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No. 62369-9

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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MARTIN HABIB,
Plaintiff/Respondent,

v.

EMERALD COIN VENDING, INC., a Washington Corporation, and
Jason and Francine Nelson
Defendants/Appellants,

BRIEF OF APPELLANTS EMERALD COIN VENDING
JASON AND FRANCINE NELSON

ORIGINAL

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I. ASSIGNMENTS OF ERROR

A. Findings of Fact & Conclusions of Law – Trial Court Errors

1. The trial court erred in entering Finding of Fact 4 to the extent that it concluded, contrary to *all* of the evidence at trial, that Plaintiff Habib actually “operated” all of the vending sites through October, 2005.

2. The trial court erred in entering Finding of Fact 5 which misstates *all* of the evidence at trial by finding that Plaintiff and Defendant “entered into a business arrangement” in November, 2005, in which ultimately by the end of January, 2006 all of Plaintiff’s 36 sites and vending equipment were entrusted to Defendant to run all aspects of the “business”.

3. The trial court erred as there is insufficient evidence to sustain Findings of Fact #6, #8 and #9:

- a) Finding and concluding that a Partnership was created on May 10, 2006, between Nelson and Habib;
- b) Relying at all on the CR2A (Exhibit 5) to support its findings and conclusions since at the time the CR2A was entered, Nelson was *not* named as a party to this lawsuit, so the CR2A *could not* apply to him;
- c) Finding the *partnership* agreement included an agreement that Nelson would continue to operate the sites and report profits and losses;

- d) Finding that Nelson was the managing partner because he was “operating all aspects of the vending machine route”;
- e) Concluding that Jason Nelson breached his fiduciary duty; the evidence is undisputed that Habib refused to do and did not do *anything* to assist the running of the business.

4. The trial court erred in entering Finding of Fact 10 because there was no evidence of a partnership with Nelson and, if there was, Nelson terminated it as of June 2006 as opposed to September 18, 2006.

5. The trial court erred in entering Finding of Fact 11 because the evidence at trial established that Plaintiff Habib had a say in all decisions.

6. The trial court erred and there is insufficient evidence to sustain Findings of Fact #12 and #14 in that there was no accounting and that the value of the assets “entrusted to the managing partner on May 10, 2006 was \$125,000 based solely upon the failed sale without any accounting and where the evidence revealed that the “business” had no value at any time during the alleged partnership because the it was *losing* money and Habib’s admitted it had no value to him.

7. The trial court erred in entering Finding of Fact #15 as the evidence shows that Habib had possession of a number of vending machines

and the title to the truck at the time of trial.

8. The trial court erred in refusing to grant a continuance, when both parties submitted a request two weeks prior to trial, because, at the time the motion was filed, Plaintiff had just been allowed to amend his complaint and add –*for the first time* – Jason Nelson as a named defendant and because the amendment was made *after* the CR2A was entered, when Mr. Nelson was not a party to this litigation.

B. Issues Pertaining to Assignment of Errors.

1. Whether the Court erred in concluding that a partnership was created?¹ Answer: Yes.
2. Whether the trial Court erred in entering Finding of Fact (“FOF”) #5 concluding that Plaintiff and Defendant entered into a business arrangement in November 2005? Answer: Yes
3. Whether the trial court abused its discretion and/or erred in entering FOF #6, #8 and #9 by finding that a partnership was created; (2) Relying on the CR2(a) Agreement to supports its Findings that Nelson was a partner when at the time of the CR2(a) agreement, Nelson was not a party to the litigation; (3) Finding that the partnership agreement was that Nelson would operate all sites and report profits and losses; (4) Finding that Nelson was the “managing partner”; and (5) In concluding that Nelson breached various alleged fiduciary duties owed to the partnership and not finding that Habib breached his fiduciary duties? Answer: Yes.

¹ This issue appeared to be presented when the court commented that he has never seen a partnership action where there is so little evidence of a partnership agreement.

4. Whether the trial Court erred in entering Finding of Fact #10 in concluding that the ‘partnership’, if one existed, terminated as of September 18, 2006 rather than June 2006? Answer: Yes.
5. Whether the Court erred in entering Finding of Fact #11 as the evidence clearly revealed that Defendant had a say in all decisions. Answer: Yes.
6. Whether, the evidence presented by Plaintiff fails to support FOF #12, #14 and #15 in finding that there was no accounting provided by Defendant to Plaintiff; whether it was improper and without sufficient evidence to assign the value of \$125,000 to the alleged partnership assets where the ‘value’ was based solely on a failed sale of the assets and the Court determined damages without an accounting; and whether there is insufficient evidence to support the finding that Defendant had possession of all the assets as of 5-10-06? Answer: Yes.
7. Whether the Plaintiff failed to sustain his burden of proof to show the value of the alleged partnership assets as of either May 10, 2006 or September 18, 2006, where Nelson offered uncontroverted proof of the value of the alleged partnership assets as of each date and where it was uncontroverted that Plaintiff was losing money and Plaintiff admitted that the machines had no value? Answer: Yes.
8. Whether the trial court erred and abused its discretion in failing to grant a continuance where defendant Nelson was made a party to the litigation just before trial and where both parties had stipulated to a continuance for Plaintiff to amend his complaint? Answer; Yes.

II. STATEMENT OF FACTS

A. Background Facts.

1. *Plaintiff Habib requested and/or begged Defendant Nelson to help him save his failing business... Habib only turned over 18 of his 36 sites to Nelson.*

In the first or second week of November, 2005, Plaintiff Martin Habib, accepted a job in Olympia. RP 60, lines 18-24. Habib lived in Woodinville at the time. RP 69, line 4. This created a problem for Habib because he was also the sole proprietor of 36 vending machine sites scattered between Arlington and Kent. RP 43, lines 9-12; RP 34, lines 11-14; RP 44, lines 10-20, RP 52, lines 10-13; Exhibit 11. At trial, Mr. Habib vehemently testified that he knew that it would be *absolutely impossible* to run any of his vending sites after his Olympia job commenced on November 22, 2005. RP 60, lines 22-24. These facts were undisputed.

On November 16, 2005, Habib sent Defendant Jason Nelson an email confirming that Mr. Nelson was going to run 18 of Mr. Habib's 36 vending machine sites beginning the following Monday. *See* Exhibit 7 dated 10-10-06, at page 7 of 8. In the email, Habib only refers to 18 sites that Nelson was taking over, and he does so repeatedly. *See e.g.*, Exhibit 7, at page 7 email dated 11-16-05. Thus, the best and contemporaneous evidence of how many sites were turned over is Habib's simultaneous email which completely impeaches Habib's contradictory testimony at trial. *Id.* RP 261, 263-264. At no point did Habib satisfy his burden of proof by a preponderance of the evidence. RP 63, line 22 - RP 65, line 13; *see generally*, Exhibit 4. This

evidence was also undisputed. Habib never even provided tax records requested in discovery to support the numbers he claimed the business made. RP 105, lines 15-19; Exhibit 11. Mr. Nelson agreed to do this because he had started Habib in the vending machine business approximately one year earlier and had purchased equipment from Emerald Coin. RP 10, lines 16-9; RP 34, lines 9-17. Mr. Nelson also thought that he would be able to make some additional money because as part of the deal to bail Habib out, Habib agreed that while Nelson would cover the expenses at the 18 sites, he would also keep whatever the 18 sites profited. RP 218, line 13 – RP 219, line 18. These facts were undisputed with the exception of the number of sites involved in the deal. RP 125, lines 1-18.

