No. 314162-III



COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

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WASHINGTON MOTORSPORTS LIMITED,

Respondent,

vs.

SPOKANE RACEWAY PARK, INC.,

And

SUSAN ROSS, TERRY and BRYAN GRAHAM, and THE MEADOWS AT DRY CREEK, LLC,

Appellants.

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# APPELLANTS' OPENING BRIEF (Second Corrected)

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## I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Denying Appellant's Motion to Intervene Because Appellants Have a Direct Interest In the Outcome of the Action and Their Interests are Not Adequately Represented by Any Party.

ISSUE: Whether a person other than the judgment debtor has a right to intervene under Civil Rule 24 in support of a motion to set aside a judgment when the judgment is being used to execute against the person's property in a separate action.

2. The Trial Court Erred by Denying the Moe's Motion to Vacate Because the Trial Court Lacked Authority to Award Remedial Sanctions Ordered Under RCW 7.26.030(2)(b) as a Judgment in Favor of WML.

ISSUE: Whether RCW 7.21.030(2)(b) authorizes a court to impose a forfeiture of up to $2,000 per day against a non-party for civil contempt and then award that amount as a judgment in favor of a party in addition to ordering payment for losses incurred by the party as a result of the contempt.

## II. STATEMENT OF THE CASE

This appeal arises out of an action originally brought by several limited partners in Washington Motorsports Limited ("WML") against the general partner, Spokane

Raceway Park ("SRP"). A receiver was appointed, and Orville Moe, the president of SRP, was ordered to cooperate with the receiver and provide certain documents. Ultimately, the trial court held Mr. Moe in contempt and issued an order imposing sanctions in the amount of $1,000 per day for each day he failed to provide the requested documents.

On February 8, 2008, the trial court entered an order assessing $341,000 in remedial sanctions against Moe for continuing contempt from December 8, 2006 to November 14, 2007. CP 5. The trial court also entered orders requiring Moe to pay WML's attorney fees and costs incurred in connection with various motions regarding the contempt proceedings. Moe appealed those orders, claiming that the multiple sanctions imposed by the court were overly harsh and amounted to punishment for criminal contempt. Appendix, p. 7. Moe also argued that the sanctions amounted to a form of punishment and were excessive. Appendix, p. 9-10. In an unpublished decision, this Court upheld the $341,000.00 in remedial sanctions as being within the authority granted under RCW 7.21.010(2)(b). Appendix, p. 10-11. The Court reasoned that the sanction of $1,000 per day was remedial and not punitive because Moe had the ability to end the sanction by complying with the trial court's order to produce documents. Appendix, p. 10. Thus, the contempt sanction was civil in nature, and Moe was not entitled to the additional procedural protections necessary to sustain punitive sanctions for criminal contempt. Appendix, p. 8.

On September 19, 2008, after Moe had filed his appeal from the contempt order, the trial court entered a "Final Judgment Against Orville Moe RE: Contempt Orders." CP 1. The judgment awarded a total of $373,626.10 to WML based upon the court's

previous contempt orders, including the order imposing remedial sanctions of $1,000 per day for the ongoing contempt. CP 5. The judgment also included awards of $17,656.85, $4,026.50 and $10,942.75 in attorney fees and costs to WML relating to motions brought by WML. CP 1-7.

Moe was found in contempt a second time for failing to comply with discovery orders and was sanctioned at the rate of $2,000 per day for a continuing contempt. On June 21, 2011, a second judgment was entered by the trial court awarding a total of $751,640.00 as sanctions against Orville and Deonne Moe.[1] CP 8-14. The total of the judgment included $730,000 as a forfeiture for 365 days at $2,000 per day pursuant to RCW 7.26.030(2)(b), plus $21,640.00 for attorneys fees and costs incurred by WML in bringing motions relating to the contempt. CP 12.

