Washington Law Review

Volume 40 | Number 2

6-1-1965

Communty Property—Torts—Liability of Community for Tortious Act of Public Officer

anon

present and vested. On the other hand, a beneficiary has no such rights; his rights are limited to the policy proceeds, and do not vest until death of the insured. By this analysis, decedent had only the rights of ownership to the pension fund, and did not possess the rights of his beneficiary to the proceeds. Hence he could not transfer his beneficiary's rights to the marital community when he executed the community property agreement with plaintiff. However, nullification of the beneficiary's rights would still result if Washington's community property law requires that the rights of the beneficiary be dependent upon either the separate character of the property source or concurrent designation as beneficiary by both spouses.

The appropriateness of the analogy between life insurance and the General Electric Pension Trust is subject to question. No direct relationship exists between life insurance premiums and proceeds; the beneficiary is entitled to proceeds in the face amount of the policy regardless of the amount of premiums paid by the insured. The proceeds of the Pension Trust, however, are directly related to, and determined by, the amount of the employee's contributions. While the distinction between rights of ownership and beneficiary rights has this conceptual support in insurance law, the conceptual distinction did not exist under the terms of the Pension Trust.[13]

Although the *Occidental Life* doctrine may be justified by considerations of community property policy, extension of its rationale to pension plans only exaggerates Washington's deviation from the position of most other community property states. Such an extension is also unfortunate in that pension plans are a rapidly expanding innovation;[14] it seems likely that litigation of pension rights will increase in the future, and the unwarranted—even if convenient—analogy to insurance law may limit relief sought, and afforded, to that traditionally available in insurance cases.

Torts—Liability of Community for Tortious Act of Public Officer. Washington marital communities have been immune since 1890 from liability for tortious acts committed by a public officer in performance

[13] California has expressly rejected the application of insurance concepts to public pension plans. Benson v. City of Los Angeles, 60 Cal.2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963). Two courts have adopted the insurance analogy, without discussion or citation of authority, in litigation involving private pension plans under community property systems. Boyd v. Curran, 166 F. Supp. 193 (S.D. N.Y. 1958) (California); Succession of Rockvoan, 141 So.2d 438 (La. 1962).

[14] See Goldworn, *Pension Plans: Their Background, Current Trends, and an Agenda for Industry*, 25 OHIO ST. L.J. 234 (1964).

of his official duties. The Washington Supreme Court reviewed this rule once again in an action for false arrest and imprisonment against a Port of Seattle commissioner. Defendant, an employer *ex officio* of the security guard at the Seattle-Tacoma International Airport, personally arrested and maintained custody over plaintiff for a period in excess of three hours. Plaintiff sued the commissioner, his marital community, and Port of Seattle. Suit against Port of Seattle was dismissed, but judgment was entered against defendant and the marital community. On appeal, *held:* Prosecution of a marital community's business includes salaried public employment, and the community is liable for a public officer's tortious acts committed under the color or purported authority of his office even though the act was committed negligently, maliciously, or in excess of his authority. *Kilcup v. McManus,* 64 Wn.2d 771, 394 P.2d 375 (1964).

The court thoroughly reviewed the immunity rule's judicial history, beginning with the decision in *Brotton v. Langert*[1] that a judgment resulting from the wrongful act of an elected constable could not be executed upon community realty when the community had not been a party defendant to the suit. *Brotton* was subsequently misinterpreted in *Day v. Henry*[2] because the court failed to note that the judgment in *Brotton* had not run against the community. The *Day* rule became accepted law,[3] although an exception was developed in *Beakley v. Bremerton,*[4] based upon the community's receipt of actual benefits of the wrongful act. Having analyzed the origin and history of the immunity rule, the court stated its intentions in the principal case: "Rather than await the gradual erosion of the rule by the engrafting of exceptions upon it case by case, we deem it advisable to and do abrogate the doctrine now and hereby overrule the cases which seem to apply it."[5] In support of its decision the court cited a community property treatise[6]

[1] 1 Wash. 73, 23 Pac. 688 (1890).

[2] 81 Wash. 61, 142 Pac. 439 (1914).

[3] See Fidelity & Deposit Co. v. Clark, 144 Wash. 520, 258 Pac. 35 (1927); Kies v. Wilkinson, 114 Wash. 89, 194 Pac. 582 (1921); Bice v. Brown, 98 Wash. 416, 167 Pac. 1097 (1917). These cases were cited by the court. The only decisions not cited by the court, in which the rule was applied, are Coles v. McNamara, 131 Wash. 691, 231 Pac. 28 (1924), and Great Am. Indem. Co. v. Garrison, 75 F. Supp. 811 (E.D. Wash. 1948).

[4] 5 Wn.2d 670, 105 P.2d 40 (1940). *Accord,* State v. Miller, 32 Wn.2d 149, 201 P.2d 136 (1948). Another established exception, not mentioned by the court, was denial of immunity in cases of non-elected public officials. Meck v. Cavanaugh, 147 Wash. 153, 265 Pac. 178 (1928); Kangley v. Rogers, 85 Wash. 250, 147 Pac. 898 (1915).

[5] 64 Wn.2d at 781, 394 P.2d at 381.

