No. 90166-0

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, a/k/a Washington Motorsports, Ltd., by and through Barry W. Davidson, in his capacity as Receiver and as Acting Managing General Partner,

Plaintiff/Respondent,

v.

SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership,

Defendant, and

SUSAN ROSS, TERRY and BRYAN GRAHAM, and THE MEADOWS AT DRY CREEK, LLC,

Appellants.

Court of Appeals Division III Case No. 31416-2
Superior Court Cause No. 03-2-06856-4

RESPONDENT WML'S ANSWER IN OPPOSITION TO APPELLANTS' PETITION FOR REVIEW

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1. Identity of Respondent/Plaintiff (Washington Motorsports Limited Partnership), Petitioners (Appellants), and Defendant (Spokane Raceway Park, Inc.)

The underlying lawsuit ("WML's Receivership Case") is between Respondent/Plaintiff, Washington Motorsports Limited Partnership ("WML"), and the Defendant Spokane Raceway Park, Inc. ("SRP").[1]

The Appellants are Susan Ross, Terry and Bryan Graham, and The Meadows at Dry Creek LLC (collectively "Ross"). They are not parties to WML's Receivership Case. Ms. Ross and Mrs. Graham are the daughters of Orville Moe and Deonne Moe ("the Moes"). Mr. Moe is the former President and majority shareholder of SRP. The Moes are not parties to WML's Receivership Case either.

Ross and the Moes are defendants in a separate, adjunct proceeding (under RCW 7.60.160(2)) to WML's Receivership Case in which WML is seeking to unwind numerous unlawful fraudulent transfers of assets worth approximately $1,000,000.00 by the Moes to Ross in furtherance of the Moes' attempt to thwart WML's efforts to collect its below-described judgments against the Moes. Spokane County Cause Superior Court No. 12-2-01033-6 ("UFTA Case").[2]

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1 WML's Receivership Case has been before this Court in at least four prior appeals. Supreme Court Nos. 80554-7, 81740-5, 81875-4, and 88189-8. In addition, at least eighteen Notices of Appeal or Motions for Discretionary Review have been filed in Division III relating to WML's Receivership Case or related proceedings.

2. Decision Below

Ross is seeking review of the March 13, 2014 Division III Order Denying Ross's Motion to Modify a December 11, 2013 Commissioner's Ruling which dismissed Ross's appeal. WML is not seeking review of any decisions below.

3. Issues Presented

a. Is there a substantial public interest[3] which would support this Court granting Ross's Petition for Review ("Petition") of the dismissal of her appeal, even though such dismissal was based upon clear, settled, non-debatable, longstanding Washington law that even if a trial court makes egregious legal or procedural error in entering a judgment, that judgment is merely voidable (and not void under CR 60(b)(5)) unless the trial court lacked personal jurisdiction or subject matter jurisdiction?

b. Is there a substantial public interest which would support this Court granting Ross's Petition to determine whether remedial sanctions under RCW 7.21.030 may be awarded to an opposing litigant (and not made payable to the court), considering that the court of appeals never reached this issue in Ross's appeal, and that Ross's arguments on this issue are barred by the law of the case

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2 The UFTA Case is stayed pending the outcome of this appeal.

3 Ross fails to cite RAP 13.4(b) or any of its subparts, but it appears she is seeking review under RAP 13.4(b)(4). *See, e.g.,* Ross's Petition, p.1 (referencing alleged "substantial interest to the citizens of this state.")

doctrine, and that, in any event, remedial sanctions under RCW 7.21.030 are properly awardable to an opposing litigant?

c. Is there a substantial public interest which would support this Court granting Ross's Petition regarding the claimed error relating to the trial court's denial of her motion to intervene, considering that the court of appeals never reached this issue, and that the dismissal of Ross's appeal relating to the remedial sanctions issue rendered her appeal on the intervention issue moot and/or harmless error, and that, in any event, the trial court properly denied Ross's motion to intervene?

d. Should WML be awarded its attorneys' fees and expenses incurred in this Court under RAP 18.1(j) and/or RAP 18.9?

4. Statement of the Case

A. Proceedings in the Trial Court

The underlying lawsuit (WML's Receivership Case) is a receivership action that has been pending in the Spokane County Superior Court since 2003. In 2005, the trial court appointed Barry W. Davidson as WML's receiver and acting managing general partner. All disputes between WML and SRP have been settled, but WML's Receivership Case continues through WML's winding up process, including, among other things, collection of judgments entered against the Moes in WML's Receivership Case.

Several final judgments (pursuant to CR 54(b)) have been entered against

Orville and/or Deonne Moe in WML's Receivership Case for remedial sanctions under RCW 7.21 *et seq.*[4] based upon their refusals to obey numerous court orders despite numerous opportunities to purge themselves of contempt and avoid the incurrence of any remedial sanctions. Three of these Judgments were entered in 2008, 2011, and 2012, respectively. (CP 1-7, 8-14, and 51-55) The 2008 Judgment was affirmed by Division III in 2010. (CP 274-86) The Moes did not oppose or appeal the 2011 Judgment. The 2012 Judgment was appealed by the Moes, but that appeal was dismissed as frivolous. Division III Case No. 311317.

