No. 312135

(Kittitas County Superior Court
No. 082002490)

89993-2

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

GARY WIVAG and SHERRY TRUMBALL,
d/b/a/ S&G LAND LTD.,

Appellants,

vs.

CITY OF CLE ELUM,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Gary Wivag and Sherry Trumball, d/b/a S&G Land LTD. (collectively hereafter as "Wivag") asks this Court to review the Court of Appeals' decision terminating review designated in Part II below.

II. COURT OF APPEALS' DECISION

Wivag seeks review of the January 16, 2014 Court of Appeals' decision in *Gary Wivag et al., v. City of Cle Elum*, No. 31213-5-III ("Decision"). A copy of the Decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Are stipulated judgments which expressly require compliance with state law, automatically exempt from Chapter 6.17 RCW in the enforcement of the judgments?

2. Are stipulated judgments which expressly require compliance with state law, automatically exempt from Chapter 7.48 RCW in nuisance abatement, and allow a municipality to forego obtaining a court order before removing inventory from a defendant's property?

IV. STATEMENT OF THE CASE

For more than two decades, Wivag has operated a small local business in Cle Elum called "The Trading Post." As an American entrepreneur, Wivag has engaged in various business ventures over the years at The Trading Post—ranging from a petting zoo to a consignment store.

During this time, Wivag became interested in collecting and selling antiques. Given his close ties with the community and his geographic location, Wivag acquired many unique western antiques, including turn-of-the-century farming equipment and hand crafted saddles and tack.

However, in spite of operating The Trading Post without incident for many years, the City of Cle Elum ("City") issued Wivag a Notice of Civil Violation and Order to Correct ("Notice") in January 2007. Within this Notice, the City alleged that Wivag violated certain provisions of the Cle Elum Municipal Code (CEMC). CP 3. At hearing on the Notice, the Hearing Examiner required Wivag to only install a site-obscuring fence on his property in order to remove any potential visual nuisance associated with storing his antique equipment outside The Trading Post's building envelope. CP 65. Wivag appealed the Hearing Examiner's decision to Superior Court which remanded the decision. CP 3. However, on remand the Hearing Examiner issued an order in April 2008 finding that Wivag's property was still in violation of the CEMC's nuisance provisions. CP 51.

To resolve as many issues as quickly as possible, the City and Wivag entered into a Stipulated Judgment and Injunction ("Stipulated Judgment") and filed it in Superior Court. CP 2. This Stipulated Judgment represented a

compromise between the parties, avoiding the necessity for additional litigation.[1] Pursuant to the Stipulated Judgment, Wivag was to:

1. Pay the City $10,000 within three calendar days from entry of the Stipulated Judgment;

2. File a complete application for a Conditional Use Permit pursuant to the Cle Elum Municipal Code by February 29, 2012; and,

3. Install a site obscuring fence along the entire frontage of the property by March 31, 2012. *Id.*

Altogether, the Stipulated Judgment articulated that **only these three conditions** needed to be satisfied in order to bring Wivag's business within compliance with the City's Code. *See id.*

Immediately after entering the Stipulated Judgment, Wivag paid the required $10,000 to the City within the specified time period. CP 120. On February 23, 2012, Wivag filed a Conditional Use Permit Application ("Application") with the City using its form. *Id.* At the time he submitted his Application, Wivag believed it was complete, containing all the required documentation. *Id.* However, two weeks after Wivag submitted his Application, the City's Administrator informed him that he believed the Application was missing certain elements. *Id.* Although the City had not

[1] The purpose of stipulations for judgment in CR2A is to "avoid disputes and to give certainty and finality to settlements and compromises, if they are made." *Eddleman v. McGhan*, 45 Wn.2d 430 (1954).

sent any written request for additional documentation, Wivag supplemented his Application with additional information on March 16th. *Id.*

Concurrent to his submission of his Application, Wivag commenced with installing a site-obscuring fence along the perimeter of his property in March 2012. *Id.* His preparations primarily included removing a wire fence that already surrounded his property. *Id.* Unfortunately, Wivag was operating under the mistaken belief that he had until May to complete the construction of his fence. *Id.* He had this belief due to his reliance on a draft of the Stipulated Judgment given to him during negotiations on stipulating to a judgment which listed May 15th as the specified deadline for the construction of the fence. *Id., see also* CP 123.[2] Thus, by relying on the draft, Wivag mistakenly did not finish installing the fence by March 31st.

