

**FILED**

OCT 19 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

Court of Appeals No. 299759

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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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TRINITY UNIVERSAL INSURANCE COMPANY OF  
KANSAS  
Appellant/Plaintiff

v.

CHRISTOPHER COOK, et al.  
Respondent/Defendants

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RESPONDENT CHRISTOPHER COOK'S BRIEF

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**Heather Yakely**  
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I. STATEMENT OF THE ISSUE

A. Did The Trial Court Properly Grant Christopher Cook's Motion For Summary Judgment Of Dismissal pursuant to Community Property and the court's precedence?

II. STATEMENT OF THE CASE

A. Statement of Facts

Trinity Universal Insurance Company ("Trinity") filed suit against Mr. and Mrs. Christopher Cook, contending they were liable for damages caused to an apartment complex from a fire which originated in Ms. Cook's apartment. Although married, Mrs. Cook was the only one who signed the apartment lease as Mr. Cook was incarcerated at the time she entered the lease (CP 10, 291-292).

The lease permitted occupancy to Mrs. Cook, her children and any additional person provided they pay \$30.00 per day after the third day of occupancy. (CP 10) There was no other provision excluding any other individual guests or visitors and the lease did not contain an express provision that it

does not cover Mr. Cook. (CP 10, 34, 42, 295-296) Mrs. Cook had also obtained renters insurance through Trinity Insurance, the appellant in this matter. (CP 94, 309)

On May 13, 2009, the fire occurred in the Cook's apartment. It damaged the Cook's apartment as well as several other units. At the time of the fire, Mr. Cook was on parole. Trinity argued that the Cooks started the fire. It is not disputed that the fire originated in the Cook apartment or that Mr. Cook was the last person in the apartment before the fire started. (CP6, 296)

B. Procedural History

On February 15, 2011, Mrs. Cook filed a Motion for Summary Judgment arguing that Trinity was not entitled to subrogation against her. (CP 34-41) Mr. Cook filed a Joinder in Mrs. Cook's Motion on March 25, 2011. Trinity's response raised an argument against Mr. Cook's joinder. (CP 92-99) As a result, Mr. Cook replied in a separate brief. (CP 82-91) On April 1, 2011, at oral argument, the trial Court granted

Summary Judgment to Mrs. Cook. The trial court denied Mr. Cook summary judgment at oral argument, but granted him permission to re-file his Reply as a separate motion thereby allowing Trinity an opportunity to fully respond. (CP 285)

The sole issue raised by Mr. Cook in his separate Motion for Summary Judgment was whether Mr. Cook was entitled to the same protections as Mrs. Cook under *Cascade Trailer Court v. Beeson*, 50 Wn.App. 678, 749 P.2d 761 (1988), as a matter of law.

### III. SUMMARY OF THE ARGUMENT

Trinity's Complaint alleges that Mrs. Cook rented an apartment in the South Regal Ridge Complex from its insured's on September 13, 2008. (CP 5) The apartment and the apartment complex were damaged in a fire that occurred on or about May 13, 2009. Trinity contends that the fire was the fault of the Cooks. Trinity insured the property against fire damage, and brought suit against the Cooks for subrogation –

reimbursement for amounts paid to its insured's pursuant to its policy. (CP 6)

Regardless of how the fire started or whether defendants were negligent, Mr. Cook is entitled to summary judgment dismissal. The lease documents attached to Trinity's Complaint as exhibit A do not contain the express language required under Washington law for Trinity to exclude him from coverage under Trinity's insurance policy so it can seek reimbursement from him. (CP 9-23)

Further, Mr. Cook is entitled to all the protections that are given to marital communities in the State of Washington. To hold otherwise goes against the laws of community property and the long standing public policy of this state.

#### IV. ARGUMENT

##### A. Standard of Review

Review of summary judgment is de novo, with the appellate court engaging in the same inquiry as the trial court. *DeWater v. State*, 130 Wash.2d 128, 133, 921 P.2d 1059

(1996). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Disputed issues of law are also reviewed de novo. *University Village Ltd. Partners v. King County*, 106 Wash. App. 321, 324, 23 P.3d 1090, review denied, 145 Wash.2d 1002, 35 P.3d 381 (2001); *Bour v. Johnson*, 80 Wash.App. 643, 647, 910, 910 P.2d 548 (1996); *Clayton v. Grange Ins. Ass'n*, 74 Wash. App. 875, 877, 875 P.2d 1246 (1994)

On review of an order for summary judgment, the court of appeals performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) Summary Judgment is proper if viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hisle*, 151 Wn.2d at 860-61. A material fact is one on which the outcome of the litigation depends. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243,

249, 850 P.2d 1298 (1993). Only when reasonable minds could reach but one conclusion on the evidence, should the court grant summary judgment. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)

There are no issues of fact before this court. Thus, the question is one of law for this Court to determine.

