

No. 63411-9-I

(Skagit County Superior Court No. 05-2-00652-1)

IN THE COURT OF APPEALS, DIVISION ONE
FOR THE STATE OF WASHINGTON

ALEXANDER MCLAREN,

Appellant,

vs.

DAVID C. CUTTER and JILLIAN L. CUTTER,

Respondents.

BRIEF OF RESPONDENTS

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INTRODUCTION

This is the second trip to the Court of Appeals for these litigants. In the first appeal (Court of Appeals No. 58611-4), the issue concerned a real estate transaction. This Court ruled in favor of the Respondents, Jillian and David Cutter. In a unanimous opinion, the panel affirmed the trial court ruling that Appellant, Alexander McLaren, breached the real estate purchase and sale agreement by refusing to close the transaction. *See Cutter v. McLaren*, noted at 143 Wn.App. 1008, 2008 WL 435540. This Court affirmed the trial court remedy of damages and specific performance of the contract.

In that first appeal, McLaren blamed everybody but himself for the failed transaction. He blamed the Cutters, the realtor, the escrow company, the bank, and even his own business partner. But as the trial court found, and as this Court affirmed, the evidence showed that McLaren had brought his troubles upon himself. The same scenario is now playing itself out with respect to the contempt orders at issue in this appeal. Once again, McLaren brings his troubles upon himself.

The present appeal, under Court of Appeals No. 63411-9, concerns various post-judgment contempt orders against McLaren. Those orders relate to McLaren's continued failure to comply with the specific performance remedy ordered by the trial court. Particularly, McLaren was

ordered to comply with a contract provision requiring removal of an old white house. As will be shown, the trial court did not abuse its discretion in finding McLaren in contempt. Indeed, McLaren continues to defy the court and **to this day**, he has not removed the old white house. The contempt orders should be affirmed and this litigation should finally be brought to an end.

STATEMENT OF THE CASE

Jillian and David Cutter, Respondents, sought to purchase a vacant lot in Anacortes on which to build their retirement home. They signed a purchase and sale agreement (Agreement) offering to buy Lot 4 of a small subdivision. The seller was Appellant, Alexander McLaren. McLaren accepted the Cutter's full price offer and signed the Agreement. Unfortunately, when it came time to close the transaction, McLaren refused to perform under the Agreement.

The Cutters tried for several months to convince McLaren that he needed to sign the closing documents and complete the transaction. Eventually, the Cutters filed a lawsuit seeking specific performance and damages.

After a bench trial, the Honorable John Meyer entered findings of fact that the Cutters were "ready, willing and able" to close (CP at 67, ¶ 25), that they had "executed every document necessary for the transaction

to close,” (CP at 66, ¶ 21) and that the sole reason the transaction did not close was the conduct of the Appellant, Mr. McLaren. CP at 67, ¶ 27. Judge Meyer found in favor of the Cutters and ordered that they were entitled to damages and specific performance of the Agreement. CP at 68, ¶ 29.

One of the contract provisions required removal by McLaren of an “old white house” from a nearby parcel also owned by McLaren. That provision stated:

Old white house on Lot 2 shall be removed
by end of December, 2004.

CP at 63, ¶ 7.

An Addendum was signed by McLaren on December 9, 2004. CP at 65, ¶ 15. That Addendum extended the “date for removal of the old white house on Lot 2 to February 28, 2005.” *Id.*

The Findings of Fact entered by Judge Meyer on June 22, 2006, expressly included placing responsibility for removing the “old white house” on McLaren. The Findings state clearly and plainly:

It was MCLAREN’s responsibility to
remove the white house.

CP at 63, ¶ 7.

These Findings of Fact and Conclusions of Law were entered June 22, 2006. CP at 61. Approximately one month later, on July 21, 2006,

Judge Meyer signed the final judgment, stating in relevant part as follows:

Based on the Findings and Conclusions of Law previously entered by the Court, it is hereby **ORDERED ADJUDGED AND DECREED** that:

1. Defendant shall sign all documents to close this transaction within seven (7) days of the date of this Order on Judgment.
2. Defendant shall remove the white house on Lot 2, Packard Estate within 60 days from closing.

CP at 81. The judgment also included \$167,485.53 in damages and attorney fees. *Id.*

McLaren filed a Notice of Appeal but **did not seek to stay enforcement** of the trial court decision. Although the supersedeas procedures of RAP 8.1 were available, McLaren did not post a supersedeas bond or otherwise file for a stay during the pendency of his appeal.

Of course, McLaren did not remove the old white house within the 60 days required by the order. The deadline for removal was September 25, 2006. Accordingly, on October 23, 2006, the Cutters filed a motion for contempt for failure to obey the court's order. The motion was ultimately heard on November 15, 2006.

Based on the evidence presented, the Court made the following finding:

...the court finds that Defendant [McLaren] has **only objected to the timing** of the removal of the white house, and that Defendant has provided sufficient evidence to warrant slightly extending the period of time to remove the white house ...

CP at 697-98. McLaren has not assigned error to this finding.

The trial court declined to sanction McLaren at that time. CP at 698:7-8. Instead, Judge Meyer granted McLaren an additional 75 days from the date of the November 15th Order to remove the old white house. Only if McLaren still failed to comply, would a remedial sanction be imposed.

That if the old white house on Lot 2, Packard Estate is not removed within 75 days of the date of this Order, I direct that the Defendant shall pay to Plaintiffs a remedial sanctions in the amount of \$250 per day pursuant to RCW 7.01.030 until the white house is removed.

CP at 698.

On December 8, 2006, McLaren filed a Notice of Appeal to this post-judgment order. However, once again, McLaren did not request a stay of the trial court order. He did not post a supersedeas bond or otherwise seek a stay.

