Supreme Court No. 97213-3

Court of Appeals No. 50979-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CATHERINE S. SHUBECK
Respondent

v.

JOHN R. SHUBECK and SHELLY A. WILLIAMS
Appellants

PETITION FOR REVIEW

John R. Shubeck
Shelly A. Williams
Appellants, Pro Se
1350 Pilchuck Heights
Fox Island, WA 98333
Tel: 253-303-0135

TABLE OF CONTENTS

Items A - I all conflict with precedents from the Court of Appeals and from this Court and are issues of substantial public interest because:

1. The Court of Appeals majority's opinion creates a conflict with other precedents from the Court of Appeals
2. The Court of Appeals majority's opinion creates a conflict with this Court's precedents
3. Only the Supreme Court has the authority to determine that Supreme Court precedent is no longer binding
4. The proper standard of review is an issue of substantial public interest that only this Court can resolve

VII. APPENDIX

A. UNPUBLISHED OPINION
(Washington State Court of Appeals Division Two)

B. ORDER DENYING MOTION FOR RECONSIDERATION
(Washington State Court of Appeals Division Two)

C. *LaRoche v. Billbe, et al*
No. 2:2013cv01913Document 30 (W.D. Wash. 2014)

TABLE OF AUTHORITIES

OTHER CASES

STATUTES

COURT RULES

I. IDENTITY OF PETITIONER

John Shubeck and Shelly Williams, Appellants below, ask this Court to accept review of the Court of Appeals' decision terminating review designated in Part III of this petition.

II. INTRODUCTION AND SUMMARY

John Shubeck ("John") and Catherine Shubeck ("Cathy") lived in New Jersey, married in 1982, separated in 2001 and divorced in 2003 at which time alimony was ordered for Cathy. John began paying alimony in 2001 and consistently paid until 2015 when he retired from EMC after 25 years of service. Cathy obtained a judgment against John for unpaid alimony on March 7, 2016 and within two (2) months, began collecting her judgment through John's new employer. John has been current ever since. Despite these facts, Cathy filed a lawsuit for fraudulent transfer in April 2016. She was not hindered or delayed in her collecting her judgment.

In October 2004 (also in New Jersey), John met Shelly Williams ("Shelly") and they began dating. In 2005, John terminated his rental agreement for his apartment and moved into Shelly's home. While John was severely in debt at the time, he and Shelly agreed that when he was able, he would pay his share of the expenses. He was not able to pay her for over a year. John eventually was able to get out of debt and repaid Shelly for these and other expenses in September 2010, in the amount of $80,000.

Also during 2005, Cathy filed a lawsuit in New Jersey after driving by Shelly's home, seeking to double her child support and alimony because

she observed that Shelly was successful and appeared to have wealth. Cathy dubbed Shelly, "the million dollar tramp," and proceeded to try to take Shelly's assets. The New Jersey court denied Cathy's motion.

Prior to getting married, John and Shelly took Cathy's lawsuit to a New Jersey attorney and asked whether Cathy could get access to Shelly's assets if they married. The attorney advised that John and Shelly must execute a Prenuptial Agreement in order for Shelly to protect her estate from Cathy. John and Shelly each met with separate attorneys and drew up a Prenuptial Agreement. While the impetus was Cathy's efforts to take what Shelly owned independently, it was important to identify the separate property status of Shelly's assets because she was coming into the marriage with significant assets and John had virtually no assets. This imbalance made a Prenuptial Agreement a prudent contract to execute. Under the advice of counsel, John and Shelly executed the agreement on August 1, 2009, three (3) months prior to their wedding.

John and Shelly married on November 20, 2009. They continued to live and work in New Jersey until Shelly's parents took ill and she needed to move back to Washington State on September 24, 2010.

Shelly sold her New Jersey home in August 2010 and contracted to buy her new home at 809 6th Lane, Fox Island in August 2010. Shelly executed an earnest money check on September 3, 2010 from her separate New Jersey bank account. Using only her separate funds from her New Jersey bank accounts, Shelly made the down payment on the home by way

of a wire transfer from her separate bank account. Once she opened a new bank account in Washington (also separate), Shelly signed up for autopay with Wells Fargo for all future mortgage payments. In March 2011, Shelly purchased a boat and trailer (Cathy is not claiming that the boat was fraudulently transferred). In April 2011, Shelly bought a pickup truck to pull the boat. Each of these purchases are traceable to Shelly's separate bank accounts, all from funds Shelly brought to Washington from New Jersey. Shelly initially allowed John's name to gratuitously go on title because she believed John's financial obligations to Cathy terminated once their youngest son graduated from high school and so she was not particularly concerned about his name being on title. Their Prenuptial Agreement designated these assets as Shelly's separate property so she was not overly concerned. When alimony requirements were reinstated, Shelly corrected the titles on October 11, 2012 to align with her separate ownership of each asset because of Cathy's previous attempts to access Shelly's assets.

These are the assets for which Shelly corrected titles on October 11, 2010. There is one additional asset that Shelly corrected the title on and that is the 2003 Lexus ES300. This was Shelly's company car while working for Lincoln Educational Services. Her employer gave Shelly this car when she resigned her position as an Executive in Human Resources in 2008 and is stipulated in her separation agreement. In November 2008, John needed a reliable vehicle so Shelly sold him 50% interest in her car for

$10,000, half the value of the car. Once John's equity in the car was consumed, John signed the title back over to Shelly as agreed upon.

It is these correction of titles in 2012, four years before Cathy even had a judgment against John, which she sued for fraudulent transfer. There is no connection between Shelly correcting titles to property she bought with her own separate funds in 2012 and John having a judgment for unpaid alimony in 2016, for which he immediately began paying by way of a garnishment through his employer.

Cathy included the boat and other property (Pilchuck Heights) Shelly purchased in her lawsuit despite the fact that she states that there was no fraudulent transfer of the boat and that John was never on title to the Pilchuck Heights property. Since John was not on title to either asset, there cannot be an allegation of a fraudulent transfer since nothing was transferred. Shelly purchased each of these assets independently with funds from her separate bank accounts. The Court of Appeals takes note of the fact that Shelly alone purchased the Pilchuck Heights property on Page 3, Fact I., "In February 2014 Shelly purchased property at Pilchuck Heights Drive, Fox Island) and again on Page 7, Finding of Fact 24, "Mr. Shubeck was never on the purchase documents," and on Page 20, Paragraph One, where it acknowledges, "Shelly then purchased a vacant lot at Pilchuck Heights…" These facts verify that Pilchuck Heights is separate property as the court validates that Shelly alone purchased the property. The closing documents clearly state that John signed the quit claim deed as required by

the title company in order for Shelly to acquire Pilchuck Heights as her separate property because Washington is a community property state. John had no interest in the property. Despite these facts, lower courts found that Pilchuck Heights and the boat were fraudulent transfers.

The lower courts do not acknowledge these facts at all. Further, the lower courts do not acknowledge the 3,000 pages of bank records, subpoenaed by Cathy and entered into evidence at trial, of John and Shelly's bank accounts from 2005 through 2016 that demonstrate that John and Shelly have ***seventeen separate bank accounts*** and ***no joint bank accounts***. These are the most important documents in this case. They show that John and Shelly ***never*** commingled funds by having a joint bank account. This demonstrates that Shelly ***intended*** to maintain her separate property. This demonstrates that since Shelly maintained all her cash in separate accounts that when she purchased an asset, that asset would retain the separate property designation as Washington statute provides. This also demonstrates that not one of the assets named in the fraudulent transfer lawsuit were a joint purchase, contrary to the findings of the lower courts.

Both courts fail to mention or consider bank records, purchase and sale agreements, cashier's checks, and wire transfer documents that prove that Shelly bought each of the assets named in the lawsuit. Neither court acknowledge that these documents exist despite the fact that they were entered into evidence at trial and are part of the record. The fact that these

critical documents go unmentioned and instead the Court of Appeals states that the record is inadequate is shocking.

Further, both courts ignore the assets Shelly brought from New Jersey to Washington on September 24, 2010. They ignore the citations to bank statements demonstrating the significant amount of cash that Shelly had on hand when she moved to Washington. They ignore that she had enough to buy the home, boat, trailer and truck with ample funds left over. They ignore that the purchases of these assets is noted on each of the bank statements from Shelly's separate bank accounts. Neither court made mention of any of these indisputable facts.

John and Shelly had to ask themselves why both courts were so intent on finding them guilty of a fraudulent transfer. The courts' obvious intent was to weave a story of corruption around John so convincingly that finding him guilty of a fraudulent transfer was inevitable. The courts eliminated all the pertinent evidence around banking records and purchases, and instead wrote page after page of real or perceived bad acts committed by John, most of which is not even relevant to this lawsuit. The lawsuit should be focused on whether or not Shelly owned the assets for which she corrected titles in 2012. Instead, the courts focused on laying out a case against John for being a bad actor, with each court repeating comments from previous courts. Whether or not John committed the acts as described, has no bearing on whether Shelly purchased the assets named in the lawsuit. That is the only issue before this Court.

The lower courts also focused on the fact that John gave Shelly money and that because she put money from him in her separate bank account, somehow that transmuted her separate bank account (and consequently assets she purchased from these accounts) into community property. Not one statute or precedent has been provided that supports that this is an appropriate conclusion of law.

Courts are supposed to provide blind justice. However, the lower courts were not blind to the fact that John and Shelly appeared Pro Se, something the trial court railed against. A retired Washington judge told John and Shelly that they were idiots for appearing Pro Se because no judge would rule against a represented litigant. He further added that no appellate panel would find for Pro Se litigants against a trial judge. The lower courts were not blind to whatever real or perceived bad acts John may have committed in the past that are not material to whether Shelly owned the assets – they focused on it extensively in their ruling and opinions and ignored addressing Shelly's purchase of the assets. Instead, the courts in this case were blind to the truth and blind to the facts. In reviewing just one of the comments made in the Court of Appeals opinion, on Page 3, Paragraph 3, it states, "In February 2014, Shelly purchased property at Pilchuck Heights Drive, Fox Island (Pilchuck property). *Shortly thereafter*, John executed a quit claim deed conveying his community property interest in the Pilchuck Property to Shelly," the intent to skew facts is apparent. The Court of Appeals leads one to believe that John had a community property

ownership and that he gave Shelly all his interest for no consideration. The truth of the matter is that Ticor Tile required John to come into their offices and sign a quit claim deed ***prior to closing*** on Shelly's purchase because she was acquiring it as her separate property, which is noted on the purchase and sale agreements. While the Court of Appeals altered the facts in what might appear to be in an insignificant way, it is quite significant that they attempt to make John look like he transferred his interests for no consideration. Judge Maxa states very clearly in the November 27, 2018 hearing that the quit claim deed was only a requirement of the bank, not indicative of some nefarious act.[1] However, that fact was oddly absent in the opinion of the Appellate Court. And lastly, the courts were blind to the fact that the trial court judge was from the same law firm representing Cathy, which could be a conflict of interest.

