IN THE COURT OF APPEALS, DIVISION 3, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

CASE # 32119-3-III

DEFENDANT-APPELLANT REBEL CREEK TACKLE INC.'S REPLY BRIEF

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APPELLANT'S REPLY TO RESPONDENT SBPI'S RESPONSE

I. SBPI'S FAILURE TO CITE TO THE RECORD

1.RCT was not subject to an order regarding the "transfer and/or delivery" of molds by a certain date prior to NOVEMBER 15, 2013. SBPI is incorrect in asserting that RCT had disobeyed an Order from the Court.

a.This appeal is from the Order of November 15, 2013. There was no prior Order. RCT was not disobeying an Order when RCT acted to protect its Plastic Injection Molds.

On June 7, 2013 SBPI filed "MOTION FOR ORDER CONFIRMING ARBITRATION AWARD AND ENTRY OF JUDGMENT AND PERMANENT INJUNCTION", CP1. The ORDER CONFIRMING ARBITRATION AWARD AND ENTRY OF JUDGMENT AND PERMANENT INJUNCTION, hereafter ORDER CONFIRMING ARBITRATION AWARD, was entered by Judge Clark on June 7, 2013, CP 44.

The ORDER CONFIRMING ARBITRATION AWARD confirmed the Arbitration Award and did not Order RCT to undertake any act.

SBPI, at Response Brief page 4, erroneously asserts that the ORDER CONFIRMING ARBITRATION AWARD required RCT to

perform as follows:

> Most importantly, the final arbitrator's award ordered RCT to take all necessary actions to transfer and/or deliver the plastic injection molds to SBPI by May 17, 2013.

SBPI errs in this assertion. RCT was required to place or assign legal ownership of the Patent Applications and Patents in the corporate entity no later than May 17, 2013 by paragraph 4.a. of the ORDER CONFIRMING ARBITRATION AWARD. CP 44

Paragraph 4.c., CP 44, of the said ORDER CONFIRMING ARBITRATION AWARD addressed but did not order any action regarding the plastic injection molds. The Record on Appeal is replete with references to the requirement of the Osborn's assigning the Patent Applications and Patents to RCT, to be accomplished by May 17, 2013 and are found throughout the present record specifically relative to the ORDER CONFIRMING ARBITRATION AWARD, i.e., seen in attachments and the executed ORDER CONFIRMING ARBITRATION AWARD at CP 4; 24; 29; 34; 39; 42-44(entered by the court June 7, 2013); 47-48; 75; 80; 98 and at additional pages within the Clerk's Papers.

RCT was not subject to any Order by the ORDER CONFIRMING ARBITRATION AWARD. CP 44. SBPI's "Most importantly..." assertion is incorrect and does not cite a portion of the record for support.

SBPI's error and failure to cite to the record, noted in the preceding paragraphs, is a violation of RAP 9.2(b) requiring citation to the record and a violation of RAP 10.3(a)(5) and (8) where a party to an appeal failing to cite to the Record for support of a "fact" results in the Appellate Court not further addressing the suggested argument. Regarding RAP 9.2(b) *City of Moses Lake v. Grant County Boundary Review Bd,* 104 Wn, App. 388, 391, 15 P.3d 716 (2001); Regarding RAP 10.3(a)(8) *Starczewski V. Unigard Ins. Grp.*, 61 Wn.App. 267, 276, 810 P.2d 58 (1991); Regarding RAP 10.3(a)(5) *Cowiche Canyon Conservancy v. Bosley* 118 Wn.2d 801, 809 (1992)

2.RCT draws the Court's attention to additional errors or failures by SBPI to identify support in the Record for assertions made by SBPI.

