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NO. 66257-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I
(King County Superior Court Cause No. 06-2-11048-0 SEA)

JEAN TROST, R.N., and ALAN G. WARNER,

Appellants,

v.

AESTHETIC LITETOUCH, INC., P.S.,

Respondent.

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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A. Restatement of Standard of Review.

Appellate Courts review de novo questions of law and a Trial Court's conclusions of law. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Appellate Courts review findings of fact "under a substantial evidence standard." *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006). In the end "[a] Trial Court's findings of fact must justify its conclusions of law." *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

B. The Trial Court Incorrectly Entered Judgment Against Warner's Marital Community.

Trost worked for ALT from January 1999 until August 12, 2005. (CP 44) Warner did not marry Trost until August 24, 2005. (CP 19, 18) In Respondent's Brief (III. Counter-Statement of the Case (A.)), the Respondent states:

> "In August 2005, Trost attempted to obtain controlling interest in ALT, informing Dr. Isbell that one of ALT's competitors, Bella Tu, Inc., had offered her a 50 percent ownership interest. Id. On Friday, August, 12, 2005, Dr. Isbell rejected Trost's demand and terminated Trost's employment...."

> "The following weekend, Trost 'gathered computer discs containing lists of patient contact information and treatment histories.' Id. at 2-3."

August 12, 2005, was a Friday. The Respondent claims by the following weekend that she gathered ALT's computer discs, which they have alleged comprised of her tort. It is uncertain whether the Respondent is stating the following weekend to be Saturday, August 13, 2005, or Saturday, August 20, 2005. Despite the meaning of the Respondent's assertation, the fact remains that Trost and Warner did not marry until August 24, 2005. Thus, during the time that Respondent alleged the tort occurred the parties were not married. The presumption of the community nature of any debt does not arise until the evidence establishes that the debt incurred **during marriage**. *Sintra, Inc. v. City of Seattle,* 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997) and see *Oil Heat Co. v. Sweeney,* 26 Wn.App. 351, 613 P.2d 169 (1980).

While the Respondent may allege that the tort continued in September 2005, neither the Respondent nor the Trial Court has made any attempt to ascertain damages in which they allege to have occurred during the marriage.

In ALT's counterclaim against Warner it was alleged that "At all times relevant hereto, Warner had been married to Trost. All actions taken

by Trost at issue herein have been taken for the benefit of the marital community comprised of Trost and Warner." (CP 48) Warner in response to said counterclaim "denied" said assertion. (CP 48)

C. Separate and Apart.

The Respondent argues that the record is void as to Warner's allegations of being separated from his wife in September 2009, but he did raise the issue, but the Court did not place the matter back on the trial calendar for further determination. (CP 2631) (CP 2637) Warner raised these issues orally and by way of brief.

D. Amendment.

The Respondent argues that the Judgment is not amended but rather "revised" and that it is just a matter of a mere housekeeping issue that merely changed numbers to reflect the actual cost(s). This is absolutely not true. The original Judgment filed in this matter did not include the marital community of Warner. This is not a revision, it is shifting liability that was not fully litigated and/or proven by ALT.

ALT violated procedure and case law in its effort to amend the Judgment. The procedural requirements to amend any Judgment are specific and they failed to follow and the Trial Court failed to require ALT to satisfy court rules, statutes and existing case law.

In the Respondent's Statement of Fact, they state "On the 5th day of May, 2008, a Judgment was entered against Warner in his individual capacity." (CP 1520-22) (The original Judgment.) All parties agree that the Judgment was taken in his individual capacity, yet on September 24, 2010, the Trial Court ruled that "The Judgment entered June 13, 2008, indicates that the marital community comprised of Jean Trost and Alan G. Warner is liable." (CP 2061-2062) The Court having incorrectly amended that Judgment did so with no findings and fact to attempt to distinguish what actions occurred prior to marriage and what actions occurred after the marriage of Trost and Warner. Further, at the time of the amended Judgment, Trost and Warner had been living separate and apart since September 2009 (CP 2631) (CP 2637) and the Trial Court made no findings in regard to that despite the issue being raised by Warner.

The Appellate Court in the first appeal declined to order that the Judgment be amended so as to reach only Warner's share of his and Trost's community property. The Appellate Court reversed and remanded the case to the Trial Court for further proceedings. Those proceedings did not occur despite Warner bringing a timely motion to request that the case be

put back on the trial calendar and for the Trial Court to set appropriate dates to facilitate the expeditious determination of the remaining issues.

CONCLUSION

The Trial Court erred in Amending the previous Judgment to include Warner's marital community without further proceedings. The previous Judgment did not include his marital community. ALT continued to garnish wages after the reversal of Warner's individual liability and before the amended Judgment. Warner is entitled to an accounting at any time, but particularly when the garnishment is occurring under a Judgment that has been reversed. Further, it was an error to not grant an accounting.

Dated: September 20, 2011.

Respectfully Submitted,

KRISTINA A. DRIESSEN, WSBA #29187
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing APPELLANT'S REPLY BRIEF on the following individuals in the manner indicated:

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SIGNED this 20th day of September, 2011, at Auburn, Washington.

NICOLE SYMES