

No. 49828-6 II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

LINVILLE LAW FIRM, PLLC,

Respondent,

v.

SCOTT M. HAYMOND, *et al.*,

Appellants.

RESPONDENT'S BRIEF

Linville Law Firm, PLLC
Lawrence B. Linville, WSBA #6401
Attorney for Linville Law Firm, PLLC
800 Fifth Ave. Ste. 3850
Seattle, WA 98104
206-515-0640

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I. INTRODUCTION

It is undisputed that Scott Haymond's ("Haymond") transfer of his residence and his membership interest in the East End Lake Tapps Rod & Gun Club ("the Club") was fraudulent. In *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 1038 (2015) this Court held in part that "the trial court had clear and satisfactory evidence that Haymond had actual intent to hinder, delay, or defraud Shelcon" (*28) and that the elements of fraud were met under the Uniform Fraudulent Transfer Act, RCW 19.40 *et seq.* (**23-29).

In said decision, this Court held that the statute of limitations had run on Haymond's transfer of his *residence* (**14-19), but did not decide whether the statute of limitations had run on the transfer of his *Club membership interest* "[b]ecause the application of the statute of limitations . . . is an issue that requires determinations of witness credibility . . .". This Court remanded the case for the trial court to determine the answers to two questions of fact:

Question of Fact #1

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. If the club required Board approval before allowing a member to transfer his membership, then Haymond did not transfer his club membership until March 2012, and the statute of

limitations would not have run on Shelcon's claim to avoid this transfer.” *Shelcon*, 187 Wn. App. at 19-20.

Question of Fact #2

It is a further question of fact whether it is possible to own a club membership without owning a residence at the club. The bylaws require that all club members own a dwelling, suggesting that Haymond lost his membership when he transferred his house. Therefore, there was conflicting evidence before the trial court regarding whether Haymond retained a club membership after transferring his house in 2006. If club rules prohibited membership without owning a dwelling, then Haymond's membership was apparently extinguished in 2006. On remand, the trial court should determine whether Haymond retained his club membership after transferring his residence.

Shelcon, 187 Wn. App. at 20.

Subsequent to the mandate issued by this Court in July 2015, the respondent Linville Law Firm PLLC (“LLF”) filed an attorney lien pursuant to RCW 60.40 *et seq.* and intervened in this action as a result of disputes between LLF and its former client Shelcon concerning attorney fees owed by Shelcon to LLF. LLF has been a party in this action since 2015. LLF and Shelcon amicably settled all of their disputes in February 2016. As part of the settlement, Shelcon assigned its judgments against Haymond to LLF (CP 1-4) making LLF a judgment creditor against Haymond.

In October 2016, an evidentiary hearing was held before the Honorable Victoria Hogan for the purpose of resolving the factual issues set forth in this Court’s remand.

II. ARGUMENT – IN RESPONSE TO ODENWALDER

A. STANDARD OF REVIEW

i. Substantial Evidence. An appellate court reviews a trial court’s decision to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). “Substantial evidence” is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Courts give “the party who prevails in the trial court the benefit of all reasonable inferences from the evidence that favor the court’s findings.” *Weyerhaeuser v. Tacoma-Pierce County Health Dep’t*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). In evaluating the persuasiveness of the

evidence, an appellate court must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

ii. Witness Credibility and Conflicting Evidence

In *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 1038 (2015), this Court emphasized that the crux of its remand was the resolution of witness credibility and conflicting evidence. It is well settled law that both of these matters are for a trier of fact to decide. Neither of these is subject to review by an appellate court. As to witness credibility, this Court stated:

Here, the declarations before the trial court presented questions of witness **credibility** without which the trial court could not resolve the legal question whether the statute of limitations had run. . . . Because the application of the statute of limitations therefore is an issue that requires determinations of witness **credibility** to resolve the conflicts between the written declarations, the trial court must hold further proceedings to resolve this question. . . . Thus, the statute appears to contemplate that this issue involves **credibility** determinations appropriate for a hearing, at minimum.

Shelcon, 187 Wn. App. at 22-23 (Emphasis added). The Supreme Court has stated that “credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.” *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); *see also*, *State v. Camarillo*, 115 Wn.2d

60, 71, 794 P.2d 850 (1990) (“Credibility determinations are for the trier of fact and cannot be reviewed on appeal.”)