2.1Consider SBPI's cite to *Tegland,* Wash. Prac., Civil Procedure § 43:3 (2nd ed. 2009) in the SBPI Response at the conclusion of paragraph D, page 15. The citation to *Tegland* is SBPI's suggestion that Washington Courts abide by the rule "It is no defense to a charge of contempt that the underlying ruling was erroneous." *15 Karl Tegland,* Wash. Prac., Civil Procedure § 43:3 (2nd ed. 2009). *Tegland* has been recited in many decisions. However the only instance of this cite to *Tegland* found by counsel for RCT by using the search tool Casemaker is in the unpublished decision *State v. Vinsonhaler*, 39395-6-II involving

"direct contempt" disrupting the court. RCT asserts that Respondent's recitation of this cite to *Tegland* is an end run around the prohibition of citing Unpublished Opinions. RCT asserts that the Court should treat this citation by SBPI under RAP 10.3(a)(5) and disregard.

2.2In this appeal, RCT assigns error to the Court's failure to consider the ambiguity of "transfer" relative to the use of the plastic injection molds allowed to SBPI. RCT Brief on Appeal, Assignment of Error 1 at page 6. The word "transfer" was not in the License Agreement, paragraph 5 found at CP 15.

RCT asserted that "all the circumstances" were required to be examined in order to effect correct contract construction as required by *Berg v.Hudesman,* 115 Wash.2d 657, 663, 80) P.2d 222 (1990); *Scott Galvanizing, Inc. v. Nw. EnviroServices. Inc.,* 120 Wn .2d 573, 580, 844 P.2d 428 (1993). Brief on Appeal page 21, 22.

RCT recited 16 factors comprising "all of the circumstances..." to be considered in the contract construction analysis of "transfer". Brief on Appeal Page 21, 22.

SBPI suggests that it likewise addresses "factors" commencing in the Response Brief page 17 where SBPI first cites to the absence of any reference in the record of a claim by SBPI of its ownership of the molds. That is, SBPI asserts that it has searched the record and

finds nothing to point this Court to and that that absence is evidence that SBPI has not claimed ownership and that this absence is a "fact" supporting SBPI's assertion that "transfer" is unambiguous.

SBPI states to this Court that, at SBPI's Response Brief 17-18,

> "The arbitrator was aware that RCT and PIM had colluded to breach SBPI's exclusive license ...and thus understood that the molds needed to be transferred to SBPI to ensure that this activity would not occur again. RP 242. This extrinsic evidence provides substantial support for the collusion that the words are unambiguous, as the Trial Court correctly found."

Before turning to RP 242 for its view of this extrinsic evidence, the Court is alerted to the fact that the concept of 'collusion" and the word "collusion" is found only in SBPI's Demand For Arbitration CP 188 at paragraphs 15- 22 CP190-193 and in SBPI's briefing in this matter. There was no ruling by the Arbitrator (CP 76-80) and no reference to collusion by the Trial Court and Judge Clark in argument or in the Order of November 15, 2013 appealed from herein. This Appellate Court will find that RP 242 is an excerpt from a SBPI memorandum commencing at RP 240:

> (at RP 242) "The arbitrator understood that the Defendant and PIM colluded in the infringing activity, which was at the heart of the arbitration. See, generally, Smith Decl. Exhibit 2. As such, "transfer and/or delivery" should be given its common meaning. Hence, in order to prevent further collusion, he directed the Defendant to cooperate in the transfer and or delivery of the molds from PIM to the Plaintiff upon his request. The Plaintiff simply desires transfer of the plastic

> injection molds so it may use a manufacturer in which it has confidence to produce its product without interference or collusion from Defendant. The arbitrator agreed with this premise and thus awarded transfer and delivery of the molds to Plaintiff. Further, despite Defendants repeated assertions in its Memorandum, the Plaintiff understands that the transfer and delivery of the molds is not a "sale" of the molds, and that ownership of the molds remains with the Defendant."

SBPI does not refer to the Clerk's Papers, the Report of Proceeding and does not identify an Exhibit or any portion of a Declaration or anything of a testimonial or evidentiary nature. The reference is solely to a conclusion reached by counsel for SBPI and set forth in pleadings. Further, there is no definition offered of collusion. Black's Law Dictionary states:

> "Collusion: is an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law..."

