

62369-9

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NO.62369-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MARTIN HABIB
Plaintiff, Respondent

v.

EMERALD COIN VENDING, INC., a Washington corporation, and
Jason and Francine Nelson
Defendants Appellants

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT MARTIN HABIB

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I. ASSIGNMENTS OF ERROR ON CROSS APPEAL

- A. The Trial Court erred in making Conclusion of Law 15 by failing to award attorneys fees to Plaintiff for the breach of a fiduciary duty by Defendant Jason Nelson in failing to maintain records so that an accounting under RCW 25.05.165(2)(a) could be made to determine whether the partnership made profits or losses.
- B. The Trial Court erred in making Finding of fact 13 and Conclusion of law 6 that defendant Nelson spent \$50,000 to store the equipment over the life of the partnership and should not have been entitled to an offset on the judgment awarded to Plaintiff.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Whether the obligation to account to the partnership as stated in RCW 25.05.165(2)(a) requires that a managing partner must maintain sufficient records on which an accounting can be made?
- B. Whether the failure to maintain sufficient records by a managing partner creates a presumption that he has not accounted to the partnership for the expenses he incurred on behalf of the partnership?
- C. Whether the Trial Court abused its discretion by failing to award attorneys fees to Plaintiff incurred in an action for an equitable

accounting when the managing partner has failed to keep any records to show that the partnership gained or lost money in its operations and thereby violated his fiduciary duty to the other partner or committed what was tantamount to constructive fraud?

III. STATEMENT OF THE CASE

A. Nature of the case.

This was an action brought by Plaintiff Martin Habib for an accounting of a partnership and damages.

B. Procedure leading to review:

The case was tried before the Honorable Michael J. Trickey of the King County Superior Court on July 14 and 15, 2008. Prior to trial the parties (Defendant Emerald Coin Vending, Inc. and Martin Habib) conducted a mediation on April 9, 2008 that resulted in a CR2A agreement (Exhibit 5). A joint motion for continuance was filed on June 26, 2008 when the trial date had been scheduled for July 14, 2008 (Clerk's papers 40-42). The Motion was denied on July 3, 2008 for the failure of the parties to comply with KCLR 40(d) (2), demonstrating extraordinary circumstances to justify the relief. After an oral decision establishing that a partnership was created between Plaintiff and defendant Jason Nelson individually (Nelson was added as a party by Plaintiff's First Amended Complaint by Court

Order, Clerk's papers pages 29-30) was rendered awarding a judgment to Plaintiff against Defendants Nelson individually. Defendants moved for reconsideration on September 3, 2008 which motion was denied by the Court on September 19, 2008. Findings of fact, Conclusions of Law and Judgment were entered on August 23, 2008. Timely Notices of Appeal and Cross Appeal were filed.

C. Statement of the Facts

Martin Habib operated 36 vending machine sites installed with machines as his own business, replacing equipment as needed, replenishment of product sold, collecting revenue and repairing machines as needed. RP 103, line 18 to RP 104, line 1. In several stages, he turned this business operation over to Defendant Jason Nelson in November 2005, who by agreement, operated it for him just as Martin Habib had done as to functions, and showed him the ledger sheets that reflected what each site had produced in revenue from his business' inception. RP 104, lines 2-14.

All decisions made about the sites thereafter were made by Jason Nelson. RP 83, lines-3-8. The sites turned over to Nelson were fully stocked with products. RP 63, lines 10-17. Although disputed as to when all sites were turned over, Habib testified that he completed the turn

over when he took a job in Olympia on or about November 20, 2005. RP 67, lines 3-9; RP 69, line 5; RP 112, lines 15-25; RP 122, lines 1-15.

Even Defendant Nelson agreed that by January or February 2006, he took over the rest of Habib's sites. RP 216, lines 1-5; RP 222, line 24; RP 223, line 1; RP 228, lines 9-14. Nelson never told Habib that all 36 sites were not in operation. RP 79, lines 18-23.

In March or April, 2006 before the partnership was formed, Nelson brokered a deal for the sale of Habib's business for \$125,000 to a Mr. Lee with Habib's approval although Habib testified it was in January or February. RP 67, lines 10-14; RP 236, lines 3-23; RP 240, line 1. Under the terms of the sale, the buyer Mr. Lee had the right to rescind which he did exercise in under two months. RP 240, lines 22-23. Nelson paid to Habib a total of \$10,000 received in payments under the sale which although demanded was not returned. RP 241, lines 13-15. Only 10-15 sites out of the total 36 of the partnership business were in operation at the time of the sale to Mr. Lee. RP 293, lines 15-25. Habib did not establish the price for the sale and was never told how many sites were included or not included, he only knew what he turned over to Nelson in November 2005. RP 333, lines 4-22.

Habib had no knowledge of what decisions were made on individual sites after November 11, 2005 on his 36 sites. RP 72, lines 1-5.

Whatever decisions were made during the operation by Lee were made by Mr. Lee, not Habib. RP 294, lines 7-24.

On May 10, 2006 after the rescission of the sale by Mr. Lee, Nelson responded to Habib's three alternative offers as to how to proceed with the arrangement by agreeing to form a partnership in which he agreed to run the routes, split profits and with either partner reserving the right to buy out the other partner's interest at any time. Exhibit 4.

He was frustrated but felt that with his reputation at stake he had no choice but to proceed with the partnership. RP 169, lines 14-25. Defendants' Counsel stipulated in open Court that the e-mails, Exhibit 4, created a partnership on May 10, 2006. RP 179, line 19 to RP 180, line 1. Regardless of his personal frustration, Nelson stated in his May 10th e-mail that he had moved the routes around so that profitability would be at a maximum. Exhibit 4. Mr. Habib represented before the partnership was formed by showing ledgers of actual receipts by site from the inception of his business that the sites in total generated \$10,000 on average per month. RP 213, lines 7-11; RP 299, lines 4-17 and Exhibit 1.

