

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2007 CA 2397**

**JOHN CHRISTEN LEIMKUHLER**

**VERSUS**

**MICHELLE ANN COX LEIMKUHLER**

Judgment Rendered: May 2, 2008

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On Appeal from the 22nd Judicial District Court  
In and For the Parish of St. Tammany  
Docket No. 2006-12997, Division "H"

Honorable Donald M. Fendlason, Judge Presiding

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Marti Tessier  
Mandeville, LA

Appellant  
Pro Se

Raymond C. Burkhart III.  
Amanda A. Trosclair  
Craig P. Hart  
Katherine O. Hillery  
Covington, LA

Counsel for Plaintiff/Appellee  
John C. Leimkuhler

Michelle Ann Cox Leimkuhler  
River Ridge, LA

Defendant/Appellee  
In Proper Person

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**BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.**

**HUGHES, J.**

This is an appeal of a judgment of the 22<sup>nd</sup> Judicial District Court that held an attorney in contempt of court for failure to appear at a hearing in the captioned matter. For the following reasons, we amend and affirm as amended.

**FACTS AND PROCEDURAL HISTORY**

Attorney Marti Tessier agreed to represent Ms. Michelle Ann Cox Leimkuhler in a contested divorce proceeding that encompassed property settlement disputes and child support and custody issues. The original petition for divorce was filed by Raymond Burkhart, III on behalf of John Christen Leimkuhler. On August 15, 2006, Ms. Tessier filed on behalf of Ms. Leimkuhler a rule for custody, support, use of vehicle, and injunctions. The hearing was scheduled for September 5, 2006, but was later continued to October 16, 2006.

On August 24, 2006, a motion to proceed in forma pauperis was filed by Ms. Leimkuhler. On September 1, 2006, an answer, reconventional demand, and an objection raising the exception of no cause of action was filed on behalf of Mr. Leimkuhler. That hearing was also set for October 16, 2006.

Therefore, all matters between the parties came before the court on October 16, 2006. But Ms. Leimkuhler's attorney was not present at the time the case was called. The court noted on the record that Ms. Tessier had entered the courtroom earlier, but without explanation to either the court or her client, had left the courthouse prior to the case being called. The court had the bailiff "sound the entire [b]uilding" for Ms. Tessier. The court then issued an instanter subpoena, but Ms. Tessier could not be found. The court issued a rule for contempt on October 23, 2006 and ordered that

Ms. Tessier show cause why she should not be held in contempt of court for her failure to appear at the October 16, 2006 hearing.<sup>1</sup> The hearing was originally scheduled for November 13, 2006, but was continued by the court to December 21, 2006 due to lack of proof of service on Ms. Tessier. In December, the hearing was again continued for lack of proof of service and was finally held on January 17, 2007. The court held Ms. Tessier in contempt and sentenced her to 30 days in the parish jail. The court, however, suspended the sentence with the conditions that Ms. Tessier pay 1) \$750.00 to Mr. Burkhart for attorney's fees, 2) \$250.00 to Ms. Leimkuhler, and 3) the costs associated with the contempt proceedings and transcript. On January 18, 2007 Ms. Tessier filed a notice of intent to file an emergency writ with the First Circuit Court of Appeal, which was signed by Judge Fendlason and made returnable to the First Circuit on or before February 22, 2007. Then, on March 14, 2007, Ms. Tessier file a motion and order for appeal which was denied by Judge Fendlason on the basis that a writ had already been taken.

On May 29, 2007, the First Circuit found that the trial court's January 17, 2007 ruling would be an appealable judgment once a written judgment is signed. This circuit, therefore, found error in the trial court's denial of Ms. Tessier's motion for appeal, reversed that ruling, and remanded the matter back to the trial court to grant the appeal. This circuit did not, however, review the contempt ruling at that time. A written judgment was rendered on August 20, 2007. Ms. Tessier filed the instant appeal, alleging the following assignments of error:

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<sup>1</sup> The "Rule for Contempt" also alleges that Ms. Tessier failed to appear at a September 6, 2006 hearing in connection with her representation of another client. However, in the instant appeal, Ms. Tessier only alleges error in the trial court's finding of contempt with regard to her failure to appear at the October 16, 2006 hearing in connection with her representation of Ms. Leimkuhler.

