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STATE OF WASHINGTON

NO. 81920-3

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

ANDREW JAMES CLAYTON,

Respondent,

v.

MARY KAY WILSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY
(Cause No. 04-2-14443-4SEA)
Court of Appeals, Division One
(No. 57891-0-I)

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SUPPLEMENTAL BRIEF OF ANDREW CLAYTON

KATHY GOATER, WSBA #9648
JAMES D. HAILEY, WSBA #7639
Counsel for Respondent
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

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I. INTRODUCTION

The Court of Appeals opinion in this matter found every finding of fact made by the trial court substantiated by the record. Those findings showed a strong and direct connection between Mr. and Mrs. Wilson's community rental property business and each of the more than 40 molestations and rapes by Mr. Wilson of their employee, Andrew Clayton, from age 9 years old through approximately age 16. Both the trial court and the Court of Appeals carefully applied Washington law in light of these specific facts and held community liability was appropriate.

The courts below also held that Mr. and Mrs. Wilson engaged in multiple acts of fraud in transferring virtually all of their community property to Mrs. Wilson in the days following the discovery of Mr. Wilson's sexual assaults. The Petition for Review only challenges two of the four counts of fraudulent transfer proven at trial.

Therefore, while we believe the challenge raised to those two counts is without merit; even if successful, the transfer will stand as fraudulent. Under Washington law, formerly community property may be reached by community creditors after a divorce but usually only to the extent of equity in such property at the time of transfer. Where there is fraud involved in the transfer of property, however, a creditor may reach

the appreciation on the property after the fraudulent transfer, in addition to the equity at the time of the transfer.

II. STATEMENT OF FACTS

A. Employment And Years Of Abuse.

The Wilsons rented a home to the plaintiff's family when plaintiff, Andrew Clayton, was 7 years old. Report of the Proceedings January 3, 2006 (hereinafter RPIV) 42.¹ The Wilsons hired Andrew at age 8 1/2 to do yard work for them at their home and various rental properties. RPIV 45. Shortly after Andrew was hired, Mr. Wilson began molesting Andrew. The molestation continued for over seven years. RPIV 48-9, RPIV 58, 104. The employment provided each and every opportunity and occasion for the sexual abuse. Andrew did his job and then had to submit to being molested before he was paid. RPIV 58; RPVI 183.

Andrew was age nine the first time Mr. Wilson physically touched him. Mr. Wilson took Andrew to the Wilson property in Monroe where Andrew did his assigned yard work. After the work was concluded, Mr. Wilson gave Andrew a back massage and then paid him for the work. RPIV 48-9. This pattern of conduct was repeated over the next several trips to the Monroe property. RPIV 50. Eventually, the physical contact progressed to Andrew being required to remove his shirt for the back rubs.

¹ See Appendix A which states how Respondent cites to the Report of Proceedings in his Brief.

RPIV 50. The conduct also began occurring at the Wilsons' Kenmore property where Andrew had to enter the Wilson home to return the keys to the tool shed. RPIV 50, 52. The pattern of conduct remained the same: work, massage, payment. RPIV 51.

The extent of the physical touching of Andrew by Mr. Wilson escalated over time and included making Andrew remove his pants and receive a full body massage, remove his underwear for massages, brushing against Andrew's genitals to arouse him, and masturbating Andrew. RPIV 53, 54, 59. Andrew was age 10 ½ when the masturbation started, and when Andrew was age 11 to 12, Mr. Wilson added oral sex to the conduct. RPIV 55, FOF 4.² At age 13, Andrew was required to masturbate Mr. Wilson. RPIV 54, 56. On two occasions Mr. Wilson made Andrew perform oral sex on him before he paid Andrew for his work. RPIV 57. RPIV 58, 104. RPIV 58; RPVI 183.

