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I. STATEMENT OF THE CASE

Both parties agree that Roger Hicks was the sole member of South-N-Erectors, LLC, (“South N Erectors” hereafter) and therefore, subjected himself and South N Erectors to well established rules governing the operation of Limited Liability Companies in Washington State. **RP 29:11 and RP 32:1-3.** The Respondent proved at trial that Roger Hicks violated those rules and the trial court correctly disregarded the company entity.

Respondent, Shinstine Associates, LLC (“Shinstine” hereafter), is a general contractor and retained South N Erectors as a sub-contractor for a public works project, “Shinstine Project” hereafter. At trial, South N Erectors stipulated to both its liability to Shinstine and its amounts, i.e., \$127,850.58. **RP 7:7 and RP 10:6.**

During the project, the Iron Workers Union Trust Fund (“Trust Fund” hereafter) notified Shinstine that South N Erectors had not made required contributions to the Trust Fund. **RP 81:19-20. [Letter admitted at trial as exhibit 4].** The owner of the project threatened to close the project if Shinstine did not remedy the problem by making South N Erectors’ payment. Further Shinstine’s bonding company indicated that the claim by Trust Fund would negatively impact Shinstine’s ability to

take future projects. **RP 65 1-2.** Ultimately, Trust Fund sued Shinstine, South N Erectors and the Fire District which owned the project as well as Shinstine's bond. To resolve this litigation, Shinstine paid a large portion of the South N Erectors' obligation, to wit: \$38,386.55. **RP 69-1-17, [Admission of Exhibit 24].**

Shinstine paid out a total of \$136,964.36 to South N Erectors pursuant to the contract for South N Erectors performance up to that time and not including the payment to the trust fund. *Id.* The trial court found that South N Erectors had used these funds to purchase, with additional financing, a real estate parcel on McKinley Avenue in 2005. **RP 131 1-5.** This was sold in October 2006 for a nice profit. The net proceeds were paid out to Mr. Hicks personally to pay his personal obligations.

At trial, Respondent called three witnesses: (1) Appellant, Roger Hicks, (2) William M. Shinstine, and (3) Karen Larimore. A summary of their testimony is laid out below.

(1) Roger Hicks

Mr. Hicks is the sole member of South N Erectors, LLC. He testified that, during the Shinstine Project, South N Erectors used company assets to invest in real property. **RP 45:10-12.** In particular, Mr. Hicks, the sole LLC member, testified that South N Erectors bought a portion of the real property. **RP 45: 14-15.** Mr. Hicks also testified that

other investors provided funds to South N Erectors. Mr. Hicks paraphrased the transaction by stating during trial: “South N Erectors bought the building. South N Erectors had investors.” **RP 45: 17-18.** He further stated, however, that the LLC had no investors but that the investors “invested into the building, into the business.” *Id.*, 22-23.

Counsel for the Appellant characterizes this transaction as third party investors obtaining mortgages or paying “down payments”. Respondent agrees that there was a mortgage on the property secured by a Deed of Trust. This was proven by Respondent itself when Exhibit 31 was admitted. **RP 79.** The mortgage was paid when the building was sold.

However, the net proceeds is any amount received from the sale that is greater than the outstanding amount of the mortgage. The record does not show any indication that the net proceeds from the sale were subject to a secured interest. **RP 46: 3-7.** That is, Appellant offered no evidence indicating that South N Erectors paid any other valid liens on the property or that he had received cash proceeds to finance the down payment with a UCC perfected secured interest, i.e., a financing statement.

Mr. Hicks testimony on this subject was evasive, contradictory and lacked credibility. Specifically, when Mr. Hicks was asked whether the alleged investors were backed by a mortgage or some security on the

property, Mr. Hicks responded “I don’t understand.” **RP 46: 10.** When asked whether he had documentation to support his claim that the subject transaction involved “investors” backed by secured interests, he stated that he “got it all in a file” but, then again, “maybe not.” **RP 46: 3.** He clarified by testifying “You invest. You invest. Some on paper. Some not on paper.” *Id.*

Counsel for Shinstine asked Mr. Hicks further to clarify whether there “would be some recorded mortgage on the property?” Mr. Hicks did not confirm that the alleged interests were secured by recording at closing or when the funds were loaned. Rather, he replied that the mortgages “*should be* when [the property] sold.” **RP 46: 14-15.**

Shortly thereafter, Mr. Hicks then stated that the alleged investors had not invested in the property at all. Counsel asked Mr. Hicks whether the investors had invested in “South N Erectors or were they investors in something else?” Mr. Hicks said they had “invested in the business, not into the property.” Then stated in the next breath that “nobody invested in South N Erectors but me.” **RP 47: 9-13.**

When asked whether the subject transaction made a profit, Mr. Hicks testified: “I think so.” **RP 47: 14-15.**

Mr. Hicks also admitted that at the same time, South N Erectors owed creditors. **RP 49:1-6.** Though evasive, Mr. Hicks finally admitted

that he, as the sole member of South N Erectors, was aware of the claim by Shinstine in this case *and* a claim by the Iron Workers Trust Fund. **RP 50:3-15.** In particular, Mr. Hicks answered that the Trust Fund had “said we owed a substantial debt to them.” This answer was in direct response to Mr. Froehling’s question whether he agreed that in 2006 he had been aware that South N Erectors owed a substantial debt to the Trust Fund. **RP 51:15-19.** He further admitted that he was aware that there were equipment rental bills that South N Erectors owed. He expounded on this by saying that “[t]he people always asking for payments . . . “ **RP 52:9-13.**

He also did not dispute that the Washington State Department of Labor and Industries was also making a claim. He explicitly agreed and noted that this “was nothing new.” **RP 52: 18-22.** Counsel for Shinstine then summarized his testimony and made an inventory of the bills: “the trust fund bills, the bills that’s owed to the rental company *and the bill – something that might have been owed to Shinstine.*” [Emphasis Added]. Counsel then asked “do you know if any of those were ever paid?”

Mr. Hicks answered by saying “no, none of them was ever paid by us, I know.” **RP 53: 1-3.**

To further clarify, counsel asked Mr. Hicks “so throughout 2006

and from then on, those bills were still outstanding?” Mr. Hicks said “bills are still outstanding.” **RP 53: 3-5.**

The next logical question ensued immediately thereafter when counsel asked “do you use any of the funds – when you sold the building on McKinley Avenue, did you use any of the funds to pay any . . . LLC bills?” **RP 53:6-9.** Mr. Hicks stated with “No.” **RP 53:25.**

Mr. Hicks then contradicted his earlier testimony. He began by saying that the funds from the sale of the property had “gone to investors and mortgage; South N Erectors had no money.” **RP 54:1-3.**

He then stated that the obligation back to the investors was not an LLC obligation at all. Rather, Mr. Hicks admitted that he had personally guaranteed the obligation to the alleged investors. **RP 54:10-12.**

(2) William M. Shinstine

Mr. Shinstine testified that Shinstine Associates is a general contracting firm and has been so since 1965. Mr. Shinstine is the general manager and a project manager for the company. **RP 56: 4-8.** Mr. Shinstine further testified that he oversaw the contract with South N Erectors and had knowledge of several problems associated with South N Erectors’ performance. **RP 58 3-25.** The problems are not relevant to this appeal because Appellant stipulated to the liability to Shinstine and its

amount at trial.

Mr. Shinstine testified that, during the project, he became aware that South N Erectors had not paid into the Iron Workers Trust Fund and the Trust Fund had a claim against South N Erectors. He became aware of this when he received a letter from the Trust Fund on November 5, 2005.

RP 81:19-20. [Letter admitted at trial as exhibit 4]. He further became aware and agreed that, in the event South N Erectors failed to contribute to the Trust Fund as required, Shinstine would be liable for that obligation.

RP 64: 17-25. He further testified that the Owner of the project, upon learning of the outstanding liability to Trust Fund, threatened to “close down the project”. **RP 64: 23-25.** Shinstine’s bond company indicated that the issue needed to be resolved immediately or it would affect Shinstine’s ability to bid future work. **RP 65 1-2.**

The Trust Fund’s outstanding claim against South N Erectors ultimately resulted in a lawsuit brought by Trust Fund against Shinstine directly. **RP 86: 23-25; RP 87: 1-24.** At the same time Shinstine was sued, South N Erectors was also sued. **RP 89: 21-25.** Proof of this was offered and admitted as Exhibit 22. **RP 90: 1-20.**

Shinstine then testified that Shinstine then paid the obligation to Trust Fund to save the project in an amount of \$38,386.55. **RP 64:12.**

Shinstine indicated that his company sent to South N Erectors a

letter notifying him of the claim by Trust Fund. **RP 82: 20-25; RP 83: 1-**

11. [Admitted into evidence as Exhibit 5].

