

Cause No. 746430

King County Superior Court No. 13-3-11851-7

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

In Re the Marriage of:

Michaela Osborne NKA Fellows,
Petitioner

And

Charles Fellows,
Respondent

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Victoria Galvan, Judge

PETITIONER'S OPENING BRIEF

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1. INTRODUCTION

The trial court found Ms. Osborne in contempt of court for her alleged damage to the parties' community property in violation of an oral court order to keep the house in "livable condition."¹ In an abuse of discretion, the trial court ordered Ms. Fellows to pay \$75,000 to Mr. Fellows, even though the finding was almost entirely based on inadmissible hearsay evidence. The trial court's sanction amounted to punitive contempt that denied Ms. Osborne the constitutional safeguards required in punitive contempt findings and to criminal defendants. This court should reverse the trial court's finding of contempt against Ms. Osborne, and the case should be remanded back to the trial court for more thorough fact-finding excluding inadmissible evidence.

2. ASSIGNMENTS OF ERROR

The trial court erred as to the following findings and conclusions:

- **Finding of Fact 2.1:** The trial court erred in finding Michaela Osborne intentionally failed to comply with the oral ruling of Judge Galvan and the lawful orders of the court dated July 8, 2015.

¹ Bench Trial V III at 240

- **Findings of Fact 2.3:** The trial court erred in finding Michaela Osborne willfully and purposefully destroyed the family home.
- **Findings of Fact 3.1:** The trial court erred in finding Michaela Osborne is in contempt of court.

3. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Mr. Fellows failed to provide any evidence directly linking Ms. Osborne to the extensive damage to the house. Did the trial court abuse its discretion by holding Ms. Osborne in contempt where there was no substantial evidence of intentional violation of the trial court's order?
2. The trial court erred in basing the contempt finding on inadmissible hearsay evidence. Should the trial court's findings be reversed as inadmissible hearsay evidence was the basis for the finding of contempt?
3. The trial court's contempt findings held that Ms. Osborne must pay Mr. Fellows \$75,000 for intentionally violating the order as a punitive sanction. Did the trial court err in ordering a punitive contempt finding against Ms. Osborne without granting her the constitutional safeguards required of criminal defendants and punitive contempt findings?

4. STATEMENT OF THE CASE

This contempt finding stems from significant property damage to the parties' house during the final stages of the parties' dissolution. The trial court found Ms. Osborne responsible for the damage, and sanctioned her \$75,000. However, the evidence provided to the trial court by Mr. Fellows was glaringly lacking in credibility and

admissibility. This court should reverse the trial court's decision that held Ms. Osborne in contempt for allegedly damaging the parties' community property house, and sanctioning her \$75,000.² The inadmissible hearsay evidence Mr. Fellows provided does not support a finding of an intentional violation of a court order or the punitive sanction ordered by the court.

The parties' six-year marriage was plagued by Mr. Fellow's controlling and abusive behavior perpetrated against Ms. Osborne. The parties dissolved their marriage by order of the trial court on June 30, 2015.³ The trial court granted Ms. Osborne a 99-year restraining order against Mr. Fellows.⁴ Once the dissolution was complete, Ms. Osborne had 60 days to remove all her belongings from the house, and quitclaim the property to Mr. Fellows, which she completed by August 28, 2015.⁵

The trial court ordered Ms. Osborne to leave the house in "livable condition,"⁶ which she took to understand that she could remove all the household belongings that didn't come with the house,

² VRP at 14

³ CP at 5

⁴ CP at 446

⁵ CP at 7

⁶ Bench Trial V III at 240

including large furnishings.⁷ When Ms. Osborne left on August 28, 2015, the house was in livable condition with no damage to the property. Through their declarations numerous family members attested to the livable state of the house on August 28, 2016.⁸

