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NO. 53878-4-II

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

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

Respondent,

vs.

KITSAP RIFLE AND REVOLVER CLUB, et al.

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

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR PIERCE COUNTY

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RESPONSE BRIEF OF APPELLEE/RESPONDENT KITSAP COUNTY

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## I. INTRODUCTION

The issue at the core of this appeal is whether the trial court abused its discretion by declining to terminate contempt sanctions after the contemnor alleged that it lacked the present ability to comply. The answer is “no.”

Washington law presumes that all parties possess the ability to comply with a court order and places the burden on the violating party to establish that it lacks the ability to do so. The Kitsap Rifle and Revolver Club (“Club”) asserts that it cannot comply with the trial court’s orders due to a lack of financial resources. The inability to comply with a contempt order is an affirmative defense to the imposition of remedial contempt and a contemnor bears the burden of production and persuasion in the presentation of such a defense. Here, the Club failed to meet its burden for three reasons: (1) it failed to provide sufficient, credible documentation of its current resources or financial status; (2) it made no showing of a meaningful effort to obtain funds and instead relied exclusively on the fact that it simply cannot obtain necessary funds; and (3) there is evidence in the record that the Club does not comply out of a continued unwillingness to do so, rather than an inability.

Since the trial court’s order was entered in 2012, the Club has made

minimal efforts to comply. When its insurance company originally denied coverage for the costs associated with preparing and submitting a permit application, the Club made no attempt to obtain the funds on its own accord and failed to provide sufficient evidence regarding its financial status, resources, liabilities, or assets prior to contempt being entered. Subsequent to that denial and leading up to the Club's motion to terminate contempt sanctions at issue in this appeal, there is still no indication that the Club made any attempts to obtain funding or even establish a plan to do so. The Club simply presented limited bank records and factually superficial declarations that conflicted with previous statements from Club members in order to support its request.

It is necessary to place the most recent request by the Club to terminate contempt sanctions into the historical context of the case to better understand the unreasonable nature of their position. The trial court entered its contempt order in 2016. Before entering the contempt order, the trial court provided the Club a 90-day continuance to give the Club additional time and opportunity to comply with its order. During that time, the Club attempted to submit a permit application which fell far below the County's permit submittal requirements. The Club's application was rejected by the County because the Club intentionally refused to pay the required application fee. The Club's conduct during contempt proceedings clearly

communicated that it would make no serious attempt to comply with the court order or to cure its unlawful conduct so long as its insurer denied coverage.

In issuing a contempt order, the trial court acknowledged the unfortunate reality of the situation before it. If the Club were allowed to continue to operate as if it were not in contempt, it would continue to reap the benefit of its unlawful site development activities. There would be no incentive for the Club to comply and its compliance would indefinitely hinge upon a coverage decision made by a third party. The insurer's denial of coverage would become an indefinite crutch.

The Club claimed then, as it claims now, that its noncompliance should be excused because compliance will require the expenditure of a significant amount of funds. If the Club's noncompliance is excused based upon a claim that it lacks the financial ability to comply, there would be no incentive for the Club to acquire the means to comply. This would create a reality in which the Club's continued noncompliance without consequences is far more attractive to it than the burdens of having to comply. In this reality, noncompliance would likely continue indefinitely, especially where the determination of whether the Club has the "ability" to comply relies exclusively on the Club's minimally supported assertions on the matter.

The trial court's contempt order is a necessary coercion. It

incentivizes compliance and creates accountability where none would otherwise exist. The Club has simply not presented sufficient, credible evidence that justifies the trial court lifting that order of contempt. Instead, in order to support its position that the trial court abused its discretion when declining to lift contempt, the Club engages in the age-old legal strategy of attempting to shift the burden to the County in a case where the burden of proof and persuasion rests solely with the Club. The trial court properly exercised its discretion and its denial of termination of the contempt order should be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

The Club presents five issues to the court. Those five issues can be condensed into the singular issue stated below.

1. Did the trial court abuse its discretion in declining to terminate the remedial contempt sanction when the Club failed to meet its burden of proof in establishing that it lacked the ability to comply with the trial court's order and when the Club has made no showing of a meaningful effort to secure the means to comply?

