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

MARY KAY WILSON,

Appellant,

and

ANDREW CLAYTON,

Respondent.

On Appeal From King County Superior Court
Honorable Theresa Doyle

Appellant's Reply Brief

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Argument in Reply

1. Drew concedes May Kay is not jointly and severally liable.

Mary Kay is not jointly and severally liable for Doug's actions. Even if there was community liability, which there is not, then only Doug and the community would be *separately liable*.

Torts which can properly be said to be done in the management of community business...will remain community torts with the community and the tortfeasor *separately* liable.¹

2. There is no community liability

a. *De novo* is the proper standard for review.

Legal conclusions are findings that carry legal implications.² Conclusions of law, even if labeled a finding of fact, are reviewed *de novo*.³ The findings: 1) Doug sexually assaulted Drew “in conjunction with the employment of [Drew];”⁴ and 2) Doug sexually assaulted Drew “in the course of managing the community property”⁵ have legal implications and are conclusions of law. Similarly, Conclusion of Law Number 4, which concludes the Wilsons' community is liable to plaintiff is a proper legal conclusion.⁶ They are all reviewed *de novo*.

¹ *deElche v. Jacobsen*, 95 Wn.2d 237, 245, 622 P.2d 835 (1980).

² *Woodruff v. McClellan*, 95 Wn.2d 394, 396-97, 622 P.2d 1268 (1980).

³ *City of Tacoma v. William Rogers Company, Inc.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002); *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987).

⁴ CP 846, ln. 1-2 (Finding of Fact No. 5).

⁵ CP 851, ln. 17-18 (Finding of Fact No. 24).

⁶ CP 856, ln. 16-21 (Conclusion of Law No. 4).

b. There is no community liability in this case because community liability is vicarious and Doug acted to gratify his own personal motives.

Community liability is vicarious and based on agency principles. It is well settled that the community liability is vicarious and based on *respondeat superior*.⁷ Spouses are agents with authority to manage the community's property.⁸ The community, therefore, can be vicariously liable for the agent spouse's torts if they are committed while managing community property, or when acting for the marital community's benefit.⁹

The community is not liable because Doug, as community property manager, was not authorized to assault Drew. "The doctrine of respondeat superior cannot be applied to acts of the husband, when such acts are without the scope of his authority."¹⁰ If the agent spouse steps aside from the community's business in order to effect some purpose of his own, then the community is not liable.¹¹

The death knell for Drew's community liability argument is the court's unchallenged finding that Doug "engaged in this conduct for his own sexual gratification."¹²

⁷ *Bergman v. State*, 187 Wn. 622, 626-27, 60 P.2d 699 (1936); and *Aichlmayr v. Lynch*, 6 Wn. App. 434, 435, 490 P.2d 1026 (1972).

⁸ RCW 26.16.030.

⁹ *deElche* at 245. Drew agrees this is the proper test. BOR at 19.

¹⁰ *Harry L. Olive Co. v. Meek*, 103 Wn. 467, 469-70, 175 P. 33 (1918); *See also*, *Bergman* at 626-27 ("unless, in a given instance, it can be said that the husband was acting as the agent of the marital community, the community is not liable."); and 19 WAPRAC §14.9 ("if the alleged basis of liability is the management theory..., community liability does not lie when the acting spouse exceeded authority and did a wrongful act on his own account.")

¹¹ *Bratton v. Calkins*, 73 Wn. App. 492, 499, 870 P.2d 981 (1994); *Kuehne v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979).

¹² CP 845, ln. 23-25.

A tort committed by an agent...is not attributable to the principal if it emanated from a wholly personal motive of the agent and was done to gratify solely personal objectives or desires of the agent.¹³

The trial court found, and it is a verity on appeal, that Doug was acting for his own sexual gratification when he assaulted Drew. The community cannot be vicariously liable under *respondeat superior* as a matter of law.

c. The trial court's findings do not support vicarious community liability.

Drew relies on the trial court's findings to conclude there is community liability, but the trial court's findings are insufficient to support this conclusion. The operative findings are that Doug's actions occurred on community property and in conjunction with Drew doing yard work on the property as well as Doug having gained access to Drew by employing Drew to work on community property.¹⁴ These facts, however, are insufficient to impose vicarious liability in a sexual assault case.

In a sexual assault case analyzing *respondeat superior* liability involving a minor student teacher's assistant and a teacher, the minor was unsuccessful in establishing *respondeat superior* liability on the teacher's principal - the school district - for the teacher's sexual assault.¹⁵ There, the trial court determined the teacher acted within his authority when he sexually assaulted the minor assistant because "there was a disparity of power in the relationship which was described as being abusive in the context of a student-teacher, teacher-coach context" and because "the

¹³ *Thompson v. Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993).

¹⁴ CP 845, ln. 15- 846, ln. 9 (Findings of Fact No. 4-6); and CP 851, ln. 17 – 852, ln. 7 (Finding of Fact No. 24).

