

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
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No. 41711-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

GARY WOEMPNER and "JANE DOE" WOEMPNER, husband and
wife, and the marital community composed thereof; and ALKI
INTERNATIONAL, INC., a Washington corporation,

Defendant/Appellants,

vs.

GARY E. CHEVALIER,
Plaintiff/Respondent

and

RONALD BEQUETTE, a single man,
Defendant/Respondent.

BRIEF OF RESPONDENT
GARY E. CHEVALIER

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I. STATEMENT OF THE CASE

Gary Chevalier generally agrees with Mr. Woempner's statement of the case; however, there were several other witnesses with relevant testimony not cited by Woempner.

Testimony of Roy Bequette.

At the time of trial, Roy Bequette (Ron Bequette's father), was semi-retired, but performing part-time independent contractor accounting for freight forwarding companies. (RP 10/22/03, p. 90, ll. 19-25; p. 91, ll. 1-3.) Roy Bequette began working as an accountant for freight forwarders in 1961; then, in the 1980s he purchased and operated his own freight forwarding company. (RP 10/22/03, p. 91, ll. 7-25; p. 92, ll. 1-16.) At the time of trial, Mr. Bequette was performing financial services such as preparing financial statements, tax information, and generation of profit and loss and balance sheets for AA Sound Forwarding, Armstrong International, Admiral Forwarding, and Alderwood Forwarding. (RP 10/22/03, p. 94, ll. 24-25; p. 95, ll. 1-25.) Ron Bequette also performed similar services for Alki International, from the time of its formation until March 1996, which Mr. Bequette refers to as the "settlement date." (RP 10/22/03, p. 97, ll. 3-9.)

In March 1996, Ron Bequette was settling out his partnership share with Mr. Woempner, and Roy Bequette was requested to develop a document which would recap profits made by Alki International, Inc., up through that time. The document was referred to at trial as Exhibit 15. (RP 10/22/03, p. 104, ll. 2-24.) After trial Exhibit 15 was prepared, Roy Bequette discussed the documents and figures with both Gary Woempner and Ron Bequette. (RP 10/22/03, p. 111, ll. 14-24.) This discussion took place in the Bothell office, and both Gary Woempner and Ron Bequette were given copies of the recap statements. (RP 10/22/03, p. 112, ll. 2-12.) When presented with the documents, both Woempner and Ron Bequette simply reviewed the documents had no questions pertaining to the document, and agreed that the document was "ok." (RP 10/22/03, p. 113, ll. 5-19.) Later, after adjustments had been made to the profit and recap document, Roy Bequette asked Mr. Woempner when the balance of Ron Bequette's partnership shares would be paid. Mr. Woempner responded "I will pay it when Ron's divorce is final." (RP 10/22/03, p. 114, ll. 12-22.)

In October 1995, Roy Bequette attended the household goods forwarders convention in Hawaii. While there, Gary Woempner introduced himself to other agents and their staff as Ron Bequette's

partner in Alki. (RP 10/22/03, p. 119, ll. 23-25; p. 120, ll. 1-25.) In another conversation with Roy Bequette, Gary Woempner told him that the money was coming in 50/50 and that it was to go out 50/50. (RP 10/22/03, p. 124, ll. 14-23.)

Testimony of Barbara McCulloch

Ms. McCulloch has worked for Gary Woempner at Ace Van & Storage for 23 years prior to trial. (RP 10/22/03, p. 243, ll. 11-22.) After formation of Alki International, Gary Chevalier had told Ms. McCulloch several times that he was part owner in Alki International. (RP 10/22/03, p. 249, ll. 18-22.) Ms. McCulloch also overheard Mr. Chevalier, at the Tacoma office, telling Mr. Woempner that he wanted Woempner to buy him out. (RP 10/22/03, p. 250, ll. 11-20.)

