

COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

WASHINGTON MOTORSPORTS LIMITED)	No. 27747-0-III
PARTNERSHIP, a/k/a Washington)	
Motorsports, Ltd., by and through Barry W.)	
Davidson, in his capacity as Receiver and as)	
Acting Managing General Partner,)	
)	
Respondent,)	
)	
v.)	
)	
SPOKANE RACEWAY PARK, INC., a)	Division Three
Washington for profit corporation and General)	
Partner of Washington Motorsports Limited)	
Partnership,)	
)	
Defendant,)	
)	
and)	
)	
ORVILLE MOE,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, A.C.J. — Orville Moe challenges the trial court’s decision in a contempt

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proceeding to impose \$341,000 in monetary sanctions and bar him from using documents he belatedly produced. He argues that the multiple sanctions converted this action from a civil contempt to a criminal contempt action. Because the Legislature has authorized multiple sanctions in a civil contempt proceeding and because Mr. Moe maintained the ability to purge the contempt by complying with the trial court's orders, we conclude that this was still a civil contempt action. The trial court also showed extraordinary patience in dealing with Mr. Moe's long-term recalcitrance; it did not abuse its discretion in imposing these sanctions. The order is affirmed.

HISTORY

This case has its genesis in litigation relating to the ownership of the Spokane Raceway Park (SRP). For over 30 years, Mr. Moe was President of SRP. SRP, as general partner of Washington Motorsports Limited Partnership (WMLP), operated an automobile racetrack in Spokane County. In 2004, several of WMLP's limited partners filed suit, alleging mismanagement of SRP by Mr. Moe and others. The partners sought appointment of a receiver pursuant to chapter 7.60 RCW. The trial court appointed a general receiver for WMLP and ordered Mr. Moe to cooperate with him.

Mr. Moe failed to cooperate with the receiver. From May 18, 2006 through December 3, 2007, the receiver filed seven motions for contempt and sanctions against

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Mr. Moe.

The first motion alleged that Mr. Moe had failed to cooperate with the receiver's request to provide documents related to WMLP. The court did not find Mr. Moe in contempt, but it removed him as manager of SRP, banned him from SRP premises, and ordered him to turn over documents related to SRP operations.

The receiver's second motion alleged Mr. Moe had failed to cooperate with the court's previous order to produce documents. On November 29, 2006, the court found Mr. Moe in contempt and issued an order imposing remedial sanctions in the amount of \$1,000 per day for each day after December 8, 2006, that he failed to produce all documents in his possession relating to WMLP ownership.

In its third, fourth, and fifth motions, the receiver contended that Mr. Moe's filing of several documents and supplying of information in response to the receiver's motions to adjudicate ownership of WMLP units represented a violation of the previous court's orders on production. Moe had not previously produced these documents or provided the information. On October 19, 2007, the court found Moe in contempt but suspended the imposition of the \$1,000 per day forfeiture. The court did order Mr. Moe to pay attorney's fees and costs to the receiver. The court also ordered Moe to file a declaration identifying documents and nondocumentary information he used in supplying information

on the ownership of the WMLP units. Moe was again ordered to produce these documents to the receiver. The order also expressly reserved the right to exclude documents that were produced in an untimely manner.

When Moe failed to file the required declaration and produce the documents, the receiver filed his sixth motion for sanctions. In response, Mr. Moe filed a declaration on November 14, 2007, explaining the source of his earlier declaration. He attached several documents to this declaration that he had not previously produced.

In response to this declaration and document production, the receiver filed his seventh motion. The motion requested the imposition of the \$1,000 per day sanction based on Mr. Moe's failure to previously produce the documents and provide the information contained in his declaration. On February 8, 2008, the court granted the receiver's motions for contempt and imposed a \$341,000 forfeiture, representing the 341 days between December 8, 2006 and November 14, 2007. It also excluded from evidence the documents which Mr. Moe had belatedly produced and three of Moe's declarations which contained information he had failed to timely produce. Finally, the court ordered Mr. Moe to pay the receiver's attorney fees and costs for bringing the contempt motions.¹ This appeal followed.

¹ The total financial cost of the daily sanction and the attorney fees was \$373,626.10.

ANALYSIS

The primary challenges presented in this appeal concern the nature of the contempt sanctions and whether they were justified. The first issue involves construction of the contempt statutes. The second involves the trial court's discretionary authority to deal with contemnors.