Habib testified that one week after striking the original deal with Nelson, he and Nelson actually agreed that Nelson would take over all 36 sites, “in probably the following week,” however, he failed to identify *any* evidence that verified or supported this claim or testimony. RP 67, lines 3-6. Moreover, all the objective evidence adduced at trial contradicted Habib’s claims and testimony. RP 63, line 22 to RP 65, line 13. Mr. Nelson also denied the claim. RP 214, line 16 to RP 216; RP 218, line 13 to RP 219, line 18; RP 222, lines 21-25; RP 223, lines 19-22; RP 249, lines 17-22; Exhibit 4.

Habib also claimed that the alleged “agreement” was that while Nelson would take over all of the expenses for the routes, the two would split the profits. RP 63, line 22 through RP 65, line 13. This claim makes no sense and Nelson testimony disputes this position. RP 214, line 16 through RP 216; RP 218, line 13 through RP 219, line 18; RP 222, lines 21-25; RP 223, lines 19-22; RP 249, lines 17-22; *see also*, Exhibit 4. The reason Habib’s testimony is inaccurate is obvious; the math simply does not add up to support Habib’s position because it was undisputed that Nelson’s product costs, alone, was 50% of the revenues recovered. RP 301, lines 1-11. After that, Nelson’s expenses for gas and maintenance etc... would account for approximately another 45%, leaving roughly a 10% profit margin. RP 301, lines 2-11.

Nelson’s undisputed testimony was that his successful sites run at about a 10% profit margin. RP 255 – RP 256. Assuming this were true and that Nelson would split profits with Habib, as Habib testified, Habib would get the benefit of Nelson’s time, expense and labor, and Nelson would get only 5% profit which is half of what he expects to earn in the vending business, and was far less than the \$5,000.00 Nelson needed to make his margins. RP 214, line 16 through RP 216; RP 218, line 13 through RP 219,

line 18; RP 222, lines 21-25; RP 223, lines 19-22; RP 249, lines 17-22; *see also*, Exhibit 4.

Even if we assume that Habib's testimony was accurate and credible, this alone would still do just as much to undercut the court's ultimate rulings in this matter. This is true because it would mean that Nelson effectively volunteered to undertake a very large burden of work to essentially *LOSE* money or barely break even for the purpose of bailing Habib out of a problem that Habib had clearly created for himself. This would completely undermine the "equitable" basis for the trial court's rulings and ultimately awarding Habib \$65,000 in so-called damages.

Nelson's testimony, corroborated by Habib's November 16th email, was that Habib turned the "remaining" sites over to Nelson in January. RP 214, line 16 through RP 216; RP 218, line 13 through RP 219, line 18; RP 222, lines 21-25; RP 223, lines 19-22; RP 249, lines 17-22; Exhibit 4 at page 7. Neither party could recall how many vending machines existed by this time, but the undisputed evidence at trial was that Habib had lost many of the sites Nelson had not taken over. *Id.* Additionally, the undisputed evidence was that some of the sites that were turned over to Nelson in November were in such bad shape that they were also lost before January 2006. RP 214, line

16 through RP 216; RP 218, line 13 through RP 219, line 18; RP 222, lines 21-25; RP 223, lines 19-22; RP 249, lines 17-22; *see generally* Exhibit 4. Based upon the undisputed and collaborated evidence, it is obvious that 18 of Habib's sites were not even serviced from November to January because of Habib's own problems and his failure to service the locations; it had nothing to do with Mr. Nelson. *Id.* This is further evidenced by virtue of Habib's emails and Nelson's testimony which confirms that Habib did not turn the routes over to Nelson until January; Habib's testimony also proves that he did not service them after the middle of November at the latest. *Id.* Thus, it is clear and obvious why 18 of Habib's sites failed. All the evidence showed that Emerald Coin and/or Mr. Nelson were losing money trying to salvage Mr. Habib's locations. RP 250 – 251; 258.

The sites failed because Habib simply dropped them and/or failed to service them. RP 289, line 19 to RP 292. He did not service them and he did not turn them over to Nelson; it is no surprise that the accounts were lost. *Id.* This uncontroverted evidence, of course, completely contradicts the trial court's unexplained and unsupported "equitable" determination that the one-half value of the business on May 10, 2006 was \$65,000. A review of the facts and the record make it clear that Habib failed in his burden of proof.

B. Summary of Argument/Facts Regarding Trial Court's Decision.

1. *The failed sale of the business and equipment to Mr. Lee supports the fact that the sale price was too high and undercuts the trial court's use of the failed sales price as the basis for valuing the business which continued to lose sites!*

In January or February, Habib and Nelson agreed that they should try to sell the entire business. RP 67, lines 10-20; RP 69, lines 1-3; RP 237, lines 5-8; RP 241, line 1. Nelson found one potential buyer with a legitimate offer at a price that Habib would consider. The buyer, a Mr. Lee, paid \$10,000 of a proposed \$125,000 purchase price over two months between February and April. (Neither Habib nor Nelson were clear on the exact dates, but agreed it was in this time range.) RP 239 - 240, FOF 6-7. Mr. Habib kept all of the money and did not compensate Mr. Nelson anything for brokering the deal. RP 241, lines 10-15. The evidence was also undisputed that the business was turned over to Lee for at least 2 or 3 months, with Mr. Nelson continuing to provide some transition assistance and with Habib doing absolutely nothing. RP 293 through RP 295, FOF #6-7.

Additionally, at around this same time, Habib was asking Nelson to pay him \$5,000 a month from the route. RP 263, lines 1-13. *The undisputed testimony at trial established that all of the routes never generated more than*

\$3,600 in gross revenues and that it ran at a loss the entire time; the only value that the company could have had, that was supported by the evidence, was the value of the machines themselves, which were constantly depreciating and, according to all the testimony at trial, never had much value. RP 223, lines 15-22; Exhibit 7 pg 4 – emails April 18 and May 7.

In approximately early April, 2006, Mr. Lee backed out of the deal and asked for his money back. RP 239-240. Mr. Habib agreed to the termination of the agreement, but refused to refund Lee's money even though it was in the contract he signed; Mr. Habib is also the one who determined the "sales" price. RP 317, lines 915. As a result, Nelson refunded the money out of his own pocket and Habib refused to ever reimburse him. This was undisputed. RP 240, lines10-17, FOF 6-7.

2. *It was improper for the trial court to rely on the communications leading up to the May 10, 2006 emails as a basis to find that a partnership was created, especially where there was no "meeting of the minds"..*

In an email dated April 18, 2006, Nelson informed Habib of approximately *13 more sites*, out of the original 36, that had closed and that there were serious problems with instability. RP 125, lines 19 to RP 131, line 22; Exhibit 4. There is no evidence from that time span that controverted this

claim and, clearly, Habib had no first hand knowledge of what was going on because his undisputed testimony all through trial was that he did nothing, checked nothing, and provided no assistance. RP 125, line 19 through RP 131, line 22; Exhibit 4.

In email exchanges between May 7, and May 8, 2006 Mr. Nelson again informed Habib that the business was having serious problems and that the businesses finances and efficacy was very unstable. RP 134, line 13-22; Exhibit 7, at page 4 of 4. Nelson also told Habib that he wanted his money back and that he wanted some compensation for all the time, labor and expense he had put into the business. *See, e.g.*, Exhibit 7, at page 4. Habib's response was that he would give Nelson the following three options:

1. Option one was that Nelson could run everything and make Martin an investor in Emerald Coin. Nelson testified that this was completely unacceptable. There was no way he was going to allow Habib to become a partner in his company.
2. Option two was that Nelson could attempt to broker a new sale and take a sales commission as payment in full for all of Nelson's work (including the money Nelson shelled out of his own pocket to reimburse Mr. Lee for the failed sale after Habib refused to return the money. This option was clearly of no value because all it would do is commit Nelson to more work with a very dubious likelihood of success given the recently failed sale. And that is what Nelson testified to.

