

No. 42436-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MERIDIAN PLACE, LLC,  
a Washington limited liability company,

Appellant,

v.

HUMCOR, INC., a Washington corporation d/b/a Callaway Fitness,  
PAWNEE LEASING CORPORATION, a Colorado corporation; KEY  
EQUIPMENT FINANCE, INC., a Michigan corporation, CASCADE  
BANK, a Washington corporation; SMART LENDING, LLC, and  
MICHAEL PETROVIC

Defendants,

JOHN AND JANE DOE HAUGHNEY, and their marital community,  
and JAMES and KRISTI LOVEALL, and their marital community,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE JOHN HICKMAN

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Washington's Uniform Fraudulent Transfer Act, RCW ch. 19.40, was enacted to provide a remedy to creditors who are unable to collect when a debtor places its assets in the hands of a third party. The trial court found based on overwhelming evidence that a commercial landlord was defrauded by its corporate tenant's principal who transferred the tenant's only valuable asset to his close friend, frustrating the landlord's ability to satisfy the tenant's lease obligations. Although the parties agreed that the asset was worth \$750,000, the trial court entered judgment for only \$75,000 against the tenant's principal and refused to enter judgment against the fraudulent transferee, who colluded with the principal to defraud the landlord.

The trial court erred by not placing the burden on the fraudulent actors to rebut the landlord's substantial evidence of the asset's value. The trial court's minimal judgment exonerates the fraudulent actors and frustrates the purpose of the UFTA. This court should vacate the trial court's judgment and direct the entry of a \$750,000 judgment against both the tenant's principal and the fraudulent transferee.

## II. ASSIGNMENT OF ERRORS

1. The trial court erred in entering the underlined portion

Finding of Fact No. 7:

Callaway 1 held its ground, but Callaway 2 was seriously behind in its rent as of October-November 2007. In an effort to obtain working capital, Humcor established additional secured debts with Smart Lending, LLC (Smart Lending) for approximately \$400,000, which was guaranteed by Haughney. And, a \$635,000 secured loan was taken out on Haughney's personal residence (referred to as the Horizon Mortgage debt), along with a secured loan on the Callaway 2 gym equipment for \$325,000.

(CP 338-39)

2. The trial court erred in entering Finding of Fact

No. 20:

Loveall did not realize any personal or economic gain from the purchase of Callaway 1 and he lost approximately \$114,000 in the transaction.

(CP 340)

3. The trial court erred in entering Finding of Fact

No. 26:

Meridian Place did not present any expert testimony at trial regarding the value of Callaway 1 at the time of its sale to Loveall. The lay testimony by the parties and the exhibits submitted did not support the position that Callaway 1 was worth \$750,000 at the time of its sale to Loveall.

(CP 341)

4. The trial court erred in entering Conclusion of Law

No. 7:

Meridian Place did not meet its burden of proof with respect to the value of Callaway 1. The Court concludes that Callaway 1 had a value of \$75,000 based on (a) the retail value of the equipment at the time of the transfer, taking into consideration that the equipment had a lien on it as well and (b) the Court's conclusion that at least \$75,000 of the \$114,000 paid by Loveall should have been made available for damages for breach of the lease.

(CP 343)

5. The trial court erred in entering Conclusion of Law

No. 8:

The testimony, exhibits, equities, and law do not support entry of judgment against either Loveall or Petrovic under RCW 19.40, *et seq.*

(CP 343)

6. The trial court erred in entering Judgment against John Haughney and his marital community. (CP 262-63)

7. The trial court erred in entering its Order Denying Reconsideration. (CP 330)

### III. STATEMENT OF ISSUES

1. Where a defrauded creditor presents competent evidence of the value of the fraudulently transferred asset, should

the burden of proof shift to the fraudulent actors to prove the asset has a lower value?

2. After finding that the debtor and a third party engaged in a fraudulent transfer, did the trial court err in awarding to the defrauded creditor damages of only ten percent of the value that the parties themselves placed on the asset at the time of transfer?

3. Did the trial court err in refusing to enter judgment against the first transferee of a fraudulently transferred asset – the transferor’s long-time friend and business associate – where the transferee treated the transfer as a sham, and creditors of the transferor were substantially harmed by the transfer?

#### **IV. STATEMENT OF THE CASE**

##### **A. Meridian Place Was Unable To Recover From Its Delinquent Tenant Because The Tenant Fraudulently Transferred Its Sole Valuable Asset To Its Principal’s Long-Time Friend And Business Associate.**

Defendant Humcor, Inc. owned and operated a successful fitness club (“Callaway I”). Appellant Meridian Place owns and operates a commercial complex in Puyallup, Washington. (FF 3, CP 338; RP 52) In 2006, Humcor entered into a five-year lease with Meridian Place for a second club (“Callaway II”). (FF 1-3, CP 337-38; Exs. 35-37)

While Callaway I was successful, Callaway II failed. (FF 24, CP 341; RP 618) After Callaway II fell behind in its lease payments, Humcor's shareholder respondent John Haughney arranged the sale of Callaway I to a close friend and business associate, respondent James Loveall, for \$750,000. (FF 8, 10, 17, CP 339-40; Ex. 1) But \$635,000 of the stated "consideration" was in the form of an "assumption" of Haughney's personal debt, which neither Haughney or Loveall believed Loveall was obligated to pay. (FF 17, CP 340; Ex. 1 at 2)

Callaway II closed its doors in November 2008 and Humcor filed bankruptcy. (FF 24, CP 341) Because of Haughney's transfer of Callaway I to Loveall, Meridian Place was unable to pursue Callaway I's substantial assets in order to satisfy Humcor's lease obligations, which totaled over \$3 million by the time of trial. (FF 14-17, 21, 24, CP 340-41; RP 107-08, 171-73; Ex. 40)

The trial court entered extensive factual findings establishing that Meridian Place was the victim of a fraudulent transfer. This Statement of the Case relies on the trial court's findings of fraud, the overwhelming evidence upon which they are based, and the undisputed evidence establishing that the value of the fraudulently

transferred Callaway I fitness club far exceeded the trial court's \$75,000 judgment.

