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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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SHELCON CONSTRUCTION GROUP, LLC,

Respondent

v.

SCOTT M. HAYMOND, et al,

Appellants

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AMENDED BRIEF OF APPELLANT

*When preparing the reply brief, it was discovered the RP reference numbers used for the original "Brief of Appellant" were taken from an incomplete verbatim report of proceedings for October 3, 2016, initially filed with the court by the court reporter. This Amended Appellant Brief corrects the RP numbers to correspond with the complete verbatim transcript filed June 13, 2017. A Supplemental Designation of Clerk's Papers was filed November 8, 2017 and the blank CP references in the Brief of Appellant have been supplemented in this Amended Brief of Appellant. The Table of Contents has been amended due to the changes created by the insertion of correct numbers. Along with name corrections in two places, these are the only amendments to the Appellant Brief dated June 14, 2017. The court should treat this as Appellant's Opening Brief.*

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## TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....	1
A. Assignment of Error.....	1
B. Issues pertaining to Assignment of Error.....	1
II. STATEMENT OF THE CASE.....	2
A. Procedural History.....	2
B. Underlying Facts.....	4
III. ARGUMENT.....	9
A. Standard of review.....	9
B. Substantive Legal Authority.....	9
Summary of Objectives to Findings and Conclusions.....	9
Findings of Fact.....	10
Conclusions of Law.....	16
Specific Legal Analysis and Argument.....	17
1. Neither the Bylaws nor any of the Club’s governing Documents or enacted rules require approval of the Club Board of Directors prior to a transfer of a Membership interest and the membership interests were property assigned.....	17
2. RCW 19.40.061 specifically defines when this type of property interest transfers (for the purposes of the FTA) and it clearly occurs “when it becomes effective between the debtor and the transferee”, regardless of what the Club Bylaws or Rules provide .....	25

3. Mr. Haymond could not retain his club membership after transferring his residence because the Bylaws clearly provide that one cannot own a membership Interest without owning a residence.....	28
4. Linville cannot possess a membership absent owning a residence.....	30
5. Even if Scott Haymond’s membership was “attachable”, then the Trust’s membership interest in 2012 is simply a “new membership”, not a “transfer” because the Trust, not Scott Haymond, owns a residence on Club property, and Scott Haymond had nothing of value to transfer as of 2012.....	32
6. The statute of limitations for challenging the transfer of the gun club membership ran at the latest in August of 2013, approximately (6) months prior to Plaintiff’s action to set it aside.....	33
IV. CONCLUSION.....	34

## TABLE OF AUTHORITIES

### Table of Cases

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wash. App. 700, 717, 281 P.3d 693, 703 (2012).....18

Columbia Cmty. Bank v. Newman Park, LLC, 177 Wash. 2d 566, 573, 304 P.3d 472, 475 (2013).....9

First Citizens Bank & Trust Co. v. Harrison, 181 Wash. App. 595, 602, 326 P.3d 808, 812, review denied, 337 P.3d 326 (Wash. 2014).....28

Morrison v. Nelson, 38 Wash. 2d 649, 659, 231 P.2d 335, 340 (1951)...18,19

Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (2015).....3,4,7,20,23,33

State v. Armenta, 134 Wash. 2d 1, 9, 948 P.2d 1280, 1284 (1997).....9

State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).....9

State v. Hill 123 Wn.2d 641, 647, 870 P. 2d 313 (1994).....9

State v. Stevenson, 128 Wn.App 179, 193 114 P.3d 699 (2005).....9

### Statutes

RCW 19.40 et. seq.....27

RCW 19.40.061.....25,27,32

RCW 19.40.061(1).....27

RCW 19.40.061(2).....27

RCW 19.40.061(3).....27

RCW 19.40.091.....26,27,33

RCW 19.40.091(a) .....33

## I. ASSIGNMENT OF ERROR

### A. ASSIGNMENT OF ERROR. The trial court erred by:

1. Determining as a matter of law that the Bylaws of the Statute of Limitations has not run as to the transfer of Scott Haymond's ("Haymond") membership interest in the East End Lake Tapps Rod & Gun Club ("the Club") to the Darra Marie Haymond Living Trust ("the Trust").
2. Determining as a matter of law that Plaintiff can attach the membership when one must own a dwelling situated on the club property to be a member
3. Determining that even if the transfer did not occur in 2006, that the membership established in 2012 was not a new membership obtained by the Trust, and not subject to RCW 19.40 et. seq.

### B. ISSUES RELATING TO ASSIGNMENT OF ERROR.

1. Do the Bylaws nor any of the Club's governing documents require approval of the Club prior to a transfer of a membership interest?
2. Does RCW 19.40.061 specifically define when this type of property interest transfers for the purposes of the UFTA, and does a transfer occur "when it becomes effective between the debtor and the transferee", regardless of what the Club Bylaws or Rules provide?
3. Can Mr. Haymond retain his club membership after transferring his residence?

4. Can Linville attach and possess a membership absent owning a residence?
5. Even if Scott Haymond's membership was attachable, was the 2012 simply a "new membership", not a "transfer" because the Trust, not Scott Haymond, owns a residence on Club property, and the trust paid the new member fee and was granted a membership interest?
6. Did the statute of limitations for challenging the transfer of the gun club membership run at the latest in August of 2013, approximately (6) months prior to Plaintiff's action to set it aside?

