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No. 63734-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of RODGER W. BENSON, JR., Deceased.

RODGER W. BENSON, III,

Appellant,

v.

JOAN BENSON, Personal Representative of the Estate,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE TIMOTHY BRADSHAW

CORRECTED BRIEF OF RESPONDENT

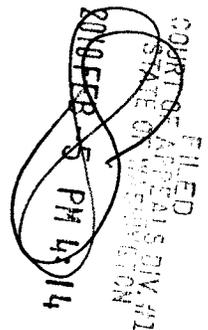
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ORIGINAL

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I. INTRODUCTION

Appellant Rodger Benson III (“Benson III”)¹ sued the estate of his late father Rodger Benson (“Decedent”) and Decedent’s widow Joan Benson (“Personal Representative”) alleging that Decedent’s Charles Schwab accounts belonged to a partnership that he and his father formed in 1997 called Benson Ventures.² The trial court held that Benson III failed to prove that he and Decedent had formed a partnership; that the partnership claim was time-barred because the alleged partnership was dissolved in 1998 when Benson III returned to work in the construction industry; that the Schwab Accounts opened by Decedent in 2006 were not partnership property; and that Decedent’s assets, which were acquired during his marriage to Joan Benson, were community property. Benson III asks this Court to reweigh the evidence to reach a different result. This would be error. The Personal Representative requests that the Court affirm the trial court’s decision and award the Estate reasonable attorneys’ fees and costs on appeal under RCW 11.96A.150 and RAP 18.1.³

¹ Due to the similarity between the Petitioner’s and the Decedent’s names, the Respondent refers to them herein as Benson III and Decedent instead of “Mr. Benson.” No disrespect is intended.

² Benson III also alleged that Decedent’s Will and marriage were invalid and sought damages for depreciation of alleged partnership property. Benson III dismissed these claims prior to trial (CP __) and the damages claim on the first day of trial. RP 36. Page numbers for newly designated documents will be filed upon receipt of the index.

³ The Estate cross appealed the denial of attorneys’ fees. A motion to withdraw the cross appeal is pending. Therefore, the issue is not addressed in this brief.

II. RESTATEMENT OF ISSUES

The Appellant's Brief does not contain a statement of issues as required by RAP 10.3(a)(4). The issues are properly stated below:

A. Can a party establish an implied partnership contract where there was no sharing of profits or losses, no co-ownership of property, and no record of financial contributions to the alleged partnership?

B. Can a party who disassociated himself from an alleged partnership wait nine years to commence suit under an alleged oral partnership agreement?

C. When an account is acquired in the name of one party with marital community funds can it be deemed a partnership asset when the account was not titled to the partnership, the account was not acquired with partnership funds, and the acquiring party's spouse did not consent to the transfer of community funds to the partnership?

D. When a party claims that an asset titled to a married decedent is a partnership asset, can that party prevent the decedent's surviving spouse from counterclaiming that the property was an asset of the marital community?

E. Can a marriage be declared "defunct" when one of the spouses continued to believe in the sanctity of the marriage until learning of her spouse's infidelity?

F. Does the Dead Man's Statute allow testimony by an interested party about the party's own acts when those acts occurred in the presence of the decedent and are offered to establish that the decedent and the interested party formed a partnership?

G. Is testimony offered without sufficient foundation and in violation of other procedural and evidentiary rules admissible because the offering party asserts it is not hearsay?

H. Would it be equitable to award the Estate its reasonable attorney fees and costs on appeal under RCW 11.96A.150 and RAP 18.1?

III. RESTATEMENT OF THE CASE

A. Mr. and Mrs. Benson Maintained Their Marital Community until Mr. Benson's Death.

1. Decedent married Joan Benson in 1972.⁴ She and the Decedent knew each other since childhood.⁵ Mr. and Mrs. Benson remained married at the time of Decedent's death.⁶
2. Mrs. Benson was a "stay-at-home wife."⁷ During her marriage to Mr. Benson, he handled most of the financial affairs.⁸
3. In 1986, Mr. Benson moved into the condominium that he and Mrs.

⁴ RP 83 1. 13-14.

⁵ Finding of Fact 2, CP 296 (not challenged on appeal).

⁶ RP 82 1. 22-24.

⁷ RP 115 1. 9-10.

⁸ RP 119 1. 8-9.

