IN THE SUPREME COURT OF OHIO

Yoder Machinery Sales Company, Appellant, v. Weldon F. Stump and Co., Inc., et al., Appellees.	)))))))))))	No. 08-0414 On Appeal from the Lucas County Court of Appeals, Sixth Appellate District Court of Appeals No. L-07-1139

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION OF APPELLANT YODER MACHINERY SALES COMPANY

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Governor of Ohio recently entered Executive Order 2008-04S Implementing Common Sense Business Regulations, with the purpose and intention that state agencies consider and assess the impact that their regulations have on fostering and promoting the business environment in Ohio. While the Executive Order does not, and constitutionally could not, reach to the courts, the same message must nevertheless be heard. Judicial decision making that creates *ad hoc* rules for the determining of partnership obligations, rights and duties, contrary to the express direction of the statutory framework, invites confusion, causes expense, and ultimately encourages businesses to look elsewhere in choosing commercial venues.

By the judgment below, the trial court refused to permit the incumbent partner, experienced in the business, from winding up affairs following its dissolution. It did so at the instance of a creditor of the defaulting partner, who had wrongfully caused the partnership dissolution, a creditor who had no interest in or right to assets of the partnership. Recognizing that substantial assets and personal fortunes are integrated with business operations and successes, and that personal liability is the essential attribute--and drawback--of the partnership entity, the General Assembly, adopting uniform legislation, enacted a comprehensive scheme for its regulation. Prior judicial decisions recognized the preemptive effect of such legislation. Business lawyers relied upon it in advising their clients, confident that legislative directive would be followed rather than ignored. None of these guideposts were followed below.

The court ignored the fact that partnership property, by statutory definition, is unique in that it cannot be pledged or attached at the instance of a single partner or that individual partner's creditor. The court ignored the law that creditors of individual partners are not permitted to intervene in dissolution proceedings, but are limited to a statutory remedy that the General Assembly provided. If business legislation and statutory directives can so easily be avoided under the guise of judicial discretion, predictability, certainty, and confidence are eroded.

Recently, in Holdeman v. Epperson (2006), 111 Ohio St.3d 551, this court noted the impact of statutory directives in connection with limited liability companies, and held that members, in drafting their operating agreements, could not contract in a manner contrary to the statute. Below, the courts ignored the statutory directive for a different, yet even more popular entity, the general partnership. If the state is to escape the difficult economic condition it now confronts, a clear, concise, and consistent application of business law is essential. Review of the judgment below facilitates that process, by reason of which the case constitutes a question of great general interest.

II. STATEMENT OF THE CASE AND FACTS

On March 25, 2004, The Huntington National Bank ["Bank"], as commercial lender to Weldon F. Stump and Co., Inc. ["WFSC"], filed its complaint against WFSC and its sole shareholder and guarantor, Robert S. Stump ["Stump"], seeking entry of judgment on cognovit notes and guarantees, and the appointment of a receiver. Pursuant to warrants of attorney in the loan documents authorizing confession of judgment, an answer on behalf of both obligors was filed, and judgment was entered accordingly.

The Bank sought and obtained the appointment of a receiver to take complete and exclusive possession, custody and control over the collateral of WFSC (used industrial machinery and equipment then available for resale), and to cause the same to be liquidated in satisfaction of the judgment simultaneously entered. On April 6, 2004, an Order for the Appointment of Receiver was entered, authorizing the receiver, among other things, to take control of the collateral, and to engage a management company to operate and wind down the business.

As there were differing ownership interests in the collateral, the Receiver filed a Notice to Apparent Joint Venturers informing them of her appointment, announcing her intention to sell property belonging to the corporate judgment debtor, and requesting that any joint venturer identify property or equipment in which it claimed an interest. The Receiver then filed a motion with the trial court to establish procedures for the sale of machinery and equipment.

Yoder Machinery Sales Company ["YMSC"], as the principal partner with WFSC, promptly served the Receiver with notice of its claims, contending that, as much of the machinery and equipment was held in partnership with WFSC, the Receiver had no authority to sell that property, partnership property being *sui generis*. The objection notwithstanding, on May 26, 2004, the Receiver filed her motion to approve an auctioneer to offer the machinery and equipment for sale by public auction. Over written opposition from WFSC and the individual judgment debtor, Robert S. Stump, who, based on his guaranty, was vitally interested in maximizing the recovery for the collateral, the Receiver noted that "the purpose of the receivership is to liquidate the assets of" WFSC, and that a public auction was the most efficient method to do so.

