

81920-3

No. 57891-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARY KAY WILSON,

Petitioner,

v.

ANDREW CLAYTON

Respondent.

FILED
JUL 30 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
AK

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUL 16 PM 4:24

PETITION FOR REVIEW BY
THE WASHINGTON SUPREME COURT

Dennis J. McGlothlin
WSBA #28177
Attorney for Appellant Petitioner
Mary Kay Wilson
Olympic Law Group, P. L. L. P.
1221 E. Pike Street, Suite 205
Seattle, Washington 98122
(206) 527-2500

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION	1
II. PETITIONER'S IDENTITY	1
III. CITATION TO APPELLATE DECISION TO BE REVIEWED	1
IV. ISSUES PRESENTED FOR REVIEW	2
A. Community Liability Issues	2
<i>B. Uniform Fraudulent Transfer Issues</i>	3
<i>C. Damages</i>	6
V. CASE STATEMENT	6
VI. ARGUMENT	9
A. <u>Community Liability.</u>	9
B. <u>Uniformed Fraudulent Transfer Act</u>	13
C. <u>Pre-injury Earning Capacity</u>	19
D. <u>Transfer of real property under the UFTA</u>	20

TABLE OF AUTHORITIES

CASES

<i>Aichylmayr v. Lynch</i> 6 Wn. App. 434, 493 P.2d 1026 (1972)	2, 11
<i>Arneson v. Arneson</i> 38 Wn.2d 99, 227 P.2d 1016 (1951)	4
<i>Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.</i> 158 Wn.2d 603, 146 P.3d 914 (2006)	17
<i>Bergman v. State</i> 187 Wn. 622, 60 P.2d 699 (1936)	2, 11, 12
<i>Bortle v. Osborne</i> 155 Wn. 585, 285 P. 425 (1930)	10
<i>Bratton v. Calkins</i> 73 Wn. App. 492, 870 P.2d 981 (1994)	3, 11
<i>Britt v. Damson</i> 334 F.2d 896 (9th Cir.1964).	18
<i>Brown v. Spokane County Fire Protection Dist. No. 1.</i> 21 Wn. App. 886, 586 P.2d 1207 (1978)	2, 11
<i>Clayton v. Wilson</i> Cause No. 57891-0-I, WL 2406195, Washington Court of Appeals, Division One (2008)	1
<i>C.J.C. v. Corporation of Catholic Bishop of Yakima</i> 138 Wn.2d 699, 718-20, 985 P.2d 262 (1999)	2, 11

<i>Columbia Intern. Corp. v. Perry</i> 54 Wn.2d 876, 344 P.2d 509 (1959)	17
<i>Cook v. Danaher Lumber Co.</i> 61 Wn. 118, 112 P. 241 (1910)	6, 19
<i>Davison v. Hewitt</i> 6 Wn.2d 131, 106 P.2d 753 (1940)	5, 18
<i>deElche v. Jacobsen</i> 95 Wn.2d 237, 622 P.2d 835 (1980)	<i>Passim</i>
<i>Farrow v. Ostrom</i> 16 Wn.2d 547, 133 P.2d 974, 976 (1943)	4
<i>Francom v. Costco Wholesale Corp.</i> 98 Wn. App. 845, 991 P.2d 1182 (2000)	12
<i>Freitag v. McGhie</i> 133 Wn.2d 816, 822, 947 P.2d 1186 (1997)	6, 19
<i>Hanson v. Hanson</i> 55 Wn.2d 884, 350 P.2d 859, 861 (1960)	4, 17
<i>In re Bubb's Estate</i> 53 Wn.2d 131, 331 P.2d 859 (1958)	4, 16, 19
<i>Jones v. Jones</i> 56 Wn.2d 328, 353 P.2d 441 (1960)	4, 14, 16, 19
<i>Kuehn v. White</i> 24 Wn. App. 274, 600 P.2d 679 (1979)	3
<i>La Framboise v. Schmidt</i> 42 Wn.2d 198, 254 P.2d 485 (1953)	2, 10, 11
<i>McHenry v. Short</i> 29 Wn.2d 263, 186 P.2d 900 (1947)	2, 11

<i>Niece v. Elmview Group Home</i> 131 Wn.2d 39, 929 P.2d 420 (1997)	2, 11
<i>Pacific Northwest Life Ins. Co. v. Turnbull</i> 51 Wn. App. 692, 754 P.2d 1262 (1988)	3
<i>Puget Sound Energy v. Certain Underwriters at Lloyd's London</i> 134 Wn. App. 228, 138 P.3d 1068 (2006)	5, 13
<i>S.H.C. v. Lu</i> 113 Wn. App. 511, 54 P.3d 174 (2002)	3, 11, 12
<i>Smith v. Retallick</i> 48 Wn.2d 360, 293 P.2d 745 (1956)	2, 7, 8, 11
<i>Thompson v. Everett Clinic</i> 71 Wn. App. 548, 860 P.2d 1054 (1993)	3, 12
<i>Watters v. Doud</i> 95 Wn.2d 835, 631 P.2d 369 (1981)	5, 18

CASES FROM OTHER JURISDICTIONS

<i>Shaw v. Greer</i> 67 Ariz. 223, 194 P.2d 430 (1948)	13
<i>Shelby v. Savard</i> 134 Ariz. 222, 655 P.2d 342 (1992)	13

STATUTES

RCW 19.40.041(a)(1)	16, 17
RCW 19.40.051(b)	19
RCW 19.40.061(1)(i)	4, 20
RCW 19.40.081(a)	16
RCW 19.40.081 (b) and (c)	5

RCW 19.40.091(c)	6, 19
RCW 19.40.011(7)	19
RCW 26.16.210	3, 14, 16

OTHER AUTHORITIES

19 Wash. Prac., Family and Community Prop. Law, §14.9	12
19 Wash. Prac., Family and Community Prop. Law, §14.11	18
Harry M. Cross, <i>The Community Property Law in Washington (Revised 1985)</i> , 61 Wash. L.Rev. 13, 142 (1986)	10, 11
<i>Proof of Lost Earning Capacity</i> , 29 Am. Jur. Proof of Facts 3d 259, § 6 (Basic Elements of Proof)	19, 20

I. INTRODUCTION

Petitioner is an innocent spouse who divorced her former husband after he admitted to sexually assaulting the next door neighbor. Years later, the neighbor sued the former husband and Petitioner for the husband's intentional, sexual, tortious conduct that the former husband perpetrated solely to satisfy his own personal sexual desires. The trial court and the Court of Appeals held the former husband's intentional sexual tort resulted in community liability. The trial court and the Court of Appeals voided the interspousal property distributions incident to the Petitioner's divorce. Petitioner seeks this Court to review this matter and determine: (A) whether courts should be refrained from imposing community liability for one spouse's intentional sexual misconduct; and (B) whether a married couple can settle their property claims in a marital dissolution proceeding without fear the interspousal transfer, which did not affect creditors, will later be disturbed by a creditor's subsequent collateral attack.

II. PETITIONER'S IDENTITY

Petitioner is the Appellant at the Court of Appeals and the defendant at the trial.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington State Supreme Court review the Washington State Court of Appeals published Opinion and decision terminating review in *Clayton v. Wilson*, Cause No. 57891-0-I, WL 2406195, Washington Court of Appeals, Division One (2008) and the Order Granting in Part Appellant's Motion for Reconsideration dated June 16, 2008 (collectively

the "Opinion").

IV. ISSUES PRESENTED FOR REVIEW

A. Community Liability Issues.

1. The Opinion conflicts with this Court's opinion in *deElche v. Jacobsen*¹ by: (A) Imposing liability on a marital community for a spouse's intentional sexual tort perpetrated solely to satisfy his own personal sexual desires because the conduct has only tenuous connection with the community (*i.e.*, gaining access to the victim through a community activity); (B) Not protecting the innocent spouse's interest in community property when she is not a tortfeasor; (C) Improperly finding the Petitioner personally liable (jointly and severally) for the Former Husband's intentional sexual tort.

2. The Opinion conflicts with this Court's opinions in *Smith v. Retallick*²; *La Framboise v. Schmidt*³; *McHenry v. Short*⁴; *Bergman v. State*⁵ and Division Three's Opinions in *Aichylmayr v. Lynch*⁶ and *Brown v. Spokane County Fire Protection Dist. No. 1*⁷ because these opinions use *respondeat superior* as the vehicle to determine community liability.

3. The Opinion conflicts with this Court's opinions in *Niece v. Elmview Group Home*⁸ and *C.J.C. v. Corporation of Catholic Bishop of Yakima*⁹ and

¹ 95 Wn.2d 237, 622 P.2d 835 (1980) (Recovery limited to husband's separate property and one-half the community property for husband's sexual assault of Ms. deElche during community recreational activity).

² 48 Wn.2d 360, 293 P.2d 745 (1956).

³ 42 Wn.2d 198, 254 P.2d 485 (1953).

⁴ 29 Wn.2d 263, 186 P.2d 900 (1947).

⁵ 187 Wn. 622, 60 P.2d 699 (1936).

⁶ 6 Wn. App. 434, 493 P.2d 1026 (1972).

⁷ 21 Wn. App. 886, 586 P.2d 1207 (1978).

