
Civil Procedure - Contempt - Intent is not an Element of Civil Contempt where Contemnor is not Subject to Incarceration - County of Cook v. Lloyd A. Fry Roofing Co., 59 Ill.2d 131, 319 N.E.2d 472 (1974)

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RECENT CASES

Civil Procedure—Contempt—INTENT IS NOT AN ELEMENT OF CIVIL CONTEMPT WHERE CONTEMNOR IS NOT SUBJECT TO INCARCERATION.—*County of Cook v. Lloyd A. Fry Roofing Co.*, 59 Ill.2d 131, 319 N.E.2d 472 (1974).

On November 18, 1974, the Supreme Court of Illinois, in *County of Cook v. Lloyd A. Fry Roofing Co.*,¹ held that intent was not an element of civil contempt where the defendant had violated an agreed order to install pollution control equipment.² In so holding, the court distinguished previous Illinois cases which have held that intent was a necessary element for civil contempt orders.³ The decision also solidifies the trend toward making the court system an alternative to the Illinois Pollution Control Board⁴ as an immediate forum for environmental litigation.

The case involved the installation of pollution control equipment by a specified date,⁵ pursuant to an agreed order. Three days after the compliance date, the defendant moved to extend the time limit, claiming it was unable to comply.⁶ The court denied the motion and issued a contempt order assessing a fine for each day the plant was in violation of the agreed order.⁷ The appellate court reversed, reasoning that there was insufficient evidence to establish that the defendant willfully failed to comply with the agreed order.

1. 59 Ill. 2d 131, 319 N.E.2d 472 (1974).

2. The Circuit Court of Cook County found defendant in contempt and ordered it to pay \$10,000 on account as a credit toward the total amount due and owing. The appellate court reversed because defendant's intent to disobey was not established. 131 Ill.App.3d 244, 300 N.E.2d 830 (1st Dist. 1973).

3. *Shapiro v. Shapiro*, 113 Ill.App.2d 374, 252 N.E.2d 93 (1st Dist. 1969); *Mattioda v. Mattioda*, 101 Ill.App.2d 475, 243 N.E.2d 495 (1st Dist. 1968); *Tudor v. Firbaugh*, 364 Ill. 283, 4 N.E.2d 393 (1936).

4. The Illinois Pollution Control Board [hereinafter cited as PCB] adjudicates and issues regulations pertaining to the Illinois Environmental Protection Act. ILL. REV. STAT. ch. 111½, § 1010 (1973).

5. The order recited that the pollution control system was to be installed on or before July 19, 1971. The defendant could test and correct the system until August 2, 1971. Results were to be reported to the court by August 19, 1971. 59 Ill.2d at 133, 319 N.E.2d at 474.

6. The defendant had contracted for the work on June 12, 1971. Despite the fact that the contract did not call for completion until after the date set by the court, the defendant did not move for an extension period until after the time limit had expired. *Id.*

7. The court assessed a fine of \$200.00 per working day until the installation was completed. The plaintiff's motion to enjoin the defendant's operation was denied due to the adverse economic effect such action would have on the surrounding area.

On review, two issues were framed by the Illinois Supreme Court: (1) whether the defendant's intent is relevant to a finding of civil contempt; and (2) whether the defendant's inability to comply with the court order relieves it of its liability for contempt. The defendant argued that intent is a necessary element of civil contempt, and that inability to comply with an order is a defense to such a proceeding. In Illinois, inability to comply is a recognized defense.⁸ However, lack of intent in civil contempt actions, except where subject to incarceration for failure to pay money, has not been previously adjudicated.⁹

Federal courts,¹⁰ and the majority of states¹¹ adopt the position that intent is not an element of civil contempt. In *McComb v. Jacksonville Paper Co.*,¹² which the Illinois Supreme Court cited with approval, the United States Supreme Court stated that

since the purpose [of civil contempt] is remedial it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents.¹³

8. See *Walsh v. Superior Oil Co.*, 50 Ill.App.2d 40, 199 N.E.2d 428 (5th Dist. 1964) (where a writ was issued but not executed, the defendant was unable to comply); *People v. Gonzales*, 120 Ill.App.2d 406, 257 N.E. 2d 236 (2d Dist. 1970) (where the defendant didn't have the required information).