Benson jointly owned.⁹ Neither spouse filed for divorce until December 2006.¹⁰ While they lived apart, Mrs. Benson continued to love Mr. Benson and she believed that he loved her. RP 91. Decedent and Mrs. Benson continued to travel together (RP 133) and to enjoy one another's company. RP 140. They kept each other up to date about what they were doing. RP 134. Mrs. Benson continued to have contact with the Decedent's son and his wife,¹¹ who considered her to be a "sweetheart."¹²

4. Decedent and Mrs. Benson filed joint income tax returns until Decedent's death.¹³ They maintained at least one joint account through the year 2003 and jointly insured their vehicles.¹⁴
5. Joan Benson started dissolution proceedings in December 2006 after learning of Mr. Benson's infidelity.¹⁵ Mrs. Benson considered herself married to Mr. Benson until his death and continued to love him even after learning of his infidelity.¹⁶ Until Mrs. Benson learned of Decedent's infidelity, she trusted him and did what he asked her to do. RP 129. She did not know of his infidelity until late 2006. RP 139.

⁹ Finding of Fact 3 CP 297 (unchallenged on appeal).

¹⁰ *Id.*

¹¹ For example, Mrs. Benson visited Benson III at the hospital while he was recovering from a heart procedure. RP 359 l. 23-25.

¹² Finding of Fact 47, CP 304 (not challenged on appeal).

¹³ Finding of Fact 5, CP 297 (not challenged on appeal).

¹⁴ Finding of Fact 6, CP 297 (not challenged on appeal).

¹⁵ Finding of Fact 4, CP 297 (not challenged on appeal); RP 138 l. 12-15.

¹⁶ Finding of Fact 4, CP 297 (unchallenged); RP 91 l. 12-16.

6. Joan Benson never heard of a partnership between her husband and Benson III prior to her husband's death¹⁷ and did not know about any business called "Benson Ventures." RP 176.

B. During the Marriage, Mr. Benson Traded in Natural Resources Securities and Died with a Portfolio Valued at Approximately \$2.3 Million.

7. Decedent began investing in natural resource securities in the early to mid 1990s.¹⁸ The investments occurred during Decedent's marriage to Mrs. Benson and were not traced to Decedent's separate property.¹⁹
8. In 1997, Decedent opened a securities account at Wedbush Morgan.²⁰ The account balance in August 1997 was in excess of \$350,000.²¹
9. The value of natural resources securities declined sharply in 1998 and 1999.²² By January 2000, the Wedbush Morgan account balance had fallen over \$300,000 to approximately \$44,000.²³
10. Decedent made large cash deposits into the Wedbush Morgan account between 2000 and his date of death.²⁴ Between January 1, 2000 and

¹⁷ Finding of Fact 36, CP 303 (unchallenged); RP 160 l. 23; 165 l. 10-14.

¹⁸ Finding of Fact 11, CP 297 (not challenged on appeal).

¹⁹ Joan Benson testified that Decedent did not have any property at the time of their marriage. RP 108 l. 22-25. Decedent's 1996 tax return reflects active trading of securities in the natural resources industry through an account at Freeman Welwood, which was titled jointly to Mr. and Mrs. Benson. Ex. 121.

²⁰ Finding of Fact 11, CP 297 (not challenged on appeal).

²¹ Finding of Fact 11, CP 297-8 (not challenged on appeal).

²² Finding of Fact 11, CP 298 (not challenged on appeal).

²³ Finding of Fact 11, CP 298 (not challenged on appeal).

²⁴ Finding of Fact 12, CP 298 (not challenged on appeal).

May 31, 2001 Decedent deposited more than \$190,000.²⁵ In 2001, Decedent opened a second Wedbush Morgan account, which held other types of securities that were not related to natural resources or mining.²⁶ Decedent deposited \$400,000 into this second Wedbush Morgan account on July 9, 2001. Ex 35 p. 487. In 2002, Decedent transferred the second Wedbush Morgan account (account #2) into the Wedbush Morgan account that held his natural resource securities (account #1).²⁷ Specifically, on April 26, 2002, \$100,000 was transferred from account #2 to account #1, and then on May 22, 2002, an additional \$144,959.93 was transferred from account #2 to account #1. Ex 117 pp. 156, 158. In addition to the transfers and deposits described above, Decedent made the following deposits into account #1 from July 2001 through July 2002: July 2, 2001: \$61,000 (Ex 117 p. 138); July 10, 2001: \$75,000 (*Id.*); August 27, 2001: \$18,000 (Ex 117 p. 140); September 4, 2001: \$65,000 (Ex 117 p. 142); September 28, 2001: \$35,000 (*Id.*); October 12, 2001: \$58,000 (Ex 117 p. 144); November 5, 2001: \$11,000 (Ex 117 p. 146); December 17, 2001: \$11,000 (Ex 117 p. 148); January 15, 2002: \$9,000 (Ex 117 p. 150); February 4, 2002: \$10,000 (Ex 117 p. 152); March 14, 2002: \$4,000

²⁵ Ex 117 pp. 108, 110, 112, 116, 118, 120, 122, 124, 130, 132, 134.

