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Mahnaz Beigi Hossaini, appellee, v. Adel Vaelizadeh, appellant.

808 N.W.2d 867

Filed February 24, 2012. Nos. S-11-508, S-11-509.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Contempt: Words and Phrases.** When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
3. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

Appeals from the District Court for Lancaster County: Jeffre Cheuvront, Judge. Judgment in No. S-11-508 affirmed in part and in part reversed, and cause remanded with directions. Judgment in No. S-11-509 affirmed.

Matthew Stuart Higgins and John J. Heieck, of Higgins Law, for appellant.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier & Lonowski, P.C., for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Stephan, J.

These consolidated appeals arise from a paternity action in which the court issued a parenting time order. The district court for Lancaster County found that the father, Adel Vaelizadeh, was in contempt of the parenting time order and ordered him to pay certain related expenses incurred by the mother, Mahnaz Beigi Hossaini. The court also found Hossaini in "technical contempt" of the parenting time order but did not impose any

sanction on her. In case No. S-11-508, Vaelizadeh appeals the denial of sanctions against Hossaini. In case No. S-11-509, he appeals the finding that he was in contempt and the subsequent imposition of a monetary sanction.

BACKGROUND

Vaelizadeh and Hossaini are the unmarried parents of Amir A. Vaelizadeh, who was born in 2008. Vaelizadeh is a Florida resident, and Hossaini resides in Nebraska. In a paternity action initiated by Hossaini, the court awarded joint legal custody to the parents and physical custody to Hossaini, subject to Vaelizadeh's reasonable rights of parenting time as set forth in a parenting plan. Initially, Vaelizadeh was granted 5 days' parenting time in Lincoln, Nebraska, every January, March, May, July, September, and November and an additional 15 days in Florida every February, April, June, August, October, and December. The order was subsequently modified to permit Vaelizadeh to exercise all 20 of his parenting days in Florida every other month, provided that he pay all associated expenses.

October and November 2010

Vaelizadeh was to begin a 20-day visit in Florida with Amir on October 15, 2010. On October 2, Hossaini left for Iran to visit her ailing mother. Hossaini left Amir in Nebraska with her former husband Zia Hossaini and Amir's half brother. According to Vaelizadeh, Zia called him on or about October 11 and asked him to come pick up Amir. Zia denied making that request. At or about the same time, Vaelizadeh spoke on the telephone with Zia's former wife Mary Hossaini and told her he was concerned that Amir was being abused or neglected by Zia. Mary assured Vaelizadeh that Zia was not abusing Amir but may have acknowledged that Amir had some bruises on his body.

Vaelizadeh picked up Amir from Zia's residence around 7 p.m. on October 13, 2010. Just before 9 o'clock that evening, Vaelizadeh telephoned the Lincoln Police Department to report possible child neglect. An officer went to the Lincoln hotel where Vaelizadeh and Amir were staying. The officer spoke

with Vaelizadeh, who was excited and emotional, and examined Amir. The officer saw "small bruises on the — part of his forearm and also around his knee area" which he characterized as "smaller than a dime." The officer saw nothing about the bruises that caused him concern. He photographed the bruises and completed a police report, but did not issue a citation.

Vaelizadeh subsequently took Amir to Florida. On October 26, 2010, the Lincoln police officer telephoned Vaelizadeh regarding the allegation of neglect. Vaelizadeh told the officer he had taken Amir to a doctor in Florida for a complete evaluation, including x rays, and that the results were "negative." Vaelizadeh encouraged the officer to contact the doctor. On October 27, Vaelizadeh sent additional photographs of Amir to the police officer via e-mail, but the officer saw nothing in these photographs which he considered significant, and he did not attempt to contact the Florida doctor. Vaelizadeh did not send a report from the doctor to the officer and did not offer any medical reports or records at trial. Eventually, the officer told Vaelizadeh that the case was being made inactive because there was insufficient evidence of neglect. It is unclear from the record when this final communication occurred. Sometime prior to November 5, Vaelizadeh filed an emergency petition under the Uniform Child Custody Jurisdiction and Enforcement Act in Broward County, Florida. He generally sought an emergency order from the Florida court authorizing him to retain custody of Amir to protect Amir from abuse in Nebraska.

