

No. 72053-8-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

DBM CONSULTING ENGINEERS, INC, a Washington Corporation,
Respondent,

v.

JOSEPH D. SANDERS, and the marital community composed of Joseph
D. Sanders and "Jane Doe" Sanders; SOOS CREEK VISTA, INC., a
Washington corporation,
Appellants

A handwritten signature in black ink is written over a faint, rectangular stamp. The signature appears to be 'J. D. Sanders'. The stamp contains some illegible text and the date '2:33'.

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED FOR REVIEW

1. Was Sanders' transfer of assets from SCV to Sanders in June 2005 a "transfer fraudulent to present creditors" forbidden by the Uniform Fraudulent Transfer Act, RCW 19.40.051(b)?

2. As a matter of interpreting the legal documents, and prior to considerations of equity, did a deed of trust issued in 1997 create a UCC security interest in promissory notes issued in 2003 and 2004, which Sanders properly perfected, and did not release, prior to the 2005 transfer?

3. Did Sanders have a UCC security interest in SCV's bank account?

4. Assuming *arguendo* that the 1997 deed of trust created a UCC security interest, is that interest effective when it is used to violate a corporate insider's fiduciary duty to a third party creditor such as DBM?

5. Since the UFTA's one-year extinguishment statute expired in 2006, did Sanders abandon any argument that the statute applies separately to him when he failed to make this argument in his prior appeal and the argument, if correct, would have made remand unnecessary?

6. Under CR 15(c), was DBM's fraudulent transfer claim timely as to Joseph Sanders when he has been a party to this lawsuit since

2002 and the fraudulent transfer claim is asserted in a motion brought in an existing lawsuit against existing parties?

7. Assuming that the fraudulent transfer motion should be treated in the same manner as if Mr. Sanders was being brought in as an entirely new party to the lawsuit, then under CR 15(c) did the trial court abuse its discretion in allowing the claim to relate back to DBM's original, timely filing in 2005?

8. If DBM prevails on appeal, is it entitled to an award of attorney fees against Soos Creek Vistas, Inc.?

II. STATEMENT OF THE CASE

A. In 1997 Sanders Forms A "One Man" Corporation And Structures It To Give Himself Priority Over All Future Creditors

DBM Consulting Engineers, Inc. provided civil engineering services relating to Soos Creek Vistas, a property development consisting of several lots owned by defendant Soos Creek Vistas, Inc ("SCV"). SCV is solely owned by defendants Joseph and "Jane Doe" (Cheryl) Sanders, who also are the only officers.¹ (CP 267-8)

SCV was formed in March 1997. (CP 174) Since its inception, it has had only one asset, which is the Soos Creek Property. (CP 270) It

¹ Although Ms. Sanders is, technically, a defendant and a corporate insider, her actual participation in the business was nominal. Therefore, all future references will be to Mr. Sanders as if he was the only officer and shareholder.

has no income other than from selling lots. (*Id.*) Sanders placed title to the property into SCV when he formed the corporation.² (CP 788) Rather than treating the property as shareholder equity, he executed documents which treated the transaction as a “loan” from Sanders to the corporation for \$762,741. (CP 296) The papers consisted of a promissory note for an amount “up to” \$1.4 million and a corresponding deed of trust. (CP 292, 301). The promissory note pledges all of Soos Creek Vistas’ income (i.e., the money from lot sales) to Mr. Sanders, in preference to any other creditor of Soos Creek Vistas. The note states:

(c) Borrower shall pay Lender one hundred percent (100%) of the net proceeds from the sale of the Property, or any portion or subdivision thereof, until the aggregate outstanding balance due under this Note, including accrued interest, is paid in full.

(CP 292)

Mr. Sander’s testimony is not entirely consistent. At the time he formed Soos Creek, he filed declarations in a probate litigation claiming “[t]here is absolutely no money to be made off this property.” (CP 767) This would suggest that from its inception SCV could never pay any

² Sanders transferred title from B&M Investments, Inc., a corporation of which he was president, into SCV. (CP 823, 788). The transaction originally was ordered set aside by a probate court (CP 785) in a probate where Sanders and his sister had already been found to be manipulating the estate’s assets to the detriment of creditors. (CP 825, 296). The order eventually was vacated as part of a settlement in the probate. These facts explain some of Sanders’ deposition testimony about why he structured the 1997 transaction like he did. (CP 273, 275)

creditor other than Sanders. However, in more recent testimony he claimed this conclusion was not clear until one or two years later:

Q. When did it first become apparent to you that the assets remaining in Soos Creek would not be sufficient to pay off the balance owed on the promissory note?

A. I would say DBM took over in '97. I would say '98, '99 when we had made no forward progress and there were huge expenses being made.

Q. When you say DBM took over, you mean DBM took over the engineering duties?

A. Yes, sir.

(CP 287)

The promissory note was due May 1, 2000. (CP 292) According to a spreadsheet created by Sanders' accountant, the "loan" balance was \$2,102,264 on that date. (CP 296) SCV had not made a single payment of either interest or principal (Id.)³ and it lacked the assets to pay the now-due note balance. (CP 287) But Sanders did not foreclose on the note, and he continued to have SCV incur debts which SCV could not possibly pay if the promissory note's terms were honored. (CP 285-287)

Sanders, however, did not comply with the note's terms. (CP 279) When asked to explain this situation, Mr. Sanders testified that he

³ The spreadsheet at CP 296 shows only additions to the loan amount and no subtractions until December 31, 2000.

intended to pay Soos Creek Vistas' creditors regardless of what the legal documents said, so long as those debts were "legitimate":

Q. So your intent -- you said everybody was going to get paid. Did that mean anybody who dealt with Soos Creek Vistas, Inc.?

A. Anyone that performed legitimate work for Soos Creek, yes.

Q. That was your intent?

A. That was my intent, yes, sir.

(CP 275-6; underline added)

Q. (BY MR. DERRIG) Sir, you testified that it was your intent that creditors be paid if they performed legitimate work.

My question is: Was that -- did you intend to pay them regardless of whether the -- whether there were legal documents that relieved you of an obligation to pay in your capacity as president of Soos Creek Vistas, Inc.?

A. I intended -- if they had performed work, I have been brought up that, yes, I would pay them if they performed legitimate work.

Q. You wanted to pay them if you thought it was the honest thing to do?

A. Yes. That's the way I was raised.

(CP 277)

B. After DBM Sues, SCV Sells 3 Lots, Receiving A Promissory Note And Deed Of Trust For Each.

DBM filed this suit in 2002 to recover its fee for services rendered. (CP 216) Sanders counterclaimed for Consumer Protection Act violations.

While the case was pending, SCV sold 3 lots—one in 2003 and two in 2004. The 3 purchasers each signed a promissory note (CP 184, 186, 188) and SCV conveyed title by warranty deed. (CP 749, 754, 759) While SCV had title, Sanders' 1997 deed of trust encumbered the title and the warranty deeds warranted title free and clear of the deed of trust. (Id.) Thus, to consummate each sale, Sanders executed a partial reconveyance of the 1997 deed of trust, effectively releasing his security interest in the lots being sold. (CP 491, 393, 395)

Sanders, in his personal capacity, did not receive any documents as part of the 3 sales. Other than the partial reconveyances, the only documents associated with each sale are (1) the promissory notes and (2) a new deed of trust from each purchaser back to SCV. (CP 475, 483)⁴ No new document, executed as part of the 3 lot sales, awarded Sanders any security interest arising from the sales.

⁴ Perhaps due to a copying mistake, Mr. Sanders claimed to attach a copy of the deed of trust from the 2003 transaction as an exhibit, but did not. (CP 395). Since nobody is arguing that the 2003 deed of trust is anything but a plain vanilla deed of trust, the mistake is irrelevant.

C. **Sanders Loses His Counterclaim, Decides To Avoid DBM's Judgment, And Transfers SCV's Assets To Himself**

The case was tried to a jury in December 2004. The jury found for DBM on its fee claim and found DBM not liable on Sanders' counterclaim. (CP 327) An initial judgment in DBM's favor was entered on March 14, 2005, and an amended judgment was entered on April 26, 2005. (CP 175) The total amended judgment amount was \$139,502.72. (Id.)

The judgment was not appealed, but Sanders was bitterly disappointed and decided not to honor the judgment:

Q. Jumping ahead a little bit, but you said it was your intent to pay legitimate creditors or creditors who performed legitimate work. Is DBM not being paid because you don't think it did legitimate work?

