

FILED

JAN 03 2011

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

NO. 291413

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

SHOU SHIA WANG, *et al.*
Respondents/Cross Appellants

v.

TA CHI, INC., *et al.*
Appellants/Cross Respondents

APPEAL FROM THE SUPERIOR COURT
FOR COUNTY OF DOUGLAS
THE HONORABLE JOHN HOTCHKISS

RESPONDENTS'/CROSS APPELLANTS' BRIEF

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I. INTRODUCTION

Between January 4, 2010 and January 14, 2010, the Honorable John Hotchkiss of the Douglas County Superior Court received evidence relating to consolidated claims and cross-claims between Respondent/Cross Appellants Shou Shia Wang and a company she owns in part, Summer Fruit, LLC, (collectively "Ms. Wang") and Appellants Ta Chi, Inc., and its subsidiary Lotus Fruit Packing, Inc. (collectively "Ta Chi"). At the conclusion of the trial, Judge Hotchkiss entered 193 findings of facts and 35 conclusions of law. (CP 1767-1801.) The court entered additional findings and conclusions following Ta Chi's motion for reconsideration. (CP 1805-1809.)

II. ASSIGNMENTS OF ERROR & RELATED ISSUES

A. Counter Statement of the Issues Pertaining to Appellants' Assignments of Error.

Ta Chi's Assignments of Error fail to state Issues Pertaining to Assignments of Error.¹ Ms. Wang therefore states what she believes are the issues pertaining to Ta Chi's Assignments of Error as follows:

¹ The Ta Chi Assignments of Error contain misdescriptions of the court's findings of fact. For instance, under Assignment of Error 1, Ta Chi assigns error to finding No. 85 that Wang's "secret" loans to Ta Chi were not temporary demand loans. The court makes no reference to loans being "secret," and the evidence established that Ms. Wang informed the Ta Chi directors of the loans in each annual report she submitted. (CP 1781 [Finding 85]; Ex. 4(a), 11(a), 12(7)(a-g.)

Assign. Err. No. 1: Upon finding that Ms. Wang's loans to Ta Chi were to be repaid when sufficient capital was injected into the company so that Ta Chi could complete expansion plans and repay the loans, did the trial court correctly conclude that the three-year statute of limitations did not bar Ms. Wang's right to repayment for her loans? (CP 1781 [Finding 85], CP 1797 [Conclusion 197].)

Assign. Err. No. 2: Upon finding that Ta Chi knew about and benefited from Ms. Wang's loans, which were used for development and operation of the Ta Chi orchard, did the trial court correctly conclude that Ta Chi's knowledge and acceptance of the benefits of the loans estopped Ta Chi from denying the loans? (CP 1781 [Finding 83], CP 1797 [Conclusion 198].)

Assign. Err. No. 3: Upon finding that Ta Chi knew about and benefited from Ms. Wang's loans (CP 1781 [Finding 83]), upon finding that Ta Chi gave Ms. Wang unquestionable authority to develop and operate its orchard and to borrow money for that purpose (CP 1780 [Finding 82]), and upon finding that Ms. Wang's identity as the lender was immaterial to Ta Chi (CP 1782 [Findings 90, 91], CP 1806), did the trial court correctly conclude that Ta Chi ratified Ms. Wang's loans? (CP 1797 [Conclusion 198-200].)

Assign. Err. No. 6: Upon finding that Ms. Wang had no personal financial interest in Lotus buying an apple packing line or in improving the Jong Seng facility to house the apple packing line (CP 1794 [Findings 174-176]), did the court correctly conclude that Ms. Wang was not responsible for paying the costs for purchase of the apple packing line or for improving the Jong Seng facility? (CP 1799 [Conclusion 212].)

Assign. Err. No. 8: Upon finding that Ta Chi failed to request rescission of the Jong Seng transaction until December 24, 2009 (CP 1772, 1792 [Findings 30-31, 162]), did the trial court correctly conclude that Ta Chi's delay barred its right to seek rescission? (CP 1798 [Conclusion 209].) Alternatively, if Ta Chi in fact sought rescission in January 2009, was the court's error in finding that Ta Chi failed to seek rescission until December 2009 harmless, since Ta Chi's January 2009 request for leave to amend to seek rescission, which was denied, was still nearly two years after the sale and since delay in seeking rescission was not the court's primary basis for rejecting rescission of the Jong Seng Cold Storage sale? (CP 1782-1783 [Findings 95– 98], 1798 [Conclusion 207].)

Assign. Err. No. 9: Upon finding that Ms. Wang did not serve as Ta Chi's agent for purposes of the sale transaction with Jong Seng (CP 1782–1783, 1792 [Findings 95–98, 161]), did the trial court correctly

conclude that Ms. Wang violated no duty to Ta Chi relating to the Jong Seng sale? (CP 1798 [Conclusion 207].)

Assign. Err. No. 10: Did the trial court properly admit parol evidence to explain a term of the Jong Seng sale agreement relating to transfer of apple bins? (CP 1792 [Finding 163].) Alternatively, if the court erred in admitting parol evidence, was that error harmless because of the court's finding that the documentation of the Jong Seng sale indicated that the apple bins were of no value? (CP 1793 [Findings 164-165].)

Assign. Err. No. 11: Upon finding that the inclusion of the apple bins in the Jong Seng sale was a term added to make the sale more attractive to the bank (CP 1792 [Finding 163]), and upon finding that the documentation of the Jong Seng sale indicated that the apple bins were of no value (CP 1793 [Finding 165]), did the court correctly conclude that Ta Chi did not suffer any damages as a result of a failure to deliver 18,000 apple bins? (CP 1793 [Finding 165].)

Assign. Err. No. 14: Did the trial court act within its discretion in refusing to review deposition testimony following conclusion of the trial for witnesses who testified at trial?

Assign. Err. No. 15: Upon finding that Ms. Wang and her entities did not divert apple-handling payments, did the trial court correctly

conclude that Lotus was not entitled to damages for claimed improper diversion of apple handling payments? (CP 1796 [Finding 190], 1806.)

Assign. Err. Nos. 16 and 17: Upon finding that Ta Chi knew Ms. Wang's management fee from Ta Chi was being paid to Ms. Wang's first employer, Fugachee, and that Ms. Wang made a \$7,000 per month management fee from Fugachee (CP 1774-1775 [Findings 43, 44]), upon finding that Ms. Wang used her best efforts to create an orchard as requested by the Ta Chi owners, and that she increased the size of the orchard from 63 acres to approximately 218 acres, (CP 1794-1795 [Finding 180]), and upon finding that Ms. Wang's management fee was more than reasonable to manage this kind of orchard operation (CP 1777, 1795 [Findings 57, 181]), did the trial court correctly conclude that no basis existed for Ta Chi's claim to reimbursement for management fees paid to Ms. Wang? (CP 1794 [Finding 179], CP 1799 [Conclusion 215].)

Assign. Err. No. 18: Upon finding that Ta Chi paid packing charges consistent within industry standards and that the packing charges were reasonable and legitimately earned (CP 1794, 1796, 1799 [Findings 179, 189, Conclusion 216]), did the trial court correctly conclude that Ta Chi was not entitled to reimbursement for packing charges paid?

Assign. Err. No. 21: Upon finding that there was insufficient evidence to support Ta Chi's claim that that Ms. Wang was "skimming"

money, did the court correctly conclude that Ta Chi was not entitled to damages relating to grower returns for 2005? (CP 1796, 1800 [Findings 179, 191, 192, Conclusion 221].)

Assign. Err. No. 22: Did the trial court correctly conclude that Ta Chi was not entitled to recovery of its attorney's fees against Ms. Wang? (CP 1800 [Conclusion 222].)

Assign. Err. Nos. 4, 5, 7, 12, 13, 19 and 20: Ta Chi in its Assignment of Error Numbers 4, 5, 7, 12, 13, 19 and 20, fails to provide citation to the record establishing where the trial court reached the contested conclusion. As these assignments of error appear to encompass the same issues as other assignments of error, Ms. Wang only responds to these where related to other issues.