**1. After Successfully Operating Callaway I, Humcor Leased Space From Meridian Place To Open Its Second Fitness Club, Callaway II.**

Michael Petrovic cofounded Humcor, Inc. with Anthony Carillo in 2004 to run the Callaway I fitness club. (RP 540-41) Donald Youderian quickly replaced Carillo as a principal in Humcor. (RP 540) In 2005, respondent John Haughney's investment company, Smart Lending LLC ("Smart Lending"), loaned Humcor \$195,000. (FF 4, 8, CP 338-39; Ex. 45; RP 328, 399, 433-34)

In 2006, Callaway I earned a profit of \$100,000. (RP 487-88; Ex. 21 at 13) It had approximately 1500 members, and its financial statements reflected \$549,549 in tangible assets at the end of 2006. (Ex. 21 at 11) Satisfied with its successful operation of Callaway I, Humcor sought to open a second club in Puyallup, Callaway II. (FF 1, CP 337)

Gregory Stein is the principal of appellant Meridian Place, LLC. (FF 3, CP 338; RP 52) In the spring of 2006, Stein negotiated with Petrovic for a lease for Callaway II at Meridian Place in Puyallup. (FF 1-3, CP 337-38)

In June 2006, Humcor signed a five-year lease (with an option to renew) for 22,000 square feet of space in Meridian Place's Puyallup commercial complex for Callaway II. (FF 3, CP 338; Ex. 35-37; RP 54) Petrovic and Youderian personally guaranteed Humcor's obligations to Meridian Place under the Callaway II lease. (RP 55; Ex. 35 at 41, Ex. 35 at Ex. H) Meridian Place spent \$600,000 for Callaway II's tenant improvements, which Humcor agreed to repay over the life of the lease. (RP 53)

**2. In 2007, Haughney Invested In Humcor And Took Over Responsibility For Major Business Decisions From Petrovic.**

In January 2007, Haughney and another Smart Lending member, Charles Harbeson, decided to invest in Humcor. (FF 4, CP 338; Ex. 21; RP 303, 398-401) Haughney and Harbeson paid \$50,000 each for 20 shares of Humcor stock, which gave each of them 14 percent ownership in Humcor. (Ex. 21 at 1-2; RP 401) Haughney made additional investments in Humcor and by January of 2008 he was a 42 percent shareholder. (RP 304)

After investing in Humcor, Haughney became the corporate treasurer and took over major business operations. (FF 5, CP 338; RP 305) Although Petrovic managed the day-to-day operations of the fitness club business, Petrovic deferred to Haughney, who is a

CPA, on almost all business decisions, including financing and payment of outstanding debt. (FF 5, CP 338; RP 554-55, 609-10)

**3. Haughney Mortgaged His Home To Provide Capital To Humcor, Using Callaway I's Cash Flow To Make The Loan Payments.**

Both before and after it opened its doors in February 2007, Callaway II needed substantial investment to stay afloat. (FF 3, 6-7, 14, 18, CP 338-40) In January of 2007, Humcor obtained a second loan from Smart Lending for \$400,000, which was secured by Callaway II's equipment and guaranteed by Haughney. (FF 7, CP 338-39; Exs. 21 at 1, 41, 47; RP 308-10, 330, 400-01) Although Humcor received cash flow from the successful Callaway I operation, by the middle of 2007, Humcor needed additional funds to keep Callaway II operating. (FF 7, 14, CP 338-40; RP 346-48, 404-05) Haughney mortgaged his home with Horizon Mortgage for \$639,000 and loaned the proceeds to Humcor. (FF 7, CP 338-39; Ex. 22; RP 308-09, 389-90, 404-05) On August 31, 2007, Humcor executed an unsecured promissory note to Haughney for \$639,000, plus interest. (Ex. 22)

After Haughney's loan to Humcor, Humcor obtained additional capital by taking out a \$325,000 loan from Key Equipment Finance, which was refinanced with Cascade Bank. (FF

7, CP 338-39; RP 454-55) This loan was secured by Callaway I and II's fitness equipment. (Ex. 1 at 17, Ex. 42; RP 317, 322, 356, 454-55) Haughney personally guaranteed this loan. (RP 308, 356)

**4. After Humcor Defaulted On The Meridian Place Lease For Callaway II, Haughney Arranged For His Close Friend To Buy Callaway I For \$114,000 In Cash And "Assumption" Of Haughney's \$635,000 Mortgage.**

By the end of 2007 Humcor could not meet all its obligations, including the Meridian Place lease, despite these infusions of capital. (FF 7, 14, 18, CP 338-40; RP 62-64, 343, 411) However, Callaway I was still generating sufficient cash flow to break even. (FF 7, CP 338; RP 348, 491-92)

Haughney realized that Callaway I could not survive if forced to bear Callaway II's debt. (FF 16, CP 340; RP 346-48, 429, 518) Without Callaway I's cash flow, Haughney would have been forced to personally pay his mortgage obligation. (FF 16, CP 340; RP 369-70, 395-97) Haughney took steps to buy Callaway I through a separate corporation, but was advised against doing so by counsel and decided not to proceed with the transaction. (RP 336-39) Haughney then approached a long-time friend and business associate, respondent James Loveall, about investing in Humcor or loaning it money. (RP 237-38, 279, 350-51) Loveall was unwilling

to invest money in Humcor because of Callaway II's financial struggles. (RP 237-38, 279, 350-51)

Haughney has prepared Loveall's taxes since the early 1990's and the two have been friends for almost 20 years. (FF 8, CP 339; RP 218, 335) Loveall has also participated in Smart Lending since 2002 and has participated in a dozen investments with Haughney. (FF 8; Ex. 16; RP 218-22, 335-36) Loveall has a fifty percent ownership in an aerospace company valued at \$22 million. (RP 283; see also RP 214, 257, 298-99, 360-61) Loveall had no interest in owning a fitness club, and never even visited the club. (FF 11-12, CP 339)

As a favor to Haughney, in January of 2008, Loveall agreed to purchase Callaway I for \$114,263.54 in cash and "assumption" of Haughney's \$635,736.46 personal mortgage balance. (FF 10, 11, CP 339; Ex. 1 at 2; RP 228-29, 233, 239, 369, 467) The cash was used to pay down the Cascade Bank loan, which was secured by Callaway I and II's equipment. (FF 22, CP 341; RP 240, 322, 356, 465, 514; Ex. 1 at 17; Ex. 42) This \$114,000 payment also reduced Haughney's personal exposure to the Cascade Bank loan, which he had guaranteed. (RP 308, 356) After this payment, Cascade

Bank released its security interest in Callaway I's equipment. (Ex. 1 at 17; RP 322, 355-59)

Both Humcor's board of directors<sup>1</sup> and Humcor's counsel discussed and approved the \$750,000 purchase price of Callaway I. (RP 352-54, 410, 513, 549-50) Both Loveall and Haughney testified that \$750,000 was the right amount and a "fair market value." (RP 232, 467) Statements prepared by Haughney's accounting firm showed that Callaway I had \$550,000 in tangible assets in January 2008. (Exs. 5A, 5B; RP 378-86)

Although 85 percent of Callaway I's purchase price was Loveall's assumption of Haughney's personal mortgage, both Loveall and Haughney understood that Loveall was not personally obligated or required to make the mortgage payments. (FF 17, CP 340; RP 234, 326-27, 364) Loveall was not substituted for Haughney as the obligor on the mortgage note. (FF 17, CP 340; RP 237, 241-42) Loveall did not secure any of his personal assets in connection with this "assumption." (FF 17, CP 340; RP 237, 241-42)

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<sup>1</sup> Humcor's board of directors consisted of Petrovic, Youderian, Harbeson, and Haughney. (RP 305-07)

Loveall claimed that he bought Callaway I to provide a job for his daughter, but she never applied for a job there and does not work in the health club business. (RP 269, 283-84) Even after “purchasing” Callaway I, Loveall did not bother to visit the fitness club, and continued to allow Haughney to make all decisions concerning its management and operation. (FF 11-12, CP 339; RP 247-48, 552)