B. Andrew Clayton Suffered Severe And Permanent Emotional And Psychological Harm.

Prior to being molested, Andrew was a happy, fun loving child who played with friends and rode bikes. RPIV 42, RPVI 162. During the years of abuse, Andrew experienced an array of negative emotions. He was scared when the assaults began in Monroe, and felt vulnerable and

² The court's Findings of Fact and Conclusions of Law (FOF) are found at CP 844-862. Hereinafter, respondent Clayton will cite to the individual Finding, using FOF.

alone. RPIV 61. He told no one what Mr. Wilson was doing, and then felt extreme guilt for not disclosing the abuse to his mother. RPIV 62.

Andrew has experienced severe anxiety since disclosing the abuse. He vomits in the mornings, has difficulty concentrating, misses work on occasion, and doesn't want to go to work. RPIV 68, 70. The vomiting occurs every day of the week and became so severe that he threw up pieces of skin/tissue. RPIV 71-72.

Psychologist Dr. Robert Wheeler evaluated Andrew and found Andrew's early development, pre-abuse, was normal. RPIV 96, 101, 105, 129, 130. Because the abuse started when Andrew was age 9½ to 10, and continued through most of his adolescence, it altered the course of Andrew's development as a person and the development of his personality in harmful ways. RPIV 104-5, 138-9. The years of abuse have rendered him permanently unassertive, lacking self-confidence, and excessively worried and apprehensive. RPIV 141, 143.

Dr. Wheeler diagnosed Andrew as Axis I mental disorders, Post Traumatic Stress Disorder, chronic with delayed onset, and Adjustment Disorder with Depressed Mood. RPIV 122. The psychological damage to Andrew impacts his future vocational functioning. He lacks self-confidence, fears making mistakes. At the time of trial Andrew was working as a plumbers apprentice for a benevolent employer, a family

friend. However, over time Andrew will have difficulty advocating for himself. He will have difficulty working. RPIV 114, 184, FOF 20, FOF 21, FOF 22, RPV 103, RPVI 21.

C. Mr. And Mrs. Wilson Fraudulently Transferred Substantially All Non-Exempt Assets From Mr. Wilson To Mrs. Wilson Within Weeks Of Mr. Wilson's Arrest.

Mr. Wilson was arrested for sexually assaulting Andrew Clayton on December 5, 2002. RPIII 69-70. Two days later he admitted sexually assaulting Andrew to Mrs. Wilson when she visited him in the King County Jail. He also told her there were other victims. RPIII 68; RPVIII 166; RPIX 124-125; FOF 8. Within four days of his arrest, the Wilsons agreed to file for a divorce and to move all assets to Mrs. Wilson. RPVIII 169; RPIX 126; FOF 9. RPVII 42-43; RPVIII 172-173; RPIX 126-127; FOF 9. Mr. and Mrs. Wilson knew at that time that Andrew Clayton and other victims of Mr. Wilson's past child sex abuse had potential claims for damages from that abuse. RPIX 119-124; FOF 30. They signed the property settlement agreement on December 19 and 20, 2002. RPV 142; FOF 12. They executed the transfer by signing their property settlement agreement on or about December 20, 2002. RPV 144-145; FOF 26; Trial Exhibit 13.

Mrs. Wilson's own expert accountant, Roland Nelson, determined 98% of the non-exempt personal and real community property was

distributed to Mrs. Wilson. RPIX 43; FOF 31. After the property was transferred, the Wilsons' relationship continued on a friendly basis. Mr. Wilson lived on one of the transferred properties – Seabeck property – without paying rent. RPIX 96; FOF 28. He continued to maintain all of the transferred properties without compensation from Mrs. Wilson until his incarceration. RPVII 11, 66; FOF 28. Mrs. Wilson prepared Mr. Wilson's 2003 income tax return, as she had always done. RPVIII 91; RPIX 92; FOF 28. She spoke at the sentencing hearing, asking for a reduced sentence. RPIX 105-106; 108-109; FOF 28. She visited Mr. Wilson in prison approximately monthly. RPIX 138; FOF 28. She regularly spoke to him by telephone. RPIX 138. She even asked the Department of Corrections to transfer him to Monroe to be closer to the family. RPIX 137; FOF 28.

