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No. 62369-9

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

MARTIN HABIB,
Plaintiff/Respondent,

v.

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

REPLY BRIEF OF APPELLANTS EMERALD COIN VENDING
JASON AND FRANCINE NELSON

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I. STATEMENT OF THE CASE IN REPLY

A. Reply to Respondent's Nature of the Case

Plaintiff Habib acknowledges that this lawsuit was simply an action for an accounting of a partnership and for damages. The problem is that Habib, like the trial court, continuously substituted and/or considered the facts that indisputably occurred *before* the formation of the alleged partnership, with those that occurred *after* the formation of the alleged partnership on May 10, 2006. This distinction is critical because, without looking at the time line as testified to by the parties, the trial court simply could not have supported its decision without relying on facts occurring before the formation of the partnership with the facts that occurred after formation of the alleged partnership; thus without this argument, Habib cannot make or support the arguments he raises in this appeal. For these reasons alone, reversal of the trial court's decision is appropriate.

B. Reply to Respondent's "Cross-Appeal".

Habib first asserts, on page 3 of his brief, that he filed a timely notice of his cross appeal. He did not. Counsel for Nelson has yet to see a verified timely filed cross appeal from Habib along with the required payment for the cross-appeal. Therefore, Habib's cross appeal should not

be considered by this Court as the docket indisputably shows no payment. See Appendix A – copy of Court Docket attached hereto. (Dated 10-07-08 – “Filing Fee Not Paid”).

B. (2) Reply to Respondent’s Statement of Facts

Habib claims that starting in November of 2005 that “all decisions related to the vending sites were made by Jason Nelson. (Habib Brief, at page 3) This claim is contrary to the evidence adduced at trial wherein both Nelson and Habib testified that Habib did not turn over all the sites in November. RP 60, lines 22-24; 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. Furthermore, even Habib admitted that, as of November, 2005, he washed his hands of his own business and did not have *any firsthand knowledge* of the business from that point forward. RP 125, line 19 through RP 131, line 22; Exhibit 4. Therefore, by this admission, Habib admitted that he knew nothing about what Nelson did or what sites he serviced from that point on. As Habib could not produce *any* contradictory evidence, Nelson’s testimony about what he did and what sites he ran, was the *only* evidence before the court. In fact Mr. Habib

acknowledged that Mr. Nelson didn't even allegedly "control" all the sites until May through September 2006. RP 138-139.

More importantly, however, Habib's claim that Nelson began "running" the entire business in November, 2005, is both irrelevant and misleading. Habib admits that in November 2005 Nelson was running 11 sites. RP 336, lines 1-2. Clearly, November, 2005 was a full six months *before* the May 10, 2006 date when Habib claims, and the trial court decided, that the partnership was formed. Finding of Fact 8, CP 88. Thus, as of November, 2005, *it is undisputed and the trial court implicitly found that, there was no partnership.* Therefore, it should be clear that based upon the same partnership law that Habib relies on, the full and exclusive responsibility for the business rested on Habib from November 2005 until May 2006. Any responsibility that Nelson may have had, if he had any, was as an employee or independent contractor, or even someone doing a favor to help a friend. However, Habib did not bring any such cause of action in the underlying case. Habib's case was exclusively tried and decided as a partnership accounting action. His case and the court's decision clearly relied on critical facts and claims that covered the time from November 2005 up to May 10, 2006. But, during this time span, it is

undisputed that Nelson had no duties of a partner of any kind. Unfortunately, both Habib and the trial court continuously failed to make this simple but critical distinction. In fact, even Habib admitted that as of May 2006, Mr. Lee operated 10 to 12 sites or less. RP 294, lines 1-10. The evidence was also uncontroverted that Mr. Lee was dissatisfied and wanted to “unwind” the transaction; Mr. Habib even admits that machines were pulled after Mr. Lee started operating the sites and that those decisions were made by the location. RP 294-295.

Mr. Habib also mischaracterizes the record where he claims that even Nelson agreed that by January or February, 2006, he had taken over all of Habib’s sites. (Habib Brief, at page 4). First, Nelson testified that by January or February, he began running whatever was left of Habib’s sites, but that he did not know the exact amount and that he only began running a few sites in November. RP 168, lines 17-25. Secondly, once again, this claim is misleading and irrelevant because it addresses actions that occurred *before* the date the partnership was allegedly created on May 10, 2006.