B. Cross Appellants' Assignments of Error.

Cross Assign. Err. No. 1: The trial court erred in concluding that Ms. Wang owed a fiduciary duty to Lotus in the purchase of Summer Fruit when Ms. Wang was hired and served only as Lotus' manager, when the Lotus directors knew that Ms. Wang managed Summer Fruit, and when the undisputed evidence established, and the trial court found, that Lotus Vice-President and Director Herman Chen was informed of and knew about Ms. Wang's ownership interest in Summer Fruit. The court erred in rescinding the Summer Fruit/Lotus sale based on its erroneous conclusion

that Ms. Wang breached a fiduciary duty owed to Lotus. (CP 1783, 1784, 1786, 1787, 1793 [Findings 96, 101, 103, 114, 118, 128-129, 166-168], CP 1773, 1774-1775, 1776, 1788, 1797, 1807 [Findings 37, 41, 43, 48-52, 132, Conclusion 201].)

Cross Assign. Err. No. 2: The trial court erred in concluding Ms. Wang violated a fiduciary duty as Ta Chi's manager when she used Ta Chi funds to defend a lawsuit arising from a valid contract entered into by Ta Chi. (CP 1797-1798 [Conclusions 203-204].)

Cross Assign. Err. No. 3. The trial court erred when it denied Ms. Wang's claim for recovery of attorneys' fees when she defended claims arising from her employment with Ta Chi.

C. Statement of the Issues Pertaining to Cross Appellants' Assignments of Error.

Cross Assign. Err. No. 1: Whether Lotus' knowledge that Ms. Wang served as Summer Fruit's manager, and whether Lotus Vice-President Herman Chen's knowledge of Ms. Wang's ownership of Summer Fruit, prevents Lotus from claiming that Ms. Wang owed it a fiduciary duty when negotiating terms of the sale of Summer Fruit to Lotus?

Cross Assign. Err. No. 2: Whether a corporate business manager can be personally liable for attorneys' fees and costs incurred in defending the corporation on a claim involving a valid corporate contract?

Cross Assign. Err. No. 3: Whether Ms. Wang is entitled under the Ta Chi Bylaws to recover her costs and attorneys' fees in defending against claims arising from her employment?

III. STATEMENT OF THE CASE

A. Counterstatement of Facts.

1. Ms. Wang's loans. In 2001, Dr. Michael Chuang was touring the Wenatchee area with the spiritual leader of the Seattle Buddhist temple, Xin Tien (referred to by his congregation as the "Master".) (CP 1772-1773 ¶33; RP 93:11-94:11.) Dr. Chuang and the Master were interested in owning an orchard business. (CP 1773 ¶33.) They knew Ms. Wang was an experienced orchard manager and had an export sales company. (CP 1772 ¶¶33-34; RP 96:10-22, 100:15-101:9.) They approached Ms. Wang with a proposal for Ms. Wang to manage an orchard that they would buy. (RP 96:10-22.) Ta Chi was formed to own and operate an orchard managed by Ms. Wang. (RP 121:12-16.) Ms. Wang was not offered any ownership in this business. (RP 123:5-12.)

Ms. Wang knew of a piece of property for sale near the Fugachee orchard that she managed. (CP 1773 ¶35; RP 95:6-20.) The property consisted of 1,000 acres, 63 of which was orchard and 350 of which had water rights. Dr. Chuang and the Master agreed that they would purchase this property. (CP 1773 ¶¶35-37.) They asked Ms. Wang to prepare a

plan to purchase and develop the property, which she did. (CP 1774 ¶40.)

The plan for the orchard's operation and development required capital contributions of \$5 million over five years, which included the initial purchase price and costs to maintain the existing orchard and to plant additional varieties of fruit trees. (CP 1774 ¶41, 1778 ¶¶61-64, 1781 ¶88; RP 125:2-20, 130:4-10, 147:4-10.) The development plan contemplated that Ta Chi would realize profits as trees came into production. (CP 1774 ¶41, RP 136:13-17, Ex. 5(1)(b).) The Master asked his old friend Mr. Shen to raise money for Ta Chi to acquire the orchard property and to serve as chairman and president of Ta Chi and Mr. Shen agreed. (CP 1773-1774 ¶38; RP 829:18-21.)

The Ta Chi directors approved the five-year plan and committed to make the capital investment necessary to purchase and develop the property. (CP 1778 ¶¶61-62.) However, despite those promises, the Ta Chi directors/shareholders failed to capitalize the company in the manner necessary to maintain the existing orchard, much less to cover expenses of expansion. (CP 1776 ¶¶62-63, 1779 ¶66, 1781 ¶84; RP 178:2-22; Ex. 12(7)(b), 35.) As a result, Ms. Wang, from the very beginning of her management of Ta Chi, found herself without funds to pay ongoing operational expenses or to undertake the planned expansion. (RP 178:24-179:25, Ex. 12(7)(a-h).) The lack of adequate funding undermined all of

the projections for development and profit. (RP 184:14-25; Ex. 5.)

Ms. Wang repeatedly asked the Ta Chi directors to provide the funding they had promised. (CP 1779 ¶66; RP 154:8-15, 186:23-187:16; Ex. 11(18-20).) The directors assured Ms. Wang that Ta Chi would fund the operation and some funds, in fact, were provided. (RP, 223:2-7, 225:17-25; Ex. 12(d-g), 35.) However, the Ta Chi directors and shareholders failed to provide the budgeted funding in any of the years in which Ms. Wang operated the orchard. (CP 1774 ¶41; RP 164:24-165:8, 165:20-22, 211:25-212:11; Ex. 7(a)-(h), 11(28), 35.)

In response to Ms. Wang's repeated pleas for funding, the Ta Chi directors told her that she would have to arrange for additional funding herself. (RP 208:10-22; Ex. 11(26).) Ms. Wang had made a commitment to Dr. Chuang and the Master to do her best to make Ta Chi a success. (RP 192:13-24.) When the Ta Chi directors failed to provide the needed working capital, Ms. Wang sought bank financing but was unsuccessful. (CP 1781 ¶84; RP 161:8-17, 162:11-25, 174:25-175:17.) Ms. Wang borrowed money from family members, friends, and business associates and provided hundreds of thousands of dollars of her own money, some of which she borrowed herself, to pay Ta Chi expenses. (RP 172: 6-16, 550: 11-18; Ex. 12(7)(a-h).)

The loans Ms. Wang arranged were not intended to be repaid

immediately. (CP 1781 ¶85.) Indeed, Ta Chi needed the loans because of its funding shortage. (CP 1776 ¶52, 1781 ¶85.) Ta Chi was to repay the loans in the future as Ta Chi became profitable and as cash flow allowed. (CP 1781 ¶85.) Ms. Wang projected the orchard would not come into full production and begin producing a profit until 2008. (RP 136:13-17; Ex. 5(1)(b).)

From 2002 through 2007, Ms. Wang informed the Ta Chi directors, officers, and shareholders that she had obtained loans to make up for the undercapitalization of Ta Chi and in order to keep the company operational. (CP 1779 ¶¶66-67, 1780 ¶¶77-80, 1782 ¶¶90-91.) Ms. Wang disclosed the Ta Chi loans in letters to the directors and shareholders and in her annual reports. (CP 1779 ¶66; Ex. 11(4)(a), 12(7)(a-g).)

2. Highland Orchard Lease. In the spring of 2002, Ms. Wang learned of a business opportunity that she felt would provide immediate cash benefits to Ta Chi. (RP 231:22-232:21, 235:5-236:16.) A nearby Fuji apple orchard, known as the Highland Orchard, was available for a lease at a low price. (RP 1093:4-1095:12.) Ms. Wang believed that she could operate the orchard and generate approximately \$250,000 in net profits for Ta Chi. (RP 235:8-21.)

