20130094

IN THE SUPREME COURT

STATE OF NORTH DAKOTA



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| The State of North Dakota,<br>ex rel. The City of Marion,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>Larry Alber,<br><br>Defendant/Appellant. | Supreme Court No. 20130094<br><br>LaMoure County District Court No. 23-2003-CV-5 |

APPEAL FROM THE MEMORANDUM OPINION AND ORDER ENTERED ON FEBRUARY 21, 2013 AND JUDGMENT ENTERED ON OCTOBER 7, 2003

# BRIEF OF APPELLANT LARRY ALBER

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## STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion by concluding Alber had willfully and inexcusably committed contempt of court?

II. Whether the district court provided sufficient findings of fact and conclusions of law to allow appellate review?

## STATEMENT OF THE CASE

Larry Alber has operated a vehicle repair and part shop in the City of Marion for several decades. In December 2002, the City initiated an action against Alber for allegedly maintaining a nuisance due to the number of "junked vehicles" on his property. In October 2003, following a bench trial on the matter, the district court entered a judgment requiring Alber to move junked vehicles to a sheltered area or to remove them from the City altogether, as well as to store vehicles in compliance with city ordinances and state law in the future. In the following weeks, Alber moved numerous vehicles and worked to clean up the property. Alber then sent a letter to the City in the fall of 2003 explaining his efforts and indicating Alber believed he had complied with the 2003 judgment.

In October 2012, more than nine years after the initial order, the City filed a Motion for an Order to Show Cause, requesting the district court require Alber to show cause as to why he should not be found in contempt of court for failing to abide by the 2003 judgment. The City's motion indicated that Alber had essentially never complied with the judgment and junked vehicles on his property continued to constitute a nuisance. The district court issued the order and held a contempt hearing in December 2012. The district court found Alber had committed contempt by failing to abide by the 2003 order. The district court ordered Alber to remove all junk vehicles from the property and authorized the City to do so if Alber failed to remove them in a timely manner. The order further awarded $2,500 in attorney fees to the City as a remedial sanction against Alber.

Alber now appeals from the Memorandum Opinion and Order finding he committed contempt of court and awarding a remedial sanction in favor of the City.

## STATEMENT OF THE FACTS

On February 5, 2003, the State of North Dakota ex rel. the City of Marion (hereinafter the "City") filed a Complaint against Larry Alber, alleging Alber maintained abandoned motor vehicles in the City in violation of N.D.C.C. ch. 39-26 and City of Marion Ordinance No. 28. (App. 6-9). The City also alleged the presence of Alber's vehicles constituted a nuisance under N.D.C.C. Title 42. Id. Alber filed an Answer admitting he owned the real property and the vehicles, but he denied the vehicles were abandoned or junk. (App. 10-11). Alber specifically noted all of the vehicles on his property were for sale, and he had a valid Sales and Use Tax Permit from the State of North Dakota. Id.

Following a bench trial where Alber acted pro se, the district court issued Findings of Fact, Conclusions of Law and Order for Judgment on October 6, 2003. (App. 14-18). The district court's relevant findings of fact were relatively brief:

1. That Ordinance 28 of the City of Marion states in part:

   Unsheltered storage of old, used, stripped, junked, or other automobiles not in good, safe operating condition, and of any other vehicles, machinery, implements and/or equipment or personal property of any kind which is no longer safely usable for the purposes for which it was manufactured, for a period of thirty days or more (except in a licensed junk yard) with the City, or any motor vehicle or other personal property which constitutes an obstruction, hazard or detriment to public traffic, snow removal operations, public safety or public health or morals or which be abandoned or unclaimed within this City is hereby declared to be a public nuisance and dangerous to public safety and shall be abated in the matter prescribed in this ordinance.

2. That Larry Alber is a licensed automobile dealer and has retail sales and use tax permit that allows him to sell automobile parts. Larry Alber has not been licensed by the City of Marion to maintain salvage yards or junk yards.

3. That Larry Alber's site on Summit Avenue is partially fenced with some vehicles outside the fence, and the business site is fenced with some vehicles also outside the fence. The fenced areas appear to be sheletered in the sense

that a fence shelters the junked vehicles from annoyance or covers them from public view. No other sites "shelter" the junked vehicles.

. . .

(App 14-15). Based upon those findings, the district court concluded in relevant part:

2. That Larry Alber's storage of the vehicles is contrary to law. The court finds the condition of the vehicles that are not sheltered are such that they constitute a nuisance. The vehicles that are being held for resale as used vehicles that constitute "an obstruction, hazard or detriment to public traffic, snow removal operations, public safety or public health and morals" are also a nuisance. The Court finds those vehicles to be a public suisance as well because they are intermingled with junked vehicles and are not in any manner displayed for sale. The ordinance prohibits those vehicles from being stored on public streets or in a manner to become a nuisance.

