IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

REBEL CREEK TACKLE, INC., a Washington corporation Petitioner, vs. SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Respondent.	Supreme Court No.: 97539-6 Division III Case No.: 35572-1-III SETH BURRILL PRODUCTIONS, INC.'S OPPOSITION TO PETITIONER'S MOTION FOR EXTENSION OF TIME

I. INTRODUCTION

Respondent Seth Burrill Productions, Inc. ("SBP") opposes Petitioner Rebel Creek Tackle, Inc.'s ("RCT") Motion for Extension of Time to Appeal. RCT has failed to provide a sufficient basis to justify granting a motion for extension of time to file its petition for review. This Court's rules and the equities favor the finality of Division III's decision. SBP respectfully requests that the motion be denied.

II. MEMORANDUM

A. The Rules Favor Finality of Division III's Decision

The Court of Appeals' decision terminating review was filed July 11, 2019. RAP 13.4(a) requires a petition for review within 30 days. Filing is allowed only when the Court is open. GR 30(c) closes filing for each business day at 5:00 p.m.

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RAP 13.4(a) also requires that the party filing a petition for review "must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals . . . ."

These two RAP 13.4 provisions were not met by RCT on or before the deadline of Monday, August 12, 2019. The petition was not submitted on time in any form. The fee was not paid with the submission and there is still no confirmation the fee has been paid as of this filing.

RCT's counsel was notified by the Court of these rule violations by letter from the Washington State Supreme Court dated August 15, 2019. Declaration of J. Christopher Lynch ("Lynch Decl.") at ¶ 3.

On August 16, 2019, SBP's counsel implored RCT's counsel not to pursue this motion, because the RAP 18.8 requirements could not be met. Lynch Decl. at ¶ 4.

Nevertheless, RCT filed its motion. RCT's motion and submission do not establish good cause, nor do they meet the stringent requirements of RAP 18.8.

RAP 18.8(a) allows the Court to waive its own rules "in order to serve the ends of justice, subject to the restrictions in sections (b) and (c)." The restrictions in RAP 18.8(b) require "extraordinary circumstances" and that the waiver would "prevent a gross miscarriage of justice."

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RCT's motion cannot serve the ends of justice. There are no extraordinary circumstances. There will be no gross miscarriage of justice if RCT's motion is denied. And, RCT has shown neither.

It cannot serve the ends of justice to allow RCT's attorney to *violate the rules* in appealing an appellate decision sanctioning RCT's attorney for *violating the rules* which appellate decision affirmed a superior court's decision sanctioning RCT's attorney for *violating the rules*. SBP is entitled to finality.

B. Denial of RCT's Motion Does Not Cause a Gross Miscarriage of Justice

RCT does not meet its burden to show how waiver of the rules prevents a "gross miscarriage of justice." RCT never explains the nature of its appeal. Indeed, RCT's petition fails to clearly articulate which of the required conflicts of law or issues of Constitutional significance are being requested for review. RAP 13.4(b)(1)-(4).[1]

Despite being the petitioner, RCT has virtually no interest in the outcome of the petition, just as it had virtually no interest in the Division III appeal. Lynch Decl. at ¶ 5. RCT's motion does not explain how the petition or the motion could aid RCT, and thus how there could be a gross miscarriage of justice if its appeal were dismissed.

[1] If this motion is granted, SBP intends to answer the petition explaining that it satisfies none of the four required categories of RAP 13.4(b)(1)-(4).

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The July 11, 2019 decision of Division III includes an accurate short summary of some of the history of the matter. Here is a synopsis presented as briefly as possible, but with sufficient detail to show RCT's counsel's harassment by litigation.

C. Arbitration One

RCT granted a license to SBP to make fishing divers. RCT's counsel improperly terminated the license. SBP invoked arbitration under the license. SBP prevailed at arbitration and was awarded money, attorneys' fees, and injunctive relief (the "Arbitration Award"). Despite the finality of arbitration, RCT did not pay the Arbitration Award or comply with it. Lynch Decl. at ¶ 6.

The point of arbitration is finality of a matter without the added expense of litigation. Indeed, the (unappealable) Arbitration Award should have been the end of it. But RCT's counsel twisted its loss in Arbitration One into four superior court rulings against it, each with a corresponding appeal. Three of those appeals have been deemed meritless, and the fourth appeal has just commenced. Most importantly to the instant motion, none of the four appeals ever had any prospect of "helping" RCT – only RCT's counsel stood to gain. Lynch Decl. at ¶ 7.

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D. Appeal One: The Contempt Ruling

SBP opened a Superior Court matter (Case No. 13-2-01982-0) to confirm the Arbitration Award as a Judgment, which was confirmed. At the direction of its counsel, RCT did not comply with the Judgment. SBP brought a motion for contempt, which was granted (the "Contempt Ruling"). Despite being in contempt, RCT appealed the Contempt Ruling to Division III (Case No. 32119-3) ("Appeal One"). Division III affirmed the Contempt Ruling, finding the appeal frivolous and awarding SBP attorneys' fees. RCT petitioned to the Supreme Court. This Court denied the petition. Lynch Decl. at ¶ 8.

E. Appeal Two: The Receiver Ruling

After denial of its petition to the Supreme Court, RCT then complied with the injunctive relief of the Arbitration Award, but RCT did not pay the Judgment or comply with Supplemental Proceedings. SBP moved in its Superior Court matter for appointment of a Receiver, which was granted (the "Receiver Ruling"). RCT appealed the Receiver Ruling to Division III (Case No. 34401-1) ("Appeal Two"). Division III affirmed the Receiver Ruling, finding the appeal frivolous and awarding SBP attorneys' fees. RCT did not petition the ruling in Appeal Two to the Supreme Court. Lynch Decl. at ¶ 9.

