[Cite as *Bell v. Bell*, 2017-Ohio-7956.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

ROY BELL, et al.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2016-P-0066**
- vs -	:	
BRUCE BELL, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2001 CV 00862.

Judgment: Affirmed.

Daniel P. Lang, 5579 Pearl Road, Suite 203, Parma, OH 44129 (For Plaintiff-Appellant).

Brian J. Green and *Sean C. Burke,* Shapero & Green LLC, Signature Square II, Suite 220, 25101 Chagrin Blvd., Cleveland, OH 44122 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Roy Bell, appeals the judgment of the Portage County Court of Common Pleas in favor of appellees, Bruce Bell and Kathy Bell, finding Roy Bell in contempt due to his violation of an injunction previously entered by the trial court. At issue is whether the court abused its discretion in finding Roy Bell in contempt. For the reasons that follow, we affirm.

{¶2} This case began in 2001, when Roy Bell filed a complaint against his brother, Bruce, and Bruce's wife, Kathy, for partition of the family real estate and an accounting of the family business. The case settled in 2006, pursuant to a settlement entry, which provided that "Bruce and Kathy Bell shall keep the right to have natural gas from the family wells to their property. This includes an easement along the current gas lines that run to their home, large enough that it permits them to inspect, repair and replace the gas lines as needed."

{¶3} In 2008, Bruce and Kathy filed a motion to show cause and a motion for an injunction against Roy due to his alleged violation of their right to gas as set forth in the parties' settlement entry. Following a hearing on the motions, the court issued an injunction prohibiting Roy, his agents, employees, and persons in concert or participation with him, from *interfering in any manner* with the flow of natural gas to Bruce and Kathy's residence.

{¶4} Six years later, on December 9, 2014, Bruce and Kathy filed a motion to show cause seeking to hold Roy in contempt for violating the court's 2008 injunction. Bruce and Kathy alleged that Roy again interfered with the supply of gas to their home. The court held a two-day evidentiary hearing on the motion in April 2015.

{¶5} Bruce testified that upon the death of their parents, the family farm was divided between the four siblings. Each sibling received a portion of the farm, a separate building to use as a residence, and a leasehold interest in the family's five gas wells.

{¶6} Bruce said that his residence was supplied with gas from one well by two gas lines, one being 1,500 feet long and the other being 2,500 feet long. The 2,500 foot

line is partly under water and the 1,500 foot line is mostly above ground. These two lines and the well originate and are on Roy's property. Pursuant to the easement referenced above, Bruce and Kathy have the right to enter Roy's property at any time to inspect and/or repair their gas lines.

{¶7} Bruce said that in September 2013, the gas stopped flowing to their home. As a result, pursuant to his easement, he checked the valves at the wellhead on Roy's property, and saw that the valve to his house was shut off while all the others remained on. He turned the valve back on and gas service resumed at their home. He said the gas valve was later shut off five or six more times and, each time, he went to Roy's property and turned the valve back on.

{¶8} Bruce identified photographs he took of gauges at the wellhead in October 2013, which showed all of the gas lines were operating, except for the lines going to his house.

{¶9} Bruce said that in October 2013, his gas lines again stopped providing gas to their home. As a result, he checked his lines and found the 2,500 foot line was plugged, but he was unable to determine the cause of the blockage.

{¶10} On October 20, 2013, while he was checking the wellhead, Roy's adult nephew saw Bruce on Roy's property. The nephew testified that, per Roy's instructions, he called Roy at work to report that Bruce was at the wellhead. The nephew confronted Bruce and told him he could not touch the wellhead without Roy being present. The nephew became violent with Bruce and the Sheriff's Office was called. When the deputy arrived, Bruce said that, due to his easement, he had a right to inspect his lines. The deputy said this was a civil issue and did not involve the police.