A. DBM is not being paid because I don't think they did legitimate work.

Q. So you disagree with the jury verdict that was rendered in the lawsuit?

A. Yes. Let me go back to that again.

I don't -- I don't object to the jury verdict on what they were limited to do. I object to the many conditions that constrained the presenting of evidence and bringing out the facts.

Q. So -- so your disagreement isn't with the 12 good men and women of the jury; it's with the way that the trial itself was handled? Could that generally --

A. Yes.

Q. -- be --

A. Yes.

(CP 279)⁵

On June 1, 2005, Mr. Sanders implemented his plan for avoiding the debt that, despite the judgment, he did not consider "legitimate":

1. He went to the offices of Inslee, Best, Doezie & Ryder, which prepared 3 assignments for the 3 deeds of trust held by SCV.⁶ (CP 178, 180, 182) Signing the documents as "President, Soos Creek Vistas, Inc.," Mr. Sanders assigned the 3 deeds of trust to himself personally. (Id.)

2. With the 3 promissory notes, Mr. Sanders wrote at the end of each note: "Pay To The Order Of Joseph D. Sanders." (CP 185, 187, 189) He signed each of these notations as "Soos Creek Vistas, Inc., by Joseph D. Sanders, President." (Id.) Based on this action, he began

⁵ Sanders remains so bitter about DBM's victory that his current brief spends 2 paragraphs rehashing the same discredited allegations against DBM that he made in front of the jury in 2005. (Opening brief at 5-6; CP 776)

⁶ The law firm's identification is found in the upper left hand corner of each assignment.

collecting the note payments directly rather than depositing the payments with SCV. (CP 244)

3. On the same day, Mr. Sanders withdrew \$12,200 from SCV's bank account, leaving a \$69 balance. (CP 229, 298)

In a declaration filed October 19, 2005, Sanders claimed he was entitled to make the transfer because it was a payment for the alleged 1997 loan referred to earlier, i.e., he claimed the transfers were payments for a preexisting debt.⁷ (CP 257)

These actions left SCV with only \$69 plus the 3 unsold lots in which it had no equity. (CP 286) SCV thus was insolvent and unable to pay DBM. (CP 248)

D. DBM's Former Attorneys Discover The Transfer And Bring A Timely Motion, But Mistakenly Serve The Wrong Law Firm

DBM's former attorneys found out about Sanders' actions. Five months after the transfer, in October 2005 they brought a "Motion For Order To Levy Execution On Assets Transferred From Soos Creek Vista, Inc. To Joseph Sanders." (CP 220) The motion argued that the transfer

⁷ Sanders subsequently claimed "[t]he promissory notes from the purchasers were always held in escrow until I personally took possession of them in my personal capacity. SCV never had possession of the promissory notes." (CP 534). There are no escrow instructions or other documents supporting Sander's assertion that he held the notes "in escrow." See, *Greenhaigh v. Dept. of Corrections*, 160 Wash. App. 706, 714, 248 P.3d 150 (2011).

was void under RCW 19.40.051(b) (Washington's version of the Uniform Fraudulent Transfer Act).

Unfortunately, they did not serve the motion properly. When DBM first filed this action in 2002, Inslee Best appeared for SCV and Sanders. However, in July 2004 Inslee Best withdrew and the firm of Johns Monroe Mitsunaga was substituted. (CP 232) DBM's attorneys served the fraudulent transfer motion on Inslee Best, rather than the new firm. (CP 218) As fate would have it, an attorney at Inslee Best also happened to be SCV's registered corporate agent for service. (CP 170) Therefore, SCV was adequately served despite the error. Mr. Sanders, however, was not adequately served since Inslee Best had withdrawn as his counsel.

The motion initially was noted for October 17, 2005. Sanders and SCV both appeared through Inslee Best and opposed DBM's motion. Sanders, being the only material witness on his side, filed a declaration as part of the opposition. (CP 256)

As a result of the opposition, the hearing was continued by stipulation. (CP 321) A new hearing eventually was scheduled. In a supplemental opposition filed January 11, 2007, Sanders contended that he had not been correctly served with the original motion and that, in the meantime, the UFTA's one-year extinguishment statute had lapsed. (CP

320) DBM opposed this argument on the ground that Sanders was not a necessary party and could be ordered, in his corporate capacity, to return the notes. (CP 230)

On February 23, 2007 Judge Cayce granted DBM's motion and ordered Sanders "in his corporate capacity" to return the promissory notes to SCV. (CP 227) Sanders and SCV both appealed. (CP 234) Sanders appealed in his own capacity as a party in the lawsuit and even asked the court of appeals for an attorney fee award. (CP 250, 253)

In that prior appeal, SCV and Sanders filed a joint brief making these arguments: (1) the Uniform Fraudulent Transfer Act required a fraudulent conveyance claim to be brought as a separate lawsuit and not as a post-judgment motion in an existing suit, (2) the UFTA's one-year statute of limitations had lapsed and thus no timely suit could be brought, and (3) Sanders was a necessary party who had not been correctly served with the motion. (CP 255)

The Court of Appeals rejected the first two arguments:

We conclude DBM's post-judgment motion to levy on assets was an appropriate way to gain relief under the UFTA. And since the motion was made within one year after the transfer, DBM's claim was not extinguished.

(Slip op. at 5; CP 7) (2010); *see* RCW 19.40.091(b).

The Court of Appeals agreed, however, that Sanders had not been properly served:

Because Sanders was not a party to the supplemental proceedings, the court's order granting DBM's motion to levy on assets is void. We remand for further proceedings consistent with RCW 6.32.270.

(Slip op. at 6; CP 8) (footnotes omitted); *see* RCW 6.32.270.

E. On Remand, DBM Obtains An Order To Show Cause And Prevails

The statute, RCW 6.32.270, states in part that in any supplemental proceeding, “[i]f the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto[.]” The post-remand road to obtaining a show cause order proved to be a rather rocky one, and the timeline is set forth in this table:

Date	Action	Source
March 2011	Division One issues mandate remanding case	CP 1
April 2011	DBM tenders prosecution of the fraudulent conveyance claim to DBM’s former attorneys and their insurance carrier	CP 171-172
November 2011	DBM reaches a settlement with the former attorneys, in which DBM is given control of the litigation.	CP 172, 1109

Date	Action	Source
March 2012	DBM obtains an Order to Show Cause, but Sanders avoids service.	CP 67, 1109
June 2012	DBM obtains an Amended Order To Show cause with an August 2012 hearing date	CP 128
August 2012	The Superior Court clerk loses track of the case and no judge is assigned, so the August hearing date is lost	CP 172, 1109
November 2012	DBM's president and shareholder, Dana B. Mower, dies.	CP 1109
December 2012-April 2013	Probate is initiated, a personal representative is appointed, and current counsel is retained by Mower's estate.	CP 1109
April 2013	Sanders files <i>Sanders v. Soos Creek Vistas, Inc, DBM Consulting Engineers, Inc., et al.</i> King County Cause No. NO. 13-2-06594-1 KNT. DBM files a counterclaim.	CP 172, 1109
October 2013	Orders are entered making rulings relevant to the present case ⁸ and terminating the above litigation	CP 854, 1109
February 2014	With the other suit resolved, DBM obtains a 3 rd Order To Show Cause.	CP 164
May 23, 2014	A combined summary judgment and show cause hearing is held, resulting in the presently-appealed Order.	CP 905

⁸ The court determined that other than the open issue in this case about the fraudulent transfer, any claims Sanders has against SCV's assets are inferior to DBM's judgment lien. (CP 855)

III. ARGUMENT

A. THE TRANSFERS WERE CONSTRUCTIVELY FRAUDULENT AS A MATTER OF LAW

1. EACH ELEMENT OF RCW 19.40.051(b) WAS MET

Washington has adopted the Uniform Fraudulent Transfer Act, which includes this section:

19.40.051. Transfers fraudulent as to present creditors

....

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Parsing the above language, Sanders' June 2005 transfers were fraudulent as to DBM if:

1. DBM's claim arose before the transfers were made.
2. The transfers were to an insider.
3. The transfers were for an antecedent debt.
4. The debtor (SCV) was insolvent at that time, and
5. The insider has reasonable cause to believe that the debtor was insolvent.

See, Farstveet v. Rudolph ex rel. Eileen Rudolph Estate, 630 N.W.2d 24, 30 (N.D. 2000)(same list).

