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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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No. 268802-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

WASHINGTON TRUST BANK

Respondent

v

RIVER GORGE, a partnership; TBM SYNDICATE
a partnership, MARVIN CHAMBERLAIN et al

Appellants

APPELLANTS' / DEFENDANTS' BRIEF

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INTRODUCTION

This is an appeal from the trial court's summary judgment ruling that River Gorge Holsteins, TBM Syndicate and Dr. Marvin Chamberlain (the "Appellants"), who leased dairy cattle to Russell Dan Reynolds ("Reynolds") for milking at Reynolds' dairy, on the basis that, in addition to operating his own dairy, Reynolds was a partner in River Gorge Holsteins and TBM Syndicate, even though Appellants held no interest in Reynolds' dairy and Reynolds did not have either actual or apparent authority to purchase hay on behalf of Appellants. As this is an appeal from a summary judgment ruling, the standard of review is de novo.

ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Cross-Motion for Partial Summary Judgment by reason that Russell Dan Reynolds was not acting with either actual or apparent authority for River Gorge, a partnership, and TBM Syndicate, a partnership, when Reynolds purchased hay from Jerry Hodges, incurring a debt therefor, and such debt is not a liability of River Gorge or TBM Syndicate.

2. The trial court erred in granting Washington Trust Bank's Motion for Partial Summary Judgment by reason that Russell Dan Reynolds was not acting with either actual or apparent authority for River Gorge, a partnership, and TBM Syndicate, a partnership, when Reynolds purchased hay from Jerry Hodges, incurring a debt therefor, and such debt is not a liability of River Gorge or TBM Syndicate.
3. The trial court erred in denying Appellants' Motion for Summary Judgment by reason that Reynolds was not acting as an agent, actual or apparent, for River Gorge or TBM Syndicate when he purchased hay from Jerry Hodges and the unpaid obligation for such hay is not a liability of River Gorge or TBM Syndicate.
4. The trial court erred in ruling, at summary judgment, that "TBM Syndicate and River Gorge Partnerships are obligated to pay for the hay delivered by Mr. Hodges and consumed by the cattle belonging to the TBM and River Gorge Partnerships" when such partnerships did not contract to purchase hay from Mr. Hodges.
5. The trial court erred in ruling, at summary judgment, that "Dr. Chamberlain, as a partner of the TBM and River Gorge

Partnerships, is obligated to pay for the hay delivered by Mr. Hodges and consumed by the cattle belonging to the TBM and River Gorge Partnerships” when TBM Syndicate and River Gorge never contracted to buy such hay and the obligation to pay for such hay is not a liability of the partnerships.

STATEMENT OF THE CASE

A. Statement of Facts

Defendant, Dr. Marvin Chamberlain (“Chamberlain”) is a veterinarian, specializing in livestock, having his principal place of business in Moses Lake, Washington. (CP 178).

Mr. Russell Dan Reynolds (“Reynolds”) is a dairyman residing in Quincy, Washington. Dan Reynolds has owned and operated a sole proprietor dairy business in Grant County, Washington, (the “Reynolds Dairy”) since 1995. (CP 130, 137, 144, 145, 179). Reynolds filed a Chapter 7 bankruptcy in 2005. (CP 6). By reason of his discharge in bankruptcy, Reynolds is not a party to this lawsuit.

Jerry Hodges (“Hodges”) was, at all times relevant, a hay farmer who sold hay to Reynolds on credit. (CP 159). Reynolds' obligation to Hodges was discharged in bankruptcy.

Washington Trust Bank (“WTB”) provided financing to Hodges’ hay farming enterprise and has accepted an assignment from Hodges of all claims and causes of action Hodges has relating to the hay sold to Reynolds. (CP 6-7, 168-169).

In October of 1998, Reynolds and Chamberlain entered into a partnership known as River Gorge Holsteins (“River Gorge”). The purpose of River Gorge was to invest in registered dairy cattle. (CP 179). Contemporaneously, Reynolds, Chamberlain and Dr. Dean Koesel entered into a partnership known as TBM Syndicate (“TBM”). Like River Gorge, the purpose of TBM was to invest in registered dairy cattle. (CP 179).

Chamberlain also acquired a registered dairy cattle herd which he solely owned, separate and apart from River Gorge and TBM. (CP 136, 143; 179). Similarly, Reynolds owned his own dairy cattle which he maintained at the Reynolds Dairy. (CP 143).

