No. 2D17-4837

**IN THE SECOND DISTRICT COURT OF APPEAL**
**FOR THE STATE OF FLORIDA**

SANDRINE MARIE AKRÉ-DESCHAMPS,

*Appellant*,

v.

BRENDAN SMITH,

*Appellee*.

On Appeal from the Circuit Court of the Tenth Judicial Circuit
in and for Polk County, Florida
L.T. No. 15-DR-11112, Hon. Reinaldo Ojeda

# REPLY BRIEF OF SANDRINE MARIE AKRÉ-DESCHAMPS

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## ARGUMENT

In this reply brief, Ms. Akré-Deschamps respectfully[1] responds to Mr. Smith's arguments.

[1] Mr. Smith's answer brief describes the initial brief as "facially self-serving" (Smith Br. 3), criticizes its arguments as lacking "any degree of believability" (Smith Br. 15), "preposterous" (Smith Br. 15), "entirely untenable" (Smith Br. 15), and "absurd" (Smith Br. 18), and accuses Ms. Akré-Deschamps of, among other things, "a blatant attempt to mislead this Court" (Smith Br. 3), making a "flagrant, knowing and utterly false statement" (Smith Br. 3), and "thumb[ing] her nose at the authority, honor and dignity of this Court" (Smith Br. 4). Ms. Akré-Deschamps will not respond in kind to these intemperate and histrionic remarks except to explain why Mr. Smith's arguments are mistaken. *See infra* Argument I.

In addition to using emotionally fraught language and making untoward personal attacks on Ms. Akré-Deschamps and her counsel, almost all of the answer brief's statement of the case (Smith Br. 2-10) is unduly argumentative and lacks sufficient record citations. *See, e.g.*, Smith Br. 2-3 (arguing child's preference was a "proverbial red-herring"), 7 n.2 (citing case in support of argument), 9 (arguing trial court's refusal to consider child's preference "should not be considered fundamental error, nor does it appear to even approach an abuse of discretion"). That is improper. "The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." *Sabawi* v. *Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000).

For that reason, Ms. Akré-Deschamps would be well within her rights to move to strike Mr. Smith's brief. *See id.* (striking brief because its statement of the case was "unduly argumentative"); *Greenfield* v. *Westmoreland*, 156 So. 3d 1, 1 (Fla. 3d DCA 2007) (same); *Williams* v. *Winn-Dixie Stores, Inc.*, 548 So. 2d 829, 830 (Fla. 1st DCA 1989) (same). Instead, however, Ms. Akré-Deschamps will address the arguments Mr. Smith improperly made in his statement of the case as if he had correctly organized and formatted his brief and made them in its argument section. *Compare* Fla. R. App. P. 9.210(b)(3) (briefs shall contain a "statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal"), *with id.* 9.210(b)(4)-(5) (describing contents of summary of argument and argument sections of brief); *see also id.* 9.210(a)(2) (footnotes "shall be in the same size type").

## I. Given Mr. Smith's concessions, the trial court erred when it concluded the mother willfully violated its January 11, 2017 oral ruling and May 5, 2017 judgment

In his answer brief, Mr. Smith buries two critical concessions. First, he concedes the language of the trial court's prior orders was not clear. *See* Smith Br. 6 ("Appellee does not dispute that the Trial Court's oral rulings and subsequent written Order to [*sic*] not mandate a specific course of conduct in the event the Parties [*sic*] daughter refused to board a return flight to Florida, nor that it [*sic*] did not make any provision regarding physically stopping Appellant [*sic*] from physically placing the child on the flight."). Second, Mr. Smith concedes that Florida law has no bright-line age limitation for child testimony. *See* Smith Br. 11 ("Appellee agrees that there is no bright-line test regarding specific ages where the court is required to consider the preferences or testimony of a minor child."). These concessions sound the death knell for his appellate arguments.