{¶11} Bruce said that two days later, on October 22, 2013, he went to the wellhead to try to find out what was happening because gas was still not flowing through his lines. When he arrived, he found the 1,500 foot gas line was cut clean through with a knife in six different places and the 2,500 foot gas line was cut clean through in one place, preventing him from receiving gas. He said these cuts were not present when he inspected the lines on October 20, 2013. He said the areas of the lines that were cut were on Roy's property. Bruce identified photographs he took of these cuts.

{¶12} While Roy argues throughout his brief that the damage to the 2,500 foot line was caused by beaver activity, he presented no such evidence at the hearing. While Roy speculated at the hearing that beavers or some other agency may have caused the damage, he presented no evidence at the hearing to support these theories.

{¶13} Bruce submitted an estimate from a contractor, Heeter Enterprises, Inc., quoting a price of $2.95 per foot to replace the lines. At 4,000 feet for the two lines, the quote was just under $12,000.

{¶14} Cal Marks, owner and operator of a company that drills gas and oil wells, testified he has extensive experience in laying pipe and drilling wells. He said that in January 2015, he inspected and tested the pressure on the wells at the Bell property. He said they had regulators on them that showed the wells had very good pressure and were "more than capable" of producing gas. However, he said that, while Bruce and Kathy's gas lines were not receiving gas and were cut, the other family residences using the wells were continually supplied with gas and had no line damage.

{¶15} Mr. Marks said that state law no longer allows pipe to be laid above ground as the lines to Bruce's residence had been. He said that, today, gas lines are

required to be buried 18 inches. He said that to re-lay these pipes would cost $7 per foot for labor and materials. At 4,000 feet, this would equate to $28,000.

{¶16} Mr. Marks inspected the gas lines and said they were made with reinforced aluminum lining, which would not rust or rot. He said that these gas lines generally do not freeze and are not harmed by the freeze/thaw cycle. He said they have an incredible lifespan and the only possible cause of damage he could imagine would be negligence or vandalism.

{¶17} Roy testified that in October 2013, he checked the wells and they were all operating. However, he said that because the gas pressure on all the wells was low, he thought there was a leak.

{¶18} Roy said that because Bruce had recently been on his property checking the wellhead, he decided the leak had to be in Bruce's gas lines. Although Roy admitted he knew he was under a restraining order not to interfere with Bruce's right to receive gas from the family wells, *he disconnected Bruce's 2,500 foot line and plugged it*. He said the pressure then started to increase on the other wells, which, he felt, meant that the leak was in Bruce's line. He said he did not walk the line to check if there was a leak because, he said, that was not his responsibility. As a result, he said he does not know if the leak was in Bruce's line. He said that once the pressure came back up, he did not do anything else with the plug and kept it in place blocking Bruce's line. He said he never told Bruce and never wrote him a letter telling him that he had disconnected and plugged his line. Roy admitted that Bruce has a right to share in the gas of all five wells and that, by plugging Bruce's line, there was more gas for him and his siblings.

{¶19} Roy admitted that since October 2013, he and his sisters have been able to use gas from the wells and that Bruce is the only sibling who cannot.

{¶20} Following the trial, on June 18, 2015, the court entered judgment finding Roy in contempt. The court noted that there is obvious animosity between the parties and that since the case was originally filed in 2001, they have been engaged in some form of legal dispute involving the wells. The court noted that, despite this apparent acrimony, she found Bruce's testimony to be more credible than Roy's. The court found that "Roy and/or his agents did violate the order of this Court by severing the gas lines and/or by plugging the 2,500 foot line, thereby interfering with the flow of gas to [Bruce's] home." Further, the court ordered Roy to pay Bruce and Kathy the cost of replacement in the amount of $19,000 (the amount agreed upon by the parties) plus attorney fees in the amount of $5,250.

{¶21} Roy appealed the court's judgment in July 2015. While that appeal was pending, Roy filed a motion for reconsideration in the trial court, which this court construed as a motion for relief from judgment. This court remanded for a ruling on the motion. In December 2015, the trial court denied the motion, finding the "evidence at hearing established that the natural gas line was cut and severed, not chewed."

