RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 11, 2016 3:13 PM
CLERK'S OFFICE

RECEIVED VIA PORTAL

No. 93530-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re: the Receivership of

NAME INTELLIGENCE, INC., a Washington corporation,
and JAY WESTERDAL, an individual; WESTERDALCORP LLC,
a Washington limited liability company.

Respondents,

Per and Melody Westerdal,

Petitioners.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondents

TABLE OF CONTENTS

A. Introduction....................1

B. Restatement of Issues....................1

C. Restatement of the Case. 2

D. Argument Why Review Should Be Denied....................7

1. The receivership statute grants the appointing court the discretion to terminate a receivership and does not grant an unsecured creditor a "vested right" to payment of a contested claim.......... 8

2. The Court of Appeals correctly affirmed the trial court's exercise of discretion in terminating this receivership once its purpose had been fulfilled because the costs of the receivership far exceeded any benefit to the Westerdals in establishing their unsecured claim. 12

E. Conclusion 15

TABLE OF AUTHORITIES

Page(s)

Cases

Boothe v. Summit Coal Min. Co.,
63 Wash. 630, 116 P. 269 (1911)....................10

Brown v. Mead,
22 Wn.2d 60, 154 P.2d 283 (1944)....................10

Camicia v. Howard S. Wright Const. Co.,
179 Wn.2d 684, 317 P.3d 987 (2014)....................9

Citizens Alliance for Prop. Rights Legal Fund v. San Juan County.,
184 Wn.2d 428, 359 P.3d 753 (2015)....................8

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992)....................2

Heinsma v. City of Vancouver,
144 Wn.2d 556, 29 P.3d 709 (2001)....................8

King County Dep't of Cmty. & Human Servs. v. Northwest Defenders Ass'n,
118 Wn. App. 117, 75 P.3d 583 (2003)....................10

Mony Life Ins. Co. v. Cissne Family, L.L.C.,
135 Wn. App. 948, 148 P.3d 1065 (2006)....................10

Penn Mut. Life Ins. Co. v. Fife,
15 Wash. 605, 47 P. 27 (1896)....................12

Prince v. Savage,
29 Wn. App. 201, 627 P.2d 996, *rev. denied*, 96 Wn.2d 1002 (1981)....................9

Secord v. Wheeler Gold Min. Co.,
53 Wash. 620, 102 P. 654 (1909)....................10

Segura v. Cabrera,
184 Wn.2d 587, 362 P.3d 1278 (2015)....................8

Statutes

RCW ch. 7.60 7-8

RCW 7.60.025 .... 3, 10, 13-14

RCW 7.60.055 10

RCW 7.60.220 .... 5, 8, 11

RCW 7.60.230 .... 11, 14

RCW 7.60.290 7-9

Rules and Regulations

RAP 10.3 2

RAP 13.4 .... 7-8, 12

A. Introduction.

The Legislature gave the superior court discretion to appoint and to discharge a receiver, who serves as an arm of the court. That discretion is guided by the principle that receivership, under which the state seizes a party's assets, is an extraordinary remedy. The trial court may thus exercise its discretion to terminate the receivership when it has accomplished its purpose.

The Court of Appeals correctly held that the trial court did not abuse its discretion in discharging a receiver who was appointed to secure a creditor's satisfaction of a judgment against respondent Jay Westerdal, after both the creditor and petitioners Per and Melody Westerdal, who were subrogated to a portion of Jay's obligation, were paid in full. The receivership statute does not give an unsecured creditor a vested right to payment of a claim that has been contested and that can be resolved only through discovery and trial.

B. Restatement of Issues.

1. Did the Court of Appeals correctly hold that the superior court did not abuse its discretion to terminate a receivership that had accomplished its purpose?

2. Did the Court of Appeals correctly hold that an unsecured creditor in a receivership does not have a vested right to

payment of a claim after the superior court has denied the claim without prejudice because the claim has been contested and can only be resolved after discovery and fact finding?