Ta Chi gave Ms. Wang virtually unlimited authority to operate the orchard. (CP 1775 ¶46.) Because of her belief in the potential profit Ta

Chi could earn, she entered into a one-year lease of the Highland Orchard in Ta Chi's name. (RP 231:22-232:21, 235:5-236:16; Ex. 1(1).) The evidence at trial was undisputed that this was a good opportunity and a sound business decision. (RP 234:8-237:16, 1093:25-1094:14, 1205:7-1206:10.) Because of Ta Chi's funding shortage, Ms. Wang used her own funds to pay the expenses of growing the crop. (RP 237:7-16; Ex. 1(2), 209.) Unfortunately, shortly before harvest, an unexpected freeze destroyed the vast majority of the 2002 crop. (RP 240:1-22.) To compound matters, the owners of the Highland Orchard sued Ta Chi claiming that Ta Chi had caused damage to certain trees. (CP 1789 ¶142.) Although Ta Chi prevailed in the lawsuit, it incurred legal fees in doing so. (RP 16:20-17:7; Ex. 225.) Because Ta Chi was the lessee and would have received all of the anticipated profits, Ms. Wang had Ta Chi pay the defense costs. (CP 1790 ¶45; RP 249:8-250:6.)

3. Storage and packing facilities. In 2006 and 2007, Ms. Wang's partners in the Jong Seng storage facility and Summer Fruit packing line were interested in selling those facilities. (RP 307.) Ms. Wang knew the income potential for a storage and packing facility, provided that a secure source of crop tonnage existed, having operated both facilities for many years. (RP 301, 308:12-16, 347:4-349:5.) To Ms. Wang, this seemed a prime opportunity for Ta Chi. (RP 310; Ex. 11(33).)

Ms. Wang proposed to the Ta Chi directors that Ta Chi become “vertically integrated.” (CP 1782 ¶¶94; Ex. 112, 113.) This plan involved the purchase of the Summer Fruit packing line and Jong Seng storage facility and expansion of the Jong Seng facility to include an apple packing line. (RP 314:2-317:21.) The Ta Chi directors knew Ms. Wang was a partner in the storage facility that she proposed Ta Chi purchase. (CP 1783 ¶¶97-98, 1790-91 ¶149; Ex. 9(2)(a), 11(45)(a).) They knew she managed Summer Fruit. (RP 863:9-864:10.) Herman Chen, Lotus Vice-President and Director, knew Ms. Wang was an owner of the Summer Fruit packing business. (CP 1787 ¶129; RP 990:4-991:6, 1004:1-11.)

As part of the expansion plan, Ms. Wang arranged for 10-year commitments for crops to be delivered for storage and packing from the Fugachee orchard that she managed, as well as from a variety of other growers with whom she worked. (CP 1791 ¶155; RP 375:1-21, 740:3-24; Ex. 20-21.) While the vertical integration required additional cash outlays the plan would have resulted in hundreds of thousands of dollars in annual net profits (and therefore operational money for Ta Chi’s orchard) immediately. (CP 1791 ¶¶154-155, 1792 ¶160; Ex. 7(1), 37.)

In the fall of 2007, Mrs. Shen took over management of the orchard and Ms. Wang resigned. (RP 392:18-396:21; Ex. 11(52), 11(59).) The Ta Chi directors canceled the long-term storage and packing contracts

with Fugachee and the other growers Ms. Wang brought to Ta Chi. (RP 403:15-23, 404:10-25, 773:23-774:9; Ex. 8(7).)

B. Procedural History.

Ta Chi (and its subsidiary Lotus) refused to pay for the packing line purchased from Ms. Wang's company, Summer Fruit, and Ms. Wang therefore initiated a collection lawsuit. (CP 1772 ¶29, 1787 ¶123.) In October 2007, Ta Chi removed Ms. Wang as manager. (Ex. 11(60).) Ta Chi still had not repaid Ms. Wang the hundreds of thousands of dollars she loaned to Ta Chi, so Ms. Wang initiated a lawsuit in January 2008 to collect the debt. (CP 1771 ¶¶26-27.)

Ta Chi counterclaimed against Ms. Wang, claiming she should not be repaid for her loans, that she should reimburse Ta Chi for the management fee she earned, and that she should reimburse Ta Chi on several other claims relating to Ta Chi's operations. (CP 70, 1768-1769.) Ms. Wang and Summer Fruit denied the Ta Chi/Lotus claims. (CP 125.)

IV. ARGUMENT

A. Standard of Review.

Appellate review of the trial court's findings of fact is limited to determining whether substantial evidence supports those findings. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 708, 64 P.3d 1 (2003). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-

minded person that the premise is true. *Proctor v. Huntington*, 146 Wn.App. 836, 844-845, 192 P.3d 958, 963 (2008). The Appellate Court reviews the trial court's legal conclusions de novo. *Id.*

B. Response to Argument of Appellant.

Assign. Err. Nos. 1, 2, 3, 4 and 5: Statute of Limitations for Demand Loans.

1. Substantial evidence supports the trial court's findings that Ms. Wang's loans would be repaid when funds became available.

Ta Chi challenges the following findings and conclusions: Ta Chi was to repay Ms. Wang's loans when sufficient capital was injected into the corporation so that the expansion plans could be completed and the loans could be repaid. (Assign. Err. No. 1, CP 1781 ¶85.) Because the loans were to be repaid when Ta Chi had sufficient funds to do so, collection is not barred by the statute of limitations. (Assign. Err. No. 2, CP 1797 ¶198.) Ta Chi ratified the loans each year when, after having knowledge that the loans were being made, it gave Ms. Wang unquestionable authority to run the orchard and to borrow money for that purpose. (Assign. Err. Nos. 3, 4, and 5; CP 1780-1781 ¶¶82, 86, CP 1797 ¶¶199-200.)

Findings and conclusions that remain unchallenged: The Ta Chi board of directors approved a five-year development plan requiring

capital investments of \$5 million. (CP 1778 ¶¶61-62.) Ta Chi failed from the beginning to provide Ms. Wang the funding promised, even though its directors knew Ms. Wang was undertaking development in anticipation of having the funds available. (CP 1779 ¶66, 1781 ¶84, 1781-1782 ¶¶88-90.)

Ms. Wang made \$765,000 in loans to Ta Chi that were used for Ta Chi's purposes. (CP 1771 ¶27.) Ta Chi knew that loans were received and that it was expected to repay the loans. (CP 1778 ¶65.) Ta Chi left the terms and nature of the loans to Ms. Wang. (CP 1780 ¶79.) Mrs. Shen, a vice president and one of the Ta Chi directors, indicated that she was grateful for Ms. Wang arranging the loans. (CP 1780 ¶80.)

Ms. Wang expected to be paid whenever funds were available and when sufficient capital was injected into the corporation to allow for repayment. (CP 1779 ¶70.) Ta Chi's officers and directors never asked in correspondence or otherwise about the nature of the loans being made, the interest being paid, or how or when the loans were to be repaid. (CP 1780 ¶77.) Ta Chi accepted the benefits of the loans without questions. (CP 1781 ¶83.)

Additional evidence supports the trial court: Ta Chi acknowledges that Ms. Wang was given broad authority to undertake any activity that she felt was in Ta Chi's best interest. (Appellant's Br. 6.) When the Ta Chi directors instructed Ms. Wang to arrange for loans she

attempted to obtain a bank loan but was unable to do so. As a result, she resorted to loaning her own money to Ta Chi and borrowing money from others. (RP 161:8-164:1, 166:3-7.)

Ms. Wang regularly reported to the Ta Chi directors that Ta Chi was short of funding and that loans were necessary to cover expenses. She reported on the amount of the loans taken. (Ex. 7(a-h).)

Ms. Wang's development plans showed that Ta Chi would not make regular profits until after the orchards came into full production, which would be several years from the initial plantings. (Ex. 5.) Ms. Wang testified that the loans were to be repaid as the orchard developed and became profitable and funds became available. (RP 277:6-278-11.)

Ms. Wang's efforts increased the orchard's value and preserved water rights that may have been lost had the work she performed not taken place. (CP 1778 ¶64; RP 280:25-281:12, 640:3-641:13; Ex. 12(7)(e-1).) Ta Chi does not dispute this.

