



relevant to this appeal are relatively straightforward. Plaintiff-appellee, U.S. Bank National Association (U.S. Bank), held a mortgage lien against a golf course known as the Lindale Golf Club (Lindale). The Highlanders were associated with Par Four, LLC (Par Four), Par Three, Inc. (Par Three), and ABC Property Holding, LLC (ABC Property). Par Four owned the real estate upon which Lindale was located, while Par Three operated the golf course and ABC Property held the liquor permit.

{¶3} In December 2006, U.S. Bank filed a complaint against numerous defendants, including Lindale and Par Four,<sup>1</sup> for breach of contract on guarantees, foreclosure on real property, and enforcement of security interests in personal property. Months later, U.S. Bank filed a motion for the appointment of a receiver for Lindale. The trial court issued an order on October 4, 2007 (the Lindale Receivership Order) appointing Sumner Saeks of SRGC Management, LLC (the receiver). The order required Par Four and "any other person or entity in possession of pertinent information or things" to undertake certain actions in order to turn Lindale over to the receiver. This included permitting the receiver immediate access to the golf course, its assets, and all information relating to its operation. The order also mandated that Par Four cooperate with the receiver in delivering possession of all necessary records including accounts receivable, assets, income, and security and maintenance records. Finally, the order provided that Par Four must take all steps necessary to ensure the receiver's right to operate the course under the current liquor license.

{¶4} On March 10, 2008, U.S. Bank and the receiver jointly moved for an order requiring Par Four to show cause why it should not be held in contempt for willfully violating the Lindale Receivership Order. The motion alleged that the receiver made

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1. Other than Lindale and Par Four, none of the other defendants named in the original complaint are relevant to this appeal.

numerous verbal and written attempts to obtain Par Four's compliance with the order, but to no avail. The motion was scheduled for a hearing on April 9, 2008 (the Par Four show cause hearing), and the Highlanders were served with subpoenas requiring them to appear.

{¶15} The Highlanders failed to attend the Par Four show cause hearing. In a decision rendered on April 11, 2008, the trial court held Par Four in contempt of the Lindale Receivership Order. The decision ordered Par Four and the Highlanders to comply with the Lindale Receivership Order and directed the Highlanders to appear at the sentencing hearing or risk further contempt both as representatives of Par Four and individually. At the April 14, 2008 sentencing hearing, the Highlanders explained that they were absent from the Par Four show cause hearing because they attended their son's graduation from the United States Marine Corps boot camp that day.

{¶16} On April 25, 2008, U.S. Bank and the receiver jointly moved for an order requiring the Highlanders to show cause why they should not be held in contempt in their individual capacities for their repeated and willful violation of the Lindale Receivership Order. The motion asserted that, as the managing members of Par Four, the Highlanders were required to provide the receiver with immediate access to business records and to cooperate and not interfere with the receiver's actions. The motion also noted that there was a tax hold on Lindale's liquor permit which, as stated, was held by ABC Property. The motion indicated that Sharon Highlander was the sole member of ABC Property.

{¶17} The contempt motion proceeded to a hearing on May 14, 2008, which the Highlanders attended. Subsequently, in a ruling issued on May 20, 2008, the trial court entered an order of contempt against the Highlanders. The court stayed sentencing due to the Highlanders' assurances that they would comply with the terms and conditions

designated in the contempt order. This included, among other things, the submission of all financial records and certain bank statements to the receiver as well as payment of the sum of \$24,000 to the receiver.

**{¶18}** Sentencing was further continued to July 10, 2008, at which time the court imposed jail terms on the Highlanders for their failure to fully comply with their obligations under the court orders. Both were ordered to serve three days in jail for failing to appear at the Par Four show cause hearing and 30 days in jail for failing to comply with the court orders. The court stayed the execution of the sentences for a brief period so the Highlanders could take care of a family matter.

**{¶19}** On July 17, 2008, the Highlanders moved to vacate the contempt order. Following a hearing, the trial court issued a nunc pro tunc entry of contempt. The court stayed the Highlanders' three-day sentences for failure to appear in order to further consider whether jurisdiction over the Highlanders was properly exercised due to the fact that the subpoenas were served on them while they resided in Kentucky. The contempt finding and 30-day sentences for the Highlanders' failure to comply remained intact. The Highlanders timely appeal, raising three assignments of error.