After filing the appeal to the post-judgment order, McLaren took no steps to pursue the appeal as a separate appellate proceeding, distinct

from the first appeal on the merits of the real estate transaction. For example, McLaren did not pay a separate filing fee, did not designate clerk's papers, and did not file any briefs. Likewise, this Court treated the post-judgment appeal as an amended appeal from the original appeal on the merits of the case. Accordingly, the December 2006 notice of appeal was not assigned a separate Court of Appeals cause number.

Under the November 15, 2006 order, McLaren had until January 29, 2007 (*i.e.* 75 more days) to comply with the specific performance ordered by the court. January 29th was 172 days after the original July 21, 2006 order requiring McLaren to remove the old house.

Not surprisingly, McLaren **did not** remove the old house.

On April 13, 2007, the Cutters filed another post-judgment motion with the trial court seeking an Order of Judgment against McLaren for the accumulated remedial sanction that began on January 30, 2007. The purpose of the motion was to calculate the remedial sanctions to that date, and reduce the amount to a judgment, and therefore hopefully convince McLaren that he needed to comply with the order. CP at __ (Cutters' Supp. Desig of CP, sub no. 142).

McLaren **did not** file a responsive pleading to the motion.

The Court's order dated May 3, 2007, included the following finding of fact:

The deadline expired on January 29, 2007 and the Defendant has not paid the award of attorney's fees nor has he removed the white house. The amount of remedial sanctions accrued as of May 1, 2007 is \$23,500.00 (January 30 through May 3, 2007 = 94 days).

CP at 804-05. McLaren has not assigned error to this finding.

Meanwhile, McLaren was pursuing his appeal on the merits of the real estate transaction. The briefing was completed on September 10, 2007 and oral argument was held before a panel of this Court on January 14, 2008. On February 19, 2008, this Court issued its unanimous decision affirming Judge Meyer's ruling that McLaren was solely responsible for breaching the contract and that the Cutters were entitled to damages and specific performance.

After Alexander McLaren and David and Jillian Cutter entered into a vacant land purchase and sale agreement, McLaren refused to close the transaction and then relisted the property at a higher price. The Cutters sued, seeking specific performance of the agreement and damages. After a bench trial, the trial court concluded (1) the Cutters were ready, willing, and able to close the purchase and sale transaction but were prevented from doing so because McLaren refused to close, (2) the Cutters did not breach the agreement, (3) McLaren was solely responsible for the transaction not closing, and (4) he is estopped from claiming the transaction expired on January 7, 2005. The trial court ordered specific

performance and awarded the Cutters damages and attorney fees and costs in accordance with the agreement. Because substantial evidence amply supports the trial court's findings, we affirm.

See Cutter v. McLaren, noted at 143 Wn.App. 1008, 2008

WL 435540, at *1.

After a series of motions for reconsideration and extensions of time, McLaren eventually filed a Petition for Review with the Washington Supreme Court. That Petition was filed on April 20, 2008.

On May 8, 2008, the Cutters filed with the trial court a second motion for contempt based on the continued refusal by McLaren to take any steps whatsoever to remove the old house. CP at __ (Cutters' Supp. Desig. of CP, sub no. 155). The Cutters sought to increase the remedial sanction in hopes of coercing McLaren to comply with the court's order.

Again, McLaren **did not** file a responsive pleading. **No evidence** was submitted by McLaren of any sort.

At the hearing on the motion, attorney Richard Hughes showed up and made a "limited appearance" for Mr. McLaren. Verbatim Report of Proceedings, June 13, 2008, at 2:2,9. At that hearing, Hughes divulged McLaren's litigation strategy. Basically, McLaren was pursuing his appeal of the July 21, 2006 judgment and was gambling on the notion that he would ultimately win his appeal. If he won the appeal and overturned

Judge Meyer's ruling on the merits of the real estate contract, there would be no valid contractual basis for requiring removal of the old house. As stated by McLaren's counsel in open court:

You know, there's good reason why this house has not been relocated; it's because he's **pursuing his appellate rights**. And the terms that are in place are fairly substantial as is, \$250 a day and counting, and I think he gets that. I certainly get that.

The point now is whether or not an additional term above that is necessary or appropriate, and frankly I don't think it is because he's going to -- you know, he's going to **follow his course** and see what he can do, you know, in his **last stage of appeal**. It may very well be nothing, in which case **he's going to be left to pay the piper ...**

Id. at 2:20-3:6 (emphasis added).

Ultimately, despite having provided no evidence whatsoever, Mr. Hughes convinced the Court in oral argument that the remedial sanction should not be increased until **after** the Supreme Court rejected McLaren's then pending Petition for Review. Accordingly, Judge Meyer ordered as follows:

Should the Supreme Court deny review or affirm, in order to provide additional incentive and sanction to timely remove the old white house, located on lot 2, Packard Estate, I direct that the Defendant shall pay to Plaintiffs an increased remedial sanction in the amount of \$350.00 per day pursuant

to RCW 7.01.030 **beginning 60 days after the Supreme Court decision** and continuing until the white house is removed.

CP at 718-19 (emphasis added).

McLaren continued to do nothing. No steps were taken to remove the white house. Nor did McLaren file an appeal to this order. The Washington Supreme Court eventually denied the Petition for Review on September 4, 2008.

Undeterred from his plan to pursue to his appellate rights to the very last stage, McLaren next attempted to file a Petition for Writ of Certiorari with the United States Supreme Court. Although no federal issues were involved in the breach of real estate contract case, this effort did consume several more months of time. However, McLaren did not comply with the U.S. Supreme Court rules and he eventually aborted that effort.

Accordingly, the avenues for appeal of the merits of the real estate transaction were finally exhausted. That appeal is final. The July 21, 2006 order on judgment has been upheld. This includes the specific performance remedy that McLaren was ordered to remove the old white house.

