No. 314162

COURT APPEALS OF
THE STATE OF WASHINGTON
DIVISION III

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.

BRIEF OF RESPONDENT WML

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1. IDENTITY OF APPELLANTS, RESPONDENT, and DEFENDANT:

The Appellants are Susan Ross, Terry and Bryan Graham, and The Meadows at Dry Creek LLC (collectively "Ross"). They are not parties to the above-captioned lawsuit ("WML's Receivership case"). Ms. Ross and Mrs. Graham are the daughters of Orville Moe and Deonne Moe ("the Moes"). The Moes are not parties to WML's Receivership case either. Mr. Moe is the former President and majority shareholder of the Defendant in WML's Receivership case, Spokane Raceway Park, Inc. ("SRP").

Respondent is Washington Motorsports Limited Partnership ("WML"), by and through Barry W. Davidson, in his capacity as WML's Court-appointed Receiver and Acting Managing General Partner. WML is the Plaintiff in WML's Receivership Case. Mr. Davidson was appointed as WML's receiver after SRP (then controlled by Mr. Moe) was removed by the trial court as WML's general partner.

WML's Receivership case was commenced in 2003 and is still pending. While most of the case has been resolved, remaining issues include resolving a dispute with Spokane County relating to real property purchased by the County from WML, distribution of funds to WML unit holders, paying remaining creditors, collection of judgments against the Moes (and others), and other matters. Judge Robert D. Austin presided over the case from its inception until approximately December of 2009. Judge Annette S. Plese has presided over the case since then.

Ross is a defendant (along with the Moes) in an "adjunct proceeding" to WML's Receivership Case (pursuant to RCW 7.60.160(2) of Washington's Receivership Statute) captioned *WML v. Orville Moe et al.*, Spokane County Superior Court Cause No. 12-2-01033-6 ("UFTA case"). In the UFTA case, WML is seeking to, among other things, unwind numerous alleged unlawful fraudulent transfers of approximately $1,000,000.00 in assets from the Moes to Ms. Ross and the Grahams immediately prior to (and after) WML obtained substantial monetary judgments against Orville and/or Deonne Moe.

2. INTRODUCTION:

As amended in 2004, WML's Receivership case sought the appointment of a receiver over WML and the removal of SRP (through Mr. Moe) as WML's managing general partner, and other relief. (CP 134-70) After a lengthy evidentiary hearing, Barry W. Davidson was appointed as WML's receiver and acting managing general partner.[1] (CP 171-91) Mr. Moe failed to cooperate with the Receiver and disobeyed numerous court orders to, among other things, produce documents and other information.

Ultimately, three separate judgments were entered against Orville and/or Deonne Moe for remedial sanctions under RCW 7.21 *et seq.* based

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[1] In 2006, while motions for sanctions were pending against Mr. Moe, he attempted to divest the trial court of jurisdiction by causing SRP to file bankruptcy. (CP 192-95) That ploy backfired, and the bankruptcy court removed Mr. Moe from any further control of SRP and appointed John D. Munding as its Chapter 11 Trustee. (CP 196-99) In 2009, the remaining disputes between WML and SRP were resolved through a settlement approved in both WML's Receivership Case and SRP's bankruptcy case. (CP 229-47)

upon their refusals to obey numerous court orders. The Judgments were entered in 2008, 2011, and 2012, respectively. (CP 1-7, 8-14, and 51-55) In November of 2012, Mr. Moe moved to vacate the judgments, claiming that they should be vacated under numerous subparts of CR 60(b). (CP 56-60) In December of 2012, Ross moved to intervene into WML's Receivership case for the sole and limited purpose of joining Mr. Moe's Motion to Vacate. (CP 61-65)

Ross limited her argument in support of vacation to CR 60(b)(5)("void"). (CP 66-73) Specifically, Ross argued that a trial court "lacked statutory authority" to enter a judgment for remedial sanctions under RCW 7.21.030(2)(b) in favor of an opposing party, and as a result, the Judgments were void. *Id.* The trial court denied Ross's Motion to Intervene, and denied Mr. Moe's Motion to Vacate. (CP 119-120, 121-122) Ross and the Moes filed separate appeals.[2] (CP 123-129, 130-133)

Ross has appealed both the denial of her Motion to Intervene and the denial of Mr. Moe's Motion to Vacate. Ross's appeal of the denial of Mr. Moe's Motion to Vacate presents a bit of an unusual procedural posture.

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[2] This Court is familiar with WML's Receivership case and Mr. Moe. There have been at least eighteen motions for discretionary review/notices of appeals connected with this case to date. *See* Division III Case Nos. 241025, 243788, 259471 (adjunct case), 263312, 263347, 265927, 270769 (arising out of an attempted appeal in another case by Deonne Moe of an order entered in the WML's Receivership case), 277470, 278166, 278981, 284778, 290280, 297926 (an attempt to quash a bench warrant issued in WML's Receivership case), 298728, 311317 (pending), 314162 (this appeal), 314171 (pending), and 317676 (pending).

The only motion filed by Ross which was ruled upon by the trial court was her Motion to Intervene. It was denied. The denial of Mr. Moe's Motion to Vacate is under review in a separate, but "linked" appeal. Division III Case No. 314171.[3]

WML submits arguments on both the denial of Ross's Motion to Intervene and the denial of Mr. Moe's Motion to Vacate. WML's arguments on the propriety of the trial court's denial of Mr. Moe's Motion to Vacate are offered to demonstrate that because the trial court properly denied that Motion, Ross's Motion to Intervene is rendered moot and/or the trial court's denial of that Motion is harmless (even if error). *See* Section 6.A.ii., *infra.* Those arguments are also offered in the event this Court otherwise considers the merits of the denial of Mr. Moe's Motion to Vacate as a part of this appeal. *See* Section 6.B., *infra.*

3. ASSIGNMENTS OF ERROR:

WML does not make any assignments of error.

4. ISSUES PRESENTED FOR REVIEW:

a. Did the trial Court err in denying Ross's Motion to Intervene considering the following:

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[3] Ross's Motion to Consolidate this appeal with the Moes' appeal of the denial of their Motion to Vacate (Division III Case No. 314171) was denied, but the two appeals have been "linked." *See* June 19, 2013 notation ruling.

(1) the trial court property denied Mr. Moe's Motion to Vacate, so the denial of Ross's Motion to Intervene has been rendered moot and/or the denial thereof was harmless (even if error); (*see* Section 6.A.ii., *infra*)

(2) Ross lacked standing to intervene to seek vacation of judgments to which she is not a judgment debtor; (*see* Section 6.A.iii., *infra*)

(3) Ross has no interest that is impaired or impeded by the Judgments against the Moes; (*see* Section 6.A.iv., *infra*)

(4) Ross's Motion to Intervene was not timely; (*see* Section 6.A.v., *infra*)

(5) Ross's interest was adequately represented by the Moes; (*see* Section 6.A.vi., *infra*)

(6) intervention was futile, because the relief sought by Ross (to vacate the judgments as "void" under CR 60(b)(5) as allegedly beyond the trial court's authority) is clearly not permitted; (*see* Section 6.A.vii., *infra*)

b. Did the trial Court err in denying Mr. Moe's Motion to Vacate the 2008, 2011 and 2012 Judgments considering the following:

(1) Ross lacked standing to seek to void the judgments under CR 60(b)(5); (*see* Section 6.B.ii, *infra*)

(2) Ross's argument that the trial court allegedly "lacked authority" to enter the Judgments is not a valid basis to seek to void the Judgments under CR 60(b)(5), because even if (*arguendo*) the Judgments were entered without authority, they are not void because the trial court had

personal jurisdiction over the Moes and subject matter jurisdiction to issue remedial sanctions against the Moes; (*see* Section 6.B.iii, *infra*)

(3) Ross's arguments are barred by the law of the case doctrine, since the issues relating to the validity of the Judgments either were or could have been raised in Mr. Moe's appeal of the 2008 Judgment for remedial sanctions (in which the 2008 Judgment was affirmed); (*see* Section 6.B.iv., *infra*)

(4) CR 60(b)(5) cannot be utilized to argue alleged legal error in the underlying Judgments, because such alleged legal errors can only be reviewed through a CR 59 motion or through timely appeal; (*see* Section 6.B.v., *infra*)

(5) as to the 2008 Judgment, the trial court properly denied the Motion to Vacate, because it lacked jurisdiction to vacate that Judgment, because it had already been affirmed on appeal by this Court; (*see* Section 6.B.vi., *infra*) and

(6) if, despite the foregoing, this Court considers the merits of whether the trial court had the authority to enter the judgments for the remedial sanctions payable to WML (*i.e.*, the alleged legal error), the trial court did possess such authority under RCW 7.21.030(2)(b), (c) and/or its inherent authority? (*See* Section 6.B.vii., *infra*)

c. Should WML be awarded its attorneys' fees on appeal under RAP 18.9(a), since Ross's argument that the underlying Judgments are "void"

under CR 60(b)(5) for alleged "lacked authority" to enter them is frivolous? Ross failed to demonstrate (or even argue) that the trial court lacked personal jurisdiction over the Moes or lacked subject matter jurisdiction to impose remedial sanctions (the prerequisites to demonstrating that a judgment is void). (*See* Section 6.C., *infra*)

5. STATEMENT OF THE CASE:

As referenced above, three judgments have been entered in WML's Receivership case against Orville and/or Deonne Moe based upon remedial sanctions that were imposed for their failure to obey court orders. The judgments were entered on September 19, 2008, June 21, 2011, and August 23, 2012, respectively. (*See* CP 1-7, 8-14, and 51-55; attached as Appendices 1-3)

The background regarding the three judgments at issue is extensive and unnecessary for the resolution of Ross's appeal.[4] Only a short summary of each judgment is provided for context.

A. The Moes' participation in WML's Receivership Case

Mr. Moe has heavily participated in WML's Receivership case since its inception in 2003 (initially as the President of Defendant SRP). He subsequently voluntarily appeared individually in this action through counsel as early as 2007. (CP 207-09) He has continuously participated in the case

[4] An appeal of an order denying a motion to vacate does not bring up for appeal the merits of the underlying judgment. *See* RAP 2.4(c); *see also State v. Gaut*, 111 Wn. App. 875, 881 (2002).

since 2003 either through counsel or *pro se*. Deonne Moe voluntarily appeared individually in this action through counsel as early as 2010. (CP 248) The Moes' most recent attorney, Jerome Shulkin, withdrew in July of 2011. (CP 304-05) Orville and/or Deonne Moe have filed numerous motions in WML's Receivership case over the years seeking various types of relief from the trial court, and have opposed numerous motions filed by WML seeking relief against them. Many of the motions/oppositions predate the first judgment entered against Mr. Moe in this case. (*E.g.*, CP 210-15, 216-17, 218-23)

Orville and/or Deonne Moe have also filed numerous Notice of Appeals/Notices of Discretion Review of orders and judgments entered in WML's Receivership case. *See* Division III Case Nos. 263312, 265927, 277470, 284778, 290280, 291154, 311317, and 314171.

B. September 19, 2008 Judgment

On September 19, 2008, the then presiding judge in this case, Robert D. Austin, entered a Final Judgment Against Orville Moe Re: Contempt Orders in the amount of $373,626.10 plus post-judgment interest. (CP 1-7; Appendix 1) The Judgment is based upon Mr. Moe's numerous, intentional violations of orders to produce certain documents. *Id.* The judgment amount was calculated based upon a $1,000.00/day remedial

sanction imposed against Mr. Moe for 341 days, plus attorneys' fees incurred by WML in the amount of $32,626.10.[5] (CP 4-6)

Mr. Moe appealed that judgment. He was represented in that appeal by Jerome Shulkin and Robert L. Christie.[6] A panel of this Court affirmed the Judgment on June 17, 2010, and the Mandate was issued on or about July 29, 2010. (CP 273-86 / Appendix 4)[7]

As a part of its opinion in that case, this Court found, for example, as follows:

- "[Judge Austin] also showed extraordinary patience in dealing with Mr. Moe's long-term recalcitrance...." (CP 275)
- "... [Mr. Moe] chose not to comply with the court's orders." (CP 280)
- "... [Mr. Moe] decided to withhold the documents until it was advantageous to him to release them...." (CP 281)
- "Mr. Moe was the person controlling his financial fate." *Id.*
- "[Judge Austin] only imposed the monetary sanction after Moe continued to defy [Judge Austin's] orders." *Id.*

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[5] Ross is apparently not challenging this portion of the 2008 Judgment, and only the portion based upon the *per diem* remedial sanctions.

[6] At that time, Mr. Christie also represented Deonne Moe and Appellant Susan Ross in WML's Receivership case. (CP 224-25, 226-28)

[7] As demonstrated below, this Court's affirmance of the 2008 Judgment deprived the trial court of the jurisdiction to vacate that Judgment. *See* Section 6.B.vi., *infra*; *see also Thomas v. Bremer*, 88 Wn. App. 728, 734 (1997)("[A]fter a judgment has been affirmed on appeal, the superior court no longer has jurisdiction to consider a CR 60 motion to vacate its own judgment.")

- "While the dollar amount of the sanction is large, Mr. Moe's repeated defiance of the court's orders illustrates that it was necessary to ensure compliance with this and other court orders." *Id.*

- "Presumably [Mr. Moe] weighed these considerations when he made the choice to attempt to frustrate the receivership by withholding his information about the ownership documentation." (CP 282)

- "In the context of civil contempt, that issue [of whether a trial court has a tenable basis for its ruling] is impacted by the fact that it is the contemnor who controls to a large extent the sanction he or she faces." (CP 283)

- "Mr. Moe did not appear to be bothered by the sanctions and, instead, supplied documents only when he deemed it in his best interests to do so." (CP 284)

- "If [Mr. Moe] now deems the $341,000 to be excessive, he can only blame himself." *Id.*

As referenced above, Ross is claiming in this appeal that the judgments are void, because the trial court allegedly lacked the statutory authority to enter a judgment of daily remedial sanctions in favor of WML (but could only have awarded them made payable to the Court). Contrary to Ross's position, this Court specifically affirmed the 2008 Judgment of a "monetary forfeiture" of $1,000.00/day payable to WML under RCW 7.21.030(2)(b) as "a coercive civil sanction...." (CP 281, 283 / Appendix 4 ("The trial court had statutory authority to impose a monetary sanction of up to $2,000 per day. RCW 7.21.030(2)(b).”))

WML justifiably relied upon this affirmed 2008 Judgment to undertake substantial collection efforts, including bank garnishments. (*E.g.*, CP 287-89, 290-92, 293-95, 296-98)

C. June 21, 2011 Judgment

On June 21, 2011, the trial court entered a Final Judgment Against Orville Moe and Deonne Moe for Sanctions in the amount of $751,640.00 plus post-judgment interest. (CP 8-14; Appendix 2) The Judgment is based upon Mr. Moe's numerous, intentional violations of the trial court's orders for him to sit for a supplemental proceedings deposition. The judgment amount was calculated based upon a $2,000.00/day remedial sanction imposed against Mr. Moe for 365 days, plus attorneys' fees incurred by WML relating to Mr. Moe's refusal to have his supplemental proceedings deposition taken. *See id.* Neither of the Moes opposed the entry of the Judgment or appealed the Judgment.

