

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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

SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

CASE # 34401-1-III

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

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CR11

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ASSIGNMENTS OF ERROR

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Assignment of Error 2. Was the court’s recitation to the appellate history of these parties a finding and a conclusion to be relied upon for the appointment of the Receiver an error?2

Assignment of Error 3. Was the failure to consider the tender of the Judgment, by an Officer of the Court, an error?.....2

Assignment of Error 4. Was the court’s denial of the Motion for Stay, on May 27, 2016, of the appointment of a Receiver error?2

STATEMENT OF THE CASE.....2

ARGUMENT 3

I.-BURRILL’S ACTS AND OMISSIONS

A.-STANDARD OF REVIEW: In this matter there was no live testimony. The facts are uncontested, and the determination of the issues turn on the meaning of statutes and court rules. The trial court has no discretion and the Appellate Court properly shows no deference¹. The Standard of Review is Obvious or Probable error²..... 3

A.1.-BURRILLS MOTION FOR RECEIVER WAS STATUTORILY..3

DEFECTIVE: Seth Burrill Production Inc.’s (hereafter Burrill) Motion for a Receiver did not meet the conditions precedent for appointment of a

¹ Chambers dissenting, State v. Graciano, 176 Wn.2d 531, 551-52 295 P. 3d 219(2013).

² Obvious and probable error are addressed in *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App. 8, 12,16 321 P.3d 262 (Div. 1 2014).

Receiver. The Motion for Receiver must comply with the conditions precedent as required by RCW 7.60.025(1)(e) and (f)³. 3

At the time of filing the Motion for Receiver and there had been no Judicial attempt to Execute the Judgment⁴. This fact, that there had been no attempt to Judicially Execute the Judgment as conditions precedent to moving for the appointment of a Receiver per RCW 7.60.025(1)(e) and (f), was brought to the attention of the Trial Court by pleadings and oral argument on April 29, 2016. In oral argument find at RP8/lines 8-11 and 15-18⁵ the following:

And there never was a further step taken beyond the scheduling of and then withdrawing of supplemented proceedings. So there never was an actual meeting of the plaintiff of Seth Burrill and the principals of Rebel Creek.
...but ***this [respondent's motion for receiver] being the actual first step in execution,*** there is inevitably the matter of what is owed by this plaintiff to the defendants under the licensing agreement.

Burrill's pleadings supporting the Motion for Receiver do not analyze RCW 7.60.025 (1)(e) and (f) relative the conditions precedent being found in the record on appeal. Burrill's Memorandum and

³ RCW 7.60.025(1) A receiver may be appointed by the superior court of this state in the following instances,...

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;

(f) If and to the extent that property is subject to execution to satisfy a judgment, to preserve the property during the pendency of an appeal, or when an execution has been returned unsatisfied, or when an order requiring a judgment debtor to appear for proceedings supplemental to judgment has been issued and the judgment debtor fails to submit to examination as ordered;

⁴ RP6/lines 3-9; 18-22; RP7/lines 12-16; RP8/lines 8-11 and 15-18; RP11/lines 23-24; RP12/lines 5-7; RP22/lines 10-13; CP8/paragraphs 8-13; CP9/paragraphs 14-16; CP10/para 25 to CP11/para 26, 29-32; CP12/para 39.

⁵ id

Declarations only recites non-judicial activity regarding the desire to collect. While the pleadings make no referral to the record on appeal of any Judicial action relative to Execution, the approximately 256 pages of the pleadings suggest that conditions precedent to seeking a Receiver per RCW 7.60.025(1)(e) and (f) were set forth therein. The Motion, Declarations and Memorandum were pleadings that were signed and filed and subject to CR11⁶.6

**A.1.a.1-THE RESPONDENT’S EXTENSIVE IRRELEVANT
DETAIL FROM 2013-14 REGARDING AN EARLIER APPEAL.....7**

ENCOURAGED AND LED THE TRIAL COURT TO ERROR: Rebel Creek appealed a 2014 Judgment of the Spokane County Superior Court.

Burrill’s Memorandum and Declarations supporting Burrill’s Motion for Receiver set out the 2014 appeal history⁷. The Motion for Receiver, one issue in the present appeal, was heard on April 29 where the Trial Judge stated relative to the 2014 appeal:

“You know, certainly the defendant kind of starts off a little bit behind the eight ball when the Court of Appeals said what they said here and that, I think, kind of colors the

⁶ CR11 asserts in part: “The signature of a party or of an attorney constitutes a certificate ... that to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. ... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

⁷ CP12/para 35 - 38

view of the history of the case here and why it has taken so long⁸.”

The Trial Court’s comment regarding the earlier appeal is de facto a finding and conclusion drawn from the 2014 appeal. There are no findings and conclusions drawn from the pleadings or oral argument regarding conditions precedent to the appointment of a Receiver on April 29, 2016.

Before the Trial Court on April 29, 2016 was 1).Rebel Creek’s offer to tender the Judgment less setoffs, 2). Rebel Creek’s statements in court that the Motion for Receiver was the first Judicial action regarding Execution⁹ and Burrill’s pleadings. The Court Granted the Motion for Receiver. There was no witness testimony and no credibility to consider. There was the record which held no evidence of a Judicial act of compliance with RCW

7.60.025(1)..... 8

A.1.a.2-7.60.025 (1)(e) allows appointment of a receiver ...”to preserve or protect [property]... or prevent its transfer”.8

A.1.a.2.A.-REGARDING PERSERVING OR.....8

PROTECTING REBEL CREEK PROPERTY: This was the first time the Trial Judge had dealt with patent issues¹⁰. A patent issue was of importance. Burrill’s attorneys told the Trial Judge that the Rebel Creek

⁸ RP15/lines 2-5

⁹ RP8/lines 15-18

¹⁰ RP14/line 25

Tackle Inc. (hereafter Rebel Tackle) was not preserving or protecting the patent application and had allowed the patent application to be absolutely lost by abandonment. Burrill's attorneys were wrong. In January 2014 Rebel Creek counsel contradicted and informed Burrill's counsel that revival was allowed by Patent Office Rule¹¹. Counsel for Rebel Creek revived the patent application within 10 days of Burrill's April 15, 2016 Motion for Receiver¹². Counsel for Burrill made no mention of this fact to the Trial Court.9

A.1.a.2.B.-REGARDING PREVENTION OF

TRANSFER: Burrill's Memorandum supporting the Motion for Receiver stated that counsel's law clerk had "discovered" that Mr. and Mrs. Osborn, the inventors and principals of Rebel Creek Tackle Inc., had Assigned¹³ the Patent and Patent Application to Rebel Creek in 2013. An Arbitration between Burrill and Rebel Creek concluded in 2013 with assignments of intellectual property made from the Rebel Creek inventors to Rebel Creek Tackle Inc.¹⁴. The Patent Office Assignment document showing Mr. Lynch's self assignment is not a part of the record: Appellant Moves to

¹¹ CP67/3rd para from top-email 1/2/2014;

¹² CP229

¹³ Burrill's Counsel's Declaration Supporting Motion for Receiver at CP12/paragraphs 33, 34.

¹⁴ Arbitrator's Final Award, CP24; CP27/para 2.

supplement the record by inclusion of the assignment document in the Appendix hereto¹⁵10

A.1.b.-7.60.025 (1)(f) allows appointment of a receiver

when... “an execution has been returned unsatisfied or when ... the judgment debtor fails to submit to examination as ordered.” There is no record on appeal that Burrill sought an Order of Execution from the court. There is no Record regarding a failure by a Rebel Creek principal to attend an Ordered Supplemental Examination.....11

A.1.b.1-Burrill’s Counsel’s Declaration implicates

Receiver Kevin O’Rourke in not advising that Burrill meet the required Judicial acts prior to seeking a Receiver... O’Rourke who Burrill counsel met with “for several hours to discuss possible strategies that SBPI...” could use¹⁶11

A.2.-BURRILL’S MEMORANDUM AND DECLARATIONS

SUPPORTING THE MOTION FOR RECEIVER IS MORE THAN 256 PAGES: Burrill’s pleading of the Motion for Receiver, Memorandum and Declarations, comprised more than 256 which did not state or identify Judicial actions which are precedent to a Trial Judge’s consideration of facts material to deciding a Motion to appoint a Receiver. Non-judicial actions included email requests to Rebel Creek to pay the judgment¹⁷;11

¹⁵ Appendix reference 1

¹⁶ CP13/para 48

¹⁷ Respondent’s Motion for Receiver CP120/line 3;

Burrill's withholding invited error and lead the court into error in appointing a Receiver. Counsel for Burrill, having knowledge of no Judicial act to Execute the Judgment and Appellant's offer to tender payment for the Judgment less setoffs on April 27, 2016, owed a duty to the court to suggest error should a Receiver be appointed12

A.2.a.-FAILURE TO GIVE DUE CONSIDERATION TO THE OFFER OF TENDER BY AN OFFICER OF THE COURT:...12

Washington State Bar Association members are officers of the court owing the Court a duty of frankness and honesty¹⁸. Counsel for Burrill knew that Rebel Creek was prepared to tender the amount of the Judgment less setoffs. The Court was appraised of Rebel Creeks ability to pay as stated to the Court in argument¹⁹ on April 29, 2016 and in pleading. An email exchange²⁰ between counsel between April 29, 2016 and May 10, 2016 discloses: the admission that Royalties were owing²¹ to Rebel Creek; Burrill's counsel not giving credence to the offer of tender or that the offer was bona fide and made in good faith; the repeated refusal of Burrill to disclose the amount owing for Royalties; and Burrill's counsel irritation of finding that the License Agreement burdened Burrill with payment for Capital Investments. The email exchange between April 29 and May 10, CP 302-328, is Exhibit 2 of the

¹⁸ *State v. Stimson*, 41 Wn.App. 385, 704 P.2d 1220 (Div. 3 1985)

¹⁹ RP 8/lines 14-15; 9/lines 19-22; 11/lines 15-19.