A third judgment for contempt sanctions was entered on August 23, 2012, in the total amount of $704,000.00. CP 51-55. Again, the judgment was entered against both Mr. and Mrs. Moe as a community despite the absence of any findings that Deonne Moe had committed any contempt, and in favor of WML. Included in the judgment total was $88,000.00 for 44 days of continuing contempt at $2,000 per day pursuant to RCW 7.26.030(2)(b) and an additional $616,000.00 as an "interim quantification of the

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[1] The second judgment was entered against Orville and Deonne Moe as a community despite the absence of any finding by the trial court holding Deonne Moe in contempt. The judgment included the following language, however: "A debt incurred during marriage is presumed to be a community obligation; the burden of proving that a debt is not a community obligation rests on the community. [citation omitted] Neither Orville Moe nor Deonne Moe has rebutted that presumption. As such, the $730,000.00 in remedial sanctions entered herein are against Orville Moe and the community property of Orville Moe and Deonne Moe." The record fails to show that Deonne Moe was given notice that her interest in community property could be at risk as a result of her husband's contempt, and the trial court did not find that she had the ability to comply with the court's discovery orders or otherwise purge the finding of contempt against her husband.

remedial sanctions already ordered by this Court" at the rate of $2,000 per day pursuant to RCW 7.26.030(2)(b). CP 53-55. At the time the third judgment was entered, the Moes were no longer represented by counsel.

On March 14, 2012, WML filed an action against Susan Ross, Terry and Bryan Graham, The Meadows at Dry Creek, LLC, and Orville and Deonne Moe seeking damages and other relief under Washington's Uniform Fraudulent Conveyance Act ("UFTA"). CP 15-42. In that action, WML seeks to obtain writs execution against property held by Ms. Ross, Mr. and Mrs. Graham, and The Meadows at Dry Creek, LLC, in order to collect on the judgments obtained against Orville and Deonne Moe. Those judgments now total more than 1.8 million dollars.

On November 19, 2012, Orville and Deonne Moe moved pursuant to Civil Rule 60 to vacate the judgments in favor of WML. CP 56-60. Hearing on the motion was set for January 18, 2013. On December 31, 2012, Appellants moved to intervene pursuant to Civil Rule 24. CP 61-65. Hearing on the motion to intervene was set for the same day and time as hearing on the motion to vacate. In their motion, Appellants argued that they had an interest in the outcome of the motion to vacate because the pending UFTA action against them depended on the validity of the judgments against the Mr. and Mrs. Moe. CP 63-64.

At the hearing on January 18, 2013, the trial court first heard argument from counsel for Appellants and for WML on the motion to intervene. RP 3-11. The court then denied the motion. RP 12. In denying Appellants' motion to intervene, the trial court stated that Appellants lacked "standing" under CR 24 and that, even if they had standing, their interests were adequately represented by the Moes. RP 12-13.

The trial court then proceeded to hear argument on the motion to vacate, but only allowed the Moes, who appeared pro se, to present argument in favor of the motion. RP 13-31. In his motion and at the hearing, Moe argued that RCW 7.21.010(2) did not authorize a forfeiture of up to $2,000 per day to be entered as a judgment in favor of a party, rather than as a fine payable to the court. CP 56; RP 14. In denying the Moes' motion the trial court did not address that argument. Instead, the court merely concluded that it had subject matter jurisdiction to enter the orders and to impose remedial sanctions for contempt, therefore, the judgments were not void. RP 32-33.

On January 30, 2013, the Moes timely filed their Notice of Appeal from the denial of the motion to vacate the judgments. CP 123. The following day, Appellants timely filed their Notice of Appeal from the order denying their motion to intervene. CP 130. On February 25, 2013, Appellant's moved to consolidate the two appeals. A ruling on the motion to consolidate was deferred pending the submission of briefs by the parties.

## III. STANDARD OF REVIEW

The denial of intervention as of right under CR 24(a)(2) is reviewed for error in applying the law to the facts ( de novo review). *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1995). In determining whether error occurred in the denial of a motion to intervene, the appellate court accepts the well pleaded allegations of the moving party as being true. *Id.*, at 303. Denial of permissive intervention under CR 24(b)(2) is reviewed for an abuse of discretion. *Id.*, at 304.

Denial of a CR 60(b) motion to vacate judgment is reviewed for an abuse of discretion. *DeYoung v. Cenex Ltd.,* 100 Wash.App. 885, 1 P.3d 587 (2000), *review denied,* 146 Wash.2d 1016, 51 P.3d 87 (2002).

## IV. ARGUMENT

1. Appellants Had a Right to Intervene Under CR 24(a)(2) Because the Trial Court's Ruling on the Moes' Motion to Vacate the Judgments has a Direct Impact on the Action Against Appellants Under the Uniform Fraudulent Transfers Act ("UFTA") and Appellant's Interest was Not Adequately Represented by the Moes.

