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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 323820-III

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

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ARMAND DeFELICE,

Appellant,

v.

STATE OF WASHINGTON,  
EMPLOYMENT SECURITY DEPARTMENT,

Respondent

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR SPOKANE COUNTY

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APPELLANT'S BRIEF

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## I. INTRODUCTION

This case originated with the Employment Security Department of the State of Washington which concluded by way of audit that Armand V. Defelice, Appellant herein was an employer of two members of his family, Dr. Louise DeFelice, his daughter, and Dr. Loretta Rosier, his daughter-in-law. It was determined by the Employment Security Department that the family members, Dr. Louise and Dr. Loretta, hereinafter referred to by their first names so as to avoid confusion, were mere employees of Dr. Armand. As such, the dental practice was responsible for unemployment tax contributions predicated upon the earnings of the two female dentists. RCW 50.04.100.

The matter was appealed to the OFFICE OF ADMINISTRATIVE HEARINGS EMPLOYMENT SECURITY DEPARTMENT STATE OF WASHINGTON with a hearing held May 23, 2013. CP 84 et seq.

The Administrative Law Judge affirmed the decision of the Employment Security Department and concluded that Dr. Louise and Dr. Loretta were mere employees of Dr. Armand. CR 299<sup>1</sup>.

The Administrative Law Judge's decision was adopted by the COMMISSIONER OF THE EMPLOYMENT SECURITY

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<sup>1</sup> "CR" refers to Commissioner's Record

DEPARTMENT OF THE STATE OF WASHINGTON, Deputy Chief  
Review Judge, Commissioner's Review Office wherein it is noted:

“Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we adopt the Office of Administrative Hearing's findings of fact and conclusions of law.” “Judicial Review of such decisions is governed by the Washington Administrative Procedure Act (APA).” RCW 34.05.510.

It should also be noted the Court reviews the decision of the Commissioner, not the underlying decision of the ALJ -- except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ, Administrative Law Judge's Order. *Smith v. Emp't Sec. Dep't*, 155 Wn.App. 24, 32, 226 P.3d 263, (2010); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993).

Appeal was then taken to the Spokane County Superior Court which concluded, “The ALJ found the Appellant (Petitioner) is liable for the contributions, penalties and interest as assessed pursuant to RCW 50.24.010.” From this it is logical to conclude that the decision of the Administrative Law Judge must be reviewed with particularity because it is the basis for all the subsequent appeals and Conclusions. Numerous errors will be assigned to the Findings of Fact and Conclusions of Law formulated by the Administrative Law Judge. Aside from the errors attributed to the Administrative Law Judge it is Appellant's position that the operation of the practice of family dentistry by the three dentists was

essentially in the nature of a partnership which is outside the scope of RCW 50.04.100. Hence the assessment of tax, penalties and interest should be refunded to Dr. Armand.

## **II. ASSIGNMENTS OF ERROR**

1. The Administrative Law Judge erred in Findings of Fact 1 through 16. Thus the decision based on erroneous facts is invalid..
2. The Administrative Law Judge erred in failing to find that the practice of dentistry by the family members was essentially equivalent to a partnership and therefore not subject to RCW 50.04.100, all of which is supported by valid testimony of the dentists and the exhibits submitted by the Department.
3. The Administrative Law Judge failed to recognize the so-called “employees,” had “100%” control and discretion over their patients.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Administrative Law Judge’s decision can stand in view of the multiple assignment of errors relevant to Findings of Fact which amounts to a total disregard of the testimony and

exhibits by employees of the Washington State Employment Security Department as well as Drs. Armand and Louise.

2. The Administrative Law Judge in Finding of Fact No. 14, CR 294, erred when it concluded that the practice did not resemble a partnership because “the Appellant (Petitioner) business did not file an annual Internal Revenue Service Form 1065 to report its ‘partnership’ income.” The question should have been, does the Internal Revenue Service require the filing of a partnership income tax return under the circumstances in this case. The answer should be no!

