IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,240

SAM PARISI, Individually, and
SAM PARISI d/b/a SAM'S
RECYCLING, INC.,

Petitioners,

v.

BROWARD COUNTY and BROWARD
COUNTY OFFICE OF NATURAL
RESOURCE PROTECTION,

Respondents.

_______________________________/

BRIEF OF PETITIONERS

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Case No. 93,240
Parisi vs. Broward County, et al

CERTIFICATE OF INTERESTED PERSONS

Counsel for petitioners certifies that the following persons and entities have or may have an interest in the outcome of this case.

Sam Parisi, individually

Sam's Recycling, Inc.

Broward County

Broward County Office of Natural Resource Protection

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PREFACE

This is a review proceeding from a civil contempt order entered by the trial court on July 19, 1995 (R 393) which held the plaintiffs-appellants in contempt of court and fined them certain amounts of moneys in the form of two bonds which were to be posted. This decision was affirmed by the Fourth District (3-0), rehearing denied (2-1).

The parties will be referred to as they stand before this Court, or as follows:

Sam Parisi	Parisi, plaintiff
Sam's Recycling Inc.	Yard, plaintiff
Broward County and Broward County Office of Natural Resource Protection	County, Broward County, defendants

The symbol "R" will be used to reflect citations to the record. The symbol "A" will be used to denote citations to the appendix to this brief (which includes the complete appendix in the Fourth District). Transcripts of various hearings will be referred to as follows: "T __ __-199_ at __". All emphasis in this brief is that of the author unless specifically noted to the contrary.

STATEMENT OF THE CASE

A. BACKGROUND PROCEEDINGS

This action began when the plaintiffs' filed a complaint for declaratory relief relating to the County's environmental administrative activities, the specific allegations of which are not directly relevant to the issues before this Court. (R 1).

The defendant Broward County filed a counterclaim and requested injunctive relief against certain activities at the salvage and recycling Yard operated by the plaintiff. (R 36). The request for injunctive relief did not request that the plaintiffs be "shut down". Rather, the County asked the court to stop automobile crushing operations, to stop the storage of fluid-containing auto parts outside of the secondary containment area, and to stop practices which caused or could cause the spill of oil or other automotive fluids onto the ground. (Id.)

1. March 30, 1993 Injunction

A number of hearings were held with respect to those issues and, on March 30, 1993, the trial court entered an order granting the request for injunctive relief and specifically enjoining the plaintiffs from taking certain actions at the Yard. (R 110, A 1).

Specifically, the Yard was enjoined from "any and all operations which continue to cause the discharge of hazardous materials in those areas which do not contain adequate secondary containment" and the Yard was ordered to construct additional secondary containment areas. June 1, 1993 contempt order. (Id.)

2. June 1, 1993 Contempt Order

Additional hearings were held concerning the plaintiffs' performance under the injunction and, on June 1, 1993, a civil contempt order was entered (R 132, A 2) containing a variety of provisions, including the following:

> 1. The Yard was ordered to stop operations "which may cause pollution to the air, ground or water of Broward County, specifically including the removal of parts or the dismantling of any vehicles by Sam Parisi, his agents or employees or anyone else, including members of the public";
>
> 2. The Yard was enjoined from "all crushing operations";
>
> 3. The Yard was further "enjoined from operational activities other than the mere selling of parts in stock until such time as adequate secondary containment" was built; and
>
> 4. The Yard was further ordered to comply with a schedule with respect to remediation activities.

The June 1, 1993 order of civil contempt contained no finding whatsoever of plaintiffs' ability to pay for the planning or remediation called for by the trial court. What the civil contempt order **did** contain was a retrospective statement that plaintiffs had the ability to comply with the March 1993 injunction.

