STATE OF MICHIGAN

COURT OF APPEALS

TINA LEE KLASS a/k/a TINA LEE KLASS-MCDONALD, Plaintiff-Appellant, V STEPHEN ANDREW KLASS, Defendant-Appellee.	UNPUBLISHED July 3, 2012 No. 305526 Midland Circuit Court LC No. 2006-001142-DM

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right from the circuit court's order modifying parenting time in defendant's favor and holding plaintiff in contempt of court. We affirm.

On January 31, 2008, a judgment of divorce was entered that divided the parties' marital assets and delineated a parenting time schedule for the parties' two minor children. However, the parties continued to seek court rulings regarding the schools that the children would attend, violations of the parenting time provision, and violation of the provision addressing the expenses for the cottage. At a hearing held on May 19, 2009, the trial court advised the parties that they should work together to resolve their issues, and that if a party acted unreasonably, that party would be subject to costs.

On September 15, 2009, the trial court held a hearing regarding an order to show cause why plaintiff should not be held in contempt with regard to the issue of cottage expenses and parenting time. At this hearing, both parties testified, without objection, regarding their change in employment status and its impact on their finances. Although plaintiff testified that she had lost her part-time job, she continued to work as a representative for a jewelry company. However, due to the loss of a steady income, plaintiff notified defendant of her intent to stop paying her obligations for the parties' cottage that was listed for sale. Plaintiff also detailed her trips, her purchase of a timeshare for use in her non-profitable business, and her other obligations that included two car payments for a Cadillac Escalade and a Saturn Sky. At the conclusion of the hearing, the trial court ordered plaintiff to comply with the terms of the judgment of divorce

regarding the shared expenses for the cottage.[1] However, the trial court also ordered that a receiver would be appointed to sell the cottage if it was not sold within 60 days. With regard to the request to change custody, the trial court referred the matter to Dr. Tracey Allen for psychological evaluations, reports, and a recommendation.

At the conclusion of the September 15, 2009 hearing, the trial court admonished the parties that "there is incredible, unbelievable dysfunction between the two of you." The trial court advised the parties that they must comply with court orders even if deemed by a party to be a "bad idea" or subject to change. The trial court noted that orders only had legitimacy if followed, and the penalty for flagrant contempt of court was swift and unpleasant consequences, including jail time. The trial court then concluded that the matters would be rescheduled. The judge advised the parties that, "what happens from this point forward is more important than what's happened up until this point." With regard to court orders, the trial judge clearly stated: "This non-compliance with orders stops now. And if there's any question about what you should do . . . you've each got a very skilled lawyer who's immanently [sic] capable of helping you understand what the court order says, what it means, and what you're supposed to do."

On November 30, 2009, defendant filed a petition to show cause for contempt. On December 18, 2009, a hearing was held regarding plaintiff's failure to pay the expenses for the cottage. The trial court noted that plaintiff continued to make car payments on two vehicles although those payments were not required by court order, but failed to pay the cottage expenses mandated by court order. At the conclusion of the hearing, plaintiff was held in contempt of court, ordered to serve 14 days in jail, and required to pay bond in the amount of the unpaid cottage expenses. Although it is not entirely clear from the record, plaintiff apparently had $6,500 in cash on her person when her property was inventoried when taken into custody. This cash amount exceeded the outstanding balance owed by plaintiff for the shared cottage expenses. Plaintiff did not appeal this finding of contempt.

On January 9, 2010, testimony was taken regarding the parties' motions to change custody. Dr. Tracey Allen testified regarding the strengths and deficiencies of both parties. However, Dr. Allen also addressed plaintiff's live-in boyfriend, Gerald McDonald. Dr. Allen acknowledged that her referral did not include an evaluation of McDonald. Yet, she described McDonald as a "strange guy" and "disingenuous." Dr. Allen described reports that the couple engaged in uncomfortable public displays of affection and McDonald assumed a parental role over plaintiff's children. She was concerned because the children expressed discomfort and tension from McDonald's presence in the home. Dr. Allen also issued a report with the following recommendation:

> 8. It is strongly recommended that Mr. Gerald McDonald step out of a parental role in relation to [the minor children]. The children have experienced a great deal of change since the parental separation, and they are having some difficulty integrating Mr. McDonald into their lives, particularly with added resistance and encouragement from their father. It is suggested that Mr. McDonald adopt the

[1] A written order was filed on October 28, 2009.

> role of a concerned and caring adult in the home rather than another parent. Toward this end, including Mr. McDonald in parent-teacher conferences or medical appointments is inflammatory and divisive. It is also recommended that Ms. Klass consider delaying wedding plans until the dust settles from the custody dispute.

