

STATE OF MICHIGAN
COURT OF APPEALS

LAURIE B. GRANDETTI,

Plaintiff-Appellant,

v

STEPHEN M. GRANDETTI,

Defendant-Appellee.

UNPUBLISHED

June 16, 2009

No. 281905

Oakland Circuit Court

LC No. 2006-727807-DM

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order holding her in contempt and ordering her to pay \$500 to defendant's attorney. We vacate the trial court's order and remand this matter to the trial court for further proceedings. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant appeared at plaintiff's home to exercise his court-ordered parenting time with the parties' two children; however, only one child left with defendant. The following day, defendant filed an emergency motion to show cause plaintiff and impose sanctions. Defendant alleged that plaintiff refused to allow him to exercise his parenting time with the younger child. Plaintiff filed a response in which she claimed that the younger child refused to go with defendant, and that defendant would not wait until the child calmed down.

The trial court held a hearing on the emergency motion the following morning. Both parties presented brief arguments. Thereafter, the trial court stated:

I reviewed the pleadings very carefully, and in reviewing the plaintiff's pleadings, it's obvious that she is not of a mindset to get her children to either appreciate their father or care for their father. This idea of always having third parties intervene on her behalf so the father can see the children is nonsense.

Madam, the defendant father has a right to know his children. And you, as the mother and the custodian of those children, should prepare those children for loving their father and seeing their father. I think you have been listening to other people. I hope it's not your lawyer.

You will have those children in the mindset to see their father. Is that understood?

* * *

And if this happens again, madam, I am going to take affirmative action against you.

* * *

\$500 in sanctions. The father shall see the children this weekend, both of them.

When contempt is committed other than in the immediate 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). For contempt committed outside the immediate view and presence of the court, on a proper showing on an ex parte motion supported by affidavits, the court shall either (1) order the person accused 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. MCR 3.606(A). When contempt is committed outside a court's presence, minimal due process requires that the contemnor be advised of the charges, afforded a hearing upon such charges, and given a reasonable time in which to prepare a defense. *Fraternal Order of Police, Lodge No 98 v Kalamazoo*, 82 Mich App 312, 315-316; 266 NW2d 805 (1978).

If the contemptuous conduct occurs outside the court's view, the court must conduct a hearing pursuant to MCR 3.606(A) to determine whether the person actually committed contempt. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 712-713; 624 NW2d 443 (2000). A court has jurisdiction over a party if the contempt hearing is a continuation of a prior proceeding as opposed to a new proceeding. *Petrucci v Petrucci*, 35 Mich App 412, 414-415; 192 NW2d 532 (1971).

We review a trial court's decision regarding a contempt motion for an abuse of discretion, and review findings of fact made in connection therewith for clear error. Clear error exists when the reviewing court is left with a firm and definite conviction that a mistake was made. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). We review a trial court's decision to award attorney fees as compensation for losses incurred by the contempt for an abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

Here, the contempt hearing was a continuation of the parties' divorce proceedings, so the trial court had jurisdiction over the plaintiff. Defendant did not file the required affidavit with his emergency motion as required by MCR 3.606(A). The trial court did not issue the plaintiff an order to show cause as required by MCR 3.606(A). However, plaintiff filed a response to defendant's emergency motion and appeared at the hearing the following morning. By voluntarily appearing at the hearing, and by not raising the issue of defendant's failure to comply with MCR 3.606(A) at that hearing, plaintiff waived this objection. MCL 600.1711(2) allows proof of charges of contempt to be made by affidavit or other method, such as a hearing.

In a civil contempt proceeding, the party seeking enforcement of the court's order bears the burden of proving that the order was violated by a preponderance of the evidence, and the contempt must be clearly and unequivocally shown. *Auto Club, supra* at 712.

Plaintiff argues that the trial court abused its discretion by finding her in contempt and imposing sanctions without following the proper procedures. We agree.

Since defendant did not provide proof of the charges of contempt in an affidavit, he bore the burden of proving that plaintiff violated a court order by presenting competent evidence at the hearing. However, defendant presented no evidence at all during the seven-minute hearing. Nevertheless, the trial court found that plaintiff was not of a mindset to get the children to appreciate or care for their father. These findings are not based on any evidence, and thus are clearly erroneous. *DeGeorge, supra* at 591.

The power of contempt must be used with the utmost restraint, and should be applied judiciously and only when the contempt is clearly shown. Punishment imposed for contempt should be the least that is adequate to accomplish its purpose. *In re Contempt of Dudzinski*, 257 Mich App 96, 109; 667 NW2d 68 (2003). The trial court did not show restraint or apply its contempt power judiciously in this case. Finding a party in contempt for acts allegedly committed outside the court's presence without proof that the acts in fact occurred was an abuse of discretion. *Taylor, supra* at 99. In addition, the court abused its discretion in ordering plaintiff to pay defendant's attorney fees. *Id.*

We vacate the trial court's order finding plaintiff in contempt and imposing a \$500 sanction, and remand this case to the trial court with instructions that the trial court hold a contempt proceeding pursuant to established procedures.

Vacated and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey