STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP001201-CR and Trial Court Case No. 2008-CV-528

IN RE THE FINDING OF CONTEMPT IN:

TOWN OF STETTIN,

Plaintiff-Respondent,

vs.

ROGER HOEPPNER and MARJORIE HOEPPNER,

Defendant-Appellants.

DEFENDANT-APPELLANTS' BRIEF AND APPENDIX

Appeal to the Court of Appeals, District 3, from the entire Final Judgment on April 5, 2013, of the Marathon County Circuit Court, The Honorable Greg Grau presiding.

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STATEMENT OF ISSUES

Issue No. 1: Did the Trial Court act contrary to law when it failed to make a finding regarding compliance by the Defendant-Appellants, Roger and Marjorie Hoeppner with the contempt order?

Answered by the trial court: No.

Issue No. 2. Did the Plaintiff-Respondent, Town of Stettin, violate the due process clause of U.S. Const. amend. XIV and Wis. Const. art. I sec. 1 when it seized property of the Defendant-Appellants, Roger and Marjorie Hoeppner?

Answered by the Trial Court: No.

Issue No. 3. Did the Plaintiff-Respondent, Town of Stettin, violate the due process Clause of U.S. Const. amend. XIV and Wis. Const. art. I sec. 1 when it sold property of the Defendant-Appellants, Roger and Marjorie Hoeppner?

Answered by the Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. There is no dispute as to the facts giving rise to this appeal. The only issues on appeal are the application of the law to the specific facts of this case and oral argument is unnecessary to clarify Plaintiff-Appellants' position.

Pursuant to Sec. 809.23, Stats., publication is not warranted. The only issues on appeal are the application of the law to the specific facts of this case, therefore, publication is not warranted.

STATEMENT OF THE CASE

On April 28, 2008, the Plaintiff-Respondent, Town of Stettin, hereinafter "Stettin" filed a Summons and Complaint seeking enforcement of town ordinances regarding sales of

farm equipment, signs located on the property and public nuisance (rubbish and vehicles). (R.Doc. 1 & 2) The Defendant-Appellants, Roger and Marjorie Hoeppner, hereinafter "Hoeppner" filed an answer denying said allegations and raising affirmative defenses.

On June 1, 2009, the parties entered into a stipulation. Said stipulation was memorialized in an Order dated June 12, 2009. (R.Doc. 18, App. pg. 122)

The Plaintiff brought a motion for contempt and enforcement of the settlement agreement. Said motion was heard on August 24, 2010. In an order dated September 24, 2010, the Court ordered the Hoeppners to remove certain items of personal property. (R.Doc. 22, App. pg. 131)

A hearing was held on May 24, 2011. At said hearing, the Court made a finding that the Hoeppners had not complied with the Court's order of September 24, 2010. The Court further authorized Stettin, after June 24, 2011, to enter upon the Hoeppners' premises and remove certain items of personal property as required by the Court's order of September 24, 2010. (R.Doc. 36)

On three (3) separate occasions, commencing June 27, 2011, Stettin entered onto the property of the Hoeppners' and seized items of personal property belonging to the Hoeppners. Stettin then sold said items at auction.

On April 5, 2013, the Court entered its findings of fact, conclusions of law and final judgment of April 5, 2013. In said order and judgment, the Court imposed a daily forfeiture and awarded legal fees for failure to comply with the May 24, 2011 order. (R.Doc. 70)

The Hoeppners have appealed from the entire judgment of the court dated April 5, 2013.

STATEMENT OF FACTS

The Plaintiff-Respondent, Town of Stettin, hereinafter "Stettin" filed a Summons and Complaint on April 28, 2008**,** to enforce provisions of its zoning code (R. Doc. 1& 2, App. pg. 102-120) The Defendant-Appellants, Roger and Marjorie Hoeppner, hereinafter "Hoeppner" filed an Answer denying said complaint and alleging four (4) affirmative defenses (R.Doc. 13. App. pg. 121)

The parties entered into an oral stipulation on June 1, 2009. The oral stipulation was memorialized in an order dated June 12, 2009. (R. Doc. 18 App. pg. 128)

In return for Stettin agreeing to review its zoning ordinances, the Hoeppners agreed to remove numerous items of personal property. Said order contained, in part, the following:

C. Remove all trailers or be stored on the parcels in an area **where they are not visible from the right of ways**;

I. All forklifts shall be stored on the parcels in an area **where they are not visible from the right of ways**;

K. All rims and tractor parts shall be moved to the parcel where the tractors are located and stored and in an area **where which is not visible from the right of ways abutting the Defendants' parcels**;

M. All material/parts/equipment shall be removed from the side of the sheds and stored in an area **where they will not be visible from the right of ways abutting the Defendants' parcels**;

O. All unlicensed and/or inoperable vehicles shall be either removed from the parcels or stored in an area **where they will not be visible from the right of ways abutting the Defendants' parcels**;

