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.
_____/

REPLY BRIEF OF PETITIONERS

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CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Florida Rule of Appellate Procedure 9.210, the size and style of type used in this brief is Courier New, 12 point.

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A. INTRODUCTION

From the County's answer brief, and particularly its Statement of the Facts and Summary of Argument, it is appropriate to refocus on what this case **is** about and what this case is **not** about.

1. Previous History at Site Not Before this Court

When the County's brief is read, one could easily get the impression that the creation of the petrochemical problems at the site was the subject of the procedural contempt issue that is now before the Court. Nothing could be further from the truth. Whatever the County's reason was for including the detailed history at this site, it has nothing to do with the defined legal question that is before the Court -- whether the trial court had any appropriate factual basis to impose contempt fines (in the form of mandatory bonds) without **any** evidence of the financial ability to pay and in the affirmative presence of evidence that there was no such ability.

What the record does show about this site is that at the time of the trial, there was a functioning secondary containment facility with a new automobile crusher in place and approved. The motion for contempt which framed the procedural issues now before this Court dealt not with the crushing of automobiles and improperly draining fluids from those automobiles as had been the

subject of previous battles. Instead, the question was whether the sales of parts authorized by the Court included the sales of parts from wrecked vehicles or only those which had previously been removed from vehicles. On 11 occasions, people were seen either removing parts or being on the site with the ability to remove parts. The record is perfectly clear, however, that none of those "incidents" involved the removal of any parts from an automobile that had any petrochemical or other polluting fluids contained therein[1].

2. The Alleged Contemptuous Conduct Had Nothing to Do with the Extensive and Expensive Installation of Remediation Equipment.

The opening paragraph of the County's Summary of Argument suggests that this case is about the petitioners' noncompliance with orders dealing with remediation of the site. It is clear beyond peradventure that there is **no** issue before this Court as to whether the installation of the remediation systems on the site in question were in any way delayed. As noted above, the secondary containment facility had already been constructed and, at the very time of trial, the installation of remediation equipment was on

[1] As set forth earlier in the initial brief, one incident involved the moving of a previously wrecked vehicle on the site. A surveillor from the County observed a liquid coming from the vehicle and concluded that it was gasoline. The factual circumstances of that incident have previously been briefed.

schedule and being completed under County supervision. There is no issue of contumacious conduct with respect to that process.

Similarly, the petitioners had never argued that they did not have the financial ability to complete the installation of remediation equipment (to clean up both the ground water and subsoil conditions). Indeed, it was the commitment and borrowing of those very funds - - hundreds of thousands of dollars - - that created the financial bind the petitioners found themselves in[2].

3. The Monies Ordered to Be Paid by the Petitioners Were a Mandatory Fine, in the Form of a Bond, with No Defined Process in Place for Their Return.

Although the petitioners could and did avoid the imposition of $285,000 of additional bonded fines by fully and completely fulfilling their responsibilities to install their remediation systems timely, the $105,000 in fines (which are the subject matter of this proceeding) were subject to absolutely no showing of purported ability on the part of the petitioners to post them, and they have not been posted. Further, there is no definitive procedure that delineated the rights of the petitioners to the recovery of any such bond monies had they been posted. Rather, the order in question (A-4) attempted to reserve the discretion of the

[2] All of this evidence was adduced, of course, in a context in which it was not the petitioners' burden to prove the **inability** to post the contempt fines; the burden was on the County to show the **ability** to do so.

trial court for the posting of additional funds and allows no release of the bonded fines until some unspecified time in the future when the trial court determines sufficient pollution has been removed through remediation.

4. At the Time of the Trial, the Petitioners Were in Violation of No Order with Respect to Remediation.

Although the County contended, successfully, that the sales activity was beyond the authority given by previous court orders, at the time of the trial in 1994 and 1995, and at the time of the order in question, contrary to the suggestion contained in the County's brief, the petitioners were not shown to be in violation of **a single previous order**. They were doing nothing that was not allowed under the remediation plan, and the sale of parts from wrecked cars (which was arguably banned by earlier order of the court as of 1993) was no longer prohibited. As such, the petitioners **were in violation of no order** as of the date of the contempt citation in question, July 19, 1995. (A-4). Since there was no violation of any previous order of the Court, there was no misconduct that had to be "coerced" through the imposition of contempt fines. Rather, the trial court simply took the opportunity to impose further financial burdens on a salvage yard which, at that time, was being held out by the County as a model yard so that others could copy the systems being installed by the

petitioners. When the extensive and expensive efforts to become that model yard left the petitioners without any demonstrated ability to post these bonded fines, the appellate review proceedings that has led to this Court commenced.