Meanwhile, concerning the post-judgment contempt orders, McLaren continued to refuse to take any steps to comply. Instead, on

February 11, 2009, McLaren filed with the Court of Appeals a motion styled as “Appellant’s Motion to Grant Appeal.” CP at 770-76. This motion was an attempt to secure a briefing schedule and hearing with the Court of Appeals for the notice of appeal that McLaren filed two years earlier on December 8, 2006.

On February 26, 2009, this Court denied that motion. McLaren then sought review of that denial by filing a Motion for Discretionary Review with the Washington Supreme Court. That motion was filed by McLaren on May 13, 2009.

On February 13, 2009, the Cutters filed with the trial court a third motion for contempt and additional sanctions. The old white house had still not been removed. That motion, however, could not be heard by Judge Meyer, but was instead heard by Judge Dave Needy. Not surprisingly, Judge Needy did not alter or increase the sanctions. Instead, he left Judge Meyer’s prior rulings intact and directed that any subsequent motion for increased sanctions be brought before Judge Meyer. The Order With Respect to Plaintiff’s Third Motion for Contempt states in part:

Judge Meyer’s prior Order of Contempt, dated November 15, 2006 and June 13, 2008 shall remain in effect until a motion for further remedial sanctions is noted before Judge Meyer.

CP at 793.

On April 17, 2009, McLaren filed a Notice of Appeal to that order. That appeal was given Court of Appeals number 63411-9. However, the Commissioner of this Court questioned whether Judge Needy's order was an appealable order. Accordingly, the Commissioner requested briefing and set the matter for hearing.

Before a decision was rendered on the Commissioner's motion, the Washington Supreme Court granted McLaren relief and issued an order, dated July 8, 2009, directing this Court to reinstate McLaren's December 8, 2006 appeal of the first contempt order. The Supreme Court agreed with McLaren that his appeal of the 2006 contempt order should have been processed as a separate and distinct appeal and therefore, upon payment of the filing fee, McLaren would be allowed to proceed.

Accordingly, by Notation Ruling dated August 24, 2009, this Court consolidated the reinstated 2006 appeal with the 2009 appeal of Judge Needy's order. The proper scope of the appeal would be left to panel based on the briefing of the parties.

ARGUMENT

I.

THE CUTTERS DO NOT CONTEST THE SCOPE OF THE APPEAL

While there is some question as to whether certain post-judgment

orders are properly the subject of this appeal (*e.g.*, the second contempt order which was not appealed), the Cutters do not contest the scope of appeal. McLaren contends that “all of the orders relating to contempt” are properly before this Court. Brief of Appellant at 7.

From the Cutters’ perspective, this litigation has already consumed far too much time and expense. Rather than contest the scope of this appeal, and risk receiving from McLaren yet future motions to grant appeal, and other legal maneuvers, the Cutters desire to simply cut to the chase and address (and defeat) the merits of McLaren’s contentions. Accordingly, the Cutters do not contest that McLaren’s appeal covers “all of the orders.” Of course, this also means that McLaren is receiving his full appellate rights, and there can be no basis for yet further appeals from the trial court rulings.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION REGARDING THE CONTEMPT ORDERS

A. Standard of Review

The “abuse of discretion” standard is applied to appellate review of contempt orders.

Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that

discretion abused, it should not be disturbed on appeal.

Moreman v. Butcher, 126 Wn.2d 36, 40 (1995) quoting *In re King*, 110 Wn.2d 793, 798 (1988)).

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, 126 Wn.2d at 40 (emphasis added).

Unchallenged findings of fact are verities on appeal. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792 (2004). Where an assignment of error is stated, but no argument is advanced, the Court of Appeals will not consider the issue. *Herring v. Dep't of Soc. and Health Serv's*, 81 Wn. App. 1, 13 (1996) (Assignments of error not supported by legal argument are not considered on appeal”).

B. The Order Entered on November 15, 2006, Was Not an Unreasonable Exercise of Discretion and Was Not Based On Untenable Grounds

McLaren's primary challenge is to the first contempt order entered on November 15, 2006. Accordingly, we turn to the evidence that was presented to the trial court on that order.

First for consideration is a letter dated September 25, 2006 from McLaren to Judge Meyer. CP at ___ (Cutters' Supp. Desig. of CP, sub. No.

101) (copy provided for convenience at Appendix A). Although this letter preceded the motion for contempt, and is not sworn testimony, it nevertheless was provided to Judge Meyer.

McLaren sent this letter to Judge Meyer as the first 60 day period for compliance with the July order to remove the old house was expiring. McLaren realized he had not complied, so he offered an explanation to Judge Meyer that he had been ill.

I am writing this letter on the deadline stated in your order to remove the house because I *personally* want to inform you of the violation. ...

My failure to comply with your order is the result of illness. I have been experiencing a serious relapse of the chronic illness I disclosed at trial.

Id. (italics in original)(App. A at 1).

At this point in time, September 25th, McLaren is offering no other explanation for his noncompliance. He does not claim here that he has any inherent inability to move the house. Rather, McLaren solely contends that his illness had prevented him from being able to get it done in a timely manner.

1. The Evidence Submitted by the Cutters on the Motion for Contempt

The Cutters waited almost another month after the September 25th letter and could see no progress by McLaren on getting the old house

moved. Accordingly, on October 23, 2006, the Cutters filed their motion for contempt for failure to obey the court's order. CP at 797.

Having received a copy of the September 25th letter to Judge Meyer, the Cutters submitted three declarations in support of contempt addressing whether McLaren's alleged illness actually prevented him from conducting business. The Declaration of Niomi Fredrickson states that she knows McLaren and that she saw him at the Anacortes public library in September "actively engaged" with a patron and that "McLaren did not appear to have any difficulty communicating." CP at __ (Cutters' Supp. Desig. of CP, sub no. 104.400) (copy attached for convenience at Appendix B) (App. B at 1:26-2:1).