The bias against John is apparent on every page of the lower courts' rulings. Once one judge assigns a negative character against a litigant, future judges grab those comments, restate them in future findings, and repeat the phrases over and over, determining that each court will make John pay for whatever grievance a previous court had against the him. The bias is so severe that the lower courts ignore the rule of law and instead apply their justice to John. In that process, since Shelly was the only party with cash, she has been harmed immeasurably by having to pay $156,000 to

[1] Wash. Court of Appeals oral argument, Shubeck v. Shubeck & Williams, No. 50979-2-II (Nov. 27, 2018), at 21 min., 20 sec. to 23 min., 13 sec., Id. at 24 min., 13 sec. to 25 min., 08 sec.

Cathy. How is it justice for Shelly to bear the burden of paying alimony (which was being collected via wage garnishment) and litigation costs between John and Cathy?

Strip away the bias and just look to the facts and there would be a very stark change in the Findings of Fact and Conclusions of Law. Shelly had separate bank accounts and has always had only separate bank accounts. Shelly brought significant assets to Washington in 2010. Shelly used those funds to purchase a house, a boat, a trailer and a truck. Shelly, by statute in Washington State, is the separate owner of each of these assets. Yet there is no mention of any of these facts in the lower courts' rulings.

If having only separate bank accounts, a Prenuptial Agreement and a Separate Property Agreement does not protect Shelly's right to maintain her assets as separate property, what else can a resident of Washington State do to protect the separate property characterization of their assets? The ruling in this case has relevance to all married couples in the State of Washington. How is it that the Washington courts can interfere with Shelly's right to own assets as her separate property, transmuting her estate for which she worked her entire career to accumulate, only to have the courts strip her separate property from her ownership, confiscate it by way of a judgment and give it to John's former wife?

At a time in our country where the rule of law is front and center as a result of what's happening with the highest ranking legal position in America, it does create pause when we witness the rule of law not being

followed in the local courts. When the local courts rule in opposition to statutes and over 100 years of case law, it is time to sit up and take notice. Martin Luther King stated, "Injustice anywhere is a threat to justice everywhere."

III. CITATION TO COURT OF APPEALS DECISION

Petitioners, John Shubeck and Shelly Williams, seek review of the Court of Appeals' decision entered on March 19, 2019, and denial of Motion for Reconsideration dated April 18, 2019, affirming the trial court's Findings of Fact and Conclusions of Law that they committed fraudulent transfer.

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Procedural History in John Shubeck and Shelly Williams Appellants' Brief is incorporated by reference.

B. STATEMENT OF FACTS

The Statement of Facts in John Shubeck and Shelly Williams Appellants' Brief is incorporated by reference.

V. ISSUES PRESENTED FOR REVIEW/ ARGUMENTS

A. SEPARATE PROPERTY VS. COMMUNITY PROPERTY

RCW 26.16.010 states:

Separate property of spouse.

1. Acquired before marriage;
2. Acquired during marriage by gift or inheritance; or
3. Acquired during marriage with the traceable proceeds of separate property.

The lower courts do not acknowledge Shelly's separate bank accounts that were evidence submitted at trial by Cathy.[2] These bank accounts identify Shelly's significant liquid assets when she moved to Washington State, all of which were held in separate bank accounts as follows: (*note the exhibit number and the page number beside each bank account admitted at trial*)

ACCOUNT #	ACCOUNT NAME	AMOUNT	EXHIBIT #	PAGE #
3720	Wachovia Crown Checking	$80,972.23	15	2194
5890	Wachovia High Performance Money Market	$185,880.33	15	2194
8752	Wachovia Crown Classic	$1,248.59	15	2194
	Wachovia High Performance Money Market – 2	**$87,779.37**	15 ***REDACTED**	2190
8765	Wachovia High Performance Money Market – 3	$9,024.06	15	2194
Account No.	**Certificate of Deposit**			
0717	Wachovia CD 2-year	$11,983.18	15	2178
	Wachovia CD 3-year	**$33,100.04**	15 ***REDACTED**	2190
Account No.	**Money Market**			
2116990538	Ally Bank	$95,094.00	41	2728
Account No. 09945295049	**Vanguard Stocks** **Vanguard Bonds** **Vanguard Money Market Fund** **Vanguard IRA**	130,000.00	10 9 9	1197 927 1155
TOTAL CASH		**$635,081.80**		

**In an effort to obscure Shelly's considerable assets from the trial court, Davies Pearson redacted these bank account numbers and balances, stating that they were beyond the scope of the litigation. Shelly used future statements to fill in the actual amounts.*

These bank records establish that Shelly held significant separate assets that she brought to Washington from New Jersey. She opened all new separate

[2] EX 1-4, EX 9-15, EX 41

bank accounts in Washington State after moving here. She had no joint bank accounts with John. These cash accounts are not all inclusive of the funds Shelly owned but are the only bank accounts subpoenaed by Cathy for trial. This list also does not account for all Shelly's real and personal property that she brought to this state.

An asset is <u>Separate Property</u> if:

Brought to Washington State from a foreign jurisdiction.

Brookman v. Durkee, 46 Wash. 578, 90 P. 914, 1907, decision by the Supreme Court, demonstrates this precedent in the following opinion:

If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other, and if the spouse should be the wife it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them. Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if it be money, is also the separate property of such spouse.

SHELLY'S ACQUISTION OF ASSETS NAMED IN THE LAWSUIT:

Non-Washington Resident:	
2003 Lexus ES300 *(January 2008):*	*From Employer*[3]
809 6th Lane Home:	
Earnest money (9/3/2010):	*$ 7,000.00*[4]
Down payment (9/23/2010):	*$ 347,718.46*[5]
Washington Resident:	
2005 Shoreland'r Boat Trailer *(3/29/2011):*	*$ 5,000.00*[6]
2006 Dodge Ram Truck *(4/7/2011):*	*$ 21,667.25*[7]

[3] EX 119
[4] EX 15, Pg. 2195
[5] EX 105, EX 41, Pg. 2719
[6] EX 123
[7] EX 124

SHELLY'S TOTAL CASH PURCHASES: ***$ 381,385.71***

Shelly clearly had enough separate funds to purchase the assets noted in the fraudulent transfer lawsuit and was able to link each purchase to banking records that confirm she made the purchase from a separate bank account.

B. SEPARATE PROPERTY RETAINS CHARACTERIZATION

The fact that Shelly could trace her purchase of each of the assets named in the fraudulent transfer lawsuit is sufficient to prove that they are her separate property. Assets purchased retain the designation of the bank account from which it is purchased. The lower courts' rulings violate both RCW 26.16.010 and long held precedent:

Schwarz v. Schwarz, 192 Wn. App. 180, 189 (2016):

An asset is separate property if "acquired during marriage with the traceable proceeds of separate property;" ...the requirement that assets be traced required Ms. Champagne to demonstrate by clear and convincing evidence that any acquisition of "new" assets she claimed as separate was with the proceeds of separate assets.

Rustad v. Rustad, 61 Wn.2d. 176, 377 P.2d 414 (1963):

In this state, the applicable rules are: (1) The community or separate character of real property is determined by the character of funds used in its purchase.

Madsen v. Commissioner of the Internal Revenue Service, 97 Wn. 2d 792, 796, 6540 P. 2d 196 (1982):

To rebut the presumption [that all property is community property], a party asserting that property acquired during marriage is separate property must be able to trace "with some degree of particularity" the separate source of the funds used for the acquisition.

Berol v. Berol, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950)

If separate assets are commingled with community assets, the entire asset is presumed to be community unless the separate funds can be traced or identified.

The separate property characterization was established on the date the assets were purchased because they were acquired with Shelly's separate funds.

C. DESIGNATION OF AN ASSET

Once the characterization of the property is established as separate, it retains that status unless a very overt action occurs to change it. The Supreme Court precedent was established in *In re Estate of Witte,* 21 Wash.2d 112, 125, 150 P.2d 595 (1944)*, In re Estate of Madsen,* 48 Wash.2d 675, 676-77, 296 P.2d 518 (1956) and *Baker v. Baker,* 80 Wash.2d 736, 745, 498 P.2d 315 (1972).

Separate property will remain separate property "through all of its changes and transitions" so long as it can be traced and identified.

Additional Supreme Court decisions are consistent with the precedent set in the above cases in *Gage v. Gage,* 78 Wash. 262, 138 Pac. 886; *Volz v. Zang,* 113 Wash. 378, 194 Pac. 409:

It is undoubtedly true that husband and wife may, by proper agreement or conveyance, change their separate property into community property and their community property into separate property. But in determining whether separate property has, in fact, been changed from separate into community property, the following rules have been definitely settled by this court and are to be kept in mind: (1) The status of property, whether separate or community, is to be determined as of the date of its acquisition; (2) this rule is true with reference to personal property as well as with reference to real property; (3) if the property is once shown to have been separate property, the presumption is that it continues separate property until that presumption is overcome by evidence; (4) separate property continues to be separate property through all its changes and transitions, as long as it can be clearly traced and identified; (5) the rents, issues and profits of separate property remain separate property. In re Brown's Estate, 124 Wash. 273, 214 Pac. 10; Rogers v. Joughin,152 Wash. 448, 277 Pac. 988.

And finally, the Supreme Court stated in *Guye v. Guye,* 63 Wash. 340, 115 PAc. 731, 37 L.R.A. (N.S.) 186:

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.

The Court of Appeals also established precedent consistent with the Supreme Court *In re Marriage of Pearson-Maines,* 70 Wash. App. 860, 865, 855 P.2d 1210 (1993).

The burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, usually a writing evidencing mutual intent. In re Marriage of Shannon, 55 Wash. App. 137, 140, 777 P.2d 8 (1989).

The lower courts' holding that Shelly's separate assets change to community property conflicts with precedent from this Court and the Court of Appeals for more than 100 years.

The lower courts held that because John gave money to Shelly, which she deposited into her separate bank accounts that this action created a commingled bank account and, therefore, every asset was transmuted to community property. In an unpublished opinion, *LaRoche v. Billbe*, et al, No. 2:2013cv01913 - Document 30 (W.D. Wash. 2014), it stated:

*"The Hoffman Court **DID NOT CONCLUDE** that his income deposited in separate bank accounts resulted in commingled funds, nor did the Hoffman Court conclude that anything purchased from those separate accounts were now community property of the marriage. The Hoffman Court held that the designation of a separate bank account remained regardless from where those funds originated."*

The court has established precedent on this exact fact pattern. The designation of separate bank accounts remain separate regardless from where the money came from that was deposited into the account. The lower courts' ruling completely alters how assets are characterized within a marriage and are of public concern.

D. STANDARD OF REVIEW - FINDINGS OF FACT ERRORS

The Court of Appeals held that the record is inadequate to review whether the findings of fact are supported by substantial evidence. As a result, the Court of Appeals treated the findings of fact as verities. This holding is improper. The Petitioners appropriately assigned error in their appellate brief to each finding of fact they contend was improperly made, in accordance with RAP 10.3(g). The Petitioners assigned errors to 27 Findings of Fact and used the exhibits at trial to disprove those Findings of Fact. Banking records, purchase and sale documents, wire transfers, and cashier's checks are adequate in proving whose funds were used to purchase assets. These documents are more than adequate to determine the assets are Shelly's separate property, therefore, this holding is improper.

