Court of Appeals, Division III No. 314359
Benton County Superior Court No. 04-2-02767-2

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

IN RE RAPID SETTLEMENTS, LTD.'S APPLICATION FOR APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS

RSL-3B-IL, LTD. and E. JOHN GORMAN,

Appellants
v.

SYMETRA LIFE INSURANCE COMPANY and
SYMETRA ASSIGNED BENEFITS SERVICES COMPANY,

Respondents

AMENDED BRIEF OF APPELLANTS RSL-3B-IL, LTD AND E. JOHN GORMAN

TELQUIST ZIOBRO MCMILLEN CLARE, PLLC
George E. Telquist, WSBA 27203
1321 Columbia Park Trail
Richland, WA 99352
(509) 737-8500

Counsel for Appellants RSL-3B-IL,
Ltd. and E. John Gorman

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MAY IT PLEASE THE COURT:

The order issued by the Benton County Superior Court purporting to hold RSL-3B-IL, Ltd. ("RSL-3B") and its Texas counsel E. John Gorman ("Gorman") in civil contempt crosses the line into the criminal realm. Above all, the trial court made no finding, as required by statute, that RSL-3B and Gorman "intentionally" disobeyed its prior temporary restraining order ("TRO"). *See* RCW 7.21.010(1)(b). The trial court abused its discretion by misapplying the unambiguous contempt statute, which imposes the essential element of "intentional" disobedience.

Symetra Life Insurance Company and Symetra Assigned Benefits Service Company ("Symetra") misled the trial court by insisting that a contempt order could rest solely on a finding that a party or its agent disobeyed a previous order. (CP 228) In other words, Symetra erased the key term "intentional" from the contempt statute and frustrated legislative intent in the process. In misstating Washington law, Symetra relied on the same case this Court already rejected as inapposite because that ***1964*** opinion construed an outdated version of the contempt statute omitting "the intentional requirement." *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355 (2010) (distinguishing *Mathewson v. Primeau*, 64 Wn.2d 929, 934 (1964)), *review denied*, 170 Wn.2d 1023 (2011). The trial court erred by using the contempt standard advocated by Symetra.

The trial court also imposed a purge clause that neither contemnor could fulfill at the time or at any time afterward. This impossibility gives rise to criminal, not civil, contempt, and makes the sanctions awarded by the trial court punitive in nature rather than coercive or remedial. RSL-3B and Gorman never held the keys to the contempt prison in their own pocket, thereby nullifying the punitive contempt order.

Nor did the trial court afford RSL-3B and Gorman the mandatory due process protections triggered by the threat of criminal contempt. The full panoply of due process protections for criminal cases attached to this charge of punitive contempt, namely the right to a jury trial, prosecution by the state, the privilege against self-incrimination, and proof beyond a reasonable doubt. *See Int'l Union, UMW v. Bagwell*, 512 U.S. 821, 826-27 (1994). Thus, the trial court abused its discretion by denying RSL-3B and Gorman their constitutional rights in a criminal contempt matter.

Indeed, Gorman, a Texas resident, remained a stranger to the litigation the entire time. Symetra never served Gorman with process to make him a formal party to the contempt proceedings and never obtained an order for him to show cause why he should avoid contempt. Gorman never otherwise appeared in the trial court to subject himself to its contempt power. Nor did the Benton County Superior Court admit him to practice *pro hac vice* in the underlying case. In violating Gorman's due

process rights, the trial court therefore issued a void contempt order as to him.

I. ASSIGNMENTS OF ERROR

1.1 **Error.** The Trial Court erred in holding RSL and its counsel E. John Gorman in contempt for disobeying the temporary restraining order when the contempt order imposed an impossible purge condition, awarded criminal sanctions without due process, and failed to make the requisite findings mandated by statute as construed by this state's courts.

1.2 **Issues Pertaining to Error.**

A. Whether the Trial Court erred in ordering sanctions for contempt despite making no finding that RSL-3B or Gorman violated the TRO "intentionally."

B. Whether the Trial Court erred in ordering sanctions for civil contempt without a valid purge clause.

C. Whether the Trial Court erred in sanctioning Gorman, a non-resident attorney that had not appeared in the Trial Court action, for violations of the TRO without due process of law.

D. Whether Gorman's conduct was sanctionable given competing duties to his clients and the Trial Court in light of the TRO.

E. Whether substantial evidence supports the Trial Court's contempt findings.

F. Whether the Trial Court imposed criminal sanctions for contempt despite labeling them as "remedial sanctions."

G. Whether the Trial Court erred in awarding Symetra attorney's fees it incurred outside of the permissible bounds of recovery.

II. STATEMENT OF FACTS

A. This Court Already Knows The Case's Background

This Court detailed the case's origins in an earlier opinion that upheld a set-off order in Symetra's favor. *See In re Application of Rapid Settlements, Ltd.*, 166 Wn. App. 683 (2012). Symetra held a judgment for attorney's fees rendered by the King County Superior Court against Rapid Settlements, Ltd. n/k/a Liquidating Marketing, Ltd. ("Rapid/LM"). The award of fees to Symetra arose under the state's Structured Settlement Protection Act ("SSPA"). Symetra owns and issues annuities that serve as the source of funds for making structured settlement payments to tort victims who have settled their suits. In this capacity, Symetra acts as the payment obligor.

