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Court of Appeals
Division I
State of Washington

No. 73305-2-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
King County Superior Court No. 11-2-02108-4SEA

JACKSON J. MIKA,

Plaintiff-Appellant,

vs.

JBC ENTERTAINMENT HOLDINGS INC., a Corporation doing business in the State of Washington; JBC OF SEATTLE, WA, INC., a Washington business, a subsidiary of JBC ENTERTAINMENT HOLDINGS INC.; an entity, GEMINI III LP owner of JBC ENTERTAINMENT HOLDINGS INC.; GAMEWORKS ENTERTAINMENT LLC, a Corporation doing business in the State of Washington; MARQUIS HOLMES, an individual, dba. BOSS LIFE ENTERTAINMENT, JANE DOE, Husband and wife, and their community, TONY HUMPHREYS, an individual, Husband and wife, and their community.

Defendants-Appellees.

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PLAINTIFF'S/APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

A. Plaintiff's Allegations against Gemini III LP

The Plaintiff alleges that the corporate veil rightfully should be pierced and Gemini III LP (Hereinafter Gemini) should stand trial as a codefendant because Gemini, to avoid liability fraudulently transferred defendant JBC Entertainment LLC's (hereinafter JBC) assets to another corporation making JBC insolvent and, thereby denied judgment creditor, Mr. Mika, an invitee an opportunity for full redress for the substantial damages he sustained after being shot with a firearm by an unknown assailant inside Gemini's nightclub, Jillians of Seattle. (Hereinafter Jillians)

B. Plaintiff's Allegations against GameWorks LLC

The Plaintiff's allegation against GameWorks LLC, (Hereinafter Gameworks) that warrant piercing the corporate veil are that Gameworks, as "first fraudulent transferee" in "bad faith" knew that Mika was potential judgment creditor with a substantial claim against JBC and was a co-conspirator with Gemini to fraudulently convey Jillians and the rest of JBC assets, whether with or without intent to deny Mika full and justifiable redress. Moreover, GameWorks is liable to Mika as "successor" corporation of JBC Entertainment Holding.

C. Plaintiff's Allegations Against Humphreys

Seattle Municipal Ordinance 10.11.015 [CP 715] requires nightclubs to have a Safety Plan. Pursuant to the Responsible Corporate Officer Doctrine, JBC Regional Director Humphreys is responsible for the violation of the Seattle Nightclub Safety Code by failing to develop, file, or direct the filing of annual Safety Plan for Jillian's of Seattle as required by City Ordinance. [CP 690]

In addition, he was also negligent in hiring, supervision, entrustment, in performing his duty to provide reasonable secure premises when he failed to put into place reasonable inexpensive security measures, such as purse searches and using a metal detecting “wand” before entry, to insure the safety of Jillians’ invitees.

II. STATEMENT OF PERTINENT FACTS

During the evening of March 20, 2010, Jillian’s was packed so much with patrons that there was a line of people forming around the corner from the entry. [CP 294] [CP 295] [CP 296] Patrons were allowed to enter the night club by merely showing proof of age. [CP 596,769] When the shooting occurred there was “chaos”, “things were flying, stuff was in the air, people were trying to get out, shoes on the floor, and were dropped as people were trying to cover up". [CP 296]

Mika had a gunshot entry wound in his right buttock and exit wound in his groin. It was discovered that the bullet struck Mika’s colon,

prostate, other organs and urethra requiring extensive surgeries and a colostomy bag and Foley Catheter for an extended period of time. [CP 308, 399, 401-405]

At the time of the shooting incident, Defendant JBC, now insolvent, was the corporate owner and operator of Jillians. [CP 276] Defendant Gameworks acquired Jillians along with other JBC properties shortly after JBC failed Summary Judgment Motion before King County Superior Court Judge Hayden. After Gameworks' acquisition of JBC's assets, former defendant Gregory Stevens, CEO/CFO of JBC was appointed CEO of Gameworks [CP 958] and Defendant Humphreys was promoted to Gameworks Vice president of Operations. [CP 438, 658]

The defendants failed to follow the security dictates of JBC's security policy to insure that their premises are "safe and secure".[CP 131] The defendants also failed to exercise reasonable care by providing adequate preventative security, such as "wandering", as did other local nightclubs to prevent firearms being brought into Jillians. [CP 67, 630] Defendants' failure to enact any security precautions, control access to the nightclub, and take other reasonable security measures created an unreasonable risk to Mika. [CP 630-631]

After JBC's failed Summary Judgment Motion, defendant Gemini, an owner of JBC, with actual knowledge of Mika's substantial monetary

claim against JBC contemplated bankruptcy, liquidation or sale of Jillians and the other JBC locations. [CP 281] JBC was immediately sold by Gemini and others to pay off as much secured debt as possible, so that Stevens, Gemini, and Alpha (Minority Owner) could recoup collateral from a JBC loan. [CP 394, 281, 289] Gemini, Stevens, and Alpha received their cash collateral after the sale. Stevens received \$600,000, Gemini received \$368,081 and Alpha received \$56,981 for a total of \$1,025,062.00. [CP 289] As a consequence of the sale JBC “has no value.” [CP 276] At the time of the sale, Gemini had already been dismissed from the case. [CP 394]

Gameworks sent Greg Stevens and Gemini a Letter of Intent to purchase the JBC’s assets, dated July 8, 2011. A mere eight (8) days after JBC’s Summary Judgment Motion failed. [CP 322]

There is absolutely no evidence, direct or circumstantial presented by the defendants that prior to the shooting of Jackson Mika, Gemini or any of the other owners contemplated bankruptcy or sale of JBC to pay off secured creditors. Gemini made the decision to sell Jillian's and other JBC assets to Gameworks. Gemini had to pay off a secured creditor in order to complete the sale. [CP 479]

Gemini's conveyance of the JBC's assets resulted in having a new owner, Gameworks. Jillians no longer exists and defendant JBC is insolvent. [CP 276]

III. ARGUMENT

Standard of Review

When reviewing an Order granting Summary Judgment the appellate court engages in the same inquiry as the trial court. *Huff v. Budbill*, 141 Wn. 2d 1, 7, 1 P.3d 1138 (2000). Questions of law are reviewed *de novo* and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party. *Williamson Inc. v. Calibre Homes, Inc.*, 147 Wash.2d 394, 398, 54 P.3d 1186 (2002) *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn. 2d 299, 305, 96 P.3d 957, 960 (2004)

Granting a summary judgment is appropriate “only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Marincovich v Taraochia* 114 Wn 2d 271, 274 (1990) 787 P.2d 562; CR 56(c). *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)

A. THE TRIAL COURT ERRED WHEN THE COURT BALANCED THE DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE AND GRANTED DEFENDANT GEMINI'S MOTION ON SUMMARY JUDGMENT

The trial court committed error because the court inappropriately acted as fact-finder and weighed the proponent's direct evidence against the circumstantial evidence of the Plaintiff, Mika, and found for the defendant.

1. Written Order

In the court's written order on Gemini's Summary Judgment Motion, the trial court found that the circumstances of Gemini's transfer were "inferences" that did not overcome the direct evidence of defendant Gemini's direct testimony that the Jillians was losing money and the sale to Gameworks was a legitimate arm's length business transaction.¹

"Essentially, the plaintiff's claim against Gemini rests upon an **inference** to be drawn from the timing of the sale of JBC Entertainment's assets while his premises liability claim was pending; in opposition to such speculation stands the overwhelming **direct evidence** that, at least as far as Gemini is concerned, the sale was compelled by sound business reasons without regard to the unadjudicated tort claims of the plaintiff. ... There is not evidence of "corporate misconduct" by Gemini resulting in actual harm to the plaintiff."² [EMPHASIS ADDED]

¹ Claiming a legitimate business to counter a fraudulent conveyance charge is one of the oldest tricks" in the corporate handbook. (See *Infra. Allen v. Kane*)

² CP 516

However, the transfer at issue is such that a rational trier of fact could weigh the circumstances that existed prior to and at the time of the conveyance, against the direct testimony of Gemini, and conclude that Jillians was sold by Gemini to avoid a substantial judgment for Mika.

2. Direct and Circumstantial Evidence

With respect to present and future creditors, Washington's fraudulent statute, RCW 19.40.041³ provides in pertinent part.

(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;

(b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(7) The debtor removed or concealed assets;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; [EMPHASIS ADDED]

Wash. Rev. Code Ann. §19.40.041

³ The court order noted that Gemini was not a party at the time Jillians was sold, but it cannot be disputed that Gemini is a future debtor should Mika prevail in trial.

In the instant matter, Gemini, as owner of JBC, exhibited “actual intent” to engage in conduct that hindered, delayed, and/or defraud when Mika prevailed at Summary Judgment against JBC. Mika argues that Gemini began seeking ways to avoid paying a judgment to Mika. Gemini considered “bankruptcy, liquidation or the outright sale of Jillian’s to another entity.”⁴

B. GEMINI ENGAGED IN FRAUDULENT TRANSFER

Circumstantial evidence can support a fraudulent transfer claim and survive a Summary Judgment Motion. It is a long held, and important principle in Washington state that appropriate circumstantial evidence is entitled to the same weight as direct evidence. The Washington Supreme court has observed that strong circumstantial evidence “often is the most satisfactory method” from which to draw a conclusion against the party claiming innocence. *cf.* State v. Douglas, 71 Wn. 2d 303, 305, 428 P.2d 535, 536 (1967)

The Washington Supreme court long ago recognized that

“A fraudulent intent is seldom confessed or blazoned upon a banner. In most cases it can only be proved by circumstantial evidence, and there is no circumstance more persuasive and more often recognized by the courts as convincing than the fact that a

⁴ CP 281

debtor, on the eve of a suit against him, transfers all of his property to another, thus placing it beyond the reach of execution.”

Allen v. Kane, 79 Wash. 248, 255-56, 140 P. 534, 538 (1914)

It is extremely unlikely and unreasonable to assume that Gemini in the face of substantial liability as exist here, would admit or provide direct evidence of any attempts to avoid a judgment which would require them to compensate Mika for his substantial harm. *Kane* shows us that little has changed over the decades with respect to corporation’s attempt to avoid justified liability.

The trial court’s written order acknowledged that the plaintiff presented evidence that gave rise to “inference” that the defendant Gemini sold Jillians to avoid liability.

The “inference” as characterized by the court was in fact, “circumstantial evidence.” Triers of fact, not the judge, should have been given the opportunity to weigh the inferences/circumstantial evidence against the direct evidence of the defendant, and determine whether the direct evidence was “overwhelming” enough to overcome the circumstantial evidence that there was a fraudulent transfer on Gemini’s part.

It is instructive that in bankruptcy proceedings, circumstantial evidence may also be used to establish actual intent to hinder, delay, or

defraud creditor, such as will permit avoidance of transfer under Washington fraudulent transfer law. *In re Huber*, Bkrtcy. W.D. Wn, 493 B.R. 798 (2013)

Circumstantial evidence stands on equal footing with direct evidence. The Washington Pattern Jury Instruction 5.01, provides in part,

“Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct and circumstantial evidence. One is not necessarily more or less valuable than the other. [EMPHASIS ADDED]

Here, notwithstanding the self-serving direct evidence of Gemini, after pointed cross examination, a reasonable juror, as instructed pursuant to Washington Pattern Instruction (WPIC 5.01) could conclude that the circumstantial evidence presented by the Plaintiff evinces the fraudulent transfer of JBC from Gemini to Gameworks.

The trial court in this case inappropriately took the role of jury/fact-finder and weighed the reasonable inferences of the plaintiff against the direct evidence of the defendant Gemini, and rendered a judgment for the defendant. Once the trial court identified that there was inference of fraudulent transfer, the court should have denied Gemini’s motion for Summary Judgment and allowed the matter to be decided by a jury. On the other hand, if the trial court found that there were no

inferences of fraudulent transfer, which he did not, the court then and only then should have granted Gemini's motion. The trial court inappropriately weighed the inferences of Mika against the direct evidence of Gemini, and found the direct evidence to be more persuasive to him.

Moreover, there was no evidence before the trial court that Gemini gave any consideration of the sale of Jillians prior to another judge denying JBC's Summary Judgment Motion. This coupled with the fact that Stevens, CEO/majority owner of JBC, became a consultant then CEO of the Gameworks,⁵ the purchasing corporation, and JBC Regional manager is promoted to Vice President of Operations, makes suspect the motivation of Gemini, and a jury should be given the opportunity to weigh these facts against any self-serving direct evidence of no impropriety.

