92085-1

IN THE SUPREME COURT, STATE OF WASHINGTON

SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

DIVISION III CASE # 32119-3-III

DEFENDANT-APPELLANT REBEL CREEK TACKLE INC.'S PETITION FOR REVIEW

Respondent/Plaintiff
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INTRODUCTION

The Defendant/Appellant Rebel Creek Tackle Inc. Petitions for Review of the July 7, 2015 Opinion in Seth Burrill Productions Inc., V. Rebel Creek Tackle, Inc., Division III, Court of Appeals, No 32119-3-III. The Opinion is found in the Appendix.

The Appellant/Licensor and the Respondent/Licensee entered into a License Agreement. An Arbitration decision modified the Respondent/Licensee's "Use" of injection molds. There was no examination by the Arbitrator[1] of the impact on scope of "Use". The modified "Use" was adopted by the Trial Court with no examination of the impact on the scope of "Use". The Respondent asserted a different type and scope of "Use" from that preceding the Arbitration. Neither the Trial Court nor Court of Appeals analyzed the "Use" relative to the "intent of the parties", as required by Supreme Court Decisions. The Trial Court and the Court of Appeals had the Respondent/Appellant's Motion for Interpretation and Resisting the Motion for Contempt, the supporting memoranda and argument describing and objectively revealing the "Use" and revealing the "intent of the parties" and defining any ambiguity. However, neither the Trial Court nor the Court of Appeals undertook analysis as required by Supreme Court.

[1]Arbitrator James Craven, Spokane.

The Court of Appeals Opinion herein fails to use the Division III 2002 process established in 2002 and thus is in conflict where Division III stated:

> We interpret this contract language to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990). And in doing so **we apply an objective manifestation test, looking to the objective acts or manifestations of the parties** rather than the unexpressed subjective intent of any party. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998). Only if the determination of intent depends on the credibility of extrinsic evidence, or a choice among reasonable inferences to be drawn from extrinsic evidence, is it an issue for the trier of fact. *Berg*, 115 Wash.2d at 667-68, 801 P.2d 222, adopting RESTATEMENT (SECOND) OF CONTRACTSS § 212(2) (1981). *State Farm Mut. Auto. Ins. Co. v. Avery*, 57 P.3d 300, 114 Wn.App. 299, 311 (Wash.App. Div. 3 2002)(Emphasis added)

Division III in *State Farm* was not presented with a "revised" or "changed" License Agreement. Division III was considering a settlement which did not depend on extrinsic evidence. *State Farm* at 311. But Division III in the instant matter was faced with an agreement which was not negotiated by the parties. The Trial Court did not comment on the modified "Use" or consider how it might be understood or limited as dictated by the "intent of the parties". The Court of Appeals did not analyze the "**objective acts or manifestations of the parties**" to determine the intent of the parties regarding what "Use" Respondent would be allowed following the modification of "Use". The Trial Court adopted the Arbitration Decision without analysis. The Court of Appeals

continued the pattern without analysis. But Division III, with a modified License Agreement and with contentions about the now intended "Use", had the opportunity to remember *State Farm, supra.*

The Court of Appeals herein ignored Division III precedent.

[T]he case of *Berg v. Hudesman* expanded the circumstances under which **a finder of fact must consider extrinsic evidence** when passing upon the meaning of the written words:

"[P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, **not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed."** *Berg v. Hudesman*, 115 Wash.2d 657, 669-70, 801 P.2d 222 (1990)

¶ 10 **Berg rejected the traditional requirement that the document be ambiguous Before extrinsic evidence may be introduced to interpret the meaning of written words.** *Berg*, 115 Wash.2d at 669, 801 P.2d 222. " '**Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.**' " Id. at 668, 801 P.2d 222 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 214(c), cmt. b (1981)). **Where it appears, therefore, that there has been a misunderstanding between the parties, the court may consider extrinsic evidence of intent.** Id. *Stephens v. Gillispie*, 108 P.3d 1230, 126 Wn.App. 375, 380 (Wash.App. Div. 3 2005) (Emphasis added)

The Trial Court Order created a modified "Use". The Court of Appeals had precedent for guidance and yet failed to conduct the required analysis.

"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, <u>all the circumstances surrounding the making of the contract, the subsequent acts and</u>

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)

The Appellant presented all of the circumstances, the subsequent acts and conduct of the parties to the contract and the reasonableness of respective interpretations to each decision maker. Neither the Trial Court nor the Court of Appeals appreciated the fact of the modified "Use" and the likelihood that a new "Use" would be attempted.