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F. The Bar Grievance

During Appeal Two, RCT's counsel filed a Bar Grievance against SBP's counsel to the Washington State Bar Association. SBP's counsel responded to the Bar Grievance, demonstrating how it was tactic used by RCT's counsel to harass SBP and its counsel. The WSBA closed the Bar Grievance without further investigation. Lynch Decl. at ¶ 10.

G. Appeal Three: The CR 11 Ruling

RCT moved in SBP's Superior Court matter for "Declaratory Relief" and "Summary Judgment", despite that the Superior Court matter was merely a vehicle for confirmation of SBP's Arbitration Award and included no filed Complaint or Counterclaim. The Superior Court denied RCT's motion and awarded sanctions against its counsel under CR 11 (the "CR 11 Ruling"). RCT appealed the CR 11 Ruling to Division III (Case No. 355721) ("Appeal Three"). Division III affirmed the CR 11 Ruling, finding the appeal frivolous and awarding attorneys' fees. This is the July 11, 2019 decision at issue in RCT's present petition. Lynch Decl. at ¶ 11.

H. Arbitration Two

While Appeal Three was pending, RCT commenced Arbitration Two. The license agreement had been reinstated by Arbitration One, and it required minimum periodic sales. SBP admitted not meeting the minimum periodic sales, but argued that RCT's litigation barrage tolled the period.

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Arbitration Two found the minimum sales period not to be tolled, and thus formally ended the license agreement. RCT was nominally awarded the contractual royalties RCT's counsel had previously refused to accept from SBP. Lynch Decl. at ¶ 12.

SBP immediately and fully complied with the Arbitration Two Award, returning the diver molds to RCT, and forwarding the royalties SBP had previously attempted to pay. Lynch Decl. at ¶ 13.

I. Appeal Four: The Wrong Case Ruling

Despite SBP's full satisfaction of the Arbitration Two Award, RCT moved in SBP's Superior Court matter to confirm the Arbitration Two Award as a Judgment.[2] The Superior Court denied the motion on procedural grounds (the "Wrong Case Ruling"), instructing RCT's counsel to file its own action and pay the required filing fee to present its requests. RCT appealed the Wrong Case Ruling to Division III (Case No. 368998) ("Appeal Four"). Lynch Decl. at ¶ 14.

Even if RCT can somehow "win" Appeal Four, neither RCT nor SBP would be financially better off. Appeal Four, like Appeal One, Appeal Two, Appeal Three, and the behavior that led to the Contempt Ruling, the Receiver Ruling, the CR 11 Ruling, and the Wrong Case Ruling all appear

[2] Without any authority, RCT also requested additional injunctive relief from the Superior Court that was not part of the Arbitration Two Award.

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to emanate from litigation harassment. RCT does not have the money or resources to mount such a campaign, and SBP does not have the money or resources to adequately respond. All signs point to RCT's counsel as the source of the harassment campaign. Lynch Decl. at ¶ 15.

J. RCT's Motion History

Counsel for RCT has filed numerous motions in the four appeals – including motions for extension of time in each of them. For example, on July 25, 2019, just after filing Appeal Four, RCT's counsel filed a "Motion to Extend Time to File Designation of Clerk's Papers and Statement of Arrangements with the Court of Appeals". Lynch Decl. at ¶ 16.

As another example, one of the motions RCT's counsel brought in Appeal Three was a Motion to Strike SBP's response to another of RCT's motions brought in Appeal Three. This Motion to Strike, filed August 16, 2018, is a good example of RCT's counsel's style of harassing litigation. The brief is ten pages and is difficult to read and understand. SBP was forced to oppose this Motion to Strike, and Division III denied the Motion to Strike. The Motion to Strike was pointless and can only be seen for what it was – a harassment tactic. Lynch Decl. at ¶ 17.

K. Nothing About RCT's Rule Violations Is Extraordinary

This Court has long held that the "extraordinary circumstances" standard set forth in RAP 18.8(b) is "rarely met." *Shumway v. Payne*, 136

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Wn.2d 383, 395 (1998) (citations omitted). Such circumstances "include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Id.* These considerations are essential to fulfilling the civil rules' purpose of ensuring the court justly, speedily, and inexpensively determine every action. *See* CR 1.

For example, the Court of Appeals, in *Reichelt v. Raymark Industries*, refused to extend the time for filing a notice of appeal filed 10 days late. *Reichelt v. Raymark Indus.,* Inc., 52 Wn. App. 763, 765 (1988). The *Reichelt*-Court rejected the appellant's argument that an unusually heavy work load justified an extension of time to avoid a gross miscarriage of justice. *Id.* The court reasoned that the prejudice of granting an extension of time would be "to the appellate system and to litigants generally, who are entitled to an end to their day in court." *Id.* at 766 n.2.

RCT claims it spent eight days, for a total of 34 hours, to prepare its petition for review. Declaration of Floyd Ivey ("Ivey Decl.") at p. 4. The Rules of Appellate Procedure afford a litigant 30 days to prepare and file a petition. RAP 13.4(a). That RCT's counsel waited until two hours before the 5:00 p.m. mark to ascertain its login/password information to electronically file the brief, does not meet the "rarely" satisfied extraordinary cause "rigorous test." *See Reichelt*, 52 Wn. App. at 766. In

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the few cases where the standard was met, the movant *timely* filed "but some aspect of the filing was challenged." *Id.* (citing *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (notice *timely* filed, but filed in wrong court); *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (notice *timely* filed but rejected by court for lack of filing fee); *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 714, 658 P.2d 679 (1983) (notice *timely* when filed within 30 days of entry of stipulated "amended" judgment).

