IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LE & ASSOCIATES, P.S., a professional service corporation, Respondent, v. ROBERTO DIAZ-LUONG and LAN THI NGUYEN, husband and wife, and the marital community comprised thereof, Appellants, v. EDWARD K. LE and VIENNA LE, individually and as spouse/partners, Third-Party Defendants.	)	No. 61912-8-I (Consolidated with Nos. 63011-3-I and 63012-1-I) DIVISION ONE UNPUBLISHED FILED: August 23, 2010

Cox, J. — In these consolidated appeals, Lan Nguyen and Roberto Diaz-Luong, a married couple, appeal contempt orders, findings and conclusions in support of these orders, the imposition of attorney fees, and other related orders. Lan and Roberto[1] argue that the trial judge violated their due process rights, primarily by denying their request for an evidentiary hearing on the motions for

[1] We adopt the naming conventions of these parties for clarity and ease of reference. See Appellants' Consolidated Opening Brief at 8 n.5.

contempt. They also contend the judge violated their right to due process by deciding whether her prior orders were violated, by applying an improper standard of proof in deciding they were in contempt of those orders, and by denying them a right to a trial by jury. Additionally, they argue that the award of attorney fees below, which was based on the contempt determinations, should be vacated.

We hold that the trial judge did not abuse her discretion in deciding the contempt motions based on declarations rather than live testimony at an evidentiary hearing. We also hold that the judge did not abuse her discretion in holding Lan and Roberto in contempt. The challenged findings are supported by substantial evidence and support the conclusions of law regarding the contemptuous conduct. In our de novo review of the claimed violations of due process, we conclude that the judge did not violate Lan and Roberto's constitutional rights. Finally, the judge did not abuse her discretion either in awarding Le & Associates, PS ("the firm") attorney fees or in determining the amount of the fees for its successful prosecution of the contempt proceedings. We affirm and remand with directions.

Lan and Roberto are both former associates of the firm. On October 23, 2007, they executed a separation agreement and an addendum that provided for the terms and conditions of their departure from the firm. The agreement lists specific cases that were then in various stages of progress and also states methods for fee sharing between the former associates and the firm.

In December 2007, based on the belief that Lan and Roberto had

improperly downloaded and copied client files, wrongfully solicited firm clients, and engaged in other unlawful activity, the firm sued them. The firm asserted claims of quantum meruit, tortious interference, replevin, violations of the trade secrets act, and conversion, among others.

In January 2008, the firm moved for a preliminary injunction. It sought an order "enjoining [Lan and Roberto's] continued possession of [the firm's] electronic client database, and hard copies of client files, and an order for redelivery." The firm further sought to enjoin Lan and Roberto from any contact with "other clients" of the firm. The trial court entered a preliminary injunction dated February 9, 2008, together with findings and conclusions on February 11, 2008. The injunction prohibits Lan and Roberto from specific acts and directs them to perform others, pending trial. It is undisputed that the injunction order was provided to their counsel in their presence in early February 2008.

In April 2008, the firm moved for a contempt order based on allegations that Lan and Roberto had violated the terms and conditions of the preliminary injunction. In response, Lan and Roberto sought an evidentiary hearing, claiming a need for live testimony of witnesses. In exploring that request, the judge indicated her intent to conduct the hearing on declarations to the extent possible. Nevertheless, she directed Lan and Roberto to specify what witnesses should testify at an evidentiary hearing, why live testimony would be better than declarations, and what estimated time would be necessary for any live testimony. Lan and Roberto partially complied with this request of the court when they submitted a written Request for Live Testimony dated May 14, 2008.

On June 5, 2008, after reviewing this request and other submissions, the trial judge proceeded with the hearing on the contempt motion on the basis of declarations, not live testimony.

Thereafter, the judge entered her Findings of Fact, Conclusions of Law and Order of Contempt dated June 11, 2008, on June 13, 2008. In an order entered June 27, 2008, the judge denied Lan and Roberto's motion for reconsideration and stay of the June 11 order, but clarified some of its terms.

Lan and Roberto timely appealed both June 2008 orders. Roberto later moved to withdraw as a party to that first appeal. A commissioner of this court granted his motion, directing that the case title should continue to list Roberto's name without the designation of appellant.