C. Restatement of the Case.

Petitioners' statement of the underlying facts, which differs substantially from the facts set forth by the Court of Appeals, is inaccurate, incomplete and largely devoid of citations to the record, in violation of RAP 10.3(a). *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992) ("It is not the function of the appellate court to search [the record] to locate relevant testimony.") This restatement of the case relies on the facts set forth by the Court of Appeals and the record before the trial court.

Respondent Jay Westerdal is a principal and founder of respondent Name Intelligence, Inc., a Washington corporation engaged in the purchase and sale of internet domain names. Name Intelligence owned the rights to a valuable domain name, holdiay.com. (Op. ¶¶ 2, 5)

A secured creditor, Raymond Beros, obtained a $1.4 million judgment against Jay, Name Intelligence and another company he controlled, respondent Westerdalcorp, LLC, for breach of a settlement agreement. The settlement agreement was secured by

Jay's promissory note, a Security and Pledge Agreement covering assets held by Name Intelligence and Westerdalcorp. Jay had guaranteed the settlement agreement and his parents, petitioners Melody and Per Westerdal, also gave Bero their personal guaranty, limited to $200,000, to secure the agreement. (Op. ¶ 2; CP 65-145)

When Jay was unable to satisfy or supersede the judgment, Bero exercised his right under the Security and Pledge Agreement to the appointment of a receiver in King County Superior Court. (CP 43-55, 105) In appointing a receiver, the trial court found that Bero had a perfected lien in Jay's and Name Intelligence's real and personal property, that the Security Agreement and Pledge Agreement authorized appointment of a receiver and that RCW 7.60.025(1) authorized appointment of a receiver to preserve revenue-producing property to satisfy the Bero judgment. (CP 204-21) The court also found that Jay Westerdal, Name Intelligence and Westerdalcorp were in imminent danger of insolvency. (CP 207-09)

The court authorized a $6,000 monthly fee to the receiver Resource Transition Consultants, plus a commission of between 1% and 2% from the gross sale price of any receivership property that was liquidated. (CP 210, 216-17) It authorized the receiver to hire

Dillon Jackson of the law firm of Foster Pepper, PLLC as the receiver's counsel at an hourly rate of $525. (CP 235, 246-47)

The Westerdals' accusations of wrongdoing and inequitable conduct in the receiver's abortive attempt to sell holiday.com at auction are not only unfounded, they are also irrelevant to any issue on review. The trial court considered the fact that the receiver withdrew those allegations before exercising its discretion to terminate the receivership, finding that the purpose of the receivership had been satisfied, that the secured creditors (including the Westerdals) had been paid, and that it was not necessary to compel Jay's compliance with any order of the court. (Op. ¶ 32)

It is undisputed that Jay paid Bero in full within four months after initiating the receivership. Bero acknowledged satisfaction of the judgment in full on December 1, 2014. (Op. ¶ 3; CP 412)

The Westerdals had loaned Jay $200,000 to pay Bero, and loaned him an additional $130,000 in July 2013, thus becoming subrogated to Bero's secured claim. (CP 790-91, 801-02, 813) The Westerdals asserted a claim in the receivership for this money, but when Jay repaid them, they acknowledged Jay's payment of both loans in full in the amount of $359,028.65 on December 3, 2014. (Op. ¶ 4; CP 791, 816-17, 835)

After recovering payment in full on their subrogated claim, the Westerdals then submitted what they called an "amended proof of claim," asserting a 25% interest in the holiday.com domain name. (Op. ¶ 6; CP 829-30) Per contended that this claim, which he valued at almost $1.4 million, arose from "working on . . . the holiday.com website." (CP 831)

Jay disputed the timeliness of the unsecured claim (CP 497) and contested the claim on the merits. (CP 498, 829)[1] He sought mediation under RCW 7.60.220(2), and affirmatively alleged that "[i]f the mediation fails, the remaining issues should . . . not [be] part of the Receivership." (CP 499)

Because the Westerdals' unsecured claim presented disputed issues of fact, the court denied the claim without prejudice on December 19, 2014. (Op. ¶ 6; CP 573, 903) At that hearing, the court similarly denied without prejudice the receiver's allegation that Jay was in contempt of court for his alleged interference with an auction