Habib claims that “he only knew what he turned over to Nelson in November...” and, he “had no knowledge of what decision were made on

individual sites after November, 2005...” (Habib Brief, at page 4); RP 123.. This, once again, proves Nelson’s case and controverts Mr. Habib’s testimony. *See e.g.*, RP 123 through 133. Habib, by his own admission did not know what happened to any of the sites or what sites were still in existence or what condition the remaining sites were in, including what if any income they were generating, at the time the partnership was formed in May, 2006. *Id.* Habib’s statement also is an admission that, for six months, he effectively abandoned his own business *prior* to the formation of the alleged partnership. Therefore, under any ownership or partnership duty theory in the case, he is solely responsible for the losses and he was fully aware of Mr. Lee’s dissatisfaction with the sites.

Habib does correctly recognize that “whatever decisions were made during the operation by Mr. Lee were made by Mr. Lee, not Habib.” (Habib Brief, at page 5). Yet this all points to the fact that he essentially acknowledges that Mr. Nelson had nothing to do with the “decisions”. Further, this admitted fact shatters the causal chain and throws more confusion and credibility into Mr. Habib’s business and what it really consisted of at the time he formed the alleged partnership with Nelson on May 10, 2006. It is further undisputed that Mr. Lee had control of the

business for approximately two months ending shortly before the partnership was formed. RP 293 through RP 295, FOF #6-7.

Habib makes a critical and blatant misstatement of fact when he states that counsel for Nelson agreed, in the CR2A, that a partnership was formed *between* Nelson and Habib, on May 10, 2006. (Habib Brief, at page 5). Again, the court joined in making this critical factual error. Nothing could be further from the truth. The CR2A agreement stated provided that a partnership was formed between Habib and ECV, Nelson's company. There was never any agreement that a partnership was formed between Nelson and Habib.

Habib's claims that he produced ledgers etc, that supposedly showed he was earning \$10,000 a month at the sites, is also irrelevant. (Habib Brief, at page 5). He also admitted that, as of November, 2005, he could no longer run his business at all and that after November, 2005, he has no idea what happened with his business. These facts make it clear that, contrary to the court and Habib's unexplained and unsupported conclusion, the only reason there was anything left of the business by May 10, is because of Nelson's unilateral, uncompensated and voluntary services!

Habib's claim that he was never told that most of the routes had been lost, prior to May 10, is blatantly untrue. It is disproven by the email exchanges admitted into evidence at trial. *See* email exchanges between May 7, and May 8, 2006 (Exhibit 7). 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 only response was that he would give Nelson three options. *See* Exhibit 4, page 1-2.

Habib continues to assert the irrelevant claim that Nelson did not keep records prior to the formation of the alleged partnership. (Habib Brief, at page 6). As for record keeping *after* the formation of the alleged partnership, there is simply no evidence that Nelson or Habib assigned the duty of maintaining records. What is established is that the email the alleged partnership was formed via an email exchange between Nelson and Habib. In that exchange, Habib said nothing about assigning the respective duties. Nelson explicitly stated what he would do. In that

statement, he did not even imply that he would keep the business records of the partnership. He merely said that he would run the routes and could be bought out at any time. *See* Exhibit 7 - email dated May 10, 2005, at page 7. It is noteworthy, as to Mr. Habib's overall credibility that he asserts 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. After the partnership was allegedly formed, Nelson periodically informed Habib, beginning approximately one month later, that the business was losing money and that he wanted out. *See* 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. What more needed to be said? What did Habib do to help with the failing business or check the accounts? He did nothing. The record and testimony is devoid of any evidence to suggest that Mr. Habib did anything to protect his so-called investment nor did he assist in any manner despite Mr. Nelson's requests and regular notifications that the ship was sinking; he just wanted someone else to blame for his own earlier mismanagement and lack of service.

II. REPLY TO ARGUMENT IN RESPONSE TO ARGUMENTS OF APPELLANT.

A. There was not substantial evidence produced at trial establishing that a partnership was formed between Habib and Nelson as defined in RCW 25.05.055(1) as an association to carry on as co-owners of a business for profit on May 10, 2006. (Habib Brief, at page 8)

Habib misreads RCW 25.05.065(4). (Habib Brief, at page 8).

Habib sites this statute for the purpose of contradicting Nelson's claim that there could be no partnership because Habib owned everything prior to the alleged inception of the partnership. The problem with RCW 25.05.065(4) is that it addresses property ownership, acquisitions and transfers *that occur after a partnership has been formed*. This is abundantly evident from the language, "Property acquired in the name of one or more *of the partners*". *Id.* Clearly, that is not what happened in this case because the property of the business was not acquired in the name of one of the "partners", i.e., Habib. It was acquired in the name of an individual who was not in a partnership at the time of the acquisition, that individual was Habib. This is not the situation contemplated by RCW 25.05.065(4).