Due to continuing disputes between the Receiver and YMSC over title to the used machinery and equipment, and the Receiver's stated purpose to liquidate WFSC, YMSC on June 20, 2004, filed its separate complaint for dissolution of the WFSC/YMSC partnership [the "Partnership"], contending that the appointment of the Receiver constituted a dissolution of the partnership, and as part of its relief, requested that it be appointed winding-up partner, pursuant to Rev. Code Section 1775.36. WFSC, by and through the Receiver, answered and counterclaimed, acknowledging the existence of the Partnership, and the acquisition of assets by and under the Partnership. As part of its pleading, WFSC sought a determination that the appointment of a Receiver did not itself constitute dissolution of the Partnership, but nevertheless sought dissolution of the Partnership, and in its demand for relief, sought to be appointed the winding-up partner.

Having secured authority to enter into an exclusive auction agreement, the Receiver, on August 22, 2004, applied for authority to sell by auction all the machinery and equipment that she had identified in which WFSC might claim or assert a divided or undivided interest. The Receiver acknowledged the then pending dispute with YMSC over title to the Partnership assets and machinery, and proposed that such assets be sold, but handled in a different manner than those owned outright by WFSC. YMSC objected, arguing that the Receiver had no authority to sell assets of the Partnership.

On September 17, 2004, the trial court sustained the objection to the auction sale, and prohibited the Receiver from selling at auction any machinery or equipment in which YMSC claimed a partnership interest. The Bank immediately, but unsuccessfully, asked the court to reconsider its order.

When the effort to sell partnership assets was frustrated by court order, the Receiver, on October 12, 2004, sought to be appointed as winding-up partner for the Partnership, all to accomplish the same purpose of selling the machinery and equipment at auction. YMSC submitted its opposition to that request, and the trial court declined to appoint WFSC, by the Receiver, to that role, having previously observed at oral argument that the Receiver was not a partner in the Partnership, and as such, could not be appointed winding-up partner. Shortly after entry of that order, the Partnership dissolution action commenced by YMSC was consolidated with the main action.

As the remaining partner who had not wrongfully caused the dissolution, YMSC then moved the court for its appointment as winding-up partner. Before the trial court could rule, the Receiver filed her Notice of Appeal, together with a written request that the appellate court determine its jurisdiction, which was resolved upon the conclusion that an order denying appointment as a winding-up partner was in fact a final appealable order.

On March 22, 2005, the Bank, along with three other petitioning creditors, then filed an Involuntary Petition for Relief under Chapter 11 against WFSC in the United States Bankruptcy Court for the Northern District of Ohio. Following a hearing in the federal forum, the involuntary Chapter 11 proceeding was converted to a Chapter 7 liquidation, and a trustee, appellee John N. Graham, was appointed. Proceedings in the bankruptcy case continue to this day.

Graham then abandoned the application to be appointed winding-up partner, by filing with the appellate court his motion to dismiss his predecessor's appeal. The court of appeals obliged, by reason of which the trial court order denying the application became final and unreviewable.

With matters pending in both the bankruptcy and appellate courts, the Bank then sought leave to intervene as a defendant and counterclaimant in the Partnership dissolution proceeding initiated by YMSC against WFSC. Over opposition from YMSC which asserted that the Bank's exclusive remedy was under Rev. Code §1775.27(A), the trial court permitted such intervention both as a matter of right under Civ. R. 24(A) and with permission under Civ. R. 24(B).

On January 24, 2007, YMSC renewed its dormant motion to be appointed winding-up partner. Both the Bank and the trustee opposed that application. The trial court denied the application. Upon appeal, the Lucas County Court of Appeals, Sixth Appellate District, unanimously affirmed. To address significant and unsettled issues of partnership law, and the rights of creditors of individual partners, YMSC has appealed to this court with a request that it entertain discretionary jurisdiction.

