

Original

No. 36838-2-II

COURT OF APPEALS DIVISION 2
OF THE STATE OF WASHINGTON

JIM J. SCHACHER, in his capacity as personal representative of the
Estate of PATRICIA M. SCHACHER,

Appellant

v.

MARILYN FEIK,

Respondent

FILED
COURT OF APPEALS
DIVISION II
08 FEB -7 AM 9:28
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

Theodore E. Sims
Attorney for Jim J. Schacher, as Appellant
522 SW Fifth Avenue, Suite 1110
Portland, OR 97204
(503) 228-8583 Fax (503) 595-1625
emsims@yahoo.com
WSBA #34260

BRIEF OF APPELLANT

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

 Issues Pertaining to Assignment of Error 1

 A. Was plaintiff’s judgment based on a finding that defendant was
 liable for the tort of conversion? 1

 B. Is the entire marital community liable for plaintiff’s judgment
 where the marital community benefitted by the commission
 of the tort? 1

B. STATEMENT OF THE CASE 1

C. SUMMARY OF ARGUMENT 3

D. ARGUMENT 4

E. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Ball v. Gladden, 250 Or. 485, 487, 443 P.2d 621 (1968) 5

Bergman v. State, 187 Wash. 622, 626, 60 P.2d 699, 106 A.L.R. 1007
(1936) 6

deElche v. Jacobsen, 95 Wn.2d 237, 622 P.2d 835 (1980) 6

Keene v. Edie, 131 Wn.2d 822, 935 P.2d 588 (1997) 4

Milne v. Kane, 64 Wash. 254, 116 P. 659 (1911) 6

Reynolds v. Schrock, 197 Or. App. 564, 578, 107 P3d 52, *rev allowed*,
339 Or. 475 (2005) 5

State v. Hannaford, 178 Or. App. 451, 37 P3d 200 (2001) 5

STATUTES

RCW 26.16.200 4

A. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred in entering the order of September 10th, 2007, granting defendant's motion to release funds garnished by plaintiff, which were claimed by defendant to be community property not liable for the judgment.

Issues Pertaining to Assignment of Error

A. Was plaintiff's judgment based on a finding that defendant was liable for the tort of conversion?

B. Is the entire marital community liable for plaintiff's judgment where the marital community benefitted by the commission of the tort?

B. STATEMENT OF THE CASE

Plaintiff is the personal representative of the Estate of Patricia M. Schacher, Defendant Marilyn Feik is a child of Patricia M. Schacher, and, with her husband, a resident of Washington. CP 36 (Stipulated Facts).

Patricia M. Schacher was married to William O. Schacher in 1970. CP 36 (Stipulated Facts). They each had children from prior marriages and an agreement that each would execute a will leaving their estate to the surviving spouse, and the survivor would devise 1/3 of the estate to

Patricia 's children and 2/3rds to William's children. CP 36 (Stipulated Facts). No changes were to be made in their wills absent further written agreement. CP 36 (Stipulated Facts).

William Schacher died on February 4, 1992. CP 36 (Stipulated Facts). At the time of his death no written modifications to the Agreement had been executed. CP 36 (Stipulated Facts). On March 3, 1992, Patricia Schacher executed a codicil to her will changing the nominated personal representative to her son, Donald Dolph from Linda Ahlstrom, a daughter of Bill Schacher. CP 36 (Stipulated Facts). She then proceeded to make gifts and beneficiary designations to Marilyn Feik as follows:

- a. \$3,000 on July 16, 1997 from a Merrill Lynch account
- b. \$16,000 on July 16, 1997 (First Interstate account)
- c. \$11,052 by naming Marilyn Feik as a co-owner of her account with Wells Fargo and,
- d. \$30,338 by naming Marilyn Feik as a beneficiary of an IRA account at Merrill Lynch, which monies were received by Feik on September 11, 2003; and
- e. purchase of a series EE Bond with a face value of \$10,000 naming Marilyn as the co-owner. CP 36 (Stipulated Facts).

Patricia Schacher died on July 3, 2003. CP 36 (Stipulated Facts). Defendant did not return to the estate the monies received from Patricia Schacher in violation of the agreement. CP 36. She testified that she and her husband had used the funds for their business and family expenses and made stock investments. CP 40 (Feik Deposition Excerpts). Plaintiff filed suit in Oregon to recover them, alleging that these transfers were in violation of the agreement to execute wills, and that Marilyn Feik's continued possession of them constituted a conversion of those assets. CP 32 (Second Amended Complaint). The Oregon court found in favor of plaintiff on this claim (and the other two claims) and entered a judgment against Feik. CP 2. This judgment was docketed in Washington and garnishments were issued to collect upon it. CP 4, 5, 8, 10. The trial court granted defendant's motion to release funds that were garnished on the basis that they were community property not subject to the judgment. CP 43. This ruling is appealed.