E. NAMES ON TITLE NOT DETERMANITIVE OF OWNERSHIP

Precedent regarding that the name under which the property is held does not determine the characterization of that property is set by both the Court of Appeals and the Supreme Court. *In re Estate of Deschamps,* 77 Wn. 514, 137 P. 1009 (1914) the Supreme Court stated:

The wife in *Deschamps* used her separate funds to acquire real estate by deed naming both husband and wife as grantees. With a fact pattern identical to this case, the *Deschamps* Court held that the asset was the wife's separate property and declined to put much significance on the fact that both names were on the deed. The Supreme Court opined:

> *[i]t is not shown that the wife ever intended to give up a one-half interest in the property, or that she understood that her husband could assert a greater interest in the property than would be represented by his advances, if any.*

In re Marriage of Mueller, 140 Wn. App. 498, 501 (2007) the Court of Appeals confirms that the names under which property is held is not determinative of ownership:

> *Spouses may change the status of their community property to separate property by entering into mutual agreements…the name under which the property is held does not determine whether the property is community or separate.*

Having John's name on title is the only fact that the lower courts rely on for determining that the assets were community property. There is clear precedent by this court that his name on title does not determine ownership.

F. IMPROPER DEFINITION OF COMMINGLED FUNDS

Both the Court of Appeals and Supreme Court established precedent as to the definition of commingling as follows:

In re: the Marriage of Schwarz, 192 Wn. App. 180 (2016):

> *Commingled is defined as to mingle or mix together:… to combine into a common fund.*

In the Matter of the Estate of E. A. WITTE, Deceased, 21 Wn.2d 112:

> *COMMINGLING OF SEPARATE AND COMMUNITY PROPERTY. Where separate funds have been so commingled with community funds that it is no longer possible to distinguish or apportion them, all of the commingled fund, or the property acquired thereby, is community property.*

In Re Binge's Estate, 105 P.2d 689 (Wash. 1940) and *In re Marriage of Skarbek*, 100 Wn. App. 444 (2000) have similar precedents:

> *We again held that, where separate funds have become so commingled with community funds as to make it impossible to trace the former or tell which are separate and which are community funds, all funds, or property into which they have been invested, belong to the community.*

Case law makes the definition of commingling clear – community funds MUST be mixed with separate funds in a joint bank account to such a degree that it can no longer be distinguished. John and Shelly never mixed separate funds with joint funds because they never had a joint bank account. The Supreme Court decision, *Gage v. Gage,* 78 Wash. 262, 138 Pac. 886 confirms that, the money John gave Shelly toward rent, issues and profits of her separate property remain her separate property.

G. PRENUPTIAL AGREEMENT

The lower courts held that John and Shelly's Prenuptial Agreement[8] is invalid and rendered it unenforceable based on inaccurate findings of fact. John and Shelly adhered to their Prenuptial Agreement and its provisions should be enforced.

H. FRAUDULENT TRANSFER STATUTE

1. There was no fraudulent transfer because once the judgment was entered on March 7, 2016,[9] Cathy began receiving payment within 60 days.[10] Therefore, there was no hinder or delay in receiving her judgment as required by RCW 19.40.

2. The lower courts' held that John was insolvent while at the same time reporting that he had significant income and was faithfully paying the judgment. This is contradictory to RCW 19.40.021.

[8] EX 101
[9] EX 58
[10] EX 150, EX 59

3. When John's name was removed from title, he was only owed whatever his share of the asset was. Since he did not contribute toward the purchase of the asset, no consideration was due. RCW.19.40.041.

4. The lower courts held that the value of the assets were established on the date Shelly corrected titles; however, those figures are not in the Findings of Fact and Conclusions of Law. This conflicts with RCW 19.40.081(3).

I. AWARD OF ATTORNEY FEES

The Court of Appeals stated that the trial court erred in not defining Shelly's portion of the judgment and as a result reversed the entire judgment and remanded it back to the trial court. With a full reversal of a judgment and a remand to the trial court, John and Shelly should not be responsible for Cathy's legal fees as she resisted defining Shelly's responsibility for the judgment in the Petitioner's Motion for Reconsideration[11] and Motion for Clarification,[12] both motions which specifically asked the trial court to define Shelly's portion of the judgment. Cathy vehemently resisted these motions, stating that she wanted to keep Shelly on the hook forever for any future judgments.[13] (Citation) The trial court denied both motions leaving John and Shelly no option but to seek a remedy through the appellate court.

VI. CONCLUSION

[11] CP 251-270, CP 283-291
[12] CP 294-303
[13] CP 390

Washington statute and courts have consistently held that married people are able to own separate property under certain conditions. The conditions that apply in this litigation is that:

1. Shelly brought considerable wealth to Washington in 2010, $635,081.80 in cash, which was substantiated with bank records. Based on Washington statute, those assets retain their separate property status.

2. Shelly traced her purchase of the 6th Lane Home, the boat and trailer, the pickup truck and the Pilchuck property with bank records from her separate bank accounts, wire transfer statements and cashier's checks; therefore, these assets retain the same designation as the funds used to purchase them. That designation was established on the date they are purchased and does not change over time.

Since the lower courts' holdings are inconsistent with Washington statute and over a century of precedents of the Court of Appeals and the State Supreme Court, the Petitioners respectfully request this Court to take review and reverse the opinion of the Appellate Court. The Petitioners also seek to reverse the order of attorney fees as the Appellate Court acknowledges the error of the trial court and fully reversed the judgment.

Dated this 17th day of May 2019.

Respectfully submitted,

Petitioner/Appellant John Shubeck

Petitioner/Appellant Shelly Williams

APPENDIX A

UNPUBLISHED OPINION
(Washington State Court of Appeals Division Two)

Filed
Washington State
Court of Appeals
Division Two

March 19, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CATHERINE S. SHUBECK, Respondent, v. JOHN R. SHUBECK AND SHELLY A. WILLIAMS, Appellants.	No. 50979-2-II UNPUBLISHED OPINION

SUTTON, J. — Catherine S. Shubeck sued her ex-husband John Shubeck and his spouse Shelly Williams, alleging that they fraudulently transferred their marital assets so that John could avoid paying Catherine a lifetime support obligation.[1] After a bench trial, the trial court agreed with Catherine that John and Shelly had engaged in a fraudulent transfer of their marital assets with the actual intent to hinder, delay, or defraud Catherine. The trial court entered findings of fact and conclusions of law and a judgment against John and Shelly, ordered that Shelly would be liable for any supplemental judgment if John stopped paying Catherine, granted a temporary injunction to bar the sale or transfer of their assets until the judgment has been fully satisfied, and ordered that John's spousal obligation to Shelly was avoided to the extent it interfered with his spousal obligation to Catherine, the judgment, or any supplemental judgment. The trial court also

[1] John Shubeck's, Shelly Williams', and Catherine Shubeck's first names are used for clarity. No disrespect is intended.

awarded Catherine attorney fees and costs at trial based on John's intransigence. John and Shelly filed a motion for reconsideration and amendment of judgment which the court denied.

On appeal, John and Shelly argue that (1) the trial court's findings of fact are not supported by substantial evidence, (2) the findings do not support the court's conclusions of law, (3) the court did not determine the value of the assets prior to entering judgment and the language that Shelly is liable for any supplemental judgment is ambiguous. John and Shelly ask that the judgment be reversed and we remand to the trial court to clarify the extent of Shelly's liability. They also request that we deny Catherine's request for fees and costs on appeal.

Because John and Shelly did not file a verbatim report of proceedings of the trial, we determine that the record is insufficient to review whether the challenged findings are supported by substantial evidence, instead we conduct a de novo review of the trial court's conclusions of law. Based on a de novo review, we hold that the trial court's conclusions of law are supported by the findings of fact, John's and Shelly's marital assets were community property and they engaged in a fraudulent transfer of their marital assets. We also hold that the trial court properly granted a temporary injunction barring the sale or transfer of their assets until the judgment has been satisfied, and the trial court properly ordered that John's spousal obligation to Shelly was avoided to the extent it interfered with his spousal obligation to Catherine, the judgment, or any supplemental judgment. However, we agree that the language in the judgment regarding Shelly's liability is unclear, and we remand to the trial court to clarify Shelly's liability and to modify the judgment accordingly. We also hold that the trial court's award of reasonable attorney fees and costs to Catherine based on John's intransigence was not an abuse of discretion, and we award Catherine reasonable appellate attorney fees and costs under RCW 26.18.160.

FACTS

Catherine and John were married from 1982 to 2003. They divorced in 2003 in New Jersey. In 2009, John and Shelly were married in Olympia, Washington.

I. JOHN'S AND SHELLY'S MARITAL ASSETS

In September 2010, John and Shelly purchased property in Washington at 6th Lane, Fox Island (6th Lane property). John and Shelly used the 6th Lane property as their personal residence.

In October 2012, John began transferring his assets to Shelly. On October 11, John transferred to Shelly (1) his interest in the 6th Lane property, (2) a 2006 Dodge Ram truck, and (3) a 2005 boat trailer. In November 2012, John transferred a 2003 Lexus ES 300 to Shelly. In February 2014, Shelly purchased property at Pilchuck Heights Drive, Fox Island (Pilchuck property). Shortly thereafter, John executed a quit claim deed conveying his community property interest in the Pilchuck property to Shelly.

II. NEW JERSEY PROCEEDINGS

The New Jersey Superior Court retained jurisdiction over John's and Catherine's dissolution. On September 27, 2012, based on Catherine's motion, the New Jersey court entered an order requiring John to pay lifetime spousal support to Catherine in the amount of $1,154 per week. John made payments from 2012 until early 2015, he then stopped paying spousal support and fell into arrears.

III. WASHINGTON STATE ENFORCEMENT ACTION

On January 19, 2016, Catherine registered the 2012 New Jersey support order in Washington and served John with the petition to register. Ten days later, John and Shelly executed

a separate property agreement making Shelly the separate property owner of all of their marital assets except for wine, golf clubs, a piano, and other musical items left with John.

On March 7, the superior court in Washington entered an initial judgment in the amount of $56,902.13 against John for unpaid spousal support owed to Catherine. Two days after the judgment was entered, Shelly filed for legal separation from John.

In April, Catherine filed the present action alleging a fraudulent transfer of marital assets by John and Shelly. John and Shelly filed counterclaims against Catherine for slander of title and malicious prosecution.

In July, John and Shelly entered an uncontested decree of legal separation. In that decree, the superior court divided the parties' assets according to the prenuptial agreement and separate property agreement, leaving John with virtually no assets, and imposed an obligation on him to pay Shelly $9,600 per month in spousal support.

IV. TRIAL PROCEEDINGS

On August 1, 2017, after a five day bench trial, the trial court concluded that John and Shelly had engaged in a fraudulent transfer of all of their marital assets to avoid paying Catherine.

The trial court entered the following relevant findings of fact:

> 1. The Plaintiff, Catherine Shubeck, was previously married to Defendant John Shubeck. The parties were married for twenty years and had three children together. Mr. Shubeck worked and was the breadwinner, while Ms. Shubeck took care of the three children and was a homemaker. The parties divorced in New Jersey in 2003. Ms. Shubeck remained in the marital home after the divorce and Mr. Shubeck paid spousal support to her.
>
> . . . .
>
> 4. In 2008, Ms. Williams sold Mr. Shubeck her 2003 Lexus ES 300 and Mr. Shubeck registered it in his sole name.

