93574-7



No. 314359

IN THE SUPREME COURT OF WASHINGTON

ON PETITION FOR REVIEW FROM
DIVISION THREE OF THE COURT OF APPEALS

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

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

Petitioners

v.

SYMETRA LIFE INSURANCE COMPANY and
SYMETRA ASSIGNED BENEFITS SERVICES COMPANY,

Respondents



# PETITION FOR REVIEW
SUBMITTED BY RSL-3B-IL, LTD. and E. JOHN GORMAN

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1. The Court will determine whether the contempt order that purports to award "remedial sanctions" to Symetra Life Insurance Company and Symetra Assigned Benefits Service Company ("Symetra") actually assesses punitive sanctions against RSL-3B and Mr. Gorman by punishing them for past acts and by imposing a purge clause whose conditions neither contemnor could ever perform.

2. The Court will determine whether the contempt order that purports to award "remedial sanctions" to Symetra comports with the state contempt statutes, with due process protections, and with case law that distinguishes between civil and criminal contempt.

3. The Court will determine whether RSL-3B and Mr. Gorman waived their complaint that they could never perform the purge clause's conditions when this Court's precedent entitles contemnors to raise this challenge at regular intervals and petitioners voiced their specific objections not only at the contempt hearing, but also in motions to set aside the contempt order.

MAY IT PLEASE THE COURT:

In a published opinion, the Court of Appeals misapplied the state statutes and case law that differentiate between civil and criminal contempt. The Court of Appeals erred by treating punitive sanctions that punish RSL-3B-IL, Ltd. ("RSL-3B") and E. John Gorman for past acts as "remedial sanctions" that would supposedly coerce compliance with an expired temporary restraining order ("TRO"). In the process, the lower court indulged in a textbook example of circular reasoning: by conducting "civil contempt proceedings," the trial court meted out remedial sanctions that in turn brand the contempt as civil. Op. at 2, 22 & n.7. In derogation of binding precedent, this false premise would preclude criminal contempt from ever occurring in a civil case because a civil case will always beget civil contempt. *See* Op. at 22 n.7.

This erroneous analysis contravenes not only the contempt statutes, which impose no such litmus test, but also this Court's seminal decision that sets the standard for distinguishing between civil and criminal contempt. *See In re Pers. Restraint of King*, 110 Wn.2d 793, 799-800 (1998). The nature and character of the relief itself determine whether the trial court held RSL-3B and Mr. Gorman in civil or criminal contempt, not whether the contempt citation arose out of a civil case. *See id.* The Court should correct this misconception for the bench and bar alike, not to mention those facing contempt charges.

The published opinion also creates uncertainty over the meaning of the operative phrase "intentional disobedience of any lawful order of the court" in the general contempt statute. Until now, Division Three held that "a finding that a violation of a previous court order was intentional is required for a finding of

contempt." *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355 (2010). Retreating from this unequivocal holding, the court below now says its precedent means "only that an individual must act intentionally to be found in contempt of court." Op. at 21. An "implicit" finding that any intentional act occurred will suffice under this new test, rather than an intentional violation of the previous court order. *See* Op. at 20-21. Public policy dictates that the Court should clarify the statutory standard muddied by the published opinion.

"In determining whether sanctions are punitive or remedial, courts look not to the 'stated purposes of a contempt sanction,' but to whether it has a coercive effect – whether 'the contemnor is able to purge the contempt and obtain his release by committing an affirmative act.'" *In re Dependency of A.K.*, 162 Wash.2d 632, 646 (2007) (quoting *Int'l Union, UMWA v. Bagwell*, 512 U.S. 821, 828 (1994)). The general contempt statute and the civil contempt statute likewise codify this coercive element as the definitive factor. *See* RCW 7.21.010(3), 7.21.030(2).

In Washington, civil contempt results only after the trial court first "finds that the person has failed or refused to perform an act that is yet within the person's power to perform." RCW 7.21.030(2). No such finding exists here. By disregarding the "threshold requirement [that the court make] a finding of *current* ability to perform the act previously ordered," the Court of Appeals created a conflict this Court must resolve. *See Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-34 (2005), *review denied*, 156 Wn.2d 1032 (2006). The Court should grant review to resolve this conflict in the case law.

## STATEMENT OF THE CASE

### A. The Contempt Order Originates With A Prior Offset

On August 6, 2010, the Benton County Superior Court signed an order purporting to offset two judgments (the "Set-Off Order"). Rapid Settlements, Ltd. ("Rapid") owed an unpaid judgment for attorney's fees to Symetra, while Symetra owed RSL-3B a $60,000 annuity payment under the other. To offset judgments that involved different parties, Symetra sought to establish mutuality *via* an alter ego theory. The day before the hearing, Symetra filed a reply brief that raised alter ego for the first time. The Benton County Superior Court agreed Rapid and RSL-3B are "one in the same" at a non-evidentiary hearing that took place on July 10, 2010. In RSL-3B's appeal, the Court of Appeals affirmed the Set-Off Order and alter ego finding. *See In re Application of Rapid Settlements, Ltd.*, 166 Wn. App. 683 (2012).

### B. RSL-3B's Collateral Attack In Texas Draws A TRO

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. RSL-3B filed suit in Texas before the set-off hearing occurred in the Benton County court three days later. 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 an offset. (CP 54-56) The Texas state court subsequently abated the suit to enable RSL-3B to appeal the Set-Off Order to the Washington Court of Appeals. (CP 456)

After that appeal failed, 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 come due. (CP 593-94) 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 593-94, 602-03, 697) The same day, RSL-3B served Symetra with a notice setting the hearing date on two motions in the Texas court for August 20, 2012. (CP 71, 594, 598-603, 697-98)

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

The TRO prohibits RSL-3B, and RSL-3B alone, "from taking any further action in Harris County District Court Case No. 2010-41653" and directs 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 or to its Texas counsel Mr. Gorman.

### C. RSL-3B's Actions In Texas Precede Service Of The TRO

On August 14, 2014, RSL-3B filed its first amended petition in the Texas

state court action joined by two secured creditors, FinServ Casualty Corp. ("FinServ") and A.M.Y. Property and Casualty Corp. ("A.M.Y."). (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) Neither FinServ nor A.M.Y. had ever appeared or participated in the Benton County litigation.

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 as strangers to the Benton County litigation. Mr. Gorman signed none of the filings submitted by RSL-3B in the Texas case, all of which but one predated service of the TRO.

**D. Symetra Baits RSL-3B In Texas To Take Action**

On August 21, 2012, Symetra moved 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 date 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 request to cancel the hearing on the motions filed by RSL-3B, FinServ, and A.M.Y. (CP 700, 852-53) Mr. Gorman argued for all three of those "plaintiffs" 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 Targets RSL-3B And Mr. Gorman For Contempt**

At this point, Symetra went back to the Benton County Superior Court and sought to hold RSL-3B and Mr. Gorman in contempt for allegedly violating the TRO. (CP 152, 164) Symetra admits in its motion for contempt that Mr. Gorman only "appeared before the Washington Court of Appeals in this matter." (CP 156) Mr. Gorman never appeared in the Benton County Superior Court case, never moved for admission *pro hac vice* in the trial court, and never 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) Mr. 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 trial court never heard Symetra's motion for contempt on August 31, 2012, because *FinServ* removed the Washington case to federal court. (CP 295-96)

*Symetra* removed the Texas case 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 continues to exercise jurisdiction over that case. (*See* CP 519-21, 548) So, no "Harris County, Texas action" exists anymore. After the Washington federal court remanded the case, Symetra re-urged its motion for contempt. (CP 223, 269-71, 295-96)

**F. The Trial Court Classifies The Sanctions As Remedial**

After a short hearing without any testimony, the trial court found RSL-3B and Mr. Gorman in contempt on January 10, 2013. (CP 524) By that time, the Texas case Symetra removed to federal court had been pending there for four months. (CP 519-20) On August 30, 2012, moreover, Symetra offset against the $60,000 annuity payment – accomplishing the very act the TRO sought to ensure would happen. (CP 995 n.3) Thus, RSL-3B could no longer take any action that would, in the TRO's own words, "undermin[e] Symetra's right to offset the September 2012 payment against the King County judgment." (CP 9)

The contempt order identifies the "Harris County, Texas action" prosecuted by RSL-3B as "a lawsuit in Harris County, Texas, No. 2010-41653." (CP 525-26) When the TRO issued in mid-August 2012, the Texas federal court action had yet to exist because Symetra removed the "Harris County, Texas action" on September 10, 2012. (CP 519-20) The TRO, which the contempt order enforces, could never relate to or reference the Texas federal court case that had not even begun.

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 requires 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 further 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 Mr. Gorman to "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) In this sense, the purge clause enforces something *other than the TRO* – the original order under which Symetra moved for contempt. (*See* CP 118-20, 152-59) The TRO expired on August 31, 2012, so it was no longer "in effect" when the contempt order issued. (CP 120)

The trial court made 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 in 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) No "lawsuit in Harris County, Texas, No. 2010-41653," remained pending at that time. Nor did the TRO continue in effect beyond August 31, 2012. (CP 120)

## ARGUMENT AND AUTHORITIES

### A. The Nature Of The Relief Confirms A Punitive Sanction

The Court of Appeals disregarded decades of Washington case law and U.S. Supreme Court precedent in characterizing the contempt as "civil." Op. at 16, 22 & n.7. Rather than focusing on "the character of the relief" granted by the trial court, the Court of Appeals zeroes in on the nature of the proceeding itself to conclude that the trial court imposed a coercive sanction. *See In re Pers. Restraint of King*, 110 Wn.2d at 799-800. According to the court below, merely treating a motion for contempt as a civil matter *ipso facto* gives rise to civil contempt. Op. at 22 & n.7.

The Court of Appeals incorrectly concludes the trial court awarded coercive sanctions because, on its face, "[t]he proceeding was initiated and conducted as a civil contempt proceeding." *Id.* As the lower court's analysis goes, coercive or remedial sanctions supposedly sprang out of this "civil contempt proceeding." *Id.* This erroneous reasoning turns long-standing legal principles governing contempt on their head and conflicts with this Court's opinions.

This Court follows the framework articulated by the U.S. Supreme Court in

*Bagwell*. In differentiating between punitive and coercive sanctions, this Court will "look to the substance of the proceeding and the character of the relief that the proceeding will afford." *In re Pers. Restraint of King*, 110 Wn.2d at 799. The context and purpose of the sanction therefore render immaterial the trial court's attempt to characterize the relief it awarded Symetra as "remedial." (CP 525) 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 U.S. Supreme Court's most famous case on contempt debunks the flawed reasoning used by the Court of Appeals. In *Bagwell*, the Supreme Court held that a trial court cited a union for *criminal* contempt and awarded *punitive* sanctions in the form of fines even though the case progressed in federal court as a *civil* action arising out of a labor dispute. *Bagwell*, 512 U.S. at 823-24, 838. The Supreme Court laid down the rule, long followed by Washington courts, "that whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved," *id.* at 827, not on whether "[t]he proceeding was initiated and conducted as a civil contempt proceeding." Op. at 22 n.7. In flatly refusing to analyze the contempt proceedings as criminal, the Court of Appeals erred in the process. *See id.*

Division Three failed to follow its own precedent for classifying the contempt as civil by looking to the "character of the relief." *See State v. John*, 69 Wn. App. 615, 618-20 (1993). The punitive sanctions punish past acts allegedly committed by RSL-3B and Mr. Gorman – acts those parties can never undo, take back, or correct. RSL-3B and Mr. Gorman can never comply with the TRO's terms that prohibit them

from taking any action in "Harris County District Court Case No. 2010-41653." Indeed, the TRO expired of its own accord on August 31, 2012, and "Harris County District Court Case No. 2010-41653" no longer exists after Symetra removed the entire action to federal court on September 10, 2012.

The inescapable "nature" of the relief ordered by the trial court serves as the hallmark of a punitive sanction and criminal contempt. *See State v. Buckley*, 83 Wn. App. 707, 711, 713-14 (1996); *In re Interest of M.B.*, 101 Wn. App. 425, 438-39, 444-45, 447 (2000), *review denied*, 142 Wn.2d 1027 (2001). Thus, "conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from the 'subjective intent of a State's laws and its courts,' but 'from an examination of the character of the relief sought.'" *Bagwell*, 512 U.S. at 828 (quoting *Hicks v. Feiock*, 485 U.S. 624, 635-36 (1988)). The Court of Appeals performed the wrong "examination," thereby creating a conflict within the state and contravening U.S. Supreme Court precedent.

As *In re Interest of M.B.* aptly points out, a truant child "can never go to school yesterday." *See* 101 Wn. App. at 448. Because the contempt order issued by the trial court here seeks to turn back the hands of time and force RSL-3B and Mr. Gorman to perform tasks retroactively, a punitive sanction exists. "When the contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect." *Bagwell*, 512 U.S. at 829. Even when the contempt order imposes both civil and criminal relief, "the criminal feature of the order is dominant and fixes its character for purposes of review." *Hicks*, 485 U.S. at 638 n.10.

By avoiding the dispositive "character" of the relief awarded by the trial court, the Court of Appeals erred in branding the contempt as civil.

**B. Division Three Reverses Its Own Precedent Sub Silentio**

Reducing its holding from *Holiday v. City of Moses Lake* to a mere "statement," Division Three overruled itself without convening en banc. Op. at 20. In *Holiday*, the court construed the contempt statute and held unequivocally that "a finding that a violation of a previous court order was intentional is required for a finding of contempt." 157 Wn. App. at 355. This holding remained the law in Division Three until the court below issued its opinion here. *See In re Marriage of Hess*, 178 Wn. App. 1010, 2013 WL 6255171, at *1 (2013) (unpublished opinion).

The *Holiday* court, speaking through two of the same justices here, rejected "the Holidays' contention" on appeal that "argu[ed] a finding that a violation of a previous court order was intentional was not required for a contempt finding." *Holiday*, 157 Wn. App. at 355. "Thus, contrary to the Holidays' contention, a finding that a violation of a previous court order was intentional is required for a finding of contempt." *Id.* Under *stare decisis*, *Holiday* bound the Court of Appeals.

Casting *Holiday* aside, along with the *Hess* case that reaffirmed its holding, the Court of Appeals creates a new acid test for finding contempt – one requiring "only that an individual must act intentionally to be found in contempt of court." Op. at 21. In other words, contempt may now rest on "an implicit finding" that one's "acts and omissions *were* intentional." Op. at 21. Before this published opinion lowered the standard for contempt, "[a] contempt ruling must be supported by *a*

*finding that a violation of a previous court order was intentional.*" *In re Marriage of Hess*, 2013 WL 6255171, at *1 (emphasis added).

An "implicit finding" that "acts or omissions were intentional" falls far short of finding that one intentionally violated the previous court order – here the TRO. In downplaying the significance of that original order as it relates to the finding of contempt, the Court of Appeals again contravenes Washington law. *See* Op. at 32. In derogation of Washington law, the Court of Appeals failed to strictly construe the TRO as the order supposedly disobeyed by RSL-3B and Mr. Gorman. *See Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 712-13, 715 (1982); *State, Dep't of Ecology v. Tiger Oil Corp.*, 166 Wash. App. 720, 768 (2012). The Court of Appeals instead goes well beyond the TRO's four corners, thereby creating confusion and uncertainty for judges, practitioners, and those facing contempt. Op. at 32-33.

Any ambiguity or confusion created by the TRO precludes a finding of contempt, making the precise wording of that original order essential to the contempt analysis. *See Tiger Oil Corp.*, 166 Wash. App. at 769-72. Yet the contempt order upheld by the Court of Appeals extends beyond the TRO' terms in five ways. First, the TRO expired on August 31, 2012, but the contempt order improperly carries the TRO's provisions forward to January 2013. Second, RSL-3B could take no action to "undermine" the Set-Off Order as directed by the TRO because Symetra already took advantage of that remedy and offset at the end of August 2012.

Third, the Texas state court lost jurisdiction over the lawsuit defined by the TRO as "Harris County District Court Case No. 2010-41653" once Symetra removed

the case to federal court. *See Iowa Cent. Ry. v. Bacon*, 236 U.S. 305, 310 (1915). After removal, any actions or events that occur in the Texas state court proceedings "are void." *Id.*; *accord Meyerland Co. v. FDIC*, 848 S.W.3d 82, 83 (Tex. 1993) (per curiam). Thus, RSL-3B, Mr. Gorman, and the Texas state court could take no valid action in the Texas state court case after the federal court assumed jurisdiction, rendering the purge clause useless for enforcing the TRO. Under the terms of the contempt statutes, RSL-3B and Mr. Gorman lacked the ability "to perform an act that is yet in the person's power to perform." RCW 7.21.010(3), 7.21.030(2).

Fourth, the contempt order's purge clause requires RSL-3B and Mr. Gorman to "agree not to file any motion 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 TRO expired on August 31, 2012, but this wording in the purge clause also applies to the permanent injunction granted by the trial court on December 28, 2012. (CP 475) The permanent injunction prohibits RSL-3B from taking action in the Texas state court, but not in the Texas federal court case. (CP 476) *See Donovan v. City of Dallas*, 377 U.S. 408, 412-14 (1964). Notably, the purge clause held up on appeal even though Symetra never moved for contempt citing any violation of the permanent injunction, and the trial court never held RSL-3B and Mr. Gorman in contempt for violating the permanent injunction.

Fifth, the Court of Appeals fails to explain how the trial court can make an "implicit finding" of "intentional acts or omissions" when Symetra never asked the court to do so. Symetra's motion for contempt – the operative filing that sought relief

below – made no request for such a finding, explicit, implicit, or otherwise. On the contrary, the motion urged the opposite – that the trial court could find contempt even in the absence of "willfulness" or "deliberate disobedience." (CP 157) Given this binding allegation, a fatal variance divides the contempt finding and the motion.

In stark contrast, the trial court found only that "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) This explicit finding in the contempt order omits the critical statutory element of "intentional disobedience." To cure this fatal defect, the Court of Appeals impermissibly rewrites the finding to add the key term "intentionally." Yet the principle of strict construction that applies here forbids expanding the contempt order by implication. *See Johnston*, 96 Wn.2d at 712-13. The maxim *expressio unius est exclusio alterius* controls.

