

FILED
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State of Washington
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SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

CASE # 36899-8-III

APPELLANT REBEL CREEK TACKLE INC.'S OPENING BRIEF

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STATUTES

<u>R.C.W 2,28,150</u>	2, 3, 8, 9, 15, 16, 17, 20
<u>R.C.W. 7.04A.220</u>	1-3, 7-10,11, 16, 17, 19, 20

INTRODUCTION

Spokane County Superior Court case 13-2-01982-0 was initiated¹ by Licensee Plaintiff Seth Burrill (hereafter Licensee) through a Motion per R.C.W. 7.04A,220, seeking an Order, Judgment and a Permanent Injunction confirming an Arbitration Decision in 2012. The Arbitration Decision in 2012 arose from the Arbitration of a dispute between Licensee and Rebel Creek Tackle Inc., Licensor herein. The Superior Court heard the motion, entered an Order and Judgment confirming the Arbitration Decision and modified the Licensee Agreement.

Thereafter it is seen that Case 13-2-01982-0 has a continuing Motion Practice History: In 2013 Licensee brought a Motion for

¹ CP 1-12; 13-21

Contempt². R.C.W. 7.04A.220 had not and did not terminate the superior court case following its Order, Judgment and Permanent Injunction. The superior court judge heard and ruled on the motion for contempt. That motion for contempt was unrelated to the initial Arbitration Decision but was related to the same parties and same modified License Agreement. The trial court exercised its authority and ruled on the Motion.

In 2015 the Licensee brought a Motion for Appointment of Receiver³. The Superior Court trial court heard and ruled on the Motion. And there remained the same Superior Court authority as provided by R.C.W 2.28.150 which confers procedural authority on courts to adopt any suitable mode of proceeding to carry out a statutory directive where none is specifically pointed out and jurisdiction is otherwise conferred upon the court. No procedure was provided by R.C.W. 7.04A.220. R.C.W. 2.28.150 was the authority empowering the trial court in ruling on the motion for Receiver.

Each Motion has addressed the same parties, the same License Agreement, the same modified License Agreement and the same Superior Court case 13-2-01982-0.

² CP 22-25

³ CP 26-36; 37-38;

This appeal of COA III case 36899-8-III bears issues regarding the scope of authority of R.C.W. 2.28.150 as is addressed in Petitioner Licensor's Motion for Discretionary Review, Washington State Supreme Court 97539-6. Petitioner will ask for this COA III 36899-8-III appeal to be consolidated with Supreme Court 97539-6 should the Supreme Court grant the Petitioners Motion for Discretionary Review.

The Licensee's 2013 motion for Contempt⁴ was in same Superior Court case 13-2-01982-0 involving the same parties and same License Agreement⁵. There was no motion per R.C.W. 7.04A,220, there was no new Superior Court with summons and complaint but there remained case 13-2-01982-0.

There was no added litigation initiation action but rather there was the continuation of trial court motion practice in the same Superior Court case, 13-2-01982-0, which had been initiated by Licensee's motion in 2012. The trial court in 2013 found contempt and ordered sanctions.⁶

In 2016 the Licensee moved for the appointment of a receiver⁷. The motion for the appointment of a receiver involved the same parties and same

⁴ CP 22; 23-25

⁵ Id

⁶ CP id 22-25

⁷ CP 26-36; 37-38

License Agreement as was considered in 2012 and 2013. Again, there was no initiating motion, no summons, no complaint but there was the same Superior Court case 13-2-01982-0.

In 2017 the date arrived which required, by the trial court's 2012 Judgment modifying the License Agreement specific sales performance from the Licensee. The required performance was contended by Licensor to not have been met and the Licensor noted its Motion for Summary Judgment⁸ seeking Termination of the License Agreement where said Motion for Summary Judgment was supported by Licensor's Memorandum of Authorities...⁹ In 2017 the same parties, same License Agreement and same modified License Agreement were involved. Did the trial court in 2017 have the authority to hear and decide Superior Court motion practice as it had in 2013 and 2016 and as provided by R.C.W. 2.28.150? The trial court concluded that a new case with summons, complaint et al was required and denied Licensor's Motion for Summary Judgment. It is the 2017 Denial and decision that is the subject of Licensor's Motion to the Supreme Court in Supreme Court case 97539-6.

