

Original

No. 35548-5-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

CLERK OF COURT
STATE OF WASHINGTON
BY: *CMC*

SAMUEL ANGELO AND SAM ANGELO CONSTRUCTION, INC.,

Appellants,

v.

MARILYN ANGELO,

Respondent.

OPENING BRIEF OF APPELLANT
SAMUEL ANGELO AND SAM ANGELO CONSTRUCTION, INC.

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A. INTRODUCTION

This case is the consolidation of a dissolution action and a civil suit involving 29 claims for relief allege violations of the Uniform Fraudulent Transfer Act RCW 19.40.011 et seq. (“UFTA”), tortious interference with a contract, fraudulent concealment, fraudulent transfer, fraudulent inducement, and failure to account. There are nine parties and two entities in this case, and only two do not have “Angelo” in his/her/its name. For clarity, we shall refer to all parties by their first names and the entities by acronyms (Sam Angelo Construction as “SAC” and Ted Angelo Brothers as “TAB”).

Sam and Marilyn entered final agreed orders February 12, 2002. The case soon returned to court on various motions relating to the property settlement before a new agreement was met. When the new agreement did not create the desired result, Marilyn re-motined to have the property settlement set aside and filed a civil suit against Sam, their business, his brothers, their business, his father, Gordon Foster, and all of the married men’s wives. The court consolidated the cases, vacated the property settlement, and dealt with a variety of pre-trial motions before starting a 13 day trial that spanned from May 9, 2005 to closing arguments on February 13, 2006. The trial court granted 14 claims, denied 13 claims, and failed to discuss 2 ½ claims.

The facts of this case fall somewhere between Wallace and Kaseburg, bridging the similar issues of those cases, and presents an issue of first impression concerning interpretation of the UFTA.¹

The trial court case is 20 volumes not including the trial exhibits. The hearing and trial transcripts are 16 volumes.² This is not as complex a case as it is voluminous. The hardest part is keeping track of the 29 claims and the related 32 properties. To assist you in this task, we have included a summary of the claims and properties following the Statement of Facts.

Although much of the 20 volumes of the trial court case has not been copied and sent to the Court of Appeals, the documents that make up the clerk's papers likely more than the Court would care to read. Much of the clerk's papers and transcripts are for reference and citation.

Below is a list of the clerk's papers and record that may assist the Court in putting the case in perspective: Decree of Dissolution (CP 59); Transcript of March 26, 2002 putting the amendments to the settlement contract on the record (RPP 3-10); Transcript of September 10, 2002 hearing on consolidating the cases (RPP 13-25); Memorandum in support of CR 12(b) motion (CP 151); Opposition to 12(b) Motion (CP 152);

¹ In re Marriage of Wallace, 11 Wn.App. 697, 45 P.3d 1131 (2002); Marriage of Kaseburg, 126 Wn.App. 546, 108 P.3d 1278 (2005).

² The hearings prior to the trial were transcribed by Linda Williams. The four volumes for hearings on 03/26/2002, 09/10/2002, 12/17/2004, and 12/29/2004 will be referred to as RPP. The trial transcripts and post-trial hearing transcripts were prepared by Evelyn Pierce. These twelve volumes of transcripts will be referred to as RPT.

Memorandum of Decision regarding 12b motion (CP 153); Closing Arguments of Marilyn and Sam (CP 344 and 347); Memorandum of Decision (CP 350); Findings of Fact and Conclusions of Law (CP 392); Judgment (CP 393).

B. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of February 7, 2003 granting Marilyn's motion for consolidation.
2. The trial court erred in denying Sam and SAC's CR 12(b)(6) motion to dismiss.
3. Error is assigned to Findings of Fact 6-10, 13-16, 18-22, 26, 29-31, 33-35, 37, 38, 40, 43, 45-50, and 52-56.
4. Error is assigned to Conclusions of Law 1-5, 10-12, 14, 15, 17, 18, 20, and 23-30.
5. Error is assigned to Judgments 1-3.
6. The trial court erred in entering the order of September 22, 2006 denying Sam and SAC's motion for reconsideration.
7. The trial court erred in entering the order of September 22, 2006 awarding \$194,014.52 in fee and \$8,650.05 in costs to Marilyn's attorneys.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court exceeded its jurisdiction under RCW 26.09.050(1) when it consolidated the dissolution action with tort claims involving different standards of proof, a right to jury trial, and multiple parties who would not have standing in the dissolution action? (Assignment of Error 1).
2. Whether the property before the court in a dissolution action is limited to the property of the parties not disposed of prior to trial? (Assignments of Error 3-7).
3. Whether the court in granting a claim must make factual findings on all of the elements of a claim to avoid a presumption that the burden of proof was not met? (Assignments of Error 3-7).
4. Whether the UFTA requires a claim to be in existence at the time the case alleging a violation of the UFTA is decided? (Assignment of Error 2).
5. Whether Sam is entitled to attorney fees and costs under RCW 26.09.140 and RAP 14.2? (Assignments of Error 1-7).

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C. STATEMENT OF THE CASE

STATEMENT OF FACTS

Marilyn and Sam were married on March 1, 1989 and separated on January 1, 2000. (CP 58, pg. 2). Marilyn met with her divorce attorney on June 8, 2001. (CP 368, pg. 1). Marilyn's attorney contacted a property valuation expert on June 12th. (Id., pg. 2). Marilyn talked to her attorney about status and tax issues on June 14th. (Id.). Sam filed for divorce on June 28th. (CP 2). Over the next few months, Marilyn began extensive discovery. (CP 368, pg. 2-10). On January 16, 2002, Marilyn's attorney reviewed the UFTA. (Id., pg. 10).

On February 11, 2002, Sam and Marilyn signed a nine page Separation Contract and all necessary final dissolution orders at Marilyn's attorney's office the same day that the documents were drafted. (CP 56-59; CP 368, pg. 12). The conference lasted two and a half hours. (CP 368, pg. 12). Sam did not have legal counsel. (CP 59, pg. 4).

As part of the settlement contract, Sam agreed to pay Marilyn maintenance to be secured by property located at Brandt Road (1903, 1921, and 1811 NE Brandt Road). (Id., pg. 10). Sam and Marilyn amended the agreement by adding an additional property as security for Sam's maintenance obligation on March 26, 2002 (RP 3-10). Both parties were represented by counsel. (CP 81).

On August 21, 2002, Marilyn motioned for relief from judgment because the additional property did not have adequate equity to secure Sam's maintenance obligation. (CP 85). Marilyn asked the court to set aside the property settlement so that the court could reach a fair and equitable distribution of all assets of the marriage. (CP 90, pg. 5-6, ¶ 19). Marilyn also filed a civil suit against Sam, SAC, Lewis, Miki, Joseph, TAB, Theodore, Maryjane, Gordon, and Sherryl the following day under the UFTA. The civil complaint also alleged tortuous interference with a contract, fraudulent concealment, fraudulent inducement, and failure to account. (CP 162)³. Marilyn claimed that community property had been transferred without her consent or by fraudulent inducement for no consideration or less than fair market value to prevent her from receiving her share through the divorce property settlement. (Id).