This weighing should be the exclusive province of the fact finder. The plaintiff presented sufficient *prima facie* evidence that clearly gave rise to the "inference" that a fraudulent transfer occurred. Once the inference of liability avoidance occurred, it is not the judge, but a jury that should weigh the inference against the direct evidence and make a finding of fact. The trial judge inappropriately assumed the role of judge and jury when he granted the Gemini's motion.

⁵ CP 958

Where the record clearly contains opposing inferences, such as was recognized by the trial judge, the trier of fact must determine the true motivation not the judge on Summary Judgment. The trial judge was did not hear testimony and truly weigh the testimony that would be subject to cross examination.

1. Trial Court's Oral Judgment Regarding Gemini

With respect to the Gemini's motion on Summary Judgment on Mika's fraudulent transfer claim, the court stated,

...There is not evidence of fraud. The circumstantial evidence that's argued based on the -- the timeline is insufficient under all of the other really indisputable circumstances regarding the -- the -- the -- the sale including the secured creditors and the general market, the situation that had been on-going with the various holdings, of JBC Holdings Entertainment for some time. So there -- there really is not -- there -- there's not evidence there sufficient to support the -- the leap of faith in order to make a determination that it was done at -- out of a specific fraudulent intent to -- to harm or hinder Mr. Mika's theoretical claim that existed at the time this -- these acts occurred...In light of the fact that the secured creditors had claims superior to Mr. Mika's to those assets and that that would have, basically, left Mr. Mika in the same situation regardless. [EMPHASIS ADDED]⁶

Here to, as can be gleaned from the language of the court, the court determined the circumstantial evidence of timing was insufficient to overcome other circumstantial evidence. Importantly, the trial court did not find that there were no inferences of fraudulent transfer. The

⁶ Verbatim Report of Proceedings, February 8, 2013, page 27

circumstantial evidence of timing of the transfer is specifically identified by statute, and case law. (See RCW 19.40.041) The trial judge stated that the “other” circumstances indicate that the sale “had been going on a long time”. This statement wholly mischaracterizes the meaning and nature of “timing” in the fraudulent transfer statute.

The court apparently was focused on the amount of time it took to close the deal, therefore, there was no fraud. This approach erroneously discounts the clear and undisputed fact that JBC apparently contacted Gameworks, a knowing successor, shortly after losing at Summary Judgment.

In addition, the possibility that there would have been superior creditors if Mika prevailed at trial, is not relevant to the issue of whether there was a fraudulent conveyance. Mika explicitly pointed out to the trial court the undisputed chronology of events leading up to the transfer of JBC’s assets.

The appropriate query is not how long the sale process had been going on, as was expressed by the trial court, but when did the motivation and intent of Gemini to sell JBC to avoid exposure to Mika’s lawsuit arise. Mika submits that a reasonable jury could conclude that the intent arose almost immediately after JBC’s failed Summary Judgment Motion.

On June 9, 2011, eight days after the court denied JBC's Summary Judgment Motion defendant GameWorks sent Gregory Stevens a Letter of Intent to purchase JBC's assets. On August 16, 2011, GameWorks Acquisition LLC was formed to purchase JBC's assets.⁷ GWE (GameWorks Entertainment) of Seattle LLC, a wholly owned subsidiary of GameWorks, now operates the former Jillians.⁸ On September 12, 2011, an "Acquisition Payoff quote and Release of Lien" letter was sent to Defendant Stevens. The Bill of Sale for the purchase of Jillians by GameWorks is dated September 16, 2011.⁹

As stated above, the jury, not the judge, should weigh the direct and all the circumstantial evidence. However, in this case it seems that the trial judge misunderstood the statutory timing elements, that is, that there was no evidence of fraud because the sale had been going on for so long. Frankly, this evidence merely touches on the process of the sale, not the intent or motivation for the transfer of Jillian's to Gameworks.

2. Gemini's Denial of Fraudulent Intent

Gemini's ability to conjure up ostensibly legitimate business reasons to sell JBC is not dispositive, and certainly does not vitiate fraudulent intent.

⁷ CP 427

⁸ CP 429

⁹ CP 415

In *Sedwick, infra*. the defendants stated legitimate reasons for the transactions at issue, that “the loans were made to aid in paying legal and living expenses and, in so doing; there was no intent to defraud Sedwick, the plaintiff. However, the court stated “viewing the evidence in the light most favorable to the plaintiff, the trial court found that Sedwick, the wife has failed to demonstrate by “clear and satisfactory proof” that no genuine issue of material fact existed on the issue of the actual intent to defraud, and granted the defendant’s Summary Judgment Motion. The appellate court concluded that on the issue of whether the husband had actual intent to defraud his wife Summary Judgment Motion was inappropriately granted . *Sedwick v. Gwinn*, 73 Wn. App. 879, 888, 873 P.2d 528, 533 (1994) Here as well, genuine issue of whether there was intent of fraud exist and the trial court’s ruling was inappropriately granted.

Furthermore, the statutory factors found in the RCW 19.40 are circumstantial evidence of intent. In cases such as the one at bar, where the debtor denies intent was to defraud the issue cannot be conclusively determined by the trier of fact until it has heard the testimony and assessed the witnesses' credibility. *Sedwick v. Gwinn*, 73 Wn. App. 879, 887, 873 P.2d 528, 533 (1994)

As noted above, the trial court erred when the judge acted as fact-finder by balancing the plaintiff’s circumstantial evidence with the

defendant's direct evidence and tipped the scale in the defendant's favor by granting a motion on Summary Judgment. The plaintiff was denied the opportunity to cross-examine and test the witnesses' credibility on the issue of true intent for the transfer at issue.

3. Gemini Engaged in Actual Fraudulent Conveyance

Gemini claimed below that Jillians had been in debt and had become a losing enterprise as the reason for selling JBC's assets. This tactic is one of the oldest plays in the corporate world's playbook. Even if this was an honest debt, the sale of Jillians and JBC "may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction."¹⁰ The circumstantial evidence in this case exposes that the JBC sell off was motivated to avoid Mika's claim.

The Washington Supreme court explained

"The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts."

Allen v. Kane, infra. at, 260

Here, the circumstantial evidence clearly show and reasonably raises the inference that Gemini sold JBC's assets not a way of making a

¹⁰ *Allen v Kane* at 258.

preference between debtors, rather, the transfer was effected to secure an litigation advantage for Gemini and to delay or prevent Mika from securing a judgment with reasonable possibility to collect. Mika was compelled to move in Superior Court to voluntarily dismiss without prejudice his claim against JBC, specifically because JBC was made insolvent, and as a consequence of the sell-off, JBC was left an “empty pocket”.¹¹ Ironically, the intended effect of the sale succeeded in a protracted delay in Mika recovering damages on his personal injury claim. He was critically and perhaps permanently injured on March 20, 2010.

