

ORIGINAL

IN THE SUPREME COURT OF OHIO

DOCKS VENTURE LLC,)	Ohio Supreme Court Case No. 13-0473
Appellant,)	Appellate Court Case No. L-12-1312
)	Trial Court Case No. CI 2012-1340
v.)	
DASHING PACIFIC GROUP LTD,)	APPEAL FROM THE LUCAS
AN OHIO LIMITED LIABILITY)	COUNTY COURT OF APPEALS,
COMPANY,)	SIXTH APPELLATE DISTRICT
Appellee.)	

MERIT BRIEF OF APPELLEE, DASHING PACIFIC GROUP LTD,
AN OHIO LIMITED LIABILITY COMPANY

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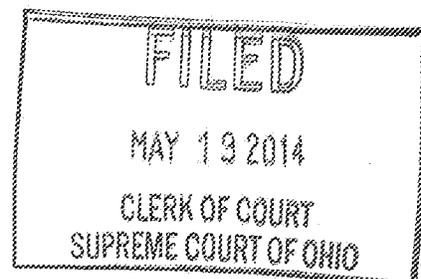
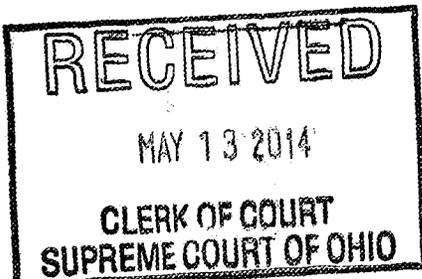


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I. Statement of Facts

The Sixth District Court of Appeals has identified the following certified conflict question for this Court: “In a contempt of court action, is the trial court’s judgment finding a party in contempt and imposing a sentence final and appealable when the sentence is imposed, albeit with purge conditions, or when the defendant has failed to purge his contempt and the sentence is executed?” (Appellant’s Appendix, February 25, 2013 Order, p. 7) Appellee Dashing Pacific Group, Ltd. (“Dashing Pacific”) requests that this Court adopt the position of the majority of Ohio’s district courts and find that a trial court’s judgment finding a party in contempt and imposing a sentence is final and appealable when the sentence is imposed, albeit with purge conditions.

This matter arises out of two separate lease agreements entered into between Appellant, Docks Venture, LLC (“Docks Venture”), and Dashing Pacific on March 18, 2011. These agreements pertained to two restaurant entities in Toledo, Ohio: (1) Admiral’s American Grill, formerly known as the Navy Bistro; and (2) El Vaquero, formerly known as Tango’s. (Appellant’s Appendix, April 19, 2012 Order, p. 13) This case arose from the utilities provisions of the two leases, which are identical and provide at Item 13:

Utilities. Lessee will pay before delinquency all charges for water, sewer, electricity, gas, heating, cooling and telephone used by Lessee on the Leased Premises. Lessee shall be responsible for contracting directly with all utility providers for such services to be provided under separate metering and direct billing arrangements. Lessor shall provide, repair and maintain the necessary distribution systems and other required equipment, fixtures or facilities necessary to furnish such services to the Leased Premises.

Additionally, Item 15 contains a list of the Lessor’s responsibilities, including the following at Item 15.6:

Installing separate meters for all utilities inside the Leased Premises.

(See Appellant’s Appendix, April 19, 2012 Order, p. 13; October 2, 2012 Order, pp. 16-17)

On April 19, 2012, the Lucas County Court of Common Pleas issued a preliminary injunction requiring Dashing Pacific to provide separately metered gas, electric, and water utilities for both leased premises within thirty (30) days. (Appellant's Appendix, April 19, 2012 Order, pp. 14-15) Dashing Pacific attempted to comply with this Order by separating the utility lines on the outside junction so that each leased premise would have a separate line of use. (Appellant's Appendix, October 2, 2012 Order, p. 17; Record, Response to Plaintiff's Motion to Show Cause, Lucas County Court of Common Pleas, filed June 19, 2012).

