

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 OPENING BRIEF

**Kristina A. Driessen, WSBA #29187
Law Office of Ryan & Driessen, Inc., P.S.
16 A St. S.E.
Auburn, WA 98002
253-939-0811
Fax: 253-939-0471**

Attorney for Appellant, Alan G. Warner

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
	1. Did the Court err in allowing Defendants to Amend the Judgment to include Warner’s marital community?	2
III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT.....	6
	Standard of Review	6
	Issue 1: Did the Court Err in Allowing Defendants to Amend the Judgment to Include Warner’s Marital Community?	7
	A. Separate and Apart	7
	B. Amended Judgment	9
	C. An Accounting	10
	D. Attorney Fees	11
V.	CONCLUSION.....	11

TABLE OF AUTHORITIES

CASES

<i>Cingular Wireless, L.L.C. v. Thurston County</i> , 131 Wn.App. 756, 768, 129 P.3d 300 (2006)	6
<i>In re Marriage of Griswold</i> , 112 Wn.App. 333, 339, 48 P.3d 1018 (2002)	9
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 353, 172 P.3d 688 (2007)	7
<i>In re Marriage of Lindsey</i> , 91 Wn.App. 944, 957 P.2d 818, 822 (1998)	8
<i>Oil Heat Co. v. Sweeney</i> , 26 Wn.App. 351, 357, 613 P.2d 169 (1980)	7
<i>Pardee v. Jolly</i> , 163 Wn.2d 558, 566, 182 P.3d 967 (2008)	6
<i>Peters v. Skalman</i> , 27 Wn.App. 247, 617 P.2d 448 (1980)	8
<i>Seizer v. Sessions</i> , 132 Wn.2d 642, 940 P.2d 261 (1997)	8
<i>Seizer v. Sessions</i> , 132 Wn.2d 642, 940 P.2d 261 (1997) (citing <i>Aetna Life Ins. Co. v. Bunt</i> , 110 Wn.2d 368, 372, 754 P.2d 993 (1988)	8
<i>Seizer v. Sessions</i> , 132 Wn.2d 642, 940 P.2d 261 (1997) (citing <i>Togliatti v. Robertson</i> , 29 Wn.2d 844, 852, 190 P.2d 575 (1948)	8
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003)	6

Togliatti v. Robertson,
29 Wn.2d 844, 852, 190 P.2d 575 (1948) 8

RCW 4.72.020 10

RCW 26.16.140 7, 8

RAP 2.4 11

RAP 14.4 11

RAP 12.8 10

I.
ASSIGNMENTS OF ERROR

Appellant, Alan G. Warner [hereinafter referred to as “Warner”], assigns errors to the Final Judgment and err to the Order Granting Aesthetic Litetouch, Inc., P.S.’s Motion for Entry of Judgment and Final Judgment entered in the above entitled matter on October 13, 2010. (CP 2059-2060, 2061-2062) (CP 2066-2071) and specifically as follows:

1. The Court erred in entering an Amended Judgment against Warner’s marital community.
2. The Court erred in Ordering the Judgment of October 13, 2010, replaces and supersedes the Judgment entered against Alan G. Warner individually on May 5, 2008.
3. The Court erred in failing to order an accounting as requested and/or further evidentiary hearing to determine the amount, if any, owed by Warner individually or his marital community given the marital date of August 24, 2005, and the separation date of May 9, 2009.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Court err in allowing ALT to Amend the Judgment to include Warner's marital community?

III.
STATEMENT OF THE CASE

On the 31st day of March, 2006, this action was filed under King County Superior Court Cause Number 06-2-11048-0 SEA by Jean E. Trost, R.N [hereinafter referred to as "Trost"]. (CP 1-32) In said Complaint the Plaintiff was named as an individual residing within the jurisdictional boundaries of the Court. (CP 14)

On May 11, 2006, Respondents, Aesthetic Litetouch, Inc., P.S., John Paul Isbell, M.D., Melissa Isbell, and James E. Finnegan [hereinafter referred to collectively as "ALT"] filed their Answer, Affirmative Defenses and Counterclaim of Defendants to Plaintiff's Complaint and included a Third Party Complaint Against Bella Tu, Inc. and Alan G. Warner. (CP 33-46) ALT in their Answer admitted Jean E. Trost, R.N. to be an individual. (CP 34)

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 assertions. (CP 48) At all times relevant to this case Warner has denied that he was married to Trost during her employment with ALT and that the actions taken by Trost brought forth in ALT’s Counterclaim were for the benefit of the 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 1918)

Throughout ALT’s pleadings they continually assert the only basis for imposing liability on Warner is that he was married to Trost. Despite the allegations of the marital community, no discovery was conducted regarding when and at what time Trost and Warner were married or separated.