3. Option three was that Nelson could buy Martin out. This was also a clearly unacceptable option for Nelson. Nelson's testimony established that he had not interest in this. *See* Exhibit 4, page 1-2.

Consequently, the upshot was that Habib not only told Nelson that he would not pay Nelson for what he had done and what he had lost in the failed Mr. Lee deal, Habib's offers all required further commitment from Nelson alone and this left Nelson with no choice but to try and make the routes work to cover his time and losses. Habib's "offers" and/or responses never denied that Nelson had lost money, time or effort in the business, nor did they include an offer to reimburse Nelson for his losses even though Habib admitted at trial that he knew Nelson would have preferred getting his money back instead of continuing in business with Habib. RP 134, lines 13-22; RP 247, lines 2-12; RP 247, line 18 through RP 249, line 4. Hence, the unequivocal evidence is that the only reason Nelson stayed involved was because he was under financial duress at the hands of Habib having committed considerable time, effort and finances. RP 250, lines 15-25.

It was in response to *these* email communications (Exhibits 4 and 7) that Nelson said, "I guess we're partners" in an email dated May 10, 2005. Exhibit 7, page 7. He then said, "let's *try* this..." *Id.* Mr. Nelson said that he would run the routes and that either one of them could be bought out at any

time or they would split the profits. *Id.* It is undisputed that, by the time of the May 10th email, many of the original 36 sites had been lost and that the machines had NO value to Habib. RP 9-13. The trial court held that it was this May 10th email from Nelson, combined with the CR2A agreement – between Emerald Coin and Habib (*to which Nelson was not a party*) that created the partnership. *See* Exhibit 5.

It is significant to note that Mr. Habib testified that he did not even understand the terms of this email. Specifically, he testified that he did not know what “bought out” meant or means. RP 137, lines 10-15.

It is also worthy of note that:

- a. Nelson disputes the existence of a partnership and takes the position that CR 2A agreement is not binding on this proceeding as it is incomplete and does not identify any terms of the so-called partnership. *See* Exhibit 5.
- b. Nelson’s undisputed testimony was that he personally did not intend to create a formal partnership with Habib.
- c. Neither party identifies *any* other language, document or agreement as to the terms of the partnership.
- d. There is no designation of any duties or terms of a partnership that must exist in a partnership. There is no managing partner designation and there is no designation of any accounting responsibilities, much less a designation of which partner would have the responsibilities.
- e. The only duty designated to Nelson is that he will “run the routes”. Exhibits 4 and 7 *generally*. That does not mean he will

manage the “business”, keep accounting books or records or anything other than go out in the field and service the machines and sites.

f. There is no statement that Habib would be absolved of any and all partnership responsibilities. Habib, himself, testified that his only contribution and role was that he was the owner of the sites and the machines.² RP 105, line 20 to RP 106, line 1.

g. Finally, when the court issued its *oral* decision, the trial court acknowledged that the normal requisites for a partnership did not exist in this case and that is why the court made its determination solely on the principles of equity. Oral Ruling of the Court, RP 8, lines 1-23.

Habib happily admitted that, following May 10, 2006 he did nothing and had no contribution in the business of the alleged partnership. RP 140, lines 8-12, RP 80, lines 12-22. Yet at the same time, he admits, and his lawsuit presumes, that he was involved in the *business* of the partnership, which imposed duties on him. CP 31-37, Conclusion of Law #4. He cannot have it both ways and this is further evidence of the Plaintiff’s failure to sustain his burden of proof.

The undisputed evidence shows that Nelson provided Habib with an accounting for the month of June, via a July 5th email. RP 265, line 8 through RP 271; Exhibit 7, at pages 6-7. That email references prior information

² This is a critical point because a partnership must be “co-owned”. Habib’s testimony that he was the owner and the fact that there is no evidence that any of the assets of the partnership were placed into joint ownership, *by itself* defeats Habib’s

provided to Habib about the serious ongoing problems with the business. *Id.* Nelson's email also makes it clear that they were losing sites, the business was failing and that he wanted out. *Id.* Habib gave no reply. He did not ask for more detail; he did not offer any assistance, and he did not contradict or question any of Nelson's claims or disclosures. *Id.*

Nelson's August 1st email repeated his July 5th and June emails. RP 270 through 271; Exhibit 7 at page 6. However, in the August email, Nelson said that he simply wanted out even if it meant selling at a loss. *Id.* In an email dated August 9, Habib responded by simply asking for information and ignoring Nelson's repeated plea to end the business. RP 272 through 273; Exhibit 7, at page 5. It is undisputed that by the latter part of August, 2006 Habib had retained an attorney and all talks went through that attorney. RP 272 through 273. On September 18, 2006, Nelson gave Habib formal notice that he was terminating their relationship. FOF #10. This was *after* Habib had already retained counsel and after Habib had ignored three months of communications from Nelson communications requesting release. *Id.*

Finally, there was NO evidence offered at trial that Nelson did anything, or failed to do anything that contributed to the demise of the

claim that there was a partnership.

business. All the testimony and evidence adduced at trial reveals that Nelson voluntarily jumped into a sinking ship in a valiant but impractical attempt to bail Habib out. The end result was that Habib, with NO first hand knowledge of the facts because he could not be bothered with the fate of his own business, was left with the only option – to blame Nelson for the demise of his business – apparently it *could not have been his fault* – and the trial court tied this unfortunate Samaritan to the mast and, in the name of “equity” blamed him for the sinking of the ship and shackled him with the losses. RP 140, lines 8-12, RP 141, line 17 through RP 142, line 2.

And, in spite of these facts, Habib also testified that he believed – even at trial – that he was the *sole owner* of the business. *Id.* Here, there was essentially no “meeting of the minds.” In *Kintz v. Reed*, 28 Wn.App. 731, 733, 626 P.2d 52 (1981), the trial judge found that “(t)here was no meeting of the minds of the parties sufficient to establish a partnership or an express contract between the parties ... relative to said business, its operation, sharing of profits and losses, interest of the parties upon acquisition, sale or dissolution, ... except for an understanding that Kintz could buy out Read's “ ‘share of the business’ ” which was “so vague and indefinite” as to preclude specific enforcement.” The trial court should be reversed.

III. ARGUMENT

Distilled to its essence, Defendants' / Appellants' argument is that the Court committed reversible legal error *and* abused its discretion in ruling that a partnership was created, that Nelson violated any fiduciary duties while Habib did not, and in valuing the company at \$125,000 as of the date the partnership was allegedly formed; especially when Mr. Habib knew that sites were being lost and pulled regularly. *See e.g.*, Exhibit 7, page 3 – email dated April 18, 2006; Exhibit 11; RP 231, lines 3-7.

A. The trial Court erred in concluding or finding that a partnership was created.

One of the most important tests of a partnership is whether there is a share in losses. *Gottlieb Bros. v. Culbertson's*, 152 Wash. 205, 277 P. 447 (1929). Here, there was no evidence that Mr. Habib shared in the losses that continued each month as related to Mr. Habib from Mr. Nelson. Quite to the contrary, Mr. Habib vehemently testified that he was not to share in any losses. Thus, an essential ingredient for finding a partnership agreement does not exist in this case. Additionally, the Court failed to take into account the fact that Mr. Nelson and/or ECV devoted substantial time and effort to the

business and failed to provide any compensation to ECV and/or Nelson and failed to allocate half of the losses to Mr. Habib. When one partner has the entire management and control and is devoting all of his time to partnership business, and the other partner renders no service in the business and is entirely and constantly away from it tending to other business of his own, such conditions may give rise to an implied contract that partner dedicating his time and attention to the business should be compensated. *Levy Estate*, 125 Wash. 240, 215 P. 811 (1923); *Flynn Estate*, 181 Wash. 254, 43 P.2d 8 (1935). Here, should this Court find a partnership existed, nothing was awarded to ECV or Nelson for all the substantial time and commitments made to the business.