2. The trial court properly concluded that a six-year statute of limitations applies to the loans. (Assign. Err. No. 1.)

A six-year statute of limitations applies to recovery on demand notes when the money is to be repaid at some point in the future but no specific date for repayment is set. *Wallace v. Kuehner*, 111 Wn.App. 809, 46 P.3d

823 (2002). The statute of limitations begins to run three years after the loan, and expires three years after that, or six years from the loan date. *Id.*

The trial court made findings of fact, supported by substantial evidence, that Ms. Wang's loans were to be repaid when sufficient capital was injected into the corporation so Ta Chi could complete the expansion plans and repay the loans. (CP 1781 ¶85.) This was not to occur until some unspecified future date, when Ta Chi either received additional capital contributions or when the orchard came into production and became profitable. Ta Chi offered no evidence to suggest that it was to repay the loans at some date other than as funds became available.

The trial court properly concluded that the three-year statute limitations did not bar Ms. Wang's recovery on her loans.

3. The trial court properly concluded Ta Chi is estopped to assert a statute of limitations defense. (Assign. Err. No. 2.)

Estoppel is an equitable remedy that bars a party from asserting a position inconsistent with a former position if that action causes damages. *Cphoon v. Cuny*, 2010 WL 1454308, 5 (2010). A corporation may not accept the benefit of a transaction and at the same time attempt to escape the consequences on the ground that the transaction was not authorized. *Pierce v. Astoria Fish Factors, Inc.*, 31 Wn.App. 214, 640 P.2d 40 (1982). Estoppel can prevent a party from asserting a statute of limitations

defense. *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 885, 719 P.2d 120, 125 (1986).

Ms. Wang's loans resulted in significant improvements to the Ta Chi orchard, improvements that Ta Chi now owns. The Ta Chi officers and directors knew about the loans at the time they were made. They accepted the benefits of the loans and were grateful that Ms. Wang had arranged them. (RP 947:8-949:2.)

The directors allowed Ms. Wang to maintain these loans on the company books until funds were available to repay the loans or until the orchard became profitable.

Substantial evidence supports the trial court's findings that Ta Chi knew about the loans, accepted the benefits of the loans and knew that the loans would be repaid when funds became available. The trial court's conclusion that Ta Chi is estopped from asserting the statute of limitations to deny the loans should be affirmed.

4. The trial court properly concluded that Ta Chi ratified the loans each year. (Assign. Err. Nos. 3, 4, and 5.)

Ratification occurs when, with knowledge of a transaction, a party accepts the benefits. *Riss v. Angel*, 131 Wn.2d 612, 636, 934 P.2d 669, 683 (1997). "Whether or not affirmance should be inferred from a failure

to repudiate a transaction is a question of fact.” *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 85, 701 P.2d 1114, 1118 (1985).

The trial court found, and the record established, that Ms. Wang reported the existence of the loans, the amount of the loans, and the use being made of the loan funds, at least annually. The Ta Chi directors knew that Ms. Wang was using loan funds to take the existing 63 acres and expand it into an orchard of several hundred acres containing modern varieties of fruit. Ms. Wang further notified the Ta Chi directors that the expansion plan was preserving existing water rights. (RP 204:18-23, 640:3-641:13; Ex. 12(7)(e-1).)

The Ta Chi officers and directors not only failed to object, they expressed gratitude for the fact that Ms. Wang was arranging for the loans. (RP 200:8-11, 947:8-949:2.)

Ta Chi argues that it could not ratify the loans from Ms. Wang because she never disclosed her identity as lender. In denying Ta Chi’s motion for reconsideration on this issue, the trial court made the following finding of fact (CP 1806):

The Court found that who made these loans was completely immaterial to the Defendant. The loans were made and acknowledged by the Defendant, who was “grateful” for the loans. There is no evidence that the fact the loans were coming from the Plaintiff, or the Plaintiff’s sister, or friends of the Plaintiff,

was material. The Defendant makes no explanation as to how this would have made any difference to the Defendant's acceptance of the benefits or ratification of the loans.

Ta Chi claims that Ms. Wang's identity as lender was material because Ta Chi would have wanted Ms. Wang to convert the debt to company stock. (Appellant's Br. 31.) Ta Chi provides no basis upon which it could have demanded that the loans be converted to equity or how Ms. Wang could be forced to make capital contributions to the company. No corporate officer or director ever inquired about the lenders or whether the persons identified as the lenders would convert loans to equity. Other Ta Chi shareholders made a variety of loans and Ta Chi repaid these loans with interest without ever demanding the lenders convert these loans to equity. (CP 1780 ¶¶72-76.)

Substantial evidence supports the court's conclusion that the Ta Chi directors ratified the loans each year and should be affirmed.

Assign. Err. Nos. 6 and 7: Ms. Wang did not have a financial interest in the apple packing line or the improvements to the storage facility.

1. Substantial evidence exists to support the Trial Court's findings that Ms. Wang did not have a financial interest in the packing line improvements.

Ta Chi challenges the following findings and conclusions: Ms. Wang did not construct or sell the building that houses the apple packing

line, nor did she sell the additional packing lines. While she may have arranged for it, she did not profit from the construction. (CP 1794 ¶174.) Ta Chi and Lotus failed to prove Ms. Wang's lack of good faith or that she had a financial interest in the new construction that would establish a breach of her fiduciary duty. (CP 1794 ¶¶175-176.)

Findings and conclusions that remain unchallenged: Ms. Wang made known to the Ta Chi directors that she was a partner in the Jong Seng storage facility and represented the Jong Seng partners in negotiating sale of the facility to Ta Chi. (CP 1783 ¶¶ 97, 98.) Ms. Wang owed Ta Chi no duty with respect to that transaction. (CP 1798 ¶¶207-209.)

Additional evidence supports trial court: Ms. Wang, with full disclosure to the Ta Chi directors of her ownership interest in Jong Seng, recommended that Ta Chi purchase the Jong Seng storage facility and that its subsidiary, Lotus, purchase an apple packing line and undertake improvements at the Jong Seng facility to house the apple packing line. (CP 1783 ¶¶97-98, 1790-91 ¶149; Ex. 9(2)(a), 7(1).) Lotus purchased the apple packing line from Westway Sales and Marketing, LTD, and Ta Chi undertook construction efforts to modify the storage facility to house the apple packing line. (RP 344:5-346:16; Ex. 7(1)(b).)

Ms. Wang's recommendations for purchase of the apple packing line and for improvements at the storage facility were made in an effort to

implement the vertical integration plan that she believed would result in profits for Ta Chi. (RP 314:2-317:2; Ex. 7(1) at 1.)

Substantial evidence supports the trial court's findings of fact that Ms. Wang did not personally benefit from purchase of the apple packing line or improvement to the storage facility. The trial court properly concluded that Ms. Wang had no obligation to reimburse Ta Chi or Lotus for the costs of purchasing the packing line or improving the storage facility.

2. The trial court had the authority to order rescission of only the Summer Fruit/Lotus sale.

Rescission is an equitable remedy. When ordering rescission, the trial court must place the parties in the position they occupied prior to the contract. *Jackowski v. Borchelt*, 151 Wn.App. 1, 16, 209 P.3d 514, 521 (2009).

In this case, the trial court ordered rescission of the Summer Fruit/Lotus transaction upon on its finding that Ms. Wang failed to disclose her ownership interest in Summer Fruit. (CP 1798 ¶210.) While Ms. Wang challenges this finding, and the conclusion that follows, the court had the discretion to rescind the contract.

Lotus challenges the court's determination that it could not rescind a contract that involved purchase of a packing line from a third party,

Westway, nor could it undo the transaction involving improvements to the Jong Seng storage facility. Since Westway was not a party to this lawsuit, nor were the contractors involved in the apple line improvement project, the court properly concluded that it should not and could not order rescission with respect to those transactions.

Assign. Err. No. 8: Ta Chi did not seek rescission until December of 2009.

1. Substantial evidence exists to support the trial court's findings that Ta Chi delayed in seeking rescission.

Ta Chi challenges the following findings and conclusions: Ta Chi filed a claim in March of 2009 against Jong Seng but did not include a request for rescission. (CP 1772 ¶30.) On December 29, 2009, Ta Chi amended its complaint to include a rescission claim. Ta Chi's claim for rescission was denied, in part, due to delay. (CP 1772 ¶31.)