On March 29, 2002, Marilyn filed a motion to consolidate the cases. (CP 94). The court heard motions to consolidate the cases, vacate the property settlement, and a motion for contempt regarding spousal support on September 10, 2002. (CP 100; RPP 13-73).

Marilyn argued that consolidation was appropriate because there were common if not identical issues of law and fact. (RPP 13, lines 15-

³ CP 162 referred to Marilyn's Amended Complaint. The original complaint was filed in the civil case prior to the consolidation.

16). She argued that CR 42 gave the court broad discretion to consolidate and no case law prohibited consolidation. (RPP 13, lines 9-11; RPP 14, lines 10-11).

Sam argued against consolidation because the cases that had allowed consolidation involved identical parties, and in the civil case he would have a right to a jury trial, while that is not a right in a divorce proceeding. (RPP 15, lines 19-24; RPP 16, lines 20-23).

The court did not rule on the motion to consolidate at the hearing because it wished to go back and read the particulars of the cases argued. (RPP 25, lines 3-5). Argument was heard on the contempt motion though no ruling was made because further discovery was necessary to determine if support payments had been made or not. (RPP 26-37).

The court also heard argument on Marilyn's motion to vacate the property settlement. (RPP 37-73). Marilyn asked the court to vacate the property settlement and withhold further property settlement decision until the fraudulent transfer case was resolved. (RPP 43, lines 12-22).

Sam argued against vacating the property settlement because divorcing parties have a duty to value assets prior to settlement and Marilyn chose not to continue discovery or complete the property valuations prior to entry the final decree. (RPP 48-49).

The judge and attorneys discussed the option of using another property to secure the obligation. (RPP 67-72). Marilyn questioned whether future agreement could be trusted and requested the property settlement be set aside so that she had an open case to conduct discovery into all of the properties in Sam's name. (RPP 67, lines 11-18; RPP 71, lines 17-21). Sam asked to have the opportunity to look into the equity available in other properties to use as a substitute. (RPP 72, lines 18-23).

The court consolidated the cases in its order of February 7, 2003 and vacated the property settlement in the order entered on April 18, 2003. (CP 112; CP 121). No record exists for hearing on April 18, 2003 during which the court set aside the property portions of the divorce settlement contract.⁴ Sam was representing himself pro se at the April 18th hearing. (CP 125, pg. 2, ¶ 2).

On June 3, 2003, the court ordered Sam to pay Marilyn \$7,500.00 in temporary attorney fees to assist her in dealing with the financial transactions that occurred. (CP 126).

On May 10, 2004, Sam filed a motion to dismiss under CR 12(b)(6). (CP 149). Sam argued that without the property settlement

⁴ The hearing was not captured on any of Judge Harris' records on April 18, 2003, though the clerk's record reflects the hearing notes (CP 122). See 2nd Statement of Arrangement filed in this case for a declaration from the court concerning the missing record.

Marilyn no longer had a no claim and therefore there was no creditor or debtor as necessary under the UFTA. (CP 125).

The court denied the motion and found that Marilyn was a creditor because at the time of the conveyances she had an interest in, a tenancy in common, or a financial offset due to the fact that the property contained in the settlement agreement had been encumbered or transferred without her authority. (CP 153).

Marilyn filed an Amended Complaint on July 23, 2004. (CP 162). Sam filed an Answer on September 1, 2004. (CP 169).

Sam motioned to exclude all testimony of Marilyn's sister, Judy Hockett, who had had detailed discussions with Marilyn and her attorney about the divorce and fraud law suit. (CP 181). Theodore and Maryjane motioned the court to make conversations between Marilyn, Judy, and Marilyn's attorney discoverable, as well as conversations between Marilyn and Judy, or to exclude all information obtained during those conversations. (CP 183). Marilyn objected to Theodore and Maryjane's motion in limine because it was did not specifically describe the evidence sought to be excluded. (CP 188).

After a brief hearing on December 17, 2004, the court entered an order stating that conversations between Marilyn's counsel and third party opponents were not privileged. (RPP 90-91; CP 201). This issue of

privileges was address in more detail on December 29, 2004. (CP 213A; RPP 95-116). The issue was whether conversations between Marilyn, Marilyn's sister, Judy, and her divorce attorney could be admissible in relation to Marilyn's knowledge of the property involved in the UFTA action prior to signing the original settlement contract. (Id). The court states that it is inclined to find that a privileged exists. (RPP 110, lines 14-19).

In late December 2004, Sam, SAC, Lewis, Miki, Joseph, TAB, Theodore, Maryjane, Gordon, and Sherryl filed motions for summary judgment. (CP 218; CP 237; CP 212; CP 214). Marilyn filed objections and supporting declarations to all of the motions. (CP 241, 242, 243, 244, 249, 254, 257, 258, 259). The court issued its decision on February 18, 2005. (CP 278).

The court granted the motion for summary judgment insofar as Gordon and Sherryl Foster and denied the other motions. (CP 278; CP 295). The court found that the two properties were acquired so that the Fosters and SAC had an equal interest in both, and then transferred for no consideration so the each party had interest in an individual home. (CP 278, pg. 2). The court also doubted whether the Fosters knew about the estrangement between Sam and Marilyn. (Id). The court denied the other motions because there were issues of fact that could not be decided without an evidentiary hearing. (Id, pg. 2-3).

Sam, SAC, Lewis, Miki, Joseph, TAB, Theodore, and Maryjane filed motions for reconsideration. (CP 284, 287, 288). Marilyn opposed the motions. (CP 294). The court denied the request to have oral arguments and also denied requests to extend time to request a jury trial. (CP 296). No order was entered in regard to the outcome of the motions to reconsider the decision of February 17, 2005.

Sam, SAC, Theodore, Maryjane, and Marilyn filed Notices of Intent to Rely on ER 904 and Marilyn filed objections to both Sam and SAC's, and Theodore and Maryjane's notices. (CP 310, 313, 315; CP 314, 317).

Trial began on May 9, 2005 with discussion of the ER 904 Notices, opening statements from all but counsel for Theodore and Maryjane, who reserved, and direct examination of Sam. (CP 325A; RPT 1-172). May 10th and 11th consisted of cross examination and redirect of Sam. (CP 325A; RPT 198-563). Lewis took the stand on May 12th. (CP 325A; RPT 563-734).

May 23rd began with a discussion of ER 904 and Mr. Riley, an appraiser. (CP 325A; RPT 734). Next Lewis, Theodore, and Maryjane each took the stand. (CP 325A; RPT 735-810; RPT 810-906; RPT 906-938). Maryjane took the witness stand again on May 24th. (CP 325A; RPT 938-1086). Following Maryjane's testimony there was a discussion

of future witnesses. (CP 325A; RPT 1086-1141). May 25th opens with additional testimony by Maryjane before the Marilyn rests. (CP 325A; RPT 1148-1182). Lucinda Baumgarten, bookkeeper for SAC and formerly for TAB takes the stand for the remainder of May 25th. (CP 325A; RPT 1186-1288).