WML justifiably relied upon this unchallenged 2011 Judgment to undertake substantial collection efforts, including executing on real property owned by the Moes. (*E.g.*, CP 306-08, 309-11, 317-19)

As a part of WML's judgment collection efforts, it uncovered a number of fraudulent transfers by the Moes to their daughters (the Appellants in this case) made just prior to, and just after, the judgments at issue.[8] As

[8] The Moes' refusals to obey court orders relating to WML's Judgment collection efforts also resulted in the issuance of bench warrants against the Moes (CP 249-55, 256-62) (subsequently quashed), the entry of the above-

such, on March 14, 2012, WML commenced a lawsuit seeking to, among other things, unwind the fraudulent transfer of assets worth approximately $1,000,000.00. (CP 17-42) The underlying Motion to Vacate Judgments (and this appeal) is an attempted "end run" on that lawsuit.

D. August 23, 2012 Judgment

On August 23, 2012, the trial court entered a Final Judgment Against Orville Moe and Deonne Moe for Sanctions in the amount of $704,000.00 plus post-judgment interest. (CP 51-55 / Appendix 3) The judgment amount was calculated based upon the $2,000.00/day each remedial sanction imposed against the Moes for 154 days for refusing to disclose who assisted them in drafting an improper lawsuit (Spokane County Cause No. 11-2-04631-6) against WML's receiver in violation of numerous Cease and Desist Orders which prohibit the filing of such lawsuits without prior order of the trial court. The Judgment also included a quantification of a prior remedial sanctions award ($88,000) against Mr. Moe relating to Mr. Moe's prior refusal to sit for a supplemental proceedings deposition. *See id.* The Moes appealed that Judgment, and it is currently on appeal under Division III Case No. 311317.

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identified 2011 Judgment in remedial sanctions against the Moes (CP 8-14), the entry of a judgment for sanctions against Mr. Moe's former lawyer (Jerome Shulkin) for improperly certifying Mr. Moe's deficient supplemental proceedings discovery responses (CP 299-303)(*see also* Div. III Case Nos. 298728 & 317676), an improper lawsuit by one of Mr. Moe's friends (Terry-Lee) which wrongfully sought a "Vulnerable Adult Protection Order" to prohibit WML's counsel from collecting WML's judgment on behalf of WML (Div. III Case No. 297926), etc. In short, the Moes have gone to great lengths to hinder WML's judgment collection efforts.

E. Mr. Moe's Motion to Vacate and Ross's Motion to Intervene

On November 19, 2012, Mr. Moe moved to vacate the three Judgments under CR 60(b). (CP 56-60) Ross moved to intervene for the sole and limited purpose of joining Mr. Moe's Motion to Vacate. (CP 61-65, 66-73) WML opposed the motions by Mr. Moe and Ross. (CP 74-86, 87-110) The trial court denied Ross's Motion to Intervene, and Mr. Moe's Motion to Vacate.[9] (CP 119-120, 121-122) This appeal ensued.

6. ARGUMENT:

A. The Trial Court Properly Denied Ross's Motion to Intervene

i. Law regarding Motions to Intervene

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application, anyone may be permitted to intervene in an action:
>
> (1) When a statute confers a conditional right to intervene; or
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. .... In exercising its discretion the court shall consider whether the

[9] The trial court also entered amended orders and final judgments denying Mr. Moe's Motion to Vacate and Ross *et al.*'s Motion to Intervene for the purpose of adding CR 54(b) certifications. (CP 341-43, 344-47)

> intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CR 24 (emphasis added).

"Where [as here] a person seeks to intervene after judgment, the court should allow intervention only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay."[10] *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832-33 (1989)

Permissive intervention is wholly discretionary with the trial court. *Spokane County v. State ex rel. Public Employments Relations Comm'n*, 136 Wn.2d 644, 650 (1998). A trial court abuses its discretion only when no reasonable person would take the position adopted by the trial court. *Id.* (Citations omitted). An appellate court reviews ruling on intervention as a matter of right de novo. *DeLong v. Parmelee,* 157 Wn. App. 119, 163 (2010)(remanded on other grounds). But a trial court's evaluation of timeliness (required for permissive of matter of right intervention) is reviewed for abuse of discretion. *Id.* at 164. The trial court can be affirmed on any basis supported by the record. *Deveny v. Hadaller*, 139 Wn. App. 605, 616 (2007).

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[10] Although the final judgment has not yet been entered in WML's Receivership case, the three judgments Ross sought to vacate was each final pursuant to CR 54(b) certifications. (CP 4-6, 13-14, and 54-55)

ii. Because the trial court properly denied Mr. Moe's Motion to Vacate, the denial of Ross's Motion to Intervene has been rendered moot and/or the denial thereof was harmless (even if error).

"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). A harmless error is an error which does "not affect the substantial rights of the adverse party...." *Id.* "[E]rror is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Cunningham*, 93 Wn.2d 823, 831 (1980). "In the absence of prejudice, even reviewable error is not reversible." *State v. Morgan,* 3 Wn. App. 470, 475 (1970)(citing, *inter alia,* RCW 4.36.240). Erroneous reasoning by a court in reaching the correct decision is harmless error. *Hill v. Corbett*, 33 Wn.2d. 219, 223 (1949).

Although the trial court denied Ross's Motion to Intervene which sought to permit her lawyer to orally argue the merits of her "joinder" in Mr. Moe's Motion to Vacate Judgments, as demonstrated below, because the trial court properly denied Mr. Moe's Motion to Vacate, Ross's Motion to Intervene is rendered moot and/or the trial court's denial of that Motion is harmless (even if error). Even if this Court were to find that the trial court

erred in denying Ross's Motion to Intervene (which WML disputes), remanding this matter to allow Ross to argue her joinder in Mr. Moe's Motion to Vacate would be futile.

As such, if this Court finds that the trial court properly denied Mr. Moe's Motion to Vacate (*see* Section 6.B., *infra*), then it need not even reach the issue of whether the trial court erred in denying Ross's Motion to Intervene, because that issue will then be moot as only involving an academic question, and/or would be harmless (even if error). WML demonstrates below, nevertheless, that the trial court did not commit error in denying Ross's Motion to Intervene.

iii. Ross lacked standing to intervene to seek vacation of judgments to which she is not a judgment debtor.

It has been the law of Washington for over 100 years that a non-party cannot intervene into a case to seek to vacate a judgment to which they are not a judgment debtor. *State ex rel. McConihe v. Steiner,* 58 Wash. 578, 582 (1910) (applying the predecessor to CR 60). A court can only "relieve a party from a judgment...." *Id.* (Emphasis added). Such a motion must be made "on application of a party to the record adversely affected by the judgment." *Id.* (Emphasis added). "It is nowhere even intimated that a stranger to the record or the court on its own motion might make the application." *Id.*

The pronouncements set forth in *McConihe* were affirmed by Division III over 15 years ago in *Thomas v. Bremer*, 88 Wn. App. 728, 734 (1997). In *Thomas,* this Court held that CR 60(b) "authorizes the court to relieve a party

or its legal representative from a final judgment on motion. A stranger to the proceeding cannot ask the court to vacate its final judgment." *Thomas* at 734 (emphasis added)(citing *McConihe* at 582-83). On its face, CR 60(b) only confers standing upon "a party or his legal representative...." to seek vacation of a judgment.

These holdings were again recently affirmed at the end of last year by Division I in *Cassell v. Portelance*, 172 Wn. App. 156 (2012). That case holds that "[a]s an avenue of relief from a final judgment or order, CR 60(b) is available only to a 'party'." *Id.* at 164. A non-party lacks standing to intervene to seek to vacate a judgment to which they are not a judgment debtor. *Id.* at 164-65.

Ross apparently does not dispute the holding of *Cassell,* but rather attempts to distinguish that decision based upon the fact that she did not seek to intervene to vacate the judgments against the Moes until after Mr. Moe first moved to vacate the judgments. This is a distinction without a difference. The relief sought by Ross was to intervene to vacate judgments to which she is not a judgment debtor. She lacks standing to seek that relief.

iv. Ross has no interest that is impaired or impeded by the Judgments against the Moes.

Along this same line, Ross lacks any "interest" that is "impair[ed] or impede[d]" by the Judgments against the Moes. CR 24(a). She is not a judgment debtor thereto. Her sole alleged interest relates to her defense of the UFTA case. She will, however, have a full and fair opportunity to defend the

merits of WML's UFTA action, and her defenses in that case are in no way impaired or impeded by the judgments.

v. Ross's Motion to Intervene was not timely

All applications to intervene, whether by right or by permission, must be timely. CR 24(a)-(b). The determination of what constitutes timely application rests within the trial court's discretion, and will be determined with reference to the facts and circumstances in a particular case. *DeLong v. Parmelee,* 157 Wn. App. 119, 164 (2010). When, as here, the applicant moves to intervene after judgment, the court will allow intervention only upon a strong showing of necessity after considering all the circumstances. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832-33 (1989).

Ross has known about each of the judgments since their respective entries (2008, 2011, and 2012). WML obtained orders to take Ms. Ross's supplemental proceedings deposition in aid of collection over a year before she moved to intervene (CP 312-16), and she was served with the UFTA lawsuit nearly a year before she moved to intervene. (CP 327-28, 329-30, 331-323) Specifically, she waited until December 31, 2012 to file that motion. (CP 61-65) She failed to make a "strong showing" of necessity under the circumstances.

In evaluating timeliness of motions to intervene after judgment has been entered, a court must also consider the "prejudice to the other parties...." *Kreidler* at 833. Allowing intervention for the purpose of seeking to vacate

WML's judgments against the Moes would have been extremely prejudicial to WML. WML has already litigated and prevailed in the trial court and the court of appeals on the remedial sanctions relating to the 2008 Judgment. (CP 273-86 / Appendix 4). The 2011 Judgment was not opposed or appealed by the Moes. The 2012 Judgment is already currently under a separate appeal by the Moes. Division III Case No. 311317.[11] WML has already completed significant collection efforts relating to the 2008 and 2011 Judgments, including bank garnishments and executions on real property owned by the Moes. (CP 287-89, 290-92, 293-95, 296-98, 306-08, 309-11, 317-19)

Further, substantial disputes relating to such collection efforts have been resolved in the trial court and in this court. (CP 249-55, 256-62) (bench warrants); (CP 299-303) (Judgment against Mr. Shulkin); Division III Case No. 298728 (Mr. Shulkin's appeal); Division III Case No. 297926 (Terry-Lee's Appeal). Allowing Ross to intervene to seek to unwind years of legal work in the state and appeals courts would have worked an undue hardship upon WML.

vi. Ross's interest was adequately represented by the Moes.

Intervention as a matter of right is not available if the intervention applicant's interests are already adequately represented in the case. CR 24(a). Lack of adequate representation generally requires that interest is not currently

[11] This is a different appeal than the Moes' "linked" appeal (Division III Case No. 314171) in which the Moes have appealed the trial court's denial of their Motion to Vacate.

represented at all. *E.g., American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34 (1972)(unsecured creditor not represented at all)).

It is important to reiterate that Ross was not moving to intervene to become a party in WML's Receivership case. She was simply moving to present her oral arguments as to why the judgments should be vacated-nothing more. (CP 64) ("[T]he court should grant the motion ... to intervene in the present action for the purpose of joining in the Moe's [*sic*] Motion to Vacate judgment pursuant to CR 60.") Although Mr. Moe, *pro se*, cannot be expected to be as skilled as Ross's lawyer in presenting such arguments, Ross did file a brief on the CR 60(b)(5) issue (CP 66-73), and Mr. Moe submitted a brief on the issue (CP 56-60), and Mr. Moe argued the issue (RP 14, 16). Mr. Moe raised the precise arguments that Ross intended to raise if intervention was granted. *Compare* RP 14 (Mr. Moe's oral argument)("Judgments should be vacated because the statute does not allow the Court, any court, to impose a forfeiture as a sanction for a contempt and then award the money to a party. The forfeiture is payable only to the Court.") and Ross Brief, p.5[12] ("Moe argued that RCW 7.21.010(2) did not authorize a forfeiture of up to $2,000 per day to be entered as a judgment in favor of a party, rather than as a fine payable to the court") *with, e.g.*, (CP 70) (Ross's brief in support of Motion to Vacate)("a remedial 'forfeiture' differs from money damages in that a forfeiture accrues only so long as the contempt

[12] Ross's "Second Corrected" Opening Brief was filed on or about August 1, 2013.

continues and is paid to the court, rather than to an aggrieved party."); *see also See* Ross Brief, p.15 ("While the court had authority under the statute to impose those amounts as remedial sanctions payable to the court, it did not have authority to award those amounts as money damages payable to WML.")

Ross's brief was essentially treated as amicus for the issues presented to the trial court. *Spokane County v. State ex rel. Public Employments Relations Comm'n*, 136 Wn.2d 644, 650 (1998)(denying intervention by permission and as a matter of right, but considering the applicant's brief as amicus). *See* RP 25-26 (referencing Ross's arguments on these issues). This is not a circumstance where Ross's arguments were never raised in the trial court because of alleged "lack of adequate representation." Ross's CR 60(b)(5) arguments were made by her in her brief, and WML specifically responded to those argument in its Memorandum in Opposition to Ross's Motion to Intervene (which was considered by the Court). (CP 77-80) Her arguments were also made by Mr. Moe in his brief and in oral argument, and Ross and Mr. Moe's interests were aligned in seeking vacation of the judgments. The trial court properly found that Ross's interest was adequately represented. RP 12.

Ross has not made any showing that the outcome of Mr. Moe's motion would likely have been any different if Ross's lawyer had been permitted to make oral argument. In fact, at least one Washington superior court does not

permit oral argument on many types of motions, and such motions are resolved strictly on the briefs. *See, e.g.,* King County LCR 7(b)(3).

vii. Intervention was futile, because the relief sought by Ross (to vacate the judgments as "void" under CR 60(b)(5) as allegedly beyond the trial court's authority) is clearly not permitted.

As demonstrated in Section 6.B.iii., *infra*, even when a trial court lacks statutory authority to act, its judgment is not void unless the trial court lacked personal jurisdiction over the person against whom judgment is entered or lacks subject matter jurisdiction to enter the judgment. Ross does not allege either. Her sole argument is that the judgments are void, because the trial court allegedly "exceeded its authority." (CP 70-71); *see also generally* Ross Brief, pp.10-15. That argument is meritless and could not support an order vacating the judgments at issue. *Marley v. Department of Labor and Indus. of State of Wash.*, 125 Wn.2d 533, 539 (*en banc* 1994)("A court or agency does not lack subject matter jurisdiction solely because it may *lack authority* to enter a given order.")(Emphasis added); *see also, e.g., 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." "[F]ailure to observe a statutory [requirement] may be a legal error, but it does not result in loss of jurisdiction.")

For further discussion of this issue, please *see* Section 6.B.iii., *infra.*

B. The Trial Court Properly Denied Mr. Moe's Motion to Vacate

As referenced above (Section 2, *supra*), Ross's appeal of the denial of Mr. Moe's Motion to Vacate presents a bit of an unusual procedural posture (because she is appealing the denial of Mr. Moe's Motion for which she was denied intervention, and because that denial is on appeal by the Moes in a separate appeal). The following arguments on the propriety of the trial court's denial of Mr. Moe's Motion to Vacate are offered, however, to demonstrate that because the trial court properly denied that Motion, Ross's Motion to Intervene is rendered moot and/or the trial court's denial of that Motion is harmless (even if error). *See* Section 6.A.ii, *supra*. The following is also offered in the event this Court otherwise considers the denial of Mr. Moe's Motion to Vacate as a part of this appeal.

i. Standard of Review for Denials of Motions to Vacate

An appeal of an order denying a motion to vacate does not bring up for appeal the merits of the underlying judgment. *See* RAP 2.4(c); *see also State v. Gaut*, 111 Wn. App. 875, 881 (2002)("On review of an order denying a motion to vacate, only 'the propriety of the denial *not* the impropriety of the underlying judgment' is before the reviewing court." (Emphasis original)(Citation omitted).

