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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JENNIFER MARESCA,

Plaintiff and Appellant,

v.

RAMONA LISA SCHLICKER,

Defendant and Respondent.

A130999

(Alameda County  
Super. Ct. No. VG09433900)

**I. INTRODUCTION**

Plaintiff and appellant Jennifer Maresca (Maresca) was severely injured in an automobile accident. The driver of the car in which she was a passenger, Hans Schlicker (Hans), was at fault. At the time of the accident, Hans was married to defendant and respondent Ramona Lisa Schlicker (Lisa), but they were living separately and Lisa had commenced dissolution proceedings.<sup>1</sup> Before the couple first separated, Lisa was in a near-fatal automobile accident, which left her permanently disabled and in need of significant future medical care. She recovered a multi-million dollar settlement; Hans recovered a half-million dollar settlement for loss of consortium. Hans made no appearance in the dissolution proceedings, and long before the accident injuring Maresca, he and Lisa had agreed to a division of property which provided, in part, that Lisa would retain her personal injury settlement proceeds and Hans would retain his. The Maresca accident occurred shortly before a default was entered against Hans in the dissolution

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<sup>1</sup> Because Hans and Lisa have the same last name, we refer to them by their first names. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

proceeding. Judgment was entered three months later, awarding Lisa the personal injury settlement proceeds she had received as her separate property.

A year after the default judgment was entered in Hans' and Lisa's dissolution proceeding, Maresca filed the instant action against them under the Uniform Fraudulent Transfer Act (UFTA)<sup>2</sup> and for conspiracy. Maresca contends a fraudulent transfer occurred by virtue of the default judgment because Lisa incorrectly identified the personal injury settlement proceeds she had received as her separate property in the papers she filed in conjunction with her request for entry of judgment. Maresca asserts that had Lisa correctly identified the settlement proceeds as community property (a) the family court would have been required to "exercise its discretion" under Family Code section 2603, which provides that personal injury damages recovered during a marriage, although community property, are to be awarded to the injured spouse as his or her separate property, unless the court finds the "interests of justice" require a different allocation; (b) the family court, in exercising its discretion under Family Code section 2603, would have found the "interests of justice" exception applicable; (c) the family court would have allocated some portion of Lisa's settlement proceeds to Hans as part of his share of the community property; and (d) Hans then would have had funds to satisfy the multi-million dollar mediation award Maresca obtained against him.

The trial court granted summary for Lisa. It first determined the fact Hans failed to appear in the dissolution proceedings, alone, did not raise a triable issue that there was a "transfer" by him subject to challenge under the UFTA. The court further determined, in light of the extensive evidence Lisa presented regarding the extent of her injuries and permanent disability and the absence of any contradictory evidence presented by Maresca, there was no triable issue that, had Lisa correctly identified her settlement proceeds as community property, the family law court would have found the "interests of justice" exception to Family Code section 2603 applicable. Accordingly, there also was no triable issue Hans had any interest in an "asset" (i.e., Lisa's settlement proceeds) he

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<sup>2</sup> Civil Code section 3439 et seq.

could transfer. We agree there is no evidence raising a triable issue of fact on the threshold question of whether there was a “transfer” by Hans and affirm the summary judgment on that ground. We therefore need not, and do not, reach any other question or issue.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

We set forth only those facts necessary to address the issues raised on appeal. Hans and Lisa were married in 1983. Twenty years later, in 2003, Lisa sustained serious injuries in an automobile accident, including brain damage and orthopedic injuries. She was found to be totally disabled by a board-certified neurologist. Prior to the accident, Lisa worked as an accountant. After the accident, she was no longer able to work and began receiving Social Security disability benefits.

Lisa and Hans filed a personal injury suit arising out of the automobile accident. They separated in 2004, while the lawsuit was pending. They resumed living together in the same household for financial reasons in 2005, but were “not cohabitating.” Lisa moved out “permanently” in January 2006, and filed for dissolution seven months later, in August 2006.

