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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' REPLY BRIEF

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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I. The Circuit Court erroneously exercised its contempt power in approving the purge conditions in the September 24, 2010 Stipulated Order as modified and reaffirmed in the May 24, 2011 Order.

Appellants have never disputed that the May 24, 2011 Order gave the Appellants the right to purge their contempt. Respondent misconstrues the argument of Appellants that no findings were made to determine if the purge conditions were within the power of the Appellants and to determine if Appellants were in compliance.

It is not the allegation that the Circuit Court did not properly set purge conditions, it is the argument that the Court did not hold a hearing to determine if Appellants met the purge conditions or if the purge conditions were within their power.

The May 24, 2011 Order, specifically provides in Paragraph 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)

It is undisputed that Appellants were given until June 24, 2011, to purge the contempt. Further, it is undisputed that on June 27, 2011, just three (3) days after the June 24, 2011 deadline, the Town of Stettin entered onto Appellants' property. Finally, it is

undisputed that in the three (3) days from the end of the order, and until June 27, 2011, no hearing was held by the Circuit Court to determine if the Appellants had purged the contempt, had the ability to purge contempt and whether or not it was within their means.

Again, it is undisputed that the Circuit Court had the power to establish purge conditions. What is shown by the record in this matter is that the Circuit Court never held any hearing to review the purge conditions.

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 contemptor. 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 Appellants 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 Appellants' and whether or not they purged said contempt.

II. The issue in this case is not whether or not the Court properly exercised its discretion in fashioning a contempt remedy at the May 24, 2011 hearing, including thirty (30) additional days for the Appellants to purge their contempt and permission for the Town to clean up the property and conduct an auction.

Respondent's reliance upon the Court's exercise of discretion in providing the purge conditions in the May 24, 2011 Order is misplaced. The issue is not whether or not the Court properly exercised it discretion in it holdings in the May 24, 2011 Order. The appropriate issue is whether or not the purge conditions were met or within the power of the Appellants. It is undisputed that the September 24, 2010 Stipulated Order and the May 24, 2011 Order contained purge conditions. Whether or not the purge conditions as established in the May 24, 2011 Order were met is unknown. Said Order authorized the Town of Stettin, after June 24, 2011, to enter upon the Appellants property. This is exactly what the Town did on June 27, 2011.

Again, the issue is not whether or not the Circuit Court had the power to establish particular purge conditions. The issue is whether or not any hearing was held after the Order of May 24, 2011 to determine if the purge conditions were in the power of the Appellants or whether or not they were in compliance with the conditions.

As argued in Defendant-Appellants' Brief and Appendix, Argument I (b)(c)(d), the Town of Stettin did not seek any hearing after June 24, 2011 and before it entered Appellants' property.

III. The Circuit Court erroneously exercised its discretion at the May 24, 2011 hearing.

As conceded by the Respondent, the May 24, 2011 Order included thirty additional days to purge their contempt. Said thirty day period expired on June 24, 2011. Within three days of the thirty day purge, the Town of Stettin entered onto Appellants property and seized numerous items of property. Again, the Town of Stettin is attempting to reframe the issue in this matter to an issue of whether or not the Circuit court had the right to establish the purge conditions. Said right is undisputed. The correct issue is whether or not the Circuit Court made any determination as to whether or not the purge conditions were met. It is undisputed that it did not.

IV. The Appellants have not waived the argument that another purge hearing was required after the May 24, 2011 hearing was held.

The May 24, 2011 Order provided that the Appellants had thirty (30) days to meet the purge conditions. Said thirty days expired on June 24, 2011. As previously discussed, just three days after this, on June 27, 2011, the Town of Stettin entered onto the Appellants property and seized numerous items of personal property.

The Town of Stettin argues that the Appellants did not present their argument for another purge hearing to the Circuit Court. (Plaintiff-Respondents' Brief, Page 16.) Again, three days after the end of the purge period, the Town of Stettin, without any further Court Order, entered onto the Appellants' property. No further action was taken by the Town of

Stettin before the Circuit Court to establish that the Appellants had failed to meet any of the purge conditions in the Order. The Town of Stettin simply and unilaterally entered onto the Appellants' property and began to seize items of personal property. As to the argument that no authority has been cited, the Court is directed to Defendant-Appellants' Brief and Appendix, Argument I (b)(c) & (d) which fully and completely develops said argument.

V. The Appellants have not made their due process argument for the first time on Appeal.

In Plaintiff-Respondent's Brief, the Town of Stettin alleges that the Appellant have made their due process argument for the first time on appeal. (Plaintiff-Respondent's Brief, pg. 18.)

Just one example where the due process was raised by the Appellants, occurred at the hearing on May 9, 2012. At that time, the following argument took place.

> MR. LISTER: The Town has argued that this Court should be within its comfort level, that nothing improper was done to the Defendant's property. That is not the standard that the Plaintiff has to meet in this matter. It's not a comfort level. It's due process. It's the right application of law. It's not a comfort level.
>
> And when the town likes to say that it took great pains -- I'm going back to the transcript, Judge, from the hearing February 21, 2012, and when we're talking about the property they took, it's hard to imagine that something can be the subject of the order when they didn't even know about it. And yet, we go on page 40, and I'm not going to read it all, but when in the questioning of Mr. Wasmundt:

"Question: And then when you went on July 1st of 2011, it was the second time you went on Mr. Hoeppner's property to take items?

