No. 312135

(Kittitas County Superior Court
No. 082002490)

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.

REPLY BRIEF OF APPELLANTS

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COUNTER STATEMENT OF FACTS

Appellants Gary Wivag and Sherry Trumball, d/b/a S& G Land Ltd., (collectively as "Wivag") generally dispute Respondent City of Cle Elum's ("City") characterization of this case and its slanted account of Wivag's compliance with the Stipulated Judgment. Within the Brief of Respondent City of Cle Elum ("City's Brief"), the City misrepresented certain facts, while ignoring others, in an effort to deemphasize the draconian tactics it employed when illegally abating Wivag's property.

First, the City misrepresented that Wivag failed to comply with the Stipulated Judgment's command to "[f]ile a complete application for a Conditional Use Permit [CUP] pursuant to the Cle Elum Municipal Code by February 29, 2012." City's Brief, at p. 3-4; CP 2. However it is un-refuted evidence that Wivag *did* file an on-time CUP application with the City using its form on February 23, 2012—six days before the Stipulated Judgment deadline. CP 120 lns. 4-5. Tellingly, the City fails to mention this fact.[1]

Second, the City failed to address the majority of Wivag's Statement of Facts in his Opening Brief[2] which outlines his good faith

[1] The City also falsely states that "Wivag concedes that he failed to satisfy…the CUP date." City's Brief, at 7. This statement is simply untrue as Wivag clearly submitted his CUP application 6 days proper to the CUP deadline within the Stipulated Judgment. CP 120.

[2] Brief of Appellants.

effort and substantial compliance with the Stipulated Judgment. Opening Brief, at p. 3-4. These facts clearly disprove the City's unwarranted characterization of Wivag as someone with a "pattern of non-compliance." City's Brief, at p. 3. Indeed, by failing to address or even refute the facts demonstrating Wivag's substantial compliance with the Stipulated Judgment, the City concedes these facts as true.

Ultimately, after reviewing the totality of the circumstances surrounding this case, the Court should find that the City anxiously waited for any excuse to zealously gut Wivag's business. This eagerness finally manifested itself when the City illegally abated of Wivag's property without a warrant and under the pretense that Wivag failed to install a site obscuring fence in time.[3]

ARGUMENT

I. THE CITY MISSTATES THE TRUE ISSUES ON APPEAL

Attempting to deflect and redirect the Court away from the real issues on appeal, the City raised a multitude of red herring arguments in its Brief. Many of these arguments pertain to the validity of the Stipulated Judgment and the availability of a supplemental judgment. *See generally* City's Brief. However, by focusing only on these issues, the City failed to

[3] Again, the City never addresses the fact that, at the time it went to illegally abate Wivag's property, Wivag had installed a site obscuring fence—thus coming into compliance with the Stipulated Judgment. CP 120-21.

address the vast majority of Wivag's arguments relating to the illegality of the City's execution of the Stipulated Judgment and abatement of his property.

Simply, Wivag *does not challenge* the validity of the Stipulated Judgment. Neither does Wivag dispute that a supplemental judgment is authorized under the Stipulated Judgment—but only if the City properly complied with the law. Rather, what Wivag *does* contend is that **the City illegally executed the Stipulated Judgment and abated Wivag's property**—that is to say, the City failed to either (1) seek an order for contempt, or (2) obtain a warrant for abatement contrary to clear state and local laws. This is the true issue before this Court.

In summation, the question for this Court to answer is whether a judgment-creditor may unilaterally enforce that judgment without seeking judicial confirmation or authorization to do so. Both state and local law dictate that the answer to this question is a resounding no.[4]

II. *DE NOVO* IS THE CORRECT STANDARD OF REVIEW

Keeping with its mischaracterization of the issues in this case, the City erroneously argues that the proper standard of review in this case is abuse of discretion. City's Brief, at 6. It does so by relying on its

[4] Elsewise, a party in whose favor judgment was rendered would have the ability to take possession of a judgment-debtor's property by merely asserting that the judgment-debtor failed to comply with the judgment.

assertion that Wivag is challenging the Stipulated Judgment itself. *Id.* However, as stated above, Wivag never once challenged the validity of the Stipulated Judgment. The City's argument that abuse of discretion is the proper standard of review is completely based on a false premise.

Given the above, the fact remains that whether the City complied with state statutes and local city ordinances is **purely a legal question**, which is reviewed *de novo* on appeal. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 642 (2007).