## II. STATEMENT OF THE CASE

### A. Procedural History.

This appeal comes following a fact finding hearing ordered on remand by this court on May 27, 2015, to determine certain issues that were unclear in the record on the first appeal of the trial court's order setting aside transfers of certain property interests to the Trust by Defendant Scott Haymond in 2006 pursuant to RCW 19.40 et. seq..

In its May 27, 2015 ruling, this Court specifically, this court asked the trial court to determine the following issues:

- 1) Whether the club rules permitted Mr. Haymond to transfer his club membership before the board approved the new member.

2) Whether Mr. Haymond retained his club membership after transferring his residence.

3) Whether or not Shelcon is entitled to possess a membership absent owning a residence.

Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*8) (2015).

In between the original appeal and the evidentiary hearing, litigation ensued between Plaintiff and the Linville Law firm. As a result of that litigation, the Linville Law firm was assigned an interest in the judgment against Haymond. CP 1-2. Thus, the Linville Law Firm became the party in interest of the issue before the court in this appeal to wit: ‘The ownership of the membership interest in the Club’. Therefore, for the purposes of this brief, rather than referring to “Plaintiff” or “Respondent” (formerly Shelcon Construction Group, LLC) , this brief will refer to the Responding party in his matter simply as “Linville”).

An evidentiary fact finding hearing was held on October 3, 2016, before the Honorable Victoria Hogan, the same trial judge who heard this matter prior to the original appeal. Testimony and documentary evidence was presented at the hearing. The court announced its oral decision on October 11, 2016. RP 140-148.

Presentation of proposed Orders on the hearing was held on December 2, 2016. Both parties presented different proposed orders including findings of fact and conclusions of law. CP 426-454 and CP 468-478. The Court entered Linville's proposed Findings of Fact and Conclusions of Law, and separate Order Avoiding Scott M. Haymond's Transfer of Club Membership ("the Orders") over Haymond and the Trust's objections. CP 468-478; CP 478-481.

The Trust filed a timely appeal of the orders on December 28, 2016. CP 506-523.

B. Underlying Facts.

As this court may recall, this appeal comes following post judgment action by Plaintiff Shelcon Construction Group LLC to set aside transfers of property made to a trust by Defendant Scott Haymond which were originally made well before any obligation or "debt" was incurred by Defendant to Plaintiff. This appellant Darra Odenwalder, the trustee of the aforementioned trust, was not initially named as a party to the underlying action, but has been recognized by this court and the trial court as an "aggrieved party", and has standing to litigate this matter. Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*3) (2015).

On April 6, 2006, over two years *prior to entering into a business relationship with Plaintiff*, Defendant Scott Haymond established the Darra Marie Haymond Living Trust (“DH Trust”). (CP180). On April 6, 2006, Defendant Scott Haymond transferred by Bill of Sale, his interest in the property which is the subject of this action, and also transferred his interest in the associated membership in the East End Lake Tapps Rod & Gun Club (“the Club”). (CP 270). The transaction between Haymond and the Trust was effective at the time of transfer on that date. *Id.* On November 14, 2008, realizing that the transfer of the property had not been recorded and desiring to do so, Scott Haymond again issued a Bill of Sale to the trust for the property, and recorded the Bill of Sale with Pierce County. CP 274. The reason that the transfer of the residence and the club membership was via a bill of sale was because Mr. Haymond’s interest in the residence and membership was personal property only, as dwelling owners at the Club do not own the land under their dwellings, only the dwellings (on club property) and the club membership. CP 280.

On or about July 5, 2006, approximately two months after he established the trust and transferred his property and gun club membership interest, Defendant Scott Haymond began construction work for Plaintiff. CP 529-549 (supplemented - Original Complaint filed in this action). On

or about November 25, 2009, over 3 years after the initial transfer of the subject property, Plaintiff filed suit against Defendant Scott Haymond as a result of its business relationship with Plaintiff. *Id.* On October 28, 2011, judgment was entered against Defendant Scott Haymond in favor of Plaintiff. CP 550-553 (supplemented - Original Judgment filed in this action).

As alleged by a former member of the board of directors in a declaration, On March 12, 2012, The Club apparently formally approved the membership of Darra Odenwalder, Trustee of the DH Trust, although no formal documentation of such an approval exists. CP 186.

On February 5, 2014, Plaintiff initiated an action to set aside the transfers of the residence and the gun club membership into the trust, pursuant to **RCW 19.40** *et. seq.* CP 1. On March 14, 2014, following an order to show cause served upon non-party, Darra Odenwalder (in addition to being served on a party Defendant, Scott Haymond), this court declared the real property interest as well as a gun membership interest belonging to the Darra Marie Haymond Living Trust (Aka Darra Marie Haymond Living Trust) to be void. CP 571-573 (supplemented - Original Court Order Avoiding Transfers filed in this action on 3/14/2014).

Thereafter, Defendant Scott Haymond, and Darra Odenwalder, as trustee of the DH trust, filed an appeal of the court's order in the Court of Appeals, Division II.

On May 27, 2015, this Court reversed this court's order setting aside the transfer of Mr. Haymond's residence, finding that the statute of limitations had expired in 2012 at the very latest (four years after the date of the transfer of the property into the trust in 2008), making Plaintiff's action to set aside the transfer of the property in February of 2014 untimely. Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*7) (2015).