⁸ CP 57-58

⁹ CP 59-170

Licensors' Motion for Summary Judgment was opposed by Licensee's attorney Kyle Nelson in his Affidavit¹⁰ where he contended that Licensors' Motion for Summary judgment could be brought solely in a case commenced with Summons and Complaint.¹¹ Mr. Nelson so asserted seemingly without awareness of the motion practice pursued by his law firm Lee & Hayes in the same case as in 2012, 2013 and 2016. An exception was that Mr. Nelson was the 4th attorney from Lee & Hayes with the Licensee's representation commencing in 2012 with Lee & Hayes counsel Christopher Lynch. Another exception was that the court hearing the Motion for Summary Judgment was the third Spokane County Superior Court Judge to consider the case which involved the same parties, the same License Agreement and the same Superior Court Case 13-02-01982-0.

Licensors' Motion for Summary Judgment was denied by the trial court and was appealed to COA III. COA III affirmed the denial of the Motion for Summary Judgment with that affirmation being the subject of Licensors' Petition for Review to the Washington State Supreme Court 97539-6.

In 2018, the Licensor submitted the contention to Arbitration within 10 days following the trial court's denial of Licensors' Motion for

¹⁰ CP 189-193

¹¹ CP id

Summary Judgment. The Arbitration Decision of January 22, 2018
Terminated the License Agreement.

In 2019 the Licensor moved for an Order and Judgment
Confirming the 2018 Arbitration Decision¹². The Licensor's Motion for
confirmation of the 2018 Arbitration Decision was supported by the
Licensor's Proposed Order¹³, Proposed Judgment¹⁴ and the Declaration of
Licensor's attorney Floyd E. Ivey¹⁵. The Licensor's Motion for
confirmation of the 2018 Arbitration Decision was opposed by Licensee's
Declarations¹⁶ and was opposed by Licensee's attorney Sarah E. Elsden in
Ms. Elsden's Declaration/Memorandum¹⁷. Ms. Elsden, as did Licensee's
attorney Mr. Nelson, contended that Superior Court case 13-02-01982-0
was not empowered to consider Licensor's Motion for Order and
Judgment confirming the January 22, 2018 Arbitration Decision and that
Licensor's Motion required the commencement of a new case with
Summons et al.

Licensee's argument did not provide citations to or refer to
authority.

¹² CP 221-335; 349-351

¹³ CP 336-341; 410-436

¹⁴ CP 342-348; 437-458; 376-378

¹⁵ CP 221-335

¹⁶ CP 379-385; 386-3

¹⁷ CP 376-378

The Court, without citation to authority, Denied Licensor's Motion¹⁸ and required the Licensor to commence a new Superior Court case by motion pursuant to R.C.W. 7.04A.220 thereby prompting this appeal to COA III.

ASSIGNMENT OF ERRORS

Assignment of Error 1. Where the Licensor's Motion for entry of Order and Judgment pursuant to R.C.W. 7.04A.220 to confirm an Arbitration Decision of January 22, 2018 in Superior Court case 13-02-01982-0 and

where Spokane County Superior Court case 13-02-01982-0 arose in 2012 from a Motion per R.C.W. 7.04A.220 where a trial judge confirmed the Arbitration Decision rendering an Order and Judgment involving, on May 17, 2019, the same parties, the same License Agreement and the same License Agreement modified by the trial court in 2013, did

the trial court on May 17, 2019 err in denying the Licensor's Motion for Order and Judgment confirming the Arbitration Decision Terminating the modified License Agreement and in

¹⁸ CP 459-462

Holding that the Superior Court case 13-02-01982-0 was not the proper case for consideration of an Order and Judgment confirming the Arbitration Decision of January 22, 2018 and

In concluding that a new Spokane County Superior Court case was required and err in concluding that the trial court in case 13-02-01982-0 did not have the authority to enter an Order and Judgment confirming the Arbitrator's Decision of January 22, 2018 because of the trial court's unawareness of R.C.W. 2.28.150?

Assignment of Error 2. Did the trial court err in holding that, where R.C. W. 7.04A.220 did not state a procedure regarding motion practice following the establishment of Superior Court Case 13-02-01982-0 for a second motion in not realizing that R.C.W. 2.128.150 conferred upon the trial court the authority to confirm the January 22, 2018 Arbitration Decision Terminating the License Agreement between Licensor and Licensee and therefore err in holding that case 13-02-01982-0 did not have authority fail to understand and utilize the authority implicitly conferred on a Superior Court case by R.C.W. 2.28.150 giving that Superior Court case the power to give authority to the trial court to engage all means necessary to carry that authority into effect.