The law does not permit a debtor, Gemini, by transfer of assets to contrive that Mika shall never be able to recover compensation for his substantial injuries. (See *Bump*, *Fraudulent Conveyances*, §172, See *Allen v. Kane*, 79 Wn. 248, 260, 140 P. 534, 539 (1914))

4. Sufficiency of the evidence

Under the Uniform Fraudulent Transfer Act (UFTA), in order for a jury to find fraudulent transfer, proof of actual intent must be demonstrated by “clear and satisfactory evidence”, but all badges of fraud enumerated in statute need not be present in order to establish this intent. *Douglas v. Hill* 148 Wn. App. 760, 199 P.3d 493 (2009) Mika here merely needs to raise a reasonable inference, which can be founded on

¹¹ Plaintiff’s Motion to Dismiss without prejudice [CP 764]

circumstantial evidence to survive a Summary Judgment Motion. Based on the sequence of events noted above, the circumstance of the sale of JBC's assets almost immediately after a failed Summary Judgment Motion, a reasonable inference of fraudulent transfer has been raised. Even if the trial court found the "other" circumstantial evidence and direct evidence outweighed the inferences raised by Mika a reasonable inference of fraudulent transfer has been raised, and Mika's claim should have survived summary judgment.

5. Consideration of Gemini's and Gameworks Post-Tort Activities.

Gemini's and Gameworks' post-tort conduct is relevant to the issue of fraudulent transfer and must be considered by the court. In *Glimcher Supermall Venture, LLC v. Coleman Co.*, 739 N.W.2d 815, 2007 S.D. 98 (2007) a debtor-tenant company transferred all its assets to an affiliated company, when the debtor had been threatened with suit. This amounted to a "badge of fraud". Under Washington's Uniform Fraudulent Transfers Act (UFTA) this type of transaction could be considered by court in determining if the transfer was made with the intent to defraud.

Here, Mika is a potential judicial creditor with a right to the assets of Jillians and JBC were he to prevail at trial. Gemini, prior to trial, disposed of the assets, leaving no assets to satisfy Mika's claim. This

specious post-tort conduct operates to prejudice Mika's legal and equitable rights.

In *Morgan v. Burks*, 93 Wash. 2d 580, 581-90, 611 P.2d 751, 753-58 (1980) the defendants erroneously claimed that post-tort activities are immaterial in determining whether to disregard the corporate entity.

Morgan at 754-755. The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another.

Culinary Workers v. Gateway Cafe, Inc., 91 Wn. 2d 353, 366, 588 P.2d 1334 (1979) This is an appropriate remedy because the liable corporation has been "guttled" and left without funds by those controlling it in order to avoid actual or potential liability. (See, e. g., *Harrison v. Puga* 4 Wn. App 52, at 63-64, 480 P.2d 247 (1971))

The Washington State Supreme Court noted that in cases like this in particular, post-tort activities must be considered, and often will independently support disregard of the corporate entity, because it is only after the tort that the impetus to "gut" the corporation arises. *Morgan* at 585 Here, the defendant is claiming that they did not "gut" the corporation because of Mika's claim alone, but because of additional financial considerations.

The defendants claim that JBC had been in default for some time. However, it was not until after Gemini prevailed in Summary Judgment and JBC did not that JBC's assets were sold and JBC was made insolvent.

6. Necessity for Corporate Disregard

The collusion of Gemini and Gameworks created the necessity for this court to consider the Fraudulent Transfers Act. Post-tort acts made in "bad faith" are relevant in determining whether to assess personal liability against shareholders for a judgment originally entered against the corporation when it is necessary and required to prevent unjustified loss to the injured party. (See *Morgan, supra* at 587) Here, the abuse of the corporate form was blatant, obvious, intentional and would result in manifest loss to Jackson Mika.

Intentional misconduct must be the cause of the harm that is avoided by disregard. *Morgan v. Burks, supra; Harris, supra* at 261. *Meisel v. M & N Modern Hydraulic Press Co., 97 Wn. 2d 403, 409-10, 645 P.2d 689, 692-93 (1982)* Here, Gemini's and Gameworks intent of misconduct, while feigning innocuous and legitimate business reasons, is selling nearly all the assets of JBC to Gameworks, with knowledge of Mika's substantial claim.

C. GAMEWORKS IS LIABLE AS TRANSFEREE OF FRAUDULENT TRANSFER

1. Gameworks as Transferee of Fraudulent Transfer

Under the Washington's UFTA, for there to be conveyance to be fraudulent, not only must transferor have had necessary fraudulent intent, but transferee must at least have had knowledge thereof. See *Columbia Intern. Corp. v. Perry* 54 Wn.2d 876, 344 P.2d 509 (1959) GameWorks, a Nevada limited company, with knowledge of Mika's claim against JBC, acquired the Jillians Nightclub, an asset located in Seattle Washington.¹² This is an undisputed fact. Prior to entering into the agreement to buy JBC's assets, Gameworks insisted on no encumbrances, and knew of Mika's claim before the transfer was made.

Actual knowledge, however, is not always needed to make liable a transferee with knowledge of fraudulent conveyance; but the entity may be charged with such knowledge where it is aware of facts and circumstances which are calculated to put him on inquiry and such inquiry would have led him to discover intent of transferor. *Columbia Intern. Corp. v. Perry* 54 Wn.2d 876, 344 P.2d 509 (1959)

In this case, as noted above, it is undeniable that Gameworks did have actual knowledge of Mika's claim and presumably what effect JBC's liquidation would have on Mika's ability to receive just compensation for

¹² CP 418, 413

his injury when JBC became insolvent. Mika should have the opportunity to cross-examine Gameworks, and have a jury decide the credibility of their denial.

Assuming *arguendo* that Gameworks did not have actual knowledge of the consequence of “gutting” JBC, the circumstance of the sale should have led Gameworks to inquire and discover Gemini’s intent. However, Gameworks clearly had guilty knowledge what affect the insolvency of JBC would have on Mika’s claim.