As to conflicting evidence, this Court stated:

[T]here was **conflicting evidence** before the trial court regarding whether Haymond retained a club membership after transferring his house in 2006. If club rules prohibited membership without owning a dwelling, then Haymond's membership was apparently extinguished in 2006. On remand, the trial court should determine whether Haymond retained his club membership after transferring his residence. Because of these **conflicting factual issues**, we cannot determine as a matter of law when the transfer of the club membership occurred for the purposes of the statute of limitations. The transfer may have occurred in 2006 or 2008 when Haymond executed the bills of sale, or in 2012 when the club admitted Odenwalder. The trial court must determine whether the statute of limitations has expired on the transfer of the club membership. Shelcon's motion to avoid the transfer of the club membership would have been timely only if the trial court determines that the transfer of the club membership occurred in March 2012 when the board of directors approved. Odenwalder as a member of the club because club rules required board approval of any new member. This is an issue of fact that we cannot resolve, because resolution requires weighing **conflicting evidence**.

Shelcon, 187 Wn. App. at 20-22 (Emphasis added). “This court must defer to the trier of fact on issues of conflicting testimony”. *State v.*

Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). “Where the trial judge is presented with conflicting evidence, [a reviewing court] will not disturb [a] finding based upon that evidence.” *Maehren v. Seattle*, 92 Wn.2d 480, 501, 599 P.2d 1255 (1979).

In short, this Court's instructions in its remand were to resolve witness credibility and conflicting evidence, which the trial court did, and which are not subject to review on appeal.

B. FINDINGS OF FACT

Page one of Odenwalder's Brief contains a section entitled "Assignments of Error". There are a total of three assignments of error in that section. Odenwalder assigns error to three conclusions of law in that section. Odenwalder does not assign error to any findings of fact in that section. RAP 10.3 requires an appellant's brief to have an assignment of errors section that lists each assignment of error that the appellant contends was made by the trial court. Although Odenwalder assigns error to certain findings of fact in other sections of her brief, the Court should consider only the assignments of error set forth in the "Assignments of Error" section of Odenwalder's brief, per the requirements of RAP 10.3. Without waiving the forgoing argument, LLF is nonetheless responding to the various challenges to fact findings that Odenwalder makes throughout her brief.

At the hearing on October 3, 2016, two witnesses testified. The first witness to testify was Richard McDermott, who testified that he was president of the Club from 2008 to 2011. [RP 10/03/2016, p. 27, lines

18-21]. The second witness to testify was Nancy Thorp, who testified that she has been a Club member for over 25 years. [*Id.* at p. 66, lines 2-8]. Both witnesses testified about the Club rules (written and unwritten) in effect during the time that Haymond transferred his membership to Odenwalder. Although both Haymond and Odenwalder have been Club members, neither of them testified at the hearing and neither called any witness to testify at the hearing.

The following findings were not challenged by Odenwalder and are verities on this appeal.

FOF 2.1: The Club’s Bylaws charge the Board with managing the “business and property of the Club”.

FOF 2.6: The Board’s authority to manage the business and property of the Club is exclusive and extends to the transfer of memberships and the admission of new members.

FOF 2.14: The Board approved Odenwalder’s membership effective March 12, 2012.

FOF 2.15: On March 12, 2012, Odenwalder first became a member of the Club.

FOF 2.16: Haymond was a Club member from 2008 to 2012.¹

¹ FOF 2.16 is potentially misleading. Haymond was a Club member between 2008 and 2012. Haymond was also a Club member prior to 2008, as evidenced by his attempted transfer of his membership to Odenwalder in 2006. *Shelcon*, 187 Wn. App. 1038, *17 (2015) (“Here, the relevant dates are: April 6, 2006: Haymond executed a bill of sale transferring his house and his club membership to Odenwalder as trustee.”).

FOF 2.17: A Club member may not transfer his or her membership without the Board's authority.

FOF 2.20: It is a function of the Board to effectuate any transfer of a Club membership by approving such transfer of a Club membership.

The following FOFs were challenged by Odenwalder:

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

Substantial evidence supports this finding. McDermott testified:

Q: Do you need to be a member in order to be a member of the board?

A: Yes, to my knowledge, you need to be a member to serve on the board.

[RP 10/03/2016, p. 9, lines 20-21].

FOF 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's Board.”*

Substantial evidence supports this finding. McDermott testified:

Q: Is it the board's function, the board's authority, to effectuate a transfer of the membership by approving the transfer?