The trial picks back up on July 20, 2005 with testimony from Ms. Baumgarten, Kay Kamer (former branch manager for Northwest National Bank), and Larissa Golden (lead associate at Umqua Bank and former employee of Centennial Bank). (CP 330; RPT 1341-1462; RPT 1462-1472; RPT 1472-1490). Ms. Baumgarten re took the stand on July 21st. (CP 330; RPT 1490-1595). Robert Seth, CPA, takes the stand (non-parties are dismissed), but is dismissed during the offer of proof. (CP 330; RPT 1596-1643). Testimony from Gordon Foster finishes the day. (CP 330; RPT 1643-1672).

On December 19, 2005, Sam again takes the witness stand. (CP 342; RPT 1673-1726). Ms. Baumgarten is on the witness stand for much of December 20th, followed by Marilyn. (CP 342; RPT 1727-1890⁵; RPT 1890-1921). Marilyn takes the stand on December 21st before the parties rest. (CP 342; RPT 1921-1971). The court reconvened on February 13,

⁵ The Report of Proceedings volumes X and XI erroneously state that the record from December 20th and 21st occurred on January 20th and 21st. The table of content of volumes XI and XII may be swapped.

2006 to hear oral summary of the closing arguments previously submitted in writing. (CP 344-349; RPT 1997-2060).

The court issued a written decision on May 10, 2006 granting 14 of the 29 claims. (CP 350). The order of May 10, 2006 awarded Marilyn a judgment against Sam and SAC for \$396, 786.00, a judgment against TAB of \$361,337.00, and a judgment of \$25,750.00 against Theodore (judgments against TAB and Theodore are joint and several with Sam and SAC and not in addition to the judgment against Sam and SAC). (*Id.*, pg. 14).

Marilyn filed a motion for clarification asking if the court also intended to set aside the transfers of property that it had found to be fraudulently transferred under the UFTA. (CP 354). Sam, SAC, Lewis, Miki, Joseph, TAB, Theodore, and Maryjane filed motions for reconsideration. (CP 355, 356, 358). Sam and SAC asked for reconsideration under CR 59(a) and pointed out ambiguities in the manner that the court calculated the judgment amount in relations to the values described in the Memorandum of Decision. (CP 358). Lewis, Miki, Joseph, and TAB asked the court to reopen the case to allow additional evidence. (CP 373). Marilyn also filed a motion for attorney fees. (CP 363).

The court heard the motions on August 11, 2006. (CP 381; RPT 2099-2135). The court denied the motion to reopen because the evidence was in existence at the time of the trial. (CP 382, pg. 2). The September 22, 2006 decision also denied the motions for reconsideration, stating that CR 59 was not applicable and many of the arguments submitted were a do-over of the arguments presented during the trial. (Id., pg. 2-3). The court clarified that the Ivy property was part of the judgment, and readjusted the judgment against TAB to \$334, 941.00. (Id., pg. 3). As for attorney fees and costs, the court awarded \$150,000.00 to Marilyn's civil attorney, \$44,014.52 to her divorce attorney, and \$8,650.05 in costs. (Id.).

Findings of Facts and Conclusions of Law, and a judgment were entered at a hearing on October 13, 2006. (CP 392-393; RPT 2135-2148). Sam and SAC objected to the wording of the Findings of Facts and Conclusions of Law, but the court signed the Findings of Facts and Conclusions of Law as drafted by Marilyn's attorneys because no other version was presented. (RPT 2146).

SUMMARY OF CLAIMS & PROPERTIES

For each claim for relief described in Marilyn's Amended Complaint, below describes the property(ies) involved, the wrong doing alleged, the defendant(s) name, the date the property was transferred, the

outcome at trial, and the award or equity (“value”) to be divided as described in the final orders.⁶

First Claim For Relief⁷ (alleged: violation of UFTA)

Properties: 1811 Brandt Rd, 1903 Brandt Rd, 1921 Brandt Rd⁸

Defendants: Sam, SAC, Lewis, Miki, and Joseph

Date: 02/13/2002 Outcome: Granted Value: \$452,992.00

Second Claim For Relief⁹ (alleged: violation of UFTA)

Property: 9500 SE Evergreen Highway

Defendants: Sam, SAC, and Theodore

Date: 10/24/2000 Outcome: Granted Value: \$109,363.68

Third Claim For Relief¹⁰ (alleged: violation of UFTA)

Property: 6908 NE 124th Avenue

Defendants: Sam, SAC, Lewis, and Miki

Date: 04/30/2001 Outcome: Granted Value: \$51,390.00¹¹

Forth Claim For Relief¹² (alleged: violation of UFTA)

Property: 6910 NE 124th Avenue

⁶ Amounts described in the Memorandum of Decision (CP 350) and Findings of Fact and Conclusions of Law (CP 392) as being either the equity in the property(ies) at the time of transfer to be now divided, or the share of such equity now being awarded to Marilyn.

⁷ CP 162, pg. 2-4; CP 350, pg. 6; CP 392, pg. 4-5, ¶17-19, and pg. 10, ¶ 1.

⁸ Same properties described in claim 11.

⁹ CP 162, pg. 2-4; CP 350, pg. 6-7; CP 392, pg. 5, ¶ 20, and pg. 10-11, ¶ 2-4.

¹⁰ CP 162, pg. 5-6; CP 350, pg. 7; CP 392, pg. 5, ¶ 21-22, and pg. 11, ¶ 5.

¹¹ Claims 3 and 4 were discussed together in the final orders with the award of \$51,390.00 covering both claims.

¹² CP 162, pg. 6-8; CP 350, pg. 7; CP 392, pg. 5, ¶ 21-22, and pg. 11, ¶ 5.

Defendants: Sam, SAC, Lewis, and Miki

Date: 05/18/2001 Outcome: Granted Value: \$51,390.00¹³

Fifth Claim For Relief¹⁴ (alleged: violation of UFTA)

Property: 1403 N 4th St

Defendants: Sam, SAC, Lewis, and Miki

Date: 06/01/1998 Outcome: Denied

Sixth Claim For Relief¹⁵ (alleged: violation of UFTA)

Property: 3108 "H" Street

Defendants: Sam, Gordon, Sherryl

Date: 09/21/2000 Outcome: Denied

Seventh Claim For Relief¹⁶ (UFTA)

Property: 3519 East 21st¹⁷

Defendants: Sam, Gordon, Sherryl, Theodore, and Maryjane

Date: 04/20/2001 Outcome: Denied

Eighth Claim For Relief¹⁸ (UFTA)

Property: 142 Greenbriar Lane

Defendants: Sam, Theodore, and Maryjane

¹³ Claims 3 and 4 were discussed together in the final orders with the award of \$51,390.00 covering both claims.

¹⁴ CP 162, pg. 8-9; CP 350, pg. 7-8, CP 392, pg. 5, ¶ 23, and pg. 11, ¶ 6.