The facts underlying the dispute are relatively straightforward. WFSC purchases for resale used industrial machinery and equipment. So too does YMSC. Together, they have engaged in similar business activities for more than thirty-five years. Many other entities engage in similar brokerage practices. With the evolution of the domestic economy from a manufacturing to a service base, and from heavy industrial equipment to microchip and fiberoptics, many industrial sites were closed, and used equipment and machinery were marketed for resale and scrap. As the size of the transactions increased, and complete manufacturing plants became available for purchase, individual dealers had insufficient capital to conclude transactions, and were in fact encouraged, if not required, to participate in the transactions. The form of participation was a partnership, where two, three, four or more partners would acquire an interest in the particular item, or the plant itself.

As familiarity among the partners developed and as the acquisitions and sales became more frequent, the formality of the transaction dissipated. Oral agreements and even implicit understandings reigned, with each partner agreeing to and accepting his undivided yet proportional interest in the partnership assets. When the assets were sold, a simple accounting was completed, and proceeds were either paid or accrued. WFSC and YMSC conducted business in this fashion over a number of years, creating if not endorsing the generally prevalent notion of a partnership.

WFSC experienced operational difficulties in the late 1990s and thereafter which placed it in a deficit with regard to the distribution of partnership profits. Funds which should have been distributed as profits among the partners were instead, and with implicit if not express consent, retained for operational expenses. What was tolerable among partners, however, degenerated when the Bank sought to prefer its interest over those of the participating partners, contending that it was secured in the assets (used machinery and equipment) owned by the Partnership, when in fact its debtor was the individual partner, WFSC. When the Bank attempted, through the appointment and activities of the Receiver, to sell partnership assets to satisfy individual partner's debts, YMSC first objected, and, confronted with the significant change in the relationship attributable to the liquidating receivership, recognized the dissolution of the partnership, and sought authority to wind up its affairs.

Among its orders entered, the trial court directed that WFSC be liquidated. Such a direction is a manifest change in the relationship between partners in carrying on the partnership business, which triggers the event of dissolution under Rev. Code Section 1775.28. Recognizing this evident fact, each partner sought to be appointed winding-up partner under Rev. Code Section 1775.36. The trial court denied the original application by the Receiver on behalf of WFSC to be appointed to such position, which became final when the bankruptcy trustee abandoned his appeal of that order. The trial court then declined to appoint the remaining partner, without consideration of the statutory mandate. Adopting an abuse of discretion standard on review, the appellate court affirmed that judgment. Central to its finding, however, was the incorrect legal assertion that the assets of the partnership were subject to the interests of the secured creditor of the partner.[1] Beguiled by such a mistaken premise, the court then concluded that, Rev. Code Section 1775.27(A) to the contrary, a creditor of a partner was a proper party in winding up proceedings, disregarding all reported authority to the contrary.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

> Proposition of Law No. 1. A partner who has not wrongfully caused the dissolution of a partnership is entitled to wind up its affairs. Revised Code Section 1775.36.

At its very essence, this case centers on the application of statutory law, here Ohio Partnership Law set forth in Chapter 1775 of the Ohio Revised Code. It confirms the proposition that partnership property is *sui generis*, that is, there are unusual incidents of partnership property which are unique. Rev. Code Section 1775.24 addresses those incidents, which speak to the point that partnership property cannot be assigned by any individual partner, nor is the individual partner's right in such property subject to attachment or execution. By operation of this statutory provision, a creditor of an individual partner (e.g., the Bank), can

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[1] At page 4, paragraph 11 of its January 11, 2008 Decision and Judgment Entry, the appellate court held that:

> "Huntington furnished evidence that it is a secured creditor of Stump and possesses valid and protected security interests against Stump assets. Clearly, the assets relevant to this case include the machinery and equipment jointly owned with Yoder."

That statement is markedly at odds with both statutory and decisional authority which holds that only creditors of the partnership, and not creditors of the partner, have a claim against partnership property, since no partner has any claim in specific partnership property. Rev. Code Sections 1775.24(B)(2); 1775.39(B) and (H); Buckman v. Goldblatt (1974), 39 Ohio App. 2d 1, 3n.6.

Similarly, at page 11, paragraph 16, the appellate court again concluded that partnership assets were manipulated to avoid the interests of the secured creditor of the partner. By law, a secured creditor of the partner has no interest in assets of the partnership.

obtain no interest in partnership property, either by voluntary assignment from the individual partner or involuntarily, by operation of law, through attachment or execution. The statute reflects the basic proposition that creditors of individual partners cannot impact the partnership assets themselves, but must look to, and wait until there is, a distribution to the individual partner.