### A. Mr. Smith concedes the mother's conduct did not willfully violate the January 11, 2017 oral ruling's and May 5, 2017 judgment's express provisions

In her initial brief, Ms. Akré-Deschamps argued the trial court's January 11, 2017 oral ruling and May 5, 2017 judgment did not expressly mandate what she was supposed to do if she brought her daughter to the airport, but her daughter refused to board the plane. *See* Akré-Deschamps Br. 15-17. Mr. Smith concedes the point. *See* Smith Br. 6. Nevertheless, he attempts to defend the contempt order be-

cause he believes a prohibition on preventing the father from using physical force or violence (*i.e.*, carrying the child onto the plane) was either implicit in or "self-evident" from the trial court's oral order and written judgment. Smith Br. 6-7. That is not how contempt works.

To the contrary, a contempt order cannot stand unless the prior order's language was "'clear and precise'" and the contemnor's behavior "'clearly violate[d] the order.'" *Reder* v. *Miller*, 102 So. 3d 742, 743 (Fla. 2d DCA 2012) (quoting *Paul* v. *Johnson*, 604 So. 2d 883, 884 (Fla. 5th DCA 1992)). Contrary to Mr. Smith's argument, a contempt order cannot be based on a court's supposedly implicit or self-evident intent in issuing an order unless that intent was "'plainly expressed in the written order.'" *Id.* (quoting *Minda* v. *Ponce*, 918 So. 2d 417, 421 (Fla. 2d DCA 2006)). In other words, a finding of contempt for violating a court order cannot be based upon something the order does not say. *Id.*; *accord Menke* v. *Wendell*, 188 So. 3d 869, 871-72 (Fla. 2d DCA 2015). And the reason for that is obvious, because the judicial contempt power is awesome, and parties should not be required to guess at the interpretation or implication of an order, particularly when reacting to a fast-moving and volatile situation as occurred in this case at the Paris airport.

In that regard, Mr. Smith misunderstands the relevant timeline. The transfer of custody was complete when Ms. Akré-Deschamps delivered her daughter to Mr.

Smith at the airport. *See* Akré-Deschamps Br. 15-16. Indeed, Mr. Smith's own testimony explains that after Ms. Akré-Deschamps delivered custody of the child, Mr. Smith took the child's bag and checked it onto the plane before returning to board with the child. Supp. App. 16-17. The trial court's prior orders simply did not contemplate anything that might occur after the moment in time when Ms. Akré-Deschamps brought the child to the airport and delivered custody to Mr. Smith. *See* App. 288-89. As such, the fact that—*after* she delivered custody—the mother might have prevented the father from using violence or physical force to make the child board the plane could not possibly establish a contempt of court.

Additionally, Mr. Smith argues *Marcus* v. *Marcus*, 902 So. 2d 259 (Fla. 4th DCA 2005), is distinguishable from this case because in *Marcus*, the father moved "just down the street," whereas the parties here live on separate continents. Smith Br. 17. But geography was not an integral factor in *Marcus*'s analysis, nor is it relevant here. The critical inquiry in *Marcus* was whether the mother's actions could be deemed a willful violation of a court order when that order did not specifically state the conduct that would be expected of her if her child were to refuse to stay with his father. *Marcus*, 902 So. 2d at 263. The resolution of this appeal likewise turns on whether Ms. Akré-Deschamps's conduct violated the express directives of the trial court's oral ruling and judgment. Thus, *Marcus* is applicable here.

Mr. Smith also contends *Marcus* differs from this case because Ms. Akré-Deschamps physically prevented him from physically placing the child on the plane, whereas the mother in *Marcus* simply refrained from forcing her child to do something he did not want to do. Smith Br. 17. But that distinction does not alter the analysis *Marcus* requires, nor does it affect *Marcus*'s applicability.