On November 19, 2012 (approximately eight months after the UFTA Case was filed and more than four years after the first judgment was entered against Mr. Moe), Mr. Moe moved pursuant to CR 60(b) to vacate the three judgments entered against him. (CP 56-60) Ross moved to intervene into WML's Receivership Case for the sole and limited purpose of joining Mr. Moe's Motion to Vacate.[5] (CP 61-65, CP 66-73) WML opposed the motions by Mr. Moe and Ross. (CP 74-86, CP 87-110) The trial court denied Ross's motion to intervene, and denied Mr. Moe's Motion to Vacate. (CP 119-120, CP 121-122)

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4 Attached hereto as Appendix A.

5 The Moes' and Ross's efforts to seek to vacate the judgments at issue were nothing other than their untimely, improper, and frivolous attempt to nullify the judgments that form the basis of the UFTA Case, and to delay that lawsuit.

B. Proceedings in the Court of Appeals

Ross appealed the denial of her motion to intervene and the denial of Mr. Moe's Motion to Vacate. On or about August 1, 2013, Ross filed her Brief of Appellant ("Second Corrected") (hereafter "Ross's Opening Brief"). As to the remedial sanction issue, Ross claimed that the judgments at issue were void under CR 60(b)(5), because the trial court allegedly exceeded its "statutory" authority under RCW 7.21.030 in making the remedial sanctions issued against the Moes payable to WML (they allegedly should have been made payable to the trial court). *See* Ross's Opening Brief, pp.1, 10-15.

Because settled, non-debatable, longstanding Washington law clearly prohibits a CR 60(b)(5)("void") motion based upon alleged lack of authority, on August 7, 2013, WML moved under RAP 18.9 to dismiss Ross's appeal as frivolous and for an award of attorneys' fees (WML moved in the alternative to affirm on the merits under RAP 18.14).

On December 11, 2013, Commissioner Monica Wasson dismissed Ross's appeal as frivolous and awarded WML its attorneys' fees and costs related thereto.[6] *See* Appendix B hereto (hereafter "Commissioner's Ruling").[7]

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6 As such, the Commissioner did not reach WML's alternatively requested relief of affirmance on the merits under RAP 18.14. Ross incorrectly claims in her Petition that WML's motion on the merits was granted. *See* Ross's Petition, pp.3-4.

7 The Commissioner's Ruling issued in Ross's appeal incorporates by reference her separate ruling which dismissed as frivolous the Moes' "linked" appeal of the

In short, Commissioner Wasson ruled that the judgments at issue were not void, because the trial court possessed personal jurisdiction over the Moes, the issue fell within the "broad original jurisdiction of the superior court" (Appendix C at App. 12), and the trial court did not invoke its "inherent power" (Appendix B at App. 8, n.1). Commissioner Wasson further ruled that the Moes' remedy was to "appeal[] the judgments in a timely fashion when the court entered them," and the Moes could not "resurrect the argument in a motion to vacate." *See* Appendix C at App. 12 (*citing, e.g., In re Marriage of Furrow*, 115 Wn. App. 661 (2003)).

As such, Commissioner Wasson did not need to (and did not) reach the issues of which Ross is seeking review in her Petition to this Court; namely, whether remedial sanctions are properly payable to an opposing litigant under RCW 7.21.030, and whether the trial court should have granted Ross's motion to intervene.

On January 9, 2014, Ross moved to modify the Commissioner's Ruling which dismissed her appeal. On March 13, 2014, Division III denied Ross's Motion to Modify. On April 11, 2014, Ross filed her Petition for Review which is presently before this Court.

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denial of Mr. Moe's Motion to Vacate (Division III Case No. 314171). *See* Appendix B at App. 8; *see also generally* Appendix C (Commissioner's Ruling in the Moes' 314317 appeal).

5. Argument

A. RAP 13.4(b)(4) Standards

Ross is apparently seeking review under RAP 13.4(b)(4). *See* n.3, *supra.* That rule provides that "[a] petition for review will be accepted by the Supreme Court only: ... [i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Although Ross states in a conclusory fashion that the issues in her Petition are of "exceptional importance to the citizens of this State" (Ross Petition, p.4), her Petition only involves an unpublished denial of a motion to modify a Commissioner's Ruling. Ross has made absolutely no showing these issues are of a recurring nature or that they impact a large number of persons.

B. The Judgments at Issue are not Void under CR 60(b)(5), because the Trial Court possessed Personal Jurisdiction over the Moes and Subject Matter Jurisdiction over the Dispute.

Ross claims that the judgments at issue are "void" under CR 60(b)(5) because a trial court allegedly lacked authority to award remedial sanctions under RCW 7.21.030 to an opposing litigant. Ross continues to ignore Washington's settled and controlling law on how to determine whether a judgment is "void."

