IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CREIG BUTLER,

Judgment Creditor-Respondent,

v.

S. Ct. No. S-1-SC-40215
Ct. App. No. A-1-CA-39546

MOTIVA PERFORMANCE ENGINEERING, LLC,

Judgment Debtor,

and

DEALERBANK FINANCIAL SERVICES, LTD., and ARMAGEDDON HIGH PERFORMANCE SOLUTIONS, LLC,

and

WILLIAM S. FERGUSON,

Relief Defendant-Petitioner.

On Writ of Certiorari to the Court of Appeals
The Honorable Victor Lopez, District Judge

RELIEF DEFENDANT-PETITIONER'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

Paul J. Kennedy
Jessica M. Hernandez
Elizabeth A. Harrison
KENNEDY, HERNANDEZ & HARRISON, P.C.
201 Twelfth Street NW
Albuquerque, New Mexico 87102
Ph: (505) 842-8662
Fax: (505) 842-0653

Attorneys for Relief Defendant-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

In Petitioner's Brief in Chief, he argued that the Court of Appeals erred in at least three identified ways: (1) it affirmed a procedurally defective criminal contempt order under the less demanding standards for civil contempt, (2) it held that a motion to reconsider was necessary to preserve the argument that Relief Defendant-Petitioner Ferguson was not given the process that was due, and (3) it held that the District Court has the authority to compel a party to donate to non-party charities chosen by the court.

Respondent Butler's Answer brief does not adequately address any of Petitioner's arguments on these issues. Instead, Respondent includes a variety of conclusory arguments that amount to affording district courts nearly unlimited power to sanction without concern for due process. However, these arguments are not supported by Respondent's cited authorities, quotes from which are taken out of their proper context or are no longer good law.

ARGUMENT

Respondent spends a large portion of his Answer providing the Court with a thorough accounting of Petitioner's bad actions. **[AB 1-15]**. While Petitioner largely does not dispute the accuracy of this account, they are irrelevant to his arguments. The District Court addressed Petitioner's actions by holding him in contempt.

However, the sanctions the District Court imposed rose to the level of criminal contempt, and it incorrectly only applied the standard for civil contempt and did not afford Petitioner sufficient due process for criminal contempt. Respondent's account of Petitioner's actions attempts to portray behavior so egregious that it somehow justifies granting the District Court near unlimited power to sanction. However, our judicial system is not so flimsy as to not possess tools to deal with wrongdoing by a party. To the contrary, the system of civil and criminal contempt readily contemplates the types of misconduct in question here. Petitioner's argument is and has always been that a certain degree of contempt rising to the criminal level requires additional process that he was not afforded.

A. Respondent insufficiently addressed Petitioner's argument that the Contempt Order incorrectly imposed criminal sanctions using the standard for civil contempt and without sufficient due process.

Respondent essentially presents two arguments in support of the District Court's sanctions: (1) the sanctions reflected civil, not criminal, contempt and (2) the question of whether the contempt was criminal is irrelevant because sanctions were justifiable under the District Court's inherent powers and Rule 1-011 NMSA powers.

i. The fundamental nature of the sanctions renders them criminal.

Respondent and the Court of Appeals are incorrect that the sanctions imposed by the District Court are civil. Respondent repeatedly states that the sanctions were

civil merely because the District Court said they were and because it did not seem to be confused about the distinction. Respondent indicates that, because the District Court did not adopt its request to refer for criminal contempt proceedings, "criminal contempt was not imposed." **[AB 16, fn4]**. Elsewhere, Respondent points out that "[t]he Court of Appeals specified 'civil' contempt in its Opinion" and relies on the Court of Appeals' discussion of the District Court's "clear understanding of the distinction between its civil and criminal contempt powers" to conclude that neither court was confused about the distinction between civil and criminal contempt. **[AB 39-40]**. However, the mislabeling of criminal contempt as civil contempt does not change its nature, and there are no magic words that either court could have written to change the criminal nature of the sanctions imposed.

