

No. 64799-7-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

PLAINFIELD SPECIALTY HOLDINGS II, INC.,

Plaintiff-Respondent

v.

WORLDWIDE WATER INC., CLEAR WATER COMPLIANCE
SERVICES, INC., and CASCADE ECOSOLUTIONS, INC.,

Defendants-Appellants

and

THOMAS LEGGIERE, *et al.*,

Intervenor Defendants.

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT

RESPONDENT'S ANSWERING BRIEF

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FILED
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STATE OF WASHINGTON
2010 JUL -1 AM 11:53

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I. INTRODUCTION AND SUMMARY

Respondent Plainfield Specialty Holdings II, Inc. (“Plainfield”) loaned Appellant Worldwide Water Inc. and its affiliates (“Worldwide”) over \$12 million dollars. Plainfield’s loans were protected by a security interest in all of Worldwide’s assets. When Worldwide defaulted on the loans and became insolvent, Plainfield filed suit and sought appointment of a receiver. The trial court agreed and appointed an independent receiver to take charge of the company. After less than a month on the job, the receiver told the court that Worldwide could not be salvaged and asked for permission to liquidate the company’s assets for the benefit of Plainfield and other creditors. Again, the trial court agreed, and the receiver sold most of Worldwide’s assets at auction for less than \$1.5 million. Even after the proceeds of the sale were distributed, Worldwide still owed Plainfield more than \$12 million, which Plainfield stands little chance of collecting from the now-defunct Worldwide.

There being nothing left to do, the receiver moved the court to terminate the receivership and distribute Worldwide’s remaining tangible and intangible assets to Plainfield. That should have been the end of it, but it wasn’t. Worldwide told the trial court it had claims against Plainfield and, unbelievably, that these claims might be worth more than the \$12 million Worldwide owed Plainfield. Worldwide asked the court

not to distribute this purported intangible asset to Plainfield. The trial court refused. Worldwide had not filed or asserted any specific claim against Plainfield during the proceedings and, after looking into the issue, the receiver found Worldwide's allegations to be without merit. The court ordered the receiver to distribute all of Worldwide's remaining assets, including causes of action, to Plainfield. Worldwide appeals that order.

Worldwide's arguments on appeal should be rejected because they were not raised below. But even if this Court reaches the merits, it must affirm. The standard of review is abuse of discretion. The trial court did not abuse its discretion because (1) the Receivership Act gave the court express authority to distribute Worldwide's unsold assets to Plainfield, (2) Plainfield had a security interest in Worldwide's purported claims, because they were not "commercial tort claims" within the meaning of Article 9 of the UCC, (3) Worldwide was afforded notice and opportunity to contest distribution and/or assert its claims, and (4) the court reasonably relied on the receiver's finding that Worldwide's claims were without sufficient merit or value to pursue when it effectively compromised that claim to partially satisfy Worldwide's \$12 million debt to Plainfield.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did Worldwide waive its arguments on appeal by failing to properly raise them in the trial court?

2. If not, did the trial court properly exercise its broad discretion to approve distribution of Worldwide's remaining assets to Plainfield, including potential claims, when:

a) the Receivership Act gave the trial court express authority to distribute all of Worldwide's remaining assets to Plainfield, Worldwide's only secured creditor;

b) Plainfield had a perfected security interest in Worldwide's tangible and intangible assets, which included any claims that arise in contract;

c) Worldwide was afforded adequate notice and opportunity to contest distribution of its assets, and did so, in accordance with the procedural requirements of UCC Article 9 and the Receivership Act; and

d) the trial court reasonably concluded, based on the receiver's findings and Worldwide's inability to substantiate its allegations, that Worldwide's claims were speculative or, at most, worth less than the \$12 million that Worldwide owed Plainfield?

III. COUNTERSTATEMENT OF THE CASE

Worldwide devotes nearly twenty pages of its brief describing allegations against Plainfield before it finally discusses the facts and procedure that are relevant to this narrow appeal. Worldwide's allegations

are not only irrelevant, they are false, misleading and unsupported by the record. Worldwide's one-sided summary is drawn exclusively from a single declaration filed by an intervening party who did not appeal the trial court's ruling. Worldwide never asserted nor substantiated any of these allegations below and, indeed, its failure and/or inability to do so led directly to the trial court ruling that Worldwide now challenges on appeal. For clarity, Plainfield presents the following facts and procedure which represent the relevant and *undisputed* record on appeal.

