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**Court of Appeals**  
**Division III**  
**State of Washington**  
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IN THE COURT OF APPEALS, DIVISION 3, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

CASE # 35572-1-III

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

Plaintiff  
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## INTRODUCTION

When a contract has an arbitration provision, who is it that decides if a dispute is subject to arbitration? What forum makes the decision that the issue is arbitrable and to be decided in arbitration or is not arbitrable and is to be decided in the trial court? The answer is that the trial court makes the decision of arbitrability<sup>1</sup>.

The “who” or what “forum” was the principal issue in this Appeal – was the defendant’s contention that the LICENSE AGREEMENT was

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<sup>1</sup> CP 331 lines 16-20 in RCT’s Proposed Order *Davis v. General Dynamics Land Systems*, 152 Wn.App. 715, 715, 718–19 217 P.3d 1191 (Wash.App Div. 2 2009) citing and stating RCW 7.04A.060(2) " The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." ). The trial court had the responsibility for determining arbitrability, and it erred in sending that issue to the arbitrator because the Arbitration Agreement does not apply to Davis's pre-employment application claims; *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885,902fn1, 16 P.3d 617 (2001).

Terminated to be determined in the trial court or in arbitration? In this matter Appellant RCT's Proposed Order<sup>2</sup> in the format of Findings, Conclusions and Orders stated the path to analyze and reach the conclusion: decide in trial court or in arbitration. However Respondent SBPs Proposed Order<sup>3</sup>, which was the order form selected by the court, recited the court's review of pleadings which did not include Appellant RCT's Proposed Order<sup>4</sup>.

Every disagreement between parties to a LICENSE AGREEMENT containing an arbitration provision may be considered for arbitration. But some disagreements are reserved for resolution by a trial court and are not submitted to arbitration and such is the case in Washington State<sup>5</sup>. The Court of Appeals may review RCT's Proposed Order, Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in considering whether the Appellant was or was not frivolous in bringing the Motion for Summary Judgment<sup>6</sup>.

In this matter a Superior Court Case had existed since 2013 and the

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<sup>2</sup> CP 328; Proposed Order on Defendant's (RCT's) Motion for Termination of the LICENSEE AGREEMENT.

<sup>3</sup> CP 341.

<sup>4</sup> CP 328.

<sup>5</sup> CP 331 lines 16-20 in RCT's Proposed Order – *Davis* 152 Wn.App. 715(Div. 2 2009); *Godfrey* 142 Wn.2d 885(2001).

<sup>6</sup> CP 326; CP 18; CP 20

Motion from which this appeal is pending was brought in that Superior Court case. The answer re: “Who or What Forum” was before the court and opposing counsel yet there is no evidence that either the court or opposing counsel reviewed the Proposed Order on Defendant’s Motion for Summary Judgment<sup>7</sup>.

That the decision of arbitrability is made by the trial court<sup>8</sup> and a path for analysis of that decision, as found in the Appellant’s Proposed Order<sup>9</sup>, was passed over without comment by the court and by opposing counsel.

The contention in this case, in August 2017 and in the trial court<sup>10</sup>, was focused on the Licensor’s assertion that the LICENSE AGREEMENT<sup>11</sup> between the parties was terminated by the Licensee’s failure to sell the LICENSE AGREEMENT provision 6.1 mandated 15,000 units by June 1, 2016.

Rebel Creek Tackle Inc. (hereafter RCT or Licensor or Appellant) moved, on August 18, 2017, for Summary Judgment of Termination of the

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<sup>7</sup> CP 328.

<sup>8</sup> CP 331 lines 16-20 in RCT’s Proposed Order – *Davis* 152 Wn.App. 715(Div. 2 2009); *Godfrey* 142 Wn.2d 885(2001).

<sup>9</sup>CP 328.

<sup>10</sup> CP 18; Defendant’s Motion for Summary Judgment for Defendant’s Motion for Motion for Declaratory Judgment of Termination of Licensee Agreement

<sup>11</sup> CP 175-180.

LICENSE AGREEMENT. The decision required of the trial court was to identify whether the Termination issue was to be arbitrated or was to be determined in the trial court<sup>12</sup>. The first comments to the court were by RCT regarding determining where the issue of arbitrability was to be made and if not in the Superior Court then in arbitration<sup>13</sup>. That is, the first statements in argument, made to the trial court, specifically addressed the issue of who or where it is that the decision would be made regarding termination of the LICENSE AGREEMENT.

Before the trial court was a Motion for Summary Judgment. The Respondent was Seth Burrill Productions Inc. (hereafter SBP or Licensee or Respondent). SBP's opposition to the motion was not stated in terms of material fact or within which forum the issue was to be decided, but rather by denial that there was an issue to be determined<sup>14</sup> and to seek sanctions.

In colloquy "arbitrability" was not examined. The court considered routine litigation issues of defense and evidence<sup>15</sup>.

Counsel attorney Mr. Kyle Nelson, for SBP and an unidentified colleague at LEE & HAYES, determined that there was no legal basis for

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<sup>12</sup> CP 328; Proposed Order on Defendant's (RCT's) Motion for Termination of the LICENSE AGREEMENT.

<sup>13</sup> RP 3/lines 23-24

<sup>14</sup> RP 14/lines 8-9/ RP 24/line 23-25.

<sup>15</sup> RP 6/lines 4-8;RP 7/lines 2-3.

the motion and opted to instruct counsel for RCT in the law to encourage RCT to withdraw the motion<sup>16</sup>. Mr. Nelson's colleague was not named but it is known that Attorney Mr. Christopher Lynch was the principal attorney supervising four attorneys in this case commencing in 2012 with arbitration. The first three of these LEE & HAYES attorneys are no longer with that firm with Mr. Kyle Nelson's departure occurring sometime in 2017 after the August 18, 2017 Motion for Summary Judgment.

Regarding the Motion for Summary Judgment, the contention was made by SBP that there was no notice or claim or pleading and that argument was adopted by the court<sup>17</sup>. That conclusion was reached while the RCT Motion and Memorandum identified the claim as the Termination of LICENSE AGREEMENT with supporting evidence<sup>18</sup> and the Proposed Order provided and supported Findings, Conclusions and Orders.

The final Order was different in form. The failure to observe the Claim, Notice, Pleadings et. al. presented by RCT in Motion, Memorandum and the Proposed Order for Termination of the LICENSE AGREEMENT is partly where an unusual "roundabout" process of ruling

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<sup>16</sup> RP 13/line 22- page 14/line 1.

<sup>17</sup> RP 14/lines 8-9/ RP 24/line 23-25.

