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Court of Appeals
Division III
State of Washington

NO. 34120-8-III

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

STATE OF WASHINGTON,

v.

ANTHONY JASON SIMS

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Respondents do not dispute that any punitive sanctions imposed against the Department of Social and Health Services (DSHS) in the proceedings below were contrary to RCW 7.21.040. Instead, Respondents attempt to muddy well-settled contempt law and create post-hoc explanations as to why sanctions imposed by the trial court for past noncompliance with its orders could be considered coercive in nature. This Court should decline the Respondents' invitations to disregard Washington contempt law and revise the trial court record.

The parties agree on one point: for a contempt sanction to be considered coercive in character as opposed to punitive, it must include a purge clause that affords a contemnor the ability to avoid incurring sanctions. Brief of Appellant (Br. Appellant) at 7; Brief of Respondent (Br. Resp't) at 9. The contempt orders did allow DSHS to avoid incurring *future* contempt sanctions by providing the ordered competency services. However, the orders afforded DSHS no opportunity to avoid the sanctions imposed for periods of past contempt. The trial court's backdated sanctions were unavoidable when imposed – the hallmark of a punitive contempt sanction.

The trial court also erred by imposing post-judgment interest against DSHS in each case after the contempt orders were reduced to

judgments. RCW 7.21 contains no evidence that the Legislature has expressly or impliedly waived its sovereign immunity in respect to interest on contempt judgments.

This Court should remand with instructions that contempt sanctions may be imposed only for periods of time following entry of the written order of contempt in each case and that interest may not be imposed against DSHS in a contempt proceeding.

II. ARGUMENT IN REPLY

Respondents make a number of arguments, addressed in turn below, that attempt to show the contempt orders did not impose punitive sanctions. These arguments all fail because they are either irrelevant to determining whether contempt sanctions are characterized as coercive or punitive, or because they are contradicted by the trial court record.

Respondents also assert that the Legislature has impliedly waived sovereign immunity as to contempt judgment interest. The contempt statute contains no such waiver, and Respondents cannot show an implied waiver should apply in their cases.

A. The Sanctions At Issue Are Punitive Because They Were Unavoidable When Imposed

Although Respondents would have this Court believe otherwise, distinguishing between coercive (civil) and punitive (criminal) contempt

sanctions in this case is straightforward. Washington courts have consistently understood the coercive/punitive distinction as follows:

[A] contempt sanction is criminal if it is determinate and unconditional; the sanction is civil if it is conditional and indeterminate, i.e., where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order.

King v. Dep't of Soc. & Health Servs., 110 Wn. 2d 793, 800, 756 P.2d 1303 (1988) (citations omitted); *see also In re Marriage of Didier*, 134 Wn. App. 490, 501, 140 P.3d 607 (2006) (same proposition).

Washington courts have been equally clear that for a contempt sanction to avoid being characterized as punitive, there must be an opportunity for the contemnor to avoid incurring the sanction by complying with a purge clause. *E.g.*, *In re Rapid Settlements, Ltd.*, 189 Wn. App. 584, 613, 359 P.3d 823 (2015), *review denied*, 185 Wn.2d 1020, 369 P.3d 500 (2016) (recognizing that a contempt sanction loses its coercive character and becomes punitive where the contemnor cannot purge the contempt); *In re Rebecca K.*, 101 Wn. App. 309, 314, 2 P.3d 501 (2000) (“ ‘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.’ ”) (quoting *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 253, 973 P.2d 1062 (1999)).

Here, Respondents do not dispute that the trial court imposed contempt sanctions against DSHS for periods of time prior to the entry of the contempt order in each case. Br. Resp't at 4-5; *see also* Br. Appellant Ex. 1 (comparing the date each contempt order was entered with the period of time for which DSHS was sanctioned). It necessarily follows that DSHS had no opportunity to avoid incurring at least a portion of the sanctions imposed in each case when each contempt order was entered. Put another way, immediately purging the finding of contempt would not have avoided the sanctions. Therefore, each order imposed at least some amount of punitive sanctions against DSHS, contrary to the requirements of RCW 7.21.040.