RCT asserts that Respondent's recitation of "collusion", without cite to the record, should be treated by the court under RAP 10.3(a)(5) and be disregarded.

II. SBPI's COUNTERSTATEMENT OF ISSUES AND ARGUMENT:

1.SBPI's issues 1 and 2 relate to Contempt. RCT's prior argument herein, at II. SBPI'S FAILURE TO CITE TO THE RECORD, regarding the lack of a prior Order compelling RCT to act pertains to SBPI's issues 1

and 2 and RCT relies on those arguments.

Additionally, RCT notes the Court holding in *State, Dept. of Ecology v. Tiger Oil Corp.*, 271 P.3d 331, 166 Wn.App. 720, 768 (Wash.App. Div. 2 2012) as follows:

> We review contempt rulings for abuse of direction. Trummel v. Mitchell, 156 Wash.2d 653, 671-72, 131 P.3d 305 (2006). " An appellate court will uphold a trial court's contempt finding ' as long as a proper basis can be found.' " Stella Sales, Inc. v. Johnson, 97 Wash.App. 11, 20, 985 P.2d 391 (quoting State v. Boatman, 104 Wash.2d 44, 46, 700 P.2d 1152 (1985)), review denied, 139 Wash.2d 1012, 994 P.2d 849 (1999). **Contempt of court includes any " intentional ... [d]isobedience of any lawful ... order ... of the court."** RCW 7.21.010(1)(b). If the superior court bases its contempt finding on a court order, " **the order must be strictly construed in favor of the contemnor,"** Stella Sales, 97 Wash.App. at 20, 985 P.2d 391, and " **[t] he facts found must constitute a plain violation of the order."** Johnston v. Beneficial Mgmt. Corp. of America, 96 Wash.2d 708, 713, 638 P.2d 1201 (1982) **(emphasis added)**.

The Court Document relied upon by SBPI was not an Order as required by RCW 7.21.010. The Court Document urged by SBPI confirmed the decision of an arbitration as a Superior Court Judgment. In a normal course following entry of a Judgment steps could be taken to execute the Judgment.

There is no evidence of Record in this Appeal of any steps by SBPI toward Execution. Whatever SBPI did following the entry of Judgment in June, 2013, the Court Document relied upon by SBPI to

support its contention of Contempt by RCT must be strictly construed in favor of RCT. The facts found must constitute a plain violation of the Order.

RCT was not ordered to deliver possession of the molds to SBPI. This Court should find that there was no prior Order requiring an act by RCT by any court ordered date and that RCT was not in contempt while attempting to protect its property.

2.SBPI's issues 3 and 4 relate to ambiguity. These issues will be addressed.

3.SBPI's issue 5 relates to attorney fees and will be addressed.

III.SBPI's COUNTERSTATEMENT OF THE CASE - SECTION III.

1.RCT's prior argument herein, at II. SBPI'S FAILURE TO CITE TO THE RECORD, regarding the lack of a prior Order compelling RCT to act pertains to this Counterstatement of the Case.

2.At SBPI's Response III.A. page 4, SBPI erroneously asserts that the arbitrator's decision:

"...ordered RCT to take all necessary actions to transfer and/or deliver the plastic injection molds to SBPI by May 17, 2013." CP 21.

The error regarding an order by the arbitrator to act with regard to

the molds by May 17, 2013 has been addresses in previous paragraphs.

Similarly at SBPI's Response Brief III.B.1 page 6 SBPI again erroneously states that

> Most importantly, the arbitrator's award required that "SBPI shall have full, unrestricted use of the injection molds during the term of the contract, and [RCT] shall cooperate in the transfer and/or delivery of said molds as requested by (SBPI]." CP 29.

