No. 90166-0

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, a/k/a Washington Motorsports, Ltd., by and through Barry W. Davidson, in his capacity as Receiver and as Acting Managing General Partner,

Plaintiff/Respondent,

v.

SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership,

Defendant, and

SUSAN ROSS, TERRY and BRYAN GRAHAM, and THE MEADOWS AT DRY CREEK, LLC,

Appellants.

Court of Appeals Division III Case No. 31416-2
Superior Court Cause No. 03-2-06856-4

RESPONDENT WML'S ANSWER IN OPPOSITION TO APPELLANTS' MOTION TO DISQUALIFY COUNSEL AND TO STRIKE ANSWER TO PETITION FOR REVIEW, AND RESPONDENT WML'S MOTION FOR SANCTIONS FOR APPELLANTS' FRIVOLOUS MOTION

DAVIDSON BACKMAN MEDEIROS PLLC
AARON D. GOFORTH, WSBA No. 28366
Attorneys for Respondent Washington Motorsports Limited Partnership
601 W. Riverside Ave., Suite 1550
Spokane, WA 99201
agoforth@dbm-law.net
Telephone: (509) 624-4600 / Facsimile: (509) 623-1660

1. Identity of Respondent/Cross-Movant/Plaintiff (Washington Motorsports Limited Partnership), Petitioners/Movants (Appellants), and Defendant (Spokane Raceway Park, Inc.)

The underlying lawsuit ("WML's Receivership case") is between Respondent/Cross-movant/Plaintiff, Washington Motorsports Limited Partnership ("WML"), and the Defendant Spokane Raceway Park, Inc. ("SRP")(WML's former general partner). That lawsuit has been pending since 2003. WML's Receiver, Barry W. Davidson, was appointed by the trial court in July of 2005.

The Appellants are Susan Ross, Terry and Bryan Graham, and The Meadows at Dry Creek LLC (collectively "Ross"). They are not parties to WML's Receivership case. Ms. Ross and Mrs. Graham are the daughters of Orville Moe and Deonne Moe ("the Moes"). Mr. Moe is the former President and majority shareholder of SRP. The Moes are not parties to WML's Receivership case either.

Ross and the Moes are defendants in a separate, adjunct proceeding (under RCW 7.60.160(2)) to WML's Receivership case in which WML is seeking to unwind numerous unlawful fraudulent transfers of assets worth approximately $1,000,000.00 by the Moes to Ross in furtherance of the Moes' attempt to thwart WML's efforts to collect well over $1,000,000.00 in judgments entered against the Moes for remedial sanctions for their repeated disobedience of trial court orders. Spokane County Cause Superior Court No. 12-2-01033-6 ("UFTA Case").[1]

---

1 The UFTA case is stayed pending the outcome of Ross's appeal.

2. Cross-Motion Relief Sought

In addition to WML opposing the disqualification (and striking) relief sought by Ross in her Motion, WML hereby moves, pursuant to RAP 18.9(a), for an award of the reasonable attorneys' fees and costs incurred in responding to Ross's frivolous motion. The premise of Ross's motion (that a receiver's law firm cannot represent the receiver without a disabling conflict) is contrary to Washington's Receivership Statute which specifically permits such representation. Under that statute, the trial court entered an order nearly nine (9) years ago authorizing the employment of the Receiver's then law firm that subsequently filed and obtained relief on nearly fifty (50) motions in the trial court during that time period.

Ross's motion also fails to cite any Rule of Professional Conduct ("RPC"), statutory authority, or apposite case law supporting her position. Her motion is purely an improper strategic and tactical tool to deprive the Receiver of his chosen counsel, to harass the Receiver and his counsel, to further delay the UFTA case, and to waste WML's time and resources. Sanctions should be issued against Ross.