III. THE CITY MISCONSTRUES THE LANGUAGE OF THE STIPULATED JUDGMENT

The City attempts to excuse, and even support, its illegal execution and abatement of Wivag's property by claiming that the Stipulated Judgment authorized it to "take 'any' corrective action reasonably necessary to abate nuisances, including completing the abatement, seeking contempt sections, or 'any other remedy available at law or in equity.'" City's Brief, at 8 (citing CP 6). The City continues to repeat this argument throughout its brief, stating that the Stipulated Judgment authorized it to disregard and bypass clear statutory provisions pertaining to the execution of judgments. *See* City's Brief, at 11-15. However, in order to support this argument, the City improperly rewrites the clear language of the

Stipulated Judgment—going so far as to add additional language that is not within the actual Judgment.[5]

The City's revisionist interpretation of the Stipulated Judgment is best demonstrated when comparing its Brief to the verbatim language within the Stipulated Judgment. Specifically, Section II of the Stipulated Judgment, Subsection 3 states as follows:

> In the event that Defendants fail to timely complete the corrective action required by the terms of paragraph 2.B., above, the City is authorized but not obligated to take any corrective action reasonable necessary to abate 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.

CP 6 (emphasis added). Comparing this verbatim language to the City's Brief, nowhere within this language is the City authorized to "complete[] the abatement" as it has argued. City's Brief, at 8. Rather, the City was only authorized to take corrective actions which **complied with state and local law.** *Id.* While both state and local law do allow for nuisance abatement, such abatement may take place **only** after following clear procedural steps.

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[5] Ironically, the City has alleged that Wivag's argument "constitutes a request for this Court to re-write the contract between the parties." City's Brief, at 7. This is ironic as the City has *actually* re-written key language within the Stipulated Judgment to excuse its illegal execution and abatement activities.

Contrary to the City's argument,[6] Section II of the Stipulated Judgment is not *carte blanche* authorization for the City to unilaterally decree that Wivag violated the terms of the judgment. Nor does the Stipulated Judgment authorize the City to circumvent the proper legal processes and proceedings required to execute the judgment.

Altogether, the City's allegation that the Stipulated Judgment "does not require compliance with, or even refer to, RCW 7.48.250 or RCW 6.17.070"[7] is completely false.[8] Indeed, this argument is contradicted by the plain language of the Stipulated Judgment which clearly requires compliance with "state law"—*i.e.,* RCW 7.48.250 and RCW 6.17.070[9]—in addition to local ordinances. CP 6. Exactly how the City believes that RCW 7.48.250 and RCW 6.17.070 do not constitute "state law" is not explained.

IV. THE CITY MISCONSTRUES *STATE V. LEW*

In addition to improperly rewriting the Stipulated Judgment to justify its actions, the City has also alleged that the Stipulated Judgment "need not be tied to specific statutory procedures." City's Brief, at 12. In

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[6] City's Brief, at 8.
[7] City's Brief, at 8.
[8] Although the City only mentioned these two statutes, Wivag cited several other on-point RCW's within his Opening Brief. Specifically, the following are the statutes which the City failed to address: RCW 6.17.060, RCW 7.21.030, RCW 7.40.150, and RCW 7.48.260-270. Wivag requests that the Court review these statutes which are appended to his Opening Brief.
[9] *See also* Fn. 8 *supra.*

other words, the City argues that the Stipulated Judgment *authorized* it to disregard clear statutory procedures and provisions. *Id.*

To support this argument, the City relies upon *State v. Lew,* 25 Wn.2d 854 (1946). However, the City misconstrues the language and ultimate holding in *Lew*. Indeed, if anything, *Lew* supports Wivag's contention that the City failed to follow proper statutory procedures when engaging in abatement activities. *See generally id.*

In *Lew*, the defendant was ordered and enjoined from running a gambling hall for one year. *Id.* at 860. However, when the defendant violated the court order/injunction, the prosecuting attorney *brought an action of contempt* against the defendant. *Id.* at 857-858.[10] In response, the defendant challenged the validity of the contempt proceedings by arguing, among other things, that there were no statutory provisions which precluded him from running a gambling hall. *Id.* at 858.