Testimony of Nancy Kelly

Ms. Kelly works for Admiral Forwarders, Inc., in the same Bothell office as Alki International. (RP 10/22/03, p. 258, ll. 10-22; p. 259, ll. 2-8.) Admiral Forwarders is run by Ray Willard in the office next to Alki. (RP 10/22/03, p. 263, ll. 4-14.) Ms. Kelly observed Gary Chevalier and Gary Woempner moving Alki out of the building. (RP 10/22/03, p. 263, ll. 15-19.) During this process, Ms. Kelly overheard Gary Woempner

speaking with Mr. Willard, and Mr. Woempner stated that he needed to get together with his accountant, Ed Yee, to “find out how much Gary Chevalier had coming” so he (Chevalier) could buy Alpine Forwarders. (RP 10/22/03, p. 265, ll. 21-25; p. 266, ll. 1-4.)

Testimony of Michael L. Fullaway

At the time of trial, Mr. Fullaway had been a Washington CPA for the past 21 years. (RP 10/23/03, p. 275, ll. 6-29.) Mr. Fullaway is Ron Bequette’s cousin, and has performed tax preparation and accounting for both Ron and Roy Bequette for the past 20 years. (RP 10/23/03, p. 276, ll. 15-25; p. 277, ll. 1-6.) In the fall of 1995, Ron Bequette called Mr. Fullaway and stated that he wanted to introduce him to his partner in Alki International, so Mr. Fullaway could then provide company accounting/tax services. (RP 10/23/03, p. 277, ll. 18-25; p. 278, ll. 1-5.) In the fall of 1995, Mr. Fullaway met with Mr. Woempner and Ron Bequette at Diamond Jim’s Restaurant in Federal Way, Washington. This was an introductory meeting, and during that meeting Fullaway was told by the parties that Alki International was a 50/50 partnership between Woempner and Bequette. (RP 10/23/03, p. 279, ll. 1-10.) Fullaway was told that Ron Bequette’s partnership interest had to be as a “silent partner,” and the

ownership was to be handled under Gary Woempner's social security number. (RP 10/23/03, p. 279, ll. 11-23.)

II. ARGUMENT

a. **Standard of Review**

Woempner's citation to *Landmark Dev. Inc., v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999), reflects the proper standard of review of a trial court's findings of fact and conclusions of law. However, the court is also guided by other rules particular to issues in this case. Woempner has asked this Court to review Judge Armijo's findings concerning the credibility of the parties and their evidence. In the original Findings of Fact and Conclusions of Law, (Finding 25) (CP 161) and then the Amended Findings of Fact and Conclusions of Law, (Finding 25) (CP 181), Judge Armijo concluded:

Woempner's testimony at trial was directly contrary to the testimony of Chevalier, Bequette, Fullaway, Kelly, and Roy Bequette on nearly every issue material to this case. The court specifically finds that overall, the plaintiff's version of facts are more credible. In particular, Woempner's testimony that he engaged Bequette as a "consultant" to assist him with the formation and start-up of Alki and that Bequette was to be paid a fee for his consulting work to be determined in Woempner's "sole discretion" was not credible.

Mr. Woempner fails to demonstrate some factual basis for his objection to this Finding; rather, the argument appears to be that Mr. Woempner should simply be believed, as opposed to the other witnesses and evidence. However, this court cannot review issues of credibility:

Evidence will be viewed in the light most favorable ... "the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wash.App. 614, 618, 829 P.2d 217 (1992). Review is deferential. *Schofield*, 96 Wash.App. at 586, 980 P.2d 277.

During the trial, "[t]he trial court heard and saw the witnesses, and was thus afforded an opportunity, which is not possessed by this court, to determine the credibility of the witnesses." *Garofalo v. Commellini*, 169 Wash. 704, 705, 13 P.2d 497 (1932). The trial court's credibility determinations and its resolution of the truth from conflicting evidence will not be disturbed on appeal. *Garofalo*, 169 Wash. at 705, 13 P.2d 497 (credibility); *Du Pont v. Dep't of Labor & Indus.*, 46 Wash.App. 471, 479, 730 P.2d 1345 (1986) (resolving truth from conflicting evidence).

City of University Place v. McGuire, 144 Wn.2d 640, 652-53, 30 P.3d 453 (Wash. 2001).