Hossaini returned from Iran on October 31, 2010, a Sunday, and contacted Vaelizadeh on Monday, November 1, to make arrangements for Amir's return on Tuesday, November 2. Vaelizadeh told her on the telephone that Amir had been abused and urged her to contact her lawyer. Hossaini testified that after contacting her lawyer and "figur[ing] out that [Vaelizadeh was] not bringing Amir" back, she obtained an ex parte order from a Nebraska court directing Vaelizadeh to return Amir. The Nebraska order is file stamped November 3. Hossaini then flew to Florida on Thursday, November 4, and filed the ex parte order. She testified that while filing the order, she was

informed by court staff that a hearing was scheduled for the next day, Friday, November 5, on Vaelizadeh's emergency petition. Hossaini was able to secure Florida counsel and attended the hearing, but Vaelizadeh did not attend. At the conclusion of the hearing, the emergency petition was summarily dismissed because it appeared to be "a blatant attempt at forum shopping." The Florida court also noted that even if the allegations in the petition were true, they were not sufficient to invoke its subject matter jurisdiction. Amir was returned to Hossaini the afternoon of November 5, and they returned to Nebraska on Saturday, November 6.

Contrary to Hossaini's testimony, Vaelizadeh testified that Hossaini was served with the emergency petition prior to the time she obtained the ex parte order on November 3, 2010. It is undisputed that on Thursday, November 4, after she had already obtained the ex parte order, Hossaini sent an e-mail message to Vaelizadeh, with "Amir" in the subject line, stating, "Bring him home[.] I'm expecting him[.] U have till Sunday [November 7]. Thanks." Hossaini testified that she sent this message before she knew of the emergency petition and that it was simply her way of giving Vaelizadeh an opportunity to bring Amir back voluntarily.

On November 12, 2010, Hossaini filed a motion for an order to show cause in the Nebraska paternity action, requesting that Vaelizadeh be found in contempt for not returning Amir on time, and for an order awarding her the attorney fees and expenses she incurred in retrieving Amir from Florida.

February 2011

In late November or early December 2010, Hossaini moved to suspend Vaelizadeh's parenting time with Amir, presumably based on the November 2010 Florida incident detailed above. After a December 17 hearing, the district court ordered that Vaelizadeh could still exercise 20 days' parenting time every other month, but that he must exercise it in Lancaster County and could not take Amir to Florida. Apparently because of this dispute, Vaelizadeh did not exercise his parenting time with Amir in December 2010. The order declining to suspend Vaelizadeh's parenting time but requiring that it be exercised in Nebraska was entered on January 3, 2011.

On February 10, 2011, Vaelizadeh sent a text message to Hossaini informing her that he planned to pick up Amir on the morning of February 14 in order to exercise his parenting time in Nebraska. Vaelizadeh testified that although the two communicated about various other matters between February 10 and 14, Hossaini never told him that he could not exercise his parenting time on February 14. Vaelizadeh traveled from Florida and arrived at Hossaini's residence early on the morning of February 14, bearing Christmas presents and Amir's favorite toys. While parked in Hossaini's driveway at 7:50 a.m., Vaelizadeh received a text message from Hossaini stating that she was away but would return home soon. At 8 a.m., a sheriff arrived and served Vaelizadeh with summons in a lawsuit which Hossaini had recently filed. When Vaelizadeh called Hossaini, she told him to call his lawyer. Hossaini never produced Amir for parenting time and admitted that she had led Vaelizadeh to believe that she would do so. She explained that she did not think Vaelizadeh was entitled to visit Amir because he had contacted only her, and she understood that he had to arrange visitation with the parties' lawyers.

Vaelizadeh filed a motion for an order to show cause on March 4, 2011. He requested that Hossaini be found in contempt for refusing him parenting time and that he be awarded costs, attorney fees, and makeup visitation time.

Disposition by District Court

The district court held a trial on both contempt motions on March 25, 2011. After hearing the evidence, it issued an order finding that Vaelizadeh was in willful contempt for failing to timely return Amir to Hossaini's custody in November 2010. The court ordered Vaelizadeh to reimburse Hossaini for her Florida travel expenses and her attorney fees, later determined to be $7,512.87. The district court also found Hossaini in "technical contempt" for denying Vaelizadeh parenting time in February 2011, but did not impose sanctions, reasoning that Hossaini's "reluctance" to allow Vaelizadeh to exercise his visitation rights was "understandable" in light of Vaelizadeh's November 2010 actions. Vaelizadeh filed timely appeals from the contempt order and the subsequent order determining the amount of the sanction. The appeals were consolidated and

moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

In case No. S-11-508, Vaelizadeh assigns, restated, that the district court erred in holding Hossaini in "technical contempt" and in not imposing sanctions against her for willfully violating the parenting time order. In case No. S-11-509, Vaelizadeh assigns that the district court erred in finding him in willful contempt of the parenting time order and in imposing a monetary sanction for that contempt.