<sup>18</sup> CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7; CP 341.

occurred that effectively formed an Order ruling that the issue of Termination was to be in arbitration. That unusual “roundabout” process also specifically led to Denial of the Motion for Summary Judgment and then assertion of a monetary sanction against RCT attorney Floyd E. Ivey.

The “roundabout” arbitrability decision was made in the Order by combining a first paragraph 1. and a second paragraph 1. which identified Arbitration and denied the Motion for Summary Judgment<sup>19</sup>. The result was referral to Arbitration<sup>20</sup>. Thus, combining two paragraphs numbered 1, in the Order, resulted in arbitration and denied the RCT Motion for Summary Judgment<sup>21</sup>. In colloquy SBP counsel admitted that RCT could immediately commence arbitration<sup>22</sup>. Within 10 days of the Denial of the Motion for Summary Judgment RCT did commence arbitration through the American Arbitration Association. Arbitrator attorney Mr. Thomas D. Cochrane rendered the Final Award in favor of RCT Terminating the LICENSE AGREEMENT on January 22, 2018. A Motion to Supplement the Record with the Arbitration Final Award will be presented to Division III.

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<sup>19</sup> CP 342

<sup>20</sup> CP 342

<sup>21</sup> CP 342 line 12-17 found that the RCT Motion for Summary Judgment of Termination was to be made in binding arbitration; at CP 342 line 20-23 the RCT MSJ was denied.

<sup>22</sup> RP 16/line 23-RP 17/line 1.

The “roundabout” manner of considering the RCT Motion for Summary Judgment, culminating in the Order of August 18, 2017 and effectively ordering arbitration, was not accompanied by the staying of the Superior Court Case No. as is required in Washington state<sup>23</sup>. SBP counsel opposed staying the Superior Court Case pending arbitration and he, Mr. Kyle Nelson, advised the court that he was unaware of the authority regarding staying the current case<sup>24</sup>. The authority was announced in colloquy but was not acknowledged by the court or SBP counsel<sup>25</sup>.

In the aftermath of argument of where the RCT request that the arbitrability forum would be decided and was decided in the “roundabout” manner, SBP pursued sanctions against attorney Ivey. SBP Counsel rehearsed the history of disputes between these parties commencing in 2012 in the Declaration of Kyle Nelson<sup>26</sup>. Mr. Nelson’s declaration that RCT was found to be selling the LICENSED product was a misrepresentation by suggesting, without verification, that RCT was

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<sup>23</sup> RP 26/line 25–RP 27/line 10;RP27/lines16-18; *Everett Shipyard, Inc. v. Puget Sound Environmental Corp.*, 155 Wn.App. 761, 231 P.3d 200 (Div. 1 2010) citing RCW 7.04A.070(6).

<sup>24</sup> RP 27/lines 9-10.

<sup>25</sup> RP 27/lines 16-18.

<sup>26</sup> CP 161.

selling<sup>27</sup>. The LICENSEE AGREEMENT contains an Arbitration Provision which requires arbitration of disputes where cure is allowed. Failure to make the required sales was not subject to cure<sup>28</sup>. SBP contended that the Superior Court Case was closed, that SBP Counsel's written admissions that SBP had failed to make the required sales did not meet evidentiary standards, that the issues were required to be resolved by arbitration and that the RCT Motion for Summary Judgment violated CR 11<sup>29</sup>.

The matter was in arbitration within 10 days of the August 18, 2017 Order, was appealed, and the LICENSE AGREEMENT was terminated by Arbitration on January 22, 2018.

However, sanctions were imposed on the court's conclusion that the Motion for Summary Judgment was frivolous it being the court's "realization" that any attorney with experience would know that the Motion for Summary Judgment would fail<sup>30</sup>. And yet the court's "roundabout" determination was that arbitration would be the forum for resolution of the Motion for Termination of the LICENSE AGREEMENT, with that being the decision that is to be made by a trial court in

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<sup>27</sup> CP 167/para 27 lines 7-10.

<sup>28</sup> CP 174 subsections 6.1 and 8.3.

<sup>29</sup> CP 137/lines 3-8.

<sup>30</sup> RP 25/lines 2-6;

Washington State<sup>31</sup>. The sanction imposed was \$4,500. The Arbitration Final Award terminating the LICENSE AGREEMENT was realized within 6 months from the Superior Court Order on Summary Judgment relying primarily on the Pleadings and Arguments presented to the trial court in this Motion for Summary Judgment.

The “roundabout” circuitous route taken by the court did lead to the determination that arbitration was the forum to be employed to address the Termination issue<sup>32</sup>. However, that route also facilitated the court’s decision to impose sanctions.

Had the RCT Proposed Order been considered, the court would have had substantive proposed Findings, Conclusions and Orders to contemplate with exhibits identified supporting each Conclusion<sup>33</sup> thereby casting a different light on sanctions in opposition of the court’s conclusion of certain failure. Counsel Nelson’s characterization of actions by RCT attorney Ivey<sup>34</sup> would also have been appreciated in a different light had the RCT Proposed Order<sup>35</sup> been considered.

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<sup>31</sup> CP 331 lines 16-20 in RCT’s Proposed Order – *Davis* 152 Wn.App. 715(Div. 2 2009); *Godfrey* 142 Wn.2d 885(2001).

<sup>32</sup> CP 331 lines 16-20 in RCT’s Proposed Order – *Davis* 152 Wn.App. 715(Div. 2 2009); *Godfrey* 142 Wn.2d 885(2001).

<sup>33</sup> CP 331 lines 16-20 in RCT’s Proposed Order – *Davis* 152 Wn.App. 715(Div. 2 2009); *Godfrey* 142 Wn.2d 885(2001).

<sup>34</sup> CP 136/lines 17-19.

<sup>35</sup> CP 331.

The trial court ruling should be reversed with the “arbitrability” processes from *Davis, and Everett*, supra, reaffirmed and SBP’s counsel, LEE & HAYES or Attorney Kyle Nelson ordered to repay \$4,500 plus interest at judgment rates to attorney Floyd E. Ivey<sup>36</sup>.

#### ASSIGNMENT OF ERRORS

Assignment of Error 1. Did the Court err in denying the RCT Motion for Summary Judgment and thereby failing to explicitly consider the forum required to determine arbitrability and to explicitly conclude which forum was to determine arbitrability?

Assignment of Error 2. Did the Court err thereby effectively ordering the Termination issue to be determined in arbitration but not in staying the Superior Court Case?

Assignment of Error 3. Did the Court err in granting the SBP Motion for CR 11 sanctions?

