IN THE COURT OF APPEALS, DIVISION 3, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

CASE # 32119-3-III

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

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INTRODUCTION

The principal issue of this Appeal is whether or not a word or phase in the Spokane County Superior Court Judgment of November 15, 2013 is ambiguous thereby requiring interpretation. A word and a phrase in the Judgment of November 15, 2014 revised a License Agreement provision addressing the Licensee's rights to the "use" of injection molds. The Superior Court Judgment incorporates the phrase "...transfer and/or deliver..." into the "use" provision of the License Agreement. Neither the "use", from the License Agreement, nor the "...transfer and/or deliver..." phrase from the Court Judgment is defined. (RP 4/line 1-5/line 4; continuing at 6/line 23-7/line 6). That is, there is no definition of either the "use" allowed by the License Agreement. There is no definition of the "use" modified by "...transfer and/or deliver..." found in the Superior Court Judgment.

The word "transfer" in Washington State is synonymous with "sale".

The central question raised is whether the "use" and/or the added phrase "...transfer and/or deliver..." is ambiguous or otherwise undefined necessitating interpretation. The touchstone of interpretation of contracts is the intent of the parties. In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language

of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations. *Berg v.Hudesman,* 115 Wash.2d 657, 663, 80) P.2d 222 (1990); *Scott Galvanizing, Inc. v. Nw. EnviroServices. Inc.,* J 20 W n .2d 573, 580, 844 P.2d 42Ji (1993).

All "...the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations..." are found in the Record on Appeal. All "...the circumstances..." are derived from the Plaintiff-Licensee's Declarations and the Plaintiff-Licensee's attorney's Memoranda, Responses to Interrogatories and Declarations arising from an Arbitration Decision of May 2013. The circumstances were presented to the Court below in Oral Argument and Memoranda.

A License Agreement dispute was arbitrated between the parties. The "use" allowed to the Licensee-Plaintiff of plastic injection molds, addressed in the License Agreement, the Arbitration Decision, the Superior Court Judgment and the Order on Plaintiff's Motion for Contempt and other Sanctions, is undefined by the words and phrases themselves.

The focus of this appeal is to determine if the License Agreement "use" of injection molds, modified by "...transfer and/or deliver..." is defined or is ambiguous. If ambiguous then definition is required. *Vacova Co.* v. *Farrell,* 814 P.2d 255, 62 Wn. App. 386,399 (Wash.App. Div. 1 1991) CP 152-53. There was no definition of "use" in the License Agreement, Arbitration Decision or by the Judge in the Court Order appealed from of November 15, 2013. Additional words/phrase were added in the Arbitration Decision and included in the Court's Order including "...in the transfer and/or delivery of said molds..." to the Respondent(CP 21, para 4). The issue of the lack of definition of the indicated words/phrases was addressed in Appellant/Defendant's November 1, 2013 motion to continue CP 146, 149-50, 152/line 25; RP 4/line 1-5/line 4. The issue was before the Superior Court again on November 15, 2013. Appellant addressed the issue in accordance with the directions provided *Vacova Co.* v. *Farrell,* 814 P.2d 255, 62 Wn. App. 386,399 (Wash.App. Div. 1 1991) holding in part "Furthermore, even if the patent ambiguities of the contract had not been reconciled by means of the rules of contract construction, the result would have been an ambiguous contract and "[i]t is axiomatic that extrinsic evidence ... is admissible to clarify such matters " CP 152/24-153/5. Extrinsic evidence of factors from *Vacova,* supra,was submitted only by Appellant-

Defendant. The Respondent-Plaintiff did not address these factors in briefing or argument. The Court did not analyze the matter of contract construction, ambiguity or need for definition.

The second principal issue is the defense allowed by definition of contract terms in Appellant/Defendant's resistance to Respondent's Motion for Contempt and terms.

Appellant seeks reversal of each of the rulings from November 15, 2013, the return of the molds to Appellant/Defendant or its designee with Respondent allowed "use" as defined in this Appeal under rules of contract construction and attorney fees based on "bad faith" of the Respondent-Plaintiff.

ASSIGNMENT OF ERRORS

Assignment of Error 1. Did the Court err in failing to consider whether "transfer" is synonymous with "sale" or "convey" in Washington State and apply contract construction factors to determine "under all the circumstances" the definition of "transfer" relative to the Plaintiff's allowed use of the injections molds?

Assignment of Error 2. Did the Court err in holding Defendant in Contempt and in not finding Defendant's resistance to the Judgment the

act of protecting property and a defense to Plaintiff's Motion for Contempt and terms?

Assignment of Error 3. Did the Court make a Finding of Fact or state a Conclusion of Law by the Court's statement at RP 17/lines 7-12 and, if so, Did the Court err in not undertaking the analysis of determining the meaning of "transfer" as equivalent to "sale" in this State followed by the consideration of all the circumstances surrounding the permitted "use" of the injection molds?

STATEMENT OF THE CASE

Seth Burrill Production Inc is the Plaintiff-Respondent and is referred to as Plaintiff. Rebel Creek Tackle Inc is the Defendant-Appellant and is referred to as the Defendant. Seth Burrill and Allen Osborn are referenced in the Clerk's Papers in Declarations submitted in the Trial Court and at Arbitration. Seth Burrill is the owner of Seth Burrill Production Inc. Allen Osborn is a co-owner of Rebel Creek Tackle Inc.

Plaintiff was licensed by Defendant to sell Defendant's Patented and Patent Pending fishing devices CP 12-17. The fishing devices are made with plastic injection molds. Plaintiff's use of the Defendant's injection molds is stated in the License Agreement, CP 14 paragraph 5, as follows:

> 5. LICENSOR has paid for the manufacture of the initial prototype units and the injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT.

The relationship of Plaintiff and Defendant was arbitrated with an Arbitration Decision issued on May 2, 2013 CP 36-40. The decision provided in part that:

> 4. Claimant shall have full, unrestricted use of the injection molds during the term of the Contract, and Respondent shall cooperate in the transfer and/or delivery of said molds as requested by Claimant; CP 39;

The Arbitration Decision contained a phrase not existing in paragraph 4 of the License Agreement as follows:

> "and Respondent shall cooperate in the transfer and/or delivery of said molds as requested by Claimant; CP 39

Plaintiff moved to take possession of the molds by its Motion for Contempt and Sanctions in PLAINTIFF'S MOTION FOR REMEDIAL SANCTIONS (CONTEMPT) AND OTHER RELIEF (CP 109) set for hearing November 1, 2014 (CP 115). Defendant's Motion for Continuance and Partial Response to Plaintiff's Motion for Contempt (CP 145) was heard on November 1, 2013 RP 10/lines 3-9. The continuance

was granted to November 15, 2013 (RP 14/lines 9-10). Defendant's goal was to have the phrase including the word "Transfer" defined, to show that resistance to the Court Order was reasonable and to have the injection molds retained in control of Defendant with Plaintiff having unrestricted use. Defendant's goal was introduced in Court on November 1, 2013 as follows:

[Attorney Ivey -I]n the order presented to the Court in its [Plaintiff's] motion for judgment, it inserted the word transfer, that is the molds would be transferred to Mr. Burrill (Plaintiff). And the word transfer is the critical factor here today. This is a word that is outside of the license agreement. It is something that comes about through the motion by Plaintiff and the order that was subsequently entered. And the word transfer then is not defined and until it is defined we would not know what the nature is of that transfer. RP 5/lines 11-22.