Lisa’s personal injury case was also settled in 2006. The total gross settlement amount as to Lisa was \$5,112,615, and her net was \$3,317,683. The gross settlement as to Hans was \$580,000 for loss of consortium. Hans and Lisa received separate checks, and each kept their settlement awards in separate accounts to which the other had no access.

Hans did not contest the dissolution and in 2006 agreed to a property disposition which included, among other things, that Lisa would retain the settlement proceeds she had recovered for her personal injuries and he would retain the settlement proceeds he received for loss of consortium.

The following year, in September 2007, Hans and Maresca were driving home in Hans’ car. Hans, intoxicated and driving at about 120 miles per hour, lost control and ran into a tree, severely injuring Maresca. Hans was convicted of driving under the influence and served six months in county jail.

One week after Han's accident, on October 7, 2007, Lisa signed an income and expense declaration prepared by her attorney. Two weeks thereafter, she signed community and separate property declarations which reflected the couple's 2006 agreement. Her community property declaration listed total net community property of \$756,103, of which \$247,000 was proposed to be awarded to Lisa and \$509,103 to Hans. Her separate property declaration included (incorrectly) the proceeds of the personal injury settlements. All declarations were filed with the family law court. On November 6, 2007, pursuant to Lisa's request, default was entered against Hans.

Three months later, on February 4, 2008, a default judgment was entered against Hans on the basis of community and separate property declarations Lisa had filed. The judgment awarded to Lisa as her separate property the funds constituting the remains of her personal injury settlement and the home she had purchased with some of the settlement funds. Lisa also received her vehicle and one-half interest in the marital home. Hans was awarded as his separate property the settlement proceeds for his loss of consortium claim, his vehicle, his retirement plan, and the right to exclusive use of and a one-half interest in the marital home. Hans was responsible for making the mortgage payments on the marital home, and Hans and Lisa were each responsible for one-half of the homeowner's insurance and one-half of the property taxes. Hans and Lisa had each paid \$150,000 from their respective settlement proceeds toward the mortgage loan principal so Hans could afford the mortgage payments.

In the meantime, in November 2007, Maresca had filed a personal injury action against Hans. Hans' automobile insurance policy had liability limits of only \$250,000.

In February 2009, a year after entry of the default judgment in Hans' and Lisa's dissolution proceeding, Maresca filed the instant action against them, alleging a fraudulent transfer under the UFTA and conspiracy.

Eight months later, in October 2009, Hans and Maresca entered into a partial settlement of Maresca's personal injury action against Hans. Hans agreed to personally pay Maresca \$75,000. Hans' insurer agreed to pay the \$250,000 policy limits. The parties also agreed Maresca's damages would be determined in binding arbitration and

reduced to a judgment of not less than \$325,000. Maresca would execute on that judgment for an amount in excess of \$325,000 only to the extent she recovered in this action against Hans and Lisa. Following the agreed-to arbitration, Maresca obtained a judgment against Hans of approximately \$3.4 million.

In August 2010, Lisa moved for summary judgment or summary adjudication of Maresca's causes of action in the instant action. The court granted the motion and entered judgment on December 14, 2010.

### **III. DISCUSSION**

#### **A. Standard of Review**

Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. (*Id.*, subds. (a), (o).) Once the defendant has met that burden, the burden shifts to the plaintiff “to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (*Id.*, subd. (p)(2).) “ ‘There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ ” (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review the grant of a summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

#### **B. Community Property and Personal Injury Damages**

We briefly review the family law pertaining to the two kinds of personal injury damages at issue here—those recovered by Lisa during her marriage to Hans and those Maresca incurred after Hans and Lisa separated (and after Lisa filed for dissolution) and for which Hans is responsible.

