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DIVISION ONE OF THE COURT OF APPEALS
OF THE STATE WASHINGTON AT SEATTLE

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DIVISION ONE

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Appeal Case Number: 63711-8-1

CRAIG BERNHART

Appellant,

vs,

MARIANN DANARD

Respondent.

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STATE OF WASHINGTON
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APPELLANT CRAIG BERNHART OPENING BRIEF

This is an appeal of a Judgment, Findings of Fact and Conclusions of Law, entered by the Honorable Judge Michael Downs, Snohomish County Superior Court, in the lawsuit of Craig Bernhart, plaintiff, v. Marian Danard, defendant, case no. NO. 07-2-02498-9

Craig Bernhart

Shoreline, Washington

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A. INTRODUCTION

This lawsuit arises from three separate disputes between the Appellant, Craig Bernhart, and the Respondent, Marian Danard. The common thread between the parties' disputes is that they center on the parties' partnership and business relations.

The issues on appeal relate to: (a) the parties' respective ownership/membership "percentage interest") of Cedar Professional Center, LLC; (b) the existence of a land development umbrella partnership referred to as the "Skyway" property partnership; and (c) Respondent's failure to comply with her duties as the financial manager of the LLC, including failure to provide periodic accountings, financial reports, and federal tax returns.

B. ASSIGNMENT OF ERRORS

1. ERRORS REGARDING OWNERSHIP INTERESTS OF CEDAR PROFESSIONAL CENTER, LLC

The first dispute relating to the parties' membership interest in Cedar Professional Center, LLC arises because the LLC agreement (Tr. Ex. 143) does not state their respective ownership shares, and was signed by the Appellant under extraordinary circumstances involving Respondent's Danard's counsel contacting Appellant Bernhart and presenting the "agreement" to him during

the absence of Appellant's Bernhart's counsel. (CP 12-35, at 27-29, Findings number 42 to 48, pages 15-17).

Respondent's counsel did not disclose the deletion of a provision stating that the parties each had a 50% ownership interest. (CP 12-35 at 28-29, Finding 46-47, pages 16-17). Appellant Bernhart signed the document in ignorance of this modification from a prior draft. (RP 486-505) . The Appellant assigns errors to all findings which condone this conduct including the following specific findings and conclusions:

Conclusion of Law Number 2 (CP 12-35, at CP 20, Findings of Fact and Conclusion of Law , Conclusion 2 which states:

That the Defendant [Danard] committed no actionable fraud as to the Plaintiff [Bernhart] with regard to the operating agreement for Cedar Professional Center, LLC, a Washington limited liability company.

Conclusion of Law Number 6 (CP 33, Findings of Fact and Conclusion of Law , conclusion 6 at page 21) which states:

That the Defendant has not breached any fiduciary duty to the Plaintiff, including but not limited to actions and/or omissions with regard to Cedar Professional Center, or the management of the real property owned by Cedar Professional Center, LLC.

Conclusion of Law Number 7 (CP 33, Findings of Fact and

Conclusion of Law Number 7 at page 21) which states:

That the Defendant has not breached any duty of good faith and fair dealing with regard to Cedar Professional Center, or the management of the real property owned by Cedar Professional Center, LLC.

Conclusion of Law Number 8 (CP 33, Findings of Fact and

Conclusion of Law Number 8 at page 21) which states:

That the Defendant has not violated any provision of WAC 308-124D-150.

Conclusion of Law Number 9 (CP 33, Findings of Fact and

Conclusion of Law Number 9, at page 21) which states:

That the Defendant has not breached any contract with Cedar Professional Center, LLC with regard to the management of the real property owned by Cedar Professional Center, LLC.

Conclusion of Law Number 10 (CP 33, Findings of Fact and

Conclusion of Law Number 10, at page 21) which states:

That the Plaintiff is not entitled to reformation of the Cedar Professional Center, LLC, operating agreement. That pursuant to the operating agreement executed by the Plaintiff and Defendant for Cedar Professional Center, LLC, the Defendant is the owner of 71% of the membership units in Cedar Professional Center, LLC and the Defendant is the owner of 29% of the membership units in Cedar Professional Center, LLC.

Conclusion of Law Number 11 (CP 33-34, Findings of Fact and Conclusion of Law number 11, 2 at pages 21-22 which states:

The operating agreement executed by and between the Plaintiff and Defendant on the 4th day of December, 2002 for Cedar Professional Center, LLC is hereby confirmed as the valid and enforceable operating agreement for the same limited liability company.

Conclusion of Law Number 14 (CP 34, Findings of Fact and Conclusion of Law number 14, at page 22) which states:

That as the prevailing party with regard to Plaintiff's claims pertaining to reformation of the Cedar Professional Center, LLC operating agreement, the Defendant is entitled to her reasonable attorney fees.

Conclusion of Law Number 15 (CP 34, Findings of Fact and Conclusion of Law number 15, at page 22) which states:

Foster was not required to identify for Bernhart the specific changes that were made in the agreements. In fact, because Foster was representing Dandard, and Bernhart was represented by independent counsel Weigelt, it would have been a breach of Foster's obligations to his client to disclose anything to Bernhart. Furthermore, because Bernhart was represented by independent counsel, it would have been improper for Foster to engage in substantive communication with Bernhart.

Conclusion of Law Number 7 (CP 33, Findings of Fact and

Conclusion of Law Number 7 at page 21) which states:

That the Defendant has not breached any duty of good faith and fair dealing with regard to Cedar Professional Center, or the management of the real property owned by Cedar Professional Center, LLC.

