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Court of Appeals
Division I
State of Washington

No. 73434-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

PER and MELODY WESTERDAL,

Defendants/Appellants,

v.

NAME INTELLIGENCE, INC., JAY WESTERDAL,
AND WESTERDALCORP, LLC,

Defendants/Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Receivership proceedings work only so long as parties in interest, the debtor in particular, are prevented from gaming the system and using it toward their own, self-serving purposes. The essential components in protecting the integrity of such a proceeding are: 1) a disinterested administrator; 2) proper supervision by the court; and 3) fulfillment of the Debtors' affirmative obligations. Only the first of these components was present in this case.

In order to settle a lawsuit filed in King County Superior Court in 2010 by Plaintiff Raymond Bero ("Bero"), Defendants/Appellants Per and Melody Westerdal ("the Senior Westerdals") and Defendants/Respondents Jay Westerdal ("Jay") [the Senior Westerdals' son], Name Intelligence, Inc. ("NI"), and Westerdalcorp, LLC, ("Westerdalcorp") (Defendants/Respondents collectively referred to as "the Debtors") entered into a settlement agreement with Bero ("Settlement Agreement"). The Settlement Agreement included a Security Agreement that provided in the event of default, the Debtors would not oppose the appointment of a general receiver. The Debtors defaulted, triggering the Senior Westerdals' liability as guarantors that they were forced to satisfy. The Debtors' acts of default included alleged wrongful attempts to sell property that was collateralized in the Security Agreement without providing for payment to Bero.

A general receiver was appointed, which the Debtors opposed in contravention of the Security Agreement. The Debtors, whose attorney represented the Senior Westerdals in the prior proceedings, was

uncooperative and, at times, untruthful; in fact, Jay actively interfered with the administration of the Receivership.

Jay obtained funds from “a friend” to pay the amounts owed to Bero. The identity of the friend was hidden under seal and Jay initially refused to disclose details regarding the funds, even privately, to the Receiver.

Once those funds were obtained and their source was concealed by court order, the Debtors asked the trial court to terminate the Receivership – not by motion, but in a memorandum opposing the Senior Westerdals’ motion to compel the sale of an asset partially owned by the Senior Westerdals. When this matter was first considered, Judge Schubert, who had tried the underlying case and was administering the Receivership, denied the dismissal. Unfortunately, Judge Schubert was rotated to ITA Court, and a new judge, unfamiliar with the case and the prior actions of the Debtors, was assigned to the case.

Despite the Receivership estate being solvent, and despite there being valid, unpaid creditor’s claims, the trial court inexplicably terminated the Receivership over the objections of the Senior Westerdals and the Receiver. In doing so, it rewarded the Debtors’ misconduct and the conflict of Debtors’ counsel. The trial court also disregarded the Senior Westerdals’ subrogation rights and their statutory rights as creditors of the creditors of the Receivership.

This is a matter of first impression for the Court. Its significance cannot be understated because the Court’s decision will shape the future of Washington’s receivership statute.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it interpreted ¶2.52 of the Order Appointing General Receiver as *requiring* termination of the receivership rather than as a condition *precedent to* termination.

Issue Pertaining to Assignment of Error 1. When the receivership is solvent, there are filed creditor's claims, and there is the ability to pay them, is it error to direct the Receiver to close the case without paying creditors over the objections of creditors?

Assignment of Error No. 2: The trial court erred in failing to subrogate the Senior Westerdals to Bero to the extent the Senior Westerdals satisfied the Debtors' liability to Bero.

Issue Pertaining to Assignment of Error 2: When creditors have, pursuant to a guaranty, paid claims of the principal, are they surrogated to the rights of the principal in a receivership?

Assignment of Error No. 3: The trial court erred when it ordered the closing of the Receivership without resolving creditor claims.

First Issue Pertaining to Assignment of Error No. 3: Did the trial court err by terminating the Receivership in light of RCW 7.60.220(1), that vests in creditors a rights to share in distributions from the receivership estate unless their claims are disallowed?

Second Issue Pertaining to Assignment of Error No. 3: Did the trial court err when it disregarded its authority over the Receivership assets and Debtors and ordered termination of the Receivership with unpaid claims?

Assignment of Error No. 4: The trial court erred in interpreting Washington's receivership statutes in a manner that invites abuse by ignoring serious allegations of the debtor's misconduct and substantial prejudice to creditors.

Issue pertaining to Assignment of Error 4: When there are allegations the debtor has engaged in inequitable and unlawful conduct that has affected the receivership administration, is it proper to reward the debtor with a dismissal of the case to his benefit and at the expense of creditors?

