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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34401-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS, INC., Respondent

v.

REBEL CREEK TACKLE INC., Appellant

PLAINTIFF-RESPONDENT SETH BURRILL PRODUCTIONS, INC.'S
RESPONSE BRIEF TO DEFENDANT-APPELLANT'S
REBEL CREEK TACKLE INC.'S OPENING BRIEF

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I. INTRODUCTION

A receivership will finally effectuate the judgment. For over three years, the Appellant in this matter, Rebel Creek Tackle, Inc. ("RCT"), has attempted to cloud the issues. RCT continues to abuse the judicial system with baseless filings and appeals. The Respondent in this matter, Seth Burrill Productions, Inc. ("SBPI"), has expended significant financial resources, time, and effort to enforce a lawful court order. Yet, SBPI has not recovered any of the judgment.

The short history of this matter is that RCT and SBPI arbitrated a patent license dispute. The arbitrator found RCT to have materially breached the agreement, and SBPI confirmed that arbitrator award in superior court. RCT has resisted SBPI's attempt to enforce the order and judgment, and an order of contempt was affirmed by this Court in 2015. According to its answers in supplemental discovery, RCT has no funds to satisfy any judgment. It does however, have other assets such as patent ownership, the license agreement between the parties, and ownership of molds that embody the invention. Once SBPI pressed the issue by moving to appoint a receiver, RCT now mysteriously claims it can satisfy the judgment because it "has the benefit of others."

The trial court granted RCT's motion for appointment of receiver after RCT argued a receiver was necessary to give effect to the judgment,

protect property or prevent its transfer, and secure justice to the parties.

RCT now argues that this appointment of a receiver was an abuse of discretion. Yet, RCT's brief fails to raise a legal issue of any merit, relying on novel and unsupported arguments that have no basis in the issues that were properly before the trial court.

Accordingly, RCT has shown no abuse of discretion of the trial court, and the history of this case shows ample evidence to support the appointment. The weight of the evidence shows that no other remedies are available and without a receivership, RCT will continue to multiple the proceedings and waste resources of the courts and the parties. As such, this Court should affirm the appointment of receiver and the trial court's denial of stay. It should further order the supersedeas bond to be released to SBPI pending an affidavit of the amount of judgment, or in the alternative, order the receivership to be effective immediately. Finally, the Court should grant attorney's fees and costs to SBPI for having to respond to an appeal without merit.

II. ASSIGNMENTS OF ERROR

1. It was not an abuse of discretion to appoint a receiver on April 29, 2016.

2. It was not error for the court to rely on the entire history of this case, including the appellate history of this matter when determining whether a receivership was necessary to enforce a valid judgment.

3. It was not error of the court to consider a tender of judgment and ultimately determine a receivership was necessary to effectuate the judgment.

4. The court's denial of the motion to stay on May 27, 2016 was not an abuse of discretion.

III. STATEMENT OF THE CASE

There have been seven major steps to this matter. At each step, RCT has breached agreements, unreasonably multiplied the proceedings, resisted lawful court orders, and abused the judicial system with baseless filings and appeals. Each step is set forth below.

A. Step 1: SBP and RCT enter into an exclusive patent license, and RCT breaches the agreement.

RCT is the owner of U.S. Patent Application No. 11,290,391 (now issued as U.S. Patent No. 7,654,031) and 12,641,291. CP at 330-335. In June 2010, SBPI entered into an agreement with RCT to exclusively license certain patents for a fishing apparatus (the "License Agreement") called "Bud's Diver." *Id.* In the License Agreement, RCT exclusively licensed its certain patents to SBPI, thereby giving SBPI the exclusive right to exclude others from making, using, or selling the subject of the

patent (including RCT).¹ *Id.* In exchange for an exclusive license to the patents and sell the device, SBPI agreed to pay royalties to RCT based on each licensed invention sold. *Id.*

RCT unilaterally attempted to change the licensing relationship from ‘exclusive’ to ‘non-exclusive’ in July 2012. CP at 24-26. As a result (along with other breaches), SBPI pursued arbitration as required by the terms of the License Agreement. CP at 334.

B. Step 2: SBPI obtains an arbitration award based on RCT’s material breach.

On May 2, 2013, SBPI received an arbitration award (the “Final Award”) for damages, reinstatement of the contract, costs, attorneys’ fees, and an order to transfer and/or deliver the Bud’s Diver plastic injection molds to SBPI. CP at 24-28. The Final Award made the following findings of fact based on an evidentiary hearing, written arguments and summations of counsel, post-Interim Award materials, and considering all the briefs, evidence, and arguments of counsel:

- (a) RCT and SBPI entered into a License Agreement on June 1, 2010.
- (b) RCT misrepresented ownership of patents at the time of execution of the License Agreement.

¹ “Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . .” 35 U.S.C. § 154.

- (c) The Licensing Agreement was intended to create an exclusive licensing arrangement between RCT and SBPI.
- (d) RCT materially breached the License Agreement by attempting to unilaterally change the nature of the licensing arrangement from exclusive to non-exclusive.
- (e) RCT materially breached the Licensing Agreement by attempting to terminate the agreement.
- (f) RCT infringed SBPI's exclusive patent rights, trademark rights, and copyrights.

CP at 24-26.

The Final Award provided relief to SBPI: “[SBPI] shall have full, unrestricted use of the injection molds during the term of the contract, and [RCT] shall cooperate in the transfer and/or delivery of said molds as requested by [SBPI].” CP at 27-28. The Final Award also enjoined RCT from “engaging in any activity in competition with or obstruction of [SBPI’s] rights under the contract, from interfering in any way with [SBPI’s] performance of the contract, and are further enjoined from interfering and/or infringing on [SBPI’s] trademark and copyrights.” *Id.* Further, the Final Award included monetary damages, costs, attorney fees, and arbitration fees totaling \$66,367.52. *Id.*

C. Step 3: Judgment is entered against RCT after confirmation of the arbitration award, and the court entered a permanent injunction against RCT.

On June 7, 2013, the superior court confirmed the Final Award and entered judgment in favor of SBPI. CP at 17-19. The court order included the following:

- (a) confirmation of the Final Award;
- (b) entry of Judgment in favor of SBPI and against Rebel Creek Tackle, Inc. (“RCT”);
- (c) RCT’s shareholders must assign the Patent Application(s) and the Patent(s) to RCT;
- (d) reinstatement and amendment of the language in the License Agreement between the parties;
- (e) SBPI shall have “full, unrestricted use of the injection molds during the term of the License Agreement;”
- (f) RCT shall “cooperate in the transfer and/or delivery of said molds;” and
- (g) RCT and its shareholders are enjoined from engaging in any activity in competition with or obstruction of SBPI’s rights under the License Agreement, among other things.

Id. Judgment was entered against RCT in the amount of \$67,451.64 with interest. CP at 20-12.

D. Step 4: RCT is held in contempt.

RCT refused to deliver (or consent to the delivery of) the molds, despite the court order requiring “full, unrestricted use of the injection

molds” and “cooperat[ion] in the transfer and/or delivery of said molds.” CP 94-99. The trial court found RCT in contempt. CP at 94-95.

RCT appealed the order to contest the court’s contempt finding and to challenge the language of the order. CP at 94-99. The Court of Appeals issued its Unpublished Opinion on July 7, 2015, and held that “RCT has not presented any debatable issue and this appeal is completely without merit.” CP at 98-99. RCT challenged the language in the order that required “transfer and/or delivery” of the molds, however, the Court found that language to be “unambiguous.” CP at 97. The Court of Appeals affirmed the trial court’s order and awarded SBPI its costs and attorneys’ fees for defending the “frivolous” appeal. *Id.*

Undeterred, RCT filed an appeal to the Washington State Supreme Court. CP at 101. Department II of the Supreme Court of Washington, composed of Chief Justice Madsen, and Justices Owens, Stephens, Gonzalez, and Yu unanimously denied RCT’s Petition for Review on January 6, 2016. *Id.*

E. Step 5: SBPI has been unable to recover the money judgment against RCT that claims to have no money to satisfy the judgment, yet, RCT now mysteriously claims it “has the benefit of others” who may satisfy the judgment.