A basic understanding of a cow’s cycle in a dairy is necessary to this case. A young cow, known as a heifer, is artificially inseminated so that it will give birth and begin producing milk. Upon giving birth, the cow is considered to be “in milk” and is a producing cow. The offspring of the cow is separated from its mother at birth. If the calf is male, after it is weaned, it

is removed from the dairy and, generally, sold. If the calf is female, it is raised until it is mature and can be bred so that it will become a producing dairy cow. If a cow is infertile, does not produce milk or is, for other reasons, unacceptable to the dairy, that cow becomes a cull and is removed from the dairy and sold. (CP 131-134, 179).

It is not uncommon for dairies to lease dairy cattle from outside parties. (CP 150-151). A standard rent is one dollar per day per head in milk. (CP 150). Under the terms of such agreements, the dairy is responsible to provide, at its sole expense, all feed, veterinary care and other expenses of maintaining the herd and raising the offspring of the herd, including bulls and culls, so long as such cattle are on the dairy premises. (CP 182-183).

From their inception, River Gorge, TBM and Chamberlain (sometimes hereinafter referred to collectively as the "Appellants") leased their cattle to the Reynolds Dairy. (CP 179-180). Under the terms of the lease agreements between the Appellants and Reynolds Dairy, Reynolds Dairy was to pay the Appellants rent of one dollar (\$1.00) per day for each cow that was in milk. (CP 136; 179-180). Reynolds owed this rental payment to the Appellants regardless of whether the dairy was profitable or losing money. (CP 143, 144). The Reynolds Dairy was solely responsible to

provide and pay for the cost of all feed, veterinary care and other expenses of maintaining the Appellants' herds and raising the herds' offspring, including calves, milking cattle and dry cattle while those cattle were on the dairy premises. The Reynolds Dairy was responsible to provide all care to bull calves and cull cows until such animals were removed from the Reynolds Dairy premises. (CP 155-156; CP 179-180).

Under the lease between the Appellants and Reynolds Dairy, heifer calves would remain on the Reynolds Dairy from birth until they were 9 to 10 months of age. During that period, Reynolds was responsible to care for the calves. (CP 131, 134). At 9 to 10 months of age, the calves were moved to property owned by Chamberlain until they were 22 to 23 months of age during which period Chamberlain paid for the feed. After that, the heifers were bred and returned to the dairy to calve and milk, after which Reynolds provided the feed. (CP 131, 135).

The Appellants profited from the lease arrangement with the Reynolds Dairy in the form of the rent of \$1.00 per day per head in milk, the value of the culls and bulls which could be sold, and any increase in the size of the herd. (CP 180). The Appellants had no interest, whatsoever, in the milk or

the proceeds of the milk produced by the leased herd. (CP 138, 139, 140, 143 144, 180).

The milk, the proceeds from the milk and the profits from the dairy belonged solely to Reynolds. (CP 24, 48, 49, 138, 139, 140, 143, 144, 149 180). Chamberlain had no interest in the dairy. (CP 144). All payments received upon the sale of the milk came in the form of checks payable solely to Reynolds and not to the Appellants. (CP 149). Consistent therewith, Reynolds was solely responsible for the costs of the dairy and any losses which the sole proprietorship might suffer. (CP 47, 180). Reynolds was responsible for feeding the cattle and the costs associated therewith. (CP 65, 155, 180). Reynolds was responsible for providing straw or other bedding materials for the cattle (CP 65). Reynolds was the sole person obligated on the Reynolds Dairy's Washington Trust operating line of credit for the dairy. (CP 144). The Appellants had no obligation to contribute to the Reynolds Dairy's feed costs, veterinary costs, straw or other bedding materials or any other expenses and, consistent therewith, Reynolds never requested that they contribute to such expenses or make any deduction from or offset against the rent Reynolds paid to the Appellants (CP 65, 146-149, 152, 180).

Jerry Hodges delivered hay to Mr. Reynolds from the spring of 2002 until April, 2005, which was fed to the cattle at the Reynolds Dairy. (CP 153-154, 159-161). Initially, Reynolds would pay Hodges at the time of delivery of each load of hay. (CP 161). This changed in the summer of 2002, when Reynolds quit paying for each load and started to fall behind in his obligation to Hodges. (CP 161). From 2003, to April, 2005, Hodges delivered 4,551,860 pounds of hay at a total price of \$246,787.90. During that period, Reynolds paid only \$32,235.80 to Hodges, leaving an unpaid balance of \$214,552.10. (CP 177).

