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SUPREME COURT

STATE OF WASHINGTON

No. 268802-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

WASHINGTON TRUST BANK, a Washington banking corporation,
Respondent

v.

RIVER GORGE, a partnership; TBM SYNDICATE, a
partnership, MARVIN CHAMBERLAIN and
MRS MARVIN CHAMBERLAIN, and the marital
community comprised thereof,
Petitioners

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

This Reply Brief is offered by Petitioners in reply to the Respondent's Answer to Petition for Review. In its Answer to Petition for Review, Respondent requests that, if the Petition for Review is granted, that the Supreme Court also review the Court of Appeals ruling that "Washington Trust cannot establish Mr. Reynolds had actual authority to act on behalf of the partnerships." Appendix at page A-10. The Respondent's reservation of review of this issue should be denied on the basis that such ruling does not conflict with existing decisions and was not erroneous.

II. STATEMENT OF THE CASE

See Section D of Petition for Review.

III. ARGUMENT

The considerations governing acceptance of review are set forth at RAP 13.4(b). That section states:

. . . A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

It appears that Washington Trust Bank (“WTB”) argues that review should be accepted under RAP 13.4(b)(1) and (2), on the basis that the Court of Appeals decision conflicts with existing decisions of the Supreme Court and the Court of Appeals. The ruling below on the issue of Mr. Reynold’s authority on behalf of the partnerships is not in conflict with existing precedent and was not erroneous.

A. Reynolds did not have authority to purchase hay for and on behalf of the Petitioners.

A partner can bind a partnership to a contract if: (1) the partner has actual authority to act for and on behalf of the partnership; or (2) the partner acts within the ordinary course of the partnership business so that it appears, to the other party to the contract, that the party has apparent authority. In short, the inquiry is did the partner have actual authority or was the partner acting with apparent authority?

1. Reynolds did not have actual authority.

Reynolds did not have actual authority to bind the Petitioners to the purchase of hay from Hodges. Actual authority arises only from agreement amongst the partners. Swanson v. Webb Tractor & Equip. Co., 24 Wn.2d 631, 648 (1946). WTB argues that Reynolds had actual authority to purchase hay for and on behalf of the Partnerships, although it does not and cannot point to any basis in the record to support this

conclusion. To the contrary, by contract the burden to feed the cattle rested with a third-party, Reynolds Dairy, the sole proprietorship in which the Petitioners had no interest. (CP 130, 137, 144, 145, 179).

The Partnerships were formed for the sole purpose of investing in registered dairy cattle. (CP 179). Likewise, Dr. Marvin Chamberlain, individually, acquired dairy cattle for the purpose of investing in registered dairy cattle. (CP 136, 143, 179). The Partnerships and Chamberlain did not own the facilities necessary to milk the cattle and did not intend to operate a dairy. (CP 60).

Reynolds, individually and in his own behalf, owned and operated a dairy with all of the facilities necessary to milk cattle. (CP 130, 137, 144, 145, 179). The Petitioners leased all of the cattle owned by the Partnerships and Chamberlain to the Reynolds Dairy. (CP 60-61, 179-180). Under the terms of the rental agreement, the Reynolds Dairy was to pay One Dollar (\$1.00) per day for each cow in milk and the Reynolds Dairy was solely responsible to provide and pay for the cost of all feed, veterinary care and other expenses of maintaining the herds while the cattle were at the Reynolds Dairy. (CP 136, 155-156, 179-180).

As is evident, the obligation to feed the cattle rested solely and exclusively with Reynolds, in his individual capacity as owner of the Reynolds Dairy and as lessee of the cattle. Under such circumstances,

how is it that Reynolds could be said to have actual authority from the Partnerships and Chamberlain to purchase hay for the cattle on behalf and as an obligation of the Partnerships? The unavoidable conclusion is that he did not. That obligation was his and his alone.