Around the last week in April 2012, Wivag received a letter from the City advising him that it would begin "abatement activity on Tuesday May 1" at his property, citing authorization from the Stipulated Judgment. CP 120, 127. The City attempted to justify this notice of abatement stating "[i]t is unfortunate that you chose not to comply with the terms of the Stipulated Judgment and Injunction." CP 127. The letter, however, contained no specific information as to what terms of the Stipulated Judgment Wivag

[2] Please note that the Declaration of Gary Wivag (CP 119) mistakenly mislabeled the attached exhibits. Specifically, where Wivag refers to Exhibit B in his declaration, it should be Exhibit A. And where Wivag refers to Exhibit C, it should be Exhibit B.

violated or any opportunity to remedy the situation before the abatement began. *See id.*

Until Wivag received the notice of abatement from the City, he believed that he was completely complying with the Stipulated Judgment. CP 120. He received no previous notices or communications pertaining to the fact that he had not yet started construction of his fence. *Id.* Nevertheless, after receiving this notice, Wivag immediately called his fencing company and had them finish the site-obscuring fence within the following days. *Id.*

On May 1st, ***after the fence was installed***, the City arrived at Wivag's property with a fleet of vehicles to commence abatement. CP 121. Despite the presence of the newly constructed site-obscuring fence, the City proceeded to remove and destroy Wivag's inventory. *Id.* By the end of the day, the City destroyed Wivag's entire inventory, worth tens of thousands of dollars, completely gutting his business. *Id.* The City also removed and destroyed business records, including copies of tax returns, as well as personal documents such as vehicle titles and loan information. With the destruction of all his business inventory, Wivag was forced to close The Trading Post. *Id.*

To add insult to injury, the City subsequently brought a Motion for Supplemental Judgment, seeking $13,519.49 in reimbursement for the

forceful removal and destruction of Wivag's inventory. CP 32. Wivag opposed the proposed supplemental judgment on the basis that the City did not properly execute on the Stipulated Judgment in compliance with state law and municipal ordinance. CP 97-107. In spite of Wivag's opposition, the trial court granted the City's motion for supplemental judgment. CP 129. Wivag timely filed a Notice of Appeal with the Division III Court of Appeals, who took no oral argument on this case. The Court of Appeals issued its decision on January 16, 2014, affirming the trial court's ruling in favor of the City.

V. REASONS THE COURT SHOULD GRANT REVIEW

The Supreme Court may review a Court of Appeals' decision terminating review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3)-(4). This case involves an issue of substantial public interest, that being whether parties may execute judgments without compliance with controlling state laws, which are specifically designed to preserve the rights of the parties when the power of the court is invoked to take property. Here, the required opportunity for judicial oversight was thwarted, resulting in the government entering private property and destroy personal property. The potential for judicial intervention before

one's property is destroyed, is an important issue of substantial public interest.

Given its sheer intrusive nature into the private rights of individuals, every procedure for nuisance abatement, which is statutorily prescribed, must be strictly followed lest the government abuse its power. This case poses such an abuse of power inasmuch as the City illegally entered and destroyed Wivag's personal property without going through the proper procedural abatement steps as required by law and the Stipulated Judgment.

VI. ARGUMENT

A. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' HOLDING THAT THE STIPULATED JUDGMENT AUTHORIZED THE CITY TO DISREGARD RCW 6.17.070 AND LOCAL LAWS

The core of the Court of Appeals' Decision is grounded upon a single finding: that the Stipulated Judgment entitled, and preauthorized, the City to disregard state and local law when it unilaterally determined to abate Wivag's property. However, given fundamental contract principles and the plain language of the Stipulated Judgment, the Court of Appeals erred in this finding. Simply stated, the language of the Stipulated Judgment undermines the entirety of the Court of Appeals' Decision and supporting arguments. To allow the Decision to stand would both weaken

fundamental contract law and dissuade future parties from agreeing to compromise in the future. Accordingly, this Court should grant this petition for review and ultimately reverse the Court of Appeals' Decision.

1. The Court of Appeals failed to abide by the proper construction of stipulated judgments by rendering the express reference to compliance with state law completely meaningless.

As correctly pointed out by the Court of Appeals, the Stipulated Judgment, as a stipulated agreement, "is a contract and its construction is governed by the legal principles applicable to contracts." Decision, at 7 (quoting *Allstot v. Edwards,* 114 Wn. App. 625, 636 (2002)). The Decision also correctly points out that courts read the terms of a contract together, so that no term is rendered ineffective or meaningless. *Id.* (citing *Cambridge Townhomes, LLC. v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487 (2009)). And yet, despite these well-established rules, the Court of Appeals failed to apply them.

Specifically, the Stipulated Judgment was clear in identifying what the City could do in the event of breach:

> In the event that Defendants fail to timely complete the corrective action required...the City is authorized but not obligated to take any corrective action reasonably necessary to abate the public nuisances at the property **consistent with the Cle Elum Municipal Code and state law.**

CP 6 (emphasis added). Given this clear language, the Court of Appeals' contention that "[t]he agreement did not require additional court action before the City acted" **is flatly erroneous**. Decision, at 8. It is this holding which directly contradicts the fundamental provision that "Courts should not adopt a contract interpretation that renders a term ineffective or meaningless"[3] (inasmuch as the Decision fails to consider the plain language of the Stipulated Judgment requiring adherence to state and local law).