## **III. NOTICE OF RELATED CASES**

For informational purposes only, Kitsap County hereby notifies the Court of the existence of the following additional cases between the parties which are currently on appeal before this Court:

COA Cause No: 53668-4-II (appeal of amended order of contempt in Pierce County Superior Court Cause No. 10-2-12913-3); and

COA Cause No.: 53898-9-II (appeal of order supplementing judgment on remand entered in Kitsap County Superior Court Cause No. 15-2-00626-8).

#### IV. STATEMENT OF THE CASE

##### A. The County's Lawsuit Against the Club

The Club has operated a shooting facility at the same general location in Kitsap County for almost one hundred years. *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 262, 337 P.3d 328 (2014) (hereinafter *Kitsap Rifle* (2014)). As of 1993, the Club's operation was a lawful, nonconforming use. *Id.* at 262–63. Beginning in the 1990s, the Club engaged in extensive development of the property on which its shooting range was located. *Id.* at 264. This development included clearing and excavating wooded or semi-wooded areas, removing vegetation, replacing a water course that ran through a wetland buffer with two 475–foot culverts, and excavating and moving soil. *Id.* The Club did not obtain permits for any of this work. *Id.*

In 2011, the County filed a lawsuit against the Club, alleging in part that the Club had engaged in unlawful development activities because it lacked the necessary permits. *Id.* at 265. The trial court concluded that

the Club's use of the property was illegal because it had not obtained any permits for its development work. *Id.* at 266. The trial court entered conclusions of law that this unpermitted use terminated the nonconforming use of the Club's property as a shooting range. *Id.* at 265–66. The trial court issued a permanent injunction prohibiting the Club from using its property as a shooting range until it obtained the proper permits. *Id.* at 266.

On appeal, this Court affirmed the trial court's ruling that the Club's development work violated County land use permitting requirements. *Id.* at 275. However, terminating the Club's nonconforming use status was not a proper remedy. *Id.* at 300–01. This Court remanded for the trial court to determine the proper remedies for the Club's permitting violations. *Id.* at 301.

**B. Order Supplementing Judgment**

On remand, the trial court entered an Order Supplementing Judgment on Remand. CP 42-45. The supplemental order required the Club to submit site development activity permitting (SDAP) within 180 days of entry of the order:

A permanent, mandatory injunction is hereby issued further requiring Defendant to apply for and obtain site development activity permitting to cure violations of KCC [Kitsap County Code] 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 45.

The trial court entered the order on February 5, 2016, with the 180-day period set to end on August 3, 2016. *Id.* During this period, the Club engaged consultants to draft a scope of work, which listed the required activities for the Club to comply with the relevant permitting requirements. The scope of work estimated that the cost of preparing the Club's SDAP applications would exceed \$158,000 and that the cost of completing all required activities would be \$398,939. *Kitsap County v. Kitsap Rifle and Revolver Club*, 2 Wn. App. 2d 1021, 1 (2018) (unpublished) (hereinafter *Kitsap Rifle* (2018)). The Club submitted the scope of work to its insurer, Northland Insurance Company. *Id.* The insurance company denied coverage for the costs associated with the scope of work. *Id.*

**C. Motion for Contempt**

The August 3, 2016, deadline passed and the Club failed to submit an SDAP application. In response, the County filed a motion for contempt, requesting that the court prohibit the Club from operating a shooting range until it submitted an application for an SDAP. *Id.* at 2, CP 46-60. The Club responded to Kitsap County's motion, arguing that it did not have the ability

to comply with the order without its insurer paying for the work. *Kitsap Rifle* (2018) at 2.