In its analysis, the Supreme Court disagreed with the defendant, stating that "[i]t is a general principle that a disobedience of any valid order of the court constitutes contempt unless the defendant is unable to comply with it." *Id.* at 864. Ultimately, the court upheld the injunction and held the defendant in contempt. *Id.* at 864-65.

[10] Contempt, rather than self-execution, is what is required in such situations.

The City incorrectly states that the court in *Lew* "determined that the existence of statutory remedies for a nuisance abatement did not preclude a court from exercising its equitable powers to issue injunctive relief." City's Brief, at 12. This statement is completely false as Supreme Court **stated that no statutory provision existed** outlining the procedures for nuisance abatement in Mr. Lew's case. *Lew,* 25 Wn.2d at 865.

Indeed, *Lew* stands for the proposition that the court's equitable powers *are only available* when there is **no** controlling statutory provision(s). *See Lew*, 25 Wn.2d at 865. This is an important distinguishing fact here as Wivag has cited a multitude of state and local laws that clearly govern the proper procedures for executing a judgment and abating a nuisance. *See generally*, Opening Brief. Furthermore, *Lew* affirms that a judgment creditor cannot, on its own accord, throw clear statutory procedures out the window and claim that it acted under the court's equitable powers.

If anything, *Lew* stands as an example of the proper procedures by which the government enforces a court order and abates a nuisance. Simply, when Mr. Lew was found to have violated the injunction, the State instigated **contempt proceedings** against him in superior court. *Id.* at 857-8. This process afforded Mr. Lew the opportunity to defend his actions, which ultimately resulted in a Supreme Court opinion. *See id.*

Here, the City completely bypassed clear statutory processes and instead unilaterally deemed Wivag to have violated the Stipulated Judgment and improperly abated Wivag's property.

Ultimately, the Court should disregard the City's argument that the Stipulated Judgment authorized it to disregard clear statutory provisions pursuant to its misinterpretation of *Lew*.

V. WIVAG DID NOT WAIVE HIS RIGHTS UNDER RCW 7.48.250 OR RCW 6.17.070

Within its Brief, the City argued that because Wivag "claims no fraud, mutual mistake, or want of jurisdiction on appeal," that somehow he is barred from asserting that the City failed to comply with state and local law in the execution of the Stipulated Judgment. City's Brief, at 9. Indeed, the City goes so far as to allege that by signing the Stipulated Judgment, Wivag "waived" his rights to the statutory procedures of RCW 7.48.250 and RCW 6.17.070. *Id.* However, this argument is both unpersuasive and yet another example of misdirection by the City.

As stated within this Reply, Wivag has not, and does not, challenge the validity of the Stipulated Judgment itself. Rather Wivag asserts that the City illegally executed the Stipulated Judgment and illegally abated his property. Because this is the actual issue on appeal, Wivag would have no reason to claim fraud, mutual mistake, or want of jurisdiction on appeal—

contrary to the City's assertions[11]—as these defenses are made when addressing the enforceability of a contract (or in this case, a stipulated judgment). *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wn.2d 89, 91 (1957).

Furthermore, nothing within the Stipulated Judgment signed by Wivag mentions, or even hints, that he voluntarily waived his statutory rights—especially those rights to procedures under RCW 7.48.250, RCW 6.17.070, and the other five RCW's cited by Wivag in his Opening Brief. *See* Fn. 8, *supra*. If anything, these rights and procedures were *secured* within the Stipulated Judgment as it explicitly required the City to comply with "state law" and local ordinances. CP 6. Thus, the City's argument is completely at odds with the doctrine of waiver which requires either an "express agreement" or a "voluntary act…to dispense with something of value or to forgo some advantage." *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954).

Indeed, by arguing waiver, the City has effectively **conceded** that the legal procedures prescribed under RCW 7.48.250 and RCW 6.17.070 normally apply to executing a judgment, absent waiver of that right. *See* City's Brief, at 9. This is due to the fact that waiver only applies when

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[11] *Id.*

"[t]he right, advantage, or benefit...exist[ed] at the time of the alleged waiver." *Bowman*, 44 Wn.2d at 669.

In the end, the Stipulated Judgment explicitly requires that the City adheres to and conforms to all state and local laws for reasons discussed *supra*. There is simply no evidence that by signing the Stipulated Judgment, Wivag explicitly waived his rights to demand that the City comply with state and local law. Accordingly, the City's argument on these issues should be disregarded.