So I'm [attorney Ivey] asking for that brief continuance in order to complete the record in

this matter so that the term transfer can be considered by the Court, fully considered by the Court, and so a record that is more fully developed will be available should there be a need for an appeal of this case. RP 10/lines 3-9.

The Court responded as follows:

I [the Court] want to be clear with Mr. Ivey …if you wants to give some briefing or memorandum on what transfer means then that is certainly up to you and I will give you that opportunity. RP 13/line 16-14/line 2

Defendant accepted the Court's invitation and did "…give some briefing or memorandum on what transfer means…" by Memorandum and Argument on November 15, 2013. The word "Transfer", in Washington State case law, is synonymous with "sale". CP 158

If "transfer" is synonymous with sale in this state then does the word "transfer" in the Judgment appealed from, CP 271, mean that the molds were "sold" to the Plaintiff? Is the word "transfer", in this case, defined as "sold"?

If not then what does the word "transfer" mean in the Court's

Order (CP 271)?

Plaintiff drafted and submitted the Proposed Order (CP 271) without definition of "Transfer".

But Plaintiff took a step toward limiting the word "transfer". Plaintiff admitted that there was no "sale" of the molds to Plaintiff and that ownership remains with the Defendant. This admission is found in PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM, AND ARGUMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR CONTEMPT, CP 242/lines 13-17; RP 18/line 21-24.

The admission that "Transfer" is not a "Sale" and that ownership remains in the Defendant leaves the definition of "transfer" to be decided. The opportunity, need and law to define TRANSFER remained before the Court on November 15, 2013.

Our Courts have not failed to address contract construction where ambiguity or lack of definition exists. The Defendant's briefing and argument, on November 15, 2013, specifically focused on pertinent cases regarding ambiguity with pointed argument. The Court, without elaboration regarding ambiguity, contract construction or any of the "circumstances surrounding the License Agreement", limited its comments regarding the definition of "Transfer" by the Court's conclusion stated at the outset of the November 15, 2013 hearing as follows:

[The Court states]...Fourth, the term, quote, transfer and or delivery, close quote, as used by the arbitrator and repeated in the judgment is

not ambiguous. Its plain, simple, common sense meaning is that the property is to be placed in the possession of the Plaintiff. RP 17/lines 7-12.

The Defendant's Memorandum (CP 158) addresses the issue of definition of the phrase "...transfer and/or delivery...".by considering all of the circumstances surrounding the use of the molds. Plaintiff did not address the factors to be considered in defining ambiguous contract terms.

The Defendant had resisted compliance with an Order to Transfer. Ambiguous terms are generally not recognized or realized until a demand is made. Here Plaintiff demanded that the molds be removed from the control of the Defendant and placed under the control and in the possession of the Plaintiff. Plaintiff's contended control is the control created by a "sale" or by "ownership". The Defendant contends that it's resistance to yielding the molds to such control was not an act of contempt. Defendant's resistance was an act to protect its property.

Plaintiff contends and the Judgment concludes that Defendant was willful and without objection in compliance with the Order. Understanding "Transfer" with the guidance of our Courts will demonstrate that the resistance was a reasonable act in protection of the property residing in the molds.

ARGUMENT

I. Standard of Review for Contract Construction

Questions of law, including the interpretation of contract provisions, are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We apply fundamental contract construction rules when interpreting a contract and to the extent we interpret contract provisions; we apply the de novo standard of review. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009); *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279 (2010).

Argument – Contract Construction

A. INVITATION: As invited by the Court in this matter, (RP 13/line 16-14/line 2), Defendant did address the Court, orally and in Memoranda, on November 1 and 15, 2013 regarding contract construction.

Contract construction is reviewed de novo.

In this case contract construction addresses not only the extent of

or limitations on the rights of the Plaintiff to the use of injection molds but also supports the Defendant's position opposing contempt. Defendant's opposition to the delivery of the molds to Plaintiff comprised its efforts to protect Defendant's property in the molds. The construction will determine the authorized use of the injection molds by the Plaintiff Licensee.

The patented fishing devices are made by plastic injection molding. The License Agreement (CP 14 paragraph 5) limits the Plaintiffs right to use of the molds with the phrase "...LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT....". The extent or nature of this "use" is not defined in the License Agreement or as revised via the Court's Order to include "...in the transfer and/or delivery of said molds... to the Plaintiff "(CP 21, para 4). That is, "use" is not defined in either the Licensee Agreement (CP 14 para 5) or in the Court's Order (CP 21, para 4).

Defendant contends that the Plaintiff's "use" revised by the "...transfer and/or deliver..." phrase is ambiguous for two reasons: First, the word "transfer" is synonymous with "sale". The Plaintiff agrees that there was no sale; and second, if not "sale" then "what" is the "use" and the meaning of "transfer"? The "what" leads to the analysis of the circumstances surrounding the relationship and the License Agreement.

State Farm General Ins. Co. v. Emerson, 687 P.2d 1139, 102 Wn.2d 477, 484 (Wash. 1984); citing *Morgan v. Prudential Ins. Co.,* 86 Wash.2d 432, 434-435, 545 P.2d 1193 (1976).

The construction or definition of the License Agreement "use" and the "use" as revised in the Court Order by the addition of the phrase "...transfer and/or deliver..." is required by *Vacova Co.* v. *Farrell,* 814 P.2d 255, 62 Wn. App. 386,399 (Wash.App. Div. 1 1991) CP 152-53.

The issue of the lack of definition of the indicated words/phrases was addressed in Defendant's November 1, 2013 motion to continue (CP 146, 149-50, 152/line 25) and again on November 15, 2013. Defendant addressed the issue in accordance with the directions from *Vacova Co., supra 399* holding in part:

> "Furthermore, even if the patent ambiguities of the contract had not been reconciled by means of the rules of contract construction, the result would have been an ambiguous contract and "[i]t is axiomatic that extrinsic evidence ... is admissible to clarify such matters " CP 152/24-153/5.

Extrinsic evidence of factors from *Vacova,* supra have been submitted only by Defendant. The Plaintiff has not presented argument regarding contract construction or ambiguities. The Court did not address these factors orally from the bench or in the Order appealed from. (CP 271).