¹⁵ *Bratton* at 493-95.

contacts that occurred up to the point of sexual intercourse were due to [the minor's] status as a teacher's assistant."¹⁶ The trial court stated

a lot of the initial contact, the grooming, the flirting, the fondling, and the alleged acts of sexual contact ... occurred on school property. In conjunction with him being a teacher. On school property. And that a lot of the conduct after-after softball practice was done in conjunction as being a coach. That is different than a mere affording of the opportunity.¹⁷

The appellate court reversed and held

The relationship was the result of [the teacher's] wholly personal motives and was done solely to gratify his personal objectives and desires. (Citation omitted). Even if his employment provided the opportunity for the wrongful acts, his intentional tortious actions should not be attributable to the school district.¹⁸

Similarly, a patient was unsuccessful in establishing *respondeat superior* liability on a clinic when a doctor, who was also an owner, sexually assaulted hundreds of patients over multiple years.¹⁹ The patient argued, like Drew argues here, the clinic should be vicariously liable because the sexual assault “happened in conjunction with an ‘authorized’ examination.”²⁰ Division One rejected the patient’s argument and held the better view is that the principal is not liable for the agent’s tortious or criminal acts as a matter of law if those acts did not further the principal’s business.²¹

¹⁶ *Id.* at 500.

¹⁷ *Id.*, f.n.2.

¹⁸ *Id.* at 501.

¹⁹ *Thompson* at 548 (case summary) 550 – 553.

²⁰ *Thompson* at 553.

²¹ *Id.* citing *Kuehn* at 278.

Here, the trial court essentially found the Wilsons' community liable under an "enterprise liability" theory, which has been repeatedly rejected. In *Thompson* Division One rejected, again, the invitation to impose enterprise liability. Enterprise liability would have extended vicarious liability for an agent's intentional assaults to "include those faults of human nature which may surface when a servant has contact with a third party."²² This is the basis upon which the trial court concluded the Wilsons' community was liable for Doug's intentional tort. It concluded the community was liable because Doug had contact with Drew while having Drew perform yard work on the community property.

The operative facts show there is no community liability. The operative facts are not who owned the property upon which the assaults occurred; but, rather, what were the tortfeasor's motives and what was the tortfeasor doing *at the time* the tort occurred.²³ The proper temporal focus is what was the tortfeasor doing and whose interests was the tortfeasor advancing at the time he or she committed the tort.²⁴ In this respect, this case is similar to *Francom*.²⁵ Like the sexual harassment alleged in *Francom*, it is clear the assaults themselves in this case were "not for the benefit of or in the course of managing the community."²⁶ Like the driver in *Kuehne*, the teacher in *Bratton*, and the doctor in *Thompson*, Doug

²² *Thompson* at 553-54; and *Kuehne* at 279-80.

²³ See *deElche*, 95 Wn.2d at 240 (criticizing the fact "distinctions more often are based on the ownership of property involved in the tort, which seldom has anything to do with the motivation of the defendant or injury to the plaintiff.")

²⁴ *Thompson* at 552.

²⁵ *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000).

²⁶ *Id.* at 868-69.

“stepp[ed] aside from [the community business] in order to effect some purpose of his own.” As a result, the community is not liable.²⁷

3. Drew’s other arguments are factually distinguishable.

Drew’s reliance on *LaFramboise*,²⁸ as well as Professor Cross’ law review article,²⁹ is misplaced and distinguishable. Succinctly, *LaFramboise* has been subsequently described as a case that found community liability based on “tenuous contacts with the community.”³⁰ That may explain why it has never been cited since *deElche* was decided.

LaFramboise is distinguishable because the community business was to safeguard a 6 year-old child 24 hours per day while her parents were away for 6 months.³¹ That explains why the jury was instructed that *if the community received consideration for undertaking to take care of the child and the husband took indecent liberties, then the community was liable.*³² This distinction was subsequently emphasized as important in *Farman v. Farman*.³³ *Farman* distinguished itself from *LaFramboise* because in *LaFramboise* “the husband’s tort was committed in connection with an activity by which community funds were earned.”³⁴ Here, the Wilsons’ community *was not* paid to take care of Drew and there are no findings or evidence that they undertook Drew’s care.

Finally, in a last ditch effort to establish vicarious liability where it

²⁷ *Kuehne* at 277; *Bratton*, 73 Wn. App. at 498; *Thompson* at 554.

²⁸ *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953).

²⁹ The Community Property Law (Revised 1985), 61 Wash. L. Rev. 13, 137 (1986).

³⁰ *deElche* at 242.

³¹ *LaFramboise* at 198-200.

³² *LaFramboise* at 199.

³³ 25 Wn. App. 896, 611 P.2d 1314 (1980).

³⁴ *Id* at 903, f.n.3.

otherwise does not exist, Drew cites a sex discrimination case *Glasgow v. Georgia-Pac. Corp.*³⁵ and tries to create strict vicarious liability for all torts committed by a manager, supervisor or owner.³⁶ First, the strict liability rule in *Glasgow* has not been applied to all sexual abuse cases. For instance, in *Thompson* the perpetrator was an owner of the clinic, yet the clinic was not responsible for the doctor's intentional tort.³⁷

Second, the strict liability rule was subsequently limited to *quid pro quo* sexual harassment cases and not extended to hostile work environment cases.³⁸ *Quid pro quo* sexual harassment is where “an employee seeks damages from an employer for a supervisor or employer’s extortion or attempted extortion of sexual favors in exchange for a job benefit or the absence of a job detriment.”³⁹ Strict liability is imposed because supervisors not only have the opportunity to discriminate in job-related decisions, but are also granted the *authority* to make those decisions.⁴⁰ Here, the record is not satisfactorily developed to affirm the judgment on this basis.⁴¹

In hostile work environment claims, on the other hand, the perpetrator’s “actual or apparent authority to make employment decisions – standing alone – is not sufficient to hold the employer automatically

³⁵ 103 Wn.2d 401, 693 P.2d 708 (1985).