⁸ 131 Wn.2d 39, 52-59, 929 P.2d 420 (1997);

⁹ 138 Wn.2d 699, 718-20, 985 P.2d 262 (1999)

other Court of Appeals' opinions in *Bratton v. Caulkins*¹⁰, as well as Division One's opinions in *Kuehn v. White*,¹¹ *Thompson v. Everett Clinic*,¹² and *S.H.C. v. Lu*,¹³ all holding that *respondeat superior* does not impose vicarious liability for intentional sexual torts.

4. It is a matter of great public importance to take this opportunity to define a marital community's liability for one spouse's intentional torts, generally, and intentional sexual torts specifically.

B. Uniform Fraudulent Transfer Issues

1. This is a matter of great public importance and an excellent opportunity for this Court to clarify the interplay between marital dissolution actions, which distribute property between spouses, and the Uniformed Fraudulent Transfer Act (UFTA), which allows creditors to avoid transfers when a debtor transfers property beyond a creditor's reach. Washington's equitable lien laws, which protects creditors by allowing them to reach the net equity in community assets even after the assets are distributed between a couple in a marital dissolution proceeding; RCW 26.16.210, which requires spouses prove good faith in interspousal transactions; Washington's common law conclusive fraud for interspousal transfers; and Washington's common law that holds fraud, even in interspousal transactions, is never presumed.

2. This Opinion conflicts with Division Two's opinion in *Pacific Northwest Life Ins. Co. v. Turnbull*¹⁴ holding there can be no actual fraud unless the trial

¹⁰ 73 Wn. App. 492, 870 P.2d 981 (1994),

¹¹ 24 Wn. App. 274, 600 P.2d 679 (1979),

¹² 71 Wn. App. 548, 860 P.2d 1054 (1993)

¹³ 113 Wn. App. 511, 529, 54 P.3d 174 (2002)

¹⁴ 51 Wn. App. 692, 702, 754 P.2d 1262 (1988).

court makes findings supporting all fraud elements.

3. The Opinion, which presumes fraud in interspousal transfers and requires the spouses to disprove fraud, conflicts with this Court's Opinion in *In re Bubb's Estate*¹⁵, and *Jones v. Jones*¹⁶ which both stated transactions between spouses have never been held to be presumptively fraudulent.

4. The Opinion conflicts with this Court's opinion in *Jones v. Jones*¹⁷ where this Court held a couple proved good faith when entering a property settlement agreement and transferring property between themselves after the husband was involved with another woman and the deed was recorded months later.

5. This case is of great public interest because it requires this Court to determine when a transfer occurs under UFTA. Both the trial court and Division One deemed the transfer to occur when the Petitioner and her husband signed their PSA. RCW 19.40.061(1)(i) unambiguously states that transfers occur when the deeds are recorded in the public record.

6. This case is of great public interest because it is necessary to determine whether married person can agree to distribute their property in a consensual marital dissolution proceeding without fear their decree will be subsequently voided by a creditor because the creditor's rights are not affected by the parties' dissolution decree.¹⁸

¹⁵ 53 Wn.2d 131, 331 P.2d 859 (1958).

¹⁶ 56 Wn. 2d 428, 337, 353 P.2d 411

¹⁷ 56 Wn.2d 328, 353 P.2d 441 (1960).

¹⁸ *Hanson v. Hanson*, 55 Wn.2d 884, 887, 350 P.2d 859, 861 (1960); *See also See Farrow v. Ostrom*, 16 Wn.2d 547, 552, 133 P.2d 974, 976 (1943); *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951).

7. This case is also of great public interest because the Opinion inhibits spouses from settling their property disputes when dissolving their marriages. Washington State has a strong public policy favoring settlements.¹⁹ The Opinion's effect will require spouses who are exposed to contingent tort liabilities to have their interspousal asset distributions resolved by a trial judge lest it be set aside by subsequent creditors if they settle their property disputes by agreement. Here, Respondent did not initiate his personal injury lawsuit until after the marital dissolution trial would have occurred.²⁰ Obviously, there could be no UFTA violation if a court distributed the Petitioner's and her Former Husband's property after trial.

8. The Opinion conflicts with the Court's decision in *Watters v. Doud*²¹, where this Court held that a community creditor was limited to collecting the net equity of the community property at the time the marriage was dissolved. The Opinion further conflicts with RCW 19.40.081(b) and (c) which limits a creditor's remedy to the value at the time the alleged fraudulent transfer took place. Here, by voiding the interspousal transfers, Respondent may claim he is entitled to collect his judgment from the former community's assets post-dissolution appreciation.

9. It is of great public importance to make Washington's debtor-creditors laws uniform with other state's laws. By resurrecting *Davison v. Hewitt*²²,

¹⁹ *Puget Sound Energy v. Certain Underwriters at Lloyd's London*, 134 Wn. App. 228, 240, 248, 138 P.3d 1068 (2006).

²⁰ CP 5-9, (Filed June 17, 2004); Ex 160 (Marital Dissolution Case Schedule setting trial date: November 3, 2003).

²¹ 95 Wn.2d 835, 838-41, 631 P.2d 369 (1981).

²² 6 Wn.2d 131, 106 P.2d 753 (1940).

Division One obliterated the entingishment provision in RCW 19.40.091(c) related to insider transactions involving spouses.²³

C. Damages

1. Division One's ruling conflicts with this Court's opinion in *Cook v. Danaher Lumber Co*²⁴ that requires a party prove pre-injury earning capacity in order to adequately prove future lost earnings.²⁵

V. CASE STATEMENT

On December 5, 2002, Mary Kay Wilson's [Petitioner's] world began unraveling when she learned her husband had been arrested by the police for sexually assaulting their next door neighbor, Andrew Clayton [Respondent].²⁶ Shortly after his arrest, Former Husband admitted he sexually assaulted Respondent and other young boys.²⁷

Petitioner reacted normally to these revelations and immediately sought to dissolve her marriage.²⁸ Hoping to secure her future,²⁹ Petitioner also told Former Husband she wanted "everything."³⁰ Humiliated and ashamed, Former Husband agreed.³¹ She also demanded Former Husband move from the couple's Kenmore home.³² A week later, he moved to a vacation home in Seabeck.³³

²³ See *Freitag v. McGhie*, 133 Wn.2d 816, 822, 947 P.2d 1186 (1997).

²⁴ 61 Wn. 118, 112 P. 241 (1910).

²⁵ *Id.* at 124.

²⁶ 7RP 37; 9RP 124.

²⁷ 7RP 5-6, 39-40; 8RP 166-67, 169-70; 9RP 125.

²⁸ 7RP 5-6; 8RP 166-67, 171; 9RP 126.

²⁹ 8RP 172-73.

³⁰ 8RP 172-73; 9RP 128-29.

³¹ 7RP 8-9; 8RP 173; 9RP 126-27.

³² 8RP 171.

³³ 7RP 7-8; 8RP 171, 183.

Petitioner hired a family law attorney, Victoria Smith [Ms. Smith], to represent her in filing a marital dissolution action.³⁴ Former Husband did not hire counsel and negotiated a Settlement Agreement.³⁵ Ms. Smith drafted a Dissolution Decree and a Property Settlement Agreement [PSA] confirming the couple's agreement.³⁶

Ms. Smith also had Former Husband sign quitclaim deeds for the former couple's jointly held real property. Ms. Smith, however, did not file them at the Recorder's Office until after the 90-day cooling off period was expired and the Dissolution Decree was to have been entered.³⁷

When Former Husband and Petitioner signed the PSA, they believed Former Husband would receive a SSOSA sentence that would have meant he had continued ability to work as a forklift salesman.³⁸

After Petitioner learned of Former Husband's acts, their relationship became business-like.³⁹ The former couple lived in separate homes.⁴⁰ They never shared the same bed.⁴¹ When they did see each other, they spoke few words.⁴² The Wilsons' was dissolved in March 2003⁴³ when the Court adopted

³⁴ 5RP 122; 8RP 174; 9RP 127.

³⁵ 5RP 122-25; 7RP 10.

³⁶ Petitioner had demanded everything but \$174,000 in liquid cash and \$7,000 worth of furnishings. 9RP 119, 123, 128; Trial Exhibit 13, Wilson PSA, ¶ 4.3.5, ln. 7-10. Former Husband felt guilty, so he gave Petitioner whatever she wanted. 7RP 8-9.

³⁷ 5RP 146-47; 8RP 186-87; 5RP 144 (testimony regarding the 90-day cooling off period), 173 (deeds were not filed until after the 90-day cooling off period).

³⁸ 7RP 21-22, 89-91.

³⁹ 7RP 14.

⁴⁰ 7RP 7-8; 8RP 171, 183.

⁴¹ 8RP 169, 190.

⁴² 8RP 190. Petitioner did continue to help Former Husband in exchange for payment, but there was no hope of reconciliation. 8RP 190.