On May 25, 2012, Docks Venture filed a Motion to Show Cause asking the trial court to hold Dashing Pacific in contempt for failing to provide separately metered utilities on the inside of the premises, a job which would have involved significant expense. (Appellant's Appendix, October 2, 2012 Order, p. 16) Dashing Pacific opposed that Motion, but on October 2, 2012, the trial court found Dashing Pacific in contempt, imposed a sentence, and established purge conditions. In summary, the trial court ordered:

- (1) that Dashing Pacific provide separate utility lines for the tenants at the leased premises that are the subject of this litigation within thirty (30) days;
- (2) that this work must not interfere with normal business hours for the leased premises;
- (3) that Docks Venture must continue to escrow rent to be held by the Clerk of Courts;
- (4) that, if Dashing Pacific fails to comply within thirty (30) days, it must pay a fine of \$1,000.00 per day until it complies with the Order.

(Appellant's Appendix, October 2, 2012 Order, pp. 17-18)

The trial court subsequently granted Dashing Pacific an extension of time through and including December 28, 2012 to comply with this Order. (Appellant's Appendix, October 26,

2012 Order, p. 19) On October 31, 2012, Dashing Pacific filed a Notice of Appeal from the October 2, 2012 Order with the Sixth District Court of Appeals.

After filing its Notice of Appeal, Dashing Pacific complied with the trial court's October 2, 2012 Order by providing separately metered utilities inside the premises. Dashing Pacific has appealed the October 2, 2012 Order to dispute the trial court's finding that Dashing Pacific's failure to separate the utilities on the inside of the premises constituted a breach of Item 13 of the lease agreements. Any issues pertaining to Dashing Pacific's actual compliance with the contempt order and purge conditions are now moot, as Dashing Pacific has separated the utilities as instructed by the trial court.

Docks Venture moved to dismiss Dashing Pacific's appeal on November 16, 2012, arguing that the October 2, 2012 Order was not final and appealable because a contempt finding imposing a punishment with an opportunity to purge was not a final determination of the contempt action. Dashing Pacific opposed Docks Venture's motion, citing Sixth District Court of Appeals precedent confirming that the October 2, 2012 Order was final and appealable. *See, e.g., In re J.Z.*, 6th Dist. No. H-11-003, 2012-Ohio-1105, ¶7.

Based on this precedent, the Sixth District denied Docks Venture's Motion to Dismiss. (Appellant's Appendix, Decision and Judgment Entry, p. 6) The Sixth District also *sua sponte* certified the record to the Supreme Court of Ohio to resolve the conflict among Ohio's district courts regarding whether a contempt order with purge conditions constitutes a final appealable order. The Sixth District identified the question for this Court as follows:

In a contempt of court action, is the trial court's judgment finding a party in contempt and imposing a sentence final and appealable when the sentence is imposed, albeit with purge conditions, or when the defendant has failed to purge his contempt and the sentence is executed?

(Appellant's Appendix, Decision and Judgment Entry, p. 7)

Based upon precedent from the majority of Ohio's district courts and policy considerations, Dashing Pacific requests that this Court adopt the rule that civil contempt orders that impose a sentence and contain purge conditions are final and appealable when the sentence is imposed.

II. Argument

A. First Proposition of Law: A Civil Contempt Order Imposing a Sentence and Containing Purge Conditions Is Final and Appealable When the Sentence Is Imposed.

Civil contempt orders, generally, are intended to provide a "remedial or coercive" punishment to compel parties to comply with a court order. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253, 416 N.E.2d 610 (1980). Generally, civil contempt orders contain "purge conditions," which provide the party held in contempt with an opportunity to purge the contempt before the sentence is executed. *See, e.g., In re J.Z.*, 2012-Ohio-1105; *In re R.T.A.*, 8th Dist. No. 98498, 2012-Ohio-5080; *Frey v. Frey*, 197 Ohio App.3d 273, 2011-Ohio-6012, ¶17 (3rd Dist.). Based upon precedent in the majority of Ohio's district courts, as well as policy considerations relevant to this issue, Dashing Pacific requests that this Court adopt a rule that a civil contempt order imposing a sentence and coupled with purge conditions constitutes a final appealable order.