B. THIS COURT CORRECTLY ACCEPTED DISCRETIONARY JURISDICTION OF THIS CASE.

Although Broward County labors mightily now to call the mandatory payments to be made by the petitioners a "bond", the record before this Court and the order drafted by the County (which is the subject of review) established that the amounts at issue before this Court, pursuant to the Civil Contempt Order, were:

1. To be paid immediately;

2. To be held for an undefined number of years into the future;

3. The subject of no stated procedure for recovery by petitioners, ever.

It also appears that, cognizant that it has failed to adduce any evidence to support either a **compensatory** fine (no damages shown), or a **coercive** fine (no ability to pay anything shown), the County now seeks some hither to unknown third category of contempt punishment, different then either category recognized by law.

The decision of the Fourth District is clearly in jurisdictional conflict, not only with this Court's decision in Johnson v. Bednar, 573 So. 2d 822 (Fla. 1991), but also with this

Court's more recent pronouncements in In re Amendments to Florida Family Law Rules of Procedure, 723 So. 2d 208 (Fla. 1998) and Gregory v. Rice, ___ So. 2d ___ (Fla. February 11, 1999, 23 Fla. L. Weekly S 78)[3], each decided since the jurisdictional briefs in this case.

These three decisions of this Court recognize that there are two species of contempt: compensatory[4] to remedy the damage caused by the contumacious conduct, and coercive, intended to force the recalcitrant party to comply with a **previous** order of the Court.

The County no longer claims that the contempt was compensatory in nature for past damages (although it now suggests it might be

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[3] The Gregory case was decided 15 days after the County served its answer brief and consequently could not have been the subject of comment in its brief. The In Re: Amendments decision, however, was reported on October 29, 1998 and was the subject of extensive comment in petitioners' initial brief on the merits, yet has been assiduously ignored by the County, both in its jurisdictional argument and in its "merits" argument.

[4] Whatever the alleged damages could have been to the environment or to the County, as a result of conduct of the landowner before the lawsuit was filed and in the early stages of this case in the court below, are not before this Court. The only subject of the contempt request which could arguably support a claim for damage would be the 12 incidents detailed in the motion for contempt and as to which there was no evidence of any damage. It was acknowledged by the County, and by the trial court, that despite the loss of a substantial portion of the transcript of this case, the petitioners assiduously and timely objected to any efforts to expand the scope of the contempt motion beyond those 12 incidents. It was further acknowledged that the County at no time attempted by motion to amend to add any arguments regarding or allegedly contumacious conduct beyond the 12 isolated and defined incidents of parts-selling off wrecked cars.

compensation for future damages for future contumacious actions which have not yet happened). Despite the fact that that was the theory upon which they sought contempt, and despite the fact that that was the only theory argued at trial, it has clearly been abandoned by the County and can no longer be used as an argument to support the actions of the trial court.

The County failed to adduce a single item of evidence to show that the 12 allegedly contumacious acts caused any party - the public, the environment, the County, anybody - a penny's worth of damages. Having failed to adduce such proof, the County is now precluded from attempting to support this theory.

The second avenue for contempt, as recognized by Johnson, In re Amendments, and Gregory, is to show that the contumacious conduct should be negatively sanctioned by an amount of money designed to compel compliance with a previous order of the court. This alternative attempt to support the claim, expressly accepted by the trial court, is in jurisdictional conflict with Johnson and its progeny.

First of all, in July 1995, when the order was entered below, the County could not point this Court to a single order that the petitioners were not in compliance with. In short, there was no existing order that the court needed to compel the petitioners to comply with. Secondary containment was completed by that time, the petitioners were lawfully authorized to sell parts (whether removed

from the wrecked cars before sale or not), and the remediation systems were on schedule to be installed at considerable expense later that year. In fact, those systems have been installed.

Of greater significance to this Court for the purposes of jurisdictional conflict, however, is to recognize that the County at no time adduced any evidence of financial ability to comply with the sanctions of the trial court despite the clear mandate from Johnson that:

> **If a fine is to be imposed as punishment or as a means of securing future compliance, the court, in determining the amount of the fine, also must consider the offending party's financial resources and the seriousness of the burden on that particular party.**

Johnson v. Bednar, 573 So. 2d 822, 825 (Fla. 1991).

