

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**6/15/2018 3:25 PM**

Court of Appeals No. 51222-0-II  
Trial Court No. 17-2-00870-08

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

DEL RAY PROPERTIES, INC.,

Appellant,

v.

SHARON DOERR and RANDALL BECK,

Respondents

---

**APPELLANT DEL RAY PROPERTIES, INC.'S REPLY BRIEF**

---

PHILLIP J. HABERTHUR, WSBA #38038  
BRADLEY W. ANDERSEN, WSBA #20640  
LANDERHOLM, P.S.  
805 Broadway Street, Suite 1000  
P.O. Box 1086  
Vancouver, WA 98666-1086  
(360) 696-3312  
Of Attorneys for Appellant

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS ..... 3

III. ARGUMENTS ..... 7

    A. Del Ray Continued to Pay Utility Billings and Did Not  
    Intentionally Violate a Court Order. .... 8

    B. Trial court erred in holding Del Ray in contempt of court. .... 11

    C. There is no basis to award Respondents their attorneys’ fees and  
    costs..... 15

IV. CONCLUSION ..... 15

## Table of Authorities

### Cases

<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007).....	14
<i>Keller v. Keller</i> , 52 Wn.2d 84, 323 P.2d 231 (1958).....	14

### Statutes

RCW 7.21 .....	8
RCW 7.21.030 .....	2, 12, 15
RCW 7.21.040 .....	12
RCW 7.21.050 .....	7

## I. INTRODUCTION

Respondents Sharon Doerr and Randall Beck concede in their Response Brief that the trial court erred when it imposed punitive sanctions against Appellant Del Ray Properties, Inc. Respondents also concede that their water was never shut-off due to non-payment, and that, prior to the contempt, Del Ray had gained the City's written promise not to shut-off the tenants' water until the accounting issues could be resolved. They also implicitly acknowledge the accounting confusions with the City's billings, which caused Del Ray not to really know what amounts needed to be paid to remain current.

And though they forced this appeal, but now concede the court improperly imposed punitive sanctions, Respondents still seek their legal fees. This, despite the fact they invited the error by asking the trial court to impose punitive as opposed to remedial sanctions.

Finally, and despite their having suffered no harm (i.e., the water never was shut-off and Del Ray secured assurances from the City that protect the tenants from having their water service terminated), Respondents essentially seek a windfall from Del Ray by capitalizing on the City's misleading and confusing billing practices.

Realizing the trial court's error (and their complicity in the court making that mistake), Respondents now want this Court to affirm the lower

court's decision, but on a new theory. Respondents contend, for the first time on appeal, that the trial court had the "inherent" power to punish Del Ray, despite not complying with the statutory process. But this theory could only work if Respondents had first demonstrated that the statutory contempt provisions were not an available process to address the alleged contempt. Absent such proof, the trial court was required to follow the statutory contempt process and only impose remedies as allowed under the law. Since Respondents did not (and cannot) make this showing, the trial court's Contempt Order must be vacated.

Ironically, considering their other argument, Respondents ask for their fees and costs under the remedial contempt statute. This statute, RCW 7.21.030, only applies to remedial sanctions, and not punitive sanctions. Respondents cannot have it both ways, especially since the trial court never awarded remedial sanctions or included any provisions in the order allowing Del Ray to purge the contempt (required for remedial sanctions to prevent the sanctions from becoming coercive/punitive).

Respondents cannot ask this Court to modify the sanction from punitive to inherent contempt powers, and then impose attorneys' fees and costs under the remedial sanction statute. Instead of attempting to piecemeal together a basis to levy sanctions against Del Ray for damages that never

occurred, this Court should vacate the award of sanctions and remand to the trial court.

Regardless, the trial court's Order of Contempt should be reversed and vacated because there was insufficient evidence that Del Ray *willfully* violated the court's preliminary injunction that required Del Ray to remain current on the City's water bills. At best, the City's bills and billing practices were ambiguous and confusing, leaving Del Ray having to guess on what was owed, or what it needed to do to avoid being found in Contempt.

For these reasons, this Court should vacate the trial court's Order of Contempt.

## **II. STATEMENT OF FACTS**

Respondents spend many pages of the Response Brief attempting to detail the lack of inconsistency in the City's billing statements. Their attempts fall flat. Many errors and issues abound in the City's billings. For example, the City's billings routinely added and removed miscellaneous charges, such as a \$25 late fee that was arbitrarily included and then removed.