B. THE COMPLAINT WHICH LED TO THE ORDER UNDER REVIEW

On August 1, 1994[1], the County filed its motion for an order adjudging the plaintiffs in contempt of court. This document, hereafter referred to as "the Complaint", sought to hold the plaintiffs in civil contempt for 12 separate incidents which took place between May 26, 1993 and August 20, 1993. No request was made for any finding of contempt with respect to any other conduct, before or after those dates[2]. At no time did the County ever seek to amend or obtain court permission to amend its Complaint beyond the scope of the 12 "incidents" or counts. The plaintiffs repeatedly objected to any attempt to expand the Complaint beyond the 12 incidents and at no time waived their objection. See, e.g., T 1-4-95 at 7, 10, 30 and 35, A 6 at 18.

The trial on the 12 alleged incidents of civil contempt took place over a number of hearings in the fall of 1994, and early 1995, culminating in the civil contempt order dated July 19, 1995 which is the subject of this review proceeding. (R 393, A 4). This order found the plaintiffs to be in contempt and required, as a fine, the posting of three bonds. Two of the bonds, totaling $105,000, are still at issue, and would have to be kept in place, without possibility of purge, until the remediation at the Yard is concluded at a future, and as yet unspecified, date.

A motion for rehearing was made and denied. (R 400, 405, A 5).

A notice of appeal was timely filed with respect to the civil contempt order. (R 419).

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[1] In the interim, there were various proceedings in the trial court which included failed attempts to obtain criminal contempt by the County and to obtain the judge's disqualification by Parisi. See, e.g., R 136, 160, 175, 184, 197, 211, 219, 316.

[2] As originally filed, Broward County included three other counts which were dropped during the trial in this matter and are not the subject of this appeal. (A 6 at 19).

Thereafter it was discovered, through no fault of the plaintiffs, that the court reporter retained by Broward County had lost, misplaced, destroyed or inadvertently destroyed the transcript notes from the bulk of the trial on this civil contempt proceeding, including the entire transcript with respect to the County's case in chief. Assiduous efforts were made by counsel for both parties in the trial court to reach an agreement as to the reconstruction of that portion of the record which was irrevocably lost and those efforts did not yield an agreement as to that record. See T 7-1-96, T 4-11-96, R 430, 431-32). Nevertheless, the trial court, at the request of Broward County, entered an order on September 18, 1996 entitled "Reconstructed Record of Testimony" which purports to comply with Florida Rule of Appellate Procedure 9.200(b)(4). That "reconstructed record" was forwarded to the Fourth District. (A 6).

The record before this Court thus consists of the trial court pleadings, the portion of the record that has been "reconstructed", the small portion of the transcript taken by a different reporter, and the exhibits.

The Fourth District affirmed unanimously, but denied rehearing by a vote of 2-1. (The decision of the Fourth District is included in the appendix as A 8.) The court concluded that the ability to comply with prior orders made ability to comply irrelevant unless the plaintiffs faced jail or a **further** contempt proceeding for failure to comply with this order.

STATEMENT OF THE FACTS

I. INTRODUCTORY STATEMENT

As noted in the Statement of the Case, the record before this Court is incomplete by virtue of the loss or destruction by the court reporter of the notes of testimony taken during the County's case in chief on the motion for contempt. The "reconstruction" was agreed to by the parties on certain, but not all, points. Notwithstanding this, the trial court ultimately imposed her view of the record on certain points and entered an order with respect to the "reconstructed" record. The following are the relevant facts as can presently be extracted from the "record" as it exists.

The appellants operate or have some legal responsibility for a salvage and recycling Yard located in Broward County. The Yard was the subject of enforcement activity by the County in respect to a history of bad fluid management of a variety of petrochemicals and other substances, the disposal of which had not been properly managed at the Yard for a period of time. (A more complete statement of the facts with respect to the background of the case can be found on pages 7 to 12 of the appellants' brief in the Fourth District but is not believed to be relevant here.) (A 9). In March 1993, the County obtained a temporary injunction against the Yard with respect to certain fluid management practices. There was absolutely no finding or conclusion in that order with respect to the appellants' ability to comply with the court's directives.