After the partnership was formed on May 10, 2006, Jason Nelson alone was responsible for running the route. RP 138, lines 20-25. Habib was never told by Nelson that all 36 sites were not operational at the time the partnership agreement was made on May 10, 2006. RP 79, lines 12-

23. This responsibility included stocking of product, collection of revenue and purchase of products for stocking. RP 139, line 3 to RP140, line 7. Habib only dealt with Jason Nelson not Emerald Coin Vending, Inc. RP 138, lines 1-12. Although Nelson may have changed his mind after operating the routes, his strategy at the inception was that he hoped Habib would buy him out if they were partners. RP 259, line 4 to RP 260, line 16. At the time he made the partnership agreement, he had already sold the assets in Defendant Emerald Coin Vending, Inc., on May 6, 2006. RP 264, lines 13-16. That entity as an operating business was no longer available to form a partnership with anyone. Thereafter all decisions were made by Nelson. RP 282, lines 9-19.

During this time, Mr. Nelson never maintained any records to show the performance of the partnership business by site or location. RP 300, lines 4-16. Nelson promised to provide monthly detailed account expenses, profit or loss, site results, purchases, labor and gross monthly income but never provided them. RP 66, lines 8-24. Nelson provided no indication that he was shutting down any sites or pulling equipment without replacing it, not in writing or phone calls. RP 69, line 20 to RP 70, line 16. The only records kept were for the whole business of his company then operating, not the partnership, and even these were lost. RP 303, lines 6-13.

Because no individual records were kept, Mr. Nelson could only estimate expenses. RP 328, lines 8-16. However, without these records, he maintained at trial that the partnership route only generated a total revenue of \$3600 per month. RP 225, lines 16-21. The first written report of this revenue estimate was made in July 2006, two months after the inception of the partnership. RP 299, line 18 to RP 300, line 3. The same machines and routes generated an average of \$10,000 per month before he took over. RP 63, lines 1-5; RP 213, lines 7-11; Exhibit 1.

Only 12-15 sites in operation were left in the partnership by July 2006. RP 327, lines 8-15. By September 2006, less than 10 machines, not sites, were left in the field. RP 194, lines 6-8. Nelson testified that each site had an average of 2 machines. RP 200, line 7. By September 18, 2006 when the partnership was terminated there were none. RP 195, lines 8-11.

The CR2A Agreement (Exhibit 5) provided that the partnership was terminated on September 18, 2006 and Nelson agreed he withdrew on that date. RP 275, lines 10-13. At the termination of the partnership Habib had only 8 or 9 machines used by him in his prior business for spare parts at his home. RP 80, line 18 to RP 81, line 5.

IV. ARGUMENT IN RESPONSE TO ARGUMENTS OF
APPELLANT

A. Substantial evidence produced at trial established that a Partnership was formed between Habib and Nelson as defined in RCW 25.05.055(1) as an association to carry on as co-owners of a business for profit on may 10, 2006.

Appellants argue that no partnership was formed because Habib claims he owned the machines and routes that were used in the partnership. They fail to mention that RCW.05.065 which determines what constitutes partnership property provides in part 4:

“(4) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership and without use of partnership assets is presumed to be separate property, even if used for partnership purposes.”

Therefore the ownership of the sites and machines as Habib claimed at trial (RP 142, lines 7-8) is nothing more than his agreement for the use of these separate assets by the partnership to make a profit does not disqualify the arrangement from being construed as a partnership as Appellants claim. The “business” of the partnership as that term is used (RCW 25.05.055(1)), in this case was the running and maintaining the Habib routes as Nelson agreed in the May 10, 2006 e-mail (Exhibit 4).

The Trial Court therefore properly found that a partnership was formed (Finding of Fact 9) based on the communication between them (Exhibit 4), the conduct of the parties thereafter and their CR2A mediation Agreement.

Although Nelson was not a direct party to the agreement, he was personally in the mediation, owned Defendant Emerald Coin Vending, Inc. (although its assets had been sold on May 6, 2006) (RP 264, lines 13-16), and that entity had no business with which to form a partnership with anyone by the time of the May 10, 2006 agreed formation date but especially not on April 9, 2008, when the CR2A Agreement was made (Exhibit 5). Because Nelson was there and in privity with that entity he cannot be heard to complain that a partnership was formed on May 10, 2006. *Hackler v. Hackler*, 37 Wash. App. 791, 794, 683 P. 2d 241 (1984) It was still up to the Court at trial to decide who the partners were.

On the strength of this evidence of the language and e-mail communication, there was substantial evidence to support the Trial Court's Findings of Fact 8, 9 and Conclusion of Law 4 as to that status of the parties' relationship. The e-mail proposing the partnership was especially telling as to that formation:

“Well Martin I guess we're partners in this route. I'd almost prefer the \$15,000 at this point that I've put into the company along with my time but lets try this: I'll run the route and split the profits with you and either one of us can be bought out anytime. If the other decides to go a different direction. I've moved everything around

16. In the face of this evidence, how can he reasonably now argue there was no partnership with Habib?

The formation of a partnership may be established by express agreement in writing or by circumstantial evidence that the parties acted as though they intended to form a partnership. *Nicholson v. Kilbury*, 83 Wash. 196, 145 P. 189 (1915). In this case, we have an expression in writing of intent found in Nelson's e-mail and acceptance by Habib that the terms were agreeable. RP 76, lines 4-23. The conduct of the parties was consistent with that expressed intent. RP 259, line 4 to RP 260, line 16; RP 169, lines 14-15; RP 138, lines 20-25 and RP 139, line 3 to RP 140, line 7.

