NO. 312135

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

CITY OF CLE ELUM,

Respondent.

BRIEF OF RESPONDENT CITY OF CLE ELUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

CONSTITUTIONAL AUTHORITIES

REGULATIONS AND RULES

I. INTRODUCTION

Appellants Gary Wivag and Sherry Trumball (collectively "Wivag") fail to acknowledge the central point in this matter - Wivag specifically and expressly agreed in writing to the very process about which he now complains.[1]

More than five years ago, in April 2008, the Cle Elum Hearing Examiner adjudicated the existence of numerous public nuisances on Wivag's property.[2] The City of Cle Elum ("City") patiently awaited compliance by Wivag. When compliance did not occur, the City sought to enforce the Hearing Examiner's order in Superior Court. Recognizing the relative weakness of his case, Wivag – with the advice of able and experienced counsel – stipulated to the very process and the very remedy that the City subsequently pursued.

Wivag did not timely satisfy either the "CUP Date" or the "Fencing Date" specifically defined in the Stipulated Judgment and Injunction ("Stipulated Judgment") entered below. Even more fundamentally, Wivag never abated the numerous public nuisances that he specifically agreed existed on his property.[3] In May 2012, but only after

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[1] CP 4 and 8.
[2] CP 64-65.
[3] CP 3, ¶¶ 2-3.

providing Wivag with four years to solve his own problem, the City followed the express terms of the Stipulated Judgment to abate the multiple public nuisances agreed to exist on Wivag's property.

With the advice of experienced counsel, Wivag voluntarily executed the Stipulated Judgment entered below. The trial court properly enforced the plain terms of the Stipulated Judgment, and entered the Supplemental Judgment at issue on this appeal. This appeal should be rejected, and the trial court's entry of the Supplemental Judgment should be affirmed.

II. RE-STATEMENT OF THE ISSUE

The Stipulated Judgment expressly authorized the City to seek and obtain the Supplemental Judgment, and additionally authorized the City to "bring motions for contempt and to seek any other remedy available at law or in equity."[4] Did the trial court err in entering the Supplemental Judgment? Answer: No.

III. RE-STATEMENT OF THE CASE

This appeal arises from a nuisance abatement case involving property owned by Wivag located in the City of Cle Elum ("Property"). On January 17, 2012, the Hon. Scott Sparks entered the Stipulated Judgment in favor of the City and against Wivag. CP 2 - 8 and 35. The

[4] CP 6.

Stipulated Judgment was executed by both Wivag's counsel, and by Wivag himself. CP 4, 7 and 8.

In the Stipulated Judgment, Wivag concedes that he was not in compliance with the Hearing Examiner's order attached to the Stipulated Judgment as Exhibit A. CP 3, ¶ 3; CP 25 - 27. In particular, ¶ 2.B of the "Order and Injunction" contained in the Stipulated Judgment enjoined Wivag from, among other things:

> [F]ailing to remedy in a manner consistent with and pursuant to applicable provisions of the City code . . . within 30 days from the Effective Date . . . all code violations or other deficiencies at the Property noted in the Order attached hereto as Exhibit A.

CP 5 and 25 - 27. Under ¶ 2.E, the "Effective Date" is specifically defined as "the earliest of Defendants' failure, if any, to timely satisfy the Payment Date, Fencing Date, or CUP Application Date." The Stipulated Judgment defines the Fencing Date as "not later than March 31, 2012," the CUP Date as "not later than February 29, 2012," and the Payment Date as "within three calendar days of entry of this Stipulated Judgment and Injunction."[5] CP 4-5.

Continuing his pattern of non-compliance with the Hearing Examiner's Order, Wivag failed to comply with both the Fencing Date and

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[5] Wivag did satisfy the Payment Date.

the CUP Date. CP 36. Wivag admits both of these failures. CP 120-21.