In June 1993, a contempt order was entered with respect to continued operations of the Yard and as a result of that order, all automobile crushing activities were stopped and only the sale of parts allowed thereafter. Again, there was no finding or conclusion in the June 1,

1993 order of the ability of the appellants then, at that time, to comply with the remediation efforts ordered by the June 1, 1993 order. The June 1, 1993 order, however, did include, retrospectively, a finding that the appellants could have complied with the March injunction order.

The August 1, 1994 motion for contempt, which led to the order under review, dealt with 12 incidents, 11 of which related to parts being removed from junked cars and the 12th of which involved the movement of a vehicle by the use of a front end loader which caused some fluid to be released from the car. Again, a detailed description of these incidents is included in the appellants' Statement of the Facts in their Fourth District brief, pages 7 to 12 (A 9), although the details are not here material..

The 12 incidents took place between May 26, 1993 and August 20, 1993, and the trial on whether these events violated previous orders of the court took place in 1994 and 1995. The evidence at trial established that in 11 of the 12 incidents, parts were either removed from wrecked vehicles or members of the public were allowed to search through the Yard for vehicles from which to remove parts. (A 6 at 2-15). These wrecked vehicles at the time were **not** located within any secondary containment facility, but evidence established that no hazardous materials or fluids were released during any of these 11 incidents. Further, there was no evidence that any of the parts removed from the wrecked automobiles even contained any hazardous materials or fluids of any kind.

The 12th incident involved the movement of a wrecked vehicle by a front end loader and was supported by testimony that, from a distance, the Broward County employee observed some "gasoline" coming out of the car[3].

Evidence Relating to the Bonded Fine

Prior to trial, the County submitted a memorandum to the trial court that it sought in its contempt proceeding to receive compensatory damages for enforcement activities. (A 7, R-382).

The County at no time submitted any evidence of any compensatory damages, any attorney's fees, any costs, or any other item of damages that arguably were included within the scope of any claim of compensatory damages arising from the contumacious conduct.

What the County did request later was the assessment of a fine, in the form of a bonded fine[4], to cover the cost of site remediation in the event the appellants failed to invest their own monies in the continued clean up of the subject site in the future. The County put on no evidence whatsoever of Parisi's or the Yard's ability to pay even one

[3] There was also evidence adduced (but not agreed to) that there was no way he could tell it was gasoline, that he performed absolutely no tests on any substance in the vicinity, and that when he went to where he thought the car may have been when the fluid was observed, there was no way to tell where the fluid was. The area had an accumulation of petrochemical residue from its long use as a salvage Yard. (A 6 at 10, 11, T 7-1-95 at 41-52).

[4] The term "bonded fine" was used by the trial court and the County in the order that it prepared for the court's signature. Parisi and the Yard were required to post a bond or funds in the amount of the bonded fine into the registry of the court to be held indefinitely until the court allows the release of those funds upon the completion of all remediation efforts and all monitoring activities. There is no outside limit on the holding of these funds or of the bond.

additional dollar as a fine or either's ability to post the $105,000 in bonded fines that were ultimately assessed[5].

In the absence of any testimony concerning the financial ability of Parisi or the Yard to pay one dollar more to purchase these bonds or place the required funds in the court registry, the appellants put forth uncontradicted evidence that they had spent or incurred obligations to pay $616,404 as of the date of the hearing. (A 6 at 17). The accountant for the Yard further testified that Parisi and the Yard were without available funds and had already borrowed extensively. (A 6 at 18).

The issue of the failure of proof with respect to the appellants' ability to pay even one dollar more in a fine or a bonded fine was preserved at the trial court, argued to the appellate court, and was the principal subject of the motion for rehearing in the Fourth District. (A 6 at 19, A 9 at 20-21).

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[5] The court assessed a fine of $75,000 as a figure to be held for annual maintenance so long as the system was operating, and an additional $30,000 bonded fine to be posted during the post-remediation monitoring period. Neither of these sums had any expiration date or deadline that would allow Parisi or the Yard to recover any funds actually posted. The court also required a bonded fine in the amount of $285,000 which was intended to cover the cost of construction of the extensive remediation systems. Inasmuch as these systems were installed in a timely fashion, there was no issue before this court with respect to that bonded fine amount.