WTB's contention that Reynolds had actual authority has no support in the record. WTB argues that as between the partners, Mr. Reynolds was responsible for feeding the cattle." The only reference WTB makes to the record to support this alleged fact is CP 65, lines 10 through 13. The cited Clerk's Papers consist of a portion of the deposition of Dr. Dean Koesel consisting of the following:

Q. You testified about Mr. Reynold's contribution to the TBM cattle and, I think, two-year-old cattle. Was one of the things he contributed providing feed to the animals?

A. He fed the animals.

As is apparent, Dr. Koesel testified that Mr. Reynolds fed the cattle but he did not testify that Mr. Reynolds fed the cattle on behalf of the Partnerships or that he had actual authority to purchase feed on behalf of the corporation. That this is an unjustified stretching of Dr. Koesel's testimony is revealed by looking to the construction WTB placed upon that same testimony in its pleadings submitted in support of WTB's motion for summary judgment. In the pleading entitled "Facts in Support

of Plaintiff's Motion for Partial Summary Judgment," WTB construed that same testimony to mean merely that "Mr. Reynolds was responsible for feeding the cattle." (CP 103).

WTB's effort to remold the testimony of Dr. Koesel to support its argument of actual authority directly contradicts the clear and unequivocal testimony of every single other party to this transaction including Mr. Reynolds himself. In deposition, Mr. Reynolds testified that he was responsible under the lease to feed the cattle.

Q. While you were renting cattle and they were milking, whose responsibility was it to provide the labor to feed them?

A. I did.

Q. Okay. And whose responsibility was it to purchase feed for them during that period?

A. That period, I was.

(CP 155-156).

The foregoing is not the only instance in which WTB mischaracterizes the facts. In the Answer to Petition for Review, WTB inaccurately paraphrases Chamberlain's testimony to suit its purposes. At footnote 5 on page 16, WTB states:

Under the terms of the agreements between the partners, "... Reynolds was solely responsible to pay for the cost of all feed, veterinary care, and other expenses of maintaining the cattle while the cattle were on the

Reynolds Dairy, including the bull calves and cull cows until such animals were removed from the dairy.” (C.P. at p. 180, l. 1-3)

(Emphasis added). The actual testimony from Chamberlain’s declaration is as follows:

. . . . **Under the terms of this lease arrangement,** Reynolds Dairy was required to pay to the Lessors rent of \$1.00 per day for each cow that was in milk. In addition, Reynolds was solely responsible to provide and pay for the cost of all feed, veterinary care, and other expenses of maintaining the cattle while the cattle were on the Reynolds Dairy, . . .

(CP 179-180) (Emphasis added).

Neither Dr. Koesel’s testimony or Chamberlain’s testimony support WTB’s contention that Reynolds’ responsibility as a partner was to buy feed for the cattle. How can it be argued that the Partnerships expressly or impliedly authorized Reynolds to buy hay on behalf of the Partnerships where the Partnerships by contract (the lease of the cattle) delegated that obligation to the Reynolds Dairy?¹ The responsibility to feed the cattle fell solely and exclusively upon Reynolds in his individual capacity as the sole proprietor of the Reynolds Dairy. The only conclusion supported by the record is that Reynolds did not have the actual authority of the Partnership or Chamberlain to buy feed.

¹ In King v. Riveland, 125 Wn.2d 500, 507 (1994), the Washington Supreme Court stated, “Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess.”

Since there existed no agreement amongst the partners bestowing actual authority upon Mr. Reynolds, WTB resorts to blurring the line between the Partnerships and the dairy. WTB contends that since Mr. Reynolds was a partner as well as the owner of the dairy, Mr. Reynolds' purchase of the hay should be attributed to both entities. This contention contradicts the accepted principles that a partner may pursue his own individual business interest separate and apart from the partnership, may contract on his own behalf, binding only himself and not the partnership, and may transact business with a partnership in which he is a partner, for which such purposes he shall be treated as though he is not a partner. RCW 25.05.165(6); Alaska Pac. Salmon Co. v. Matthewson, 3 Wn.2d 560, 563 (1940); 59A Am. Jur. 2d Partnership § 303. The fact that Reynolds was both a partner and the sole proprietor of Reynolds Dairy does not make the hay obligation he incurred a debt of the Partnerships' unless he had actual or apparent authority.