³⁶ BOR at 24.

³⁷ *Thompson*, 71 Wn. App. at 548, 549 – 553.

³⁸ *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 835-41, 9 P.3d 948 (2000).

³⁹ *Henningsen*, 102 Wn. App. at 836.

⁴⁰ *Henningsen*, 102 Wn. App. at 838.

⁴¹ RAP 2.5(a) only allows argument affirming a judgment for the first time on appeal “if the record has been sufficiently developed to fairly consider the ground.”

liable for the [perpetrator's] conduct.”⁴² In fact, the employer has an affirmative defense to hostile work environment cases by proving “(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm.”⁴³ Again, the record is not sufficiently developed to decide this issue.

Finally, Drew’s arguments, *raised for the first time on appeal*, should not be considered because they were never plead. Courts have no jurisdiction to grant relief beyond that sought in the complaint.⁴⁴ Here, Drew never remotely plead any employment based discrimination claims.⁴⁵ He never even alleged an employment relationship existed. His Second Amended Complaint merely said “[W]hen [Drew] was about nine years old he began to help the defendant with yard work.”⁴⁶ He was given leave twice during trial to properly plead all his grounds for relief. The trial judge even specifically told him that if he did not plead all his claims when he amended his complaint the second time, then they could not be raised.⁴⁷

4. There is no authority allowing the trial court to disturb the property distribution in the dissolution decree – the appropriate creditor’s remedy is an equitable lien.

⁴² *Henningsen*, 102 Wn. App. at 840.

⁴³ *Sangster v. Albertson’s, Inc.*, 99 Wn. App. 156, 164-65, 991 P.2d 674 (2000).

⁴⁴ *In re Marriage of Leslie*, 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

⁴⁵ CP 5-9 (First Complaint filed 6/17/04); CP 667-672 (First Complaint filed when court granted leave to amend during trial on 12/8/06); and CP 695-722 (Third Amended Complain).

⁴⁶ CP 696, ¶3.1.

⁴⁷ *See* 2RP 176.

Britt v. Damson is clear that Drew's remedy was an equitable lien and not a UFTA claim.

We are not aware of any Washington decision in which it was held that creditors of a marital community which has been terminated 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.*⁴⁸

Jones does not change this result because it made clear it involved a void Nevada divorce decree and therefore "must be judged as conveyances between husband and wife, while still married."⁴⁹

Britt also makes clear that the equitable lien is a tool a creditor can use to collect a community debt against former community property after the community is legally dissolved.⁵⁰ The rationale for this remedy is a dissolution decree does not bind creditors who are not parties to the dissolution proceedings.⁵¹ Drew, however, did not bring an action to impress an equitable lien on the Wilsons' former community property.

This is where the trial court's error becomes prominent and must be rectified. The marriage is dissolved, there is no community and there is no community property.⁵² Because there can be no community property after a marriage is dissolved, Washington creditors only have the right to an equitable lien on the former community property.

⁴⁸ *Britt v. Damson*, 334 F.2d 896, 901 (9th Cir 1964).

⁴⁹ *Jones v. Jones*, 56 Wn.2d 328, 336, 353 P.2d 441 (1960).

⁵⁰ *Britt*, 334 F.2d at 901.

⁵¹ *Id. citing Farrow v. Ostrom*, 16 Wn.2d 547, 552, 133 P.2d 974 (1943)

⁵² *Ambrose v. Moore*, 46 Wn. 463, 466, 90 P.588 (1907).

A community creditor's equitable lien is limited, however, to the community's "net equity" at the time the dissolution decree was entered and not the appreciation on the property awarded to the other spouse.⁵³ It should also be reduced by the other spouse's separate property contributions to the community's net equity.⁵⁴ This is consistent with the UFTA. Comment 3 to the Model UFTA Section 8 states:

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. (citations omitted)...The premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery.⁵⁵

A separate creditor, on the other hand, may only collect against the separate property awarded the spouse in the dissolution decree. "Property distributed to a former spouse even though previously community property cannot be used to satisfy a judgment against the other spouse."⁵⁶

Alternatively, if this Court believes UFTA can upset an uncontested dissolution, then courts should use the limited remedy set forth in RCW 19.40.081 (b) and (c). This provides a creditor a judgment remedy against the transferee spouse that is limited to the value at the time the transfer took place. This remedy would bring UFTA in line with Washington's common law considering creditors' rights after a dissolution decree has been entered.

⁵³ *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 218, 941 P.2d 16 (1997); and 19 Wash. Prac., Family and Community Prop. Law, §14.11.

