

No. 81920-3

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ANDREW JAMES CLAYTON,

Respondent,

v.

DOUGLAS MECKLEM WILSON

Defendant,

and

MARY KAY WILSON,

Petitioner.

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PETITIONER'S SUPPLEMENTAL BRIEF

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STATE OF WASHINGTON

Dennis J. McGlothin  
WSBA #28177  
For Petitioner Mary Kay Wilson  
Olympic Law Group, P. L. L. P.  
1221 E. Pike Street, Suite 205  
Seattle, Washington 98122  
(206) 527-2500

ORIGINAL

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## SUPPLEMENTAL ARGUMENT

A. Mr. Wilson is separately liable for Respondent's injuries.

1. Respondeat superior or vicarious liability agency rules still determine whether a marital community is liable for a spouse's tort even though the community is not a separate entity.

While this Court may have abrogated the concept that a marital community is a separate juristic entity, it continues to use respondeat superior as the vehicle to determine whether the community is liable for a spouse's tort. It became clear in 1930 that a marital community was not a separate juristic entity.<sup>1</sup> Despite having clearly held a marital community is not a separate juristic entity, this Court used respondeat superior and agency law to determine whether a spouse's tortious act was a community or separate liability:

It is now the settled law of this state that, if the tortious act of the husband be committed in the management of community property or for the benefit of the marital community, such community is thereby rendered liable for the act. (Citations omitted).

But this rule is not based upon the mere fact of marital relationship. It is founded on the doctrine of respondeat superior. Under that doctrine, *unless, in a given instance, it can be said that the husband was acting as the agent of the marital community, the community is not liable.*<sup>2</sup>

This Court has continued to use respondeat superior as the rule to determine community liability for decades.<sup>3</sup> Moreover, intermediate appellate courts

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<sup>1</sup> *Bottle v. Osborne*, 155 Wash. 585, 589-90, 285 P. 425 (1930).

<sup>2</sup> *Bergman v. State*, 187 Wash. 622, 626-27, 60 P.2d 699 (1936).

<sup>3</sup> *MacKenzie v. Sellner*, 58 Wn.2d 101, 104, 361 P.2d 165 (1961); *Smith v. Retallick*, 48 Wn.2d 360, 364, 293 P.2d 745 (1956); *LaFramboise v. Schmidt*, 42 Wn.2d 198, 200, 254 P.2d 485 (1953); *Sitarek v. Montgomery*, 32 Wn.2d 794, 801, 203 P.2d 1062 (1949); *Mountain v. Price*, 20 Wn.2d 129, 135, 146 P.2d 327 (1944); and *Furuheim v. Floe*, 188 Wash. 368, 370, 62 P.2d 706 (1936)

have also continued to embrace this rule in determining community liability.<sup>4</sup> Finally, even the Court of Appeals in this case recognized respondeat superior to be the theoretical underpinning for community liability.<sup>5</sup>

This rule makes sense because community liability vicariously imposes liability onto an otherwise innocent party. When the community is liable for one spouse's tortious act, it imposes liability on innocent spouses.<sup>6</sup> Here, if community liability were found, then Respondent would not only be able to recover from Mr. Wilson's interest in the Wilsons' former community property, but would also be able to recover against Mrs. Wilson's interest in the former community property. It is conceded Mrs. Wilson is an innocent spouse and committed no tortious act against Respondent.

The Court of Appeals completely refused to apply a respondeat superior analysis in this case. It rationalized its decision based on the community-as-an-entity theory having been abrogated and it seemingly limited the analysis' applicability to situations involving employers and employees or "masters" and "servants."<sup>7</sup>

The Court of Appeals' rationale and seeming limitation do not comport

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<sup>4</sup> *Brown v. Spokane County Fire Prot. Dist. No. 1*, 21 Wn. App. 886, 888-89, 586 P.2d 1207 (1978); and *Aichmayer v. Lynch*, 6 Wn. App. 434, 435, 493 P.2d 1026 (1972).

<sup>5</sup> *Clayton v. Wilson*, 145 Wn. App. 86, 98, 186 P.3d 348 (2008) ("*LaFramboise* identified agency law, or respondeat superior, as the theoretical basis for placing liability upon the community for torts committed in the management of community business or for its benefit.").

<sup>6</sup> *See Keene v. Edie*, 131 Wn.2d 822, 830, 935 P.2d 588 (1997) ("noting that prior case law "imposed liability on innocent spouses" sometimes "upon the most tenuous consideration of benefit.") (Citation omitted).