CR 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in and action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims and interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Under CR 24(a)(2), the following four requirement must be met in order for a person to have a right to intervene in an action: (1) the application for intervention is timely made; (2) the applicant claims an interest in the subject of the action; (3) the applicant is situated such that disposition will impair or impede the applicant's ability to protect that interest; and (4) the applicant' interest is not adequately represented by the existing parties. *Westerman v. Cary*, 125 Wn. At 303.

The meaning of "interest" for purposes of CR 24(a)(2) is to be broadly interpreted on a case-by-case basis. *Id.* The interest must be one that is recognized by law and "be of such direct and immediate character that the intervener will either gain or lose by the

direct legal operation and effect of the judgment." *Id., quoting, In re J.H.*, 117 Wn.2d 460, 468, 815 P.2d 1380 (1991).

Here, Appellants clearly meet all of the requirements for intervention as of right under CR 24(a)(2).

First, the motion to intervene was filed after the Moes had filed their motion to vacate the judgments pursuant to CR 60 and more than two weeks prior to the hearing on the motion to vacate. Thus the motion was timely filed. *See, River Park Square, LLC v. Miggins*, 143 Wn.2d 79-80, 68, 17 P.3d 1178 (2001)(holding that CR 24 motion filed on same day as hearing on matter for which intervention was sought was not timely).

Second, Appellants clearly have an interest in the subject of the action seeking to vacate the judgments. The UFTA action that has been brought against Appellants is entirely dependent on those judgments. If the judgments are vacated, the UFTA action cannot go forward. Thus, Appellants' interest in the subject of action is both direct and immediate, and Appellants will either gain or lose by the direct legal operation and effect of any final ruling on the motion to vacate.

Third, the Appellants' ability to protect their interest in seeing the judgments vacated will be impaired, if not entirely foreclosed, by a final disposition upholding the judgments because Appellants will be left with only the possibility of collaterally attacking those judgments in the UFTA action.

Finally, Appellants' interest is not adequately represented by any existing party. The Moes were not represented by counsel in the trial court and have not been represented by counsel since at least August 23, 2012. The motion filed by the Moes and Mr. Moe's presentation at the hearing demonstrate that they have only a very limited

understanding of the law and issues relating to the motion to vacate. The Moes are clearly not capable of adequately representing their own interest in this case, let alone the interests of others.

Rather than arguing to the trial court that Appellants did not meet the requirements of CR 24(a)(2) or (b)(2), WML argued that Appellants lacked "standing" to intervene because a non-party cannot move to vacate a judgment under CR 60. WML cited *In re Estate of Finch,* 172 Wn.App. 156, 294 P.3d 1 (2012) in support of that position. Lack of standing as a party to an action generally does not affect standing to intervene in the action. *See, Crosby v. County of Spokane*, 137 Wn.2d 296, 312, 971 P.2d 32 (1999). Thus, the efficacy of the holding in *Finch* is questionable.

In any event, *Finch* is inapplicable here. Appellants did not move to vacate the judgments against Mr. and Mrs. Moe. The Moes did. WML does not claim that the Moes lacked standing to move to vacate the judgments, even though the Moes have never been made parties to the action. The judgments at issue here were not entered on the basis of claims made by WML against the Moes as opposing parties, but were based solely on findings of contempt of court by Mr. Moe for failing to obey the court's discovery orders. If the holding of *Finch* is applied literally as urged by WML, then even the Moes would be precluded from seeking to vacate the judgments pursuant to CR 60, since they are not "parties" to the action between WML and Spokane Raceway Park, Inc.

Moreover, *Finch* is inapplicable here because Appellants moved to intervene only after the Moes filed their motion to vacate the judgments. The filing of that motion created an action in which Appellants have an interest with respect to the outcome. WML's argument that Appellants lack "standing" to intervene because they are not

parties is entirely circular; i.e., because Appellants are not parties, they lack standing to become parties by intervening under CR 24, regardless of whether they have a legitimate interest in the action.

The whole purpose of CR 24 is to allow created an action in which Appellants have an interest with respect to the outcome. WML's argument that Appellants lack "standing" to intervene because they are not parties is entirely circular; i.e., because Appellants are not parties, they lack standing to become parties by intervening under CR 24, regardless of whether they have a legitimate interest in the action. persons who are not parties but who have an interest in the outcome of an action, to become parties and thereby participate in the action in order to protect that interest. Contrary to that purpose, the trial court denied Appellants' motion to intervene solely on the grounds that Appellants lacked "standing" under Rule 60 to bring the motion in the first instance. RP, p. 11. In doing so, the trial court committed an error of law.