#### **IV. STATEMENT OF THE CASE**

##### **A. Dr. Loretta and Dr. Louise Are Not Employees.**

Dr. Armand DeFelice has been practicing dentistry in Spokane, Washington for over 50 years. CR 60. On February 1, 1990 Armand entered into an Association Agreement with his daughter-in-law, Loretta DeFelice. CR 71, et seq. On January 2, 2004, Dr. Armand entered into an Association Agreement with his daughter, Louise DeFelice. CR 77, et seq. CR 69, 73. The agreement with Dr. Armand’s daughter, Dr. Louise, provides for essentially the same terms and conditions, including income

of 35% of production as applicable to Dr. Loretta. CR 77, 79. The audit period covered the years 2010, 2011, 2012. During that period the subject Association Agreements were not in existence. The major thrust of the case depends upon whether or not the above-referred-to Association Agreements were in existence and enforceable at the time of the Audit for 2010, 2011, and 2012. On examination before the ALJ, Dr. Armand, was asked whether or not they were still in force. CR 132, L 3-8. Dr. Armand testified that the written Agreements were no longer in force, and they were replaced as a verbal agreement with respect to the sharing of profits. CR 129, L 23-25. Doctor testified:

“The 40% of what they produced is what they get paid.”

The new verbal agreement increased the Doctors’ income from 35%.

With respect to the disposition of patients in the event that one or more of the dentists left the practice, Dr. Armand testified, “. . . but I know darn well that a good percentage would.” That is, they would follow the dentist that left the practice. Dr. Armand went on to testify that in 2010 and 2011 the overhead factor was 60%. CR 131, L 8-9. Dr. Armand also testified “there is no written agreement with these dentists as of today.” CR 132, L 3-8.

Each of the dentists have their own patients. CR 156, L 21-25. Additionally, Drs. Loretta and Louise do not consider themselves an

employee of DeFelice Family Dentistry.

Each dentist procures and pays for his or her own malpractice insurance. CR 162, L 22-24.

On cross-examination, Dr. Louise answered the Department's attorney, CR 162, that she receives a Form 1099, a Federal form which contains income but not "wages." CR 162, L 11-13. Similarly she pays her own Social Security type withholding which is Self-Employment Tax.

The building in which the dentists practice is owned by a family LLC called JADS, LLC, which includes Dr. Armand and Dr. Louise as Members. CR 143, CR 152. The dental building is leased to the practice. In addition, the equipment utilized in the practice of dentistry is owned by the individual dentists, including Drs. Loretta and Louise. CR 147, L 9-11. Additionally, much confusion was created by the Department's Attorney and witness argument which was predicated apparently on the fact they didn't understand the division of profits between the three dentists. Dr. Louise testified that "each of the dentists received 40% of the amount of the production on each of their patients, and the overhead is split 60%." CR 156, L 11-13. The way the profits are split, each dentist receives 40% of his or her production against which 60% is charged representing overhead and costs. This will be demonstrated infra, on Page 7, by utilizing the income statements and "payroll records" developed by

the Department. CR 61. The documents were prepared by Ms. Angi Hughes, a tax specialist with the Department of Employment Security. CR 89.

All Three Doctors treated the Dental Practice essentially as a Partnership.

Much confusion has been brought about by the failure to understand the profit-sharing arrangement applicable to the three dentists. They have testified that each dentist receives 40% of his or her production. From that is subtracted the overhead which covers the cost and expenses amounting to 60% of gross revenues earned by each dentist. This is illustrated in the following table.

**2010 PARTNERSHIP DISTRIBUTIONS OF PROFIT**

CR 231.