{¶22} In January 2016, this court noted the judgment was not a final order and remanded the case for the court to specify the amount of damages and attorney fees owed to Bruce and Kathy. On October 19, 2016, the trial court issued a nunc pro tunc entry, which included these elements.

{¶23} The next day, October 20, 2016, Roy filed a motion for relief from judgment in the trial court, which was virtually identical to his prior motion for reconsideration. On remand, the trial court denied the motion without a hearing.

{¶24} Appellant appeals the trial court's judgment, asserting three assignments of error. The first two are related and are thus considered together. They allege:

{¶25} "[1.] The trial court committed prejudicial error and abused its discretion in granting Defendants Appellees' motion to show cause as there were absolutely no facts adduced providing competent credible evidence supporting a finding of clear and convincing evidence of contempt where Defendant Appellee testified that he did not know who allegedly interfered with his access to gas and his witness Cal Marks testified that he did not know who interfered with access to gas. The entry found that Plaintiff Roy Bell severed the gas lines and/or plugged the 2,500 foot line. The 2,500 foot line was damaged by Beavers and there was no competent credible evidence that proves clearly and convincingly that Roy Bell severed either section of line.

{¶26} "[2.] The trial court committed prejudicial error and abused its discretion in admitting evidence and in assessing against Plaintiff-Appellant as damages for full repair and replacement of a 2,500 foot gas line clearly damaged by beavers and through no contemptuous actions of Plaintiff-Appellant, particularly in a case where the burden of proof was clear and convincing evidence to prove willful and intentional contempt of court where evidence of the damages were contradicted by Defendant-Appellee's own contractors and other evidence."

{¶27} Roy argues the trial court's judgment was not supported by competent, credible evidence. As such, he challenges the manifest weight of the evidence.

{¶28} "[A]n appellate court will not reverse a judgment as being contrary to the weight of the evidence as long as there is some competent, credible evidence supporting the judgment." *In re Kangas*, 11th Dist. Ashtabula No. 2006-A-0084, 2007-Ohio-1921, ¶81. When applying the manifest-weight standard of review, the reviewing court reviews the entire record, "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶17, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001).

{¶29} "Under the manifest weight standard of review, we are guided by a presumption that the fact-finder's findings are correct. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80 (1984). See also *Eastley* at ¶21. We must make "'every reasonable presumption * * * in favor of the judgment and the finding of facts.'" *Eastley*, *supra*, quoting *Seasons Coal Co*. at 80, fn. 3. "'If the evidence is susceptible of more than one construction,'" we are "'bound to give it that interpretation which is consistent with the * * * judgment [and] most favorable to sustaining the * * * judgment.'" *Id*., quoting *Seasons Coal Co., supra.*

{¶30} Roy argues that in order for him to be found in contempt, Bruce was required to present direct evidence that he saw Roy damage the lines. We do not agree. Direct evidence is what a witness perceives with his own senses, while circumstantial evidence is evidence of a fact from which other related fact(s) may be inferred. OJI 1:5.10; 4:405.01. Circumstantial and direct evidence have the same

probative value. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus. Further, "[t]he identity of a perpetrator may be established using direct or circumstantial evidence." *State v. Liggins*, 9th Dist. Summit No. 24220, 2009-Ohio-1764, ¶11. In fact, "[c]ircumstantial evidence alone can be used to establish the identity of a perpetrator." *Liggins, supra*. In addition, because it is impossible to read a person's mind, "[p]roof of an accused's * * * intent invariably requires circumstantial evidence, absent an admission." *State v. Mundy*, 99 Ohio App.3d 275, 289 (2d Dist.1994).

