

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2031-FT

Cir. Ct. No. 2004CV775

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

RAMESH KAPUR AND BHUPINDER SAINI, M.D.,

PLAINTIFFS-RESPONDENTS,

V.

ROHIT SHARMA,

DEFENDANT-APPELLANT,

**BAKER ENERGY, INC., T-MART, INC., BP PRODUCTS NORTH
AMERICA, INC., AND FOX RIVER STATE BANK,**

DEFENDANTS.

APPEAL from an order of the circuit court for Sheboygan County:
TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ This is a contempt case. Rohit Sharma appeals from an order finding him in contempt of court and imposing a remedial sanction in favor of the respondents, Ramesh Kapur and Bhupinder Saini. Sharma challenges the contempt finding on two grounds: (1) his conduct did not violate any standing order of the circuit court and (2) his conduct was not intentional. Sharma also challenges the remedial sanction, contending that Kapur and Saini did not suffer any harm as the result of the alleged contempt. We reject Sharma's arguments and affirm the contempt order.

BACKGROUND

¶2 Although the financial dealings between the parties are extensive and involved, the facts bearing on the contempt issue are relatively straightforward. Kapur and Saini invested money in gas stations operated by Baker Energy, Inc., a corporation solely owned by Sharma and his wife. In addition, Kapur and Saini guaranteed letters of credit issued by various financial institutions to Baker Energy.²

¶3 Over time, Kapur and Saini came to suspect that Sharma was self-dealing and not properly accounting for the income and expenses of the business. As a result, Kapur and Saini commenced this action alleging, inter alia, that Sharma had taken "improper and unlawful steps to trigger draws" against various lines of credit issued to Baker Energy, thereby jeopardizing the guarantees

¹ This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The guarantees were supported by collateral provided by Kapur and Saini.

provided by Kapur and Saini.³ Among other requests for relief, Kapur and Saini sought a temporary and permanent injunction barring Sharma from causing future additional draws against the lines of credit.

¶4 On November 30, 2004, pending further proceedings, the circuit court entered a temporary injunction (the November injunction) against Sharma. The November injunction enjoined Sharma

from causing by any act or omission any further draw by Marathon Ashland [P]etroleum LLC or by Lion Oil Company on Letter of Credit No. FRSB0005 issued by Fox River State Bank on August 31, 2004, or on Letter of Credit No. FRSB0003 issued by Fox River State Bank on August 16, 2004, or on the letter of credit issued by M&I Marshall & Ilsley Bank on or about August 6, 2004 in the amount of \$500,000 upon the application of Fox River State Bank and Baker Energy, Inc., either by purchasing products from one or more of the beneficiaries of any of the said letters of credit other than for cash, or by failing to pay for products already purchased, or in any other fashion.

¶5 Following a hearing on January 31, 2005, the circuit court entered a further temporary injunction on February 8, 2005 (the February injunction), “forbidding any action or omission by ... Sharma ... that would trigger any draws upon the remaining \$150,000 letter of credit issued by Fox River State Bank in favor of Lion Oil Company” This order also directed Kapur and Saini to post a bond “securing any liability they may have should it ultimately be determined that the temporary injunction ... was improvidently granted”⁴

³ Kapur and Saini also named other defendants who are not involved in this appeal.

⁴ This injunction further stated that the parties should agree to the amount of the bond and, in the event they could not agree, the amount would be determined by the court.

¶6 On February 22, 2005, Kapur and Saini filed the instant contempt motion alleging that Sharma had failed to abide by the November injunction. The motion alleged that Kapur and Saini had recently been notified by the Fox River State Bank that the bank had received a request from Lion Oil Company seeking a draw against the letter of credit in the amount of \$128,994.66 in payment for gasoline shipped to Baker Energy. This draw request was based on Lion Oil Company's unpaid invoices to Baker Energy dated between January 4, 2005, and January 31, 2005. Baker Energy had attempted to pay these invoices by postdated checks, but Lion Oil Company had declined that form of payment, opting instead to obtain payment by drawing against the line of credit at the Fox River State Bank. Kapur and Saini contended that Baker Energy's attempted payment by postdated check was in violation of the November injunction, which required payment in cash.

¶7 The circuit court conducted a hearing on the contempt motion on April 25, 2005. The parties did not present formal evidence at this hearing. Instead, the proceeding was limited to the arguments of counsel. At the conclusion of the hearing, the court found that Sharma had violated the November injunction and adjudged Sharma in contempt. As a remedial sanction, the court ordered Sharma to post a bond with the court in the amount of \$128,994.66, the amount of the letter of credit draw paid to Lion Oil Company.