[1] Jay asserted that he agreed to provide Per a 25% commission on all money earned by holiday.com following his father's assumption of webmaster duties, with this income terminating three years after his services as webmaster ceased. (CP 797) Jay also timely objected to the elder Westerdals' amended unsecured claim brought in February 2015. (CP 591-92, 766-85)

to sell the holiday.com domain name, also because of disputed issues of fact. (CP 891)

In March 2015, Jay moved to terminate the receivership because its original purpose – payment in full of the Bero judgment – had been fulfilled. (CP 605-06) On March 23, 2015, Judge Ronald Kessler ("the trial court") entered an order terminating the receivership, finding the unresolved disputed claim of Per and Melody to an equity interest in holiday.com was not within "the scope of the initial order appointing a general receiver," and would not "be resolved quicker within the receivership than via separate cause or causes of action in light of the apparent complexity of the factual issues which the parties will need to flesh out through discovery." (CP 908-09)

The receiver agreed, withdrawing its contempt allegations. (CP 967) The trial court authorized payment of over $86,000 in attorney fees to the receiver's counsel, approved the receiver's final accounting and discharged its bond. (CP 1192-94)

The Westerdals appealed; the receiver did not. (Op. ¶ 7)[2] Division One held that the trial court had the discretionary authority

---

[2] The receiver did not participate in the Court of Appeals and has notified this Court that it does not intend to participate in further appellate review.

to terminate the receivership under RCW 7.60.290(5), (Op. ¶¶ 12, 17), and rejected the Westerdals' argument that their unsecured claim became vested as a matter of law when the trial court did not affirmatively disallow it. (Op. ¶¶ 14-17) The Court of Appeals held that the trial court did not abuse its discretion in finding that the expenses of administrating the receivership far outweighed the benefits to the elder Westerdals in litigating their unsecured claim in the receivership action because "they would still need discovery and trial to prove it" and failed to "explain why the trial court could not reasonably decide that a separate lawsuit would provide a more appropriate setting for their claim." (Op. ¶¶ 29, 31)

D. Argument Why Review Should Be Denied.

The Court of Appeals followed plain and unambiguous statutory language under RCW ch. 7.60 in holding that a trial court has "the power" to terminate a receivership. RCW 7.60.290(5). In arguing that the Court should address a "question of first impression," (Pet. 7), the Westerdals concede that the decision does not conflict with any decision of this Court or of the Court of Appeals under RAP 13.4(b)(1), (2). The Court of Appeals' affirmance of the trial court's decision to terminate a receivership that had fulfilled its initial purpose does not present a matter of substantial public

interest because it comports with established precedent holding that receivership is an extraordinary remedy that must be exercised with caution, and with the receivership statute RCW ch. 7.60, when read as a whole. RAP 13.4(b)(4).

1. **The receivership statute grants the appointing court the discretion to terminate a receivership and does not grant an unsecured creditor a "vested right" to payment of a contested claim.**

The Westerdals' assertion that "the plain language of RCW 7.60.220(1) precludes termination of the Receivership" (Pet. 8) reads one subsection of the receivership statute in isolation, ignores RCW 7.60.290 entirely, and disregards established precedent regarding the court's equitable authority to supervise receivers. The Court of Appeals properly held that the trial court had authority to terminate the receivership once its purpose had been fulfilled.

In interpreting a statute, the Court must consider "the enactment as a whole, harmonizing its provisions by reading them in context with related provisions." *Segura v. Cabrera*, 184 Wn.2d 587, 593, ¶ 14, 362 P.3d 1278 (2015); *Citizens Alliance for Prop. Rights Legal Fund v. San Juan County.*, 184 Wn.2d 428, 437, ¶ 14, 359 P.3d 753 (2015) (court must "consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions.") (quoting *Heinsma v. City of Vancouver*, 144 Wn.2d

556, 564, 29 P.3d 709 (2001)). The Court may not, as the Westerdals do here, read "a single sentence of a statute . . . in isolation." *Prince v. Savage*, 29 Wn. App. 201, 206, 627 P.2d 996, *rev. denied*, 96 Wn.2d 1002 (1981). The Court "must interpret the terms of a statute in harmony with its purpose." *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 694, ¶ 23, 317 P.3d 987 (2014).