	<u>Distributions</u>	
Dr. Louise	$\$186,671 \div 40\% =$	\$466,678
Dr. Loretta	$\underline{156,315} \div 40\% =$	<u>390,787</u>
	<u>\$342,986</u>	
	Total Profit Sharing $\div 40\% =$ Gross	\$857,465

(CR 232)

Gross Revenues	\$1,370,027	
Less Partners Distributable Portion	<u>857,465</u>	
Dr. Armand Gross Revenues (37.41% of gross)		<u>\$512,562</u>

(CR 232, 233)

Total Expenses CR 232 from Income Statement	\$1,151,381
Less Partners Profit Distributions	<u>( 342,986)</u>
Net Expenses - subject to allocation	\$808,395
x 37.41%	
Net Expense - \$808,395 ÷ Gross Revenue - \$1,370,027 =	
59.0057%	\$302,420
Dr. Armand Gross Revenue	<u>512,562</u>
	Net to Dr. Armand: <u>\$210,142<sup>2</sup></u>

The Year 2010 is representative and would apply to the other years as well. Remember, each Doctor receives 40% of his or her production collected. In the case of Dr. Louise for 2010 it was \$186,671, divided by 40% that would mean that her total production was \$466,678. The same formula would apply with respect to Dr. Loretta. Their combined gross production was \$857,465. With total revenue of \$1,370,027, less the Partners' distributable portion of \$857,465, that leaves Dr. Armand's gross revenues of \$512,562. CR 232, 233, we have total expenses of \$1,151,381. From that is subtracted the profit distributions to Dr. Louise and Dr. Loretta, amounting to \$342,986. The balance is \$808,395, which divided by the gross revenues of \$1,370,027 represents 59.0057% of profits. The profit distributable to Dr. Armand was 40%. Thus, the

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<sup>2</sup> CR 233, reflect Net Profit of \$218,645, all of which is applicable to Dr. Armand. The difference in expense items applicable to Dr. Armand.

combination of his payment of expenses as well as profit distribution equals 99.0057%, which is rounded up to 40.000%.

During the course of the hearing the issue of termination of the oral agreement involving distribution of profits arose, in particular whether or not the patients would stay with the dental practice or follow the departing dentist. It is clear, Dr. Armand testified:

“Q. If Loretta or Louise leave the practice, would the patients follow them?

“A. Well, I think some will, because they are very much in tune to them. And some maybe won't. That is hard to know. You don't know for sure, but I know darn well that a good percentage would.” CR 130, L 25, CR 131, L 1-3.

The Employment Security Department's case rests primarily on the efficacy of the Association Agreements for Dr. Loretta in 1990 and Dr. Louise in 2004. Through the hearing, it was established by the testimony of Dr. Armand that the Agreements were disregarded or revoked. They no longer existed at the time of the Audit for the Calendar Years 2010, 2011, and 2012. More importantly, Ms. Hughes obtained the Association Agreements for Dr. Loretta and Dr. Louise from the bookkeeper for the dental practice, Rhonda Lee. Ms. Hughes did not ask anyone in the dental office whether or not the Agreements were valid and enforceable. CR

113, L 1-4. Ms. Hughes, the Tax Specialist simply assumed that the Agreements the bookkeeper gave her would be valid, but she didn't ask. CR 113, L 6-9. The mere fact the documents were very old, the Tax Specialist wasn't alerted or asked any questions as to whether or not the documents were still valid. CR 113, L 15-23. She was content to inform the ALJ ". . . The Agreement was given to me. I had no reason to believe that it wasn't a valid agreement, otherwise why they give it to me." CR 113, L 24-25, CR 114, L 1. When questioned about the percentage of participation and profits in the Agreement, she answered:

"A. I believe it is stated at 35%.

"Q. Okay, and during the course of your audit, what was the percentage of participation and profits?

"A. I did not calculate that.

"Q. Did you ask what it was?

"A. No.

"Q. Okay. Wouldn't that affect the results of your audit?

"A. Not really, no. Even if the percentage was 40%, it still wouldn't affect the results or audit." CR 114, L 4-15.

The Tax Specialist stated:

"That's not really my concern as to how much they get paid for their services they provide. My check is whether or not they are an

employee or truly an independent contractor.

“Q. Okay. You didn’t consider the fact that they were partners  
(inaudible).