<sup>7</sup> *Clayton v. Wilson*, 145 Wn. App. at 98 ("Petitioner's "analysis is flawed because it assumes that the marital community was, like a corporation, a separate and distinct "master"...").

with Washington's jurisprudence. Courts have often used agency and respondeat superior principals to make persons other than the tortfeasor liable outside the employer/employee or master/servant context. For example, another firmly rooted concept embedded in *stare decisis* that uses agency law and respondeat superior is the family car doctrine.<sup>8</sup> Similar to the community liability concept, the family car doctrine imposes liability on other family members for another family member's tortious acts.<sup>9</sup> Obviously the family, like a husband and wife, is not a separate juristic entity, but the fact there is no separate entity does not prevent courts from properly using agency and respondeat superior principles to make otherwise innocent family members liable for another family member's tortious acts. As it was explained:

We realize that an analysis based upon agency principles may seem rather strained. As Prosser noted: "There is obviously an element of unblushing fiction in this manufactured agency; and it has quite often been recognized, without apology, that the doctrine is an instrument of policy, a transparent device intended to place the liability upon the party most easily held responsible." W. Prosser, *Torts* s 73, at 483 (4th ed. 1971). However, we are bound to this line of reasoning by the doctrine of *stare decisis*.<sup>10</sup>

There is no sound policy reason for not continuing to utilize the same agency and respondeat superior principles when imposing liability on otherwise innocent spouses through community liability.

Since the respondeat superior doctrine has been regularly used to impose liability on otherwise innocent family members, it should not be

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<sup>8</sup> *Cameron v. Downs*, 32 Wn. App. 875, 880-81, 650 P.2d 260 (1982).

<sup>9</sup> *Cameron*, 32 Wn. App. at 880.

<sup>10</sup> *Cameron*, 32 Wn. App. at 881, n.1.

overruled lightly. This Court has stated that it endeavors “to honor the principle of stare decisis, which ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”<sup>11</sup> Here, the Court of Appeals’ Opinion dismisses a standard respondeat superior agency analysis that would impose liability on a principle if an agent commits a tort because the Wilsons’ marital community was not a separate legal entity.<sup>12</sup> The Court of Appeals did so without announcing any rational policy basis for supporting its departure. Similarly, Respondent, in his Answer to Petition for Discretionary Review, has not provided any rational reason for this departure. That is because there is no rational basis to depart from the rule this Court and other courts have relied on for a century.

2. A spouse steps aside from community business, and the community is not liable, if that spouse commits an intentional sexual tort for their own sexual gratification.

When applying agency and respondeat superior principals to determine community liability, courts must undertake a scope of agency analysis. Under agency principles an agent must be acting within the scope of his or her authority when the tortious act occurs in order for the principal to be liable.<sup>13</sup> This Scope of authority analysis has been expressly used by this Court when

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<sup>11</sup> *Keene*, 131 Wn.2d at 831, *citing*, *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991).

<sup>12</sup> *Clayton v. Wilson*, 145 Wn. App. 86, 98-99, 186 P.3d 348 (2008).

<sup>13</sup> *Freeman v. Navarre*, 47 Wn.2d 760, 776, 289 P.2d 1015 (1955) (“The principle of agency is always limited by the course and scope of the agency...”)

determining community liability.<sup>14</sup>

Moreover, when undertaking a scope of authority analysis when it is alleged a spouse committed a tort while managing community property, courts must determine whether a spouse stepped aside from managing community property and was acting for his own purpose when the tort occurred. Under the rule announced in *Kuehne v. White* a principal is not liable when an agent steps aside from the principal's business in order to effectuate some purpose of his or her own.<sup>15</sup> This identical scope of authority analysis has also been expressly applied by this Court when determining community liability when a spouse is managing community property.<sup>16</sup> There is no case cited by Respondent or the Court of Appeals that treats the agency analysis any different in a community liability case than the agency analysis used when determining whether an employer is liable for an employee's acts.

Using a proper agency and respondeat superior analysis, including determining whether a spouse was managing community property when the tort occurred or whether the spouse had stepped aside from that purpose and

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<sup>14</sup> *Bergman*, 187 Wash. at 627 ("In committing the offense, he was acting entirely outside of, and beyond, the scope of his authority..."); and *Hanley v. Most*, 9 Wn.2d 429, 461, 115 P.2d 953 (1941).