Abatement of the long-standing public nuisances on Wivag's Property was the City's highest priority, and the stated purpose of the underlying litigation. Given that, the Stipulated Judgment further expressly authorized the City to abate the nuisances (as those violations were set forth in the Hearing Examiner's order, attached to the Stipulated Judgment) beginning 30 days after the defined "Effective Date." CP 5, ¶ 2.B; *see* CP 25 - 27.

Under the terms of the Stipulated Judgment, Wivag agreed to take three separate actions at issue here – cure the public nuisances existing on his Property, install a fence across the Property frontage, and file a complete application for a conditional use permit. CP 3, ¶ 5. Had he simply complied with his own agreement and timely satisfied the Fencing Date and the CUP Date, then the Effective Date would have been extended until "not sooner than 31 days" after the City issued its decision on his conditional use permit application. CP 5, ¶ 2.E. In other words, the City could not have abated the nuisances under the Stipulated Judgment until a final decision had been issued on Wivag's CUP application – a decision which could have conditionally authorized certain of the nuisance activities on the Property.

Given Wivag's failure to satisfy the February 29, 2012 CUP Date, the Effective Date was March 30, 2012. Even if Wivag had satisfied the CUP Date, he likewise failed to satisfy the March 31, 2012 Fencing Date, which set an Effective Date of April 30. The City commenced the abatement authorized by the Stipulated Judgment on May 1, 2012. CP 36, ¶ 4; CP 121.

As Wivag had agreed by the terms of the Stipulated Judgment, the City then "present[ed] a supplemental judgment assessing the associated costs, including City employee costs, contractor fees, and attorney fees" incurred in taking the corrective action authorized by the Stipulated Judgment. CP 6, 36 and 130. On September 24, 2012, and over the objection of Wivag who was again represented by able counsel, the trial court granted the City's Motion for Supplemental Judgment and entered the Supplemental Judgment in the amount of $13,519.49. CP 129 - 131. This appeal followed.

IV. ARGUMENT

A. Standard of Review.

On appeal, Wivag does not contest the validity of the Stipulated Judgment or the voluntary nature of his assent. Rather, his sole assignment of error argues simply that the trial court erred in entering the Supplemental Judgment due to a failure to follow statutory procedures

claimed to apply.

The Stipulated Judgment constitutes a binding agreement under Civil Rule 2A. A stipulated judgment "will not be reviewed on appeal" absent fraud, mistake, or want of jurisdiction. *Washington Asphalt Co. v. Harold Kaeser Co.*, 51 Wn. 2d 89, 91, 316 P.2d 126 (1957). If the court does undertake review on appeal, a trial court's decision to enforce a binding agreement under Civil Rule 2A is reviewed for abuse of discretion. *In re Patterson*, 93 Wn. App. 579, 586, 969 P.2d 1106 (Div. 1 1999); *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357 (Div. 1 1993).[6]

Here, the trial court enforced the Stipulated Judgment simply by entry of the Supplemental Judgment pursuant to the plain terms of the process set out in the Stipulated Judgment and agreed to in writing by Wivag and his counsel.

B. The Trial Court Properly Issued the Supplemental Judgment Pursuant to the Terms of the Stipulated Judgment.

The Stipulated Judgment signed by both Wivag and his counsel and entered by the trial court constitutes a binding agreement under Civil

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[6] De novo review is not the applicable standard of review because no dispute exists between the parties regarding the validity of the Stipulated Judgment or the voluntary nature of the assent of Wivag and his counsel. De novo review applies in cases of genuine dispute regarding the terms of a CR 2A agreement. *See, e.g., Lavigne v. Green,* 106 Wn. App. 12, 16, 23 P.3d 515 (Div. 3 2001) (applying de novo review to motion to determine whether settlement agreement complied with CR 2A); *Brinkerhoff v. Campbell,* 99 Wn. App. 692, 696, 994 P.2d 911 (Div. 1 2000) (exercising de novo review when determining whether settlement agreement is genuinely disputed).