The trial court held a hearing on August 26, 2016. The Club argued that it was unable to comply with the court's order because of the expense. *Id.* The court provided 90 additional days for the Club to file the required SDAP application and scheduled a second hearing for December 2, 2016. *Id.*

**D. Second Contempt Hearing**

At the second contempt hearing, once again the inability to pay was the focus of the contempt hearing. The County argued that the Club had not met its burden of establishing an inability to pay the expenses of the permit process due to its sole reliance on unsupported assertions. *Id.* at 3. Notably, the Club never submitted bank statements, asset and liability information, or tax returns. *Id.* The County also argued that there was no information about whether the Club had made efforts to obtain grant funding or engage in fundraising to pay for the necessary expenses. *Id.*

The Club responded to the County's argument by stating it lacked the ability to pay for the professional and engineering services required to submit a complete SDAP application. *Id.* Similarly to the current appeal, the Club argued that it had un rebutted evidence that it was unable to pay the \$158,000 cost for those services. *Id.*

The trial court granted the County's motion for contempt and entered an order enjoining the Club from “operating a shooting facility” until the Club obtained SDAP permitting to remedy the violations found in the original judgment. CP 61-66. Under the contempt order, the Club is still allowed to utilize the property for other lawful activities other than the discharge of a firearm. CP 66.

**E. The Club Appeals the Original Contempt Order**

KRRC appealed the December 2, 2016, contempt order. This Court affirmed the trial court’s finding of contempt but vacated the purge condition in *Kitsap Rifle* (2018). The Court found that the condition to obtain an SDAP was punitive rather than coercive because it relied on the action of the County to issue a permit. *Id.* at 11. The Court remanded the case for the trial court to impose a proper purge condition stating that “[a]lthough the Club may have control over submitting an application for an SDAP, it does not have control over obtaining an SDAP.” *Id.* (emphasis in original). The Club’s ability to obtain a permit is dependent on the County issuing a permit but its ability to apply for a permit is not. *Id.*

The Court also noted that the Club had not meet its burden of proof to show an inability to comply: “In light of the minimal evidence the Club presented, it is apparent that the court concluded that the Club did not present credible evidence of inability to pay and therefore did not meet its

burden of proof. Given the abuse of discretion standard of review, we will not second guess the court's determination.” *Id.* at 8.

**F. The Amended Contempt Order**

On June 7, 2019, the trial court held a hearing to enter an amended contempt order on remand. CP 67-69. The amended contempt order imposed a new purge condition which states in pertinent part:

Defendant KRRC is enjoined from operating a shooting facility until such time that: (a) KRRC submits a complete site development activity permit ("SDAP") application to Kitsap County for permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment (hereafter "Purge Condition") . . . to submit a "complete" SDAP application means to transmit through the County's online portal an SDAP application that contains each and every one of the items listed in KCC §21.04.160(B).

CP 68.

The Amended Contempt Order also included language that if KRRC proves in a future proceeding that it does not have the ability to comply with the permitting order in the Supplemental Judgment, such as by proving it does not have the ability to perform the Purge Condition, the court may lift the contempt sanctions. CP 68-69.

**G. The Club's Motion to Terminate Contempt**

Shortly after entry of the Amended Contempt Order on June 7, 2019, the Club submitted an incomplete application to Kitsap County Department

of Community Development (DCD) for an SDAP. CP 77; CP 90-91, ¶5-6; CP 155; CP 159, ¶3-7. After its incomplete submittal, the Club then moved the trial court to terminate contempt based on an inability to comply. CP 70-82. On June 28, 2019, the trial court heard the Club's motion to terminate contempt. Once again, the Club claimed that it did not have the ability to comply with the purge condition due to financial resource limitations and requested that the contempt be terminated as a result. CP 78-80. The Club cited, in support of its contention that it cannot comply with the purge condition, declarations of Marcus Carter and Barbara Butterton. CP. 76-77. Ms. Butterton indicated that she filed several of the required documents for permit approval on June 19, 2019, via the County online permitting system. CP 90-91, ¶5-6. She acknowledged that this submission merely initiated the review process and that the County had not responded to the submission. Id. Ms. Butterton asserted that she has no information to the contrary that to complete the application process will cost anything less than \$45,377.40, \$113,000 less than the Club's previous filed scope of work. CP 91, ¶6.