Rev. Code Section 1775.39 establishes the priority of payment of liabilities of the partnership upon its dissolution. It affirmatively recites that no partner shall receive a distribution until the debts of the partnership have been satisfied, first those debts existing to creditors outside the partnership [§1775.39(B)(1)], and then those owing to creditors inside the partnership, i.e., internals debts owed by one partner to the other arising from partnership business. [§1775.39(B)(2).] Only after the debts of the partnership have been satisfied, and only after the capital in the partnership has been returned, is there to be any distribution of profit. [§1775.39(B)(3)-(4).] The individual creditor is limited in his remedy to the capital returned or the profit distributed by the partnership to the individual partner.

This principle of law is set forth in Rev. Code §1775.27, which expressly limits the individual partner's creditor to the remedy of a charging order against the individual partner's interest. That provision underscores the philosophy that the partners are entitled to address partnership affairs first, and only when the partnership affairs are resolved and distributions are to be made, do the creditors of the individual partners have any right to participate. That observation was originally made by the court in Buckman v. Goldblatt (1974), 39 Ohio App.2d 1, 3 n.6, where the court explained the purpose of the statute:

> "The full text of R.C. 1775.24(A) and (B) demonstrates a clear legislative intention to put partnership assets outside the reach of any claim that requires establishment through the individual partner, whether by assignment, judgment, exemption, or the operation of probate or family law, unless specifically permitted by statute, e. g., R.C. 1775.24(B)(4) and R.C. 1775.27."

See also, Farmers State Bank & Trust Co. v. Mikesell (1988), 51 Ohio App. 3d 69.

Finally, recognizing the process of the conclusion of a partnership, from dissolution through winding-up to eventual termination, the Ohio legislature, following the uniform principles of partnership law, has articulated that a partner who has not wrongfully caused the dissolution of a partnership has the *right* to wind up its affairs. This is but a recognition that the partner of a general partnership has personal liability, i.e,. joint and several, for the debts and obligation of the partnership. Rev. Code Section 1775.14(A)(1). A partner, who consensually agreed to pursue the partnership business, is legislatively preferred to wind-up its affairs once the business of the partnership has been dissolved. Rev. Code Section 1775.36.

Sections 1775.28-.42 of the Ohio Revised Code provide the framework for a partnership to conclude its affairs. Although the nomenclature is often misleading, the terminal stages of a partnership, in sequence, are its dissolution, its winding up, and its termination. [Rev. Code Sections 1775.28, .29, .36, and .40.] Dissolution is defined as the change in the relationship of the partners caused by any partner's ceasing to be associated in the carrying on of the partnership business. Given the intrinsically voluntary nature of a partnership, any change in that relationship causes a dissolution. Farmers State Bank & Trust Company v. Mikesell (1988), 51 Ohio App.3d 69, 75. That proposition was long ago established by the court, in Kruse v. Vollmar (1992), 83 Ohio App.3d 378, 384, where it held:

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit." R.C. 1775.05. It is personal and consensual in nature and continues only so long as the parties mutually agree. It may be dissolved at any time by the express will of any partner, whether or not such dissolution is in contravention of the partnership agreement. * * * "

In the case at bar, WFSC and YMSC were engaged in the business of buying and brokering used machinery and equipment. In various transactions, one partner would expend its credit for the benefit of another partner. With the appointment of a Receiver, with the mandate among other things to liquidate its assets, WFSC was no longer capable of carrying on the business of the partnership. That constituted the necessary change in relationship, characterized legally as a dissolution.

When the Receiver herself sought to be appointed winding-up partner, it was necessarily a recognition, if not a concession, that a dissolution had occurred. Her application to the trial court reflected the observation that the Receiver and YMSC "at least agreed on one point – that the Partnership ought to be dissolved." Dissolution had in fact occurred, because (i) WFSC was no longer engaged *in carrying on* the business of the partnership, and (ii)YMSC was not required to accept a substituted partner. When the Receiver's motion for appointment was denied, and her appeal abandoned, only YMSC, as the remaining partner and the partner who had not wrongfully caused the dissolution, had the right to wind up the partnership affairs. The duty in winding-up is succinctly set forth in Rev. Code Sections 1775.39, .40, and .42.