. . . .

6. Ms. Williams stated that the reason [she] and Mr. Shubeck entered into the Prenuptial Agreement was not to keep their assets separate from one another, as she trusted Mr. Shubeck, but instead to ensure that assets remained out of the reach of Ms. Shubeck.

7. The Prenuptial Agreement provides that:

> a. Bank accounts would remain separate and distinct, not to be commingled;
>
> b. Mr. Shubeck would maintain his separate ownership of the Lexus ES 300, as well as investment accounts he owned;
>
> c. Each party would be responsible for their separate debts and liabilities; and
>
> d. Ms. Williams would retain separate ownership of a home she owned in New Jersey, as well as any other homes she purchased in the future.

8. Throughout the marriage, Mr. Shubeck and Ms. Williams failed to abide by the terms of the Prenuptial Agreement. Specifically, they failed to maintain separate and distinct bank accounts, and instead commingled funds extensively and used funds in those accounts to make joint purchases and pay community debts. Mr. Shubeck eventually transferred his interest in the Lexus ES 300 and funds in his investment accounts to Ms. Williams. Mr. Shubeck's funds were used to pay for debts and liabilities that were alleged to belong to Ms. Williams. Ms. Williams was not the sole owner of the homes the parties purchased after marriage, as Mr. Shubeck was named on the title and paid for the homes. Mr. Shubeck's name, however, was only on title to the property on 6th Lane, Fox Island, [Washington].

9. Mr. Shubeck earned far more than Ms. Williams during their marriage. From 2011 through 2016, Mr. Shubeck had an average annual salary of approximately $225,000. On the other hand, during that same time period, Ms. Williams only received approximately $18,000 per year in Social Security Disability income. Throughout the marriage, Mr. Shubeck would transfer thousands of dollars every month into Ms. Williams' separate bank accounts. After the transfers were made, she would pay for assets, as well as pay other community debts and liabilities.

10. In September 2010, Mr. Shubeck and Ms. Williams jointly purchased real property located at 809 6th Lane FI, Fox Island, WA 98333 ("6th Lane Property")

for approximately $760,000. Mr. Shubeck was named on the real estate purchase and sale agreement, the statutory warranty deed, deed of trust, and mortgage. Mr. Shubeck also deposited $80,000 into Ms. Williams' bank account just weeks before the home closed, and those funds were utilized in the down payment for the home. Mr. Shubeck also deposited money on a monthly basis into Ms. Williams' separate bank account to pay for the mortgage and property taxes. Some of his electronic transfers to her account specifically mark the payment for the "mortgage" or "property taxes." Mr. Shubeck and Ms. Williams also filed joint income tax returns and benefitted from the mortgage interest deduction. The home was later sold in December 2016 for approximately $980,000.

11. In 2011, Mr. Shubeck and Ms. Williams jointly purchased a 2006 Dodge Ram Truck for approximately $26,000 and registered the vehicle in both their names.

12. In 2011, Mr. Shubeck and Ms. Williams jointly purchased a 2005 Regal Thirty Foot Commodore Cabin Cruiser ("boat") and a 2005 boat trailer for approximately $42,000. The boat was registered in Ms. Williams' name only, but the trailer was registered in both parties' names. Just prior to purchasing the boat, Mr. Shubeck wrote Ms. Williams a check for $35,000 and wrote "boat" in the memo line.

13. In early 2011, Mr. Shubeck and Ms. Shubeck's marital home sold. Shortly after, Ms. Shubeck initiated proceedings in New Jersey to modify Mr. Shubeck's spousal support obligation.

14. After numerous delays, the New Jersey court heard the matter on September 27, 2012, in which Mr. Shubeck failed to appear. Mr. Shubeck was ordered to pay Shubeck lifetime spousal support in the amount of $1,154.00 per week. He was also ordered to pay retroactive spousal support, child support, and attorney fees. Mr. Shubeck's 401k was garnished to pay the retroactive support and fees.

15. Mr. Shubeck sought reconsideration of the September 27, 2012 Order, but it was denied. He then appealed the case to the New Jersey Court of Appeals. In September 2014, the appellate court denied him relief and issued an opinion, wherein the Appellate Court, in quoting the trial court, wrote that Mr. Shubeck "acted in bad faith, failed to appear, failed to be responsive to mediation sessions, failed to take and maintain positions throughout the case, and basically stonewalled [Ms. Shubeck], causing her to borrow significantly from her parents."

16. After entry of the September 27, 2012[,] order, Mr. Shubeck stated that he "panicked." Mr. Shubeck and Ms. Williams both stated that after witnessing what happened in the New Jersey proceeding, they decided to secure the various assets they had purchased by transferring title to Ms. Williams in order to keep them out of reach of Ms. Shubeck. They alleged that Mr. Shubeck never had an interest in

any of these assets to begin with because the Prenuptial Agreement made then all Ms. Williams, and these transfers were considered "corrections of title," as opposed to transfers of title.

17. On October 11, 2012, Mr. Shubeck quit claimed his interest in the 6th Lane Property to Ms. Williams for no consideration. At the time of transfer, the home was valued at approximately $688,000. The Defendants only owed appropriately $374,000 on the mortgage, giving them approximately $314,000 in equity.

18. Also on October 11, 2012, Mr. Shubeck transferred his interest in the 2006 Dodge Ram Truck to Ms. Williams for no consideration. The 2006 Dodge Ram Truck was valued at approximately $22,000 at the time of transfer.

. . . .

20. On or about October 18, 2012, Mr. Shubeck withdrew $24,719.49 from his Vanguard investment account and transferred the funds to Ms. Williams for no consideration.

21. On or about October 23, 2012, Mr. Shubeck withdrew $23,768.20 from his UBS investment account and transferred the funds to Ms. Williams for no consideration.

22. On November 5, 2012, Mr. Shubeck transferred his sole interest in the 2003 Lexus ES 300 to Ms. Williams for no consideration.

23. After making these transfers, Mr. Shubeck had no assets of significant value remaining. Yet Mr. Shubeck continued to make use of these assets and live in and work out of the 6th Lane Property home.

24. Later, in 2014 while Mr. Shubeck and Ms. Williams were husband and wife, Ms. William[s] purchased a vacant piece of land commonly known as 1350 Pilchuck Heights, Fox Island, WA 98333 ("Pilchuck Property"). Mr. Shubeck was never on the purchase documents. However, at the time of closing, Mr. Shubeck quit claimed his interest in the property to Ms. Williams for no consideration. The value of the vacant piece of land at the time of transfer was approximately $180,000.

25. From 2014 through the time of trial, Mr. Shubeck and Ms. Williams have been constructing a new water view home with approximately 6000 feet of living space on the Pilchuck Heights property. In order to construct the home, the Defendants utilized a home equity line of credit in which the 6th Lane Property was used as collateral. Both Defendants are named as borrowers on the line of credit. Mr. Shubeck's income was also used to construct the home, as he deposited funds into

Ms. Williams' bank accounts, and she paid for construction costs. After the 6th Lane Property sold in December 2016, proceeds from the sale of that home were used to construct the Pilchuck Property home. The current value of the Pilchuck Property, including the land and newly constructed home, is estimated to be over $1,000,000.

. . . .

27. In early January 2015, shortly after Mr. Shubeck's appeal to the New Jersey Court of Appeals was denied, Mr. Shubeck sent Ms. Shubeck a letter stating that he was retiring, that he was not going to be enslaved to her anymore, and that he would no longer be paying support. In that letter, he also stated that he had to "decide if it is reasonable to comply with the court order to pay alimony." He then stopped paying support.

. . . .

32. Mr. Shubeck did not pay the arrears. Instead, from August 2015 through September 2016, he began to almost exclusively deposit his paychecks into Ms. Williams' bank account, which was different from their previous practice where Mr. Shubeck would transfer smaller sums of money to her on a monthly basis.

33. Unable to collect on the arrears from New Jersey, Ms. Shubeck then sought counsel in Washington to help her collect the outstanding support.

. . . .

35. On January 29, 2016, only ten days after being served with the petition to register the order, Mr. Shubeck and Ms. Williams executed a Separate Property Agreement, which purported to make Ms. Williams the separate owner of all the above described assets, and much more, leaving Mr. Shubeck with assets consisting of wine, golf clubs, piano, and other musical accessories.

. . . .

39. Since that Decree was entered, Mr. Shubeck and Ms. Williams continue to live together, make equal use of the assets described above, and carry on a marital relationship.

40. Eventually in late April 2016, per Washington State Employment Security Department subpoena, Ms. Shubeck discovered that Mr. Shubeck was actually still working and she was able to start garnishing Mr. Shubeck's wages. The wage garnishment is costly and needs to be renewed approximately every sixty (60) days.

> Mr. Shubeck has not made any voluntary payment on the outstanding arrears, and has failed to pay support as it becomes due and owing. Mr. Shubeck has made Ms. Shubeck's attempts to enforce the support order laborious and costly. The outstanding debt at the time of trial was $67,524.53. The support continues to become due and owing in the amount of $1,154 per week. Currently the obligation is [$6400] per month and accordingly the balance is increasing in amount.

Clerk's Papers (CP) at 231-40.

The trial court also entered the following relevant conclusions of law:

> **Community Property vs. Separate Property**
> 2. In Washington, "all property acquired during marriage is presumptively community property." *In re Marriage of Mueller*, 140 Wn. App. 498, 501 (2007). While spouses may enter into contractual agreements to change community property into separate property, to recognize such an agreement, courts require "clear and convincing evidence" to overcome the "heavy presumption" that the property is characterized as community. *Id.* The requirement of clear and convincing evidence is not met through the use of self-serving declarations of the spouses claiming the property is separate and that he or she acquired it from separate funds and a showing that separate funds were available for that purpose." *Schwarz v. Schwarz*, 192 Wn. App. 180, 189 (2016). When community and separate funds are "so commingled they may not be distinguished or apportioned," the entire amount is rendered community property. *Id.* at 190. To establish clear and convincing evidence, the party purporting to convert community property to separate property must show both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement through their marriage. 140 Wn. App[.] at 501. A prenuptial agreement is unenforceable if the conduct of the parties is inconsistent with the terms of the agreement. *See In re Marriage of Sanchez*, 33 Wn. App. 215, 217-218 (1982); *see also In re Marriage of Fox*, 58 Wn. App. 935, 939-940 (1990).
>
> 3. The Defendants have failed to overcome the heavy presumption that the assets acquired during marriage were community in nature. None of the assets in question were ever the separate property of Ms. Williams, as the Defendants failed to abide by the terms of their Prenuptial Agreement, thereby rendering it unenforceable. Mr. Shubeck's income was deposited into Ms. Williams' bank accounts throughout the marriage and she paid for the assets. The Defendants failed to abide by numerous other terms in the Prenuptial Agreement as well. Therefore, Mr. Shubeck had an interest in the assets at the time of transfer, and continues to have an interest in those assets now.

Fraudulent Transfers

4. Washington's Uniform Fraudulent Transfer Act (UFTA) governs the Plaintiff's claims. Under RCW 14.40.041(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 or 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.

. . . .