A. Factual Background

Worldwide Water, Inc. designed, developed and installed storm water filtration systems. Under a July 27, 2007 Note Purchase Agreement ("Agreement"), Worldwide agreed to issue up to \$20,000,000 in secured notes to Plainfield. CP 747 (Johnson Decl.) ¶ 3; CP 754-861 (Agreement). The Agreement included an unconditional guarantee of Worldwide's obligations by Clear Water Compliance Services, Inc. and Cascade EcoSolutions, Inc. (collectively, "Worldwide"). *Id.*, ¶ 5. Pursuant to the Agreement, Worldwide executed an initial note in the amount of \$3,500,000. *Id.*, ¶ 4; CP 863-67 (note). At Worldwide's request, Plainfield funded seven additional advances in the total amount of \$9,095,849.80. Altogether, Worldwide owed Plainfield \$12,595,849.80, plus interest, fees and expenses as of April 2009. *Id.*

Plainfield's loans to Worldwide were secured by, among other things, a security interest in all then owned and after-acquired property of Worldwide, including all general intangibles, as described in a separate security agreement. *Id.*, ¶ 6; CP 868-911 (security agreement). Plainfield perfected its security interest over Worldwide's property by filing UCC-1 financing statements in both Delaware and Washington. *Id.*, ¶ 9. Worldwide represented that its property was free and clear of any other lien and that Plainfield's security interest was prior and superior to any liens on the property. CP 878, §§ 4.02 & 4.03.

After Plainfield determined that Worldwide had defaulted on its obligations, it gave Worldwide written notice of default. CP 748 (Johnson Decl.) ¶ 11; CP 714-15 (Supp. Johnson Decl.) ¶¶ 2-6; CP 955-58 (notice of default). Following Worldwide's inability to cure the default, on November 15, 2008, Plainfield sent Worldwide a Notice of Acceleration and Intention to Exercise Remedies. *Id.*, ¶¶ 12 & 13; CP 960-62 (notice of acceleration). Plainfield thereafter learned that Worldwide had executed a letter of intent with a third party by which it transferred property subject to Plainfield's security interest to the third party in exchange for cash. This agreement was made without Plainfield's consent. *Id.*, ¶¶ 18 & 19.

B. Procedural Background

Plainfield concluded that Worldwide did not have sufficient assets to cover the amount due and owing to Plainfield, and that Worldwide was insolvent and/or lacked sufficient revenue to pay its operating debts as they became due. *Id.*, ¶ 20 & 21. Accordingly, on April 9, 2009, Plainfield filed suit against Worldwide in Snohomish County Superior Court seeking damages in the amount of Worldwide's default and the appointment of a general receiver to protect and preserve Worldwide's remaining assets and Plainfield's security interests. CP 971-79. Plainfield filed a motion for appointment of a receiver the same day. CP 117-124.

In response, the founding shareholders of Worldwide (the "Intervenors") filed a consolidated motion to intervene and opposition to Plainfield's motion for appointment of a receiver. CP 91-105. In support of Intervenors' motion, Thomas Leggiere, Worldwide's CEO, filed a declaration containing a myriad of unsupported allegations that constitute the sole basis of Worldwide's purported claims against Worldwide. CP 447-713. Worldwide filed a brief joining Intervenors' opposition to appointment of a receiver, but did not otherwise answer the complaint or assert counterclaims against Plainfield. CP 114-16. Although Intervenors opposed a general receiver with power to liquidate Worldwide's assets, they did not oppose appointment of a custodial receiver. CP 104. In fact,

neither Worldwide nor Intervenors denied that Worldwide's assets were insufficient to satisfy its debt to Plainfield. CP 91-105; CP 114-16.

Following a hearing on April 29, 2009, the commissioner granted Plainfield's motion for the appointment of a receiver, in part. RP (4/29/09) at 44¹; CP 81-90. The court authorized the appointment of a custodial receiver only, but reserved the right to later convert the receivership to a general one. CP 82. Plainfield was ordered to bear all fees and costs associated with the receivership, for which it would have an administrative claim in the receivership proceedings. CP 84. The parties agreed on the appointment of Tyrell Vance LLC ("Receiver") as receiver several days later. CP 73-75. In addition, the court granted Intervenors' motion to intervene. RP (4/29/09) at 41; CP 79-80. The Intervenors, however, did not thereafter file a complaint or assert any kind of claim against Worldwide. In fact, the Intervenors never again filed a pleading in the case, and their counsel subsequently withdrew. *See* Dkt. No. 129.