Likewise, Dawn L. Porter stated in her declaration that she has known McLaren for several years and that on

numerous occasions throughout September 2006, I have seen Alexander McLaren around town, actively working, supervising and going from place to place. At no time did he ever appear to be suffering from any sickness or other ailments. From my observations, he has acted and appeared as he always has.

CP at __ (Cutters' Supp. Desig. of CP, sub no. 104.500).

The declaration of Jillian Cutter further supported the view that McLaren's "illness" was just an excuse for delay, and did not really prevent him from

conducting business.

I submit that the Defendant is using his alleged illness to delay the removal of the house. On numerous occasions throughout the month of September, 2006, I have seen the Defendant drive by my house. During the same period, I have seen the Defendant at other places around Anacortes. I have talked to people who have had contact with Mr. McLaren during the same period. At no time when I personally saw him, did he ever appear to be ill or “under the weather.” No one who was in contact with him ever mentioned to me that Mr. McLaren was ill.

CP at ___ (Cutters’ Supp. Desig. of CP, sub no. 104.600) (copy provided for convenience at Appendix D) (App. D at 2:12-20).

Jillian Cutter also testified that she checked with the City of Anacortes and as of September 30, 2006, McLaren had “not applied for a permit to move the old white house.” CP at ___ (Appendix D at 2:22-23).

The Declaration of Donald Measamer, Assistant Director of the Planning Department, stated that the time frame for obtaining a permit to remove the white house would be “two to three weeks.” CP at ___ (Cutters’ Supp. Desig. of CP, sub no. 104.300) (copy provided for convenience at Appendix E)(App. E at 2:14)

Finally, Jillian Cutter testified that failure to remove the old house was delaying “construction of our new house on Lot 4.” App. D at 2:24-25.

Through Cutters' trial attorney, Mr. Paul Taylor, they contended:

Defendant offers no explanation as to his failure to remove the house other than he was ill with some undisclosed and unspecified illness. His allegation is not supported or corroborated in any way and the Court should not believe, without supporting evidence, the assertions of this Defendant.

CP at __ (Cutters' Supp. Desig of CP, sub no. 104.200) (copy provided for convenience at Appendix F) (App. F at 2:13-17).

2. McLaren's Response Abandons the "Illness" Excuse

In response to the contempt motion, McLaren filed his own declaration on November 1, 2006. CP at 674-83. As expected, McLaren did not support his "illness" excuse with any corroborating evidence. The illness remained unidentified, there was no declaration by a physician, no copy of a prescription or treatment, and no explanation of the symptoms and how those symptoms or conditions precluded him from conducting business.

Perhaps having realized that the "illness" would not withstand scrutiny, McLaren completely shifted his excuse. As will be seen, the new excuse is no more convincing.

3. McLaren Claimed That He Sold the House on September 4, 2006

In his declaration, McLaren offered three facts to justify why the old house had not been moved. These are found in paragraph 8 of McLaren's declaration, at CP 676. First McLaren states that the old house is located "on my own property." *Id.* (§ 8, line 3). Of course, the Cutters do not dispute that McLaren owns the property where the old house sits. If anything, this fact supports the contempt order.

Second, McLaren states that the "house is not merely an 'old' house but rather an historic house." CP at 676 (§ 8, line 5-6). Of course, this is why the house is to be moved, *rather than demolished*. This fact provides no basis for McLaren's failure to comply with the July 2006 order.

Third, and most relevant, McLaren states:

I sold the house on September 4 to a third party who **has not had time** to remove it due to his travel abroad.

CP at 676 (emphasis added).

This is a very interesting statement. As evidence to support the alleged sale, McLaren attached Exhibit D to his declaration. That exhibit was a Declaration of Thomas Hsueh, the alleged third party buyer. CP at 682-83. Mr. Hsueh's declaration states:

3. The purpose of this declaration is to inform the court that I have purchased the large white colonial house from Mr.

McLaren which is related to this litigation and to ask the court **give me additional time** to relocate it to other property.

4. I wish to inform the court that **I have both the financial means and the personal desire** to save the house and that **I have an excellent site** for the house. I have made some preliminary inquiries and have learned that moving the house from its current location to its new location will require some permits and approvals which will take **a few weeks**. Once obtained, the moving company will schedule its move approximately **two months** later.

5. I am leaving on a business trip abroad on September 5th and will return in early October. During my absence, my assistant will keep this matter moving ahead.

CP at 682-83 (emphasis added).

There are a number of observations that the Cutters simply cannot ignore. First, although undated, the declaration must have been written **before** September 5, 2006. That is because the declaration states that Hsueh will be “leaving on a business trip on September 5th and will return in early October.” CP at 683. At the time of the writing, the business trip is yet to happen. Accordingly, the declaration must have been signed on September 4th (or earlier). Of course, McLaren states that it was September 4th when he sold the house to a third party.

If that September 4th “sale” is the truth, why is there **no mention** of such a sale in the **September 25th** letter to Judge Meyer? One would think

that such an important fact (if true) would be told to the Judge, especially in a letter that purportedly is attempting to disclose to the Judge what is going on concerning arrangements for relocating the old house.

Second, why would McLaren bother, *on September 4th*, to have Hsueh write a formal declaration? Indeed, it seems even more strange if McLaren had that document on September 25th, why would he not include it with his September 25th letter?

Despite the peculiarities of the sale and this evidence, *even if true*, this “fact” does not show that Judge Meyer abused his discretion. Rather, Judge Meyer gave McLaren the benefit of every doubt and allowed McLaren exactly the opportunity he requested; *i.e.*, more time to get the house removed from the property.