<sup>15</sup> *Kuehne v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979).

<sup>16</sup> *De Phillips v. Neslin*, 155 Wash. 147, 153, 283 P. 691 (1930) ("Of whatever tortious acts he was guilty in the conduct of the community business, he is presumed to act as the agent of the community, unless...he exceeded his authority and stepped outside the scope of the community business to do a wrong on his own account..."); and *Benson v. Bush*, 3 Wn. App. 777, 780, 477 P.2d 929 (husband had not "launched upon an individual enterprise of his own...."). *See, also*, 19 Wash. Prac. Series §14.9, Responsibility for payments of debts – Tort liability (2009) ("And, if the alleged basis of liability is the management theory...community liability does not lie when the acting spouse exceeded authority and did a wrongful act on his own account" or "when the spouse was engaged in an enterprise having no relation to community property.")

was acting for his or her own purpose when the tort occurred, it is clear there is no community liability here. When an agent's intentionally tortious or criminal acts are not performed in furtherance of the principal's business, the principal will not be held liable as a matter of law even though the principal-agency situation provided the opportunity for the agent's wrongful acts or the means for carrying them out.<sup>17</sup> Where an agent's acts "are directed toward personal sexual gratification," the agent's conduct falls outside the scope of his or her agency.<sup>18</sup> Here, the trial court found Mr. Wilson engaged in the tortious act "for *his own* sexual gratification."<sup>19</sup> This finding is unchallenged and is, therefore, a verity on appeal.<sup>20</sup> Because Mr. Wilson committed the tort in question in this case for his own sexual gratification, he is separately liable.

The Court of Appeals completely refused to apply a proper scope of agency analysis in this case and refused to consider whether Mr. Wilson had stepped aside from managing community property when he committed the intentional tort. In addition to distinguishing this case because there was no separate entity, the Court of Appeals' also rationalized that a scope of agency analysis was unnecessary because Mr. Wilson was the statutory agent for the community and an owner. The Court of Appeals held that because he was a statutory agent and owner, then whatever his purpose was at the time he committed the tort, even assaulting Respondent, automatically became the

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<sup>17</sup> *Kuehn*, 24 Wn. App. at 279.

<sup>18</sup> *Robel v. Roundup Corp.*, 148 Wn.2d 35, 54, 59 P.3d 611 (2002), *citing* *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993).

<sup>19</sup> Finding of Fact No. 4, CP. 845, ln 24-25

<sup>20</sup> *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 446, 200 P.3d 232 (2009).

community's purpose and his acts were, therefore, within the scope of his authority.<sup>21</sup> If this is the correct analysis, then respondeat superior and the concomitant scope of agency analysis is meaningless because it would mean whatever a spouse's purpose was when committing a tort it would necessarily be a community purpose and within the scope of the spouse's authority simply because the spouse is, by definition, a statutory agent and owner.

This is not and has never been the law in Washington. In *Bergman v. State* a husband burned down a community owned property and business for insurance money that would have inured to the community.<sup>22</sup> Despite this, there was no community liability.<sup>23</sup> In *Newbury v. Remington* a husband got into an altercation while driving the family car and drove another motorist off the road.<sup>24</sup> This Court found no community liability because the intentional assault was committed by the husband as an aggressor wholly beyond his managing the community's car.<sup>25</sup> In these cases community liability was not found because the spouse had stopped managing community property and began to further his own purposes when the intentional tort occurred. In *Benson v. Bush*, and *McHenry v. Short* the courts engaged in the same analysis, although they reached a different conclusion.<sup>26</sup> Finally, in *Nichols Hills Bank v. McCool* this Court refused to impose community liability when a spouse

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<sup>21</sup> *Clayton*, 145 Wn. App. at 99.

<sup>22</sup> *Bergman*, 187 Wash. at 623-24 and 626.

<sup>23</sup> *Id.* at 627-28.

<sup>24</sup> *Newbury v. Remington*, 184 Wash. 665, 666-67, 52 P.2d 312 (1935).

<sup>25</sup> *Newbury*, 184 Wash at 667-68. See, also, *Verstaelen v. Kellog*, 60 Wn.2d 115, 372 P.2d 543 (1962); and *Smith*, 48 Wn.2d 360.