⁴³ Trial Exhibit 14 (Decree of Dissolution).

the Wilsons' PSA and entered a Dissolution Decree.⁴⁴ The Dissolution decree was public record.⁴⁵ Ms. Smith recorded the deeds.⁴⁶

In September 2003, Former Husband learned he was not eligible for a SSOSA and would receive a long-term prison sentence.⁴⁷ Former Husband pled guilty and was sentenced to 130 months.⁴⁸

On June 16, 2004, 18 months after Former Husband was arrested and more than 15 months after the Wilsons' divorce became official, Respondent filed a lawsuit against Former Husband and the Petitioner.⁴⁹ Petitioner still owned all the real property and other assets transferred to her in the PSA. She made no effort to conceal, encumber, or reduce the property's value.⁵⁰

The trial court's unchallenged finding is that Former Husband assaulted Respondent for his own sexual gratification.⁵¹ There was absolutely no evidence Petitioner knew about Former Husband's tortious acts.

Despite Petitioner not knowing anything about what was going on, a joint and several judgment was entered against her.⁵² Moreover, despite the trial court's findings Former Husband assaulted Respondent for Former Husband's own self gratification, the marital community was vicariously liable for Former

⁴⁴ Trial Exhibit 14 (Divorce Decree with attached Property Settlement Agreement).

⁴⁵ SRP 176-77.

⁴⁶ SRP 173-74; Exhibits 16-34 (Property Descriptions, Quit Claim Deeds and Excise Tax forms).

⁴⁷ 7RP 91-92.

⁴⁸ Trial Exhibit 4 (Judgment and Sentence – Felony).

⁴⁹ CP 5-9.

⁵⁰ Opening Brief at 11.

⁵¹ CP 845 (Finding of Fact No. 4).

⁵² CP 857 (Conclusion of Law No. 8). In response to Petitioner's Motion for Reconsideration, the trial court changed its order by overtly stating Petitioner is not separately liable for Former Husband's tortuous actions.

Husband's intentional sexual tort.⁵³

Testimony indicated that Respondent's earning potential pre-injury was equivalent to a high school graduate or a person with an associate arts degree⁵⁴ -- no more than \$35,400.⁵⁵ At trial, however, Respondent was earning \$19 per hour⁵⁶ or \$39,520 per year – more than his pre-injury earning potential. Despite this, the trial court awarded \$200,000 in future wage loss damages.⁵⁷

VII. ARGUMENT

A. Community Liability.

1. *Conflict with deElche v. Jacobsen.*⁵⁸ Division One's decision contrasts sharply with this Court's reasoning in *deElche*. *deElche*'s facts are indistinguishable from the present facts. In *deElche*, Mr. Jacobsen and his wife were engaged in a community activity (recreation) on the Jacobsen's community property. Mr. Jacobsen subsequently forcibly raped Ms. deElche.⁵⁹

The *deElche* court examined the common law regarding community liability for a spouse's tortious acts and determined that the common law yielded "illogical, inconsistent and unjust results."⁶⁰ It held that Mr. Jacobsen's intentional sexual tort imparted separate and not community liability despite his gaining access to his victim through a community activity taking place on community property.⁶¹ This Opinion in this case conflicts with *deElche* (which

⁵³ CP 855 (Conclusion of Law No. 4).

⁵⁴ 6RP 51.

⁵⁵ 8RP 122.

⁵⁶ 6RP 182.

⁵⁷ Finding No 22, CP 850

⁵⁸ 95 Wn.2d 237, 622 P.2d 835 (1980).

⁵⁹ *Id.* at 238.

⁶⁰ *Id.* at 242.

⁶¹ *Id.* at 238.

limited recovery to Mr. Jacobsen's separate property and his interest in community property)⁶² because it found community liability because Former Husband gained access to the Respondent through a community activity on community property and found the community liable.⁶³

2. *Misguided Reliance on LaFramboise v. Schmidt*.⁶⁴ The Opinion found *LaFramboise* determinative. *deElche* specifically criticized *LaFramboise* as having found community liability based on "emotional overtones" and only "tenuous contacts with the marital community."⁶⁵

Division One justified its using *LaFramboise* as a precedent upon a 1986 law review article by Professor Harry M. Cross who commented he thought *LaFramboise* was correctly decided and had continued viability.⁶⁶ Since Professor Cross' article, however, this Court and various courts have significantly limited vicarious liability based upon *respondeat superior* for intentional sexual torts.⁶⁷

3. *Respondeat Superior*. Division One took a bold leap and refused to apply *respondeat superior* to determine whether the community was liable for the Former Husband's intentional sexual torts.⁶⁸ To justify its decision, Division One cited *deElche*⁶⁹ which relied on this Court's 1930's opinion in *Bortle v.*

⁶² Id. at 246.

⁶³ Opinion at ¶ 10- ¶ 28.

⁶⁴ 42 Wn.2d 198, 254 P.2d 485 (1953).

⁶⁵ Id. at 242.

⁶⁶ Opinion at ¶ 21.

⁶⁷ See *infra* at ____.

⁶⁸ Opinion at ¶ 22- ¶ 26.

⁶⁹ *deElche* at 243.

*Osborne*⁷⁰, which held a community is not a separate legal entity.⁷¹ Division One ignored, however, plethora opinions by this Court and other intermediate appellate courts that continue to use *respondeat superior* to determine whether a marital community should be liable for a spouse's tort. *Bergman v. State*,⁷² *McHenry v. Short*,⁷³ *LaFramboise v. Schmidt*,⁷⁴ *Smith v. Retallick*⁷⁵; *Aichlmayr v. Lynch*⁷⁶ and *Brown v. Spokane County Fire Protection Dist. No. 1*.⁷⁷

Finally, even Professor Harry Cross, in the same article cited by Division One to bolster *LaFramboise*, admitted *respondeat superior* analysis is still the proper vehicle to determine community liability.⁷⁸

Applying *respondeat superior*, it is clear the community in this case was not liable for the former husband's intentional tort. This Court has consistently held there is no vicarious liability under *respondeat superior* for intentional sexual torts.⁷⁹ Other intermediate appellate divisions have also refused to conclude there was vicarious liability under *respondeat superior* even when grooming behavior occurred while the tortfeasor was acting within his

⁷⁰ 155 Wn. 585, 589-90, 285 P. 425 (1930).

⁷¹ *Id.* at

⁷² 187 Wn. 622, 626-27, 60 P.2d 699 (1936).

⁷³ 29 Wn.2d 263, 273-74, 186 P.2d 900 (1947).

⁷⁴ 42 Wn.2d 198, 200, 254 P.2d 485 (1953).

⁷⁵ 48 Wn.2d 360, 364-65, 293 P.2d 745 (1956).

⁷⁶ 6 Wn. App. 434, 435, 493 P.2d 1026 (1972).

⁷⁷ 21 Wn. App. 886, 888-89, 586 P.2d 1207 (1978).

⁷⁸ Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L.Rev. 13, 142 (1986).

⁷⁹ *Niece v. Elmview Group Home*, 131 Wn.2d 39, 52-59, 929 P.2d 420 (1997); *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 718-20, 985 P.2d 262 (1999); and *S.H.C. v. Lu*, 113 Wn. App. 511, 529, 54 P.3d 174 (2002).

authority on the principal's property.⁸⁰ The reason there was no vicarious liability was because "the relationship was the result of [the teacher's] wholly personal motives and was done solely to gratify his personal objectives and desires."⁸¹ Division One has similarly held there is no there is no vicarious liability under *respondeat superior* for intentional sexual torts.⁸²

This Court has applied this same rule when determining whether a liability is community or separate. In *Bergman* this Court held: "unless, in a given instance, it can be said that the husband was acting as the agent of the marital community, the community is not liable."⁸³

Commentators today, agree that the *respondeat superior* theory prevails when determining whether liability is community or separate.⁸⁴

Applying these sound *respondeat superior* principles to this case, it is clear Former Husband was separately liable for his acts. Former Husband had stepped aside from managing property and had embarked on his own selfish purpose - to gratify his personal sexual desires.⁸⁵ This was not a case where Former Husband was actively managing community property when the tort occurred, such as mowing the lawn and running over the Respondent with the

⁸⁰ See *Bratton v. Calkins*, 73 Wn. App. 492, 494, 870 P.2d 981 (1994).

⁸¹ *Id.* at 500. See also, *Francom v. Costco Wholesale*, 98 Wn. App. 845, 868-69, 991 P.2d 1182 (2000) where Division Three refused to extend liability to the marital community despite the fact that a husband was earning money for the marital community when he allegedly sexually harassed a co-worker because the husband committed the sexual harassment for his own personal gratification.

⁸² *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993) and *S.H.C. v. Lu*, 113 Wn. App. 511, 529, 54 P.3d 174 (2002).

⁸³ *Bergman* at 626-27.

⁸⁴ See 19 WAPRAC §14.9 ("if the alleged basis of liability is the management theory..., community liability does not lie when the acting spouse exceeded authority and did a wrongful act on his own account.")

⁸⁵ CP 845 (Finding No. 4).

lawn mower causing personal injury.

