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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

Case No 697498-I

BART KLEIN and GOLRIZ AMIRI,

Appellants,

v.

MAISIE BIERET DELGADO and JAVIER F. DELGADO,

Respondents.

BRIEF OF RESPONDENTS JAVIER & MAISIE DELGADO

2019 JUL -8 AM 9:05
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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CONTENTS

I.	Summary of Response	1
II.	Argument and Authority	5
2.1	The Delgados’ Motion to Dismiss was Timely Filed and Klein Received Ample Notice	5
2.2	Klein’s Complaint was Properly Dismissed - Under either the Summary Judgment Standard of CR 56 or the More Rigorous CR 12(b)(6) Standard.	6
2.3	Matters Outside the Pleadings were Clearly Considered at the time of the Hearing on the Delgados’ Motion to Dismiss. The Matter Should be Treated as one for Summary Judgment under CR 56.....	6
2.4	Klein Never Moved for a Continuance of the Motion pursuant to CR 56, as He Was Required to Do if Any Additional Discovery Was Needed to Respond to the Motion to Dismiss.....	8
2.5	Under the Arguably More Rigorous 12(b)(6) Standard, Dismissal was Proper	9
2.5.1	The Allegation that Any Transfer from Maisie Delgado to Javier Delgado is Fraudulent is Objectively Inaccurate and False as a Matter of Law	10
2.6	Even if Plaintiffs Alleged the Elements of the UFTA, their Complaint Lacks the Substance Needed to Constitute a Claim Upon Which Relief can be Granted	13
2.6.1	Taking all Statements and Allegations as True, Plaintiffs’ Complaint is Illogical and Legally Insufficient on its Face	13
2.6.2	The Complaint Fails to Allege any Transfer at All, Let Alone a “Fraudulent Transfer” under RCW 19.40 et. seq. .	14
2.7	Plaintiffs’ Complaint Merely Stated a Circular Truism. Notice Pleading Allows the Plaintiff to Provide Minimal Facts - Just Enough to Put the Other Party On Notice of what is Plaintiff’s Complaint Concerns. But Notice Pleading Does Not Allow the Complaining Party to Omit Actual Allegations	15
2.8	More than Mere Notice Pleading is Required when a Plaintiff Alleges Fraud	16
2.9	This Court Can Affirm on Any Proper Basis. The Sole Claim in this Matter is Under RCW 19.40.041, and that RCW 19.40.091	

Provides a Four Year Statute of Repose. Klein filed Suit More than 5½ Years After Javier’s Purchase of the Property.	17
2.10 The “Discovery Rule” Does not Save the Plaintiffs’ Claims.....	18
2.10.1 Klein Admits He had Actual Notice of the Facts Giving Rise to the Claim.....	18
2.10.2 At a Minimum, Klein had Constructive Notice of the Facts Giving Rise to the Claim.....	19
2.11 Plaintiffs’ Counsel was Properly Disqualified.....	19
2.11.1 The Trial Court’s Order of Disqualification was Not an Abuse of its Discretion.....	19
2.11.2 RPC 1.9, Which Governs Duties Owed to Former Clients, Precluded Chris Kerl’s Continued Representation of Klein in the Case Below	22
2.11.3 The Current Case is “Substantially Similar” to the Prior Case – the Dissolution – in which Mr. Kerl Represented Maisie.....	23
2.12 Plaintiffs’ Argument Regarding Imposition of CR 11 Sanctions is Moot and Irrelevant, Because the Trial Court Vacated the Sanctions.	25
2.13 The Delgados have Cross-Appealed the Denial of CR 11 Sanctions, and Ask This Court to Award the Delgados’ their Attorneys’ fees Below and on Appeal.....	28
2.14 Arguments by the Klein Appellants Regarding the Delgados’ Discovery Answers Are Meritless and Should be Disregarded.	29
2.12.1 This Court Should Not Entertain Klein’s Discovery Arguments.....	29
III. Conclusion	31

TABLE OF AUTHORITIES

Cases

Bock v. State, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978) 17
Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 120, 744 P.2d
1032, 750 P.2d 254 (1987), *appeal dismissed*, 488 U.S. 805 (1988)..... 9
Northern Pac. Railroad v. Washington Util. & Transp. Comm'n, 68 Wn.2d 915,
416 P.2d 337 (1966)..... 17
Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co., 124 Wn.2d
789, 812, 881 P.2d 1020 (1994)..... 19
Tenore v. AT & T Wireless Servs. 136 Wn.2d 322, 330, 962 P.2d 104 (1998),
cert. denied, 525 U.S. 1171 (1999)..... 9

Statutes

RCW 19.40 *et. seq.* 10, 13, 14
RCW 19.40.041 4, 10, 11, 14, 15, 17
RCW 19.40.091 17

Rules

APR 9..... 20
CR 11 18, 25, 26, 27
CR 12(b)(6)..... 5, 6, 7, 8, 9
CR 12(c)..... 7
CR 26 29
CR 26(f)(5) 30
CR 26(i) 29, 30, 31
CR 56 6, 7, 8
CR 56(f) 8, 9
CR 9(b) 17
KCLR 37..... 29, 30, 31
KCLR 7..... 27
RPC 1.9..... 22, 23, 24, 25

I. SUMMARY OF RESPONSE

In January 2007, well before the present case was filed, the Plaintiffs had filed a lawsuit against Maisie Delgado in King County Superior Court under case № 07-2-03128-6 SEA (hereinafter, the 2007 litigation shall be referred to as the “Prior Litigation”). In the Prior Litigation, the Plaintiffs (hereinafter collectively “Klein”)¹ alleged that Maisie Delgado embezzled funds from Bart Klein in the Summer of 2006 during the course of Maisie Delgado’s employment with Klein’s firm. CP 38 (line 10). The Prior Litigation culminated in a default judgment against Maisie Delgado. CP 127.