9. Other defenses to contempt are: *People v. Mette*, 21 Ill.App.3d 774, 316 N.E.2d 106 (1st Dist. 1974) (lack of knowledge of the order); *Lustre Prod. v. De Michel*, 13 Ill.App.3d 285, 300 N.E.2d 847 (1st Dist. 1973) (void court order). Defenses which have been expressly excluded: *Faris v. Faris*, 35 Ill.2d 305, 220 N.E.2d 210 (1966) (erroneous order); *Bigelow v. RKO Radio Pictures, Inc.*, 78 F.Supp. 250, *aff'd*, 170 F.2d 788 (7th Cir. 1948) (advice from counsel); *City of Chicago v. Bender*, 10 Ill.App.3d 133, 294 N.E.2d 2 (1st Dist. 1973) (order was not in writing).

10. *NLRB v. Fairview Hosp.*, 443 F.2d 1217 (7th Cir. 1971) (good faith was not a defense). See also *NLRB v. Mastro Plastic Corp.*, 261 F.2d 147 (2d Cir. 1958); *NLRB v. Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290 (5th Cir. 1971) (corporate employer was responsible despite contrary instructions); *NLRB v. San Francisco Typographical, Local 21*, 465 F.2d 53 (9th Cir. 1972) (good faith not a defense for violating injunction against picketing); *Hodgson v. A-Ambulance Serv., Inc.*, 455 F.2d 372 (8th Cir. 1972) (financial inability is no defense).

11. *Ex parte Textile Workers Union*, 264 Ala. 603, 89 So.2d 92 (1956); *Clear Lake Water Co. v. Superior Court*, 33 Cal. App.2d 710, 92 P.2d 921 (1939); *In re Murphy*, 124 Colo. 581, 239 P.2d 706 (1951); *Klein v. State*, 36 Del. Ch. 111, 127 A.2d 84 (1956); *Bird v. Johnson*, 234 Ind. 555, 130 N.E.2d 29 (1955); *United Factory Outlet v. Jay's Stores, Inc.*, 72 Mass. 159, 278 N.E.2d 716 (1972); *Silver Plate Co. v. Schimmel*, 59 Mich. 524, 26 N.W. 692 (1886); *Thompson v. Pennsylvania R.R.*, 48 N.J. Eq. 105, 21 A. 182 (1891); *In re Young*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (1961). However, a minority of states require intent as an element of civil contempt. *Atlanta Printing Spec. & Paper Prod., Local 527 v. Zell*, 215 Ga. 732, 113 S.E. 2d 401 (1960); *Raszler v. Raszler*, 80 N.W.2d 535 (N.D. 1956); *Laing v. Commonwealth*, 205 Va. 511, 137 S.E.2d 896 (1964).

12. 336 U.S. 187 (1949).

13. *Id.* at 191.

Federal courts also impose an affirmative duty to comply with a court order¹⁴ which is not absolved by acting in good faith.¹⁵

The defendant argued that previous Illinois decisions required a showing of intent for contempt decrees. However, the court distinguished *Fry* from previous Illinois decisions requiring intent because those cases involved criminal contempt,¹⁶ or civil contempt subject to incarceration.¹⁷ The court noted that civil contempt¹⁸ is distinguished from criminal contempt¹⁹ in that its focus is remedial as opposed to punitive.²⁰ This is true even where the civil contemnor is subject to incarceration.²¹ The court further distinguished civil contempt cases involving incarceration which continue to require intent by noting the constitutional implications surrounding the deprivation of a person's liberty for failure to pay money.²² By adopting this position, the Illinois Supreme Court followed the federal and majority position with respect to civil contempt.

It could be argued that the holding is limited to violations of consent decrees because here the contemnor freely entered into the order. However, the better interpretation is that since the court adopted the reasoning of cases that did not involve consent decrees,²³ and distinguished those cases where the contemnor was subject to the penalty of being

14. *Singer Mfg. Co. v. Sun Vacuum Stores, Inc.*, 192 F.Supp. 738 (D.N.J. 1961).

15. *NLRB v. San Francisco Typographical, Local 21*, 465 F.2d 53 (9th Cir. 1972).

16. *People v. Wilcox*, 5 Ill.2d 222, 125 N.E.2d 453 (1955).

17. See note 3 *supra*.

18. *People ex rel Kazubowski v. Ray*, 48 Ill.2d 413, 272 N.E.2d 225 (1971). Civil contempt consists of failing to do something ordered to be done by the court in a civil action for the benefit of the opposing litigant.

19. *Id.* at 416, 272 N.E.2d at 226. Criminal contempt is conduct which is directed against the dignity and authority of the court or a judge acting judicially.

20. However, a useful test by which a civil contempt can be distinguished from a criminal one is the punishment imposed. When punishment is purely punitive: imprisonment for a definite term, fine for a certain sum of money, the contempt is said to be criminal. When punishment is a remedial or coercive measure: commitment of a contumacious party until he complies with the mandate of the court, a fine until there is obedience to the court's order, the contempt is said to be civil. . . .