III. ARGUMENT

A. Community Liability.

1. **The Court of Appeals Opinion Does Not Conflict With *deElche v. Jacobsen*.**

Petitioner Mrs. Wilson claims the Court of Appeals opinion below conflicts with *deElche v. Jacobsen*, 95 Wn.2d 237 (1980), but that opinion actually relies heavily upon *deElche* and carefully analyzed the connection between the sexual abuse of Andrew Clayton and the management of the community property. Petitioner identified three alleged conflicts with

deElche, but it appears these “conflicts” are based primarily upon Petitioner’s views of the facts, not with any legal mandate emanating from the *deElche* decision.

Petitioner claims there was inadequate connection established between Mr. Wilson’s torts and the community business, arguing the facts here are “indistinguishable” from the sexual assault in *deElche*. In *deElche*, the only connection between the rape and the Jacobsen community was that some drinking and socializing had occurred earlier in the evening of the rape on Mr. Jacobsen’s community owned sailboat. The rape itself occurred aboard another vessel. *Id. at 238*. There was no claim the tort occurred in the management of the community property.

Petitioner also is incorrect in suggesting that *deElche* stands for the proposition that community liability may not be asserted where one spouse is “innocent” and a non-tortfeasor. The test for community liability exists precisely to address situations where one spouse is not a joint tortfeasor. Rather than modify the test for community liability, *DeElche* created a fairer remedy for torts committed by one spouse *where the community was not implicated*. In order to understand why *deElche* changed the remedy and what impact that has on the Court’s review of this case, it is important to understand how the law had developed before *deElche*.

Before *deElche*, a victim of a tort committed by one spouse was limited to reaching only the separate property of the tortfeasor unless it could be shown that the tort was committed either for the benefit of the marital community or in the course of managing the community property. *DeElche* concluded this amounted to an all or nothing rule that led to inconsistent results in cases where the legal analysis arguably was influenced by the desire to reach a just result rather than by a logical evaluation of the facts.

DeElche reasoned that a better approach would be to alter this all or nothing community liability rule to an all or half rule and thus encourage more consistent and logical appellate opinions. Under *deElche's* new rule, half the community property would be available to the tort victim if the community was not implicated. However, *DeElche* reaffirmed that if the tort were committed while the spouse was acting either for the benefit of the community or in the course of managing the community property, then all the community property would be available to satisfy the tort damages. This latter test for community liability was the same test used in dozens of previous cases.

The second prong of this test—whether the tortfeasor spouse was acting in the course of managing the community property—was the test

used by the courts below in affirming community liability under the facts of this case. Finding of Fact 24 stated:

“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 the 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.”³

The Court of Appeals, reviewing the issue de novo, agreed with Judge Doyle that these torts occurred while the tortfeasor spouse was participating in the management of the community’s real property. *Court of Appeals opinion* at p. 11.⁴ The careful analysis by both the trial court

³ C.P. at 898-99.

⁴ We argued that whether an act occurred within the course of employment was a question of fact for the trier of fact. *Dickinson v. Edwards*, 105 Wn.2d 457, 466-467, 716 P.2d 814 (1986); *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). The Court of Appeals determined this was a legal question reviewed de novo. *Court of Appeals opinion* at p. 5. This is a fact intensive question. Four Judges have now found the tort to have been committed within the course of management of the community property. If the standard is whether there is a genuine issue of material fact, as *Dickinson* and *Balise* suggest, then community liability must be affirmed. Otherwise, the Court would be saying that it will become the final arbiter in all close cases. However, since the Court of Appeals analyzed this de novo, we have made our argument here as if the Supreme Court will follow the same standard of de novo review.

and the Court of Appeals on this issue is consistent with both the letter and spirit of the *deElche* decision.⁵

2. Petitioner Mischaracterizes The Role *Respondeat Superior* Has Played In Community Liability Issues Since *deElche*.

Petitioner claims the Court of Appeals took a bold and misguided “leap” in not applying traditional master/servant *respondeat superior* analysis to community liability. She claims “Division One ignored...plethora [sic] 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” and instead relied upon *deElche*’s description of how the concept of “community” had evolved.”⁶

One naturally would expect Petitioner to cite to this “plethora” of post-*deElche* cases using *respondeat superior* to determine community liability, however there are no such cases cited. Petitioner’s claim is false. *Respondeat superior* has not been used by this Court or by lower appellate courts in Washington since *deElche* to determine community liability.