B. Analysis

1. The Trial Court properly granted Mrs. Cook's Motion For Summary Judgment.

The question for this Court to determine is two part with Mr. Cook's dismissal inextricably linked to Mrs. Cook's Motion. Thus, the Court must first determine whether Ms. Cook is entitled to dismissal as set forth in her brief also filed in Response to Trinity's Appeal. This brief will not reargue Mrs. Cook's position and recognizes that if this Court reverses the Motion granting Mrs. Cook's Summary Judgment, Mr. Cook's motion would also fail.

2. Mr. Cook Is Entitled To The Same Protections Under *Beeson* As Mrs. Cook.

Assuming that this Court upholds the trial court's summary judgment order dismissing Mrs. Cook the second question this Court must determine is whether Mr. Cook is entitled to a dismissal of all claims against him by extension of *Beeson* as an operation of law.

a. The Community Property Laws of Washington Provide the Same Protection to Mr. Cook as Mrs. Cook.

In Washington, courts have long followed the rule of community property. Under the law of community property, 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. The presumption may be overcome by proof that the judgment is based solely on the separate obligation of one spouse. 14A Wash. Prac., Civil Procedure § 35:14.

"Thus, here the principle of partnership undergirds Washington community property law, in that each spouse is regarded as contributing equally to and sharing equally in the well being of the 'marital enterprise.'" Cross, H., *The Community Property Law* (Revised 1985), 61 Wash. L. Rev. 13 (1986).

Trinity ignores Mr. Cook's invocation of the protections of community property law in its brief. However, it offers no authority or citations to support its argument. (CP 308-315) Rather, Trinity attempts to argue that because Mr. Cook resided at a halfway house, he is somehow less than a part of the marital community – all without any citation to the record and pure conclusory arguments. (CP 308-315) Argumentative assertions, speculative statements, and conclusory allegations do not raise material fact issues that preclude a summary judgment. *Adams v. City of Spokane*, 136 Wn. App. 363, 365, 149 P.3d 420 (2006). Nor are statements of ultimate facts, conclusions of fact, or conclusory statements of fact sufficient

to overcome a summary judgment motion. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008).

Further, despite Trinity's unsupported argument, Mr. Cook clearly meets the statutory definitions of tenant under the Residential Landlord Tenant Act and via the operation of community property.

(1) Mr. Cook is a Resident Of The Apartment

Mr. Cook's entitlement to reside with his wife and children is unquestionable. By virtue of his status as Mrs. Cook's husband, he both contributes to the marital community and enjoys the benefits flowing there from. To deny him the benefit enjoyed by his wife Mrs. Cook is absurd and as Trinity's briefing indicates is unsupported by any case law.

Judgment inures to Mr. Cook as a member of the marital community. The unfortunate fact of his transient stay at a DOC half-way house at the time of the fire does not affect his

residence with his wife and daughters. Any other conclusion contravenes over one-hundred years of community property law, and in reality does nothing more than circumvent this Court's prior ruling in favor of Mrs. Cook, by opening the community, thus her, to a judgment as would be permitted under the same laws of community property which Plaintiff has chosen to ignore.

As the record notes, it is undisputed that Mr. Cook did not sign the residential lease for apartment No. 9. (CP 100, 123-136) It is also undisputed that the Rental Contract states in pertinent part: "A TENANT is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement. Meanings as defined in RCW 59.18.030." (CP 100, 123-136)

The term "residence" however is not statutorily defined in the RTLA. Thus, courts resort to dictionary definitions to give undefined terms their plain and ordinary meaning. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802

P.2d 784(1991). Webster's Third New International Dictionary defines "residence" as:

1 a: the act or fact of abiding or dwelling in a place for some time...

2 a(1): the place where one actually lives or has his home as distinguished from his technical domicile

(2): a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit.