Respondent proceeds to repeat the Court of Appeals' holding that the sanctions were appropriate under the District Court's inherent powers and Rule 1-011. He begins by misstating the contents of his own Motion for Order to Show Cause: "[Respondent] argued "that the district court should . . . sanction [Petitioner] under Rule 1-011 NMRA ('Rule 11') and pursuant to the court's inherent powers." **[AB 10]**. However, no mention of Rule 1-011 appears in Respondent's motion; instead, it only invoked the District Court's inherent powers *See* **[8 RP 1995-2030]**. He then points out that the District Court, in its Contempt Order, "emphasized its

inherent powers to sanction attorneys and litigants." **[AB 14]**. This argument mirrors that of the Court of Appeals, which stated that "[a]lthough the district court did not explicitly impose the sanctions under its inherent powers, the court repeatedly referenced those powers to impose sanctions in its conclusions of law and in the order." *Butler v. Motiva Performance Eng'g, LLC*, mem. op. ¶ 13, A-1-CA-39546 (N.M. Ct. App. Nov. 16, 2023) ("Opinion"). However, the mere reference to inherent powers does not mean that the District Court issued its sanctions under them. The District Court also thoroughly discussed criminal contempt proceedings, **[9 RP 2118 ¶ 77]**, yet neither Respondent nor the Court of Appeals thinks such mention is sufficient to have imposed criminal contempt. Both attempt to put words into the mouth of the District Court, which only ever invoked Rule 1-011 as a basis for its Contempt Order. *See* **[9 RP 2126]**.

None of this discussion addresses Petitioner's argument that the fundamental nature of the sanctions is criminal and that the basis for contempt or sanctions is not relevant to this status that triggers heightened protections. Indeed, Respondent's Answer does little to engage with this argument apart from mischaracterizing the case law that describes the distinction between civil and criminal contempt. To rebut the idea that, in civil contempt, the contemnor must have the capacity to cure himself of the contempt by performing that which he has previously refused to do,

Respondent cites *Jencks v. Goforth*: "The picturesque phrase, 'he carries the keys of his prison in his own pocket,' while expressing effectively a general principle of law, will not serve to determine all of the vast number of cases arising in the field of civil contempt." **[AB 32]** (citing *Jencks v. Goforth*, 1953-NMSC-090, ¶ 25, 57 N.M. 627). He conveniently omits the following sentence of *Jencks*, which makes clear that "in a civil contempt action coercion must be the primary motive of the court's action and the contemnor must be in a position to purge himself." *Jencks*, 1953-NMSC-090, ¶ 25.

Respondent similarly mischaracterizes *Concha v. Sanchez* in an attempt to support his argument that "civil contempt 'may use fines, imprisonment, or other sanctions as coercive measures to compel the contemnor to comply in the future with an order of the court.'" **[AB 34]** (citing *Concha v. Sanchez*, 2011-NMSC-031, ¶¶ 23, 25, 150 N.M. 268). This citation again takes the citation out of its context; the same paragraphs from *Concha* cited by Respondent make clear that "[b]ecause the purpose of those civil contempt sanctions is to compel compliance with the court's orders and not to punish, the continuing contempt sanctions end when the contemnor complies. A civil contempt defendant 'carries the keys of his prison in his own pocket. He can end the sentence and discharge himself of contempt at any moment by doing what he has previously refused to do.'" *Concha*, 2011-NMSC-031, ¶ 25.

From this, it is clear that *Concha* endorses the use of civil contempt to "compel the contemnor to comply in the future with an order of the court" only insofar as that compliance relates to an ongoing violation of the court's order. *See id.* It does not envision coercion to unknown future orders of the court.

A third mischaracterization appears when Respondent responds to Petitioner's use of the Tenth Circuit case *Dartez v. Peters* by stating that *Dartez* is not applicable. *See* **[AB 35]**. He claims that, in *Dartez*, the fact that the district court "(1) held an attorney in contempt after he had complied with a discovery order, and (2) waited six more months before imposing a sanction of pro bono hours . . . convinced the Tenth Circuit that the sanctions were not coercive." **[AB 35]**. He contrasts *Dartez* with this case by stating that "the district court held [Petitioner] in contempt and issued sanctions on the same date" and again referencing Petitioner's bad actions. **[AB 35-36]**. Respondent entirely ignores large portions of *Dartez*. While the Tenth Circuit did discuss the amount of time that had elapsed, it was only in the context of determining whether the sanction in question was coercive. *See Dartez v. Peters*, 759 F. App'x 684, 690 (10th Cir. 2018). This timing was not coercive because the contemnor "had no ability to bring his conduct into accord with the district court order and free himself of the contempt." *Id.* In the same paragraph, the Tenth Circuit indicated a second reason that the sanction in question was criminal: "[it] was not