On the 5th day of May, 2008, a Judgment was entered against Warner in his individual capacity. A timely appeal of that determination was sought and thereafter on July 6, 2009, the Court of Appeals for the State of Washington, Division I, the Court found that pursuant to CR 56 (c) ALT had the burden to establish when there is individual liability, and had failed to do so. In fact, ALT had provided no evidence of Warner’s

personal wrong doing. As thus, it was improper for the Trial Court to grant Summary Judgment on the issue of Warner's individual liability.

Warner's individual liability was reversed. The Court also stated:

"We decline to order dismissal of ALP's individual claims against Warner or to order the Judgment amended so as to reach only Warner's share of his and Trost's community property."

Thus, the Court of Appeals acknowledged that there was no existing Judgment against Warner's marital community and they declined to order that said Judgment be Amended to include such. The Court reversed and remanded the case to the Trial Court for further proceedings.

Trost and Warner were married on the 24th day of August, 2005, (CP 1918) and living separate and apart on and after the 9th day of May, 2009.

The Court of Appeals also noted:

"ALT did not allege facts in its complaint that support a misappropriation claim against Warner individually. ALT referred to Warner only as Trost's husband and alleged that '[a]ll actions taken by Trost at issue herein have been taken for the benefit of the marital community comprised of Trost and Warner.' ALT's brief in support of its motion for summary judgment did not address Warner's conduct. No evidentiary support for the claim is present in the record. On appeal, to support its judgment against Warner individually, ALT points to Dr. Isbell's comment to Warner concerning the patient form templates constituting ALT's property. However, this statement does not establish Warner's individual liability for misappropriation of ALT's trade secrets. Warner did not work for ALT. There is no allegation that he personally used

ALT's patient lists to solicit business. At most, Dr. Isbell's statement establishes that he had a conversation with Warner about Trost's actions."

The same can be said about the current Judgment, at most, Dr. Isbell had a conversation with Warner prior to Warner and Trost's marriage.

ALT began garnishing Warner's wages on December 2, 2008. (CP 1628-1629) This Garnishment continued despite the Court of Appeals' Ruling on July 6, 2009. (CP 2065) On August 28, 2009, Warner brought an opposition to ALT's Third Garnishment of his Veteran Benefits. (CP 1847-1849) The Court failed to make a ruling, written or oral.

Warner then brought a Motion to Dismiss the Judgment against him, which was noted on the Court's calendar for July 2, 2010. (CP 1877-1906) In Warner's Motion to Dismiss, he requested the following relief:

*"1. The Third-Party Defendant, Alan Warner, in the above entitled case, in accordance with the First Circuit Court of Appeals, Mandate dated June 2, 2010, to dismiss all judgments against the Third-Party Defendant, Alan Warner in the above entitled Action.
2. To place this case back on the trial calendar and set appropriate dates to facilitate the expeditious determination of the remaining issues.*

3. Order the Defendants, and Third-Party Plaintiff, AESTHETIC LITETOUCH, INC., P.S. to provide an accounting to this court, of all the funds received from the Clerk of the Court and to return to the Clerk of this Court, all funds, in whole or in part, collected from Third-Party Defendant Alan Warner.

4. Direct the Clerk of the court, to return to Alan Warner, all funds currently in its possession.” (CP 1877-1906)

In ALT’s Response to Warner’s Motion to Dismiss, they allege that nowhere in the opinion of the Appellate Court did it address the liability of Warner’s marital community. (CP 1913-1917) This statement is incorrect, as noted above, the Court of Appeals specifically declined to order the Judgment be amended to include Warner’s marital community. Thereafter, by oral motion, ALT moved to amend the Judgment against Warner to include his marital community and to deny his request for an accounting and reimbursement. The Court granted ALT’s Motion. (CP 2059-2060)

IV. **ARGUMENT**

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).

Issue 1: Did the Court Err in Allowing ALT to Amend the Judgment to Include Warner’s Marital Community?

A. **Separate and Apart:** Trost and Warner were married on the 24th day of August, 2005. The presumption of the community nature of the debt does not arise until the evidence establishes that the debt was incurred during the marriage, before the parties separated. See *Oil Heat Co. v. Sweeney*, 26 Wn.App. 351, 357, 613 P.2d 169 (1980). Thus, all acts giving rise to liability occurring prior to the marriage are clearly separate liabilities of Trost. There was no finding and in fact no attempt to distinguish what actions occurred prior to marriage and what actions occurred after the marriage of Trost and Warner.

Trost and Warner have been living separate and apart since September 2009. The Trial Court made no findings in this regard despite the issue being raised by Warner.