SBPI has spent three years attempting to enforce the judgment against RCT, and has not recovered any of the money judgment. CP at 2-

3. After the Court's entry of judgment, SBPI initiated supplemental proceedings pursuant to RCW § 6.32 and CR 69(b). CP at 8. SBPI lodged an Abstract of Judgment with the Superior Court of Washington in and for Benton County on July 29, 2013. *Id.* SBPI then petitioned the court for supplemental proceedings, which was granted on December 13, 2013. *Id.* SBPI pursued numerous attempts to take the judgment debtor examination of RCT's officer, but was unable due to RCT's officer's health. *Id.* To accommodate the officer's health, SBPI served RCT with two sets of interrogatories and requests for production of documents to ascertain RCT's assets. *Id.* The purpose of the discovery was to identify ways to satisfy the judgment since RCT would not pay the judgment.

RCT responded to SBPI's requests, and generally stated that its sole assets consist of the following:

- (1) the Bud's diver molds (now in SBPI's possession, but remain owned by RCT);
- (2) Bud's Diver Patent No. 7,654,031;²
- (3) Patent Publication No. 2010/0223834, Application No. 12/641/291;³

² RCT refused to pay maintenance fees for Patent No. 7,654,031 and Application No. 12,641,291, stating that RCT had "no motivation to protect IP" unless its demands are met. CP at 60-61. At the time of the email, RCT was enjoined from engaging in activity that obstructed SBPI rights under the License Agreement. CP at 17-19. Ultimately, SBPI paid the maintenance fee to keep the patent current. CP at 64-65.

³ RCT did not timely respond to the United States Patent Office regarding Patent Application 12,641,291 (publication No. 2010/0223834). CP at 57-58. Counsel

- (4) the License Agreement between RCT and SBPI;
and
- (5) application for rights in Canada and in the
European Union.

CP at 40.

Further, RCT confirmed that it does not have a current bank account, an insurance policy, a corporate minute book, or financial statements. CP at 36-45. RCT also responded that it has not filed income tax returns or made a profit from January 2010 through December 2013. CP at 38-39. RCT also served a second set of interrogatories and requests for production asking RCT to provide estimated values of its assets. CP at 49-55. RCT rebuffed SBPI's attempts to partially satisfy the judgment by assigning the patent from RCT to SBPI. CP at 75-84.

As of May 4, 2016, RCT continues to assert that there are "no funds" in the RCT account. CP at 343. Puzzlingly, RCT also states that RCT "has the benefit of others" and "is capable of satisfying the amount owed to SBPI less the set-offs from Royalties and SBPI obligations regarding capital expenses." *Id.* Attorney fees have been awarded in favor

for SBPI advised RCT's counsel numerous times over several months that there as a deadline to seek revival of the 12,641,291 application and requested RCT to take measures to revive the patent that was part of the License Agreement between the parties. CP at 10. RCT did not timely act, and the USPTO abandoned the 12,641,291 application on June 15, 2013. *Id.* RCT has since revived the patent, narrowly missing permanent abandonment.

of SBPI multiple times, but have not been paid by RCT. CP at 103-111.

RCT asserts that it has no funds, accordingly, the additional attorney fees incurred by RCT for meritless appeals may go unpaid.

F. Step 6: The trial court appointed a general receiver after reviewing the extensive materials and hearing oral argument.

On April 15, 2016, SBPI filed a Motion for Appointment of a General Receiver and an Order Directing Assignment of Patent and Molds to the Receiver. CP 1-126. SBPI determined that the proper way to satisfy the judgment is to appoint a receiver to sell the patent. *See Ager v. Murray*, 105 U.S. 126 (1881) (directing patent owner to assign rights in patent such that the patent could be sold to satisfy judgment, or in the alternative, appointing a trustee to sell the patent). SBPI noted the motion for April 29, 2016. CP 112. RCT untimely served a Motion in Opposition less than forty-eight hours before the scheduled hearing, and the same Motion in Opposition was filed the day of the hearing on April 29, 2016. CP 127-167.