As its final effort to establish that Mr. Reynolds had the actual authority of the Partnerships to buy the hay from Hodges, WTB points out that the cattle had to be fed in order to maintain their health and value and, therefore, the feed served to benefit the partnership. Once again, actual authority arises only from the expressed or implied agreement amongst the partners. The only conclusion that is supported by the record is that

Reynolds did not have actual authority to buy hay for and on behalf of the Petitioners where that obligation was placed upon his separate and solely owned dairy in which the Petitioners had no interest.

2. Reynolds did not have apparent authority.

In the absence of actual authority, the conduct of a partner may still bind the partnership if the partner is acting with apparent authority. “Apparent authority” exists only if a third-party has a reasonable belief that the partner has authority to act for the partnership. This point was recently addressed by the Washington Supreme Court in its September 18, 2008, ruling in Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 555 (2008), wherein the Supreme Court stated:

An agent has apparent authority to act for a principal only when the principal makes objective manifestations of the agent's authority “to a third person.” King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). To create apparent authority, a principal's objective manifestations “must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for a principal [and] be such that the claimant's actual, subjective belief is objectively reasonable.” Id. (citing Smith v. Hansen, Hansen, & Johnson, Inc., 63 Wn. App. 355, 363, 818 P.2d 1127 (1991)). Manifestations of authority by the purported agent do not establish apparent authority to act. Lamb v. Gen. Assocs., Inc., 60 Wn.2d 623, 627, 374 P.2d 677 (1962).

In King v. Riveland, 125 Wn.2d 500, 507 (1994), the Supreme Court stated that “apparent authority” is based, amongst other things, upon the subjective belief of the affected third-party:

With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person. Smith, at 363. Such manifestations will support a finding of apparent authority only if they have two effects. First, they must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant's actual, subjective belief is objectively reasonable. Smith, at 364.

In short there is a two part test for apparent authority: (1) did the third-party subjectively believe that the agent/partner had authority, and, if so; (2) was such belief reasonable?

WTB alleges facts which it contends gave Reynolds’ apparent authority. Some of those facts are as follows:

- “The animals had to be fed regardless of which of the partnership purposes were being served.” [Answer to Petition for Review, page 16];
- “It was apparent that Mr. Reynolds was conducting a cattle operation on his premises. Feeding cattle is an apparent component of conducting a cattle operation.” [Answer to Petition for Review, page 18];

In addition to the foregoing, WTB also states, “Mr. Hodges reasonably concluded that Mr. Reynolds’ purchase of the hay and straw was “incident” and “appropriate” to the conduct of the business of the

Partnerships,”² although WTB gives absolutely no reference to the record to support this assertion.

WTB seemingly misses the point. While these facts might, in other circumstances, support a finding of apparent authority, they do not in this case because Hodges did not subjectively believe that Reynolds was acting for the Partnerships.

In the present case, Hodges knew of the existence of the Partnerships and knew that he was selling hay to Mr. Reynolds, in his individual capacity. 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);

² Answer to Petition for Review, page 19.

It was Hodges' specific understanding that Reynolds, not River Gorge or any of the Petitioners, 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.

(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 Bank, 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).

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 believed or 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, understood he was acting for himself.*

IV. CONCLUSION

The Court of Appeals found that "Washington Trust cannot establish Mr. Reynolds had actual authority to act on behalf of the Partnerships." Mr. Reynolds did not have actual authority to purchase hay on behalf of the Partnerships for the purpose of feeding the cattle insofar as the obligation to feed the cattle was that of Mr. Reynolds alone.