Other community property jurisdictions, with identical or similar community liability laws, have created special rules for limiting community liability for intentional torts. Arizona is a community property jurisdiction that has identical substantially similar community liability laws.⁸⁶ In *Shaw v. Greer*⁸⁷, the Arizona Supreme Court interpreted Washington's case law on community liability for a spouse's tortious acts and concluded these cases "proceed on the theory that the married tortfeasor was pursuing his work or duties in the usual manner and attempting honestly to perform his work or duties according to the direction of his employment or office."⁸⁸ It then considered the issue: "Should the community be liable for the torts of the husband, not participated in by the wife, conceived and executed in malice for the purpose of wickedly injuring the other."⁸⁹ The Court Reasoned "[s]uch a tort could not benefit the employer, private or state, nor could it ordinarily benefit the community." It then created a rule for intentional torts, that the community is not liable for one spouse's malicious acts unless it is specifically shown that the other spouse consented to the act or that the community benefited from it.⁹⁰

⁸⁶ See *Shaw v. Greer*, 67 Ariz. 223, 225, 194 P.2d 430 (1948) ("This court has repeatedly made the observation that our community property law is more like that of the State of Washington than of any of the other community property states.").

⁸⁷ 67 Ariz. 223, 194 P.2d 430 (1948)

⁸⁸ *Shaw*, 67 Ariz. at 225-29.

⁸⁹ *Id.* at 229.

⁹⁰ *Shelby v. Savard*, 134 Ariz. 222, 229, 655 P.2d 342 (1992).

B. Uniformed Fraudulent Transfer Act

1. This is the first Washington case that addresses the interplay between the UFTA and an uncontested Dissolution Decree. This case is of great importance. Washington's policy is to encourage settlements.⁹¹ The Opinion is published and has precedential value. In marital dissolution cases involving contingent liability for intentional torts, parties will not be able to settle their property distribution claims amicably, lest the distribution be subsequently set aside by creditors under the UFTA. This is especially important in cases like this one where the Respondent never asserted a claim until after the marital dissolution trial would have occurred.⁹² Clearly, had Petitioner went to trial then the resulting property distribution would not have been disturbed.

2. *Conflict with facts in Jones v. Jones.*⁹³ Division One agreed with the trial court that Petitioner failed to meet her burden of proving "good faith" under RCW 26.16.210.⁹⁴ The Court rendered this conclusion despite the fact that the facts in *Jones* unequivocally support the opposite conclusion.

In *Jones*, the Court determined that a husband's transfer of property to his former wife via a PSA was in "good faith" because when the wife filed for a Nevada divorce she intended to dissolve the marriage because her husband was cheating.⁹⁵ Critical to this Court's ruling in *Jones* was the fact that the wife had

⁹¹ *Puget Sound Energy v. Certain Underwriters at Lloyd's London*, 134 Wn. App. 228, 240, 248, 138 P.3d 1068 (2006).

⁹² Ex 160 (Marital Dissolution Case Schedule setting trial date: November 3, 2003); Complaint filed June 17, 2004, CP 5-9.

⁹³ 56 Wn.2d 328, 353 P.2d 441 (1960).

⁹⁴ Opinion at 7-8.

⁹⁵ *Jones* at 337-38. Plaintiff alleged former wife had acquired the divorce to vest the transfer of property. The court found former wife's motives pure; his lone purpose was to divorce her cheating spouse.

not immediately recorded the deeds.⁹⁶

Division One failed to address the similarities between *Jones* and the present case and instead stated:

The Supreme Court reversed [in *Jones*], but contrary to Mrs. Wilson's suggestion, it was not because of any reluctance to apply the law of fraudulent transfer to a conveyance between spouses. Rather, it was because the evidence and the timing of events could only support a finding that the transfer was made in good faith.

The court neglected to explain how Petitioner was any less sincere than the wife in *Jones*. After all, as any wife would, she immediately sought a divorce when learning her husband had sexually assault the neighbor boy. Her sincerity was confirmed by the change in their relationship, which became distant and business-like.⁹⁷ Finally, like the former wife in *Jones*, Petitioner did not immediately record the deeds, she had her attorney wait approximately 3 months before filing the quit claim deeds.⁹⁸ And even after they were filed, she did nothing to conceal or encumber them.⁹⁹

3. *No Joint and Several liability*. Petitioner asked the trial court to reconsider its initial finding that Petitioner was separately liable, jointly and severally, for Respondent's Judgment against the Marital Community. In response, Division One amended its decision by stating:

The record does not contain evidence of any separate property

⁹⁶ *Id.* at 338.

⁹⁷ Opening Brief at 12. Yes, Petitioner did continue to help Former Husband, but this was out of the goodness of her heart and she clearly helped at arms-length. Moreover, she received Former Husband's paycheck in exchange for her help.

⁹⁸ Opening Brief at 31.

⁹⁹ Opening Brief at 11.

owned by Mrs. Wilson....Nevertheless, we conclude that Conclusion of Law 8 and the judgment should be amended to clarify that Mrs. Wilson is liable to Andrew to the extent of the former community property. To that extent, it was appropriate to make her jointly and severally liable with Mr. Wilson.¹⁰⁰

Division One's amended decision clearly conflicts with this Court's ruling in *deElche*. The *deElche* Court clarified how court's should apportion liability for a miscreant spouse's tortious actions:

Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the tortfeasor separately liable.¹⁰¹

The *deElche* court clearly limited liability for the miscreant spouse's torts to the miscreant spouse and marital community - with each separately liable. The *deElche* Court made no provision for finding an innocent spouse separately liable, and certainly not jointly and severally liable.

4. *Actual Fraud*. The trial court never made any findings supporting actual fraud under RCW 19.40.041(a)(1). In fact, the Court never delineated any actual fraud elements. And yet, Division One agreed there was actual fraud.¹⁰² Here, the trial court concluded Petitioner and Former Husband did not meet their burden of demonstrating "good faith" under RCW 26.16.210, and therefore, Former Husband committed actual fraud.¹⁰³ The Court of Appeals agreed.¹⁰⁴

This reasoning conflicts with *Jones v. Jones*, and *In re Bubb's Estate* which

¹⁰⁰ Opinion at ¶ 28.

¹⁰¹ *deElche* at 245.

¹⁰² CP 858, ln. 3-15.

¹⁰³ *Id.*

¹⁰⁴ Opinion at ¶ 33.

observed this Court has never presumed fraud in interspousal transactions.¹⁰⁵

Under UFTA, “good faith” is an affirmative defense that need only be proven if the moving party first proves actual fraud.¹⁰⁶ Under RCW 19.40.081(a), “good faith” is an affirmative defense that must be proven only after the Court concludes there was actual fraud.¹⁰⁷

There are no UFTA cases that discuss the interplay between UFTA and RCW 26.19.210.

By collapsing actual fraud and good faith in this manner, the court, in effect, made RCW 19.40.081, which makes good faith a defense to an actual fraud claim, meaningless. This is contrary to *Ballard Square Condominium Owners Ass’n v. Dynasty Constr. Co.*,¹⁰⁸ where this Court declared “A court may not construe a statute in a way that renders statutory language meaningless or superfluous.”¹⁰⁹

5. *Equitable Lien*. An issue of great public interest is whether creditors should ever be allowed to collaterally attack a dissolution decree through a UFTA action because a dissolution decree does not affect a creditor's right to recover against former community property. Because creditors are not a party to a dissolution decree, dissolution decrees only distribute property between the spouses and do not affect creditor's rights.¹¹⁰ In fact, community creditors have

¹⁰⁵ *Jones v. Jones*, 56 Wn.2d 328, 337, 353 P.2d 441 (1960), citing, *In re Bubb's Estate*, 53 Wn.2d 131, 331 P.2d 859 (1958).

¹⁰⁶ RCW 19.40.081(a).

¹⁰⁷ *Appellant's Opening Brief at 44-45 citing Columbia Intern. Corp. v. Perry*, 54 Wn.2d 876, 880-81, 344 P.2d 509 (1959).

¹⁰⁸ 158 Wn.2d 603, 146 P.3d 914 (2006).

¹⁰⁹ *Id.* at 610.

¹¹⁰ *Hanson v. Hanson* at 887.

an equitable lien on all former community property in the hands of both spouses.¹¹¹

RCW 19.40.041(a)(1) requires a transfer be made with actual intent to hinder delay or defraud a creditor. Because a creditor's rights are not affected by a dissolution decree and are protected with an equitable lien, there should be no UFTA action available in Washington. This is the same conclusion the Ninth Circuit Court of Appeals reached in *Britt v. Damson*.¹¹²

3. The Opinion conflicts with this Court's Opinion in *Watters v. Doud*.¹¹³ There, this Court held a community creditor is limited to recovering "the net community equity at the time of dissolution of the marriage."¹¹⁴ This is consistent with RCW 19.40.081 (b) and (c) that provides that a creditor's judgment remedy is limited to the value at the time the transfer took place. The Opinion in this case voids the interspousal property distribution and in effect, and provides the Respondent greater relief than that permitted by *Watters* because it allows the Respondent to realize on the appreciation on the property distributed, a result specifically rejected in *Watters*.¹¹⁵

4. *Conclusive Common Law Fraudulent Transfer*. The Court of Appeals agreed with the trial court that Former Husband and Petitioner had committed a conclusive common law fraudulent transfer¹¹⁶ adding: "As there is no specific provision in UFTA governing transactions between husband and wife, we

¹¹¹ *Id.*

¹¹² 334 F.2d 896 (9th Cir.1964).

¹¹³ 95 Wn.2d 835, 631 P.2d 369 (1981).

¹¹⁴ *Id.* at 838-41; *see also* 19 Wash. Prac., Family and Community Prop. Law, §14.11.

¹¹⁵ *Watters* at 838-41..

