68036-6

68036-6

No. 68036-6-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ESTATE OF SHIRLEY A. HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND JASON HARTY

Plaintiffs-Appellants,

v.

GREG HARTY,

Defendant-Respondent.

RESPONDENT'S BRIEF

INSLEE, BEST, DOEZIE & RYDER, P.S.
David J. Lawyer, WSBA # 16353
Attorneys for Respondent Greg Harty
777 - 108th Avenue N.E., Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
Telephone: (425) 455-1234
Fax: (425) 637-0247
Email: dlawyer@insleebest.com

425952.1 | 361415 | 0001

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB -8 PM 4: 28

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUE ON APPEAL 4

III. ARGUMENT AND LEGAL AUTHORITY 5

A. INTRODUCTION 5

B. UNDER WASHINGTON LAW, A MARITAL COMMUNITY IS NOT A SEPARATE JURISTIC PERSON. 5

1. Abolishment of the "Entity" View of Marital Communities in Washington. 6

2. Enforceability of Separate Liabilities of Married Persons 9

3. There Is No Logical Basis For Treating A Judgment For Attorney's Fees and Costs, Arising Under RCW 11.96A.150(1) Any Differently Than a Tort Judgment. 15

C. RAP 12.8 DOES NOT APPLY UNDER THE FACTUAL CIRCUMSTANCES PRESENTED IN THIS CASE..... 17

1. The Underlying Judgment Was Not Negated, and Is Still Enforceable. 17

2. Greg Harty's Garnishments "Took" No Property From Christine Harty To Be "Restored" Under RAP 12.8..... 22

3. Pat and Christine Harty Waived the Right to Prohibit Garnishment of Community Assets. 24

D. GREG HARTY IS ENTITLED TO AN AWARD OF ATTORNEYS FEES ON THIS SECOND APPEAL 26

IV. CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Atlantic Coast Line Railroad Co.,
295 U.S. at 310, 55 S.Ct. 713 19

Benson v. Bush,
3 Wash. App. 277, 477 P.2d 929 (1970) 11

Beyers v. Moore,
45 Wn.2d 68, 70, 272 P.2d 626 (1954) 9

Blais v. Phillips,
7 Wash. App. 815, 502 P.2d 1245 (1972)..... 11

Brotton v. Langert,
1 Wash. 73, 78, 23 Pac. 688 (1890).....7

deElche v. Jacobsen,
95 Wn.2d 237, 622 P.2d 835 (1980) 12, 13, 23

DePhillips v. Neslin,
139 Wash. 51, 245 Pac. 749 (1926) 11

Ehsani v. McCullough Family P'ship,
160 Wn.2d 586, 159 P.3d 407 (2007)..... 17, 18, 19

Gould v. McFall,
118 Pa. 455, 456, 12 A. 336 (1888)..... 19

Hartman v. Anderson,
49 Wn.2d 154, 298 P.2d 1103 (1956)..... 11

Household Financial Corp. v. Smith,
70 Wn.2d 401, 403, 423 P.2d 621 (1967).....8

Keene v. Edie,
131 Wn.2d 822, 935 P.2d 588 (1997)..... 15

Mason,
48 Wash.App. at 693, 740 P.2d 356 18

McHenry v. Short,
29 Wn.2d 263, 186 P.2d 900 (1947) 11

Milbradt v, Margaris,
103 Wn.2d 337, 693 P.2d 78 (1985) 23

Moffit v. Krueger,
11 Wn.2d 658, 661, 120 P.2d 512 (1941) 12

Pacific Gamble Robinson Co. v. Lapp,
95 Wn.2d 341, 344, 622 P.2d 850 (1980). 14

Powell v. Pugh,
13 Wash. 577, 578, 43 Pac. 879 (1896) 9

Schramm v. Steele,
97 Wash 309, 315, 166 Pac. 634 (1917) 7, 9, 10

Seattle-First Nat'l Bank v. Crystal & Gold,
85 Wn. App. 1084 (1997) 26

Town Concrete Pipe of Wash., Inc. v. Redford,
43Wash. App. 493, 499, 717 P.2d 1384 (1986) 19

Werker v. Knox,
197 Wash. 453, 456, 85 P.2d 1041 (1938) 12, 13

Wilson v. Horsley,
137 Wn.2d 500, 510, 974 P.2d 316, (1999) 25

Statutes

RCW 11.96A.150(1) 15, 16, 27

RCW 26.16.030(2) 14

RCW 26.16.030(3) 9, 14

RCW 26.16.030(3), 040 10

RCW 26.16.030(5) 9, 14

RCW 26.16.030(6) 9, 14

RCW 6.27 24

RCW 6.27.150(1)(b) 23

RCW 6.27.220 24

Rev. Comp. Stat., §§ 6890-6906 7

Wash. Terr. Code ch. 183 §2410 10

Rules

CR 11 2

RAP 12.8. ..... 3, 5, 6, 17, 18, 20, 21, 22

RAP 18.1(b) 27

RCW 11.96A 1

Other Authorities

Black's Law Dictionary 1580 (6th ed. 1990) 25

I. INTRODUCTION

This is a dispute between family members. This case originated when J. Patrick ("Pat") Harty and his sons, Jason and Benjamin, sued their brother/uncle, Greg Harty, when they discovered that Shirley Harty (mother to Pat and Greg Harty and grandmother to Jason and Ben) had left most of her financial estate to her son Greg. (CP 4).