2. The Trial Court Erred by Denying Appellants to Intervene by Permission Under CR 24(b)(2).

CR 24(b)(a) provides that "anyone" may be permitted to intervene in an action upon timely application when the "applicant's claim or defense and the main action have a question of law or fact in common." In exercising its discretion to allow permissive intervention, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Here the trial court failed to exercise any discretion under CR(b)(2). In denying intervention, the trial court relied solely on its conclusion that Appellants did not have "standing" to intervene. The trial court did not consider whether any claim or defense the

Appellants had in the UFTA action had any question of law or fact in common with the present action. Yet, there are clearly common questions of both law and fact with regard to whether the judgments are valid. If the judgments are not valid as against Mr. and Mrs. Moe, then those same judgments cannot form the basis of an action against Appellants under UFTA. Therefore, the trial court was required under CR 24(b)(2) to exercise discretion in permitting Appellants to intervene unless there was some reason not to allow intervention.

Specifically, the trial court was required to consider whether intervention would unduly delay or prejudice the rights of the existing parties. The court did not engage in any such consideration and there is no basis from which the trial court could have concluded that intervention would result in any delay or prejudice to any party. Appellants had timely filed their motion to intervene so that the hearing on that motion could be held at the same time as the hearing on the Moes motion to vacate the judgments. The motion to intervene was properly filed and served on all interested parties, stated the grounds for the motion, and was accompanied by a memorandum setting forth Appellants' position with respect to the motion to vacate, as required by CR(c). Granting Appellant's permissive intervention would not have resulted in any delay or prejudice to any party. The trial court abused its discretion by failing grant Appellants intervention by permission.

3. The Judgments Against Mr. and Mrs. Moe are Void Insofar as they Award Monetary Damages in Favor of WML Based Solely Upon a Forfeiture Imposed Pursuant to RCW 7.21.030(2)(b).

CR 60(b)(5) provides that a court may order relief from a judgment that is "void." Generally, the trial court exercises discretion when ruling on a motion to vacate under CR 60. However, a motion to vacate a judgment made pursuant to CR 60(b)(5) must be granted if it is shown that the judgment is void. *Summers v. Dept. of Revenue*, 104 Wn.App. 87, 90, 14 P.3d 902 (2001), *citing, In Re Marriage of Leslie*, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989).

A judgment is void if the court lacked authority to enter it. *Id., citing Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975), *supplemented*, 88 Wn.2d 167, 558 P.2d 1013 (1989). A judgment or order entered pursuant to a statue is void if it exceeds the authority granted by the statute or otherwise exceeds the court's inherent authority. *See, Summers v. Dept. of Revenue*, 104 Wn.App. at 89-92 (order extending tax liens not void because extension was authorized by statute); *see also, Marriage of Leslie*, 112 Wn.2d 612-17 (judgment entered in excess of or substantially different from relief requested in compliant is void).

RCW 7.21.030 provides as follows:

> (1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.
>
> (2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:
>
> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

The language of RCW 7.21.030 makes clear that the "remedial sanctions" that may be imposed under subsection (2) are separate and distinct from the actions authorized under subsections (3) and (4). Under subsection (2), the court is authorized to "order a person found in contempt to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney fees." The authority to order such payments is "in addition to the remedial sanctions" authorized under subsection (2). It is clear from the language of the statute that an order entered under subsection (3) is not a "remedial sanction," but is instead an award of damages to compensate a party for any monetary losses resulting from the contempt and/or contempt proceedings.

Remedial sanctions authorized by subsection (2) include a "forfeiture not to exceed $2,000 per day for each day the contempt of court continues." RCW 7.21.030(2)(b) Nothing in the language of the statute suggests that the word "forfeiture" was intended to mean an order requiring payment to a party rather than a payment to the court in the nature of a fine. On the contrary, when the Legislature intended to grant the court authority to order a person found in contempt to make payment to another party, it used the clear and unambiguous language found in subsection (3). Thus, the forfeiture authorized under subsection (2)(b) cannot be construed as authorizing an order requiring a person held in contempt to make payments of up to $2,000 per day to a party.