1. *Evidence of the Club's Continued Unwillingness to Comply*

As a part of the online application for the SDAP, applicants have the option to file a submittal waiver which requests the waiver of specific documents related to the permit. Kitsap County Code §21.04.160(C). CP 159, ¶4. The form is simple and in the online format it involves clicking a

bubble and filling out an explanation provided for each waiver request. CP 168-170. Ms. Butterton filed such a waiver on June 19, 2019, with the Club's incomplete application submittal and made the following waiver requests with the associated reasons:

- Reason to waive Flood Evaluation Report: "*Waste of time and resources.*"
- Reason to waive Geological/Geotechnical Report: "*Waste of time and resources.*"
- Reason to waive Habitat Management Plan: "*Waste of time and resources.*"
- Reason to waive Hydrogeological Report: "*Not necessary.*"
- Reason to Waive Pre-Application Meeting Summary: "*The pre-application meeting summary appears to not consider any pre-existing conditions.*"
- Reason to Waive Wetland Habitat Report: "*Not needed as nothing changes.*"
- Reason to Waive Soils Report: "*Soils evaluation done while Washington DOE inspected our well installation.*"
- Reason to Waive SEPA checklist: "*Waste of time and money.*"

CP 168-170.

The County highlighted these statements in its responsive briefing to the trial court to support its contention that the true motivating factor behind the non-compliance of the Club appeared to stem more with unwillingness to comply rather than inability. CP 155. In response to the County highlighting the Club's position on certain requirements of the SDAP application as evidenced by Ms. Butterton's editorializations in the

waiver form, the Club submitted an additional declaration where Ms. Butterson explained that “County appears to have misconstrued the Club’s comments it submitted when initiating its SDAP Commercial Application.” CP 231, ¶6. Those comments simply referred to the fact that the Club does not have the money it needs to submit a complete SDAP commercial application, so requiring it to submit incomplete subparts of the application would be a waste of time and resources. Id.

2. *The Club’s evidence with respect to its financial resources and attempts at securing additional funding*

In further support of the Club’s motion, a declaration of Marcus Carter, the Club’s executive officer, was submitted which attested to the financial state of the Club. CP 95-99. Attached to Mr. Carter’s declaration were limited bank records from only 2019 that appeared to indicate that the Club had on average between four thousand and five thousand dollars in the selected bank accounts. CP 127-148. Mr. Carter also attested that the Club was unaware of any way the club could obtain a loan secured by any of its property and that even in the event that such a loan could be secured, the Club wouldn’t be able to make monthly payments. CP 99, ¶8.

There was no record of attempts to secure credit nor proof of subsequent denials of credit. There was no record at all with respect to the application for a business loan or other loan through any one of the banks

that the Club maintains accounts with. The Club failed to provide the trial court with any information about what a monthly payment on a loan would be other than purportedly unaffordable. The Club did not provide meaningful information that indicated financial options have been exhausted, let alone explored. The Club simply relied on lacking a means to secure funding, not even that they had tried and failed to secure funding.

The Club also provided the trial court with scant information with respect to what fundraising efforts had been undertaken. The Club submitted unsubstantiated statements regarding the failure to raise funds after continuous and ongoing effort. Ms. Butterson provides some detail with respect to sending out 150 donation letters to various entities since 2012, an effort that generated less than \$1,000 in donation. CP 230, ¶3. It is unclear from the record if this took place before the original contempt finding or afterwards. Ms. Butterson also referenced a failed GoFundMe attempt to fundraise, but again her declaration does not provide any details about when these attempts were made. *Id.*

Nevertheless, the Club was aware of the estimated cost of the application fee and work to be done by Soundview and Contour as of at the earliest August 2018, yet the record is silent as to the steps that KRRC took to address securing financing for the project.

After considering the evidence presented by the Club and hearing argument from both the Club and the County, the trial court denied the Club's motion to lift the contempt sanctions. The Club then filed this appeal.

## V. ARGUMENT

### A. Standard of Review

Contempt is within the sound discretion of the trial court. *King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). Contempt findings are reviewed for abuse of discretion. *Id.* at 798. Meaning, a finding of contempt should be upheld so long as there is a proper basis for the contempt. *In re M.B.*, 101 Wn. App. 425, 454, 3 P.3d 780 (2000). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

The Club argues that the substantial evidence standard should be applied. In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party, in this case Kitsap County. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Substantial evidence is the "quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee*

*Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

The trial court's decision meets this standard.