⁵ Petitioner also claims it was wrong for the Court of Appeals to conclude that Mrs. Wilson was jointly and severally liable for this Judgment to the extent she was in possession of formerly community property, but that is precisely her liability here. There is no liability extending to her separate property. That is expressly confirmed by the Court of Appeals decision. Court of Appeals Opinion at p. 14-15.

⁶ Petition for Review at p. 11.

These cited cases, rather than reveal clear precedent ignored by the Court of Appeals below, exemplify the sometimes inconsistent application of the two-pronged test for community liability discussed by *deElche*. Some conclude there was no community liability.⁷ Some conclude there was community liability.⁸

In *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953), the husband and wife ran a day care business. The husband molested a 6 year old child under the care and custody of that community business. *Id.* at 199. There, the appellant also argued that the “secret and concealed” molestation could not have been within the course and scope of the husband’s employment by the community. *Id.* The court held otherwise

⁷ *Smith v. Retallick*, 48 Wn.2d 360, 293 P.2d 745 (1956), [husband drove a community car to get gas and on the way there, became involved in a road rage confrontation and assaulted another driver]; *Aechlmayr v. Lynch*, 6 Wn. App. 434, 493 P.2d 1026 (1972) [claim of alienation of affection against defendant for seducing plaintiff’s wife]; and *Brown v. Spokane County Fire Protection Dist. No.1.*, 21 Wn. App. 886, 586 P.2d 1207 (1978) [case involving the legitimacy of third party complaints in a wrongful death action, attempting to implead the husband...we simply did not understand its relevancy to the issues here and the Petition does not further explain why it is cited]; and *Bergmann v. State of Wash.*, 187 Wn. 622, 60 P.2d 699 (1936) [collection of a judgment for costs associated with a criminal case, not a tort claim]

⁸ *McHenry v. Short*, 29 Wn.2d 263, 186 P.2d 900 (1947), [community liability found despite less connection to management of the community property than with Mr. Wilson’s torts. The husband’s assault was committed in connection with an eviction. The court acknowledged that the assault itself may have been committed for personal motives, but still found it to have been committed in the course of managing the community rental property]; *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953) which we discuss at greater length above.

using the standard test for community liability. *Id.* at 200. Mrs. Wilson suggests *deElche* overruled *LaFramboise*, but it did not.

No less a scholar than Professor Harry Cross has analyzed *LaFramboise* in light of *deElche* in the post-*deElche* revision of his seminal article: *The Community Property Law in Washington* (revised 1985), 61 Wash.L.Rev. 13, 139 (1986).⁹ The purpose in reviewing these cases was to determine whether they likely would be decided similarly under the approach set forth in *deElche*. He concluded community liability probably would still be found under the facts of *LaFramboise*:

“*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.”.... at p. 139

3. Community Liability For A Spouse's Tort Is Not The Same As Employer Liability For An Employee's Tort.

Despite multiple cases finding community liability for a spouse's intentional tort, Petitioner claims respondeat superior decisions from the employer/employee arena conclusively foreclose such torts from ever serving as a basis for community liability.

⁹ *LaFramboise* was one of many cases summarized by *deElche* as representing facts where the results may have been influenced by the all or nothing test that *deElche* determined to change. However, the court did not overrule *LaFramboise* or any other case it questioned, leaving only the dicta that “[i]t may be that some torts which have in the past been classified as community (possibly as a result of “significant emotional factors or overtones” as suggested by Justice Finley's dissent in *Smith v. Retallick*, 48 Wn.2d 360, 365, 293 P.2d 745 (1956)) may now be properly considered separate.” *Id.* at 840.

Petitioner cites conflict with a series of cases arising out of employer/employee relationships. None of the cases cited involved acts of an owner or manager of the enterprise. None involve married couples. They are of little assistance in determining the community liability issue here.