The Court remanded the issue of Defendant's transfer of the Club membership back to the trial court for determination as to whether or not the statute of limitations had also run on that transfer, and as to whether or not that transfer could logically be set aside, separate from the property ownership in the house, since one must own a dwelling on club property in order to be a member. Plaintiff does not own a dwelling on club property. Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*8) (2015).

While this matter was on appeal, a dispute arose between Plaintiff,

Shelcon, and its legal counsel, the Linville Law Firm, and litigation ensued between them. Prior to that lawsuit, The Linville Law Office withdrew from representation of Plaintiff, by order of this court on August 21, 2015, effective August 24, 2015, and had not reappeared at the time of the evidentiary hearing scheduled in this matter. Thereafter, Linville became a partial assignee of Plaintiff's Judgment against Haymond, including the claim involved in this appeal. CP 1-2.

An evidentiary hearing was held on October 3, 2016, before the Honorable Judge Victoria Hogan, who made the original determination to set aside both the transfer of Haymond's residence and the Club membership. No new Club Bylaws or Rules were introduced into evidence at that hearing. Rather, two witnesses were presented by Linville who were members of the Club Board of Directors who testified as to their understanding of the Club Bylaws as well as other facts surrounding meetings and interactions with Haymond and Mrs. Odenwalder. CP 3.

Other than the statement of opinions of the two Board members, who admitted that there was nothing other than the Bylaws to support their opinions, no further evidence of any "rules" or other governing documents were presented to demonstrate whether or not a member needs prior approval of the Board of Directors in order to transfer his or her

membership interest in the Club. RP 61-64\RP 71-73; RP 83-88; RP 111-113. As will be argued below, the witnesses acknowledged the limitations of the Bylaws.

### III. ARGUMENT

#### **A. Standard of Review**

When reviewing a trial court's ruling on a question of law, the appellate court reviews the question de novo. Columbia Cmty. Bank v. Newman Park, LLC, 177 Wash. 2d 566, 573, 304 P.3d 472, 475 (2013).

After a bench trial or fact finding, review is limited to determining whether substantial evidence supports the challenged findings and if so, whether the findings support the conclusions of law. State v. Hill 123 Wn.2d 641, 647, 870 P. 2d 313 (1994). State v. Stevenson, 128 Wn.App 179, 193 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo. State v. Armenta, 134 Wash. 2d 1, 9, 948 P.2d 1280, 1284 (1997); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

#### **B. Substantive Legal Authority**

#### SUMMARY OF OBJECTIONS TO FINDINGS AND CONCLUSIONS

The following is a summary list of the Trust's objections to the Findings of Fact and Conclusions of Law entered by the Court on

December 2, 2017 (CP 468-478), which are simply not supported by the evidence; were not even addressed at the hearing; or otherwise did not have a basis for inclusion in the court's findings. Generally, as the court can see from a review of the court's oral ruling, these findings depart in great detail from the actual findings and conclusions given orally to the parties. RP 140-148. The Trustee's Findings of Fact and Conclusions of Law, which were rejected by the trial court, tracked virtually identically with the court's ruling. CP 426-454.

#### Findings of Fact

*“2.3. Only Club members may be elected to the Club's Board”.*

This finding is erroneous because the Bylaws do not require a Board member to be a club member. CP 280-281. Richard McDermott, President, acknowledged this fact at the hearing. RP 83-84. There simply is no evidence to support this finding whatsoever. Furthermore, the Court overruled a proper objection to testimony that contradicted the document, which had no foundation. RP 38.

*“2.18 The Club rules require Board approval of transfers of memberships. The Club rules permit members to transfer their membership upon the transferee's payment of an initiation fee to the Club and upon the transferee being approved by the Club' Board.”*

This finding is erroneous to the extent that “approval” at the time of the transfer of Haymond’s membership interest in 2006/2008, was merely conditioned on payment of a fee, as acknowledged by Board testimony at hearing, and by the Bylaws<sup>1</sup>. CP 280, 284, RP 73-75.

*“2.19 A Club member retains his or her membership interest until such time as the Club’s Board meets with and approves the transfer of Club membership to the transferred or until the member is expelled by the Club.”*

This finding is erroneous because this language simply does not exist in the Bylaws whatsoever, and it was not established by the testimony. CP 280.

*“2.21 Prior to the transfer of a Club membership, a prospective transferee must be brought before the Board.”*

This finding is erroneous because this language simply does not exist in the Bylaws whatsoever, and it was not established by the testimony. CP 280.

*“2.22 The Club’s Bylaws required the Board’s approval before transfer of Haymond’s membership.” **(Emphasis added)***

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<sup>1</sup> While not raised in the Findings or Conclusions, another requirement for a “transfer” was that the transferor not be delinquent in dues. Testimony from both McDermott and Thorp was that not only was Haymond not delinquent at the time of transfer, McDermott testified that he did not believe that he was never delinquent. RP 86; RP 118-120; CP 471.

This finding is erroneous because this language simply does not exist in the Bylaws whatsoever, and the testimony only supported a belief by Board members of what they thought the Bylaws required, which lacks relevance. The documents speaks for itself, and the court should have sustained objections regarding the same. CP 280; RP 59.

*“2.23 A transferee of a Club membership becomes a new member only after the Board votes and approves the transfer.”*

This finding is erroneous because this language simply does not exist in the Bylaws whatsoever, and the testimony only supported a belief by Board members of what they thought the Bylaws required, which lacks relevance. The documents speaks for itself. CP 280, RP 41-42; RP 60-63; RP 70-73; RP 111-112.