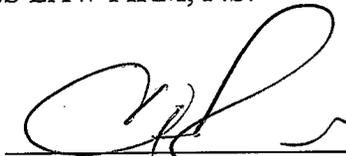
Likewise, Mr. Reynolds did not have apparent authority to purchase hay from Mr. Hodges on behalf of the Partnerships as is apparent from the fact that Mr. Hodges did not subjectively believe that Mr. Reynolds was acting for the Partnerships. The Court of Appeals did not err in finding that Mr. Reynolds was not acting on behalf of the Partnerships when he bought hay from Mr. Hodges. Washington Trust Bank's request for review of this issue should be denied.

DATED this 13th day of April, 2009.

Respectfully submitted,

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By



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**WASHINGTON TRUST BANK, a
Washington banking corporation,**

Respondent,

v.

**RIVER GORGE, a partnership; TBM
SYNDICATE, a partnership; MARIN
CHAMBERLAIN and MRS. MARVIN
CHAMBERLAIN and the marital
community comprised thereof,**

Appellants.

No. 26880-2-III

Division Three

UNPUBLISHED OPINION

BROWN, J. — Russell Dan Reynolds, Marvin Chamberlain, D.V.M., and Dean Koesel, D.V.M., formed two separate partnerships, which purchased, bred, and sold registered dairy cattle. The cattle from both partnerships lived at a dairy owned by Mr. Reynolds. Mr. Reynolds was responsible for providing feed for the cattle, and for approximately three years, he purchased hay for the cattle from Jerry E. Hodges. Mr. Reynolds failed to pay for a majority of the hay delivered. Mr. Hodges assigned any claim related to the hay bill to Washington Trust Bank. Washington Trust Bank sued both partnerships, and the trial court granted partial summary judgment in its favor,

finding the partnerships liable for the hay bill. The partnerships appeal. We find the partnerships liable for the hay bill under the doctrine of unjust enrichment, and affirm.

FACTS

Mr. Reynolds, as a sole proprietor, operated a dairy located in Quincy, Washington. In 1998, Mr. Reynolds and Dr. Chamberlain formed a partnership, known as River Gorge Holsteins ("River Gorge"). The purpose of the partnership was to purchase, breed, and eventually sell registered dairy cattle. The River Gorge cows spent the first portion of their lives at Mr. Reynolds' dairy, and then were transferred to Dr. Chamberlain's property for a period of time. After Dr. Chamberlain artificially inseminated the cows, they were transferred back to Mr. Reynolds' dairy, where they calved and were then milked.

Also in 1998, Mr. Reynolds, Dr. Chamberlain, and Dr. Koesel formed a partnership known as TBM Syndicate. The purpose of the partnership was also to purchase, breed, and eventually sell registered dairy cattle. Like the River Gorge cows, the TBM Syndicate cows spent the first portion of their lives at Mr. Reynolds' dairy, then were transferred to Dr. Chamberlain's property, and returned to Mr. Reynolds' dairy after they were artificially inseminated. The TBM Syndicate cows remained at Mr. Reynolds' dairy to calve and give milk.

While their cattle remained at Mr. Reynolds' dairy, River Gorge and TBM Syndicate (collectively "the partnerships") charged Mr. Reynolds rent in the amount of one dollar per day, per cow. This rent was only charged for the days each cow

produced milk. Any profits from the sale of milk from the partnership cows belonged to Mr. Reynolds; the partnerships were not entitled to these profits.

Further, while the partnership cattle were at Mr. Reynolds' dairy, Mr. Reynolds was responsible for purchasing feed for the cattle. Mr. Reynolds was also responsible for other expenses associated with maintaining the partnership cattle, including veterinary costs.