Under *Marcus*, in deciding whether particular conduct establishes contempt of court, appellate courts must consider whether that conduct violated the express directives of a court order or judgment. 902 So. 2d at 263 ("holding one party in contempt based upon aspirational directives as to what ideal visitation conditions should be is error"). *Marcus* also requires reviewing courts to consider the circumstances under which that conduct transpired (*e.g.*, a child refusing to board a plane with her father). *See id.* at 263 ("the original order did not inform the custodial parent of the conduct expected of her in assuring that the husband is able to exercise his visitation"). These parameters do not vary based on the nature of a party's conduct. So regardless whether Ms. Akré-Deschamps's actions differed from those of the mother in *Marcus*, *Marcus* guides this Court's determination whether Ms. Akré-Deschamps's conduct could establish a contempt of court.

Furthermore, Mr. Smith's attempt to factually distinguish *Cooley* v. *Moody*, 884 So. 2d 143 (Fla. 2d DCA 2004), is also misguided. Ms. Akré-Deschamps does not cite *Cooley* as an on-all-fours factual analog. Rather, she relies on it for its le-

gal principles. *See id.* at 145 (ruling "'[o]ne may not be held in contempt of court for [violating] an order or … judgment which is not clear and definite [enough] to'" notify the party "'of its command,'" and "'implied or inherent provisions of a final judgment cannot serve as a basis for an order of contempt'" (citations omitted)). Indeed, Mr. Smith concedes the trial court's oral rulings and judgment did not "mandate a specific course of conduct in the event the Parties [*sic*] daughter refused to board a return flight to Florida." Smith Br. 6. He also concedes they "did not make any provision regarding physically stopping Appellant [*sic*] from physically placing the child on the flight." Smith Br. 6. Therefore, regardless of the circumstantial differences between the failed custody transfer in *Cooley* and the custody transfer that actually occurred here, under *Cooley*'s principles, Ms. Akré-Deschamps's actions at the airport could not be considered contempt of court.

### B. Mr. Smith concedes Florida law did not categorically forbid the trial court from considering the nine-year-old girl's preference

As with his concession regarding the prior orders' lack of clarity (*see* Smith Br. 6), Mr. Smith also concedes that Florida law does not prohibit trial courts from considering the testimony of children at any particular age (*see* Smith Br. 11). Nevertheless, he defends the trial court's ruling on two alternative grounds. First, Mr. Smith contends the appeal of this issue is not timely. *See* Smith Br. 2. Second, Mr. Smith argues it was not fundamental error. *See* Smith Br. 9. Both contentions are incorrect.

### 1. The appeal of the trial court's ruling regarding the child's parental preference is timely

Mr. Smith's statement of the case does not set forth his timeliness argument with the requisite specificity and citations to legal authority required by the appellate rules, *e.g.*, Fla. R. App. P. 9.210(b)(5) (argument must contain "citation to appropriate authorities" and "the applicable appellate standard of review"), which makes it difficult to understand and respond to it. Nevertheless, he appears to argue that Ms. Akré-Deschamps should have filed an earlier appeal about the child's parental preference. *See* Smith Br. 2.

As an initial matter, that argument does not make sense because the trial court ruled *at the contempt hearing* that it would not consider the child's preference with respect to whether to hold the mother in contempt. *See* App. 314-15. The two issues (*i.e.*, the time-sharing arrangement versus contempt) are different. Moreover, to the extent Mr. Smith means to argue that the trial court's prior ruling regarding the child's preference somehow became the law of the case, he is incorrect because there was no prior appeal. *Fla. Dep't of Transp.* v. *Juliano*, 801 So. 2d 101, 107 (Fla. 2001) ("the law of the case doctrine … bars consideration only of those legal issues that were actually considered and decided in a former appeal").

Mr. Smith's separate point about the applicability of Rule 12.407 is also hard to understand. *See* Smith Br. 19. That is because the child had already testified. As such, the question was how much weight to give the child's testimony.