The first time Ms. Osborne learned about the damage was when she received a call from the Renton Police Department stating someone had damaged the house.⁹ Ms. Osborne immediately believed this damage was a result of Mr. Fellow's actions as a proxy for domestic violence.¹⁰ In fact, Ms. Osborne suspects that is why Mr. Fellow's attorney specifically asked the court to ensure the house was in livable condition.¹¹

Most concerning is the almost absolute absence of admissible evidence provided by Mr. Fellows proving that Ms. Osborne intentionally violated the dissolution decree. The only evidence Mr. Fellows provided for the contempt charge was his declaration,¹² estimates of the damage, which essentially rebuilds the interior of the

⁷ CP at 429, 489-500

⁸ CP at 428

⁹ CP at 429

¹⁰ CP at 427

¹¹ Bench Trial Vol. III at 240

¹² CP at 13

house,¹³ a double hearsay interview of the neighbor Michael Elvidge, and a police report.¹⁴

In stark contrast, Ms. Osborne provided four sworn declarations of people who had seen the house in livable condition on or right after August 27, 2015.¹⁵ In Ms. Osborne's declaration she readily acknowledges the damage that she was responsible for such as the writing on the walls that occurred *prior to the trial or appraisal of the house*.¹⁶

The trial court based the findings on circumstantial evidence that Ms. Osborne had control of the property when the damage occurred, that she admitted to causing minimal damage in her declaration, and the double hearsay interview with the neighbor. However, these are untenable grounds founded on inadmissible evidence that do not substantiate the claim that Ms. Osborne intentionally violated the court order.¹⁷

¹³ CP at 29- 420

¹⁴ CP at 422

¹⁵ CP at 489 -500

¹⁶ CP at 426

¹⁷ VRP at 14-15

5. ARGUMENT

a. STANDARD OF REVIEW

When reviewing a contempt findings this court assesses whether the trial court abused their discretion by basing the findings on untenable grounds and unreasonable reasons that are not supported by substantial evidence. The court reviews findings of contempt and the appropriateness of contempt sanctions for abuse of discretion.¹⁸ An abuse of discretion by the trial court is when a discretionary decision is exercised using untenable ground for untenable reasons.¹⁹ An unreasonable decision is one based on untenable grounds if the record has not supported factual findings, or if it is based on incorrect standard or the facts don't meet the requirements of the correct standard.²⁰ A trial court's factual findings are accepted if "supported by substantial evidence in the record,"²¹ which is evidence that would "persuade a fair-minded, rational person of the truth of that

¹⁸ *State v. Berty*, 136, Wn. App. 74 (2006); *In re Marriage of James*, 79 Wn. App. 436, 440 (1995)

¹⁹ *In re James* at 440 (1995)

²⁰ *In re Marriage of Littlefield*, 133 Wn2d 39, 47 (1997)

²¹ *In re Marriage of Thomas*, 63 Wn. App. 658, 660 (1991), citing *In re Marriage of Nicholson*, 17 Wn. App. 110, 114 (1997).

determination.”²² A finding of contempt will be upheld as long as proper basis can be found.²³

A court also “acts unreasonably if its decision is outside the range of acceptable choices given the facts and legal standard.”²⁴

Courts will review *de novo* as a question of law.²⁵

b. THE TRIAL COURT ERRED IN FINDING THAT MS. OSBORNE INTENTIONALLY VIOLATED THE LAWFUL COURT ORDER BASED ON INADMISSIBLE EVIDENCE AND UNTENABLE GROUNDS TO SUPPORT THE FINDING

This case presents a clear abuse of discretion by the trial court in that the contempt finding and the sanction was based on inadmissible hearsay evidence; and the trial court lacked sufficient evidence of willful or intentional violation of the order.²⁶ There is no evidence that proves Ms. Osborne actually or intentionally destroyed the home in willful violation of the oral court order.²⁷ A finding that a party intentionally violated a previous court order must support a

²² *In re Marriage of Spreen*, 107 Wn. App. 341, 346 (2001), citing *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986).

²³ *State v. Berty*, 136 Wn. App. 74, 84 (2006), citing *State v. Hobble*, 126 Wn.2d 283, 292 (1995).

