

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

MIAMI TOWNSHIP BOARD OF TRUSTEES,	:	CASE NO. 2019 CV 05444
	:	JUDGE RICHARD S. SKELTON
Plaintiff,	:	
	:	
v.	:	<u>BENCH BRIEF OF PLAINTIFF</u>
	:	<u>MIAMI TOWNSHIP BOARD OF</u>
DARREN POWLETTE, et al.	:	<u>TRUSTEES IN SUPPORT OF</u>
	:	<u>DAMAGES EXCEEDING THE</u>
Defendants.	:	<u>STATUTORY GUIDELINES</u>
	:	<u>CONTINGENT UPON A FINDING</u>
	:	<u>OF CONTEMPT</u>
	:	

Now comes Plaintiff Miami Township Board of Trustees, by and through counsel, and hereby submit its Bench Brief to the Court in anticipation of the hearing to show cause currently set for July 1, 2022, at 11:00 a.m.

I. INTRODUCTION

On December 29, 2021, this Court issued its Final Judgement Entry: Injunction, wherein this Court expressly held:

Now therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendants, Darren Powlette and Stoney Hill Rustic Wedding, LLC (including officers, agents, servants, and employees, attorneys and those persons in active concert or participation with them), are ENJOINED AND PROHIBITED from renting, leasing, or otherwise operating for a fee, the barn located at 7757 Upper Miamisburg Road, Miami Township, Montgomery County, Ohio, for weddings, receptions, graduation parties, or other celebratory events; it is FURTHER ORDERED that Defendants shall pay the costs of this action and this Court will retain jurisdiction for the purpose of enforcing this Judgment.

Contrary to the Order, the Defendants have continued to utilize and profit from the Property on at least six occasions: to wit: April 15, 2022, April 17, 2022, May 14, 2022, and May 16, 2022, May 19, 2022, and May 20, 2022. Despite Plaintiff's best efforts to curtail the use of the Property for commercial purposes, the Defendants have continued its usage in contravention of this Court's order with no end in sight. In our estimation, the evidence presented before this Court on July 1, 2022, will likely yield but one result—Defendants defied this Court's order. For the proceeding reasons, Plaintiff, Miami Township Board of Trustees respectfully request this Court enter judgment against Defendants, Darren Powlette and Stoney Hill Rustic Weddings in accordance with the underlying principles and legislative policy of contempt charges—to force the Defendants into compliance with the Court's order by whatever means this Court deems fit.

II. LAW AND ARGUMENT

A. This Court is not Bound by the Strictures of Ohio Revised Code § 2705.05, nor should it Adhere to them if it Seeks to Mold a Punishment that will Persuade the Defendants to Remedy the Contempt at Issue.

R.C. § 2705.05 provides a basic framework of punishment for contempt—the operative word being “basic.” The framework does not account for the unique situations when the prospective punishment is futile in counteracting the contemptuous behavior. More specifically, when the benefits conferred upon the contemnor by the repeated acts of contempt far outweigh the legislative punishment. Here, the magnitude of the fines under the statutory framework is but a fraction of the profit the Defendants are earning from each event such that any prospective punishment under R.C. § 2705.05 would likely fail to ensure compliance with this Court's Order. Thus, we ask this Court to exceed the statutory framework by whatever means it deems fit.

Ohio courts are given deference in their ability to deter behavior contrary to a court's final disposition, thereby protecting the rights of the aggrieved party to a lawsuit. "Courts have certain inherent powers to ensure the orderly and efficient exercise of justice * * *." (Internal quotation marks omitted.) *Schutz v. Schutz*, 85 N.E.3d 481, 2017-Ohio-695, ¶ 50 (2nd Dist.2017), quoting *Zakany v. Zakany*, 9 Ohio St.3d 192, 194, 459 N.E.2d 870 (1984) (Citations omitted.). These powers include "the authority to punish the disobedience of the court's orders with contempt proceedings." *Id.*, quoting *Zakany*, 9 Ohio St.3d at 194 (Citations omitted.). As to any contention that an Ohio court cannot lawfully exceed the legislative authority under R.C. 2705.05 and R.C. 2727.12, the Ohio Supreme Court has stated:

It is, however, highly doubtful that the General Assembly may properly limit the power of court to punish for contempt. Although it is conceded that the General Assembly may prescribe procedure in indirect contempt cases, the power to punish for contempt has traditionally been regarded as inherent in the courts and not subject to legislative control. See *State v. Local Union 5760*, supra (172 Ohio St. 75, 173 N.E.2d 331). The Courts of Common Pleas are established by Section 1 of Article IV of the Ohio Constitution not by the General Assembly, and, hence, are coequal branches of the government. Those courts are vested with the judicial power of the state, which includes the power to enforce lawful orders by contempt proceedings.

Cincinnati v. Cincinnati District Council 51 (1973), 35 Ohio St.2d 197, 299 N.E.2d 686, 694.

Should this Court find Defendants in contempt, it need not look to O.R.C. § 2705.05. Rather, it should consider the totality of the circumstances surrounding this litigation, and in doing so, ponder what would effectuate compliance with its Order.