B. ARGUMENT RE: AMBITUITY OF "TRANSFER" What are the arguments supporting the contention that the phrase "...transfer and/or delivery..." is ambiguous requiring interpretation? The law was submitted to the Court at CP 159-60.

The word "transfer" is consistently synonymous with the words "sale" and "convey" in Washington State law. Plaintiff's right is only related to "USE" of the Molds. With "sale" and "transfer" synonymous in this state, the insertion of the word "transfer" comprises an ambiguity.

The law equating "sale" or "convey" to "transfer" follows commencing at CP 161:

1. "The issue posed is whether the interpretation of the statutory language

"sells or otherwise conveys, directly or indirectly" includes a ***transfer*** to a secured creditor of inventory in which the creditor holds a security interest." . *Martin* v. *Meier,* 111 Wash.2d 471,479, 760 P.2d 925 (1988)

2. The word "sale" is considered in *Palmer* v. *Department of Revenue,* 917 P.2d ll20, 82 Wn.App. 367, 372-75 (Wash.App. Div. 2 1996) as follows:

a. At 82 Wn.App.373 - "Sale is defined in RCW 82.04.040, in part, as follows: "Sale" means any ***transfer*** of

the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.40.050."

...

This definition incorporates the plain and ordinary meaning of "sell," which is a transfer or exchange of property, goods, or services to another for money or its equivalent. See Webster's New World Dictionary (3d. ed.1989) ....

In Black's Law Dictionary 333 (6th ed.1990) the word "convey" is defined as: To ***transfer*** to another. To pass or transmit the title to property

b. At 82 Wn.App. 374 - " ... To ***transfer*** property or the title to property by deed, bill of sale, or instrument under seal. Used popularly in sense of "assign", "sale", or "***transfer***. "

3. "... the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the

property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice.' This statement of the law is in harmony with [55 P. 37] universal authority, but we do not see that it can be made applicable to appellant's interest in this case, for the statement assumes the very question which is in dispute here, viz. whether or not the party promised to conveyor assign or transfer this property as security. It is the intention of the parties to the contract which is to be determined from the phraseology of the instrument." *Hossackv. Graham,* 55 P. 36, 20 Wash. 184,188 (Wash. 1898)

4. Under the second alternative, the State must prove that Sant trafficked in stolen property. RCW 9A.82.050(1). To "traffic" in stolen property means to "sell, ***transfer***, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, ***transfer***, distribute, dispense, or otherwise dispose of the property to another person." RCW9A.82.010(19). *State* v. *Sant,* 37668-7-I1(Div. 11 2009)

5. Other jurisdictions agree gift transfers or transfers

without substantial consideration inuring to the benefit of the principal violate the scope of authority conferred by a general power of attorney to sell, exchange, ***transfer***, or convey property for the benefit of the principal. *E.g., Shields* v. *Shields, 200* CaLApp.2d 99, 19 Cal.Rptr. 129 (1962); *Aiello* v. *Clark,* 680 P.2d 1162 (Alaska *1984); Fierst* v. *Commonwealth Land Title Ins. Co.,* 499 Pa. 68. 451 A.2d 674 *(1982); Gaughan* v. *Nickoloff.* 28 Misc.2d 555. 214 N.Y.S.2d 487 (1961); *King* v. *Bankerd,* 303 Md. 98, 492 A.2d 608 (1985). *Bryant* v. *Bryant,* 882 P.2d 169, 125 Wn.2d 113, 118-19 (Wash. 1994).

6. The writ commanded the bank not to pay any debts to the Knapps and "not to deliver, sell, or ***transfer***. or recognize any sale or of, any personal property or effects of the Defendant in your possession or controL .. " *Fireman's Fund Ins. Co. v. Northwest Paving and Canst. Co., Inc.,* 891 P.2d 747, 77 .Wn.App. 474, 478 (Wash..App. Div. 3 1995)

The word "transfer" is synonymous, in Washington State, with "sale" and "convey".

Plaintiff admits that there was no "sale" of the molds to Plaintiff and that ownership remains with the Defendant. (CP 242/lines 13-17).

Defendant submits that if "transfer" in the Court's Order is admitted to not be a sale or conveyance, then an ambiguity exists. The word "transfer" must be interpreted.

C. **AMBIGUITY** - Extrinsic Evidence of the meaning of "TRANSFER"- Consider all the Circumstances.

1. The question in this case involves interpretation of the indemnity clause contained in the Hazardous Waste Agreement. **Indemnity agreements are interpreted like any other contracts**, *Jones v. Strom Constr. Co.*, 84 Wash.2d 518, 520, 527 P.2d 11]5 (1974), and the touchstone of the interpretation of contracts is the intent of the parties. *Berg v.Hudesman,* 115 Wash.2d 657, 663, 80) P.2d 222 (1990); *Bonneville Power Admin. v. Washington Public Power Supply System,* 956 F.2d 1497,1505 (9th Cir.1992) (applying Washington law). Therefore, **the intention of the parties must be the starting point for the interpretation of the indemnity agreement.** See *Scruggs v. Jefferson County,* 18 Wash.App. 240,243, 567 P.2d 257 (1977) (indemnity provision construed to effectuate intent of the parties); *McDowell v. Austin Co.*, 105Wash2d 48, 53, 710 P.2d 192 (1985) (indemnity agreements enforced according to intent of parties). **In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the**

circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations. *Scott Galvanizing, Inc. v. Nw. EnviroServices. Inc.,* J 20 W n .2d 573, 580, 844 P.2d 42Ji (1993) (Emphasis added)

2. General principles of contract law govern settlement agreements. *Lavigne v. Green,* 106 *Wn.AQQ.* 12,20, 23 P.3d 515 (2001). In construing a contract, this court first looks to the language of the agreement. *Hadley,* 60 Wn.App. at 438. The parol evidence rule bars the admission of extrinsic evidence "to add to, subtract from, vary, or contradict written instruments which are contractual in nature, and which are valid, complete, unambiguous. and not affected by accident, fraud, or mistake.' *Bond v. Wiegardt,* 36 Wn.2d 41 ,47. 216 P.2d 196 (1950). (Emphasis added)

3. If the writing was not intended to be complete, evidence of additional terms is admissible. *Univ. Prop .• Inc., v. Moss.* 63 Wn.2d 619,621, 388 P.2d 543 (1964). "People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the court's duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not,'" *Id.* (quoting *Barber v.Rochester,* 52 Wn.2d 691,698, 328 P.2d 711 (1958).