All 5 elements are met here:

- The claim preexisted the transfers. DBM's amended judgment was filed in April 2005 and DBM's claim thus arose before the June 2005 transfers.⁹

- Sanders is an insider. SCV is a closely held corporation in which Mr. and Mrs. Sanders are the only officers and shareholders. (CP 267-8) Mr. Sanders was SCV's president and signed the transfer documents in that capacity. (CP 178, 180, 182, 185, 187, 189) The Act defines "insider" as follows:

(7) "Insider" includes:

....

(ii) If the debtor is a corporation:

....

(B) An officer of the debtor;

(C) A person in control of the debtor;

RCW 19.40.011.

- The transfer was for an alleged, antecedent debt. "[T]he meaning of 'antecedent debt' . . . means nothing more than debt that

⁹ Since the statute only requires a "claim" and not a claim reduced to judgment, the transfer only had to take place after 2002, when DBM first filed its suit for fees.

exists before the transfer.” *Elliot & Callan, Inc. v. Crofton*, 615 F. Supp. 2d 963, 969 (D. Minn. 2009); *see, Truelove v. Buckley*, 733 S.E.2d 499, 502 (Ga.App. 2012). Sanders claimed (and still claims) the transfer was a payment toward his 1997 “loan.” (CP 257 ¶4) Thus the June 2005 transfer was for an antecedent debt.

- SCV was insolvent. By making the transfers, Mr. Sanders left SCV with only \$69 available to pay DBM.¹⁰

- Sanders had reasonable cause to believe SCV was insolvent. He was the sole shareholder and corporate president and would have been aware of SCV’s financial position. Indeed, he confessed that he performed the transfer because he disagreed with the result of the trial, did not consider the judgment to be a “legitimate” debt, and did not want to see DBM paid. (CP 279) The entire purpose of the transfers was to make SCV insolvent.

Since all elements of RCW 19.40.051(b) have been met, Sanders’ transfer was fraudulent as to DBM. Therefore, the trial court correctly voided the transfer. *See, Comer v. Calim*, 716 N.E.2d 245, 249-50 (Ohio App. 1998).

¹⁰ SCV still held title to 3 other lots in the development, but those lots were completely encumbered by Sanders’ 1997 deed of trust, so SCV had no equity in them. (CP 193 section B, CP 291 section 5)

[W]here the transfer of assets strips a debtor corporation of all its assets, and disables the corporation from earning money to pay its debts, thus leaving creditors and holders of claims no resources to which they may look for the payment of their due, the net result is in legal effect a fraud; and the courts will subject the transferee to liability for the satisfaction of claims against the corporation whose assets it has absorbed.

Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 135 Wash. 2d 894, 906, 959 P.2d 1052, 1057 (1998), *quoting Avery v. Safeway Cab, Transfer & Storage Co.*, 148 Kan. 321, 80 P.2d 1099 (1938).

2. **SANDERS DID NOT HAVE A SECURITY INTEREST IN THE PROMISSORY NOTES**

Sanders and Soos Creek do not contest that section 051(b) applies on its face. Rather, they argue the 3 notes were not “assets” of SCV because Sanders held a UCC security interest in the notes. This argument is based solely on the 1997 Deed of Trust from SCV to Sanders. Thus, Sanders’ argument is that a Deed of Trust issued in 1997 created an enforceable UCC security interest in promissory notes issued by the lot purchasers in 2003 and 2004.

The argument fails on numerous levels.

First, The 1997 deed of trust language only applies to personal property that conveyed as part of the 1997 transaction. The 3 notes did not even exist until 2003-2004.

Normally the UCC does not apply to a deed of trust because the UCC does not apply to real property. *U.S. Bank Nat. Ass'n v. Oliverio*, 109 Wash. App. 68, 73, 33 P.3d 1104, 1106 (2001). Article 9 of the UCC usually is applied to sales of personal property financed on credit, such as selling household furniture or a computer. The 1997 deed of trust, however, contains the following language which Sanders now depends on:

This instrument is intended to be a security agreement pursuant to the Uniform Commercial Code for any of the items specified above as part of the Property which, under applicable law, may be subject to a security interest pursuant to the Uniform Commercial Code, and Borrower hereby grants Lender a security interest in said items.

(CP 409)

The 1997 deed of trust is a “boilerplate” document and its many paragraphs don’t always make sense in the context of the actual transaction. The above paragraph might make sense if, for example, the real property being sold in 1997 contained personal property which was included in the sale, e.g., a washing machine included as part of the sale of a residence. In that case, if “any of the items specified above as part of the Property” were personal property, then the paragraph tries to make

the deed of trust also function as a UCC agreement.¹¹ So, to continue the example, if the 1997 sales documents “specified” a washing machine as one of the items in the sale, the paragraph could apply.

But Sanders doesn’t identify a single item of personal property actually involved in the 1997 sale. And with good reason, because the 1997 transaction involved vacant, unimproved land. In testimony filed in June 1997, Sanders said “the property was little more than a ‘gravel pit’ adjacent to Seattle International Raceway.” (CP 763) There is no reason to believe this “gravel pit” contained personal property which might have been subject to a UCC security interest. Thus, despite the deed of trust’s boilerplate, no UCC security interest actually was created during the 1997 sale.

More to the point, the 3 promissory notes at issue in this appeal, were not “specified above as part of the Property” involved in the 1997 sale. The notes could not possibly have been, because they did not even exist until 2003-2004. “[A] court reads a contract as an average person would, giving it a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results.” *Certain Underwriters at Lloyd's London v. Travelers Prop. Cas. Co. of Am.*, 161 Wash. App. 265,

¹¹ The mortgagee—in this case Sanders—would have to perfect that interest by filing a UCC financing statement, which Sanders never did. *See*, RCW 62A.9A-310(a); *In re Freeborn*, 94 Wn.2d 336, 343-344 & n.5, 817 P.2d 424 (1980).

278, 256 P.3d 368, 375 (2011). The boilerplate in the 1997 deed of trust was designed to create a security interest in any personal property that was identified as being sold in 1997. The 3 promissory notes were not part of that sale. Sanders' interpretation of the deed of trust is strained and makes no sense.

Second, the sales in 2003-2004 were free and clear of the 1997 deed of trust, which was released. As part of each sale, SCV issued a warranty deed conveying title free and clear of the 1997 deed of trust. Sanders reconveyed and thus released the 1997 deed of trust. When a deed of trust is reconveyed, that leaves the lender without a security interest. *See, U.S. Bank Nat. Ass'n v. Oliverio, supra* 109 Wash. App. at 73; *Siegel v. Am. Sav. & Loan Assn.*, 210 Cal. App. 3d 953, 957, 258 Cal. Rptr. 746, 747 (1989); *accord, Falk v. Mt. Whitney Sav. & Loan Ass'n*, 5 F.3d 347, 349 (9th Cir. 1993)(describing effect of partial reconveyance as “thereby releasing the 1.65-acre portion from the encumbrance”). Because the lots were sold free and clear of the 1997 deed of trust, Sanders no longer had any security interest which the deed of trust might have granted. After all, if releasing the deed of trust did not also release any UCC security interest created by the deed, then any personal property located on the lots would have remained encumbered by Sanders' lien—a result which most certainly would have surprised the purchasers. It

makes no sense to say that a sale *free and clear* of the deed of trust somehow created a new security interest in promissory notes executed as part of selling the real property that was being sold free and clear of the very deed of trust cited as creating the security interest.

Third, if the released Deed of Trust was supposed to continue functioning as a UCC security agreement, then Sanders failed to perfect that interest. According to the UFTA's definitions, "'asset' means property of the debtor, but the term does not include . . . property that is encumbered by a valid lien." RCW 19.40.011(2)(i). However, an Article 9 lien is not "valid" until it is perfected, so property subject to an unperfected UCC security interest remains subject to the UFTA. *See, Comer v. Calim*, 716 N.E.2d 245, 249 (Ohio App. 1998). More specifically, if a UCC financing statement is not filed prior to the transfer, the claimed UCC security interest is not valid, DBM's judgment lien is the superior right, and the UFTA applies to the transfer. *Id; see, In re Dean & Jean Fashions, Inc.*, 329 F.Supp. 663, 666 (W.D.Ok. 1971)("An unperfected security interest is subordinate to the rights of a lien creditor"). Here, if Sanders expected the released Deed of Trust to create a UCC security interest, then he needed to take the steps necessary to perfect that interest by filing a financing statement. *See*, RCW 62A.9A-

310(a); *In re Freeborn*, 94 Wn.2d 336, 343-344 & n.5, 817 P.2d 424 (1980). He did not.