10. In considering the factors described above, there is clear and satisfactory evidence that Mr. Shubeck's transfer of assets to Ms. Williams constitutes a fraudulent transfer made with actual intent to hinder, delay, or defraud Ms. Shubeck. Specifically, (1) the transfers were made to an insider, his wife; (2) there was no consideration given for any of the transfers; (3) Mr. Shubeck retained possession and control over the assets after they were transferred; (4) directly before the transfers were made, Mr. Shubeck was involved in legal proceedings and ordered to pay spousal support; (5) the transfers were essentially all of Mr. Shubeck's assets; (6) Mr. Shubeck became insolvent, as his debts were greater than a fair valuation of all his assets, and he failed and refused to pay the support as it became due and owing; (7) Mr. Shubeck sought to conceal assets by titling them in Ms. Williams['] name only; and (8) a significant portion of the transfers occurred directly after the New Jersey court entered the spousal support order.

11. The Court also considered factors outside those provided for in the UFTA. Specifically, Mr. Shubeck's January 2015 letter telling Ms. Shubeck that he was not going to comply with the court order anymore and refused to be enslaved to her. Also, Mr. Shubeck's efforts to avoid enforcement by Ms. Shubeck's New Jersey counsel by returning mail and avoiding service, and that when the New Jersey court entered an order freezing his assets, he began to secrete his income in Ms. Williams' bank accounts. The Court also considers that Mr. Shubeck and Ms.

Williams executed a Separate Property Agreement ten days after being served with Ms. Shubeck's petition to register the New Jersey order here in Washington. The Court also considers the agreed upon Decree of Separation that the Defendants jointly entered into. The uncontested Decree of Legal Separation, its division of assets, and $9,600 spousal support obligation is also a fraudulent transfer made with actual intent to hinder, delay, or defraud Ms. Shubeck, as it seeks to solidify the previous fraudulent transfers through a court order and it checks all the same badges of fraud. To the extent the legal separation and its consensual support obligation interferes in any way, as a matter of fact or as a matter of law, with Ms. Shubeck's ability to collect the spousal support, it is avoided.

12. There is also substantial evidence that the transfers were constructively fraudulent, as Mr. Shubeck did not receive any consideration for the transfers and at the time of transfer he knew that he would incur debts beyond his ability to pay as they became due and that he was insolvent.

Relief

13. The UFTA expressly allows for judgment against both the transferor and transferee. Under RCW 19.40.081(b), "to the extent a transfer is voidable in an action by a creditor . . . the creditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim . . . . The judgment may be entered against . . . the first transferee of the asset or the person for whose benefit the transfer was made." The UFTA also provides for the avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claims, and subject to equity and the rules of civil procedure, and injunction against further disposition of assets by the debtor or transferee, and any other relief the circumstances may require. *See* RCW 19.40.071.

14. Judgment shall be entered against both Mr. Shubeck, the transferor, and Ms. Williams, the transferee. Ms. Shubeck shall be entitled to a principal money judgment against both Defendants in the present amount of $67,524.53, reflecting the debt due and owing to her at the conclusion of trial. Ms. Shubeck shall also be entitled to seek supplemental money judgments against both Defendants in the future in the event that Mr. Shubeck fails to pay future support and new deficiencies arise. There shall also be a temporary injunction against further disposition of Mr. Shubeck and Ms. Williams' assets or other property, including funds in financial accounts. Mr. Shubeck's $9,600 monthly spousal support obligation to Ms. Williams under their uncontested Decree of Legal Separation is avoided to the extent it interferes with Ms. Shubeck's right to collect due and owing to future spousal support.

Reasonable Attorney Fees and Costs

15. Under RCW 26.18.160, "in any action to enforce a support or maintenance order . . . the prevailing party is entitled to recover costs, including an award for reasonable attorney fees." Further, in cases arising out of a marital dissolution, the court may grant reasonable attorney fees to a prevailing party based on the other spouse's intransigence. Intransigence consists of delay tactics, obstruction, and any other actions that make proceedings unduly difficult and costly. *In re Marriage of Bobbitt,* 135 Wn. App. 8, 30, (2006).

16. The present case is an action to enforce a spousal support order, and Ms. Shubeck is the prevailing party. Therefore, she is entitled to recover her costs and reasonable attorney fees.

17. Mr. Shubeck's intransigence also supports an award of reasonable attorney fees. Mr. Shubeck has persistently, dating back to 2011, resisted Ms. Shubeck's efforts to collect this obligation. His obstructionist efforts in the New Jersey proceeding were well documented by the New Jersey Court of Appeals. Thereafter, his efforts to hinder, delay, and defraud Ms. Shubeck have cost her exorbitant amounts of time and money. He has consistently stonewalled her collection efforts and met her at every turn along the way to defend his unlawful actions. Mr. Shubeck had the ability to pay his debt, yet he simply refused to, and still refuses to. He has created needless litigation.

Dismissal of Counter Claims

18. Under Washington law, the necessary elements for a slander of title action are that the words: (1) must be false; (2) must be maliciously published; (3) must be spoken with reference to some pending sale or purchase of the property; (4) must result in a pecuniary loss or injury to the claimant's title. *Pay'n Save Corp. v. Eads*, 53 Wn. App. 443, 448 (1989).

19. In a malicious prosecution action, the claimant must allege and prove (1) that the prosecution claimed to have been malicious was instituted or continued by the opposing party; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the claimant, or were abandoned; and (5) that the claimant suffered injury or damage as a result of the prosecution. *Eads,* 53 Wn. App. at 447.

20. The Defendants have failed to prove the elements of each cause of action, and therefore those claims are dismissed with prejudice.

CP at 240-247.

After dismissing the counterclaims, the trial court entered judgment in the amount of $67,524.53[2] against John and Shelly. After finding that John's conduct amounted to intransigence, the trial court awarded Catherine her reasonable attorney fees in the amount of $83,826.00 and costs in the amount of $5,625.24, plus interest at the rate of 12 percent.

The trial court also granted a temporary injunction against John and Shelly restricting the sale or transfer of their assets until Catherine's judgment has been fully satisfied. The trial court further ordered that "to the extent [John's] and [Shelly's] [d]ecree of [l]egal [s]eparation, including its division of assets or [John's] monthly $9,600 spousal support obligation to [Shelly], interferes with [Catherine's] right to collect her spousal support award, or [the] judgment, or any supplemental judgment entered in this case, it is avoided." CP at 250. John and Shelly filed a motion for reconsideration and amended judgment which the trial court denied. John and Shelly appeal the trial court's order denying their motion for reconsideration and amendment of judgment, and the award of attorney fees and costs.

ANALYSIS

I. LEGAL PRINCIPLES

We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors,* 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of

[2] The amount awarded in the judgment reflected "the amount of spousal support due and owing to [Catherine] at the conclusion of trial." CP at 248.

acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Littlefield*, 133 Wn.2d at 47.

II. RECORD ON APPEAL AND FINDINGS OF FACT[3]

"The party seeking review has the burden to perfect the record so that, as the reviewing court, we have all relevant evidence before us." *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012). "An insufficient appellate record precludes review of the alleged errors." *Stiles*, 168 Wn. App. at 259. The appellant must provide argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. RAP 10.3(a)(6).

We review a trial court's decision following a bench trial to determine whether substantial evidence supports the trial court's findings of fact and whether those findings of fact support the conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC,* 176 Wn. App. 335, 341, 308 P.3d 791 (2013). Where the record is inadequate to review whether the findings of fact are supported by substantial evidence, we treat the findings of fact as verities on appeal. *Morris v. Woodside*, 101 Wn.2d 812, 815, 682 P.2d 905 (1984).

[3] A commissioner of this court ordered John and Shelley to file an amended brief with proper citations to exhibits and evidence admitted at trial. Their amended brief and appendices A, B, and D do not comply with that order. Thus, we do not consider any documents, evidence, or appendices to the briefs not admitted at trial, nor do we consider any arguments not supported by proper citations to authority. RAP 10.3(a)(6).

Catherine argues that, because appellants failed to provide a verbatim report of proceedings (VRP) of the bench trial as required under RAP 9.2, the findings of fact are verities. John and Shelly argue that the findings are not verities on appeal because they "rely solely on exhibits entered as evidence at trial." Reply Br. of Appellant at 8. They quote RAP 10.3(g) as authority to claim that because they "noted there are errors on 27 separate findings of fact," we are not bound by the trial court's findings. Reply Br. of Appellant at 4, 8. We agree with Catherine.[4] Because John and Shelly failed to file a VRP, the record on appeal is insufficient for us to review whether the challenged findings are supported by substantial evidence. Further, the unchallenged findings of fact are verities on appeal. *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011). Thus, all of the findings are verities.

Because the findings are verities, we do not need to determine whether substantial evidence supports the challenged findings, as John and Shelly claim. Instead, we review the conclusions of law de novo to determine whether the challenged conclusions of law are supported by the findings.[5]

[4] Without the VRP, the exhibits themselves are insufficient for our review because we are unable to determine what the trial court said in admitting them, what purposes they were admitted for, what weight the trial court gave them, if any, or whether the trial court admitted any contrary evidence.

[5] Although John and Shelly assign error to conclusions of law 18, 19, and 20 regarding their counterclaims for slander of title and malicious prosecution, they fail to provide argument in support of these assignments of error. Thus, we decline to review this issue further. *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002); RAP 10.3(a)(6).

III. TRIAL COURT'S CONCLUSIONS OF LAW

Whether a trial court's findings of fact support its conclusions of law is a question of law that we review de novo. *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 290, 337 P.3d 328 (2014). We review a trial court's conclusions of law by first determining whether the court applied the correct legal standard. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (2001).

A. COMMUNITY PROPERTY V. SEPARATE PROPERTY CHARACTERIZATION

John and Shelly argue that the trial court's findings of fact do not support the court's conclusions of law regarding the community property character of their marital assets. We disagree. The trial court's conclusions of law are supported by the findings that all of John's and Shelly's marital assets were community property based on their comingling of assets and funds and their violations of their prenuptial agreement and separate property agreement, which agreements are unenforceable.

"[P]roperty acquired during marriage is presumptively community property." *In re Marriage of Mueller*, 140 Wn. App. 498, 501, 167 P.3d 568 (2007). Spouses may enter into contractual agreements to change community property into separate property, but to recognize such an agreement, courts require "clear and convincing evidence to overcome the heavy presumption" that the property is characterized as community. *Mueller*, 140 Wn. App. at 501. "'The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse[s] claiming the property in question [is separate and] that he [or she] acquired it from separate funds and a showing that separate funds were available for that purpose.'" *In re Marriage of Schwarz*, 192 Wn. App. 180, 189, 368 P.3d 173 (2016) (footnote omitted) (quoting *Berol v.*

Berol, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950)). When community and separate funds are "so commingled that they may not be distinguished or apportioned," the entire amount is rendered community property. *Schwarz,* 192 Wn. App. at 190.

To establish clear and convincing evidence, the party purporting to convert community property to separate property must show both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage. *Mueller*, 140 Wn. App. at 501. A prenuptial agreement is unenforceable if the conduct of the parties is inconsistent with the terms of the agreement. *See In re Marriage of Sanchez*, 33 Wn. App. 215, 217-18, 654 P.2d 702 (1982); *see also In re Marriage of Fox*, 58 Wn. App. 935, 939-940, 795 P.2d 1170 (1990).