*Webster's Third New International Dictionary 1931 (1993).*

A dwelling unit is defined as:

a structure or that part of a structure which is used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, including but not limited to single family residences and units of multiplexes, apartment buildings, and mobile homes.

RCW 59.18.030(5).

A half-way house is not recognized as a dwelling by the RLTA. In fact a correction facility is specifically excluded from the RLTA. RCW 59.18.040(1) (a correctional facility as a "living arrangement" is exempted from RLTA). (emphasis added)

It is undisputed Mr. Cook was on parole. (CP 85, 254, 300) While on parole, Mr. Cook was required to sleep at a halfway house. (CP 291) Yet under the RLTA, this mandatory sleeping requirement cannot be defined as Mr. Cook's dwelling or residence.

Further, while Trinity wants to argue that Mr. Cook was not a "resident" of the Cook Apartment, the RLTA defines a tenant as: "...any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." RCW 59.18.030(19)(emphasis added). A rental agreement is defined as: "all agreements which establish or modify the terms, conditions, rules, regulations, or any other

provisions concerning the use and occupancy of a dwelling unit." RCW 59.18.030(17).

Here, Mr. Cook was not specifically excluded under the Rental Agreement between Mrs. Cook and the Apartment Complex Landlord. (CP 88, 292) Mr. Cook's sleeping at the half-way house was nothing more than a transient or technical domicile, as mandated by the terms of the halfway house (CP 85, 299, 317). Mr. Cook was allowed four hours per Sunday at the apartment. (CP 110-111) This was an earned privilege through the halfway house, as integration back into society. (*Id.* at p. 22, l. 12-13) Mrs. Cook and their daughters would visit Mr. Cook at the halfway House three times per week. (CP 110-111). There is nothing in the record to indicate that at that time of the fire, Mr. Cook was not preparing to integrate back into the family apartment. Mr. Cook intended on returning to the family home. (CP 85, 291-292, 302) The family also intended he return. (CP 120, 291-292) Mr. Cook did not consider the half-way house his residence. (CP 291-292, 311)

He did not receive mail at the half-way house. (CP 291) In addition, when his transition period was up he returned to the family home. (CP 120, 291-292)

Additionally, there is no evidence of a parenting plan/no contact order preventing Mr. Cook from being at the residence. (*see Nuss v. Nuss* infra) The restrictions that were in place limiting Mr. Cook's access to the apartment then were only temporary.

Thus, while there was no case law directly, or even indirectly, on point, based upon the RLTA, the definition of "residence," and the undisputed evidence that Mrs. Cook intended on Mr. Cook returning to the family home, Mr. Cook is a "tenant" as contemplated by the Rental Contract and the laws of Washington.

Therefore, Mr. Cook's inability to sleep at the apartment on a nightly basis is no different than a college student, peace corps member, or a member of the military forced to sleep elsewhere for temporary, even if lengthy, periods of time. Nor

in reality could he ever be permitted to reside in any permanent nature at a correctional facility. He is thus a resident as defined by the RTLA and entitled to the same protections under *Beeson* as Mrs. Cook. The fact that he was on parole does nothing to alter his residential status.

(2) Plaintiff's Exclusion Of Mr. Cook From *Cascade Trailer*, Fails To Account For The Law Of Community Property In The State Of Washington.

Mr. Cook is entitled to the same benefits as a spouse in the marital community. Trinity produced no facts or case law to establish otherwise. That is also the benefit contemplated by the community property law(s). He is treated as a tenant at the apartment home. While there is no case directly on point to the issues in this particular case, Washington law is abundantly clear that law of community property binds both spouses in numerous transactions. While most of the cases obviously deal with binding both parties to a financial transaction, a lease, loan or etc., there is nothing in the law of community property which

excludes a spouse when there may be a *benefit* to a spouse or the community.

Under community property, a judgment against 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. This presumption may be overcome only by proof that the judgment is based solely on the separate obligation of one spouse.