Rule 2A. A written stipulation, signed by either the parties or their counsel, is binding on the parties and on the court. CR 2A; *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (Div. 3 2002) (binding party to agreed stipulation regarding witness's inability to testify); *see also Reilly v. State*, 18 Wn. App. 245, 253 and n. 17, 566 P.2d 1283 (Div. 3 1977) (binding parties to stipulation of one issue before court); *Riordan v. Commercial Travelers Mutual Insurance Company*, 11 Wn. App. 707, 715, 525 P.2d 804 (Div. 2 1974) (binding insurance company to signed stipulation regarding timeliness of notice). Stipulations are favored, and will be enforced if they are reasonable, not against sound public policy, are within the general scope of the case, and conform to form requirements of the applicable rule. *Smyth Worldwide Movers, Inc. v. Whitney* (1971) 6 Wn. App. 176, 178, 491 P.2d 1356 (Div. 1 1971). The trial court properly enforced the terms of the Stipulated Judgment when it issued the Supplemental Judgment. Wivag concedes that he failed to satisfy both the CUP Date and the Fencing Date set forth in the Stipulated Judgment. CP 36 and 120-21. His argument essentially constitutes a request for this Court to re-write the contract between the parties and to forgive his non-performance.

Wivag further argues that the Supplemental Judgment was improperly entered because the City failed to comply with the abatement

procedures of RCW 7.48.250 and the execution procedures of RCW 6.17.070. These arguments ignore the fact that Wivag agreed in the Stipulated Judgment that the City could take "any" corrective action reasonably necessary to abate the nuisances, including completing the abatement, seeking contempt sanctions, or "any other remedy available at law or in equity." CP 6. The agreement between the parties does not require compliance with, or even refer to, RCW 7.48.250 or RCW 6.17.070.

1. Wivag Offers No Defense Against the Enforceability of the Stipulated Judgment and Injunction.

For sound litigation strategy reasons, Wivag and his able counsel both executed the Stipulated Judgment in January 2012. Wivag knew he was out of compliance with the Hearing Examiner's order. CP 3, ¶ 3. Daily penalties for non-compliance in the amount of $500 had been accruing since June 3, 2008. CP 27, ¶ 4. Had he continued to litigate, and lost, the ensuing judgment would have devastated Wivag.

The City proposed eminently reasonable financial and other terms designed to cure the existing public nuisances. Wivag agreed to those terms. Wivag failed to comply with his agreement. This appeal is no more complicated than that.

A stipulated judgment constitutes a contract that contains the terms of the judgment between the parties. *Washington Asphalt*, 51 Wn. 2d at 91. A party's consent to a stipulated judgment "excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment." *Id.* Absent fraud, mistake, or want of jurisdiction, a stipulated judgment should not be reviewed on appeal. *Id.*

Here, Wivag claims no fraud, mutual mistake, or want of jurisdiction on appeal. While Wivag does admit that he mistakenly relied on a Fencing Date contained in an unexecuted draft of the Stipulated Judgment, his unilateral mistake of fact is wholly insufficient to void or reform the contract. *See Haller v. Wallis*, 89 Wn. 2d 539, 544, 573 P.2d 1302 (1978) (determining mutual mistake was necessary to set aside stipulated agreement); *see also In re Estate of Hartford*, 86 Wn. App. 259, 262-63, 936 P.2d 48 (Div. 1 1997) (refusing to set aside settlement agreement where court found only unilateral mistake).

Furthermore, to the extent Wivag could have relied on the statutory procedures of RCW 7.48.250 and RCW 6.17.070 as he argues here, Wivag waived that choice. "The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled." *Schroeder v. Excelsior Management Group LLC*, 297 P.3d 677, 683 (Wn. 2013). Waiver occurs where a party voluntarily relinquishes a known right. *Id.* A party can

waive most rights by agreement, absent legislative intent to the contrary. *Id.*

Here, and with the advice of his counsel, Wivag voluntarily agreed to the procedures and remedies set forth in the Stipulated Judgment. Wivag is bound by his decision.