Here, the trial court's conclusions of law are supported by the findings. John and Shelly purchased or owned during their marriage: the investment accounts with Vanguard and UBS, the 6th Lane property, the Dodge Ram truck, the boat and trailer, the Lexus, their bank accounts, the Pilchuck property, and the house they built on the Pilchuck property. Catherine registered the New Jersey support order in Washington to enforce it, and after the New Jersey court ordered John to pay retroactive support and he appealed and lost, the New Jersey appellate court found that John "stonewalled" Catherine. CP at 235.

Further, Shelly acknowledged that they entered into the prenuptial agreement to ensure that the assets remained out of reach of Catherine. The prenuptial agreement required that they keep their bank accounts separate, John would separately own the Lexus, each would be responsible for his/her own debts and liabilities, and Shelly would separately own the home in New Jersey plus any other home she purchased in the future.

John and Shelly failed to abide by the terms of their prenuptial agreement because they comingled their funds, used their funds to make joint purchases and pay community debts, and eventually had John transfer to Shelly virtually all of his assets that he purchased or owned during the marriage. And after the transfer, John continued to use the transferred assets as his own.

John earned an average of $225,000 per year from 2011-2016, while Shelly received approximately $18,000 per year in disability income. John transferred thousands of dollars into Shelly's accounts so that she could pay the community bills and debts. Although Shelly claimed during oral argument that John's payments on the mortgage and for taxes constituted "rent," the findings do not refer to any record of a rental agreement or rent paid or received. Wash. Court of Appeals oral argument, *Shubeck v. Shubeck & Williams*, No. 50979-2-II (Nov. 27, 2018), at 8 min., 39 sec. to 37 min., 22 sec. (on file with court).

The trial court properly concluded that John and Shelly violated the terms of their prenuptial agreement and separate property agreements which made the agreements unenforceable. The trial court's conclusion that John "had an interest in the assets at the time of transfer, and continues to have an interest . . . now" is also supported by the findings. CP at 241. The trial court also properly concluded that John and Shelly "failed to overcome the heavy presumption that the assets acquired during [their] marriage were community in nature," and that "[n]one of the assets in question were ever the separate property of [Shelly]" are supported by the findings. CP at 241. Because the conclusions of law are supported by the findings, we hold that John's and Shelly's arguments regarding the character of their marital property fail.

B. FRAUDULENT TRANSFERS

John and Shelly next argue that the trial court's conclusions of law are not supported by the findings that they engaged in a fraudulent transfer of their marital assets with actual intent to hinder, delay, or defraud Catherine. Amended Br. of Appellant at 18, 45-47. We disagree.

Under Washington's Uniform Voidable Transactions Act (UVTA), RCW 19.40:[6]

> A transfer made or obligation incurred by a debtor is voidable 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:
>
> (a) With actual intent to hinder, delay, or defraud any creditor or debtor; or
>
> (b) 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 the debtor would incur, debts beyond the debtor's ability to pay as they became due.

RCW 19.40.041(1).

Fraudulent transfers occur when "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 Wn.2d 738, 744, 239 P.3d 537(2009). The UVTA provides for two types of fraudulent transfer. RCW 19.40.041(1). The first type is made "with actual intent to hinder, delay, or defraud any creditor." RCW 19.40.041(1)(a). The second type is a constructively fraudulent transfer. RCW 19.40.041(1)(b); *see Clearwater v. Skyline Const. Co.,* 67 Wn. App. 305, 320-21, 835 P.2d 257 (1992). Transfers made without consideration are constructively fraudulent without

[6] Formerly "Uniform Fraudulent Transfer Act." LAWS OF 1987, ch. 444.

regard to the actual intent of the parties, if the debtor was left by the transfer with unreasonably small assets. *Clearwater*, 67 Wn. App. at 320.

After John lost his appeal of the New Jersey order requiring that he pay Catherine lifetime support, he "panicked." CP at 235. He decided to secure the various assets he and Shelly had purchased by transferring titled to her in order to keep them out of reach of Catherine. John and Shelly claimed that John never had any interest in the assets, and that they entered into a prenuptial agreement and agreed that all of their marital assets were Shelly's separate property, not as transfers of title, but as "corrections of title." CP at 235. John then transferred his interest in the 6th Lane property, the Dodge Ram truck, the boat and trailer, his two investment accounts, and the Lexus. While husband and wife, Shelly then purchased a vacant lot at Pilchuck Heights and began construction of a 6,000 square foot waterfront home. John and Shelly took out a joint line of credit using the 6th Lane property as collateral. John transferred his income into Shelly's bank accounts which she then used to pay for construction costs from 2014 through trial. By trial, the land and new home were estimated to be over $1,000,000 in value. They also continued to live together as husband and wife and make use of the assets.

Further, in early January 2015, John wrote a letter to Catherine stating that he was retiring and would no longer be paying her support. Catherine later discovered that John did not retire as he had claimed, and at her request, the Washington State Employment Security Department began to garnish his wages based on arrears as of April 2016 of $67,524.53, or $1,154 per week. Meanwhile, from August 2015 through September 2016, John began to exclusively deposit his paycheck into Shelly's bank account. Catherine then sought counsel in Washington to enforce the outstanding support.

The trial court properly concluded that there was clear and satisfactory evidence that John's transfers of the marital assets to Shelly constituted a fraudulent transfer made with the actual intent to hinder, delay, or defraud Catherine. The transfers were made to an insider, John's wife; there was no consideration given for any of the transfers; John retained possession and control over the assets after they were transferred; and directly before the transfers were made, he was involved in legal proceedings and ordered to pay spousal support. Further, the transfers essentially consisted of all of John's assets rendering him unable to pay his support obligation to Catherine as his debts were greater than a fair valuation of all his assets, and he then failed and refused to pay the support as it became due and owing. Thus, the trial court's conclusion of a fraudulent transfer is supported by the findings that "[t]here is also substantial evidence that the transfers were constructively fraudulent, as [John] did not receive any consideration for the transfers and at the time of transfer he knew that he would incur debts beyond his ability to pay as they became due and that he was insolvent." CP at 245. Thus, because the court's conclusions of law regarding a fraudulent transfer are supported by the findings, John's and Shelly's claims on this basis fail.

C. RELIEF ORDERED AND SCOPE OF SHELLY'S LIABILITY

John and Shelly next argue that the trial court (1) did not determine the value of the assets prior to entering the judgment, (2) improperly granted an injunction, (3) ordered that John's spousal obligation to Shelly is avoided to the extent it interferes with his support obligation to Catherine, the judgment, or any supplemental judgment, and (4) ordered that Shelly was liable for any supplemental judgment if John stopped paying Catherine. They argue that the extent of Shelly's liability is unclear and request that we reverse the judgment and remand to the trial court to clarify her liability. We hold that the trial court did determine the value of the assets prior to

entering judgment, properly entered a temporary injunction, and avoided John's spousal obligation to Shelly to the extent it interfered with his spousal obligation to Catherine, the judgment, or any supplemental judgment. We agree that the extent of Shelly's liability is unclear, and we reverse the judgment and remand to the trial court to clarify this language and modify the judgment accordingly.

The UVTA provides that

> [t]o the extent a transfer is avoidable in an action by a creditor[,] . . . the creditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim . . . . The judgment may be entered against . . . [t]he first transferee of the asset or the person for whose benefit the transfer was made[.]

RCW 19.40.081(2)(a)(i). Here, the transferee is Shelly, the "person for whose benefit the transfer was made" is John.

After ruling that John and Shelly engaged in a fraudulent transfer, the trial court, based on its findings which are verities, entered conclusions of law as to the value of the assets prior to entering judgment. Thus, we disagree with John and Shelly that the trial court failed to determine the value of the assets. Further, the trial court properly granted Catherine a temporary injunction to bar any sale or transfer of their assets until the judgment has been fully satisfied. The trial court also properly ordered that John's $9600 monthly spousal obligation to Shelly is avoided to the extent it interferes with John's support obligation to Catherine, the judgment, or any supplemental judgment. However, we agree that the extent of Shelly's liability is unclear. Therefore, we reverse the judgment and remand to the trial court to clarify this provision and modify the judgment accordingly.

IV. ATTORNEY FEES AND COSTS

A. INTRANSIGENCE

John and Shelly argue that the trial court erred in awarding Catherine attorney fees and costs at trial. Catherine contends that the trial court did not err in awarding her reasonable fees and costs. We agree with Catherine, and hold that the court did not err by awarding her reasonable attorney fees and costs based on John's intransigence.

Trial courts may award attorney fees on the basis of intransigence of a party. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). "'Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in "foot-dragging" and "obstruction" . . . or simply when one party made the trial unduly difficult and increased legal costs by his or her actions.'" *In re Marriage of Katare,* 175 Wn.2d 23, 42, 283 P.3d 546 (2012) (*quoting Greenlee*, 65 Wn. App. at 708).

When awarding attorney fees on the basis of intransigence, a trial court must make findings sufficient to allow appellate review. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). "An appellate court will uphold an attorney fee award unless it finds that the trial court manifestly abused its discretion." *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013). The trial court abuses its discretion by granting a fee award based on untenable grounds or for untenable reasons. *Berryman*, 177 Wn. App. at 657. RCW 26.18.160 provides authority for trial courts to award attorney fees and costs to the prevailing party "[i]n any action to enforce a support . . . order."

Here, the trial court reviewed the attorney's declaration filed in support of an attorney fee award for Catherine at trial. The trial court found that John's intransigence resulted in protracted litigation because John "persistently, dating back to 2011, resisted [Catherine's] efforts to collect this obligation." CP at 246. The trial court based its award on RCW 26.18.160, and awarded Catherine reasonable attorney fees and costs in the amount of $89,451.24.

Based on our de novo review, the conclusions of law are supported by the findings of fact regarding John's intransigence. Because a fee award is authorized under RCW 26.18.160, and the award is not unreasonable or untenable, we hold that the trial court did not abuse its discretion in awarding Catherine reasonable attorney fees and costs at trial.

B. ATTORNEY FEES AND COSTS ON APPEAL

Catherine requests an award of reasonable attorney fees and costs on appeal based on RCW 26.18.160 and RAP 18.1. Because Catherine maintained this action to enforce a registered judgment in Washington for support, we agree that Catherine is entitled to an award of reasonable appellate attorney fees and costs under RCW 26.18.160.

CONCLUSION

We affirm the trial court's order denying John's and Shelly's motion for reconsideration and amendment of judgment. Because the extent of Shelly's liability is ambiguous, we remand for the trial court to clarify her liability and modify the judgment accordingly. We hold that the

trial court did not abuse its discretion by awarding Catherine reasonable attorney fees and costs at trial and we affirm that order. We award Catherine her reasonable attorney fees and costs on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Melnick, J.

MELNICK, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION
(Washington State Court of Appeals Division Two)

Filed
Washington State
Court of Appeals
Division Two

April 18, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CATHERINE S. SHUBECK,

Respondent,

v.

JOHN R. SCHUBECK AND SHELLY A. WILLIAMS,

Appellants.

No. 50979-2-II

ORDER DENYING MOTION FOR RECONSIDERATION

Appellants move for reconsideration of the court's March 19, 2019, unpublished opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. MAXA, MELNICK, SUTTON

FOR THE COURT:

Sutton, J.