RCT was required—but has failed—to show that despite reasonable diligence, its filing was defective due to excusable error or circumstances beyond its control. RCT admits it waited until the last minute to file its brief. Ivey Decl. at 4. RCT admits it "expected" to file its brief two hours prior to the deadline. *Id.* These choices do not support a finding of extraordinary cause and, therefore, the lost opportunity to appeal cannot constitute a gross miscarriage of justice because of RCT's lack of reasonably diligent conduct. RAP 18.8(b). RCT could have asked the Court for its login name and password earlier, but chose to wait until the last day in the last hours of the 30-day window.

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This is not the first time RCT has claimed technical difficulties precluded timely filing.[3] When the Court of Appeals previously accepted filings by mail, RCT penned a letter explaining why its mailing was late, lobbying for an electronic filing system. RCT now argues its electronic filing system failed RCT. *See id.* at Ex. A, p. 3.

In an attempt to frame "ordinary" vs. "extraordinary", RCT's counsel's declaration at page 4 references another "appeal of a related case" filed in June 2019. Presumably, that reference is to Appeal Four – and presumably it is cited as an example of an appeal that, for RCT's counsel, was "ordinary." Appeal Four, however, is particularly telling as an insight to RCT's counsel's vexatious litigation tactics.

For the price of a filing fee, RCT could (as directed by the Superior Court judge) commence its own action, pay the required filing fee, and then attempt to present its (already fully satisfied) Arbitration Two Award for confirmation as a Judgment. But instead, RCT filed Appeal Four, presumably to argue that RCT should have some right to present its (already fully satisfied) Arbitration Award under SBP's old case number. What substantive difference would it make if RCT "wins" Appeal Four? None.

[3] *See* Lynch Decl., ¶ 20, Ex. A (communications to Court of Appeals about "formatting issue", "fax at COA turned off", and late filing because "mail had been picked up").

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RCT still would need to try to present its (already fully satisfied) Arbitration Award for confirmation as a Judgment. Lynch Decl. at ¶ 15.

Winning Appeal Four would change nothing for RCT other than having to suffer the cost of an entire appeal in order to save the cost of a superior court filing fee. Why would RCT spend its resources in this manner? No rational actor would pay to pursue Appeal Four. RCT's counsel is obviously litigating for sport – his tactics have been to drive up SBP's costs at every opportunity. Appeal Four is anything but ordinary. Lynch Decl. at ¶ 15.

RCT's counsel's filing mishaps were not caused by forces outside his control – in that sense they were "ordinary." By his own admission, RCT's counsel elected to wait until two hours before the deadline to attempt to file its brief, despite that Rule 13.4(a) afforded RCT 720 hours to timely file the brief. RCT's argument that SBP received the late-filed brief within 29 minutes of the cut-off is irrelevant to this Court's analysis. RAP 18.8(b) does not turn on prejudice to the responding party, although—as shown below—SBP would be prejudiced by the late filing as it perpetuates an interminable history of abusive litigation tactics at SBP's expense. Notwithstanding, RCT's late filing prejudices "the system and an extension of time undermines the finality of a judgment." *Pybas v. Paolino*, 73 Wn.

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App. 393, 103 (1994) (additionally considering prejudice to the responding party).

RCT's counsel's decision to wait until the eleventh hour to ask for its e-file login information to file RCT's petition does not evince extraordinary circumstance justifying a waiver of this Court's rules. Indeed, "negligence, or lack of 'reasonable diligence,' does not amount to 'extraordinary circumstances.' " (State v. Hand, 309 P3d. 588, 589 (2013) (citing *Beckman v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000).

L. RCT Did Not Timely Pay Its Filing Fee

RAP 13.4(a) required that RCT "must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed." RCT admits that it did not comply with this rule – claiming the fee was sent by mail on August 14, 2019, two days after the deadline. *See* RCT Mot. for Extension at 1.

RCT's motion provides no explanation why the filing fee was not paid "at the time the petition [was] filed". RAP 13.4(a). No arrangements were made to pay the fee on time. No explanation about the fee was apparently provided to the Court staff with whom Mr. Ivey claims to have spoken on August 12. Paying the fee on time is not optional – it is mandatory.

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RCT's motion provides no explanation of anything "extraordinary" that prevented paying the required fee on time.

M. SBP Is Entitled To Finality

RCT's counsel claims that a 29-minute delay did not prejudice SBP – but it does. Given the onslaught of appeals, motions, and tactics employed by RCT's counsel – each of which have cost SBP and its counsel wasted time and money – any "failure to litigate" by RCT is noticed and is a welcome relief from the tactics SBP has grown to expect from RCT's counsel.

For example, SBP was surprised that Mr. Ivey did not file a motion for reconsideration of the ruling in Appeal Three – the passing of that deadline was noticed. As another example, SBP was surprised that Mr. Ivey did not object to any aspect of SBP's request for attorneys' fees in Appeal Three – the passing of that deadline was noticed.

Likewise, the close of the business day Monday August 12 without a petition for discretionary review for another appeal was noticed. SBP's counsel has been in continual communication with SBP, often having to include an apology to SBP on behalf of our profession at the maneuvers a determined attorney can make to harass an opposing party and its counsel. There is no logical or business-like explanation for RCT's counsel's harassment campaign. SBP is yearning to reach the end of this matter that

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it assumed was over when it prevailed in Arbitration One – and on August 12, 2019, at 5:01 p.m. when the deadline for RCT to file a petition to this Court for review of Appeal Three lapsed.

As one can imagine, SBP is highly frustrated by RCT's counsel's non-sensical litigation tactics, so one less item of harassment is noticed and appreciated. This is why SBP's counsel implored RCT's counsel not to pursue its present motion once the Supreme Court notified the parties that the appeal was not timely – because SBP is entitled to finality.

