IN THE SUPREME COURT OF THE STATE OF FLORIDA

GEORGE W. JOHNSON, et ux.,

Petitioners,

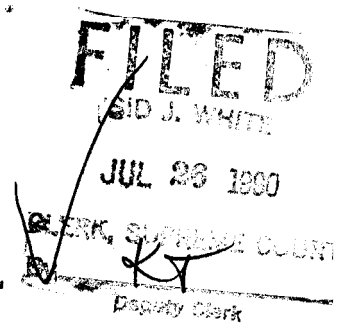
v.

THOMAS BEDNAR,

Respondent.

No. 75,305

* * *



ON CONFLICT REVIEW
FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. Reasonable Relationship.

Leaping from the principle that in proceedings to enjoin a violation of a non-competition covenant the fact of irreparable harm will ordinarily be presumed by the trial judge, respondent has reached the unjustifiable conclusion that a civil fine for violation of that injunction should not be required to bear a reasonable relationship to damages suffered by the party in whose favor the injunction was entered. How he got there is not explained and is quite difficult to understand.

A necessary prerequisite for any injunction is that the applicant show that he suffers irreparable harm from another's conduct and thus that he has no legal remedy in money damages. In some cases, the fact of irreparable harm is the very essence of the claim in suit, and thus a requirement of proof of irreparable harm would defeat the purpose of the only real remedy available. Hence the law indulges the presumption that the lack of a legal remedy in money damages does not require any specific showing on that point. Capraro v. Lanier Business Products Inc., 466 So.2d 212 (Fla.1985).

But respondent's new argument is that the presumption of no legal remedy in money damages which led to the injunction in the first place should later be magically transformed in contempt proceedings for a violation of that same injunction to the contrary presumption that there is a remedy in money damages and even that such damages should now be presumed. This is legal legerdemain and represents the kind of thinking that gives

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lawyers a bad name, for it is little more than a "gotcha" to insure winning the issue.

In cases of patent or copyright or trademark infringement, the applicable statutes specifically allow damages measured by the infringing party's profits. But there is no comparable statute in non-competition covenant cases. Such covenants are limited exceptions to the ordinary public policy against agreements restricting competition. See Miller Mechanical Inc. v. Ruth, 300 So.2d 11 (Fla.1974). Thus those who seek punishment for violating them should prove that they have actually been damaged by the competition. Otherwise the contempt proceedings become little more than journeys into revenge.

The unarticulated premise of respondent's argument is that in cases involving alleged violations of an injunction enforcing a non-competition covenant the trial court needs penal/coercive powers which would allow huge fines unrelated to any damages, or those enjoined will continue to flout the court's order with impunity. There is, however, absolutely nothing in this record that will support such an extravagant claim. The trial judge here, e.g., made no attempt to impose an in terrorem, per-transaction fine: a fine of $100 for each new retail transaction made by petitioners.

Respondent also seeks to justify the fine as an expression of profits allegedly made by petitioners in violating the injunction. Even if this court's previous decisions on civil contempt powers could be read to allow such a base for a civil fine, the facts in this case do not. He points to petitioners'

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new business of purchasing retail installment sales finance contracts from other retailers as a supposed violation of the injunction and then reasons that the profits from such contracts would greatly exceed the fine. This injunction, however, did not -- either expressly or implicitly -- forbid petitioners from going into the sales finance business; it enjoined only the retail water conditioning business.

Construing the order as respondent now contends is to expand it far beyond the line of commerce which was the subject of the business sold and the covenant not to compete. It is to read a competitive restraint broadly when public policy is to construe them narrowly. It is to subject a contracting party to punishment for violating a restraint he previously had no notice he would be required to comply with. And, as suggested in petitioners' earlier brief, it is to modify an injunction in a way that could never have been allowed originally. Hence there is no possible basis to punish petitioners for their sales finance business transactions, and certainly no basis for any punishment predicated on any profits from it they may have made.

The argument that the fine should be approved because it was coercive' is too illogical to be taken seriously. This

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1 Respondent now argues that this fine is really coercive rather than penal because the trial judge extended the length of the injunction for an additional year as part of his contempt order and that this "coercion" of $25,000 was necessary to compel compliance with the extended restraint. The trial judge could not lawfully extend the period of the injunction. National Exterminators Inc. v. Truly Nolen Inc., 86 So.2d 816 (Fla.1956), expressly holds that the chancellor had no power to extend the injunction beyond the effective period of the covenant not to compete. Hence this injunction had actually expired, and there was no basis to coerce compliance with an injunction that had

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contention is really just an argument that **$25,000** should be acceptable because it is more coercive than **$500.** A fine of **$100,000** would be still more coercive. How about a fine of **$1,000,000?** Why not life in prison? This is but another attempt to put a different face on palpable punishment which was not imposed with the constitutional safeguards of rule **3,840.**

Just as out of place is respondent's suggestion that this court should adopt as part of Florida common law the pre-Wagner Act decisions of the United States Supreme Court as a basis for civil contempt fines. In many of the decisions before 1937[2] the Court demonstrated an anti-collective bargaining bias which it attempted to justify under the now discredited notion of substantive due process. The Gompers[3] decision is an example of the court punishing strikers for the mere act of attempting to organize and bargain collectively. These decisions have no precedental value even in the federal courts. Why they should be adopted by a state court is hard to fathom.