Any reading of RCW 7.21.030(3) as authorizing the award to a party of payment up to $2,000 per day for a contempt, regardless of whether the party has suffered any loss as a result of the contempt, would also be contrary to the general rule that a court cannot grant judgment in favor of one party and against another based solely on a finding of contempt. *See, Mitchell v. Watson*, 58 Wn.2d 206, 212-14, 361 P.2d 744 (1961)(holding that cannot simply award judgment against one party and in favor of another as a means of punishing contempt. *Id.* As stated by the court in Mitchell:

> The contumacy of a party, disobeying an order of a court, may justify his punishment for contempt, but it does not justify the deprivation of his civil rights or the taking of his property and giving it to another.

*Mitchell v. Watson*, 58 Wn.2d at 214.

At least one state court has expressly recognized the distinction between a forfeiture of money to the court imposed as a remedial sanction for contempt and money damages imposed to compensate a party for loss or injury suffered as a result of the contempt. *See, Investors Title Ins. Co. v. Herzig*, 785 N.W.2d 863 (N.D. 2010). In that case, the Supreme Court of North Dakota was asked to determine whether sanctions ordered by the trial court survived the defendant's death under North Dakota law. The sanctions had been entered pursuant to a North Dakota statute that is substantially similar to RCW 7.21.030. *See,* N.D.C.C. § 27-10-01. In reaching its decision, the court noted that a remedial "forfeiture" differs from money damages in that it is paid to the court, rather than to an aggrieved party. *Id.*, at 878.

Other cases are in accord. In *Hooker v. Lucero*, 94 N.M. 798, 617 P.2d 1313 (1980), the Supreme Court of New Mexico reversed in part an award for costs incurred by the father of minor children as the result of a finding of contempt on the part of the children's uncle. The court noted that the general rule is that a court may award damages and attorney fees to a party aggrieved by a contempt, but that any such award is limited to actual losses, plus attorney fees and litigation costs. *Id.*, at 800; See also, *Hall v. Hall*, 114 N.M. 378, 838 P.2d 995 (1992)(distinguishing between jail time and fines that may be imposed for civil contempt for the purpose of coercing compliance with court orders and amounts awarded to wife for expenses incurred as a result of husband's contempt).

Appellants have been unable to find any cases from any jurisdiction in which the court imposed a "forfeiture" or fine similar to that authorized under RCW 7.21.030(2) and then awarded that amount to a party in the form of a judgment.

Here, each of the judgments entered against Mr. and Mrs. Moe included specific amounts for attorney fees and costs incurred by WML in connection with the contempt proceedings. Those amounts were authorized under RCW 7.26.030(3). However, the trial court then included in the judgments an additional award to WML based upon the number of days the contempt had continued multiplied by the amount of forfeiture imposed per day pursuant to RCW 7.31.030(2). While the court had authority under the statute to impose those amounts as remedial sanctions payable to the court, it did not have authority to award those amounts as money damages payable to WML. Thus, the judgments are void as to the forfeiture amounts included therein and should be vacated as to those amounts pursuant to CR 60(b)(5).

4. In the Event This Court Declines to Allow Intervention Pursuant to CR 24, Appellants' Arguments Should be Treated as Amicus for the Substantive Issues Presented in This Appeal and in the Moes' Appeal.

In cases where this Court has declined to allow a party to intervene in an action, it has nevertheless accepted arguments of that party on appeal as amicus with respect to substantive issues raised by the appeal. *See; e.g., Spokane County v. PERC*, 136 Wn.2d 644, 651, 966 P.2d (1998). This Court should do so here as well.

## V. CONCLUSION

For the foregoing reasons, this court should reverse the order denying Appellants' motion to intervene and enter an order allowing intervention pursuant to CR 24. This Court should also reverse the trial court's order denying the Moe's motion to vacate the judgments and should enter an order vacating that part each judgment that awards remedial sanctions under RCW 7.26.030(2)(b) as a debt to WML payable by Mr. and Mrs. Moe.

Respectfully submitted this 31st day of July, 2013.

Richard D. Wall, WSBA#16581
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on this date the foregoing was caused to be served on the following person(s) in the manner indicated:

JOHN P. GIESA
AARON D. GOFORTH
Reed & Giesa, P.S.
222 North Wall Street, Suite 410
Spokane, WA 99201 By legal messenger

Dated this 1 day of August, 2013.

**COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON**

| | | |
|---|---|---|
| **WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, a/k/a Washington Motorsports, Ltd., by and through Barry W. Davidson, in his capacity as Receiver and as Acting Managing General Partner,** | ) | **No. 27747-0-III** |
| **Respondent,** | ) | |
| **v.** | ) | |
| **SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership,** | ) | **Division Three** |
| **Defendant,** | ) | |
| **and** | ) | |
| **ORVILLE MOE,** | ) | |
| **Appellant.** | ) | **UNPUBLISHED OPINION** |

KORSMO, A.C.J. — Orville Moe challenges the trial court's decision in a contempt proceeding to impose $341,000 in monetary sanctions and bar him from using documents

he belatedly produced. He argues that the multiple sanctions converted this action from a civil contempt to a criminal contempt action. Because the Legislature has authorized multiple sanctions in a civil contempt proceeding and because Mr. Moe maintained the ability to purge the contempt by complying with the trial court's orders, we conclude that this was still a civil contempt action. The trial court also showed extraordinary patience in dealing with Mr. Moe's long-term recalcitrance; it did not abuse its discretion in imposing these sanctions. The order is affirmed.

HISTORY

This case has its genesis in litigation relating to the ownership of the Spokane Raceway Park (SRP). For over 30 years, Mr. Moe was President of SRP. SRP, as general partner of Washington Motorsports Limited Partnership (WMLP), operated an automobile racetrack in Spokane County. In 2004, several of WMLP's limited partners filed suit, alleging mismanagement of SRP by Mr. Moe and others. The partners sought appointment of a receiver pursuant to chapter 7.60 RCW. The trial court appointed a general receiver for WMLP and ordered Mr. Moe to cooperate with him.

Mr. Moe failed to cooperate with the receiver. From May 18, 2006 through December 3, 2007, the receiver filed seven motions for contempt and sanctions against Mr. Moe.

The first motion alleged that Mr. Moe had failed to cooperate with the receiver's request to provide documents related to WMLP. The court did not find Mr. Moe in contempt, but it removed him as manager of SRP, banned him from SRP premises, and ordered him to turn over documents related to SRP operations.

The receiver's second motion alleged Mr. Moe had failed to cooperate with the court's previous order to produce documents. On November 29, 2006, the court found Mr. Moe in contempt and issued an order imposing remedial sanctions in the amount of $1,000 per day for each day after December 8, 2006, that he failed to produce all documents in his possession relating to WMLP ownership.

In its third, fourth, and fifth motions, the receiver contended that Mr. Moe's filing of several documents and supplying of information in response to the receiver's motions to adjudicate ownership of WMLP units represented a violation of the previous court's orders on production. Moe had not previously produced these documents or provided the information. On October 19, 2007, the court found Moe in contempt but suspended the imposition of the $1,000 per day forfeiture. The court did order Mr. Moe to pay attorney's fees and costs to the receiver. The court also ordered Moe to file a declaration identifying documents and nondocumentary information he used in supplying information on the ownership of the WMLP units. Moe was again ordered to produce

these documents to the receiver. The order also expressly reserved the right to exclude documents that were produced in an untimely manner.

When Moe failed to file the required declaration and produce the documents, the receiver filed his sixth motion for sanctions. In response, Mr. Moe filed a declaration on November 14, 2007, explaining the source of his earlier declaration. He attached several documents to this declaration that he had not previously produced.

In response to this declaration and document production, the receiver filed his seventh motion. The motion requested the imposition of the $1,000 per day sanction based on Mr. Moe's failure to previously produce the documents and provide the information contained in his declaration. On February 8, 2008, the court granted the receiver's motions for contempt and imposed a $341,000 forfeiture, representing the 341 days between December 8, 2006 and November 14, 2007. It also excluded from evidence the documents which Mr. Moe had belatedly produced and three of Moe's declarations which contained information he had failed to timely produce. Finally, the court ordered Mr. Moe to pay the receiver's attorney fees and costs for bringing the contempt motions.[1] This appeal followed.

[1] The total financial cost of the daily sanction and the attorney fees was $373,626.10.

ANALYSIS

The primary challenges presented in this appeal concern the nature of the contempt sanctions and whether they were justified. The first issue involves construction of the contempt statutes. The second involves the trial court's discretionary authority to deal with contemnors.