"On motion ... the court may relieve a party ... from a final judgment ... for the following reasons: ... [t]he judgment is void...." CR 60(b)(5). Washington has adopted a narrow definition of when a judgment is void under CR 60(b)(5), and under Washington's clear law, a trial court's alleged "lack of authority" or allegedly

"exceeding its authority" does not render a judgment void for purposes of CR 60(b)(5). Such alleged lack of authority is simply alleged "legal error" which is "not correctable through CR 60(b)," but rather must be challenged, if at all, through a direct appeal. *Burlingame v. Consolidated Mines & Smelting Co.,* 106 Wn.3d 328, 336 (*en banc* 1986); *see also Haley v. Highland*, 142 Wn.2d 135, 156 (2000)(citation omitted)("Errors of law are not grounds for vacation under CR 60(b).")

Specifically this Court has "adopt[ed] the definition of a valid order set forth in the Restatement (Second) of Judgments § 1 (1982).... [and has] conclude[d] that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." *Marley v. Department of Labor and Indus. of State of Wash.*, 125 Wn.2d 533, 541 (1994)(emphasis added). Ross has never argued that the trial court lacked personal jurisdiction over the Moes or that it lacked subject matter jurisdiction to issue the remedial sanctions at issue.[8]

Ross's attempt to equate alleged "lack of authority" with "lack of subject matter jurisdiction" is (and was) frivolous. "The very broad subject matter jurisdiction of the superior court is defined by the state constitution, not by statutes." *Cole v. Harveyland,* 163 Wn. App. 199, 206 (2011)(citing Wash. CONST.

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8 Instead, Ross mischaracterizes the issue as one involving lack of "inherent authority" of the trial court (and that such lack of "inherent authority" allegedly equates with lack of subject matter jurisdiction). *See* Section 5.C.iii., *infra.*

art. IV, §6).

This Court also found in its *Marley* decision as follows:

> Section 11 of the Restatement defines subject matter jurisdiction: "A judgment may properly be rendered against a party only if the court has authority to adjudicate the *type of controversy* involved in the action." (Italics ours.) We underscore the phrase "type of controversy" to emphasize its importance. A court or agency does not lack subject matter jurisdiction solely because it may ***lack authority*** to enter a given order.

Marley at 539 (italics original, underlining and bolding added).

Ross even conceded in Division III that the trial court had the authority to adjudicate this "type of controversy" (remedial sanctions), she only challenged the manner in which the trial court exercised that authority (awarding them to WML). *See* Ross' Opening Brief, p.15. But, "[o]bviously the power to decide [a type of controversy] includes the power to decide wrong, and an erroneous decision is as binding as one that is correct." *Marley* at 543.

The "failure to observe a statutory [requirement] may be a legal error, but it does not result in loss of jurisdiction." *In re Marriage of Buecking and Buecking*, 167 Wn. App. 555, 559-60 (2012). "A court's alleged failure to operate within the statutory framework does not render its judgment void." *Id.* at 559.

The case of *In re Marriage of Furrow,* 115 Wn. App. 661 (2003), demonstrates beyond any doubt that a trial court's complete lack of statutory authority to make certain orders still does not render those orders void for purposes of CR 60(b)(5). In *Furrow*, a mother voluntarily relinquished her parental rights as

part of a parenting plan modification action. Pursuant thereto, the trial court entered an order terminating her parental rights. Approximately two years later, the mother moved to vacate the order under, among other bases, CR 60(b)(5), claiming that the order was void because the trial court lacked authority under the marital dissolution statute (RCW 26.09) and did not operate within the framework of the adoption statute (RCW 26.33) to terminate parental rights.

Division I agreed that the trial court lacked statutory authority to enter the orders at issue, and that the orders constituted "egregious legal and procedural error," but it nevertheless found (relying on *Marley*, etc.) that **the orders were not void under CR 60(b)(5)**, because the trial court possessed the "authority" under Washington's Constitution to decide matters involving the termination of parental rights.[9] "[A] court's failure to operate within the statutory framework of the ... statute renders its order merely voidable." *In re Furrow* at 669. Ross failed to address the *Furrow* decision in this Court or in Division III, because that decision is fatal to her position. *See* Appendix C at App. 12 (Commissioner's Ruling citing *Furrow*).

Ross solely relies upon inapposite cases involving gifts of public funds, cases involving punitive sanctions (as opposed to civil remedial sanctions), cases involving denial of constitutional rights (free speech and due process), and/or cases

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9 Division I in *Furrow* ultimately vacated the order under CR 60(b)(11) (not at issue in Ross's appeal). *In re Furrow* at 664.

which suffer from the imprecise use of the terms "jurisdiction" and/or "void" (instead of using the term "voidable"). *See generally* Ross's Petition, pp.7-13; *see also Cole v. Harveyland,* 163 Wn. App. 199, 208 (2011)("[c]ourts have sometimes been 'profligate' in the use of the term ["jurisdiction"], producing 'unrefined dispositions' that the Court has referred to as 'drive-by jurisdictional rulings.'"); *see also In re Marriage of McDermott*, 175 Wn. App. 467, 479-80 (2013)("[C]ourts should 'use caution when asked to characterize an issue as "jurisdictional" or a judgment as "void."'")(citation omitted).