4. McLaren Requested More Time, and That Is Exactly What Judge Meyer Granted

As already has been shown, Mr. Hsueh declared that he simply needed more time to get the old house removed. Hsueh stated that he had the financial ability, the personal desire, and an excellent site for relocating the white house. Moreover, he declared that it would take a few weeks to get permits, and the moving company would need two months to schedule and complete the work. Accordingly, measuring from September 4th, Mr. Hsueh’s declaration indicates that the house should be

relocated by approximately December 4th.

McLaren did not submit a responsive legal memorandum to the Cutters' motion, but he did show up at the hearing. Consistent with the Hsueh declaration, McLaren provided oral statements in open court indicating that he would get the house removed with just a little more time. At the November 15th hearing, McLaren states:

With regard to relocating the house from the old site, I've submitted an application for a permit. That's pending now.

With regard to moving the house, I met with Murray Nickel, who is president of Nickel Bros. ...

We met on both sites, where the house is being relocated from and to, and he said, "We can move the house," and right now he's submitting a bid and particulars on that.

And with regard to the site where it's being moved to, I contacted Gary Christianson on behalf of the new owner of the house and ... he has given permission in an e-mail, temporary permission to situate the house there.

Verbatim Report of Proceedings, November 15, 2006, at 7:5-10; 7:15-21, 25; 8:1-2.

Based on the evidence and arguments, Judge Meyer made the following finding:

...the court finds that Defendant [McLaren] has **only objected to the timing** of the removal of the white house, and that

Defendant has provided sufficient evidence to warrant slightly extending the period of time to remove the white house ...

CP at 697-98. McLaren has not assigned error to this finding.

Judge Meyer also declined to sanction McLaren at that time. CP at 698:7-8. Instead, he granted McLaren an additional 75 days from the date of the November 15th Order to remove the old white house. Only if McLaren still failed to comply, would a remedial sanction be imposed.

That if the old white house on Lot 2, Packard Estate is not removed within 75 days of the date of this Order, I direct that the Defendant shall pay to Plaintiffs a remedial sanctions in the amount of \$250 per day pursuant to RCW 7.01.030 until the white house is removed.

CP at 698.

Under these facts, Judge Meyer was **not** unreasonable in his exercise of discretion. He provided 75 additional days for McLaren to relocate the old house. According to the declaration of Hsueh, the job could have been completed by early December, yet Judge Meyer allowed an additional two months for compliance. McLaren stated that he already applied to the city for a permit and that the relocation company had already conducted site visits to both properties and the project was feasible. Under these circumstances, granting an additional 75 days was not unreasonable. Indeed, it was ample time.

Nor was it an abuse of discretion to impose the conditional remedial sanction. Given the substantial delay that had already occurred, and the peculiarities of McLaren's evidence, Judge Meyer was on solid ground to impose remedial sanctions that were conditional on McLaren failing again to follow through and comply with the order to relocate the house. Under these facts, it was reasonable for Judge Meyer to believe that his July order might again be ignored if there were not some coercive force to provide incentive for McLaren to actually get the job done.

On appeal, McLaren argues that the sale of the house as personal property to Hsueh meant that McLaren did not have the "power or ability to comply with the order." Br. of App. at 16. Of course, there is absolutely no evidence to support that contention. Rather, the evidence indicates that even after the sale, McLaren remained actively involved, and was even controlling the arrangements. Moreover, McLaren's November 1, 2006 declaration makes absolutely no reference to the Hsueh sale as somehow blocking McLaren's ability to relocate the house.

The law is clear that one challenging a contempt order on the grounds of inability to comply, as does McLaren, must meet the burden of production and persuasion.

Mr. Butcher had both the burden of production and the burden of persuasion regarding his claimed inability to comply

with the court's order. Mr. Butcher must "offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible."

Moreman, 126 Wn.2d at 40-41 (quoting *In re King*, 110 Wn.2d at 804).

McLaren has completely failed to identify any evidence presented to Judge Meyer showing McLaren's inability to comply with the order due to the sale of the house to Hsueh. Rather, the only evidence was that McLaren was able to comply. The reality is that McLaren simply chose not to comply. As conceded by McLaren's attorney at the second contempt hearing, McLaren opted to pursue his appellate rights and was aware that, if he lost, he would have to eventually "pay the piper."

Significantly, even after expiration of the January 29, 2007 deadline (*i.e.* after expiration of the additional 75 days), McLaren still presented no evidence of any inability to comply. On April 13, 2007, the Cutters filed a motion requesting an Order of Judgment against McLaren for the accumulated remedial sanction that began on January 30, 2007. CP at __ (Cutters' Supp. Desig of CP, sub no. 142). McLaren **did not even bother** to file a responsive pleading to the motion.

Likewise, on the second motion for contempt filed one year later, on May 8, 2008, McLaren made no effort to defend his noncompliance. Again, McLaren **did not** file a responsive pleading. **No evidence** was

submitted by McLaren of any sort. No claim was made that the alleged sale to Hsueh somehow precluded McLaren's ability to comply. Instead, McLaren at the last minute asked attorney Richard Hughes to file a limited appearance for the oral argument. As mentioned above, Hughes simply argued that the amount of the sanction should not be increased until after the Supreme Court acted on the Petition for Review. No argument was made that McLaren was unable to comply. Rather, as stated by McLaren's attorney:

You know, there's good reason why this house has not been relocated; it's because he's **pursuing his appellate rights**. ...
he's going to **follow his course** and see what he can do, you know, in his **last stage of appeal**. It may very well be nothing, in which case **he's going to be left to pay the piper** ...

Verbatim Report of Proceedings, June 13, 2008, at 1-2 (emphasis added).