Under an order issued by the Benton County Superior Court in 2005 in the SSPA transfer case, Symetra owed RSL-3B a single $60,000 annuity payment that came due on September 2, 2012. RSL-3B purchases structured settlement payment rights as an investment in what the industry calls factoring transactions. The Benton County Superior Court approved

the transfer of this $60,000 payment by Nicholas Reihs to RSL-3B under the SSPA (the "Transfer Order").

In June 2010, Symetra asked the Benton County Superior Court to modify the Transfer Order under CR 60(b). The Rule 60(b) motion requested the trial court to set off the King County judgment owed by Rapid/LM against the $60,000 payment Symetra owed to RSL-3B. The one-time payment of $60,000 would occur two years in the future. While contesting personal jurisdiction and invoking its due process rights, RSL-3B opposed the Rule 60(b) motion in the trial court.

After a summary hearing, the Benton County Superior Court granted Symetra relief under Rule 60(b) and authorized the future offset (the "Set-Off Order"). This Court affirmed the Set-Off Order in a reported opinion after RSL-3B appealed. Before the annuity payment came due on September 2, 2012, Symetra performed the offset at the end of August 2012. Symetra's offset fully extinguished the judgment debt owed by Rapid/LM, leaving no amounts due under the King County judgment.

B. RSL-3B Collaterally Attacks The Set-Off Order In Texas

On July 7, 2010, RSL-3B sued Symetra in state court in Harris County, Texas seeking to stave off any offset up in Washington. (CP 52) *See* No. 2010-41653; *RSL-3B-IL, Ltd. v. Symetra Life Insurnace Co. & Symetra Assigned Benefits Service Co.*; in the 190th Judicial District Court of Harris County, Texas. In the Texas state court action, RSL-3B brought

claims for declaratory relief, breach of contract, and fraud based on Symetra's attempt to obtain the offset in the Benton County case that had ended in 2005. (CP 54-56) The Texas state court subsequently abated the suit to enable RSL-3B to appeal the Set-Off Order to this Court.

After this Court disposed of the appeal, RSL-3B moved the Texas state court to vacate its abatement order and reinstate the case to the active docket. (CP 697-98) RSL-3B sought to reactivate the Texas action on August 14, 2012, ahead of the time the $60,000 annuity payment would mature. Before seeking such relief, RSL-3B consulted with Symetra's Texas counsel on August 9, 2012 for purposes of completing a certificate of conference. (CP 602-03, 697) On the same day, RSL-3B served Symetra with notice that the Texas court would hear the motion to vacate and a separate motion to deposit funds on August 20, 2012. (CP 71, 598-603, 697-98)

C. Symetra Obtains An Anti-Suit TRO To Stop RSL-3B

In response to the advance notice given by RSL-3B, Symetra moved the Benton County Superior Court *ex parte* for an "antisuit" TRO. (CP 1-11) Through this "antisuit injunction," Symetra sought to bar RSL-3B from taking any further action in the Texas state court that might "undermin[e] Symetra's right to offset the September 2012 payment against the King County judgment." (CP 9) Symetra filed for such relief

in the trial court on August 13, 2012, and the TRO issued against RSL-3B on August 17, 2014. (CP 1, 118, 120)

The TRO prohibited RSL-3B, and RSL-3B alone, "from taking any further action in Harris County District Court Case No. 2010-41653" and directed RSL-3B "to strike any and all pending motions in that case." (CR 119) By its own terms, the TRO would expire 14 days later on August 31, 2014. (CP 120) The TRO never states that it extends to RSL-3B's counsel in general or to its Texas counsel Gorman in particular.

On August 14, 2014, RSL-3B filed its filed amended petition in the Texas state court action joined by two secured creditors, FinServ Casualty Corp. ("FinServ") and A.M.Y. Property and Casualty Insurance Corp. ("A.M.Y."), which sought to appear as plaintiffs. (CP 697-701) The Feldman Law Firm LLP represented FinServ and A.M.Y. On the same day, FinServ and A.M.Y. joined in RSL-3B's motion to lift the stay in the Texas state court suit and reactivate the case. (CP 697-701) RSL-3B, FinServ, and A.M.Y. also moved the Texas court on August 17, 2012 to direct Symetra to deposit the $60,000 payment in the registry for safekeeping. (CP 575, 697-701)

On the night of August 20, 2012, Symetra finally served the TRO on RSL-3B and sent a copy of it by email the following day to RSL-3B's Texas counsel, John Craddock. (CP 137, 612) The TRO mentions neither FinServ nor A.M.Y. Nor does it purport to apply to them. Gorman signed

none of the pleadings or motions filed by RSL-3B in the Texas case, all of which preceded August 21, 2012. Rather, RSL-3B's "attorney in charge" John R. Craddock signed the first amended petition and other papers RSL-3B filed in the Texas court before Symetra served the TRO. *See* TEX. R. CIV. P. 8 (defining a party's attorney in charge).