### C. Neither Contemnor Intentionally Disobeys The TRO

The trial court purportedly issued the TRO to stop RSL-3B from "directly or indirectly, undermining Symetra's right to offset the [annuity] payment due on September 2, 2012, as set forth in this Court's 2010 Orders and subsequent order of the Washington Court of Appeals." (CP 119) The TRO's plain wording reinforces this central purpose: "RSL-3B is pursuing a lawsuit in Harris County, Texas, No. 2010-41653. This lawsuit is an attempt to undermine the Court's 2010 Order in this matter allowing Symetra to set off a judgment against Rapid Settlements, Ltd. against a structured settlement payment owed to 3B. It is also an attempt to undermine this Court's jurisdiction over the structured settlement payment." *Id.*

When the contempt order issued on January 10, 2013, Symetra had already "set off" against that payment *back in August 2012*. The TRO accomplished its stated objective of ensuring that Symetra could offset without any further interference by RSL-3B, thereby creating confusion as to what "coercive" sanctions could now really achieve. *See Tiger Oil Corp.*, 166 Wash. App. at 769-72. The offset occurred, Symetra pocketed RSL-3B's money, and the trial court's jurisdiction over the structured settlement payment remained intact. At that point, the contempt order could only punish RSL-3B and Mr. Gorman for their past acts.

Nor was RSL-3B re-litigating the merits of the Washington offset proceedings that took place in 2010, followed by the earlier appeal. (CP 488) In Texas state court, RSL-3B attempted to collaterally attack the judgment rendered by the trial court and affirmed by the Court of Appeals. (*Id.*) This collateral attack asks only whether the Washington courts fully and fairly adjudicated the issues they decided. (CP 459-61, 488-91) *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-83 (1982); *Underwriters Nat'l Assurance Co. v. N. Car. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-07 (1982). Neither RSL-3B nor Mr. Gorman intentionally disobeyed the TRO by pursuing a limited collateral attack that failed to "undermine" the trial court's "jurisdiction" or Symetra's right to offset. *See Tiger Oil Corp.*, 166 Wash. App. at 769-72. (12/28/12 TR 9)

**D. The Court Upholds A Purge Clause No One Could Perform**

Unlike a valid purge clause, the one in the contempt order prevented RSL-3B and Mr. Gorman from immediately complying with the terms and conditions of the

TRO. *See In re Interest of J.L.*, 140 Wn. App. 438, 446 (2007). The sanction turned punitive because the contempt could only punish RSL-3B and Mr. Gorman for past acts that allegedly violated the TRO. *See State v. Buckley*, 83 Wn. App. 707, 711, 713-14 (1996).

The trial court made no finding, as mandated by RCW 7.21.030(2), that RSL-3B and Mr. Gorman possessed a present ability to purge the contempt. *See Britannia Holdings Ltd.*, 127 Wn. App. at 933-34. No present ability to perform the conditions set by the TRO or the purge clause could exist once the TRO expired, Symetra removed the Texas state court case to federal court, and time marched on. *See id.* To conclude that RSL-3B and Mr. Gorman could perform under the purge clause, the Court of Appeals improperly erased the five-month gap that separates the TRO from the contempt order. *See id.* A conflict exists with *Britannia Holdings*.

As of January 10, 2013, RSL-3B and Mr. Gorman could not physically go back to the Texas state court and dismiss all of RSL-3B's pending motions. Tracking the TRO, the purge clause requires them to do so even though Symetra removed the state court case to federal court in early September 2012, making this task utterly impossible. Nor could RSL-3B and Mr. Gorman "take no further action" in a Texas state court that lost jurisdiction after the case's removal to federal court. An order of civil contempt must coerce future acts one can actually perform, not Orwellian inventions that elude the contemnor's capabilities. *See id.*

The Court of Appeals impermissibly shifts the burden to RSL-3B and Mr. Gorman to disprove an essential statutory element of Symetra's prima facie case for

contempt and remedial sanctions. Op. at 31-34. Symetra must prove that "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), 7.21.030(2). Only then can remedial sanctions issue under the civil contempt statute. The trial court never made such a threshold finding in awarding what it called "remedial sanctions" – an award the Court of Appeals improperly upholds in conflict with *Britannia Holdings*. (CP 525)

Under the contempt statute, "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 that person's power to perform.*'" *Britannia Holdings Ltd.*, 127 Wn. App. at 933-34 (emphasis in original). Symetra never discharged this burden nor did the trial court make this specific finding. The Court of Appeals nevertheless affirmed the finding of contempt. In Washington, however, "a threshold requirement is a finding of *current* ability to perform the act previously ordered." *Id.* at 934.

The trial court never made this requisite finding that RSL-3B and Mr. Gorman possessed the "current ability" to carry out "the act previously ordered" by the TRO. The Court of Appeals tries to mask this fatal defect by ruling that RSL-3B and Mr. Gorman waived their complaint that the purge clause demands an impossible task. Op. at 33-36. But the burden to raise an affirmative defense of impossibility would never shift to RSL-3B and Mr. Gorman unless Symetra first fulfilled its own burden and the trial court made the threshold finding required by the contempt statute. This statutory prerequisite never occurred, and the burden never shifted to RSL-3B and Mr. Gorman.

Nor does the Court of Appeals abide by this Court's precedent entitling a contemnor to demonstrate, "at regular intervals," that the purge clause "has lost its coercive effect or that there is no reasonable possibility of compliance with the court order." *In re Pers. Restraint of King*, 110 Wn.2d at 805. RSL-3B and Mr. Gorman raised the defense of impossibility in post-judgment filings to assail the contempt order. (CP 692-93, 718-20, 733-36, 999, 1023-26, 1360-61, 1371-73, 1386-89) One filing served as a motion for new trial and the other asked the trial court to reconsider its contempt finding. *See* CR 59, 60(b). By allowing challenges to contempt orders "at regular intervals," the *King* case eliminates any basis for waiver here.

**E. Due Process Guarantees Fall By The Wayside**

The fatal defects with the purge clause earmark what the trial court deems "remedial sanctions" as punitive ones that give rise to criminal contempt. *See In re Pers. Restraint of King*, 110 Wn.2d at 799-800; *Buckley*, 83 Wn. App. at 711, 713-14. The fines here turn punitive because the coercive ability to comply with the TRO (the original order) no longer exists, thereby leaving only the power to punish for past disobedient acts. *Bagwell*, 512 U.S. at 828-29; *Buckley*, 83 Wn. App. at 711, 713-14; *In re Interest of M.B.*, 101 Wn. App. at 447-48. Under the contempt statute, no remedial sanction lies because the trial court could never issue "an order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c).

"Purge conditions are valid only if they are in the contemnor's capacity to immediately purge." *In re Interest of Silva*, 166 Wn.2d at 142 n.5; *see Bagwell*, 512 U.S. at 829. As *Bagwell* holds, "a 'flat, unconditional fine' totaling even as little as

$50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." *Bagwell*, 512 U.S. at 829. Absent a valid purge clause, the contempt order imposes punitive, and thus criminal, sanctions. *Id.* at 828-29. The Court of Appeals erroneously upheld a finding of civil contempt when the contempt order punishes RSL-3B and Mr. Gorman for their past acts without affording them the full panoply of due process protections. *See id.* at 826-30, 834-37; *In re Pers. Restraint of King*, 110 Wn.2d at 800; *In re Interest of M.B.*, 101 Wn. App. at 438, 447.

Nor could the trial court exercise personal jurisdiction over Mr. Gorman, a Texas lawyer who never appeared in the Benton County Superior Court. *See* Op. at 14 n.5. Mr. Gorman only attended two hearings in the Texas state court the entire time the TRO remained in effect, one of which Symetra set. These limited actions in Texas can never establish substantial contact with the forum even if they produced an effect in this state. *See Kulko v. Superior Court of Calif.*, 436 U.S. 84, 98-99 (1978). In upholding jurisdiction, the Court of Appeals failed to conduct a thorough analysis of general or specific jurisdiction, addressing the matter only in a footnote. *See* Op. at 14 n.5. The brief of appellants confirms Mr. Gorman raised this very complaint about personal jurisdiction despite what the court below concludes. *See* Brief at 2-3.

## PRAYER FOR RELIEF

RSL-3B and Mr. Gorman pray the Court will grant this petition, reverse the judgment of the Court of Appeals, vacate the contempt order and finding of contempt, and render judgment that Symetra take nothing.

RESPECTFULLY SUBMITTED on November 30, 2015.

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## CERTIFICATE OF SERVICE

On this 30th day of October, 2015, I caused to be served a true and correct copy of the within document described as APPELLANTS' PETITION FOR REVIEW to be served on all interested parties to this action as follows:

| | |
|---|---|
| Medora A. Marisseau<br>Karr Tuttle Campbell<br>1201 Third Avenue, Suite 2900<br>Seattle, Washington 98101<br><br>Phone: (206) 223-1313<br>Facsimile: (206) 682-7100<br>Email:<br>mmarisseau@karrtuttle.com<br>fmendez@karrtuttle.com<br><br>Counsel for Plaintiff | Via United States Mail [x]<br>Via Federal Express [ ]<br>Via Hand Delivery [ ]<br>Via Facsimile [ ]<br>Via Electronic Mail [x] |

Amber Peters

**AMBER PETERS**,
*Legal Assistant to George E. Telquist*

No. 314359

IN THE SUPREME COURT OF WASHINGTON

ON PETITION FOR REVIEW FROM
DIVISION THREE OF THE COURT OF APPEALS

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

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

Petitioners

v.

SYMETRA LIFE INSURANCE COMPANY and
SYMETRA ASSIGNED BENEFITS SERVICES COMPANY,

Respondents

# APPENDIX TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

**TAB A - OPINION ISSUED (PUBLISHED)**

359 P.3d 823
Court of Appeals of Washington,
Division 3.

In the Matter of RAPID SETTLEMENTS, LTD 'S Application for Approval of Transfer of Structured Settlement Payment Rights.

No. **31435- 9- III.** | Aug. 18, 2015. | As Amended on Denial of Rehearing Oct. 29, 2015.

**Synopsis**

**Background:** Prospective structured settlement investor was required to pay fees and costs to settlement obligor, 134 Wash.App. 329, 139 P.3d 411, which obligor was unable to collect until investor purchased a structured settlement payment from a payee to be paid by obligor, and obligor successfully obtained an order to recognize a right of setoff with regard to previous award of fees and costs, 166 Wash.App. 683, 271 P.3d 925. Affiliate of investor, which was beneficiary of structured settlement purchase, revived an action in Texas to challenge Washington court's order regarding setoff, and obligor obtained a temporary restraining order in Washington to prevent affiliate from proceeding in Texas, which affiliate disregarded. Obligor moved to find affiliate in contempt of court and, following a removal to federal district court and remand, 2013 WL 3244807, the Superior Court, Benton County, Carrie L Runge, J., found affiliate and its attorney in contempt and ordered them to pay fees, costs, and make a forfeiture payment. Affiliate and attorney appealed.

**Holdings:** The Court of Appeals, Siddoway, C.J., held that:

[1] attorney received sufficient notice to protect due process rights;

[2] affiliate and attorney committed civil contempt of court;

[3] affiliate was obligated to pay obligor's fees for obtaining remand, but not for extending restraining order;

[4] affiliate was obligated to pay obligor's fees incurred in Texas action, but not for expenses incurred in litigating with third parties; and

[5] purge condition of contempt order did not exceed scope of violated order.

Affirmed in part, reversed in part, and remanded.

West Headnotes (34)

[1] **Constitutional Law**
Proceedings
**Injunction**
Notice or process

Attorney for party received sufficient notice to protect attorney's due process right to be heard before trial court issued order finding attorney in contempt of court for violating temporary restraining order requiring party to strike pending motions and to not appear in action pending in another state, despite contention that trial court was required to issue order to show cause before finding attorney in contempt; motion procedure was substituted for proceedings on an order to show cause, attorney mentioned the contempt motion during arguments in other state court proceedings, and attorney was served with motion for contempt and proposed order in advance of hearing. U.S.C.A. Const.Amend. 14; West's RCWA 7.21.030(1); West's RCWA 7.20.040 (Repealed).

Cases that cite this headnote

[2] **Contempt**
Notice or other process; attachment
**Contempt**
Affording defendant opportunity to exculpate himself

The requirements of a valid contempt of court order are notice and an opportunity to be heard, with the opportunity to be heard being the most significant.

Cases that cite this headnote

[3] **Constitutional Law**

Services and service providers

**Contempt**

Jurisdiction

**Courts**

Nature, number, frequency, and extent of contacts and activities

Attorney's appearance in state in a legal proceeding whose outcome he then collaterally attacked elsewhere, in contempt of court, was a contact of such character that maintenance of the contempt action did not offend traditional notions of fair play and substantial justice, and therefore trial court had personal jurisdiction over attorney. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185.

Cases that cite this headnote

[4] **Appeal and Error**

Reply briefs

Rule stating that appellate court will not consider contention presented for the first time in a reply brief applies even to challenges regarding personal jurisdiction. RAP 10.3(c).

Cases that cite this headnote

[5] **Courts**

Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

Under state long-arm statute, courts may assert jurisdiction over nonresident individuals to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185.

Cases that cite this headnote

[6] **Injunction**

Actions or proceedings in other states

**Injunction**

Abusive, Vexatious, or Harassing Litigation

Injunctions issued from a court of one state enjoining parties from engaging in vexatious litigation in another state may not control the second court's actions regarding the litigation in that court, but they are effective against the parties, with sanctions generally administered only by the court issuing the injunction.

Cases that cite this headnote

[7] **Contempt**

Nature and grounds of power

A court may find a person in contempt of court whether or not it is possible to coerce future compliance. West's RCWA 7.21.010(1)(b), 7.21.030(3).

Cases that cite this headnote

[8] **Contempt**

Costs and fees

**Contempt**

Indemnity to Party Injured

The court is allowed to order a contemnor to pay losses suffered as a result of the contempt of court and costs incurred in the contempt proceedings for any person found in contempt of court without regard to whether it is possible to craft a coercive sanction. West's RCWA 7.21.010(1)(b), 7.21.030(3).

Cases that cite this headnote

[9] **Contempt**

Punishment of contempt as criminal

Punitive sanctions can be imposed for a past contempt of court through a criminal contempt proceeding whether or not it is continuing. West's RCWA 7.21.050.

Cases that cite this headnote

[10] **Contempt**

Review

A trial court's finding of contempt of court will not be disturbed on appeal as long as it is supported by substantial evidence in the record.

Cases that cite this headnote

[11] **Contempt**

Disobedience to Mandate, Order, or Judgment

Where the superior court bases its contempt of court finding on a court order, the order must be strictly construed in favor of the contemnor, and the facts found must constitute a plain violation of the order.

Cases that cite this headnote

[12] **Injunction**

Advice of counsel

**Injunction**

Courts and actions in general

Beneficiary of structured settlement purchase and its attorney committed civil contempt of court by violating temporary restraining order, requiring beneficiary to strike pending motions and enjoining it from appearing in action pending in another state, even though beneficiary did not file emergency motion precipitating the need for court appearance and hearings were scheduled by court; beneficiary's failure to strike pending motions as ordered prompted emergency motion, beneficiary's striking of pending motions would have caused court to strike hearings or beneficiary could have explained to court why it could not participate, attorney's alleged advice did not excuse beneficiary from violating order, and attorney could have encouraged compliance with order or could have withdrawn. West's RCWA 7.21.010(1)(b).

Cases that cite this headnote

[13] **Injunction**

Advice of counsel

Acting on advice of counsel in refusing to obey a temporary restraining order is not a defense to a civil contempt of court proceeding.

Cases that cite this headnote

[14] **Injunction**

Courts and actions in general

Beneficiary of structured settlement purchase and its attorney's actions were inherently intentional, and therefore their refusal to strike pending motions and their appearance in an action pending in another state in violation of temporary restraining order constituted civil contempt of court, even though trial court did not make a written finding of intentional conduct. West's RCWA 7.21.010(1)(b).

Cases that cite this headnote

[15] **Contempt**

Findings

Nothing in contempt statute requires that the court make a written finding of intentional conduct to make a finding of contempt of court. West's RCWA 7.21.010 et seq.

Cases that cite this headnote

[16] **Appeal and Error**

Attorney fees

A trial court's award of attorney fees is reviewed for an abuse of discretion.

Cases that cite this headnote

[17] **Appeal and Error**

Imperfect condition of transcript, or record in general

If the record proves inadequate to review the trial court's attorney fee award, the reviewing court must remand for further proceedings.

Cases that cite this headnote

[18] **Removal of Cases**

Costs on remand

Contemnor was obligated to pay fees for services performed by complainant in obtaining a remand of case from federal court after contemnor improperly removed case while motion for contempt was pending; contemnor caused improper removal to federal court, a clear objective of the remand was to allow contempt motion to be heard, and remand was

necessary and appropriate to that end. West's RCWA 7.21.030(3).

Cases that cite this headnote

**[19] Injunction**

Costs and fees

Contemnor was not obligated to pay fees incurred by complainant in obtaining temporary restraining order contemnors violated, in obtaining extension to temporary restraining order, and in complainant's motion to add third parties to action; even though fees were incurred after temporary restraining order was obtained, fees were not incurred in connection with the contempt proceeding. West's RCWA 7.21.030(3).

Cases that cite this headnote

**[20] Contempt**

Indemnity to Party Injured

A defendant may be punished even in a civil contempt of court proceeding if the purpose is to compensate the complainant.

Cases that cite this headnote

**[21] Contempt**

Nature and grounds in general

**Contempt**

Punishment of contempt as criminal

If the punishment is for civil contempt the punishment is remedial, and for the benefit of the complainant; but if the punishment is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Cases that cite this headnote

**[22] Contempt**

Indemnity to Party Injured

A fine payable to complainant as a remedial sanction for contempt of court intended as compensation must be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

Cases that cite this headnote

**[23] Contempt**

Nature and grounds in general

Where the purpose of a remedial sanction for contempt of court is to make the defendant comply, the court's discretion is otherwise exercised; it must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

Cases that cite this headnote

**[24] Injunction**

Costs and fees

Contemnor was obligated to pay attorney fees incurred by complainant in action pending in other state after contemnors refused to strike its pending motions and appeared in action in violation of temporary restraining order; even though order expired and complainant removed action in other state to federal court, contemnors' failure to comply with order while order was in effect produced the fees incurred even after the expiration of the order and after removal, complainant's ability to obtain relief was delayed through no fault of its own, and dates of expiration of order and removal were artificial cutoff points for purposes of determining amount of loss suffered as a result of the contempt. West's RCWA 7.21.030(3).

Cases that cite this headnote

**[25] Injunction**

Courts and actions in general

Where a party violates an antisuit injunction, the most obvious loss suffered as a result of the contempt of court is the cost of answering to proceedings in the foreign court that would not have occurred had the injunction been complied with.