Contrary to the Court of Appeals' argument, the Stipulated Judgment is not *carte blanche* authorization for the City to unilaterally decree that Wivag violated the terms of the Stipulated Judgment or that it could take whatever it wanted from Wivag's property. Nor does requiring the City to comply with state and local law "violate the purpose behind stipulated judgments and violate contract principles." Decision, at 8.

Strangely, the Court of Appeals argued that if the City was required to comply with state and local law to enforce the Stipulated Judgment, Wivag "would be the only party receiving a benefit from the agreement." Decision, at 8-9. However, this line of reasoning completely ignores the nature of stipulations as a *compromise* between meritorious arguments. *Eddleman*, 45 Wn.2d at 430.

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[3] *Wagner v. Wagner*, 95 Wn.2d 94, 101 (1980).

Under the terms of the Stipulated Judgment, the City received the direct benefit of avoiding further litigation, obtaining a $10,000 fine, and the installation of new fence around Wivag's property. Similarly, Wivag benefited in avoiding further litigation costs and was afforded an opportunity to cure any perceived code violations on his property. *See generally*, CP 2-7. To effectuate this mutual exchange of promises, the parties negotiated, and entered into, a stipulated judgment which specifically outlined the responsibility of both parties. In consideration of these facts, the Court of Appeals' pronouncement that applying the safeguards of state and local law would somehow undermine the nature of the Stipulated Judgment itself is incorrect. The City received a speedy resolution to its code enforcement action and Wivag was ensured that any additional abatement activities would follow standard due process procedures required by state law. And yet, the Court of Appeals' Decision wiped out the protection the Legislature expressly provided in Chapter 6.17 RCW as is discussed below.

2. Any execution of a judgment must follow the provisions within Chapter 6.17 RCW.

RCW 6.17.060 identifies three ways to accomplish execution upon a judgment:

(1) First, against the property of the judgment debtor;

> (2) Second, for the delivery of the possession of real or personal property or such delivery with damages for withholding the same; and
>
> (3) Third, **commanding the enforcement of or obedience to any other order of the court.**

(numbering, spacing and emphasis added); *see also* Appendix B. The first provision of RCW 6.17.060 did not apply to Wivag because he paid the $10,000 provided in the Stipulated Judgment. CP 4; CP 120.

The second provision did not apply to Wivag as the Stipulated Judgment did not involve the delivery of real or personal property. *See* CP 41. Pertaining to the third option, this type of execution of a judgment "permits service of a certified copy of the judgment on the person against whom the judgment was entered or to whom it was directed, together with a writ of execution commanding obedience to or enforcement of the judgment...."[4] This third option directly applied to Wivag and the enforcement of the Stipulated Judgment.

3. The Court of Appeals removed the protections in Chapter 6.17 RCW which afford an offending party the opportunity to cure.

After a writ of execution is served, if the person against whom the judgment was entered disobeys or otherwise does not comply with the judgment, said person is subject to RCW 6.17.070 which states:

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[4] Marjorie D. Rombauer, 28 WASHINGTON PRACTICE: Creditors' Remedies – Debtors' Relief § 7.41, Kinds of Execution (2012)

> When a judgment of a court of record requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given or the person or officer who is required by the judgment or by law to obey the same, and **a writ may be issued** commanding the person or officer to obey or enforce the judgment. **Refusal to do so may be punished by the court as for contempt.**

Id. (emphasis added); *see also* Appendix B.

RCW 6.17.070 specifically identifies the issuance of a writ and then "contempt" as being the only remedial course of action for the disobedience of a court order. It **gives no authorization for self-help execution.** *See id.* The court's civil contempt power is the primary vehicle for ensuring compliance with a court order: "The primary purpose of the civil contempt power is to coerce a party to comply with an order or judgment." *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105 (2002) (citation omitted); *see also King v. Dep't of Soc. & Health Services*, 110 Wn.2d 793, 800 (1988) ("the purpose of a civil contempt sanction is to coerce future behavior that complies with a court order.").

To bring an action for contempt, the aggrieved party must file a motion to the court. RCW 7.21.030(1); Appendix B. When the action or inaction triggering the motion for contempt occurs outside of the court room, the contemnor must be afforded notice and hearing before the court may enforce an order of contempt. *Id.* At this hearing, the court may

conduct review hearings to determine whether the contemnor has complied with requirements imposed at previous hearings. *See State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246 (1999).

During this review, the party seeking a finding of contempt has the burden of proving the contemptuous conduct by a preponderance of the evidence. *In re Marriage of James*, 79 Wn. App. 436 (1995). Importantly, if a person is found in contempt, he/she must be afforded the opportunity to "purge" the contempt charge by complying with the original order within a reasonable time. *See Bloomer*, 94 Wn. App. at 253. (An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for non-compliance).