D. Very Little Happens In The Texas State Court Case

On August 16, 2012, the trial judge in the Texas case recused herself, thereby canceling the hearing RSL-3B had scheduled for August 20, 2012. (CP 605, 698) The Texas case landed with a new judge on August 17, 2012, and on the same day, in a file-stamped letter, RSL-3B, along with FinServ and A.M.Y. requested a new hearing date for their motions. (CP 606-07, 698-99) On August 17, 2012, Symetra was served with notice of a hearing to take place on August 24, 2012 covering these motions. (CP 608-11, 699)

On August 21, 2012, Symetra reacted by moving to cancel or continue the hearing set by RSL-3B in the Texas court, citing the TRO. (CP 614-26, 666-681, 699) At Symetra's urging, the Texas court set Symetra's emergency motion for hearing on August 23, 2012. (CP 701-02) RSL-3B, FinServ, and A.M.Y. responded to Symetra's motion ahead of the hearing on that motion scheduled by the Texas court. (CP 682, 700) Symetra also opposed the motion filed by RSL-3B, FinServ, and A.M.Y. to lift the stay imposed by the Texas court. (CP 858)

The Texas court denied Symetra's motion to cancel the hearing on the motions filed by RSL-3B, FinServ, and A.M.Y. (CP 700, 852-53) Gorman argued for all three "plaintiffs," RSL-3B, FinServ, and A.M.Y., at that telephonic hearing. (CP 837) In concluding the hearing, the Texas court "reset" the hearing on the motions filed by RSL-3B, FinServ, and A.M.Y. to August 28, 2012. (CP 700, 853)

E. Symetra Seeks To Hold RSL-3B And Gorman In Contempt

At this point, Symetra went back to the Benton County Superior Court and sought to hold RSL-3B and Gorman in contempt for allegedly violating the TRO. (CP 152, 164) Symetra admits in this motion for contempt that Gorman only "appeared before the Washington Court of Appeals in this matter." (CP 156) No evidence proves that Gorman ever appeared in the Benton County Superior Court case, moved for admission *pro hac vice* in the trial court, or obtained permission to appear *pro hac vice* in the Benton County Superior Court.

On August 28, 2012, the Texas court heard the motions filed by RSL-3B, FinServ, and A.M.Y. to lift the stay and to deposit funds in the registry. (CP 637-64, 700) Gorman appeared at the hearing and argued on behalf of all three plaintiffs and movants in the Texas action, RSL-3B, FinServ, and A.M.Y. (CP 639-46, 659-62, 700-01) Over Symetra's opposition, the Texas court lifted the stay for the limited purpose of adding FinServ and A.M.Y. as plaintiffs. (CP 700-01, 834) Otherwise,

the Texas case remained abated until further order of the court. (CP 700-01, 834)

The Benton County Superior Court never heard Symetra's motion for contempt on August 31, 2012, because A.M.Y. removed the case to federal court. (CP 295-96) As for the Texas case, Symetra removed it to the U.S. District Court for the Southern District of Texas on September 10, 2012. (CP 519-20, 701) The federal court in Texas never remanded the case back down to the Texas state court. (*See* CP 519-21, 548) The Washington federal court, however, remanded the underlying case to the trial court, where Symetra re-urged its motion for contempt against RSL-3B and Gorman. (CP 223, 269-71, 295-96)

III. DISPOSITION IN THE TRIAL COURT

After a short hearing where it heard no testimony, the trial court found RSL-3B and Gorman in contempt on January 10, 2013. (CP 524) By that time, the case in Texas had been pending in federal court for four months. (CP 519-20) Before then, the Texas state court had left the abatement order "in force." (CP 834) Symetra took the position in the Texas state court suit that the abatement order rendered any filing null and void. (CP 700, 861, 891)

The Benton County Superior Court found that RSL-3B "has not stricken its pending motions in said lawsuit and has opposed Symetra's motion to extend the time for hearing said motions. Mr. Gorman argued

for the extension of time in a hearing on August 23, 2012 and for an abatement of the stay at a hearing on August 28, 2012." (CP 525) "Good cause" supposedly exists "for the imposition of remedial sanctions." (CP 525) The trial court also made a finding that RSL-3B "and its agent and attorney Mr. Gorman have disobeyed this Court's Temporary Restraining Order against 3B and are hereby found in contempt" (CP 525)

The contempt order required RSL-3B to pay Symetra "its costs and attorney's fees" in bringing the motion for contempt and in defending "the Harris County, Texas action between August 20, 2012, when the Court's Temporary Restraining Order was served on 3B," and January 10, 2013. (CP 526) This figure totals $47, 024.50. (CP 526) The contempt order imposed a "one-time forfeiture" of $1,000 on "Attorney Gorman, as attorney and agent for 3B." (CP 526)