**B. The Club Failed To Meet Its Burden of Proof**

The Club asserts that the trial court abused its discretion by denying the motion to terminate contempt sanctions based on the Club's purported inability to comply. The Club's argument fails because it asks the Court to step into the trial court's shoes and make credibility determinations as to the Club's evidence.

The Washington State Supreme Court has definitively held that the party claiming inability to comply with a court order carries the burden of proof on that issue. *Moreman*, 126 Wn.2d at 40; *King*, 110 Wn.2d at 804. Specifically, in the "context of civil contempt, the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense." *Moreman*, 126 Wn.2d at 40 (quoting *King*, 110 Wn.2d at 804).

At a contempt hearing, the party claiming inability to comply has both the burden of persuasion and the burden of proof on that issue. *Id.* To meet this burden, the contemnor must "offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible." *Id.* at 41 (quoting *King*, 110 Wn.2d at 804). The trial court's credibility determinations, even of written declarations, are not reviewed on appeal. *In*

*re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189, 192 (2008) (citing *In re Marriage of Rideout*, 150 Wn. 2d 337, 352, 77 P.3d 1174 (2003)). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). The Court of Appeals defers to trial court on both witness credibility and evaluating the persuasiveness of evidence. *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

1. *The Club Failed to Present Sufficient Credible Evidence Regarding Inability to Comply*

The Club failed to meet its burdens of persuasion and proof in support of its claim that it lacks the ability to comply due to its financial limitations. The Club solely relied on limited bank and treasury report records and the self-serving statements of Marcus Carter and Barbara Butterton to prove its inability to comply.

The Club's documentation is inadequate for multiple reasons. From the declarations, it is not clear that the bank records presented are the only banking accounts that the Club maintains. As with the Club's initial defense of the contempt sanction, it still did not disclose any additional financial resources, tax documentation, asset and liability reports, or otherwise describe its potential sources of funding. Instead, the Club attempts to bolster its position by shifting the burden of proof to the County. The Club

inappropriately argues that “the County did not dispute the credibility of the Club’s financial records and presented no evidence showing the had more cash than those records reported.” Appellant Brief at 33. The burden of proof and persuasion rests solely with the Club. The County need not present any evidence as suggested by the Club.

The Club further supports their position that the evidence presented was uncontroverted and credible by pointing to the County not disputing that the club needed more than \$45,000 to submit a complete application. This is a curious position to take given the history of the case. In the Club’s first defense of contempt it claimed that more than \$158,000 was necessary to complete an SDAP application and that its liquid assets totaled a mere \$11,000. *Kitsap Rifle (2018)*, 2 Wn. App. 2d at 2.

After a meeting between DCD staff and the Club’s consultants, during which it was determined that a SDAP commercial application was needed, the Club’s anticipated costs dropped dramatically. In the Club’s most recent motion to terminate, the amount required to complete the application is substantially reduced to \$45,000 with an unexplained reduction in liquidity of around \$5,000. Such massive unexplained disparities in position in a relatively short period of time with respect to the same essential subject matter do not lend to the credibility of the Club’s presentation.

2. *The Club Made no Showing of a Meaningful Effort to Obtain Funds*

The Club has known since at least August 18, 2018 the cost of completing an SDAP application. The Club relies on its apparent lack of liquid capital to justify its position that it simply cannot comply. Absent from the Club's explanation, however, is what steps have been taken to raise funding or exhaust avenues of funding.

The Club has never submitted any evidence or testimony that it tried and failed to obtain funds or resources from any other source besides its liability insurance. No record exists that the Club applied for credit or a loan and were denied. No record exists that the Club attempted to work out a payment plan or other arrangement with their consultants and were denied. Ms. Butterton provides unsubstantiated information with respect to limited fundraising engaged by the Club. Notably, it is unclear when that fundraising took place and if it occurred after entry of the contempt order. Additionally, there is no indication that the Club created a plan to secure funding for this project after the contempt finding and that upon execution of the plan, fundraising failed.

