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No. 72336-7-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

CALIFORNIA SHELLFISH COMPANY, INC.,
d/b/a POINT ADAMS PACKING COMPANY,

Plaintiff/Appellant,

v.

SEAFOOD SALES, INC. and TERRY R. BERTOSON,

Defendants/Respondents.

A handwritten signature in black ink is written over a faint, circular stamp. The signature is a cursive-style name, possibly "Terry Bertosen". The stamp is mostly illegible but appears to contain some text around the perimeter.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Honorable Monica J. Benton)

**BRIEF OF APPELLANT CALIFORNIA SHELLFISH
COMPANY, INC.**

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I. INTRODUCTION

On August 16, 2013, a judgment was entered in favor of appellant California Shellfish Company, Inc. (“CA Shellfish”) and against respondents Seafood Sales, Inc. (“Seafood Sales”) and Terry R. Bertosen (“Bertosen” and together with “Seafood Sales,” the “Respondents”), jointly and severally, in the amount of \$171,127.15, plus interest and costs. As part of CA Shellfish’s judgment enforcement, CA Shellfish took the supplemental proceeding examination of Bertosen (the “Examination”). A homestead property was revealed during the Examination. Thereafter, CA Shellfish moved for an order directing the sale of the homestead (the “Sale Motion”).

Respondents opposed the Sale Motion, arguing that CA Shellfish had the burden of proving the debt from the judgment was community liability, and that the marital community or Bertosen’s spouse needed to be named as a separate entity in order for CA Shellfish’s judgment lien to attach to the homestead. Contrary to Respondents’ arguments, Washington law is clear that a debt incurred by either spouse during marriage is *presumed* to be a community debt. In order to overcome that presumption, the party disputing community liability must prove, by clear and convincing evidence, that the debt is separate obligation. Additionally, Washington

courts have held that the marital community does not need to be separately named in order for the judgment to be enforced against the community.

Despite clear Washington law and authority, the trial court denied CA Shellfish's Sale Motion. The trial court provided a ruling without any reasoning and completely overlooked binding case law.

II. ASSIGNMENT OF ERROR

The Superior Court erred in denying CA Shellfish's Sale Motion when it held that: (1) the marital community (*i.e.*, Bertoson's spouse) needed to be named as a party to the action to encumber the marital assets; and (2) the presumption that a debt incurred by one spouse is enforceable against the marital community can be overcome without the presentation of any evidence whatsoever; much less clear and convincing evidence.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether Respondents can overcome the presumption of community liability where they did not offer any evidence whatsoever to overcome the presumption even though clear and convincing evidence is required?
2. Whether the Superior Court erred in refusing to direct the sale of the homestead owned by Bertoson, when the marital community was not named as a party to the action?

III. STATEMENT OF THE CASE

On November 3, 2010, Bertson signed a credit application on behalf of Seafood Sales and a continuing personal guaranty for the extension of credit by CA Shellfish to Seafood Sales.¹ Under the terms of the credit application and guaranty, from August 19, 2011 through October 1, 2011, CA Shellfish sold and delivered goods to Seafood Sales, for which \$171,127.15 remains unpaid.

On August 16, 2013 the trial court granted CA Shellfish summary judgment against Respondents, jointly and severally, in the amount of \$171,127.15, plus interest of \$76,374.28 and costs of \$444.98, together with attorneys' fees (the "Judgment").²

As part of CA Shellfish's judgment enforcement efforts, on January 22, 2014, CA Shellfish took the Examination of Bertson, and Bertson produced certain documents pursuant to CA Shellfish's Order for Supplemental Proceedings.³ Among the production, Bertson revealed the homestead property owned by him and his spouse (the "Homestead").⁴

Bertson testified at the Examination that there was \$440,794 in liens and encumbrances against the Homestead senior to CA Shellfish's

¹ CP 9.

² CP 105-107.

³ CP 129-134.

⁴ CP 164, ¶ 4.

Judgment.⁵ On March 13, 2014, a writ of execution was issued against the Homestead.⁶ Thereafter, Appellant petitioned the trial court to appoint an appraiser to appraise the Homestead pursuant to statute.⁷ The court-appointed appraiser established the appraisal value of the Homestead at \$810,000.⁸ As such, Bertoson and his spouse have approximately \$396,206 of equity in the Homestead – more than enough to pay CA Shellfish’s Judgment.

The Sale Motion

On May 14, 2014, CA Shellfish filed the Sale Motion.⁹ In their opposition, Respondents argued that CA Shellfish failed to establish the Homestead is divisible¹⁰, and that community property in Washington is not subject to the debts of the husband.¹¹

In its reply in support of the Sale Motion, CA Shellfish argued that under Washington law, a debt incurred by either spouse during marriage is presumed to be a community debt.¹² In addition, in order to overcome that

⁵ *Id.* at ¶ 5

⁶ CP 135.

⁷ CP 169-141.

⁸ CP 142-159.

⁹ CP 162-165.

¹⁰ The trial court took judicial notice of the zoning of the Homestead and found that the Homestead is not divisible; as such the issue related to the divisibility of the property will not be addressed in this brief. (RP, June 23, 2014, p. 6, lines 14-16)

¹¹ CP 166.

