

NO. 67823-0-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JOHN L. DONLIN,

Appellant,

v.

JERRY MURPHY, in his individual capacity and in his capacity as director and office of Greenshields Industrial Supply, Inc., a Washington Corporation, and CONTRACTOR SUPPLY CORPORATION, a Washington Corporation,

Respondents.

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BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this matter the trial court properly dismissed appellant's, John Donlin's ("Mr. Donlin"), derivative claims for lack of standing because Mr. Donlin cannot fairly and adequately represent the interests of shareholders similarly situated. CP 177-79. As a result, the single issue on appeal is whether Mr. Donlin has the required standing to assert his derivative claims.

At the trial court, Mr. Donlin alleged both individual and derivative claims against Respondents, Jerry Murphy ("Mr. Murphy") and Contractor Supply Corporation ("Contractor Supply"), in an attempt to unwind the court-approved sale of Greenshields Industrial Supply, Inc.'s ("Greenshields") assets and liabilities. CP 250-89; 246-49; 243-44. Although Mr. Donlin's individual claims have been voluntarily dismissed, his derivative claims still remain aimed at attacking the court-approved sale of Greenshields, which was completed through a court-approved receivership. CP 332-34; 246-49; 243-44. The final distribution of payments to creditors in accordance with the sale to Contractor Supply was subsequently agreed to by Mr. Donlin. CP 510-16. Now, more than two years after Greenshields was liquidated, wound up and administratively dissolved, Mr. Donlin continues to maintain his claims

derivatively. CP 345; 492; 250-89. Mr. Donlin lacks the required standing to bring derivative claims for the following reasons:

1. After the court-approved sale/liquidation and administrative dissolution, Mr. Donlin cannot fairly and adequately represent the interests of shareholders similarly situated pursuant to CR 23.1;

2. All of Greenshields' assets, liabilities and claims were properly managed and disposed of in accordance with the receivership process under RCW 7.60; and

3. Mr. Donlin does not have standing under the Uniform Fraudulent Transfers Act ("UFTA") because Greenshields is not a creditor as defined under the statute.

As summarized above and as reasoned by the trial court in its oral decision, Mr. Donlin cannot fairly and adequately represent the interests of shareholders similarly situated given the court-approved sale/liquidation and the administrative dissolution. CP 177-79. Court Rule 23.1 requires that a derivative action cannot be maintained unless the plaintiff fairly and adequately represents other shareholders similarly situated in enforcing the rights of the corporation. In applying that rule, the Washington Supreme Court has held that a plaintiff cannot fairly and adequately represent other shareholders without a proprietary interest in the corporation. *Sound*

Infiniti, Inc. v. Snyder, 169 Wn.2d 199, 213-14, 237 P.3d 241 (2010). Furthermore, it is not enough that the plaintiff was a shareholder at the time of the alleged wrongdoing, but the plaintiff must remain a shareholder throughout the action. *Sound Infiniti*, 169 Wn.2d at 212.

In this case, Greenshields was administratively dissolved by the Secretary of State in April 2010. CP 345; 492. Prior to the administrative dissolution, the court appointed a receiver to manage Greenshields' assets, arrange for payment of liabilities and wind up the business. CP 848-50. As a result of the winding up and dissolution process during the receivership, both Mr. Donlin and respondent, Mr. Murphy, no longer had an ownership interest in Greenshields. Although claims may survive dissolution of a corporation, such claims cannot be maintained derivatively without a proprietary interest in the corporation. As noted by the Honorable Judge Okrent in his oral decision to dismiss Mr. Donlin's derivative claims, Mr. Donlin cannot fairly and adequately represent a class of shareholders because the business was wound up by a receiver and administratively dissolved.

In addition, Mr. Donlin lacks standing to maintain his derivative claims because all of Greenshields' assets, liabilities and claims were properly managed and disposed of in accordance with the receivership

under RCW 7.60. CP 246-49; 243-44; 510-16. In April 2009, Mr. Donlin filed a Complaint asking the court for the dissolution of Greenshields. CP 295-316. As a result of such request, Greenshields was placed into a general receivership, whereby all of Greenshields' assets and liabilities were sold to a third party, Contractor Supply, upon the recommendation of the Receiver and approval of the court. CP 848-50; 246-49; 243-44.

Although Mr. Donlin had the opportunity to present his claims to the court-appointed Receiver in accordance with the statute, he failed to do so. In fact, counsel for Mr. Donlin signed an Agreed Order, which approved the final distribution of payments to creditors following the sale of Greenshields' assets to Contractor Supply and discharged the receiver. CP 510-16. Now, more than two years after the sale and dissolution of the corporation, Mr. Donlin seeks to unwind the court-approved sale of Greenshields' assets, add the third party purchaser as a defendant and maintain all of his claims derivatively even though he cannot fairly and adequately represent shareholders similarly situated as required under CR 23.1. CP 250-89. Because he does not meet the requirements of CR 23.1 and failed to present his claims to the receiver under RCW 7.60 during the receivership proceedings, Mr. Donlin does not have standing to bring his claims derivatively.

Furthermore, in addition to failing to meet the requirements under CR 23.1, Mr. Donlin does not have standing under the Uniform Fraudulent Transfers Act (“UFTA”) because Greenshields is not a creditor as defined under the statute. A creditor, defined as an individual or entity that is owed money, may seek to void a transfer if it was made with the intent to hinder or delay payment to such creditor. In order to maintain an action under UFTA, Mr. Donlin not only claims that Greenshields is a creditor of itself, but also that the court-approved sale by Greenshields was made with the intent to defraud itself. Because Greenshields is not a creditor under UFTA, Mr. Donlin does not have standing to maintain such a claim.

II. STATEMENT OF THE ISSUES

A. Whether Mr. Donlin has standing to maintain his derivative claims when he does not fairly and adequately represent a class of shareholders similarly situated as required by CR 23.1?

B. Whether Mr. Donlin has standing to unwind a court-approved sale of Greenshields’ assets when he failed to present any claims to the receiver and subsequently signed an Agreed Order finalizing the distribution of payments to creditors following the sale to Contractor Supply?

C. Whether Mr. Donlin has standing to maintain a claim under the Uniform Fraudulent Transfers Act when Greenshields is not a creditor under the statute?

III. STATEMENT OF THE CASE

A. Procedural History.

Appellant, John Donlin, seeks to unwind and invalidate the receiver-recommended and court-approved asset sale of Greenshields Industrial Supply, Inc., a Washington corporation. CP 250-89. Mr. Donlin filed suit on April 1, 2009 in the Snohomish County Superior Court asking for dissolution of the corporation, liquidation of its assets, and an accounting. CP 295-316. As a result, on September 11, 2009, the court appointed Andrew Wilson as the receiver (the “Receiver”) to assume control of Greenshields for the purpose of managing the business, determining how best to provide for the sale of the business assets and payment of business debts during the dissolution process, and providing an accounting. CP 848-50.