¹⁵ CP 162, pg. 9-10; CP 350, pg. 8; CP 392, pg. 5, ¶ 24. Not discussed in Conclusions of Law.

¹⁶ CP 162, pg. 10-11; CP 350, pg. 8; CP 392, pg. 5-6, ¶ 24-25, and pg. 11, ¶ 7.

¹⁷ Same property as described in claim 12.

¹⁸ CP 162, pg. 11-12; CP 350, pg. 9; CP 392, pg. 6, ¶ 27, and pg. 11, ¶ 8.

Date: 03/29/2001 Outcome: Denied

Ninth Claim For Relief¹⁹ (UFTA)

Property: 615 SE Polk Street

Defendants: Sam, Lewis, and Miki

Date: 02/15/2000 Outcome: Denied

Tenth Claim For Relief²⁰ (UFTA)

Property: 4801 NE 118th Court

Defendants: Sam, Lewis, and Miki

Date: 02/11/2001 Outcome: Granted Value: \$43,500.00

Eleventh Claim For Relief²¹ (Tortuous Interference with Contract)

Property: 1811 Brandt Rd, 1903 Brandt Rd, 1921 Brandt Rd²²

Defendants: Lewis, Miki, and Joseph

Date: 02/13/2002 Outcome: Unknown²³

Twelfth Claim For Relief²⁴ (Tortuous Interference with Contract)

Property: 3519 East 21st²⁵

Defendants: Gordon, Sherryl, Theodore, and Maryjane

¹⁹ CP 162, pg. 12-13; CP 350, pg. 9-10; CP 392, pg. 6, ¶ 28, and pg. 11, ¶ 9.

²⁰ CP 162, pg. 14-15; CP 350, pg. 10; CP 392, pg. 6, ¶ 30, and pg. 12, ¶ 11.

²¹ CP 162, pg. 15.

²² Same properties as described in claim 1.

²³ While the Brandt Road properties are discussed in the final orders in relation to claim 1, the claim for tortuous interference with contract is not addressed. (CP 350, pg. 6; CP 392, pg. 4-5, ¶ 17-19, and pg. 10, ¶ 1).

²⁴ CP 162, pg. 15-16; CP 350, pg. 8; CP 392, pg. 5-6, ¶ 24-25, and pg. 11, ¶ 7.

²⁵ Same property as described in claim 7.

Date: 04/20/2001 Outcome: Denied

Thirteenth Claim For Relief²⁶ (UFTA)²⁷

Property: 8519 NE 63rd Street

Defendants: TAB, Lewis, Miki, Sam, and Joseph

Date: 07/17/2002 Outcome: Granted Value: \$11,000.00²⁸

Fourteenth Claim For Relief²⁹ (UFTA)³⁰

Property: 8601 NE 63rd Street

Defendants: TAB, Lewis, Miki, Sam, and Joseph

Date: 07/17/2002 Outcome: Granted Value: \$11,000.00³¹

Fifteenth Claim For Relief³² (Fraudulent Concealment & Accounting)

Property: 3803 NE 52nd Street

Defendants: Sam, SAC, and Theodore

Date: 02/07/2003 Outcome: Granted Value: \$44,514.12³³

Sixteenth Claim For Relief³⁴ (Fraudulent Inducement & Accounting)

Property: 213 Cloverdale

²⁶ CP 162, pg. 16-17; CP 350, pg. 10-11; CP 392, pg. 6, ¶ 31, and pg. 12, ¶ 12.

²⁷ Fraudulent Concealment was also alleged in the Amended Complaint (CP 162, pg. 16), but was not addressed in Marilyn's written Closing Argument (CP 334, pg. 61).

²⁸ Claims 13 and 14 were discussed together with the award of \$11,000.00 covering both claims. Full amount awarded to Marilyn.

²⁹ CP 162, pg. 17-18; CP 350, pg. 10-11; CP 392, pg. 6, ¶ 31, and pg. 12, ¶ 12.

³⁰ Fraudulent Concealment was also alleged in the Amended Complaint (CP 162, pg. 17), but was not addressed in Marilyn's written Closing Argument (CP 334, pg. 69).

³¹ Claims 13 and 14 were discussed together with the award of \$11,000.00 covering both claims. Full amount awarded to Marilyn.

³² CP 162, pg. 18-19; CP 350, pg. 12; CP 392, pg. 7, ¶ 37, and pg. 12, ¶ 17.

³³ \$29,714.12 + \$14,800.00 = \$44,514.12

³⁴ CP 162, pg. 19; CP 350, pg. 12; CP 392, pg. 7, ¶ 32, and pg. 12, ¶ 13.

Defendant: Sam

Date: 06/30/1999 Outcome: Denied

Seventeenth Claim For Relief³⁵ (Fraudulent Inducement & Accounting)

Property: 215 Cloverdale

Defendant: Sam

Date: 10/04/1999 Outcome: Denied

Eighteenth Claim For Relief³⁶ (Fraudulent Transfer)³⁷

Property: 116 & 118 Old Spreadborough Road

Defendants: Sam and Theodore

Date: 04/10/2000 Outcome: Granted³⁸ Value: Unstated

Nineteenth Claim For Relief³⁹ (Fraudulent Inducement & Accounting)

Property: 526 2nd Place, 534 2nd Place, and 338 Ivy⁴⁰

Defendants: Sam

Date: 08/31/2000 Outcome: Granted Value: \$22,000.00

Twentieth Claim For Relief⁴¹ (Fraudulent Concealment & Accounting)

Property: 570 2nd Place North

³⁵ CP 162, pg. 19; CP 350, pg. 12; CP 392, pg. 7, ¶ 32, and pg. 12, ¶ 13.

³⁶ CP 162, pg. 20-21; CP 350, pg. 10; CP 392, pg. 6, ¶ 29, and pg. 11-12, ¶ 10.

³⁷ Violation of UFTA was also alleged in the Amended Complaint (CP 162, pg. 20), but was not addressed in Marilyn's written Closing Argument (CP 334, pg. 79).

³⁸ The final orders do not discuss 118 Old Spreadborough Road, only 116 Old Spreadborough Road.

³⁹ CP 162, pg. 21; CP 350, pg. 11; CP 392, pg. 7, ¶ 33-34, and pg. 12, ¶ 14.

⁴⁰ Also referred to as Lots 4-7, Block 3, IMUS ADDITION, and Lots 7-9, Block 4, IMUS ADDITION.

⁴¹ CP 162, pg. 21-22.