Both lower courts, guided by unarticulated principles, chose to ignore the statutory framework. That analysis was aided by a fundamental misapprehension that creditors of an individual partner have an interest in partnership property. The statute addressing appointment of a winding-up partner establishes a preference in favor of that partner who has not wrongfully dissolved the partnership. Rev. Code Section 1775.36. The trial court made no finding, and explained no conclusion, why the remaining incumbent partner should not wind up the partnership affairs. The appellate panel, apparently recognizing this inadequacy, attempted to extract factual findings, and concluded, erroneously, that an individual partner's creditor could reach partnership assets, and that any attempt to address partnership assets between the partners was presumptively fraudulent as to that secured creditor. Such a conclusion turns partnership law inside out, and constitutes nothing less than a judicial re-writing of Rev. Code Sections 1175.27(A) and 1775.39(B). As the remaining partner in the Partnership, YMSC was entitled to wind up its affairs. See also, Seminatore v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, Gen Partnership (2002), 148 Ohio App.3d 613, 624 [¶60]. The judgments entered below, holding to the contrary, are simply erroneous.

> Proposition of Law No. 2. The statutory remedy afforded a creditor of an individual partner under Rev. Code Section 1775.27(A) supercedes the procedural provisions of Civil Rules 24(A) and (B) in partnership dissolution actions.

Due to the particular nature of a partnership, an individual partner has no interest in specific partnership property. [Revised Code Section 1775.24.] Since no partner has the right to specific partnership property, no creditor of an individual partner has any such right either. No creditor can cause partnership property to be sold to satisfy the debt of the individual partner. Revised Code Section 1775.24(B)(2) makes that principle plain:

> "(2) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property."

This basic principle was enunciated in Buckman v. Goldblatt (1974), 39 Ohio App.2d 1, 3 n.6:

> "The full text of R.C. 1775.24(A) and (B) demonstrates a clear legislative intention to put partnership assets outside the reach of any claim that requires establishment through the individual partner, whether by assignment, judgment, exemption, or the operation of probate or family law, unless specifically permitted by statute, e. g., R.C. 1775.24(B)(4) and R.C. 1775.27."

See also, Farmers State Bank & Trust Co. v. Mikesell (1988), 51 Ohio App. 3d 69. Given the statutory language and the judicial explanation, it is evident that a creditor of a partner (here, the Bank as creditor of WFSC) cannot claim an interest in specific partnership property, and as such, any argument of intervention as a matter of right under Civ. R. 24(A)(2), to claim an interest relating to property, is simply mistaken as a matter of law.

To be sure, the Civil Rules were adopted and are employed to effect just results and to eliminate delay, expense, and other impediments to the expeditious administration of justice. However, they are not intended to afford substantive rights contrary to express legislative determinations. Here, the General Assembly, in adopting the uniform partnership act, expressly determined that partners of individual creditors had no interest in partnership property. A finding granting intervention as a matter of right, premised upon a claimed interest in the partnership property, is an express judicial repudiation of the statute.

So too is any permissive intervention authorized under Civ. R. 24(B)(2). There is no common question of law or fact, since there is no common interest. A creditor of an individual partner must await the winding up of the partnership, and can only look to that partner's distributive share of income or capital to satisfy its interest. It cannot, by consent or otherwise, seize partnership assets to satisfy the obligations of an individual partner.

Denial of intervention, consistent with the statutory framework, does not leave a creditor helpless. Its remedy to protect its interest is outlined in Rev. Code. Section 1775.27(A), which provides that:

> "On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require."

It is this statute which refutes the Bank's argument that its status as a secured creditor of WFSC somehow confers rights to participate in statutory partnership proceedings. Only when and after WFSC's interests in the Partnership have been determined, after the winding up of the Partnership has been concluded, is there to be any distribution to WFSC. The Bank, as a judgment creditor of WFSC, may charge that partnership interest. The Bank has not pursued this remedy; rather it has attempted to interfere with the internal operations of the Partnership by insisting that the remaining partner not otherwise disqualified from winding-up Partnership affairs be prohibited from doing so. Ohio law makes plain that the Bank is reaching where it is not permitted to go. It has no right to interfere in the partnership winding-up proceedings, and the decisions below which recognized and enforced that right were clearly at odds with the law.