Additionally, the partnership that was, supposedly subsequently formed, and referenced in the CR2A, was between Habib and Emerald

Coin Vending, not Habib and Nelson as Mr. Nelson was not even a party to the litigation at that point. *See* Exhibit 5 and CP 1-4 and CP 31-37. Habib, too, was represented by counsel at the time of the CR2A and it was the same counsel that had – at that time – not even yet sued Nelson in his individual capacity. *Id.* This one fact, alone, should dismantle the trial court’s decision as a matter of law and is an undisputed fact. ***At the time of the CR2A, Nelson was not a party and the CR2A did not state that there was a partnership between Mr. Nelson and Habib!*** Habib argues that Nelson cannot make this argument because he was in privity with Emerald Coin Vending, Inc., so he cannot complain or argue that the CR2A does not apply to him or include him as a party. (Habib Brief, at page 9). This argument is attempting to place form over substance since *at the time the CR2A was signed, Nelson was not a party to the lawsuit.* Emerald Coin was a corporation, and, therefore, a “separate and distinct legal entity.” Furthermore, the trial court did not make this finding of “privity”, nor was it argued to the trial court and is therefore waived. *See State v. Wilson*, 117 Wn.App. 1, 21, 75 P.3d 573 (2003); *Davidson v. Hensen*, 135 Wn.2d 112, 123, 954 P.2d 1327 (1998).

Habib argues, and the trial court found, that Nelson violated his partnership duties by failing to keep business records. (Habib Brief, at page 10). However, there is absolutely nothing in the agreement that assigns such a duty or managing partner duties, to Nelson. Habib argues that conduct proves the partnership. (Habib Brief, at page 11). However, there was nothing in the conduct that was different than when Nelson was just essentially volunteering his time to help Habib or between Nelson and a contractor or employee, for the period of November, 2005 and May 10, 2006. Nothing changed between the parties during the period of time following May 10, 2006 other than the CR2(a) Agreement.

Habib makes a critically important argument on page 11 of his Brief, which fully supports Nelson's case. He argues that the parties' conduct comported with the "written agreement" and that this conclusively proves the partnership and their respective duties. However, if the words and conduct do prove the existence of the partnership and its duties, they prove that Nelson had NO managing partner type duties.

In the alleged agreement, Habib never requested, and Nelson *never* offered to undertake the managing partner role or its duties or to provide site by site itemized monthly accounts and records. He merely offers to

continue “running the routes”. This offer had a history between Nelson and Habib. Other than the two months that Mr. Lee had owned the business, Nelson had run some or all of the routes for Habib on an uncompensated basis. This is clear since Nelson wanted to be paid for his time and commitment. 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. He had not kept meticulous or specific item by item records or accounts. It was almost an ad hoc arrangement. So, in the “course of dealings” that already existed between these two men, with respect to Nelson’s activities, his “running the routes” did not entail anything more than he had already been doing for free (or at a loss when considering the time and expense he incurred) and that *did not include* specific or itemized record keeping which appears to be much more an after-the-fact lawyer’s argument than an actual agreement between the parties.

Furthermore, it was clear that Nelson offered to enter this agreement just to get back some of the money and time he had already lost in the deal – as Habib had not paid him anything for his work. 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. Nelson clearly had no intention of taking on more duties or throwing more good time after bad. This is evident from his emails. See Exhibits 1-7 generally. Finally, Nelson's undisputed testimony was that, he simply does not run routes or track earnings that way, nor is there any need to, when every site is losing money! The evidence was consistent and essentially admitted by both parties that there were not the full 36 sites as of May 10, 2006; 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.

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.

Habib flatly misstates and misrepresents the facts when he argues that he and Nelson engaged in a joint enterprise and that Nelson agreed to undertake “all management decisions”. (Habib Brief, at page 11). This is flatly contrary to the record. If there was a partnership, why does Habib have to consistently expand the terms of the agreement beyond what was actually stated?