4. The Court of Appeals' decision eviscerates the protection in Chapter 6.17 RCW by approving the City's failure to adhere to the applicable rules for executions of judgment which prevented Wivag from rectifying his belated compliance.

Applying these clear rules to this case, the City failed to serve a writ of execution and failed to bring an action of contempt against Wivag for his alleged violations of the Stipulated Judgment as statutorily required. Furthermore, the language of the Stipulated Judgment itself specifically authorizes the City to bring a motion for contempt after discussing the City's remedies upon Wivag's breach. CP 6. However,

instead of complying with both the law and the Stipulated Judgment, the City engaged in self-help, forcefully removing inventory and business records from Wivag's property, incurring completely avoidable and unnecessary costs. The Court of Appeals concluded this was proper.

Unfortunately, the City willfully ignored that the installation of the site-obscuring fence **was completed** when it showed up to abate Wivag's property. CP 120-121. The presence of this fence, in tandem with Wivag's pending conditional use permit,[5] and the payment of $10,000,[6] removed any need for enforcement and brought Wivag's property fully within compliance with the City code. And yet, despite this fact, the City proceeded anyway, possibly due to a retributive motive as suggested by the record. *See* CP 121. Given the City's actions, the Court of Appeals' Decision opens the door for abusive private enforcement of judgments, unsupervised by the judicial branch.

While Wivag readily admits that he misunderstood the date by which he had to construct the site-obscuring fence,[7] failure to comply by this date did not automatically authorize the City to proceed in the manner

[5] CP 120
[6] *Id.*
[7] CP 120-121

that it did. In fact, had the City gone through the proper channels of serving a writ, Wivag would have constructed the fence even sooner.[8]

Altogether, in Wivag's own words: "the City ignored everything I did to comply with the judgment and seemed more concerned with putting me out of business than actually enforcing city codes." CP 121. Such a statement is bolstered in two ways: first by the fact that the City did not inform Wivag of his noncompliance or violation of the Stipulated Judgment until approximately five days prior to its notice of abatement on May 1st; and second, because Wivag's immediate response to the notice by completing the fence (which is what the City supposedly wanted), was completely ignored. Verbatim Report of Proceedings, p. 3. If the City was truly concerned with abating the view of Wivag's inventory, it would not have expended thousands of dollars to remove materials that were already obscured from public view and then seek that Wivag foot the bill in the Supplemental Stipulated Judgment.

Wivag endeavored to comply as best as he could with the Stipulated Judgment. He paid the $10,000 fine, applied for a conditional use permit, and installed a site-obscuring fence. The fact that the fence was not installed by a certain date does not erase Wivag's **substantial**

[8] This is evidenced by the fact that, as soon as Wivag discovered he was out of compliance with the Order, he "contacted a fencing company and had a complete site-obscuring fence installed within two days" after receiving said notice. CP 121.

compliance with the Stipulated Judgment in good faith. That being said, at the moment the City realized or discovered Wivag's noncompliance with the Stipulated Judgment, its ***only*** avenue of redress was to issue a writ and then bring a motion for contempt if necessary—not engage in self-help. RCW 6.17.070; Appendix B. That avenue clearly would have avoided the more than $13,000 cost to the City and the taking and disposal of tens of thousands of dollars in inventory and personal and business records from Wivag.

B. THE COURT OF APPEALS REMOVED THE PROTECTIONS IN CHAPTER 7.48 RCW FOR ABATING NUISANCES.

In addition to violating the proper procedure for the executions of judgments, the City also failed to comply with the required preconditions for the abatement of a nuisance found within Chapter 7.48 RCW. Again, the Court of Appeals erroneously construes the Stipulated Judgment as authorizing the City to bypass these preconditions. However, as discussed above, the Stipulated Judgment explicitly requires compliance with state and local law, which includes the preconditions to abating a nuisance. Ultimately, the Court of Appeals eviscerated the legislative protections afforded to individuals such as Wivag, resulting in the improper taking and destruction of property.