CP 29 recites a paragraph from the Arbitrator's Decision stating:

> 4. Claimant shall have full, unrestricted **use of the injection molds** during the term of the Contract, and Respondent shall cooperate in the **transfer and/or delivery** of said molds as requested by Claimant; (emphasis added)

3.At SBPI's Response III.B –Statement of Facts: Section 1 starting at page 5, addresses SBPI's allegations regarding the arbitration against RCT in stating that "RCT materially breached the Contract. CP2". RCT does not find this specific statement or even the topic at CP 2. But RCT does agree that allegations were made and recognizes that SBPI obviously refers to the Demand for Arbitration commencing at CP 188.

In the Demand for Arbitration this court will find the allegation that "RCT materially breached the Contract", e.g. CP 190-91 at paragraph 15. However, SBPI's introduction of the Demand for Arbitration allows for the examination of other of SBPI's allegations in the Demand which are specifically pertinent to RCT interest in the proper construction of

these words including "transfer and/or delivery" and "use". For example at Demand Para 16 "RCT **colluded** with PlM to change the master molds... and at Para 20 "RCT and its counsel **colluded** with PlM and ordered it not to do business with SBP, despite Section 5 of the License Agreement. which allows SBP to control the molds and despite knowledge of pending and desired orders by SBP." at CP 191. And at CP 192, para 21 "RCT **colluded** with PIM to produce colored versions of the trolling divers..." and at CP192, para 22 "RCT **colluded** with retailers in Washington State to replace the black devices in packages delivered by SBP with the colored...." (emphasis added). The present Record does not disclose any reference by the Arbitrator or Court to Collusion.

However, the repeated assertion of "collusion" between RCT and PMI indicates SBPI's understanding of PMI's character to be corrupt and undesirable. This assertion by SBPI is contradicted by the fact that, following entry of the Arbitration Decision as a Superior Court Judgment, SBPI's counsel successfully negotiated with PIM and reached an agreement for PIM's production of the product at an agreed price. This success is recorded at CP 55 paragraph 5 of SBPI's counsel's Declaration commencing at CP 54. But, the very next sentence, the concluding sentence at CP 55 paragraph 5, asserts yet another contradiction by the stated request of SBPI that the molds be transferred from PIM.

RCT submits that this "successful" negotiation with PIM immediately countered by a request to withdraw the molds from PIM is a meaningful circumstance to be incorporated into the contract interpretation of "transfer and/or delivery" and "use". The Court is again directed to the process in Washington State for contract construction:

> In Washington, **the intent of the parties** to a particular agreement may be **discovered not only from the actual language of the agreement**, but also from **"viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."** Berg v. Hudesman, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) (quoting Stender v. Twin City Foods, Inc., 82 Wash.2d 250, 254, 510 P.2d 221 (1973)). See, e.g., The Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wash.App. 177, 180-82, 810 P.2d 27 (determining meaning of "fence" by reference to "overall purpose" of homeowner's agreement), review denied, 117 Wash.2d 1013, 816 P.2d 1224 (1991). *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 844 P.2d 428, 120 Wn.2d 573, 580-81 (Wash. 1993).(emphasis added)

The conclusion the Court can draw from the SBPI characterization of collusion by PIM, SBPI's negotiation with PIM for production and cost followed immediately by the request to transfer molds from PIM is that SBPI expects that production information would be provided by PIM to RCT. SBPI would not want production information given to RCT if SBPI intended to falsely report sales. Mr. Burrill lied regarding his contribution to the invention of the Patented Device. (CP 50 at 52) Mr. Burrill complained about the royalty required in the License Agreement. (CP 50

at 52). These findings make reasonable the conclusion that Mr. Burrill intends to and will falsely report sales and royalty due to RCT.

The acts of Mr. Burrill and SBPI are a principal source of the body of facts which comprise "1. all the circumstances surrounding the making of the contract, 2. the subsequent acts and conduct of the parties to the contract, and 3. the reasonableness of respective interpretations advocated by the parties".