Although this Court need go no farther to decide that punitive sanctions were unlawfully imposed in each proceeding, DSHS will address Respondents' arguments to the contrary.

1. A trial court's motivation for imposing contempt sanctions cannot convert a sanction from punitive to coercive

Respondents suggest that the trial court's reason for imposing the sanction was to "force the state government as a whole to comply with due process by providing timely competency services," and that this motivation could somehow convert a punitive sanction to a coercive one. Br. Resp't at 7-8. Respondents cite no authority to support this novel

proposition, one that ignores how Washington courts are instructed to distinguish between punitive and coercive sanctions.

Federal decisions also recognize that the trial court's motivation for sanctioning is not relevant to characterizing the sanctions imposed. It “ ‘requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction.’ ” *In re E.I. DuPont De Nemours & Co.–Benlate Litig.*, 99 F.3d 363, 368 (11th Cir. 1996) (quoting *Blalock v. United States*, 844 F.2d 1546, 1560 n.20 (11th Cir.1988) (per curiam) (Tjoflat, J., specially concurring)). This Court should examine the contempt orders themselves, not the trial court's motivation for imposing them.

2. Monetary sanctions imposed for periods of time preceding a contempt finding are by definition punitive

Respondents rely on *Shell Offshore, Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 630 (9th Cir. 2016), for the proposition that per diem fines are generally viewed as coercive. Br. Resp't at 8. That decision makes no such generalization. In contrast to the instant appeals, all monetary sanctions in *Shell* were imposed for periods of time following entry of the contempt order. *Shell*, 815 F.3d at 630. The sanctions in *Shell* were considered coercive because the contemnor had notice of the sanctions and

an opportunity to avoid them. *Id.* This decision is in accord with Washington law because it recognizes that “the ability to purge is perhaps the most definitive characteristic of coercive civil contempt.” *Shell*, 815 F.3d at 629. Again, DSHS had no such opportunity in respect to at least a portion of the sanctions imposed in each case.

Respondents also suggest that a contempt order in one proceeding could supply notice that a contemnor could be held in contempt in a different proceeding, thereby rendering all sanctions in the subsequent proceeding coercive—even if unavoidable when imposed. Br. Resp’t at 10. Similarly, they suggest that a motion seeking contempt sanctions gives the contemnor an opportunity to comply, making all sanctions later imposed coercive. Br. Resp’t at 11. Respondents again cite no authority to support this argument that, if accepted, would turn Washington’s contempt law on its head.

Under the Respondents’ reasoning, so long as a party has notice that it could potentially be held in contempt for violating a court order (i.e., every case where a party has knowledge of the order), a court could always impose “coercive” monetary sanctions for past noncompliance, even if the party had already complied by the contempt hearing. Such reasoning obliterates the punitive/coercive contempt distinction, as it allows for the sanctioning of past contempt without the opportunity to

avoid incurring the sanctions. It is also contrary to the express requirements of the remedial contempt statute, which provides that upon “find[ing] the person in contempt of court,” remedial monetary sanctions may be imposed “for each day the contempt of court continues.” RCW 7.21.030(2)(b). The contempt statute itself thus makes clear that a finding of contempt is required to *begin* imposing coercive monetary sanctions.¹

The purpose of a civil contempt proceeding is to “coerce future behavior that complies with a court order.” *King*, 110 Wn.2d at 800. Its purpose is not, as Respondents suggest, to effectuate system-wide program reform. Contempt proceedings by definition cannot be used to litigate constitutional rights or seek class-wide relief, and Respondents offer no authority that would permit this Court to review the contempt orders collectively as opposed to individually.

3. The contempt sanctions ceased being punitive upon entry of the written contempt order in each case

Respondents rely on *State v. Latham*, 100 Wn.2d 59, 667 P.2d 56 (1983), to argue that the sanctions at issue transitioned from punitive to

¹ Case law is equally clear that for monetary sanctions to be coercive, they must run forward from the finding of contempt—not from a motion for contempt or some other notice of potential contempt. *See, e.g., Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994) (concluding that “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.”); *In re Rebecca K.*, 101 Wn. App. at 314 (“An order of remedial civil contempt must contain a purge clause” to avoid incurring sanctions).

coercive upon the court's oral ruling as opposed to when the written order finding contempt was entered. Br. Resp't at 12. *Latham* is not a contempt case. It involved a trial court's decision after voir dire to reverse its pretrial ruling that a prior drug conviction would be inadmissible at trial. *Latham*, 100 Wn.2d at 65-66. The court recognized that "the defendant was entitled to rely upon [the clear pretrial] ruling" when conducting voir dire, but concluded any error caused by the revised ruling was harmless. *Id.* at 66-68.