B. Remedies, Damages, and Awards at this Court's Disposal.

This Court has creative liberty in achieving compliance with its Order. However, other Ohio courts have already established several means to achieve said compliance. First, "[a] trial court may, within its discretion, include attorney fees as part of the costs taxable to a defendant found guilty of civil contempt." *Planned Parenthood Ass'n of Cincinnati, Inc. v.*

Project Jericho, 52 Ohio St.3d 56, 67, 556 N.E.2d 157 (1990), citing *State, ex rel. Fraternal Order of Police, v. Dayton*, 49 Ohio St.2d 219, 361 N.E.2d 428 (1977). Court costs are recoverable in actions for civil contempt. See *Cincinnati v. Cincinnati District Council 51* (1973), 35 Ohio St.2d 197, 299 N.E.2d 686. In the same case it determined that an award for damages in a civil contempt claim is proper. They gleaned from other jurisdictions that:

‘* * * conduct can amount to both civil and criminal contempt,’ *United States v. United Mine Workers of America* (1947), 330 U.S. 258, 299, 67 S.Ct. 677, 698 and that both aspects may be dealt with in the same proceeding. See also, *Cromaglass Corp. v. Ferm* (M.D.Pa.1972), 344 F.Supp. 924. It is also well settled that ‘judicial sanctions in civil contempt proceedings may in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.’ *United Mine Workers, supra*, 330 U.S. at 303, 67 S.Ct. at 701. See, also *N. L. R. B. v. San Francisco Typographical Union* (C.A.9, 1972), 465 F.2d 53; *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815; and *Dept. of Pub. Health v. Cumberland Cattle Co.*, 72 Mass. 1031, (1972), 282 N.E.2d 895.

Cincinnati v. Cincinnati District Council 51 (1973), 35 Ohio St.2d 197, 299 N.E.2d 686, 694.

Even the Second District has exceeded the strictures of R.C. § 2705.05(A)(1)-(3). See *Moraine v. Steger Motors, Inc.*, 111 Ohio App.3d 265, 675 N.E.2d 1345, 1348 (2nd Dist.1996). (“[Defendant] argues that the fine imposed by the court exceeds the maximum fine of \$250 for a first offense of contempt allowed by R.C. 2705.05(A)(1). It does, but the court is not bound by that provision. Among the inherent powers of a court necessary for the orderly and efficient exercise of justice are the powers to punish the disobedience of the court's orders with contempt proceedings. *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 459 N.E.2d 870. Implicit in the exercise of that power is the authority to fashion a punishment that will induce the contemnor to remedy the contempt involved. The trial court obviously believed that its order serves that requirement . . . However, the purpose of the fine is neither to compensate [Plaintiff] for [its] losses nor to punish [Defendant] for its conduct. The fine is

instead coercive in nature, one imposed to produce compliance by [Defendant] with the court's prior order. The court is not prohibited from awarding the fine proceeds to [Plaintiff] if the award serves that purpose, as the trial court obviously believes that it does.”)

Despite the finding in *Moraine*, compensating Plaintiff for damages may be proper under certain circumstances. With regard to permanent injunctions, the court in *Arthur Young & Co. v. Kelly*, 68 Ohio App.3d 287, 588 N.E.2d 233, 242 (10th Dist.1990) provided that:

R.C. 2727.12 provides that a party who has breached an injunction ‘ * * * shall pay a fine of not more than two hundred dollars, for the use of the county, make immediate restitution to the party injured, and give further security to obey the injunction or restraining order. * * * ’ In the context of permanent injunctions, the restitution language has been read to sanction a compensatory contempt award. *Cincinnati, supra*, 35 Ohio St.2d at 207–208, 64 O.O.2d at 135–136, 299 N.E.2d at 694–695; *Brown, supra*, 64 Ohio St.2d at 254, 18 O.O.3d at 449, 416 N.E.2d at 613. In *Cincinnati*, the court rejected a narrow reading of the word restitution and instead held that it included damages for losses sustained during and as a consequence of the breach. *Cincinnati, supra*, 35 Ohio St.2d at 208, 64 O.O.2d at 135, 299 N.E.2d at 694. See Rendelman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction* (1980), 1980 U.Ill.L.F. 971.

In summation, this Court has a wide spectrum of recourse at its disposal to ensure Defendants’ compliance with the zoning ordinance.

III. CONCLUSION AND PRAYER FOR RELIEF

While Plaintiff will always respect and show deference to this Court’s decisions, it would be remiss of it not to implore this Court to exceed the statutory framework if there is a finding of contempt based on the evidence provided by Plaintiff and documents produced by the Defendants at the July 1, 2022, Hearing to Show Cause. Based on our extensive experience litigating against the Defendants, and in our estimation, any judgment that does not render these events profitless or run the risk of resulting in jail time will be ineffective in attaining

compliance with this Court's Order. Accordingly, and in the event that Defendants are found in contempt, Plaintiff respectfully requests the Court to:

1. Impose substantial fines against Defendants to encourage compliance with the court order;
2. Award Plaintiff attorney fees and expenses incurred in pursuing the show cause order; and
3. Take any additional action it deems necessary to prevent Defendants from continuing to violate its Order and Entry of Injunction.

Should the Court choose not to fashion a punishment in such a manner as requested, Defendants will almost certainly remain undeterred, and we will find ourselves before this Court again.

Respectfully submitted,

/s/ Edward J. Dowd

Edward J. Dowd (0018681)

Christopher T. Herman (0076894)

Nathaniel W. Rose (0099458)

8163 Old Yankee Street, Suite C

Dayton, Ohio 45458

(937) 222-2333, (937) 222-1970 (fax)

edowd@sdtlawyers.com

cherman@sdtlawyers.com

nrose@sdtlawyers.com

*Attorneys for Miami Township Board of
Trustees*

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2022, I electronically filed the foregoing with the Montgomery County Clerk of Courts, which will send notification of such filing to the following:

Gregory Page
GREGORY S. PAGE CO., LPA
7501 Paragon Road
Dayton, Ohio 45459
greg@gsplaw.net
Attorney for Defendants

/s/ Edward J. Dowd
Edward J. Dowd (0018681)