Respondents acknowledge these floating billing practices, yet attempt to downplay their significance on the accuracy of the utility billings. Respondents acknowledge that it was sometimes included, and often

omitted, causing confusing billings. Br. of Resp., p.4, n2; p.7; n.4; p.8 (“less the \$25 penalty that was assessed on July 26”); p.8.

Regardless of the Respondents’ admissions, the record clearly demonstrate the City’s ambiguous and arbitrary billing statements. For example, the Third Declaration of Susan Chamberlain, submitted to support Respondents’ Motion for Contempt, details the irregularities in the billings, and how difficult it was for Del Ray to determine how much it owed at any given time. Del Ray attempted to pay to keep the account current, despite not having a clear record of what was owed. CP 108; 39-43.

While the Respondents focus solely on the amounts owed, Del Ray was also concerned about the consumption and how the City appeared to be overcharging for water consumption.

The City’s monthly billings were consistently wrong, yet the City did not afford Del Ray the chance to challenge the consumption amount until October 2017 when the CR2A was executed. By this point, Del Ray had noticed many months of erroneous billings. Here is a summary of the consumption amounts submitted by the City:

- 4/25/16 to 5/24/16. Meter previous reading: 3253; Current reading: 3467. Reported Consumption: 527. Actual consumption was 214. CP 87.

- 5/25/16 to 6/24/16. Meter previous reading: 3467; Current reading 3694. Reported Consumption: 492. Actual consumption was 227. CP 88.
- 6/25/16 to 7/24/16. Meter previous reading: 3694; Current reading 3893. Reported Consumption: 529. Actual consumption was 199. CP 89.
- 7/25/16 to 8/24/16. Meter previous reading: 3893; Current reading 4149. Reported Consumption: 716. Actual consumption was 256. CP 90.
- 8/25/16 to 9/24/16. Meter previous reading: 4149; Current reading 4343. Reported Consumption: 522. Actual consumption was 194. CP 91.
- 9/25/16 to 10/24/16. Meter previous reading: 4343; Current reading 4530. Reported Consumption: 661. Actual consumption was 187. CP 92.
- 10/25/16 to 11/24/16. Meter previous reading: 4530; Current reading 4538. Reported Consumption: 547. Actual consumption was 8. CP 93.
- 11/25/16 to 12/24/16. Meter previous reading: 4538; Current reading 4539. Reported Consumption 608. Actual consumption was 1. CP 94.
- 12/25/16 to 1/24/17. Meter previous reading: 4539; Current reading 4540. Reported Consumption 528. Actual consumption was 1. CP 95.
- 1/25/17 to 2/24/17. Meter previous reading 4540; Current reading 4540. Reported Consumption 497. Actual consumption was 0. CP 96.
- 2/25/17 to 3/24/17. Meter previous reading 4540; Current reading 4540. Reported Consumption 487. Actual consumption was 0. CP 97.

- 3/25/17 to 4/24/17. Meter previous reading 4540; Current reading 4540. Reported Consumption 440. Actual consumption was 0. CP 98.

**And then, after the City installed a new meter.** 3/25/17 to 4/24/17. No charge. CP 99.

- 4/25/17 to 5/24/17. Meter previous reading 32343; Current reading 32804. Consumption 461. Actual consumption was 461. CP 100.
- 5/25/17 to 6/24/17. Meter previous reading 32804; Current reading 33179. Consumption 375. Actual consumption was 375. CP 101.
- 6/25/17 to 7/24/17. Meter previous reading 33179; Current reading 33629. Consumption 451. Actual consumption was 450. CP 102.

As shown by the City's billing statements, water meter 45488138 was providing erroneous readings that clearly did not match the consumption charged to Del Ray. After months of complaints lodged by Del Ray, the City started reading meter 13966 in April 2017. The meter readings matched the consumption reported and billed, and Del Ray's bills dropped. Compare CP 87 to 100, showing a drop in consumption from 527 to 461; CP 88 to CP 101, showing a drop in consumption from 492 to 375; and CP 89 to CP 102, showing a drop in consumption from 529 to 451.

On top of these errors, the City also inconsistently billed \$25 penalty charges to Del Ray. These were sometimes billed as separate line item charges, CP 100, and other times hidden within the billing charges. CP 101. For example, when Del Ray reviewed the July 2017 billing, the totals for

water, sewer, garbage, storm water, and taxes did not add up correctly because the penalty charge was included, but not shown. CP 101. Undoubtedly, this led Del Ray to question why the City's charges fluctuated without explanation.