A: Yep.

Q: Can a member without the board's authority, the board's approval, can the member them self (sic) transfer a membership?

A: Not to my understanding. . . . Not my understanding of the bylaws. You need to come to the board to bring any prospective buyer or transfer. We've transferred a few other ones because of death and things like that within family members.

Q: Has a membership ever been transferred without the board's approval?

* * * * *

A: Not when I served as president.

Q: And does the transfer become effective upon the date of board approval?

A: Yes.

[*Id.*, p. 13, ln. 2 - p. 14, ln. 6].

Q: And during that time that Haymond's in violation, did Haymond still retain his membership interest subject to board sanctions or action?

A: Yes.

[*Id.*, p. 24, lines 20-23].

Q: So in your experience, the new members have come in, they pay their initiation fee, and they become a member?

A: Yeah, they present them self (sic) to the board and the board votes on it and then . . .

Q: And Ms. Odenwalder did that at some point?

A: She did.

Q: And she was approved?

A: She was.

[*Id.*, p. 24, lines 2-8].

FOF 2.18 was also supported by Thorp's testimony.

Q: Do the club rules require that a transfer of membership be approved by the board?

A: Absolutely.

[*Id.*, p. 73, lines 9-11].

Q: Then my question here was about the bylaws. Does the violation of the bylaws, the drugs, or I guess in Mr. Haymond's case not owning the house on the land, those are violations of the bylaws or the club rules. Do the club rules automatically disqualify you or do you automatically forfeit your membership upon a violation or -- let's just stop there. Is it an automatic forfeiture or is there some discovery trying to work things out? . . . Some continued process of looking at how we're going to handle the situation?

A: Well, I would say that it's a continued process. Actually, we're in the process of changing the bylaws as we speak today. And there is a process in place once those new bylaws come into effect.

But the board on all situations that I've been involved in has always worked with the homeowners on resolution.

[*Id.*, p. 77, ln. 18 - p. 78, ln. 14].

Q: And for this case here, is it the management of the transfer of memberships, the admission of new members and the termination of old memberships? The transfer of assignment of memberships, bringing in new members, is that part of the business of the board?

A: It is.

[*Id.*, p. 71, ln. 21 – p. 72, ln. 1].

Q: How did they become members?

A: They came to a board meeting.

[*Id.*, p. 76, ln. 23 – 24].

The Club Bylaws, Art IX, § 1(c) provides:

A member may sell, transfer, or assign his or her membership, or a transfer may occur as the result of a death of a member, only under the following terms:

- a) ...
- b) ...
- c) The transferee pays the \$300 initiation fee as a condition of Board approval.

[CP 283].

FOF 2.18 is also supported by unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20.

FOF 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.”

Substantial evidence supports this finding. McDermott testified:

Q: And does the transfer become effective upon the date of board approval?

A: Yes.

[RP 10/03/2016, p. 14, ln. 4 – 6].

Q: And during that time that Haymond's in violation, did Haymond still retain his membership interest subject to board sanctions or action?

A: Yes.

[*Id.*, p. 24, lines 20-23; *see also* p. 45, lines 2-8].

FOF 2.19 is also supported by Thorp's testimony cited above that supports FOF 2.18. FOF 2.19 is also supported by Club Bylaws, Art IX, § 1(c), which was cited in support of FOF 2.18 as well as unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20.

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

Substantial evidence supports this finding. *See* McDermott's testimony at RP dated 10/03/2016, p. 13, ln. 2 - p. 14, ln. 6; *see* Thorp's testimony at p. 71, ln. 21 – p. 73, ln. 17; *see also*, unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20.

FOF 2.22. *“The Club's Bylaws required the Board's approval before transfer of Haymond's membership.”*

Substantial evidence supports this finding. *See* McDermott's testimony, p. 30, ln. 13 to p. 31, ln. 17; *see* Thorp's testimony at p. 71, ln. 21 – p. 73, ln. 17; *see also*, unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20).

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

Substantial evidence supports this finding. See McDermott’s testimony, p. 13, ln. 2 - p. 14, ln. 6; p. 5, ln. 21 - p. 6, ln. 2; p. 45, ln. 2 – 9; see Thorp’s testimony, p. 71, ln. 21 - p. 73, ln. 17; see also unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20.

