

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT**

**LEAD CASE NO. 4D23-1637**

**CONSOLIDATED CASE NO. 4D23-1732**

**LOWER CASE NO. 50 2017 CA 03497 XXXXMB AO**

HARLEY KANE and MICHELLE J. KANE,

Appellants,

v.

STEWART TILGHMAN FOX  
& BIANCHI, P.A., et al.

Respondents.

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**APPELLEES' ANSWER BRIEF**

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## **STATEMENT OF THE CASE AND OF THE FACTS**

### **Nature of the Case**

These consolidated appeals arise from proceedings supplementary to execution on Plaintiffs/Appellants' 2008 judgment against appellant Harley Kane. Mr. Kane and his wife, Michelle J. Kane, each separately appeals a judgment (the "Fraudulent Transfer Judgment") entered against them in their capacity as joint tenants by the entireties (i) avoiding a fraudulent transfer to them and (ii) entering a money judgment against them for the amount of the fraudulently transferred funds. (R. 1308).

### **Statement of the Facts**

#### **Plaintiffs' 2008 Judgment against Harley Kane**

Plaintiffs/Appellees ("Plaintiffs") are three law firms who jointly hold an unsatisfied 2008 judgment ("2008 Judgment") against Harley Kane in the principal amount of \$2 million. (R. 1227, ¶¶ 1-3, 6; R. 455-477).<sup>1</sup> The outstanding balance on the 2008 Judgment now exceeds \$4 million. *Id.* at ¶ 6.

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<sup>1</sup> "R." denotes citations to the record on appeal. "T." denotes citations to the trial transcript.

Harley and Michelle Kane; Formation of Kane Lawyers, PLLC

As of 2014, Harley Kane had practiced law in Florida since 1993. (T. 216). Michelle Kane, who had practiced law since 2011, had married Harley Kane in 2010, two years after entry of Plaintiffs' 2008 Judgment, in which she was not involved. (R. 161; T. 367-368; T. 379).

In 2014, while the 2008 Judgment against Mr. Kane remained unsatisfied (as it still is today), Mr. and Mrs. Kane, together with another lawyer, Thomas Flanagan, formed and began their employment with the law firm of Kane Lawyers, PLLC ("Kane Lawyers"). (R. 112).

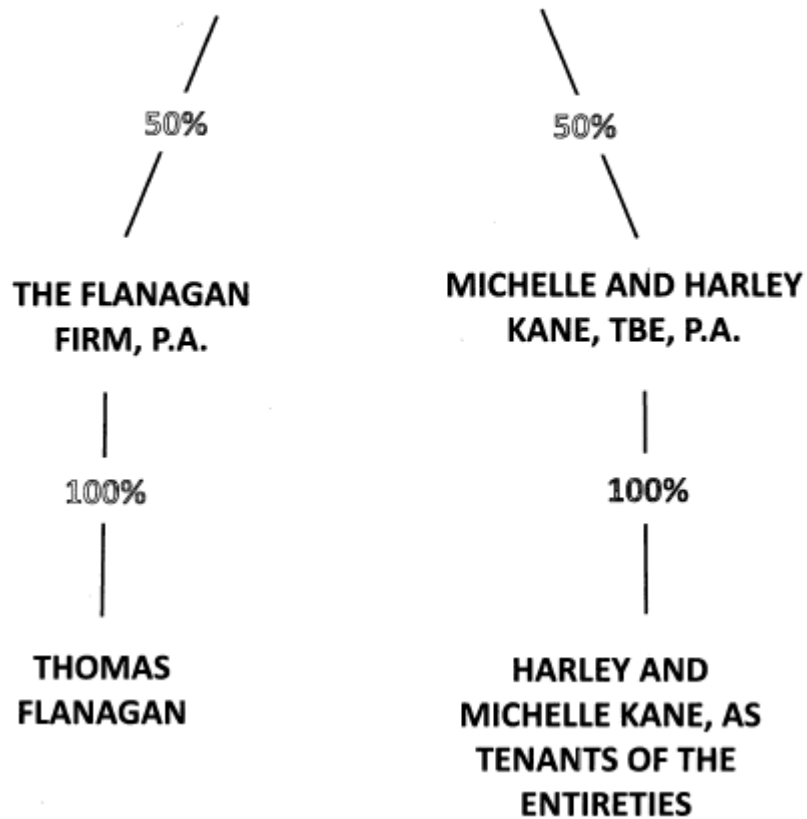
Flanagan indirectly owned 50% of Kane Lawyers, and Harley and Michelle Kane putatively owned the other 50% indirectly via another newly-formed intermediate entity called "Michelle and Harley Kane, TBE, P.A." <sup>2</sup> (R. 111-112). Mr. and Mrs. Kane nominally owned 100% of this entity as joint tenants by the entireties. (R. 1228, ¶¶ 13-14).

The following diagram illustrates the putative chain of ownership of Kane Lawyers. (T. 370; R. 1754).

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<sup>2</sup> This entity changed its name to Michelle J. Kane, P.A. in 2016, after the events relevant to this case. It is sometimes referred to in the record as Michelle J. Kane, P.A. or "MJKPA." The name change has no relevance to this appeal. In this brief, the company will be consistently referred to as "Michelle and Harley Kane, TBE, P.A."