Not relying upon the malfunctioning meter appeared to fix the billings moving forward; however, it did nothing to resolve the year or more of erroneous billings that Del Ray continued to challenge. CP 38-44. Del Ray therefore requested, and the City Agreed, to enter into a temporary CR2A Stipulation to allow Del Ray and the City to resolve the billings and agree to some accounting. The City readily agreed, and further promised not to shut off the water to any tenants until the past accounting issues had been resolved. CP 114-16.

Del Ray requested the Respondents to join the CR2A, but they refused because they wanted to pursue sanctions, attorneys' fees, and costs for Del Ray's alleged contempt of court. CP 144-45. The Respondents now concede on appeal that the trial court erred in awarding punitive damages to them. Br. of Resp., p.3.

### **III. ARGUMENTS**

The Respondents concede in their Response that the trial court failed to follow RCW 7.21.050, deprived Del Ray of its due process rights and imposed sanctions not afforded in that statute. But rather than conceding

this was reversible error, the Respondents double down to argue this Court should affirm the trial court on the grounds that courts have the inherent authority to impose punitive sanctions.

The Respondents' argument can be summed up as follows: the trial court lacked the authority to award them sanctions, but the trial court was essentially "right for the wrong reasons" because Del Ray "intentionally disobeyed a lawful order in violation of RCW 7.21." *Id.* The Respondents' argument fails for several reasons.

A. **Del Ray Continued to Pay Utility Billings and Did Not Intentionally Violate a Court Order.**

Del Ray continued to raise serious and well-founded challenges to the City's erroneous billings before the trial court. Larry Foster, owner of Del Ray, continued to ask why the meter showed one consumption amount, but the billing had an entirely different consumption billed? Once the meters were switched, why did his consumption finally drop? Why were the billings sometimes itemizing and then other times lumping the \$25 payments into other charges? Why did Chamberlains' (City's billing clerk) multiple declarations contain inconsistencies regarding the billing dates, due dates, and when payments were made? Further, Larry Foster testified that he did not receive the supposed late notices from the City, and

Chamberlain offered no evidence these invoices were ever sent or received by Del Ray.

Contrast this with Foster's (Del Ray) willingness to make the payments required by the City. Foster's Declaration in Response to Motion and Order of Contempt detailed the payments he made on the accounts to ensure they were all current. CP 117-123. Foster stated that even though he believed he was overbilled, he understood he would "be considered 'current' with the City of Longview provided [he paid] \$20,194.64 within five days, which [he planned] to do." CP 118. Foster's Declaration was signed on October 3, 2017, one day before the Contempt Hearing. CP 118. The Declaration was based upon Foster finally receiving an amount the City claimed was owed. CP 146.

But then, the next day, October 4, 2017, the City Attorney wrote there was also an additional \$5,739.65 due, but no notice had been sent out with this amount. CP 143. This was only brought to Foster's attention after he had mailed out checks to the City, and on the same day of the contempt hearing. *Id.* The City Attorney tried to explain that that this latest bill was in the grace period until October 10, 2017, nearly a week after the contempt hearing. CP 143.

The irony of the shifting target of what was owed was not lost on Foster's attorney who wrote back to the City, "you can imagine how hard it

is when the amounts keep changing. I thought we had this all worked out.” CP 143.

After the City Attorney apologized, Del Ray’s attorney stated he “[u]nderstood and we [Del Ray] don’t plan to avoid paying the bills as they become due.” CP 142.

At the time of the contempt hearing, Del Ray had sent checks for all outstanding amounts that were currently due. He also promised to immediately pay the one bill that was still in the grace period, even though it had never received the bill. CP 142-143.

Because of the City’s admission of confusion, and the fact that they knew Mr. Foster was making good faith efforts to remain current, the City and Del Ray agreed to the CR2A, which protected the tenants from threat of having their water services terminated. CP 142-46.

This agreement preserved Del Ray’s rights to challenge the City’s billings, as it had become clear that something was amiss with the meters and consumption amounts, while also protecting the tenants. What more needed to be done? What more could Del Ray do to protect the Respondents?