Javier Delgado was not named as a Defendant in the Prior Litigation, because he and Maisie² were divorced at all times relevant to the alleged misconduct by Maisie Delgado. CP 14-18. Javier and Maisie were originally married August 1, 1998. CP at 88. Maisie filed a Petition for Dissolution on September 1, 2004. CP 14. A final Decree of

¹ Plaintiffs below and Appellants in this court are Bart Klein and Golriz Amiri, his wife. Bart Klein is an attorney and is Maisie’s former employer. In referring to the Plaintiffs collectively as “Klein,” no disrespect is intended to Mrs. Amiri.

² From this point forward, Maisie and Javier Delgado will be referred to at times by only their first names for the sake of clarity. No disrespect is intended, nor is any unwarranted informality before this tribunal intended.

Dissolution was entered on February 8, 2005, along with Findings of Fact and Conclusions of Law. CP 19-27 and CP 28-34.

After obtaining a default judgment against Maisie in the Prior Litigation, Klein embarked on various collection efforts. In the course of those efforts, Klein observed that Maisie Delgado was living in property that was owned by Javier Delgado. CP 148.

The gravamen of the claims below in the present case rested on the allegation that there are no documents “of record” between the Javier and Maisie to explain why Maisie was residing in a home owned by Javier. CP at 2 (Verified Complaint); CP at 201 (Amended Complaint).³ The Complaint filed in the present case goes on to “allege”⁴ that Klein seeks to establish the source of funds used by Javier for his purchase of the home in 2006 and his payment of ongoing mortgage obligations on the home. CP at 2 (¶3.10 of the Verified Complaint).

³ The “Amended Verified Complaint” was filed by Klein *after* Klein moved for leave to file an amended Complaint, but before the date of the hearing on the motion for leave to amend. Thus, Klein not only filed an unauthorized Amended Complaint, but has now designated the improperly filed Amended Complaint in the clerk’s papers before this Court. The Amended Complaint never became ‘operative,’ but in any event, the objectively false and unsupported allegation regarding the absence of any documents “of record” to explain Maisie residing in Javier’s house is contained in both documents.

⁴ “Allege” is placed in quotation marks because the core of the complaint does not so much contain an allegation as it simply states the desire of Plaintiffs to learn the ‘source of funds’ used by Javier to acquire the property.

To understand at any level what Plaintiffs below sought to accomplish in the current case, it is important to know the not just the history of the Prior Litigation, but to also understand the unusual (but not unheard of) fact that Maisie and Javier were divorced and then remarried. CP at 88.

Relevant to the Disqualification of Chris Kerl as Klein's attorney of record in the instant case is the fact that Chris Kerl was formerly Bart Klein's Rule 9 Legal Intern. CP at 27, 34. Klein and Chris Kerl represented Maisie as Maisie's attorney of record in her divorce from Javier. CP 15, CP 27, and CP 34.

Well after Maisie and Javier's divorce was final, Javier purchased a home (at 117 North 74th Street) in October 2006, as a single man. CP at 90, CP at 92.

Several years after they split, Maisie and Javier re-united, and ultimately remarried, in August 8, 2008. CP at 88. Anecdotally, remarrying a former spouse is unusual although certainly not unheard of.

A summary timeline of the foregoing facts are:

Date	Event
8/1/1998	Maisie and Javier Delgado are Married. CP 88.
9/1/2004	Maisie Files for Divorce, and is represented by Bart Klein and Klein's Rule 9 Legal Intern, Chris Kerl. CP 14-34.
2/8/2005	Divorce Decree Entered. CP 34.
10/12/2005	Javier Delgado Purchases his House. CP 90-92.

1/19/2007	Klein, represented by attorney Chris Kerl, files a Complaint against Maisie (Maisie only, and not Maisie's then-ex husband, Javier) in King County Superior Court Case No. 07-2-03128-6 SEA. CP at 2.
8/8/2008	Maisie and Javier are Remarried. CP at 88.
12/10/2009	A Default Judgment is Entered against Maisie in the Prior Litigation, i.e., Case 07-2-03128-6 SEA. CP at 2.
4/26/2012	Klein, represented by Chris Kerl, files the present lawsuit against Maisie and Javier. CP at 1-3.

In the present case, Plaintiffs' complaint contains a single cause of action, entitled "Fraud (Uniform Fraudulent Transfer Act)." Klein contended that *any* transfer of money *from Maisie to Javier* violates the Uniform Fraudulent Transfer Act, RCW 19.40.041. CP at 3 (¶4.2).

Putting all of the foregoing together: Plaintiff Klein, represented by his former Rule 9 legal intern Chris Kerl, was engaged in collecting on the Prior Litigation judgment, which was entered against their former client (and Klein's former employee) Maisie. Klein and Kerl discovered that Maisie was residing at a house titled solely in Javier's name; without further minimal investigation - which would have revealed the remarriage of Javier and Maisie - Klein files suit against Maisie and Javier, vaguely invoking the Uniform Fraudulent Transfer Act and seeking, as relief, to establish where Javier obtained the funds to purchase his home during a period when he was a single man in October 2006.