That same principle of law was later repeated by this Court in In Re: Amendments in its discussion of the law of civil contempt. Although speaking in a family law context, the general principles were reiterated in great detail. This Court again emphasized the critical nature of the ability of an alleged contemnor to pay before a coercive fine is imposed.

Finally, in Gregory, this Court reemphasized that **before** a contempt fine could be imposed, the movant had to demonstrate the present ability of the contemnor to pay the fine and ultimately purge the contempt. 23 Fla. L. Weekly S78 at page 2, slip opinion.

The reality is that the County failed to prove any compensatory damages, and wholly failed to prove any ability of the petitioners to pay whatsoever (beyond the hundreds of thousands of dollars already paid (or borrowed) to remediate the site). It now argues, in the face of the language that they selected, that this "bonded fine" is nothing more than a simple bond and therefore does not fall into the contempt category recognized by Johnson, In Re: Amendments, and Gregory. The attempt is specious.

The County labored long and hard in its attempt to establish that the petitioners were in contempt on the 12 incidents in question and then sought and received an order from the trial court compelling the petitioners - on pain of being closed down forever - to post hundreds of thousands of dollars in "bonded fines", $105,000 of which are still at issue. Although the County has not yet asked the trial court to do so, the order and the statements of the trial court below expressly indicated that the failure to comply with the trial court's order of July 19, 1995, in each particular (including the posting of the bonded fine) would be grounds to shut down the yard totally, sounding in the death knell of this entity.

What the County now argues is that this entire procedure was not really a contempt procedure at all, but simply some effort to have a bond posted, **the failure to do so being the ultimate**

contumacious act which would have to be subject to Johnson/ In Re: Amendments/Gregory rules. This analysis is simply sliced too thin.

The petitioners in this cause, after spending hundreds of thousands of dollars to remedy the environmental effect of long-stopped practices, were ordered by the trial court, upon threat of being closed down, to post in excess of one hundred thousand dollars in "bonded fines" for an indefinite period of time without any procedure in place to get that money back save for the trial court's discretion.

There was no thought given at that time, or incorporated into the Court's order, to a separate and future hearing at which the petitioners' financial ability would be addressed. It is only now that the procedural flaw in the County's case has been laid bare that the County seizes upon this approach to avoid the consequences of its failure to comply with the law of contempt during the trial.

This is not some 13th hour "gotcha" argument. Rather, this was the basis of a request by the petitioners to the trial court to rehear or reconsider its ruling (A-5) and had been the subject of argument before the court since the "bonded fine" was first addressed.

In its last attempt to argue against jurisdiction in this Court, the County argues at page 19 of its brief, also for the first time, that this "bonded fine" was not only to ensure

compliance with the court's previous orders (never defined), but also was to create a bond which would secure future compensatory damages **if** the County had to clean up the site afterwards. The fatal flaw in this 13th hour logic is that there was no ongoing noncompliance **with any previous order.** The petitioners had funded a massive cleanup of this project and converted it from a target of approbation into the "model yard" in Broward County.

Johnson, along with its progeny, create important limits on a trial court's contempt power. A trial court is not able to order contempt finds (or bonded fines) simply because it is "ticked off" or "mad" at a litigant. A court can impose a fine to remedy damages in place or to coerce a recalcitrant party into complying with a previous order. The County, tactically and strategically, chose to put on no evidence of damages. For whatever reason, it failed in the presence of specific objections to put on any evidence of financial ability (even in the face of affirmative evidence of the absence of ability). The decision of the Fourth District that the issue of ability to post the bonds in question would only become relevant if there was a subsequent, further motion for contempt is unsupported in the law and creates jurisdictional conflict in the body of law in Florida for judges and practitioners alike. The trial court indicated it need not hold a further motion on financial ability. It can simply shut the

petitioners down, based in whole or in part upon the failure to post the bonds in question.

For the reasons set forth above, it is respectfully urged that this Court has properly accepted jurisdiction, there being conflict between the decision of the court below and the decision of this Court in Johnson v. Bednar, supra, as well as in the subsequent decisions of this Court in In re Amendments to Florida Family Law Rules of Procedure, supra, and Gregory v. Rice, supra.

C. THE TRIAL COURT HAD NO BASIS FOR IGNORING THE ABSENCE OF ANY EVIDENCE WITH RESPECT TO ABILITY TO PAY.

The County next argues in Point II that, notwithstanding what it asked for and notwithstanding what the trial court gave it, the Fourth District "found that a coercive fine had not yet been imposed" and therefore did not require any showing of financial ability to pay. While the undersigned counsel admires zealous advocacy as much as the next attorney, it cannot seriously be suggested that that was the construction placed upon the trial court's order by the Fourth District, nor is it accurate.

It is true that the Fourth District (or rather the majority thereof) felt that the petitioners' ability (or lack of evidence thereof) might be relevant at a future proceeding, it did not for a minute suggest that the proceedings in the trial court did not yield a contempt citation and fine. The Civil Contempt Order itself found the petitioners to be in contempt and further found

that "contemptuous conduct contemplates coercive action". (A-4 at 3).

While courts may have discretion to tailor remedies, they cannot ignore the simple requirements of Johnson/In Re Amendments/Gregory. In the absence of any evidence whatsoever that the petitioners could spend a penny more on the project in question, the court ordered them to post bonds approaching $400,000, $105,000 of which are still relevant at this point. Whatever terminology or spin the County wishes to place on this order in retrospect, the real day-to-day effect was the trial court's order that money had to be paid and that failure to comply with the court's order would subject the petitioners to being shut down. The proceedings below were not some interim, temporary, undefined bond proceeding. They were exactly what they were described to be by the County, an action for civil contempt addressed to 12 very carefully defined acts where parts were sold or available for sale to members of the public.

In another effort to support the court's order for the contempt, the County argues at page 23, n.6 of its brief, that although not in contempt at the time of the trial, the petitioners had been late in their submittal of the required RAP. This last minute suggestion was not made at the trial, was not made in the proposed order, was not approved by the court in the court's final order, was not argued to the trial court on rehearing, and was not

argued to the Fourth District below. The only actions for which the petitioners were charged with contempt were the 12 incidents carefully defined in the County's motion. Just as the record cannot be expanded to provide that which the County chose not to submit at the outset, the legal theories for the contempt order cannot be expanded now at the Supreme Court level to include alleged conduct which was never argued to the trial court or to the appellate court as the basis for the order of July 19, 1995.

The trial judge entered an order on July 19, 1995 entitled a "Civil Contempt Order". It was not simply an order to make preliminary rulings or thoughts concerning the petitioners; the order, at the end of a long trial, was designed to hold these parties in contempt and to punish them in a manner inconsistent with Florida law. There was no previous existing order that the petitioners were not in compliance with, and there was no need to coerce them to comply with any obligations which were not yet due to be performed. The petitioners were, at the time of the order below, doing what they were supposed to do and spending hundreds of thousands of dollars doing it.

In the face of that uncontradicted record, the County's tactical and strategic decision not to offer any evidence with respect to financial ability to pay is fatal and the decision of the trial court should be quashed.

D. THE DECISION OF THE TRIAL COURT SHOULD BE QUASHED.

In a final effort to sustain the contempt citation, the County argues that, notwithstanding its wholesale failure to offer any evidence whatsoever of financial ability, they should be offered a second chance to do so in a remand of this case to the trial court. Such a process, however, would be an affront to the judicial notion of fair play in Anglo-American jurisprudence. Indeed, the only entity who is seeking a "second bite at the apple" is the County.

This is not a case in which the County tried and for some technical reason failed to submit adequate proof of an essential element of its case. Rather, the County, for whatever tactical or strategic reason, chose to ignore the law in Florida and adduced absolutely no evidence whatsoever that suggested that the petitioners before this Court could pay even a penny more than the hundreds of thousands of dollars they had already invested in or borrowed to pay for environmental remediation. To be given a second opportunity now to go back and remedy its tactical or strategic approach is both unfair and not supported by Florida law. See Howell v. Howell, 700 So. 2d 467 (Fla. 1st DCA 1997); Smith v. Austin Development Co., 538 So. 2d 128 (Fla. 2d DCA 1989); U Shop Rite, Inc. v. Richard's Paint Mfg. Co., 369 So. 2d 1033 (Fla. 4th DCA 1979); International Equipment Co. v. Town Sandwich Shop, Inc., 369 So. 2d 955 (Fla. 3d DCA 1978); United Steel & Strip Corp. v. Monex Corp., 310 So. 2d 339 (Fla. 3d DCA 1975).

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the decision of the Fourth District affirming the Civil Contempt Order be reversed, and that the Civil Contempt Order entered on July 19, 1995 be quashed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished by mail on this 8th day of March, 1999 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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