²⁰ CP302 – 328; following the email thread is best accomplished by reference to Exhibit 2 in the Appendix where the email is ordered and portions relevant to this topic are highlighted.

²¹ CP317-18 where counsel indicates that setoffs were about one-quarter of the total judgment of approximately \$100,000.

Appendix.....12

A.3.-BURRILL HAS JUDGMENT BUT TAKES NO COURT ACTION:

Rebel Creek licensed²² Burrill to sell a patented fishing device. A dispute was arbitrated and Burrill obtained a judgment in 2013. There is no Record on Appeal to support Burrill’s suggestion that an act by Rebel Creek resulted in Counsel’s failure to conduct a hearing. Burrill never requested the Superior Court to order Execution. Execution was never pursued in Court. There was no return of a judgment unsatisfied....13

A.4.-BURRILL USED EMAIL INSTEAD OF THE COURT TO ASK REBEL CREEK TO PAY THE JUDGMENT: With the exception of emails requesting that Rebel Creek pay the judgment there has been no action for execution by Burrill between 2014 and the Motion for Receiver of April 15, 2016²³14

A.5.-BURRILL’S UNFOUNDED ASSERTIONS OF COMPLIANCE WITH RCW 7.60.025(e) AND (f) OFFENDS COURT RULE 11: Court Rule 11 characterizes pleadings as certificates of accuracy. The pleadings supporting Burrill’s Motion do not comply with CR 11 and expose the party signing to sanctions including payment of attorney fees²⁴ 14

²² License Agreement CP147

²³ Respondent’s Motion for Receiver CP120/line 3

²⁴ CR11, concluding sentences of sections (a) and (b).

A.6.-BURRILL CONTENDS THE ORDER APPOINTING A RECEIVER IS INTERLOCATORY: Burrill’s counsel asserted that the Order appointing a Receiver was Interlocutory allowing the Receiver to proceed. The Order was Stayed by the Court of Appeal..... 15

Attempts of Execution of the Judgment of 2014 was likely interlocutory. Burrill’s failure to enforce or execute the judgment did not comply with the Receiver Statute conditions precedent to moving for the appointment of a general Receiver. See footnote 3.....15

A.7.-BURRILL’S VOLUME OF PLEADINGS FOR APPOINTMENT OF A RECEIVER FAILS TO INFORM THE COURT OF THE STATUS OF CONDITIONS PRECEDENT AND LEADS TO ERROR: Burrill’s Pleadings of more than 256 pages failed to reveal facts required by the Trial Judge regarding the Motion to appoint a Receiver. Burrill’s pleadings failed to reveal material facts, invited error and lead the court into error of appointing a Receiver. Counsel owed a duty to the court to suggest error so that it could be avoided or be cured²⁵.15

A.8.-THE ABSENCE OF CITATION TO THE RECORD: A party engaged in appellate review has the burden of providing the Court of Appeals with all evidence in the record relevant to the issue before us. RAP

²⁵ *Heitfeld v. Benevolent and Protective Order of Keglers*, 36 Wn.2d 685, 707, 220 P.2d 655 (1950).

9.2(b)²⁶. Without the trial record the Court of Appeals cannot review challenged evidence in the context of the rest of the evidence presented. An insufficient record on appeal generally precludes appellate review of the alleged errors. Burrill’s failure to cite to the Record on Appeal regarding the RCW 7.60.025(e) and (f) conditions precedent to seeking a Receiver requires the Court of Appeals to disregard Burrill’s arguments to the contrary15

A.9.-CRITICAL FACTS OPPOSING THE APPOINTMENT OF A RECEIVER BUT NOT BROUGHT TO THE COURT’S ATTENTION BY BURRILL ARE REVEALED IN THE RECORD:16

A.9.a.-LICENSE AGREEMENT OBLIGATION

REGARDING NUMBER OF SALES: The License Agreement required Burrill to have sold 15,000 of the fishing units by June 1, 2016 with failure terminating Burrill’s rights in the License Agreement²⁷.16

A.9.b.-LICENSE AGREEMENT OBLIGATION

REGARDING ROYALTIES OWING TO REBEL CREEK: Burrill owed Royalties²⁸ to Rebel Creek which were not paid to Rebel Creek following 2012. The Record of Proceeding reveals that Royalties of \$20,000 to \$30,000 where owing by Burrill to Rebel Creek if sales of 15,000 were made²⁹ ...16

²⁶ *Starczewski V. Unigard Ins. Grp.*, 61 Wn.App. 267, 276, 810 P.2d 58 (1991); *Allemeier v. Univ. of Wash*, 42 Wn.App. 465, 473, 712 P.2d 306 (1985); *Bulzomi v; Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996 (1994).

²⁷ CP150/para 6.1; CP27/para 3 where the date is extended to June 1, 2016.

²⁸ CP129/lines 12-13

²⁹ CP270 paragraph d.

A.9.c.-LICENSE AGREEMENT OBLIGATION

REGARDING CAPITAL INVESTMENTS OWING TO REBEL

CREEK: Burrill owes Capital Investments³⁰ to Rebel Creek. “Capital investments” have not been defined in the License Agreement subjecting the term to examination for ambiguity which was not litigated in the Arbitration or at any time in the Spokane County Superior Court.....17

A.9.d.-THE REVOLUNTARY CHARACTER AND

VALUE OF THE LICENSED DEVICE: The Burrill web page³¹ states that the licensed device is revolutionary resulting in markedly increase fishing success and suggesting great value.17

A.10.-INTENDED AND UNINTENDED CONSEQUENCES OF THE DISCLOSED AND UNDISCLOSED FACTS:.....18

A.10.a. SANCTIONS FOR WRONGFUL OR BAD FAITH

PROCUREMENT OF RECEIVER: RCW 7.60.290 (5) allows, that where the **appointment of the receiver was wrongfully procured or procured in bad faith**, assessment of all of the receiver's fees and any other sanctions the court determines to be appropriate. Sanctions, including those imposed by violation of Court Rule 11, and attorney fees on appeal are sought commencing April 15, 2016, and in the Court of Appeal..... 18

A.10.b.-LEADING THE COURT TO BELIEVE THAT..18

CONDITIONS PRECEDENT TO APPOINTING A RECEIVER WERE

³⁰ CP235/last paragraph; CP224/line 13; CP269/line 25; CP270/line 7,15; CP288/line 22; CP289/line 10.

³¹ CP171.

MET AND THAT REBEL CREEK’S PATENT APPLICATION WAS LOST: Burrill’s law firm, LEE&HAYES³², represented to the Trial Court that the Patent Application was irretrievably lost³³. A Trial Judge has the expectation of reliance³⁴ on statements in pleadings. Burrill represented to the court that conditions precedent to seeking a receiver had been made³⁵ and that Rebel Creek had lost³⁶ the asset of the patent application. The patent application was revived by Rebel Creek within 7 days of the April 15, 2016 Motion for Receiver³⁷.

The LEE & HAYES opinions and assertions were erroneous³⁸ leading the Trial Court to error.18

II.INTRODUCTION – REBEL CREEKS ACTS AND DISCLOSURES:

B.1.REBEL CREEK’S OPPOSITION TO APPOINTMENT OF RECEIVER:19

B.1.a.-REBEL CREEK GIVES NOTICE TO BURRILL AND INFORMS THE COURT THAT REBEL CREEK WOULD TENDER THE JUDGMENT AMOUNT LESS SETOFFS AND THAT THE MOTION FOR RECEIVER WAS THE FIRST JUDICIAL ACT.19

³² CP145

³³ CP115/line 1 to CP116/line 15

³⁴ Hale v. Island County, 88 Wn.App. 764, 770 946 P.2d 1192 (Div. 1 1997)

³⁵ MR. BURRILL AT CP2/para 4-7; CP3/para 11; BURRILL’S COUNSEL CP7/para 5, 9-12; CP8/para 14-16; CP12/para 39.

³⁶ Burrill’s Counsel CP9/para 17, 18; CP10/para 19,20; CP11/para 29-32

³⁷ CP229

³⁸ CP9/para17 & 18; CP10/para 19 & 20; CP58; CP76/1st para; CP77/para 4; CP116/10-22; CP121/line 9;

REGARDING EXECUTION OF THE JUDGMENT: Rebel Creek’s

Memorandum informed Burrill and the Court that Rebel Creek was prepared to tender the judgment less amounts owed by Burrill to Rebel Creek³⁹.

Burrill’s counsel had the duty to advise the court that error was likely if a Receiver was appointed⁴⁰. Rebel Creek’s oral arguments stated the ability of Rebel Creek to tender the Judgment less setoffs⁴¹. Counsel for Rebel Creek stated to the Trial Court that Burrill’s Motion for Receiver was the first Judicial act to pursue Execution of the Judgment⁴²

B.1.b.-: THE ORDER APPOINTING A RECEIVER WAS OBVIOUS OR PROBABLE ERROR⁴³:.....20

B.1.b.1-THE APPOINTMENT OF A RECEIVER WAS A FINAL ORDER AFFECTING A SUBSTANTIAL RIGHT OF.20

REBEL CREEK: The Order appointing a Receiver was a final order that affected a substantial right and was appealable as matter of right under RAP 2.2(a)(13) which identifies as appealable any "written decision affecting a substantial right in a civil case that in effect determines the and prevents a final judgment or discontinues the action."

Appointing a Receiver to seize the Appellant's property would affect a substantial right, would ignore the conditions precedent to seeking a receiver

³⁹ CP129/lines 4-7

⁴⁰ Sdorra v. Dickinson, 80 Wn.App. 695, 702, 910 P.2d 1328 (Div. 2 1996)

⁴¹ RP8/lines 14-15; RP9/lines 21-22.