II. ARGUMENT AND AUTHORITY

2.1 *The Delgados' Motion to Dismiss was Timely Filed and Klein Received Ample Notice*

On September 18, 2012, The Delgados drafted and served a Motion to Dismiss pursuant to CR 12(b)(6). The Motion was originally scheduled to be heard on September 27, 2012, CP⁵ at 57, but that hearing date was rescheduled *at the request of Plaintiff Klein*; thus, the originally noted date for the motion hearing was changed by the Delgados as a courtesy to Klein to accommodate Klein's schedule. The Motion to Dismiss was then re-noted to be heard on October 19, 2012,⁶ i.e., giving Klein 29 days' notice. Ten days prior to the hearing, i.e., on October 9, 2012 Judge Monica Benton's bailiff notified the parties that the hearing would need to be rescheduled due to a judicial scheduling conflict. CP 194. Judge Benton reset the hearing to October 24, 2012. CP 194 Thus, it is true that on October 9, 2012 Judge Benton's Bailiff rescheduled the

⁵ Clerk's Papers will be referred to as "CP."

⁶ Local practice in King County Superior Court is that when a party wishes to note a hearing that requires oral argument, such as a 12(b)(6) motion or motion for summary judgment, the moving party contacts the bailiff for the assigned judge. Once an available date is secured, the moving party files its motion along with a "Notice of Hearing." The Notice of Hearing (also known as a "Note for Motion") sets forth the nature of the motion and the date and time scheduled for oral argument. In keeping with this local practice, the initial October 19, 2012 hearing date was scheduled by the Delgados' attorney in consultation with Judge Benton's bailiff. As sometimes happens, while Judge Benton was originally available for October 19, she subsequently became unavailable.

motion hearing to October 24, which was some 15 days later. But Klein's argument that this is tantamount to only having 15 days notice is specious and grossly misleading.

Indeed, based on the original hearing date (which was rescheduled at the request of, and as a courtesy to, Klein⁷), Klein had the Delgados motion 'in hand' for 36 days (based on the original service date of September 18, 2012).

2.2 *Klein's Complaint was Properly Dismissed - Under either the Summary Judgment Standard of CR 56 or the More Rigorous CR 12(b)(6) Standard.*

At oral argument for the hearing on the Delgados' Motion to Dismiss, counsel for the Delgados indicated a willingness to argue either under CR 56 or CR 12(b)(6). RP⁸ at 4. Under either standard, the dismissal was proper and should be affirmed.

2.3 *Matters Outside the Pleadings were Clearly Considered at the time of the Hearing on the Delgados' Motion to Dismiss. The Matter Should be Treated as one for Summary Judgment under CR 56*

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to the trial court (and not excluded by the court upon said presentation), the motion is treated as a motion for summary

⁷ Proving the old adage that 'no good deed goes unpunished.'

⁸ The Report of Proceedings will be referred to as "RP."

judgment pursuant to CR 56, and disposed of as provided in said rule. CR 12(c). In such case, all parties are to be given reasonable opportunity to present all material made pertinent to such a motion by CR 56. *See* CR 12(c).

Clearly, matters outside the primary pleadings (complaint and answer) were considered by the Court, so the motion to dismiss was properly considered under CR 56.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Indeed, at one point in the oral presentation by Bart Klein, the court noted the dearth of evidence for the court's consideration:

MR. KLEIN: ... What happened is she was represented by counsel at that time, both in the civil matter and

THE COURT: How -- how was -- you haven't [provided] the Court with a declaration to this effect, have you? There's nothing in the record that supports this to defeat a 12(b)(6).

MR. KLEIN: Um -- I can't cite to the record.

THE COURT: Very well.

RP at 13

Again, during Mr. Klein's presentation at the Motion to dismiss, as Mr. Klein made repeated reference to facts that were not before the court via declaration or otherwise, the court interrupts to inquire:

THE COURT: Why didn't you -- why haven't you submitted that in terms of, you know, with some evidence that the Court can rely on in the record?

MR. KLEIN: Well --

THE COURT: To defeat a 12(b)(6), if it could?

MR. KLEIN: Well, there is -- there is a letter from counsel where he objects to the interrogatories and responds with evidence. He goes through it, he -- it's extensive. It's a two- page letter and it refers to the interrogatories and the documents that we're requesting to try to prove this kind of case.

RP at 15.

Thus, when asked why no record evidence on which the court could rely had been submitted, Mr. Klein referred the court to a letter from the *Delgados' attorney* objecting to various items of interrogatories.

2.4 Klein Never Moved for a Continuance of the Motion pursuant to CR 56, as He Was Required to Do if Any Additional Discovery Was Needed to Respond to the Motion to Dismiss.

Since additional evidence was submitted to the court outside the pleadings, the motion to dismiss was to be judged under CR 56 and its attendant rules. CR 56(f) provides that “[s]hould it appear from the *affidavits of a party opposing the motion* that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance

to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” CR 56(f).

Klein did not submit *any* affidavits to the court seeking a continuance and explaining the reasons why a continuance was needed. Mr. Klein vaguely referred to his motion to compel discovery which was noted *after* the motion for summary judgment was pending, but as discussed in the Delgados’ response to *that* motion, Klein never conferred in good faith with defense counsel regarding discovery prior to noting his motion to compel.