Repeatedly, RCT has failed completely to honor its obligations in the Arbitration One Award, leading to the superior court matter, the Contempt Ruling, the Receiver Ruling, the CR 11 Ruling, the Wrong Case Ruling, and Appeals One, Two and Three – all of which were decided against RCT, and none of which were a prudent use of anyone's resources.

RCT "has not provided sufficient excuse for its failure to file a timely [petition for review], nor has it demonstrated sound reasons to abandon [this Court's] preference for finality." *See Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368 (1993).

N. RCT Cites No Authority That Its Acts Are Good Cause For An Extension

RCT's motion does not address the competing factors in RAP 18.8(b). RCT cannot explain how the facts are extraordinary under the law,

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or how RCT will suffer a gross miscarriage of justice if its appeal is dismissed, or why SBP is not entitled to finality.

RCT presents no declaration that the Court's system was down or otherwise inaccessible to other counsel on Monday, August 12, 2019. RCT cites no authority that it claimed technical difficulties were deemed "extraordinary circumstances" in other cases.

RCT cites no authority that the requirement of RAP 13.4(a) to simultaneously pay the statutory filing fee is somehow waived if the attorney encounters technical difficulties in filing its paperwork.

RCT cites no authority that a waiver of the rules is appropriate when counsel elects to electronically file a time-sensitive brief mere hours before the deadline especially when RCT's counsel has encountered repeated "difficulties" with timely online filings.

RCT cites no authority that a waiver of the rules is appropriate when the petitioning party has no interest in the petition or the appeal. RCT has nothing to "win" by winning this motion or this appeal – the appeal is all about sanctions against RCT's counsel. By contrast, SBP has a real interest in "winning" in order to avoid more months of responding to meritless motions and appeals. If RCT's motion is granted and RCT's counsel is allowed to proceed with another meritless appeal, SBP is the victim of the gross miscarriage of justice.

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RAP 18.8 has few reported decisions. But all of them support SBP, because none include a motion to waive the rules brought by a serial litigation abuser like RCT's counsel.

O. Request For Sanctions and Attorneys' Fees

RCT violated this Court's rules, namely RAP 13.4 in its late filing of the petition and the failure to pay the filing fees "at the time the petition is filed." RCT violated this Court's rules, namely RAP 18.8(b) in presenting this motion without extraordinary circumstances or any potential for gross miscarriage of justice to RCT. Immediately after the parties received this Court's August 15, 2019, rule violation letter, SBP's counsel demanded withdrawal of the petition and informed RCT's counsel specifically that filing a motion for an extension under the circumstances would not be brought in good faith and invokes potential CR 11 sanctions. Lynch Decl. at 21, Ex. B; *see also Biggs v. Vail*, 124 Wn.2d 193, 199, n.2 (1994) (informal notice is sufficient).

Pursuant to RAP 18.9 and CR 11, SBP respectfully requests that RCT be sanctioned (i) for its use of the rules to delay, (ii) for filing a frivolous appeal, and (iii) for failure to comply with the rules of this Court. SBP also respectfully requests that this Court condition any additional litigation by RCT (e.g. Appeal Four) on full and immediate payment of any sanctions so awarded. RAP 18.9(a).

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III. CONCLUSION

SBP respectfully requests that this Court deny RCT's motion. SBP respectfully requests that RCT's counsel be sanctioned for violating the rules and filing a meritless motion and appeal. SBP respectfully requests that RCT's counsel be prohibited from litigating any further against SBP unless and until any awarded sanctions or attorneys' fees are paid.

DATED this 23rd day of August, 2019.

LEE & HAYES, P.C.

By: _____

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 23rd day of August, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated upon:

Floyd E. Ivey, Esq. Ivey Law Offices, P.S. Corp. 7233 W. Deschutes Avenue, Suite C, Box #3 Kennewick, WA 99336 feivey@3-cities.com feivey@bossig.com	___ Hand Delivery _X_ U.S. Mail _X_ Email ___ Facsimile

SARAH E. ELSDEN

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REBEL CREEK TACKLE, INC., a Washington corporation Petitioner, vs. SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Respondent.	Supreme Court No.: 97539-6 Division III Case No.: 35572-1-III DECLARATION OF J. CHRISTOPHER LYNCH IN SUPPORT OF SETH BURRILL PRODUCTIONS, INC.'S OPPOSITION TO PETITIONER'S MOTION FOR EXTENSION OF TIME

J. CHRISTOPHER LYNCH declares under penalty of perjury as follows:

1. I am over the age of 18, competent to be a witness herein, and make this declaration on personal knowledge and the books and records of my firm.

2. I am an attorney for Seth Burrill Productions, Inc. ("SBP"). I submit this declaration regarding SBS's Opposition to Petitioner's Motion for Extension of Time.

3. RCT's counsel was notified by the Court of these rule violations by letter dated August 15, 2019. RCT's counsel was informed it could seek to extend time by establishing good cause, but that such motions are normally not granted.

4. On August 15, 2019, I implored RCT's counsel not to pursue the motion, because the requirements could not be met and

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demanding withdrawal of the petition. My email to RCT's counsel is attached as Exhibit B.

5. Despite being the petitioner, RCT has virtually no interest in the outcome of the petition, just as it had virtually no interest in the Division III appeal. This is because the "motion" brought by RCT was mooted by Arbitration Two, which is completed and the Arbitration Two Award is fully satisfied. The only ripe matter on appeal is the sanctioning of RCT's counsel at the Superior Court and at Division III – none of which affects RCT.

6. RCT granted a license to SBP to make fishing divers. RCT's counsel improperly terminated the license. SBP invoked arbitration under the license. SBP prevailed at arbitration and was awarded money, attorneys' fees, and injunctive relief. Despite the finality of arbitration, RCT did not pay the Arbitration Award or comply with it.