Conduct alone is sufficient to establish a partnership. *Roediger v. Reid*, 133 Wash. 608, 611, 234 P. 452 (1925). A common venture uniting labor, skill or property for purposes of engaging in lawful commerce or business for the benefit of the parties' sharing profits and losses and joint control of its affairs is a partnership. *Eder v. Reddick*, 46 Wn. 2d 41, 278 P.2d 361 (1955). In this case the parties jointly controlled the enterprise by agreement that placed all management decisions and responsibility on Nelson by the terms of the agreement, all of which was consistent with the formation of a partnership and when viewed with the other evidence as to intent, was inconsistent with any other theory. RP 138, lines 20-25. Exhibit 4 and, the May 10, 2006 e-mail from Nelson.

While it is true that *Nicholson v. Kilbury*, Id at page 202, citing a Utah case, states that circumstantial evidence may establish a partnership if it is in the main inconsistent with any other theory, but that court went on to state:

“Where from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill, and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed to be established”

Where there is substantial evidence to support a finding, a reviewing court may not substitute its judgment for that of the trial court on the finding of that fact. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn. 2d 570, 343 P. 2d 183 (1959). If substantial evidence supports challenged findings and conclusions, findings of fact become facts of the case and may not be re-examined on appeal. *McDonald v. Parker*, 70 Wn. 2d 987, 425 P. 2d 910 (1967). In this case substantial evidence supported the Trial Court’s Findings of Fact 8, 9 and Conclusion of Law 4 that a partnership was formed and those findings may not be reviewed on appeal.

The key factor of intent is established by statements and conduct. *Stipich v. Marinovich*, 13 Wn. 2d 155, 124 P. 2d 215 (1942). That determination depends on all the facts and circumstances, including actions and conduct of the parties. *Minder v. Gurley*, 37 Wn. 2d 123, 222

P. 2d 185 (1950). While a contract of partnership either express or implied is essential to the creation of a partnership relation, it is not necessary that the contract be established by direct evidence and may be implied from the circumstances. *Minder v. Gurley*, Id.

As to intent to form a partnership, Nelson's own words at trial deny his claim there was no intent to form a partnership with Habib. In explaining this intention, he testified in response to a question, "what was your exit strategy?" he answered, "I was hoping that he would buy me out of it, if we were partners". RP 259, lines 10-12.

That one party to a purported partnership gave to the other an option to buy his interest and thus terminate the partnership as Nelson and Habib did here, is not inconsistent with the thesis that the agreement created a partnership so the buy out provision in this agreement does not negate the formation of a partnership. *Vance v. Ingram*, 16 Wn. 2d 399, 412, 133 P. 2d 938 (1943). When you combine the express words of Nelson and the acceptance by Habib and the operation consistent with the agreement expressed, there can be no doubt that substantial evidence supported the Trial Court's findings and conclusions of law on this point.

Appellants argue at page 36 of their Brief that since Nelson exercised no dominion or control over the vending machines and the routes (contradicted by the evidence, RP 72, lines 1-5; RP 138, lines 20-

25) except what would be consistent with the duties of an employee or consultant, the Trial Court should be reversed. Appellants offer no reference to the record to show evidentiary support for this argument but even if the statement was true it does not comply with RAP 10.3(a)(6).

Appellants argue that no partnership was formed because not all the terms necessary for formation of a partnership were present or that a meeting of the minds is necessary on essential terms citing non partnership cases (Appellants' Brief, pages 34 and 35). This is true enough as a general principle but in partnership cases not one fact alone determines the existence of a partnership. *Nicholson v. Kilbury*, Id at page 202.

Furthermore, it is not necessary that the contract to form a partnership is established by direct evidence. In this case the direct evidence and the circumstantial evidence, specifically identified before, all point to the formation of a partnership as the Trial Court found and was supported by substantial evidence sufficient to be upheld. Appellants cite *Hoglund v. Meeks*, 139 Wash App., 854, 170 P. 3d 37 (2007) for the proposition that parties must assent to sufficiently definite terms to make a contract but that same Court stated at page 870 -871,

“A contract may be oral as well as written, and a contract may be “implied in fact with its existence depending on some act or conduct of the party to be charged” *Bell v. Hegewald*, 95 Wash. 2d 686,690, 628 P. 2d 1305 (1981). A trial court may deduce mutual assent from the circumstances, whereby the court infers a contract

based on a course of dealing between the parties or a common understanding within a commercial setting.”

Since there was substantial evidence to support the findings and conclusions as stated before, the formation of a partnership may not be reversed by the reviewing court. *McDonald v. Parker*, 70 Wn. 2d 987, 425 P. 2d 910 (1967).

B. Finding of fact 5 that the parties entered a business arrangement in November 2005 was supported by substantial evidence and should stand.

Appellants argument (Page 23 of Brief) (at least in the caption) doesn't match what they offer in argument. However, the evidence clearly supported the Finding challenged as being in error. Habib testified that in several stages he turned over this business operation to Jason Nelson in November 2005, who by agreement, operated it for him just as Habib had done as to functions, RP 104, L-12-14. What else does it take to state a business arrangement? Besides, its probably not an issue in the appeal since the award was for breach of a fiduciary duty to account to the partnership not their prior business arrangement.

Even though not relevant, Nelson himself proved that he admitted he took over the rest of Habib's sites. RP 216, lines 1-51-5.. RP 222,line

24 to RP 223, line 1; RP 228, lines 9-14. The burden of proof that all 36 were turned over was amply met.

Finding of fact 7 is not inaccurate or relevant to this appeal. Nelson testified he received \$15,000 from Mr. Lee even though the last \$5,000 payment was never paid over to Habib and the next day returned to Lee by Nelson. RP252, Lines 11-15. The last sentence of Appellant's argument that Mr. Habib did nothing to assist in the sale of the business or in maintaining the sites, is odd in that he agreed to the terms (RP 240, line 1) and he had no duty to maintain the sites, since that was Nelson's job by the Agreement. (Exhibit 4).

There was a business arrangement in November 2005 and it became a partnership on May 10, 2006.

