

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1482

ROBERT J. BRIGGS

vs.

KIMBERLY A. BRIGGS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Judgment entered finding the husband, Robert J. Briggs, in contempt for violating a provision of a separation agreement, incorporated into the divorce judgment, governing payment of college tuition. On appeal, Kimberly¹ raises a threshold challenge to jurisdiction. Robert contends that the trial judge erred in ruling that the language in the separation agreement was clear and unequivocal, and in finding him in contempt of the divorce judgment for failure to pay college costs. Finally, Robert challenges the award of Kimberly's attorney's fees and expenses. We affirm.

Background. Robert and Kimberly Briggs were married on May 10, 1997. The parties have two daughters, who at the time of

¹ Because the parties share the same last name, we refer to them by their first names.

trial were seventeen and nineteen, respectively. They resided with Kimberly. The parties' separation agreement included a provision setting forth their obligations to pay for one-third of the children's college expenses. The judgment of divorce nisi was entered on March 14, 2016 and incorporated the separation agreement.

Kimberly filed a complaint for civil contempt on February 20, 2019 alleging that Robert violated the divorce judgment by refusing to pay for one-third of college tuition for their eldest child. In anticipation of a hearing on her motion, Kimberly subpoenaed Robert's bank statements and other financial documents. Acting pro se, Robert filed a number of motions, including one to quash the subpoena.

The judge heard the pending motions and the complaint for contempt simultaneously. Robert did not bring any financial records to the hearing (contrary to the directives in the subpoena) and produced none. The judge determined that the education provision in the separation agreement was clear and unambiguous, that Robert was cognizant of his obligations, that Robert had the ability to pay for his share of college tuition, and held Robert in contempt of the divorce judgment. The judgment on the complaint for contempt awarded Kimberly \$5,804: \$3,657 for the contempt, and \$2,147 in attorney's fees and expenses. Robert filed a postjudgment motion, which was denied.

Discussion. 1. Jurisdiction. Kimberly asserts that Robert's appeal must be dismissed for lack of jurisdiction because Robert did not file a new notice of appeal after his motion to amend the amended judgment was denied. See Eyster v. Pechenik, 71 Mass. App. Ct. 773, 779-780 (2008); Mass. R. A. P. 4 (a) (2) & (3), as appearing in 481 Mass. 1606-1607 (2019). Robert filed a notice of appeal on May 6, 2019, together with his rule 52 (b) and rule 59 motion. His motion, filed pursuant to Mass. R. Civ. P. 52 (b), as amended, 423 Mass. 1402 (1996), and Mass. R. Civ. P. 59, 365 Mass. 827 (1974), was denied on May 20, 2019, but a new notice of appeal was not filed. See Mass. R. A. P. 4 (a). Under Eyster, supra, this omission might have been fatal to this court's jurisdiction. However, the Supreme Judicial Court has recently determined that an appeal need not be dismissed where the concerns underlying rule 4 (a) are not implicated. Roch v. Mollica, 481 Mass. 164, 165 n.2 (2019). The appeal is properly before us. Id.

2. Contempt. "To find a civil contempt, there must be a clear and undoubted disobedience of a clear and unequivocal command" (quotation and citation omitted). Cooper v. Keto, 83 Mass. App. Ct. 798, 804 (2013). Robert contends that the judge erred as a matter of law in concluding that the college payment provision of the separation agreement was clear and unequivocal. "[W]hether a separation agreement is ambiguous is a question of

law, and we review the issue de novo." McManus v. McManus, 87 Mass. App. Ct. 864, 868 (2015), citing Lalchandani v. Roddy, 86 Mass. App. Ct. 819, 823 (2015).

The separation agreement states:

"The parties agree to contribute to the best of their ability, to the cost of tuition and educational expenses of the children in consideration of their respective financial circumstances at the time said expenses become due. Contributions of the parties are to be applied after any available grants, financial aid or scholarships and loans.

"The total contribution for educational cost per year shall be one third each, Husband, Wife and child(ren), based upon University of Massachusetts tuition."

Robert contends that this provision does not state a clear and unequivocal command because it does not contain a sum certain to be paid for college costs, and because it refers to the "total contribution." The provision is not ambiguous. It sets a maximum amount of contribution towards college expenses at one-third each (husband, wife, and child) of all educational costs remaining after any available grants, financial aid, or scholarships are applied, based upon the tuition at the University of Massachusetts.² Unlike Cooper, 83 Mass. App. Ct.

² For the first time on appeal, Robert maintains that the provision is ambiguous because it does not state to which campus of the university the tuition cap applies. This argument was not raised at the hearing and is waived. See Scheffler v. Board of Appeal on Motor Liab. Policies & Bonds, 84 Mass. App. Ct. 904, 905 (2013), quoting Palmer v. Murphy, 42 Mass. App. Ct. 334, 338 (1997) ("Objections, issues, or claims -- however meritorious -- that have not been raised at the trial level are deemed generally to have been waived on appeal"). Furthermore,

at 807-808, Robert's payment obligation was tied to an objective benchmark that can be calculated with certainty. There is nothing ambiguous in this language.

Nor does the phrase "to the best of their ability" render the provision ambiguous. Rather, as discussed infra, this phrase is congruent with our legal standard requiring that a party charged with contempt have a present ability to pay. See Stabile v. Stabile, 55 Mass. App. Ct. 724, 728 (2002).