Assignment of Error 3. Was the trial court holding on May 17, 2019, in Superior Court case 13-02-01982-0 which was commenced in 2012 by motion pursuant to R.C.W. 7.04A.220 to confirm an Arbitration Decision and where, in multiple years thereafter where the trial court heard multiple motions in case 13-02-01982-0,

in error in holding that the trial court in case 13-02-01982-0 on May 17, 2019, was not the correct case in 2019 to rule on a motion to confirm an Arbitration Decision by Order and Judgment where case 13-02-01982-0, on May 17, 2019, had the same parties, same License Agreement, and same License Agreement as modified by the trial court in 2012 in case 13-02-01982-0

and in holding that the Licensor was required to open a new case in Spokane County in order to move by R.C.W. 7.04A.220 to confirm the Arbitration Decision and to have a Superior Court Order and Judgment confirming the Arbitration Decision rule on a motion involving case 13-02-01982-0 which case, in accordance with R.C.W 2_28_150, is empowered with authority enabling and conferring a trial court with procedural authority to *adopt any suitable mode of proceeding* to carry out a statutory directive where none is specifically pointed out and jurisdiction is otherwise conferred upon the court.

STATEMENT OF THE CASE

An Arbitration Decision modifying a License Agreement was confirmed and rendered to an Order and Judgment in 2012 in Spokane County Superior case 13-02-01982-0 following a motion per R.C.W. 7.04A.220. In 2013 a motion for contempt was argued and ordered in case 13-02-01982-0 involving the same parties, same License Agreement and same License Agreement as modified by the 2012 Order and Judgment. In 2015 a motion for appointment of a receiver was argued and granted in case 13-02-01982-0, same parties, same License Agreement.

In 2016 required performance had not occurred and a Declaratory Judgment was filed and in 2017 the Licensor brought a Motion for Summary Judgment¹⁹ to enforce the Declaratory Judgment for Termination of the License Agreement in case 13-02-01982-0. The Motion for Summary Judgment was denied with sanctions imposed²⁰ on counsel for Licensor, in August 2017, on the trial court's conclusion that case 13-02-01982-0 was not a Superior Court case bearing characteristics of Summons, Complaint et al notice, was appealed and decided by the Court of Appeals Division III 36899-8-III. That COA III decision is now before the Washington State Supreme Court 97539-6.

¹⁹ CP 57-58; 59-170; 171-183;184-187

²⁰ CP 184-187

On denial of the Motion for Summary Judgment, in August 2017, the contended failure to meet the required License Agreement performance was Arbitrated and decided with the Arbitration Decision of January 22, 2018 Terminating the License Agreement.

Thereafter, and while the August 2017 appeal of the trial court's denial of the Motion for Summary Judgment was pending, a motion was brought on May 17, 2019 per R.C.W. 7.04A.220 in case 13-02-01982-0 for confirmation of the January 22, 2018 Arbitration Decision.

On May 17, 2019 the trial court asked if case 13-02-01982-0 was the correct case²¹. Counsel for the appellant Licensor stated the history of case 13-02-01982-0, the origin in 2012 by motion per R.C.W.7.04A.220, the multiple motions thereafter involving the same parties, the same License Agreement as modified by the trial court in 2012²².

Opposing counsel, the 4th attorney from Lee & Hayes, argued²³ at RP4/line 19 - 5/line 13

"The last hearing before this court...[in August 2017], before Judge Hazel, that was on RCT's motion for summary judgment. **At that time, counsel for SBP from my firm articulated that that was not appropriate for the court to consider because, just like we're in the same**

²¹ RP 4:3-5

²² RP 4:commencing at line 6

²³ RP 5:commencing at line 16

scenario here, it's just an open file number. There are no operative pleadings. There's not a complaint. There's not an answer. There are no counterclaims.

