

NO. 64117-4-I

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

LINDA SEVEN,

Appellant,

v.

STOEL RIVES, LLP, an Oregon Limited Liability Partnership;
GEORGE W. STEERS and LUCY STEERS, husband and wife, and
the marital community comprised thereof, Individually, and
GEORGE W. STEERS in his capacity as Personal Representative
of the Estate of Robert Resoff and as Trustee of the Shelford
Family Trust, the Dean Family Trust, and the Resoff Family Trust;
SUSANNA DEAN SUTTON, in her capacity as trustee of the Resoff
Testamentary Trust for the benefit of the Dean Family; ROBERT N.
HOPE, in his capacity as Trustee of the Resoff Testamentary Trust
for the benefit of the Resoff family,

Respondents.

REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

REPLY TO STATEMENT OF FACTS 2

REPLY TO ARGUMENT 5

A. Standard of Review: This Court reviews the evidence *de novo* to determine whether a jury could determine that a reasonable judge would have found a committed intimate relationship under the facts of this case. 5

B. The evidence would support a jury verdict that a reasonable judge would find that Linda Seven and Bob Resoff were in a committed intimate relationship from 1993 through 2001. 9

1. The trier of fact must evaluate and balance the evidence and the five *Connell* factors to determine whether there was a committed intimate relationship. 9

2. Linda Seven and Bob Resoff did not pool significant resources because Bob would not let Linda pay for anything, but Linda contributed her services. 10

3. The intent of the parties was to be in a permanent intimate relationship until parted by death. 11

4. Viewing the factors as a whole, a jury could find that a reasonable judge would find a committed intimate relationship. 17

C. The evidence would support a jury verdict that a reasonable judge would find that Linda Seven was entitled to an equitable share of Bob Resoff's interest in the Russian joint venture crab fishing operation. 18

CONCLUSION 21

TABLE OF AUTHORITIES

| | Page(s) |
|-----------------------------------------------------------------------------------------------------------------------------------|----------------|
| CASES | |
| <i>Brust v. Newton</i> , 70 Wn. App. 286, 287, 852 P.2d 1092 (1993), <i>rev. denied</i> , 123 Wn.2d 1010 (1994)..... | 5, 6, 8, 9 |
| <i>Connell v. Francisco</i> , 127 Wn. 339, 346, 898 P.2d 831 (1995) | 9, 10, 12, 13 |
| <i>Creasman v. Boyle</i> , 31 Wn.2d 345, 196 P.2d 835 (1948) | 13 |
| <i>Dewberry v. George</i> , 115 Wn. App. 351, 62 P.3d 525, <i>rev. denied</i> , 150 Wn.2d 1006 (2003) | 13 |
| <i>Geer v. Tonnon</i> , 137 Wn. App. 838, 155 P.3d 163 (2007), <i>rev. denied</i> , 162 Wn.2d 1018 (2008) | 7 |
| <i>In re Pennington</i> , 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000) | 6, 7, 12, 13 |
| <i>In Re Relationship of Eggers</i> , 30 Wn. App. 867, 638 P.2d 1267 (1982) (BR 29-30) | 11 |
| <i>Marriage of Lindsay</i> , 101 Wn.2d 299, 678 P.2d 328 (1984) | 11, 13 |
| <i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001) | 1, 2, 7, 10 |
| STATUTES | |
| RCW 5.60.030..... | 15 |

OTHER AUTHORITIES

Tegland, Wash. Practice: Evidence Law and Practice §
601.18 at p. 315 5th 16

INTRODUCTION

The defendants ignored below and continue to ignore on appeal the basic admonitions of our Supreme Court regarding committed intimate relationships:

- “[E]quitable claims must be analyzed under the specific facts presented in each case.”
- “Even when we recognize ‘factors’ to guide the court’s determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence.”
- “In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment.”

Vasquez v. Hawthorne, 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001).

Contrary to the Supreme Court’s direction, the defendants asked the trial court and ask this Court to paint with a broad brush and ignore the factual details, to narrow the inquiry to a mechanical process of counting factors, to reach inferences favorable to themselves and adverse to Linda Seven, and to characterize Linda Seven’s relationship with Bob Resoff on an abbreviated summary judgment record. Unlike the trial court, this Court should recognize the need for a full trial and reverse and remand.

