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No. 35548-5-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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SAMUEL ANGELO AND SAM ANGELO CONSTRUCTION, INC.,

Appellants,

v.

MARILYN ANGELO,

Respondent.

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REPLY BRIEF OF APPELLANTS  
SAMUEL ANGELO AND SAM ANGELO CONSTRUCTION, INC.

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Terry J. Lee and Leah M. Eccles  
Attorneys for Appellants  
Samuel Angelo and Sam Angelo  
Construction, Inc.

Terry J. Lee  
WSBA # 16559  
Law Office of Terry Lee  
201 NE Park Plaza Drive, Suite 222  
Vancouver, WA 98684  
(360) 891-1100

Leah M. Eccles  
WSBA # 36175  
Next Generation Divorce, PLLC  
13504 NE 84<sup>th</sup> St, Suite 103-263  
Vancouver, WA 98682  
(360) 448-8858

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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY  
COURT OF APPEALS  
DIVISION II

## TABLE OF CONTENTS

	<b>Page</b>
A. ARGUMENT	
1. The Minor Technical Flaw In The Notice Of Appeal Should Be Overlooked In Accordance With RAP 1.2(a) So That This Case Can Be Decided On Its Merits	1
2. The Vacated Property Settlement Agreement Cannot Be An Alternative Basis For The Amended Judgment	3
3. The Trial Court Erred In Consolidating The Tort Case With The Dissolution Action	4
4. Without A Claim Or Creditor The Damages And Attorney Fees Awarded Based On The Uniform Fraudulent Transfer Act Claims For Relief Should Be Reversed	6
5. Fraud Based On Undue Influence In A Confidential Relationship Cannot Be Assumed Because A Defunct Marriage Relieves The Managing Spouse Of His/Her A Duty To Act For The Benefit Of The Lapsed Community	9
6. This Court Should Deny Marilyn’s Request For Attorney Fees And Award Fees And Costs To The Appellants	12
B. CONCLUSION	14
C. APPENDIX	
Chronological Table of Clerk’s Papers	15

## TABLE OF AUTHORITIES

Page

### Table of Cases

#### Washington Cases

<u>CTVC of Hawaii, Co., Ltd. v. Shinawatra</u> 82 Wn. App. 699, 919 P.2d 1243, 932 P.2d 664, <i>rev. denied</i> , 131 Wn.2d 1020 (1997)	1
<u>Eide v. Eide</u> 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969)	12
<u>Gamache v. Gamache</u> 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965)	12
<u>Hwang v. McMahill</u> 103 Wn. App. 945, 15 P.3d 172 (2000)	2
<u>In re Marriage of Crosetto</u> 82 Wn. App. 545, 564, 918 P.2d 954 (1996)	12
<u>In re Marriage of Langham and Kolde</u> 153 Wn.2d 553, 106 P.3d 212 (2005)	5
<u>In re the Marriage of Wallace</u> 111 Wn. App. 697, 45 P.3d 1131 (2002)	5
<u>Marriage of Kaseburg</u> 126 Wn. App. 546, 108 P.3d 1278 (2005)	5-6
<u>McCluskey v. Handorff-Sherman</u> 125 Wn.2d 1, 888 P.2d 157 (1994)	4
<u>Pedersen v. Bibioff</u> 64 Wn.App. 723, 828 P.2d. 1126 (1992)	9, 10

	<b>Page</b>
<u>Peters v. Skalman</u> 27 Wn. App. 247, 617 P.2d 448, <i>rev. denied</i> , 94 Wn.2d 1025 (1980)	10-11
<u>Smith v. King</u> 106 Wn.2d 443, 451, 722 P.2d 796 (1986)	12
<u>State v. Armenta</u> 134 Wn.2d 1, 14 (1997)	12
<u>State v. Cass</u> 62 Wn. App. 793, 795, 816 P.2d 57 (1991), <i>rev. denied</i> , 118 Wn.2d 1012 (1992)	12-13
<u>State v. Olsen</u> 126 Wn.2d 315, 893 P.2d 629 (1995)	2
<b>Other Cases</b>	
<u>In re Arleaux</u> 229 B.R. 182 (8 <sup>th</sup> Cir. BAP 1999)	8-9
<u>In re Compagnone</u> 239 B.R. 841 (Bankr. D. Mass. 1999)	7
<u>In re Degner</u> 227 B.R. 822 (Bankr.S.D.Ind 1997)	8

#### **Statutes**

RCW 19.40.011 et seq Uniform Fraudulent Transfer Act	6, 7, 8, 9
RCW 26.09.140	14
RCW 26.16.030(3)	6

	<b>Page</b>
<b>Regulations and Rules</b>	
RAP 1.2(a)	1, 2
RAP 14.2	13, 14
ER 904	13

## A. ARGUMENT

### 1. THE MINOR TECHNICAL FLAW IN THE NOTICE OF APPEAL SHOULD BE OVERLOOKED IN ACCORDANCE WITH RAP 1.2(A) SO THAT THIS CASE CAN BE DECIDED ON ITS MERITS

Marilyn Angelo (hereinafter “Marilyn”) alleges that Samuel T. Angelo (hereinafter “Sam”) and Sam Angelo Construction, Inc. (hereinafter “SAC”) have waived their right to challenge the Amended Judgment because it was not designated in the Notice of Appeal. Marilyn bases her claim on CTVC of Hawaii, Co., Ltd. v. Shinawatra, 82 Wn. App. 699, 919 P.2d 1243, 932 P.2d 664, *rev. denied*, 131 Wn.2d 1020 (1997). In CTVC, the court discusses which orders are on review and decides that the orders relating to the dismissal for failure to state a claim are not on review because they were not designated in the notice of appeal, argued by the plaintiffs, and because the orders address the original complaint not the amended complaint. Id. at 706. In this case, the Amended Judgment entered on February 9, 2007 (CP 4855-4858) does not include any additional judgments against Sam and/or SAC not described in the original Judgment entered on October 13, 2006 (CP 3718-3721).<sup>1</sup>

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<sup>1</sup> In the Opening Brief the Clerk’s Papers were mistakenly cited to by docket number instead of index number. The appropriate index number is cited to in this brief. Respondent does not bring up this oversight in her brief and does not appear to have been prejudiced by it. A chronological table listing the docket number, filing date, document name, pages numbers, and starting index number is included in the appendix to assist the Court with the voluminous Clerk’s Papers.

