opposing party to the underlying action. The fact that the proceeding is initiated by an ex parte motion is an indication that the contemnor's presence at, or knowledge of, the initial proceedings is not necessary. Rather, the requirement of an ex parte motion appears to serve the function of providing the court with information regarding facts or actions of which it would otherwise be unaware, and thereby demonstrating a basis for the initiation of contempt proceedings by show cause order or bench warrant. MCR 3.606(A)(1) and (2). Having provided a prima facie basis to invoke the court's contempt power, the function of the ex parte motion and supporting affidavits is ended; proof of the contempt must await the show cause hearing.

The instant case presents a hybrid situation: the trial court was aware that its order had not been followed, but it was not aware of the reason the order was not followed. According to *Robertson*, *supra* and *McRipley*, *supra*, the contempt proceedings could not be pursued summarily; however, sufficient facts were known to the court upon which to invoke a show cause hearing, and the court chose to initiate such a proceeding by order to show cause. By way of contrast, in *In re Contempt of Barnett*, 233 Mich App 188, 189-191; 592 NW2d 431 (1998), the attorney's contemptuous behavior occurred in the hallway outside the courtroom and the trial judge was not privy to the contempt. The necessity of filing an ex parte motion and supporting affidavits to inform the trial judge of the allegedly contemptuous behavior is therefore apparent. Where the facts that form the basis for the show cause are known to the trial court, and it is the trial court – rather than the opposing party – that initiates the contempt, it makes little sense for the trial court itself to file an ex parte motion and affidavits to support its decision to issue a show cause order.

Moreover, the show cause order in this case provided sufficient notice of the basis for the contempt charge to enable plaintiff's attorneys to appropriately answer the charge.[3] As this Court stated in *In re Contempt of Robertson, supra* at 438:

> It is well established that when a contempt is committed outside the presence of the court, the law requires that the accused be advised of the charges against him, afforded a hearing regarding those charges, and given a reasonable opportunity to meet the charges by defense of explanation. . . . These minimal due process safeguards require that an accused be given a reasonable time in which to prepare a defense to the contempt charge. [Citations omitted.]

Also, in *In re Albert*, 383 Mich 722, 724; 179 NW2d 20 (1970), our Supreme Court considered a similar claim and held:

> Respondent's assertion that a contempt procedure must include a show-cause order based on an affidavit supporting the charged facts is not correct. A court's judicial notice of its own records is a wholly satisfactory "other method" of establishing the failure or the fact of filing in a particular period – the gravamen of the charge here.

The show cause order issued in this case complied with minimum due process requirements. It informed plaintiff's attorneys of the basis for the allegation of contempt, provided for a hearing on the allegation, and further provided a reasonable time in which to prepare a defense of the charge. *In re Contempt of Robertson, supra* at 438. The trial court's notice of the relevant facts from its own knowledge constituted a sufficient basis from which to issue the show cause order. *In re Albert, supra* at 724.

Furthermore, plaintiff's attorneys claimed in their response to the show cause order that pursuant to MCL 600.1711; MSA 27A.1711 the trial court was required to provide proof of the facts charged either by affidavit or other method and that the court had failed to provide such proof prior to issuing the show cause. The statute provides that when the alleged contempt has occurred outside the immediate view and presence of the court, the court "*may punish it* by fine or imprisonment, or both, *after proof of the facts charged* has been made by affidavit *or other method* and opportunity has been given to defend." MCL 600.1711(2); MSA 27A.1711(2) (emphasis supplied). The statute clearly contemplates that the proof of the facts charged will be provided *at the hearing*, not prior to it; it is also at the hearing that the alleged contemnor will be given the opportunity to defend against the charge. Similarly, our Supreme Court in *In re Albert, supra* at 724, concluded that judicial notice of a court's own records "is a wholly satisfactory 'other method' of establishing" proof of the contempt. The procedure followed in this case was therefore proper and the argument of plaintiff's attorneys in this regard is meritless.

Plaintiff's attorneys next argue that the absence of an affidavit of facts rendered the entire proceeding "less an evidentiary hearing and more inquisitorial." As we noted above, the statute provides that punishment for contempt may be imposed "after proof of the facts charged has been made by affidavit *or other method*." MCL 600.1711(2); MSA 27A.1711(2) (emphasis supplied). Proof by

inquiries directed by the judge at counsel, and admissions by counsel, constitute proof by another method. See *In re Albert, supra* at 724. The trial court questioned plaintiff's attorneys and verified that the attorney who tried the case had not been present at the settlement conference. The trial court further ascertained the reason for the trial attorney's failure to attend the settlement conference. We conclude that the trial court complied with the requirements of the statute.

Plaintiff's attorneys next contend that the trial court erred in not appointing another trial judge to conduct the proceedings. Plaintiff's attorneys cite *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998), a case involving a probation violation hearing, for the proposition that a case should be assigned to a different judge if the trial judge is unable to put his previously expressed feelings out of mind without substantial difficulty. Our review of the lower court record does not reveal any indication that the trial judge was unable to set aside any previously expressed feelings without substantial difficulty. The trial court did express its general frustration that plaintiff's trial counsel did not attend the settlement conference, but this frustration was based on the court's feeling that the presence of trial counsel was essential to the settlement process.

Our Supreme Court, in *In re Albert, supra* at 724-725, stated:

> Equally untenable is the respondent's assertion that the Court could not institute these proceedings on its own motion without becoming so personally interested as to be disqualified. The interest a court has in its relationship with the attorneys practicing before it not only does not disqualify it from assaying their conduct in such practice, but on the contrary obliges the court to scrutinize the conduct of attorneys as officers of that court in sharing the awesome responsibility of effectively administering justice.