The Club argues that its ability to fundraise or secure financing should not be considered by the trial court because it places the Club's ability to comply in the hands of third parties and does not indicate an

immediate ability to comply. The Club's argument fails because it misconstrues the purpose of attempting to raise funds to comply with a court order. If the Club made efforts to obtain financing, donations, or another revenue source and failed that may be evidence that it has an inability to comply. The Club throwing up its metaphorical hands before any attempts are made is not an inability to comply but rather shows an unwillingness to do so.

Requiring the Club to document some sort of action in an attempt to come into compliance is reasonable and consistent with Washington law. For example, in the unpublished case of *JZK, Inc. v. Coverdale*, 192 Wn. App. 1022 (2016)<sup>1</sup> the superior court assessed a \$3,000 sanction for contempt for selling a car without authority, but provided three weeks for the contemnor to purge contempt by "bringing the vehicle back into the Court's jurisdiction." *Id.* at 3. To comply with the purge condition, the contemnor needed to purchase the vehicle back and present it to the court. *Id.* The contemnor argued that she did not have the ability to comply with the purge clause and further argued that she could not comply with the alternative method of purging contempt because the \$3,000 penalty had already been spent on basic human essentials. *Id.* at 15. The Contemnor in

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<sup>1</sup> Unpublished cases filed after March 1, 2013 may be cited as nonbinding authority pursuant to GR 14.1.

the *Coverdale* case bore the burden of production and persuasion. At the hearing she presented no evidence that she attempted to repurchase the car. As a result, she did not carry the burden of the defense. *Id.*

Similar to the situation in *Coverdale*, the Club simply did not present enough credible evidence that they made the effort to obtain funding and were rejected. By saying that another party controls its fate with respect to finances, the Club makes the same failed argument of the contemnor in *Coverdale*, who simply claimed that they could not return the car.

What the Club did is merely asked the trial court to take it at its word that it lacked the resources and ability to prepare and submit a permit application based upon purportedly not having enough cash on hand to comply and was simply incapable of coming up with the funding through other sources. The Club indicates that it engages in “continuous and on-going” fundraising efforts, yet fails to even identify what that looks like, other than to say that such efforts are a failure. The unsupported declarations of Marcus Carter and Barbara Butterson left the trial court in the same position that it found itself in during the first attempt by the Club to defend contempt.

It is plausible that the Club is even in a better position to secure funding for its application simply given the passage of time to find a funding source, the reduced amount (from \$158,000 to \$45,000) required to make

the application, and having the guidance of the legal decision in this case. Even with those new advantages, the Club put forward what amounts to the bare minimum effort and then complains that the trial court abused its discretion by failing to terminate contempt.

Given all that the Club could have done with the time allotted to it to raise funds or create a record whereby it is clear that all efforts to raise funds have been fruitless, and makes the trial court's denial of the Club's motion to terminate all the more reasonable.

3. *Britannia Holdings, Ltd. v. Greer and Phillips v. Phillips are Distinguishable*

The Club relies on *Britannia Holdings, Ltd. v. Greer*, 127 Wn. App. 926, 113 P.3d 1041 (2005) to argue that the Club is not required to make any attempts to comply through fundraising or other efforts to secure finances due to a current lack of liquid assets. *Britannia Holdings, Ltd.* is distinguishable from this case. First, *Britannia Holdings, Ltd.* specifically addresses the ability to comply at the entry of contempt. This Court already affirmed that the trial court did not err in its implicit finding that the Club had the ability to comply at the time of entry of contempt. *Kitsap Rifle (2018)*, 2 Wn. App. 2d at 8-10. Second, the court in *Britannia Holdings, Ltd.* noted that the basis for the court's findings that the Greer's could not comply was incorrect in that the court based its findings on \$635,000

previously possessed by the Greers not their current assets at the time of the hearing. *Id.* at 934. The court did not state that those assets must be cash in a bank account, they only need to be within the Greers' control or ability to access. *Id.*

The Club's reliance on the Florida case *Phillips v. Phillips*, 588 So. 2d 9 (Fla. 2d DCA 1991) is likewise misplaced. The Club makes no argument as to why the Court should look outside of Washington State caselaw at a 19-year-old Florida case for guidance when Washington has specific standards articulated in state caselaw on the inability to comply. The Court should decline the invitation to apply the Florida case reasoning to the current circumstances.