In Hwang v. McMahill, the court said that it will review an order not designated in the notice of appeal if that order prejudicially affects the decision designated in the notice and is entered before the appellate court accepts review. 103 Wn. App. 945, 949, 15 P.3d 172 (2000). RAP 1.2 allows the court to overlook technical flaws and to decide a case on its merit. This rule is further explored in State v. Olsen when the court said:

“It is clear from the language of RAP 1.2(a), and the cases decided by this court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.”

126 Wn.2d 315, 893 P.2d 629 (1995). In Olsen, the court reviews an order not specifically designated in the notice of appeal because the opening brief argued the issue sufficiently for the respondent to respond and the respondent did. Id.

There are no additional issues seeking to be reviewed that are exclusive to the Amended Judgment. The amended judgment merely reduced the total judgment against Sam and SAC. Appellants ask this Court to overlook the fact that the Notice of Appeal was not later amended

to include the Amended Judgment because the errors contained in the original judgment remained in the amended judgment. The nature of the appeal and the issues presented are unchanged by the Amended Judgment. Marilyn has responded to the issues contained in both judgments showing that she was not prejudiced by the oversight. Furthermore Marilyn has given no compelling reason for the court to not exercise its discretion. Therefore we ask this Court to exercise its discretion and consider this case on its merits overlooking this technical flaw.

## 2. THE VACATED PROPERTY SETTLEMENT AGREEMENT CANNOT BE AN ALTERNATIVE BASIS FOR THE AMENDED JUDGMENT

The property settlement agreement cannot support the relief granted in the original or amended judgment because it was vacated at Marilyn's request. We have not challenged whether or not Sam complied with the property settlement agreement because when it was the question of compliance became moot. When the agreement was vacated it could no longer be used as the basis for an award. If Marilyn had wished to use the property settlement as the basis for the award she should have sought enforcement of the agreement which would have been more efficient than asking to have the property settlement vacated so that the property division could be decided anew through trial.

Marilyn refers to McCluskey v. Handorff-Sherman, where a jury was given two alternative theories to base the verdict on and the appellant conceded that one of the theories was properly before the jury. 125 Wn.2d 1, 11-12, 888 P.2d 157 (1994). This case does not apply because the property agreement cannot be an alternative basis for a potential judgment once it was vacated. This court cannot affirm the findings of the lower court based on the property settlement agreement because the lower court vacated the agreement.<sup>2</sup>

### 3. THE TRIAL COURT ERRED IN CONSOLIDATING THE TORT CASE WITH THE DISSOLUTION ACTION

Marilyn erroneously claims that the only parties who could have been aggrieved by the consolidation have settled and therefore the issue of whether the trial court had the authority to consolidate the cases is moot. Appellant SAC could be a subject of the property division in the divorce action, but was not a party in the case until the divorce action was consolidated with the tort case. Both Sam and SAC were parties to the tort case and were aggrieved by the consolidation. The consolidation changed the procedure and removed some of the rights that Sam and SAC would have had in the tort case (such as a jury trial). By combining the

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<sup>2</sup> If this court wished to revive the property settlement agreement, then it could reverse the trial court's order of April 18, 2003 (CP 749-750) and remand for enforcement of the property settlement agreement. However, Appellants do not request such action and Marilyn has also not requested that the April 18, 2003 order be reversed.

issues of the divorce with the issues of the tort case, Sam had to prepare for two cases at the same time while his pleadings were still limited to the length limitations of a single case. Sam and SAC were aggrieved by the consolidation that should have never occurred.

Marilyn cites to In re Marriage of Langham and Kolde to support the trial court's consolidation of the tort and divorce cases. 153 Wn.2d 553, 106 P.3d 212 (2005). Langham is about a husband who objected to having a property settlement agreement enforced through the family law court. We agree that the trial court would have had the authority to enforce the provisions of the property settlement agreement had it not been vacated. Langham does not apply to the case at bar because it does not deal with a consolidation of a divorce and tort case.

The trial court in In re the Marriage of Wallace, told the husband that the wife would file a separate complaint for fraudulent transfer. 111 Wn. App. 697, 704, 45 P.3d 1131 (2002). Wallace shows the method that should be followed; resolve the divorce action separately from the tort case.

In Marriage of Kaseburg, the court addresses the issue of whether or not divorce actions may be consolidated with tort claims in a footnote rather than the body of the decision because the wife in that case had not filed a tort action. 126 Wn. App. 546, 557 and 562, 108 P.3d 1278 (2005).

This footnote succinctly synthesizes previous case law dealing with the consolidation of tort and dissolution actions. We ask this Court to raise the Kaseburg footnote to a holding in this case by reversing the trial court's order to consolidate and in so doing put an end to any confusion.

4. WITHOUT A CLAIM OR CREDITOR THE DAMAGES AND  
ATTORNEY FEES AWARDED BASED ON THE UNIFORM  
FRAUDULENT TRANSFER ACT CLAIMS FOR RELIEF SHOULD BE  
REVERSED

Marilyn incorrectly states that the challenges to the Uniform Fraudulent Transfer Act (hereinafter "UFTA") are moot because all third parties have settled and dismissed their appeals. SAC was not a party to the divorce action prior to its consolidation with the tort case. SAC has not settled with Marilyn or dismissed its appeal.