4. The touchstone of contract interpretation is the parties' intent. *Scon Galvanizing. Inc. v. Nw. EnviroServices, Inc.,* 120 Wn.2d 573,580,

844 P.2d 428 (1993). "**Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole. the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.**" *Stender v. Twin City Foods. Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973); Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 312 P.3d 976, 176 Wn.App. 185 (Wash.App. Div. 1 2013) at footnote 8. (Emphasis Added)

D. **ALL THE CIRCUMSTANCES SURROUNDING THE CONTRACT** – *Stender*, supra 254 and *Trinity Universal*, supra footnote 8, Factors are considered. The rule is:

"Determination of the intent of the contracting parties is to be accomplished by viewing the **contract as a whole**, the **subject matter and objective of the contract, all the circumstances surrounding the making** of the contract, **the subsequent acts and conduct of the parties** to the contract, and **the reasonableness of respective interpretations advocated by the parties**." (Emphasis added)

The portion of the License Agreement considered here is the combination of paragraph 5 from the License Agreement" with added phrase "transfer and/or deliver" from the Court Order.

The "the subject matter and objective of the contract" is the Licensing of Plaintiff and the objective of the contract is the sale of fishing devices."

"[A]ll the circumstances surrounding the making of the contract" includes activities related to the fishing devices;

1. the years long inventive process of Defendant in inventing the devices,[1]

2. the selection of the Plastic Injection Molding (PIM) company[2],

3. the manufacture and obtaining of the molds[3],

4. the discussions between Plaintiff and Defendant[4],

5. the contact between Defendant and the injection mold company (Plastic Injection Mold or PIM)[5],

6. the execution of the License Agreement on June 10, 2010[6],

7. the relationship between Defendant and Plaintiff following execution of the License Agreement,

8. the events leading to a dispute between the Defendant and Plaintiff[7],

9. the claims by Plaintiff of having been the inventor of the device[8],

10. the extensive evidence of the Defendant's years long inventive process[9],

11. the absence of testimony that the Plaintiff had invented[10],

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[1] Defendant Mr. Osborn's Declaration CP 180/line 18-25; 181/line 27-182/line 13; CP 234 Defendant Osborn Discovery Answer Under Oath to Question B-7, line 15 to CP 235/line 16; Reference to prototypes exhibits at CP 235/line 15-16 and prototype exhibits at CP 237-238.

[2] CP 181/line 27 to 182/line 17

[3] CP 180/line 27 to 181/line 17

[4] CP 227/3-230/16(pages 228, 229 were blurred as filed and are in the appendix.)

[5] CP 181/27-182/line 2

[6] CP 173

[7] CP 153/lines 6-11; CP 182/24-183/3;

[8] CP 194/line 8-195/line 3; CP 107; CP 104 last line to CP 105;

[9] See footnote 1

[10] See footnote 6

12. the finding of the Arbitrator that the Plaintiff had made no inventive contribution[11],

13. the relationship between the Plaintiff and PIM following the Arbitration[12],

14. the efforts of the Plaintiff to remove the molds from PIM[13],

15. the decision of the Plaintiff to not provide detailed reporting of sales to the Defendant[14],

16. the credibility of the Plaintiff[15].

The *Stender* factors, supra 254, for this Plaintiff and Defendant are revealed in the Clerks Papers comprised in part of Arbitration pleadings including 1. Plaintiff and Plaintiff's counsels Declarations; 2. The Arbitration Decision; 3. The Defendant's Declaration. The view of these pleadings in revealing the *Stender* Factors is not a rehash of the Arbitration. The process specifically considers evidence extrinsic to the License Agreement as revised by the Court relating to the "USE" of the molds by the Plaintiff.

The *Stender* process, supra 254, is labor intensive.

The time frame and events included in this examination extends from the earliest activity through and including "...the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective

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[11] See Footnote 6

[12] CP 110/19-24

[13] CP 110/19-112/6

[14] CP 182/24-183/line 3.

[15] See Footnote 6; CP 233/11 – 236/2

interpretations advocated by the parties."

Defendant has filed with the Superior Court and now with the Court of Appeals via the Clerk's Papers most pleadings and argument derived from the Arbitration. Portions of the pleadings relate to the credibility of the Plaintiff.

Commencing at CP 161: Osborn invented and patented a fishing device and filed an additional Patent Application for an improvement of the fishing device. On May 6, 2010 Osborn and Burrill entered into a License Agreement whereby Burrill would sell the original and improved Device. The Plastic Injection Molds (hereafter Molds) by which the Device is made are addressed in the License Agreement[16] as follows:

> 5. LICENSOR has paid for the manufacture of the initial prototype units and the injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT.

The Molds are assets of Defendant. Title to the Molds is in Defendant.

a. DISPUTE: A dispute occurred between Defendant and Plaintiff and was arbitrated with an Arbitration Decision[17] entered May 2, 2013. The Arbitrator's decision regarding the Molds was as follows:

> The Claimant (Burrill) is entitled to full, unrestricted use of the injection molds throughout the duration of the Contract;

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[16] CP 14 Paragraph 5

[17] The Arbitrator's decision is found at CP 49, Exhibit A appended to Plaintiff's Attorney Smith's Declaration supporting the Motion for Remedial Sanctions.

The Arbitration Decision was reduced to a Spokane County Superior Court Judgment on June 7, 2013 in accordance with Counsel's Proposed Judgment, stating the following:

> 3. Seth Burrill Productions, Inc. shall have full, unrestricted use of the injection molds during the term of the License Agreement, and Rebel Creek Tackle. Inc. shall cooperate in the transfer and/or delivery of said molds as requested by Seth Burrill Productions, Inc.

The words/phrase "Rebel Creek Tackle,Inc. shall cooperate in the transfer and/or delivery of said molds" is found only in in the Judgment as entered. The words are not found in the License Agreement or in the Arbitration Decision. This phrase was added by Plaintiff's Counsel and included in the Judgment but without definition.

Thus the following consideration of "all the circumstances surrounding the phrase including "transfer" will include all circumstances from the negotiations between Defendant and Plaintiff from 2009 through November 15, 2013.

There has been consistent use, manufacturing and location of the Molds, from 2009 through the execution of the License Agreement in 2010 until sometime following November 15, 2013 when Plaintiff seized and removed the molds to a location unknown to Defendant. In September 2012, Defendant advised Plaintiff that Plaintiff was no longer a

sole licensee for the product. Following this Defendant had Fishing Devices made for Defendant's sales. Otherwise, all production for sales purposes had been undertaken solely for Plaintiff while production for experimentation had been undertaken solely for Defendant.

b. THE SINGLE MANUFACTURER OF THE DEVICE:

Plastic Injection Molding Inc., owned by Mr. Ken Williams, (hereafter PIM or Williams), was the sole manufacturer of the Device from the arrival of the molds in 2009 through a date following November 15, 2013. Plaintiff had a fishing device, separate from the Defendant's Fishing Device, manufactured at PIM prior to meeting Defendant. Plaintiff alleges that he told Defendant about PIM and that PIM would be desired as a manufacturer of the Defendant's fishing device.