In was in that Motion and in its oral arguments before the Trial Court, that SBPI was initially made aware of the possibility that RCT could satisfy the Judgment. CP at 129. Because this offer was sprung upon SBPI at the last possible moment, there was no way to ascertain whether the offer was bona fide. The parties submitted 167 pages of briefing and exhibits for

Judge Cozza's review. CP 1-167. Judge Cozza also heard oral arguments on the issue of receivership.

Ultimately, after reviewing the briefs and hearing oral argument, Judge Cozza ordered appointment of a general receiver. CP 172-182. Kevin O'Rourke was named in the Order as the appointed receiver. *Id.* Between April 29, 2016 and May 10, 2016, the parties engaged in settlement negotiations via email. CP 302-328. On May 2, 2016, RCT filed a Notice of Appeal. CP 183-194.

The settlement negotiations were not fruitful, as RCT demanded upwards of \$15,000 (without identifying a true value) for "necessary capital investments" to be offset against the judgment owed. CP at 323-328. "Necessary capital investments" is not defined in the License Agreement and the parties dispute what is included. *Id.* The parties will likely have to arbitrate this dispute according to the License Agreement's requirements. Further, RCT was convinced that Judge Cozza "didn't read the memo" and "[t]he Judge just didn't read the Memos," indicating an unwillingness to accept the result of the trial court's order. CP at 304, 308.

RCT did not raise the issue of set-offs in arbitration and when the Final Award was confirmed, and hence, neither the arbitrator nor Judge Clark addressed this issue. CP 17-28. Additionally, SBPI is not satisfied that the source of the funds or the offers are legitimate because RCT

continues to claim it has no funds whatsoever. CP at 308. Yet, RCT states that it “has the benefit of others,” and this creates a paradox whereby SBPI does not trust that the settlement offers are bona fide.

G. Step 7: RCT stays the appointment of receiver.

Following the parties’ unsuccessful settlement negotiations, on May 12, 2016, RCT filed a Motion to Stay the Appointment of Receiver in Spokane Superior Court. CP 195-283. On May 20, 2016, SBPI filed its opposition the motion. CP at 284-346. On May 26, 2016, RCT paid to the Clerk of the Court \$103,000.00 drawn on Ivey Law Offices IOLTA account. CP 347-348. On May 27, 2016, a Hearing was held to consider Appellant’s Motion to Stay. After hearing oral arguments and reviewing the briefing, Judge Cozza denied Appellant’s Motion to Stay. CP at 381-382.

RCT filed a motion for discretionary review of the trial court’s denial of the motion to stay. CP 383-394. The court granted RCT’s motion for stay because it filed a supersedeas bond pursuant to RAP 8.1. CP at 398-400.

IV. ARGUMENT

SBPI sets forth five arguments below, each of which show that RCT has raised no appeal of merit. First, the standard of review in this matter is abuse of discretion. Second, there has been no showing of abuse

of discretion to appoint a receiver, and the trial court's appointment was properly based on the language of the statute and facts of this case. Third, there was no error for the court to consider the entire record, including this Court's strong language in a prior appeal, and there is no evidence the court did not "consider" (or legal arguments to suggest the court must consider) RCT's statement that it was willing to settle the matter. Fourth, a stay should not issue in this case because the proper remedy is release of the bond, or in the alternative, immediate appointment of the receiver. Fifth, SBPI should be awarded reasonable attorneys' fees for responding to the instant appeal, which lacks merit in both law and fact.

A. The standard for review for appointment of receiver is abuse of discretion.

A court's appointment of a receiver is only overturned where the appointment was an abuse of discretion. *Womach v. Sandygren*, 94 Wash. 256, 162 P. 354 (1917) ("the court's appointment [of a receiver] will not be disturbed where record does not show an abuse of discretion"); *Mony Life Ins. Co. v. Cissne Family L.L.C.*, 135 Wn. App. 948, 952-53, 148 P.3d 1065, 1066 (Div. 3 2006) (affirming trial court order "because he trial court did not abuse its discretion in appointing or compensating the receiver"). It is an abuse of discretion where the "decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons.” *Mony Life*, 135 Wn. App. at 952 (citing *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006)). Findings of fact and conclusions of law are not required to appoint a receiver. *Mony Life*, 135 Wn. App. at 952.