On the instructions of Haughney or Petrovic, Haughney's mortgage continued to be paid from the income received by Callaway I. (RP 293-95; Ex. 10) Haughney knew that Humcor could not pay all of its bills, the largest of which was the rental obligation to Meridian Place, but he did not inform Stein, Meridian Place's principal, or any creditors, that Humcor was transferring to a third party its only valuable asset. (FF 13, 14, 15, 16, 18, CP 339-40; RP 72-73, 346)

#### **5. Callaway II Shut Its Doors In November 2008.**

On February 11, 2008, Meridian Place sent a “pay-or-quit premises” letter to Humcor demanding \$178,031 in unpaid rent. (FF 15, 23, CP 340-41; Ex. 38; RP 65-66, 437) In March of 2008, Stein met with Petrovic and Haughney to discuss Callaway II's increasing financial difficulties. (FF 9, CP 339; RP 67) The

meeting was contentious and ultimately the parties were unable to reach an agreement. (FF 9, CP 339; RP 68-69) Neither Haughney nor Petrovic disclosed to Stein Humcor's "sale" of Callaway I. (RP 69-70) Stein ultimately learned that Humcor no longer owned Callaway I in April 2008. (RP 70-72) Stein and Petrovic met again in June 2008 and agreed to reduced lease payments, hoping the agreement would allow Callaway II to survive. (FF 24, CP 341; Ex. 23-24; RP 76-79, 562)

On November 27, 2008, unable to meet a reduced rent obligation, Callaway II shut its doors and Humcor filed for bankruptcy under Chapter 11. (FF 24, CP 341; RP 92, 447; Ex. 11, 30)<sup>2</sup> In its bankruptcy filings, Humcor (which then only owned Callaway II) listed fitness and related equipment worth \$200,000. (Ex. 11 at 4; RP 317-19)

**6. After Humcor Declared Bankruptcy, Loveall Sold Callaway I Back To Petrovic For \$1 And Assumption Of Haughney's Remaining Mortgage Balance.**

Haughney discussed selling Callaway I's membership base to two other fitness clubs, Vision Quest and LA Fitness. (RP 451-

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<sup>2</sup> Humcor's Chapter 11 filing was dismissed in March 2009. It filed a Chapter 7 bankruptcy in May 2009. That case was also dismissed. (RP 552; Ex. 12)

52) LA Fitness offered to pay between \$200,000 and \$300,000 for the membership base, exclusive of any physical assets. (RP 451-52) Vision Quest made a similar offer. (RP 451-52) Instead, in October 2009, almost one year after Humcor filed for bankruptcy, Loveall sold Callaway I back to Petrovic for \$1 and assumption of the \$625,370 remaining balance on Haughney's mortgage. (FF 25, CP 341; Ex. 15; RP 230, 251-54, 259-60, 557) At the time of the 2009 sale to Petrovic, Loveall and Haughney believed that Callaway I was worth over \$600,000. (RP 277, 452)

At the time of trial in 2011, Callaway I remained in operation with about 1,600 active members. (RP 618) Haughney also continues to satisfy his monthly mortgage payments with cash generated by Callaway I. (RP 323-24) By the time of trial, Humcor's delinquent lease obligations to Meridian Place totaled \$3,049,227.48. (RP 107-08, 171-73; Ex. 40)

#### **B. Procedural History**

Meridian Place filed suit in Pierce County Superior Court against Haughney, Loveall, Petrovic, and Humcor alleging breach of the lease and fraudulent transfer of Callaway I from Humcor to Loveall in January 2008. (CP 3-153) Beginning on May 23, 2011,

the Honorable John Hickman (“the trial court”) presided over a five day trial.

The parties did not dispute the value of Callaway I, only whether its transfer from Humcor to Loveall was fraudulent, and in particular Meridian Place's contention that the assumption of Haughney's mortgage by Loveall was illusory. (RP 27, 32, 47-49, 232, 369, 467, 537; *see also* CP 199, 202-03) During closing argument, counsel for Loveall argued that “we know that the \$750,000 paid by Mr. Loveall was fair market value. They told us that; they've agreed with us.” (RP 720; *see also* RP 687, 691-92, 702-03, 714-15, 727-29)

The trial court incorporated its oral decision into its final findings of fact and conclusions of law. (RP 750-66, CP 337-344) The trial court found that the transaction between Haughney and Loveall was fraudulent because Loveall's assumption of Haughney's mortgage was illusory and “[n]either party believed that Mr. Loveall was personally liable for the debt at the time of the transfer.” (RP 755-58; FF 17, CL 3-4, 6, CP 340-43) The trial court found that Haughney and Loveall engaged in both actual and constructive fraud under RCW 19.40.041. (CL 3-4, CP 342-43)

The trial court then found that Meridian Place had not met its burden of proof on damages because Meridian Place presented no expert testimony establishing the value Callaway I at the time of its transfer to Loveall. (RP 759-60; FF 26, CL 7, CP 341-43) The trial court rejected as evidence of Callaway I's value the \$750,000 purchase price, its directors' determination that the price was fair, its accountant's statements showing Humcor's value immediately before and after the transfer, and the value placed on its assets by third parties. (RP 759, 764; FF 26, CP 341)

The trial court entered a \$75,000 personal judgment against Haughney. (CL 6-7, CP 262-63, 343) It arrived at the figure by valuing Callaway I's fitness equipment, but not its membership or other assets at the time of the transfer. (RP 761-62; CL 7, CP 343) It then discounted that value based on its belief that the equipment was encumbered by a lien that had in fact been released. (RP 761-62; CL 7, CP 343)

The trial court refused to impose any judgment on Loveall, reasoning that "there was no personal or economic gain he realized from the sale." (RP 760; FF 20, CL 8, CP 340, 343) The trial court also held that Petrovic was not liable because he was a good faith transferee. (RP 758; CL 8, CP 343)

Meridian Place timely moved for reconsideration, arguing that the trial court's \$75,000 valuation of Callaway I was not based on substantial evidence and that Loveall was jointly liable with Haughney. (CP 296-310) The trial court denied the motion on August 26, 2011. (CP 330)

Meridian Place timely appealed. (CP 311-13) Neither Haughney nor Loveall has cross-appealed.

## **V. ARGUMENT**

The trial court found based on overwhelming evidence that Haughney and Loveall engaged in a fraudulent transaction in order to place Humcor's only valuable asset – Callaway I – out of its creditor's reach. The trial court then erred by disregarding uncontested evidence of Callaway I's value at the time of its transfer, including the \$750,000 purchase price approved by Humcor's board of directors and attorneys and its accountant's statements demonstrating Callaway I's tangible assets worth at least \$550,000, and by refusing to enter judgment against Loveall, who actively colluded with Haughney to defraud Humcor's creditor. The trial court misapplied the Uniform Fraudulent Transfer Act, RCW ch. 19.40, by refusing to hold those who defrauded Meridian Place liable for the value of the asset that was placed out of

Meridian Place's reach. This court should remand with instructions to enter judgment against Haughney and Loveall for at least Callaway I's agreed upon purchase price of \$750,000, but not less than \$550,000, the value of its tangible assets.