REPLY TO STATEMENT OF FACTS

Defendants cannot decide whether this appeal raises factual questions or legal questions. Defendants offer the Court a lengthy statement of facts, BR 5-17, but then claim that the appeal presents legal issues, not factual questions. BR 17-23. Their statement of facts is sprinkled with legal assertions, such as, “Mr. Resoff and Ms. Seven’s relationship from 1993 to 2001 was not a CIR,” and, “[t]he relationship was not equivalent to a marriage.” BR 6. Suffice it to say, as Linda Seven pointed out in her opening brief, “equitable relief in committed intimate relationships ‘should seldom be decided by the court on summary judgment.’” BA 1, *quoting Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001).

Defendants ask this Court to make significant inferences in their favor based on the incomplete information presented at summary judgment. For example, defendants point out that Linda recorded her net worth in her own notebook, and that, “[t]here is no evidence she ever shared this information with Mr. Resoff.” BR 3. Defendants similarly suggest that Linda made profits from buying and selling two homes without sharing those transactions with Bob Resoff. *Id.*

Defendants argue that finding a committed intimate relationship would defeat Bob Resoff's intent as reflected in his will. BR 4. Bob's apparent intent was based on the advice of defendant Steers, who was unaware of the doctrine of committed intimate relationships. To the extent that Bob's actions were guided by Steers' advice, those actions were taken without appropriate legal advice and fail to reflect how Bob might have acted under a correct understanding of the law.

The very purpose of trial is to allow each side to present evidence, not to pile inference upon inference from summary judgment pleadings. At a trial, Linda could explain that as a bookkeeper, she keeps track of everything and that she told Bob about her accounting of her investments. Linda could also testify that she lost money on the sale of one of the houses, which accordingly failed to produce any profit which could be shared with Bob.

Defendants ask this Court to trivialize Linda's relationship to Bob, attempting to reduce the relationship from physical and emotional intimacy to a venal matter of dollars and cents. Defendants argue that Bob reimbursed Linda for all of her services through a regular monthly salary, asserting that Bob gave Linda a

raise in 1991. BR 8-9. The Court should reject defendants' cynical spin on Linda's and Bob's committed intimate relationship. Linda explained that Bob gave her a salary, not in return for services rendered, but because he knew that she would be foregoing the opportunity to earn her own income when she moved into live with and care for him (CP 1205-06):

Bob was immensely wealthy. I needed to work. Bob did not want me to go to Alaska to work; he wanted me to be with him. In order for Bob to make sure that we were together; he agreed to pay me a salary. Bob paid me a salary of \$36,000 which was the amount of salary I was making at the last fishing company I worked for. At the risk of sounding arrogant, I was very good at what I did and got job offers all the time. I would have been making much more than \$36,000 if I had been working. The defendants state in their motion, "In response to Ms. Seven's demand, Mr. Resoff increased Ms. Seven's salary to \$50,000 per year as compensation for the additional household duties she had assumed.....". See Defs. Mt. for Partial S.J., p. 5: lines 1-2. This is completely incorrect. Bob raised my salary from \$36,000 to \$50,000 on January 2, 1989 **not** in 1991 as the defendants claim. I did make a request to Bob for a raise in 1991, however, it was a casual request as I was doing more things in regards to taking care of his family. I was not given a raise ever in 1991 or anytime after my raise to \$50,000 on January 2, 1989. Defendants try to portray my request to Bob for a raise in 1991 as a big deal, however, the request

was simply a casual conversation with Bob and not serious in any manner whatsoever as I did not press the issue.¹

Defendants argue that Linda never financially contributed to the community, but they do not dispute Linda's testimony that this was because Bob would not allow her to pay for anything. BA 23-24.

REPLY TO ARGUMENT

A. Standard of Review: This Court reviews the evidence *de novo* to determine whether a jury could determine that a reasonable judge would have found a committed intimate relationship under the facts of this case.

Linda Seven argued in her opening brief that the issue in a trial of her malpractice claims is whether a reasonable judge would have found a committed intimate relationship. BA 16-17 (*citing **Brust v. Newton**, 70 Wn. App. 286, 287, 852 P.2d 1092 (1993), rev. denied, 123 Wn.2d 1010 (1994)*). Defendants disagree, arguing that if there is no dispute of fact, the trial court grants summary judgment to one party or the other. BR 17-18.