After less than a month on the job, on May 29, 2009, the Receiver moved to convert the receivership from a custodial one to a general one. CP 61-69. Based on the Receiver's consultation with Worldwide's

¹ The transcripts that comprise the verbatim report of proceedings erroneously identify the speaker at numerous points during the proceedings below. The parties subsequently agreed to correct the report by stipulation. CP 1199-1203.

management, and review of its books and records, the Receiver concluded that a general receivership was in the best interest of all parties because, among other things, unlike a custodial receiver, a general receiver has the power to request the court to order a sale of assets free and clear and to reject executory contracts. *Id.*; CP 443-446 (Vance Decl.) ¶¶ 4-8. Neither Worldwide nor Intervenors objected to the Receiver's motion, which the trial court granted on June 9, 2009. CP 58-60.

Thereafter, the Receiver began making arrangements for an orderly liquidation of the companies' property, including appraisal of its assets and notice to creditors. CP 12-25 (Final Report). The Receiver prepared a schedule of Worldwide's assets and liabilities pursuant to RCW 7.060.090. CP 26-57. Although Worldwide's purported claim against Plainfield was not listed as a company asset, neither Worldwide nor Intervenors objected. On July 31, 2009, the trial court granted the Receiver's uncontested motion to sell certain of Worldwide's assets via auction. CP 423-27; CP 431-35; CP 415-19. The auction was held on August 6, 2009, and resulted in proceeds of \$1,475,000. CP 412-14. The Receiver disbursed \$850,000 of this amount to Plainfield in partial satisfaction of its security interest. CP 16.

The Receiver then moved to terminate the receivership and distribute Worldwide's remaining assets. CP 5-8. Its motion stated:

The Receiver has now sold or otherwise liquidated all of the assets of the receivership entities and those sales were confirmed by the Court on August 11, 2009. ... All of the assets of the receivership entities were subject to the security interest of the plaintiff, Plainfield Specialty Holdings II, Inc. (“Plainfield”). Because the sale of the assets did not generate sufficient funds to pay the secured creditor in full, **there will be [no] distribution to unsecured creditors.**

CP 6 (emphasis in original). The Receiver requested authority to disburse remaining funds in the amount of \$253,049 to Plainfield, and “to assign any remaining assets to Plainfield.” CP 7. Notice of the Receiver’s proposed order of termination and disbursement was sent to Worldwide’s approximately 300 creditors. CP 9; RP (12/11/09) at 4.²

The Receiver received only two responses—one from Plainfield and one from Worldwide. RP (12/11/09) at 4-5. Plainfield did not object to the Receiver’s proposal, but wanted clarification that Worldwide’s remaining assets included “claims or causes of action.” CP 1197-98. For its part, Worldwide also agreed that the receivership should be terminated, but objected to assignment of “claims and/or causes of action that [Worldwide] hold[s] against Plainfield.” CP 1193-95. The Receiver took no position on the issue, but informed the trial court that:

² The verbatim report of proceedings for the Receiver’s motion to terminate the receivership is erroneously dated December 12, 2009. The hearing was held on December 11, 2009. *See* Dkt. No. 159.

Although the Receiver did not do a formal investigation into the allegations against Plainfield, the Receiver in the course of fulfilling its duties, examined the claims and decided not to pursue these.

CP 408-11. In addition, the Receiver wrote that, even after disbursement of Worldwide's remaining assets, Worldwide would still owe Plainfield more than \$12 million, plus an administrative claim for the \$290,000 that Plainfield had advanced to cover receivership fees and costs. CP 411.

The Receiver's motion to terminate and distribute Worldwide's remaining assets was heard by Commissioner Bedle on December 11, 2009. Once again, the Receiver's counsel told the court that there simply was not enough merit to Worldwide's allegations to warrant further action:

The receiver did, as I indicated, look at these briefly, [and] did not determine that [there were] sufficient allegations to expend the attorney's fees, basically, to explore this any further.