It is undisputed that by the time of the May 10th 2006 email, Habib only had about 12 remaining sites. Exhibit 7, page 1. Obviously with the decreased sites, there was even less “gross profit”. Plaintiff’s claim that this email is what created a partnership. This is not sustainable based on the evidence and the facts that:

a. Nelson disputes the existence of a partnership and takes the position that the CR 2A agreement is not binding on this proceeding as it is incomplete and does not identify any terms of the so-called partnership.

b. Nelson’s undisputed testimony is that he did not intend to create a formal partnership with Habib.

c. Neither party identifies any other language, document or agreement as to the terms of the partnership.

d. There is no designation of any duties or terms of the partnership that must exist in a partnership. There is no managing partner designation and there is no designation of any accounting responsibilities, much less any designation of which partner would have the responsibilities.

e. The only duty designated to Nelson is that he will “run the routes”. That does not mean he will manage the “business”, keep accounting books or records or anything other than go out in the field and service the machines and sites.

f. There is no statement that Habib would be absolved of any and all partnership responsibilities. Habib, himself, testified that his only contribution and role was that he was the owner of the sites and the machines. RP 61, lines 14-17; RP 141, lines 18-25.

Habib happily admits that he did nothing and had no involvement in the business of the partnership. RP 61, lines 12-17. But, at the same time, he admits, and his very law suit presumes, that he was involved in the business of the partnership if not the service because he claims that he needed monthly accountings. He cannot have it both ways. Counsel even admitted that Habib turned the sites over to Emerald Coin. RP 55, lines 5-7 and Habib admits that it was turned over to “your company” (ECV). RP 65, lines 3-5; Exhibit 4 email 11-6-05.

The undisputed evidence shows that Nelson/ECV provided Habib with an accounting of the month of June, via a July 5th email. *See* Exhibit 7, page 7. That email references prior information provided to Habib about the problems, all of which Habib was aware. Nelson's email also makes it clear that they are losing sites, the business is failing and that he wants out. *Id.* Habib gave no reply. He did not ask for more detail; he did not offer any assistance, and he didn't contradict or question Nelson's claims. He also admits that he signed the title to the truck over to ECV. RP 48, lines 10-23.

Mr. Nelson's August 1st email basically is a repeat of his July 5th email. However, in the August email, Nelson says that he simply wants out even if it means selling at a loss. *See* Exhibit 7, at page 6. Habib did respond to this email until about a week later. Neither party could provide any testimony as to exactly what communications followed, but it is undisputed that by the latter part of August, Habib had retained an attorney and was doing all of his talking through that attorney. RP 273, line 20 through RP 274.

On September 18, 2006, Nelson gave Habib notice that he was terminating their relationship. Exhibit 7, page 7; FOF 10. This was after Habib had already retained counsel. *Id.* By this time, there were few if any

remaining sites. It is undisputed that continuing through trial, Nelson/ECV had been storing Habib's vending equipment at great expense. RP 197-198; FOF 13. It is also undisputed that Habib has refused ECV/Nelson's numerous requests to retrieve this equipment or to pay for the storage.

As a final matter, on approximately May 6, 2006, Nelson sold all the assets of his former company, Emerald Coin Vending, Inc., ("ECV"). RP 264, lines 13-16. When Nelson was providing his initial assistance to Habib, he was doing it in the capacity of ECV. *See* Exhibit 5. On May 10, 2006 when the alleged Habib / Nelson partnership agreement was entered into, Nelson did not make any direct representation as to whether he was acting in the capacity of ECV or by himself. *See* Exhibit 7, at page 7. There was no evidence that the sale of ECV in any way compromised or affected Nelson's ability to run Habib's remaining routes.

Likewise, there is no evidence that any of the Habib assets or business was commingled with that of ECV. It appears that Habib's attempt to bootstrap in claims related to ECV and/or Mr. Nelson, is legal gamesmanship aimed at what is mistakenly perceived as a possible deep pocket. Furthermore, it is undisputed that the money paid to Mr. Habib was paid by ECV and the money returned to Mr. Lee was paid by ECV. FOF 7. The trial

court therefore erred and the matter should be reversed.

B. The trial court erred in entering Finding of Fact 5 (“FOF”) #5 concluding that Plaintiff and Defendant entered into a business arrangement in November 2005.

Mr. Habib was unable to prove how many additional sites were “turned over” to ECV. Mr. Nelson also testified and confirmed that he did not believe that all of the other 28 sites were turned over to him (or ECV). RP 215, lines 12-19. Clearly, Plaintiff Habib had the burden of proof on this issue. Specifically, he was required to prove how many sites he turned over to ECV. He completely failed to provide any evidence on this point.

Based upon the above evidence, FOF #7 is also inaccurate as the only testimony was that the intended buyer (Mr. Lee) made 2 payments of \$5,000.00. RP 240-245. The agreement was to make 3 payments of \$5,000.00 during his due diligence period, but he only made two and this was uncontroverted and was confirmed by both parties’ testimony. RP 252, lines 6-25; FOF #7. It was also undisputed that ECV paid this money to Mr. Habib when received and when Mr. Lee backed out of the agreement and/or elected not to purchase the business, ECV repaid this money to Mr. Lee. RP 252, lines 6-25; FOF #7. Mr. Habib did nothing to assist in the sale of the business or in maintaining the sites. RP 247-248.

- C. **The trial court abused its discretion and/or erred in entering FOF #6, #8 and #9 by finding that a partnership was created; (2) Relying on the CR2(a) Agreement to supports its Findings that Nelson was a partner when at the time of the CR2(a) agreement, Nelson was not a party to the litigation; (3) Finding that the partnership agreement was that Nelson would operate all sites and report profits and losses; (4) Finding that Nelson was the “managing partner”; and (5) In concluding that Nelson breached various alleged fiduciary duties owed to the partnership and not finding that Habib breached his fiduciary duties.**

RCW 25.05.055 Formation of Partnership provides in pertinent part,

that a partnership is created as follows:

(1) Except as otherwise provided in subsection (2) of this section, the association of two or more persons *to carry on as co-owners* a business for profit forms a partnership, whether or not the persons intend to form a partnership. . . .

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

(a) Joint tenancy, tenancy in common, tenancy by the entireties, 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:*

(i) *Of a debt by installments or otherwise;*

(ii) ***For services as an independent contractor or of wages or other compensation to an employee;*** (Emphasis added).

Under the facts of this case, it is indisputable that the reason Nelson/ECV went into business with Habib on May 10, 2006 and the reason Habib accepted, was that Nelson wanted payment for a debt that Habib owed for the substantial services Nelson had provided. Hence, under RCW 25.05.055 subsections (3) (c) (i) and (ii), this cannot be a partnership, as a matter of law. The case law further supports this conclusion.

A partnership cannot be created without the *voluntary* consent of all alleged partners. *Ferguson v. Jeanes*, 27 Wn.App. 558, 619 P.2d 369 (1980). A contract of partnership, either express or implied, is essential to partnership relationship, and such contract must contemplate common venture uniting labor, skill, or property of parties for purpose of engaging in lawful commerce or business for benefit of all of them, sharing of profits and losses, and joint right of control of its affairs. *Eder v. Reddick*, 46 Wn.2d 41, 278 P.2d 361 (1955). An implied partnership is based upon contract principles. *Kintz v. Read*, 28 Wn.App. 731, 626 P.2d 52 (1981). Here Habib never testified that he believed that he was partners with Nelson and Nelson never intended to be partners with Habib. RP 256, line 8 to RP 257, line 4.