⁵⁴ *Farrow v. Ostrom*, 16 Wn.2d 547, 555-56, 133 P.2d 974 (1943).

⁵⁵ UFTA § 8 cmt. 3, 7A U.L.A. 654 (2004) (citations omitted).

⁵⁶ *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 586, 599 P.2d 1289 (1979).

5. Drew did not prove, and the trial court did not properly find, actual fraud.

a. There were no actual fraud findings.

Drew did not and could not point to any trial court Findings or Conclusions that the Wilsons committed actual fraud. Drew, therefore, tacitly agreed with Mary Kay that the trial court failed to make specific findings of actual fraud under RCW 19.40.041(a).⁵⁷ The only findings or conclusions Drew quotes in support of his claim the court found the Wilsons guilty of actual fraud were Conclusions of Law Nos. 11 and 12 in which the court concludes the Wilsons did not meet their burden to show “good faith” under RCW 26.16.210. There are no actual fraud findings.

RCW 26.16.210 does not apply to this case because the transfers were not between married persons. Drew, in his Response, relied on *Jones v. Jones*⁵⁸, and argued that the Wilsons’ PSA was a stand alone contract that fixed the character of the Wilson’s assets even before the dissolution decree was entered and the PSA is the operative document transferring the Wilsons property.⁵⁹

Jones has been overruled by UFTA as to when a transfer occurs. RCW 19.40.061(1)(i) makes clear that a real property transfer is not made until a deed is recorded in the public records. This provision is new in the UFTA and was enacted in 1987 – 27 years after *Jones* was decided.⁶⁰ The prefatory note makes clear UFTA’s

⁵⁷ BOA at 31-32.

⁵⁸ 56 Wn.2d 328, 333, 353 P.2d 441 (1960).

⁵⁹ BOR at 28.

⁶⁰ The statutory note states that RCW 19.40.061 became effective in 1987.

premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.⁶¹

Here, a transfer did not occur when the parties agreed to the PSA; rather, it occurred when the transfer became public record. That occurred when the parties' marriage was dissolved. The transfer, therefore, was not a transaction between spouses and RCW 26.16.210 does not apply.

This is consistent with the avowed purpose behind RCW 26.16.210. This statute is designed to protect a spouse from overreaching by the other spouse, a point not contested by Drew in his Response Brief.⁶² Moreover, *Jones* made clear its application was limited to a spouse's creditors only if the transfer occurred when the couple remained married and kept the property amongst themselves. Because the Nevada divorce decree in *Jones* was void, "the deeds conveying the property to [the wife], must be judged as conveyances between husband and wife, *during their marriage*."⁶³ Nowhere did *Jones* extend RCW 26.16.210 to situations where a couple actually dissolves their marriage and divides their property and the transferor spouse relinquishes title.

b. RCW 26.16.210 does not apply because good faith is not an issue in a *prima facie* UFTA case.

Not only does RCW 26.16.210 not apply because the transaction here was pursuant to a valid dissolution decree, but also because Mary Kay's good faith was not an issue in the UFTA action until Drew proved fraud.

⁶¹ UFTA Prefatory Note, 7 ULA (2004) - comment regarding the new section explaining "when a when a transfer is made or an obligation is incurred. .

⁶² See *In re Madden's Estate*, 176 Wn. 51, 53-54, 28 P.2d 280 (1934).

⁶³ *Jones*, 56 Wn.2d at 336.

By its own explicit language the burden shifting in RCW 26.16.210 only applies when good faith is an issue. The Uniform Fraudulent Conveyance Act (UFCA) preceded UFTA. Good faith was embodied in the term “fair consideration” and was part of a UFCA *prima facie* case. UFTA was enacted in 1987.⁶⁴ It substituted “reasonably equivalent value” in place of “fair consideration” and thereby made good faith a defense *after* the creditor proved fraud.⁶⁵

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in *eliminating good faith* on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense *after a creditor establishes that a fraudulent transfer has been made* or a fraudulent obligation has been incurred.⁶⁶

[UFTA] substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the Uniform Fraudulent Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. *The transferee's good faith is irrelevant* to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under § 8 *infra*.⁶⁷

⁶⁴ Statutory history of each section of the RCW 19.40 indicate it was enacted in 1987.

⁶⁵ UFTA, Comment 1 to Section 5, 7 ULA (2004).

⁶⁶ See UFTA Prefatory Note, 7 ULA (2004). UFTA section 5 (fraud as to present creditors) also replaced “reasonably equivalent value for “fair consideration” and thereby removed good faith from the *prima facie* case.

⁶⁷ UFTA, Comment 2 in Section 4, 7 ULA (2004).

c. Statutory construction does not prefer RCW 26.16.210.

Drew's statutory construction arguments only tell half the story. Drew cites *In re Estate of Black*⁶⁸ and argues "[a] specific statute takes precedent over language of a more general statute."⁶⁹ He argues UFTA is the general statute and RCW 26.16.210 is the specific statute.⁷⁰

Even if Mary Kay were to admit RCW 26.16.210 was more specific, which it is not, other statutory construction principles prefer UFTA over RCW 26.16.210. Drew, in his Response Brief, stated only part of the applicable rule. When two statutes directly conflict the following *principles* govern: *The later statute governs the earlier statute* and *the specific statute governs the more general statute*.⁷¹ UFTA is a later statute, enacted in 1987, while RCW 26.16.210 is the earlier statute, enacted in 1881. So, UFTA governs RCW 26.16.210.