3. That the vehicles sheltered by fencing are also within the definition of a public nuisance. There are weeds among the vehicles, the manner of storage does not lend itself to the salvaging of parts from the vehicles, and there is testimony that wild animals and vermin inhabit the vehicles. The state of the storage of these vehicles is a public nuisance.

(App. 15).

The district court's order for judgment then provided:

1. That Larry Alber shall either remove all junked vehicles to a sheltered area, or remove them completely from the City.

2. That Larry Alber clean and maintain the sheltered areas so as not to be a nuisance.

3. That any vehicles held by Larry Alber for resale as used vehicles be stored in a manner and in a place that they are not a nuisance.

4. That City's request that Alber be prohibited from brining vehicles into the City is granted to the extent that such other vehicles are stored in violation of the city ordinance and state law, and not in accordance with this order.

5. That Larry Alber comply with this order within six (6) Weeks of entry of judgment.

(App. 16). The clerk of court filed the judgment on October 7, 2003 (hereinafter "2003 judgment"). (App. 1). Therefore, Larry Alber was required to comply with the district court's order on or about November 25, 2003.

Following entry of the judgment, the docket remained static for nine years until October 12, 2012, when the City filed a Motion for Finding of Contempt and Order to Show Cause. (App. 18-19). The City's motion claimed Alber had violated the 2003 judgment "by allowing vehicles on his property that are not stored in a manner and in a place that they are not considered a nuisance, and Alber has brought vehicles into the City of Marion in violation of city ordinance or state law." (App. 18-19). The motion requested the district court issue an order to show cause as to why the court should not find Alber in contempt, as well as to allow the City to abate the alleged ongoing nuisance. (App. 19.).

In support of its motion, the City filed an affidavit from Gene Rode, who was mayor at the time. (App. 24-25). The affidavit did not indicate Rode's involvement in the 2003 case, if any, or his knowledge of the condition of Alber's property prior to or immediately after the 2003 judgment. Id. Nevertheless, the affidavit conclusively states Alber "did not comply with the Court's Order" because "[Alber] has allowed the accumulation of inoperable junked vehicles in unsheltered areas, miscellaneous personal property, and vehicles in supposed sheltered areas that constitute nuisances due to the manner of storage."[1] Id. Two exhibits were attached to the Rode affidavit: (i) a letter from the City attorney, dated June 14, 2012, asking Alber to clean up the property; and

[1] The 2003 judgment did not require Alber to remove personal property other than junk vehicles. Therefore, it is unclear how the alleged accumulation of "miscellaneous personal property" was evidence of contempt of court.

(ii) a copy of a newspaper article containing the minutes of the City Council meeting on September 5, 2012, wherein the City Council voted "to have the City Attorney communicate with Larry Alber to vacate all city property and enforce the judgment from 2003." (App. 27-29).

The City also filed 32 photographs marked as Exhibit C with the district court in support of its motion. (App. 2, Dkt. Nos 19-50). The City's brief in support of its contempt motion cited Exhibit C in support of the statement: "Mr. Alber has again accumulated items that constitute a nuisance under the Junk Ordinance of the City of Marion and in violation of the Court's Judgment." (App. 22). However, the City filed no evidence providing foundation for the photographs, nor explaining what the photos purportedly demonstrated. The Affidavit of Gene Rode did not discuss the photographs at all. (App. 24-25).

In response to the City's contempt motion, Alber filed a response brief and affidavit. (App. 30-38). The affidavit indicated Alber continued to sell used vehicles from the property in question. (App. 37, ¶ 8). The affidavit further indicated that, after the 2003 judgment, Alber removed more than 80 vehicles from his property. (App. 36, ¶ 4). Alber also stated that he contacted the City in late 2003 or early 2004 and informed it that he had complied with the 2003 judgment. (Id. at ¶ 5). Alber did not receive a response from the City, and he therefore understood that he had fully satisfied his obligations under 2003 judgment. (Id. at ¶¶ 5-6). Alber stated the City did not contact him about the vehicles until 2012. (App. 37, ¶ 7). Alber suffered from a health issue in 2012 that prevented him from removing the vehicles until the end of August 2012. (Id. at ¶ 8).

However, in late August, Alber began preparing vehicles for removal, and he ultimately removed and crushed approximately 60 vehicles. (Id. at ¶ 9).