Transferring corporate assets for the purpose, or with the intention, of escaping liability is, by definition, a transfer of assets with fraudulent purpose.” See *Raytech Corp. v. White*, 54 F.3d 187, 190 (3d Cir.1995) cited by the Washington Supreme Court in *Eagle Pacific*, *infra*. at 908. In general, a fraudulent transfer occurs where one entity transfers an asset to another entity, with the effect of insolvency on the part of the transferring entity. The Fraudulent Transfers Act is to provide some measure of protection for creditors, such as the plaintiff in the instant matter. (See *Thompson v. Hanson*, 168 Wn. 2d 738, 744-745, 239 P.3d 537 (2009))

Washington's version of the UFTA regulates fraudulent transfers. In general, a fraudulent transfer occurs where one entity transfers an asset to another entity, with the effect of placing the asset out of the reach of a creditor, with either the intent to delay or hinder the creditor, or with the

effect of insolvency on the part of the transferring entity. *Thompson v. Hanson*, 168 Wash. 2d 738, 744, 239 P.3d 537, 539 (2009) Furthermore, the intent of the transferee is not dispositive.

“A plain reading of the remedial provision indicates that creditors may seek relief from first transferees without regard to the transferees' intent. The structure of the statute indicates that while fraudulent transfers may or may not include a culpable mental state, once a transfer has been found to be fraudulent, remedy is available against transferees. The drafters understood this as a change from the UFCA and accepted that some transfers would be constructively fraudulent (without intent) yet could still be remedied by way of a money judgment against first transferees.”

Thompson v. Hanson, 168 Wn. 2d 738, 749, 239 P.3d 537, 541 (2009)

2. Gameworks Constructive Fraudulent Transfer

Constructive fraudulent transfer may occur when a judgment debtor has unreasonably small assets in relation to its business after transfer where virtually all of debtor's remaining assets were foreclosed on shortly after transfer. *Thompson v. Hanson* 142 Wn. App. 53, 174 P.3d 120, (2007) review granted 164 Wn.2d 1024, 195 P.3d 958, affirmed 168 Wn.2d 738, 239 P.3d 537

Constructive Fraudulent transfer must be shown by “substantial evidence”, *Sedwick* at 888. Under Washington's UFTA, the actual intent to defraud must be demonstrated by “clear and satisfactory proof”. *Clearwater v. Skyline Const. Co. Inc.*, 67 Wn. App. 305, 321, 835 P.2d 257 (1992), review denied, 121 Wash.2d 1005, 848 P.2d 1263 (1993) In

contrast, constructive fraud must be shown by “substantial evidence”.
Clearwater, at 321, 835 P.2d 257

In this case, the trial court has substantial evidence that Gameworks is liable due to at least “constructive fraudulent transfer”. Here, only the shell of JBC was left after JBC’s assets were transferred from JBC to Gameworks. In order for Gameworks to prevail on Summary Judgment on a constructive fraudulent transfer claim, the defendant must show by “substantial evidence” that no genuine issue of material fact existed on the issue of the constructive fraud. *Sedwick* at 890-891. In this case, the plaintiff presented genuine material evidence of JBC’s insolvency that clearly raises the reasonable inference that transfer and consequential insolvency of JBC epitomized the “badge” of fraudulent intent. It then follows that Summary Judgment in Gemini’s favor was inappropriate.

In *Sedwick*, facts gave rise to competing inferences, the court found that Sedwick “failed to demonstrate by “substantial evidence” that no genuine issue of material fact existed on the issue of the constructive fraud, and thus, Summary Judgment was inappropriately granted on this basis.

The appellate court, as the trial court in this matter should have done, concluded that because a genuine issue of material fact exists on

both actual intent to defraud and constructive fraud claims, the trial court erred in granting Sedwick's motion for partial summary judgment. *Sedwick v. Gwinn*, 73 Wn. App. 879, 890-91, 873 P.2d 528, 534 (1994)

“[W]e conclude that the statutory factors are only circumstantial evidence of intent, and in cases where the debtor denies that his or her intent was to defraud, the issue cannot be conclusively determined by the trier of fact until it has heard the testimony and assessed the witnesses' credibility.

Sedwick at 887

Likewise, the jury should have had the opportunity to assess the witnesses' credibility in this matter.

3. Manifest Injustice

The corporate structure will be respected except to “prevent fraud or manifest injustice”; the corporate veil will then be pushed aside. There would be a manifest injustice and unjustified loss if Mika is denied a remedy for his substantial injuries merely because Gemini is permitted to hide behind the corporate veil. *Rapid Settlements, Ltd.'s Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wn. App. 683, 271 P.3d 925, 930 (2012) is helpful to point out that the court stated that typically piercing the corporate veil is “one involving fraud, misrepresentation or some form of manipulation to the entities benefit and creditor’s detriment. *Rapid Settlements* at 692, citing *Truckweld v.*

Equipment Co, Inc. v. Olson, 26 Wn. App. 638, 644-45, 618 P. 2d 1017 (1980) where the court found no misconduct. In *Rapid Settlement*, the court found that assets were transferred between entities to avoid creditor's claims. Here, all JBC's were sold to Gameworks to Gemini's benefit and to Mika's detriment.

The court in *Rapid Settlement*, as the trial court in the instant matter should have done, pierced the corporate veil and found the corporate entities to be one, and therefore liable, due to the corporate misconduct designed to avoid liability. Transferring corporate assets for the purpose, or with the intention, of escaping liability is, by definition, a transfer of assets with fraudulent purpose." See *Raytech Corp. v. White*, 54 F.3d 187, 190 (3d Cir.1995) cited by the Washington Supreme Court in *Eagle Pacific*, infra. at 908.

4. Good faith

Mika submits that the transfer of JBC assets was done in "bad faith by Gemini and Gameworks. Not in bad faith relative to one another, but in bad faith with respect to Mika because Gemini sold, and Gameworks purchased JBC's assets with full knowledge that JBC would be left insolvent without value, and as a consequence, Jackson Mika would be denied justice.

Good faith, or the lack thereof, ultimately rests upon the intent of the parties involved in the transaction. Mika argues that the intent of Gemini and Gameworks only can be found by a fact finding jury, not judge.

JBC assets were dumped so that the same management could continue operating the Jillians nightclub site, and so that the defendants could collect the substantial collateral used to secure a JBC loan.

Gameworks argued below, in the alternative, that a transfer is not voidable against a person who took in "good faith" and gave reasonable equivalent value.

However, the Washington State Supreme Court held,

[W]here the transfer of assets strips a debtor corporation of all its assets, and disables the corporation from earning money to pay its debts, thus leaving creditors and holders of claims no resources to which they may look for the payment of their due, the net result is in legal effect a fraud; and the courts will subject the transferee to liability for the satisfaction of claims against the corporation whose assets it has absorbed.