1. The Honorable Judge erred in holding counsel in contempt of court;
2. The Honorable Judge erred in ordering payment for attorney fees, payment to a litigant, payment to a court reporter, and costs; and
3. The Honorable Judge erred in denying mover's application for suspensive appeal and ordering her to jail until the costs were paid.

## **LAW AND ARGUMENT**

### **I. Assignment of Error No. 1-Contempt Charge**

It has been settled in our jurisprudence that “[t]he authority to punish for contempt of court falls within the inherent power of a court to aid in the exercise of its jurisdiction and to enforce its lawful orders.” **In re Clyde D. Merritt**, 391 So.2d 440, 442, (La. 1980), **Rogers v. Dickens**, 2006-0898 (La. App. 1 Cir. 2/9/07), 959 So.2d 940, 945. Contempt of court is defined in the Code of Civil Procedure as “any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority.” LSA-C.C.P. art. 221. Acts constituting contempt of court are either classified as direct or constructive. LSA-C.C.P. art. 221. A direct contempt of court is defined by LSA-C.C.P. art. 222 as an act that is “committed in the immediate view and presence of the court and of which it has personal knowledge, or a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record.” Moreover, a constructive contempt of court is defined in the code as “any contempt other than a direct one.” LSA-C.C.P. art. 224.

The greatest significance of the distinction between a direct and constructive contempt of court is that a direct contempt of court can be

punished immediately while a constructive contempt of court requires a hearing on a rule to show cause.<sup>2</sup> The court's rule, issued on October 23, 2006, ordered Ms. Tessier to show cause why she should not be held in contempt of court for "her failure to appear" at the October 16, 2006 hearing.<sup>3</sup> The supreme court has established that an attorney's failure to appear at a court hearing is, if proven, a constructive contempt of court. **Kidd v. Caldwell**, 371 So.2d at 254 (Dennis, J., concurring in part and dissenting in part.)

The hearing in the instant action was ultimately held on January 17, 2007. Ms. Tessier's client, Michelle Leimkuhler, testified that she had discussed the October hearing with Ms. Tessier prior to the hearing date. Ms. Leimkuhler stated that she arrived at the courthouse at approximately 9:00 a.m., that the courtroom was filling up at that time, and that she waited for Ms. Tessier outside of the courtroom. Ms. Leimkuhler testified that she never saw Ms. Tessier at the courthouse that day and that it was around one o'clock when she finally reached Ms. Tessier at the instruction of the bailiff. At that time, Ms. Leimkuhler testified that she was instructed by Ms. Tessier to "go back in the courtroom to get a continuance."

The trial judge stated for the record that Ms. Tessier entered the courtroom that morning, but that she did not address the court, left before her client's case was called, and gave no explanation for her departure. The

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<sup>2</sup> We note that the jurisprudence also requires, in certain instances, that the rule to show cause on a contempt motion be held "before a judge other than the one toward whom the contumacious behavior was directed." **Kidd v. Caldwell**, 371 So.2d 247, 256, (La. 1979). However, Ms. Tessier does not assign error to the fact that Judge Fendlason presided over the contempt hearing. We will therefore not address this issue on appeal.

<sup>3</sup> We note that although no specific assignment of error is made, in brief Ms. Tessier argues that the court failed to comply with the requirements of LSA-C.C.P. art. 225(A) in that it did not state in the rule to show cause the facts alleged to constitute contempt. However, we note that the rule to show cause specifically states that Ms. Tessier left the courthouse without explanation to the court and before a scheduled hearing. Because she left her client unrepresented, the court was forced to continue the hearing resulting in inconvenience to the court, litigants, and opposing counsel. The rule then orders Ms. Tessier to appear and show cause "why she should not be held in contempt of court for her failure to appear at the above hearings." Thus, the court satisfied the requirements of LSA-C.C.P. art. 225.

court then ordered the clerk to issue an instanter subpoena to have Ms. Tessier returned, but Ms. Tessier could not be found.