Cases that cite this headnote

[26] **Contempt**

Indemnity to Party Injured

Contemnor was not obligated to pay for expenses incurred by complainant in litigating with third parties over priority of competing security interests in contemnor's funds, in action by complainant to collect on prior judgment; assuming third parties had good faith belief that they had viable security interests, parties were entitled to assert legal rights, and contemnor's acts of contempt did not provide a reasonable basis for imposing costs on contemnor. West's RCWA 7.21.030(3).

Cases that cite this headnote

[27] **Judgment**

Nature and elements of bar or estoppel by former adjudication

Res judicata, or claim preclusion, prohibits the relitigation not only of claims and issues that were litigated but also those that could have been litigated in a prior action.

Cases that cite this headnote

[28] **Contempt**

Purging contempt after adjudication

An order of remedial civil contempt of court must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt or incarceration for noncompliance.

Cases that cite this headnote

[29] **Contempt**

Purging contempt after adjudication

Because a sanction loses its coercive character and becomes punitive where the contemnor cannot purge the contempt of court, there must be a showing that the contemnor has the means to comply with the purge condition.

Cases that cite this headnote

[30] **Contempt**

Review

Whether a purge condition exceeded the court's authority or violated a contemnor's due process rights are questions of law, which are reviewed de novo. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[31] **Injunction**

Courts and actions in general

Purge condition requiring contemnors to strike pending motions and agree not to file any motion or take any other action in case pending in other state did not exceed scope of original temporary restraining order violated by contemnors, which required contemnors to strike pending motions and enjoined them from appearing in other case; even though the purge condition was not required in original order, purge condition served remedial aims, and condition was reasonably related to the cause or nature of contempt.

Cases that cite this headnote

[32] **Contempt**

Review

Courts of Appeals would refuse to entertain contemnors' argument that they were unable to comply with purge condition in finding of contempt of court, where contemnors had ample advance notice of proposed purge condition needed to raise affirmative defense of inability to comply, and contemnors did not raise issue of inability to comply during or before the hearing on motion for contempt. RAP 2.5(a).

Cases that cite this headnote

[33] **Contempt**

Presumptions and burden of proof

In the context of civil contempt of court, the law presumes that one is capable of performing those actions required by the court; thus, inability to comply is an affirmative defense for which a contemnor has both the burden of production as well as the burden of persuasion.

Cases that cite this headnote

[34] **Contempt**

Presumptions and burden of proof

**Contempt**

Weight and sufficiency

The contemnor must offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible to support the affirmative defense in civil contempt of court context.

Cases that cite this headnote

**Attorneys and Law Firms**

***827** George E. Telquist and Nicholas Andrew Ashjian, Telquist Ziobro McMillen PLLC, Richland, WA, E. John Gorman, The Feldman Law Firm, LLP, Houston, TX, for Appellant.

Medora Marisseau, Jacque Elizabeth St. Romain and James Derek Little, Karr Tuttle Campbell, Seattle, WA, for Respondent.

**Opinion**

SIDDOWAY, C.J.

¶ 1 Symetra Life Insurance Company and Symetra Assigned Benefit Services Company (Symetra) obtained an antisuit temporary restraining order (TRO) enjoining RSL–3B–IL, Ltd. (3B) from collaterally attacking Symetra's final Washington order against 3B in Texas courts. When 3B violated the TRO, Symetra filed a motion for contempt against 3B and its Texas lawyer, John Gorman.

¶ 2 As a result of removal of the Washington action to federal court, its remand, and a continuance, Symetra's motion for contempt was not heard by the Benton County court for four months. By that time, 3B's collateral attack on Symetra's final order had been removed by Symetra to federal district court in Texas.

¶ 3 The superior court found 3B and Mr. Gorman in contempt, ordered Mr. Gorman to pay a one-time forfeiture of $1,000 and ruled that to purge themselves of the contempt charge, 3B and Mr. Gorman must strike all pending motions in the "Harris County, Texas, action" and agree not to take further action in that case as long as they were subject to a Benton County court injunction. Clerk's Papers (CP) at 526. The court also awarded Symetra substantial attorney fees and costs. 3B and Mr. Gorman appeal, arguing that the forfeiture amount and fees and costs awarded are punitive sanctions that could not be imposed in a civil contempt proceeding and, for the first time on appeal, that the purge condition was not possible to perform and was therefore invalid.

¶ 4 We conclude that only part of Symetra's fees and costs were properly awarded. But where 3B and Mr. Gorman committed clear acts of contempt and failed in the trial court to assert and support what they now contend was their inability to perform the purge condition, the relief ordered by the court was largely proper. We reverse the award of loss and costs, remand for further review and recalculation by the court, and otherwise affirm.

## FACTS AND PROCEDURAL BACKGROUND

¶ 5 Symetra and 3B are both engaged in businesses involving structured settlements. As explained in a legislative report on what became Washington's Structured Settlement Protection Act (SSPA), chapter 19.205 RCW:

> In the settlement of large tort claims, damages are often paid by a defendant to a plaintiff in the form of a structured settlement. In its simplest form, a structured settlement typically involves the initial payment of a lump sum, followed by a series of subsequent smaller payments that are made at specified intervals over a period of years (an annuity).
>
> ... Structured settlements are usually paid by an insurance company (the obligor), that obtains a benefit by paying off the obligation in installments over a long period of time, rather than as a single lump sum. The recipient of the structured settlement proceeds (the payee) can benefit as well, since the annuity payments are not subject to federal income tax and the receipt of payments over the long term can provide financial security.

FINAL BILL REP. ON ENGROSSED H.B. 1347, at 1, 57th Leg., Reg. Sess. (Wash. 2001). The legislature enacted the SSPA after it became common for injured persons to be offered discounted payments in exchange for their entitlements under a structured settlement, by companies that

hoped to profit from the investment. The SSPA reflected the legislature's concern that payees not be permitted to sell annuity rights until a court had reviewed the proposed transfer for adequate disclosure and determined that a transfer was in the best interest of the injured person, taking into account the welfare and support of his or her dependents. *See* RCW 19.205.030 (requiring court or agency approval).

***828** ¶ 6 Symetra is engaged in the business of assuming the obligation to pay a tort liability and then fulfilling it through structured settlement payments. 3B and at least one of its affiliates, Rapid Settlements, Ltd. (RSL) [1] are engaged in the business of buying injured persons' future payment rights at a discount.

¶ 7 In July 2004, a structured settlement payee agreed to sell a future payment due him from Symetra to RSL. As the investor, RSL was required by the SSPA to seek approval of the transfer in superior court. Symetra opposed RSL's application as violating requirements of the SSPA. The court agreed, dismissed RSL's application, and awarded Symetra its reasonable attorney fees and costs under RCW 19.205.040(2)(b).[2] RSL unsuccessfully appealed the award of fees to the Court of Appeals and unsuccessfully sought review by our Supreme Court. *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.,* 134 Wash.App. 329, 332, 139 P.3d 411 (2006), *review denied,* 160 Wash.2d 1015, 161 P.3d 1027, (2007). Additional fees and costs were awarded to Symetra at both levels of appeal. In 2008, the King County Superior Court entered an amended judgment of $39,287.04 against RSL reflecting the cumulative fees and costs.

¶ 8 Symetra unsuccessfully attempted to collect the judgment in both Washington and Texas. Efforts to collect in Washington proved unsuccessful because only RSL's affiliates, not RSL, maintain bank accounts in Washington. Symetra's efforts to collect the judgment in Texas were met with RSL's response to post-judgment discovery that it owned no property, even in its home state.

¶ 9 In a then unrelated proceeding, RSL had applied in Benton County in November 2004 for approval of a transfer agreement under which Nicholas Reihs would sell a future payment from Symetra (payable in September 2012) in exchange for a discounted payment. Over Symetra's objection, the court approved the transfer. Although RSL's transfer application listed itself as the transferee, the order approving the transfer stated that the designated beneficiary had been changed to 3B.

¶ 10 Five years after the court order approving transfer of the Reihs payment but before it came due, Symetra moved to modify the order to allow it to apply the amount otherwise payable to 3B to its King County judgment against RSL. Over the objection of 3B, which was allowed to intervene, the superior court found that 3B was the alter ego of RSL and modified the transfer order to recognize a right of setoff in Symetra, 3B appealed. We affirmed the superior court's modified order in February 2012. *In re Rapid Settlements, Ltd.,* 166 Wash.App. at 696, 271 P.3d 925.

¶ 11 3B then revived an action it had commenced in Texas two years earlier (shortly after Symetra asked the Benton County court to authorize setoff) in which it challenged Symetra's ability to collect its judgment through a setoff taking place in Washington. At Symetra's request, the Texas court had stayed the action—"abated" it, in Texas terms—pending disposition of 3B's appeal in Washington.

¶ 12 Following our decision on the appeal, John Craddock, one of Mr. Gorman's law partners, wrote Symetra's lawyers, stating that 3B continued to assert a right to receive the upcoming September 2012 Reihs payment and that two creditors, FinServ Casualty Corporation and A.M.Y. Property & Casualty Corporation, asserted prior secured interests in the payment. On August 9, Mr. Craddock notified Symetra's lawyers that 3B would move to vacate the abatement order in the Texas action and would seek an order requiring Symetra to deposit the September Reihs payment in the Texas court. Symetra responded by moving the Benton County ***829** court on August 10 to issue an antisuit TRO in the Reihs transfer action.

¶ 13 On August 14 and 15, 3B filed an amended petition in the Texas action naming FinServ and A.M.Y. as additional plaintiffs. FinServ and A.M.Y. purported to join in 3B's motion to vacate the stay and reinstate the Texas case to the active docket. Mr. Craddock, Mr. Gorman, and their law firm submitted all materials filed with the Texas court as "Counsel for Plaintiffs." CP at 1492, 1517. Both motions were eventually set for an August 24 hearing date.

¶ 14 On August 17, the Benton County court heard Symetra's motion for a TRO. Based on findings that 3B's Texas action was "an attempt to undermine this Court's 2010 Order in this matter," and "an attempt to undermine this Court's jurisdiction over the structured settlement payment," the court issued a TRO enjoining 3B, in relevant part, from taking

further action "in Harris County District Court Case No. 2010–41653" and to strike any and all pending motions in that case. CP at 119. The order set a hearing on Symetra's request for a permanent injunction for the afternoon of August 31.

¶ 15 3B's chief executive officer was personally served with the TRO on August 20. The following day, Symetra filed an emergency motion asking the Texas court to cancel the impending Texas hearings based on the TRO's dictate that 3B strike pending motions and take no further action in the Texas case. Despite 3B's having been served with the TRO, it did not strike its motions; instead, Mr. Craddock filed a brief in opposition to Symetra's motion on August 22, on behalf of "[a]ll three plaintiffs." CP at 170. While the brief argued that "[n]othing can stop FinServ and A.M.Y. from moving forward in this [Texas] Court" because the TRO did not apply to them, the order of abatement had not been lifted and as of August 22, FinServ and A.M.Y. were not parties to the Texas action. CP at 170–71.

¶ 16 A hearing on Symetra's motion was held before the Texas court on August 23. Mr. Gorman appeared on behalf of 3B and argued that—contrary to this court's decision on appeal —the offset order had been obtained without due process and was invalid. The Texas court reset the hearing on 3B's motions for August 28.

¶ 17 In light of 3B's post August 20 acts and failures to act, Symetra moved in the Benton County court on August 24 for an order finding 3B in contempt. It asked that it be awarded its costs and attorney fees in bringing the contempt motion and in having to participate in the Texas action after service of the TRO. It also asked for a one-time forfeiture of $1,000 against Mr. Gorman. Symetra set the contempt motion to coincide with the permanent injunction hearing set for August 31.

¶ 18 Mr. Gorman and 3B were not deterred. 3B still did not strike its motions and Mr. Gorman appeared at the August 28 hearing in the Texas court, where he argued that the stay should be lifted so that 3B could pursue its challenge to the Washington court orders. The Texas court was persuaded to lift the stay for the limited purpose of adding FinServ and A.M.Y. as parties but explained that the suit would otherwise "remain abated, and let's see what happens in Washington on Friday [the August 31 hearing date in Washington], and then we will go from there." CP at 899.

¶ 19 What happened in Washington on Friday was that a lawyer representing FinServ appeared at the time set for the hearings and presented FinServ's notice of removal to federal court, filed earlier in the day. The notice of removal represented that FinServ "is being joined as a party to this lawsuit." CP at 193. While Symetra had filed a motion to add FinServ and A.M.Y. as parties, the court had not yet done so, and the removal was later determined to be defective on multiple grounds.[3] The removal nonetheless ***830** derailed Symetra's request for a permanent injunction to replace the expiring TRO and its motion for contempt, which were necessarily stricken.

¶ 20 In granting Symetra's motion to remand the case to state court in early November, the federal court denied Symetra's request for fees and costs, but observed:

> [T]his court takes notice that state court proceedings both in Washington and Texas will allow an ample opportunity for the prevailing party to pursue monetary and equitable relief against FinServ (and possibly others). Under these circumstances, attorney fees and costs are DENIED.

CP at 857.

¶ 21 Within two weeks of the order remanding the Washington case to Benton County, Symetra moved for an extension of the TRO and noted its previously filed motions for November 30. On November 29, 3B requested a continuance. It emphasized that Symetra would not be prejudiced because the insurer had already applied the Reihs payment to its judgment against RSL, and the Texas action —in which 3B, FinServ and A.M.Y. were trying to recover the Reihs payment—had been removed to federal court by Symetra on September 10 and was "on hold" pending 3B's motion for remand. CP at 293. The Benton County court granted 3B's request in part; it entered Symetra's proposed order continuing temporary injunctive relief but continued the motions for a permanent injunction and contempt to December 28.

¶ 22 The hearing proceeded on December 28, and at its conclusion the court entered the permanent injunction requested by Symetra. It took the proposed contempt order under advisement. While 3B filed no brief in opposition to the motion for contempt, its lawyer informed the court during the hearing that it relied for its opposition on the declaration filed with its request for a continuance in November. Unsure that it had reviewed the continuance materials in preparing

for the December 28 hearing, the court indicated it wanted to be "fully briefed" before ruling. Report of Proceedings (RP) (Dec. 28, 2012) at 17. Two weeks later, it granted Symetra's motion and entered an order of contempt.

¶ 23 The court's order found 3B and Mr. Gorman in contempt for failing to strike 3B's motions after service of the TRO on August 20 and for appearing and participating in the hearings on August 23 and 28. Based on its findings, the court ordered the following relief:

> 1. 3B is ordered to pay Symetra for its costs and attorneys' fees incurred in bringing this motion for contempt and all costs and attorneys' fees incurred by Symetra in the Harris County, Texas, action between August 20, 2012, when the Court's Temporary Restraining Order was served on 3B, and the date of this Order of Contempt. Symetra has submitted a cost and fee bill showing the amount of these costs and fees is $47,024.50.
>
> 2. Attorney Gorman, as attorney and agent for 3B, is ordered to pay Symetra a one-time forfeiture pursuant to RCW 7.21.030(1)(b) of One Thousand Dollars ($1,000.00).
>
> 3. In order to purge themselves of this contempt charge, 3B and its attorney Gorman must 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 this Court restraining them from doing so is in effect.

CP at 526. 3B and Mr. Gorman appeal.

## ANALYSIS

¶ 24 3B and Mr. Gorman assign error to the superior court's order holding them in contempt, identifying seven issues. We will first address their challenges to the court's findings of contempt. (Appellant's issues A, C, D, and E). We will then turn to their partially viable challenges to the relief ordered by the court. (Appellant's issues B, F and G). [4]

### *831 I. *The court had jurisdiction over Mr. Gorman and its findings of contempt are both sufficient and supported by substantial evidence*

¶ 25 Mr. Gorman argues that because he had not appeared in the Benton County action and was not served with an order to show cause, the court violated his right to due process by entering relief against him. He also argues that his conduct was not sanctionable given "competing duties to his clients." Br. of Appellant at 3. Both Mr. Gorman and 3B contend that substantial evidence does not support the court's contempt findings and that the court erred by granting relief for contempt without finding that they violated the TRO "intentionally."

#### *Due process as to Mr. Gorman*

**[1]** ¶ 26 Mr. Gorman, a Texas resident, argues that Symetra never served him with process making him a party and that it never obtained an order to show cause, with the result that the court lacked jurisdiction to issue a contempt order against him. Br. of Appellant at 2–3, 21–22. He relies on *Burlingame v. Consolidated Mines and Smelting Company, Ltd.*, 106 Wash.2d 328, 722 P.2d 67 (1986).

**[2]** ¶ 27 The *Burlingame* case does not help Mr. Gorman. He focuses on the court's holding in that case that a trial court's order to show cause issued under former RCW 7.20.040 (1881) was adequate notice, and then contrasts that with the contempt proceeding against him, which was initiated, instead, by motion. When Washington's contempt statutes were substantially modified in 1989, a motion procedure was substituted for proceedings on an order to show cause. *See* RCW 7.21.030(1) (court initiates a contempt proceeding on its own motion or the motion of a person aggrieved). The court in *Burlingame* did not hold that an order to show cause is required by due process; it held only that the order to show cause that was statutorily required at the time sufficed under the "minimal notice" that traditionally has satisfied due process requirements for a valid judgment of contempt. *Burlingame,* 106 Wash.2d at 332, 722 P.2d 67. The requirements of a valid contempt order are notice and an opportunity to be heard, with the opportunity to be heard being the most significant. "The notice requirement is important only because it protects an individual's right to be heard." *Id.* (citing *Hovey v. Elliott,* 167 U.S. 409, 414–15, 17 S.Ct. 841, 42 L.Ed. 215 (1897)). *Burlingame* requires only that we consider whether the motion procedure followed below provided notice sufficient to protect Mr. Gorman's right to be heard.

[3] [4] [5] ¶ 28 Symetra moved the court to "enter an order finding 3B and its agent, attorney Gorman, in contempt." CP at 156. There can be no question that Mr. Gorman was aware of Symetra's motion. During the hearing in Texas on August 23, Symetra's lawyer mentioned that his client viewed 3B as being in contempt of the TRO, to which Mr. Gorman responded, "Contempt, I just heard contempt. You know, we want to be in Texas. We want a forum that's going to hear us." CP at 511. During the August 28 hearing in Texas, Mr. Gorman told the court that "as forewarned the other day ... [Symetra has] now filed a motion for contempt seeking to hold me personally in contempt of court up in Washington for pursuing this action in a Texas court." CP at 485. A certificate of service establishes service by mail of the motion for contempt and proposed order on Mr. Gorman at least as early as November 19, 2012. In granting the continuance requested by 3B on November 30, the Benton County court created its order—which clearly indicated the time and place of the December 28 hearing—by modifying Symetra's proposed "Order of Contempt Against RSL–3B–IL, Ltd. and Attorney Gorman." CP at 310–12. The order was signed "approved as to form" by 3B's lawyer. Collectively, the notice provided was more than sufficient to protect Mr. Gorman's right to be heard. [5]

### *832 *Substantial evidence supports the findings of contempt*

¶ 29 The court's contempt order included the following findings of violations of the TRO after it was served on 3B, and thereby contempt: that 3B and Mr. Gorman continued to pursue the Texas action (finding 1), that 3B failed to strike the motions in that lawsuit that were pending at the time of the TRO (finding 2), that 3B opposed Symetra's motion to extend the time for hearing those motions (finding 2), and that Mr. Gorman presented argument at the August 23 and August 28 hearings (finding 2).