RCW 7.48.250 provides in regards to a public or common nuisance, that the court "may order such nuisance to be abated, and issue a warrant...." *Id.*; *see also* Appendix B. Specifically pertaining to the warrant for abatement, RCW 7.48.260 outlines the process by which such a warrant is issued:

> When, upon indictment or information, complaint or action, any person is adjudged guilty of a nuisance, if it be in superior court the court may in addition to the fine imposed, if any, or to the judgment for damages or costs, for which a separate execution may issue, order that such nuisance be abated, or removed at the expense of the defendant, and **after inquiry into and estimating, as nearly as may be, the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor...**

RCW 7.48.260 (emphasis added); *see also* Appendix B. Stated another way, if a party is found guilty of nuisance, the court may issue a warrant to abate the nuisance, but only *after* inquiry into estimating the cost to defray the expenses of the abatement. *See id.* Significantly, the court may allow the defendant to stay the warrant, provided that he or she enters into a bond conditioned upon the defendant's cure of the nuisance within no longer than six months' time. RCW 7.48.270; Appendix B.[9]

Altogether, Chapter 7.48 RCW provides a clear set of preconditions to the enforcement of nuisance abatement. These provisions

[9] The City codified similar code provisions within its municipal code, mirroring their RCW counterparts—CEMC 8.12.080 *et. seq.*

ensure that both the public's and defendant's rights are considered and protected while addressing a public nuisance.

Unfortunately, for the City's own reasons, the City chose to ignore these clear procedures, opting instead to unilaterally abate Wivag's property. At the time of the abatement, Wivag was never given a copy of the warrant, nor was afforded the opportunity to stay the warrant of abatement, as allowed under RCW 7.48.270. *See* CP 121. This is because ***no warrant existed*** authorizing the City to engage in abatement activities in the first place. *Id.* Absent a warrant issued from the Court, the City was not authorized to remove Wivag's inventory from his property.

The Stipulated Judgment contained no inquiry into and estimation of the sum necessary to defray the expenses of abatement as required by RCW 7.48.260. Nor can the Stipulated Judgment serve as a substitute for compliance with that law because it provides no way for Wivag to post a bond in lieu of execution of a warrant for abatement as prescribed under RCW 7.48.270. As such, the Stipulated Judgment could not provide the warrant-like authorization required to abate the property.

By affirming the trial court and siding with the City, the Court of Appeals eliminated protections in state law simply because certain terms were agreed to within a stipulated judgment. The unnecessary destruction

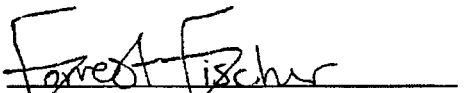
of property after the nuisance was fully abated is what these laws were designed to avoid—laws which the Court of Appeals' Decision has gutted.

VII. CONCLUSION

The Stipulated Judgment and Injunction signed by Wivag and the City stated that if Wivag did not comply with the stipulated corrective actions, the City was authorized to abate the public nuisance "***consistent with Cle Elum Municipal Code and state law***." CP 6 (emphasis added). As demonstrated above, the Court of Appeals ignored controlling state law when the City engaged in abatement activities on Wivag's property. Accordingly, this Court should grant this petition and ultimately reverse the Court of Appeals' Decision.

RESPECTFULLY submitted this 14th day of February, 2014.

GROEN STEPHENS & KLINGE LLP

By: 

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DECLARATION OF SERVICE

I, Linda Hall, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On February 14, 2014, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Michael R. Kenyon	☐ Legal Messenger
KENYON DISEND PLLC	☒ First Class U.S. Mail
11 Front Street South	☐ Federal Express Overnight
Issaquah, WA 98027-3820	☐ E-Mail: Mike@KenyonDisend.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 14th day of February, 2014 at Bellevue, Washington.

Linda Hall

APPENDIX A

FILED
JAN. 16, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

GARY WIVAG and SHERRY TRUMBALL, d/b/a S&G LAND LTD.,	)	No. 31213-5-III
Appellants,	)	
v.	)	UNPUBLISHED OPINION
CITY OF CLE ELUM,	)	
Respondent.	)	

KULIK, J. — Gary Wivag and the city of Cle Elum (City) agreed to a stipulated judgment and injunction to address the nuisance violations on Mr. Wivag's property. When Mr. Wivag failed to satisfy his obligations under the agreement, the agreement authorized the City to take corrective action to abate the nuisance. Following abatement, the trial court entered a supplemental judgment and ordered Mr. Wivag to pay associated costs. Mr. Wivag appeals. He contends that the trial court erred in entering the supplemental judgment because the City engaged in self-help by abating the property without a court order. He also contends that the City failed to comply with its own preconditions to enforcement of the nuisance abatement. We disagree with Mr. Wivag's

arguments and affirm the trial court's ruling in favor of the City.

FACTS

In 2008, a hearing examiner found the existence of numerous public nuisances on Mr. Wivag's property and ordered abatement of these nuisances. Mr. Wivag failed to comply. The City sought enforcement of the hearing examiner's order.

In January 2012, Mr. Wivag and the City entered into a "Stipulated Judgment and Injunction" to address the nuisance violations. Clerk's Papers (CP) at 2-7. Mr. Wivag and the City stipulated (1) that Mr. Wivag failed to remedy the violations found by the hearing examiner and allowed new public nuisances to occur on the property, (2) that Mr. Wivag was required to screen the property frontage, and (3) that Mr. Wivag was required to submit a complete application for a conditional use permit (CUP) for his land use and business activities. The parties also stipulated to a judgment in favor of the City for $10,000.