C. There was no abuse of discretion in the Trial Court's decision except as noted in the Cross Appeal by Habib.

Respondent Answers the arguments of this section as follows:

1. The Partnership existence issue was addressed in Section A and will not be repeated. However, the new claims will be addressed.
2. Appellant makes no reference to the record to support their argument on Page 25 concerning the existence of a debt excluding the existence of a Partnership under RCW 25.05.055(c)(i), as the

“indisputable” reason Nelson formed a Partnership with Habib on May 10, 2006 and may not be considered on Appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn ns 801, 809,828P.2d 549 (1992) and RAP 10.3(a)(6).

Besides, Appellants misread the statute concerning debts or services as an independent contractor or employee as specified in RCW 25.05.055. Those sections specifically deal with the presumption of partnership and its exceptions for debts where a person receives the profits of a business of this category. No profits were ever received under the partnership for the assumption or to even apply. The money that Appellant may be claiming to be a debt (the Lee payment) was distributed from the sale of the business before the partnership was formed and not a “profit of the partnership” as required for the presumption exception to apply RP 236, L-3-23; RP 240, L-1.

3. Appellants’ contention of undue influence is groundless and not supported by the record. Appellants reliance on *Ferguson v. Jeanes*, 27 Wash. App. 558, 619 P.2d 369 (1980) for the proposition that voluntary consent is required for the formation of a partnership is misplaced as we stated earlier. Nelson testified that he did intend to be partners with Habib. He stated his strategy was that Habib would buy him

out if they were partners and otherwise he implied that he might not.

RP259, L4, to RP 260, L16.

His written words in the May 10, 2006, email clearly express his intention to be a partner and specified the terms. (Exhibit 4) Undue influence requires proof by clear and convincing evidence, a standard not met by referring to the Exhibits 4 and 7 without more when the testimony showed he did intend to exercise his exit strategy by becoming a partner with Habib. RP 259, line 4, RP 260, line 16.

Proof of undue influence must be by evidence that shows one party took away the will of the other to act. *Ferguson v. Jeanes*, 27 Wash. App. 558, 563, 619 P.2d 369 (Div.1, 1980). All Nelson had to do was say was “no, here is you business back”. There was no undue influence. Giving Nelson three options was no undue influence required only that he say no. Habib could not know whether Nelson lost money or not because he kept no records and gave no accounting. In addition these claims were waived (see Section E)

Appellant cites to no authority for this argument that in the “absence of agreement on the subject”, the duty of keeping partnership accounts rests equally on each party. Am Jur is an argument by editors of legal publications and does not meet the authority citation required to have an argument reviewed. Also missing is any explanation why the absence

of agreement on the subject argument, failed to consider that Nelson agreed to run the routes exclusively and Habib had no means to keep accounts.

Appellants concede at Page 28 of their Brief that under Washington Law a partner is required to render accounting with respect to partnership profits, citing *In re Norquist*, 43 B.R. 224 (ED.Wash.1984) How was Habib supposed to do any accounting? Nelson agreed to and did run the route according to Habib's testimony which the Court could accept for substantial evidence (Exhibit 4; RP 138, lines 20-25.) Habib had no access to information from which to account. RP 138, lines 13-25. What Mr. Habib did before he turned the route over is irrelevant except to show that the business went from \$10,000 gross revenue per month to -0- under Nelson's leadership when he kept no records to show why. RP 104, lines 13-14; RP 328 lines 8-16; RP 195, lines 8-11.

Appellants argument on Pages 28 and 29 of their Brief that since Habib owned the equipment and there was no specific express agreement that Nelson was to be managing partner, Habib must have been that partner, is an argument without citation to authority or references to the record and may not be considered on appeal. *Cowiche Canyon Conservancy v. Bosley*, Id at 809, RAP 10.3(a) (6).

Appellants try to limit the requirement of an accounting under Washington Law only if there are profits. RCW 25.05.165(1) clearly shows that the fiduciary duty is to account to the partnership for any property, profit or benefit derived by the partner in the conduct of the partnership. The determination of profit or losses requires records to show which existed. In this case, it required records to show what happened to the property Nelson was required to account for. The number of sites went from 36 to -0- under Nelson's conduct of the pre and partnership periods without any records to show what happened since he only combined his record keeping with his other business and lost those records. RP303, lines 6-13. The Nelson e-mails in July and August, 2006, (Appellants Brief is in error as to date page29) could not have been based on records and even those reports were like after the horse was already out of the barn with the barn on fire and complaining to Habib to put it out. Washington law requires of a managing partner (by their agreement Nelson was the only one involved in the conduct of the business. RP 138. Lines 20-25) when he is sued for settlement to sustain the burden of proof of the correctness of his account by showing the books, income and expenses together with vouchers and checks and the amounts of various items and when he fails in this duty, every presumption will be made against him for that misconduct. *In re Tembreull's Estate*, 37 Wash 2d,

Partnership and hold as Trustee for it any property, profit or benefit derived by the partner in the conduct of the partnership. RCW 25.05.165 (1). Appellants would have this Court ignore the language of the Statute and common sense. The managing partner is required to account for property, profit or benefits derived. There is no way the Trial Court could tell whether there was a profit, loss or benefit because no records were kept for the partnership separate from the other business of Nelson. RP303, lines 6-13. Because no individual records were kept, Nelson could only estimate expenses. RP328, lines 8-16. He failed in the requirements set by the Supreme Court's decision in *In re Tembreull's Estate*, 37 Wash 2d, 93, 221 P.2d 821 (1950) at page 102.

While the Revised Uniform Partnership Act RCW 25.05.165 (hereinafter "RUPA") defines what acts shall constitute a fiduciary duty, the common law has been used to interpret and apply other provisions of the Act. Where the Statute does not specify what must be decided, the Court may look to Washington Case law for assistance. In answering a certified question from the Ninth Circuit Court of Appeals the Washington Supreme Court in *J & J Celcom v. AT&T Wireless Services, Inc.*, 162 Wash 2d 102, 169 P.3d 825(2007) did just that. Our Supreme Court was answering whether a controlling partner violates a duty of loyalty when he causes the partnership to sell its assets to an affiliated party. In holding it

did not violate the duty, the Supreme Court looked to prior case law (before RUPA was adopted in 1998) to decide the question.

When the RUPA specifies a duty of loyalty to account to the Partnership and hold as trustee for it any property, profit or benefit and the Statute does not specify what kind of accounting and what type of recordkeeping is required, it is reasonable to suggest that Washington Case law such as *In re Tembreull's Estate*, 37 Wash 2d, 93, 221 P.2d 821 (1950), that specifically addressed that issue should be looked to for guidance to apply the Statute.

While *Guntle v. Barnett*, 73 Wash App 825, 832,871, P.2d 627 (1994) suggests that a limitation on the Court's equitable powers by a specific provision of the partnership act and that a specific RUPA provision may not be disregarded. However RCW 25.05.20 dealing with supplemental principles of law provides that unless displaced by particular provisions of the chapter, principles of law and equity supplement this chapter. This clearly allows the Court to look to cases such as *In re Tembreull's Estate* Id for guidance on whether a basis existed for the Trial Court to find that Nelson violated his fiduciary duty to account.

There could be no showing of loss or profit without records to support it. The failure to maintain them violated a clear duty of loyalty by Nelson to his partnership and its partner Habib.

The Appellants fail to cite to the record how the “Trial Courts Other rulings” constitutes a determination that Nelson did not violate his duty of loyalty and may not be examined on appeal. *Cowiche canyon Conservancy v. Bosley*, Id at page 809 .

Finally on this section, Appellants argue that somehow the case was not ripe buy do not point to any part of the record or city any authority to support it which also must be disregarded on the appeal. *Cowiche canyon Conservancy v. Bosley*, Id at page 809 .

D. Nelson agreed that the partnership terminated on September 18, 2006. Rather than June, 2006; Finding of Fact 10 was correct.

The Argument of the Appellants in this section (Page 33 of their Brief) appears to be addressed to a different issue than that stated in the heading. Nelson testified he withdrew September 18, 2006. RP275, lines 10-13. The argument presented goes back to the already addressed argument by both sides as to the existence of a partnership and has nothing to do with the date of termination. Arguments as to the existence of this partnership will not be repeated. Appellants argue, however, that Nelson was supposed to be paid for his time. (Appellants Brief p. 36). Nothing in the e-mail of May 10, 2006, ever suggested that and no point to the record can be made in support. It is a non issue. The failure to establish a partnership fund account can only be blamed on Nelson. He collected all

the money and decided what to do with it along with all other operating decisions of the partnership. RP137, line3.

Appellants are simply wrong in arguing Nelson had no control over the vending machines. The record on that is clear RP138, lines 20-25.

Appellant fails to cite any authority or point to the record in support of their argument that the consistency of duties of an employee or consultant precludes a partnership and may not have the matter considered on appeal. *Cowiche canyon Conservancy v. Bosley*, Id at page 809 .

E. The Facts and argument of Appellants under this section were not assigned as error by the Appellant and not raised at Trial. Because of that, they are waived.

No allegations of fraud, undue influence or, misrepresentation were raised at trial, found by the Court or challenged as error for the failure to make such a finding. Accordingly, those issues are waived for purposes of this Appeal. *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91Wash2d 230,240, 558 P.2d 1308 (1978)

F. There was no accounting made at trial because Nelson failed

to maintain records sufficient for that task and the substantive evidence supported this finding of the establishment of the value of assets entrusted to Nelson in the partnership.

Finding of Fact 12 was established by substantial evidence in that Nelson admitted he did not maintain records to show individual site production, expense and profit or loss or even a separate act of books for the partnership, RP 303, lines 6-13. Appellants contend that because it was alleged by Nelson there were losses and that there were no duty to account. This argument has already been refuted and won't be repeated.

Finding of Fact 14 that the value of the assets entrusted to Nelson in the Partnership was supported by substantial evidence. Appellants argue that by May 10, 2006, many sites had been lost but those sites were all under his care and control since November, 2005, and any loss was due to his own failures or he has not shown why otherwise they were lost. RP.67, lines 3-9; RP 216, lines 1-5.

Appellants argue that Habib had the burden to prove how many sites were present at the formation of the partnership when all of that information was under Nelson's control. RP 138, lines 20-25. If sites were lost, it was because Nelson lost them. Appellants accuse but do not refer to the record for their argument both parties knew sites had been lost. Habib testified he was never told that any of his sites had not

been maintained. RP 79, lines 18-23. Nelson not Habib had control of this information. RP 66, lines 8-24. No number of sites in the Lee sale were disclosed to Habib and only Nelson had that information. RP333, lines 21-22. If he failed to account for the partnership property and failed to provide that accounting, he must not be heard to complain that the partnership had value. He had the burden to account and if he failed to do that, he must suffer from any inaccuracies and uncertainties in the evidence . *Cederlund v. Cederlund*, 7 WashApp320, 321,499 P.2d 14(Div 1,1972).

Appellants argue that since sites had been lost by May 10, 2006, the value in the sale to Lee could not represent the market value (Appellants Brief page40) since Habib failed to present any evidence on these questions. But how could he, since he wasn't told that sites had been lost (RP69, line 20 to RP70, line 16), and Nelson and Lee had control of the business assets exclusively during that period, RP 244, lines 7-24. How is it inequitable for Nelson to be blamed for the losses when he was the only one in control? (RP294, lines 7-24. The fact the value was diminished can be traced solely to him because he failed to maintain any records to prove it one way or the other and cannot be heard to complain. *Cederlund v. Cederlund*, 7 Wash. App. 320, 321,499 P.2d 14 (1972).

