

No. 36838-2-II

COURT OF APPEALS DIVISION 2
OF THE STATE OF WASHINGTON

JIM J. SCHACHER, in his capacity as personal representative of the
Estate of PATRICIA M. SCHACHER,

Appellant

v.

MARILYN FEIK,

Respondent

FILED
COURT OF APPEALS
DIVISION II
08 APR 25 AM 9:21
STATE OF WASHINGTON
BY DEPUTY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. REPLY ARGUMENT 1

 A. Procedural Posture 1

 B. Washington Law Governs What Property is Available for Execution of Garnishment. 1

 C. Property received by Ms. Fiek can no longer be traced or characterized as separate property. 1

 D. Judgment was entered against Ms. Feik on all claims, including the Tort claim of conversion. 2

 E. The Oregon judgment draws no distinction Between “Claim” and “Claim for Relief”. 4

 F. The case was tried, not submitted as a controversy under ORCP 66. 5

 G. Claim Preclusion has no bearing on this case 6

II. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Burch v. Rice, 37 Wn.2d 185, 222 P.2d 847 (1950). 2

Hocks v. Jeremiah, 92 Or App 549, 759 P.2d 312 (1988). 3

Shipe v Hillman, 206 Or 556, 292 P.2d (1956). 2

CONSTITUTIONAL CITES

U.S. Const. Article IV, Section 1 1

STATUTES

ORCP 18. 4,5

ORCP 66 5

I. REPLY ARGUMENT

A. Procedural Posture

Appellant agrees with Respondent's statement of procedural posture.

B. Washington Law Governs What Property is Available for Execution of Garnishment.

Appellant agrees that Washington law determines what property may be executed upon, consistent with Washington's obligation to give full faith and credit to the nature of the Oregon judgment. US Const. Art IV, Sec 1.

C. Property received by Ms. Fiek can no longer be traced or characterized as separate property.

The parties stipulated in the Oregon proceedings that Patricia Schacher transferred property to Marilyn Feik. Because the court found those transfers to have been improper, it imposed a constructive trust upon them and directed Ms. Feik to return them. She was unwilling or unable to do so, having put that property in with the rest of what she and her husband had. They did not keep their financial affairs separate. CP 40 (Feik deposition p. 72). Since it can no longer be traced and identified, it

can no longer be characterized as separate property. *Burch v Rice*, 37 Wn.2d 185, 222 P.2d 847 (1950).

In light of the fact that the Oregon court found that Ms. Feik was a constructive trustee of this property, it is doubtful that it should be characterized as ever having been separate property in the first place, since a trustee is a titleholder of property, not the equitable owner. *Shipe v Hillman*, 206 Or 556, 292 P.2d (1956). Respondent argues that her use of some of this property for family purposes could not convert it to community property because she could have been required to use separate property for family purposes. Clearly, as a trustee holding naked title for the benefit of appellant she had no right to use that property for her own or her family's benefit and could not have been forced to do so.

The Feik's finances are thoroughly commingled. As she testified, "we have been married for 35 years. We share our money" CP 40 (at 72). Any status the property received from Patricia Schacher may have had as creating only a separate obligation of repayment has long since been lost.

D. Judgment was entered against Ms. Feik on all claims, including the Tort claim of conversion.

Respondent argues that the only relief granted by the Oregon court

was declaratory judgment, so there was no need to decide whether relief should be granted on the other two claims. The judgment however makes clear that plaintiff prevailed on “all claims”, not just the first claim for declaratory judgment. Respondent notes that the court declared the rights of the parties and imposed a constructive trust in virtually the same terms as set forth in the complaint’s First Claim for Relief. That claim asked that to the extent that assets could not be traced and returned, a money judgment should be entered. The General Judgment proceeds to do so, in the sum of \$88,319.97. The court clearly granted more than just the relief sought on the first claim.

Defendant is asking this court to, in effect, re-try the Oregon case and find that plaintiff did not establish the elements of conversion, in particular the element of good faith. She makes this argument despite her concession that good faith is not a defense to conversion, citing *Hocks v. Jeremiah*, 92 Or App 549, 759 P.2d 312 (1988) as precedent that the recipient of a gift is not a converter of that property.