“A. No. There was nothing that gave me the idea that it was a  
partnership.” CR 117, L19-25, CR 118, L 1.

It is submitted the difference in the profit percentage should have  
created some additional questions for the Tax Specialist to determine if in  
fact the Agreements were still valid.

At the conclusion of the Audit, Dr. Armand had some idea of the  
Audit Determination. As a result, counsel for the 3 dentists contacted Ms.  
Hughes and during the hearing counsel made inquiry concerning the  
nature of the discussion. The response was:

“Well, you were saying you disagreed with it, I believe, and was  
asking about an exit interview with my supervisor to resolve  
things.”

“Q. And what was your answer?”

A. That that was not our procedure. That at this point I had issued  
the Audit findings and so the proper procedure would be to  
go through an appeal.” CR 111, L 7-15.

## V. ARGUMENT

**A. The ALJ after identifying the problem, neglected to follow the testimony and exhibits demonstrating Drs. Loretta and Louise were not employees of DeFelice Dentistry.**

The ALJ in Conclusions of Law, No. 2 poses the question:

“In determining whether the Petitioner (Appellant herein) was in employment as concerns Dr. Louise and Dr. Loretta, *the first question to be answered is whether the two dentists performed personal services, of whatever nature, for wages or under a contract calling for performance of such services.* RCW 50.40.100.

“An individual is not an employee if the answer is answered in the negative. If the answer is answered in the affirmative, the individual is in employment unless the services are excluded from coverage by another section of Title 50 RCW.” CR 295.

The Decision of the ALJ has the same force and effect as if it were made by the Commissioner, because the Commissioner adopted the ALJ’s Findings and Decision. *Tapper v. Emp’t Sec. Dep’t*, 122 Wash. 2d 397, 405-406, 858 P.2d 494 (1993). Under the APA, a Reviewing Court may reverse the agency’s adjudicative decision if, among other things, the agency erroneously interpreted or applied the law, the agency’s decision was not supported by substantial evidence, or the agency’s ruling was arbitrary or capricious. RCW 34.05.570(3)(D)(a)(i), *Tapper, Supra*. The party challenging an agency’s action carries the burden of demonstrating the action was invalid. RCW 34.05.570(1)(a). The Court shall grant relief from an agency order in an adjudicated proceeding only if it determines that:

- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) *The agency has not decided all issues requiring resolution by the agency;* or
- (i) The order is arbitrary or capricious. RCW 34.05.570.

The above-referred-to Conclusion No. 2 would be answered in the negative insofar as the two dentists did not perform personal services and were not performing services for wages or under a contract calling for performance of such services. Instead, the two dentists were engaged on behalf of themselves in performing services on patients in which the net profits of the operation was split amongst the dentists performing the various services. Under the facts of this case Dr. Armand received the same profit percentage applicable to his production as Dr. Loretta and Dr. Louise. At the very least, Drs. Loretta and Louise had an economic interest in the operation.

Finding of Fact 1, CR 292, recites in pertinent part: “Effective February 1, 1990 Dr. DeFelice, as owner of the business entered into an

Association Agreement with Dr. Loretta.” The record is clear, during the audit period, 2010, 2011, 2012, the “Association Agreements” were not valid and enforceable. They no longer existed as far as the dental business was concerned.

Finding of Fact 2, CR 292, is irrelevant and invalid for the reasons expressed pertaining to Finding of Fact No. 1, supra.

Finding of Fact 3, CR 293, is not relevant for the reasons explained applicable to Finding of Fact 1, supra.

Finding of Fact 4, CR 293, is not relevant for the reasons stated in Finding of Fact 1, supra.

Finding of Fact 5, CR 293, is not relevant for the reasons explained in Finding of Fact 1, supra.

Finding of Fact 6, CR 293, is not relevant, because the Agreement was not valid and enforceable during the Audit Period. It was cancelled. See Finding of Fact 1, supra.

Finding of Fact 7, CR 293, is invalid and nonenforceable for the reasons set forth in Finding of Fact 1, supra.