It is possible to read the two statutes together and give them both meaning.⁷² RCW 26.16.210 only applies if good faith is an issue. UFTA resolved any conflict with former UFCA by making good faith "irrelevant" in the *prima facie* UFTA case. Instead, it made good faith a defense to be proven by the transfer's proponent after the opponent proves fraud. UFTA agrees with RCW 26.16.210 and makes the proponent of the husband wife transaction prove good faith once the opponent proves either actual or constructive fraud.

⁶⁸ 116 Wn. App. 476, 489, 66 P.3d 670 (2003).

⁶⁹ BOR at 26.

⁷⁰ *Id.*

⁷¹ *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 446, 869 P.2d 1110 (1994) ("Another general rule of statutory construction gives preference to the later-adopted statute and to the more specific statute if two statutes appear to conflict.").

⁷² BOR at 26, citing *In Re; Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004)

d. Drew failed to address why *Jones* does not dictate Mary Kay acted in good faith.

If the wife in *Jones* proved good faith as a matter of law, then Mary Kay proved good faith here. Drew cites *Jones* on numerous occasions in his argument, but then fails to reply to Mary Kay's analogy from *Jones* in support of her "good faith." In *Jones*, the Supreme Court determined a husband's transfer of property to his former wife via a PSA was in "good faith" because when the wife filed for a Nevada divorce she intended to dissolve the marriage because her husband was cheating.⁷³ The *Jones* court also focused on wife's not immediately recording the deeds.⁷⁴

As noted below, Mary Kay's divorce was equally sincere – she immediately sought a divorce (as any wife would) when she learned was molesting teenage boys. This was confirmed by the profound change in their subsequent relationship: they did not see each other over the Christmas holiday, they no longer shared a bed, they saw each other infrequently and spoke infrequently and their relationship became "business-like."⁷⁵ Finally, the former wife in *Jones*, Mary Kay did not immediately record the deeds, she had her attorney wait approximately 3 months before filing the quit claim deeds.⁷⁶ And even after they were filed, she did nothing to conceal or encumber them.⁷⁷

⁷³ *Jones* at 337-38. Plaintiff alleged former wife had acquired the divorce to vest the transfer of property. The court found former wife's motives pure; his lone purpose was to divorce her cheating spouse.

⁷⁴ *Id.* at 338.

⁷⁵ BOA at 12. Yes, Mary Kay did continue to help Doug, but this was out of the goodness of her heart and she clearly helped at arms-length. Moreover, she received Doug's paycheck in exchange for her help.

⁷⁶ BOA at 31.

⁷⁷ BOA at 11.

e. The dissolution documents were prepared quickly because the attorney, not the Wilsons, wanted to prepare them over the weekend.

There was absolutely no evidence Mary Kay or Doug pressured Victoria Smith to complete the Petition for Dissolution and PSA over the weekend following their meeting. Ms. Smith testified she created the PSA solely based on her own schedule.⁷⁸ Moreover, though the quitclaim deeds were executed in late December 2002, Ms. Smith held them for approximately 3 months before she filed them.⁷⁹ Mary Kay made no effort after property was transferred to conceal or encumber property.

f. The Wilsons' conduct does not constitute fraud or bad faith.

Drew tries hard to paint a picture of a sham divorce specifically to thwart creditors.⁸⁰ He, however, twists the facts to get this effect. *First*, Doug did not continue to maintain all the former couple's properties. Doug did some insignificant work at the Kenmore property and routine maintenance at the Seabeck property.⁸¹

Second, Drew also cites Mary Kay permitting Doug to continue to live on the Seabeck property as evidence of bad faith. Mary Kay "rented" Doug the premises in exchange for his paychecks.⁸² The property was in an isolated area, Seabeck, Washington⁸³, far removed from Kenmore and So, this kept Doug at arms-length.

⁷⁸ 5RP 143-44, 172-73.

⁷⁹ 5RP 173-74.

⁸⁰ BOR at 13-14, 32.

⁸¹ 7RP 66-67.

⁸² *Id.*

⁸³ 7RP 11-13.

Third, Drew argues Mary Kay continuing to receive Doug's paycheck was evidence of bad faith. This was in exchange for using the Seabeck property and paying Doug's bills⁸⁴

Fourth, Drew also infers that the continued contact between the Wilsons following their meeting with Victoria Smith was evidence of actual fraud. Contact, yes. They were parents to four children and had grandchildren together. Their relationship, however, went from intimate to business-like.⁸⁵ In *Jones* the couple reconciled and there was no fraud imputation.⁸⁶ The facts in *Owensboro* showed more involvement and there was no fraud.⁸⁷ Finally, the facts in *Rodgers* showed a closer relationship and a skewed property award, yet there was no fraud.⁸⁸ In fact, in *Jones* the Washington Supreme Court reversed a lack of good faith finding and held there was good faith as a matter of law.⁸⁹

g. There was no fraud finding and the evidence was insufficient to establish actual fraud.