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<sup>36</sup> *Meeker v. Johnson*, 3 Wash. 247,252(1891).

Assignment of Error 4. Did the Court err in denying the RCT Motion for CR 11 sanctions?

#### STATEMENT OF THE CASE

Rebel Creek Tackle Inc. is the Plaintiff-Appellant and is referred to as RCT or Licensor or appellant. Seth Burrill Production Inc. is the Defendant-Respondent and is referred to as SBP or Licensee or respondent. Seth Burrill and Allen Osborn are referenced in the Clerk's Papers in Declarations submitted in the Trial Court and at Arbitration. Seth Burrill is an officer of Seth Burrill Production Inc. Allen Osborn is an officer of Rebel Creek Tackle Inc.

RCT licensed SBP to sell RCT's Patented and Patent Pending fishing devices<sup>37</sup>. The original LICENSE AGREEMENT, provision 6.1<sup>38</sup>, required SBP to sell 15,000 units by June 1, 2015. The date was extended to June 1, 2016 by an arbitration Final Award in 2013<sup>39</sup>. SBP did not sell the required number of units by the deadline. That failure was admitted by SBP Counsel Smith by Letter dated June 10, 2016<sup>40</sup>. SBP Attorney Smith's letter and denial was refuted by SBP Counsel Nelson in

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<sup>37</sup> CP 174

<sup>38</sup> CP 178.

<sup>39</sup> CP 189.

<sup>40</sup> CP 99 third para.

the August 18, 2017 Motion for Summary Judgment. However, in the immediately following Arbitration, the SBP failure to make the required sales was admitted by SBP counsel Christopher Lynch in SBP's Response with Mr. Lynch's Arbitration Response Brief to be presented to the Court of Appeals in a Motion to supplement the Record.

SBP counsel Smith, in his 2016 letter, blamed the SBP failure to make the required sales on RCT. SBP counsel Nelson asserted that the admissions by SBP counsel Smith did not meet evidentiary standards. SBP counsel Lynch admitted the sales required had not been made and blamed the failure on RCT.

Arbitrator Thomas D. Cochrane concluded that RCT did not cause SBP to fail to make required sales and ordered that the LICENSE AGREEMENT was terminated effective January 22, 2018.

The Motion for Summary Judgment of Termination of LICENSE AGREEMENT was denied on August 18, 2017, the Arbitration was commenced by August 28, 2017 and the Arbitration Final Award Terminating the LICENSE AGREEMENT was issued January 22, 2018.

By review of the Pleadings, Notice and argument in the RCT Memorandum Supporting the Motion for Summary Judgment<sup>41</sup> and the

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<sup>41</sup>CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7; CP 341.

RCT Proposed Order<sup>42</sup> claims and supporting evidence are found supporting the Motion for Summary Judgment.

RCT gave notice that the contractual sales had not been made and that the LICENSE AGREEMENT was Terminated. Notice was given in a Declaratory Judgment on June 1, 2016 and again by US Mail to Mr. Seth Burrill on June 21, 2016 and was copied to SBP counsel Smith.

RCT noted its Motion for Summary Judgment of Termination of the LICENSE AGREEMENT for hearing in Superior Court, Case # 13-2-01982-0 on August 18, 2017. SBP moved for CR 11 sanctions and RCT made a counter-motion for CR 11 sanctions. The Motion for Summary Judgment was denied, the RCT Motion for sanctions was denied and the SBP motion for sanctions was granted imposing sanctions of \$4,500 against attorney Floyd E. Ivey.

On or about August 28, 2017 RCT commenced arbitration with the American Arbitration Association. RCT briefed and provided exhibits supporting the failure of SBP to meet the contractual demand that 15,000 units be sold by June 1, 2016. SBP, in Response admitted the failure to make contractually mandated sales and blamed the failure on RCT. The Arbitration Final Award on January 22, 2018 found that RCT did not

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<sup>42</sup> Id footnote 12; CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7.

cause the failure to make the required sales and TERMINATED THE LICENSE AGREEMENT.

### **ARGUMENT- ASSIGNMENT OF ERROR 1 AND 2**

I.Regarding Assignments of Error 1 and 2. RCT contends that the Trial Court erred in denying the RCT Motion for Summary Judgment, erred in failing to explicitly consider the forum required to determine arbitrability, erred in failing to explicitly conclude which forum was to determine arbitrability and, upon ordering that the issue of Termination was to be determined in arbitration, erred in failing to stay the present Superior Court Case.

The LICENSE AGREEMENT between RCT and SBP contained an arbitration provision.

#### **1.A.Standards of Review for Summary Judgment and Arbitrability.**

The court reviews an order or denial of summary judgment de novo, performing the same inquiry as the trial court. The court construes the " facts and reasonable inferences from the facts ... in the light most favorable to the nonmoving party." A material fact is one upon which the outcome of the litigation depends. The burden is on the moving party to show no remaining issue of material fact. The nonmoving party must

specify facts demonstrating a genuine issue of material fact and cannot rest on mere allegations. The court affirms a summary judgment if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. *Montgomery v. Engelhard*, 188 Wn.App. 66, 69 (Div 3 2015).

Regarding questions of arbitrability, the Court of Appeals reviews questions of arbitrability de novo and determines the arbitrability of the dispute by examining the arbitration agreement between the parties. If the court can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration. If arbitration is ordered the court stays the pending superior court case. *Davis v. General Land Systems*, 152 Wn.App. 715, 718, 217 P.3d 1191 (Div. 2 2009); *Everett Shipyard v. Puget Sound Environmental Corp*, 155 Wn.App. 761 (Div 1 2010).

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### **Argument**

**1.B.RCT** brought a Motion for Summary Judgment asserting that the LICENSE AGREEMENT with SBP was terminated for failure of SBP to

make sales as required by LICENSE AGREEMENT provision 6.1<sup>43</sup>

stating in part as follows:

**6.1 LICENSOR and LICENSEE agree that it is difficult to predict the market for the ROYALTY BASED PRODUCTS. In the event that LICENSEE fails to sell a total of fifteen thousand (15,000) units of the ROYALTY BASE PRODUCTS within the first five (5) years of this AGREEMENT, then LICENSOR may terminate this AGREEMENT by written notice to LICENSEE within thirty (30) days of the five (5) year anniversary of this AGREEMENT. (Emphasis added)**

The LICENSE AGREEMENT contains an Arbitration provision<sup>44</sup> stating in part as follows:

**Paragraph 8.3: "No cure period is required, except as may be otherwise provided in this AGREEMENT, if: (a) this AGREEMENT sets forth specific deadline dates for the obligation allegedly breached; or (b) this AGREEMENT otherwise states that no cure period is required in connection with the termination in question. (Emphasis added)**

RCT gave notice of Termination as follows: on June 1, 2016 by filing a Declaratory Judgment in Spokane County Superior Court case # 13-2-01982-0 and by mail to Mr. Seth Burrill, Seth Burrill Productions Inc. on June 21, 2016. RCT filed its Motion for Summary Judgment for Termination of the LICENSE AGREEMENT on July 5, 2017 for hearing August 18, 2017<sup>45</sup>.

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<sup>43</sup> CP 175 subsections 6.1 and 8.3.

<sup>44</sup> CP 175 subsection 8

<sup>45</sup> CP 20.

RCT also filed its RCT Proposed Order on Summary Judgment setting forth proposed Findings, Conclusions and Orders with supporting evidence and Exhibits identified<sup>46</sup>.

In the RCT Proposed Order at CP 328-330 the Finding 1. with support is stated that LICENSE AGREEMENT provision 6.1 required sales of 15,000 units by June 1, 2016, that SBP's counsel's letters admitted that sales had not been made, that RCT had the option of terminating the LICENSE AGREEMENT upon notice and that RCT did give notice of Termination.

In the Proposed Order CP 330-331 Finding 2. regarded the SBP contention that notice was not properly given with the Finding that SBP contended that notice was required to be given within 30 days preceding May 31, 2016 and that such notice was not given. The proposed Conclusion was that the Arbitrator's comment of notice being required before May 31, 2016 was dicta and was not binding.

In the Proposed Order CP 331-332 Finding 3. regarded the Arbitration Provisions 8.1 through 8.6, that arbitration is required when cure is permitted per 8.2 and 8.4. The proposed Conclusion was that the

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<sup>46</sup> CP 328 Proposed Order on Defendant's (RCT's) Motion for Termination of the LICENSE AGREEMENT. CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7 Notices, Pleading, Claims in the Memorandum Supporting the Motion for Summary Judgment.

trial court and not an arbitrator determines arbitrability citing *Davis*, supra, and *Godfrey v. Hartford Cas. Ins. Co.* 142 Wash.2d 885 (2001), that the arbitration provisions do not allow cure and that if the court orders arbitration that the trial court must stay the case citing *Everett Shipyard v. Puget Sound Environmental Corp.*, 155 Wn.App. 761 (Div 1 2010).

In the Proposed Order Issue 4. Findings and Conclusions are stated that the LICENSE AGREEMENT is Terminated.

In the Memorandum Supporting the Motion for Summary Judgment the Pleadings, and Claims are set forth at CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7.

1.C. In Argument of the Motion for Summary Judgment on August 18, 2017, RCT Counsel Ivey introduced the argument:

"Your Honor, I believe there are three different matters that you will rule on today; one of them is the summary judgment brought by Rebel Creek to be granted, if not in the Superior Court then is it to be referred to arbitration,...(RP 3/lines 21-24)

And RCT counsel argued that SBP as the non-moving party was required to show material facts and if not then that the Motion for Summary Judgment should be granted and that the trial court should make the ruling and should hold that the LICENSE AGREEMENT was terminated. (RP 4/line 2 through RP 5/line 13. At RP 5/line 14 RCT counsel stated:

And so that advances to the issue of whether this Court has the authority to handle this matter as a controversy that is subject to the Court's judgment.

At RP 6/lines 1-3 RCT counsel stated that the issues raised by SBP were not material as required.

The court responded RP 6/lines 4-8:

THE COURT: All right. So you don't believe that given the context of litigation that they would have a defense or even an arguable defense that their inability to complete the contractual terms was not contributed to your client, you don't think that would be allowed in court?

At RP 7 the Court indicated its contemplation of whether RCT acts had prevented SBP from making sales and whether or not it would be pertinent to allow SBP to pursue that concern.

The court's reference to the potential for RCT to have had a role in preventing SBP's attaining its sales goal is and was not understood to be made from the view of arbitrability but rather from a view of either SBP raising a material fact or the court considering such as a rudimentary possibility needing to be developed in litigation.

The court was not considering the matter of arbitrability as required by *Davis*, supra as shown by the failure of the Court to Find, much less mention in argument, that the issue was subject to arbitration even though the arbitration provisions did not provide for cure where a date certain was set in the LICENSE AGREEMENT at 6.1.

RCT Counsel emphasized the requirement of *Davis*, supra, at RP

7/line 22-RP 8/line 2 stating:

MR. IVEY: If it is not a matter of summary judgment then the issue is whether or not this could be decided in Superior Court or arbitration and under RCW 7.04(a).060(2), the Court is to decide whether an arbitration agreement exists or if they counter the subject to an agreement to arbitrate.

And again RCT Counsel at RP 8/lines 2-7 differentiates this case from one where the court would direct the case to arbitration noting the nature of the conflict in *Marcus*, 192 Wn.App. 465, where there was a dispute as to the amount of a commission. In the instant matter there was no dispute regarding the failure to sell 15,000 as shown by attorney Mr. Smith's letters acknowledging the failure to sell the mandated quantity.

Counsel for SBP showed no sign that a decision regarding arbitrability was an issue. SBP counsel advised the court RP 13/line 23 – RP 14/line 1 that:

in July I reviewed this motion along with an attorney at my law firm, Lee and Hayes, and we determined there was no legal basis for this motion so I wrote a letter to Mr. Ivey asking him to withdraw this motion.

SBP counsel recited his view that there was no claim<sup>47</sup> disregarding both the Proposed Order and the statement of claim in the

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<sup>47</sup> RP 14

Memorandum Supporting the Motion for Summary Judgment<sup>48</sup>. Counsel asserted that “every issue is subject to mandatory arbitration<sup>49</sup>” thereby suggesting his lack of awareness of an issue regarding who or where arbitrability is determined. SBP counsel Mr. Nelson had the RCT Proposed Order citing *Davis and Everett*<sup>50</sup>, supra, yet ignored the claims in the Motion for Summary Judgment, Ignored the RCT Proposed Order and ignored “who” it was that would decide trial or arbitration and failed to raise the cases to the trial court.

Colloquy between the court and SBP counsel was as follows<sup>51</sup>:

THE COURT: Let me just ask you this, do you believe that if they pursue their claim at this time arbitration would be available to them?

MR. NELSON: Arbitration is available.

THE COURT: That's your position?

MR. NELSON: We've insisted on arbitration and we've never wavered from that.

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<sup>48</sup> CP 328 Proposed Order on Defendant's (RCT's) Motion for Termination of the LICENSEE AGREEMENT. CP 20/lines 17 through CP 27/line 2 stating claims, pleadings, notices and SBP Defenses with exhibits regarding Notices, Pleading, Claims in the Memorandum Supporting the Motion for Summary Judgment.

<sup>49</sup> RP 16/lines 18-20

<sup>50</sup> CP 328 Proposed Order on Defendant's (RCT's) Motion for Termination of the LICENSEE AGREEMENT. CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7 Notices, Pleading, Claims in the Memorandum Supporting the Motion for Summary Judgment.

<sup>51</sup> RP 16/line 23 – RP 17/line 5

THE COURT: Thank you.

1.D.The “roundabout” Order Sending the Case to Arbitration. At RP

23/line 6-20, when considering the SBP CR 11 motion, the following

focused on the known existence and the availability of arbitration:

MR. IVEY: Well, in this case counsel has just argued that there are no claims left and yet he's ready to go to arbitration so, obviously, in his mind there's no claims left for this argument with this Judge but he's ready to take the same claim to arbitration.

It's clear that there was a declaratory judgment filed and the Court of Appeals made decisions only on the amount of the judgment that was issued through arbitration back in 2014. **So the matter of there being no claim made is quite apparently incorrect and it's stated only for the purpose of dragging us in here to make these arguments. But I think if the Court sees that there is a claim left and that it be done here in this court and resolved or in arbitration, in either event the work done by the attorneys in this matter largely have applied both to this matter being in Superior Court or in arbitration. (Emphasis added)**

The Court denied the Motion for Summary Judgment and imposed sanctions against attorney Floyd E. Ivey and the case went to arbitration 10 days later with a ruling for RCT 6 months later. Arbitrator Thomas D. Cochrane ruled the LICENSE AGREEMENT Terminated as of January 22, 2018.

The ruling sending the Termination claim to arbitration was on the basis of it being obvious to any attorney with experience that the Motion for Summary Judgment would fail<sup>52</sup>. However, the fact is that the claim was articulated in the Motion for Summary Judgment and a template provided for the court and SBP counsel in the RCT Proposed Order<sup>53</sup>. Each issue suggested by SBP was addressed with evidence. Substantial evidence existed upon which the court could have ordered that the Termination issue would be determined in court had the court considered arbitrability.

SBP did not state a material fact opposing the Motion for Summary Judgment.

The Court erred in not considering the RCT Proposed Order and in not clearly ruling, based not on what discovery or testimony might disclose in a trial, but based on whether there was a Finding that the Arbitration Provision in LICENSE AGREEMENT Section 8 allowed a cure and if no cure that the issue of Termination would be considered in court.

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<sup>52</sup> RP 26/lines 11-24. RP 32/line 24 to RP 33/line 14.

<sup>53</sup> CP 328 Proposed Order on Defendant's (RCT's) Motion for Termination of the LICENSEE AGREEMENT. CP 18/lines 17-19; CP 23/line 2-4; CP 26/line 3 – CP 36/7 Notices, Pleading, Claims in the Memorandum Supporting the Motion for Summary Judgment.

The court erred in not considering *Davis*, supra<sup>54</sup> and in not ruling on arbitrability. Counsel for RCT requested, and the court initially agreed, to stay the case upon the ruling that the RCT issue of Termination would be determined by arbitration. Thereafter SBP counsel moved for reconsideration of the stay and stay was stricken from the Order.

The court erred in sending the case to arbitration without staying the present and still open Superior Court Case as required by *Everett*, supra.

SBP counsel led the court into error asserting that mandatory arbitration was required for every instant of dispute between the parties and in not considering *Davis*, supra. And SBP counsel successfully directed the court away from staying the case upon the Court's ordering that the matter be decided in arbitration<sup>55</sup>. SBP counsel Mr. Nelson is no longer with the LEE & HAYES firm advising RCT that attorney Ms. Sarah Elsdon with LEE & HAYES was henceforth the representative of SBP. Supervising attorney Mr. Christopher Lynch remains with LEE & HAYES, was counsel Responding in the August 28, 2017 Arbitration and

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<sup>54</sup> RP 26/lines 11-24

<sup>55</sup> RP 26/line 25 – RP 28/line 18 followed by striking stay on SBP's motion for reconsideration at RP 30/line 16 to RP 32/line 23.

was the only LEE & HAYES attorney signing the Response in the Arbitration.

1.E.Conclusion – Division III should rule as follows: reverse the denial of the RCT Motion for Judgment on the basis that SBP did not assert a material fact in opposition; find that the court erred in not applying *Davis* and *Everett*, supra by not ruling on arbitrability and stay; and require the SBP law firm to repay the \$4,500 sanction, plus interest at judgment rate, to attorney Floyd E. Ivey.

#### **ASSIGNMENT OF ERROR 3 AND 4**

II.Regarding Assignments of Error 3 and 4. Did the Trial Court err in granting the SBP Motion for CR 11 sanctions personal to attorney Floyd E. Ivey and in denying the RCT Motion for CR 11 sanctions against SBP?

2.A. Standards of Review for CR 11 Sanctions.

The Court of Appeals reviews a trial court's decision to award or deny sanctions under CR 11 for an abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *Ames v. Pierce County*, 194 Wn.App. 93, 120-21, 374 P.3d 228 (Div. 2 2016)

CR 11 requires attorneys to make certain guarantees when they sign pleadings, motions, briefs, and legal memoranda. Specifically, an

attorney's signature is his or her certification that the pleading, brief, or motion is " (1) ... well grounded in fact; [and] (2) ... warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR 11(a). The rule is not meant to be a " fee shifting mechanism" or to " chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," but to curb abuses of the judicial system and to deter baseless filings. *Id.*

A filing is " baseless" when it is " '(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.'" A trial court may not impose CR 11 sanctions for a baseless filing unless it determines both that (1) the claim was without a factual or legal basis and (2) the attorney who signed the filing failed to perform a reasonable investigation into the claim's factual and legal basis. *Id.*

The Court of Appeals reviews a superior court's decision to impose or deny CR 11 sanctions for an abuse of discretion. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn.App. 720, 745, 218 P.3d 196 (2009). A superior court abuses its discretion only when it bases a ruling on untenable or unreasonable grounds. *State v. R.G.P.*, 175 Wn.App. 131, 136, 302 P.3d 885, review denied, 178 Wn.2d 1020 (2013). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

Under CR 11, a superior court may impose sanctions to remedy situations "where it is patently clear that a claim has absolutely no chance of success." *Saldivar v. Momah*, 145 Wn.App. 365, 404, 186 P.3d 1117 (2008) (quoting *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 122, 780 P.2d 853 (1989)), review denied, 165 Wn.2d 1049 (2009). However, in doing so, courts "must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer." *Id.*

CR 11 addresses two types of filings-(1) baseless filings and (2) filings made for an improper purpose. *West v. Wash. Ass'n of County Officials*, 162 Wn.App. 120, 135, 252 P.3d 406 (2011). A filing is

baseless if it is "(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law." *Id.* (quoting *MacDonald v. Korum Ford*, 80 Wn.App. 877, 883-84, 912 P.2d 1052 (1996)). If a party files a baseless motion, the superior court may impose sanctions upon motion or "upon its own initiative." CR 11(a). The superior court is not required to impose sanctions for every CR 11 violation. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 219, 304 P.3d 914, review denied, 178 Wn.2d 1022 (2013). Also, the court may deny a request for sanctions without entering findings on whether or not a CR 11 violation occurred. *Id.*

2.B.SBP sought sanctions of \$13,000<sup>56</sup> for its research and briefing to support its CR 11 Motion asserting that attorney Floyd E. Ivey had filed a baseless Motion for Summary Judgment.

In the RCT Motion for Summary Judgment, the filing was not baseless being (a) well grounded in fact, and (b) warranted by (i) existing law? Division III is respectfully directed to the claims plead in the Motion for Summary Judgment stating the relationship of the parties via a LICENSE AGREEMENT<sup>57</sup> containing a requirement that SBP sell 15,000 units by June 1, 2016<sup>58</sup>, that SBP failed to make the required sales RCT and that RCT had the option to Terminate the LICENSE AGREEMENT<sup>59</sup>.

And, further, that the LICENSE AGREEMENT Arbitration provision provided for the resolution of disputes between the parties by

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<sup>56</sup> RP 18/line 7

<sup>57</sup> CP 20/lines 18-20.

<sup>58</sup> CP 20/line 23-CP 21/line 2.

<sup>59</sup> CP 21/line 21-26.

arbitration when a breach was curable and that the failure to make the required sales was not curable<sup>60</sup>. And, additionally that with the breach of the agreement not being curable that the trial court would be correct in ordering that the claim of Termination of the LICENSE AGREEMENT would be determined in the trial court and not in arbitration<sup>61</sup>. And further that RCT gave notice of Termination of the LICENSE AGREEMENT in the RCT Motion For Declaratory Judgment, that SBP counsel Smith acknowledged the Notice by the Admission that:

**"Moreover, the criteria for termination of the License is number of units sold. The only reason SBPI was unable to sell the required number of units..." (Emphasis added)**

And further that a second Notice of Termination was mailed to Mr. Seth Burrill and SBP on June 21, 2016<sup>62</sup>. And that SBP counsel Smith responded with the same admission of failure to make the required sales and stating that the Notice was ineffective being required by the prior arbitration to be given within 30 days prior to May 31, 2016<sup>63</sup> thereby raising the issue of dicta. The arbitrator referred to 30 days prior to May

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<sup>60</sup>CP 23/lines 2-8; CP 31/line 9 – CP 32/line 16.

<sup>61</sup> CP 25/line 25-CP 26/line 2.

<sup>62</sup> CP 25/line 16-19.

<sup>63</sup> CP 26/lines 2-7.

31, 2016 in commentary with no reference in the Final Award with this reference dicta<sup>64</sup>.

SBP asserted that the admitted failure to make the required sales was the fault of RCT. RCT refuted this contention<sup>65</sup>.

Additionally, and for further clarification that claims were asserted and clearly available for SBP's consideration and development of the Material Fact(s) needed for opposition, RCT set out in the Memorandum proposed Findings and Conclusions<sup>66</sup>.

As in *Ames's*, Id 120-21, RCT's Memorandum Supporting the Motion for Summary Judgment and Proposed Order demonstrates that the RCT claims for Termination of the LICENSE AGREEMENT were made in good faith and after a consideration of and inquiry into relevant evidence, contractual relations and precedent. First, RCT began its pleading with reference to contractual provisions and factual acts by SBP which breached the Agreement. RCT gave notice with SBP counsel admitting the breach in failing to make required sales. RCT refuted defenses and set out proposed Findings, Conclusions and Rulings.

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<sup>64</sup> CP 25/lines 4-9; CP 28/line 24-30/line 1.

<sup>65</sup> CP 30/lines 3-20.

<sup>66</sup> CP 35/line 21-26.

RCT cites case law regarding the issue of whether a contention between the parties would be resolved in the trial court or in arbitration and cited to case law regarding the stay of the case should arbitration be determined. *Davis and Everett*, supra.

SBP's responses to the stated claims was to deny that SBP counsel Smith letters were admissions that met evidentiary standards, that the notice of Termination was effective, that any claims had been asserted and that SBP had warned RCT counsel Ivey of these fatal deficiencies lest SBP would be put to the burden of seeking CR 11 sanctions. It is additionally noted that SBP also failed to reveal its possession of the RCT Proposed Order which provided important guidance to the court and to SBP regarding issues regarding whether or not arbitration was applicable.

However, SBP did offer comments which RCT respectfully highlights. SBP counsel Mr. Kyle Nelson provided two declarations<sup>67</sup> relying in part of the testimony found in the Declaration of Mr. Seth Burrill<sup>68</sup>. Mr. Nelson in his first Declaration<sup>69</sup> does not initially address the RCT claim and pleading assertions in its Memorandum Supporting the Motion for Summary Judgment. Rather, Mr. Nelson recites the history of

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<sup>67</sup> CP 161 and CP 299.

<sup>68</sup> CP 151.

<sup>69</sup> CP 161

disputes, court rulings, arbitrations and motions dating from 2012<sup>70</sup>. Mr. Nelson in this ten page Declaration made no reference to the RCT Motion for Summary Judgment to be heard on August 18, 2107.

Mr. Nelson did make assertions without referencing evidence or exhibits or any source for the accusations made of RCT and of RCT counsel Floyd E. Ivey;

1. at CP 162/line 11 reference is made to SBP's required sales of "about 3000" found in provision 6.2 without comment of the required sales of 15,000 units required in provision 6.1 – Provision 6.2 required 3000 sales per year assuming that the sales of 6.1 had been made and the LICENSE AGREEMENT had not been Terminated;

2. at CP 162/lines 11-12 that Mr. Ivey drafted the Agreement without reference to Mr. Seth Burrill and SBP's counsel John Carroll of Spokane Valley and his participation in drafting the Agreement;

3. at CP 162/lines 19-20 the assertion that PIM started manufacturing for RCT at Mr. Ivey's direction is unsupported;

4. at CP 162/lines 21-22 reference to changing the molds to make the product incompatible with earlier product was demonstrated to be false

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<sup>70</sup> CP 161/lines 3-CP 172/line 3, comprising the entirety of the Declaration.

during testimony at the 2013 arbitration – Mr. Nelson gives no evidence to support his statement;

5. at CP 162/line 23 – CP 163/line 2 that sales commenced **presumably** at the direction of Ivey with the “presumption void of supporting evidence”;

6. at CP 163/line 13-23 reference is made to the 2013 arbitration without reference to the arbitrator’s finding that the claim by Mr. Lynch that Mr. Burrill was the inventor of the fishing devices was false and that neither SBP or Mr. Burrill made any inventive contribution with this contention adding thousands in costs in concluding the arbitration;

7. at CP 165/lines 15-16 reference is made to SBP’s lack of knowledge that RCT had inventory while the inventory was addressed in the arbitrator’s Final Award;

8. at CP 165/lines 17-18 the statement “...[RCT] held and surreptitiously began selling on or before June 8, 2016...” is without foundation but may be based on unfounded assertions in the Declaration of Seth Burrill;

9. at CP 165/lines 18-20 the statement “...appears that there may have been undisclosed funds or parties in interest because, as explained below, Rebel went from having no assets to coming into over \$100,000 in

cash is a supposition that assets were undisclosed in discovery and is without basis;

10. at 167 paragraph 27 the assertion is made that RCT was discovered to be selling – with the statement wholly lacking in fact or truth; 11. at CP 168 line 12 – 169/line 3 the assertion that the Superior Court Case was over and yet it remains an open case today.

These and other unsupported assertions were made by Mr. Kyle Nelson. It is respectfully asserted that the purpose of such suggestions, without demonstrated evidence was a factor in leading the trial court away from the law of *Davis and Everett, Id*, and toward error. It is respectfully asserted that the Nelson Declaration at CP 161 is a weaponization of a pleading to achieve a result prohibited by CR 11.

Mr. Nelson filed the Declaration<sup>71</sup> of Seth Burrill in Support of the SBP Motion for CR 11 Sanctions. Mr. Nelson offers the “conclusions” of Mr. Burrill including at CP 151/paragraph 2 that attorney Floyd Ivey harasses, retaliates, and that SBP has no other options but CR 11. At CP 152/para 4 that SBP has control of the patents as long as it sells 3000 units per year.

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<sup>71</sup> CP 151.

Also at CP 152 paragraph 4 that Floyd Ivey has retaliated by filing a Bar Complaint against one of SBP's attorneys.

At CP 153 paragraph 6 is the assertion that Floyd Ivey and Rebel was, without knowledge of SBP, modifying the molds and that PIM was manufacturing for both SBP and RCT with these assertions made without reference to exhibits or evidence but made with the intent to influence a trial judge.

At CP 154 paragraph 7 the allegation that SBP was without inventory because of Mr. Ivey is not supported, is unsupportable and was found so by Arbitrator Thomas D. Cochrane in the Final Award of January 22, 2018. The references at paragraph 8, 9 and 10 are and were unsupportable. At CP 155 para 11 Mr. Burrill rehashes the 2013 arbitration. At CP 155 para 12 Mr. Burrill states that SBP became aware in June 2016 that RCT was selling with this allegation unsupportable. At CP 156 para 16, 17 and 19 that Ivey stopped SBP from getting inventory with this contention addressed by email exhibits from SBP counsel Smith confirming that attorney Smith had successively negotiated with PIM. At CP 158 para 25 that "...Rebel may be selling.." and "These sales, if attributable to Rebel..." demonstrate the lack of evidentiary value in the assertions by Mr. Burrill in his Declaratory.

At CP 159 para 31 the conclusion that “The issues between the parties have been *created* by Mr. Ivey, and are not a result of a legitimate dispute between the parties to the License Agreement” is wholly a conclusion and was specifically identified by Arbitrator Thomas D. Cochrane as false in the Final Award Terminating the LICENSE AGREEMENT on January 22, 2018.

The filing of the Burrill Declaration with the Superior Court was a weapon designed to chill<sup>72</sup> the representation of RCT by attorney Floyd E. Ivey. The Burrill Declaration was a filing for an improper purpose.

SBP counsel Mr. Nelson filed a second Declaration<sup>73</sup> where he describes his professional obligations, his research, and that “we” concluded that Mr. Ivey’s Motion for Summary Judgment was not supported by law or fact, that there were no pending claims or counterclaims, that the LICENSE AGREEMENT required binding arbitration, that Washington strongly favors arbitration<sup>74</sup>. At CP 300 para 5 “we” also concluded that Rebel had presented zero admissible or authenticated evidence. This para 5 conclusion was reached while SBP Counsel correspondence from attorney Smith admitted the failure to meet

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<sup>72</sup> SBP argument RP 20/line 4 – 22/line 7; the Court RP 23/line 6- RP 26/line 5.

<sup>73</sup> CP 299.

<sup>74</sup> CP 300 para 4

the sales requirements and that that admission was sent twice by SBP counsel.

At CP 300 para 6 SBP counsel states that he requested Ivey to withdraw his motion, that this was a good faith effort to provide safe harbor for Ivey and that on refusal to respond that Mr. Nelson again wrote to advise of CR 11 and that at CP 300 para 7 this was an effort to save time and money because the court could not grant relief as a matter of law. At CP 300 para 8 Mr. Nelson (or “we”) only filed the CR 11 motion for the purpose of protecting SBP and not for any other (read improper) purpose and that “Our research confirms that Rebel cannot prevail so, we attempted to raise these concerns to save time and expense.”

At CP 301 para 12 counsel advises that detailed Declarations are filed by SBP because the court is new to the case and may need the entire history of the case as needed to understand the pattern of continued harassment and because SBP is out of options. SBP assures the court that the filings by SBP are not for improper purposes such as might be improper for CR 11 purposes.

Division III is alerted to the omission by SBP Counsel and “we” of reference to the statement of claims in the Memorandum Supporting the Motion for Summary Judgment and in the RCT Proposed Motion. SBP

counsel makes no mention to *Davis and Everett*, supra. Counsel makes no reference to the decision of who it is that decides arbitrability.

And, following the trial court's August 18, 2017 denial of the RCT Motion for Summary Judgment, with its "roundabout" order to arbitration, and the commencement of Arbitration by RCT on or about August 28, 2017, it was noted that SBP undertook no discovery and made no arguments that the required sales had not been made but rather, admitted that the sales had not been made. And that the failure to make sales was solely the fault of RCT. RCT notes that the Arbitrator found that RCT was not the cause of the failure to make sales.

Shortly following the RCT filing of the Arbitration Mr. Nelson advised that the LEE & HAYES attorney for the SBP case would henceforth be Sara Elsdon of the same law firm. It is observed that Mr. Nelson is no longer with the LEE & HAYES firm.

**2.C. CONCLUSION:** SBP counsel Nelson's briefs were not well grounded in fact or warranted by existing law when he signed. Counsel Nelson did not cite to *Davis or Everett*, supra. The SBP CR 11 Motion was meant to be a "fee shifting mechanism" and to "chill attorney Ivey's enthusiasm or creativity in pursuing factual or legal theories". The SBP

briefs and motion constituted abuses of the judicial system and baseless filings. *Ames, supra*.

Mr. Nelson lead the trial court into error by the CR 11 Motion and recitation of history and the statement of the retaliation and harassment and expense experienced by SBP. Arbitrator Cochrane's Final Award holding that the actions of RCT was not the cause of SBP's failure to sell 15,000 units is a conclusion that casts doubt on the good faith and honest recitations of Mr. Nelson and "we" in casting fault on RCT and specifically on Floyd Ivey?

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The Court of Appeals reviews a superior court's decision to impose or deny CR 11 sanctions for an abuse of discretion. *Bldg. Indus. Ass 'n of Wash. v. McCarthy*, 152 Wn.App. 720, 745, 218 P.3d 196 (2009). A superior court abuses its discretion only when it bases a ruling on untenable or unreasonable grounds. *State v. R.G.P.*, 175 Wn.App. 131, 136, 302 P.3d 885, review denied, 178 Wn.2d 1020 (2013). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

Did the court's failure to involve the parties in colloquy regarding the RCT Proposed Order and the case law re: arbitrability and staying if arbitration resulted comprise a simple oversight in the rush of the motion docket? The repeated comments in the record regarding arbitrability, the recitation of claims in the Motion for Summary Judgment and in the Proposed Order, and the court's denial of the Motion for Summary Judgment, even though resulting in Arbitration, was an abuse of discretion. Whether or not led by counsel to a conclusion directly at odds with *Davis and Everett*, supra, SBP's failure to raise a material fact renders the court's denial of the Motion for Summary Judgment error.

Was "...it patently clear that [the RCT claim] had absolutely no chance of success" and warranted CR 11 sanctions? *Saldivar v. Momah*, 145 Wn.App. 365, 404, 186P.3d 1117 (2008) (quoting *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 122, 780 P.2d 853 (1989)), *review denied*, 165 Wn.2d 1049(2009). No, it was not patently clear that RCT had absolutely no chance of success warranting CR 11 sanctions. The recitation of RCT claims in the Motion for Summary Judgment and as stated in the RCT Proposed Order eliminated the "absolutely no chance of success" as asserted by counsel Nelson and as stated by the court in the Order denying the Motion for Summary Judgment, in awarding Sanctions to LEE & HAYES and in denying CR

11 sanctions to RCT on its motion for sanctions against SBP?

RCT requests the Court of Appeals to conclude that the trial court abused its discretion in denying the Motion for Summary Judgment via paragraph 1 combined with the second paragraph 1 thereby sending the RCT claims to Arbitration and failing to acknowledge the role of the trial court in determining arbitrability;

to find that the trial court abused its discretion in finding that the RCT Motion for Summary Judgment was a CR 11 baseless claim warranting the award of \$4,500 sanctions personally against attorney Floyd E. Ivey and in favor of LEE & HAYES;

to find that the record reveals that SBP counsel filed briefs which were unsupported by fact or law but were filed for the CR 11 improper purpose of leading the trial court to error and to avoid the application of *Davis and Everett*, supra, in determining arbitrability. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 219, 304 P.3d 914, review denied, 178 Wn.2d 1022 (2013);

and to award CR 11 Sanctions against the SBP law firm in an amount related to the labor and cost of bringing this Appeal.

**2.D. Attorney Fees: Rule 18.1. ATTORNEY FEES AND EXPENSES**

Defendant requests attorney fees and expenses pursuant to COA Rule 18.1. RCT has spent considerable time in research, drafting, filing and arguing the issue of Termination of the LICENSE AGREEMENT in the trial court and before Division III. It has as well expended considerable time in commencing and concluding Arbitration leading to the Arbitrator's Final Award Terminating the LICENSE AGREEMENT. RCT seeks attorney fees caused to be incurred by a CR 11 improper purpose by SBP.

Respectfully submitted this 7<sup>th</sup> day of March, 2018.

A handwritten signature in cursive script, appearing to read "Floyd E. Ivey". The signature is written in dark ink and is positioned above a horizontal line.

---

Floyd E. Ivey, WSBA 6888, Attorney for RCT.

APPENDIX

CERTIFICATE OF SERVICE

1

1 AFFIDAVIT OF SERVICE

2 I hereby declare, under penalty of perjury under the laws  
3 of the State of Washington, that on March 7, 2018 I made service  
4 of the foregoing pleading or notice on the party/ies listed  
5 below in the manner indicated:

6 Sarah Elsden  US Mail  
7 LEE & HAYES, PLLC  Facsimile  
8 601 W. Riverside Ave., Suite 1400  Hand Delivery  
9 Spokane, WA 99201  Overnight Courier  
10 509 324 9256  Email  
11 Christopher Lynch  
12 chris@leehayes.com  
13 Sarah.Elsden@leehayes.com

14 Spokane County Superior Court  US MAIL  
15 1116 W. Broadway Ave.  EMAIL  
16 Spokane WA 99260

17 Court of Appeals Div III  US Mail  
18 500 N. Cedar st  Fax: 509 456 4288  
19 Spokane WA 99201-1905

20 DATED: MARCH 7, 2018

21 

22 Floyd E. Ivey, WSBA #6888  
23 Attorneys for Appellant

24 Motion Extend time

1 IVEY Law Offices, P.S. Corp  
7233 W. Deschutes Ave.,  
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**IVEY LAW OFFICES**

**March 16, 2018 - 11:12 AM**

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**Appellate Court Case Number:** 35572-1  
**Appellate Court Case Title:** Seth Burrill Productions, Inc. v. Rebel Creek Tackle, Inc.  
**Superior Court Case Number:** 13-2-01982-0

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Phone: 509-735-6622

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