Defendants: Sam and SAC

Date: 02/25/2000 Outcome: Unknown⁴²

Twenty-first Claim For Relief⁴³ (Fraudulent Concealment & Accounting)

Property: 334 Ivy

Defendants: Sam, SAC and TAB

Date: 04/07/2000 Outcome: Granted Value: management fee⁴⁴

Twenty-second Claim For Relief⁴⁵ (Fraudulent Concealment & Accounting)

Property: 801 SE 110th Avenue

Defendants: Sam, Lewis, Miki, Joseph, and Theodore

Date: 05/17/2000 Outcome: Granted Value: \$4,000.00⁴⁶

Twenty-third Claim For Relief⁴⁷ (Fraudulent Concealment & Accounting)

Property: 720 SE 125th Avenue

Defendants: Sam and SAC

Date: 05/07/1999 Outcome: Denied

Twenty-fourth Claim For Relief⁴⁸ (Fraudulent Concealment & Accounting)

Property: 6411 NE 217th Court

⁴² Final orders do not discuss this property.

⁴³ CP 162, pg. 22; CP 350, pg. 11-12; CP 392, pg. 21, ¶ 7, and pg. 12, ¶ 15.

⁴⁴ The court found that the property had an equity of \$100,279.00 when sold by TAB and that a management fee should have gone to SAC (CP 350, pg.11; CP 392, pg. 7, ¶35, and pg. 12, ¶ 15).

⁴⁵ CP 162, pg. 22-23; CP 350, pg. 22; CP 392, pg. 8, ¶ 40, and pg. 12-13, ¶ 20.

⁴⁶ Full amount awarded to Marilyn.

⁴⁷ CP 162, pg. 23; CP 350, pg. 11; CP 392, pg. 7, ¶ 36, and pg. 12, ¶ 16.

⁴⁸ CP 162, pg. 24; CP 350, pg. 11; CP 392, pg. 7, ¶ 36, and pg. 12, ¶ 16.

Defendants: Sam

Date: 10/29/1999 Outcome: Denied

Twenty-fifth Claim For Relief⁴⁹ (Fraudulent Concealment & Accounting)

Property: 1339 China Garden Road

Defendants: Sam and SAC

Date: 08/08/2001 Outcome: Granted Value: \$45,807.00

Twenty-sixth Claim For Relief⁵⁰ (Fraudulent Concealment & Accounting)

Property: 693 Gore Road

Defendants: Sam and SAC

Date: 04/12/2000 Outcome: Denied

Twenty-seventh Claim For Relief⁵¹ (Fraudulent Concealment & Accounting)

Property: 206 Kilkelly Road

Defendants: Sam and SAC

Date: 08/30/2000 Outcome: Denied

Twenty-eighth Claim For Relief⁵² (Fraudulent Concealment & Accounting)

Property: 208 Kilkelly Road

Defendants: Sam and SAC

Date: 01/16/2001 Outcome: Denied

⁴⁹ CP 162, pg. 24-25; CP 350, pg. 12-13; CP 392, pg. 7, ¶ 38, and pg. 12, ¶ 18.

⁵⁰ CP 162, pg. 25; CP 350, pg. 13; CP 392, pg. 7-8, ¶ 39, and pg. 12, ¶ 19.

⁵¹ CP 162, pg. 26; CP 350, pg. 13; CP 392, pg. 8, ¶ 41, and pg. 13, ¶ 21.

⁵² CP 162, pg. 26-27; CP 350, pg. 13; CP 392, pg. 8, ¶ 42, and pg. 13, ¶ 22.

Twenty-ninth Claim For Relief⁵³ (Fraudulent Concealment & Accounting)

Property: 145 Spencer Creek Road

Defendants: Sam and SAC

Date: 09/17/2000 Outcome: Granted Value: \$16,500.00⁵⁴

SUMMARY OF OUTCOME

Total Claims: 29 Granted: 14 Denied: 13 Unknown Outcome: 2 ½⁵⁵

Total Claims Against Sam: 27 Total Claims Against SAC: 14

Judgment Granted: \$396,786.00⁵⁶ (\$599,450.57 with fees and costs)

Attorney Fees Requested: \$160,754.85⁵⁷ + \$54,834.52⁵⁸ = \$215,589.37

Attorney Fees Granted: \$194,014.52⁵⁹ (\$150,000.00 + \$44,014.52)

Costs Requested: \$8,673.05⁶⁰ Costs Granted: \$8,650.05⁶¹

⁵³ CP 162, pg. 27; CP 350, pg. 29; CP 392, pg. 8, ¶ 43, and pg. 13, ¶ 23.

⁵⁴ Full amount awarded to Marilyn.

⁵⁵ The final orders do not discuss tortious interference with contract as alleged in claim 11 in relation to the Brandt Road properties (CP 350, pg. 6; CP 392 pg. 4-5, ¶ 17-19, and pg. 10, ¶ 1). The discussion of claim 18 is ambiguous because the final orders only describes one of the two properties (CP 350, pg.10; CP 392, pg. 6, ¶ 29, and pg. 11-12, ¶ 10). Claim 20 is not discussed in the final orders (570 2nd Place North).

⁵⁶ CP 350, pg. 14; CP 392, pg. 9-10, ¶ 52-54, and pg. 13-14, ¶ 24-30; CP 393.

⁵⁷ CP 366, pg. 2, ¶ 2.

⁵⁸ CP 368, pg. 37, ¶ 2.

⁵⁹ CP 382, pg. 3; CP 392, pg. 9-10, ¶ 48-54, and pg. 13-14, ¶ 25-30; CP 393, pg. 2-3.

⁶⁰ The cost bill submitted by Marilyn showed a total of \$12,558.91 in costs and a note that the amount was less the lined out items (CP 357, pg. 6). A declaration by Terry Lee stated that the cost bill total minus the lined out items came to \$8,655.05 (CP 362, pg. 2). Double checking with the assistance of an Excel spread sheet, the Cost Bill included \$3,885.86 lined out items for a true total of \$8,673.05.

⁶¹ CP 382, pg. 3-4; CP 392, pg. 10, ¶ 54, and pg. 14, ¶ 30; CP 393.

D. SUMMARY OF ARGUMENT

There are four primary mistakes that occurred at the trial court. The court first erred when it consolidated the dissolution action with the tort claims. The second mistake was making rulings regarding property that could not be before the court in a dissolution action. The third error is found in the final decisions and orders of the court that omitted to find factual determinations on all of the elements of the claims granted.

The fourth mistake is an issue of first impression. There is no case law concerning the definition of a *claim* or *creditor* under the UFTA. There is also no case law and little statutory direction to clarify whether the UFTA can apply to situations where the order creating a claim has been vacated prior to the UFTA action being decided.

This brief will address these four principal errors that occurred during the trial court proceedings and show why the trial court decision should be reversed.

E. ARGUMENT

1. STANDARD OF REVIEW

Factual findings of a trial court are reviewed under a substantial evidence standard. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123-24, 615 P.2d 1279 (1980). Evidence is substantial if it is sufficient to

persuade a fair-minded person. Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Legal determinations of a trial court are reviewed de novo. Mt. Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

RCW 26.09.080 gives the trial court broad discretion to evaluate and distribute the parties' property and liabilities and such determinations are held to a manifest abuse of discretion standard. In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). The trial court manifestly abuses its discretion if it makes an untenable or unreasonable decision. In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

Fee awards are reviewed for abuse of discretion. In re Estate of Larson, 103 Wn.2d 517,521, 694 P.2d 1051 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, or if its decision is based on an erroneous view of the law. In re Marriage of Rusch, 124 Wn. App. 226, 231, 98 P.3d 1216 (2004).