Marilyn claims that RCW 26.16.030(3) makes a spouse a creditor with a claim under the UFTA. Had our Legislatures intended for the RCW 26.16.030 descriptions of property and marriage to have applied to the definition of a creditor and claim in the UFTA they would likely have stated so in the exhaustive list describing a creditor and claim in the UFTA RCW 19.40.011(3-4).

There is no Washington case law addressing the question of whether a spouse is a creditor under the UFTA by virtue of being married (or once the relationship begins to end, or a spouse files for dissolution).

Because of the strong similarities in the definition section between the UFTA and the Bankruptcy Code, it makes sense to look to bankruptcy cases for guidance on the definition of a creditor and claim during the end of a marriage.

In re Compagnone, the wife argued that she was a creditor within the Bankruptcy Code because she had filed for divorce prior to filing for bankruptcy and there was a strong likelihood that she would be awarded spousal support and property division. 239 B.R. 841, 845 (Bankr. D. Mass. 1999). That court held that the husband's obligation was not a debt and the wife was not a creditor because, although there was a probability that she would be awarded some relief she did not have a right to a payment merely because she filed for divorce. Id. The Compagnone court notes that the Bankruptcy Code encompasses contingent rights to a payment. Id. It further explains at as some point on the contingency continuum a right becomes so contingent that it cannot fairly be deemed a right to a payment at all. Id. That court held that the wife's right to a payment did not exist until the court order created such right. Id.

The Eight Circuit also addressed this issue in In re Arleaux, when it ruled that the husband could not add his former wife as a creditor in his bankruptcy because when he filed for bankruptcy the divorce was still pending so the wife did not yet have a claim. 229 B.R. 182, 183 (8<sup>th</sup> Cir.

BAP 1999). The husband argued that the claim arose concurrently with the filing of the divorce petition. Id. The court rejected the argument because a “petition is just a petition; where the process concludes is not a certainty.” Id.

In In re Degner, the court found that “while rights to equitable distribution vest against marital property upon filing of a divorce action, only the entry of an agreement of the parties or an equitable distribution order can create an enforceable right against a spouse, and thus potentially give rise to a ‘right to payment.’” 227 B.R. 822, 824 (Bankr.S.D.Ind 1997).

Marilyn was a creditor under the Bankruptcy Code and the UFTA when the property settlement agreement was signed because she had a claim for payment. Once the property settlement agreement was vacated, Marilyn no longer had a claim and therefore could not be a creditor under the Bankruptcy Code. This court should apply the interpretations of the Bankruptcy Code to this case because the definitions of a credit and claim in the UFTA were taken directly from the Bankruptcy Code. This court should find that Marilyn ceased having a claim under the UFTA when the property settlement was vacated. For this reason, this court should reverse the trial court’s award for damages and attorney fees based on Marilyn’s UFTA claims for relief.

5. FRAUD BASED ON UNDUE INFLUENCE IN A CONFIDENTIAL RELATIONSHIP CANNOT BE ASSUMED BECAUSE A DEFUNCT MARRIAGE RELIEVES THE MANAGING SPOUSE OF HIS/HER A DUTY TO ACT FOR THE BENEFIT OF THE LAPSED COMMUNITY

Marilyn states that the trial court did not have to consider all of the elements of common law fraud prior to finding that the UFTA had been violated. Of the 29 claims for relief only, 12 alleged violations of the UFTA. The other 17 claims alleged tortuous interference with a contract, fraudulent concealment, fraudulent transfer, fraudulent inducement, and failure to account. Of the claims granted by the trial court, claims 15, 18, 19, 21, 22, 25, and 29 alleged common law fraud.

To sustain a finding of common law fraud, the trial court in most cases must make findings of fact as to each of the nine elements of fraud.<sup>3</sup> Pedersen v. Bibioff, 64 Wn.App. 723, 828 P2d. 1126 (1992). Marilyn also cites to Pedersen. In Pedersen, the appellant's father was unable to read, write, or understand English and relied on his son James Bibioff almost completely. Id. at 719. The Pedersen court found that the relationship between James and his father was a confidential relationship and therefore gave rise to undue influence. Id. at 720. James Bibioff was found to have used undue influence to get his father to make him the sole beneficiary of the estate. Id. The court held that fraud can be presumed when there are

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<sup>3</sup> The exception is in instances of undue influence, which does not apply in this case. Id.

facts support a finding of undue influence. Id. at 724. When that occurs, the burden to prove that the transaction was valid shifts to the beneficiary. Id.

Marilyn discusses the fiduciary relationship between spouses and then cites to the discussion in Peters v. Skalman about confidential relationships. (Resp. Br 25). This transition suggests that fiduciary and confidential relationships are one and the same. The discussion in Peters suggests otherwise. Following the portion of the case cited to in Marilyn's Responsive Brief, the court in Peters goes on to say:

“termination of the marriage relieves the managing spouse of his or her duty to act for the benefit of the lapsed community. This termination can result from legal action divorce or dissolution- or when it can be determined that the marriage is defunct. Here, the trial court found that Marian and W. C. separated for the last time in 1943, and that thereafter their conduct indicated that the marriage had been renounced. The court therefore concluded that the marriage was defunct as of such date.