B. The trial court’s order appointing receiver is not an abuse of discretion.

The RCWs give the trial court “broad discretion over receiverships.” *Bero v. Name Intelligence, Inc.*, 195 Wn. App. 170, 175, 381 P.3d 71, 74 (Div. 1 2016) (citing RCW 7.60.055). The power to appoint a receiver is considered discretionary. *Mony Life*, 135 Wn. App. 952–53. A receiver is “the court’s agent” appointed to “take possession of, manage, or dispose of property of a person.” *Bero*, 195 Wn. App. at 175 (citing RCW 7.60.005(10)).

Receiverships are to be employed where the receivership “is reasonably necessary and that other available remedies either are not available or are inadequate.” *Mony Life*, 135 Wn. App. 953. The appellate court “will consider the affidavits and oral evidence . . . but will not overrule or interfere with the discretion of the trial court on the mere weight of the evidence.” *Draper v. J. G. Robinson Lettuce Farms*, 164 Wash. 8, 12, 2 P.2d 661, 662 (1931) (citing *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, 54 P. 1128 (1898)).

The statutory scheme for receiverships lists 40 circumstances by which a receiver is proper. RCW 7.60.025(1)(a)-(nn). In other words, SBPI is not limited to subsections (1)(e) or (1)(f) as argued by RCT.

Here, at the trial court, SBPI argued that a receivership was justifiable under subsections (1)(c), (1)(e), (1)(g), and (1)(nn). CP at 119. Those subsections authorize a receivership in the following instances:

(1)(c) After judgment, in order to give effect to the judgment;

(1)(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;

(1)(g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property's owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;

(1)(nn) In such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.

RCW 7.60.025(1). As set forth above, the trial court has *broad authority* to appoint receivers. *Bero*, 195 Wn. App. at 175 (citing RCW 7.60.055).

This is reflected in the broad statutory language, e.g., “[a]fter judgment, in

order to give effect to the judgment” or when “it may be necessary to secure ample justice to the parties.” RCW 7.60.025(1)(c), (nn).

Accordingly, RCT must show that the court abused its broad authority to appoint a receiver to “give effect to the judgment,” “to preserve or protect [property], or prevent its transfer,” to “secure ample justice to the parties,” or because the “nature of the property or the exigency of the case otherwise provides cause” for a receiver. Plainly, RCT’s meandering brief does not address the justifications advanced to the trial court.⁴

Accordingly, there are three reasons why the trial court’s appointment of receiver should be affirmed. First, this case’s history shows that other remedies⁵ are not available. For three years, SBPI has exhausted every possible remedy in attempt to satisfy its Judgment against RCT. SBPI attempted to take the judgment debtor examination of RCT on

⁴ RCT spends portions of its brief addressing subsections (1)(e) and (1)(f). Subsection (1)(f) is completely irrelevant because SBPI never advanced it as a justification. Further, (1)(e) plainly states that the subsection applies before execution, therefore, RCT’s argument that execution is a statutory prerequisite is not supported by the statute or case law. Moreover, a writ of execution is not a sufficient remedy because the intangible nature of the asset requires legal assignment. Regardless, SBPI advanced additional justifications ((1)(c), (1)(g), and (1)(nn)) for appointment of receiver.

⁵ Settlement is not a “remedy.” SBPI engaged in settlement negotiations with RCT in a good faith attempt to end this matter without using additional resources, however, it is not a remedy in the true sense of the term. *See, e.g.*, Black’s Law Dictionary (10th ed. 2014) (“A remedy is anything *a court can do* for a litigant who has been wronged or is about to be wronged”) (citing Douglas Laycock, *Modern American Remedies* 1 (4th ed. 2010)) (emphasis added).

numerous occasions in Kennewick, Washington, proposed assignment of the Patent to SBPI, and served RCT with two sets of post-judgment discovery requests. RCT's post-judgment discovery responses and its counsel's representations illustrate that RCT is insolvent, but for the Bud's diver molds and the Patent. RCT has no revenue or other assets to satisfy the Judgment. It is unclear where potential source of funding may arise from and RCT has not been forthcoming with the source of funds. Therefore, without remedies, the receivership is necessary to "give effect to the judgment," "to preserve or protect [property], or prevent its transfer," and to "secure ample justice to the parties."