The claims that were asserted were asserted back in 2013 and resolved by final judgment. This has just been an open case number. There's nothing to resolve. And in quoting Judge Hazel at that hearing, Judge Hazel said, "Again, your summary judgment motion, however, I don't see how a reasonable attorney could see it prevailing given that there are a number of issues that would be in material dispute and given that there are no connections with the pleadings." There are no pleadings here and there were no pleading in 2017.

The court went on to find the motion for summary judgment frivolous and imposed sanctions²⁴.

The trial court, on May 17, 2019, asked counsel for the Licensee if the court in August 2017 has ordered the case to Arbitration and counsel said "yes, your honor"²⁵. However, the trial court found that the issue on May 17, 2019 regarded the confirmation of the January 22, 2018 Arbitration Decision as follows:

We're here today following a second arbitration that took place, I believe, in January of 2018 and there's a motion to confirm

²⁴ CP 184-187

²⁵ RP 6/lines 14-16

that award. I think the problem here is this matter was filed with one simple issue and that issue was an arbitrator's award from May 2nd of 2013. Now there's a request under this case number to confirm an award that was entered in January of 2018. That's a totally separate matter. It was never originally petitioned for when this matter was initiated, and it relates to something completely different, which is a whole separate arbitration...²⁶

ARGUMENT- ASSIGNMENT OF ERROR 1, 2 AND 3

The Licensor contends that the Trial Court, on May 17, 2019 erred in denying the Licensor's Motion for confirmation of the Arbitration Decision of January 22, 2018. The court, on May 17, 2019, erred in concluding that case 13-02-01982-0 was not the proper case, where the Judgment from 2012 had been entered modifying the License Agreement. Superior Court case 13-02-01982-0 was opened in 2012 and has been considered previously by three Spokane County Superior trial courts.

²⁶ RP 14/lines 12-22

A Superior Court case, including case 13-02-01982-0, has an existence separate from the issue initially existing as realized from R.C.W. 2.28.150 as follows.

RCW 2.28.150 does not confer jurisdiction on the superior court. It specifically states that when the court has jurisdiction but " the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws."RCW 2.28.150. ... Eagle Sys., Inc. v. Employment Sec. Dep't, 181 Wn.App. 455, 459, 326 P.3d 764 (Div. 2 2014).

RCW 2.28.150... confers procedural authority on courts to adopt any suitable mode of proceeding to carry out a statutory directive where none is specifically pointed out and jurisdiction is otherwise conferred upon the court. *In re Cross*, 99 Wash.2d 373, 379-80, 662 P.2d 828 (1983); *Ladenburg v. Campbell*, 56 Wash.App. 701, 784 P.2d 1306 (1990). However, a court may rely on RCW 2.28.150 for authority to create a mode of proceeding necessary to carry out a statutory directive without violating constitutional rights. *Rogoski v. Hammond*, 9 Wash.App. 500, 513 P.2d 285 (1973) (use of show cause hearing to satisfy due process where prejudgment attachment statute did not provide for prior notice and a hearing). *Abad v. Cozza*, 128 Wn.2d 575, 588, 911 P.2d 376 (1996).

The court on May 17, 2019, erred in concluding that case 13-02-01982-0 did not have the character necessary to be heard in the present case. The trial judge said²⁷:

We're here today following a second arbitration that took place, I believe, in January of 2018 and there's a motion to confirm that award. **I think the problem here is this matter was filed with one simple issue and that issue was an arbitrator's award from May 2nd of 2013.** Now there's a request under this case number to confirm an award that was entered in January of 2018. **That's a totally separate matter.** It was never originally petitioned for when this matter was initiated, and **it relates to something completely different, which is a whole separate arbitration.** It also has the moving party now being the defendant, rather than what should be the plaintiff in the matter. **At this point it appears this matter isn't properly before the court. It should be filed under a new case number because it's an entirely new issue** and there's nothing in the record that has extended the scope of the first arbitration to this second arbitration. For that reason, I'm going to find that --

On May 17, 2019 the trial court misapprehended the power of case 13-02-01982-0 revealed by his thought that

“...I think the problem here is this matter was filed with one simple issue and that issue was an arbitrator's award from May 2nd of 2013...” And at RP _____ “ That's [the 2018 Arbitration Decision of January 22, 2018] **a totally separate**

²⁷ RP 14/Line12 to 15/line 5

matter. It was never originally petitioned for when this matter was initiated, and it relates to something completely different, which is a whole separate arbitration."²⁸

This case, in May 2019, was filed by a R.C.W. 7.04A.220 motion as was the he initial act in 2012 in case 13-02-01982-0²⁹ for confirmation of an Arbitration Decision. However, the character and the authority of the case occurred when the Superior Court Judge, in 2013 entered the Order and Judgment confirming the Arbitration Decision and where the Judgment modified the License Agreement. That first Judgment and the court's modification of the License Agreement exhibited judicial authority in case 13-02-01982-0 empowering subsequent superior court judges to rule on motions for contempt and for receivership as provided by R.C.W. 2.128.150.