Eagle Pacific Insurance Co. v Christensen Motor Yacht Corp, 135 Wn 2d. 894, 906, 959 P.2d 1052 (1998) citing *Avery v. Safeway Cab, Transfer & Storage Co.*, 148 Kan. 321, 80 P.2d 1099, 1101 (1938)

5. Gameworks Successor Liability

The trial court committed error when that court decided that defendant Gameworks, as a matter of law, is not liable as a successor to

Jillians. The Verbatim Report of Proceedings captures the court's reasoning.

- Trial Court's Order

The court's pertinent oral ruling was as follows:

“...But when we look at the arguments in favor of successor liability, I -- I -- I do think it's quite clear as a matter of law that the evidence comes up short... The absence of commonality of shareholders, officers and directors in this case, I think is a -- a fatal flaw to the claim. Only Mr. Stevens arguably came back on in some capacity, but not at a management level, not as a director or officer initially....fraudulent conveyance or fraudulent transfer theories, again, the Court has made its findings regarding the legitimacy of the transaction for the price paid to satisfy the secured creditors, which was necessarily done by JBC....”¹³
[EMPHASIS ADDED]

The court erred on this point. However, if the lack of commonality of shareholders officers and directors was the fatal flaw in Mika's claim, it should be pointed out that Stevens, formerly CEO/CFO of JBC was made consultant, initially, then CEO of Gameworks,¹⁴ Furthermore, Humphreys, formerly Regional Director of JBC was promoted to Vice President of Operations for GameWorks.¹⁵

Washington adheres to the general rule that a corporation purchasing the assets of another corporation does not become liable for the debts and liabilities of the selling corporation. *Hall v. Armstrong Cork*,

¹³ Verbatim Report of Proceedings, September 15, 2013, Page15-16

¹⁴ CP 429

¹⁵ CP 438

Inc., 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984)

There are four well-established exceptions to this doctrine. An important exception is applicable in the instant case; (1) the transfer of assets is for the fraudulent purpose of escaping liability.” *Cambridge Townhomes LLC v Pacific Star Roofing Inc.* 166 Wn. 2d 475 481-482 (2009) See also *Cashar v. Redford*, 28 Wn. App. 394, 396, 624 P.2d 194 (1981)

GameWorks made no express or implied agreement to assume JBC’s liabilities; however, that does not bar GameWorks liability as a successor to Jillians and JBC. Defendant GameWorks acquired with actual and constructive knowledge of Mika’s cause of action. By purchasing the assets of the named defendants in this action, GameWorks, as successor corporation with notice, by fraudulent transfer, is liable as transferee and successor of JBC.

6. Mere Continuation of the Seller

The trial court was in error when the court found that it was a fatal flaw to Mika’s claim that there was no continuation of officers and directors. The trial court wholly mischaracterized Stevens and Humphreys changing hats. A crucial factor in a “continuation” is a common identity of the officers, directors, and stockholders in the selling and purchasing companies. *Cashar v. Redford*, 28 Wn. App. 394, 397, 624 P.2d 194, 196

(1981) This court held that the continuity of individuals in control of the business satisfies the “continuance” factor. (EMPHASIS ADDED)
Cambridge at 482-483 Here, Stevens was made CEO and Humphreys promoted to Vice President; it is unreasonable to posit that they did not “control” the operations of Gameworks and the former Jillians.

Where a transfer is fraudulent or the transferee corporation is a mere continuation or reincarnation of an old corporation, courts have held that the new corporation is liable for the obligations of the old corporation. See, e. g., *Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn. 2d 392, 411, 418 P.2d 443 (1966) (The courts will ignore separate corporate entities in order to defeat a fraud, wrong, or injustice, at least where the rights of third persons are concerned) *18 C.J.S. Corporations 7e, p. 382*
Kueckelhan v. Fed. Old Line Ins. Co. (Mut.), 69 Wn. 2d 392, 411, 418 P.2d 443, 456 (1966)

In *Cashar*, unlike in the instant case, there was no common identity of management or ownership between the buyer and purchaser, and the post-sale relationship between defendant and a third person, who was employed to operate full-time a portion of the defendant's business, was strictly one of employer/employee. *Cashar v. Redford*, 28 Wn. App. 394, 397, 624 P.2d 194, 196 (1981)

A transfer of all, or substantially all of the seller corporation's assets was an implied element to the theory of mere continuation. *Young* at 97 The dissolution of the selling corporation after the transfer of assets is not a necessary finding, *Id* at 97-98, but in this case, the transfer led to insolvency which has the same effect as dissolution. In *Young*, the transferor's inability to meet its obligations to its creditors did not result from the transfer of the management contracts to the transferee. Therefore, the court held that no equitable principle would be served in finding the transferee to be a mere continuation of transferor. *Young* 98-99

In this case however, not only are the managing and operational officers identical, but the plaintiff has submitted evidence of a fraudulent transfer of essentially all of JBC's assets to Gameworks. Clearly, the instant case is distinguishable from the *Young* case where the court had to make a determination of value. Such a determination is not necessary in this case.

Washington courts rely on several factors to determine whether a successor business is a mere continuation of a seller. *Cashar v. Redford*, 28 Wn. App. 394, 397, 624 P.2d 194 (1981) The court is to discern whether the "purchaser represents 'merely a "new hat" for the seller.' " *Id.* (quoting *McKee v. Harris-Seybold Co.*, 109 N.J.Super. 555, 570, 264 A.2d

98, 106 (1970) Gameworks is merely new hats for former defendant Stevens and Humphreys.

GameWorks argued that there is no commonality of officers at the time of the asset purchase. This argument, although true, unjustifiably limits the scope of the inquiry because it is not until after the transfer that one would expect a commonality of officers to arise. The issue should be resolved on who now manages and controls Gameworks and the former JBC assets.

D. HUMPHREYS IS PERSONALLY LIABLE AND HAD A DUTY TO INVITEE MIKA

Humphreys was the person responsible for the day to day operation of Jillians as well as Jillians' compliance with local laws. He is *per se* liable for violating a safety ordinance designed to protect a class of patrons of which Mika is a member. Moreover, he had a duty to invitee Mika, and that duty was breached when Humphreys failed, by negligently training and or supervising Michael Knudsen regarding the use of promoters.