# KANE LAWYERS, PLLC



## \$2.0375 Million Distribution to Michelle and Harley Kane, TBE, P.A.

In 2015, Kane Lawyers made profit distributions to each of its two corporate members. (R. 1229, ¶15). The Kanes' putative holding company, Michelle and Harley Kane, TBE, P.A., received \$2,037,500.00 (the "Profit Distribution") and immediately transferred these funds to a personal bank account in the name of Michelle and Harley Kane, as joint tenants by the entireties. *Id.*

### Supplementary Proceedings and Fraudulent Transfer Action

Plaintiffs contended that the intermediate holding company --- Michelle and Harley Kane, TBE, P.A. --- was a sham entity formed for the purpose of thwarting collection of their 2008 Judgment against Harley Kane. (R. 450). They contended that the company was Harley Kane's alter ego and that its transfer of the Profit Distribution into the joint marital bank account was a fraudulent transfer designed to convert non-exempt funds (the profit distribution from Kane Lawyers, PLLC) into exempt funds (joint marital bank account held by Mr. and Mrs. Kane as tenants by the entirety). (R. 450-451).

Plaintiffs commenced proceedings supplementary to execution against Harley Kane under §56.29, Fla. Stat. (R. 441). Pursuant to that statute, they commenced a fraudulent transfer action, and impleaded Harley and Michelle Kane, in their capacity as joint tenants by the entirety, as supplemental defendants. (R. 436).

Plaintiffs sought to avoid and recover one specific fraudulent transfer: the transfer by the *transferor* (Michelle and Harley Kane, TBE, P.A.) of the sum of \$2.0375 million to the *transferees* (Michelle and Harley Kane as tenants by the entirety). (R. 450-451). Crucially, as noted above, Plaintiffs

asserted that the putative transferor, Michelle and Harley Kane, TBE, P.A., was actually the alter ego of Harley Kane. (R. 450). Thus, they asserted that the actual “transferor” of the funds was Harley Kane, and that, while he was indebted to Plaintiffs under their 2008 Judgment, he had fraudulently transferred the non-exempt funds to himself and his wife as joint tenants by the entireties to put the funds beyond Plaintiffs’ reach. (R. 450-451).

### Summary Judgment Motions

Harley Kane, acting *pro se*, filed a motion for summary judgment on behalf of “Michelle J. Kane and Harley N. Kane, as tenants by the entireties” (“Harley Kane MSJ”). (R. 115). Mr. Kane never set that motion for hearing, and it was never argued or decided.

Michelle Kane and Michelle J. Kane, P.A.,<sup>3</sup> represented by counsel, filed their own separate motion for summary judgment (“Michelle Kane MSJ”). (R. 147). After briefing and argument by Plaintiffs and by Michelle Kane, in which Harley Kane did not participate, the trial court denied the Michelle Kane MSJ. (R. 599).

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<sup>3</sup> As previously noted, Michelle J. Kane, P.A. was the successor by name change to Michelle and Harley Kane, TBE, P.A., the nominal owner of the 50% interest in Kane Lawyers. (R. 147).

## Trial, Verdict, and Judgment

The case was tried to a jury, which entered a special verdict making the following factual findings:

The payment of \$2,037,500.00 paid by Kane Lawyers, PLLC to Michelle and Harley Kane, TBE, P.A. was received by that entity as alter ego of Harley Kane.

Harley Kane, as alter ego of Michelle and Harley Kane, TBE, P.A., then transferred the funds to Harley Kane and Michelle Kane, as tenants by the entirety, with actual intent to hinder, delay, or defraud Plaintiffs.

Harley Kane, as alter ego of Michelle and Harley Kane, TBE, P.A., was insolvent when he transferred the funds to Harley Kane and Michelle Kane, as tenants by the entirety, and he received less than reasonably equivalent value for the transfer.

(R. 1249-1250). A discussion of the trial evidence supporting this verdict appears *infra* at 32-34.

Pursuant to the jury verdict, the trial court entered the Fraudulent Transfer Judgment, pursuant to §§726.108(1) and 726.109(2), Fla. Stat., (i) avoiding the \$2.0375 million transfer by Michelle and Harley Kane, TBE, P.A. and (ii) entering money judgment in favor of Plaintiffs and against the transferees of the fraudulent transfer, Harley N. Kane and Michelle J. Kane as tenants by the entirety, in the principal amount of \$2,837,725.32. (R. 1308).

The Kanes now appeal the Fraudulent Transfer Judgment.

### **SUMMARY OF ARGUMENT**

Harley Kane's arguments on appeal are all legal. He does not challenge the sufficiency of the evidence supporting the jury's findings. Neither he nor Michelle Kane actually identifies the summary judgment order that they are contesting, but, on the one such motion that the Court heard, there was ample record evidence to create factual issues for the jury.

Plaintiffs properly sued Mr. and Mrs. Kane in their specific capacities as joint tenants by the entireties, because that was their specific capacity as statutory "first transferees" of the fraudulent transfer. Plaintiffs did not violate any "second judgment rule" by suing them because both the underlying cause of action, and the identity of the parties differed from that in Plaintiffs' original 2008 Judgment.

The trial court's veil-piercing instruction properly instructed the jury on the "improper conduct" requirement. Mr. Kane did not specifically object to the fact that the ultimate instruction was non-standard and the trial court stated its reasons for its changes to the instruction and for its rejection of language requested by Mr. Kane.

There was no requirement, upon a determination that the corporate existence of Michelle and Harley Kane, TBE, P.A. should be disregarded and that the company be considered the alter ego of Harley Kane, that the jury or court make findings as to the value of Michelle Kane's interest in the company, because the company was no longer deemed to have a valid corporate existence.