During the receivership, Mr. Donlin amended his Complaint alleging derivative claims on behalf of Greenshields against Mr. Murphy and Contractor Supply Corporation, a Washington corporation, and

individual claims against Mr. Murphy. CP 250-89. Mr. Donlin's derivative claims included breaches of fiduciary duty against Mr. Murphy and derivative claims of breach of the Uniform Fraudulent Transfer Act against Contractor Supply. *Id.* The individual claims against Mr. Murphy were later dismissed voluntarily by Mr. Donlin in response to a Motion for Summary Judgment filed by Mr. Murphy. CP 332-34; 207-09.

Upon recommendation by the Receiver, the court approved the sale of Greenshields' assets and liabilities, including tangible and intangible, to Contractor Supply on December 14, 2009. CP 246-49; 243-44. As partial consideration, Contractor Supply assumed all of Greenshields' liabilities and relieved Mr. Murphy and Mr. Donlin from personal guarantees. 632-57. After Greenshields was completely wound up by the Receiver, the court approved and finalized the sale recommended by the Receiver and discharged the Receiver from further responsibility. CP 510-16. In addition, Mr. Donlin signed an Agreed Order finalizing the distribution of payments to creditors from the sale to Contractor Supply as recommended in the Receiver's final report. *Id.* On April 1, 2010, in response to Mr. Donlin's complaint requesting dissolution and after both Mr. Donlin and Mr. Murphy received notice, Greenshields was administratively dissolved by the Washington Secretary of State. CP 345; 492.

On September 7, 2011, Respondents filed a Motion to Dismiss for lack of standing under Court Rule (CR) 23.1 and the Uniform Fraudulent Transfers Act (UFTA). CP 193-206. On September 16, 2011, the court granted the Respondents' Motion and dismissed the claims against Mr. Murphy and Contractor Supply. CP 177-79. In his oral opinion, the Honorable Judge Okrent granted the Motion to Dismiss for lack of standing because Mr. Donlin could not fairly and adequately represent the class of shareholders as required under CR 23.1. Because Greenshields was wound up by the receiver and administratively dissolved, there is no longer a corporation or a class of shareholders to represent. As a result, Mr. Donlin moved for Reconsideration, however the Court denied his motion on October 21, 2011. CP 165-76; 1-2. On October 14, 2011, Mr. Donlin filed a Notice of Appeal to seek review by this Court of the trial court's decision to dismiss Mr. Donlin's derivative claims for lack of standing. CP 3-8.

B. Statement of Facts.

Purchase of Greenshields Industrial Supply, Inc. Jerry Murphy, Respondent, and John Donlin, Appellant, incorporated Greenshields Industrial Supply, Inc., a Washington corporation, located in Everett, Washington in 2006 and purchased the assets of the predecessor business.

CP 102-03. It was their intent to own the business together. CP 103. At the same time that Mr. Murphy and Mr. Donlin acquired the assets of Greenshields, they entered into a lease agreement with an option to purchase the real property on which Greenshields sat (the "Real Property"). CP 103-04; 252; 263-72. The lease with the option was in the individual names of Jerry Murphy and John Donlin, rather than in the name of Greenshields. CP 263-72; 728. Therefore, the option to purchase the Real Property was not a corporate asset or corporate opportunity of Greenshields. As a result, either Mr. Donlin or Mr. Murphy was free to exercise the option at any time.

Sale Subject to Lease with Option to Purchase. On June 18, 2007, Jerry Murphy and his wife, Marlene, formed Whido Isle, LLC, a Washington limited liability company. CP 336; 338-39. In late July, 2007, the Greenshields family sold the premises on which the business sat to Whido Isle, LLC, "subject to" a list of exceptions, which included the lease with the option to purchase the premises to Mr. Murphy and Mr. Donlin. CP 346; 440-44. However, John Donlin never made any effort to exercise the option with Jerry Murphy.

In January 2008, Greenshields held a special meeting of its shareholders to discuss the 2007 financials, compensation for 2007, and a

report on the real estate and lease. CP 346; 449-50. During that meeting it was made clear that the unexercised option had expired on December 31, 2007, that Greenshields and Whido Isle, LLC had a five year lease, and that Greenshields would have been at risk if the premises were not secured. *Id.* Mr. Donlin's attorney at that time, Duncan Turner, was provided copies of the real estate lease and the independent lease market valuation report which was used to determine the market rate for the lease payments. CP 337; 344.

John Donlin Creates a Deadlock and Files a Lawsuit for Dissolution. On March 2, 2009, meetings of Greenshields' shareholders and directors took place. CP 347; 451-52. During the shareholders' meeting Mr. Donlin's attorney at that time, Stephen D. Fisher, indicated it was Mr. Donlin's intention to establish a deadlock and liquidate Greenshields' assets. *Id.* During the directors' meeting Mr. Donlin voted against continuing with Greenshields' accounting firm for tax purposes, but failed to provide an alternative CPA firm option. CP 347; 453. Mr. Donlin had in fact used Greenshields' accounting firm for his personal taxes in the past. CP 427. Mr. Donlin also voted against Mr. Murphy's proposals with regard to Greenshields legal counsel, election of officers,

and authority to enter into financing agreements to maintain cash flow. CP 347; 451-53.

On April 1, 2009, John Donlin sued Greenshields for dissolution of the corporation, liquidation of its assets, and an accounting. CP 295-316. In August, 2009, Mr. Murphy advised Mr. Donlin that a loan from Coastal Community Bank (“Coastal”) needed to be refinanced, and that a company with a lawsuit filed against it would be unlikely to obtain financing. CP 753-54. At that point, Mr. Donlin made a request that the company make all reasonable efforts to refinance the loan. CP 347; 434. Mr. Donlin later testified that he understood that with a lawsuit in place, the company was a less desirable loan candidate. CP 347; 435.

