

STATE OF INDIANA                    )  
  ) SS:  
COUNTY OF WABASH                )  
  ) CAUSE NO. 85D01-0302-DR-40

IN RE THE MARRAGE OF                )  
  )  
Jane A. (Jacobs) HOULIHAN,        )  
    Petitioner,                                )  
  )  
        vs.                                        )  
  )  
Donald V. JACOBS,                        )  
    Respondent.                                )

**Notice of Unlawful Contempt Process;  
and, Verified Motion to Dismiss the Same**

Comes now the Respondent, Donald V. Jacobs, and in direct support of his notice and motion presented to the Court, hereby alleges, states, and provides the following:

**Background and Introduction:**

1. That the Petitioner has instituted what she proffers as a proceeding for contempt, alleging that the Respondent has somehow failed to comply with a lawfully-entered order for payment of various monies, including an amount alleged as due for payment of college expenses, an amount alleged as due for payment of child support, and an amount alleged as due for attorney's fees.
2. That several violations against law and due process, as regards said contempt proceedings, are noted and detailed below, and that same said contempt proceedings are void, and/or voidable, for lack of sufficiency of process and other matters, not limited to certain acts of fraud and/or constructive fraud committed by the Petitioner, and any of which support this motion to dismiss.
3. That as a natural and legal consequence, this Court is **without any lawful authority** to proceed further upon the Petitioner's proffering for supposed contempt against the Respondent.

4. Moreover, it is strictly improper to allow the continuation of contempt proceedings that are demonstrably in multiple violations of the established due process of law, and that then also open up liabilities for damages and other remedial actions against various persons and entities.

“[S]ince Ex parte Young, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Id., at 159-160. (Emphasis supplied.)

*Ex parte Young*, like Sterling v. Constantin, 287 U.S. 378 (1932), involved a question of the federal courts' injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, Edelman v. Jordan, supra; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944), damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. Myers v. Anderson, 238 U.S. 368 (1915). See generally Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.”

Scheuer v. Rhodes, 416 U.S. 232, 242-244, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

5. However, the Respondent respectfully notes that the original cause and potential for serious trouble in this matter comes originally, not from any deeds on the part of this Court or this County, but from various acts and omissions committed by the Petitioner and/or her counsel.

6. Nonetheless, this Court is under an affirmative duty to ensure the proper operation of the laws, to ensure that the Respondent's federal rights to due process are not violated, and being also duly advised in the premises by the contents of this pleading, to dismiss the contempt action.

**Mandatory requirements of law in contempt proceedings:**

7. The Indiana Court of Appeals has clearly delineated the mandatory factors in contempt:

“In such cases, IC 34-47-3-5 provides clear due process protections. It states:

(a) In all cases of indirect contempts, the person charged with indirect contempt is entitled:

(1) before answering the charge; or

(2) being punished for the contempt;

to be served with a rule of the court against which the contempt was alleged to have been committed.

(b) The rule to show cause must:

(1) clearly and distinctly set forth the facts that are alleged to constitute the contempt;

(2) specify the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant; and

(3) specify a time and place at which the defendant is required to show cause, in the court, why the defendant should not be attached and punished for such contempt.

(c) The court shall, on proper showing, extend the time provided under subsection (b)(3) to give the defendant a reasonable and just opportunity to be purged of the contempt.

(d) A rule provided for under subsection (b) may not issue until the facts alleged to constitute the contempt have been:

(1) brought to the knowledge of the court by an information; and

(2) duly verified by the oath of affirmation of some officers of the court or other responsible person.”

White v. White, 755 N.E.2d 644, 659-660 (Ind. Ct. App. 2001).

8. Accordingly, and as a strict matter of established law, **before** an allegation of indirect contempt may be heard in **any** Indiana court, there **must** be:

a) (1) *willful* disobedience of (2) a *lawfully entered* order of which (3) the offender had proper *due process* notice. Meyer v. Wolvos, 707 N.E.2d 1029, 1031 (Ind. Ct. App. 1999), trans. denied;

b) full clarity, in that (1) the order must be clear and certain such that there is no question regarding what a party may or may not do and (2) no question regarding when the order is being violated. Gordon v. Gordon, 733 N.E.2d 468, 472 (Ind. Ct. App. 2000);

c) an information regarding the alleged contempt that (1) specifically alleges the facts, together with (2) any relative times and/or dates, required to formulate such contempt, and that is (3) duly verified by oath of affirmation. Ind. Code § 34-47-3-5(d);

- d) in the situation of an informing party *already represented in an existing cause by counsel*, that said information *be also* (1) signed by such counsel, (2) have attached to the same such counsel's proper certificate of service, and (3) be duly served upon all other parties. E.g., Indiana Trial Rules 5(A), 5(C), 11(A), 11(B), and etc.; *and*,
- e) a rule of the court which comports with the requirements of Ind. Code § 34-47-3-5(b), specifying, *inter alia*, (1) the clear and distinct facts that are alleged to constitute the contempt, (2) the time and place of the facts with reasonable certainty, as to inform the defendant of the nature and circumstances of the charge against the defendant, and that (3) must be properly served upon the respondent in accordance with due process of law.
9. That without – first – having properly accomplished all of the above procedures, *and in the proper order*, there can be no hearing in accordance with the due process protections of law.

