

STATE OF VERMONT
CALEDONIA COUNTY, SS.

FILED

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KATHERINE LAWSON & BRADLEY LAWSON,
individually, and as parents and guardians of their
daughter, JORDAN LAWSON

CALEDONIA COUNTY COURTS
Caledonia Superior Court
Docket No. 195-9-97 Cacv

v.

BROWN'S HOME DAY CARE CENTER, INC., and
LUCILLE M. NELSON & ROBERT NELSON, JR.

Motion to Strike, filed June 13, 2003

The court interprets the motion as a Motion to Alter or Amend under V.R.C.P. 59(e). Having reviewed the motion carefully, the court declines to alter or amend the findings, conclusions, and order of January 23, 2003. The court will respond to Respondent's argument, raised apparently for the first time, that the evidence must support the findings "beyond a reasonable doubt" because the sanction was punitive. In the decision of January 29, 2003, the court used the "clear and convincing" standard of proof.

Respondent cites Mackler v. Cohen, 146 F.3d 126 (2d Cir. 1998), for the proposition that punitive sanctions must be proven beyond a reasonable doubt. Respondent claims that the Supreme Court has already found the sanction to be punitive; that the Court has thus established the law of the case; and that it is not for this court now to try to recast its intent.

In the oral decision on September 2, 1998, the court stated very clearly that the amount of the sanction was based on the increased burden which fell upon court resources. The estimate was that "the amount of time absorbed by the specific conduct of filing material protected by the confidentiality agreement was approximately five days' worth of court time," and that it costs about \$600 a day for the court to operate. The court's determination was that "there was a burden of approximately \$3,000 that resulted to the court as a result of this action." Transcript of Sanctions Hearing at 31-32. No appeal was taken as to the amount or basis for the sanction.

The Supreme Court opinion does state that the sanction is "essentially punitive" because it will go to the State of Vermont and not to a litigant. The opinion also states that the superior court called the sanction a "fine." The Court went on to suggest that a substantial fine could be imposed only through procedures applicable to a criminal proceeding "because the adjudication was fundamentally indistinguishable from criminal contempt." Lawson v. Brown's Day Care

Center, 172 Vt. 574, 577 (2001). Those comments are not the “law of the case” because they are *dicta* and not part of the holding. The gist of the discussion is that criminal procedures would be necessary before the court could impose a punitive fine; however, it is not clear what materials were filed with the Supreme Court, and therefore whether the Supreme Court was aware of the court’s calculation of the sanction based on actual costs to the public from use of court resources.

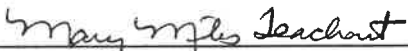
The cases from the federal courts clearly support a distinction between compensatory fines and punitive fines. In Mackler v. Cohen, 146 F.3d 126 (2d Cir. 1998), the court stressed the need for criminal procedures before imposition of a \$10,000 punitive fine, but the court also upheld a \$45,000 compensatory sanction based on less stringent procedures. The Vermont Supreme Court cited Mackler in its discussion of punitive fines, and Respondent relies upon it in his motion. Other cases show that, under appropriate circumstances, a court may impose a compensatory sanction for costs to the court. See Eash v. Riggins Trucking, Inc., 757 F. 2d 557 (3d Cir. 1985), upholding a monetary sanction against an attorney based on misuse of court resources, specifically the cost of impaneling a jury for one day. Grounding the sanction on the specific cost consequences of the conduct provides both a nexus and a limit on the terms of the sanction. Id. at 565.

In short, Respondent has not set forth a persuasive argument that a criminal standard of proof must be met before the court may impose a sanction that is compensatory in nature. As set forth in the Decision of January 29, 2003, the court concludes that the use of the “clear and convincing” standard of proof is a high standard that provides sufficient fairness to attorneys and restraint against abuse of judicial power, and thus is the appropriate standard to apply by a court considering attorney sanctions in the exercise of inherent judicial authority.

Order

For the foregoing reasons, the Motion to Strike is *denied*.

Dated this 25th of July, 2003.



Mary Miles Teachout
Superior Judge