⁴² RP8/lines 8-11; 15-16

⁴³ See Footnote 2

and would ignore the option of satisfying the money Judgment. The amount of the money judgment is known and set-offs have been admitted⁴⁴ and shown to be quantifiable. The value of the intellectual property is unknown. Rap 2.3(b) (1) and (2) allows appeal by Discretionary Review where the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act. Appointing the Receiver was obvious error⁴⁵ with the court led to error by Burrill not having undertaken the conditions precedent to seeking a Receiver.....

B.1.b.2.-REBEL CREEK’S PROPOSED

DISCOVERY AND HEARING SCHEDULE TO DETERMINE....22

SETOFFS: Rebel Creek proposed a trial schedule to determine setoffs. By May 27, 2016, the date for hearing of the Rebel Creek Motion to stay appointment of a Receiver⁴⁶, Burrill’s counsel had admitted that royalties were owed Respondent⁴⁷. It was also determined, by the admitted dollar amount owing for Royalties, that Burrill had failed to sell 15,000 units by June 1, 2016 as required by the License Agreement⁴⁸. A Motion for Declaratory Judgment⁴⁹ was filed for the Judicial determination that Burrill’s Exclusive License was terminated by failing to sell 15,000 units by June

⁴⁴ CP424 email from Burrill counsel to Rebel Creek counsel of May 27, 2016.

⁴⁵ *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App. 8, 12,16 321 P.3d 262 (Div. 1 2014).

⁴⁶ CP195

⁴⁷ CP424 email from Burrill counsel to Rebel Creek counsel of May 27, 2016.

⁴⁸ CP413 Paragraph 6.1 of the License Agreement extended to June 1, 2016 by the Arbitrator’s Decision at CP420 paragraph 3.

⁴⁹ CP401; CP270/lines 3-5.

1,2016.

The Rebel Creek plan was addressed in its Response Opposing Appointment of Receiver⁵⁰. The Trial Court’s authority to determine setoffs and hence the balance of any judgment owed found therein⁵¹.

B.1.b.3.-FINAL DETERMINATION OF SETOFFS AND TERMINATION OF THE EXCLUSIVE LICENSE TO BE IN....22

SUPERIOR COURT: As of April 29, 2016 Rebel Creek expected that determination of setoffs could be concluded by June, 2016⁵². Admissions have shifted the date by which remaining setoffs for Capital Investments and the Judicial determination of the termination of the Exclusive License can be determined in the Superior Court contrary to Burrill’s Counsel’s assertion that such must be returned for determination by Arbitration. While Burrill’s counsel had admitted Royalties owing of about \$10,000, he also asserted that royalties owing must be determined by arbitration⁵³. Returning this matter to Superior Court and not to Arbitration is supported by the Division III ruling of April 28, 2016⁵⁴22

⁵⁰ CP132/line 19. Authority for the determination of Setoffs is addressed at CP133/line 8 citing *Reichlin v. First Nat. Bank*, 51 P.2d 380, 184 Wash. 304,313-14 (Wash. 1935); CP133/line 24 to CP135/line 2 citing *Sherry v. Financial Indem. Co.*, 160 P.3d 31, 160 Wn.2d 611, 617-18 (Wash. 2007)

⁵¹ *Reichlin v. First Nat. Bank*, 51 P.2d 380, 184 Wash. 304,313-14 (Wash. 1935); CP133/line 24 to CP135/line 2 citing *Sherry v. Financial Indem. Co.*, 160 P.3d 31, 160 Wn.2d 611, 617-18 (Wash. 2007).

⁵² CP135/lines 14-15.

⁵³ CP403/lines 3-7; The Plaintiff has admitted that Royalties of approximately \$10,000.000 are owing. The Plaintiff also suggests that a determination of Royalties owing be submitted to arbitration. Division III held on April 28, 2016 that a party submitting a case to litigation in the state court forfeits the right to Arbitration. *Schuster v. Prestige SeniQr Management, L.L. c.*, 33242-0-III.

⁵⁴ *Schuster v. Prestige SeniQr Management, L.L. c.*, 33242-0-III

B.1.c.-REBEL CREEK’S REVIVAL OF THE

“ABANDONED” PATENT APPLICATION: Burrill incorrectly advised the Trial Court that Rebel Creek had lost all rights to the Patent Application. The words Abandon and Abandonment are terms of art in Patent Law. The patent applicant’s failure to respond within 6 months results in Abandonment⁵⁵. Abandonment is reversed with a Petition to Revive and Rebel Creek filed the petition to Revive and notice of Revival was received by April 25, 2016⁵⁶. 23

B.2.-REBEL CREEK MOTIONS THE TRIAL COURT FOR STAY OF THE ORDER APPOINTING A RECEIVER; REBEL CREEK POSTS \$103,000.00 SUPERSEDEAS BOND ON MAY 26, 2016:.....24

Division III considered "obvious error" in *Minehart v. Morning Star Boys Ranch, Inc.*, 232 P.3d 591, 156 Wn.App. 457, 462-63 (Wash.App. Div. 3 2010) regarding Interlocutory review holding it available where the alleged error is reasonably certain and its impact on the trial manifest and being defined by RAP 2.3(b) where the superior court has committed an obvious error which would render further proceedings useless. Rebel Creek so contends herein. RAP 2.3(b)(1), (2). Division III in *Morning Star* noted the relationship between the "certainty of error" and its impact on the trial with the present facts contended to weigh heavily for finding a high certainty of error. Regarding Division III's second prong, requiring the Order appealed

⁵⁵ CP58; CP140-141;
⁵⁶ CP127/line 25 to CP128/line 6; CP140-141.

from to be "substantially altering [of] the status quo or substantially limiting the freedom of a party to act" it is asserted that the seizure of the Appellant's property substantially alters both the status quo and limits the Appellant's freedom to act.25

B.2.a-REBEL CREEK POSTS SUPERSEDEAS BOND:25

Rebel Creek posted Supersedeas Bond of \$103,000.00 on May 26, 2016⁵⁷. The Stay was proper per RAP 8.1(b) (1) and (2) since the appointment of a Receiver is specifically “a decision affecting real, personal or intellectual property; a money judgment exists and the decision affects rights to possession, ownership or use”... of tangible personal property, plastic injection molds, and intangible personal property, the patent, patent application and License Agreement. Molds and the use of the intangible intellectual property were possessed by Burrill for sales and production of royalties owing to Rebel Creek⁵⁸25

At the time of filing of Rebel Creek’s Motion for Stay and the Court of Appeal’s hearing of the Emergency Motion, the Royalty owing to Rebel Creek⁵⁹ had been admitted⁶⁰ to be about \$10,000 and Burrill’s counsel also asserted that royalties owing must be determined by arbitration⁶¹. Rebel Creek asserts *Schuster v. Prestige SeniOr Management, L.L. c.*, 33242-0-III

⁵⁷ CP349-51; CP359

⁵⁸ CP197/lines 7-25

⁵⁹ CP319 penultimate and ultimate sentences of email of May 10, 2016.

⁶⁰ CP289/line 2, CP389/lines 13-14; CP390/lines 25-26;

⁶¹ CP403/lines 3-7; The Plaintiff has admitted that Royalties of approximately \$10,000,000 are owing. The Plaintiff also suggests that a determination of Royalties owing be submitted to arbitration. Division III held on April 28, 2016 that a party submitting a case to litigation in the state court forfeits the right to Arbitration. *Schuster v. Prestige SeniOr Management, L.L. c.*, 33242-0-III.

holding that entry into litigation causes forfeiture of rights of arbitration.....26

Burrill subsequently admitted that Royalties owing to Rebel Creek was confirmed to be \$9559.86⁶² and contends that other amounts owing, e.g., for Capital Investments, would have to be determined by Arbitration⁶³26

C.-CONCLUSION – ERROR AND THE REQUEST BY REBEL

CREEK:.....26

C.1.-THE ORDER APPOINTING A RECEIVER AND THE ORDER DENYING STAY WERE OBVIOUS ERROR: 26

The non compliance with RCW 7.60.025(1)(e) and (f), the failure to pursue Judicial action to Execute the Judgment prior to seeking a Receiver, burying material facts in Pleadings signed and filed by counsel, ignoring the offer by an Officer of the Court to pay the Judgment, and counsel’s failure to alert the Trial Court to the potential for error all led the Trial Court into error.....26

The Trial Court’s failure to attend to Rebel Creek’s Counsel’s statement that Burrill had taken no prior Judicial action to Execute the Judgment, the Court’s not finding a record of Judicial action in the Pleadings, the Trial Court’s failure to note the tender of payment of the Judgment by an Officer of the Court, the Court’s refusal to acknowledge the posting of a Supersedeas Bond resulted in error. The Trial Court’s granting of the Motion

⁶² CP424 email from Burrill’s counsel of May 27, 2016

⁶³ CP424 email Burrill counsel to Rebel Creek counsel May 27, 2016.

for appointment of a Receiver and the Denial of the Motion for Stay was obvious error.....27

C.1.a-REBEL CREEK’S REQUESTS OF THE COURT

OF APPEALS: The Motion for Receiver precipitated a Response to the motion for Receiver, an Appeal, a Motion for Stay, an Emergency Motion in the Court of Appeals and the Appeal.27

Rebel Creek requests the reversal of the orders of the Trial Court, to send the case back to Superior Court for determination of setoffs including royalties and Capital Investments owing from Burrill to Rebel Creek and to determine the differential between the Judgment held by Burrill less the setoffs owing to Rebel Creek.....27

Rebel Creek requests the Court of Appeals to find that new issues, specifically pertinent to the issues raised by Burrill’s original Motion for Receiver, are issues for decision by the Superior Court and to return the case to the Superior Court to determine that Burrill’s rights in the License Agreement is terminated by failure of Burrill to sell 15,000 units by June 1, 2016.....28