R.C. §2705.09 provides that "[t]he judgment and orders of a court or officer made in cases of contempt may be reviewed on appeal." The Ohio Constitution establishes that appellate court may review "judgments or final orders." Section 3(B)(2), Article IV, Ohio Constitution. *See, also*, R.C. §2505.03(A). R.C. §2505.02(B) provides, in relevant part, that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:"

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

* * *

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

* * *

Civil contempt orders imposing a sentence and containing purge conditions are final orders under R.C. §2505.02(B)(1). Under R.C. §2505.02(A)(1), a “substantial right” is “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” In addition to a contemnor’s statutory right to appeal under R.C. §2705.09, civil contempt orders generally affect a contemnor’s substantial rights with regard to property and potential incarceration. *See Puritas Metal Prods. v. Cook*, 9th Dist. No. 10CA009866, 2012-Ohio-2116, ¶9 (“[P]roperty rights are expressly protected by the Ohio Constitution”); *Davis-Wright v. Wright*, 4th Dist. No. 09CA1, 2010-Ohio-3984, ¶7.

Here, the trial court’s October 2, 2012 Order imposes a sentence of \$1,000.00 per day, subject to purge conditions. This sentence affects Dashing Pacific’s substantial right to protect its property under the Ohio Constitution. Section 1, Article I, Ohio Constitution. A penalty of \$1,000.00 per day would be devastating to Dashing Pacific’s assets, property, and business. The October 2, 2012 Order effectively determines this action and prevents judgment in favor of Dashing Pacific. A finding that the October 2, 2012 Order is not final and appealable would place Dashing Pacific, and other similarly situated contemnors, in the impossible position of choosing between failing to satisfy the purge conditions, and risking execution of the sentence,

or satisfying the purge conditions and forfeiting the right to any meaningful appeal. The right to an immediate appeal is necessary to protect contemnors' rights arising from civil contempt orders.

Furthermore, if civil contempt orders are provisional, as Plaintiff suggests, they also constitute final orders under R.C. §2505.02(B)(4). Civil contempt orders that impose a sentence, with purge conditions, effectively determine the action, prevent judgment in favor of the contemnor, and prevent any effective remedy by appeal following final judgment. To have any meaningful remedy through appeal and to protect their rights, contemnors must have the ability to immediately appeal civil contempt orders that impose a sentence, with purge conditions.

1. **The Majority of Ohio's Appellate District Courts Agree that a Civil Contempt Order Imposing a Sentence and Containing Purge Conditions Is Final and Appealable.**

Nearly all of Ohio's appellate district courts, including the Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Twelfth Districts, agree that a civil contempt order imposing a sanction or penalty and providing purge conditions constitutes a final appealable order. *See, e.g., Frey*, 2011-Ohio-6012, at ¶17 (3rd Dist.); *Davis-Wright*, 2010-Ohio-3984, at ¶7-8 (4th Dist.); *Peterson v. Peterson*, 5th Dist. No. CT 2003 0049, 2004-Ohio-4714, ¶8; *In re J.Z.*, 2012-Ohio-1105, at ¶7 (6th Dist.); *In re R.T.A.*, 2012-Ohio-5080, ¶6 (8th Dist.); *Noll v. Noll*, 9th Dist. No. 03CA008216, 2003-Ohio-5358, ¶11; *Hetterick v. Hetterick*, 12th Dist. No. 2012-02-002, 2013-Ohio-15, ¶21.

This case arises from the Sixth District Court of Appeals. In March 2012, the Sixth District reaffirmed its position that a finding of contempt accompanied with the opportunity to purge the sanctions before they are executed is final and appealable. *In re J.Z.*, 2012-Ohio-1105,

¶7;¹ *Strong v. Strong*, 6th Dist. No. L-01-1464, 2002-Ohio-234, *2 (Jan. 23, 2002). In *In re J.Z.*, the court observed that “this court follows the line of cases that hold that an order is final and appealable if it includes both a finding of contempt and the imposition of a penalty or sanction, even though the order contains purge conditions.” *In re J.Z.*, 2012-Ohio-1105, at ¶7. See, also, *Strong*, 2002-Ohio-234, at *2; *Frey*, 2011-Ohio-6012, ¶17 (3rd Dist.); *Peterson*, 2004-Ohio-4714, ¶8 (5th Dist.); *In re R.T.A.*, 2012-Ohio-5080, at ¶6 (8th Dist.); *Hetterick*, 2013-Ohio-15 (12th Dist.).