3. Brief Background

A. Ross's appeal

In December of 2012, Ross moved in WML's Receivership case to intervene into that case to join the Moes' motion to vacate the above-referenced judgments. Ross's motion to intervene was denied and the Moes' motion to vacate

was also denied. Ross and the Moes appealed those rulings through separate (but "linked") appeals. In December of 2013, a commissioner of Division III dismissed Ross's appeal as frivolous, because Ross's requested relief was contrary to longstanding, clear, non-debatable Washington law. WML was awarded its attorney's fees and costs in defending the appeal. Ross's motion to modify that ruling was also denied by a panel of Division III judges.[2]

Ross then further compounded her frivolous conduct by seeking review in this Court of those issues, even though they are settled by clear law and/or were not even reached by the court of appeals. *See* Respondent WML's Answer in Opposition to Appellants' Petition for Review, pp.19-20 (requesting an award of attorneys' fees). Ross now continues her frivolous conduct by urging frivolous arguments upon this Court that are clearly without merit and which present no possibility of success.

B. WML's Receivership case

As referenced above, WML's Receivership case has been pending in the Spokane County Superior Court since 2003. *See* Declaration of Aaron D. Goforth in Opposition to Appellants' Motion to Disqualify Counsel ("Goforth Decl."). WML's Receivership case was commenced as a direct lawsuit by some of WML's

---

2 The Moes' appeal was also dismissed as frivolous and WML was awarded its attorneys' fees and costs against the Moes. The Moes have not sought review in this Court of the denial of their motion to modify the commissioner's ruling which dismissed their appeal. Division III Case No. 31417-1.

unit holders against SRP. The attorney for those unit holders withdrew as counsel in September of 2004. In October of 2004, John P. Giesa and Aaron D. Goforth of Reed & Giesa, P.S., appeared as counsel for the then plaintiffs and amended the complaint to remove all direct causes of action by the unit holders, and to assert only derivative claims by and on behalf of WML against SRP. *See* Goforth Decl., Exhibit 1,[3] CP 134-35.

In 2005, the trial court appointed Barry W. Davidson as WML's receiver and acting managing general partner. CP 188-190. The Receiver subsequently took over direct prosecution of the lawsuit against SRP, and the derivative claims were severed and stayed. All disputes between WML and SRP have since been settled with Court approval, but WML's Receivership case continues through WML's winding up process, including, among other things, the enforcement of judgments entered against the Moes in WML's Receivership case.

C. Counsel for WML

On September 30, 2005 (nearly nine years ago), the trial court entered an order authorizing Mr. Davidson's then law firm, Davidson & Medeiros, A Professional Service Corporation ("Davidson & Medeiros") to represent him as WML's Receiver. Goforth Decl., Exhibit 2. On March 24, 2006, the trial court

---

3 The documents attached to the Goforth Decl. as exhibits are not intended or requested to be added to the record on review (RAP 9.1(a)), and are merely provided to this Court to further demonstrate the frivolity of Ross's current motion.

issued an order also authorizing Reed & Giesa, P.S., to represent Mr. Davidson as the Receiver of WML. *Id.*, Exhibit 3. Aaron D. Goforth was one of the attorneys for Reed & Giesa that assisted in the successful effort to obtain the appointment of the Receiver. *E.g.*, CP 190.

Mr. Goforth has continued to represent the Receiver in the trial court (and nearly twenty appeals therefrom), numerous adjunct cases to WML's Receivership case (pursuant to RCW 7.60.160(2))(and appeals therefrom), other Superior Court lawsuits, United States District Court lawsuits and proceedings involving WML and SRP (and appeals therefrom), SRP's Chapter 11 bankruptcy case (and appeals therefrom), and in various other courts from 2006 to the present. *See* Goforth Decl. As such, Mr. Goforth has substantial institutional knowledge of all of the legal proceedings relating to WML, including defending Ross's current appeal, and WML's pending UFTA case against Ross.