Finding of Fact 8, CR 293, is not relevant, because the “two respective agreements” were not in force and valid during the Audit Period.

Finding of Fact 9, CR 293, is not relevant, for the reasons stated in

Finding of Fact 1, supra.

Finding of Fact 10, CR 294, is not relevant for the reasons set forth in Finding of Fact 1, supra. More over, Ms. Hughes did not ask Ms. Lee, the bookkeeper, whether or not “the referenced agreements” were valid and enforceable. Without asking, Ms. Hughes simply assumed that they were valid and enforceable. She knew that the profit percentage for the two dentists involved was 35%. The exhibits consisting of the computation of “wages” prepared by Ms. Hughes applicable to Drs. Loretta and Louise would indicate by way of a small calculation that the percentage of profits distributable to the two Doctors was 40% less their share of the overhead. CR 107, L12-14.

Finding of Fact 11, CR 294, is invalid as it relates to the “. . . Petitioner (Appellant herein) had paid Dr. Louise and Dr. Loretta miscellaneous income reported on Form 1099. The record clearly shows that Dr. Louise and Dr. Loretta did not receive miscellaneous income but their share of the profits applicable to the professional services rendered.

Finding of Fact 12, CR 294, there is no evidence in the record that Ms. Hughes “concluded that the amounts paid to Dr. Louise and Dr. Loretta in the first quarter of 2010, the first quarter of 2011, and the first quarter of 2012 should be classified as wages and subject to taxation for employment security purposes.” Ms. Hughes took it upon herself to

classify the profit distributions as wages. CR 117.

Finding of Fact 13, CR 294, is not correct as the chart explaining the distribution of profits clearly indicates by taking the income distribution and dividing by 40% one arrives at gross production. Using the same formula for Dr. Louise, her gross production is determined. As a result, if you add the two dentists' gross production and subtract that from the gross income reflected on the income statement, you then have the gross production developed by Dr. Armand. Moreover the statement, "Neither Dr. Louise nor Dr. Loretta would contribute to overhead if they did not work" is invalid. Under the method of sharing profits, there is no connection between work and payment for overhead. It is production that determines the contribution to overhead. If a doctor did not contribute anything to overhead, it would have to be for the entire calendar year. It is silly to assume that a doctor would not work for an entire year without production.

Finding of Fact 14, CR 294, is incorrect and invalid when it states "The Petitioner's (Appellant herein) business did not file an annual Internal Revenue Service Form 1065 to report its 'partnership' income." Such a requirement is not necessary. But more importantly, this was utilized simply to demonstrate the nonexistence of a partnership which is contrary to the Federal taxing scheme. The Form 1065 is a partnership

income tax return which does not reflect any income taxes due but is rather an *information return* showing each partner's share of the income. More importantly, in the case of a "small partnership," reasonable cause is presumed (emphasis added) if, upon request by the IRS it is shown that all partners have fully reported their share of partnership income, deductions and credits on their timely-filed income tax returns. See IRS Rev.Proc. 84-35, 1984-1CB. For this purpose, a small partnership is: A partnership comprised of ten or fewer partners; and each is an individual (other than a non-resident alien), a corporation, or an estate of a deceased partner. It is clear the dental practice fits within the Rule. Bottom line, no harm, no foul. Apparently the effort was made by the Department to exalt form over substance.

Finding of Fact 16, CR 294, is irrelevant and contrary to the Department's theory of the case. It is stated neither Dr. Loretta nor Dr. Louise had any current Employment Security Department accounts in effect during the Audit Period. It is the Department claiming that Dr. Loretta and Dr. Louise were mere employees. Under such circumstances, it would be the employer that would be responsible for the payment of the Employment Security taxes and maintaining an account.

Finding of Fact 17, CR 294, indicating Dr. Loretta and Dr. Louise each paid for their own dental malpractice coverage in order to take

advantage of the better rates clearly indicates that they were something other than employees. If it is to reduce the rates, the employer should have reimbursed them if they were treated as employees.