Based on this stipulation, the court ordered (1) that Mr. Wivag pay the City $10,000 within 3 calendar days of the stipulated judgment and injunction, (2) that Mr. Wivag remedy all code violations or other deficiencies at the property as noted in the 2008 hearing examiner order within 30 days of the effective date of the injunction, (3) that Mr. Wivag install wood fencing along the entire frontage of the property not later

than March 31, 2012, and (4) that Mr. Wivag file a complete application for a CUP not later than February 29, 2012.

The trial court also ordered,

> 3. In the event that Defendants fail to timely complete the corrective action required by the terms of [this order and injunction], the City is authorized but not obligated to take any corrective action reasonably necessary to abate the public nuisances at the Property consistent with the Cle Elum Municipal Code and state law. In that event, the City is authorized to present a supplemental judgment assessing the associated costs, including City employee costs, contractor fees, and attorney fees against Defendants and in favor of the City.
>
> 4. The City shall retain the right to bring motions for contempt and to seek any other remedy available at law or in equity. The Court shall retain jurisdiction over this case to hear any such matters.

CP at 6.

Mr. Wivag paid the $10,000 judgment to the City within the required time period. On February 23, Mr. Wivag filed a CUP application. He believed that he had included all required information. On March 20, the City informed Mr. Wivag that the application was incomplete. The City identified three areas of the application that required additional information. The City did not give a time period for submitting the additional materials. Mr. Wivag claims that he sent in the materials shortly after the notification.

As for the fence, Mr. Wivag believed he had until May 15 to complete the fence. He based this belief on an earlier draft version of the stipulated agreement. The old wire fence was removed in March. He did not install the fencing by March 31.

The City sent Mr. Wivag a letter notifying him that it would begin abatement activities on May 1 due to Mr. Wivag's failure to comply with the stipulated judgment and injunction. The City informed Mr. Wivag that the stipulated judgment and injunction authorized the abatement activity and the assessment of costs.

Beginning on May 1, the City abated Mr. Wivag's property. Then, following the terms of the stipulated judgment, the City filed a motion for supplemental judgment. The City asked the trial court to assess Mr. Wivag with the costs, contractor fees, and attorney fees incurred by the corrective action. The trial court granted the City's motion and entered a supplemental judgment in the amount of $13,519.49.

Mr. Wivag appeals the supplemental judgment. He contends that he should not be required to pay the costs of abatement because the City acted without legal authority when it abated the nuisance. He maintains that the City improperly enforced the stipulated judgment without first obtaining a writ of execution as required by RCW 6.17.070. In the alternative, he contends that the City failed to comply with its own preconditions to enforcement of the nuisance abatement.

ANALYSIS

A trial court's legal conclusions and statutory interpretations are reviewed de novo. *Vance v. XXXL Dev., LLC*, 150 Wn. App. 39, 41, 206 P.3d 679 (2009).

However, a trial court's decision to enforce a binding agreement under CR 2A is reviewed for an abuse of discretion. *In re Patterson*, 93 Wn. App. 579, 586, 969 P.2d 1106 (1999). "[A] trial court's determination that the parties fully appreciated the terms of the settlement will not be disturbed where it is supported by the evidence." *Snyder v. Tompkins*, 20 Wn. App. 167, 173-74, 579 P.2d 994 (1978).

Courts are inclined to view stipulated settlements as final. *Id.* at 173. A judgment by consent will not be reviewed on appeal absent fraud, mistake, or want of jurisdiction. *Wash. Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957).

Execution of the Judgment. Mr. Wivag admits that the stipulated judgment and injunction is valid and that the supplemental judgment is authorized under the stipulated agreement. Also, he admits that he did not meet the timelines in the stipulated judgment and injunction. On appeal, Mr. Wivag maintains that he should not be required to pay the costs for abatement of the nuisance because the City did not follow proper procedure for enforcing the stipulated judgment under RCW 6.17.070.

RCW 6.17.070 governs the execution of a judgment in particular cases. It reads: "When any judgment of a court of this state requires the payment of money or the delivery of real or personal property, it may be enforced by execution. When a judgment of a court of record requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given or the person or officer who is required by the judgment or by law to obey the same, and a writ may be issued commanding the person or officer to obey or enforce the judgment. Refusal to do so may be punished by the court as for contempt." RCW 6.17.070.

Contrary to Mr. Wivag's contention, the City was not required to enforce the stipulated judgment and injunction under RCW 6.17.070. The terms of the stipulated judgment and injunction did not require execution under this statute. Mr. Wivag agreed to other procedures when he reached a stipulated agreement with the City. The trial court authorized the agreed upon procedures.