VI. PREEMPTION IS NOT AT ISSUE IN THIS CASE

In another attempt justify its failure to comply with clear state and local laws, the City argues that both RCW 7.48.250 and 6.17.070 do not apply under the doctrine of preemption. City's Brief, at 10, 13. However, this argument is confusing given the fact that (1) Wivag has never asserted that RCW 7.48.250 preempted its local counterpart, CEMC 8.12.070; and (2) the City provided no local statute which conflicts with RCW 6.17.070.

In reality, Wivag's argument is quite the opposite of preemption. Particularly, Wivag argued that both RCW 7.48.250 and CEMC 8.12.070 are vastly similar and thus require the same process for abating a nuisance. Opening Brief, at 16-17. Given the fact that these laws are in harmony with each other, there is no issue of preemption. *See King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 612 (1997) ("An ordinance

must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized.").[12]

Turning to RCW 6.17.070, the City's argument pertaining to preemption of this statute[13] is further confusing given that the Cle Elum Municipal Code is **silent** as to the proper way to execute a judgment. Accordingly, the proper procedures and requirements for executing on a judgment are governed by Chapter 6.17 RCW which regulates such executions. And, as argued by Wivag, the proper procedure in compelling obedience to a court order is through contempt proceedings and prescribed within RCW 6.17.070. Opening Brief, at 8-11.

Given the above, there is simply no issue of preemption in this case—*i.e.,* no allegation of conflict between state and local law. For these reasons, the City's argument of preemption is unpersuasive and unwarranted.

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[12] The City also cites *Hessan Corp. v. City of Lakewood*, 118 Wn. App. 341 (2003) in an effort to support its argument. However, the plaintiff in *Hessan* specifically argued that state law governing adult cabarets preempted the City of Lakewood's local ordinances. *Id.* at 353-354. Unlike *Hessan*, Wivag makes no such contention but argues instead that applicable state laws and City ordinances here can exist concurrently and do not conflict.
[13] City's Brief, at 13.

VII. THE CITY FAILED TO ADDRESS WIVAG'S ARGUMENTS PERTAINING TO RCW 6.17.070

The City failed to address the majority of Wivag's arguments within his Opening Brief which pertain to the proper procedures for executing a judgment and the City's violation of RCW 6.17.070. *See* Opening Brief, at 8 – 15. In light of the City's failure to engage the issues, Wivag will not reproduce these arguments here, but rather directs the Court to review his Opening Brief.

What the City did argue was merely a regurgitation of its previous assertions. That is to say, the City attempted to argue that the issues on appeal pertain to the validity of the Stipulated Judgment itself, and not its illegal and improper execution of said judgment. City's Brief, at 14. In the City's words "[e]xecution on a judgment is not at issue." *Id.* However, as discussed in detail *supra*, execution of the Stipulated Judgment is the *exact* issue in this case.

The City then continues to state that RCW 6.17.070 "does not identify contempt proceedings as the exclusive remedy for executing upon a judgment." City's Brief, at 14. To this point, Wivag is actually in agreement with the City, going so far as to agree that **court** has the discretion to fashion a remedy consistent with the statutory requirements, including contempt. *Id.* However, in recognizing the discretion of the

court to fashion the appropriate remedy, the City has undercut its own justification pertaining to its unilateral execution of the Stipulated Judgment. Simply stated, it is the **Court**— not the City as a judgment creditor—that (1) determines whether Wivag violation the Stipulated Judgment; and (2) fashions the appropriate remedy. *See* RCW 6.17.070. The court—and the court alone—is given this discretion under RCW 6.17.070, and it is not left up to the judgment creditor to decide. *Id.*

The foregoing is exactly the point that Wivag is arguing on appeal. Specifically, Wivag argues that the City improperly and illegally bypassed the court's authority as well as clear state and local provisions when it unilaterally executed the Stipulated Judgment and abated Wivag's property. In the end, the City's attempt to argue that RCW 6.17.070 is not the exclusive remedy for violating court order only serves to undermine its position.

VIII. THE CITY FAILS TO ADDRESS CLEAR LOCAL ORDINANCES WHICH ARE DIRECTLY ON POINT

The City completely failed to address the key Cle Elum ordinances which are directly on-point—namely CEMC 8.12.070, .080 and .090. Thus, the Court is safe to assume that the City has no such argument which would excuse its complete disregard of these local ordinances.

