

No. COA 18-600

TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

GARY PHILIP RAMSEY)	
)	
Plaintiff-Appellant)	
)	
vs.)	<u>FROM BUNCOMBE COUNTY</u>
)	15 CVD 1562
)	
KALLEY ELIZABETH RAMSEY)	
)	
Defendant-Appellee.)	

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ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING DAMAGES IN A CONTEMPT PROCEEDING.

The trial court found Plaintiff in civil contempt for failure to immediately file a Qualified Domestic Relations Order. (Rp 77)

The trial court found that Defendant lost the benefit of interest and thus considered said interest as damages. (Rp 76) Equitable Distribution Judgment did not award interest to Defendant and only awarded a distributive award. (Rp 21) The distributive award had been paid in full prior to the hearing in this matter. (Rp 76)

Since Plaintiff had fully complied with the Order by the time of hearing, there can be no finding of civil contempt. Ruth v. Ruth, 158 N.C. App. 123, 579 S.E. 2d 909 (2003).

Civil contempt is not punishment but is a means to force compliance with a court order. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980). The order holding Plaintiff in contempt must specify how the person may purge himself of Contempt. The purge provision is essential to the civil contempt order and without it the order must be vacated. Bethea v. McDonald, 70 N.C. App. 566, 320 S.E.2d 690 (1984).

In this matter the Court awarded damages to Defendant and ordered that Plaintiff pay interest damages to Defendant to

purge his civil contempt. (Rp 77-78)

The general rule is that a court may not award costs or damages in a civil contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

In 2015, N.C.G.S. 5A-21(d) was amended to state specifically that the court may not impose a fine as a sanction for civil contempt.

The trial court erred in imposing sanctions for civil contempt that exceeded the court's statutory contempt powers and when civil contempt was improper as the prior order had been fully complied with prior to hearing.

The evidence must be reviewed differently in a criminal contempt proceeding as criminal contempt must be proved beyond a reasonable doubt. N.C.G.S. 5A-15(f)

The standard for review is whether or not there was an abuse of discretion by the trial court.

II. THE TRIAL COURT ERRED IN MAKING FINDINGS NOT SUPPORTED BY COMPETENT OR SWORN TESTIMONY.

The standard of review is whether or not there is competent evidence to support findings of fact and whether the findings are supported by conclusions of law.

This action came on for hearing upon Defendant's Motion for Contempt, Sanctions and Attorney fees and for Order to Show

Cause. At the time of hearing Defendant requested that pending issues be resolved by submission of written affidavits and arguments. Plaintiff did not object and the Court agreed to hear pending issues upon written affidavits and arguments. (Rp 1), (Rp 75).

On the 19th day of January, 2018, Defendant filed "Brief in Support of Motion for Contempt". (Rp 37) Defendant filed no sworn affidavit by way of testimony and thus Defendant offered no evidence for consideration by the Court.

On the 31st day of January, 2018, Plaintiff filed sworn Affidavit alleging that he had fully complied with the terms of the Judgment of August 11, 2016. (Rp 51) That he paid \$14,500.00 to Plaintiff on September 30, 2016. That Plaintiff had suffered substantial damage to property which occurred during a time Defendant was using the Narrows Court property without Plaintiff's knowledge. (Rp 52) Following entry of the Order resolving the Rule 60 Motion, which arose as a result of damage to the Narrows Court property, Plaintiff submitted Domestic Relations Order which was entered by the trial court. (Rp 52) When the Department of Justice desired a modification to said Order, same was submitted September 20, 2017. (Rp 52) That the delay in the approval process from the Retirement Systems Division was not within Plaintiff's control. (Rp 52)

Plaintiff submitted evidence to the court by way of sworn

affidavit and Defendant did not.

The burden of proof in this contempt proceeding is upon Defendant. N.C.G.S. 5A-23.

Rule 43 of the North Carolina Rules of Civil Procedure states, "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." In this case the parties consented that testimony of witnesses could be by affidavit of the parties. Defendant presented no evidence as to matters of contempt, damages or attorney fees.

Rule 52 of the North Carolina Rules of Civil Procedure required the trial court to find the facts specially and state separately its conclusions of law. This rule requires that findings of fact be established by evidence. Hollerbach v. Hollerbach, 90 N.C. App. 384, 368 S.E.2d 413 (1988) The trial court erred in making findings of fact and conclusions of law in this case as there was no evidence to support same.

Defendant's Motion for contempt should have been denied by the Court as requested in Argument of Plaintiff filed January 31, 2018. (Rp 49-50)

III. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES IN A CRIMINAL CONTEMPT PROCEEDING

As set forth above, Defendant offered no evidence to the Court to support an award of attorney fees

An award of attorney's fees is not appropriate as part of

criminal contempt. United Artists Records, Inc. v. Eastern Tape Corporation, 18 N.C. App. 183, 187, 196 S.E.2d 598 (1973).


In this case the trial court found Plaintiff in civil contempt when the order had been fully complied with prior to the contempt hearing. Thus, had there been evidence submitted in this case, the only avenue open to Defendant was criminal contempt.

The standard of review is whether or not there was an abuse of discretion by the trial court.

CONCLUSION

Defendant's Motion to have Plaintiff held in contempt of this Court should have been denied by the trial court due to Defendant's failure to submit sworn testimony to support her claims. The trial court's award of damages and attorney fees was in error. Plaintiff respectfully prays this Court to reverse the trial court such that Defendant's Motion is denied.

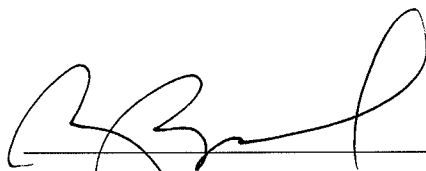
Respectfully submitted, this the 16 day of July, 2018.


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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Appellee certified that the foregoing Brief, which is prepared using a proportional font, contains no more than 1020 words, (excluding cover, indexes, tables of authorities, certificate of service, this certificate of compliance and appendixes) as reported by the word processing software.

This the 16 day of July, 2018.



MARY ELIZABETH ARROWOOD
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned has this date served this pleading in the above entitled action upon all parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

This 16 day of July, 2018.



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