

NO. 72336-7-I

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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CALIFORNIA SHELLFISH COMPANY, INC.,

Plaintiff/Appellant,

v.

SEAFOOD SALES, INC. and TERRY R. BERTOSON,

Defendants/Respondents.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Honorable Monica J. Benton)

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**BRIEF OF RESPONDENT**

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Matthew D. Hartman, WSBA No. 33054  
1325 Fourth Avenue, Suite 1400  
Seattle, WA 98101  
(206) 792-5230  
matt@impactlawgroup.com  
*Attorney for Defendants/Respondents  
Seafood Sales, Inc. and Terry R. Bertoson*

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**ORIGINAL**

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## I. INTRODUCTION

Plaintiff/Appellant California Shellfish Company seeks to enforce a judgment obtained against Defendant/Respondents Seafood Sales, Inc. and Terry R. Bertson by executing on indivisible homestead property which is owned in part by Mr. Bertson's spouse who was neither named as a defendant nor alleged to have benefited from the acts giving rise to the judgment against Mr. Bertson. At its core, the Appellant seeks an order allowing execution of a judgment on indivisible real homestead property that is not held exclusively by the judgment debtor. Appellant is not entitled to such relief under Washington law.

## II. RESTATEMENT OF THE CASE

This case arises from a business debt incurred by Defendant/Respondents Seafood Sales, Inc. and Terry R. Bertson in favor of Plaintiff/Appellant California Shellfish Company. Appellant obtained a judgment against Mr. Bertson and Seafood Sales, Inc. The judgment makes Mr. Bertson and Seafood Sales, Inc. jointly and severally liable for the debt at issue. The parties do not dispute that Appellant failed to name Mr. Bertson's spouse and or his marital community as a defendant in the underlying action or that the judgment does not identify Mr. Bertson's spouse or his marital community as judgment debtors.<sup>1</sup> Appellant subsequently attempted to enforce the judgment against Mr. Bertson's homestead which is owned as

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<sup>1</sup> CP 105-107

community property with his spouse.<sup>2</sup> Mr. Bertosen objected to enforcement on his homestead arguing the property was indivisible community property he owned jointly with his spouse and that Appellant's failure to plead or prove his spouses' liability for the underlying debt precluded execution on this indivisible community property.<sup>3</sup> The trial court denied the Appellant's motion for an order directing sale of the real property at issue finding that the Appellant failed to name the spouse or the marital community in the action.<sup>4</sup> The trial court found the real property at issue was indivisible community property and not subject to execution to satisfy the judgment against Mr. Bertosen.

### III. RESTATEMENT OF THE ISSUE

Did the trial court err in denying the Appellant the right to enforce a judgment by executing on the indivisible homestead of the judgment debtor when neither the spouse nor the marital community of the judgment debtor were pled or proven to be liable parties?

### IV. ARGUMENT

#### A. Standard of Review.

The material facts of this case are not in dispute. Accordingly, the issues before the trial court involved questions of law. The standard of review on appeal of a trial court's decision on a question of law is *de*

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<sup>2</sup> CP 135

<sup>3</sup> CP 162-166

<sup>4</sup> CP 195-196

**B. Where a party has failed to plead or prove community liability a judgment obtained against a party in their individual capacity is not presumed to be a community debt.**

A party seeking a judgment which it intends to enforce against the assets of the marital community must plead and prove community liability. “Nowhere has this court intended to countenance the idea that a person from whom the wife borrows has from the mere circumstance of her borrowing a personal claim upon the husband as well. Indeed, we held in *Conley v. Greene*, 89 Wash. 39, 153 Pac. 1089, that even when the wife's post-marital note was reduced to judgment in her marital name, but in hers only, there was no lien or presumed lien on the family estate.” *Balkema v. Grolimund*, 92 Wash. 326, 328 (Wash. 1916). *See also Fielding v. Ketler*, 86 Wash. 194, 149 Pac. 667 (the question of whether the act of one spouse creates a community obligation is a question of fact.)