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already passed beyond its effective life.

2 That a lawyer in 1990 could seriously entertain using supreme court decisions on labor relations or other economic legislation handed down before the Court reversed itself in **1937** -- the famous "switch in time that saved nine" -- shows just how historically illiterate we have become. See National Labor Relations Board v. Jones & Laughlin Steel Corp., **301** U.S. **1, 57** S.Ct. **615, 81** L.Ed. **893 (1937);** Stern, "The Commerce Clause and the National Economy, **1933-1946", 59** Harv.L.Rev. **645** (1946). It is the functional equivalent of citing Plessy v. Ferguson, **163** U.S. **537, 16** S.Ct. **1138, 41** L.Ed. **256 (1896),** instead of Brown v. Board of Education, **347** U.S. **483, 74** S.Ct. **686, 98** L.Ed. **873 (1954),** on an issue of racial discrimination.

3 Gompers v. Bucks Stove & Range Co., **221** U.S. **418, 31** S.Ct. **492, 55** L.Ed. **797 (1910).**

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In the end, respondent seeks to justify the district court's decision by proposing that this court add a new wrinkle to the trial judge's civil contempt powers: the power to punish with fines far greater than could be imposed for criminal contempt. That is *so* obviously at odds with due process and other applicable constitutional requirements for punishment, not to mention the commands of rule **3.840,** that nothing more need be said.

II. Purge Provision.

Here respondent seeks to rewrite this court's decisions by arguing that a purge provision in a civil contempt case is required only when the coercion is incarceration and only when the contempt results from the failure to obey an "affirmative" command. The problem with his argument, and indeed with the fourth district's decision, is that "coercion" has become entangled in their minds with "punishment".

To repeat from our earlier brief, the entire purpose of civil contempt is to push the recalcitrant party into complying with the court order; it is not to punish him for past non-compliance. If punishment is what is sought, then the court must comply with rule **3.840** by treating the attempt as criminal contempt and afford the alleged contemnor his due process protections.

But if the effort is to induce future compliance, i.e. coerce the party into following the order, then the sanction imposed must be conditional. That is to say, it must allow the

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party a choice: comply with the order, i.e. purge oneself of non-compliance; or suffer the sanction hanging over one's head like a sword of Damocles. That is simply another way of saying that it must have a dire consequence for continued non-compliance. Without the purge or choice, the sanction is really absolute rather than conditional. It is then punishment.

But respondent and the district court have confused the recognition that any sanction -- to be a real sanction -- must contain a penal aspect to it, with the quite separate notion that civil contempt is limited to coercion. The fact that consequence must inevitably be penal or punitive cannot be used to mete out pure punishment without attending to the inconvenience of the requirements of rule **3.840.**

Concededly civil contempt does not work at all when there is no unwanted consequence attached to future non-compliance, where the court merely wraps its command with a promise of commendation if the party does in fact comply. That understanding does not excuse confusing the civil purpose of coercion with the criminal purpose of punishment. It is that confusion which has led the trial and district courts astray in this case.

In short, the failure to provide a purge provision, even where the sanction is money rather than prison, is to turn the contempt into criminal, or punitive, contempt. Because there was absolutely no adherence to rule **3.840's** requirements, the order should have been reversed.

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111. Ambiguousness of Injunction.

Dealing directly with a few retail customers, while carrying on a bona fide wholesale water conditioning business, is not the same thing as engaging in the retail business. Even if were, it hardly justifies a $25,000 fine for a half dozen occurrences,

But the real question on construction of the original injunction is whether it can fairly be read to include a ban on leasing business premises to a legitimately separate retail water conditioning business (in which they have no other interest) operated by someone other than petitioners. Similarly, the operation of a sales finance business which buys paper from third party retailers of water conditioning products covered by the prohibition is not retail water conditioning.

As argued before, the public policy underlying restraints on competition does not allow such an expansive reading of the covenant not to compete agreed to by the parties in this suit. If it did, the scope of the statutory exception would absorb the rule itself.

IV. Excessive Fine.

Respondent's only argument here is that the fine in question was civil, not criminal, because it was coercive. As that analysis has already been shown unsustainable, it is manifest that the failure to limit the fine to $500 is serious error,

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CONCLUSION

The decision of the district court should be disapproved and the cause remanded with instructions to vacate the trial court order and dismiss the case.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24th, 1990, a true and correct copy of petitioner's reply brief was placed in the U.S. mail first class postage prepaid and addressed to Lawrence J. Forno, Esq., Counsel for Respondent, 2401 East Atlantic Blvd., Suite 206, Pompano Beach, FL 33062.

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