At the same time that Shinstine paid South N Erectors obligation, Mr. Shinstine had learned that South N Erectors had purchased the real estate parcel on McKinley Avenue. **RP 69: 14-17.**

3. Karen Larimore

Ms. Larimore testified that she is the accounting manager at Shinstine and responsible for handling all financial aspects of the company. **RP 94: 13-20.** Ms. Larimore testified as to her accounting methods and the reports used to aid her in her work. **RP 94-96.** She then testified that she was aware of the South N Erectors project and had generated the accounting on the project to include the liability brought by Trust Fund. She further testified that the total amount of obligation owed by South N Erectors to Shinstine was \$96,146.08 plus prejudgment interest for a total amount of \$127,850.58. **RP 96: 9-15.** This is the amount of which Appellant stipulated at trial. Courts also awarded statutory costs at the trials conclusion.

4. Exhibits Offered as to Sale of Real Property

The trial court admitted exhibits 28-32. Exhibit 29 was a certified copy of the Real Estate Tax Affidavit dated 8/8/2005 showing that South N Erectors purchased the building in 2005. The trial court also admitted

Exhibit 24. This exhibit was sponsored by Mr. Shinstine and it showed that Shinstine had paid out large payments to South n Erectors immediately prior to the purchase of the real estate parcel on McKinley Avenue. **RP 68-69.** In particular, it showed a total of \$116,612.74 in payments from June 16, 2006 until August 19, 2005. Exhibit 30 showed that South N Erectors financed the building for an amount of \$130,900.00 pursuant to a Deed of Trust and Security Agreement executed in favor of third party lender, InterBay Funding, LLC. This Deed of Trust and Security Agreement was signed on August 8, 2005.

It should be noted that the trial court concluded that the down payment to purchase the building had not come from third party secured lenders. Rather, the Court referred specifically to Exhibit 24 and found that “South N Erectors was undercapitalized, but rather they used funds *that they received from Plaintiff* in conjunction with the Pierce County Fire District contract to acquire the property and building that they subsequently sold.” **RP 131 1-5.**

Exhibits 31 and 32 proved that South N Erectors sold the property in November of 2006. In particular, Exhibit 31 is the certified copy of the Statutory Warranty Deed and Exhibit 32 was a certified copy of the Real Estate Excise Tax Affidavit showing that South N Erectors sold the property for \$311,00.00. The Court correctly found that the net proceeds

was simply the sale price amount of \$311,000 less the mortgage amount of \$130,900, i.e., \$180,100. **RP 132: 18-22.**

II. RESTATEMENT OF THE ISSUE:

Under RCW 25.15.235 and RCW 19.40 ("UFTA"), did the trial court correctly disregard the corporate entity when (1) South N Erectors purchased a parcel of real property; (2) acquired numerous and substantial debts to various creditors including the Respondent; (3) sold the asset for a profit; (4) did not repay its debts to creditors to include Shinstine and (4) dispersed funds to pay Mr. Hicks' personal obligations.

III. ARGUMENT:

A. RCW 25.15.235 Provides a Basis to Disregard the Corporate Form

Under RCW 25.15.235, an LLC is prohibited from making distributions that would render it insolvent, and the members of a limited liability company can be held liable to the limited liability company for such distributions. RCW 25.15.235 provides in relevant part as follows:

RCW 25.15.235 Limitations on Distribution

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution (a) the limited liability company would not be able to pay its debts as they became due in the usual course of business, or (b) all liabilities of the limited liability company ... exceed the fair value of the assets of the limited liability company

(2) A member who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to a limited liability company for the amount of the distribution.

RCW 25.15.235 does not include separate definitions of "assets" or

"liabilities." Other portions of the LLC Act and other provisions of the Washington Business Corporations Act, however, do provide the necessary answers and help establish the standard by which one determines the propriety of distributions.