In response to the aforementioned evidence, the district court issued an order requiring Alber to "show cause why he should not be held in civil contempt of court by reason of his failure to comply with the Judgment dated October 6, 2003." (App. 40). The contempt hearing occurred on December 27, 2012. The City called Mayor Rode as its sole witness. (Tr. 18-49). The Mayor largely testified about a series of photos that he took the day prior to the hearing. Id.; see also Dkt. No. 91 (Plaintiff's Exhibit 1 from the hearing, which contains all of Mayor Rode's photos).[2] Mayor Rode acknowledged that some of the items of personal property shown in the photographs were not owned by Larry Alber. (Tr. 38-39). Mayor Rode even testified that two of the photographs showed real property owned by someone other than Larry Alber. (Tr. 33: 7-9).

Mayor Rode acknowledged multiple vehicles had been coming and going on Alber's property and had not simply remaining parked. (Tr. 22: 6-13; Tr. 26: 5-9; Tr. 28: 4-6). Mayor Rode also testified that Alber drove several of the vehicles in the photos on a regular basis. (Tr. 27: 6-8). Rode stated he did not know which of the vehicles shown in the photos were operable and which, if any, were not. (Tr. 37: 14-17; Tr. 45: 16-23; Tr. 46: 1-6).

In addition, two of the photographs, numbers 17 and 18, show a fence placed by Alber to shelter his property from the street. (Dkt. No. 91). The City specifically

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[2] The contempt hearing transcript refers to the photos in the City's Exhibit 1 by number. However, because the individual photos were not separately marked, Alber is unable to determine the exact photograph to which the particular numbers refer. Due to the inability to identify the exact photographs by number and to avoid confusion, Alber did not file the City's Exhibit C as part of the Appellant's Appendix despite the obvious relevance of the photographs therein.

acknowledged the fence could constitute a proper shelter as envisioned by the 2003 judgment, as well as the fact that not all of the vehicles shown in the photographs could constitute a nuisance. (Tr. 31: 11-21).

Following Mayor Rode's testimony, Alber testified. (Tr. 50-77). Alber testified he has operated a vehicle repair shop in the City since 1974, from which he has sold new and used parts. (Tr. 50: 9-11; Tr. 51:6-9). More importantly, Alber specifically testified about his clean up efforts following the 2003 judgment.

> My understanding [of the 2003 judgment] was I had some property setting along, they said on the city right-of-way, and they wanted those removed and put on my property was my understanding and cleaned up, which I did commence doing I think it was in October of 2003.
> . . .
> After we had – we had at that time crushed I think it was 58 or 59 cars.

(Tr. 51: 17-21; Tr. 52: 19-20).

After cleaning up the property in October 2003, Alber stated he had an attorney send a letter to the City on his behalf. (Tr. 52: 2-5). The letter stated:

> I represent Larry Alber. I have studied the Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment entered on October 6, 2003.
>
> Based upon the information available to me, it is my opinion that Mr. Alber has complied in all material respects with the Court's Judgment. He has removed some 52 vehicles from his property. All other vehicles are either behind the fence and properly stored, or properly on display for sale, or are being worked on at the present time.

(App. 43; Tr. 52: 2-20). The letter, dated November 17, 2003, was sent by fax and U.S. mail. (App. 43).

Alber stated the City did not contact him after receipt of the letter to indicate its disagreement with the statement that he had complied with the 2003 judgment. He testified: "No, I never heard anything back [from the City] until this order [to show

cause] started, that was the first I heard it wasn't in compliance." (Tr. 52: 24-25; Tr. 53: 1). In fact, Alber testified that representatives of the City had actually thanked him for his efforts following the 2003 judgment: "I had heard it from different people numerous times. They were glad I moved it off the street, and when I put up the fence they remarked how much better that looked and how much that was an improvement." (Tr. 53: 11-14).

After receiving the letter from the City in June 2012 about his alleged contempt, Alber attended a City Council meeting. (Tr. 54: 21-25). "I told them I had surgery on the 31st of January when I tore the rotator cuff out of my shoulder and the doctor said I couldn't go back to work yet, at least until the first part of August, that I couldn't use my right arm. I couldn't use my right arm. I had to keep it – any time I was working when I did try to do [work] if I could do it with the left arm." (Tr. 55: 3-9). Alber testified his right arm was placed in a brace that restrained the arm against his body at the time. (Tr. 55: 9-11). Alber stated his physician released him to perform work activities on August 23, 2012, and he contacted Gerdau Ameristeel in Jamestown on August 25, 2012 to arrange for the crushing of additional vehicles. (Tr. 55: 18-25).