The contempt order includes a purge clause mandating that RSL-3B "and its attorney Gorman must strike all pending motions in the Harris County, Texas, action and agree not to file any motions or take any other action in said case while an injunction from this Court restraining them from doing so is in effect." (CP 526) The trial court makes a finding that RSL-3B, "through the Feldman Law Firm and particularly attorney John Gorman, has continued to pursue a lawsuit in Harris County, Texas, No. 2010-41653, despite the Court's August 17, 2012, Temporary Restraining Order enjoining 3B from taking any further action is said lawsuit and

ordering 3B to strike any and all pending motions therein." (CP 525) This finding pertains to the state of affairs that supposedly exists on January 10, 2013 – that is, four months after Symetra removed the Texas state court action to federal court. (CP 519-20)

At the hearing on December 28, 2012, the trial court permanently enjoined RSL-3B from prosecuting only the Texas state court action, but not the Texas federal court action. (CP 475-77) On January 11, 2013, RSL-3B filed its sur-reply in response to Symetra's supplemental reply brief. (CP 546) This filing came within the ten-day period for submitting a motion for new trial even though RSL-3B failed to denominate it as such. (*See* CP 715)

The Benton County Superior Court refused to consider the "sur-reply" as a motion for new trial or as a sur-reply. (CP 525, 953) RSL-3B then asked the trial court to reconsider the contempt order. (CP 715) The trial court denied the motion for reconsideration on January 29, 2013. (CP 947) This appeal ensued on February 11, 2013. (CP 951) RSL-3B timely appealed the contempt order within 30 days because the deadline for doing so rolled over from the weekend. *See* RAP 18.6(a).

IV. BRIEF OF THE ARGUMENT

A. An Appeal Lies From The Final Contempt Order

This appeal challenges a final order of contempt, vesting the Court with jurisdiction. "An adjudication of contempt" qualifies as a final and

appealable order when, as here, "the contumacy – the party's willful resistance to the contempt order – is established, and the sanction is a coercive one designed to compel compliance with the court's order." *Wagner v. Wheatley*, 111 Wn. App. 9, 15-16 (2002). The trial court's order held RSL-3B and Gorman in "contempt" of the TRO and imposed what it called "remedial sanctions" on them to compel compliance. (CP 525-26) Jurisdiction over this appeal therefore lies from a final order punishing indirect contempt. *Wagner*, 111 Wn. App. at 16.

B. This Court Tests The Trial Court's Discretion

This Court reviews the contempt order to determine whether the trial court abused its discretion. *In re Pers. Restraint of King*, 110 Wn.2d 793, 798 (1988); *In re M.B.*, 101 Wn. App. 425, 454 (2000). The trial court abuses its discretion by basing its contempt ruling on an erroneous view of the law or an incorrect legal analysis. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833 (2007).

"Whether a purge clause exceeded the court's authority or violated a contemnor's due process rights, however, is a question of law, which is reviewed de novo." *In re M.B.*, 101 Wn. App. at 454. The trial court's authority to impose sanctions for contempt frames a question of law subject to de novo review. *In re Interest of Silva*, 166 Wn.2d 133, 140 (2009). The issue of statutory construction likewise poses a question of

law the Court reviews de novo. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778 (2012).

C. The Trial Court Found No Intentional Disobedience

In derogation of Washington law, the trial court applied the civil contempt statute without finding that RSL-3B and Gorman "intentionally" disobeyed the TRO. (CP 525) The civil contempt statute, which the trial court cited and supposedly followed, looks to the general contempt statute for the meaning of "contempt of court." RCW 7.21.030(1)-(2). The general contempt statute defines "contempt of court" to require "*intentional* disobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b) (emphasis added).

This Court holds "a finding that a violation of a previous court order was intentional is required for a finding of contempt." *Holiday*, 157 Wn. App. at 355. Notwithstanding this precedent, Symetra assured the trial court that "[i]n order to enter contempt sanctions for violation of a court order, the court need only find that the party or its agent disobeyed. A finding of willfulness or that the disobedience was deliberate is not required." (CP 157) (citing *Mathewson v. Primeau*, 64 Wn.2d 929 (1964)).

Yet this Court in *Holiday* rejected the holding from *Mathewson* as outdated because the legislature had amended the contempt statute since the opinion came out in 1964. *Holiday*, 157 Wn. App. at 355. Other

Washington courts likewise require the contempt order explicitly to find the essential element of intentional disobedience. *See In re Estates of Smaldino*, 151 Wash. App. 356, 364-65 (2009). Absent a finding of intentional disobedience, the trial court abused its discretion by misapplying the unambiguous contempt statute. *See Holiday*, 157 Wn. App. at 355.

D. The Order Makes Purging Contempt An Impossibility

In attempting to fashion civil contempt sanctions, the trial court improperly imposed a purge clause neither RSL-3B nor Gorman could perform at the time. RCW 7.21.030(2). The civil contempt statute demands, however, that the act entitling one to purge contempt must lie "within the person's power to perform." *Id.* The trial court classified the coercive relief as "remedial sanctions." (CP 525) But the general contempt statute similarly defines "remedial sanction" as "a sanction 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).