Trost and Warner separated on May 9, 2009. In Washington, when a husband and wife live separate and apart their marriage may be defunct and under RCW 26.16.140, all earnings and accumulations are the

acquiring spouses separate property. *Seizer v. Sessions*, 132 Wn.2d 642, 940 P.2d 261 (1997). The statute contemplates permanent separation of the parties, i.e., a defunct marriage. *Seizer v. Sessions*, 132 Wn.2d 642, 940 P.2d 261 (1997) (citing *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372, 754 P.2d 993 (1988)). Where a marital community no longer exists there can be no community property because there is no longer any common enterprise to which each spouse is contributing. *Id.* While a mere physical separation does not dissolve the community, it is not necessary for purposes of RCW 26.16.140 that a dissolution action be final or even pending. *Seizer v. Sessions*, 132 Wn.2d 642, 940 P.2d 261 (1997) (citing *Togliatti v. Robertson*, 29 Wn.2d 844, 852, 190 P.2d 575 (1948)). The determination whether husband and wife are living separate and apart turns on the particular facts of each case. *Togliatti v. Robertson*, 29 Wn.2d 844, 852, 190 P.2d 575 (1948).

Generally, a defunct marriage is one in which the conduct of one of the spouses have exhibited their will to renounce the marriage with no intention of ever resuming the marriage relationship. *Peters v. Skalman*, 27 Wn.App. 247, 617 P.2d 448 (1980). Intent is a factual issue, to be decided by the trier of facts. *In re Marriage of Lindsey*, 91 Wn.App. 944, 957 P.2d 818, 822 (1998).

While debt incurred by either spouse during the marriage is presumed to be a community debt, when no community exists to incur liability because the parties are living separate and apart, the presumption may be overcome as community liability ordinarily will not attach to a marriage that is clearly defunct. *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002).

In the instant case, without so much as a written motion, not to mention findings of fact to allow the amendment of the Judgment, the Court ordered that it would supersede the previous Judgments taken against Warner individually, to be amended to include his one-half of the marital community.

B. Amended Judgment: ALT sought to convert an overturned Judgment against Warner, individually, in his separate estate, into a Judgment against his marital estate.

ALT's request was procedurally defective, and a violation of procedure and law.

The procedural requirements to amend any judgment are specific, requiring a written motion with accompanying affidavit, neither of which has been accomplished in this instance.

RCW 4.72.020, Motion to vacate – Time limitation.

The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party or on his attorney in the action, and within one year. (see also CR 60)

A one-year limitation, upon which amendment of a judgment may be had, the Judgment in question is in excess of two years old.

The Court of Appeals previously remanded the case for further proceedings at the Trial Court level, this did not occur, but rather substituted Warner's alleged marital estate without benefit of further discovery.

C. **An Accounting:** A bankruptcy proceeding was filed staying this matter on the 5th day of March, 2008. (CP 1444-1445) Thereafter, ALT obtained judgment against Warner individually. The Court of Appeals reversed that decision and in the interim Trost and Warner permanently separated on May 9, 2009. Trost and Warner are living separate and apart. Warner requested an accounting and a disgorging of the sums previously obtained through garnishment pursuant to RAP 12.8. The Court denied said request. (CP 1933) At the very least, an accounting should have occurred to determine if the amount of interest requested by ALT was accurate. Again there has been no testimony,

evidence or findings regarding what portion of the Judgment, if any, can attach to Warner.

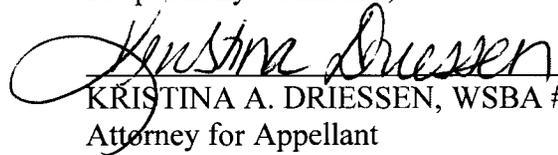
D. Attorney Fees: Pursuant to RAP 2.4, Appellant requests an award of attorney's fees in the amount of \$2,670.50 and costs (RAP 14.4) in the amount of \$1,541.00.

V.
CONCLUSION

The Trial Court erred in Amending the previous Judgment to allow the Judgment to attach to Warner's marital community and as such, said Judgment should be reversed.

Dated: June 6, 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 OPENING BRIEF on the following individuals in the manner indicated:

Rob J. Crichton, WSBA #20471
Keller Rohrback L.L.P.
1201 THIRD AVENUE, SUITE 3200
SEATTLE, WA 98101-3052

(X) Via Hand Delivery (ABC Legal Messengers)

Jean E. Trost a.k.a. Bella Tu, Inc.
2814 NE 149th Court
Duvall, Washington 98019

(X) Via Mail

SIGNED this 6th day of June, 2011, at Auburn, Washington.



NICOLE SYMES