<sup>26</sup> *Benson*, 3 Wn. App. at 779-80; and *McHenry v. Short*, 29 Wn.2d 263, 274, 186 P.2d 900 (1947).

exceeded his authority in pledging community credit.<sup>27</sup>

Washington should embrace our sister state Arizona's rule when determining whether a community is liable for a spouse's intentional malicious tort. There, a community is liable for either spouse's intentional torts if the tortious act was committed with the intent to benefit the community regardless whether community benefit results.<sup>28</sup> Moreover, there is no community liability for one spouse's *malicious* acts unless it is shown that the other spouse consented to the act or that the community benefitted from it.<sup>29</sup> This is based on the premise that a malicious tort does not ordinarily benefit the community.<sup>30</sup> This rule would greatly benefit our State by adding certainty and predictability to community liability law. Spouses would not have to be surprised or worried about their other spouse's malicious conduct imposing community liability and subjecting the innocent spouse's interest in the community property to pay for a liability they did not participate in or consent to. Obviously, if a spouse consented to the malicious act or participated in it, then they would have no occasion to be surprised. This rule would also help guide future trial and appellate courts in properly analyzing intentional torts and malicious torts. Here, we have both a malicious and intentional tort. Applying this rule would necessitate reversal because it is beyond dispute Mr. Wilson's actions did nothing to benefit the community and Mrs. Wilson did not know about or consent to Mr. Wilson's actions.

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<sup>27</sup> *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 83-86, 701 P.2d 1124 (1985).

<sup>28</sup> *Shelby v. Savard*, 134 Ariz 222, 229, 655 P.2d 342 (1992)

<sup>29</sup> *Shelby*, 134 Ariz. at 229, *citing*, *Shaw v. Greer*, 67 Ariz. 223, 1194 P.2d 430 (1948).

<sup>30</sup> *Shelby*, 134 Ariz. At 229.

3. *LaFramboise* is distinguishable because the *LaFramboise* community undertook the duty to safeguard the child victim.

Not only has this Court criticized *LaFramboise* as imposing community liability based on tenuous contacts with the community and on emotional overtones,<sup>31</sup> but *LaFramboise* is also distinguishable from the present case because the community in *LaFramboise* was paid to safeguard the child. In *LaFramboise*, the jury instruction that was given required the jury to find “that said community undertook to care for Beverly LaFramboise and received a consideration therefor” before it could find the community liable.<sup>32</sup> Here, the Wilsons neither undertook to care for Respondent nor were they paid to provide for his care. This distinction has subsequently been recognized as important in at least one other case.<sup>33</sup>

This distinction is also important because it makes a difference when agency law concepts are applied. When a principal undertakes a duty to care for others, then the duty is non-delegable and the principal is liable if the duty is not discharged even if the harm is caused by a third person or by an agent who acts outside the scope of their authority.<sup>34</sup> In *LaFramboise* the husband and wife agreed to provide care for the six-year-old child. Proper care was not provided when the husband took indecent liberty with the child.<sup>35</sup> Because the community in that case undertook the duty to provide care, the community was liable for an agent’s acts even if the agent exceeded the scope of his or her

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<sup>31</sup> *deElche v. Jacobsen*, 95 Wn.2d 237, 242, 62 P.2d 835 (1980); and *Keene*, 131 Wn.2d at 830.

<sup>32</sup> *LaFramboise*, 42 Wn.2d at 199.

<sup>33</sup> *Farman v. Farman*, 25 Wn. App. 896, 903, n.3, 611 P.2d 1314 (1980).

<sup>34</sup> *See Travis v. Bohannon*, 128 Wn. App. 231, 244, 115 P.3d 342 (2005); and Restatement (Second) of Agency, 214, Comment a.

<sup>35</sup> *LaFramboise*, 42 Wn.2d at 198-99.

authority.<sup>36</sup>

The Court of Appeals in this case totally glossed over this distinction. It saw no reason to distinguish *LaFramboise* despite the fact the community in that case was paid to provide for a child's care and in this case the community had not undertaken to provide for Respondent's care.<sup>37</sup> As shown, this distinction is not only real, but also has legal relevancy because if a married couple is paid to care for a child, then the community is liable even if an agent exceeds the scope of his or her authority and harms the child. This special agency rule does not apply here; when the Wilsons employed Respondent, were not paid to provide for his care, and there is no evidence they agreed to provide for his care.

4. *Glasgow* is distinguishable because this is not a sexual harassment case.