Answer: Correct.

Question: And on that date did you walk around his property looking for items to take?

Answer: Yes.

Question: And on July 11, 2011, you went back to his property?

Answer: Correct.

Question: And again on that date, did you walk around his property looking for items to take?

Answer: Yes."

And important, Judge, we get to line 15 on page 40:

"Question: And you were looking for items that were not known to you before you walked on this property?

Answer: Correct.

Question: And that's the same on July 1st, you went walking around his property looking for items you didn't know about. Is that fair to say?

Answer: Yes.

Question: And the same on June 27th, 2011, you went walking around looking for items that you previously didn't know about?

Answer: Some.

Question: Yes or No, sir?

Answer: Yes."

> Judge, we have a situation here where there is no definitive listing of what property is to be taken or what specific items are to be taken, and it's clear from the testimony in this case that Mr. Wasmundt went on that property and went looking for things that were never contemplated to be removed by anybody, and he admits that in his testimony.

(R.Doc. 98, pg. 88-90)

An additional example of Appellants raising the issue of a denial of due process is contained in Defendants' Emergency Motion to Stay Auction. (R.Doc. 39)

Said Motion is supported by the Affidavit of Roger Hoeppner. (R.Doc. 40) In Paragraph 7 of said Affidavit, Hoeppner states, in part, as follows:

> On June 27, 2011, the Chairman of the Town of Stettin, Matt Wasmundt, and others acting at his direction, entered onto the property of Roger Hoeppner and Marjorie Hoeppner. The Chairman of the Town of Stettin, Matthew Wasmundt and others acting at his direction, removed personal and business items from the property. *** Said entry onto the property of Roger Hoeppner and Marjorie Hoeppner and the taking of their property was under color of law and in violation of the Wisconsin Constitution, the United States Constitution and 42.U.S.C. 1983 and denied them the due process of law and equal protection of the law.

The due process claim was also raised as to the entry by the Town of Stettin onto Appellants' property on July 1, 2011, in Paragraph 10 of said Affidavit. (R.Doc. 40)

Further, said due process claim is raise in Paragraph 12 of said Affidavit regarding the July 11, 2011 entry onto Appellant's property by the Town of Stettin. (R.Doc. 40)

Said argument was properly developed by Defendant-Appellant in Argument II of Defendant-Appellants' Brief and Appendix, pg. 8-10. Said argument included citations to the Wisconsin Constitution, the United States Constitution, State of Wisconsin Case Law and State of Wisconsin Statutes. What happened here is that the Town of Stettin entered onto Appellants' property without having a determination by the Court that Appellants had failed to purge their contempt. Also, the Town of Stettin entered onto Appellants' property on three (3) different occasions, without any definitive listing of what property was to be taken. Finally, as described above, Town Chairman Matthew Wasmundt went back onto the property on several occasions and was walking around looking for items to take.

Further, Town Chairman Matthew Wasmundt stated that he was looking for items that were not known to him before he walked on to the property. Town Chairman Matthew Wasmundt went on the Appellants' property and went looking for items that were never contemplated to be removed by anybody. This is exactly the situation that should have been avoided in this matter. It could simply have been avoided by holding a hearing after June 24, 2011, to determine if the Appellants had the ability and had purged their contempt.

The Appellant's were denied due process of law in several respects. After the May 24, 2011 Order, the Appellants had the right to purge their contempt. However, the Town of Stettin did not request a hearing after June 24, 2011 to determine whether or not the purge conditions were within the power of the Appellants and whether the Appellants had purged said contempt. The Town of Stettin unilaterally entered onto the Appellant's property without any further Court Order. Said actions by the Town of Stettin were in direct violation of Wis.Stats. § 785.03(1)(a). The unilateral actions by the Town of Stettin in determining if

the Appellants were still in contempt and what items could be taken is a violation of due process.

CONCLUSION

The issue in this matter is not whether the Circuit Court had the authority to issue purge conditions for remedial contempt. A circuit Court clearly does. The issue in this matter is whether or not the proper procedure was followed by the Town of Stettin and the Circuit Court in determining whether or not the Appellants had the ability to meet the purge conditions and whether or not the conditions were met.

As the Town of Stettin unilaterally entered onto the Appellant's property without a further Court Order, they acted in violation of the Wisconsin Statutes and in violation of Appellants' due process rights.

The Appellants respectfully request that the Court of Appeals overturn the Findings of Fact, Conclusions of Law and Final Judgment of April 5, 2013.

Respectfully submitted,

_____

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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), as modified by the court's order, for a reply brief produced with a proportional font. The length of this brief is 2,316 words.

Dated this ____ day of February, 2014.

_____
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CERTIFICATE OF COMPLIANCE WITH RULE 908.19(12)

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

This electronic reply 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 reply brief filed with the court and served on all opposing parties.

Dated this _____ day of February, 2014.

_____
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