²⁶ Finding of Fact 12, CP 298 (not challenged on appeal).

²⁷ Finding of Fact 12, CP 298 (not challenged on appeal).

(Ex 117 p. 154).

11. As of August 2002, Decedent's Wedbush Morgan account was valued at \$855,672.19. Ex 117 p. 165. More than \$790,000 came from new deposits Decedent made from March 2000 to July 2002, after the account value had plummeted to just \$44,000 in January 2000. *See supra* at ¶10. Between July 2002 and March 2006, Decedent's investments grew from \$855,672.19 to \$2,275,947.72. Ex 117 pp. 165, 264. Benson III did not make any contributions to the Wedbush Morgan account during this period.²⁸ The deposits described above were not traced to Decedent's separate (non-community) property.²⁹
12. In 2006, the remaining Wedbush Morgan account was transferred to Charles Schwab.³⁰ Benson III did not make any contributions to the Charles Schwab account.³¹ The Schwab accounts were not traced to Decedent's separate (non community) property.³²
13. The Decedent's stock portfolio at Charles Schwab was valued at

²⁸ Finding of Fact 29, CP 301 (challenged on appeal).

²⁹ Conclusion of Law 17, CP 307 (challenged on appeal). The most likely source of funds for the deposits was the sale of property owned by the McDermott Group Partnership. The McDermott Group was a partnership formed in 1976 during Decedent's marriage to Mrs. Benson. *See* Ex 178. It operated until 2001. *See* Ex 110, 111. In 2001, tax records reflect that Decedent and Mrs. Benson received \$946,371 from sale of property owned by the McDermott Group. Ex 110.

³⁰ Finding of Fact 14, CP 298 (not challenged on appeal).

³¹ Finding of Fact 29, CP 301 (challenged on appeal).

³² Finding of Fact 7, CP 297; Conclusion of Law 17, CP 307 (challenged on appeal).

approximately \$2.3 million when he died.³³ His money market account at Schwab was valued at \$156,808.98 on his date of death.³⁴

C. Decedent's Stock Portfolio Was Never Co-Owned With His Son or Titled to Any Partnership; No Written Partnership Agreement Ever Existed.

14. The Wedbush Morgan account that was opened in 1997 was acquired in the name of the Decedent, without reference to Benson III or to any joint owner, as shown by the account applications. Ex 78, 157, 158. The Decedent also signed account applications in 2001 as sole owner. Ex. 159, 160. One account document signed in 1997 identifies "Benson Ventures" as Decedent's employer/firm and indicates that Decedent was "owner." Ex 78. The same form indicates that the account is an "individual" account not a "partnership" account. Benson III was not referred to in any of the documents setting up the Wedbush Morgan accounts. *See* Ex. 78, 157, 158, 159, 160. These documents are discussed in more detail below.
15. From the inception of the Wedbush Morgan account until it was transferred to Charles Schwab in 2006, all account statements were issued solely in the name of the Decedent and did not reference a partnership, Benson Ventures or Benson III. Ex 35, 117.
16. Decedent's stock broker Brian Decker testified that Decedent made

³³ Finding of Fact 10, CP 297 (not challenged on appeal).

³⁴ Finding of Fact 10, CP 297 (not challenged on appeal).

clear that the money being invested was his. He told Mr. Decker “this is all my money.”³⁵ The trial court found this testimony credible.³⁶

17. The Schwab accounts opened in 2006 were acquired in the name of the Decedent, without reference to Benson III, Benson Ventures or any joint owner. Ex 118 pp. 129-134. Certificated stocks that were transferred to the Schwab portfolio were all titled to Decedent individually without reference to Benson III, Benson Ventures or any joint owner. Ex 118 pp. 142-156. Charles Schwab account statements were issued solely in Decedent’s name and did not refer to a partnership, Benson Ventures or Benson III. Ex 118 pp. 169-280.
18. There was no written partnership agreement between the Decedent and Benson III.³⁷ There was no written partnership agreement for any entity called “Benson Ventures.”³⁸

D. Benson III Returned to Full-Time Employment in the Construction Industry in 1998.

19. Benson III left his stressful job in the construction industry in March 1997.³⁹ Between March 1997 and July 1998, Benson III worked with his father researching natural resource and mining securities.⁴⁰ Decedent taught Benson III about the natural resources industry, about

³⁵ Finding of Fact 22, CP 300 (challenged). *See also* RP 785, 786, 788.