The Respondent's and the Court of Appeals' reliance on *Glasgow*<sup>38</sup> is misplaced because that is a workplace sexual harassment case and Respondent never plead sexual harassment. *Glasgow* is a state law sexual harassment case that is similar to a federal Title VII action.<sup>39</sup> This is not, and never was, a sexual harassment case. Courts have no jurisdiction to grant relief beyond that sought in the complaint.<sup>40</sup> Respondent was given two chances during trial to amend his complaint to plead, re-plead, and re-re-plead all his separate and distinct causes of action and was admonished that if he did not plead all his

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<sup>36</sup> Restatement (Second) of Agency, 214, Comment a. ("By contract, or by entering into certain relations with others, a person may become responsible for harm cause to them by conduct of his agents or servants not within the scope of employment...")

<sup>37</sup> *Clayton*, 145 Wn. App. at 98.

<sup>38</sup> *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 693 P.2d 708 (1985).

<sup>39</sup> *Glasgow*, 103 Wn.2d at 711, n.2.

<sup>40</sup> *In re Marriage of Leslie*, 112 Wn.2d 612, 617-18, 772 P.2d 1013 (1989).

causes of action in this final pleading, then they would not be considered by the trial court.<sup>41</sup> Neither Respondent's complaint or either of his amended complaints ever plead anything remotely resembling a workplace sexual harassment claim.<sup>42</sup> This is a distinction with a difference because employers in sexual harassment claims have certain affirmative defenses that are not available in regular tort cases for sexual assault.<sup>43</sup> The record has not been sufficiently developed to decide a workplace sexual harassment case.

The law that imputes sexual harassment claims to an employer when an owner is the harasser has not been extended beyond the workplace sexual harassment cases. To be sure, the doctor in *Thompson v. Everett Clinic* who sexually assaulted his male patients was also an owner of the clinic where he worked.<sup>44</sup> Despite this, the clinic was not liable.<sup>45</sup>

5. It is this State's public policy to both protect an innocent spouse from a miscreant spouse's deeds and to provide tort victims a remedy.

It is this State's announced public policy to protect innocent spouses from liability if their spouse commits a tortious act that has tenuous contacts with the community and, at the same time, to give tort victims a meaningful remedy.<sup>46</sup> Before *deElche* was decided courts tended to find community liability based on tenuous contacts with the community so that tort victims would have a remedy. These cases would oftentimes be based on emotional

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<sup>41</sup> 2RP 176.

<sup>42</sup> CP 5-9; 667-672; and 695-772

<sup>43</sup> *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 165-67, 991 P.2d 674 (2000).

<sup>44</sup> *Thompson*, 71 Wn. App. at 548

<sup>45</sup> *Id.*, at 549 – 553.

<sup>46</sup> *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 88, 701 P.2d 1115 (1985); *Keene v. Edie*, 131 Wn.2d 822, 830, 935 P.2d 588 (1997); *Milbradt v. Margaris*, 103 Wn.2d 337, 341-42, 693 P.2d 78 (1985); and *deElche*, 95 Wn.2d at 244-45, 622 P.2d 835 (1980).

overtones.<sup>47</sup> *deElche* changed the law to balance the interests between providing a tortfeasor some recovery and, at the same time, allowing an innocent spouse's interest in community property to be protected from the other spouse's tortious conduct that was unknown to the innocent spouse.<sup>48</sup>

The trial court's decision in this case does not advance this public policy because it effectively gave Respondent recourse to all the non-exempt community assets and left Mrs. Wilson with nothing despite her committing no tortious act. Here, the Wilson's entire estate was valued at \$1, 686,357.93.<sup>49</sup> Exempt property totaled: \$175,046.89. The nonexempt assets were, therefore, \$1,511,311.11. The trial court's total damage award was \$1, 400,000.<sup>50</sup> Imposing community liability in this case not only makes Mrs. Wilson vicariously liable for her former husband's actions, but it also wipes out Mrs. Wilson's interest in all the community property she acquired during her 39-year marriage. This does not balance her interests as an innocent spouse with Respondent's interests to have a remedy.

Mrs. Wilson's proposal, on the other hand, adequately protects both parties' interests. Mrs. Wilson does not propose Respondent have no remedy; rather, she proposes Respondent's remedy be limited to Mr. Wilson's interest in the former community property at the time the Wilsons' marriage was dissolved. *deElche* allows a tort victim to reach a tortfeasor's interest in community

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<sup>47</sup> *deElche*, 95 Wn.2d at 245.

<sup>48</sup> *Id.* at 244 ("the system we now establish balances these competing legal and societal considerations.")

