

No. 50011-6-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY, a political subdivision of the State of Washington,

Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation
registered in the State of Washington, and JOHN DOES and
JANE DOES I-XX, inclusive,

Appellants,

and

IN THE MATTER OF NUISANCE AND UNPERMITTED
CONDITIONS LOCATED AT
One 72-acre parcel identified by Kitsap County Tax Parcel ID No.
362501-4-002-1006 with street address 4900 Seabeck Highway NW,
Bremerton Washington.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Kitsap Rifle and Revolver Club (the “Club” or “KRRC”) petitions this Court to reverse the trial court’s *Order Granting Kitsap County’s Motion for Contempt with Findings of Fact and Conclusions of Law* dated December 2, 2016 (“Contempt Order”). The Club also requests that this Court deny the County’s contempt motion that was the subject of the Contempt Order or remand with an order for the trial court to deny the motion, based on the undisputed facts in the record and the County’s failure to present substantial evidence to support each essential element of its motion. Alternatively, the trial court should receive instructions on how to correctly apply the applicable laws so as to avoid repeating any of its errors on remand.

The first issue in this appeal is whether the trial court committed a legal error by failing to expressly find that the Club had the ability to comply with both the Permitting Order of the Supplemental Judgment¹

¹ On remand, the trial court issued an injunction as part of its *Order Supplementing Judgment on Remand* dated February 5, 2016 (hereafter, the “Supplemental Judgment”),

“requiring [the Club] to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment [i.e., the February 2012 trial decision]. Defendant’s application for permitting shall be submitted to

and the purge condition of the Contempt Order² before holding the Club in contempt. The controlling statute, RCW 7.21.030, and the applicable Washington case law required the trial court to make this finding before holding the Club in contempt and ordering the purge condition, but there is no such finding in the Contempt Order. This was a legal error that requires reversal of the Contempt Order.

Because the uncontroverted evidence in the record unequivocally shows the Club was, at the time of the Contempt Order, unable to comply with the Permitting Order and purge condition, the trial court should also be instructed to deny the County's contempt motion. Alternatively, the trial court should receive appropriate instructions so that it does not repeat its legal errors on remand.

The second issue on appeal is whether the trial court erred in finding the Club *intentionally* failed to comply with the Permitting Order

Kitsap County within 180 days of the entry of this final order.”

CP at 286 (hereafter “Permitting Order”).

² The purge condition states,

“The injunction will not be lifted until this Court so orders. When Defendant has obtained permitting, Defendant shall move for an order lifting the injunction.”

CP at 414.

when it submitted a permitting application to the County that the County deemed deficient according to its preferred interpretation of the Permitting Order. This assignment of error assumes that interpretation was correct. If it was, the trial court nevertheless erred because the record shows the Club wanted to comply with the Permitting Order and took substantial steps to do so, but was unable because of a lack of financial means and a denial of coverage from its liability defense insurer. Thus, the record does not contain substantial evidence that the Club intended to disobey the Permitting Order, and instead proves the opposite. Because the essential element of intent is lacking, the Club was not in contempt. The Contempt Order should be reversed and the contempt motion denied.

The third issue on appeal is whether the trial court misconstrued the Permitting Order to require the Club to submit a particular type of site development activity permit application containing none of the deficiencies alleged by the County. Washington law required the County and trial court to strictly construe the plain language of the order in the Club's favor and prohibited the trial court from holding the Club in contempt unless the facts plainly showed a violation of the order. Under these standards, the trial court should have found that the Club was in compliance with the order because it had submitted a site development activity permitting application to the County before the hearing at which

the trial court issued the Contempt Order. Because the trial court failed to do so, the Contempt Order must be reversed. Because the undisputed evidence shows the Club complied with the correct interpretation of the Permitting Order, the County's motion for contempt must be denied.

The fourth issue on appeal is whether the trial court fashioned a remedial sanction that is impermissibly punitive because it fails to serve remedial ends and is not reasonably related to the cause or nature of the alleged noncompliance. This assignment of error assumes, for the sake of argument, that the trial court correctly held the Club in contempt. Nevertheless, its remedy of shutting down all firearm activities at the Club until it applied for *and obtained* site development activity permitting is impermissibly punitive and contrary to law. To correct this legal error, the Contempt Order must be reversed with instructions for the trial court to refashion the contempt remedy.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the Contempt Order sought by the County and held the Club in contempt without first finding whether the Club had the ability to comply with the Permitting Order in the Supplemental Judgment and the purge condition in the Contempt Order, where the record is devoid of substantial evidence to support a finding that the Club had that ability.

2. Assuming for the sake of argument that the Court's interpretation of the Permitting Order was correct, the trial court erred in finding the Club intentionally violated that order where substantial evidence in the record does not support that finding and the uncontroverted evidence showed the Club intended to comply and took substantial steps to do so, but lacked the means to satisfy all of the County's demands.

3. The trial court erred when it failed to strictly construe the plain terms of the Permitting Order in the Club's favor and found the Club had not complied with the order where the evidence did not plainly show a violation of that order.