The Plaintiffs' claims were tried to the bench in January of 2009. At the end of seven days of trial, the Plaintiffs rested their case-in-chief, and the trial court dismissed their claims on Greg Harty's motion. (CP 4) Pursuant to the authority granted under the Trust and Estates Dispute Resolution Action, RCW 11.96A, the trial court exercised its discretion to make an award and to enter judgment for attorneys' fees and costs in favor of Greg Harty. (Cp 11) The judgment entered in the trial court was originally entered against J. Patrick Harty and Christine Harty, husband and wife; Jason Harty and Carlotta Galluci Harty, husband and wife; and Benjamin Harty.

In their first appeal, the Petitioners challenged every aspect of the trial court's decision, seeking a complete reversal, and an order remanding the case to the King County Superior Court for a new trial before a different judge. This Court's decision on the first appeal

affirmed dismissal of the Petitioners' original claims, affirmed the trial court's decision that Greg Harty was entitled to an award of attorneys' fees, affirmed the trial court's finding that the amount of the fee award was reasonable and within the court's exercise of its discretion, and affirmed that under TEDRA, the trial court was within its discretion to award fees against a party to the TEDRA proceeding. (CP 2-13). The Court of Appeals reversed the trial court's determination that the judgment should be entered against the spouses of J. Patrick Harty and Jason Harty.[1] (CP 13-17). The Court of Appeals also authorized an award of attorney's fees on appeal in favor of Greg Harty, since the trial court's judgment was upheld in substance over the Petitioners' multiple challenges. (CP 17).

Neither the Petitioners nor Greg Harty sought review of this Court's decision on the first appeal. A mandate was issued on June 24, 2011. (CP 1). On remand, the trial court entered orders corresponding to the Court of Appeals' decision, modifying Greg's judgment so that the liability applies only to J. Patrick Harty, Jason Harty and Benjamin Harty, and not to any of their spouses. (CP 154-157). The Court also

[1] As a related matter, a post-trial supplemental judgment under CR 11 was also reversed by this Court in the Petitioners' first appeal.

entered an order vacating the supplemental judgment, in accordance with the Court of Appeals directive. (CP 158159). Upon the Court of Appeals' permission, Greg Harty presented his claim for attorney's fees on appeal to the trial court, and a second judgment, for fees on appeal, has also been entered against J. Patrick Harty, Jason Harty and Benjamin Harty. (CP 150-153).

On remand, however, Pat Harty[2] also made a separate motion, asking the trial court for judgment against Greg Harty, in an amount equal to all sums collected by Greg through writs of garnishment. (CP 37-38). Noting that all of the sums collected by Greg Harty in enforcement of his judgment during the pendency of the first appeal came from community property assets, Pat argued that these recoveries must be disgorged, under RAP 12.8.

In response, Greg Harty argued that the Pat had waived the right to oppose the garnishment process, and that, even under the modified judgment following the Petitioners' first appeal, Greg had a right to enforce his judgment against Pat Harty's one-half interest in community

---

[2] For reasons explained infra, it is noteworthy that only Pat Harty made a motion for recovery of garnished monies. Christine Harty is identified as a "party" in the Notice of Appeal for this second appeal, but she was not

assets, because Pat Harty admittedly had no separate assets from which to satisfy all or any part of the judgment entered against him. (CP 124-134).

By order dated October 31, 2011, the trial court entered the Modified Judgment *Nunc Pro Tunc* (CP 154-157), entered an order vacating the supplemental judgment previously entered (CP 158-159), denied Pat's motion for disgorgement of garnishment proceeds (CP 160-162), and entered judgment for attorneys' fees and costs incurred by Greg Harty in the successful defense of the Petitioner's first appeal. (CP 150-153).

On November 8, 2011, J. Patrick filed a timely motion for reconsideration (CP 163-169), which was denied by order dated November 30, 2011. (CP170-171) This appeal follows the denial of the motion for reconsideration. (CP 172-173).