The Motion for Contempt demonstrated the attempt at a new "Use". The Respondent's Motion to find the Appellant in Contempt was resisted in light of the change of the "Use" proposed by the Respondent.

The Appellant Moved and was granted Continuance of the Motion for Contempt seeking time to seek definition of "Use" in light of "...transfer and/or deliver..." and was invited by the Trial Court to return to argue. However, the Trial Court refused to consider the Applicant's Motion for Interpretation of "Use" in light of "...transfer and/or deliver..." (RP 4/line 1-5/line 4; continuing at 6/line 23-7/line 6).

The "Use" proposed and granted by the Trial Court resulted in the Order authorizing removal of the plastic injection molds to a site unknown to and with which the Appellant has neither awareness of or communication with. The "...transfer and/or deliver..." as imposed on "Use" dramatically deviated from the "Use" as previously practiced.

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..." were presented to the Trial Court and are found in the Record on Appeal.

The Decision by the Court of Appeals should be Reversed.

ASSIGNMENT OF ISSUES

Issue 1. Is the Court of Appeals Decision in conflict with decisions of the Supreme Court regarding the determination of the intent of the parties to a License Agreement as modified by the Trial Court?

Issue 2. Is the Court of Appeals Decision in conflict with decisions of the Supreme Court regarding whether the Trial Court's modification of the Respondent/Licensee's "Use" by the order to "transfer" injection molds requires the application of contract construction factors to determine "under all the circumstances" the definition of "transfer" relative to the Respondent/Plaintiff's allowed "Use" of the injections molds?

Issue 3. Is the decision of the Court of Appeals in this matter in conflict with other decisions of Division III Court of Appeals regarding contract interpretation and resolution of ambiguity?

Issue 4. Does the decision of the Court of Appeals in this matter in holding Appellant/Defendant in Contempt and in not finding Appellant/Defendant's resistance to the Judgment the act of protecting

property and a defense to Respondent/Plaintiff's Motion for Contempt and terms?

Issue 5. 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 abuse its discretion 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 Respondent/Plaintiff/Licensee. Rebel Creek Tackle Inc is the Defendant-Appellant referred to as the Appellant/Defendant/Licensor. Seth Burrill and Allen Osborn are referenced in the Clerk's Papers in Declarations.

Respondent/Licensee was licensed by Appellant/Licensor to sell Appellant's Patented and Patent Pending fishing devices CP 12-17. The fishing devices are made with plastic injection molds. Respondent's "Use" of the Appellant'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 Respondent/Licensee and Appellant/Licensor was arbitrated with an Arbitration Decision at 2013 CP 36-40 and providing 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

Respondent moved to take possession of the molds by its Motion for Contempt and Sanctions by Motion set for hearing November 1, 2014 (CP 115). Appellant's Motion for Continuance and Partial Response to Plaintiff's Motion for Contempt was heard and granted (CP 145); RP 10/lines 3-9, (RP 14/lines 9-10). Appellant's Motion regarded the modification of the "Use" by "...transfer and/or delivery..." to show that resistance to the Motion for Contempt was reasonable and in light of the "intent of the parties" and all of the circumstances. Appellant's argument regarded the Respondent's intent to transfer the injection molds into its possession, that such transfer was outside the "Use" of the License, was not defined and until defined the parties would not know the nature of the "Use" allowed under "transfer". RP 5/lines 11-22.

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

Appellant/Defendant filed it's Motion and Memorandum and presented Argument on November 15, 2013. The word "Transfer" was noted, in Washington State case law, to be synonymous with "sale". CP 158

I the word "transfer", in this case, is not defined as "sold" then what does the word "transfer" mean in the Court's Order (CP 271)? CP 242/lines 13-17; RP 18/line 21-24. The need and law to define "Use" and "transfer" remained before the Trial Court on November 15, 2013.

The Court, ignoring Appellant's Motion was Abuse of Discretion noted 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 Appellant's Memorandum (CP 158) addresses the issue of "Use" modified by "...transfer and/or delivery..".by considering all of the circumstances surrounding the use of the molds. The Respondent/Plaintiff did not address "Use" in light of "transfer.

Lacking definition of "Transfer" and with Respondent seeking possession of the injection molds, Appellant urges analysis of the intent of the parties and consideration of all the circumstances surrounding the Licensee Agreement relationship.