2.5 Under the Arguably More Rigorous 12(b)(6) Standard, Dismissal was Proper

Dismissal under 12(b)(6) is warranted when the court concludes, beyond a reasonable doubt, the plaintiff’s complaint is drafted such that even if all facts stated are proved, recovery would still not be justified. *Tenore v. AT & T Wireless Servs.* 136 Wn.2d 322, 330, 962 P.2d 104 (1998), *cert. denied*, 525 U.S. 1171 (1999). All facts alleged in the plaintiff’s complaint are presumed true. *Tenore*, 136 Wn.2d at 330. But the court is not required to accept the complaint’s legal conclusions as true. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987), *appeal dismissed*, 488 U.S. 805 (1988).

The factual allegations in this case are set forth in ten short, almost cryptic paragraphs of the Plaintiffs' complaint.

Plaintiffs allege at ¶3.6 that there are no documents "of record" between Maisie and Javier regarding the home that is titled in Javier's name. ¶3.10 is not so much an allegation as a statement of Plaintiffs' intent in bringing the present suit: "Plaintiffs seek to establish the source of funds used for the purchase and ongoing mortgage obligations of the home titled in the name of Javier Delgado."

Plaintiffs then assert a single cause of action, entitled "Fraud (Uniform Fraudulent Transfer Act)." Plaintiffs' cause of action reads as follows:

Defendant Maisie Delgado's transfer of any assets, including payment of money, to Defendant Javier Delgado, [sic] is a violation of the Uniform Fraudulent Transfer Act, RCW 19.40.041, as an attempt to hinder, delay or defraud a creditor. This transfer should be voided to the extent necessary to satisfy creditor's claim.

2.5.1 The Allegation that Any Transfer from Maisie Delgado to Javier Delgado is Fraudulent is Objectively Inaccurate and False as a Matter of Law

Legally and objectively, the allegation that *any* transfer of assets from Maisie to Javier is a violation of the Uniform Fraudulent Transfer Act, RCW 19.40 *et. seq.* (hereinafter "UFTA") is untrue. Only transfers of assets for less than fair market value, when undertaken to hinder, delay

or defraud a creditor, would violate the UFTA. RCW 19.40.041 provides as follows:

RCW 19.40.041. Transfers fraudulent as to present and future creditors.

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

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

RCW 19.40.041 [emphasis added].

RCW 19.40.041 goes on to set forth the factors for a court to consider in determining “intent to hinder.”

As an initial matter, the plain language of the UFTA, as well as logic and common sense, demonstrates that the UFTA is concerned with transfers made *by a debtor* and *obligations incurred by a debtor*.

Under any conceivable set of circumstances, a debtor living in a house owned by another person for either no rent or reduced rent simply does not implicate the UFTA.

Plaintiffs' complaint, at its core, suggests the following:

1. Maisie and Javier were divorced in 2005
2. In 2007, Plaintiff filed a lawsuit against Maisie Delgado (but not Javier Delgado), and obtained a default judgment.
3. At some point after obtaining their default judgment against Maisie, the Plaintiffs learned that Maisie was living in a home owned by Javier Delgado.

From this set of factual allegations, the Plaintiffs conclude the "facts" section of their complaint with a statement that the Plaintiffs want to establish the source of funds used for Javier's purchase of the house and how he pays the ongoing mortgage obligations of the home.

But whether Javier was using his salary, or lottery winnings, or inheritance money, or anything else is simply irrelevant to Klein's desire to collect the Judgment obtained in the Prior Litigation - which all parties agree is a separate debt of Maisie Delgado.

Klein put forth, as their single cause of action, the legally and factually false proposition that any transfer of assets from Maisie to Javier violates the UFTA.

2.6 *Even if Plaintiffs Alleged the Elements of the UFTA, their Complaint Lacks the Substance Needed to Constitute a Claim Upon Which Relief can be Granted*

Plaintiffs' complaint fails to state a cause of action for two separate and independent reasons.

2.6.1 *Taking all Statements and Allegations as True, Plaintiffs' Complaint is Illogical and Legally Insufficient on its Face*

First, *Javier* is not the debtor, so even if (i) Javier and Maisie were divorced, and (ii) Javier were allowing Maisie to live in his house either rent free, or in exchange for below-market rent, there would be no basis to sue Javier. Such conduct would not violate either the spirit nor the letter of RCW 19.40 *et. seq.*

This is because a debtor (Maisie) can be on the receiving end of any transfer without running afoul of the UFTA; it is only when the debtor is **shedding** assets that the provisions of RCW 19.40 come into play.

A debtor who actually receives a windfall transfer of assets, or who receives a windfall benefit such as what Klein alleged below (Maisie living in a home owned by her ex husband) would have even more assets available from which a judgment creditor could satisfy the judgment.

Taking every factual allegation and statement in Plaintiff's Complaint as true, and accepting all inferences (reasonable or unreasonable) in favor of Klein, suppose Maisie and Javier were never remarried. Suppose further that the fair market rental value of Javier's home were \$2,000.00 per month, and that he and Maisie had some secret agreement (i.e., in the words of the Complaint, an agreement not "of record") whereby Maisie were allowed to reside in her ex-husband's home for \$500.00 per month, or even for free. In such a case Maisie would have a monthly windfall of \$1,500.00 (in the case that Maisie were paying \$500.00 per month instead of \$2,000.00 per month) to \$2,000.00 (in the case that Maisie paid no rent). The extra funds that would thus remain in Maisie's possession (rather than in the possession of her landlord) would, by definition, be funds available to the judgment debtor for collection.⁹