Coastal Community Bank Calls Loan Due. As a result of the financing issues being raised by Coastal, Mr. Murphy advised Mr. Donlin on August 12, 2009, that a shutdown of Greenshields’ operations should be expected unless an alternative plan was found. CP 753-54. Because Greenshields could not refinance and could not meet its payment obligations, Coastal called their loan to Greenshields due, and drained funds from the Greenshields’ bank accounts held at Coastal to pay off the loan. CP 336; 340-43. While this resolved the Coastal loan, it left Greenshields with insufficient funds to meet its payroll obligations or to

continue making payments to Greenshields' vendors. *Id.* Because of the financial crisis facing Greenshields, immediate action was necessary to keep the doors to the business open, and prevent other Greenshields creditors from closing accounts and enforcing liens against Greenshields' assets. *Id.*

On August 24, 2009, an Agency Agreement between Greenshields and Contractor Supply Corporation, a new company formed by Jerry Murphy, was established to allow the doors of the company to remain open with new funds from Mr. Murphy's new company. CP 754. Without the Agency Agreement, Greenshields would have closed and been unable to pay employees and creditors as of August 24, 2009. CP 806. In early September the Agency Agreement was finalized and a receiver, Andrew Wilson ("Receiver"), was appointed by the court to manage and control all of Greenshields' assets during the dissolution and winding up process. CP 337; 848-50.

In late September, 2009, the Receiver filed a report with the Court noting that both Mr. Donlin and Mr. Murphy, as the shareholders of Greenshields, benefitted from the continuation of Greenshields' business under the Agency Agreement with Contractor Supply. CP 796-847. The Receiver characterized the Agency Agreement as "an elegant solution to

maintain asset values” to the shareholders. CP 806. In the Receiver’s opinion, without the Agency Agreement, Greenshields “most certainly would have been forced into bankruptcy.” *Id.* At no point during this time did Mr. Donlin assert claims under the receivership statutes to the Receiver.

Mr. Donlin Files Amended Complaint. In October, 2009, Mr. Donlin, perhaps realizing the demands he made in his initial Complaint were actually going to be carried out, filed an Amended Complaint alleging derivative claims on behalf of Greenshields against Jerry Murphy and Contractor Supply, and individual claims against Jerry Murphy. CP 250-89. Plaintiff’s derivative claims included breaches of fiduciary duty against Mr. Murphy and derivative claims of breach of the Uniform Fraudulent Transfer Act against Contractor Supply. *Id.* The individual claims against Mr. Murphy were subsequently dismissed leaving only the above derivative claims for trial. CP 332-34; 207-09.

Sale Approved and Greenshields Dissolved. During the winding up process, the Receiver received almost identical offers to purchase from Mr. Donlin and Contractor Supply (owned by Mr. Murphy). CP 632-92. The offers both included the purchase of all tangible and intangible assets of Greenshields. *Id.* Upon review of the offers the Receiver recommended

that Greenshields sell all of its assets to Contractor Supply. *Id.* As part of the sale, Mr. Donlin was relieved of personal guarantees. *Id.* In addition, Greenshields' creditors were fully paid. *Id.* On December 14, 2009, as recommended by the Receiver, the sale of Greenshields to Contractor Supply was approved and confirmed by the Hon. Anita L. Farris. CP 243-44. On the same day, Mr. Donlin requested a trial date, and trial was subsequently set before a twelve person jury. CP 348.

On January 19, 2010, Mr. Donlin's counsel was advised that the annual report, filing fee, and state license fees were due for Greenshields by March 22, 2010, or the company would be dissolved. CP 348; 490. Because the annual report, filing fee and state license fees were not renewed, on April 1, 2010, Greenshields was administratively dissolved by the Washington Secretary of State pursuant to RCW 23B.14.210. CP 348; 492.

IV. ARGUMENT

A. STANDARD OF REVIEW.

On appeal of a motion to dismiss under CR 12(b)(1) for lack of subject matter jurisdiction, the standard of review is de novo. *Corona v. Boeing Co.*, 111 Wn.App. 1, 5, 46 P.3d 253 (Div. I 2002). On appeal of a

motion to dismiss under CR 12(b)(6) for failure to state a claim upon which relief may be granted, the standard of review is de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Review of statutory construction and interpretation are reviewed de novo. *Sound Infiniti*, 169 Wn.2d at 206; *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 612, 146 P.3d 914 (2006).

B. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO DISMISS FOR LACK OF STANDING.

John Donlin does not have standing to maintain his derivative claims because he does not fairly and adequately represent other shareholders similarly situated as required under CR 23.1. In addition, Mr. Donlin does not have standing because all of Greenshields' assets, liabilities and claims were properly managed and disposed of in accordance with the receivership process under RCW 7.60. Furthermore, Mr. Donlin does not have standing because Greenshields is not a creditor under the Uniform Fraudulent Transfers Act. As a result, Mr. Donlin's derivative claims were properly dismissed by the trial court for lack of standing.

- 1. John Donlin Does Not Have Standing To Maintain His Derivative Claims Because He Does Not Fairly And Adequately Represent The Class Of Shareholders As Required Under CR 23.1.**

John Donlin Does Not Meet the Standing Requirements Under CR 23.1 Because His Individual Interests Have Been Prioritized Ahead of the Corporation's Interests. By forcing the dissolution of the corporation, John Donlin does not have standing to maintain his derivative claims because he cannot fairly and adequately represent the interests of the shareholders similarly situated. As a general rule, a plaintiff cannot join in the same suit a claim on behalf of the corporation and an individual, personal claim against the defendants. *Hames v. Spokane-Benton County Natural Gas Co.*, 118 Wash. 156, 203 P. 18 (1922). In addition, Court Rule (CR) 23.1 provides in pertinent part that a “derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the rights of the corporation or association.”

In the present case, Mr. Donlin, as an individual shareholder, forced the dissolution of Greenshields by manufacturing a deadlock and filing the complaint in this action for judicial dissolution. After the receivership process was complete and all of the tangible and intangible assets of the corporation had been liquidated by the Receiver, the corporation terminated pursuant to dissolution in April of 2010. CP 295-316. As a result of Mr. Donlin's individual actions and claims to force

dissolution, he is unable to fairly and adequately represent similarly situated shareholders. Instead, only a receiver is in the proper position to assert such claims.

John Donlin Does Not Meet the Standing Requirements Under CR 23.1 Because the Receivership Liquidation and Winding Up Together with the Dissolution of the Corporation Have Stripped Mr. Donlin of His Proprietary Interests.

In applying CR 23.1, the Washington Supreme Court held that a plaintiff could not fairly and adequately represent shareholders similarly situated without a proprietary interest in the corporation. *Sound Infiniti*, 169 Wn.2d at 213-14. In the *Sound Infiniti* decision, the plaintiff, a minority shareholder, was divested of his shares as a result of a reverse stock split. *Id.* at 204-05. The plaintiff sued derivatively on behalf of the corporation, however the Court affirmed the trial court's dismissal of such claims because the plaintiff was no longer a shareholder. *Id.* at 205-06.