¶8 Sharma appeals. We will recite additional facts as we address the appellate issues.

DISCUSSION

¶9 Whether conduct constitutes a contempt of court is a question committed to the trial court's discretion. *Currie v. Schwabach*, 132 Wis. 2d 29,

36, 390 N.W.2d 575 (Ct. App. 1986), *aff'd*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987). A circuit court's determination of contempt will not be reversed on appeal except in a plain instance of mistake or misuse of discretion. *Kaminsky v. Milwaukee Accetance Corp.*, 39 Wis. 2d 741, 746, 159 N.W.2d 643 (1968). In reviewing a circuit court's contempt determination, we defer to the court's findings of fact, which will not be overturned unless they are clearly erroneous. *Currie*, 132 Wis. 2d at 36.

¶10 **The Governing Injunction:** Kapur and Saini based their contempt motion on Sharma's alleged violation of the November injunction, which enjoined Sharma from causing any draws against the lines of credit issued by the various financial institutions listed in the order, including the Fox River State Bank. Later, the circuit court issued the February injunction against Sharma. The February injunction, however, was limited to a single line of credit issued by Fox River State Bank. In addition, this injunction required Kapur and Saini to post a bond to cover any potential damage to Sharma should it later be determined that the February injunction was "improvidently granted."

¶11 Because the contempt motion was filed *after* the February injunction, Sharma argues that his alleged contempt should have been measured from this injunction, not the earlier November injunction. And since Kapur and Saini had not filed the bond contemplated by the February injunction, Sharma reasons that this injunction did not come to fruition and therefore cannot form the basis for any contempt finding.

¶12 We summarily reject Sharma's argument because it is based on a faulty history. As Kapur and Saini correctly observe, the record establishes that Sharma's offending conduct occurred during January 2005, *prior to the issuance*

of the February injunction. Thus, the earlier November injunction was the governing injunction at the time of the contemptuous conduct and the question of Sharma's alleged contempt was properly measured under that injunction.⁵

¶13 **Intentional Conduct:** WISCONSIN STAT. § 785.03(1) requires that contempt of court conduct be “intentional.” Sharma argues that the circuit court never made this requisite finding and that the record does not otherwise demonstrate that he acted with the requisite intent to violate the November injunction when Baker Energy issued its postdated checks in an effort to pay the Lion Oil Company invoices.

¶14 As to Sharma's argument that the circuit court did not make an intent finding, Sharma cites to the court's statement that he did not act with “malicious intent.” Sharma argues that this statement is tantamount to a finding of no intent. We disagree. The court's statement does not say that Sharma did not act with intent. Rather, we read the court's statement to say just the opposite—that Sharma acted with intent, but that his intent was not malicious. The court's very next statements are telling on this point. After stating that Sharma did not act with “malicious intent,” the court correctly observed, “Malicious intent is not required.” The court then followed that remark with the explanation that while

⁵ In addition, we see nothing about the proceedings leading to the February injunction which indicates that it was designed to cancel or negate the earlier November injunction. The November injunction covered multiple letters of credit issued by the Fox River State Bank and also a letter of credit issued by M&I Marshall & Ilsley Bank. Sharma's argument would nullify the provisions of the November injunction as to these other letters of credit.

We also observe that Sharma has not provided us with a transcript of the January 31, 2005 hearing that led to the February injunction. If something occurred at that hearing to support Sharma's argument that the February injunction was intended to supplant the November injunction, it is Sharma's duty to provide us with that documented information. See *Jocius v. Jocius*, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998).

Sharma intended the postdated checks to cover the Lion Oil Company obligation (hence no “malicious intent”), the fact remained that his conduct intentionally violated the terms of the November injunction, which required cash payments on the Lion Oil Company account.

¶15 We hold that the circuit court addressed the question of Sharma’s intent and that the court’s finding that Sharma acted intentionally under the contempt statute is not clearly erroneous.⁶

¶16 In a separate argument somewhat related to the “intent” question, Sharma contends the offending conduct of issuing the postdated checks was not committed by him, but by others acting on Baker Energy’s behalf over whom he did not have control or authority.