On January 27, 2009, the trial judge entered a number of additional orders in this matter. They related to the June 2008 contempt order that was a subject of the then-pending appeal by Lan. The judge also entered a new contempt order together with supporting findings and conclusions.

Lan and Roberto filed second and third notices of appeal. We consolidated all appeals and directed filing of consolidated briefs.

MATTERS ON APPEAL

The firm argues that we should not reach the merits of the consolidated appeals now before us. Its arguments are largely unpersuasive.

The firm first argues that Roberto's second appeal is moot because he successfully sought to withdraw as a party to his first appeal. We disagree.

RAP 2.4(b) provides that an appellate court will review a trial court order

not designated in the notice of appeal if that order prejudicially affects the decision designated in the notice and the order is entered before the appellate court accepts review.[2] Our supreme court has interpreted the term "prejudicially affects" to turn on whether the order designated in the notice of appeal would have occurred absent the other order.[3]

Here, Roberto successfully moved to withdraw as a party to his appeal of the June 2008 contempt orders. The January 2009 ruling of a commissioner of this court granting the motion does not state whether Roberto's withdrawal of that appeal is with prejudice. We will not presume that it was in the absence of an express statement in the ruling that the dismissal was with prejudice.

Thereafter, in January 2009, the trial judge entered seven additional orders, including a new contempt order. Lan and Roberto designated all of these orders in their second and third notices of appeal. These notices state that Lan and Roberto "seek review of these orders, ***and any prior order that prejudices review of any of these orders***."[4] Even if the language that we emphasized in the previous sentence was not in the notices of appeal, we would still be faced with the question whether prior orders "prejudicially affected" the

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[2] RAP 2.4(b); Hwang v. McMahill, 103 Wn. App. 945, 949, 15 P.3d 172 (2000).

[3] See Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 378-80, 46 P.3d 789 (2002) (court of appeals should not have declined to review trial court's denial of a motion to dismiss under RAP 2.4(b) because the order designated in the notice of review, a discovery order, would have precluded the discovery order if granted).

[4] (Emphasis added.)

orders designated in the most recent notices of appeal.

The contempt order of January 27, 2009, designated in a more recent notice of appeal, is "prejudicially affected" by the June 2008 contempt orders. In this more recent contempt order, the trial judge found Lan and Roberto in "continuing" contempt of court because they "intentionally failed and refused to comply with the [prior] orders of this Court." Among the orders that Roberto and Lan allegedly "refused to comply with," is the court's order dated June 11, 2008, and its order dated June 25, 2008. Accordingly, the scope of our review includes the two June 2008 orders under RAP 2.4(b).

The firm next claims that Roberto waived his right to appeal the contempt order by virtue of language in his declaration supporting his motion to withdraw his prior appeal. The firm further claims that it detrimentally relied on this language in his declaration by deciding not to move to dismiss the first appeal. Neither argument overcomes the plain words of RAP 2.4(b) that permit our review of these consolidated appeals on the basis we already explained.

In any event, we retain the discretion to liberally interpret the RAPs to promote justice and facilitate decisions on the merits.[5] Accordingly, we also exercise our discretion to reach the merits of these appeals of very serious matters.

The firm also argues that Lan failed to preserve most of the arguments she now makes on appeal. We address this argument as we analyze each of

[5] RAP 1.2(a).

the specific claims on appeal.

CONTEMPT OF COURT

Lan and Roberto attack the contempt orders on a number of bases. None are persuasive.

"Contempt of court" is defined by statute, in relevant part, as intentional "[d]isobedience of any lawful judgment, decree, order, or process of the court."[6]

Contempt may be direct, occurring in the court's presence, or indirect, occurring outside of court.[7] "Due process requirements vary depending on whether the contempt is direct or indirect and whether the sanctions imposed are remedial or punitive in nature."[8]

Direct contempt may only be committed in the presence of a judge in a courtroom.[9] In such cases, the judge may deal summarily with the matter.[1] Indirect contempt involves conduct outside the courtroom, and summary proceedings are not available.[11]

A "remedial sanction" is one that is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform

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[6] RCW 7.21.010(1)(b).

[7] In re Dependency of A.K., 162 Wn.2d 632, 644, 174 P.3d 11 (2007) (citing Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 n.2, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)).

[8] Id. at 645 (citing Bagwell, 512 U.S. at 831).

[9] RCW 7.21.050.