In applying CR 23.1, the Court stated that it was "utterly unreasonable to think that [the plaintiff] could fairly and adequately represent interests of the shareholders similarly situated, as he is simply not a shareholder." *Sound Infiniti*, 169 Wn.2d at 213. In response, the plaintiff argued that a divested shareholder should be able to maintain

standing to bring derivative actions “if the loss of standing ‘is the result of corporate action in which the holder did not acquiesce.’” *Id.* However, the Court declined to adopt the exception and affirmed that “standing cannot be maintained without a proprietary interest in the corporation.” *Id.* at 214.

In addition, it is a long-standing rule in Washington that a “shareholder must *remain* a shareholder in order to maintain corporate derivative claims” (emphasis in original). *Id.* at 212. Although the plaintiff asked the Court to abandon the general rule, the Court refused to adopt an exception and affirmed the rule in Washington that “standing cannot be maintained without a proprietary interest in the corporation.” *Id.* at 213-14. Therefore, because the plaintiff did not have ownership rights in the corporation and could not fairly and adequately represent the shareholders similarly situated under CR 23.1, the Court dismissed the plaintiff’s derivative claims for lack of standing. *Id.* at 214.

Here, Mr. Donlin cannot fairly and adequately represent shareholders similarly situated given the court-approved sale and the dissolution of Greenshields. As stated above, a plaintiff must meet the requirements of CR 23.1 in order to maintain a derivative action. In addition, Mr. Donlin does not have standing because he is no longer a

shareholder and does not have a proprietary interest in Greenshields. The Corporation's affairs and liabilities were wound up by the court-appointed Receiver, and the Corporation was subsequently dissolved. CP 848-50; 345; 492. As a result, Mr. Donlin was divested of his shareholder rights. Like the plaintiff in *Sound Infiniti*, Mr. Donlin attempts to argue that this court should adopt an exception to Washington's long-standing rule because his own request for dissolution caused him to lose his shareholder status and rights.

However, the Washington courts have continually declined to adopt an exception, and instead have affirmed that a plaintiff must have an ownership interest in the corporation to fairly and adequately represent shareholders similarly situated pursuant to CR 23.1. The courts have not carved out an exception for when an individual loses his shareholder status. Rather, the court focused on the status of the plaintiff to determine whether he had standing to maintain his claims derivatively. Because Mr. Donlin does not have a proprietary interest in Greenshields and cannot fairly and adequately represent the shareholders similarly situated under CR 23.1, he lacks standing to maintain his derivative claims.

Response to Mr. Donlin's Claim That He Can Maintain Claims Derivatively After Dissolution. John Donlin does not have standing to

maintain his claims derivatively because he does not fairly and adequately represent other shareholders similarly situated. CR 23.1. In addition, Mr. Donlin is no longer a shareholder and does not have a proprietary interest in the corporation. *Sound Infiniti*, 169 Wn.2d at 212. Sections 23B.14.050 and 23B.14.340 of the Revised Code of Washington, both provide in pertinent part that dissolution of a corporation does not prevent the commencement of a proceeding by or against the corporation or prevent the ability to assert claims. RCW 23B.14.050; RCW 23B.14.340. In addition, asserting such claims are not limited to the winding up process and may be asserted at any time within three years of the dissolution. *Ballard Square*, 158 Wn.2d at 613; RCW 23B.14.050; RCW 23B.14.340. However, when asserting the claim derivatively, the plaintiff must fairly and adequately represent other shareholders similarly situated. CR 23.1.

The issue before this court is not whether claims can survive corporate dissolution, but whether Mr. Donlin has standing to now maintain such claims in light of CR 23.1 and the receivership. Court Rule 23.1 governs whether and how a plaintiff is able to maintain a claim derivatively. Mr. Donlin relies solely on the fact that RCW 23B.14.050 and RCW 23B.14.340 allow claims to exist after a corporation is dissolved. However, Mr. Donlin fails to cite any authority that would

allow him to assert and maintain a claim derivatively, without fairly and adequately representing the class of shareholders under CR 23.1. Such a failure is fatal to his derivative claims.

Although individual claims and other claims may survive Greenshields' dissolution, Mr. Donlin cannot assert such claims derivatively because he does not have standing under CR 23.1. Even though Mr. Donlin may have been able to assert his individual claims, he voluntarily dismissed such claims and therefore they are not at issue. CP 332-34. Washington courts have clearly stated that in addition to meeting the requirements of CR 23.1, the plaintiff must remain a shareholder and must have a proprietary interest in the corporation. As summarized by the Honorable Judge Okrent in his oral opinion to dismiss Mr. Donlin's derivative claims for lack of standing, Mr. Donlin cannot fairly and adequately represent the class of shareholders when the corporation was wound up and dissolved. As a result, there is no business to claim an interest in and no class of shareholders to fairly and adequately represent as required by CR 23.1. As a result, Mr. Donlin does not have standing to maintain his claims derivatively under CR 23.1. Therefore, Mr. Donlin's derivative claims were properly dismissed.

2. John Donlin Does Not Have Standing Because All Claims And Causes Of Action On Behalf Of

Greenshields Are Controlled By The Receiver.

All of Greenshields' Assets, Liabilities and Claims Were Managed and Disposed of by the Court-Appointed Receiver. John Donlin does not have standing to maintain his derivative claims because all of Greenshields' assets and claims were addressed and disposed of in the court-approved receivership proceedings under RCW 7.60. Under RCW 7.60.015, a general receiver is appointed by the court to take possession and control over *all* of the corporation's assets and property with the authority to liquidate such property and wind up its affairs (emphasis added). "Property" includes the corporation's legal and equitable rights. RCW 7.60.005(9). In addition, the statute provides in pertinent part that the general powers of the receiver include the power to assert any rights, claims, or choses in action *of the corporation* in the receiver's name or in the name of the corporation. RCW 7.60.060(c). Consequently, any right to bring a lawsuit on behalf of the corporation was held by and controlled by the receiver. RCW 7.60.015; RCW 7.60.060. In addition, as stated in the notes to RCW 7.60.005, the purpose of the receivership statutes is "to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts." Laws of 2004, Ch. 165, §1.

Here, it was Mr. Donlin that asked for dissolution of Greenshields that resulted in the receivership. He filed a Complaint in April 2009 seeking an accounting and dissolution of Greenshields due to a deadlock. CP 295-316. As a result of the lawsuit, a receiver was appointed by the court to take possession and control over all of Greenshields' property, with the authority to liquidate the assets and wind up its affairs. CP 848-50. Under the receivership statute, the receiver had possession and control over Greenshields' legal claims and had the power to assert such claims on its behalf.