Since Sanders did not have a perfected UCC security interest in the promissory notes, the notes were “assets” of Soos Creek. Section .051(b) otherwise applies on its face, the transfers were fraudulent, and the trial court properly granted summary judgment. *See generally, Douglas v. Hill*, 148 Wash. App. 760,763, 199 P.3d 493 (2009)(holding a transfer violated the UFTA as a matter of law).

3. SANDERS DID NOT HAVE A SECURITY INTEREST IN SCV’S BANK ACCOUNT

Although the bulk of the present controversy swirls around the promissory notes, one should not lose sight of the fact that on June 1, 2005, in addition to transferring the notes from SCV to himself, Sanders also took \$12,200 from SCV’s corporate account, leaving only \$69 for DBM. (CP 229, 298). Appellants’ opening brief offers no argument about this transfer.

With good reason. The account is not “specified above as part of the Property” in the 1997 deed of trust and thus the deed did not attempt to create a UCC security interest in the account. Even if one assumes the 1997 deed of trust encompasses the account, Sanders did not have a

perfected security interest in that account. Perfection requires control, and the applicable statute states:

(a) **Requirements for control.** A secured party has control of a deposit account if:

(1) The secured party is the bank with which the deposit account is maintained;

(2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) The secured party becomes the bank's customer with respect to the deposit account.

RCW 62A.9A-104

Subsection (1) does not apply because Sanders was not the bank.

With respect to subsection (2), Sanders has not provided (or even testified to) any “authenticated record” in which SCV, Sanders personally, and the bank agreed to comply with instructions from Sanders in his personal capacity.

With respect to subsection (3), there is no evidence that Sanders personally was a customer of the bank with respect to the account, i.e., it was not a joint account. Since Sanders had no perfected UCC security interest, the UFTA applies, the insider transfer was fraudulent, and

summary judgment was correctly granted. *See, Comer, supra*, 716 N.E.2d at 249.

4. **ALTERNATIVELY, ANY SECURITY INTEREST WAS UNENFORCEABLE AS BEING IN BREACH OF SANDER'S FIDUCIARY DUTY TO CREDITORS**

Sanders' defense is based on his 1997 Deed of Trust, which he claims gives him a priority security interest in the 2003-2004 notes and removes those notes from the category of "assets" subject to the UFTA. DBM has shown that, on a purely technical level without considerations of equity, Sanders did not have such an interest. However, even if Sanders managed to create a perfected security interest on a technical level, that interest still would not be effective against DBM and the notes thus would continue to be "assets" subject to the UFTA.

"Asset" does not include property to the extent it is encumbered by a "valid lien." RCW 19.40.011(2)(i). "'Valid lien' means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings." RCW 19.40.011(13)(underline added). Because he was an insider and a fiduciary to creditors, Sanders' alleged first-position lien would not be effective in equity when asserted against a third-party creditor such as DBM.

The UFTA is, in general, a declaration of the common law. *Rainier National Bank v. McCracken*, 28 Wash. App. 498, 506, 615 P.2d 469 (1980). As such, the UFTA is intended to be supplemented by, not to overrule, general principals of equity:

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

RCW 19.40.902 (underline added).

Under the common law and general principals of equity, an insider's attempt to give himself priority over the corporation's general creditors is invalid and enforceable. Begin with the proposition that an insider such as Sanders is a fiduciary to corporate creditors:

As a fiduciary, the officer or director has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, such as minority shareholders or creditors, who also have legitimate interests in the corporation but lack the power of the fiduciary.

Saviano v. Westport Amusements, Inc., 144 Wash. App. 72, 79, 180 P.3d 874 (2008)(underline added), quoting *Intertherm, Inc. v. Olympic Homes Sys., Inc.*, 569 S.W.2d 467, 471 (Tenn. App. 1978); see, *Pepper v. Litton*,

308 U.S. 295, 309-10, 60 S. Ct. 238, 84 L. Ed. 281 (1939)(leading case); *Garner v. Pearson*, 545 F.Supp. 549, 558 (M.D.Fla. 1982).

This principal applies with special force when the lien arises from a supposed “loan” to the corporation by a corporation’s sole owner. *See, Pepper, supra*, 308 U.S. at 309-10; *In re Trimble Co.*, 479 F.2d 103, 113 (3d Cir. 1973). This is because such transactions are not at arms length and are likely devices for self-dealing by the fiduciary, to the detriment of creditors. *See, Timble, supra, quoting Gordon v. Hartford Sterling Co.*, 38 A.2d 229, 234 (Pa. 1944); *Rainer v. Washington Plate Glass Co., Inc.*, 27 B.R. 550, 551-2 (D.D.C. 1982); *Boyum v. Johnson*, 127 F.2d 491, 494 (8th Cir. 1942)(controlling stockholder’s “general dealings with the corporation were not on the arm’s length plane of the other creditors”).

In this case, when Sanders created Soos Creek Vista in 1997, he gave it only one asset—the property. He did not characterize this initial infusion of capital as shareholder’s equity, but instead created legal documents characterizing the transaction as a “loan” of \$762,000, using a promissory note that also allowed him to characterize any future capital infusions as further “loans” up to \$1.4 million. And then Sanders gave himself a priority security interest over all future corporate creditors by having Soos Creek grant him a first-position Deed of Trust securing these “loans.” The result was a corporate shell filled not with shareholder

equity, but instead with debt to the sole shareholder, together with a corporate pledge to pay the shareholder first, in preference any third-party creditors. Put more colloquially: At the corporation’s inception, Sanders put himself at the front of the creditors’ line.

The common law does not allow such attempts by corporate shareholders and fiduciaries “to jump in the front of the queue.” *Gaff v. Federal Deposit Ins. Corp.*, 919 F.2d 384, 392 (6th Cir. 1990). Justice Learned Hand explained the reason this way:

Both the shareholders and the creditors in any enterprise assume some risk of its failure, but their risks are different. The shareholders stand to lose first, but in return they have all the winnings above the creditors’ interest, if the venture is successful; on the other hand the creditors have only their interest, but they come first in distribution of the assets. . . . If in such a case [shareholders] are allowed to prove in insolvency on a parity with other creditors, as shareholders of the debtor they can use their control to take all the winnings which may be made on their advances while the company is successful, yet they will expose themselves only to creditors’ risks, if it fails.

In re V. Loewer’s Gambrinus Brewery Co., 167 F.2d 318 (2nd Cir. 1948)(L. Hand, J. concurring; ellipses added); *see, Gaff, supra*, 919 F.2d at 392 (similar observation).

Because the insider is a fiduciary, his transactions are subject to “rigorous scrutiny.” *Garner v. Pearson, supra*, 545 F.Supp. at 558; *see, Gaff, supra*, 919 F.2d at 329; *Saviano, supra*, 114 Wash. App. at 79;

Intertherm, supra, S.W.2d at 471-2. The bottom line is that the fiduciary cannot use his corporate powers to manipulate the corporation's legal documents to his advantage:

He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.

Pepper v. Litton, supra, 308 U.S. at 311 (underline added); *accord, Saviano*, 144 Wash. App. at 78 (rejecting argument that insider's loan was enforceable because "he complied with the law" by filing UCC statements); *Casterline v. Roberts*, 168 Wash. App. 376, 383-4, 284 P.3d 743 (2012)(applying UFTA when trustee breached her fiduciary duty to the beneficiary).

In this case, Sanders created a corporate shell filled not with equity but instead with (allegedly) secured debt to himself that placed his interests in front of all future creditors. This is a violation of fiduciary

duty as a matter of law, because “[a] fiduciary ‘is bound to act in the highest good faith toward his beneficiary’ and he may never seek to gain an advantage over his beneficiary by any means.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash. 2d 784, 798 n.2, 16 P.3d 574 (2001) (Talmadge, J. concurring), *quoting* Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 Ky. L.J. 1, 2 (2000)(underline added).

To combat attempts by corporate insiders to put themselves at the front of the line as Sanders did here, courts have developed two remedies. The first is equitable subordination: Regardless how technically correct the transaction might have been from a purely legal point of view, the insider’s claim nevertheless is subordinated to the claims of genuine, arms-length corporate creditors. *See, e.g., Pepper v. Litton, supra*, 308 U.S. 309-310; *Matter of Herby’s Foods, Inc.*, 2 F.3d 128 (5th Cir. 1993); *Costello v. Fazio*, 256 F.2d 903, 910 (9th Cir. 1958); *Boyum v. Johnson*, 127 F.2d 491, 494 (8th Cir. 1942); *In re Hyperion Enterprises, Inc.*, 158 B.R. 555 (D.R.I. 1993).