In June of 2014, after 38 years as a law firm, Reed & Giesa began to wind up its affairs. *Id.* On June 16, 2014, Mr. Goforth joined the law firm of Davidson Backman Medeiros PLLC ("DBM") (the law firm under which Mr. Davidson has accepted new clients for representation since May of 2008). *Id.*

On June 27, 2014, the trial court entered an order approving the employment of DBM as counsel for the Receiver. Goforth Decl., Exhibit 4. On June 30, DBM substituted (in place of Reed & Giesa) as counsel for the Receiver in this Court (received by this Court on July 2). On July 1, 2014, DBM substituted (in

place of Reed & Giesa) as counsel for the Receiver in the superior court in both WML's Main Receivership case and the UFTA case, and in the Division III case out of which Ross's present Petition for Review arises. *Id.* Exhibits 5-7. Ross's counsel was served with copies of each of the foregoing withdrawals and substitutions. *See id.* (Certificates of Service). On July 2, 2014, Mr. Goforth, through DBM, signed and mailed to this Court for filing Respondent WML's Answer in Opposition to Appellants' Petition for Review (received by this Court on July 7).

On July 9, 2014, Ross mailed to this Court for filing her present motion to disqualify DBM (received by this Court on July 14, 2014). Her Motion is only two (2) pages in length and fails to provide this Court with all of the pertinent background, fails to provide this Court with any reasoned argument, and fails to cite or provide any documentary evidence supporting her assertions. She also failed to undertake a review of the orders entered in WML's Receivership case (which authorized Mr. Davidson's law firm to represent him in his capacity as Receiver of WML), failed to undertake even a cursory review of Washington's Receivership Statute which clearly permits such representation, and failed to undertake a reasonable factual and legal inquiry into the circumstances in which disqualification of opposing counsel will be granted.

Instead, Ross simply offers her conclusory opinion, unsupported by any apposite authority, that such representation creates "both an actual and apparent

conflict" of interest. Ross's motion is frivolous, and WML should be awarded its attorneys' fees incurred in defending against it.

4. Argument

A. Ross's Motion to Disqualify Counsel and to Strike WML's Answer in Opposition to Petition for Review should be Denied.

"Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely necessary." *In re Firestorm 1991*, 129 Wn.2d 130, 140 (en banc 1996).

Ross's motion should be denied, because: (1) Washington's Receivership Statute (RCW 7.60.180) specifically permits such representation, and the trial court has entered orders authorizing the employment of the Receiver's law firm pursuant to that statute (the first of which was entered nearly nine years ago); (2) Ross fails to support her motion with any apposite authority; (3) Ross's motion is untimely, and her arguments for disqualification have been waived; (4) Ross's motion is an improper litigation tool to harass the Receiver and his counsel, to waste the Receiver's resources, to further delay the UFTA case, and to deprive the Receiver of his chosen counsel; (5) disqualification would unfairly prejudice WML; and (6) Ross's motion is an improper attack on the trial court orders that granted the employment of the Receiver's law firms.

i. The Receiver is statutorily authorized to act as the attorney for the receivership estate, and the Receiver has obtained trial court approval for such representation.

Ross claims that the Receiver has an "actual and apparent" conflict of interest in hiring his own law firm to act as the lawyer for WML's receivership estate, because the Receiver will "direct[] work to his own law firm." Ross's Motion, p.1. Ross's argument ignores Washington law. Washington's legislature has specifically authorized a court appointed receiver to act as the attorney for the receivership estate, even where (unlike here), the receiver holds or represents an interest adverse to the receivership estate, or if (unlike here) the receiver represents or has some other relationship with a creditor or party in interest. Specifically, RCW 7.60.180 provides, in relevant part, as follows:

> (1) The receiver, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons that do not hold or represent an interest adverse to the estate to represent or assist the receiver in carrying out the receiver's duties.
>
> (2) A person is not disqualified for employment under this section solely because of the person's employment by, representation of, or other relationship with a creditor or other party in interest, if the relationship is disclosed in the application for the person's employment and if the court determines that there is no actual conflict of interest or inappropriate appearance of a conflict.
>
> (3) This section does not preclude the court from authorizing the receiver to act as attorney or accountant if the authorization is in the best interests of the estate.

Emphasis added.