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

Substantial evidence supports this finding. See McDermott’s testimony at RP dated 10/03/2016, p. 30 ln. 24 - p. 31, ln. 17.

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

Substantial evidence supports this finding. Club Bylaws, Article II, §2 provides: “The Board of Directors may allow new membership of the Club upon the payment on an initiation fee of \$300.00.” [CP 280]. Thorp testified that the club rules require that a transfer of membership be approved by the board. [RP 10/03/2016, p. 73, lines 9-11].

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

McDermott testified that Haymond was a member of the board of directors (*Id.* at p. 51, ln. 18 – p. 52, ln. 11) and testified that Haymond was a former president of the Club (*Id.* at p. 14, ln. 22, p. 52, ln. 13 – p. 53, ln. 1) (“he was president of the club”).

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

Substantial evidence supports this finding. *See* McDermott’s testimony, p. 24, lines 6-23.

FOF 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.”*

Substantial evidence supports this finding. Notably, the Board approved McDermott’s own personal Club membership even though McDermott did not own a dwelling at the time he became a Club member. McDermott purchased a dwelling sometime after he became a member, which he was required to do by Club rules. Unchallenged FOFs 2.32 and 2.37; McDermott testimony, p. 5, ln. 21 - p. 6, ln. 2; p. 24, ln. 6-23; Thorp testimony, p. 69, ln. 4, ln. 19; p. 75 ln. 11 – p. 76, ln. 8; p. 77, ln. 18 – p. 78, ln. 18; p. 79, ln. 18 – p. 89.

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

Substantial evidence supports this finding. Unchallenged FOFs 2.32 and 2.37; McDermott testimony, p. 24, ln. 6-23; Thorp testimony, p. 69, ln. 4-23; p. 75 ln. 11 – p. 76, ln. 8; p. 77, ln. 18 – p. 78, ln. 18; p. 79, ln. 22 – p. 81, ln. 24.

FOF 2.38. *“The testimony of McDermott and Thorp was credible. Each witness was a Club member of longstanding and each witness served multiple terms on the Club’s Board. Each witness possessed substantial knowledge and experience with the Club’s rules and practices.”*

Substantial evidence supports this finding. The trial court’s perceptions of the credibility of witnesses McDermott and Thorp were based upon the trial court’s courtroom experiences observing the testimony of many witnesses over a long period of time. Additionally, both witnesses served on the Club’s Board (McDermott testimony, p. 6, ln. 10; p. 9, ln. 10-13; Thorp testimony, p. 65, ln. 2). Both witnesses possessed knowledge and experience to answer all questions addressed to them by counsel and the trial court.

FOF 2.39. The findings stated in FOF 2.39 are simply a statement of the facts stated in the Court of Appeals' Opinion (RP 288-292). FOF 2.39 provides the context and support for COL 3.7.

FOF 2.40. *“Given the previous acts 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.”*

This Court previously affirmed the trial court’s determination that the elements of fraud were met in this case. *See pages 24 – 29 in Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 1038 (2015) (“Thus, the trial court had clear and satisfactory evidence that Haymond had actual intent to hinder, delay or defraud Shelcon.”).

C. CONCLUSIONS OF LAW

The trial court entered seven conclusions of law (COL 3.1 - 3.7), five of which Odenwalder challenged. Odenwalder did not challenge COL 3.1 (“The Board has exclusive authority to manage the business and property of the Club, including the transfer of memberships and approval or disapproval of new members”) or COL 3.7 (“Haymond’s purported transfer of his Club membership in March 2012 was a fraudulent transfer pursuant to RCW Ch. 19.40.”).

COLs 3.2 and 3.3. Odenwalder challenges COLs 3.2 and 3.3 on the basis that no Club rules exist or if they do exist, they are irrelevant. Club rules embrace the acts, practices and procedures of the Club in addition to the Club bylaws. In this Court's prior decision, the Court queried whether the Club rules, if not the Club bylaws, required Board approval for membership transfers, and whether Club rules, if not Club bylaws, permitted a member to retain his/her membership if he/she did not own a residence on Club property. The Court treated the Club bylaws as separate from Club rules which are the Club's operative acts, practices and procedures. The remand was for the purpose of factually determining how Club rules (if not Club bylaws) applied to memberships and transfer of memberships. The factual inquiry on remand was whether the Board had exclusive authority to control and manage the transfer of Club memberships. The trial court found that "The Board's authority to manage the business and property of the Club is **exclusive and extends to the transfer of memberships and the admission of new members.**" FOF 2.6 (Emphasis added). This finding was not challenged. COL 3.1 (unchallenged) states:

The Board has the exclusive authority to manage the business and property of the Club, including the transfer of memberships and the approval or disapproval of new members.