Defendant's position erroneously ignores the fact that the existence of a CIR is mixed question of law and fact: "We view this

¹ Defendants claim that Linda testified by deposition that she told Bob in 1991 that she wanted a raise and that this conversation generated a raise. BR 8-9. But defendants omit Linda's testimony at the same time that she forgot which year she got the raise, CP 98, a point that she clarified in the declaration quoted above.

determination as a mixed question of law and fact; as such, the trial court's factual findings are entitled to deference, but the legal conclusion flowing from those findings are reviewed de novo." *In re Pennington*, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000). That is why this Court held in *Brust* that the jury's task in a legal malpractice trial is to determine what a reasonable judge would have done. *Brust*, 70 Wn. App. at 293 (quoted at BA 16).

Defendants' argument is premised on the fiction that given the same set of facts, every single trial judge would rule in the same way on an alleged CIR. That assertion is counter-intuitive to say the least, and it is not borne out by experience. Rather, different judges hearing the same evidence can come to different findings and conclusions and they do so all the time.

Defendants offer several mistaken arguments. First, defendants argue that Linda Seven never argued to the trial court that a jury should have determined what a reasonable judge would have concluded in the case, *i.e.*, whether a reasonable judge would have found a committed intimate relationship. BR 18-19. Defendants have overlooked that Mr. Gould, Linda's trial counsel, argued to the trial court that it is up to a jury to decide how a judge

would rule regarding a committed, intimate relationship. RP 44-45 (8/21/09).

Defendants are equally wrong when they argue that the existence of a committed, intimate relationship is a legal conclusion reviewed de novo, claiming that, “[t]his case is just like *In Re Marriage of Pennington*” BR 19-20. To the contrary, this case is unlike *Pennington*, which was actually tried, while this case was dismissed on summary judgment without a trial. And as noted above, the *Pennington* Court held that the determination of the existence of a CIR is a mixed question of law and fact. *Pennington* at 602-03. Determination of this relationship is so fact-specific that it simply should not be decided on summary judgment. *Vasquez, supra*, 145 Wn.2d at 107-08.

Defendants misplace their reliance on a case in which this Court affirmed a dismissal on summary judgment in a professional negligence claim for failure to file an equitable lien claim because the claim in the case was not a recognized cause of action under Washington law. BR 21, citing *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (2007), *rev. denied*, 162 Wn.2d 1018 (2008). Here, by contrast, no one disputes that Washington recognizes a claim for a CIR under Washington law, and *Geer* is inapposite.

Defendants attempt unsuccessfully to distinguish ***Brust v. Newton***. BR 22. Defendants quote this Court’s statement in ***Brust*** that, “the line between questions for the judge and those for the jury in legal malpractice actions has generally been drawn *between questions of law and questions of fact.*” *Id.* (emphasis in original). Defendants ignore the context of this statement, which immediately follows this Court’s rejection of an argument that the judge in a legal malpractice action decides all issues that would have been resolved by a judge in the underlying case-within-a-case: “[T]he majority of courts and legal scholars considering the question of whether a particular issue should be for the judge or the jury in a legal malpractice action have declined to analyze it in terms of whether that issue should have been one for the judge or the jury in the original proceeding.” ***Brust*** at 290. Defendants’ quotation from ***Brust*** is also immediately followed by this statement (*Id.* at 291):

The critical distinction is that a suit alleging negligence by an attorney in drafting a prenuptial agreement is not a dissolution action. It is an action in tort. [citation omitted] Thus, the fact that there would be no right to a jury in a divorce action or other equitable proceeding, [citations omitted], does not factor into the analysis. [citations omitted] To rule otherwise would be to withdraw from the jury in a malpractice suit the resolution of purely factual disputes in all cases arising out of an attorney’s actions in connection with equity, probate, or administrative proceedings.

Ultimately, this Court held in *Brust* that a jury should decide both proximate cause and damages. The same is true here. The negligence issue in a trial of Linda's claim will be whether defendant Steers was negligent in responding to Linda that, "Washington does not recognize common law marriage" never telling her about the doctrine of committed intimate relationships. CP 287. The proximate cause and damage issues are whether that advice damaged Linda by depriving her of an opportunity to assert and prove the existence of a committed, intimate relationship. Under *Brust*, that is an issue for the jury.