The contempt order directed the contemnors to "strike all pending motions in the Harris County, Texas, action, and agree not to file any motion or take any other action in said case while an injunction from [the trial court] restraining them from doing so is in effect." (CP 526) In the contempt order, the trial court unmistakably identifies the "Harris County,

Texas action" as "a lawsuit in Harris County, Texas, No. 2010-41653." (CP 525-26)

The contempt order leaves no doubt the "Harris County, Texas action" can only mean *the state court suit* initiated by RSL-3B under that cause number in July 2010 in the 190th District Court of Harris County, Texas. An intra-court transfer later moved the "Harris County, Texas action" to another court in Harris County, Texas months before the trial court signed the contempt order. Shortly thereafter, Symetra removed the state court case to the Texas federal court on September 10, 2012 – four months before the contempt order issued. *See* 28 U.S.C. §§ 1441, 1446. The act of removal "federalized" the Texas action by moving it out of the state forum and into the federal one, where the suit remains pending. *See Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1303-04 (5th Cir. 1988).

The "Harris County, Texas action" ceased to exist once Symetra removed the case to federal court in September 2012, thereby divesting the Texas state court of jurisdiction. No way remained for RSL-3B and Gorman to purge the contempt by "striking all pending motions in the Harris County, Texas, action" or by "agree[ing] not to take any other action in said case." (CP 526) As such, the affirmative defense of impossibility protects RSL-3B from civil contempt. *See United States v. Rylander*, 460 U.S. 752, 757 (1983); *In re Pers. Restraint of King*, 110 Wn.2d at 804. "Where compliance is impossible, neither the moving party

nor the court has any reason to proceed with the civil contempt action." *Rylander*, 460 U.S. at 757.

The wording of the contempt order made it impossible for RSL-3B and Gorman to purge themselves of contempt as a matter of law. The Texas state court "lost jurisdiction" to take any action in the case once Symetra removed it to the Texas federal court. *Iowa Cent. Ry. v. Bacon*, 236 U.S. 305, 310 (1915); *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882); *E.D. Sys. Corp. v. Sw. Bell Tel. Co.*, 674 F.2d 453, 457-58 (5th Cir. 1982). After removal, any actions or events that occur in the Texas state court proceedings "are void." *Bacon*, 236 U.S. at 310; *Meyerland Co. v. FDIC*, 848 S.W.2d 82, 83 (Tex. 1993) (per curiam). Federal law imposed a "duty on the State court . . . to proceed no further in the cause" once Symetra removed the case. *Tugman*, 106 U.S. at 122; *see* 28 U.S.C. § 1446(d) (codifying this same mandate).

If RSL-3B and Gorman moved the Texas state court to strike all pending motions, the court issued by that court after removal would be "*coram non judice*" – that is, void. *Tugman*, 106 U.S. at 122; *E.D. Sys. Corp.*, 674 F.2d at 457-58; *Meyerland Co.*, 848 S.W.2d at 83. "The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, *see Bowser v. Collins*, Y.B. Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng. Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b,

77a, 77 Eng. Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase coram non judice, 'before a person not a judge' – meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment." *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 608-609 (1990).

The trial court abused its discretion by failing to make the threshold finding that RSL-3B and Gorman could fulfill the purge condition at the time the contempt order issued. *See Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-34 (2005). In Washington, "exercise of the contempt power is appropriate only when '*the court finds* that the person has failed or refused to perform an act that is yet *within the person's power to perform.*' Thus, a threshold requirement is a finding of *current* ability to perform the act previously ordered." *Id.* (emphasis in original). Absent this requisite finding, "the contempt was not coercive but impermissibly penal." *Id.* at 934.

According to Symetra, moreover, the abatement order issued by the Texas state court would render any attempt by RSL-3B or Gorman to strike "all pending motions" "void" and "a nullity." (CP 700, 861, 891) "Abatement precludes the trial court and parties from going forward in any manner until the case has been ordered reinstated. Pleadings, such as Plaintiff's First Amended Original Petition purporting to add FinServ and

A.M.Y. as additional parties, are void." (CP 861) (citing *In re Kimball Hill Homes Tex., Inc.*, 969 S.W.2d 522, 527 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). As a result, RSL-3B and Gorman could never satisfy the purge condition.

E. Attorney Gorman Lacked Authority To Act Unilaterally

The trial court similarly devised an impossible purge condition by requiring Gorman to take action as an attorney without his clients' consent or knowledge. RCW 7.21.010(3), 7.21.030(2). Gorman lacked the authority as RSL-3B's counsel to act on his client's behalf in order to purge himself of contempt. "An attorney is without authority to surrender a substantial right of a client unless the client grants specific authority to do so." *In re Marriage of Maxfield*, 47 Wn. App. 699, 707 (1987). Nor would taking such unilateral action comport with Gorman's ethical obligations as RSL-3B's counsel. *See In re Dann*, 136 Wn.2d 67, 79-80 (1998). To hold otherwise would elevate Gorman's personal interest in avoiding contempt over his client's right to receive open, honest, and good faith advice from counsel. *See Cunningham v. Hamilton County*, 527 U.S. 198, 206-07 (1999); *Dike v. Dike*, 75 Wn.2d 1, 14-16 (1968).