¶17 Sharma’s argument misses the point. The November injunction was targeted at Sharma, not Baker Energy. That injunction directed that Sharma not engage in any conduct that would cause or trigger any future draws against the various lines of credit recited in the injunction. While Sharma presumably resisted the issuance of the November injunction, nothing in the record before us indicates that Sharma objected to the injunction on the grounds that he did not have the ability to assure that Baker Energy would comply with the injunction. Nor does he make this particular argument on appeal.⁷ As such, Sharma’s responsibility

⁶ Even if we were to assume that the circuit court did not expressly state that Sharma acted with the requisite intent, such is not necessarily fatal if the court’s factual recitations and legal conclusions nonetheless reveal that the statutory elements of contempt have been satisfied. See *Currie v. Schwalbach*, 132 Wis. 2d 29, 38, 390 N.W.2d 575 (Ct. App. 1986), *aff’d*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987).

⁷ Indeed, such an argument would ring hollow given that Sharma and his wife are the sole owners of the corporation.

under the injunction was to assure that Baker Energy paid Lion Oil Company's invoices by cash. That others executed the postdated checks did not relieve Sharma of his responsibility under the injunction to assure that payment was made only by cash.⁸ A person may be held in contempt of court if he or she has the ability, but refuses, to comply with a court order. *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999).

¶18 **The Remedial Sanction:** Finally, Sharma challenges the circuit court's remedial sanction which ordered him to post a bond in the amount of \$128,994.66, the amount of the draw to Lion Oil Company against the line of credit at the Fox River State Bank. Sharma argues that the sanction was inappropriate because Kapur and Saini had not, as yet, incurred any damages as a result of the contempt.

¶19 Kapur and Saini sought the injunction because they were concerned about Sharma's business practices, which had precipitated draws against the lines of credit issued to Baker Energy that were guaranteed by Kapur and Saini. The purpose of the November injunction was to stop Sharma from triggering future draws and thereby protect Kapur and Saini from further potential liability under their guarantees to the lines of credit. Sharma's subsequent violation of the injunction cleared the way for the Fox River State Bank, should it so choose, to look to Kapur and Saini to make good on the draws pursuant to their guarantees. Moreover, Kapur and Saini were clearly at risk under their guarantees since Baker

⁸ We also observe that a person who creates and operates a corporation as a "one-man band," or as an "alter ego," and who has extracted the benefits of that corporate existence, will not be heard to distance himself or herself from that existence when it works to a disadvantage. *State v. Judd*, 147 Wis. 2d 398, 404, 433 N.W.2d 260 (Ct. App. 1988).

Energy was already in bankruptcy at the time of the contempt hearing, and Sharma conceded at the hearing that bankruptcy was an alternative he was trying to avoid.

¶20 WISCONSIN STAT. § 785.01(3) defines a remedial sanction as “a sanction imposed for the purpose of terminating a continuing contempt of court.” WISCONSIN STAT. § 785.04(1) recognizes various forms of remedial sanctions, including “[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as a result of a contempt of court.” Sharma rests his argument against the remedial sanction on this subsection, arguing that Kapur and Saini have not incurred any “loss or injury” because the Fox River State Bank has not, as yet, moved against them under their guarantees.

¶21 We question whether “loss or injury” under this subsection should be construed in such a narrow fashion. We note that the statute speaks generically of “loss or injury,” not of “monetary” or “pecuniary” loss or injury. While Kapur and Saini had not, as yet, suffered any pecuniary loss directly related to Sharma’s contempt at the time of the contempt hearing, it remained that their financial circumstances had markedly changed for the worse and they were at clear peril under their guarantees to the Fox River State Bank. In that broad sense, Kapur and Saini had incurred a “loss or injury” under WIS. STAT. § 785.04(1)(a). To undo that “loss or injury,” the circuit court sought, to the extent possible, to return the parties to the position they were in prior to the contempt by requiring Sharma to post a bond in the amount of the draws against the line of credit. We see no error in the circuit court’s fashioning of this remedial sanction.

¶22 Alternatively, we hold that the circuit court’s remedial sanction also qualifies under WIS. STAT. § 785.04(1)(d), which describes a further form of remedial sanction: “An order designed to ensure compliance with a prior order of

the court.” The bond requirement not only protected Kapur and Saini from potential loss because of Sharma’s contempt, but also sought to obtain Sharma’s future compliance with the injunction by putting him on clear notice that a similar sanction might result from any future violations of the injunction. “Remedial contempt seeks to procure present *and future* compliance with court orders” *Benn*, 230 Wis. 2d at 309 (emphasis added).

CONCLUSION

¶23 We hold that the November 30, 2004 temporary injunction was the governing injunction at the time of Sharma’s contemptuous conduct. We further hold that the circuit court found Sharma’s conduct to be intentional and that the evidence supports that finding. Finally, we uphold the circuit court’s remedial sanction.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