The trial court did not rule at the conclusion of Dr. Allen's testimony. Rather, on January 20, 2009, plaintiff *stipulated* to entry of an order containing the following provision:

> IT IS FURTHER ORDERED that Gerald McDonald and his son shall move out of the Plaintiff's house 30 days from the date of this order. Mr. McDonald shall not spend the night at the Plaintiff's house while the children are present nor shall he provide babysitting services. The Plaintiff may file a motion after nine months from the date of his move to have this Provision in the Order changed.

On January 12, 2010, plaintiff filed a motion to hold defendant in contempt for violating court orders regarding telephone calls, pick-up times, and other matters. On May 18, 2010, defendant filed a motion to hold plaintiff in contempt for violating the stipulated order requiring McDonald to move out of her home. Additionally, defendant asserted that McDonald was allowed to babysit the children contrary to the terms of the stipulated order. Defendant also filed a petition to change custody.

On July 12, 2010, the trial court held a hearing addressing the motions regarding the rental of the cottage, contempt motions filed by both parties, and custody. With regard to the issue of plaintiff's alleged contempt for failing to remove McDonald from her home, defense counsel asserted that McDonald was present at her home from morning until after the children went to bed. McDonald "may" be leaving to sleep elsewhere, but if he did, it was simply to a trailer in plaintiff's backyard. It was alleged that this action was contrary to the purpose of the order; to remove McDonald from the children's lives. Plaintiff's counsel asserted that she learned of McDonald's move to a camper on plaintiff's driveway after defendant's petition was filed. Plaintiff's counsel advised plaintiff of the "spirit of the law" and recommended that McDonald move. Upon inquiry by the trial court, plaintiff's counsel stated that McDonald had moved from plaintiff's premises and then asked her client, plaintiff, "Where exactly is he?" Plaintiff responded that the camper had been moved to Kirkland Drive. Defense counsel argued that McDonald's presence at the home for sixteen hours during the day and the fact that he may have slept elsewhere did not comport with the court's order that McDonald "move out." Without being sworn and without objection from her counsel, plaintiff stated on the record that it was not her intent to violate the court order, and she merely thought that McDonald had to leave the home at night because the couple was not married. The trial court stated the purpose underlying the order that McDonald move from the home:

> It's because Mr. McDonald is a caustic influence. He was not a positive influence in the life of your children. That's why.
>
> I don't care whether you're married or not. It's not the Government's job to police whether you're living with a guy you're married with or not.

> The Court's only interest was the extent to which he was not a positive figure in the life of your children.

Plaintiff reiterated, once again without being sworn and without objection from her counsel, that it was not her intention to "go against the order," and once advised by her attorney, the camper was moved immediately. Despite the information presented, the trial court did not rule on the contempt motions filed by both parties. The trial court decided, in light of the thickness of the file, that it would conduct the custody hearing instead of referring the matter to the friend of the court to eliminate the "middle step." The trial court stated that the custody hearing would incorporate the parties' contempt motions, and the parties did not object to that procedure.

The proceedings were concluded, but the trial court had the matter recalled after learning from his court staff that plaintiff married McDonald on July 2, 2010, ten days earlier. The trial court inquired why the issue of the marriage had not been raised at the hearing when McDonald's residence was discussed and the stipulated order prohibited contact for nine months. Plaintiff stated that they did not intend to violate the nine month no contact provision. The trial court then stated on the record:

> The only reason you're not going to jail today is because I got to count to ten. I mean, if I did it right now, I would hold you in criminal contempt for being that flagrant in violating the Court order. . . . What it tells me is that your needs, your desires, your interests come before orders of the Court, and more importantly, the welfare of your children.
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> Criminal contempt is 93 days in the County Jail and a fine of $7,500.
>
> I'm not going to do it today, because I don't want to do it because I'm so offended about what you did. I want to make sure I'm doing it for the right reason.
>
> And probably the appropriate way to address the extent to which your narcissistic attitude and the Tina Klass comes first above and beyond all else is best reviewed in the context of the petition to change custody.
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> It would behoove you to bring your toothbrush with you when you come back for that hearing, because I'm not saying you're not going to jail. I'm saying you're not going to jail today.
>
> But I can't believe what you did. And you just got caught, and you better believe there are going to be consequences. And I hope this guy means enough to you that you're willing to lose custody of your children.