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9. After denial of its petition to the Supreme Court, RCT then complied with the injunctive relief of the Arbitration Award, but RCT did not pay the Judgment or comply with Supplemental Proceedings. SBP moved in its Superior Court matter for appointment of a Receiver, which was granted (the "Receiver Ruling"). RCT appealed the Receiver Ruling to Division III (Case No. 34401-1) ("Appeal Two"). Division III affirmed the Receiver Ruling, finding the appeal frivolous and awarding attorneys' fees. RCT did not petition to the Supreme Court.

10. During Appeal Two, Mr. Ivey filed a Bar Grievance against me to the Washington State Bar Association. Similar to RCT's present petition, the Bar Grievance is lengthy and difficult to read. I responded to the Bar Grievance, demonstrating how the Bar Grievance was tactic used by Mr. Ivey to harass SBP and its counsel. Mr. Ivey submitted a reply to the Bar Grievance which is also long and difficult to read. The WSBA closed the Bar Grievance without further investigation.

11. RCT moved in SBP's Superior Court matter for "Declaratory Relief" and "Summary Judgment", despite that the Superior Court matter was merely a vehicle for confirmation of SBP's Arbitration

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Award and had no Complaint or Counterclaim. The Superior Court denied RCT's motion and awarded sanctions against its counsel under CR 11 (the "CR 11 Ruling"). RCT appealed the CR 11 Ruling to Division III (Case No. 355721) ("Appeal Three"). Division III affirmed the CR 11 Ruling, finding the appeal frivolous and awarding attorneys' fees. This is the July 11, 2019 decision at issue in RCT's present petition.

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13. SBP immediately and fully complied with the Arbitration Two Award, returning the molds to RCT, and forwarding the royalties SBP had previously attempted to pay.

14. Despite SBP's full compliance with the Arbitration Two Award, RCT moved in SBP's Superior Court matter to confirm the Arbitration Two Award as a Judgment. The Superior Court denied the motion on procedural grounds, instructing RCT's counsel to file its own action to present its requests (the "Wrong Case Order"). RCT appealed the Wrong Case Order to Division III (Case No. 368998) ("Appeal Four ").

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15. Even if RCT can somehow "win" Appeal Four, neither RCT nor SBP party would be financially better off. Appeal Four, like Appeal Three, Appeal Two, Appeal One, and the behavior that led to the Contempt Order, the Receiver Order, and the CR 11 Order all appear to emanate from litigation harassment. RCT does not have the money or resources to mount such a campaign, and SBP does not have the money or resources to adequately respond to such a campaign. All signs point to RCT's counsel as the source of the harassment campaign. Winning Appeal Four would change nothing for RCT other than having to suffer the cost of an entire appeal in order to save the cost of a superior court filing fee. No rational actor would pay to pursue Appeal Four. RCT's counsel is obviously litigating for sport – his tactics have been to drive up SBP's costs at every opportunity. Appeal Four is anything but ordinary.

16. Counsel for RCT has filed numerous motions in each of the four appeals – including motions for extension of time in each of them. For example, on July 25, 2019, just after filing Appeal Four, RCT's counsel filed a "Motion to Extend Time to File Designation of Clerk's Papers and Statement of Arrangements with the Court of Appeals".

17. As another example, one of the motions RCT's counsel brought in Appeal Three was a Motion to Strike SBP's response to another of RCT's motions brought in Appeal Three. This Motion to Strike, filed August 16, 2018, is a good example of RCT's counsel's style of harassing litigation. The brief is ten pages and is difficult to read and understand. SBP was forced to oppose this Motion to Strike, and Division III denied

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the Motion to Strike. The Motion to Strike was pointless and can only be seen for what it was – a harassment tactic.

18. For the price of a filing fee, RCT could (as directed by the superior court judge) commence its own action and then attempt to present its (already fully satisfied) Arbitration Award for confirmation as a Judgment. But instead, RCT filed Appeal Four, presumably to argue that RCT should have some right to present its (already fully satisfied) Arbitration Award under SBP's matter number. What substantive difference would it make if RCT "wins" Appeal Four? None. RCT still would need to try (somehow) to present its (already fully paid) Arbitration Award for confirmation as a Judgment.

19. Winning Appeal Four would change nothing for RCT other than suffering the cost of an entire appeal in order to save the cost of a superior court filing fee. No rational actor would pay to pursue Appeal Four. RCT's counsel is obviously litigating for sport – his tactics have been to drive up SBP's costs at every opportunity. Appeal Four is anything but ordinary.

20. RCT's counsel's filing mishaps were not caused by forces outside his control – in that sense they were "ordinary". RCT's counsel had difficulty filing matters with the appellate court on other occasions. When the Court of Appeals previously accepted filings by mail, RCT penned a letter explaining why its mailing was late, lobbying for an electronic filing system. Attached to my declaration as Exhibit A are true and correct copies of two emails and one letter my firm received from

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counsel for RCT, Floyd Ivey, dated July 24, 2019, June 14, 2018, and October 27, 2016, respectively.

21. Immediately after I received this Court's August 15, 2019, rule violation letter, I sent an email to counsel for RCT and demanded withdrawal of the petition and informed RCT's counsel specifically that filing a motion for an extension under the circumstances would not be brought in good faith and invokes potential CR 11 sanctions. A true and correct copy of the email that I sent to Floyd Ivey on August 15, 2019, is attached to my declaration as Exhibit B.

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing statements are true and correct, and as to statements of recollection belief, that I believe them to be correct.

EXECUTED this 23rd day of August, 2019 at Spokane, Washington.

LEE & HAYES, P.C.