[1] Id.

[11] In re M.B., 101 Wn. App. 425, 438 n.32, 3 P.3d 780 (2000).

an act that is yet in the person's power to perform."[12] It is considered civil, rather than criminal, in nature.[13] A "punitive sanction," in contrast, is "imposed to punish a past contempt of court for the purpose of upholding the authority of the court,"[14] and it is considered criminal in nature.[15]

In determining whether sanctions are punitive or remedial, courts do not look to the "stated purposes" of a 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."[16] "When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect."[17]

"Because most contempt sanctions contain both remedial and punitive elements, however, distinguishing criminal from civil contempt is a notoriously difficult task."[18] In determining whether a particular sanction is civil or criminal,

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[12] RCW 7.21.010(3); see also Bagwell, 512 U.S. at 827 ("civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience").

[13] A.K., 162 Wn.2d at 645 (citing Bagwell, 512 U.S. at 827).

[14] RCW 7.21.010(2).

[15] A.K., 162 Wn.2d at 645-46 (citing Bagwell, 512 U.S. at 828).

[16] Id. at 646 (citing Bagwell, 512 U.S. at 828).

[17] Bagwell, 512 U.S. at 829.

[18] M.B., 101 Wn. App. at 438 & n.36 (citing Bagwell, 512 U.S. at 827 ("Although the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempts are somewhat less clear.")).

courts look not to the subjective intent of a State's laws and its courts, but examine the character of the relief itself.[19]

Generally, one may not attack an underlying order in a contempt proceeding unless that order was entered by a court without either personal or subject matter jurisdiction.[2] Notice and hearing are required for any contempt proceeding.[21] But the nature of a hearing is a matter within the discretion of the trial court.[22] A preponderance of the evidence is generally sufficient to prove contemptuous conduct.[23]

"Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not

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[19] Id. at 439 & n.37 (quoting Bagwell, 512 U.S. at 828) (citing King v. Dep't of Soc. & Health Servs., 110 Wn.2d 793, 799, 756 P.2d 1303 (1988) (courts look to substance of proceeding and character of relief the proceeding will afford)).

[2] In re Det. of Broer, 93 Wn. App. 852, 858, 957 P.2d 281 (1998) (generally, under the "collateral bar rule," a court order cannot be collaterally attacked in contempt proceedings arising from its violation since a contempt judgment will normally stand even if the order violated was erroneous or later ruled invalid); see also Dike v. Dike, 75 Wn.2d 1, 8, 448 P.2d 490 (1968) ("[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt" since such order, though erroneous, is a lawful order.); Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 540-41, 886 P.2d 189 (1994) (reconfirming Dike).

[21] RCW 7.21.030(1); State ex rel. Shafer v. Bloomer, 94 Wn. App. 246, 251, 973 P.2d 1062 (1999).

[22] See State v. Hatten, 70 Wn.2d 618, 622, 425 P.2d 7 (1967); see also Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court.).

[23] State v. Boren, 44 Wn.2d 69, 73, 265 P.2d 254 (1954).

be disturbed on appeal."[24] But "[a] court's authority to impose sanctions for contempt is a question of law, which we review de novo."[25] Additionally, "[t]he applicability of the constitutional due process guaranty is a question of law subject to de novo review."[26] In short, though this court reviews a contempt finding for abuse of discretion, we review de novo questions of law related to the court's authority and a contemnor's due process rights.[27]

Request for Evidentiary Hearing

Lan and Roberto argue that the trial court violated their right to due process by denying their request for an evidentiary hearing rather than a hearing on declarations on the firm's first motion for contempt. We disagree.

Notice and a hearing are required when remedial sanctions are sought.[28] But the statutes do not specify that such a hearing must be an evidentiary hearing. In contrast, the contempt statutes do specify a right to a trial "on an information or complaint seeking a punitive sanction."[29] Where a more extensive

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[24] King, 110 Wn.2d at 798.

[25] A.K., 162 Wn.2d at 644.

[26] In re Det. of Fair, 167 Wn.2d 357, 362, 219 P.3d 89 (2009) (citing Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n, 149 Wn.2d 17, 24, 65 P.3d 319 (2003)).

[27] See also M.B., 101 Wn. App. at 454 ("We review a contempt finding for abuse of discretion. . . . Whether a purge condition exceeded the court's authority or violated a contemnor's due process rights, however, [are] question[s] of law, which [are] reviewed de novo." (footnotes omitted)).