Rebel Creek asks the Court of Appeals to find that Burrill and Counsel is sanctioned for failure to abide by CR11, is sanctioned under RCW 7.60.290; sanctions sought include the 1). termination of Judgment interest commencing April 15, 2016 by reason of failing to perform conditions precedent to seeking a Receiver and 2). for attorney fees accrued through the

conclusion of this Appeal.....28

Rebel Creek asks the court to require the Superior Court to compel Burrill to allow inspection of the molds to determine if deterioration has occurred and, if so, for the Superior Court to take testimony as to the cost of repair or replacement and to make the molds available to a Rebel Creek representative and for Burrill counsel to facilitate delivery of the molds to Rebel Creek.29

Rebel Creek further requests the Court of Appeals to instruct the Trial Court to impose sanctions against Burrill and counsel of \$100 per day for any delay in the return of the molds to Rebel Creek in care of Plastic Injection Molding of West Richland Washington.....29

C.1.b-REBEL CREEK REQUESTS ATTORNEY’S

FEES:Pursuant to RAP 18.1 Rebel Creek seeks attorney’s fees from the commencement of this litigation on April 15, 2016 to the conclusion of the Appeal and to the conclusion of the matter should it be remanded to the Superior Court.....29

INTRODUCTION

Seth Burrill Productions Inc. (hereafter Burrill) obtained a Spokane County Superior Court Judgment against Rebel Creek Tackle Inc. (hereafter Rebel Creek) in 2014. The next and only Judicial action thereafter was Burrill's Motion for the Appointment of a Receiver on April 15, 2016⁶⁴. Burrill had not sought an Order to Execute on the Judgment or a Writ of Execution and had not met the conditions precedent to seeking a Receiver⁶⁵. See Footnote 63 stating the conditions precedent, of RCW 7.60.025(1)(e) and (f), to seeking a Receiver. Said statutes discussed at length *infra*.

Burrill's failure to meet the conditions precedent to seeking a Receiver was brought to the attention of Burrill's counsel and the Trial Court as was Rebel Creek's tender of the Judgment less setoffs. The Order appointing a Receiver was granted. The Order was appealed, a Motion to Stay was heard and denied by the Trial Court on May 27, 2016. An Emergency Motion for Stay was heard. Discretionary Review and the Stay were granted by Division III on June 2, 2016.

⁶⁴ CP124

⁶⁵ Dep't of Revenue v. Federal Deposit Insurance Corp, 190 Wn.App. 150, 163 359 P.3d 913 (Div. 1 2015); Washington State Department of Revenue v. Federal Deposit Insurance Corp., 71524-1-1; *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 145 P.3d 1196 (2006) stating in part until...; a writ of execution on the judgment has been returned unsatisfied..." ;

ASSIGNMENT OF ERRORS

Assignment of Error 1. Was the court in error in appointing a Receiver on April 29, 2016?

Assignment of Error 2. Was the court's recitation to the appellate history of these parties a finding and a conclusion to be relied upon for the appointment of the Receiver an error?

Assignment of Error 3. Was the failure to consider the tender of the Judgment, by an Officer of the Court, an error?

Assignment of Error 4. Was the court's denial of the Motion for Stay of the appointment of the Receiver error?

STATEMENT OF THE CASE

Burrill filed, on April 15, 2016, a Motion for Appointment of a Receiver for hearing on April 29, 2016⁶⁶. The Motion appointing a Receiver was granted on April 29, 2016. Rebel Creek filed its Appeal to Division III on May 2, 2016⁶⁷. Rebel Creek filed its Motion to Stay the appointment of Receiver, with the Spokane County Superior Court, on May 11, 2016 for hearing on May 27, 2016⁶⁸. A Supersedeas Bond of \$103,000.00 was filed⁶⁹ on May 26, 2016 on behalf of Rebel Creek. The Motion to Stay the appointment of the Receiver was denied on May 27,

⁶⁶ CP124

⁶⁷ CP183

⁶⁸ CP281

⁶⁹ CP349, 347

2016⁷⁰. Rebel Creek's Motion for Discretionary Review was filed May 27, 2016⁷¹. Rebel Creeks Motion for Declaratory Judgment was filed with the Superior Court on June 1, 2016⁷². The Motion for Discretionary Review was heard and granted June 2, 2016⁷³.

I.-ARGUMENT- BURRILL'S ACTS AND OMISSIONS

A.-STANDARD OF REVIEW: In this matter the Trial Court took no testimony. The facts are uncontested, and the determination of the issues turn on the meaning of statutes and court rules. In this circumstance the trial court has no discretion and the Appellate Court properly shows no deference⁷⁴. The Standard of Review in this matter is not abuse of discretion. Rather the Standard is Obvious or Probable error: discretionary review occurs where the superior court has committed an obvious error which would render further proceedings useless; or the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act⁷⁵.

A.1.-BURRILLS MOTION FOR RECEIVER WAS STATUTORILY

DEFECTIVE: Seth Burrill Production Inc.'s (hereafter Burrill)] Motion for

⁷⁰ CP381

⁷¹ CP383

⁷² CP401, 407

⁷³ CP398

⁷⁴ Chambers dissenting, *State v. Graciano*, 176 Wn.2d 531, 551-52 295 P. 3d 219(2013).

⁷⁵ Obvious and probable error are addressed in *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App. 8, 12.16 321 P.3d 262 (Div. 1 2014).

a Receiver did not meet the conditions precedent for appointment of a Receiver. The Motion for Receiver fatally failed to comply with the requirements of RCW 7.60.025(1)(e) and (f)⁷⁶.

RCW 7.60.025(1)(e) addresses preservation, protection and unauthorized transfer of property. RCW 7.60.025(1)(f) addresses an execution returned unsatisfied and a judgment debtor's failure to submit to examination as ordered. Burrill did not fulfill the requirements of either statute before filing the Motion for Receiver.

Burrill's counsel knew, at the time of filing the Motion for Receiver and that there had been no Judicial attempt to Execute the Judgment.

Burrill's failure to Judicially Execute the Judgment and thereby comply with the conditions precedent to moving for the appointment of a Receiver, as imposed by RCW 7.60.025(1)(e) and (f), was brought to the attention of the Trial Court on April 29, 2016. At RP8/lines 8-11 and 15-18 find Rebel Creek Tackel Inc's (hereafter Rebel Creek) comments to the Trial Court:

And there never was a further step taken beyond the scheduling of and then withdrawing of supplemented proceedings. So there never was an actual meeting of the plaintiff of Seth Burrill and the principals of Rebel Creek. ...but this [respondent's motion for

⁷⁶ RCW 7.60.025(1) A receiver may be appointed by the superior court of this state in the following instances,...

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;

(f) If and to the extent that property is subject to execution to satisfy a judgment, to preserve the property during the pendency of an appeal, or when an execution has been returned unsatisfied, or when an order requiring a judgment debtor to appear for proceedings supplemental to judgment has been issued and the judgment debtor fails to submit to examination as ordered;

receiver] being the actual first step in execution, there is inevitably the matter of what is owed by this plaintiff to the defendants under the licensing agreement.

Burrill's Memorandum supporting the Motion for Receiver does not analyze RCW 7.60.025 (1)(e) and (f) relative to the record on appeal. Burrill's counsel merely recites non-judicial activity regarding the desire to collect the Judgment. Counsel makes no referral to the record of any Judicial action relative to Execution⁷⁷. Counsel for Burrill told the court that until a month before⁷⁸ May 27, 2016 that he had been told that Rebel Creek had no funds; the assertion is not supported by a record in this appeal; and, the assertion is irrelevant in that Burrill had not complied with the conditions precedent to the appointment of a Receiver.

This Court will find at Footnote 4 that Respondent took no Judicial action to comply with the requirements of RCW 7.60.025(1)(e) and (f). Rather, Respondent only asserted their diligence in attempting to Execute the Judgment. Hence the Trial Judge was not presented with a record allowing the formation of Findings of Fact and Conclusions of Law inherently necessary to support the appointment of a Receiver. Findings and Conclusions sufficient for the appointment might be as follows:

The Court, having reviewed the record and having heard argument of counsel finds that Rebel Creek has not preserved the asset of a patent application and concludes that this failure

⁷⁷ RP6/lines 3-9; 18-22; RP7/lines 12-16; RP11/lines 23-24; RP12/lines 5-7; RP22/lines 10-13; CP8/paragraphs 8-13; CP9/paragraphs 14-16; CP10/para 25 to CP11/para 26, 29-32; CP12/para 39.

⁷⁸ RP22/lines 11-12

requires, in compliance with RCW 7.60.025(1)(e), the appointment of a Receiver; and

The Court, finds that Burrill sought and obtained an Order of Execution which was served on Rebel Creek but which was returned as an Execution Unsatisfied with the Court concluding that this Return Unsatisfied, in compliance with RCW 7.60.025(1)(f), the appointment of a Receiver; and

The Court Finds that Burrill sought and obtained an Order requiring a Principal of Rebel Creek to appear for proceedings supplemental to judgment and that a Principal refused to appear and the Court thereby concludes that in accordance with RCW 7.60.025(1)(f) a Receiver is to be appointed....

There is no basis for and there are no Findings and Conclusions in the record. Rather, the Motion for Receiver with supporting Memorandum and Declaration of counsel recites that Burrill *asked several times to be paid and that Rebel Creek didn't pay.*

This recitation without disclosing that no Judicial step was taken, as required by RCW 7.60.025(1)(e) and (f) as the conditions precedent to seeking a Receiver, was presented to the Trial Court for the Court's reliance thereon and that the Court would be led to understand that Burrill had satisfied the requirements precedent to the Appointment of a Receiver. The assertions made with knowledge that no Judicial action had been taken were made in bad faith in violation of CR11⁷⁹. Counsel is

⁷⁹ CR11 asserts in part: "The signature of a party or of an attorney constitutes a certificate ... that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a

subject to sanction for the deliberate and intentional filing of the Motion for Receiver known by counsel to not be supported by a record on this appeal.