Ross fails to even attempt to address the implications of this statutory authority in her motion, because she apparently failed to even read the receivership statute or the orders authorizing the employment of Davidson & Medeiros and DBM prior to filing her motion.

Mr. Davidson does not hold or represent any interest adverse to the Receiver or WML, nor is he employed by, represent, or have another relationship with any creditors or parties in interest. But even assuming, *arguendo,* that he did, subparagraph (3) specifically permits the receiver (and thus his law firm) to act as attorney for the receivership estate in those circumstances if it is in the best interests of the estate. Such authorization has been obtained from the trial court in 2006 and 2014. *See* Goforth Decl., Exhibits 2&4. Davidson & Medeiros has represented the Receiver and WML for nearly nine (9) years and has filed and obtained orders on nearly fifty (50) motions. *See* Goforth Decl., Exhibit 8.

Lastly, Ross fails to identify any actual or apparent conflict of interest that would arise by the Receiver directing work to his law firm, to the lawyers who are most familiar with the proceedings, and who can most efficiently represent WML. The Receivership Statute provides clear procedures that govern the compensation of professionals by requiring that all requests for compensation (including the Receiver and his law firm) are subject to notice and an opportunity to object. RCW 7.60.180(4). If such an objection is filed, the compensation request cannot be paid unless the objection is first overruled by court order. *Id.* The order approving

DBM's employment also specifically requires compliance with that statute. Goforth Decl., Exhibit 4. The Receiver is also an agent of the court and is subject to the control of the court. RCW 7.60.005(10).

ii. Ross has failed to offer any apposite authority in support of her motion.

Although Ross seeks the "drastic" remedy of disqualification, she fails to cite any RPC, statute, or apposite case law in support of her motion.

She relies solely upon *Kurbitz v. Kurbitz,* 77 Wn.2d 943 (1970). *See* Ross's Motion, p.2. In that case, this Court acknowledged that two factors are to be considered when evaluating whether to disqualify an attorney for a conflict of interest: (1) "whether the matters embraced within the pending suit involving an attorney's former client are substantially related to matters on which the attorney or someone in his association previously represented the former client...."; and (2) "if the attorney in the present litigation did not formerly represent the adverse client, but had access to confidential information which is material to the present suit, then the attorney should disqualify himself." *Kurbitz* at 947 (Emphasis added)(citations omitted); *see also RWR Mgmt., Inc. v. Citizens Realty Co.,* 133 Wn. App. 265, 280 (2006)(favorably citing the *Kurbitz* two part test); *see also In re Firestorm 1991*, 129 Wn.2d 130, 140 (en banc 1996)(citing *Kurbitz* at 947)("One situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party.")

Neither the Receiver nor any attorney for DBM has represented Ross or possess any confidential information relating to her, nor does Ross make any claim to the contrary. *Kurbitz* is completely inapposite. Ross's motion is less than two pages in length, and her legal argument spans less than half a page. Other than her passing citation to *Kurbitz*, Ross offers this Court no analysis of that case, and fails to offer any other authority or argument in support of her motion. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Gerow v. Washington State Gambling Comm'n,* 324 P.2d 800, 803, n.3 (2014)(citation omitted). This Court "will not consider issues on appeal that ... are not supported by argument and citation of authority." *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 705 (1989); *Cf. also* RAP 10.3(a)(6)(requiring appellate briefs to be supported by argument, to contain citation to legal authority, and to reference the relevant parts of the record).

iii. Ross's motion is untimely and her request for disqualification has been waived.

> A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion. This court will not allow a litigant to delay filing a motion to disqualify in order to use the motion later as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed.

First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon, 108 Wn.2d 324, 337 (1987 en banc)(emphasis added)(quoting *Central Milk Producers Coop. v. Sentry Food Stores, Inc.,* 573 F.2d 988, 992 (8th Cir. 1978)).