Procedural history: In January of 2009, Ta Chi filed a motion for leave to amend in an attempt to join a rescission claim against Jong Seng with claims filed against Ms. Wang. The court denied that motion, but did not prohibit Ta Chi from filing a separate action against Jong Seng for rescission. (CP 47.) Ta Chi did not do so.

Ta Chi filed its original motion for leave to amend almost two years after the transaction it was seeking to rescind. (CP 18.) Ta Chi

operated the facility during the two years between the sale and its attempt to rescind the transaction. (RP 1660:18-1662:2, Ex. 43.)

The delay by almost two years in filing the motion for leave to amend to include a rescission claim, filed in January 2009, independently justified denial of the rescission claim. However, the principal basis for the court's denying rescission involved the determination that Ms. Wang breached no duty to Ta Chi with respect to the Jong Seng sale. (CP 1798 ¶207.) See Response to Assign. Err. No. 9, below.

2. The trial court correctly concluded that Ta Chi's delay in seeking rescission barred its right to rescission.

Ta Chi waited too long to seek rescission of the Jong Seng transaction. In Washington, “[t]he rule is that a party who desires to rescind a contract on the ground of fraud must, upon the discovery of the facts, at once (or at least reasonably quickly) announce his purpose and adhere to it. . . . This would be particularly true where the contract of sale involved expensive mechanical equipment subject to rapid depreciation if not properly cared for.” *Fines v. Westside Implement Co.*, 56 Wn.2d 304, 309-311, 352 P.2d 1018 (1960).

[B]efore a party to a contract is entitled to a rescission he must be willing to do equity and restore that which he has received from the other party....

Morango v. Phillips, 33 Wn.2d 351, 357, 205 P.2d 892, 895 (1949).

Ta Chi knew that Ms. Wang owned the Jong Seng storage facility. Ms. Wang told the Ta Chi directors that she represented the seller, Jong Seng, in that transaction. Ta Chi did not seek rescission until, at the earliest, almost two years after the sale took place. Ta Chi and Lotus continued to use the storage facility during those years. (RP 1663:3-13; Ex. 43.) The trial court correctly concluded that Ta Chi's delay in seeking rescission justified denial of its rescission claim.

Assign. Err. No. 9: Ms. Wang was not Ta Chi's agent for purposes of the Jong Seng sale.

1. Substantial evidence exists to support the trial court's findings that Ms. Wang was not Ta Chi's agent for purposes of the Jong Seng sale.

Ta Chi challenges the following findings and conclusions: Ta Chi knew or should have known of Ms. Wang's ownership interest in the Jong Seng storage facility. Ta Chi knew or should have known that Ms. Wang was not representing Ta Chi in the Jong Seng sale. Ms. Wang violated no duty to Ta Chi relating to the Jong Seng sale. (CP 1798 ¶207.)

Findings and conclusions that remain unchallenged: The Ta Chi directors knew Ms. Wang represented the Jong Seng sellers in the transaction for Ta Chi's purchase of the Jong Seng storage facility. (CP 1783 ¶¶96-98, 100.) As such, they had no right to relax the care and vigilance that the law requires of corporate officers and directors. (CP

1807.) Furthermore, Ta Chi suffered no damages from this transaction because the sales price of the Jong Seng storage facility was reasonable. (CP 1791 ¶151.)

Additional evidence supports the trial court: In an April 2006 letter to Ta Chi directors Mr. and Mrs. Shen, Ms. Wang stated that the owners of the Jong Seng facilities, the Wang brothers, wanted her to look for a buyer for the Jong Seng cold storage facility. (Ex. 11(33).) In a letter to the Shens in February of 2007, Ms. Wang stated:

In reviewing the financing issue for the purchase of the cold storage, recalling to the point when we started the planning of this project, *I took the position as a representative of the seller in conducting this deal.* According to [my] understanding, Ta Chi recommended Herman Chen at that time to represent the buyer's position.

(Ex. 11(45(a)(emphasis added.))

Ms. Wang testified at trial that she told Ta Chi directors Mr. and Mrs. Shen, “You need to do your own duty to do your buyer position. I’m just represent the seller.” (RP 353:14-18.) Ta Chi director Mrs. Shen confirmed that Ms. Wang “Did whatever the sellers told her to do. She works for them; she has to abide by the orders from her boss.” (RP 941:17-25.) Mr. Shen, a Ta Chi director and its president, testified that he knew Ms. Wang represented Jong Seng in the sale. (RP 864:4-12.)

Ms. Wang signed the agreement for Ta Chi's purchase of the Jong Seng facility as Jong Seng's "managing partner." (Ex. 9(2)(a).) Mr. and Mrs. Shen both signed the agreement. Ms. Wang likewise signed a contract addendum and a memorandum to the title company closing the transaction, in both instances signing as Jong Seng's representative. (Ex. 9(2)(b, c).) Mrs. Shen signed the contract addendum as the Ta Chi representative, and Mr. Shen signed the memorandum to the title company as the Ta Chi representative. Ta Chi does not dispute these facts.

Substantial evidence supported the trial court's finding that Ta Chi knew or should have known that Ms. Wang represented Jong Seng, and not Ta Chi, in the sale. (CP 1782 ¶¶95, 98.)

2. The trial court correctly concluded that Ms. Wang was not Ta Chi's agent for purposes of the Jong Seng sale.

An agency relationship can exist expressly or can be implied by the circumstances. *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App. 229, 215 P.3d 990 (2009). Ms. Wang, as Ta Chi's manager, was an agent who owed Ta Chi a duty of loyalty. However, upon disclosure to Ta Chi that she represented Jong Seng in the proposed sale of the cold storage facility, Ms. Wang's duty of loyalty to Ta Chi ended:

Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not

constitute a breach of duty if the principal consents to the conduct, provided that

(a) in obtaining the principal's consent, the agent

(i) acts in good faith,

(ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal;

Restatement 3d Agency § 8.06. See also *Moss v. Vadman*, 77 Wn.2d 396, 403, 463 P.2d 159, 164 (1969).

The court made findings of fact, supported by substantial evidence, that Ms. Wang fully disclosed to the Ta Chi directors that she represented the Jong Seng sellers and that she had an interest in Jong Seng. She signed the purchase documents as Jong Seng's managing partner. The court concluded that the terms of the sale of the Jong Seng facility were fair to Ta Chi. (CP 1791 ¶151.) The court cited the two appraisal reports, and in particular the income approach contained within the appraisals, along with other evidence to support its conclusions. (CP 1791-1792 ¶150-156.) All evidence presented at trial supported the fact that the Jong Seng cold storage facility was a good investment and had strong potential

to provide fast and high returns to Ta Chi. (RP 1552:12-1554:1; Ex. 7(1).) Ta Chi provided no evidence to the contrary.

The trial court correctly denied Ta Chi's rescission claim because Ms. Wang breached no duty owed to Ta Chi and the sale terms were fair.

Assign. Err. No. 10: Parol evidence was properly admitted.

Ta Chi asserts the trial court improperly admitted parol evidence to contradict the terms of the parties' written agreement. The trial court determines admissibility of parol evidence as a matter of fact. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wn.App. 761, 766, 565 P.2d 819, 822-823 (1977). The trial court properly concluded that the provision in the Jong Seng purchase agreement relating to apple bins was added for bank financing. (CP 1792, ¶163.) Testimony along those lines was introduced not to modify the contract or contradict its terms, but merely to explain the intent of the parties. As such, that evidence was properly admitted. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

The parties' contract addendum, which established that, for purposes of the sale agreement, the apple bins had zero value, further supported the trial court's finding that the apple bins were added for bank financing only and were not intended to have separate value. (CP 1792-1793 ¶¶163-165; Ex. 9(2)(b).)

Assign. Err. Nos. 11 and 12: Ta Chi did not suffer damages by the non-delivery of apple bins.

1. Substantial evidence exists to support the trial court's findings that failure to deliver bins resulted in no damages.