Thus, this court is bound to accept the trial court's determination of the credibility of the witnesses which, as the trial court stated, was a guiding force in the factual findings. Mr. Woempner cannot ask this court

to believe him, when the trial court had the opportunity to observe the testimony of all of the witnesses, observe their reactions to questioning, cross-examination, and then considering it in light of all the other evidence. It is from that process that the trial court drew its determination as to credibility, and, as a result, made its findings of fact. Mr. Woempner cannot now ask this court to believe him when the trial court found that it could not.

b. The Evidence Presented at Trial Offers Substantial Support for the Finding that the Parties Intended to be Partners in the Operation of Alki International.

Mr. Woempner has taken the position that virtually all of the substantive Findings of Fact have no support in the law or the evidence presented at trial. However, other than Finding of Fact 10/Amended Finding of Fact 10, Mr. Woempner has not identified any particular finding that he believes has no factual support in the record. As to the balance of the contested Findings of Fact, it seems that Mr. Woempner's position might be more accurately stated as, although each finding has factual support in the trial testimony and exhibits, the law does not support Judge Armijo's ultimate conclusion as to the existence of an enforceable partnership agreement.

With respect to Finding of Fact 10, as a whole, the record contains more than substantial evidence that all parties intended to form and operate a partnership and share their profits on a 50/50 basis. However, Mr. Woempner takes the position that no such agreement could be made because (1) no writing was produced evidencing the partnership, and (2) no agreement was reached at “the restaurant meeting.” This argument assumes that (1) a writing is necessary to form a legally binding agreement, and (2) the only probative evidence of an agreement is limited to discussions that occurred at the restaurant meeting. Both assumptions are incorrect.

“The essential test of the existence of a partnership is whether the parties intended to establish such a relation as manifested by their express agreement or inferred from their acts and statements.” *In re Estate of Thornton*, 81 Wash.2d 72, 79, 499 P.2d 864 (1972).

The goal of contract interpretation is to determine the intent of the parties. *Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wash.2d 656, 674, 911 P.2d 1301 (1996).

In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement but also from “viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making

of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." [Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc., 120 Wash.2d 573, 580-81, 844 P.2d 428 (1993)] (quoting Berg v. Hudesman, 115 Wash.2d 657, 663, 667, 801 P.2d 222 (1990)).

Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wn.App. 361, 375, 44 P.3d 929 (Wash.App. Div. 3 2002).

Thus, in order to determine whether an agreement to form and operate a partnership was made between Woempner and Bequette, and then between Woempner and Chevalier, the court must look at not only what was discussed at the initial meetings, but also what occurred thereafter, i.e., did the parties' subsequent actions and statements evidence an intent to form and operate a partnership. In finding for Mr. Chevalier, that is exactly what Judge Armijo did; finding fact after fact consisting of the parties' actions and statements that were entirely consistent with the formation and operation of a partnership as was originally contemplated in the first meetings.

c. The Creation of Alki International, Inc. Did Not Preclude the Finding and Conclusion that Woempner, Bequette, and Chevalier Had Created a Partnership At Will

After hearing all of the testimony from witnesses and reviewing all

of the documents, the trial court determined that the business relation between Mr. Woempner and Mr. Bequette, and then between Mr. Woempner and Mr. Chevalier, was a partnership at will. That conclusion is easily drawn from all the evidence presented and, more importantly, is supported in the law.

The law of implied partnership is accurately stated in *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189, 191 (1915):

The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the main inconsistent with any other theory. *Bridgman v. Winsness*, 34 Utah 383, 98 P. 186. It is well settled that no one fact or circumstance will be taken as the conclusive test. 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 established.

In re Estate of Thornton, 81 Wn.2d 72, 79, 499 P.2d 864 (Wash. 1972)

Mr. Woempner cites two Washington cases dealing with the issue of whether the existence of a corporation within a partnership precludes the existence of the partnership. *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1966), and *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007). In both cases, the correct result was obtained when the court analyzed all of the facts and circumstances in order to determine the intent of the contracting parties.