Over Labor Day weekend in 2012, Alber had four semi-trailer loads totaling approximately 60 vehicles or 120 tons removed from his property and crushed. (Tr. 56: 11-13; Tr. 73: 20-21). To prepare for the crushing, Alber had to remove the radiators, catalytic converters, batteries and battery cables, and drain all fluids from each of the vehicles. (Tr. 56: 11-16). Alber also removed trees from the property, hauling approximately 40 loads of trees and branches. (Tr. 57: 2-24). Alber stated he would have crushed more vehicles, but Gerdau Ameristeel could only allow use of its crusher for four

days that fall. (Tr. 56: 22-24). As a result, Alber had already discussed renting the crusher in the spring of 2013 after load restrictions were removed for the township road leading to the crushing area. (Tr. 57: 6-14). Alber's ultimate goal was to clear out enough area to put all vehicles on his property inside of the fence. (Tr. 57: 22-24). With regard to the City's evidence of his alleged contempt, Alber testified that many of the vehicles depicted in the City's photos either presently ran or could run with the addition of a battery or some other basic part. (Tr. 58: 19-23).

The City did not produce evidence at the hearing to contradict Alber's testimony. The City's only witness, Mayor Rode, testified he did not know whether the City ever responded to Alber's letter in 2003. (Tr. 41: 9-11). Mayor Rode also stated that he did not know whether any City representative directly contacted Alber regarding the alleged nuisance between the 2003 judgment until the June 2012 letter. (Tr. 42: 10-20). Then, once the City did contact Alber in July 2012, Mayor Rode acknowledged that Alber did attend City Council meetings and informed the City that he could not immediately remove any vehicles from his property due to medical issues. (Tr. 44: 2-11). Finally, Mayor Rode admitted Alber removed around 50 vehicles from his property in the fall of 2012 and had them crushed. (Tr. 33: 16-25).

The district court took the matter under advisement following the hearing and requested closing briefs from the parties. However, rather than simply file a closing brief, the City decided to submit additional evidence that Alber would not have a chance to rebut or address. Specifically, the City filed an affidavit from Nancy Noot, the City Auditor, indicating each instance where the City Council meeting minutes or agenda mentioned Larry Alber generally; the removal of junk vehicles from the City; or the

removal of vehicles from the city right-of-way. (App. 44-49). Noot's affidavit did not state or otherwise indicate a single instance of anyone from the City contacting Albert to discuss his compliance with the 2003 judgment. Id. To the contrary, the exhibits to the Noot affidavit actually discussed a prior agreement between the parties in the fall of 2009 where the City hired Alber to stack and crush vehicles. (App. 3-4).

The City also submitted a purported letter from former City Attorney Daniel Narum to Alber's former counsel, Monty Mertz, dated November 18, 2003. (App. 50). The letter is a response to Mertz's 2003 letter and indicated the City did not agree that Alber had sufficiently cleaned up his property to comply with the 2003 judgment. Id. Noot's affidavit does not specifically state whether the letter from attorney Narum was actually sent to attorney Mertz, and the exhibit is unsigned and states "Draft" in handwriting over the written text. Id. Finally, as part of its post-hearing brief, the City submitted a "Report of Recommendations Premises Survey" for the City of Marion. (App. 51-57). The Report is not mentioned in the Noot affidavit, nor did Mayor Rode testify about it at the contempt hearing. To the contrary, and much like the photographs submitted as Exhibit C to the City's brief in support of motion to for order to show cause, the City submitted this evidence without any foundation or explanation. Nevertheless, the City cited the Report in its post-hearing brief as providing an evidentiary basis for a finding of contempt.

The district court filed its Memorandum Opinion and Order on February 22, 2013. (App. 58-65). In the decision, the district court failed to make specific findings of fact or conclusions of law, though it did ultimately conclude Alber had committed contempt of court by failing to abide by the 2003 judgment. Id. The district court's opinion also did

not make any finding regarding whether the vehicles on Alber's property are "junk vehicles" or otherwise running, nor does the opinion identify specific vehicles constituting a "nuisance." Id.

The district court's opinion does provide:

> Albers [sic] claim that he has been in compliance with the judgment is not supported by the evidence. The city's exhibits clearly show both the sheltered and the unshelteterd storage of the vehicles is overgrown with weeds, and trees have taken root around many of the vehicles. Common sense reveals that wild animals must be present as well. The evidence is clear that Alber has not complied with the judgment, and the lack of compliance is contempt of the court order contained in the judgment.