[6] ¶ 30 The United States Supreme Court decided 125 years ago that the court of one state may enjoin parties to a case before it from engaging in vexatious litigation in another state for the purpose of evading the rulings of the first court. *Cole v. Cunningham,* 133 U.S. 107, 111, 10 S.Ct. 269, 33 L.Ed. 538 (1890). Such injunctions may not control the second court's actions regarding the litigation in that court, but they are effective against the parties, with sanctions generally administered only by the court issuing the injunction. *Baker v. Gen. Motors Corp.,* 522 U.S. 222, 236, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998) (citing, *e.g., James v. Grand Trunk Western R. Co.,* 14 Ill.2d 356, 372, 152 N.E.2d 858 (1958); *Stiller v. Hardman,* 324 F.2d 626, 628 (2d Cir.1963)).

¶ 31 In this case, the Benton County court issued the TRO on August 17 and it was served on 3B on August 20. The TRO ordered 3B "to strike any and all pending motions in [Harris County District Court Case No. 2010–41653]." CP at 119. 3B had pending motions in the case at the time. It did not strike them.

¶ 32 The TRO enjoined 3B "from taking any further action" in the Texas case. *Id.* Two days after being served with the TRO, on August 22, 3B filed a response in the Texas court opposing Symetra's emergency motion.

¶ 33 A temporary restraining order is binding upon "the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." CR 65(d). Days after service of the TRO on 3B, Mr. Gorman appeared in the Texas court on August 23 and 28 to advocate on behalf of 3B and in opposition to Symetra. The existence of the Washington TRO was a subject matter of his argument on both occasions.

[7] [8] [9] ¶ 34 While chapter 7.21 RCW provides that a court may find a person in contempt *and* impose a coercive sanction only upon "[a] person [who] has failed ... to perform an act that is yet within the person's power to perform," RCW 7.21.030(2), a court may find a person in contempt whether or not it is possible to coerce future compliance. Any "intentional ... [d]isobedience of any lawful judgment, decree, order or process of the court" is a contempt of court as defined by RCW 7.21.010(1)(b). RCW 7.21.030(3) allows the court to order a contemnor to pay ***833** losses suffered as a result of the contempt and costs incurred in the contempt proceedings for any "person found in contempt of court" without regard to whether it is possible to craft a coercive sanction. See *State ex rel. Chard v. Androw,* 171 Wash. 178, 17 P.2d 874 (1933) (affirming judgment for $3,000 loss imposed on contemnor for violating court order; no coercive sanction imposed due to contemnor's inability to perform). [6]

[10] [11] ¶ 35 A trial court's finding of contempt will not be disturbed on appeal as long as it is supported by substantial evidence in the record. *In re Marriage of Farr,* 87 Wash.App. 177, 184, 940 P.2d 679 (1997); *Ramstead v.*

*Hauge,* 73 Wash.2d 162, 167, 437 P.2d 402 (1968). Where, as in this case, "the superior court bases its contempt finding on a court order, 'the order must be strictly construed in favor of the contemnor,' and '[t]he facts found must constitute a plain violation of the order.' " *Dep't of Ecology v. Tiger Oil Corp.,* 166 Wash.App. 720, 768, 271 P.3d 331 (2012) (emphasis omitted) (citations omitted).

**[12]** ¶ 36 The record unquestionably supports the violations found by the court. Since they occurred after service on 3B of the TRO, they would appear to support the court's findings of contempt. But 3B and Mr. Gorman argue that their literal violations were not contumacious for several reasons.

¶ 37 First, they emphasize that it was Symetra's emergency motion in Texas that precipitated the need for 3B's opposition. But if 3B had stricken its motions as ordered, Symetra would have had no need to file its emergency motion. Moreover, the relief that Symetra was seeking through its emergency motion was entirely consistent with the Benton County court's TRO. Consistent with the TRO, 3B should not have opposed it.

¶ 38 3B and Mr. Gorman argue that the two hearings at which Mr. Gorman appeared while the TRO was in effect were set by the Harris County court. Again, if 3B had stricken its motions as required by the TRO, the hearings would presumably have been stricken by the court. If they weren't, then consistent with the TRO, 3B should have done no more than explain to the court why it could not participate.

¶ 39 3B and Mr. Gorman argue that FinServ and A.M.Y. were interested parties and would have been free to take action in the Texas proceeding. But until FinServ and A.M.Y. were joined—which was not acted upon by the court until it vacated the abatement order for that limited purpose on August 28—only 3B was a party to the proceeding. And even if FinServ and A.M.Y. could be viewed as parties to the proceeding before the limited lifting of the abatement order on August 28, that does not excuse 3B's own participation in violation of the TRO or Mr. Gorman's appearance on 3B's behalf.

**[13]** ¶ 40 Finally, 3B argues that it acted on its lawyer's advice and Mr. Gorman argues that he was duty bound to advance the wishes of his client. Neither rationale excuses them from responsibility for contempt. Acting on advice of counsel in refusing to obey a TRO is not a defense to a civil contempt proceeding. *Ramstead,* 73 Wash.2d at 166, 437 P.2d 402; *Rekhi v. Olason,* 28 Wash.App. 751, 757, 626 P.2d 513 (1981). Because the TRO did not require Mr. Gorman to violate any privilege, the limited defense recognized in assertion of privilege cases does not apply. *Cf. Dike v. Dike,* 75 Wash.2d 1, 5–9, 448 P.2d 490 (1968) (where lawyer is ordered by the court to reveal privileged information and is held in contempt for refusal to do so, the proper procedure is to stay all sanctions for contempt pending appellate review). While Mr. Gorman argues that he could not take action against his client's wishes, he had the options of encouraging his client to comply with the TRO or, if 3B could not be persuaded to comply, then of withdrawing from the representation rather than commit contempt. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d) ("A lawyer shall not ... knowingly disobey, or advise the client to ***834** disobey ... a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience") and 1.15(b)(4) (providing that a lawyer may withdraw from representing a client who "insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement").

¶ 41 Appellants cite *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.,* 55 Wash. 1, 13, 103 P. 426 (1909), *modified on reh'g,* 55 Wash. 1, 107 P. 196 (1910) (Mount, J., dissenting) for the proposition that "[t]here is nothing in the [contempt] statute to indicate that it was intended to include one who in good faith advises the wrong." But that case dealt with a lawyer, Mr. Abel, who did not himself violate the court's order as Mr. Gorman did here. *Id.* at 14, 107 P. 196. Mr. Abel "advised the officers to do the things complained of," but "did not directly participate therein himself." *Id.* at 17, 107 P. 196. As observed by the majority opinion, "An offending attorney *would be liable ... for a willful disregard of the orders of the court,* but it would require a forced construction of the statute to make him subject to civil liability because of his advice honestly given." *Id.* at 14, 107 P. 196 (emphasis added). Mr. Gorman was not found in contempt for his advice, but for his actions.

¶ 42 Appellants are correct that the TRO expired on August 31. CR 65(b) (temporary restraining orders expire within 14 days unless extended). But the acts of contempt found by the court all occurred on or before August 31. The findings of contempt are supported by substantial evidence of violations of the court's order during the two weeks it was in effect.

***No "finding" of intentional conduct was required***

**[14]** ¶ 43 The superior court's contempt order did not include an explicit finding that 3B's and Mr. Gorman's violations of the TRO were intentional. Relying on the statement in *Holiday v. City of Moses Lake,* 157 Wash.App. 347, 355, 236 P.3d 981 (2010) that "a finding that a violation of a previous court order was intentional is required for a finding of contempt," 3B and Mr. Gorman argue that absent an explicit finding of intentional conduct, the trial court's order is insufficient. As further support, they cite *In re Estates of Smaldino,* 151 Wash.App. 356, 365, 212 P.3d 579 (2009), in which a lawyer was found in contempt for violating the terms of a TRO prohibiting his client from transferring her real property, after he caused her to grant him a deed of trust to secure payment of his legal fees and then recorded it. On appeal, the lawyer argued that the court's finding that he intentionally disobeyed the TRO was contradicted by its finding that he had chosen not to read the TRO. *Id.* at 362, 212 P.3d 579. The court held that knowledge could be imputed. It also held that because the lawyer's acquisition of a security interest in the property "was an intentional act," his act in disobedience of the order was intentional. *Id.* at 365, 212 P.3d 579.

¶ 44 The two decisions hold only that an individual must act intentionally to be found in contempt of court. Under RCW 7.21.010(1)(b), "contempt of court" is defined, in relevant part, as "*intentional* ... [d]isobedience of any lawful judgment, decree, order, or process of the court." (Emphasis added.) But given that definition, the Benton County court's finding of contempt reflects an implicit finding that 3B's and Mr. Gorman's acts and omissions *were* intentional.

**[15]** ¶ 45 When the Washington legislature intends to require that an explicit finding must be made for a court to act, it says so. *See, e.g.,* RCW 13.34.155 ("dependency court ... must make a written finding" that parenting plan is in a child's best interest); RCW 13.40.193 (juvenile found to have been unlawfully in possession of a firearm must receive a disposition that includes program participation "unless the court makes a written finding ... that participation ... would not be appropriate"); RCW 4.84.185 (court may award expenses of suit "upon written findings by the judge that the action ... was frivolous"). Nothing in chapter 7.21 RCW requires that the court make a written finding of intentional conduct.

***835** ¶ 46 All of 3B's and Mr. Gorman's acts and omissions identified by the contempt order as violations were supported by evidence that established their inherently intentional character. The court was not required to explicitly find that they were intentional.

**II. *The relief ordered for the contempt was largely although not entirely appropriate, given the civil character of the contempt proceeding***

¶ 47 Having determined that the trial court properly found 3B and Mr. Gorman in contempt, we turn to the propriety of the relief awarded in what was initiated and conducted as a civil contempt proceeding. [7] The relief awarded consisted of attorney fees and costs incurred in the contempt proceeding; attorney fees and costs incurred in the Texas proceeding; and the $1,000 onetime sanction against Mr. Gorman.

***Costs incurred in the contempt proceeding***

¶ 48 RCW 7.21.030(3) provides in relevant part that in addition to imposing remedial sanctions authorized elsewhere in the statute, "[t]he court may ... order a person found in contempt of court to pay a party for ... any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." 3B and Mr. Gorman do not contend that Symetra was not entitled to costs, including attorney fees; they argue that Symetra was awarded costs that were not incurred in the contempt proceeding. They specifically complain of

> [t]he 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 [Texas federal district court] Judge Lake's Court.

Br. of Appellant at 27.

¶ 49 Symetra responds that fees for the Texas proceeding were recoverable not as costs, but as losses suffered as a result of the contempt. Losses are separately recoverable and are addressed below.

¶ 50 As to costs, Symetra submitted declarations documenting $14,890.50 in attorney fees incurred in the Washington action between August 18, the day after the TRO was obtained, and December 12, 2012, including those incurred while the action was temporarily in federal court. The declarations did not segregate fees for services directly related to the motion for contempt from other fees incurred during that time frame.

**[16]** **[17]** ¶ 51 We review a trial court's award of attorney fees for an abuse of discretion. *Rettkowski v. Dep't of Ecology,* 128 Wash.2d 508, 519, 910 P.2d 462 (1996). If the record proves inadequate for us to review the fee award, we must remand for further proceedings. *Just Dirt, Inc. v. Knight Excavating, Inc.,* 138 Wash.App. 409, 157 P.3d 431 (2007).

**[18]** ¶ 52 We conclude that all of the fees for services performed in obtaining a remand of the case from the federal court were properly awarded. Symetra was a victim, not the cause, of the improper removal to federal court. A clear objective of the remand was to get the proceeding back before the Benton County court so that Symetra's earlier-filed motion for contempt could be heard. Obtaining the remand was necessary and appropriate to that end.

**[19]** ¶ 53 Other fees included in the $14,890.50 figure were not incurred in connection with the contempt proceeding, however. Just as Symetra's fees incurred in obtaining the TRO are not recoverable under RCW 7.21.030(3), its fees incurred in obtaining the extension of the TRO and the permanent injunction are not recoverable. Nor can Symetra recover its fees incurred in moving to add FinServ and A.M.Y. as parties to the Benton County action.

***836** ¶ 54 Because the declarations submitted are inadequate to segregate fees that were recoverable as costs, the case must be remanded for further submissions by Symetra and a second review by the court.

***Loss suffered as a result of the contempt***

¶ 55 As to loss, RCW 7.21.030(3) provides in relevant part that in addition to other relief available in the contempt proceeding, "[t]he court may ... 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."

**[20]** **[21]** ¶ 56 The seminal decision in *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797 (1911) observed that "[c]ontempts are neither wholly civil nor altogether criminal," and that in either event, there is "an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor." As a result, a defendant may be "punished" even in a civil contempt proceeding if the purpose is to compensate the complainant:

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt *the punishment is remedial, and for the benefit of the complainant.* But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, *and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant,* but also in committing the defendant to prison.

*Id.* at 441–42, 31 S.Ct. 492 (emphasis added).

**[22]** **[23]** ¶ 57 In *United States v. United Mine Workers of America,* the United States Supreme Court again recognized that there are two types of remedial sanctions imposed in civil contempt proceedings, holding that "[j]udicial sanctions in civil contempt proceedings may ... be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." 330 U.S. 258, 303–04, 67 S.Ct. 677, 91 L.Ed. 884 (1947) (citing *Gompers,* 221 U.S. at 448–49, 31 S.Ct. 492).

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

*Id.* (footnotes omitted).

¶ 58 In his treatise on remedies, Professor Dobbs writes:

> The Supreme Court has long recognized that one appropriate kind of sanction for civil contempt is remedial rather than coercive. That is, the sanction provides the plaintiff with a substitute for the defendant's obedience without compelling that obedience itself. The most straightforward version of the remedial sanction is the compensatory fine, paid to the plaintiff as compensation. If the fine is to be justified because it is remedial, courts have said that it must be based on evidence, either of the plaintiff's loss or the defendant's gains.

1 DAN B. DOBBS, DOBBS LAW OF REMEDIES 194 (2d ed.1993) (footnotes omitted).

¶ 59 Federal courts and a clear majority of state courts allow compensatory damages or fines payable to the injured party as relief in a civil contempt proceeding. Annotation, *Right of Injured Party to Award of Compensatory Damages or Fine in Contempt Proceedings,* 85 A.L.R.3d 895, § 2[a] (1978). In *State ex rel. Lemon v. Coffin,* 52 Wash.2d 894, 896, 332 P.2d 1096 (1958), the Washington Supreme Court held that the purpose of the provision for recovery of loss under former ***837** RCW 7.20.100 (1880)[8] was "to provide complete relief in the original action and to eliminate the necessity of a second suit to recover the expense caused by such contempt."

¶ 60 Compensatory fines have been imposed in Washington contempt proceedings to address many types of loss and damage caused by a party's contumacious acts. *E.g., Premium Distrib. Co., Inc. v. Int'l Bhd. of Teamsters,* 35 Wash.App. 36, 39, 664 P.2d 1306 (1983) (affirming award of $15,000 for property damage and business loss caused by violations of an injunction); *Ramstead,* 73 Wash.2d at 167, 437 P.2d 402 (affirming award of expenses incurred where defendant prevented moving of home in violation of TRO); *McFerran v. McFerran,* 55 Wash.2d 471, 476, 348 P.2d 222 (1960) (affirming award of repair expense and loss of use for husband's violation of divorce decree); *Chard,* 171 Wash. at 180, 17 P.2d 874 (affirming award of damages for lost property value for purchaser's violation of judicial order of sale); *Nicomen,* 55 Wash. at 11, 103 P. 426, (plaintiff was entitled to be awarded damages for lost profits attributable to interference with its booming privileges in violation of judgment).

**[24]** **[25]** ¶ 61 Where a party violates an antisuit injunction, the most obvious "loss suffered ... as a result of the contempt" is the cost of answering to proceedings in the foreign court that would not have occurred had the injunction been complied with. Symetra submitted declarations documenting $32,134 in attorney fees incurred in the Texas action between August 18 and December 12, 2012. 3B and Mr. Gorman argue that even if some fees in the Texas proceeding are recoverable, they ceased to be recoverable after the TRO expired on August 31 or, at the latest, after Symetra removed the Texas action to federal court on September 10. They also argue that Symetra cannot claim to have suffered loss from its actions in the Texas litigation since FinServ and A.M.Y., who were not subject to injunction, were asserting their own challenge to Symetra's offset of the Reihs transfer payment.

¶ 62 3B's failure and refusal to comply with the TRO and strike all of its motions in the Texas action produced the fees incurred by Symetra in the post August 31 and post September 10 Texas proceedings against 3B, both state and federal. If the losses were incurred over a matter of months, it was because Symetra's ability to obtain relief was delayed through no fault of its own. In *McFerran,* the complainant was awarded an amount for lost use of a home over a number of months even though the lost use was only an indirect result of her husband's failure to make court ordered repairs to her home. In *Chard,* the complainant was awarded damages for a decline in value of its property following the date on which a purchaser failed to honor the judicial order of sale of the complainant's home. In both cases, damages were not limited according to the time frame within which the contemnor had been ordered to act. They were based on the loss that, at the time of hearing, the complainant could demonstrate had resulted from the contempt.

¶ 63 Although the August 31 and September 10 dates are significant for other purposes,[9] they are artificial cutoff points for purposes of determining the amount of loss Symetra had suffered as a result of the contempt by the time of its first opportunity to have its motion heard.