II. ISSUE ON APPEAL

Did the trial court correctly deny Petitioners' request for disgorgement of garnishment proceeds, under circumstances where the judgment debtor lacks sufficient separate assets to satisfy any portion of

---

identified as a moving party in the remand motion for recovery of garnishment proceeds.

the judgment, and where the proceeds of garnishment do not exceed the judgment debtor's one-half interest in community assets, and where the judgment debtor did not supersede the judgment entered, nor take any steps to object to the garnishment writs?

III. ARGUMENT AND LEGAL AUTHORITY

A. INTRODUCTION

The Petitioners' simple analysis is fatally flawed because it begins with an incorrect but unstated assumption. Without directly saying so, Pat Harty assumes that the Patrick and Christine marital community is a "juristic person". Under this erroneous assumption, Pat argues that the marital community is a "party" to this dispute that was "harmed" by Greg Harty's judgment enforcement actions, and that this "party" is entitled under RAP 12.8 to be returned to the economic position it enjoyed prior to Greg's judgment enforcement efforts.

B. UNDER WASHINGTON LAW, A MARITAL COMMUNITY IS NOT A SEPARATE JURISTIC PERSON.

Pat Harty's analysis is wrong because the J. Patrick and Christine Harty marital community is not a "juristic person". The marital community is not, therefore, a "party" to this appeal or to the underlying trial court action. The "marital community" does not own property or

other assets separate and apart from Pat Harty and Christine Harty themselves.

It is somewhat ironic that this dispute is back before the Court of Appeals where Pat's limited success on the first appeal was to argue that Christine Harty lacked standing to be considered a "party" in the underlying TEDRA action, and that judgment liability had to be considered a separate obligation of Pat Harty only; while Greg argued, unsuccessfully, that the underlying lawsuit was a "family project" of both Pat and Christine Harty, such that the judgment entered by the trial court was properly a community liability. Now, Pat seeks to argue that the marital community was itself a "party", separate and distinct from the spouses who comprise it, entitled to invoke the benefits of RAP 12.8. The black and white letter of the law requires the conclusion that the Harty marital community is not an entity that can be a "party" to a lawsuit. The consequences of this conclusion bear heavily on the proper analysis of Pat Harty's appeal.

1. Abolishment of the "Entity" View of Marital Communities in Washington.

The so called "entity" view of community ownership of property was rejected by the Washington Supreme Court in 1930. Prior to 1930,

courts in this state had held the view that the legislature had created a statutory entity in the form of a marital community. *See, Schramm v. Steele*, 97 Wash 309, 315, 166 Pac. 634 (1917); *Brotton v. Langert*, 1 Wash. 73, 78, 23 Pac. 688 (1890).

In *Bortle v. Osborne*, 155 Wash. 585, 589-90, 285 Pac. 425 (1930) the court rejected the entity view, stating:

> By the community property law of this state, Rev. Comp. Stat., §§ 6890-6906, the legislature did not create an entity or a juristic person separate and apart from the spouses composing the marital community. The legislature did nothing more than classify as community property – designate the character of certain property as community and other property as separate – property acquired after marriage by the spouses. We have, for convenience of expression, employed the terms "entity" and "legal entity" in referring to a partnership and to a marital community. However, we have never held that a partnership or a marital community is a legal person separate and apart from the members composing the partnership or the marital community, or that either the partnership or the marital community has the status of a corporation.

Id. at 589. For the last eighty years, our Supreme Court has never returned to the "entity" view that Pat Harty silently urges on this appeal.

In fact, "[l]ater cases have made it clear ... that the community does not exist as a separate and distinct juristic entity, and that the property of the community is under the ownership of the husband and

wife. *Household Financial Corp. v. Smith,* 70 Wn.2d 401, 403, 423 P.2d 621 (1967).

Regardless of our imprecise use of language, Washington Courts have long recognized that a marital community is not a separate entity in and of itself. Rather, the marital community is just a convenient reference to the manner in which property can be held by married persons. Amongst married couples, property can be held in any of three ways: the husband's separate property, the wife's separate property, and community property.

Likewise (and logically) liabilities of married persons can also take three characteristic forms: the separate liabilities of the husband, the separate liabilities of the wife, and the joint liabilities of the husband and the wife. It comes as no surprise that for a joint liability of the husband and the wife, the judgment creditor can enforce the judgment against any of three forms of property the married couple might own. The situation is more complicated where, like here, a judgment is the separate liability of one of the two spouses.