[28] RCW 7.21.030.

[29] RCW 7.21.040(2)(d), (3).

hearing in a contempt proceeding than that afforded by the trial court is sought, a request must be made to the court.[3]

Here, the trial judge entered the Order Granting Preliminary Injunctive Relief on February 11, 2008. The order is supported by findings and conclusions. As the order states, the findings were for the purpose of the preliminary injunction only and without prejudice to the parties' right to full litigation of the matter.

The order expressly directs Lan and Roberto, in pertinent part, as follows:

> 4. Defendants shall identify to the Plaintiff and its IT professional selected to carry out the Court's order, all computers that now contain or once contained the misappropriated Le Firm client database, or any part thereof. The IT professional selected by the Plaintiff shall destroy the Le Firm client database on any and all such computers of the defendants or their surrogates, permanently removing any trace of such computer files so that they might never be restored. If that cannot be successfully achieved the IT professional shall so report to the Court.
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> 5. Defendants shall individually provide to the Court an undertaking made under penalties of perjury under the laws of this State, whereby each states that he/she has fully complied with the order of this Court with respect to the destruction of these electronic file materials, and that each shall comply with all provisions of this Court's order granting the preliminary injunction.
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> . . . .
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> 9. Defendants shall meet all obligations set forth in the preceding subparagraphs and further provide to the Court, (original to be filed with the clerk and "working copy["] to the Court) to the Court the required undertakings not later than the 7th calendar day following the entry of this order.[31]

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[3] Hatten, 70 Wn.2d at 622.

[31] Clerk's Papers at 482-86.

Believing that Lan and Roberto had violated the terms of the preliminary injunction order, the firm moved for an order of contempt in April 2008. The firm also asked the court to refer the matter to the prosecuting attorney for possible criminal prosecution and sanctions for contempt.

In response, Lan and Roberto sought additional time to respond to the motion. At a hearing on April 14, 2008, the judge considered oral arguments of the parties and ultimately granted the motion to continue the hearing until June. The judge also set a briefing schedule for that hearing.

During the April 14 hearing, counsel argued over what contempt statute applied and what procedures were required to seek a contempt hearing.[32] The record reflects the following colloquy between the judge and one of the defense attorneys near the end of the hearing:

> [COUNSEL]: I assume we will have an evidentiary hearing so we will not be submitting declarations?
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> THE COURT: Well, I would prefer declarations. If you feel there's a need for testimony, who are you thinking is going to need to testify?
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> [COUNSEL]: Well, certainly the Le's and Mr. Andrew [the IT specialist], to establish the alleged contempt. Possibly Mr. Diaz-Luong and Ms. Nguyen.
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> THE COURT: I'm going to indicate to the extent possible, it should be declarations. If you feel there needs to be testimony, if you could indicate in your responsive pleadings which witnesses you would like to have testify and why they would be better than declarations and the amount of time you feel is needed.[33]

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[32] Report of Proceedings (Apr. 14, 2008) at 9-16 (counsel argued that RCW 7.40.150, a statute relating to contempt for disobedience of an injunction, should apply, and argued that the "statutory procedure" under that section required an order to show cause and an evidentiary hearing).

A Request for Live Testimony dated May 14, 2008, which Lan and Roberto filed in response to the above directive by the judge, lists nine witnesses.[34] Although defense counsel orally indicated to the court during colloquy at the April 14 hearing that the principals of the firm as well as Mr. Andrew would be called to give live testimony, none of them are listed as witnesses in the written request. Likewise, Lan and Roberto are not listed as witnesses. This written request states further, in part, "It is believed that [some of those listed] speak English as a second language and that declarations may not accurately reflect their testimony."

At the beginning of the contempt hearing on June 5, 2008, Lan and Roberto renewed their objection to proceeding without an evidentiary hearing. The judge indicated that she had reviewed the request for live testimony and other submissions, but decided to proceed on the basis of declarations, not live testimony. The order memorializing this denial states, in part:

> B. Defendants also request an evidentiary hearing regarding the imposition of sanctions. Defendants have not shown a need for an evidentiary hearing and the Court finding none, the request is hereby DENIED.
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> C. Defendants have submitted both argument and documentary evidence amply addressing both motions. This Court's rules do not provide for oral argument except where the Court in its discretion deems it appropriate for the Court to better understand the issues. The Court's earlier orders and findings on contempt are clear and direct, the evidence necessary to act on both motions is adequate, and the Court has a full understanding of the issues on both motions. There is no showing by defendants, as requesting parties, why any witnesses need oral testimony beyond the

[33] Id. at 30-31.