¹¹⁶ CP 858, ln. 16 - 859, ln. 3.

conclude there has been no displacement and the claim recognized in *Davison* remains a viable cause of action.”¹¹⁷

In making its ruling, Division One ignored argument and evidence that *Davison* did not apply to this case and that UFTA had subsumed common law fraudulent transfer. Petitioner ably demonstrated in her Opening Brief that UFTA had subsumed common law fraudulent transfer via its insider trading provision -- RCW 19.40.051(b).¹¹⁸ Under RCW 19.40.11(7) an “insider” means a relative of the person making the transfer; this obviously includes both husbands and wives. Moreover, contrary to *Davison*, this Court subsequently observed that this Court never presumed fraud in interspousal transactions.¹¹⁹

It is of great public interest that this Court make a definitive pronouncement whether there is a viable conclusive common law fraudulent transfer independent from the insider preference statute under the UFTA. Recognizing a special common law insider preference rule is problematic. Here, Respondent's UFTA insider preference claim was not viable because UFTA imposes a one-year time period to bring an insider preference claim.¹²⁰ Respondent was not allowed to subvert the UFTA's extinguishment provisions by bringing an identical common law claim. It is of great public importance to address this issue to provide certainty to debtors and creditors in this State. A major purpose of the UFTA was to make time periods uniform among the

¹¹⁷ Opinion at ¶ 36.

¹¹⁸ Opening Brief of Appellant at 45.

¹¹⁹ *Jones v. Jones*, 56 Wn.2d 328, 337, 353 P.2d 441 (1960), citing, *In re Bubb's Estate*, 53 Wn.2d 131, 331 P.2d 859 (1958).

¹²⁰ RCW 19.40.091(c); CP 861, ln 8-10.

States.¹²¹

C. Pre-injury Earning Capacity

The measure of damages for impairment of earning capacity is the difference between the earning capacity before and after the injury.¹²² An essential element of proof of lost future wages is proof of pre-injury earning capacity.¹²³ Here, the trial court offered no viable proof of Respondent's pre-injury earning capacity. Here, Respondent's pre-injury earning capacity was no more than \$34,500 a year.¹²⁴ This pre-injury capacity was not viable and provided absolutely no valid baseline for the determination of lost income in this case, because Respondent's was already earning \$39,520 per year¹²⁵ at the time of trial.

D. Transfer of real property under the UFTA

The Court of Appeals determined that the transfer between Former Husband and Petitioner occurred when the parties signed the PSA.¹²⁶ This determination conflicts with RCW 19.40.061(1)(i) which makes it clear that transfer of real property under UFTA does not occur until the deeds are entered into the public record.

¹²¹ *Freitag v. McGhie*, 133 Wn.2d 816, 822, 947 P.2d 1186 (1997).

¹²² *Cook v. Donaher Lumber Co.*, 61 Wn. 118, 124, 112 P. 241 (1910).

¹²³ *Proof of Lost Earning Capacity*, 29 Am. Jur. Proof of Facts 3d 259, § 6 (Basic Elements of Proof).

¹²⁴ 8RP 122.

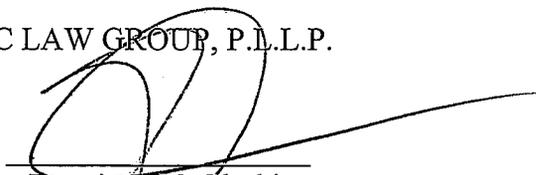
¹²⁵ 6RP 182. \$19.00 per hour multiplied by an average work year of 2080 hours.

¹²⁶ Opinion at ¶ 33.

RESPECTFULLY SUBMITTED July 16, 2008.

OLYMPIC LAW GROUP, P.L.L.P.

By:



Dennis J. McGlothlin
WSBA #28177
Attorneys for Appellants

No. 57891-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARY KAY WILSON,

Petitioner,

v.

ANDREW CLAYTON

Respondent.

APPENDIX
TO
PETITION FOR REVIEW BY
THE WASHINGTON SUPREME COURT

Dennis J. McGlothin
WSBA #28177
Attorney for Appellant Petitioner
Mary Kay Wilson
Olympic Law Group, P. L. L. P.
1221 E. Pike Street, Suite 205
Seattle, Washington 98122
(206) 527-2500

ORIGINAL

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ANDREW JAMES CLAYTON,)	NO. 57891-0-1
)	
Respondent,)	
)	ORDER
v.)	
)	1. GRANTING IN PART APPELLANT'S
MARY KAY WILSON,)	MOTION FOR RECONSIDERATION;
)	
Appellant,)	2. WITHDRAWING OPINION FILED
)	APRIL 21, 2008; AND
and)	
)	3. SUBSTITUTING AMENDED OPINION
DOUGLAS MECKLEM WILSON,)	
)	
Defendant.)	
_____)

On April 21, 2008, this court filed its published opinion in the above-entitled action. Appellant has moved for reconsideration. The panel has decided to grant the motion for reconsideration in part, withdraw the opinion filed on April 21, 2008, and replace it with the amended opinion attached hereto.

IT IS HEREBY ORDERED that the appellant's motion for reconsideration is granted in part;

IT IS FURTHER ORDERED that the published opinion of this court filed in the above-entitled action on April 21, 2008 be withdrawn and that the amended opinion be substituted in its place.

Order/No. 57891-0-1/2

In all other respects, the appellant's motion to reconsider is denied.

Dated this 16th day of June, 2008.

Cross

Becker, J.

Baker, J PT

FILED.
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN 16 PM 12:12

APPENDIX 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ANDREW JAMES CLAYTON,

Respondent,

v.

MARY KAY WILSON,

Appellant,

and

DOUGLAS MECKLEM WILSON,

Defendant.

) NO. 57891-0-1

) PUBLISHED OPINION

) FILED: June 16, 2008

BECKER, J. -- Over a period of years, Douglas Wilson sexually abused a neighbor boy who was doing yard work on property belonging to the Wilson marital community. When Mr. Wilson's criminal activity came to light, he agreed to a divorce settlement with his wife whereby she received almost all the community assets. The abuse victim filed suit against both of the Wilsons. Because Mr. Wilson used his position as manager of the community property to obtain access to his victim, the trial court did not err in imposing liability on Mrs.

Wilson to the extent of the former community property. After rightly concluding the property settlement agreement was a fraudulent transfer, the trial court appropriately protected the plaintiff's ability to collect the judgment by voiding the transfer and enjoining the Wilsons from disposing of the assets. We reverse and modify in part, and affirm the remainder of the trial court's decision.

FACTS

According to findings entered by the trial court after a bench trial, appellant Mary Kay Wilson had been married to her husband Douglas Wilson for 37 years when she found out that he had been sexually molesting a young neighbor boy named Andrew Clayton. Andrew and his family moved into a rental home owned by the Wilsons when Andrew was eight years old. When Andrew was between nine and ten years old, Mr. Wilson began sexually assaulting him. He began by giving Andrew back rubs over his clothing after Andrew had performed yard work. These backrubs gradually progressed to fondling, masturbation, and fellatio.

The sexual assaults occurred on more than 40 separate occasions, ending when Andrew was 15 years old and his family moved away. The assaults occurred in conjunction with Andrew's employment doing yard work for the Wilsons. After Andrew would complete his assigned yard work, Mr. Wilson would take him inside, sexually assault him, and then pay him for the yard work.

Andrew did not tell anyone about the molestation until he was 18 years old. His disclosure led to the arrest of Mr. Wilson on December 7, 2002. Mr.

Wilson admitted to police that he had sexually assaulted Andrew for several years. When Mrs. Wilson came to visit her husband while he was in jail, he told her there were other victims besides Andrew.

Mr. Wilson was released from custody on December 9, 2002. Mrs. Wilson contacted a divorce attorney on December 10. Mr. Wilson agreed that his wife would get all of their assets. The Wilsons met with the attorney on December 11 to discuss dissolving the marriage and dividing the property. Working through the weekend, the attorney prepared a property agreement dividing the property as directed by the Wilsons. Under the terms of the agreement, Mrs. Wilson would receive \$1,639,501, representing about 90.5 percent of the property. Mrs. Wilson signed the property settlement agreement on December 19 and Mr. Wilson signed on December 20. Their divorce became final in March 2003.

The State charged Mr. Wilson with child molestation and rape of a child. He pled guilty as charged on November 5, 2003 and was sentenced to 130 months in prison.

Andrew filed this civil lawsuit on June 17, 2004. After a bench trial, the court concluded that both Mr. Wilson and the marital community were liable to Andrew for the sexual abuse perpetrated by Mr. Wilson. The court awarded Andrew \$1,200,000 in damages for emotional distress, \$200,000 for future lost wages, \$4,024.50 for past medical expenses, and \$14,200 for future medical expenses, for a total of approximately \$1.4 million. On February 23, 2006, the court entered judgment for Andrew in the total of those amounts against Mr.

Wilson individually, and also against Mrs. Wilson as a joint and several obligation with Mr. Wilson. The court enjoined the Wilsons from further disposing of any property that had formerly been community property without court approval, pending an accounting to identify any separate funds of Mr. Clayton available to satisfy the judgment

The court also concluded that the transfer of property from husband to wife that occurred by means of the property settlement agreement was fraudulent. The Wilsons had not sustained their burden of proving that the transfer was made in good faith and Mr. Wilson did not receive reasonably equivalent value in exchange for the assets. The court imposed the statutory remedy of voiding the transfer and enjoined the Wilsons from disposing or encumbering any former community property distributed by their agreement unless approved by the court.