It is clear that Humphreys, pursuant to King County Local Rules, should not have asked a second Superior Court Judge to review and rule on another Superior Court's judgment.¹⁶ He violated this rule, and the successor judge apparently waived this flagrant violation of the local rule.

¹⁶ Ironically, the first Judge's wise approach to hear the evidence, consistent with case law, before judgment, was summarily rejected by the successor Judge. [CP 757]

The trial court, however, has the inherent power to waive its rules. *Ashley v. Superior Court*, 83 Wn.2d 630, 636, 521 P.2d 711 (1974). Unless the record shows that an injustice has been done, it will be presumed that the Superior Court disregarded KCLR 7, for sufficient cause. *Snyder* at 637, 577 P.2d 160 *Raymond v. Ingram*, 47 Wn. App. 781, 784, 737 P.2d 314, 316 (1987) Mika submits that for the reasons stated below, that an injustice has been the unfortunate consequence of the court free pass.

1. Humphreys, The Responsible Corporate Officer Was Per Se Negligent

Violation of an ordinance is *prima facie* proximate cause. *NeSmith v. Bowden*, 17 Wn. App. 602, 563 P.2d 1322 (1977) However, negligence *per se* only applies if the statute's purpose is to protect the one who was injured. *NeSmith*, at 608, 563 P.2d 1322.

It is indisputable that the Seattle Municipal Code 10.11 requiring that nightclubs file annually Safety Plans with the City was designed to protect nightclub patrons, such as the plaintiff Mika. Jillians had no Safety Plan.¹⁷

Washington adheres to the test of Restatement (Second) of Torts §286 (1965) in determining whether violation of a public regulation must be considered in determining liability if the regulation is designed,

¹⁷ CP 632

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

Kness v. Truck Trailer Equip. Co., 81 Wn.2d 251, 257, 501 P.2d 285 (1972); *Schneider v. Yakima County*, 65 Wn.2d 352, 397 P.2d 411 (1964)

In *Kness*, the decedent was found to be a member of the class of persons the regulations were designed to protect, a member of the public using a public highway; and the injury to him was of the type the regulations¹⁸ were designed to protect against. Therefore, a *prima facie* causal connection between the violations and the injury exists, and the evidence is therefore relevant and material to the issues of negligence and proximate cause, which are questions of fact for the jury. *Id.* at 258

In *Ne Smith* the court held that evidence that constitutes a *prima facie* case sufficient to support a denial of a motion to dismiss and to create jury questions. *NeSmith v. Bowden*, 17 Wash. App. 602, 607, 563 P.2d 1322, 1325 (1977)

Humphreys was JBC's "Regional Director--Director of Operations" on the West Coast and at one East Coast location. JBC former Vice President, Tyler Warfield testified that Humphreys reported

¹⁸ (Arguably, less authoritative than a statute or a legislated municipal ordinance.)

directly to him. [CP 579] Humphreys oversaw the nightclub operations, the hiring, and managed the managers. Humphreys essentially had operational control and oversight over those properties. [CP 579]

Humphreys was expected to be aware of local ordinances, such as the Seattle ordinance requiring the filing of safety plans. [CP 586] Local management and regional management¹⁹ were expected be aware of “local peculiarities” that may differ from national guidelines. [CP 586]

It is clear that Humphreys was the corporate officer responsible for insuring Jillians’ compliance with Seattle’s nightclub safety ordinance. Therefore, Humphrey is personally liable under the “Responsible Corporate Officer Doctrine” because he violated and or failed to comply with a public safety ordinance when he failed to act to insure compliance with the Seattle Municipal Code law directing that his nightclub file a safety plan.

Humphreys knew that JBC’s policy was to adhere to local laws and policies and procedures. [CP 680] He incredulously was unaware of the Seattle Ordinance requiring that nightclubs file a Safety Plan. [CP 690] He was unaware of any of his managers knowing of this requirement. [CP 681, 685, 686] He was unaware of the "best practices" for nightclubs distributed by the City of Seattle. [CP 686] He testified that he was

¹⁹ Regional Manager such as Tony Humphreys.

unaware that Seattle's best practices policy that advised club management, "never allow a promoter or staff to control ID checking at the door," and that owners are liable for occupancy limits, contraband, weapons, behavior, level of intoxication, and admissions taxes. [CP 687, 688] He was also unaware that the best practices provide that "it is imperative that all security personnel be thoroughly trained by a qualified organization." He was unaware of any of his staff going through the Seattle Police Department Training Program, or of any records indicating that his staff has been trained. [CP 688, 690] He was unaware of whether Jillian's had a safety plan. [CP 690] Humphreys testified that he was aware of some of the local rules and regulations. [CP 681] Humphreys had heard of the Seattle Police Department Nightclub Security Program. [CP 681] But he knew of no records, and did not know whether some of Jillians' door host have attended that program. [CP 682]

2. Manifest Injustice Justifies Piercing The Corporate Veil

The corporate structure will be respected, except to "prevent fraud or manifest injustice" when the corporate veil will be pushed aside. Humphreys has not presented undisputed material evidence that he as Regional Director was not liable to Mika, an /invitee of Jillians and it is a manifest injustice if he is allowed to hide under the corporate veil, for the harm suffered by Mika.

3. A Special Relationship Existed Between Humphreys And Mika

Humphreys relies on *Tae Kim v Budget Rent a Car Systems Inc.* 143 Wn 2d 190, 195, 15 P.3d 1283 (2001) to support his argument that he had no duty to Mika. In *Kim*, the court found that a car dealership owed no duty to prevent a third party from stealing a car and committing vehicular assault after leaving keys in the ignition, an act of omission. The defendants are correct that the general rule is that a private person has no duty to protect others from third party criminal acts except where there is a “special relationship”.

A “special relationship” exist to the one suffering the harm, or “where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm, through such conduct that a reasonable person would take into account”. *Kim* at 196, Restatement (Second) of Torts §302B, cmt. e (1965)

Defendant Humphreys negligent hiring, supervision, entrustment and Nightclub Safety Ordinance violation created significantly more, and far less attenuated, high degree of risk than leaving the keys in an ignition. Moreover, the Washington Supreme Court has found an on point “special relationship” with a “victim”, as in the case at bar, where there is a business to business invitee relationship because the invitee enters a business for the economic benefit of the business. *Nivens* at 202 Viewed

through the responsible corporate officer lens, here a “special relationship” existed.