B. The evidence would support a jury verdict that a reasonable judge would find that Linda Seven and Bob Resoff were in a committed intimate relationship from 1993 through 2001.

1. The trier of fact must evaluate and balance the evidence and the five *Connell* factors to determine whether there was a committed intimate relationship.

The defendants concede the three factors of continuity of cohabitation, duration of the relationship, and purpose of the relationship. BR 24. The defendants argue, however, that there is no committed, intimate relationship as a matter of law because the defendants maintain there was no pooling of resources or intent of the parties. BR 25-39. Defendants cite absolutely no authority that

the absence of two **Connell** factors means that parties are not in a committed intimate relationship. BR 37-39. The defendants' argument simply ignores the holding of the Supreme Court in **Vasquez** that the five **Connell** considerations are "not exclusive, but are intended to reach all relevant evidence." 145 Wn.2d at 108 (quoted at BA 20). This lack of authority confirms Linda Seven's argument that the Court should have tried this case to uncover and consider all relevant evidence instead of disposing of the case on summary judgment. Moreover, the defendants' analysis of the two factors of pooling of resources and intent of the parties is fatally flawed, as we now show.

2. Linda Seven and Bob Resoff did not pool significant resources because Bob would not let Linda pay for anything, but Linda contributed her services.

Defendants argue that Bob paid Linda for all of his services to him. BR 27-29. As discussed above, Linda explained that Bob's payments to her were not a salary, but were instead to replace the income she was foregoing by living with Bob and losing any opportunity for gainful employment. In this summary judgment

appeal, the Court should accept Linda's account of the salary issue and make any inferences favorable to Linda, not to defendants.²

Defendants' reliance in *In Re Relationship of Eggers*, 30 Wn. App. 867, 638 P.2d 1267 (1982) (BR 29-30) is anachronistic. *Eggers* was decided before our Supreme Court abandoned the "Creaseman presumption" in *Marriage of Lindsay*, 101 Wn.2d 299, 678 P.2d 328 (1984). *Eggers* no longer has persuasive value.

3. The intent of the parties was to be in a permanent intimate relationship until parted by death.

Defendants cannot deny that there is sufficient evidence for a jury to find that a judge would find that Linda and Bob intended to be in a permanent, intimate relationship until parted by death. *E.g.*, CP 1206 ("We considered ourselves a couple, in essence, a husband and wife lacking only a marriage certificate."); CP 1194 ("Linda Seven took better care of Bob Resoff than I did of my own husband."); CP 1197 ("[T]heir relationship grew into, what I

² Although it is not the role of the Court on summary judgment to determine the credibility of Linda's testimony on any inferences arising from it, it is counter-intuitive, if not incredible, to conclude that Linda was willing to trade the salary she earned as a seasonal bookkeeper for a 24-hour, 7-day-a-week position as Bob's loving companion. It is far more likely that a jury would accept Linda's testimony that her "salary" was never intended to compensate her for all of the services she rendered to Bob.

considered, a married couple; but without the formality of a marriage license.”)

Defendants cannot deny that there is sufficient evidence for a jury to find that a judge would find that Linda and Bob intended to be in a committed intimate relationship, intended to be in a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” *Pennington*, 142 Wn.2d at 601 (quoting *Connell v. Francisco*, 127 Wn. 339, 346, 898 P.2d 831 (1995)).

Unable to deny the evidence, the defendants attempt to change the law, arguing without any authority that the intent to be in a committed intimate relationship “must include some expression of the parties’ intent to commingle assets and services, to share in gains and losses and to treat assets held in common as a married couple would in the event their relationship is ‘dissolved’ or ended by the death of one of the partners.” BR 31.

No authority supports defendants’ argument. While co-mingling of assets is certainly relevant to finding a committed intimate relationship, it is not in any sense the *sine qua non* of the relationship. Nor is defendants’ proposed test a necessary aspect of marriage. Married couples sometimes agree to maintain their

assets separately. *E.g.*, ***Dewberry v. George***, 115 Wn. App. 351, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003).