### *Spousal personal injury damages*

Personal injury damages received by one spouse during the marriage are “a species unique to the Family Law Act; they are held as community property during marriage, but upon dissolution such damages are subject to special assignment rules.” (*In re Marriage of Devlin* (1982) 138 Cal.App.3d 804, 807 (*Devlin*)). “Personal injury damages received or to be received from a cause of action arising during marriage are community property.” (*Ibid.*) Upon dissolution of the marriage, however, Family Code section 2603 mandates that community estate personal injury damages (CEPID) be allocated to the spouse who suffered the injury unless the court finds the “interests of justice” require a different allocation. (Fam. Code, § 2603.)<sup>3</sup>

Specifically, section Family Code 2603 provides, in part: “ ‘Community estate personal injury damages’ as used in this section means all money or other property received or to be received by a person . . . pursuant to an agreement for the settlement or compromise of a claim for the damages, if the cause of action for the damages arose during the marriage but is not separate property as described in Section 781,<sup>[4]</sup> unless the money or other property has been commingled with other assets of the community estate. [¶] (b) *Community estate personal injury damages shall be assigned to the party who suffered the injuries* unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community estate personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries.” (§ 2603, italics added.)

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<sup>3</sup> All further statutory citations are to the Family Code unless otherwise specified.

<sup>4</sup> Section 781 provides that a settlement or satisfaction of a judgment in a personal injury action by a married person is separate property if the cause of action arose after a judgment of dissolution or while living separate and apart. (§ 781.)

### *Personal Injuries Caused by a Spouse*

The Family Code also addresses personal injury damages caused by a spouse. The fact of marriage, alone, does not make one spouse vicariously liable for the other spouse's torts. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) [¶] 8:760, 8:761, p. 8-188 (Hogoboom & King, Family Law).) "A married person is not liable for any injury or damage caused by the other spouse except in cases where the married person would be liable therefor if the marriage did not exist." (§ 1000, subd. (a).)

"Rather than classify a spouse's tort obligation as a 'separate' or 'community' debt, the [Family] Code establishes an order of preference for satisfaction of the liability," depending on whether that spouse was performing an activity for the benefit of the community when he or she committed the tort. (Hogoboom & King, Family, *supra*, [¶] 8:762, p. 8-189.) If the tortfeasor spouse was engaged in an activity for the benefit of the community, the liability must be first satisfied from the community estate. If not, the liability must first be satisfied from the tortfeasor spouse's separate property. (§ 1000, subd. (b).)

Although a married couple's community property is liable for the debts either spouse incurred during the marriage, it is not liable for a debt incurred, by committing a tort or otherwise,<sup>5</sup> after the spouses are living separate and apart. (See § 910.) Section 910, subdivision (a), provides: "Except as otherwise provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage . . . regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." (§ 910, subd. (a).) " 'During marriage' " for purposes of section 910, however, "does not include the period during which the spouses are living separate and apart before a judgment of dissolution of marriage . . ." (§ 910, subd. (b).) Accordingly, "[w]hen the liability arises out of a *postseparation tort*," both intentional and negligent torts are the tortfeasor spouse's *separate* obligation under section 903,

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<sup>5</sup> An exception not at issue here exists for one spouse's "common necessities of life" while the spouses are living separately. (§ 914.)

subdivision (b). (Hogoboom & King, Family Law, *supra*, [¶] 8:767.5, p. 1-191, citing *In re of Marriage of Feldner* (1995) 40 Cal.App.4th 617, 628, fn. 12.)

Even when the debt at issue is community, “ [t]he Legislature determined that, under most circumstances, after a marriage has ended, it is unwise to continue the liability of spouses for community debts incurred by former spouses.’ ” (*Mejia v. Reed* (2003) 31 Cal.4th 657, 665 (*Mejia*)). Therefore, “[t]he separate property owned by a married person at the time of the division *and the property received by the person in the division* is not liable for a debt incurred by the person’s spouse before or during marriage, and the person is not personally liable for the debt, *unless* the debt was assigned for payment by the person in the division of the property. . . .” (§ 916, subd. (a)(2), italics added.) If the debt *is* assigned for payment by the nondebtor spouse, and a “money judgment for the debt is entered *after* the division [of community property], the property is not subject to enforcement of the judgment and the judgment may not be enforced against the [formerly] married person, unless the person is made a party to the judgment for the purpose of this paragraph.” (§ 916, subd. (a)(3), italics added.)