This was McLaren's choice, not an inability to comply. However, McLaren did not have the right to make a choice without being in contempt of court. As stated in *Murne v. Schwabacher*, 2 Wash. Terr. 191 (1883):

Well, he had an option ... to abide by the judgment of the court, or to have the consequences of not having it. We do not think he ought to complain of the bed he has made for himself.

Id. at 194. The same is true for McLaren. He had the option to abide by Judge Meyer's ruling. He must now live with his choice and "pay the piper" for not complying with the court's orders.

C. The Sale of the House to Hsueh Is Not a Valid Legal Excuse for McLaren's Failure to Comply With the July 21, 2006 Order

Judge Meyer entered the order and judgment on July 21, 2006, requiring McLaren to remove the old house. With full knowledge of that very clear order, McLaren nevertheless intentionally and purposefully sold the house to Hsueh. Of course, neither the trial court nor the Cutters ever approved of any transfer to Hsueh of the responsibility to remove the house. The Court's orders were clear and plain that the responsibility was McLaren's.

Under these circumstances, McLaren cannot absolve himself of responsibility by simply selling the property to a third party. Perhaps McLaren has a third party claim against Hsueh for breach of contract, or some other theory, but that is not the Cutter's problem.

It is worth noting that it is now 2010. If McLaren has a problem with Hsueh, which is different from the position he presented to Judge Meyer, it is McLaren's responsibility to address that problem. Of course, McLaren never sued Hsueh during these three years. The reason is because McLaren was not interested in moving the house. Rather, as

mentioned above, McLaren was not relocating the house because he was pursuing his appellate rights.

While McLaren had a right to pursue his appeal, exercising that right is not a legal excuse for ignoring Judge Meyer's orders. In *Allen v. American Land Research*, 95 Wn.2d 841 (1981), a contempt order was entered by the trial court.

The opportunities given to purge the contempts were not taken. No supersedeas bond was filed. ... The filing of the appeal did not act as a bar to the trial court to enter a second contempt order nor did it prevent that court from holding additional proceedings to aid in enforcement of the judgment.

Id. at 849-50. The same is true here.

D. Judge Meyer Provided a Reasonable Opportunity to Purge the Contempt by Complying Within 75 Days of the November 15, 2006 Order

McLaren contends that he was not given the benefit of a purge clause. That is just not true. Judge Meyer provided ample opportunity for McLaren to purge the contempt and avoid any remedial sanction at all. The November 15th order expressly provided 75 additional days for McLaren to comply with the July order to relocate the house. Moreover, the evidence before Judge Meyer indicated that this was more than enough time to get the job done. Unfortunately, McLaren did not take advantage

of that opportunity.

E. Assertions on Appeal of Insufficient Finances to Move the House Are Not Persuasive

On appeal, McLaren implies that he could not afford to pay for relocating the house. Again, such a case had to be presented to Judge Meyer. McLaren did not present evidence of such an excuse. As extensively discussed above, the excuse was first that McLaren was sick, and then the excuse became that he needed just a bit more time. McLaren did not contend to Judge Meyer that he (or Hsueh) did not have the financial resources to do the job.

In the Brief of Appellant at page 19, McLaren states that he had to pay the “whopping sum of \$167,485.53” to the Cutters to satisfy the judgment amount. Contrary to the implication, McLaren did not pay “out-of-pocket” for the judgment damages. Instead, he satisfied the judgment amount by abating that amount against the purchase price of the property. CP at 715.

In short, McLaren has not met the burden of production or persuasion of a financial inability to comply with the order. If there was any truth to that contention, McLaren should have presented that evidence to Judge Meyer in November 2006.

In conclusion, Judge Meyer did not abuse his discretion in finding McLaren in contempt. McLaren was given ample opportunity to avoid remedial sanctions, yet he chose to disregard Judge Meyer's orders. The purpose of the civil contempt power is precisely for situations such as this. Judge Meyer's orders should be affirmed.

III

THE CUTTERS ARE ENTITLED TO ATTORNEYS' FEES AND EXPENSES FOR THIS APPEAL PURSUANT TO RAP 18.1

The Cutters are entitled to award of reasonable attorneys fees under RCW 7.21.030(3). The statutory right to fees extends to a party defending a contempt order on appeal. *In re Marriage of Curtis*, 106 Wn. App. 191, *rev. denied* 145 Wn.2d 1008 (2001).

The Cutters are also entitled to attorneys' fees and expenses pursuant to section 17p. of the Purchase and Sale Agreement. CP at 70. The Agreement states that "[i]f Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." *Id.* Obviously, this appeal concerns compliance with the contract provision requiring McLaren to remove the old white house.

It is well established that "[a] contractual provision for an award of attorney's fees at trial supports an award of attorney's fees on appeal

under RAP 18.1.” *West Coast Stationary Eng’rs Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 477 (1985). *See also Alejandro v. Bull*, 159 Wn.2d 674, 691 (2007).

If fees are awarded, Cutters respectfully request the opportunity to submit fee affidavits pursuant to RAP 18.1.

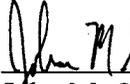
CONCLUSION

McLaren has created his own troubles. It is now time that he pay the piper. McLaren pursued a strategy of full appellate review while ignoring his obligations under the trial court orders. Judge Meyer acted reasonably, and within his discretion, in finding McLaren in contempt and ultimately, imposing remedial sanctions. There are no persuasive grounds for reversal. It is respectfully submitted that Judge Meyer’s contempt orders, and all related orders, be affirmed. This matter should then be remanded for further proceedings consistent with that ruling.

RESPECTFULLY submitted this 8th day of January, 2010.