4. Assuming for the sake of argument that the trial court correctly held the Club in contempt, the trial court erred in fashioning a coercive contempt remedy that was impermissibly punitive because it did not serve a remedial purpose and was not reasonably related to the cause or nature of the alleged noncompliance.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Where a party moves for contempt alleging another party failed to comply with a court order, but fails to present evidence that the other party has the power to comply with that order, and that party presents un rebutted evidence that it does not have the power to comply,

must the trial court find the alleged contemnor lacks the power to comply and then deny the motion? (Assignment of Error 1.)

B. Where a party moves for contempt alleging another party failed to comply with its interpretation of a court order, but fails to present substantial evidence that the party intended that noncompliance, and the other party presents uncontroverted evidence that it intended to comply and took substantial steps to do so but lacked the means to satisfy all of the movant's demands, must the trial court find the party did not intend to disobey the order and then deny the motion? (Assignment of Error 2.)

C. Where a party moves for contempt alleging another party failed to comply with a court order, must the trial court strictly construe the order according to its plain meaning and then deny the motion unless the movant presents facts that plainly prove a violation? (Assignment of Error 3.)

D. Where a party moves for a remedial contempt sanction alleging another party disobeyed a court order and the trial court correctly holds that party in contempt, can the trial court fashion a punitive remedy or must it fashion a coercive remedy consisting of a sanction and purge condition that serve remedial ends and that are reasonably related to the cause and nature of the noncompliance? (Assignment of Error 4.)

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IV. STATEMENT OF THE CASE

A. Background Summary

This dispute was previously before the Court in case number 43076-2-II. *Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014), *amended on denial of reconsideration* (Feb. 10, 2015), *review denied*, 183 Wn. 2d 1008, 352 P. 3d 187 (July 8, 2015) (hereafter, “*KRRC*” or “Published Opinion”). The Published Opinion provides a detailed summary of the facts surrounding this case. The Club incorporates the entire Published Opinion as relevant background for this motion. Below, the Club will reiterate some of those facts and supplement them with additional facts relevant to this appeal of the Contempt Order.

After a bench trial in 2011, the trial court found that certain development work at the Club’s property violated KCC Titles 12 (“Storm Water Drainage”) and 19 (“Critical Areas Ordinance”). CP at 271–72 (original trial judgment).³ The trial court held that those violations terminated the Club’s nonconforming use rights and enjoined use of Club property as a shooting range until the Club obtained a conditional use permit, which could require the Club to cure its violations of Titles 12 and 19. *Id.* The Club appealed.

³ The Kitsap County Code is available online at <http://www.codepublishing.com/WA/KitsapCounty/> (last visited April 20, 2017).

The Court of Appeals agreed that some of the Club’s development work violated KCC Titles 12 and 19, but reversed the decisions to terminate the Club’s nonconforming use and to enjoin all shooting at the Club because there was no legal basis for those remedies. *Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 297 (2014). The Court of Appeals instructed the trial court to fashion appropriate remedies on remand that would allow the Club to operate its grandfathered shooting range within its nonconforming use rights, which included the right to intensify but not expand its land use. *Id.* at 300–01.

On remand, the trial court issued the Supplemental Judgment, which contains the Permitting Order

“requiring [the Club] to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment. Defendant’s application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.”

CP at 286. The Supplemental Judgment further ordered

“that a WARRANT OF ABATEMENT may be authorized upon further application by the [County], in the event that the [Club’s] participation in the County permitting process does not cure the code violations and permitting deficiencies on the Property.”

Id.

The Club has not waived any rights to defend itself in opposition to a warrant of abatement proceeding. The parties appear to agree, however, that the general purpose of a warrant of abatement proceeding is to authorize the County to take specific steps to abate site development permitting violations and then seek a money judgment for the cost of that effort.

Thus, the County and trial court decided during remand proceedings that if the Club's permitting effort were deficient, the County's remedy would be a warrant of abatement. Most importantly, the Supplemental Judgment did not require the Club to apply for or obtain any particular kind of site development activity permitting, it did not set a deadline for the Club to obtain site development activity permitting, nor did it prohibit the Club from operating if there were a deficiency in its permitting effort.

B. The Previous Stay and the County's Contempt Motion

The Club has appealed the Supplemental Judgment, and that appeal is now pending before this Court in case number 48781-1-II. That appeal challenges the Permitting Order on the grounds that it violates CR 65(d) by referencing another document (the trial decision) for its meaning and by failing to say what specific violations the Club had to remedy or what specific permits the Club would need to apply for and obtain to

remedy those violations. *Br. of Appellant* at 49 (filed Dec. 23, 2016) (case no. 48781-1-II).

Over the County's objections, the Court of Appeals granted the Club's motion to stay the portions of the Supplemental Judgment that prohibited use of "weaponry greater than .30 caliber," "practical shooting," and "commercial, for-profit uses." CP at 241 (order granting stay). The Court of Appeals explained:

"This court concludes that the injury the Club will suffer by the denial of a stay is greater than the injury Kitsap County would suffer by the granting of a stay. The restriction on caliber size is unsupported by evidence of a relationship between caliber size and noise level and thus is unduly burdensome. The term 'practical shooting' is undefined and ambiguous and is therefore unduly burdensome. And the prohibition on commercial or for-profit uses burdens the financial viability of the Club pending appeal."

Id. By granting the stay, the Court allowed the Club to resume operations. After the stay was granted, the County filed a motion for contempt, asking again for the trial court to shut down the Club, this time to supposedly "coerce" the Club into complying with the Permitting Order. *Id.* at 174.