The second remedy is to recharacterize an insider’s so-called “loan” as shareholder equity, thus restoring the risk-allocation model outlined by Justice Hand. *See, Rabinowitz and Rotenberg Bankruptcy Workouts Manual* §8:41 (West 2014); *see, also, Hyperion, supra*, 158

B.R. at 561. This second remedy can only apply where (as here) the insider also is a shareholder. As a result of the recharacterization, the insider is only entitled to the equity left over after the real, arms-length creditors have been paid. *See*, RCW 23B.06.400(2); *In re Poole, McGonigal & Dick*, 796 F.2d 318, 323 (9th Cir. 1986), *quoting Robinson v. Wangemann*, 75 F.2d 756, 757 (5th Cir.1935)(“The assets of a corporation are the common pledge of its creditors, and stockholders are not entitled to receive any part of them unless creditors are paid in full”).

With a one-man corporation such as SCV, the legal distinctions between equitable subordination and debt recharacterization have no practical significance: Because the insider/fiduciary is both an officer and a controlling shareholder, either road leads to the same result.

The burden is on the insider/fiduciary to demonstrate the inherent fairness of the transaction. *See, Tacoma Ass'n of Credit Men v. Lester*, 72 Wash.2d 453, 458-9, 433 P.2d 901 (1967); *Saviano, supra*, 114 Wash. App. at 79; *Garner v. Pearson, supra* 545 F.Supp. at 558. Appellants' efforts fall far short. Sanders and Soos Creek cite the general proposition that preferences are not illegal *per se*, and an insolvent debtor may prefer one creditor over another. *See, Public Utility Dist. No. 1 v. Washington Public Power Supply Sys.*, 104 Wn.2d 353, 379 , 705 P.2d 1195 (1985).

The short rebuttal: Not if the preference violates principals of equity. *See, Allen v. Kane*, 79 Wash. 248, 259, 140 P. 534 (1914).

The longer rebuttal is that the general rule only applies in the absence of contrary statutory authority, *PUD No. 1, supra*, and section 051(b) of the UFTA is a specific statutory exception to the general rule allowing preferences. *See, Farstveet, supra*, 630 N.W.2d at 30-31. Preferential transfers by an insolvent corporation, to corporate insiders in payment of an antecedent debt, are not allowed. *Id.* Further, Washington corporation law codifies the general principal that creditors are to be paid in preference to corporate shareholders. RCW 23B.06.400(2).

It is inequitable to allow an insider/fiduciary to circumvent these statutory principals through the simple device of declaring his initial investment in the corporation to be a “secured loan” completely encumbering the corporation’s only asset, and then to allow him to use the corporation to procure services that the insider knows the corporation can’t pay for if his so-called “security interest” is enforced as written. *Pepper, supra*, 308 U.S. at 309-10; *Saviano, supra*, 144 Wash. App. at 78 (rejecting argument that insider’s loan was enforceable because “he complied with the law” by filing UCC statements). But that is exactly what Sanders and SCV are trying to do here. The attempt fails as a matter of law.

5. **SANDERS DID NOT CREATE A MATERIAL ISSUE OF FACT**

Sander's argues there is a fact issue over whether he "acted in the normal course of business rather than with fraudulent intent." (Opening brief at 3) Proof of fraudulent intent, however, is not required. Section 051(b) does not mention intent, and a transfer in violation of this section is *constructively* fraudulent regardless of intent. *See, Truelove v. Buckley, supra*, 733 S.E.2d at 502; *Wilder v. Miller*, 17 P.3d 883, 887 (Idaho 2000); *Farstveet, supra*, 630 N.W.2d at 30. While Washington courts have not addressed section 051(b) specifically, they have held that when other UFTA sections do not specifically mention intent, this means proof of intent is not required. *See, Thompson v. Hanson*, 168 Wash.2d 738, 742, 239 P.3d 537 (2009); *accord, Osawa v. Onishi*, 33 Wash.2d 546, 555-556, 206 P.2d 498 (1949)(prior statute). This same reasoning applies here.¹²

There also is no competent evidence that the transfers in June 2005 were "in the normal course of business." As Sanders testified, the usual course of business was to pay creditors regardless of what the 1997 note and deed of trust said. (CP 275-279) The corporate accounts

¹² Because intent is not an issue, DBM's burden of proof is by a preponderance of the evidence rather than by clear and convincing evidence. *See, Clearwater v. Skyline Constr. Co.*, 67 Wash. App. 305, 321, 835 P.2d 257 (1992); *Matter of National Safe Northeast, Inc.*, 76 B.R. 896, 901 (D.Conn. 1987).

showed that this in fact was the case, and the June 2005 transfers were an isolated occurrence. (CP 243-4) The only reason DBM is not being paid is because Sanders does not consider DBM's judgment to be "legitimate." (CP 279-80) Argumentative assertions and unsupported statements in Sander's brief and opposing declarations cannot overcome this unambiguous evidence. *See, In re Kelly & Moesslang*, 170 Wash. App. 722, 738, 287 P.3d 12, 19 (2012); *Rizzuti v. Basin Traveler Service of Othello, Inc.*, 125 Wash. App. 602, 621, 105 P.3d 1012 (2005).

6. **ALTERNATIVELY THERE IS AN ISSUE OF FACT OVER WHETHER SANDER'S ALLEGED SECURITY INTEREST IS ENFORCEABLE IN EQUITY**

Sanders assigns error to the trial court's failure to grant his motion for summary judgment based on his UCC argument. Because the UFTA incorporates general principals of equity, RCW 19.40.902, the validity of Sander's purported lien is not measured by whether Sanders and his closely-held corporation meticulously satisfied technical legal requirements. *Pepper v. Litton, supra*, 308 U.S. at 311. Rather, the question is whether Sanders, the fiduciary, satisfied his burden of demonstrating the inherent fairness to creditors of the 1997 insider transaction that created the claimed security interest. *Saviano, supra*, 144 Wash. App. at 79; *Garner, supra*, 545 F.Supp. at 558. The circumstances

here—in which Sanders placed himself in front of all future creditors at the corporation’s very inception--demonstrate a blatant violation of fiduciary duty that cannot possibly satisfy this standard. At most, this question presents a fact issue for trial, and thus Sanders’ cross-motion for summary judgment was correctly denied.

B. THE UFTA’S EXTINGUISHMENT STATUTE DOES NOT APPLY.

1. SANDERS SHOULD HAVE MADE THIS ARGUMENT IN THE PRIOR APPEAL

Because Sanders had not been correctly served, this case was remanded “for further proceedings consistent with RCW 6.32.270.” (Slip op. at 6; CP 8) Pointing to the one-year extinguishment provision in RCW 19.40.091(c), Sanders’s complains that more than one year lapsed between the mandate and DBM’s service of a third Order To Show cause. (Opening brief at 2, 3, 21) Perhaps, but the mandate’s date has nothing to do with when the extinguishment statute began to run. It began to run “when the transfer was made,” *id.*, or at the latest when DBM became aware of the fraudulent conveyance. *Freitag v. McGhie*, 133 Wash.2d 816, 821-2, 947 P.2d (1997). All of that took place in 2005 and the prior appeal already determined that the motion in 2005 satisfied the statute.

It seems that the Sanders points to the mandate’s date because he wants to avoid some obvious questions: The prior appeal was decided in

2010, almost 4 years after the one-year statute lapsed in 2006, so if DBM was required serve Sanders to separately satisfy the statute as to Sanders, why bother to remand the case “for further proceedings consistent with RCW 6.32.270,” as the statute clearly had lapsed? And if Sanders believed the statute had lapsed and remand was futile, shouldn’t he have made that argument in the prior appeal? And having failed to make that argument, didn’t Sanders abandon it?

The answer is “yes.” By failing to argue a potentially dispositive point in the prior appeal, Sanders abandoned it. *See, Bank of Am., N.A. v. Owens*, 177 Wash. App. 181, 193, 311 P.3d 594, 600 (2013). Any other result is one “in effect allowing [appellant] to sit on its . . . [alternative] theory and raise it upon not prevailing on its initial theory. Doing so flies squarely in the face of the indisputable policy against allowing piecemeal appeals.” *Id.*

2. THE MOTION FILED IN 2014 RELATED BACK TO THE ORIGINAL MOTION THAT WAS TIMELY FILED IN 2005

a. REVIEW IS FOR ABUSE OF DISCRETION

As will be shown, the present appeal involves amendment of a pleading (DBM’s original motion in 2005) and, therefore, application of CR 15(c), which determines whether, for statute of limitations purposes, an amendment relates back to the original pleading’s timely filing date.