Mrs. Wilson appeals.

COMMUNITY LIABILITY

Mrs. Wilson contends the court erred in holding the marital community liable for the sexual assaults. A key question is whether the trial court properly characterized the sexual molestation as an act done in the course of managing community business.

The trial court's determination of this issue rested on its finding that the sexual assaults occurred in the course of Andrew doing yard work for the

Wilson:

Douglas Wilson committed the sexual assaults of Andrew Clayton in the course of managing the community property of the Wilsons. Mr. Wilson gained access to Andrew by first employing him to do yard work on the property owned by the Wilsons. Andrew was molested after performing his assignments. Andrew testified that every time he was molested the sexual assault was preceded by doing yard work for which he was paid, be it on the Kenmore, Monroe, or Seabeck property. The court finds Andrew's testimony credible, and finds Mr. Wilson's testimony denying the molestation incidents always followed the performance of yard work to be not credible. Andrew was paid with community funds, and the work he did benefited the community. His job included yard work on the rental properties, from which the community received income. Mrs. Wilson knew that Andrew was employed to do yard work on the community property and was being paid with community assets. Mrs. Wilson participated in supervising the minor males who did yard work on the Wilson's property. She also was the chief manager of the family's finances including the community's rental property business.⁽¹⁾

Generally, an appellate court reviews a trial court's findings to determine if the findings are supported by substantial evidence. Nichols Hills Bank v. McCool, 104 Wn.2d 78, 82, 701 P.2d 1114 (1985). There is substantial evidence to support the finding that each time the abuse occurred, it was after Andrew had been doing yard work for the Wilsons. The issue raised by Mrs. Wilson is whether under these circumstances it is correct to say that Mr. Wilson committed the sexual assaults in the course of managing the community property. This is a legal issue that we will review de novo.

The trial court relied on LaFramboise v. Schmidt, 42 Wn.2d 198, 254 P.2d 485 (1953). Mrs. Wilson contends LaFramboise is not applicable and that the assaults on Andrew were intentional torts committed by her husband for which he

¹ Clerk's Papers at 898-99 (Finding of fact 24).

alone is liable. We conclude LaFramboise, the Washington precedent with the most analogous facts, is still good law and supports the imposition of community liability.

In LaFramboise, the parents of six year old Beverly LaFramboise left her in the care of the Schmidt family for six months while they were traveling in Alaska. The Schmidts were paid to take care of Beverly. Louis Schmidt subjected Beverly to indecent liberties and was criminally convicted of this crime. LaFramboise, 42 Wn.2d at 199. Beverly's mother brought a civil action against Louis Schmidt for damages caused by the sexual abuse. A jury returned a verdict in favor of Beverly LaFramboise. Judgment in the amount of \$7,500 was entered against the Schmidt marital community.

The Schmidts appealed. They contended the trial court erred in instructing the jury on community liability. The jury instruction read as follows:

You are instructed that the defendant and his wife, Blanche Schmidt, constitute a marital community.

If you find by a preponderance of the evidence that said community undertook to care for Beverly LaFramboise and received a consideration therefor, and if you further find by a preponderance of the evidence that the defendant, Louis Schmidt, during the period while said child was in the care and custody of said defendant and of the said community, did take indecent liberties with said child, then the community would be liable therefor.

LaFramboise, 42 Wn.2d at 199. The Schmidts claimed there was no basis for community liability because the evidence showed that Louis Schmidt committed the abuse on his own and the abuse was secret and concealed.

The Supreme Court disagreed. A marital community is liable for the torts of the husband if the act constituting the wrong "either (1) results or is intended to result in a benefit to the community or (2) is committed in the prosecution of the business of the community." LaFramboise, 42 Wn.2d at 200. The Schmidt marital community was responsible for Beverly's care and the criminal acts were a part of the care the child received. "They were done in the course of the community's business, and the community is, therefore, liable for them."

LaFramboise, 42 Wn.2d at 200.

Mrs. Wilson suggests that LaFramboise has been undermined or displaced by deElche v. Jacobsen, 95 Wn.2d 237, 242, 622 P.2d 835 (1980). In that case Mr. Jacobsen, a married man, forcibly raped Ms. deElche during a social event on a sailboat owned by Ms. deElche's ex-husband. Ms. deElche brought an action for damages and was awarded a judgment against Mr. Jacobsen separately. Mr. Jacobsen did not have any separate property to satisfy the judgment. Ms. deElche appealed and asked the Supreme Court to overturn the rule which immunized the Jacobsens' community property from collection on the judgment for the separate tort of Mr. Jacobsen.

The Supreme Court recognized that courts were straining to find facts that would connect a tort with the marital community of the tortfeasor spouse so as to justify imposing community liability and allowing the plaintiff to be made whole. The rule that made a plaintiff's ability to recover depend upon whether the tort

was classified as community or separate was producing "illogical, inconsistent and unjust results":

When logically and equitably it was the tortfeasor alone who should bear the costs of his actions, the courts have been given only two choices -- either impose one-half of the liability upon the property of the nontortfeasing spouse, even though that spouse had nothing to do with the tort, or force the innocent victim to bear all damages produced by an acknowledged tortfeasor if that tortfeasor, even though solvent, had only community property. The tortfeasor could hardly lose; absent the ownership of separate property he or she could be held liable to pay either only half the judgment or nothing at all.

deElche, 95 Wn.2d at 242. The court mentions LaFramboise as an example of the tendency to make the marital community liable rather than leave an innocent plaintiff with no recovery:

Other cases which found community liability upon tenuous contacts with the community include LaFramboise v. Schmidt, 42 Wn.2d 198, 254 P.2d 485 (1953), where the husband committed indecent liberties upon a child staying in their home. In the cited cases the only way plaintiff could recover was a determination that the community was liable.

deElche, 95 Wn.2d at 242.

To enable a plaintiff to recover from community property even for a separate tort, the court adopted a new rule. If a plaintiff obtained judgment against one spouse for which there was no community liability, and that spouse's separate property was insufficient to satisfy the judgment, the plaintiff could go after the tortfeasor's half interest in community personal property. deElche, 95 Wn.2d at 246. However, torts committed in the management of community

business or for the benefit of the community "will remain community torts with the community and the tortfeasor separately liable." deElche, 95 Wn.2d at 245.²

The court commented in deElche that as a result of its holding, it was possible that some torts which in the past had been classified as community, based on emotional factors or overtones, would now be properly characterized as separate. deElche, 95 Wn.2d at 245. Mrs. Wilson points out that Justice Finley identified LaFramboise as a case with emotional overtones when he dissented in Smith v. Retallick, 48 Wn.2d 360, 365, 293 P.2d 745 (1956) (Finley, J., dissenting), a dissent which was influential in deElche. See deElche, 95 Wn.2d at 245. The deElche court refers to LaFramboise as an opinion that found community liability upon "tenuous contacts" with the community. deElche, 95 Wn.2d at 242. Based on these references, Mrs. Wilson describes LaFramboise as "antiquated and highly criticized."³ That is an exaggeration. In Smith, after all, Justice Finley was arguing in favor of making the marital community liable to the plaintiff for at least half the judgment on the basis that no principled distinction could be found between the facts in that case and the facts in community liability cases like LaFramboise. Smith v. Retallick, 48 Wn.2d at 368 (Finley, J., dissenting). And the deElche court, despite its use of the word "tenuous" to

² The court has since extended deElche to make a judgment against a tortfeasor spouse collectable from the tortfeasor's interest in community real property as well if "the tortfeasor's separate property and share of community personal property are insufficient to satisfy the judgment." Keene v. Edie, 131 Wn.2d 822, 835, 935 P.2d 588 (1997).

³ Br. of Appellant at 21 n.192.

describe the connection between the tort and the community in LaFramboise, nevertheless preserved community liability for torts "which can properly be said to be done in the management of community business." deElche, 95 Wn.2d at 245.

LaFramboise may be old, but its stability as a precedent after deElche has been affirmed by no less a commentator than Harry M. Cross. Professor Cross explored the probable impact of the deElche decision in a 1986 law review article:

The holding obviously calls for drawing the line between community and separate torts in a new location to put more incidents on the separate side of the line. Since the new location is uncertain, however, and all real and personal community property must respond to a community tort, rather than only half of the community personal property to a separate tort under deElche, plaintiffs will still seek community liability even though the supporting argument may be tenuous. The previous cases in which community liability was found are therefore of continuing interest though deElche may have undermined the authority of some of them.^[4]

The Cross article discusses LaFramboise in connection with "management of community business" as a recognized basis for community tort liability:

There obviously would be some difficulty in saying that the husband was managing community property at the time or that the act was intended to benefit the marital community, although the employment to care for the child was so intended. In this area the concept of "business" is not narrow and the looseness of the test which the cases developed is better identified as requiring that the spouse be engaged in some community errand, affair, or business at the time of the tort to establish community liability.^[5]

⁴ Harry M. Cross, The Community Property Law in Washington (Revised 1985), 61 Wash. L. Rev. 13, 132 (1986).