Appellants concede that if the sale to Mr. Lee had closed it would

be evidence of the partnership assets' value (Appellants' Brief, page 40). But then they argue that the loss of sites between February and May 10, 2006 reduced its value when Nelson and the buyer he guaranteed, Mr. Lee, were solely in charge of the business that had been sold. RP 294, lines 7-24.

Appellants cite foreign case law (Appellants' Brief, page 41) for the proposition that the burden was on Habib to establish the value of the partnership and therefore that Habib failed in his burden to establish the value as of May 10, 2006. Washington case law puts the burden squarely on Nelson because he failed to maintain records from which an accounting could be made. *Cederlund v. Cederlund*, Id. Appellants also cite *Ferland Corp. v Bourchard*, 626 A.2d 210, 215(1993) as being a holding of a Washington court when it clearly is from another jurisdiction. The holding in *Cederlund v. Cederlund*, Id is a Washington appellate decision and its puts the blame for the inability of the partner responsible to maintain records if there is any uncertainty in the determination of the accounting.

The time of dissolution standard for the determination of value may apply in Colorado, but not in Washington where the Trial Court had to make an accounting from the evidence Nelson presented as the one with the responsibility to maintain those records and he had none. In February or March 2006 there was a willing buyer and seller for 10-15 sites of the

36 that Habib had turned over to Nelson for \$125,000, even though the number of sites in the sale were never disclosed to Habib for his approval. RP 333, lines 21-22. Surely the price for 10-15 sites negotiated at arms length between Nelson and Lee is a fair market value of all the sites, if not more, since the only reason more sites were not available for sale at that date was due to Nelson's failure to maintain them at the pre-transfer level of 36 sites generating an average of \$10,000 per month. RP104, lines 12-14; RP 213, lines 7-11 and RP 63, lines 1-5.

Appellants state accurately that RCW 25.05.330 has not been interpreted by any Washington case. The Trial Court declined to use that statute and instead decided the case on grounds of equity. Paragraph (2) of that Statute requires that there be an accounting or settlement of partner's accounts before distribution. That was impossible in this case because Nelson breach of fiduciary duty prevented the very accounting he was obligated to provide. Profits and losses could not be determined except for estimates made without any reference to actual costs and revenues. Nelson can't be heard to complain when he caused the very condition (dissipation of sites and the failure to maintain records). *Cederlund v. Cederlund* Id at page 321. There was no way to settle the accounts without resorting to equity because Nelson made that inability to apply RCW 25.05.330 by his own conduct in the breach of his fiduciary

duty to the partner Habib and the partnership. Actions in equity are permitted when a specific statutory remedy is not in conflict with other sections of the chapter such as provided by RCW 25.05.170(2) to enforce a partner's rights under RCW 25.05.165 or where case law may be consulted when the statute is not clear. *J.J.Celcom v. AT&T Wireless Services, Inc.*, 162 Wn. 2d 102, 107, 169 P. 3d 823 (2007). The Trial Court's decision to apply equitable remedies when an accounting on the evidence presented but a true settlement of accounts could not be made was reasonable under the circumstances Nelson generated and did not conflict with specific RUPA provisions.

The partnership under Nelson's tutelage proceeded to dissipate to the point where the sites were reduced to zero except for stored machines. RP 175, lines 8-11.

Appellants then argue incredibly that Finding of Fact 15 was in error in that the remaining assets were in possession of Defendants when Habib had 8-9 machines he had kept back in November for spare parts at his garage. Oddly Appellants argue this when those spare parts machines were never included in the producing partnership assets or the pre-partnership business arrangement. RP 80, line 18 to RP 81, line 5. The award was only of the assets in Defendants' possession at the time of trial

and not any spares that Habib may have retained from before the partnership was started.

Then they argue that because there was no accounting there is no cause of action arising out of the partnership. This argument ignores that Habib's cause of action was for an accounting which Nelson's breach of fiduciary duty made impossible unlike the cited cases by Appellants. *Stipich v. Marinovich*, 13 Wn. 2d 155, 124 P. 2d 215 (1942) and *Polluck v. Ralston*, 5 Wn. 2d 36, 104 P.2d 934 (1940), where no action for accounting was brought as Habib did in this case. However under RUPA's, RCW 25.05.170(2), a partner may maintain an action against another partner for legal or equitable relief, with or without an accounting as to partnership business. Habib's action was for an accounting which Nelson's breach of duty prevented the Court from making a full determination of value, profits or losses and it made the best accounting it could from the records Nelson presented. The Court in *Cederlund v. Cederlund*, Id was faced with a similar failure of a partner to account due to the failure of the responsible partner to maintain records from which an accounting could be made, and stated at 320-321:

“We hold that the court's accounting was as good as could be expected under the circumstances; and any inaccuracies, if any, were the fault of appellant, who cannot be heard to complain.”

Appellants argue that the Trial Court could properly refuse to award attorneys fees to a partner against a managing partner where both parties were at fault or breached partnership duties, citing *Guntle v. Barnett*, 73 Wash. App. 825, 871 P. 2d 627 (1994). The Trial Court in this case refused to award attorneys fees because the judge stated in his oral decision only (no findings of fact were made as to any duty Habib owed to the partnership) that Habib produced no evidence about the business that he was running before he got involved with Nelson. (Verbatim Report of Proceedings, page 12). The evidence at trial was to the contrary in that Habib produced ledgers of revenue generated by site for the eleven months he operated his business on his own and turned over fully stocked machines to Nelson in November 2005. RP 63, lines 10-12. However, even if true, it had no relevance to a breach of a partnership duty.

Appellants argue that the partnership assets should have been valued at termination when it had no value of any consequence. Nelson was the one who got it to that place and there are no Washington cases that hold that a Trial Court when given facts like the one in this case where the responsible partner has breached his duty to account and proceeded to dissipate the assets of the partnership after a fair market arms length sale had been negotiated and accepted that it could not do exactly

as Judge Trickey did in this case and value the assets due back to Habib at that market determined price.

