

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

RICHARD D. MOORE,

Petitioner,

v.

THE SUPERIOR COURT OF  
MENDOCINO COUNTY,

Respondent;

HAZEL MOORE,

Real Party in Interest.

A141265

(Mendocino County Superior  
Court No. SCUKCVFL 03-89980)

**BY THE COURT:**<sup>1</sup>

An order to show cause re: contempt was filed against petitioner for failing to reimburse real party in interest for health insurance payment, as required by their marital settlement agreement (MSA). Petitioner made several arguments against the contempt citation, including that he did not have the ability to pay. The court ruled against petitioner and, because each month petitioner failed to reimburse real party constituted a separate contempt, petitioner was found guilty of 23 counts and sentenced to 5 days for each count, with a total of 115 days imposed. He challenges that decision here.

---

<sup>1</sup> Before Kline, P.J., Richman, J., and Brick, J.\*

\*Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Ability to pay must be shown in order to hold one in contempt; it is not an affirmative defense and the finding must be supported by substantial evidence. (*In re Koehler* (2010) 181 Cal.App.4th 1153, 1170.) Here, the trial court's entire discussion on this topic was that petitioner had "the ability to pay throughout th[e] period of time." But substantial evidence does not support that finding. The undisputed evidence was that petitioner's income is approximately \$2200 a month and that his expenses are virtually the same amount. The only other evidence regarding petitioner's ability to pay was that an ability to pay was found in 2007, when petitioner previously had been found in contempt for not paying the premium. The 2007 finding, however, is not evidence of a present ability to pay. Moreover, given the undisputed evidence that petitioner's income match his expenses, it cannot be said that there is substantial evidence supporting the finding that petitioner had the ability to pay.

Let a peremptory writ of mandate issue commanding respondent superior court to vacate its judgment finding petitioner guilty of contempt.