**A.1.a.1-THE RESPONDENT'S EXTENSIVE IRRELEVANT
DETAIL FROM 2013-14 REGARDING AN EARLIER APPEAL**

ENCOURAGED AND LED THE TRIAL COURT TO ERROR: Rebel Creek appealed the 2014 Judgment of the Superior Court contending a contractual ambiguity. Burrill enumerated the 2014 appeal history by Rebel Creek⁸⁰. Regarding the 2014 appeal, Trial Judge stated on April 29, 2016

"You know, certainly the defendant kind of starts off a little bit behind the eight ball when the Court of Appeals said what they said here and that, I think, kind of colors the view of the history of the case here and why it has taken so long⁸¹."

The Trial Court's comment regarding the earlier appeal is de facto a "finding and conclusion' drawn from the 2014 appeal. The Trial Court's comment does not relate to Burrill's Pleadings and record in support of the Motion for Receiver. The Court's granting the Motion for Receiver was based on the results of an earlier appeal having no relevance to the statutory

lack of information or belief. ... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

⁸⁰ CP12/para 35 - 38

⁸¹ RP15/lines 2-5

conditions precedent regarding Receivership. There are no findings and conclusions drawn from the pleadings or oral argument regarding conditions precedent to the appointment of a Receiver on April 29, 2016.

Before the Trial Court on April 29, 2016 was 1).Rebel Creek's offer to tender the Judgment less setoffs, 2).the failure of Burrill's attorneys to have met the conditions precedent to seeking a Receiver, 3).the failure of Burrill's attorneys to recite to the record of Judicial efforts to Execute the Judgment and 4).Rebel Creek's statements in court that the Motion for Receiver was the first Judicial action regarding Execution⁸².

The Court's Granting of the Motion for Receiver was obvious error⁸³. There was no witness testimony and no credibility to consider. There was the record which held no evidence of a Judicial act of compliance with RCW 7.60.025(1). Burrill's counsel led the Trial Court to a decision that is manifestly unreasonable based on the record.

A.1.a.2-7.60.025 (1)(e) allows appointment of a receiver ..."to preserve or protect [property]... or prevent its transfer".

A.1.a.2.A.-REGARDING PERSERVING OR PROTECTING REBEL CREEK PROPERTY: This was the first time the

⁸² RP8/lines 15-18

⁸³ Chambers dissenting, *State v. Graciano*, 176 Wn.2d 531, 551-52 295 P. 3d 219(2013). Obvious and probable error are addressed in *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App. 8, 12,16 321 P.3d 262 (Div. 1 2014). Abuse of Discretion is addressed in *Kreidler v. Cascade National Ins. Co.*, 179 Wn.App. 851, 860-61 321 P.3d 281 (Div. 1 2014)

Trial Judge had dealt with patent issues⁸⁴. A patent issue was of importance. Burrill's attorneys told the Trial Judge that the Rebel Creek Tackle Inc. (hereafter Rebel Tackle) was not preserving or protecting the patent application and had allowed the patent application to be absolutely lost by abandonment. Burrill's attorneys were wrong. Burrill's attorneys, LEE & HAYES has multiple patent attorneys⁸⁵. But in this instance Burrill's attorneys advised the Trial Judge that the patent application was lost and could not be revived⁸⁶.

However, in January 2014 Rebel Creek counsel contradicted and informed Burrill's counsel that revival was allowed by Patent Office Rule⁸⁷. Counsel for Rebel Creek revived the patent application within 10 days of Burrill's April 15, 2016 Motion for Receiver⁸⁸. Burrill's attorneys, prior to the hearing of Motion for Receiver on April 29, 2016, could have visited the USPTO.gov site to confirm that the Patent Application had been revived. They were told that revival had occurred. Burrill's counsel had knowledge of the Revival of the Patent Application upon receipt of Rebel Creek's Memorandum on April 27, 2016. Yet, Counsel for Burrill made no mention of this fact to the Trial Court.

⁸⁴ RP14/line 25

⁸⁵ CP171.

⁸⁶ CP9/para17 & 18; CP10/para 19 & 20; CP58; CP76/1st para; CP77/para 4; CP116/10-22; CP121/line 9;

⁸⁷ CP67/3rd para from top-email 1/2/2014;

⁸⁸ CP229

A.1.b.-7.60.025 (1)(f) allows appointment of a receiver

when... “an execution has been returned unsatisfied or when ... the judgment debtor fails to submit to examination as ordered.

Burrill did not seek an Order of Execution from the court. An execution was not returned unsatisfied. There is no Record that Burrill sought an Order of Execution.

There is no Record on Appeal cited to support Burrill’s attorney’s statement regarding a failure by Burrill to conduct a supplemental examination.

A.1.b.1-Burrill’s Counsel’s Declaration implicates

Receiver Kevin O’Rourke in not advising that Burrill meet the required Judicial acts prior to seeking a Receiver... O’Rourke who Burrill counsel met with “for several hours to discuss possible strategies that SBPI...” could use⁸⁹.

A.2.-BURRILL’S BURIAL OF FACTS AND FAILURE TO INFORM THE COURT LEADS TO ERROR: Burrill’s Motion, Memorandum and Declarations, with more than 256 pages of Declarations, Argument and Exhibits, withheld and covered up material facts required by the Trial Judge in considering and deciding the Motion to appoint a Receiver.

Burrill’s withholding and cover up of material facts invited error and lead the court into error in appointing a Receiver. Counsel for Burrill, having

⁸⁹ CP13/para 48

knowledge of Appellant's offer to tender payment for the Judgment less setoffs on April 27, 2016, owed a duty to the court to suggest error should a Receiver be appointed. *Sorra v. Dickinson*, 80 Wn.App. 695, 702, 910 P.2d 1328 (Div. 2 1996); *Heitfeld v. Benevolent and Protective Order of Keglers*, 36 Wn.2d 685, 707, 220 P.2d 655 (1950).

A.2.a.-THE COURT FAILS TO GIVE DUE

CONSIDERATION TO THE OFFER OF TENDER BY AN OFFICER

OF THE COURT: A member of the Washington State Bar Association is an officer of the court. As such, the attorney owes the Court a duty of frankness and honesty. *State v. Stimson*, 41 Wn.App. 385, 704 P.2d 1220 (Div. 3 1985). Counsel for Burrill knew, on April 27, 2016 and before the hearing of the Burrill Motion For Receiver, that Rebel Creek was prepared to tender the amount of the Judgment less setoffs. The statement that Rebel Creek would pay as stated in the Rebel Creek's Memorandum Opposing the Appointment of a Receiver was made by an Officer of The Court.

The Court was appraised of Rebel Creeks ability to pay as stated to the Court in argument⁹⁰ on April 29, 2016. Immediately following the entry of the Order appointing a Receiver empowered to seize all of Rebel Creek's assets within 5 days, counsel for Burrill and Rebel Creek discussed the 5 days as prompting appellate action. And, counsel also discussed the possibility of

⁹⁰ RP 8/lines 14-15; 9/lines 19-22; 11/lines 15-19.

settlement. An email exchange⁹¹ between counsel between April 29, 2016 and May 10, 2016 discloses the following: the admission that Royalties were owing⁹² to Rebel Creek; Burrill's counsel not giving credence to the offer of tender or that the offer was bona fide and made in good faith; the repeated refusal of Burrill to disclose the amount owing for Royalties; and Burrill's counsel irritation of finding that the License Agreement burdened Burrill with payment for Capital Investments.

The email exchange between April 29 and May 10, found at CP 302-328, is not ordered by date and is best reviewed by seeing Exhibit 2 of the Appendix. There is found a summary with highlights of the many email in the exchange.

A.3.BURRILL HAS JUDGMENT BUT TAKES NO COURT ACTION:

Rebel Creek licensed⁹³ Burrill to sell a patented fishing device. A dispute was arbitrated and Burrill obtained a judgment against Rebel Creek. in 2013.

Burrill's counsel scheduled, in 2014, and rescheduled and rescheduled but failed to attend a supplemental hearing. There is no Record on Appeal to support Burrill's suggestion that an act or omission by Mr. Osborn resulted in Counsel's failure to conduct a hearing.

⁹¹ CP302 – 328; following the email thread is best accomplished by reference to Exhibit 2 in the Appendix where the email is ordered and portions relevant to this topic are highlighted.

⁹² CP317-18 where counsel indicates that setoffs were about one-quarter of the total judgment of approximately \$100,000.

⁹³ License Agreement CP147

Burrill never requested the Superior Court to order Execution. Execution was never pursued in Court. There was never a return of judgment unsatisfied.

A.4.BURRILL USED EMAIL INSTEAD OF THE COURT TO ASK REBEL CREEK TO PAY THE JUDGMENT: With the exception of emails requesting that Rebel Creek pay the judgment there has been no action for execution by Burrill between 2014 and the Motion for Receiver of April 15, 2016⁹⁴.

The first act in the court was the April 15, 2016 motion for appointment of a Receiver seeking transfer of title of the assets of Rebel Creek to the Receiver.

A.5.BURRILL'S UNFOUNDED ASSERTIONS OF COMPLIANCE WITH RCW 7.60.025(e) AND (f) OFFENDS COURT RULE 11: Court Rule 11 characterizes pleadings bearing signatures as certificates of accuracy requiring that the pleading is (1)...well grounded in fact; (2) is warranted by existing law ...; (3)...is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;... The pleadings supporting Burrill's Motion for Receiver are demonstrated to not comply with CR 11 and thus expose the

⁹⁴ Respondent's Motion for Receiver CP120/line 3

party signing and the party to sanctions including payment of attorney fees⁹⁵.