At the hearing and in brief, Ms. Tessier admits that when she did not see the client at the courthouse by 10 a.m. she left “thinking the client had settled things out with her husband.” In brief, Ms. Tessier attempts to justify her departure with a litany of excuses, including the following: 1) Her representation of Ms. Leimkuhler was pro bono, 2) the representation was more involved than she first anticipated that it would be, 3) Ms. Leimkuhler did not contact Ms. Tessier to advise Ms. Tessier which witnesses would be at the hearing, and 4) she thought that Mr. and Mrs. Leimkuhler may have worked things out.

On review, we find no error by the trial court in rejecting the explanations offered by Ms. Tessier. She admits that although she knew of the hearing, she left the courthouse before the case was called. She therefore was not present at the time of the hearing and failed to represent her client. The evidence sufficiently establishes a constructive contempt of court. This assignment of error lacks merit.

## **II. Assignment of Error No. 2-Contempt Fine**

In her second assignment of error, Ms. Tessier argues that the trial judge erred in the punishment imposed. Specifically, Ms. Tessier alleges that the trial court does not have the authority to order payments to attorneys or litigants in lieu of a contempt fine.

Although the authority to punish for contempt of court falls within the inherent power of the court to aid in the exercise of its jurisdiction and to enforce its lawful orders, **Rogers v. Dickens**, 959 So.2d at 945. The Louisiana Constitution, Article V, Section 2 provides that “[t]he power to punish for contempt of court shall be limited by law.” Under that authority,

the Louisiana Legislature has limited the court's contempt power by enacting LSA-R.S. 13:4611(1)(d), which imposes a \$500.00 cap on the fine a court can impose for the type of contempt presented in this case.<sup>4</sup>

On the issue of to whom a contempt fee must be paid, the jurisprudence has held that the fine must be made payable to the court, not a party. **City of Kenner v. Jumonville**, 97-125, 97-210, 97-602 (La. App. 5 Cir. 8/27/97), 701 So.2d 223, 231, writ denied, 97-2890 (La. 1/30/98), 709 So.2d 718, cert. denied, 524 U.S. 953, 118 S. Ct. 2371, 141 L. Ed. 2d 739

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<sup>4</sup> LSA-R.S. 13:4611

Except as otherwise provided by law:

(1)The supreme court, the courts of appeal, the district courts, family courts, juvenile courts and the city courts may punish a person adjudged guilty of a contempt of court therein, as follows:

(a) For a direct contempt of court committed by an attorney of the law, by a fine of not more than one hundred dollars, or by imprisonment for not more than twenty-four hours, or both; and, for any subsequent contempt of same court by the same offender, by a fine of not more than two hundred dollars, or by imprisonment for not more than ten days, or both;

(b) For disobeying or resisting a lawful restraining order, or preliminary or permanent injunction, by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or both.

(c) For a deliberate refusal to perform an act which is yet within the power of the offender to perform, by imprisonment until he performs the act; and

(d) For any other contempt of court, including disobeying an order for the payment of child support or spousal support or an order for the right of custody or visitation, by a fine of not more than five hundred dollars, or imprisonment for not more than three months, or both.

(e) In addition to or in lieu of the above penalties, when a parent has violated a visitation order, the court may order any or all of the following:

(i)Require one or both parents to allow additional visitation days to replace those denied the noncustodial parent.

(ii)Require one or both parents to attend a parent education course.

(iii)Require one or both parents to attend counseling or mediation.

(iv)Require the parent violating the order to pay all court costs and reasonable attorney fees of the other party.

(f) A pattern of willful and intentional violation of this Section, without good cause, may constitute a material change in circumstances warranting a modification of an existing custody or visitation order.

(2)Justices of the peace may punish a person adjudged guilty of a direct contempt of court by a fine of not more than fifty dollars, or imprisonment in the parish jail for not more than twenty-four hours, or both.

