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CASE NO. 93,240

4TH DCA CASE NO. 95-02949
BROWARD
L.T. CASE NO. 93-3234-21

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.

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JURISDICTIONAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND OF THE FACTS

The order in question arises out of a lengthy environmental proceeding in a Broward County Circuit Court case, first commenced by the petitioners as a declaratory judgment proceeding[1].

In 1993, an injunction and an initial contempt order were entered compelling the petitioners to perform certain remediation activities with respect to groundwater and soil pollution at an automobile recycling facility/salvage yard[2]. The remediation activities were then commenced by the petitioners and extensive environmental systems were put in place at the yard. As this was happening, however, the County concluded that the initial orders of the court were not being fully complied with and a further series of civil contempt proceedings began[3].

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[1] Petitioners, SAM PARISI, Individually, and SAM PARISI d/b/a SAM'S RECYCLING, INC., will be referred to as Petitioners. Respondents, BROWARD COUNTY and BROWARD COUNTY OFFICE OF NATURAL RESOURCE PROTECTION, will be referred to as Respondents or County.

[2] The decision of the Fourth District below states that the trial court had found that the petitioners had the ability to comply with **both** the injunction and the original 1993 contempt order. Slip Opinion at 1. While not material to this discretionary review proceeding, when this Court considers the merits of this matter, it will be clear that the only finding with respect to the petitioners' ability to comply with anything dealt with the original injunction order of the Court, entered more than 28 months before the order in question.

[3] The subject contempt proceedings in the trial court began as a **criminal** contempt proceeding but was later converted into a civil contempt proceeding, which is as it stands before this Court.

After a protracted trial on the civil contempt issues, the trial court, on July 19, 1995, entered a civil contempt order which is the subject matter of this proceeding. The order required the petitioners to pay or post $105,000 (as a so-called "bonded fine") to ensure that the remediation systems being built would be continuously viable at the yard into the future.

There was no finding that the petitioners, as of July 19, 1995, had the financial wherewithal to post any or all of that fine (in the form of a bond or otherwise). In addition to other sanctions, the court ordered that if the contempt order were violated, the court would consider stopping all business on the site.

Decision of the Fourth District Court of Appeal

On August 27, 1997, the Fourth District rendered a unanimous decision which addressed only a portion of the issues raised in the appeal, but which specifically discussed the jurisdictional issue before this Court. The Fourth District felt that there was a finding in the trial court of the petitioners' ability to comply with the **initial** 1993 order, but the Fourth District made no similar finding or conclusion, nor did the trial court, as to the petitioners' financial ability in 1995 to post the additional $105,000 of bonded fines. Instead, the Fourth District stated as follows:

> **Appellant's [petitioners'] ability to post the bond would become relevant in a motion for contempt for the failure to post it**, where the county seeks the imposition of a fine under Johnson or of a purgeable jail sentence.

Slip Opinion at 1. See Exhibit A.

Petitioners filed a motion for rehearing in the Fourth District and on May 13, 1998, that motion for rehearing was denied per curiam. Judge Warner, however, dissented from this decision, and concluded in accordance with this Court's decision in Johnson v. Bednar, 573 So.2d 822 (Fla. 1991), that a coercive fine cannot be entered unless the trial court first considers evidence of the alleged contemnor's ability to pay when establishing the amount of the bonded fine[4].

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[4] Because the per curiam decision denying the rehearing added nothing to the merits of the opinion of the court per se, no further 9.330 motions appear to have been appropriate. Nevertheless, the decision on rehearing carried with it a legend with respect to the non-finality of the opinion pending a motion for rehearing. The petitioners below filed a precautionary motion to certify the conflict with this Court's decision in Johnson v. Bednar, which motion was objected to by the County as being an unauthorized subsequent or second motion under Rule 9.330.

SUMMARY OF ARGUMENT

In 1991, this Court, in Johnson v. Bednar, 573 So.2d 822 (Fla. 1991), established or confirmed that if a contempt fine had as its purpose the coercion of compliance by a litigant, then and in that event the trial 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". Id. at 824.

What the Fourth District below has done is change that law, eliminating the requirement that a litigant's financial ability to comply with a coercive fine is a **condition precedent** to the imposition of the fine in the first place. Rather, the court below held, for the first time in Florida law, that a litigant's ability to post a bond only becomes "relevant in a motion for contempt for the failure to post it". Parisi v. Broward County, Slip Opinion at 1. See Exhibit A.

In short, rejecting without stating so, this Court's rule in Johnson, the Fourth District now has pushed back the relevance of a litigant's ability to pay a fine to a point in time **after** the fine is already imposed and when there is a further and subsequent contempt proceeding for the failure to post that fine.

That decision is in jurisdictional conflict with this Court's decision in Johnson and it is urged that this Court recognize that conflict by allowing full merits briefing in this matter.

ARGUMENT

POINT ON DISCRETIONARY REVIEW

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL , WHICH HELD THAT A PARTY'S FINANCIAL ABILITY TO PAY A COERCIVE FINE BECOMES RELEVANT ONLY ON A **SUBSEQUENT** MOTION FOR CONTEMPT FOR THE FAILURE TO POST IT, IS IN JURISDICTIONAL CONFLICT WITH THIS COURT'S DECISION IN JOHNSON V. BEDNAR, 573 SO.2D 822 (FLA. 1991), WHICH EXPLICITLY HELD THAT IN DETERMINING THE AMOUNT OF A COERCIVE FINE, THE TRIAL COURT "**MUST CONSIDER THE OFFENDING PARTY'S FINANCIAL RESOURCES AND THE SERIOUSNESS OF THE BURDEN ON THAT PARTICULAR PARTY**".