The Appellant further assigns error to the trial courts related finding and the award of attorney fees as set forth in the Judgment and Order of Dismissal.

2. ERRORS REGARDING EXISTENCE OF UMBRELLA PARTNERSHIP

The second disputes relates to the existence of a general partnership between the parties involving the purchase, development, ownership, use and sale of real property which for references purposes will be referred to as the "Skyway" property partnership. This was an "umbrella" partnership which later included a number of other parcels of real property. The Respondent disputed the existence of a partnership.

The trial court held that the arrangement between the parties was not a partnership but a convoluted series of business relations which shared a few common threads. This was in complete disregard of the parties' handwritten memorandum of partnership (Trial Exhibit 1) which was entered into in connection

of Appellant Bernhart's Skyway property and provides that: "all profits shall be divided equally after expenses and costs (Tr. Ex. 1)

Appellant Bernhart assigns error to the trial court findings and conclusions that the relation between the parties was not a partnership. Appellant Bernhart assigns error to the following specific Finding of Fact and Conclusions made by the trial court:

Finding of Fact Number 52 (CP 31) which states:

There was no failure on Danard's part to disclose to Bernhart. While in the process of negotiating the terms of the operating agreement, Danard and Bernhart were operating at arms length, and were entitled to negotiate the terms of an agreement that best suited their respective interests.

Conclusion of Law Number 2 (CP 32, Findings of Fact and Conclusion of Law Number 2 at page 20)) which states:

No partnership exists between the Plaintiff and Defendant with regard to the Skyway/Tuscany property, or any other parcel or real property as alleged in the Plaintiff's Complaint, including but not limited to the following identified entities and/or projects (list of properties omitted).

Conclusion of Law Number 3 (CP 32, Findings of Fact and Conclusion of Law Number 3 at page 20) which states:

That the Plaintiff has no right, title or interest in or to any of the properties described in the preceding paragraph 2.

3. ERRORS REGARDING RESPONDENT'S LLC DUTIES

The third dispute relates to the Respondent's management of the parties' Cedar Professional Center, LLC, and her failure to provide periodic financial reports, file federal tax returns, provide Appellant with K-Is, provide annual accountings or financial summaries., and failure to collect rent from herself or entities she owned who were tenants. The Respondent, who was the managing member and in exclusive control of the LLC's financial books and records, did not file any tax returns for six years.

Respondent assigns error to the following specific Findings of Facts and Conclusions of Law, (CP 12-35) and the Judgment and Order of Dismissal. (CP 6-11).

Conclusion 6, (CP 23, Findings page 21) that Respondent did not breach any fiduciary duty to Appellant, and related finding in the Judgment and Order of Dismissal. (CP 10).

Conclusion 7 (CP 23, Findings page 21) that Respondent did not breach any duty of good faith or fair dealing, or duty regarding the management of the LLC, and related finding 6 in the Judgment and Order of Dismissal. (CP10).

Conclusion 9 (CP23, Findings page 21) that Appellant did

not breach any contract regarding management of the LLC and related finding 8 in the Judgment and Order of Dismissal. (CP 10).

Conclusion 10 (CP23 Findings page 21) that Respondent is not entitled to reformation of the LLC agreement, and related finding 9 in the Judgment and Order of Dismissal. (CP10).

C. STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The trial court's errors regarding the parties respective ownership interest in Cedar Professional Center, LLC raise the following issues to be considered by the Court of Appeal.

1. Whether an attorney revising a draft contract has a duty to disclose to the opposing party and his counsel changes made to the draft agreement.
2. Whether the changes to the draft agreement made by an attorney are effective when the attorney or his office directly contacts the opposing party and asks him to sign the contract during the opposing party's counsel's absence and without disclosing to the opposing party or the opposing party's counsel the changes that were made.
3. Whether the client of an attorney who revised a draft contract and presented it to an opposing party for signature during the opposing party's counsel's absence may benefit from the changes in the contract when the changes (a) were not disclosed and (b) involved subtle language which modified the parties' ownership percentage from being stated as "Craig Bernhart 50%, Marian Ann Danard 50%" in

the draft to stating that the ownership interests were held by “Craig Bernhart and Marinann Danard.”

The trial court’s errors regarding the existence of the umbrella partnership raise the following issues:

4. Whether the trial court’s fundamental belief that the absence of the word “loss” in the parties hand written partnership memorandum means that the parties did not have intend a partnership even though they agreed to share the profits, expenses and costs.

5. Whether the trial court erred in finding that the parties did not have a partnership relating to the Skyway property, and the properties later purchased with the monies or proceeds from the refinance or sale of that property.

The trial courts errors regarding its findings that the Respondent’s conduct regarding the management of the LLC was not a breach of duties raises the following issues.

6. Whether there is any legal authority supporting the trial court’s findings and conclusions that Marian Danard’s complete failure to produce financial reports, periodic accountings, federal income tax returns, bank records, and related financial records, is not a breach of her fiduciary duties as a manager of the parties’ LLC.

D. STATEMENT OF THE CASE

Procedural History. This is an appeal of a Judgment (CP 6-

11), Findings of Fact and Conclusions of Law (CP 12-35), entered on May 29, 2009 by the Honorable Judge Michael Downs of the Snohomish Superior Court, in the matter of Craig Bernhart v. Marian Danard, case number 07-2-02498-9. Notice of the Appeal was timely filed with the trial court on June 25, 2009.