The grand finale in the Demand for Arbitration regards the allegation that Mr. Burrill invented the fishing device. CP 193. There Mr. Burrill, through his counsel, asserted that Mr. Burrill was the inventor of the fishing device. The caption concluding the Demand and asserting that Mr. Burrill was the inventor states "V. Mr. Burrill is an Unnamed Joint-Inventor of the '291 Application" followed by Paragraphs 29-33 where the inventive skills of Mr. Burrill are extolled.

The Arbitrator specifically found that SBP and Mr. Burrill made no inventive contribution and the arbitrator made no reference to collusion in any instance. CP 36-40. Mr. Burrill lied to the Arbitrator in his assertion of invention. Mr. Osborn's Declaration describes the years of research, testing and development of the fishing device. CP 180 at 182;

images of the prototypes made by Mr. Osborn are seen at CP 237-38. Mr. Burrill had no evidence to support his false claim.

SBPI is very sparing in its "construction" of what the rights are of SBPI to "use" and what "transfer and/or delivery" means. But, the little contributed to the definition of these terms is illuminating as follows:

a.SBPI states, Response Brief III.B.4 page 9 "Finally, after this order was issued, SBPI eventually **obtained possession** of the molds. (emphasis added). This "fact" is not of record but no objection is made.

b. Similar to the case at hand, the plain meaning of "transfer and/or deliver," under the circumstances of this case, simply means "the passing of a thing or of property from one person to another." *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS. This definition was enforced by the Trial Court, when the judge explained "the term 'transfer and/or deliver,' as used by the arbitrator and repeated in the judgment is not ambiguous. It's plain, simple, common sense meaning is that the property is to be **placed in the possession** of the plaintiff." RP 17. (emphasis added)

c.While SBPI describes the following excerpt from RP 17 as how the "judge explained "the term 'transfer and/or deliver,' the Court's precise conclusion is:

"Fourth, the term, quote, transfer and or delivery, close quote, as used by

the arbitrator and repeated in the judgment is not ambiguous. Its plain, simple, common sense meaning is that the property is to be placed in the **possession** of the Plaintiff.(emphasis added)

The trial Court renders a conclusion with no findings of fact. The findings of fact were itemized for the Trial Court in it listing of 16 matters comprising the circumstances surrounding this matter. Brief on Appeal 21-22.

d. (RP 242) "The arbitrator understood that the Defendant and PIM **colluded** in the infringing activity, which was at the heart of the arbitration. See, generally, Smith Decl. Exhibit 2. As such, "transfer and/or delivery" should be given its common meaning. Hence, in order **to prevent further collusion**, he directed the Defendant to cooperate in the transfer and or delivery of the molds from PIM to the Plaintiff upon his request. The **Plaintiff simply desires transfer of the plastic injection molds so it may use a manufacturer in which it has confidence to produce its product without interference or collusion from Defendant.** The arbitrator agreed with this premise and thus awarded transfer and delivery of the molds to Plaintiff. **Further, despite Defendants repeated assertions in its Memorandum, the Plaintiff understands that the transfer and delivery of the molds is not a "sale" of the molds, and that ownership of the molds remains with the Defendant."** (emphasis added)

e. "In reviewing the record of proceedings, at no point has SBPI attempted to take any ownership of the injection molds, or argue that they have any rights to ownership of the molds. SBPI has even attempted to explain this to RCT, and did explain to the Trial Court that SBPI understands they are obtaining no ownership in the molds." RP 18. SBPI Response Brief IV.D at page 17.

This Court's attention is now drawn to the immediately preceding paragraphs 4.a., b., and c. regarding "possession". The physical aspect of injection molds comprises blocks of steel. However, as with all property,

there are also non-physical elements which combine with the physical to comprise the whole property. "Property" is therefore often analogized to a **bundle of sticks** representing the right to possess, exclude, alienate, etc. (emphasis added) *Manufactured Hous. Communities of Wash. v. State*, 142 Wash.2d 347, 366-67, 13 P.3d 183 (2000).