[34] Clerk's Papers at 1114-15.

detailed declarations.[35]

Thereafter, the judge considered the declarations the parties submitted and the arguments of counsel before granting the motion for contempt. The contempt order is supported by findings and conclusions. The court imposed sanctions for Lan and Roberto to each pay $1,000 per day "for every day until the Defendants fully comply with the Injunction and this Order." The court expressly characterized the sanctions as remedial and based on RCW 7.21.030.

With the above considerations in mind, we now focus on whether the trial judge abused her discretion by denying the request for an evidentiary hearing and instead proceeding on the basis of declarations and oral argument. We conclude there was no abuse of discretion.

Below, the written request for an evidentiary hearing was based primarily on the characterization that potential witnesses speak English as their second language and that the testimony of these witnesses might not be accurately reflected in declarations submitted to the court. The request does not mention counsel's references at the April 14 hearing to constitutional concerns. In any event, Lan and Roberto abandon on appeal the argument expressed in their written request for live testimony.

Lan and Roberto now claim that the trial judge denied their constitutional right to due process by denying them an evidentiary hearing on a basis they did not clearly articulate to the judge below. Specifically, they claim such right based on defense counsel's argument at the April 14, 2008 hearing that "an

[35] Clerk's Papers at 2463.

accused must be able to meet the opponent and examine them."[36] Counsel also stated, "[U]nder the special statute, the referral of the matter to the prosecutor, I think Sixth Amendment rights are also implicated and it makes it all the more important that strict due process compliance occur."[37]

It is unclear to this court whether the April 14, 2008 references to either the constitutional right of confrontation or the Sixth Amendment implicates the due process concerns now raised on appeal. For example, the judge did not refer this matter to the prosecutor for the purpose of prosecuting a separate criminal contempt proceeding. In short, a criminal contempt proceeding, under our statutes, was never before this trial judge.

Still, we assume, without deciding, that the basis for the request for an evidentiary hearing that Lan and Roberto appear to make for the first time on appeal was properly raised below. Thus, the question before us is whether Lan and Roberto have demonstrated that the proceeding below was anything other than a civil contempt proceeding. For the following reasons, we conclude that this was a civil contempt proceeding imposing remedial, not punitive sanctions.

We acknowledge that a court's stated purpose in a contempt proceeding is not determinative of the nature of the sanctions.[38] As the United States Supreme Court stated in International Union, United Mine Workers of America v.

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[36] Appellants' Consolidated Opening Brief at 30.

[37] Id.

[38] A.K., 162 Wn.2d at 646 (citing Bagwell, 512 U.S. at 828).

Bagwell,[39]

> A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained." Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. . . .
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> A close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged.[4]

As our supreme court has stated, the question is whether the "'the contemnor is able to purge the contempt and obtain his release by committing an affirmative act.'"[41] If so, the sanctions are coercive and properly characterized as civil.[42]

Here, the unchallenged findings of the trial judge state that Lan and Roberto had "the present ability to comply with the Court's order, including the certification and identification of additional" computers or electronic media containing or having once contained the firm's data.[43] "They also have the present ability to comply with the Court's order for the payment of IT charges" as well as "the financial remedial sanctions imposed as a result of their contempt."[44] Significantly, the judge imposed sanctions of $1,000 per day per defendant with

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[39] 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994).

[4] Id. at 829 (some alterations in original) (citations omitted).

[41] A.K., 162 Wn.2d at 646 (quoting Bagwell, 512 U.S. at 828).

[42] Id.

[43] Clerk's Papers at 1536 (finding of fact 41).

[44] Id.

a purge clause. Thus, they were able to purge themselves of the sanctions upon complying with the requirements of the preliminary injunction order that was in effect until trial. Finally, the amount of the sanction is within the monetary limitations imposed by statute.[45] We conclude that the monetary sanctions were civil remedial sanctions, not punitive sanctions.