This lawsuit was originally filed on February 13, 2007. The Complaint was amended on three occasions. The issues raised in the Third Amended Complaint (CP 311- 312) and the Answer and 3rd party Complaint (CP 241-248) proceeded to trial on January 5, 2009 before the Honorable Michael Downs of the Snohomish County Superior Court. The trial court entered its Findings of Fact and Conclusion of Law (CP 12-35) on May 29, 2009, and Judgment (CP 6-11) on the same date.

The underlying lawsuit was for an accounting of the parties' partnership and determination of the parties' ownership, i.e./membership interest) of the Professional Center, LLC, and the existence of a real property partnership related to the "Skyway" property, and later properties purchased from the proceeds and refinance of it. (CP 241-248)

By agreement, the issues in the case were bifurcated. The

issues relating to the existence and terms of the partnership(s) proceeded to trial on January 5, 2009, and the issues related to the accounting were reserved for later proceedings. While the accounting issues were not presented, certain financial aspects of the parties' financial affairs were before the court as evidence supporting or refuting the existence of the parties' partnerships. In this regard, the issues at trial were limited to the existence and terms of the partnerships in dispute. There was no accounting of either the parties' Skyway partnership nor an accounting of the parties' Cedar Professional Center, LLC.

Despite the bifurcation of the accounting issues, the trial court entered a series of findings relating to Respondent's conduct to the effect that she had not violated her duties, even though it was undisputed that she engaged in numerous acts which are per se violations such as her failure to provide an accounting, failure to provide periodic financial reports, the co-mingling of personal and corporate funds and bank accounts, and failure to file federal tax returns for the years 2002 to 2008. (RP 171, 428-432, 442-446, 448-450, 453-456)

Appellant Bernhart has assigned error to the Findings of

Fact and Conclusion of Law relating to these issues.

E. STATEMENT OF FACTS

1. Overview Of the Parties' Relation.

This case arises from a series of business arrangements between Appellant Bernhart and Respondent Danard involving the purchase, development, ownership and sale of real property.

The Appellant Bernhart contends that these arrangement rise to a level of partnership between the parties. (RP 70-115) The “umbrella” partnership is evidenced by a hand written memo signed by Appellant Craig Bernhart and Respondent Mariann Danard (Trial. Exhibit 1) and provides for the sharing of “profits”, “costs” and “expenses.” The document written by the parties did not use the word “losses”, but the sharing of costs and expenses entailed the sharing of losses, particularly in the context of non-revenue producing real property which was being developed by the parties.

The original partnership between the parties related to the “Skyway Property” (aka Tuscany). (RP 126-128). This property was owned by Appellant Bernhart, and conveyed to Respondent Mariann for “financing purposes” to generate funds for development, and ultimately for purchase of other properties. (RP

128).

The original partnership was an “umbrella” partnership in the context that it acted as a springboard for the parties’ later purchase of additional properties. Over the course of the next five years it encompassed nearly a dozen real estate developments, and separately, set the tone of the parties limited liability company Cedar Professional Center, LLC, in which they were to be 50/50 owners. (RP 158-163, RP 195-196, 277-278, RP 309-312, RP 317, RP 320, RP 340).

Throughout the parties’ relation, Appellant Bernhart, who is a dentist by profession, literally devoted hundreds and hundreds of hours in overseeing the land developments, working with government officials, and otherwise being actively engaged in the development side of the parties’ partnership. He was not engaged in the financial side of the partnership. The Respondent Danard oversaw the financial side, doing the books, managing cash flow, making banking arrangements, managing the bank accounts, responsible to do the federal tax returns, and other hands on administrative tasks and the paperwork.

The parties’ relation continued until they had a falling out in

late 2006. At this juncture the Respondent (with the projects nearly finished) disclaimed the partnerships and alleged for the first time that the parties were not 50/50 owners of Cedar Professional Center and not partners in the other properties.

2. Background and Common Facts Relating To Cedar Professional Center, LLC

The history of the parties' relation as members of the Cedar Professional Center, LLC, its formation, and the property it owns, are not seriously in dispute other than the parties' respective ownership share. The history between the parties' is summarized in Mr. Weigelt's testimony. (RP 489-505, also 506-526)). His testimony in its entirety is material to the parties' Member's Operating Agreement which was now in dispute. (RP 489-505).

By way of chronology, in the fall of 2002 the Appellant Bernhart had an option agreement and right of first refusal to purchase from Covenant Mortgage/Harry Properties, LLC certain commercial property known as the Cedar Professional Center. (RP 249-265, 422, 434, 573-573, 578, 487-526).

This property had originally been owned by the Appellant, and conveyed to Covenant Mortgage as part of a financial

settlement of Appellant's personal liability of a failed condominium project he has invested in. The property consists of an office building. The Appellant Bernhart conveyed it to Covenant Mortgage subject to Appellant Bernhart's right to repurchase it. (RP 249-265, 432, 434-438)

In fall of 2002 Mariann Danard and the Appellant Bernhart desired to form a limited liability company for the purpose of purchasing the office building pursuant to the Appellant Bernhart's agreement and right of first refusal with Covenant Mortgage. At the time, Covenant desired to be cashed out of the building and was offering to sell it at a price several hundreds of thousands of dollars below its fair market value. In the fall of 2002 the parties agreed that the value of the right of first refusal was \$150,000 or more. (RP 497) (Danard Dep. 303-304).

Under the Covenant Agreement the Appellant had the right to purchase the property at a price and more than \$250,000 below the then current appraised price of the property. (RP 492)

The Appellant Bernhart's rights were not transferable but could be exercised by a limited liability company or other entity owned by the Appellant Bernhart, or in which the Appellant

Bernhart owned 50% or more of the outstanding ownership share. In November 2002 the Appellant Bernhart and Ms. Danard retained separate legal counsel to assist them in forming an limited liability company to purchase the property. (RP 433, 440, 441, and 449)

The parties intended that Appellant Bernhart's capital contribution would be an assignment of his rights to purchase the property plus a promissory note. In the context of the LLC agreement the Appellant Bernhart was to receive a capital contribution credit of \$150,000 in exchange for the assignment of his rights to the building. Ms. Danard was to contribute her capital contribution in cash. (RP 492, 149-152, 640-643, 487, and 526).

In connection with the formation of the limited liability company the facts relating to execution of the agreement are not in dispute. (CP 27-29 Findings 43-48 at pages 15-17). Ms. Danard was represented by William Foster, William Foster, P.S. and the law firm of Hutchison and Foster. Appellant Bernhart was represented by separate counsel, Mr. Edward P. Weigelt, Jr. The Mr. William Foster previously represented the Appellant Bernhart through late 2000.

In connection with the Appellant and Respondent's mutual

desire to form a limited liability agreement the parties first contacted Mr. Weigelt, in November, 2002. (CP 27, Finding 43) Mr. Weigelt did not agree to represent Respondent Danard, and she also had a long term relation with Mr. Foster. (CP 27-28, Finding 44). In this meeting the parties advised Mr. Weigelt of their general intent and their desire to form an LLC. (CP 28, Findings 44-45). All involved understood and agreed that Mr. Weigelt would represent Appellant, and that Mr. Foster would represent Respondent, and that Mr. Weigelt would prepare the agreement for Mr. Foster's review. (CP 28, Findings 44-45)

Based on this meeting and the representations made to him by the parties, Mr. Weigelt then prepared a draft Cedar Professional Center, LLC, Member's Agreement (aka Member's Operating Agreement). He did so on behalf of Appellant Bernhart. (CP 28, Findings 45)

The key provision relating to the parties' ownership interests was based on what the Respondent and Appellant had originally advised Mr. Weigelt of as to their mutual intent during the parties' meeting. Material to the draft of this Agreement is that Mr. Weigelt understood from both the Respondent and the Appellant

that they would be 50/50 owners, that Appellant would contribute to the LLC his right to purchase the building, plus the sum of \$100,000 to be paid in the future. The document drafted by Mr. Weigelt reflects his actual understanding of the parties' intent based on their meeting. (CP 28, Findings 44).

Upon completion of the Agreement, Mr. Foster asked Mr. Weigelt to forward the disc so that he (Foster) could proof it and make minor changes. They did not discuss the particulars of any changes. They did not discuss the parties' ownership interests. They did not discuss the contributions to be made by either party. Mr. Weigelt delivered a copy of the Agreement and a disc to Mr. Foster as he (Weigelt) was leaving town. Mr. Foster, if needed, was going to proof out the agreement and potentially make changes to it during Mr. Weigelt's absence. (RP 341-371, RP 376-380, RP 381, RP 387, RP 388)

During Mr. Weigelt's absence, Respondent stressed to the Appellant the urgency of completing the formation of the LLC, and that the parties could not wait a few days for Mr. Weigelt's return. At this juncture Mr. Foster prepared the revised Agreement now in dispute. Neither Mr. Foster nor his office contacted the Appellant's

counsel, Mr. Weigelt. (RP487-526) (CP 29, Finding 47).

Mr. Foster or his office did, however, contact Appellant directly, and requested that Appellant come to his office and signed the Agreement. (CP 29, Finding 47-48)

Appellant then went to Mr. Foster's office. He understood that this "agreement" was the one drafted by his attorney. No one corrected his understanding. At Mr. Foster's office his staff presented Appellant with the agreement. (CP 29, Finding 47).

They did not advise Appellant that it had been changed in anyway from the one drafted by Mr. Weigelt, nor did they provide Appellant with a "redline" version, or one which was marked or which highlighted the changes in any way. (CP 29, Finding 47)

Mr. Foster's office did not provide a copy to Mr. Foster's version of the agreement to Mr. Weigel. (RP 487-505) (CP 29-30, Finding 48). Nor did Mr. Foster's office advise Mr. Weigelt that they had contacted the Appellant. Mr. Weigelt was not aware that Mr. Foster was presenting this document to Appellant for his signature. (CP 30, Finding 48). (RP 487-505).

Neither Mr. Foster nor his staff contacted Mr. Weigelt to request authorization to communicate directly with Appellant. (CP

29-30, Findings 47-48). However, given the prior relation between Mr. Foster and Appellant and the parties' overall business relation and umbrella partnership, this was not an issue nor should the mere fact this communication occurred be construed as improper.

At issue on appeal is that neither Mr. Foster nor his staff informed Appellant Bernhart that:

- (a) Mr. Weigelt had not seen the document being presented;
- (b) Mr. Weigelt had not approved the document being presented; and
- (c) The document being presented potentially materially changed the ownership interest in the LLC from a 50/50% ownership to something else.

Neither Mr. Foster nor his staff advised Appellant that they had not obtained his attorney's approval of the document. Appellant was led to believe, or at had assumed, that Mr. Weigelt had approved the document, and no one at Mr. Foster's office corrected this belief. (RP 487-526).

After the Agreement was signed, the original document was taken by Respondent Mariann Danard before anyone could make copies. Mr. Foster did not have a copy. Appellant Bernhart did not have a copy. (RP 487-505)

Upon Mr. Weigelt's return he learned that a document had been signed in his absence and requested a copy of it. Mr. Foster was not able to provide a copy, and did not disclose to Mr. Weigelt that the document was anything other than a "proofed and printed out" version of what Mr. Weigelt had originally drafted. (RP 487-505) Mr. Foster opined that he did not have a copy because his client had taken it and not returned it. Mr. Foster did not advise Mr. Weigelt of any to had been made to the draft agreement. (RP 487-505, RP 442-444, RP 449-451, Danard Dep at 326,327).

Thereafter, Ms. Danard did not provide Appellant, Mr. Weigelt, or even her own counsel with a copy of the agreement. (RP 487-526) At the time the parties were close friends, and Appellant was not concerned. During the course of the parties' business relation, there was no dispute that they were equal partners, i.e., over the course of the next several years, there was no dispute that the parties were 50/50 owners of Cedar Professional Center, LLC. In fact, the agreement now in dispute itself recites that the ownership of the LLC is vested in: Craig Bernhart and Mariann Danard. It does not state any percentage interest next to their names. (Trial Exhibit ____ at page ____).

When the parties' relation soured in 2006, Mariann Danard, for the first time, claimed to own more than 50% of the LLC. (RP 640-643, 487-505). She now claimed that she had contributed more money and hence had a larger ownership share. Despite the parties' agreement as to the value of Appellant's right to purchase the building, the Respondent now claimed that it had no value and hence Appellant, she argued, should not get credit for it.

The Respondent produced the subject disputed agreement only at or after the commencement of this lawsuit. Prior to then, Appellant had believed that it the document he signed had been the agreement prepared by his attorney. (RP 443, 448-480)

The validity of the agreement and the parties' respective ownership interest are now in dispute. Appellant contends that the parties' LLC agreement is not valid because Respondent's attorney did not disclose the changes to the document, nor disclose that it had not been given to or approved by Appellant's own attorney.

3. Cedar Professional Center, LLC Breach of Duties By Respondent.

The trial court makes a series of conclusions that Respondent Danard did "not breach" her fiduciary duties as the

manager of the Cedar Professional Center, LLC. (CP 23-24, Conclusions 6,7, 9, and 10. Findings at page 21) and that Respondent did not breach any fiduciary duty to Appellant, and related finding in the Judgment and Order of Dismissal. (CP 10).

The trial court's findings/conclusions are either: (a) totally inconsistent with the law or (b) not intended to address the matters which were touched upon but not the subject of this litigation.

In this broad context of this litigation there was undisputed evidence that the Respondent Danard had commingled funds, not provided periodic financial or businesses reports, not prepared or filed federal the tax returns, not collected rent from her personal use of the property, and otherwise disregarded her duties as the manager of the LLC and the manager responsible for its financial books. (See generally, RP 163, 171, 172, 428, 442-446,453-456) .

Respondent's management of the LLC was discussed in detail in her deposition, which was admitted in its entirety as evidence at trial. Her conduct is noted at: (RP 480, 466, 478, 504, 17-29, 80, 143, 163-172, 428-432, 442-446, and in the deposition of M. Danard at 358-370, 478-493, 504-507, 510-521)

With respect to the Cedar Professional Center, the

Appellant did not have access to books, nor access to bank records, and had no tax records. This conduct is the hallmark of a breach of duties by a managing member of an LLC.

4. The Skyway Partnership.

The parties' Skyway partnership was disputed. However, the evidence was clear that some material relation existed: Appellant paid partnership bills, Appellant works hundreds and hundreds of hours for the development of the partnership properties, Appellant contributed the property at discounts, and the parties worked together. While the properties were titled in the Respondent's name for financing purposes, all of their conduct was done in association for mutual benefit.

D. STANDARD OF REVIEW

The standard of review of the trial court's finding of fact is one of substantial evidence. The trial court's findings will be sustained on appeal if it is supported by substantial evidence. Sandler v. U.S. Development, 44 Wn. App. 98 (1986). Substantial evidence is evidence which is sufficient to persuade a fair minded person of the truth of the premises. Washington Belt and Drive Systems, Inc. vs. Active Erectors, 54 Wn. App., 612 (1989).

E. ARGUMENT

1. Respondent and Her Attorney Breached Their Duties To the Respondent By Their Failure To Disclose Material Changes To The LLC Agreement.

The initial issues on appeal are: (a) Whether an attorney revising a draft contract has a duty to disclose to the opposing party and his counsel changes made to it; and (b) whether the changes to the draft agreement are not void when the attorney contacts the opposing party and asks him to sign the contract during the opposing party's counsel's absence and without disclosure of the changes to agreement.

These issues are not issues of first impression, and the trial court erred in not following the established law in Washington. Under well established law the Respondent and her attorney had a duty to inform Appellant Bernhart of material changes to the draft agreement, and an additional duty to inform him that the draft agreement had not been shown to or approved by Appellant Bernhart's own attorney.

It is well established Washington law that an attorney owes a duty to the opposing party when the attorney acts like an escrow agent and procures the opposing party's signature on contracts.

The decisions of Bohv v. Cody, 119 Wn.2d 357 (1992) and Hurburt v. Gordon, 64 Wn. App. 386 (1992) elucidates this rule of law and explain why an attorney has liability to a non-client when he fails to disclose a material fact. In Bohn v. Cody the Supreme court considered a malpractice lawsuit arising from an attorney's failure to inform a non-client that an assignment of a fulfillment deed he prepared for his own client could be junior to IRS lien. The attorney had discussed the terms of the assignment with the plaintiff and admonished them that he did not represent them. The attorney's admonishment did not shield the attorney from potential liability.

The Supreme Court in Bohn v. Cody imposed a duty on an attorney to disclose a material fact when dealing with opposing parties. Sometimes, however, some attorney's are like ostriches, and they don't say anything. This was circumstance in Hurburt v. Gordon, 64 Wn. App. 386 (1992). In th is case, the disputed conduct centered on the adequacy of disclosure of changes in draft documents. The parties in this case were all represented by separate legal counsel. The contract at issue was revised on several occasions. The dispute arose when a client was called in to sign the final documents. The final documents contained certain

revisions which were not pointed out to the client by the opposing attorney who was also acting as the closing agent for the transaction.

In Hurburt v. Gordon, the opposing attorney did not have liability. The Court of Appeals noted that the attorney, legally and ethically, had a duty to adequately disclose his changes to the documents that he had done on behalf of this client, and under the facts of this particular case, properly fulfilled his duties because he had (a) notified the client's attorney of the changes he had made and (b) specifically identified the changes he made.

In this case, the attorney's whose conduct was in issue was Mr. William Holt and his law firm Gordon Thomas Honeywell. Mr. Holt and his law firm represented a Brazior Forest Products in connection with its purchase of a lumber mill from Gateway Lumber, Inc. Gateway was represented by separate counsel. As is often the case in commercial transaction, an attorney for one of the parties assumes the escrow duties for both parties and obtains their signature on the final contracts.

By fulfilling this role of obtaining signatures, the court held that Mr. Holt had assumed escrow duties, and as also noted by the

Court of Appeals, therefor had the “obligations of an escrow agent.” The court noted that “an escrow agent has a duty to disclose all changes in the closing documents.” (Id. at 385-386). This duty is not discharged by being silent but by affirmative action.

In holding that Mr. Holt properly discharged his duties in this case, the Court of Appeals recognized the standard of care between attorneys and recognized that disclosure of changes in draft documents is the norm, it is routine and a widespread practice. The court observed:

In the present case, adequate disclosure of the deletion of the substitution clause was made to Gateway’s agents. Holt forwarded the changed document to Bennet and understood that it in turn was forwarded to Seather and approved by him.

Just as significant the court noted:

The practice of forwarding drafts of proposed documents in order that they be reviewed by opposing parties or attorneys, as Holt did in this case, is widespread and routinely used to provide “notice” that changes to the documents are desired by a party. Where all parties are represented by counsel, such drafts are exchanged among the attorneys. It would not have been permissible for Holt to deal directly with Gateway in these negotiations, because Holt knew Bennet had been instructed to retain an attorney to represent Gateway with respect to the closing documents. So long as the proposed change was clearly visible, as it was here, it was justifiable for

Holt to assume that he the document would be examined and the change noted by Gateway's attorney.

The import of this language is that the "change" must be "clearly visible" , and it must to be provided to the opposing party's counsel. In this case, Holt was relieved from liability because he could justifiably assume that Gateway's attorney was aware of the change, had examined and approved it, and so informed his client.

The Appellant in the present case was represented by separate counsel. The Respondent's counsel, Mr. Foster, knew that Appellant's counsel was out of town, and did not forward a copy of it to Mr. Weigelt. Mr. Foster he knew that Mr. Weigelt had not seen the document and had not approved it. Mr. Foster knew that Mr. Weigelt could not have seen it since it was not forwarded, and knew it was not approved. Despite this, Mr. Foster then failed to advise the Appellant of the changes or even that Mr. Weigelt had not seen it.

Appellant Bernhart, who had known Mr. Foster and who had been represented by Mr. Foster in the past, had a right to rely on the standard of this industry that attorneys exchange drafts, and disclose changes to draft documents. Appellant had every reason

to think that Mr. Foster had gotten Mr. Weigelt's approval to present the document to him.. Hence when Appellant received word from Mr. Foster's office to come in and sign the document, he reasonably believed it was a draft approved by his own attorney. Mr. Foster did not disclose that it was not. Mr. Bernhart signed it, and despite requests for a copy, he never saw it again for years. (Assuming that what was introduced was the original document.)

Mr. Foster was Respondent Danard's attorney and agent. He had a duty to advise Appellant Bernhart that the document had not been sent to Mr. Weigelt, that Mr. Weigelt had not approved it, and that it had material changes compared to the agreement prepared by Mr. Weigelt.

Mr. Foster's conduct caused Appellant Bernhart direct injury. Mr. Bernhart entered into the agreement with the belief that Respondent and he would be 50/50 owners of the LLC. As drafted the ownership interest is stated as being owed by " Craig Bernhart and Mariann Danard." This reference coupled with their being equal managers, is deceptive, particularly since the import of this wording is only known to an attorney.

Mr. Foster's conduct has one of two consequences, it

mislead the Appellant and thus grounds is for reformation, or the agreement is void.

In the context of the parties' LLC agreement, the trial court's first error was to believe that Mariann Danard's counsel did not have a duty to disclose to Appellant Bernhart that he had changed the document. This error also extends to Mariann's Danard's counsel's failure to inform Mr. Weigelt (Appellant' Bernhart's counsel) upon his return, that he (Danard's counsel) had changed the LLC Agreement, and Danard and her counsel's failure to provide a copy of the agreement to either Craig Bernhart or Craig Bernhart's counsel (Craig Bernhart did not receive a copy of the agreement when he signed it. Ms. Danard took the only signed copy and did not return it either her counsel or Craig Bernhart. The signed copy of the agreement was produced in the context of the underlying lawsuit).

As indicated by the above decisions, Mr. Foster, even though he was Respondent's counsel, had a duty to advise the Appellant and his counsel, of changes to the agreement, and/or at a minium advise the Appellant that the document he was being asked to sign was not approved by Mr. Weigelt. In Hurburt v.