Washington authority conflicts regarding whether an appeal of an order denying a motion to vacate a judgment as void under CR 60(b)(5) is reviewed for abuse of discretion or de novo. *E.,g., Kennedy v. Sundown*

Speed Marine, Inc., 97 Wn.2d 544, 548 (*en banc* 1982)(abuse of discretion standard of review); *Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366, 372 (Div. III 2009)(abuse of discretion standard); *Ahten v. Barnes,* 158 Wn. App. 343, 350 (Div. I 2010)(*de novo* standard). The trial court can be affirmed on any basis supported by the record. *Deveny v. Hadaller*, 139 Wn. App. 605, 616 (2007).

As demonstrated below, under either standard of review, the trial court should be affirmed because this appeal is clearly frivolous and without merit under controlling and settled law.

ii. Ross lacks standing to seek to void the judgments under CR 60(b)(5)

Under longstanding, clear Washington law, a non-party lacks standing to seek to vacate a judgment to which they are not judgment debtors. *See* CR 60(b) ("the court may relieve a party")(emphasis added); *see also Cassell v. Portelance*, 172 Wn. App. 156, 164 (2012)("As an avenue of relief from a final judgment or order, CR 60(b) is available only to a 'party'."); *see also* Section 6.A.iii, *supra.*

iii. The Judgments are not Void under CR 60(b)(5), because the trial court had personal jurisdiction over the Moes and possessed subject matter jurisdiction to issue remedial sanctions.

Ross's sole argument in the trial court in support of Mr. Moe's Motion to Vacate was that the underlying judgments were allegedly "void" under CR 60(b)(5). (CP 66-73) Specifically, she argued that the trial court

"exceeded its authority" under RCW 7.21.030 to award a *per diem* remedial sanctions judgment against the Moes in favor of WML. (CP 70-71) She makes the same argument on appeal. Ross Brief, pp.10-15. Ross simply ignores Washington's settled and controlling law on how to determine whether an order or judgment is "void."[13]

Washington law is clear that a trial court's alleged "lack of authority" or allegedly "exceeding its authority" does not render an order or judgment void for purposes of CR 60(b)(5). Washington State's Supreme 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).[14]

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[13] Ross even goes so far as to argue in this Court that "In denying the Moes' motion [to vacate] the trial court did not address [the "exceeds authority"] argument. Instead, the court merely concluded that it had subject matter jurisdiction to enter the orders and to impose remedial sanctions for contempt, therefore, the judgments were not void." *See* Ross Brief, p.5 (emphasis added)(citing RP 32-33). She apparently does not understand that personal and subject matter jurisdiction are the linchpins as to whether a judgment is void.

[14] Some Washington court decisions reference a third circumstance in which a judgment can be deemed void, *e.g.*, when a court lacks the "inherent power to enter the order." But the Supreme 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.

Ross did not argue in the trial court (nor in her Brief to this Court) that the trial court lacked personal jurisdiction over the Moes or that it lacked subject matter jurisdiction to issue the remedial sanctions at issue.[15] Ross even concedes that the trial court possessed the authority to issue remedial sanctions, she simply claims that the court lacked the statutory authority to make the sanctions payable to WML (instead of to the Court).

Specifically, Ross admitted that "[w]hile the court had authority under the statute to impose those amounts as remedial sanctions payable to the court, it did not have authority to award those amounts as money damages payable to WML." *See* Ross Brief, p.15 (emphasis added). Alleged "lack of authority" is a distinct concept, however, from alleged lack of subject matter jurisdiction, and as demonstrated below, alleged lack of authority cannot constitute a basis to void a judgment under CR 60(b)(5). Such alleged lack of authority is simply alleged "legal error" which must be challenged, if at all, through a CR 59 motion or a timely appeal. *See* Section 6.B.v., *infra.* Ross's appeal on this issue is frivolous. *See* Section 6.C., *infra*, requesting an award of attorneys' fees pursuant to RAP 18.9(a).

Even if Ross attempts to characterize her "lack of authority" argument as one involving alleged lack of subject matter jurisdiction, such an attempt

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[15] As part of its oral ruling, the trial court specifically found that "I had subject matter jurisdiction. [The prior presiding judge] had it, and at this time, this is not a void judgment." RP 32-33. Further, the trial court indisputably had personal jurisdiction over the Moes (and Ross does not argue to the contrary). *See* Section 5.A., *supra.*

would fail. Our Washington State Supreme Court has specifically held that article IV, section 6 of Washington's Constitution is dispositive and has overruled precedents that erroneously classify the superior court's jurisdiction as arising from authority granted by statutes. "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. art. IV, §6). The Washington Constitution places very few constraints on superior court jurisdiction. *See* Wash. CONST. art. IV, §6 ("The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.") "Exceptions to the jurisdictional grant in article 4, section 6 are to be narrowly construed." *Cole* at 206 (citation omitted).

> In recent cases where our appellate courts have considered the constitutional grant of subject matter jurisdiction to the superior courts, they have accorded it the centrality that it deserves. Our Supreme Court has held that article IV, section 6 is dispositive and has overruled precedents that erroneously classify the superior court's jurisdiction as statutory.

MHM & F, LLC v. Pryor, 168 Wn. App. 451, 459 (2012)(citations omitted)

> As our Supreme 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.
>
> The term "subject matter jurisdiction" is often confused with a court's **"authority"** to rule in a particular manner. This has led to improvident and inconsistent use of the term.
>
> ....
> ... Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. If the phrase is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error.

Marley at 539 (italics original, underlining and bolding added)(quoting *In re Major,* 71 Wn. App. 531, 534–35 (1993))(footnote omitted).

The United States Supreme Court has observed the misuse of the term "jurisdiction" and found that "[c]ourts have sometimes been 'profligate' in the use of the term, producing 'unrefined dispositions' that the Court has referred to as 'drive-by jurisdictional rulings.'" *Cole* at 208 (citations omitted). "[F]ailure 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.

Otherwise, as here, litigants could wait many years after entry of a judgment to raise new statutory interpretation arguments, and claim that based upon such arguments, the trial court lacked statutory authority to enter the judgment at issue, and further argue that such judgment is thus void under CR 60(b)(5). The public policies favoring certainty and finality would be entirely undermined if such conduct was permitted.

The Court in *Marley* further discussed the "type of controversy" issue as follows. "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." *Marley* at 539.

> [T]he focus must be on the words "type of controversy." If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.

Marley at 539 quoting Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse,* 1988 B.Y.U.L.Rev. 1, 28 (emphasis added).

In this case, Ross has conceded that the trial court had the authority to adjudicate the type of controversy (issuance of remedial sanctions), she simply claims that the trial court exceeded its statutory authority by making the award payable to WML. *See* Ross Brief, p.15 ("While the court had authority under the statute to impose those amounts as remedial sanctions payable to the court, it did not have authority to award those amounts as money damages payable to WML.") (Emphasis added); *see also* (CP 69) (Ross's trial court memorandum) ("RCW 7.21.030(2) allows the court to impose 'remedial sanctions' for contempt of court....")

Although the Washington Constitution (and not statutes) sets the boundaries of a trial court's subject matter jurisdiction, even the remedial sanction statute at issue demonstrates that trial courts have the statutory authority to adjudicate this type of controversy. *See* RCW 7.21.020 /

Appendix 8 ("A judge ... of ... the superior court ... may impose a sanction for contempt of court under this chapter."); RCW 7.21.030(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.... [T]he court, after notice and hearing, may impose a remedial sanction authorized by this chapter."); RCW 7.21.030(2)("[T]he court may ... impose one or more of the following remedial sanctions....")

The case of *In re Marriage of Furrow*[16] clearly demonstrates 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) to terminate parental rights. Excerpts of Division I's opinion (which relied heavily on *Marley, supra*) follow:

> No provision in Ch. 26.09 RCW permits a court to terminate parental rights in the course of a marital dissolution or a post-decree modification action.
>
> ....

[16] 115 Wn. App. 661 (2003).

> A superior court proceeding solely under the marital dissolution statutes certainly lacks statutory authority to enter an order terminating parental rights.
>
> ....
>
> [But] the broad original jurisdiction of the superior court as provided in Art. IV, Sec. 6 of the state constitution ... encompasses proceedings to terminate parental rights. So it cannot be said that the modification court had no authority in this case to decide the matter of termination of parental rights at all, let alone to order that particular kind of relief, when acting under the appropriate statutes and procedures. We conclude that although the modification court committed egregious legal and procedural error by terminating Ms. Taylor's parental rights in the modification action without proceeding within the parameters of the adoption code, the order was not thereby rendered void.
>
> Accordingly, notwithstanding the fact that the modification court lacked statutory authority under Ch. 26.09 RCW to terminate Ms. Taylor's parental rights, the trial court did not err by refusing to vacate the termination order under CR 60(b)(5).

Furrow at 667-69 (emphasis added).[17]

In short, alleged lack of statutory authority to enter a judgment is not a proper basis to seek to void that judgment under CR 60(b)(5). The trial court

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[17] Division I in *Furrow* similarly found that although the trial court "acted outside the statutory framework of the adoption statute [RCW 26.33]", it "did not exceed its subject matter jurisdiction...." *Furrow* at 673. The court, nevertheless, ultimately vacated the order under CR 60(b)(11), because of the unique and extraordinary impact on the children, and "serious issues of public policy that go beyond the impact of the procedural irregularities on the children involved in this particular case," including that not vacating the order would result in "children's rights [being] bartered away by parents to achieve their own ends or surrendered by one parent acting under duress." *Id.* at 677 (citation omitted).

did not err in denying Mr. Moe's Motion to Vacate.[18] Additional bases to affirm the trial court's denial of Mr. Moe's Motion to Vacate (and thus to affirm the trial court's denial of Ross's Motion to Intervene) follow.

iv. Ross's argument that the underlying Judgments are void under CR 60(b)(5) is barred by the law of the case doctrine.

"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." *State v. Bailey*, 35 Wn. App. 592, 594 (1983) (emphasis added) (quoting *Davis v. Davis,* 16 Wn.2d 607, 609, (1943)). "Even [where] an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised in a second appeal." *State v. Sauve*, 100 Wn.2d 84, 87 (*en banc* 1983)(emphasis added). Because this Court already affirmed the 2008 Judgment granting a *per diem* remedial sanctions judgment against Mr. Moe payable to WML, Ross's arguments are barred by the law of the case doctrine. *Washington*

[18] Also, as referenced above, because the trial court properly denied Mr. Moe's Motion to Vacate, Ross's Motion to Intervene was futile and/or any alleged error relating thereto was harmless.

Motorsports Limited Partnership v. Spokane Raceway Park, Inc., 156 Wn. App. 1035 (2010), 2010 WL 2433128 (CP 273-86 / Appendix 4)[19]

Specifically, all three judgments involve an award of *per diem* remedial sanctions against Mr. and/or Mrs. Moe under Washington's remedial sanction statute (RCW 7.21 *et seq.*) for their repeated refusals to obey court orders. (CP 1-7, 8-14, 51-55) Mr. Moe already obtained judicial review from this Court relating to the 2008 Judgment. (CP 273-86 / Appendix 4)

In that appeal, Mr. Moe argued, among other things, that the award of $341,000.00 in remedial sanctions was punitive and excessive because, among other things, the trial court already compensated WML through an award of attorneys' fees (and exclusion of documents), and that WML had allegedly made no showing of additional prejudice. *Id.* Despite Mr. Moe's arguments in that appeal, in June of 2010, a panel of this Court affirmed that "monetary forfeiture" of $1,000/day to WML under RCW 7.21.030(2)(b) as a "coercive civil sanction." (CP 281 / Appendix 4) It also specifically rejected the "lack of authority" argument raised by Ross in this appeal by ruling 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).

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[19] This unpublished opinion of this Court which involves the same lawsuit, same parties, and some of the same facts is offered for the purpose of providing some of the underlying factual and procedural background and as "law of the case," so citation thereto is not prohibited by GR 14.1(a). *E.g., Regan v. McLachlan,* 163 Wn. App. 171, 174, n.1 (2011); *Ranger Ins. Co. v. Pierce Co.*, 138 Wn. App. 757, 761, n.1 (2007).

Regardless of how Ross characterizes her argument for reversal under CR 60(b)(5), the issue of whether the remedial sanctions were properly awardable to WML was either already determined by this Court in the appeal of the 2008 Judgment, or it could "have been determined had [it] been presented." *See Bailey* at 594. The 2010 Division III opinion which affirmed the judgment against Mr. Moe of *per diem* remedial sanctions as a "forfeiture" to WML under RCW 7.21.030(2)(b) is the law of this case.

v. CR 60(b) cannot be used to attempt to correct alleged legal error.

It is clear that Ross's argument that the trial court allegedly "lacked authority" to issue the sanctions at issue is an alleged error of law. *In re Marriage of Buecking and Buecking*, 167 Wn. App. 555, 559-60 (2012)("[F]ailure to observe a statutory [requirement] may be a legal error, but it does not result in loss of jurisdiction.")(Emphasis added). In fact, she goes to great length to urge upon this Court her interpretation of the statutory term "forfeiture" as used in RCW 7.21.030(2)(b) (*i.e.*, alleged legal error). *See* Ross Brief, pp.12-13.

An alleged "judicial error" or "error of law" cannot, however, be corrected under a motion to vacate under CR 60(b). "Errors of law are not grounds for vacation under CR 60(b)." *Haley v. Highland*, 142 Wn.2d 135, 156 (2000)(citation omitted). Judicial errors cannot be corrected under CR 60. *Presidential Estates Apartment Assocs. v. Barrett,* 129 Wn.2d 320, 326

(*en banc* 1996). A judicial error can only be reviewed through a CR 59 motion or through timely appeal. *Id.*

vi. The trial court lacked jurisdiction to vacate the 2008 Judgment under CR 60(b) since that Judgment had already been affirmed by this Court.

"[A]fter a judgment has been affirmed on appeal, the superior court no longer has jurisdiction to consider a CR 60 motion to vacate its own judgment." *See Thomas v. Bremer*, 88 Wn. App. 728, 734 (1997)(citing *Kath v. Brown*, 53 Wash. 480, 482-83)(1909)). Since a panel of this Court affirmed the 2008 Judgment in 2010 (CP 273-86 / Appendix 4), the trial court lacked jurisdiction to even consider Mr. Moe and Ross's CR 60 motion to vacate the 2008 Judgment, and as such, it could not have erred in denying the Moes' Motion to Vacate as to that Judgment.

vii. The trial court possessed the statutory authority to issue the remedial sanctions at issue.

The trial court's denial of Mr. Moe's Motion to Vacate should be affirmed on the foregoing bases. But even if the merits (*i.e.*, alleged legal error) of the underlying judgments were before this Court (as Ross argues under the guise of her "void" argument), the trial court properly exercised its broad discretion to issue the remedial sanctions at issue under RCW 7.21.030(2)(b), (c), and/or its inherent authority.

a. Remedial sanctions standards

Our system of justice only works when litigants follow court orders. Remedial sanctions should be completely unnecessary. But for the few

litigants who simply refuse to obey court orders, the legislature has armed trial judges with the power and authority to issue "remedial sanctions" in an effort to coerce contemnors to obey the court's orders. *See* RCW 7.21 *et seq.*

> Pursuant to RCW 7.21.030:
>
> (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[20] in the proceeding to which the contempt is related. . . . .
>
> (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:
>
> . . . .
>
> (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.

Appendix 8 (emphasis added)(footnote added).