During the time Hodges was delivering hay to Reynolds Dairy, Hodges knew the following facts:

- a. Chamberlain and Reynolds were partners in River Gorge (CP 83, 85, 86, 162, 164-165);
- b. That River Gorge produced dairy cows (CP 86, 164, 165);
- c. That River Gorge owned a portion of the herd on the Reynolds Dairy (CP 85, 164, 165);
- d. That Reynolds was obligated to pay rent on the River Gorge cattle (CP 87, 166-167); and

- e. That the proceeds of the milk were being paid by the purchasers of the milk directly to Reynolds and not to Chamberlain, River Gorge or TBM (CP 165).

It was Hodges' specific understanding that Reynolds, not River Gorge or any of the Appellants, was obligated to pay for the hay Hodges delivered to Reynolds. In this respect, Hodges testified as follows:

- Q. In your - - over the course of obviously this three-year period we're talking about and your conversations with Mr. Reynolds, was it ever discussed or did you discuss with Mr. Reynolds whose obligation it was to feed the River Gorge cattle?
- A. Specifically I don't think we discussed it, because I guess it's obvious. It depends on where the cattle are. If they are at Reynolds' facility, of course, he is responsible. If they are at Marvin's facility, then he would be responsible. But, specifically, we didn't discuss that.
- Q. So just a common-sense approach?
- A. Right.

(CP 168).

All payments Hodges received were by check written on Reynolds' account. (CP 83, 84, 162-163). No payment to Hodges ever originated from Chamberlain (CP 83, 162). Hodges never spoke with Chamberlain about the unpaid hay account. (CP 83, 162). Hodges never made an effort to contact Chamberlain about getting payment on the unpaid hay account. (CP 170).

On the financial statements Hodges prepared for his bank, Washington Trust, he identified the unpaid hay account receivable under the name "Dan Reynolds" and never identified an account receivable under the name of Chamberlain, River Gorge or TBM Syndicate. (CP 170). In fact, it never occurred to Hodges that Chamberlain might have any responsibility for the unpaid hay account until after all of the cattle on the Reynolds Dairy, including the Appellants' cattle, were sold at auction on June 3 and 4, 2005.

At deposition, Hodges testified as follows:

Q. When is the first time that it occurred to you that perhaps Mr. Chamberlain might have some responsibility for this bill?

A. I really don't recall that. I guess I'm not very versed in law.

...

Q. I'm not asking you for a legal opinion. I am not asking you whether he is or is not. Just the first time that it occurred that he might be.

A. I would imagine, when I saw that he was taking half of the money from the sale and thinking that, hey, I'm someone that's owed money out of this, too.

...

Q. Now, was it at that time, at the time of the sale, that you realized that he had an interest in some of the herd?

A. Oh, I knew he had an interest in it before the sale was even conducted.

Q. Okay. So then it should not have been a surprise that he took some of the money?

A. No, it wasn't a surprise. I knew he was going to get some. I knew he was going to get half of it.

(CP 171-172)

The last load of hay Hodges sold to Reynolds was delivered on April 16, 2005. (CP 173). A few days later, Hodges decided not to deliver any more hay to Reynolds (CP 173). Hodges filed a lien which resulted in the commencement of a frivolous lien lawsuit by Reynolds. (CP 174).

All of the cattle on the Reynolds Dairy, including the Appellants' cattle, were sold at auction on June 3 and 4, 2005. The proceeds of the sale of the River Gorge cattle were split between Chamberlain and Reynolds. The proceeds from sale of the TBM cattle were split between Chamberlain, Reynolds and Koesel. The monies from the sale of the cattle owned solely by Chamberlain were paid to Chamberlain. Finally, the proceeds from the sale of cattle owned solely by Reynolds were paid to Reynolds. (CP 181).

Reynolds filed for bankruptcy protection on July 29, 2005. Hodges received approximately \$70,000 through the bankruptcy. (CP 175).

B. Proceedings Below

Washington Trust Bank commenced this lawsuit before the Grant County Superior Court filed in May 22, 2006. (CP 1-10). The parties filed cross-motions for summary judgment. (CP 14-15, 108-109). On December 11, 2007, the Honorable Evan E. Sperline entered an order granting

Washington Trust Bank's motion for partial summary judgment and denying Appellant's cross-motion for summary judgment. (CP 199-203).

Appellants filed a motion for reconsideration of the trial court's ruling on the cross-motions for summary judgment on December 21, 2007 (CP 204-215) which was denied by order of the trial court dated January 22, 2008 (CP 225).

On February 13, 2008, Appellants filed their Notice for Discretionary Review. (CP 226-233). Washington Trust Bank joined in Appellants' Motion for Discretionary Review. On April 16, 2008, the Commissioner's Ruling was issued granting the Motion for Discretionary Review.