Second, if a receiver is not appointed, the next three years of this matter will mirror the first three years. RCT has already been held in contempt, has nearly lost its patent ownership due to failure to respond to the USPTO, filed baseless appeals, maintained meritless arguments before the Court and in emails to counsel, made no reasonable offer to counsel, and unreasonably multiplied the proceedings to the detriment of the parties and the court. To top it off, RCT now has the mysterious "benefit of others" despite having no corporate assets. SBPI submitted these arguments to the trial court, which used its discretion to enforce SBPI's judgment by appointing a receiver. Therefore, to end RCT's unreasonable delay and vexatious litigation, the receivership is necessary to "give effect

to the judgment,” “to preserve or protect [property], or prevent its transfer,” and to “secure ample justice to the parties.”

Third, RCT has not shown a modicum of abuse of discretion by the trial court. About half of RCT’s arguments center around the evidence presented to the court and the other half center around RCT’s mistaken understanding of “set offs.” First, RCT acts as if the proceedings before the trial court were *ex parte*; to the contrary, it had the chance to timely file a response to the motion to appoint receiver (it filed an untimely response), and it also had the opportunity to present oral argument to the court. Frankly, the arguments are not grounded in any conceivable reality, and the extensive record presented to the trial court and the opposing party’s opportunity to present contradictory evidence completely undercut RCT’s arguments.

Second, RCT has no right to “set offs” in this action; any royalties owed must be pursued in arbitration.⁶ “As to the general right of offset, it

⁶ RCT’s reliance on *Schuster v. Prestige Senior Mgmt., L.L.C.*, is completely misplaced. In *Schuster*, the Court affirmed the trial court’s finding that the right to arbitrate was waived. 193 Wn. App. 616, 649, 376 P.3d 412, 428 (Div. 3 2016). The Court explained that waiver is an “intentional relinquishment or abandonment of a known right.” *Id.* at 631. The party invoking waiver has a “heavy burden of proof.” *Id.* at 632. Waiver requires “acts inconsistent with that existing right.” *Id.* at 633. “A party acts inconsistently with its right to arbitrate if the party substantially invokes the litigation machinery before asserting its right to arbitration.” *Id.* at 634 (citation omitted). In *Schuster*, the parties engaged in over a 18 months of litigation before a motion to compel arbitration was filed. *Id.* at 624-25. In this case, however, the issue of royalties and necessary capital

is of course true that no right of set-off as to judgments can come into existence until *both judgments* have been rendered.” *Spokane Sec. Fin. Co. v. Bevan*, 172 Wash. 418, 421, 20 P.2d 31, 32 (1933) (emphasis added). In other words, “set offs” are an equitable *defense*, “i.e. a recognized legal right without adequate legal means of enforcement.” *Skarperud v. Long*, 40 Wn. App. 548, 550, 699 P.2d 786, 788 (Div. 3 1985) (emphasis added).

Here, the arbitration award did not mention “set-offs,” and neither did the order confirming the award. CP 17-28. Set offs cannot be awarded by the trial court because there is no judgment against SBPI. Consequently, SBPI is entitled to the full judgment amount, and any effort by SBPI to voluntarily reduce the judgment in settlement negotiations is a good faith attempt to give RCT an incentive to resolve this matter.

Furthermore, RCT has an adequate legal means of enforcement of any royalties owed. The Licensing Agreement provides that any dispute must be arbitrated – this is RCT’s remedy. SBPI *does not dispute* that royalties are owed, and has not paid royalties owed under the Licensing

investments owed *has never been litigated*, and no conceivable theory supports that SBPI has waived arbitration on this claim. Moreover, the “litigation machinery” has not been invoked on this issue; RCT has never filed a complaint that pleaded this issue. *See also Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007) (holding that trial court had jurisdiction to resolve offset issue because the complaint included a declaratory claim on the offset issue). As such, there has been no litigation on this issue, there is no complaint capable of litigation, and there is no judgment that can be the subject of set offs.

Agreement because (a) there was no assurance that RCT would pay the judgment and (b) RCT stated that it had no funds, and any royalties paid would likely be siphoned out of the corporate account to pay for additional baseless appeals. RCT seizes on this potential settlement proposal to argue that “set-offs” are a required question that needs to be answered before the judgment is satisfied.

Payment of royalties, however, is a completely discrete issue that requires its own litigation. Consequently, SBPI is entitled to the entire judgment and any effort by SBPI to reduce the amount owed was a pure tactical move designed to give RCT an incentive to settle the dispute rather than pursue additional remedies to determine the amount of royalties.

In sum, the weight of the evidence is in clear favor of a receivership so that SBPI can finally enforce its judgment against RCT. *Draper*, 164 Wash. at 12 (citing *Cameron*, 20 Wash. 169) (explaining that the appellate court “will not overrule or interfere with the discretion of the trial court on the mere weight of the evidence.”). If a receiver is not appointed, the next three years mirror the last three years, and SBPI will waste more resources dealing with an opponent that has breached agreements, unreasonably multiplied the proceedings, resisted lawful court orders, and abused the judicial system with baseless filings and appeals.

Therefore, SBPI asks the Court to affirm the trial court's appointment of receiver because there is not a modicum of abuse of discretion in this matter (in fact, good cause was shown by SBPI necessitating a receiver).

C. It is not error for the court to rely on the entire record of appeal, and there is no evidence to suggest that the court did not "consider" RCT's assertions of potential settlement.

RCT assigns errors for the court's reference to this Court's order on affirming contempt. The statutory standards for appointing a receiver is to "give effect to the judgment," "to preserve or protect [property], or prevent its transfer," and to "secure ample justice to the parties." Consequently, the court must be apprised of all improprieties in this case such that it can determine whether a receivership is proper. It is not error to evaluate prior appellate rulings that bear on the subject of the action.

RCT also assigns error for the court's failure to "consider" a tender of judgment. There is no evidence to suggest the court did not "consider" the evidence. Rather, the court had briefings from each party and heard oral argument, the court considered the evidence but ultimately found that the receivership was proper. As such, there is no showing of error on each element, and these assignments have no basis in law or fact.

D. The stay of receivership should only last during the pendency of appeal, and a stay should not be granted post-appeal.

Although this is likely clear from the Court's June 3, 2016, Order (CP 398-400) that the stay was only granted during the pendency of

appeal, SBPI briefs the issue of whether a stay should apply post-appeal if the Court finds that a receivership was not an abuse of discretion. *See CP* at 400 (“The motion for stay is granted as Rock Creek has filed a sufficient cash amount with the superior court clerk to stay execution on the amount of the judgment *pending appeal*) (emphasis added). SBPI asks the Court to clarify that the grant of stay of the receivership does not apply post-appeal. Absolute clarity is required such that RCT cannot continue to extend this matter.

A court’s order denial of a stay of proceedings is only overturned on abuse of discretion. *State v. Music*, 79 Wn.2d 699, 716, 489 P.2d 159 (1971), judgment vacated in part, 408 U.S. 940 (1972). Appellant’s meandering argument that appointment of a receiver is moot because settlement is possible is imprecise. Three years have passed since judgment was entered in SBPI’s favor in the amount of \$67,451.64. CP at 20-12. With interest and attorneys’ fees that have been awarded, the judgment is now exceeds \$100,000.00. It appears that RCT is eager to resist payment of the judgment at every turn because the mounting interest and attorneys’ fees are of no consequence as RCT has no financial assets capable of execution. There are three primary reasons why a stay is not appropriate.