Defendant worked with Williams and PIM for the development and manufacture of the fishing device. Defendant was at the PIM facility on frequent occasions from 2009 through 2012. Defendant, Mr. Osborn, discussed the fishing device with Williams and Williams devised the form of the fishing device suitable for plastic injection molding and for assembly and disassembly, packaging and shipping. Defendant, Mr. Osborn, and Williams frequently talked via telephone regarding the process of taking the fishing device from the prototype to a finished and commercial product. Defendant, Mr. Osborn, and Williams frequently

discussed, by telephone and in person, changes required of the Molds in order to eliminate a slippage problem occurring in the device during fishing. Williams and PIM are in the same local as Defendant, Mr. Osborn.[18] Defendant, Mr. Osborn, has a trusting relationship with Williams. It was always understood by Defendant, Mr. Osborn, that with the extent of William's involvement in getting the fishing device to production, and with the close working and trusting relationship between Williams and Defendant, Mr. Osborn, that Williams would be the sole manufacturer of the device.

Defendant's attorney Ivey has known Williams for years and has frequently referred Patent Clients to Williams for consultation and injection molding services. Attorney Ivey has frequently talked with Williams regarding the Defendant's product. Attorney Ivey specifically communicated with Williams regarding the quantities of fishing devices produced for Plaintiff and concerning Mold changes required to cure Mold defects that caused fishing device slippage during fishing. Williams provided invoice and other production documents to Defendant that were eventually used in the Arbitration. Williams provided a Declaration of his involvement in manufacturing and gave testimony in the Arbitration.

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[18] Declaration of Defendant inventor, Mr. Osborn, CP 180.

c. BURRILL'S CREDIBILITY: Decades ago Defendants, Mr.Osborn and Mrs. Osborn, developed a fishing device[19]. The single prototype was lost in the weeds of Puget Sound. Osborn resumed development of the fishing device in 2005, following retirement. From 2005 through 2009 Osborn made more than 60 different prototype fishing devices including prototypes of the improved fishing device[20]. The original fishing device was improved with the addition of a diverter that caused the fishing device to move to the side of the direction of stream flow or boat direction. The initial prototype of the diverter fishing device was made in 2005[21] with others following into 2009. The initial diverter fishing devices were made and tested by Defendant, Mr. Osborn, prior to Defendant, Mr. Osborn meeting Plaintiff in about January 2009. The diverter fishing device was not revealed to Plaintiff at the initial meeting in 2009. Defendant, Mr. Osborn undertook additional testing of the diverter fishing device before inviting Plaintiff to view the diverter fishing device in operation in about February or March 2009. Plaintiff was unaware of the extent of prototype development and testing until the Contemporaneous Exchange of Discovery in the Arbitration that occurred

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[19] Defendant Mr. Osborn's Declaration CP 180/line 18-25; 181/line 27-182/line 13; CP 234 Defendant Osborn Discovery Answer to Question B-7, line 15 to CP 235/line 16; Reference to prototypes exhibits at CP 235/line 15-16 and prototype exhibits at CP 237-238.

[20] See footnote 7

[21] See footnote 7

in early 2013[22].

However, in the 2012 filing of the Arbitration Demand[23] Counsel for Plaintiff asserted that Plaintiff, Mr. Burrill was an or the inventor of the diverter Fishing Device. Counsel for Plaintiff states in Counsel Chris Lynch's Declaration[24] of April 29. 2013 paragraph 4 that he, Lynch, had suggested to Plaintiff that he, Plaintiff was a co-inventor. Counsel Ivey's Motion for Reconsideration[25] of Apri126, 2013 and Responsive Memorandum of April 30, 2013[26] fleshes out the Circumstances revealed during the Arbitration which compel the conclusion that Plaintiff has the intentions to conduct fraudulent accounting and reporting and hence underpayment of royalties.

On the day of Contemporaneous Exchange of Discovery in the Arbitration, Counsel for Plaintiff and Counsel for Defendant contemporaneously exchanged discovery. A limited portion of Plaintiff's Discovery Production[27], pertaining solely to Plaintiff, Mr. Burrill, claim of inventing the improved diverter fishing device, is attached. A limited

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[22] See footnote 7.

[23] Arbitration Demand attached as Exhibit 3, CP 188.to Defendant's Memorandum.

[24] Declaration of Chris Lynch, April 29, 20 13 attached as Exhibit 4., CP 198.

[25] Defendant's Motion for Reconsideration of Apri126, 2013 as Exhibit 5, CP 205.

[26] Defendant's Reply Memorandum of April 30, 2013 attached as Exhibit 6. CP 223.

[27] Limited portion of Burrill's Discovery Production attached at Exhibit 7, CP 226.

portion of Defendant's Discovery Production[28], pertaining solely to Mr. Osborn's prototype development of fishing devices and the improved diverter fishing device is attached as Exhibit 8 showing, by marking arrows, 11 examples of Diverter Fishing Devices developed by the Defendant prior to meeting the Plaintiff, Mr. BurrilL

The Court's attention is drawn to Exhibit 7 and Plaintiff, Mr. Burrill's unqualified declaration that he was the inventor of the diverter fishing device. Plaintiff, Mr. Burrill declared that he gave the idea and guidance to Defendant, Mr. Osborn for the making of the diverter fishing device. Plaintiff, Mr. Burrill's Declaration predates his viewing of the multitude of Diverter Fishing Devices made by Defendant, Mr.Osborn before meeting Plaintiff, Mr. Burrill.

The Court's attention is drawn to Defendant, Mr. Osborn's production of photographs of fishing devices, as early as 2005 and four years before meeting Plaintiff, Mr. Burrill, which display the "diverter" extending from the main fishing device body.

The Court's attention is drawn to Defendant, Mr. Osborn's Discovery statement describing the invention and development of the "diverter" fishing device.

Following the contemporaneous exchange of discovery, Plaintiff,

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[28] Limited portion of Osborn's Discovery Production attached at Exhibit 8, CP 233.

Mr. Burrill's claim of any role in inventing was addressed in a Motion for Summary Judgment. Plaintiff, Mr. Burrill's claim of being the sole inventor was revised to a role of having invented a particular angular setting.

In the Arbitration Decision, the Arbitrator held that Plaintiff, Mr. Burrill made no inventive contribution. The Arbitrator's holding is an implicit finding that Burrill's assertions were without credibility. The Arbitrator's holding "That neither Claimant [SBPI] nor Mr. Seth Burrill(Plaintiff) made an inventive contribution to the technology of U.S. Patent Application No. 12,641,291, and neither is a co-inventor;" is found at page 1 of Exhibit A to the Declaration, (CP 54-108), of Jeffrey R. Smith in Support of Plaintiff's Motion for Remedial Sanctions (Contempt) and other Relief as filed in this matter on or about October 15. 2013. The Arbitrator's holding is an implicit finding that Plaintiff, Mr. Burrill, is a liar.

d. BURRILL'S INTENTION: Burrill is bound by the License Agreement to make quarterly sales reports and quarterly royalty payments. The reports, from the first report, identified sales by customer name with sales details provided for each customer reported. Defendant is aware of sales not reported by Plaintiff. In Arbitration, Plaintiff, Mr. Burrill, testified that his attorney, Mr. Joseph Carroll, advised him that he was not

obligated to report these details and that subsequent reports would not provide these details.

