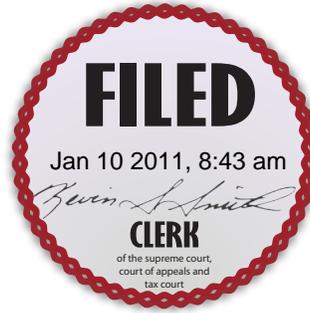


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN D. ABLES,)

Appellant-Petitioner,)

vs.)

No. 18A05-1002-DR-144

WRAY J. ABLES,)

Appellee-Respondent.)

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Linda Ralu Wolf, Judge
Cause No. 18C03-0908-DR-103

January 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Kevin D. Ables (“Kevin”) appeals the trial court’s post-dissolution order and raises the following consolidated and restated issues:

- I. Whether the trial court abused its discretion in denying Kevin’s Motion for Relief Pursuant to Trial Rule 60(B); and
- II. Whether the trial court abused its discretion in finding Kevin in contempt of court for nonpayment of his child support and in awarding Wray attorney fees.

We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2001, the trial court dissolved the marriage of Kevin and Wray J. Ables (“Wray”). Wray was granted custody of the couple’s two minor children, and Kevin was ordered to pay child support in the amount of \$127 per week. In a 2006 modification order, the trial court reduced Kevin’s child support obligation to \$74 per week. *Appellant’s App.* at 119.

Wray filed a Petition to Modify Kevin’s child support. Following a hearing, the trial court entered an order (“Support Order”), increasing Kevin’s child support payments to \$190 per week retroactive to September 18, 2008. Kevin filed a Verified Motion for Relief [from the Support Order] Pursuant to Trial Rule 60(B) (“T.R.60(B) Motion”), in which he asked the trial court:

to grant him relief pursuant to Trial Rule 60(B) by vacating the Order on Modification of Support with respect to the hearing held on May 26, 2009, and that the Court enter an Order modifying the Petitioner’s support obligation based on his actual wages retroactive to September 25, 2008.

Id. at 127.

Wray filed an Affidavit for Citation requesting that Kevin be found in contempt for failing to pay child support as ordered and that Kevin be required to pay reasonable attorney fees. *Id.* at 125. Following a hearing on Wray's Affidavit for Citation and Kevin's T.R.60(B) Motion the trial court denied Kevin's T.R.60(B) Motion, found Kevin in contempt of court for failing to pay his child support as ordered, and directed Kevin to pay Wray's attorney fees. Kevin now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Introduction

We begin by noting that both parties' briefs deal extensively with an issue that is not today before us, that is, whether the trial court abused its discretion in the Support Order by modifying Kevin's child support to \$190 per week retroactive to September 18, 2008. In his brief, Kevin argued that the trial court abused its discretion by increasing his child support to \$190 per week when the evidence at the May 26, 2009 hearing did not support such a modification. In response, Wray argued that Kevin forfeited his right to appeal the Support Order when he failed to timely appeal that order.

Here, in an attempt to sidestep the issue of whether his appeal of the Support Order was timely, Kevin characterized his T.R.60(B) Motion as a motion to correct error. Wray accepted Kevin's characterization of the T.R.60(B) Motion as a motion to correct error and structured her response in light of that characterization.

The parties' current assumption that the T.R.60(B) Motion is in fact a motion to correct error, however, is of no import where, as here, the parties and the trial court

previously understood Kevin’s motion to be, and treated his motion as, a motion for relief from judgment under Trial Rule 60(B). On appeal, Kevin states that his motion was “erroneously entitled” as a 60(B) motion, but was a motion to correct error and that Kevin’s counsel argued the motion as a motion to correct errors. *Appellant’s Br.* at 3, 7. To the contrary, Kevin’s counsel never referenced Indiana Trial Rule 59, never moved to amend the motion for relief from judgment to invoke Trial Rule 59, and specifically argued that the Support Order should be set aside “due to (B)(1) mistake, surprise, or excusable neglect,” specifically quoting Trial Rule 60 (B). *Tr.* at 50-51. A party may not present an argument on appeal that was not presented to the trial court. *Morgan v. State*, 755 N.E.2d 1070, 1077 (Ind. 2001) (where defendant’s argument on appeal is different than his argument to the trial court, his argument is waived.)

II. Trial Rule 60(B)

Kevin contends that the trial court erred in denying his T.R.60(B) Motion. “A motion made under Indiana Trial Rule 60(B) is addressed to the ‘equitable discretion’ of the trial court.” *V.C. Tank Lines, Inc. v. Faison*, 754 N.E.2d 1061, 1064 (Ind. Ct. App. 2001). We review the denial of a motion for relief from judgment under Trial Rule 60(B) only for an abuse of discretion. *In re Adoption of T.L.W.*, 835 N.E.2d 598, 600 (Ind. Ct. App. 2005). An abuse of discretion will be found only when the trial court’s judgment is clearly against the logic and effect of the facts before it and the inferences to be drawn therefrom. *Id.* In reviewing the evidence, we will not reweigh the evidence or substitute our judgment for that of the trial court. *Id.*

In the Support Order, Kevin was ordered to pay child support retroactive to September 18, 2008; a date one week prior to the September 25, 2008 date on which Wray filed her Petition to Modify. *Appellant's App.* at 23, 123. As part of his T.R.60(B) Motion, Kevin requested the trial court to “enter an Order modifying the Petitioner’s support obligation based on his actual wages retroactive to *September 25, 2008.*” *Id.* at 127 (emphasis added). This request contained two parts, one was a request that Kevin’s support be based on actual wages, and the second was a request to change the retroactive date to September 25, 2008.