From spring 2002 through April 2005, Mr. Reynolds purchased hay to feed the partnership cattle from Mr. Hodges. Initially, Mr. Reynolds paid Mr. Hodges when the hay was delivered. During the summer of 2002, the regular payments ceased, and from that point through April 2005, Mr. Reynolds made limited payments to Mr. Hodges. Mr. Reynolds incurred a substantial obligation for the hay he accepted without making payments. All payments received from Mr. Reynolds by Mr. Hodges came in the form of a check written in Mr. Reynolds' name only or via automatic withholdings from the milk proceeds received by Mr. Reynolds.

The partnership cattle were bred while at Mr. Reynolds' dairy, increasing the size of the herds. All of the partnership cattle consumed the hay purchased by Mr. Reynolds from Mr. Hodges.

On June 3-4, 2005, the partnerships sold their cattle at an auction. The proceeds from the River Gorge cows were split equally between Dr. Chamberlain and Mr. Reynolds. The proceeds from the TBM Syndicate cows were split equally between Dr. Chamberlain, Mr. Reynolds, and Dr. Koesel.

Mr. Hodges' hay bill remained outstanding. He assigned any claim regarding this bill to Washington Trust Bank ("Washington Trust").

Washington Trust sued the partnerships and Dr. Chamberlain, alleging Mr. Reynolds purchased the hay from Mr. Hodges on behalf of the partnerships, and therefore, the partnerships are liable for the hay.¹ Washington Trust moved for partial summary judgment on the issue of liability, arguing it was entitled to relief based on partnership liability, or the alternative, based on the doctrine of unjust enrichment. The partnerships filed a cross-motion for partial summary judgment, also on the issue of liability.

In support of their motions, both parties submitted excerpts from Mr. Hodges' deposition. Mr. Hodges deposed he knew Dr. Chamberlain and Mr. Reynolds were partners in River Gorge. He further deposed he knew River Gorge owned a portion of the cattle on Mr. Reynolds' property, and that Mr. Reynolds "was supposed to pay some sort of . . . rent on the cattle." Clerk's Papers (CP) at 87. Mr. Hodges deposed he sold the hay to Mr. Reynolds' business, "Dan Reynolds Dairy." CP at 85. He further deposed he did not contact Dr. Chamberlain about the hay bill, "[b]ecause he wasn't the person I dealt with on the hay." CP at 170. Mr. Hodges deposed he had an account

¹ In addition to the partnership cows, Dr. Chamberlain also leased his own cows to Mr. Reynolds. Therefore, Washington Trust also alleged Dr. Chamberlain is liable for the hay his cows consumed because Mr. Reynolds purchased this hay as Dr. Chamberlain's agent. However, it appears Washington Trust only proceeded against Dr. Chamberlain on a theory of partnership liability. The trial court only ruled on Dr. Chamberlain's liability as a partner for hay consumed by the partnership cows. Further, in its brief, Washington Trust acknowledges it "is not seeking to recover from the

receivable for Mr. Reynolds, but not for Dr. Chamberlain or River Gorge. Additionally, Mr. Hodges deposed he and Mr. Reynolds did not discuss who had the obligation to feed the River Gorge cattle.

Additionally, both parties submitted excerpts from Mr. Reynolds' deposition. Mr. Reynolds deposed the milk proceeds he received from the River Gorge cattle went toward their expenses, including the hay they consumed. In addition, Mr. Reynolds deposed he did not ask Dr. Chamberlain or Dr. Koesel to contribute to the hay bill because "I didn't think they would." CP at 148.

In support of its motion, Washington Trust submitted excerpts from Dr. Koesel's deposition. When asked if Mr. Reynolds ever discussed the hay bill with him, Dr. Koesel stated, "[n]ot specifically. Before the sale, he just mentioned he owed for hay." CP at 64-65.

In his declaration submitted in support of the partnerships' motion, Dr. Chamberlain declared, "I did not know [Reynolds Dairy] was having difficulties paying for feed." CP at 180. He further declared, "I did not become aware of the problem with the unpaid hay account or the extent of that account until April, 2005, when [Mr.] Reynolds told me that he could no longer continue to afford to operate the dairy or provide feed to the cattle." CP at 181.