The trial court concluded that the Board possessed the exclusive authority to manage the business and property of the Club including the transfer of memberships and the approval or disapproval of new members. Additionally, COL 3.2 is supported by unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20. Furthermore COL 3.2 is supported by FOFs 2.1, 2.11, 2.18, 2.19, 2.21, 2.22, and 2.23 all of which were in turn supported by substantial evidence.

COL 3.3. COL 3.3 is supported by the trial court's unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20 together with FOFs 2.11, 2.18, 2.19, 2.21, 2.22, and 2.23 all of which were supported by substantial evidence.

COL 3.4. COL 3.4 is supported by the trial court's unchallenged FOF 2.32. COL 3.4 is also supported by FOFs 2.29, 2.30, 2.31 all of which are in turn supported by substantial evidence.

COL 3.5. COL 3.5 is supported by the trial court's unchallenged FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, and 2.20 together with FOFs 2.11, 2.18, 2.19, 2.21, 2.22, and 2.23 all of which were supported by substantial evidence and unchallenged COL 3.1.

COL 3.6. COL 3.6 is supported by FOFs 2.28 – 2.32 and is the ultimate conclusion of the trial court and is further addressed by LLF in the following section.

D. LEGAL ANALYSIS

i. Requirement of Board Approval Before Transfer of Club Membership

Unchallenged COL 3.1 provides:

The Board has the exclusive authority to manage the business and property of the Club, including the transfer of memberships and the approval or disapproval of new members.

COL 3.6 provides:

Shelcon's Motion to Avoid the transfer of Haymond's Club membership was timely filed within the statute of limitations set forth in the Uniform Fraudulent Transfer Act, RCW 19.40.091.

This Court's mandate to the trial court did not limit the trial court's evidentiary hearing to consideration of Club bylaws or "governing documents" as suggested by Odenwalder. The trial court properly considered other Club rules, acts, practices, and procedures including the testimony of the Club's former president McDermott and longstanding member Thorp. Their testimony provided evidence of Club

rules and procedures pertinent to the transfers of Club memberships.

Neither Haymond nor Odenwalder offered testimony to the contrary.

Haymond's own actions provided evidence to the trial court on the factual issue of whether a membership interest can be transferred to a new member without the Club first approving the new member.

Haymond was a longstanding Club member (FOF 2.16), former Board member (McDermott testimony, p. 51, ln. 18 – p. 52, ln. 11) and former Club president (*Id.*, p. 14, ln. 22). If Haymond himself had not believed that the Board's approval was a prerequisite for the effective transfer of his membership interest to Odenwalder, Haymond would not have come to the Board in 2011 and request he Board to approve his transfer of membership to Odenwalder and **backdate** the transfer to April 6, 2006 as was the Court's unchallenged FOF 2.11 (McDermott testimony, p. 10, lines 12-25; p. 11, lines 1-3; Thorp testimony, p. 77, ln. 18 to p. 78, ln. 18).

On this appeal, Odenwalder is claiming that Board approval is not a prerequisite to the transfer of Haymond's membership. But Odenwalder did not challenge FOFs 2.1, 2.6, 2.14, 2.15, 2.16, 2.17, 2.20; especially, FOF 2.17 ("A Club member may not transfer his or her membership without the Board's authority."). Nor did Odenwalder

challenge COL 3.1 (The Board has exclusive authority to transfer memberships).

Furthermore, Odenwalder did not challenge the trial court's finding that Haymond was a Club member **continually** from 2008-2012 (FOF 2.16). Odenwalder did not challenge the trial court's finding that Odenwalder's membership was approved by the Board on March 12, 2012 (FOF 2.12). Odenwalder did not challenge the trial court's finding that Odenwalder first became a Club member on March 12, 2012 (FOF 2.15). Odenwalder did not challenge the trial court's finding that it is the Board's function to effectuate any transfer of a Club membership by approving such transfer (FOF 2.20).

ii. RCW 19.40.061. Odenwalder does not argue that COL 3.6 is not supported by the trial court's findings. Instead, Odenwalder seeks to raise new arguments that were not previously raised in the trial court or the Court of Appeals. Odenwalder has never argued or briefed her perceived application of RCW 19.40.061 in any prior proceeding. Nor has Odenwalder ever argued or briefed its "new membership" argument in any prior proceeding. These are new and novel arguments that were never presented to the trial court. Under RAP 2.5(a), this Court does not consider arguments not presented to the trial court and raised for the first

time on appeal. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). Especially so on this remand which was for the sole and limited purpose of conducting an evidentiary hearing to resolve conflicting evidence, evaluate the credibility of witnesses who actually testified and answer two specific factual questions from the Court of Appeals to the trial court.