Hocks is not helpful to defendant. The issue in *Hocks* was not whether the gift-giver had the right to make the gift, but whether he intended to make one. The court found as to some transfers he did, and as

to others he did not. In our case, the Oregon court clearly found that Patricia Schacher did not have the right to make the gifts. Defendant thus did not have the right to accept and keep them.

The trial court had ample evidence to support its ruling in favor of plaintiff on the conversion claim, including consideration of her good faith. Defendant admitted getting the property. Plaintiff sued to get it back. At the time of trial she had not returned any of it. She counterclaimed to get additional property from plaintiff. There was no question of the extent and duration of defendant's interference with plaintiff's right of control of that property. The inconvenience and expense to plaintiff was manifest. Defendant took the largest single asset, the \$30,000 IRA from Merrill Lynch, on September 11th, 2003, knowing that plaintiff, who was appointed as personal representative the month before, was claiming that to be an estate asset. CP 40. Rather than preserve the asset, she commingled those funds with her husband.

**E. The Oregon judgment draws no distinction Between
“Claim” and “Claim for Relief”.**

Respondent attempts to draw a substantive distinction between the term “claim” and “claim for relief”, citing ORCP 18, arguing that the

judgment's use of the word "claims" refers to the gifts made to Ms. Feik and not to the three claims set forth in the complaint. This is parsing words beyond recognition. ORCP 18 itself uses the terms interchangeably, defining claims, counterclaims, cross-claims and third party claims all as claims for relief. The complaint sets forth the first thirteen allegations as "facts common to all claims", not "all claims for relief". The judgment entered in favor of plaintiff "on all claims against defendant" also enters judgment against defendant "on her counterclaim", not her "counterclaim for relief". The judgment was for plaintiff on all his claims, including the third claim for conversion. Defendant did not object to the form of the judgment nor did she appeal it. She is bound by the Oregon court's judgment in favor of plaintiff on his conversion claim.

F. The case was tried, not submitted as a controversy under ORCP 66.

The next legal contortion by respondent is the contention that plaintiff abandoned his complaint as per ORCP 66, Submitted Controversy. The central problem with this argument is that the case was not resolved under the provisions of this rule, which is limited to matters submitted without action and to pending cases "at any time before trial".

This case was not resolved before trial, but, as noted in the first sentence of the judgment, “came before the court for trial”. Each party offered evidence in addition to the stipulated facts. There was no abandonment of either parties’ pleadings. The court ruled on each of the plaintiff’s claims and on the defendant’s counterclaim. The court even offered defendant a post trial opportunity to show that she had used some of the property to pay for Patricia Schacher’s living expenses so that amount could be credited against her obligation to plaintiff. She produced none and the full judgment was entered.

The absence of the word “conversion” in the Opinion and Order is not significant in the Judgment in favor of plaintiff on that claim. The Judgment also found against the defendants’ counterclaim for conversion without using the word “conversion”.

G. Claim Preclusion has no bearing on this case

This argument is completely specious. Plaintiff’s existing judgment includes a favorable ruling on the issue of conversion. He is not attempting to re-litigate his case to add that claim. He is simply trying to collect on it in the face of respondent’s continuing effort to defeat his rights through the cynical maneuver of taking property rightfully

belonging to plaintiff and willfully commingling it with the rest of her and her husband's property so it cannot be traced. This leaves her arguing, in essence, that "sorry, we spent your money, so all we have left is ours".

II. CONCLUSION

This attempt to abuse the community property laws of this state should not be allowed. The trial court's ruling should be reversed.

April 24, 2008

Respectfully submitted,



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CERTIFICATE

I certify that I mailed a copy of the foregoing REPLY BRIEF OF
APPELLANT to Ben Shafton, Defendant's/Respondent's attorney, at 900
Washington St Ste 1000 Vancouver , WA 98660-3455, postage prepaid,
on April 24, 2008.



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