The Court of Appeals correctly looked to the statute as a whole in holding that the appointing court has the equitable discretion to terminate a receivership once its purpose has been fulfilled. The "plain language" of RCW 7.60.290 vests in the court "the power" to terminate the receivership on a party's motion:

> Upon motion of any party in interest, or upon the court's own motion, the court has the power to discharge the receiver and terminate the court's administration of the property over which the receiver was appointed.

RCW 7.60.290(5). The court may discharge the receiver upon "completion of the receiver's duties with respect to estate property." RCW 7.60.290(1).

The Court of Appeals correctly held that this statutory grant of "power" in RCW 7.60.290(5) necessarily vests in the Court discretion to terminate a receivership. (Op. ¶ 12) Its decision comports with the court's discretionary authority to appoint a

receiver in the first instance, RCW 7.60.025(1)(a), and its "exclusive authority" to supervise a receiver, who at all times acts under the Court's control. RCW 7.60.055. *See Mony Life Ins. Co. v. Cissne Family, L.L.C.*, 135 Wn. App. 948, 952, ¶ 11, 148 P.3d 1065 (2006) ("The power to appoint a receiver is discretionary."); *King County Dep't of Cmty. & Human Servs. v. Northwest Defenders Ass'n*, 118 Wn. App. 117, 122, 75 P.3d 583 (2003); *Brown v. Mead*, 22 Wn.2d 60, 64, 154 P.2d 283 (1944). Indeed the Westerdals recognize that the "[t]rial courts are conferred with expansive authority in Receiverships." (Pet. 14)

The Court of Appeals properly recognized, as does the statute, that receivership is an extraordinary remedy (Op. ¶ 11), authorized only if "reasonably necessary and . . . other available remedies either are not available or are inadequate," and only upon certain specified grounds. RCW 7.60.025(1). *See Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 625-26, 102 P. 654 (1909) (reversing appointment of receiver over solvent corporation). Because the power to take control of a person's assets entails a substantial limitation of personal liberty, "a receivership should be terminated as soon as practicable after its purposes have been accomplished." *Boothe v. Summit Coal Min.*

Co., 63 Wash. 630, 634, 116 P. 269 (1911) (internal quotations omitted).

By stating that a properly served claim "not disallowed by the court" is "entitled" to distribution in RCW 7.60.220(1), the Legislature did not give unsecured creditors a vested right to distribution, as the Westerdals argue. The Westerdals read one sentence of that statute in isolation, ignoring the rest of RCW 7.60.220, which also gives "any party in interest" the right to file an objection to the claim,[3] requires mediation upon request of any party objecting to the claim, RCW 7.60.220(2),[4] and allows but does not require, the receiver to provide an estimate of any unliquidated claim that could delay administration of the remainder of the receivership estate. RCW 7.60.220(3). They also ignore that only "[a]llowed claims in a general receivership shall receive distribution." RCW 7.60.230(1).

The Court of Appeals correctly held that a claimant's timely service of a claim is but the first step in resolving a contested claim. The Court of Appeals interpreted the receivership statute to give

---

[3] Jay contested timely service of the claim, and contested the claim on the merits. (CP 497-98)

[4] Jay timely sought mediation after objecting to the claim. (CP 499)

effect to the statute as a whole, to further the Legislature's intent and this Court's precedent giving the superior court broad discretion over an extraordinary remedy. The Westerdals' contention that the trial court lacks authority to terminate a receivership over a solvent estate until disallowance of every unsecured and contested claim is without merit.

2. The Court of Appeals correctly affirmed the trial court's exercise of discretion in terminating this receivership once its purpose had been fulfilled because the costs of the receivership far exceeded any benefit to the Westerdals in establishing their unsecured claim.

The Westerdals' argument in support of review constitutes a fact-bound challenge to the exercise of the trial court's broad discretion to terminate the receivership, presenting no issue of substantial public interest. RAP 13.4(b)(4). This Court has long held that in supervising a receiver, the trial court acts in equity and its decisions are reviewed for manifest abuse of discretion. *Penn Mut. Life Ins. Co. v. Fife*, 15 Wash. 605, 607, 47 P. 27 (1896).