Lan and Roberto heavily rely on Bagwell to support their claim that they were entitled to an evidentiary hearing on June 5, 2008, on the motion for a contempt order. That case does not require a different result here.

In Bagwell, a union was engaged in a protracted labor dispute with mine companies over unfair labor practices.[46] The companies commenced an action to enjoin what they claimed were unlawful strike-related activities.[47] The trial court entered an injunction that prohibited the union and its members from conducting certain strike-related activities.[48] The activities included obstructing access to company facilities, physically threatening company employees, placing tire-damaging objects on roads used by company vehicles, and picketing with more than a specified number of people at designated sites.[49] The court additionally ordered the union to take all steps necessary to ensure compliance with the injunction, to place supervisors at picket sites, and to report all

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[45] RCW 7.21.030(2)(b).

[46] Bagwell, 512 U.S. at 823.

[47] Id.

[48] Id.

[49] Id.

violations to the court.[5]

During a series of eight contempt hearings, the trial court found that the union had committed over 400 violations of the injunction.[51] The court ultimately fined the union over $64 million.[52] Twelve million of that total was payable to the mine companies.[53] The remaining $52 million was payable to the state of Virginia and two of its counties impacted by the union's unlawful activities.[54]

Each level of the state courts characterized the fines as civil contempt sanctions.[55] The Supreme Court characterized the question before it as "what procedural protections are due before any particular contempt penalty may be imposed."[56]

After an extended discussion about the nature of various procedures for civil and criminal contempt, the Supreme Court concluded that the fines for indirect contempt that were levied against the union were criminal, not civil as the state courts had characterized them.[57] Accordingly, the Supreme Court reversed the judgment of the Virginia Supreme Court, which had approved the

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[5] Id. at 823-24.

[51] Id. at 824.

[52] Id.

[53] Id.

[54] Id.

[55] Id. at 825-26.

[56] Id. at 830-31.

[57] Id. at 830-38.

imposition of the fines.[58]

In this case, Lan and Roberto primarily rely on the portion of Bagwell in which the Court discusses a "discrete category of indirect contempts." Specifically, the Court said:

> For a discrete category of indirect contempts, however, civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.[59]

Counsel in this case have not cited any Washington cases applying these principles. And we have not found any such cases. But we have found two federal court cases that provide some useful guidance.

In Federal Trade Commission v. Trudeau,[6] the Federal Trade Commission (FTC) obtained a permanent injunction banning a weight loss book's author/marketer from misrepresenting his products in television infomercials.[61] When he failed to comply with the terms of the injunction, the FTC sought and obtained a contempt order in the United States District Court for the Northern District of Illinois.[62] That court ultimately imposed sanctions of

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[58] Id. at 839.

[59] Id. at 833-34 (citations omitted).

[6] 579 F.3d 754 (7th Cir. 2009).

[61] Id. at 757-58.

$37.6 million against him.[63]

On appeal, Trudeau made a number of arguments, most of which the appellate court rejected. One of them was that he was entitled to greater procedural safeguards—"a 'neutral factfinder' (presumably a jury or at least a different district judge) and a proof-beyond-a-reasonable-doubt standard"—for a civil contempt sanction.[64] The argument was based on the same discussion in Bagwell that we quoted above.[65]

The Seventh Circuit first characterized this portion of the Supreme Court's discussion in Bagwell as dicta.[66] The court went on to note that its circuit has never required a more exacting burden of proof for the complainant in a civil contempt proceeding than the normal standard for that circuit.[67] The court further observed that it shared the skepticism of the Tenth Circuit of the feasibility and fairness of varying the due process requirements in civil contempt cases based on the alleged "complexity" of the injunction at issue.[68] Likewise, it believed there would be further difficulties in instructing juries on the proper

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[62] Id. at 760-61.

[63] Id. at 762.

[64] Id. at 775.

[65] Id.

[66] Id.

[67] Id. at 776.

[68] Id. (citing Fed. Trade Comm'n v. Kuykendall, 371 F.3d 745, 754 (10th Cir. 2004) (circuit court, sitting en banc, rejected a panel's adoption of the flexible due process model discussed in Bagwell)).

burden of proof where juries were required in such cases.[69] In sum, the court rejected applying the dicta of Bagwell to that case.