The trial court allowed the amended pleading to relate back. Such decisions are reviewed for abuse of discretion. *See, Watson v. Emard*, 165 Wash. App. 691, 702, 267 P.3d 1048, 1054 (2011); *Nepstad v. Beasley*, 77 Wash. App. 459, 468, 892 P.2d 110, 115 (1995).

b. BECAUSE SANDERS ALREADY WAS A PARTY TO THE LAWSUIT, THE NEW MOTION AUTOMATICALLY RELATES BACK TO 2005

The rebuttal to Sanders' argument is found in CR 15(c). The first sentence states:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The above sentence applies when new claims are asserted against existing parties. *See, Stansfield v. Douglas County*, 146 Wash. 2d 116, 122, 43 P.3d 498, 501 (2002); *see, also, In re Frank Santora Equip. Corp.*, 256 B.R. 354, 367-8 (E.D.N.Y. 2000)(applying rule to newly asserted fraudulent conveyance claim). This is because once litigation has begun, "the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of claims that arise out of the same conduct as set forth in the original pleading." 146

Wash.2d at 122-3, *quoting Causo v. Local Union No. 690*, 100 Wash.2d 343, 351, 670 P.2d 240 (1983).

There is no question here that the Sanders was and always has been a party. He is named in the caption. He participated in the prior appeal. He even requested attorney fees in that appeal as the prevailing party. (CP 253).

DBM's original, timely fraudulent conveyance motion was a "pleading." Black's defines "pleading" as follows:

pleading, *n.* (16c) **1.** A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. • In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer.

Black's Law Dictionary (9th ed. 2009)(online version).

DBM's 2005 motion was a formal document that set forth a new fraudulent conveyance claim. It satisfied the statute of limitations and thus functioned as the "pleading" for that claim. This result is consistent with the general purpose of the civil rules, which favor reaching the merits over ultra-technical interpretations. *See, Kohl v. Zemiller*, 12 Wash. App. 370, 372, 529 P.2d 861, 862 (1974); *Petrarca v. Halligan*, 83 Wash. 2d 773, 775, 522 P.2d 827, 828 (1974).

Since DBM's original motion in 2005 was a pleading, the motion for summary judgment DBM brought in 2014, after remand, can be

treated as an amendment of the original “pleading,” making it crystal clear that DBM’s fraudulent conveyance claim was against Sanders personally as well as Sanders in his corporate capacity. As an amended pleading, it is subject to CR 15(c). When an amended claim adds new claims against existing parties, the amended claim automatically relates back to the original claim’s timely filing date. *Stansfield, supra*.

Sanders cites RCW 6.32.130 for the proposition that an order to show cause order must be served. Sanders misunderstands the issue. The question isn’t whether Sanders was correctly served with DBM’s original motion in 2005 (he wasn’t) or with a show cause order in 2014 (he was), but whether the failure to serve the original motion in 2005 caused the statute to run when DBM’s 2005 motion was timely filed and Sanders already was a party to the lawsuit?

According to CR 15(c), the answer is “no.” While Sanders was entitled to service of DBM’s motion in 2005, the failure to serve a motion on an *existing* party is not at the same level as failing to serve a party who has no prior connection with the lawsuit and thus remains in danger of losing defenses through the passage of time. Treating Sanders as an entirely new party under these circumstances, and allowing the statute of limitations to continue to run, would be an ultra technical approach that would not advance the statute’s general policy of protecting persons from

“stale claims.” *See, Schroeder v. Weighall*, 179 Wash. 2d 566, 580, 316 P.3d 482, 489 (2014).

The UFTA’s unique statutory language supports such a result. A normal statute of limitations limits the time within which a lawsuit must be “commenced.” RCW 4.16.005. A suit against a particular party is not commenced until it is served. *See, RCW 4.16.170; Tellinghuisen v. King Cnty. Council*, 103 Wash. 2d 221, 223, 691 P.2d 575, 576 (1984). If the statute of limitations is not complied with, the cause of action still survives but the ability to sue a particular defendant does not. *See, CHD, Inc. v. Taggart*, 153 Wash. App. 94, 106, 220 P.3d 229, 235 (2009)(“if the statute of limitations has expired, the debt is not extinguished; Taggart is simply left with no remedy to collect on the obligation”)

The UFTA is different. It says “[a] cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought” within the specified time period. RCW 19.40.091. Unlike a statute of limitations, the UFTA extinguishes the cause of action itself rather than limiting the time for “commencement” of an action. *See, United States v. Bacon*, 82 F.3d 822, 823 (9th Cir. 1996).

Here, Division One has already said the UFTA cause of action was not extinguished, because action was timely brought within the one-

year time limit. Since the cause of action remains viable and there is no separate limitation on “commencement,” the statute has not run as to Sanders. This result makes sense where, as here, the party bringing the UFTA claim makes that claim in the context of an *existing* suit, against *existing* parties, and is not filing a new lawsuit or adding entirely new parties.

c. **ALTERNATIVELY, IF SANDERS IS TREATED AS A NEW PARTY, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE AMENDMENT TO RELATE BACK**

The second sentence of CR 15(c) states:

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

This sentence exists because even if the amendment adds a new party to the lawsuit “once the notice and prejudice requirements of the rule have been met, any amendment does not subvert the policies of the statute of limitations.” *North Street Ass'n v. City of Olympia*, 96 Wash.2d 359, 368, 635 P.2d 721 (1981), *overruled on other grounds by Sidis v.*

Brodie/Dohrmann, Inc., 117 Wash.2d 325, 815 P.2d 781 (1991); *see, Stansfield, supra*, 146 Wash.2d at 122.

DBM's claim against Sanders easily meets criteria (1). As the sole owner and officer of SCV, Sanders has personally participated in the defense since day one and thus has had ample notice of the action. On October 19, 2005, only 2 weeks after DBM filed its original motion, Mr. Sanders filed a declaration opposing DBM's fraudulent transfer claim. (CP 256) Sanders personally participated in the prior appeal. (CP 8-9) And, regardless of corporate formalities, as far as knowledge goes there is no difference between SCV and Sanders: He is the only shareholder and officer; so his knowledge and SCV's knowledge are the same thing. *See, Plywood Marketing Associates v. Astoria Plywood Corp*, 16 Wash. App. 566, 575, 558 P.2d 283 (1976).

Sanders cannot establish prejudice. Sanders' opening brief on appeal does not even mention the issue of prejudice, much less does it provide adequate argument or citations to the record. *See, Smith v. Behr Process Corp.*, 113 Wash. App. 306, 338, 54 P.3d 665, 682 (2002); *CTVC of Hawaii, Co. v. Shinawatra*, 82 Wash. App. 699, 711, 919 P.2d 1243, 1250 (1996) *modified*, 932 P.2d 664 (1997).

As for criteria (2), Sanders actually has known that but for DBM's error, he would have been correctly served with the original motion.

After all, it was Sanders who was arguing in the prior appeal that he should have been served with the motion.

While criteria (1) and (2) are met and CR 15(c) thus applies on its face, Washington case law has imposed an additional criteria that CR 15 “still does not permit joinder if the plaintiff’s delay is due to inexcusable neglect.” *North Street, supra*, 96 Wash.2d 359, 368-9, 635 P.2d 721 (1981).¹³ “[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” *South Hollywood Hills Citizens Ass’n v. King County*, 101 Wash.2d 68, 78, 677 P.2d 114 (1984). Under the same rubric, “a conscious decision, strategy or tactic” prevents relation back of an amendment adding a party. *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.*, 115 Wash.2d 339, 349, 797 P.2d 504 (1990).

The trial court did not abuse its discretion in determining there was no neglect, and certainly no “inexcusable” neglect. Some cases suggest the inquiry only focuses on the “initial failure to name the party.” *South Hollywood Hills, supra*. The initial failure in 2005 took place because DBM’s counsel at the time served the motion on the attorneys who had originally appeared for Sanders rather than the attorneys who substituted later. (CP 218, 232)

¹³ The inexcusable neglect rule does not apply to amendments adding new claims against existing parties. *Stansfield, supra*, 146 Wash.2d at 122.