Habib argues that this Court cannot substitute its judgment for the trial court, “where there is substantial evidence to support a finding” and that the trial court’s finding that there was a partnership is supported by the parties’ “words and conduct”. (Habib Brief, at page 12). The problem with Habib’s argument is that the trial court found that the evidence was *insufficient* to find a partnership as a matter of law, based upon either party’s words or conduct and relied on the CR 2(a) Agreement. In its decision, the Court states: “It seems to me the parties have agreed that there was a partnership between them and I will not consider defense argument that the partnership does not exist, based on that agreement. I want to be clear, I think part of my ruling is to enforce the agreement between the parties. And that drives a lot of my rulings on this.” Court’s Oral Decision, at Page 5, lines 13-18.

Hence, the court found there was a partnership by exercising its equitable powers and discretion. Oral Ruling of the Court, RP 8, lines 1-6. At the very least, it is clear from both the court's findings and the evidence that Mr. Nelson was not vested with managing partner duties and his words, what he allegedly agreed to, were to the contrary. Finally, the CR2A Agreement did *not* establish a partnership between Nelson and Habib. The court's finding that it did is patently incorrect and should be reversed.

B. Finding of Fact #5 is not supported by substantial evidence and should be reversed. (Habib Brief, at page 15).

Ironically, Habib's argument on this point establishes arguments to support Nelson's case. Habib claims that Nelson ran the business just as Habib had and the evidence is clear that Nelson's conduct was the same *after* May 10 as it had been prior (other than the attempted sale to Mr. Lee and Mr. Lee running it for 2 months). Thus, Habib and his counsel have argued, and Habib's conduct in subsequently entering into the alleged partnership has shown, that Habib fully and knowingly understood and approved of Nelson's way of trying to run the business from November, 2005 onward through September 2006. Thus, Habib's legalistic after the

fact arguments to the contrary are not countenanced in partnership case law, statute or equity.

C. Based on the Trial Court's rulings and reliance on the CR 2(a) Agreement there was clearly an abuse of discretion and the evidence does not support the Cross Appeal by Habib. (Habib Brief, at page 16).

On page 17 of his Brief, Habib makes an argument that is self defeating wherein he states, "No profits were ever received under the partnership for the assumption (sic) or to even apply." Here, Habib essentially admits that the partnership never made a profit. This is an extremely important point because it focuses attention on just exactly what affirming the trial court's decision will do; it will result in the fact that a partnership is created where a person who has been hired to work for another, as an employee or contractor, but has never been paid and who has put some of their own money and time into the business as part of that working agreement is left with the choice of continuing to work with no guarantee and only the risk of being liable if the so-called business is not profitable or successful. There was no evidence that Mr. Nelson did anything illegal or improper and black letter partnership law provides that partners share equally in all losses and profits. *See e.g., McCormick v. Dunn & Black, P.S.*, 140 Wn.App. 873, 882-883, 167 P.3d 610 (2007).

Here that did not occur and without evidence that Mr. Nelson did something wrong to cause the alleged partnership to lose money, he should not be left alone to suffer all of the losses or damage.

Mr. Nelson clearly stated in his email that he would “almost prefer the money you owe me at this point with all that I’ve put into the company along with my time, but let’s try this: I’ll run the route and split the profits with you and either one of us can be bought out anytime if the other decides to go a different direction.” *See* (Exhibits 4 and 7) and email dated May 10, 2005. Exhibit 7, page 7.

Habib argues that there was no duress because Nelson “voluntarily” consented. (Habib Brief, at page 17). This argument, in view of the emails that gave rise to the “partnership” and the facts of this case, is simply preposterous. Habib argues that because Nelson was “running the routes” there was no way for Habib to do the accounting. (Habib Brief, at page 19) Again, this argument imposes an after the fact legalistic concept onto a business where the concept simply does not work and where the application is completely inconsistent with the “partners” history and understanding of what constituted an accounting. This point has already been argued exhaustively in this brief. Nelson did nothing

different after the partnership was formed. He offered to continue doing what he had been doing and that is exactly what Habib asked him to do and agreed to.

Habib argues that Washington law, RCW 25.05.265(1) requires “a partner” to account for “any property, profit or benefit derived by the partner...” (Habib Brief, at page 20). However, he misapplies the law to say that the partner must also account for losses. Habib’s argument also contradicts the history of Nelson’s responsibilities (or those which he agreed to undertake) which were simply incorporated into the “partnership agreement” and which *did not* include any such accountings. Habib acknowledges that the number of sites diminished from thirty-six (36) to essentially zero (0), from the time Habib bailed out in November. Thus, Habib acknowledges that he was on notice for more than six months before the alleged partnership that the number of sites was diminishing. His failure to engage in an accounting cannot be blamed on Nelson or imposed on Nelson – after the fact.