C. The Club's Efforts to Comply with the Permitting Order

After the Club received the Permitting Order, it attempted to comply with it. *Id.* at 217. The Club obtained a detailed professional scope of work (SOW) at a cost of more than \$8,000, which called for the Club's environmental consultants to prepare and submit two site

development activity permit (SDAP) applications to the County. *Id.* The estimated budget for the entire SOW was \$398,939.00. *Id.* at 217, 235. The budget for portions of the SOW related to preparing and filing the permitting applications exceeded \$158,000. *Id.* at 217, 227, 229 (tasks A.1 and A.2). The Club’s consultant intended the SOW to “represent a reasonable estimate” of the cost to obtain the agreement of all involved regulatory agencies. CP at 222.

At the time of the Contempt Order, the Club’s financial resources had been diminished to almost nothing due to the County’s two protracted lawsuits in which the County had repeatedly sought to shut down the Club. CP at 219. The Club is a non-profit organization with no endowment, and its end-of-month operating account balance in 2016 averaged less than \$10,000. CP at 218. The Club wanted to pay for the SOW but could not without money from its insurer, Northland. *Id.*

Northland had been paying for the Club’s defense under a reservation of rights. *Id.* The Club considered the cost of the extensive permitting applications to be part of the cost of its defense because the applications would determine whether and to what extent the Club was liable for harm to third-party property covered by the insurance policies. *Id.* The Club’s position was that Northland had a duty to authorize and pay for the applications. *Id.*

The Club submitted the SOW to Northland on March 21, 2016, but Northland refused to authorize or pay for any part of the SOW. CP at 240, 287–99 (coverage denial letter).

The Club was party to a pending lawsuit against Northland in the United States District Court for the Western District of Washington, which the Club filed in January 2011 to force Northland to provide coverage for this still ongoing lawsuit. CP at 218. The Federal District Court stayed the Club’s lawsuit against Northland in March 2012 after Northland began performing its coverage obligations. *Id.*

The Club, through its attorneys, took appropriate steps to attempt to persuade Northland to change its position. They had multiple communications with Northland regarding the need and legal grounds for defense coverage for the cost of applying for permitting. *Id.* Those communications culminated in a letter to Northland on November 25, 2016, with legal analysis supporting the Club’s position. CP at 339–44. The letter also proposed alternative dispute resolution. CP at 344. Reinstating the coverage lawsuit remained an option, although a litigated solution would take time, and there was no guarantee the Club would prevail.

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D. The Club’s Permitting Application and Its Alleged Deficiencies

Without insurance coverage, the Club did the best it could to satisfy the minimal requirements expressly stated in the Contempt Order. On November 28, 2016, the Club submitted a permit application for site development to the County. *Id.* at 330–31. The Club prepared the application materials without the assistance of any professional consultant or engineer because it was unable to afford those services. *Id.* The Club made a good faith effort to prepare the application using the application forms and instructions provided on the Kitsap County website. *Id.*

Jeff Rowe was Kitsap County’s Building Official and was employed by the Kitsap County Department of Community Development. *Id.* at 400.⁴ He reviewed the Club’s application and alleged a number of deficiencies. *Id.* at 400–01. According to Mr. Rowe, the Club filed for an “SDAP I” when it should have filed for an “SDAP III,” and its application lacked, among other things, technical reports, hydro-analysis, drainage analysis, a geo-technical report, a hydro geological study, SEPA review, National Pollutant Discharge Elimination system permit, and wetland remediation plans. *Id.* at 401–02.

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⁴ Mr. Rowe was also one of the County’s main witnesses who testified against the Club at trial.

Mr. Rowe and the County did not explain why the County required the Club to submit an SDAP III, as opposed to an SDAP I or some other kind of application, nor did they present any evidence that the Club's materials failed to satisfy the requirements of an SDAP I. Most importantly for purposes of this proceeding, the Club lacked the substantial funds necessary to hire professional engineers and consultants to address all of the deficiencies alleged by the County. *Id.* at 218, 331.

V. ARGUMENT

A. The Trial Court Abused Its Discretion.

A trial court must make specific findings of fact as the basis for any contempt judgment. *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995). A trial court's finding of contempt is reviewed for an abuse of discretion, and such abuse is present when the trial court's finding of contempt is "manifestly unreasonable, based on untenable grounds, or based on untenable reasons." *Moreman v. Butcher*, 126 Wn. 2d 36, 40, 891 P.2d 725, 728 (1995); *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P. 2d 775, 784 (1971).

A trial court necessarily abuses its discretion if it bases its ruling on an "erroneous view of the law or involves application of an incorrect legal analysis," and errors of law are reviewed de novo. *Dix v. ICT Grp., Inc.*, 160 Wn. 2d 826, 833–34, 161 P.3d 1016, 1020 (2007); *Worden v.*

Smith, 178 Wn. App. 309, 323, 314 P. 3d 1125, 1132 (2013) (citing *State v. Bunker*, 169 Wn. 2d 571, 577–78, 238 P.3d 487, 490–91 (2010)); see also *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 88, 173 P.3d 959, 962–63 (2007).