Furthermore, Odenwalder's arguments could and should have been raised by Odenwalder to this Court during the first appeal. It is now too late to make these new arguments in light of this Court's narrow and limited remand. RAP 12.2 provides in part:

Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court.

In *Bank of Am., NA v. Owens*, the Court stated, referring to RAP 12.2:

These principles embody the law of the case doctrine. Under that doctrine, "once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation." The law of the case doctrine binds the parties, the trial court, and subsequent appellate courts to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled.

Bank of Am., NA v. Owens, 177 Wn. App. 181, 189-90, 311 P.3d 594 (2013) (citing *State v. Schwab*, 134 Wn. App. 635, 644, 141 P.3d 658

(2006)). Accordingly, the legal determinations made by this Court in *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 1038 (2015) bind the parties, the trial court, and this Court in this subsequent proceeding.

In *Shelcon*, this Court held that:

If the club required Board approval before allowing a member to transfer his membership, **then Haymond did not transfer his club membership until March 2012**, and the statute of limitations would not have run on Shelcon's claim to avoid this transfer.

(**19-20) (Emphasis added). This Court held that when the membership transfer occurred depends on whether Board approval was required in order to transfer a membership. The purpose of the remand was to determine whether Board approval was required. Odenwalder argues that “The issue of Board approval is actually a complete red herring” because the timing of a transfer is determined by RCW 19.40.061. This is an argument that could and should have been raised by Odenwalder during the previous appeal. Moreover, Odenwalder could have requested reconsideration or appealed this Court’s decision, but did not.

Arguing in the alternative, even if the Court were to consider Odenwalder’s argument concerning RCW 19.40.061, this argument should be rejected. Odenwalder argues that subsection (3) of RCW 19.40.061 applies. Subsection (3) does not apply. Subsection (3) applies only “[i]f applicable law does not permit the transfer to be perfected”.

Haymond's purported transfer of his membership via a bill of sale in 2006 to Odenwalder was perfected by the Board's approval of the transfer in March 2012. Haymond knew he need the Board's approval to perfect the transfer, which is why he came before the Board in late 2011 and requested that it backdate his purported membership transfer to Odenwalder. [McDermott testimony, p. 10, lines 18 – 25].

iii. Possession of a Club Membership Without a Residence

The trial court found that a member in violation of Club rules nonetheless remains a member until expelled by the Club or until further action is taken by the Board. [FOFs 2.28 - 2.32]. Odenwalder's phrasing of the issue as whether Haymond can "retain" his Club membership after transferring his residence (Odenwalder's Brief, p. 1) is not quite what was before the trial court on remand nor was it quite what the trial court found. It was not a matter of Haymond "retaining" his Club membership without consequences. There were and are consequences to a violation of Club rules. Haymond's violation of a Club rule (mandatory ownership of a dwelling) could result in the Club's expulsion of Haymond from the Club and termination of Haymond's membership *if* the rule violation could not be resolved between Haymond and the Board.

FOF 2.32 (unchallenged) states:

During the violation period, it is the practice of the Board to work with the member(s) concerned to reach a resolution and removal of the violation.

Only if the violation cannot be resolved or cured is the member expelled.

See Thorp's testimony at RP dated 10/03/2016, p. 76, ln. 4; Club Bylaws, Article II, §1 (CP 280).

The trial court found that a member who does not own a dwelling is in violation of Club rules. However, the member is not thereby expelled and his/her membership interest is not thereby terminated. Rather, the Board attempts to address and resolve the rule violation with the member. In the interim, the member continues to be a member of the Club. [FOFs 2.28 - 2.32]. COL 3.4 states:

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.