This analysis was explicitly set forth by the appellate court in <u>Home Savings and Loan Company, Columbiana, Ohio v. Bil- Ko Film Distributors</u>, *unreported,* 1976 WL 188565

(Ohio App. 7 Dist.,1976), which addressed the right of a creditor of one partner to intervene in an action against a partnership. In that case, Profit Investments, Ltd. asserted its interest as an assignee of a judgment creditor against one of the partners, and sought to intervene in an action against the partnership. The trial court denied the motion to intervene, which decision was upheld by the appellate court, with the following analysis:

> "R. C. 1775.24 in the Uniform Partnership Law under (B)(3) states 'a partner's right in specific partnership property is not subject to attachment or execution except on a claim against the partnership.' R. C. 1775.27(A) states that 'on due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount . . . . .' By reason of this statutory limitation and authorized procedure, it is apparent that the appellant cannot be a materially interested petitioner, nor is this case appropriate as required in Morris [v. Investment Life Ins. Co. (1966), 6 Ohio St. 2d 185], supra, so as to give Civil Rule 24, Intervention of Right, any impact.
>
> Appellee has cited Farm Bureau Agricultural Credit Corp. v. Dicke, 29 Ohio App.2d 1,(1972), and Buckman v. Goldblatt [1974], 39 Ohio App.2d 1. A syllabus of each holds that property belonging to a partnership is not subject to levy of execution pursuant to a judgment against a partner individually. Further, Buckman went on to say, in Syllabus 2, that creditors of individual debtor partners may satisfy their claims from the individual partner's interest (as defined in R. C. 1775.25) by subjecting it to a charging order under circumstances that fall within the statutory design of R. C. 1775.27. We agree with both of the above appellate citations and find the syllabi referred to totally applicable herein. For these reasons, we find no merit in the First Assignment."

Unfortunately, the appellate court failed to address this authority, or to articulate its rationale for concluding that intervention, whether by right or by permission, was appropriate. Misled perhaps by its analysis that partnership property was in fact subjected to the claims of creditors of individual partners, the court compounded its error by ignoring the statute, and permitting additional mischief.

IV. CONCLUSION

Certainty and predictability are critical components for business transactions. The General Assembly provided such certainty with its adoption of the uniform partnership act in Chapter 1775 of the Revised Code. Judicial re-writing of the statute not only invites speculation and confusion, but undermines the prerequisites for an essential business climate. The rule of law and respect for private property are often recognized as critical determinants for a successful commercial economy; the decision below undermines both, as it extinguishes the vestiges of partnership property, and substitutes judicial fiat for legislative enactment.

The courts below erred as a matter of law in declining to appoint, as winding-up partner, the only remaining partner in the Partnership, especially where final judgment was entered against the other applicant refusing the application for appointment. From a simple business perspective, let alone a common sense point of view, winding up of a partnership engaged in the complicated business of buying, selling, and brokering used industrial machinery and equipment ought to be conferred on the partner most capable of discharging that task, especially where that partner has not wrongfully caused the dissolution. The focus must be on the partner winding up the business, not on the creditor of the individual partner seeking to satisfy its judgment.

The courts complicated that error by permitting a judgment creditor to intervene in a partnership dissolution action where the legislature had specifically limited its remedy to a charging order. The very nature of a partnership relationship requires that partners resolve between themselves the debts and obligation of the partnership before any distribution is made to individual partners. Permitting intervention, by right or by grace, turns that principle on its head, by advancing the interests of creditors of individual partners over those of the partnership itself. Rev. Code Section 1775.27(A) prescribes the remedy available to judgment creditors of individual partners. Only this court can now vindicate that legislative determination.

The judgment below is contrary to law, and should be reversed. Only by exercising its discretionary jurisdiction can this court address and remedy the error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Claimed Jurisdiction was duly served by ordinary mail, postage prepaid, upon Steven Alexsy, Esq., attorney for The Huntington National Bank, at his office at Seyburn, Kahn, Ginn, Bess and Serlin, P.C., 2000 Town Center, Suite 1500, Southfield, Michigan 48075-1195; and Howard Hershman, Esq., attorney for John Graham, Chapter 7 Trustee for Weldon F. Stump & Co., Inc., at his office at Gressley, Kaplin & Parker, LLP, One SeaGate, Suite 1645, Toledo, Ohio 43604, this 22nd day of February, 2008.

