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STATE OF WASHINGTON  
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DEPUTY

COURT OF APPEALS, DIV. II

OF THE STATE OF WASHINGTON

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In re the Estate of MARK EUGENE DUXBURY,  
Deceased.

SOJOURNER T. DUXBURY, Petitioner,

and

CHINYELU DUXBURY, Respondent.

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APPELLANT'S OPENING BRIEF

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## INTRODUCTION

The Mark Duxbury Estate may be awarded \$150 million if it eventually prevails in the pending federal False Claims Act (FCA) qui tam action that Mark filed in 2003 based upon information he had acquired while employed by the “Big Pharma” defendant prior to mid-1998. Though Mark could have filed his FCA action prior to marrying Chinyelu Duxbury in 2001, she asserts that because he filed it after their marriage any proceeds from it are community property that, by intestacy, pass entirely to her. Mark’s sole child, Sojourner Duxbury, asserts that her father acquired his FCA statutory claim before his marriage to Chinyelu, so any proceeds from it are separate property that she will split equally with Chinyelu. Alternatively, Sojourner asserts that any proceeds from the FCA action are separate property of her father’s estate because they were not acquired onerously by labor of the marital community formed in 2001 by Mark and Chinyelu. The superior court agreed with Chinyelu. Sojourner appeals.

## ASSIGNMENT OF ERROR & ISSUES

**Assignment of Error:** The superior court erred by ruling that Mark’s FCA cause of action, and any proceeds from it, are community property of his martial community with Chinyelu.

**Issue #1:** Did Mark acquire as property his FCA cause of action as his separate property before his 2001 marriage to Chinyelu?

**Issue #2:** If Mark is viewed as acquiring a property right in his FCA claim only upon filing it in 2003, was it nonetheless his separate property because it was not acquired by onerous title—by the labor and industry of Mark and Chinyelu after their 2001 marriage?

### STATEMENT OF THE CASE

In October 2009 Mark E. Duxbury (Mark) died intestate survived by his spouse, Chinyelu, whom he married in February 2001, and one child from a prior marriage, Sojourner. Clerk's Papers (CP) at 1. His estate is being probated in Pierce County Superior Court, and Chinyelu was appointed its personal representative. *Id.*

Mark was employed from 1992 to July 20, 1998, by Ortho Biotech Products L.P. (OBP) promoting the sale of its prescription oncology drug named Procrit. *Id.* While employed by OBP, Mark learned of a “kickback scheme” that led him on November 6, 2003, to bring a civil action (called a “qui tam action”) against OBP under the federal False Claims Act, 31 U.S.C. § 3730 for himself and for the United States government. *Id.* Under § 3730(d), a person (called a “realtor”) bringing a qui tam action for the U.S. government is entitled to 15 to 30 percent of the proceeds from any

resulting settlement or judgment. CP at 2. Mark's action remains a pending case in the U.S. District Court of Massachusetts, and Chinyelu has been substituted as realtor/plaintiff for Mark in that action. CP at 2, 7. Published opinions in that FCA case are *United States ex rel. Duxbury v. Ortho Biotech Products*, 551 F. Supp.2d 100 (D.Mass. 2008) and *United States ex rel. Duxbury v. Ortho Biotech Products*, 579 F.3d 13 (1st Cir. 2009). CP at 8, 9.

In an estate inventory Chinyelu listed as estate property Mark's pending FCA action and asserted, "All of the property of the decedent was community property." CP at 5-6. In a sworn declaration, Chinyelu stated concerning the FCA case, "If the case is successful, damages of anywhere from \$3 billion to \$10 billion could be awarded and the share of the Mark Duxbury Estate would be approximately \$150 million if the recovery was \$3 billion." CP at 81.

In July 2011, Sojourner (then a minor represented by a guardian ad litem<sup>1</sup>) petitioned the superior court to rule that Mark's FCA cause of action and any proceeds from it are separate property, as to which she would be entitled to one-half under RCW 11.04.015. CP at 1-34. Chinyelu opposed that motion. CP at 35-40. Following a hearing, court commissioner pro tem James Marshall granted Sojourner's motion. CP at

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<sup>1</sup> The superior court dismissed Sojourner's guardian ad litem in December 2011 because she had attained legal age. CP at 111.