{¶31} For civil contempt, the burden of proof is clear and convincing evidence. *Lopez v. Lopez*, 10th Dist. Franklin No. 04AP-508, 2005-Ohio-1155, ¶56. "Clear and convincing evidence is * * * evidence sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Janson*, 11th Dist. Geauga No. 2005-G-2656, 2005-Ohio-6712, ¶33. A reviewing court will not overturn a trial court's finding on a manifest-weight challenge if the record contains some competent, credible evidence supporting the trial court's factual findings. *Id*.

{¶32} This court reviews a finding of contempt by a trial court under the abuse of discretion standard. *State ex rel. Ventrone v. Birkel,* 65 Ohio St.2d 10 (1981). This court has stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. Ashtabula No.2009-A-0011, 2010-Ohio-2156, ¶24.

{¶33} Here, the trial court's finding of contempt was supported by competent, credible evidence. That evidence is summarized as follows: First, Roy has a history of ill will toward Bruce and of tampering with his gas lines. In 2008, the trial court issued an injunction against Roy due to the same type of conduct he committed in the present

case. Following a hearing on Bruce and Kathy's 2008 motion to show cause and motion for injunction, the court found that Roy had been *tampering with the valves to their gas lines by repeatedly turning them off*.

{¶34} Second, in September 2013, the gas valves to Bruce's property were turned off many times, just like in 2008. Each time, Bruce went to the wellhead and turned them back on and, each time he did, the gas functioned properly and flowed once again to his property.

{¶35} Third, in October 2013, the gas stopped again. Bruce went to the wellhead and turned the valve back on, but this time the gas did not resume flowing. He unhooked the 2,500 foot line, tested it, and found it was plugged.

{¶36} Fourth, on October 20, 2013, Roy's nephew prevented Bruce from inspecting the lines. The nephew became violent with Bruce and the Sheriff's Office was called.

{¶37} Fifth, Roy said that in October 2013, because the pressure to the wells was low, he thought there was a leak and since Bruce was recently at the wellhead, he assumed the leak was in his lines. As a result, he disconnected Bruce's 2,500 foot line and plugged it. Roy said he left the line plugged even though he only suspected a leak in Bruce's line without ever inspecting it. Regardless of whether there was a leak, Roy had no right to plug Bruce's gas line as this violated the injunction. Further, even though Roy knew Bruce was having problems with his gas supply, after Roy plugged Bruce's line, *he never told Bruce what he had done* and simply left Bruce with no gas.

{¶38} Sixth, on October 22, 2013, Bruce went to the wellhead to inspect the lines because he was still not receiving gas. At that time he found six cuts in the 1,500

foot line and one cut in the 2,500 foot line that were not there when he inspected on October 20, 2013.

{¶39} Seventh, at all relevant times, Roy had access to Bruce's gas lines, an opportunity to tamper with them, and the motive to do so based on his ill will for Bruce.

{¶40} Roy argues on appeal that the cause of the failure of the 2,500 foot line was beaver activity. However, he does not reference anything in the hearing transcript supporting this argument and, based on our review of the transcript, Roy failed to present any evidence at the hearing that beavers damaged the 2,500 foot line. Because Roy presented no evidence at the hearing to support this theory, his reliance on his later-filed motion for relief from judgment and its attachments is misplaced as they are irrelevant to his argument that the judgment was not supported by competent, credible evidence.

{¶41} Roy argues that the trial court's finding that Mr. Marks, Bruce's expert, testified he saw severed areas of the lines, is not supported by the record. However, to the contrary, Mr. Marks testified that, based on his review of the photographs Bruce took, the 1,500 foot line had been cut. Thus, the trial court's finding was supported by the record.