²⁴ *In re Marriage of Wicklund*, 84 Wn. App. 763, 770 n.1 (1996), citing *In re Marriage of Kovacs*, 121 Wn.2d 795 (1993).

²⁵ *In re Silva*, 166 Wn.2d 133 (2009)

²⁶ *In re James*, at 440

²⁷ RP at 4; RP at 14

finding of contempt.²⁸ Here, the trial court found no intentional acts by Ms. Osborne, yet based the findings on circumstantial evidence such as of pictures of damage, hearsay investigations, police reports, and that Ms. Osborne “had control over the residence.”²⁹

The party moving for contempt has the burden of proving contempt by a preponderance of the evidence.³⁰ The trial court’s circumstantial evidence falls below the standard of a preponderance of the evidence because none of the evidence directly supports the finding that Ms. Osborne was the perpetrator of the damage to the house. While the evidence presented details what damage was done at no point does the evidence provide any connection as to who caused the damage. In fact, it is in dispute as to who caused the damage to the property, and Ms. Osborne believes it was Mr. Fellows who damaged the property.³¹ The disputed facts combined with the inadmissible evidence do not meet the standard of a preponderance of the evidence that Ms. Osborne intentionally violated the court order.

²⁸ *Holiday v. City of Moses Lake*, 157 Wn. App. 347 (2010); RCW 7.21.010(1)(b); *In re Marriage of Humphreys*, 79 Wn. App. 596, 599 (1995)

²⁹ VRP at 14 -15

³⁰ *In re James*, at 442

³¹ VRP at 10

In determining whether the facts support a finding of contempt, the court must strictly construe the order alleged to have been violated, and the facts must be a clear violation of the order.³² The writings on the wall occurred prior to the trial, and the children tracking paint through the house occurred with a police officer present.³³ There was no evidence submitted of anyone witnessing Ms. Osborne intentionally damage the house, or first person declarations of persons who heard Ms. Osborne admit to damaging the house. The circumstantial evidence that Ms. Osborne had control of the house, and a contradictory statement by a neighbor in a double hearsay declaration is not credible evidence to support a finding of an intentional violation.

Consequently, the circumstantial evidence and the inadmissible hearsay evidence fall below the standard of a preponderance of the evidence proving that she intentionally violated the trial court's oral court order to "leave the house in livable condition."³⁴

c. THE TRIAL COURT ERRED IN BASING THE
CONTEMPT FINDINGS ON INADMISSIBLE HEARSAY
EVIDENCE

³² *In re Marriage of Humphreys*, 79 Wash. App. 569, 599 (1995)

³³ CP at 428-430

³⁴ Bench Trial Vol. III at 240

The trial court erred in basing the contempt findings on inadmissible hearsay in a police report and double hearsay in Ms. Sanderson's declaration.³⁵ A court's decision is unreasonable if the factual findings are unsupported by the record, such as based on an incorrect standard or the facts do not meet the requirements for the correct standard.³⁶ A trial court's challenged factual findings regarding contempt will be upheld on appeal if they are supported by substantial evidence.³⁷ This court is capable of determining whether the evidence supports a trial court's findings of fact.³⁸ The party moving for contempt has the burden of proving contempt by a preponderance of the evidence.³⁹ The contemnor must provide evidence of their inability to comply, which the court must find credible.⁴⁰

Hearsay is evidence offered as proof of the matter asserted.⁴¹ A statement is a written assertion intended by the person as an assertion, and a declarant is a person who makes the statement.⁴²

³⁵ VRP at 14, 423

³⁶ *In re Marriage of Littlefield*, 133 Wash.2d 39, 47 (1997), citing *State v. Rundquist*, 79 Wash. App. 786 (1995)

³⁷ *In re Marriage of Rideout*, 150 Wn. 2d 337, 350 (2003)

³⁸ *Quinn v. Cherry Lane Auto Plaza Inc.*, 153 Wn. App. 710, 717 (2009)