ARGUMENT

I. **CONFLICT WITH SUPREME COURT**: The Division III Opinion, regarding contract construction, conflicts with decisions of the Supreme Court and with Decisions from Division III. The Opinion, regarding contract interpretation including resolution of ambiguities and intent of parties to contracts is an issue of substantial public interest. The Court of Appeals Opinion should be reviewed by the Supreme Court.

A. **Contract Construction:** As invited by the Court in this matter, (RP 13/line 16-14/line 2), Appellant addressed the Court regarding contract construction. Contract construction is reviewed de novo on Appeal. *Turbin v. Lowe, 285552-9-III.*

In this case contract construction addresses not only the extent of

or limitations on the rights of the Respondent to the "Use" of injection molds but also supports the Appellant's position opposing contempt. The construction must be undertaken to determine the authorized "Use" of the injection molds by the Respondent.

The License Agreement (CP 14 paragraph 5) limits the Respondent's right to "Use" of the molds "...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 Respondent "(CP 21, para 4). "Use" is not defined in either the Licensee Agreement (CP 14 para 5) or in the Court's Order (CP 21, para 4).

Respondent's "Use" revised by the "...transfer and/or deliver..." phrase is not the "Use" intended and 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 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 Appellant/Defendant. The Respondent/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: AMBIGUITY 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. Respondent/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 Appellant briefed the law equating "sale" or "convey" to "transfer" follows commencing at CP 161. The Court of Appeals only addressed "transfer" by it reference, COA Opinion page 3 referring to BLACK'S LAW DICTIONARY 1727 (10th ed. 2014) for the position that transfer can mean a change in possession of a sale. While the specific reference from Black's Law Dictionary is not found elsewhere in Washington Law, it is noted that the briefing by Appellant demonstrates that "possession" is a characteristic of transfer of title or sale. *Palmer* v. *Department of Revenue*, 917 P.2d 1120, 82 Wn.App. 367, 372-75 (Wash.App. Div. 2 1996)

C. **INTENT OF THE PARTIES OR AMBIGUITY - Consider all the Circumstances.**

1. The Court of Appeals Opinion fails to analyze the construction issue in accord with decisions of the Supreme Court. 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 an 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. The Court of Appeals fails its analysis regarding the intent of the parties but further fails by it refusal to consider all the circumstances.

"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. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 312 P.3d 976, 176 Wn.App. 185 (Wash.App. Div. 1 2013)

citing *Stender v. Twin City Foods. Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973) at footnote 8. (Emphasis Added)

D. **ALL THE CIRCUMSTANCES SURROUNDING THE CONTRACT** – *Stender*, supra 254 and *Trinity Universal*, supra footnote 8, factors determining the intent of the parties are revealed by circumstances at the making of and during the performance by the parties subsequent to the commencement of the License Agreement. These are considered in light of *Stender*. 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 Trial Court Order.

The "the subject matter and objective of the contract" are the Patent and Patent Application for fishing devices and the objective of the contract is the performance by the Respondent in selling the fishing devices."

"[A]ll the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract..." are stated as follows:

1. the years long inventive process of Defendant in inventing the devices,[2]

2. the selection of the Plastic Injection Molding (PIM) company[3],

3. the manufacture and obtaining of the molds[4],

4. the discussions between Respondent Plaintiff and Appellant/Defendant[5],

5. the contact between Appellant/Defendant and the injection mold company (Plastic Injection Mold or PIM)[6],

6. the execution of the License Agreement on June 10, 2010[7],

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[8],

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

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

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

12. the finding of the Arbitrator that the Plaintiff had made no inventive

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[2] 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.

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

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

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

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

[7] CP 173

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

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

[10] See footnote 1

[11] See footnote 6

contribution[12],

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

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

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

16. the credibility of the Plaintiff[16].

The *Stender* factors, supra 254, for this Appellant and Respondent are revealed in the Clerks Papers comprised in part of 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 interpretations advocated by the parties."

Appellant/Defendant has filed with the Superior Court and Court

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[12] See Footnote 6

[13] CP 110/19-24

[14] CP 110/19-112/6

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

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

of Appeals, via the Clerk's Papers, pleadings and argument derived from the Arbitration. Portions of the pleadings relate to the credibility of the Plaintiff.