### 2. The issue about the child's parental preference is a question of law reviewed de novo, not for fundamental error

Additionally, the trial court's categorical refusal to consider the child's parental preference is a question of law to be reviewed de novo, not for fundamental error. *See* Akré-Deschamps Br. 11 (explaining standard of review). In the trial court, Ms. Akré-Deschamps took the unmistakable position that the trial court needed to take into consideration her daughter's parental preference. *See* App. 314-16. She did not need to use magic words or cite the exact authorities on which she relied; instead, she simply needed to (and did) make her argument with sufficient specificity "to inform the court of the perceived error." *Aills* v. *Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010). That means the error is preserved for this Court's review.

To the extent Mr. Smith is now arguing that Ms. Akré-Deschamps needed to have previously cited to the trial court the exact same cases she now cites in this appeal, that is not how appellate courts handle error preservation. "Parties can most assuredly waive positions and issues on appeal, but not individual arguments—let alone authorities." *Sec'y, U.S. Dep't of Labor* v. *Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017). Instead, "[o]ffering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable" to improve "the quality and depth of argument ... on appeal." *Id.*

### C. Mr. Smith's contention that the trial court's physical-force ruling did not deny due process because it was supposedly tried by "express" consent misplaces reliance on the wrong legal authorities

Mr. Smith cites Rule 1.190(b) for the proposition that his physical-force argument was tried by implied[2] consent. *See* Smith Br. 20. That rule provides that "[w]hen issues not raised by the *pleadings* are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the *pleadings*." Fla. R. Civ. P. 1.190(b) (emphases added). First of all, a motion is not a pleading. *Compare* Fla. R. Civ. P. 1.100(a) (describing pleadings), *with id.* 1.100(b) (describing motions). Rule 1.190(b) speaks about "pleadings," not motions. When Mr. Smith sought to have the trial court hold Ms. Akré-Deschamps in contempt, he did so by filing a series of motions for contempt—not by filing a pleading of any kind. *See* App. 291-96, 305-07. For that reason, Mr. Smith's reliance on Rule 1.190(b) is inapposite.

For the same reason, Mr. Smith's unexplained reliance on the Fourth District's decision in *Fed. Home Loan Mortg. Corp.* v. *Beekman*, 174 So. 3d 472, 475-76 (Fla. 4th DCA 2015), is also misplaced. That is because that case involved the presentation of evidence outside the scope of the pleadings, not outside the scope

[2] To be sure, Mr. Smith's brief says Ms. Akré-Deschamps "*expressly* consented" to try the physical-force argument because she did not object at the contempt hearing. Smith Br. 20 (emphasis added). But that confuses the distinction between express consent and implied consent, so presumably Mr. Smith meant to say it was tried by implied consent.

of a motion. *Id.* Moreover, that case also held the judgment was void because the issue was not set forth in the pleadings or tried by implied consent. *Id.* at 476.

Here, by employing a sandbagging tactic wherein Mr. Smith's written motions did not seek a contempt order on the basis of physical force, but he nevertheless argued for precisely that at the hearing, he deprived Ms. Akré-Deschamps of due process and prejudiced her case. Had she known that he intended to rely on a physical-force argument, she might have called her sister as a witness to contradict his testimony and that of his girlfriend. *Cf. Smith* v. *Mogelvang*, 432 So. 2d 119, 122 (Fla. 2d DCA 1983) (implied consent depends on "(a) whether the opposing party had a fair opportunity to defend against the issue and (b) whether the opposing party could have offered additional evidence on that issue if it had been pleaded").

Moreover, to the extent Mr. Smith is complaining that Ms. Akré-Deschamps did not object on this basis at the hearing, his concern is misplaced. A due process argument may be made for the first time on appeal. *E.g.*, *Hooters of Am., Inc.* v. *Carolina Wings, Inc.*, 655 So. 2d 1231, 1234-35 (Fla. 1st DCA 1995) (violation of due process is a fundamental error that can be raised for the first time on appeal).

## CONCLUSION

The Court should vacate the Order of October 27, 2017 and remand for further proceedings.

Respectfully submitted,

/s/ Thomas Burns

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

June 19, 2018

/s/ Thomas Burns
Thomas A. Burns