RP (12/11/09) at 6. After brief argument by counsel for Plainfield and Worldwide (the Intervenors did not participate), the trial court ruled:

I'm struck with a couple of things. One is the tremendous balance of moneys that are still owed to this plaintiff, Plainfield. ... [¶] And perhaps I don't know enough of the facts of this case, the rather speculative nature of the potential claim of defendants versus Plainfield for somehow violating the contract itself, and even if the[re] were a recovery it would have to be so substantial to recover the other moneys that were owed. ... [¶] And so at this point I'm going to include any potential causes of action by the defendant corporations against Plainfield as a corporate asset, which they would themselves possess.

Id. at 16. The court entered a written order granting the Receiver’s motion to terminate the receivership and distribute Worldwide’s remaining assets to Plainfield, including an assignment of “any claims or causes of action possessed by the Receivership Entities.” CP 1192. Worldwide appeals only this aspect of the order. CP 1184-89.

IV. ARGUMENT

A. **Worldwide’s Arguments Are Waived On Appeal Because They Were Not Adequately Raised In The Trial Court.**

This Court should reject all the issues Worldwide raises on appeal because it failed to properly preserve them below. An issue or argument not briefed or argued in the trial court will not be considered for the first time on appeal. *See Brower v. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001); *see also* RAP 2.5(a). This rule ensures that the trial court has an opportunity to fully consider a matter upon proper briefing or argument and to correct its own errors, thereby avoiding unnecessary appeals or retrials. *Demelash*, 105 Wn. App. at 527. None of the specific arguments Worldwide raises on appeal were argued in the trial court and, thus, they should be deemed waived on appeal.

In its written response to the Receiver’s motion, and Plainfield’s request that distribution of Worldwide’s assets include an assignment of claims, Worldwide’s entire argument was as follows:

While defendant companies have no objection to assignment of all other assets of the defendant companies to Plainfield, the defendant companies do object to the Receiver's assignment to Plainfield of claims and/or causes of action which the defendant companies may possess against Plainfield. Plainfield should not be in a position to receiver [sic], in effect, a release of claims simply because the receivership has now terminated. This Court's order can clarify that Plainfield preserves its set-off rights against any claims that the companies may assert against it, but this Court should not sanction an assignment of those claims to Plainfield, effectively causing a release of those claims.

CP 1194. Worldwide did not argue, as it does now, that (1) the trial court lacked authority under the Receivership Act to assign Worldwide's claims, *see* Appellants' Br., pg. 2 (Assignment of Error 1) & pp. 25-30; (2) Worldwide did not hold a valid security interest in Worldwide's claims because they constitute "commercial tort claims," *id.*, pg. 2 (Assignment of Error 2) & pp. 30-32; or (3) assignment of Worldwide's claims deprived Worldwide procedural safeguards provided by UCC Article 9, *id.*, pp. 32-33. Indeed, Worldwide's brief did not contain a single citation to any statute or case. CP 1193-96.

Worldwide's arguments at hearing were no more specific. Like its brief, Worldwide argued simply that, "it doesn't seem appropriate for this court in terminating a receivership to transfer those claims to Plainfield." RP (12/11/09) at 10; *id.* at 9 (it "seems inappropriate for the court to, in effect, give Plainfield a release"). In response to the court's question as to whether Plainfield's security interest included potential claims, counsel's

response was: “No, I don’t think that it would, Your Honor. They certainly would like a security interest, but I’ve never seen a lender have a security interest in claims that exist against itself.” *Id.* at 8. Worldwide did not mention, much less rely upon, the Receivership Act, Article 9 or any statutory or case law doctrine to support its “it doesn’t seem appropriate” plea. Because Worldwide never gave the trial court an opportunity to consider the specific arguments it now raises on appeal, those arguments are waived. The ruling below may be affirmed on this basis alone.

B. The Trial Court Did Not Abuse Its Discretion When It Assigned Worldwide’s Purported Claims To Plainfield.

Even if this Court reaches the merits of Worldwide’s appeal, the trial court’s order assigning Worldwide’s claims to Plainfield was entirely proper and should be affirmed. As an initial matter, Worldwide wholly ignores the proper standard of review—for obvious reasons. This Court reviews orders terminating receiverships, as well as orders approving distribution of receivership property, only for abuse of discretion. *See Walton v. Severson*, 100 Wn.2d 446, 451, 452, 670 P.2d 639 (1983); *Thompson v. Mitchell*, 128 Wash. 192, 202, 222 P. 617 (1924); *Boothe v. Summit Coal Min. Co.*, 63 Wash. 630, 634, 116 P. 269 (1911). A trial court does not abuse its discretion unless its acts are manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ferree v. Fleetham*, 7 Wn. App. 767, 773, 502 P.2d 490 (1972) (*citing*