"'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." RCW 7.21.010(3)(emphasis added). "[C]ivil contempt looks to remedy by coercing an action and compel compliance with an order or judgment

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[20] "'Contempt of court' means intentional: . . . (b) [d]isobedience of any lawful judgment, decree, order, or process of the court; . . . (d) [r]efusal, without lawful authority, to produce a record, document, or other object." RCW 7.21.010(1).

requiring performance of some act by the contemnor." *In re Marriage of Didier*, 134 Wn. App. 490, 501 (2006). "A court has civil contempt power in order to coerce a party to comply with its lawful order or judgment." *Id.*

"When punishment in contempt cases is not inevitable but can be controlled by the party himself or herself, such contempt actions are not considered 'criminal' but historically are considered civil." *In re Marriage of Bralley*, 70 Wn. App. 646, 652 (1993). "Civil contempt sanctions are coercive, conditional and indeterminate." *State v. John*, 69 Wn. App. 615, 619 (1993). A sanction is only punitive if it does not permit the contempt to be "purged." *Rhinevault v. Rhinevault,* 91 Wn. App. 688, 694 (1998). "The contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order." *State v. John* at 619 (citation omitted).

b. The trial court possessed the statutory authority to enter the Judgments as a result of "forfeitures" for "civil remedial sanctions" under RCW 7.21.030(2)(b).

RCW 7.21.030(2)(b) grants trial courts the power to issue as a remedial sanction "[a] forfeiture not to exceed two thousand dollars for each day the contempt of court continues." The term "forfeiture" is not defined by the statute. *See* RCW 7.21.010. Despite Ross's tortured statutory interpretation to support her argument that a "forfeiture" can only be made payable to a court, the legislature clearly left the trial court with the discretion

of whether to make such "forfeitures" payable to the court or the opposing party.

This Court need look no further than its own opinion in the prior appeal by Mr. Moe of the 2008 Judgment for the $341,000 in remedial sanctions entered against Mr. Moe to determine that forfeiture's under RCW 7.21.030(2)(b) may be awarded to an opposing party. Specifically, in that case, this Court affirmed the Judgment of $341,000.00 payable to WML (despite Mr. Moe's argument that WML had been fully compensated by an award of WML's attorney's fees). *Id.* This Court found that the Judgment was a proper "monetary forfeiture" of $1,000.00/day to WML under RCW 7.21.030(2)(b) as "a coercive civil sanction...." (CP 281 / Appendix 4) This Court also explicitly found that "The 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).

Also, the primary purpose of a court's civil contempt power is to coerce a party to comply with an order or judgment. *State v. Breazeale*, 144 Wn.2d 829, 842 (2001). A trial court has 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). RCW 7.21.030(2)(b) specifically permits a "forfeiture" of $2,000/day. "[A] remedial sanction typically benefits another party." *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 694 (1998)(emphasis added). It is the contemnor's actions

that determine the amount of sanctions, not the opposing party's damages.[21] The Moes always controlled the amount, if any, of the remedial sanctions that would be assessed.

Although the trial court certainly could have fashioned the remedial sanction so that it would have been payable to the court, it fashioned the sanction in the way it thought would have the most coercion to obtain compliance, *i.e.*, to make any assessed remedial sanction payable to WML. That decision was within its considerable discretion.

Ross's specific statutory interpretation argument focuses on the term "forfeiture" as used in RCW 7.21.030(2)(b). Her argument is off base. First, as referenced above, this Court already affirmed a remedial sanctions "forfeiture" payable by Mr. Moe to WML. (CP 273-86 / Appendix 4)

Second, she argues that a court cannot award remedial sanctions and attorneys' fees caused by the contempt. Ross Brief, p.1 ("Whether RCW 7.21.030(2)(b) authorizes a court to impose a forfeiture ... in addition to ordering payment for losses incurred....")(Emphasis added); *see also id.*, p.15. This Court already rejected this argument in Moes' first appeal as well. (CP 282-83 / Appendix 4) ("RCW 7.21.030(2) specifically authorizes the use of 'one or more' remedies. The Legislature clearly intended to grant the

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[21] A trial court is, however, authorized by RCW 7.21.030(3) to also make an award to a party for the losses suffered as a result of contempt. A trial court may impose more than one of the remedial sanctions permitted under RCW 7.21.030. *See* RCW 7.21.030(2)("court [may] impose one or more" forms of remedial sanctions.

courts broad coercive authority rather than limit a judge to only one tool at a time.")

Third, Ross relies on several inapposite cases involving punitive sanctions (as opposed to civil sanctions), which are not at issue in this case. *See* Ross Brief, pp.13-14 (citing *Mitchell v. Watson*, 58 Wn.2d 206 (1961))(involving "punishment" for contempt, and not involving civil remedial sanctions);[22] *Hooker v. Lucero*, 617 P.2d 1313 (1980)(out of jurisdiction case involving "punishment" for contempt, and not remedial sanctions similar to RCW 7.21.030). The sanctions at issue in this case were, however, remedial sanctions imposed to coerce compliance with orders that were yet within Mr. Moe's control.

Ross also cites *Hall v. Hall,* 838 P.2d 995 (N.M. 1992). Her citation to *Hall* is curious, since it involves, among other things, an affirmance of a "fine" for remedial sanctions of $500.00/day (for a total of $28,000), plus $4,246.00 in attorneys' fees payable to the opposing party. *See id.* at 1000, 1003. As a part of its opinion, the court in *Hall* found, among other things, that "fines may be imposed for civil contempt if their purpose is to coerce

[22] Further, in *Mitchell*, "the result of the trial court sanction was to deny the party its right to be heard prior to deprivation of a property right." *Jewell v. City of Kirkland*, 50 Wn. App. 813, 820 (1988)(distinguishing *Mitchell*). In this case, however, Mr. Moe had the opportunity to purge himself of contempt in each of the underlying remedial sanctions orders and not suffer any sanctions, but he chose not to do so.

compliance with court orders...." and that the "fines of $500 per day in this case were appropriate civil contempt fines." *Id.* at 1003. (Emphasis added)[23]

Fourth, Ross's reliance upon a North Dakota case for the proposition that a "forfeiture" must be paid to the court is misplaced. *See* Ross Brief, p.14 (citing *Investors Title Ins. Co. v. Herzig*, 785 N.W.2d 863 (N.D. 2010)). The court in *Herzig* relies solely upon a law review (which itself relies solely upon testimony of a staff attorney) for this proposition. *Herzig* at 878. Also, the North Dakota statute, although similar to RCW 7.21 *et seq.*, contains important distinctions, including specifically identifying when payments are to be made to someone "other than the court." N.D.C.C. ch.27-10-01.4(1)(a). The *Herzig* decision and the North Dakota statute are inapposite.

Fifth, Ross's proposed definition of "forfeiture" is far too narrow. That term is not defined in RCW 7.21.010. Rather than being confined by the narrow definition proposed by Ross, that term is instead, "[a] comprehensive term which means a divestiture of specific property without compensation...."

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[23] Ross claims in her Brief that she has been "unable to find any cases from any jurisdiction in which the court imposed a 'forfeiture' or fine similar to that authorized under RCW 7.21.030(2) and then awarded that amount to a party in the form of a judgment." *See* Ross Brief, p.15. Ross's assertion is unfounded. First, WML's counsel provided Ross's counsel with several such cases in August of 2012. (CP 83) Such authority includes the 2010 opinion issued in Mr. Moe's appeal of the 2008 Judgment. *Id.* Second, the *Hall* decision cited by Ross stands for that exact proposition. Third, Ross was ordered to strike the portion of her Brief which made this inaccurate assertion, but she failed to do so. *See* Commissioner's Ruling entered July 25, 2013 (delete "the entire paragraph that starts, 'In an unpublished opinion....'") Ross struck the beginning of that paragraph in her Second Corrected Brief, but not the "entire paragraph" as ordered.

Black's Law Dictionary, 6th ed. p.650 (emphasis added). That term in no way is limited to payments to a Court.

c. The Judgments were properly entered as a result of "order[s] designed to ensure compliance with a prior order of the court" under RCW 7.21.030(2)(c).

The judgments (and underlying orders for remedial sanctions) were issued pursuant to RCW 7.21.030(2)(b)***&(c)***. They were not "solely" based upon the "forfeiture" provision of RCW 7.21.030(2)(b) as asserted by Ross. *See* Ross Brief, p.10. RCW 7.21.030(2)(c) grants the court the power to issue as a remedial sanction an "order designed to ensure compliance with a prior order of the court." The trial court possesses broad discretion to fashion remedial sanctions pursuant to RCW 7.21.030(2)(c), to attempt to obtain compliance with its orders. *In re Marriage of Matthews,* 70 Wn. App. 116, 126 (1993).

Such authority includes the power to issue hundreds of thousands of dollars in daily remedial sanctions and enter them as judgments in favor of an opposing party if the contemnor does not timely purge themselves of contempt. *See* EXTREME AMERICAN NEIGHBORHOOD LAW, 45 Gonz. L. Rev. 335, 369 and 396 (2009-10)(citations omitted per GR 14.1(a)).[24]

The 2008 Judgment is based upon a remedial sanction order that specifically references RCW 7.21.030(2)(c). (CP 203 /

[24] WML has located two unpublished opinions which affirmed judgments of substantial *per diem* remedial sanctions in favor of opposing parties under RCW 7.21.030(2)(c). Because of GR 14.1(a), they are not cited herein.

Appendix 5)("[P]ursuant to RCW 7.21.030(2)(b)&(c), the Court imposes remedial, monetary sanctions, of $1,000 per day, against Orville Moe and payable to the Receiver....")

The 2011 and 2012 Judgments (and underlying orders for remedial sanctions) are similarly not limited to RCW 7.21.030(2)(b). Instead, they were broadly issued under RCW 7.21.030 (which includes subpart (2)(c)) "to attempt to obtain [the Moes'] compliance with the Orders...." (CP 269 / Appendix 6, CP 324 / Appendix 7)(tracking the language of RCW 7.21.030(2)(c)). The trial court properly exercised its discretion under RCW 7.21.030(2)(c) in issuing the remedial sanctions at issue. Ross simply turns a blind eye to the trial court's authority to impose daily remedial sanctions payable to an opposing party under RCW 7.21.030(2)(c), and instead focus all of her argument on the trial court's alleged lack of authority under RCW 7.21.030(2)(b).

d. The trial court possessed the inherent authority to issue the remedial sanctions at issue.

Although the trial court did not explicitly base the remedial sanctions at issue as being issued under its inherent authority, the trial court can be affirmed on any basis supported in the record. *Deveny v. Hadaller*, 139 Wn. App. 605, 616 (2007).

"Because contempt of court is disruptive of court proceedings and/or undermines the court's authority, courts are vested with 'an inherent contempt

authority, as a power necessary to the exercise of all others.'" *In re Dependency of A.K.*, 162 Wn.2d 632, 645 (2007) (some internal quotation marks omitted). A trial court also has the authority to "impose appropriate sanctions under its inherent authority to control litigation." *In re Firestorm 1991*, 129 Wn.2d 130, 139 (1996); *see also e.g., State v. S.H.*, 102 Wn. App. 468, 473 (2000).

"Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." *King v. Department of Soc. & Health Servs.*, 110 Wn.2d 793, 798 (1988). A reviewing court will uphold a finding of contempt if it "can find any proper basis for the finding." *Trummel v. Mitchell*, 156 Wn.2d 653, 672 (2006)(emphasis added).

The trial court possessed the inherent authority to impose daily remedial monetary sanctions against the Moes payable to WML to attempt to coerce the Moes' compliance with its orders. The amount of the remedial sanctions (if any) was always within the control of the Moes. They elected to disobey the trial court's orders rather than complying. The trial court did not abuse its discretion.

C. WML Should be awarded its Reasonable Attorneys' Fees and Costs Pursuant to RAP 18.9(a)

WML is entitled to an award of attorneys' fees and costs in defending

this appeal pursuant to RAP 18.9(a).[25] Under that Rule, the "appellate court ... on motion of a party may order a party or counsel ... who ... files a frivolous appeal ... to pay terms or compensatory damages to any other party who has been harmed...." "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." *See Johnson v. Mermis,* 91 Wn. App. 127, 137 (1998).

Ross moved to intervene for the sole and limited purpose of joining Mr. Moe's Motion to Vacate. Under clear Washington law, however, Ross could not properly seek vacation of those judgments in the trial court (or reversal of the trial court's denial of Mr. Moe's Motion to Vacate in this Court) under CR 60(b)(5) without first arguing and establishing that the trial court lacked personal jurisdiction over the Moes or lacked subject matter jurisdiction to issue remedial sanctions. She failed to argue or attempt to establish either premise.

Instead, she limited her arguments to a claim that the judgments were void, because the trial court allegedly lacked statutory authority to make remedial sanctions payable to an opposing party. That argument is frivolous. *See e.g., Marley v. Department of Labor and Indus. of State of Wash.*, 125 Wn.2d 533, 539 (*en banc* 1994)("A court or agency does not lack subject

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[25] If WML prevails in this appeal, regardless of whether it is found to be frivolous, the imposition of costs against Ross is also proper. RAP 14.2.

matter jurisdiction solely because it may *lack authority* to enter a given order.")(Emphasis added).

Reasonable minds could not differ about the issues raised. Ross has failed to offer any legitimate basis in law or in fact to obtain reversal of the trial court's denial of Mr. Moe's Motion to Vacate under CR 60(b)(5) (and thus no basis to obtain reversal of the trial court's denial of her Motion to Intervene).

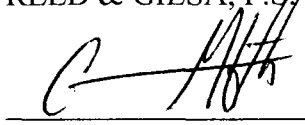
WML requests leave to submit an affidavit detailing the expenses incurred and the services performed by counsel pursuant to RAP 18.1(d), or direct that the amount of fees and expenses to be awarded be determined by the trial court after remand pursuant to RAP 18.1(i).

7. CONCLUSION:

For the foregoing reasons, WML respectfully requests that the Court affirm the trial court's denial of Ross's Motion to Intervene and the denial of Mr. Moe's Motion to Vacate, and award WML its attorneys' fees and costs incurred in defending this appeal.

DATED this 7th day of August, 2013.

REED & GIESA, P.S.



Aaron D. Goforth, WSBA #28366
Attorneys for Respondent Washington Motorsports Ltd., by and through Barry W. Davidson, in his capacity as Receiver and Acting General Partner

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, along with the following appendices, to be served upon the following in the manners indicated below.