Whatever the City's excuse is, the fact remains that CEMC's 8.12.070 — .090 contains specific language which prescribes the proper steps and procedures for nuisance abatement. *See* Appendix B to Opening Brief. Like RCW 7.48.260, CEMC 8.12.070 requires the issuance of a warrant before a nuisance can be abated. *Id.* However, before this warrant is issued, CEMC 8.12.080 requires that there be an inquiry into, and the estimation of, the sum necessary to defray the expense of the abatement. *Id.* This is because CEMC 8.12.090 allows the defendant to post a bond in lieu of execution of the warrant for abatement. *Id.* Again, the City never addressed these clear local ordinances in its Brief.

The reason the City failed to address these ordinances in its briefing is simply because it chose to ignore them when abating Wivag's property. As stated within his Opening Brief, the City never obtained a warrant of abatement, nor was Wivag afforded the opportunity to the abatement of his property by posting a bond pursuant to CEMC 8.12.090. Opening Brief, at 17. Altogether, by failing to adhere to these clear CEMC's, the City was not authorized to remove Wivag's inventory from his property.

In the end, the City was required to obtain and serve a writ of execution before it sought to execute the Stipulated Judgment[14] which it did not do. Rather, the City unilaterally and illegally entered into Wivag's

[14] CEMC 8.12.070.

property, removed his inventory, and ultimately destroyed this inventory. Tellingly, the City's briefing is silent on this allegation.

IX. THE CITY IS NOT ENTITLED TO ATTORNEYS FEES ON APPEAL

Though it has argued that the Stipulated Judgment authorizes attorney's fees on appeal, the City is simply mistaken in this regard.

"In Washington, a party may recover attorney fees only when a statute, contract, or recognized ground of equity permits recovery." *Bloor v. Fritz*, 143 Wn. App. 718, 746-47 (2008). The City has argued that, because the Stipulated Judgment is treated as a contract under Washington law,[15] that it may recover attorney's fees on appeal. City's Brief, at 15. However, this argument makes two erroneous assumptions: (1) that the validity of the Stipulated Judgment is at issue; and (2) that the Stipulated Judgment authorizes attorney's fees *after* abatement.

As discussed many times within this Brief, Wivag does not challenge the validity of the Stipulated Judgment itself. With the Stipulated Judgment not at issue, there is no "contract" upon which the City may claim attorney's fees. *See Bloor*, 143 Wn. App. at 746-47. Nevertheless, even if the Court determines that contract principles should apply to the issues here, the

[15] *Washington Asphalt v. Harold Kaeser Co.*, 51 Wn.2d 89, 91 (1957).

Stipulated Judgment does not authorize attorney's fees after the abatement has been concluded.

Specifically, the Stipulated Judgment authorizes only those attorney's fees incurred to "**abate public nuisances**" at Wivag's property. CP 6 (emphasis added). Here, the City has already (albeit illegally) abated Wivag's property and was awarded its accrued attorney's fees via supplemental judgment. CP 129. Thus, because no further abatement can be had, no additional attorney's fees can be awarded under the Stipulated Judgment. Altogether, the Stipulated Judgment simply lacks the requisite language needed to authorize fees on appeal. And, because the City has argued no equitable grounds to support its request for attorney's fees, its argument thus should be disregarded.

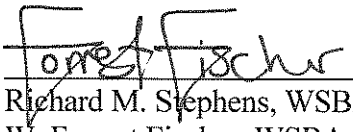
CONCLUSION

The vast majority of the City's arguments assume that Wivag is challenging the validity of the Stipulated Judgment itself. However, this is simply not the case. Rather, the sole issue before this Court is whether the City properly executed the Stipulated Judgment and followed all of the correct procedures in abating Wivag's property. Wivag asserts that the answer to this question must be a resounding no—otherwise the Court opens the door for future judgment creditors to unilaterally execute judgments without court oversight.

The simple fact is that the City ignored clear state and local laws when it forcefully removed and destroyed Wivag's inventory on his property. Tellingly, the City does not address these laws head on, opting instead to raise red-herring preemption arguments against the state laws while completely ignoring the local ordinances. In the end, the City's position and arguments are unpersuasive and the Court should reverse the trial court and deny the City's Motion for Supplemental Judgment.

RESPECTFULLY submitted this 19th day of June, 2013.

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 June 19, 2013, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

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

Executed this 19th day of June, 2013 at Bellevue, Washington.

Linda Hall