SUTTON, JUDGE

APPENDIX C

LaRoche v. Billbe, et al
No. 2:2013cv01913Document 30 (W.D. Wash. 2014)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAROLE LAROCHE,

Plaintiff,

v.

TED D. BILLBE, et al.,

Defendants.

C13-1913 TSZ

ORDER

THIS MATTER comes before the Court on defendants' motion for partial summary judgment, docket no. 17. Having reviewed all papers filed in support of, and in opposition to, defendants' motion,[1] the Court enters the following order.

Background

Plaintiff Carole LaRoche brings this action against her former attorney, Ted D. Billbe, who represented her in dissolution proceedings against Alan Hoffman. Hoffman and LaRoche were wed in August 2000; their marriage was dissolved in October 2010. LaRoche alleges that Billbe's legal services were deficient in several regards, including a failure to assert that a prenuptial agreement between LaRoche and Hoffman had been

[1] Plaintiff's motion to strike, docket no. 21, Paragraphs 10, 13, & 14 of the Declaration of Ted D. Billbe, docket no. 18, is DENIED. Defendants' motion to strike, docket no. 26, the Declaration of Emmelyn Hart, docket no. 23, is also DENIED. The Court has considered the declarations to the extent appropriate.

rescinded by their conduct during the marriage. *See* Compl. at ¶¶ 4.1(A) & (C) (docket no. 1). Defendants' motion for partial summary judgment is focused solely on this allegation concerning the prenuptial agreement.

The prenuptial agreement provided that, in the event of a dissolution, each party would receive his or her separate property, neither party would be entitled to payment for support or other maintenance, personal service earnings during the marriage would be treated as community property, except that LaRoche could accumulate up to $75,000 of her earnings in a separate property account, and Hoffman would make contributions to an individual retirement account that would be community property awarded to LaRoche upon dissolution. *See* *In re Marriage of Hoffman*, 2012 WL 1699455 at *1 (Wash. Ct. App. May 14, 2012). During trial before the King County Superior Court, Billbe argued, on behalf of LaRoche, that the prenuptial agreement was not enforceable.

Under Washington law, a prenuptial agreement is first tested for substantive fairness, *i.e.*, whether the agreement makes "fair and reasonable provision for the party not seeking enforcement of the agreement." *In re Marriage of Matson*, 107 Wn.2d 479, 482, 730 P.2d 668 (1986). If the prenuptial agreement is substantively fair, then the analysis ends and the agreement is deemed enforceable. *Id.* If the agreement fails the substantive inquiry, then it must be evaluated for procedural fairness, pursuant to which a court must assess (i) whether full disclosure was made concerning the amount, character, and value of the property involved, and (ii) whether the parties entered into the agreement voluntarily, on independent advice, and with full knowledge of their rights. *Id.* at 483. In the underlying action, the King County Superior Court concluded that the prenuptial

agreement at issue was both substantively and procedurally fair. Ex. 9 to Billbe Decl. (docket no. 18-1 at 59).

The King County Superior Court entered judgment in favor of LaRoche in the amount of $568,000, together with attorney fees in the amount of $70,000. Ex. 10 to Billbe Decl. (docket no. 18-1 at 68). The award consisted of fifty percent (50%) of the stipulated value of a personal residence (the "Trilogy" home), reimbursement in the amount of $75,000 for the increase in value of a residence sold during the marriage (the "Woodinville" house), and compensation in the amount of $5,500 for LaRoche's labor in preparing the Woodinville house for sale. *Id.* (docket no. 18-1 at 70-71). Hoffman unsuccessfully appealed, contending that both the Trilogy home and Woodinville house were his separate property. On cross-appeal, LaRoche was represented by a different attorney and argued that the trial court erred in concluding that the prenuptial agreement was enforceable, adding to the substantive and procedural challenges an argument that the agreement had been rescinded by the postnuptial conduct of the parties. In affirming the King County Superior Court's judgment, the Washington State Court of Appeals declined to address the rescission issue because it had been raised for the first time on appeal. 2012 WL 1699455 at *3.

Discussion

A. Summary Judgment Standard

The Court shall grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue

of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. *Id.* at 255, 257. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. *See Celotex*, 477 U.S. at 322.

B. Legal Malpractice

To establish a claim for legal malpractice, a plaintiff must prove the following four elements: (i) the existence of an attorney-client relationship giving rise to a duty of care on the part of the attorney toward the client; (ii) an act or omission by the attorney in breach of such duty of care; (iii) damage to the client; and (iv) a causal link between the attorney's breach of duty and the damage incurred. *E.g.*, *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). Washington courts apply an "attorney judgment rule," pursuant to which "mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986); *see Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, --- Wn. App. ---, 324 P.3d 743 (2014). The "attorney judgment rule" has particular relevance when the alleged error involves an "uncertain, unsettled, or debatable proposition of law." *Halvorsen*, 46 Wn. App. at 717.

To combat the "attorney judgment rule," a malpractice plaintiff must show either (a) the attorney's judgment was "not within the range of reasonable choices from the

perspective of a reasonable, careful and prudent attorney in Washington," or (b) even if the decision was within the range of reasonable choices, the attorney breached the standard of care in making the decision. *Clark County*, 324 P.3d at 752-53. To establish that the attorney's judgment was outside the range of reasonable choices, the plaintiff must do more than present opinions from experts who disagree with the decision; the plaintiff must submit evidence that "no reasonable Washington attorney would have made the same decision as the defendant attorney." *Id.* at 752. If the plaintiff proffers sufficient evidence to demonstrate a factual issue as to whether the judgment was within the range of reasonable choices and/or was the product of negligence, then the matter must be decided by a jury. *Id.* at 753.

In the legal malpractice arena, Washington courts strictly adhere to the "but for" standard of causation.[2] *Daugert v. Pappas*, 104 Wn.2d 254, 260-63, 704 P.2d 600 (1985); *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591-94, 999 P.2d 42 (2000). In most instances, the question of "but for" causation is one of fact for a jury. *Daugert*, 104 Wn.2d at 257. For example, when the alleged malpractice consists of an error during trial, the cause-in-fact issue to be decided by the jury is whether the client would have fared better "but for" the attorney's mishandling. *Id.* at 257-58. The jury in the malpractice action must evaluate what a reasonable trier of fact would have done "but

[2] Washington law recognizes two components of proximate causation, namely cause in fact and legal causation. *Brust v. Newton*, 70 Wn. App. 286, 292, 852 P.2d 1092 (1993) (citing *Hartley v. Wash.*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). Cause in fact refers to the consequences of an act or omission; legal causation involves the question of whether liability should attach to the act or omission in light of policy considerations, common sense, logic, precedent, and concepts of justice. *Hartley*, 103 Wn.2d at 778-79. The "but for" standard applies to the cause-in-fact side of the proximate cause equation. *Id.* at 778.

for" the attorney's negligence. *Id.* at 258. This methodology applies even if the fact finder in the underlying case was a judge rather than a jury. *Brust*, 70 Wn. App. at 287, 291-94.

In *Brust*, the malpractice plaintiff, William Brust, had been a party to a prenuptial agreement drafted by the defendant attorney, Henry T. Newton. When Brust was in the midst of a dissolution proceeding, he was advised by other lawyers that the prenuptial agreement was probably not enforceable because of both substantive and procedural unfairness. *Id.* at 287-88 & n.1. As a result, Brust abandoned attempts to enforce the prenuptial agreement and settled the dissolution proceeding. *Id.* at 288. He then sought damages against Newton. The trial court concluded that the issue of negligence was for the jury and the issues of proximate cause and damages were for the judge, but the trial court submitted the latter two issues to the jury so that a retrial would not be required if the bifurcation of decision-making responsibilities was reversed on appeal. *Id.* at 288-89. The jury found Newton negligent and awarded $46,364.47 in damages to Brust; the trial court calculated a different amount and entered judgment for $439,084. *Id.* at 289.

On appeal, in an effort to preserve the judgment, Brust argued that, because dissolution actions must be tried to a judge, *see* RCW 26.09.010(1), the questions of proximate cause and damages in a malpractice action must likewise be decided by a judge. 70 Wn. App. at 290. The Washington State Court of Appeals disagreed, reasoning that a case of malpractice, even though it involves the drafting of a prenuptial agreement, is not a dissolution action, but rather an action in tort, as to which the right to jury trial remains inviolate. *Id.* at 289-91 (citing Wash. Const. Art. 1, § 21). The *Brust*

Court explained that, in computing the amount of spousal support or dividing assets in a dissolution proceeding, the judge is deciding questions of fact, not law. *Id.* at 294. The jury in a subsequent malpractice action may determine what the result should have been in the dissolution proceeding "but for" the alleged negligence even though the original trier of fact was a judge. *Id.* at 293 ("there is no reason why a jury cannot replicate the judgment of another fact-finder, whatever its composition").

In contrast, when the proximate cause issue in a malpractice action involves legal expertise, the question whether, "but for" the attorney's negligence, the client would have achieved a better result must be answered by a judge. For example, in *Daugert*, the client prevailed in the trial court, but received an unfavorable ruling from the appellate court, and despite the client's immediately issued instructions, the attorney delayed in filing a petition for discretionary review by the Washington State Supreme Court and missed the deadline for doing so by one day. 104 Wn.2d at 255-56. In the subsequent malpractice action, the trial court submitted the issue of proximate cause to the jury, which found a twenty percent (20%) probability that the Supreme Court would have granted review and reversed the unfavorable ruling. *Id.* at 256. Judgment was entered against the attorney for $71,341.84, which was twenty percent (20%) of the damages incurred by the client plus the $5,000 retainer paid to the attorney to handle the underlying appeal; the attorney did not dispute that the retainer should have been refunded. *Id.* at 257 & n.1. On appeal, transferred pursuant to Washington Rule of Appellate Procedure 4.4, the Supreme Court reversed, concluding that the cause-in-fact inquiry, which required "an analysis of the law and the rules of appellate procedure," was "within the exclusive province of the court, not

the jury, to decide." *Id.* at 258. The *Daugert* Court also clarified that the "but for" test does not require certainty, but merely a showing that the alleged malpractice "more likely than not" caused the damage. *Id.* at 263.

A similar result was reached in *Nielson*. In *Nielson*, the clients secured a favorable judgment against Madigan Army Medical Center, but settled the matter while it was on appeal for 85.5% of the award to avoid the risk of losing on a statute of limitations issue. 100 Wn. App. at 588. In the subsequent malpractice action, the clients sought the difference between the judgment and the settlement amount, asserting that the attorney was negligent in advising them about the applicable limitation period. The trial court granted summary judgment in favor of the attorney and the Washington State Court of Appeals affirmed, reasoning that the proximate cause question constituted an issue of law requiring "special expertise," and that the attorney's negligence was not a "but for" cause of the clients' loss. *Id.* at 594-99.