compensatory." *Id.* This analysis is in line with the court's earlier definition of civil contempt as "characterized by the court's desire to compel obedience of the court order or to compensate the litigant for injuries sustained from the disobedience." *Id.* at 689. Reading *Dartez* fully, it clearly is applicable to Petitioner's case; the sanctions in question here were not coercive—actions that would bring Petitioner into compliance with the preliminary injunction were detailed elsewhere in the Contempt Order—and they did not compensate Respondent for injuries sustained from the disobedience. Mirroring Petitioner's case, the district court in *Dartez* indicated an intent to impose a civil sanction and proceeded to impose a criminal one. *See id.* at 690.

ii. Criminal contempt sanctions require a heightened level of due process regardless of the authority relied on for their imposition.

Respondent attempts to sidestep the relevance of the criminal nature of the Contempt Order by stating that sanctions imposed under Rule 1-011 and the district court's inherent powers never require criminal due process. Regarding Rule 1-011, he states that "'the power to impose Rule 11 sanctions springs from a different source than does the power to punish for criminal contempt' and, thus, criminal due process requirements do not apply to such sanctions." **[AB 23-24]** (quoting *Dona Ana Sav. & Loan v. Mitchell*, 1991-NMCA-054, ¶ 11, 113 N.M. 576). This grossly

mischaracterizes *Dona Ana*, which made no such sweeping statement. Instead, *Dona Ana* discussed positively a principle articulated by the Eleventh Circuit that "it is not necessary for a court to follow the procedures required in criminal contempt proceedings for *every* case involving Rule 11 sanctions." *Id.* at ¶ 11 (emphasis added). In the following paragraph, the court stated that "[d]etermining what process is due in a Rule 11 case simply requires an application of familiar principles of due process." *Id.* at ¶ 12. Therefore, if a court imposes Rule 1-011 sanctions that rise to the criminal level, a corresponding level of due process is warranted. In *Dona Ana*, the award of a Rule 1-011 sanction without criminal due process was affirmed because the district court had imposed a fine of only $250, far less than the $50,000 fine imposed here and well within the civil contempt framework. *Id.* at ¶ 23. Contrary to Respondent's statement that Rule 1-011 sanctions never require criminal due process, "Rule 11 sanctions should be imposed rarely [and] should be levied only if the mandates of procedural due process are obeyed." *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 23, 111 N.M. 670.

Respondent then asserts that any of Petitioner's behaviors that are not encompassed by Rule 1-011 are covered instead by the district court's inherent powers. **[AB 26]**. He cites a flood of cases that explain, *inter alia*, that district courts have the inherent power to impose sanctions for litigation abuse. **[AB 26-29]**. These

cases are irrelevant because (1) Petitioner never questioned that the District Court had inherent power to sanction, and (2) the District Court did not exercise this inherent power. As discussed above, the District Court explicitly relied on Rule 1-011 for its sanctions. Respondent's argument that the District Court's discussion of its inherent power in the conclusions of law of the Contempt Order is unavailing; the District Court also included a detailed discussion of criminal contempt, and Respondent clearly does not believe that such discussion means that the District Court imposed criminal contempt.[1]

Respondent's own statements illustrate the distinction that forms the basis of Petitioner's argument. Section A of the Contempt Order ordered Petitioner to take a variety of actions to reverse the actions that violated the preliminary injunction and to compensate Respondent for damage incurred by these actions, *i.e.*, by paying Respondent's relevant attorneys' fees. Section C required (1) satisfaction of the full judgment, plus interest and attorneys' fees, and (2) payment of $50,000 to a non-