First, the proper remedy if the Court determines that appointment of a receiver was not an abuse of discretion is either release of the supersedeas bond or appointment of the receiver. A party is liable on a supersedeas bond where it is not successful on appeal. *Nyby v. Allied Fid. Ins. Co.*, 42 Wash. App. 543, 547, 712 P.2d 861, 864 (Div. 3 1986). “The purpose of a supersedeas bond is to pay the judgment if affirmed on appeal—whether it be by the Court of Appeals or the Supreme Court.” *Id.* A party may move for forfeiture of a bond where damages result from delaying enforcement of an order. *Ames v. Ames*, 184 Wn. App. 826, 855, 340 P.3d 232 (Div. 3 2014) (approving trial court's partial forfeiture of bond in order to compensate the prevailing party for damages resulting from ongoing litigation). At the trial court, however, this remedy is not available and the Court’s justification for staying the current order does not exist.

Second, RCT has no right to “set offs.” Any discussions between the parties regarding a voluntary resolution of royalties owed is irrespective of the fact that “set offs” require two judgments that offset. “Set offs” in this case have never been litigated, and were never raised before the arbitrator or in the order confirming the Final Award. As such, the issue is still justiciable, but cannot be decided in this proceeding without a final judgment.

In sum, the Court should clarify its June 3, 2016, Order, and hold that the stay only applies during the pendency of appeal. If the Court holds that the appointment of a receiver was not an abuse of discretion, the Court should also order the supersedeas bond to be released to SBPI pending an affidavit of the amount of judgment, or in the alternative, order the receivership to be effective immediately.

E. SBPI is entitled to costs and attorney fees for defending this meritless appeal.

SBPI respectfully requests this court to award costs and attorney fees in SBPI's favor pursuant to RAP 18.1(a) and RAP 18.9(a). RAP 18.1(a) provides that if applicable law grants to a party the right to recover attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule. RAP 18.1(a) *see also Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 439, 98 P.3d 463 (2004) (holding that requesting attorney's fees and costs on appeal in an opening brief was sufficient for RAP 18.1(a) purposes).

To receive an award of costs and attorney fees on appeal, a party must devote a section of its opening brief to the request. RAP 18.1(b); *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 700–05, 915 P.2d 1146 (1996). “The court rule requires more than a bald request for attorney expenses on appeal.” *Id.* at 705. The party seeking costs and attorney fees

must provide argument and citation to authority to establish that such expenses are warranted. *Id.*

Pursuant to RAP 18.1 and RAP 18.9(a), a party can request an award of attorney's fees on appeal. An appeal is frivolous (and a recovery of fees warranted) “if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *In re Marriage of Greenlee*, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (quoting *Chapman v. Perera*, 41 Wash. App. 444, 455–56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985)). *See also*, *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258 (2000).

In this case, RCT has advanced *no reasonable theories* that can support an abuse of discretion by Judge Cozza. RCT’s brief submitted to support its arguments does not ground its arguments in applicable law, it clearly misstates SBPI’s stated justifications under multiple subsections of the receivership statute, raises meritless arguments, and follows no clear structure by which SBPI can apprehend RCT’s legal position. Accordingly, SBPI should be awarded attorney fees and costs incurred due to this meritless appeal.

V. CONCLUSION

A receivership will finally effectuate the judgment. SBPI has made multiple attempts over three years to bring closure to this matter. RCT has

acted in an obstructionist fashion from the beginning, resulting in contempt, affirmed by this Court.

This appeal is meritless. RCT has provided no conceivable legal theory or factual basis to show that the trial court abused its discretion. Rather, the weight of this evidence shows that no other remedies are available and without a receivership, RCT will continue to multiple the proceedings and waste resources of the court and the parties.

Accordingly, this Court should affirm the appointment of receiver and the trial court's denial of stay. It should further order the supersedeas bond to be released to SBPI pending an affidavit of the amount of judgment, or in the alternative, order the receivership to be effective immediately. Finally, the Court should grant attorney's fees and costs to SBPI for having to respond to an appeal without merit.

Respectfully submitted this 28th day of November, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of November, 2016, I caused to be served a true and correct copy of the foregoing document as follows:

Floyd E. Ivey IVEY Law Offices, PS 7233 West Deschutes Ave. Ste. C, Box #3 Kennewick, WA 99336	<input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Fax Transmission <input checked="" type="checkbox"/> Email
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