*“2.24 Since 2002, the practice of the Club has been to transfer Club membership only upon Board’s approval.”*

This finding is erroneous because this language simply does not exist in the Bylaws whatsoever, and while the Board did frequently handle memberships like this, they did not always pre-approve transfers, as admitted by Nancy Thorpe. RP106-107, RP 112

*“2.25 The Board’s exercise of authority it’s to accept new membership in the Club is discretionary (“may allow”).”*

This finding is erroneous because this language simply does not exist in the Bylaws. CP 280. The Bylaws simply required a payment of a \$300 filing fee as of the time of the issues in this case, which Nancy Thorp acknowledged. RP 113.

*“2.27 Haymond was a club member in good standing in 2011 and was president of the Club in 2011.”*

This finding is erroneous because it is a legal conclusion, not a finding of fact. While the Board might have, in fact, seen him as a member in good standing, for the reasons argued in this brief, that was legally impossible.

*“2.29 Upon this Court’s Order Avoiding Scott M. Haymond’s Transfer of Club Membership, Haymond will be in violation of Club rules.”*

This finding is erroneous because the finding does not specify what rule would have been violated, and why that was relevant to any Conclusions of law regarding transfer of the membership interest.

*“2.30. During the time that Haymond will be in violation of Club rules, Haymond will continue on as a Club member subject to action(s) to be taken by the Board.”*

This finding is erroneous because the Bylaws simply do not allow for that process, and the Board never testified that this is how they characterized his status and how they would handle the matter. In fact, the

Mr. McDermott testified that they “Didn’t know about all of the trailing stuff” and at the time the Trustee applied for membership, they just treated her as a new member. Furthermore, the McDermott reported no “violation status” with respect to Haymond and took no negative action against him. This is simply a manufactured finding. RP 74.

*“2.31 A member who violates Club rules remains a member until expelled.”*

This finding is erroneous because while in general it may be true, this does not track with the Bylaws whatsoever, and it is simply inserted in the Findings to provide context. It was not specifically found by the court.

*2.34 Duplicative of Finding 2.29*

See comment to Finding 2.29.

*2.35 Duplicative of Finding 2.30*

See comment to Finding 2.30.

*2.36 Duplicative of Finding 2.31*

See comment to Finding 2.31.

*“2.38 The testimony of McDermott and Thorp was credible. Each witness was a Club member of longstanding and each witness served*

*multiple terms not he Club's Board. Each witness possesses substantial knowledge and experience with the Club's rules and practices."*

The only problem with this finding is that credibility issues were exposed with Mr. McDermott when pressed about his former declaration that said he believed Haymond transferred the property to avoid creditors, when he first said that he never said that, then seemed confused, which would indicate that the declaration he signed back in 2015 was simply prepared by Linville for him to sign. RP 68-73.

*"2.39 [This is a long narrative reciting issues not even presented to the court in this remand, but rather are a reiteration of prior testimony dating back to February 20, 2014.]"*

There was absolutely no evidence or testimony ever taken about any of the contents of this finding, and it was clearly erroneous for the court, who didn't even reference it in its oral decisions, let alone accept evidence on any of these issues, to accept this as a finding. RP 140-148.

*"2.40. Given the previous actions of Haymond and Odenwalder to place Haymond's membership interest beyond the reach of Haymond's creditors, there is a substantial risk that such actions could occur again."*

There was absolutely no evidence or testimony ever taken about any of the contents of this finding, and it was clearly erroneous for the court, who didn't even reference it in its oral decisions, let alone accept evidence on any of these issues, to accept this as a finding. RP 140-148.

Conclusions of Law

*“3.2 The Club rules do not permit a member to transfer his/her club membership until such time as the Board approves the new member.”*

This Conclusion of Law is erroneous because the only “Club Rules” that exist are the Bylaws, and the Bylaws simply do not say that. CP 280-286.

*“3.3 The Club rules require Board approval for all Club Membership transfers and this approval by the Board must occur before the transfer of the membership can occur.”*

This Conclusion of Law is erroneous because the only “Club Rules” that exist are the Bylaws, and the Bylaws simply do not say that. CP 280-286. The testimony of witnesses merely pointed to the Bylaws. RP 58-59, 71-72, RP 111-112.

*“3.4 A Club Member may own and possess a Club membership without owning a dwelling at the Club until such time as the rule violation is addressed by the Club’s Board and the Board has resolved the situation and taken final action.”*

This finding is erroneous because the Bylaws simply do not allow for that process, and the Board never testified that this is how they characterized his status and how they would handle the matter. In fact, the Mr. McDermott testified that they “Didn’t know about all of the trailing stuff” and at the time the Trustee applied for membership, they just treated her as a new member. Furthermore, the McDermott reported no “violation

status” with respect to Haymond and took no negative action against him.

This is simply a manufactured finding. RP 74.

*“3.5 Haymond did not transfer his Club Membership until March 12, 2012, the date that the Club’s Board approved said transfer to Odenwalder as trustee of the Trust.”*

This conclusion is erroneous because it contradicts the Bylaws, and is contrary to the clear mandate of RCW 19.40.061, to be explained later, which legally defines when transfers of this nature occur.