Drew invites this Court to find fraudulent intent based on circumstantial evidence. As stated above, the trial court did not make a finding of actual fraud. This Appellate Court does not make findings. "The absence of a finding on an issue is construed against the party having the burden of proof on that issue."⁹⁰ Drew had the burden to show actual fraud. The absence of a finding on that issue is fatal to his claim.

⁸⁴ After all, Mary Kay testified she used these funds to support herself not Doug. RP

⁸⁵ See BOA at 12.

⁸⁶ *Jones* at 330.

⁸⁷ *Owensboro v. Gipe*, 157 B.R. 171, 174 (Bkrtcy M.D. Fla. 1993)

⁸⁸ 315 B.R. 533, 542 (Bkrtcy D. N.D. 2004).

⁸⁹ *Jones*, 56 Wn.2d at 338-39.

⁹⁰ *City of SeaTac v. Cassan*, 93 Wn. App. 357, 362, 967 P.2d 1274 (1998).

6. There is no UFTA constructive fraud because Mary Kay gave reasonably equivalent value for the asset transfer.

Drew did not contest the persuasive authority that clearly showed a court considering a UFTA claim in connection with a collusive dissolution proceedings should have limited review.⁹¹ This makes sense since courts should not re-try dissolution cases. It also promotes public policy by encouraging settlement. Similarly, he did not contest the persuasive authority that holds a spouse who waives maintenance enjoys a rebuttable presumption that the maintenance waiver constitutes reasonably equivalent value for a disproportionate property distribution.⁹²

Drew did not contest the fact a debtor can transfer exempt property⁹³ (defined as “assets” under UFTA).⁹⁴ This is consistent with the intent behind UFTA, which

declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. ..it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.⁹⁵

Drew does not dispute the fact that only 56% of the Wilsons’ property that was transferred to Mary Kay were non-exempt UFTA assets; the remaining property transferred was exempt property. Roland Nelson calculated the Wilsons’ non-exempt UFTA assets as \$963,741.⁹⁶ The

⁹¹ *In Re Sorlucco*, 68 B.R. 748, 753 (Bnkcty D. N.H. 1986); BOA at 35-36.

⁹² *In re Matter of Chappel*, 243 F. Supp 417, 420-21 (S.D. Cal. 1965).

⁹³ BOA at Pg. 35, f.n.273.

⁹⁴ RCW 19.40.011(2).

⁹⁵ UFTA, Comment Section 1, 7 ULA (2004).

⁹⁶ Trial Exhibit 164, Pg. 4, “Douglas M & Mary Kay Wilson, Actual UFTA Asset and Liability Distribution.”

Wilson's exempt and non-exempt property totaled \$1,686,357.⁹⁷ Mary Kay was awarded \$947,054 in non-exempt UFTA assets.⁹⁸ This was 56% of the Wilsons' total property. In addition, she was awarded some exempt property.

Drew also does not contest that his own expert, upon whom the court relied, Ms. Mabry Debuys testified that Mary Kay would receive between 60 and 65% of the Wilsons' property in a dissolution case.⁹⁹

Putting these all together there is no constructive fraud because Mary Kay gave reasonably equivalent value for the property award. According to Drew's own expert Mary Kay could have received between 60 – 65% of the Wilsons' total property. This would have included the marital home and the home her aged mother lives in.¹⁰⁰ Mary Kay received a 90% award of the Wilsons' property, but only over half that award constitutes actionable UFTA assets. When you look at the non-exempt UFTA assets that were awarded to Mary Kay they are only 56% of the Wilsons' total property. That was entirely within the range of possible outcomes at trial. Under *Sorlucco* reasonably equivalent value has been provided.¹⁰¹ The remaining property transferred to Mary Kay was exempt property and not a UFTA asset subject to a UFTA lawsuit because that property Drew could not reach anyway.

⁹⁷ Trial Exhibit 37.

⁹⁸ Trial Exhibit 164, Pg. 4.

⁹⁹ 9RP 210-11, 239.

¹⁰⁰ 9 RP 244.

¹⁰¹ *In re Sorlucco* at 753.

7. There is no common law interspousal fraudulent transfer law after UFTA.

UFTA displaced any common law interspousal fraudulent transfer law or, at the very least, placed a one-year statute of limitation on such an action. There is no doubt the challenged transfer in *Davison v. Hewitt*¹⁰² is now voidable under 19.40.051(b). In other words, RCW 19.40.051(b) now governs those transfers by statute. Insider transfer actions under RCW 19.40.051(b) must be brought within one year.¹⁰³ This shows UFTA superseded any common law interspousal fraudulent transfer claim. The whole purpose behind this provision, like the purpose behind uniform laws in general, is to eliminate common law variances from state to state.

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. (Citations omitted). Together with § 6, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations.¹⁰⁴

To accept Drew's argument and not find UFTA subsumed and superseded *Davison* would vitiate UFTA's stated purpose.