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)). As explained below, the trial court did not abuse its discretion

1. The Receivership Act Gave The Trial Court Authority To Distribute Worldwide's Assets To Plainfield.

Worldwide's argument that the trial court lacked statutory authority to distribute Worldwide's purported claims to a third party creditor is baseless. Receivership actions are governed by statute. RCW 7.60 *et seq.* As it concerns claims belonging to a business in receivership, the Receivership Act does not limit a receiver's authority to sale, administration or abandonment of receivership assets, as Worldwide apparently contends. *See* Appellants' Br., pg. 26. Rather, the Act gave the trial court broad discretion to authorize the Receiver to distribute Worldwide's remaining unsold assets to Plainfield, as Worldwide's senior (and only) secured creditor, upon termination of the receivership.

Worldwide does not dispute that, regardless of merit, its purported claim against Plainfield was receivership property. "It is beyond dispute that the receiver's powers, under the court's control, include the power to dispose of the receivership property." *Walton*, 100 Wn.2d at 451-52 (*citing In re Spokane Savings Bank*, 198 Wash. 665, 89 P.2d 802 (1939)). While a trial court may sell, administer or abandon receivership property, its power is not so limited. To the contrary, the Act expressly gives a trial court complete discretion to determine the best method of distribution:

[T]he court in all cases has ... exclusive possession and right of control with respect to ... all tangible and intangible personal property with respect to which the receiver is appointed, ... and ***the exclusive jurisdiction to determine all controversies relating to ... distribution of all the property, ...***[.]

RCW 7.60.055 (emphasis added); *also Walton*, 100 Wn.2d at 452 (“in the absence of statutory limitations, the receivership court has broad discretion in determining the manner of disposition of receivership property”). Although it applies here, and plainly refutes Worldwide’s statutory argument, Worldwide ignores this provision of the Act completely.

Critically, Washington courts have specifically recognized that a trial court has the power to assign a claim belonging to a business in receivership to a creditor as part of an order of distribution. *See Guaranty Trust Co. v. Satterwhite*, 2 Wn.2d 252, 260, 97 P.2d 1055 (1940) (“If the claim of the receivership ... [is] considered an asset of the corporation, ... as a chose in action, the claim passed to respondent under the order of distribution.”). Such an assignment makes sense where, as here, the receivership property is intangible, and not readily amenable to sale. Indeed, as discussed below, because Worldwide’s claims were general intangibles within the scope of the parties’ security agreement, Plainfield stood in priority over all other creditors with respect to distribution of that asset. *See RCW 7.60.230* (secured creditors with duly perfected security

interest shall receive first priority in distribution of collateral by receiver).

The trial court did not exceed its authority under the Receivership Act.

2. Plainfield Possesses A Valid Security Interest In Worldwide's Purported Legal Claims.

Worldwide next contends that the trial court could not assign Worldwide's claims to Plainfield because Plainfield had no valid security interest in them. Appellants' Br., pp. 30-32. Worldwide's analysis is flawed here as well. Worldwide is correct that, under Washington's version of UCC Article 9, Plainfield's security interest in Worldwide's general intangibles does not reach "commercial tort claims." See RCW 62A.9A-108(e)(1); RCW 62A.9A-204(b)(2). But Worldwide's purported claims against Plainfield are not commercial tort claims under Article 9 or Washington law. To be a "commercial tort claim," the claim must "aris[e] in tort." RCW 62A.9A-102(a)(13). Even if Worldwide had valid claims against Plainfield (it does not), those claims are grounded in the parties' contractual relationship and, therefore, fall outside of Article 9's "commercial tort claim" exception.

Breach of contract claims are not "commercial tort claims." *In re Pacific/West Comm. Group, Inc.*, 301 F.3d 1150, 1152 n. 4 (9th Cir. 2002) (interpreting California's identical version of Article 9). Worldwide characterizes its claims against Plainfield as "breach of contract, breach of implied duty of good faith and fair dealing, promissory estoppel,

fraudulent inducement and negligent misrepresentation.” Appellants’ Br., pg. 5. On their face, most of these purported claims are contract claims or equivalents and, even those characterized as torts, do not “aris[e] in tort” within the meaning of Article 9. Because the UCC does not define this term, courts necessarily examine how the debtor’s claims are treated under analogous provisions of state law to determine if they are essentially contract-based or tort-based claims. *In re Wiersma*, 283 B.R. 294, 300-301 (Bankr.D.Idaho 2002), *aff’d*, 324 B.R. 92 (Bankr. 9th Cir. 2005), *rev’d in part on other grounds*, 483 F.3d 933 (9th Cir. 2007).