Prior to this Court's decision in Johnson v. Bednar, 573 So.2d 822 (Fla. 1991), the relationship between the conditions sufficient to support a compensatory civil contempt fine as opposed to the conditions necessary to support a coercive civil contempt fine was not particularly clear. In Johnson, however, Justice Kogan, speaking for the unanimous Court, identified that the circumstances sufficient to support a compensatory fine are not necessarily the same as are sufficient to support the amount of a coercive fine. Compensatory fines, as the name suggests, must be based on evidence of the injured party's

actual loss. 573 So.2d at 824, citing, with approval, United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

When one moves into the realm of coercive fines - those which are designed to seek compliance with a court order - a number of factors come into play, including the character and magnitude of the threatened harm and the effectiveness of the possible sanction.

Of principal jurisdictional significance, however, is the fact that, irrespective of the threat of incarceration, this Court, in Johnson, explicitly and unequivocally stated that, before the court determines the amount of a coercive fine, it

> **... must consider the offending party's financial resources and the seriousness of the burden on that particular party.**

573 So.2d at 824 (also citing with authority the U.S. Supreme Court decision in United States v. United Mine Workers, supra).

The decision of the court below (ultimately dissented from by Judge Warner on this precise issue on rehearing) is a categorical departure from this Court's rule established in Johnson and is in express, direct and jurisdictional conflict with this Court's decision in Johnson. See Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

What the panel opinion below correctly reflects is that there had been a previous injunction and a previous contempt order in 1993, at least one of which[5] contained a statement by the trial court as to the petitioner's ability then to comply with **those** terms. Once this history is recounted, however, the Fourth District departs from the rules explicitly created in **Johnson** and concluded its opinion with these words:

> **Appellant's ability to post the bond would become relevant in a motion for contempt for the failure to post it, where the County seeks the imposition of a fine under Johnson or of a purgeable jail sentence.**

Slip Opinion at 1.

It is respectfully suggested to this Court that the Fourth District has wholly misstated the proper procedures necessary to establish the amount of a coercive fine and, indeed, has impermissibly placed the cart before the horse in such a proceeding. Under the procedures as now adopted by the Fourth District, the amount of a coercive fine can be "established" or "determined" by the trial court without **any** reference, whatsoever, to the ability of the alleged contemnor to comply with the financial terms of the fine. Nor is it required (as it was in

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[5] As will be set forth in greater detail on the merits, the only arguable finding of ability to do anything related to the terms of an injunction entered in early 1993, and is in no wise carried over to the subject contempt order entered in July of 1995. More significantly, the opinion does not suggest that it should.

Johnson) that the trial court even consider the seriousness of the burden that is placed upon that party.

Significance of Conflict Between Decision Below and Johnson v. Bednar

Although it may not be a strength of Twentieth Century society, the fact remains that in many areas of law (some more than others), one or both parties find themselves in the position where they may be subject to a coercive contempt fine which has as its purpose the use of a court ordered fine to compel compliance with a court directive.

In the case of the petitioners before this Court, expensive remediation systems for both the groundwater and the soil were coming on line by the time of the hearing, but the court, because of earlier conduct of the petitioners, wished to coerce the petitioners into maintaining the systems into the undefinable future. To do so, at the County's urging, the court selected the posting of $105,000 of "bonded fines".

The uncertainty present in the law now, after the Fourth District's decision, makes lawyers and judges alike uncertain as to when the financial ability of a litigant comes into play with respect to coercive fines.

Under this Court's decision in Johnson, the court must determine -- before the fine can be established -- whether the amount of that fine is within the financial resources of the prospective contemnor.

Under the decision under review, however, the Fourth District has pushed that determination of ability to pay off into the future, thereby allowing trial courts to establish fines in amounts wholly unrelated to any defendant's ability to pay and without any regard to the effects that such fines might have on a defendant. Under the new rule created by the court below, the relevance of financial inability only comes up at a **subsequent** contempt proceeding when the party is again hauled before the court to explain why that party should not be held in contempt for the failure to comply with the financial terms of the previous coercive fine. The cart is indeed now not only before the horse but apparently disconnected from the horse.

Litigants in Florida who, for whatever reason, find themselves crosswise with a court on a particular matter should be subject to **no more than** reasonable and appropriate contempt orders. The procedures established by the Fourth District automatically require yet another level of contempt for the potential violation of an order improvidently entered because of the absence of a litigant's ability to financially comply with the original order.

For the reasons set forth in this brief, it is respectfully urged that this Court accept jurisdiction in this cause and establish a full merits briefing in this matter.

CONCLUSION

The decision of the Fourth District (J. Warner dissenting) is in jurisdictional conflict, expressly and directly conflicting with the decision of this Court in Johnson v. Bednar.

Accordingly, it is respectfully urged that this Court accept jurisdiction and enter an order establishing a full merits briefing schedule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail on the 29th day of June, 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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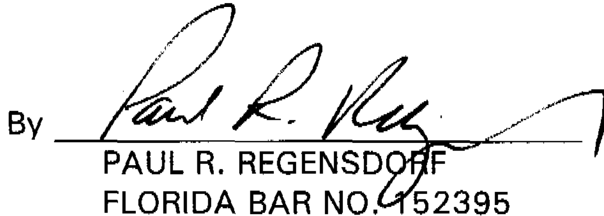
By 
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