SUMMARY OF ARGUMENT

This is an appeal from a civil contempt order which, among other things, ordered the appellants to post $105,000 in bonds. That total amount was not keyed to the actions of that were the subject of the contempt, but instead were linked directly to an attempt to ensure future compliance with an environmental remediation process that was **not** the subject of the contempt motion. The order must be quashed.

Under Florida law, a civil contempt fine may be imposed either to coerce a contemnor into compliance with an existing court order, or to compensate the victim of the contumacious conduct for damages suffered as a result of that contempt. No evidence in the court below supports the entry of the bonded fine order under neither basis and as such, it cannot stand for failure of proof.

If the civil contempt fine is imposed as a coercive measure to induce compliance with an existing order, then the contemnor must be shown, in the record, to have the present ability to pay the fine or else the fine becomes prohibited punishment. On the record before this Court, there was no evidence adduced as to the appellants' financial ability to post these bonds, nor was there any finding by the trial court of any present ability by the appellants to post this bond. Rather, the evidence which was presented to the trial court was that the appellants had spent or incurred over $600,000 in remediation efforts on the site in question and did not have the ability to pay an additional $105,000 as a bond against undefined future events. Similarly, since the bonds were to be held under court supervision for an indefinite, undetermined period of time, against the future compliance by the appellants with later remediation activities, the bonded fines imposed by the trial court were not in the nature of

coercive measures with respect to past conduct but were punishment and prohibited by Florida law.

In seeking these fines, the County argued to the trial court that the fines would be in the nature of compensatory damages (and not coercive). Having thus argued for one of the two alternative bases for civil contempt fines, the County is now precluded from attempting to support the fines on an alternative basis. The County presented absolutely no evidence of any damages requiring compensation by the appellants. Certainly, nothing in the realm of $105,000 could be inferred from any evidence offered in the trial court. Whatever elements of compensatory damages or costs may have been theoretically recoverable in such an enforcement proceeding, the absence of proof as to any such damages precludes compensation as being an alternative support for the orders in question.

The County having failed to present competent proof as to either of the two alternative bases for a civil contempt fine, the order of the trial court dated July 19, 1995 must be quashed or reversed.

ARGUMENT

POINT I ON APPEAL

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPOSING A CIVIL CONTEMPT FINE BECAUSE BROWARD COUNTY WHOLLY FAILED TO ESTABLISH THE REQUISITE BASIS FOR ANY FINE IN THE FORM OF A BOND OR OTHERWISE.

A. Present State of the Law

The law in Florida with regard to contempt is, with one possible exception, clear.

There are two categories of contempt. Criminal contempt (designed to punish intentional violations of court orders) and civil contempt (utilized in the main to compel compliance with an uncomplied with court order). Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985); Pugliese v. Pugliese, 347 So. 2d 422 (Fla. 1977); International Union, United Mine Workers v. Bagwell, 512 U.S. 821 (1994). Inasmuch as the proceedings before this Court arose out of a **civil** contempt matter, the Court's inquiry can be focused on that topic. In this regard, this Court recently spoke at length with respect to the law of civil contempt in the case of In re Amendments to Florida Family Law Rules of Procedure, 23 Fla. L. Weekly S573 (Fla. Oct. 29, 1998). Although arising in a family law rules-making context, this Court's began its analysis of the law with a review of the principles that guide courts in civil contempt matters generally.

This Court first spelled out the principles with respect to civil contempt which it stated "appear[ed] to be fairly straightforward". Id. at S576. The principles are as follows:

1. If the primary purpose of a civil contempt proceeding is to compel compliance with a court order, a civil contempt sanction is "coercive in nature and is avoidable through obedience". Id.

2. If the civil contempt fine is **compensatory** and not coercive in nature, there is no requirement for a purge provision and, as such, the contemnor's ability to purge the contempt is irrelevant. See Bagwell, supra, at 829; In re Amendments to Florida Family Law Rules of Procedure, supra at S576.

