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IN THE SUPREME COURT OF THE STATE OF FLORIDA

GEORGE W. JOHNSON, et al.,
Petitioners,

v.

THOMAS BEDNAR,
Respondent.

No. 75,305
(4th DCA NO. 88-00655)

* * *

ON DISCRETIONARY REVIEW
FROM THE FLORIDA DISTRICT COURT OF APPEAL
FOURTH DISTRICT

* * *

PETITIONERS' BRIEF ON JURISDICTION

* * *

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TABLE OF CITATIONS

Cases

Allman v. Johnson,
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SUMMARY OF ARGUMENT

Jurisdiction to review this case is undisputable because the fourth district openly recognized that its decision here was contrary to the decision of the third district on the same issue in the Balzam case. In addition, other unavoidable conflict grounds exist. The subject decision also carries within it an obvious, though unarticulated, construction of the requirements of the due process clauses in both civil and criminal contempt cases.

There are many reasons to take this case up. The fourth district decision here plainly encourages open-ended fines, unrelated to any losses incurred by the moving party or to any gain derived by the offending party, for trivial violations of a judicially enforced covenant not to compete after the sale of a business, which but for the statutory exeception would be unenforceable. Moreover, when imposed by a judge as a contempt fine, rather than by a jury as a punitive damages fine, this fine entirely eludes the statutory limits on fines in civil cases, see § 768.73, and in criminal cases, see § 775.083.

Declining review is but an open invitation to seek such contempt fines, without any standards and any guidelines for reviewing courts. It is, in short, to nourish another litigation industry, in the face of contrary legislative policies.

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ISSUES TO BE REVIEWED

Should this court review a punitive civil contempt fine, having no relationship to any damages (because the moving party disclaimed any) and lacking any provision for the contemnors to purge themselves of the contempt, where the district court expressly recognized that its decision conflicted with a third district decision requiring that any such fine be related to damages, where the decision also conflicts with other decisions requiring the same relationship and also requiring a purge provision, and where the fine greatly exceeds any fine that a judge could impose on a convicted felon or a jury could impose as punitive damages?

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STATEMENT OF CASE AND FACTS

As succinctly put by the district court,

> "[t]his case involves the sale of a business followed by violations of a covenant not to compete, resulting in an injunction against the sellers. The violations continued and a contempt order, the subject of this appeal, ensued."

Appendix, at 1. The case involves a $25,000 fine after the party seeking the punishment disclaimed any damages.

First, the district court considered whether it is necessary to show a relationship between the amount of the fine and the moving party's damages and expressly disavowed following the third district decision *so* requiring in Balzam v. Cohen, 427 So.2d 329 (Fla. 3rd DCA 1983) (holding that even a coercive civil contempt fine must bear some reasonable relationship to the actual damages suffered by the aggrieved party). The fourth district reasoned that "a coercive fine may be appropriate" to enforce compliance "without resorting to the more drastic step of jailing the offending party", but did not explain why a coercive fine instead of imprisonment need not be reasonably related to the aggrieved party's damages or pecuniary loss. Appendix, at 2.

Also, the district court then expressly held that no "purge provision" was necessary in an order requiring payment of a $25,000 fine to the buyers, because no imprisonment was ordered and thus the seller did not need "a key to his prison cell". In short, a purge provision without imprisonment is unnecessary in civil contempt proceedings.

Seller timely filed his notice invoking this court's discretionary jurisdiction.

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ARGUMENT

I. Grounds for Jurisdiction

The easiest part of this discretionary review decision is whether this court has jurisdiction. Plainly it does.

In the third paragraph of its decision, the district court openly recognized that its decision on the reasonable relationship issue was directly contrary to the third district's decision on the same issue in Balzam, where the third district said:

> "the amount of a civil contempt fine imposed by a trial court for contempt of its order should bear a reasonable relationship to the damages, if any, suffered by the party in whose favor the order was entered."

Balzam, at 330. The fine in Balzam was indisputably coercive. Putting aside its reasoning, the fourth district simply said: "we, in the fourth district, have disavowed Balzam * * * . Thus its conflict with another district court on the same issue is open and defiant. Jurisdiction follows conflict.

If that were not enough, this court held in National Exterminators Inc. v. Truly Nolen Inc., 86 So.2d 816 (Fla. 1956), that the amount of a fine imposed for contempt of an order should be measured by the damages, if any, suffered by the aggrieved party. See also Carlyle v. Carlyle, 438 So.2d 176 (Fla. 1st DCA 1983) (same holding). This court made no exception for coercive civil contempt fines, and indeed the fine there was just as "coercive" as the fine is here.