STANDARD OF REVIEW

These appeals are from orders entered by the district court in postjudgment proceedings after each party asked the court to utilize its contempt jurisdiction to enforce rights arising from prior court orders governing parenting time. Each party sought compensation for expenses incurred as a result of the other party's alleged willful noncompliance with those orders. In *Smeal Fire Apparatus Co. v. Kreikemeier*,[2] we characterized such contempt proceedings as civil in nature and overruled prior cases to the extent they held that a final civil contempt order from a postjudgment proceeding is nonappealable and may be attacked only through a habeas corpus proceeding.

[1] In *Smeal Fire Apparatus Co.*, we stated that civil contempt orders in postjudgment proceedings are reviewed on appeal "for errors appearing on the record"[3] and that factual findings in such contempt proceedings are to be upheld unless clearly erroneous. But we now hold that the "errors on the record" standard is incorrect. We do so because this standard was derived from cases decided under prior law, when only

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[1] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

[2] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[3] *Id.* at 698, 782 N.W.2d at 876.

criminal contempt orders were appealable.[4] We explained in *In re Contempt of Liles*[5] that such "judgments of [criminal] contempt are reviewable in the same manner as in criminal cases," with appellate review confined to "errors appearing on the record." Such a standard should not apply, however, when the contempt is civil. Other state and federal appellate courts employ an abuse of discretion standard when reviewing a trial court's determinations of whether to find a party in civil contempt and of the sanction to be imposed.[6] We conclude that an abuse of discretion standard of review is both workable and appropriate in this type of case, but that the traditional standards for reviewing a trial court's findings of fact and resolution of questions of law should be retained. Accordingly, we hold that in a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. To the extent that *Smeal Fire Apparatus Co.* and the cases listed in footnote 4 of this opinion employ a different standard of review, they are disapproved.

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[4] See, *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2.

[5] *In re Contempt of Liles, supra* note 4, 217 Neb. at 416, 349 N.W.2d at 378.

[6] See, e.g., *Sizzler Fam. Steak Houses v. Western Sizzlin Steak*, 793 F.2d 1529 (11th Cir. 1986); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376 (9th Cir. 1986); *In re Stasz*, 387 B.R. 271 (2008); *Czaja v. Czaja*, 208 W. Va. 62, 537 S.E.2d 908 (2000); *Smith v. Smith*, 136 Idaho 120, 29 P.3d 956 (Idaho App. 2001); *In re Contempt of ACIA*, 243 Mich. App. 697, 624 N.W.2d 443 (2000).

ANALYSIS

[2,3] The following general principles govern our resolution of the issues presented in these appeals: When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element.[7] "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[8] Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.[9] With these principles in mind, we turn to Vaelizadeh's specific assignments of error.

November 2010 Parenting Time

Vaelizadeh argues that the district court erred in finding him in contempt and imposing a sanction with respect to the November 2010 incident in which Vaelizadeh failed to return Amir to Nebraska at the end of his parenting time in Florida. The district court made the following factual findings, summarized and restated: (1) Vaelizadeh asked a Lincoln police officer to view the bruises on Amir's body; (2) Vaelizadeh was dissatisfied with the officer's conclusion that the bruises were not indicative of neglect; (3) Vaelizadeh then took Amir to Florida, had him examined by a doctor there, and commenced custody proceedings in a Florida court; (4) Vaelizadeh did not return Amir to Lincoln by November 2; and (5) Hossaini was required to travel to Florida in order to retrieve Amir. These findings are not clearly erroneous.

But Vaelizadeh argues that these facts do not establish a violation of the parenting time order. First, he argues that the duration of the parenting time was made ambiguous by the circumstances. He contends that he and Hossaini had originally agreed that it would be from October 15 to November 4, 2010, and that because he actually picked Amir up on October 13, it was unclear whether November 4 remained the end date.

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[7] *Smeal Fire Apparatus Co., supra* note 2; *Schwartz, supra* note 4.

[8] *Id.*

[9] *Smeal Fire Apparatus Co., supra* note 2.