CR 2A governs stipulated agreements. CR 2A applies when (1) an agreement was made by the parties or the attorneys in respect to the proceedings in a cause, and (2) the purport of the agreement is disputed. *In re Marriage of Ferree*, 71 Wn. App. 35, 39, 856 P.2d 706 (1993). A stipulated judgment that is properly entered is binding on the parties and will not be reviewed on appeal absent a showing of fraud, mistake, misunderstanding,

or lack of jurisdiction. *Baird v. Baird*, 6 Wn. App. 587, 589, 494 P.2d 1387 (1972). The stipulated judgment "excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment." *Wash. Asphalt*, 51 Wn.2d at 91. The purpose of CR 2A agreements is to "insure that negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one." *Ferree*, 71 Wn. App. at 41. The amicable settlement of disputes is favored by the courts. *Snyder*, 20 Wn. App. at 173.

"A stipulation agreement signed and subscribed by the attorneys representing the parties is a contract and its construction is governed by the legal principles applicable to contracts." *Allstot v. Edwards*, 114 Wn. App. 625, 636, 60 P.3d 601 (2002). "A traditional bilateral contract is formed by the exchange of reciprocal promises. The promise of each party is consideration supporting the promise of the other." *Govier v. N. Sound Bank*, 91 Wn. App. 493, 499, 957 P.2d 811 (1998). We read the terms of a contract together so that no term is rendered ineffective or meaningless. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009).

In Mr. Wivag's agreement with the City, the stipulated judgment and injunction authorized the City to take corrective action reasonably necessary to abate the public nuisance in the event that Mr. Wivag failed to timely complete his obligations. Mr.

Wivag admits that he did not fully comply.[1] Under the terms of the agreement, the City entered his property, abated the nuisance, and petitioned the court for abatement costs. The agreement did not require additional court action before the City acted to abate the nuisance. Mr. Wivag agreed to the stipulated judgment and is bound by its terms, including the authorization of action by the City and the entry of the supplemental judgment.

Even though Mr. Wivag did not meet his obligations, the City was not required to compel him to comply by requesting execution of the judgment. Mr. Wivag never sought to avoid enforcement of the agreement. He attempted to perform, but instead failed. Provisions were in place for his failure to comply. There was no need to request execution of a judgment that was not being challenged and where relief was agreed upon and provided in the judgment.

Requiring following RCW 6.17.070 would violate the purpose behind stipulated judgments and violate contract principles. Stipulated judgments avert the need for trial. Under contract principles, if a writ was needed to enforce this stipulated judgment and injunction, the provision that allowed the City to take corrective action would be meaningless. Furthermore, Mr. Wivag would be the only party receiving a benefit from

[1] Mr. Wivag suggests that his lack of performance should be excused because he

the agreement. Mr. Wivag gained time to cure the nuisances found by the hearing examiner. In exchange, if Mr. Wivag failed to fulfill his obligations, he authorized the City to take corrective action. This provision would be of no benefit if the City was still required to obtain a court order to act on the terms that were bargained for by the parties. Requiring additional litigation to enforce a mutual agreement does not favor the amicable settlement of disputes.

The City did not take matters into its own hands, as asserted by Mr. Wivag. The City acted within the scope of the law and within the scope of the stipulated judgment and injunction. RCW 7.48.220 allows any public body to abate a nuisance. Mr. Wivag agreed that the City could take corrective action reasonably necessary to abate the nuisance if he failed to timely complete his obligations. The trial court did not err by entering the supplemental judgment ordering Mr. Wivag to pay for the abatement.

The City was not required to enforce the stipulated judgment under RCW 6.17.070.

City's Preconditions. Mr. Wivag also contends that the City failed to comply with RCW 7.48.250, RCW 7.48.260, and Cle Elum Municipal Code (CEMC) 8.12.070 when it abated the nuisance. Generally speaking, both the statute and the CEMC require the

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substantially complied. He provides no legal authority for this argument.

issuance of a writ before a nuisance can be abated. RCW 7.48.250; CEMC 8.12.070. RCW 7.48.260 requires that the trial court inquire into the costs of abatement before issuing a warrant ordering abatement at the defendant's expense.

A writ was not needed for the City to act under the terms of the stipulated judgment and injunction. While RCW 7.48.250 and CEMC 8.12.070 provide a method for the City to abate a nuisance, this is not the procedure agreed upon by the City and Mr. Wivag in the stipulated judgment. The parties entered into an agreement to allow Mr. Wivag to correct the violations before taking drastic abatement measures. The stipulated judgment "excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment." *Wash. Asphalt*, 51 Wn.2d at 91.

Additionally, there was no need for additional court authorization under the procedures set forth in RCW 7.48.250 and CEMC 8.12.070 because the trial court authorized abatement in the stipulated judgment and injunction. And under RCW 7.48.260, there was no need to estimate costs before abatement. The parties did not include such a provision. The court reviewed costs before issuing the supplemental judgment, as provided in the stipulated judgment and injunction.