Ross is inviting this Court to effectively overturn *Marley.* This Court declined such an invitation nearly 20 years ago. *See Kingery v. Department of Labor & Indus.,* 132 Wn.2d 162, 177 (1997)(Appellant "invites the Court to effectively overturn *Marley*.... We decline to do so.")

In short, alleged lack of authority to enter a judgment is not a proper basis to seek to void that judgment under CR 60(b)(5). Ross provided absolutely no basis in law or fact to succeed in her appeal, and it was properly dismissed as frivolous.

C. This Court should Deny Ross's Petition seeking Review of the Trial Court's alleged Error in Making the Remedial Sanctions against the Moes Payable to WML.

Ross is asking this Court to review whether remedial sanctions under RCW 7.21.030 may be awarded to an opposing litigant (or whether they are only properly awarded to the trial court). *See* Ross's Petition, p.1 (issue number 2); *see also generally* Ross's Petition, pp.7-14.

i. A ruling on this issue would be an improper advisory opinion.

Division III dismissed Ross's appeal under *Marley* and *Furrow,* because the trial court did not lack personal jurisdiction, subject matter jurisdiction, or invoke its inherent authority. *E.g.,* Appendix B at App. 8, n.1. As such, it did not need to (and did not) reach the issue of "[w]hether [the trial court] could order the Moes to pay the sanctions directly to Washington Motorsports...." *Id.* Since Division III did not reach this issue, a ruling from this Court would be an improper advisory opinion on how it would rule had Division III ruled on the issue. Advisory opinions are impermissible. *Richert v. Tacoma Power Utility,* 179 Wn. App. 694, 319 P.3d 882, 891, n.9 (2014).

ii. It is the law of this case that remedial sanctions issued against Mr. Moe are properly awardable to WML.

In Mr. Moe's appeal of the 2008 Judgment, Division III specifically found that "[t]he trial court had statutory authority to impose a monetary sanction of up to $2,000 per day. RCW 7.21.030(2)(b)." (CP 283)(emphasis added). Division III also found that the "monetary forfeiture was a coercive civil sanction." (CP 281)(emphasis added). That 2010 Opinion is the law of this case. *State v. Bailey*, 35 Wn. App. 592, 594 (1983) ("This court from its early days has been committed to the rule that questions determined on appeal ***or*** questions which might have been determined had they been presented, will not again be considered on a subsequent appeal in the same case.")(Emphasis added)(citation omitted); *see*

also State v. Sauve, 100 Wn.2d 84, 87 (*en banc* 1983).

iii. Remedial sanction imposed under RCW 7.21.030(2) are properly awardable to an opposing litigant

a. Statutory authority

Although Ross mischaracterizes the alleged trial court error as one allegedly involving the "inherent" authority of the court, it cannot be reasonably disputed that the trial court acted solely under its statutory authority.[10] A trial court derives its authority from, among other sources, statutes, court rules, case law, or its inherent authority. *State v. Breazeale* 144 Wn.2d 829, 841)(*en banc* 2001). A reviewing court only considers whether a trial court possessed inherent authority to issue sanctions if the sanctions were not "imposed under a statute or a rule or because of a violation of a court order." *State v. Gassman*, 175 Wn.2d 208, 211 (*en banc* 2012); *State v. Breazeale* at 840. "When a specific sanction rule applies [as here,

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10 In Ross's Opening Brief, she solely argued that the trial court lacked "statutory authority." Faced with WML's motion to dismiss, Ross changed her argument to assert that the trial court lacked "inherent authority." Ross continues to raise her lack of "inherent authority" argument in this Court. It stems from her latching onto inapplicable language from some cases that reference a third circumstance (in addition to lack of personal and subject matter jurisdiction) in which a judgment can be deemed void, namely, if a court lacks the "inherent power to enter the order." But this Court in *Marley* clarified that such "third element—the inherent power to enter the order—is a subset of subject matter jurisdiction, adopted by this court to account for the unique qualities of contempt orders." *Marley* at 540. This Court went on to rule "that a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." *Marley* at 541 (emphasis added). In any event, as demonstrated in this section, the trial court indisputably exercised its "statutory" authority, and not its "inherent" authority.

RCW 7.21 *et seq.*], the inherent power of the trial court to sanction does not apply." *Saldivar v. Momah,* 145 Wn. App. 365, 402 (2008).

Ross incorrectly characterizes the issue as one involving the "inherent authority" of the Court, but all she has ever argued (and continues to argue in this Court) is whether the trial court possessed the authority "under" or "pursuant to" RCW 7.21.030 (*i.e.*, "statutory" authority). *E.g.,* Ross's Petition, pp.1, (issue presented), 7-14.[11] Ross is thereby conflating the distinct concepts of "inherent authority" and "statutory authority." In issuing the underlying remedial sanctions orders and judgments relating thereto, the trial court only ever purported to act under its statutory authority (RCW 7.21.030). *See, e.g.,* CP 1-7, 8-15, 51-55, 200-206, 263-272.