***838** **[26]** **[27]** ¶ 64 Symetra's expenses incurred litigating with FinServ and A.M.Y. after August 28 are

another matter. The preexisting perfected security interests that FinServ and A.M.Y. claim to have in the Reihs payment were not addressed in the Benton County transfer action. It appears that Symetra was unaware of the existence of any competing security interests. If and to the extent that FinServ and A.M.Y. held viable security interests, or at least interests they believed in good faith were viable, then those two entities were entitled to assert their legal rights, and 3B's August 2012 acts of contempt do not provide a reasonable basis for imposing Symetra's cost of fighting that priority issue with FinServ and A.M.Y on 3B. [10]

¶ 65 Symetra should have segregated the attorney fees incurred in the Texas action against 3B, offensively or defensively, from the attorney fees incurred in that action, against FinServ and A.M.Y, offensively or defensively. *Cf. Manna Funding, LLC v. Kittitas County,* 173 Wash.App. 879, 295 P.3d 1197, *review denied,* 178 Wash.2d 1007, 308 P.3d 642 (2013) (requiring segregation of fees between claims where fees are recoverable only as to some claims); *Seattle–First Nat. Bank v. Washington Ins. Guar. Ass'n.,* 94 Wash.App. 744, 972 P.2d 1282 (1999) (requiring a reasonable allocation of fees among multiple clients, where fees were recoverable only by some clients). To the extent that 3B, FinServ, and A.M.Y. joined in the same submissions and appeared through the same counsel, the superior court must arrive at some reasonable basis for allocating fees. In the *Seattle–First* case, the court suggested looking to the law firm's fee agreement with its clients as a basis for allocation. *Id.* at 763, 972 P.2d 1282. Another approach would be for Symetra to determine, through discovery, what percentage of the cost of representation in the Texas action was being borne by each of the three entities. The allocation need not be precise, but it must be examined and be reasonable. *Id.*

***The $1,000 onetime sanction against Mr. Gorman***

¶ 66 The final relief awarded by the court was its $1,000 onetime forfeiture against Mr. Gorman. The provision describing the forfeiture and the clause describing action required to purge the contempt provide in their entirety:

> 2. Attorney Gorman, as attorney and agent for 3B, is ordered to pay Symetra a one-time forfeiture pursuant to RCW 7.21.030(1)(b) of One Thousand Dollars ($1,000.00). [11]
>
> 3. In order to purge themselves of this contempt charge, 3B and its attorney Gorman must 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 this Court restraining them from doing so is in effect.
>
> CP at 526.

**[28]** **[29]** **[30]** ¶ 67 "An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for noncompliance." *State ex rel. Shafer v. Bloomer,* 94 Wash.App. 246, 253, 973 P.2d 1062 (1999). Because a sanction "loses its coercive character and becomes punitive where the contemnor cannot purge the contempt," there "must be a showing that the contemnor has the means to comply" with the purge condition. *Britannia Holdings Ltd. v. Greer,* 127 Wash.App. 926, 933, 113 P.3d 1041 (2005) (footnote omitted). ***839** "Whether a purge condition exceeded the court's authority or violated a contemnor's due process rights ... [are] question[s] of law, which [are] reviewed de novo." *In re M.B.,* 101 Wash.App. 425, 454, 3 P.3d 780 (2000); *In re Silva,* 166 Wash.2d 133, 140, 206 P.3d 1240 (2009).

**[31]** ¶ 68 Mr. Gorman first challenges the purge condition as exceeding the scope of the original order, something he claims a civil contempt sanction can never do. He relies on the statement in *State v. Buckley,* 83 Wash.App., 707, 711, 924 P.2d 40 (1996) that a sanction is punitive "if it is imposed to punish a past contempt of court ... and does not afford the defendant an opportunity to purge the contempt *by performing the acts required in the original order.*" (Emphasis added) (footnote omitted). He asserts that the contempt order in this case could, at most, have required him to "undo" acts or omissions occurring between August 17 and 31, while the TRO was in effect—an impossibility in this case. The argument was addressed and rejected in *M.B.,* in which the court rejected an appellant's attempt to "seize upon" the same language in *Buckley* to argue that a court may not impose a purge condition that was not required by the court order that was violated. *M.B.* holds that a trial court has inherent authority to impose purge conditions beyond the four corners of the violated order, as long as the condition serves remedial aims and the condition is "reasonably related to the cause or nature of the contempt." *M.B.,* 101 Wash.App. at 450, 3 P.3d 780 (emphasis omitted) (citing *In re Marriage of Larsen,* 165 Wis.2d 679, 478 N.W.2d 18 (1992)). The purge condition here satisfies those criteria.

**[32]** ¶ 69 3B and Mr. Gorman next contend that the trial court erred in failing to make a threshold finding that they were able to comply with the purge condition at the time the contempt order issued. They argue for the first time on appeal that they were *not* able to comply because the Texas state court action had been removed to federal court by the time of the contempt hearing, and after a case is removed to federal court, "the state court loses jurisdiction to proceed further, and all subsequent proceedings therein are void." *Iowa Cent. Ry. Co. v. Bacon,* 236 U.S. 305, 310, 35 S.Ct. 357, 59 L.Ed. 591 (1915).

¶ 70 Alternatively, if the reference to "the Harris County, Texas, action" in the purge condition means or includes the federal action (as Symetra contends), then 3B and Mr. Gorman reply that the court could not impose such a purge condition consistent with *Donovan v. City of Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964).

**[33]** **[34]** ¶ 71 "In the context of civil contempt, the law presumes that one is capable of performing those actions required by the court." *In re Pers. Restraint of King,* 110 Wash.2d 793, 804, 756 P.2d 1303 (1988). "Thus, inability to comply is an affirmative defense. A contemnor has both the burden of production on ability to comply ... as well as the burden of persuasion." *Id.; Moreman v. Butcher,* 126 Wash.2d 36, 40, 891 P.2d 725 (1995). "The contemnor must offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible." *King,* 110 Wash.2d at 804, 756 P.2d 1303.

¶ 72 3B's and Mr. Gorman's argument that they were unable to comply with the purge condition comes too late. As pointed out by Symetra, the argument was not made in the superior court. While 3B represents that it *did* make the argument or, alternatively, that its inability to comply "only ripened into a real controversy once the trial court signed the Contempt Order," Reply Br. at 18, neither contention is supported by the record.

¶ 73 The record reveals that Symetra's proposed contempt order, with its proposed purge condition, was served on 3B and Mr. Gorman at least as early as November 19. Moreover, when the superior court granted a continuance on November 30, it adapted the proposed contempt order to grant the continuance. As adapted, the order of continuance (including the proposed purge condition) is signed "approved as to form" by 3B's Washington lawyer. Since 3B and Mr. Gorman had ample advance notice of the proposed purge condition, any inability to comply with it was an affirmative defense that they needed to raise before the contempt order was entered, not after.

***840** ¶ 74 The record also belies 3B's and Mr. Gorman's contention that they raised the issue of inability to comply with the purge condition during or before the hearing on the motion for contempt. The only briefing they submitted—3B's motion for a continuance—was filed at a time when 3B had moved to remand the Texas case to state court. Accordingly, the briefing contemplated future state litigation, not federal litigation. On the merits of the motion for contempt, 3B's continuance briefing argued only that (1) the Benton County court issued the TRO after 3B, FinServ and A.M.Y. filed their motion to vacate the Texas stay and their first amended petition, (2) the TRO did not apply to FinServ or A.M.Y., and (3) Symetra's application for a permanent injunction was not heard because FinServ removed the Washington action to federal court. The only reference in the briefing to the fact that the Texas action had been removed to federal court was in the context of explaining why Symetra would not be prejudiced by the requested continuance.

¶ 75 Nor did 3B's lawyer argue inability to comply with the purge condition at oral argument of the motion for contempt. Instead, he argued that there was no intentional violation of the TRO because (1) the lawyer representing 3B had also been representing FinServ and A.M.Y., (2) the abatement order remained in place in relevant respects during the 14 days the TRO was in effect, (3) the "violations" complained of predated the TRO, and (4) appearing at a hearing that had already been set "on behalf of FinServ and A.M.Y." was not contumacious. RP (Dec. 28, 2012) at 6–7. The one reference to removal of the Texas action to federal court was not in connection with any inability to perform the purge condition but in the context, instead, of arguing that the Benton County court no longer had jurisdiction to deal with the parties' disputes because Symetra had moved the Texas action to federal court "because they wanted it there."[12] *Id.* at 7.

¶ 76 RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal." *In re Guardianship of Cornelius,* 181 Wash.App. 513, 533, 326 P.3d 718 (2014). We follow the general policy provided by the rule of refusing to entertain this issue, which is raised for the first time on appeal.

***Attorney fees on appeal***

¶ 77 Both parties request attorney fees on appeal. 3B and Mr. Gorman seek fees and ask the court to deny Symetra's request for fees on the grounds that "Symetra sought and utilized the trial courts [sic] jurisdiction to obtain the contempt order in derogation of Washington law." Br. of Appellant at 29–30. They fail to show entitlement based on a contract, statute, or recognized ground of equity. *Hsu Ying Li v. Tang,* 87 Wash.2d 796, 797–98, 557 P.2d 342 (1976).

¶ 78 Symetra seeks its fees on appeal under RAP 18.1(a) and RCW 7.21.030(3). RAP 18.1 permits recovery of reasonable attorney fees or expenses on review if applicable law grants that right. RCW 7.21.030(3) permits an award of attorney fees incurred by a party in defending the appeal of a contempt order. *R.A. Hanson Co. v. Magnuson,* 79 Wash.App. 497, 505, 903 P.2d 496 (1995). Symetra is awarded its fees and costs on appeal subject to compliance with RAP 18.1(d).

¶ 79 The superior court's award of costs and loss is reversed and remanded for further proceedings consistent with this opinion. The order of contempt is otherwise affirmed.

WE CONCUR: BROWN, and KORSMO, JJ.

**All Citations**

359 P.3d 823

Footnotes

1 RSL is now known as Liquidated Marketing, Ltd. This fact and others relating to Washington proceedings taking place before February 2012 are drawn from this court's earlier decision in *In re Rapid Settlements, Ltd.,* 166 Wash.App. 683, 271 P.3d 925 (2012).

2 RCW 19.205.040(2) provides in relevant part that a transferee "shall be liable to the structured settlement obligor and the annuity issuer ... (b) For any other liabilities or costs, including reasonable costs and attorneys' fees ... arising as a consequence of the transferee's failure to comply with this chapter."

3 The federal court granted Symetra's motion for remand to state court "based on the following:"

> FinServ's non-party status in the underlying litigation; the passage of more than one year since the original litigation which was commenced in approximately 2004 was filed; the non-joinder by other similarly affected entities in FinServ's Notice Of Removal; the failure of FinServ to show that $75,000.00 or more is in controversy; and the apparent ancillary nature of the action which is pending in the Superior Court of Benton County, Washington.

CP at 856–57.

4 Symetra raises a threshold objection that 3B and Mr. Gorman are raising several arguments for the first time on appeal and asks that we refuse to consider them. Apart from a new challenge to the validity of the purge condition, which we discuss below, we conclude that the appellants' issues were adequately raised in the superior court.

5 For the first time in the reply brief, Mr. Gorman recasts his argument as one challenging a second requirement of due process: an alleged lack of personal jurisdiction over him for lack of minimum contacts with the State. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (due process requires that a defendant be given notice and be subject to the personal jurisdiction of the court.) As Mr. Gorman pointed out to the Texas court on August 23, 2012, there is a difference between adue process "International Shoe minimum contacts type of presentation" and a due process argument that one is deprived of "a full and fair adjudication ... where [one] never [gets] served with process." CP at 847–48. Under RAP 10.3(c), "a contention presented for the first time in the reply brief will not receive consideration on appeal." *Fosbre v. State,* 70 Wash.2d 578, 583, 424 P.2d 901 (1967). This rule applies even to challenges regarding personal jurisdiction. *See, e.g., State ex rel. Pub. Disclosure Comm'n v. Permanent Offense,* 136 Wash.App. 277, 294, 150 P.3d 568 (2006). Even so, under our long-arm statute, RCW 4.28.185, Washington courts may assert jurisdiction over nonresident individuals to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute. *Deutsch v. West Coast Mach. Co.,* 80 Wash.2d 707, 711, 497 P.2d 1311 (1972). Mr. Gorman had been admitted pro hac vice by this court in 2011 and appeared in Spokane to argue the first appeal. We have no doubt that Mr. Gorman's appearance in Washington in a legal proceeding whose outcome he then collaterally attacks elsewhere, in contempt of court, is a contact of such character that maintenance of the contempt action does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

6 While not an issue in this case, punitive sanctions can be imposed for a past contempt of court through a criminal contempt proceeding whether or not it is continuing. *See* RCW 7.21.050. A completed intentional act of a type identified by RCW 7.21.010 falls within the definition of "contempt of court."

7 3B and Mr. Gorman argue that some of the relief awarded was in the nature of punishment, making the proceeding below a criminal contempt proceeding; from that, they argue that because it was not conducted as a criminal contempt proceeding, all of the relief ordered by the court fails. The proceeding was initiated and conducted as a civil contempt proceeding. To the extent that relief ordered by the court was improper, it will be reversed. We reject the appellants' effort to have us analyze the proceeding as something it was not.

8 Former RCW 7.20.100 (1881) provided:

> If any loss or injury to a party in an action, suit or proceeding prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements.

9 For example, the superior court could not find acts or omissions enjoined by the terms of the TRO but that took place after August 31 to be contempt. It did not. Under the United States Supreme Court's decision in *Donovan v. City of Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), the superior court could not exercise authority over 3B's conduct in the federal case in Texas following removal. Here, we are not dealing with that limitation; we are determining the losses that resulted from the August acts of contempt.

10 To be clear, to the extent *3B* was asserting FinServ's and A.M.Y.'s priority, Symetra's legal expense in responding should be recoverable from 3B as loss. Insofar as 3B asserts an interest in having its creditors' security interests recognized, it should have asserted that interest in the 2010 proceedings in Benton County. Res judicata, or claim preclusion, prohibits the relitigation not only of claims and issues that were litigated but also those that could have been litigated in a prior action. *Pederson v. Potter,* 103 Wash.App. 62, 67, 11 P.3d 833 (2000).

11 The forfeiture provision (language proposed by Symetra) would more clearly have been a remedial coercive sanction had it made clear, as provided by RCW 7.21.030(1)(b), that Mr. Gorman had a day within which to comply with the purge condition and thereby avoid any forfeiture. Because the order describes the forfeiture as "pursuant to RCW 7.21.030(1)(b)," we construe the one-day purge period as incorporated by reference.

12 3B and Mr. Gorman also cite to portions of the record that postdate the order of contempt, including a motion for new trial and reconsideration filed on January 23, 2013, in which they challenged the validity of the purge clause for the first time. CP at 692. The reconsideration motion was summarily denied. CP at 1753. Since they have not assigned error or presented any argument or authority regarding any mishandling of their post order submissions, we will not consider them. RAP 10.3(a)(4), (6).

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**TAB B - OPINION ISSUED (UNREPORTED)**

**FILED**
**AUGUST 18, 2015**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| In the Matter of RAPID SETTLEMENTS, LTD'S APPLICATION FOR APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS | ) | No. 31435-9-III |
| | ) | PUBLISHED OPINION |

SIDDOWAY, C.J. — Symetra Life Insurance Company and Symetra Assigned Benefit Services Company (Symetra) obtained an antisuit temporary restraining order (TRO) enjoining RSL-3B-IL, Ltd. (3B) from collaterally attacking Symetra's final Washington order against 3B in Texas courts. When 3B violated the TRO, Symetra filed a motion for contempt against 3B and its Texas lawyer, John Gorman.

As a result of removal of the Washington action to federal court, its remand, and a continuance, Symetra's motion for contempt was not heard by the Benton County court for four months. By that time, 3B's collateral attack on Symetra's final order had been removed by Symetra to federal district court in Texas.

The superior court found 3B and Mr. Gorman in contempt, ordered Mr. Gorman to pay a one-time forfeiture of $1,000 and ruled that to purge themselves of the contempt charge, 3B and Mr. Gorman must strike all pending motions in the "Harris County,

Texas, action" and agree not to take further action in that case as long as they were subject to a Benton County court injunction. Clerk's Papers (CP) at 526. The court also awarded Symetra substantial attorney fees and costs. 3B and Mr. Gorman appeal, arguing that the forfeiture amount and fees and costs awarded are punitive sanctions that could not be imposed in a civil contempt proceeding and, for the first time on appeal, that the purge condition was not possible to perform and was therefore invalid.

We conclude that only part of Symetra's fees and costs were properly awarded. But where 3B and Mr. Gorman committed clear acts of contempt and failed in the trial court to assert and support what they now contend was their inability to perform the purge condition, the relief ordered by the court was largely proper. We reverse the award of loss and costs, remand for further review and recalculation by the court, and otherwise affirm.

## FACTS AND PROCEDURAL BACKGROUND

Symetra and 3B are both engaged in businesses involving structured settlements. As explained in a legislative report on what became Washington's Structured Settlement Protection Act (SSPA), chapter 19.205 RCW:

> In the settlement of large tort claims, damages are often paid by a defendant to a plaintiff in the form of a structured settlement. In its simplest form, a structured settlement typically involves the initial payment of a lump sum, followed by a series of subsequent smaller payments that are made at specified intervals over a period of years (an annuity).

> . . . Structured settlements are usually paid by an insurance company (the obligor), that obtains a benefit by paying off the obligation in installments over a long period of time, rather than as a single lump sum. The recipient of the structured settlement proceeds (the payee) can benefit as well, since the annuity payments are not subject to federal income tax and the receipt of payments over the long term can provide financial security.

FINAL BILL REP. ON ENGROSSED H.B. 1347, at 1, 57th Leg., Reg. Sess. (Wash. 2001). The legislature enacted the SSPA after it became common for injured persons to be offered discounted payments in exchange for their entitlements under a structured settlement, by companies that hoped to profit from the investment. The SSPA reflected the legislature's concern that payees not be permitted to sell annuity rights until a court had reviewed the proposed transfer for adequate disclosure and determined that a transfer was in the best interest of the injured person, taking into account the welfare and support of his or her dependents. *See* RCW 19.205.030 (requiring court or agency approval).

Symetra is engaged in the business of assuming the obligation to pay a tort liability and then fulfilling it through structured settlement payments. 3B and at least one of its affiliates, Rapid Settlements, Ltd. (RSL)[1] are engaged in the business of buying injured persons' future payment rights at a discount.

[1] RSL is now known as Liquidated Marketing, Ltd. This fact and others relating to Washington proceedings taking place before February 2012 are drawn from this court's earlier decision in *In re Rapid Settlements, Ltd.*, 166 Wn. App. 683, 271 P.3d 925 (2012).