For example, Petitioner cites *Niece v. Elmview Group Home*, 131 Wn.2d 39, 52-59, 929 P.2d 420 (1997). *Niece* involved a sexual assault by an employee in a nursing home. The court followed the long-standing rule that employers are generally not vicariously liable for intentional torts their employees. Other cases cited repeat similar language related to the liability of an employer for acts of an employee.¹⁰

The Court of Appeals reasoned otherwise, understanding that marital community liability was *sui generis*:

“...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

¹⁰ *Bratton v. Calkins*, 73 Wn. App. 492, 870 P.2d 981 (1994) [sexual assault in the context of an employee teacher at a school who initiated a sexual relationship with a student]; *Kuehn v. White*, *supra* [no vicarious liability attached to a trucking company for the assault committed by its truck driver in a road rage incident]; *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993) [doctor employed at a clinic who molested a patient during a physical examination]; *S.H.C. v. Lu*, 113 Wn. App. 511, 54 P.2d 174 (2002) [molestation of adult temple worshipper by head guru]; *CJC v. Corporation of Catholic Bishop of Yakima*, 138 Wn. App. 699, 985 P.2d 262 (1999) [liability of an employer Church for conduct of an employee].

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.”¹¹

Mrs. Wilson also cites *Francom v. Costco*, 98 Wn. App. 845, 991 P.2d 1182 (2000), involving sexual harassment by a non-managerial co-worker at Costco. The tort victim tried to reach the marital community of the tortfeasor and that claim was dismissed. Mrs. Wilson claims that, like *Francom*, Mr. Wilson’s motives were purely personal and therefore his acts of abuse must be outside the scope of his “employment” by the community. The Court of Appeals below considered this argument and thoughtfully concluded it was inapplicable because Mr. Wilson was not a mere employee, but an owner and manager of the community property:

“...In directing yard work for houses owned by his marital community, Mr. Wilson was managing property belonging to the community. In his 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.”

¹¹ Court of Appeals opinion at p. 12.

4. Public Interest In This Kind Of Tort.

Mrs. Wilson claims public policy demands she not be burdened with any share of liability here. This ignores other legitimate public interests applicable to the sexual abuse of Andrew Clayton by Mr. Wilson.

The first and, we argue, the foremost public interest here is the protection of minor children. The Wilson community chose to hire young children and to assume the responsibility that attends that undertaking. Mrs. Wilson, as well as her husband, undertook those responsibilities. She was fully aware that Andrew was doing work on her properties not on just one occasion but repeatedly for years.

“As a matter of public policy, the protection of children is a high priority.” *CJC, supra*, at 274. The legislative findings appended to RCW §26.44.030 state that “The Washington state legislature finds and declares: The children of the state of Washington are the state's greatest resource and the greatest source of wealth to the state of Washington. Children of all ages must be protected from child abuse. Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority.”¹²

Second, where such protection fails, there is another public interest: that of doing what can be done through a monetary award to

¹² See also *State v. Waleczek*,” 90 Wn.2d 746, 751, 585 P.2d 797 (1978) holding husband-wife privilege may be “subordinated to the overriding and paramount legislative intent to protect children from physical and sexual abuse.”

make the victim of such tortious conduct whole. See *Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978).¹³

Third, there is the public interest in making a business responsible for acts committed by its owners and high-level managers. *Glasgow, supra*. This relates directly to and reinforces the first public interest above, namely the protection of children voluntarily invited into a business.

In the community setting, these three public interests converge and support a determination that the community should be liable for a tort such as the one presented here. Only then will both spouses have the proper incentive to take seriously the responsibilities they have undertaken by hiring minor children and be held truly responsible for the injury caused by their community activities.

B. The Wilsons' Fraudulent Transfer of Community Property.

1. Petitioner Did Not Ask For Review Of The Trial Court's Conclusions Of Two Claims Of Statutory Constructive Fraud.

The petition only requests review of two of the four findings and conclusions of fraudulent transfer affirmed below. In addition to the fraudulent transfer rulings challenged by the Petitioner, the Court of

¹³ holding that insurance reimbursement was only due if the injured person had been made whole by the recovery: "This rule embodies a policy deemed socially desirable in this state, in that it fosters the adequate indemnification of innocent automobile accident victims."