3. When the purpose of the contempt order is coercion, however, whether the sanction of the court is incarceration or financial fine, this Court recognized that it was essential that there be a determination that the contemnor has the financial ability to meet the terms of the fine so as to be able to purge himself or itself of the contempt sanction. Id.

The concern that this Court had with respect to the civil contempt sanction in the family law context was procedural for a party who had been ordered to make a certain periodic payment, who had been found financially able **at that time** to make the payment, but who for whatever reason failed in the future to maintain that financial obligation. Thus, in the family law context (although applicable in other situations as well), this Court has wrestled and is wrestling with appropriate procedures to be utilized in subsequent proceedings when the contemnor either fails to appear at an initial hearing determining ability to pay or fails to attend a subsequent hearing when his or her failure to make court-ordered payments is challenged as being contumacious.

While the resolution of this last procedural issue is still pending before this Court, it is not believed that this review proceeding will require this Court to address those issues.

B. Application of Existing Law to Our Facts

The law in the State of Florida is clear that when, in a civil context, a court order has not been appropriately complied with, the trial court, upon appropriate request **and proof**, can impose contempt fines against civil litigants. As will be demonstrated below, Broward County put forth **absolutely no evidence** whatsoever to warrant or justify the imposition of any dollar amount as a fine. The law does not allow a court to simply "pull a number" out of the air to punish an alleged civil contemnor and the record before this Court fails to establish any basis for any number, let alone the $105,000 bonded fine ordered here.

Secondly, there is nothing whatsoever in this regard, nor any finding to establish that the appellants had the ability to pay any fine, let alone the $105,000 bonded fine required to be posted here[6].

The law in Florida does not allow a trial court to transfer previous displeasure with a litigant on other matters so as to impose a fine such as this unless there has been a demonstrated ability to pay the fine. Indeed, in the record before this Court, the appellants (without obligation to do so) demonstrated the **absence** of an ability to pay any more than they have and are already paying in this massive environmental remediation effort, unprecedented in comparable yards in Broward County.

Thirdly, there is no other basis in this record to substantiate or support the imposition of the bonded fine ordered by the trial court below and consequently, this Court should quash the order of the trial court.

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[6] The order appealed actually required the appellants to post a much larger fine (also without support), but that portion of the order has been mooted because of the admittedly successful implementation of two expensive remediation systems. (R 399).

In reviewing the following argument, it is absolutely essential that this Court keep track of that which was seemingly lost on the trial court throughout the contempt proceedings under review. The appellants operate a salvage Yard which, in the past, had bad fluid management and had been the source of subsurface petrochemical pollution. The remediation or clean-up of those problems (many of them predating the appellants' affiliation with the site) are **not the subject** of this appeal and explicitly were not the subject of the contempt proceeding under review. The appellants have assiduously invested hundreds of thousands of dollars into the remediation effort of the site in question (an effort unique to Broward County), and have not challenged **any** of the court orders or other directives to install remediation equipment. Indeed, they have been called, by the head of Broward County's department controlling this area, **a model in the field of remediation activities for salvage yards**. (A 6 at 17).

The **only** issues before this Court in the civil contempt matter relate to 12 "incidents" that took place between May 26, 1993 and August 20, 1993, where individuals were observed at the salvage Yard removing, or with the ability to remove, some parts from junked automobiles without any showing that any of those parts were fluid-containing parts. The Complaint of Broward County was never broadened beyond the 12 incidents. No effort was ever made by the County to amend its Complaint or to otherwise assert broader charges against the appellants, and the trial court at no time allowed any such amendment.

The County's tack in this case was extremely narrow, but the response of the trial court was over broad and without any record support.

C. Broward County Wholly Failed to Prove Any Actual Damages That Flowed from the

Contumacious Acts, Let Alone Any Damages Which Would Support the Award of a Bonded Fine of $105,000.

Broward County began its claim in support of this order of contempt with an accurate statement of the law with respect to civil contempt fines. It stated that:

> A civil contempt fine must be related to actual damages for purpose of compensating a party for losses sustained. (R 382, A 7).

The citation of authority for this accurate statement of law was the case of Johnson v. Bednar, 573 So. 2d 822 (Fla. 1991).