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Although the fourth district did not cite National Exterminators, jurisdiction exists whether the district court explicitly names the conflicting decision or not. Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

Other grounds for finding jurisdiction also exist. Even though the district court held that no purge provision was necessary because there was no incarceration involved, that holding plainly conflicts with the decisions on the same issue in Allman v. Johnson, 488 So.2d 884 (Fla. 5th DCA 1986); and Palmer v. Palmer, 530 So.2d 508 (Fla. 3rd DCA 1988). Both of these districts, unlike the fourth, require a purge provision in all civil contempt orders, without distinguishing between fines and jail.[1]

Quite apart from these is the traditional contempt rule that any fine for past violations[2] is criminal and requires compliance with all of the criminal contempt due process protections. E.g. Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977); Griffin v. Griffin, 375 So.2d 1086 (Fla. 1st DCA 1979); In re S.L.T., 180 So.2d 374 (Fla. 2nd DCA 1965); and Fla.R.Crim.P. 3.840. This

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[1]The nature of the civil contempt penalty -- jail or fine -- seems a terribly insubstantial distinction on which to base this court's jurisdiction. It is a distinction that is not greatly favored in other contexts, e.g. due process constitutional issues, because one man's fine may really be another man's prison -- i.e. for some any fine may be impossible or may bankrupt the contemnor, while for others a few months in jail may be a respite, a refuge from other cares of the world outside, as in William Sydney Porter's (O'Henry) well-known short story "The Cop and the Anthem".

[2]This must be especially true where, as here, future compliance with the subject order had become moot simply because the prescribed term of the injunction had expired by its own terms.

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case was treated purely as a civil contempt case: there was no order to show cause, the court applied either a greater weight of the evidence or clear and convincing standard, rather than the reasonable doubt standard required in criminal cases; and the fine was payable to the buyer and not the state. Yet a purely punishing fine -- rather than to coerce future compliance -- is what was imposed, thereby creating conflict with Pugliese, Griffin and S.L.T.

Moreover, even if it were permissible in civil or criminal contempt cases to base a fine on something other than the pecuniary loss suffered by the other party or the pecuniary gain derived by the contemnor, due process certainly requires that the outer limits of the possible fine be fixed by statute. See e.g., §§ 768.73(1)(a), and 775.083, Fla. Stat. (1987).

A fine which exceeds the statutory limits is per se reversible. Comparato v. State, 419 So.2d 1131 (Fla. 1st DCA 1982). Thus there was either a violation of due process standards, i.e. a constitutional question raised, or there was a statutory violation. Either way there is jurisdiction because of conflict with Comparato, or there is constitutional construction jurisdiction because of due process requirements.

Jurisdiction is indisputable.

II. Reasons to Review

Jurisdiction having been established, the key question is whether to exercise it and review this case. The amount of the fine alone, $25,000, suggests that the "error-correcting function'' role of this court has been properly implicated, and thus jurisdiction should be used in this case to right a palpable wrong. But that alone is not the only reason that it should be taken up.

Even more important is the opportunity to sweep away some prevailing misconceptions on the use of the civil contempt power, by itself alone greatly misunderstood by both the bench and the bar, and in cases that begin as ordinary breach of contract disputes. For the jurisprudence of contempt is one of the murkiest in our law, And this is doubly *so* in the enforcement of agreements (restrictive covenants) which, if not specifically excepted in some circumstances by another statute, would otherwise be unenforceable as a restraint of trade.

Among the more serious and frequently recurring questions involved here are the following:

A. Is the court's contempt powers in such a case limited to civil contempt remedies designed to coerce compliance, or may the court also use its criminal contempt powers to punish previous non-compliance?

B. Must a civil coercive fine be related to the pecuniary loss suffered by the moving party or the pecuniary gain derived by the contumacious party?

C. If civil fines can be used to punish, must they be similarly based?

D. In any event, can punishment fines imposed by a judge to enforce a private contract, in the absence as here of any provision *so* permitting, ever exceed the limits fixed by law for criminal penalties? Stated another way, can one who is found to have violated a non-competition covenant for (arguably) three retail sales perhaps related to water conditioning be punished by a fine **40** % greater than the highest fine which can be imposed on one convicted of a life felony? See §775.083(1)(a), Fla. Stat. (1987).

E. Can devious litigants avoid the punitive damages statute's limitation on the amount which may be awarded, simply because contempt rather than contract damages is employed?

F. Where civil contempt fines are involved, must the contemnor be first given a chance to purge the contumacious conduct before suffering the fine?

If this court lets the fourth district's already published decision stand, inventive trial lawyers will soon routinely use these business covenant-not-to-compete cases as vehicles to win huge contempt fines, unrelated (as this one is) to any reasonably related damages or profits, a result which would be otherwise impossible as a tort or punitive damages award. See § 768.73(1)(a), Fla. Stat. (1987).

Moreover, because §768.73 would not seem to be involved where a fine for contempt is involved rather than a jury award of punitive damages, no part of the fine would find its way to the

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state treasury, obviously in contravention of that statute. Can the legislature really be thought seriously to have intended such a result?

A decision not to review this case sanctions, or will be seen to sanction, all of these horribles. The solution is at hand. The court should bring this case up.

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Conclusion

Conflict jurisdiction clearly exists, as does constitutional construction authority to review, It would be difficult to imagine a more appropriate case to decide. This case should be accepted, and a briefing schedule set,

Respectfully submitted,

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GMF:gmf