In *Malnar*, Mr. Malnar and Mr. Carlson had an oral agreement that they would develop certain properties together. Mr. Malnar would locate properties suitable for development and sale, and Mr. Carlson would put up the earnest monies and finance the projects. However, on the purchase of a third parcel, Mr. Carlson eventually took title to the property in the name of a corporation which he had formed. Later, when Mr. Malnar brought suit to enforce the partnership agreement with respect to the third parcel, Mr. Carlson argued that the formation of the corporation precluded any finding that he had intended to enter into a partnership with Mr. Malnar with respect to that parcel. The trial court granted summary judgment of dismissal of Mr. Malnar's claim because it found that no material issue of fact existed to support the claim of partnership.

However, when the case reached the Supreme Court it reversed the lower court determinations. First, the Supreme Court reviewed all of the facts and circumstances surrounding the dealings of Mr. Malnar and Mr. Carlson; the analysis did not stop when the Court saw the word “corporation.” Ultimately, the court used the following legal framework to determine that material facts did exist on the issue of whether a partnership was formed.

This Court has explained that the existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. A partnership may be found to exist even though title to the alleged partnership property is held in the name of but one of the alleged partners. Where, from all the competent evidence, it appears 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 purposes of joint profits, a partnership will be deemed established. E.g., *In re Thornton*, 81 Wash.2d at 79, 499 P.2d 864 (citing *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189 (1915)); *Kintz v. Read*, 28 Wash.App. 731, 734, 626 P.2d 52 (1981); see also *Goeres v. Artquist*, 34 Wash. App. 19, 22, 658 P.2d 1277 (where no express agreement exists, whether the parties have entered into a joint venture is a question of fact), *review denied*, 99 Wash.2d 1017 (1983); *Ocean View Land, Inc. v. Wineberg*, 65 Wash.2d 952, 400 P.2d 319 (1965) (whether there existed an oral agreement

of partnership or joint venture involved factual dispute).

Malnar v. Carlson, 128 Wn.2d at 535.

Thus, the Supreme Court directed the trial court to go back and review whether the parties had combined their property, labor, skill, or experience, in pursuit of joint profits, in order to purchase and develop the property, even though that property was held in the name of a corporation. The existence of the corporation was not fatal to the proposition that the parties had intended to, and did, form a partnership.

Similarly, the result in *McCormick v. Dunn & Black, P.S., supra*, was correct given the particular circumstances of that case. There, the plaintiff, McCormick, and the defendants, Dunn & Black, met to discuss forming a law firm which was incorporated as McCormick, Dunn & Black, P.S. Mr. McCormick was listed on the incorporation papers as an incorporator, he was on the board of directors, and was the president of the corporation. Mr. McCormick was issued stock certificates in the corporation, and there was evidence that Mr. McCormick had drafted the articles of incorporation and bylaws, and the employment agreement for the corporation. The board of directors held regular meetings with the plaintiff present, and, at one such meeting, he voted to reimburse the

incorporators a \$5,000 advance each had made to the corporation.

In *McCormick*, it was more than obvious that the plaintiff and defendants had intended to form a corporation through which they would conduct of their law practice. The only evidence to suggest that a partnership was formed was McCormick's testimony that the parties intended to equally share profits of the enterprise.

On the other hand, in the present case, Judge Armijo found fact, after fact, after fact, which clearly showed that the parties had intended to form a partnership, and that the use of the corporate form for Alki International, Inc., was simply a vehicle to accommodate Mr. Bequette's request that he be a "silent partner." In that way, Mr. Woempner obtains the benefit of Mr. Bequette's contacts, experience, and startup funding, and the hands on experience, labor, and industry of Mr. Chevalier.

In addition to the overwhelming evidence that McCormick, Dunn and Black formed and operated their business as a corporation, the court was troubled by the lack of authority from the plaintiff "that an incorporated business can actually be a partnership based on the parties' conduct." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. at 883. Such authority does exist and it is consistent with Washington law.