³⁶ Finding of Fact 22, CP 300 (challenged on appeal).

³⁷ Finding of Fact 8, CP 297 (not challenged on appeal).

³⁸ Finding of Fact 9, CP 297 (not challenged on appeal).

³⁹ Finding of Fact 25, CP 300 (not challenged on appeal).

⁴⁰ Finding of Fact 26, CP 300-1 (not challenged on appeal).

which Decedent was very knowledgeable.⁴¹ Benson III used his superior computer skills to assist his father (though Decedent also operated a computer) and set up a Yahoo web page.⁴² According to the testimony of Decedent's stock broker, Decedent appeared to be in charge, and Benson III appeared to be learning from his father.⁴³

20. In July 1998, Benson III returned to full-time salaried work in the construction industry. Decedent continued to use Brian Decker as his stock broker until Decedent's death in April 2007. *See* Ex 118 pp. 169-280. Mr. Decker had no contact with Benson III after Benson III returned to work in the construction industry in 1998. RP 776, 827. Benson III did not call or fax in any trades after July 1998. *Id.*; RP 835. Brian Decker testified that he did not consider Benson III to have ongoing authority to make trades on Decedent's account after he returned to construction work in 1998.⁴⁴

E. Benson III Never Had Authority To Change Title To His Father's Securities.

21. Between March 1997 and August 1998, Decedent authorized Benson III to make stock trades for him on the Wedbush Morgan account (RP 770); however, according to the testimony of stock broker Brian

⁴¹ Finding of Fact 26, CP 301 (not challenged on appeal).

⁴² Finding of Fact 26, CP 301 (not challenged on appeal).

⁴³ Finding of Fact 26, CP 301 (not challenged on appeal).

⁴⁴ Finding of Fact 27, CP 301 (challenged on appeal); RP 776, 777, 835.

Decker, Benson III did not have unilateral power of investment with regard to the Decedent's stock portfolio.⁴⁵ It appeared to Mr. Decker that Benson III followed what the Decedent asked him to do. RP 795.

22. Brian Decker also testified that Benson III was never authorized to change title to Decedent's securities or accounts, notwithstanding his authority to make trades.⁴⁶ Decedent also made it clear to Mr. Decker that the ownership information on his accounts was not to be changed and that the accounts were to remain titled solely to Decedent.⁴⁷

F. Benson III and the Decedent Did Not Share Profits And Losses.

23. In 1997, a checking account was opened at U.S. Bank under the names "Benson Ventures, Rodger Benson and Rodger Benson III."⁴⁸ The last activity in U.S. Bank account 42270013789 was in July 1998 and the account was closed prior to 2001.⁴⁹

24. Co-ownership of a bank account is not established by joint title to the account. Funds are owned by the depositor, regardless of whose name is on the account.⁵⁰ Because of the passage of time, no deposit records

⁴⁵ Finding of Fact 22, CP 300 (challenged on appeal).

⁴⁶ Finding of Fact 27, CP 301 (challenged on appeal); RP 841.

⁴⁷ Finding of Fact 27, CP 301 (challenged on appeal); RP 785-787.

⁴⁸ Finding of Fact 33, CP 302; Finding of Fact 28, CP 301 (unchallenged).

⁴⁹ Finding of Fact 30, CP 301 (not challenged on appeal). The exact date that the account closed could not be determined because the bank did not maintain records more than seven years old. Ex 134.

⁵⁰ See RCW 30.22.090(2) ("Funds on deposit in a joint account without right of survivorship and in a joint account with right of survivorship belong to the depositors in

were available. Ex 134. All there is to go by are three signed checks (Ex 7), the check register (Ex 29), unwritten checks (Ex 29) and one account statement produced by Benson III (Ex 5).