Respondents contend that Del Ray “offered no facts that contested they owed \$5,596.65 when the trial court found Appellant in contempt.” Br. of Resp., p.9. This is untrue. Del Ray offered undisputed testimony that

payment arrangements were made with the City to pay the amount claimed owed. CP 118 (“provided I pay \$20,194.64 within five days, which I plan to do.”). Foster paid this amount on October 3, 2017. CP 140. Since the remaining \$5,739.00 was still in a grace period until October 10<sup>th</sup>, this bill could not support a finding of contempt against Del Ray. CP 142.

Respondents were in such a rush to hold their landlord in contempt, they glossed over the fact that their water had never been turned off, nor were they at risk of having their services terminated under the CR2A agreement Del Ray had secured with the City. And unlike the City, the Respondents did not care that Del Ray was being overcharged for water services. They instead rush forward to ask the trial court to award punitive sanctions, even though they now admit that such sanctions were not allowed under the contempt statutes.

Even though they now admit this error, the Respondents still ask this Court to find some other basis, any basis, to allow them to keep the \$3,300 punitive sanction, and their fees and costs.

**B. Trial court erred in holding Del Ray in contempt of court.**

Respondents admit that punitive sanctions are not allowed under these circumstances. Putting aside that Respondents invited the trial court’s error when they sought punitive sanctions and presented the court with a draft order granting punitive sanctions under the statute, the Respondents

now argue that the trial court's decision should be upheld for other reasons. Br. of Resp., p.6. They want this Court to find the trial court right for the wrong reasons, without regard to the impact such a decision would have on Del Ray.

Respondents' arguments are misplaced for several reasons. First, Respondents concede that punitive sanctions cannot be imposed because the trial court failed to follow the statutory process in RCW 7.21.040. Second, remedial sanctions cannot be imposed without a purge clause, and Del Ray was afforded no opportunity to purge the \$3,300 sanction labeled as "punitive." *See* RCW 7.21.030. Further, because the court cannot impose remedial sanctions, it also cannot award attorneys' fees and costs to Respondents because those are only allowed after a finding of remedial contempt under RCW 7.21.030. Respondents argue that the Court may impose the attorneys' fees and costs as a "remedial sanction," Br. of Resp. p.11, but they again miss the point of remedial sanctions. Remedial sanctions must contain a purge clause or else they become coercive. There is no basis for Del Ray to purge an award of attorneys' fees and costs. And, the purge clause must be written in the order of contempt, which is silent on this point.

Second, the basis of Respondents' Motion for Contempt was RCW 7.21, which affords Del Ray procedural protections against punitive

sanctions, and even the imposition of remedial sanctions (requiring a purge clause). Respondents now appear to recognize that the trial court improperly awarded punitive sanctions. Indeed, Del Ray had made the required payments by the time of the contempt hearing and so there was nothing left to purge.

Respondents' attorney admitted this point when she wrote to Del Ray and the City's attorney that, "I'm not in a position to waive my request for sanctions." CP 145. The issue was not whether water would be shut-off—Del Ray had resolved that through its CR2A agreement with the City. Respondents instead wanted the court to impose \$3,300 in sanctions, plus their attorneys' fees and costs, even though the issue had been resolved.

Respondents desperately advocate for any basis to have their sanctions and award of attorneys' fees and costs upheld, without regard to Del Ray's rights.

Respondents urge this Court to hold, as a matter of law, that the trial court properly used its inherent contempt power under the Washington State Constitution. But Respondents can only cite to *Keller v. Keller*, 52 Wn.2d 84, 89, 323 P.2d 231 (1958) to support their position. *Keller* affords them no such support.

While *Keller* speaks to the general proposition that courts retain an inherent power of contempt, that power is not without restraint. "Inherent

contempt power is separate from statutorily granted contempt power. It is ‘created by the constitution, ... comes into being upon the very creation of ... a court and remains with it as long as the court exists.’” *In re Dependency of A.K.*, 162 Wn.2d 632, 645, 174 P.3d 11, 17 (2007) (internal citations omitted). And “[w]hile inherent contempt authority is a critical component of judicial power, its use is appropriate only in limited situations.” As the supreme court stated: “We have long held that courts may not exercise their inherent contempt power ‘[u]nless the legislatively prescribed procedures and remedies are specifically found inadequate.’” *Id.* at 647 (internal citations omitted).

Here, as in *In re Dependency of A.K.*, the trial court did not, and could not, find that all statutory remedies were inadequate to justify having the trial court abandon the statutory contempt procedures. Indeed, the Respondents have not even argued that the statutory remedies are inadequate.