All of these issues are governed by statute. Remedial sanctions are authorized by RCW 7.21.030. This statute is frequently referred to as "civil contempt." *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008). RCW 7.21.030(1) allows either the court or a party to seek remedial sanctions for injuries arising from contempt of court. A "remedial sanction" is one which is "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." RCW 7.21.010(3).

In contrast is RCW 7.21.040, which authorizes "punitive sanctions." This statute is also known as "criminal contempt." *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002). "'Punitive sanction' means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). If a court seeks to impose punitive sanctions, a prosecutor must file a complaint or information and certain other procedures must be followed that are generally

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consistent with a criminal case. RCW 7.21.040(2).

[A] sanction is punitive if there is a determinate sentence and no opportunity to “purge” the contempt [I]t is remedial where it is indeterminate and the contemnor is released upon complying with the court’s order. A punitive sanction generally is imposed to vindicate the court’s authority, while a remedial sanction typically benefits another party.

Rhinevault v. Rhinevault, 91 Wn. App. 688, 694, 959 P.2d 687 (1998) (citations omitted), *review denied*, 137 Wn.2d 1017 (1999).

RCW 7.21.030(2), in relevant part, outlines the possible remedial sanctions available for contempt:

If the court finds that the person has failed or refused to perform an act that is yet within the person’s power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

- (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)
- (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
- (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
- (c) An order designed to ensure compliance with a prior order of the court.

A trial court’s decision to impose remedial sanctions is within the court’s sound discretion. *Rhinevault*, 91 Wn. App. at 694. It will not be disturbed absent abuse of that discretion. *Id.* A court abuses its discretion if its decision is “manifestly unreasonable or rests upon untenable grounds or reasons.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

With these considerations in mind, we turn to Mr. Moe's contentions.

Monetary Sanctions

Mr. Moe argues that the \$341,000 in per diem sanctions was punitive because it was overly harsh and was combined with other sanctions. This argument ignores the fact that Mr. Moe was on notice for more than one year that he might face this sanction. He had the power to avoid the sanction, and he chose not to comply with the court's orders. While the difference between civil (remedial) and criminal (punitive) contempt can be easily stated, distinguishing between the two can be hard because coercive sanctions often appear to be punitive. *In re Interest of M.B.*, 101 Wn. App. 425, 438, 3 P.3d 780 (2000), *review denied*, 142 Wn.2d 1027 (2001). The critical factor in distinguishing between the two circumstances is the triggering mechanism for the sanction. If the purpose of the sanction is to force a person to do something, it is coercive and hence "remedial." *In re Pers. Restraint of King*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). Where a sanction is imposed for past conduct, it typically is punitive. *Id.* A civil sanction "is conditional and indeterminate, *i.e.*, where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order." *Id.*

This was a civil contempt. The order entered November 30, 2006, directed Mr.

Moe to turn over the documents or pay \$1,000 each day they were withheld after December 8, 2006. Mr. Moe controlled his destiny. He could have turned over the documents prior to December 8 and faced no financial penalty. Instead, he decided to withhold the documents until it was advantageous to him to release them—typically in response to a motion. Mr. Moe was the person controlling his financial fate.

The trial court allowed Mr. Moe numerous opportunities to comply without immediately paying. It found Mr. Moe in contempt, ordered monetary sanctions, and then stayed the order pending future compliance. The court only imposed the monetary sanction after Moe continued to defy its orders. Even after imposing the sanction, the court did not attempt collection until Mr. Moe finally supplied some of the documents.² Rather than abusing its discretion, the trial court showed extraordinary patience with Mr. Moe. While the dollar amount of the sanction is large, Mr. Moe's repeated defiance of the court's orders illustrates that it was necessary to ensure compliance with this and other court orders.

Mr. Moe had control over the monetary sanction. He decided when to comply. The fact that he waited nearly a year to do so resulted in a large monetary sanction, but it was only one-half of what the court could have ordered under the statute. Since he was

² For instance, the trial court could have directed Mr. Moe to make regular payments while the contempt was in progress.

solely responsible for the amount of the sanction, it was remedial in nature. There was no need to extend the due process protections applicable to criminal cases to this action. The monetary forfeiture was a coercive civil sanction, not a punitive criminal one.

Exclusion of Documents

Mr. Moe also argues that by not allowing him to use documents and information which he produced late, the court in effect is punishing him and not using the least severe means to coerce compliance. But again, Mr. Moe was on notice by at least October 19, 2007, that the court was considering this sanction, and he continued to defy the court's orders. If a court is not allowed to execute on its threats of sanctions, the sanctions will cease to serve the remedial function that the Legislature intended them to have.