In *Wiersma*, the debtors had claims for “breach of contract, breach of warranty, negligence, fraud and violation of Idaho’s Consumer Protection Act.” *Id.* The bankruptcy court had to decide whether the debtors’ claims were general intangibles, in which case they would be subject to the creditor’s security agreement, or “commercial tort claims,” in which case they would not. *Id.* The court examined Idaho law to determine whether claims of this sort primarily arose in contract or tort:

While these decisions do not specifically address the character of a claim as a commercial tort claim under Revised Article 9, their analysis seems sound, and the circumstances of those cases appear reasonably analogous to the case at bar. Under the case law, if a party’s claims against another are not premised primarily on tort causes of action, and where a contract between the parties exists, the claims need not be characterized as arising in tort. ...

[T]he Court concludes the [claims are] primarily premised on a contract between Debtors and Gietzen [¶] First, Debtors' claims for breach of contract and breach of warranty relate directly to their contract with Gietzen. Clearly, the contract is integral to these claims. [¶] Debtors' other claims for negligence, fraud and violations of Idaho's Consumer Protection Act, while not traditional contract claims, are also integrally related to the contract. The presence of these other causes of action in Debtors' complaint do not change the fundamental nature of the action and its genesis in contract law. ...

Because the contract between Debtors and Gietzen is the gravamen of Debtors' claims, the Court concludes that those claims arise in contract rather than tort. Therefore, Debtors' right to recover against Gietzen is not a commercial tort claim under the definition in [UCC 9-102(42)]. Completing the circle, the Court therefore concludes Debtors' claim against Gietzen fits the definition of a general intangible under the Idaho UCC, and is therefore subject to [the creditor's] security agreement.

Id. at 302 (citations omitted). Notably, the bankruptcy court relied in part on Washington law, which similarly looks to the essence of a claim, rather than its label, to determine whether it arises in contract or tort. *Id.* at 301 n. 7 (citing *Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495 (2002), *Brown v. Johnson*, 109 Wn. App. 56, 34 P.3d 1233 (2001), and *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997)).

Washington case law shows that if Worldwide had any claim against Plainfield at all, it would not be a “commercial tort claim.” In the context of attorney’s fee awards made pursuant to a contractual attorney’s fee clause—the analogous state law that *Wiersma* considered—

Washington courts look to whether the claims “arose out of” the parties’ contract, and whether the contract was “central to the dispute.” *Edmonds*, 87 Wn. App. at 855 (quoting *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993)); *Hill*, 110 Wn. App. at 412. Washington courts follow a similar analysis under the “economic loss rule,” which bars recovery for certain tort claims where the parties have a contractual relationship. *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007). “The key inquiry is the nature of the loss and the manner in which it occurs, *i.e.*, are the losses economic losses, with economic losses distinguished from personal injury or injury to other property.” *Id.* at 684.

Here, the Agreement is “central” to Worldwide’s putative claims against Plainfield and those claims, however characterized, “arose out of” the parties’ contractual relationship, not tort. As Worldwide’s own one-sided and unsupported summary of the “facts” shows, the gravamen of its purported claim is that Plainfield induced Worldwide to enter into the Agreement, and then failed or refused to provide funding thereunder. *See* Appellants’ Br., pp. 9-20. Washington courts have consistently found identical claims to arise in contract where, as here, they fundamentally relate to negotiation or performance of a contract. *Brown*, 109 Wn. App. at 59 (misrepresentation); *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 299, 716 P.2d 959 (1986) (fraudulent inducement).