Signed this 7th day of August, 2013, 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 1: Final Judgment Against Orville Moe Re: Contempt Orders, entered September 19, 2008 (CP 1-7)

Appendix 2: Final Judgment Against Orville Moe and Deonne Moe For Sanctions, entered June 21, 2011 (CP 8-14)

Appendix 3: Final Judgment Against Orville Moe and Deonne Moe For Sanctions, entered August 23, 2012 (CP 51-55)

Appendix 4: Mandate issued Division III Case No. 277470 (attaching the unpublished opinion of *Washington Motorsports Limited Partnership v. Spokane Raceway Park, Inc.*, 156 Wn. App. 1035 (2010), 2010 WL 2433128 (CP 273-86)

Appendix 5: Order Granting WML's Amended Second Motion for Order Finding Orville Moe in Contempt of Court and Imposing Remedial Sanctions Including Attorneys Fees, entered on November 30, 2006 (CP 200-06)

Appendix 6: Order Granting WML's Fourth Motion for Supplemental Proceedings against Orville Moe, Third Motion for Supplemental Proceedings against Deonne Moe, Eighth Motion for Remedial Sanctions against Orville Moe, and First Motion for Remedial Sanctions against Deonne Moe, and Motion for an Award of Attorneys' Fees, entered on June 4, 2010 (CP 263-272)

Appendix 7: Order **Granting** WML's Motion for Finding of Contempt Against Orville and Deonne Moe, and **Granting** WML's Ninth Motion for Remedial Sanctions against Orville Moe, and **Granting** WML's Second Motion for Remedial Sanctions against Deonne Moe, entered on March 7, 2012 (CP 320-26)

Appendix 8: Chapter 7.21 RCW

Honorable Robert D. Austin

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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, v. SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership, Defendant.	Case No. 03-2-06856-4 FINAL JUDGMENT AGAINST ORVILLE MOE RE: CONTEMPT ORDERS **[x] Clerk's Action Required**

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1. Judgment Creditor: Washington Motorsports Limited Partnership, by and through its Receiver and Acting Managing General Partner, Barry W. Davidson

ORIGINAL

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Appendix 1

2. Judgment Debtor: Orville L. Moe

3. Principal Judgment Amount: $373,626.10

4. Taxable Costs and Attorneys' Fees: $0

5. Pre-judgment interest: $0

6. Post-judgment interest shall accrue interest at 12% per year.

7. Attorney for Judgment Creditor: John P. Giesa, Reed & Giesa, P.S.

8. Attorneys for Judgment Debtor: Aaron L. Lowe, Aaron L. Lowe & Associates, P.S., Donna M. Boris, Boris and Associates, *pro hac vice*

JUDGMENT

1. This Court has entered the following contempt and remedial sanctions Orders against Orville Moe based upon the Findings of Fact and Conclusions of Law described in the respective orders, all of which form the basis of this Final Judgment:

A. *Nunc Pro Tunc* Order on Amended Motion for Clarification etc., and on Motion for Contempt Order but Reserving any Relief Against Spokane Raceway Park, Inc., entered November 29, 2006 (Clerk's Side #436);

B. Order Granting WML's Amended Second Motion for Order Finding Orville Moe in Contempt of Court and Imposing Remedial Sanctions Including Attorneys Fees, entered November 30, 2006 (Clerk's Side #437);

C. Order Granting WML's Motion for Order Imposing Remedial Sanctions Against Orville Moe for Failing to Produce Documents and Information within the Deadline Ordered by this Court; AND

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Granting WML's Supplemental Motion for Order Imposing Remedial Sanctions Against Orville Moe for Contempt for Failing to Produce Documents and Information; AND Granting WML's Motion for Order Quantifying and Awarding Losses Caused by Orville Moe's Contempt of Court, entered October 19, 2007 (Clerk's Side #975);

D. Order Granting Receiver's Sixth Motion for Order Imposing Remedial Sanctions Against Orville Moe for Contempt of this Court's October 19, 2007 Order, entered November 9, 2007 (Clerk's Side #1020);

E. Order Granting WML's Motion for Order Quantifying and Awarding Losses Caused by Orville Moe's Contempt of this Court's October 19, 2007 Order re: WML's Sixth Motion for Remedial Sanctions, entered January 25, 2008 (Clerk's Side #1126);

F. Order Granting WML'S Fifth Motion for Order Imposing Remedial Sanctions Against Orville Moe for Continuing Contempt for Failing to Produce Documents and Information AND Granting WML'S Seventh Motion for Order Imposing Remedial Sanctions Against Orville Moe for Contempt of this Court's Sixth Contempt Order and Continuing Contempt for Failure to Produce Documents and Information, entered February 8, 2008 (Clerk's Side #1149); and

G. Order Granting WML's Motion for Order Quantifying and Awarding Losses Caused by Orville Moe's Contempt re: WML's Fifth and Seventh Motions for Orders Imposing Remedial Sanctions Against Orville Moe, entered February 22, 2008 (Clerk's Side #1162).

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2. There is no just reason for delay in entering a final judgment on the foregoing Orders. This main Receivership case involves multiple issues, disputes, claims, and defenses between WML and Spokane Raceway Park, Inc. and multiple issues, disputes, claims, and defenses involving numerous creditors and persons claiming an ownership in WML. These other issues, disputes, claims, and defenses will take additional time to finally resolve. The requested Final Judgment of the foregoing Orders does not depend upon the outcome of these other issues, claims, defenses and disputes.

3. Moreover, pursuant to RAP 7.2(l) and RCW 7.21.070, an appeal from this Final Judgment will not delay the adjudication of the other issues, claims, defenses, and disputes in this Main Receivership case.

4. Based upon the foregoing, and in light of the express purposes of the Receivership Statute to provide more comprehensive, streamlined, and cost-effective receivership procedures, there is no just reason why the entry of Final Judgment regarding the above-identified Orders should be delayed until final adjudication of the other issues, claims, defenses, and disputes in this Main Receivership Case.

5. Accordingly, the Court enters Final Judgment against Orville Moe in favor of WML as follows:

A. WML is awarded a Final Judgment against Orville Moe in the amount of **$17,656.85** (consisting of $17,281.00 in attorneys' fees and $375.85

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in costs), pursuant to this Court's Order Granting WML's Motion for Order Imposing Remedial Sanctions Against Orville Moe for Failing to Produce Documents and Information within the Deadline Ordered by this Court; AND Granting WML's Supplemental Motion for Order Imposing Remedial Sanctions Against Orville Moe for Contempt for Failing to Produce Documents and Information; AND Granting WML's Motion for Order Quantifying and Awarding Losses Caused by Orville Moe's Contempt of Court, entered October 19, 2007 (Clerk's Side #975).

B. WML is also awarded a Final Judgment against Orville Moe in the amount of **$4,026.50** in attorneys' fees, pursuant to this Court's Order Granting WML's Motion for Order Quantifying and Awarding Losses Caused by Orville Moe's Contempt of this Court's October 19, 2007 Order re: WML's Sixth Motion for Remedial Sanctions, entered January 25, 2008 (Clerk's Side #1126).

C. WML is also awarded a Final Judgment against Orville Moe in the amount of **$341,000.00** in remedial sanctions, pursuant to this Court's Order Granting WML's Fifth Motion for Order Imposing Remedial Sanctions Against Orville Moe for Continuing Contempt for Failing to Produce Documents and Information AND Granting WML'S Seventh Motion for Order Imposing Remedial Sanctions Against Orville Moe for Contempt of this Court's Sixth

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Contempt Order and Continuing Contempt for Failure to Produce Documents and Information, entered February 8, 2008 (Clerk's Side #1149).

D. WML is also awarded a Final Judgment against Orville Moe in the amount of **$10,942.75** in attorneys' fees, pursuant to this Court's Order Granting WML's Motion for Order Quantifying and Awarding Losses Caused by Orville Moe's Contempt re: WML's Fifth and Seventh Motions for Orders Imposing Remedial Sanctions Against Orville Moe, entered February 22, 2008 (Clerk's Side #1162).

E. This Court expressly directs that a **FINAL JUDGMENT** against Orville Moe in favor of WML regarding the above-identified Orders and the monetary awards made therein be immediately entered, and that such **FINAL JUDGMENT** be immediately appealable pursuant to CR 54(b) and RAP 2.2(d).

DONE IN OPEN COURT this 19th day of September, 2008.

Robert D. Austin
Superior Court Judge

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PRESENTED BY:

REED & GIESA, P.S.

John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Robin Lynn Haynes, WSBA #38116
Attorneys for Barry W. Davidson,
in his capacity as Receiver and as
Acting Managing General Partner of
Washington Motorsports Limited Partnership

APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:

Approved via Email 9/16/2008

John D. Munding, WSBA #21734
Chapter 11 Bankruptcy Trustee for
Spokane Raceway Park, Inc.

APPROVED AS TO FORM AND CONTENT;
NOTICE OF PRESENTMENT WAIVED:

Aaron L. Lowe, WSBA #15120
~~Donna M. Boris, *Pro Hac Vice*~~
Attorneys for Orville L. Moe

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Honorable Annette S. Plese

FILED

JUN 21 2011

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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, v. SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership, Defendant.	Case No. 03-2-06856-4 FINAL JUDGMENT AGAINST ORVILLE MOE AND DEONNE MOE FOR SANCTIONS **[x] Clerk's Action Required**

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1. Judgment Creditor: Washington Motorsports Limited Partnership, by and through its Receiver and Acting Managing General Partner, Barry W. Davidson

2. Judgment Debtors: Orville Moe and Deonne Moe

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Appendix 2

3. Principal Judgment Amount: $751,640.00

4. Taxable Costs and Attorneys' Fees: [Included in Principal]

5. Pre-judgment interest: $0

6. Post-judgment interest shall accrue interest at 12% per year.

7. Attorneys for Judgment Creditors: John P. Giesa and Aaron D. Goforth of Reed & Giesa, P.S.

8. Attorneys for Judgment Debtors: Jerome Shulkin

JUDGMENT

1. On September 19, 2008, Judge Robert Austin entered a judgment against Orville Moe in this case in the amount of $373,626.10 (plus interest) based upon Mr. Moe's violations of numerous court orders. Clerk's Side #1440. As referenced below, the Division III Court of Appeals affirmed that Judgment.

2. In WML's effort to collect that judgment, it sought to take the supplemental proceedings depositions of Orville and Deonne Moe, and for them to produce documents. WML obtained Orders for supplemental proceedings against Orville and Deonne Moe. *E.g.*, Clerk's Side ##1752, 1774, 1812, 1837. Both Orville and Deonne Moe were found to be in contempt of those Orders for disobedience thereof. This Court issued bench warrants for the arrest of both Orville and Deonne Moe. Clerk Side ##1822-1825.

3. On June 4, 2010, this Court entered an Order Granting WML's Fourth Motion for Supplemental Proceedings against Orville Moe, Third Motion for Supplemental Proceedings against Deonne Moe, Eighth Motion for Remediation Sanctions Against Orville

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Moe, and First Motion for Remedial Sanctions Against Deonne Moe, and Motion for an Award of Attorneys Fees ("Order Re: Supplemental Proceedings and Remedial Sanctions")(Clerk's Side #1837).

4. As a part of the Order Re: Supplemental Proceedings and Remedial Sanctions, this Court ordered that Orville Moe would incur a $2,000.00 per day remedial sanction for every day after June 11, 2010 that Orville Moe failed to, among other things, sit for a supplemental proceedings deposition as ordered by this Court. Orville Moe failed to comply with that Order.

5. On June 11, 2010, this Court entered an Order Finding Orville Moe in Contempt for Disobeying this Court's Orders for Supplemental Proceedings and Order for Award of Attorneys' Fees and Costs Re: Same (Clerk's Side #1843). As a part of that Order, this Court ordered that pursuant to the terms of the Order Re: Supplemental Proceedings and Remedial Sanctions, the remedial sanctions set forth therein had commenced against Orville Moe. *Id.*

6. To date, Orville Moe has still not complied with Court's Order Re: Supplemental Proceedings and Remedial Sanctions, and remains in ongoing contempt thereof.

7. On September 10, 2010, this Court also entered an Order Granting WML's Motion for Order Quantifying the Attorneys' Fees and Costs Already Ordered to be Paid to WML by Orville Moe and Deonne Moe Based Upon Their Disobedience of Supplemental Proceedings Orders. Clerk's Side #1900.

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8. In that Order, the Court awarded WML $21,640.00 against Orville and Deonne Moe, jointly and severally, in attorneys' fees and costs that were expended in relation to WML's supplemental proceedings efforts. *Id.*, Order, ¶2.

9. As referenced above, in relation to this case, the Division III Court of Appeals has already affirmed prior remedial sanctions of $341,000.00 against Orville Moe (representing a $1,000.00/day remedial sanction for 341 days), plus attorneys' fees for his disobedience of prior orders entered in this case. Clerk's Side #1851 at Exhibit 1. In its decision, the Court of Appeals rejected Mr. Moe's argument that the monetary sanction was excessive. *Id.*, pp.10-11. It also ruled, among other things, that "[w]hile the dollar amount of the sanction is large, Mr. Moe's repeated defiance of the court's orders illustrates that it was necessary to ensure compliance with this and other court orders." *Id.*, p.8. Similarly, while the dollar amount of this judgment is large, it is necessary to attempt to obtain compliance by Mr. Moe with this Court's Orders, and such monetary remedial sanction could have been entirely avoided by Mr. Moe had he complied with this Court's Order Re: Supplemental Proceedings and Remedial Sanctions.

10. This portion of this Judgment relating to the remedial sanctions incurred by Mr. Moe is $730,000.00 (representing $2,000.00/day for the time period of June 11, 2010 to June 10, 2011 (365 days)).

11. The remedial sanctions contained in this Court's Order Re: Supplemental Proceedings and Remedial Sanctions continue to accrue until Mr. Moe purges himself of

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contempt of that Order. WML is granted leave to seek to reduce such additional remedial sanctions to judgment at a later date.

12. The remedial sanctions awarded in this Court's Order Re: Supplemental Proceedings and Remedial Sanctions are remedial in nature. They were imposed, and continue to accrue, not to punish Mr. Moe for prior conduct, but instead to attempt to gain his compliance with this Court's Orders. Mr. Moe could have avoided the monetary remedial sanctions in their entirety by complying with this Court's Order Re: Supplemental Proceedings and Remedial Sanctions (and thereby purging himself of contempt), but he chose not to do so. The incurrence of remedial sanctions, and the amounts thereof, were and continue to be entirely within Mr. Moe's control.

13. As part of this Judgment, this Court also rules that if the amounts awarded in this judgment are not paid in full at the time of any distributions or payments of creditors' claims by WML, WML may offset any amounts owed to Deonne Moe and/or Orville Moe (if any) by the amount still owed hereunder.

14. At all relevant times, Orville Moe and Deonne Moe were husband and wife. For the benefit of Orville and Deonne Moe's marital community, Orville Moe has refused to comply with this Court's Orders for supplemental proceedings to avoid WML's efforts to collect its $373,626.10 (plus interest) judgment. A debt incurred during marriage is presumed to be a community obligation; the burden of proving that a debt is not a community obligation rests on the community. *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 343 (1980). Neither Orville Moe nor Deonne Moe has rebutted that presumption. As such, the

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$730,000.00 in remedial sanctions entered herein are against Orville Moe and the community property of Orville Moe and Deonne Moe. Pursuant to this Court's September 10, 2010 Order, the award of $21,640.00 in attorneys' fees and costs are entered against Orville Moe and Deonne Moe, jointly and severally, and against their community property.

15. There is no just reason for delay in entering a final judgment on the amounts awarded. This main Receivership case involves multiple issues, disputes, claims, and defenses between WML and Spokane Raceway Park, Inc. and multiple issues, disputes, claims, and defenses involving numerous creditors and persons claiming an ownership in WML. These other issues, disputes, claims, and defenses will take additional time to finally resolve. The requested Final Judgment does not depend upon the outcome of these other issues, claims, defenses and disputes.

16. Moreover, pursuant to RAP 7.2(l), an appeal (if any) from this Final Judgment will not delay the adjudication of the other issues, claims, defenses, and disputes in this Main Receivership case. Further, pursuant to RCW 7.21.070, "[a]ppellate review does not stay ... any judgment, decree, or order in the action, suit, or proceeding to which the contempt relates."

17. Based upon the foregoing, and in light of the express purposes of the Receivership Statute to provide more comprehensive, streamlined, and cost-effective receivership procedures, there is no just reason why the entry of Final Judgment regarding the award should be delayed until final adjudication of the other issues, claims, defenses, and disputes in this Main Receivership Case.

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18. Accordingly, the Court enters Final Judgment against Orville Moe and Deonne Moe in favor of WML in the amount of **$751,640.00** (consisting of $730,000.00 in remedial sanctions and $21,640.00 in attorneys' fees and costs).