(App. 62). The district court also addressed Alber's injuries and physical limitations during 2012 but concluded such limitations did not excuse his contempt: "While Alber's physical problems may have limited his ability to personally do the labor required for preparation of the vehicles for crushing, those limitations do not amount to an inability to comply with the judgment. Others could perform those services for a fee." (App. 63).

As a result of Alber's alleged contempt, the district court ordered Alber to remove "all nuisance vehicles" within 60 days of "the lifting of road restrictions that prevent the hauling of vehicles to a commercial crushing operation" and to pay $2,500 to the City as a remedial sanction for his contempt. (App. 64-65). Alber now appeals from the district court's order finding he is in contempt of the 2003 judgment.

## ARGUMENT

This Court should conclude the district court abused its discretion by finding the City established that Alber had committed contempt of court by not complying with the terms of the 2003 judgment. To the contrary, this Court should conclude the City did not meet its burden to prove by clear and convincing evidence that Alber had willfully and

intentionally committed contempt of court, and the district court's order should be reversed.

In the alternative, this Court should conclude the district court did not make sufficient findings of fact and conclusions of law to permit informed appellate review and remand the case back to the district court for further explanation of its decision.

## I. Standard of Review.

"An appeal may be taken to the supreme court from any order or judgment finding a person guilty of contempt. An order or judgment finding a person guilty of contempt is a final order or judgment for purposes of appeal." N.D.C.C. § 27-10-01.3(3). "The determination whether a contempt has been committed and remedial sanctions are warranted lies within the sound discretion of the trial court, and its decision will not be overturned on appeal unless there is a clear abuse of discretion." Harger v. Harger, 2002 ND 76, ¶ 14, 644 N.W.2d 182, 185. "A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination." Niles v. Eldridge, 2013 ND 52, ¶ 11, 828 N.W.2d 521 (quoting Johnson v. Hovland, 2011 ND 64, ¶ 8, 795 N.W.2d 294).

## II. Legal Standard for Determining Whether Alber Committed Contempt of Court by Failing to Abide by the 2003 Judgment.

Under N.D.C.C. § 42-02-10, "[a]ny person violating the terms of an injunction for the abatement of a nuisance in any place in this state is guilty of contempt of court." "Contempt of Court" is defined to include "[i]ntentional disobedience, resistance, or obstruction of the authority, process, or order of a court or other officer, including a referee or magistrate." N.D.C.C. § 27-10-01.1(1)(c). "A party seeking a contempt

sanction under N.D.C.C. ch. 27-10 must clearly and satisfactorily prove the alleged contempt was committed." Prchal v. Prchal, 2011 N.D. 62, ¶ 5, 795 N.W.2d 693 (citing Berg v. Berg, 2000 ND 37, ¶ 10, 606 N.W.2d 903; Flattum-Riemers v. Flattum Reimers, 1999 ND 146, ¶ 5, 598 N.W.2d 499). See also State v. Harris, 105 N.W. 621, 623 (N.D. 1905) ("In contempt cases the rule generally followed is that the offense must be clearly shown to have been committed."). A court must conduct a contempt proceeding "arising out of the violation of any injunction granted under the provisions of [N.D.C.C. ch. 42-02] in the manner prescribed for the conduct of such proceeding in chapter 27-10." N.D.C.C. § 42-02-11. Section 27-10-01.3, N.D.C.C., outlines the procedures where a motion for contempt is made by an aggrieved party and permits the court to impose a "remedial sanction" after "notice and hearing."

"To warrant a remedial sanction for contempt, there must be a willful and inexcusable intent to violate a court order." Id. (quoting Hargar, at ¶ 14). "Black's Law Dictionary defines 'willful' as '[v]oluntary and intentional, but not necessarily malicious.'" Sample v. North Dakota Dept. of Transp., 2009 ND 198, ¶ 12 (citing Black's Law Dictionary, 1630 (8th ed. 2004)). Whether a person has acted "willfully" is a factual determination for the court. Id. (citing Hausauer v. N.D. Workers Comp. Bur., 1997 ND 243, ¶ 19, 572 N.W.2d 426). In addition, this Court has explained that the disobedience of a court order is excusable where the alleged condemnor was or is unable to comply with the order. Prchal, at ¶ 5 (citing Hargar, at ¶ 15). The alleged condemnor has the burden of proving this defense. Id. Possible remedial sanctions include "[p]ayment of a sum of money sufficient to compensate a party or complainant . . . for a

loss or injury suffered as a result of the contempt" and "[a]n order designed to ensure compliance with a previous order of the court." N.D.C.C. § 27-10-01.4.