Hence RCT's seeking, determining and exposing "all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations." *Berg v.Hudesman,* 115 Wash.2d 657, 663, 80) P.2d 222 (1990) is the effort to identify the entire 'bundle of sticks" comprising the property of the molds. It is noted that one stick not in the bundle is the right to use one's property in a manner harmful to one's neighbor. *Eggleston v. Pierce County*, 64 P.3d 618, 148 Wn.2d 760 (Wash. 2003). SBPI's intent is to harm RCT's property right by removing an aspect of ownership through its possession.

This Court's attention is next drawn to the immediately preceding paragraph 4. d., and e., with SBPI's counsel's cite to RP 18, to find that counsel does not identify any of the Clerk's Papers or exhibits of other testimony to support this contention by the Respondent SBPI and thus

should, in the normal course, disregard under RAP 10.3. However, Respondent SBPI's admission that there is no evidentiary record further weakens SBPI's apparent contention that there are findings which support the Court's Conclusion that the molds are simply to be delivered to and placed in the possession of SBPI.

IV.SBPI's ARGUMENTS AT SBPI SECTION IV

A. SBPI argues that RCT Intentionally Disobeyed an Order

At SBPI's Response, page 9-11, the history of the entry of the ORDER CONFIRMING ARBITRATION AWARD is reiterated. The ORDER CONFIRMING ARBITRATION AWARD entered on June 7, 2013 was the entry of an Arbitration Decision as a Spokane County Superior Court Judgment. The Court did not order RCT to undertake any act.

In *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 442, 87 Wn.2d 327 (Wash. 1976) the trial court entered a restitution order giving appellants 15 days to place $142,000 in a trust account in a King County bank. Appellants did not establish the trust

account within the 15-day time period. Respondent, the State of Washington, filed a motion and affidavit for an order to show cause why appellants should not be held in contempt of court. The court also ordered appellants to show cause why they should not be held in contempt of court. Appellants did not establish the trust account. The trial court entered an order finding appellants in contempt for their failure to establish the trust account and to appear for the ancillary proceedings and gave appellants 15 days to purge the contempt. The rule of law articulated in this case was as follows:

'(W)here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt.' *Dike v. Dike*, 75 Wash.2d 1, 8, 448 P.2d 490 (1968), quoting *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352, 146 A.L.R. 966 (1943); *Deskins v. Waldt*, 81 Wash.2d 1, 5, 499 P.2d 206 (1972). . . . *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 442, 87 Wn.2d 327 (Wash. 1976)

In the present matter of SBPI v. RCT, there was no order requiring RCT to undertake any act. In November 2013, RCT was not refusing to

obey an Order in resisting the demand by SBPI to yield possession of the molds. RCT, in the hearings on November 1 and November 15, 2013, was urging the court to undertake the process of contract construction to determine the factors, the sticks within the bundle defining "use" of the molds and defining "transfer and/or delivery".

There being no "order" to be disobeyed there was no contempt.

Counsel for RCT urged the Court to consider the contract construction of "use" and "transfer and/or delivery" and respectfully noted that failure to do so was error. RP 28/line 14; 32/line 10. To do otherwise simply authorizes SBPI to drive off into the sunset with the molds. And this after SBPI had negotiated production and cost with PIM. CP 55 and page 10 herein.

At page 11 of SBPI's Response it is noted that "at no time did RCT formally object to the arbitrator's award or the court's affirmation of the award.

At no time in *Scott v. Northwest, supra,* did any challenge of the indemnity provision occur until circumstances arose which brought it to the attention of the parties. As in *Scott,* supra, at no time in SBPI v. RCT, before the motion for Contempt, was the "transfer" term brought to a state of action where the intent was to remove the molds to a site unknown to RCT. When this action was taken to enable and cause the ambiguous

terms to be implemented, RCT reacted exactly as did the parties in *Scott, supra.* RCT took action and resisted.