Latham considered whether a criminal defendant could claim prejudicial error after relying on a subsequently-reversed evidentiary ruling; it did not address whether a trial court's oral disposition of a proceeding is sufficient to bind the litigants. As DSHS demonstrated in its opening brief, considerable authority reflects that oral rulings are not effective until reduced to writing. *See* Br. Appellant at 9-10.

Litigants should not have to guess as to whether a final written order of contempt will reflect an oral ruling. Further, a litigant could not appeal an oral ruling to contest it or seek a stay from the appellate court to prevent sanctions from accruing. RAP 5.2(a) ("a notice of appeal must be filed . . . within . . . 30 days after the entry of the decision of the trial court . . ."); CR 5(e) (a decision is entered when "papers" are filed with the

court); *Templeton v. Hurtado*, 92 Wn. App. 847, 853, 965 P.2d 1131 (1998) (holding that “an oral ruling does not supply an adequate basis for appellate review of an order of contempt.”).

Accordingly, the court’s finding of contempt became effective when reduced to writing, and sanctions imposed prior to that point in each proceeding should be considered punitive. *E.g.*, *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (holding that oral opinions have no final or binding effect and are “no more than oral expressions of the court’s informal opinion at the time rendered.”)

4. Prior noncompliance in another proceeding does not make a punitive contempt sanction coercive

Respondents suggest that a trial court may ignore the coercive/punitive contempt distinction where the contemnor has a history of noncompliance with court orders. Br. Resp’t. at 13. Respondents again offer no authority that supports this proposition, and in any event a party’s history of noncompliance sheds no light on whether a given sanction is coercive or punitive in nature.² The sole case relied upon by Respondents

² Respondents repeatedly ask this Court to take notice of findings made by a federal district court in a separate proceeding. Br. Resp’t at 13-14, 16, 21-22 (citing *Trueblood v. Washington State Dep’t of Soc. & Health Servs.*, 822 F.3d 1037, 1040 (9th Cir. 2016)). Their request is improper and this Court should decline to consider the district court’s findings. *See In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (recognizing that “we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings ”); *see also* RAP 9.11 (restricting appellate consideration of additional evidence on review).

again illustrates that only sanctions imposed for periods of time following a finding of contempt can be considered coercive in nature. *CBS Broad., Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 103 (2d Cir. 2016) (recognizing that the contemnor “received notice in the 2013 Contempt Judgment that any further violation of the Injunction would result in daily sanctions.”)

Contrary to the Respondents’ assertions, Br. Resp’t at 11, DSHS does not claim it is entitled to avoid all sanctions in these proceedings – only the portions that constitute punitive sanctions. *See* Br. Appellant Ex. 1 (identifying the punitive portions of each contempt order). Respondents do not dispute that any punitive sanctions imposed by the trial court were improperly ordered, and this Court should accordingly vacate the punitive portions of the trial court’s sanctions orders.

5. The trial court did not impose contempt sanctions against DSHS to compensate a party for losses

Respondents argue that the trial court “fashion[ed] a sanction that would, at least in part, compensate the class of affected persons and remedy some of the harm being done” under RCW 7.21.030(3) and that this “compensatory purpose” renders the sanctions civil rather than criminal. Br. Resp’t at 14-15. The trial court made no such findings when entering its orders of contempt. *See, e.g.*, Clerk’s Papers (CP) at 1572-577.

The trial court's contempt orders in no way suggest that the sanctions were being imposed to compensate a party for losses under RCW 7.21.030(3). The court simply ordered \$200 per day of noncompliance with its competency orders, with no regard as to whether Respondents had suffered any losses as a result of the contempt. CP at 1576-577. The sanctions were to continue until the purge condition was satisfied, not until a party was made whole. CP at 1576-577. This is unsurprising, as Respondents never sought compensation for losses in briefing or at oral argument,³ and never submitted any evidence into the record as to losses suffered by Respondents as a result of the contempt.