Indeed, had Worldwide asserted tort claims against Plainfield, those claims would have been barred by the economic loss rule. *Poulsbo Group, LLC v. Talon Development, LLC*, 155 Wn. App. 339, 346-47, 229 P.3d 906 (2010) (rule bars intentional misrepresentation claims where parties have a contract); *Cox v. O'Brien*, 150 Wn. App. 24, 35, 206 P.3d 682 (2009) (same for negligent misrepresentation)

Because Worldwide's purported claims were not "commercial tort claims," they constituted general intangibles within the scope of Plainfield's security interest. See RCW 62A.9A-102(a)(42) (general intangible defined as "any personal property, including things in action, other than ... commercial tort claims"); *Parker Roofing Co. v. Pac. First Fed. Sav. Bank*, 59 Wn. App. 151, 160, 796 P.2d 732 (1990) (security interest in general intangibles included claims not contemplated when security agreement was signed). The trial court was therefore authorized to approve distribution of those claims, along with Worldwide's other remaining assets, to Plainfield pursuant to its security agreement.³

³ Even if Worldwide's purported claims against Plainfield were "commercial tort claims," those claims would not automatically revert to Worldwide. Rather, such claims would be deemed unsecured receivership property, subject to distribution to Worldwide's creditors in order of priority. See RCW 7.60.230. In that case, Plainfield would still have priority over this asset as a result of its superior claim for reimbursement of receivership costs. RCW 7.60.230(1)(b).

3. The Trial Court Afforded Worldwide All The Procedural Safeguards To Which It Was Entitled.

Worldwide's related argument that assignment of Worldwide's claims "provide[d] Plainfield with an end-run around the procedural safeguards provided by Article 9" is equally without merit. Appellants' Br., pg. 32-33. In the first place, it is doubtful that Article 9's "procedural safeguards" apply in a receivership proceeding at all. Article 9 contains a preemption provision, which states in part:

This Article does not apply to the extent that ... [a]nother statute of this state expressly governs the creation, perfection, *priority, or enforcement of a security interest* created by this state or a governmental unit of this state[.]

RCW 62A.9A-109(c)(2) (emphasis added). The Receivership Act contains statutes expressly governing priorities and enforcement of security interests, including notice, claim and objection procedures. *See e.g.*, RCW 7.60.190 (participation of creditors and parties in interest); RCW 7.60.210 (claims); RCW 7.60.220 (objections to claims); RCW 7.60.230 (priorities). Worldwide received the benefit of these applicable "safeguards"; it was given notice of, and cursorily opposed, assignment of Worldwide's purported claims. Notably, Worldwide did not object below, nor does it assign error on appeal, to the procedures followed by the trial court. Worldwide simply disagrees with the order on the merits.

Worldwide’s “due process rights under Article 9” were satisfied in any event. The only Article 9 “procedural safeguard” Worldwide cites is RCW 62A.9A-610(b)’s requirement that “disposition of collateral ... must be commercially reasonable.” Appellants’ Br., pg. 32. What Worldwide ignores, however, is that Article 9 also expressly states that a “disposition ... is commercially reasonable if it has been approved ... [i]n a judicial proceeding.” RCW 62A.9A-627(c)(1). Without question, the trial court’s order terminating the receivership and ordering assignment of Worldwide’s claims is precisely the kind of judicial imprimatur of commercial reasonableness required by Article 9. Worldwide’s Article 9 arguments must be rejected on this basis as well.

4. The Trial Court Reasonably Found That Worldwide’s Purported Claims Were Worth Far Less Than Its Outstanding Debt To Plainfield.

Worldwide’s final argument is that, in assigning Worldwide’s claims to Plainfield, the trial court effectively released claims that “could far exceed the amount owed to Plainfield.” Appellants’ Br., pg. 33. Not so. As an initial matter, for the reasons explained above, because Worldwide’s purported claims were general intangibles subject to Plainfield’s security interest, the Receivership Act *required* the court to distribute them to Plainfield. *See* RCW 7.60.230(1)(a) (secured creditor has priority over collateral subject to duly perfected lien). But even if

assignment was a matter of discretion, the court acted reasonably when it concluded, based on the Receiver's findings and the speculative nature of Worldwide's allegations, that Worldwide's claims were baseless or, even if they had some merit, the value of such claims was eclipsed by the more than \$12 million Worldwide owed Plainfield on its defaulted loans.

Worldwide's contention that "the Receiver admittedly undertook no independent investigation or analysis into the viability" of Worldwide's purported claims is simply untrue. Appellants' Br., pg. 32. What the Receiver said was that while it did not do a "formal investigation" into Worldwide's allegations, the Receiver did, in fact, independently "examine[] the claims and decided not to pursue the[m]." CP 410. At the hearing, the Receiver's counsel said the same thing in even stronger terms:

The receiver did ... look at these briefly, [and] did not determine that [there were] sufficient allegations to expend the attorney's fees, basically, to explore this any further.