First, the restrictions placed on a limited liability company's distributions are the same as the restrictions placed on the distributions for Washington general business corporations, because the limited liability statute expressly makes the law applicable to corporations applicable to limited liability companies in situations such as the one at issue here.¹ RCW 25.15.060. Under the Washington Business Corporation Act, limitations on distribution are found at RCW 23B.06.400, which provides in relevant part:

RCW 23B.06.400 Distribution to Shareholders

- (2) No distribution may be made if, after giving it effect:
 - (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or
 - (b) The corporation's total assts would be less than the sum of its total liabilities

¹ Maurice, John Morey, *Operational Overview of the Washington Limited Liability Company Act*, 3 Gonz. L. Rev. 183, 203 (1994/95). In fact, the limited liability company statute expressly mandates that "Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances. ..." RCW 25.15.060.

As noted above, RCW 23B.06.400 states that the validity of distributions should be considered under the "circumstances" of the distribution.

RCW 25.15.030 must be considered. That section of the LLC Act provides in pertinent part as follows:

RCW 25.15.030 Nature of Business Permitted - Powers

A limited liability company which has dissolved shall pay or make reasonable provision to pay **all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company and all claims and obligations which are known to the limited liability company but for which the identity of the claimant is unknown. ...**

RCW 25.15.300 (2) (emphasis added).

In the instant case, the Court should uphold the trial court because

(1) Mr. Hicks made distributions to himself at the same time that South N Erectors was not able to pay its debts as they become due and (2) the Shinstine claim against South N Erectors was mature.

(1) South N Erectors was not able to pay debts as they become due:

The testimony conclusively showed that, at the time of the distributions, Appellant LLC was insolvent. That is, Mr. Hicks testified the South N Erectors had many creditors but yet had "no money." **RP 54:1-3.** Further, he testified that South N Erectors had many creditors and

that even at the time of trial, they had not been paid.

Specifically, Mr. Hicks had testified that the Trust Fund had “said we owed a substantial debt to them.” This answer was in direct response to Mr. Froehling’s question whether he agreed that in 2006 he had been aware that South N Erectors owed a substantial debt to the Trust Fund. **RP 51:15-19.** He further admitted that he was aware that there was equipment rental bills that South N Erectors owed. He expounded on this by saying that “[t]he people always asking for payments . . . “ **RP 52:9-13.**

He also did not dispute that the Washington State Department of Labor and Industries was also making a claim. He explicitly agreed and noted that this “was nothing new.” **RP 52: 18-22.** Counsel for Shinstine then summarized his testimony and made an inventory of the bills: “the trust fund bills, the bills that’s owed to the rental company *and the bill – something that might have been owed to Shinstine.*” [Emphasis Added]. Counsels then asked “do you know if any of those were ever paid?”

Mr. Hicks answered by saying “no, none of them was ever paid by us, I know.” **RP 53: 1-3.**

To further clarify, counsel asked Mr. Hicks “so throughout 2006 and from then on, those bills were still outstanding?” Mr. Hicks said

“bills are still outstanding.” **RP 53: 3-5.**

Clearly, Appellant LLC did not make reasonable provisions to pay all claims and all obligations under the statute. Rather, Mr. Hicks’ testimony revealed a defiant and almost cavalier attitude about the obligations.

(2) Shinstine Claim was Mature

At the same time South N Erectors refused to pay its obligations to the Department of Labor and Industries and the Trust Fund, it was sued by Trust Fund on the obligation. Shinstine was brought into the litigation and paid a large portion of South N Erectors obligation. There can be no real intellectually honest argument that the claims against South N Erectors were “contingent.” The Trust Fund claims against South N Erectors were also mature claims because they were sent via proper notice and resulted in a Summons and Complaint filed and served against South N Erectors to collect. Shinstine discharged a part of South N Erectors’ obligation by paying a large portion of the debt. Thus, in a sense, the Trust Fund’s claim was Shinstine’s claim.