Q. All white PVC pipe, wire, wood, and culverts on said parcels shall be moved and/or stored in an area **where it will not be visible from the right of ways abutting the Defendants' parcels**;

(emphasis added)

Said order further provided that upon the affidavit of the Town Chairman, Stettin would be granted immediate injunctive relief to enforce the terms thereof. (R.Doc. 18, App. pg. 128-129)

Stettin filed a motion for contempt and enforcement of the settlement agreement in this matter. Said motion came on for hearing before the court on August 24, 2010. Said hearing was memorialized in an Order dated September 24, 2010. Said order addressed items of personal property belonging to the Hoeppners. The Hoeppners stipulated to a finding of contempt. Further, said order provided in Paragraph 9 as follows:

> Upon the Defendants' failure to comply with any aspect of this Order, the Town shall be granted all relief and may seek all remedies for the contempt. In all other respects, the Defendants' parcels shall conform to the requirements of the district for which said parcels are zoned.
>
> (R.Doc. 22, App. pg. 133)

The matter was before the Court again on May 24, 2011. At that time, the Court found that the Defendants had not complied with the order signed on September 24, 2010. Further the Court found that the Defendants had not purged their contempt as of May 24, 2011. In addition, the Court ordered , in Paragrapg 3 as follows:

> The Town, its agents, officers, employees and/or persons and companies contracted by the Town are authorized after June 24, 2011, to enter upon the

> Defendants' premises and remove or cause to be removed all farm equipment, pallets, and other material required by the Court's Order signed September 24, 2010, to be removed and/or which in any respect is in violation of said order and to dispose of the said property as set forth in Paragraph 4 of Plaintiff's Motion to the Court dated July 28, 2010.
>
> (R.Doc 36, App. pg. 155-156)

On June 27, 2011, Stettin entered onto Hoeppners' property. Stettin removed personal and business items from the Hoeppners' property. Said items consisted in part of business property such as farm equipment, trailers, wooden pallets and items of personal property such as a wood splitter and wood. (R.Doc. 39)

On July 1, 2011, Stettin entered onto Hoeppner's property a second time. Stettin, purportedly under authority of the a document issued by the Marathon County Circuit Court, removed personal and business items form the Hoeppners' property. (R.Doc 39)

On July 11, 2011, Stettin entered onto the Hoeppners' property a third time. Again, Stettin removed personal and business items from the Hoeppners' property. .(R.Doc. 39)

The estimated fair market value of the Hoeepners' property that was seized and removed form the property by the Town of Stettin is approximately $164,815.00. (R.Doc. 39)

That the property seized by Stettin from the Hoeppners' property was sold at auction. (R.Doc. 34) Said auction was held on July 23, 2011.

On April 5, 2013, the matter came on for hearing before the Court. The Court awarded a Judgment in favor of Stettin and against the Hoeppners in the amount of $24,000.00. Further, the Court reaffirmed its judgment of June 21, 2011, with forfeitures in

the sum of $23,000.00 together with costs in the amountof $11,568.21. (R.Doc. 70, App. pg. 173)

ARGUMENT

I. The Court acted contrary to law when it authorized Stettin to enter onto Hoeppner's property and to seize and sell items of personal property.

A. Standard of review.

Questions of law will be considered de novo by the appellate courts. A question of law is presented when the construction of a statute is in issue. *Phelps v. Physicians Ins. Co. of Wis.*, 319 Wis.2d 1, 768 N.W. 2d 615 (2009).

B. After the Order of May 24, 2011, no hearing was held and no findings were made to determine if the purge condition was in the power of the Defendants.

A hearing was held in this matter on May 24, 2011. The Court stated the following as to the right to purge:

> MR. LISTER: I understand, but these things can be moved.
>
> Once he is in compliance, the township has no authority to
>
> come and set foot on that property.
>
> THE COURT: I agree. I am giving him actually in effect
>
> another month. The forfeitures are going to accumulate.
>
> Apparently a hundred dollars a day isn't enough.
>
> (R.Doc. 85, App. pg. 152)

The rule regarding the right to purge a contempt is as follows:

> ...In the case of a remedial sanction, compliance with the purge provision must be in the power of the contemnor. See *State ex rel. N.A. v. G.S.,* 156 Wis. 2d 338, 343, 456 N.W.2d 867, 869 (Ct. App. 1990). ...*In re Marriage of*

Krieman v. Goldberg, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997).

In *State Ex Rel. N.A. v. G.S.,* 156 Wis. 2d 338, 342, 456 N.W.2d 867 (Ct. App. 1990): the court held as follows:

> Remedial contempt looks to present and future compliance with court orders, and the sanction must be purgeable through compliance. *State v. King,* 82 Wis. 2d 124, 130, 262 N.W.2d 80, 83 (1978). The purge provision must clearly spell out what the contemnor must do to be purged, and that action must be within the power of the person. *Schroeder v. Schroeder,* 100 Wis. 2d 625, 638, 302 N.W.2d 475, 482, (1981). Thus it is often said that contemnors "hold the keys to their own jails." *King,* 82 Wis. 2d at 137, 262 N.W.2d at 86.