Consistent with the requirement that a partnership cannot be created without the *voluntary* consent of *all* partners, *Fergusson supra*, the exercise of undue influence or fraud is a defense to the formation of a partnership.

The Washington Supreme Court has stated:

“We hold that partnership agreements, like other contracts, are subject to rescission for undue influence. A partnership cannot be created without the voluntary consent of all alleged partners. *Beebe v. Allison*, 112 Wash. 145, 192 P. 17 (1920). Undue influence makes assent to the partnership involuntary, and unless the unduly influenced party elects to affirm the contract, the appropriate remedy is a rescission that places the parties in the position they were in prior to the invalid agreement. *Severson v. First Baptist Church of Everett, supra*, and *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wn.App. 892, 491 P.2d 241 (1971).

The usual ground of annulment of the [partnership] contract is fraud or misrepresentation, and mistake has also been held as a ground for rescission. Inadequacy of consideration and undue influence may warrant rescission . . .” *Ferguson v. Jeanes*, 27 Wn.App. 558, 564, 619 P.2d 369 (1980).

The uncontroverted evidence surrounding the May 10, 2006 communications that supposedly formed the partnership proves two things. First, that Habib exerted undue influence over Nelson immediately leading up to the May 10, 2006 email. Secondly, there is no equity in the trial court's decision. Prior to this email, Nelson clearly asked Habib for his money back

and Habib was clearly refusing and made it clear that Nelson would either have to eat his loss or enter some kind of ongoing business arrangement with Habib. *See generally* Exhibits 4 and 7.

Nelson's uncontroverted testimony was that the May 10 offer to run Habib's routes was far more desirable than the three options Habib offered and was better than just walking away. RP 247-254. This is a clear case of undue influence. Nelson's only other options were either other business arrangements that could result in bigger losses, or to simply cut his losses. Habib never disputed that Nelson had lost money, time, expenses and labor prior to May 10. RP 255, lines 7-22.

As for the CR2A agreement, it was incomplete. *See* Exhibit 5. It was clearly and undoubtedly done for settlement purposes only and it clearly contemplated further mediation, and was the reason for the parties' mutual and joint stipulation for a continuance of this trial. Unfortunately, that motion for continuance was denied and the parties had to proceed with the trial. CP 112-113. Lastly, the CR2A Agreement was only between Habib and Emerald Coin as Nelson was not a party at the time of the Agreement. *See* Exhibit 5 and CP 26.

It is an ordinary duty of partners to keep true and correct books

showing firm accounts. *In the absence of an agreement on the subject, the duty of keeping partnership firm accounts rests equally on each partner.* However, if one partner is a managing partner, the duty to keep books is on him or her. **Am Jur. § 614. Partner charged with duty.**

Under Washington law, it is an obligation of continuing partners to provide information and to render accounting *with respect to partnership profits* accumulated during one's tenure as an equal partner. *In re Norquist*, Bkrtcy 43 B.R. 224 (E.D.Wash.1984). There is no dispute that Habib never did any accounting. In fact, he never did any accounting with respect to the business before he turned it over to Nelson/ECV. Even the gross profits he claims vary in his pleadings.

In this case, assuming that there is a partnership, there is no question that there is no agreement as to which partner will keep the accounts and there is no agreement that one partner will be the “managing” partner. Additionally, as noted previously, Habib’s testimony was that his contribution was that he “owned” the assets and there is no evidence that he ever transferred any ownership to Nelson. RP 141, lines 25 to 142. Accordingly, if it is to be presumed that one partner was the managing partner, it would have to be Habib and the duty to account would be Habib’s.

In this case, there is no question that there is no agreement as to which partner would keep the accounts and there is no agreement that one partner will be the “managing” partner. Additionally, as noted previously, Habib’s testimony was that his contribution was that he “owned” the assets and there is no evidence that he ever transferred any ownership to Nelson/ECV. Accordingly, if it is to be presumed that one partner was the managing partner, it would have to be Habib and the duty to account would be Habib’s.

Likewise, there is no question that the Washington accounting law pertains to profits. In this case there is no argument that the business that was allegedly a partnership did not profit during the term of the arrangement, i.e., May 10 through September 18. Thus, there were no profits for which to account. Mr. Nelson/ECV communicated regularly to Habib via email and telephone, which was not disputed, that the locations were losing money and were not profitable. It is uncontroverted that on April 18, 2007, May 7, 8 and 10, 2007 July 5, 2007 and August 1, 2007 Nelson sent Habib emails saying that they were not grossing more than \$3,600 in total before-expense revenues, that they were losing money, they were losing sites, the business was unstable, they were getting bad offers, that Nelson was losing money in labor and other expenses, and (July and August) that Nelson wanted out! *See*

Exhibits 4 and 7.

Habib never denied receiving these emails. He even testified at trial that he never questioned or disputed or did anything about any of this information. RP 258. He did not offer to assist the so-called business, nor did he offer any suggestions on how to improve the instability of the business. Is this because he knew that the business was failing all along? Defendants believe that this is the case and Habib knew this well before he ever approached ECV/Nelson to assist in the service of the routes when he took the job in Olympia. Likewise, there is no question that the Washington accounting law pertains to *profits*. In this case there is no argument that the business that was allegedly a partnership *did not profit* during the term of the arrangement, i.e., May 10 through September 18. Thus, there were no profits for which to account.

Finally, the law does not define exactly what has to be done to constitute an “accounting”. In this case, there is no dispute that Nelson sent Habib emails on July 5th and August 1st, informing him of the company’s dire financial and business prospects, the gross revenues, the lost money and the bad purchase offers that had been received. Exhibit 7, page 6. Therefore, even if there were an “accounting” requirement placed on Nelson, the

evidence was he satisfied any such requirement. RP 220, lines 4-15. The trial Court should therefore be reversed.

A partner owes a fiduciary duty of loyalty and of care to both the partnership and to other partners. RCW 25.05.165. A partner's duty of loyalty is limited to avoiding secret profits, self-dealing, and conflicts of interest. RCW 25.05.165(2)(a)-(c).

At trial, there was no evidence submitted or which showed that Nelson breached any fiduciary duty. Habib speculated and accused, but presented no evidence. The trial court found no evidence! Habib implicitly agreed that the business lost money during the alleged partnership. RP 131 to 137. Thus, there could be no "secret profits or self dealing. There was simply *no* evidence adduced at trial that Nelson received *any* personal or corporate benefit and, in point of fact, the trial court's other rulings constitutes a determination that he *did not*.³

³ RCW 25.05.150 sets for a Partner's rights and duties as follows:

- (1) Each partner is deemed to have an account that is:
 - (a) Credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and
 - (b) Charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and

RCW 25.05.165. General standards of partner's conduct, provides:

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

the partner's share of the partnership losses. [There was no evidence as to either partner complying with this requirement].

(2) Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits. [Habib testified that he "owned" the assets; likewise, it is undisputed that Nelson has unilaterally paid for the storage of all the equipment].

(3) A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property. [There is no question that Habib has failed to cover any of these extensive expenses].

(4) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute. [There was no evidence of such an agreement in this case].

(5) A payment or advance made by a partner which gives rise to a partnership obligation under subsection (3) or (4) of this section constitutes a loan to the partnership which accrues interest from the date of the payment or advance. [Again, there was no such agreement].

(6) Each partner has equal rights in the management and conduct of the partnership business. [Habib cannot now claim that he had no such duty and his claim that he had no such involvement is an admission that he violated this provision].

(7) A partner may use or possess partnership property only on behalf of the partnership.

(8) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership. [Thus, Nelson is entitled to remuneration for his services to the alleged partnership].

(9) A person may become a partner only with the consent of all of the partners. . .

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity; . . .

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(4) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing. . . .

A partner's breach of fiduciary duties does not compel an award of attorney's fees, but may be the basis of such an award. *Guntle v. Barnett*, 73 Wn. App. 825, 871 P.2d 627 (1994). Based upon the foregoing, Habib is clearly not entitled to attorney's fees. Just as clearly, Nelson is entitled to attorney's fees for Habib's pursuit of an unripe action.

D. The trial Court erred in entering Finding of Fact #10 in concluding that the 'partnership', if one existed, terminated as of September 18, 2006 rather than June 2006.

The burden of proving the factual existence of a partnership rests on the party asserting its existence and relying on the fact of its existence. *Kintz*

v. Read, 28 Wn.App. 731, 734, 626 P.2d 52 (1981). In *Kintz*, the Court stated that: “The burden of proving a partnership is upon the party asserting its existence, and the evidence must be stronger as between the parties than when third parties allege its existence.” *Eder v. Reddick*, 46 Wn.2d 41, 278 P.2d 361 (1955). Whether evidenced by an express agreement between the parties or implied from the surrounding circumstances, “(t)he existence of a partnership depends upon the intention of the parties.” *Id.* (citations omitted). In *Kintz*, the trial court found that “there was not a meeting of the minds of the parties, that their discussions were loose and indefinite, that they had different goals, understandings and interests, and that their conduct ... is inconsistent with partnership or partnership principles.” *Id.* Mutual assent, or mutual intention, is the modern expressions for the concept of “meeting of the minds.”⁴ For a contract to exist there must be a “meeting of the minds” on the essential terms of the agreement.⁵ The parties must assent to sufficiently

⁴ See e.g., *Ford v. Trendwest Resorts, Inc.*, 146 Wn2d 146, 43 P.3d 1223 (2002) (dispute involving interpretation of employment contract; trial court improperly allowed jury to award damages for breach of promise to reinstate employee in at-will employment); *Swanson v. Holmquist*, 13 Wn.App. 939, 942, 539 P.2d 104, 106 (1975) (no contract existed between prospective purchasers and builder where parties reached no agreement on which was responsible for assuming the excess mortgage discount over 2%) (quoting *Wetherbee v. Gary*, 62 Wn.2d 123, 381 P.2d 237 (1963)).

⁵ *Evans & Son, Inc. v. City of Yakima*, 136 Wn.App. 471, 149 P.3d 691 (2006)

definite terms in order to form a contract.⁶ In the instant case, there was never any agreement as to all necessary terms of an agreement.

Moreover, a contract of partnership, express or implied, is essential to the creation of the partnership relationship. *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189 (1915). Such a contract must reflect a common venture uniting labor, skill, or property of the parties, for the purpose of engaging in lawful commerce or business **for the benefit of all of them**; a sharing of profits and losses; and joint right of control of its affairs. *Nicholson v. Kilbury*, 83 Wash. 196, 201, 145 P. 189 (1915); *Constanti v. Barovic*, 199 Wash. 117, 126, 90 P.2d 724 (1939). The essential test of the existence of a partnership is whether the parties intended to establish such a relation as manifested by their express agreement or inferred from their acts and statements. *In re Estate of Thornton*, 81 Wash.2d 72, 79, 499 P.2d 864 (1972) (quoting *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189 (1915)).

Whether a partnership contract has come into existence depends, as in the case of other contracts, on the intention of the parties, this intention to be

(genuine issue of material fact regarding whether contractor and city intended their exchange of correspondence be their agreement); *McEachren v. Sherwood & Roberts, Inc.*, 36 Wn.App. 576, 675 P.2d 1266 (1984).

⁶ *Hoglund v. Meeks*, 139 Wn.App. 854, 170 P.3d 37 (2007).

manifested by the conduct, statements, and writings of the parties. *Id.* However, circumstantial evidence does not tend to prove the existence of a partnership, unless it is inconsistent with any other theory; generally the facts are to be gleaned from the acts and conduct of the parties, rather than from the spoken word and no one fact or circumstance will be taken as the conclusive test. *Nicholson v. Kilbury, supra* at 202. Applying these principles to the testimony and evidence presented in the instant case as described above reveals that Mr. Habib failed to sustain his burden of proof, and that the evidence clearly mitigates against the findings of the trial court that Mr. Habib and Mr. Nelson had entered into a partnership agreement. Mr. Habib owned all the equipment and routes and Mr. Nelson was supposed to be paid for his time, although the testimony revealed that he earned nothing and lost considerable funds. RP 214, line 16 through RP 216; RP 218, line 13 through RP 219, line 18; RP 222, lines 21-25; RP 223, lines 19-22; RP 249, lines 17-22; Exhibit 4 at page 7 Furthermore, there was no partnership fund or account that was established. Finally, Mr. Nelson exercised no dominion or control over the vending machines, except such as would be consistent with the duties of an employee or consultant. The trial Court should be reversed on this issue.

E. The Court erred in entering Finding of Fact #11 as the evidence clearly revealed that Defendant had a say or was advised of all decisions.

An implied partnership is based upon contract principles. *Kintz v. Read*, 28 Wn.App. 731, 626 P.2d 52 (1981). Yet, a partnership cannot be created without voluntary consent of all alleged partners. *Ferguson v. Jeanes*, 27 Wn.App. 558, 619 P.2d 369 (1980). A contract of partnership, either express or implied, is essential to a partnership relationship, and such contract must contemplate common venture uniting labor, skill, or property of parties for purpose of engaging in lawful commerce or business for benefit of all of them, sharing of profits and losses, and joint right of control of its affairs. *Eder v. Reddick*, 46 Wn.2d 41, 278 P.2d 361 (1955). Here there is little to no evidence to support a contract of partnership. Furthermore, it has been held that the exercise of undue influence or fraud is a defense to the formation of a partnership. The Washington Supreme Court has stated:

“We hold that partnership agreements, like other contracts, are subject to rescission for undue influence. A partnership cannot be created without the voluntary consent of all alleged partners.” *Beebe v. Allison*, 112 Wash. 145, 192 P. 17 (1920). Undue influence makes assent to the partnership involuntary, and unless the unduly influenced party elects to affirm the

contract, the appropriate remedy is a rescission that places the parties in the position they were in prior to the invalid agreement. *Severson v. First Baptist Church*, 34 Wash.2d 297, 317, 208 P.2d 616 (1949); *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wn.App. 892, 491 P.2d 241 (1971). The usual ground of annulment of the [partnership] contract is fraud or misrepresentation, and mistake has also been held as a ground for rescission. Inadequacy of consideration and undue influence may warrant rescission. . . .” *Ferguson v. Jeanes*, 27 Wn.App. 558, 564, 619 P.2d 369 (1980).

In this case, Habib’s uncontroverted testimony was that his so-called “contribution” to the alleged partnership was that he was the “owner” of everything. RP 105, line 20 to RP 106, line 1. This directly contradicts and runs afoul of the statutory and case law requirement of “joint ownership” and thereby refutes the claim that there was a partnership. Furthermore, the evidence proves that Habib exerted undue influence over Nelson immediately leading up to the May 10th 2006 email. *See generally Exhibits 4 and 7.* Nelson clearly asked Habib for his money back and Habib clearly refused and made it clear that Nelson would either have to eat his loss or enter some other kind of ongoing business arrangement with Habib. *See Exhibits 4 and 7.*

Nelson's uncontroverted testimony was that the May 10 offer to run Habib's routes was far more desirable than the three options Habib offered Habib's May 7, 2006 three option "offer" to reimburse Nelson for his losses, was no offer at all. Exhibit 4, at pages 1&2. It was just more of the same. Habib simply wanted to get Nelson involved in other possible business arrangements that could result in even bigger losses. Habib never disputed that Nelson had lost money, time, expenses and labor prior to May 10. This is a clear case of undue influence.

It is also clear that from October 2006 to May 10, 2007, Habib consistently made misrepresentations to Nelson/ECV and that ECV/Nelson relied upon these misrepresentations all to their detriment. Habib lured Nelson in, and then attempted to cut bait and run and blame everything on Nelson/ECV. *See generally*, CP 31-37. The trial court should be reversed and the matter remanded for dismissal.

F. The trial court erred and there is insufficient evidence to sustain Findings of Fact #12 and #14 in that there was no accounting and that the value of the assets "entrusted to the managing partner on May 10, 2006 was \$125,000 based solely upon the failed sale without any accounting and where the evidence revealed that the "business" had no value at any time during the alleged partnership because the it was losing money and Habib's admitted it had no value to him.

Finding of Fact #14 is not supported by the weight of the evidence. As of May 10, 2006 it was uncontroverted that many sites had been lost. Plaintiff had the burden to prove how many sites were present when the alleged partnership was created and how many had been lost: a) before January, 2006; and, b) during Mr. Lee's control of the sites. Mr. Habib failed to even present any evidence on these questions.

Even if the Court is to do equity, we know (and these facts were essentially admitted by both parties) that there were not the full 36 sites as of May 10, 2006 and we know that the value of the "business" could not be \$125,000 since Mr. Lee backed out of the purchase for this amount and by mid-April at least an additional 11 sites had been lost. See Exhibits 4 and 7; RP 293, lines 5-25.; RP 294, lines 17 to RP 295, lines 7. Thus, there is no evidence to reveal what the value of the business was as of May 10, 2006 except that we know it was substantially LESS than \$125,000.

Had the sale closed with Mr. Lee and he defaulted perhaps Plaintiff could argue the value was \$125,000.00 but we know the sale never closed. Even if it had closed, that would only tell us the value of the business in February, as – in fact – the trial Court held. However, given the undisputed fact that the sale did not close, the Court's use of the value in February, has

no actual basis in law for a fair market value in May 2006. Furthermore, given the undisputed fact that many sites were lost between February and May, 10, even if the value of the business was \$125,000 in February, all that confirms is that it was less than \$125,000 on May 10, 2006 because of all the lost sites. Based upon the above-discussed uncontroverted evidence adduced at trial, it is clear that the value of the business and the value of Habib's contribution were *less* than \$125,000 on May 10, 2006. The Court's finding is also contrary to the law.

In *Cauble v. Handler*, 503 S.W.2d 362, 364 (1974), the Court noted that: "Plaintiff thus had the burden to prove the market value of the partnership assets. See *Taormina v. Culicchia*, 355 S.W.2d 569 (1962); *Palmer v. Manville*, 228 N.W. 20 (1929); *Oskaloosa Sav. Bank v. Mahaska County State Bank*, 205 Iowa 1351, 219 N.W. 530 (1928); and *Nichols v. Martin*, 277 Mich. 305, 269 N.W. 183 (1936). Mr. Habib failed to meet his legally required burden of proving the value of the business as of May 10, 2006 or September 18, 2006.

Furthermore, Washington Courts have held that "[F]air-market value" means "that price the property would probably bring in a transaction in a fair market between a willing seller and a willing buyer." See *e.g.*, *Ferland*

Corp. v. Bouchard, 626 A.2d 210, 215 (1993) (quoting *Rosen v. Restrepo*, 119 R.I. 398, 400, 380 A.2d 960, 961 (1977)). Here we know that there was no willing buyer as of May 10, 2006. The defendant contends that plaintiff offered no evidence during the trial tending to establish the reasonable cash market value of the partnership assets at date of dissolution and that the burden of proof was on the plaintiff to establish such a value.

Since the record contains no evidence as to the market value of the inventory or assets that the court's action in using a failed purchase price should be considered reversible error. In consideration of uniformity, certainty, and ease of application, it is held as a matter of law that an accounting between partners must be based on the fair market value of partnership assets at the time of dissolution.⁷ Definition: "Fair market value" of partnership assets is the amount that a willing buyer, who desires to buy, but is under no obligation to buy, would pay a willing seller, who desires to sell, but is under no obligation to sell.⁸

⁷ *Rasheed v. Mubarak*, 695 P.2d 754 (Colo. Ct. App. 1984).

⁸ *Atterbury v. Brison*, 871 S.W.2d 824 (Tex. App. 1994), writ denied, (1994); See also, *Fanning v. Chick-A-Dilly of Winnfield and Jonesboro*, 428 So. 2d 513 (La. Ct. App. 2d Cir. 1983), writ denied, 434 So. 2d 1094 (La. 1983). (In determining the gross receipts of a partnership, where the partnership books admittedly do not reflect its true earnings, an auditor properly computes gross revenue based on the inventory purchased and the average retail sales price of that inventory, showing a substantial

Finally, Finding of Fact #15 is inaccurate as Mr. Habib still had possession of many vending machines at his home and he also had title to the vehicle. RP 221, lines 3-6. If this Court confirms the trial court's rulings and Findings, Mr. Habib needs to turn over the machines and sign over the title to the vehicle. Under Washington law, it is clear that not only is an accounting a pre-requisite to a Court award damages, *but there must be an accounting and a full settlement and dissolution of the partnership before a partner can sue his copartner.* A partnership Partner cannot sue his copartner for money received or advances made until after full settlement and dissolution of partnership. *Kwapil v. Bell Tower Co.*, 55 Wash. 583, 104 P. 824 (1909); *Potter v. Scheffsky*, 139 Wash. 238, 246 P. 567 (1926); *Miller v. Kemper*, 107 Wash. 274, 181 P. 859 (1919).

Until accounting and settlement of partnership affairs is had, there is no cause of action between partners arising out of partnership transactions. *Stipcich v. Marinovich*, 13 Wn.2d 155, 124 P.2d 215 (1942). Even though partnership has been dissolved, partner cannot sue his copartner until after an accounting and settlement. *Pollock v. Ralston*, 5 Wn.2d 36, 104 P.2d 934 (1940). Trial court could refuse to award fees to partner who brought action

discrepancy between the partnership books and the calculated figure).

against managing partner for accounting and distribution of partnership assets; trial court found that both partners were at fault in that each breached various partnership duties. *Guntle v. Barnett*, 73 Wn.App. 825, 871 P.2d 627, on subsequent appeal 93 Wn.App. 1067, review denied, 138 Wn.2d 1006, 984 P.2d 1034 (1994). Valuation is required, generally as of the date of dissolution, in connection with accounting for and settlement of partnership affairs under certain circumstances.⁹ See Generally, 59A Am.Jur. 2d Partnership § 635 Second Edition (May 2009).

In this case, it is undisputed that there has not been any kind of winding up or accounting, thus, as a matter of law, Plaintiff's suit is not ripe and cannot be decided. Furthermore, as such, Defendants should be entitled to their attorney's fees for having to defend against claims and an action that was not ripe. A partner's breach of fiduciary duties does not compel an award of attorney's fees, but may be the basis of such an award. *Hsu Ying Li*

⁹ In resolving a dispute between partners over the valuation of partnership assets after dissolution, the test is either the accounting principles which the partners agreed to use or their custom and practice. *Rosen Trust v. Rosen*, 53 A.D.2d 342, 386 N.Y.S.2d 491 (4th Dep't 1976), order *aff'd*, 43 N.Y.2d 693, 401 N.Y.S.2d 66, 371 N.E.2d 828 (1977). The value of partnership assets for the purposes of a settlement on accounting is determined as of the date of dissolution, *Hanson v. Hanson*, 125 Ariz. 553, 611 P.2d 557 (1979); *Rasheed v. Mubarak*, 695 P.2d 754 (1984); *Swann v. Mitchell*, 435 So. 2d 797 (1983); *Ordway-Saunders Co. v. Little*, 568 S.W.2d 711 (1978), writ refused *n.r.e.*, (1978).

v. *Tang*, 87 Wash.2d 796, 557 P.2d 342 (1976). This has always been discretionary with the Court. *Id.* A trial court can clearly refuse to award fees to a partner who brought an action against the managing partner for an accounting and distribution of partnership assets. *Guntle v. Barnett*, 73 Wn.App. 825, 871 P.2d 627, *on subsequent appeal* 93 Wn.App. 1067, *review denied* 138 Wn.2d 1006, 984 P.2d 1034 (1994) (trial court found that both partners were at fault in that each breached various partnership duties).

Based upon the foregoing, Habib is clearly not entitled to his attorney's fees. Just as clearly, Nelson is entitled to attorney's fees for Habib's pursuit of an unripe action and making allegations without any evidence to support them. Defendants contend that Habib's silence with respect to all of the communications from Defendant is a tacit admission with respect to the accuracy of the communications. Habib never once complained or refuted the communications until he decided to file suit. *See generally* Exhibits 4 and 7.

G. The trial court erred in entering Finding of Fact #15 as the evidence shows that Habib had possession of a number of vending machines and the truck at the time of trial.

There was insufficient evidence to enter a judgment against Mr. Nelson as the basis for the award was not based on any credible information

or testimony and the trial court failed to account for the machines in Habib's possession and the fact that he still had title to the truck as he presented no evidence to the contrary. RP 80, lines 16-22. Mr. Habib failed in his burdens of proof and the facts do not support the findings of the trial court on this issue.

H. The trial court erred in refusing to grant a continuance, when both parties submitted a request two weeks prior to trial, because, at the time the motion was filed, Plaintiff had just been allowed to amend his complaint and add – *for the first time* – Jason Nelson as a named defendant and because the amendment was made after the CR2A was entered, at which time Nelson was not a party to this case.

Decisions whether to grant a motion for a continuance are generally within the discretion of the trial court and are upheld absent an abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). An action constitutes an abuse of discretion if the discretion is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.... Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the

decision one way or the other”. *In re Schuoler*, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). In deciding whether to grant a continuance, the court will consider the diligence of the moving party in filing the motion.¹⁰ Here, Defendants were diligent in requesting a continuance.

In deciding whether to grant a continuance, the court will also consider whether the moving party has acted in good faith.¹¹ In cases where the motion for a continuance is prompted by an amendment to the pleadings allowed by the court, which introduces a new issue of fact, the necessity for a continuance may be more apparent, and refusal to grant it might easily be an abuse of discretion.¹² The court in passing on the motion for a continuance necessarily has to use its discretion, and the court will be guided not only by

¹⁰ Motion for continuance interposed on morning collision case was scheduled for trial was not timely and was properly refused particularly where report of findings of physician whose deposition was sought had been in possession of movants for more than one year. *Swope v. Sundgren*, 73 Wn.2d 747, 440 P.2d 494 (1968); *Northern State Const. Co. v. Banchemo*, 63 Wn.2d 245, 386 P.2d 625 (1963).

¹¹ *State v. Edwards*, 68 Wn.2d 246, 412 P.2d 747 (1966). (Good faith is essential ingredient to any application for recess, postponement or continuance, and for issuance of process, and request may be denied if it is designed to delay, harry, or obstruct orderly process of trial or to take prosecution by surprise).

¹² Trial court has discretion to permit real estate broker's pleadings to be amended to show compliance with statute providing that no action shall be brought to collect broker's commission without alleging and proving that broker was licensed, and to grant continuance to permit introduction of such proof by broker. *West & Wheeler Associates, Inc. v. Lochridge*, 58 Wn.2d 84, 360 P.2d 739 (1961). See also *Wright v. Northern Pac. Ry. Co.*, 38 Wash. 64, 80 P. 197 (1905).

its duty to be fair to both sides and to see that substantial justice is done, but also by the interests of the general public, which bears the major part of the expense of jury trials and has a legitimate interest in having the trial conducted with all reasonable dispatch.¹³ In the present case, Plaintiff was allowed a short time before trial to amend his complaint to add a new party which was clearly prejudicial to Defendants. CP 31-37. This was true despite the fact that the parties had stipulated to a continuance. CP 40-42. The Court clearly abused its discretion and should be reversed on this issue as an abuse of discretion.¹⁴

IV. CONCLUSION

The Plaintiff failed to establish his burden of proof as to the fair market value of the so-called partnership either as of May 2006 or as of its date of dissolution. Furthermore, there was no evidence that the partnership

¹³ Conflict of interest on part of defendant's counsel became evident just before trial. Continuance should have been granted. *Saylor v. Elberfeld Mfg. Co., Inc.*, 30 Wn.App. 955, 639 P.2d 785 (1982); (Trial court erred in denying continuance requested by defendant for purpose of locating witness who allegedly saw victim going after defendant with butcher knife at time he was shot, where defense of defendant was self-defense because of reasonable apprehension of grievous bodily harm or death, and where diligent efforts had been made to locate and produce witness, compounded by refusal to instruct jury not to consider failure of defendant to produce the witness. *State v. Watson*, 69 Wn.2d 645, 419 P.2d 789 (1966).

¹⁴ A court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *In re the Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005).

was with anyone other than ECV by virtue of the CR2A agreement. Exhibit

5. Based on the arguments above as well as the uncontroverted testimony and evidence adduced at trial, the proper “remedy” was for the trial Court order the sale of all partnership assets and the proceeds distributed.¹⁵

¹⁵ RCW 25.05.330 governs winding up of partnership business. It provides in part:

(1) In winding up a partnership's business, the assets of the partnership, including the contributions of the partners required by this section, must be applied to discharge its obligations to creditors, including, to the extent permitted by law, partners who are creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions under subsection (2) of this section.

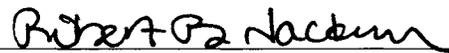
(2) Each partner is entitled to a settlement of all partnership accounts on winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account.

No Washington court has construed this statute. However, in *Guntle*, the Court considered UPA's analogous winding-up statute, former RCW 25.04.320 (1997) (Each partner is entitled to have “the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners.”). *Id.* at 833. *Guntle* involved a partnership created to purchase and operate a fish processing business and boat launch facility. Guntle sued for an accounting and distribution of partnership assets. After valuing the partnership assets and debts, the trial court awarded specific partnership property to each party and the trial court awarded a money judgment to Guntle, but without specifying how it derived the sum. *Guntle*, at 829 n. 8. Guntle argued on appeal that the court could not distribute the partnership assets and debts in kind, but should have sold the assets, liquidated the debts, and distributed any surplus in cash. *Id.* at 831. The appellate court agreed, holding that “[t]he trial court was not authorized to distribute partnership assets and debts in kind absent consent of all concerned.” *Id.* at 834. We remanded for the trial court to distribute partnership assets and debts by having “the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners,” as the applicable statute required. *Id.* at 837, (quoting former RCW 25.04.380(1)).

In this case, Habib's uncontroverted testimony was that his "contribution" to the alleged partnership was that he was "*the owner*". This contradicts the requirement of "joint ownership" and thereby it defeats the claim that there was a partnership. Additionally, Habib's own testimony is shows that Habib breached his fiduciary duty to any alleged partnership. This is because, as a matter of law, mere ownership, without any action whatsoever, does not fulfill the fiduciary duties of a partner. Based upon the foregoing points and authorities, Nelson requests that this court either determine that there was no partnership or that, if there was a partnership, Habib's action is premature and not ripe. The trial court should be reversed and the matter remanded for a new trial or the claims of Plaintiff should be outright dismissed against the Defendants.

DATED this 28th day of May 2009.

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