Attorney for Yoder Machinery Sales
Company

APPENDIX

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Yoder Machinery Sales Co.	Court of Appeals No. L-07-1139
Appellant	Trial Court No. CI 04-2406
v.	
Weldon F. Stump & Co., Inc., et al.	**DECISION AND JUDGMENT ENTRY**
Appellees	Decided: JAN 11 2008

* * * * *

John J. McHugh, III and Patrick A. Sadowski, for appellant.

Howard Hershman, for appellee John Graham, Chapter 7 Trustee for Weldon F. Stump & Co., Inc.; Steven Alexsy, for appellee The Huntington National Bank.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to be named winding-up partner and granted a motion to intervene filed by secured creditor Huntington National

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Bank ("Huntington"). For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Yoder Machinery Sales Company ("Yoder"), sets forth the following two assignments of error:

{¶ 3} "Assignment of error No. 1. The trial court erred as a matter of law in declining to appoint appellant as the winding-up partner of the partnership.

{¶ 4} "Assignment of error No. 2. The trial court erred as a matter of law in permitting the Huntington National Bank to intervene in the dissolution and winding-up of the partnership."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. Yoder and Weldon F. Stump & Co. ("Stump") were two separate businesses engaged in used machinery sales. Huntington is a secured creditor of Stump. Yoder and Stump collaborated for over three decades in the purchase and resale of used machinery and equipment. Their business practice and custom was that one of the businesses would front the initial purchase price in its entirety for the used equipment and retain sole possession of it until resale. Upon resale, the proceeds would be distributed on a pro rata basis, net costs, to all owners. In the interim, the other owners would be invoiced.

{¶ 6} Ray Darr, controller of Stump during the course of its used machinery resale partnership with Yoder, testified that the partnership arrangements between Yoder and Stump were primarily oral, with the sole document memorializing these arrangements being the invoices prepared for the co-owners who had agreed to participate in the purchase and resale venture.

{¶ 7} As the assets of these informal used machinery partnerships have been liquidated, Yoder has failed to issue distribution payments to Stump. In conjunction with this, Yoder has continued liquidating these joint assets without consent of the Chapter 7 bankruptcy trustee for Stump.

{¶ 8} On October 20, 2003, approximately five months before Huntington filed suit against Stump to enforce and protect its perfected security interest, Stump inexplicably altered the inventory coding on its jointly owned machinery and equipment in which Yoder maintained an interest. The asset coding was modified to reflect that the machines were solely owned by Yoder. The prior coding, confirming joint ownership with Stump, was deleted. None of the parties involved in the suspect coding modifications furnished any testimony evidencing a legitimate business reason.

{¶ 9} On March 25, 2004, judgment was entered in favor of Huntington against Stump in an amount of $2,676,832.93. On March 25, 2004, Huntington filed a complaint against Stump seeking enforcement of its security interests and for appointment of a receiver. Significantly, on March 31, 2004, just one week after Huntington received its judgment adverse to Stump, the bulk of Stump employees were furnished similar positions working for Yoder, undermining continued operations of Stump. In April 2004, Yoder modified its inventory records to eliminate any reference to machinery jointly owned with Stump rendering its asset modifications consistent with the alterations already performed in the inventory records of Stump.

{¶ 10} On June 29, 2004, Yoder filed suit seeking dissolution of the Stump partnership and an order appointing Yoder as winding-up partner. Ultimately, an involuntary bankruptcy was filed against Stump. A Chapter 7 bankruptcy trustee was appointed.

{¶ 11} On January 3, 2006, Huntington filed a motion to intervene in the complaint filed by Yoder to dissolve its partnership with Stump. Huntington furnished evidence that it is a secured creditor of Stump and possesses valid and protected security interests against Stump assets. Clearly, the assets relevant to this case include the machinery and equipment jointly owned with Yoder. On December 11, 2006, the court granted Huntington's motion to intervene in the Yoder/Stump dissolution case. On January 23, 2007, Yoder filed a renewed motion for appointment as the winding-up partner for the Yoder/Stump partnerships. The motion was denied. A timely notice of appeal was filed.