After a hearing on the motions, the trial court granted Washington Trust's motion for partial summary judgment, and denied the partnerships' motion. The trial court ruled

Partnerships for the hay consumed by cattle owned solely by ... Dr. Chamberlain." Resp't Br. at 14.

the partnerships, and Dr. Chamberlain, are liable for the hay from Mr. Hodges, consumed by the partnership cattle. The partnerships unsuccessfully moved for reconsideration.

We accepted discretionary review.

ANALYSIS

The issue is whether the trial court erred in granting partial summary judgment in favor of Washington Trust, ruling the partnerships are liable for the hay from Mr. Hodges, consumed by the partnership cattle. The partnerships contend the hay bill is a debt incurred by Mr. Reynolds on his own behalf, not on behalf of the partnerships. Alternatively, the partnerships contend Washington Trust is not entitled to relief under the doctrine of unjust enrichment.

We review a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert*, 141 Wn.2d at 34. Further, summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." CR 56(c).

In its motion for discretionary review, the partnerships acknowledged there are no genuine issues of material fact.² Accordingly, the issue before us is whether Washington Trust was entitled to judgment as a matter of law.

Partnership Liability

The partnerships first contend the hay bill is a debt incurred by Mr. Reynolds on his own behalf, not on behalf of the partnerships.

“Each partner is an agent of the partnership for the purpose of its business.”

RCW 25.05.100(1). Furthermore:

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.

RCW 25.05.100(1).

In addition, “when a contract is made in the name of an individual but for the benefit of the partnership, there is implied liability on the part of other partners even though they are not named.” *Barnes v. McLendon*, 128 Wn.2d 563, 572, 910 P.2d 469 (1996) (citing *Warren v. Rickles*, 129 Wash. 443, 445, 225 P. 422 (1924), *aff'd*, 134 Wash. 701, 234 P. 673 (1925)). However, “[i]n order to bind unnamed partners, the obligation must be within the scope of the partnership business or the proceeds must be

² For the first time in their reply brief, the partnerships assert “there are genuine issues of fact warranting trial for which the trial court’s ruling must be overturned.” Reply Br. of Appellant at 17. However, Washington appellate courts will not consider

used in the business or for the benefit of the firm.” *Id.* at 573 (citing *Collyer v. Egbert*, 200 Wash. 342, 348-49, 93 P.2d 399 (1939)).

Here, the business of the partnerships was to purchase, breed, and eventually sell registered dairy cattle. Thus, feeding the partnership cattle was for “carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership.” RCW 25.05.100(1).

However, the more difficult question is whether Mr. Reynolds was acting in his capacity as a partner when he purchased feed for the partnership cattle. Although Mr. Reynolds was a partner in River Gorge and TBM Syndicate, Mr. Reynolds was also a sole proprietor operating a dairy. As a sole proprietor, Mr. Reynolds paid rent in exchange for receiving the milk from the partnership cows. All parties agree he was also responsible for purchasing feed for the partnership cattle. Further, according to Mr. Reynolds, the milk proceeds from the River Gorge cattle were used to cover their expenses, including the hay they consumed.

In light of these established facts, it cannot be said that Mr. Reynolds’ purchase of hay from Mr. Hodges was in his capacity as a partner of River Gorge and TBM Syndicate. Rather, Mr. Reynolds’ purchase of hay was in his capacity of a sole proprietor operating a dairy. When the partnerships leased their cattle to Mr. Reynolds individually, and agreed to allow Mr. Reynolds to keep the milk proceeds, he assumed the obligation to provide feed to the cattle.

arguments raised for the first time in a reply brief. *Lewis v. City of Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991).

Likewise, contrary to the assertion of Washington Trust, Mr. Reynolds did not have actual or apparent authority to purchase hay on behalf of the partnerships. See *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994) (stating “[a]n agent’s authority to bind his principal may be of two types: actual or apparent”).