2.6.2 The Complaint Fails to Allege any Transfer at All, Let Alone a "Fraudulent Transfer" under RCW 19.40 et. seq.

Second, there is not even a transfer alleged as a factual matter. Plaintiffs vaguely seek to have "the transfer" avoided. But no "transfer" is

⁹ The only way an agreement not "of record" between Maisie and Javier would even implicate RCW 19.40.041 would be an agreement whereby Maisie paid \$5,000.00 per month to Javier under the auspices of "rent" where the fair rental value of the property was \$2,000.00. In such case, one could draw the conclusion that the judgment debtor was trying to disguise, and place outside the reach of creditors, the extra \$3,000.00 per month. Plaintiffs in effect alleged the exact opposite in this matter.

alleged or even alluded to. The cryptic nature of Plaintiffs' allegation is that Maisie is living in the house owned by her ex husband. Even if the complaint and the factual allegations are taken as true, there has been no transfer alleged. If and to the extent the Plaintiffs allege that Javier's act of allowing Maisie to live in Javier's home is a "transfer," then avoidance of that transfer would render Plaintiffs all the more incapable of locating assets from which to satisfy their judgment. *See* ¶2.4.1 above.

2.7 *Plaintiffs' Complaint Merely Stated a Circular Truism. Notice Pleading Allows the Plaintiff to Provide Minimal Facts - Just Enough to Put the Other Party On Notice of what is Plaintiff's Complaint Concerns. But Notice Pleading Does Not Allow the Complaining Party to Omit Actual Allegations*

Even if Klein had properly incorporated the standard set forth in RCW 19.40.041, (i.e., prohibiting a transfer of assets *from a debtor with intent to hinder or delay a creditor, or for below fair market value*), such a statement would merely be a truism. To illustrate the insufficiency of Plaintiffs' Complaint in the court below, suppose the Plaintiffs had *actually* included all of the requisite elements under RCW 19.40.041. The Plaintiffs still failed to allege culpable conduct on the part of either Defendant. Plaintiffs' complaint, *were it to contain* the requisite elements of RCW 19.40.041, would read as follows:

“*If* Maisie has transferred assets to Javier for below fair market value, *then* such transfer would be voidable under the UFTA.” Such an allegation could just as easily read “*If* Maisie transferred assets to Judge Monica Benton for less than fair market value, *then* such transfer would be voidable under the UFTA.” Or “*If* Maisie transferred assets to attorney David Ruzumna for below market value, *then* such transfer would be voidable under the UFTA.” But merely stating the standard under an applicable cause of action, and then making an allegation that is contingent on the hypothetical breach of that standard, is not the same as making an allegation, even under the charitable standard of notice pleading (which allows for scant facts). A tenant cannot file suit against her landlord and allege “*if* the Landlord failed to afford a habitable premises, then such failure amounts to a violation of the Residential Landlord Tenant Act.” In this last example, the doctrine of Notice pleading would forgive the tenant for not spelling out the precise manner in which the premises was not habitable, but would not likewise excuse the tenant from at least making an affirmative statement constituting an allegation.

2.8 *More than Mere Notice Pleading is Required when a Plaintiff Alleges Fraud*

While Klein is generally correct in his contention that Washington is a so-called “Notice Pleading” state, there is an important exception to the general notice pleading standard stated in CR 9(b). That rule provides:

Fraud, Mistake, Condition of the Mind. *In all averments of fraud or mistake, the circumstances constituting fraud or misstate shall be stated with particularity.* Malice, intent, knowledge and other condition of mind of a persona may be averred generally.

CR 9(b) [emphasis added]

2.9 This Court Can Affirm on Any Proper Basis. The Sole Claim in this Matter is Under RCW 19.40.041, and that RCW 19.40.091 Provides a Four Year Statute of Repose. Klein filed Suit More than 5½ Years After Javier’s Purchase of the Property.

An appellate court reviewing the decision of a trial court can and should affirm a judgment if there are alternative grounds for affirmance presented by the pleadings and record. *See, e.g., Bock v. State*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978), *citing Northern Pac. Railroad v. Washington Util. & Transp. Comm’n*, 68 Wn.2d 915, 416 P.2d 337 (1966). RCW 19.40.091 provides that an action under the Uniform Fraudulent Transfer Act must be asserted within four years of the date the cause of action accrues. The allegation in this case concerns the allegedly fraudulent transfer that occurred in the purchase, by Javier, of his home in 2006. *See* CP 274, 276. This action was filed in April 26, 2012, some 5½ years after Javier’s purchase of his home. ¶2.8 of the Delgados Answer to

Plaintiffs' Complaint asserts, as an affirmative defense, that the Plaintiffs' claims are time-barred or, alternatively, barred by the doctrine of laches. CP at 332. Thus, ample grounds are contained in the pleadings and record to support dismissal based on the statute of repose. If this case were to be remanded, the Delgados would move for dismissal on the grounds of time bar, and the trial court would be bound to dismiss on that basis.

2.10 The "Discovery Rule" Does not Save the Plaintiffs' Claims

2.10.1 Klein Admits He had Actual Notice of the Facts Giving Rise to the Claim

In defending himself against the Delgados' request for CR 11 sanctions, Klein stated that:

Plaintiffs conducted extensive investigation prior to filing of this action. Plaintiffs sought and obtained real estate records for the property owned in the name of Javier Delgado. Plaintiffs knew that the property was acquired individually by defendant Javier Delgado in October 2006. Plaintiffs also knew that Maisie Delgado lived at that address, probably continuously, from that time. She was in fact personally served there with the summons and complaint in plaintiffs' previous action on January 25, 2007, a time she was ostensibly divorced from her co-defendant and before she remarried him.