Because the trial court imposed the sanctions at issue under a specific statute, the Commissioner correctly found that the "question [before the trial court] did not involve ... the inherent power of the court, and, thus, was not the proper subject of a CR 60(b) motion to vacate." *See* Appendix B at App. 8, n.1.

Such civil remedial sanctions under RCW 7.21.030 are imposed to attempt to coerce contemnors to obey court orders. RCW 7.21.030(2)(b) grants trial courts

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11 Specifically, Ross's argument focuses on the statutory interpretation of the term "forfeiture" as used in RCW 7.21.030(2)(b), and claims that term only permits payment to a court. *See* Ross's Petition, pp.7-8; *see also* Ross's Opening Brief, pp.10-15. Ross even goes so far as to argue the alleged legislative intent of RCW 7.21.030(2)(b). *See* Ross's Petition, p.7.

the power to issue as a remedial sanction "[a] forfeiture not to exceed two thousand dollars for each day the contempt of court continues." *See generally* Appendix A. The term "forfeiture" is not defined by the statute. *See* RCW 7.21.010. The legislature clearly left the trial court with the discretion of whether to make such "forfeitures" payable to the court or an opposing litigant.[12]

This Court need look no further than the Division III opinion in the prior appeal by Mr. Moe of the 2008 judgment in which it found that that forfeitures under RCW 7.21.030(2)(b) may be awarded to an opposing litigant. (CP 274-286)[13]

Also, because the primary purpose of a trial court's civil contempt power is to coerce a litigant to comply with an order or judgment, *State v. Breazeale*, 144 Wn.2d 829, 842 (2001), it possesses broad discretion in selecting the sanction it believes will most likely coerce compliance, tempered only by its reasonable exercise. *State v. Dugan*, 96 Wn. App. 346, 351 (1999). "[A] remedial sanction typically benefits another party." *Rhinevault v. Rhinevault,* 91 Wn. App. 688, 694

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12 *See also* Black's Law Dictionary, 6th ed. p.650 (defining "forfeiture" as "[a] comprehensive term which means a divestiture of specific property without compensation....")(emphasis added). That term in no way is limited to payments to a court. Ross offers no authority in support of her statutory interpretation of the term "forfeiture." *See* Ross's Petition, pp.7-8.

13 As such, Ross's assertion that this issue has never been addressed by any court in any state is false. *See* Ross's Petition, p.7; *see also* law review article cited in n.14, *infra.*

(1998). *See also Hall v. Hall,* 838 P.2d 995 (N.M. 1992) (cited by Ross in her Opening Brief, p.14)(affirming an award of *per diem* civil contempt "fines" to an opposing party).

Although the trial court certainly could have fashioned the remedial sanctions so that they would have been payable to the court, it fashioned the sanctions in the way it thought would have the most coercive power to obtain the Moes' compliance, *i.e.*, to make any assessed remedial sanctions payable to WML. That decision was within the trial court's considerable discretion.[14]

b. Inherent authority

But even if the trial court had acted under its inherent authority, it possessed such authority to issue the remedial sanctions and make them payable to WML. A trial court clearly possesses inherent authority to issue sanctions to control the litigation before it. "[T]he trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." *In re Firestorm 1991,* 129 Wn.2d 130, 139 (*en banc* 1996); *see also State v. Gassman,*

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14 Ross's Petition (and arguments in the court of appeals) limits its arguments to RCW 7.21.030(2)(b), but subpart (2)(c) thereof (also relied upon by the trial court) provides an additional basis to award the remedial sanctions to WML. *See* EXTREME AMERICAN NEIGHBORHOOD LAW, 45 Gonz. L. Rev. 335, 369 and 396 (2009-10)(citations omitted per GR 14.1(a)); *see also generally* CP 203 (specifically referencing RCW 7.21.030(2)(c)); *see also, e.g.,* CP 269 & CP 324 (broadly imposing the remedial sanctions under RCW 7.21.030, which includes subpart (2)(c)). Ross continues to simply ignore subpart (2)(c) as a separate and proper basis to award the remedial sanctions at issue.

175 Wn.2d 208, 211 (*en banc* 2012); *State v. S.H.*, 102 Wn. App. 468, 473 (2000). The trial court can be affirmed on any basis supported by the record. *Deveny v. Hadaller*, 139 Wn. App. 605, 616 (2007). Although the trial court did not purport to act under its inherent authority, it made sufficient findings to support such an award. *E.g.,* CP 203; CP 265, ¶6.

D. Intervention

Ross is also asking this Court to review whether the trial court erred in denying her motion to intervene. *See* Ross's Petition, p.1 (issue number 1); *see also generally* Ross's Petition, pp.5-7.

i. A ruling on this issue would be an improper advisory opinion.