Gordon, supra the court noted that in these circumstances, the attorney acted as an agent for his client. In the present case, Mr. Foster's failure to inform the Appellant of material facts is grounds to either void or reform the contract, and the Respondent is bound by her attorney's conduct.

2. The Trial Court Erred In Finding The That The Parties Were Not Partners.

The next issue is whether the parties had, by agreement or implication, a partnership. The partnership is not evidenced by a writing with the exception of a hand written memorandum, signed by both parties, and which recites that they share equally in the 'profits" and "expenses" of the partnership. The ultimate error in this case is the trial court's findings of fact and conclusion of law to the effect that the parties did not have a partnership. This conclusion was reached because of a series of fundamental mistakes made by the trial court including that the partnership memorandum recites that the parties agreed to share "profits and expenses" as opposed to "profits and losses."

The trial court placed significant weight on Respondent Danard's testimony that she did not intend to form a partnership when she signed the handwritten partnership memo wherein she

agreed that the parties would share in and each get ½ of the profits after payment of costs and expenses. Danard's after the fact purported subjective intent for litigation is not substantial evidence, and in fact, is not even relevant to the issue of whether the parties have contractual intent.

To the contrary, Washington follows a objective manifestation standard for determining whether the parties entered into a contract. See e.g. Barclay v. Spokane, 893 Wn. 2nd 698 (1974). Under this standard, the court considers objective evidence, such as the words spoken, and the parties' conduct, and not their subjective beliefs. Jacoby v. Grays Harbor Chair and Mfg. Co., 77 Wn. 2d 911 (1970).

Under the objective manifestation standard, the role of the court is to impute to a person an intention corresponding to the reasonable meaning of his words and acts, and his unexpressed impressions and subjective intent are meaningless and irrelevant. Janzen v. Phillips, 73 Wn. 2nd 174 (1968); Dwelley v. Chesterfield, 88 Wn. 2nd 331 (1977). The trial judge totally disregarded this standard and considered Respondent's Danard's self serving litigation testimony on this point and then gave it great weight.

Partnership and joint venture is generally defined as an “association” of persons for a common purpose. A partnership is an association for a business purpose which involves the sharing of profits or losses. While the existence of either depends on the intent of the parties, their intent need not be express, and the parties do not themselves need to refer to themselves as “partners” or “joint venturers.” This intent is to be ascertained from the overall facts and circumstances, including the actions and conduct of the parties. Nicholson v. Kilbury, 83 Wash. 196 (1915). In re Thornton, 81 Wn.2d 72 (1972) (adopting the Nicholson test). And may be inferred from their conduct. In re Estate of Thompson, 81 Wn.2d 72 (1972); Eder v. Reddick, 46 Wn.2d 41 (1955).

A partnership or joint venture may be formed whether or not the terms "partner", "partnership", "joint venturer", or similar words are used. See e.g. Will v. Dommer, 134 Wash 576 (1925). No writing is required to evidence the formation of a relation. Davis v. Alexander, 25 Wn. 2d 458 (1946). To state that persons co-owned property is sufficient to find that there was a partnership or joint venture. Bengston v. Shain, 42 Wn.2d 404 (1953); Nicholson v. Kilbury, 83 Wash. 196 (1915). A joint venture may exist even

though title to the property is held by one partner who disputes the existence of the partnership. Malner v. Carlson, 128 Wn. 2d. 521 (1996). An oral agreement among the partners is fully enforceable even though it is not in writing. Malner v. Carlson, supra.

When facts, actions and conduct of the parties, as considered as a whole are most consistent with a partnership relation in contrast to another relation, then a partnership or joint venture will be found. Chlopeck v. Chlopeck, 47 Wash. 256 (1907).

The intent of the parties need not be expressed, even to each other, but may be simply inferred from their conduct. In re Estate of Thompson, 81 Wn.2d 72 (1972); Eder v. Reddick, 46 Wn.2d 41 (1955). A partnership or joint venture may be formed whether or not the terms "partner", "partnership", joint venturer, or similar words are used. See e.g. Will v. Dommer, 134 Wash 576 (1925). No writing is required to evidence the formation of a partnership even when the partnership relates to the acquisition, ownership, development, or sale of interests in real property. Davis v. Alexander, 25 Wn. 2d 458 (1946).

Co-owned property is sufficient to find that there was a partnership. Bengston v. Shain, 42 Wn.2d 404 (1953); Nicholson

v. Kilbury, 83 Wash. 196 (1915). Under the Revised Uniform Partnership Act, RCW 25.05 a partnership may exist even though there is no sharing of losses., and is presumed whenever the parties share profits. (RCW 25.05.055).

A partnership may exist even though title to the property is held by one partner who disputes the existence of the partnership. Malner v. Carlson, 128 Wn. 2d. 521 (1996). An oral agreement among the partners for the purpose of buying and selling real property is not within the statute of frauds and is fully enforceable even though it is not in writing. Malner v. Carlson, supra.

When facts, actions and conduct of the parties, as considered as a whole are most consistent with a partnership relation in contrast to another relation, then a partnership or joint venture will be found. Chlopeck v. Chlopeck, 47 Wash. 256 (1907).

The objective evidence in this case is that the parties entered into a contract, acted on the contract, and engaged in a course of conduct over the next four years consistent with it. They incurred expenses, shared in them, and rolled their profits and income into more properties and into the development.