Defendants' argument collapses the intent element into the pooling element. If the necessary intent is to pool resources and treat them as jointly owned, then there is no separate intent requirement. The intent requirement must mean something different than pooling of resources.

Defendants' proposed test is an attempted throw-back to the artificial title-oriented presumption of ***Creasman v. Boyle***, 31 Wn.2d 345, 196 P.2d 835 (1948). Our Supreme Court wisely jettisoned this mechanical approach in favor of the multifactor equitable analysis of the ***Lindsay/Connell/Pennington*** line of cases.

Defendants' proposed test would also penalize the less sophisticated partner in a committed intimate relationship. Linda Seven did not know of the doctrine of committed, intimate relationships at all. A more savvy and calculating person might manipulate their financial affairs to satisfy defendants' rigid, mechanical test. But the equitable treatment of partners in a committed, intimate relationship should not turn on a party's legal knowledge and sophistication. Rather, it must turn on the nature of

the relationship under a variety of factors and the analysis must give the judge broad discretion to consider all facts and render an equitable decision.

Defendants correctly point out that the trial court granted summary judgment against Linda based primarily on this factor, the lack of any pooling or commingling of specific bank accounts or assets. BR 32. The trial court's analysis is contrary to the law and summary judgment should be reversed for this reason alone.

Defendants attempt to limit the evidence to be considered by this Court, specifically the mutual intent of Bob and Linda that their relationship would be permanent (CP 284, quoted at BA 25 and BR 33):

When Bob asked me to move back in with him in January of 1993, he made me promise that I would not leave. I made that promise to him and I kept that promise until the day he died. We were a close and loving couple from that time, indeed, earlier, as I have stated, until the day he died.³

The defendants offer the argument that this declaration was submitted in response to the earlier motion for summary judgment, not the second motion for summary judgment that is the subject of this appeal. BR 33-34. This is not only hyper-technical, it is wrong.

³ As explained above, Bob's statement that Linda must promise not to leave was stricken as to defendant trustees, but not as to defendant law firm and lawyer.

Linda's response to the second motion for summary judgment repeatedly refers to this very declaration. CP 1185-86. The same judge considered both motions. The evidence was certainly before the Court.

Defendants argue that Bob's intent must be discerned from "what he wrote down in his will while he was alive." BR 33. Defendants ignore that Bob's last will was written in 1995, before he realized millions of dollars from his investment in AAS-DMP and six years before his death. BR 13-14. Bob considered re-writing his will at the end of 1999 when he consulted with defendant Steers, CP 1210, 1376, but was apparently unable to do so before his death. Linda was a substantial beneficiary of the 1995 will, CP 125-26, and Bob made her the beneficiary of his life insurance policy. CP 1207. Bob's generosity to Linda evidences a much stronger relationship than that of a mere employee; it evidences a committed intimate relationship.

Defendants also argue that the trial court struck any portion of Linda's declaration that purported to recount Bob's statements under the Dead Man's Statute, RCW 5.60.030. BR 34, citing CP 1415-16. This argument misses the mark for two reasons. First, Linda's own statements to Bob and her intent are still admissible

under the trial court's order. Second, the motion was brought by the trustees of the testamentary trusts, not by defendant lawyers. CP 381. The motion itself states that it "is not relevant to Ms. Seven's claim against Stoel Rives." CP 381 n.1. Thus, striking a portion of Linda's declaration applies only as to the trustees, not as to defendant lawyers, consistent with Washington law interpreting the Dead Man's Statute:

If the interested party sues multiple defendants, testimony that may be barred as against one defendant (who is an adverse party under the dead man's statute) may still be admissible for the limited purpose of supporting a claim against another defendant (who is not an adverse party).

5A K. TEGLAND, WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 601.18 at p. 315 5th Ed. (2007).

Defendants acknowledge that Linda Seven filed an additional declaration in response to the second motion for summary judgment discussing the mutual intent between Bob and herself. BR 35-36. Defendants argue that Linda's second declaration "speaks to Mr. Resoff's intent in a conclusory fashion." BR 36. This is a summary judgment. Conclusory or not, Linda's declaration speaks directly to Bob's intent.