Odenwalder argues that the context of Haymond's transfer of his membership interest to Odenwalder in 2012 was the creation of a "new membership" versus the transfer of Haymond's existing membership. [Odenwalder's Brief, p. 31-32]. This argument was never raised either in the trial court or the Court of Appeals and should be rejected for that reason alone. RAP 2.5(a); *Washburn*, 120 Wn.2d at 290.

This argument is contrary to the trial court’s unchallenged FOFs (2.9, 2.10, 2.11, 2.12, 2.13, 2.14, 2.15, 2.16, 2.17, 2.20) all of which placed the transfer in the context of a transfer—not the creation of a new membership in Odenwalder’s name.

Moreover, the Bylaws do not state that if a member transfers his/her residence but not his/her membership, the membership is then extinguished and/or reverts back to the Club such that the transferee of the residence would later obtain a “new membership”. Nor was there any evidenced offered in support of this proposition. Rather, the evidence presented was that a member who transfers his/her *residence* but not his/her *membership* continues to be a member, but is a member in violation of the rules.

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III. ARGUMENT – IN RESPONSE TO HAYMOND

A. STANDARD OF REVIEW

“In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons.” *Chuong Van Pham v Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (citations omitted).

B. DEFECTS IN HAYMOND’S BRIEF

There is no company called “Shelcon Collection Services”. The only Shelcon company is Shelcon Construction Group, LLC. Shelcon is no longer an interested party because it assigned its judgments against Haymond to LLF. [CP 1-4].

Haymond’s attachment of documents to his brief does not comply with RAP 9.1, RAP 10.3(a)(8), or RAP 10.4(c).

Haymond’s brief fails to comply with RAP 10. It has no table of contents, no table of authorities, no assignment of errors and no statement of issues pertaining to assignment of errors. A ruling of the trial court to which no error has been assigned is not subject to review. RAP 12.1(a); *State v. Hubbard*, 103 Wn.2d 570, 574, 693 P.2d 718 (1985). Without explanation, Haymond ignored this Court’s instruction

to correct his brief. On June 28, 2017, the Court of Appeals directed Haymond to submit and reserve a corrected brief. Haymond was specifically directed to identify any assignments of error together with issues pertaining to assignments of error pursuant to RAP 10.3(a)(4). Haymond's brief does not comply with this order.

Haymond's Statement of the Case contains no citations to the record. Haymond's brief is unsigned.

After Haymond filed his first brief on June 23rd, Haymond was directed by this Court to submit a corrected brief—not a substantively altered brief. Haymond's second and third briefs submitted on September 6th and September 15th are briefs altered in substance—not corrected briefs as directed by the Court of Appeals on June 28th. Haymond's Statement of the Case contains narrative that was not previously included in Haymond's first brief. Haymond now challenges time entries that were neither previously challenged in the trial court (CP 422-425) nor in Haymond's first brief to this Court filed on June 23rd. Haymond's narrative in his Conclusion has been altered.

In summary, Haymond did not submit and serve a “corrected brief” as directed by the Court of Appeals on June 28th. Haymond has instead submitted two new briefs (filed September 6th and September

15th) that contain new and substantially different content which should not be considered by the Court.

C. LEGAL ANALYSIS

Shelcon's Motion for Order Avoiding Defendant Scott M. Haymond's Two Transfers of Personal Property was a supplemental proceeding to enforce and collect upon its judgment against Haymond entered on October 28, 2011. Said judgment (CP 493 - 494) provides for the recovery of attorney fees and expenses to Shelcon incurred in collecting upon its judgment. Section 5 of said judgment provides:

Leave of Court is granted Shelcon Construction Group, LLC to apply for supplemental judgment(s) for additional costs and attorneys' fees reasonable and necessarily incurred by Shelcon Construction Group, LLC in the course of executing and collecting upon the judgment entered herein.

[CP 493 - 494].

At the conclusion of the evidentiary hearing, LLF filed a motion requesting attorney fees of \$89,950.50 and costs of \$3,139.95 (CP 329-347) along with supporting declarations from Lawrence and David Linville (CP 348-405). Haymond did not dispute that LLF was entitled to attorney fees. [CP 422]. Haymond disputed only the *amount* of attorney fees requested by LLF. The trial court ultimately awarded to LLF approximately 79% of the attorney fees requested and 100% of the

costs requested. The trial court awarded to LLF attorney fees in the amount of \$71,240.00 and costs in the amount of \$3,139.95. [CP 496-499].