Although the Receiver was aware of Mr. Donlin's claims, he did not assert any claims on behalf of Greenshields. Instead, the Receiver found that the Agency Agreement with Contractor Supply was "an elegant solution to maintain asset values" to the shareholders and to avoid bankruptcy. CP 806. During the winding up process, the Receiver determined that the Agency Agreement between Greenshields and Contractor Supply not only was the proper solution for maintaining the operations of the business, but also served as a benefit to both Mr. Donlin and Mr. Murphy. CP 796-847. The Receiver stated in his report that the Agency Agreement should remain in place until Greenshields' assets were completely liquidated. CP 806. On October 7, 2009, the court affirmed

such arrangement stating “the company will continue to operate under the Agency Agreement.” CP 724.

Unhappy with the Receiver’s recommendations and the court’s subsequent approval, Mr. Donlin amended his Complaint to include derivative claims. CP 250-89. Again, the Receiver noted that he was aware of Mr. Donlin’s claims outside of the receivership; however, the Receiver did not assert such claims on Greenshields’ behalf after reviewing the facts. CP 724. Rather, the Receiver continued to wind up the business as authorized by the court. CP 632-92. During the winding up process, the Receiver received almost identical offers to purchase from Mr. Donlin and Contractor Supply (owned by Mr. Murphy). *Id.* The offers both included the purchase of all tangible and intangible assets of Greenshields. *Id.* Upon review of the offers the Receiver recommended that Greenshields sell all of its assets to Contractor Supply. *Id.* As part of the sale, Mr. Donlin was relieved of personal guarantees. *Id.* In addition, Greenshields’ creditors were fully paid. *Id.* On December 14, 2009, the Honorable Judge Farris approved the sale of all Greenshields’ assets to Contractor Supply. CP 243-44. On December 29, 2009, an Agreed Order approving the final distribution of payments to creditors in accordance with the sale as set forth in the Receiver’s final report was signed by all

parties and entered by the court. CP 510-16. Because the Receiver disposed of all of Greenshields' tangible and intangible assets, liabilities and claims upon court approval, Mr. Donlin does not have standing to maintain his derivative claims on behalf of Greenshields. By allowing the claims to pass outside of the receivership and to give Mr. Donlin standing, undermines the policy and intent of the receivership process, which is to efficiently dispose of the assets and claims of the corporation.

Response to Mr. Donlin's Claim That Although He Failed to Present His Claims to the Receiver, He Still Has Standing. In addition to Mr. Donlin's inability to fairly and adequately represent the class of similarly situated shareholders, Mr. Donlin cannot maintain his derivative claims on behalf of the Greenshields because such claims were not properly presented during the receivership proceedings. Any person in interest may submit such claims to the receiver by delivering the claim to the receiver within thirty (30) days from the date notice of receivership is given. RCW 7.60.210. The receiver has the power to assert any claims on behalf of the corporation in the receiver's name or in the name of the corporation. RCW 7.60.060(c). As noted by RCW 7.60.005, the purpose of the receivership statutes is "to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property

of a person is administered by the courts.” Laws of 2004, Ch. 165, §1. As a result, RCW 7.60.210 provides the procedures for submitting a claim to the receiver during the receivership process. The receivership court then has “the exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of all the property.” RCW 7.60.055. However, if no claims are presented, the receiver may use, sell or lease estate property, free and clear of all liens and rights upon the court’s approval. RCW 7.60.260.

Here, Mr. Donlin did not present any claims, individual or derivative, to the Receiver pursuant to RCW 7.60.210. Although it was Mr. Donlin’s initial Complaint for dissolution that resulted in the receivership, he failed to present any claims to the Receiver and instead amended his Complaint outside of the receivership to include derivative claims. After the court approved the sale of Greenshields’ assets to Contractor Supply, Counsel for Mr. Donlin signed an Agreed Order approving the final distribution of payments to creditors as recommended by the Receiver. CP 510-16. In addition, the final report detailed the court’s approval of the sale to Contractor Supply. CP 519-61. The Receiver also had noted that all actions taken during the receivership were not only in the best interest of Greenshields (because it kept the

corporation out of bankruptcy), but also benefitted Mr. Donlin because he was relieved of personal guarantees. CP 796-847. Mr. Donlin did not object to such benefits.

Furthermore, Mr. Donlin's derivative claims seek to bypass the receivership process and unwind the court-approved sale. The purpose of the receivership statute is to create a streamlined and cost-effective procedure to manage and dispose of property that is administered by the court. Mr. Donlin's claims go directly against this purpose. Even though Mr. Donlin approved the Receiver's final report, which recommended and approved the sale of Greenshields' assets, Mr. Donlin now seeks to include a third party purchaser, Contractor Supply, as a party to this action, alleging that Greenshields' assets were "improperly taken from Greenshields" by Contractor Supply. CP 250-89. Such claims were not presented to the Receiver as required by statute. Instead, Mr. Donlin agreed to the final distribution of payments to creditors following the court-approved sale of Greenshields' assets to Contractor Supply pursuant to the receivership statute. CP 510-16. Therefore, Mr. Donlin cannot maintain his derivative action because he failed to properly present such claims to the Receiver, and the Receiver elected to not pursue the claims he was aware of based on Mr. Donlin's Amended Complaint.

3. John Donlin Does Not Have Standing Under The Uniform Fraudulent Transfers Act Because Greenshields Is Not A Creditor Under The Statute.

John Donlin does not have standing to maintain an action under the Uniform Fraudulent Transfers Act (“UFTA”) because Greenshields is not a creditor as required by statute. To maintain an action under Washington’s UFTA, the plaintiff must prove: (1) a transfer was made or an obligation was incurred by the debtor; (2) *the plaintiff was a creditor of the debtor* (emphasis added); and (3) the transfer made or obligation incurred was made with the actual intent to hinder, delay or defraud any creditor of the debtor. RCW 19.40.041. In addition, to maintain such claims derivatively, the plaintiff must fairly and adequately represent the class of similarly situated shareholders. CR 23.1. A creditor may obtain avoidance of the transfer to the extent necessary to satisfy the creditor’s claim. RCW 19.40.071. A creditor is defined as a person who has a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. RCW 19.40.011(3) and (4).

Here, Greenshields does not have standing because it is not a creditor as defined under Washington’s UFTA. Mr. Donlin brought a

derivative action on behalf of Greenshields alleging that the sale of Greenshields' assets to Contractor Supply, a third party, was a fraudulent transfer and therefore should be avoided. CP 250-89. However, Greenshields does not have a right to payment as required under RCW 19.40. To avail itself of the remedies under UFTA, Mr. Donlin asks the court to find that Greenshields is a creditor of itself. Allowance of such an action would create absurd results.