48.

Chinyelu filed a timely motion for revision. CP at 49-50. Following additional briefing by Sojourner (CP at 53-59) and by Chinyelu (CP at 60-67), Judge Bryan Chuschoff in October revised the commissioner's ruling and ruled that Mark's FCA action and any proceeds from it are community property. CP 70-72.

Sojourner moved for reconsideration (CP at 73-82), Chinyelu responded (CP at 83-90), to which Sojourner replied (CP at 91-106). At a hearing in late October, Judge Chuschoff denied reconsideration (CP at 108) explaining that he views the qui tam provisions of the FCA as the federal government's unilateral contract offer to pay a reward, and a qui tam plaintiff accepts that offer and acquires the contractual right to a contingent reward by actually filing the FCA action. Report of Proceedings on October 28, 2011 (RP) pages 6-7. In December Judge Chuschoff entered an order denying the motion for reconsideration. CP at 109-10.

The undisputed relevant facts as stated in paragraphs 1 and 2 of the order of October 6, 2011, (CP at 71) are the following:

1. While the Decedent was employed from 1992 to July 20, 1998, by Ortho Biotech Products LP (OBP) he learned information that led him in November 2003 to file in federal court against OBP a claim under the

False Claims Act (FCA), 31 U.S.C. § 3730.

2. The Decedent married Chinyelu Duxbury in February 2001. She survives him and is the personal representative of his estate.

### STANDARD OF REVIEW

No relevant facts are disputed, so this Court's standard of review is de novo. *Estate of Earls*, 164 Wn. App. 447, 450, 262 P.3d 832 (2011) (“Where the relevant facts are undisputed and the parties dispute only the legal effects of those facts, the standard of review is de novo.”).

### ARGUMENT

**1. Mark acquired as property his FCA cause of action before his 2001 marriage to Chinyelu, so it was his separate property.**

*History of False Claims Act.* The federal False Claims Act (FCA) originally was adopted during the Civil War in 1863 to remedy false claims for payment from federal funds, empowering any person to bring a suit against the wrongdoer. Act of March 2, 1863, ch. 67, 12 Stat. 696-99 (1863). The key statutory language from 1863 until 1982 was “such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States.” *Id.* In 1982,

Congress changed the phrase “as well for himself as for the United States” to read “for the person and for the United States Government,” 31 U.S.C. § 3730(b)(1) (1982). Until 1943, the FCA provided that half the amount of the recovery—that included double the government’s actual damages—is paid to the person instituting the suit while the other half goes to the government. Act of March 2, 1863, ch. 67, 12 Stat. 696-99 (1863). Congress amended the FCA in 1943 to reduce the award to the qui tam plaintiff, also called “relator,” to what the judge determines to be “fair and reasonable compensation” but not more than 10 percent if the government intervened and not more than 25 percent if it did not. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1943). In 1986, Congress substantially amended the FCA to encourage more qui tam actions. False Claims Amendment Act of 1986. Public Law No. 99-562, 100 Stat. 3153. Its key changes were summarized by a commentator as follows:<sup>2</sup>

“First, it increased a relator’s ability to recover under the FCA. The amendment granted that prior government knowledge of the allegations does not automatically prevent a relator from filing a qui tam action. More importantly, the 1986 amendment provided that even if the government joins the lawsuit and has “primary responsibility for prosecuting the action,” the relator “shall have the right to continue as a party to the action.” Second, it increased a relator’s recovery for a successful suit to a maximum of 30% if the government does not intervene, and to a maximum of 25% if it does, and increased the overall damages and penalties that can be imposed on a defendant from double to treble damages.

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<sup>2</sup> Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Columbia L. Rev. 949, 954 (2007).

Finally, the 1986 amendment protected a relator from retaliatory actions by employers, making it safer for an individual to bring qui tam actions by adding whistleblower protection language to the statute.”

The qui tam provisions of the FCA presently are codified in 31 U.S.C. § 3730, a copy of which is in the Appendix.<sup>3</sup> The key statutory language from 1986 remains “A person may bring a civil action for a violation of section 3729 *for the person* and for the United States Government.” 31 U.S.C § 3730(1)(b) [First sentence only, emphasis added.]