In July 2004, a structured settlement payee agreed to sell a future payment due him from Symetra to RSL. As the investor, RSL was required by the SSPA to seek approval of the transfer in superior court. Symetra opposed RSL's application as violating requirements of the SSPA. The court agreed, dismissed RSL's application, and awarded Symetra its reasonable attorney fees and costs under RCW 19.205.040(2)(b).[2] RSL unsuccessfully appealed the award of fees to the Court of Appeals and unsuccessfully sought review by our Supreme Court. *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 134 Wn. App. 329, 332, 139 P.3d 411 (2006), *review denied*, 160 Wn.2d 1015, (2007)). Additional fees and costs were awarded to Symetra at both levels of appeal. In 2008, the King County Superior Court entered an amended judgment of $39,287.04 against RSL reflecting the cumulative fees and costs.

Symetra unsuccessfully attempted to collect the judgment in both Washington and Texas. Efforts to collect in Washington proved unsuccessful because only RSL's affiliates, not RSL, maintain bank accounts in Washington. Symetra's efforts to collect the judgment in Texas were met with RSL's response to post-judgment discovery that it owned no property, even in its home state.

[2] RCW 19.205.040(2) provides in relevant part that a transferee "shall be liable to the structured settlement obligor and the annuity issuer . . . (b) For any other liabilities or costs, including reasonable costs and attorneys' fees . . . arising as a consequence of the transferee's failure to comply with this chapter."

In a then unrelated proceeding, RSL had applied in Benton County in November 2004 for approval of a transfer agreement under which Nicholas Reihs would sell a future payment from Symetra (payable in September 2012) in exchange for a discounted payment. Over Symetra's objection, the court approved the transfer. Although RSL's transfer application listed itself as the transferee, the order approving the transfer stated that the designated beneficiary had been changed to 3B.

Five years after the court order approving transfer of the Reihs payment but before it came due, Symetra moved to modify the order to allow it to apply the amount otherwise payable to 3B to its King County judgment against RSL. Over the objection of 3B, which was allowed to intervene, the superior court found that 3B was the alter ego of RSL and modified the transfer order to recognize a right of setoff in Symetra. 3B appealed. We affirmed the superior court's modified order in February 2012. *In re Rapid Settlements, Ltd.*, 166 Wn. App. at 696.

3B then revived an action it had commenced in Texas two years earlier (shortly after Symetra asked the Benton County court to authorize setoff) in which it challenged Symetra's ability to collect its judgment through a setoff taking place in Washington. At Symetra's request, the Texas court had stayed the action—"abated" it, in Texas terms—pending disposition of 3B's appeal in Washington.

Following our decision on the appeal, John Craddock, one of Mr. Gorman's law partners, wrote Symetra's lawyers, stating that 3B continued to assert a right to receive

the upcoming September 2012 Reihs payment and that two creditors, FinServ Casualty Corporation and A.M.Y. Property & Casualty Corporation, asserted prior secured interests in the payment. On August 9, Mr. Craddock notified Symetra's lawyers that 3B would move to vacate the abatement order in the Texas action and would seek an order requiring Symetra to deposit the September Reihs payment in the Texas court. Symetra responded by moving the Benton County court on August 10 to issue an antisuit TRO in the Reihs transfer action.

On August 14 and 15, 3B filed an amended petition in the Texas action naming FinServ and A.M.Y. as additional plaintiffs. FinServ and A.M.Y. purported to join in 3B's motion to vacate the stay and reinstate the Texas case to the active docket. Mr. Craddock, Mr. Gorman, and their law firm submitted all materials filed with the Texas court as "Counsel for Plaintiffs." CP at 1492, 1517. Both motions were eventually set for an August 24 hearing date.

On August 17, the Benton County court heard Symetra's motion for a TRO. Based on findings that 3B's Texas action was "an attempt to undermine this Court's 2010 Order in this matter," and "an attempt to undermine this Court's jurisdiction over the structured settlement payment," the court issued a TRO enjoining 3B, in relevant part, from taking further action "in Harris County District Court Case No. 2010-41653" and to strike any and all pending motions in that case. CP at 119. The order set a hearing on Symetra's request for a permanent injunction for the afternoon of August 31.

3B's chief executive officer was personally served with the TRO on August 20. The following day, Symetra filed an emergency motion asking the Texas court to cancel the impending Texas hearings based on the TRO's dictate that 3B strike pending motions and take no further action in the Texas case. Despite 3B's having been served with the TRO, it did not strike its motions; instead, Mr. Craddock filed a brief in opposition to Symetra's motion on August 22, on behalf of "[a]ll three plaintiffs." CP at 170. While the brief argued that "[n]othing can stop FinServ and A.M.Y. from moving forward in this [Texas] Court" because the TRO did not apply to them, the order of abatement had not been lifted and as of August 22, FinServ and A.M.Y. were not parties to the Texas action. CP at 170-71.

A hearing on Symetra's motion was held before the Texas court on August 23. Mr. Gorman appeared on behalf of 3B and argued that—contrary to this court's decision on appeal—the offset order had been obtained without due process and was invalid. The Texas court reset the hearing on 3B's motions for August 28.

In light of 3B's post August 20 acts and failures to act, Symetra moved in the Benton County court on August 24 for an order finding 3B in contempt. It asked that it be awarded its costs and attorney fees in bringing the contempt motion and in having to participate in the Texas action after service of the TRO. It also asked for a one-time forfeiture of $1,000 against Mr. Gorman. Symetra set the contempt motion to coincide with the permanent injunction hearing set for August 31.

Mr. Gorman and 3B were not deterred. 3B still did not strike its motions and Mr. Gorman appeared at the August 28 hearing in the Texas court, where he argued that the stay should be lifted so that 3B could pursue its challenge to the Washington court orders. The Texas court was persuaded to lift the stay for the limited purpose of adding FinServ and A.M.Y. as parties but explained that the suit would otherwise "remain abated, and let's see what happens in Washington on Friday [the August 31 hearing date in Washington], and then we will go from there." CP at 899.

What happened in Washington on Friday was that a lawyer representing FinServ appeared at the time set for the hearings and presented FinServ's notice of removal to federal court, filed earlier in the day. The notice of removal represented that FinServ "is being joined as a party to this lawsuit." CP at 193. While Symetra had filed a motion to add FinServ and A.M.Y. as parties, the court had not yet done so, and the removal was later determined to be defective on multiple grounds.[3] The removal nonetheless derailed

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[3] The federal court granted Symetra's motion for remand to state court "based on the following:"

> FinServ's non-party status in the underlying litigation; the passage of more than one year since the original litigation which was commenced in approximately 2004 was filed; the non-joinder by other similarly affected entities in FinServ's Notice Of Removal; the failure of FinServ to show that $75,000.00 or more is in controversy; and the apparent ancillary nature of the action which is pending in the Superior Court of Benton County, Washington.

CP at 856-57.

Symetra's request for a permanent injunction to replace the expiring TRO and its motion for contempt, which were necessarily stricken.

In granting Symetra's motion to remand the case to state court in early November, the federal court denied Symetra's request for fees and costs, but observed:

> [T]his court takes notice that state court proceedings both in Washington and Texas will allow an ample opportunity for the prevailing party to pursue monetary and equitable relief against FinServ (and possibly others). Under these circumstances, attorney fees and costs are DENIED.

CP at 857.

Within two weeks of the order remanding the Washington case to Benton County, Symetra moved for an extension of the TRO and noted its previously filed motions for November 30. On November 29, 3B requested a continuance. It emphasized that Symetra would not be prejudiced because the insurer had already applied the Reihs payment to its judgment against RSL, and the Texas action—in which 3B, FinServ and A.M.Y. were trying to recover the Reihs payment—had been removed to federal court by Symetra on September 10 and was "on hold" pending 3B's motion for remand. CP at 293. The Benton County court granted 3B's request in part; it entered Symetra's proposed order continuing temporary injunctive relief but continued the motions for a permanent injunction and contempt to December 28.

The hearing proceeded on December 28, and at its conclusion the court entered the permanent injunction requested by Symetra. It took the proposed contempt order under

advisement. While 3B filed no brief in opposition to the motion for contempt, its lawyer informed the court during the hearing that it relied for its opposition on the declaration filed with its request for a continuance in November. Unsure that it had reviewed the continuance materials in preparing for the December 28 hearing, the court indicated it wanted to be "fully briefed" before ruling. Report of Proceedings (RP) (Dec. 28, 2012) at 17. Two weeks later, it granted Symetra's motion and entered an order of contempt.

The court's order found 3B and Mr. Gorman in contempt for failing to strike 3B's motions after service of the TRO on August 20 and for appearing and participating in the hearings on August 23 and 28. Based on its findings, the court ordered the following relief:

> 1. 3B is ordered to pay Symetra for its costs and attorneys' fees incurred in bringing this motion for contempt and all costs and attorneys' fees incurred by Symetra in the Harris County, Texas, action between August 20, 2012, when the Court's Temporary Restraining Order was served on 3B, and the date of this Order of Contempt. Symetra has submitted a cost and fee bill showing the amount of these costs and fees is $47,024.50.
>
> 2. Attorney Gorman, as attorney and agent for 3B, is ordered to pay Symetra a one-time forfeiture pursuant to RCW 7.21.030(1)(b) of One Thousand Dollars ($1,000.00).
>
> 3. In order to purge themselves of this contempt charge, 3B and its attorney Gorman must 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 this Court restraining them from doing so is in effect.

CP at 526. 3B and Mr. Gorman appeal.

ANALYSIS

3B and Mr. Gorman assign error to the superior court's order holding them in contempt, identifying seven issues. We will first address their challenges to the court's findings of contempt. (Appellant's issues A, C, D, and E). We will then turn to their partially viable challenges to the relief ordered by the court. (Appellant's issues B, F and G).[4]

I. *The court had jurisdiction over Mr. Gorman and its findings of contempt are both sufficient and supported by substantial evidence*

Mr. Gorman argues that because he had not appeared in the Benton County action and was not served with an order to show cause, the court violated his right to due process by entering relief against him. He also argues that his conduct was not sanctionable given "competing duties to his clients." Br. of Appellant at 3. Both Mr. Gorman and 3B contend that substantial evidence does not support the court's contempt findings and that the court erred by granting relief for contempt without finding that they violated the TRO "intentionally."

*Due process as to Mr. Gorman*

Mr. Gorman, a Texas resident, argues that Symetra never served him with process

[4] Symetra raises a threshold objection that 3B and Mr. Gorman are raising several arguments for the first time on appeal and asks that we refuse to consider them. Apart from a new challenge to the validity of the purge condition, which we discuss below, we conclude that the appellants' issues were adequately raised in the superior court.

making him a party and that it never obtained an order to show cause, with the result that the court lacked jurisdiction to issue a contempt order against him. He relies on *Burlingame v. Consolidated Mines and Smelting Company, Ltd.*, 106 Wn.2d 328, 722 P.2d 67 (1986).

The *Burlingame* case does not help Mr. Gorman. He focuses on the court's holding in that case that a trial court's order to show cause issued under former RCW 7.20.040 (1881) was adequate notice, and then contrasts that with the contempt proceeding against him, which was initiated, instead, by motion. When Washington's contempt statutes were substantially modified in 1989, a motion procedure was substituted for proceedings on an order to show cause. *See* RCW 7.21.030(1) (court initiates a contempt proceeding on its own motion or the motion of a person aggrieved). The court in *Burlingame* did not hold that an order to show cause is required by due process; it held only that the order to show cause that was statutorily required at the time sufficed under the "minimal notice" that traditionally has satisfied due process requirements for a valid judgment of contempt. *Burlingame*, 106 Wn.2d at 332. The requirements of a valid contempt order are notice and an opportunity to be heard, with the opportunity to be heard being the most significant. "The notice requirement is important only because it protects an individual's right to be heard." *Id.* (citing *Hovey v. Elliott*, 167 U.S. 409, 414-15, 17 S. Ct. 841, 42 L. Ed. 215 (1897)). *Burlingame* requires only

that we consider whether the motion procedure followed below provided notice sufficient to protect Mr. Gorman's right to be heard.

Symetra moved the court to "enter an order finding 3B and its agent, attorney Gorman, in contempt." CP at 156. There can be no question that Mr. Gorman was aware of Symetra's motion. During the hearing in Texas on August 23, Symetra's lawyer mentioned that his client viewed 3B as being in contempt of the TRO, to which Mr. Gorman responded, "Contempt, I just heard contempt. You know, we want to be in Texas. We want a forum that's going to hear us." CP at 511. During the August 28 hearing in Texas, Mr. Gorman told the court that "as forewarned the other day . . . [Symetra has] now filed a motion for contempt seeking to hold me personally in contempt of court up in Washington for pursuing this action in a Texas court." CP at 485. A certificate of service establishes service by mail of the motion for contempt and proposed order on Mr. Gorman at least as early as November 19, 2012. In granting the continuance requested by 3B on November 30, the Benton County court created its order—which clearly indicated the time and place of the December 28 hearing—by modifying Symetra's proposed "Order of Contempt Against RSL-3B-IL, Ltd. and Attorney Gorman." CP at 310-12. The order was signed "approved as to form" by 3B's

lawyer. The notice provided was more than sufficient to protect Mr. Gorman's right to be heard.[5]

*Substantial evidence supports the findings of contempt*

The court's contempt order included the following findings of violations of the TRO after it was served on 3B, and thereby contempt: that 3B and Mr. Gorman continued to pursue the Texas action (finding 1), that 3B failed to strike the motions in that lawsuit that were pending at the time of the TRO (finding 2), that 3B opposed Symetra's motion to extend the time for hearing those motions (finding 2), and that Mr. Gorman presented argument at the August 23 and August 28 hearings (finding 2).

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[5] For the first time in the reply brief, Mr. Gorman recasts his argument as one challenging a second requirement of due process: an alleged lack of personal jurisdiction over him for lack of minimum contacts with the State. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (due process requires that a defendant be given notice and be subject to the personal jurisdiction of the court.) Under RAP 10.3(c), "a contention presented for the first time in the reply brief will not receive consideration on appeal." *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967). This rule applies even to challenges regarding personal jurisdiction. *See, e.g., State ex rel. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 294, 150 P.3d 568 (2006). Even so, under our long-arm statute, RCW 4.28.185, Washington courts may assert jurisdiction over nonresident individuals to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute. *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311 (1972). Mr. Gorman had been admitted pro hac vice by this court in 2011 and appeared in Spokane to argue the first appeal. We have no doubt that Mr. Gorman's appearance in Washington in a legal proceeding whose outcome he then collaterally attacks elsewhere, in contempt of court, is a contact of such character that maintenance of the contempt action does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

The United States Supreme Court decided 125 years ago that the court of one state may enjoin parties to a case before it from engaging in vexatious litigation in another state for the purpose of evading the rulings of the first court. *Cole v. Cunningham*, 133 U.S. 107, 111, 10 S. Ct. 269, 33 L. Ed. 538 (1890). Such injunctions may not control the second court's actions regarding the litigation in that court, but they are effective against the parties, with sanctions generally administered only by the court issuing the injunction. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (citing, *e.g.*, *James v. Grand Trunk Western R. Co.*, 14 Ill. 2d 356, 372, 152 N.E.2d 858 (1958); *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963)).

In this case, the Benton County court issued the TRO on August 17 and it was served on 3B on August 20. The TRO ordered 3B "to strike any and all pending motions in [Harris County District Court Case No. 2010-41653]." CP at 119. 3B had pending motions in the case at the time. It did not strike them.

The TRO enjoined 3B "from taking any further action" in the Texas case. *Id.* Two days after being served with the TRO, on August 22, 3B filed a response in the Texas court opposing Symetra's emergency motion.

A temporary restraining order is binding upon "the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." CR 65(d). Days after service of the TRO on 3B, Mr. Gorman

appeared in the Texas court on August 23 and 28 to advocate on behalf of 3B and in opposition to Symetra. The existence of the Washington TRO was a subject matter of his argument on both occasions.

While chapter 7.21 RCW provides that a court may find a person in contempt *and* impose a coercive sanction only upon "[a] person [who] has failed . . . to perform an act that is yet within the person's power to perform," RCW 7.21.030(2), a court may find a person in contempt whether or not it is possible to coerce future compliance. Any "intentional . . . [d]isobedience of any lawful judgment, decree, order or process of the court" is a contempt of court as defined by RCW 7.21.010(1)(b). RCW 7.21.030(3) allows the court to order a contemnor to pay losses suffered as a result of the contempt and costs incurred in the contempt proceedings for any "person found in contempt of court" without regard to whether it is possible to craft a coercive sanction. See *State ex rel. Chard v. Androw*, 171 Wash. 178, 17 P.2d 874 (1933) (affirming judgment for $3,000 loss imposed on contemnor for violating court order; no coercive sanction imposed due to contemnor's inability to perform).[6]

A trial court's finding of contempt will not be disturbed on appeal as long as it is supported by substantial evidence in the record. *In re Marriage of Farr*, 87 Wn. App.

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[6] While not an issue in this case, punitive sanctions can be imposed for a past contempt of court through a criminal contempt proceeding whether or not it is continuing. *See* RCW 7.21.050. A completed intentional act of a type identified by RCW 7.21.010 falls within the definition of "contempt of court."

177, 184, 940 P.2d 679 (1997); *Ramstead v. Hauge*, 73 Wn.2d 162, 167, 437 P.2d 402 (1968). Where, as in this case, "the superior court bases its contempt finding on a court order, 'the order must be strictly construed in favor of the contemnor,' and '[t]he facts found must constitute a plain violation of the order.'" *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 768, 271 P.3d 331 (2012) (emphasis omitted) (citations omitted).

The record unquestionably supports the violations found by the court. Since they occurred after service on 3B of the TRO, they would appear to support the court's findings of contempt. But 3B and Mr. Gorman argue that their literal violations were not contumacious for several reasons.

First, they emphasize that it was Symetra's emergency motion in Texas that precipitated the need for 3B's opposition. But if 3B had stricken its motions as ordered, Symetra would have had no need to file its emergency motion. Moreover, the relief that Symetra was seeking through its emergency motion was entirely consistent with the Benton County court's TRO. Consistent with the TRO, 3B should not have opposed it.

3B and Mr. Gorman argue that the two hearings at which Mr. Gorman appeared while the TRO was in effect were set by the Harris County court. Again, if 3B had stricken its motions as required by the TRO, the hearings would presumably have been stricken by the court. If they weren't, then consistent with the TRO, 3B should have done no more than explain to the court why it could not participate.

3B and Mr. Gorman argue that FinServ and A.M.Y. were interested parties and would have been free to take action in the Texas proceeding. But until FinServ and A.M.Y. were joined—which was not acted upon by the court until it vacated the abatement order for that limited purpose on August 28—only 3B was a party to the proceeding. And even if FinServ and A.M.Y. could be viewed as parties to the proceeding before the limited lifting of the abatement order on August 28, that does not excuse 3B's own participation in violation of the TRO or Mr. Gorman's appearance on 3B's behalf.