C. Rescission of Prenuptial Agreement

In this case, LaRoche contends that Billbe committed malpractice by failing to advance the theory of rescission by conduct as a means of avoiding the effect of the prenuptial agreement. Under Washington law, the party seeking to enforce a prenuptial agreement bears the burden of establishing that it has been "strictly observed in good faith." *In re Marriage of Fox*, 58 Wn. App. 935, 938, 795 P.2d 1170 (1990); *In re Marriage of Sanchez*, 33 Wn. App. 215, 218, 654 P.2d 702 (1982). In both *Fox* and *Sanchez*, the prenuptial agreement was deemed rescinded by the parties' postnuptial conduct. In *Fox*, the wife transferred all of her separate funds to a community account,

and the funds were spent on *inter alia* improvements to the family home and the parties' living expenses; the husband inherited money during the course of the marriage and deposited it into the community account from which it was used by both parties for living expenses. 58 Wn. App. at 936-37. Because neither party observed the terms of the prenuptial agreement, evidencing the parties' mutual intent to abandon it, the *Fox* Court affirmed the trial court's decision that the agreement had been rescinded. *Id.* at 939-40.

Likewise, in *Sanchez*, the parties "did not mutually observe" the terms of the prenuptial agreement. 33 Wn. App. at 217. The agreement provided that each party's property acquired before marriage would remain separate, and it waived all rights arising "by virtue of the marital relation," including community property rights. *Id.* at 216. Approximately two years after the parties were wed, the wife pawned, among other items, a gold coin purchased before the marriage and then used the proceeds to make payment on the parties' home. *Id.* at 217. The husband subsequently redeemed the wife's pawned belongings and paid the premiums on a life insurance policy awarded to the wife prior to the marriage. *Id.* Moreover, both parties deposited funds, including the husband's personal income, into a joint account. *Id.* The *Sanchez* Court concluded that the wife, who sought to enforce the prenuptial agreement, was precluded from doing so by her own failure to observe the agreement in good faith. *Id.* at 218.

In moving for partial summary judgment, Billbe explains that he did not raise the issue of rescission in the dissolution proceeding because (i) it was unsupported by the evidence, LaRoche having testified in her deposition that she had adhered to all of the terms of the prenuptial agreement, and (ii) it would have undermined his credibility and

diverted attention away from the stronger arguments aimed at invalidating the prenuptial agreement. Billbe Decl. at ¶¶ 10-14 & Ex. 3 at 188:15-17 (docket no. 18). Under the "attorney judgment rule," to hold Billbe liable for any error in forming these judgments, LaRoche must show that either (a) no reasonable Washington attorney would have made the same decision, or (b) Billbe breached the standard of care in reaching this decision. The evidence LaRoche has proffered indicates merely that her expert, Emmelyn Hart, a partner at Lewis Brisbois Bisgaard & Smith, LLP who leads the firm's appellate practice, believes Billbe "should have made the argument" that, because Hoffman did not observe the terms of the prenuptial agreement, it was not enforceable. *See* Hart Decl. at ¶¶ 2 & 5(A) (docket no. 23). Such testimony does not negate the "attorney judgment rule." *See Clark County*, 324 P.3d at 752 ("Merely providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; the expert must do more than simply disagree with the attorney's decision. The plaintiff must submit evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney." (citations omitted)). The Court HOLDS as a matter of law that, pursuant to the "attorney judgment rule," LaRoche's malpractice claim against Billbe may not be premised on the decision not to pursue rescission of the prenuptial agreement.

Moreover, even if Billbe had argued for rescission, the result of the dissolution proceeding would have been the same, and LaRoche has not demonstrated a triable issue concerning proximate cause. The cause-in-fact analysis required in this case is similar to the evaluations necessary in *Daugert* and *Nielsen*, namely an assessment of how the

tribunal in the underlying matter would have decided an issue of law. This inquiry is for the Court, not a jury. *Daugert*, 104 Wn.2d at 258. With regard to the equitable remedy of rescission by conduct,[3] the ways in which Hoffman is alleged to have disregarded the prenuptial agreement are: (i) depositing community income into separate accounts; (ii) discontinuing required contributions to a retirement account in LaRoche's name; and (iii) using community property to improve the Woodinville house, which Hoffman owed before, and sold during, the marriage. *See* Respondent/Cross-Appellant Brief at 48-49, Ex. 13 to Billbe Decl. (docket no. 18-1). The Court is satisfied that the King County Superior Court would not have found these grounds for rescission persuasive.

Indeed, the King County Superior Court rejected the first accusation concerning the commingling of community and separate property. During trial on the dissolution matter, Billbe offered, on behalf of LaRoche, the expert testimony of Christien L. Drakeley, J.D., Ph.D, who traced how certain funds, including Hoffman's wages from the University of Washington ("UW"), flowed through the complex portfolio of assets owned by Hoffman and LaRoche. *See* Exs. B & C to Waid Decl. (docket nos. 22-2 & 22-3). In connection with the pending motion, neither party has provided a complete transcript of the King County Superior Court's oral ruling, but according to Billbe, the state court found the opinion of Hoffman's expert, Steven J. Kessler, CPA, more convincing, and

---

[3] Although the published authorities of *Fox* and *Sanchez* place the burden of proving "strict observance" of the prenuptial agreement on the party trying to enforce it, 58 Wn. App. at 938; 33 Wn. App. at 218, an unpublished decision suggests that the burden of establishing rescission by conduct is on the party seeking to invalidate the agreement. *In re Estate of Elvidge*, 2007 WL 4239791 at *5 (Wash. Ct. App. Dec. 4, 2007).

concluded that "the community benefitted from all of the community income" as well as from separate funds used to subsidize Hoffman's wages to "maintain the standard of living during the marriage." Billbe Dep. at 34:21-35:15, Ex. A to Waid Decl. (docket no. 22-1). Moreover, the judge did not believe any commingling was relevant to the final division of assets. *See id.* at 35:11-15 ("the fact that some community income, be them UW wages, for example, went through an account where also trust monies went was the tail wagging the dog, and . . . the court wasn't persuaded that that commingling was important to her final decision"). LaRoche does not dispute that the King County Superior Court discounted the allegation of commingling, and she makes no contention that she has any evidence of commingling other than what was considered during the dissolution proceeding.

With regard to the other two allegations relating to rescission, *i.e.*, that Hoffman ceased making required contributions to a retirement account for LaRoche's benefit, and used community assets, including LaRoche's labor, to improve his Woodinville house, the Court is persuaded that the King County Superior Court would not have viewed these breaches of the prenuptial agreement as evidence of mutual intent to abandon it. In this case, at least one party, namely LaRoche, abided by the terms of the prenuptial agreement and never took steps to modify it. LaRoche Dep. at 188:15-19, 188:25-189:1, 190:4-24, Ex. 3 to Billbe Decl. (docket no. 18). The Court therefore concludes that, even if the rescission theory had been raised during the dissolution proceedings, the King County Superior Court would have done exactly what it did, namely calculate the damages resulting from the breaches of the prenuptial agreement and require Hoffman to

compensate LaRoche in such amount. *See* Exs. 9 and 10 to Billbe Decl. (docket no. 18-1) (awarding LaRoche $75,000 for the increase in value of the Woodinville house, $5,500 as reimbursement for her labor in preparing the Woodinville house for sale, 60% of the community portion of Hoffman's UW TIAA/CREF retirement account (roughly $228,860), a Smith Barney IRA valued at $13,518, which had been Hoffman's separate property, and a Smith Barney IRA valued at $9,643).

Given the extensive nature of Hoffman's separate property, consisting of a residence in Sun Valley worth over $1.5 million, investment and trust accounts with an aggregate balance exceeding $12 million, retirement accounts containing $1.58 million, certain stock, share of a sailboat, and a timeshare interest, *see* Ex. 9 to Billbe Decl. (docket no. 18-1 at 60-61), the Court concludes that the minor ways in which Hoffman deviated from the provisions of the prenuptial agreement would not have convinced the King County Superior Court to grant LaRoche the equitable remedy of rescission. This case is entirely different from *Fox* and *Sanchez*, in which the failures to comply with the terms of the prenuptial agreement were mutual and involved virtually all of the parties' assets. To invalidate the prenuptial agreement in this matter on the minimal showing that LaRoche could have made, *i.e.*, unilateral as opposed to mutual departures from the agreement involving relatively small sums, and thereby permit LaRoche to seek an equal share of Hoffman's extensive assets, would have been inconsistent with the notions of

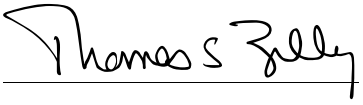
equity underlying the theory of rescission.[4] The Court therefore HOLDS as a matter of law that Billbe's decision not to advance the theory of rescission was appropriate and did not fall below the applicable standard of care, and that it was not the proximate "but for" cause of any damages sustained by LaRoche.

Conclusion

For the foregoing reasons, defendants' motion for partial summary judgment, docket no. 17, is GRANTED. Plaintiff's claim pleaded as Paragraph 4.1(A) of the Complaint, docket no. 1, is DISMISSED with prejudice. Plaintiff's claim pleaded as Paragraph 4.1(C) of the Complaint, to the extent it is based on the allegations in Paragraphs 3.15, 3.16, and 3.17 of the Complaint, is DISMISSED in part with prejudice. Defendants' motion does not address the additional contentions in the Complaint regarding alleged malpractice on the part of Billbe, and those issues must await further proceedings in this case.

IT IS SO ORDERED.

Dated this 17th day of July, 2014.



THOMAS S. ZILLY
United States District Judge

---

[4] As noted by the Washington State Court of Appeals, the ways in which the prenuptial agreement was intended to protect LaRoche's interests did not "play[ ] out as well as she might have hoped at the time she signed the agreement." 2012 WL 1699455 at *3. The lawsuit that had been pending before the marriage settled without a financial award to LaRoche, she chose not to work for most of the marriage and therefore did not acquire separate earnings, and as a result of legal restrictions, Hoffman could not continue contributing to the retirement account for LaRoche's benefit. *Id.* These developments, which were not anticipated at the time the prenuptial agreement was executed, and are only apparent with the benefit of hindsight, do not constitute a basis in equity for rescission.

SUPREME COURT OF THE STATE OF WASHINGTON

CATHERINE S. SHUBECK, Respondent, vs. JOHN R. SHUBECK AND SHELLY A. WILLIAMS Appellants.	:	No. 50979-2-II **DECLARATION OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that, on the date below, I did the following:

On the 17th day of MAY, 2019, I served a true copy of APPELLANTS' PETITION FOR REVIEW filed in this matter to Thomas L. Dashiell, attorney for the Respondent, by mailing it to the following address via U.S. Priority and Certified Mail:

920 Fawcett Ave., Tacoma, Washington 98402.

Dated: 5-17-2019

Signature: John R Shubeck

JOHN R. SHUBECK
Appellant, Pro se

JOHN SHUBECK - FILING PRO SE

May 17, 2019 - 9:12 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Catherine S Shubeck, Respondent v John R Shubeck & Shelly A Williams, Appellants (509792)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190517083134SC667126_1778.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 50979 2 II Petition for Review.pdf

A copy of the uploaded files will be sent to:

- jrshubeck@gmail.com
- tdashiell@dpearson.com

Comments:

Please note: The filing fee will be sent via U.S. Mail under a different cover.

Sender Name: John Shubeck - Email: jrshubeck@gmail.com
Address:
1350 Pilchuck Heights
Fox Island, WA, 98333
Phone: (253) 303-0135

Note: The Filing Id is 20190517083134SC667126