At the start of the custody hearing, defense counsel requested that the trial court take judicial notice of the report and recommendation submitted by Dr. Allen as well as the marriage license that plaintiff filed on July 2, 2010. Plaintiff's counsel did not object to the admission of

the documents. Following a multi-day custody and contempt hearing, the trial court denied defendant's motion for change of custody, but expanded defendant's visitation rights. Plaintiff did not testify at the hearings.[2] Addressing the issue of plaintiff's contempt, the trial court held:

> With regard to the petition seeking to hold Mrs. Klass in contempt of court for failing to comply with the Court's January 20, 2010 order, I note initially that the order was based on the negotiations of the parties. This wasn't a situation where I made a finding or a conclusion that the parties disagree with.
>
> It doesn't mean you cannot comply with an order simply because you don't like it. But it at least - - I can understand when a litigant doesn't like or opposes a particular provision in an order and then opts to not follow it. I understand why a person might do that. . . .
>
> The specific provision in the order regarding Mr. McDonald was based on the recommendation of Dr. Alan after an interview of all the parties, of all the involved individuals. . . . The parties, therefore, agreed and the Court ordered that Mr. McDonald and his son move out of the Plaintiff's house within 30 days of the date of the order. That he shall not spend the night at Plaintiff's house while the children are present, nor shall he provide babysitting services.
>
> It specifically provided that the Plaintiff can file a motion after the expiration of nine months from the date of the move.
>
> Clearly, what the intent of the parties in entering or stipulating to entry of that order was to say that until further . . . order of the Court, Mr. McDonald was not to be in this parental role. He wasn't to live in the house. He wasn't supposed to be part of the family unit. He wasn't supposed to be a disciplinarian. He wasn't supposed to be a primary caregiver.
>
> Ms. Klass takes the position, apparently, as best I can understand her response, is that the Court's order to move out of the house means its [sic] okay to live in a pop-up camper in the yard.
>
> She came to court on July 12th and argued that she was in substantial compliance and that Mr. McDonald had moved out of the house and went so far as to say that the camper had been re-located to an address on Kirkland Street or Court which is near her home at 1301 Wakefield.
>
> What she failed to mention even to the point of the parties having left the courtroom, she had every opportunity through her counsel to make the Court

[2] Plaintiff did not succeed in her request to have defendant held in contempt of court, and that ruling is not challenged in this appeal.

aware that on July 2nd, just ten days before the hearing, she had gotten married to Mr. McDonald.

Now nothing in the order says they can't get married. She's not in - - it's not a contempt for getting married. I'm not suggesting that.

What she also failed to mention at the July 12th hearing was that on June 29th she filled out an application under oath at the Midland County Clerk's Office that said that Mr. McDonald's residence was 1301 Wakefield Drive, the same as hers.

The Court finds that contrary to the unsworn, unverified assertions regarding the fact that Mr. McDonald was not living in the house and had moved in his pop-up camper to the end of the street, Ms. Klass, nonetheless, said after being duly sworn in the Clerk's Office that he was.

The Court finds that Ms. Klass willfully failed to follow a court order. The Court further finds based on the prior actions with regard to the $6,000 in cash in her purse that she has a propensity to not follow court orders until she gets caught.

Put differently, she only complies when she gets caught.

Twice now she has intentionally misled and misrepresented fact to this Court.

The Court finds beyond a reasonable doubt that Ms. Klass is in criminal contempt of court. It cannot be purged or undone. We can't turn the clock back and unring the bell.

It is an affront to the integrity of the Court's order, and I . . . will impose a sentence * * * of 30 days in the custody of the Midland County Sheriff. . . . She's also going to be fined $5,000 for criminal contempt of court.

Plaintiff appeals by right challenging this order of contempt, whether a violation of her right to marry occurred, and the change in parenting time.

An appellate brief must contain a statement of all material facts, both favorable and unfavorable, presented fairly without argument or bias. MCR 7.212(C)(6). A brief that does not conform to the requirements of the court rule may be stricken. MCR 7.212(I). Despite the fact that plaintiff's appellate brief failed to comply with the court rule, we will nonetheless address the issues raised on appeal.[3]

[3] For example, plaintiff cites to the expert testimony that delineated the faults of defendant. However, despite the faults of plaintiff, particularly the harsh criticism of plaintiff's relationship

The first allegation is that the trial court "wrongfully held" plaintiff in contempt of court because there was insufficient clear and unequivocal evidence to support the ruling, plaintiff was wrongfully compelled to testify, and the trial court failed to enter an order allowing for an appeal to be taken. In light of the fact that these claimed errors are not supported by the lower court record, we disagree.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009). A trial court's decision to hold a party or individual in contempt is also reviewed for an abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). In a contempt proceeding, questions of law are reviewed de novo. *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009). "We review a trial court's findings in a contempt proceeding for clear error, and such findings must be affirmed if there is competent evidence to support them." *In re Kabanuk*, 295 Mich App 252, 256; 813 NW2d 348 (2012). When determining if there is competent evidence to support the contempt findings, we do not weigh the evidence or the credibility of the witnesses. *Id*.