[6] McKAY, COMMUNITY PROPERTY §§ 817 at 552, 821-23 at 554-57, 826-27 at 559-60 (2d ed. 1925). The court might well have cited MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 150-51, 154-55 & n. 69 (1952), in which the rule is characterized as "irrational discrimination" and an "historical accident." The "salary as community

and an Arizona decision[7] which had thoroughly reviewed and rejected the Washington immunity rule as unjust.

Unfortunately the decision in the principal case is weakened by its facts. The tort doctrine of respondeat superior was clearly applicable, yet the trial court—without stating a reason—granted Port of Seattle's motion to dismiss. If Port of Seattle was not liable it would seem that McManus must not have been acting within the scope of his employment and, therefore, the tortious act was not committed in the performance of his official duties. If McManus was not performing his official duties when he arrested and imprisoned plaintiff, the facts of the case do not support the court's holding that the marital community is liable for the tortious acts of a public officer committed *in the performance of his official duties.*

Having purported to overturn the immunity rule, the court stated the general rule that "a community is liable for the tort of either spouse if the tort is calculated to be, is done for, or results in a benefit to the community or is committed in the prosecution of the community business."[8] Earning a salary, the court held, is prosecution of community business. Consequently the community is liable for a tortious act "under the color or purported authority [of the spouse's employment] . . ." even though the act may have been committed "negligently, or in excess of his authority, or maliciously."[9]

The decision in the principal case is noteworthy on several counts. Sitting en banc, the court candidly[10] reviewed and unanimously rejected a rule having its foundation in Volume 1 of Washington Reports, yet consideration of the rule was initiated by the court rather than by the contentions of either party. The court's intention to broaden the tort liability of marital communities was manifested by its subsequent decision in *Brink v. Griffith,*[11] in which the court was squarely presented with the issue of whether the marital community is liable for the tortious

benefit" rationale of the decision in the principal case was predicted in Comment, *Community Property and Tort Liability in Washington,* 23 WASH. L. REV. 259, 264-65 (1948). The rule was also criticized in Note, 3 WASH. L. REV. 153, 153-54 (1928).

[7] Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948). As noted by the court in the principal case, the communities in *Shaw* were held not to be liable on other grounds. 64 Wn.2d at 781 n. 2, 394 P.2d at 381 n. 2. The Arizona Supreme Court has not been presented with an opportunity to directly reject the rule, perhaps because litigants could have little doubt of the result.

[8] 64 Wn.2d at 781, 394 P.2d at 381, citing LaFramboise v. Schmidt, 42 Wn.2d 198, 254 P.2d 485 (1953) for the general rule.

[9] 64 Wn.2d at 781, 394 P.2d at 381.

[10] The rule was variously described as an "incongruity," a "palpable non sequitur," and a "rule which now seems to have little or no basis in reason or justice and is dictated by neither experience nor necessity." 64 Wn.2d at 780, 394 P.2d at 380-81.

[11] 65 Wash. Dec.2d 235, 396 P.2d 793 (1964).

act of a public officer committed in the performance of his official duties. *Kilcup v. McManus* was cited as controlling, and the dictum of *Kilcup* became the holding in *Brink*.

CONTRACTS

Property—Evidence—Oral Contracts to Devise. Nearly twenty years after it was announced, the Washington court has amplified an announced intention[1] to enforce stringent technical rules in its consideration of oral contracts to devise. In an action for specific performance of his deceased employer's alleged oral contract to devise realty, plaintiff presented an uncontroverted line of evidence dating from 1937. At that time plaintiff was a friend and neighbor of decedent and her husband, and was employed as a logger at a wage of $5.60 per day. Shortly after the husband's death, plaintiff left his logging job and commenced operation of decedent's farm for $1.50 per day plus board and room. Three months later his wages were reduced to $.50 per day, and remained at that figure until mortgages on the property were satisfied in 1942. The wage of $1.50 per day was then reinstated and continued 19 years. During this 24 year period, plaintiff took only one vacation "that amounted to anything";[2] the rest of his time was spent working on decedent's property. Plaintiff, at his own expense, erected permanent farm buildings in 1949 and 1958 on decedent's property rather than on his own adjoining property. "A considerable time" prior to her death in 1961, decedent made out a holographic will devising her farm to plaintiff, but failed to sign it. Nine neighbors of decedent gave undisputed testimony of her intention to devise the farm to plaintiff. A neighbor who contacted decedent about acquiring a right of way across her property was referred to plaintiff to see if he would agree. However, no witness was able to testify as to the existence of an express contract between plaintiff and decedent. The trial court decreed specific performance and defendant administrator appealed. *Held:* Following death of the alleged promisor, circumstantial evidence is not sufficient to establish an oral contract to devise. *Bicknell v. Guenther*, 65 Wash. Dec.2d 726, 399 P.2d 598 (1965).

The facts in the principal case, while failing to establish by direct evidence the existence of an oral contract, leave little doubt that one did exist. Plaintiff's uncontroverted circumstantial evidence was con-

[1] *E.g.*, Jennings v. D'Hooghe, 25 Wn.2d 702, 172 P.2d 189 (1946); Resor v. Schaefer, 193 Wash. 91, 74 P.2d 917 (1937).

[2] Bicknell v. Guenther, 65 Wash. Dec.2d 726, 730, 399 P.2d 598, 601 (1965).