RP (12/11/09) at 6. The Receiver also noted that, "no one disputes that Plainfield infused more than \$12 mil. into the companies and is still owed at least that amount." CP 411. In short, after considering Worldwide's allegations and meeting with its representatives, the Receiver determined that there was insufficient merit and/or value in Worldwide's claims to

justify expenditure of receivership assets. The trial court was within its discretion accepting the Receiver's independent judgment on this issue.⁴

On top of the Receiver's assessment, Worldwide refused to substantiate the viability or value of its purported claims. Worldwide did not answer Plainfield's complaint or file a counterclaim. Intervenor's pointed to Worldwide's purported claims as a basis for intervention, but then similarly failed to assert such a claim. *In re Custody of C.C.M.*, 149 Wn. App. 184, 198, 202 P.3d 971 (2009) ("intervening party has the right to participate in the principal action to the same extent as the original parties").⁵ Likewise, when the Receiver omitted Worldwide's claims from its schedule of assets, neither Worldwide nor Intervenor's complained. To this day, the only articulation of Worldwide's purported claims comes

⁴ There was good reason for the Receiver's rejection of Worldwide's claims, which are uniformly based on alleged oral promises. Appellants' Br., pg. 8 ("Appellants reasonably relied on Plainfield's promised alliance with JLC"); pg. 9 ("Reehl encouraged Worldwide to continue expansion"); pg. 9 n. 2 ("Clear Water reasonably relied upon Plainfield's representations"); pg. 12 ("Reehl ... encourag[ed] continued development of Appellants' businesses"). The Agreement contains a conspicuous integration clause (CP 812) that renders any alleged oral promise unenforceable as a matter of law under New York law, which applies here (CP 821). *See Societe Financiere de Banque v. Bitter-Larkin*, 670 N.Y.S.2d 87 (1998) (integration clause precludes party from relying on any prior written or oral agreements); N.Y. Gen. Oblig. Law § 15-301(1) (statute of frauds requires post-agreement promises to be written).

⁵ The automatic stay that applies upon appointment of a receiver only stays actions *against* the business in receivership, not actions *by* the business in receivership. *See* RCW 7.60.110(1).

from a one-sided and misleading declaration filed by Mr. Leggiere in opposition to Plainfield's motion for appointment of a receiver. For this reason too, the trial court was well within its discretion in concluding that Worldwide's claims were too "speculative" to value in excess of the \$12 million Worldwide owed Plainfield. RP (12/11/09) at 16.

At the very most, and even assuming that Worldwide's purported claims had some nuisance value, the trial court's assignment of Worldwide's claims to Plainfield constituted a compromise of those claims in partial satisfaction of Worldwide's outstanding \$12 million debt. The trial court plainly acted within its discretion here as well:

As a general rule, where a claim in receivership is doubtful and application is made for authority to compromise, to which creditors object, the court should approach the question from a business standpoint and make the same inquiry as in the ordinary cases of compromise where no objection is made, that is, as to the validity of the claim, difficulty in enforcement, delay and expense, and collectibility thereafter; an objection by creditors should present some substantial reason why the compromise should not be ordered. ... The mere fact that creditors are "willing to take a chance" will not be sufficient to stay the hand of the court in directing a compromise if the best interests of the estate are not served by so doing. If inquiry discloses a claim doubtful in fact and in law, this court will not reverse an order directing a compromise to be made unless there is an abuse of discretion.

Gordon v. Hartford Sterling Co., 179 A. 234, 237-38 (Pa. 1935); *Bancroft v. Allen*, 190 So. 885, 891 (Fla. 1939) (same). As explained above, the Receiver concluded that Worldwide's putative claims were doubtful, and

neither Worldwide nor Intervenors presented a “substantial reason why the a compromise should not be ordered”; to be sure, Worldwide did not raise any of the specific (albeit erroneous) arguments it raises for the first time on appeal. The trial court did not abuse its discretion.

V. CONCLUSION

The trial court’s order terminating the receivership and ordering Worldwide’s remaining tangible and intangible assets, including its purported causes of action, to be assigned to Plainfield should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of July, 2010.

LANE POWELL PC

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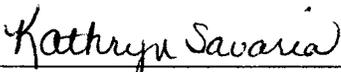
CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2010, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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Kathryn Savaria

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