B. At SBPI's Response page 12, did the Court abuse its Discretion in finding Contempt

Did the ORDER CONFIRMING ARBITRATION AWARD of May 17, 2013, entering the Arbitration Decision as a Superior Court Judgment, Order RCT to undertake an Act? The Trial Court read RCT's briefing regarding Ambiguity and Contract Construction, RP 16/lines 18-25, but refused to consider those materials or arguments. The Trial Court found RCT's materials and arguments regarding contract construction irrelevant and considered solely whether an order had been violated. RP 16/lines 23-25. What is the Standard of Review: SBPI says Abuse of Discretion, RCT says de novo citing, in its Brief on Appeal, "...fundamental contract construction rules when interpreting a contract and to the extent we interpret contract provisions; we apply the de novo standard of review. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009); *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279 (2010).

SBPI supported its argument of contempt citing *State v. Dugan* 96 Wn. App. 346, 979 P.2d 885 (1999). *Dugan,* involved "direct contempt" and a summary order of contempt. On appeal the order of contempt was

reversed. The Court of Appeals stated that "A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995)." *Dugan*, supra 349.

RCT contends that the facts of this case demonstrate that the Trial Court, if Abuse of Discretion is the Standard of Review, exercised its discretion in a manifestly unreasonable manner in considering all of RCT's briefing re: ambiguity and contract construction, then refusing to consider any argument regarding contract construction and then basing its decision upon the court's conclusion, without findings, that the Arbitration Decision and ORDER CONFIRMING ARBITRATION AWARD, using the word "transfer", was clear and not ambiguous.

First the Trial Court read all briefing, then denied the SBPI Motion to Strike, then refused to consider argument regarding contract construction, then concluded that the word "transfer" was clear and not ambiguous and then entered an Order of Contempt. RP 16/line 2 to 17/line 22. The November 15, 2013 Order should be reversed.

What is the Standard of Review for this present case? There was no prior order directing RCT to act. RCT contends that the Abuse of Discretion Standard is not the standard for this case. RCT contends, as noted in the RCT Brief on Appeal, that the Standard is de novo where

ambiguity and contract construction are the issues to be decided. Noting the dissent in *Bryant v. Joseph Tree, Inc.*, 829 P.2d 1099, 119 Wn.2d 210, 227-28 (Wash. 1992), Acting Chief Justice Andersen addressed the process of determining the Standard on Review in reviewing de novo or for Abuse of Discretion in a case involving CR 11.

In *Keck v. Collins*, 31128-7-III, appeal pending to the Washington State Supreme Court, one party argued for the Standard of Review to be de novo and the other for Abuse of Discretion.

There was no order requiring action by RCT. Yet SBPI presents and argues its Motion for Contempt contending that RCT had disobeyed a Court Order. The Trial Court refused to consider any other issue. But the Trial Court was mindful of the issue of ambiguity and contract construction, had read briefing prior to arguments and heard presentations of both November 1 and November 15, 2013.

RCT moved for continuance with that heard on November 1, 2013. Introductory argument at RP 2/line 6 -7/line 17. The need for a continuance was addressed for the purpose of compiling multiple Declarations and other evidence arising from the Arbitration in order to adequately argue and to comprise a record should an appeal occur. RP

7/line 7 – line 17. The matter of contract construction to address an ambiguity was addressed commencing at RP 8/line 20 -25. A continuance was granted to November 15, 2013 with the Court addressing at RP 13/line 16 and noting specifically the issue of contract construction of "transfer", RP 13/line 24-14/line 2.

On November 15, 2013 the Court addressed the format of the hearing starting at RP 16/line 2 stating at the outset "I spent a lot of time looking over the file and the documents that have been submitted." RP 16/line 3-5. At RP 16/lines 18-22 the court stated that "Third, I do find that a large portion of the Defendant's materials and argument are irrelevant to the issue at hand and I will not be considering those materials or arguments that are not relevant to the issue before us."