"Delay in filing [a] motion to disqualify is suggestive of its use for purely tactical purposes and could be the sole grounds for denying a motion to disqualify." *In re Firestorm 1991,* 129 Wn.2d 130, 145 (1996).[4]

In *Firestorm,* this Court indicated that a nine (9) month delay in filing a motion to disqualify was significant in evaluating whether disqualification was warranted. *Id.* at 144–45. Also, in *Eubanks v. Klickitat Cnty.*, Division II found that an eighteen (18) month delay in bringing a motion to disqualify constitutes waiver. 326 P.3d 796, 799 (2014).

Ross has participated in WML's Receivership case as an interested person since at least as early as 2007. *See* Goforth Decl., Exhibit 9. Ross waited to seek disqualification until more than seven (7) years after her active participation in WML's Receivership case, and nearly nine (9) years after Davidson & Medeiros was employed by court order. Ross has not (and cannot) make any showing of any material differences between the Receiver being represented by Davidson & Medeiros and being represented by DBM.[5] Further, Ross has never sought such disqualification in either WML's Main Receivership case or the UFTA case. *See*

---

4 Delay in filing a motion to disqualify weigh towards denial thereof regardless of whether the motion is believed to have been filed for tactical reasons. *Eubanks v. Klickitat Cnty.*, 326 P.3d 796, 799 (2014).

5 The Receiver's motion to employ DBM, in place of Davidson & Medeiros, simply accounted for Mr. Goforth joining DBM and having the Court enter an Order employing the law firm through which Mr. Davidson accepts new clients.

also Section 4.A.vi., *infra* (re: improper attack on trial court orders). Ross's motion for disqualification is untimely and has been waived.

iv. Ross's motion is being used as a tactical weapon against WML.

Motions to disqualify counsel should not be used as a litigation tool, or to deprive an opponent of counsel of their choice. *First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon,* 108 Wn.2d 324, 337 (1987 en banc)(citation omitted).

> Courts often try to discern whether the movant is using the disqualification motion as a tool simply to delay the proceedings, harass the lawyer or lawyer's client, or otherwise seek an unfair advantage in the litigation. Any suggestion of these tactics--no matter how slight or speculative--will usually weigh heavily against disqualification.

Keith Swisher, The Practice and Theory of Lawyer Disqualification, 27 Geo. J. Legal Ethics 71, 91 (2014)(Goforth Decl., Exhibit 13)(emphasis added)(*citing, inter alia, Vegetable Kingdom, Inc. v. Katzen*, 653 F. Supp. 917, 926 (N.D.N.Y. 1987)("The court finds this cynical perversion of the commendable objectives which inspired the promulgation of codes of conduct designed to guide an attorney through difficult ethical dilemmas particularly offensive.")(Emphasis added).

Instead of Ross trying to address some "actual or apparent conflict" (which she entirely fails to identify), Ross's transparent motivation is to further delay the UFTA case, to gain an unfair advantage by depriving the Receiver of his chosen counsel, and to harass the Receiver and his counsel.[6]

---

6 The Receiver and his counsel have an extensive litigation history with Ross for which Ross is now seeking retribution through her disqualification motion. *See* Goforth Decl., Exhibit 10 (WML's settlement with Ross in which she withdrew her claim to ownership to various WML limited partnership units), CP 17-42 (the

The policy discouraging the use of disqualification motions as litigation weapons is so strong that many courts will not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification, and will find that non-clients lack standing to seek such relief. "As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification." *Kasza v. Browner,* 133 F.3d 1159, 1171 (9th Cir. 1998)(citations omitted)("hav[ing] difficulty seeing" how an opposing party "has standing to complain about a possible conflict of interest ... having nothing to do with [their] own representation.")

These rules have evolved to ensure that an antagonist or opposing party does not utilize disqualification as a strategy or tactical tool in litigation, or as a method to delay and prolong proceedings, wasting party and judicial time and resources, and depriving an opposing party of their chosen counsel. That is exactly what Ross is attempting to accomplish.