All of these issues are governed by statute. Remedial sanctions are authorized by RCW 7.21.030. This statute is frequently referred to as "civil contempt." *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008). RCW 7.21.030(1) allows either the court or a party to seek remedial sanctions for injuries arising from contempt of court. A "remedial sanction" is one which is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3).

In contrast is RCW 7.21.040, which authorizes "punitive sanctions." This statute is also known as "criminal contempt." *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002). "'Punitive sanction' means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). If a court seeks to impose punitive sanctions, a prosecutor must file a complaint or information and certain other procedures must be followed that are generally consistent with a criminal case. RCW 7.21.040(2).

> [A] sanction is punitive if there is a determinate sentence and no opportunity to "purge" the contempt . . . . [I]t is remedial where it is indeterminate and the contemnor is released upon complying with the court's order. A punitive sanction generally is imposed to vindicate the court's authority, while a remedial sanction typically benefits another party.

*Rhinevault v. Rhinevault*, 91 Wn. App. 688, 694, 959 P.2d 687 (1998) (citations omitted), *review denied*, 137 Wn.2d 1017 (1999).

RCW 7.21.030(2), in relevant part, outlines the possible remedial sanctions available for contempt:

> If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:
>
> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
>
> (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
>
> (c) An order designed to ensure compliance with a prior order of the court.

A trial court's decision to impose remedial sanctions is within the court's sound discretion. *Rhinevault*, 91 Wn. App. at 694. It will not be disturbed absent abuse of that discretion. *Id.* A court abuses its discretion if its decision is "manifestly unreasonable or rests upon untenable grounds or reasons." *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

With these considerations in mind, we turn to Mr. Moe's contentions.

*Monetary Sanctions*

Mr. Moe argues that the $341,000 in per diem sanctions was punitive because it was overly harsh and was combined with other sanctions. This argument ignores the fact that Mr. Moe was on notice for more than one year that he might face this sanction. He had the power to avoid the sanction, and he chose not to comply with the court's orders. While the difference between civil (remedial) and criminal (punitive) contempt can be easily stated, distinguishing between the two can be hard because coercive sanctions often appear to be punitive. *In re Interest of M.B.*, 101 Wn. App. 425, 438, 3 P.3d 780 (2000), *review denied*, 142 Wn.2d 1027 (2001). The critical factor in distinguishing between the two circumstances is the triggering mechanism for the sanction. If the purpose of the sanction is to force a person to do something, it is coercive and hence "remedial." *In re Pers. Restraint of King*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). Where a sanction is imposed for past conduct, it typically is punitive. *Id.* A civil sanction "is conditional and indeterminate, *i.e.*, where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order." *Id.*

This was a civil contempt. The order entered November 30, 2006, directed Mr. Moe to turn over the documents or pay $1,000 each day they were withheld after December 8, 2006. Mr. Moe controlled his destiny. He could have turned over the

documents prior to December 8 and faced no financial penalty. Instead, he decided to withhold the documents until it was advantageous to him to release them—typically in response to a motion. Mr. Moe was the person controlling his financial fate.

The trial court allowed Mr. Moe numerous opportunities to comply without immediately paying. It found Mr. Moe in contempt, ordered monetary sanctions, and then stayed the order pending future compliance. The court only imposed the monetary sanction after Moe continued to defy its orders. Even after imposing the sanction, the court did not attempt collection until Mr. Moe finally supplied some of the documents.[2] Rather than abusing its discretion, the trial court showed extraordinary patience with Mr. Moe. While the dollar amount of the sanction is large, Mr. Moe's repeated defiance of the court's orders illustrates that it was necessary to ensure compliance with this and other court orders.

Mr. Moe had control over the monetary sanction. He decided when to comply. The fact that he waited nearly a year to do so resulted in a large monetary sanction, but it was only one-half of what the court could have ordered under the statute. Since he was solely responsible for the amount of the sanction, it was remedial in nature. There was no need to extend the due process protections applicable to criminal cases to this action. The monetary forfeiture was a coercive civil sanction, not a punitive criminal one.

[2] For instance, the trial court could have directed Mr. Moe to make regular payments while the contempt was in progress.

*Exclusion of Documents*

Mr. Moe also argues that by not allowing him to use documents and information which he produced late, the court in effect is punishing him and not using the least severe means to coerce compliance. But again, Mr. Moe was on notice by at least October 19, 2007, that the court was considering this sanction, and he continued to defy the court's orders. If a court is not allowed to execute on its threats of sanctions, the sanctions will cease to serve the remedial function that the Legislature intended them to have.