Statutory meaning is a question of law and is therefore reviewed de novo. In re Parentage of J.M.K., 155 Wn.2d 374, 387, 119 P.3d 840 (2005) (citing King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 142 Wn.2d 543, 555, 14 P.3d 133 (2000); Dioxin/Organochlorine Ctr.

v. Pollution Control Hr'gs Bd., 131 Wn.2d 345, 352, 932 P.2d 158 (1997)).

2. CONSOLIDATION OF THE DISSOLUTION ACTION AND TORT CLAIMS IS PROHIBITED BY STATUTE AND CASE LAW

RCW 26.09.050(1) grants the court many powers in dissolution cases, and give no authority to resolve tort claims. In Marriage of Kaseburg, the court discussed how a separate tort action should have been brought rather than asking the court to adjudicate fraud claims with dissolution the property settlement. 126 Wn.App. 546, 557, 108 P.3d 1278 (2005). In footnote 7, the court states:

“An equitable action for dissolution cannot be joined or tried with a legal tort or fraud claim. RCW 26.09.050(1); see also In re Marriage of J.T., 77 Wn. App. 361, 362-63, 891 P.2d 729 (1995) (fraud and dissolution actions tried separately); Plankel v. Plankel, 68 Wn. App. 89, 95, 841 P.2d 1309 (1992) (rejecting respondent's suggestion that "consolidation of the interspousal tort and dissolution actions is workable or desirable"). There is no right to a jury trial in a dissolution action and the court cannot consider a party's fault, such as immoral or abusive conduct. RCW 26.09.010(1), .080. A tort claimant is typically entitled to a jury trial and the plaintiff must prove fault, negligence, or strict liability. Edgar v. City of Tacoma, 129 Wn.2d 621, 627-28, 919 P.2d 1236 (1996); see also CR 38.

Id. at 562. Kaseburg is very similar to this case because both deal with divorce actions where the wife alleged fraud and other financial

misconduct and the trial courts made rulings about property disposed of prior to trial.

Almost two years prior to the Kaseburg decision, but well after the decisions cited in footnote 7 and the passage of RCW 26.09.050, the court granted Marilyn's Motion to Consolidate Cases. (CP 112). The order basis its ruling on CR 42(a), that there are common issues of law or fact, that it will simplify discovery and improve efficiency, and because of the relationship between the timing of the alleged fraudulent transfers and the dissolution. (CP 112, pg. 2, lines 15-21).

The trial court's decision to consolidate the cases was an erroneous legal finding subject to de novo review. Sam argued that the trial court did not have any power that could not be inferred from the divorce act and whether it exceeded its jurisdiction must be determined from the language of the act. (RPP 16:6-13). We ask the court to find error in the trial court's Order Granting Marilyn Angelo's Motion to Consolidate entered on February 7, 2003.

3. PROPERTY DISPOSED OF PRIOR TO TRIAL IS NOT BEFORE THE COURT IN A DISSOLUTION ACTION

RCW 26.09.080 give the trial court broad discretion to distribute the parties' property and liabilities in a dissolution action. "When

exercising this broad discretion, a trial court focuses on the assets then before it - i.e., on the parties' assets at the time of trial. If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." In re Marriage of White, 105 Wn. App. 545, 549, 20 P.3d 481 (2001) (footnote omitted).

Two recent cases with facts and allegations similar to the case at bar deal with the issue of which property is properly before the court in a dissolution action.

In Wallace, the trial court found that the husband wasted and attempted to conceal assets to such an extent that the trial judge began his oral ruling by stating that it was the most disturbing domestic relations case that he had ever heard. In re Marriage of Wallace, 11 Wn.App. 697, 708, 45 P.3d 1131 (2002). The trial court awarded the husband his business that he had been working so hard to de-value, ordered him to pay a judgment he incurred for the community, and an equalizing property settlement payment to his wife and her attorney fees. Id. at 704. The wife was awarded two properties with an adjudicated value of zero. Id. at 703-704.

The husband argued on appeal that the trial court had disestablished a third party's property rights when it awarded property to the wife that he had transferred to his father prior to the trial. Id. at 709.

This court found that the trial court did not determine the right of any nonparty because the court expressly stated that it lacked the authority to set aside the conveyance the husband made to his father. Id. at 710. The trial court stated the wife was going to have to bring a separate fraudulent conveyance action against and noted in its reasoning for valuing the property at zero that it was in part to offset the litigation expenses she might incur setting aside the conveyance. Id. at 704 and 709.

This court affirmed the trial court's decision to award an interest in property that had likely been fraudulently conveyed to a third party in the dissolution because the trial court did not try to set aside the conveyance or otherwise distribute property, only a future interest in the outcome of a fraudulent conveyance case.

In Kaseburg, the trial court found that the husband has committed fraud, waste and financial misconduct and gave the wife a judgment for her community interest the former family home. Marriage of Kaseburg, 126 Wn.App. 546, 108 P.3d 1278 (2005). This court reversed because after the foreclosure by the husband's father, which occurred prior to the trial, the home was no longer before the court. Id. at 556.

In this case, all of the properties described in the complaint were transferred prior to the trial on May 9, 2005. (CP 162). By the time that Marilyn filed her tort action, properties described in 9 of the claims were

beyond the three year statute of limitation for fraud. (CP 347, pg. 22, lines 18-23). None of the 32 properties could be properly before the trial court in a dissolution action because they had all been transferred prior to the trial. That is not to say that Marilyn had no method for seeking damages if the properties had been fraudulently transferred. Wallace shows that there are many creative ways that the trial court can address fraudulent transfers without seeking to adjudicate torts in a dissolution action.

Because the property described in Marilyn's complaint could not have been before the court in a pure dissolution action, we ask this Court to reverse the trial court's ruling and find that the case law of dissolution actions can not be circumvented by an improper consolidation with a tort case.

4. THE TRIAL COURT'S FAILURE TO MAKE FINDINGS OF
FACT ON ALL OF THE ELEMENTS OF THE CLAIMS
GRANTED SHOULD RESULT IN A DETERMINATION THAT
THE BURDEN OF PROOF WAS NOT MET

Marilyn alleged many claims involving fraud in her complaint. (CP 162). Before the UFTA elements can be reviewed, the trial court first had to find each of the nine elements of fraud. The trial court failed to even discuss the nine elements of fraud in its Memorandum of Decision or

Findings of Fact and Conclusions of Law. (CP, 350 and 392). Half of the 14 claims granted dealt with fraud and not the UFTA. (Id.).