4. *There is Evidence in the Record that the Club's Lack of Compliance is Based on an Unwillingness to Comply Instead of an Inability to Comply.*

The Club entirely dismisses the impact of evidence that demonstrates an unwillingness to comply rather than an inability to do so. The Club's initial application which contained the Title 21 submittal waiver supports the inference that the Club simply disagrees with the County about what is required or necessary for a complete application. The answers provided by Barbara Butterton in that waiver request betray the Club's true feelings with respect to the permit application process. The consideration of components of the application process to be a "waste of time," "resources,"

and “money” should give this Court pause in determining that KRRC’s inability to comply is anything more than an unwillingness to do so or a fundamental disagreement with the County and courts over their need to do so.

In *Moreman*, the contemnor was required to return cabinets to the other party. *Moreman*, 126 Wn.2d at 38-39. At a contempt hearing the contemnor testified that he no longer possessed the cabinets and could only speculate that they had been stolen. *Id.* at 39. The court decided that the contemnor had not presented credible evidence of his claimed inability to comply. *Id.* at 41. Notwithstanding evidence of the Club’s unwillingness to comply and like the contemnor in *Moreman* who offered only unsupported and self-serving testimony to support his claim that the cabinets were stolen, the Club has offered largely unsupported, self-serving testimony to support its claim that it lacks the ability to comply despite the fact it had now well more than two years to prepare. The trial court rejected the Club’s motion because the Club failed to meet its burdens of proof and persuasion and properly exercised its discretion and implicitly found the evidence presented by the Club to not be credible.

**C. Washington Law Does Not Require Formal Finding As to A Party's Ability To Comply**

The Club complains that the trial court erred when it failed to provide a specific reason aside from “whatever the county argued in denying its motion to terminate contempt.” Appellant Brief at 26. The Club’s argument fails. Washington law does not require a formal finding on the ability to comply. This Court has already made that clear in this case in *Kitsap Rifle (2018)*: “we hold that the trial court did not err in imposing remedial sanctions without making an express finding that the Club failed to prove that it was unable to comply with the court's order.” 2 Wn. App. 2d at 7.

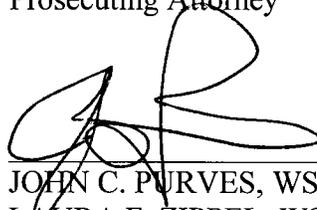
While the trial court declined to state a specific reason for denying the Club’s motion, in so denying, the trial court expressly rejected the Club’s attempt to lift contempt sanctions based on its inability to comply. Ultimately, whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court and unless that discretion is abused, it should not be disturbed on appeal. *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978). The Court should not second guess the trial court’s determination.

**VI. CONCLUSION**

For the foregoing reasons, the Court should affirm the trial court's denial of the motion to terminate contempt order.

Respectfully submitted this 4th day of February, 2020

CHAD M. ENRIGHT  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'John C. Purves', is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

I, Batrice Fredsti, 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 Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

Brian D. Chenoweth	<input type="checkbox"/>	Via U.S. Mail
Brooks Foster	<input checked="" type="checkbox"/>	Via Email:
The Chenoweth Law Group	<input type="checkbox"/>	Via Hand Delivery
510 SW Fifth Ave., Ste. 500		
Portland, OR 97204		

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SIGNED in Port Orchard, Washington this 4<sup>th</sup> day of February,  
2020.

  
\_\_\_\_\_  
BATRICE FREDSTI, Paralegal  
Kitsap County Prosecuting Attorney  
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**KITSAP COUNTY PROSECUTING ATTORNEY'S OFFICE - CIVIL DIVISION**

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**Appellate Court Case Title:** Kitsap County, Respondent v. Kitsap Rifle and Revolver Club, Appellant  
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