Plaintiff's, Mr. Burrill, intent is to remove the Molds from Osborn and to deprive Osborn from any contact with a new plastic injection molding company and hence to deny Defendant any manufacturing data.

In ages past homestead claims were described in Patents. These claims were subject to the hazard of claim jumpers. The individuals proving the claim were deprived of the fruit of their labors. Plaintiff, Mr. Burrill is a "claim jumper". Plaintiff, Mr. Burrill intends to maintain two sets of books: One for the "no detail" report to Defendant but with a diminished royalty check; A second set of books will be the record of actual manufacturing and sales. The increased likelihood of Plaintiff, Mr. Burrill, being positioned to not report all sales will additionally reduce the value of the Patents and License Agreement. This will deter others from having an interest in investing in the Defendant's Corporation.

Plaintiff, Mr. Burrill, is a liar. He has shown his hand by claiming to be the inventor of the improved diverter fishing device, by intending to provide no sales details and by intending to deprive Osborn of any contact with the manufacturer for production data.

e. DEFINING "TRANSFER" BY ALL OF THE CIRCUMSTANCES:

1. PIM and Williams were recommended to Osborn by Burrill in 2009.

2. PIM and Williams manufactured a different fishing device for Plaintiff, Mr.Burrill.

3. Plaintiff, Mr. Burrill trusted and relied upon PIM and Williams.

4. The Molds have been at PIM with Williams and all manufacturing of the fishing device has been done at PIM from 2009 until a date after entry of the Court's Order in November, 2013. Thereafter Plaintiff removed the molds from PIM to an undisclosed location.

5. Defendant is located in the local of PIM, has been at PIM many times, knows and has collaborated with Williams in developing the Molds.

6. When Defendant, Mr. Osborn tested the fishing device and determined that slippage was occurring during fishing, Williams developed the method of adjusting the Molds and performed the adjustment.

7. Williams has always been accessible to Defendant, Mr. Osborn for discussion of and action required relative to the Molds.

8. Williams has at all times made production records available to Defendant, Mr. Osborn relative to each part of the fishing device.

9. Williams and PIM have been in business for many years.

10. Plaintiff's counsel's statement that "Plaintiff' simply desires transfer of the plastic injection molds so it may use a company in which it has confidence to produce its product without interference from Defendant"

flies in the face of Burrill's recommendation of PIM and Williams and emphasis Plaintiff's, Mr. Burrill's intention of depriving Defendant of production data and committing fraud in quarterly reporting. Plaintiff, Mr. Burrill makes no criticism of the quality and timeliness of PIM's performance but substantiates Plaintiff's intention to complete "claimjumping" through use of a double set of books. Plaintiff, Mr. Burrill, in past quarterly sales reports, failed to reveal sales made to commercial customers where such sales were known to Mr. Osborn.

11. The definition of "transfer", considering all the circumstances, should be to retain all the conditions existing since 2009 with the exception of Ordering that there be no fishing devices manufactured except for Plaintiff at Plaintiff's instructions thereby retaining the Molds, which are the property of Defendant, in circumstances known and relied up by Defendant and thereby reducing the opportunities for Plaintiff to fraudulently hide sales and avoid making royalty payments.

12. Should Plaintiff be allowed to remove the Molds from PIM either to Plaintiff's possession or to another plastic injection molding company, the limitations should meet the circumstances existing at the time of the making of the contract including; 1. location at a local equally available to Defendant as was PIM, 2. a company having recognition in the industry for quality, 3. where communications are assured relative to the safety,

security, insurance and condition of the Molds, 4. the enforceable ability to communicate regarding flaws detected in the fishing device requiring Mold adjustment, 5. the enforceable ability to communicate and freely and accurately receive production data re: the dates and quantities of all pieces manufactured, 6. the assurance of being advised of the location to which the production is transported or shipped, 7. the reporting by each of Plaintiff's Customers with detailed reporting of all parts sold showing dates and sales prices, 8. the circumstances should also recognize, the evidence exhibited to this Court and as found by the Arbitrator, that Plaintiff, Mr. Burrill lied to the Arbitrator as a Tribunal leading to the conclusion that Plaintiff, Mr. Burrill intends and plans to fraudulently maintain records and fraudulently report sales and royalties.

13. Osborn must be assured of the ability to recover the Molds in the event of Plaintiff's default or breach or should Plaintiff become incapacitated or suffer death while Defendant is without sufficient records to identify and retrieve the Molds. Defendant must not be without protection should Plaintiff fail to pay any lien available to a new and unknown company. A default by Plaintiff relative to the new plastic injection molding company housing the thousands of pounds of steel comprising the plastic injection molds, without certainty of communications between Defendant and a new company has the likelihood of a result of destruction or sale of the

Defendant's property.

Additionally, Plaintiff's, Mr. Burrill intentions and credibility have been revealed by the Memoranda and Declarations presented by Counsel Chris Lynch for Plaintiff and by Counsel Ivey for Defendant during the Arbitration and recently by Counsel Smith on behalf of Plaintiff and by the testimony of the Plaintiff during arbitration.

II. Standard of Review of Order Holding Defendant in Contempt

Contempt rulings are reviewed for abuse of direction. An appellate court will uphold a trial court's contempt finding ' as long as a proper basis can be found.' Contempt of court includes any " intentional ... [d]isobedience of any lawful ... order ... of the court." RCW 7.21.010(1)(b). If the superior court bases its contempt finding on a court order, " the order must be strictly construed in favor of the contemnor and " the facts found must constitute a plain violation of the order." *Johnston v. Beneficial Mgmt. Corp. of America*, 96 Wash.2d 708, 713, 638 P.2d 1201 (1982) (emphasis added).

Argument - Contempt

Defendant contends that it has attempted to protect Defendant's corporate property in resisting the Plaintiff's demand to take all control of

Defendant's plastic injection molds. The injection molds are the Defendant's property. CP 242/lines 13-17. The issue is the definition of the "use" which Plaintiff is allowed and what the word "transfer" means from the Court's Order.

The injection molds have been placed in total control of the Plaintiff in accordance with the Order appealed from in this matter. CP 271-73; at 272 Defendant was ordered as follows "Rebel Creek Tackle, Inc. is hereby enjoined from further interference with the transfer of the molds, and the molds shall be transferred to SBPI immediately."

Plaintiff took the molds. Defendant has no awareness of the location, use or care of the molds. Defendant is wholly without knowledge of the molds.