A defunct marriage exists where it can be determined that the spouses, by their conduct, indicate that they no longer have a will to union. In Re Estate of Osicka, 1 Wn. App. 277, 461 P.2d 585 (1969); Mackenzie v. Sellner, 58 Wn.2d 101, 361 P.2d 165 (1961); In Re Estate of Armstrong, 33 Wn.2d 118, 204 P.2d 500 (1949); Togliatti v. Robertson, 29 Wn.2d 844, 190 P.2d 575 (1948). Physical separation, by itself, does not negate the existence of the community. Kerr v. Cochran, 65 Wn.2d 211, 396 P.2d 642 (1964); Rustad v. Rustad, 61 Wn.2d 176, 377 P.2d 414 (1963). The test is whether the parties through their actions have exhibited a decision to renounce the community "with no intention of ever resuming the marital relationship." Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wn. App. 351,354, 613 P.2d 169 (1980).

27 Wn. App. 247, 525-523, 617 P.2d 448, rev. denied, 94 Wn.2d 1025  
(1980).

The argument that Marilyn and Sam had a confidential relationship and therefore a finding of undue influence would have shifted the burden of proof to Sam, only applies to part of claim 19 (of the 8 fraud claims granted). Claim for relief 19 alleges fraudulent inducement and accounting relating to real property located at 526 2<sup>nd</sup> Place, 534 2<sup>nd</sup> Place, and 338 Ivy transferred on August 13, 2000, over eight months after the parties separated. (CP 797). There is no finding by the trial court that Sam and Marilyn had a confidential relationship after they separated, let alone that such relationship led to a presumption of undue influence.

Fraud was not proven on any of the seven granted claims for relief alleging common law fraud. Neither the Findings of Fact and Conclusions of Law, Memorandum of Decision of May 10, 2006, or Memorandum of Decision of September 22, 2006 discuss the nine elements of common law fraud. (CP 3703-3717, 3365-3379, and 3692-3695 respectively). In the absence of a finding on a factual issue the court must indulge the presumption that the party with the burden of proof failed to sustain their burden on that issue. State v. Armenta, 134 Wn.2d 1, 14 (1997), (citing Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); State v. Cass, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *rev. denied*, 118 Wn.2d 1012

(1992).). We therefore ask the court to reverse all awards and attorney fees related to the claims of relief alleging fraud.

6. THIS COURT SHOULD DENY MARILYN'S REQUEST FOR ATTORNEY FEES AND AWARD FEES AND COSTS TO THE APPELLANTS

This court should deny Marilyn's request for attorney fees and award attorney fees to the Appellants. One reason that the court may award attorney fees is based on need and ability to pay. Marilyn claims that she does not have the ability to pay her own fees. Her claim ignores the negotiated settlement with the other defendants. If Marilyn were to prevail then she would also receive the damages and large attorney fees award ordered by the trial court. If Marilyn were to prevail, Sam and SAC would likely struggle to pay their own attorney fees and the amended judgment, let alone have the ability to pay Marilyn's attorney fees. Therefore this court should not grant Marilyn's request for attorney fees.

The court may also award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses. Gamache v. Gamache, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965); Eide v. Eide, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). If intransigence is established, the court does not need to consider the parties' resources. In re Marriage of Crosetto, 82 Wn. App. 545, 564, 918 P.2d 954 (1996).

This case was originally settled out of court. When a problem arose with the property settlement, Marilyn first sought resolution through the courts. (CP 98). Through negotiations, the parties were able to resolve the problems and come to a new agreement without litigation. (CP 162). When another problem arose, Marilyn again sought court intervention instead of pursuing further negotiations. (CP 163).

When Sam and SAC filed notice of their intent to rely on ER 904, Marilyn objected. (CP 2845-2855). After the trial, Sam and SAC sought attorney fees under ER 904 (c)(1) for the time spent admitting exhibits that Marilyn had objected to, and the court admitted. (CP 3602-3611). Marilyn even objected to exhibits contained in her own ER 904 submission. (CP 3603-3604). Marilyn's actions show a litigious behavior that supports an award of attorney fees and costs to Sam and SAC.

This court should not award attorney fees and costs to Marilyn because it is questionable whether she has need and whether Sam and SAC have the ability to pay. If Sam and SAC substantially prevail on this appeal, the court should award them attorney fees and cost as described in RAP 14.2 and RCW 26.09.140. The court may also award attorney fees and costs to the Appellants' based on Marilyn's intransigence.

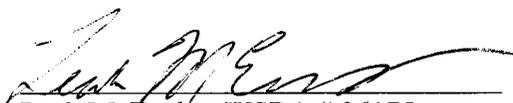
## B. CONCLUSION

For all of the foregoing reasons, this court should vacate the decision of the trial court on Marilyn's claims for relief 1-4, 10, 13-15, 18-19, 21-22, 25, and 29, and reverse the judgment and attorney fees and cost awards. In the alternative, this Court should remand so that the dissolution and tort actions can be adjudicated separately with proper application of the statutory provisions and case law described above and in the Opening Brief. In either scenario, this Court should award Sam and SAC reasonable attorney fees and costs under RCW 26.09.140 for maintaining the appeal and RAP 14.2 for substantially prevailing.

Respectfully submitted this 10<sup>th</sup> day of July, 2007.



Terry J. Lee, WSBA # 16559  
Attorney for Appellants, Samuel Angelo and  
Sam Angelo Construction, Inc.



Leah M. Eccles, WSBA # 36175  
Attorney for Appellants, Samuel Angelo and  
Sam Angelo Construction, Inc.