## III. The Evidence Adduced at the Contempt Hearing Does Not Justify A Finding That Alber Willfully and Inexcusably Failed to Abide by the 2003 Judgment.

This Court should conclude the evidence adduced at the contempt hearing does not justify a finding that Alber willfully and inexcuseably failed to abide by the district court's 2003 judgment, because (a) Alber reasonably believed the City of Marion had found his previous cleanup efforts in 2003 to be sufficient; (b) Alber was physically unable to perform further remediation during the timetable requested by the City in 2012; and (c) once able, Alber did make good faith efforts to clean up his property. In addition, upon review of the record herein, this Court should conclude the district court's decision is not supported by the evidence adduced at the actual contempt hearing.

Finally, this Court should conclude the evidence does not justify a finding of contempt, and the district court abused its discretion, because the court's Findings of Fact are not supported by the actual evidence adduced at the hearing.

### A. Alber Reasonably Believed the City of Marion Found His Previous Cleanup Efforts in 2003 to be Sufficient.

The evidence at the contempt hearing established Alber did in fact clean up his property and remove junked vehicles in 2003 following entry of the original district court judgment. More importantly, the evidence demonstrates that, following his cleanup efforts, Alber's legal counsel sent a letter to the City stating Alber believed he had complied with the 2003 judgment and would consider the matter resolved unless he heard differently from the City. Alber testified he never heard back from the City, and Alber

therefore believed he was in compliance with the 2003 judgment. Mayor Rode testified he did not know whether the City ever responded to the letter from Alber's counsel.

After the contempt hearing, the City filed a letter from the City attorney to Alber's counsel indicating the City did not agree that Alber had complied with the 2003 judgment. However, the City's response letter was unsigned with the word "draft" was handwritten on top. The City produced no evidence demonstrating it actually sent the letter. Therefore, Alber's testimony stands, and only one conclusions can be reached from the evidentiary record: Alber believed he had complied with the 2003 judgment.

This Court must recognize that Alber's cleanup efforts and belief regarding compliance are paramount, because contempt of court is an intentional act that must be proven by clear and convincing evidence. In this case, the evidence establishes good faith efforts to comply with the 2003 judgment, which is effectively the opposite of contempt. Alber intentionally cleaned up his property and confirmed with the City – or at least believed he had confirmed – that such efforts were sufficient to comply with the 2003 judgment.

Therefore, even if the district court correctly determined the condition of Alber's property violated the 2003 judgment, the evidence does not support a finding that Alber's failure to comply was intentional. The only evidence of intent shows a good faith effort to meet the requirements of the 2003 judgment. As a result, this Court should conclude the district court abused its discretion by finding clear evidence established Alber willfully and intentionally committed contempt of court.

### B. Alber Was Physically Unable to Perform Further Remediation During the Timetable Requested by the City in 2012 Due to Personal Health Issues.

In addition, the evidence at the hearing established that, once the City finally informed Alber of his alleged contempt, he was physically unable to clean up the property due to health issues during the timetable requested by the City. Therefore, this Court should further conclude the district court abused its discretion by finding Alber committed contempt because he was physically unable to comply with the 2003 judgment at the time he was put on notice regarding the alleged contempt.

As this Court has previously explained, disobedience of a court order is not contempt of court where the alleged condemnor was unable to comply with the order. Prchal, 2011 N.D. 62, ¶ 5 (citing Hargar, 2002 ND 76, ¶ 14). In this case, when the City finally informed Alber of his alleged failure to comply with the 2003 judgment, he was initially unable to perform further remidication due to personal health issues. Alber had rotator cuff surgery in January 2012 and was placed on work restrictions by his physician through August 23, 2012. As a result, when Alber received a letter from the City in June 2012 claiming he was not in compliance with the 2003 judgment, he was not physically able to clean up his property.

While such physical limitations may not create a permanent bar to complying with the 2003 judgment, this Court should nevertheless conclude it does justify a short, two-month delay in cleaning up the property. Furthermore, this Court should conclude the district court abused its discretion by ignoring Alber's unrebutted evidence regarding his injury and physical limitations and concluding he nevertheless could have always complied with the 2003 judgment.

### C. When Physically Able, Alber Made Good Faith Efforts to Clean Up the Property to Meet the City's Requirements.

Furthermore, this Court should conclude the district court abused its discretion by finding contempt of court because the evidence established that, once Alber was physically able, he immediately removed and crushed as many vehicles as possible to meet the City's prior demands. This Court should conclude that such efforts justify a reversal of the district court's order, because Alber willfully and intentionally sought to clean up the property to meet the 2003 judgment and City's demands, and he did not wilfully and intentionally disobey such judgment.