A partner's breach of fiduciary duty may be the basis for an award of attorney's fees to his partner in an accounting action. *Hsu Ying Li v. Tang*, 87 Wn. 2d 796, 557 P. 2d 342 (1976). The Trial Court in this case did not find Habib at fault for any conduct after the formation of the partnership so *Guntle v. Barnett*, 73 Wash. App. 825, 871 P. 2d 627 (1994) is easily distinguished on its facts. Appellants have made no reference to the record of any finding of fault by Habib during the time of the partnership period. Such an argument cannot be sustained without such a record reference. *Cowiche Canyon Conservancy v. Bosley*, Id at page 809.

Habib's arguments on the justification for an award of attorney's fees to him will be addressed more specifically in that section of the Cross Appeal. Appellants contend that the action is not ripe and by making allegations without record support but these approaches ignore the record and law. Habib's alleged silence in a non response to Nelson is countered on the record before this Court by testimony of continuous requests for the detailed accounting that was promised and never performed. RP 76, lines 14-23; RP 222, lines 6-16. There was never any explanation to those

demands for the unfulfilled promises of detailed accounting arising from Nelson's fiduciary duty breached.

G. There was no finding by the Trial Court that the location of spare parts machines in Habib's garage at the time of trial or any indication that it had any bearing on the judgment.

The Trial Court asked Habib if he wanted the stored machines in Nelson's possession and he said no. Those machines in Nelson's possession were awarded to Nelson with no finding that the 8 or 9 spare parts machines in Habib's garage had even mentioned by anyone and not even a part of the award. RP 80, line 18 to RP 81, line 5; Verbatim Report of Proceedings page 13. The award of the judgment was based on the value of the producing sites at the time of the sale to Mr. Lee representing the value at or about the time of the formation of the partnership of the assets Habib had contributed to the partnership, which in equity, the Trial Court awarded a judgment of \$125,000 less offsets. All the lost producing sites thereafter could only be blamed on Nelson because he made the decisions that led to the business' demise. RP 138, lines 20-25. Eight to nine spare parts machines in Habib's garage at the time of the judgment had no bearing on the award.

H. The continuance was denied because the parties didn't comply with Local Rule 40(d)(2) by failing to specify what extraordinary circumstances there were and no such circumstances existed.

All the Defendants had to do if they were dissatisfied with the order denying the motion for continuance was to show the Court what extraordinary circumstances were present under King County Superior Court Local Rule KCLR 40(d)(2) and they did not comply. It is argued that a continuance motion was brought due to the extraordinary circumstance because of a recent amendment to the complaint. The Amended Complaint was dated May 16, 2008 and the trial was scheduled for July 14, 2008. The only change was to add Nelson as a party as an individual because it was learned in discovery he had transferred assets of the Defendant Corporation to himself. See Conclusion of Law 9 that denied such relief because Nelson was found by the Trial Court as being a partner with Habib as an individual and the issue had become moot. No new facts were needed for that issue except the facts within his own knowledge. A continuance based on a failure to conduct discovery must be supported by an adequate showing of due diligence and that was not shown. *Bramall v. Wales*, 29 Wash. App. 390, 393, 628 P. 2d 511 (1981) No such showing could have been made by Appellants. A court abuses

discretion only on untenable or unreasonable grounds. *In re Marriage of Muhammad*, 153 Wn. 2d 795, 803, 108 P. 3d 779 (2005). A decision denying the continuance on July 3rd for a trial scheduled for July 14th was not an abuse of discretion under these circumstances as presented to the Court.

V. ARGUMENTS IN SUPPORT OF CROSS APPEAL

A. The Trial Court abused its discretion in failing to award attorney's fees to Habib for having to bring his action for an accounting.

When one partner establishes that another partner has breached his fiduciary duty to the partnership (Conclusion of Law 4 and 8) the Court may in its sound discretion award attorneys fees to the partner who sought the accounting against the one who breached his duty to account. *Guntle v. Barnett*, 73 Wash. App. 825, 837, 871 P. 2d 627 (1994). Appellants argue that *Guntle v. Barnett*, Id supports their contention that fees to Habib should be denied because Habib violated his duties as a partner. This argument disregards entirely that based on the deal the partners made, Habib had no such duties (E-mail on May 10, 2006, Exhibit 4). They argue that the partnership statute RCW 25.05.055(6) which gives each partner an equal right to management and control imposed on Habib a duty to do so which by assigning that duty to Nelson he violated (Page 32 of Appellants

Brief, foot note). The difference between a right and a duty is telling. When Nelson agreed to exclusively run the route and Habib agreed, the right of Habib was surrendered and no replacement duty was substituted. In the *Guntle v. Barnett* case, the complaining partner Guntle, unilaterally took over the operation of the business while Barnett operated another facility of the partnership. *Guntle v. Barnett*, Id at page 828. Guntle demanded to see records and Barnett refused. The partnership duties were violated both ways in that case and attorneys fees to Guntle were properly refused in the sound discretion of the Court. On the other hand in the case of *Hsu Ling Li v. Tang*, 87 Wn. 2d 796, 557 P. 2d 342 (1976), attorneys fees were awarded when a partner violated his fiduciary duty to the partnership and the other partner by commingling partnership and personal funds and failing to keep records. The Court held that the actions of the partner were tantamount to constructive fraud and awarded fees to Plaintiff. In this case, the Trial Court made no findings of fact that Habib owed or breached any duty to the partnership or Nelson. The oral decision of the Court(Verbatim Report of Proceedings, page 12) states that Habib had a fiduciary duty as well as Nelson but failed to state what that duty was, made no findings of fact in that regard and only commented that he produced at trial any evidence of his business before he met Nelson. The pre-involvement records were never discussed or included in the

partnership discussions except Habib did show Nelson his detailed collection records by site for 36 sites over an eleven month operating cycle that showed he had generated on these sites an average of \$10,000 per month. RP 64, lines 10-12; RP 104, lines 12-14. Nelson never produced even those kinds of records for any time he had control and operated the business for Habib and the partnership. It was untenable and unreasonable for the Court to use to use pre-partnership activities that had no relation to any finding of fact as a justification to presume a partnership duty was breached afterwards and place all of the litigation costs he incurred on him when his partner clearly breached a fiduciary duty to the partnership and Habib. See *In re Marriage of Muhammad*, 153 Wn. 2d 795, 803, 108 P. 3d 779 (2005) as to the standard for abuse of discretion. The fiduciary duty standard under the RUPA is now clear which is to account or to commit gross negligence in the conduct of partnership affairs. Habib cannot be shown on this record to have done either. The Trial Court's decision in the denial of attorney's fees should be reversed and Habib should be permitted to show evidence of his attorney fee costs under RAP 18.1.