**C. APPENDIX**

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
2	6/6/2001	Summons & Petition For Dissolution Of Marriage	7	1
6	7/13/2001	Response To Petition (Domestic Relations)	3	8
52	1/24/2002	Submission (Deposition Transcript)	28	11
56	2/12/2002	Declaration Support Of Entry Of Decree Of Dissolution (Petitioner)	2	39
57	2/12/2002	Declaration Support Of Entry Of Decree Of Dissolution (Respondent)	2	41
58	2/12/2002	Findings Of Fact & Conclusions Of Law	17	43
59	2/12/2002	Decree Of Dissolution	14	60
63	2/26/2002	Motion To Compel	1	74
64	2/26/2002	Declaration Re Motion To Compel	23	75
67	3/5/2002	Motion For Relief From Judgment	1	98
68	3/5/2002	Supplemental Declaration Of Respondent Re Motion To Compel Compliance And In Support Of Motion For Entry Of Judgment And Attorney Fees.	23	99
73	3/12/2002	Declaration Of Diana Amren In Response To Respondent's Supplemental Declaration	17	122
74	3/14/2002	Motion For Protective Order, CR 26(C)(1), 65(A); Sanctions, CR 37(B)	7	139
79	3/15/2002	Declaration Of Diana Amren Regarding Signatures	2	146
80	3/19/2002	Petitioner's Objections/Motion To Dismiss Respondent's Motion For Relief From Judgment, CR 60(E); CR 12(B) Request For Attorney Fees/Terms	6	148

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
80A	3/25/2002	Trial Memorandum Re Respondent's Motion For Relief From Judgment	8	154
81	3/26/2002	Motion Hearing Clerk's In Court Record	1	162
85	8/21/2002	Motion For Relief From Judgment	1	163
86	8/21/2002	Amended Trial Memorandum Re Respondent's Motion For Relief From Judgment	9	164
90	8/21/2002	Declaration In Support Of Motion For Relief From Judgment	155	173
92	8/29/2002	Affidavit In Support Of Motion To Consolidate Causes Of Action	2	328
93	8/29/2002	Memorandum In Support Of Motion To Consolidate Causes Of Action	3	330
94	8/29/2002	Plaintiff's Motion To Consolidate Cases	2	333
96	8/29/2002	Petitioner's Second Filing Of Objections/Motion To Dismiss Respondent's Motion For Relief From Judgment, CR 60(E); CR 12(B), Request For Attorney Fees/Terms, Enforcement Of Proposed Amended Separation Agreement	90	335
98	9/6/2002	Defendant Samuel T. Angelo's Objection To Consolidation Of Cases Numbers 01-3-01055-4 & 02-2-03635-3; Request For Attorney Fees; RCW 4.85.185, CR 11	14	425
99	9/6/2002	Petitioner's Third Filing Of Objections/Motion To Dismiss Respondent's Motion For Relief From Judgment, CR 60(E); CR 12(B), Request For Attorney Fees/Terms, Enforcement Of Proposed Amended Separation Agreement	15	439

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
100	9/10/2002	Motion Hearing Clerk's In Court Record #5	2	454
108	1/16/2003	Sealed Financial Source Documents	186	456
109	1/16/2003	Declaration Of Sam Angelo	8	642
110	1/22/2003	Second Sealed Financial Source Documents	38	650
111	1/22/2003	Second Declaration Of Sam Angelo Re Interest In Real Property	4	688
112	2/7/2003	Order Granting Marilyn Angelo's Motion To Consolidate Cases	7	692
115	3/5/2003	Petitioner Sam Angelo's Motion For Court Order Disqualifying Respondent's Attorneys, The Scott Horestein Law Firm, P.L.L.C., And Carolyn M. Drew, RPC 3.7; Court Declination To Hold Evidently Hearings Re Fraud	12	699
116	3/7/2003	Summary Of Real Property	32	711
120	4/18/2003	Affidavit Of Attorney Fee	6	743
121	4/18/2003	Order	2	749
122	4/18/2002	Motion Hearing Clerk's In Court Record #5	1	751
125	5/2/2003	Declaration Of Sam Angelo	4	752
126	6/3/2003	Memorandum Of Decision	1	756
127	6/3/2003	Order Entering Judgment For Attorney Fees And Past Due Spousal Support	2	757
149	5/11/2004	CR 12b Motion	2	759
151	5/11/2004	Memorandum	5	761
152	5/19/2004	Opposition Of Plaintiff/Respondent Marilyn Angelo To Rule 12(B) Motion Of Sam Angelo	9	766
153	6/22/2004	Memorandum Of Decision	2	775
162	7/23/2004	Amended Complaint	108	777

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
163	8/11/2004	Defendant's Ted Angelo And Mary Jane Angelo's Answer To Plaintiff's First Amended Complaint	7	885
166	8/12/2004	Answer To Amended Complaint For Money Damages And Injunctive Relief	19	892
169	9/1/2004	Answer By Samuel T Angelo And Sam Angelo Construction, Inc. To Amend Complaint For Money Damages And Injunctive Relief Of Marilyn Angelo	282	911
180	10/25/2004	Stipulated Protection Order	3	1193
181	11/12/2004	Motion And Declaration To Exclude/Limit Testimony Of Judy Hockett	3	1196
183	11/16/2004	Motion In Limine	2	1199
186	11/17/2004	Declaration Of Counsel In Opposition To Motion In Limine Of Defendants Sam Angelo, And Defendants Theodore And Maryjane Angelo	2	1201
187	11/17/2004	Declaration Of Counsel In Opposition To Motion In Limine Of Defendants Sam Angelo, And Defendants Theodore And Maryjane Angelo	2	1203
188	11/17/2004	Opposition Of Plaintiff/Respondent Marilyn Angelo To Motions In Limine Of Defendants Sam Angelo, And Defendants Theodore And Maryjane Angelo	5	1205
190	11/30/2004	Supplemental Memorandum	3	1210
192	12/1/2004	Response Of Plaintiff/Respondent Marilyn Angelo To Theodore And Maryjane Angelo's Supplemental Memorandum And Motion In Limine	5	1213