GROEN STEPHENS & KLINGE LLP

By:

 by Samuel A. Rodabaugh, WSBA # 35347
John M. Groen, WSBA #20864 (with authorization)
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On January 8, 2010, a true copy of Brief of Respondents was placed in envelopes, which envelopes with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

Richard J. Hughes
Hughes Law Group, PLLC
825 Cleveland Ave.
Mount Vernon, WA 98273

Paul W. Taylor
Law Offices of Paul Taylor, Inc.
20388 Eric St.
Mt. Vernon, WA 98274-7736

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 8th day of January, 2010 at Bellevue, Washington.


Linda Hall

APPENDIX A

ALEXANDER MCLAREN

1904 7TH STREET, ANACORTES, WASHINGTON 98221 TEL: 360.293.3666 FAX: 360.293.3666

The Honorable John M. Meyer
Skagit County Superior Court
205 West Kincaid - Room 202
Mount Vernon, WA 98273

25 September 2006

Subject: Cutter v. McLaren, Skagit County Superior Court Cause No 05 2 00652 1

Dear Judge Meyer:

The purpose of this letter is to inform you that I have inadvertently failed to comply with the order you entered on July 24 to remove the "old house" located on a parcel near the Cutters' lot in the above-referenced matter.

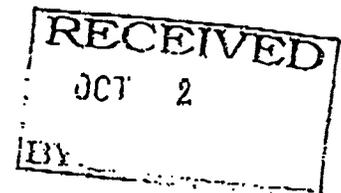
I am writing this letter on the deadline stated in your order to remove the house because I *personally* want to inform you of the violation. My training and experience throughout a career as a court officer, senior military officer and government official, preclude me from willingly violating orders and I have a long, demonstrated history of complying with instructions given to me.

My failure to comply with your order is the result of illness. I have been experiencing a serious relapse of the chronic illness I disclosed at trial. And, a change of prescribed medication last month did little to alleviate the symptoms I am suffering.

As you may recall, in violation of civil procedure rules I was served with the substantive pleadings and notice of the hearing the night before the hearing at which you signed the order containing the removal deadline. Due to that prejudice, you allowed me to move for reconsideration and tender new evidence. Unfortunately, I was not able to finalize the motion for reconsideration before the onset of illness.

I am now preparing pleadings and intend to note my motion for reconsideration to be heard before you at your next scheduled Friday morning civil docket on 20 October. The house at issue is not merely an "old house" but rather an historic asset and there is good merit in allowing sufficient time for it to be moved to a new location. I will address this aspect in my pleadings.

EXHIBIT B



I apologize for violating your order -- I did not intend to violate it. Thank you for your consideration of this matter and kindly await my motion on 20 October.

Very truly yours,



Alexander McLaren

cc: Paul Taylor, Attorney for Plaintiff

APPENDIX B

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

**DAVID CUTTER and JILLIAN
CUTTER, husband and wife,**

Plaintiffs

No. 05 2 00652 1

v.

ALEXANDER MCCLAREN,

Defendant

**DECLARATION OF NIOMI
FREDRICKSON IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CONTEMPT**

NIOMI FREDRICKSON, declares under penalty of perjury under the laws of the State of Washington that the following is true:

1. I am a resident of the State of Washington, over the age of eighteen (18), and that I am competent to testify to, and have personal knowledge of the matters stated herein.
2. I live in Anacortes, Washington. I have know Alexander McLaren. For several years. I saw Alexander McLaren inside the Anacortes Public Library on or about September 14, 2006. At the time I saw him he was actively engaged

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Mount Vernon, WA 98274
Phone: (360) 416-6900
Fax: (360) 428-0990

with another library patron at the check out counter. He did not appear to
have any difficulty in communicating.

Executed at Anacortes, Washington, this 23 day of October, 2006.



NIOMI FREDRICKSON
Declarant

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APPENDIX C

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

**DAVID CUTTER and JILLIAN
CUTTER, husband and wife,**

Plaintiffs

No. 05 2 00652 1

v.

ALEXANDER MCCLAREN,

Defendant

**DECLARATION OF DAWN L.
PORTER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CONTEMPT**

DAWN L. PORTER, declares under penalty of perjury under the laws of the State of Washington that the following is true:

1. I am a resident of the State of Washington, over the age of eighteen (18), and that I am competent to testify to, and have personal knowledge of the matters stated herein.
2. I live in Anacortes, Washington. I have know Alexander McLaren for several years. On numerous occasions throughout September 2006, I have seen Alexander McLaren around town, actively working, supervising and going

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1 from place to place. At no time did he ever appear to be suffering from any
2 sickness or other ailments. From my observations, he has acted and
3 appeared as he always has.

4 Executed at Anacortes, Washington, this 23RD day of October, 2006.

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7 _____
8 **DAWN L. PORTER**
9 Declarant

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APPENDIX D

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

**DAVID CUTTER and JILLIAN
CUTTER, husband and wife,**

Plaintiffs

No. 05 2 00652 1

v.

ALEXANDER MCCLAREN,

Defendant

**DECLARATION OF JILLIAN
CUTTER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CONTEMPT**

JILLIAN CUTTER declares, under penalty of perjury under the laws of the State of Washington, that the following is true:

1. I am a resident of the State of Washington, over the age of eighteen (18), and that we are competent to testify to, and have personal knowledge of the matters stated herein. My husband, David Cutter, and I are the Plaintiffs in this case and I make this Declaration in support of the Motion for Contempt against Defendant who has failed to remove the old white house from Lot 2 Packard Estates, located in the City of Anacortes,

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Mount Vernon, WA 98274
PHONE: (360) 416-6060

Washington legally described as follows:

1 Lot 2 of Survey recorded June 21, 2004 under Skagit County
2 Auditor's File No. 200406210184, being a portion of Block 16,
3 "BOWMAN'S CENTRAL SHIP HARBOR WATERFRONT PLAT TO
4 ANACORTES", according to plat thereof in the Office of the
5 Auditor of Skagit County, Washington in Volume 2 of Plats, pages
6 33, together with that portion of vacated "X" Avenue.