14A Wash. Prac., Civil Procedure § 35:14 states:

The law of community property then clearly binds a spouse to a bank loan, credit card debt, mortgage payments, or car payments, even where the spouse has not signed on the contract. (emphasis added)

Further, assets earned during the course of a marriage, wages included, are considered community property. Washington community property law makes no distinction

between an "earning" spouse or a "non-earning" spouse. For instance:

- a stay at home mother is entitled to one-half of the wages earned by the working spouse *See e.g., Hinson v. Hinson*, 461 P.2d 560 (1969)(Salaries or wages earned by either member of marital community becomes community property, each spouse receives beneficial interest in amounts earned, and each is owner of an undivided one-half interest in such property); RCWA 26.16.030;
- a volunteer spouse with Green peace, the Peace Corp. or the spouse of a disabled spouse is entitled to one-half of the wages earned by the paid spouse: disability payments made to one spouse (during the marriage) are considered community assets. *Brewer v. Brewer*, 137 Wn.2d 756, 777 (1999);

- an injured spouse's recovery, to the extent it includes lost wages is community property, *Colagrossi v. Hendrickson*, 50 Wash.2d 266, 272, 310 P.2d 1072 (1957)( compensation for lost wages and diminished earning capacity will be community property, because the wages which would have been earned during the marriage but for the injury are community)
- Inmates are also found to retain Community Property Standing. *Dean v. Lehman (infra)*

In *Dean*, the Washington Supreme Court found that DOC inmate spouses' had constitutional standing to file a class action against DOC by virtue of community property law. *Dean v. Lehman*, 143 Wn.2d 12, 19, 18 P.3d 523, 528 (2001)(en banc)

The *Dean* Court held:

The Class correctly notes that this argument conflicts with a line of cases establishing that a spouse's community property interest does not

dissipate simply because he or she is not in a position to exercise full control over the property. Class Br. at 5; see *Seattle-First Nat'l Bank v. Brommers*, 89 Wash.2d 190, 200, 570 P.2d 1035 (1977) (spouse under guardianship continues to have an interest "in the ownership" of community property); *Rustad*, 61 Wash.2d 176, 377 P.2d 414 (wife confined to mental hospital for remainder of life retains community property rights in assets acquired by husband).

*Dean*, 143 Wash.2d at 20, 18 P.3d 523, 528 (Wash., 2001)

Here the situation is analogous to the *Dean* case. Mr. Cook, while certainly not in a position to exercise "active control," in community decisions or finances would have the same rights as the DOC spouse, or a spouse under a guardianship who remains entitled to the benefits of the community. (see *Rustad* supra)

There is no distinction between Mr. Cook and the other situations where courts have found that community property exists. Thus, Mr. Cook is equally entitled to the benefit of the community assets, including those benefits granted by the law. There is simply no legal support for, or any existing public policy, which would exclude a married spouse from the benefits of the community simply because he was imprisoned.

Following the law of community property then, any funds which Mrs. Cook paid to Trinity insurance were with community funds and Mr. Cook contributed to the purchase of that insurance by virtue of being a member of the community. That community also paid for the Landlord's fire insurance because rent payments were made from community assets.<sup>1</sup>

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<sup>1</sup> Under the *Sutton* Rule (from *Beeson*) a presumption exists that the insurance premiums will be paid in part by the Tenants rent payment and the Tenant should benefit from the policy as a co-insured. See e.g. *Safeco Ins. Co. v. Capri*, 705 P.2d 659, 661 (Nev. 1985)

Mrs. Cook paid for the rent with community funds. Despite Mr. Cook's then current living condition, it is undisputed that there was every intention that he would return to the family home. (CP 291-292) Mr. Cook did not consider the half-way house his "residence." Regardless, the law of community property makes only very limited exception for spouses who live apart. (infra) The "community" characterization remains. While there are some limited exceptions recognized by Washington for "defunct" marriages where the community property status may be lost that exists only in limited circumstances where they are legally separated, or the marriage is "defunct." See e.g. RCW 26.16.040, *Seizer v. Sessions*, 132 Wash.2d. 642, 940 P.2d. 261 (1997)(WA statute governing earnings contemplates permanent separation of parties, that is a defunct marriage). However, even a 25 year separation did not conclusively establish a defunct marriage without more (Id.) Nor did a "defunct marriage" exist here. Nor was there any order requiring them to live apart.

In *Nuss v. Nuss*, the Court also held that even a domestic violence protection order was not determinative of whether the parties were living "separate and apart." *Nuss v. Nuss*, 65 Wash. App. 334, 828, P.2d 627 (1992). Here, the only evidence in the record establishes that were it not for the half-way house rules, Mr. Cook would have resided in the apartment and he was most certainly still a part of the "community."