2. Wivag Erroneously Relies on RCW 7.48.250 as the Exclusive Procedure for Nuisance Abatement.

Even if Wivag had not agreed to the terms of the Stipulated Judgment, his reliance upon RCW 7.48.250 is misplaced. As a matter of contract, the Stipulated Judgment does not require the City to abate nuisances initially or exclusively pursuant to that statute.

More fundamentally, Article XI, Section 11 of the Washington Constitution grants municipalities the authority "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Art. XI, Sec. 11, Wash. Const. Municipal regulations designed to combat public nuisances are common, and reflect the goals and values of individual communities (e.g., Seattle takes a different approach to public nuisance abatement than does, say, Pateros). Accordingly, a State statute regarding public nuisances was not intended to and does not preempt the field of public nuisance regulation. *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 354, 75 P.3d 1003

(Div. 2 2003).

As a code city, the City of Cle Elum:

> [S]hall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to . . . real property of all kinds, . . . structures, or any other improvement or use of real or personal property, ...

RCW 35A.11.020; *see* also, RCW 35A.21.160, which states:

> A code city organized or reorganized under this title shall have all of the powers which any city of any class may have and shall be governed in matters of state concern by statutes applicable to such cities in connection with such powers to the extent to which such laws are appropriate and are not in conflict with the provisions specifically applicable to code cities.

State law explicitly grants a first class city the power to "declare what shall be a nuisance, and to abate the same . . . ." RCW 35.22.280(30). As a code city, Cle Elum is likewise vested with this grant of authority to regulate public nuisances apart from the procedures of RCW 7.48, by virtue of the grant of authority set forth in RCW 35A.21.160.

Moreover, the Washington Supreme Court has made clear that a court's equitable powers include the enjoining of public nuisances, and

injunctions of that type need not be tied to specific statutory procedures. *State v. Lew*, 25 Wn. 2d 854, 865, 172 P.2d 289 (1946). In *Lew*, the Court considered the validity of a stipulated judgment and injunction which enjoined the defendant from committing the public nuisance of gambling on his property for a period of one year. *Id.* at 859-60. In affirming the injunction, the Court considered the defendant's own consent to the stipulated judgment and injunction. *Id.* at 868. The Court further determined that the existence of statutory remedies for nuisance abatement did not preclude a court from exercising its equitable powers to issue injunctive relief. *Id.* at 865-67. In its analysis, the Court noted that statutory remedies may prove "inadequate because the judgment cannot be made continuing in its operation." *Id.* at 866. The described inadequacy of the remedy supports injunctive relief to abate public nuisances in broad form. *Id.* at 867; *see* CP 6, ¶ 4 (trial court retained jurisdiction in order for City to "bring motions for contempt and to seek any other remedy. . . .").

Here, as in *Lew*, the trial court properly exercised its equitable powers in entering the Stipulated Judgment, which included the Injunction and Order. CP 2 - 8 and 35. The trial court's authority to do so exists separate and apart from the statutory authority of RCW 7.48. The trial court properly issued the Supplemental Judgment at issue in this appeal based on the plain terms of the Stipulated Judgment. CP 128 - 130.

3. Wivag Erroneously Relies on RCW 6.17.070, Which Is Inapplicable to Injunctions.

For the reasons described in Section IV(B)(2), above, Wivag's reliance on RCW 6.17.070 is similarly misplaced.

Additionally and independently, the statute is inapplicable here. RCW 6.17.070 allows for contempt proceedings in cases where a judgment requires payment of money or delivery of real or personal property. Wivag timely paid the money judgment, and the City does not seek the "delivery" of any property.