In *Koestner v. Wease & Koestner Jewelers, Inc.*, 63 Ill. App.3d 1047, 381 NE 2nd 11, 21 Ill. Dec. 76 (1978), the Illinois Court of Appeals specifically held that the operation of the business in a corporate form does not preclude the existence of a partnership. The facts underlying *Koestner* are as follows:

In the latter part of 1974 William Wease and William Koestner, both of whom were experienced in the jewelry business, began discussing the idea of opening a jewelry store together. Testimony indicated the parties wished to enter some type of business relationship which would allow a 50/50 division of profits, losses and work. Several possible arrangements were considered, but the men finally agreed on a corporate form with a corporate stock to be evenly divided between themselves. However, an accountant suggested that a tax advantage for Wease could be derived if he (Wease) originally purchased all of the stock issued by the business. The parties agreed that Wease would initially purchase all of the stock, and Koestner would hold a 6-month option to purchase one-half of the stock. Thus, Wease became the sole shareholder in Wease and Koestner Jewelers, Inc., buying 10,000 shares of stock for \$10,000. The money used by Wease to pay for the stock was loaned to him by Koestner in exchange for Wease's one year noninterest bearing note.

Wease and Koestner Jewelers, Inc., commenced operations in January 1975, with Wease as president of the corporation and Koestner vice president. The parties agreed that each of them would devote full time to the business and each would receive \$1,200 monthly from the corporation's profits. Both men did work full time; however, the expected profits were not realized, and both men were forced to take smaller monthly amounts from the

business. The relationship continued through May 1975, with each man receiving a total of \$2,600 from the corporation. On May 30, 1975, Koestner terminated his involvement with the business. He had not exercised his option to purchase stock, and at no time was he a shareholder in the corporation. A financial statement was prepared indicating that from January through May, 1975, the corporation had a net operating loss of \$2,182.98

Koestner v. Wease & Koestner Jewelers, Inc., 381 NE 2nd 12, 13.

At trial, Koestner claimed that he was simply an employee of the corporation and entitled to receive additional monies as the unpaid portion of the \$1,200 a month salary he was promised as reasonable value for his services. However, Wease counterclaimed alleging that Mr. Koestner was a partner and liable for 50% of the operating losses. This claim was made in the face of a corporation which was formed to run the business in which Mr. Koestner owned no stock, had no position, and was not connected to in any way on paper. The trial court and the court of appeals agreed with Wease and found a partnership existed, and further held Mr. Koestner liable for his share of the operating losses.

The decision was based upon a review of all of the facts and circumstances surrounding the formation of the business. However, there was a distinct split in the legal authority as to whether the existence of the corporation would preclude any finding that a partnership was formed.

The court first cited the older rule, which supported Koestner's position as found in *Jackson v. Hooper*, 75 Atl. 568, 76 N.J. Eq. 592 (1910). In *Jackson*, the court ruled a joint venture could not be carried on by individuals through the corporate form, finding where parties adopt the corporate form with the corporate shield extended over them to protect them against personal liability they cease to be partners, and have only the rights, duties and obligations of stockholders.

However, the Illinois Court of Appeals rejected this old rule and found that operating a business as a corporation did not, as a matter of law, prohibit the partnership from being formed.

However, the highly formalistic ruling of *Jackson* has come under heavy attack and has been rejected by many jurisdictions. An emphasis on substance over form has led numerous courts to conclude that, "There is little logical reason why individuals cannot be 'partners Inter sese and a corporation as to the rest of the world,' so long as the rights of third parties such as creditors are not involved." *Arditi v. Dubitzky* (2d Cir. 1965), 354 F.2d 483 at 486; *Elsbach v. Mulligan* (1943), 58 Cal.App.2d 354, 135 P.2d 651; *De Boy v. Harris* (1955), 207 Md. 212, 113 A.2d 903; *Mendelsohn v. Leather Mfg. Corp.* (1950), 326 Mass. 226, 93 N.E.2d 537. In each of these cases the court found the corporation to be a mere agency for convenience in carrying out the joint venture or partnership. The courts ruled that for the purposes of determining the rights and liabilities of the parties, it was proper to place the parties in the position they would have occupied had the corporate form not been adopted. The corporate form was not allowed to preclude

recovery by one party from the other if justice so required and no innocent third parties were thereby injured.