Very significantly, Respondent Danard has no alternative

explanation for key aspects of the parties' conduct: such as: (1) it Bernhart's payment of partnership bills, (2) Bernhart spending hundreds and hundreds of hours working on the projects which took away from his own dentistry practice; (3) Bernhart providing equipment for the site work, and (4) Bernhart managing the projects without pay or other compensation .

The trial's courts incorrect understanding of "partnerships" lead to a series of errors relating to characterization of the parties' contact. The parties agreed in Trial Exhibit 1 to share profits, costs and expenses. That alone is sufficient to find a partnership. Their conduct including sharing of management, expenses, and effort. All evidence supports the existence of a partnership.

3. The Trial Court Erred By Not Finding That Respondent Had Breached Her Duties

Washington law is clear that a managing partner or member has fiduciary duties to the other partners and members. The information which a partner must provide, must be complete, accurate, and must include all material information. Jacobson v. Arntzen, 1 Wn. App. 226 (1969). This is an affirmative duty and extends beyond dissolution of the partnership and continues through the process of winding up. Bovy v. Graham, Cohen and

Wampold, 17 Wn. App. 567 (1977). The duties expressly include an obligation to keep and maintain records and to permit the other members access to them. See also RCW 25.15.135.

The duty of a manager is even more stringent. A managing partner is the one who manages, conducts, or operates or oversees the partnership business. Simich v. Culjak, 27 Wn. 2d 403 (1947). The duty of the managing partner involves the highest standards. In Bovy v. Graham, Cohen and Wampold, supra at 571 n.3. the court characterized this duty:

We also note that (the managing partner) occupied a higher fiduciary position and had the burden of dispelling all doubts concerning the discharge of his duties. In the event the managing partner is unable to satisfy this burden, all doubts would ordinarily be resolved against him.

The duty to maintain accurate books and records means that such records are kept and maintained in the ordinary course of business that material facts relating to the affairs of the partnership may be ascertained without resort to other records. This means the records are "auditable", with appropriate entries and supporting records. In re Tembreull's Estate, supra at 98. Records "developed later" such as for litigation are NOT "books of accounts kept as the transactions transpired" and statements for court are "mere

statements made up." In re Tembreull's Estate, supra at 98.

Complete records includes income and expense ledgers, invoices, receipts, vouchers, checks, maintained in the ordinary course of business and not simply manufactured books generated after the fact for litigation. Simich v. Culjak, 27 Wn. 2d 403 (1947).

All doubts about what the records of the accounts would have revealed shall be resolved against the partner responsible for keeping them. Escallier v. Baines, 40 Wash. 176 (1905). If no books of accounts are kept, or if they are kept unintelligently, or if they are withheld, then every presumption will be made against those who were responsible to keep them. Moreover:

When a managing partner who keeps the books is sued for settlement, he must sustain the burden of proof of the correctness of the account. In so doing he will be held to strict proof of the items of his account.

Simich v. Culjak, 27 Wn. 2d 403, 408 (1947).

A partner who fails to account properly is grounds for the court to disgorge the defaulting party from any share of the partnerships profits. In re Tembreull's Estate, supra. In this case the court held that because of the omissions of the partner to keep and maintain books of account and his failure or inability to provide

this information, the responsible partner was:

"divested of any interest in and to the remaining assets of this partnership, and is hereby adjudged not entitled to participate in any division of the remaining partnership assets, but should be and is hereby barred therefrom." Supra at 96

At trial it was not disputed that Respondent Danard had not provided financial information, not filed tax returns for the LLC, and denied Appellant access to the books and records, all in a violation of RCW 25.15.135. A managing partners failure to maintain financial books, failure to permit access to them, and failure to file tax returns are per se blatant breaches of duty, and are the hallmarks for breaches of fiduciary duties.

The trial court's findings state that the Respondent did not breach her duties. Respondent has still failed to an accounting, failed to file the tax returns, and continues to run the LLC into the ground. The trial court's findings are overbroad to the extent they encompass the Respondent's conduct and contrary to Respondent's duties.

F. CONCLUSION

The trial court found that the LLC agreement was presented to Appellant Bernhart by Respondent's attorney and while

Appellant's Bernhart's own counsel was out of town. The evidence is undisputed that the Respondent's attorney did not disclose material facts to the Appellant when he was called in by Respondent's attorney to sign the document. The document is void. Under these facts the Cedar Professional Center, LLC agreement should not be interpreted as vesting Respondent with more than a 50% interest. To the extent it does, it should be vacated or reformed to be consistent with what the parties had originally agreed upon and what that represented to Appellant's counsel, i.e., that they were to be 50/50 owners of the LLC.

Separately, The trial court embraced the incorrect standard of law by deeming a partnership as requiring the parties to share losses. As such, the language of the parties memo that they share profits and costs and expenses was deemed inadequate. This was the foundation of the trial court's partnership analysis and its was in error. The matter should be remanded for a new trial.

Respectfully submitted, this 12st day of April, 2010


Craig Bernhart

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE AT SEATTLE

Craig Bernhart,)	
)	Appeal No. 63711-8-1
)	
Appellant,)	
vs.)	
)	
Mariann Danard,)	Certificate of Service of
)	Appellant's Amended Opening Brief
Respondents,)	
_____)	

The undersigned hereby certifies under penalty of perjury states that on April 13, that he/she served the Respondent, Mariann Danard, with the APPELLANT'S OPENING BRIEF by hand delivery of said document on her attorney William B. Foster and the law firm of Hutchison and Foster at Suite 100, 198th Str. S.W. Lynnwood, Washington 98036, her attorneys of record.

Dated this 13st day of April 2010.

Kara J. Dolquist
Kara J. Dolquist