It cannot be reasonably argued that Jillians and JBC owed no duty to the invitee Mika. The remaining question in this regard is whether that duty extends to defendant Humphreys, the Corporate Regional Director. The answer is yes. Furthermore, it was clearly foreseeable, with respect to all the defendants that their policy to have a “no security” policy and to violate Municipal Safety Ordinance would result in serious injury to a patron at one of their events.

4. **Negligent Hiring**

Dr. Daniel Kennedy Ph.D., opined about defendant Humphreys’ negligent decision to select Knudsen for a management position.

"[i]t would seem Mr. Knudsen's poor judgment in selecting and supervising promoters was once again displayed by his actions at the scene. These shortcomings may be taken to reflect negligent hiring, retention, training, assignment, entrustment, supervision and failure to direct on the part of JBC Entertainment."²⁰

Humphreys cite *Ruchsher v ADT, Seq. Systems, Inc.*, 149 Wn App. 655, 204 P.3d 271 (2006) to support his stance that he is not liable for negligent hiring. Despite his protestations to the contrary it is clear that Humphreys and the general manager hired Knudsen. This is a disputed material fact on the issue of negligent hiring and therefore Summary

²⁰ CP 424

Judgment in Humphreys favor was inappropriate.

The letter offering Knudsen a position as an assistant manager was signed in Humphreys' name.²¹ He noted during his deposition that the signature on the document was not his. Humphreys as the very least ratified Knudsen's hiring.

Ratification is the *affirmance* by a person of a prior act which did not bind him but which was done or professedly done on his account. Restatement (Second) of Agency §82 (1958) *National Bank of Commerce v. Thomsen*, 80 Wash.2d 406, 495 P.2d 332 (1972), *Nichols Hills Bank v. McCool*, 104 Wn. 2d 78, 85, 701 P.2d 1114, 1118 (1985)

Humphreys ratified Knudsen's employment when he conducted a guidance session with him.²² Moreover, it is now clear that the offer to hire Knudsen was done by Humphreys. It is undisputed that Humphreys was the person who "fired" Knudsen. Therefore, the jury should be given the opportunity to deliberate whether he is liable for negligent hiring, supervision, entrustment, or not, and to what extent. (See *Ruchsher v ADT, Seq. Systems, Inc.*, at 680)

5. Foreseeability

The plaintiff notes that Humphrey's duty owed was limited by "foreseeability". If the risk is unforeseeable, an actor generally has no

²¹ CP 653

²² CP 115

duty to prevent it. *Ruchsher* at 680. However, Humphreys admits that there was another shooting at one of the clubs within his purview, which occurred prior to the shooting in Seattle. It was therefore foreseeable, coupled with the spate of shooting incidents in Seattle at that time, that without adequate security measures, a shooting would occur in Jillians. Therefore, it is reasonable to assume that Humphreys could and or should have foreseen that another shooting would occur.

6. Negligent Supervision

"[A]n employer can be liable for negligently supervising an employee". *Harris v. Pierce County Pub. Transp. Benefit Auth. Corp.* 90 Wn App 468, 475, 957 P.2d 767 (1998)

Premise Security expert, Dr. Kennedy, PhD., opined that JBC failed to effectively supervise assistant manager Michael Knudsen, possibly due to personnel transitions involving his superiors.²³ Assistant manager Knudsen received no directives from anyone regarding patron safety.²⁴ On one hand, Humphreys claims that he had nothing to do with the day to day management of Jillians' of Seattle.²⁵ But, on the other hand, he claims that he gave express instructions to Knudsen and the other managers not to have any event while he is on vacation. This assertion

²³ CP 84

²⁴ CP 454

²⁵ CP 109

believes the claim that he had no control, oversight or involvement with the day to day operations of Jillians.

7. **Proximate Cause**

The first prong of proximate cause is cause in fact which concerns “but for” causation. *Hertog v. City of Seattle*, 138 Wn. 2d 265, 282-83, 979 P.2d 400 (1999) This query typically is for the jury, unless reasonable minds could not differ; is whether events the act produced in a direct unbroken sequence would not have resulted had the act not occurred. *Kim* at 203. Here, but for, Humphreys violation the Seattle Nightclub Safety ordinance, there would have been a safety plan in place that Knudsen could have to refer to when he made arrangements for the event and did not direct that patrons be searched or wanded, this shooting is unlikely to have occurred.

The second prong of proximate cause is legal cause. The focus in legal causation analysis is on “whether as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability”. The court is to consider a “mixture” of factors such as a “logic” “common sense” justice, policy and precedent. Legal cause is grounded in policy considerations as to how far the consequences of a defendant's acts should extend. *Medrano v. Schwendeman*, 66 Wn. App. 607, 611, 836 P.2d 833 (1992) Clearly,

Seattle's policy to prevent preventable shooting should be strictly enforced.

Proximate and legal causation are an easy analysis with respect to defendant Humphreys who oversaw habitual and continuous violation of the Safety Ordinance, was unaware of Seattle's best practices regarding promoters, and failed to initiate inexpensive security measures.

Humphreys dishonorably attempts to pawn this important non-delegable responsibility on to lesser managers.²⁶ There is nothing in the JBC Management Handbook that places the responsibility of complying with the local and state laws on the facility general managers. Therefore, by default, this responsibility falls on Humphreys, not on an inexperienced assistant manager like Knudsen.

IV. CONCLUSION

If the trial court is compelled to weigh the direct evidence against the circumstantial evidence it necessarily follows that there are disputed material facts and Summary Judgment is inappropriate. For all the foregoing reasons, to include the fraudulent transfer of JBC assets, to wit: Jillians, and defendant Humphreys', as Responsible Corporate Officer, *per se* negligence and utter failure to provide premise security to insure the safety of Jillian's invitees, the Mr. Mika, appellant respectfully request

²⁶ (See CP 644)

that this court reverse the Summary Judgment of all defendants and award Attorney Fees in favor of the Plaintiff pursuant to RAP 18.1.

DATED this 22nd day of October, 2015.

Respectfully Submitted,
PHILLIPS LAW LLC

A handwritten signature in black ink, appearing to read 'H. Phillips', written over a horizontal line.

By: _____
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DECLARATION OF SERVICE

I declare that on this day, I sent via email, with recipient's approval,
and/or by First Class US Mail a copy of:

Appellant's Opening Brief

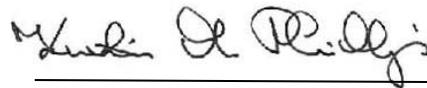
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