At the January 2010 hearing, Kevin argued that a relief from judgment under Trial Rule 60(B) should be granted because the trial court had improperly imputed to Kevin a higher wage than he earned, and “there are things that were never brought up at the [at the May 26, 2009] hearing that if they had been, that the outcome might have been different.” *Id.* at 81.

Our court has held:

Any matter which was known to or discoverable by a party within the period when a timely motion to correct errors could have been filed must be raised in a motion to correct errors under T.R. 59 and made the subject of a proper and timely appeal if appellate review is to be had. Any such issue[,] which was raised by, or could have been raised by a timely motion to correct errors and a timely direct appeal may not be the subject of a motion for relief from judgment under T.R. 60.

Mathis v. Morehouse, 433 N.E.2d 814, 816 (Ind. Ct. App. 1982), *overruled on other grounds* by *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332 (Ind. 1983).

Here, the matters about which Kevin complained—the amount of the support ordered, the evidentiary basis for such order and its retroactive application were all known to Kevin at

the time he filed his T.R.60(B) Motion. They could and should have been raised in a motion to correct error. He did not do so, and the issues are waived. The trial court did not abuse its discretion in denying Kevin's request for relief from judgment.

III. Contempt

Kevin next contends that the trial court abused its discretion by finding him in contempt and ordering him to pay attorney fees. Decisions regarding child support rest within the sound discretion of the trial court. *Dore v. Dore*, 782 N.E.2d 1015, 1018 (Ind. Ct. App. 2003). "We will reverse a trial court's decision in child support matters only for an abuse of discretion or if the trial court's determination is contrary to law." *Id.* "An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Poppe v. Jabaay*, 804 N.E.2d 789, 793 (Ind. Ct. App. 2004), *trans. denied*. When we review a contempt order, we neither reweigh the evidence nor judge the credibility of the witnesses. *Lasater v. Lasater*, 809 N.E.2d 380, 386 (Ind. Ct. App. 2004).

Under the Support Order, the trial court ordered Kevin to pay child support in the amount of \$190 per week. In the 2010 Order, the trial court found that, pursuant to the Support Order, Kevin should have paid child support in the amount of \$12,920 through the date of January 12, 2010. The trial court also found that Kevin paid child support only in the amount of \$5,536, notwithstanding the fact that Kevin was employed for most of the time in question. *Appellant's App.* at 23. Because the trial court concluded that Kevin willfully

failed to comply with the Support Order, the trial court found him in contempt of court and ordered him to pay Wray her attorney fees

To the extent Kevin attempts to claim that the contempt finding was improper because the trial court abused its discretion in increasing his support payments to \$190 per week, he is entitled to no relief. “In general, contempt of court involves disobedience of a court which undermines the court’s authority, justice, and dignity.” *City of Gary v. Major*, 822 N.E.2d 165, 169 (Ind. 2005) (citing *Hopping v. State*, 637 N.E.2d 1294, 1297 (Ind. 1994), *cert. denied*). Among the inherent powers of a court is that of “maintaining its dignity, securing obedience to its process and rules, rebuking interference with the conduct of business, and punishing unseemly behavior.” *Id.* Although a defendant cannot be held in contempt of a void order, a defendant may be held in contempt of an erroneous order. *Id.* “A party must follow an erroneous order. The only remedy from an erroneous order is appeal and disobedience thereto is contempt.” *Id.* (citing *Carson v. Ross*, 509 N.E.2d 239, 243 (Ind. Ct. App. 1987), *trans. denied* (1988)); *accord Crawl v. Berryhill*, 678 N.E.2d 828, 830 (Ind. Ct. App. 1997)

Kevin failed to timely appeal the Support Order requiring him to pay \$190 per week in child support. The trial court did not abuse its discretion in finding Kevin in contempt of court for failing to pay his child support as ordered in the Support Order.

In reviewing a trial court’s award of attorney fees, we likewise apply an abuse of discretion standard. *Mason v. Mason*, 775 N.E.2d 706, 711 (Ind. Ct. App. 2002), *trans. denied* (2003). A trial court has wide discretion in awarding attorney fees, and we will

reverse such an award only if the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. *Id.* The trial court may look at the responsibility of the parties in incurring the attorney fees. *Id.* Here, Wray initiated the contempt action in an effort to prompt Kevin to pay his child support. The trial court found that the action was warranted. The trial judge was in the best position to determine whether attorney fees were justified under these circumstances. We cannot say that the trial court abused its discretion in awarding Wray attorney fees.

Affirmed.

RILEY, J., and BAILEY, J., concur.