Michelle Kane's points on appeal are presented in shotgun fashion, and either rehash Mr. Kane's arguments or consist of conclusory and facially unmeritorious assertions. To the extent that she specifically challenges the jury's verdict, Plaintiffs presented more than sufficient evidence, primarily consisting of the direct testimony of Mr. and Mrs. Kane themselves, to support the jury's findings of fact.

## **ARGUMENT**

### **I. The Trial Court Did Not Err in Denying Summary Judgment**

#### **A. The Trial Court Never Heard or Ruled on Harley Kane's Motion for Summary Judgment.**

Harley Kane's first argument on appeal is that "The trial court erred in failing to grant Appellant's motion for summary judgment." (Harley Kane Initial Brief at 5-8). But Harley Kane is the sole "Appellant" on that brief, and his motion for summary judgment (R. 115) was never set for hearing and

never ruled upon. *Mr. Kane's brief nowhere identifies the allegedly erroneous order denying his motion for summary judgment, because no such order exists.*

Michelle Kane's brief suffers from the same defect. In her "Point Nine," she tersely declares, without further argument or elaboration, that "The undisputed pre-trial record shows the Appellant was entitled to summary final judgment *as set forth in the Initial Brief of Appellant Harley N. Kane.*" (Michelle Kane Amended Initial Brief at 13) (emphasis added).

Thus, insofar as the issue of summary judgment is concerned, both appellants are appealing a non-existent order.

The only actual order denying summary judgment was the trial court's July 19, 2022, order denying the *Michelle Kane* MSJ. (R. 599). Neither Harley Kane's brief nor its perfunctory incorporation into Michelle Kane's "Point Nine" can be construed as referring to this order. Neither the July 19 order nor the underlying Michelle Kane MSJ itself is cited anywhere in either brief. And none of the "record evidence for motion for summary judgment" cited by Harley Kane in his brief was part of the summary judgment evidence presented to the trial court in connection with the

Michelle Kane MSJ. *Compare* Harley Kane Initial Brief at 5-6 with Michelle Kane MSJ (R. 147-163).

Appellants have thus failed to properly present the issue of denial of summary judgment for this Court's review.

Nonetheless, in an overabundance of caution, and though neither Appellees nor the Court should be required to engage in this exercise, Appellees will respond to Appellants' arguments --- despite the fact that their briefing is completely untethered to what was actually before the trial court when it addressed the issue of summary judgment -- as to why the court erroneously failed to enter summary judgment in their favor.

**B. There Was Ample Record Evidence that Michelle and Harley Kane, TBE, P.A. was Harley Kane's Alter Ego**

Appellants argue that the trial court should have granted summary judgment in their favor because "[Plaintiffs] failed to put forth any record evidence of the requisite elements for piercing the corporate veil." (Harley Kane Initial Brief at 6).

## 1. Applicable Legal Standards

Standard of Review of Orders on Summary Judgment: “[T]he correct test for the existence of a genuine factual dispute is whether ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *In re Amendment to Florida Rule of Civil Procedure 1.510*, 317 So.3d 72, 74 (Fla. 2021) (internal citations omitted). Since the correctness of summary judgment is a question of law, [the appellate] court reviews the matter de novo.” *Maldonado v. Publix Supermarkets*, 939 So.2d 290, 293 (Fla. 4th DCA 2006).

Piercing the Corporate Veil: To pierce the corporate veil, a claimant must prove three things: “(1) the shareholder dominated the corporation to such an extent that the corporation had no independent existence, ... such that the shareholder was the alter ego of the corporation; (2) the corporate form was used fraudulently or for an improper purpose; and (3) the claimant was injured as a result. ... This ‘showing of improper conduct’ requires proof that ‘the corporation was actually organized or used to mislead creditors or to perpetrate a fraud upon them.’” *Wurtzebach v. Flooring Depot FTL, Inc.*, ---- So.3d ---, 2024 WL 696617 (Fla. 4th DCA February 21, 2024) at \* 2 (citing *Seminole Boatyard, Inc. v. Christoph*, 715

So.2d 987 (Fla. 4th DCA 1998); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1119–20 (Fla. 1984).

## **2. The Record Evidence Supported the Trial Court's Denial of Summary Judgment**

The trial court correctly ruled that, on the record evidence before it at the summary judgment stage, a reasonable jury could return a verdict for Plaintiffs, the non-moving parties, on the alter ego issue. Plaintiffs had presented substantial record evidence supporting their claim that Harley Kane was the alter ego of Michelle and Harley Kane, TBE, P.A. (R. 164-338). These included the following:

Michelle and Harley Kane, T.B.E., P.A. had no corporate existence prior to 2014, was formed for the express purpose of being the shareholder in Kane Lawyers, and was formed to provide “protection from creditors.” (R. 300-301). The company was not capitalized: Neither Harley nor Michelle Kane could attest to the injection of *any* money or capital into the company at its formation. (R. 300-301; R. 213). There were no corporate governance documents. (R. 302). No shares of stock were issued, no corporate minutes were maintained, and no annual meetings were held. R. 306. Indeed, apart from minimal boilerplate documents filed with the State of Florida, no corporate records of any description existed, including any

documents relating to the 2015 Profit Distribution. (R. 306; R. 223-225; R. 228; R. 318; R. 333; R. 320; R. 331-332. In short, the company was a sham with no independent corporate existence.