The Tenth Circuit case cited by the court in Trudeau was also a contempt proceeding.[7] A panel of that court decided to adopt the dicta in the Supreme Court in Bagwell.[71] In an en banc decision, the circuit court rejected the reasoning of the panel.[72]

We adopt the views of the Seventh and Tenth Circuits in addressing the arguments that Lan and Roberto make here. First, as we have explained earlier in this opinion, the sanctions imposed in this case are coercive, not punitive. The $1,000 per day per defendant amount is designed to coerce compliance. And the purge clause fits the requirement that such sanctions will cease as the order continues in effect, provided the defendants comply with its terms.

Second, while Lan and Roberto characterize the injunction as one with "a detailed code of conduct," we are not persuaded that the material portions of the order are anything like that described in Bagwell. The material portions of the injunction that served as the bases for sanctions were paragraphs four and nine of that order. They are straightforward: Lan and Roberto were to identify to the firm and its IT professional all computers that then or at anytime contained any part of the firm database. They were also individually to provide to the court an

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[69] Id.

[7] Kuykendall, 371 F.3d at 748-49.

[71] Id. at 751.

[72] Id. at 751-52.

undertaking stating that he or she had fully complied with the court's orders with respect to the destruction of the electronic file materials. This is quite different from finding contempt for what appears to have been over 400 incidents by the union in Bagwell.

More importantly, it makes no sense to allow the detailed nature of the injunction, designed to shield against vagueness challenges, to be used as a sword to strike down the hearing procedures used in this case. In addition, we agree with the Seventh and Tenth Circuits that a sliding scale of due process based on the "complexity" of this injunction would be difficult to administer.[73]

Third, while Lan and Roberto urge that a neutral fact finder must adjudge contempt, this record does not show that this judge was anything less than neutral. The Seventh Circuit rejected a similar argument in Trudeau because of a similar lack of evidence.[74]

We note that the trial judge in this case found Lan and Roberto in contempt for violation of certain provisions of the injunction order. But the same judge determined that there was insufficient evidence to find contempt for alleged violations of other provisions of the order. There simply is no evidence of the trial judge's lack of neutrality here.

The trial judge has considerable discretion in how to conduct hearings. The contempt hearing of June 5, 2008, centered on conflicting evidence, much of it forensic evidence provided by Mr. Andrew, the IT person designated by the

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[73] See Trudeau, 579 F.3d at 776.

[74] Id. at 775-76.

court to examine computers and provide testimony about his observations. It was well within the discretion of the trial judge to reject the request for an evidentiary hearing based on the submissions made to her and to proceed on the basis of declarations.[75]

Finally, although Lan and Roberto contend that the fines could not be purged once imposed, they misread the plain words of the contempt order stating otherwise. In any event, these monetary sanctions are not the "fixed, determinate retrospective criminal fines" that the Supreme Court described in Bagwell.[76]

For these reasons, we cannot agree that Lan and Roberto were entitled to more due process than they received at the June 5, 2008, contempt hearing. They were not entitled to an evidentiary hearing under these circumstances. The trial judge did not abuse her considerable discretion in deciding to hear the matter on declarations rather than live testimony.

Lan and Roberto do not expressly challenge the procedures at the hearing leading to the January 2009 contempt order. To the extent they impliedly challenge those procedures, we reject their arguments for the same reasons we just explained.

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[75] See Commodity Futures Trading Comm'n v. Premex, Inc., 655 F.2d 779, 782 n.2 (7th Cir. 1981) (refusal to grant a full evidentiary hearing did not create a due process denial where the documentary evidence was more than sufficient to establish the contemptuous conduct, the defendants failed to demand a show cause hearing, and the defendants did not present any arguments which created a material issue of fact).

[76] Bagwell, 512 U.S. at 837.

Other Procedural Claims

Lan and Roberto make additional procedural claims, none of which were preserved below. They claim that they were entitled to a heightened standard of proof at the contempt hearing, although they never raised this issue with the trial judge. For largely the same reasons we explained in concluding that they were not entitled to an evidentiary hearing, we also conclude that the firm only needed to satisfy a preponderance of the evidence standard. The beyond a reasonable doubt standard does not apply here because this was a civil contempt matter, imposing remedial sanctions.

They also claim a right to trial by jury, another request not made below. They have no such entitlement in this civil contempt proceeding. Criminal contempt was never before this trial judge.