Commencing at CP 161: Osborn 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)
are assets of Defendant. Title to the Molds is in Defendant.

a. DISPUTE: A dispute occurred between Defendant and Plaintiff and was arbitrated. The Arbitrator's decision regarding the "Use" of Molds modified "Use". The Trial Court adopted the Arbitration Decision. The impact on "Use" was not considered. However, the Supreme Court requires that the intent of the parties be considered in light of all circumstances from the negotiations between Defendant and Plaintiff from 2009 through November 15, 2013.

b. THE SINGLE MANUFACTURER, THE CREDIBILITY AND THE INTENTIONS OF THE RESPONDENT.

Significant factors regarding the intent of the parties and the circumstances surrounding the parties and the License Agreement are

found in the Declaration of Mr. Osborn[17] regarding the development of the a fishing device[18], the Appellant's making of prototypes[19]; the improvements in 2005 through 2009[20] prior to Appellant and Respondent meeting; the Respondent's unawareness of prototype development and testing until the Contemporaneous Exchange of Discovery in the Arbitration in 2013[21]; the demonstrated lack of credibility of Respondent revealed by the filing of the Respondent's Arbitration Demand[22]; Respondent's attorney's assertion that Mr. Burrill was the inventor; the explanation by counsel Christopher Lynch of the asserted inventorship[23]; Appellant's Counsel's Motion for Reconsideration[24] and Responsive Memorandum[25] which compels the conclusion that Mr. Burrill has the intentions to conduct fraudulent accounting, reporting and underpayment of royalties; the portion of Respondent's Discovery Production showing Exhibit 7[26] and pertaining solely to Mr. Burrill's claim of inventing[27]; the

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

[18] 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.

[19] See footnote 7

[20] See footnote 7

[21] See footnote 7.

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

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

[24] Defendant's Motion for Reconsideration of April26, 2013 as Exhibit 5, CP 205.

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

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

Arbitrator's conclusions of no credibility is found at page 1 of Exhibit A to the Declaration at (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.

c. DEFINING "TRANSFER" - 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

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

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 negotiation for production by PIM following the Arbitration.

CONCLUSION

The Court of Appeals failed to abide by Supreme Court decisions. "Use" should be to retain conditions existing since 2009 with production solely at Respondent's instructions. Alternatively, should Respondent be allowed to remove the Molds from PIM, the "Use" should require identification of the location, assurance of Appellants recovery of the molds upon Respondent's default with communication required regarding production. Appellant should be awarded attorney fees.

Respectfully submitted this 6th day of August, 2015.

Floyd E. Ivey, WSBA 6888, Attorney for Appellant

APPENDIX

CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on August 6, 2014 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Petition for Review; Table of Authorities; Table of Contents; Title Page-Appeal 321193-3-III; Appendix

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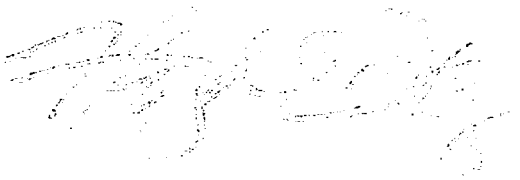

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COA Appeal No. 321193

FILED
JULY 7, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SETH BURRILL PRODUCTIONS, INC., a Washington corporation, Respondent, v. REBEL CREEK TACKLE, INC., Appellant.	)	No. 32119-3-III UNPUBLISHED OPINION

KORSMO, J. — This is an appeal from a finding of contempt for violation of an order resolving a previous dispute between the parties. Concluding that this appeal is completely without merit, we affirm the contempt finding and award costs and attorney's fees for the appeal.

FACTS

Allen Osborn invented and patented a fishing lure, and formed Rebel Creek Tackle, Inc. (RCT) to handle the ensuing business. In order to begin manufacture of the lures, RCT had prototypes and steel injection molds produced in China. RCT then licensed Seth Burrill Productions, Inc. (SBP) to be the exclusive producer and distributor of the lures, granting it "full, unrestricted use of the injection molds." The molds were

then transferred to Richland based manufacturer, Plastic Injection Molds, Inc. (PIM) for production.

Following a breakdown in relations with SBP, RCT unilaterally terminated the license in 2012, and began its own distribution of lures obtained from PIM. In response, SBP brought an action for breach of contract. In May 2013, an arbitrator found that RCT had breached the licensing agreement, and entered an award providing for damages and the reinstatement of a modified licensing agreement. The arbitration award was then confirmed in a court order filed June 7, 2013. Pertinently, the arbitration award and court order amended the provision in the licensing agreement granting SBP use of the injection molds to additionally require that RCT "cooperate in the transfer and/or delivery of said molds as requested by [SBP]."