That statute falls under RCW Title 6, "Enforcement of Judgments." Title 6 generally provides for three different types of execution: (1) against the judgment debtor's property; (2) for delivery of the judgment debtor's property; or (3) "commanding enforcement of or obedience to any other order of the court." RCW 6.17.060.

Here, Wivag appeals the Supplemental Judgment even though it awards costs for the City's abatement actions taken pursuant to the express terms of the Stipulated Judgment. CP 6, 35-36 and 130. Wivag stipulated to the very process and remedy about which he now complains, and his stipulation applies *in addition to* contempt sanctions and any other available remedy. CP 6, ¶ 4.

Execution on a judgment is not at issue. Wivag himself correctly notes that he satisfied the money judgment portion of the Stipulated Judgment by the timely payment of $10,000. Brief of Appellants, at 8; CP 120. Instead, Wivag complains about terms of the injunction to which he agreed. As described above, however, a trial court has the discretion to exercise its equitable powers to fashion such relief (or, more precisely in this case, to enter such relief in the form of an agreed judgment put forth by the parties).

Even if the City's abatement actions constituted execution upon a judgment rather than enforcement of the terms of the agreed injunction set forth in the Stipulated Judgment, RCW 6.17.070 does not identify contempt proceedings as the exclusive remedy for executing upon a judgment. The relevant part of that statute states:

> 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 (emphasis added).

The broad language of this statute grants a court the authority to punish a party for contempt if it fails to abide by a judgment. *Id.* Nowhere does the statute deprive a court of its equitable powers to fashion alternative remedies. *Id. See* CP 6, ¶ 4.

Here, and after four years of failing to comply with the terms of the Hearing Examiner's order, Wivag also failed to comply with the terms of the Stipulated Judgment. CP 36 and 120-121. Accordingly, the City properly chose to abate the long-standing and numerous public nuisances on Wivag's Property, and to obtain the Supplemental Judgment under the agreed terms of the Stipulated Judgment. CP 6, 35-36 and 130.

C. The City Is Entitled to an Award of Its Attorney Fees on Appeal.

The Stipulated Judgment authorizes the City to recover its attorney fees and other costs incurred in taking action "reasonably necessary" to abate the public nuisances. CP 6. In the Supplemental Judgment, the trial court accordingly included an award of the City's attorney fees. CP 129. Defending this appeal likewise constitutes such a "reasonably necessary" action.

The Stipulated Judgment is a contract between the parties and is subject to contract principles. *Washington Asphalt*, 51 Wn. 2d at 91; *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (Div.

2 2005). 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 (Div. 2 2008). This Court should award the City's attorney fees incurred on appeal.

V. CONCLUSION

Wivag and his experienced counsel both executed the Stipulated Judgment, and wisely so. Continuing a four-year period of non-compliance, Wivag failed to comply with his own agreement as reflected in the Stipulated Judgment. The trial court properly and unremarkably then entered the Supplemental Judgment at issue in this appeal.

Wivag offers no legal argument sufficient to excuse compliance with his own contract. Wivag fails to even argue the existence of fraud, mutual mistake, or lack of jurisdiction under the applicable standard of review. Moreover, and as reviewed by this Court, the trial court's entry of the Supplemental Judgment under the express terms of the contract between the parties cannot constitute an abuse of discretion.

This Court should affirm the trial court's entry of the Supplemental Judgment. The City should be awarded its attorney fees on appeal.

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RESPECTFULLY SUBMITTED this 7 day of May, 2013.

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By _____
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DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 7th day of May, 2013, I served a true copy of the foregoing *Brief of Respondent City of Cle Elum* on the following counsel of record using the method of service indicated below:

Richard M. Stephens W. Forrest Fischer Groen Stephens & Klinge LLP 10900 NE 8th Street, Suite 1325 Bellevue, WA 98004	☐ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: *Stephens@gsklegal.pro* and *ForrestFischer@gsklegal.pro*

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

DATED this 7th day of May, 2013, at Issaquah, Washington.

Margaret C. Starkey