**Invalidity of the “Agreed Entry” in question:**

10. The Petitioner bases her contempt upon a certain “Agreed Entry” of August 17, 2005.
11. On that date, instead of holding the hearing that was scheduled to adjudicate various matters, Petitioner's counsel Richard Fisher and Respondent's previous counsel Mark Dabrowski met informally, *without the personal presence of the parties*, and issued said “Agreed Entry”.
12. It is an axiomatic matter of law that such informal minute entries may **only** provide the Court with review information, points of a merely procedural nature, and the like, but that they strictly may **not** implicate any substantive matters affecting either or both parties, *whatsoever*, without ***also*** containing the written signatures of the real parties in interest in agreement.
13. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a

prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b).

14. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.

15. A number of Professional Conduct Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a).

16. The Respondent gave absolutely no consent, whatsoever, for his former counsel to pursue a course of action that was strictly detrimental to his substantive rights and interests. In fact, the Respondent was specifically appearing in person that day to argue for emancipation of his adult children, termination of any child support therefore, and fraud in regards to college expenses – a fact which cannot be reconciled with the unlawful substantive contents of said “agreed entry”.

17. Without also containing the written signatures of the real parties in interest, the parties are not bound to the implications of any substantive nature contained within such an alleged “agreed entry”, and, otherwise, **only** the Court has the power and authority, by and through the holding of a hearing, or upon the proper application for relief through formally written and signed pleadings, with which to adjudicate any substantive matters of the nature contained within said document, including the alleged issues of child support, college expenses, and attorney fees.

18. Moreover, and even notwithstanding the above due process protections, the alleged “agreed entry” is *also* legally insufficient as regards said substantive matters affecting the parties, in the following additional respects: (1) the face of the document itself clearly reveals that said counsel checked only the first box, requesting the Court to enter minutes, instead of checking the

second box, which would be the *first* step required for stipulation of any substantive matters (in addition to actually having the parties, themselves, personally sign any such document(s)); (2) the document does not contain the written names, addresses and phone numbers of said counsel, in violation of Local Rule 3(A), and which also mandates that it must be stricken, pursuant to Local Rule 3(D) [*see also, e.g.,* Indiana Trial Rules 5(C), 11(A), and etc.]; and (3), also failing the several aspects of Local Rules 5(C) and 5(D), *also* requiring striking under Local Rule 5(F).

19. Additionally, the Respondent alleges, and has various documentation in proof thereof, that the Petitioner has committed either direct fraud, and/or constructive fraud, upon the court in regards to the issue of college expenses, either with or without the assistance of the parties adult daughter, Staci Jacobs – while Respondent was diligently working towards various forms of financial aid on behalf of Staci, the Petitioner refused to allow the normal course of those proceedings, and instead took it upon herself to use a credit card to pay \$5000 of Staci's college expenses directly. By subverting the process to which Respondent was allowed to make his own normal arrangements in his best financial interest, the Petitioner has invited the error to which she now complains, and she is also liable for treble damages for attempting false prosecution.

20. There are five elements of actual fraud: 1) a false statement of past or existing material fact 2) made with knowledge it was false or made recklessly without knowledge of its truth or falsity 3) made for the purpose of inducing the other party to act upon it 4) and upon which the other party did justifiably rely and act 5) proximately resulting in injury to the other party. *See Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996).

21. Constructive fraud "arises by operation of law from a course of conduct which, if sanctioned by law, would 'secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud.'" *Paramo v. Edwards*, 563 N.E.2d 595, 598 (Ind. 1990)

(quoting *Beecher v. City of Terre Haute*, 235 Ind. 180, 132 N.E.2d 141, 143 (1956)). It is "based on the premise that there are situations which might not amount to actual fraud, but which are 'so likely to result in injustice that the law will find a fraud despite the absence of fraudulent intent.'" *Stoll v. Grimm*, 681 N.E.2d 749, 757 (Ind. Ct. App. 1997) (quoting *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 324 (Ind. Ct. App. 1991)).

22. Constructive fraud may be found where one party takes unconscionable advantage of his dominant position in a confidential or fiduciary relationship. *Hall v. Indiana Dept. of State Revenue*, 170 Ind. App. 77, 351 N.E.2d 35, 38 (1976) ("Any breach of a duty arising from a confidential or fiduciary relation, without any actual fraudulent intent gains an advantage at the expense of any one to whom he owes such duty, amounts to a constructive fraud."). In addition, a representation regarding future conduct can, in some situations, give rise to a constructive fraud. *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1250 (Ind. Ct. App. 1998), trans. denied.

#### **Invalidity of the "Information in Contempt":**

23. The Petitioner has already been represented in this cause of action by her counsel, Mr. Richard Fisher, for *quite some time prior* to the filing of her proffering for alleged contempt.

24. As a legal consequence, and as more thoroughly discussed above, this fact mandates that any and all papers filed into this cause on her behalf must *not only* be personally signed by counsel Fisher, but *also* that counsel Fisher's Rule 11 certificate of service must be attached.