In light of these decisions we believe it was proper for the trial court to determine the rights and liabilities between Koestner and Wease as though they were partners or joint adventurers. The parties intended the business to be run on a 50/50 basis notwithstanding its incorporation. The corporate form was used merely as a medium for carrying out the partnership purposes; it was not intended as a means of defining the legal relationship between the parties. No creditors or other third parties will be injured by the trial court's decision. Moreover, Illinois courts have long held that substance and not form should be the controlling criterion in determining the nature of a business relationship. (Baker Farmers Co. v. ASF Corp. (3d Dist.1975), 28 Ill.App.3d 393, 328 N.E.2d 369; Reese v. Melahn (1973), 53 Ill.2d 508, 292 N.E.2d 375; Ditis v. Ahlvin Construction Co. (1951), 408 Ill. 416, 97 N.E.2d 244.)

Koestner v. Wease & Koestner Jewelers, Inc., 381 NE 2nd 14.

This holding is consistent with Washington law.

An express or implied contract is essential to a partnership relationship and must contemplate a common venture uniting labor, skill or property of the partners for the purpose of engaging in lawful commerce for the benefit of all the parties, a sharing of profits and losses, and joint right of control of its affairs. *Eder v. Reddick*, 46 Wash.2d 41, 49, 278 P.2d 361 (1955). **The relationship is not controlled by the name of the arrangement or by certain terms and labels, but in substance is derived from all the circumstances surrounding their relations.** *Stipcich v. Marinovich*, 13 Wash.2d 155, 161, 124 P.2d 215 (1942). (emphasis added)

The Woempner/Bequette/Chevalier arrangement is very much like that found in *Koestner*, and not anything like that found in *McCormick*. Judge Armijo found clear and substantial evidence that Woempner, Bequette, and Chevalier intended a partnership be formed, and that the corporate form be used simply to accommodate Mr. Woempner and Mr. Bequette in the initial formation and operation of Alki International, Inc. Now, it is time for Mr. Woempner to be held accountable to Mr. Chevalier.

Finally, RCW 25.05.055(2) does not preclude the formation of a partnership in the present circumstance. RCW 25.05.005(6) defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055, predecessor law, or comparable law of another jurisdiction.”

Further, a “person” is defined in RCW 25.05.055(10) as “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal commercial entity.” Thus, in the present case, although imperfectly done, the parties may have formed a partnership between Alki International, Inc., and the

individuals because, as the definitional sections show, our partnership statute contemplates the partnership being formed amongst various possible entities, including corporations and individual persons.

Ultimately, the court should not have to rely on a technical interpretation of the definitional sections of our partnership statute. Rather, the intent of the parties was very clear that they form a partnership, and that the corporation that was formed was simply a vehicle through which the individuals accommodated their business relationship. Under these circumstances, the court can certainly disregard the corporate form, find a partnership did exist between and amongst Woempner and Bequette, and then Woempner and Chevalier, and finally give Mr. Chevalier the relief that is just and due.

d. The Partnership Formed by Woempner and Bequette, and then Woempner and Chevalier, was not Void for Illegality.

Mr. Woempner's illegality theory suffers from two fatal defects. First, there has been no showing that the alleged violation of the military shipping regulations would rise to the level of "illegality" or a violation of "public policy," such that the partnership agreement would be rendered unenforceable. While the general rule is that an illegal contract is void,

that is not necessarily true where “the agreement is neither immoral nor criminal in nature and the statute or ordinance subjects violators merely to a penalty without more.” *Sienkiewicz v. Smith*, 97 Wn.2d 711, 716, 649 P.2d 112 (1982). An agreement to violate a statute or municipal ordinance is void, except when the agreement is not criminal or immoral, and the statute or ordinance contains an adequate remedy for its violation. *Evans v. Luster*, 84 Wn. App. 447, 928 P.2d 455 (1996). This exception developed from the rule that courts should examine a statute’s purpose and apply the statutory penalty before voiding a contract for a statutory violation. *Seinkiewicz* at 716. The courts have also looked to whether non-enforcement of an illegal contract would result in unjust enrichment of the defendant. *Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 648 P.2d 468 (1982).