**A. The Legislature Passed The Uniform Fraudulent Transfer Act In Order To Protect Creditors And Allow Recovery From Fraudulent Debtors.**

The trial court misapplied the Uniform Fraudulent Transfer Act ("UFTA"), RCW ch. 19.40, whose "overriding purpose . . . is to provide relief for creditors whose collection on a debt is frustrated by the actions of a debtor to place the putatively satisfying assets beyond the reach of the creditor." *Thompson v. Hanson*, 168 Wn.2d 738, 750, 239 P.3d 537 (2009). Rather than protecting the defrauded creditor, Meridian Place, the trial court's allocation of the burden of proof and assessment of damages allowed Haughney and Loveall to benefit from the fraud.

Under RCW 19.40.041, a debtor may commit "actual" or "constructive" fraud on a present or future creditor. *Glimcher Supermall Venture, LLC v. Coleman Co.*, 739 N.W.2d 815, 820-

21 (S.D. 2007) (construing RCW 19.40.041(a)(1)-(2)).<sup>3</sup> A transfer is actually fraudulent if made “[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.” RCW 19.40.041(a)(1). RCW 19.40.041(b) lists eleven nonexclusive factors a court may consider to determine actual intent. A transfer is constructively fraudulent if made “[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation.” RCW 19.40.041(2); see also **Thompson**, 168 Wn.2d at 744-45.

A defrauded creditor may avoid a fraudulent transfer and “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.” RCW 19.40.081(b). “If the judgment . . . is based upon the value of the

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<sup>3</sup> The UFTA superseded the Uniform Fraudulent Conveyance Act (“UFCA”). “Because the UFTA substantially tracks with the UFCA,” cases interpreting the UFCA are relevant when interpreting the UFTA. **Clearwater v. Skyline Const. Co., Inc.**, 67 Wn. App. 305, 321, 835 P.2d 257 (1992), *rev. denied*, 121 Wn.2d 1005 (1993). Because the UFTA is a uniform act, Washington courts look to decisions of other states for guidance. **Thompson**, 168 Wn.2d at 744 (*citing* RCW 19.40.903).

The UFTA is also substantially similar to provisions of the federal bankruptcy code. See 11 U.S.C. § 548 (bankruptcy trustee may avoid transfers made with “actual intent to hinder, delay, or defraud” or where debtor “received less than a reasonably equivalent value in exchange for such transfer”); **In re Grove-Merritt**, 406 B.R. 778, 789 (Bankr. S.D. Ohio 2009) (“The fraudulent transfer provisions of the Code and the Ohio UFTA are substantially similar both in terms of rights, remedies, and defenses.”).

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.” RCW 19.40.081(c). A court may enter judgment for this amount against “[t]he first transferee of the asset or the person for whose benefit the transfer was made.” RCW 19.40.081(b)(1).

Here, the trial court correctly found that Haughney and Loveall defrauded Meridian Place, and that Haughney, who continued to benefit by using the Callaway I income to pay his mortgage obligation, was “the person for whose benefit the transfer was made.” RCW 19.40.081(b). The trial court then misapplied the UFTA, by refusing to enter judgment for “the value of the asset at the time of transfer,” RCW 19.40.081(c), and by refusing to enter judgment against Loveall – “the first transferee of the asset.” RCW 19.40.081(b).

**B. The Trial Court Misapplied The UFTA By Holding That Meridian Place “Did Not Meet Its Burden” Of Proving The Value Of Callaway I And By Refusing To Require Haughney And Loveall To Prove That The Asset Was Worth Less Than Its Purchase Price.**

By valuing Callaway I at only \$75,000, the trial court imposed an improper burden of proof on Meridian Place, the defrauded creditor, thus allowing Haughney and Loveall to benefit

from their fraudulent acts. (CL 7, CP 343) The proper allocation of the burden of proof is a question of law reviewed de novo. **Home Builders Ass'n of Kitsap County v. City of Bainbridge Island**, 137 Wn. App. 338, 345, 153 P.3d 231 (2007). Once Meridian Place established fraud and presented evidence of Callaway I's value, including an uncontested purchase price and financial balance sheets, the trial court should have shifted the burden of refuting Meridian Place's evidence to Haughney and Loveall. Placing the burden of proof on the defendant to establish a lower value than that shown by the creditor prevents fraudulent parties from benefiting from their fraud, and comports with the UFTA's policies and common law damages principles.

Under RCW 19.40.081(a), a transferee must establish as an affirmative defense that he or she "took in good faith and for a reasonably equivalent value".<sup>4</sup> See also Unif. Fraudulent Transfer Act, 7A pt. II U.L.A. § 8 cmt. 1 ("The person who invokes this

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<sup>4</sup> Under the former UFCA Washington courts transferred the burden of proof to the defendant in a variety of circumstances. See, e.g., **Davis v. Nielson**, 9 Wn. App. 864, 871, 515 P.2d 995 (1973) ("when the consideration for the conveyance is shown to be grossly inadequate, the burden of proving his good faith is on the defendant"); **Sparkman & McLean Co. v. Derber**, 4 Wn. App. 341, 349-50, 481 P.2d 585 (1971) (burden of proving good faith shifted to transferee "where close relatives are dealing together and . . . where the same individuals control two or more businesses which are dealing together") (citations omitted).

defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged.”). Courts routinely transfer the burden of proof to the fraudulent actor under the UFTA. See, e.g., **Scholes v. Lehmann**, 56 F.3d 750, 757 (7th Cir.) (“If the plaintiff proves fraudulent intent, the burden is on the defendant to show that the fraud was harmless because the debtor’s assets were not depleted even slightly.”), *cert. denied*, 516 U.S. 1028 (1995); **Sportsco Enterprises v. Morris**, 917 P.2d 934, 938 (Nev. 1996) (“where the creditor establishes the existence of certain indicia or badges of fraud, the burden shifts to the defendant to come forward with rebuttal evidence that a transfer was not made to defraud the creditor”).

Where, as here, a transfer is fraudulent because the consideration was illusory, and not because the agreed upon consideration was inadequate, there is no reason to ignore the agreed upon purchase price as prima facie evidence of an asset’s value. Under the identically worded language of the bankruptcy

code,<sup>5</sup> the defendant bears the burden of refuting such prima facie evidence. *In re Clemons*, 42 B.R. 796 (Bankr. S.D. Ohio 1984).

In *Clemons* a bankruptcy trustee sued to set aside a preferential transfer under the bankruptcy code. The debtor transferred his failing business and its assets to his father in exchange for \$50,000 in debt forgiveness. Finding that the purpose of the transaction was to place assets outside creditors' reach, the court avoided the transfer. When valuing the asset under 11 U.S.C. § 550, the court relied upon the agreed upon purchase price and imposed the burden on the transferor and transferee to refute the price:

The plaintiff looks to the August 11, 1980 agreement to establish the value of the assets which were the subject of the preferential transfer. That agreement assigns a value of \$50,000.00 to those assets. By showing this, plaintiff has made out a prima facie case of value, and the burden shifts to defendants to show otherwise.