***Qui Tam Plaintiffs’ Cause of Action.*** In a FCA action brought by a qui tam plaintiff, the plaintiff is a real party in interest. The U.S. Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), rejected the view that a qui tam plaintiff is merely an agent contracting with the government to receive a fee out of its recovery, stating the following:

“It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, *in whose name* (as the statute provides, see 31 U.S.C. § 3730(b)) the suit is brought—and that the relator’s bounty is simply the fee he receives *out of the United States’ recovery* for filing and/or prosecuting a successful action on behalf of the Government. This analysis is precluded, however, by the fact that the statute

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<sup>3</sup> The copy of 31 U.S.C. § 3730 filed in the superior court at the hearing on July 18, 2011 ( CP at 41-47) failed to reflect two 2010 amendments. Section 10104(j)(2) of the Patient Protection and Affordable Care Act amended 31 U.S.C. § 3730(e). Section 1079A of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended 31 U.S.C. § 3730(h).

gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery. Thus, it provides that “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government,” § 3730(b) (emphasis added); gives the relator “the right to continue as a party to the action” even when the Government itself has assumed “primary responsibility” for prosecuting it, § 3730(c)(1); entitles the relator to a hearing before the Government’s voluntary dismissal of the suit, § 3730(c)(2)(A); and prohibits the Government from settling the suit over the relator’s objection without a judicial determination of “fair[ness], adequa[cy] and reasonable[ness],” § 3730(c)(2)(B). For the portion of the recovery retained by the relator, therefore, some explanation of standing other than agency for the Government must be identified.” [Underscored emphasis added; italicized emphasis was by the court.]

The Supreme Court held that a qui tam plaintiff has standing in a FCA action because “The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” 529 U.S. at 773. Notice the Court held that *the partial assignment is effected by the statutory language of the FCA itself*— not by any post-filing action by the U.S. Attorney General or any other federal government official.

***When Qui Tam Plaintiff’s Claim Accrues.*** Many federal court cases have held that person’s right to bring a FCA action accrues once he or she knows or reasonably should know the facts material to their FCA right of action. In *U.S. ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211 (9th Cir., 1996), the court stated at 1217:

“Once the *qui tam* plaintiff has the requisite information, he cannot sleep on his rights. He is “charged with responsibility to

act under the circumstances.” Thus, as to the *qui tam* plaintiff, the three-year extension of the statute of limitations begins to run once [the] *qui tam* plaintiff knows or reasonably should have known the facts material to his right of action.”

The quoted passage refers to the FCA statute of limitations, at 31 U.S.C. § 3731(b), that requires actions to be brought within six years of the false claim or, if later, three years after a responsible federal official knew or reasonably should have known the facts material to the action. The *Hyatt* court applied the three-year extension to *qui tam* plaintiffs as well as to federal officials, stating at 1213, “We conclude ... that for the *qui tam* plaintiff the limitations period runs from the date the plaintiff knew or reasonably should have known of the facts material to the right of action.”

Most of the federal cases addressing the time that a private plaintiff’s FCA claim accrued involve former employees who filed their FCA claims after having signed termination agreements with their former employers that expressly release all then existing claims against the employer. In *U.S. ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319, 329 (4th Cir. 2010), the Fourth Circuit expressly rejected the relator’s argument that his FCA claim was not subject to his pre-filing release because he did not become a partial assignee of the government’s FCA claim until he filed it in court (the same argument that Chinyelu makes in this case). The court ruled otherwise, at 328-29:

“Radcliffe next argues that the plain language of the Release does not encompass his *qui tam* claims against Purdue. Specifically, in paragraph 4 he released Purdue from “*all liability to Employee* for ... claims ... which Employee ... ever had, may now have or hereafter can, shall or may have ... *as of the date of the execution of this Agreement* [August 1, 2005].” ... Radcliffe asserts that as of the date the Release was executed, he had no FCA claim against Purdue. As support for this proposition, he relies on the Supreme Court’s statement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), that “[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” In Radcliffe’s view, no such assignment occurred until he filed his complaint under seal with the district court, which occurred after he signed the Release. We disagree.