CP 148 (Declaration of Bart Klein at ¶3).

The Delgados need only cite to Plaintiffs' own words to demonstrate Klein's actual notice of the facts giving rise to his subsequent claim. Klein is judicially estopped from now claiming that Javier and

Maisie's remarriage, and Maisie's residence at the subject property, were somehow hidden from view in a way that would toll the statute of limitations under the discovery rule.

2.10.2 At a Minimum, Klein had Constructive Notice of the Facts Giving Rise to the Claim.

It is undisputed in this case that the fact of Maisie and Javier's remarriage was "of record," publicly published by King County Records. It is also undisputed that the date Javier bought the subject property, the name and address of the parties from whom Javier purchased, and the amount of the purchase price, were all publicly available and could be located using just Javier's name, or just the address of the property. These are not just 'findable,' but they are easily, routinely 'findable.' That Klein - an attorney himself - never bothered to look is not a fact that excuses his failure to find this information.

2.11 Plaintiffs' Counsel was Properly Disqualified

2.11.1 The Trial Court's Order of Disqualification was Not an Abuse of its Discretion

A trial court's order disqualifying an attorney is reviewed for abuse of discretion. *Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994).

Appellant complains that prior attorneys involved in the Klein/Delgado imbroglio had not previously noticed the prior representation by Mr. Kerl and Mr. Klein, and so had not previously sought to disqualify Mr. Kerl from this litigation. The fact that the Delgados attorney David Ruzumna was both pioneering and meticulous in noticing the fact that Plaintiffs' counsel (Kerl) had previously represented the Defendant (Maisie) in a divorce (from Defendant Javier) is hardly a basis to undermine that attorney's successful motion o disqualify. The Delgados should not be faulted for retaining an assiduous attorney.

The Admission to Practice ("APR") Rules contain the basis for so-called "Rule 9 Internships." *See* APR 9. APR 9 sets forth a mechanism for certain qualified law students and other individuals to be granted a limited license to practice law under the direct supervision of a "Supervising Attorney," who assumes joint professional responsibility for the conduct of the Rule 9 Intern.

Appellant Bart Klein is an attorney, and is the former employer of Defendant Maisie Delgado. Klein was Maisie's¹⁰ attorney of record when Maisie filed for divorce from her then-husband, Javier. By the time the Decree of Dissolution was entered, and the Findings of Fact and

¹⁰ For clarity, Maisie and Javier Delgado will be referred by first names. Neither disrespect to the litigants, nor improper informality before this Court are intended.

Conclusions of Law entered by the Court, Klein employed Chris Kerl as a Rule 9 Intern. CP 27, 34. Chris Kerl, Klein's disqualified attorney, signed and presented the Findings and Conclusions and the Final Decree in February 2005. Plaintiff Bart Klein also signed both of those pleadings. CP 27, 34.

APR 9(c) defines the scope of the Practice in which the Rule 9 Intern is authorized to engage. APR 9(c) provides:

(c) Scope of Practice. A legal intern shall be authorized to engage in the limited practice of law, in civil and criminal matters, only as authorized by the provisions of this rule. **A legal intern shall be subject to the Rules of Professional Conduct and the Rules for Enforcement of Lawyer Conduct as adopted by the Supreme Court and to all other laws and rules governing lawyers admitted to the Bar of this state, and shall be personally responsible for all services performed as an intern.**¹¹

Thus, Chris Kerl, the Rule 9 Intern representing Maisie in Maisie's divorce from Javier, was at all times subject to the same rules as would be applicable if Mr. Kerl were an attorney at the time he represented Maisie in Maisie's divorce.

¹¹ Emphasis added.

**2.11.2 RPC 1.9, Which Governs Duties Owed to Former Clients,
Precluded Chris Kerl's Continued Representation of
Klein in the Case Below**

RPC 1.9 governs duties owed to former clients, and provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

See RPC 1.9

Putting these rules together and applying them to the facts before the trial court, then, Chris Kerl was a lawyer who formerly represented Maisie Delgado as a Rule 9 Intern, subject to the rules applicable to a full fledged lawyer. He was representing Klein, whose interest in this case are directly adverse to those of Maisie.¹²

2.11.3 The Current Case is “Substantially Similar” to the Prior Case – the Dissolution – in which Mr. Kerl Represented Maisie

Official Comment 3 to RPC 1.9 provides that matters are “substantially related” within the meaning of RPC 1.9 “if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the [current] client's position in the subsequent matter.

To give full protection to the interests sought to be protected by Rule 1.9, Official Comment 3 goes on to provide that:

[a] former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the

¹² Plaintiff Bart Klein also previously represented Maisie Delgado, but Klein is arguably currently litigating a dispute he — as named Plaintiff — has with his former client Maisie. Respondents do not assert that Klein is precluded by any RPC from prosecuting this matter *pro se*.

possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.¹³

In the present case, the gravamen of the Appellants' claims below concerns the nature, extent, and terms of Maisie's interests in Javier's real property. Thus, the present matter is "substantially related" to the prior, dissolution matter, if the nature of the services a lawyer provides concerns the same general subject matter as would be learned by a lawyer providing legal representation in a dissolution case. Lawyers handling dissolution cases necessarily learn information regarding ownership, ownership interests, financing, and debts related to real and personal property of their client, whether such property is community or separate.