Drew does not contest Mary Kay's arguments that *Davison* required Doug be insolvent at the time he made the transfer and that there is no finding to support this required element.¹⁰⁵ He does not contest *Jones* effectively overruled the proposition in *Davison*.¹⁰⁶ And he does not

¹⁰² 6 Wn.2d 131, 106 P.2d 753 (1940)

¹⁰³ RCW 19.40.091(c).

¹⁰⁴ UFTA, Section 9, Comment 2, 7 ULA (2004).

¹⁰⁵ BOA at 44.

¹⁰⁶ *Id.*

address the fact the transfer in *Davison* was between husband and wife while remaining married.¹⁰⁷ He merely cites a commentator that thinks it is good law without analysis.¹⁰⁸

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

a. Drew's argument that the evidence fully supports the court's determination of future wage loss is misguided.

Drew's argument in reply that future wage loss is fully supported by the record bolsters Mary Kay's argument that the court did not agree with Drew's experts about the extent of Drew's lost wages and, in the end, pulled a dollar figure out of thin air.

Drew does an excellent job summarizing the dire picture painted by Dr. Wheeler and Cloie Johnson regarding the profound effects of sexual molestation on his future ability to work.¹⁰⁹ Moreover, Drew touts Ms. Johnson testimony that Drew was so fragile and impaired that future wage loss would be at a minimum of \$1 Million and a maximum of \$1.26 Million.¹¹⁰

Drew, however had to admit the court awarded only \$200,000.¹¹¹ This was a tacit admission the court found Ms. Johnson's assessment of Drew's condition hard to believe. The court obviously could not reconcile Dr. Wheeler's and Ms. Johnson's doom and gloom assessments with Drew's success in work and school.

¹⁰⁷ BOA 44-45.

¹⁰⁸ BOR at 39-40.

¹⁰⁹ BOR at 47-48.

¹¹⁰ BOR at 48-49.

¹¹¹ BOR 49.

Drew, moreover, fails to address the black letter law Mary Kay cited in her opening brief: Lost wages are determined by earning capacity before and after the injury.¹¹² Drew's silence is troubling but not unexpected.

b. Drew, however, erroneously asserts Drew had the pre-injury capacity to earn the wages of a journeyman plumber.

Drew, however, argues "Pre-injury Andrew had the capacity to earn the wages of a successful journeyman plumber."¹¹³ Drew bases this assertion on Cloie Johnson's testimony on redirect where she offers an unsupported opinion that Andrew may have had the pre-injury capacity to be a successful journeyman plumber.¹¹⁴

This unsupported opinion, offered for the first time on re-direct that contradicts her prior testimony and the psychologist's testimony is insufficient to support a finding as to Drew's pre-injury vocational capacity.

There must be substantial evidence, as distinguished from a "mere scintilla" of evidence, to support a verdict-i.e., evidence of a character "which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." (Citation omitted). A verdict cannot be founded on mere theory or speculation.¹¹⁵

Opinion evidence, unsupported by facts on which to base it, is scintilla in character. It is speculative and conjectural, and does not have the fitness to induce conviction. It cannot support a finding or verdict.¹¹⁶

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

¹¹³ BOR at 48.

¹¹⁴ 4RP at 81.

¹¹⁵ *Ethridge v. Hwang*, 105 Wn. App. 447,457-58, 20 P.3d 958 (2001)

¹¹⁶ *State v. Boyd*, 21 Wn. App. 465, 470-71, 586 P.2d 878 (1978).

Here, Ms. Johnson's unsupported opinion is insufficient to support the trial court's finding. First, the exchange itself was precarious. Ms. Johnson first answered the question "no" – stating Drew did not have the pre-injury capacity to be a journeyman plumber and then corrected herself.

Second, her testimony conflicted with her written report. In her report, she unequivocally stated, "Based on a review of the records...it is my opinion that Andrew Clayton's pre-abuse educational capacity is best described as compatible within a range of a high school graduate on the low end to an Associate Degree on the high end."¹¹⁷

Third, it conflicted with her unequivocal opinion testimony on direct and cross examination. On direct and cross examination she was asked about Drew's pre-abuse capacity, she unequivocally stated that Drew's pre-abuse earning capacity is equivalent to person with a high school or associate level degree.¹¹⁸

In short, Ms. Johnson's reply on redirect directly contradicted her report and testimony consistent with her report. This is why, understandably, she was equivocal in her response.

Finally, her testimony was inconsistent with the psychologist's testimony on whose opinion she relied. Ms. Johnson admittedly grounded her opinion in her conversation with Dr. Wheeler.¹¹⁹ She relied on his determination of the psychological harm experienced by Drew as a result of Doug's abuse.¹²⁰ Following her conversation with Dr. Wheeler, she

¹¹⁷ Exhibit 102, page 3.

¹¹⁸ 6RP 51, 63, 78.

¹¹⁹ 6RP 15.