Furthermore, Mr. Donlin alleges that "any person or entity that improperly dissipated Greenshields' assets is the debtor," and therefore Greenshields is a creditor under the statute. Such allegation does not meet the statutory requirements under UFTA. Greenshields' assets were not improperly dissipated, but rather were properly sold to a third party, Contractor Supply, upon the recommendation of the Receiver and approval of the trial court. In addition, the final distribution of payments to creditors following the sale was approved by Mr. Donlin in an Agreed Order dated December 29, 2009. CP 510-16. As a result, Mr. Donlin's derivative claims were properly dismissed not only because Greenshields is not a creditor under UFTA, but also because Mr. Donlin does not fairly and adequately represent similarly situated shareholders under CR 23.1.

C. THE HONORABLE JUDGE FARRIS' ORDER APPROVING THE SALE OF GREENSHIELDS'

**ASSETS DID NOT ADDRESS THE ISSUE OF
STANDING.**

The Order entered on June 7, 2010 by the Honorable Judge Farris (the "Order") does not create a vested Chose in Action as alleged by Mr. Donlin. The Order simply confirms that the sale of Greenshields' assets to Contractor Supply was authorized and approved by the court. CP 210-13. Although the Order states that Mr. Donlin's claims would remain for trial and survive the sale, it did not guarantee that Mr. Donlin's claims could be maintained derivatively or that Mr. Donlin had standing to bring such claims. In fact, the Order confirms her previous order entered on December 14, 2009, whereby the Honorable Judge Farris stated that the order to sell Greenshields' assets is "not a finding one way or the other as to any facts or issues later to be raised at trial in this pending suit." CP 243-44. The Honorable Judge Farris did not make a finding one way or the other because there was not a motion proposed by either party regarding whether Mr. Donlin had standing to maintain his derivative claims. As a result, both parties were free to address any facts and issues, such as standing, once the sale was completed. On September 7, 2011, Mr. Murphy made a motion asking the court to dismiss Mr. Donlin's derivative claims for lack of standing. CP 193-206. Mr. Murphy's motion was the first time that the issue of standing was presented to the court. As

a result, once the issue of standing was presented to the court after the sale of Greenshields' assets, the court agreed that Mr. Donlin did not have standing to maintain his claims derivatively because he cannot fairly and adequately represent shareholders similarly situated as required under CR 23.1. CP 177-79.

Furthermore, the Honorable Judge Farris' Order does not have the sweeping affect that Mr. Donlin suggests. In his brief, he states that the Honorable Judge Farris expressly conditioned the sale of Greenshields' assets to Contractor supply "on the survival of the *derivative* claims against Mr. Murphy and Contractor Supply" (emphasis added). On the contrary, the Order does not expressly allow the survival of derivative claims. In fact, the Order simply allowed the parties to address Mr. Donlin's claims at trial after the sale was completed. CP 210-13. The Order did not make a ruling on whether such claims could be maintained derivatively by Mr. Donlin because the issue of standing was not before the court. However, once the issue of standing under CR 23.1 was addressed, the court held that Mr. Donlin's derivative claims must be dismissed for lack of standing because he does not fairly and adequately represent shareholders similarly situated as required under CR 23.1. CP 177-79. The issue of standing related to Mr. Donlin's derivative claims

does not impact his right to reassert individual claims which were previously voluntarily dismissed. CP 332-34; 246-49.

V. CONCLUSION

John Donlin does not have standing to maintain his derivative claims against Jerry Murphy or Contractor Supply Corporation. Under CR 23.1, Mr. Donlin cannot fairly and adequately represent the interests of shareholders similarly situated given the court-approved sale/liquidation and the administrative dissolution. In addition, Mr. Donlin does not meet the requirements of CR 23.1 because he no longer is a shareholder and does not have a proprietary interest in the corporation.

In addition, Mr. Donlin does not have standing because all of Greenshields' assets, liabilities and claims were properly managed and disposed of in accordance with the receivership process under RCW 7.60. Now, more than two years after the winding up and dissolution process, Mr. Donlin still seeks to unwind the sale of all of Greenshields' assets as a result of the court-approved receivership proceedings. However, during the receivership process, Mr. Donlin failed to present the corporation's claims to the court-appointed receiver in accordance with the statute. Because Mr. Donlin does not meet the requirements of CR 23.1 and failed

to properly present the corporation's claims to the receiver under RCW 7.60, Mr. Donlin does not have standing to maintain his derivative claims.

Finally, Mr. Donlin does not have standing to maintain his derivative claims under the Uniform Fraudulent Transfers Act ("UFTA") because Greenshields is not a creditor under the statute. A creditor is an individual or entity that is owed money. In attempting to maintain his derivative claims under UFTA, Mr. Donlin not only claims that Greenshields is a creditor of itself, but also claims that the court-approved sale by Greenshields was made with the intent to defraud itself. Because Greenshields is not a creditor under UFTA, Mr. Donlin does not have standing to maintain such a claim.

The Respondents, Jerry Murphy and Contractor Supply Corporation, respectfully request that this Court affirm the decision of the trial court granting Mr. Murphy's and Contractor Supply's Motion to dismiss John Donlin's derivative claims for lack of standing.

Respectfully submitted this 2nd day of July, 2012.

ADAMS & DUNCAN, INC., P.S.

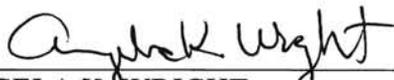
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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via legal messenger to counsel for Appellant:

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DATED this 2nd day of July, 2012 at Everett, Washington.


ANGELA K. WRIGHT

VI. APPENDIX

- Appendix 1 (A-1): **CR 23.1**: Derivative Actions by Shareholders
- Appendix 2 (A-2): **RCW 7.60.005**: Definitions (Receivers)
- Appendix 3 (A-3): **RCW 7.60.015**: Types of Receivers
- Appendix 4 (A-4): **RCW 7.60.055**: Powers of the Court
- Appendix 5 (A-5): **RCW 7.60.060**: Powers and Duties of Receiver Generally
- Appendix 6 (A-6): **RCW 7.60.210**: Submission of Claims in General Receiverships
- Appendix 7 (A-7): **RCW 7.60.260**: Receiver's Disposition of Property – Sales Free and Clear
- Appendix 8 (A-8): **RCW 19.40.011**: Definitions (Uniform Fraudulent Transfers Act)
- Appendix 9 (A-9): **RCW 19.40.041**: Transfers Fraudulent as to Present and Future Creditors (Uniform Fraudulent Transfers Act)
- Appendix 10 (A-10): **RCW 19.40.071**: Remedies of Creditors (Uniform Fraudulent Transfers Act)

RULE 23.1
DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (a) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (b) that the action is not a collusive one to confer jurisdiction on a court of this state which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

The definitions in this section apply throughout this chapter unless the context requires otherwise.