Robert further contends that the judge erred in ordering him to provide \$3,657 towards the college costs of the older child because no documentation was presented at trial to show the actual amounts owed towards tuition. He also claims that the judge erred in relying on representations made at the hearing about his past income in determining he had a present ability to pay colleges costs.

Robert claims that the judge's findings were clearly erroneous because the cost of college was not proven by clear and convincing evidence. See Cooper, 83 Mass. App. Ct. at 804, citing Birchall, petitioner, 454 Mass. 837, 852 (2009) ("The defendant must have the ability to comply with the order. . . . The complainant must also establish the contempt by clear and

the representations at the hearing established that the daughter chose to attend an institution with educational costs far below that of any University of Massachusetts campus.

convincing evidence"). However, both parties waived their right to an evidentiary hearing and agreed to proceed on representations.³ See Milano v. Hingham Sportswear Co., 366 Mass. 376, 379 (1974) ("A defendant in a contempt proceeding may, of course, waive his right to an evidentiary trial"). Cf. Mahoney v. Mahoney, 65 Mass. App. Ct. 537, 540-541 (2006) (evidentiary hearing must be held where both parties did not acquiesce to proceed on representations). Robert did not dispute the amount of the tuition and costs represented to the judge by both Kimberly and her attorney. The judge found Robert knew his daughter had enrolled in college and that the cost of tuition and educational expenses for the daughter's first year, after financial aid, was \$14,753. Robert's share of the obligation was \$4,857.67, of which he paid \$1,200. The judge's finding that Robert knew he was responsible for paying \$3,657 toward his daughter's tuition and knowingly failed to do so was fully supported by the evidence.

The judge also found that Robert had the ability to pay. To find a defendant in civil contempt, "the defendant must be

³ Although the judge told him he had a right to an evidentiary hearing, Robert, now represented by counsel on appeal, suggests that he did not really understand what the agreement to proceed on representations meant. "[D]espite their lack of legal training, pro se litigants are held to the same standards as practicing members of the bar." Mains v. Commonwealth, 433 Mass. 30, 36 (2000), quoting Commonwealth v. Jackson, 419 Mass. 716, 719 (1995).

found to have the ability to pay at the time the contempt judgment enters." Larson v. Larson, 28 Mass. App. Ct. 338, 340 (1990). Robert moved to quash Kimberly's subpoena. Robert's motion to quash was denied, but, in contravention of the subpoena, he did not bring the documents to the hearing. Having refused to comply with the subpoena duces tecum, Robert cannot now complain that the judge lacked documentary evidence regarding his ability to pay. See Automobile Insurers Bur. of Mass. v. Commissioner of Ins., 430 Mass. 285, 291 (1999).

Furthermore, Robert admitted that he sold real estate in June 2017, netting \$110,848.39 from the sale. He claimed these funds were spent on living expenses, but the judge did not credit this testimony, in part because Robert refused to comply with the subpoena for financial records.⁴ See Automobile Insurers Bur. of Mass., 430 Mass. at 291. An assessment of each party's credibility is "'quintessentially the domain of the trial judge.'" Rosen v. Rosen, 90 Mass. App. Ct. 677, 690 (2016), quoting Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (2016). The judge's finding that Robert had an ability to pay

⁴ At the time of the hearing, Robert had an additional child by a subsequent marriage, and his second wife was pregnant with another child. His financial obligations to those children may not be used to offset or reduce an existing order or judgment pertaining to the children of his first marriage. See Massachusetts Child Support Guidelines § II.H (2013); Massachusetts Child Support Guidelines, § II.K.4 (2018).

was not clearly erroneous, and the judge did not err in finding Robert in contempt.

3. Attorney's fees. In an action for contempt for failure to obey a support order "there shall be a presumption that the plaintiff is entitled to receive . . . all of [her] reasonable attorney's fees and expenses." G. L. c. 215, § 34A (a). "As a matter of law, the awarding of attorney's fees and costs is an appropriate element of a successful civil contempt proceeding." Martinez v. Lynn Hous. Auth., 94 Mass. App. Ct. 702, 708 (2019), quoting Ventresca v. Town Manager of Billerica, 68 Mass. App. Ct. 62, 65 (2007). As we have determined that the provision's language was clear and the judge did not err in finding Robert in contempt for refusing to pay his portion of college costs, we affirm the award of attorney's fees.⁵

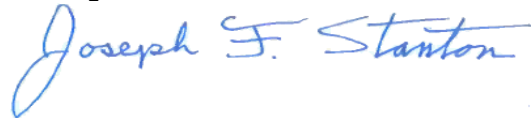
Kimberly's request for appellate attorney's fees is allowed. Within fourteen days of the issuance of the rescript in this matter, she may apply for an award of reasonable appellate attorney's fees and costs. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004). The petition should contain an itemization of the time and labor required based on contemporaneous billing records, the result obtained, the experience, reputation, and ability of the attorney, and the

⁵ Robert does not challenge the reasonableness of the amount of the fees and expenses awarded.

usual price charged for similar services by other attorneys in the same area. Robert will then have fourteen days to file an opposition to the amounts requested. See id.

Judgment on complaint for
civil contempt affirmed.

By the Court (Sullivan,
Neyman & Hand, JJ.⁶),



Clerk

Entered: June 11, 2021.

⁶ The panelists are listed in order of seniority.