III. STANDARD OF REVIEW

This appeal presents a pure question of law regarding the interpretation of the Washington receivership statute RCW 7.60. Accordingly, the trial court's decision is reviewed "de novo". *State v. Ammons*, 136 Wn. 2d 453, 693 P.2d 812 (1998). To the extent this appeal presents subsidiary issues involving determinations of fact, those issues are reviewed under the "substantial evidence" standard. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

IV. STATEMENT OF THE CASE

This appeal concerns the termination of a general receivership that was ordered by Judge Schubert in King County Superior Court on July 31, 2014. CP 204-228. The parties agreed to appointment of a receiver in the Settlement Agreement.¹ The Settlement Agreement was comprehensive

¹ See Exhibit E, Security Agreement, supplied to the Court of Appeals with Appellant's Second Designation of Clerk's Papers, Exhibit List, Sub 5, p. 38 ¶ 11(g).

and included pledging of collateral owned in part by the Senior Westerdals who also executed a guaranty in Bero's favor.² Liability under the guaranty would be triggered by the Debtors' default.

Foreshadowing his conduct in the Receivership, Jay attempted to sell certain Internet domain names that were collateralized under the Settlement Agreement without Bero's knowledge or consent. CP 8 ¶ 35. Any proceeds Jay may have received would have been unaccounted for. CP 8 ¶ 36. This and other failures triggered default of the Settlement Agreement.

Bero commenced suit in 2013 to enforce the Settlement Agreement, including the appointment of a general receiver. The Debtors opposed the appointment of a receiver while being represented by Mr. Sternberg who was also the Senior Westerdals' attorney. CP 146-160. The Debtors' opposition was unsuccessful; Resource Transition Consultants, LLC ("RTC"), through its agent, Kevin Hanchett, was appointed general receiver by Judge Schubert on July 31, 2014. CP 204-228. The powers and authority conferred on the Receiver included:

[T]he exclusive power and authority to manage, operate, maintain, secure, market, license[,] sell, repair, and control the Property; exercise all powers available to [the Debtors] and their agents, in their capacities as owners of the Property; and to do all things permitted pursuant to RCW 7.60.060, including but not limited to the leasing, licensing[,] marketing and sale of any of the receivership Property[.]

² See Exhibit D, Per and Melody Westerdal Guaranty, supplied to the Court of Appeals with Appellant's Second Designation of Clerk's Papers, Exhibit List, Sub 5, pp. 24-30.

CP 211 ¶ 2.5. The Receivership property that vested in the Receiver included “all of [Jay’s] stock ownership, voting, membership and management rights in NI and Westerdalcorp.” CP 211 ¶ 2.6. The Receiver’s authority was bolstered by an injunction against the Debtors prohibiting the Debtors from “obstructing, delaying, or interfering with Receiver in the performance of its duties or from taking any action purporting to transfer, encumber or dispose of the Property or any portion of it.” CP 215 ¶ 2.25.

Notice of the Receivership was sent to scheduled creditors by first class mail pursuant to RCW 7.60.200; however, the Senior Westerdals were not properly noticed since the address provided to the Receiver for them was an incorrect address. CP 853. Upon learning of the Receivership, the Senior Westerdals contacted the Receiver. After verifying notice had been sent to the wrong address, the Receiver advised the Senior Westerdals they could submit their claim. At no time did the Receiver object to their claim, whether on the ground of timeliness or otherwise.

The property within the Receiver’s control included the domain name holiday.com and a brokerage agreement for its sale. The brokerage agreement was negotiated pre-receivership between Jay and Breathe Luxury to sell holiday.com at the “World Travel Market,” an international trade show held annually for the travel industry. CP 289 ¶ 2.1. Jay set a reserve price for holiday.com at \$5.1 million. CP 290 ¶ 2.4. Breathe Luxury reserved an auction spot at World Travel Market in London on November 5, 2014. *Id.*

The Breathe Luxury agreement was valid and executory. Thus, its assumption and execution stood to substantially benefit the Receivership estate by producing funds sufficient to satisfy all the claims against the Debtors in an efficient, cost-effective manner. Conversely, rejection of the contract would have damaged the estate because it would constitute a pre-receivership breach, giving Breathe Luxury a large claim against the estate. *See* RCW 7.60.130(2).

The preferred course of action was obvious.

Jay Westerdal had other plans. On November 3, 2014 – two days before the scheduled auction – Jay sent a letter to Breathe Luxury and the trade show producer, Reed Expo, a letter that effectively canceled the auction of holiday.com:

This letter is to inform you that you are in breach of our agreement with myself and that you have not fulfilled your obligations under that contract. At this point with a breach of the agreement I do not consent to a sale and you are not allowed to sell the domain name under the terms of the agreement we have signed.