Habib argues on with various legal citations and discussions about fiduciary duties and managing partners from page 21 through page 24 of his Brief. However, none of these discussions surmount the simple facts

of the parties' ongoing relationship, or the agreement, which both prove that Nelson could not be considered the managing partner.

D. There was not substantial evidence to support entry of Finding of Fact 10. (Habib Brief, at page 24).

This is only true if Habib's failure to respond to Nelson's concerns from June through September can be deemed a modification of the plain language in the "agreement" which said that either party can withdraw at any time. Furthermore, there was evidence that Habib had possession of partnership assets, including title to the truck. RP 48, lines 10-23.

E. The claims of Respondent that Appellants failed to assign error or were not raised at trial are incorrect. (Habib Brief, at page 25).

Habib's claim that Nelson did not raise allegations of fraud, undue influence or misrepresentations at trial, is incorrect and absurd. These claims, especially undue influence and duress, were raised and argued in the briefing. *See* CP 5-9 and CP 55-77 – Supplemental Trial Brief; RP 353-354. Habib's refusal to address them now should constitute a waiver of this argument. Appellants clearly asserted and argued that Mr. Habib had misrepresented the status of the business and its profitability from the very beginning and this is evident by virtue of reviewing the emails

between the parties and Mr. Nelson's dissatisfaction with the routes. *See generally*, Exhibits 1-7.

F. It was improper for the Court to conclude that Nelson had any duty to account where all the evidence showed that the only things to account for were losses and Habib was aware of this throughout the relationship. (Habib Brief, at page 26).

Again, this argument begs the question. The counter arguments have already been made. This simply was not Nelson's duty, either by the express terms of the contract or based upon the parties' conduct from November, 2005 through September, 2006. Imposing such a duty on Nelson, after the fact and under the circumstances of this case is contrary to public policy and the entire purpose of the partnership statute. It would result in case law that would have a wide sweeping and horrible impact on business in Washington that is far from what the legislature intended.

G. All of the assets of the partnership were the basis upon which the Court reached its valuation, including assets held by Habib after they were removed from various locations and clearly had a significant bearing on the amount of the judgment. (Habib Brief, at page 34).

Mr. Habib has the boldness to assert that the "parts" in Mr. Habib's garage had any bearing on the judgment. The point is that Mr. Habib did have machines in the garage and the trial court awarded all of the so-called

partnership assets to Mr. Nelson which would obviously include any assets in Mr. Habib's possession.

H. Respondent's arguments relating to the alleged failure to comply with Local Rule 40(d)(2) by failing to specify what extraordinary circumstances existed is improper. (Habib Brief, at page 35).

Habib's claim is incorrect in all respects. Nelson did specify what the extraordinary circumstances were, and it was indeed extraordinary and notably was a joint motion. CP 109-111. The primary circumstance, as Habib admits, was that *after* the CR2A was signed and just two months before trial, Habib amended the complaint to add Nelson as a Defendant, all without the Appellants' opportunity to conduct any discovery or investigate the new claims asserted by Habib. How Habib can argue that this was not "extraordinary" is quite baffling given that the trial court eliminated Habib's claim against Emerald Coin at the outset of the trial and given that the CR2A was between Habib and Emerald Coin, not Habib and Nelson. *See* Exhibit 5. There is simply no dispute that Mr. Nelson was not a party to the lawsuit or the CR2(a) agreement except in his corporate capacity. It was improper for the trial court to essentially ignore this significant distinction and the trial court should be reversed on this issues as well.

III. Response to Arguments on Cross Appeal. (Brief at page 36).

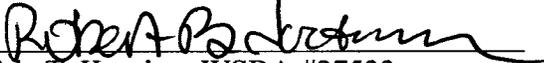
Since Mr. Habib did not comply with the law by paying the filing fee for the cross appeal, Nelson asserts that Mr. Habib has waived any right or ability to file a cross-appeal. As the Docket shows clearly, Mr. Habib did not pay the required filing fee. If, for some reason, this Court should disagree, Nelson requests a ruling from the appellate court and an opportunity to respond to the arguments.

IV. Conclusion

For the foregoing reasons the trial court's decision should be reversed and the matter dismissed outright. At the very least, the trial court's decision should be reversed and the matter remanded for a new trial with the Appellants having a reasonable opportunity to conduct discovery into the late asserted claims of Habib. The trial court should therefore be reversed and the matter remanded.

Respectfully submitted this 31st day of July, 2009.

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