42 B.R. at 799. The court held that the debtor did not "offer[] any documentary evidence or business records to support a lower valuation." 42 B.R. at 799. See also *K. Jin Lim v. Alwerfalli*, 10-

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<sup>5</sup> See Unif. Fraudulent Transfer Act, 7A pt. II U.L.A. § 8 cmt. 2 ("Subsection (b) is derived from § 550(a) of the Bankruptcy Code."); 11 U.S.C. § 550(a) ("the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property").

CV-13006, 2011 WL 717607, at \*2-3 (E.D. Mich. Feb. 22, 2011) (under Michigan UFTA burden to disprove accuracy of price agreed to by transferor and transferee shifted to transferee; affirming judgment against transferee where transferee presented no evidence disputing price).

There are strong policy reasons for imposing the burden of proof on fraudulent actors as they are often “the repository and best source of documents and information relating to the transfers.” ***Mussetter v. Lyke***, 10 F. Supp. 2d 944, 962 (N.D. Ill. 1998) (citing ***ACLI Government Securities, Inc. v. Rhoades***, 653 F.Supp. 1388, 1391 (S.D.N.Y. 1987)), *aff'd*, 202 F.3d 274 (7th Cir. 1999); *see also In re Centennial Textiles, Inc.*, 220 B.R. 165, 171-72 (Bankr. S.D.N.Y. 1998) (“where the evidentiary facts as to the nature and value of the consideration are within the transferee’s control, as is the case here, the burden of coming forward with the evidence of the fairness of the consideration shifts to the transferee.”).

Shifting the burden to fraudulent actors also comports with Washington’s law of damages. Washington courts refuse to exonerate a defendant from the payment of damages because the measure of damages is difficult or because the evidence does not

provide a precise basis for calculating damages. ***Eagle Point Condominium Owners Ass'n v. Coy***, 102 Wn. App. 697, 703, 9 P.3d 898 (2000) (“A party who has established the fact of damage will not be denied recovery on the basis that the amount of damage cannot be exactly ascertained.”). Likewise, Washington courts refuse to allow a party to benefit from that party’s own fraud or other wrongful act. ***McGuigan v. Simpson***, 197 Wash. 260, 264-65, 84 P.2d 1012 (1938) (party may not “gain an advantage from his own fraud or negligence”) (quotation omitted).

The trial court erred as a matter of law in holding that “Meridian Place did not meet its burden of proof with respect to the value of Callaway I.” (CL 7, CP 343) Both Haughney and Loveall testified that the \$750,000 purchase price was a “fair market value.” (RP 232, 467) Humcor’s other officers and counsel, who did not benefit from Haughney’s and Loveall’s fraud, discussed and approved the \$750,000 purchase price. (RP 352-54, 410, 513, 549-50) Petrovic, who founded Callaway I and still owned part of it when it was sold to Loveall, believed that the \$750,000 purchase was a fair value. (RP 550) The parties never disputed, but consistently agreed, that the \$750,000 purchase price was an accurate value of Callaway I. (RP 27, 32, 37, 47-49, 369, 537, 687,

691-92, 702-03, 714-15, 720, RP 727-29, 736; *see also* CP 199, 202-03) Meridian Place presented more than enough evidence of Callaway I's value to shift the burden of proof to Haughney and Loveall.

The trial court's misapplication of the burden of proof allowed Haughney to benefit from the fraudulent conveyance that he engineered. Haughney maintained the financial records for Callaway I both before and after its sale to Loveall and was in the best position to provide evidence of Callaway I's value. (FF 5, 12, CP 338-39; RP 306, 378-80, 516) Any deficiency in the evidence of Callaway I's value should be held against the fraudulent actors, and not the defrauded party. The trial court's allocation of the burden of proof undermines the purpose of the UFTA by failing to protect a defrauded creditor and by allowing those engaging in a fraudulent transfer to benefit from their fraudulent acts.

**C. The Trial Court's Finding That Callaway I Was Worth Only \$75,000 At The Time Of Its Transfer Is Not Supported By Substantial Evidence.**

Regardless of who bore the burden of proof, the trial court's award of \$75,000 is not supported by substantial evidence, and further undermined the purpose of the UFTA by allowing Haughney to use the substantial cash flow from Callaway I to pay his personal

mortgage rather than the delinquent rent due Meridian Place. A trial court may only award damages that are within the range of evidence. ***Federal Signal Corp. v. Safety Factors, Inc.***, 125 Wn.2d 413, 439, 886 P.2d 172 (1994) (citation omitted). An appellate court “review[s] a damage award to determine whether substantial evidence supports the findings of fact and whether the findings support the trial court’s conclusions of law and judgment.” ***Tacoma Athletic Club, Inc. v. Indoor Comfort Sys., Inc.***, 79 Wn. App. 250, 259-60, 902 P.2d 175 (1995), *rev. denied*, 128 Wn.2d 1020 (1996). Because the trial court’s finding that Callaway I was worth only \$75,000 at the time of its transfer is not supported by substantial evidence, this court should remand with directions to enter judgment for its uncontested purchase price of \$750,000, or direct the trial court to find damages of at least \$550,000, which was the value of Callaway I’s physical assets.

There was no basis in fact or in law for the court to categorically reject the purchase price as evidence of Callaway I’s value. The trial court apparently reasoned that because the transaction was fraudulent, the agreed upon price must be inaccurate. (RP 759 (“This Court has no basis to find that this corporation . . . was worth \$750,000 when the person preparing

these financial statements had an obvious conflict of interest.”) But the trial court found that the transaction was constructively fraudulent because the consideration agreed upon was illusory, not because the value of the asset was overstated. (FF 17, CP 340)

The UFTA expressly contemplates a situation like this – where the transaction is fraudulent even though the agreed upon consideration accurately reflects the asset’s value. RCW 19.40.041(b) (listing the failure to exchange “reasonably equivalent value” as one of 11 non-exclusive indicators of fraud). See ***China Resource Products (U.S.A.) Ltd. v. Fayda Int’l, Inc.***, 856 F. Supp. 856, 861-62 (D. Del. 1994) (upholding jury verdict under UFTA valuing fraudulently transferred asset based on value stated in a letter of intent between the parties); ***K. Jin Lim v. Alwerfalli***, 10-CV-13006, 2011 WL 717607, at \*2-3 (E.D. Mich. Feb. 22, 2011) (relying on price agreed upon between transferor and transferee in affirming judgment against transferee under Michigan UFTA). Federal courts have routinely used an agreed upon purchase price to establish a transferred asset’s value under 11 U.S.C. § 550(a). See, e.g., ***In re Clemons***, 42 B.R. 796, 799 (Bankr. S.D. Ohio 1984) (relying on agreement between transferee and transferor to establish value of transferred asset); ***In re Computer Universe***,

*Inc.*, 58 B.R. 28, 32 (Bankr. M.D. Fla. 1986) (“By agreement of the parties, the equipment was worth \$38,393. . . . The defendant is bound to its agreed valuation.”).

The trial court also erred in requiring “expert testimony at trial regarding the value of Callaway I at the time of its sale to Loveall,” (FF 26, CP 341) because Haughney’s, Loveall’s, and Petrovic’s testimony provided sufficient evidence of the value of Callaway I. An owner of property is competent to testify to its value. *Risdon v. Hotel Savoy Co.*, 99 Wash. 616, 617-18, 170 P. 146 (1918); *Cunningham v. Town of Tieton*, 60 Wn.2d 434, 436, 374 P.2d 375 (1962). Similarly, under the bankruptcy code, “[a]n owner of a business is competent to give his opinion as to the value of his property.” *Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 739 (1st Cir. 1982) (allowing testimony of business owner to establish value of fraudulently transferred business under bankruptcy code), *cert. denied*, 459 U.S. 1105 (1983), 459 U.S. 1204 (1983); *K. Jin Lim v. Alwerfalli*, 2011 WL 717607, at \*2-3 (relying on testimony of asset owner to establish value of fraudulently transferred asset).

The trial court’s determination that Meridian Place was obligated to present expert testimony unfairly penalizes the

innocent creditor. In deciding not to present the testimony of a business valuation expert, Meridian Place was entitled to rely on the fact that all parties agreed that \$750,000 was a “fair market” value for Callaway I. (RP 232, 467, 702-03, 714-15, 720, 727-29; *see also* CP 199, 202-03) *See Thompson v. Hanson*, 142 Wn. App. 53, 65, 174 P.3d 120 (2007) (holding that defendants could not dispute the value of a fraudulently transferred asset where the parties stipulated to its value), *aff’d*, 168 Wn. 2d 738, 239 P.3d 537 (2009). This court should remand with directions to enter judgment for \$750,000, which was the undisputed value of Callaway I at the time of transfer.

Should it allow the trial court the opportunity to exercise discretion on remand, this court should hold that the trial court’s determination of value cannot be less than Callaway I’s tangible assets. Humcor’s financial statements before and after the transfer demonstrated that Callaway I had \$550,000 worth of tangible assets in January 2008. (Exs. 5A, 5B; RP 378-86) This amount was consistent with the amount listed by Petrovic a year earlier. (See Ex. 21 at 11) Yet, for unexplained reasons, the trial court valued Callaway I based only on its fitness equipment and ignored all of its other tangible and intangible assets, including its 1500

members. (RP 761-62; CL 7, CP 343) Prior to Callaway I's sale to Petrovic, two third-party fitness clubs were willing to pay up to \$300,000 for Callaway I's membership base. (RP 451-52) Loveall and Haughney both testified that at the time of Loveall's sale to Petrovic in late 2008, the club was worth over \$600,000. (RP 277, 452)<sup>6</sup> Further, Haughney and Harbeson each paid \$50,000 for 14 percent of Humcor's stock. (Ex. 21; RP 401) Accordingly, Humcor had over \$350,000 in equity value in January 2007 when Haughney and Harbeson invested in Humcor in a fully arm's length transaction.

No evidence supports the trial court's award of \$75,000, which is inconsistent with its own findings. The trial court found that Loveall did not give reasonably equivalent value for Callaway I by paying \$114,000 in cash and "assuming" Haughney's mortgage. (FF 17, CP 340) If Callaway I was worth only \$75,000 then the \$114,000 in cash paid by Loveall would have been a reasonably equivalent value. The trial court also reduced the judgment amount based on its erroneous belief that Callaway I's equipment was

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<sup>6</sup> Evidence of an asset's value after its transfer is relevant evidence for valuing an asset at the time of its transfer. See *Thompson v. Hanson*, 142 Wn. App. 53, 64, 174 P.3d 120 (2007), *aff'd*, 168 Wn.2d 738, 239 P.3d 537 (2009).

burdened by a lien, (RP 761-62; CL 7, CP 343), but it was undisputed that Cascade Bank released its lien after Haughney paid down the loan with the cash from Loveall. (Ex. 1 at 17; RP 322, 355-59, 514)<sup>7</sup>

This court should vacate the trial court's award of damages and direct the entry of a \$750,000 judgment. At a minimum, this court should remand to the trial court for a redetermination of damages and instruct the trial court that the evidence does not support a damage award lower than \$550,000 – the difference in the value of Humcor's tangible assets before and after the sale of Callaway I to Loveall.

**D. The Trial Court Erred By Refusing To Impose Judgment On Loveall, The First Transferee, Who Actively Engaged In The Fraudulent Transfer.**

The trial court erred in refusing to enter judgment against Loveall “the first transferee” of Callaway I. RCW 19.40.081(b)(1). The trial court found that Loveall committed fraud by taking title to a fitness club he had absolutely no interest in, as a favor to his close friend Haughney (FF 8, 11, CP 339), but refused to enter judgment against Loveall because “Loveall did not realize any personal or

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<sup>7</sup> The trial court's belief that the Callaway I equipment was burdened by a lien also conflicts with its finding that the Cascade Bank loan was only secured by Callaway II's equipment. (See FF 7. CP 338)

economic gain from the purchase of Callaway I.” (FF 20, CL 8, CP 340, 343) Neither RCW ch. 19.40 nor the UFTA immunizes a transferee from damages because he or she did not realize an economic gain from the transaction. This court should reverse the trial court’s refusal to impose judgment against Loveall as an error of law.

The UFTA authorizes a court to enter judgment against “[t]he first transferee of the asset.” RCW 19.40.081(b)(1). A defrauded creditor may seek relief from a transferee “without regard to the transferees’ intent.” *Thompson v. Hanson*, 168 Wn.2d 738, 749, 239 P.3d 537 (2009). Transferees are protected from outsized judgments by RCW 19.40.081(d)(3), which entitles a good-faith transferee to a reduction in the judgment by the amount of value given the debtor.

The trial court made no finding that Loveall acted in good faith, and the evidence would not have supported such a finding because Loveall actively colluded with Haughney to defraud Humcor’s creditor Meridian Place. (FF 10-11, 17, CP 339-40; RP 755-58) In the absence of good faith, the trial court’s finding that Loveall “did not realize any personal or economic gain” and lost approximately \$114,000 is immaterial and affords no basis for

exonerating Loveall. (FF 20, CP 340) The UFTA imposes liability based on the value of the asset at the time of its transfer, not based on whether a transferee's fraudulent investment ultimately bore fruit. See RCW 19.40.081(c).

While RCW 19.40.081(c) provides that a judgment is "subject to adjustment as the equities may require," no principle of equity allows one who participated in a fraudulent transfer to avoid liability because he or she ultimately lost money from the fraud. Indeed, such a rule would encourage fraudulent transfers because transferees would know their liability turned on whether their fraudulent investment was ultimately successful. RCW 19.40.081(c) contemplates a situation where a transferee *increases* the asset's value after its transfer. **Thompson**, 168 Wn.2d at 750 (*citing* Unif. Fraudulent Transfer Act, 7A pt. II U.L.A. § 8 cmt. 3). Here, Loveall did nothing to increase the value of Callaway I, and, indeed, took no role in its operation whatsoever. He should be liable for conspiring to insure that Callaway I's cash flow would be available to service his friend Haughney's personal debt and remain out of reach of Humcor's creditor Meridian Place. (FF 12, CP 339)

The trial court's reasoning is plainly inconsistent with the purpose of the UFTA, which is to provide relief for creditors, not to absolve fraudulent transferees of liability when their fraudulent investments fail. *Thompson*, 168 Wn.2d at 750. The trial court erred by refusing to impose judgment against Loveall. This court should direct entry of judgment for \$750,000 against Loveall and Haughney.

## VI. CONCLUSION

Having found that Haughney and Loveall defrauded Meridian Place, the trial court erred in limiting Meridian Place to a \$75,000 judgment against Haughney. This court should vacate the trial court's judgment and direct the entry of judgment against Loveall and Haughney for \$750,000, or at a minimum, remand with instructions that the trial court enter judgment of not less than \$550,000 – the value of the tangible assets at the time Callaway I was fraudulently transferred.

Dated this 4<sup>th</sup> day of April, 2012.

SMITH GOODFRIEND, P.S.

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### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 4, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
William B. Foster Attorney at Law PO Box 69 Lynnwood, WA 98046-0069	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 4th day of April, 2012.

  
\_\_\_\_\_  
Victoria K. Isaksen

No. 42436-3-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MERIDIAN PLACE, LLC,  
a Washington limited liability company,

Appellant,

v.

HUMCOR, INC., a Washington corporation d/b/a Callaway Fitness,  
PAWNEE LEASING CORPORATION, a Colorado corporation; KEY  
EQUIPMENT FINANCE, INC., a Michigan corporation, CASCADE  
BANK, a Washington corporation; SMART LENDING, LLC, and  
MICHAEL PETROVIC

Defendants,

JOHN AND JANE DOE HAUGHNEY, and their marital community,  
and JAMES and KRISTI LOVEALL, and their marital community,

Respondents.

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UNPUBLISHED AUTHORITY CITED IN  
BRIEF OF APPELLANT (GR 14.1)

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Only the Westlaw citation is currently available.

United States District Court,  
 E.D. Michigan,  
 Southern Division.  
 K. JIN LIM, Trustee, Plaintiff/Appellee,  
 v.  
 Diana ALWERFALLI, Defendant/Appellant.

District Court No. 10-cv-13006.  
 Bankr.Ct. No. 09-04960.  
 Feb. 22, 2011.

Kenneth M. Schneider, Schneider, Miller, Detroit,  
 MI, for Plaintiff/Appellee.

Gary B. Boren, Boren and Carey, Dearborn, MI, for  
 Defendant/Appellant.

*OPINION AND ORDER AFFIRMING THE BANK-  
 RUPTCY COURT'S JULY 16, 2010 ORDER DENY-  
 ING DEFENDANT/APPELLANT'S JUNE 28, 2010  
 MOTION FOR RECONSIDERATION OF ITS  
 JUNE 14, 2010 JUDGMENT IN FAVOR OF  
 PLAINTIFF/APPELLEE (BANKR.DKT. NO. 28)*

PAUL D. BORMAN, District Judge.

\*1 This matter is before the Court on Defendant/Appellant's appeal of Bankruptcy Judge Marci B. McIvor's July 16, 2010 Order Denying Defendant's Motion for Reconsideration. (Bankr.Dkt. No. 28.) Both Defendant/Appellant and Plaintiff/Appellee have filed briefs. This Court held a hearing on February 3, 2011. For the reasons that follow, the Court **AFFIRMS** the Order of the Bankruptcy Court.

### **I. BACKGROUND**

On February 17, 2009, Tamer D. Alwerfalli, ("Debtor") Debtor in this proceeding, filed a voluntary petition under Chapter 7 of the Bankruptcy Code. (June 15, 2010 Order Denying Defendant's Motion for Reconsideration, Bankr. Dkt. No. 28, 1, App. Rec. No. 4.) On June 2, 2009, the Trustee/

Appellee initiated an adversary proceeding against the Debtor's mother, Diana Alwerfalli, alleging that on December 18, 2009, the Debtor fraudulently transferred to his mother property located at 3071 Cornell Street, Dearborn, Michigan ("the Cornell Property"). (*Id.*) The Trustee/Appellee based his complaint on a "Settlement Statement" which indicated the sales price of the property as \$155,000. The Settlement Statement also indicated that the purchaser, Defendant/Appellant, was receiving a "gift of equity" in the amount of \$30,234.54. (*Id.*) The complaint alleged that because the Debtor gave his mother a gift of equity as part of the sales transaction, he transferred the property for less than its reasonably equivalent value in violation of the Michigan Fraudulent Transfer Act, Mich. Comp. Laws § 566.35. (*Id.* 1-2.)

The Bankruptcy Judge, Honorable Marci B. McIvor, held a trial on June 14, 2010, receiving documents and testimony from the Debtor, the Trustee/Appellee, the Defendant/Appellant and the Quicken Loan officer, George Popofski, who authenticated the loan documents. (Transcript of June 14, 2010 Trial, Bankr. Dkt. No. 27, App. Rec. No. 5, p. 2.) On June 15, 2010, Bankruptcy Judge McIvor issued a Judgment against Defendant/Appellant in the amount of \$30,234.54, the amount designated on the Settlement Statement as a "gift of equity." On June 28, 2010, Defendant/Appellant filed a motion for reconsideration of Judge McIvor's June 14, 2010 Judgment, arguing that the Trustee/Appellee had failed to meet its burden of establishing the value of the Cornell Property and therefore failed to establish that the transfer was for less than the reasonably equivalent value. (Bankr.Dkt. No. 25, App.Rec. No. 2.) On June 15, 2010, Judge McIvor issued an Order Denying Defendant's Motion for Reconsideration. (Bankr.Dkt. No. 28, App.Rec. No. 4.) Defendant/Appellant now appeals the June 14, 2010 Judgment.

### **II. STANDARD OF REVIEW**

This Court reviews the Bankruptcy Court's

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findings of fact for clear error and its conclusions of law *de novo*. *In Re Baker & Getty Fin. Serv., Inc.*, 106 F.3d 1255, 1259 (6th Cir.1997). A bankruptcy judge's factual findings will not be set aside unless they are clearly erroneous and the appellant can demonstrate "the most cogent evidence of a mistake of justice." *Id.* On appeal to a district court, a bankruptcy court's findings of fact are reversible only if they are clearly erroneous. "[I]f a question is a mixed question of law and fact, then [the district court] must break it down into its constituent parts and apply the appropriate standard of review for each part." *In re Batie*, 995 F.2d 85, 88 (6th Cir.1993). "[T]he Bankruptcy Court's rulings on evidentiary issues are reviewed for an abuse of discretion." *In re Shekerjian*, No. 09-14708, 2010 WL 1417782 at \* 5 (E.D.Mich. April 5, 2010).

### III. ANALYSIS

\*2 At the hearing on this matter before this Court, counsel for Defendant/Appellant conceded that he had "a big hill to climb" in appealing the Bankruptcy Court's factual determination as to the value of the property which the debtor transferred to his mother, the Defendant/Appellant. Defendant/Appellant nonetheless challenges certain of the Bankruptcy Judge's evidentiary rulings and ultimate factual conclusions as to the value of the property transferred. The Court concludes that the Bankruptcy Court did not abuse its discretion in admitting into evidence, and relying on, the debtor's own statement of financial affairs and the debtor's own testimony as to his opinion of the value of the property, along with the settlement statement. The Court concludes that the Bankruptcy Judge's factual finding as to the value of the property, based upon this evidence, was not clearly erroneous. There is no dispute that the parties agreed to a sum certain and that the consideration transferred was less than that amount, the difference characterized as a "gift of equity."

In concluding that the Debtor transferred the property to his mother, Defendant/Appellant, for less than a reasonably equivalent value in violation

of the Michigan Fraudulent Transfer Act, Mich. Comp. Laws § 522.35,<sup>FN1</sup> the Bankruptcy Judge relied on the following evidence: (1) the Settlement Statement from the loan transaction; (2) the Statement of Financial Affairs filed in the Debtor's bankruptcy case; and (3) the testimony of the Debtor as to the value of the property. Both the Settlement Statement and the Debtor's Statement of Financial Affairs listed the sale price of the Cornell Property as \$155,000. (June 15, 2010 Order, p. 3.) The Settlement Statement listed as a component of the purchase price a gift of equity from the Debtor to the Defendant/Appellant in the amount of \$30,234.54. (*Id.*) The Debtor testified at the trial that the property was worth "way more than \$110 [\$110,000]." (Trial Tr., App. Rec. 5, p. 25.) The Debtor testified that he had purchased the home at foreclosure for about \$110,000 but that it needed work. The Debtor further testified that he put approximately \$10,000 into the home and planned to make money on the home when he sold it. (*Id.* at 25-26.) The Debtor also testified that homes in the neighborhood of the Cornell Property were selling for more than \$155,000 when he purchased the home. (*Id.* at 25.) The Defendant/Appellant objected to the evidence offered by the Trustee/Appellee as based on hearsay but did not introduce any evidence to rebut the evidence offered by the Trustee/Appellee. (*Id.* at 6.)

FN1. Mich. Comp. Laws § 566.35 provides in relevant part:

(1) 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 the time or the debtor became insolvent as a result of the transfer or obligation.

Relying on a series of cases holding that a

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property owner is generally competent to give an opinion of the value of his property under Fed.R.Evid. 701, the Bankruptcy Judge held that the Debtor's testimony, in conjunction with the Settlement Statement and the Statement of Financial Affairs, was sufficient to shift the burden of proof to the Defendant/Appellant with regard to the value of the Cornell Property and the value of the gift of equity. (June 15, 2010 Order, App. Rec. No. 4, p. 4.) See *United States v. 329.73 Acres of Land, Etc.*, 666 F.2d 281, 284 (5th Cir.1982) ("the opinion testimony of a land owner as to the value of his land is admissible without further qualification" as to the value of his land); *Buckland v. Household Realty Corp. (In re Buckland)*, 123 B.R. 573 (Bankr.S.D. Ohio 1991) (land owner's opinion of the value of his land is admissible as evidence of value).

\*3 In response to this evidence, the Defendant/Appellant offered no evidence as to the value of the property or as to the amount of the gift of equity. Denying Defendant/Appellant's motion for reconsideration, the Bankruptcy Judge held:

Through the Settlement Statement, the Statement of Financial Affairs and the testimony of the Debtor, Plaintiff met his burden of proof that the sale price of the \$155,000 reflected an appropriate value for the Cornell property. At that point, the burden of proof shifted to Defendant to demonstrate: (1) the value of the Cornell property as of December 18, 2007 or (2) that the Defendant did not receive a gift of equity, because the sale price was something less than the price reflected on the Settlement Statement.... Such evidence might have included: (1) a copy of Defendant's mortgage, for purposes of demonstrating that the new mortgage was substantially less than the price of the property; (2) testimony from the mortgage broker who facilitated the transfer of the property from Debtor to Defendant regarding how the sale price stated on the Settlement Statement was calculated; or (3) testimony from an appraiser regarding the value of the Cornell prop-

erty in December 2007.

Defendant failed to produce any evidence to support a finding that on December 18, 2007, the property purchased by Defendant, Diana Alwerfalli, was worth less than \$155,000, the sale price listed on the Settlement Statement. The Settlement Statement states that the purchaser received a gift of equity in the amount \$30,234.54. The fact that the Debtor received no money from the transfer, or that Defendant was unaware of the manner in which the purchase price was calculated, is not relevant to the Court's fraudulent transfer analysis. The evidence supports the Court's finding that Debtor received significantly less for the property than he would have had he marketed the property, rather than arranged for the transfer of the property to his mother.

(June 15, 2010 Order, App. Rec. 4, pp. 7-8.)

On appeal, Defendant/Appellant does not contest the authenticity of the documents relied on by the Bankruptcy Judge in reaching her decision and offers no law in support of the argument that the evidence admitted was legally insufficient to form the basis for the Bankruptcy Court's conclusion as to the amount of the judgment. Defendant/Appellant states in her brief on appeal, without citation to any legal authority, that the Bankruptcy Court should have disregarded all of the evidence presented at the trial regarding the value of the Cornell Property. However, Defendant/Appellant does not contest the fact that she introduced no evidence in the Bankruptcy Court as to the value of the property. At the hearing on this matter, counsel for the Defendant/Appellant conceded that he introduced no evidence as to the value of the property because he just didn't think the trustee had met his burden.

Moreover, as Plaintiff/Appellee points out in his brief on appeal, the actual value of the property is not an essential finding as the purchase agreement clearly establishes that the parties agreed to a sale price, \$155,000, and further agreed that a portion of that price, \$30,234.54, was a gift. It is clear

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that the Debtor intended, and accomplished, a gift to his mother resulting in a transfer of less than the reasonably equivalent value the Debtor could have obtained had he marketed the property to a third party for full value. The Court concludes that there is no clear error in the findings of fact made by the Bankruptcy Judge that the Cornell Property was sold to Defendant/Appellant for \$155,000 on December 18, 2007 and that Defendant/Appellant received a gift of equity in the amount \$30,234.54, which resulted in a transfer of the property for less than reasonably equivalent value under Mich. Comp. Laws § 566.35.

#### IV. CONCLUSION

\*4 For the foregoing reasons, the Court **AF-FIRMS** the June 14, 2010 Judgment of the Bankruptcy Court in the amount of \$30,234.54 against the Defendant/Appellant. (Bankr.Dkt. No. 24, App.Rec. No. 2.)

IT IS SO ORDERED.

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