**{¶110}** Assignment of Error No. 1:

**{¶111}** "THE TRIAL COURT ERRED BY FINDING APPELLANTS IN CONTEMPT OF COURT WITHOUT TAKING ANY EVIDENCE ON THE ISSUE."

**{¶112}** The Highlanders challenge the trial court's assertion that they admitted to being in contempt of the Lindale Receivership Order, arguing instead that the court failed to adduce any evidence regarding the following: the Highlanders' relationship with Par Four, whether Par Four in fact operated Lindale or held the liquor license, whether Par Four had the necessary information to comply with the Lindale Receivership Order, or whether the Highlanders received notice of the Lindale Receivership Order. The

Highlanders also insist that they were deprived of due process because the trial court determined they were in contempt at the Par Four show cause hearing, before they had ever appeared before the court.

{¶13} Contempt is the disobedience of a court order. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus. "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Id.* at paragraph two of the syllabus. Contempt can be either direct or indirect. *In re J.M.*, Warren App. No. 2008-01-004, 2008-Ohio-6763, ¶46. Direct contempt occurs within the actual or constructive presence of the court, whereas indirect contempt involves conduct that occurs outside of the actual or constructive presence of the court. *Id.*

{¶14} It is well established that an alleged contemnor must be afforded due process. *Courtney v. Courtney* (1984), 16 Ohio App.3d 329, 332. Both constitutional and statutory protections require that a person accused of indirect contempt be given notice and an opportunity to be heard. *Poptic v. Poptic*, Butler App. No. CA2005-06-145, 2006-Ohio-2713, ¶8; R.C. 2705.03. "More specifically, due process requires that the alleged contemnor have the right to notice of the charges against him or her, a reasonable opportunity to defend against or explain such charges, representation by counsel, and the opportunity to testify and to call other witnesses, either by way of defense or explanation." *State ex rel. Miller v. Waller*, Franklin App. No. 04AP574, 2004-Ohio-6612, ¶7.

{¶15} A person found to be in contempt of court is subject to punishment. See R.C. 2705.05. Contempt is classified as civil or criminal depending upon the character and purpose of the punishment. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253. Where imprisonment is imposed as punishment for the contemnor's

disobedience, the contempt is criminal. *Id.* at 254. Prison sentences are unconditional in cases of criminal contempt. *Id.* at 253-54.

{¶16} By contrast, civil contempt contemplates punishment that is remedial or coercive and for the benefit of the complainant. *Id.* at 253. See, also, *Tomaszczyk* at paragraph three of the syllabus. Prison sentences are conditional in cases of civil contempt. *Brown* at 253. Because a civil contempt sanction is coercive in nature, the contemnor must be afforded the opportunity to purge his contempt. *In re Cox* (Dec. 23, 1999), Geauga App. Nos. 98-G-2183, 98-G-2184, 1999 WL 1312688 at \*4. Once the contemnor purges his contempt, any sanctions will be discontinued because compliance has been achieved. *Id.* Accordingly, the contemnor is said to "carry the keys to his prison in his own pocket." *Brown* at 253.

{¶17} Initially, we observe that the Highlanders were accused of indirect civil contempt. Both the failure to obey a subpoena and the failure to appear at a court proceeding constitute indirect contempt. *City of Cleveland v. Ramsey*, 56 Ohio App. 3d 108, paragraph one of the syllabus. The failure to obey the Lindale Receivership Order also constituted an allegation of indirect contempt, as it occurred outside the presence of the court. The contempt was civil in nature in view of the fact that the prison sentences were meant to compel the Highlanders to comply with the Lindale Receivership Order and the Highlanders were given the opportunity to purge the contempt by cooperating with the receiver. Therefore, we proceed with our analysis mindful of the due process requirements inherent in an indirect civil contempt proceeding.

{¶18} Although the Highlanders dispute the contempt finding and claim they were not afforded due process, a review of the record indicates otherwise. The transcript of the May 14, 2008 hearing on the contempt motion against the Highlanders

reveals that the contempt finding in the absence of testimony was the result of an agreement among those present:

{¶19} "THE COURT: \* \* \* We've had some brief discussions in chambers. My understanding is that Mr. Ring [counsel for the Highlanders] has been discussing the matter on behalf of the Highlanders with counsel for the Receiver and the Bank; that *today in lieu of testimony that there would be an admission or acknowledgment* in some fashion of the fact *that the Highlanders were in contempt of the Court's previous order of October 4th of 2007, and also in contempt for failing to appear* after personal service of subpoenas ordering them to appear on April 2, 2008, at a hearing in this particular case." (Emphasis added.)