By: _____

J. CHRISTOPHER LYNCH
WSBA #49981
601 W. Riverside Avenue, Suite 1400
Spokane, WA 99201
Telephone: (509) 324-9256
Facsimile: (509) 323-8979
chris@leehayes.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 23rd day of August, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated upon:

Floyd E. Ivey, Esq. Ivey Law Offices, P.S. Corp. 7233 W. Deschutes Avenue, Suite C, Box #3 Kennewick, WA 99336 feivey@3-cities.com feivey@bossig.com	___ Hand Delivery _X_ U.S. Mail _X_ Email ___ Facsimile

SARAH E. ELSDEN

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EXHIBIT A

From: Ivey Law Offices <feivey@bossig.com>
Sent: Wednesday, July 24, 2019 4:35 PM
To: Macklin, Anita; feivey@3-cities.com
Cc: Sarah Elsden; chris@7pointlaw.com
Subject: Re: Clerk's papers Seth Burrill v. Rebel Creek
Attachments: C3APPEALDesigClerksPapersFILED190724.pdf

[External Email]

Ms. Macklin, See attached the Designation of Clerk's Papers in the COA Div III case of 368998.

I'll call Thursday morning to see if the designation is clear or confused. There may be a formatting issue with MSWord and I'll not know until 7/25.

Floyd E. Ivey, JD, MBA, BSEE
Registered Patent Attorney
IVEY Law Offices., P.S. Corp
7233 W. Deschutes Ave.,
Ste. C, Box #3
Kennewick, WA 99336
509 735 6622(o)
509 948 0943(c)
feivey@3-cities.com--

From: "Macklin, Anita" <AMacklin@spokanecounty.org>
Date: Tuesday, July 23, 2019 at 11:55 AM
To: "feivey@3-cities.com" <feivey@3-cities.com>

Hey Floyd

Here ya go ☺

Anita

From: Ivey Law Offices <feivey@bossig.com>
Sent: Thursday, June 14, 2018 5:49 PM
To: Sarah Elsden; Chris Lynch; Dalton, Janet
Cc: feivey@3-cities.com
Subject: Re: COA# 355721 / Seth Burrill Productions v. Rebel Creek Tackle
Attachments: C2MotionSuppRecordfFILINGFAXSUPPRECORD180614.docx

Ms. Dalton, Fax at COA turned off and am sending by email. If unable to receive then I'll send tomorrow when your fax is turned on. Service by email has been made to opposing counsel by email whose fax was also turned off.

Floyd E. Ivey
Attorney at Law
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Kennewick, WA 99336
509 735 6622(o)
509 948 0943(c)
feivey@3-cities.com--

From: Ivey Law Offices <feivey@bossig.com>
Date: Thursday, June 14, 2018 at 5:44 PM
To: Sarah Elsden <Sarah.Elsden@leehayes.com>, "chris@leehayes.com" <chris@leehayes.com>, "Dalton, Janet" <Janet.Dalton@courts.wa.gov>
Cc: "feivey@3-cities.com" <feivey@3-cities.com>
Subject: Re: COA# 355721 / Seth Burrill Productions v. Rebel Creek Tackle

Ms. Dalton, Find attached the Supplemental

From: "Dalton, Janet" <Janet.Dalton@courts.wa.gov>
Date: Thursday, June 14, 2018 at 9:35 AM
To: Sarah Elsden <Sarah.Elsden@leehayes.com>, "chris@leehayes.com" <chris@leehayes.com>
Cc: "feivey@3-cities.com" <feivey@3-cities.com>
Subject: COA# 355721 / Seth Burrill Productions v. Rebel Creek Tackle

Please see attached ruling.

Janet L. Dalton
Case Manager
Court of Appeals, Division III
500 N. Cedar Street
Spokane WA 99201

IVEY Law Offices. P.S. Corp.

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Attorneys at Law

Intellectual Property
Floyd E. Ivey *
Registered Patent Attorney
Patents, Trademarks, Copyrights, Licensing, Litigation Counseling, Strategic Planning

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Of Cou
Ian A. I
Licensed in Maryl
Resident Philadelphia

October 27, 2016

Renee S. Townsley
Clerk/Administrator
Court of Appeals
500 North Cedar
Spokane, WA 99201

Dear Ms. Townsley,

I inquire re: the modes of service acceptable to the Court.

In the matter of Burrill v. Rebel Creek, 34401-1-III, Rebel Creek's Opening Brief and Motion to Supplement the Record were sent by email to the Court and to opposing counsel Mr. Jeffrey Smith. Final preparation of the Brief was not completed until after mail had been picked up. My discussion Ms. Zendel led to mailing on October 27, 2016 with a Motion to Extend to date of Receipt by the Court.

The Brief has been mailed today. Printing, packaging, and travel to the Post Office for postage required 55 minutes, postage of $3.04 and counsel's time. The brief that was received on October 26, 2016 was printed and mailed. Confirmation was emailed to Mr. Smith.

I've not opened one paper file since November 12, 2007. My filings with the Federal Courts and with the United States Patent and Trademark Office arc all by electronic means. In inquire about the expectations, if any, of Division III accepting service of Briefs by an electronic means.

It is a common theme in literature and seminars to hear of the cost of providing legal services. Attorneys, Judges, administrators and clients all agree that steps should be taken to reduce the costs incurred. Thus my inquiry. Transmitting the Brief on October 26, 2016, required location of the email address for your office, entering that address in Outlook, entering the title of the email, typing a note re service to Division III and Mr. Smith, attaching the Brief and pushing send. Time was approximately 5 minutes.

Mr. Smith and other attorneys from Mr. Smith's firm, acting as counsel for Burrill, and I have exchanged email and effected service routinely since 2013. I encourage Division III to consider email or other electronic means to be deemed sufficient for service of pleadings.