To the extent the claims on appeal include challenges to the trial judge's findings of fact, we reject them. All the findings are supported by substantial evidence.

For example, Lan challenges finding of fact 8 in the June 11 order. The finding states,

> The declarations of the Defendants identify no computers that once contained any of the data. They identified a single portable USB hard drive as having contained the Le firm's client database. However, only a computer can access the data on that drive. As made clear to the Defendants, any computer accessing the USB drive did at some point have, and may still have, copies of the data on it. Nevertheless, the defendants refused to identify any computers as having once had the data, or accessed the data.[77]

[77] Clerk's Papers at 1528.

Lan claims that because her deposition testimony shows that she deferred to Roberto on computer and other technology matters, the trial court erred in finding her in contempt in this regard. But an examination of the trial court's preliminary injunction and Lan's February 15, 2008 declaration to the trial court shows that this finding is supported by substantial evidence.

There simply is no showing that the trial judge abused her discretion in deciding that Lan and Roberto were in contempt for violating the preliminary injunction.

Freedom of Marriage

Lan argues that the trial court violated her constitutional right to freedom of marriage by penalizing her for being married to Roberto by holding her culpable for Roberto's actions in material part because "they are married." We disagree.

The finding of fact on which this argument relies, finding of fact 40, states

> Ms. Nguyen knew about the creation of the second drive, its false presentation to the IT expert, and the subsequent destruction of the USB and computer hard drives. *Included in the facts that support this finding are[:] the parties were married,* worked together from their home, filed identical declarations, Ms. Nguyen claimed knowledge and purchase of the USB drive, and one of the hard drives intentionally destroyed was in her personal laptop.[78]

The plain words of this finding show that trial court did not rely solely on the fact that Lan is married to Roberto in deciding that she knew of the prohibited acts. Rather, the finding makes clear that the fact of their marriage,

[78] Clerk's Papers at 1536 (emphasis added).

together with other facts showing their close association, supported the decision that she knew of the creation of the second drive. There was no constitutional violation of her right to marry.

Lan cites Levinson v. Washington Horse Racing Commission[79] for support. In that case, the court concluded that a horse racing regulation, which provided that neither spouse could race horses if either one was disqualified, was an unconstitutional infringement on the right to marry.[8] As discussed in the previous paragraph, here, the trial court relied on more than the sole fact of Lan and Roberto's marriage. Levinson is not helpful here.

Challenge to Preliminary Injunction

Lan and Roberto also assign error to findings of fact in the preliminary injunction order. These challenges are not well taken. There is no argument that the trial judge lacked personal or subject matter jurisdiction to enter the order. Thus, this challenge is nothing more than a prohibited collateral attack on the preliminary injunction.[81]

Lan and Roberto rely on a series of cases to argue that we should review the underlying preliminary injunction: Franz v. Lance,[82] Ambach v. French,[83] and

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[79] 48 Wn. App. 822, 740 P.2d 898 (1987).

[8] Id. at 824-27.

[81] See Broer, 93 Wn. App. at 858.

[82] 119 Wn.2d 780, 836 P.2d 832 (1992).

[83] 141 Wn. App. 782, 173 P.3d 941 (2007), rev'd, 167 Wn.2d 167, 216 P.3d 405 (2009).

Right-Price Recreation, LLC v. Connells Prairie Community Council.[84] None of these cases involved contempt orders. As stated above, generally, one may not attack an underlying order in a contempt proceeding unless that order was entered by a court without either personal or subject matter jurisdiction.[85] Lan and Roberto make no such arguments here. Their citations to unrelated cases are unpersuasive.

ATTORNEY FEES

Lan and Roberto request that this court vacate the trial court's award of attorney fees to the firm if this court vacates the contempt order. The firm requests attorney fees on appeal for "both appeals" from Lan and Roberto if the firm prevails on appeal.

The award of attorney fees below was based on RCW 7.21.030(3). That statute gives the court discretion to "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."

We affirm all orders on appeal and impose attorney fees on appeal. The amount of fees is to be determined by the trial court on remand, subject to the

[84] 146 Wn.2d 370, 46 P.3d 789 (2002).

[85] Broer, 93 Wn. App. at 858; see also Dike, 75 Wn.2d at 8; Marley, 125 Wn.2d at 540-41.

firm's compliance with RAP 18.1.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.