"Criminal contempt differs from civil contempt in that the sanctions are punitive rather than remedial." *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). A trial court's exercise of its criminal contempt power does not force the contemnor to comply with an order, but is utilized to punish the contemnor for past misconduct that was an affront to the dignity of the court. *Vanderpool v Pineview Estates, LC*, 289 Mich App 119, 123; 808 NW2d 227 (2010). "Proceedings for criminal contempt . . . are prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders." *In re Rapanos*, 143 Mich App 483, 496; 372 NW2d 598 (1985). Criminal sanctions of an unconditional and definite sentence are imposed to punish past disobedient conduct. *DeGeorge*, 276 Mich App at 592. "A party charged with criminal contempt has a presumption of innocence and a right against self-incrimination." *Id*. However, an individual may waive the privilege against self-incrimination. See *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996) ("A defendant waives his privilege against self-incrimination when he takes the stand and testifies."). In a criminal contempt proceeding, the accused is afforded time to prepare a defense, obtain the assistance of counsel, and procure witnesses on his or her behalf. *DeGeorge*, 276 Mich App at 593. The burden of proof rests with the party seeking to hold the individual in contempt. *Id*. at 594. To establish criminal contempt beyond a reasonable doubt, it must be established "(1) that the individual engaged in a wilful disregard or disobedience of the authority or orders of the court, and (2) that the contempt must be clearly and unequivocally shown." *In re Rapanos*, 143 Mich App at 488. Clear and unequivocal evidence is presented when a contemnor knows of an issue in dispute, such as an ownership interest, but the contemnor nonetheless

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with McDonald and its impact on her children, plaintiff's counsel completely omitted any reference to this expert testimony. This expert testimony was particularly relevant in light of the fact that it was cited to by the trial court. Another deficiency is plaintiff's lack of mention of her prior contempt of court despite the fact that it was cited as a basis for her most recent contempt of court and also considered in the morality factor for determining child custody. Additionally, the brief on appeal takes excerpts of the court's statements out of context and fails to cite to the trial court's ultimate rulings in the case. MCR 7.212(C)(6)(e).

engages in improper activity regarding the interest, such as encumbering the disputed interest. *Id*. at 489-490.

As an initial matter, we reject plaintiff's contention that she was compelled to testify and sacrificed her procedural and substantive due process rights including the right to be free from self-incrimination. At the *initial* hearing regarding the parties' motion to hold the other in contempt, there is no indication that the parties were sworn or took the stand to provide testimony. Rather, plaintiff's counsel answered questions of the trial court and in turn made inquiry of plaintiff regarding the current residence for McDonald. Although plaintiff continued to answer questions raised by the trial court, there was no objection to this inquiry, and the trial court did not reach the issue of contempt at that time, but concluded that the issue would be presented at an evidentiary hearing. Upon learning that plaintiff and McDonald had secretly married without offering that information to the trial court, the judge expressly stated that he needed to calm down before rendering any decision on contempt. Furthermore, even if the trial court's inquiry could be construed as taking testimony, the self-incrimination privilege may be waived. *Dixon*, 217 Mich App at 405. Additionally, a party may not harbor error as an appellate parachute by assenting to action in the lower proceeding and raising the issue as an error on appeal. *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010). In the present case, plaintiff's counsel initiated the questioning of plaintiff, and there was no objection to any inquiry by the trial court. Plaintiff did not provide sworn testimony at this initial hearing and did not testify at the child custody hearings. Accordingly, plaintiff cannot contest this issue for the first time on appeal.[4] *Id*.

Plaintiff also contends that the trial court improperly failed to enter an order holding her in contempt and waited over a year to enter the order, thereby infringing on her right to appeal. We disagree. The language of a court rule must be given its plain and ordinary meaning. *Brausch v Brausch*, 283 Mich App 339, 348; 770 NW2d 77 (2009). MCR 2.602(B), the court rule addressing entry of an order, sets forth the available procedures and does not limit submission or completion of an order to the trial court or the prevailing party. The plain language of the court rule contains no limitation on the party that submits the order. *Id*.; *Brausch*, 283 Mich App at 348. In fact, MCR 2.602(B)(4) provides that "A party may prepare a proposed judgment or order and notice it for settlement before the court." Plaintiff faults the trial court for inaction when she could have acted on her own behalf. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence[.]" *Genna v Jackson*, 286 Mich App 413, 422; 781 NW2d 124 (2009) (citation omitted). Accordingly, this claim of error is simply without merit.