- (1) "Court" means the superior court of this state in which the receivership is pending.
- (2) "Entity" means a person other than a natural person.
- (3) "Estate" means the entirety of the property with respect to which a receiver's appointment applies, but does not include trust fund taxes or property of an individual person exempt from execution under the laws of this state. Estate property includes any nonexempt interest in property that is partially exempt, including fee title to property subject to a homestead exemption under chapter 6.13 RCW.
- (4) "Executory contract" means a contract where the obligation of both the person over whose property the receiver is appointed and the other party to the contract are so far unperformed that the failure of either party to the contract to complete performance would constitute a material breach of the contract, thereby excusing the other party's performance of the contract.
- (5) "Insolvent" or "insolvency" means a financial condition of a person such that the sum of the person's debts and other obligations is greater than all of that person's property, at a fair valuation, exclusive of (a) property transferred, concealed, or removed with intent to hinder, delay, or defraud any creditors of the person, and (b) any property exempt from execution under any statutes of this state.
- (6) "Lien" means a charge against or interest in property to secure payment of a debt or the performance of an obligation.
- (7) "Notice and a hearing" or any similar phrase means notice and opportunity for a hearing.
- (8) "Person" means an individual, corporation, limited liability company, general partnership, limited partnership, limited liability partnership, association, governmental entity, or other entity, of any kind or nature.
- (9) "Property" includes all right, title, and interests, both legal and equitable, and including any community property interest, in or with respect to any property of a person with respect to which a receiver is appointed, regardless of the manner by which the property has been or is acquired. "Property" includes any proceeds, products, offspring, rents, or profits of or from property in the estate. "Property" does not include any power that a person may exercise solely for the benefit of another person or trust fund taxes.
- (10) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person.
- (11) "Receivership" means the case in which the receiver is appointed. "General receivership" means a receivership in which a general receiver is appointed. "Custodial receivership" means a receivership in which a custodial receiver is appointed.
- (12) "Security interest" means a lien created by an agreement.
- (13) "State agent" and "state agency" means any office, department, division, bureau, board, commission, or other agency of the state of Washington or of any subdivision thereof, or any individual acting in an official capacity on behalf of any state agent or state agency.
- (14) "Utility" means a person providing any service regulated by the utilities and transportation commission.

[2004 c 165 § 2.]

Notes:

Purpose -- 2004 c 165: "The purpose of this act is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein." [2004 c 165 § 1.]

Captions not law -- 2004 c 165: "Captions used in this act are not part of the law." [2004 c 165 § 48.]

RCW 7.60.015
Types of receivers.

A receiver must be either a general receiver or a custodial receiver. A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs. A receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property. The court shall specify in the order appointing a receiver whether the receiver is appointed as a general receiver or as a custodial receiver. When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property, or the giving of a notice of a trustee's sale under RCW 61.24.040 or a notice of forfeiture under RCW 61.30.040, the court shall appoint the receiver as a custodial receiver. The court by order may convert either a general receivership or a custodial receivership into the other.

[2004 c 165 § 3.]

Notes:

Purpose -- Captions not law -- 2004 c 165: See notes following RCW 7.60.005.

RCW 7.60.055
Powers of the court.

(1) Except as otherwise provided for by this chapter, the court in all cases has exclusive authority over the receiver, and the exclusive possession and right of control with respect to all real property and all tangible and intangible personal property with respect to which the receiver is appointed, wherever located, and the exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of all the property, and all claims against the receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties. However, the court does not have exclusive jurisdiction over actions in which a state agency is a party and in which a statute expressly vests jurisdiction or venue elsewhere.

(2) For good cause shown, the court has the power to shorten or expand the time frames specified in this chapter.

[2011 c 34 § 2; 2004 c 165 § 7.]

Notes:

Purpose -- Captions not law -- 2004 c 165: See notes following RCW 7.60.005.

RCW 7.60.060
Powers and duties of receiver generally.

(1) A receiver has the following powers and authority in addition to those specifically conferred by this chapter or otherwise by statute, court rule, or court order:

(a) The power to incur or pay expenses incidental to the receiver's preservation and use of the property with respect to which the appointment applies, and otherwise in the performance of the receiver's duties, including the power to pay obligations incurred prior to the receiver's appointment if and to the extent that payment is determined by the receiver to be prudent in order to preserve the value of property in the receiver's possession and the funds used for this purpose are not subject to any lien or right of setoff in favor of a creditor who has not consented to the payment and whose interest is not otherwise adequately protected;

(b) If the appointment applies to all or substantially all of the property of an operating business or any revenue-producing property of any person, to do all things which the owner of the business or property might do in the ordinary course of the operation of the business as a going concern or use of the property including, but not limited to, the purchase and sale of goods or services in the ordinary course of such business, and the incurring and payment of expenses of the business or property in the ordinary course;

(c) The power to assert any rights, claims, or choses in action of the person over whose property the receiver is appointed relating thereto, if and to the extent that the claims are themselves property within the scope of the appointment or relate to any property, to maintain in the receiver's name or in the name of such a person any action to enforce any right, claim, or chose in action, and to intervene in actions in which the person over whose property the receiver is appointed is a party for the purpose of exercising the powers under this subsection (1)(c);

(d) The power to intervene in any action in which a claim is asserted against the person over whose property the receiver is appointed relating thereto, for the purpose of prosecuting or defending the claim and requesting the transfer of venue of the action to the court. However, the court shall not transfer actions in which both a state agency is a party and as to which a statute expressly vests jurisdiction or venue elsewhere. This power is exercisable with court approval in the case of a liquidating receiver, and with or without court approval in the case of a general receiver;

(e) The power to assert rights, claims, or choses in action of the receiver arising out of transactions in which the receiver is a participant;

(f) The power to pursue in the name of the receiver any claim under chapter 19.40 RCW assertable by any creditor of the person over whose property the receiver is appointed, if pursuit of the claim is determined by the receiver to be appropriate;

(g) The power to seek and obtain advice or instruction from the court with respect to any course of action with respect to which the receiver is uncertain in the exercise of the receiver's powers or the discharge of the receiver's duties;

(h) The power to obtain appraisals with respect to property in the hands of the receiver;

(i) The power by subpoena to compel any person to submit to an examination under oath, in the manner of a deposition in a civil case, with respect to estate property or any other matter that may affect the administration of the receivership; and

(j) Other powers as may be conferred upon the receiver by the court or otherwise by statute or rule.