2. Enforceability of Separate Liabilities of Married Persons

Community property was historically exempt in Washington from judgments arising from separate tort activities of one of the two spouses. Separate torts are those that do not arise from management of community property or do not provide any benefit to the community. Beginning in 1917, victims of separate torts had no means of satisfying judgments against solvent, married tortfeasors unless the tortfeasors had sufficient separate property to pay them. *Schramm v. Steele*, 97 Wash 309, 314-18, 166 Pac. 634 (1917) (community personal property is not available to satisfy a judgment on a husband's separate tort).[3]

Somewhat in contrast, early Washington cases held that community *personal* property could be sold to satisfy a husband's separate *contractual* debt, because the husband had absolute management and control of personal property. *Powell v. Pugh*, 13 Wash. 577, 578, 43 Pac. 879 (1896). But *real* property was subject to a wife's consent or

[3] In contract, the rule developed somewhat differently, because there was a basic presumption of community liability for contractual debts, rebuttable by proof of purely separate benefit. *See., e.g., Beyers v. Moore*, 45 Wn.2d 68, 70, 272 P.2d 626 (1954). Further, the legislature has required joinder of both spouses for transactions involving community real property (RCW 26.16.030(3)), community business transactions (RCW 26.16.030(6)), and even to pledge or encumber household appliances (RCW 26.16.030(5)).

joinder in the debt, due to statutory limitations on subjecting community real estate to community debts. Wash. Terr. Code ch. 183 §2410; RCW 26.16.030(3), 040. In this fashion, community real property was immune from execution on a husband's separate contractual debts, but community personal property was vulnerable to such debts.

In the *Schramm* case, the Washington Supreme Court held that community *personal* property could not be reached to satisfy a separate *tort* liability. The *Schramm* court reasoned that the theoretical basis for community liability for the separate acts of the husband arose under the doctrine of *respondeat superior*, based on the then-prevailing view that the marital community was a distinct legal entity, for which the husband was acting as an agent.[4] However, because the principal is not liable for acts committed by an agent that are outside of the scope of the agent's authority, the *Schramm* court held that community property was reachable only when the husband had acted on behalf of the entity. *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634 (1917). Thus, the *Schramm* court determined that community property – real or personal – was not available for execution on a judgment for a separate obligation

---

[4] Equal management of community assets did not come along until 1972.

arising in tort or in contract. Under the "entity" theory, community property was only available to satisfy a tort judgment if the tort was committed during the course of managing community property, or if the tortious conduct was aimed at providing some benefit to the community.

This harsh and inequitable ruling led to decades of decisions in which Washington courts incrementally expanded the notions of "management of community property" and "benefit to the community", finding ways to allow innocent tort victims to be compensated through community assets.[5]

When the entity view of marital communities was rejected in 1930 by *Bortle v. Osborne*, the principal and agent analysis underlying the liability framework disappeared. But the *Schramm* rules of community and separate liability lived on. Because it became so

---

[5] *See, e.g., Hartman v. Anderson*, 49 Wn.2d 154, 298 P.2d 1103 (1956) (community liable for wife's misrepresentation of boundaries of property); *McHenry v. Short*, 29 Wn.2d 263, 186 P.2d 900 (1947) (community liable for fatal assault by husband, ejecting party from community property); *DePhillips v. Neslin*, 139 Wash. 51, 245 Pac. 749 (1926) (community liable for slander, assault and malicious prosecution to recover property allegedly stolen from community business); *Blais v. Phillips*, 7 Wash. App. 815, 502 P.2d 1245 (1972) (community liable for husband's assault in court parking lot where wife allegedly supported him); *Benson v. Bush*, 3 Wash. App. 277, 477 P.2d 929 (1970) community liable where defendant sprayed chemicals on plaintiff's dog during dog fight, where altercation was part of continuing dispute over community property).

important to find that a liability was a community obligation, the Washington Supreme Court recognized a trend toward finding ways to make community property available to tort creditors, because it was unfair for a solvent tortfeasor to use his marital status as a means to escape responsibility for harm he caused, leaving victims uncompensated. *See Werker v. Knox*, 197 Wash. 453, 456, 85 P.2d 1041 (1938). Courts began to expand the test for community liabilities, finding community liabilities not only where money was involved, but also where the acts were committed in the course of community recreation[6], or for a community purpose[7].

In 1981, the Washington Supreme Court made a significant shift in its analysis of enforceability of separate judgments in *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980). There, the court overruled *Schramm*, and held that, for torts committed by one spouse, and not in the management of community business or for its benefit, the separate property of the tortfeasor should be primarily available to satisfy the obligation; and if there is insufficient separate property, then the

---

[6] *E.g., Moffit v. Krueger*, 11 Wn.2d 658, 661, 120 P.2d 512 (1941).

[7] E.g., *Werker v. Knox*, 197 Wash. 453, 85 P.2d 1041 (1938).

tortfeasor's half interest in community personal property shall first become liable. *Id.* at 246. Relying on the 1930 rejection of the entity theory of community ownership under *Bortle*, the *deElche* court could see no justification for insulating any property a person owns from a tort judgment. *Id.* at 242-44.

The *deElche* court's apparent goals were (1) to continue to impose liability on community assets when a tort is committed for the benefit of a community, (2) to protect the separate property of the innocent spouse where the tort is committed that is not for a community purpose or benefit, and (3) to allow the maximum prospect for recovery by the innocent victim of a solvent tortfeasor. Thus, the holding of *deElche* is that a victim of a separate tort is permitted to enforce a judgment to the extent of the tortfeasor's one-half interest in community personal property. The innocent spouse (in this case, Christine Harty) is protected with a right of reimbursement, protected by an equitable lien against remaining community assets, arising upon dissolution of the community. *Id.* at 246. In this fashion, enforcement of a separate obligation against Pat Harty's one-half share of community assets will not invade Christine Harty's financial estate if the marriage dissolves.

While the *deElche* decision involved a tort liability, the decision only suggests that contractual debts would be treated differently.[8] Going all the way back to *Schramm*, the Washington Supreme Court has said that any distinction between contractual and tort liabilities is "absurd". *Schramm v. Steele,* 97 Wash. 309, 314, 166 Pac. 634 (1917). But, to the extent that such a distinction exists, it can be explained. In general, torts involve injury to innocent victims, and either a negligent or intentionally injurious tortfeasor. Contracts, in contrast are the product of voluntary interaction between two parties, where each has a measure of control over the legal consequences of the undertaking, which can include identifying parties liable for breach, limiting damages, etc. There is legislative policy already in existence to protect community assets from voluntary depletion by one spouse.[9]

While *deElche* was limited in its facts to considering whether community *personal* property should be exposed to enforcement of a

---

[8] For example, later in the same year that *deElche* was decided, the Supreme Court cited the case as contrary authority to the proposition that, under Colorado law, only a husband's property is subject to a separate debt. By use of the term "debt", the Washington Supreme Court may conclude that an obligor's spouse's half of community assets are subject to separate contractual obligations. *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 344, 622 P.2d 850 (1980).

[9] *See, e.g.*, RCW 26.16.030(2), (3), (5), (6).

separate tort liability, subsequent case law has expanded that enforceability to community *real* property. *See Keene v. Edie*, 131 Wn.2d 822, 935 P.2d 588 (1997).

3. There Is No Logical Basis For Treating A Judgment For Attorney's Fees and Costs, Arising Under RCW 11.96A.150(1) Any Differently Than a Tort Judgment.

Greg Harty is aware of no reported decision from any Washington Court that has considered the enforceability of a separate debt arising under RCW 11.96A.150(1), or any other statutory authority, against an obligor spouse's one-half of community assets, where the obligor spouse lacks separate assets to satisfy the obligation. The question may be one of first impression.

The *nature* of Pat's liability to Greg much more closely resembles a tort liability than a contract liability. The obligation is involuntary, and imposed by operation of law, and not by any agreement between the parties. Greg is an innocent victim, in the sense that he was forced to suffer economic harm by reason of the intentional acts of his brother and nephews.

Pat Harty has consistently made the circular argument that it would be more just to structure the judgment in this case a manner that

Greg would never be able to collect what the court has ruled he is entitled to receive because, otherwise, Pat would be put to the hardship of having to pay it. In ruling for Greg Harty on this issue, the trial court judge, who observed the seven-day trial, added her observation:

> The Court found much of the testimony to be mean-spirited and filed as a means to punish Greg Harty rather than one designed to resolve a genuine dispute re Shirley Harty's intent. A fee award from the estate accomplishes what the Petitioners did not achieve through trial. Fundamental fairness and the Court's prior findings require the entry of this order.

(CP 125)

Pat Harty tried unsuccessfully to get the trial court to decline to awardi fees. He tried unsuccessfully to get the trial court to enter judgment in favor of Greg against the insolvent probate estate of Shirley Harty. The trial court saw through those efforts, and awarded judgment for Greg against the parties who sued him with such animosity, and improper purpose. While the authority for the judgment arises out of statute, and not common law, the *character* of the obligation is identical to a tort liability. This court should hold that the principles of *deElche* apply to a judgment for fees and costs under RCW 11.96A.150(1).

C. RAP 12.8 DOES NOT APPLY UNDER THE FACTUAL CIRCUMSTANCES PRESENTED IN THIS CASE.

1. RAP 12.8 is Not Automatic In Its Application, and Should Not Be Applied Here.

Pat Harty's casual reference to *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 159 P.3d 407 (2007) cannot be squared with his excoriation of the trial court's denial of his motion for disgorgement of garnishment proceeds. The case strongly favors Greg's position. As one of few reported cases interpreting RAP 12.8, *Ehsani* is illuminating. First the *Ehsani* court noted that

> [t]he plain language of RAP 12.8 is ambiguous because the phrase "in appropriate circumstances" is not defined therein or in any related statute. This language inherently requires judicial construction based on other sources of authority to determine when restitution is appropriate under RAP 12.8.
>
> Appropriate circumstances" for providing restitution under RAP 12.8 may be identified by looking to the common law of restitution as set forth in the 74. Restatement of Restitution § 74

Id. at 590. Section 74 of the Restatement of Restitution is not nearly as categorical as Pat Harty would have this court conclude. The section provides:

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

And so, the trial court on remand was tasked with determining whether it would be inequitable to permit Greg Harty to retain garnishment proceeds, recovered under procedurally proper garnishment efforts, during the pendency of Pat and Christine Harty's first appeal. The Ehsani court recognized this rule, and stated:

> As an initial matter, the Court of Appeals errs in suggesting that under RAP 12.8 reversal of a trial court judgment entitles judgment debtors to restitution of attorney fees as a matter of right. *See Ehsani*, 2005 Wash.App. LEXIS 3181, at *6 (citing *Mason*, 48 Wash.App. at 693, 740 P.2d 356). This assertion is fundamentally at odds with the equitable nature of the restitution remedy.

Ehsani at 596.

The total amount recovered by Greg through garnishments did not even match the interest that has accumulated on the judgment since it was entered. Pat did not supersede the judgment during his appeal, which was largely unsuccessful anyway. Of course, most important to the trial court's consideration is the fact that the Court of Appeals did not

reverse the trial court's decision and negate the liability. The trial court could easily see the incongruence of Greg Harty being simultaneously a judgment creditor to Pat Harty separately, and to Jason and Ben Harty, and then to be a judgment debtor to Pat and Christine Harty. It was not inequitable in the exercise of the trial court's sound discretion, to deny Pat's request for a disgorgement of garnishment proceeds under the circumstances.

As explained by the United States Supreme Court in Atlantic Coast Line Railroad Co., 295 U.S. at 310, 55 S.Ct. 713 (quoting Gould v. McFall, 118 Pa. 455, 456, 12 A. 336 (1888), and quoted with approval by *Ehsani*, 596):

> Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it

This Division One has itself previously recognized this fundamental principle of restitution law. *See Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wash. App. 493, 499, 717 P.2d 1384 (1986) ("A party must make restitution when he has been unjustly enriched at

the expense of another. The mere fact of benefit alone is not enough. Liability only attaches where the circumstances of the benefit would make it unjust to retain it." (citations omitted)). Additionally, the plain language of RAP 12.8 confirms that its restitution remedy is discretionary, not a matter of right. Restitution is to be provided by the trial court "in appropriate circumstances;" it is not automatic upon the modification of a judgment by an appellate court. Pat and Christine Harty fail to properly frame the issue, and analyze why they consider the trial court's decision in this case to be an abuse of discretion. Instead, they improperly couch relief under RAP 12.8 as automatic, and strenuously criticize the trial court judge for not treating it that way, when in fact, Pat and Christine Harty misstate the standard.

2. The Underlying Judgment Was Not Negated, and Is Still Enforceable.

Relying on *State v. A.N.W. Seed Corp.*, 56 Wn. App. 763, 785 P.2d 838 (1990), rev'd 116 Wn.2d 39, 802 P.2d 1353 (1991), Pat and Christine Harty oversimplify the analysis and conclude that monies garnished while this court's original judgment was being appealed **must** be "restored". The argument is self serving, and ignores the context of this case.

First, in *A.N.W. Seed,* a default judgment of some $750,000 was ***vacated*** on appeal, and the case was remanded for trial. During the pendency of the appeal, however, the judgment creditor had executed upon both real and personal property assets, selling them to produce cash in partial satisfaction of the judgment. Because the appeal completely erased the liability, RAP 12.8 came into play. Here, and unlike the situation in *A.N.W. Seed*, the judgment and obligation have not been vacated or reversed.

In the first appeal, and despite Pat's broad assault, the Court of Appeals did not disturb the underlying decision of the trial court on the substantive merits, did not disturb the determination that Greg was entitled to a fee award, did not disturb the determination that he was entitled to an award against his adversary parties, and did not disturb the finding as to the reasonableness of the amount of the fee award. The Court of Appeals has only ruled that the obligation is Pat Harty's separate obligation, and not the joint obligation of Pat and Christine Harty.

3. Greg Harty's Garnishments "Took" No Property From Christine Harty To Be "Restored" Under RAP 12.8.

RAP 12.8 provides, in pertinent part:

> If a **party** has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any **property taken from that party**, the value of the property, or in appropriate circumstances, provide restitution.

(emphasis added). As analyzed in great detail above, a marital community is not a juristic person, and the "Pat and Christine Harty marital community" was never a "party" to this lawsuit. Christine Harty was successful in the first appeal in having the judgment for fees and costs limited to that of a separate obligation of Pat, and not a joint obligation of both spouses. But, for the reasons explained below (and successfully argued to the trial court), Greg Harty's garnishment activities never "took" any property from Christine Harty that would be the subject of any order under RAP 12.8.

Greg's ability to execute against property assets that are community in character is limited by the rule of *deElche*: Greg must first seek to satisfy his judgment against Pat's separate assets. Pat has already given sworn testimony by declaration that he owns ***no*** separate

assets of any value. (CP 130). Hence, his separate liability to Greg cannot be satisfied out of his separate property assets. Where Pat's separate assets are insufficient to satisfy the judgment, Greg may proceed against Pat's half of the assets of the marital community. *deElche v. Jacobsen,* 95 Wn.2d 237, 622 P.2d835 (1980). In *Milbradt v, Margaris*, 103 Wn.2d 337, 693 P.2d 78 (1985) the court applied *deElche* retroactively, and garnishment of one-half of the husband's salary was permitted in efforts to enforce a separate judgment that was entered before *deElche* was decided.

Under a wage garnishment, seventy-five percent of a debtor's "disposable earnings" are exempt from garnishment. RCW 6.27.150(1)(b). Accordingly, no wage garnishment under Washington's statutory framework can ever invade the non-obligor's half of community wages. Greg Harty can never lawfully garnish any more than 25% of Pat Harty's periodic *net* paychecks. So, no matter how many garnishment writs he obtains, Greg never can actually execute on his judgment against Christine Harty's one-half interest in any community paycheck. The rule of *deElche* gives Christine Harty additional protection in the form of an equitable lien against community assets in

the amount of Greg Harty's garnishment recoveries so that, in the event of a dissolution of their marriage, none of Greg Harty's collection activities will cause Christine Harty to receive less than her one -half of the couple's community assets.

4. Pat and Christine Harty Waived the Right to Prohibit Garnishment of Community Assets.

Garnishments are "special proceedings", authorized by legislation under RCW 6.27. Under the statutory scheme, a judgment debtor has the right to "controvert" the answer filed by a garnishee defendant, and to argue to the court why the funds subject to garnishment should not be delivered into the possession of the judgment creditor. RCW 6.27.220. If a judgment debtor can persuade the court that the funds are not properly subject to garnishment, the court has the power to order the funds exempt from being used to satisfy the judgment.

A judgment debtor is not required to use the controversion process contained in RCW 6.27. A judgment debtor may also make a motion to quash a writ of garnishment. If successful, when a garnishment writ is quashed, the funds otherwise subject to garnishment are released to the judgment debtor.

Patrick and Christine Harty never took any steps to interrupt any of the garnishments exercised by Greg Harty following entry of judgment. As Courts in this state and others have so often remarked, waiver is defined as the "intentional or voluntary relinquishment of a known right." Black's Law Dictionary 1580 (6th ed. 1990). *Wilson v. Horsley*, 137 Wn.2d 500, 510, 974 P.2d 316, (1999). Patrick and Christine Harty were acutely aware of their position and argument that community assets were beyond the proper reach of Greg Harty in seeking to recover on his judgment. Yet, Pat and Christine Harty took absolutely no steps to prevent those community assets from being accessed to satisfy Greg's judgment. Pat and Christine did not supersede the judgment. They did not controvert the answers of garnishee defendants. They did not petition the court to quash the garnishment writs. They knowingly and voluntarily allowed the garnishment proceedings to take place. They waived the right to contest the garnishments.

It must also be stressed that the Court of Appeals did not, on the first appeal, undermine the basic judgment and liability. Pat Harty is liable to Greg Harty, for the entirety of the judgment. It is perfectly

okay for a marital community to permit a separate liability to be satisfied through application of community assets. The best evidence of this right is, ironically, the fact that Pat and Christine Harty pledged their community asset, in the form of equity in their family home, against Pat's separate liability for attorney's fees to his lawyers, incurred in the course of pursuing his separate claims against Greg! If Patrick and Christine Harty can choose to apply community assets to Pat's bill for his own attorney's fees, surely they can just as properly allow community assets to be used to satisfy a small fraction of Pat's separate liability to Greg in the form of a judgment. By failing to take action to prevent the garnishment of community funds, the community waived the right to retroactively undo the garnishment process. *See also*, *Seattle-First Nat'l Bank v. Crystal & Gold,* 85 Wn. App. 1084 (1997) (defendant's failure to make motion to quash prejudgment writ of garnishment operated as a waiver of the right to quash).

D. GREG HARTY IS ENTITLED TO AN AWARD OF ATTORNEYS FEES ON THIS SECOND APPEAL

Even though Pat has finally conceded the substantive outcome of his unsuccessful TEDRA action, this appeal still arises out of TEDRA. Pat's dogged efforts to sabotage Greg's legal victory are part of a

longstanding vendetta, borne of anger by Pat toward his brother. An unchallenged finding of fact from the trial court was that much of the testimony at trial betrayed Pat's mean spirited effort to punish Greg, rather than to get at the truth. (CP 125). The cost of defending Pat's legal assault has been financially devastating to Greg.