The Trial Court continued at RP 17/line 7-22 stating that the sole argument before the court was whether an order had been willfully and intentionally violated. The Court commented on the word transfer and described its statements at RP 17/line 7-22 as its findings. RP 17/line 24-25.

The SBPI argument described the Arbitrator's Decision and the ORDER CONFIRMING ARBITRATION AWARD as a conclusion of law stating:

"You know we have a valid court order here that is very clear and unambiguous. Our client, the Plaintiff, understands the transfer and the delivery of these molds has nothing to do with transfer of

ownership." RP 18/lines 19-24.

The court indicated its decision to order that the molds be removed from PlM to an unknown location. RCT counsel responded with argument regarding parole evidence needed for contract construction re: "use" and "transfer", itemized hazards that would occur regarding this RCT property and noted the error by the court in disregarding "all the circumstances" needed to define these sticks amid the bundle defining this mold property. RP 22/line 22- 32/line 21.

C. At SBPI's Response page 13, was RCT Collaterally Barred from Arguing that the Findings of Fact in the Contempt Order are Ambiguous?

Ambiguity and construction issues arise after events occur which place light on ambiguous terms. Washington Courts review questions of law, including the interpretation of contract provisions, de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009); *Kim v. Moffett*, 156 Wn.App. 689, 697, 234 P.3d 279 (2010).

The Court gives the parties' intent as expressed in the instrument's plain language controlling weight and give words in a contract their ordinary

meaning; *Cambridge Townhomes*, supra at 487 and Courts may discover intent from: "'viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" In re Marriage of Litowitz, 146 Wn.2d 514, 528, 48 P.3d 261 (2002) (internal quotation marks omitted) (quoting Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428, cert, denied, 537 U.S. 1191 (2003)

D. Argument – Terms are Unambiguous

SBPI states that there was substantial evidence to support the Trial Court's "finding" that the words were unambiguous and that SBPI has never attempted or intended to take ownership. SBPI does not cite to the Record on Appeal for either substantial evidence, "findings" or "ownership". This failure subjects the argument to not be regarded by the Court of Appeals. RAP 9.2(b) requiring citation to the record and RAP 10.3(a)(RAP 10.3(5). This Court should not consider these arguments.

V. CONCLUSION

Adding the word "ORDER" to the entry of an Arbitration Decision as a Superior Court Judgment does not "order" a party to take an action. What is included in the "use" of the molds, what does the phrase "transfer and/or delivery" do, i.e., does it change the "use", and what are the several sticks which confine the molds and their "use"? Bringing these questions

to the Trial Court on November 1, 2013, invited to return on November 15, 2013, were steps showing that there was no contempt. RCT property was threatened. (RP 4/lines 1-10; RP 4/line 14-5/line 5; RP 5/line 21-6/line 14; RP 6/line 17-9/line 7). The "facts" showing the "all the circumstances" included many declarations and pleadings. The Court invited this presentation November 15, 2013. (RP 14/lines 13-18)

There was no Order. There was no Contempt. Contract construction for undefined terms was required. The Trial Court considered the "circumstances surrounding the "use" and "transfer", made no findings but stated a conclusion that there was no ambiguity. The Trial Court erred. The Contempt should be reversed. This Court should consider de novo the circumstances defining "use" and "transfer and/or delivery" and render its definition of these terms.

SBPI should not be awarded fees/costs. RCT should be awarded fees/costs.

Respectfully submitted this 29th day of August, 2014.

Floyd E. Ivey, WSBA 6888, Attorney for Appellant

APPENDIX

CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on AUGUST 29, 2014 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Reply Brief on Appeal; Table of Authorities; Table of Contents; Title Page-Reply Brief Appeal 321193; Appendix

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DATED: AUGUST 29, 2014

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Appeal No. 321193