A.6.BURRILL CONTENDS THE ORDER APPOINTING A RECEIVER IS INTERLOCATORY: Burrill's counsel asserted that the Order appointing a Receiver was Interlocutory allowing the Receiver to proceed. But, the Order was Stayed by the Court of Appeals.

The enforcement of the 2014 Judgment was likely interlocutory. Yet Burrill's attorney did not enforce the judgment. The failure to enforce or execute the judgment did not comply with the Receiver Statute conditions precedent to moving for the appointment of a general Receiver. See footnote 3.

A.7.BURRILL'S BURIAL OF FACTS AND FAILURE TO INFORM THE COURT LEADS TO ERROR: Burrill's Motion, Memorandum and Declarations, with more than 256 pages of Declarations, Argument and Exhibits, withheld and covered up material facts required by the Trial Judge in considering and deciding the Motion to appoint a Receiver. Burrill's withholding and cover up of material facts invited error and lead the court into error in appointing a Receiver. Counsel owed a duty to the court to suggest error so that it could be avoided or be cured. *Heitfeld v. Benevolent and Protective Order of Keglers*, 36 Wn.2d 685, 707, 220 P.2d 655 (1950).

A.8.THE ABSENCE OF CITATION TO THE RECORD: A party

⁹⁵ CR11, concluding sentences of sections (a) and (b).

engaged in appellate review has the burden of providing the Court of Appeals with all evidence in the record relevant to the issue before us. RAP 9.2(b); *Starczewski V. Unigard Ins. Grp.*, 61 Wn.App. 267, 276, 810 P.2d 58 (1991). Without the trial record the Court of Appeals cannot review challenged evidence in the context of the rest of the evidence presented. *Allemeier v. Univ. of Wash*, 42 Wn.App. 465, 473, 712 P.2d 306 (1985). An insufficient record on appeal generally precludes our review of the alleged errors. *Bulzomi v; Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996 (1994).

Burrill's failure to cite to the Record on Appeal regarding the RCW 7.60.025(e) and (f) conditions precedent to seeking a Receiver requires the Court of Appeals to disregard Burrill's arguments to the contrary.

A.9.CRITICAL FACTS OPPOSING THE APPOINTMENT OF A RECEIVER BUT NOT BROUGHT TO THE COURT'S ATTENTION BY BURRILL ARE REVEALED IN THE RECORD:

A.9.a.LICENSE AGREEMENT OBLIGATION

REGARDING NUMBER OF SALES: The License Agreement between Rebel Creek and Burrill required Burrill to have sold 15,000 of the fishing units by June 1, 2016, only 45 days after Burrill's Motion for Receiver. Burrill's failure to make 15,000 sales by June 1, 2016 would terminate Burrill's rights in the License Agreement⁹⁶.

A.9.b.LICENSE AGREEMENT OBLIGATION

⁹⁶ CP150/para 6.1; CP27/para 3 where the date is extended to June 1, 2016.

REGARDING ROYALTIES OWING TO REBEL CREEK: Burrill owed Royalties⁹⁷ to Rebel Creek for each sale. Royalties were not paid to Rebel Creek following 2012. The Record of Proceeding reveals that Royalties of \$20,000 to \$30,000 were owing by Burrill to Rebel Creek if sales of 15,000 were made⁹⁸.

A.9.c.LICENSE AGREEMENT OBLIGATION

REGARDING CAPITAL INVESTMENTS OWING TO REBEL CREEK: Burrill owes Capital Investments⁹⁹ to Rebel Creek. The License Agreement states "...will pay royalties, make all necessary capital investments, and¹⁰⁰ ...". Burrill correctly states that "capital investments" has not been defined. The Court of Appeals and the Trial Court recognizes that undefined terms in contracts are subject to examination for ambiguity and definition with such actions occurring in a trial. The obligation regarding "capital investments" was not litigated in the Arbitration or at any time in the Spokane County Superior Court.

A.9.d.-THE REVOLUNITARY CHARACTER AND

VALUE OF THE LICENSED DEVICE: Not provided by Burrill in this matter but provided by Rebel Creek is the Burrill web page¹⁰¹ stating that the licensed device is revolutionary resulting in markedly increase fishing success

⁹⁷ CP129/lines 12-13

⁹⁸ CP270 paragraph d.

⁹⁹ CP235/last paragraph; CP224/line 13; CP269/line 25; CP270/line 7,15; CP288/line 22; CP289/line 10.

¹⁰⁰ CP335.

¹⁰¹ CP171.

and suggesting great value.

A.10.-INTENDED AND UNINTENDED CONSEQUENCES OF THE DISCLOSED AND UNDISCLOSED FACTS:

A.10.a.-SANCTIONS FOR WRONGFUL OR BAD FAITH PROCUREMENT OF RECEIVER: RCW 7.60.290 (5) allows, if the court determines that the **appointment of the receiver was wrongfully procured or procured in bad faith**, assessment of all of the receiver's fees and any other sanctions the court determines to be appropriate. Other sanctions, including those imposed by violation of Court Rule 11, include reimbursement to Rebel Creek of the costs of resisting the Receivership in Superior Court, commencing April 15, 2016, and in the Court of Appeals.

A.10.b.-LEADING THE COURT TO BELIEVE THAT REBEL CREEK'S PATENT APPLICATION WAS LOST: Burrill's law firm, LEE&HAYES is an Intellectual Property specialty firm. One page of the LEE & HAYES web site¹⁰², notes their expertise in Patent Law, states that it is "one of the largest patent law firms in the U.S., states that they "protect innovations through patent...", has "built a patent law powerhouse", has "opened an office in Washington D.C.", "of the big Spokane-based intellectual property law firm LEE & HAYES PLLC". And yet Burrill' counsel represented to the Trial Judge that the Patent Application was

¹⁰² CP145

irretrievably lost¹⁰³. Burrill represented that such was the opinion of the LEE & HAYES patent powerhouse. A Trial Judge has the expectation of reliance on statements from a prominent patent law firm. And yet the patent application was revived within 7 days of the April 15, 2016 Motion for Receiver.

The LEE & HAYES opinion and assertion that the Rebel Creek patent application was lost was false, misleading and intentional¹⁰⁴ in leading the Trial Court to error.

II.INTRODUCTION – REBEL CREEKS ACTS AND DISCLOSURES:

B.1.-REBEL CREEK’S OPPOSITION TO APPOINTMENT OF RECEIVER:

B.1.a.-REBEL CREEK GIVES NOTICE TO BURRILL AND INFORMS THE COURT THAT REBEL CREEK WOULD TENDER THE JUDGMENT AMOUNT LESS SETOFFS AND THAT THE MOTION FOR RECEIVER WAS THE FIRST JUDICIAL ACT REGARDING EXECUTION OF THE JUDGMENT: Rebel Creek’s Memorandum Opposing the Receiver informed Burrill and the Court that Rebel Creek was prepared to tender the judgment less amounts owed by Burrill to Rebel Creek¹⁰⁵. Burrill’s counsel, upon knowing that Rebel Creek would pay the judgment less setoffs, had the duty to advise the court that error

¹⁰³ CP115/line 1 to CP116/line 15

¹⁰⁴ CP9/para17 & 18; CP10/para 19 & 20; CP58; CP76/1st para; CP77/para 4; CP116/10-22; CP121/line 9;

¹⁰⁵ CP129/lines 4-7

was likely if a Receiver was appointed¹⁰⁶.

Rebel Creek's arguments to the Court stated the ability of Rebel Creek to tender the amount of the Judgment less setoffs¹⁰⁷. The Appellant, responding to the Respondent's Motion for Receiver on April 27, 2016, advised the Respondent that the Appellant was prepared to pay the judgment less setoffs¹⁰⁸.

Counsel for Rebel Creek stated to the Trial Court that Burrill's Motion for Receiver was the first Judicial act to pursue Execution of the Judgment¹⁰⁹.

B.1.b.-THE ORDER APPOINTING A RECEIVER WAS OBVIOUS OR PROBABLE ERROR¹¹⁰:

B.1.b.1.A-THE APPOINTMENT OF A RECEIVER WAS A FINAL ORDER AFFECTING A SUBSTANTIAL RIGHT OF REBEL CREEK: The April 29, 2016 Order appointing a Receiver was granted without having met the conditions precedent required for the appointment. The Order appointing a Receiver was a final order that affected a substantial right and was appealable as matter of right under RAP 2.2(a)(13). RAP 2.2(3) identifies as appealable any "written decision affecting a substantial right in a civil case that in effect determines the and prevents a final judgment or

¹⁰⁶ Sdorra v. Dickinson, 80 Wn.App. 695, 702, 910 P.2d 1328 (Div. 2 1996)

¹⁰⁷ RP8/lines 14-15; RP9/lines 21-22.

¹⁰⁸ Setoff or Offset is a fundamental consideration accompanying the execution of a judgment and was briefed and argued by Appellant in this matter. CP129/lines 5-25;CP131/lines 22-23; CP 217/lines 4-25; CP266/18-Cp268/line 26;

¹⁰⁹ RP8/lines 8-11; 15-16

¹¹⁰ See Footnote 2

discontinues the action."

For Rebel Creek, an act by a Receiver of seizing the Appellant's property would affect a substantial right and would have ignored the option of satisfying the money Judgment. The amount of the money judgment is known and set-offs have already been shown to be quantifiable. The value of the intellectual property is unknown. The Order appealed from relieves Receiver from having to have an appraisal of the intellectual property and molds.

Rap 2.3(b) (1) and (2) allows appeal by Discretionary Review where (1) The superior court has committed an obvious error which would render further proceedings useless; or (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.