In the Texas state court action, Gorman represented not only RSL-3B, but also the secured creditors FinServ and A.M.Y. Unrestrained by the TRO, FinServ and A.M.Y. filed a motion to require Symetra to deposit the $60,000 annuity payment in the Texas state court's registry. During its

short duration, the TRO applied to neither FinServ nor A.M.Y. as nonparties in the Washington litigation. (CP 118-20, 304-05)

Yet the purge clause broadly directed Gorman to "strike all pending motions . . . and agree not to file any motion or take any other action" in the Texas court case. To do so would impair the rights of two litigants (FinServ and A.M.Y.) that were not subject to the TRO's narrow scope. *See Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 436-37 (1934) (injunction does not apply to a nonparty).

In other words, the purge clause impermissibly took the keys to the contempt prison out of Gorman's pocket and gave them to FinServ and A.M.Y. *See Bagwell*, 512 U.S. at 828-29; *In re Pers. Restraint of King*, 110 Wn.2d at 800; *In re M.B.*, 101 Wn. App. at 439-40. The trial court abused its discretion in conditioning the purge clause so that it would deprive FinServ and A.M.Y. of their rights as litigants. *See United States v. Int'l Bhd. of Teamsters*, 899 F.2d 143, 147, 149 (2d Cir. 1990) (holding that one cannot be required to "surrender the rights of other parties" to purge contempt). The Court should vacate the punitive contempt order.

F. "Remedial Sanctions" Turned Into Criminal Contempt

The trial court mislabeled penalties for criminal contempt as "remedial sanctions" that normally give rise to civil contempt. (CP 525) To impose an impossible condition in the purge clause transforms the coercive purpose of civil contempt into the punitive weapon of criminal

contempt. *See Bagwell*, 512 U.S. at 828-29; *In re Pers. Restraint of King*, 110 Wn.2d at 800; *In re M.B.*, 101 Wn. App. at 439-40. Labels aside, the character and purpose of the relief determines whether a contempt order imposes coercive or punitive sanctions. *Bagwell*, 512 U.S. at 827-29, 838. The fatally defective purge clause in the contempt order here transforms the so-called "remedial sanctions" into criminal contempt. *See id.*

Acting as judge, jury, and prosecutor, the trial court afforded RSL-3B and Gorman none of the due process protections mandated by a criminal contempt proceeding. *See id.* at 826-27; *In re M.B.*, 101 Wn. App. at 439-40. These due process protections include the right to a jury trial, prosecution by the state, the privilege against self-incrimination, and proof beyond a reasonable doubt. *Bagwell*, 512 U.S. at 827-29; *In re M.B.*, 101 Wn. App. at 439-40. A void contempt order resulted when the trial court deprived RSL-3B and Gorman of due process. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *In re Pers. Restraint of King*, 110 Wn.2d at 800.

"Criminal contempt is a crime in the ordinary sense and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Bagwell*, 512 U.S. at 826 (omitting quotation marks and citations). The trial court failed to issue and serve a show cause order on both RSL-3B and Gorman advising them of the criminal charges against them.

Burlingame v. Consol. Mines and Smelting Co., Ltd., 106 Wn.2d 328, 336-37 (1986). Absent such notice to satisfy the requirements of due process, the trial court lacked jurisdiction to issue the contempt order. *Id.* at 332-33.

G. Zealous Representation In Good Faith Precludes Contempt

By zealously representing his clients in good faith in the Texas state court action, Gorman can defeat the contempt charge here. "The familiar benchmark of the attorney-client relationship is that '[a]ttorneys have a duty of zealously representing their clients within the bounds of the law.'" *In re Dann*, 136 Wn.2d at 79 (quoting *Bohn v. Cody*, 119 Wn.2d 357, 367 (1992)). "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." *In re Watts*, 190 U.S. 1, 29 (1903). "There is nothing in the [contempt] statute to indicate that it was intended to include one who in good faith advises the wrong." *State v. N. Shore Boom & Driving Co.*, 55 Wash 1, 13, (1910).

Far from offending the dignity of the trial court or willfully defying the TRO, Gorman represented more than RSL-3B's interests in the Texas state court case. Gorman also advocated for FinServ and

A.M.Y., two parties to which the TRO never applied. RSL-3B based its claims in the Texas state court action on case law authorizing collateral attacks on void state court judgments. (CP 530, 727-28)

When the contempt order issued, Gorman faced a Hobson's choice – he could attempt to either purge the contempt or he could carry out his ethical obligations to follow all of his clients' instructions. The purge condition placed Gorman at odds with his clients by directing him to perform an affirmative act that disserved their interests. Gorman lacked the authority to take such action independently of his clients' wishes. As an attorney, Gorman must elevate his clients' interests over his own. *In re Dann*, 136 Wn.2d at 79 (quoting *Bohn*, 119 Wn.2d at 367)).