Finally, 3B argues that it acted on its lawyer's advice and Mr. Gorman argues that he was duty bound to advance the wishes of his client. Neither rationale excuses them from responsibility for contempt. Acting on advice of counsel in refusing to obey a TRO is not a defense to a civil contempt proceeding. *Ramstead*, 73 Wn.2d at 166; *Rekhi v. Olason*, 28 Wn. App. 751, 757, 626 P.2d 513 (1981). Because the TRO did not require Mr. Gorman to violate any privilege, the limited defense recognized in assertion of privilege cases does not apply. *Cf. Dike v. Dike*, 75 Wn.2d 1, 5-9, 448 P.2d 490 (1968) (where lawyer is ordered by the court to reveal privileged information and is held in contempt for refusal to do so, the proper procedure is to stay all sanctions for contempt pending appellate review). While Mr. Gorman argues that he could not take action against his client's wishes, he had the options of encouraging his client to comply with the TRO or, if 3B could not be persuaded to comply, then of withdrawing from the

representation rather than commit contempt. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d) ("A lawyer shall not . . . knowingly disobey, or advise the client to disobey . . . a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience") and 1.15(b)(4) (providing that a lawyer may withdraw from representing a client who "insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement").

Appellants cite *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 55 Wash. 1, 13, 103 P. 426 (1909), *modified on reh'g*, 107 P. 196 (1910) (Mount, J., dissenting) for the proposition that "[t]here is nothing in the [contempt] statute to indicate that it was intended to include one who in good faith advises the wrong." But that case dealt with a lawyer, Mr. Abel, who did not himself violate the court's order as Mr. Gorman did here. *Id.* at 14. Mr. Abel "advised the officers to do the things complained of," but "did not directly participate therein himself." *Id.* at 17. As observed by the majority opinion, "An offending attorney *would be liable . . . for a willful disregard of the orders of the court*, but it would require a forced construction of the statute to make him subject to civil liability because of his advice honestly given." *Id.* at 14 (emphasis added). Mr. Gorman was not found in contempt for his advice, but for his actions.

Appellants are correct that the TRO expired on August 31. CR 65(b) (temporary restraining orders expire within 14 days unless extended). But the acts of contempt found by the court all occurred on or before August 31. The findings of contempt are supported by substantial evidence of violations of the court's order during the two weeks it was in effect.

*No "finding" of intentional conduct was required*

The superior court's contempt order did not include an explicit finding that 3B's and Mr. Gorman's violations of the TRO were intentional. Relying on the statement in *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355, 236 P.3d 981 (2010) that "a finding that a violation of a previous court order was intentional is required for a finding of contempt," 3B and Mr. Gorman argue that absent an explicit finding of intentional conduct, the trial court's order is insufficient. As further support, they cite *In re Estates of Smaldino*, 151 Wn. App 356, 365, 212 P.3d 579 (2009), in which a lawyer was found in contempt for violating the terms of a TRO prohibiting his client from transferring her real property, after he caused her to grant him a deed of trust to secure payment of his legal fees and then recorded it. On appeal, the lawyer argued that the court's finding that he intentionally disobeyed the TRO was contradicted by its finding that he had chosen not to read the TRO. *Id.* at 362. The court held that knowledge could be imputed. It also held that because the lawyer's acquisition of a security interest in the property "was an intentional act," his act in disobedience of the order was intentional. *Id.* at 365.

The two decisions hold only that an individual must act intentionally to be found in contempt of court. Under RCW 7.21.010(1)(b), "contempt of court" is defined, in relevant part, as "*intentional* . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." (Emphasis added.) But given that definition, the Benton County court's finding of contempt reflects an implicit finding that 3B's and Mr. Gorman's acts and omissions *were* intentional.

When the Washington legislature intends to require that an explicit finding must be made for a court to act, it says so. *See, e.g.*, RCW 13.34.155 ("dependency court . . . must make a written finding" that parenting plan is in a child's best interest); RCW 13.40.193 (juvenile found to have been unlawfully in possession of a firearm must receive a disposition that includes program participation "unless the court makes a written finding . . . that participation . . . would not be appropriate"); RCW 4.84.185 (court may award expenses of suit "upon written findings by the judge that the action . . . was frivolous"). Nothing in chapter 7.21 RCW requires that the court make a written finding of intentional conduct.

All of 3B's and Mr. Gorman's acts and omissions identified by the contempt order as violations were supported by evidence that established their inherently intentional character. The court was not required to explicitly find that they were intentional.

II. *The relief ordered for the contempt was largely although not entirely appropriate, given the civil character of the contempt proceeding*

Having determined that the trial court properly found 3B and Mr. Gorman in contempt, we turn to the propriety of the relief awarded in what was initiated and conducted as a civil contempt proceeding.[7] The relief awarded consisted of attorney fees and costs incurred in the contempt proceeding; attorney fees and costs incurred in the Texas proceeding; and the $1,000 onetime sanction against Mr. Gorman.

*Costs incurred in the contempt proceeding*

RCW 7.21.030(3) provides in relevant part that in addition to imposing remedial sanctions authorized elsewhere in the statute, "[t]he court may . . . order a person found in contempt of court to pay a party for . . . any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." 3B and Mr. Gorman do not contend that Symetra was not entitled to costs, including attorney fees; they argue that Symetra was awarded costs that were not incurred in the contempt proceeding. They specifically complain of

[7] 3B and Mr. Gorman argue that some of the relief awarded was in the nature of punishment, making the proceeding below a criminal contempt proceeding; from that, they argue that because it was not conducted as a criminal contempt proceeding, all of the relief ordered by the court fails. The proceeding was initiated and conducted as a civil contempt proceeding. To the extent that relief ordered by the court was improper, it will be reversed. We reject the appellants' effort to have us analyze the proceeding as something it was not.

> [t]he 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 [Texas federal district court] Judge Lake's Court.

Br. of Appellant at 27.

Symetra responds that fees for the Texas proceeding were recoverable not as costs, but as losses suffered as a result of the contempt. Losses are separately recoverable and are addressed below.

As to costs, Symetra submitted declarations documenting $14,890.50 in attorney fees incurred in the Washington action between August 18, the day after the TRO was obtained, and December 12, 2012, including those incurred while the action was temporarily in federal court. The declarations did not segregate fees for services directly related to the motion for contempt from other fees incurred during that time frame.

We review a trial court's award of attorney fees for an abuse of discretion. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). If the record proves inadequate for us to review the fee award, we must remand for further proceedings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007).

We conclude that all of the fees for services performed in obtaining a remand of the case from the federal court were properly awarded. Symetra was a victim, not the cause, of the improper removal to federal court. A clear objective of the remand was to

get the proceeding back before the Benton County court so that Symetra's earlier-filed motion for contempt could be heard. Obtaining the remand was necessary and appropriate to that end.

Other fees included in the $14,890.50 figure were not incurred in connection with the contempt proceeding, however. Just as Symetra's fees incurred in obtaining the TRO are not recoverable under RCW 7.21.030(3), its fees incurred in obtaining the extension of the TRO and the permanent injunction are not recoverable. Nor can Symetra recover its fees incurred in moving to add FinServ and A.M.Y. as parties to the Benton County action.

Because the declarations submitted are inadequate to segregate fees that were recoverable as costs, the case must be remanded for further submissions by Symetra and a second review by the court.

*Loss suffered as a result of the contempt*

As to loss, RCW 7.21.030(3) provides in relevant part that in addition to other relief available in the contempt proceeding, "[t]he court may . . . 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."

The seminal decision in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441, 31 S. Ct. 492, 55 L. Ed. 797 (1911) observed that "[c]ontempts are neither wholly civil nor altogether criminal," and that in either event, there is "an allegation that in

contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor." As a result, a defendant may be "punished" even in a civil contempt proceeding if the purpose is to compensate the complainant:

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt *the punishment is remedial, and for the benefit of the complainant.* But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, *and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant*, but also in committing the defendant to prison.

*Id.* at 441-42 (emphasis added).

In *United States v. United Mine Workers of America*, the United States Supreme Court again recognized that there are two types of remedial sanctions imposed in civil contempt proceedings, holding that "[j]udicial sanctions in civil contempt proceedings may . . . be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." 330 U.S. 258, 303-04, 67 S. Ct. 677, 91 L. Ed. 884 (1947) (citing *Gompers*, 221 U.S. at 448-49).

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy,

> and the probable effectiveness of any suggested sanction in bringing about the result desired.

*Id.* (footnotes omitted).

In his treatise on remedies, Professor Dobbs writes:

> The Supreme Court has long recognized that one appropriate kind of sanction for civil contempt is remedial rather than coercive. That is, the sanction provides the plaintiff with a substitute for the defendant's obedience without compelling that obedience itself. The most straightforward version of the remedial sanction is the compensatory fine, paid to the plaintiff as compensation. If the fine is to be justified because it is remedial, courts have said that it must be based on evidence, either of the plaintiff's loss or the defendant's gains.

1 DAN B. DOBBS, DOBBS LAW OF REMEDIES 194 (2d ed. 1993) (footnotes omitted).

Federal courts and a clear majority of state courts allow compensatory damages or fines payable to the injured party as relief in a civil contempt proceeding. Annotation, *Right of Injured Party to Award of Compensatory Damages or Fine in Contempt Proceedings*, 85 A.L.R.3D 895, § 2[a] (1978). In *State ex rel. Lemon v. Coffin*, 52 Wn.2d 894, 896, 332 P.2d 1096 (1958), the Washington Supreme Court held that the purpose of the provision for recovery of loss under former RCW 7.20.100 (1880)[8] was "to provide

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[8] Former RCW 7.20.100 (1881) provided:

> If any loss or injury to a party in an action, suit or proceeding prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements.

complete relief in the original action and to eliminate the necessity of a second suit to recover the expense caused by such contempt."

Compensatory fines have been imposed in Washington contempt proceedings to address many types of loss and damage caused by a party's contumacious acts. *E.g.*, *Premium Distrib. Co., Inc. v. Int'l Bhd. of Teamsters*, 35 Wn. App. 36, 39, 664 P.2d 1306 (1983) (affirming award of $15,000 for property damage and business loss caused by violations of an injunction); *Ramstead*, 73 Wn.2d at 167 (affirming award of expenses incurred where defendant prevented moving of home in violation of TRO); *McFerren v. McFerren*, 55 Wn.2d 471, 476, 348 P.2d 222 (1960) (affirming award of repair expense and loss of use for husband's violation of divorce decree); *Chard*, 171 Wash. at 180 (affirming award of damages for lost property value for purchaser's violation of judicial order of sale); *Nicomen*, 55 Wash. at 11, (plaintiff was entitled to be awarded damages for lost profits attributable to interference with its booming privileges in violation of judgment).

Where a party violates an antisuit injunction, the most obvious "loss suffered . . . as a result of the contempt" is the cost of answering to proceedings in the foreign court that would not have occurred had the injunction been complied with. Symetra submitted declarations documenting $32,134 in attorney fees incurred in the Texas action between August 18 and December 12, 2012. 3B and Mr. Gorman argue that even if some fees in the Texas proceeding are recoverable, they ceased to be recoverable after the TRO

expired on August 31 or, at the latest, after Symetra removed the Texas action to federal court on September 10. They also argue that Symetra cannot claim to have suffered loss from its actions in the Texas litigation since FinServ and A.M.Y., who were not subject to injunction, were asserting their own challenge to Symetra's offset of the Reihs transfer payment.

3B's failure and refusal to comply with the TRO and strike all of its motions in the Texas action produced the fees incurred by Symetra in the post August 31 and post September 10 Texas proceedings against 3B, both state and federal. If the losses were incurred over a matter of months, it was because Symetra's ability to obtain relief was delayed through no fault of its own. In *McFerrin*, the complainant was awarded an amount for lost use of a home over a number of months even though the lost use was only an indirect result of her husband's failure to make court ordered repairs to her home. In *Chard*, the complainant was awarded damages for a decline in value of its property following the date on which a purchaser failed to honor the judicial order of sale of the complainant's home. In both cases, damages were not limited according to the time frame within which the contemnor had been ordered to act. They were based on the loss that, at the time of hearing, the complainant could demonstrate had resulted from the contempt.

Although the August 31 and September 10 dates are significant for other purposes,[9] they are artificial cutoff points for purposes of determining the amount of loss Symetra had suffered as a result of the contempt by the time of its first opportunity to have its motion heard.

Symetra's expenses incurred litigating with FinServ and A.M.Y. after August 28 are another matter. The preexisting perfected security interests that FinServ and A.M.Y. claim to have in the Reihs payment were not addressed in the Benton County transfer action. It appears that Symetra was unaware of the existence of any competing security interests. If and to the extent that FinServ and A.M.Y. held viable security interests, or at least interests they believed in good faith were viable, then those two entities were entitled to assert their legal rights, and 3B's August 2012 acts of contempt do not provide a reasonable basis for imposing Symetra's cost of fighting that priority issue with FinServ and A.M.Y on 3B.[10]

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[9] For example, the superior court could not find acts or omissions enjoined by the terms of the TRO but that took place after August 31 to be contempt. It did not. Under the United States Supreme Court's decision in *Donovan v. City of Dallas*, 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964), the superior court could not exercise authority over 3B's conduct in the federal case in Texas following removal. Here, we are not dealing with that limitation; we are determining the losses that resulted from the August acts of contempt.

[10] To be clear, to the extent *3B* was asserting FinServ's and A.M.Y.'s priority, Symetra's legal expense in responding should be recoverable from 3B as loss. Insofar as 3B asserts an interest in having its creditors' security interests recognized, it should have asserted that interest in the 2010 proceedings in Benton County. Res judicata, or claim

Symetra should have segregated the attorney fees incurred in the Texas action against 3B, offensively or defensively, from the attorney fees incurred in that action, against FinServ and A.M.Y, offensively or defensively. *Cf. Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 295 P.3d 1197, *review denied*, 178 Wn.2d 1007 (2013) (requiring segregation of fees between claims where fees are recoverable only as to some claims); *Seattle-First Nat. Bank v. Washington Ins. Guar. Ass'n.*, 94 Wn. App. 744, 972 P.2d 1282 (1999) (requiring a reasonable allocation of fees among multiple clients, where fees were recoverable only by some clients). To the extent that 3B, FinServ, and A.M.Y. joined in the same submissions and appeared through the same counsel, the superior court must arrive at some reasonable basis for allocating fees. In the *Seattle-First* case, the court suggested looking to the law firm's fee agreement with its clients as a basis for allocation. *Id.* at 763. Another approach would be for Symetra to determine, through discovery, what percentage of the cost of representation in the Texas action was being borne by each of the three entities. The allocation need not be precise, but it must be examined and be reasonable. *Id.*

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preclusion, prohibits the relitigation not only of claims and issues that were litigated but also those that could have been litigated in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000).

*The $1,000 onetime sanction against Mr. Gorman*

The final relief awarded by the court was its $1,000 onetime forfeiture against Mr. Gorman. The provision describing the forfeiture and the clause describing action required to purge the contempt provide in their entirety:

> 2. Attorney Gorman, as attorney and agent for 3B, is ordered to pay Symetra a one-time forfeiture pursuant to RCW 7.21.030(1)(b) of One Thousand Dollars ($1,000.00).[11]
>
> 3. In order to purge themselves of this contempt charge, 3B and its attorney Gorman must 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 this Court restraining them from doing so is in effect.

CP at 526.

"An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for non-compliance." *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 253, 973 P.2d 1062 (1999). Because a sanction "loses its coercive character and becomes punitive where the contemnor cannot purge the contempt," there "must be a showing that the contemnor has the means to comply" with the purge condition. *Britannia Holdings Ltd. v. Greer*, 127

[11] The forfeiture provision (language proposed by Symetra) would more clearly have been a remedial coercive sanction had it made clear, as provided by RCW 7.21.030(1)(b), that Mr. Gorman had a day within which to comply with the purge condition and thereby avoid any forfeiture. Because the order describes the forfeiture as "pursuant to RCW 7.21.030(1)(b)," we construe the one-day purge period as incorporated by reference.

Wn. App. 926, 933, 113 P.3d 1041 (2005) (footnote omitted). "Whether a purge condition exceeded the court's authority or violated a contemnor's due process rights . . . [are] question[s] of law, which [are] reviewed de novo." *In re M.B.*, 101 Wn App. 425, 454, 3 P.3d 780 (2000); *In re Silva*, 166 Wn.2d 133, 140, 206 P.3d 1240 (2009).

Mr. Gorman first challenges the purge condition as exceeding the scope of the original order, something he claims a civil contempt sanction can never do. He relies on the statement in *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996) that a sanction is punitive "if it is imposed to punish a past contempt of court . . . and does not afford the defendant an opportunity to purge the contempt *by performing the acts required in the original order*." (Emphasis added) (footnote omitted). He asserts that the contempt order in this case could, at most, have required him to "undo" acts or omissions occurring between August 17 and 31, while the TRO was in effect—an impossibility in this case. The argument was addressed and rejected in *M.B.*, in which the court rejected an appellant's attempt to "seize upon" the same language in *Buckley* to argue that a court may not impose a purge condition that was not required by the court order that was violated. *M.B.* holds that a trial court has inherent authority to impose purge conditions beyond the four corners of the violated order, as long as the condition serves remedial aims and the condition is "reasonably related to the cause or nature of the contempt." *M.B.*, 101 Wn. App. at 450 (emphasis omitted) (citing *In re Marriage of Larson*, 165 Wis. 2d 679, 478 N.W.2d 18 (1992)). The purge condition here satisfies those criteria.

3B and Mr. Gorman next contend that the trial court erred in failing to make a threshold finding that they were able to comply with the purge condition at the time the contempt order issued. They argue for the first time on appeal that they were *not* able to comply because the Texas state court action had been removed to federal court by the time of the contempt hearing, and after a case is removed to federal court, "the state court loses jurisdiction to proceed further, and all subsequent proceedings therein are void." *Iowa Cent. Ry. Co. v. Bacon*, 236 U.S. 305, 310, 35 S. Ct. 357, 59 L. Ed. 591 (1915).

Alternatively, if the reference to "the Harris County, Texas, action" in the purge condition means or includes the federal action (as Symetra contends), then 3B and Mr. Gorman reply that the court could not impose such a purge condition consistent with *Donovan v. City of Dallas*, 377 U.S. 408, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964).

"In the context of civil contempt, the law presumes that one is capable of performing those actions required by the court." *In re Pers. Restraint of King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988). "Thus, inability to comply is an affirmative defense. A contemnor has both the burden of production on ability to comply . . . as well as the burden of persuasion." *Id.*; *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). "The contemnor must offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible." *King*, 110 Wn.2d at 804.