<sup>49</sup> Trial Exhibit 37.

<sup>50</sup> CP 856-57 (Finding of Fact No. 7 lists emotional distress damages of \$1,200,000.00 and lost future wages of \$200,000.00).

property.<sup>51</sup> First, Respondent must reach Mr. Wilson's interest in community personal property. To the extent that is insufficient to satisfy the judgment against Mr. Wilson, Respondent can reach Mr. Wilson's interest in community real property.<sup>52</sup> Respondent should be able to reach the former community property after the Wilsons dissolved their marriage because his interests were not affected by the decree since he was not a party.<sup>53</sup> As such, Respondent has a right to satisfy his claim against Mr. Wilson's interest in the former community property no matter who it was distributed to in the dissolution decree.<sup>54</sup> While this remedy has historically applied only to community liabilities, after *deElche* there is no reason it should not apply to separate liabilities. Respondent's ability to recover, however, would be limited to Mr. Wilson's interest in the community property valued at the time the dissolution decree was entered because the community dissolved and any increase in value inured to the former spouse who was awarded the property.<sup>55</sup> Mrs. Wilson would be allowed to keep her interest in the community personal and real property and all her separate property. This would provide Respondent a meaningful remedy and allow Mrs. Wilson to retain that which she has worked for during her 39-year marriage. Remand will be necessary, however, to determine Mr. Wilson's interests in the community property because Mrs. Wilson might have been entitled to a disproportionate share of the community property, as conceded by Respondent's expert at trial.<sup>56</sup> Value will not be an issue because the trial court

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<sup>51</sup> *deElche*, 95 Wn.2d at 245; and RCW 6.04.040(1).

<sup>52</sup> *Keene*, 131 Wn.2d at 137.

<sup>53</sup> *Hanson v. Hanson*, 55 Wn.2d 884, 887, 350 P.2d 859, 861 (1960)

<sup>54</sup> *Dizard & Getty v. Damson*, 63 Wn.2d 526, 531, 387 P.2d 964.

<sup>55</sup> *Watters v. Doud*, 95 Wn.2d 835, 838-41, 631 P.2d 369 (1981)

<sup>56</sup> 9RP 239 (A 65/35 percent split plus some maintenance would be a possibility outside of the envelope).

made findings as to value.<sup>57</sup>

B. There is no Uniform Fraudulent Transfer Act violation.

1. There can be no fraudulent transfer in an uncontested dissolution proceeding in Washington because creditors are not affected by the decree.

Washington is unique insofar as it provides a married couple's creditors adequate protection against a dissolution decree adversely affecting their rights. First, it provides a dissolution decree does not affect creditors because they are not parties to the decree.<sup>58</sup> Second, it allows creditors the right to satisfy liabilities arising during the marriage with former community property after a dissolution decree is entered no matter who received the property in the dissolution decree.<sup>59</sup> While there is authority that suggests a creditor cannot enforce a separate tort liability against former community property,<sup>60</sup> that authority was decided before *deElche* gave separate tort creditors a right to collect against the tortfeasor spouse's interest in community property. Mary Kay concedes that this authority should be overruled in light of *deElche*, and Respondent in this case should have the same rights as a community creditor to reach Mr. Wilson's interest in former community property at the time the marriage was dissolved to satisfy Mr. Wilson's separate liability. Since the Wilsons' dissolution decree did not adversely affect Respondent's rights as a creditor, it cannot be said to have been collusively entered into with an actual intent to hinder, delay or defraud creditors.<sup>61</sup>

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<sup>57</sup> Finding of Fact No. 11, CP 847

<sup>58</sup> *Hanson* 55 Wn.2d at 887.

<sup>59</sup> *Dizard*, 63 Wn.2d at 531.

<sup>60</sup> See *Griggs v. Averbaeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979)

<sup>61</sup> See RCW 19.40.041(a)(1).

Washington's uniqueness has already been determined to bar a fraudulent transfer claim for any property distributed in a dissolution decree.

We are not aware of any Washington decision in which it was held that creditors of a marital community which has been terminated by divorce may set aside a property award on the basis that it was a fraudulent transfer. *Their only right as against such property is to enforce an equitable lien.*<sup>62</sup>

Given the fact a married couple's creditors are unaffected by a dissolution decree and adequately protected by being able to enforce their claim against former community property after a marriage is dissolved, there is no reason to allow creditors to collaterally attack a final dissolution decree entered by trial courts in this State.