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
193	12/7/2004	Defendants Ted Angelo And Maryjane Angelo's Motion For Summary Judgment	2	1218
195	12/10/2004	Citation	2	1220
196	12/15/2004	Response Of Plaintiff/Respondent Marilyn Angelo To Theodore And Maryjane Angelo's Citation For 5 Separate Matters	10	1222
197	12/15/2004	Deposition Transcript Of Marilyn Angelo Re Fee Agreement	5	1232
198	12/16/2004	Motion To Amend Answer	9	1237
200A	12/17/2004	Motion Hearing Clerk Record Judge Harris	1	1246
201	12/17/2004	Order	3	1247
203	12/21/2004	Declaration Re Evidentiary Hearing	10	1250
205	12/21/2004	Affidavit Of Michael G. Borge	43	1260
206	12/21/2004	Affidavit Of Maryjane Angelo	2	1303
207	12/21/2004	Declaration Of Lucinda Baumgarten	29	1305
208	12/21/2004	Affidavit Of Lewis Angelo	5	1334
209	12/21/2004	Affidavit Of Ted Angelo	4	1339
210	12/21/2004	Affidavit Of Sam Angelo	38	1343
211	12/21/2004	Memorandum In Support For Defendants Ted Angelo And Maryjane Angelo's Motion For Summary Judgment	104	1381
212	12/21/2004	Defendants Ted Angelo And Maryjane Angelo's Amended Motion For Summary Judgment	2	1485
214	12/22/2004	Defendants Gordon D. Foster And Sheryl L. Foster's Motion For Summary Judgment	4	1487
215	12/22/2004	Memorandum In Support For Gordon D. Foster And Sherryl L. Foster's Motion For Summary Judgment	6	1491
216	12/22/2004	Declaration Of Gordon Foster	13	1497

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
218	12/23/2004	Defendant Samuel T. Angelo, An Individual And Sam Angelo Construction, Inc.'s Motion For Summary Judgment	87	1510
219	12/23/2004	Declaration Of Samuel T. Angelo In Support Of Samuel T. Angelo And Sam Angelo Construction, Inc.'s Motion For Summary Judgment	330	1597
220	12/23/2004	Declaration Of Lucinda Baumgarten In Support Of Samuel T. Angelo And Sam Angelo Construction, Inc.'s Motion For Summary Judgment	12	1927
221	12/23/2004	Declaration Of Terry Lee In Support Of Motion For Summary Judgment	81	1939
224	12/23/2004	Correction Declaration Of Samuel T. Angelo	2	2020
231	12/29/2004	Plaintiff's Opposition To Theodore Angelo's Motion To Amend Answer	4	2022
231A	12/29/2004	Motion Hearing Clerk In Court Record Jg Harris #5	1	2026
233	12/30/2004	Defendant Joseph Angelo Declaration In Support Of Motion For Summary Judgment	2	2027
234	12/30/2004	Defendant Miki Angelo Declaration In Support Of Motion For Summary Judgment	2	2029
235	12/30/2004	Defendant Lewis Angelo Declaration In Support Of Motion For Summary Judgment	7	2031
236	12/30/2004	Memorandum In Support Of Defendant's Lewis, Miki And Joseph Angelo And Ted Angelo Partnership's Motion For Summary Judgment	17	2038
237	12/30/2004	Defendant's Lewis, Miki And Joseph Angelo And Ted Angelo Partnership's Motion For Summary Judgment	2	2055

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
241	1/10/2005	Plaintiff's Opposition To Defendants' Theodore And Maryjane Angelo's Amended Motion For Summary Judgment	52	2057
242	1/10/2005	Plaintiff's/Respondent's Declaration In Opposition To Motion For Summary Judgment Of: Defendant's Sam Angelo And Sam Angelo; Theodore & Maryjane Angelo; And Gordon And Sherry Foster	4	2109
243	1/10/2005	Declaration Of Counsel In Opposition To Motion For Summary Judgment Of: Defendant's Sam Angelo And Sam Angelo; Theodore & Maryjane Angelo; And Gordon And Sherry Foster	3	2113
244	1/10/2005	Plaintiff's/Respondent's Brief In Opposition To Defendant's Gordon Foster's And Sherry Foster's Motion For Summary Judgment	10	2116
249	1/11/2005	Plaintiff's Opposition To Defendants' Sam Angelo And Sam Angelo Construction Motion For Summary Judgment	20	2126
251	1/13/2005	Motion And Declaration Re Procedure For Trial	3	2146
252	1/14/2005	Memorandum Of Decision	2	2149
253	1/18/2005	Declaration Of Terry J. Lee In Support Of Motions For Summary Judgment For Defendant Samuel Angelo And Sam Angelo Construction, Inc.	149	2151
254	1/18/2005	Respondent's Summary Rebuttal To Plaintiff's Opposition To Motion For Summary Judgment	17	2300
255	1/18/2005	Affidavit Of Michael G. Borge	7	2317

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
256	1/18/2005	Defendant's Ted And Maryjane Angelo's Response To Plaintiff's Opposition To Defendant's Ted And Maryjane Angelo's Motion For Summary Judgment	15	2324
257	1/18/2005	Declaration Of Counsel In Opposition To Motion Summary Judgment Of Defendants' Lewis And Miki Angelo; Joseph Angelo; And Ted Angelo Brothers	2	2339
258	1/18/2005	Plaintiff's/Respondent's Declaration In Opposition To Motion For Summary Judgment Of: Defendants' Lewis Angelo, Miki Angelo, Joseph Angelo And Ted Angelo Brothers	2	2341
259	1/18/2005	Plaintiff's Opposition To Defendant's Lewis Angelo, Miki Angelo, Joseph Angelo And Ted Angelo Brothers Motion For Summary Judgment	88	2343
260	1/19/2005	Plaintiff's Response To Sam Angelo's Motion To "Clarify" Trial Procedure	4	2431
264	1/21/2005	Defendants Ted Angelo And Mary Jane Angelo's First Amended Answer To Plaintiff's First Amended Complaint	7	2435
268	1/25/2005	Motion For Stay Of Proceedings	2	2442
269	1/25/2005	Declaration Of John R. Briscoe In Support Of Motion For Stay Of Proceedings	3	2444
270	1/25/2005	Defendant's Lewis Angelo, Miki Angelo, Joseph Angelo And Ted Angelo Partnership's Reply To Plaintiff's Opposition To Motion For Summary Judgment	6	2447
271	1/25/2005	Defendant Lewis T. Angelo Declaration In Support Of Motion For Summary Judgment	2	2453