Alber testified that just two days after he was released from work restrictions, he contacted Gerdau Ameristeel to arrange for the crushing of vehicles over Labor Day weekend. Alber further stated that he removed and crushed four semi-trailers of vehicles totaling approximately 60 vehicles or 120 tons that weekend. To prepare for the crushing, Alber stated he had to remove radiators, catalytic converters, batteries and battery cables, and drain all fluids from each of the vehicles. Alber also stated he removed trees from the property, hauling approximately 40 loads of trees and branches. Alber testified he would have crushed more vehicles, but Gerdau Ameristeel could only allow use of its crusher for four days that fall. As a result, Alber stated he would have to wait until spring to perform additional removal and crushing of vehicles.

In reviewing the unrefuted evidence regarding Alber's good faith efforts to clean up the property, this Court should further conclude the district court abused its discretion by finding Alber had committed intentional and wilfull contempt. Alber did not hear from the City for nine years after entry of the 2003 judgment. The City then wrote him a letter in late 2012. Once he was physically able, Alber immediately took action to clean up the

property and meet the City's demands. Alber completed all of the vehicle crushing as he possibly could within the small window provided by Gerdau Ameristeel. This Court should recognize that rather than contempt of court, the evidence establishes Alber made extensive, good faith efforts to comply with the 2003 judgment.

Therefore, the district court abused its discretion by finding Alber was in contempt, and its order should be reversed.

### D. The District Court's Memorandum Opinion is Not Supported by the Evidence Admitted at the Hearing.

Finally, this Court should conclude the district court's memorandum opinion is simply not supported by the evidence adduced at the hearing, nor does the opinion make the proper connection between the 2003 judgment and the allegation of contempt against Alber.

The district court's memorandum opinion claims the City's photographs show vehicles "overgrown with weeds," as well as vehicles where trees have "taken root" around them. (App. 62). The district court also claimed that "[c]ommon sense reveals that wild animals must be present as well." Id. In reality, the photographs were taken in late December and show a snow-covered landscape largely devoid of any and all weeds, much less overgrown ones. While the City's photos do show trees throughout Alber's property, neither the City's original Complaint, the 2003 judgment nor the City's 2012 motion for contempt involve the growth of trees on the property. (App. 6, 18). Finally, the City presented no evidence regarding the presence of wild animals on Alber's property, nor did the Court indicate any intention of taking judicial notice of their presence during the contempt hearing. As a result, this Court should conclude the district

court's statements regarding weeds, trees, and wild animals are either unsupported by the evidence or not a proper basis for a finding of contempt against Alber.

In addition, this Court should conclude this district court's memorandum opinion is not supported by the evidence adduced at the hearing because the court wrongfully allowed the introduction of post-hearing evidence. Section 27-10-01.3(1)(a), N.D.C.C., provides a court may impose a remedial sanction "after notice and hearing." The statute does not provide for the submission of post-hearing evidence, nor do the Rules of Court or Rules of Civil Procedure. This Court has also previously discussed the application of constitutional due process rights to contempt proceedings. See, e.g., Blaesing v. Syvertson, 532 N.W.2d 670, 671 (N.D. 1995). In both civil and criminal law, the right of a defendant to know the evidence against him and to have the opportunity to rebut such evidence is a basic right of procedural due process.

In this case, the City denied Alber of such right by introducing the Affidavit of Nancy Noot, Exhibit D, and Exhibit E after the actual contempt hearing and as part of its post-hearing brief. To the extent such evidence was not admitted at the hearing, this Court should hold the district court could not use such evidence to form the basis of a finding of contempt. As discussed in more detail in Section IV below, the district court's opinion largely fails to identify the evidence supporting its finding of contempt. Therefore, this Court cannot reasonably know the extent to which the district court relied upon the wrongfully admitted evidence in support of its decision. Nevertheless, because such evidence was submitted after the hearing, this Court should exclude it from consideration when determining whether the district court's decision is supported by the evidence.

In reviewing the evidence admitted at the hearing, this Court should conclude the district court abused its discretion by finding Alber had committed contempt and reverse its order.

## IV. The District Court Failed to Make Adequate Findings of Fact and Conclusions of Law to Provide for Appellate Review.

