IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEAN E. TROST, R.N.,	)	
	)	DIVISION ONE
Plaintiff/Counterclaim Defendant,	)	
	)	No. 66257-1-I
v.	)	
	)	
AESTHETIC LITETOUCH, INC., P.S., a Washington corporation; JOHN PAUL ISBELL, M.D., Officer/Medical Director, Aesthetic Litetouch, Inc.; MELISSA ISBELL, Office Manager, Aesthetic Litetouch, Inc.; and JAMES E. FINNEGAN, Co-Owner/Manager, Aesthetic Litetouch, Inc.,	)	UNPUBLISHED OPINION
	)	
Respondents,	)	
	)	
BELLA TU, INC., a Washington corporation,	)	
	)	
Third Party Defendant,	)	
	)	
ALAN G. WARNER,a married man, and his marital community,	)	
	)	
Appellant.	)	FILED: July 16, 2012

Dwyer, J. — Alan Warner appeals for the second time from the judgment entered in an action involving his wife's misappropriation of trade secrets.

Following Warner's first appeal, we held that the issue of Warner's personal liability in that action was improperly determined on summary judgment and remanded for further proceedings.[1] Warner now asserts that the trial court erred by thereafter determining that the original judgment reached Warner's community property. However, because the conduct of Warner's wife clearly conferred a benefit upon the marital community, the trial court did not err by determining that the marital community was liable. Because Warner's other contentions are also without merit, we affirm.

I

We briefly recite the relevant facts. Aesthetic Litetouch, Inc., P.S., (ALT), a high-end, cosmetic skincare medical practice, was formed by Dr. John Paul Isbell in 1999. ALT hired Jean E. Trost, a registered nurse, to run the practice and treat ALT's patients. In August 2005, Trost, who held no ownership stake in ALT, attempted to obtain a controlling interest in the company. She informed Dr. Isbell that one of ALT's competitors, Bella Tu, Inc., had offered her a 50 percent ownership interest. Dr. Isbell told Trost that he would consider her proposal.

On August 12, 2005, Dr. Isbell rejected Trost's demand and terminated Trost's employment. He told Trost to remove her personal effects and belongings from the office. Dr. Isbell further informed Trost that she was "not to take any patient records or copy down any patient information on a chart."

[1] Trost v. Aesthetic Litetouch, Inc., P.S., noted at 151 Wn. App. 1002, 2009 WL 1917072 (2009).

Nevertheless, Trost gathered computer discs containing lists of patient contact information and treatment histories and removed them from the office.

On August 24, 2005, Trost married Alan G. Warner. Shortly thereafter, on September 6, 2005, she began work at Bella Tu. Trost utilized the information contained in ALT's contact lists to send letters to 800 patients, soliciting their business for Bella Tu. These letters were prepared during September 2005. Over the next 16 months, 145 of ALT's patients received treatment at Bella Tu.

In March 2006, Trost filed a complaint against ALT and its officers and shareholders, asserting 19 causes of action arising out of ALT's alleged infringement of her statutory and common law rights of publicity. In turn, ALT asserted a counterclaim against Trost, and corresponding third-party claims against Warner and Bella Tu, for misappropriation of trade secrets in violation of the Uniform Trade Secrets Act, chapter 19.108 RCW. The counterclaim alleged that "[a]t all times relevant hereto, Warner has been married to Trost. All actions taken by Trost at issue herein have been taken for the benefit of the marital community comprised of Trost and Warner." Trost and Warner denied this allegation.

ALT thereafter moved for partial summary judgment, seeking liability against Trost, Warner, and Bella Tu on ALT's trade secrets claim. The trial court granted this motion on February 28, 2007. The issue of damages was set for

trial.

Following trial, the jury determined that the misappropriation of trade secrets was willful and malicious,[2] and awarded substantial damages to ALT. Judgment was entered against Warner and Bella Tu on May 5, 2008 and against Trost on June 12, 2008.[3] The trial court ordered that "Jean Trost, Alan G. Warner, and Bella Tu, Inc. are jointly and severally liable to [ALT] for the amounts owed on the judgments entered against them in this case."

Warner, Trost, and Bella Tu appealed from the entry of judgment. In Trost v. Aesthetic Litetouch, Inc., P.S., noted at 151 Wn. App. 1002, 2009 WL 1917072, at *1 (2009), we affirmed the judgment as to the liability of Trost and Bella Tu for the misappropriation of trade secrets, but reversed as to Warner's personal liability. We explained that "ALT failed to carry its initial burden on its misappropriation claim against Warner individually" and that summary judgment on this issue was therefore improper. Trost, 2009 WL 1917072, at *6. However, we "decline[d] to order dismissal of ALT's individual claims against Warner or to order the judgment amended so as to reach only Warner's share of his and Trost's community property." Trost, 2009 WL 1917072, at *6 n.4. Instead, we remanded the case for further proceedings.[4] Trost, 2009 WL 1917072, at *6 n.4.