*“3.6 Shelcon’s Motion to Avid the transfer of Haymond’s club membership was filed within the statute of limitations set forth in the Uniform Fraudulent Transfers Act, RCW 19.40.091.”*

This conclusion is erroneous because, as will be explained below, any and all “transfers” occurred in 2006 or 2008. To the extent that the membership wasn’t transferred at that time, the Trust’s membership in 2012 was a new membership, as will be explained more fully below.

#### Order Avoiding Scott M. Haymond’s Transfer of Club Membership

The Trust generally objects to the effect of the order based on the lack of support from the above Findings of Fact and Conclusions of Law.

#### SPECIFIC LEGAL ANALYSIS AND ARGUMENT

1. Neither the Bylaws nor any of the Club’s governing documents or enacted rules require approval of the Club Board of Directors prior to a

transfer of a membership interest, and the Membership interests were properly assigned.

The Club Bylaws do not require approval by the board of directors of a transfer or assignment of a membership interest (other than in an estate situation), nor do they require any other affirmative action by the transferor or transferee of a membership in order to complete such a transfer or assignment (other than arguably for the transferor to be current in his or her assessments at the time of assignment<sup>2</sup>). They certainly do not require approval of a transfer of a membership interest prior to such transfer, as the court of appeals has asked the court to decide. Therefore, the transfer of Mr. Haymond's membership interest in the club was complete as of 2008 at the latest, when it was transferred by Bill of Sale.

Contracts are assignable unless such assignment is expressly prohibited by statute or contract or is in contravention of public policy. 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wash. App. 700, 717, 281 P.3d 693, 703 (2012). Anti-assignment provisions are to be narrowly construed. Id. An assignment in violation of a restriction is not void, but voidable at the option of the other contracting party. Morrison

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<sup>2</sup> Article IX is inartfully drafted, and could appear to have no requirements, but a logical reading of that section could reveal that subsection "b" requires assessments of the transferor be paid at the time of transfer.

v. Nelson, 38 Wash. 2d 649, 659, 231 P.2d 335, 340 (1951). Such an assignment is good as between the assignor and assignee, subject to whatever rights the party with approval rights may have. Id. Thus, the invalidity of an assignment, on the ground that it has not been assented to by the party with approval rights can be raised only by that party. Id.

Scott Haymond fulfilled his obligations in transferring his interest in the residence and the gun membership when he signed and recorded its Bill of Sale in 2008 (at the latest). He had no further obligation with respect to this transfer. In fact, once Mr. Haymond transferred his interest in the dwelling, he had no right to remain a member of the club.

Plaintiff seems to be making the argument that an assignment is not valid or complete between the assignor (Scott Haymond) and assignee (Darra Odenwalder, Trustee) until a third party with approval rights ( the Club) has exercised that approval. There is simply no legal authority to support such an argument, and in fact, as stated above, this is contrary to basic law on assignments in Washington.

*a. No other rules than the Bylaws exist, contrary to McDermott's January 15, 2015 Declaration.*

In this Court's decision entered on May 27, 2015, the court remanded this matter back to the trial court for a fact finding hearing due

to a conflict in the appellate record between the language of the Club's Bylaws, which did not contain a prohibition on transferring a membership interest prior to board approval of the same, and a declaration signed by the Club president, Richard McDermott indicating that one could not become a club member without first being approved by board of directors. Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*8) (2015).

In its decision the Court said:

*“Therefore, there remains a question of fact as to whether the club rules permitted Haymond to transfer his club membership before the board approved the new member”.*

Id. at \*7

First of all, there is a difference between “transferring a membership” and “becoming a member”. For the purposes of the “Uniform Fraudulent Transfers Act” *RCW 19.40 et. Seq.*, this court need only be concerned about the “transfer” of Haymond’s interest in the membership to another person or entity, not the admittance and recognition of the Trust’s membership by the Board. The Court of Appeals here inquired whether or not Mr. Haymond needed, by Club rule, to obtain permission from the board prior to executing a written transfer of his interest in the club to the Trust. The Bylaws clearly do not require

such approval. CP 280-286. Mr. McDermott's declaration filed created a fact issue as to whether some other Club "rule" existed which further refined the Bylaws requiring board approval prior to transfer of the interest. CP 185-201. The trial court was assigned the task of exploring this issue.

The evidence at the evidentiary hearing cleared up any question on this issue. Simply put, as both witnesses (Richard McDermott and Nancy Thorp) acknowledged, no such other rule exists because there are no other governing documents on the subject outside of the Bylaws, which this court has already reviewed. RP 58-59, 71-72, 111-112. There are no other governing documents or rules of the Club, let alone a rule requiring board pre-approval for a transfer of a membership interest. Id. Mr. McDermott when asked about what documents dictate transfer and approval of a new member confirmed that the Bylaws was the only document used by the Board to make such a determination. RP 71,72. Mrs. Thorp, another board member also confirmed that the published bylaws, as amended from time to time, was the only governing document speaking to this issue. RP 111-112. No other documents were referenced or presented at hearing.

On direct examination (over objection of the Trust's counsel), Mr. McDermott gave a conclusory statement as to his interpretation of the

Bylaws, as the only evidence to support the statement he made in his declaration before this court on January 15, 2014 (before the initial appeal). The dialogue was as follows:

By Mr. Linville

Q. “Does Exhibit 3 [the Bylaws] require board approval before transfer of memberships?”

By Mr. McDermott

A. “Yes.”

RP 58-59

This statement is simply not supported whatsoever in the Bylaws (as this Court has already recognized) and Mr. McDermott has acknowledged the Bylaws as the only Club governing document (or “rule”) speaking on the subject. RP 71- 72. When asked if a member can, without board’s authority, “self transfer a membership” (again over an overruled objection by the undersigned), Mr. McDermott answered “Not my understanding” and “Not my understanding under the Bylaws” RP 41-42.