As this Court explained in Erickson v. Brown, 2012 ND 43, ¶ 6, 813 N.W.2d 531:

> "In an action tried on the facts without a jury[,] . . . the court must find the facts specially and state its conclusions of law separately." N.D.R.Civ.P. 52(a)(1). The rule expressly permits making findings of fact and conclusions of law "in an opinion or memorandum of decision filed by the court." Id. "Findings of fact are adequate under N.D.R.Civ.P. 52(a) if they provide this Court with an understanding of the district court's factual basis used in reaching its decision." City of Fargo v. Salsman, 2009 ND 15, ¶ 9, 760 N.W.2d 123.

"Conclusory, general findings do not comply with N.D.R.Civ.P. 52(a), and a finding of fact that merely states a party has failed in [or has sustained] its burden of proof is inadequate under the law." In re R.A.S., 2008 ND 185, ¶ 6, 756 N.W.2d 771 (internal citations omitted).

The district court did provide a memorandum opinion in this case. However, upon review of the opinion, this Court should conclude the district court nevertheless failed to adequately explain the basis of its findings of fact and conclusions of law. (App. 58-65). The first four pages of the district court's memorandum opinion largely provide the procedural background leading up to the order to show cause. (App. 58-62). The memorandum opinion then refers to the City's photographic exhibits as supporting a finding that Alber's property constitutes a nuisance, but the district court does not make any specific findings explaining how the vehicles on Alber's property constitutes a nuisance or the specific photographs to which the court referred.

For example, the 2003 judgment required Alber to "either remove all junked vehicles to a sheltered area, or remove them completely from the City." (App. 16). The district court's memorandum opinion regarding contempt does not make any finding about which specific vehicles on Alber's property constitute "junked vehicles." The district court failed to make such finding despite testimony from both Alber and Mayor Rode regarding whether the vehicles were presently being used or generally operable.

In addition, despite the City's photographic evidence demonstrating that many of the vehicles on Alber's property were located inside of a fenced shelter area, the district court did not make any finding regarding whether such vehicles complied with the City's ordinance. The City ordinance makes a distinction regarding "unsheltered" vehicles constituting a nuisance, but the district court did not address that distinction despite evidence that it applies to Alber. Specifically, in finding Alber had committed contempt, the district court did not make any findings regarding whether the contempt included all of the vehicles inside the fence, outside the fence, both, or some combination of the two.

In fact, the district court did not even make any specific findings about whether Alber's failure to comply with the 2003 judgment was wilful and intentional. The memorandum opinion does not address the letter sent by Alber's counsel indicating Alber believed he had complied with the 2003 judgment by cleaning up the property. The memorandum opinion also does not address Alber's testimony that he did not receive any response to the letter from the City or other indication that he had not complied with the 2003 judgment until 2012. Because contempt of court requires the mens rea of willful disobedience of a court order, the failure to make any findings about whether Alber acted intentionally is particularly damaging.

This Court should conclude that, without any specific written findings regarding whether Alber intentionally and willfully failed to comply with the 2003 order and a citation to the specific evidence upon which the district court relied, it cannot adequately review the district court's decision as to whether Alber committed contempt of court. As a result, if this Court is not willing to entirely overrule the contempt order, it should alternatively remand the matter back to the district court for an explanation of its findings of fact and conclusions of law on this matter.

## CONCLUSION

Based on the above, Appellant Larry Alber respectfully requests this Court reverse the district court order providing he is in contempt of court and awarding attorney fees as a remedial sanction. In the alternative, Alber respectfully requests this Court remand the matter back to the district court for an explanation of its findings of fact and conclusions of law regarding whether he intentionally and willfully committed contempt of court.

Dated this 4 day of June, 2013.

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| The State of North Dakota,<br>ex rel. The City of Marion,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>Larry Alber,<br><br>Defendant/Appellant. | Supreme Court No. 20130094<br><br>LaMore County District Court No. 23-2003-CV-5 |

## AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA )
)ss.
COUNTY OF CASS )

MANDY SEIGEL, being first duly sworn, deposes and says that on June 4, 2013, she served the following documents:

**APPELLANT'S BRIEF AND APPENDIX**

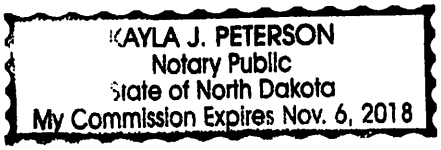
by placing a true and correct copy thereof in an envelope addressed as follows upon:

Delvin Losing
Attorney at Law
746 Front Street
Casselton, ND 58012-0308

and depositing the same, with postage prepaid, in the United States mail.

MandySeigel
MANDY SEIGEL

Subscribed and sworn to before me this 4th day of June, 2013.




(SEAL)

KAYLA J. PETERSON, Notary Public
Cass County, North Dakota
My Commission Expires: 11/06/2018