A movant seeking to impose contempt sanctions must prove each required element by a preponderance of the evidence. *State v. Boren*, 44 Wn. 2d 69, 73, 265 P.2d 254, 256 (1954). In general, absent a legal error, a trial court’s finding of contempt will be reversed on appeal if any essential element is not supported by substantial evidence in the record. See *In re of Rapid Settlements, Ltd’s (“Rapid Settlements”)*, 189 Wn. App. 584, 601, 359 P.3d 823, 833 (2015) (citing *In re Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679, 682 (1997); *Ramstead v. Hauge*, 73 Wn. 2d 162, 167, 437 P.2d 402, 405 (1968)).

When “the superior court bases its contempt finding on a court order ‘the order must be strictly construed in favor of the contemnor,’ and ‘[t]he facts found must constitute a plain violation of the order.’” *Dep’t of Ecology v. Tiger Oil Corp. (“Tiger Oil”)*, 166 Wn. App. 720, 768, 271 P.3d 331, 353 (2012) (emphasis in original) (quoting *Stella Sales Inc. v. Johnson*, 97 Wn. App. 11, 20, 985 P.2d 391 (1999); *Johnston v. Beneficial Mgmt. Corp. of America*, 96 Wn. 2d 708, 713, 638 P.2d 1201 (1982)). In *Tiger Oil*, the record did not show a plain violation. 166 Wn. App. at 772.

The court therefore reversed the finding of contempt without remanding for further proceedings. *Id.* at 773.

Further, when a trial court issues a remedial sanction with a purge condition, like the order on review here, that purge condition must meet three requirements:

“First, it must be designed to serve remedial aims; that is, it must be directed at obtaining future compliance. Second, the condition must be within the power of the [contemnor] to fulfill. Third, the condition must be reasonably related to the cause or nature of the [contemnor’s] contempt.”

In re M.B. (“*M.B.*”), 101 Wn. App. 425, 450, 3 P.3d 780, 788 (2000). If it fails any of these requirements, the order must be reversed or vacated. *E.g., id.* (vacating contempt order); *In re the Interest of J.L.*, 140 Wn. App. 438, 448, 166 P.3d 776 (2007) (vacating contempt order, without remand, where the purge condition was not within the contemnor’s capacity to complete at the time the sanction was imposed); *In re the Interest of N.M.*, 102 Wn. App. 537, 542 n. 11, 7 P.3d 878 (2000) (reversing contempt order, without remand, where purge condition did not provide a means of compliance and the sanction was excessive).

Here, the trial court abused its discretion pursuant to each of the legal rules cited above. It apparently applied the wrong legal standards, as evident by its failure to make a finding as to whether the Club had the power to comply with the underlying Permitting Order or purge condition

at the time of the Contempt Order. There is no substantial evidence to support a finding that the Club had that power. The trial court erred in finding the Club intended to disobey the Permitting Order, as there is no substantial evidence to support that finding. The trial court erred in misconstruing the Permitting Order to require more than what it plainly states. Finally, even if we assume the Club was intentionally noncompliant with the Permitting Order, the trial court erred in fashioning a purge condition that does not serve a remedial purpose and is not reasonably related to the alleged noncompliance.

On any of these grounds, the Contempt Order must be reversed. Depending on the Court's ruling, the trial court may also need to be ordered to deny the County's contempt motion. Alternatively, it should be given clear instructions regarding how to avoid repeating its various errors on remand by correctly applying the legal standards discussed herein.

B. The Trial Court Committed Legal Error When It Held the Club in Contempt Without First Making a Finding as to Whether It Had the Ability to Comply with Both the Permitting Order and the Purge Condition.

RCW 7.21.030 expressly requires a trial court to find that an alleged contemnor has the power to comply before holding them in contempt. Applicable Washington case law reinforces this requirement. Yet the trial court did not make this required finding. Thus, the trial court

necessarily abused its discretion by not applying the correct legal analysis. Furthermore, the record does not contain substantial evidence that the Club had the power to comply, at the time of the Contempt Order, with the Permitting Order or purge condition. Therefore, the trial court abused its discretion when it held the Club in contempt and fashioned the purge condition, and the Contempt Order must be reversed.

The trial court issued its Contempt Order pursuant to RCW 7.21.030(2)(c). CP at 412–13. The statute provides:

“(2) If the court finds that the person has failed or refused to perform an act that is yet within the person’s power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

* * *

(c) An order designed to ensure compliance with a prior order of the court.”

RCW 7.21.030(2)(c) (emphasis added). This statute required the trial court to find that the Club had failed or refused to take some action that was “yet within the [Club’s] power to perform[.]” In the absence of such a finding, the trial court should not have held the Club in contempt or imposed a remedial sanction pursuant to RCW 7.21.030.

A similar rule applies to the fashioning of a purge condition, which is a necessary part of any remedial contempt sanction, as the ability to purge creates an incentive for the defendant to comply with the underlying

order. In the absence of an express finding that the defendant has the ability to purge the remedial contempt sanction, the remedy is “not coercive but impermissibly penal.” *Britannia Holdings Ltd. v. Greer* (“*Britannia*”) is particularly instructive on this point. 127 Wn. App. 926, 113 P.3d 1041 (2005).

The trial court must apply “great restraint” to any exercise of its contempt power. *M.B.*, 101 Wn. App. at 439. A remedial contempt sanction may coerce compliance, but it must not have a punitive purpose. *In re Pers. Restraint of King*, 110 Wn. 2d 793, 802, 756 P.2d 1303, 1309 (1988); *Smith v. Whatcom Cty. Dist. Court*, 147 Wn. 2d 98, 105, 52 P.3d 485, 489 (2002).