Fraud is defined through case law. Fraud is never presumed and must be proven by clear, cogent, and convincing evidence. Beckendorf v. Beckendorf, 76 Wn.2d 457, 462, 457 P.2d 603 (1969). To establish fraud, the plaintiff must demonstrate the each of the following necessary elements by clear, cogent, and convincing evidence:

- (1) representations of an existing fact;
- (2) its materiality;
- (3) its falsity;
- (4) the speaker's knowledge of its falsity;
- (5) the speaker's intent that it shall be acted upon by the person to whom it is made;
- (6) ignorance of falsity on the part of the person to whom it is addressed;
- (7) the latter's reliance on the representation;
- (8) a right to rely upon it; and
- (9) consequential damages.

Id. To sustain a finding of common law fraud, the trial court in most cases must make findings of fact as to each of the nine elements of fraud.

Pedersen v. Bibioff, 64 Wn.App. 723, 828 P2d. 1126 (1992). The rules

stated in Beckendorf are not absolute because fraud may be presumed in cases with undue influence. Id.

In the absence of a finding on a factual issue the court must indulge the presumption that the party with the burden of proof failed to sustain their burden on that issue. State v. Armenta, 134 Wn.2d 1, 14 (1997), (citing Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); State v. Cass, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), review denied, 118 Wn.2d 1012 (1992).).

As the trial court did not make specific or any findings on the elements of fraud, there should be a presumption that Marilyn failed to proof her burn on all claims involving fraud. We ask that the trial court's rulings on all claims alleging fraud are reversed.

5. OVERVIEW OF THE UNIFORM FRAUDULENT TRANSFER ACT

As the landmark case on fraudulent transfer law is Twyne's Case, announced in the Star Chamber by Lord Coke in 1601, the law of fraudulent transfers has been around a long, long time. 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). In 1918, the Uniform Law Commissioners codification the law relating to fraudulent transfers with the Uniform Fraudulent Conveyances Act ("UFCA"), which 25 States eventually adopted. Changes to other laws, such as the Uniform

Commercial Code and Bankruptcy Reform Act of 1978 propagate a move to update the UFCA, and in 1984 the Uniform Fraudulent Transfers Act was adopted by the Uniform Law Commissioners, and so far 40 states have adopted UFTA.⁶²

RCW 19.40.041 addresses claims of future and present creditors, while RCW 19.40.051 looks only as present creditors.

Claims of future creditors must show that the transfer was made with either actual intent to hinder, delay, or defraud the creditor, or the debtor did not receive a reasonably equivalent value in the exchange. RCW 19.40.041 (a)(1-2). Section (b) describes eleven factors for the court to consider in determining actual intent. The statute does not state whether any of the eleven issues are dispositive on their own or if the factors should be weighed together in a totality of the circumstances test. The reference in section (b) to “among other factors” suggests that the intent was for the factors to be weighed with the facts of the case in a totality of the circumstances test.

RCW 19.40.051 looks at a transaction involving a present creditor only; that is a creditor with claims prior to the transfer. Section (a) allows a finding of fraudulent transfer if debtor did not receive reasonably

⁶² Uniform Laws Commissioners webpage, “A Few Facts About The Uniform Fraudulent Transfers Act”, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufta.asp

equivalent value and was either: 1) insolvent at the time of the transfer, or 2) became insolvent as a result of the transfer. Section (b) says that there is a fraudulent transfer if: 1) the transfer was made to an insider for an antecedent debt, 2) the debtor was insolvent, and 3) the insider has reason to believe the debtor was insolvent.

RCW 19.40.021 defines two versions of insolvency. Sections (a) and (c) define insolvency as when a debtor (or partnership under (c)) has greater debts than assets. Section (b) says that a debtor can be presumed insolvent if s/he is generally not paying debts when due. Section (d) limits assets to those not transferred, concealed, or removed with the intent to hinder, delay, or defraud creditors. Section (e) excludes debts to those secured by valid liens and not included in assets.

6. THE UFTA CLAIMS FOR RELIEF SHOULD HAVE BEEN DISMISSED UNDER CR 12 (B)(6) FOR LACK OF A CLAIM

The trial court erred when it found that Marilyn was a creditor with a claim against Sam under RCW 19.40.011 by virtue of her status as Sam's wife and the potential that at or following the time when the properties were transferred that she had a right to a payment from Sam in regard to the transferred properties. (CP 153). This is an issue of first

impression because there are no Washington cases that discuss the definition of a creditor under the UFTA.

In the Memorandum in support of his CR 12(b) motion, Sam described the core issue: “[W]hether a spouse has a claim against another spouse for the distribution of property and payment of maintenance when a dissolution has been filed but the Decree of Dissolution has not been entered”? (CP 151, pg. 2, lines 19-21).

The foundation of the UFTA is a claim, a creditor, a debt, and a debtor. These four elements are defined in RCW 19.40.011 (3-6) (see appendix). A person is a creditor if that person has a right to a payment from another person (the debtor). A right to a payment is a claim. Without establishing that there is a claim and a creditor the provisions after RCW 19.40.011 don’t make sense.

Having a right to receive a payment, a claim, is fundamental to establishing a case of action under the UFTA. Marilyn had a clear claim against Sam under the property settlement provisions of their dissolution settlement contract. (CP 59, pg. 5-14). When the court vacated those provisions in its order on April 18, 2003, Marilyn’s claim was also vacated and her standing under the UFTA. (CP 121).

In his Motion re CR12(b), Sam cited Bankruptcy cases, because there are no case under UFTA claims that deal with the issue of who is a

creditor. (CP 151). Because provisions in the UFTA mirror the Bankruptcy code, it is a logical step to look to bankruptcy cases for guidance when no other case law can be found. To better illustrate the point, Sam cited to Bankruptcy cases that looked at the similarities between the UFTA when dealing with the concept of a claim. The trial court dismissed the motion stating that the cases cited were from other jurisdictions and did not necessarily deal with the UFTA. (CP 153).

There is no direct guidance on this issue, so the Court must look at the text of the statute. The court's primary goal in construing a statute is to determine and give effect to the legislature's intent. Am. Cont'l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (citing State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002)). The court should begin by analyzing the text of the statute. Id. If the text is clear and unambiguous on its face, the court should not resort to statutory construction principles, such as legislative history, even if the court thinks that "the legislature intended something else but did not adequately express it." Id.

RCW 19.40.011(3) is very broad in its definition of a claim, "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." After the trial court vacated the property settlement, Marilyn no longer had a judgment. Her

alleged claim is clearly disputed and not yet mature, though both of those descriptors are allowed. Her alleged claim is contingent on the court determining that she has a right to payment. The court who might determine that right is ambiguous since it could be through a tort action or the dissolution. The person from whom Marilyn may have a right to receive payment from is also unclear in the crowd of ten defendants.

We ask the court to find that either the cases cited in Sam's Memorandum apply and Marilyn does not have a claim under the UFTA. Or in the alternative, that an analysis of the UFTA and current circumstances leads to a determination that an alleged claim against an undetermined debtor contingent on a yet to be decided court's potential ruling in her favor is not a claim under the UFTA. In either case, we ask the Court to reverse the trial court's ruling in this case.