³⁹ *In re Marriage of James* at 440

⁴⁰ *In re King* at 804

⁴¹ Washington State Rules of Evidence 801 (c)

⁴² Rules of Evidence 801(a) & (b)

Hearsay is not admissible except by the rules of evidence, by other⁴³ court rules or by statute. Hearsay within hearsay is only included if each part of the statements conform with an exception to the hearsay rule.⁴⁴

Here, the trial court based the finding on inadmissible hearsay evidence and unsubstantiated circumstantial evidence in the declaration of Karen Sanderson, and the police report. The trial court said "I've seen pictures. I've seen the reports. I've seen the admissions."⁴⁵ While Ms. Osborne admitted to carving words into the front door, and writing on the walls back in April 2015, she never admitted to substantively damaging the house.⁴⁶ However, Mr. Fellows proffered a declaration written by Karen Sanderson, proposing to have spoken to a neighbor Michael Elvidge on the phone.⁴⁷ The declaration was a statement by a declarant submitted into evidence as proof of the matter asserted, taken over the phone by a third party and this inadmissible declaration does not fall within any hearsay exceptions. Moreover, this inadmissible declaration included the contrarian statements of "Michael never saw the wife do any damage to the

⁴³ Rules of Evidence 802

⁴⁴ Rules of Evidence 805

⁴⁵ VRP at 14

⁴⁶ CP at 428, 489-500

⁴⁷ CP at 422

house...He thought everything was normal.”⁴⁸ To the statement, “he recalled the conversation he had with the wife where she admitted she damaged the house.”⁴⁹ The trial court then references this inadmissible declaration as “admissions to neighbors” as providing a substantial basis for the contempt finding.⁵⁰

Each one Mr. Elvidge’s statements is hearsay within hearsay as they were provided to the court, via a third person interview, and the statements were offered to support the truth of the matter asserted that Ms. Osborne damaged the property, yet none of these statements fall within any hearsay exceptions.⁵¹ In fact, the final statements made by Mr. Elvidge that “he has no interest in being involved in this case” indicates he is readily available to testify except that he does not wish to be involved in the case.⁵²

The police report offered into evidence by Mr. Fellows is hearsay and inadmissible; this report does not amount to the best evidence available as Mr. Fellow’s attorney made no attempts to call the reporting officer to the hearings.⁵³ Moreover, the police report had

⁴⁸ CP at 424

⁴⁹ CP at 424

⁵⁰ VPR at 15

⁵¹ Rules of Evidence 803 & 804

⁵² CP at 425

⁵³ Rules of Evidence 804

multiple instances of misinformation including the officer's statement that Ms. Osborne said she had three children when she in fact has two children.⁵⁴ However slight these discrepancies may be, the hearsay evidence was in dispute, and Ms. Osborne disputed numerous statements from the police report in the hearing.⁵⁵ The trial court ignored these discrepancies and based the findings on the inadmissible hearsay evidence.⁵⁶

The majority of evidence submitted by Mr. Fellows was inadmissible as hearsay and double hearsay, which is an improper basis for supporting an intentional violation of the order.

d. THE COURT ERRED IN HOLDING MS. OSBORNE IN CONTEMPT AND SANCTIONING HER WITH A PUNATIVE SANCTION WITHOUT GRANTING HER THE CONSTITUTIONAL SAFEGUARDS REQUIRED OF A PUNITIVE SANCTION

This contempt charge was clearly punitive and deprived Ms. Osborne of her constitutional safeguards and due process rights granted to criminal defendants.