---

[1] Respondent also includes an argument that the amount of the District Court's sanction was appropriate. The amount of the sanction is only relevant to Petitioner's arguments insofar as the amount is one reason that renders the sanction criminal. As such, Petitioner engages with this argument minimally and only points out that most of Respondent's citations concern the ability to sanction at all, which is irrelevant to his argument that the amount is justified, and that the only case that Respondent cited that upheld a large sanction explicitly did not address whether the amount was appropriate, making it yet another misstatement of case law. *See Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 13, 311 P.3d 1236 (declining to address whether the amount of a $100,000 sanction was appropriate because it was not challenged).

party charity. Regarding Section A, Respondent recognizes that it "seeks to coerce compliance with the preliminary injunction and compensate parties for attorney's fees caused by the $120,000 bank loan." **[AB 31]**. Regarding Section C, Respondent admits that "the sanctions in Section C do not fit the traditional coercive model" in that they do not permit purging the contempt by complying with the preliminary injunction. **[AB 32]**. Respondent attempts to brush aside the meaningful difference between the nature of Sections A and C by insisting that Section C is civil because of its coercive power. He cites *Jencks* to state that the ability to purge contempt is not necessary for civil contempt and that a court's contempt power can be used "when litigants demonstrate 'open and complete disrespect' for the court's authority." **[AB 32]** (citing *Jencks*, 1953-NMSC-090, ¶¶ 25, 33). As discussed previously, Respondent's reliance on *Jencks* is misplaced, and his citations in support of his position attempt to mislead the Court. Not only does *Jencks* clarify that "in a civil contempt action coercion must be the primary motive of the court's action and the contemnor must be in a position to purge himself," it also provides an in-depth analysis of civil versus criminal contempt that tracks Sections A and C quite well. *Jencks*, 1953-NMSC-090, ¶ 25. Like the Section A sanctions, civil contempt "is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant." *Id.* at ¶ 20. In contrast, like the Section C

sanctions, criminal contempt "cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience." *Id.* By Respondent's own cited authority, the Section C sanctions are criminal.

B. Respondent insufficiently addressed Petitioner's argument that it is not necessary to file a motion to reconsider in order to preserve his due process argument.

In his Answer, Respondent states that Petitioner "had the opportunity to raise his due process concern no less than four times before his docketing statement." **[AB 36]**. According to Respondent, these four opportunities were "in response to [Respondent's] Motion for Order to Show Cause," "in response to the Order to Show Cause," "at the evidentiary hearing," and "after the Sanctions Order was issued [in Petitioner's] motion for reconsideration." **[AB 36-37]**. Respondent appears to be confused about when the right to due process has been violated. The first three of these "opportunities" were at times *prior* to the District Court's Contempt Order. Until that order was issued, there was no indication from either the parties or the court that the order would impose criminal contempt without the appropriate protections. Respondent suggests that Petitioner should have seen into the future to preemptively argue that he was not afforded due process that was not yet due.

Regarding the only of these opportunities that occurred after the order was issued—Petitioner's motion for reconsideration—Respondent does not engage with

Petitioner's argument. Respondent's argument on this point is not clear, but he suggests that "a party that moves for reconsideration waives arguments not presented in the motion or at any time prior to the motion for reconsideration." **[AB 38]**. He does not provide any authority for this proposition and does not respond to Petitioner's argument that a party is not required to bring every argument challenging a ruling at the optional step of a motion to reconsider and that such a requirement would unduly burden parties that wish to make this discretionary motion. As required, Petitioner promptly brought up his due process argument on appeal.

In addition to arguing that the due process issue was preserved, Petitioner also noted that a preservation exception applies under Rule 12-321(B)(2) NMRA. Respondent states that the Court of Appeals "did not rule on this issue because it ultimately held that the sanctions were proper under Rule 11 and the district court's inherent powers." **[AB 19]**. Petitioner does not disagree with this characterization of the Court of Appeals' opinion, but that does not bear on his arguments, which Respondent ignores. Whether the sanctions imposed by the District Court were criminal is a threshold question that determines how much process is due. It is Petitioner's argument that they are criminal regardless of whether they were imposed under Rule 1-011, inherent powers, or any other authority. A Rule 12-321 exception

applies to this question, and Petitioner was not, therefore, required to otherwise preserve the issue.