{¶ 12} In its first assignment of error, Yoder asserts that the trial court erred in declining to name it as winding-up partner. In support, Yoder argues that the trial court judgment denying its motion was contrary to the evidence.

{¶ 13} A judgment supported by competent, credible evidence will not be reversed by a reviewing court unless it is against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. Trial court findings are presumed correct and are reviewed with deference by an appellate court. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. The rationale underlying this deferential standard of review is rooted in the notion that the trial court is best suited to view the witnesses, observe their demeanor, and utilize first-hand observations in weighing the credibility of evidence and testimony. *Bd. of Trustees of Springfield Twp. v. Anderson*, 6th Dist. No. L-06-1014, 2007-Ohio-1530.

{¶ 14} R.C. 1775.36 establishes the parameters of those who are qualified to be appointed as winding-up partner. The statute sets forth in relevant part, "the partners who have not wrongfully dissolved the partnership or the legal representatives of the last surviving partner, not bankrupt, has [sic] the right to wind up the partnership affairs."

{¶ 15} We have carefully reviewed the record of evidence, paying particular attention to the actions of Yoder and Stump connected to their used machinery resale partnership. This joint enterprise clearly was part of the ongoing business operations of both entities. The record reflects that as business conditions at Stump deteriorated, its viability became suspect, and its creditors began to take proactive measures to protect their security interests, both Stump and Yoder engaged in collaborative conduct contrary to proper dissolution of their machinery partnership.

{¶ 16} The record establishes through the testimony of relevant employees of both companies that they engaged in post hoc asset accounting modifications that clearly ran counter to the security interest of Huntington. Their conduct was explicitly and implicitly designed to remove assets from the inventory of Stump in contravention of years of internal business practice and custom and thereby avoid the reach of Huntington. As the inevitability of receivership and asset liquidation of Stump became apparent, Yoder simultaneously poached the Stump workforce, accelerating its demise.

{¶ 17} The record contains ample objective and credible evidence supporting the conclusion that appellant did not qualify as winding-up partner of Stump pursuant to R.C. 1775.36. The record encompasses a multitude of actions by appellant demonstrative of a pattern of conduct indicative of highly suspect partnership dissolution. There is ample evidence in the record constituting competent, credible evidence in support of denying appellant's motion to be named winding-up partner of Stump. Appellant's first assignment of error is found not well-taken.

{¶ 18} In appellant's second assignment of error, it asserts that the trial court abused its discretion in granting Huntington's motion to intervene in the Yoder case seeking official dissolution of its partnership with Stump.

{¶ 19} Civ.R. 24(A) establishes the prerequisites in order for a party to be entitled to intervention in a pending action as a matter of right. It states, in pertinent part, "when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

{¶ 20} As was discussed in some detail above, the applicant in this matter, Huntington, clearly possessed an interest relating to the property that was the subject of the pending action. Huntington possessed perfected security interests against assets of Stump. In conjunction with this, Huntington possessed a judgment against Stump in the amount of $2,676,832.93.

{¶ 21} In the context of the above scenario, Yoder filed suit seeking to dissolve its machinery partnership with Stump simultaneous to both Stump and Yoder altering their asset records in an effort to delete Stump's co-ownership interest in the partnership's machinery. Clearly, Huntington's security interest could not be adequately represented by the existing parties. Disposition of the action without inclusion of Huntington in the case would impede its ability to protect its security interest.

{¶ 22} Our review of the disputed granting of Huntington's motion to intervene is conducted pursuant to the abuse of discretion standard. In order to find that an abuse of discretion transpired, we must be convinced by the record of evidence that the disputed decision was unreasonable, arbitrary, or unconscionable and not an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} Given the facts of this case, we need not belabor our analysis on this issue. Whether reviewing the second assignment of error on a de novo or abuse of discretion standard, it is equally clear that Huntington's security interest was related to property included in the subject action, disposition of the action would impede Huntington's ability to protect that interest, and Huntington's interest would not be adequately represented by the existing parties. Wherefore, we find appellant's second assignment of error not well-taken.

{¶ 24} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, P.J. ____________________
JUDGE

Arlene Singer, J. ____________________
JUDGE

Thomas J. Osowik, J. ____________________
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.