(2) A receiver has the following duties in addition to those specifically conferred by this chapter or otherwise by statute or court rule:

(a) The duty to notify all federal and state taxing and applicable regulatory agencies of the receiver's appointment in accordance with any applicable laws imposing this duty, including but not limited to 26 U.S.C. Sec. 6036 and RCW 51.14.073, 51.16.160, and 82.32.240, or any successor statutes;

(b) The duty to comply with state law;

(c) If the receiver is appointed with respect to any real property, the duty to file with the auditor of the county in which the real property is located, or the registrar of lands in accordance with RCW 65.12.600 in the case of registered lands, a certified copy of the order of appointment, together with a legal description of the real property if one is not included in that order; and

(d) Other duties as the receiver may be directed to perform by the court or as may be provided for by statute or rule.

(3) The various powers and duties of a receiver provided for by this chapter may be expanded, modified, or limited by order of the court for good cause shown.

[2004 c 165 § 8.]

Notes:

Purpose -- Captions not law -- 2004 c 165: See notes following RCW 7.60.005.

RCW 7.60.210

Submission of claims in general receiverships.

(1) All claims, whether contingent, liquidated, unliquidated, or disputed, other than claims of creditors with security interests in or other liens against property of the estate, arising prior to the receiver's appointment, must be served in accordance with this chapter, and any claim not so filed is barred from participating in any distribution to creditors in any general receivership.

(2) Claims must be served by delivering the claim to the general receiver within thirty days from the date notice is given by mail under this section, unless the court reduces or extends the period for cause shown, except that a claim arising from the rejection of an executory contract or an unexpired lease of the person over whose property the receiver is appointed may be filed within thirty days after the rejection. Claims need not be filed. Claims must be served by state agencies on the general receiver within one hundred eighty days from the date notice is given by mail under this section.

(3) Claims must be in written form entitled "Proof of Claim," setting forth the name and address of the creditor and the nature and amount of the claim, and executed by the creditor or the creditor's authorized agent. When a claim, or an interest in estate property of securing the claim, is based on a writing, the original or a copy of the writing must be included as a part of the proof of claim, together with evidence of perfection of any security interest or other lien asserted by the claimant.

(4) A claim, executed and served in accordance with this section, constitutes prima facie evidence of the validity and amount of the claim.

[2004 c 165 § 23.]

Notes:

Purpose -- Captions not law -- 2004 c 165: See notes following RCW 7.60.005.

RCW 7.60.260

Receiver's disposition of property — Sales free and clear.

(1) The receiver, with the court's approval after notice and a hearing, may use, sell, or lease estate property other than in the ordinary course of business. Except in the case of a leasehold estate with a remaining term of less than two years or a vendor's interest in a real estate contract, estate property consisting of real property may not be sold by a custodial receiver other than in the ordinary course of business.

(2) The court may order that a general receiver's sale of estate property either (a) under subsection (1) of this section, or (b) consisting of real property which the debtor intended to sell in its ordinary course of business be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property, unless either:

(i) The property is real property used principally in the production of crops, livestock, or aquaculture, or the property is a homestead under RCW 6.13.010(1), and the owner of the property has not consented to the sale following the appointment of the receiver; or

(ii) The owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver's sale, and the court determines that the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale.

Upon any sale free and clear of liens authorized by this section, all security interests and other liens encumbering the property conveyed transfer and attach to the proceeds of the sale, net of reasonable expenses incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to the property immediately before the conveyance. The court may authorize the receiver at the time of sale to satisfy, in whole or in part, any allowed claim secured by the property out of the proceeds of its sale if the interest of any other creditor having a lien against the proceeds of the sale would not thereby be impaired.

(3) At a public sale of property under subsection (1) of this section, a creditor with an allowed claim secured by a lien against the property to be sold may bid at the sale of the property. A secured creditor who purchases the property from a receiver may offset against the purchase price its allowed secured claim against the property, provided that the secured creditor tenders cash sufficient to satisfy in full all secured claims payable out of the proceeds of sale having priority over the secured creditor's secured claim. If the lien or the claim it secures is the subject of a bona fide dispute, the court may order the holder of the claim to provide the receiver with adequate security to assure full payment of the purchase price in the event the lien, the claim, or any part thereof is determined to be invalid or unenforceable.

(4) If estate property includes an interest as a co-owner of property, the receiver shall have the rights and powers of a co-owner afforded by applicable state or federal law, including but not limited to any rights of partition.

(5) The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal.

[2011 c 34 § 9; 2004 c 165 § 28.]

Notes:

Purpose -- Captions not law -- 2004 c 165: See notes following RCW 7.60.005.

RCW 19.40.011
Definitions.

As used in this chapter:

(1) "Affiliate" means:

(i) A person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities;

(A) As a fiduciary or agent without sole discretionary power to vote the securities; or

(B) Solely to secure a debt, if the person has not exercised the power to vote;

(ii) A corporation twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(A) As a fiduciary or agent without sole power to vote the securities; or

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) Property to the extent it is encumbered by a valid lien; or

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(i) If the debtor is an individual:

(A) A relative of the debtor or of a general partner of the debtor;

(B) A partnership in which the debtor is a general partner;

(C) A general partner in a partnership described in subsection (7)(i)(B) of this section; or

(D) A corporation of which the debtor is a director, officer, or person in control;

(ii) If the debtor is a corporation:

(A) A director of the debtor;

(B) An officer of the debtor;

(C) A person in control of the debtor;

(D) A partnership in which the debtor is a general partner;

(E) A general partner in a partnership described in subsection (7)(ii)(D) of this section; or

(F) A relative of a general partner, director, officer, or person in control of the debtor;

(iii) If the debtor is a partnership:

(A) A general partner in the debtor;

(B) A relative of a general partner in, or a general partner of, or a person in control of the debtor;

(C) Another partnership in which the debtor is a general partner;

(D) A general partner in a partnership described in subsection (7)(iii)(C) of this section; or

(E) A person in control of the debtor;

(iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) A managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

[1987 c 444 § 1.]

Notes:

Effective date -- 1987 c 444: "This act shall take effect July 1, 1988." [1987 c 444 § 16.]

RCW 19.40.041

Transfers fraudulent as to present and future creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[1987 c 444 § 4.]

Notes:

Effective date -- 1987 c 444: See note following RCW 19.40.011.

RCW 19.40.071
Remedies of creditors.

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in RCW 19.40.081, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by chapter 6.25 RCW;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

[2000 c 171 § 54; 1987 c 444 § 7.]

Notes:

Effective date -- 1987 c 444: See note following RCW 19.40.011.