....  
“[O]nce the government suffered an injury (and Radcliffe became aware of the fraud causing the injury), Radcliffe had a statutory claim, and the necessary legal standing as partial assignee, to file a *qui tam* lawsuit.

“ In short, he had “an interest in the lawsuit” regardless of when he opted to vindicate it. The fact that Radcliffe chose not to file suit until after signing the Release does not negate the fact that he had the *right* to file suit beforehand—a right he waived under the terms of the Release. *See* 6A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1545, pp. 351-353 (2d ed. 1990) (“[W]hen there has been ... a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest.”). Because Radcliffe possessed a presently enforceable claim at the time he signed the Release, the plain terms of the Release encompassed his FCA claims.”

Similarly, in *U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168-69 (10th Cir. 2009), the Tenth Circuit held that the relator’s signing of releases covering “any and all claims [Ritchie] might have arising under federal, state or local law” barred his later filing of his FCA

claim. And in *U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 231-33 (9th Cir. 1997), the Ninth Circuit ruled that the relator's execution of a broadly worded mutual release incident to his settlement with his former employer of several state law claims operated as a bar to his later filing against that employer of his FCA claim.

This line of cases confirms that a qui tam plaintiff's statutory cause of action under the FCA arises or accrues when that plaintiff acquires knowledge of the facts supporting the FCA claim. In this case, had Mark signed a broadly worded release when he terminated employment by OBP in 1998, that act would have released his FCA claim that he later filed in 2003. He accrued his statutory FCA claim well before his 2001 marriage to Chinyelu.

Another circumstance in which federal courts must determine when a qui tam plaintiff had acquired his FCA cause of action is if the plaintiff files his FCA claim after filing bankruptcy without having listed the claim as an asset in his bankruptcy proceeding. In *U.S. ex rel. Gebert v. Transp. Admin. Services*, 260 F.3d 909 (8th Cir. 2001), the court upheld the dismissal of a qui tam action that the relators had failed to list as an asset in their bankruptcy proceeding though they then possessed the information material to their later-filed qui tam action. As an asset of the debtors (even though they failed to list it), the debtors' unfiled FCA qui

tam claim passed to the trustee of their bankruptcy estate. The court stated, at 913:

“Under the Bankruptcy Code, 11 U.S.C. § 541(a)(1) (1994), all of the debtors’ legal and equitable interests are transferred to the bankruptcy estate at the time the bankruptcy petition is filed. .... Most importantly, the property of the bankruptcy estate includes all causes of action that the debtor could have brought at the time of the bankruptcy petition. [Citation omitted.]

“The record shows that, as of July 1994 when the Geberts filed for bankruptcy, they possessed all of the information necessary to file the qui tam claim against TAS and Steward. The law is clear that once the Geberts filed the bankruptcy petition in 1994 all of their property rights and interests became assets of the bankruptcy estate. [Citation omitted.] Accordingly, at the time the Geberts filed the qui tam claim, the claim had long since passed to the bankruptcy estate and the Geberts no longer had standing to bring it.”

The court rejected the relators’ arguments that their FCA qui tam claim did not become a property right until they filed their FCA suit (the same argument that Chinyelu makes in this case), stating at 914-15:

“The United States, as *amicus curiae*, tries to get around the assignment of the Gebert’s *qui tam* claim to the bankruptcy estate by contending that the United States had not yet assigned the claim to the Geberts at the time of bankruptcy. This argument fails for three reasons. First, neither the Geberts nor the United States point to any authority that supports their proposition that the United States’ assignment of its injury-in-fact occurred at the time the *qui tam* case was filed. In fact, the caselaw goes the other way. *See* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir.1993) (noting that “the FCA effectively assigns the government’s claims to *qui tam* plaintiffs ... *who then may sue*”) (emphasis added), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 433 (1994). Second, we reject the notion that the *qui tam* claim was only perfected subsequent to the bankruptcy. The record is clear that the Geberts possessed all the necessary

information about TAS and Steward for the *qui tam* claim to proceed at or before the time of bankruptcy; they gained little, if any, information subsequent to the bankruptcy. It is also clear that the Geberts could have filed the *qui tam* claim in 1994 irrespective of any action or inaction on the part of the United States.”