In the trial court, Haymond's objections to the award of attorney fees were as follows:

1. Duplication
2. Fees were unnecessarily incurred in obtaining McDermott's Declaration
3. Single block entries exceeded \$1,000.00
4. "Work" on motion entries
5. Fees were "breathtaking"

[RP 422 - 425].

The trial court's oral ruling (RP 12/02/2016) indicates that the trial court carefully reviewed and evaluated Haymond's objections. The trial court first calculated the Lodestar and then reviewed LLF's billings for any time spent that was unnecessary, wasteful, or duplicative. [RP dated 12/02/2016, p. 21 – 22].

The trial court reviewed LLF's time entries and the supporting declarations (CP 348-403) for contemporaneously record keeping, detail sufficiency of time entries, duplication, and block billing. [RP dated 12/02/2016, p. 21 - 24].

Haymond did not object to the attorney hourly rates and the trial court found that the attorney hourly rates were reasonable.

The trial court stated that there was a “reduction based upon conservation of efforts in certain areas, but not a criticism.” [*Id.* at p. 22, lines 21-22.] The court further stated that “while there could have been perhaps some efficiencies, the court can’t assume that.” [*Id.* at p. 23, lines 6-7]. The court observed that “it is easier after the case is over to go back and say, well, we didn’t need to spend that much time...”. [*Id.* at p. 21, ln. 24 - p. 22, ln. 1].

The trial court considered the objections raised by Haymond, (“But in considering the objections that were raised to some of the entries” p. 22, lines 10 – 11) and awarded \$71,240.00 in attorney fees to LLF, which was significantly less than the \$89,950.50 in attorney fees originally requested.

Under the Lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Id.* Counsel must provide contemporaneous records documenting the hours worked.

Id. Such documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work, that is, senior partner, associate, etc. *Id.*

Haymond's Statement of the Case is thus inaccurate in two respects. First, attorney fees were reduced to \$71,240.00—not \$74,379.95. Second, the trial court offered a reasoned and reasonable explanation and basis for its fee award.

The trial court applied the Lodestar test to determine its fee award to LLF. [RP dated 12/02/2016, p. 21-24]. Haymond has challenged Lawrence Linville's time entries that were not previously challenged by Haymond in either the trial court (CP 422) or in Haymond's first brief (filed in the Court of Appeals on June 23rd).

IV. REQUEST FOR ATTORNEY FEES AND EXPENSES AGAINST HAYMOND

LLF requests an award of attorney fees and expenses against Haymond pursuant to RAP 18.1 and the terms of the Judgment and Decree of Foreclosure entered against Haymond. [CP 493 - 94)]. Said judgment provides for the recovery of attorney fees and expenses to Shelcon incurred in collecting upon its judgment against Haymond. Section 5 of said judgment provides:

Leave of Court is granted Shelcon Construction Group, LLC to apply for supplemental judgment(s) for additional costs and attorneys' fees reasonable and necessarily incurred by Shelcon Construction Group, LLC in the course of executing and collecting upon the judgment entered herein.

[CP 493 - 94]. The trial court awarded attorney fee and expenses to LLF pursuant to this provision and this Court should do the same if LLF prevails on this appeal against Haymond.

Dated this 9th day of October 2017

LINVILLE LAW FIRM, PLLC

/s/ Lawrence B. Linville

Lawrence B. Linville, WSBA #6401
Attorney for Linville Law Firm, PLLC

CERTIFICATE OF SERVICE

Kristen Wayman Yoon declares as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.

2. I caused to be served a copy of

RESPONDENT’S BRIEF

on counsel as follows:

<u>Attorney at Law</u> Allan L. Overland 705 S 9 th St, Suite 101 Tacoma, WA 98405 <input checked="" type="checkbox"/> VIA E-SERVICE <input checked="" type="checkbox"/> VIA FACSIMILE <input checked="" type="checkbox"/> VIA EMAIL	<u>Attorney at Law</u> Mark E. Bardwill 615 Commerce St., Ste 102 Tacoma, WA 98402 <input checked="" type="checkbox"/> VIA E-SERVICE <input checked="" type="checkbox"/> VIA EMAIL
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 9th day of October 2017, at Seattle, Washington.

/s/ Kristen Wayman Yoon
Kristen Wayman Yoon

LINVILLE LAW FIRM PLLC

October 09, 2017 - 12:14 PM

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