“A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce. Accordingly, there must be a showing that the contemnor has the means to comply with the order. And should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears.”

State ex rel. Daly v. Snyder, 117 Wn. App. 602, 606, 72 P.3d 780, 781 (2003). A movant seeking to impose contempt sanctions must prove each required element by a preponderance of the evidence. *State v. Boren*, 44 Wn. 2d 69, 73, 265 P.2d 254, 256 (1954). A trial court must make specific findings of fact as the basis for any contempt judgment. *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470, 472 (1995).

Britannia is particularly instructive on this point. 127 Wn. App. 926 (2005). There, the First Division of the Washington Court of Appeals interpreted the controlling statute according to its apparent, plain meaning, just as the Club interprets it. The court explained:

“It is well settled that ‘the law presumes that one is capable of performing those actions required by the court . . . [and the] inability to comply is an affirmative defense.’ But exercise of the contempt power is appropriate only when ‘*the court finds* that the person has failed or refused to perform an act that *is yet within the person’s power to perform.*’ Thus, a threshold requirement is a finding of *current* ability to perform the act previously ordered.”

Id. at 933–34 (emphasis in original).

In *Britannia*, the trial court held the defendants in contempt for failing “to deliver assets and to provide a credible accounting” to a judgment creditor. *Id.* at 928. The purge clause of the contempt order required the defendants to pay \$635,000 within four months to the creditor or be jailed for contempt. *Id.* The contempt order included no finding that the defendants had the ability to comply with the underlying order or the purge condition at the time of the contempt order. *Id.* at 928, 934. The appellate court therefore reversed the contempt order “because the contemnor must hold the keys to his release, and the [trial] court made no finding that the [defendants] had the present ability to pay the purge amount.” *Id.* at 928.

The Club will assume for the sake of this argument that the County correctly interpreted the Permitting Order to require permitting applications that exhibited none of the deficiencies alleged by the County. In that case, the Permitting Order effectively required the Club to pay over \$158,000 within 180 days by hiring professionals to prepare and submit one or more SDAP III applications that would comply with the County's various permitting demands. There is no determination in the Contempt Order as to whether the Club had the financial ability to pay that expense or any other means of satisfying the County's expansive interpretation of the Permitting Order. The record is also devoid of substantial evidence to support a finding that the Club had this power.

At the initial August 26, 2016 hearing on the County's motion to hold the Club in contempt, the trial court considered the Club's evidence regarding its inability to comply and then gave the Club an additional 90 days to show progress towards compliance with the Permitting Order. CP at 318; RP at 14:4–15:9 (Aug. 26, 2016 hearing transcript). At the second hearing, the Club emphasized that the record contained un rebutted evidence that the Club was still unable to comply with the Permitting Order. The transcript of the hearing contains the following exchange:

“[The Club's counsel] MR. FOSTER: . . . Well, I believe the record is very clear and un rebutted about the Club's

inability to pay for what is estimated as \$158,000.00 cost for those types of services. . . .

“THE COURT: And where do I find that delineated?”

“MR. FOSTER: In Marcus Carter’s two declarations.

“THE COURT: Uh-huh.

“MR. FOSTER: In the first one he goes into some detail. He explains that the Club has never had more than \$11,000.00 in its operating account at the end of the month, and he repeatedly testifies that the Club lacks the ability to pay. Now I could call him to the stand if we want to make this a fact investigation, a fact hearing. I could call him to testify to these things. He has testified that the Club lacks the funds and does not have access to these professionals.”

RP at 10:23–11:12.

Although the County had every opportunity, it made no effort to disprove or impeach Mr. Carter’s testimony regarding the Club’s limited financial means. It came forward with absolutely no evidence whatsoever that the Club had, at the time of the Contempt Order, the power to pay for or perform the scope of work prepared by its consultants. The County introduced no evidence that the Club’s SOW was erroneous as to scope or cost. The County has vaguely speculated that if the Club had acted differently, in some unspecified way, it might have had the power to perform. The record contains no evidence, however, to substantiate that allegation.

The uncontroverted evidence in the record shows the Club made a good faith effort to comply with the Permitting Order but lacked access to

the services of professional engineers and consultants needed to address all of the deficiencies alleged by the County. *Id.* It was, therefore, not “yet within [the Club’s] power” to address all of those deficiencies. Not only did the trial court fail to apply the law by making a determination as to whether the Club had the ability to comply, but the record did not contain any evidence from which the trial court could have properly made that finding. It was, therefore, error to hold the Club in contempt.

By omitting the findings required by RCW 7.21.030(2), the trial court either misunderstood this statute or disregarded it. Either way, the trial court failed to apply the correct legal standard and issued an order that did not satisfy the requirements of RCW 7.21.030(2). Its legal error constitutes an abuse of discretion, requiring reversal of the Contempt Order. Because the County did not rebut the Club’s evidence in the record that it lacked the power to perform the Permitting Order and purge condition, the trial court should also be instructed on remand to deny the County’s motion for contempt.

C. The Trial Court Erred in Finding the Club *Intentionally* Violated the Permitting Order Where Substantial Evidence in the Record Does Not Support That Finding.