Harley Kane acknowledged that the available of that extraordinary \$2.0375 million distribution in the first year of Kane Lawyers' existence was largely attributable to his work. R. 227; R. 255). At the time Kane Lawyers was formed, Harley Kane had 21 years of legal experience and had earned millions of dollars practicing law. (R. 238-240). The other co-owners of the firm, Michelle Kane and Thomas Flanagan, had only eight years of *collective* experience. R. 167.

All of the foregoing evidence (dominant shareholder; disregard of corporate formalities; and non-capitalization) is directly relevant to disregard of the corporate entity. *Hilton Oil Transport v. Oil Transport Co., S.A.*, 659 So.2d 1141, 1151-1152 (Fla. 3d DCA 1995).

In determining whether a jury issue existed as to whether Michelle and Harley Kane, TBE, P.A. had been organized or used for an improper purpose, the trial court had before it substantial evidence of Harley Kane's specific animus against the Plaintiffs, and his history of dishonest conduct specifically directed at them. Harley Kane had been disbarred as a direct

result of the same conduct that gave rise to Plaintiffs' 2008 Judgment against them. R. 166 (citing *The Florida Bar v. Kane*, 202 So.3d 11 (Fla.2016)). The Supreme Court found that, in connection with his acts giving rise to that judgment, Harley Kane had violated numerous ethical rules and that his conduct "was dishonest, deceitful, and contrary to honesty, and justice." *The Florida Bar v. Kane, supra*, at 24; R. 265 at ¶ 21; R. 280 at ¶ 21. Kane had been unable to discharge the 2008 Judgment in his personal bankruptcy because three federal courts held that it had arisen from a "willful and malicious injury." (R. 265 at ¶20; R. 280 at ¶20. And he had vowed that Plaintiffs "would never see a dime" from him. (R. 242 at 24).

The byzantine corporate structure Mr. Kane devised for ownership of his interest in Kane Lawyers evidenced an intent to misuse the corporation to work a harm on creditors. Had Mr. Kane owned a direct interest in Kane Lawyers, the profit distribution would have constituted non-exempt funds that Plaintiffs could have garnished. Under Florida law, proceeds from a debtor's business, including a law practice, do not constitute exempt "earnings." *Brock v. Westport Recovery Corp.*, 832 So.2d 209, 212 (Fla. 4th DCA 2002); *Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 197 So.3d 137,

142 (Fla. 4th DCA 2016). A reasonable jury could infer that, by creating a non-capitalized sham corporation putatively owned with his wife, and by funneling the non-exempt profit distribution to an exempt joint entireties account, Kane had misused the corporate entity for an improper purpose.

After reviewing the record evidence, the trial court thus correctly concluded that:

There remain questions of fact and law whether the tenancy by the entirety corporation [i.e., Michelle and Harley Kane, TBE, P.A.] was an alter ego of Harley Kane and therefore the transfer from that entity to the Kane's [sic] amounts to a transfer for the purpose of the fraudulent transfer law.

(R. 599). A reasonable jury could (and ultimately did) find that Michelle and Harley Kane, TBE, P.A. was Harley Kane's alter ego.

Thus, even if the Court construes the appellants' briefs as seeking review of the July 19, 2022 order denying *Michelle Kane's* SJ Motion (R. 599) ---- which it should not --- the trial court did not err in entering that order.

## **II. There Was No Legal Impediment to Entry of Judgment Against Harley and Michelle Kane in Their Capacity as Joint Tenants By The Entireties**

Mr. Kane next argues that Harley and Michelle Kane lacked the legal capacity to be sued in their specific capacity as joint tenants by the entireties. He also argues that the Fraudulent Transfer Judgment against him and Michelle Kane, as joint tenants by the entireties, violates the “second judgment rule” because Plaintiffs already hold the 2008 Judgment against him. (Harley Kane Initial Brief at 9-16). Neither proposition is correct.

### **A. Florida Law Does Not Prohibit a Suit Against the Kanes in Their Joint Capacity**

Mr. Kane suggests that the existence of statutes expressly permitting corporations, LLCs, partnerships, and trusts to sue and be sued somehow implies a prohibition against suing a husband and wife as tenants by the entireties. (Harley Kane Initial Brief at 13-14). He cites no authority for this illogical proposition, and Florida law is to the contrary. *Ellis Sarasota Bank & Trust Co. v. Nevins*, 409 So.2d 178 (Fla. 2d DCA 1982).

In *Ellis*, the court held that the deposit of a judgment debtor’s funds into a joint entireties account with his wife could be a fraudulent transfer, but that to pursue such a claim, “a plaintiff must join both tenants in the

*proceedings* before an entireties account can be made available to answer for the judgment debts of one of the tenants individually.” *Id.* at 180 (emphasis added). By suing both Harley and Michelle Kane, as tenants by the entireties, to challenge the fraudulent transfer into the entireties account, Plaintiffs properly followed this express legal mandate.

*Beal Bank, SSB v. Almand & Associates*, 780 So.2d 45 (Fla. 2001) and the other cases cited by Kane are silent on the issue of a defendant’s capacity to be sued. These cases recognize the unremarkable proposition that a joint tenancy by the entireties is a form of ownership, but none holds or even hints at the notion that a husband and wife may not be sued in their capacities as joint tenants by the entireties.