LEGAL ARGUMENT

A. Standard of Review.

This is an appeal from the trial court's ruling at summary judgment. The standard of review is de novo. Am. Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 768 (2007). Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

Summary judgment may be granted as to all or any part of a claim. CR 56(b). In responding, the non-moving party may not rely on the allegations made in his pleadings, but “by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e); Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

The purpose of a motion for summary judgment is to pierce the formal pleadings and test the non-moving party’s evidence to see if there is a genuine issue as to any material fact to be determined by the trier of fact. If there is none, the futile expense of a trial can be saved. See W.G. Platts, Inc. v. Platts, 73 Wn.2d 434, 441-43, 438 P.2d 867(1968); Lundgren v. Kieren, 64 Wn.2d 672, 677, 393 P.2d 625 (1964).

A defendant moving for summary judgment may meet its initial burden of proof by showing that there is an absence of evidence to support the non-moving party’s case. Ingersoll v. DeBartolo Inc., 123 Wn.2d 649, 654, 869 P.2d 1014 (1994); Young, 112 Wn.2d at 225, n. 1. The burden then shifts to the plaintiff to show the existence of a genuine issue of material fact. Ingersoll, 123 Wn.2d at 654; Young, 112 Wn.2d at 225. The nonmoving party may not rely on speculation or argumentative assertions to meet this

burden. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). If the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to the party’s case, on which that party will bear the burden of proof at trial,” the court should grant summary judgment in favor of the defendant. Young, 112 Wn.2d 225 *quoting* Celotex Corp. v. Catret, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. The Hodges’ hay obligation is not a debt of River Gorge, TBM or Chamberlain.

Washington Trust and the trial court, in rendering its ruling, leaned heavily upon the premise that all partners are liable for partnership liabilities. Although an accurate statement of the law, the joint and several liability of partners is not the issue in this case. The determinative issue is whether the Hodges hay obligation is a debt of the Partnerships at all.

Partnerships and their partners are not liable for all acts of their partners. In this regard, RCW 25.05.120(1) states:

A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner *acting in the ordinary course of business of the partnership or with authority of the partnership.*

(Emphasis added). The inverse is also true. “[N]either the partnership nor

the other partners are bound by the unauthorized act of one partner in a matter not within the apparent scope of the business of the partnership.” Swanson v. Webb Tractor & Equip. Co., 24 Wn.2d 631, 648 (1946).

So far as third persons are concerned, the authority of a partner, whether he be a member of a general partnership or of a special partnership, must be found in the actual agreement of the partners, or through implication arising from the nature of the business or the actual or usual manner in which it is conducted by the particular partnership or by similar partnerships in the same locality, or else from a reasonable inference of its necessity or fitness for the successful operation of the particular partnership business.

Swanson, at 649-650, *citing* First Nat. Bank of Ann Arbor v. Farson, 226 N.Y. 218, 123 N.E. 490. Thus, partnership liability for a partner’s actions arises either from actual authority as expressed in the partnership agreement or from apparent authority.

1. The facts do not support a conclusion that Reynolds had either actual or apparent authority to purchase hay for the Partnerships.

Reynolds did not have actual authority under the partnership agreement to purchase hay on behalf of the Partnerships insofar as the obligation to feed the cattle was part of Reynolds' rental obligation (CP 155-156; 179-180). Therefore, the Partnerships are liable only if Mr. Reynolds bought the hay as an apparent agent for the Partnerships.

The agency authority of a partner is codified at RCW 25.05.100. That statute states, in relevant part:

(1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, **for apparently** carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

(2) An act of a partner **which is not apparently** for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

(Emphasis added.) According to the foregoing statute, the relevant inquiry is whether the act allegedly binding the partnership was or was not “apparently” for carrying on the Partnerships’ business.

In this case, all of the evidence indicates that Mr. Reynolds was not acting under “apparent” authority for the Partnerships. The evidence in this respect is as follows:

During the time Hodges was delivering hay to Reynolds Dairy, Hodges knew the following facts:

- a. Chamberlain and Reynolds were partners in River Gorge (CP 83, 85-86, 162, 164, 165);

- b. That River Gorge produced dairy cows (CP 86, 164, 165);
- c. That River Gorge owned a portion of the herd on the Reynolds Dairy (CP 85, 164, 165);
- d. That Reynolds was obligated to pay rent on the River Gorge cattle (CP 87, 166, 167);
- e. That the proceeds of the milk were being paid by the purchasers of the milk directly to Reynolds and not to Chamberlain, River Gorge or TBM (CP 86, 165);

It was Hodges' specific understanding that Reynolds, not River Gorge or any of the Appellants, was obligated to pay for the hay Hodges delivered to Reynolds. In this respect, Hodges testified as follows:

Q. In your - - over the course of obviously this three-year period we're talking about and your conversations with Mr. Reynolds, was it ever discussed or did you discuss with Mr. Reynolds whose obligation it was to feed the River Gorge cattle?