¹² CP 176.

presumption, Respondents have to provide clear and convincing evidence that the debt is not a community debt.¹³

In respondents' improper¹⁴ supplemental pleading, instead of providing evidence to overcome the presumption that the debt is not community debt, Respondents attempted to place the burden of overcoming the presumption on CA Shellfish.¹⁵ In fact, the cases cited to by Respondents were no longer binding given the holding by the Washington Supreme Court in *Whitehead v. Satran*, 37 Wn.2d 724, 725 (1950), discussed in detail in Section IV below.¹⁶

The trial court held a telephonic hearing on the Sale Motion.¹⁷ At the hearing, Respondents argued that the sale should not move forward because Bertosen's spouse was never named or brought into the suit by proper service.¹⁸ In response, CA Shellfish argued that you can serve a marital community through service on either spouse, as supported by

¹³ *Id.*

¹⁴ CA Shellfish's Sale Motion was filed May 27, 2014. Respondents' deadline to file a response was due May 22, 2014, but Respondents filed the response late on May 23, 2014. CA Shellfish was left with limited time to draft a reply, and filed a reply along with a subsequent supplemental pleading on June 6, 2014 because it was prejudiced by the delay caused by Respondents. Respondents then improperly filed a supplemental pleading without leave of court, when it is CA Shellfish, the moving party, that should be entitled to the last word. (CP 189-190)

¹⁵ CP 182-185.

¹⁶ CP 182-185.

¹⁷ RP, June 23, 2014.

¹⁸ RP, June 23, 2014, p. 7, lines 7-16

Washington case law.¹⁹ CA Shellfish went on to argue that the burden of proving that the debt is not community liability is on the party disputing community liability.²⁰

The next day, the trial court issued the order denying the Sale Motion without providing any reasoning.²¹ Specifically, the trial court held that the Homestead could not be sold or encumbered because the marital community was not named as a party to the action.²²

CA Shellfish filed a motion for reconsideration, which the trial court denied.²³ Consequently, CA Shellfish timely filed this appeal.²⁴

IV. ARGUMENT

A. Standard of Review.

This Court reviews the Superior Court's decision denying CA Shellfish's Sale Motion *de novo*. *Labriola v. Pollard Grp., Inc.*, 152 Wash. 2d 828, 832 (2004); *Ramey v. Knorr*, 130 Wash. App. 672, 686 (2005); *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 195 (1992). Because the material facts are undisputed in this case, this Court should employ *de novo* review.

¹⁹ *Id.* at p. 7, line 25, p. 8, lines 1-5.

²⁰ *Id.* at p. 8, lines 15-18.

²¹ CP 195-196.

²² *Id.*

²³ CP 199-206, 225.

²⁴ CP 226-230.

B. Respondents have failed to provide clear and convincing evidence to overcome the presumption of community liability and thus the marital community remains liable.

“A debt incurred by either spouse during marriage is presumed to be a community debt.” *Oil Heat Co. v. Port Angeles, Inc. v. Sweeny*, 26 Wn. App. 351, 354 (1980) (citing *Flies v. Storey*, 37 Wn.2d 105 (1950)); *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710 (1892); *National Bank of Commerce v. Green*, 1 Wn. App. 187 (1969). *See also*, 14A Wash. Prac., Civil Procedure § 35:14 (2d ed.) (“A judgment against only one spouse will be presumed to be a community liability, and the judgment may be enforced against the community even though only one spouse was named as a defendant and served.”). It is well settled that this presumption may be overcome only by clear and convincing evidence. *Oil Heat Co.*, 26 Wn. App. at 354. Further, courts have acknowledged that the burden of proof in overcoming the presumption of marital liability is on the party disputing community liability for the debt. *Whitehead*, 37 Wn.2d at 725;

Here, the only evidence Respondents offered to overcome this presumption was that the Judgment was only against Bertson in his personal capacity, which is wholly insufficient evidence.²⁵ *See Malotte v. Gorton*, 75 Wash. 2d 306, 309 (1969) (Uncorroborated testimony of

²⁵ CP 167, 169.

individual and his wife that there was no benefit to the community from the transaction did not overcome presumption that the individual was acting on behalf of the community in signing note).

Instead of addressing their burden of proof, Respondents argued that CA Shellfish has neither pled nor proven that Bertoson's marital community benefitted from the personal guaranty or that the transaction giving rise to the debt benefitted the marital community.²⁶ However, Washington courts have repeatedly held that the marital community presumption applies to individual sureties and guarantors, and that the burden of overcoming the presumption is on the Respondents. *See Warren v. Washington Trust Bank*, 19 Wn. App. 348, 361-62 (1978) ("We agree that the burden of proving lack of community obligation upon the husband's suretyship rests with the party seeking to avoid the obligation... We note the burden is a heavy one, and we agree with the court that the [defendants] failed to overcome the presumption]; *see also Rainier Nat. Bank, Bellevue Midlakes Branch v. Clausing*, 34 Wn. App. 441, 445 (1983) ("A suretyship obligation of one spouse creates a presumption of community liability.").