The County's selection of the Johnson v. Bednar option of "compensatory damages" was obviously a deliberate one. Johnson and other cases in Florida acknowledge the possibility that a civil contempt fine can also be used to **coerce** a party into compliance with a previous court order. As evidenced by the County's selection of the compensatory type of fine, and in the absence of any evidence or record support that the appellants were continuing to in any way allow individuals improperly on the Yard to obtain parts, at the time of trial there was no basis for coercing the appellants to do or not to do **anything** with respect to people gaining access to the Yard to purchase parts. At the time of the hearing, appellants had ordered and installed substantive environmental protection systems and containment (at tremendous expense to the appellants) and no suggestion was made that people could not at that time purchase parts from the appellants at will. The remediation

effort is a model, a great success, and was not the subject of any coercive request for sanctions[7].

Having elected the "compensatory damage" arm of the court's civil contempt power, and properly rejecting the coercive approach, the County was well aware that it was its burden to prove some compensatory damage that would have supported a fine. In the case of Schoenthal v. Schoenthal, 138 So. 2d 802 (Fla. 3d DCA 1962), the Third District stated the question and answered it as follows:

> The sole question presented is whether the chancellor may punish one in contempt by the transfer of real property from that party in a suit to another when no attempt has been made to relate the amount of compensation, if any, to be awarded to the value of the property involved. We think that the general rule is that he cannot. South Dade Farms, Inc. v. Peters, Fla. 1956, 88 So. 2d 891. That case sets forth the law of Florida to be that in an appropriate civil contempt case the court may coerce performance of a required act by imprisonment or, in the event that the violation of the decree has resulted in damage to the injured party, the court may assess a compensatory fine to the extent of the damage suffered to be paid to the party injured by the wrongdoing party.
>
> By definition a compensatory fine is one which has a relationship to the loss suffered.

138 So. 2d at 803-04.

Similarly, the Supreme Court, in a pre-Johnson case, addressed more specifically the issue of burden of proof for a person seeking a compensatory contempt fine. Discussing such fines, the Court, in National Exterminators, stated:

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[7] It was only **after** the trial below and **after** the County had committed itself to a compensatory fine and **after** it had failed in its proof that the words "coercive fine" came up.

> The amount of such a [compensatory] fine may be measured by the damages, if any, suffered by the party in whose favor the injunction is granted. **It is his burden, however, to prove the amount and extent of the damages which should be reasonably certain of measurement**.

National Exterminators, Inc. v. Truly Nolen, Inc., 86 So. 2d 816 (Fla. 1956).

On the record before this Court, the County recognized its obligation at the outset of the contempt proceeding under review, but then wholly failed to put forth **any evidence whatsoever** to prove damages[8], let alone with reasonable certainty. Consequently, the County has completely failed to establish an absolutely essential predicate for the award of any compensatory contempt fine, let alone one of $105,000.

The County also has argued that Florida law allows recovery of attorney's fees and other costs incurred in the efforts by Broward County to establish and prove the contumacious conduct. The record, however, is completely devoid of any proof as to the value of the County's damages in either attorney's fees, increased surveillance activities, or other administrative expenses attendant upon its claim. These elements of proof are absent.

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[8] Although it is not the appellants' burden to show the absence of damage, the record before this Court does absolutely establish that the alleged contumacious acts of removing car parts all involved parts which contained no hazardous liquid or materials, and certainly without the escape of any such materials. The one day an observation was made of a "liquid" escaping from the back area of a car, the record does establish that there was no basis for concluding what that liquid was, no testing done to confirm its character, no estimate whatsoever as to the magnitude of the "spill" and certainly no indication as to the amount of any damage that was caused to the environment, the public or to Broward County as the result of that minimal (at worst) event.

Whatever the law may be on other proof failures, when a party such as this, after full appreciation of its obligations, chooses to use a particular trial strategy, that selection cannot inure to the detriment of its opponent when its proof fails to support its allegations.