C. SUMMARY OF ARGUMENT

Washington's community property laws, as interpreted by the courts, do not allow tort creditors of one member of the marital community to collect against community property unless the tort occurred

for the benefit of the community or during management of community property. It does allow recovery against the half interest of the tortfeasor.

Plaintiff's claim for relief on the tort of conversion against Marilyn Feik was successful and judgment was entered against her. Her half interest in community property is subject to the judgment.

Furthermore, since the tort was committed by turning over the funds Feik received to the marital community instead of returning them to Schacher, the marital community has benefitted by the tort and it should therefore be liable as well.

D. ARGUMENT

Schacher's claim is an exception to the general rule that community property is not subject to the collection efforts of a creditor on a separate debt of one spouse. RCW 26.16.200. Washington law recognizes an exception for a tort-feasor's half interest in community property, which is held to be liable for the tort judgment. Keene v. Edie, 131 Wn.2d 822, 935 P.2d 588 (1997).

The court below erred in holding that the judgment against Feik did not fit within this exception. It held that without an express finding by the Oregon court that Feik converted the funds sought by Schacher by

receiving them (emphasis supplied), then community property cannot be liable for the judgment against Feik.

Schacher pled a claim for relief against Feik for conversion, not for receiving the funds, but for her continued possession of them. In Oregon, the tort of conversion is defined as the intentional exercise of control over a chattel belonging to another that is so serious an interference with the other's right to control the chattel that the actor must be required to pay the other the full value of the chattel. Reynolds v. Schrock, 197 Or. App. 564, 578, 107 P3d 52, *rev allowed*, 339 Or. 475 (2005). Feik admitted to receiving these funds and that she had never returned them. The Oregon court entered judgment against Feik on this claim.

Whether the court's opinion did or did not contain an express finding of conversion, or the precise method of the conversion, does not matter. Even if findings are not made on a factual issue, it is presumed that the facts are consistent with the trial court's ultimate conclusion. Ball v. Gladden, 250 Or. 485, 487, 443 P2d 621 (1968). State v. Hannaford, 178 Or. App. 451, 37 P3d 200 (2001). That conclusion was a judgment in favor of Schacher. He is entitled to recover against the community property interest of Feik.

2) Washington law also provides that community liability arises from a tortious act of one spouse if the act occurred for the benefit of the marital community. deElche v. Jacobsen, 95 Wn.2d at 239-40; see, e.g., Bergman v. State, 187 Wash. 622, 626, 60 P.2d 699, 106 A.L.R. 1007 (1936); Milne v. Kane, 64 Wash. 254, 116 P. 659 (1911); Harry M. Cross, *The Community Property Law* (Revised 1985), 61 WASH. L. REV.

Feik testified that the funds she received from Patricia Schacher's violation of the agreement to execute wills were not held by her as separate property, but were used for, among other things, family expenses and investments by her husband in the stock market. The family finances were commingled. CP 40 (Feik Deposition Excerpts).

Since Feik committed the tort of conversion by giving the funds to the marital community instead of returning them to Schacher, retention of these funds was clearly for the benefit of the marital community, and that community has liability for the judgment entered against Feik. The entire amount garnished should be awarded to Schacher to apply on the judgment.

E. CONCLUSION

The trial courts ruling releasing the garnished funds to Feik should be reversed, and Schacher should be allowed to pursue collection of the judgment not only against Feik's share of the marital community, but against the marital community itself.

February 6, 2008

Respectfully submitted,



Theodore E. Sims
Attorney for Jim J. Schacher, as Appellant
522 SW Fifth Avenue, Suite 1110
Portland, OR 97204
(503) 228-8583 Fax (503) 595-1625
emsims@yahoo.com
WSBA #34260

FILED
COURT OF APPEALS
DIVISION II

08 FEB -7 AM 9:28

STATE OF WASHINGTON
BY *CEM*
DEPUTY

CERTIFICATE

I certify that I mailed a copy of the foregoing BRIEF OF APPELLANT to Ben Shafton, Defendant's/Respondent's attorney, at 900 Washington St Ste 1000 Vancouver , WA 98660-3455, postage prepaid, on February 6, 2008.


Theodore E. Eims
Attorney for Plaintiff/Appellant Jim J. Schacher