19. This Court expressly directs that this **FINAL JUDGMENT** against Orville Moe and Deonne Moe in favor of WML be immediately entered, and that such **FINAL JUDGMENT** be immediately appealable pursuant to CR 54(b) and RAP 2.2(d).

DONE IN OPEN COURT this 21st day of June, 2011.

Annette S. Plese
Superior Court Judge

PRESENTED BY:
REED & GIESA, P.S.

John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Attorneys for Barry W. Davidson,
in his capacity as Receiver and as
Acting Managing General Partner of WML

~~APPROVED AS TO FORM AND NOTICE OF PRESENTMENT WAIVED:~~ objected on record - By phone

Jerome Shulkin, WSBA #2198
Attorney for Orville Moe and Deonne Moe

APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:
[did not appear]

John D. Munding, WSBA #21734
Chapter 11 Bankruptcy Trustee for
Spokane Raceway Park, Inc.

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Honorable Annette S. Plese

FILED

AUG 23 2012

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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, v. SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership, Defendant.	Case No. 03-2-06856-4 FINAL JUDGMENT AGAINST ORVILLE MOE AND DEONNE MOE FOR SANCTIONS **[x] Clerk's Action Required**

JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1. Judgment Creditor: Washington Motorsports Limited Partnership, by and through its Receiver and Acting Managing General Partner, Barry W. Davidson

2. Judgment Debtors: Orville Moe, individually; Deonne Moe, individually; and the marital community of Orville Moe and Deonne Moe

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Appendix 3

3. Principal Judgment Amount: $704,000.00

4. Taxable Costs and Attorneys' Fees: $0

5. Pre-judgment interest: $0

6. Post-judgment interest shall accrue interest at 12% per year.

7. Attorneys for Judgment Creditors: John P. Giesa and Aaron D. Goforth of Reed & Giesa, P.S.

8. Attorney for Judgment Debtors: None

JUDGMENT

Remedial Sanctions pursuant to this Court's June 4, 2010 Order

1. On June 21, 2011, this Court entered a Final Judgment Against Orville and Deonne Moe for Sanctions in the amount of $751,640.00 plus interest. Clerk's Side #2089. That Judgment was not opposed or appealed. The findings in that Judgment are hereby incorporated by this reference as if fully set forth herein.

2. That Judgment was based upon prior remedial sanctions orders of $2,000.00 per day issued against Orville Moe which commenced on June 11, 2010. Clerk's Side #1837; 1843. Those Orders are hereby incorporated by this reference as if fully set forth herein.

3. This Court's above-referenced Judgment reduced to judgment the remedial sanctions incurred for the time period of June 11, 2010 to June 10, 2011 (365 days).

4. Pursuant to that Judgment, the remedial sanctions contained in the underlying June 4, 2010 Order continued to accrue until Mr. Moe purged himself of contempt of that Order. Mr. Moe purged himself of contempt on July 25, 2011. (Clerk's Side #2107).

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5. That Judgment also granted WML leave to later seek to reduce to judgment such additional remedial sanctions incurred after June 10, 2011. The additional remedial sanctions of $2,000.00 per day ran from June 11, 2011 to July 24, 2011 (44 days). Such remedial sanctions total $88,000.00 ($2,000/day * 44 days). Judgment is hereby entered for that $88,000.00 in favor of WML against Orville and Deonne Moe, jointly and severally, and against their respective separate property, and against their community property.

Remedial Sanctions pursuant to this Court's March 7, 2012 Order

1. Pursuant to this Court's Order granting WML's Motion to Quantify Remedial Sanctions Pursuant to this Court's Order Granting WML's Motion for Finding of Contempt against Orville and Deonne Moe, and Granting WML's Ninth Motion for Remedial Sanctions against Orville Moe, and Granting WML's Second Motion for Remedial Sanctions against Deonne Moe ("Order Quantifying Remedial Sanctions"), this Court hereby enters judgment for $616,000.00 in favor of WML against Orville and Deonne Moe, jointly and severally, and against their respective separate property, and against their community property.

2. The Findings of Fact and Conclusions of Law contained in that Order Quantifying Remedial Sanctions are incorporated by this reference as if fully set forth herein.

3. This Judgment for $616,000.00 is an interim quantification of the remedial sanctions already ordered by this Court. The Moes continue to incur $2,000.00/day remedial sanctions each until they purge themselves of contempt by complying with this Court's December 22, 2011 Order. WML is granted leave to seek to reduce such additional remedial sanctions to judgment at a later date.

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4. If any amounts awarded in this Judgment are not paid in full at the time of any unit holder distribution or payments of creditors' claims by WML, WML may offset any amounts payable and/or owed to Deonne Moe and/or Orville Moe (if any) by the amount still owed hereunder.

Findings Pursuant to CR 54(b)

1. Pursuant to CR 54(b), there is no just reason for delay in entering a final judgment on the amounts quantified and reduced to judgment herein. This Main Receivership case involves multiple issues, disputes, claims, and defenses involving numerous creditors and persons claiming an ownership in WML. These issues, disputes, claims, and defenses will take additional time to finally resolve. The requested Final Judgment does not depend upon the outcome of these other issues, claims, defenses and disputes.

2. Moreover, pursuant to RAP 7.2(l), an appeal (if any) from this Final Judgment will not delay the adjudication of the other issues, claims, defenses, and disputes in this Main Receivership case. Further, pursuant to RCW 7.21.070, "[a]ppellate review does not stay ... any judgment, decree, or order in the action, suit, or proceeding to which the contempt relates."

3. Based upon the foregoing, and in light of the express purposes of the Receivership Statute to provide more comprehensive, streamlined, and cost-effective receivership procedures, there is no just reason why the entry of Final Judgment regarding the award should be delayed until final adjudication of the other issues, claims, defenses, and disputes in this Main Receivership case.

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4. Accordingly, the Court enters Final Judgment against Orville Moe and Deonne Moe in favor of WML in the amount of **$704,000.00** (consisting of $88,000.00 in remedial sanctions pursuant to this Court's June 11, 2010 remedial sanctions Order (Clerk's Side #1843; *see also* Clerk's Side #1837 & #2089) and $616,000.00 in remedial sanctions pursuant to this Court's March 7, 2012 and August 23, 2012 remedial sanctions Orders (*e.g.*, Clerk's Side #2262)).

5. This Court expressly directs that this **FINAL JUDGMENT** against Orville Moe and Deonne Moe in favor of WML be immediately entered, and that such **FINAL JUDGMENT** be immediately appealable pursuant to CR 54(b) and RAP 2.2(d).

DONE IN OPEN COURT this 23 day of August, 2012.

Annette S. Plese
Superior Court Judge

PRESENTED BY:
REED & GIESA, P.S.

John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Attorneys for Barry W. Davidson,
in his capacity as Receiver and as
Acting Managing General Partner of WML

PRESENT IN COURT:
Present on Record 8/23/12

Orville Moe, *pro se*

PRESENT IN COURT:
Not present but given notice 8/23/12

Deonne Moe, *pro se*

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FILED

JUL 30 2010

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

FILED

JUL 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

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

Respondent,

v.

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

Defendant,

and

ORVILLE MOE,

Appellant.

MANDATE

No. 27747-0-III

Spokane County No. 03-2-06856-4

Affirmed

The State of Washington to: The Superior Court of the State of Washington, in and for **Spokane** County

This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on **June 17, 2010** became the decision terminating review of this court in the above-entitled case on **July 19, 2010**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at **Spokane**, this **29th** day of **July, 2010.**

Renee S. Townsley

Clerk of the Court of Appeals, State of Washington
Division III

cc: Jerome Shulkin
Robert L. Christie
Ann E. Mitchell
John P. Giesa
Aaron D. Goforth
Hon. Annette S. Plese
(Hon. Robert D. Austin's case)

JAR

Appendix 4

Hon. Austin

COURT OF APPEALS, DIVISION THREE, 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,	**No. 27747-0-III**
Respondent,	
v.	
SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership,	**Division Three**
Defendant,	
and	
ORVILLE MOE,	
Appellant.	**UNPUBLISHED OPINION**

KORSMO, A.C.J. — Orville Moe challenges the trial court's decision in a contempt proceeding to impose $341,000 in monetary sanctions and bar him from using documents

he belatedly produced. He argues that the multiple sanctions converted this action from a civil contempt to a criminal contempt action. Because the Legislature has authorized multiple sanctions in a civil contempt proceeding and because Mr. Moe maintained the ability to purge the contempt by complying with the trial court's orders, we conclude that this was still a civil contempt action. The trial court also showed extraordinary patience in dealing with Mr. Moe's long-term recalcitrance; it did not abuse its discretion in imposing these sanctions. The order is affirmed.

HISTORY

This case has its genesis in litigation relating to the ownership of the Spokane Raceway Park (SRP). For over 30 years, Mr. Moe was President of SRP. SRP, as general partner of Washington Motorsports Limited Partnership (WMLP), operated an automobile racetrack in Spokane County. In 2004, several of WMLP's limited partners filed suit, alleging mismanagement of SRP by Mr. Moe and others. The partners sought appointment of a receiver pursuant to chapter 7.60 RCW. The trial court appointed a general receiver for WMLP and ordered Mr. Moe to cooperate with him.

Mr. Moe failed to cooperate with the receiver. From May 18, 2006 through December 3, 2007, the receiver filed seven motions for contempt and sanctions against Mr. Moe.

The first motion alleged that Mr. Moe had failed to cooperate with the receiver's request to provide documents related to WMLP. The court did not find Mr. Moe in contempt, but it removed him as manager of SRP, banned him from SRP premises, and ordered him to turn over documents related to SRP operations.

The receiver's second motion alleged Mr. Moe had failed to cooperate with the court's previous order to produce documents. On November 29, 2006, the court found Mr. Moe in contempt and issued an order imposing remedial sanctions in the amount of $1,000 per day for each day after December 8, 2006, that he failed to produce all documents in his possession relating to WMLP ownership.

In its third, fourth, and fifth motions, the receiver contended that Mr. Moe's filing of several documents and supplying of information in response to the receiver's motions to adjudicate ownership of WMLP units represented a violation of the previous court's orders on production. Moe had not previously produced these documents or provided the information. On October 19, 2007, the court found Moe in contempt but suspended the imposition of the $1,000 per day forfeiture. The court did order Mr. Moe to pay attorney's fees and costs to the receiver. The court also ordered Moe to file a declaration identifying documents and nondocumentary information he used in supplying information on the ownership of the WMLP units. Moe was again ordered to produce

these documents to the receiver. The order also expressly reserved the right to exclude documents that were produced in an untimely manner.

When Moe failed to file the required declaration and produce the documents, the receiver filed his sixth motion for sanctions. In response, Mr. Moe filed a declaration on November 14, 2007, explaining the source of his earlier declaration. He attached several documents to this declaration that he had not previously produced.

In response to this declaration and document production, the receiver filed his seventh motion. The motion requested the imposition of the $1,000 per day sanction based on Mr. Moe's failure to previously produce the documents and provide the information contained in his declaration. On February 8, 2008, the court granted the receiver's motions for contempt and imposed a $341,000 forfeiture, representing the 341 days between December 8, 2006 and November 14, 2007. It also excluded from evidence the documents which Mr. Moe had belatedly produced and three of Moe's declarations which contained information he had failed to timely produce. Finally, the court ordered Mr. Moe to pay the receiver's attorney fees and costs for bringing the contempt motions.[1] This appeal followed.

[1] The total financial cost of the daily sanction and the attorney fees was $373,626.10.

ANALYSIS

The primary challenges presented in this appeal concern the nature of the contempt sanctions and whether they were justified. The first issue involves construction of the contempt statutes. The second involves the trial court's discretionary authority to deal with contemnors.

All of these issues are governed by statute. Remedial sanctions are authorized by RCW 7.21.030. This statute is frequently referred to as "civil contempt." *In re Det. of Young*, 163 Wn.2d 684, 693 n.2, 185 P.3d 1180 (2008). RCW 7.21.030(1) allows either the court or a party to seek remedial sanctions for injuries arising from contempt of court. A "remedial sanction" is one which is "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." RCW 7.21.010(3).

In contrast is RCW 7.21.040, which authorizes "punitive sanctions." This statute is also known as "criminal contempt." *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002). "'Punitive sanction' means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). If a court seeks to impose punitive sanctions, a prosecutor must file a complaint or information and certain other procedures must be followed that are generally consistent with a criminal case. RCW 7.21.040(2).

> [A] sanction is punitive if there is a determinate sentence and no opportunity to "purge" the contempt . . . . [I]t is remedial where it is indeterminate and the contemnor is released upon complying with the court's order. A punitive sanction generally is imposed to vindicate the court's authority, while a remedial sanction typically benefits another party.

Rhinevault v. Rhinevault, 91 Wn. App. 688, 694, 959 P.2d 687 (1998) (citations omitted), *review denied*, 137 Wn.2d 1017 (1999).

RCW 7.21.030(2), in relevant part, outlines the possible remedial sanctions available for contempt:

> 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.

A trial court's decision to impose remedial sanctions is within the court's sound discretion. *Rhinevault*, 91 Wn. App. at 694. It will not be disturbed absent abuse of that discretion. *Id.* A court abuses its discretion if its decision is "manifestly unreasonable or rests upon untenable grounds or reasons." *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

With these considerations in mind, we turn to Mr. Moe's contentions.

Monetary Sanctions

Mr. Moe argues that the $341,000 in per diem sanctions was punitive because it was overly harsh and was combined with other sanctions. This argument ignores the fact that Mr. Moe was on notice for more than one year that he might face this sanction. He had the power to avoid the sanction, and he chose not to comply with the court's orders. While the difference between civil (remedial) and criminal (punitive) contempt can be easily stated, distinguishing between the two can be hard because coercive sanctions often appear to be punitive. *In re Interest of M.B.*, 101 Wn. App. 425, 438, 3 P.3d 780 (2000), *review denied*, 142 Wn.2d 1027 (2001). The critical factor in distinguishing between the two circumstances is the triggering mechanism for the sanction. If the purpose of the sanction is to force a person to do something, it is coercive and hence "remedial." *In re Pers. Restraint of King*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). Where a sanction is imposed for past conduct, it typically is punitive. *Id.* A civil sanction "is conditional and indeterminate, *i.e.*, where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order." *Id.*

This was a civil contempt. The order entered November 30, 2006, directed Mr. Moe to turn over the documents or pay $1,000 each day they were withheld after December 8, 2006. Mr. Moe controlled his destiny. He could have turned over the

documents prior to December 8 and faced no financial penalty. Instead, he decided to withhold the documents until it was advantageous to him to release them—typically in response to a motion. Mr. Moe was the person controlling his financial fate.

The trial court allowed Mr. Moe numerous opportunities to comply without immediately paying. It found Mr. Moe in contempt, ordered monetary sanctions, and then stayed the order pending future compliance. The court only imposed the monetary sanction after Moe continued to defy its orders. Even after imposing the sanction, the court did not attempt collection until Mr. Moe finally supplied some of the documents.[2] Rather than abusing its discretion, the trial court showed extraordinary patience with Mr. Moe. While the dollar amount of the sanction is large, Mr. Moe's repeated defiance of the court's orders illustrates that it was necessary to ensure compliance with this and other court orders.

Mr. Moe had control over the monetary sanction. He decided when to comply. The fact that he waited nearly a year to do so resulted in a large monetary sanction, but it was only one-half of what the court could have ordered under the statute. Since he was solely responsible for the amount of the sanction, it was remedial in nature. There was no need to extend the due process protections applicable to criminal cases to this action. The monetary forfeiture was a coercive civil sanction, not a punitive criminal one.

[2] For instance, the trial court could have directed Mr. Moe to make regular payments while the contempt was in progress.