It is clear that the Bylaws is the only Club governing document which regulates when and how members may transfer their interests in the Club. It is also clear that Mr. McDermott's previous declaration and testimony at the evidentiary hearing is simply his lay opinion on the subject, and is not supported by another "rule" as said earlier declaration suggested.

The Bylaws have a formal written process for modification, which has not been enacted with respect to the issue of transfer of memberships requiring prior board approval, and therefore any testimony from the Board as to their belief on the subject lacks relevance. CP 285. The Bylaws have not been modified to say what Linville wants them to say. Article XIII of the Bylaws provides for a full process for modification, which includes submission in "proper" written form. This was not done.

Again, as the court noted in its May 25, 2015 decision, the Bylaws do not require prior board approval for transfer of a membership. Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*7) (2015). Linville failed to present any evidence of another rule that contradicts the Bylaws on this issue and therefore did not meet its burden of proof to set aside the transfer.

*b. The Board admits approving other transfers after the fact, has never rejected a member, and nothing in the Bylaws says when a membership “takes effect”.*

Linville has worked hard to add formality to the process of the board “approving a transfer” where one really has never previously existed. The Bylaws only have one requirement for approval and that is payment of a fee. CP 283. Mr. McDermott acknowledged that the Board has never “rejected” a membership. RP 73. He acknowledges that a member simply pays a fee to become a member. RP 73. Ms. Thorp acknowledges that others have acquired interests in the property/club and sought approval of the membership later. RP 112. Mr. McDermott indicates that now there is a process for a background check prior to approval, but that such a process was not in place in 2006/2008 when Haymond transferred the membership to the Trust. RP 64. Thorp acknowledged that the same result would have occurred had the Trustee applied in 2006/2008 as when she was approved in 2012. RP 113.

The Bylaws simply do not require that a transferor and transferee obtain permission for the transfer from the Board prior to such transfer. The Bylaws further do not designate when a membership transfer occurs between the transferor and transferee. The Bylaws simply require that a

fee be paid when a member formally joins the Club. There has never been an instance where a member has been assigned an interest and then was rejected by the Club.

The only issue that is relevant is whether there was an adopted Bylaw or rule requiring approval of the board *prior to* the transfer of a membership interest from Haymond to the Trust. The evidence at hearing demonstrated that there was not.

2. RCW 19.40.061 specifically defines when this type of property interest transfers (for the purposes of the FTA) and it clearly occurs “when it becomes effective between the debtor and the transferee, regardless of what the Club Bylaws or Rules provide.

The Trust argued at trial that *for the purposes of the Uniform Fraudulent Transfer’s Act*, which obviously is the basis for Linville’s action to set aside the transfer of Haymond’s membership interest in the club, RCW 19.40.061, not the Club Bylaws or any “rule” actually governs when a transfer of an interest in property occurs.

**RCW 19.40.061** provides, in pertinent part as follows:

**“For the purposes of this chapter:**

**(1) A transfer is made:**

*(i) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and*

*(ii) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee;*

*(2) If applicable law permits the transfer to be perfected as provided in subsection (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action;*

***(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee;***

*(4) A transfer is not made until the debtor has acquired rights in the asset transferred;... ”*

***(Emphasis Added)***

The issue before the court is narrowly focused on whether or not Haymond transferred his interest in the membership interest in the Club to the Trust beyond the statute of limitations set forth in **RCW 19.40.091** such that Linville is prohibited from setting aside the transfer.

The issue of the timing of the transfer under the UFTA has nothing to do with Haymond's or the Trust's obligations with the Club or whether or not they violated any club Bylaw or rule with respect to seeking prior

approval of the transfer. While the issue of the Club approval as raised by Linville is unpersuasive because the club Bylaws or “rules” do not require such prior approval, that issue is truly not dispositive. The issue of Board approval is actually a complete red herring because the only analysis of the timing of the transfer that has to take place is through the filter of **RCW 19.40.061**. The Court’s primary inquiry should be: When did the transfer take place for the purposes of **RCW 19.40 et. seq.**?

It is undisputed by either party that the membership interest is not an interest in real property. Clearly the membership interest is not a fixture. Thus, neither **RCW 19.40.061(1)** or **(2)** apply. Therefore, as stated in **RCW 19.40.061(3)**, the membership interest is transferred, for the purposes of the UFTA when it became effective between the Debtor (Haymond) and the Transferee (the Trust), which was upon transfer of that interest in the Bill of Sale in either 2006 or 2008. For the purposes of the UFTA it simply doesn’t matter when the transfer was recognized or approved by the club. It only matters when the parties to the transfer recognized the transfer, which was upon execution of the Bill of Sale in 2006/2008.

The Statute of Limitations under **RCW 19.40.091** has run because the transfer of interest in the Club Membership was effective in 2006/2008

and thus the four year statute of limitations ran for that action well prior to the date of the action to set aside the transfers in February of 2014.