Ross admits that "the Court of Appeals did not consider or rule on whether the trial court erred by denying the motion to intervene." Ross's Petition, p.6; *see also id.* at p.4. As such, it is respectfully submitted that any ruling on this issue by this Court would be an improper advisory opinion. *See* Section 5.C.i., *supra.*

ii. The denial of Ross's Motion to Intervene was rendered moot and/or harmless error by the dismissal of her appeal regarding whether the judgments are void.

"An appeal is moot where it presents merely academic questions and where this court can no longer provide effective relief." *In re Detention of M.K.,* 168 Wn. App. 621, 625 (2012). In addition, "no judgment shall be reversed or affected by reason of [harmless] error...." RCW 4.36.240; *see also, e.g., Public Utility Dist.*

No. 1 v. Washington Public Power Sys., 104 Wn.2d 353, 381 (1985). Ross sought to intervene into WML's Receivership Case for the sole and limited purpose of joining Mr. Moe's Motion to Vacate Judgments. Because (as demonstrated above) Ross's appeal of the denial of the motion to vacate judgments was properly dismissed, her appeal relating to the denial of her motion to intervene was rendered moot and/or harmless error (even if error).

iii. In any event, the trial court properly denied Ross's Motion to Intervene.

Ross fails to cite even one case in support of her argument on the intervention issue. She also fails to address any of the arguments WML raised in Division III as to why the denial of Ross's motion to intervene was proper. *See* WML's Brief of Respondent, pp.13-22. WML does not have sufficient briefing space to fully develop those arguments herein, but they can be summarized as follows. First, Ross lacked standing to intervene to seek to vacate the judgments to which she is not a judgment debtor. *State ex rel. McConihe v. Steiner,* 58 Wash. 578, 582 (1910); *Thomas v. Bremer*, 88 Wn. App. 728, 734 (1997); *Cassell v. Portelance*, 172 Wn. App. 156, 164-65 (2012).

Second, Ross's interest was not impaired by the judgments against the Moes because she is not a judgment debtor under those judgments and will have a full opportunity to defend the UFTA Case. Third, Ross's motion to intervene was not timely. CR 24(a)-(b)(requiring timely application); *Kreidler v. Eikenberry*, 111

Wn.2d 828, 832-33 (1989)(requirements for post-judgment intervention). Ross waited nearly a year after the UFTA Case was filed to move to intervene, and years after she learned of the judgments, and after many judgment collection issues had been resolved by the trial court. Allowing Ross to intervene would have worked an undue hardship upon WML.

Fourth, Ross's interests were adequately represented by the Moes. Ross's briefs were considered by the trial court (but found not convincing), and Mr. Moe raised the precise arguments in oral argument as Ross wanted to advance. RP 14. Ross's brief was essentially treated as amicus for the issues presented to the trial court. *Spokane County v. State ex rel. Public Employment Relations Comm'n*, 136 Wn.2d 644, 650 (1998)(denying intervention, but considering the applicant's brief as amicus). Fifth, granting intervention would have been futile, because the relief sought by Ross is barred by *Marley*. *See* Section 5.B., *supra.*

E. WML Should be Awarded its Attorneys' Fees and Expenses Incurred in this Court pursuant to RAP 18.1(j) and/or RAP 18.9(a).

WML prevailed in the court of appeals and was awarded attorneys' fees therein, and should also be awarded its attorneys' fees and expenses incurred in this Court if Ross's Petition for Review is denied. RAP 18.1(j); *see also* RAP 14.1-14.2. Ross's current Petition is also frivolous and filed for the purpose of further delaying the UFTA Case by seeking review of issues that, as demonstrated above, are settled by clear law and/or were not even reached by the court of appeals. *See*

Sections 5.B., 5.C.i., & 5.D.i., *supra*; *see also* RAP 18.9(a); *see also Johnson v. Mermis,* 91 Wn. App. 127, 137 (1998)("An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.")

6. Conclusion

For the foregoing reasons, WML respectfully requests that the Court deny Ross's Petition for Review, and grant WML an award of its attorneys' fees incurred in this appeal.

DATED this 2nd day of July, 2014.

DAVIDSON BACKMAN MEDEIROS, PLLC

Aaron D. Goforth, WSBA #28366
Attorneys for Plaintiff/Respondent
WML, and its Receiver

DECLARATION OF SERVICE

I hereby declare and certify under penalty of perjury under the laws of the State of Washington that on the date I signed this Declaration I caused a true and correct copy of the foregoing document to be served upon the following in the manner(s) indicated below.

Signed this 2nd day of July, 2014, at Spokane, Washington.