The regulations cited at the trial court and here do not identify any criminal liability, administrative penalties, or other consequence for a person having Common Financial and Administrative Control over two competing freight forwarding companies. If it was determined that a person had CFAC that person could simply be disqualified from doing business where those two forwarding companies compete, it certainly does

not void the existence of the company. Additionally, CFAC is only a problem where the two companies compete in the same “channels”; if they don’t, it is not a problem. The only criminal liability which could attach would be to Mr. Woempner for falsely representing to the Department of the Army that he was not in a business relationship with Mr. Bequette, thus it seems that having CFAC is not criminal, just misrepresenting that fact is.

Finally, the attorney advisor to the Department of the Army ITGBL Personal Property Program, Daniel L. Rothlisberger, explained to counsel for Mr. Woempner that “the CFAC program is an expression of procurement policy and procedure and is not considered a rule of general application to the public. Therefore, it is not published in the code of federal regulations.” (CP 287.) Whatever the effect of the CFAC program, it certainly doesn’t seem to rise to the level of “illegality” or a violation of “public policy” such that it would render unenforceable the Woempner, Bequette, Chevalier partnership agreement.

The second and most obvious failure in the “illegality” argument is that, although the Woempner/Bequette partnership might have been subject to the “illegality” argument, the Woempner/Chevalier partnership

agreement was entirely free of that problem. Once Gary Chevalier bought Mr. Bequette's interest, and became Mr. Woempner's partner, that business was not in violation of any of the military's regulations. From the onset, the parties anticipated a potential problem with the MTMC regulations, but they also anticipated purging the partnership of any such burden when Mr. Chevalier bought in.

III. CONCLUSION

At trial, Judge Armijo heard all of the facts, reviewed all of the evidence, and made extensive findings of fact and conclusions of law based upon all of the evidence and his determinations of the parties' credibility. It was obvious to Judge Armijo that the parties did intend to structure their relationship as a partnership, not a corporation. This court should not disturb that determination; rather, just as done by Judge Armijo, this court should keep in mind Mr. Woempner's purported "lesson" to Gary Chevalier when he denied his rightful claim to partnership profit.

Woempner gave Chevalier a check for \$1,000 and denied that Chevalier had any interest in Alki, informed him that was all the money he would ever get, that he was going to "**teach him a lesson in Business 101,**" that he should get a lawyer and get off his property. (emphasis added)

Finding of Fact No. 23 (CP 160, 161).

Now it is time for this Court to uphold the findings of the trial court, and in that way give Mr. Woempner a lesson in “law and justice 101.”

Respectfully submitted this 16th day of September, 2011.

Law Office of Timothy A. Reid, P.S.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

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Tue 9/20/2011
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No. 41711-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

GARY WOEMPNER and "JANE DOE" WOEMPNER, husband and
wife, and the marital community composed thereof; and ALKI
INTERNATIONAL, INC., a Washington corporation,

Defendant/Appellants,

vs.

GARY E. CHEVALIER,
Plaintiff/Respondent

and

RONALD BEQUETTE, a single man,
Defendant/Respondent.

CERTIFICATE OF SERVICE

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Issaquah, Washington 98027
(425) 313-9414

I, Julie Waitt, under penalty of perjury under the laws of the State of Washington declare as follows:

That I am a U.S. citizen and over the age of 18 years; I am not a party to the foregoing entitled action and am competent to be a witness herein.

On the 16 September, 2011, I caused to be served by email a copy of the following pleading:

BRIEF OF RESPONDENT GARY E. CHEVALIER

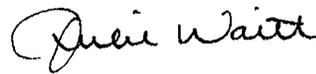
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Executed at Issaquah, Washington, this 16th day of September, 2011.



Julie Waitt