Separate and apart from the requirement that the alleged contemnor have the ability to comply, the contempt statutes require proof that noncompliance was “intentional” in order to satisfy the statutory

definition of “contempt of court.” RCW 7.21.010(1). The Contempt Order does include a finding of “intentional” noncompliance. CP at 412. The record, however, does not contain substantial evidence to support that finding. Instead, the record shows that any lack of compliance with the Permitting Order was unintentional and that the Club made good faith efforts to comply. *Id.* at 218, 330–31.

In *Rapid Settlements*, the Third Division of the Washington Court of Appeals found substantial evidence in the record to support the inference that the defendants knowingly and intentionally violated a trial court order requiring them to strike certain motions in a lawsuit they had initiated in another state and to cease acting to advance that lawsuit. 189 Wn. App. at 601, 604–05. The defendants undisputedly failed to strike the motions and instead filed oppositional reply briefs and made court appearances to argue the motions. *Id.* at 600. These actions had an “inherently intentional character” so there was substantial evidence of intent to disobey the trial court order. *Id.* at 605.

Moreman v. Butcher is another illuminating case regarding the essential element of intent. 126 Wn. 2d 36, 891 P.2d 725 (1995). There, the defendant possessed cabinets that the court had ordered him to return to the plaintiff. The defendant offered an incredible story that he had removed the cabinets for some undisclosed reason when an insurance

adjustor came to collect them. *Id.* at 41. He also testified that, a month after the order had been issued, the cabinets were stolen, leaving him unable to comply. *Id.* at 39. He failed to explain, however, why he did not return the cabinets during the month between the issuance of the order and the time at which the cabinets were allegedly stolen. *Id.* The movant also called a witness who testified that the contemnor told his son after the show cause hearing that “he still had the cabinets and he was not going to give them back.” *Id.* The trial court expressly found the contemnor had not presented credible evidence of an inability to comply and further found that he “willfully failed to return the cabinets that were in his control.” *Id.* at 39, 43. The Supreme Court upheld these findings.

This case is starkly different from *Rapid Settlements* and *Moreman*. Here, the Club presented credible evidence that it wanted to comply, but could not. CP at 217–19, 330–31. That evidence included its work to obtain a detailed SOW, for which it paid over \$8,000. CP at 217. It included its efforts to obtain coverage for the SOW from its liability defense insurer, which the insurer denied. CP at 218, 287–99. It included the testimony of its Executive Officer that the Club is a non-profit organization with no endowment, and its end-of-month operating account balance in 2016 averaged less than \$10,000. CP at 218. It included the evidence that cost to comply with the various permitting requirements

alleged by the County would exceed \$158,000 and that the Club could not afford that expense or find any other way to perform the work the County desired without the required funding. CP at 217–18, 221–37. It included evidence of the Club’s attempts to comply with the plain terms of the Permitting Order by preparing and submitting a permitting application, which the County rejected as deficient based on its interpretation of the Permitting Order. CP at 330–31, 400–04.

The County predictably responded with skepticism and argument, but failed to present any evidence contradicting any of this evidence presented by the Club. Unlike the litigants in *Rapid Settlement*, there is no evidence that the Club knowingly and deliberately took action to violate the underlying order, such as by spending \$158,000 on other expenses after the Permitting Order took effect. Unlike the cabinet thief in *Moreman*, there is no evidence that the Club had any particular reason to want to disobey the Permitting Order. Why would it? The Club’s executive officer testified that the Club wanted to comply, and there is no evidence in the record impeaching or controverting that testimony.

Considering that the Club is a non-profit without an endowment, the Club’s evidence that it did not intend to lack the funds and ability to comply with the County’s demands is credible. The County never actually impeached or contradicted that evidence, and the trial court did not find

that it lacked credibility. Thus, the trial court's finding that the Club intended to disobey the Permitting Order (CP at 412) was not supported by substantial evidence.

Without substantial evidence to support the trial court's finding of intent, the finding must be vacated and the Contempt Order reversed. The trial court should be instructed to find, based on the un rebutted evidence, that any noncompliance with the Permitting Order by the Club was not intentional. Far from intending to fail or refusing to comply with the Permitting Order, the Club has made substantial, good faith efforts to comply, but was unable. Because substantial evidence of the essential element of intent to violate the Permitting Order is completely lacking, the Contempt Order should be reversed with an instruction for the trial court to deny the County's motion for contempt.

D. The Trial Court Erred in Construing the Permitting Order to Require the Club to Submit an SDAP III Application with None of the Deficiencies Alleged by the County.

When "the superior court bases its contempt finding on a court order, 'the order must be strictly construed in favor of the [alleged] contemnor,' and '[t]he facts found must constitute a plain violation of the order.'" *Tiger Oil*, 166 Wn. App. at 768 (citations omitted) (emphasis in original). The trial court should have strictly construed the plain language of the Permitting Order in the Club's favor. If it had done so, it would

have found that the Club had indeed submitted a permitting application as required by the Permitting Order. It could not have found a plain violation of the terms of the Permitting Order. The order, therefore, must be reversed with an instruction for the trial court to deny the County's motion.