{¶20} At this point in the hearing, the agreement was recited on the record by counsel for the receiver. Counsel stated his belief that the Highlanders agreed to acknowledge a finding of contempt by the court for their failure to appear and their failure to obey the Lindale Receivership Order. Among other things, the Highlanders would immediately provide the receiver with access to financial information believed to be in the possession of Lindale's bookkeeper or accountant. The Highlanders would also turn over the requested bank statements to the receiver. Finally, the Highlanders would pay the receiver the sum of \$24,000 in accordance with the payment plan established under the agreement.

{¶21} After the terms of the agreement were stated on the record, the trial court directly addressed the Highlanders and their counsel:

{¶22} "THE COURT: \* \* \* Mr. Ring, would you bring the Highlanders up to the podium for me, please?

{¶23} "MR. RING: Yes, Sir.

{¶24} "THE COURT: I want to talk with them for a minute. I want to make sure

they understand. I'm sure you've explained to them, but I want to make sure in my mind they understand what's going on. First, Mr. Ring, from your discussions with counsel and your client, is this [the acknowledgment of contempt and the agreement] the manner in which the contempt citation is going to be resolved today, the show cause order?

{¶25} "MR. RING: It is, Your Honor \* \* \* .

{¶26} " \* \* \*

{¶27} "THE COURT: \* \* \*[P]art of what they're acknowledging is that they fail to appear after a service of a subpoena, correct?

{¶28} "MR. RING: That is correct.

{¶29} "THE COURT: And they're also acknowledging that they fail to comply with [the Lindale Receivership Order] by failing to turn over the \$24,000 to the Receiver; is that correct?

{¶30} "MR. RING: That is correct, Your Honor.

{¶31} "THE COURT: And then the other records, point of sale, computer, those types of things that have been discussed on the record here today, they're acknowledging that those things have not been done; is that correct?

{¶32} "MR. RING: That is correct, Your Honor.

{¶33} "THE COURT: They're also acknowledging that those things are within their capacity to perform?

{¶34} "MR. RING: The things that we've agreed to, yes Sir, Your Honor.

{¶35} " \* \* \*

{¶36} "THE COURT: And the importance of that is – I want the Highlanders to understand. The importance of that is that you're acknowledging to me that you have the ability to do these things, to perform these acts. That is to give over to the Receiver

the documents that they want, the point of sale information, either that you personally have them, or that someone is holding them on your behalf that has – that you have the authority to instruct to do so. The importance of that is if you fail to do that, I can lock you up in the county jail forever until you do it. In other words, if you have the capacity to do it, I can instruct you do to it. If you fail to do it, I can incarcerate you until you do it. There's no time limit with respect to that; do you understand?

{¶37} "MR. HIGHLANDER: Yes, Sir.

{¶38} "THE COURT: Understand, Ms. Highlander?

{¶39} "MRS. HIGHLANDER: Yes."

{¶40} The court went on to find the Highlanders in contempt for failing to appear and for failing to comply with the Lindale Receivership Order. In exchange for the Highlanders' promise to acknowledge their contempt and cooperate with the receiver, the court agreed to continue sentencing and permit the Highlanders time to comply with the terms of the agreement reached at the hearing.

{¶41} It is clear from the transcript that the Highlanders chose to forego a hearing on the merits and to stipulate that they were in contempt of court. The record indicates that the Highlanders attended a properly-noticed hearing at which they were represented by legal counsel, and that each of them separately admitted, on the record, that they were in contempt of court. The Highlanders acknowledged that the bases for the contempt were their failure to comply with the Lindale Receivership Order and their failure to appear at the Par Four show cause hearing.

{¶42} We note that the Highlanders assented to this approach, lodging no objection at the trial court level. It is axiomatic that an appellate court will not consider any error which the complaining party could have called to the attention of the lower court at a time when such alleged error could have been avoided or corrected by the

lower court. *In re Z.S.*, Clermont App. Nos. CA2005-02-010, -011, 2005-Ohio-7033, ¶7.