Ta Chi challenges the following findings and conclusions: The inclusion of the 18,000 apple bins as part of Ta Chi's purchase of the Jong Seng facility was thrown in to make this purchase and sale more attractive to the bank. The 18,000 bins never existed. Furthermore, the purchase and sale agreement between Ta Chi and Jong Seng indicated that the bins were of no value. (CP 1792-1793 ¶163-165.)

Evidence supporting the trial court's decision: Ms. Wang's trial testimony established that the apple bins were included as part of the Jong Seng sale in order to increase the assets included in the sale and make the sales price more attractive for bank financing. (RP 359:7-21.) She further testified that Jong Seng agreed to provide the bins, which belonged to Fugachee orchards, because Fugachee signed a 10-year storage and packing agreement with Ta Chi. (RP 349:6-21, 360:1-9; Ex. 9(2)(b), 20.) Ta Chi, in return, was to provide Fugachee with bins at no rental charge. For that reason, the parties assigned a zero value to the bins. (RP 732:13-733:5.) Ta Chi unilaterally canceled the Fugachee long-term storage agreement. (Ex. 8(7).)

Substantial evidence supports the trial court's conclusion that Ta Chi incurred no damages as a result of a failure to deliver apple bins. In addition, Ta Chi's unilateral cancellation of the long-term storage agreement eliminated any obligation that Jong Seng deliver the bins.

Assign. Err. No. 14: The court properly excluded deposition designations.

On December 24, 2009, roughly two weeks before trial, Ta Chi designated several hundred pages of deposition designations which it requested the court read outside of the trial. (CP 775.) Ms. Wang objected on a variety of bases, one of which was that deposition testimony should not be offered at trial for witnesses who appear at trial to testify. (CP 758.)

Ta Chi inaccurately summarizes the court's comments at trial regarding these deposition designations. The first day of trial, the court stated, "[I]f a witness testifies live and in person...I probably won't use or allow the depositions other than for impeachment purposes..." (RP 18.) Consistent with this decision, the court published deposition designations during trial solely for impeachment purposes. (RP 877.) On day seven of the trial, the court reiterated that it would not review deposition testimony of witnesses who testify live at trial. (RP 1296.) The court again affirmed its position at the beginning the eighth day of trial. (RP 1534, 1536.)

In its post-trial brief Ta Chi asked the court to review Ms. Wang's deposition testimony for selective quotes and "facts" regarding issues already explored during trial. (See e.g. CP 1302:17-19, 1303:10-11.) Ta Chi had the opportunity to cross-examine Ms. Wang on all the issues identified in the appendices to its post-trial brief, but chose to wait to use the deposition testimony until its post-trial brief so that Ms. Wang had no opportunity to explain her answers or rebut the testimony at trial.

"Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion." *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610, 621 (1994). The designation of this deposition testimony, post-trial, was improper and the court properly excluded those designations as cumulative. Furthermore, Ta Chi fails to indicate how this ruling affected any court findings or conclusions.

Assign. Err. No. 15: Ms. Wang did not divert apple handling revenue.

Substantial evidence exists to support the trial court's findings that Ms. Wang diverted no revenue.

Ta Chi challenges the following findings and conclusions: Ta Chi and Lotus failed to meet their burden of proving that Summer Fruit received payments that should have been made to Lotus. The January 11, 2008 letter

from Lotus to Summer Fruit supports Ms. Wang's position that Lotus seeks recovery for work performed by Summer Fruit. (CP 1796 ¶190.)

Evidence supporting the trial court's decision: Ms. Wang testified that, after her employment with Lotus terminated, fruit remained in storage that required packing and shipping. However, Summer Fruit remained responsible for seeing that the fruit was properly sold and proceeds delivered to the growers. Ms. Wang, through her company Summer Fruit, provided the fruit handling services that were then invoiced to the purchasers. Summer Fruit received payments and distributed those to the growers. (RP 1706:20-1707:13.)

Lotus acknowledged that it was Summer Fruit, and not Lotus, that provided the fruit handling services. In a January 11, 2008 letter, Colleen Choi confirms Ms. Wang's trial testimony: "Lotus Fruit is not responsible for these charges *as all the fruit movement have occurred through Summer Fruit Packers or Fugachee Orchard Partnership.*" (Ex. 43)(emphasis added.)

The trial court's findings that Summer Fruit diverted no Lotus revenue are supported by substantial evidence and should be affirmed.

Assign. Err. No. 16: Ta Chi knew that Ms. Wang was Fugachee's manager and that Fugachee received Ta Chi's management payment.

Substantial evidence exists to support the trial court's findings that Ta Chi was aware of Ms. Wang's role as Fugachee's manager.

Ta Chi challenges the following findings and conclusions: Ta Chi agreed to pay Ms. Wang \$3,000 per month for her services as Ta Chi's manager. The Ta Chi principals knew that Ms. Wang managed Fugachee yet had no discussions with the Fugachee partners about hiring Ms. Wang to also manage Ta Chi. The Ta Chi principals knew that Ms. Wang's salary would be paid directly to Fugachee. The Ta Chi principals believed that they could borrow an employee being paid \$7,000 per month to manage another orchard without any discussions with the owners of that orchard. Ta Chi's knowledge of Ms. Wang's role as manager of Fugachee put Ta Chi on notice that Ms. Wang was more than just Fugachee's manager. (CP 1774-1775 ¶¶43, 44.)

Evidence supporting the trial court's decision: Ms. Wang testified that she was approached in the summer of 2001 by Dr. Chuang and the Master, two of Ta Chi's founders, with a request that she assist in finding them an orchard they could purchase. Dr. Chuang and the Master toured the Fugachee orchards and were informed that Ms. Wang managed the Fugachee orchards. They were also informed that Ms. Wang owned an export company. (RP 100:15-101:9.)

Ms. Wang agreed to help Dr. Chuang and the Master find an orchard and then manage that orchard on their behalf. Ms. Wang did not suggest compensation be paid to her, but the principals of Ta Chi set her

salary at \$3,000 per month. (RP 108:18-23.) Ms. Wang testified that she paid that salary to Fugachee, and did not receive the money herself, because she felt an obligation to her Fugachee partners. Ms. Wang believed that it was through their support that she had gained the knowledge that made it possible for her to undertake management of Ta Chi, and therefore it was appropriate that the Fugachee partners share in the management fee. (RP 139:6-22.) Ms. Wang received no additional compensation as a result of serving as Ta Chi's manager. (RP 139:23-140:3.) Ta Chi paid the management fee by check made payable to Fugachee Orchards. (Ex. 308.)

Substantial evidence supports the court's finding that Ta Chi knew that Fugachee was receiving the management fee.

Assign. Err. No. 17: Ta Chi was not entitled to reimbursement for management fees paid to Fugachee.

1. Substantial evidence exists to support the trial court's findings that Fugachee was entitled to its management fee.

Ta Chi challenges the following findings and conclusions: No factual basis exists for Ta Chi to recover amounts paid to Ms. Wang as a result of the management services that she performed. (CP 1794 ¶179, 1799 ¶215.)

The following findings and conclusions remain unchallenged: Ms. Wang used her best efforts to create an orchard as requested by the

Master and others. She increased the size of the orchard from 63 acres to approximately 218 acres. (CP 1794-1795 ¶180, Ex. 12(6)(c), 12(7)(h).) Ms. Wang worked hard and the fees paid were at or below market value. (CP 1795 ¶181.) The management fee paid was more than reasonable and, with the other services Ms. Wang provided, was a bargain. (CP 1777 ¶57.)

Additional evidence supporting the trial court: Evidence at trial also established that, through Ms. Wang's efforts, she increased the value of the Ta Chi orchard. (RP 1200:17-1202:5.) Her efforts preserved water rights that Ta Chi risked losing through non-use. (CP 1778 ¶64.)

2. Ta Chi failed to meet its burden of proof that Ms. Wang breached a duty of good faith in managing the orchard.

Ta Chi had the burden of proving that Ms. Wang acted in bad faith on particular transactions and that she personally benefitted from her actions. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn.App. 502, 728 P.2d 597 (1986). “The duty of reimbursement is limited to those losses that were proximately caused by the fiduciary’s misconduct.” *Id.*, at 512. Ta Chi failed to prove Ms. Wang’s management of the orchard caused Ta Chi any losses, much less that Ms. Wang personally benefitted.