Vaelizadeh relies upon *In re Rush*,[10] an unpublished opinion from the Washington Court of Appeals. *In re Rush* involved language in a parenting plan which provided that Thanksgiving visitation would "'begin Wednesday after school dismissal.'"[11] Subsequently, the school policy changed so that the dismissal occurred on the Monday preceding the holiday. The court found that the parenting plan was ambiguous as to whether the visitation period was to begin on the Wednesday preceding the holiday or on Monday, when the child was dismissed from school. We find no such ambiguity in the visitation provision before us in these cases; the order clearly states that the duration of Vaelizadeh's parenting time was to be 20 days.

Alternatively, Vaelizadeh argues that Hossaini was equitably estopped from objecting to an extended parenting time period by her e-mail message sent on November 4, 2010, which instructed Vaelizadeh to return Amir by November 7. But as the district court correctly found, Amir should have been returned to his mother by November 2, so Vaelizadeh was already in violation of the order on November 4. And, as the court correctly found, the November 7 date was immaterial because it was clear from the legal proceedings which Vaelizadeh commenced in Florida that he did not intend to return Amir to Nebraska. The doctrine of equitable estoppel has no application to these facts.

Finally, Vaelizadeh argues that if he did violate the parenting time order, he did not do so willfully. He contends that he did not return Amir to Nebraska because of his valid concerns about abuse. But the record does not support this argument. There is no competent evidence to rebut the police officer's testimony that the minor bruising which he observed was not indicative of abuse or neglect.

We conclude that the district court's factual findings were not clearly erroneous and that based upon those findings, it did not abuse its discretion in determining Vaelizadeh to be in contempt of the parenting time order when he failed to return Amir

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[10] *In re Rush*, No. 61022-8-I, 2009 WL 151665 (Wash. App. Jan. 20, 2009) (unpublished opinion).

[11] *Id.* at *1.

to Nebraska at the end of the 20-day parenting time. Further, we conclude that the district court did not abuse its discretion in imposing a monetary sanction to compensate Hossaini for her expense in securing Amir's return from Florida.

February 2011 Visitation

Vaelizadeh next argues that the district court erred in finding Hossaini to be in only "technical contempt" of the parenting time order and in not imposing a sanction. At issue is the district court's reasoning for not imposing a sanction on Hossaini. The court stated that "in view of the actions of [Vaelizadeh] in filing an unwarranted action in the Florida courts, her reluctance to allow [Vaelizadeh] to take possession of [Amir] is understandable."

But that reluctance is presumably what motivated Hossaini to file a motion requesting the court to suspend Vaelizadeh's parenting time following Amir's return to Nebraska in November 2010. As noted, the district court's order of January 3, 2011, denied that request but required that Vaelizadeh exercise his parenting time solely in Lancaster County, Nebraska. Several weeks later, Vaelizadeh attempted to exercise his parenting time in compliance with that order. Hossaini led him to believe that she would make Amir available for visitation, but after Vaelizadeh had traveled to Nebraska, she refused to do so.

There is a logical inconsistency in the two rulings by the district court. In its January 3, 2011, order, the court concluded that Vaelizadeh's conduct in November 2010 did not warrant suspension of his parenting time, provided that it was exercised in Nebraska. But in its subsequent order of March 25, 2011, the court found Hossaini's refusal to comply with the January 3 order "understandable" based upon the same events. The second order effectively negates the first without modifying or revoking it.

Moreover, we perceive no material difference in the conduct and relative culpability of the parties. Indeed, in its ruling from the bench, the district court stated: "They are both in contempt to a minor degree." The record reflects that both parents willfully violated unambiguous court orders with respect to parenting time. Both attempted to justify their conduct based upon

their concern for the welfare of their child. Each subjected the other to unnecessary travel and expense. We conclude that having imposed a compensatory sanction upon Vaelizadeh for his contempt, the district court abused its discretion in not imposing a similar sanction upon Hossaini for her subsequent, comparable contempt.

CONCLUSION

The district court did not abuse its discretion in finding both parties in contempt of orders pertaining to parenting time; nor did it abuse its discretion in imposing a monetary sanction against Vaelizadeh for his contempt. However, for the reasons discussed, the court did abuse its discretion in not imposing a monetary sanction against Hossaini for her contempt. Accordingly, we affirm the judgment of the district court in case No. S-11-509. In case No. S-11-508, we affirm the finding of contempt, but reverse, and remand to the district court with directions to determine the appropriate sanction to be imposed for Hossaini's contempt.

JUDGMENT IN NO. S-11-508 AFFIRMED IN PART AND IN PART REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENT IN NO. S-11-509 AFFIRMED.