“When an agent has actual authority to act on behalf of the principal, the agent’s exercise of the authority binds the principal.” *Blake Sand & Gravel, Inc. v. Saxon*, 98 Wn. App. 218, 223, 989 P.2d 1178 (1999). “Actual authority may be express or implied.” *King*, 125 Wn.2d at 507. “Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess.” *Id.* Implied actual authority depends upon objective manifestation from the principal to the agent. *Id.* The most common example of implied actual authority is when “the agent has consistently exercised some power not expressly given to the agent and the principal, knowing of the same and making no objection, has tacitly sanctioned continuation of the practice.” *Id.*

Here, the partnerships did not expressly or impliedly authorize Mr. Reynolds to purchase hay on behalf of the partnerships. Rather, Mr. Reynolds assumed the responsibility of purchasing hay for the partnership cattle in his capacity of a sole proprietor operating a dairy.

Regarding apparent authority, “[a]n agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent’s authority ‘to a third person.’” *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008) (quoting *King*, 125 Wn.2d at 507). Further, “a principal’s objective

manifestations 'must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for a principal [and] be such that the claimant's actual, subjective belief is objectively reasonable.'" *Id.* (quoting *King*, 125 Wn.2d at 507). "The burden of establishing apparent authority rests on the one asserting its existence." *State v. French*, 88 Wn. App. 586, 595, 945 P.2d 752 (1997).

Here, although Mr. Hodges knew of the existence of River Gorge, and that this partnership owned a portion of the cattle on Mr. Reynolds' property, neither River Gorge nor TBM Syndicate made any manifestations to Mr. Hodges that would lead him to believe Mr. Reynolds was acting with the apparent authority of the partnerships. See *Ranger Ins. Co.*, 164 Wn.2d at 555. Mr. Hodges acknowledged he solely dealt with Mr. Reynolds. Accordingly, Washington Trust cannot establish Mr. Reynolds had apparent authority to act on behalf of the partnerships. See *French*, 88 Wn. App. at 595.

Unjust Enrichment

Next, the partnerships contend Washington Trust is not entitled to relief under the doctrine of unjust enrichment.

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A claim of unjust enrichment requires proof of three elements: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Id.* at 484-85.

Here, the partnerships received a benefit at the expense of Mr. Hodges, in that their cattle were sustained by the hay provided by him. Thus, the remaining question is whether it would be unjust for the partnerships to retain this benefit without paying for it. See *Young*, 164 Wn.2d at 484-85. Washington Trust argues the doctrine of unjust enrichment applies here, relying on *Costanzo v. Lawrence*, 64 Wn.2d 901, 395 P.2d 93 (1964).

In *Costanzo*, Sam Lawrence and Norman Harris formed a partnership, with the purpose of purchasing, breeding, feeding, and selling cattle. Subsequently, Mr. Lawrence and Mr. Harris moved their cattle onto a ranch owned by the plaintiff. *Id.* at 902. They entered into a lease with an option to purchase the ranch, with Mr. Harris named as the lessee. *Id.* Mr. Lawrence did not sign the lease, but he did participate in the lease negotiations, helped pay rent, and retained the right to exercise the option to purchase if Mr. Harris chose not to. *Id.* The plaintiff stored a large amount of hay on the ranch. *Id.* The lease provided if Mr. Harris exercised the option to purchase, the hay would be sold to him at a set price; if not, Mr. Harris could either pay for or replace any hay consumed. *Id.*

Mr. Lawrence and Mr. Harris later terminated their partnership. *Id.* Mr. Harris then exercised the option to purchase the plaintiff's ranch, without paying for the hay. *Id.* The plaintiff sued Mr. Lawrence and Mr. Harris for the value of the hay stored at the ranch. *Id.* The trial court found in favor of the plaintiff, concluding the partnership was unjustly enriched by the hay consumed by the partnership cattle. *Id.* at 902-03. On appeal, our Supreme Court affirmed. *Id.* at 903-04. The court concluded "the record

contains substantial evidence to support the trial court's finding that the partnership was unjustly enriched to the extent of the hay consumed by the partnership cattle." *Id.* at 903. Further, the court found that even though the plaintiff knew of both partners, and only one partner, Mr. Harris, signed the lease, the non-contracting partner, Mr. Lawrence, received a benefit. *Id.* at 903-04.