Exclusion of Documents

Mr. Moe also argues that by not allowing him to use documents and information which he produced late, the court in effect is punishing him and not using the least severe means to coerce compliance. But again, Mr. Moe was on notice by at least October 19, 2007, that the court was considering this sanction, and he continued to defy the court's orders. If a court is not allowed to execute on its threats of sanctions, the sanctions will cease to serve the remedial function that the Legislature intended them to have.

As with the monetary sanction, we conclude that this sanction also was remedial rather than punitive. The reason for that conclusion also is the same—Mr. Moe was the one who held the key to his own sanctions. Prior to ultimately turning over some documents on November 14, 2007, Mr. Moe knew that he was facing $1,000 per day and possible exclusion of his evidence if he did not turn the documents over to the receiver. Presumably he weighed these considerations when he made the choice to attempt to frustrate the receivership by withholding his information about the ownership documentation. For better or for worse, it was Mr. Moe who decided to risk the sanctions rather than comply with the court's order. The exclusion order, too, was a coercive civil sanction. It was not punishment.

Mr. Moe also argues that the cumulative effect of the two sanctions amounts to punishment. However, RCW 7.21.030(2) specifically authorizes the use of "one or

more" remedies. The Legislature clearly intended to grant the courts broad coercive authority rather than limit a judge to only one tool at a time. As with the previous arguments, this argument also misses the critical point. The nature of the sanction is dependent upon control over the sanction. Since Mr. Moe controlled his own sanctions, the multiple sanctions imposed here were coercive and civil, not criminal, in nature.

The decision to exclude the belatedly produced documents, even in conjunction with the monetary sanction, was a remedial civil sanction. No additional due process protections were needed.

Excessiveness

Mr. Moe also argues that the $341,000 sanction was excessive. He has not shown that the trial court abused its significant discretion in this matter.

As previously noted, an appellate court will review a contempt sanction for abuse of discretion. *Rhinevault*, 91 Wn. App. at 694. The question then becomes whether the trial court had a tenable basis for its ruling. *Davies*, 144 Wn. App. at 497. In the context of civil contempt, that issue is impacted by the fact that it is the contemnor who controls to a large extent the sanction he or she faces.

The trial court had statutory authority to impose a monetary sanction of up to $2,000 per day. RCW 7.21.030(2)(b). The trial court chose to use only $1,000 of that daily authority. Despite facing that threat, Mr. Moe did not comply even in part until 341

days had passed. The court had repeatedly imposed sanctions and then suspended them in efforts to coerce compliance. It showed great patience under the circumstances. Mr. Moe did not appear to be bothered by the sanctions and, instead, supplied documents only when he deemed it in his best interests to do so.

Under these facts, we see no abuse of discretion. The trial court did what it could, but apparently the sanctions were not so coercive that Mr. Moe felt like complying with them. If he now deems the $341,000 to be excessive, he can only blame himself. While the ultimate efficacy of the sanction can be debated, it is not excessive.

The trial court did not abuse its discretion by its ultimate sanction order.

Calculation of Sanction

Mr. Moe additionally contends that the trial court incorrectly calculated the amount of per diem sanctions. As a general principle, an appellate court will not review an issue that was not raised in the trial court. *See* RAP 2.5(a). Mr. Moe did not argue to the trial court that it had wrongly calculated the number of days that the documents had been withheld. Because Mr. Moe did not present this issue to the trial court, most particularly in his motion for reconsideration, we decline to address it here. *Id.*

Attorney Fees

Finally, the receiver seeks attorney fees for this appeal. RCW 7.21.030(3) authorizes attorney fees for successful defense of an appeal of a contempt order. *In re*

Marriage of Curtis, 106 Wn. App. 191, 202, 23 P.3d 13, *review denied*, 145 Wn.2d 1008 (2001); *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 505, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010 (1996). However, we are aware of no authority that mandates a fee award. The statute expressly states that a trial court "may" award attorney fees. RCW 7.21.030(3). Typically, the decision to impose attorney fees under that language rests in the discretion of the court. *E.g., Farwest Steel Corp. v. DeSantis*, 102 Wn.2d 487, 493, 687 P.2d 207 (1984), *cert. denied*, 471 U.S. 1018 (1985). Because Mr. Moe made a plausible, if unsuccessful, argument for reversal concerning the punitive impact of the sanctions, we exercise our discretion and decline to award attorney fees for this appeal.

CONCLUSION

While the sanctions imposed on Mr. Moe were significant, they were the product of his decision to defy repeated trial court orders. There was no error and no abuse of trial court discretion. The sanction order is affirmed.

A majority of the panel has determined this opinion will not be printed in the

No. 27747-0-III
Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc.

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Brown, J.

I certify that the foregoing document is a full, true and correct copy of the original, as the same appears of record and on file in my office.

Dated: JUL 29, 2010

RENEE S. TOWNSLEY
Clerk of the Court of Appeals, Division III, State of Washington

By Barbara Spence
CASE MANAGER

Honorable Robert D. Austin

FILED
NOV 3 0 2006
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

DONALD MATERNE, limited partner, derivatively, by and on behalf of Washington Motorsports Limited Partnership; ED TORRISON, limited partner, derivatively, by and on behalf of Washington Motorsports Limited Partnership; and MATERNE BROS. CO., a Washington Corporation and limited partner, derivatively, by and on behalf of Washington Motorsports Limited Partnership Plaintiffs, v. SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership; and WASHINGTON MOTORSPORTS LIMITED PARTNERSHIP, a Washington limited partnership, Defendants.	Case No. 03-2-06856-4 **ORDER GRANTING WML'S AMENDED SECOND MOTION FOR ORDER FINDING ORVILLE MOE IN CONTEMPT OF COURT AND IMPOSING REMEDIAL SANCTIONS INCLUDING ATTORNEYS FEES**

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ORIGINAL

Appendix 5

THIS MATTER came before the Court on November 29, 2006 upon Washington Motorsports Ltd.'s ("WML") Amended Second Motion for Order Finding Orville Moe in Contempt of Court and Imposing Remedial Sanctions (including costs and attorneys' fees) pursuant to RCW 7.21.030, and in addition, or in the alternative, an award of fees and costs under the doctrine of intransigence. Having considered the evidence and relevant pleadings, the Court makes the following:

FINDINGS OF FACT

1. On June 1, 2006, following a consolidated hearing on the Receiver's Motion for Clarification, and the Receiver's Motion for Contempt, this Court made oral orders, in the presence of Orville Moe, the president of Spokane Raceway Park, Inc. ("SRP"), requiring Orville Moe and SRP, among other things, to do the following:

a. Turn over control of the entire Wells Fargo Bank Account No. 252-6168717 (the "Wells Fargo Account") to the Receiver, including all money that Orville Moe may have deposited to that account, subject to reimbursement for any contributions of personal funds that Orville Moe could prove belonged to him.

b. Turn over all original WML documents to the Receiver.

2. Orville Moe has willfully failed and refused to comply with the above orders. Specifically, Orville Moe knowingly and intentionally failed and refused to comply with the requirements of the June 1, 2006 order in the following respects:

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a. He failed and refused to turn over to the Receiver control of the entire Wells Fargo account, the funds on deposit therein at the time of the Court's Order or any blank, cleared, or voided checks, the original check register, the original account statements, or other original account documents. ~~The address on the bank account is Mr. Moe's home address, and the bank statements would have been mailed to that address.~~ Instead of delivering the Wells Fargo account funds to the Receiver as ordered by this Court, Orville Moe instead withdrew all of the remaining funds of approximately ~~$14,000~~ $11,505 from the Wells Fargo Account and closed that account. On September 14, 2006, he deposited the funds in a new bank account at Inland Northwest Bank under the name of SRP. That account and the funds in it are now in possession and control of SRP's Chapter 11 Trustee. As a result of Mr. Moe's direct, intentional disregard of this Court's express order, the Receiver did not obtain and still does not have a full accounting of all funds deposited into the Wells Fargo Account, and the Receiver does not have possession or control of the funds that were in the account on June 1, 2006.

b. Orville Moe did not deliver all original WML documents to the Receiver. Although the Receiver has taken possession of all records on the SRP premises, Mr. Moe has not turned over nor has he caused others under his control to turn over any original documents or records of WML to the Receiver since the June 2, 2006 ruling of this Court, whether located at the Moes' personal residence, or

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anywhere other than the offices at the race park. On August 10, 2006, this Court had to again order Carl Oreskovich to turn over the original WML documents in his possession because Orville Moe would not allow him to do so, notwithstanding this Court's order.

3. On August 17, 2006, SRP filed for Chapter 11 bankruptcy.

4. On October 24, 2006, Bankruptcy Judge Patricia C. Williams entered an Interim Order on Motion for Relief from Stay. That Order is in the record as an attachment to the Declaration of Aaron D. Goforth filed October 25, 2006. This Court has reviewed that Order.

5. The Bankruptcy Court's Interim Order permits the Receiver to obtain the requested relief against Orville Moe while reserving any relief directly against SRP.

Now, therefore,

IT IS HEREBY ORDERED that Orville Moe is found in contempt for his knowing and intentional failure and refusal to comply with the above-identified portions of the Court's June 1, 2006 oral rulings. On or before Dec. 8 2006, MR Moe shall do the following to purge himself from contempt: See Next Page 4a

IT IS FURTHER ORDERED that, pursuant to RCW 7.21.030(2)(b)&(c), the RDG Court imposes remedial, monetary sanctions, of $ 1,000 per day, against Orville Moe and payable to the Receiver:

~~(a) For each day that Orville Moe fails to serve the Receiver and file with this Court evidence showing the exact amount of funds that were in the Wells~~ RDG

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1. He shall submit to the Receiver any proof he has that any of the funds deposited in the Wells Fargo bank account were his personal funds, or funds in which WMS had no interest. Such proof shall include proof of the source of funds of any third party that Mr. Moe deposited and claims do not belong to WML.

2. The original check register for the Wells Fargo account shall be delivered to Mr. Davidson.

3. Any and all documents or information in Mr. Moe's possession or control which supports or upon which the claims of ownership of any WML Limited Partnership Units by SRP, Inc., Orville Moe, Deonne Moe, or Susan Ross are based or claimed including but not limited to any proof of how the units were obtained, when, from whom, for what price, paid to whom, and any WML certificates and letters, written assignments, checks, receipts or similar documentation, shall be delivered to Mr. Davidson.

4. Any and all similar documents or information concerning or pertaining to any purchase, transfer or ownership, name, address or contact information of any other WML unit holders, shall be delivered to Mr. Davidson.

5. Mr. Moe shall deliver the documents to Mr. Davidson's office upon 24 hour prior notice and appointment, during business hours.

RDA

Order
page 4a

~~Fargo Bank Account No. 252-6168717 on June 1, 2006;~~ RDa

~~(b) For each day after December 4, 2006 that Orville Moe fails to deliver to the Receiver the exact amount that was in the Wells Fargo bank account on June 1, 2006;~~ RDa

(c) For each day after December ~~4~~ 8, 2006 that Orville Moe fails ~~to~~ deliver all such information and documents to the Receiver and that he ~~obtain all records and documents of WML in his possession or control and for each~~ RDa day after December ~~4,~~ 2006 that ~~he~~ fails to serve and file a sworn Declaration certifying that he has delivered all ~~such~~ the information and documents to the Receiver in his possession RDa (whether located at his house or any other place under his control) ~~on June 1, 2006,~~ covered by this order RDa and that he has directed his wife Deonne Moe, Susan Ross, LeMaster & Daniels, and Robert E. Kovacevich to immediately deliver to the Receiver any such information and documents possessed by them ~~on June 1, 2006 but~~ which are RDa subject to his control. If there are no such documents or information, he shall file and serve the Receiver with a sworn Declaration stating

IT IS FURTHER ORDERED that, pursuant to RCW 7.21.030(3), Orville Moe, RDa personally, is ordered to pay the Receiver the losses incurred by the Receiver, including the costs and attorney fees that have been expended in necessary efforts to obtain compliance and for bringing this motion. The Receiver is hereby granted leave to present the amounts of such losses, including the attorneys' fees and costs incurred, in a supplemental declaration after the Court rules upon this motion.

IT IS FURTHER ORDERED that pursuant to RCW 7.21.030(3) and the doctrine of intransigence, the Receiver be and is awarded against Orville Moe,

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personally, the losses incurred, including the costs and attorneys' fees that have been expended in necessary efforts to obtain compliance and for bringing this motion. The Receiver is hereby granted leave to present the amounts of such losses, including the attorneys' fees and costs incurred, in a supplemental declaration after the Court rules upon this motion.

DONE IN OPEN COURT this 29 day of Nov, 2006.

Robert D. Austin
Superior Court Judge

PRESENTED BY:

REED & GIESA, P.S.

John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Attorneys for Barry W. Davidson,
in his capacity as Receiver and as
Acting Managing General Partner of
Washington Motorsports Limited Partnership

Approved
Coombs & Munding, P.S.
John Munding,
Trustee, SRP, Inc.

Reed & Giesa, P.S.
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Honorable Annette S. Plese

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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, v. SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership, Defendant.	Case No. 03-2-06856-4 ORDER GRANTING WML'S FOURTH MOTION FOR SUPPLEMENTAL PROCEEDINGS AGAINST ORVILLE MOE, THIRD MOTION FOR SUPPLEMENTAL PROCEEDINGS AGAINST DEONNE MOE, EIGHTH MOTION FOR REMEDIAL SANCTIONS AGAINST ORVILLE MOE, AND FIRST MOTION FOR REMEDIAL SANCTIONS AGAINST DEONNE MOE, AND MOTION FOR AN AWARD OF ATTORNEYS' FEES

THIS MATTER came before the Court on June 4, 2010 upon Plaintiff, Washington Motorsports Limited Partnership's ("WML") Fourth Motion for Supplemental Proceedings Against Orville Moe, Third Motion for Supplemental Proceedings Against Deonne Moe, Eighth Motion for Remedial Sanctions Against Orville Moe, and First Motion for Remedial Sanctions Against Deonne Moe, and

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Appendix 6

Motion for an Award of Attorneys' Fees." Having considered the evidence, relevant pleadings, and arguments of Counsel, the Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court hereby incorporates by this reference as if fully set forth herein, its Findings of Fact and Conclusions of Law contained in its 'Order Granting WML's Third Motion for Supplemental Proceedings Against Orville Moe, Second Motion for Supplemental Proceedings Against Deonne Moe, and Motion for an Award of Attorneys' Fees Against Deonne Moe' (Clerk's Side #1812), and in its 'Bench Warrant (Civil) **and** Order Awarding WML Its Attorneys' Fees and Costs Against Orville Moe Relating to Supplemental Proceedings' (Clerk's Side #1822), and in its 'Order for Issuance of Bench Warrant (Civil) **and** Order Awarding WML its Attorneys' Fees and Costs Against Deonne Moe Relating to Supplemental Proceedings' (Clerk's Side #1823), and all other relevant findings of fact and conclusions of law made in this proceeding.

2. Orville Moe and Deonne Moe are in ongoing contempt of this Court's Orders for them to sit for Supplemental Proceedings Depositions and to produce the documents as ordered by this Court.

3. Orville Moe has been ordered to answer supplemental proceedings interrogatories and requests for production of documents. He has also been ordered on two prior occasions to appear and to sit for a supplemental proceedings deposition and

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to produce documents. He refused to fully answer the Court ordered supplemental proceedings interrogatories and requests for production of documents, and he has refused to attend each such deposition and produce Court ordered documents.

4. Deonne Moe has been ordered on two prior occasions by this Court and by another judge to appear and sit for a supplemental proceedings deposition and to produce documents as ordered by the Court. She has refused to attend each such deposition and produce Court ordered documents.