Following remand, the trial court issued an order entered July 16, 2010,

[2] Pursuant to RCW 19.108.030(2), if the jury determines that "wilful and malicious misappropriation exists, the court may award exemplary damages."

[3] The judgment against Trost was delayed due to a stay based upon Trost's filing for bankruptcy. The bankruptcy proceeding was dismissed on May 22, 2008.

[4] We denied Warner's motion for reconsideration and the Supreme Court denied his petition for review.

ruling in part that, "[t]he judgment against Alan Warner in his individual capacity is vacated" and requesting additional briefing, in light of our decision, regarding "whether the judgments reach the marital community of Warner/Trost." On September 24, 2010, after considering the arguments of counsel, the trial court entered a second order ruling that "[t]he judgment entered June 13, 2008 indicates that the marital community comprised of Jean Trost and Alan G. Warner is liable." A final judgment in the amount of $624,701.82 was thereafter entered against "Jean E. Trost and the marital community of Jean E. Trost and Alan G. Warner."

Warner appeals.

II

Warner first contends that the trial court erred by determining that the original judgment reached the marital community of Trost and Warner and that, accordingly, the trial court's entry of the revised judgment clarifying the liability of the marital community was improper. We disagree.

The trial court determined the liability of the parties on summary judgment; it was this determination by the court that served as the basis of the original judgment entered on June 13, 2008. On remand, the trial court heard no testimony and considered no additional evidence prior to determining that the original judgment "indicates that the marital community comprised of Jean Trost and Alan G. Warner is liable." Accordingly, this order is properly considered as

a clarification of the court's original summary judgment order. We review such orders de novo, engaging in the same inquiry as the trial court. Morin v. Harrell, 161 Wn.2d 226, 230, 164 P.3d 495 (2007).

Summary judgment is appropriate only if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We must consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "However, when reasonable minds could reach but one conclusion from the evidence presented, questions of fact may be determined as a matter of law, and summary judgment is appropriate." Cent. Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

Our Supreme Court has recently clarified the circumstances in which a marital community may be liable for the tortious conduct of one of its members. In Clayton v. Wilson, the court explained that the community is liable for the tort of a member spouse where "'the act constituting the wrong *either* (1) results or is intended to result in a benefit to the community *or* (2) is committed in the prosecution of the business of the community.'" 168 Wn.2d 57, 63, 227 P.3d 278 (2010) (quoting LaFramboise v. Schmidt, 42 Wn.2d 198, 200, 254 P.2d 485 (1953)); see, e.g., Kilcup v. McManus, 64 Wn.2d 771, 782, 394 P.2d 375 (1964) (because actions in employment benefit the marital community, the marital

community was liable for husband's false imprisonment committed in the course of his duties); McHenry v. Short, 29 Wn.2d 263, 273, 186 P.2d 900 (1947) (because eviction of tenant was in furtherance of community-owned business, the marital community was liable for deadly beating of tenant during eviction). However, where liability is alleged on the basis that a community benefit was intended, no community liability may be imposed for acts that, from the perspective of a reasonable person, are unlikely to produce such a benefit. Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 869, 991 P.2d 1182 (2000); Edmonds v. Ashe, 13 Wn. App. 690, 694, 537 P.2d 812 (1975).

Here, there is no dispute regarding the relevant facts. Warner was married to Trost on August 24, 2005. Trost prepared and distributed the letters soliciting the business of ALT's patients in September 2005, during her marriage to Warner. There is no dispute that Bella Tu benefited significantly from Trost's actions—in our decision following Warner's first appeal, we noted that "as a result of soliciting business from individuals who had previously received treatment at ALT, Bella Tu earned approximately $119,000 in revenues." Trost, 2009 WL 1917072, at *4. Similarly, the parties do not dispute that Trost benefited from Bella's Tu's success—as both an officer and owner of the company, Trost directly profited from the acquisition and disclosure of ALT's trade secrets.

There is no merit to Warner's contention that, because Trost acquired

ALT's patient lists prior to marrying Warner, "all acts giving rise to liability occur[ed] prior to the marriage." Warner is correct that where a tort is committed prior to marriage, the obligation may be satisfied only from the tortfeasor's separate property and one-half interest in community personal property. Haley v. Highland, 142 Wn.2d 135, 152, 12 P.3d 119 (2000). Here, however, although Trost removed the patient lists from ALT's office prior to her marriage to Warner, she utilized the information contained within the lists only during their marriage.

Pursuant to the Uniform Trade Secrets Act, misappropriation includes:

> Disclosure or use of a trade secret of another without express or implied consent by a person who . . . [a]t the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.

RCW 19.108.010(2). Thus, it is Trost's use of the patient lists, not her removal of those lists from ALT's office, that constituted misappropriation in this case. As we have previously noted, "[i]n blatant disregard of Dr. Isbell's admonition not to take any patient information with her after she stopped working for ALT, Trost *used* Alt's patient lists to solicit business for Bella Tu." Trost, 2009 WL 1917072, at *5 (emphasis added). Because Trost's use of the patient lists occurred *during* her marriage to Warner, Warner's contention that all acts giving rise to liability occurred prior to the marriage is unavailing.