Thus, under RCW 23B.06.400, no distribution should have been made other than to creditors, most notably Shinstine, and South N Erectors was obligated to preserve net proceeds for the sale of the real property to meet its obligations. However, Appellant LLC distributed the net

proceeds to Mr. Hicks to discharge his *personal* obligations. There can be no doubt of this. Even if circumstantial, the Appellant could have easily presented evidence that the net proceeds were not distributed to Mr. Hicks to rebut the presumption made by the trial court.

Thus, the trial court correctly based its ruling on the conclusion that Mr. Hicks, in his capacity as the member/manager of the LLC, simply distributed LLC funds from the sale of an LLC asset in order to pay himself *instead of* repaying LLC creditors.

Further, Mr. Hicks did not dispute that this had occurred. Rather, he specifically stated that South N Erectors had many debts and South N Erectors had not paid any of these creditors. Mr. Hicks also continually testified that South N Erectors had no money but conceded that the sale of the real property generated a profit. **RP 54:1-3; RP 47: 14-15.**

Thus, the Court should hold that Appellant LLC did not make reasonable provisions to pay all claims and all obligations under the statute under RCW 25.15.235.

B. South N Erectors and Its Member Are Liable for Fraudulent Conveyances.

The Uniform Fraudulent Transfer Act, RCW 19.40 ("UFTA"), provides yet another basis for the members' liability on the Shinstine obligation. The UFTA recognizes two types of fraudulent transfers: (1)

transfers entered into by a debtor with actual intent to defraud creditors, RCW 19.40.041(a)(1), and (2) Constructive fraudulent transfers, RCW 19.40.041(a)(2) and RCW 19.40.051.

1. The LLC Member Is Liable under the Intent to Defraud Standard.

One type of fraudulent transfer covered by UFTA is a transfer made by a debtor with actual intent to hinder, delay, or defraud any creditor. RCW 19.40.041(a)(1). The relevant portion of RCW 19.40.041 provides:

RCW 19.40.041 Transfers Fraudulent as to Present and Future Creditors

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

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor...
RCW 19.40.041(a).

The burden of proving actual intent is on the party seeking to set aside the conveyance, and the burden is met if there is "clear and satisfactory proof." *Sedwick v. Gwinn*, 73 Wn. App. 879, 885 - 888, 873 P.2d 528 (1994); *Sparkman & McLean Co. v. Derber*, 4 Wn. App. 341, 349, 481 P.2d 585 (1971).

In determining whether actual intent was present, consideration may be given to the eleven factors or "badges of fraud" listed in RCW 19.40.041(b). These badges of fraud are:

1. The transfer or obligation was to an insider;
2. The debtor retained possession or control of the property transferred after the transfer;
3. The transfer or obligation was not disclosed or concealed;
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. The transfer was of substantially all the debtor's assets;
6. The debtor absconded;
7. The debtor removed or concealed assets;
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
10. The transfer occurred shortly before or shortly after substantial debt was incurred; and
11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

RCW 19.40.041(b).

Not all of the "badges" need be present for the Court to find the requisite intent. *See Sedwick*, 73 Wn.App. at 886-87. Moreover, the list is

non-exclusive and precatory. *Id.* Other evidence impacting on intent may be considered by the court. *Id.*

At trial, the evidence showed that numerous badges of fraud exist in this case. These badges of fraud include but are not limited to the following:

1. Transfer Made to Insider. The distributions or transfers of LLC funds from the sale of the real property were made by the debtor, South N Erectors, to an insider, Mr. Hicks. Under the UFTA, insiders are defined as, *inter alia*, directors of the debtor, officers of the debtor, persons in control of the debtor, partnership in which the debtor is a general partner, a managing agent of the debtor. RCW 19.40.011(7). South N Erectors is managed by its sole member, Mr. Hicks. Hicks, therefore, is clearly a person in control of debtor and "insiders" by definition.

3. Transfer Was Not Disclosed or Concealed. The transfer was not disclosed to Shinstine at the time of the transfer. It was only discovered at trial.

4. Transfer Made When Sued or Threatened with Suit. Here, South N Erectors knew the amount owed Shinstine and did not dispute the

liability at trial. Though evasive, the court clearly found that Mr. Hicks was well aware of several debts owed by South N Erectors in addition to Shinstine to include the Iron Workers Trust Fund. After much labor, counsel for Shinstine was able to tie this to the same time period as the sale of the real property.