A. Specifically I don't think we discussed it, because I guess it's obvious. It depends on where the cattle are. If they are at Reynolds' facility, of course, he is responsible. If they are at Marvin's facility, then he would be responsible. But, specifically, we didn't discuss that.

Q. So just a common-sense approach?

A. Right.

(CP 168).

All payments Hodges received were by check written on Reynolds' account. (CP 83-84, 162, 163). No payment to Hodges ever originated from Chamberlain (CP 8, 1623). Hodges never spoke with Chamberlain about the unpaid hay account. (CP 83, 162). Hodges never made an effort to contact Chamberlain about getting payment on the unpaid hay account. (CP 170). On the financial statements Hodges prepared for his bank, Washington Trust, he identified the unpaid hay account receivable under the name "Dan Reynolds" and never identified an account receivable under the name of Chamberlain or River Gorge. (CP 170) In fact, it never occurred to Hodges that Chamberlain might have any responsibility for the unpaid hay account until after all of the cattle on the Reynolds Dairy, including the Appellants' cattle, were sold at auction on June 3 and 4, 2005. (CP 171-172)

Although Hodges was aware of both the existence and purpose of the Partnerships, it was his understanding and belief that it was Mr. Reynolds' sole and exclusive responsibility to feed the cattle, that he was selling hay to Mr. Reynolds, not the Partnerships, and that Reynolds, not the Partnerships, were responsible to pay him. It had not been made to appear that Mr. Reynolds was acting for the Partnerships. Mr. Reynolds was not acting on behalf of the Partnerships with "apparent" authority or any authority, for that

matter. Neither Mr. Hodges nor anyone else ever claimed that the Partnerships had any responsibility for the bill until Washington Trust Bank, which was not a party to any of these events, took an assignment from Mr. Hodges. Simply put, there exists not one scintilla of evidence to support a conclusion that Mr. Reynolds had actual or apparent authority to purchase hay for and on behalf of the Partnerships. *All of those involved, including the seller, Mr. Hodges, believed he was acting for himself.*

This case falls squarely within the holding of Alaska Pac. Salmon Co. v. Matthewson, 3 Wn.2d 560, 563 (1940), where the Washington Supreme Court stated:

It is a well-known rule that, where a partnership business exists, each partner is a principal, as well as an agent. In other words, each partner is an agent of the other partners in the transaction of the partnership business. 47 C.J. 643; 1 Rowley, *Modern Law of Partnership*, 485, § 411.

Where, however, the partners are disclosed and known to a party contracting, and the contract is only signed by one of the partners, who contracts on his own behalf, the other partners are not bound thereby. 2 C.J. 836; Chapman v. Ross, 152 Wash. 262, 277 Pac. 854; 1 Mechem on Agency (2d ed.), 1048, § 1419.

Mr. Hodges knew of the existence of the Partnership and knew the identity of the partners. The agreement to purchase hay was entered solely by Mr. Reynolds, who was acting in his own behalf. Under the foregoing authority,

it follows that the Partnerships and Mr. Chamberlain are not liable to Mr. Hodges.

2. A partner may act for and on behalf of himself in the pursuit of his own outside business interests and the partnership incurs no liability for such actions

As is evident from the foregoing authorities, every act of a partner is not attributed to the partnership. A partner does not always act for and on behalf of the partnership or the other partners. "A partnership is an entity distinct from its partners." RCW 25.05.050(1). A partner can "switch his hat," so to speak, and act on behalf of any number of other legal entities or himself. Where a partner acts for and on behalf of himself, the partnership derives neither right nor responsibility from such actions.

The capacity of a partner to pursue his own individual business interests separate and apart from the partnership has long been recognized. In this respect, 59A Am. Jur. 2d Partnership § 303 states:

There is nothing inherently fraudulent or against public policy in permitting partners to engage in enterprises in their own behalf, provided they act in good faith toward the other partners, and provided the partnership agreement does not restrict the partners' outside business activities. Otherwise, a member of a partnership would be prohibited from investing his or her private funds.

The Washington Supreme Court has acknowledged that a partner may contract on his own behalf and, in so doing, binds only himself and not the partnership.