The May 17, 2019 motion to confirm the Arbitration Decision was brought pursuant to R.C.W. 7.04A.220 in case 13-02-01982-0 where the parties and the modified License Agreement were the same as in 2012 where years earlier a Superior Court Judge had modified the License Agreement and where in intervening years superior court judges ruled on

²⁸ RP 14/line 14-line 22

²⁹ RP 12/line 15-21

motions for contempt and receivership. The trial court on May 17, 2019 concluded³⁰

"I'm not overturning what the arbitrator has found. I'm just indicating there's nothing in the record showing that this court extended the scope of the original motion from 2013 into a second arbitration to continue jurisdiction over this case.

Mr. Ivey, you're welcome to file this under a new case number. I think that's the appropriate mechanism. It would be a new motion rather than a continuing motion on this 2013 case where the issues have -- I know it's on appeal, but have been resolved since 2013.

The motion -- or the request to have the matter heard today will be denied in favor of a few filing.

Ms. Elsdén, do you have a proposed order?

MS. ELSDEN: I do, Your Honor.

MR. IVEY: With respect, Your Honor, I think this is error that we're -- this -- this promotes the matter of the expense of litigation in a way that is, quite frankly, surprising.

THE COURT: Sir, it's just an additional filing fee. This case has been going on for six years and the issue that's being raised is completely different than the issue that was pled in 2013. The issue in 2013 was one arbitration award. The issue before the court today is a second arbitration award that was entered five years later. They're two distinct issues. Although the

³⁰ RP15/line 20-16/line 25

parties are the same and the subject might be the same, the issues are completely the different.

In my reading of the statute, the filing of a motion would fall under a separate case number for each arbitration unless there's some type of continuing jurisdiction.

By the court's May 17, 2019 analysis, a case commenced by motion via R.C.W. 7.04A.220 would have a single opportunity to perform and, upon confirming the Order and Judgment of a single Arbitration Decision, should have been dismissed. This analysis proposes that the single 2013 confirmation then would have fulfilled and exhausted the jurisdiction and authority of case 13-02-01982-0 and dismissal would have occurred. However, R.C.W. 7.04A.220 is not so limited.

That statute does not suggest a limitation to a single act but it does allow, by motion, the opening of a case which, unless limited by a statutory process found in R.C.W. 7.04A.220, is a regular Superior Court Case giving authority to the next Superior Court Judge to act, per R.C.W. 2.128 to be judicial in addressing the next issue, whether motion or other, to be brought where the parties and subject matter remains the same. The initial Judgment authorized the modification of the License Agreement and gave the case and the next trial court and the next trial court the power to judge and order and render judgment as provided by R.C.W. 2.28.150.

It is the act of rendering Judgment that gives a case a status allowing a trial court to subsequently act upon issues pertaining to that Judgment.

The conclusion that a new case has to be initiated is illogical, is not supported by the founding statute R.C.W. 7.04A.220 where no procedure is stated and denies access to the history of the case which have continued in identity with each motion. Parties and subject matter are identical. The May 17, 2019 ruling was error and should be reversed.

Rule 18.1. ATTORNEY FEES AND EXPENSES:

Defendant requests attorney fees and expenses pursuant to COA Rule 18.1. Licensor has spent considerable time in research, drafting, filing and arguing the issues and, it has as well expended considerable time in commencing and concluding Arbitration leading to the Arbitrator's Final Award Terminating the LICENSE AGREEMENT. Licensor seeks fees and costs.

Respectfully submitted this 3rd day of December 2019.

A handwritten signature in blue ink, appearing to read "Floyd E. Ivey". The signature is fluid and cursive, with the first name "Floyd" written in a larger, more prominent script than the last name "Ivey".

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

IVEY LAW OFFICES

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