It is undisputed that the Court, in the May 24, 2011 Order, gave the Hoeppners the right to purge their contempt. However, no hearing was held to determine whether or not the purge conditions were within the power of the Hoeppners' and whether or not the Hoeppners purged said contempt.

C. The court can not abdicate its power to make a finding of fact regarding compliance to the Town of Stettin.

The Town of Stettin does not have authority to determine if the Hoeppners have complied with the court order nor does it have authority to impose the remedial sanction of cleaning up the property and conducting an auction. Only a court of record may impose a remedial sanction.

Paragraph 3 of the Order of May 24, 2011, provides as follows:

> The Town, its agents, officers, employees and/or persons and companies contracted by the Town are authorized after June 24, 2011, to enter upon the Defendants' premises and remove or cause to be removed all farm equipment, pallets, and other material required by the Court's Order signed September 24, 2010, to be removed and/or which in any respect is in

violation of said order and to dispose of the said property as set forth in Paragraph 4 of Plaintiff's Motion to the Court dated July 28, 2010.

(R.Doc 36, App. pg. 155-156)

Unless a hearing is held after June 24, 2011, there is no way to determine what property is to be removed pursuant to the Court's Order of June 12, 2009. Further, without a hearing, there is no way to determine if the property seized and removed from the Hoeppners' property is property that can be legaly disposed of. For example, as previously stated in the June 12, 2009 Order, numerous items could not be removed if they were not visible from the right of way abutting the Hoeppners' parcel. No determination has ever been made regarding each separate item of property as to whether or not it complied with the June 12, 2009 Order.

D. The Town of Stettin did not follow the proper procedure to obtain a remedial sanction after June 24, 2011.

The proper procedure was for the Town of Stettin to file a motion, **after** June 24, 2011, if the Hoeppners were not in compliance. Wis. Stat. § 785.03(1)(a) provides as follows:

> (a) Remedial sanction. A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, **after notice and hearing**, may impose a remedial sanction authorized by this chapter. (Emphasis added.)

After June 24, 2011, Stettin failed to file a motion and request a hearing to impose the sanction. Instead, just three (3) days later, on June 27, 2011, Stettin entered Hoeppner's property and started seizing and removing items of personal property.

II. The procedure followed by the Town of Stettin denied the Hoeppners due process of law.

A. The Hoeppners were deprived of property without due process of law.

The U.S. Const, amend. XIV; Wis. Const., art. I, sec. 1 provides, in part, that no state may deprive any person of property without due process of law.

It is undisputed that Stettin is a municipal corporation. Further, it is undisputed that Stettin entered onto the Hoeppners' property and seized items of personal property and then sold said items.

B. Stettin's zoning ordinance is an exercise of its police power to regulate the use of property.

When police power legislation is challenged on due process grounds, the question is whether the means chosen have a reasonable and rational relationship to the purpose or object of the enactment. *Messner v. Briggs & Stratton Corp*., 120 Wis.2d [131 Wis.2d 534] 127, 135, 353 N.W.2d 363, 367 (Ct.App.1984).

C. The procedure followed by Stettin in this matter deprived the Hoeppners of due process of law.

Stettin denied Hoeppners due process of law in several respects. After the May 24, 2011 Order, the Hoeppner's had the right to purge their contempt. However. Stettin did not request a hearing to determine whether or not the purge conditions were within the power of the Hoeppners and whether or not the Hoeppners purged said contempt.

Further, Stettin did not follow the proper procedure to obtain a remedial sanction. Wis.Stats. § 785.03(1)(a), allows a Court, after notice and hearing, to impose a remedial sanction. Stettin did not seek a hearing to determine which specific items of farm equipment, pallets and other material were in violation of the May 24, 2011 Order. Without a hearing, Stettin was judge and jury as to which items of personal property should be removed from the

Hoeppners. This is a violation of the due process clause of the U.S. Constitution, Amendment XIV.

CONCLUSION

The proper procedure to impose remedial sanctions for a contempt proceeding were not followed by Stettin. The failure to follow the remedial sanctions deprived the Hoeppners of their property without due process. Further, the actions by Stettin were in direct violation of the procedure outlined by Wisconsin Statutes.

The Hoeppners respectfully request the Court to find that Stettin seized and sold Hoeppner's property in violation of the Wisconsin Statutes and in violation of Hoeppners' due process rights.

The Hoeppners request that the Court of Appeals overturn the findings of Fact, Conclusions of Law and Final Judgment of April 5, 2013, imposing forfeitures, costs and legal fees against the Hoeppners.

Respectfully submitted,

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), as modified by the court's order, for a brief and appendix produced with a proportional font. The length of this brief is 2,604 words.

Dated this ____ day of December, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 908.19(12)

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of December, 2013.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been
so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of December, 2013

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