Indeed, in *Beal*, the Florida Supreme Court expressly recognized the proposition that entireties property may be acquired with fraudulently transferred funds and subject to recovery under Ch. 726, Fla. Stat. --- the very remedy invoked by Plaintiffs in this case. *Beal, supra*, at 59 (“[T]oday’s decision in no way limits creditors’ ability to protect their interests against debtors who seek to shield assets from creditors”).

The fact that a tenancy by the entireties is a “form of ownership” does not exclude the right to sue spouses in their capacity as joint tenants by the

entireties; if anything, it implies that they may be sued in such capacity. As a logical and legal proposition, it was necessary for Plaintiffs to sue the Kanes in their joint capacity: The fraudulently transferred assets that Plaintiffs sought to reach --- the \$2.0375 million and any future proceeds of same --- had been transferred to the Kanes as joint tenants by the entireties. Without a judgment against them in that capacity, Plaintiffs would have been unable to reach those assets. And because the Kanes, *as joint tenants by the entireties*, were the literal recipients of the fraudulent transfer, they constituted ---- *in that capacity* ---- the literal “first transferee of the asset” under §726.109(2)(a), Fla. Stat., the remedial portion of Florida’s enactment of the Uniform Fraudulent Transfer Act. Ch. 726, Fla. Stat.

**B. The “Second Judgment Rule” Does Not Apply Here**

Mr. Kane argues that Plaintiffs are impermissibly trying to get two judgments against the same judgment debtor. This argument fails for the simple reason that the Fraudulent Transfer Judgment and the 2008 Judgment involve completely different causes of action. The 2008 Judgment was for unjust enrichment that occurred in 2004, while the instant Fraudulent Transfer Judgment against Mr. Kane *and* his wife is for

their *joint* receipt, as statutory “transferees,” of a fraudulent transfer that occurred in 2015 that was designed to thwart collection of the earlier judgment.

None of the authorities cited in connection with Mr. Kane’s invocation of the “second judgment rule” is apposite. In *Yusem v. South Florida Water Management District*, 770 So.2d 746 (Fla. 4th DCA 2000), the husband/judgment debtor deposited proceeds of a personal asset into a joint account with his wife, then on the same day moved the vast majority of the proceeds into a personal offshore account. The trial court found the transfer to have been fraudulent under the Uniform Fraudulent Transfer Act, Chapter 726, Fla. Stat. (“UFTA”), and entered judgment against the husband and wife, jointly and severally.

This Court reversed. It first found that there was no basis to hold the wife liable because the money was only “momentarily” in her account, without her knowledge, and there was no evidence that she benefitted from the transfer.<sup>4</sup> This left the husband/original judgment debtor as the only

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<sup>4</sup> In so ruling, the Court applied what is known in bankruptcy law as the “mere conduit” rule, under which passive, momentary recipients of bank transfers who act in good faith are not deemed “transferees” for purposes of the fraudulent transfer statutes. See, e.g., *In re Harwell*, 628 F.3d 1323

judgment debtor under the new fraudulent transfer judgment ---- an obviously redundant outcome. The Court held that “[T]hat there is nothing in section 726.108 which provides that a creditor ... that has a judgment against a debtor ... can obtain an additional judgment against the same debtor, because the debtor fraudulently transferred funds to avoid his creditors. ... A fraudulent conveyance action, under section 726.108, is not an action against a debtor for failure to pay an amount owing from a prior judgment.” *Yusem, supra*, 770 So.2d at 749. <sup>5</sup>

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(11th Cir. 2010). The Kanes do not, and could not, argue that this rule applies in this case.

<sup>5</sup> This Court appeared to recede from this position, without citing or discussing *Yusem*, in *Hansard Constr. Corp. v. Rite-Aid of Florida, Inc.*, 783 So.2d 307, 309 (4th DCA 2001) where it stated that a plaintiff *may* recover money damages against the *transferor* under §726.108(1)(c)(3), Fla. Stat., the “catch-all” remedy in UFTA allowing “any other relief the circumstances may require.” *Accord, McCalla v. E.C. Kenyon Const. Co., Inc.*, 183 So.3d 1192, 1194 (Fla. 1st DCA 2016) (UFTA authorizes money damages awards “against both fraudulent transferor and transferee, jointly and severally”). *Contra, SE Property Holdings, LLC v. Welch*, 65 F.4th 1335, 1346 (11th Cir. 2023) (finding it doubtful that the Florida Supreme Court would follow *Hansard*). In all events, none of these cases applies here, where the judgment does not lie solely against the judgment debtor and where Plaintiffs obtained their judgment under the specific authority of a separate and explicit statutory provision, §726.109(2)(a), Fla. Stat.

*Yusem* is thus distinguishable on multiple grounds. Here, Harley and Michelle Kane, as tenants by the entireties, are distinct from, and not “the same debtor” as, Harley Kane.<sup>6</sup> Nor did Plaintiffs sue Harley Kane as the transferor of the fraudulent transfer, or for failing to pay his prior judgment. They sued different defendants ---- Harley and Michelle Kane jointly, as initial transferees of Harley Kane’s fraudulent transfer. Unlike the wife in *Yusem*, who successfully invoked the “mere conduit” defense, Michelle Kane has substantive liability as a co-transferee under UFTA. As this Court noted in *Yusem*, “a fraudulent conveyance action is an action against a transferee [here Harley and Michelle Kane jointly] who has received an asset [the \$2.0375 million] by means of a fraudulent conveyance and should be required to either return the asset or pay for the asset (by way of a judgment and execution).” *Yusem, supra*, 770 So.2d at 749.