The Permitting Order required the Club to submit an "application for permitting . . . to Kitsap County within 180 days of the entry of [the Supplemental Judgment]." CP at 286. At the August 26, 2016, show cause hearing, the Club was given an additional 90 days to show progress toward complying with the Permitting Order. CP at 318. Although the Club did not submit its application within the initial 180 days while it pursued funding from its insurer, it did submit an application within the additional 90 days granted by the trial court. CP at 330. Accordingly, the Club complied with the Permitting Order's requirement to submit an application.

The untimeliness of the application provides no support for a remedial sanction because the Club had already cured that defect when it appeared for the second hearing on the County's contempt motion. Thus, there was no basis to issue a remedial contempt sanction to coerce the Club into doing what it had already done. The only question is whether the various permitting application deficiencies alleged by the County

constituted noncompliance with the Permitting Order.

The Permitting Order required the Club to “submit”⁵ a site development permitting application, and the Supplemental Judgment provides no definition of the term “submit” that would alter its plain meaning. *Id.* at 286. The plain meaning of “submit” is “to present or propose to another for review, consideration, or decision.”⁶ The record shows the Club presented its application to the County for review, consideration, or decision. *Id.* at 330 (testimony regarding delivery of application to County). The County does not allege that it failed to receive or consider the application, but explains that it decided to reject the application for a variety of reasons. CP at 400–04. Nevertheless, the submission occurred.

The Permitting Order required the Club to apply for “site

⁵ The Permitting Order

“require[s] [the Club] to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment [i.e., the February 2012 trial decision]. Defendant’s application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.”

CP at 286.

⁶ *Merriam-Webster Online* at <https://www.merriam-webster.com/dictionary/submit> (last visited April 13, 2017).

development activity permitting.” It did say the Club had to submit an SDAP III application as opposed to the SDAP I application the Club submitted. It did not say the Club had to submit an application with technical reports, hydro-analysis, drainage analysis, a geo-technical report, a hydro geological study, SEPA review, National Pollutant Discharge Elimination system permit, or wetland remediation plans, as the County interpreted the order to require. *Id.* at 401–02. By treating these alleged deficiencies as violations of the Permitting Order, the County and trial court deviated from the plain language of the order and failed to strictly construe the order in the Club’s favor, as required by law.

If the County responds by arguing that extrinsic evidence or findings from other parts of the case support its interpretation of the order, it must identify some principle of law that allows such evidence to be used to construe an ambiguous order. It is the Club’s position that such arguments are foreclosed by the rule of strict construction in favor of the alleged contemnor.

Moreover, the immediate context of the order Permitting Order supports the Club’s interpretation. The Permitting Order appears in context next to an order that the County can apply for a warrant of abatement “in the event that the [Club’s] participation in the County permitting process does not cure the code violations and permitting

deficiencies on the Property.” CP at 286. This shows that any alleged deficiencies in the Club’s permitting efforts must be addressed through warrant of abatement proceedings, not through misinterpretation of the Permitting Order itself.

The County has advocated for a warrant of abatement remedy throughout this case. It has never disputed that the warrant of abatement and Permitting Order constituted a complete remedy for the site development permitting violations at the Club’s property. It has never appealed those orders or initiated warrant of abatement proceedings. Instead, it has sought to rewrite the Permitting Order through a motion for contempt to impose requirements that are not stated in the order itself, which is contrary to law.

The trial court erroneously adopted the County’s alleged permitting application requirements as though they were expressly stated in the Permitting Order. With that order correctly interpreted, the facts in the record do not show a “plain violation” of the order. Instead, they show that the Club submitted a site development activity permitting application as the order plainly required. Thus, the trial court’s conclusion that the Club was in a state of disobedience at the time of the Contempt Order was based on an erroneous interpretation of the order. This error of law constitutes an abuse of discretion that requires the Contempt Order to be

reversed with an instruction for the County's contempt motion to be denied.

E. Even If the Trial Court Correctly Found the Club Was in Contempt, the Trial Court Nevertheless Erred in Fashioning Remedies That Were Impermissibly Punitive.

A remedial sanction for contempt must necessarily include a sanction and a purge condition, as the Contempt Order does here. The sanction issued by the trial court was to effectively shut the Club down by prohibiting all use of firearms at its grandfathered shooting range facility. CP at 413. The purge condition was that the Club had to apply for *and obtain* all site development activity permitting required by the County. These remedies were impermissibly punitive and therefore must be reversed even if the trial court correctly found the Club in contempt.

The trial court purported to issue a remedial sanction pursuant to RCW 7.21.010(3). This statute defines a remedial sanction as “a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.” Conversely, a punitive sanction is “imposed to punish a past contempt of court for the purpose of upholding the authority of the court.” RCW 7.21.010(2). The County did not request a punitive sanction, and the trial court never claimed to have issued one.

In order to be coercive and not merely punitive, a remedial sanction must meet three requirements:

“First, it must be designed to serve remedial aims; that is, it must be directed at obtaining future compliance. Second, the condition must be within the power of the [contemnor] to fulfill. Third, the condition must be reasonably related to the cause or nature of the [contemnor’s] contempt.”

101 Wn. App. 425, 450, 3 P.3d 780, 794 (2000). In *M.B.*, the contemnors appealed only the remedial sanction, not the finding of contempt. The First Division was tasked with “determining how courts can exercise their discretion to fashion an appropriate purge condition such that the court is assured of the contemnor’s future compliance while also ensuring that the sanction is remedial.” *Id.* at 448–49. The *M.B.* court derived its three-prong ruling quoted above from a Wisconsin Supreme Court case, *In re Marriage of Larsen*, 165 Wis. 2d 679, 478 N.W.2d 18 (1992). *M.B.*, 101 Wn. App. at 449.

In *Larsen*, the contemnor was undeniably in contempt for failing to make child support payments, but he testified he was unable to pay because he was unemployed, which he further testified was due to his being afflicted with post-traumatic stress disorder (PTSD). *Id.* The *Larsen* court affirmed the lower court’s remedial sanction that ordered Larsen to serve 90 days in jail if he failed to seek treatment for his PTSD.

Id. This remedy served remedial ends and was reasonably related to the cause of Larsen's contempt. *Id.*

Here, the Contempt Order prohibits the Club from operating until it applies for *and obtains* site development activity permitting. CP at 414. This remedy goes well beyond addressing the permitting application deficiencies alleged by the County. It is akin to prohibiting a judgment debtor from operating his business until he pays \$100,000 because he failed to pay a judgment for \$50,000. It is made even worse by the fact that the County itself will have the power to grant or deny the Club's permitting applications. Thus, there is a substantial risk that the \$158,000 scope of work and budget prepared by the Club's consultants will not be sufficient to satisfy all of the County's permitting demands. There is also a risk that the County will require the Club to perform remediation of the site as a condition of issuing the permits. In that event, the Club might have to spend more than the total estimate of \$398,939 provided by the Club's consultant before resuming any firearm activities at its property.

The remedial sanction in the Contempt Order does not serve remedial aims, nor is it reasonably related to the cause or nature of the alleged contempt. To satisfy those elements of the rule from *M.B.*, the remedy would need to allow the Club to continue operating because that is the only way it can remain solvent and generate income needed to satisfy

the permitting requirements alleged by the County. At minimum, it would need to allow the Club to continue using those substantial portions of its 72-acre parcel where site development activity permitting violations do not exist. The order shutting down the entire Club until it applies for and obtains site development activity permitting is not reasonably related to the cause or nature of the alleged contempt, nor does it serve a remedial purpose. It is impermissibly punitive.

The theory behind the County's contempt motion and the trial court's Contempt Order appears to be that if they punish the Club severely enough, it will somehow find a way to comply with the Permitting Order. That is not a permissible approach to fashioning a remedial contempt sanction. The remedy in the Contempt Order is contrary to law and therefore must be reversed as an abuse of discretion.

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VI. CONCLUSION

For the foregoing reasons, the Contempt Order should be reversed and the trial court should be instructed to deny the County's contempt motion. Alternatively, the Contempt Order should be reversed and the case should be remanded with clear instructions to the trial court regarding the applicable legal standards discussed above.

DATED: April 20, 2017

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APPENDIX

Pursuant to RAP Rule 10.3(8) and 10.4(c), Appellant Kitsap Rifle
and Revolver Club respectfully submits the attached Appendix.

(1) Revised Code of Washington (RCW) 7.21.010.....	1
(2) Revised Code of Washington (RCW) 7.21.030.....	2

RCW 7.21.010**Definitions.**

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

[1989 c 373 § 1.]

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.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

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

NOTES:

Findings—Intent—2001 c 260: See note following RCW 10.14.020.

Findings—Intent—1998 c 296 §§ 36-39: "The legislature finds that an essential component of the children in need of services, dependency, and truancy laws is the use of juvenile detention. As chapter 7.21 RCW is currently written, courts may not order detention time without a criminal charge being filed. It is the intent of the legislature to avoid the bringing of criminal charges against youth who need the guidance of the court rather than its punishment. The legislature further finds that ordering a child placed in detention is a remedial action, not a punitive one. Since the legislature finds that the state is required to provide instruction to children in detention, use of the courts' contempt powers is an effective means for furthering the education and protection of these children. Thus, it is the intent of the legislature to authorize a limited sanction of time in juvenile detention independent of chapter

7.21 RCW for failure to comply with court orders in truancy, child in need of services, at-risk youth, and dependency cases for the sole purpose of providing the courts with the tools necessary to enforce orders in these limited types of cases because other statutory contempt remedies are inadequate." [1998 c 296 § 35.]

Findings—Intent—Part headings not law—Short title—1998 c 296: See notes following RCW 74.13.025.

CERTIFICATE OF SERVICE

I, Skylar Washabaugh, declare under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned a resident of the State of Oregon, over the age of eighteen years, not a party to or interested in the above-titled action, and competent to be a witness herein.

On the date given below, a copy of BRIEF OF APPELLANT was served upon the following individuals by via email, pursuant to an e-service agreement between the parties, to the following:

Christine M. Palmer
Laura F. Zippel
Kitsap County Prosecutor's Office
Civil Division
614 Division St., MS-35A
Port Orchard, WA 98366
Email: cmpalmer@co.kitsap.wa.us
lzippel@co.kitsap.wa.us

I filed the BRIEF OF APPELLANT electronically with the Court of Appeals, Division II, through the Court's online e filing system.

DATED: April 20, 2017

CHENOWETH LAW GROUP, PC



Skylar Washabaugh, Paralegal
swashabaugh@northwestlaw.com

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Personal Restraint Petition (PRP)

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Comments:

No Comments were entered.

Sender Name: Skylar Washabaugh - Email: swashabaugh@northwestlaw.com