Obvious and probable error are addressed in *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App. 8, 12,16 321 P.3d 262 (Div. 1 2014). Burrill's counsel, having buried the failure to undertake the conditions precedent to seeking a Receiver led the Trial Court to err. The Rebel Creek's offer to tender the amount of the Judgment less setoffs and advising the Court that the Motion for Receiver was the first Judicial act relative to Execution was alerting to the Trial Court that the circumstance was not ripe for the appointment of a Receiver. Being led and ignoring the offer to tender and the advice of no record to support conditions precedent to appointment of a Receiver resulted in the Trial Court committing either obvious or probable

error in appointing the Receiver.

B.1.b.2.-REBEL CREEK'S PROPOSED DISCOVERY

AND HEARING SCHEDULE TO DETERMINE SETOFFS: Rebel Creek proposed a trial schedule to determine setoffs expecting that the plan would require discovery and one or more hearings should discovery be obstructed. However, by May 27, 2016 Burrill's counsel had admitted that royalties were owed Respondent¹¹¹. It was also determined, by the admitted dollar amount owing for Royalties, that Burrill had failed to sell 15,000 units by June 1, 2016 as required by the License Agreement¹¹². A Motion for Declaratory Judgment¹¹³ was filed for the Judicial determination that Burrill's Exclusive License was terminated by failing to sell 15,000 units by June 1, 2016.

The discovery and hearing plan, proposed by Rebel Creek addressed the authority for and the proposed plan in its Response Opposing Appointment of Receiver¹¹⁴. The Trial Court's authority to determine setoffs and hence the balance of any judgment owed is seen in *Reichlin v. First Nat. Bank*, 51 P.2d 380, 184 Wash. 304,313-14 (Wash. 1935); CP133/line 24 to CP135/line 2 citing *Sherry v. Financial Indem. Co.*, 160 P.3d 31, 160 Wn.2d 611, 617-18 (Wash. 2007).

B.1.b.3.-FINAL DETERMINATION OF SETOFFS

¹¹¹ CP424 email from Burrill counsel to Rebel Creek counsel of May 27, 2016.

¹¹² CP413 Paragraph 6.1 of the License Agreement extended to June 1, 2016 by the Arbitrator's Decision at CP420 paragraph 3.

¹¹³ CP401.

¹¹⁴ CP132/line 19. Authority for the determination of Setoffs is addressed at CP133/line 8 citing *Reichlin v. First Nat. Bank*, 51 P.2d 380, 184 Wash. 304,313-14 (Wash. 1935); CP133/line 24 to CP135/line 2 citing *Sherry v. Financial Indem. Co.*, 160 P.3d 31, 160 Wn.2d 611, 617-18 (Wash. 2007)

AND TERMINATION OF THE EXCLUSIVE LICENSE TO BE IN SUPERIOR COURT: As of the date of hearing of the Motion for Receiver, April 29, 2016 Rebel Creek expected that determination of setoffs could be concluded by June, 2016¹¹⁵. The litigation events in this matter have shifted the date by which remaining setoffs for Capital Investments and the Judicial determination of the termination of the Exclusive License can be determined. These issues must be determined in the Superior Court contrary to Burrill's Counsel's assertion that such must be returned for determination by Arbitration. While Burrill's counsel had admitted Royalties owing of about \$10,000, he also asserted that royalties owing must be determined by arbitration¹¹⁶.

Returning this matter to Superior Court and not to Arbitration is supported by the Division III ruling of April 28, 2016 holding that a party submitting a case to litigation in the state court forfeits the right to Arbitration. *Schuster v. Prestige SeniQr Management, L.L. c.*, 33242-0-III.

B.1.c.-REBEL CREEK'S REVIVAL OF THE "ABANDONED" PATENT APPLICATION: Burrill advised Trial Judge Cuzzo, with absolutely certainty, that Rebel Creek had lost all rights to the Patent Application. However, Burrill's attorneys were wrong. The words

¹¹⁵ CP135/lines 14-15.

¹¹⁶ CP403/lines 3-7; The Plaintiff has admitted that Royalties of approximately \$10,000,000 are owing. The Plaintiff also suggests that a determination of Royalties owing be submitted to arbitration. Division III held on April 28, 2016 that a party submitting a case to litigation in the state court forfeits the right to Arbitration. *Schuster v. Prestige SeniQr Management, L.L. c.*, 33242-0-III.

Abandon and Abandonment are terms of art in Patent Law. A patent examiner reviews a patent application and responds to the inventor with the Examiner's Office Action identifying objections and rejections. The patent applicant's failure to respond within 6 months results in Abandonment¹¹⁷. Abandonment is reversed with a Petition to Revive thereby restoring the application to examination. Rebel Creek filed the petition to Revive and notice of Revival was received by April 25, 2016¹¹⁸.

B.2.-REBEL CREEK MOTIONS THE TRIAL COURT FOR STAY OF THE ORDER APPOINTING A RECEIVER AND REBEL CREEK POSTS \$103,000.00 SUPERSEDEAS BOND ON MAY 26, 2016:

Division III considered "obvious error" in *Minehart v. Morning Star Boys Ranch, Inc.*, 232 P.3d 591, 156 Wn.App. 457, 462-63 (Wash.App. Div. 3 2010) stating as follows: ... Interlocutory review is available in those rare instances where the alleged error is reasonable certain and its impact on the trial manifest. RAP 2.3(b) defines four situations in which an appellate court may grant pretrial review. Only the first two of those criteria are argued by the parties: (1) The superior court has committed an obvious error which would render further proceedings useless; (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act. RAP 2.3(b)(1), (2). Under these criteria, there is an inverse relationship between the certainty

¹¹⁷ CP58; CP140-141;

¹¹⁸ CP127/line 25 to CP128/line 6; CP140-141.

of error and its impact on the trial. Where there is a weaker argument for error, there must be a stronger showing of harm.

Division III in *Morning Star* described a relationship between the "certainty of error" and its impact on the trial. In the present case the overlooking of the Appellant's stated ability and offer of tender to satisfy the judgment less set-offs is contended to weigh heavily for finding a high certainty of error. Additionally, the Order relieving the Receiver of the need for an appraisal of intellectual property and molds is obvious disregard of the present knowledge of the Judgment. Regarding Division III's second prong, requiring the Order appealed from to be "substantially altering [of] the status quo or substantially limiting the freedom of a party to act" it is asserted that the seizure of the Appellant's property substantially alters both the status quo and limits the Appellant's freedom to act. The Receiver seizes, receives and disposes. The Receiver is not a judge to make decisions regarding set-offs owed by the Respondent to the Appellant.

B.2.a-REBEL CREEK POSTS SUPERSEDEAS BOND:

Rebel Creek posted Supersedeas Bond of \$103,000.00 on May 26, 2016¹¹⁹.

The Stay was proper per RAP 8.1(b) (1) and (2) since the appointment of a Receiver is specifically "a decision affecting real, personal or intellectual property; a money judgment exists and the decision affects rights to possession, ownership or use... of tangible personal property, plastic injection molds, and intangible personal property, the patent, patent application and License Agreement. Molds and the use of

¹¹⁹ CP349-51; CP359

the intangible intellectual property were possessed by Burrill for sales and production of royalties owing to Rebel Creek¹²⁰.

At the time of filing of Rebel Creek's Motion for Stay and the Court of Appeal's hearing of the Emergency Motion, the Royalty owing to Rebel Creek¹²¹ had been admitted¹²² to be about \$10,000. While Burrill's counsel had admitted Royalties owing of about \$10,000, he also asserted that royalties owing must be determined by arbitration¹²³. However, Rebel Creek notes the Division III opinion in *Schuster v. Prestige SeniQr Management, L.L. c.*, 33242-0-III holding that entry into litigation causes forfeiture of rights of arbitration.

However, immediately prior to the hearing of Rebel Creek's Motion for Stay and the Court of Appeal's hearing of the Emergency Motion, the Royalty owing to Rebel Creek was confirmed to be \$9559.86¹²⁴. However, Burrill's counsel contended that other amounts owing, e.g., for Capital Investments, would have to be determined by Arbitration¹²⁵.

C.-CONCLUSION – ERROR AND THE REQUEST BY REBEL

CREEK:

C.1.-THE ORDER APPOINTING A RECEIVER AND

¹²⁰ CP197/lines 7-25

¹²¹ CP319 penultimate and ultimate sentences of email of May 10, 2016.

¹²² CP289/line 2, CP389/lines 13-14; CP390/lines 25-26;

¹²³ CP403/lines 3-7; The Plaintiff has admitted that Royalties of approximately \$10,000,000 are owing. The Plaintiff also suggests that a determination of Royalties owing be submitted to arbitration. Division III held on April 28, 2016 that a party submitting a case to litigation in the state court forfeits the right to Arbitration. *Schuster v. Prestige SeniQr Management, L.L. c.*, 33242-0-III.

¹²⁴ CP424 email from Burrill's counsel of May 27, 2016

¹²⁵ CP424 email Burrill counsel to Rebel Creek counsel May 27, 2016.

THE ORDER DENYING STAY WERE OBVIOUS ERROR: Burrill's Counsel's refusal to acknowledge the non compliance with RCW 7.60.025(1)(e) and (f), the failure to pursue Judicial action to Execute the Judgment prior to seeking a Receiver, burying material facts in 256 pages of Pleadings signed and filed by counsel, ignoring the offer by an Officer of the Court to pay the Judgment less setoffs and counsel's failure to alert the Trial Court to the potential for error all led the Trial Court into error.

The Trial Court's failure to attend to Rebel Creek's Counsel's statement that Burrill had taken no prior Judicial action to Execute the Judgment, the Court's not finding a record of Judicial action in the Pleadings signed and filed by counsel, the Trial Court's failure to note the tender of payment of the Judgment by an Officer of the Court, the Court's refusal to acknowledge the posting of a Supersedeas Bond resulted in error. The Trial Court's granting of the Motion for appointment of a Receiver and the Denial of the Motion for Stay was obvious error.