(3)The court or justices of the peace, when applicable, may suspend the imposition or executing of the whole or any part of the sentence imposed and place the defendant on unsupervised probation or probation supervised by a probation office, agency, or officer designated by the court or justice of the peace, other than the division of probation and parole of the Department of Public Safety and Corrections. When the court or justice of the peace places a defendant on probation, the court or justice of the peace may impose any specific conditions of probation as set forth in Code of Criminal Procedure Article 895. A term of probation shall not exceed the length of time a defendant may be imprisoned for the contempt, except in the case of contempt for disobeying an order for the payment of child support or spousal support or an order for the right of custody visitation, when the term of probation may extend for a period of up to two years.

(1998). **Joseph v. Entergy**, 2005-0263 (La. App. 4 Cir. 8/3/05), 918 So.2d 47, 52. The reason for this requirement is that contempt proceedings are “designed for vindication of the dignity of the court rather than for the benefit of a litigant.” **Nungesser v. Nungesser**, (La. App. 1 Cir. 1990), 558 So.2d 695, 701, writ denied, 560 So.2d 30 (La. 1990), **Davis v. Harmony House Nursing Home**, 35-080, p. 5 (La. App. 2 Cir. 10/31/01), 800 So.2d 92, 96, writ denied, 2001-3162 (La. 2/22/02), 810 So.2d 1143.

Moreover, attorneys fees are generally not recoverable unless provided by statute or contract. **Tassin v. Golden Rule Ins. Co.**, 94-0362 (La. App. 1 Cir. 12/22/94), 649 So.2d 1050, 1058, **Reeves v. Thompson**, 95-0321 (La. App. 4 Cir. 12/11/96), 685 So.2d 575, 580. Under LSA-R.S. 13:4611(e)(iv), attorneys fees are only allowed in the instance in which a parent is found in contempt of court for violating a child visitation order.

The judgment from which Ms. Tessier appeals sentences her to 30 days in the parish jail, but suspends that sentence with the condition that she pay \$750.00 in attorney’s fees, \$250.00 to a litigant, and court costs. We find persuasive the reasoning of the Fifth Circuit in **City of Kenner v. Jumonville**, 97-125 (La. App. 5 Cir. 8/27/97), 701 So.2d 223. In that case, property owners were ordered by the city to complete renovations on their homes and found in contempt of court for their failure to comply with the order. The contempt judgment ordered the property owners to pay \$1,000.00 in “penalties” to the city of Kenner. The Fifth Circuit, looking to the record, found that it was clear that the “penalty” was a “fine” for the act of contempt and therefore amended the judgment accordingly. **City of Kenner**, 701 So.2d at 231. We likewise find the monetary assessments made in the instant action to be “fines” for Ms. Tessier’s act of contempt, as authorized by LSA-R.S. 13:4611. We further find that the court erred in



making the fines payable to Mr. Burkhart and Ms. Leimkuhler, as opposed to the court. A fine payable to either Mr. Burkhart or Ms. Leimkuhler would only serve to benefit those parties and not vindicate the court. And last, we find that the amount of the fine is in excess of the statutorily prescribed cap of \$500.00. For these reasons, that portion of the judgment awarding the monetary payments is amended to reflect that the payments are actually one fine, to reduce the fine to \$500.00 and to reflect that the fine is made payable to the 22<sup>nd</sup> Judicial District Court.

### **III. Assignment of Error No. 3-Appeal Denial**

Ms. Tessier's third assignment of error, alleging that the trial judge erred in denying her application for suspensive appeal and ordering her to jail until the costs were paid, has been addressed in this court's civil writ opinion No. 2007 CW 0732, rendered on May 29, 2007. In that opinion, which has been made a part of this record, this court found that the trial court did err in denying Ms. Tessier's motion for suspensive appeal. The trial court's action was reversed and the matter was remanded back with instructions to grant the appeal. This assignment of error is moot.

### **CONCLUSION**

The evidence sufficiently establishes a constructive contempt of court. In compliance with LSA-R.S. 13:4611, the judgment of the trial court is amended to reflect a fine of \$500.00, made payable to the court. The costs of this appeal are assessed against appellant, Ms. Tessier.

**AMENDED AND AFFIRMED AS AMENDED.**