

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 11, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP2550-FT**

**Cir. Ct. No. 2005CV1486**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE FINDING OF CONTEMPT IN  
IN RE THE ESTATE OF WILLIAM R. CAPE:**

**THE ESTATE OF WILLIAM R. CAPE, DECEASED, BY AND THROUGH  
FREDERICK A. CAPE AND SINA A. DOWNS, THE SUCCESSOR  
CO-PERSONAL REPRESENTATIVES OF THE ESTATE, AND SINA A.  
DOWNS,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**CHRISTOPHER C. CAPE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for  
Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

¶1 BROWN, C.J.<sup>1</sup> Christopher C. Cape appeals from a judgment and order finding him in contempt of court and assessing attorney fees, costs and interest. The trial court found that, despite a clear order by the court to promptly execute and deliver certain documents so that 110.806 acres of land could be partitioned, Cape continuously engaged in unwarranted delay. His appeal can aptly be described as nothing more than an attempt to retry the facts before this court. We decline to do so. Our standard of review is clear. The trial court's findings of facts will not be overturned unless they are clearly erroneous. *Noll v. Dimiceli's Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The findings here are not clearly erroneous. Having found the historical facts, we hold that the trial court then properly applied the facts to Wisconsin law. We affirm.

¶2 Our recitation of the facts comes directly from the record and the trial court's findings. The trial court's partition order of December 15, 2008, specifically required that the parties

shall promptly execute and deliver to Tri City their respective copy of the Commitment Letters dated December 9, 2008 ... and the parties shall otherwise execute and deliver such other documents and take such other further actions as are necessary or appropriate to consummate their respective parts of the transaction contemplated by the Proposal Letter and said Commitment Letters.

¶3 Cape did not promptly sign and deliver that commitment letter. He admitted it. That was not the issue. The issue recognized by the trial court was whether the conduct was intentional and contemptuous. Cape contended that it was not. He claimed that the only reason why he did not sign the commitment

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

letters was that he had no idea that the letters required his wife to personally guarantee a loan. He claims that all he was trying to do was to get his wife removed from such involvement and that a delay for this purpose was not only justified, but necessary.

¶4 The trial court did not find his story to be credible. It noted that its order referenced the commitment letter of December 9. The commitment letter was therefore incorporated by reference in the order and the letter explicitly required his wife to sign the guarantee. The trial court also found that a witness who was a bank official personally communicated this requirement to Cape before he issued the commitment letter. The trial court found this bank official's testimony to be credible. Cape knew of the requirement *before* the entry of the judgment. Cape also knew that his wife would have to sign a second mortgage on their home, but he took no steps to involve her in that transaction prior to the failed closing of March 19, 2009. His wife's deposition bears this out. The trial court additionally found that Cape made no meaningful effort to close the transaction, that the refinance transaction did not close for over a year, that Cape would not have closed at all but for the contempt motion and that his actions were intentional and willful.

¶5 Cape regurgitates his own account of the historical facts and asks this court to accept his version rather than the facts found by the trial court. We will not spend our time recounting his specific factual disagreements. The trial court explicitly made credibility findings and found facts that are supported by the record. Thus, the findings are not clearly erroneous. That is all we need to say.

¶6 Cape complains that the trial court erred in defining the contempt standard as "intentional and willful disobedience" rather than "intentional

disobedience.” He asserts that “willful” invokes a higher standard of proof than “intentional.” This is a curious argument because assuming that Cape is correct, it inures to his benefit since the evidence had to show not only that his conduct was intentional, but also willful. How such benefit harmed him, we do not begin to speculate. But regardless, there is plenty of evidence from which a trier of fact could conclude that Cape’s conduct was intentional, but also willful. We need say no more about the issue.

¶7 Cape argues that, because he eventually went through with the closing, he was no longer in contempt when the court hearing ensued. He relies on *Christensen v. Sullivan*, 2009 WI 87, ¶54, 320 Wis. 2d 76, 768 N.W.2d 798, for the proposition that the contempt must be ongoing or continuing and “cannot be imposed if for any reason the contempt has ceased.” (Emphasis omitted.) But we hold that the trial court properly relied on *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85. The trial court in this case held that timeliness was an essential part of the court’s order and that Cape’s intentional foot-dragging would have continued but for the contempt motion. *See id.*, ¶¶4, 47 (When timeliness is an “essential element of the court’s order,” a party is not relieved of its contempt by late compliance when it causes damage.).

¶8 A party cannot stick up his or her nose at a trial court order and then try to escape a contempt finding by complying at the eleventh hour. *See id.* That is precisely what Cape was doing here. Thus, this case is nothing like *Christensen* where the complainants conceded that Milwaukee county had been in compliance with an order to address overcrowding conditions and poor medical services in the Milwaukee county jail for several months prior. *See Christensen*, 320 Wis. 2d 76, ¶¶5, 74. In other words, in that case, the contemptuous conduct ceased quite apart

from the contempt action, whereas here, the contempt action is what caused the contemptuous action to cease. This is a *Frisch* case.

¶9 Finally, Cape objects to the award of attorney fees and an award of unpaid interest on the estate's unpaid real estate taxes. We need say no more other than that the record amply supports those awards.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