Defendants also argue that Linda's declaration is inconsistent with her declaration testimony. There is no

inconsistency. Linda testified in her deposition that moving back in with Bob had more to do with Bob's health than with the end of her relationship with another man. CP 617-18 quoted at BR 6-7. Linda's deposition is not inconsistent with the statement in her declaration that, "I did not move back in with Bob solely because of his health, I moved back in because I loved him." In any event, any arguable inconsistency is for a jury to evaluate.

4. Viewing the factors as a whole, a jury could find that a reasonable judge would find a committed intimate relationship.

Linda Seven's opening brief pointed out that the *Connell* factors are not exclusive but are intended to reach all relevant evidence and that the existence of a committed, intimate relationship should seldom be decided on summary judgment. BA 29-31. Defendants cannot respond to this argument, and so they simply repeat their incorrect argument that there was no committed intimate relationship, arguing that there was a failure to pool resources and no intent to form a CIR. BR 37-39. As discussed above, the defendants stubbornly refuse to recognize that Linda Seven contributed services to this relationship, enabling Bob to carry on with his business investments without distraction. Defendant's argument is also flawed because their re-definition of

the requisite intent is incorrect. Viewing all of the evidence together and granting all reasonable inferences in Linda's favor, the Court erred in granting summary judgment, and should have allowed this case to proceed to trial by jury.

C. The evidence would support a jury verdict that a reasonable judge would find that Linda Seven was entitled to an equitable share of Bob Resoff's interest in the Russian joint venture crab fishing operation.

Defendants argue that Bob Resoff's investment in AAS-DMP was exclusively his separate property and that Linda Seven failed to offer any evidence that profits derived from the AAS-DMP investment were attributable to communities later. BR 39-44. Defendants are simply ignoring the evidence.

Bob Resoff invested in AAS in December 1992 or perhaps January 1993 by making a net investment of approximately \$1 million. CP 1310. AAS subsequently formed a separate joint venture with a Russian joint venture partner, forming AAS-DMP. BA 33-34; CP 1310. Bob Resoff invested a total of \$333,333 in AAS-DMP. CP 1310.

In return for his investment of \$333,333 in AAS-DMP, Bob Resoff eventually received distributed profits of approximately \$17.7 million. CP 1310. A reasonable juror would probably

conclude from this evidence that Bob Resoff's community-like labor had the effect of increasing the value of the joint venture. The amount of that increase is necessarily an equitable calculation. Linda Seven carried her burden on summary judgment by presenting the evidence that Bob was integrally involved in the formation of AAS-DMP and that he continued to advise Lloyd Cannon throughout the joint venture. In order to prevail on summary judgment, defendants were required to present some evidence that no part of the increase in the value of AAS-DMP was due to Bob's community-like labor. The defendants never even attempt to shoulder this burden. Instead, they try to shift to Linda the burden of presenting additional evidence quantifying the increase. That is not how summary judgment works. The defendants had the burden of showing the absence of an issue of material fact. They utterly failed to carry that burden and summary judgment was erroneous.

Defendants argue that the community was "adequately reimbursed" for the value of any community-like labor contributed by Bob Resoff by AAS-DMP. BR 45-47. The defendants argue that Bob annually transferred more than \$400,000 into his personal account, paying for all of his and Linda's expenses. BR 45. At

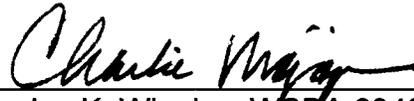
least some portion of this was clearly community-like income including Bob's annual compensation from Sea Catch of \$105,000. BR 45. It is unclear from the summary judgment record exactly how all of the funds in the personal account were used. In any event, calculating the exact amount of Bob's personal funds that were spent on the committed intimate relationship is a complex accounting matter never undertaken by the defendants or their expert witness. Finally, any alleged reimbursement must be weighed against the value of the \$17 million return on the investment in AAS-DMP. The defendants have failed to show that the reimbursement more than compensated for the investment of community-like labor into the joint venture.

CONCLUSION

For all the reasons stated in the Brief of Appellant and this Reply Brief, the trial court erred in granting summary judgment. Linda Seven respectfully asks the Court to reverse the summary judgment and remand for trial.

RESPECTFULLY SUBMITTED this 16 day of June
2010.

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CERTIFICATE OF SERVICE BY MAIL

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