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<sup>6</sup> *Pasternack v. Klein*, 2019 WL 330593 (M.D.Fla. January 25, 2019) is distinguishable for the same reason because the court similarly held that a judgment creditor could not obtain a second money judgment against its exact same judgment debtor, which is not the relief Plaintiffs seek here.

### III. The Trial Court Did Not Err in Instructing the Jury

#### A. The Jury Was Properly Instructed on the “Improper Conduct” Requirement

As previously noted, Florida law requires a showing of “improper conduct” in order to pierce the corporate veil. *Dania Jai-Alai, supra*, 450 So.2d at 1121. Harley Kane argues that the trial court’s instruction to the jury on the alter ego issue (R. 1252-1253) was erroneous because it “indicated” that this element was merely “optional,” thereby creating the possibility that “the jury could find the existence of an alter ego entity without a finding [of] improper conduct.” (Harley Kane Initial Brief at 21).

But the very first sentence of the trial court’s instruction stated that “Under Florida law, a finding that a corporation is the alter ego of an individual **will not be made** absent a showing of improper conduct.” (R. 1252) (emphasis added). This language plainly emphasized that a showing of improper conduct was not “optional.” The later reference in the instruction to “existence of fraud, wrongdoing or injustice to third parties” as a factor that the jury “may” consider, (R. 1253), did not negate the clear mandate in the first sentence that the jury was required to find “improper conduct” in order to make the alter ego finding.

## **B. The Trial Court Did Not Err By Not Giving the Standard “Veil-Piercing” Instruction**

Mr. Kane also argues that the trial court erroneously refused to give the standard jury instruction on piercing the corporate veil, and that it failed to articulate its reasons for doing so. (Harley Kane Initial Brief 16-20). Mr. Kane, who represented himself *pro se* before the trial court, had submitted the standard instruction as one of his proposed jury instructions on March 1, 2023 (more than a month before the April 4-6 trial). (R. 1208-1209).

But by the time of the final charge conference on April 5, 2023 (T. 474-518), all parties were already negotiating, in conjunction with the trial court, a *non-standard* instruction to reflect the particular facts of the case. See, e.g., T. 473-474 (discussing special interrogatory question on verdict form re alter ego, Mr. Kane states “I think that’s a fair question. We need to work on the definition of alter ego”); T. 507 – 508 (Plaintiffs’ undersigned counsel advises trial court that, as to the alter ego *instruction*, “Mr. Kane and Mr. Agnetti [Michelle Kane’s counsel] have agreed to all of the [nonstandard] language that’s in there, but Mr. Kane wants additional language that we object to”).

Mr. Kane participated with the other parties and the trial court in an extensive discussion of the language of the proposed (and by now non-standard) alter ego instruction at this final charge conference. (T. 499-500; T. 507–518). As the trial court correctly observed in rejecting certain language requested by Kane, “[Plaintiffs are] not trying to impose debts from this corporation on the individual and then get money from that debt. You are really saying that this was the alter ego of its ---- of a stakeholder, namely Harley Kane.” (T. 510-511). This was not a classic “veil-piercing” case where Plaintiffs sought to hold a shareholder liable for the corporation’s debts; it was a case where a sham corporate entity was disregarded and its actions were imputed to its alter ego.

Mr. Kane continued to voice objections to the instruction (although these objections did not include the fact that it was non-standard). (T. 512-518). Even if Kane is deemed to have “timely objected” to the instruction ultimately approved by the trial court, the trial court explained its reasons on the record, as required by Fla.R. Gen.Prac. & Jud.Admin. 2.580.

Accordingly, the standard instruction was neither necessary nor mandatory. *See In re Standard Jury Instructions in Contract and Business Cases - 2018 Report*, 260 So.3d 87, 88 (Fla. 2018) (“In authorizing the

publication and use of these instructions and verdict forms, *we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions* or verdict forms nor contesting the legal correctness of the instructions or verdict forms”)(emphasis added).

“[T]he trial court is ‘accorded broad discretion in formulating jury instructions, and its decision should not be reversed unless the error complained of resulted in a miscarriage of justice or the instruction was reasonably calculated to confuse or mislead the jury.’ *McConnell v. Union Carbide Corp.*, 937 So.2d 148, 152 (Fla. 4th DCA 2006). *Accord, Nason v. Shafranski*, 33 So.3d 117, 120 (Fla. 4th DCA 2010) (“Trial courts are accorded broad discretion in their decisions to give a particular jury instruction, and any such decision will not be reversed on appeal absent prejudicial error.” (Internal citations omitted). The trial court adequately and accurately instructed the jury on the alter ego issue. And as discussed at 32-34, *infra*, the jury heard substantial evidence supporting all of its findings on the alter ego issue.

#### **IV. The Jury Was Not Required to Make a Findings As to Michelle Kane's Interest in the Fraudulently Transferred Funds**

Mr. Kane's final argument is that the trial court "failed to require a finding that no portion of the funds transferred belonged to Michelle Kane." (Harley Kane Initial Brief at 21). He complains that "The jury was never asked whose monies were transferred and [Plaintiffs] put forth no direct evidence as to whether the monies were exclusively Harley Kane's." *Id.* at 21-22.