As with the monetary sanction, we conclude that this sanction also was remedial rather than punitive. The reason for that conclusion also is the same—Mr. Moe was the one who held the key to his own sanctions. Prior to ultimately turning over some documents on November 14, 2007, Mr. Moe knew that he was facing $1,000 per day and possible exclusion of his evidence if he did not turn the documents over to the receiver. Presumably he weighed these considerations when he made the choice to attempt to frustrate the receivership by withholding his information about the ownership documentation. For better or for worse, it was Mr. Moe who decided to risk the sanctions rather than comply with the court's order. The exclusion order, too, was a coercive civil sanction. It was not punishment.

Mr. Moe also argues that the cumulative effect of the two sanctions amounts to punishment. However, RCW 7.21.030(2) specifically authorizes the use of "one or

more" remedies. The Legislature clearly intended to grant the courts broad coercive authority rather than limit a judge to only one tool at a time. As with the previous arguments, this argument also misses the critical point. The nature of the sanction is dependent upon control over the sanction. Since Mr. Moe controlled his own sanctions, the multiple sanctions imposed here were coercive and civil, not criminal, in nature.

The decision to exclude the belatedly produced documents, even in conjunction with the monetary sanction, was a remedial civil sanction. No additional due process protections were needed.

*Excessiveness*

Mr. Moe also argues that the $341,000 sanction was excessive. He has not shown that the trial court abused its significant discretion in this matter.

As previously noted, an appellate court will review a contempt sanction for abuse of discretion. *Rhinevault*, 91 Wn. App. at 694. The question then becomes whether the trial court had a tenable basis for its ruling. *Davies*, 144 Wn. App. at 497. In the context of civil contempt, that issue is impacted by the fact that it is the contemnor who controls to a large extent the sanction he or she faces.

The trial court had statutory authority to impose a monetary sanction of up to $2,000 per day. RCW 7.21.030(2)(b). The trial court chose to use only $1,000 of that daily authority. Despite facing that threat, Mr. Moe did not comply even in part until 341

days had passed. The court had repeatedly imposed sanctions and then suspended them in efforts to coerce compliance. It showed great patience under the circumstances. Mr. Moe did not appear to be bothered by the sanctions and, instead, supplied documents only when he deemed it in his best interests to do so.

Under these facts, we see no abuse of discretion. The trial court did what it could, but apparently the sanctions were not so coercive that Mr. Moe felt like complying with them. If he now deems the $341,000 to be excessive, he can only blame himself. While the ultimate efficacy of the sanction can be debated, it is not excessive.

The trial court did not abuse its discretion by its ultimate sanction order.

*Calculation of Sanction*

Mr. Moe additionally contends that the trial court incorrectly calculated the amount of per diem sanctions. As a general principle, an appellate court will not review an issue that was not raised in the trial court. *See* RAP 2.5(a). Mr. Moe did not argue to the trial court that it had wrongly calculated the number of days that the documents had been withheld. Because Mr. Moe did not present this issue to the trial court, most particularly in his motion for reconsideration, we decline to address it here. *Id.*

*Attorney Fees*

Finally, the receiver seeks attorney fees for this appeal. RCW 7.21.030(3) authorizes attorney fees for successful defense of an appeal of a contempt order. *In re*

*Marriage of Curtis*, 106 Wn. App. 191, 202, 23 P.3d 13, *review denied*, 145 Wn.2d 1008 (2001); *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 505, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010 (1996). However, we are aware of no authority that mandates a fee award. The statute expressly states that a trial court "may" award attorney fees. RCW 7.21.030(3). Typically, the decision to impose attorney fees under that language rests in the discretion of the court. *E.g., Farwest Steel Corp. v. DeSantis*, 102 Wn.2d 487, 493, 687 P.2d 207 (1984), *cert. denied*, 471 U.S. 1018 (1985). Because Mr. Moe made a plausible, if unsuccessful, argument for reversal concerning the punitive impact of the sanctions, we exercise our discretion and decline to award attorney fees for this appeal.

CONCLUSION

While the sanctions imposed on Mr. Moe were significant, they were the product of his decision to defy repeated trial court orders. There was no error and no abuse of trial court discretion. The sanction order is affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.