Gorman signed no pleadings or motions in the Texas state court action, and never acted as the "attorney in charge" for RSL-3B. *See* TEX. R. CIV. P. 8. While the TRO was in effect, the entirety of Gorman's participation in the Texas state court action consisted of attending two hearings set *by the Texas state court*. One hearing concerned *Symetra's* request for emergency relief and request for an emergency hearing. The other hearing related to relief requested by all three Plaintiffs – RSL-3B, FinServ, and A.M.Y. (CP 532, 736-37)

RSL-3B relied on its counsel's advice in collaterally attacking the Set-Off Order as void in the Texas state court action. RSL-3B's attorneys relied on U.S. and Washington Supreme Court precedent validating such

actions. (CP 530, 533, 535) *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-83 (1982); *Fuller v. Ostruske*, 48 Wn.2d 802, 814-15 (1956). U.S. Supreme Court authority further shielded RSL-3B and Gorman from contempt for failing to purge after Symetra removed the Texas state court action to federal court. *See Donovan v. City of Dallas*, 377 U.S. 408, 412-14 (1964). In light of this precedent, Gorman advised his clients in good faith and thereby should avoid contempt. *See Mannes v Meyers*, 419 U.S. 449, 465 (1975).

H. No Evidence Supports The Trial Court's Contempt Findings

In issuing its January 10, 2013 contempt order, the trial court disregarded the only permissible view of the undisputed evidence in making certain findings against RSL-3B and Gorman. The trial court found that RSL-3B, "through the Feldman Law Firm and particularly attorney John Gorman, ha[ve] continued to pursue a lawsuit in Harris County, Texas, No. 2010-41653, despite the Court's August 17, 2012, Temporary Restraining Order enjoining 3B from taking any further action is said lawsuit and ordering 3B to strike any and all pending motions therein." (CP 525)

The trial court also found that RSL-3B "has not stricken its pending motions in said lawsuit and has opposed Symetra's motion to extend the time for hearing said motions. Mr. Gorman argued for the extension of time in a hearing on August 23, 2012 and for an abatement of

the stay at a hearing on August 28, 2012." (CP 525) "Good cause" supposedly existed "for the imposition of remedial sanctions." (CP 525) Finally, the trial court also found that RSL-3B "and its agent and attorney Mr. Gorman have disobeyed this Court's Temporary Restraining Order against 3B and are hereby found in contempt." (CP 525)

When the contempt order issued, Symetra had removed the Texas state court action to federal court four months earlier. (CP 519-20, 526) This inescapable fact, which finds ample support in the record, disproves the trial court's findings that RSL-3B "has continued to pursue" the Texas state court action as no such proceeding existed after removal on September 10, 2012. Nor could RSL-3B and Gorman "strike any and all pending motions" in a nonexistent case.

The TRO took effect for two weeks – from August 17, 2012 to August 31, 2012. Symetra served RSL-3B on the night of August 20, 2012, meaning RSL-3B could comply with its terms for fewer than ten court days. The contempt order, which issued on January 10, 2013, could only capture past acts completed long ago by RSL-3B and Gorman. In effect, the contempt order is reinstating the TRO's terms even though that order expired at the end of August 2012.

The character and purpose of the contempt order exemplifies punitive sanctions – punishing "a completed act of disobedience" instead of coercing future compliance. *Bagwell*, 512 U.S. at 828-29; *Gompers v.*

Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911). In short, criminal and civil contempt differ in what and how they penalize: "Punishment in criminal contempt cannot undo or remedy the thing which has been done, but in civil contempt punishment remedies the disobedience." *Bagwell*, 512 U.S. at 841 (Scalia, J., concurring) (quoting *In re Fox*, 96 F.2d 23, 25 (3d Cir. 1938)).

In its motion for contempt, Symetra sought punitive as opposed to coercive sanctions. (CP 158-59) In particular, Symetra requested "a one-time forfeiture of [$1,000] be ordered against attorney Gorman personally, as a sanction for his disobedience." (CP 159) The contempt motion targeted RSL-3B for punishment because it "clearly and flagrantly disobeyed this Court's TRO by continuing to pursue the Texas action." (CP 158) Thus, the trial court erred in finding that "good cause" merits an award of "remedial sanctions" against RSL-3B and Gorman.

I. Symetra Recovered More Fees Than The Law Allows

In the context of awarding attorney's fees against a party held in contempt of court, RCW 7.21.030(3) provides:

> 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.

RCW 7.21.030(3).

The provision thus gives the court discretion to order that the party found in contempt to pay for losses incurred "as a result of the contempt" and costs and reasonable attorneys fees "incurred in connection with the comtempt proceeding . . .." *Id.*; *see Parentage of Schroeder*, 106 Wn. App. 343, 353, 22 P.3d 1280 (2001). The trial court has discretion in setting the amount of attorney fees in a contempt action, but only so long as the fees are reasonable and *incurred as a result of noncompliance with a court order*. *See Edwards v. Edwards*, 83 Wn. App. 715, 724-25 (Wash. Ct. App. 1996).