So based on the *Gebert* case, if Mark had filed bankruptcy after he learned the material facts supporting his FCA claim but before he married Chinyelu in 2001, his claim as a then existing property right would have passed to the bankruptcy trustee. Plainly, Mark acquired his FCA claim as a property right before he married Chinyelu.

*Washington Law Recognizes a Cause of Action as Property.* A cause of action is a property right that is acquired when the cause of action accrues. In *Schneider v. Biberger*, 76 Wash. 504, 136 P. 701 (1913), a woman after the dissolution of her marriage filed an action against a third party based upon an assault that occurred while she had been married. The state supreme court held that because she acquired her cause of action while she was married it was community property regardless of her having commenced litigation on her cause of action after her marital dissolution, stating at 506-06:

“It is suggested by respondent that, as the community had been dissolved by the divorce decree prior to the commencement of this action, the respondent had no husband to join in the action. The divorce did not change the situation so far as *property rights* were concerned. The cause of action having arisen during the existence of the community, the damages would be community

property, as the community *status of property is determined and fixed at the time the property is acquired.*” [Emphasis added.]

On that same principle, if an individual acquires a cause of action before marriage it is his or her separate property even if he or she commences litigation on the cause of action after becoming married. In this case, it is an undisputed fact that while Mark was employed from 1992 to mid-1998 by OBP he learned the information supporting his FCA claim that he filed in 2003, so his FCA cause of action and any and all proceeds from it are his separate property even though he commenced litigation on that cause of action after his 2001 marriage to Chinyelu.

Many Washington cases address the time that a cause of action accrues, because that commences the running of a statute of limitations. In *Jones v. Jacobsen*, 45 Wn.2d 265, 273 P.2d 979 (1954), the court stated the law as follows, quoting from a treatise that it quoted in one of its earlier opinions:

“Statutes of limitations commence to run against a cause of action from the time it accrues, or from the time when the holder thereof has the right to apply to the court for relief, and to commence proceedings to enforce his rights. The time when a cause of action was accrued within the statutes of limitations means the time when plaintiff first became entitled to sue.”

And in *Browning v. Howerton*, 92 Wn. App. 644, 966 P.2d 367 (1998), the court stated at 651:

“As a general principle, a statutory limitation period commences

and a cause of action accrues when a party has the right to seek relief in the courts.”

And federal law is the same, as stated by the court in *Acri v. International Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393 (9th Cir. 1986), at 1396:

“Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action.”

In the Duxbury Estate’s pending FCA litigation that Mark filed in November 2003, Chinyelu (who became the qui tam plaintiff following Mark’s death (CP at 7 n.1)) admitted that the six-year statute of limitations lapsed on OBP’s wrongdoing that had occurred prior to November 1997. CP at 16 n.2. Considering the holding of *Hyatt, supra* at 8, that a qui tam plaintiff’s FCA claim may be filed more than six years after a wrongdoer’s acts if filed within three years after the plaintiff learned of those acts, Chinyelu’s admission constitutes her additional admission that Mark had learned of OBP’s misconduct—so his FCA claim had accrued—before November 2000. That was several months before Mark and Chinyelu’s marriage in February 2001.

***Property Acquired and Owned Before Marriage Is Separate Property.*** Fundamental to Washington’s marital property system is the absolute rule that “property and pecuniary rights owned by a spouse before marriage” are separate property of that spouse. RCW 26.16.010.

Since Mark acquired his statutory FCA claim against OBP before his 2001 marriage to Chinyelu, that FCA claim and any proceeds from it are separate property.

*Absence of Direct Case Law.* There are only two reported court opinion (from California and Texas) that address the character of a pending FCA claim as separate or community property, but neither is helpful here. In both cases, the qui tam plaintiff both discovered the fraud and filed his qui tam lawsuit during a marriage that subsequently dissolved, so the courts readily concluded that any proceeds from the FCA lawsuit would be community property. *Biddle v. Biddle*, 52 Cal.App.4th 396, 60 Cal.Rptr.2d 569 (1997); *D.B. v. K.B.*, 176 S.W.3d 343 (Tex.App.-Houston [1st Dist.] 2004).

- 2. If Mark is viewed as acquiring a property right in his FCA claim only upon filing it in 2003, it nonetheless was his separate property because it was not acquired by onerous title—by the labor and industry of Mark and Chinyelu after their 2001 marriage.**

Even if, contrary to the foregoing arguments, this court determines that Mark did not acquire his FCA claim as “property” until he filed his complaint in federal court in 2003 following his 2001 marriage, the court should apply the current onerous-lucrative test to characterize that acquisition as separate rather than as community property. Before our

state supreme court decided *Brown v. Brown*, 100 Wash.2d 729, 737, 675 P.2d 1207 (1984), our courts characterized property acquisitions *during marriage* as community property unless separate property under RCW 26.16.010 as acquired by “gift, bequest, devise or descent.” That test “has now been abandoned, and instead the onerous or donative nature of the acquisition is the test.” Washington State Bar Assoc., *Washington Community Property Deskbook* § 3.2, at 3-104 (3d ed. 2003).

In *Brown*, the supreme court ruled that community property is only “property acquired through the toil, talent, or other productive faculty of either spouse,” described as being acquired by “onerous title,” stating at 737:

“RCW 26.16.030 provides that property “acquired” by either spouse after marriage is community unless it is acquired or owned as prescribed in RCW 26.16.010 and RCW 26.16.020, defining separate property. In company with the Nevada Supreme Court, we believe that the word “acquired” should be construed to encompass wages and other property acquired through the toil, talent, or other productive faculty of either spouse, but not compensation for personal injury. [Citation omitted.] Such a construction is consistent with the basic principle that, except for gifts to the community, community property consists only of that which is acquired by onerous title, or in exchange for other community property.”

In its opinion, the state supreme court quoted extensively from W. deFuniak & M. Vaughn, *Principles of Community Property* (2d ed 1971), including its passage at § 82, page 201:

“Except for gifts clearly made to the marital community, community property only consists of that which is acquired by onerous title, that is, by labor or industry of the spouses, or which is acquired in exchange for community property ....”

Washington cases since *Brown* recognize its onerous-lucrative test when reciting applicable law. *E.g.*, *White v. White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001) (“[A]n asset is community property if acquired onerously during marriage.”); *Brewer v. Brewer*, 137 Wash. 2d 756, 767, 976 P.2d 102 (1999) (“*Brown*, in defining community property, limited it to acquisitions ‘through the toil, talent or other productive faculty of either spouse, but not compensation for personal injury.’”)

The historic rationale for property acquired by onerous title—from a spouse’s labor and industry—being characterized as community property is presented in deFuniak & Vaughn at §6.2 *Onerous and lucrative titles.*, at page 127, as follows:

“[P]roperty acquired by onerous title is always community property. This is so because it is acquired by the labor and industry of members of a form of partnership, that is, a marital partnership, or is acquired for valuable consideration which had previously been acquired by the industry and labor of the marital partnership, and whatever is earned or gained by one marital partner during the existence of the marital partnership must accrue to the benefit of both marital partners, who share equally in such earnings and gains. Such earnings and gains, even if by one spouse alone, are necessarily for the maintenance and furtherance of the marital society. They are earned or gained at the expense of the community in that the one making the earnings or gains is furthered therein by the use of community property or by the joint efforts of the other spouse, joint efforts on the part of

the other spouse which may consist, as in the case of the wife, in maintaining the home and rearing the children, for that is a sharing of the burdens of the marital partnership and a contribution to the community effort.” [Footnotes omitted.]

If the onerous-lucrative test is applied to Mark’s filing of his FCA complaint in 2003, it should be recognized that his FCA claim, and proceeds from it, did not result from Mark’s or Chinyelu’s “toil, talent, or productive facility” during their marriage that began in 2001, but resulted simply from his sharing with the government the information that he had possessed since his employment by OBP terminated in 1998. Under the FCA, a relator is assured a recovery of at least 15 percent of any proceeds from his qui tam claim simply by filing it in federal court and providing his information to government officials. 31 USC § 3730(d)(1). No further participation by the qui tam plaintiff is required if the government intervenes in the case. If the government declines to intervene and the relator’s attorneys<sup>4</sup> prosecute the claim, the relator is guaranteed at least 25% of any proceeds, plus attorneys’ fees. 31 USC § 3730(d)(2). The fact that Congress set generous recovery percentages for qui tam plaintiffs in order to induce whistleblowing on fraud perpetrated against the U.S. government should not cause a state court to regard a qui tam plaintiff’s whistleblowing as an onerous act requiring his “toil, talent, or productive

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<sup>4</sup> A qui tam plaintiff must be represented by a duly admitted attorney, the plaintiff may not prosecute a FCA claim pro se. E.g., *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126-28 (9th Cir.2007).

facility.” In this case, the Duxbury Estate’s possible recovery of \$150 million could not be said to have resulted from the “toil, talent, or productive facility” of Mark or Chinyelu during their marriage. Accordingly, any recovery from the pending FCA claim should be recognized as Mark’s separate property that would be divided, considering his death intestate, between his sole child, Sojourner, the appellant, and his surviving spouse, Chinyelu, the respondent.

#### **REQUEST FOR ATTORNEY FEES**

Because this is a proceeding concerning a decedent’s estate governed by Title 11, RCW, this appellate court under RCW 11.96A.150(1) “may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party ... to be paid in such amount and in such manner as the court determines to be equitable.” Considering the volume of strong federal and state case law supporting the position by Mark’s sole child, Sojourner, that any FCA suit proceeds were his separate property, it was inequitable for Mark’s widow and personal representative, Chinyelu, to assert that the possible \$150 million recovery from Mark’s FCA claim is community property that passes entirely to her, leaving Mark’s daughter with nothing. Accordingly, Sojourner requests that this court award her against Chinyelu attorney fees on this appeal and direct the superior court

to so award her attorney fees for the proceedings in that court.

### CONCLUSION

The superior court committed an error of law by characterizing Mark's FCA claim as community property rather than his separate property. Case law requires that it be characterized as Mark's separate property.

Mark acquired his FCA cause of action against OBP while employed by it prior to mid-1998. A cause of action is property. Mark acquired his FCA cause of action against OBP prior to his 2001 marriage to Chinyelu, so it was his separate property, along with any proceeds from it.

Even if this court views Mark as not having acquired a property right in his FCA cause of action until he filed his lawsuit in 2003, that property right was not acquired by post-marriage labor and industry of him or Chinyelu, so it should be characterized as Mark's separate property.

Respectfully submitted this 7th day of May, 2012.

  
Douglas A. Schafer, Attorney for Appellant  
WSBA No. 8652

**APPENDIX**

Copy of 31 U.S.C. § 3730 (2012).

United States Code Annotated

Title 31. Money and Finance (Refs & Annos)

Subtitle III. Financial Management

Chapter 37. Claims (Refs & Annos)

Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3730

§ 3730. Civil actions for false claims

Effective: July 22, 2010

Currentness

**(a) Responsibilities of the Attorney General.**--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

**(b) Actions by private persons.**--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.<sup>1</sup> The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

**(c) Rights of the parties to qui tam actions.**--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

**(B)** The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

**(C)** Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

- (i)** limiting the number of witnesses the person may call;
- (ii)** limiting the length of the testimony of such witnesses;
- (iii)** limiting the person's cross-examination of witnesses; or
- (iv)** otherwise limiting the participation by the person in the litigation.

**(D)** Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

**(3)** If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

**(4)** Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

**(5)** Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

**(d) Award to qui tam plaintiff.--(1)** If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government<sup>2</sup> Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall

be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

**(e) Certain actions barred.**—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government<sup>2</sup> Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

**(f) Government not liable for certain expenses.**--The Government is not liable for expenses which a person incurs in bringing an action under this section.

**(g) Fees and expenses to prevailing defendant.**--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

**(h) Relief from retaliatory actions.**--

**(1) In general.**--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

**(2) Relief.**--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

**(3) Limitation on bringing civil action.**--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

#### Credits

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub.L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub.L. 111-148, Title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub.L. 111-203, Title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

Notes of Decisions (1682)

Current through P.L. 112-104 (excluding P.L. 112-91, 112-95, 112-96, and 112-102) approved 4-2-12

#### Footnotes

- 1 See, now, Rule 4(i) of the Federal Rules of Civil Procedure.
- 2 So in original. Probably should be "General".

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