It is a well-known rule that, where a partnership business exists, each partner is a principal, as well as an agent. In other words, each partner is an agent of the other partners in the transaction of the partnership business. 47 C.J. 643; 1 Rowley, *Modern Law of Partnership*, 485, § 411.

Where, however, the partners are disclosed and known to a party contracting, and the contract is only signed by one of the partners, who contracts on his own behalf, the other partners are not bound thereby. 2 C.J. 836; Chapman v. Ross, 152 Wash. 262, 277 Pac. 854; 1 Mechem on Agency (2d ed.), 1048, § 1419.

Alaska Pac. Salmon Co. v. Matthewson, 3 Wn.2d 560, 563 (1940). Where a partner acts for and on behalf of himself, the partnership has no liability.

The Revised Uniform Partnership Act, as adopted by Washington, even permits a person to transact business with a partnership in which such person is a partner. RCW 25.05.165(6) states:

A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

This statute not only authorizes a person to conduct business with a partnership in which he is involved, but also expressly provides that he shall,

for purposes of such transaction, be treated as though he is not a partner. In construing the respective legal rights and obligations of the parties to such a transaction, the fact that such person is a partner is irrelevant. The partnership is not liable for debts contracted by a partner for the partner's own account so long as the partner is not acting with apparent authority of the partnership (as was the case with Mr. Reynolds as described above).

In the case at bar, the Partnerships have no liability for the Hodges' hay bill. The Hodges' hay bill was incurred by Reynolds for and on behalf of himself. Neither the Partnerships or Dr. Chamberlain had any interest in Reynolds Dairy. The dairy was a sole-proprietorship owned solely by Reynolds. (CP 145). Chamberlain, River Gorge and TBM did not share in profits of the dairy and were not entitled to any portion of the milk proceeds, all of which were paid directly to Reynolds. (CP 24, 48, 49, 138, 139, 140, 143, 144, 149, 180). Conversely, the Appellants did not share in the Dairy's losses and were not liable on the Dairy's operating line from Washington Trust. (CP 47, 144, 180). Finally, Chamberlain, River Gorge and TBM never contributed toward any of the dairy's expenses including land rent, vet bills, or cattle feed expenses (CP 49, 146-149). The Partnerships and Dr. Chamberlain were not partners in Reynolds Dairy.

The relationship between the Partnerships, Dr. Chamberlain and Reynolds Dairy was one of lessor/lessee. The dairy rented cows from the Appellants under an oral agreement. Under the rental agreement, Reynolds Dairy paid the Appellants rent of \$1.00 per day. (CP 48, 136-137, 140-142). Reynolds was solely responsible for feeding the cattle under lease. (CP 155-156). Consequently, Reynolds was entitled to all of the proceeds of the milk produced by those cattle, which he did not have to share with the Appellants. (CP 48, 49, 138, 140, 144, 149).

In purchasing the hay and incurring the obligation to Hodges, Reynolds was feeding the cattle as he was required to do under the terms of the lease with Chamberlain, River Gorge and TBM for the purpose of producing milk for his sole and exclusive benefit. Reynolds was acting for and on behalf of himself, not the Appellants. WTB's predecessor-in-interest, Hodges, fully understood that the obligation to pay for the hay rested solely with Reynolds. Reynolds was not acting within the scope of either River Gorge or TBM when he purchased hay from Hodges and, consequently, did not obligate Chamberlain, River Gorge or TBM on the Hodges hay bill.

Under the foregoing authorities, the lease transaction between Mr. Reynolds, on his own behalf as Reynolds Dairy, and the Partnerships in

which Mr. Reynolds is partner is a wholly legal and competent relationship. The Trial Court cannot ignore the lines between the Partnerships and Mr. Reynolds' personal business enterprise. The fact that Mr. Reynolds is involved in the Partnerships has no affect whatsoever on his transaction with Mr. Hodges unless Mr. Reynolds contracted that debt as an agent of the Partnership, which did not happen as discussed above.

C. Washington Trust Bank is not entitled to relief under the doctrine of unjust enrichment.

Before the trial court, WTB argued that it should be entitled to receive payment for the hay from Chamberlain and the Partnerships for the reason that, even if the hay was not purchased by Reynolds as an agent of the Partnerships, since the hay fed cattle owned by the Appellants, they would be unjustly enriched if they were not required to pay for the hay. In support of this argument, WTB directed the trial court to Costanzo v. Harris, 64 Wn.2d 901 (1964). Costanzo is plainly distinguishable from the facts at bar. Moreover, the doctrine of unjust enrichment is not available to WTB.