Aaron D. Goforth

Richard D. Wall
Attorney at Law
505 W. Riverside Avenue, Suite 400
Spokane, WA 99201
Via U.S. Mail, postage prepaid

APPENDIX

Appendix A: RCW 7.21 *et seq.* (App. 1-5)

Appendix B: Commissioner's Ruling issued in Division III Case No. 314162 on December 11, 2013 (App. 6-9)

Appendix C: Commissioner's Ruling issued in Division III Case No. 314171 on December 11, 2013 (App. 10-13)

Chapter 7.21 RCW
CONTEMPT OF COURT

RCW Sections

7.21.010 Definitions.
7.21.020 Sanctions -- Who may impose.
7.21.030 Remedial sanctions -- Payment for losses.
7.21.040 Punitive sanctions -- Fines.
7.21.050 Sanctions -- Summary imposition -- Procedure.
7.21.060 Administrative actions or proceedings -- Petition to court for imposition of sanctions.
7.21.070 Appellate review.
7.21.900 Severability -- 1989 c 373.

7.21.010
Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

[1989 c 373 § 1.]

7.21.020
Sanctions — Who may impose.

A judge or commissioner of the supreme court, the court of appeals, or the superior court, a judge of a court of limited jurisdiction, and a commissioner of a court of limited jurisdiction may impose a sanction for contempt of court under this chapter.

[1998 c 3 § 1; 1989 c 373 § 2.]

7.21.030
Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

[2001 c 260 § 6; 1998 c 296 § 36; 1989 c 373 § 3.]

Notes:

Findings -- Intent -- 2001 c 260: See note following RCW 10.14.020.

Findings -- Intent -- 1998 c 296 §§ 36-39: "The legislature finds that an essential component of the children in need of services, dependency, and truancy laws is the use of juvenile detention. As chapter 7.21 RCW is currently written, courts may not order detention time without a criminal charge being filed. It is the intent of the legislature to avoid the bringing of criminal charges against youth who need the guidance of the court rather than its punishment. The legislature further finds that

ordering a child placed in detention is a remedial action, not a punitive one. Since the legislature finds that the state is required to provide instruction to children in detention, use of the courts' contempt powers is an effective means for furthering the education and protection of these children. Thus, it is the intent of the legislature to authorize a limited sanction of time in juvenile detention independent of chapter 7.21 RCW for failure to comply with court orders in truancy, child in need of services, at-risk youth, and dependency cases for the sole purpose of providing the courts with the tools necessary to enforce orders in these limited types of cases because other statutory contempt remedies are inadequate." [1998 c 296 § 35.]

Findings -- Intent -- Part headings not law -- Short title -- 1998 c 296: See notes following RCW 74.13.025.

7.21.040
Punitive sanctions — Fines.

(1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.

(2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(4) A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment for up to three hundred sixty-four days, or both.

[2011 c 96 § 3; 2009 c 37 § 1; 1989 c 373 § 4.]

Notes:

Findings -- Intent -- 2011 c 96: See note following RCW 9A.20.021.

7.21.050
Sanctions — Summary imposition — Procedure.

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(2) A court, after a finding of contempt of court in a proceeding under subsection (1) of this section may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

[2009 c 37 § 2; 1989 c 373 § 5.]

7.21.060
Administrative actions or proceedings — Petition to court for imposition of sanctions.

A state administrative agency conducting an action or proceeding or a party to the action or proceeding may petition the superior court in the county in which the action or proceeding is being conducted for a remedial sanction specified in RCW 7 21.030 for conduct specified in RCW 7.21.010 in the action or proceeding.

[1989 c 373 § 6.]

7.21.070
Appellate review.

A party in a proceeding or action under this chapter may seek appellate review under applicable court rules. Appellate review does not stay the proceedings in any other action, suit, or proceeding, or any judgment, decree, or order in the action, suit, or proceeding to which the contempt relates.

[1989 c 373 § 7.]

7.21.900
Severability — 1989 c 373.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1989 c 373 § 30.]

The Court of Appeals
of the
State of Washington
Division III

DEC 11 2013

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, et al., Respondents, v. SPOKANE RACEWAY PARK, INC., et al., Defendants, and SUSAN ROSS, et al., Appellants.	)	No. 31416-2-III COMMISSIONER'S RULING

Susan Ross, Terry and Bryan Graham, and the Meadows at Dry Creek, LLC (Ross) have appealed the Spokane County Superior Court's January 18, 2013 "Order Denying Ross et al.'s Motion to Intervene," and its "Order Denying Motion to Void Judgments," entered that same date. The superior court entered the latter Order in Orville

Appendix B

and Deonne Moe's motion to vacate certain judgments that the court had imposed against them as sanctions for discovery violations in actions the receiver for Washington Motorsports Limited Partnership had initiated against the Moes.

The receiver for Washington Motorsports now moves this Court to dismiss Ross's appeal as frivolous under RAP 18.9(c) or, in the alternative, to affirm the superior court on its motion on the merits pursuant to RAP 18.14. It also asks for reasonable attorney fees and costs on appeal under RAP 18.9(a).

Ms. Ross and Ms. Graham are Orville Moe's daughters. Mr. Moe is the former president and majority shareholder of Spokane Raceway Park, Inc. The receiver of Washington Motorsports had previously sued Spokane Raceway and the Moes. The receiver's action alleged the latter had mismanaged the assets of Washington Motorsports. In that action against the Moes, the receiver sought discovery of certain documents. The Moes did not comply with the receiver's discovery requests. The superior court sanctioned the Moes for their discovery violations. It ordered the Moes to pay monetary sanctions directly to Washington Motorsports.