Even in their October 16, 2015 motion "To Order That Sanction Be Paid To Risk Management For Social Workers," Respondents did not request that they be compensated for losses under RCW 7.21.030(3). CP at 1826-833. This motion simply requested that the accrued sanctions be paid to risk management for social workers – it did not supply a new legal basis for the already-ordered sanctions. In short, RCW 7.21.030(3) played no role in the proceedings below, and Respondents now invoke a heretofore nonexistent basis for the trial court's contempt orders.

³ See CP at 1536-543, where defense counsel requested sanctions under RCW 7.21.030(2) but never sought compensatory relief under RCW 7.21.030(3), and *Sims* Report of Proceedings (RP) at 10, where defense counsel stated: "I'm asking that Eastern State Hospital be held in contempt and sanctioned \$500 a day for every day past the Court's order that evaluations have not been performed."

Even if this Court were to consider Respondents' post-hoc justification, it fails on the merits. In relevant part, RCW 7.21.030(3) provides that "[t]he 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...." This Court has expressly recognized that evidence of the actual losses suffered by the party alleging contempt must be demonstrated. *In re Rapid Settlements, Ltd.*, 189 Wn. App. at 609 (recognizing that compensatory sanctions under RCW 7.21.030(3) " 'must of course be based upon evidence of complainant's actual loss' " and affirming an award where declarations of actual losses were filed in the trial court) (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04, 67 S. Ct. 677, 91 L. Ed. 884 (1947)).

Respondents seem to believe that a lawyer's argument to the court about one Respondent's alleged mental health status, Br. Resp't at 16 (citing Sims RP at 7-10) and generalized findings made by a federal court months later in a separate proceeding, *id.* (citing *Trueblood*, 822 F.3d at 1042) can constitute "evidence" of a party's losses in a contempt proceeding. This is not the law in Washington. *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361, 370 (2007) (recognizing that "counsel's argument

is not evidence”); *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (recognizing that “we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings.”) Respondents identify no evidence in the record of losses suffered as a result of the contempt proceedings.

Even if there were evidence of a Respondent’s losses due to contempt, which there is not, the trial court ordered that the sanctions be forwarded to Spokane County Detention Services, not to the Respondents. CP at 1834-835. This fact belies Respondents’ claim that the sanctions were intended to be compensatory, as they will in no way compensate Respondents as required by RCW 7.21.030(3).

Respondents suggest that *United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999), a class action employment discrimination case, could justify the trial court’s reliance on RCW 7.21.030(3) if the court had relied upon it. This case actually illustrates the two fatal deficiencies with Respondents’ argument: the compensatory contempt sanctions in that case were awarded to the complaining *parties* in the litigation, *City of Miami*, 195 F.3d at 1297, and the award was supported by evidence of economic losses, *id.* at 1301 n.6. Both elements are required to sustain an award of compensatory sanctions under RCW 7.21.030(3), and both are missing in the instant cases.

Respondents' interpretation of RCW 7.21.030(3) would allow entities other than the allegedly harmed party to receive compensatory sanctions and allow sanctions to be imposed without evidence of actual economic losses. Both of these results are contrary to the plain language of the statute and the case law interpreting it. This Court should accordingly reject Respondents' argument.

B. Sovereign Immunity Precludes An Award Of Judgment Interest On Contempt Sanctions Against The State

Respondents do not dispute that the State of Washington has not expressly waived its sovereign immunity as to interest on contempt judgments as it has in several other arenas. They instead argue that RCW 7.21 contains an implied waiver of sovereign immunity. Br. Resp't at 19. The contempt statute contains no such waiver, and even if it did Respondents are not entitled to it here.