Instead, the exact opposite is true. The Respondents sought statutory remedies (punitive sanctions), which they now concede were available.

Respondents attempt to brush this off by arguing that the trial court “found Appellant in contempt of court for a valid reason—noncompliance with a court order—but cited the incorrect statute as a basis for its ruling.” Br. of Resp., p. 14. Respondents then urge this Court to look to the trial

court's inherent authority and "uphold its ruling on any alternate and applicable legal theory." *Id.* This approach has been soundly rejected, and the trial court's ruling must be vacated and remanded. This Court simply cannot switch to inherent contempt of court until and unless a determination is made that statutory sanctions are inadequate. Citing to the incorrect statute is woefully insufficient and deprives Del Ray of due process.

C. **There is no basis to award Respondents their attorneys' fees and costs.**

Respondents seek their attorneys' fees and costs under the remedial sanction statute, RCW 7.21.030, which is the very statute they must prove is inadequate and inapplicable to the facts at hand to justify using the inherent contempt power of the court. Respondents also claim they are entitled to fees because they defended a contempt order on appeal, yet they concede that contempt order was improperly granted due largely to their own error. Respondents have failed to set forth a valid basis for fees or facts justifying why fees should be awarded on appeal. Their request should be denied.

IV. **CONCLUSION**

The City's messy and arbitrary billing practices preclude a finding that Del Ray intentionally violated the trial court's order. The undisputed evidence instead shows that Del Ray consistently worked with the City to obtain accurate utility billings and to create a process that would allow Del

Ray to challenge the City's accounting while also protecting its tenants, including the Respondents, from having their water services terminated.

But the Respondents were not happy with this result and instead wanted the court to punish Del Ray.

However, the Respondents invited the trial court not to follow the proper statutory contempt process, which resulted in the court improperly imposing punitive sanctions against Del Ray.

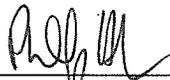
And finally, because the statutory process was adequate to address Respondents' alleged concerns about a potential contempt, there was (and is) simply no basis for the trial court to use its inherent authority to find Del Ray in contempt or to impose punitive sanctions.

The trial court's Order of Contempt should therefore be vacated.

DATED this 15th day of June, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.



---

PHILLIP J. HABERTHUR, WSBA # 38038  
BRADLEY W. ANDERSEN, WSBA #20640  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 15th day of June, 2018, a copy of the foregoing **APPELLANT DEL RAY PROPERTIES, INC.'S REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to this person:

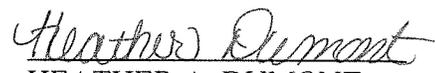
James McNamara, City Attorney  
City of Longview  
1525 Broadway  
Longview WA 98632-7080  
E-mail:  
[james.mcnamara@ci.longview.wa.us](mailto:james.mcnamara@ci.longview.wa.us)

Jeffrey S. Myers  
Law, Layman, Daniel, Kamerrer  
& Bogdanovich, P.S.  
2674 R.W. Johnson Rd  
Tumwater, WA 98512  
PO Box 11880  
Olympia WA 98508-1880  
E-mail: [jmyers@lldkb.com](mailto:jmyers@lldkb.com)

Lisa Waldvogel  
Northwest Justice Project  
1338 Commerce Avenue, Suite 210  
Longview WA 98632  
E-mail: [LisaW@nwjustice.org](mailto:LisaW@nwjustice.org)  
cc: [Sherrills@nwjustice.org](mailto:Sherrills@nwjustice.org)

**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

DATED: June 15, 2018  
At: Vancouver, Washington

  
HEATHER A. DUMONT

**LANDERHOLM, P.S.**

**June 15, 2018 - 3:25 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51222-0  
**Appellate Court Case Title:** Del Ray Properties, Inc., Appellant v Sharon and Randall, Respondents  
**Superior Court Case Number:** 17-2-00870-3

**The following documents have been uploaded:**

- 512220\_Briefs\_20180615152426D2190814\_0734.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- lisaw@nwjustice.org
- philh@landerholm.com

**Comments:**

---

Sender Name: Heather Dumont - Email: heather.dumont@landerholm.com

**Filing on Behalf of:** Bradley W. Andersen - Email: brad.andersen@landerholm.com (Alternate Email: KeeleyAnn.Martin@landerholm.com)

Address:  
805 Broadway Street, Suite 1000  
Vancouver, WA, 98660  
Phone: (360) 696-3312

**Note: The Filing Id is 20180615152426D2190814**