5. Transfer was of Substantially All Debtor's Assets. There is no real dispute that the funds from the real property constituted the only assets the LLC had. Mr. Hicks testified that the sale of the real property constituted a profit but at the same time represented that the LLC had no money.

8. Reasonably Equivalent Value Received. The LLC received nothing in exchange for the distributions.

9. Debtor Was Insolvent or Became Insolvent Shortly After the Transfer. Under the UFTA, a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation. RCW 19.40.021(a). The term "debt" is defined as "liability on a claim." RCW 19.40.011(5). The term "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. RCW 19.40.011(3). As discussed above, the evidence at trial proved that, after the distributions to Mr. Hicks from the sale proceeds, South N Erectors' liabilities clearly exceeded its assets. At the time of trial, Mr. Hicks stated plainly that no creditor's claims had ever been paid by South N Erectors. His testimony was cavalier as he agreed that South N Erectors owed the Department of Labor and Industries but this was "normal."

Shinstine submits that all relevant "badges" of fraud are present, mandating a finding that South N Erectors and its members intended by the distributions to defraud Shinstine of the amounts due it.

(2) The Sole Member of South N Erectors Will Not Be Able to Establish a Valid Defense to Avoid Liability.

Under the UFTA, after the plaintiff carries its initial burden of proof for actual intent to defraud creditors, a recipient of transfer can avoid liability only by establishing that he or she took "in good faith and for a reasonably equivalent value". RCW 19.40.081 (a) (emphasis added). The burden of proof is by "substantial evidence." *Sparkman*, 4 Wn. App. at 349.

It is Clear that the South N Erectors Members Did Not Act In Good Faith. The UFTA does not define "good faith." Case law defines the term as follows:

(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, hinder, delay, or defraud others. Presumably, if any one of these factors is absent, lack of good faith is established and the conveyance fails. *Sparkman*, 4 Wn. App. at 348.

Here, South N Erectors and its members knew at the sale of the real parcel that it had several unpaid debts to creditors to include Shinstine. Further, it can be reasonably inferred that the sole member, Mr. Hicks, knew at the time of the distributions of the net sale proceeds to himself that he would dispute Shinstine's claims as proven by the protracted litigation in this case. Yet, South N Erectors did not have a good faith defense as proven by South N Erectors stipulation to the liability and its amount to Shinstine at trial. Clearly, Mr. Hicks' defiance was predicated on the premise that he would not have to pay the debt owed to Shinstine personally and, as he pointed out repeatedly, the LLC "had no money." **RP 54:1-3**. The LLC had no money, of course, because Mr. Hicks dispersed funds from the LLC to himself. Consequently, Mr. Hicks will not be able to establish how under the circumstances, he had

"an honest belief in the propriety" of the distributions or net proceeds.

It should be noted that the trial court had concluded that Mr. Hicks had *not* taken a personal loan from "investors" at all. Rather, the trial court concluded that Appellant LLC had purchased the property from funds it had received from Shinstine under the contract at the nearly the same time it had failed to meet its obligation to Trust Fund, an obligation for which Shinsinte ultimately became liable.

The Court's conclusion is supported by substantial evidence. Mr. Hicks testimony was damaging because it was maddeningly vague. To prevail, he simply needed to offer evidence that the down payments were financed and properly secured. Yet, the only evidence at trial was that a mortgage to Interbay Finance was secured by Deed of Trust in an amount far below the net proceeds.

Mr. Hicks testimony was further damaging to his position because the net proceeds from the sale was transferred to himself to pay his personal obligations. He tried to characterize these as personal loans from "investors" for the sole purpose of financing the building. This does not hold water. Investors are different than lenders. The former buys equity and the latter buys debt, e.g., Promissory Note with a stated interest rate, properly secured. Even if there were lenders, counsel for Appellant tries

to characterize the transaction as one in which unsecured and unidentified lenders loaned money to Mr. Hicks personally and then Mr. Hicks transferred into the LLC. According to Appellant's theory, the LLC then took all of the cash funds transferred in from Mr. Hicks to make the down payment on the building.