The trial court’s findings of fact are supported by substantial evidence. The trial court correctly concluded that Ta Chi is not entitled to

reimbursement for the management fee paid.

Assign. Err. Nos. 18, 19, 20 and 21: Ta Chi had no right to recover for the Summer Fruit packing charges.

1. Substantial evidence exists to support the trial court's findings that Ms. Wang breached no duty to Ta Chi with the Summer Fruit charges and in finding that the Summer Fruit packing fees were reasonable.

Ta Chi challenges the following findings and conclusions: No factual basis exists for Ta Chi to recover amounts paid to Ms. Wang as a result of packing services provided by Summer Fruit. (CP 1794 ¶179.)

Evidence supporting the trial court's decision: Prior to 2005, Ms. Wang arranged for Ta Chi fruit to be packed through local companies that provided fruit packing services. (RP 212:21-25, 221:17-23, 295:2-8.) Ta Chi was charged for those services, fees that are required by state law to be posted with the State and available to all growers. RCW 20.01.080. (Ex. 1(3).) In 2005, Ms. Wang packed some of Ta Chi's fruit herself through her company Summer Fruit. (RP 295:2-8.) The main reason that Ms. Wang established Summer Fruit was to provide a level of service for the packing and sale of the Ta Chi fruit, particularly the export quality fruit, that she believed was not being offered through the available packing companies. (RP 285:15-287:2, 289:17-290:8, 295:2-22, 566:6-567:15.)

Summer Fruit charged industry standard charges for packing of the Ta Chi fruit. (RP 296:22-297:5, 566:25-567:1.)

Ta Chi contends that Ms. Wang is liable to Ta Chi for all packing charges paid to Summer Fruit. Ta Chi makes this argument without regard to whether Ms. Wang breached a duty to Ta Chi and without regard to whether Ms. Wang made a profit from the fruit packing. In doing so, Ta Chi ignores the very law that it cites, *Johns v. Ariz. Fire Ins. Co.*, 76 Wash. 349, 360-62, 136 P. 120 (1913):

...[T]he agent has many opportunities of acquiring an interest or benefit to himself out of the transaction, to the detriment of the principal, and against which the latter may be unable to protect himself. For this reason the law jealously guards all the agent's dealings or actions in reference to the subject-matter of the agency, and requires that they shall be strictly in good faith and loyal to the interests of his principal. As stated above, an agent will not be allowed to assume any position which is inconsistent with his duty to be loyal to his principal, or to place himself in an attitude of antagonism to the interests of his principal.

Ms. Wang testified that she established Summer Fruit because she felt Summer Fruit could provide better packing services than could be provided by other packing facilities. Ms. Wang believed she could achieve a higher return for Ta Chi by increasing the pack out and by taking advantage of her connections in the export market. (RP 566:6-20.) Her decision to use Summer Fruit was made in keeping with her obligation to act in the best interests of Ta Chi, not in violation of any

duty. Ms. Wang further testified that she told Mrs. Shen, Ta Chi's Vice President and Director, that Summer Fruit was packing Ta Chi's fruit. (RP 566:6-567:15.) Mr. Shen testified that he knew Ms. Wang managed Summer Fruit. (RP 863:9-864:11.) Furthermore, Ms. Wang sent Ta Chi grower statements that showed the fruit packed at Summer Fruit and the prices paid. (RP 299:23-300:13.)

Ta Chi also seeks to recover additional funds for crop returns that it believes were less than should have been paid. The court heard testimony explaining why differences exist between returns from one packing facility and another. (RP 600:2-601:3, 1705:25-1706:9.) The court heard testimony on how preliminary grower settlement statements differ from final grower statements. (RP 1575:9-1579:16.) The preliminary grower statements for Ta Chi in some instances show a higher return than the final statement, and in some instances show a lower return. (RP 1377:8-17; Ex. 160(g).)

Substantial evidence supports the trial court's findings with respect to the Summer Fruit packing charges and the grower returns. The court correctly concluded that Ta Chi was not entitled to recover against Ms. Wang for Summer Fruit packing charges.

2. The packing fees were earned and therefore properly paid.

Ta Chi seeks full reimbursement of all Summer Fruit packing charges incurred between 2005 and 2007, even though the court found no

evidence to suggest that the packing charges were unreasonable and further concluded Ta Chi would have incurred these expenses regardless of who packed its fruit. (CP 1796 ¶189, 1808.) Ta Chi can only collect on the amount it proves Summer Fruit failed to earn. *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 405, 357 P.2d 725, 733 (1960). Ta Chi has failed to provide any evidence that Summer Fruit did not earn every cent of the packing charges.

Ta Chi also continues to argue that something inappropriate occurred when Summer Fruit issued draft grower statements different from the final grower statements. The trial court's unchallenged factual finding that Ta Chi provided insufficient evidence that Ms. Wang was "skimming" money from Ta Chi precludes Ta Chi from recovering on this claim. (CP 1796 ¶191.)

Assign. Err. No. 22: The trial court properly denied Ta Chi's request for recovery of attorneys' fees.

Ta Chi failed to plead constructive fraud in its counterclaims, precluding Ta Chi from now recovering on that theory. (CP 720.) Ta Chi also incorrectly cites cases supporting its argument for attorneys fees based on a theory of constructive fraud that applies only in actions involving partnerships under a common fund theory. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557 P.2d 342 (1976). No common fund exists here, and Ta Chi is

not entitled to attorneys' fees under any theory of constructive fraud or otherwise.

Assign. Err. No. 13: Jong Seng Breach of Contract.

Ta Chi assigns error to the trial court's failure to reach the question of whether Ms. Wang and Fugachee would be liable for a breach of contract by Jong Seng. Because the court did not find Ms. Wang breached her duty and did not find a breach of contract occurred, and because Ms. Wang has provided citations to the record supporting the court's decision, she does not respond separately to this assignment of error.

C. Ms. Wang's Cross Appeal

Cross Assign. Err. No. 1: The trial court erred in concluding that Ms. Wang breached a fiduciary duty to Lotus and in rescinding the Summer Fruit sale. (CP 1784, ¶103, CP 1786, ¶114, 118, 119, 1787, ¶122, CP 1798-1799, ¶¶210-214.)

1. Existence of a fiduciary duty.

In order to establish liability for a breach of fiduciary duty, Lotus had to first prove that a fiduciary duty existed. *Micro Enhancement Intl. Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 433-434, 40 P.3d 1206 (2002). A fiduciary relationship can arise in law, such as attorney-client, trustee-beneficiary, or "in fact" regardless of the legal relationship of the parties. *Micro Enhancement*, 110 Wn.App. at 433-434. Washington does not automatically impose this duty on corporate

managers or employees. To prove a fiduciary relationship exists “in fact”:

The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party...

Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 741-742, 935 P.2d 628 (1997)(citations omitted).

A confidential or fiduciary relationship cannot exist between two parties who have operated at arms length and whose only relationship has been a business relationship:

A simple reposing of trust and confidence in the integrity of another does not alone make of the latter a fiduciary. There must be **additional circumstances, or a relationship that induces the trusting party to relax the care and vigilance which he would ordinarily exercise for his own protection.**

Moon v. Phipps, 67 Wn.2d 948, 954-955, 411 P.2d 157, 160-161 (1966) (citations omitted)(emphasis added).

Even when a business owner puts trust and confidence in its general manager to operate its business, such does not give rise to a fiduciary relationship. See *Gilliland v. Mount Vernon Hotel Co.*, 51 Wn.2d 712, 715-716, 321 P.2d 558 (1958).

In *Hood v. Cline*, 35 Wn.2d 192, 212 P.2d 110 (1949), the Washington Supreme Court recognized that intimate friendships may “justify one in relaxing the standard of caution he would normally exercise in business dealings.” *Id.*, at 200. Yet the Court refused to find a fiduciary relationship existed, even though the parties’ families had been friends for several years and the parties had gone to school together.