The effect of Plaintiff's taking is the equivalent of a "sale" or "conveyance". "Transfer" in this state is equivalent to a "sale" or "conveyance".

In 1936 in *State ex rel. Gardner v. Superior Court for King County*, 56 P.2d 1315, 186 Wash. 134, 136-37 (Wash. 1936) Mr. Gardner was directed to appear to explain why he should not be held in contempt

for failure to comply with an Order.

The superior court has, of course, extensive jurisdiction in any case pending before it for the purpose of enabling it to protect corporate property against waste..." *Gardner*, supra 138.

It is no defense to a charge of contempt that the underlying ruling was erroneous. 15 Karl Tegland, Washington Practice: Civil Procedure § 43:3, at 203 (2nd ed. 2009).

However, the Court's Order, without definition per contract construction rules, is essentially the action allowed of a receiver by "RCW § 7.60.070. Turnover of property: Upon demand by a receiver appointed under this chapter, any person shall turn over any property over which the receiver has been appointed that is within the possession or control of that person unless otherwise ordered by the court for good cause shown. A receiver by motion may seek to compel turnover of estate property unless there exists a bona fide dispute with respect to the existence or nature of the receiver's interest in the property, in which case turnover shall be sought by means of an action under RCW 7.60.160 . In the absence of a bona fide dispute with respect to the receiver's right to possession of estate

property, the failure to relinquish possession and control to the receiver shall be punishable as a contempt of the court. "

Here the Defendant has presented a bona fide dispute. The property has been removed from any control of Defendant. The effect is that of a sale.

Defendant respectfully stated, in argument, that the Court's action was in error seen at RP 28/line 13 to 32/line 21. Several obvious hazards were described to the Court in these comments. The same hazards are effectuated by not defining "transfer" in light of all the circumstances surrounding the agreement. These pages from RP 28/line 13 to 32/line 21 follow:

With due respect, Your Honor, I think that it is error to not have considered -- to not consider the documents filed, exhibits filed, by Defendant in this case. I think it is an abuse of discretion. I propose to the Court that the Court's definition of transfer and delivery is also done without an understanding, without consideration of the circumstances surrounding all of the factors in Scott Galvanizing. The circumstances from 2009 to the present, the subsequent acts of Mr. Burrill and his conduct, and then the reasonableness of this in destroying the commercial value, the

value to Rebel Creek of this property.
The entire effort here, and I am have not
been a part of this case from September 6 until
October 24 but the entire effort that has been
undertaken since that date has been to protect
the property value that is represented in these
molds. And so from that view that is
absolutely a justification to resist the action
of removing these molds from the present
location without limitations. If the
model(sic)[molds] are
to be removed from the present manufacturer in
order to preserve the property value, they must
be removed with directions that will -- that
will bind a subsequent plastic injection
manufacturing company, will bind them, to have
the types of communications that are necessary
in order to allow the property value of these
molds to continues.
I think that -- that terms like that can
be set forth and I am confident that a list of
terms that I would provide to Mr. Smith will be
met with a list of terms provided as counter
terms and that we will not come to an agreement
probably, we might, and if we did, we could
present an agreed order and if we didn't, then

I think it would be appropriate for this Court
to hear and make a ruling.
But without the surrounding circumstances,
based on the rule of the law found in Scott
Galvanizing, without those limiting terms, then
we're gonna see that this property is lost.
And then so I think a matter of simply defining
transfer and delivery with the word transfer
absolutely correlated with and synonymous with
sale in this state, you combine that with the
word delivery and you have an even greater
distance from ownership, a greater distance

13 separating the ownership properties -- the
14 ownership elements and attributes from the
15 Osborns and from Rebel Creek.
16 So I do believe that there has to be some
17 limiting factors that are put into place that
18 will protect the property value and that effort
19 to bring that kind of -- those kind of
20 limitations to bear in the matter of
21 transferring to a different company, those
22 support, the -- the problem in getting a
23 removal of these items from the present
24 location.
25 I'm just thinking how it would go. I have
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1 had clients with their products, their molds,
2 in China during the earthquakes when the
3 earthquake finished there was no molds left.
4 I'm wondering what happens here with regards to
5 insurance. What is the nature of the company
6 that would be proposed by Mr. Burrill?
7 What would be the circumstance if the
8 payments were not made? And that's been a
9 history, it is not in the record with this
10 Court, but that has been a history between Mr.
11 Burrill and the present holder of the molds.
12 Would there be a lien? Will that lien be
13 enforced in some way? Would there be a sale of
14 those molds without any opportunity by Rebel
15 Creek to come in to protect that property
16 interest?
17 So really without the circumstances here
18 that give the property owner rights of
19 understanding of what's happening, we're gonna
20 have a -- we're gonna have property destroyed.
21 And I do believe that this would then
22 be -- that the Court in this instance will have
23 defined transfer and delivery to mean Seth
24 Burrill Productions, Inc. drives a truck up to
25 the front door of PIM, 2000 pounds of steel is
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1 loaded in and that truck is driven off to a
2 place that is unknown to Rebel Creek. It is
3 unknown unless we have a court order here that
4 will bind that third party, that injection
5 molding company, to make these communications
6 with the owner.
7 So my thought about this definition of
8 transfer and delivery, that it ignores the
9 requirements of Scott Galvanizing and with due
10 respect I think it is error and abuse of
11 discretion. But I do assert that this is the
12 reason, the rationale, for having not simply
13 said: Bring your truck down, pick these things
14 up. It is a matter of protecting property, it
15 is not -- it is not contemptuous of the Court's
16 order. It is a willful act on the part of the
17 owners but it is not a act of contempt. It is
18 an act to obtain the kind of definition that is
19 a required to assure that the property value is
20 not lost.
21 Thank you, Your Honor.

Defendant respectfully requests the Court of Appeals to reverse the trial Court Judgment of Contempt and to vacate the award of attorney fees re: contempt.

III. Standard of Review re: Finding Of Fact/Conclusion of Law

A.First Citation: Finally Mr. Ross challenges finding of fact 12. This finding goes to the credibility of Mr. Enstad's testimony. Our standard of review requires us to accept the fact finder's view on

credibility of the witnesses. *See Freeburg v. City of Seattle,* 71 Wash.App. 367, 371-72, 859 P.2d 610 (1993). . The trial court was in a better position to evaluate the credibility of witnesses and we will not substitute our judgment for the trial court when reviewing findings of fact. *Fisher Props., Inc. v. Arden-Mayfair, Inc.,* 115 Wash.2d 364, 369-70, 798 P.2d 799 (1990). *Noble v. A & R Environmental Services, LLC,* 164 P.3d 519, 140 Wn.App. 29,34 (Wash.App. Div. 3 2007).

B.Second Citation: The trial court did not abuse its discretion in awarding Hougan the 44th Avenue property, with Lang receiving $2,877 as one half the reduction in principal. Lang does not suggest a standard of review. He has failed to assign error to the trial court's finding of fact that Hougan provided the down payment, and this unchallenged finding is a verity on appeal. *See Noble,* 114 Wash.App. at 817, 60 P.3d 1224. *Lang v. Hougan,* 150 P.3d 622, 136 Wn.App. 708 (Wash.App. Div. 2 2007). *Lang v. Hougan,* 150 P.3d 622, 136 Wn.App. 708, 719 (Wash.App. Div. 2 2007)

C.Third Citation: "It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal."[28] This Court will review only findings of fact to which error has been assigned.[29] The

challenged findings will be binding on appeal if they are supported by substantial evidence in the record.[30] "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding."[31] *In re Contested Election of Schoessler*, 998 P.2d 818, 140 Wn.2d 368, 385 (Wash. 2000). *Dumas v. Gagner,* 971 P.2d 17, 137 Wn.2d 268, 280 (Wash. 1999)

D. Fourth Citation: Vail assigns error to the commissioner's findings of fact 4, 5, 6, 7, 9, and 10.[4] But Vail does not argue that substantial evidence does not support each finding. Instead, Vail argues that the commissioner should have found misconduct. Because substantial evidence supports each finding of fact, the commissioner did not err.

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the ESD commissioner. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). We sit in the same position as the superior court and apply the APA standards directly to the administrative record. *Verizon*, 164 Wn.2d at 915. We review the decision of the commissioner, not the ALJ's underlying decision. *Verizon*, 164 Wn.2d at 915.

We review the commissioner's findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *Lee's Drywall Co. v. Dep't of Labor & Indus.*, 141 Wn.App. 859, 864, 173 P.3d 934 (2007). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d at 553. We neither weigh creditability of witnesses nor substitute our judgment for the agency's. *Brighton v. Dep't of Transp.*, 109 Wn.App. 855, 862, 38 P.3d 344 (2001). Our review of disputed issues of fact is limited to the agency record. RCW 34.05.558.

E.Fifth Citation: As "[t]he party claiming error," Morcos Brothers has "the burden of showing that a finding of fact is not supported by substantial evidence." *Fisher Properties, Inc v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (*citing Leppaluoto v. Eggelston*, 57 Wn.2d 393, 401, 357 P.2d 725 (1960)). Evidence is substantial when it "'would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.'" *Shelden*, 68 Wn. App. at 685 (*quoting Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 81, 492 P.2d 1058 (1971), *review denied*, 80 Wn.2d 1010 (1972)). If substantial evidence supports a

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before meeting Plaintiff. Plantiff, in the Demand for Arbitration, in Contemporaneous exchange of Discovery, in subsequent Declarations claimed to have been the inventor. Plaintiff also stated that a new royalty reporting system would be implemented where Defendant would have no audit capability to determine the accuracy of sales. Plaintiff, without definition of "transfer" brought the Motion for Contempt, removed the molds from control or knowledge of Defendant of the whereabouts of the molds. These acts comprise bad faith. The acts describe comprise matters of contract and contract interpretation supporting "bad faith" per RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (emphasis added) (quoted in part in BLACK'S LAW DICTIONARY 159 (9th ed.2009)). Thus, at least where a party owes some duty analogous to a contractual obligation, negligence or gross negligence suffices to support a finding of bad faith. *Francis v. Washington State Dept. of Corrections*, 313 P.3d 457, 178 Wn.App. 42 (Wash.App. Div. 2 2013); also see

The recitation of facts challenging Plaintiff's credibility are relied upon here to support a finding of "Bad Faith" and the basis for an award of attorney fees and expenses on this Appeal.

Respectfully submitted this 26th day of May, 2014.

Floyd E. Ivey, WSBA 6888, Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on MAY 26, 2014 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Brief on Appeal; Table of Authorities; Table of Contents; Title Page-Appeal 321193; Appendix

Jeffrey R. Smith LEE & HAYES, PLLC 601 W. Riverside Ave., Suite 1400 Spokane, WA 99201 509 324 9256 fax: 509 323 8979	_X_ US Mail ___Facsimile ___Hand Delivery ___Overnight Courier _X_Email
Court of Appeals Div III 500 N. Cedar st Spokane WA 99201-1905	_x__ US Mail

DATED: MAY 26, 2014

Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Appeal No. 321193

APPENDIX

11. I also advised a change to the prototype at Rock Lake. The prototypes at that time were all done with nuts and bolts as the bridge, which were creating drag. I advised Allen that if he used a piece of UHMW plastic for the bridge instead. I told him to sharpen the front leading edge to cut down on the drag and that the plate would act like a crank bait bill to help drive the diver down thus allowing less weight to achieve depth. These contributions are reflected in the prototypes in Exhibit 3 that have diverters and are made of aluminum. Allen gave me these prototypes, which I still have. Exhibit 3 is a true and correct photograph of prototypes Allen gave me to test, and the prototypes with diverters attached were developed after I met Allen in January 2009. As explained below, these prototypes demonstrate my contributions to the invention – the development of the diver + diverter structure that also include my ideas of angling the diverter fin slightly off perpendicular and angling the tips of the fins.

12. During the outing to Rock Lake, Allen and I discussed a business relationship as well as production of the devices. I told Allen about Plastic Injection Molding ("PIM"), with whom I had worked with since 2007. I told Allen that PIM might be a good fit for the molding of the device.

13. After the trip to Rock Lake, Allen and I exchanged numerous phone calls throughout 2009 regarding the diver and the adjustment to the fin. *See* Exhibit 1. As I had suggested at Rock Lake, angles up to 9 or 10 degrees were determined to perform the best. One of the many things we discussed was how when diver was released into the water, it wanted to swing under the boat. To remedy this problem, I discussed with Allen about how to angle out the tips of the fins. The angled tips allowed for the water to catch and swing the diver

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from the boat on a slack drop. I spoke with Allen about how to create the diver angles through shims and the fin tips through torch melting of plastic.

14. I also suggested providing two different-sized diverter fins. Allen was having problems with the product rolling at high speeds. My knowledge of the industry and other trolling products, like the Luhr Jensen "Hot Shot" Side Planer lead me to believe that a fast water (or smaller diverter) and a slow water (or bigger diverter) would solve that problem, which is what it did when tested. I made the final call on the size of the fins to be produced for the product.

15. After extensive phone conversations, in October 2009, I coordinated a trip with Allen to test the prototype at White Bluffs on the Hanford Reach of the Columbia River. Also with me and Allen was Dennis Stuhlmiller. During this trip, we filmed an episode of my fishing instructional show, the Angler's Xperience, using the diver to promote the product and to test the final hand-built prototype before sending off for the mold with PIM. The prototype fished well and Allen and I made the final decision to send it out for PIM to mold.

DATED this ____ day of February, 2013, in Spokane, Washington.

SEE ATTACHED SIGNATURE

Seth Burrill

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