To support their argument, Respondents rely primarily on *Union Elevator & Warehouse Co. v. State ex rel. Dep't of Transp.*, 171 Wn.2d 54, 248 P.3d 83 (2011). That case involved a corporation's attempt to secure relocation assistance benefits from the Department of Transportation under the Relocation Act, RCW 8.26, including prejudgment interest. *Union Elevator*, 171 Wn.2d at 58-59. Recognizing that the act contained no express waiver of sovereign immunity as to

interest, the court considered whether the Act could be construed to impliedly waive sovereign immunity. *Union Elevator*, 171 Wn.2d at 65-68. It determined that “[a] waiver of sovereign immunity exists when the State has expressly, or by reasonable construction of a contract or statute, placed itself in a position of attendant liability,” and found no implied waiver because the Legislature enumerated specific categories of compensable expenses under the act, interest not being among them. *Id.* at 68. It also found persuasive that two related statutes expressly provided for interest, while the statute at issue did not. *Id.*

Like the Relocation Act, RCW 7.21 contains no express waiver of sovereign immunity. Also like the Relocation Act, the contempt statute does not mention post-judgment interest. *See* RCW 7.21.030–.040. As recognized by *Union Elevator*, the Legislature knows how to specify when the State will be liable for interest, *see* RCW 8.28.040 (eminent domain actions); RCW 4.56.115 (tort actions); RCW 51.32.080 (industrial insurance), RCW 82.32.060 (tax refunds), and chose not to do so in respect to contempt judgments. If it had intended to waive sovereign immunity for interest on contempt judgments, it could have easily done so as it has done in several other arenas.

Respondents cite two cases in which an implied waiver as to interest was found. Both are distinguishable. *Architectural Woods, Inc.*

considered the State's implied liability for interest on contractual claims made by private parties. *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979). No contracts are at issue in these appeals, making *Architectural Woods* inapposite. In *Smoke v. City of Seattle*, the court found an implied waiver as a result of the State's "consent[] to suit for damages" for unlawful land use decisions and cited *Architectural Woods* and RCW 4.56.110(3), the statute waiving sovereign immunity for interest on torts judgments, for support. *Smoke v. City of Seattle*, 132 Wn.2d 214, 228, 937 P.2d 186 (1997). In contrast, the State has not consented to suit in the contempt statute, and contempt proceedings do not involve allegations of tortious conduct.

Even if this Court were inclined to find an implied waiver of sovereign immunity for compensatory sanctions made under RCW 7.21.030(3) as Respondents request, it should not do so here. As argued, the trial court did not rely on this provision when imposing the sanctions at issue. *See supra*, 9-13. Accordingly, there is no "comprehensive relief" to provide to Respondents via judgment interest. Br. Resp't at 21. Further, the record contains no indication that the trial court imposed judgment interest as a *contempt sanction*. Judgment interest was ordered for the first time as part of the contempt judgments, which were entered weeks after the contempt orders themselves. There appears

to have been no discussion in the trial court as to the propriety of ordering interest.

Finally, Respondents assert that judgment interest was an “essential part of achieving the court’s compensatory purpose” and that without such an award, its contempt orders would “lack teeth.” Br. Resp’t at 22. This is a meritless argument. The trial court has the authority to impose any sanction it likes under RCW 7.21.030(2)(d) to coerce performance so long as the sanction is coercive in character. It could have jailed a state official or monetarily sanctioned DSHS considerably more than it did to coerce compliance, but the trial court exercised its discretion to impose lesser sanctions. Judgment interest is far from essential to the trial court’s ability to enforce its orders in contempt proceedings.

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III. CONCLUSION

This Court should partially vacate the twenty-eight contempt orders on appeal and remand with instructions that sanctions may only be imposed for periods of time following entry of the written contempt order in each proceeding. It should do so because the punitive sanctions imposed prior to that point exceeded the trial court's authority under RCW 7.21.040 to sanction. This Court should also vacate the twenty-eight corresponding judgments and recognize that RCW 7.21 contains neither an express nor implied waiver of sovereign immunity as to interest.

RESPECTFULLY SUBMITTED this 15th day of May 2017.

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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on May 15, 2017, I served a true and correct copy of this **APPELLANTS' REPLY BRIEF** and this **CERTIFICATE OF SERVICE** as follows:

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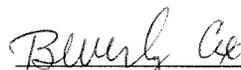
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 15 day of May 2017, at Tumwater, Washington.



BEVERLY COX
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