Similarly, it is clear that the community comprised of Warner and Trost benefited as a result of Trost's tortious conduct. It has long been the rule of our

state that "all property acquired during marriage is presumptively community property." In re Marriage of Mueller, 140 Wn. App. 498, 501, 167 P.3d 568 (2007); Dean v. Lehman, 143 Wn.2d 12, 19, 18 P.3d 523 (2001); Yesler v. Hochstettler, 4 Wash. 349, 353-54, 30 P. 398 (1892). Thus, the financial benefit obtained by Trost as a result of her misappropriation of ALT's patient lists is presumed to belong to the marital community. Warner points to no evidence in the record to rebut this presumption. Accordingly, because the fruits of Trost's tortious conduct are community property, Trost's misappropriation of ALT's trade secrets conferred a community benefit. In such circumstances, the marital community is liable. Clayton, 168 Wn.2d at 63-64. The trial court properly determined that the original judgment reached the marital community of Warner and Trost.[5]

III

Warner next contends that he and Trost "have been living separate and apart since September 2009," and that, because the trial court did not enter the revised judgment until October 2010, it was improper to impose community liability at that time. Warner additionally appears to contend that, because a spouse's earnings and accumulations are that spouse's separate property when a marriage is defunct, the garnishment of his wages to satisfy this community obligation was improper. We disagree on both counts.

[5] Because the trial court did not, in fact, amend its original judgment—instead determining that the original judgment already indicated that the community was liable—we need not address Warner's contention that the judgment was amended by improper procedures.

We first note that Warner's claim of separation has no impact upon the trial court's power to enter judgment against the marital community in this case. Warner is correct that "community liability ordinarily will not attach to a marriage that is clearly defunct." Oil Heat Co. of Port Angeles, Inc. v. Sweeney, 26 Wn. App. 351, 354, 613 P.2d 169 (1980). Here, however, liability attached prior to the alleged separation. As discussed above, Trost's tortious conduct occurred in September 2005, during the first month of her marriage to Warner. Because this date precedes the date of the alleged separation by several years, the trial court did not err by entering a judgment that imposed community liability based upon Trost's conduct at that time.

Moreover, Warner cannot rely on a bald assertion of separation to avoid the payment of a community obligation. It is true that "[w]hen spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each." RCW 26.16.140. In general, community debts are collectable only from community property.[6] Pacific Gamble Robinson Co. v. Lapp, 95 Wn.2d 341, 344, 622 P.2d 850 (1980), overruling on other grounds recognized by Haley, 142 Wn.2d 135. However, mere physical separation does not dissolve the community, Seizer v. Sessions, 132 Wn.2d 642, 657, 940 P.2d 261 (1997) (citing Kerr v. Cochran, 65 Wn.2d

[6] Upon the termination of the marriage by judicial proceeding, all community property must be distributed to the parties as separate property. RCW 26.09.080. However, this does not preclude the collection of a community debt. Following a dissolution, "community debts may be satisfied from the community's net equity, as measured at the time of divorce, in any property held by either spouse." Watters v. Doud, 95 Wn.2d 835, 841, 631 P.2d 369 (1981).

211, 224, 396 P.2d 642 (1964)); instead, the statute applies only to marriages that are "'defunct.'" Seizer, 132 Wn.2d at 657 (quoting Rustad v. Rustad, 61 Wn.2d 176, 180, 377 P.2d 414 (1963)). A marriage is defunct only when the evidence demonstrates that "'*both* parties to the marriage no longer have the will to continue the marital relationship.'" Seizer, 132 Wn.2d at 658 (quoting In re Marriage of Short, 125 Wn.2d 865, 871, 890 P.2d 12 (1995)). The person asserting that the marriage is defunct must establish that fact by clear and convincing evidence. Sweeney, 26 Wn. App. at 354.

Here, Warner points to nothing in the record indicating the "mutuality on the part of the spouses" that is a prerequisite to the application of RCW 26.16.140.[7] Seizer, 132 Wn.2d at 659. Absent such a showing, the garnishment of Warner's wages—which are presumptively community property, Lehman, 143 Wn.2d at 19—was proper.[8]

Affirmed.[9]

[7] Indeed, Warner points to no portion of the record at all. His lone citations with regard to this issue refer us to two page numbers that do not exist in the designated clerk's papers.

[8] Warner further asserts that the trial court erred by denying his request for an accounting and an order directing ALT to disgorge all funds collected from him. Warner's request for this relief was based upon his contentions that (1) "the court did not grant judgment against Alan Warner in his marital community" and (2) that "Alan Warner was not married to Jean Trost at the time of the misappropriation." Having previously disposed of these arguments, we need not readdress them. We also need not address Warner's assertion that he is entitled to an accounting "to determine if the amount of interest requested by ALT was accurate." Because Warner did not raise this issue in the trial court, it is not properly before us for review.

[9] Because Warner is not a prevailing party, we deny his request for an award of attorney fees and costs.

Dwyer, J.

We concur:

Becker, J.

Appelwick, J.