//

//

//

UFTA case in which WML has sued Ross), Exhibit 11 (order obtained by WML which freezes assets claimed to be owned by Ross), Exhibit 12 (order obtained by WML which appoints a receiver over an entity in which Ross claims ownership), and Appendix B to WML's Answer in Opposition to Ross's Petition for Review filed in this Court (the dismissal of Ross's underlying appeal as frivolous and awarding attorneys' fees to WML).

v. The relief sought in Ross's motion would unfairly prejudice WML and its Receiver.

Another factor to consider in evaluating a motion for disqualification is the prejudice that would be suffered by the party whose attorney would be disqualified. *Eubanks v. Klickitat Cnty.*, 326 P.3d 796, 799 (2014). Here, if WML had to retain different counsel, the cost and delay associated with such a change would be prohibitive – the very reason why Ross is bringing her present motion.

vi. Ross's motion is an improper attack on the trial court orders authorizing employment of Davidson & Medeiros and DBM.

The employment orders for Davidson & Medeiros and DBM were entered in 2006 and 2014, respectively. Goforth Decl., Exhibits 2&4. Ross has never sought relief in the trial court with respect to those orders, nor has she sought review of those orders by Division III. Instead, she is raising the issue for the first time in this Court. Ross should not be permitted to, in effect, obtain direct review of those orders in this Court under guise of a disqualification motion. *E.g.*, RAP 4.2(a)(governing direct review by this Court of superior court decisions).

B. This Court should Issue Sanctions against Appellants for their Frivolous Motion.

Under RAP 18.9(a), the "appellate court ... on motion of a party may order a party or counsel ... who uses these rules for the purpose of delay [or] files a

frivolous appeal ... to pay terms or compensatory damages to any other party who has been harmed...."

> [A] motion for sanctions for filing a frivolous motion is properly made under RAP 18.9(a). Fees are awarded only if an appeal, or in this case, a motion is frivolous. An appeal or motion is frivolous if there are "'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility'" of success.

In re Recall Charges Against Feetham, 149 Wn.2d 860, 872 (2003)(emphasis added)(citations omitted).

Sanctions are appropriate when a motion to disqualify appellate counsel based upon an alleged conflict of interest has no factual or legal basis. *Bryan v. Joseph Tree, Inc.*, 57 Wn. App. 107, 122-23 (1990). Here, Ross's motion presents no debatable point of law. As demonstrated above, the sole case cited by Ross is entirely inapposite. As also demonstrated above, the relief sought by Ross in this motion is contrary to the clear language of RCW 7.60.180. Further, Ross's motion fails to cite any authority which would permit the striking of WML's Answer to her Petition for Review. For these reasons, and those set forth above, Ross's motion is frivolous and WML's motion for the attorneys' fees incurred in defending against it should be granted.

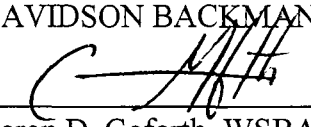
5. Conclusion

For the foregoing reasons, WML respectfully requests that this Court deny Ross's motion to disqualify counsel and her related request to strike WML's Answer is Opposition to Petition for Review. WML further requests that this Court

determine Ross's Motion is frivolous, award WML its attorneys' fees incurred in connection herewith, and grant WML leave to submit by subsequent affidavit the fees incurred herein in compliance with RAP 18.1(d).

DATED this 22nd day of July, 2014.

DAVIDSON BACKMAN MEDEIROS PLLC



Aaron D. Goforth, WSBA No. 28366
Attorneys for Plaintiff/Respondent
WML, and its Receiver

DECLARATION OF SERVICE

I hereby declare and certify under penalty of perjury under the laws of the State of Washington that on the date I signed this Declaration I caused a true and correct copy of the foregoing document to be served upon the following in the manner(s) indicated below.

Signed this 22nd day of July, 2014, at Spokane, Washington.

Tara J. Nichols

Richard D. Wall
Attorney at Law
505 W. Riverside Avenue, Suite 400
Spokane, WA 99201
Via U.S. Mail, postage prepaid