We also reject plaintiff's challenge to the sufficiency of the evidence to support the criminal contempt. A review of the record reveals that plaintiff's counsel called Lori

[4] Plaintiff also alleged that she was not apprised of the nature of the proceedings or given the opportunity to obtain a criminal defense attorney. The record reflects that plaintiff expressly was advised that she faced a criminal contempt proceeding, and the hearing was adjourned, yet plaintiff failed to retain new or criminal counsel.

Chamberlin Clemens, the children's outpatient psychotherapist, to testify on plaintiff's behalf. During *direct* examination and without objection, Clemens testified that one of the children was concerned that McDonald spent too much time at the house. Specifically, in April 2010, the child reported that McDonald was present in the home when she got up in the morning and was there at the home after she went to bed. He was also present for breakfast, lunch, and dinner. Additionally, the children were told by plaintiff not to divulge McDonald's living arrangement to defendant. Clemens opined that McDonald's presence for this lengthy period of time did not satisfy the requirement that he "move out," and that she spoke with plaintiff regarding the importance of honoring the court order. Clemens also testified regarding the anxiety the children felt as a result of being told to lie by plaintiff. Additionally, defendant submitted documentation from plaintiff indicating that McDonald was present for breakfast, lunch, and dinner. The order *stipulated to by plaintiff* required McDonald to "move out." The physical re-location of McDonald to a camper on the driveway at night, but his continued daylong physical presence in the home demonstrated that the "move out" requirement of the stipulated order was not followed. The testimony that plaintiff asked her children to lie about McDonald's location further evidenced that plaintiff knew that she was not complying with the *stipulated* court order. Plaintiff's challenge to the sufficiency of the evidence has no basis in light of the lower court record.[5] *In re Rapanos*, 143 Mich App at 489-490.

Next, plaintiff contends that the trial court deprived her of the fundamental right to marry and raise a family. We disagree. This issue is not preserved for appellate review because it was not raised, addressed, and decided in the trial court. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). Constitutional issues may be addressed when raised for the first time on appeal if the claimed error could have been decisive of the outcome. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). "An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights." *Id*.

A review of the record reveals that Dr. Allen testified regarding the detrimental impact that plaintiff's relationship with McDonald had on plaintiff's children. After this testimony, plaintiff entered into a stipulated order, signed by the judge, that McDonald was to "move out" of plaintiff's home, that he would not spend the night at the home, and that he would not provide babysitting services. The plaintiff was entitled to petition the court to remove this provision after nine months. There was no restriction in the order precluding plaintiff from marrying McDonald, although Dr. Allen recommended that plaintiff place the marriage plans on hold for the sake of the children.

Stipulations of fact are binding on the parties, but stipulations of law are not. *Gates v Gates*, 256 Mich App 420, 426; 66 NW2d 231 (2003). "[A] stipulation is equivalent to a finding of facts by the court or the special verdict of a jury in its binding force upon the parties thereto."

[5] On appeal, it was alleged that plaintiff and her neighbor testified that McDonald did not live in the house. Again, we cannot locate any sworn testimony on this issue by plaintiff in the lower court record. Additionally, plaintiff's neighbor, Kathryn Lundsford testified, "I can't even confirm exactly where he [McDonald] was living specifically."

Thomas Canning Co v Johnson, 212 Mich 243, 249; 180 NW 391 (1920). A review of the record reveals that the trial court never ruled that plaintiff could not marry or determine how she should raise her family. Additionally, the trial court never initiated or recommended McDonald's removal from the home. Rather, following Dr. Allen's testimony, plaintiff *stipulated* to McDonald's removal for a minimal period of nine months, and the trial court merely signed the stipulated order. The trial judge repeatedly stated that plaintiff's marriage was not the basis of any contempt, but rather, the impact of her marriage on her children was the only concern. Moreover, the claim that the trial court interfered with her fundamental right to marry is belied by the fact that she married McDonald. In light of plaintiff's stipulation to remove McDonald from the home, this claim of error is without merit. *Genna*, 286 Mich App at 422.

Lastly, plaintiff asserts that the trial court inappropriately modified parenting time so significantly that it effectively constituted a modification of child custody. This issue is moot. A review of the record reveals that the parties subsequently agreed to modify the trial court's ruling in open court on March 9, 2011. An order reflecting the parties' settlement agreement was filed on July 21, 2011. Accordingly, plaintiff is not entitled to relief. See MCR 2.507(G); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). For purpose of completeness, we cannot conclude that plaintiff's challenge to the trial court's earlier ruling has merit. MCL 722.28.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly