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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 RESPONDENTS

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

CERTIFICATE OF INTERESTED PERSONS

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

1. Ackerman, Senterfitt & Eidson, P.A., counsel for Petitioners
2. Lisa Zima Bosch, Esq., trial counsel for Respondents
3. Broward County, Respondent
4. Broward County Office of Natural Resource and Protection, Respondent
5. The Honorable Miette K. Burnstein, Circuit Court Judge
6. Edward M. Kay, Esq., trial counsel for Petitioners
7. Sam Parisi, Petitioner
8. Noel M. Pfeffer, Esq., counsel for Respondents
9. Sam's Recycling, Inc., Petitioner
10. Paul R. Regensdorf, Esq., counsel for Petitioners
11. Tamara M. Scrudders, Esq., counsel for Respondents

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman, proportionately spaced.

PREFACE

Petitioner, SAM PARISI, will hereinafter be referred to as "PARISI" or "Petitioner." Petitioner, SAM'S RECYCLING, INC., will be referred to as "SAM'S RECYCLING" or "Petitioner."

Respondents, BROWARD COUNTY and BROWARD COUNTY DEPARTMENT OF NATURAL RESOURCE AND PROTECTION will be referred to collectively as "BROWARD COUNTY" or "Respondents." When reference is made solely to the BROWARD COUNTY DEPARTMENT OF NATURAL RESOURCE PROTECTION, it will be referred to as "DNRP."

All references to the record will be designated by "R", followed by the volume number of the record according to its court index, followed by the page numbers in that volume.

STATEMENT OF THE CASE

On February 8, 1993, PARISI and SAM'S RECYCLING filed a Complaint for Declaratory Relief and Motion for Restraining Order in the circuit court. (R-1-p.1-12). BROWARD COUNTY filed a Motion to Dismiss and Counterclaim for Injunctive Relief. (R-1-p.36-45).

The circuit court granted BROWARD COUNTY's Motion to Dismiss the Complaint for Declaratory Relief, and on March 29, 1993 entered an order granting BROWARD COUNTY's Counterclaim for Injunctive Relief. (R-1-p.110-112).

Thereafter, BROWARD COUNTY filed a Motion for an Order Adjudging PARISI and SAM'S RECYCLING in Contempt of Court for violating the injunction entered March 29, 1993. (R-1-p.130-131A). On June 3, 1993, the circuit court entered an order finding PARISI and SAM'S RECYCLING in civil contempt. (R-1-p.p.132-135).

On August 1, 1994, BROWARD COUNTY filed a second Motion for an Order Adjudging PARISI and SAM'S RECYCLING in Contempt of Court. (R-2-p.316-324). On July 19, 1995, the circuit court entered an order once again finding PARISI and SAM'S RECYCLING in contempt of court. (R-3-p.393-398). PARISI and SAM'S RECYCLING filed a Motion for Rehearing, (R-3-p.400-404), which was denied. (R-3-p.412).

On August 18, 1995, PARISI and SAM'S RECYCLING filed a Notice of Appeal from the circuit court's July 19, 1995 order. (R-3-p.419). Because the court reporter's notes from three days of the trial which resulted in the July 19, 1995 order were either lost or destroyed, (due in no part to any fault of either party in this case), the parties engaged in a reconstruction of the record for those days. A "reconstructed record" was settled and approved by the circuit court in accordance with Rule 9.200 Florida Rules of Appellate Procedure.

The Fourth District Court of Appeal issued its order on August 27, 1997, affirming the trial court's order per curiam. PARISI and SAM'S RECYCLING filed a Motion for Rehearing. On May 13, 1998, the Motion for Rehearing was denied, with one judge dissenting. See Parisi v. Broward County, 710 So.2d 98 (Fla. 4th DCA 1997).

PARISI and SAM'S RECYCLING timely petitioned this court to accept jurisdiction, claiming that the Fourth District Court of Appeal's decision directly and expressly conflicts with the case of Johnson v. Bednar, 573 So.2d 822 (Fla. 1991). This Court accepted jurisdiction by a 4 to 3 majority decision.

STATEMENT OF THE FACTS

Petitioner, PARISI, is the owner of SAM'S RECYCLING, a car recycling plant located in Pompano Beach, Florida. (R-1-p.2; R-1-p.64). In 1993, PARISI's attorney described it as a "multi-million dollar business, which "is one of the largest car recycling plants in Broward County." (R-4-p.8, 10; See also, R-1-p.64). In the operation of the business, PARISI receives junk vehicles, pulls off and sells usable parts, and crushes the remains in an auto crusher that operates on site. (R-4-p.66, 67).

Administrative Hearings

In January of 1987, the Environmental Quality Control Board, predecessor to the BROWARD COUNTY DEPARTMENT OF NATURAL RESOURCE AND PROTECTION (hereinafter "DNRP"), became aware that a number of violations of BROWARD COUNTY's environmental regulations were taking place at SAM'S RECYCLING. (R-1-p.36; R-4-Transcript of February 18, 1993, p.18). During 1987 and 1988, numerous Notices of Violation were issued because petroleum products (such as gasoline, oil, antifreeze, and other automotive fluids) were being dumped onto the ground during the course of business, (R-1-p.36-37), and because SAM'S RECYCLING had failed to install monitoring wells and perform an analysis to assess the damage that had been done. (R-1-p.37).

In February of 1990, DNRP licensed PARISI to begin environmental cleanup

of his site. (R-1-p.2, 13). Pursuant to the license, PARISI agreed to scrape, remove and dispose of all contaminated soil. (R-1-p.13, 37). Additionally, because the discharge of automotive fluids was often occurring during the crushing of old automobiles, PARISI agreed to install a new auto crusher, which would trap all fuel, oil, grease, transmission, and other automotive fluids, to prevent discharge onto the ground during crushing. (R-1-p.13). PARISI's license also specified that a Contamination Assessment Plan ("CAP") was to be submitted by PARISI by June 1, 1990. (R-1-p.37).

From December of 1990 through February of 1993, PARISI was cited with dozens of violations of the Broward County Code, for incidents including the discharge of automotive fluids onto the ground, inadequate secondary containment surrounding the auto crusher,[1] (R-1-p.37), failure to submit the CAP which was due in June 1990, failure to submit a Contamination Assessment Report ("CAR"). (R-1-p.38), and operating without a hazardous material facility license, (R-1-p.38) all in blatant disregard of Broward County's environmental regulations.

On December 11, 1992 and February 24, 1993, a hearing was held before a DNRP hearing examiner on eleven (11) of these citations. (R-1-p.62-75). The

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[1] Secondary containment is a method to capture the gasoline products or any hazardous product if the first containment fails.

evidence presented established, among other things, that the soil on the property was soaked with automotive fluids in numerous areas, that the facility did in fact continue to operate without a hazardous material license, and that no acceptable CAR had been submitted. Id. PARISI was found guilty on each and every violation. (R-1-p.74).[2]

Injunctive Order

In February of 1993, BROWARD COUNTY filed a claim in circuit court for injunctive relief against PARISI and SAM'S RECYCLING seeking to enjoin PARISI from the continued operation of his business in a manner that was polluting the environment. (R-1-42-45). The claim for injunctive relief was in part based on Chapter 403 of the Florida Statutes, the "Environmental Protection Act of 1971". At hearings held on the Complaint for Injunctive Relief on February 18, 1993, March 4, 1993, and March 25, 1993, it was established that PARISI was operating his business without a hazardous material facility license. (R-4-transcript of February 18, 1993, p. 64). Sworn testimony and videotape evidence was presented that showed employees of SAM'S RECYCLING running a fork lift under cars and using crow bars to punch holes in the gas tanks in order to drain the gasoline in the tanks onto the

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[2] The hearing examiner's order was eventually overturned upon a finding that the Broward County Code was unconstitutional in some respects, but not because the order was not supported by appropriate findings.

ground. (R-4-Transcript of February 18, 1993, p.71-81). The evidence also showed PARISI's employees draining gasoline from gas tanks into a bucket without any secondary containment as required by Broward County's Code, and allowing it to spill over onto the ground. Id. The soil in front of the auto crusher was so saturated with oil, gasoline and antifreeze, that it ruined the shoes of the DNRP inspector who inspected the site. (R-4-Transcript of February 18, 1993, p.80).

The evidence also showed that SAM'S RECYCLING is located near a well field which supplies drinking water to part of South Florida. (R-5-p. 55, 89). The site was so saturated with large amounts of automotive fluids in the ground water and in the soil at the site, that there existed the potential that the hazardous chemicals would reach the well. The potential for harm was extremely high. (R-5-Transcript March 25, 1993, p. 53).

Additionally, the evidence showed that PARISI and SAM'S RECYCLING failed to submit an adequate Contamination Assessment Report, which would have assessed the exact amount of the contamination that existed on the site. (R-5-Transcript March 25,1993, p. 77).

On March 29, 1993, the circuit court entered an order granting BROWARD COUNTY's Motion for Injunctive Relief. (R-1-p.110-112). PARISI and SAM'S RECYCLING were ordered to immediately cease any and all operations which

continued to cause the discharge of hazardous materials in those areas of its property which did not contain adequate secondary containment. The court specifically prohibited any further operations of dismantling, crushing or processing of automobiles and/or the storage of automobile parts in areas which did not contain adequate secondary containment. (R-1-p.111). SAM'S RECYCLING was also ordered to take all steps to provide necessary secondary containment forthwith. (R-1-p.111-112).

First Civil Contempt Order

Within days of the court's March 29, 1993 Order, BROWARD COUNTY informed the court that PARISI and SAM'S RECYCLING were ignoring the injunction. (R-6-Transcript of April 2, 1993). BROWARD COUNTY made a Motion to the court to hold PARISI and SAM'S RECYCLING in contempt. Evidentiary hearings were held on April 27, 1993, May 12, 1993, and May 13, 1993. At the hearings, BROWARD COUNTY presented videotape evidence and testimony of the dismantling of vehicles occurring at SAM'S RECYCLING on April 1, 1993, April 15, 1993, and April 26, 1993 in areas without adequate secondary containment, in violation of the circuit court's March 29, 1993 injunctive order. (R-1-p.132-135). Additionally, BROWARD COUNTY presented videotape evidence and testimony of the crushing of automobiles on April 6, 1993 and April 8, 1993 in areas without

adequate secondary containment, and evidence of engines stored on the ground on April 8, 1993, all in violation of the court's injunctive order. Id. No acceptable CAP or CAR had ever been submitted. (R-6-p.7,22). The court found that although Appellants had the ability to comply, PARISI and SAM'S RECYCLING willfully disregarded the injunctive order of March 29, 1993. They were found to be in civil contempt. (R-1-p.133).

The circuit court ordered the cessation of all operations at SAM'S RECYCLING which may cause pollution, specifically including the removal of parts or dismantling of any vehicles by PARISI, his agents, employees or anyone else, including members of the public. (R-1-p.133-135). The court also ordered that all crushing operations were to cease effective May 13, 1993, and the court enjoined all operational activities other than the mere selling of parts in stock until such time as adequate secondary containment was built to DNRP specifications.

The court further ordered that PARISI was to hire a consultant and submit a completed Contamination Assessment Report ("CAP") to DNRP no later than July 12, 1993, and within sixty (60) days thereafter, PARISI and his consultant were to submit a completed Remedial Action Plan ("RAP") to DNRP. Construction of remedial measures were ordered to be initiated and completed within a reasonable time thereafter. (R-1-p.133-135). The Court warned that, "In the event this portion of the

Court's order is not complied with, all aforementioned operations of the business shall again cease." In fact, the court indicated that if PARISI could not comply with the portion of the Contempt Order which required remediation, that PARISI and SAM'S RECYCLING could simply shut down to be purged of contempt. (R-6-Transcript of May 13, 1993, p.33-34).

PARISI filed a Motion for Rehearing or Clarification, which was heard by the court on May 20, 1993. At the hearing, the evidence presented showed that there are numerous automotive fluids in an automobile, and that these fluids can be (and in fact were being) discharged onto the ground during the removal of parts from the vehicles. The court reiterated its order that there was to be no car crushing or car dismantling either by PARISI or members of the public. (R-7-p.72).

On June 1, 1993, the circuit court entered a written order setting forth its rulings of May 13, 1993 and May 20, 1993. (R-1-p.132-135). PARISI and SAM'S RECYCLING did not appeal that order.

Criminal Contempt Proceedings

Once again, PARISI and SAM'S RECYCLING ignored the court's orders. On June 1, 1993, BROWARD COUNTY filed another Motion for an Order Adjudging PARISI and SAM'S RECYCLING to be in contempt of court for violating the circuit court's order of May 13, 1993, which was rendered on June 1, 1993. (R-1-130-131A).

Specifically, BROWARD COUNTY alleged that on May 26, May 27, and May 28, 1993, DNRP inspectors observed the dismantling of cars and the removal of parts from cars on site when adequate secondary containment had not yet been built. (R-1-p.130-131A).

On June 16, 1993, BROWARD COUNTY filed a Motion for Order to Show Cause, requesting that the court issue an order to PARISI and SAM'S RECYCLING to show cause why they should not be found in criminal contempt. (R-1-p.136-159). The circuit court issued an order to show cause, and PARISI and SAM'S RECYCLING entered a plea of "not guilty" and the matter proceeded to a jury trial. (R-1-p.184-185). The trial resulted in a hung jury.

Thereafter, PARISI and SAM'S RECYCLING plead guilty to two counts of indirect criminal contempt for violation of the circuit court's order of June 1, 1993. PARISI was ordered to serve two years of supervised probation. Additionally, the court ordered that PARISI and SAM'S RECYCLING were not to operate any portion of the business until the temporary secondary containment was completed and approved by DNRP, and until the Contamination Assessment Report was submitted to DNRP. All operational activity was prohibited, specifically including the removal of any parts or the dismantling of vehicles by PARISI, his employees or members of the public. The court further ordered that PARISI was to submit a Remedial Action

Plan within sixty (60) days after the Contamination Assessment Plan (CAP) was approved by DNRP. PARISI was to then begin remediation of the property as required by the RAP.

At a hearing on February 10, 1994, the court was advised that PARISI still had not submitted a completed CAR. PARISI moved for an emergency extension of time to comply with the requirements of the court's order. (R-2-p.265-266). The motion was denied. (R-2-p.269). PARISI then moved for the circuit judge's recusal. That motion was also denied.

On May 6, 1994, BROWARD COUNTY filed a Motion to Enforce Conditions of Probation, specifically alleging that PARISI had violated the conditions of his probation and had also caused the illegal dumping of contaminated soil from his business into a nearby lake. (R-2-p.277-295).

On June 28, 1994, the court held a hearing on BROWARD COUNTY's Motion to Enforce Conditions of Probation. At that time, PARISI made an ore tenus motion to withdraw his guilty plea to the two counts of indirect criminal contempt. Primarily, PARISI contended that he had not been sufficiently informed of his rights by the court at the time of his plea. The court granted the motion and set aside the guilty plea. The court then set the outstanding violations for a civil contempt trial on its trial docket beginning September 19, 1994.

Second Civil Contempt Order

On July 26, 1994, BROWARD COUNTY filed a Motion to Compel Submission of RAP (Remedial Action Plan) and to Enforce Prior Civil Contempt Order. Specifically, BROWARD COUNTY alleged that PARISI had not submitted the required RAP, was operating his business without the required County permits, and was in violation of the circuit court's prior civil contempt orders. (R-2-296-315).

On August 1, 1994, BROWARD COUNTY then filed a Motion for An Order Adjudging PARISI and SAM'S RECYCLING in Contempt of Court. (R-2-p.316-328). In the motion, BROWARD COUNTY alleged that PARISI and SAM'S RECYCLING failed to abide by the court's prior orders on 15 different occasions between May 26, 1993 and March 24, 1994. (R-2-p.316-328). The violations included incidents where people were seen removing auto parts from the vehicles at SAM'S RECYCLING in areas without adequate secondary containment, and incidents where a front-end loader was observed moving junk vehicles around the site. On one occasion, a DNRP inspector observed a front-end loader in operation carrying a grey Mustang and observed gasoline pour out of the gas filler directly onto the ground. (Appendix to Appellants' Brief, A-6, Count VIII). Additionally, the Motion alleged that (as of August 1, 1994) PARISI and SAM'S RECYCLING had still not submitted a RAP, which was had been due by September 23, 1993 pursuant to the court's prior

Civil Contempt Order.

BROWARD COUNTY asked the court to hold PARISI and SAM'S RECYCLING in contempt of court, and further asked for its attorney's fees and costs incurred to date on this case. On November 17, 1994, BROWARD COUNTY filed a Memorandum In Support of its Request for Compensatory Damages. (R-2-p.382-384). In that request, BROWARD COUNTY requested that the court set a bond in the amount of the cost of site remediation and further requested that the court set a timetable for the completion and monitoring of the remediation system that was still not built on the site. Additionally, BROWARD COUNTY moved for its attorney's fees and costs to be decided by the court at a later date.

Trial was held on October 6, 1994, October 7, 1994, and November 18, 1994, January 4, 1995, and May 8, 1995. Numerous witnesses testified that on various occasions they observed "business as usual" at the yard on a number of occasions between May 26, 1993 and August 20, 1993. (See Appendix to Petitioner's Brief, A-6). Specifically, members of the public and/or employees were observed on a number of occasions removing parts and dismantling vehicles. A front-end loader was observed moving scrap cars on site. On one occasion, a DNRP inspector observed gasoline pour out of a gas filler area of a gray vehicle directly onto the ground. Testimony established that remediaton of the property was not complete, and that

there was still much work to be done.

On July 19, 1995, the circuit court entered an order finding PARISI and SAM'S RECYCLING in civil contempt of court. (R-3-p.393-398). The circuit court found that they wilfully violated the court's prior orders by allowing members of the public to continuously remove parts from automobiles on site and by allowing the discharge of more hazardous contaminant onto the ground. The court found that their conduct was contemptuous.

The court ordered PARISI to post a bond in the amount of $285,000, which is the amount that PARISI's consultant indicated that it was going to take to build a remediation system (to implement the Remedial Action Plan). Upon the completion of the remediation system, the court would release the money to PARISI. As the Petitioners point out, this portion of the order is now moot because the Petitioners have in fact built the required system (despite the fact that they claim they did not have the financial ability to do so).

Once he remediation system was constructed, in order to ensure that the system remained on-line and in working order until cleanup standards are achieved, PARISI was ordered to post a bond in the amount of $75,000. The money was to be released to PARISI when clean up standards are met.

PARISI was also ordered, once the remediation system was built and cleanup

standards were met, to post a bond in the amount of $30,000 during the post remediation monitoring period, which would be released to PARISI at the end of the post remediation period.

The (second) Civil Contempt Order provided that, "if this Court finds violations of this Order in the future, the Court will consider ordering the complete cessation of all business on site." (R-3-398)

PARISI and SAM'S RECYCLING appealed the trial court's order of July 19, 1995, which found them to be in civil contempt for a second time. The Fourth District Court of Appeal affirmed the trial court's order on August 27, 1997. On May 13, 1998, PARISI and SAM'S RECYCLING's Motion for Rehearing was denied, with one judge dissenting.

This Court has accepted jurisdiction on a 4 to 3 majority decision based on a direct and express conflict with Johnson v. Bednar, 573 So.2d 822 (Fla. 1991).

SUMMARY OF ARGUMENT

This is an appeal from a circuit court order which found the Appellants in civil contempt of court for a second time. There is no question that the Petitioners' were in fact in contempt, and that they blatantly and willfully disregarded the trial court's prior orders concerning both the prevention of further contamination and the timely remediation of same. The only issue before the Court is whether the district court of appeal was correct in finding that the trial court was not required to make a determination that Respondents had the ability to post the bond.

First, BROWARD COUNTY contends that this Court lacks jurisdiction of this matter because the district court of appeal's decision does not expressly or directly conflict with the case of Johnson v. Bednar, 573 So.2d 822 (Fla. 1991). The instant case involves the posting of a bond, whereas Johnson involves the payment of a fine. In fact, the the district court's opinion specifically finds that the trial court's order was entered within the parameters of Johnson.

Second, the Petitioners' ability to post the bond was irrelevant until such time as BROWARD COUNTY moved for contempt for failure to post the bond, for a fine under Johnson, or for the imposition of a purgeable jail sentence. The trial court's order requiring Petitioners to post a bond was not a coercive fine. It simply gave the Petitioners the opportunity to avoid a fine, and at the same time provided a mechanism

from which the trial court could award compensatory damages to BROWARD COUNTY if Petitioners continued to disregard the court's orders. In this situation, the finding of an ability to post the bond should not be required.

Finally, even if the Court finds that the lower tribunals erred, the case should simply be remanded to the trial court for further determination as to Petitioners' ability to post the bond, whether the court should require Petitioners should cease operations, or impose other methods to ensure the prevention of further contamination on the property.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED BECAUSE PARISI V. BROWARD COUNTY, 710 SO.2D 981 (FLA. 4TH DCA 1997), DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH JOHNSON V. BEDNAR, 573 SO.2D 822 (FLA. 1991).

Discretionary jurisdiction of this matter is predicated on an express and direct conflict of the Fourth District Court of Appeal's decision in Parisi v. Broward County, 710 So.2d 981 (Fla. 1997), with the Florida Supreme Court's decision in Johnson v. Bednar, 573 So.2d 822 (Fla. 1991).[3] Respectfully, BROWARD COUNTY asserts that there simply is no direct and express conflict between these two cases, and the case

[3] Jurisdiction has been accepted by a 4 to 3 majority decision.

should be dismissed.

Johnson v. Bednar holds that when a coercive **fine** is imposed as a sanction for contempt of court, the court must make a determination that the party being ordered to pay the fine has the ability to do so. The present case, Parisi v. Broward County, involves an order that requires a party to post a **bond**. No fine has yet been imposed. Therefore, the dictates of Johnson do not apply.

In Parisi, the Fourth District Court of Appeal specifically recognized in its majority opinion that the trial court's order was entered within the parameters of Johnson v. Bednar. That Court stated that PARISI's ability to post the bond would become relevant in the future, "in a motion for contempt for the failure to post [the bond], **where the county seeks the imposition of a fine under Johnson** or of a purgeable jail sentence." (Emphasis added). Thus, Parisi not only does not conflict with Johnson; it expressly follows Johnson.

Petitioners' argument amounts to nothing more than a claim that the Johnson rationale should extend to bonds as well as fines. The Fourth District's rejection of that claim, whatever its merit or lack thereof, does not in any way create conflict, much less express or direct conflict. It is a determination of a separate issue and therefore not a basis for the exercise of this Court's jurisdiction.

Moreover, Parisi and Johnson do not conflict for one additional reason. As

noted above, Johnson involved **solely** the imposition of a coercive fine. Parisi, however, involves an order that required a party to post a bond not only to ensure compliance with the court's previous orders enjoining environmental hazards, but also so that the County could apply for release of the funds in the event that PARISI failed to perform the remedial measures ordered by the Court. Thus, unlike Johnson, which dealt solely with a "coercive fine," the order at issue in Parisi ordered the posting of a bond which would secure compensatory damages suffered by the County in the event that it was required to clean up the contamination. When a contempt order provides for compensatory damages related to a party's loss, there is no need to make a finding of the contemnor's ability to pay this amount. Instead, such finding only becomes relevant when a party moves for to hold the party in contempt for failure to pay the compensatory damages. Again, the Fourth District Court of Appeal specifically noted that the Petitioners' ability to pay would become relevant in a subsequent Motion for failure to post the bond. Parisi is thus consistent, not in conflict, with Johnson.

Petitioners' claims in the present case are simply an attempt to gain a second appeal. They disagree with the district court's decision and want a second bite at the apple. Respondents respectfully request that this Court decline to provide that second bite, and dismiss this case for lack of jurisdiction.

II. THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN FINDING THAT IN THIS CASE, THE TRIAL COURT WAS NOT REQUIRED TO MAKE A FINDING THAT THE PETITIONERS HAD THE ABILITY TO POST THE BOND PRIOR TO ENTERING ITS ORDER OF JULY 19, 1995.

Petitioners correctly indicate that the law in Florida provides that civil contempt proceedings may be employed to compensate an injured party for losses sustained, and they may also be employed to coerce an offending party into compliance with a previously issued order. Johnson v. Bednar, 573 So.2d 822 (Fla. 1991); Florida Coast Bank of Pompano Beach v. Mayes, 433 So.2d 1033 (Fla. 4th DCA 1983). See also, United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979); Latrobe Steel Co. v. U.S. Steelworkers of America, 545 F.2d 1336 (3d Cir. 1976).

When compensatory damages are awarded in such proceedings, they must be related to the damages suffered by the opposing party. On the other hand, coercive fines imposed in such procedings need not be related to actual damages of the opposing party, and are solely designed to coerce the offending party into compliance with the court's orders in the future.

Petitioners argue that when a coercive fine is imposed, the court is required to make a finding that the contemnor has the ability to pay the fine, so that he has the

ability to purge himself of the contempt sanction. However, in this case, the Fourth District Court of Appeal found that a coercive fine had not yet been imposed, and therefore declined to apply the dictates of Johnson, which Petitioners cite to support their position.

A trial court should have broad discretion to fashion a remedy in civil contempt proceedings. See generally, Johnson v. Bednar, 573 So.2d 822 (Fla. 1991). In this case, the district court of appeal recognized that the trial court exercised that discretion and crafted a unique order. Rather than immediately ordering the imposition of a coercive fine, (such as the $25,000 non-refundable penalty imposed in Johnson), the trial court here simply ordered the Petitioners to post a bond or place funds in escrow or with the court registry for the amount the evidence showed was required to fully remediate the property.[4] Remediation of the property was already required. The bonded funds (or cash deposited in escrow or with the court) was to be released to the Petitioners upon completion of each stage of the remediation. There simply was no "fine" imposed as of yet by the second civil contempt order.[5]

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[4] The bond was specifically requested by BROWARD COUNTY in its Memorandum filed with the trial court in November of 1994.

[5] The situation in this case is analogous to the fact that a court can impose probation, a condition of which is that a supervisory fee be paid, without making any determination that the defendant has the ability to pay. It is only if the

The bond (or placement of money in escrow or in the court registry) in this case was no doubt intended to do two things. There is no question that the trial court hoped that it would ensure compliance with the court's prior orders to prevent future contamination and complete remediation. However, as the district court of appeal noted, the order was also intended to provide a mechanism to compensate BROWARD COUNTY after further hearings in the event that Petitioners continued to fail to comply with the prior orders and the Court ordered BROWARD COUNTY to arrange to perform the necessary corrective measures. To that extent, the order was not solely intended to be coercive in nature, but it was also designed to provide for a compensatory damage award in the future, which does not require a finding that the Petitioners had the ability to pay.

The trial court's order in this case was unique and should be given great deference. The trial court was faced with a situation where the Petitioners had blatantly, willfully and repeatedly violated the trial court's orders, and yet took great pains not to impose additional sanction against Petitioners which would deter money from the property. Not only had Peitioners continued to allow the dismantling of

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defendant fails to pay and the trial court seeks to revoke the probation, that a determination is necessary as to whether the defendant has the ability to pay. Aaron v. State, 400 So.2d 1033 (Fla. 3d DCA 1981).

vehicles and further contamination of the property after the first Civil Contempt Order, but they also failed to timely submit a Remedial Action Plan, (RAP), one of the first steps in the remediation of the property, which had been ordered in the first Civil Contempt Order.[6]

However, rather than simply impose a coercive fine, the trial court attempted to simply do what it felt would best benefit the environment. In essence, the court gave the Petitioners the chance to simply clean up its property (which they indicated they had begun doing by the time of the final hearing) without sanctions. In the event the Petitioners failed to post the bond, then, as the Fourth District Court of Appeal found, the Petitioners' ability to post the bond would become relevant where BROWARD COUNTY seeks the imposition of a fine under Johnson, in a motion for

[6] Although Petitioners indicate that the only allegations contained in Respondents' Motion for Contempt concerned twelve (12) incidents where Petitioners allowed further dismantling of vehicles in areas without secondary containment, one of which resulted in further contamination of the property with gasoline, the Motion clearly alleges that the Petitioners should also be held in contempt because, as of August 1, 1994, the date of the Motion, they had not submitted a RAP, which was required to have been submitted by September 23, 1993 under the first Civil Contempt Order. The evidence at the contempt hearings shoewed that the RAP was not submitted until the end of 1994. The fact that the RAP was submitted by the time the hearings concluded on the contempt proceedings was and is of no import. The fact was that Petitioners were failing to abide by the Court's ordered remediation schedule, which was no doubt still behind due to the late submissions.

contempt for failure to post the bond, or when the County seeks a purgeable jail sentence.[7]

[7] In the district court of appeal, BROWARD COUNTY argued in the alternative that, even if the Petitioners' ability to post the bond was relevant, it was the Appellants' burden to demonstrate that they did not have the ability to do so and that they did not meet this burden. That argument was based on the fact that in the prior contempt order of June 3, 1993, the circuit court specifically ordered the Appellants to pursue and complete remediation of the property pursuant to a court-ordered timetable. Respondents argued that this Order, which was never challenged by the Appellants, established that they did in fact have the ability to comply. Therefore, when they were brought back before the court on a second round of contempt hearings, the burden was shifted to the Appellants to demonstrate that they no longer had the ability to remediate the property. Respondents cited Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985)to support the proposition that a prior judgment establishing the amount of support or alimony to be paid creates a presumption that the defaulting party has the ability to pay that amount. However, in preparation of the instant brief, Respondent has discovered the case of Tremblay v. Tremblay, 687 So.2d 313 (Fla. 4th DCA 1997), which was never cited by Petitioners, but arguably decides this issue against the Respondents. However, it does not appear that the district court of appeal ruled on that basis.

III. IN THE EVENT THAT THIS COURT FINDS THAT THE TRIAL COURT ERRED IN REQUIRING PETITIONERS TO POST A BOND, THE CASE SHOULD SIMPLY BE REMANDED TO THE TRIAL COURT TO DETERMINE A PROPER REMEDY OR SANCTION CONSISTENT WITH THE RECORD.

The Petitioners in this case do not challenge the fact that they were held in contempt. The record clearly shows that they violated the prior orders of the court in a blatant and willful manner. Therefore, the finding of contempt should be upheld.

In the event this Court finds that the trial court erred as contended by Petitioners, then the case should simply be remanded to the trial court for further proceedings and determination as to Petitioners' ability to comply. The testimony in this case was simply insufficient to establish their inability to post the bond. In fact, Petitioners concede in their own brief that they have already successfully completed the first, and largest portion of the required remediation process, despite the fact that they also claim the record shows their inability to do so.

Moreover, in the trial court's second Civil Contmept Order, the court specifically indicated that if the Petitioners did not post the bond, that it would consider ordering the complete cessation of all business on the site. There can be no question but that the Petitioners had and have the ability to comply with this

alternative measure. Additionally, the trial court should be permitted to entertain other options. Tribue v. Langston, 667 So.2d 508 (Fla. 3d DCA 1996); Perez v. Perez, 599 So.2d 682 (Fla. 3d DCA 1992); The case should be remanded for consideration of these issues.

CONCLUSION

For the reasons stated above, Respondents respectfully request this Court dismissing this case for lack of jurisdiction, or affirm the decision of the Fourth District Court of Appeal. Alternatively, Respondents respectfully request this Court remand the case to the trial court for further proceedings as described above.

Respectfully submitted,

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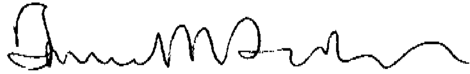
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 27th day of January, 1999 via U.S. Mail to: Paul Regensdorf, Esq., ACKERMAN, SENTERFITT & EIDSON, P.A., Attorneys for Petitioners, Las Olas Centre, Suite 950, 450 East Las Olas Boulevard, Fort Lauderdale, Florida 33301.



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