Yours very truly,

FLOYD E. IVEY

EXHIBIT B

From: Chris Lynch
Sent: Thursday, August 15, 2019 4:01 PM
To: Ivey Law Offices; Sarah Elsden
Subject: RE: SBP

Mr. Ivey: We are in receipt of today's letter from the Washington Supreme Court that your Petition for Discretionary Review was not timely filed and did not include the filing fee.

Please note that any Motion for an Extension of Time requires "extraordinary circumstances" "to prevent a miscarriage of justice" and that "the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time". SBP is entitled to finality of Division Three's award of sanctions against you affirming the Superior Court's award of sanctions against you.

Could you sign a Motion for Extension of Time in good faith? What is the "miscarriage of justice" if your appeal is dismissed? There is no benefit to RCT in "winning" the Petition, since RCT already "won" Arbitration Two and has been fully paid. There is no benefit to RCT in "winning" the Petition allowing RCT to pay to appeal that its lawyer should not have been twice sanctioned for continued violation of Court rules. There is no benefit to "RCT" in paying an additional $200 to allow you to pursue another frivolous appeal out of whatever misguided spite is motivating your continued harassment campaign. If your client cannot benefit from "winning", how can there be a miscarriage of justice if its Petition is dismissed?

We see the letter's reference to your *ex parte* communications with the Court that you had difficulties filing the Petition on time. Given your history of filing errors, we do not doubt that you had difficulties. But how are those difficulties "extraordinary"? If the Court's system was down on Monday before 5pm, it would have said so. Even more importantly, failure to timely submit the filing fee is not a technical issue – RAP 13.4(a)'s requirement for paying fees is mandatory. Failure to timely pay the fee is a pure rule violation that belies any excuse of "technical difficulties". The money was due on the 30th day and you made no arrangement to pay it on or before the deadline, regardless of any "technical difficulties" in filing the Petition.

We do not consent to any extension. We implore you to drop the Petition. Else, please understand that we will vigorously oppose any Motion to Extend Time and we will request sanctions under RAP 18.9(a) for continued violation of the Court's rules.

Like I said yesterday – this is ridiculous. Now is your chance to stop harassing SBP and this firm.
JCL

From: Chris Lynch
Sent: Wednesday, August 14, 2019 5:07 PM
To: Ivey Law Offices <feivey@bossig.com>; Sarah Elsden <Sarah.Elsden@leehayes.com>
Subject: RE: SBP

Thank you for the reply. We do have thoughts on your concerns:

The license required payment of royalties for devices made and sold.

All devices made and sold were accounted for.

The appropriate level of royalty was paid for all of those sales.

Ms. Burrill testified under oath as to the sales and that all payments were made.

Are you disputing that these sales were made? Are you disputing that the accounting is accurate? Seems like those would have been issues for Arbitration Two if that was your concern.

Our point is that the sales were proper and all royalty were paid.

No new devices have been made since Arbitration Two, and all of the old devices are accounted for and paid for.

None of the authority you have cited is about the patent first sale doctrine, which is clearly applicable given the "first sale" of the devices.

We do not see that you can articulate any violations of Section 271 of Title 35. If you can explain how there is a violation of that law, we're willing to listen and try to resolve it. But otherwise, we see no violation of federal law and we see no manner under which a Complaint could be signed in federal court that complies with FRCP 11 under these circumstances.

Thank you.
JCL

PS – Yes we are still representing SBP. As you can imagine, they, along with our firm, are exceedingly frustrated with your avalanche of vexatious litigation. Your recent Appeal Four to Division III is an example – what is the point? Judge Cooney explained that RCT could simply open its own matter number and then try to present its (already satisfied) Judgment. Why waste 100 times the amount of that simple filing fee on an appeal other than to harass SBP to incur expenses to respond? What would "winning" Appeal Four even mean? What is the substantive difference in presenting the (already satisfied) Judgment in SBP's matter number vs RCT's own matter number? There is no difference – there is only added expense – that's why Appeal Four is frivolous and brought for purposes of harassment. We fully expect Division III to find Appeal Four to be frivolous and to award sanctions and fees again.

Your Petition to the Supreme Court is another example. Your Petition identifies none of the bases for discretionary review under RAP 13.4(b) – the requested summary judgment was mooted by the Arbitration and the sanctions award was discretionary. None of the four categories of discretionary review are presented in your Petition – and the categories are mandatory. Consequently, under CR 11 we request that you withdraw the Petition. Else, we intend to Answer the Petition and seek attorneys' fees under RAP 18.1(j) which provides for fees for an Answer to a Petition to be awarded by the Supreme Court in cases like this where fees have already been awarded by the Court of Appeals.

This entire exercise is ridiculous – you were personally sanctioned $4500 and brought an appeal found frivolous, leading to another award of attorneys' fees and sanctions which we fully expect Division III to assess against you personally. We expect the Petition will end in the same manner as we expect for Appeal Four – another round of sanctions and attorneys' fees. What is your objective?

We have an obligation to our clients, to the judicial system, and to each other to act in a professional manner within the ethical rules. Filing frivolous appeals is not ethical. Filing meritless patent infringement actions is not ethical.

We would like to fully and finally resolve the entirety of disputes between our clients and law firms. This will require that RCT abandon Appeal Four and the Petition and the presentation of a Judgment, plus pay the soon-to-be-assessed attorneys fees and sanctions on Appeal Three. We will soon know the amount of the new sanctions against you from Appeal Three – we cannot imagine it will be any less than $25,000. There is no point in perpetuating this dispute.