⁵ Cross, 61 Wash. L. Rev. at 137.

Professor Cross concluded that LaFramboise would likely be decided the same way even in light of the change in the law brought about by deElche:

LaFramboise involved indecent liberties taken during the care of a minor child; the reasoning that there was a community enterprise being conducted during which the tort occurred probably leaves the community liability intact.

It appears probable then, that deElche stands only for the proposition that a separate tort creditor can reach the tortfeasor spouse's half interest in community personal property and perhaps in community real property, in those situations involving purely personal wrongs having no conceivable connection with community property or affairs. If this is correct, the distortion of long-standing concepts in Washington community property law is likely to be more apparent than real -- and to the author such extraordinary distortion is tolerable given the need for some chance of protection for the tort victim.^{6]}

Here, like in LaFramboise, the tort occurred while the tortfeasor spouse was participating in a community enterprise. Mr. Wilson was personally engaged in managing the community's real property when he took advantage of Andrew's presence as a yard worker. Mrs. Wilson tries to distinguish LaFramboise on the basis that her husband's management of the community property involved paying out community funds to Andrew for his yard work, rather than receiving community funds for caring for a child as was the case in LaFramboise.

However, she proposes no reason, and we see none, why the community liability that arises from torts committed in the management of community property or

⁶ Cross, 61 Wash. L. Rev. at 139, 140.

business would be limited to situations where money comes in rather than goes out.

LaFramboise identified agency law, or respondeat superior, as the theoretical basis for placing liability upon the community for torts committed in the management of community business or for its benefit. LaFramboise, 42 Wn.2d at 200. Mrs. Wilson contends that under agency law there can be no community liability for Mr. Wilson's intentional tort because his assaults upon Andrew were outside the scope of his authority. See Kuehn v. White, 24 Wn. App. 274, 277, 600 P. 2d 679 (1979) (under agency law, when a servant steps aside from the master's business in order to effect some purpose of his own, the master is not liable). Her analysis is flawed because it assumes that the marital community was, like a corporation, a separate and distinct "master" to whom Mr. Wilson was merely a "servant". In reality, as deElche explains, a marital community does not have the status of a corporation and in fact "does not exist as a separate and distinct juristic entity." deElche, 95 Wn.2d at 243. Mr. Wilson was managing the community property on behalf of the marital enterprise consisting of himself and his wife. Any purpose he had while managing that property was the purpose of the "master".

Mrs. Wilson attempts to draw an analogy to Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 991 P.2d 1182 (2000). In that case, a woman employed by Costco alleged that she had been sexually harassed at work by Mr. Hathaway, a non-managerial coworker. Primarily, the decision gave the victim

the right to proceed against Costco. And the court assumed that the victim could also make Hathaway individually liable for his conduct. But the victim also wished to proceed against the Hathaway marital community, on the theory that since Hathaway's acts of harassment were committed at work, they were done in the course of managing community property or for the benefit of the community. Francom, 98 Wn. App. at 868. The court rejected this theory on the ground that sexual harassment "certainly was not within the scope of Mr. Hathaway's employment" and affirmed the dismissal of this claim. Francom, 98 Wn. App. at 869. Mrs. Wilson argues that her husband's motives, like Hathaway's, were purely personal and therefore his acts of abuse were outside the scope of his "employment" by the community.

The scope of employment addressed in Francom was the scope of Hathaway's employment by Costco. In directing the yard work for houses owned by his marital community, Mr. Wilson was managing property belonging to the community. In relationship to his marital community, Mr. Wilson was not a mere employee; he was a manager. If comparisons can be made to employment cases, the appropriate analogy is to the rule that where an owner, manager, partner or corporate officer personally participates in workplace harassment, liability for harassment is imputed to the employer as a matter of law. See Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985); Francom, 98 Wn. App. at 853. Because Mr. Wilson was one of the "owners" and "managers" of the Wilson marital community, torts that he committed while

engaged in management of community business are automatically imputed to the community whether they were negligent or intentional, open or concealed, and whether his wife knew about them or not.

LaFramboise is the controlling case here, not Francom. It would be inconsistent with LaFramboise to read Francom as holding that a marital community can never be liable for intentional torts secretly committed by one spouse for personal gratification. Because Mr. Wilson sexually abused Andrew while overseeing yard work on behalf of the community, the trial court correctly concluded that the marital community is liable.

The trial court's Conclusion of Law 8 stated that the judgment for over \$1.4 million should be entered against Mr. Wilson individually, and against Mrs. Wilson as a joint and several obligation with Mr. Wilson's judgment. The judgment was entered in accordance with this conclusion. Mrs. Wilson expresses concern that the judgment, written in this way, will make any separate property that she owns reachable by creditors. Such a result was not intended by the trial court; the only liability that Mrs. Wilson has is as a member of the former marital community.⁷ But that is indeed a substantial liability. Because the former marital community is liable along with Mr. Wilson, the community property of the marriage is subject to recovery along with any separate property held by Mr. Wilson.

⁷ Clerk's Papers at 903 (Conclusion of Law 4)

The record does not contain evidence of any separate property owned by Mrs. Wilson before the property settlement agreement and dissolution. She does not specify any separate assets that she fears will be unfairly exposed to attack. Thus her concern about the wording of the judgment appears to be technical rather than substantive. Nevertheless, we conclude that Conclusion of Law 8 and the judgment should be amended to clarify that Mrs. Wilson is liable to Andrew to the extent of the former community property. To that extent, it was appropriate to make her jointly and severally liable with Mr. Wilson.

FRAUDULENT TRANSFER

The trial court found that the hastily prepared property settlement agreement that transferred the bulk of the Wilsons' community assets to Mrs. Wilson was a fraudulent transfer as to Andrew, a present and future creditor of Mr. Wilson and the community. The court ruled that the transaction amounted to actual and constructive fraud under the common law and violated Washington's Uniform Fraudulent Transfer Act (UFTA), Chapter 19.40 RCW. Mrs. Wilson attacks this determination on all fronts and seeks to have the fraudulent transfer claim dismissed. However, the issues raised by the claim are primarily factual in nature, and the findings underlying the trial court's analysis are undisputed.

The Wilsons executed their property settlement agreement two weeks after Mr. Wilson was arrested for sexually abusing Andrew Clayton. They knew that Andrew and perhaps other victims of Mr. Wilson's past child sex abuse had

claims for damages. Mrs. Wilson specifically discussed with the attorney the possibility that Andrew would be making a claim.

The agreement allocated to Mrs. Wilson assets valued at \$1,639,501; the value of Mr. Wilson's share was \$171,411. The Wilsons presented two expert witnesses who testified that they believed the division of assets was fair. But the court found the opinion of family law attorney Mabry DuBuys, who testified on behalf of Andrew, to be more credible and realistic. Ms. DuBuys, who has handled over 750 dissolution cases with total assets at or exceeding \$2 million, testified that the property division was "very skewed and not fair" and the speed at which the Wilsons divided the property was "incredibly quick."⁸ The court found the division of property was "not within the range of likely distribution" that a court would have ordered had the dissolution been tried.⁹ It was undisputed that as a result of the property settlement agreement, Mr. Wilson became insolvent.

The trial court imposed upon the Wilsons the burden of proving their good faith, relying on a statute that applies generally to transactions between spouses: "In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith." RCW 26.16.210. The court concluded the

⁸ Clerk's Papers at 901 (Finding of fact 34).

⁹ Clerk's Papers at 907 (Conclusion of law 23).

Wilson's did not prove the good faith of the conveyances set forth in the property settlement.

Mrs. Wilson claims that RCW 26.16.210 does not apply because the property settlement agreement was not a transaction between husband and wife. She reasons that the property settlement agreement "merged" into the dissolution decree and therefore she was not married when the settlement went into effect. The plain language of the agreement defeats Mrs. Wilson's argument: "It is understood and agreed by the parties that this contract shall be final and binding upon execution by both parties whether or not a Decree of Dissolution is obtained."¹⁰ By its terms, the property settlement agreement was an independent contract effective when signed. Both Wilson's signed it while they were still married. The Wilson's' failure to prove the good faith of their transaction supports the trial court's conclusion that Mr. Wilson transferred property with actual intent to defraud. See RCW 19.40.41(a)(1).

Even if there were no support for the finding of actual intent to defraud, the trial court also ruled that the transfer was constructively fraudulent because Mr. Wilson made the transfer without receiving "reasonably equivalent value" in exchange for it. RCW 19.40.041(a)(2); RCW 19.40.051(a). Mrs. Wilson contends her husband did receive reasonably equivalent value because she waived any right to maintenance. However, the court's undisputed finding was

¹⁰ Plaintiff's Exhibit 13 at 3 (Property Settlement Agreement)

that the distribution of property was highly skewed in favor of Mrs. Wilson. It would have been unrealistic to look at her share as a fair exchange for her waiver of maintenance, considering that Mr. Wilson's future earning power would be so diminished by his incarceration that he would be unable to pay maintenance. The findings support the conclusion that Mr. Wilson did not receive reasonably equivalent value for the transfer.