Thus, the Family Code required that Lisa’s personal injury settlement proceeds be allocated to her, in the absence of a determination the “interests of justice” required a different allocation. (§ 2603.) The Family Code further required that Hans’ postseparation debt to Maresca be confirmed as to him, without offset. (§ 910.)

### **C. *The UFTA***

Aware of the foregoing Family Code sections regarding spousal personal injury damages and postseparation torts, Maresca contends the family law court was fraudulently prevented from exercising its discretion under section 2603 to determine that the “interests of justice” exception applied. Had the court not been so prevented, asserts Maresca, it would have allocated a portion of Lisa’s settlement proceeds (the community estate personal injury damages) to Hans as a part of his share of the marital community

property estate.<sup>6</sup> Hans, himself, would then have had additional assets to pay the postseparation debt he owes Maresca. By this construct, Maresca is not seeking payment of Hans' postseparation debt directly by Lisa, which is precluded by section 910.

The UFTA prohibits both intentional acts to defraud creditors and constructive fraud that has the same result. (Civ. Code, §§ 3439.04, 3439.05.)

With respect to actual fraud, the UFTA provides: “A *transfer made* or obligation incurred *by a debtor* is fraudulent as to a creditor, whether or not the creditor's claim arose before or after the transfer was made or the obligation incurred, if *the debtor made the transfer* or incurred the obligation as follows: [1] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. [2] (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. [¶] (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.” (Civ. Code, § 3439.04, subd. (a), italics added.)

With respect to constructive fraud, the UFTA provides: “A *transfer made* or obligation incurred *by a debtor* is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if *the debtor made the transfer* or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.” (Civ. Code, § 3439.05, italics added.)

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<sup>6</sup> In her briefing on appeal, Maresca asserted community property personal injury damages, like Lisa's settlement proceeds, “should be treated as is the rest of the community property; that is, beyond the degree of inequality needed to ensure that the injured spouse is made financially whole, the community property should be divided between the spouses equally so that they may use it to pay their debts.” Accordingly, at oral argument she disclaimed she was seeking a full half of Lisa's settlement monies, but some lesser percentage (which, at a minimum, included the “double recovery” Lisa received by virtue of the collateral source rule).

The UFTA defines a transfer as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. . . .” (Civ. Code, § 3439.01, subd. (i).)

An asset “means property of a debtor” that is not “encumbered by a valid lien,” “generally exempt under nonbankruptcy law,” or “[a]n interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.” (Civ. Code, § 3439.01, subd. (a).) There is “no fraudulent transfer where conveyed property is exempt from debt liability. . . .” (Schwartz et al., *Cal. Practice Guide Enforcing Judgments and Debts* (The Rutter Group 2011) [¶] 3:317, p. 3-95, citing *Yausu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13.) “The UFTA generally applies only to property that is subject to enforcement of a money judgment.” (*Ibid.*)

The UFTA can apply in the dissolution context. In *Mejia, supra*, 31 Cal.4th 657, the Supreme Court held a marital settlement agreement (MSA) can be invalidated under the UFTA if all the requirements of the act are met. In *Mejia*, the husband had an extramarital affair, during which he fathered a child. In connection with their dissolution proceeding, the husband and wife entered into a MSA transferring all of the husband’s interest in jointly held real estate to the wife and transferring all of the wife’s interest in the husband’s medical practice to him. The mother of the child, who had prevailed in a paternity action and obtained child support, claimed the purpose of the MSA was to prevent her from collecting the court-ordered child support from the husband. (*Id.* at pp. 662-663.) The Supreme Court concluded that despite the protection section 916 affords to separated, nondebtor spouses, “the UFTA applies to property transfers under MSA’s.” (*Id.* at p. 669.) While the high court determined the mother could state a claim under the UFTA, the merits of her claim were not before it. (The Court of Appeal had also determined there were triable issues of actual fraud, requiring reversal of the summary judgment that had been granted to the husband.) (*Id.* at pp. 663, 669.)