The County failed to prove any basis for compensatory damages in this cause and as a result, the fine must be quashed if its basis is claimed to be compensatory.

D. Broward County Wholly Failed to Establish Proof That Would Warrant the Imposition of a Coercive Contempt Fine in this Court, Let Alone a $105,000 Fine for Which There Was No Capacity to Pay or Purge.

1. The County Failed to Put on Any Evidence Whatsoever That the Appellants, after Spending over $600,000 to Acquire Remediation Systems, Could Post the Bonded Fine Called for by the Trial Court's Order.

The law in Florida is now clear, as recently recognized by this Court in In re Amendments to Florida Family Law Rules of Procedure, 23 Fla. L. Weekly S573 (Fla. Oct. 29, 1998), that with respect to contempt orders that are coercive in nature, the alleged contemnor must be shown to have the present ability to comply or purge his or her contempt in a civil context, or else the order becomes a punishment that cannot purge. That "ability" determination is not put off until the time of incarceration, it is part and parcel of the decision on contempt.

The importance of this cannot be understated. The trial court below made absolutely no finding on July 19, 1995 that the appellants, or either of them, had any present ability whatsoever to post two "bonded fines" that totaled $105,000. The reason, of course, why no such finding was made in the order drafted by the County is that there was absolutely no evidence presented during the County's case that even suggested that appellants had any

further financial abilities after spending over $600,000 to acquire the remediation systems[9]. In fact, the record of the appellants' financial status was simply that **there was no such ability**.

In a decision cited by this Court as being a "well-reasoned opinion", the Fourth District stated that:

> The ability to comply is the lynchpin of civil contempt, and this principle underlies all assumptions concerning the protections afforded a civil contemnor.

Pompey v. Cochran, 685 So. 2d 1007 (Fla. 4th DCA 1997)(en banc), as quoted with approval in this Court's decision in In re Amendments to Florida Family Law Rules of Procedure, 23 Fla. L. Weekly S573 (Fla. Oct. 29, 1998).

This is not a situation in which a parent has been found to have had the ability in the past to make a certain payment based upon financial resources, none of which has changed in the intervening period. See Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985). There is no basis for a presumption of ability to meet new financial obligations that have never been addressed by the court.

The record before this Court is not analogous to the case of Spade Eng'g Co. v. State, 697 So. 2d 974 (Fla. 2d DCA 1997). In that case, an alleged environmental polluter was directed in a previous order to undertake certain corrective actions at its facilities, much as the

[9] In fact, the trial court made no finding of financial ability to pay in either its original March 1993 injunction or in its June 1993 contempt order. What it did do in the June order was "find" retrospectively that the appellants had the ability to comply with the March 1993 order; and what it did in the July 1995 order, subject to review here, is find that the appellants had the financial ability to comply with the June 1993 order. No finding has been made, however, with respect to any ability to comply with the order under review requiring the posting of a bond or cash in the amount of $105,000.

appellants here were required to do. When a debate arose as to the quality of the compliance, another motion for contempt was filed which led to an order requiring incarceration of a principal of the contemnor unless a variety of specific actions were taken in compliance with the original contempt order. After noting that the alleged polluter had made substantial efforts to attempt to comply with the original order, the court also noted that the civil contempt order had to contain a purge provision. In Spade Engineering, the trial court actually went so far as to make a finding that the contemnor would have had the ability to pay the required fees if it better maintained its financial resources. The contemnor countered with direct testimony that it did not have the financial ability to pay the ordered fees. In reversing the contempt order, the Second District ruled that the trial court's theoretical conclusion that money might have been available if the company had been better run, "is not the equivalent of presently available assets or income". Id. at 976.

In this case, the court ordered that if the conditions of its contempt order were not met, it reserved the right to close down the facility altogether. The record reflects that the bonds have not been posted, but the claimed sanction of a shutdown has also not occurred.