CP 307. Jay further stated that Breathe Luxury would need to negotiate a new agreement with the Receiver, while simultaneously suggesting the futility of doing so: “I think I have satisfied what I think RTC is responsible for collecting and I don’t think they would agree to a sale at this time.” *Id.*

Jay concluded the letter with a demand that Breathe Luxury “cease all efforts to sell our domain name and to remove the domain as publicly listed for sale unless you have a valid agreement.” He also threatened legal action. *Id.* Unsurprisingly, the auction of holiday.com did not go

forward. CP 304 ¶5. What is surprising is the brazenness of Jay's actions and his disregard of the provisions of the Order Appointing General Receiver ("Receivership Order").

The estate was obviously damaged by Jay's actions. *Id.* It lost a unique opportunity to sell the holiday.com domain name and was subject to a damage claim by Breathe Luxury. The Senior Westerdals, too, were harmed because they have an ownership interest in holiday.com.

Jay's reference in the letter to Breathe Luxury to having "satisfied what I think RTC is responsible for collecting" is another aspect of Jay's troublesome conduct in the Receivership proceedings. *Id.* Despite having previously failed to satisfy his obligation to Bero – a failure that brought the Receivership into being – once it became clear that holiday.com would be sold, Jay was suddenly possessed with the funds to pay Bero in full. Jay's statutory duty of assistance and cooperation notwithstanding, *see* RCW 7.60.080, the Receiver made repeated inquiries regarding the source of these funds in order to ensure they did not come from estate property. CP 291-292 ¶2.6; ¶2.7, ¶2.9; 293 ¶2.12.

The source of the funds was ordered sealed and cannot be described in detail here. To summarize, Jay received an advance for services he promised to furnish in the future. The declaration was signed by Jay. No one has ever been able to verify Jay's friend paid in excess of \$1 million for Jay's future services. No declaration by the source was ever filed. The Senior Westerdals were (and remain) concerned that holiday.com was bound up in, or likely to be affected by, the sealed transaction.

The Senior Westerdals subsequently moved the trial court for an order directing the Receiver to liquidate holiday.com. CP 591-92. Debtors opposed the motion. CP 766-788. Debtors also filed a motion to terminate the receivership. CP 597-613.

A prior attempt to terminate was denied by Judge Schubert, but this time, with a new judge, and conflicted counsel out, the Debtors' motion to terminate was granted. The trial court ordered that the Receivership be terminated notwithstanding: (a) a surplus of funds available for distribution to creditors; (b) serious and unaddressed misconduct by the Debtors and, potentially, the Debtors' conflicted counsel; (c) the Senior Westerdals' subrogation rights; and (d) the presumptively valid claim filed by the Senior Westerdals. CP 908-909. To the trial court, the Senior Westerdals' rights would be sufficiently protected if they simply filed a separate lawsuit. *Id.*

As directed by the trial court, the Receiver filed a motion to approve his final account, distribute remaining funds to the Debtor, and terminate the receivership. At the same time, the Senior Westerdals asked the trial court to reconsider its decision to terminate the Receivership.³ Accompanying the motion to reconsider was evidence obtained regarding a transfer of holiday.com. CP 928-937. The trial court was unmoved, however, and denied the Senior Westerdals' motion. CP 986-987.

³ See Motion for Reconsideration, supplied to the Court of Appeals in Second Designation of Clerk's Papers, Sub 195.

V. SUMMARY OF ARGUMENT

The trial court erred in interpreting the receivership statute RCW 7.60, and the operative document in this case as requiring termination of the Receivership upon satisfaction of the Debtors' liability to Raymond Bero. CP 220 ¶2.52. The trial court's interpretation of the Receivership Order was at odds with the language of the specific provision interpreted, the provisions of that Order directed at creditors generally, and the explanation of the provision given by the judge who signed that Order.

The trial court further erred when it cast aside the rights of the Senior Westerdals. The trial court showed no regard for their ownership interest in Receivership property or documented evidence of the Debtors' interference with that ownership interest. The trial court failed to give due regard to the Senior Westerdals' subrogation rights and the various statutory rights RCW 7.60 confers on receivership creditors.

The trial court further erred when it terminated the Receivership absent disallowance of filed claims in direct contradiction of statutory mandate. The trial court compounded its error by failing to utilize its authority to estimate the Senior Westerdals' claim and by depriving them of the statutory presumption that their claim was valid.

If allowed to stand, the trial court's termination of the Receivership invites abuse. The trial court expressed not one iota of concern about what can only charitably be described as questionable behavior by the Debtors. That behavior included failure to cooperate with the Receiver, interference with the Receiver's administration of the estate,

and allegations of interference with others' rights to property before and during the Receivership and, likely, to this day. In terminating the Receivership under a cloud of misbehavior, the trial court sent a signal: scoundrels may find comfort in the King County Superior Court.