Cook County & Illinois v. Cook County College Teachers, Local 1600, 126 Ill. App.2d 418, 262 N.E.2d 125 (1st Dist. 1970).

21. *Id.* at 427-28, 262 N.E.2d at 129. See also Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 236 (1971).

22. 59 Ill.2d at 136, 319 N.E.2d at 476.

23. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1943); *United States v. Swingline, Inc.*, 371 F.Supp. 37 (E.D.N.Y. 1974); *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 72 Mass. 159, 278 N.E.2d 716 (1972); *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971).

incarcerated,²⁴ intent is not a required element in any civil contempt case unless the contemnor is subject to imprisonment. Since the contempt order is remedial and is meant to assure compliance with a certain objective standard of conduct, for the benefit of another party, the intent of the violator is strictly speaking, irrelevant.²⁵

The second issue addressed by the court was whether the defendant's inability to comply with the court order relieves it of liability for contempt. In *People ex rel Melendez v. Melendez*,²⁶ the Illinois Supreme Court had indicated that the defense of inability applied only where the defendant was not at fault. Where the inability arose due to defendant's own actions,²⁷ wrongful or illegal act,²⁸ or was not newly arisen,²⁹ it is not a defense to contempt. Moreover, there is an affirmative duty to avoid being unable to comply.³⁰ Thus, where the purpose of the order is not impossible to achieve, inability is not a valid defense.³¹

Whether or not inability exists is a determination made by the trial court, and will not be overruled unless clearly erroneous.³² Here, the plaintiff contended that since the defendant had knowledge and experience with similar orders, and a history of noncompliance,³³ the inaction of the defendant was a self-imposed inability. The record reflected "that there was a negligent if not an intentional disregard for the terms of the

24. See note 3 *supra*.

25. *United States v. Swingline, Inc.*, 371 F.Supp. 37 (E.D.N.Y. 1974).

The same wilfulness [as in criminal contempt] is not said to be required in civil contempt cases since the purpose of those cases is to give the opposing party the relief to which he is entitled, and the contemnor's state of mind is not therefore, important.

Dobbs, *supra* note 21, at 261.

26. 47 Ill.2d 383, 266 N.E.2d 327 (1971). The court stated, "clearly if the respondent was unable to obey the court's order without fault on his part he was not guilty of contempt."

27. *Id.* at 387, 266 N.E.2d at 329; *People v. Rezek*, 410 Ill. 618, 103 N.E.2d 127 (1951).

28. *Sullivan v. Sullivan*, 16 Ill.App.3d 549, 306 N.E.2d 604 (5th Dist. 1974).

29. *Oriel v. Russell*, 278 U.S. 358 (1929).

30. *People v. Rezek*, 410 Ill. 618, 103 N.E.2d 127 (1951). The court held that "self-created inability" will not purge one of contempt, "nor will passive inactivity when reasonable effort might secure compliance." *Id.* at 628, 103 N.E.2d at 132.

31. *Humpa v. Hedstrom*, 345 Ill.App. 289, 102 N.E.2d 686 (1st Dist. 1951). *Accord, Ex parte Fielder*, 446 S.W.2d 698 (Tex. Civ. App. 1969).

32. *City of Carbondale v. Grose*, 49 Ill.2d 367, 273 N.E.2d 832 (1971); *In re Dunagan*, 80 Ill.App.2d 117, 225 N.E.2d 119 (1st Dist. 1967). The trial court determines whether a defense of inability exists because it hears the testimony and therefore is better suited to decide the credibility of an explanation given by the contemnor as to his conduct.

33. *State v. Lloyd A. Fry Roofing Co.*, 9 Ore. App. 135, 495 P. 2d 751 (1972); *City of Portland v. Lloyd A. Fry Roofing Co.*, 3 Ore. App. 352, 472 P.2d 826 (1970).

order."³⁴ As a result, the trial court was clearly not erroneous in disbelieving the claim of inability. The court stated,

to hold otherwise under the facts of this case would allow a party to enter an agreed order, thereby deferring a decision on the merits, and then permit the violation of said order, which would render nugatory the salutary effects of such a disposition.³⁵

The result of *Fry* is that it furthers the trend towards making the court system an immediate forum for environmental litigation. The Illinois Environmental Protection Act (IEPA)³⁶ states, "No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this Act."³⁷ This indicates that individuals can compel compliance with pollution control standards through the court system.³⁸ However, the IEPA also requires that a party bring his action before the Pollution Control Board (PCB) before resorting to the court.³⁹ Early judicial interpretation had been that administrative remedies must be exhausted⁴⁰ before resorting to the courts.⁴¹ Recently however, the Illinois Supreme Court, in *People ex rel Scott v. Janson*,⁴² rejected the agency's exclusive control by holding that the circuit court had concurrent jurisdiction in environmental matters.⁴³

34. 59 Ill.2d at 138, 319 N.E. 2d at 477.