First, the jury was indeed asked "whose monies were transferred." The jury's first express finding was that the funds paid by Kane Lawyers to Michelle and Harley Kane, TBE, P.A. was received by that entity "as alter ego of Harley Kane." (R. 1249). And in both of its remaining findings, the jury expressly found that Harley Kane transferred the funds to himself and his wife "as the alter ego of Michelle and Harley Kane, TBE, P.A." *Id.* at 1249-1250. It bears repeating that Mr. Kane nowhere challenges the sufficiency of the evidence supporting these findings.

The fallacy in Mr. Kane's position lies in his insistence that "Once the jury discarded the corporate entity, ... it was *required* to determine which, if any, funds actually belonged to Michelle Kane." (Harley Kane Initial Brief at 24). The jury heard --- without objection by Mr. Kane --- the parties' pretrial

stipulation that “Michelle and Harley Kane, TBE, P.A. received a \$2,037,500 distribution from Kane Lawyers, PLLC. These funds were immediately deposited into a bank account in the name of Harley N. Kane and Michelle Kane, as joint tenants by the entireties.” (T. 210).

Contrary to Mr. Kane’s position, the jury was not required to make a finding “that no portion of the funds transferred belonged to Michelle Kane.” Michelle Kane, in her individual capacity, was not a shareholder in Kane Lawyers and thus never had a direct interest in the Profit Distribution prior to receipt of the fraudulent transfer. This was a matter of personal choice: She received a direct salary from Kane Lawyers. (T. 224; T. 227; T. 326). She could have also received direct profit distributions from Kane Lawyers by insisting on taking a direct ownership in that company. Instead, she voluntarily acquiesced in the creation of the sham non-capitalized “TBE” entity, which, by her admission, was formed as “protection against creditors.” T. 373. Whether Michelle & Harley Kane TBE, P.A. is (incorrectly) viewed as a legitimate entity, of which she was merely a shareholder, or as a sham alter ego of her husband, Michelle Kane never had a direct interest in the funds. *A fortiori*, no jury “finding” as to the extent of her interest in the funds was necessary or appropriate.

It bears emphasis that the \$2.0375 million distribution from Kane Lawyers was *not* a distribution of *earnings* to Michelle or Harley Kane. Each of them was separately compensated for their labor via salary. (T. 224; T. 227; T. 326). The profit distribution was made to the 50% shareholder of Kane Lawyers --- whom the jury found to be Harley Kane --- as a dividend in respect of an equity interest. Thus, the trial court correctly instructed the jury that:

Whether the \$2,037,500 distribution from Kane Lawyers, PLLC was earned solely by Harley Kane should not be considered in the factual determination whether Michelle and Harley Kane TBE PA is the alter ego of Harley Kane.

(R.1253).

Mr. Kane himself acknowledges the correctness of this instruction. (Harley Kane Initial Brief at 23). But he then advances --- without any case authority --- the illogical proposition that, *after* a determination that the sham company was his alter ego, the jury had to somehow calculate the value of Michelle Kane's co-tenancy interest in the sham entity (which Ms. Kane acknowledges, at p.6 of her brief, to have been "unfunded"). But once the entity was found to be the alter ego of Harley Kane, the money held in the name of that entity was, by definition, deemed to be *his*, and the jury correctly found that the funds were transferred by him to the entireties bank

account that he owned with his wife. Stated another way, when the putative corporate existence of Michelle and Harley Kane, TBE, P.A. was disregarded, so too was her putative equity interest in that sham entity.

## **V. MICHELLE KANE HAS IDENTIFIED NO GROUNDS FOR REVERSAL OF THE TRIAL COURT’S JUDGMENT**

With few exceptions, Michelle Kane’s Amended Initial Brief either adopts Harley Kane’s brief by reference, or merely presents a “shotgun” recitation of conclusory assertions unaccompanied by any legal analysis or authority.

### **A. The Jury’s Alter Ego Finding Moots “The Unities of Tenants by the Entireties.”**

In her “Point One,” Ms. Kane appears to argue that the fact that Michelle and Harley Kane, TBE, P.A. was putatively organized as an entity owned by her and her husband as tenants by the entireties *per se* precludes the jury’s finding that the company was Harley Kane’s alter ego. (Michelle Kane Amended Initial Brief at 4-6). But she cites no authority for the proposition that a company whose shareholders are husband and wife co-tenants by the entireties is immune to the same principles of disregard of the corporate entity as any other corporation. As stated above, when the putative corporate existence of Michelle and Harley Kane, TBE, P.A. was

disregarded, her putative tenancy by the entireties equity interest was necessarily extinguished for purposes of this case.

**B. It is Irrelevant That Ms. Kane “Owed Nothing to the Appellees”**

The gist of Ms. Kane’s “Point Two” (Michelle Kane Amended Initial Brief at 6-7) appears to be that she “owed nothing” to Plaintiffs at the outset and thereafter participated in no “conspiracy” against them. The simple answer to this is that she and Mr. Kane, as joint tenants by the entireties, were the “first transferee” of the avoided fraudulent transfer and thus have strict liability for the amount of the transfer under §726.109(a), Fla. Stat. One need not have a pre-existing obligation to the creditor of a debtor in order to be liable as the transferee of a fraudulent transfer from that debtor. And UFTA does not have a “conspiracy” or scienter requirement for a “first transferee” to be liable under §726.109(a), Fla. Stat.