In short, what the trial court did was to attempt to extract from the appellants a civil contempt fine in the nature of a bond to be held against future actions for the court. The sanctions by the trial court were imposed without any demonstrated evidence of or finding with respect to ability of the appellants to comply with the posting of such a bond. As such, the law of the State of Florida compels the reversal of the order. See also Arena v. Herman, 675 So. 2d 210 (Fla. 3d DCA 1996); Brown v. Brown, 658 So. 2d 627 (Fla. 5th DCA 1995);

Betancourt v. Manning, 679 So. 2d 83 (Fla. 3d DCA 1996); Howell v. Howell, 700 So. 2d 467 (Fla. 1st DCA 1997).

Certainly, the initial reason for this protection of financial ability for those charged with contempt was that, in a civil context, if an individual was jailed until a particular fine was paid, the contemnor was required by Florida law to have "the key to his cell" within his grasp or ability. Otherwise, such order is erroneous. See generally Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985).

Not only did the County not put on evidence of ability, the appellants proved the contrary.

The record affirmatively shows (even in its truncated state) that the appellants affirmatively have been placed "on the ropes" by the clean-up of the contaminated site (a substantial portion of which predated their becoming involved with the site). Hundreds of thousands of dollars have been spent and more borrowed just to bring this site into compliance. At the time of the trial, even as the County was continuing to press this contempt proceeding, the head of the environmental department of Broward County acknowledged that the appellants' Yard was indeed being held out by the County as a **model** to other yards. (A 6 at 17). Unfortunately, models are only built at great expense and the County chose to put on absolutely no evidence of the appellants' financial ability to meet this new charge. While the reason why the County chose not to step into that financial thicket is now clear, the simple fact of the matter is that the record is devoid of any proof, whatsoever, that the appellants have any financial ability to meet the $105,000 bonded fine requirement.

The order must be quashed or reversed.

2. The Circumstances Present at the Time of the Court's Order Demonstrated That the Appellants Were Not in Violation of Any Court Order with Respect to the Future Maintenance of the Remediation Equipment.

The second aspect of the inability of the appellants to pay the fine, or purge, is that by its very nature, the order under review is not one to coerce compliance with an existing order. Rather, it was an attempt by the trial court to extend its jurisdiction and force compliance in the future with the unknown vagaries that may develop in the remediation of a major pollution site.

The law in Florida is clear that, if a contempt fine is not intended as compensation for past damages, then it must be to coerce a party into compliance with an order already outstanding. See The Florida Bar v. Taylor, 648 So. 2d 709, 711 n.2 (Fla. 1995); Johnson v. Bednar, 573 So.2d 822 (Fla. 1991), Lindman v. Ellis, 658 So. 2d 632 (Fla. 2d DCA 1995). It is not to provide a fund from which to pay future remediation expenses or costs in the event the landowner is no longer able to run the equipment.

By the very nature of the order entered, there is no way that the appellants can purge their alleged contempt (for the conduct that took place between May 1993 and August 1993). Rather, the trial court has structured, at the County's request, an order which required the appellants to post money they do not have as security in the event, for years in the future, the remediation systems no longer function and the Yard is no longer able to maintain them as a viable business.

No authority has been cited to allow such contempt fines for in futuro anticipated breaches of obligations imposed by law or by court order.

In the absence of such law, the County has wholly failed to demonstrate any ability by appellants -- ever -- to purge themselves of the contempt that occurred in 1993.

CONCLUSION

For the reasons contained in the foregoing brief, it is respectfully suggested to this Court that the County has wholly failed to establish any basis in fact or in law for the bonded contempt fine ordered in the court below. The County adduced no evidence whatsoever of any damages it suffered for which it was seeking compensation, and wholly failed to establish any present ability on the part of the appellants to post the bond or place the cash into the registry of the court. With the period over which the bonds are to be held being in essence infinite, the County has failed to establish the factual predicate necessary to sustain the effect of such bonds. The order of July 19, 1995 must be quashed or reversed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished by mail on this 14th day of December, 1998 to Tamara Scrudders, Esq., Assistant County Attorney, 115 S. Andrews Avenue, Suite 423, Fort Lauderdale, FL and Edward M. Kay, Esq., 633 SE Third Avenue, Ft. Lauderdale, FL 33301.

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