Conclusion of Law 6, CR 296, again, the Conclusion is predicated upon facts which are based upon the Association Agreements which are invalid and revoked. The reference to Dr. Armand's testimony is misleading. Dr. Armand clearly testified that there were no written agreements in force during the time of the Audit Period.

Conclusion of Law 7, CR 296, also is in error. The ALJ "concludes that the three dentists, during the time period at issue, were not in a partnership relationship for tax purposes. First, Dr. Louise and Dr. Loretta did not share in the profits or losses. They were paid exclusively a percentage of their own respective gross production. . . Nor did it file any Federal income tax returns evidencing a partnership entity, such as a Form 1065." The evidence clearly demonstrates that not only were the two younger dentists, that is Dr. Louise and Dr. Loretta were participating in profits predicated upon their production and they received net profits after provision for overhead. The bottom line is profits were distributed. Profits indicates partnership. The mere fact that the dental practice did not file a Partnership Income Tax Return, Form 1065, is irrelevant and was addressed above. Under the circumstances of this case, with a small

partnership, the Form 1065 is not required.

Conclusion of Law 8, CR 296, recites, “Accordingly, the undersigned concludes that the services performed by Dr. Louise and Dr. Loretta during the time period at issue clearly and directly benefited the employer, and that the services performed were performed for wages.” The theory of the Department appears to be there was no partnership, there is no profits, there is no distribution of profits, the practicing dentists did not have any interest in the assets of the practice, they did not have any control over their patients, et cetera. As a result the Department avoided these particular questions of fact so as to support and bootstrap if you will, the decision of an employee working for wages.

Conclusion of Law 11, CR 298, is clearly wrong when it states, “The undersigned does not discount the testimony offered by the Petitioner (Appellant Dr. Armand) to the effect that Dr. Armand did not train or supervise the dentistry of the two dentists. He did not necessarily control and direct how Dr. Louise and Dr. Loretta treated patients. That being said, the preponderance of the evidence shows that Dr. Louise and Dr. Loretta were *likely subject to at least some direction and control.*” This is totally contrary to the sworn testimony of Dr. Louise. She testified that she was in 100% control of the patients. Control is also an important fact, even though not raised by the Department involving the creation of a

partnership.

For all the above reasons involving the Findings of Fact and the Conclusions of Law when there was 18 separate Findings and at least 16 are in error, it is impossible to conclude that the CONCLUSIONS OF LAW are valid and clearly demonstrate that the professional dentists, Dr. Loretta and Dr. Louise were mere employees. There is a complete failure to interpret the evidence and more importantly applying the facts to the law in the case such is tantamount to an arbitrary and capricious result.

An “arbitrary and capricious action” is defined as:

(A) willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached. *Ameriquest Mortg. Co. v. State Atty. Gen.*, 148 Wn.App. 145, 167, 199 P.3d 468 (2009) (quoting *Int’l Fed’n of Prof’l and Technical Eng’rs v. State Personnel Bd.*, 47 Wn.App. 465, 472, 736 P.2d 280 (1987)).

**B. The 3 Dentists at all times during the Audit Period, 2010, 2011, and 2012 were operating under a verbal agreement on the sharing of profits which involves a partnership or at the very least an equitable interest in the Dental Practice.**

All three dentists were operating under a verbal agreement for sharing profits which involves a partnership or at the very least an equitable interest in the Dental Practice.

The central issue is whether or not the three dentists were acting as partners, not mere employees.

The determination of Partnership vs. Employee-Employer related relationship is determined in large part under the Revised Uniform Partnership Act, which provides a partnership is “created whenever two or more persons agree to carry on a business and *share in profits and ownership control*.” “A partnership is an entity distinct from its partners and (may be) formed regardless of whether the persons entering into the agreement intend to form the partnership entity.” *Curley Elec., Inc. v. Bills*, 130 Wn.App. 114, 118, 121 P.3d 106 (2005) (quoting 1B Kelly Kunsch, *Washington Practice: Methods of Practice* § 67.2, at 37 (4th ed. Supp.2005)).