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
276	2/4/2005	Objection As To Form Of Order	5	2455
278	2/18/2005	Memorandum Of Decision	3	2460
279	3/4/2005	Motion And Declaration For Reconsideration	2	2463
280	3/4/2005	Motion And Declaration Re Oral Argument In Support For Motion For Reconsideration	2	2465
281	3/4/2005	Motion And Declaration To Extend Time To Allow Jury Trial	2	2467
283	3/4/2005	Motion And Declaration For Reconsideration	2	2469
284	3/4/2005	Motion And Declaration Re Oral Argument In Support For Motion For Reconsideration	2	2471
286	3/4/2005	Motion And Declaration To Extend Time To Allow Jury Trial	2	2473
287	3/4/2005	Motion And Declaration Re Oral Argument In Support For Motion For Reconsideration	2	2475
288	3/4/2005	Motion And Declaration For Reconsideration In The Alternative For A Jury Trial	2	2477
293	3/9/2005	Plaintiff's Opposition To Motion Of Theodore And Maryjane Angelo And Lewis, Miki And Joseph Angelo To Extend Time To Request A Jury Trail	6	2479
294	3/9/2005	Plaintiff's Opposition To Defendants Angelos' Motion For Reconsideration	6	2485
295	3/11/2005	Order Granting Motion For Summary Judgment Dismissing Gordon D. Foster, Jr And Sherryl L. Foster	4	2491
296	3/18/2005	Order	4	2495
300	3/24/2005	Motion To Compel Answers To Second Set Of Interrogatories And Requests For Productions	3	2499

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
302	3/25/2005	Plaintiff/Respondent's Motion For A Protective Order	2	2502
303	3/25/2005	Plaintiff's Motion, Memorandum And Declaration Of Counsel To Compel Answers To Plaintiff's Second Interrogatories And To Compel Production Of Documents	50	2504
306	3/30/2005	Memorandum Re Protective Order	2	2554
307	3/30/2005	Defendant's Declaration Of Counsel Re Discovery Dispute	3	2556
308	3/31/2005	Responsive Declaration Of Counsel Regarding Declaration Of Defendants' Counsel Terrance Lee	4	2559
310	4/7/2005	Notice Of Intent To Rely On ER 904	246	2563
313	4/8/2005	Notice Pursuant To ER 904	21	2809
314	4/8/2005	Plaintiff/Response ER 904 Notice	15	2830
315	4/21/2005	Defendant's Objections To Plaintiffs' Evidence Rule 904 Notice	11	2845
317	4/22/2005	Plaintiff's Objection To Defendants' Theodore And Maryjane Angelo Evidence Rule 904 Notice	8	2856
318	4/27/2005	Declaration Of Counsel Regarding Failure Of Sam Angelo And Sam Angelo Construction To Provide Court-Ordered Discovery Per Court's Order Of April 1, 2005	19	2864
321	5/2/2005	Motion Re: Plaintiff's Failure To Provide Court Ordered Discovery	52	2883
322	5/2/2005	Motion Re Plaintiff's Response To Defendant's Third Request For Production Of Documents	15	2935
323	5/4/2005	Plaintiff's Response To Discovery Motions Of Sam Angelo And Sam Angelo Construction	6	2950

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
324	5/4/2005	Declaration Of Defendant 'S Counsel Re Plaintiff's Motion/Court Order Of April 1, 2005, And Related Matters	26	2956
325	5/4/2005	Declaration Of Defendant Samuel T. Angelo	2	2982
325A	5/9/2005	Non-Jury Trial #5 Clerks In Court Record	4	2984
325B	5/9/2005	Log Sheet	9	2988
327	6/3/2005	Non-Jury Trial Clerks In Court Record	4	2997
328	6/3/2005	Log Sheet	9	3001
329	7/19/2005	Exhibit List	15	3010
330	7/20/2005	Non-Jury Trial Clerks In Court Record	19	3025
333	10/19/2005	Motion To Continue Trial	4	3044
334	10/19/2005	Declaration Of John R. Briscoe	5	3048
335	10/19/2005	Declaration Of Larry E. Hazen In Support Of Order Shortening Time For And For A Trial Continuance	5	3053
339	10/20/2005	Declaration Of Counsel In Opposition To Defendants' Lewis, Miki & Joseph Angelo's Motion To Continue Trial	5	3058
342	12/21/2005	Non-Jury Trial Clerks In Court Record	18	3063
343	12/21/2005	Log Sheet	4	3081
344	1/6/2006	Plaintiff's Written Closing Argument	115	3085
345	1/20/2005	Defendants Lewis T. Angelo's, Miki M. Angelo's & Joseph T. Angelo's Closing Argument	38	3200
346	1/20/2006	Memorandum	42	3238
347	1/20/2006	Sam Angelo's Closing Argument	53	3280
348	1/27/2006	Plaintiff's Rebuttal Closing Argument To Closing Arguments Of All Defendants	30	3333
349	2/13/2006	Motion Hearing Clerks In Court Record	2	3363