C.1.a-REBEL CREEK'S REQUESTS OF THE COURT

OF APPEALS: Respondent's Motion for Receiver precipitated a Response to the motion for Receiver, an Appeal, a Motion for Stay, an Emergency Motion in the Court of Appeals and the Appeal.

Rebel Creek requests the Court of Appeals to reverse the orders of the Trial Court, to send the case back to Superior Court for determination of setoffs including royalties and Capital Investments owing from Burrill to

Rebel Creek and to determine the differential between the Judgment held by Burrill less the setoffs owing to Rebel Creek.

Rebel Creek requests the Court of Appeals to find that new issues, specifically pertinent to the issues raised by Burrill's original Motion for Receiver, are issues for decision by the Superior Court and to return the case to the Superior Court to determine that Burrill's rights in the License Agreement is terminated by failure of Burrill to sell 15,000 units by June 1, 2016.

Rebel Creek asks the Court of Appeals to find that Burrill is sanctioned for failure to abide by CR11 and RCW 7.60.290; sanctions sought include the termination of the accumulation of Judgment interest on April 15, 2016 by reason of failing to perform conditions precedent to Burrill's seeking a Receiver and for attorney fees accrued commencing April 15, 2016 through the conclusion of this Appeal.

Rebel Creek asks the court to require the Superior Court, if Burrill's rights in the License Agreement are terminated, to compel Burrill to allow inspection, by a Rebel Creek representative, of the molds in Burrill's possession to determine if deterioration has occurred and, if so, for the Superior Court to take testimony as to the cost of repair or replacement and to make the molds available for delivery to a Rebel Creek representative and for Burrill counsel to facilitate delivery of the molds to Rebel Creek. Rebel Creek further requests the Court of Appeals to instruct the Trial Court to

impose sanctions against Burrill and counsel of \$100 per day for any delay in the return of the molds to Rebel Creek in care of Plastic Injection Molding of West Richland Washington.

Rebel Creek further requests the Court of Appeals to require that Burrill take all steps necessary to withdraw the false assignment of Patent Application 11/290391/Patent 7,645,031 and clear the title held by Rebel Creek Tackle Inc. See section A.1.a.2.B.

C.1.b-REBEL CREEK REQUESTS ATTORNEY'S

FEES:Pursuant to RAP 18.1 Rebel Creek seeks attorney's fees from the commencement of this litigation on April 15, 2016 to the conclusion of the Appeal and to the conclusion of the matter should it be remanded to the Superior Court.

Respectfully submitted this 26th day of October, 2016.



Floyd E. Ivey, WSBA 6888, Attorney for Defendant

APPENDIX

CERTIFICATE OF SERVICE	a
CP302 – 328; email thread	b-e
USPTO.GOV ASSIGNMENT HISTORY	f

APPENDIX 2 for Appellant Brief on Appeal.

Appendix to Declaration of Jeff Smith opposing Motion for Stay -- Appendix A email exchange Smith and Ivey April 29 through May 10, 2016

Email chain from April 29 to May 10. Not in order in the Clerks Papers.

Cp = Clerks Papers cite

Date 429 = April 29

From j = Smith, f or I = Ivey

Topic = summary or copy of email or portions of email

Cp	date	from	to	topic
305-6	429 2:56	j	f	As soon as possible, please send me the calculated amount of "capital investments" as those amounts relate to the patent along with corresponding documentation verifying the amount. I note there is no definition of this term anywhere in the agreement.
302	429 3:39	f	j	Estimated setoff. Capital investment. Need response to discovery. Ask for agreement to extend to 10 days for settlement discussion.
304-5	429 3:49	j	f	Thanks for the information. I will be discussing with my client and will contact you on Monday regarding our discussion.
304	52 4:01	I	j	See attached the Appeal filed today. The 5 day delivery to the Receiver created an unusual deadline regarding appeal. The Judgment can be considered separate from the Appeal. Identify the sales and the royalties due RCTI. Do it by responding to the Discovery. Judge Cozza didn't read the memo or the response to your Motion to Strike - both identify defendant's readiness to pay the judgment less set-offs.
316	54 3:49	f	j	RCTI has the benefit of others and, as I noted last Friday, is capable of satisfying the amount owed to SBPI less the set-offs from Royalties and SBPI obligations regarding capital expenses. This ability of RCTI was written in the responsive Memo and in the Memo resisting the motion to Strike. The Judge just didn't read the Memos. Your suggest that sales/royalties and capital expense might be about \$25,000. I'll have to see that data. Disagree re: stay. Rap 2.3 judicial error. which renders further

			t	proceedings useless or has committed probable error and the decision of the superior court substantially alters the status quo etc. The Order takes the property of RCTI and does so with the Memo assertions that RCTI is prepared to pay. The Court jumped the gun. The Order is either an obvious error or probable error.
317-8	54 9:13	j	f	interlocutory, turn to Receiver w/o capital. RCT owes \$101k. Setoff likely one quarter of total. Based on the history of this case, I am sure you can understand my reticence regarding a bona fide offer. Any transfer of funds will be via wire transfer to the Lee & Hayes Trust account, and we will issue a check to my client. We either get this settled today, or I will expect assignment of the patent and delivery of the molds to the receiver today per Judge Cozza's Order, and we will let Kevin O'Rourke sort this out from this point forward.
315	55 11:46	j	f	This is my second email to you this morning. Are we going to get this done today? I am unavailable after 3 this afternoon, until next week. If I don't have numbers by then I will contact the receiver. I am not going to let this drag on. I believe if you had a bona fide offer to settle, I would have heard from you by now. We are going on a week of promises to settle and yet I don't have a sum certain on the capital expenditures with documentation. You indicated last week that you had the information readily available.
307	55 4:02	f	j	Unable today. Wait till Monday.
311	55 4:28	f	j	The pleadings in Superior Court state that Defendant is prepared to tender the difference between Judgment and setoffs. You've apparently some information and I'll get the capital expenses. But pushing this before we see where settlement is will only increase costs.
315	55 4:30	f	j	And yes, I'm prepared to meet the differential. Do you have reliable information from SBPI?
328	510 11;20	j	f	serious resolve w/o receiver
327	510 11:35	f	j	I've control and authority re: the differential between Judgment and set-offs.
326-7	510 11:58	j	f	has spreadsheets with royalties owed; will provide when you get me the capital expenditure client will not respond to interrogatories, however. You cannot enforce discovery at this stage. The

license agreement provides for enforcement including royalty reporting. If you question the validity of the reporting, the license agreement addresses how to deal with that that as well. You have not responded to my request to place funds in escrow, or the escrow agreement. Without this, **I have no way of knowing whether or not any suggestion of settlement is in good faith.**

325-6	510 12:20	f	j	Re: good faith, Always paid settlment. You have spreadsheets but won't respond to discovery. Issue of setoffs is demand for royalties. Why reluctant to send number.
325	510 12:32	j	f	Why reluctant to escrow till sort out setoff
325	510 12:35	f	j	Strange escrow. Cap expense is negotiable.
324	510 1:11	f	j	Able to pay \$75k. Capital may>\$15k. You indicate Royalty<=\$10k. does Burrell want out. Get more now.
323-4	510 4:43	j	f	Document Cap Invest. Ambiguity. Inflation may kill settlement. Any less 100776 less royalties + reasonable capital investment not accepted. Drop dead is 5/11 4pm. Then receiver.
323	510 4:55	F	J	Rush is trying to collect for 3 years thank you.



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Application #: 11290391 **Filing Dt:** 11/30/2005 **Patent #:** 7654031 **Issue Dt:** 02/02/2010
PCT #: NONE **Intl Reg #:** **Publication #:** US20070119091 **Pub Dt:** 05/31/2007
Inventors: Allen Odah Osborn, Dorothy Darlene Osborn
Title: A TROLLING APPARATUS AND METHOD OF USE

Assignment: 1

Reel/Frame: 030443 / 0672 **Received:** 05/17/2013 **Recorded:** 05/17/2013 **Mailed:** 05/21/2013 **Pages:** 3
Conveyance: ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS).
Assignors: OSBORN, ALLEN ODAH
 OSBORN, DOROTHY
Assignee: REBEL CREEK TACKLE INC.
 2107 W. 15TH AVE.
 KENNEWICK, WASHINGTON 99336
Correspondent: FLOYD E. IVEY
 73233 W. DESCHUTES AVE., STE C, BOX #3
 KENNEWICK, WA 99336

Assignment: 2

Reel/Frame: 036447 / 0636 **Received:** 08/21/2015 **Recorded:** 08/21/2015 **Mailed:** 08/31/2015 **Pages:** 12
Conveyance: JUDGMENT ON ARBITRATOR'S AWARD
Assignor: REBEL CREEK TACKLE INC. **Exec Dt:** 06/07/2013
Assignee: SETH BURRILL PRODUCTIONS, INC.
 LEE & HAYES PLLC, C/O CHRIS LYNCH, ESQ. 601 WEST RIVERSIDE AVENUE, SUITE 1400
 SPOKANE, WASHINGTON 99201
Correspondent: J. CHRISTOPER LYNCH
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 801 W. RIVERSIDE AVENUE, SUITE 1400
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Assignment: 3

Reel/Frame: 036744 / 0412 **Received:** 10/02/2015 **Recorded:** 10/02/2015 **Mailed:** 10/08/2015 **Pages:** 3
Conveyance: CORRECTION BY DECLARATION FOR PATENT NO 7654031 REEL/FRAME 036447/0636
Assignor: REBEL CREEK TACKLE INC. **Exec Dt:** 10/01/2015
Assignee: REBEL CREEK TACKLE INC.
 106 FONNER ST
 ENDICOTT, WASHINGTON 99336
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 7233 W. DESCHUTES AVE.
 STE C., BOX #3
 KENNEWICK, WA 99336

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