5. Based upon such refusals, on May 6, 2010, this Court issued Civil Bench Warrants for the arrest of Orville and Deonne Moe. Despite those Civil Bench Warrants, Orville and Deonne Moe continue to refuse to sit for their deposition, and they continue to refuse to produce the documents as ordered.

6. This Court has attempted to obtain Orville and Deonne Moe's compliance with this Court's (and other judges') orders through the threat of the issuance of Civil Bench Warrants. Both Orville and Deonne Moe continue, however, to knowingly, willfully, intentionally, deliberately, and defiantly disobey this Court's Orders, and this Court must now impose remedial sanctions in an attempt to coerce their compliance with Court Orders as set forth below.

7. Based upon Mr. Moes' refusal to obey Judge Austin's prior orders to produce documents upon a threat of the assessment of a $1,000/day remedial sanction (Clerk's Side ##437 and 1149), this Court finds that a remedial sanction in that amount

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will be insufficient to coerce Orville and Deonne Moe to comply with this Court's Orders.

8. Based upon Orville and Deonne Moe's refusal to obey this Court's (and other judges') orders for supplemental proceedings despite the threat of arrest pursuant to Civil Bench Warrants, this Court finds that a remedial sanction limited to incarceration will be insufficient to coerce Orville and Deonne Moe to comply with this Court's Orders.

9. WML continues to suffer prejudice by Orville and Deonne Moe's disobedience of Court orders to have their depositions taken and to produce documents relating thereto. Such prejudice includes WML being entirely prevented from collecting any of its $373,626.10 judgment against Orville Moe, although that judgment was entered in September of 2008.

10. The Moes' ongoing contempt is of the nature of those identified in RCW 7.21.010(1)(b) through (d), because they are disobeying lawful orders, decrees, and processes of the court; they are refusing to appear as witnesses, be sworn and answer questions at their court ordered depositions; and they are refusing, without lawful authority, to produce records and documents as ordered by this Court.

11. This Court has considered lesser remedial sanctions, including imposing a monetary remedial sanction of $1,000/day (or less), not imposing incarceration as a remedial sanction, and not imposing an award of attorneys' fees. The Court finds,

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however, that based upon Orville and Deonne Moe's history of disobedience of Court orders and their intransigence, and their refusal to obey prior court orders despite the threat of the imposition of a $1,000/day remedial sanction and despite threats of the issuance of Civil Bench Warrants for their arrests, that lesser sanctions will not be sufficiently coercive for the Moes to obey this Court's orders.

12. The below remedial sanctions are the least severe sanctions that may be adequate to obtain Orville and Deonne Moe's compliance with this Court's orders.

13. RCW 7.21.030(2) permits the simultaneous imposition of more than one type of remedial sanction described therein.

14. The sanctions set forth below are remedial in nature. The assessment of the remedial sanctions is not inevitable. Orville and Deonne Moe can entirely avoid the assessment thereof by purging themselves of contempt by complying with this Court's Orders. Their own conduct will determine what, if any, sanctions will actually be imposed, and they control the total amount of the *per diem* sanctions, if any, ultimately imposed.

ORDER

Now, therefore,

1. WML's Fourth Motion for Supplemental Proceedings Against Orville Moe, Third Motion for Supplemental Proceedings Against Deonne Moe, Eighth Motion for Remedial Sanctions Against Orville Moe, and First Motion for Remedial

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Sanctions Against Deonne Moe, and Motion for an Award of Attorneys' Fees is **HEREBY GRANTED**.

2. Specifically, the Court orders as follows:

a. Orville Moe shall sit for a deposition in (or just outside of) Courtroom 303 on the 11th day of June, 2010, at 9:00 a.m., and Deonne Moe shall sit for a deposition in (or just outside of) Courtroom 303 on the 11th day of June, 2010, at 2:00 p.m., then and there to be examined under oath concerning Mr. Moe's assets, liabilities, and income, and other matters relating to the collection of the judgment entered in this matter, and they are ordered to bring with them the following documents or information:

i. All personal income tax returns for Orville Moe for the years 2007, 2008, and 2009.

ii. All bank statements for accounts in which Orville Moe has had funds in the previous one (1) year.

iii. Description and location of all personal property exceeding $1000 in value in which Orville Moe has an interest.

iv. Original stock certificates of Spokane Raceway Park, Inc.

v. Copies of original stock certificates of Spokane Raceway Park, Inc.

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vi. Legal descriptions and street addresses of all real property and all documents of conveyance for such property in which Orville Moe has an interest.

vii. All trust instruments in which Orville Moe is a grantor and/or beneficiary.

b. If any of the foregoing documents are not currently in the possession of Orville Moe and/or Deonne Moe, they hereby ordered to obtain copies thereof from whomever has possession thereof.

c. This Court also imposes the following remedial sanctions, pursuant to RCW 7.21.030, to attempt to obtain there compliance with the Orders herein:

i. An Order imposing remedial, monetary sanctions of $2,000 each, per day, against Orville Moe and Deonne Moe, jointly and severally, payable to the Receiver:

(A) For each day after June 11, 2010 that Orville and/or Deonne Moe fail to sit for their deposition on that date as ordered by this Court. Orville and/or Deonne Moe will be deemed to have failed to sit for their deposition if they fail to answer any questions as ordered by any Judge or Commissioner of the Spokane County Superior Court.

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(B) For each day after June 11, 2010 that Orville and/or Deonne Moe fail to produce to the Receiver's counsel all responsive documents ordered to be produced by this Order for Supplemental Proceedings, and for each day after June 11, 2010 that Orville and/or Deonne Moe fail to serve and file a sworn Declarations certifying that they have delivered all such documents and information to the Receiver's counsel covered by this Order.

ii. An order of imprisonment of Orville Moe and/or Deonne Moe to continue for each day after June 11, 2010 if Orville and/or Deonne Moe fail to sit for their deposition on that date as ordered by this Court, and/or if they fail to produce to the Receiver's counsel all responsive documents ordered to be produced by this Order for Supplemental Proceedings, pursuant to RCW 7.21.030(2)(a) and RCW 7.21.010(b)-(d). Such imprisonment shall extend so long as it serves a coercive purpose as decided by this Court.

iii. This Court will award WML its attorneys' fees and costs if WML has to bring any motions to enforce any of the above orders.

d. WML is hereby awarded its attorneys' fees and costs incurred in bringing this Motion pursuant to RCW 7.21.030(3), RCW 6.32.010, the doctrine of intransigence, and this Court's inherent authority.

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e. WML is hereby granted leave to submit by supplemental declaration the amount of the attorneys' fees and costs incurred by WML in bringing this Motion.

YOUR FAILURE TO APPEAR AS SET FORTH AT THE TIME AND DATE AND PLACE THEREOF MAY CAUSE THE COURT TO ISSUE A BENCH WARRANT FOR YOUR APPREHENSION AND CONFINEMENT IN JAIL UNTIL SUCH TIME AS THE MATTER CAN BE HEARD, UNLESS BAIL IS FURTHER FURNISHED AS PROVIDED IN SUCH BENCH WARRANT.

DONE IN OPEN COURT this 4th day of June, 2010.

Annette S. Plese
Superior Court Judge

PRESENTED BY:
REED & GIESA, P.S.

John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Robin Lynn Haynes, WSBA #38116
Attorneys for Barry W. Davidson,
in his capacity as Receiver and as
Acting Managing General Partner of WML

APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:

John D. Munding, WSBA #21734
Chapter 11 Bankruptcy Trustee for
Spokane Raceway Park, Inc.

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APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:

FTA 6/6/11

Jerome Shulkin, WSBA #2198
Shulkin Hutton, Inc., P.S.
Attorney for Orville Moe and Deonne Moe

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Honorable Annette S. Plese

FILED
MAR - 7 2012
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

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, v. SPOKANE RACEWAY PARK, INC., a Washington for profit corporation and General Partner of Washington Motorsports Limited Partnership, Defendant.	Case No. 03-2-06856-4 ORDER **GRANTING** WML'S MOTION FOR FINDING OF CONTEMPT AGAINST ORVILLE AND DEONNE MOE, AND **GRANTING** WML'S NINTH MOTION FOR REMEDIAL SANCTIONS AGAINST ORVILLE MOE, AND **GRANTING** WML'S SECOND MOTION FOR REMEDIAL SANCTIONS AGAINST DEONNE MOE

THIS MATTER came before the Court on March 7, 2012 upon Plaintiff, Washington Motorsports Limited Partnership's ("WML") "Motion for Finding of Contempt against Orville and Deonne Moe, and Ninth Motion for Remedial Sanctions against Orville Moe, and Second Motion for Remedial Sanctions against Deonne Moe" Having considered the evidence, relevant pleadings, and arguments, the Court makes the following:

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Appendix 7

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court hereby incorporates the Findings of Fact and Conclusions of Law contained in its numerous orders of contempt and remedial sanctions against Orville and Deonne Moe, and all other relevant pleadings on file.

2. On November 9, 2011, Orville and Deonne Moe's two daughters, Susan Ross and Terry Graham, filed a lawsuit against WML's Receiver, Barry W. Davidson, captioned *Susan Ross and Terry Graham, Partners, and the Moe Family Partnership v. Barry Davidson, Receiver of Washington Motorsports Limited,* Spokane County Cause No. 11-2-04631-6 ("Quiet Title Action"). Clerk's Side #2173 at Exhibit 2.

3. On December 22, 2011, this Court entered an Order granting WML's motion for a cease and desist order against Orville Moe, Deonne Moe, the Alleged Moe Family Partnership, Terry Graham, and Susan Ross. Clerk's Side #2199.

4. That Order prohibited each of the foregoing from, among other things, further prosecution of Quiet Title Action. Clerk's Side #2199, pp.6-7. That Order also required each of the foregoing to "file affidavits in this Receivership Case on or before January 3, 2012 identifying all individuals (whether they are licensed attorneys or not) who assisted them in drafting, preparing, filing, researching, and/or editing (or similar assistance) the Quite Title Action, and identify therein with specificity the assistance each such person provided." *Id.*, p.9.

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5. Discussion about this particular provision of the order was conducted in open court with both Orville and Deonne Moe sitting at counsel table. *See* attachment to Clerk's Side #2220 (excerpt of hearing transcript (pp.47-48, 51-52)).

6. Despite the foregoing, neither Orville Moe, Deonne Moe, the Alleged Moe Family Partnership, Terry Graham, nor Susan Ross filed affidavits in this case by January 3, 2012 as required by this Court's December 22, 2011 Order.

7. Susan Ross filed an affidavit as required by this Court's Order on January 11, 2012. Terry Graham filed an affidavit as required by this Court's Order on January 23, 2012. Clerk's Side ##2212, 2218.

8. WML has not sought a finding of contempt against Terry Graham, Susan Ross, or the Alleged Moe Family Partnership.

9. Orville and Deonne Moe's disobedience of this Court's December 22, 2011 Order is knowing, willful, intentional, deliberate, and defiant. Their disobedience is also ongoing. They offered no justification for disobeying this Court's December 22, 2011.

10. On or about February 14, 2012, Orville and Deonne Moe filed a document titled Orville Moe's Answer and Motion to Quash Action for Contempt against Orville and Deonne Moe. That pleading does not disclose the information ordered to be disclosed in this Court's December 22, 2011 Order.

11. Although Deonne Moe signed that pleading, she did not disclose any information therein, she simply signed the statement provided by Orville Moe.

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12. Mr. Moe claims in that pleading that the information ordered to be disclosed is privileged. An attorney-client privilege does not apply to the identity of counsel for Orville and/or Deonne Moe or to a general description of the work performed by such attorneys.

13. This Court must now impose remedial sanctions in an attempt to coerce their compliance with this Court's Order as set forth below.

14. Based upon Mr. Moe's refusal to obey Judge Austin's prior orders to produce documents upon a threat of the assessment of a $1,000/day remedial sanction (Clerk's Side ##437 and 1149), this Court finds that a remedial sanction in that amount will be insufficient to coerce Orville and Deonne Moe to comply with this Court's Orders.

15. WML continues to suffer prejudice by Orville and Deonne Moe's disobedience of this Court's Order. Such prejudice includes their apparent use of unnamed third parties to draft pleadings for them in violation of the Receivership Statute (RCW 7.60 *et al.*) and numerous Cease and Desist Orders issued by this Court. WML continues to incur otherwise unnecessary attorneys' fees and delays based upon such misconduct.

16. This Court has considered lesser remedial sanctions, including imposing a monetary remedial sanction of $1,000/day (or less). The Court finds, however, that based upon Orville and Deonne Moe's history of disobedience of Court orders and their intransigence, and their refusal to obey prior court orders despite the threat of the imposition of $1,000/day remedial sanctions, that lesser sanctions will not be sufficiently coercive for the Moes to obey this Court's orders.

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17. The below remedial sanctions are the least severe sanctions that may be adequate to attempt to obtain Orville and Deonne Moe's compliance with this Court's orders.

18. RCW 7.21.030(2) permits the simultaneous imposition of more than one type of remedial sanction described therein.

19. The sanctions set forth below are remedial in nature. The assessment of the remedial sanctions is not inevitable. Orville and Deonne Moe can entirely avoid the assessment thereof by purging themselves of contempt by complying with this Court's December 22, 2011 Order, and this Order. Their own conduct will determine what, if any, sanctions will actually be imposed, and they control the total amount of the *per diem* sanctions, if any, ultimately imposed.

ORDER

Now, therefore,

1. WML's Motion for Finding of Contempt against Orville and Deonne Moe, and Ninth Motion for Remedial Sanctions against Orville Moe, and Second Motion for Remedial Sanctions against Deonne Moe is **HEREBY GRANTED**.

2. Specifically, the Court finds Orville Moe and Deonne Moe in contempt of this Court's December 22, 2011 Order.

3. In addition, the Court imposes the following remedial sanctions, pursuant to RCW 7.21.030, to attempt to obtain Orville and Deonne Moe's compliance with the Orders herein:

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i. An Order imposing remedial, monetary sanctions of $2,000 each, per day, against Orville Moe and Deonne Moe, jointly and severally, payable to the Receiver, for each day after March 14, 2012 that Orville and/or Deonne Moe fail to fully comply with this Court's December 22, 2011 Order to file affidavits in this Receivership Case "identifying all individuals (whether they are licensed attorneys or not) who assisted them in drafting, preparing, filing, researching, and/or editing (or similar assistance) the Quite Title Action [Spokane County Cause #11-2-04631-6], and identify therein with specificity the assistance each such person provided." Clerk's Side #2199.

ii. This Court will award WML its attorneys' fees and costs if WML has to bring any motions to enforce this Order.

4. Orville Moe's Motion to Quash Action for Contempt against Orville and Deonne Moe is hereby **Denied.**

DONE IN OPEN COURT this 7th day of March, 2012.

Annette S. Plese, Judge

PRESENTED BY:
REED & GIESA, P.S.

John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Attorneys for Barry W. Davidson,
in his capacity as Receiver and as
Acting Managing General Partner of
Washington Motorsports Limited Partnership

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APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:
Crumb & Munding, P.S.

[*Did not appear*]

John D. Munding, WSBA #21734
Chapter 11 Bankruptcy Trustee for
Spokane Raceway Park, Inc.

APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:

Present - objected

Orville Moe, *pro se*

APPROVED AS TO FORM AND NOTICE
OF PRESENTMENT WAIVED:

Present - objected

Deonne Moe, *pro se*

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Chapter 7.21 RCW
CONTEMPT OF COURT

RCW Sections

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.

Appendix 8

(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.]