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
350	5/10/2006	Memorandum Of Decision	15	3365
354	5/22/2006	Plaintiff s/Respondent's Motion To Clarify Court's Ruling	4	3380
355	5/22/2006	Defendant's Motion For Reconsideration And Alteration And/Or Amendment Of Judgment	23	3384
356	5/22/2006	Defendant's Ted Angelo And Mary Jane Angelo's Motion And Declaration For Reconsideration Of Memorandum Of Decision/Clarification Of Memorandum Of Decision And/Or Motion To Amend Or Alter Memorandum Of Decision (CR59(A), (6), (7), (9)(H))	16	3407
357	5/22/2006	Cost Bill	6	3423
358	5/22/2006	Motion And Declaration For Reconsideration/Clarification And To Alter Or Amend Judgment	49	3429
362	5/24/2006	Declaration Of Terry Lee Re Duggan, Schlotfeldt & Welch, PLLC Cost Bill	8	3478
363	5/25/2006	Plaintiff s/Respondent's Motion For Attorney Fees	39	3486
366	5/25/2006	Affidavit In Support Of Attorney Fees	33	3525
368	5/25/2006	Affidavit In Support Of Attorney Fees	37	3558
369	5/31/2006	Objection To Plaintiff's Attorney Fees	5	3595
370	5/31/2006	Response Plaintiff's To Cost Bill	2	3600
372	7/28/2006	Motion And Declaration For Award Of Attorney Fees Pursuant To ER904(C)(1)	10	3602
373	8/4/2006	Defendant's Motion And Memorandum To Re-Open Case To Permit Limited Additional Evidence Re: Brant Road Properties' Mortgage Balances At The Time Of Transfer	27	3612

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
375	8/4/2006	Plaintiff's Response In Opposition To Defendant's Motion For Reconsideration	23	3639
377	8/7/2006	Plaintiff's/Respondent's Response To Ted Angelo's Opposition To Plaintiff's Motion For Attorney Fees; Plaintiff's Opposition To Ted Angelo's Motion For ER 904 Fees	8	3662
378	8/7/2006	Plaintiff's/Respondent's Response To Sam Angelo's Motion For ER 904 Fees	5	3670
379	8/9/2006	Plaintiff's Opposition To Defendant's Brothers Motion To Reopen	7	3675
380	8/9/2006	Defendant's Objection And Memorandum In Opposition To Plaintiff's Motion For Attorney Fees	8	3682
381	8/11/2006	Motion Hearing Clerk's In Court Record #9	2	3690
382	9/22/2006	Memorandum Of Decision	4	3692
386	9/29/2006	Defendant's Motion To Clarify The Court's Memorandum Of Decision	3	3696
391	10/5/2006	Defendant Ted Angelo And Maryjane Angelo's Objection To Cost Bill	4	3699
392	10/13/2006	Findings Of Fact And Conclusions Of Law	15	3703
393	10/13/2006	Judgment	4	3718
394	10/26/2006	Abstract Of Judgment	2	3722
395	10/26/2006	Abstract Of Judgment	2	3724
418	11/9/2006	Deposition Of Lewis Angelo	75	3726
419	11/9/2006	Deposition Of Samuel Angelo Vol. I	95	3801
420	11/9/2006	Deposition Of Samuel Angelo Vol. II	76	3896
421	11/9/2006	Deposition Of Joseph Angelo	81	3972
422	11/9/2006	Deposition Of Theodore Angelo	94	4053
423	11/9/2006	Deposition Of Marilyn Angelo	112	4147
424	11/9/2006	Deposition Of Marilyn Angelo Vol. II	188	4259

<b>Doc. No.</b>	<b>File Date</b>	<b>Docket Description</b>	<b>No. Pgs.</b>	<b>Page No.</b>
425	11/9/2006	Deposition Of Sam Angelo	230	4447
426	11/9/2006	Notice Of Appeal To Court Of Appeal	43	4677
428A	11/9/2006	Exhibits	39	4720
439	11/13/2006	Notice Of Appeal To Court Of Appeal	23	4759
442	11/13/2006	Notice Of Appeal To Court Of Appeal (Division II)	29	4782
541	12/11/2006	Designation of Clerk's Papers	42	4811
		Certificate of Clerk	2	4853
642	2/9/2007	Amended Judgement	4	4855
659	5/7/2007	Supplemental Designation of Clerk's Papers	4	4859
		Certificate of Clerk	2	4863

201 NE Park Plaza Drive  
Suite 222  
Vancouver, WA 98684

*Law Office of Terry Lee*  
*Attorney at Law*

Phone: (360) 891-1100  
Fax: (360) 891-1661

July 10, 2007

Washington State Court of Appeals  
Division Two  
**ATTN: Court of Appeals Clerk**  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

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CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

**Re: *Angelo v. Angelo***  
***35548-5-II***

Dear Clerk:

Enclosed please find an original and two copies of the Reply Brief of Appellants Samuel Angelo and Sam Angelo Construction, Inc. Please return one copy conformed in the self-addressed envelope provided.

Should you have any questions, please do not hesitate to contact this office.

Sincerely,



Jentri Linn  
Paralegal to  
Terry J. Lee

Enclosures

cc:

Client (w/Reply Brief of Appellants Samuel Angelo and Sam Angelo Construction, Inc.)  
Carolyn Drew (w/Reply Brief of Appellants Samuel Angelo and Sam Angelo Construction, Inc.)  
Curtis Welch (w/Reply Brief of Appellants Samuel Angelo and Sam Angelo Construction, Inc.)  
Catherine Smith (w/Reply Brief of Appellants Samuel Angelo and Sam Angelo Construction, Inc.)