**C. Ms. Kane’s Points Three, Four, Five, Six, Eight, and Nine Do Not State Grounds for Reversal**

Ms. Kane’s “Points” Three through Six are conclusory statements, unsupported by argument or citations to the record or legal authority. (Michelle Kane Amended Initial Brief at 7-9)

Points Three and Five (“Nothing in Evidence Can Strip the Appellant of Co-ownership in MJKPA;” “Nothing Solely Owned by Harley N. Kane;”) is a rehash of Point One, discussed *supra* at 29-30.

Point Four (“MJKPA Never Encumbered by Obligation to Appellees”) erroneously rehashes her erroneous argument in Point Two that her strict liability as a fraudulent transferee required the existence of some pre-existing liability or obligation to Plaintiffs.

Point Six (“No proof Harley N. Kane Caused Anything”) appears to be a frivolous attempt to argue that there was insufficient proof that the fraudulent transfer of the funds from the alter ego entity, Michelle and Harley Kane, TBE, P.A., to Mr. and Mrs. Kane’s personal entireties bank account occurred. But Ms. Kane entered into a pretrial stipulation confirming that Michelle and Harley Kane, TBE, P.A. received the Profit Distribution, and that it was immediately transferred into the personal entireties account. (R.1229, ¶ 15).

In Point Eight (Michelle Kane Amended Initial Brief at 13), Ms. Kane simply adopts, without further discussion, Harley Kane’s argument that the Court erroneously instructed the jury. That issue is discussed *supra* at 22-25.

As previously noted, Point Nine (Michelle Kane Amended Initial Brief at 13-14) adopts Harley Kane's argument that the trial court erroneously denied summary judgment in favor of appellants, an argument disposed of at 8-15, *supra*.

**D. The Jury's Alter Ego Finding Was Supported by Sufficient Evidence**

This leaves Ms. Kane's Point Seven (Michelle Kane Amended Initial Brief at 9-13), which amounts to an argument that there was insufficient evidence to support the jury's findings that Michelle and Harley Kane, TBE, P.A. received and then transferred the funds constituting the Profit Distribution as the alter ego of Harley Kane.

A jury verdict that is supported by substantial, competent evidence is not reversible on appeal. *Caulkins Indiantown Citrus Co. v. Nevins Fruit Co., Inc.*, 831 So.2d 727, 733 (Fla. 4th DCA 2002). The jury received evidence of all of the following facts:

Harley and Michelle Kane eschewed direct ownership of the Kane Lawyers, PLLC law firm in favor of an inexplicable and byzantine structure using the purported intermediate entity of Michelle and Harley Kane, TBE, P.A. (T. 218; T. 236 – 237; T. 369-371). This sham entity was devoid of corporate formalities or other indicia of a bona fide corporate existence ---

there were no stock certificates, no ledgers, no resolutions, and no minutes. (T. 239; T. 242- 247; T. 377-379; T. 385 - 387). Harley and Michelle Kane both admitted that this company was never capitalized. (T. 238-239; T. 375-376). It had no purpose or actual corporate activity other than to serve as a funnel for the transfer of \$2.0375 million from Harley Kane to himself and his wife. Ms. Kane expressly testified that the motive for forming the entity was “protection from creditors.” (T. 371-373).

The jury heard substantial evidence of Harley Kane’s animus against Plaintiffs and his intent to hinder collection of their judgment against him, including (i) his vow that Plaintiffs “would never see a dime” (T. 234); (ii) Judge Crow’s 2008 ruling that Kane had unjustly enriched himself at Plaintiff’s expense (T. 347); (iii) the Bankruptcy Court’s determination that Kane had inflicted a “willful and malicious injury upon” Plaintiffs (T. 347-348) and (iv) Kane’s failure to make a single voluntary payment on Plaintiffs’ judgment despite earning more than \$2.6 million between 2011 and 2020 (not including the \$2.0375 million profit distribution)(T. 219-229).

As to the transfer of the \$2.0375 million, the jury heard evidence of the statutory “badges of fraud,” including (i) transfer to insider (Harley and Michelle Kane were “insiders” of Harley Kane); (ii) retention of control

(Harley Kane retained control over the funds, together with his wife); (iii) transfer made after entry of large judgment (the 2008 Judgment for \$2 million was still outstanding and still accruing interest; and (iv) Harley Kane's insolvency at the time of the transfer (he acknowledged that in 2015, his non-exempt assets were less than the amount of the balance on Plaintiffs' 2008 Judgment) (T. 332-335).

The jury's verdict was supported by competent substantial evidence.

### **CONCLUSION**

This Court should affirm the judgment of the trial court.

Dated this 19th day of March, 2024.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed and served by e-mail to **John A. Reynolds, Esq.**, [john@reynoldsandreynoldspl.com](mailto:john@reynoldsandreynoldspl.com), Reynolds & Reynolds, P.L., 120 South Olive Avenue, Suite 600, West Palm Beach, FL 33401; **Nicholas Demes, Esq.**, [nick@reynoldsandreynoldspl.com](mailto:nick@reynoldsandreynoldspl.com), Reynolds & Reynolds, P.L., 120 S. Olive Avenue, Suite 600, West Palm Beach, FL 33401; and **Michelle J. Kane, Esq.**, [shellybythesea16@gmail.com](mailto:shellybythesea16@gmail.com), 101425 Overseas Highway #63, Tavernier, FL 33037 this 19th day of March, 2024.

/s/ Charles W. Throckmorton  
Charles W. Throckmorton

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P. 9.210(a).

/s/ Charles W. Throckmorton  
Charles W. Throckmorton