VI. ARGUMENT

- A. Appointment of a general receiver places all assets of the debtor in the hands of the receiver and requires, absent the consent of creditors or exhaustion of receivership assets, completion of the proceeding before it is terminated.

Washington receivership law is codified at RCW 7.60. It provides for two different types of receiverships: general and custodial. A custodial receivership is limited; it is established for the purpose of taking control of a specific asset or group of assets. RCW 7.60.015.

A general receivership places *all assets* of the debtor in the hands of the receiver and provides a manner to liquidate all the assets and payment of creditors. RCW 7.60.015. A critical distinction between general and custodial receiverships is that in a general receivership there is a claims process for other creditors of the debtor. RCW 7.60.210; RCW 7.60.220.

In this case RTC was appointed a general receiver pursuant to the express terms ordered by the trial court. CP 204-228. Following appointment, the Receiver mailed to all known creditors notice of the general receivership and informing creditors of the Receivership Order and soliciting the filing of claims.

The notice sent to the Senior Westerdals was sent to an incorrect address while they were out of town. Nevertheless, upon learning of the

Receivership, they contacted the Receiver and submitted a claim. Their claim was later amended when they retained counsel, Marc S. Stern. An Amended Proof of Claim was filed on December 10, 2014.⁴ The amount of their claim was \$1,613,417.13.

- B. The trial court erred when it interpreted ¶2.52 of the Receivership Order as requiring termination of the Receivership rather than as a condition precedent to termination.

The trial court relied, incorrectly, on ¶2.52 of the Receivership Order, treating that provision as conclusive on the question of termination. Paragraph 2.52 states:

This Receivership Order shall terminate only upon payment in full of all amounts due the Receiver and satisfaction in full of all amounts due under the Judgment, including any advances made by Plaintiff as provided for herein.

CP 220 ¶ 2.52. The trial court’s misunderstanding of ¶2.52 is evident in ordering the termination of the Receivership:

While one could parse the language of the court’s July 2014 order, *supra*, to argue that this does not mandate the termination “upon payment in full,” the point of the receivership, set out in Bero’s motion last July, was for the purpose set out in ¶ 2.52 or Judge Schubert’s order. That condition has been met.

CP 909:24-26.⁴

“Parsing” is not required because ¶2.52 simply does not have the meaning the trial court ascribed to it. The placement of the word “only” ahead of “upon payment in full” makes ¶2.52 a condition precedent to termination, not a mandate for termination. The trial court’s interpretation

⁴ In this Brief, where a colon follows a CP cite, the number after the colon indicates the line numbers on the page.

writes “only” out of the order in a way that fundamentally alters the meaning of the phrase.

The trial court’s reference to “Judge Schubert’s order” is important and instructive. Judge Schubert presided over the proceedings below until December 2014 when he was rotated to another court. At a November 14, 2014 hearing before Judge Schubert, the meaning of ¶2.52 was discussed at some length. When the discourse concluded, all parties understood that Judge Schubert interpreted ¶2.52 of the Receivership Order he signed to be *a condition precedent to termination*, not a mandate compelling it:

I read 2.52 as the order appointing general receiver. And I signed it, so even though it was proposed to me by the wonderful folks at Karr Tuttle, it’s still my order, so I’ll take blame for any ambiguities in it. But the way I read 2.52 is that that is a sufficient but not a [sic] necessary language. What I mean by that is it says it “shall terminate only upon payment in full of all amounts due to Receiver in satisfaction in full of amounts due under the judgment including any advances made by plaintiff that is provided for herein.” It doesn’t say that it must terminate as soon as those things happen, but those things are conditioned proceeding [sic] to terminate. *You cannot terminate without those things happening, but that doesn’t mean it must terminate when those things happen.* That’s how I read it.

CP 868 (emphasis added). Judge Schubert reiterated his interpretation of ¶2.52 when Attorney Okrent, one of the Debtors’ attorneys, sought further clarification:

Well, so the “shall” language is that it shall terminate only upon payment in full of all amounts due. So that’s a condition precedent. That is a condition that has to be satisfied. But what that language to me doesn’t say is if it satisfies the receivership it’s [sic] terminated. The receivership can’t terminate without that happening.

...

But what I’m saying is it’s not an automatic termination. It doesn’t just terminate because you satisfied the condition,

but in order for it to terminate you must satisfy the condition.

CP 875.

The trial court's error in interpreting ¶2.52 is glaringly obvious: The trial court's interpretation of ¶2.52 is at odds with the provision's operative language and Judge Schubert's explanation of what that language means.

C. The trial court erred in failing to subrogate the Senior Westerdals to Bero to the extent they satisfied the Debtors' liability to Bero.