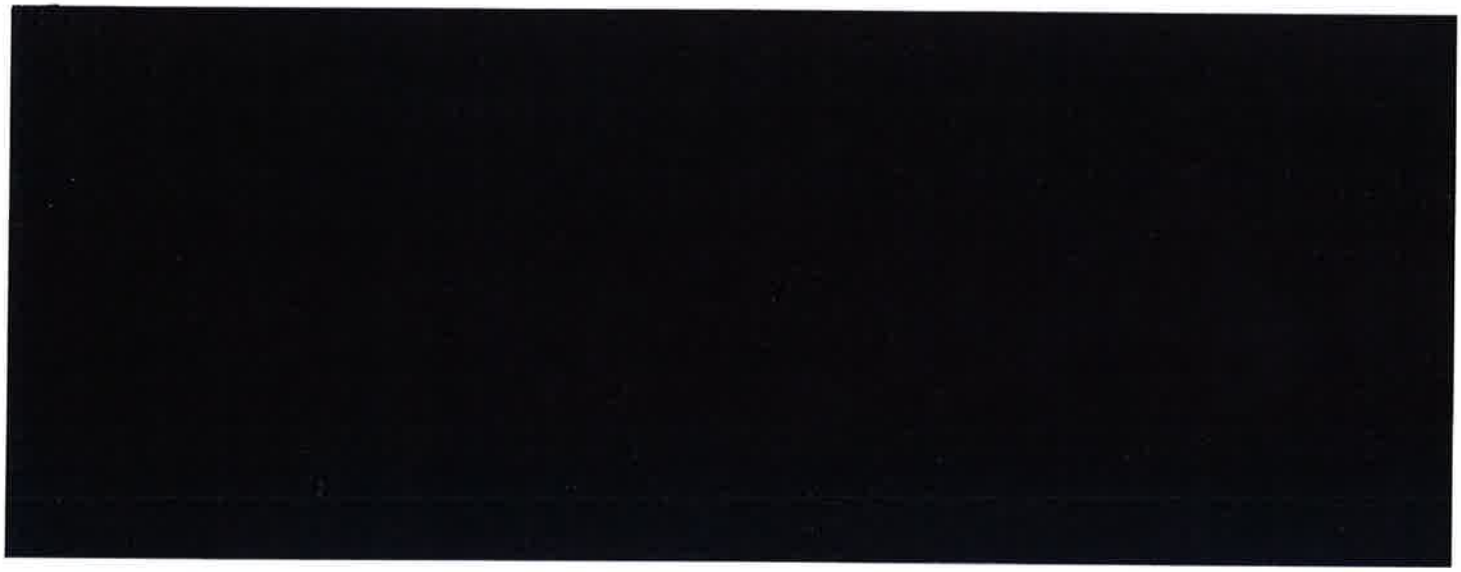
Bottom line: Yes we still represent SBP. We are willing to listen if you have any authority under 35 USC 271. We demand that you withdraw the Petition and Appeal Four. We expect full payment of the impending new sanctions award against you. There is no reason for this matter to continue – a decision that is in your hands.

From: Ivey Law Offices <feivey@bossig.com>
Sent: Wednesday, August 14, 2019 3:02 PM
To: Chris Lynch <chris@leehayes.com>; Sarah Elsden <Sarah.Elsden@leehayes.com>
Subject: Re: SBP

[External Email]

Chris, Sarah,

My question regarding representation was prompted by the Appeals Court receipt showing distribution to Chris@7pointslaw. I see that there is a 2nd Chris Lynch in Washington.



Your thoughts on resolution of this issue?

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From: Chris Lynch <chris@leehayes.com>
Date: Tuesday, August 13, 2019 at 6:34 PM
To: Ivey Law Offices <feivey@bossig.com>, Sarah Elsden <Sarah.Elsden@leehayes.com>
Subject: Re: SBP

Mr. Ivey: As we have repeatedly demonstrated, all sales of the diver device have been accounted for.

Your client has long ago already been paid all of the royalties it was due.

No new devices have been made.

The law allows re-sale and use of the paid-for devices under the "first sale doctrine" which exhausts the patent holder's rights.

Under patent law, these sales are 100% lawful.

SBP has no intention of violating any laws. If you have authority that patent law is somehow violated under these facts despite the first sale doctrine, please advise. We are unaware of any such authority.

FRCP 11 and the Octane and Highmark cases are strong tools for falsely accused patent defendants. Unless you can persuade us that RCT has some lawful claim under Title 35, we will actively pursue those available defense attorneys fees and sanction remedies.

Thank you.
JCL

From: Ivey Law Offices <feivey@bossig.com>
Sent: Tuesday, August 13, 2019 5:45 PM
To: Sarah Elsden <Sarah.Elsden@leehayes.com>; Chris Lynch <chris@leehayes.com>
Subject: SBP

[External Email]

Sarah, Chris,

Are both of you representing SBP?

[redacted]

Floyd E. Ivey
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LEE & HAYES, P.C.

August 23, 2019 - 10:22 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97539-6
Appellate Court Case Title:	Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Inc.
Superior Court Case Number:	13-2-01982-0

The following documents have been uploaded:

- 975396_Briefs_20190823101735SC055968_4317.pdf
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A copy of the uploaded files will be sent to:

- Mary.Newlin@leehayes.com
- ShellyG@leehayes.com
- feivey@3-cities.com
- litigation@leehayes.com
- sarah.elsden@leehayes.com

Comments:

SBP Opposition to Petitioner's Motion for Extension of Time

Sender Name: Mary Newlin - Email: Mary.Newlin@leehayes.com
Filing on Behalf of: John Christopher Lynch - Email: chris@leehayes.com (Alternate Email: Litigation@leehayes.com)

Address:
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Suite 1400
Spokane, WA, 99201
Phone: (509) 324-9256 EXT 4682

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