2. It is a trial court's obligation to independently distribute a married couple's property in a just and equitable manner.

Not allowing creditors to collaterally attack a final dissolution decree entered by the courts in this State also protects the judicial system's integrity. It is a trial court's independent obligation to distribute a couple's community property in a just and equitable manner.<sup>63</sup> Once a property settlement agreement is approved by a court, it becomes more than a contract, it also become a decree signed by a judge – a judge who has the statutory duty to distribute property in a just and equitable manner.

We should be slow to conclude that a trial court waives or abdicates its duty to the public when it embodies or incorporates by reference in its decree of divorce the parties' agreed settlement. By and large, a trial court does not accept a

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<sup>62</sup> *Britt v. Damson*, 334 F.2d 896, 901 (9<sup>th</sup> Cir 1964).

<sup>63</sup> RCW 26.09.080.

settlement agreement of the parties simply because of their contractual rights, but because its provisions seem just and equitable and in furtherance of sound public policy, all factors being considered.<sup>64</sup>

Since the Wilsons' property distribution was judicially reviewed and determined it is no longer a transaction between spouses. It is now a judicial order that should be dignified and respected. In *Jones*, the attack was against a property settlement agreement because the Nevada dissolution decree was void.<sup>65</sup>

There are factors present in this case that make this distinction more applicable. First, Respondent did not bring this suit until well over one year after the Wilsons' divorce would have been tried. Had a trial occurred and the trial court have made the same property distribution, then there would be little doubt that there would be no fraudulent transfer action to set aside the decree. Second, the trial court in this case did not vacate or set aside the dissolution decree.<sup>66</sup> This results in two competing and inconsistent decrees over the same property. This result should be avoided. By allowing creditors the unique Washington remedies already provided to them, this Court can avoid competing, inconsistent decrees over the same property in this case and in the future.

3. Once the Wilsons' marriage was dissolved, the appreciation on the property inured to the spouse receiving the property in the marital dissolution proceeding.

Respondent's rights to collect his claim against former community

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<sup>64</sup> *Decker v. Decker*, 52 Wn.2d 456, 463-64, 326 P.2d 232 (1958).

<sup>65</sup> *Jones v. Jones*, 56 Wn.2d 328, 336, 353 P.2d 441. ("The Nevada Decree, being void, leaves the property settlement agreement between Barbara Jones and Thomas C. Jones, without consideration. It becomes merely a contract between husband and wife, and the deeds conveying the property to Barbara Jones, must be judged as conveyances between husband and wife, during their marriage.")

<sup>66</sup> CP. 863-64, ¶ 2.

property is necessarily limited to Mr. Wilson's interest in the community property as it was valued at the time the dissolution decree was entered. Once a dissolution decree has been entered there is no more community.<sup>67</sup>

Accordingly, any post-decree appreciation on former community property is the separate property of the spouse that received the property in the dissolution decree.<sup>68</sup> This rule becomes important in this case because the appreciation on the non-exempt property awarded to Mrs. Wilson in this case should be her own separate property.

4. There is no conclusive common law fraud.

a. Conclusive common law fraud was overruled.

This Court has implicitly overruled any conclusive common law fraud claim. After *Davison v. Hewitt* was decided, which conclusively presumed fraud when an insolvent spouse transfers property to his or her spouse while they are still married,<sup>69</sup> this Court held fraud is never presumed in transactions between a husband and wife.<sup>70</sup> Since *Jones* and *In re Bubb's Estate* were decided after *Davison*, they control. They provide that fraud is never presumed and implicitly overrule the presumption in *Davison* that fraud is conclusively presumed.

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<sup>67</sup> *Griggs*, 92 Wn.2d at 585.

<sup>68</sup> *Watters*, 95 Wn.2d at 838-41.

<sup>69</sup> *Davison v. Hewitt*, 6 Wn.2d 131, 106 P.2d 753 (1940).

<sup>70</sup> *Jones*, 56 Wn.2d at 337, *citing*, *In re Bubb's Estate*, 53 Wn.2d 131, 331 P.2d 859 (1958).

- b. Conclusive common law fraud was displaced by the Uniform Fraudulent Transfer Act, which extinguished insider preference actions if they were not brought within one year.