The Senior Westerdals executed a guaranty as part of the global Settlement Agreement with Bero and the Debtors.⁵ When the Debtors defaulted on their obligations, including Jay's alleged attempts to sell property collateralized by the Settlement Agreement without Bero's knowledge or consent, the Westerdals' liability was triggered. They satisfied their guaranty obligation, giving rise to their right of subrogation.

In *Mahler v. Szucs*, the court discussed subrogation at some length and its words bear repeating:

[Subrogation] applies in cases involving multiple claims upon the same property, suretyship, joint debtors, parties to bills and notes, the administration of estates, and contracts of insurance. Subrogation is favored in Washington law. "Subrogation is always liberally allowed in the interests of justice and equity." *J.D. O'Malley & Co. v. Lewis*, 176 Wash. 194, 201, 28 P.2d 283 (1934).

There are, in effect, two features to subrogation. The first is the right to reimbursement. The second is the mechanism for the enforcement of the right. The right to reimbursement may arise by operation of law, termed legal or

⁵ See Exhibit D, Per and Melody Westerdal Guaranty, supplied to the Court of Appeals with Appellant's Second Designation of Clerk's Papers, Exhibit List, Sub 5, pp. 24-30.

equitable subrogation, or by contract, called conventional subrogation. *Ross v. Jones*, 174 Wash. 205, 216, 24 P.2d 622 (1933).

The more troublesome question is the precise enforcement mechanism for the subrogee's right of reimbursement. Considerable imprecision on this question is present in case law on subrogation. By virtue of payments made to a subrogor stemming from the actions of a third party, a subrogee has a right of reimbursement under general subrogation principles. That reimbursement may be enforced as a type of lien against any recovery the subrogor secures from the third party. Alternatively, the subrogee, standing in the shoes of its subrogor, may pursue an action in the subrogor's name against the third party to enforce the reimbursement right.

Mahler v. Szucs, 135 Wash. 2d 398, 957 P.2d 632, 640 (Wash. 1998) (footnote omitted) (*rev'd* on other grounds). *See also, Columbia Community Bank v. Newman Park, LLC*, 177 Wn. 2d 566, 304 P.3d 472 (Wash. 2013) (where third party pays debt, party is subrogated to lender's interest thus preventing windfall to debtor).

As applied here, the only “troublesome question” is the one before this Court: Did the trial court err in terminating the Receivership? Washington's statutory receivership regime demonstrates the Receivership was the proper forum to enforce the Senior Westerdals' rights. To hold otherwise, as the trial court did, is to render superfluous the provisions of RCW 7.60 relating to creditor claims and to endorse an inefficient and wasteful use of parties' and courts' resources.

Prior to termination, the Senior Westerdals had the right to step into Bero's shoes because they were owed from the Receivership estate that portion of the Debtors' liability to Bero that the Senior Westerdals satisfied via the Guaranty. Therefore, even the trial court's faulty

interpretation of ¶2.52 is in error. Bero himself may well have been satisfied, but because that satisfaction depended in part on the Westerdals' contribution, ¶2.52's requirement that "all amounts due under the Judgment" be fully satisfied was not met.

D. The trial court erred when it ordered the closing of the General Receivership without addressing creditor claims.

The plain language of RCW 7.60.220(1) precludes termination of the Receivership. RCW 7.60.220(1) provides in pertinent part:

Claims properly served upon the general receiver and not disallowed by the court are entitled to share in distributions from the estate in accordance with the priorities provided for by this chapter or otherwise by law.

There was approximately \$68,000 available to pay creditor claims when the trial court terminated the Receivership. The Senior Westerdals' claim was properly served and was not disallowed by the trial court. Absent disallowance of their claim, the Senior Westerdals were "entitled to share in distribution from" the funds held by the Receiver.

The trial court's error is manifest. Through RCW 7.60.220(1), the Senior Westerdals acquired a statutorily vested right in the funds held by the Receiver. That right was only terminable by disallowance of the Senior Westerdals' claim.

The trial court compounded its error in its determination that the Senior Westerdals could pursue their Receivership claims by filing a separate lawsuit against the Debtors. CP 909; 987. Without acknowledging the irony, the trial court described this determination as a "just and reasonably speedy manner" of resolving the Senior Westerdals' claim. CP 908.

This determination evidences a number of errors in that it (1) relied on an incorrect interpretation of ¶2.52 of the Receivership Order as discussed above; (2) ignored the court's statutory authority regarding controversies arising in the Receivership; and (3) substantially prejudiced the Senior Westerdals.

Other than the first of these errors, as discussed in Section V.A. above, each will be discussed in turn.

1. The trial court ignored its statutory authority.

Trial courts are conferred with expansive authority in Receiverships and Assignments for the Benefit of Creditors by RCW 7.60.055, which in part provides:

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.