Here, the benefit received by the partnerships from Mr. Hodges was substantial. The sole asset of the partnerships were their cattle, which increased in number while residing at Mr. Reynolds' dairy, consuming hay provided by Mr. Hodges. Therefore, akin to *Costanzo*, it would be unjust for the partnerships to retain the substantial benefit of the feed provided to their cattle without making any payment.

The partnerships argue although they received an incidental and indirect benefit from the hay, they were not unjustly enriched, because purchasing hay was solely Mr. Reynolds' obligation under his lease of the partnerships' cattle. In support of this argument, the partnerships cite to *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 741 P.2d 58 (1987). There, a third party who had contracted to provide materials to a subcontractor sued the general contractor for materials it provided to the subcontractor, under a theory of unjust enrichment. *Id.* at 720-21. The court found that although the general contractor was enriched by the actions of the third party, the enrichment was not unjust. *Id.* at 732-33. Instead, the general contractor was "a mere incidental beneficiary" of the contract between the subcontractor and the third party. *Id.* at 732. The court reasoned the general contractor did not contribute to the third party's

loss, in that it did not "acquiesce in or encourage the contract" with the third party. *Id.* at 732-33.

However, unlike here, *Farwest Steel Corp.* did not involve a partnership. *Id.* at 721-22. Here, the benefit accruing to the partnerships from the contract between Mr. Hodges and Mr. Reynolds was not merely incidental. To the contrary, the primary asset of the partnerships, their cattle, was sustained by this third party contract. Thus, it would be unjust to allow the partnerships to retain this benefit without payment. Accordingly, Washington Trust is entitled to relief against the partnerships, under the doctrine of unjust enrichment, for the hay consumed by the partnership cattle. In addition, Dr. Chamberlain is liable, jointly and severally, for this obligation. See RCW 25.05.125(1) (in general, "all partners are liable jointly and severally for all obligations of the partnership").

The trial court did not err in granting partial summary judgment in favor of Washington Trust.

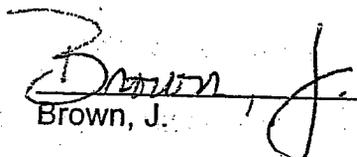
Affirmed.

A majority of the panel has determined this opinion will not be printed in the

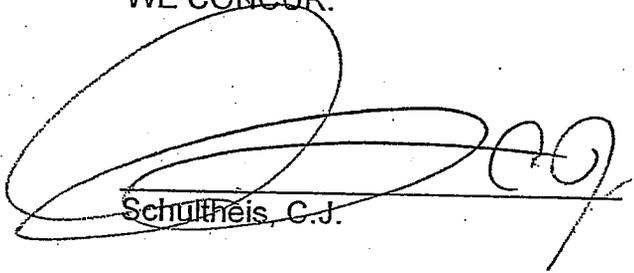
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Wash. Trust Bank v. River Gorge

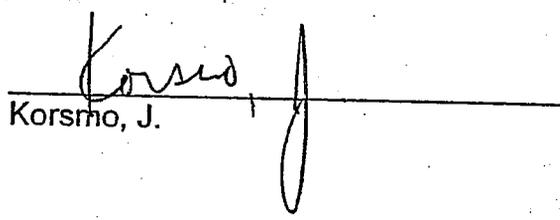
Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.


Brown, J.

WE CONCUR:


Schultheis, C.J.


Korsmo, J.