Here, Respondents failed to offer any evidence whatsoever to overcome the presumption that the marital community is liable for the debts

²⁶ CP 169.

of either spouse, much less *clear and convincing evidence*. Thus, the trial court incorrectly denied the Sale Motion.

C. The trial court incorrectly held that marital assets may not be encumbered because the marital community was not named as a party to the action.

Even when a marital community is not separately named as a party to the action, a judgment against the marital community is still presumed.

Washington courts have long held that marital community is not a separate and distinct juristic entity. *See, deElche v. Jacobson*, 95 Wn.2d 237, 243 (1980) (“[T]he community does not exist as a separate and distinct juristic entity, and...the property of the community is under the ownership of the husband and wife.”). As stated by the Washington Supreme Court:

[T]he legislature did not create an entity or a juristic person separate and apart from the spouses composing the marital community. The legislature did nothing more than classify as community property designate the character of certain property as community and other property as separate the property acquired after marriage by the spouses. We have, for convenience of express, employed the terms “entity” and “legal entity” in referring to a partnership and to a marital community. However, we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or community, or that either the partnership or the marital community has the status of a corporation.

Bortle v. Osborne, 155 Wash. 585, 589-90 (1930) (cited by *deElche*, 95 Wn.2d at 243).

In *Whitehead*, plaintiff obtained a default judgment against a garnishee defendant, a married man, after the garnishee defendant failed to

answer a writ of garnishment. 37 Wn.2d at 725. The default judgment in that case was against the garnishee defendant alone, and the marital community was not named. *Id.* Before obtaining the default judgment, no evidence was put forth in the record that the garnishee defendant was married; nor was the garnishee's spouse or the marital community named as a defendant. *Id.* The marital obligation only later became an issue when the garnishee defendant moved for an order fixing the status of the default judgment as a separate obligation. *Id.* It was not until after the garnishee defendant moved for the order, that the facts regarding the defendant's marital status were put into the record. *Id.* Notably, in *Whitehead*, the defendant took affirmative steps to fix the status of the default judgment as a separate obligation (and ultimately failed). *Id.* Respondents made no affirmative steps to fix the Judgment as a separate obligation, nor is there any evidence in the record that the marital community is not liable.

In sum, Washington courts have consistently held that even when only one spouse is named in a judgment, the other spouse need not be named in order for the judgment to encumber the marital community. *Knittle v. Knittle*, 2 Wn. App. 208, 213 (1970); *see also La Framboise v. Schmidt*, 42 Wn.2d 198, 200 (1953) (“[A]n action against a married man is presumed to be against the community, and the wife need not be joined separately or independently, since she is represented in the action through the husband.”).

Here, the Judgment was against Bertoson, a married man. Although the Judgment only named Bertoson, there is no requirement to name the marital community or Bertoson's spouse as a party. Respondents cannot now attempt to overcome this failure by arguing *ex post facto* that the Judgment was not against the marital community.

Thus, the Judgment against Mr. Bertoson is also against the marital community, even if the marital community was not separately named, and the Sale Motion should be granted.

D. CA Requests its Attorney's Fees and Expenses.

RAP 18.1(a) provides:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

Here, Articles 2 and 3 of the credit application and guaranty provide that Appellant is entitled to all "collections expenses," including but not limited to attorney's fees, related to the enforcement of the guaranty. In addition, the August 16, 2013 judgment provides that Respondent "may apply to the court to have all fees and costs incurred to date as a supplemental judgment, and may additionally apply for all future, additional attorney's fees and costs incurred during enforcement and

collection of this judgment added to the amounts owing hereunder to the extend authorized by statute or contract, or as an additional, supplemental judgment.” Pursuant to RAP 18.1, CA Shellfish respectfully requests its attorney’s fees and expenses for bringing this appeal.

V. CONCLUSION

For the foregoing reasons, CA Shellfish respectfully requests that the Court reverse the trial court’s denial of the Sale Motion. The Court should remand with directions to the trial court to grant CA Shellfish’s Sale Motion, and for such other relief deemed appropriate by the Court. The Court should further award CA Shellfish its attorney’s fees and expenses pursuant to RAP 18.1

DATED this 16th day of December, 2014

SCHWEET LINDE & COULSON, PLLC

Laurin S. Schweet, WSBA 16431

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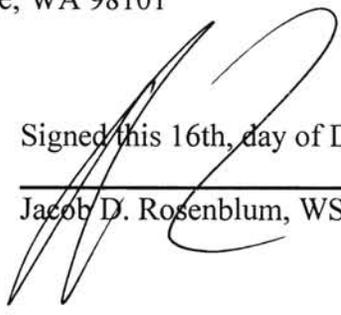
Local Attorneys for Appellant, California Shellfish
Company, Inc., d/b/a Point Adams Packing Co.

CERTIFICATE OF SERVICE

I certify that on December 16, 2014 I caused a copy of the foregoing Brief of Appellant California Shellfish Company, Inc. to be personally served by legal messenger to:

Matthew Hartman
Impact Law Group, PLLC
1325 Fourth Avenue, Suite 1400
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Signed this 16th, day of December, 2014.



Jacob D. Rosenblum, WSBA #42629