Appeals specifically affirmed constructive fraudulent transfer under RCW 19.40.041(a)(2) and RCW 19.40.051(a).¹⁴ RAP 13.7(b) limits review to the specific issues raised by petitioner. Consequently, even if Petitioner succeeded in reversing the Court of Appeals on the fraudulent transfer claims challenged in the petition, she would still be subject to a Judgment against her for fraudulent transfer.

RCW 19.40.041(a)(2)¹⁵ and RCW 19.40.051(a)¹⁶ are similar though not identical bases for determining a transfer is fraudulent. In this case, Mr. and Mrs. Wilson conceded that Andrew Clayton was a known creditor at the time of the transfer and that the transfer made Mr. Wilson insolvent. The only specific challenge to these two conclusions of Constructive Fraud in the appeal below was a challenge to whether Mr. Wilson had received “reasonably equivalent value” for the transfer of property to Mrs. Wilson. The Court of Appeals affirmed the trial court’s conclusion that the transfer had been made without such reasonably equivalent value returning to Mr. Wilson.¹⁷ Mrs. Wilson’s Petition did not challenge the finding that reasonably equivalent value had not been received by Mr. Wilson. The statutes are not even cited in the Petition.

¹⁴ Court of Appeals opinion at p. 17-18.

¹⁵ Constructive Fraud as To Present and Future Creditors Under 23 §19.40.041(a)(2) is set forth in Conclusion of Law No. 24.

¹⁶ Constructive Fraud as to Present Creditors under §19.40.051(a) is set forth in Conclusions of Law Nos. 17, 18, 19, 20, 21, 22, and 23.

¹⁷ Court of Appeals opinion at p. 17.

Consequently, as the Court of Appeals noted, even if there were no support for the finding of actual intent to defraud, or this Court were to hold that Conclusive Common Law Fraud did not survive the passage of the Uniform Fraudulent Transfer Act, the transfers would still be fraudulent.

2. The Petition and Fraudulent Transfer Claims.

We have dealt with most of the points raised by Petitioner in our initial Answer to the Petition for Review on pages 13 through 18 and we refer the Court to that argument. The Petitioner also claims the UFTA should never be applied to property distribution from a divorce because creditors are already fully protected under the law.¹⁸

Petitioner argued that the UFTA is irrelevant and should not be applied to dissolution property transfers because fraud would not change the extent of property creditors could reach¹⁹, citing *Watters v. Doud*, 95 Wn.2d 835, 631 P.2d 369 (1981) and RCW 19.40.081(b) and (c). Petitioner incorrectly claims both caselaw and statute limit a creditor's remedy to the equity in the property at the time of the transfer where there

¹⁸ Petitioner cites *Hanson v. Hanson*, 55 Wn.2d 884, 350 P.2d 859 (1960) and two earlier cases, *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951) and *Farrow v. Ostrom*, 16 Wn.2d 547, 133 P.2d 974 (1943), for the rule that community creditors can reach post-divorce formerly community property, limited to the equity at the time of the divorce. None of these cases involve claims of fraudulent transfer of property.

¹⁹ The trial court specifically declined to do set aside the dissolution. For example, Conclusion of Law No. 9 refers to "formerly community property", and to both the property settlement agreement and to the dissolution decree.¹⁹

is fraud in such transfer. *Watters v. Doud* expressly identifies fraud in the transfer of property as an exception to this normal rule limiting community creditor's equity existing at the time of transfer:

“Creditors can also, using traditional remedies, have a property settlement agreement set aside by proving the divorce was an attempt to defraud them. [citations omitted]”²⁰

Similarly, RCW 19.40.081(b) and (c), cited by Petitioner in support of her argument, refer to the “value of the asset” at the time of transfer “subject to adjustment as the equities require.” This language is consistent with *Watters v. Doud*.²¹ Any other interpretation would allow defrauding parties to profit from their fraud by colluding to change future appreciation into unreachable separate property of the transferee spouse.