In Costanzo v. Harris, the defendants, Lawrence and Harris, formed a partnership to purchase, breed, feed and sell cattle. Under their partnership agreement, Lawrence was to buy the cattle and Harris was to provide the

expense of their care and do the work. Harris acquired a lease and option to purchase Costanzo's ranch. A large quantity of hay was stored on Costanzo's ranch. The oral agreement was that Harris would purchase the hay if he exercised the option and, if he did not exercise the option, he had the further option to either pay for or replace any hay consumed. The defendants' livestock venture was unsuccessful and they dissolved their partnership. Shortly thereafter, Harris exercised the option to purchase the ranch on his own behalf but did not pay for the hay. Costanzo sued both Lawrence and Harris for the value of the hay which had been consumed by the defendants' livestock.

The issue on appeal was whether the partnership and, therefore, Lawrence, as a partner, was jointly and severally liable with Harris for the value of the hay which was consumed by cattle owned by the partnership. Despite that only Harris had contracted the lease and option to buy, the court found that since "the hay was consumed by partnership cattle and the partnership was benefited," the partnership was unjustly enriched.

The Costanzo opinion lacks any explanation as to why the court found the enrichment to be "unjust." In that case, the hay was acquired specifically for the purpose of satisfying the partnership's obligation to feed its own

cattle. That case is distinguishable from the current circumstances insofar as the Appellants did not have an obligation to feed the cattle. The obligation to feed the cattle rested entirely upon the Reynolds Dairy, which was leasing the cattle from Chamberlain, River Gorge and TBM.

The mere fact that a third person benefits from a contract between two other persons does not make such third person liable under implied contract, unjust enrichment, or restitution. Enrichment alone will not suffice to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the circumstances and as between the two parties to the transaction. Farwest Steel Corporation v. Mainline Metal Works, Inc., 48 Wn. App. 719 (Div. I, 1987).

. . . [W]here a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. In other words a person who is conferred a benefit upon another, by the performance of a contract with a third person, it is not entitled to restitution from the other merely because of the failure performance by the third person.

Farwest Steel Company at 732. There must be a clear act of bad faith by the defendant resulting in such person's unjust enrichment before the court will

exercise its equitable powers. Id. at 733. According the Restatement of the Law of Restitution Section 112:

A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit has been conferred under circumstances making such action necessary for the protection of the interest of the other or third persons.

Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 603 (1943).

Washington Trust does not point to a single fact which justifies the exercise of the court's equity powers against the Appellants. None of the Appellants coerced or requested that Hodges sell hay to Reynolds.

A most striking aspect of this case is the length of time during which Hodges continued to deliver hay to Reynolds without payment. Hodges did not receive payment for more than 4 million pounds of hay delivered from 2003 through April 16, 2005. In this two and one-half year period during which Hodges continued to throw his hay at Reynolds without payment, he did not bother to contact Chamberlain or Koesel to advise them of the nonpayment. Hodges' conduct, under the circumstances, was un-business-like, if not negligent. Hodges' delay in insisting on payment before delivering any more hay makes it unfathomable for the court to exercise its

equitable powers in his favor. After all, he who sits on his hands is not entitled to equity.

D. Washington Trust Bank is not entitled to the formulation of a new lien remedy where the legislature has not seen fit to create a lien.

In asking the court to exercise its powers of equity and grant it relief in the form of unjust enrichment, Washington Trust is essentially requesting the court fabricate some new lien beyond the lien remedies already accorded by the legislature.

The legislature has created a lien, known as a “preparer’s lien” in order to secure hay growers such as Hodges. Under RCW 60.13.030-.040, a farmer delivering hay to a dairy is entitled to a preparer’s lien in and to the hay and the dairy’s accounts receivable if a notice is filed within thirty days of the date of delivery. Hodges followed this procedure. The legislature has not seen fit to create a lien in favor of the hay grower and against the owner of cattle fed with that hay. In the absence of such a legislative enactment, no such right exists and WTB must rely solely upon contract rights. In this instance, the contract was with Reynolds who filed bankruptcy. No further remedy is afforded and it is inappropriate for the court to exercise its equitable powers to grant a remedy in restitution or unjust enrichment.

E. The dairy cattle lease arrangement between the parties does not create a partnership nor give rise to liability akin to a partnership.

The mere fact that a lessor/lessee relationship exists between the parties, which, by its very nature, links the fortunes of both lessor and lessee to some degree, does not mean that a partnership exists or that lessor and lessee are liable for one another's obligations. To the contrary, Washington courts have repeatedly recognized that even imaginative agricultural leases do not create partnership or co-partner liability.