The trial court awarded Symetra costs and attorney's fees for filings that were not "as a result of the contempt" and awarded costs that were not "incurred in connection with the contempt proceeding." These include the costs and fees awarded for the removal and remand filings in both the Texas and Washington federal courts, the filings related to RSL-3B's Motion for Vacate the Abatement and the Motion to Deposit, and responding to RSL-3B's Motion to Transfer to Judge Lake's Court.

As for the remand filings in the federal courts, it is beyond dispute that RSL-3B cannot be held in contempt for prosecuting the Texas federal court action. *See Donovan*, 377 U.S. at 412-14. Furthermore, the cases were not removed because of any contempt proceedings and are certainly not "as a result of the contempt." *Id.* The contempt order is erroneous

because the attorney fees and costs awarded are not authorized by RCW 7.21.030's language. *See Edwards*, 83 Wn. App. at 724-25.

In those 10 days that the TRO was in effect, RSL-3B was forced by Symetra to file a response to Symetra's Emergency Motion for Continuance, on which the Texas state court held a hearing, at Symetra's request. After that hearing, the Texas state court ordered another hearing to be held on the motion to vacate, which had been filed and set for hearing before the TRO issued. Thus, between August 20 and August 31, the days on which RSL-3B had notice of the TRO, any action taken by RSL-3B in the Texas state proceedings was caused by Symetra's own filing or by court order or requirement, precluding a recovery of fees.

On November 30, 2012, the Court extended the TRO, even though the first TRO had already lapsed two months prior. RSL-3B could not violate the continued TRO because by the time it was issued, Symetra had removed the Texas state court action to federal court on September 10, 2012. The Texas state court action had been abated before removal, such that little activity occurred therein.

Further, the award of Symetra's attorney fees and costs for filings related to the removal and remand of this case is improper because they have no relation to the alleged bases or proceedings underlying the Contempt Order. *See In Re Parentage of Schroeder*, 106 Wn. App. at 353. No mention of the contempt proceedings are made in the removal and

remand filings, nor *vice versa*. Likewise, a ruling on one does not affect the ruling on the other. The removal and remand filings result neither from the contempt nor in connection with the contempt proceedings, precluding an award of fees. *Edwards*, 83 Wn. App. at 724-25 (holding trial court did not abuse discretion by declining to award attorneys fees and costs for first of two contempt motions because it was never resolved and was therefore not connected with the contempt proceeding that was resolved); *see also In Re Parentage of Schroeder*, 106 Wn. App. at 354 (holding party not entitled to attorneys fees for fees generated before order of contempt entered and reversing and remanding for recomputation of award).

RSL-3B removed the case below, and it was subsequently remanded by the United States District Court for the Eastern District of Washington. The order granting remand provides "each party shall bear its own fees and costs in connection with this removal." (CP 270) The Contempt Order is contrary to the federal court order.

VI. ATTORNEY'S FEES

Pursuant to RAP 18.1(a), reasonable attorneys' fees may be recovered on appeal where provided for by the underlying law. IN Washington, attorneys' fees are recoverable if authorized by a stateu, contract, or by a recognized basis in equity. *Fisher Porps., Inc. v. Arden Mayfair, Inc.*, 106 Wn.2d 826, 849-50 (1986). Symetra sought and

utilized the trial courts jurisdiction to obtain the contempt order in derogation of Washington law. Symetra should thus be denied any recovery of fees on appeal and RSL-3B and Gorman awarded their attorneys' fees in order to be made whole.

VII. PRAYER FOR RELIEF

The trial court mistakes coercive sanctions for punitive ones. Without following the contempt statute, the trial court awarded Symetra monetary sanctions. The trial court never found "intentional" disobedience as mandated by the general contempt statute and failed to afford RSL-3B and Gorman due process that attaches to criminal proceedings.

Appellants RSL-3B-IL, Ltd. and Gorman therefore pray that the Court will reverse and vacate the contempt order and render judgment that Symetra take nothing. In the alternative, the Court should vacate the contempt order and remand for further proceedings. Finally, the Court should tax costs of this appeal against Symetra, award Appellants their reasonable and necessary attorney's fees on proper application to be presented after prevailing, and grant such other available relief as authorized by Washington law.

RESPECTFULLY SUBMITTED on November 6th, 2014.

TELQUIST ZIOBRO MCMILLEN CLARE, PLLC

GEORGE E. TELQUIST, WSBA #27203

1321 Columbia Park Trail
Richland, WA 99352
(509) 737-8500

Counsel for Appellants RSL-3B-IL,
Ltd. and E. John Gorman

DECLARATION OF SERVICE

On the 6TH day of November, 2014, I caused to be served a true and correct copy of the within document (AMENDED BRIEF OF APPELLANTS RSL-3B-IL, LTD AND E. JOHN GORMAN) to be served on all interested parties to this action as follows:

Medora A. Marisseau Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle, Washington 98104 Phone: (206) 223 1313 Facsimile: (206) 682 7100 Email: mmarisseau@karrtuttle.com Counsel for Plaintiffs	□ Hand Delivery X U.S. Mail, postage prepaid □ Overnight Mail □ Facsimile Transmission X Via Electronic Mail

Amber Peters

AMBER PETERS,
Legal Assistant to George E. Telquist