3. Mr. Haymond could not retain his club membership after transferring his residence because the Bylaws clearly provide that one cannot own a membership interest without owning a residence.

Courts construe statutes to effect their purpose while avoiding absurd, strained, or unlikely consequences. First Citizens Bank & Trust Co. v. Harrison, 181 Wash. App. 595, 602, 326 P.3d 808, 812, review denied, 337 P.3d 326 (Wash. 2014).

An additional inquiry that this court made on remand (as an alternative theory if the transfer was voidable because prior board approval from the Club board was necessary), was:

*Could Haymond continue to legally hold a membership interest once he transferred his residence to the trust?*

On that issue the court made the following findings of fact and conclusions of law:

*“2.19 A Club member retains his or her membership interest until such time as the Club’s Board meets with and approves the transfer of Club membership to the transferee or until the member is expelled by the Club”. CP 73.*

The Bylaws are silent as to what happens to a membership after a club member has transferred his interest in his residence. It appears that this is because like Haymond, most persons who transfer their interest in

the residence, transfer the membership interest at the same time. In fact, Haymond's Bill of Sale when he purchased the property from Jeffrey and Shawna Swanson in 2002, which was attached to the Declaration of Richard McDermott (original clerk's papers from initial appeal – CP 559,560) substantively reads exactly the same as his Bill of Sale between Haymond and the Trust, assigning both the residence and the membership interest at the same time. CP 471; RP 75-77. McDermott's Declaration with the Swanson Bill of Sale was admitted to evidence at trial.

Two things of note indicate that a member is free to transfer or sell his membership interest without input from the board, and that the residences and memberships are already transferred prior to a new member coming before the board for approval of membership:

First, **Article II, Section 1 of the Bylaws** provides:

*"Each member of the Club must own a dwelling situated on Club property".* CP 280.

Implied in this sentence is the fact that one already has acquired and owns a dwelling at the time of application for membership. The sentence does NOT read *"Each member of the Club must acquire a membership"*, it says that they must *OWN* a dwelling.

Second, **Article XI, Section 4 of the Bylaws** provides as follows:

*"The seller of a membership shall make the buyer aware of the provisions in the Club Bylaws:"*

Again, if a member had to be pre-approved by the board prior to the selling of a membership, they would already be aware of the provisions of the Bylaws. This sentence clearly infers that there is a sale and at closing the seller must make the buyer aware of the Bylaws, at which time the Buyer would apply for membership thereafter.

While the Bylaws require that each member of the Club must own a dwelling situated on Club property, Mr. McDermott acknowledges that the reverse is not true. The Bylaws do not say that each person owning a structure must be a club member. RP 85. Haymond transferred both interests in his Bill of Sale dated 2006 and 2008. To the extent that somehow his membership interest was separated from his transfer of the residence, it immediately extinguishes, because it is a prerequisite to membership that one already owns a residence. Without a residence, one has no right to membership.

4. Linville cannot possess a membership absent owning a residence.

Assuming Linville could demonstrate that despite all of the problems with the argument that Haymond's membership interest in the club was separated from the transfer of the dwelling, and that it was

attachable, he merely stands in the same shoes as Haymond: A person without a dwelling, with no right to apply for a membership.

There simply is no basis to determine that Linville has a sustainable interest in property to which he can attach. The membership interest in the Club is an intangible property right that only springs from ownership of a dwelling within the club. With only 22 memberships, each represented by a residence, it would be legally impossible for Linville to hold a property right that is *void ab initio*. Contrary to Linville's argument, and the court's finding, the membership interest Linville would arguably acquire would be void, not voidable. If, as Linville argues, one is not a transferee of a membership interest until the Board approves the transfer, then Linville would be in that same position after attaching Haymond's membership interest. When he would apply to the Board for membership, as he argues must occur for there to be a transfer, the Board would legally have to decline the membership for one simple fact: He does not own a dwelling.

If, as Linville argues, one does not acquire membership status after someone obtains a membership interest from another, be it from sale, assignment, or even as argued here, involuntary attachment, but rather after the board approves the transfer, Linville can never be a member.

5. Even if Scott Haymond's membership was "attachable", then the Trust's membership interest in 2012 is simply a "new membership", not a "transfer" because the Trust, not Scott Haymond, owns a residence on Club property, and Scott Haymond had nothing of value to transfer as of 2012.

It is undisputed that the Trustee paid a \$300 initiation fee in 2012. At the time she paid the fee, the Board recognized that she was presented as a "new member". RP 74-75. They accepted the payment of her initiation fee and officially recognized her as a member. *Id.* The Board accepted a \$300 initiation fee, rather than the \$1000 initiation fee charged after 2009. RP 74-75; CP 471. The club took no action against her or Haymond for "violation" of the Club rules with respect to memberships.

Because Haymond had nothing to "transfer" to the Trust in 2012, this was not a transfer the membership interest to the Trust in 2012, and the Club did not recognize it that way either. The legal arguments made by Linville in attempt to suspend the statute of limitations in this matter do not track with what happened in fact in this case.

Even if somehow Haymond was able to retain a membership interest, rather than it being transferred with the dwelling pursuant to the Bill of Sale and/or **RCW 19.40.061**, that membership interest was not transferred to the Trust in 2012. The membership, if acquired by the trust in 2012, was acquired by the Trustee as a new member, because she owned a dwelling and paid the fee.