2. Knowledge of conflicting duties precludes imposing a fiduciary relationship.

No basis exists for claiming a fiduciary duty when an agent owes duties to different principals and that relationship is known to the principals: “A fiduciary is one who has a duty to act primarily for the benefit of another.” *Goodyear*, 86 Wn.App. at 741. A fiduciary relationship cannot exist when the parties have conflicting business interests. *Id.*, at 743. *See also Gilliland*, 51 Wn.2d at 715-716.

A corporation is charged with knowledge of the facts known to its officers and directors:

It is well settled that a corporation is chargeable with constructive notice of facts acquired by an agent while acting within the scope of his authority.

Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wn.2d 375, 386, 391 P.2d 979, 986 (1964). *See also Interlake Porsche*, 45 Wn.App. at 518.

3. Ms. Wang was not Lotus' agent for purposes of the Summer Fruit sale.

A fiduciary relationship cannot arise simply because Lotus' officers claim to have trusted Ms. Wang and have confidence in her.

Consent and control are the essential elements of an agency. The relationship is created by law, but if no factual pattern exists which gives rise to an agency, then no agency exists despite the intent of either or both of the parties. Because of this, one may believe that he has created an agency when in fact the relationship is that of a seller to buyer.

Moss v. Vadman, 77 Wn.2d at 403 (citations omitted).

Ms. Wang's relationship with Lotus did not exist prior to her agreement to work as Lotus' manager. Unlike the sellers in *Hood*, Ms. Wang had no relationship with the Shens prior to her involvement with Ta Chi and Lotus. Ta Chi and Lotus' officers were charged with overseeing the business transactions facilitated by Ms. Wang. They did not display the level of trust of one relying on a confidential or fiduciary relationship.

In addition, the Ta Chi and Lotus directors knew that Ms. Wang was the manager of Summer Fruit prior to Lotus purchasing the Summer Fruit packing line. Mr. Shen, president and chairman of the board for both Ta Chi and Lotus (Ex. 7(6,7), 12(6)(c-1)), testified as follows:

Q. Mr. Shen, did you visit the Summer Fruit facilities?

A. Yes. I was taken there, yes.

Q. And did you understand that Ms. Wang was managing the Summer Fruit facility?

A. She also told me that someone hire her to manage the place.

....

Q. Let me clarify. Before the sale of the Summer Fruit equipment, you were aware that Ms. Wang was managing the Summer Fruit packing line, were you not?

A. Yes.

(RP 863:9-864:11.) Mrs. Shen likewise knew that Ms. Wang managed the Summer Fruit facility. (RP 942:1-4.) The Lotus directors also knew that Ms. Wang managed the Jong Seng facility and represented the sellers in that transaction. (RP 864:4-12.) Moreover, Herman Chen, a Lotus director and its vice president, knew Ms. Wang owned Summer Fruit prior to the Summer Fruit purchase. (CP 1787 ¶129, RP 990:4-991:6, 1004:2-11; Ex. 7(6)(6, 7).) Ms. Wang did not consent to acting as Lotus' agent in the Summer Fruit transaction, nor did Lotus have any control over Ms. Wang's actions and decisions in that transaction. Lotus could not reasonably rely on Ms. Wang acting as their fiduciary when Ms. Wang's duties to her other principals clearly precluded her ability to owe a primary duty of loyalty to Lotus.

The trial court erred in finding that Ms. Wang concealed her ownership interest in Summer Fruit, and in concluding that she owed a fiduciary duty to Lotus and that she breached a fiduciary duty to Lotus in the sale of Summer Fruit.

Cross Assign. Err. No. 2: The trial court erred in concluding that Ms. Wang violated a fiduciary duty as Ta Chi's manager when she used Ta Chi funds to defend a lawsuit arising from a valid contract entered into by Ta Chi. (CP 1797-1798 [Conclusions 203-04].)

The business judgment rule shields Ms. Wang from liability for reasonable decisions made during the course of her employment as Ta Chi's manager. *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn.App. 389, 395-396, 739 P.2d 717, 722 (1987). The court found that Ta Chi gave Ms. Wang carte blanche authority to do almost anything she felt in the best interest of Ta Chi's business. (CP 1775 ¶46.) The court found that Ms. Wang had "unquestionable authority" to run Ta Chi. (CP 1780-1781 ¶82.)

In 2002, Ms. Wang signed a contract on behalf of Ta Chi for the operation of the Highland Orchard. (Ex. 1(1).) The evidence at trial established that the lease of the Highland Orchard was a good business decision and had the potential to generate approximately \$250,000 net profit for Ta Chi. (RP 1094-1095, 233:16-237:3, 1205-1206.) Because of Ta Chi's funding shortages, Ms. Wang provided her own funds to raise the Highland crop. In the fall of 2002, the Highland Orchard experienced an

unexpected freeze that virtually wiped out the crop. The limited sale proceeds paid growing expenses but nothing more. To compound matters, the owners of the Highland Orchard sued Ta Chi following the 2002 crop year claiming Ta Chi had caused chemical damage in the orchard. (CP 213.)

No evidence was offered that entering into the Highland lease was not a sound business decision. Nevertheless, the court found that because Ms. Wang leased the Highland Orchard and operated it without informing any of the Ta Chi officers or directors, she breached her duty as manager and as Ta Chi's fiduciary. (CP 1789 ¶¶136-142, 1797 ¶¶203-204.)

The trial court further found that Ms. Wang violated her duty as manager and fiduciary to Ta Chi by using Ta Chi funds to defend the Highland lawsuit. The court entered judgment against Ms. Wang for unreimbursed defense costs, as well as the profit that the court found had been earned on the Highland lease and not reimbursed to Ta Chi.² (CP 1789-1790 ¶¶136-145, 1797 ¶¶203-206, 1805-1806.)

The court's award against Ms. Wang for the \$12,312 profit from the Highland Orchard's transaction reveals the inconsistency in the court's decision. By awarding a judgment against Ms. Wang for the profit earned,

² Ms. Wang disputes that there was any profit from operation of the Highland Orchard but does not challenge this finding made by the court.

the court enforced the lease as if Ta Chi was a party to the agreement (the lessee). If Ta Chi has no liability for the lease, then Ta Chi has no claim to any profits earned under the lease. In the alternative, if Ta Chi was a proper party to the lease, the position taken by Ms. Wang, then Ta Chi is responsible for any damages caused by breach of the lease. Ms. Wang can have no personal liability for damages due under a lease properly entered into by Ta Chi. *Union Machinery & Supply Co. v. Taylor-Morrison Logging Co.*, 143 Wash. 154, 254 P. 1094 (1927). Ta Chi cannot accept the benefit of the lease and yet have no liability for the burden.

The trial court erred in finding that Ms. Wang violated a duty owed to Ta Chi by entering into the Highland lease. The trial court erred in concluding that Ms. Wang was liable for the attorneys' fees incurred in defending the Highland lawsuit.

Cross Assign. Err. No. 3: The trial court erred when it denied Ms. Wang's claim for recovery of attorneys' fees when she defended claims arising from her employment with Ta Chi. (CP 1800 ¶222.)

The Ta Chi Bylaws provide for indemnification for costs and fees to its employees involved in corporate litigation. (Ex. 12(4) at 9.) As a manager and employee of Ta Chi, Ms. Wang acted in good faith and reasonably believed her conduct was in Ta Chi's best interests. Ms. Wang did not derive personal benefit from those transactions for which she seeks indemnification. Therefore, Ms. Wang is entitled to indemnification by

Ta Chi for the cost of defending those claims against her which arose by virtue of the fact that she was manager of Ta Chi, including costs and attorneys' fees on appeal.

V. CONCLUSION

Ms. Wang respectfully requests this Court:

1. Affirm the trial court's award in her favor for the loans she made to Ta Chi;
2. Affirm the trial court's denial of damages to Ta Chi; and
3. Reverse the trial court's ruling with respect to the Summer Fruit sale agreement, Highland Orchard lease and the court's denial of her attorney's fee request.

SUBMITTED this 30th day of December, 2010.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By



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