¹²⁰ 6RP 18, 23, 49.

determined both a best and worst case scenario regarding Drew's future earnings.¹²¹ In both scenarios, Ms. Johnson opined that Drew would earn substantially less than he was earning at this present job.¹²²

Significantly, Ms. Johnson's "gloom and doom" predictions were unsupported by Dr. Wheeler who testified that he could not say on a more probable than not basis that Drew's vocational trajectory was different because of the fact he was sexually abused.¹²³ The very expert she relied on as a foundation for her best and worst case scenarios opined there was no more probable than not basis on which to make a pre-injury vocational determination. Therefore, Ms. Johnson's opinion offered for the first time on redirect is unsupported by facts, is a mere scintilla of evidence and cannot form the basis for a finding on pre-injury vocational capacity. As such, Drew's wage loss claim must fail.

c. Drew's argument that emotional damages are fully supported by the record is disingenuous.

Drew begins his response to Mary Kay's assertion that damages were excessive by quoting cases setting the standard for appellate review of damages award by juries.¹²⁴ This case was a bench trial, so they are inapplicable here.

As stated in Mary Kay's opening brief, an appellate court reviews a trial court's award of damages for abuse of discretion¹²⁵ and an appellate court will reverse a damages amount only if it is outside the range of

¹²¹ 6RP 22; *See* Exhibit 102, pages 4-5.

¹²² 6RP 22-23, 28-29, 67; *See* Exhibit 102, pages 4-5 and Exhibit 105.

¹²³ 4RP 159.

¹²⁴ BOR at 45.

¹²⁵ *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 636, 865 P.2d 527 (1993).

relevant evidence, shocks the conscience, or results from passion or prejudice.¹²⁶

Drew takes great pains to paint Andrew as an emotional basket case who will have difficulty functioning in real life.¹²⁷ However, he, like the Court, ignores the reality of Drew's life. Against all odds, Drew is functioning well in a variety of settings: college, work and relationships. The dark picture Drew paints is contradicted by his own life experience, which Dr. Wheeler admits will get better with counseling/treatment. It is this disconnect between real life and theory that is the core of Mary Kay's objection to the court's emotional damages award. Drew's reply does nothing to explain this gap.

Moreover, the court's emotional damages are outside the range of relevant evidence, because the court, unlike its determination of future lost wages, ignored the disconnect between Dr. Wheeler's doom and gloom assessment and Drew's successful adjustment to everyday life.

9. Conclusion

Based on the argument presented herein, Mary Kay requests this Court reverse, vacate the trial court's Final Judgment and Findings of Fact and remand with the following instructions:

- I. On the Sexual Assault Tort Claim
 - i. If this is a separate tort, then to enter judgment against Doug separately.
 - ii. If this is a community tort, then to enter judgment against Doug and the Wilsons' non-existent former marital community *separately*.

¹²⁶ *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990).

¹²⁷ BOR at 46-47.

II. On the Uniform Fraudulent Transfer Act claim

- i. Deny relief under UFTA because there is no authority to set aside a transfer pursuant to a valid dissolution decree.
- ii. Deny relief under UFTA's actual fraud provisions because there was no actual fraud finding and/or because Mary Kay met her burden of proving good faith
- iii. Deny relief under UFTA's constructive fraud provisions because Drew did not meet his burden of proving Mary Kay gave less than equivalent value for the asset transfers.
- iv. Deny relief under the claimed common law conclusive fraud claim because it was usurped and superceded by UFTA.

III. As to Imposing an Equitable Lien

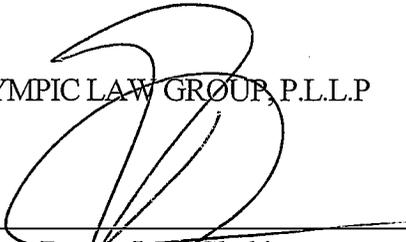
- i. Deny relief because it was neither plead nor argued to the trial court; or
- ii. If Drew's tort claim is Doug's separate liability, then
 1. Limit Drew's remedy to the property Doug received in the dissolution decree.
 2. Alternatively, impress an equitable lien on the Wilsons' former community non-exempt assets in both the Wilsons' possession to the extent of Doug's interest in those assets *at the time the dissolution decree was entered*, which according to the testimony was between 35% - 40% depending on the disproportionate share Mary Kay was entitled to in the dissolution proceedings.
- iii. If Drew's tort claim is a community liability, then impose an equitable lien on the former community non-exempt assets in both the Wilsons' possession *to the extent of the community equity at the time the dissolution decree was entered*.

- III. Costs. Award Mary Kay her costs as the substantially prevailing party. Neither party requested attorney fees because there is no basis.

Respectfully submitted, August 30, 2007

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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION I

MARY KAY WILSON,

Appellant,

and

ANDREW JAMES CLAYTON,

Defendants.

No. 57891-0

LOWER COURT CASE
No. 04-2-14443-4 SEA

DECLARATION OF SERVICE

I, RYAN M. BON, hereby declare as follows:

1. I am employed by Olympic Law Group, P.L.L.P., a citizen of the State of Washington, over the age of 18 years, not a party to this action, and competent to testify herein.
2. On August 30, 2007, I caused the following documents:
 - a. Reply Brief of Appellant; and
 - b. Declaration of Service;to be served on the attorney at the following addresses:

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I certify under penalty of perjury under the laws of the State
of Washington, that the foregoing is true and correct.



Ryan M. Bon
Legal Assistant