(3) Public Policy Is In Favor Of *Beeson's* Protection Extending to Mr. Cook

Finally, there is no sound public policy or justification to prevent Mr. Cook from being entitled to the same benefits of the community as Mrs. Cook. Community property is not designed to be only a sword for creditors and those involved in dissolutions. As a matter of public policy, Mr. Cook is entitled to the same benefits of Mrs. Cook. *See e.g., Lyon v. Lyon*, 100 Wash.2d 409, 414, 670 P.2d 272 (1983) (to rebut the basic presumption of the community nature of marital property, which is firmly embedded in the policy of this State the

Legislature must be explicit in its intent) No such explicit statement has been made which would alter the law of community property apply under these facts. While Trinity argued that community property does not apply it could not produce any case law or citations in support of its argument. Thus, there is no support for Trinity's argument that Mr. Cook is somehow exempt from the laws of community property.

b. Other Courts, Pursuant to Public Policy Do Not Permit Subrogation.

Even assuming this Court disagrees with Mr. Cook as a beneficiary of the policy pursuant to community property and finds him as a "guest" or "relative," Washington as well as other States have held that there is no right to subrogate. In *Beeson*, this Court established its current rule: a landlord's insurance carrier may not subrogate against a tenant unless the lease agreement specifically states that the landlord's policy does not benefit the tenant. *Cascade Trailer v. Beeson*, 50 Wn. App. 678. The *Cascade Trailer* case discussed two competing lines

of cases regarding the potential liability of a tenant – landlord subrogation issue. Ultimately, the *Cascade Trailer* Court adopted the line of cases holding, "Where the landlord has secured fire insurance covering a leased premise, the tenant can reasonably expect the insurance to cover him as well, *unless the parties have specifically agreed otherwise.*" *Id.* at 686.

Thus, unless the parties expressly agreed otherwise, the landlord's carrier cannot subrogate against tenants.<sup>2</sup>

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<sup>2</sup> Mrs. Cook's brief, also filed in response to Trinity Insurance's Appeal, addresses the *Sutton\_Rule* in detail. Mr. Cook joins in that argument. However, it is sufficient to note that there have been several cases in Washington that have touched on the issue of subrogation against tenants; *Millican of Washington, Inc. v. Wienker Carptet Serv., Inc.*, 44 Wn. App. 409, 722 P.2d 861 (1986); *Rizzuto v. Morris*, 22 Wn. App. 951, 592 P.2d 688, *rev. den'd*, 92 Wn.2d 1021 (1979)(parties lease agreement contained a clause exempting the tenant from liability for fire damage); *Washington Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 635 P.2d 138 (1981)(a tenants agreement to maintain the premises does not mean rebuilding them after a fire)

Other states have also held that there is no right to subrogate against a guest or relative who damaged the property. *see e.g., Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984)(insurer not allowed to subrogate against property owner's brother who burned down the host's home while staying as a guest); *Allstate Ins. Co. v. Palumbo*, 994 A.2d 174 (Conn. 2010)(insurer not allowed to subrogate against insured's live in fiancé whose negligence started a fire that damaged the insured property; (*Continental Ins. Co. v. Bottomly*, 817 P.2d 1162 91991))brother and nephew of owner were insured's for subrogation purposes under homeowner's policy on the cabin, and therefore owner's carrier could not seek subrogation from brother or nephew.)

Clearly, these cases are not binding on Washington Courts. However, they offer examples of other courts support of the public policy that insurance companies cannot subrogate against guests or relatives. These, in conjunction with those cases as set forth in Mrs. Cook's brief, § D. Subrogation against

Mr. Cook both defeats *Beeson's* protections against a tenant but also ignores community property. If, as Trinity argues, Mr. Cook is not entitled to protections under *Beeson* because he was on parole this does nothing more than allow Trinity to take a judgment against Mrs. Cook because it was a community debt.

V. CONCLUSION

As a Matter of Law Mr. Cook is entitled to all the protections of Mrs. Cook under *Beeson*; whether because he is a tenant or by operation of community property. Public policy further dictates that Trinity may not subrogate against an individual as a guest, tenant or otherwise.

DATED THIS 19th day of October, 2011.

Respectfully Submitted,

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