C. Respondent insufficiently addressed Petitioner's argument that the District Court does not have the authority to compel a party to donate to non-party charities.

While Respondent "does not take a position" on whether the District Court has the authority to compel payments to third parties, he devotes some discussion to it. **[AB 17]**. He largely ignores Petitioner's arguments apart from attempting to cabin one of Petitioner's citations to the context of criminal sentencing. He does not address Petitioner's constitutional and policy arguments.

Respondent does cite one new case, *Case v. State*, in support of his argument that the legislature "'may not impair or destroy the power of the court to punish for [criminal] contempt by limiting the penalty unduly,' because any such interference with the inherent powers of the court would 'violate the doctrine of separation of powers.'" **[AB 42]** (citing *Case v. State* 1985-NMCA-027, ¶ 22, 103 N.M. 574). This citation is included to rebut Petitioner's "argument that only the legislature could authorize payment to a third-party," **[AB 43]**, an argument that does not appear in Petitioner's Brief in Chief. Instead, Petitioner argued that such payments were unconstitutional and contrary to policy. However, a greater problem exists regarding Respondent's reliance on *Case v. State*; it is not valid law. Respondent only cites the

opinion from the Court of Appeals,[2] and this Court reversed that opinion. *See Case v. State*, 1985-NMSC-103, ¶ 8, 103 N.M. 501. *Case* is further inapposite in that it concerned a defendant who was held in criminal contempt and who was afforded appropriate due process, and no payments to third parties were involved. *See generally id.*

Respondent requests that, if this Court finds that the District Court did not have the authority to require a $50,000 payment to a third party, the Court remand to have the payment made to the court. This proposed solution ignores the various other issues concerning the award, namely that it remains a criminal penalty for which Petitioner was not afforded adequate due process. As such, Respondent's proposed solution should be discarded.

CONCLUSION

Respondent's Answer does not adequately address any of Petitioner's arguments. Apart from his repetition of the reasoning of the Court of Appeals and misstatements of law, his argument appears to be that Petitioner's actions were so inappropriate that they merit ignoring the procedures that exist to hold wrongdoers accountable. However, this case is not merely about Petitioner's rights. It concerns

---

[2] Respondent may have been confused about which case he was citing, as he indicated that "this court" ruled in the cited Court of Appeals opinion. **[AB 42]**.

the fundamental rights of all litigants. Petitioner asks that litigants be afforded the procedural protections they are due. Respondent asks that these protections be abandoned in any case where a district court imposes sanctions pursuant to Rule 1-011 or inherent powers. Because "[t]he contempt power of a court is so broad that it is uniquely liable to abuse," these protections must be maintained. *Concha*, 2011-NMSC-031, ¶ 29 (citing *Bloom v. State of Ill.*, 391 U.S. 194, 88 (1968)) (internal quotation marks omitted). The judge is "often personally involved to some degree in the conflict that must be adjudicated," including the refusal of a party to obey the orders of the court, which "often strikes at the most vulnerable and human qualities of a judge's temperament." *Id.* (citation omitted). Affording district court judges the ability "to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." *Id.* (citation omitted).

For the above reasons and the reasons stated in Petitioner's Brief in Chief, the Court should reverse the Opinion of the Court of Appeals and vacate the District Court's Contempt Order.

Respectfully Submitted,

KENNEDY, HERNANDEZ & HARRISON, P.C.

/s/ Paul J. Kennedy
Paul J. Kennedy
Jessica M. Hernandez
Elizabeth A. Harrison
201 Twelfth Street Northwest
Albuquerque, New Mexico 87102
Ph: (505) 842-8662
Fax: (505) 842-0653

Attorneys for Relief Defendant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document to the following counsel of record electronically through the Odyssey System on July 8, 2024, and by email to:

Spencer L. Edelman
Elizabeth A. Martinez
P.O. Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, NM 87103
(505) 848-1800
sle@modrall.com
eam@modrall.com

/s/ Paul J. Kennedy
Paul J. Kennedy