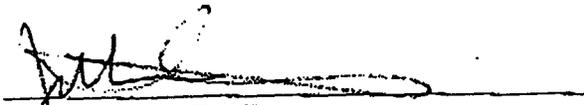
7 TOGETHER WITH an undivided 1/5 interest in Tract 17, "PLATE
8 NO. 9 ANACORTES TIDE AND SHORELINES OF SECTION 18,
9 TOWNSHIP 35 NORTH, RANGE 2 EAST, W.M., ANACORTES
10 HARBOR", according to the official map thereof on file in the Office
11 of the State Land Commissioner at Olympia, Washington.

12 Subject to protective covenants, restrictions, easements of record.

- 13
- 14 2. I am aware that Defendant has claimed he is suffering from some "illness"
- 15 which has prevented him from complying with the Court's July 22, 2006
- 16 Order. I submit that the Defendant is using his alleged illness to delay the
- 17 removal of the house. On numerous occasions throughout the month of
- 18 September, 2006, I have seen the Defendant drive by my house. During
- 19 the same period, I have seen the Defendant at other places around
- 20 Anacortes. I have talked to people who have had contact with Mr.
- 21 McLaren during the same period. At no time when I personally saw him,
- 22 did he ever appear to be ill or "under the weather". No one who was in
- 23 contact with him has ever mentioned to me that Mr. McLaren was ill.
- 24 3. As of September 30, 2006, I have checked with the City of Anacortes and
- 25 Mr. McLaren has not applied for a permit to move the old white house.
4. Mr. McLaren's failure to remove the old white house has been a factor in
our delay in the construction of our new house on Lot 4, Packard Estates.

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Executed at Anacortes, Washington, this 22 day of October, 2006.



JILLIAN CUTTER
Declarant

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Fax: (360) 428-0990

APPENDIX E

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

**DAVID CUTTER and JILLIAN
CUTTER, husband and wife,**

Plaintiffs

No. 05 2 00652 1

v.

ALEXANDER MCCLAREN,

Defendant

**DECLARATION OF DONALD
MEASAMER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CONTEMPT**

DONALD MEASAMER declares, under penalty of perjury under the laws of the State of Washington, that the following is true:

1. I am a resident of the State of Washington, over the age of eighteen (18), and that I am competent to testify to, and have personal knowledge of the matters stated herein.
2. I am Assistant Director, Planning & Development Services for the City of Anacortes and Senior Plans Examiner for the City of Anacortes. I am familiar with the process that is required to move a residential structure in the City of

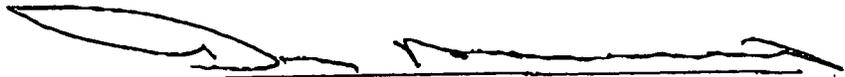
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20388 Eric Street
Mount Vernon, WA 98274
Phone: (360) 416-6900
Fax: (360) 428-0990

Anacortes, and specifically what process is necessary to move the white
Packard Estate house on ^{57th} Street in Cap Sante neighborhood.

3. The process is as follows:

- a. A designated new location would be required to meet current setbacks and zoning requirements. (FF Placed within city limits) (on)
- b. Permission granted by all owners who could be affected by relocating the structure. For example, if movement on city streets is required and trimming of trees is necessary, abutting property owners would be required to give their permission,
- c. A structure evaluation and appropriate permit granted before relocating the structure.
- d. A standard building permit issued before relocating the structure.
- e. The time frame for obtaining a permit is two to three weeks.

Executed at Anacortes, Washington, this 23rd day of October, 2006.



DONALD MEASAMER
Declarant

Don (on)

APPENDIX F

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

**DAVID CUTTER and JILLIAN
CUTTER, husband and wife,**

Plaintiffs

v.

ALEXANDER MCCLAREN,

Defendant

No. 05 2 00652 1

**DECLARATION OF PAUL W.
TAYLOR IN SUPPORT OF
MOTION FOR CONTEMPT**

I, Paul W. Taylor, declare under penalty of perjury under the laws of the State of Washington that the following is true:

1. I am a resident of the State of Washington, over the age of eighteen (18), and that I am competent to testify to, and have personal knowledge of, the matters herein
2. I am the attorney of record for the Plaintiffs in the above captioned action.

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3. On July 20, 2006 the Court entered an order requiring the Defendant to remove the white house which sits on Lot 2 of the Packard Estate. The last day the Defendant had to remove the house was September 25, 2006.

4. Defendant's only response was to write a letter after the last day allowed for removal asking the Court to forgive him because he was ill. Defendant's letter constitutes improper ex parte contact with a judge and does not allow the Defendant to ignore the Court's Order. In early August 2006, Defendant timely filed a Motion for Reconsideration but struck the hearing and failed to reschedule a hearing, choosing instead to delay any decision until after the date to remove the white house had expired.

5. Defendant offers no explanation as to his failure to remove the house other than he was ill with some undisclosed and unspecified illness. His allegation is not supported or corroborated in any way and the Court should not believe, without supporting evidence, the assertions of this Defendant. The Defendant has not offered any evidence as to any arrangement he has made with respect to contracting with a moving company or submitting an application for a permit with the City of Anacortes to move the house. In other words, he has done nothing for sixty day plus days. Such dilatory tactics should be severely sanctioned.

6. On behalf of my clients, I am requesting that the Defendant be held in contempt and sanctions imposed.

Executed at Mount Vernon, Washington, this 23rd of October, 2006

Paul W. Taylor

PAUL W. TAYLOR, WSBA NO. 13945
Declarant

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