Even if this Court did not implicitly overrule any conclusive common law fraud claims, the Legislature displaced any conclusive common fraud law claim when it enacted the Uniform Fraudulent Transfer Act (UFTA) and provided any insider preference claim was extinguished within one year. The UFTA displaces inconsistent common law provisions.<sup>71</sup> RCW 19.40.051(b) provides a transfer to an insider is conclusively fraudulent if the transferor was insolvent at the time the transfer was made. This is the same exact situation presented in *Davison*. The husband's wife in *Davison* was an insider.<sup>72</sup> The husband was insolvent at the time he transferred the property to the wife. Because the *Davison* fact pattern has been completely subsumed by RCW 19.40.051(b), UFTA has displaced the common law rule in *Davison*. This is important because insider preference claims under RCW 19.40.051(b) are extinguished after one year.<sup>73</sup> Respondent cannot breathe life into his expired insider preference claim by asserting it as a common law theory.

5. It would undermine this State's public policy encouraging settlements to allow unaffected creditors to collaterally attack judicial property distributions in a marital dissolution proceeding.

It would undermine this State's avowed public policy to encourage settlement if creditors, who are unaffected by a dissolution decree, were allowed to set aside judicial property distributions within that decree. It has

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<sup>71</sup> RCW 19.40.902.

<sup>72</sup> See RCW 19.40.011(7) defining an insider as a relative; and RCW 19.40.011(11) defining a relative as including a spouse.

<sup>73</sup> RCW 19.40.091(c).

long been this State's public policy to encourage settlements without recourse to litigation.<sup>74</sup> By not adopting Petitioner's proposal in this action and by allowing Respondent and other creditors to collaterally attack the dissolution decree in this case, it will cause couples with contingent tort liabilities to litigate their dissolution cases through trial. If a couple has a contingent tort liability, like the Wilsons did in this case, then they will not be able to settle a marital dissolution case should they desire to dissolve their marriage. If they did settle, then they would run the risk of having their agreement and the subsequent judicial dissolution decree collaterally attacked by creditors as fraudulent. Moreover, by not allowing collateral attacks on dissolution decrees by creditors, trial courts would not have to re-try the settled dissolution action in order to determine whether reasonably equivalent value was given to support the agreed-upon property distribution.

6. The real property transfers occurred when the deeds were recorded.

RCW 19.40.061(1)(i) makes clear that no real property was "transferred" for UFTA purposes when the Wilsons signed their property settlement agreement; rather any real property transfer occurred when the deeds were recorded or when the dissolution decree was entered.

- C. There is no joint and several liability in this case.

*de Elche* makes clear that even in cases where there is community liability, the community and tortfeasor are *separately* liable and not jointly and severally liable.<sup>75</sup>

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<sup>74</sup> *Kubista v. Romaine*, 14 Wn. App. 58, 71, 538 P.2d 812 (1975).

<sup>75</sup> *deElche*, 95 Wn.2d at 245.

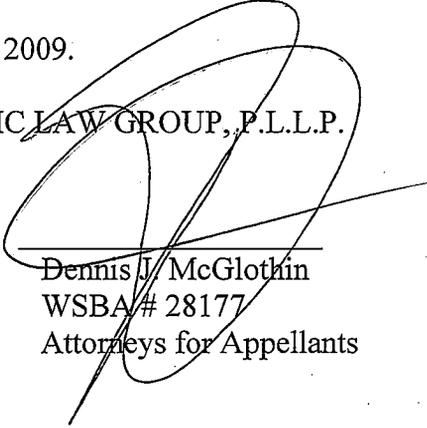
D. Respondent did not adequately prove lost wages.

Lost wages is based on comparing a victim's pre-injury earning capacity with the victim's post-injury wages. It was undisputed in this case that Respondent's pre-injury earning capacity was a person with an Associate of Arts degree.<sup>76</sup> This translated to a \$34,500 per year earning capacity.<sup>77</sup> It was similarly undisputed that Respondent was actually exceeding his pre-injury earning capacity as a full-time plumber apprentice earning \$19 per hour<sup>78</sup> or \$39,520 annually.<sup>79</sup> Because Respondent's actual wages exceeded his pre-injury earning capacity, it was error to award any lost wages as damages.

RESPECTFULLY SUBMITTED May 4, 2009.

OLYMPIC LAW GROUP, P.L.L.P.

By:



Dennis J. McGlothlin  
WSBA # 28177  
Attorneys for Appellants

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<sup>76</sup> 6RP 51.

<sup>77</sup> 8RP 122.

<sup>78</sup> 6RP 182.

<sup>79</sup> \$19 per hour multiplied by 2080 hours per year.