{¶42} With respect to the court's award of damages, the Supreme Court of Ohio, in *Cincinnati v. Cincinnati District Council 51*, 35 Ohio St.2d 197, 207 (1973), held: "The award of damages * * * is the civil aspect [of contempt], and such award is proper in a contempt proceeding to compensate for losses." *Accord RLM Industries, Inc. v. Indep. Holding Co*., 83 Ohio App.3d 373, 377 (8th Dist.1992) ("The court may award damages to a complainant where it can be proven that the damages were a direct result of the

contempt."); *First Bank of Marietta v. Mascrete, Inc*., 125 Ohio App.3d 257, 265 (4th Dist.1998); *Heinrichs v. 356 Registry, Inc.*, 10th Dist. Franklin Nos. 15AP-532, 15AP-595, 2016-Ohio-4646, ¶54 (civil contempt is a sanction to enforce compliance with a court order or to compensate for losses or damages sustained due to noncompliance).

{¶43} Roy argues the trial court abused its discretion in assessing damages against him for the cost of replacement of the 2,500 foot gas line because, according to him, that gas line was damaged by beavers. While this argument may be germane to Roy's third assignment of error regarding his failed motion for relief from judgment, because he failed to present any evidence at the hearing that beavers damaged the line, this argument is irrelevant here.

{¶44} While Roy objects to the $12,000 estimate prepared by Bruce's contractor, Roy fails to mention that Mr. Marks estimated the replacement cost at $28,000. In any event, Roy's argument is irrelevant because, as the trial court noted in its judgment entry, he *stipulated the cost of replacement was $19,000*. Thus, the court's award of $19,000 was supported by the record.

{¶45} We therefore hold the trial court's judgment finding that Roy violated the court's prior injunction and awarding Bruce and Kathy a monetary award was supported by competent, credible evidence and was not an abuse of discretion.

{¶46} For his third and last assigned error, Roy alleges:

{¶47} "The trial court committed prejudicial error and abused its discretion in denying, without hearing, Plaintiff-Appellant's 60 (B)(2) motion for Relief from judgment on the grounds of newly discovered evidence or 60(B)(5) for any other reason justifying relief from the judgment where exhibits attached to said motion clearly and

unequivocally proved the truth and accuracy of Appellant's and Appellant's witnesses testimony and defenses in the prior court proceeding and contradicted the position of Appellee." (Sic. Throughout.)

{¶48} Roy argues the trial court abused its discretion in denying his motion for relief from judgment because, he argues, the 2,500 foot line was damaged by beavers.

{¶49} To prevail on a motion brought under Civ.R. 60(B), the moving party must demonstrate that: (1) he has a *meritorious defense* or claim to present if relief is granted; (2) he 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, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment was entered. *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 150-151 (1976). "Failure to satisfy any one of the three prongs of the GTE Automatic decision is fatal to a motion for relief from judgment." *Len-Ran, Inc. v. Erie Ins. Group*, 11th Dist. Portage No. 2006-P-0025, 2007-Ohio-4763, ¶20.

{¶50} The grounds for relief asserted by Roy on appeal, are "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)," i.e., within 28 days from the entry of final judgment, or "(5) any other reason justifying relief from the judgment."

{¶51} "A motion filed pursuant to Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion." *Hiener v. Moretti*, 11th Dist. Ashtabula No. 2009-A-0001, 2009-Ohio-5060, ¶18. Civ.R. 60(B) has been viewed as a mechanism to strike

a balance between the need for finality and the need for "fair * * * decisions based upon full and accurate information." *In re Whitman*, 81 Ohio St.3d 239, 242 (1998).

{¶52} First, Roy has failed to demonstrate he is entitled to relief from judgment under either of the two grounds for relief he asserts on appeal, namely, newly discovered evidence (Civ.R. 60(B)(2)), or any other reason justifying relief from judgment (Civ.R. 60(B)(5)).