Contrary to the claims of the Appellant in the instant matter, Washington jurisprudence requires that a creditor name both the husband and wife and the marital community to enforce a judgment against the marital estate and or establish facts before the court proving the marital community derived a benefit from the debt at issue. For example, in *Belknap v. Platter*, 54 Wash. 1 (Wash. 1909), where a creditor was endeavoring to subject a debtor's property to the payment of his claim. The court held the creditor could not judicially establish

such claim as a community obligation without proceeding against the husband and wife. Id.

Appellant cites to *Whitehead v. Satran*, 37 Wn.2d 724, (Wash. 1950) arguing that this case is directly on point and stands for the proposition that a creditor need not plead or prove facts establishing community liability to execute a judgment against assets of the marital estate. In that case, the court noted that there were facts before the trial court regarding the garnishee debtors marital status and the wife's relationship with the business from which the debt allegedly arose. "The affidavit stated that he was married in October, 1938, and that his interest in the Hob Nobbers Tavern was acquired March 1, 1947, with funds acquired subsequent to his marriage. That allegation would not overcome the presumption that this was a community obligation. It would tend to verify the presumption." Id. At 726. *Whitehead* is a very short opinion and deals primarily with whether an affidavit establishing facts relied on by the trial court is part of the appellant record. However, a close read of *Whitehead* suggests that in that case Plaintiffs named both the husband and wife as defendants and the husband subsequently moved to have the court declare the debt at issue to be his separate liability. Id. 725-726. The case at bar is fundamentally distinguishable *Whitehead* in that here, there were no facts whatsoever before the trial court concerning Mr. Bertson's marital status at the

time the debt was incurred let alone his current wife's relationship to the business where the debt was incurred.

Appellant improperly relies on other cases in support of its theory that there is a presumption of community liability where a judgment creditor has failed to plead or prove claims against the spouse or the marital community. For example, in *Oil Heat Co. of Port Angeles, Inc. v. Sweeney et al.*, 26 Wn. App. 351 1980, the judgment creditor pled and proved its claims against the wife and marital community. "Plaintiff eventually sued the marital community of D. D. and Myrna Sweeney to satisfy the debt." *Id.* at 352. Contrary to Plaintiff's characterization of the meaning of this opinion, this is a case that informs the court as to a judgment debtor's burden in overcoming a presumption of community liability when the judgment creditor has properly pled claims for such liability. "We hold that the evidence presented by Mrs. Sweeney to refute community liability and the findings entered thereon did not meet the burden of proof necessary to overcome the presumption of community liability, and that the trial court erred in characterizing D. D. Sweeney's debt to plaintiff as a separate, not a community, obligation. *Sweeny* at 356. This precedent is not helpful in answering the question in the instant case because here the plaintiff failed to plead and prove a claim of community liability.

In *Warren v. Wash. Trust Bank*, 19 Wn. App. 348, 359-360 (Wash. Ct. App. 1978), another case incorrectly relied upon by the

Appellant, it appears the parties who were subject to the community liability at issue were named in the action and that the court entered into a fact finding procedure to ascertain whether a community did in fact receive a benefit. It does not stand for the proposition as Plaintiff asserts, that a community liability will be presumed against one who is neither named in the complaint nor alleged to have benefited from the transaction at issue.

Likewise Appellant incorrectly relies on the precedent in *Flies v. Earl M. Story, Billie Storey*, 37 Wn. 2d 105 for the proposition that a plaintiff need not plead or prove community liability to enforce a judgment against the assets of the marital community. In that case, as the caption suggests, once again the judgment creditor named both husband and wife as defendants. The wife answered the complaint and denied execution of the note at issue. *Id.* at 106. Further the evidence before the court in that case established that the debt at issue was incurred for the benefit of the marital community. *Id.* at 110. No such evidence was before the trial Court in the instant matter and Appellant has not asserted such.