Drs. Loretta and Louise were not subject to the control of Dr. Armand. Just to the contrary. Dr. Louise testified that she had 100% discretion in dealing with her patients.

Throughout the hearing it was brought up from time to time that at the conclusion of the Audit Period and effective January 1, 2013, the DeFelice Family Dentistry formed a professional limited liability company

titled DeFelice and DeFelice PLLC. The operating assets of the dental practice owned in part by all three dentists were transferred to the PLLC. Dr. Loretta and Dr. Louise were not mere employees but rather had an interest in the former practice. Such interest connotes partnership.

The existence of a partnership is controlled by RCW 25.04.060 which provides in pertinent part, “By statute, a partnership is defined as an association of two or more persons to carry on as co-owners of a business for profit.”

Additionally, RCW 25.05.055, Formation of Partnership further provides:

“(3)(c) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits are received in payment: (emphasis added.)

“(i) of a debt by installment or otherwise;

“(ii) for services as an independent contractor or if wages or other compensation to an employee;

“(iii) of rent.”

After the establishment of a partnership, RCW 25.05.005, Definitions provide:

“(7) Partnership Agreements means the agreement, whether written, oral, or implied among the parties concerning the partnership . . .”.

As reflected in the facts of this case, there was:

- A verbal partnership is established and is proved by:
- A sharing of profits;
- Each of the three dentists contributed to the cost of the equipment;
- Each of the three paid their pro-rata share of overhead;
- Two of the three had an ownership interest in the facility in which the dentistry was practiced;
- Each of the three paid their pro-rata share of the materials utilized in the practice of dentistry;
- Each of the three had an ownership interest in the equipment utilized in the practice;
- In the event that either Dr. Louise or Dr. Loretta left the practice they would communicate the same to their patient and the patient would have the option of following them; and
- Unlike an employee, each Doctor had an economic interest in the dental practice which explains how the three Doctors transferred their assets, including the patients' list, to the professional LLC.

## VI. CONCLUSION

It is truly unfortunate that this case had to go through the loops of various hearings before an Administrative Law Judge, appealed to Spokane County Superior Court, and now further appeal to this Court of Appeals, Division III. All of this could have been avoided had the Tax Specialist at the conclusion of her examination of DeFelice Dentistry would have permitted counsel for the dental practice to review the materials and background with her. Instead, she simply stated that her job was complete, and if counsel wanted to go forward, he would have to follow the appeal process. This has placed an added burden on the Courts, the parties, and their respective lawyers. Nevertheless, based upon the foregoing, DeFelice and DeFelice PLLC, the successor in interest to DeFelice Dentistry requests that Division III, Court of Appeals reverse the Superior Court, and the State of Washington Employment Security Department.

In the event Appellant herein is successful in this appeal, it is Counsel's intention to apply to the Court for attorney's fees and costs in accordance with the provision RCW 50.32.160 (1988) which provides in pertinent part:

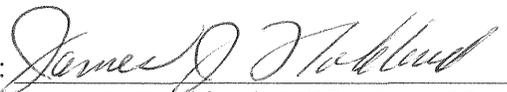
*“ . . . If the decision of the Commissioner shall be reversed or modified, such fee and costs shall be payable out of the Employment Compensation Administration Fund. In the allowance of fees the Court shall give consideration to the*

*provisions of this title in respect to fees pertaining to proceedings involving an individual's application for an initial determination for a waiting period credit, or claim for benefits. In other respects the practice in civil cases shall apply."*

RESPECTFULLY SUBMITTED this 8th day of July,

2014.

WORKLAND & WITHERSPOON, PLLC

By:   
James J. Workland, WSBA No. 4324

Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing and/or attached was served by the method indicated below to the following this 8th day of July, 2014.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX) to:

Email Transmission to: \_\_\_\_\_

Leah E. Harris  
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\_\_\_\_\_  
JAMES J. WORKLAND