3B's and Mr. Gorman's argument that they were unable to comply with the purge condition comes too late. As pointed out by Symetra, the argument was not made in the

superior court. While 3B represents that it *did* make the argument or, alternatively, that its inability to comply "only ripened into a real controversy once the trial court signed the Contempt Order," Reply Br. at 18, neither contention is supported by the record.

The record reveals that Symetra's proposed contempt order, with its proposed purge condition, was served on 3B and Mr. Gorman at least as early as November 19. Moreover, when the superior court granted a continuance on November 30, it adapted the proposed contempt order to grant the continuance. As adapted, the order of continuance (including the proposed purge condition) is signed "approved as to form" by 3B's Washington lawyer. Since 3B and Mr. Gorman had ample advance notice of the proposed purge condition, any inability to comply with it was an affirmative defense that they needed to raise before the contempt order was entered, not after.

The record also belies 3B's and Mr. Gorman's contention that they raised the issue of inability to comply with the purge condition during or before the hearing on the motion for contempt. The only briefing they submitted—3B's motion for a continuance—was filed at a time when 3B had moved to remand the Texas case to state court. Accordingly, the briefing contemplated future state litigation, not federal litigation. On the merits of the motion for contempt, 3B's continuance briefing argued only that (1) the Benton County court issued the TRO after 3B, FinServ and A.M.Y. filed their motion to vacate the Texas stay and their first amended petition, (2) the TRO did not apply to FinServ or A.M.Y., and (3) Symetra's application for a permanent injunction

was not heard because FinServ removed the Washington action to federal court. The only reference in the briefing to the fact that the Texas action had been removed to federal court was in the context of explaining why Symetra would not be prejudiced by the requested continuance.

Nor did 3B's lawyer argue inability to comply with the purge condition at oral argument of the motion for contempt. Instead, he argued that there was no intentional violation of the TRO because (1) the lawyer representing 3B had also been representing FinServ and A.M.Y., (2) the abatement order remained in place in relevant respects during the 14 days the TRO was in effect, (3) the "violations" complained of predated the TRO, and (4) appearing at a hearing that had already been set "on behalf of FinServ and A.M.Y." was not contumacious. RP (Dec. 28, 2012) at 6-7. The one reference to removal of the Texas action to federal court was not in connection with any inability to perform the purge condition but in the context, instead, of arguing that the Benton County court no longer had jurisdiction to deal with the parties' disputes because Symetra had moved the Texas action to federal court "because they wanted it there."[12] *Id.* at 7.

[12] 3B and Mr. Gorman also cite to portions of the record that postdate the order of contempt, including a motion for new trial and reconsideration filed on January 23, 2013, in which they challenged the validity of the purge clause for the first time. CP at 692. The reconsideration motion was summarily denied. CP at 1753. Since they have not assigned error or presented any argument or authority regarding any mishandling of their post order submissions, we will not consider them. RAP 10.3(a)(4), (6).

RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal." *In re Guardianship of Cornelius*, 181 Wn. App. 513, 533, 326 P.3d 718 (2014). We follow the general policy provided by the rule of refusing to entertain this issue, which is raised for the first time on appeal.

*Attorney fees on appeal*

Both parties request attorney fees on appeal. 3B and Mr. Gorman seek fees and ask the court to deny Symetra's request for fees on the grounds that "Symetra sought and utilized the trial courts [sic] jurisdiction to obtain the contempt order in derogation of Washington law." Br. of Appellant at 29-30. They fail to show entitlement based on a contract, statute, or recognized ground of equity. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 797-98, 557 P.2d 342 (1976).

Symetra seeks its fees on appeal under RAP 18.1(a) and RCW 7.21.030(3). RAP 18.1 permits recovery of reasonable attorney fees or expenses on review if applicable law grants that right. RCW 7.21.030(3) permits an award of attorney fees incurred by a party in defending the appeal of a contempt order. *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 505, 903 P.2d 496 (1995). Symetra is awarded its fees and costs on appeal subject to compliance with RAP 18.1(d).

The superior court's award of costs and loss is reversed and remanded for further proceedings consistent with this opinion. The order of contempt is otherwise affirmed.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Korsmo, J.

**TAB C - ORDER DENYING MOTION FOR REHEARING**

**FILED**
**OCTOBER 29, 2015**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| In the Matter of RAPID SETTLEMENTS, LTD'S APPLICATION FOR APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS | ) | No. 31435-9-III<br><br>ORDER DENYING MOTION FOR REHEARING AND AMENDING OPINION |

THE COURT has considered Appellant's motion for rehearing and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion seeking reconsideration of this court's decision of August 18, 2015, is hereby denied.

IT IS FURTHER ORDERED, the opinion filed August 18, 2015, is amended as follows:

The record citation, "Br. of Appellant at 2-3, 21-22." shall be added following the sentence on pages 11 and 12 of the opinion that reads, "Mr. Gorman, a Texas resident, argues that Symetra never served him with process making him a party and that it never obtained an order to show cause, with the result that the court lacked jurisdiction to issue a contempt order against him."

The first sentence on page 14 of the opinion shall be modified by prefacing it with the word, "collectively," to wit: "Collectively, the notice provided was more than sufficient to protect Mr. Gorman's right to be heard."

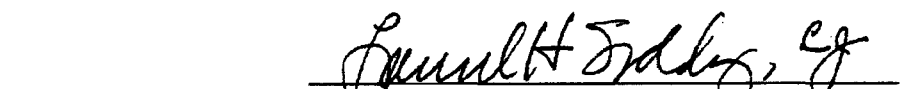
A new sentence is added to footnote 5 at page 14 of the opinion, with the result that the footnote shall read:

> For the first time in the reply brief, Mr. Gorman recasts his argument as one challenging a second requirement of due process: an alleged lack of personal jurisdiction over him for lack of minimum contacts with the State. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (due process requires that a defendant be given notice and be subject to the personal jurisdiction of the court.). As Mr. Gorman pointed out to the Texas court on August 23, 2012, there is a difference between a due process "*International Shoe* minimum contacts type of presentation" and a due process argument that one is deprived of "a full and fair adjudication . . . where [one] never [gets] served with process." CP at 847-48. Under RAP 10.3(c), "a contention presented for the first time in the reply brief will not receive consideration on appeal." *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967). This rule applies even to challenges regarding personal jurisdiction. *See, e.g., State ex rel. Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 294, 150 P.3d 568 (2006). Even so, under our long-arm statute, RCW 4.28.185, Washington courts may assert jurisdiction over nonresident individuals to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute. *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311 (1972). Mr. Gorman had been admitted pro hac vice by this court in 2011 and appeared in Spokane to argue the first appeal. We have no doubt that Mr. Gorman's appearance in Washington in a legal proceeding whose outcome he then collaterally attacks elsewhere, in contempt of court, is a contact of such character that maintenance of the contempt action does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

DATED: October 29, 2015

PANEL: Judges Siddoway, Brown, Korsmo

FOR THE COURT:



LAUREL SIDDOWAY, Chief Judge

**TAB D - JANUARY 10, 2013 ORDER OF CONTEMPT**

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR BENTON COUNTY

| | |
|---|---|
| *In re* RAPID SETTLEMENTS, LTD.'S APPLICATION FOR APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS | NO. 04-2-02767-2<br><br>ORDER OF CONTEMPT AGAINST RSL-3B-IL, LTD. AND ATTORNEY GORMAN FOR VIOLATION OF TEMPORARY RESTRAINING ORDER |

This matter came on before the Court for hearing on November 30, 2012, and again on December 28, 2012, on the Motion of Symetra Life Insurance Company and Symetra Assigned Benefits Service Company (collectively "Symetra") for an Order finding Intervenor RSL-3B-IL, LTD. ("3B") in contempt of The Court's Temporary Restraining Order. The Court reviewed and considered the following pleadings, together with the related files and orders already entered in this matter:

1. Symetra's Motion for Contempt of Temporary Restraining Order;

2. Declarations of Gregory Carboy and Medora Marisseau in support of such motion with attached exhibits;

3. 3B's Motion for Continuance;



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4. Supplemental Declaration of Johanna M. Coolbaugh in Support of Request for Attorneys' Fees;

5. Declaration of Gregory W. Carboy [in Support of Request for Attorney's Fees];

~~and~~

6. Declaration of Medora A. Marisseau in Support of Attorneys' Fees; and

7. Symetra's Supplemental Reply in Support of Motion for Contempt.

After reviewing the above and based on the argument of counsel and deeming itself fully advised, the court finds:

1. 3B, through its attorneys 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 in said lawsuit and ordering 3B to strike any and all pending motions therein. The Court's August 17, 2012, Temporary Restraining Order was served on 3B on August 20, 2012, through personal service on its officer and registered agent Stewart Feldman.

2. 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.

3. 3B and its agent and attorney Mr. Gorman have disobeyed this Court's Temporary Restraining Order against 3B, and are hereby found in contempt.

4. Good cause has therefore been shown for the imposition of remedial sanctions and it is:



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ORDERED as follows:

1. 3B is ordered to pay Symetra for its costs and attorneys' fees incurred in bringing this motion for contempt and all costs and attorneys' fees incurred by Symetra in the Harris County, Texas, action between August 20, 2012, when the Court's Temporary Restraining Order was served on 3B, and the date of this Order of Contempt. Symetra has submitted a cost and fee bill showing the amount of these costs and fees is $47,024.50.

2. Attorney Gorman, as attorney and agent for 3B, is ordered to pay Symetra a one-time forfeiture pursuant to RCW 7.21.030(1)(b) of One Thousand Dollars ($1,000.00).

3. In order to purge themselves of this contempt charge, 3B and its attorney Gorman must 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 this Court restraining them from doing so is in effect.

DONE ~~IN OPEN COURT~~ this 10 day of Jan., 2013.

Carrie Runge
Judge / ~~Court Commissioner~~

Presented by:

By: _____
Medora A. Marisseau, WSBA # 23114
Johanna M. Coolbaugh, WSBA #39518
Attorneys for Symetra Life and Symetra Assigned



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## CERTIFICATE OF MAILING

I hereby certify that on the **10th** day of **January, 2013** I caused to be delivered the following document(s) by US Mail, Hand-Delivery or Inter-City Legal Processing & Messenger Service.

**CASE NUMBER:** 04-2-02767-2

**DOCUMENT(S):** Other

**ORIGINAL:** BENTON COUNTY CLERK

**COPIES TO:** **ARTHUR KLYM**
**ATTORNEY AT LAW**
**660 SWIFT BLVD, SUITE A**
**RICHLAND, WA 99352**
**EMAIL:** **aklym@akwalaw.com**
**VIA:** ☐ US Mail ☐ Hand-Delivery ☐ Email ☒ Inter-City Legal Processing

**COPIES TO:** **MEDORA MARISSEAU**
**1201 3 RD AVE, STE 2900**
**SEATTLE, WA 98101**
**VIA:** ☒ US Mail ☐ Hand-Delivery ☐ Email ☐ Inter-City Legal Processing

**COPIES TO:** **JOHANNA COOLBAUGH**
**1201 3RD AVE, STE 2900**
**SEATTLE, WA 98101**
**VIA:** ☒ US Mail ☐ Hand-Delivery ☐ Email ☐ Inter-City Legal Processing

**COPIES TO:** **THOMAS FRANCIS PETERSON**
**ATTORNEY AT LAW**
**601 UNION ST., STE 4950**
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0-000000527

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**ATTORNEY AT LAW**
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**Amber Peters**
Superior Court Administration for
Benton and Franklin Counties

0-000000528

**TAB E – AUGUST 17, 2012 ORDER GRANTING TRO AND ORDER TO SHOW CAUSE**

JOSIE DELVIN
BENTON COUNTY CLERK

AUG 17 2012

FILED

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR BENTON COUNTY

| | |
|---|---|
| *In re* RAPID SETTLEMENTS, LTD.'S APPLICATION FOR APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS | NO. 04-2-02767-2<br><br>TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE |

This matter came on before the Court for hearing on August 17, 2012, on the Motion of Symetra Life Insurance Company and Symetra Assigned Benefits Service Company (collectively "Symetra") for a Temporary Restraining Order against Intervenor RSL-3B-IL, LTD. ("3B"). The court reviewed and considered the following pleadings:

1. Symetra's Motion for Temporary Restraining Order;

2. Declaration of Medora A. Marisseau in support of such motion with attached exhibits;

3. Declaration of Bonnie Greenlund, with attached exhibit;

4. Affidavit of Service by Henry Heinbuch;

5. First Supplemental Declaration of Medora Marisseau, with exhibits attached;



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After reviewing the above and based on the argument of counsel and deeming itself fully advised, the court finds:

1. Notice of the hearing was given to 3B through its counsel The Feldman Law Firm LLP and its ~~CEO~~ president Stewart Feldman.

2. 3B is pursuing a lawsuit in Harris County, Texas, No. 2010-41653. This lawsuit is an attempt to undermine this Court's 2010 Order in this matter allowing Symetra to set off a judgment against Rapid Settlements, Ltd. against a structured settlement payment owed to 3B. It is also an attempt to undermine this Court's jurisdiction over the structured settlement payment.

3. 3B has filed pending motions in the Harris County, Texas lawsuit against Symetra that seek to reopen that case and further undermine this Court's Orders and jurisdiction.

2. Good cause having been shown for the maintenance of the status quo and the issuance of a temporary restraining order pending further hearing, it is:

ORDERED as follows:

1. 3B is enjoined from taking any further action in Harris County District Court Case No. 2010-41653 and is ordered to strike any and all pending motions in that case.

2. 3B is enjoined from initiating any other lawsuits in any state that attempt to, or would have the effect of, directly or indirectly, undermining Symetra's right to offset the payment due on September 2, 2012, as set forth in this Court's 2010 Orders and subsequent order of the Washington Court of Appeals.



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3. 3B shall appear before the ~~Hon. Robert Swisher on~~ above-captioned Court August 31, 2012 at 1:30 a.m./p.m. for a hearing on a preliminary injunction and shall show cause, if any, why 3B should not be permanently enjoined from the acts described in this Order.

4. Unless otherwise ordered by the Court, this temporary restraining order shall expire following the hearing provided for in the previous paragraph.

5. Symetra shall be required to post a bond of $500 within two days of the entry of this Order.

Dated and issued this 17 day of August, 2012 at 2:44 am/pm.

DONE IN OPEN COURT this 17 day of August, 2012.

Judge ~~Robert G. Swisher~~ Brack Spencer

Presented by:

By: Jan A. M

Medora A. Marisseau, WSBA # 23114
Matthew D. Mihlon, WSBA # 40524
Attorneys for Symetra Life and Symetra Assigned



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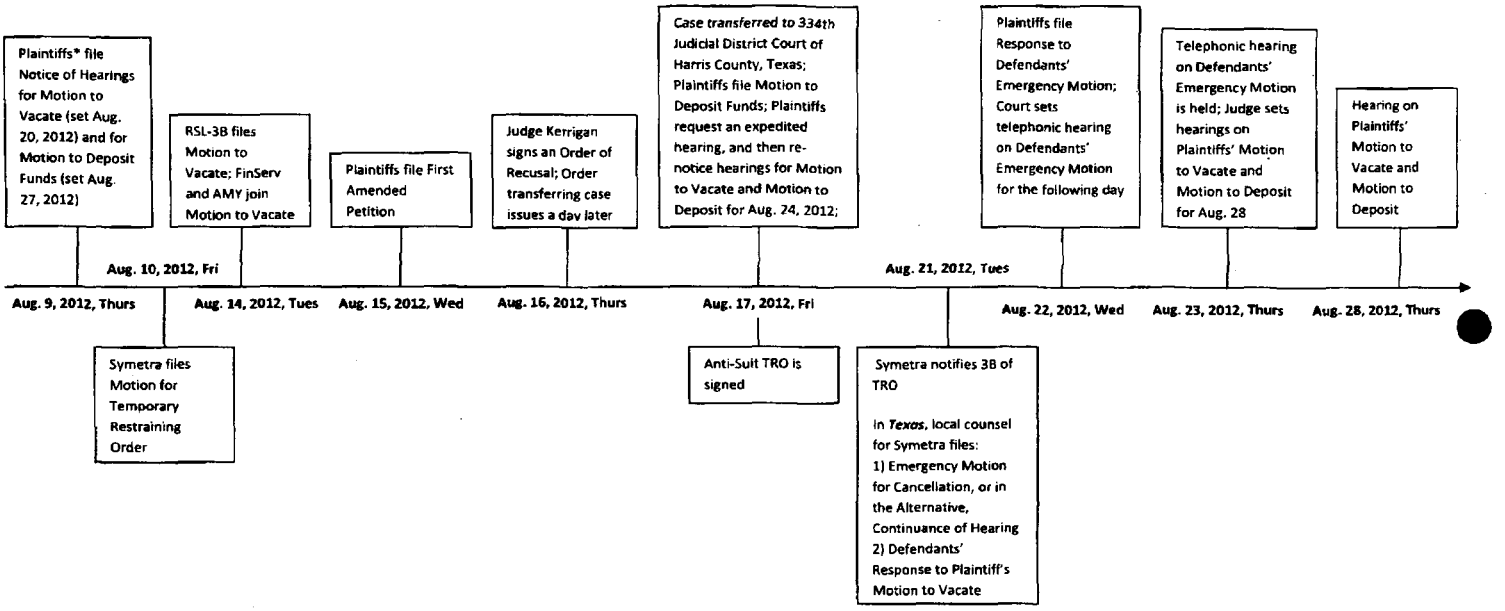
# TAB F - ANTI-SUIT TRO PROCEEDINGS TIMELINE




*Plaintiffs in Texas State Court Action: RSL-3B-IL, Ltd., FinServ Casualty Corp., and A.M.Y. Property & Casualty Corp.

0-00000539

**Anti-Suit TRO Proceedings Timeline**

**TAB G - RCWA 7.21.010**

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.21. Contempt of Court (Refs & Annos)

West's RCWA 7.21.010

# 7.21.010. Definitions

Currentness

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means 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.

**Credits**
[1989 c 373 § 1.]

Notes of Decisions (221)

West's RCWA 7.21.010, WA ST 7.21.010
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

End of Document

**TAB H - RCWA 7.21.030**

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.21. Contempt of Court (Refs & Annos)

West's RCWA 7.21.030

# 7.21.030. Remedial sanctions--Payment for losses

Currentness

(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.

**Credits**

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]

Notes of Decisions (153)

West's RCWA 7.21.030, WA ST 7.21.030
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions