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No. 57891-0
STATE OF WASHINGTON COURT OF APPEALS
DIVISION ONE

MARY KAY WILSON,

Appellant,

and

ANDREW CLAYTON,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAY 11 AM 10:14

On Appeal From King County Superior Court
Honorable Theresa Doyle

BRIEF OF APPELLANT

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ORIGINAL

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I. Assignments of Error and Issues Pertaining to Assignments of Error

A. Assignments of Error

The trial court erred in:

1. Entering Findings 2, 4, 11, 12, 18, 26, 28 and 29 because they were not supported by substantial evidence.
2. Finding Douglas Wilson's ("Doug") tortious acts "occurred *in conjunction with*" employing Respondent. Finding 5.
3. Finding Plaintiff ("Drew") suffered \$1,200,000 in emotional damages. Finding 15.
4. Finding Ms. Johnson's testimony credible when she determined Respondent's future wages will fall between that earned by assistant plumbers, and wages earned at entry-level jobs with rote requirements. Finding 20.
5. Finding any future wage loss. Finding 22.
6. Finding Doug committed the tort in this case "in the course of managing the community property." Finding 24).
7. Finding and concluding Mary Kay did not give reasonably equivalent value to Doug for the assets she received in the dissolution decree when she waived maintenance. Finding 37; Conclusion 22 and Conclusion 24..
8. Concluding Drew proved the Findings of Fact by a preponderance of the evidence and/or by substantial evidence. Finding 41.
9. Concluding the Doug's intentional tort was a community liability. Conclusion 4.
10. Concluding damages were \$1,200,000 for emotional distress, \$200,000 for lost future wages, \$4,024.50 for past medical expenses, and \$14,200 for future medical expenses. Conclusion 7.

11. Concluding a judgment should be entered against Mary Kay jointly and severally with Doug. Conclusion 8.
12. Concluding the Wilsons should be enjoined from disposing or encumbering their property. Conclusion 9 and 26.
13. Concluding RCW 26.210 applies to this case and that the burden was on the Wilsons to show good faith. Conclusion 11, 21 and 24.
14. Concluding the Wilsons did not sustain their burden of proof of showing the good faith. Conclusion 12, 21 and 24.
15. Concluding fraudulent intent can be conclusively presumed for any reason not enumerated in the Uniform Fraudulent Transfer Act (“UFTA”). Conclusion 13.
16. Concluding there is a common law fraudulent transfer claim that was not displaced by UFTA that remains viable. Conclusion 14.
17. Concluding a dissolution court could not penalize Doug for his intentional tort by reducing his portion of the community property. Conclusion 20.
18. Concluding Drew met his burden of proving a Construct Fraud Claim under 19.40.051(a). Conclusion 21.
19. Concluding there was sufficient evidence to rebut a presumption that Mary Kay’s maintenance waiver was reasonably equivalent value for the assets she received in the dissolution decree. Conclusion 23
20. Concluding the property division in the Dissolution Decree “is not within the range of likely distribution that a reasonable court would order had the matter gone to trial.” Conclusion 23
21. Concluding Drew proved a Constructive Fraud Claim under RCW 19.40.041(a)(2) by substantial evidence as there was not reasonably equivalent

value received (see above) and Mr. Wilson reasonably should have believed that he had incurred debts beyond his ability to pay as they became due.”

22. Voiding the asset transfer in the dissolution decree. Conclusion 26.

23. Denying Mary Kay’s Motion to Amend Findings of Fact and Conclusions of Law and Judgment.

24. Denying Mary Kay’s Motion for Reconsideration.

25. Denying Mary Kay’s Motion for Separate Trials.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court improperly concluded Mary Kay was separately liable for Doug’s intentional tort when there was neither allegation nor evidence that Mary Kay knew about or participated in the tortious activity.

2. Whether the trial court wrongly concluded that the Doug’s intentional tort was a community liability even though it was found to be purely personal to Doug and did not advance community interests.

3. Whether the trial court improperly found lost future wage damages when Drew is making more than his pre-injury earning capacity.

4. Whether the trial court’s emotional damages are excessive.

5. Whether the trial court mistakenly concluded the assets transferred to Mary Kay pursuant to the dissolution decree violated UFTA’s actual fraud provisions when there was insufficient evidence to conclude Doug lacked intent to hinder, delay or defraud Respondent

6. Whether the trial court mistakenly placed the burden of proving good faith on the Wilsons?

7. Whether the trial court inappropriately concluded there is a viable action for conclusive common law fraudulent transfer after Washington enacted UFTA in 1988.

8. Whether the trial court erroneously concluded the assets transferred to Mary Kay violated UFTA's constructive fraud provision when Doug received reasonably equivalent value for the assets transferred?

9. Whether the trial court wrongly denied Mary Kay's Motion for a Separate Trial.

10. Whether the trial court improperly denied Mary Kay's Motion for Reconsideration?

11. Whether the trial court improperly denied Mary Kay's Motion to Amend Findings of Fact and Conclusions of Law.

12. Whether the trial court improperly entered numerous findings of fact when these findings are not supported by the record?

II. Statement of the Case

A. Procedural Facts

On June 16, 2004, Drew sued Doug for an intentional tort and sued Doug and Mary Kay for fraudulent transfer of property.¹ Drew did not request relief against the Wilsons' community in his initial complaint.² On August 22, 2005, Mary Kay requested the fact finder decide Drew's damages before hearing evidence as to the Wilsons' assets.³ The trial court denied Mary Kay's motion.⁴

¹ CP 5-9.

² CP 5-9.

³ CP 16-31.

⁴ CP 72.

The trial court entered its Findings of Fact and Conclusions of Law on February 8, 2006⁵ and judgment for Drew on February 23, 2006.⁶

On March 1, 2006, Mary Kay filed her Motion for Reconsideration.⁷ That same day, Mary Kay also filed her Motion to Amend Findings of Fact and Conclusions of Law.⁸ Drew responded to Mary Kay's Motion to Amend Findings of Fact and Conclusions of Law and agreed that at least one finding should be amended.⁹ Despite this, the trial court denied Mary Kay's Motions.¹⁰ Mary Kay timely filed her Notice of Appeal on March 2, 2006.¹¹

B. Statement of Facts¹²

Throughout thirty-seven (37) years of marriage, Mary Kay was a model homemaker, mother to 4 children (2 adopted and 2 biological)¹³ and grandmother. She is "reliable, consistent, dependable, fun, somebody you could depend on."¹⁴ She taught children music at the North Sound School District¹⁵ and at home.¹⁶ She also accompanies an adult choir.¹⁷ Doug was a fork lift salesman.¹⁸

⁵ CP 844-862.

⁶ CP 865-868.

⁷ CP 869-873.

⁸ CP 874-876.

⁹ CP 912: ln. 15-18.

¹⁰ CP 931-32.

¹¹ CP 877-878.

¹² Verbatim Report of Proceedings 1RP is dated 12/7/05; 2RP is dated 12/8/05; 3RP is 12/9/05; 3RP is 1/3/06; 4RP is 1/4/06; 5RP is 1/5/06; 6RP is 1/9/06; 7RP is 1/10/06; 8RP is 1/11/06; and 9RP is 1/12/06.

¹³ 8RP 170.

¹⁴ 8RP 25.

¹⁵ 8RP 170.

¹⁶ 8RP 171; 9RP 88-89.

¹⁷ 8RP 170.

¹⁸ 7RP 9, 21, 52 (earned approximately \$80,000 through \$100,000 a year as a salesperson the five years before Doug retired).

Doug, however, had a secret life. It first surfaced when Matthew Burns, a teenage boy, said Doug touched him inappropriately.¹⁹ Doug was charged with Fourth Degree Misdemeanor Assault²⁰, but agreed to suspend his sentence in favor of court ordered treatment.²¹ Mary Kay did not believe Matthew Burns.²² Then Doug was arrested on December 5, 2002 for sexually assaulting Drew.²³

Drew started doing yard work for the Wilsons when he was 9.²⁴ Doug groomed Drew with massages²⁵ and started to sexually assault him more than a year later.²⁶ He assaulted Drew for his own sexual gratification.²⁷ There was also a clear break between Drew doing yard work and the sexual assaults. Drew said the yard work would stop, then they would go into the house and the molestation would begin.²⁸ There was neither allegation nor evidence that Mary Kay knew about, or participated in, Doug's behavior.²⁹

Mary Kay learned Doug was in jail the following day.³⁰ Angry, she did not visit him that day; rather she visited him the following day.³¹ During this brief visit, Doug admitted he sexually assaulted Drew and also confessed he had sexually assaulted others in the distant past.³²

¹⁹ 8RP 79-80.

²⁰ 8RP 90.

²¹ *Id.*

²² 9RP 140.

²³ 7RP 37; 9RP 124.

²⁴ 4RP 45.

²⁵ 4RP 48-57 (Respondent described the progression from massages to sexual assault); 8RP 69.

²⁶ 4RP 54-57 (Masturbation began when he was 11 or 12); 8RP 68-69.

²⁷ CP 845: ln. 24-25. This is an unchallenged finding on appeal.

²⁸ 6RP 183-84 (Respondent unequivocally stated he was not molested while doing yard work.).

²⁹ *See* CP 5-9; CP 667-72; and CP 695-702.

³⁰ 8RP 165-66.

³¹ 7RP 5, 38; 8RP 166; 9RP 124-25.

³² 7RP 5-6, 39-40; 8RP 166-67; 9RP 125.

After hearing this, Mary Kay, amidst tears, did what any normal, innocent spouse would do – she demanded a divorce.³³ She no longer wanted to be married to someone who could do such things.³⁴ Doug was humiliated and did not want to hurt Mary Kay anymore and agreed to the divorce.³⁵ Mary Kay left the jail without posting his bail³⁶ and went home to ponder her uncertain future.³⁷

Later that evening, Mary Kay accompanied the Kenmore Junior High Choir at a community event and broke down.³⁸ Linda Hamilton, the choir director, described Mary Kay's demeanor as "sobbing, crying, physically devastated."³⁹ Hamilton became concerned and offered to play piano in Mary Kay's place. Wanting to follow-through with her commitment, Mary Kay pressed on and finished the performance.⁴⁰ Sensing something was terribly wrong, Hamilton contacted Mary Kay's best friend, Judy Filibeck.⁴¹

Concerned, Ms. Filibeck visited Mary Kay at Mary Kay's home that evening. She described Mary Kay as "incredibly distraught" to the point where it was difficult for Mary Kay to speak.⁴² After some time passed, Mary Kay was able to tell Ms. Filibeck what had happened.⁴³ Ms. Filibeck watched Mary Kay as Mary Kay managed to pull herself together.⁴⁴

³³ 7RP 5-6; 8RP 166-67.

³⁴ 8RP 167.

³⁵ 7RP 6-8; 8RP 172-73.

³⁶ 7RP 6; 8RP 168.

³⁷ 8RP 172.

³⁸ 8RP 20.

³⁹ *Id.*

⁴⁰ 8RP 21.

⁴¹ *Id.*

⁴² 8RP 27.

⁴³ *Id.*

⁴⁴ 8RP 28.

Doug was not immediately charged so he was released from jail, two days later, on Monday, December 9, 2002.⁴⁵ He went directly to the Wilsons' Kenmore residence.⁴⁶ Mary Kay was understandably angry.⁴⁷ The mood was "tense."⁴⁸ Doug revealed his past to Mary Kay.⁴⁹ After listening to Doug⁵⁰, Mary Kay once again reacted normally and reiterated her desire for an immediate divorce and she also told Doug she wanted him out of the house despite the upcoming Christmas holidays.⁵¹

Mary Kay was economically disadvantaged. She was primarily a stay-at-home mother during the entire 37-year marriage. She only worked part-time in a non-lucrative profession – a child music educator⁵², so she was anxious about her future financial security.⁵³ Feeling betrayed and anxious, she asked Doug to give her "everything."⁵⁴ She, however, did not think she could get his retirement.⁵⁵ Humiliated and ashamed, Doug agreed.⁵⁶

Mary Kay taught music to children at her home, so she demanded Doug leave the Kenmore home.⁵⁷ Doug agreed.⁵⁸ He moved to the Wilson's vacation home in Seabeck, Washington within a week after his release.⁵⁹

⁴⁵ 7RP 7; 9RP 126.

⁴⁶ 7RP 40; 9RP 126.

⁴⁷ 7RP 7; 8RP 168.

⁴⁸ 7RP 7; 8RP 168. Mary described her demeanor as "icy cold" and said she was "not cordial." Husband describes Mary Kay's demeanor as "angry."

⁴⁹ 8RP 169-70.

⁵⁰ 9RP 126.

⁵¹ 8RP 171; 9RP 126.

⁵² 8RP 89. Wife estimated her income from her work as a part-time music educator was typically \$18-20,000 annually.

⁵³ 8RP 172-73.

⁵⁴ 8RP 172-73; 9RP 128-29.

⁵⁵ 9RP 17-28; 130.

⁵⁶ 7RP 8-9; 8RP 173; 9RP 126-27.

⁵⁷ 8RP 171.

⁵⁸ *Id.*; 7RP 7-8.

Mary Kay called Victoria Smith, an attorney, and Ms. Smith agreed to represent Mary Kay.⁶⁰ Doug proceeded without representation.⁶¹ Mary Kay and Ms. Smith discussed the divorce process and set-up a meeting between themselves and Doug to work out the divorce details.⁶² The Wilsons met with Ms. Smith on December 11, 2006.⁶³

At the time, Mary Kay was 59 years old and earned approximately \$13,000 - \$23,000 a year.⁶⁴ Doug was 62 years old⁶⁵ and earned approximately \$100,000 a year.⁶⁶ He had always been the primary income-earner.⁶⁷

Mary Kay went into the meeting with Ms. Smith and Doug preparing for the worst - Doug's possible long-term incarceration.⁶⁸ During this meeting, Mary Kay learned she could get Doug's retirement.⁶⁹ She wanted all the real property and furniture, a car, and some retirement money.⁷⁰ She was willing to give Doug liquid cash. Feeling guilty, Doug agreed to give Mary Kay whatever she wanted.⁷¹

⁵⁹ 7RP 7-8; 8RP 171, 183.

⁶⁰ 5RP 122; 8RP 174; 9RP 127.

⁶¹ 5RP 122-25; 7RP 10.

⁶² 8RP 174; 9RP 127. Note, Mary Kay, having nothing to hide waived her attorney-client privilege at trial. 5RP 118.

⁶³ 5RP 126; 8RP 174; 9RP 127.

⁶⁴ 9RP 89 (Mary Kay testified her income over the last fifteen years of their marriage averaged approximately \$20,000), 151 (Judge Wartnick pointed out that Mary Kay was actually earning between \$13,000 and \$20,000 a year). Mr. Nelson used the 2001-02 tax years to determine an average of \$ 13,279 for Mary Kay. 9RP 14.

⁶⁵ Doug was born on April 27, 1940. Trial Exhibit 2, page 1, ln. 15.

⁶⁶ 7RP 9 (Doug testified his salary averaged between \$80,000 and \$100,000 a year); 9RP 151 (Judge Wartnik testified Doug's income was between \$100,000 and \$110,000). Doug's two year average according to Mr. Nelson was \$118,512 for 2001-02. 9RP 14.

⁶⁷ 7RP 9, 52.

⁶⁸ 5RP 133, 135, 139; 9RP 129.

⁶⁹ 8RP 181; 9RP 127-28, 130.

⁷⁰ Trial Exhibit 13 (Wilson PSA) ¶ 4.2.12, 4.3.5 and 4.4.

⁷¹ 7RP 8-9.

He also wanted to alleviate any long term management responsibilities regarding the real property in case he was incarcerated.⁷²

The Wilsons signed a property settlement agreement [“PSA”] on different days outside each other’s presence.⁷³ Doug was awarded just under 10% of the Wilsons’ property: his IRA accounts valued at \$160,000, his Smith Barney account worth \$14,000;⁷⁴ and \$7,000 in furniture.⁷⁵ Mary Kay was the rest.⁷⁶ 43% of the Wilsons’ community property was exempt and could never be reached by Drew or other creditors.⁷⁷ 56% of the Wilson’s property was non-exempt and awarded to Mary Kay. She was also awarded exempt property to make up the approximate 90/10 split in Mary Kay’s favor.

That weekend, Ms. Smith drafted the final agreement for signature.⁷⁸ At no time did either Mary Kay or Doug pressure Smith to expedite the process.⁷⁹ Ms. Smith pressured herself to draft the documents quickly, due to potential logistical problems if Doug were charged and incarcerated.⁸⁰ She also prepared, and Doug signed, quitclaim deeds designed to transfer the real property to Mary Kay when

⁷² 5RP 136; 7RP 10-11.

⁷³ 8RP 185-86.

⁷⁴ 9RP 119, 123, 128; Trial Exhibit 13, Wilson PSA, ¶ 4.3.5, ln. 7-10.

⁷⁵ 7RP 51; Trial Exhibit 13, Wilson PSA, ¶ 4.1.

⁷⁶ This percentage is reached by dividing the total dollar amount of property awarded to wife, \$1,577,000, by the total value of the Wilsons’ property, \$1, 686,357.93. 9RP 197. See also Trial Exhibit 37.

⁷⁷ 9RP 32 (According to Mr. Nelson, under the UFTA, property that is exempt under bankruptcy laws are also exempt under UFTA. Therefore, the Wilsons’ retirement assets are not included in an UFTA analysis; See Exhibit 164; Mr. Nelson determined the Wilsons’ gross UFTA assets equal \$963,741. 9RP 37. The value of the Wilsons’ total assets which they listed on their spreadsheet of assets as \$1, 686,357.93. When the UFTA asset amount is divided by total assets, this equals approximately 57%.

⁷⁸ 5RP 143-44, 172-73.

⁷⁹ 5RP 143-44, 172-73.

⁸⁰ 5RP 143-44, 172-73.

the dissolution was final.⁸¹ Mary Kay was not present when Doug executed these documents.⁸²

The Wilsons understood Doug was a good candidate for a Special Sex Offender Sentencing Alternative [“SSOSA”].⁸³ That would enable him to continue working after a six month sentence.⁸⁴ Both Doug’s attorney and his sex offender treatment provider told him he was a likely candidate for a SSOSA.⁸⁵

Nobody sued the Wilsons or threatened them with a lawsuit while they were getting divorced.⁸⁶ Drew filed his lawsuit 1 ½ years after Doug was arrested; over a year after the Wilsons’ dissolution was final;⁸⁷ and more than 7 months after the Wilsons’ trial would have concluded had it gone to trial.

Moreover, Mary Kay did not believe any other victim would file lawsuits against Doug or her.⁸⁸ Most were in their forties and the alleged abuse occurred many years prior.⁸⁹ Her own experience shaped her belief. Despite her family having ample reasons to sue, including their daughter’s serious foot injury at school, they never sued because they did not believe it was right.⁹⁰

The Wilsons did not conceal their affairs. They disclosed all income and liabilities, recorded all deeds, and their dissolution was public record.⁹¹ Mary Kay never encumbered or otherwise disposed, or reduced the value of, any property.⁹²

⁸¹ 5RP 146-47; 8RP 186-87; 5RP 144 (testimony regarding the 90-day cooling off period), 173 (deeds not filed until after the 90-day cooling off period).

⁸² 8RP 186.

⁸³ 7RP 91.

⁸⁴ 7RP 21-22 and 90.

⁸⁵ 7RP 89-90.

⁸⁶ 8RP 200.

⁸⁷ CP 5-9; Trial Exhibit 14 (Decree of Dissolution).

⁸⁸ 8RP 202.

⁸⁹ 8RP 169-70, 202-03.

⁹⁰ 8RP 203-04.

⁹¹ 8RP 199-200.

After the revelation, Mary Kay's and Doug's relationship changed. It went from "trusting" to "business-like."⁹³ They never shared the same bed.⁹⁴ They spoke infrequently.⁹⁵ In fact, Doug did not come home or visit the family during the Christmas holidays.⁹⁶ Indeed, Mary Kay did not see him after he moved out until January or February 2003.⁹⁷

Despite this, she could not tell him to "Go to Hell."⁹⁸ She did continue to help him, but they never held themselves out as a married couple and there was no chance at reconciliation.⁹⁹ In exchange for receiving Doug's monthly paycheck throughout 2003¹⁰⁰, Mary Kay allowed Doug to stay at the Seabeck house, paid his bills¹⁰¹ including his counseling fees¹⁰², shopped for some of his groceries, did his 2003 taxes and provided him with any cash he requested.¹⁰³ She also allowed him to stay at her Kenmore house during his evening counseling sessions because it was hard for him to drive back to the Seabeck property.¹⁰⁴ She further facilitated his seeing his grandchildren because she agreed to supervise his visits.¹⁰⁵

The Wilsons' only saw each other on occasion and even when they did, they spent only a short time together.¹⁰⁶

⁹² 8RP 200-01.

⁹³ 7RP 14.

⁹⁴ 8RP 169, 190.

⁹⁵ 8RP 184-85 (just a few conversations with husband in the few months immediately after the Wilsons' signed the PSA).

⁹⁶ 7RP 14-15; 8RP 184.

⁹⁷ 8RP 183.

⁹⁸ 8RP 189.

⁹⁹ 8RP 190.

¹⁰⁰ 7RP 12-13; 8RP 188-89; 9RP 95-97.

¹⁰¹ 7RP 13, 53-54; 9RP 96-97.

¹⁰² 9RP 96-97.

¹⁰³ 7RP 13.

¹⁰⁴ 7RP 104-05; 8RP 189.

¹⁰⁵ 8RP 201-02.

¹⁰⁶ 8RP 190.

Doug was charged for his sexual assaults in February 2003.¹⁰⁷ Mary Kay posted bail for Doug using a home equity loan the former couple had acquired just prior to their divorce.¹⁰⁸ Her sole purpose for bailing him out was so he could continue to work until things were resolved.¹⁰⁹

The Wilsons' marriage ended in March 2003.¹¹⁰ The Court adopted the Wilsons' PSA and entered a Dissolution Decree.¹¹¹ The PSA, § 1.13, specifically stated that the PSA would merge into the Dissolution Decree if it was obtained.¹¹² The Dissolution Decree was public record.¹¹³ Ms. Smith recorded the deeds.¹¹⁴

Doug voluntarily participated in sexual deviancy counseling and evaluation in order to get a SSOSA.¹¹⁵ Dr. Lennon, who treated Doug, found him amenable to treatment and recommended him for a SSOSA.¹¹⁶

In September 2003 Doug found out the State would not accept a SSOSA and he would receive a long-term sentence.¹¹⁷ Up until then he continued to work, but retired shortly before sentencing.¹¹⁸ He pled guilty and received 130 months.¹¹⁹

Roland Nelson, an accountant, with extensive experience with property division and disproportionate property splits opined the Wilsons' property division

¹⁰⁷ 8RP 187-88. Trial Exhibit 2, Information, attached to guilty plea.

¹⁰⁸ 7RP 58-59; 8RP 188.

¹⁰⁹ 8RP 188.

¹¹⁰ Trial Exhibit 14 (Decree of Dissolution).

¹¹¹ Trial Exhibit 14 (Divorce Decree with Attached Property Settlement Agreement).

¹¹² CP 5-9; Trial Exhibit 13, § 1.13, ln. 11-14.

¹¹³ 5RP 176-77.

¹¹⁴ 5RP 173-74; Exhibits 16-34 (Property Descriptions, Quit Claim Deeds and Excise Tax forms).

¹¹⁵ 7RP 89-90.

¹¹⁶ 7RP 90; Trial Exhibit 53: pg. 36.

¹¹⁷ 7RP 91-92.

¹¹⁸ 7RP 47.

¹¹⁹ Trial Exhibit 4 (Judgment and Sentence Felony).

was an “equitable division.”¹²⁰ He was the only person who analyzed the property division by concentrating on UFTA “assets” and not the Wilsons’ property when determining reasonable equivalent value.¹²¹ He is also the only person who attempted to quantify the value Mary Kay gave when she waived maintenance.¹²² He began by assuming a 60/40 property split in Mary Kay’s favor.¹²³ He then quantified Mary Kay’s maintenance waiver¹²⁴ by assuming Doug was going to work until age 70 (as he stated in his deposition), calculating his future income¹²⁵ and by calculating the parties’ anticipated social security.¹²⁶ He also recognized value in Mary Kay waiving a claim for attorney fees.¹²⁷ Under the circumstances, he opined that the overall property distribution was reasonable.¹²⁸

Retired Judge, Anthony Wartnik¹²⁹, a retired superior court judge¹³⁰, also opined the Wilsons’ property distribution was in the realm of “reasonable expectation.”¹³¹ Judge Wartnik analyzed the PSA from two different dates: (1) the effective date of the Wilson’s dissolution decree and (2) the date a trial was to occur in the Wilson’s dissolution.¹³² He believed the property division was proper, on the date of marital dissolution¹³³ because Doug was working and had capacity

¹²⁰ 9RP 8; Trial Exhibit 164 (Nelson Expert Opinion Regarding Wilson Property) Division).

¹²¹ 9RP 32.

¹²² 9RP 23.

¹²³ 9RP 23.

¹²⁴ 9RP 39.

¹²⁵ 9RP 13-14.

¹²⁶ 9RP 24-25.

¹²⁷ 9RP 39-40.

¹²⁸ 9RP 8, 39-40, 81-82.

¹²⁹ 9RP 144-45.

¹³⁰ 9RP 145-46.

¹³¹ 9RP 147; Trial Exhibit 163 (Expert Opinion of Judge Anthony P. Wartnik).

¹³² 9RP 156-57.

¹³³ 9RP 161.

to work¹³⁴ until he was seventy years old¹³⁵ and receive a substantial income and social security¹³⁶ without having to pay maintenance.¹³⁷

Judge Wartnik further believed the property division was equally reasonable if the Wilsons would have gone to trial.¹³⁸ Had this happened, the trial court would have known Doug's fate, but there would have been no indication Drew would have sought damages.¹³⁹ Judge Wartnik opined the settlement was within the range of probable outcomes because Doug would have very few expenses once imprisoned¹⁴⁰, he would be receiving enhanced social security payments upon release¹⁴¹, he would not be paying maintenance¹⁴² and he would have avoided having to pay the disadvantaged spouse's attorney fees¹⁴³, and, finally, a court likely would have awarded Mary Kay all the real estate because he could not manage any of it from prison.¹⁴⁴

Respondent's expert, Mabry De Buys testified she would have expected a court to start with a 60/40 split in Mary Kay's favor, and then award maintenance depending upon her earning power.¹⁴⁵ She further opined that a 65/35 split in Mary Kay's favor with some maintenance was within the range of probable

¹³⁴ 9RP 161-62.

¹³⁵ 9RP 151, 162.

¹³⁶ 9RP 162, 171.

¹³⁷ 9RP 160-62, 171.

¹³⁸ 9RP 162.

¹³⁹ As noted earlier, no lawsuits were filed at the time the dissolution became official or at the time Doug pled guilty.

¹⁴⁰ 9RP 152.

¹⁴¹ 9RP 152, 163.

¹⁴² 9RP 163.

¹⁴³ *Id.*

¹⁴⁴ 9RP 163-64.

¹⁴⁵ 9RP 210-11, 216.

outcomes.¹⁴⁶ She made no effort to quantify the maintenance Mary Kay would have likely received.¹⁴⁷ Ms. De Buys also admitted that a court's duty is to provide for support for the rest of the disadvantaged spouse's life and this might be a case where a court would award lifetime maintenance.¹⁴⁸ Finally, she opined that it was likely a family judge would have granted Mary Kay the marital home in Kenmore and the adjoining home in which her mother resided.¹⁴⁹ Despite finding Ms. De Buys' testimony credible, the trial court set aside the transfer of the marital home and the transfer of the adjacent home.¹⁵⁰

Despite there being neither allegation nor evidence that Mary Kay knew about, or was involved in, Doug's predilections, the Court held Mary Kay separately liable for his actions.¹⁵¹ Despite finding he committed the tort for his own personal gratification,¹⁵² the trial court concluded the liability was a community liability.¹⁵³

Respondent's pre-injury income potential was equivalent to a high school graduate or a person with an associate arts degree.¹⁵⁴ His pre-injury earning capacity was, thus, no more than \$35,400.¹⁵⁵ At trial, Drew was earning \$19 per hour¹⁵⁶ or \$39,520 per year – more than his pre-injury earning potential. Despite

¹⁴⁶ 9RP 216-17 (Court could go as high as a 65/35 split with some maintenance); 9RP 239 (65/35 split outside of the envelope); 9RP 241 (65/35 is the outer edge of the bell curve); 9RP 243-44 (65/35 is a possible outcome, because family law courts have a great deal of discretion).

¹⁴⁷ 9RP 222.

¹⁴⁸ 9RP 229, 256.

¹⁴⁹ 9RP 244.

¹⁵⁰ CP 861, ln. 11-19 (Court voids all transfers of property reachable under UFTA).

¹⁵¹ CP 857, Conclusion of Law No. 8.

¹⁵² Finding No. 4, CP 845

¹⁵³ Conclusion No. 4, CP 855

¹⁵⁴ 6RP 51.

¹⁵⁵ 8RP 122.

¹⁵⁶ 6RP 182.

this, the trial court awarded \$200,000 in future wage loss damages.¹⁵⁷ In doing so, it mistakenly believed Drew was only making \$18 per hour.¹⁵⁸

Drew is a reasonably successful young man. He is doing very well in school;¹⁵⁹ is excelling at his job;¹⁶⁰ and has a healthy and nurturing relationship with his girlfriend and a reasonably normal sex life.¹⁶¹ His own mother did not notice any change in Drew. He behaved so well and never showed much anger.¹⁶²

The expert psychologist confirmed that therapy¹⁶³ will reduce the impact of the symptoms Drew is said to be experiencing and his is expected to function even better than he is now.¹⁶⁴

Despite this reasonable lifestyle and prognosis, the trial court awarded Drew \$1.2 million in emotional damages¹⁶⁵ The Wilson's entire estate was valued at \$1, 686,357.93.¹⁶⁶ The trial court's total damage award totaled \$1, 400,000.¹⁶⁷

¹⁵⁷ Finding No 22, CP 850

¹⁵⁸ Finding No. 18, CP 848

¹⁵⁹ 4RP 40, 150, 182-83.

¹⁶⁰ 6RP 59-62, 169, 170 and 182.

¹⁶¹ 6RP 168 (Ms. Singh has been Respondent's girlfriend since 2002); and 5RP 90, 92; (Respondent states he believes sexual abuse has not impacted his sex life with girlfriend.).

¹⁶² 6RP 149, 151-52 ("Kept waiting for [Respondent] to have behavior problems but he never did.").

¹⁶³ 4RP 141-42. (Dr. Wheeler recommended three (3) years of therapy.).

¹⁶⁴ Therapy and counseling will: 4RP 166 (reduce intrusive memories); 4RP 169 (increase Respondent's functioning); 169-70 (lessen his cluttered mind); 171 (lessen irritability and stress); 4RP 170, 173 (increased vocational functioning and decrease tendency to avoid); 4RP 173 (reduce amount of worrying); 4RP 175 (his anger); 176 (reduce gastro symptoms); 4RP 178-79 (improve Respondent's ability to concentrate); and 4RP 180 (increase Respondent's self-esteem).

¹⁶⁵ CP 848, Finding of Fact No. 15, ln. 12.

¹⁶⁶ Trial Exhibit 37.

¹⁶⁷ CP 856-57 (Finding of Fact No. 7 lists emotional distress damages of \$1,200,000.00 and lost future wages of \$200,000.00). This becomes even more evident when exempt property is removed from the total. Exempt property totaled: \$175,046.89.¹⁶⁷ When this is subtracted from the Wilson's total net worth, then it becomes clear that the Court's had a purposeful intent to grant Respondent virtually all the Wilsons' nonexempt assets.

III. ARGUMENT

- A. Mary Kay is not separately liable for Doug's intentional torts because she was neither an active tortfeasor nor vicariously liable for his actions.

The trial court concluded Mary Kay was jointly, severally and, therefore, separately liable for Doug's actions.¹⁶⁸ Drew never even alleged Mary Kay should be individually liability in his complaint, amended complaint or second amended complaint.¹⁶⁹

1. Standard of review.

An appellate reviews a trial court's legal conclusions and how it applies the facts to the law *de novo*.¹⁷⁰

2. Mary Kay cannot be jointly responsible for Doug's intentional torts because her liability is limited by statute and agency law.

Mary Kay's liability for Doug's intentional torts is limited by RCW 26.16.190 and agency law. According to RCW 26.16.190, the separate property of a non-tortfeasor spouse is immune from recovery "except in cases where there would be joint responsibility if the marriage did not exist."¹⁷¹

Here, there is no joint responsibility for Doug's intentional torts. Joint responsibility can only occur when two individuals act in concert or vicariously when an agent acts for a principal.¹⁷² Generally, principals are only vicariously liable if the agent is furthering the principal's interests or acting within the scope of

¹⁶⁸ CP 857, ln. 5-7.

¹⁶⁹ CP 5-9; CP 667-92; CP 695-722.

¹⁷⁰ *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007); and *Kramarevcky v. DSHS*, 64 Wn. App. 14, 18, 822 P.2d 1227 (1992).

¹⁷¹ RCW 26.16.190; see also *deElche v. Jacobsen*, 95 Wn.2d 237, 244, 622 P.2d 835 (1980).

¹⁷² RCW 4.22.070(1)(a).

the agent's authority when the agent commits the tort.¹⁷³ Neither ground exists here.

3. Mary Kay was not an active tortfeasor.

Initially, Drew never alleged Mary Kay was an active tortfeasor and did not request a judgment against either Mary Kay or the Wilsons' marital community.¹⁷⁴ Despite amending his complaint twice during trial, Drew still never alleged that Mary Kay was negligent or committed any other tortious act and never requested a judgment against her separately.¹⁷⁵ The closest Drew came was to allege community liability in both his First and Second Amended Complaints.¹⁷⁶ Moreover, there is no evidence suggesting Mary Kay was an active tortfeasor and the trial court made no finding Mary Kay was an active tortfeasor.

4. Mary Kay is not vicariously liable for Doug's intentional torts because he did not act within the scope of authority or further a business purpose.

Mary Kay was also not vicariously liable. The only finding the trial court made to support vicarious liability was she co-owned the Wilson's real property and co-employed Drew.¹⁷⁷ After trial Drew argues this was a partnership.¹⁷⁸

Even if this were true, Mary Kay still would not be individually liable under

¹⁷³ See *Iron v. Suave*, 27 Wn.2d 562, 568, 179 P.2d 327 (1947).

¹⁷⁴ CP 8-9.

¹⁷⁵ CP 5-9; CP 667-692; CP 695-722.

¹⁷⁶ CP 670, ¶ 4.1; CP 698, ¶ 4.1.

¹⁷⁷ CP 852, Finding of Fact No. 25, ln. 8-9.

¹⁷⁸ See CP 913-15 where Respondent argued for the first time that partnership law is a valid basis for the Court's finding Mary Kay separately liable. Mary Kay does not agree there was an ostensible partnership, because it would undermine the community property statutes. To adopt an ostensible partnership liability theory for married couples would undermine public policy and obliterate the distinction between community and separate liability. Any community liability would automatically become both spouses' separate liability because both spouses would be ostensible partners by definition and would, therefore, have separate liability.

partnership principles and agency law. Partners are agents, and therefore, agency law determines the limits to a partner's vicariously liability for another partner's intentional tort.¹⁷⁹ Generally, a principal can be liable for an agent's tort if the agent commits the tort while acting within the scope of the agent's authority.¹⁸⁰ For intentional torts involving physical contact, however, a stronger showing is required to hold the principal liable.¹⁸¹ In addition to the agent acting within the scope of his authority, the agent must also be furthering the principal's interests.¹⁸² There is no finding or evidence to suggest Doug was authorized to assault Drew or that it somehow furthered the partnership's interests. In fact, the finding is that Doug sexually molested Drew *for his own personal sexual gratification*.¹⁸³ This finding is unchallenged, making it a verity on appeal.¹⁸⁴

Moreover, there is no vicarious liability for sexual torts. An employer-employee relationship is also an agency relationship. Agency law, therefore, also determines an employer's liability for an employee's acts.¹⁸⁵ The major difference, however, between an employer-employee relationship and other principal-agent relationships is the employer has more oversight and control over an employee than other principals have over their agents. Due to this increased

¹⁷⁹ See Restatement 2d of Agency § 14A cmt. (a); *Iron*, 27 Wn.2d at 568.

¹⁸⁰ See Restatement 2d of Agency § 219 (1) cmt. (a).

¹⁸¹ See *Titus v. Tacoma Smeltermen's Union*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963); and *Curley Elec. Inc. v. Bills*, 130 Wn. App. 114, 122, 121 P.3d 106 (2005).

¹⁸² *Id.*

¹⁸³ *Robel v. Roundup*, 148 Wn.2d 35, 54, 59 P.3d 611 (2002) *citing Thompson v. Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993) (“[T]he actions of a doctor who, for his own personal sexual gratification, had manually obtained sperm samples from his male patients during examination were not within the scope of the doctor's employment”).

¹⁸⁴ *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

¹⁸⁵ See Restatement 2d of Agency 228 cmt. (a).

oversight vicarious liability attaches more readily to employers.¹⁸⁶ Washington courts have nonetheless held an employee's acts that "are directed toward personal sexual gratification" "fall outside the scope of employment."¹⁸⁷

5. Mary Kay is not separately liable for Doug's intentional torts because their co-owned property belonged to the marital community and she always acted as the marital community's manager and agent.

Mary Kay always acted as the marital community's manager and agent.¹⁸⁸ According to RCW 26.16.030, "Property...acquired after marriage by either husband or wife or both, is community property." It is true that Mary Kay managed the family's finances and that the title to the Wilsons' real property was in both the Wilsons' names.¹⁸⁹ However, "either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property...."¹⁹⁰ In other words, Mary Kay always acted as the community's manager and not in her separate capacity. At most, the community could be liable.¹⁹¹

- B. The Wilsons' community is not liable because Doug did not advance the community's interests and did not act within the scope of his authority.

The trial court concluded Doug's actions created a community liability.¹⁹²

This legal conclusion is reviewed *de novo*.¹⁹³

¹⁸⁶ See *id.*

¹⁸⁷ See *Robel*, 148 Wn.2d at 54 citing *Thompson*, 71 Wn. App. at 553

¹⁸⁸ 7RP 52-53 (Even before Doug's arrest, Mary Kay had always been the family finance manager).

¹⁸⁹ 7RP 52-53. Doug had to sign a quit claim deed to each of the Wilson's jointly owned properties. See Exhibits 20, 23, 26, 29 and 32.

¹⁹⁰ RCW 26.16.030.

¹⁹¹ Mary Kay does not concede the community is liable for Doug's intentional tort.

¹⁹² CP 856 (Conclusion of Law No. 4). The Court erroneously cites *LaFramboise v. Smith*, 42 Wn.2d 198, 254 P.2d 485 (1953) as determinative on this issue. *LaFramboise* is antiquated and highly criticized.

There are two ways a marital community can be liable for an individual spouse's tort: 1) if the tortious activity benefited the community; or 2) if the act was committed while the spouse was acting within the scope of his authority in managing the community property.¹⁹⁴ No finding supports either possibility.

1. The trial court ignored *deElche v. Jacobsen* and its progeny.

a.. Prior to *deElche v. Jacobsen*, courts strained their legal analysis to find community liability in order to provide tort victims a meaningful recovery.

Before the Washington Supreme Court decided *deElche v. Jacobsen*,¹⁹⁵ a tort victim could only recover against a tortfeasor spouse's separate property if the spouse committed a tort that was found to be that spouse's separate liability.¹⁹⁶

Problems arose when a solvent spouse committed a tort, but only owned community property. Courts faced a dilemma: Either find the community liable, even when the ties between the tort and the community were tenuous, or provide no meaningful recovery to the tort victim.¹⁹⁷

This dilemma "yielded illogical, inconsistent and unjust results."¹⁹⁸ An unjust result was courts found community liability in order to provide tort victims a meaningful remedy. "In practice, the community with few exceptions has been found liable for all torts..."¹⁹⁹ As an example, *DeElche* criticized *LaFramboise v. Schmidt*²⁰⁰ - the case cited to support community liability in this case.²⁰¹

¹⁹³ *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007); and *Kramarevcky*, 64 Wn. App. at 18.

¹⁹⁴ *See deElche v. Jacobsen*, 95 Wn.2d 237, 239-40, 622 P.2d 633 (1980).

¹⁹⁵ 95 Wn.2d 237, 622 P.2d 633 (1980).

¹⁹⁶ *Id.* at 239.

¹⁹⁷ *Id.* at 242.

¹⁹⁸ *Id.*; *See deElche*, 95 Wn.2d at 239 – 42 for the illogical, inconsistent and unjust results.

¹⁹⁹ *deElche*, 95 Wn.2d at 239.

²⁰⁰ 42 Wn.2d 198, 254 P.2d 485 (1953).

²⁰¹ *See* CP 856 (Conclusion No. 4), ln. 16-21.

LaFramboise involved a husband who sexually assaulted a child and the community was liable.²⁰² *DeElche* criticized *LaFramboise* and cited it as an example where the court found community liability “upon tenuous contact with the community” and because that was “the only way plaintiff could recover was a determination that the community was liable.”²⁰³

b. DeElche recognized the problem, acknowledged the public policy protecting innocent spouses from financial ruin, and balanced the rights between the innocent spouse and the tort victim.

DeElche recognized the policy to protect an innocent spouse from a tortfeasor spouse’s misdeeds. Since courts were finding community liability upon tenuous community connection, courts were improperly imposing “one half of the liability upon the property of the nontortfeasing spouse.”²⁰⁴ This vitiated the policy “to protect the community entity from the ‘misdeeds, improvidence or mismanagement of the miscreant spouse.’”²⁰⁵

DeElche balanced the interests between an innocent spouse and a tort victim when a solvent spouse commits a tort:

As we see it, the best rule for dealing with tort recoveries from married persons is one which will impose liability on the community when a tort is done for the community’s benefit, protect the property of the innocent spouse if the tort was separate, and at the same time allow recovery by the victim of a solvent tortfeasor.²⁰⁶

In a concerted effort to balance these competing, but equally important, interests the *deElche* Court re-wrote Washington’s law and allowed tort victims to recover

²⁰² *LaFramboise*, 42 Wn.2d at 200.

²⁰³ *deElche*, 95 Wn.2d at 242.

²⁰⁴ *Id.*

²⁰⁵ *Id. citing, Brotton v. Langert*, 1 Wash. 73, 80, 23 P.2d 688 (1890)

²⁰⁶ *deElche*, 95 Wn.2d at 244-45.

against a tortfeasor's interest in community property even for separate liabilities.²⁰⁷

There was an important corollary announced in *DeElche*:

It may be that some torts which have in the past been classified as community (possibly as a result of "significant emotional factors or overtones" as suggested by Justice Finley's dissent in *Smith v. Retallick*, 48 Wash.2d 360, 365, 293 P.2d 745 (1956)) may now be properly characterized as separate.²⁰⁸

Justice Finley's dissent specifically cited *LaFramboise* as a case with emotional overtones that found community liable with tenuous community contacts.²⁰⁹

2. There is no post-*deElche* case that holds a community liable when a spouse commits a tort involving sexual relations with another.

There are no post-*deElche* cases finding community liability when one spouse commits a sexually improper act. There are cases, however, that specifically hold a sex tort is a separate liability even when the spouse is engaged in an activity that made money for the community. For instance, in *Francom v. Costco*,²¹⁰ a female worker sued her employer (Costco), her manager and the manager's marital community for sexual harassment.²¹¹ The coworker argued the manager's sexual actions benefited the marital community because the manager was engaged in a community activity (work) when he committed the tortious acts.²¹²

The *Francom* court focused on the tortfeasor spouse's motivations when he committed the acts to determine whether it benefited the marital community or was incurred while managing the community's property. The court dismissed the coworker's claims against the manager's marital community because "the

²⁰⁷ *deElche*, 95 Wn.2d at 246.

²⁰⁸ *deElche*, 95 Wn.2d at 245.

²⁰⁹ *Smith v. Retallick*, 48 Wn.2d 360, 365-66 (1956).

²¹⁰ 98 Wn. App. 845, 991 P.2d 1182 (2000).

²¹¹ *Id.* at 851.

²¹² *Id.* at 868.

harassment itself was not for the benefit of, *or in the course of managing*, the community²¹³ and defendant's motivations were "to gratify his personal objectives and desires."²¹⁴ Here, Doug's motives are a verity on appeal, and were not community. They were purely personal. There is no community liability.

C. Doug's intentional tort is not a community liability because there is no *respondeat superior* liability for sex torts.

Community liability for a spouse's tort is based on vicarious liability or *respondeat superior*.²¹⁵ Generally, *respondeat superior*, renders a master liable for his servant's tortious acts if the servant is acting within the scope of his employment *and in furtherance of the master's business*.²¹⁶ That means, "[w]hen a servant steps aside from the master's business in order to effect some purpose of his own, the master is not liable."²¹⁷ Here, there is no community liability because Doug stepped aside from a community endeavor and engaged in purely personal matters when he committed the tort.²¹⁸ It makes no difference that Doug gained access to Drew through the yard work.²¹⁹ It makes no difference that the sexual assaults occurred on community property.²²⁰

²¹³ *Id.* at 868-69. (emphasis added).

²¹⁴ *Id.* at 869.

²¹⁵ *Bergman v. State*, 187 Wn. 622, 626-27, 60 P.2d 699 (1936).

²¹⁶ *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979). Notice the rule is in the conjunctive, the servant must not only be acting in the scope of his employment, but when the tort occurs she must also be furthering the master's business.

²¹⁷ *Kuehn* at 277.

²¹⁸ *See, also, Thompson*, 71 Wn. App. at 551, citing *Kryeacos v. Smith*, 89 Wn.2d 425, 429, 572 P.2d 723 (1977); and *Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 440, 667 P.2d 125, *rev. denied*, 100 Wn.2d 1025 (1983)(no vicarious liability when sexual assaults are committed while working for employer).

²¹⁹ *See Scott v. Blanchet High School*, 50 Wn. App. 37, 47, 747 P.2d 1124 (1987) (holding that despite the fact a sexually assaulting teacher gained access to a girl through his employment, the school was not vicariously liable because no reasonable person could infer the teacher was furthering the school's purpose.) *See also Bratton v. Calkins*, 73 Wn. App. 492, 870 P.2d 981 (1994).

²²⁰ *See Farman. v. Farman*, 25 Wn. App. 896, 901-03, 611 P.2d 1314 (1980)(Husband not liable for harassing phone calls made from marital home to husband's former wife).

Because Doug's tortious conduct is not a community liability, he is separately liable for his actions. Seemingly, emotional overtones got the better of the trial court in this case. The trial court ignored *DeElche*'s corollary rule that directed it to properly characterize liabilities and not strain to find community liability if there was only a tenuous connection between the tort and the community. In fact, the trial court specifically relied upon *LaFramboise*, a case that has been repeatedly criticized for finding community liability when there was only a tenuous connection between the tort and the community, in arriving at its conclusion. The result in this case was the exact result the Washington Supreme Court directed trial courts to avoid – imposing responsibility on an innocent spouse's interest in community property when the underlying tort is truly the other spouse's separate liability.

D. A creditor cannot use UFTA to set aside a dissolution decree.

There is no authority allowing a creditor to set aside a dissolution decree under UFTA. The Ninth Circuit Court of Appeal, interpreting Washington law, held this right does not exist.²²¹ The creditor's only right is to an equitable lien.²²² Here, the property was transferred by deeds recorded in contemplation of a dissolution decree. Even if the deeds were voided, there still is a dissolution decree dividing

See also, Furuheim v. Floe, 188 Wn. 368, 369-70, 62 P.2d 706 (1936) (husband was separately liable for assaulting another man at the community's insurance and real estate office because the mere fact the assault occurred on community property did not result in community liability). *See also, Bergman*, 187 Wn. at 627. (Husband's arson was a separate liability despite the fact it occurred on community property because "his act was destructive of the community business and could entail nothing but loss in the marital community.")

²²¹ *Britt v. Damson*, 334 F.2d 896, 901 (9th Cir. 1964)

²²² *Id.* at 901 ("We are not aware of any Washington decision in which it was held that creditors of a marital community which has been eliminated by divorce may set aside a property award on the basis that it was a fraudulent transfer. Their only right as against such property is to enforce an equitable lien.").

the Wilsons' property.²²³ The trial court refused to set aside the dissolution decree's property division.²²⁴

E. Even if a creditor was allowed to use UFTA to set aside a dissolution decree, there would be no grounds to do so in this case.

Even if a creditor was allowed to set aside a dissolution decree's property division, there are no grounds to do so in this case. UFTA applies when a debtor transfers assets with *actual intent* to defraud, hinder or delay creditors ("Actual Fraud Claims").²²⁵ It also applies to certain transactions if the debtor did not receive "reasonably equivalent value" for the transfer regardless of what the debtor's intent was at the time the transfer was made ("Constructive Fraud Claim").²²⁶ None of these UFTA claims apply here.

F. The trial court erroneously concluded there was "actual fraud".

1. There is no actual fraud.

The trial court never made a finding the Wilsons had fraudulent intent or that Drew proved actual fraud by "clear convincing, or cogent evidence." Instead, the trial court concluded the Wilsons did not meet their burden and show good faith.²²⁷ Since this Court is reviewing the trial court's conclusion as to whether the Wilsons' met their burden, it is a legal conclusion and review is *de novo*.²²⁸

a. RCW 26.16.210 does not apply to this case because the PSA merged into the Dissolution Decree.

The trial court misapplied RCW 26.16.210 because the transfers occurred pursuant to a dissolution decree and not between a husband and wife while they

²²³ Trial Exhibits 10, 13 and 14.

²²⁴ CP 863-64, ¶ 2.

²²⁵ RCW 19.40.041(a)(1).

²²⁶ RCW 19.40.041(a)(2)(i) and (ii); and RCW 19.40.051(a).

²²⁷ CP 858, ln. 5-14.

²²⁸ *Jones v. Jones*, 56 Wn.2d at 328, 339, 353 P.2d 441 (1960).

were married. The PSA was entered December 20, 2002.²²⁹ It specifically stated it would merge into a dissolution decree.²³⁰ Findings of Fact and a Dissolution Decree were entered on March 31, 2003.²³¹ The PSA was incorporated by reference and merged into the Decree.²³²

*Jones*²³³ makes this clear. There, the Court went to great lengths to emphasize the fact the Nevada dissolution decree was void and the real property conveyances were, therefore, made by the husband to the wife pursuant to the PSA and were transactions that occurred between them when they were married.²³⁴ There is no case that applies RCW 26.16.210 to a transfer pursuant to a dissolution decree.

There is no policy reason to construe RCW 26.16.210 the way the trial court did. The purpose behind RCW 26.16.210 is not to protect a married couple's creditors; rather it is to protect one spouse from overreaching by the other spouse.²³⁵ Creditors are only protected if the transfer occurs while the parties are still married and the couple keeps the property amongst themselves. There is no corresponding policy that would presumptively infect a transaction between a couple who dissolved their marriage and one spouse transfers his or her interest in property to the other spouse and loses it forever.

²²⁹ Trial Exhibit 13.

²³⁰ Trial Exhibit 13, ¶ 1.13, Pg. 3, ln 11 - 15.

²³¹ Trial Exhibits 14 and 15.

²³² *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 333-34, 941 P.2d 1108 (1997)

²³³ *Jones v. Jones*, 56 Wn.2d at 328.

²³⁴ *Id.* at 336 (“The Nevada Decree, being void, leaves the property settlement agreement between Barbara Jones and Thomas C. Jones, without consideration. It becomes merely a contract between husband and wife, and the deeds conveying the property to Barbara Jones, must be judged as conveyances between husband and wife, during their marriage.”)

²³⁵ *In re Madden's Estate*, 176 Wn. 51, 53-54, 28 P.2d 280 (1934).

- b. Good faith is not an issue addressed in the *prima facie* actual fraud case; rather, it is a defense that is raised once the plaintiff establishes actual fraud.

Prior to UFTA being enacted the creditor asserting a fraudulent transfer to prove “the absence of good faith.”²³⁶ A party challenging a transaction had to show the transferor did not receive “*fair consideration*.”²³⁷ Under the UFCA “fair consideration” required good faith.²³⁸ So, a party challenging a transaction had to prove there was no good faith.

UFTA made clear that good faith is only an issue if the party challenging a transaction proves fraud. UFTA replaced “fair consideration” with “reasonably equivalent value” and “reasonably equivalent value” does not require good faith. It only involves value given for the transfer.²³⁹ UFTA made it clear that good faith is only an absolute defense to a court voiding a transaction if he or she can show good faith and reasonably equivalent value.²⁴⁰

The trial court’s interpreting RCW 26.16.210 in the manner it did renders RCW 19.40.081(a) meaningless. “A court may not construe a statute in a way that renders statutory language meaningless or superfluous.”²⁴¹ If parties to a transaction must show good faith in order to defeat Actual Fraud Claims, then there is no reason to have good faith enumerated as a defense to be proven after the Actual Fraud Claim has been established.

²³⁶ *Columbia Intern. Corp. v. Perry*, 54 Wn.2d 876, 880-81, 344 P.2d 509 (1959).

²³⁷ RCW 19.40.040 (“[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.”)

²³⁸ RCW 19.40.030.

²³⁹ RCW 19.40.031.

²⁴⁰ RCW 19.40.081(a).

²⁴¹ *Ballard Square Condominium Owners Ass’n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006).

Finally, the trial court's interpreting RCW 26.16.210 is inconsistent with *Jones*. Despite *Jones*' holding the burden was on the married couple to show good faith, it started its good faith analysis with the proposition that "[t]his court has never held that transactions between husband and wife are presumptively fraudulent."²⁴² Here, the trial court presumed fraud and required the Wilsons to disprove it.

- c. Even if the Court properly applied RCW 26.16.210 to these facts, Mary Kay acted in "good faith."

Even if RCW 26.16.210 applies, Mary Kay met her burden and proved good faith. *Jones* supports Mary Kay's argument. In *Jones* the trial court found the wife who received property pursuant to a PSA did not sustain her burden of proving good faith.²⁴³ The Supreme Court reversed and concluded the former wife established the requisite "good faith."²⁴⁴ In doing so, it relied upon the fact there were no findings the wife sought a divorce for any reason other than to dissolve the marriage to the husband.²⁴⁵ It also relied upon the fact the former wife did not record the deeds immediately when the PSA was entered.²⁴⁶

Here, the situation is no different. There is no finding and no evidence Mary Kay dissolved her marriage for any reason other than she no longer wanted to be married to Doug. *That would be the normal reaction for a woman who discovered her spouse had molested teenage boys*. Moreover, Mary Kay did not post bail when Doug was arrested; never shared a room or a bed with Doug after his arrest; made Doug move from the marital home; did not spend Christmas or New Years

²⁴² *Jones v. Jones*, 56 Wn.2d 328, 337, 353 P.2d 441 (1960).

²⁴³ *Jones* at 334, 339.

²⁴⁴ *Id.* at 339.

²⁴⁵ *Id.* at 338-39.

²⁴⁶ *Id.* at 338.

with him; and her contact with Doug was infrequent. Also, like the wife in *Jones*, Mary Kay did not immediately record the deeds. They were held for approximately 3 months after they were signed. If there was no good faith, then one would think the deeds would have been recorded immediately after Doug signed them. Moreover, even after the quitclaim deeds were recorded, Mary Kay took no steps to hinder creditors from pursuing claims by selling the property or encumbering it in any way.