Immediately thereafter, SBP contacted PIM to arrange the transfer of the molds. However, because the molds are the property of RCT, PIM would not release the molds without permission. SBP attempted to contact RCT, but was unable. SBP eventually contacted RCT's attorney, who refused to agree to the transfer, instructed PIM not to release the molds, and then informed SBP that he no longer represented RCT. SBP then made several additional, unsuccessful attempts to directly contact RCT before bringing the present action for contempt, four months after the court order was filed. The trial court found that RCT had intentionally violated the court order and imposed remedial sanctions. RCT appealed.

ANALYSIS

RCT challenges the contempt finding, arguing that the licensing agreement, as modified by the court order, was ambiguous and that its violation of the order was justified in order to protect its property interests. We will address those arguments and then consider SBP's request for attorney's fees.

Contempt

A party is subject to contempt where there is intentional disobedience of a valid court order. RCW 7.21.010. A finding of contempt is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCT argues that the modification to the licensing agreement imposed by the arbitration award and court order is ambiguous because the word "transfer" can mean alternatively a change in possession or a sale. *See* BLACK'S LAW DICTIONARY 1727 (10th ed. 2014). However, a term in a contract is not rendered ambiguous merely because one word is susceptible to multiple meanings. *Grant County Constructors v. E.V. Lane Corp.*, 77 Wn.2d 110, 121, 459 P.2d 947 (1969). Rather, the word must be read in the context of the contract as a whole, and where the language used is

unambiguous, an ambiguity will not be read into the contract. *Hering v. St. Paul-Mercury Indem. Co.*, 50 Wn.2d 321, 323, 311 P.2d 673 (1957).

The clause requiring RCT to "cooperate in the transfer and/or delivery of the molds," unambiguously contemplates only a change in possession in order to facilitate SBP's use of the molds for the duration of the contract.[1] "Transfer" could not reasonably mean "sale" in this context since that word already is used in the same phrase as an alternative possibility to "transfer." Furthermore, the parties agree on this meaning of the word "transfer" in this context. Consequently, the modified licensing agreement was unambiguous.

RCT next contends that its actions were justified as a means to protect its property interests in the molds. It contends that SBP intends to perpetrate fraud by misreporting sales and that SBP could lose or damage the molds while in its possession. However, RCT has presented no evidence that any of these hypothetical future harms will occur[2]

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[1] RCT argues that resolving the ambiguity entails adding conditions to SBP's possession of the molds. These conditions were not included in the original agreement nor in the court order, and a court order cannot be collaterally attacked in contempt proceedings. *State v. Coe*, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984). Additionally, even if this were a reasonable interpretation, RCT would still have been in contempt of court for refusing to cooperate with the transfer.

[2] The contention that SBP intended to defraud RCT stems from the fact that SBP previously failed to submit the quarterly sales reports required by the licensing agreement. However, the arbitrator determined that this failure was inconsequential because SBP had instead reported all sales as they occurred.

nor is there any legal support that this constitutes a defense to contempt. RCT also has the ability to enforce any breach of the agreement by SBP by bringing its own action.

RCT has failed to demonstrate that the trial court's finding of contempt was in any manner untenable. Therefore, we affirm.

Attorney's Fees

SBP requests that this court award costs and attorney's fees as sanctions under RAP 18.9(a) for bringing a frivolous appeal.[3] An appeal is frivolous when it presents no debatable issues upon which reasonable minds might differ, and it is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). Doubts as to whether an appeal is frivolous should be resolved in favor of the appellant. *Id.* Raising at least one debatable issue precludes a finding of frivolousness. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

Here, RCT has appealed from a finding of contempt, while conceding all of the essential facts establishing that it intentionally violated a court order. It contends instead that its actions were acceptable because the court order is ambiguous. Yet under any interpretation, it would still have been in violation of the order. It also contends that its actions were justified without any factual or legal support. Thus, RCT has not presented

[3] Because RCT is not the prevailing party, we need not address its claim for attorney's fees on appeal.

any debatable issue and this appeal is completely without merit. SBP is awarded its costs and attorney's fees for this appeal upon compliance with RAP 18.1(d).

Affirmed

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, A.C.J.

Lawrence-Berrey, J.