Even if this were true, the amount of funds transferred into the LLC was simply cash. It is true that Appellant could have prevailed, possibly, if he could have proved that the cash proceeds were secured. Appellant seemed to allude to this by mentioning *Eagle Pacific Ins. Co. v. Christinason Motor Yacht, Corp.*, 85 Wn.App. 695, 934 P.2d 715 (1997). The *Eagle Pacific* case was not a RCW 25.135 case. Rather, it was a Uniform Fraudulent Transfer Act (UFTA) case. However, the road map for secured interests in cash are laid out nicely in *Eagle Insurance* case, a division two opinion. In *Eagle*, the Court points out that “[t]he general rule for perfecting a security interest in cash is found in RCW 62A.9-304(1), which provides in relevant part: [a] security interest in money or instruments . . . can be perfected only by the secured party's taking possession, except as provided . . . in subsections (2) and (3) of RCW 62A.9-306 on proceeds. Under RCW 62A.9-306(3), a security interest in cash proceeds is continuously perfected when the original collateral was covered by a financing statement.”

Unlike Eagle, Hicks offered no evidence that as “cash proceeds, the funds remained subject to [any] underlying security interests.” To prevail under its theory on appeal, Appellant would have had to show at trial that the cash proceeds were subject to a secured interest properly perfected under UCC 9A.62.304(1). Appellant offered no evidence of this at all. Mr. Hicks himself contradicted this theory when he said that it was all in his file but that some [investors] were on paper and some were not. The trial court no doubt concluded that the only “investor” who was on paper was Interbay through its Deed of Trust and the ones who were not on paper were the investors that either did not exist or had perhaps loaned money to Mr. Hicks personally for whatever reason.

It should be emphasized that the Court concluded that the down payment was financed from funds received from Shinstine. However, even if the Court found that this conclusion was in error, it is not decisive because even if there were liquid funds that Mr. Hicks obtained from personal loans, these loans were used as cash and directed to Appellant LLC as capital investments in his capacity as sole member. This is why Mr. Hicks continually insisted that even though there were “investors”, he was the only owner of South N Erectors.

Thus, the Court should find that the transfer was fraudulent and Mr. Hicks lacks a good faith defense. As such, the trial court should be

upheld.

IV. CONCLUSION

The trial court should be upheld for two reasons. First, South N Erectors distributed net proceeds from the sale of the real property when it could not pay its creditors in violation of RCW 25.15.235. Second, the distribution of net proceeds violated the UFTA found at RCW 19.40 because (1) South N Erectors transferred net proceeds to an insider, Mr. Hicks, (2) the transfer was concealed, (3) the transfer was made when sued by Trust Fund, (4) the transfer was the only liquid funds owned by South N Erectors and (5) the South N Erectors was not solvent at the time the transfer was made.

For these reasons, the Respondent request that this Court rule in its favor and uphold the trial court's ruling.

DATED this 16th day of December, 2009

Froehling Law Office



Antoni H. Froehling, WSBA #8271
Attorney for Respondent

09 DEC 18 PM 1:51

STATE OF WASHINGTON
BY §
DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Shinstine/Assoc., L.L.C., a Washington)
Limited Liability Company,)

Respondent)

vs.)

South-N-Erectors, LLC, a Washington)
limited liability company, ROGER)
HICKS, individually, and OHIO)
CASUALTY INSURANCE CO.,)
Bond No. 3740456,)

Appellant)

NO. 39277-1-II

AFFIDAVIT OF
MAILING

STATE OF WASHINGTON)

ss.

County of Pierce)

The undersigned being first duly sworn on oath, deposes and says: That I am a resident of Pierce County, Washington, a person of more than eighteen years of age and competent to be a witness in the above entitled proceedings. That theretofore and on or about the 17th day of December, 2009, she placed an envelope addressed to:

Michael B. Galletch
Attorney at Law
2200 6th Avenue, Suite 888
Seattle, WA 98121-1896

the following: BRIEF OF RESPONDENT in the United States Post Office at Puyallup, Washington, postage prepaid.

Naome Martinez
Naome Martinez

SUBSCRIBED & SWORN to before me this 17th day of December, 2009.



Betty A. Hendricks
NOTARY PUBLIC in and for the State of Washington residing at SUMNER
My Commission Expires: 3/15/10