6. The statute of limitations for challenging the transfer of the gun club membership ran at the latest in August of 2013, approximately (6) months prior to Plaintiff's action to set it aside.

As this court noted in its previous opinion on May 27, 2015, a significant event occurred in August of 2012, when Plaintiff deposed Darra Odenwalder regarding the transfers of the residence and gun membership. Shelcon Constr. Grp., LLC v. Haymond, 187 Wash. App. 1038 (\*13) (2015).

At that time, as the court noted, Plaintiff obtained information which it argues gave rise to a claim to set aside both transfers. Id.

**RCW 19.40.091(a)** *does* have a “discovery rule” savings clause, which allows a party discovering a fraudulent transfer after the initial (4) year period to bring an action to set aside a transfer “*within (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant*”.

To the extent that the statute of limitations did not already run as to the transfer of the membership based on the 2006 and 2008 assignments, Plaintiff was certainly aware of the issue it is now raising with respect to the 2012 “approval” of the earlier assignments, as early as August of 2012. Therefore, to the extent that the (1) year “discovery rule” savings clause served to revive the expired (4) year statute of limitations, Plaintiff should

have filed its action to set aside the transfer of the club membership by the date of Ms. Odenwalder's deposition in August of, 2013.

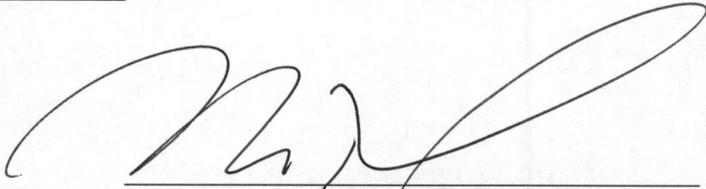
Plaintiff did not file its action to set aside either the residence or the club membership until February 5, 2015. Therefore, even based on the (1) year discovery rule savings clause, Plaintiff's (Linville's) action to set aside the gun membership transfer is also untimely, and therefore should be dismissed.

#### IV. CONCLUSION

For the foregoing reasons, the court erred in Findings 2.3, 2.18, 2.19, 2.21, 2.22, 2.23, 2.24, 2.25, 2.27, 2.29, 2.30, 2.31, 2.34, 2.35, 2.36, 2.38, 2.39 and 2.40. The Court erred in entering Conclusions of Law 3.2, 3.3, 3.4, 3.5 and 3.6. Base on the above errors in the Findings and Conclusions entered by the Court on December 2, 2016, the Order Avoiding Scott M Haymond's Transfer of Club Membership was without proper legal basis.

For the above reasons, this court should reverse the trial court's order invalidating the transfer of Haymond's membership interest in the Club to the trust.

Respectfully submitted this 11<sup>th</sup> day of December, 2017.



MARK E. BARDWIL, WSBA #24776  
Attorney for Appellant Darra Odenwalder,  
Trustee

Certificate of Service

On December 11, 2017, the undersigned caused to be sent by first class mail, postage prepaid in the mails of the United States at Tacoma, Washington, a copy of the Amended Brief of Appellant to the following:

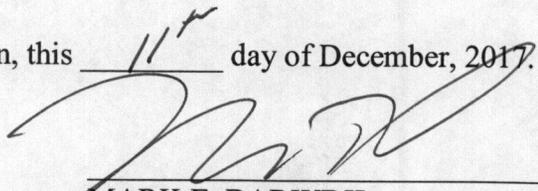
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I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 11<sup>th</sup> day of December, 2017.

  
\_\_\_\_\_  
MARK E. BARWDIL,  
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December 11, 2017

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO  
950 Broadway, Suite 300  
Tacoma, WA 98402

RE: Shelcon Construction Group, Respondent v. Haymond, et al., Appellants  
Court of Appeals Division II Case No. 49828-6-II

Dear Court Clerk/ Case Manager:

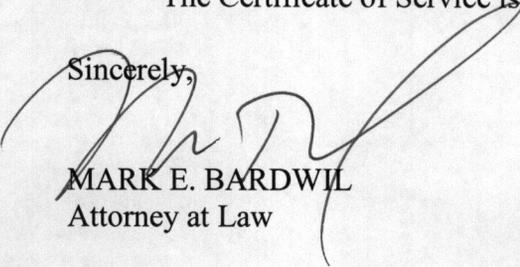
Enclosed please find an Amended Brief of Appellant and one copy to serve as Bench Copy for the matter referenced above.

When preparing the reply brief, it was discovered the RP reference numbers used for the original "Brief of Appellant" were taken from an incomplete verbatim report of proceedings for October 3, 2016, initially filed with the court by the court reporter. This Amended Appellant Brief corrects the RP numbers to correspond with the complete verbatim transcript filed June 13, 2017. A Supplemental Designation of Clerk's Papers was filed November 8, 2017 and the blank CP references in the Brief of Appellant have been supplemented in this Amended Brief of Appellant. The Table of Contents has been amended due to the changes created by the insertion of correct numbers. Along with name corrections in two places, these are the only amendments to the Appellant Brief dated June 14, 2017.

The court should treat this as Appellant's Opening Brief. **Please disregard citations in the original brief submitted June 14, 2017, as they are based on the incomplete transcript and are dramatically off from the complete transcript.** I apologize for any inconvenience created by the inaccuracies.

The Certificate of Service is included as the last page of the Amended Brief.

Sincerely,

  
MARK E. BARDWIL  
Attorney at Law