35. *Id.*

36. ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1973).

37. ILL. REV. STAT. ch. 111½, § 1045 (1973).

38. *Schatz v. Abbott Lab., Inc.*, 131 Ill.App.2d 1091, 269 N.E.2d 308 (2d Dist. 1971); *Feder v. Perry Coal Co.*, 279 Ill.App. 314 (4th Dist. 1935); *O'Connor v. Aluminum Ore Co.*, 224 Ill.App. 613 (4th Dist. 1922). Prior to the passing of the IEPA individuals could bring environmental cases before the court. These cases were primarily brought under a nuisance theory.

39. ILL. REV. STAT. ch. 111½, § 1045(b) (1973).

40. *Switzer v. Industrial Comm'n*, 394 Ill. 141, 68 N.E. 2d 290 (1946); *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). The doctrine of exhaustion provides that one must exhaust all administrative remedies offered by the statute before resorting to the court for review. *Rajala v. Joliet Grade School*, 107 Ill.App. 410, 246 N.E.2d 74 (3d Dist. 1969). This applies even where the agency has failed to act; *W.F. Hall Printing Co. v. EPA*, 16 Ill.App.3d 864, 306 N.E. 2d 595 (1st Dist. 1973). The purpose of exhausting all provisions of the agency first is to allow the agency to correct its own errors, clarify its policy, and reconcile conflicts before seeking judicial relief.

41. In *City of Waukegan v. Pollution Control Bd.*, 57 Ill.2d 170, 311 N.E.2d 146 (1974), the Illinois Supreme Court held that the state-wide attack on pollution could be brought about by having one authority conduct hearings, determine violations, and impose penalties. *Id.* at 184, 311 N.E.2d at 153. *Accord*, *C.M. Ford v. EPA*, 9 Ill.App.3d 711, 292 N.E.2d 540 (3d Dist. 1973).

42. 57 Ill.2d 451, 312 N.E.2d 620 (1974).

43. This interpretation is consistent with ILL. REV. STAT. ch. 14, § 12 (1973) which

Acting on the jurisdiction granted in *Janson*, *Fry* expands the court's new role in expediting environmental litigation by enforcing compliance with its orders through the use of civil contempt without a showing of intent. As a result, where parties agree to install pollution control equipment, and, fail to do so, the court can issue a contempt order solely on the basis that the installation was not made.⁴⁴ The court no longer needs to establish that IEPA standards were actually violated, or that the defendant intentionally violated the order. This standard of proof enables the court to expeditiously grant relief where the parties have agreed to the order, and allows individuals yet another forum to enforce compliance with pollution standards.

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Professional Malpractice—Statute of Limitations—CAUSE OF ACTION ACCRUES IN PROFESSIONAL MALPRACTICE TORT CLAIMS FROM THE DATE THE ALLEGED INJURY IS DISCOVERED—*Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill.2d 129, 334 N.E.2d 160 (1975).

The time when a cause of action accrues for purposes of the statute of limitations for professional malpractice tort claims was significantly extended by the Illinois Supreme Court's decision in *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*¹ Until this case a claimant had to bring his action within one year of the date the tort was committed. The court held that the broader discovery rule,² generally used only in medical malpractice cases, should be applied instead. Thus, the cause of action would accrue on the date the claimant discovered the alleged injury and the statute of limitations would begin to run on the discovery date. This decision maintains Illinois in a leadership role, along with California, in the development of a trend extending the discovery rule from the strict confines of medical malpractice cases

permits the attorney general to bring an action in the circuit court to fight pollution regardless of any administrative agency.

44. The court held in *Fry* that failure to hold a hearing on the issue of contempt was not a denial of due process since the defendant had an opportunity to be heard on the merits of the decree in a hearing on another motion. 59 Ill.2d at 139, 319 N.E.2d at 477.

1. 61 Ill.2d 129, 334 N.E.2d 160 (1975).

2. The discovery rule holds that a cause of action accrues, and the statute of limitations begins to run, on the date the claimant discovered, or with reasonable diligence should have discovered, the alleged injury. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).