RCW 7.60.055(1). The authority provided by RCW 7.60.055(1) is recited verbatim in the Receivership Order. CP 210 ¶2.2.

The Receivership property within the trial court's control included property in which the Senior Westerdals have an ownership interest. The Senior Westerdals' claim is premised in part on Jay's interference with the

Receiver's liquidation of assets and the consequent diminution of the value of the property partially owned by the Senior Westerdals.

The Receiver intended to assume a contract with Breathe Luxury for the sale of the domain name holiday.com at a previously scheduled auction. CP 289 ¶ 2.2. Two days before the auction, Jay notified Breathe Luxury it was in breach of the sale contract and revoked Breathe Luxury's authority to sell holiday.com. CP 304:8-9; CP 307. Jay threatened legal action against Breathe Luxury and the venue in which the auction was to take place. *Id.* As a result, the auction was cancelled and the Senior Westerdals were deprived of their share of the sale proceeds. The lost value from the auction of holiday.com was substantial as the reserve price set by Jay was \$5.1 million. CP 290 ¶ 2.4.

The manner and extent to which Jay flouted the lower court's authority and interfered with the Receiver's administration of assets are precisely why statutes such as RCW 7.60.055(1) are enacted. Rather than exercising its statutorily-conferred authority, however, the trial court shrugged. Bero had been paid and the Senior Westerdals could bring a separate suit, the trial court declared, so no harm, no foul.

Further evidencing the trial court's error is RCW 7.60.220(3), that empowers the court to estimate an unliquidated claim where liquidation of that claim "would unduly delay the administration" of the receivership. Given the trial court's concern regarding the "complexity of the factual issues which the parties will need to flesh out through discovery," the Senior Westerdals' claim might have been a candidate for estimation. CP 909:1.

Courts interpreting identical language from the Bankruptcy Code, *see* 11 U.S.C. § 502(c), have held that whether a claim is liquidated or unliquidated depends on its value and the readiness with which that value can be ascertained. *In re Huelbig*, 313 B.R. 540, 544 (Bankr. D.R.I. 2004), quoting *In re Mazzeo*, 131 F.3d 295, 304 (2d Cir. 1997). The value of a claim is readily ascertainable if the amount due is evident “by reference to an agreement or by simple computation,” *In re Salazar*, 348 B.R. 559, 568 (Bankr. D. Colo. 2006), quoting *In re Robertson*, 143 B.R. 76, 79 (Bankr. N.D. Tex. 1992), or if the claim’s value can be determined after a simple evidentiary hearing versus one requiring an extensive hearing and the introduction of substantial evidence. *In re Huelbig*, 313 at 545, quoting *In re Weintraub*, 94 B.R. 631, 634 (9th Cir. B.A.P. 1988).

Whether the Senior Westerdals’ claim could have been estimated is not at issue. What matters is that the trial court deemed the Westerdal’s claim to be sufficiently complex to warrant termination of the Receivership without regard to whether it could eliminate that complexity through estimation.

2. The trial court substantially prejudiced the Senior Westerdals.

That collective proceedings,⁶ of which a general receivership is one, are prosecuted for the benefit of unsecured creditors, is so well settled as to be black letter law. When ranking priorities in collective

⁶ "Collective proceedings" means proceedings which are brought by a class representative on behalf of persons whose claims raise common issues and which may be instituted as a group action or a representative action; Cap 520.fm - Europa Aug 1, 2012. *See, Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1208 (9th Cir. 2005) (D.W. NELSON Dissent).

proceedings, debtors are last in line. If this case were an assignment for the benefit of creditors – a close analogy given the Debtors’ prior agreement to the general receivership – the Debtors’ consent would be irrevocable. *See* RCW 7.08.030. Likewise, the Bankruptcy Code imposes an absolute priority rule on chapter 11 debtors, permitting them to take nothing if unsecured creditors are not paid in full. 11 U.S.C. § 1129(b)(1). Chapter 13 debtors may not voluntarily dismiss their cases if they acted in bad faith. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). Before dismissing a chapter 7 case at the Debtors’ request, courts should require that no prejudice to creditors will result from the dismissal. *See In re Hopper*, 404 B.R. 302 (Bankr. N.D. Ill. 2009). Prejudice is found where dismissal results in the loss of assets available for distribution to creditors. *Id.*, citing *In re Harker*, 181 B.R. 326, 328 (Bankr. E.D. Tenn. 1995).

The trial court turned this settled, foundational principal on its head, to the Senior Westerdals’ substantial prejudice. When it terminated the Receivership, the trial court stripped away the statutory provisions intended to benefit creditors. It also forced the Senior Westerdals to bear the cost of the trial court’s failure to protect the Receivership assets from an uncooperative, misbehaving debtor whose counsel had an obvious disqualifying conflict of interest.

