

NO. 40173-8
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HUGO ANTONIO CASTILLO MARTE,

Appellant,

vs.

JESSIKA HERNANDEZ, as personal representative of the Estate of
FRANKLYN CASTILLO; and the ESTATE OF FRANKLYN
CASTILLO,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN F. NICHOLS

REPLY BRIEF

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RECAPITULATION

This Reply Brief will address the arguments made by Hugo Antonio Castillo Marte (Tony) concerning the single Assignment of Error made by the Estate of Franklyn Castillo (the Estate) on cross-appeal. RAP 10.1(c). Tony had assigned error to the trial court's reserving to itself the issues of whether Tony and the Decedent (Franklyn Castillo or Frank) had formed an unlawful partnership and whether they were *in pari delicto*. In response, the Estate assigned error to the trial court's failure to submit these issues to the jury. The Estate was explicit that its Assignment of Error was made conditionally and should only be considered if the Court believed that the trial court had erred in reserving consideration of these issues to itself in the manner in which it did. Specifically, the Estate argued that if the trial court should not have decided these matters itself, it should have given the Estate's proposed instructions dealing with these questions and should have submitted a verdict form encompassing these issues.

ARGUMENT

Tony appears to contend that the questions of whether the brothers formed an unlawful partnership and whether they were *in pari delicto* should not have been submitted to the jury. In making this argument, he

fails to recognize that these questions turn on issues of fact that must be resolved. The critical factual issues are set out in the Findings of Fact and Conclusions of Law the trial court made. (CP 444-450) They include, without limitation, the fact that McDonald's Corporation does not grant franchises to partnerships. (CP 445; FF 4);¹ that the brothers were aware of this fact (CP 445; FF 7); that the brothers agreed that Frank would apply for a franchise from McDonald's Corporation and that they would lie to McDonald's Corporation about the existence of their partnership and the money that Tony was contributing to the venture (CP 445; FF 8); that Tony provided Frank with information concerning the advisability of purchasing a McDonald's franchise in various different locations (CP 446; FF 10); that Tony made false notations on the memo line of checks he wrote to Frank for the purpose of concealing the partnership (CP 447; FF 15); that Tony falsely certified under penalty of perjury that money that he advanced for the partnership came from the proceeds of a sale of real property located in the Dominican Republic (CP 448; FF 17); that Tony prepared invoices for the provision of information technology services for the restaurants when in fact he performed no such work (CP 448; FF 19); and that Tony failed to report monies received from the operation of the

¹ "FF" means "Finding of Fact."

restaurants on his federal income tax return for the purpose of concealing his involvement in the partnership (CP 449; FF 21).

At the trial, someone had to make those factual findings. If that should not have been the trial court, as Tony has contended, then the jury should have been required to find the facts and apply the law to those facts. *State v. Fry*, 168 Wn.2d 1, 17, 228 P.3d 1 (2010), Chambers, J., concurring. Clearly, it is the jury's role to find facts on questions properly presented to it. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); *Esparza v. Skyreach Equipment, Inc.*, 103 Wn.App. 916, 944, 15 P.3d 188 (2000). Furthermore, as RCW 4.44.090 states:

All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them.²

Therefore, if the trial court should not have reserved all questions concerning the unlawful partnership and *in pari delicto* issues, the matter should have been presented to the jury. The trial court should have instructed the jury on those questions and presented a verdict form calling for a decision by the jury on those issues.

² RCW 4.44.080 provides:

All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.

Tony contends that the unlawful partnership and *in pari delicto* issues are matters of law that the trial court must decide. First of all, this argument contradicts the position Tony has previously taken — that the trial court improperly reserved these matters to itself. Furthermore, the authority that Tony cites in support of his argument is not helpful. In *Daugert v. Pappas*, 104 Wn.2d 254, 258, 704 P.2d 600 (1985), the Court held that in a legal malpractice case where the attorney’s error was failing to file a Notice of Appeal in a timely fashion, the issue of whether the client would have prevailed on appeal was one for the court. It based its decision on the notion that a party’s chances on appeal primarily involved an analysis of law. It acknowledged that this holding was an exception to the rule that the determination would “normally be within the sole province of the jury.” 104 Wn.2d at 258. In *Mega v. Whitworth College*, 138 Wn.App. 661, 672, 158 P.3d 1211 (2007), the Court noted that it is improper to instruct a jury on contract interpretation when, apparently, extrinsic evidence was not necessary to resolve the interpretation issue.³ These two cases are inapplicable for one simple reason—the questions

³ Contract interpretation is an issue of law when the interpretation does not depend on extrinsic evidence or when the extrinsic evidence can lead to only one conclusion. *Tanner Electric Co-op v. Puget Sound Power & Light Co.*, 128 Wn.2d 676, 911 P.3d 1301 (1998); *Save Columbia CU Committee v. Columbia Credit Union*, 134 Wn.App. 175, 181, 139 P.3d 386 (2006); Comment to WPI 301.05.

presented in our case require resolution of factual issues where the issues in those cases did not as the respective Courts discussed.

Tony next argues that any issue of law was decided by the trial court in its denial of the Estate's motion for summary judgment on the unlawful partnership issue. Tony is simply incorrect. A denial of a motion for summary judgment is not a binding determination. It has no preclusive effect. *Zimny v. Lovric*, 59 Wn.App. 737, 801 P.2d 259 (1990). As one commentator has stated:

If summary judgment is denied, the case simply proceeds as if no motion had been made. The denial does not constitute a determination on the merits and is not appealable. Review is limited to discretionary review by the appellate court, or review of the denial in the context of the case in which an appeal is taken from some other appealable order or judgment.

Tegland *Civil Procedure* 14A Wash.Prac. §25:25.

CONCLUSION

As stated in the Brief of Respondent, the trial court's decision should be affirmed in all respects. If, however, the Court concludes that the trial court improperly reserved to itself the determination of the

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unlawful partnership and *in pari delicto* questions, the matter should be remanded for a jury trial on those matters.

RESPECTFULLY SUBMITTED this 25 day of Oct,
2010.



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