Indeed, during oral argument during the motion to dismiss, Klein argued in effect that Masie's and Javier's dissolution was a sham. While Respondents obviously deny that allegation, if the allegation is taken as true, then the attorneys representing the parties to the 'sham' divorce would by necessity have (or potentially have) relevant information.

As an example of how Rule 1.9 is to operate, suppose, as Plaintiff alleges in the current case, Maisie and Javier actually did have an

¹³ See Official Comment 3 to RPC 1.9.

agreement, not ‘of record,’ *see* CP at 2 and CP at 228-229, bearing on Maisie’s right to use or occupy Javier’s real property. Surely such an agreement is in the nature of what would be relevant to the nature of the services Mr. Kerl provided in representing Maisie in a case against Javier, where the outcome of the case (the dissolution) is to allocate rights, responsibilities, and allocate assets and liabilities regarding real and personal property.

Indeed, that is precisely what was *actually* covered by the Findings, Conclusions, and Decree in the dissolution matter in which Mr. Kerl represented Maisie. In such case, Maisie would not, in seeking to invoke the protections of RPC 1.9, be required to divulge the information to which Mr. Kerl was exposed. Requiring such specification of confidential information would eviscerate the protections that RPC 1.9 seeks to afford a former client whose former attorney undertakes to represent an adverse party against that former client.

2.12 Plaintiffs’ Argument Regarding Imposition of CR 11 Sanctions is Moot and Irrelevant, Because the Trial Court Vacated the Sanctions.

The Delgados were entitled to CR 11 sanctions, and appeal the Court’s denial of CR 11 Sanctions. However, Appellant Klein has not made a preemptive argument in opposition to CR 11 sanctions. Such an argument would be proper in Appellants’ Response to the Delgado’s

cross-appeal (or their Reply brief - since the Delgados cross-appeal is contained within this Respondent's Brief). Rather, Appellant's have assigned error to Judge Benton's erroneous CR 11 Order, which Order was vacated at the outset of the hearing on the Delgados Motion to Dismiss.

Crucially, this Court should understand that the Delgados' request for CR 11 Sanctions was intended to be heard contemporaneously with the Motion to Dismiss. As described in §2.1.3 above, the Motion to Dismiss was rescheduled twice - first at the request of Klein, and again at the instance of Judge Benton. Judge Benton erroneously considered the CR 11 Motion on the day it was originally scheduled to be heard, but this was entirely a clerical error by Judge Benton. The Delgados were just as surprised as Klein when they received the Order Granting their CR 11 Motion, and the Delgados immediately took steps - on their own accord and not at the insistence or urging of Plaintiffs - to notify Judge Benton that her entry of the CR 11 Order was in error, and premature. Indeed, Defendants notified Judge Benton's bailiff in writing, and confirmed to Appellant Klein in writing, immediately, that the CR 11 order should not have been entered on the date it was entered. CP 222 (e-mail from Delgados' attorney, David Ruzumna, to Judge Benton's bailiff, Laura Doris). Judge Benton's bailiff responded that Judge Benton would

consider the CR 11 issue at the time of the oral argument on the motion to dismiss. Despite having the Delgados' written acknowledgement of error in timing of when Judge Benton signed the CR 11 order, Klein nevertheless drafted and filed a "Motion for Reconsideration."¹⁴

The Delgados did not oppose Judge Benton's vacation of the CR 11 Order at the outset of the October 24 hearing for precisely the reason that the Delgados agreed that Judge Benton entered the order in error.¹⁵

In any event, the trial court - with the agreement of the Delgados' counsel - vacated its earlier CR 11 Order at the outset of the hearing on the motion to dismiss. RP at 3. Accordingly, *Appellant's* request for relief in the present court makes no sense, since the award of CR 11 sanctions was vacated by the Court. RP 3-4.

¹⁴ While this was unnecessary 'overkill' because the Delgados agreed that the CR 11 sanctions should not have been imposed in advance of the hearing on the motion to dismiss, Klein was likely in a bit of a panic, as he was the pro se Plaintiff at that point facing sanctions that he would be responsible to pay.

¹⁵ Indeed, King County Local Rule 7 ("KCLR 7") provides that no response to a Motion for Reconsideration is permitted unless one is requested by the judge, and that no motion for reconsideration may be granted unless and until the judge requests such a response. Thus, pursuant to the King County local rules, the Delgados could have objected to the vacation of the CR 11 Order on the grounds that Judge Benton had not yet afforded the Delgados the opportunity to respond. The Delgados did not make such an objection because they agreed that the order should be vacated - but only until after the motion hearing, at which time the Delgados would be entitled to CR 11 sanctions for the reasons stated in their motion for such sanctions.

2.13 *The Delgados have Cross-Appealed the Denial of CR 11 Sanctions, and Ask This Court to Award the Delgados' their Attorneys' fees Below and on Appeal.*

For the reasons stated in their original motion for CR 11 Sanctions, CP at 75-102, the Delgados ask this Court to reverse the Trial Court's denial of CR 11 sanctions. CR 11 sanctions warranted, as a substantive matter, based on the flawed theories, and failure to investigate, and failure to stand down after defects were pointed out to Klein at the earliest states of litigation. See, e.g., CP at 94-97. But as a matter of appellate jurisprudence and the trial court's discretion, the trial court vacated its earlier CR 11 Order on the basis that the timing of the imposition of the sanctions was erroneous. Thus, the trial court's imposition of CR 11 sanctions was proper, as was its order on reconsideration vacating the same based on the court's error in timing, but once the motion to dismiss was heard and granted, all of the reasons that warranted imposition of CR 11 sanctions were present, and CR 11 sanctions should have been awarded.