B. No substantial evidence supported Finding of Fact 13 and the trial court erred in making Conclusion of law 6 by awarding a \$50,000 offset on the judgment against Nelson for storage costs

because Nelson failed to maintain records of that storage and could not document what he claimed to have spent.

Habib owned 36 vending machine sites and entrusted them to Nelson who agreed to be his partner to operate them exclusively and split the profits and losses. RP 79, lines 12-23; RP 216, lines 1-5; RP 122, line 24. He proceeded on his own authority without communication and participation on any decision to allow the route that under Habib's management that was averaging \$10,000 per month through October 2005 with 36 producing sites, to drop to 10-15 sites when he, Nelson, agreed to become Habib's partner without disclosing that this dissipation in route performance had occurred. RP 79, lines 18-23. The Trial Court considered this evidence and established the value of the business at the time of formation of the partnership that Habib had contributed based on an arms length sale negotiated by Nelson and approved in total without details by Habib of \$125,000. RP 236, lines 3-23; RP 240, line 1. This was substantial evidence to award this value for his contribution to the partnership which Nelson reduced to zero in four months by his own decisions in operation by the termination of the partnership. RP 195, lines 8-11. The Court awarded deductions from this amount for the \$10,000 in payments Habib had been paid from the cancelled Lee sale which is not challenged as error on this Cross Appeal.

However, as to the \$50,000 offset awarded for storage costs, Habib challenges the findings and conclusions for that offset on this Cross Appeal. Nelson produced no records of these expenses and according to the holding in *In re Tembreull's Estate*, 37 Wn. 2d 93, 102, 221 P. 2d 821 (1950), Nelson as managing partner is held to strict proof of the correctness of his account, which he has not done in this instance or at all. This proof requires the necessary vouchers which because he maintained no separate records, he cannot produce because they do not exist. RP 303, lines 6-13. The court stated at page 102, quoting *Bingham v. Keylor*, 25 Wash. 156, 64 P. 942 (1901) as follows:

“If the agent wholly fails to recognize the duties and responsibilities imposed upon him, or so conducts himself that his services are of no value, it is entirely just and reasonable that he should receive no compensation whatever, and to this extent the law is well settled.”

The Court held in *Tembreull's Estate* that the partner in failing to account in accordance with his responsibilities in the partnership was properly barred from any share in the partnership property and every presumption was held against him. In a partnership accounting, the partner with the duty to keep records so an accounting can be made cannot be heard to complain and when he fails to discharge that duty, he must suffer from any

inaccuracies and uncertainties in the evidence. *Cederlund v. Cederlund*, 7 Wash. App. 320, 321, 499 P. 2d 14 (1972).

Nelson testified that the storage costs were under \$100,000 at first but then he thought it was \$50,000 “\$50,000 or something like that, I just don’t know exactly”. RP 198, lines 1-3. This wishy washy undocumented evidence from a managing partner required to make a strict standard of proof of necessary vouchers, should not sustain a finding whether credible or not. If you believe him he just didn’t know. This does not meet the accounting requirement standard of strict proof set forth in *In re Tembreull’s Estate*. Id. This rule is especially applicable to Nelson because he commingled the partnership accounts with that of his other business and maintained no records to show otherwise. RP 303, lines 6-13. Every presumption goes against as managing partner. *Guntle v. Barnett*, 73 Wash. App. 825, 835, 871 P. 2d 627 (1994). In this instance, he is presumed to have not supported his claim for this storage cost. He has no one to blame for this but himself.

With the exception of the \$50,000 storage offset incurred because Nelson made every one of those decisions leading to the loss of the sites and the necessity for storage, he should bear that burden and this portion of the judgment should be added back leaving a judgment in favor of Habib in the principle sum of \$125,000 less the Lee payments as offsets

for a net judgment of \$115,000 in favor of Habib.. It was his partner's assets he was frittering away.

VI. CONCLUSION

The evidence was substantial to support every Finding of Fact and Conclusion of Law except for the Finding that Nelson justified his claim to have expended \$50,000 that he could not document or even remember and the failure of the Trial Court to award attorneys fees to Habib for the clear breach of the fiduciary duty of Nelson to account to the partnership of the property, profits, losses or benefits. Since he did not maintain any separate partnership records to enable the Court to settle the accounts there could be no accounting and he must suffer that loss. The value of Habib's property awarded to him in the judgment was supported by the evidence of a sale for \$125,000 based on an arms length transaction. The sale did not close and the partnership thereafter proceeded to go to zero value as a going concern all caused by the partner, Jason Nelson, who complains that he has to suffer a loss but fails to admit that he was the one that caused it. He will not be heard to complain for inaccuracies and uncertainties in the evidence. *Cederlund v. Cederlund*, 7 Wash. App. 320, 321, 499 P. 2d 14 (1972).

The Trial Court's Judgment should be affirmed except that the amount should be increased to \$115,000 and attorneys fees awarded to Habib as costs pursuant to RAP 18.1 including for the appeal or remanded to the Trial Court for actions consistent with this result advocated by Respondent.

Respectfully submitted this 29th day of June 2009.

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