The City was not required to follow additional statutory procedures outside the scope of the agreement to execute abatement.

Attorney Fees. The City requests attorney fees on appeal.

Where a contract allows an award of attorney fees at trial, an appellate court has authority to award attorney fees on appeal. *Bloor v. Fritz*, 143 Wn. App. 718, 753, 180 P.3d 805 (2008). A stipulated judgment is a contract between the parties and is subject to contract principles. *Allstot*, 114 Wn. App. at 636. The stipulated judgment and injunction stated that in the event that the City takes corrective action reasonably necessary to abate the nuisance on Mr. Wivag's property, "the City is authorized to present a supplemental judgment assessing the associated costs, including . . . attorney fees against Defendants and in favor of the City." CP at 6.

The City is awarded attorney fees on appeal. The stipulated judgment allows for the City to request attorney fees in the event that it is required to take corrective action to abate the nuisance on Mr. Wivag's property. The City took corrective action, and this appeal is directly related to that action. While Mr. Wivag contends that his challenge does not pertain to the stipulated judgment so the fee provision is inapplicable, his argument is not persuasive. Mr. Wivag's arguments were rooted in the stipulated judgment and the City's authority to act under the parties' agreement. The City incurred attorney fees defending its abatement actions. It is entitled to attorney fees on appeal.

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Wivag v. City of Cle Elum

We affirm the trial court and grant the City's request for attorney fees.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Korsmo, C.J.

Fearing, J.

APPENDIX B

MATERIAL PORTIONS OF CITED RCW'S

RCW 6.17.060: Kinds of execution.

There shall be three kinds of executions: First, against the property of the judgment debtor; second, for the delivery of the possession of real or personal property or such delivery with damages for withholding the same; and third, commanding the enforcement of or obedience to any other order of the court. In all cases there shall be an order to collect the costs.

[1987 c 442 § 406; 1929 c 25 § 3; RRS § 511. Prior: Code 1881 § 327; 1877 p 68 § 331; 1854 p 176 § 244. Formerly RCW 6.04.020.]

RCW 6.17.070: Execution in particular cases.

When any judgment of a court of this state requires the payment of money or the delivery of real or personal property, it may be enforced by execution. When a judgment of a court of record requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given or the person or officer who is required by the judgment or by law to obey the same, and a writ may be issued commanding the person or officer to obey or enforce the judgment. Refusal to do so may be punished by the court as for contempt.

[1987 c 442 § 407; 1957 c 8 § 1; 1929 c 25 § 1; RRS § 512. Prior: Code 1881 § 326; 1877 p 68 § 330; 1854 p 176 § 244. Formerly RCW 6.04.030.]

RCW 7.21.030: Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]

RCW 7.48.250: Penalty — Abatement.

Whoever is convicted of erecting, causing or contriving a public or common nuisance as described in this chapter, or at common law, when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided: PROVIDED, That orders and warrants of abatement shall not be issued by district judges.

[1987 c 202 § 136; 1957 c 45 § 1; Code 1881 § 1248; 1875 p 81 § 14; RRS § 9925.]

RCW 7.48.260: Warrant of abatement.

When, upon indictment or information, complaint or action, any person is adjudged guilty of a nuisance, if it be in superior court the court may in addition to the fine imposed, if any, or to the judgment for damages or costs, for which a separate execution may issue, order that such nuisance be abated, or removed at the expense of the defendant, and after inquiry into and estimating, as nearly as may be, the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor: PROVIDED, That if the conviction was had in a district court, the district judge shall not issue the order and warrant of abatement, but on application therefor, shall transfer the cause to the superior court which shall proceed to try the issue of abatement in the same manner as if the action had been originally commenced therein.

[1987 c 202 § 137; 1957 c 45 § 2; Code 1881 § 1249; 1875 p 81 § 15; RRS § 9926, part. FORMER PARTS OF SECTION: Code 1881 § 1250; 1875 p 81 § 16.]

RCW 7.48.270: Stay of warrant.

Instead of issuing such warrant, the court may order the same to be stayed upon motion of the defendant, and upon his or her entering into a bond in such sum and with such surety as the court may direct to the state, conditioned either that the defendant will discontinue said nuisance, or that within a time limited by the court, and not exceeding six months, he or she will cause the same to be abated and removed, as either is directed by the court, and upon his or her default to perform the condition of his or her bond, the same shall be forfeited, and the court, upon being satisfied of such default, may order such warrant forthwith to issue, and an order to show cause why judgment should not be entered against the sureties of said bond.

[2011 c 336 § 220; 1957 c 45 § 3; Code 1881 § 1251; 1875 p 81 § 17; RRS § 9927.]