{¶53} "In order to be granted relief under Civ.R. 60(B)(2), 'the moving party must demonstrate that: (1) the evidence was actually "newly discovered", that is, it must have been discovered subsequent to trial; (2) the movant exercised due diligence; and (3) the evidence is material, not merely impeaching * * *, and that a new trial would probably produce a different result.'" *Biro v. Biro*, 11th Dist. Lake No. 2006-L-068 and 2006-L-236, 2007-Ohio-3191, ¶110, quoting *Cominsky v. Malner*, 11th Dist. Lake No. 2002-L-103, 2004-Ohio-2202, ¶20. "Evidence that could have been discovered prior to trial by the exercise of due diligence does not qualify as newly discovered evidence." *Healey v. Goodyear Tire & Rubber Co*., 9th Dist. Summit No. 25888, 2012-Ohio-2170, ¶16.

{¶54} Roy failed to demonstrate that he was unable to obtain the two affidavits and photographs attached to his motion prior to trial and thus that he acted with due diligence. In the first affidavit filed on behalf of Roy, an individual named Kyle Reynolds says he took some photographs and a video in July 2015 of damage to pipes that he believes were consistent with beaver damage. However, while this affiant says he took these photos in July 2015, he does not say why he could not have taken them prior to the trial, which was just three months earlier.

{¶55} Further, Roy says in his affidavit that at the time of the gas line failure in 2013, he could not inspect the 2,500 foot line because the lines were in the swamp and he was "afraid" to enter Bruce's property to inspect the lines. However, at the hearing, in response to a question by the court, Roy testified that both lines are "above ground so you can see them." In any event, although Roy now says the lines were in the swamp, the 2,500 foot line is on Roy's property so there is no reason Roy could not have inspected it before the hearing or hired a contractor to do it, other than he did not want to pay a contractor.

{¶56} Roy argues he should not have been required to hire a contractor to examine the 2,500 foot line because Bruce had the burden of proof. However, in making this argument, Roy fails to understand the difference between the burden of proof at trial and the burden on the moving party in order to be entitled to relief from judgment. While Bruce had the burden of proof at the hearing, *Roy was required to demonstrate his entitlement to relief from judgment.* If hiring a contractor was necessary to timely provide the information he needed, his failure to do so was at his own peril.

{¶57} Roy argues that even if his evidence was not newly discovered, he was still entitled to relief from judgment for "any other reason justifying relief" under Civ.R. 60(B)(5). "Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64 (1983), paragraph one of the syllabus. Because Roy argued his evidence was newly discovered, he was not entitled to take

advantage of the catch-all provision. In any event, Roy does not say what other reason justified relief from judgment. This is simply a case of *inexcusable* neglect because, while Roy suggested at the hearing that beaver activity was a possible cause of the damage, in the two years prior to trial between October 2013 and the April 2015 trial date, he never bothered to examine the lines.

{¶58} In view of the foregoing, Roy failed to demonstrate any grounds for relief and for this reason alone, he was not entitled to relief from judgment.

{¶59} In addition, Roy failed to demonstrate he had a meritorious defense. The fact that his witness Kyle says the holes in the pipe were "consistent" with beaver activity is no evidence that beavers *caused* this damage. But for the evidence presented at the hearing, the holes shown in the pictures could have been caused by anything. In any event, Roy fails to address the undisputed fact that the 2,500 foot line was also cut clean through with a knife and that he plugged that line, both of which made the line non-functioning. As a result, regardless of Roy's "beaver" theory, he interfered with the flow of gas to Bruce's home and thus violated the court's injunction.

{¶60} Further, while Roy repeatedly argues that Bruce's workers said the line was damaged by beavers, Roy presented no competent evidence of this, just a one-line *hearsay* comment to this effect in Kyle's affidavit. Significantly, Roy failed to present any affidavit to this effect from any of Bruce's workers.

{¶61} Roy argues he was entitled to a hearing because Roy did not present any evidence opposing his motion. However, because the court relied on evidence presented at the hearing in ruling on Roy's motion, Bruce was not required to file duplicate evidence.

{¶62} We therefore hold the trial court did not abuse its discretion in denying Roy's motion for relief from judgment.

{¶63} For the reasons stated in this opinion, the assignments of error are overruled. It is the order and judgment of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.