As a separate, independent and sufficient basis for imposition of attorneys' fees against Klein is the present appeal, and Klein's appeal of the CR 11 sanctions which were vacated at the time of the appeal (hence rendering *Klein's* appeal on that issue frivolous). So too is Klein's appeal

of the disqualification of Chris Kerl frivolous, warranting attorneys' fees on appeal.

2.14 Arguments by the Klein Appellants Regarding the Delgados' Discovery Answers Are Meritless and Should be Disregarded.

Klein propounded Interrogatories and Requests for Production to the Delgados on August 20, 2012. CP at 149 (i.e., ¶4 of Klein Declaration, at line 11, admitting that Discovery served August 20, 2012).

In the startlingly diligent and attentive style emblematic of the Delgados' attorney *throughout* this case, the Delgados outlined their objections, in detail, *on the very same day that the discovery was propounded*. CP 196-199 (i.e., the August 20, 2012 letter from the Delgados attorney). Klein admits that he unjustifiably missed the one discovery conference that the parties originally scheduled. CP at

2.12.1 This Court Should Not Entertain Klein's Discovery Arguments

In the event this Court entertains the discovery dispute, notwithstanding CR 26(i) and KCLR 37, the Delgado Appellants wish to briefly respond. Plaintiffs' Interrogatories were objectionable, and counsel for the Delgados immediately objected to them. CP 176-178.

In general, most of the discovery did not come within the (admittedly broad) scope of CR 26, in that they did not appear calculated to lead to the discovery of admissible information. Counsel for the

Delgados *immediately* objected to the Interrogatories, and invited Plaintiff to contact him to provide authority that might justify the Plaintiff's improper and in some respects bizarre discovery questions. CP 176-178. Plaintiff never bothered to respond pursuant to CR 26(i) or King County Local Rule 37 ("KCLR 37"), in that Klein never tried to confer with Defense counsel prior to moving to compel discovery. *See* CP 197.¹⁶

Defendants attorney warned Plaintiff that Defendants would bring a motion to limit the Plaintiffs' improper and offensive discovery requests - wherein Plaintiffs asked questions regarding the sexual practices of the Defendants, and asked oddly worded questions about the parties sexual partners. CP 196-199.

This Court is invited to review an example of the bad faith conduct displayed by Klein throughout this case, at CP 190-211, and particularly 190-193. Synopsizing what is set forth at those pages of the clerk's papers is the painstakingly documented fact that Klein led the Delgados' attorney (David Ruzumna) to believe that Klein would be calling Ruzumna at any moment, and *simultaneously* was in the process of filing with the court

¹⁶ Defense counsel indicated a willingness and eagerness to discuss the propriety of Plaintiffs' interrogatories with Plaintiffs' counsel: "[p]ursuant to my normal practice of remaining ready, willing and able to stand corrected, and if nothing else pursuant to CR 26(f)(5), I will consider any information or authority you have bearing on the merits of my objections."

pleadings that represented to the court that Ruzumna was not making himself available for a discovery conference as required by CR 26(i) and KCLR 37.

If Klein believed that additional discovery was needed to respond to the motion to dismiss, he should have moved for a continuance pursuant to CR 56(f), which was never done. Klein should not now be heard to complain that his lackluster response to the Delgados motion to dismiss was on account of discovery deficiencies.

III. CONCLUSION

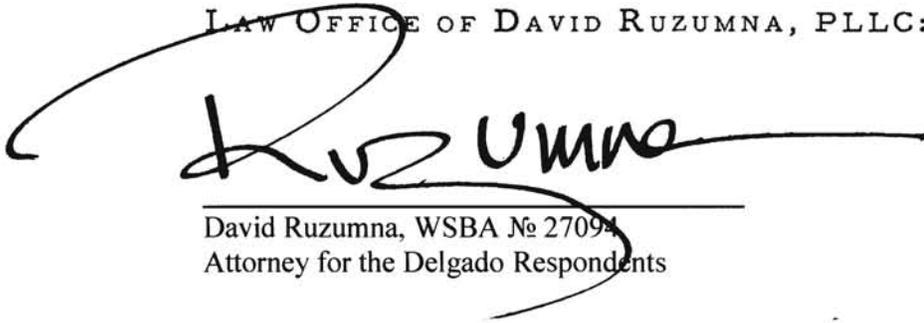
The trial court's dismissal of Klein's claims should be affirmed, whether the propriety of the dismissal is judged under CR 56 or CR 12(b)(6). Klein's complaint failed to state a claim upon which relief could be granted. Even Klein's "Amended Complaint," which he had no authority to file since the Motion for Leave to Amend had not even been considered at the time the "amended complaint" was filed, likewise fails to state a claim, but in any event should not have been filed with the court and should not have been designated as part of the clerk's papers in this court.

The trial court's denial of CR 11 sanctions should be reversed and this matter remanded for calculation of CR 11 sanctions, including fees on appeal. The Delgados request fees on appeal on the grounds that the

appeal is frivolous, at least in significant part. Klein ignored early warnings by the Delgados urging Klein to stand down and dismiss the action, and explained in detail *why* that should occur.

RESPECTFULLY SUBMITTED this 8th day of July,
2013.

LAW OFFICE OF DAVID RUZUMNA, PLLC:



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