The most recent precedent from the Twelfth District also supports the conclusion that a contempt order with purge conditions is a final appealable order. In *Gauthier v. Gauthier*, 12th Dist. No. CA2011-05-048, 2012-Ohio-3046, ¶22, the Twelfth District Court of Appeals relied upon *Dudley v. Dudley*, 12th Dist. No. CA2010-05-14, 2012-Ohio-225, to find that a contempt order with the opportunity to purge was not a final appealable order. Approximately six months later, however, the Twelfth District decided *Hetterick*, in which it expressly overruled *Dudley* and held that “a contempt finding paired with an imposition of a sentence or sanction constitutes a final appealable order regardless of the opportunity to purge the contempt.” *Hetterick*, 2013-Ohio-15, ¶19.

The *Gauthier* case recently came before the Supreme Court of Ohio as a certified conflict matter, but the Court dismissed it as improvidently accepted on December 18, 2013. *Gauthier v. Gauthier*, 137 Ohio St.3d 562, 2013-Ohio-5479. Justice Kennedy’s dissenting opinion, with which Justices French and O’Neill concurred, provides an overview of the conflict in the district courts and emphasizes the public and general interest inherent in this issue.

¹ The Sixth District certified the record for review by the Supreme Court of Ohio on the same conflict question in *In re J.Z.*, but it appears that no further action was taken in that case. *In re J.Z.*, 2012-Ohio-1105, at ¶18.

Although the Supreme Court of Ohio did not resolve the certified conflict in *Gauthier*, it previously has indicated support for the position that a finding of contempt with purge conditions is a final appealable order. *Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶30. In *Liming*, the Court observed: “At that initial contempt hearing, the parent will have had the opportunity to defend against the contempt charges and otherwise object to or appeal from a finding of contempt and any purge conditions.” *Id.* The Court also noted that the issue before courts during a purge hearing is whether the contemnor has complied with the purge conditions, not whether the imposition of the contempt finding or purge conditions was proper. *Id.*

Docks Venture cites *Liming* for the proposition that, regardless whether a contemnor purges or fails to purge, the court must hold a purge hearing and determine the contemnor’s compliance (or lack thereof) before a contempt action is determined. But, Docks Venture disregards the Court’s analysis in *Liming* that a contemnor has the opportunity to defend against contempt charges or appeal from a finding of contempt and any purge conditions. Here, the trial court issued a contempt finding imposing a specific sentence with purge conditions. Requiring Dashing Pacific to wait until the sentence was actually executed upon it would not only result in unnecessary delay, but would also place Dashing Pacific in the untenable position of deciding whether to fail to comply with the October 2, 2012 Order and face execution of the sentence or to satisfy the purge conditions, which would essentially nullify the benefit of an appeal.

2. **The Seventh District Court of Appeals Has Not Adopted a Specific Position, and the Eleventh District Court of Appeals Is the Only District Court to Consistently Find that a Civil Contempt Order with Purge Conditions Is Not Final and Appealable.**

Despite the agreement of the majority of Ohio’s district courts, some conflict remains. In the Seventh District, the court has consistently held that, “to constitute a final appealable order

in a contempt proceeding, the order must contain both a finding of contempt and the imposition of a sanction.”” *McCree v. McCree*, 7th Dist. No. 01CA228, 2003-Ohio-1600, *5. The Seventh District, however, has not applied this principle uniformly. In *McCree*, the court found that a contempt order with purge conditions was a final appealable order, observing that the trial court had imposed a jail sentence, notwithstanding the purge conditions, because the trial court did not defer sentencing. *Id.* at **5-6. Conversely, in *B.J. Alan Co. v. Andrews*, 7th Dist. No. 10MA87, 2011-Ohio-5165, the Seventh District concluded that a contempt finding with a jail sentence and opportunity to purge would not become a final appealable order until the opportunity to purge is removed. *Id.* at ¶22. *See, also, Burke v. Burke*, 7th Dist. No. 11 MA 166, 2012-Ohio-6279 (recognizing the contradictory precedent in the Seventh District but finding that *Burke* was not the proper case to resolve the issue because the purge condition in question was void).

Only the Eleventh District Court of Appeals has affirmatively concluded that a contempt order with purge conditions should not be considered a final appealable order. *See Davis v. Davis*, 11th Dist. No. 2004-G-2572, 2004-Ohio-4390, ¶6.

3. **Majority Precedent and Policy Considerations Dictate that this Court Should Adopt a Rule Finding that a Civil Contempt Order with Purge Conditions Is Final and Appealable.**

Docks Venture argues that a civil contempt order with purge conditions, including the October 2, 2012 Order, is not final and appealable for reasons including: (1) the contempt action is not decided until a purge hearing is held and the sentence is executed; (2) applying the majority position from Ohio’s district courts could result in numerous and piecemeal appeals; and (3) if appeals are permitted, a trial court may not be able to subsequently modify purge conditions. In support of this argument, Docks Venture relies upon case law from the Eleventh District. *See Davis*, 2004-Ohio-4390, at ¶6.