The Order Appointing Receiver emphasizes the purpose of the receivership, stating that it "shall terminate only upon payment in full of all amounts due the Receiver and satisfaction in full of all amounts due under the [Bero] Judgment." (CP 220) The Westerdals

do not dispute that the receivership had served its purpose, which was to protect Bero's secured interest in Jay's and Name Intelligence's property, RCW 7.60.025(1)(a), (b), and to give effect to Bero's judgment, RCW 7.60.025(1)(c). (CP 204-21) It is undisputed that Jay paid the Westerdals their subrogated claim in full and that the Westerdals acknowledged satisfaction of that obligation. (CP 816-17, 835) The Westerdals patently misrepresent the undisputed record by asserting that they were subrogated to Beros because they "satisfied their guaranty obligation," (Pet. 12) and that "their [subrogation] rights were ignored." (Pet. 13) *See* Op. ¶ 22 ("Per and Melody's claim to 25 percent ownership in holiday.com is completely separate from Jay's liability under the guaranty.").

The Westerdals also ignore that receivership is a *remedy* (an extraordinary one, at that), not a *punishment*, in arguing that the trial court countenanced "Jay's interference with the Receiver's administration" and "liquidation of assets." (Pet. 15) Their allegation similarly ignores the undisputed record: the trial court failed to make any finding supporting that allegation, and the receiver abandoned his allegations of contempt once Beros and the Westerdals were paid in full. (CP 967, 1192-94)

But even if the Westerdals' allegation concerning Jay's actions were ultimately found to be credible, their conclusory statement that "Per and Melody were significantly damaged" (Pet. 16) is meritless. Both during and after the receivership, the Westerdals would have to establish that they in fact owned 25% of holiday.com in order to recover anything. As their unsecured claim to a 25% interest in the domain name holiday.com had not been allowed, under RCW 7.60.230(1), Per and Melody had no vested right in the receivership or any of its property and had no independent basis under the statute to continue a receivership over a solvent estate in the absence of any evidence that Jay would impair the value of an intangible asset. *See* RCW 7.60.025(1)(a).

Per and Melody's contested claim to holiday.com gave them no "probable right to or interest in" that property – they had the burden of proving it. The Court of Appeals correctly relied on the fact that, as the receiver and the trial court acknowledged, the Westerdals' claim required discovery and a trial. (3/20 RP 28) Per and Melody agreed that, at a monthly fee of $6,000 plus $525 per hour for the receiver's counsel, the receiver was being paid "an awful lot if he isn't doing anything." (3/20 RP 33) The Court of Appeals could reasonably hold that the trial court was well within its

discretion in finding that the unsecured and disputed claim of the Westerdals to an equity interest in holiday.com would not "be resolved quicker within the receivership than via separate cause or causes of action in light of the apparent complexity of the factual issues which the parties will need to flesh out through discovery." (CP 908-09)

E. Conclusion

The Court of Appeals decision presents no ground for review. The petition should be denied.

Dated this 11th day of October, 2016.

SMITH GOODFRIEND, P.S.

By:
Howard M. Goodfriend
WSBA No. 14355

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 11, 2016, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Marc S. Stern Attorney at Law 1825 NW 65thStreet Seattle, WA 98117 office@hutzbah.com	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail
Dillon E. Jackson Foster Pepper PLLC 1111 3rd Ave Ste 3400 Seattle WA 98101-3264 jackd@foster.com	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 11th day of October, 2016.

Jenna L. Sanders

SMITH GOODFRIEND, PS

October 11, 2016 - 3:13 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93530-1
Appellate Court Case Title:	Per and Melody Westerdal v. Name Intelligence, Inc., et al.

The following documents have been uploaded:

- 935301_20161011151247SC404230_5616_Answer_Reply.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- office@hutzbah.com
- howard@washingtonappeals.com
- jackd@foster.com

Comments:

Sender Name: Jenna Sanders - Email: jenna@washingtonappeals.com
Filing on Behalf of: Howard Mark Goodfriend - Email: howard@washingtonappeals.com (Alternate Email:)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20161011151247SC404230