

# Third District Court of Appeal

State of Florida

Opinion filed August 14, 2019.

Not final until disposition of timely filed motion for rehearing.

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No. 3D18-1618

Lower Tribunal No. 10-31827

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**Robert G. Orban,**

Appellant,

vs.

**Susan M. Rorrer, etc.,**

Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Ariana Fajardo Orshan, Judge.

Lubell & Rosen LLC, and Norman S. Segall, for appellant.

Young, Berman, Karpf & Gonzalez, P.A., and Cynthia L. Greene; Joanne Garone (Pembroke Pines), for appellee.

Before EMAS, C.J., and FERNANDEZ, and LINDSEY, JJ.

PER CURIAM.

Robert Orban, the former husband, appeals a final order finding him in contempt for failing to make timely attorney's fees and costs payments to Susan

Rorrer, the former wife, pursuant to two previously entered Fee Orders. Because the trial court did not make findings as to Mr. Orban's ability to pay or his willful violation of the Fee Orders and did not include a purge provision in its contempt order, we reverse.

## **I. BACKGROUND**

This appeal stems from a divorce proceeding, finalized in 2011. Following the divorce settlement, the parties engaged in numerous post-judgment proceedings, resulting in an appeal in which this Court found that the trial court erred in applying its own formula to calculate attorney's fees. We reversed and remanded for entry of a new fee award. See Rorrer v. Orban, 215 So. 3d 148 (Fla. 3d DCA 2017). Following the appeal, the trial court entered two orders awarding Ms. Rorrer attorney's fees and costs for the appeal (the "Fee Orders"). Pursuant to the Fee Orders, Mr. Orban was required to make payments on the first of every month. In June 2018, Mr. Orban failed to make a timely payment. Mr. Orban made partial payments of his \$5,500.00 obligation on June 4 and 5, totaling \$3,500.00. On July 11, Ms. Rorrer moved to impose sanctions on Mr. Orban for failure to make timely payments. A day later, Mr. Orban paid the remaining balance for June 2018.

An evidentiary hearing on Ms. Rorrer's motion for sanctions took place on July 9, 2018. At the hearing, Mr. Orban, who was not represented by counsel, was current on all his fee obligations and testified about his inability to pay. The trial

court found Mr. Orban in contempt and entered an order requiring him to pay an additional \$3,877.50 to Ms. Rorrer in attorney's fees within thirty days as a sanction for failing to make timely payments (the "Contempt Order"). The Contempt Order allowed Mr. Orban to make his payments between the first and fifteenth days of months subsequent.

This timely appeal followed.

## **II. JURISDICTION**

We have jurisdiction because when a "trial court enters a post-judgment order . . . imposing sanctions, that order is itself an appealable final order." HSBC Bank, USA, Nat'l Ass'n v. Buset, 216 So. 3d 701, 703-04 (Fla. 3d DCA 2017); see also Philip J. Padovano, Florida Appellate Practice § 24:15 (2018 ed.) ("An enforcement order, such as an order on a motion for contempt . . . might also be reviewable by appeal as a subsequent final order.").

## **III. STANDARD OF REVIEW**

A trial court's contempt judgment on appeal is presumed correct and should not be overturned unless this Court finds that the trial court either abused its discretion or "departed so substantially from the essential requirements of law as to have committed fundamental error." Rojo v. Rojo, 84 So. 3d 1259, 1261 (Fla. 3d DCA 2012) (quoting Demello v. Buckman, 914 So. 2d 1090, 1093 (Fla. 4th DCA 2005)).

#### **IV. ANALYSIS**

Mr. Orban asserts that the trial court abused its discretion by finding him in contempt because it (1) made no finding that he had the ability to pay and willfully disobeyed the Fee Orders and (2) failed to include a purge provision in its Contempt Order. Mr. Orban also asserts that the trial court abused its discretion by awarding attorney's fees and costs as a sanction without considering evidence as to the reasonableness of the hours or rates. Because we find that the trial court abused its discretion in finding Mr. Orban in contempt, we need not address his argument concerning reasonableness of the hours or rates.

##### **A. The Trial Court's Failure to Find Ability to Pay and Willful Violation of Fee Orders**

Civil contempt proceedings involve a two-stage inquiry: first, the court must determine that the allegedly contemptuous respondent willfully violated the court's order; and second, decide what remedy is appropriate. Perez v. Perez, 599 So. 2d 682, 683 (Fla. 3d DCA 1992) (citing Russel v. Russel, 559 So. 2d 675, 676 (Fla. 3d DCA 1990)).

Here, no evidence was entered at the hearing below on the motion for contempt showing that Mr. Orban was able to make timely payments. In contrast, Mr. Orban provided evidence and testimony that he attempted to fulfill his obligations: Mr. Orban maxed out the credit lines on his property, borrowed money from his family, declared bankruptcy, borrowed against his life insurance policy,

and fell behind on the mortgage to his home. The trial court seemed to acknowledge Mr. Orban’s inability to timely pay by allowing him a grace period within which Mr. Orban could submit subsequent payments to Ms. Rorrer. But ultimately, the trial court found Mr. Orban in contempt and sanctioned him without making findings as to his ability to pay or whether he willfully violated the Fee Orders. This was error. See Perez, 599 So. 2d at 683.

## **B. The Trial Court’s Failure to Include a Purge Provision**

Florida jurisprudence recognizes three kinds of sanctions: (1) criminal sanctions, (2) compensatory civil sanctions, and (3) coercive civil sanctions. Creative Choice Homes, II, Ltd. v. Keystone Guard Servs., Inc., 137 So. 3d 1144, 1146 (Fla. 3d DCA 2014). “The key distinction between criminal and civil contempt is that criminal contempt is punitive in nature and imposes an unavoidable sanction, whereas civil contempt is remedial or incentive-based and allows the contemnor to purge the contempt and avoid or reduce the sanction by complying with court orders.” Id. (citing Parisi v. Broward Cty., 769 So. 2d 359, 365 (Fla. 2000)).<sup>1</sup>

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<sup>1</sup> Coercive civil sanctions are imposed by courts to prompt—coerce—alleged contemnors to comply with court orders. See id. “[T]here is a broad arsenal of coercive civil contempt sanctions available to the trial court, including ‘incarceration, garnishment of wages, additional employment, the filing of reports, additional fines, the delivery of certain assets, the revocation of a driver’s license . . . .’” Parisi, 769 So. 2d at 365 (Fla. 2000) (quoting Gregory v. Rice, 727 So. 2d 251, 254 (Fla. 1999)).

Here, Mr. Orban was not given the opportunity to purge the sanction imposed upon him. See id. at 1148. The Contempt Order was a civil sanction because its purpose was to (1) compensate Ms. Rorrer and her attorney for the time and costs associated with filing the subject motion for contempt, and (2) coerce Mr. Orban's future compliance with the trial court's Fee Orders. Therefore, like in Creative Choice Homes, the trial court's omission of a purge provision in the Contempt Order is reversible error. Id. at 1146 (finding that trial court abused its discretion in holding alleged contemnor in contempt without considering the alleged contemnor's ability to pay or purge contempt).<sup>2</sup>

## V. CONCLUSION

Accordingly, for the reasons set forth above, we reverse and remand for proceeding consistent herewith.

Reversed and remanded.

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<sup>2</sup> Civil contempt orders without a purge provision become criminal contempt fines. Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985) (“Because [criminal contempt] proceeding[s are] punitive in nature, potential criminal contemnors are entitled to the same constitutional due process protections afforded criminal defendants in more typical criminal proceedings.” (citing Aaron v. State, 284 So. 2d 673 (Fla. 1973))).