During the contempt proceedings, the trial court stated that in its experience, the presence of trial counsel was necessary for the settlement process to be effective. Plaintiff's attorneys complain that the trial court found that the scheduling order was violated before trial even began, and that such a finding was premature. Plaintiff's attorneys fail to recognize that the issue during the contempt proceedings was whether they had a sufficient reason to excuse the failure of trial counsel to attend the settlement conference, and that whether trial counsel was absent from the settlement conference was not disputed.

Although not cited on appeal by plaintiff's attorneys, this Court's decisions in *In re Contempt of Scharg*, 207 Mich App 438; 525 NW2d 479 (1994) and *People v Kurz*, 35 Mich App 643; 192 NW2d 594 (1971), would at first blush appear to compel the conclusion that the trial court erred by failing to assign the contempt hearing to another judge. However, after examining those decisions, we conclude that they are distinguishable. Both decisions involved the disposition of criminal contempt charges that arose during the course of criminal trials. *In re Contempt of Scharg, supra* at 439; *Kurz, supra* at 645. Both cases rely on the decision of the United States Supreme Court in *Mayberry v Pennsylvania*, 400 US 455; 91 S Ct 499; 27 L Ed 2d 532 (1971), a decision that also dealt with criminal contempt that occurred during the course of a criminal trial. The Supreme Court advised that where a judge "does not act the instant the contempt is committed, but waits until the end of the trial, on balance, *it is generally wise where the marks of the unseemly conduct have left personal stings* to

ask a fellow judge to take his place." *Mayberry, supra* at 463-464 (emphasis supplied). The Court emphasized the personal nature of the attacks made by the contemnor on the trial judge, and further emphasized that the need to assign the contempt case to another judge was not required in every case. *Id.* at 464-466. The Court concluded "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." *Id.* at 466.

This case did not involve criminal contempt or a personal attack on the trial judge. Therefore, in the circumstances presented by this case, we conclude that our prior decision in *In re Contempt of Scharg, supra*, does not control and that the trial court did not commit error requiring reversal by declining to assign the conduct of the contempt hearing to another judge.

Plaintiff's attorneys next argue that the appearance of Benjamin Hirsch at the settlement conference constituted an appearance for all the attorneys in the firm. They rely on *Eggleston v Boardman*, 37 Mich 14, 19 (1877) (finding that the retention of one member of a law firm served as the retention of all the firm's members, and that any may argue the client's cause); MCR 2.117(B)(3)(b) ("The appearance of an attorney is deemed to be the appearance of every member of the law firm."); *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329; 536 NW2d 886 (1995) ("a client's employment of one member of a law firm is deemed to be the employment of the firm itself"); and *In re Attorney Fees & Costs*, 233 Mich App 694, 706-707; 593 NW2d 589 (1999) (holding that where the plaintiffs' counsel filed a frivolous lawsuit that identified him as a lawyer with a particular law firm, the trial court could properly impose joint and several sanctions on the individual attorney and the law firm). Plaintiff's attorneys also point to the fact that the trial court never ordered, by name, any specific attorney to appear at the settlement conference.

Plaintiff's attorneys' argument would have merit were it not for a key fact. While the trial court did not refer to any attorney by name in the scheduling order, the court did order "trial counsel" to appear at the conference. The court's order was conspicuous and unequivocal – both the scheduling conference order and the settlement conference notice contained notations that emphasized, by way of capital letters and underlining, the fact that "trial counsel" was to appear at the conference. As the court explained, if plaintiff's attorneys were uncertain regarding which of them was going to conduct the trial, then both should have attended the conference. The court's reasoning does not evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias. The court did not abuse its discretion in sanctioning plaintiff's attorneys for failing to comply with the scheduling order.

Plaintiff's attorneys' final argument is that the court's sanctions improperly punished them for protecting plaintiff's right to prosecute a civil action through the retention of counsel, as guaranteed by Const 1963, art 1, § 13 ("[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."). Because they did not raise this argument before the trial court, it is not preserved for review. *Alford v Pollution Control Industries of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997). In any event, this argument is without merit since plaintiff was given a trial and was represented by her retained attorney, and the sanctions were not imposed on plaintiff. Moreover, the sanctions were imposed because plaintiff's attorneys did not

comply with the terms of the settlement conference order, not because they failed to reach a settlement and instead took this case to trial.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] The trial court found both attorneys in contempt for violating the scheduling conference order and sanctioned them, along with their law firm, "jointly and severally" for a total of $1,375: $700 payable to Grand Traverse County and $675 payable to defendant. Plaintiff's attorneys do not challenge the trial court's determination of joint and several liability.

[2] The trial court's scheduling conference order provided in pertinent part:

> Settlement will be fully explored at this Conference. TRIAL counsel and each named party SHALL be present. Corporations, partnerships and governmental entities SHALL be represented by persons with ultimate authority to settle the litigation. Insurance company representatives and lien claimants, each with ultimate authority to settle the litigation, SHALL be present.

The particular requirement that the trial attorney attend the scheduling conference was based on MCR 2.401(E) which provides:

> The attorneys attending the conference shall be thoroughly familiar with the case and have the authority necessary to fully participate in the conference. *The court may direct that the attorneys who intend to try the case attend the conference.* [Emphasis supplied.]

[3] Separate show cause orders were issued on October 26, 1998 to Benjamin I. Hirsch and Jonathan C. Hirsch, but they both provided in identical language that the named attorney was to appear on November 4, 1998 "and show cause why you should not be punished for contempt for violation of this Court's Civil Conference Scheduling Order entered November 20, 1997, for the reason that the settlement conference held October 2, 1998, was attended by attorney, Benjamin C. Hirsch [sic], rather than by his associate and trial attorney, Mr. Jonathan C. Hirsch." Benjamin and Jonathan Hirsch filed a response to the show cause order on October 29, 1998.