As with the monetary sanction, we conclude that this sanction also was remedial rather than punitive. The reason for that conclusion also is the same—Mr. Moe was the one who held the key to his own sanctions. Prior to ultimately turning over some documents on November 14, 2007, Mr. Moe knew that he was facing \$1,000 per day and possible exclusion of his evidence if he did not turn the documents over to the receiver. Presumably he weighed these considerations when he made the choice to attempt to frustrate the receivership by withholding his information about the ownership documentation. For better or for worse, it was Mr. Moe who decided to risk the sanctions

rather than comply with the court's order. The exclusion order, too, was a coercive civil sanction. It was not punishment.

Mr. Moe also argues that the cumulative effect of the two sanctions amounts to punishment. However, RCW 7.21.030(2) specifically authorizes the use of "one or more" remedies. The Legislature clearly intended to grant the courts broad coercive authority rather than limit a judge to only one tool at a time. As with the previous arguments, this argument also misses the critical point. The nature of the sanction is dependent upon control over the sanction. Since Mr. Moe controlled his own sanctions, the multiple sanctions imposed here were coercive and civil, not criminal, in nature.

The decision to exclude the belatedly produced documents, even in conjunction with the monetary sanction, was a remedial civil sanction. No additional due process protections were needed.

Excessiveness

Mr. Moe also argues that the \$341,000 sanction was excessive. He has not shown that the trial court abused its significant discretion in this matter.

As previously noted, an appellate court will review a contempt sanction for abuse of discretion. *Rhinevault*, 91 Wn. App. at 694. The question then becomes whether the trial court had a tenable basis for its ruling. *Davies*, 144 Wn. App. at 497. In the context

of civil contempt, that issue is impacted by the fact that it is the contemnor who controls to a large extent the sanction he or she faces.

The trial court had statutory authority to impose a monetary sanction of up to \$2,000 per day. RCW 7.21.030(2)(b). The trial court chose to use only \$1,000 of that daily authority. Despite facing that threat, Mr. Moe did not comply even in part until 341 days had passed. The court had repeatedly imposed sanctions and then suspended them in efforts to coerce compliance. It showed great patience under the circumstances. Mr. Moe did not appear to be bothered by the sanctions and, instead, supplied documents only when he deemed it in his best interests to do so.

Under these facts, we see no abuse of discretion. The trial court did what it could, but apparently the sanctions were not so coercive that Mr. Moe felt like complying with them. If he now deems the \$341,000 to be excessive, he can only blame himself. While the ultimate efficacy of the sanction can be debated, it is not excessive.

The trial court did not abuse its discretion by its ultimate sanction order.

Calculation of Sanction

Mr. Moe additionally contends that the trial court incorrectly calculated the amount of per diem sanctions. As a general principle, an appellate court will not review an issue that was not raised in the trial court. *See* RAP 2.5(a). Mr. Moe did not argue to

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the trial court that it had wrongly calculated the number of days that the documents had been withheld. Because Mr. Moe did not present this issue to the trial court, most particularly in his motion for reconsideration, we decline to address it here. *Id.*

Attorney Fees

Finally, the receiver seeks attorney fees for this appeal. RCW 7.21.030(3) authorizes attorney fees for successful defense of an appeal of a contempt order. *In re Marriage of Curtis*, 106 Wn. App. 191, 202, 23 P.3d 13, *review denied*, 145 Wn.2d 1008 (2001); *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 505, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010 (1996). However, we are aware of no authority that mandates a fee award. The statute expressly states that a trial court “may” award attorney fees. RCW 7.21.030(3). Typically, the decision to impose attorney fees under that language rests in the discretion of the court. *E.g.*, *Farwest Steel Corp. v. DeSantis*, 102 Wn.2d 487, 493, 687 P.2d 207 (1984), *cert. denied*, 471 U.S. 1018 (1985). Because Mr. Moe made a plausible, if unsuccessful, argument for reversal concerning the punitive impact of the sanctions, we exercise our discretion and decline to award attorney fees for this appeal.

CONCLUSION

While the sanctions imposed on Mr. Moe were significant, they were the product

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of his decision to defy repeated trial court orders. There was no error and no abuse of trial court discretion. The sanction order is affirmed.

A majority of the panel has determined this opinion will not be printed in the

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Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.

Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.