As discussed above, the appointment of a general receiver creates a right in the creditors to distribution from the estate. A critical component of the claims process is the manner in which the validity of a

claim is determined. Borrowing from Fed. R. Bankr. P. 3001(f), RCW 7.60.210(4) provides that a claim executed in accordance with the requirements set forth therein “constitutes prima facie evidence of the validity and amount of the claim.”

The effect of RCW 7.60.210(4) is the presumptive validity of a claim, which requires the objecting party produce evidence sufficient to overcome the presumption. As one court explained:

[T]he burden of going forward with the evidence then shifts to the objecting party to produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. This can be done by the objecting party producing specific and detailed allegations that place the claim into dispute, by the presentation of legal arguments based upon the contents of the claim and its supporting documents, or by the presentation of pretrial pleadings, such as a motion for summary judgment, in which evidence is presented to bring the validity of the claim into question. If the objecting party meets these evidentiary requirements, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence.

In re Armstrong, 320 B.R. 97, 104 (Bankr. N.D. Tex. 2005), quoting *In re Rally Partners*, 306 B.R. 165, 168-69 (Bankr. E.D. Tex. 2003).

The trial court disregarded RCW 7.60.210(4) in its entirety, depriving the Senior Westerdals of the intended benefit of the statute. The trial court's apparent belief that the Senior Westerdals' rights are protected by their ability to file a separate lawsuit is thus revealed to be error.

Moreover, the trial court clearly did not consider the merits of the Debtors' objection to the Senior Westerdals' claim. If it had, the trial

court would have observed the Debtors' failure to meet their burden of production and the Senior Westerdals' claim would have been allowed without need for further litigation.

The Debtors' objections are defective and, in some respects, spurious. The Debtors' first objection to the Senior Westerdals' claim was prepared but not signed by Mr. Sternberg's law firm; it was signed by Jay. CP 499. Mr. Sternberg's firm could no longer represent Jay due to a conflict of interest with the Senior Westerdals. CP 424 ¶8. Also problematic is the fact that Jay signed for himself and on behalf of NI and Westerdalcorp. CP 499. Additional defects are immediately apparent as discussed below.

Incredibly, the objection relies on Jay's interference with the auction of holiday.com to challenge the value of the domain name. CP 498:20-23. Jay claims holiday.com did not sell for failure to meet the minimum bid. CP 498:21-22. It failed to sell due to Jay's interference. CP 304:8-9; CP 307.

The objection challenges the Senior Westerdals' standing in the case despite its prior acknowledgment in open court that they have a valid claim. CP 496-497 ¶ 1; and despite Debtors' counsel's acknowledgment that the court ruled it had jurisdiction over the Senior Westerdals' claim, CP 130 ¶ 7.

The Debtors complain of a lack of timeliness while acknowledging the Notice of Receivership was sent to an incorrect address for the Senior Westerdals and despite the court's statutory power to expand the time frames in the receivership. RCW 7.60.055(2). CP 497 ¶ 2:13-15.

The objection alleges the Senior Westerdals did not provide supporting documentation while referencing specific terms of the allegedly missing information at various places throughout its text. CP 497 ¶ 2:8-11.

The Debtors' subsequent objection, prepared by substitute counsel, provides the same bases for objection, but fails to explain why the Debtors should be permitted to file two objections to the same claim. CP 767. By attaching the documentation to Jay's accompanying declaration, the Debtors further undermine their own objection to documents allegedly missing from the Senior Westerdals' claim.

Moreover, the Debtors flatly contradict language in the Receivership Order:

[The Receivership Order] neither listed nor identified any ground for establishment of a receivership except to satisfy the Bero Judgment. By way of example, there was no finding that the liabilities or debts of the [Debtors] exceeded their assets, or had failed to pay any other creditors.

CP 769:1-4. The Receivership Order provides numerous grounds for the Receivership including findings that:

- 1.19 property had been improperly transferred (CP 209);
- 1.20 Debtors were not paying their debts as they came due or were in imminent danger of insolvency (CP 209);
- 1.21 a receiver was necessary to "secure ample justice to the parties" (CP 209); and
- 1.22 a receivership would best serve the interests of Bero "and the other creditors of" the Debtors (CP 209).

Adding to the Debtors' inaccurate portrayal of the findings in the Receivership Order is the absence of any objection to Judge Schubert's remarks regarding the scope of his Order.

In all respects, the Debtors' objections to the Senior Westerdals' claim fail to meet the legal standard for rebutting the presumption of validity. It is cursory, contradictory, and devoid of any credible legal challenge. To the extent Debtors' second objection attempts to fill in details, it expects that Jay, whose conduct has been questionable at best, ought to be taken at his word. CP 290-293 ¶¶2.4-2.12. Moreover, Debtors' second objection appears designed to confuse the trial court, which did not have Judge Schubert's history with the case, perhaps explaining the trial court's erroneous statement that the Senior Westerdals' claims were too complex to resolve within the Receivership. CP 908:27-909:1.