Accordingly, “creditors without recourse against a nondebtor spouse under Fam[ily Code section] 916 . . . may still have a remedy under the Uniform Fraudulent

Transfer Act.” (Hogoboom & King, Family Law, *supra*, [¶] 8:790, pp. 8-192.7 to 192.8; see also *CMRE Financial Services, Inc. v. Parton* (2010) 184 Cal.App.4th 263, 268-269 [“[t]he only exception to application of section 916 our courts have recognized is where a creditor alleges a marital settlement agreement violates the separate provisions of the Uniform Fraudulent Transfer Act . . .”]).

Both the actual fraud and constructive fraud provisions of the UFTA require a “transfer” by the “debtor,” in this case Hans. (§§ 3439.04, subd. (a), 3439.05.) As the trial court stated, “Hans did not affirmatively act at all but simply acquiesced in the division tendered unilaterally to the family law court by Lisa . . . .” While the trial court posited a “transfer” might occur in a dissolution proceeding by means other than a written MSA (although an MSA was the only “transfer” the Supreme Court discussed in *Mejia*), it concluded the mere fact Hans defaulted, alone, was not sufficient to raise a triable issue of a “transfer” by Hans subject to attack under UFTA. Rather, even assuming a default could be some part of a “transfer” scheme, there had to be some evidence *Hans* agreed not to appear to enable Lisa to file documentation that incorrectly listed her settlement proceeds as separate property in order to avoid any exercise of discretion by the family court under section 2603 and procure a default judgment awarding the settlement proceeds to her as her separate property. We agree. As the trial court observed, default judgments in family law proceedings are “commonplace.” Certainly *Mejia* does not contemplate that any such judgment is subject to challenge under the UFTA solely because the spouse failed to appear and the matter was therefore concluded by way of a default judgment.

We further agree there is no evidence raising a triable issue of any agreement, formal or informal, by Hans to default in order to allow Lisa to manipulate the family law proceedings. To the contrary, the evidence is undisputed that Hans agreed he and Lisa would treat their respective settlement proceeds as their separate property long before he was in the automobile accident with Maresca, that he thought the divorce had been finalized long before the accident, and that he never appeared in the dissolution action, either before or after the accident. There is not a scintilla of evidence that *Hans* did

anything other than default.<sup>7</sup> Under these circumstances, there is no basis to invoke the UFTA to attempt to overturn the dissolution judgment in order to allocate some portion of Lisa’s settlement proceeds to Hans, augmenting his share of the marital community property estate, which would, in turn, be reachable by Maresca.

Since a “transfer” by the debtor is a requisite element of a UFTA claim and there is no triable issue that a “transfer” by Hans occurred, the trial court correctly granted summary judgment in favor of Lisa and against Maresca. We therefore need not, and do not, consider the additional question of whether there is a triable issue that Hans had any interest in an “asset” (i.e., in Lisa’s settlement proceeds) he could transfer. This additional question involves issues concerning Maresca’s claim that, had Lisa correctly identified her settlement proceeds as community estate personal injury damages, the family court would have determined the “interests of justice” exception to section 2603 applied and would have allocated some of these proceeds to Hans as part of his share of the community property estate. But given our conclusion as to the threshold question—that there is no triable issue Hans made any “transfer”—we do not reach these issues.

#### **IV. DISPOSITION**

The judgment is affirmed.

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<sup>7</sup> The fact *Lisa* testified at her deposition that she “wanted to be sure that our divorce was final so that I would not be liable for [Hans’] actions” does not raise a triable issue as to Hans. There is no evidence Lisa had any communication with Hans in this regard, and the limited evidence in the record is all to the contrary. Hans was in jail following the accident, and Lisa testified she did not communicate with Hans while he was there. Hans testified at his deposition that after he was served with the ‘divorce papers’ he never talked to anyone about them. Moreover, Lisa testified her attorney already had the information regarding her property, and Lisa simply signed the prepared documents shortly after Hans’ accident.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.