The court also correctly concluded that Andrew established a "common law" claim of fraudulent transfer between the spouses based on Davison v. Hewitt, 6 Wn.2d 131, 135-36, 106 P.2d 733 (1940). In that case a husband transferred shares of stock to his wife for no consideration at a time when he was already indebted. The trial court ordered that the shares issued to the wife be sold to satisfy the debt. Upon the wife's appeal, the Supreme Court affirmed:

Under our community property law (Rem. Rev. Stat., § 6890 et seq.), the husband or wife may give or convey his or her separate property to the other spouse, provided he or she is free from debts and liabilities or, at the time of the making of the gift or conveyance, has ample means readily and conveniently accessible to his or her creditors and to the ordinary process used in the collection of debts.

Irrespective of the motive actuating the transfers by the husband of his separate property to his wife, it is clear that, at the time the transfers were made to appellant, her husband was insolvent; hence, the act of transferring the property is conclusive evidence of fraud, and the intent is presumed from the act. The burden of proof was not met by appellant.

Davison, 6 Wn.2d at 135-36 (emphasis added).

The UFTA provides that common law principles, including the law related to fraud, supplement the UFTA unless displaced by its provisions. RCW

19.40.902. Mrs. Wilson argues that common law fraudulent transfer as exemplified by Davison has been displaced by the UFTA. As there is no specific provision in the UFTA governing transfers between husband and wife, we conclude there has been no displacement and the claim recognized in Davison remains a viable cause of action.

A theme running throughout Mrs. Wilson's defense of the property settlement agreement is that transfers between spouses in contemplation of divorce are simply not susceptible to being deemed fraudulent transfers, because an imbalance in the distribution of property could just as easily reflect one spouse's commendable desire that the other spouse be well taken care of. While cases can indeed be found in which courts have refused to void transfers that occurred between spouses pursuant to divorce—Mrs. Wilson cites several decided by bankruptcy courts—generally this is because the factual prerequisites for a fraudulent transfer are absent, not because the law bars creditors from asking courts to void such transfers. For example, Mrs. Wilson relies on Britt v. Damson, 334 F.2d 896 (9th Cir. 1964). But Britt actually confirms that in appropriate circumstances a bankruptcy trustee can use the law of fraudulent transfer to reach former marital property in the hands of the bankrupt's divorced spouse. Britt, 334 F.2d at 902; see also In Re Gipe, 157 B.R. 171, 177 (Bankr. D. Fla. 1993).

Mrs. Wilson also cites Jones v. Jones, 56 Wn.2d 328, 333, 353 P.2d 441 (1960). In that case, the trial court found that a husband had fraudulently

transferred a wheat farm to his second wife in order to place it beyond the reach of the child support obligations he owed to his first wife. The Supreme Court reversed, but contrary to Mrs. Wilson's suggestion, it was not because of any reluctance to apply the law of fraudulent transfer to a conveyance between spouses. Rather, it was because the evidence and the timing of events could only support a finding that the transfer was made in good faith.

Because Andrew was a known creditor at the time the Wilsons agreed to divide their property, Mr. Wilson did not receive reasonably equivalent value, the division rendered Mr. Wilson insolvent, and the Wilsons did not prove that the transfer was made in good faith, the trial court's conclusions on the various theories of fraudulent transfer are adequately supported. The remedy of voiding the transfer and freezing the assets was properly imposed.

DAMAGES

Pretrial, Mrs. Wilson moved to bifurcate the trial to have the personal injury claim be heard separately from the claims of fraudulent transfer, so that the court would not be aware of the extent of the Wilsons' assets when assessing how much to award Andrew for his emotional damages. She assigns error to the court's denial of this request.

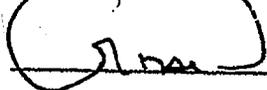
The ruling is discretionary. Brown v. General Motors Corp., 67 Wn.2d 278, 282, 407 P.2d 461 (1965). There was no factor of convenience or prejudice compelling bifurcation. This was a bench trial. There were good reasons of judicial economy to try both matters together. And even if the sex abuse claim

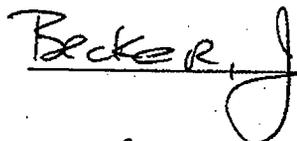
had been tried first, it would have been virtually impossible to conceal the fact that the Wilsons owned property and were relatively prosperous. We find no abuse of discretion.

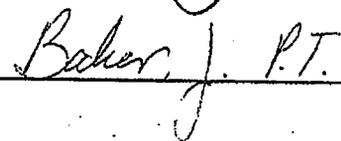
Mrs. Wilson contends the damage awards for emotional harm (\$1.2 million) and future wage loss (\$200,000) were excessive, warranting a new trial. This argument fails. Andrew was subjected to sexual abuse for six years as a young boy and the damage has permeated every aspect of his life. Although he presently works at an entry-level job, there was substantial evidence that even with successful counseling he will be unlikely to advance because he will continue to have difficulty concentrating and working without supervision. The damage awards were within the range supported by the evidence and accordingly will not be disturbed.

The case is remanded to the trial court for the sole purpose of amending the conclusions and judgment to clarify that Mrs. Wilson is liable to Andrew to the extent of the former community property. In all other respects the judgment is affirmed.

WE CONCUR:







APPENDIX 3

RCW 19.40.041

Transfers fraudulent as to present and future creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[1987 c 444 § 4.]

Notes:

Effective date -- 1987 c 444: See note following RCW 19.40.011.

APPENDIX 4

RCW 19.40.051

Transfers fraudulent as to present creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

[1987 c 444 § 5.]

Notes:

Effective date -- 1987 c 444: See note following RCW 19.40.011.

APPENDIX 5

RCW 19.40.061

When transfer is made or obligation is incurred.

For the purposes of this chapter:

(1) A transfer is made:

(i) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(ii) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee;

(2) If applicable law permits the transfer to be perfected as provided in subsection (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action;

(3) If applicable law does not permit the transfer to be perfected as provided in subsection (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee;

(4) A transfer is not made until the debtor has acquired rights in the asset transferred;

(5) An obligation is incurred:

(i) If oral, when it becomes effective between the parties; or

(ii) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

[1987 c 444 § 6.]

Notes:

Effective date -- 1987 c 444: See note following RCW 19.40.011.

APPENDIX 6

RCW 19.40.081
Defenses, liability, and protection of transferee.

(a) A transfer or obligation is not voidable under RCW 19.40.041(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under RCW 19.40.071(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under RCW 19.40.041(a)(2) or 19.40.051 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with Article 9A of Title 62A RCW (62A.9A).

(f) A transfer is not voidable under RCW 19.40.051(b):

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

[2001 c 32 § 1; 1987 c 444 § 8.]

Notes:

Effective date -- 2001 c 32: See note following RCW 62A.9A-102.

Effective date -- 1987 c 444: See note following RCW 19.40.011.

APPENDIX 7

RCW 19.40.091
Extinguishment of cause of action.

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(a) Under RCW 19.40.041(a)(1), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) Under RCW 19.40.041(a)(2) or 19.40.051(a), within four years after the transfer was made or the obligation was incurred;
or

(c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.

[1987 c 444 § 9.]

Notes:

Effective date -- 1987 c 444: See note following RCW 19.40.011.

APPENDIX 8

RCW 19.40.011
Definitions.

As used in this chapter:

(1) "Affiliate" means:

(i) A person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities;

(A) As a fiduciary or agent without sole discretionary power to vote the securities; or

(B) Solely to secure a debt, if the person has not exercised the power to vote;

(ii) A corporation twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(A) As a fiduciary or agent without sole power to vote the securities; or

(B) Solely to secure a debt, if the person has not in fact exercised the power to vote;

(iii) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(iv) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(i) Property to the extent it is encumbered by a valid lien; or

(ii) Property to the extent it is generally exempt under nonbankruptcy law.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(i) If the debtor is an individual:

(A) A relative of the debtor or of a general partner of the debtor;

(B) A partnership in which the debtor is a general partner;

(C) A general partner in a partnership described in subsection (7)(i)(B) of this section; or

(D) A corporation of which the debtor is a director, officer, or person in control;

(ii) If the debtor is a corporation:

(A) A director of the debtor;

(B) An officer of the debtor;

(C) A person in control of the debtor;

(D) A partnership in which the debtor is a general partner;

(E) A general partner in a partnership described in subsection (7)(ii)(D) of this section; or

- (F) A relative of a general partner, director, officer, or person in control of the debtor;
 - (iii) If the debtor is a partnership:
 - (A) A general partner in the debtor;
 - (B) A relative of a general partner in, or a general partner of, or a person in control of the debtor;
 - (C) Another partnership in which the debtor is a general partner;
 - (D) A general partner in a partnership described in subsection (7)(iii)(C) of this section; or
 - (E) A person in control of the debtor;
 - (iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
 - (v) A managing agent of the debtor.
- (8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.
- (9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.
- (10) "Property" means anything that may be the subject of ownership.
- (11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.
- (12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.
- (13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

[1987 c 444 § 1.]

Notes:

Effective date -- 1987 c 444: "This act shall take effect July 1, 1988." [1987 c 444 § 16.]

APPENDIX 9

RCW 26.16.210

Burden of proof in transactions between husband and wife.

***** CHANGE IN 2008 *** (SEE 3104-S2.SL) *****

In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

[Code 1881 § 2397; RRS § 5828.]