An absence of good faith cannot be presumed when a creditor protects his or her interests. “[I]t is settled law in this state that a debtor though insolvent, may prefer one or more of his bona fide creditors, even if it exhaust his whole property to do so.” (Citations omitted).²⁴⁷ A preference, even to a family member, that is not specifically voidable as constructive fraud, can be made even if the debtor is insolvent and the transfer exhausts his assets.²⁴⁸ Similarly, the preferred creditor, provided his or her debt is real, is allowed to seek a preference and still be acting in good faith even if the creditor knows the preference may thwart other creditors’ ability to get paid.²⁴⁹ “Mere knowledge on the preferred creditor’s part that his preference will hinder or defeat other creditors will not alone render his preference fraudulent” as long as the debt is real.²⁵⁰

d. There are insufficient facts to support an Actual Fraud Claim.

The trial court made no finding that Doug had fraudulent intent when the transfers were made. Moreover, it made *no finding Drew proved actual fraud by*

²⁴⁷ *Union Securities Co. v. Smith*, 93 Wn. 115, 122, 160 P. 304 (1916).

²⁴⁸ 37 Am.Jur.2d *Fraudulent Conveyances and Transfers* §69; and 37 C.J.S. *Fraudulent Conveyances* § 162..

²⁴⁹ 37 C.J.S. *Fraudulent Conveyances* §164.

²⁵⁰ *Union Sec.*, 93 Wn. at 122-23.

clear and satisfactory proof. There is insufficient evidence to support an Actual Fraud Claim by clear and satisfactory proof.

i. What Drew was required to prove.

In order to prevail on his Actual Fraud Claim, Drew had to prove that Doug transferred assets “with the actual intent to hinder, delay, or defraud” creditors.²⁵¹ He had to do so by “clear and satisfactory proof.”²⁵² That is because honesty is presumed and the burden in a fraud case is a heavy one.²⁵³ In addition, Drew had to show Mary Kay *knew about Doug’s fraudulent intent.*²⁵⁴ Drew must show more than mere suspicion to charge Mary Kay with inquiry and knowledge of the Doug’s fraud.²⁵⁵ “There must be discovery of evidential facts leading to a belief in the fraud.”²⁵⁶

ii. The record is devoid of any direct evidence of “actual fraud.”

There is insufficient evidence to sustain an Actual Fraud Claim by clear and satisfactory evidence. There is no direct evidence Doug committed actual fraud. Doug testified that he agreed to Mary Kay’s demands because he was ashamed and remorseful for what he had done. Moreover, there was no evidence Mary Kay, or anybody else, had reason to know Doug had a different motivation.

iii. There was insufficient circumstantial evidence of “actual fraud.”

²⁵¹ RCW 19.40.041(a).

²⁵² *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 528 (1994).

²⁵³ *Columbia Intn’l Corp. v. Perry*, 54 Wn.2d 876, 880-81, 344 P.2d 509 (1959)

(Citations omitted).

²⁵⁴ *Id.* at 878-79 (Citations omitted).

²⁵⁵ *Id.* at 879.

²⁵⁶ *Id.*

Since there was no direct actual fraud evidence, the only way to prove an Actual Fraud Claim was through circumstantial evidence. UFTA codifies 11 common law fraud badges. Mary Kay concedes there was sufficient evidence to find Doug transferred substantially all of his assets and the transfer left him insolvent, but when the other 9 badges of fraud are considered it becomes clear the circumstantial evidence was far from “clear and satisfactory” to prove actual fraud.

First, neither Mary Kay nor Doug concealed the transfers.²⁵⁷

Second, there was no lawsuit threat or a lawsuit filed when the transfers were made.²⁵⁸ In fact Drew never sought restitution during the criminal proceedings.²⁵⁹

Third, the Wilsons never absconded.²⁶⁰

Fourth, the transferred assets were not concealed in any manner.²⁶¹

Fifth, Mary Kay was not an insider.²⁶² When the dissolution decree was entered she was no longer Doug’s spouse.

Sixth, Doug did not possess or control substantial assets after they were transferred.²⁶³ Mary Kay may have rented the Seabeck property to Doug. (Doug gave Mary Kay his pay checks).²⁶⁴

Seventh, Doug did not transfer the assets to a lienor who transferred the assets an insider.²⁶⁵

²⁵⁷ RCW 19.40.041(b)(3).

²⁵⁸ RCW 19.40.041(b)(4).

²⁵⁹ 6RP 153-54, 188-89, 191-93.

²⁶⁰ RCW 19.40.041(b)(6); Respondent’s Exhibit 4 (Judgment and Sentence).

²⁶¹ RCW 19.40.041(b)(7).

²⁶² RCW 19.40.041(b)(1).

²⁶³ RCW 19.40.041(b)(2).

²⁶⁴ 7RP 11-13.

²⁶⁵ RCW 19.40.041(b)(11).

Mary Kay concedes the transfer did occur shortly after Doug's arrest²⁶⁶, but this factor should be minimized. The transfer occurred pursuant to a contemplated dissolution decree. It is infinitely more likely Mary Kay wanted to dissolve her marriage because of what Doug did. Moreover, the "debt" associated with the Doug's acts occurred years earlier when he committed the acts.²⁶⁷

The final factor – *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*²⁶⁸ – is the most significant and potentially dispositive. It will be discussed in detail.

This is a matter of first impression in Washington. No Washington state court has examined the interplay between the UFTA and property divisions in dissolution decrees. Other courts, however, have addressed this issue and are persuasive.

Because it becomes important, Mary Kay intentionally differentiates between the word "property" and "assets." An "asset" is defined by UFTA as unencumbered, non-exempt, property that a creditor could reach to satisfy his or her claims.²⁶⁹ The term "property" is used to refer to all exempt, non-exempt, encumbered and unencumbered property.

For certain, Doug's transferring 50% of the parties' property was permissible and not fraudulent *per se*. In *Britt v. Danson*,²⁷⁰ the Ninth Circuit held both spouses had "joint possession of all of the community property" under Washington

²⁶⁶ 19.40.041(b)(10).

²⁶⁷ See definition of "debt" and "claim." RCW 19.40.011(5) and (3).

²⁶⁸ RCW 19.40.041(b)(8).

²⁶⁹ RCW 19.40.011(2).

²⁷⁰ 334 F.2d 896 (9th Cir. 1964).

community property statutes.²⁷¹ As a result, to the extent Mary Kay was awarded 50% of the community *property*, there can be no fraudulent transfer because she received “fair consideration” or what is known as “reasonable equivalent value.”²⁷² Moreover, there can be no fraudulent transfer as to exempt property because the creditor could not reach the property to satisfy his or her claims.²⁷³ *Doug could, therefore, transfer 50% of the community property plus all the exempt property to Mary Kay and such transfer would not be fraudulent as a matter of law.*

Britt left open whether adjustments can be made to the 50% rule when a disadvantaged spouse gives up his or her right to maintenance or otherwise has legal right to a disproportionate property split.²⁷⁴ *In re Matter of Chappel*²⁷⁵ held a *rebuttable presumption* arises that a disadvantaged spouse who waived his or her right to maintenance gave fair consideration or reasonably equivalent value to the advantaged spouse for the advantaged spouse’s transferring more than 50% of the community property to the disadvantaged spouse.²⁷⁶ In order to rebut this presumption, a creditor must prove sufficient facts for a trial court to determine the extent to which the waiver of maintenance falls short of fair consideration or reasonably equivalent value.²⁷⁷ In order to sustain an uncontested dissolution decree against a UFTA claim, a court should make a “surface determination... that the division of marital property between the divorcing parties was within the range

²⁷¹ *Id.* at 902.

²⁷² *Britt*, 334 F.2d at 903. The term fair consideration was used in the prior UFCA. *See* RCW 19.40.030. It has since been replaced with the term “reasonably equivalent value.” RCW 19.40.031, .041, .051 and .081.

²⁷³ *See generally Goedel v. Bradley*, 174 S.W.3d 359, 364 (Tex. App. 2005).

²⁷⁴ *Britt*, 334 F.2d at 903, F.N. 13.

²⁷⁵ 243 F. Supp. 417 (S. D. Cal. 1965).

²⁷⁶ *Chappell* at 420.

²⁷⁷ *Chappell* at 420-21.

of likely distribution that would be ordered by the state divorce court if the property division had actually been litigated in that state court.”²⁷⁸

Here, there was no “substantial” evidence to set aside the property transfer in the dissolution decree or conclude Mary Kay gave less than “reasonably equivalent value” in exchange for Doug’s transferring more than 50% of the community assets to Mary Kay in connection with the dissolution proceedings. Three things are largely undisputed in this matter:

- Mary Kay was likely entitled to a disproportionate distribution of community assets based on her long-term marriage and her interrupting her work career to raise Doug’s and her children²⁷⁹;
- Mary Kay was probably entitled to maintenance²⁸⁰; and
- Doug was also saved the expense and embarrassment of a contested proceeding, which he likely would have had to pay for both himself and Mary Kay.²⁸¹

Even if this Court accepted Drew’s experts conservative analysis as to the likely range of outcomes a trial court might have reached had the Wilsons went to trial, then the asset transfer in this case is not fraudulent. Drew’s expert opined a 65% disproportionate *property* split in Mary Kay’s favor was toward the outside edge of reasonably likely results at trial.²⁸² This is where the distinction between UFTA “assets” and property becomes important. The Wilsons had both UFTA

²⁷⁸ *Herman v. Sorlucco*, 68 B.R. 748, 753 (Bankruptcy D. N. H. 1986).

²⁷⁹ 9RP 23 (Nelson started with a 60%/40% split based on the length of marriage, history of couple and financial situation), 9RP 210-11 (Respondent’s own expert opined that one would expect to see a disproportionate split around 60%/40% in a case with these facts).

²⁸⁰ 9RP 39, 147, 255-56 (Respondent’s own expert opined that due to the extreme nature of this case, Mary Kay may have been entitled to lifetime maintenance).

²⁸¹ 9RP 82 (Nelson testified Doug benefited financially, as much as \$30-40,000.00, by Mary Kay’s waiver of trial). See also RCW 26.09.140. See *Owensboro v. Gipe* 157 B.R. 171, 176 (M.D.Fla. 1993) for the proposition that avoiding extensive litigation may be considered value.

²⁸² 9RP 239 (A 65/35 percent split plus some maintenance would be a possibility outside of the envelope).

assets and exempt *property*. Mary Kay was awarded 56% of the Wilsons' property that were also UFTA assets.²⁸³ The other property that she was awarded to achieve the 90/10 disproportionate property division was all exempt and, therefore not UFTA *assets*,²⁸⁴ and cannot be the basis for a UFTA claim.²⁸⁵ In other words, if the Dissolution Decree would have awarded all the non-exempt UFTA *assets* to Mary Kay and awarded all the exempt *property* to Doug, then this would have resulted in a 57%/43% disproportionate *property* split in Mary Kay's favor. This, according to Drew's own expert, would have been well within the range of likely outcomes at trial and would not have been fraudulent. In order to accomplish the 90%/10% disproportionate *property* split in this case, the dissolution decree awarded Mary Kay exempt *property* over and above the non-exempt UFTA *assets*. This exempt *property* award is what comprises Drew's UFTA claim and is not actionable.

Mary Kay also settled her maintenance claim and thereby exchanged additional value for the disproportionate property split. It is presumed Mary Kay's maintenance waiver is reasonably equivalent to the value of the *assets* awarded to her over and above 50% of all the property's value.²⁸⁶ Neither Drew nor his expert made any attempt to value Mary Kay's maintenance claim.²⁸⁷ The trial court's finding that somehow Drew rebutted this presumption is not supported by substantial evidence. Moreover, Drew put forth no evidence, much less substantial

²⁸³ See Nelson Spreadsheet "Actual UFTA Asset and Liability Spreadsheet," Trial Ex. 164, Pg. 4; showing Doug retained \$16,687 in UFTA assets; and Trial Ex. 37 showing the Wilsons had \$1,686,357.93 in total property. Mathematically \$16,687/\$1,686,357.93 or 1% of the Wilsons' total property were UFTA assets retained by Doug.

²⁸⁴ RCW 19.40.011(2).

²⁸⁵ *Goebel v. Brandley*, 174 S.W.3d 359, 364 (Tex. App. 2005).

²⁸⁶ *Chappell* at 420.

²⁸⁷ 9RP 222.

evidence, to show any shortfall between the value of the assets over 50% of the total property value that were awarded to Mary Kay and the maintenance waiver's value.²⁸⁸

The property award is even more reasonable when it is considered at the right point in time. The proper time to consider the asset transfer's validity is when the assets were transferred.²⁸⁹ This would have been on March 31, 2003 when the dissolution decree was entered and divided the Wilsons' property. At this time, Doug was working and the Wilsons believed Doug would likely receive a SSOSA sentence and be able to continue working.

Even if this Court views the asset transfer's validity at the time the Wilsons' dissolution case would have been tried, the result is no different. The Wilsons' dissolution trial was scheduled to have occurred on November 3, 2003.²⁹⁰ At this time, Doug knew his SSOSA sentence request would not be granted and he would face long term incarceration. But this would still have been more than 7 months prior to Drew filing suit in this matter. That means *the Wilsons' dissolution matter would have been tried and completed before Drew filed suit*. Certainly if the matter was tried and the Court divided the property, there would be no UFTA claim. That is why *Sorlucco* makes sense and a court considering fraudulent transfers should look to the likely range of outcomes and if the agreed-upon property award is within that range, then the award in the uncontested dissolution decree should not be disturbed. Looking at it another way, if the Wilsons' dissolution matter would have been tried and may have resulted in the same award that the parties agreed to, then it should not be set aside.

²⁸⁸ *Chappell* at 420-21.

²⁸⁹ RCW 19.40.061(1)

²⁹⁰ Trial Ex. 160.

To do otherwise would totally thwart Washington's public policy favoring settlements. Washington has a "strong public policy of encouraging settlements."²⁹¹

Public policy in Washington favors the settlement of cases in whole or in part, and defendants who wish to settle should be able to do so *without fear of being re-exposed to litigation and liability after settlement.*²⁹²

To uphold the trial court's findings, conclusions and judgment in this matter would force people like Mary Kay to forego settlement and have the matter tried so they would not fear subsequent litigation by a creditor challenging the dissolution decree and property award.

Here, it is undisputed the UFTA assets were substantially awarded by the parties within the range a court would have likely awarded them. Respondent's expert agreed the marital home and home next door in which Respondent's 93 year-old mother lived would "likely" have been awarded to Mary Kay.²⁹³ Moreover, she agreed it would have been possible that all the Wilsons' real and personal real property could have been awarded to Mary Kay had the dissolution court known Doug would be incarcerated for a long time.²⁹⁴ Specifically she said she doubted an appellate court would have disturbed the property award if it were appealed.²⁹⁵ Respondent's expert acknowledged this makes sense since the dissolution court would undoubtedly consider the fact Doug would have very few living expenses while in prison.²⁹⁶

²⁹¹ *Puget Sound Energy v. Certain Underwriters at Lloyd's London*, 134 Wn. App. 228, 240, 138 P.3d 1068, citing, *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 366, 898 P.2d 299 (1995).

²⁹² *Puget Sound Energy*, 134 Wn. App. at 248.

²⁹³ 9RP 244

²⁹⁴ 9 RP 243-44

²⁹⁵ 9RP 243-44..

²⁹⁶ 9RP 228, ln10-15.

- iv. Case law that examines UFTA Actual Fraud Claims in an uncontested dissolution context refuses to disturb the resulting property awards.

Cases in Washington and various jurisdictions have consistently refused to disturb property awards in uncontested dissolution matters. In *Jones*²⁹⁷ the Washington Supreme Court refused to set aside a property transfer made between spouses that were contemplating divorce. In fact, the Supreme Court reversed the trial court's attempt to disturb the property transfer, even if it would defeat a former wife's ability to collect child support, because the finding that the wife failed to meet her burden of proving good faith was a conclusions of law reviewed *de novo*.²⁹⁸ The Supreme Court's proper focus was on whether the wife really intended to get a divorce due to marital difficulties.²⁹⁹

In *Owensboro v. Gipe*³⁰⁰ the facts were more egregious and the trial court still could not find actual fraud. There, like here: the husband and wife were married for 37 years; wife hired an attorney and the husband was unrepresented;³⁰¹ the couple signed a property settlement agreement that was incorporated into a dissolution decree; the couple transferred all the non-exempt assets with equity to the wife and the husband was left insolvent with very little income to support himself;³⁰² and after the marriage was dissolved the wife supported the husband by paying practically all of his living expenses, tuition, expenses, and mortgage payments on his condominium.³⁰³ Despite this, the court found no actual fraud

²⁹⁷ 56 Wn.2d 328

²⁹⁸ *Jones*, 56 Wn. 2d at 339.

²⁹⁹ *Id.* at 337-38.

³⁰⁰ 157 B.R. 171 (M. D. Fla. 1993).

³⁰¹ *Gipe* at 174.

³⁰² *Id.* at 174-75

³⁰³ *Id.* at 175.

because the Doug's motivation to agree to the dissolution decree's award was to "take care of his wife."³⁰⁴ In doing so, the trial court emphasized the parties' agreement should be examined by the dissolution court for fairness and not re-examined for fairness by a court considering a fraudulent transfer claim.³⁰⁵

Finally, *In re Rodgers*³⁰⁶ is also in accord. There, the husband was awarded all the debt attributable to his veterinary practice and wife received virtually all the assets in an uncontested divorce.³⁰⁷ The Rodgers went to Las Vegas together for a veterinary convention days before their divorce was final.³⁰⁸ After the divorce wife: kept working for husband's veterinary practice; allowed husband to continue using assets awarded to her in the divorce; stayed in the same apartment as husband; and referred to her ex-husband as her current husband.³⁰⁹ Despite these facts, the court did not find actual fraud and even commended the Rodgers for their cooperation and civility to one another after the divorce.³¹⁰

v. There was no actual fraud because there is no evidence Mary Kay knew of Doug's fraudulent plan.

Even if Doug had a fraudulent plan, he could still prefer Mary Kay as a creditor as long as Mary Kay did not know about the plan.³¹¹ Drew still had to show Mary Kay knew about the fraudulent plan.³¹² There is no finding Mary Kay knew Doug had a fraudulent plan. Moreover, the evidence, at best, shows she was

³⁰⁴ *Id.* at 178.

³⁰⁵ *Id.* at 177.

³⁰⁶ 315 B.R. 533 (Bkrtcy D.N.D. 2004)

³⁰⁷ *Rodgers* 315 B.R. at 542.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Curtis v. Crooks*, 190 Wn. 43, 59-61, 66 P.2d 1140 (1937).

³¹² *Columbia*, 59 Wn.2d at 878-79.

merely protecting herself to face life without the advantaged spouse. This she was entitled to do without imputing fraud to either party.³¹³

2. Mary Kay has an absolute defense to any actual fraud claim because she took in good faith and for reasonably equivalent value.

It is a complete defense to an actual fraud claim to take “in good faith and for a reasonably equivalent value.”³¹⁴ There is no evidence Mary Kay took in bad faith. The trial court’s conclusions Mary Kay did not establish good faith³¹⁵ is a legal conclusion reviewed de novo.³¹⁶ Here, Mary Kay established a more than reasonable explanation why she wanted to dissolve her marriage. She had property distribution and maintenance claims against Doug.³¹⁷ She merely enforced her claims and protected herself before Respondent/Plaintiff filed suit. This she was entitled to do without being guilty of fraud.³¹⁸

3. There is no constructive fraud as to present creditors.

Like the Actual Fraud Claim, the trial court concluded RCW 26.16.210 applied and the Wilsons had the burden to prove good faith in order to defeat Respondent’s Constructive Fraud Claim as to present creditors under RCW 19.40.51(a). Unlike the Actual Fraud Claim, the trial court also concluded that if RCW 26.16.210 did not apply, then Drew met his burden of proving all the

³¹³ *West Coast Grocery Co. v. Stinson, Sheriff, et. al*, 13 Wn. 255, 259, 43 P. 35 (1895) (Creditor has a duty to obtain security for his debt, at the exclusion of other creditors, without the imputation of fraud).

³¹⁴ RCW 19.40.081(a).

³¹⁵ CP 858 (Finding of Fact 12).

³¹⁶ Jones, 56 Wn.2d at 339.

³¹⁷ There is little doubt Mary Kay was Doug’s creditor when she filed the dissolution action. *See Roosevelt*, 176 B.R. at 207 (“it is appropriate to perceive dissolving spouses as mutual creditor-debtors because the law requires a fair and equitable settlement of their claims against the marital *res* and one another.”).

³¹⁸ 37 C. J. S. Fraudulent Conveyances § 164.

constructive fraud claim elements.³¹⁹ These legal conclusions, on whether a party meets their burden of proof, are reviewed de novo.³²⁰

In order to prove a Constructive Fraud Claim under RCW 19.40.051(a), Drew had to prove “by substantial evidence” that Doug did not receive “reasonably equivalent value” for the transfer. For the reasons discussed at length above³²¹, there is insufficient evidence to supporting such a conclusion.

4. There is no constructive fraud as to present and future creditors.

The trial court also concluded Mary Kay and Doug committed constructive fraud as to present and future creditors under RCW 19.41.041(a)(2).³²² Again, it did so based on burden of proof conclusions.³²³ Review is *de novo*.³²⁴

In order to prove constructive fraud under this provision, Drew must show Doug did not receive “reasonable equivalent value in exchange for the transfer.” Again, as discussed previously, there is insufficient evidence to conclude the value Mary Kay gave Doug was not reasonably equivalent to the UFTA assets she was awarded in the Dissolution Decree.

5. The Court improperly found Mary Kay liable for conclusive common law fraudulent transfer.

The Court, relying on *Davison v. Hewitt*,³²⁵ concluded there was Conclusive Common Law Fraud.³²⁶ Review is *de novo* because it involves a legal conclusion.

³¹⁹ CP 859-61 (Conclusions of Law No. 21).

³²⁰ *Jones*, 56 Wn.2d at 339.

³²¹ See supra at 34-39 (Reasonable equivalent value argument).

³²² CP 860-61 (Conclusion of Law No. 24). The trial court, once again, erroneously bases its initial conclusion under RCW 26.16.210. This argument is specious. See above, supra 45.

³²³ Conclusion 24, CP 860-61.

³²⁴ *Jones*, 56 Wn.2d at 339.

³²⁵ *Davison v. Hewitt*, 6 Wn.2d 131, 106 P.2d 733 (1940).

³²⁶ CP 858-59 (Conclusions of Law No. 13-15).

The trial court's conclusion is improper for a plethora reasons. *First*, at common law, the transferor had to be insolvent *at the time of the transfer was made*.³²⁷ Here, there was no evidence Doug was insolvent at the time he made the transfer. The *Davison* Conclusive Common Law Fraudulent Transfer rule was codified in RCW 19.40.051(b), that provides a transfer to an insider (including a spouse) is fraudulent if made for an antecedent debt and the transferor was insolvent *at the time the transfer was made* and the insider had reasonable cause to believe the transferor was insolvent *at the time the transfer was made*. In the statute, like *Davison*, the transferor had to be insolvent "at the time the transfer was made." This varies from the language in the immediately preceding subsection, RCW 19.40.051(a) that provides Constructive Fraud occurs if the "debtor was insolvent at the time or *became insolvent as a result of the transfer or obligation*." Obviously there is a difference between the language and the difference should be given effect. Here, there was insufficient evidence to find Doug was insolvent *at the time he made the transfer*. The trial court's only finding was he became insolvent as a result of the transfer.³²⁸

Second, *Davison*'s holding has been clarified by *Jones*. There, the court emphatically stated: "This court has never held that transactions between husband and wife are presumptively fraudulent."³²⁹ This effectively overruled *Davison* on this point of law.

Third, *Davison* involved a situation where the transfer was between spouses who remained married. There is no conclusive common law fraud claim when

³²⁷ *Davison*, 6 Wn.2d at 135.

³²⁸ CP 855 (Finding No. 38).

³²⁹ *Jones v. Jones*, 56 Wn.2d 328, 337, 353 P.2d 441 (1960), citing, *In re Bubb's Estate*, 53 Wn.2d 131, 331 P.2d 859 (1958).

transfers are made between divorcing spouses.

Finally, *Davison* was displaced by UFTA. RCW 19.40.902 specifically states that common law survives “unless displaced by the provisions of this Chapter.” As previously discussed, *Davison* was subsumed by, RCW 19.40.051(b) (“Insider Preference Claims”). As such, UFTA displaced the rule. UFTA requires Insider Preference Claims to be brought within one year.³³⁰ Here, the trial court correctly concluded all Insider Preference Claims are time barred.³³¹ Drew did not file a cross appeal. Since the Conclusive Fraudulent Transfer Claim is an Insider Preference Claim, it is time barred by RCW 19.40.091(c).

To be sure, one of UFTA’s central purposes was “to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. *In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on evidence of actual intent.*”³³² UFTA, thus, was specifically designed to displace common law conclusive fraud and make it apply only in certain defined circumstances set forth in the UFTA so it would be consistent with the laws in other states. *Davison* was displaced by UFTA.

G. It should have separated the trials because the court improperly exposed itself to the Wilsons’ assets when determining damages.

Pretrial, Mary Kay moved for separate trials because evidence of the Wilsons’ assets was necessary for the UFTA claim and was highly prejudicial to the personal injury claim, especially when determining emotional damages.³³³ The trial court denied her request.³³⁴ During the bench trial, the trial court was exposed

³³⁰ RCW 19.40.091(c).

³³¹ CP 861 (Conclusion of Law 25).

³³² *Id.*

³³³ CP 16-31.

³³⁴ CP 72.

to the Wilsons' assets.³³⁵ Accordingly, the trial court entered a judgment that totally subsumed the Wilsons' collective assets.

A trial court's decision to deny a motion for separate trials is reviewed for abuse of discretion.³³⁶ If there ever can be an abuse of discretion, then it would be here where a fact-finder considers a party's assets in connection with hearing a trial involving a tort case with emotional overtones and then enter a \$1.4 million judgment.³³⁷

H. The trial court's damages awards were excessive and should be stricken.

The court's emotional damages award is excessive. A trial court's award of damages is reviewed for abuse of discretion.³³⁸ The court abuses its discretion when its discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."³³⁹ An appellate court will not disturb an award of damages unless it is outside the range of substantial evidence in the record, shocks the conscience of court, or appears to have been arrived at as a result of passion or prejudice.³⁴⁰

First, the trial court's emotional damages award was excessive because it is clearly outside the range of substantial evidence. Objectively, Drew is doing reasonably well. He is doing very well in college;³⁴¹ is doing well at work³⁴², and

³³⁵ See testimony of Roland Nelson, Mabry De Buys and Judge Wartnik as well as testimony of Mary Kay and Doug regarding their PSA and assets.

³³⁶ *Sage v. Northern Pacific R. Co.*, 62 Wn.2d 6, 380 P.2d 856 (1963).

³³⁷ CP 865.

³³⁸ *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 636, 865 P.2d 527 (1993).

³³⁹ *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991).

³⁴⁰ *Henderson v. Tyrrell*, 80 Wn. App. 592, 631, 910 P.2d 522 (1996) (citing *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 699 P.2d 1230 (1985)).

³⁴¹ 4RP 40, 150 and 6RP 183..

³⁴² 6RP 59-62, 169-70 and 182.

has a good intimate relationship without significant sexual problems.³⁴³ Even his mother could not detect any noticeable change in her son who was “behaving so well” and never showed much anger.³⁴⁴

Second, Dr. Wheeler testified, emphatically, that the symptoms Drew was experiencing at the time of the trial would improve with counseling/treatment.

1. The court’s future lost wages damages award is also excessive because it is not supported by substantial evidence.

The measure of damages for impairment of earning capacity is the difference between the earning capacity before and after the injury.³⁴⁵ Here, Respondent’s pre-injury earning capacity was no greater than a person with an Associate of Arts Degree³⁴⁶ or \$34,500 a year.³⁴⁷ At trial, Drew was making more than his pre-injury capacity. He made \$19.00 per hour³⁴⁸ or \$39,520 per year.³⁴⁹ Under these circumstances, there can be no future wage loss.

Moreover, the trial court improperly based its finding on \$18.00 per hour, when he was making \$19.00 at the time of trial.³⁵⁰

- I. The trial court erred when it denied Mary Kay’s Motion to Reconsider.

A trial court’s ruling on the motion of reconsideration for a manifest abuse of discretion.³⁵¹ A trial court abuses its discretion when it exercises it in “a manifestly

³⁴³ 6RP 168 (Ms. Singh has been Respondent’s girlfriend since early 2002) and (Respondent states he believes sexual abuse has not impacted his sex life with girlfriend.).

³⁴⁴ 6RP 151 (“Kept waiting for [Respondent] to have behavior problems but he never did.”).

³⁴⁵ *Cook v. Donaher Lumber Co.*, 61 Wn. 118, 124, 112 P. 241 (1910).

³⁴⁶ 6RP 51.

³⁴⁷ 8RP 122.

³⁴⁸ 6RP 182.

³⁴⁹ \$19.00 per hour multiplied by an average work year of 2080 hours.

³⁵⁰ CP 848 (Finding No. 18); see also 6RP 182.

³⁵¹ *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001), *review denied*, 146 Wn.2d 1018 (2002).

unreasonable manner or bases it upon untenable grounds or reasons.”³⁵² Here, the trial court abused its discretion because the evidence shows Mary Kay is not jointly and severally liable for Doug’s intentional tort and the liability is not a community liability.³⁵³ The trial court abused its discretion when it summarily denied Mary Kay’s motion.³⁵⁴

J. Plethora findings are not supported by substantial evidence.

An appellate court reviews a trial court’s findings of fact and conclusions of law to determine whether the findings are supported by substantial evidence in the record and, if so, whether the conclusions are supported by those findings.³⁵⁵

Substantial evidence is more than “a mere scintilla” of evidence.³⁵⁶ It is sufficient if it “would convince an unprejudiced thinking mind of the truth of the fact” to which the evidence is directed.³⁵⁷ The trial court made numerous findings that are unsupported by the record and have not yet been addressed in this brief:

1. *FOF No. 2.* Drew admits the trial court incorrectly stated Doug resided at the Kenmore home until he was convicted.³⁵⁸
2. *FOF No. 4:* Drew testified sexual contact began at age ten.³⁵⁹
3. *FOF No. 11.* First, both Drew and Mary Kay’s experts opined the proper

³⁵² *Id.*

³⁵³ CP 869-73 (Defendant Mary Kay Wilson’s Motion for Reconsideration).

³⁵⁴ CP 931-32 (Order Denying Motion for Reconsideration).

³⁵⁵ *Scott v. Trans-System*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).

³⁵⁶ *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 818, 733 P.2d 969 (1987) (quoting *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)).

³⁵⁷ *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003) (emphasis omitted) (quoting *Thomson v. Virginia Mason Hosp.*, 152 Wn. 297, 300-01, 277 P. 691 (1929)).

³⁵⁸ RP 912, ln 15- 17.

³⁵⁹ 4RP 58.

valuation of personal property during property settlement is the “garage sale” value.³⁶⁰ The court used replacement value to value the Wilsons’ personal property at \$300,000.³⁶¹ According to Nelson, the “garage sale” value of the personal property was \$50,000.³⁶²

4. *FOF No. 11* There was also a second loan on the real estate for \$28,545.86 still owed on 7728 NE 265th, Kenmore, property.³⁶³

5. *FOF No. 12*. The court incorrectly determined the value of the Wilsons’ net worth, because it failed to take into account of a \$75,000 loan, failed to adjust personal property from \$300,000 to \$50,000, include \$28,545.86 still owed on 7728 NE 265th, Kenmore, property, and failed to account for the \$18,000 loan on Mary Kay’s Toyota car.³⁶⁴

6. *FOF No. 18*. The trial court failed to list the Respondent’s proper rate of pay as \$19.00 per hour. The court, however, did correctly state Respondent’s wage in FOF No. 21, ln. 17.

7. *FOF No. 26*. This finding is a conclusion and is erroneous. The asset transfer property did not occur when the PSA was signed, but rather when the Dissolution Decree was entered and the deeds recorded.³⁶⁵ Moreover, all of the Wilsons’ community property was not transferred to Mary Kay. Doug kept cash, a retirement account, a Smith Barney account, and furniture all classified as community property and totaling \$171,411.³⁶⁶

³⁶⁰ 9RP 31; 9RP 245-47.

³⁶¹ CP 847, ¶, ln. 11-12.

³⁶² 9RP 30-31.

³⁶³ Exhibit 37.

³⁶⁴ Respondent’s Exhibit 37.

³⁶⁵ RCW 19.40.061(i).

³⁶⁶ Trial Exhibit 137.

8. *FOF No. 28.* Doug did not perform all the maintenance on the Wilsons' properties after his arrest. At most, he did some insignificant work on the Kenmore property³⁶⁷, but there was no evidence he helped maintain any of the other properties.

9. *FOF No. 29.* Doug's 2003 earnings were also used to pay therapy fees³⁶⁸, a monthly stipend³⁶⁹, and a \$600.00 replacement car.³⁷⁰

10. *FOF No. 41:* This is a conclusion of law mislabeled a finding of fact. It is erroneous, because there are insufficient findings and evidence.

IV. Conclusion.

Based on the foregoing, Mary Kay requests this Court reverse the trial court's judgment and findings of fact and conclusions of law and remand it back to the trial court with instructions to conduct a new trial as to damages, to not award future wage loss, to characterize all damages as Doug's separate liability, to dismiss Mary Kay Wilson, individually, and to dismiss the UFTA claims. Mary Kay requests her costs in this appeal.

Respectfully submitted, May 7, 2007

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³⁶⁷ 7RP 66-67.

³⁶⁸ 8RP 188.

³⁶⁹ 7RP 54.

³⁷⁰ 7RP 55.