Sanders argument, however, focuses on the lapse of time between remand in 2011 and the eventual hearing date in 2014. (Opening brief at 21) The time line (set forth at page 12-14, *supra*) does not demonstrate “inexcusable neglect.” The “inexcusable neglect” standard in CR 15(c) should not be confused with the “due diligence” standard applied when vacating default judgments. *See, Perrin v. Stensland*, 158 Wash. App. 185, 201-02, 240 P.3d 1189, 1197 (2010). A due diligence standard would change the focus from prejudice to the new party, which CR 15(c) is concerned with, to how quickly the plaintiff moved regardless of prejudice. Delay that causes no prejudice is irrelevant, so long as the delay is explained and does not appear to be the result of tactical manipulations. *Id.* Any delay was explained here, and the trial court did not abuse its discretion in accepting the explanation and allowing the amendment to relate back.

C. **DBM IS ENTITLED TO ATTORNEY FEES TO THE EXTENT IT PREVAILS AGAINST SOOS CREEK VISTAS, INC.**

In the prior opinion, the Court ruled that as between DBM and SCV, the party prevailing on appeal is entitled to attorney fees. (Slip op. at 6-7; CP 8-9). In addition, the trial court on remand awarded attorney fees to DBM, and that order was not appealed. (CP 989) Thus, when

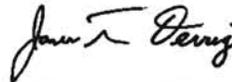
DBM prevails here, it is entitled to a partial attorney fee award representing the time incurred as to SCV.

IV. CONCLUSION

For the above reasons, the trial court's order granting summary judgment to DBM should be affirmed, and DBM should be awarded the attorney fees it incurred on appeal relative to Soos Creek Vistas, Inc.

DATED this 26th day of January 2015.

JAMES T. DERRIG
ATTORNEY AT LAW PLLC



James T. Derrig, WSBA 13471
Attorney for DBM

APPENDIX

West's Revised Code of Washington Annotated Title 4. Civil Procedure (Refs & Annos) Chapter 4.16. Limitation of Actions (Refs & Annos)
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West's RCWA 4.16.005

4.16.005. Commencement of actions

Currentness

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

Credits

[1989 c 14 § 1.]

Notes of Decisions (29)

West's RCWA 4.16.005, WA ST 4.16.005

Current with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.16. Limitation of Actions (Refs & Annos)

West's RCWA 4.16.170

4.16.170. Tolling of statute--Actions, when deemed commenced or not commenced

Currentness

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

Credits

[1971 ex.s. c 131 § 1; 1955 c 43 § 3. Prior: 1903 c 24 § 1; Code 1881 § 35; 1873 p 10 § 35; 1869 p 10 § 35; RRS § 167, part.]

Notes of Decisions (94)

West's RCWA 4.16.170, WA ST 4.16.170

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West's Revised Code of Washington Annotated Title 6. Enforcement of Judgments (Refs & Annos) Chapter 6.32. Proceedings Supplemental to Execution
--

West's RCWA 6.32.130

6.32.130. Service of orders

Currentness

An injunction order or an order requiring a person to attend and be examined made as prescribed in this chapter must be served by delivering to the person to be served a certified copy of the original order and a copy of the affidavit on which it was made. In the case of an order requiring a person to attend and be examined and not imposing injunctive restraints, a noncertified copy may be served if the noncertified copy bears a stamp or notation indicating the name of the judge or commissioner who signed the original order, and a stamp or notation indicating the original order has been filed with the court.

Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered. Where an order is personally served upon a corporation, unless the officer to be served is specially designated in the order, the order may be served upon any person upon whom a summons can be served.

Credits

[1995 c 73 § 1; 1925 ex.s. c 38 § 1; 1893 c 133 § 13; RRS § 625.]

Notes of Decisions (6)

West's RCWA 6.32.130, WA ST 6.32.130

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West's Revised Code of Washington Annotated
Title 6. Enforcement of Judgments (Refs & Annos)
Chapter 6.32. Proceedings Supplemental to Execution

West's RCWA 6.32.270

6.32.270. Adjudication of title to property--Jury trial

Currentness

In any supplemental proceeding, where it appears to the court that a judgment debtor may have an interest in or title to any real property, and such interest or title is disclaimed by the judgment debtor or disputed by another person, or it appears that the judgment debtor may own or have a right of possession to any personal property, and such ownership or right of possession is substantially disputed by another person, the court may, if the person or persons claiming adversely be a party to the proceeding, adjudicate the respective interests of the parties in such real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor. If the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto, and shall set such proceeding for hearing on the first open date in the trial calendar. Any person so made a party, or any party to the original proceeding, may have such issue determined by a jury upon demand therefor and payment of a jury fee as in other civil actions: PROVIDED, That such person would be entitled to a jury trial if the matter was adjudicated in a separate action.

Credits

[1923 c 160 § 4; RRS § 638-1.]

Notes of Decisions (26)

West's RCWA 6.32.270, WA ST 6.32.270

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West's RCWA 19.40.011

C West's Revised Code of Washington Annotated Currentness
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.40. Uniform Fraudulent Transfer Act (Refs & Annos)

→ 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.

West's RCWA 19.40.011

(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

West's RCWA 19.40.011

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.

CREDIT(S)

[1987 c 444 § 1.]

HISTORICAL AND STATUTORY NOTES

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

Source:

Former § 19.40.010.

West's RCWA 19.40.091

C West's Revised Code of Washington Annotated Currentness
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.40. Uniform Fraudulent Transfer Act (Refs & Annos)

→ 19.40.091. Extinguishment of cause of action

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

- (a) Under RCW 19.40.041(a)(1), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
- (b) Under RCW 19.40.041(a)(2) or 19.40.051(a), within four years after the transfer was made or the obligation was incurred; or
- (c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.

CREDIT(S)

[1987 c 444 § 9.]

HISTORICAL AND STATUTORY NOTES

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

West's RCWA 19.40.051

C West's Revised Code of Washington Annotated Currentness
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
 Chapter 19.40. Uniform Fraudulent Transfer Act (Refs & Annos)

→ 19.40.051. Transfers fraudulent as to present creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

CREDIT(S)

[1987 c 444 § 5.]

HISTORICAL AND STATUTORY NOTES

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

West's RCWA 19.40.902

C West's Revised Code of Washington Annotated Currentness
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.40. Uniform Fraudulent Transfer Act (Refs & Annos)

→ 19.40.902. Supplementary provisions

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

CREDIT(S)

[1987 c 444 § 10.]

HISTORICAL AND STATUTORY NOTES

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

Source:

Former § 19.40.110.

RESEARCH REFERENCES

Treatises and Practice Aids

27 Wash. Prac. Series § 5.145, Creditors' Remedies.

West's RCWA 19.40.902, WA ST 19.40.902

Current with 2008 Legislation effective through June 11, 2008

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West's Revised Code of Washington Annotated
Title 23b. Washington Business Corporation Act (Refs & Annos)
Chapter 23B.06. Shares and Distributions (Refs & Annos)

West's RCWA 23B.06.400

23B.06.400. Distributions to shareholders

Effective: July 26, 2009

Currentness

(1) A board of directors may approve and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (2) of this section.

(2) No distribution may be made if, after giving it effect:

(a) The corporation would not be able to pay its liabilities as they become due in the usual course of business; or

(b) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(3) For purposes of determinations under subsection (2) of this section:

(a) The board of directors may base a determination that a distribution is not prohibited under subsection (2) of this section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances; and

(b) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section.

(4) The effect of a distribution under subsection (2) of this section is measured:

(a) In the case of a distribution of indebtedness, the terms of which provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made; or

(b) In the case of any other distribution:

(i) If the distribution is by purchase, redemption, or other acquisition of the corporation's shares, the effect of the distribution is measured as of the earlier of the date any money or other property is transferred or debt incurred by the corporation, or the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(ii) If the distribution is of indebtedness other than that described in subsection (4) (a) and (b)(i) of this section, the effect of the distribution is measured as of the date the indebtedness is distributed; and

(iii) In all other cases, the effect of the distribution is measured as of the date the distribution is approved if payment occurs within one hundred twenty days after the date of approval, or the date the payment is made if it occurs more than one hundred twenty days after the date of approval.

(5) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent provided otherwise by agreement.

(6) In circumstances to which this section and related sections of this title are applicable, such provisions supersede the applicability of any other statutes of this state with respect to the legality of distributions.