In reality, majority precedent and policy considerations strongly favor Dashing Pacific's position. The trial court's October 2, 2012 Order expressly imposed a sentence upon Dashing Pacific, to take effect if Dashing Pacific did not satisfy the purge conditions outlined in the Order. Specifically, the trial court ordered "that, if Dashing Pacific fails to comply within thirty (30) days, it must pay a fine of \$1,000.00 per day until it complies with the Order." Under the law applicable in the majority of Ohio's district courts, including the Sixth District, this Order is final and appealable, regardless of the purge conditions, because it includes both a finding of contempt and the imposition of a penalty or sanction. *See In re J.Z.*, 2012-Ohio-1105, at ¶7.

Furthermore, if this Court would find that contempt orders with purge conditions are not final and appealable until a purge hearing is held and the sentence is executed, contemnors, including Dashing Pacific, would be forced to choose between defying the purge order and risking a penalty or incarceration, or complying with the purge order and forfeiting any meaningful appeal. *See Hetterick*, 2013-Ohio-15, at ¶20. Under this rationale, contemnors would have no access to effective judicial review to protect their substantial rights implicated by a finding of contempt.

Docks Venture's concern that permitting appeals from contempt orders with purge conditions could lead to numerous and piecemeal appeals is likewise without merit. Docks Venture suggests that, because courts often issue civil contempt orders in domestic and juvenile actions where emotions may "run high," contemnors would be more likely to pursue meritless appeals. (Appellant's Brief, p. 7) Additionally, Docks Venture states that forcing a contemnor to wait until after a sentence is executed to appeal would make contemnors more likely to bring appeals based on "good grounds." Not surprisingly, Docks Venture cites no authority to support its hypothetical scenarios regarding domestic and juvenile matters. (Appellant's Brief, pp. 7-8)

This Court's evaluation of this certified conflict does not depend upon parties' unpredictable emotions or the mere possibility that contemnors might file more appeals or piecemeal appeals. Indeed, the majority of district courts have already implemented the rule that civil contempt orders with purge conditions are final appealable orders without any apparent problem in number or nature of the appeals in this regard. Even if permitting appeals from civil contempt orders with purge conditions did result in meritless appeals, the judicial system is well-equipped to handle meritless appeals and establish precedent to prevent them in the future.

Finally, Docks Venture expresses concern that permitting appeals might prevent trial courts from modifying purge conditions after their initial orders. (Appellant's Brief, p. 8-9) Again, this concern is premature and speculative, and the majority of district courts that already treat civil contempt orders with purge conditions as final and appealable have not had any apparent difficulty in this regard. The possibility that a future problem could arise with regard to the modification of purge conditions, or any other issue, is not a valid reason to deny contemnors the right to a meaningful appeal from a final and appealable order.

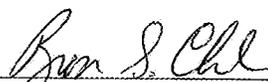
Adopting the position of the majority of Ohio's district courts that a contempt order with purge conditions is a final appealable order would serve judicial economy by discouraging contemnors from inaction or non-compliance with contempt orders while preserving a contemnor's ability to appeal a contempt finding. All parties would benefit from finality and consistency in contempt findings so that they can avoid costs generated from repetitive litigation and unnecessary delay. Precedent from the majority of Ohio's district courts and relevant policy considerations strongly dictate in favor of a finding that a trial court's judgment finding a party in contempt and imposing a sentence is final and appealable when the sentence is imposed, albeit with purge conditions.

III. Conclusion

Based upon the foregoing, Dashing Pacific respectfully requests that this Court affirm the Sixth District Court of Appeals' denial of Docks Venture's Motion to Dismiss Dashing Pacific's appeal and adopt the rule that a trial court's judgment finding a party in contempt and imposing a sentence is final and appealable when the sentence is imposed, albeit with purge conditions.

Respectfully submitted,

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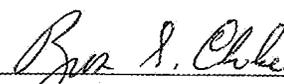
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served on this 12th day of May,

2014, by ordinary U.S. mail, postage prepaid, upon:

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