The receiver ultimately obtained judgments against the Moes for these remedial sanctions.

On March 14, 2012, the receiver sued Ross for damages under the fraudulent conveyance act. In that action, the receiver sought a writ of execution against property

the Moes had transferred to Ross, as a means of satisfying its judgments against the Moes.

The Moes then moved to vacate the judgments. And, Ross unsuccessfully moved to intervene in the receivership action so as to join the Moes' motion to vacate. On the same day it entered the Order that denied the motion to intervene, the superior court also denied the Moes motion to vacate the judgments re sanctions. The Moes appealed the latter Order. *See* no. 31417-1-III.

This Court has granted the receiver's motion to dismiss the Moes' appeal in no. 31417-1-III as frivolous. As Ross does here, the Moes had argued that the judgments for sanctions were void and the proper subject of their CR 60(b) motion to vacate, because the superior court lacked authority to order the Moes to pay the sanctions directly to Washington Motorsports. This Court's ruling rejected the Moes' argument, and is incorporated by reference here.[1] The ruling effectively disposes of Ross's argument, as well.

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[1] Unlike the Moes' brief on appeal, Ross's brief cites several cases in support of their argument that the superior court lacked authority to make the sanctions directly payable to Washington Motorsports. This Court has carefully reviewed those cases and has determined that they are consistent with this Court's ruling that dismissed the Moes' appeal. The superior court had the authority to sanction the Moes for their discovery violations. Whether it also could order the Moes to pay the sanctions directly to Washington Motorsports was a question that the Moes could have appealed upon entry of the judgments. The question did not involve personal or subject matter jurisdiction, or the inherent power of the court, and, thus, was not the proper subject of a CR 60(b) motion to vacate.

Accordingly, IT IS ORDERED, Washington Motorsports' motion to dismiss Ross's appeal as frivolous is granted, as is its motion for reasonable attorney fees and costs, subject to its compliance with RAP 18.1(d).

December 11, 2013

Monica Wasson
Commissioner

The Court of Appeals
of the
State of Washington
Division III

FILED
DEC 11 2013

WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, et al., Respondents, v. SPOKANE RACEWAY PARK, INC., et al., Defendants, and ORVILLE AND DEONNE MOE, et al., Appellants.	)	No. 31417-1-III COMMISSIONER'S RULING

Orville and Deonne Moe (Moe) have appealed the Spokane County Superior Court's January 18, 2013 "Order Denying Motion to Void Judgments." Washington

Appendix C

Motorsports now moves to dismiss Moe's appeal as frivolous under RAP 18.9(c) or, in the alternative, to affirm the superior court on the merits pursuant to RAP 18.14. It also asks for reasonable attorney fees on appeal under RAP 18.9(a).

Moe brought his motion in the superior court under CR 60, which provides that "(b) [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) The judgment is void."

Moe's opening brief in this appeal raises the following issue: Did the superior court err when it denied Moe's CR 60(b)(5) motion to vacate the judgments that ordered Moe to pay Washington Motorsports, rather than the court itself, the amounts it had imposed as sanctions against Moe?

Specifically, Moe contends that the superior court lacked authority under RCW 7.21.030(b)(2)(b) to order him to pay sanctions to anyone other than the court. Therefore, he asserts that the judgments are void, and a proper subject of a CR 60(b)(5) motion to vacate. He points out that while RCW 7.21.030(2)(b) provides that a court may impose a sanction of up to $2,000 per day on a party in contempt of court, subsection (3) of that same statute provides that the court may order the party in contempt to pay an opposing party reasonable attorney fees and costs. I.e., RCW 7.21.030(3) provides that "[t]he court may, in addition to the remedial sanctions set forth in

section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees."

In Moe's view, the court lacked authority to order Moe to pay the sanctions to Washington Motorsports because the statute provides a remedy to Washington Motorsports, in that the court can order a party in contempt to pay an opposing party's reasonable attorney fees.

However, the Washington State constitution provides for the broad original jurisdiction of the superior court. Under Art. IV, Sec. 6, the superior court has jurisdiction "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Therefore, even if the superior court committed a legal error when it ordered Moe to pay the contempt sanctions to Washington Motorsports, that alleged error did not render the judgment void, only voidable. Moe's remedy, if any, was to have appealed the judgments in a timely fashion when the court entered them. Moe cannot resurrect the argument in a motion to vacate. *See also In re Marriage of Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003).

In these circumstances, this Court holds that Moe's appeal is frivolous, as it presents no debatable issue and is so devoid of merit as to have no reasonable possibility of reversal. *See Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187 (1980).

Accordingly, IT IS ORDERED, Washington Motorsports' motion to dismiss Moe's appeal as frivolous is granted, as is its motion for reasonable attorney fees and costs, subject to its compliance with RAP 18.1(d).

December 11, 2013

Monica Wasson
Commissioner