(7) A transfer of the assets of a dissolved corporation to a trust or other successor entity of the type described in RCW 23B.14.030(4) constitutes a distribution subject to subsection (2) of this section only when and to the extent that the trust or successor entity distributes assets to shareholders.

Credits

[2009 c 189 § 12, eff. July 26, 2009; 2006 c 52 § 2, eff. June 7, 2006; 1990 c 178 § 10; 1989 c 165 § 59.]

Notes of Decisions (26)

West's RCWA 23B.06.400, WA ST 23B.06.400

Current with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)

West's Revised Code of Washington Annotated
Title 62a. Uniform Commercial Code (Refs & Annos)
Article 9a. Secured Transactions; Sale of Accounts, Contract Rights and Chattel Paper (Refs & Annos)
Part 1. General Provisions
Sub Part 1. Short Title, Definitions, and General Concepts

West's RCWA 62A.9A-104

62A.9A-104. Control of deposit account

Currentness

(a) **Requirements for control.** A secured party has control of a deposit account if:

- (1) The secured party is the bank with which the deposit account is maintained;
- (2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
- (3) The secured party becomes the bank's customer with respect to the deposit account.

(b) **Debtor's right to direct disposition.** A secured party that has satisfied subsection (a) of this section has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

Credits

[2001 c 32 § 17; 2000 c 250 § 9A-104.]

Editors' Notes

UNIFORM COMMERCIAL CODE COMMENTS

1. **Source.** New; derived from Section 8-106.

2. **Why "Control" Matters.** This section explains the concept of "control" of a deposit account. "Control" under this section may serve two functions. First, "control ... pursuant to the debtor's agreement" may substitute for an authenticated security agreement as an element of attachment. See Section 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See Section 9-312(b)(1).

3. **Requirements for "Control."** This section derives from Section 8-106 of Revised Article 8, which defines "control" of securities and certain other investment property. Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor's deposit account is maintained may assert a claim against the deposit account.

Example: D maintains a deposit account with Bank A. To secure a loan from Banks X, Y, and Z, D creates a security interest in the deposit account in favor of Bank A, as agent for Banks X, Y, and Z. Because Bank A is a “secured party” as defined in Section 9-102, the security interest is perfected by control under subsection (a)(1).

Under subsection (a)(2), a secured party may obtain control by obtaining the bank's authenticated agreement that it will comply with the secured party's instructions without further consent by the debtor. The analogous provision in Section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party's instructions suffices for “control” of a deposit account under this section even if the bank's agreement is subject to specified conditions, e.g., that the secured party's instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the *debtor's* further consent, the statute explicitly provides that the agreement would *not* confer control.) See revised Section 8-106, Comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank's “customer,” as defined in Section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-401(a), 4-403(a).

As is the case with possession under Section 9-313, in determining whether a particular person has control under subsection (a), the principles of agency apply. See Section 1-103 and Restatement (3d), Agency § 8.12, Comment b.

Although the arrangements giving rise to control may themselves prevent, or may enable the secured party at its discretion to prevent, the debtor from reaching the funds on deposit, subsection (b) makes clear that the debtor's ability to reach the funds is not inconsistent with “control.”

Perfection by control is not available for bank accounts evidenced by an instrument (e.g., certain certificates of deposit), which by definition are “instruments” and not “deposit accounts.” See Section 9-102 (defining “deposit account” and “instrument”).

Notes of Decisions (1)

West's RCWA 62A.9A-104, WA ST 62A.9A-104

Current with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)

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West's Revised Code of Washington Annotated

Title 62a. Uniform Commercial Code (Refs & Annos)

Article 9a. Secured Transactions; Sale of Accounts, Contract Rights and Chattel Paper (Refs & Annos)

Part 3. Perfection and Priority

Sub Part 2. Perfection

West's RCWA 62A.9A-310

62A.9A-310. When filing required to perfect security interest or agricultural lien;
security interests and agricultural liens to which filing provisions do not apply

Effective: July 1, 2013

Currentness

(a) **General rule: Perfection by filing.** Except as otherwise provided in subsections (b) and (d) of this section and RCW 62A.9A-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) **Exceptions: Filing not necessary.** The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under RCW 62A.9A-308 (d), (e), (f), or (g);

(2) That is perfected under RCW 62A.9A-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in RCW 62A.9A-311(a);

(4) In goods in possession of a bailee which is perfected under RCW 62A.9A-312(d) (1) or (2);

(5) In certificated securities, documents, goods, or instruments which is perfected without filing, control, or possession under RCW 62A.9A-312 (e), (f), or (g);

(6) In collateral in the secured party's possession under RCW 62A.9A-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under RCW 62A.9A-313;

(8) In deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which is perfected by control under RCW 62A.9A-314;

(9) In proceeds which is perfected under RCW 62A.9A-315; or

(10) That is perfected under RCW 62A.9A-316.

(c) **Assignment of perfected security interest.** If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(d) **Further exception: Filing not necessary for handler's lien.** The filing of a financing statement is not necessary to perfect the agricultural lien of a handler on orchard crops as provided in RCW 60.11.020(3).

Credits

[2012 c 214 § 1508, eff. July 1, 2013; (2012 c 214 § 1507 expired July 1, 2013); 2011 c 74 § 709, eff. July 1, 2013; 2000 c 250 § 9A-310.]

Editors' Notes

UNIFORM COMMERCIAL CODE COMMENTS

1. **Source.** Former Section 9-302(1), (2).

2. **General Rule.** Subsection (a) establishes a central Article 9 principle: Filing a financing statement is necessary for perfection of security interests and agricultural liens. However, filing is not necessary to perfect a security interest that is perfected by another permissible method, see subsection (b), nor does filing ordinarily perfect a security interest in a deposit account, letter-of-credit right, or money. See Section 9-312(b). Part 5 of the Article deals with the office in which to file, mechanics of filing, and operations of the filing office.

3. **Exemptions from Filing.** Subsection (b) lists the security interests for which filing is not required as a condition of perfection, because they are perfected automatically upon attachment (subsections (b)(2) and (b)(9)) or upon the occurrence of another event (subsections (b)(1), (b)(5), and (b)(9)), because they are perfected under the law of another jurisdiction (subsection (b)(10)), or because they are perfected by another method, such as by the secured party's taking possession or control (subsections (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), and (b)(8)).

4. **Assignments of Perfected Security Interests.** Subsection (c) concerns assignment of a perfected security interest or agricultural lien. It provides that no filing is necessary in connection with an assignment by a secured party to an assignee in order to maintain perfection as against creditors of and transferees from the original debtor.

Example 1: Buyer buys goods from Seller, who retains a security interest in them. After Seller perfects the security interest by filing, Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on X's part, continues perfected against *Buyer's* transferees and creditors.

Example 2: Dealer creates a security interest in specific equipment in favor of Lender. After Lender perfects the security interest in the equipment by filing, Lender assigns the chattel paper (which includes the perfected security interest in Dealer's equipment) to X. The security interest in the equipment, in X's hands and without further steps on X's part, continues perfected against *Dealer's* transferees and creditors. However, regardless of whether Lender made the assignment to secure Lender's obligation to X or whether the assignment was an outright sale of the chattel paper, the assignment creates a security interest in the chattel paper in favor of X. Accordingly, X must take whatever steps may be required for perfection in order to be protected against *Lender's* transferees and creditors with respect to the chattel paper.

Subsection (c) applies not only to an assignment of a security interest perfected by filing but also to an assignment of a security interest perfected by a method other than by filing, such as by control or by possession. Although subsection (c) addresses explicitly only the absence of an additional filing requirement, the same result normally will follow in the case of an assignment of a security interest perfected by a method other than by filing. For example, as long as possession of collateral is maintained by an assignee or by the assignor or another person on behalf of the assignee, no further perfection steps need be taken on account of the assignment to continue perfection as against creditors and transferees of the original debtor. Of course, additional action may be required for perfection of the assignee's interest as against creditors and transferees of the *assignor*.

Similarly, subsection (c) applies to the assignment of a security interest perfected by compliance with a statute, regulation, or treaty under Section 9-311(b), such as a certificate-of-title statute. Unless the statute expressly provides to the contrary, the security interest will remain perfected against creditors of and transferees from the original debtor, even if the assignee takes no action to cause the certificate of title to reflect the assignment or to cause its name to appear on the certificate of title. See PEB Commentary No. 12, which discusses this issue under former Section 9-302(3). Compliance with the statute is “equivalent to filing” under Section 9-311(b).

West's RCWA 62A.9A-310, WA ST 62A.9A-310

Current with all 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)

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