25. However, the Petitioner's "Information in Contempt" has neither: (1) any signature by counsel Fisher – although the paperwork was clearly done by Fisher, noting "Law Offices of Fisher & Ireland" on the left margin of the same; nor (2) the required certificate of service.

26. Pursuant to various mandates of both the Indiana Trial Rules, and the Local Rules of this Court, the Petitioner's "Information in Contempt" is legally insufficient, and **must** be stricken.

27. The Respondent notes further that Petitioner's counsel can be held liable for sanctions.

**Invalidity of the "Citation":**

28. Pursuant to the authority vested under Ind. Code § 34-47-4-1(b), a court "may" issue a citation to the local sheriff in regards to contempt proceedings, to be served upon the alleged contemptnor in accordance with the due process of law. The statutory language is the clear and unambiguous word "may", which, by its very terms, means an *optional* judicial event.

29. However, the *mandatory* statutory language of Ind. Code § 34-47-3-5(a) is that an alleged contemptnor is "entitled" to be served with a rule of the court to show cause, and which must be served prior to hearing, and, pursuant to I.C. § 34-47-3-5(b), must also be specific and detailed.

30. In short, the Citation issued by this Court under I.C. § 34-47-4-1(b) is legally insufficient.

31. A citation is an optional act by the court, whereas the rule to show cause is mandatory.

32. Further, and in any event, there has never been *any* form of requisite issuance by this Court that has comported with the aforementioned mandatory requirements of notifying the undersigned alleged contemptnor with the required specific facts, including also such relevant dates and/or times with reasonable certainty therein, to meet the due process protections of law.

33. Without any such issuance by this Court, there can be no lawful contempt hearing held.

**Summary and Conclusion:**

34. These failures or refusals to obey Indiana law have violated this Respondent's various rights guaranteed by at least the Sixth and Fourteenth Amendments to the U.S. Constitution, and similar rights guaranteed by at least Article 1, Sections 12 and 26, of the Indiana Constitution.

35. The alleged "agreed entry", of which the Petitioner complains provides her with reason to move forward with alleged contempt, fails due to: (1) her own acts of fraud and/or constructive fraud; (2) being legally insufficient to adjudicate any substantive matters between the parties; (3)



not being properly marked with written names, addresses, and telephone numbers of counsel involved with the production of such document; (4) not including a proper Rule certificate of service; and (5) numerous related aspects of both the Indiana Trial Rules, and of the Local Rules of this Court – which further require, instead, that such “agreed entry” be stricken.

36. The Petitioner’s “Information in Contempt” also is legally insufficient, due to failures to include: (1) any signature by counsel Fisher; nor (2) the required certificate of service – again, which further require, instead, that such pleading be stricken as a matter of law.

37. The Court’s “Citation” is only an optional judicial event, whereas the Court has yet to ever issue its proper rule to show cause, which, pursuant to I.C. § 34-47-3-5(b), must also be specific and detailed as to all the necessary dates, times, and facts constituting the alleged contempt – AND, which may ONLY issue after the other pre-requisite events before it are issued properly in accordance with the due process of law.

38. As there have been many, many aspects committed in this cause that are in violation of the due process of law for indirect contempt proceedings, there is – as of yet – absolutely no lawful basis – whatsoever – for this Court to proceed any further, with the sole exception of dismissal.

39. This Court must, according to the established due process of law, dismiss the Petitioner’s proffering for alleged contempt against the Respondent, and vacate any corresponding hearing, all without prejudice, as to the Petitioner’s possible election to re-file any such potential action for contempt against the Respondent that is made completely *pursuant to law*.

40. The Respondent respectfully reminds the Court, the Petitioner, and also her counsel, that any such re-filing, considering the aspects of Petitioner’s alleged fraud and/or constructive fraud in regards to the issues of college expenses, in combination with counsel’s mandatory good faith ethics limitations under the Professional Rules of Conduct, would need to be carefully drafted.

41. Lastly, Respondent's federal bankruptcy attorney has already successfully discharged all liability that may have arisen in respect to said alleged college expenses and/or attorney fees.

42. A suitable proposed order has been tendered with this motion per Local Rule 3(C).

**WHEREFORE**, the undersigned Respondent now moves this Court to dismiss Petitioner's current proffering for contempt, and for all other relief that is just and proper in the premises.

Respectfully submitted,

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Donald V. Jacobs

I affirm, under the pains and penalties for perjury that the foregoing representations are true and correct, to the best of my knowledge, information, and belief.

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Donald V. Jacobs

CERTIFICATE OF SERVICE

I hereby certify: that on this \_\_\_\_\_ day of November, 2005, a true and complete copy of the foregoing *Notice of Unlawful Contempt Process; and, Verified Motion to Dismiss the Same*, by depositing the same in United States mail, first class postage prepaid, has been duly served upon:

Richard P. Fisher, # 6851-85  
65 West Canal Street  
Wabash, IN 46992

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Donald V. Jacobs

Donald V. Jacobs  
[mailing address redacted]  
Kokomo, IN 46902  
[telephone redacted]