⁵⁴ VRP at 11

⁵⁵ VRP at 11

⁵⁶ VRP at 14

Contempt is civil or criminal with the latter requiring constitutional safeguards extended to other criminal defendants.⁵⁷ A “punitive⁵⁸ sanction” is “a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.” A “remedial sanction” is “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.”⁵⁹ Prior to filing punitive contempt the prosecutor must file a criminal complaint and the contemnor must receive “due process rights extended to other criminal defendants.”⁶⁰ To determine if remedial or punitive we look at the actual character of the relief.⁶¹ If there is no opportunity to purge contempt then it is punitive.⁶² Punitive sanctions are criminal in nature, and must afford a contemnor full criminal due process.⁶³

⁵⁷ *Berty*, 136 Wn.App. at 84 (2006), citing *In re the Marriage of Didier*, 134 Wash.App. 490, 500 (2006)

⁵⁸ RCW 7.21.010(2)

⁵⁹ RCW 7.21.010(3)

⁶⁰ *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105 (2002)(quoting *In re Pers. Restraint of King. Dept. of Soc. And Health Serv’s*, 110 Wn. 2d 793, 800 (1988)

⁶¹ *M.B.*, 101 Wn. App. At 425, 439 (2000)

⁶² *In re King*, 110 Wn. 2d 793, 799 (1988)

⁶³ *In re Silva*, 166 Wash.2d 133, 141 (2009)

The court looks at the specific provisions of the order to determine whether contempt is punitive or coercive.⁶⁴ The mere “purging-type” language in a contempt order does not determine if a penalty is punitive or coercive.⁶⁵ The purpose of a criminal contempt sanction is to punish for past behavior; the purpose of civil contempt sanction is to coerce future behavior that complies with a court order.⁶⁶ Continuing contempt for acts the party was powerless to perform effectually makes sanctions punitive.⁶⁷

The trial court’s ruling exemplified the punitive intent of the sanction by stating, “[t]his was a tantrum, and an expensive one at that. That’s all it was.”⁶⁸ The court went on stating, “[y]our client ignored this court. She was clearly upset about losing the house...there was a court order and she failed to abide by it.”⁶⁹ Even with a purge clause in the contempt order, this language indicates a punitive contempt sanction intending to punish Ms. Osborne for her

⁶⁴ *In re Marriage of Didier*, 134 Wash. App. 490, 504 (2006) (A father required to report to jail after a certain date indicated the penalty was punitive and not coercive.)

⁶⁵ *Id*

⁶⁶ *In re King* at 800

⁶⁷ *In re King* at 804

⁶⁸ VRP at 15

⁶⁹ VRP at 14

past acts.⁷⁰ The trial court's findings do not attempt to persuade Ms. Osborne to abide by the court order, but punish her for her alleged tantrum that was unsupported by substantial evidence, and fell below the standard of a preponderance of the evidence required in civil contempt findings.

Moreover, the trial court's punitive intent was indicated by the trial court's statement that Ms. Osborne could face a "felony filing of malicious mischief in this case."⁷¹ Further indicating the punitive nature of the contempt findings is there was no review hearing set to ensure Ms. Osborne complied with the contempt.⁷² The trial court's intent was to punish Ms. Osborne for her alleged past actions, however she was not granted the constitutional safeguards required of a punitive sanction.

The trial court erred in finding Ms. Osborne intentionally violated the court ruling and ordering a punitive sanction without the due process safeguards required of a punitive contempt and criminal defendants.

⁷⁰ *In re Marriage of Didier*, 134 Wash. App. at 504 (2006)

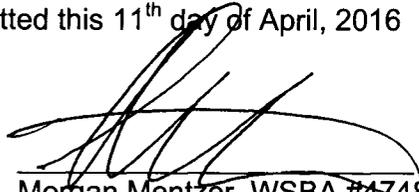
⁷¹ VRP at 15

⁷² CP at 504, Section 3.10

6. CONCLUSION

The trial court's contempt finding should be reversed as the basis for the finding is inadmissible hearsay evidence, which amounted to a clear abuse of discretion. Additionally Ms. Osborne was deprived the constitutional safeguards granted to criminal defendants and required in punitive contempt sanctions. This court should reverse the trial court's findings of contempt and remand the case back to the trial court for a more thorough fact-finding.

Respectfully submitted this 11th day of April, 2016



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