The prejudice to the Senior Westerdals as a result of the trial court's errors cannot be understated. Their statutory rights were cast aside and their property was not protected. Funds and property in which they had an interest were handed over to Jay, whose behavior throughout the Receivership bore the hallmarks of bad faith. They incurred costs in an effort to protect their interests in the Receivership only to be told to try again another day.

E. The trial court's errors invite abuse.

When Washington's receivership statute was revised ten years ago, the declared intent of the revision was "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.”⁷ That intent was thwarted in this case, with the trial court’s assistance. The Senior Westerdals’ interests and the statutes that protected them were of no consequence to the trial court, neither was the evidence that Jay was continuing to dissipate assets to the Senior Westerdals’ detriment at the time the Receivership was terminated. In stark contrast, the Debtors took for themselves whatever benefit the Receivership offered without accepting the burdens, and the trial court rewarded their conduct by giving to them the approximately \$68,000.00 on hand when the Receivership terminated.

What happened in the court below is an invitation to abuse. Resort to speculative hypotheticals is unnecessary because the facts of this case comprise a textbook scenario of a bad faith debtor putting the good offices of a court to unseemly purposes. Reversal of the trial court’s order terminating the Receivership is required.

VII. CONCLUSION

The trial court erred in interpreting the operative document in this case, the Receivership Order, as requiring termination of the Receivership upon satisfaction of the Debtors’ liability to Raymond Bero. The trial court’s interpretation of the Receivership Order was at odds with the language of the specific provision interpreted, the provisions of the Receivership Order directed at creditors generally, and the explanation of

⁷ S.B. 6189-S Digest (2004). Appendix A.

the provision given by the judge whose signature gave the Receivership Order legal effect.

The trial court further erred when it cast aside the rights of Per and Melody Westerdal. The trial court showed no regard for their ownership interest in Receivership property or documented evidence of the Debtors' interference with that ownership interest. The trial court failed to give due regard to the Senior Westerdals' subrogation rights and the various statutory rights that RCW 7.60 confers on receivership creditors.

The trial court further erred when it terminated the receivership absent disallowance of filed claims in direct contradiction of statutory mandate. The trial court compounded its error by failing to utilize its authority to estimate the claims of Per and Melody Westerdal and by depriving them of the statutory presumption that their claim was valid.

If allowed to stand, the trial court's termination of the Receivership invites abuse. The trial court expressed not one iota of concern about what can only charitably be described as questionable behavior by the Debtors. That behavior included failure to cooperate with the Receiver, interference with the Receiver's administration of the estate, and allegations of interference with others' rights to property before and during the Receivership and, likely, to this day. In terminating the Receivership under a cloud of misbehavior, the trial court sent a signal: scoundrels may find comfort in the King County Superior Court.

The trial court's order directing termination of the Receivership must be reversed.

Respectfully submitted this September 18, 2015.

/s/ Marc S. Stern
Marc S. Stern, WSBA No. 8194
Attorney for Appellants Per and
Melody Westerdal

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the State of Washington that on September 18, 2015, I served a copy of this document on all parties by email per agreement as follows:

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Dated at Seattle, Washington this 18th day of September, 2015.



Tanya Bainter, Legal Assistant
Law Office of Marc S. Stern

SB 6189-S - DIGEST(DIGEST AS ENACTED)

Declares that 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.

Repeals numerous provisions.

VETO MESSAGE ON SB 6189-S

March 26, 2004

To the Honorable President and Members,
The Senate of the State of Washington

Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 47 (40), 47 (41) and 47 (42), Substitute Senate Bill No. 6189 entitled:

"AN ACT Relating to receiverships;"

This bill develops a body of statutes to govern receivership proceedings and consolidates these laws into one chapter.

In creating this chapter, it was necessary to repeal duplicative or inconsistent statutes. These statutes are repealed in section 47. Section 47 (40) repeals RCW 24.03.310; section 47 (41) repeals RCW 24.03.315; and section 47 (42) repeals RCW 24.03.320. All three statutes deal with foreign corporations, and have no connection with receivership proceedings. These statutes were included in error, as the statutes that were meant to be repealed are RCW 24.06.310, RCW 24.06.315, and RCW 24.06.320.

For these reasons, I have vetoed sections 47 (40), 47 (41) and 47 (42) of Substitute Senate Bill No. 6189.

With the exception of sections 47 (40), 47 (41) and 47 (42), Substitute Senate Bill No. 6189 is approved.

Respectfully submitted,
Gary Locke
Governor

APPENDIX A-1