7. SAM IS ENTITLED TO ATTORNEY FEES AND COST UNDER
RCW 26.09.140 AND RAP 14.2

"The appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." (RCW 26.09.140). RAP 14.2 states that the court will award costs to a party who substantially prevails on review.

If Sam and SAC substantially prevail on this appeal, the court should award cost as described in RAP 14.3 and RCW 26.09.140.

The court may also award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses. Gamache v. Gamache, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965); Eide v. Eide, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). If intransigence is established, the does not need to consider the parties' resources. In re Marriage of Crosetto, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). This case was settled through agreed orders.

F. CONCLUSION

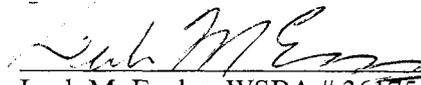
For all of the foregoing reasons the decision of the trial court on Marilyn's claims for relief 1-4, 10, 13-15, 18-19, 21-22, 25, and 29 should be vacated, and the judgment and attorney fees and cost awards reversed. In the alternative, the Court should unconsolidate and remand the cases so that the dissolution and tort actions can be adjudicated separately with proper application of the statutory provisions and case law described above. In either scenario, Sam and SAC ask the Court for an

award of reasonable attorney fees and costs under RCW 26.09.140 for
maintaining the appeal and RAP 14.2 for substantially prevailing.

Respectfully submitted this 10 day of April, 2007.



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Attorney for Appellants, Samuel Angelo and
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E. APPENDIX

Chapter 19.40 RCW - Uniform Fraudulent Transfer Act

Chapter Listing - RCW Sections

- 19.40.011 Definitions.
- 19.40.021 Insolvency.
- 19.40.031 Value.
- 19.40.041 Transfers fraudulent as to present and future creditors.
- 19.40.051 Transfers fraudulent as to present creditors.
- 19.40.061 When transfer is made or obligation is incurred.
- 19.40.071 Remedies of creditors.
- 19.40.081 Defenses, liability, and protection of transferee.
- 19.40.091 Extinguishment of cause of action.
- 19.40.900 Short title.
- 19.40.901 Captions not law.
- 19.40.902 Supplementary provisions.
- 19.40.903 Uniformity of application and construction.

19.40.011
Definitions.

As used in this chapter:

(1) "Affiliate" means:

(i) A person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities;

(A) As a fiduciary or agent without sole discretionary power to vote the securities; or

(B) Solely to secure a debt, if the person has not exercised the power to vote;

(ii) A corporation twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty

percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(A) As a fiduciary or agent without sole power to vote the securities; or

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) Property to the extent it is encumbered by a valid lien; or

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(i) If the debtor is an individual:

(A) A relative of the debtor or of a general partner of the debtor;

(B) A partnership in which the debtor is a general partner;

(C) A general partner in a partnership described in subsection (7)(i)(B) of this section; or

(D) A corporation of which the debtor is a director, officer, or person in control;

(ii) If the debtor is a corporation:

(A) A director of the debtor;

(B) An officer of the debtor;

(C) A person in control of the debtor;

(D) A partnership in which the debtor is a general partner;

(E) A general partner in a partnership described in subsection (7)(ii)(D) of this section; or

(F) A relative of a general partner, director, officer, or person in control of the debtor;

(iii) If the debtor is a partnership:

(A) A general partner in the debtor;

(B) A relative of a general partner in, or a general partner of, or a person in control of the debtor;

(C) Another partnership in which the debtor is a general partner;

(D) A general partner in a partnership described in subsection (7)(iii)(C) of this section; or

(E) A person in control of the debtor;

(iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(v) A managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

19.40.021

Insolvency.

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.

(b) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate of all of the

partnership's assets, at a fair valuation, and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

19.40.031
Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of RCW 19.40.041(a)(2) and 19.40.051, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

19.40.041

Transfers fraudulent as to present and future creditors.

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

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

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

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

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

(3) The transfer or obligation was disclosed or concealed;

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

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

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

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

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

19.40.051

Transfers fraudulent as to present creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

19.40.061

When transfer is made or obligation is incurred.

For the purposes of this chapter:

(1) A transfer is made:

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

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

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

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

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

(5) An obligation is incurred:

(i) If oral, when it becomes effective between the parties; or

(ii) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

19.40.071

Remedies of creditors.

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in RCW 19.40.081, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by chapter 6.25 RCW;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

19.40.081

Defenses, liability, and protection of transferee.

(a) A transfer or obligation is not voidable under RCW 19.40.041(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under RCW 19.40.071(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under RCW 19.40.041(a)(2) or 19.40.051 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with Article 9A of Title 62A RCW (62A.9A).

(f) A transfer is not voidable under RCW 19.40.051(b):

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

19.40.091

Extinguishment of cause of action.

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(a) Under RCW 19.40.041(a)(1), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) Under RCW 19.40.041(a)(2) or 19.40.051(a), within four years after the transfer was made or the obligation was incurred; or

(c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.

19.40.900

Short title.

This chapter may be cited as the uniform fraudulent transfer act.

19.40.901

Captions not law.

Section headings as used in this chapter do not constitute any part of the law.

19.40.902

Supplementary provisions.

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

19.40.903

Uniformity of application and construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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6
7 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
8 **DIVISION II**

9 MARILYN ANGELO,)
10)
11) Plaintiff,)

11 vs.)

Case No. 01-3-01055-4

12 SAMUEL T. ANGELO, an individual; SAM)
13 ANGELO CONSTRUCTION, INC., a)
14 Washington corporation; LEWIS T. ANGELO)
15 and MIKI M. ANGELO, husband and wife;)
16 JOSEPH T. ANGELO, an individual;)
17 THEODORE C. ANGELO and MARY JANE)
18 ANGELO, husband and wife; and GORDON)
19 D. FOSTER, JR. and SHERRYL L. FOSTER,)
20 husband and wife,)

Court of Appeals No. 35548-5-II

AFFIDAVIT OF DELIVERY

18 Defendants.)

19 IN RE THE MARRIAGE OF:)

20 SAMUEL ANGELO,)
21)
22) Petitioner,)

21 and)

22)
23)
24) MARILYN ANGELO,)
25) Respondent)

Terry J. Lee
Attorney at Law
201 NE Park Plaza Drive, Suite 222
Vancouver, WA 98684
Phone: (360) 891-1100

1 The Honorable Judge Robert L. Harris
ATTN: LeAnn Kunze
2 Clark County Superior Court
1200 Franklin Street
3 Vancouver, WA 98666-5000

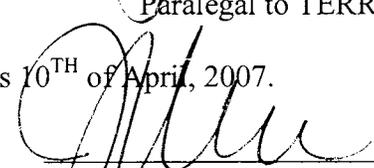
VIA COURIER ON 04-11-07

4
5 DATED this 10TH day of April, 2007.



JENTRI LINN
Paralegal to TERRY LEE

6
7 SIGNED AND SWORN to before me this 10TH of April, 2007.



Notary Public in and for the State of
Washington, residing at Vancouver.
My appointment expires: 10-15-10