Affirming the trial court's decision will, it is hoped, end the substantive elements of this long and difficult battle between family members. Justice demands, however, that Greg not be made to suffer still more financial damage as a result of this latest effort. Under RCW 11.96A.150(1), this court has the authority to make another fee award in favor of Greg, as it did in the first appeal. Pursuant to RAP 18.1(b), Greg hereby respectfully requests that the court make an award of his reasonable attorneys fees incurred in defending this second appeal.

IV. CONCLUSION

The evidence before the court is not complex, although the rationale supporting Greg Harty's right to enforce his judgment against Pat Harty's one-half of community assets arises out of relatively obscure and intellectually complex legal authority, and requires a solid understanding of the evolution of community property principles in this state.

The judgment in Greg's favor has been affirmed in substance and amount by the Court of Appeals. The Court of Appeals has only affected the original judgment by determining that Christine Harty is not jointly liable on it. For this reason, Greg's avenues of pursuit against community assets are limited by the rule of *deElche*. Because Pat Harty has previously given sworn declaration testimony to this court that he has no separate property of any significance, Greg has a right to execute against Pat's half interest in community personal property.

Because the garnishment statute exempts 75% of any given net paycheck from execution, Greg has never been able to invade Christine Harty's half of any community paycheck through wage garnishments. Because Greg has a right to enforce his judgment, albeit with limitations, against Pat Harty's one-half interest in community assets, Greg's garnishments have never been "wrongful". Because of Pat and Christine Harty's decision not to supersede the judgment, Greg was authorized to execute on the judgment during Pat's appeal. Pat has never made any suggestion that Greg violated any garnishment procedure. Pat never controverted any garnishment answer, and never sought to quash any

garnishment writ. In this way, Pat and Christine waived the arguments they seek to make now.

But even in the absence of a waiver, Greg has been statutorily limited to recovering a maximum of 25% of any of Pat's specific paychecks. Thus, Greg has not received through garnishments, even as much as one half of Pat's community wages.

Pat's entire motion is premised on the "entity" theory of community property that was formally rejected by the courts of this state back in 1930, in *Bortle v. Osborne*. There is no juristic person known as the Patrick and Christine marital community. The Pat and Christine marital community was never a "party" from whom any property was "taken" that needs to be "restored" under RAP 12.8 as a result of the decision of this court on the first appeal. Rather, there is certain property that is community property in character, and Greg Harty's judgment, according to the decision of the Court of Appeals, can only be enforced against Greg's one-half interest in any such community property. Greg has not violated that limitation in his garnishment activities. The trial court's rejection of Pat and Christine's motion for recovery of garnished funds must be affirmed.

RESPECTFULLY SUBMITTED this 8th day of February, 2012.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____
David J. Lawyer, W.S.B.A. #16353
Attorneys for Respondent Greg Harty

No. 68036-6-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ESTATE OF SHIRLEY A. HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND JASON HARTY

Plaintiffs-Appellants,

v.

GREG HARTY,

Defendant-Respondent.

DECLARATION OF SERVICE

INSLEE, BEST, DOEZIE & RYDER, P.S.
David J. Lawyer, WSBA # 16353
Attorneys for Respondent Greg Harty
777 - 108th Avenue N.E., Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
Telephone: (425) 455-1234
Fax: (425) 637-0247
Email: dlawyer@insleebest.com

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB -8 PM 4:28

426226.1 | 361415 | 0001

ORIGINAL

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ESTATE OF SHIRLEY A. HARTY, J. PATRICK HARTY, BENJAMIN HARTY AND JASON HARTY, Appellants, vs. GREG HARTY, Respondent.	No. 68036-6-I DECLARTION OF SERVICE

DECLARATION OF SERVICE

I HEREBY CERTIFY that on this 8th day of February, 2012, I caused to be served true and correct copy of the following documents:

1. Respondent's Brief; and
2. Declaration of Service

to the individual(s) named below in the specific manner indicated:

Attorneys for Petitioners

Charles "Ted" Watts
Oseran Hahn Spring Straight
& Watts, P.S.
10900 NE Fourth St. #850
Bellevue, WA 98004

- [x] Personal Service (Legal Messenger)
- [ ] U.S. Mail
- [ ] Certified Mail
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Fax #
- [ ] Email

DATED this ____ day of February, 2012, at Bellevue, Washington.

Jerilyn K. Kovalenko, Legal Assistant
Inslee, Best, Doezie & Ryder, P.S.
777 - 108th Avenue N.E., Suite 1900
P.O. Box 90016
Bellevue, Washington 98009-9016
Telephone: (425) 455-1234
Fax: (425) 637-0247
Email: jkovalenko@insleebest.com