A partnership is statutorily defined as "an association of two or more persons to carry on as co-owners a business for profit . . ." RCW 25.05.005. Likewise, a partnership is formed when two or more persons associate to carry on as co-owners of a business for profit. RCW 25.05.055(1). The Revised Uniform Partnership Act provides some guidance in determining if a partnership exists. RCW 25.05.055(3) states, in relevant part:

(3) In determining whether a partnership is formed, the following rules apply:

(a) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property;

(b) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have

a joint or common right or interest in property from which the returns are derived; and

(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 were received in payment:

...

(iii) Of rent;

In order for a partnership to exist there must be joint ownership of the business itself accompanied by a joint right of control of its affairs. Hopkins v. Smith, 45 Wn.2d 548, 551-552 (1954). "One of the most important tests of a partnership or joint adventure is whether there is a share in losses." Gottlieb Bros. v. Culberton's, 152 Wash. 205, 208-209 (1929). Even where there is an agreement to share the profits, in the absence of an agreement to share losses there is, generally, no partnership. Z.C. Miles Co. v. Gordon, 8 Wash. 442, 446 (1894).

Washington courts have repeatedly recognized numerous agricultural arrangements which, despite the sharing of profits, do not give rise to partnerships. In State ex rel. Ratliffe v. Superior Court for Whitman County, 108 Wash. 443, 451 (Wash. 1919), the Supreme Court stated:

Over this entire country we see that farmers lease their lands for agricultural purposes, and agree to receive a third or other portion of the products of the soil and the labor of the tenant as a payment of the rent. Again, it not unfrequently occurs that the owner of the soil furnishes the land, the teams, implements and the seed; whilst another performs the labor,

and they divide the product according to the terms of their agreement, and no one ever imagined that in either class of such cases the parties became in any sense copartners.

In Z.C. Miles Co. v. Gordon, 8 Wash. at 446, the court stated:

It is true that there is an agreement here to share the profits, but on the other hand there is no agreement to share the losses, which is the ordinary test of a partnership. We know of no reason why a person who has a house, or a farm, or any other character of property which he is desirous of leasing, shall not be allowed to make his own terms as to what the payment shall consist of, whether, in the case of a farm, it shall be for one-half of the gross amount of grain raised, or for one-half of the amount of grain raised after the expense of putting in and harvesting the crop are deducted, or for a certain number of bushels of grain without regard to the amount raised, or for a certain specified sum of money. In each instance the amount agreed upon is intended as a payment for the use of the premises; and in the case at bar it seems that nothing more is imported into this contract than is generally found in contracts of lease.

As in the foregoing examples, the Appellants determined to lease their cattle to Reynolds. The Appellants were free to make their own terms as to what constitutes payment for the use of their cattle. The parties settled on \$1.00 per day per cow in milk and payment of all expenses of maintaining the cattle, including feed, while the cattle were on the dairy premises. As the evidence establishes, such terms are standard within the industry. These terms do not create a partnership nor do they make the Appellants liable for the feed as though they were copartners.

CONCLUSION

The trial court erred in granting partial summary judgment in favor of Washington Trust Bank and in denying Appellants' motion for summary judgment. Reynolds was not acting as an agent of the Partnerships when he purchased hay from Hodges. It is undisputed that Reynolds did not have actual authority to contract hay on behalf of the Appellants. Moreover, it is indisputable that Reynolds did not have apparent authority to buy the hay for the Partnerships. Every single person involved in the transaction was of the belief and understanding that Reynolds was buying the hay for his own account and not for the Partnerships. The only conclusion which can result from such facts is that Reynolds did not have apparent authority, or any authority, to buy hay for and on behalf of the Partnerships. The hay debt is not an obligation of the Partnerships or its partners.

The trial court's ruling cannot be supported by the Costanzo case of the doctrine of unjust enrichment. The application of the doctrine of unjust enrichment is appropriate only when such enrichment is the result of an act of bad faith by the party alleged to have been enriched. Washington Trust Bank cannot point to one single fact justifying the exercise of the trial court's

equity powers against the Appellants. The trial court's ruling cannot be sustained by the doctrine of unjust enrichment.

Appellant's respectfully request the trial court's ruling be overturned and that summary judgment dismissing Washington Trust Bank's claims against the Appellants be granted.

DATED this 30th day of July, 2008.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'C. F. Ries', written in black ink.

Christopher F. Ries, WSBA #23584
Attorney for Appellants / Defendants