The other cases cited to by the plaintiff supporting the notion that a judgment debtor has a burden to overcome a presumption of community liability only apply where the complaint has been properly pled to establish such a presumption. *See for example Malotte v. Gorton*, 75 Wn.2d 306, 311 (Wash. 1969) (Judgment creditor named

both husband and wife and obtained a judgment against each of the defendants); *Oregon Imp. Co. v. Sagmeister*, 4 Wash. 710 (Wash. 1892) (The undisputed facts showed, and the court below found, that the debt at issue were incurred by the husband in the prosecution of his business in the interest of the community, and from which the community intended to receive the benefits and profits.); *Nat'l Bank of Commerce v. Green*, 1 Wn. App. 713 (Wash. Ct. App. 1969)(a close review of the case suggests that both husband and wife were named as defendants).

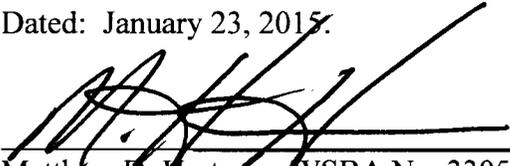
Appellant cites to the holdings in *Bortle v. Osborne*, 155 Wash.585, 589-90 (1930) and *deElche v. Jacobsen*, 95 wn.2d 237, 243 (1980) in support of their position that the “marital community” is not a “legal entity” for the purposes of naming and identifying as a party to a lawsuit. However, Washington jurisprudence suggests, that in debt collection actions, it is common practice to name the spouse and the marital community as defendants and to allege that a debt at issue was incurred for the benefit of the marital community. Appellant failed to take that simple step in this case and therefore Mr. Bertosen’s spouse has never appeared in this action. It is accordingly, improper to then make her portion of an indivisible piece of community real property, the homestead in this instance, subject to collection of a debt held only against her husband. Finally, the matter of *Rainier Nat'l Bank v. Clausing*, 34 Wn. App. 441 (Wash. Ct. App. 1983) is distinguishable from the present case. There, the husband appealed, assigning error to

the superior court's imposition of liability upon his marital community, among other things. By contrast, in the present case there has been no finding by the trial court that the debt at issue is community debt. The dearth of evidence in the record on this issue is due to the fact that no such allegation was ever pled or proven by the Appellant.

## V. CONCLUSION

Appellant has failed to cite a single case wherein a judgment creditor was allowed to execute a judgment against the indivisible homestead of a marital community where the judgment creditor failed to plead or prove any liability as to one of the members of the marital community holding an interest in the indivisible homestead. Accordingly, Appellant has failed to meet their burden to establish they are entitled to the relief requested. The trial Court's ruling in this matter as to the restriction on enforcement of the judgment against the indivisible homestead of a marital community at issue should be upheld.

Dated: January 23, 2015.



Matthew D. Hartman, WSBA No. 33054  
1325 Fourth Avenue, Suite 1400  
Seattle, WA 98101  
(206) 792-5230  
matt@impactlawgroup.com  
*Attorney for Defendants/Respondents  
Seafood Sales, Inc. and Terry R. Bertson*

**PROOF OF SERVICE**

I declare that on January 23, 2015, I caused a true copy of the foregoing Respondent’s Brief to be served on the following in the manner indicated:

Local Attorneys for Plaintiff:  
Laurin Schweet  
Jacob D. Rosenblum  
Schweet Rieke & Linde, PLLC  
575 S. Michigan Street  
Seattle, WA 98108  
[laurins@schweetlaw.com](mailto:laurins@schweetlaw.com)  
[jacobr@schweetlaw.com](mailto:jacobr@schweetlaw.com)

- Via Hand Delivery
- Via Facsimile
- Via U.S. Mail
- Via Overnight Delivery
- Via E-Mail

**Impact Law Group PLLC**

  
Traci Clark