C. The Court's Award Of Future Earnings Loss Was Consistent With Washington Law.

The 1910 case alleged to be “in conflict” with the Court of Appeals decision merely stands for the obvious and long accepted principle that earnings loss damages are the difference in earning capacity before and

²⁰ *Id.* at 840.

²¹ Petitioner asserts the transfer did not occur when the Property Settlement Agreement was signed, but rather only when the deeds were recorded. We addressed these arguments in detail in our Brief of Respondent before the Court of Appeals, at pp. 28 to 30, subsection 2, “The Property Settlement Agreement Was Operative and Effectively Transferred the Community Property.” However, we did not specifically address RCW 19.40.061(1)(i) which Petitioner claims establishes the “transfer” at the time deeds are recorded in the public record. We can only respond that we do not read the statute to so state and the Petition does not explain further why she so concludes.

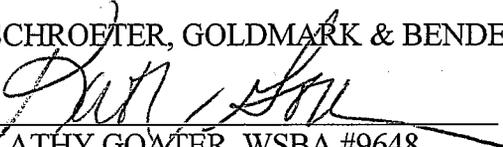
after an accident.²² Petitioner alleges that Andrew failed to prove his “pre-injury” capacity. That is not correct. As shown in our Statement of Facts, supra, expert testimony established that the years of abuse will seriously and detrimentally impact his ability to succeed vocationally. Such testimony formed a substantial foundation for an award of future wage loss/loss of earning capacity.²³

IV. CONCLUSION

Under these facts, it was both reasonable and just to hold the community liable for the harm done to Andrew Clayton. Mrs. Wilson must not be allowed to profit from her participation in the fraudulent transfer of essentially all the community property to her in the weeks after Mr. Wilson’s torts were discovered. The proper remedy is to allow Andrew Clayton to reach the appreciated value of that property to compensate him for the great harm he has suffered.

RESPECTFULLY SUBMITTED this 4 day of May, 2009.

SCHROETER, GOLDMARK & BENDER


KATHY GOATER, WSBA #9648
JAMES D. HAILEY, WSBA #7639
Attorney for Respondent

²² *Cook v. Danaher Lumber Co.*, 61 Wn. 118, 112 P. 241 (1910).

²³ RPVI 7, 12, 14, 15, 19-21, 54, 64, 81, 92, 94, 95-97, 98-99, 100-101, 103-104, 114, 130, and 130.

Appendix A
VERBATIM REPORT OF PROCEEDINGS DESIGNATIONS

Date of Trial	Designation of Report of Proceedings By Party	Witness or Event	Page Numbers in RP
12/09/05	Andrew Clayton cites as RP III	Opening Statements Janette Luitgaarden	1 – 64 65 – 77
01/03/06	Andrew Clayton cites as RP IV	Dr. Robin Sloane Andrew Clayton Robert Wheeler	7 – 32 37 – 95 96 - 192
01/04/06	Andrew Clayton cites as RP V	John Lennon Jessica Singh John Clayton Victoria Smith	5 – 58 73 – 98 98 – 117 118 - 194
01/05/06	Andrew Clayton cites as RP VI	Mary Kay Wilson Cloie Johnson Robert Moss Crystal Clayton Andrew Clayton	3 – 5 6 – 88 89 – 134 135 – 167 167 - 199
01/09/06	Andrew Clayton cites as RP VII	Douglas Wilson	4 – 113
01/10/06	Andrew Clayton cites as RP VIII	Linda Hamilton Judy Filibeck Douglas Wilson Janice Reha Mary Kay Wilson	16 – 22 23 – 55 56 – 98 99 – 164 165 - 205
01/11/06	Andrew Clayton cites as RP IX	Roland Nelson Mary Kay Wilson Judge Anthony Wartnik Mabry DeBuys	3 – 87 88 – 140 141 – 201 204 – 254
01/12/06	Andrew Clayton cites as RP X	Mary Kay Wilson	3 – 13