The Highlanders intentionally and unequivocally surrendered their right to present evidence and arguments to rebut the contempt allegations. Such a relinquishment falls squarely within the definition of waiver. *United States v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770 (defining waiver as "the intentional relinquishment or abandonment of a known right").

{¶43} Although the Highlanders acquiesced to the stipulation of contempt and now claim that their due process rights were violated, this court has previously noted that "[c]onstitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.'" *In re Z.S.* at ¶7, quoting *State v. Awan* (1986), 22 Ohio St.3d 120, 122. By failing to object, the Highlanders waived any alleged error with respect to the manner in which the contempt proceedings were handled at the trial court level.

{¶44} The Highlanders' first assignment of error is overruled.

{¶45} Assignment of Error No. 2:

{¶46} "THE TRIAL COURT ERRED BY FINDING APPELLANTS IN CONTEMPT OF COURT WHEN IT LACKED PERSONAL JURISDICTION OVER THEM."

{¶47} The Highlanders contend that the trial court did not have jurisdiction over them because they resided and worked in Kentucky and were not parties to the litigation. Therefore, the Highlanders insist, they were not required to obey the Lindale Receivership Order or the subpoena requiring them to appear at the Par Four show cause hearing.

{¶48} "In some instances, a party who voluntarily submits to the court's jurisdiction may waive available defenses, such as insufficiency of service of process or lack of personal jurisdiction." *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶13. In civil cases, the defense of lack of personal

jurisdiction usually must be raised either in the defendant's answer or in a pre-answer motion. *Beachler v. Beachler*, Preble App. No. CA2006-03-007, 2007-Ohio-1220, ¶17. The failure to timely raise this defense constitutes a waiver thereof. *Id.*, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-59. See, also, Civ.R. 12(H)(1).

{¶49} The Highlanders appeared at the April 14, 2008 sentencing hearing on the Par Four contempt. At no time during this hearing, or during any of the multiple proceedings thereafter, did the Highlanders object on grounds that the trial court lacked personal jurisdiction over them. Therefore, they waived the defense of lack of personal jurisdiction. *Beachler* at ¶17.

{¶50} The Highlanders' second assignment of error is overruled.

{¶51} Assignment of Error No. 3:

{¶52} "THE FINDING OF CONTEMPT AND JAIL SENTENCE IMPOSED AGAINST APPELLANTS CONSTITUTED AN ABUSE OF DISCRETION."

{¶53} The Highlanders maintain that the trial court abused its discretion in finding them in contempt of court and in imposing the maximum jail sentence against both of them. According to the Highlanders, the trial court incorrectly assumed that their attorney admitted the contempt without hearing any testimony from them. Then, when their new attorney suggested that the court reconsider its actions at the hearing on the motion to vacate the contempt order, the court unjustly refused and ordered the Highlanders to serve their jail sentences immediately.

{¶54} An appellate court will not reverse a trial court's finding of contempt absent an abuse of discretion. *Unger v. Unger*, Brown App. No. CA2003-10-013, 2004-Ohio-7136, ¶26. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶155}** As discussed under the first assignment of error, the record indicates that the Highlanders willingly agreed to acknowledge that they were in contempt of court in lieu of the court hearing testimony on the matter. In addition, prior to the hearing on the contempt motion against the Highlanders, Brent and Sharon were given numerous opportunities to cooperate with the receiver and to explain why their efforts to comply had been lacking. At no time did they fully comply with the Lindale Receivership Order, despite being afforded several opportunities to do so.

**{¶156}** It is also clear from the record that, from the commencement of the receivership on, the Highlanders provided information and documents to the receiver in a piecemeal and sluggish fashion over the span of many months. Initial assertions by the Highlanders that they were unable to obtain certain records, followed by a number of intervening months, were later retracted and the records produced by the Highlanders. Their assertions of lack of access, coupled with their protracted lack of cooperation, casts the Highlanders in a disingenuous light.

**{¶157}** Even after the Highlanders were individually found in contempt, sentencing was continued a number of times to afford them the chance to purge the contempt by coming into full compliance with the Lindale Receivership Order. This they failed to do. Far from acting hastily, the trial court exhibited much patience before imposing and executing the Highlanders' respective sentences. We conclude that the trial court did not abuse its discretion in finding the Highlanders in contempt of court and in imposing sentence.

**{¶158}** The Highlanders' third assignment of error is overruled.

**{¶159}** Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