25. U.S. Bank account 42270013789 was reported to the IRS under Decedent's social security number.⁵¹ Benson III's tax returns and the few documents relating to the U.S. Bank account 42270013789 do not reflect that Benson III deposited any of his own funds into the account.⁵² The register reflects that funds from the joint Freeman Welwood account that Decedent owned with Mrs. Benson (Ex 121A) were transferred to the U.S. Bank account. Ex 29 p. 1362, 1364. Correspondence also reflects that funds were transferred from the Wedbush Morgan account that was titled to Decedent to the U.S. Bank account. Ex 80.

26. Petitioner was paid over \$40,000 from the U.S. Bank account between March 1997 and July 1998, during a period that the Wedbush Morgan securities were plummeting in value. Ex 29. These payments were not

proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at the time the account was created.”)

⁵¹ Social Security Number ending 7897 appears on the U.S. Bank statement for the joint checking account. Ex 5. This social security number belonged to Decedent according to his death certificate. See Ex 118 p. 158.

⁵² Ex 5, Ex 7, Ex 29, Ex 133. See also Finding of Fact 29, CP 301 (challenged on appeal).

reported on Benson III's tax returns as profits or income.⁵³

27. "All gains, losses and income from the Wedbush Morgan accounts and the Schwab accounts were reported on the individual income tax returns filed for Decedent and Mrs. Benson from 1997 through Decedent's date of death. None of the gains, losses or income from the Wedbush Morgan accounts or the Schwab accounts was reported to the IRS as having been generated by any partnership."⁵⁴ None of the gains or losses was reported in Benson III's tax returns.⁵⁵ Decedent's tax returns do not report any partnership income, gains or losses from a partnership with his son or from any business called Benson Ventures.⁵⁶ The type of tax schedules and forms normally associated with partnerships were not prepared with regard to the partnership alleged by Benson III.⁵⁷

28. Benson III invested his own funds in mining and natural resources stocks during the same time as the alleged partnership.⁵⁸ These natural resources securities were Benson III's individual assets, not partnership property.⁵⁹ Benson III did not share the profits and losses

⁵³ Ex 133. Benson III could not find his tax return for 1997. RP 358 l. 17-25. The return for 1998 does not report taxable income or gains from the alleged partnership.

⁵⁴ Finding of Fact 19, CP 299 (not challenged on appeal).

⁵⁵ Finding of Fact 20, CP 299 (not challenged on appeal); Ex 133.

⁵⁶ Finding of Fact 17, CP 298-9 (not challenged on appeal).

⁵⁷ Finding of Fact 17, CP 298-9 (not challenged on appeal).

⁵⁸ Finding of Fact 23, CP 300 (not challenged on appeal).

⁵⁹ Finding of Fact 24, CP 300 (not challenged on appeal).

from his individually-titled securities with his father.⁶⁰

G. Benson III Did Not Make Financial Contributions To The Alleged Partnership.

29. Benson III did not make any financial contribution to the alleged partnership.⁶¹ There is no record that Benson III deposited any of his own funds into the U.S. Bank account titled to “Benson Ventures, Rodger Benson and Rodger Benson III.”⁶² There is no record that Benson III deposited any of his funds into the Wedbush Morgan account or the Charles Schwab accounts. Ex 35, 117, 118. Benson III offered in evidence documents relating to refinances of his home and the cashing in of his 401(k), but did not show that the proceeds were given to Decedent or contributed to the alleged partnership.⁶³

30. Stock broker Brian Decker testified that his practice was to verify the source of funds for every deposit into the securities accounts (RP 813) and that he had no information indicating that Benson III deposited any of his own money into Decedent’s Wedbush Morgan or Charles Schwab accounts. RP 836-7; 841-2.

H. The Name “Benson Ventures” Was Used Prior to the Alleged Partnership.

31. The name “Benson Ventures” appears in summaries of the Decedent’s

⁶⁰ *Id.*

⁶¹ Finding of Fact 29, 301 (challenged on appeal).

⁶² Finding of Fact 29, CP 301 (challenged on appeal); Ex 29; Ex 5.

⁶³ Findings of Fact 31 and 32, CP 301-2 (not challenged on appeal).

investment activities dating back to March 1994 – three years prior to formation of the alleged partnership. Benson III offered in evidence an exhibit titled “Benson Ventures Stock Transactions” that details stock trades occurring in 1994, 1995, 1996, and 1997, most of which predated the formation of the alleged partnership. Ex 98. Some of the listed stocks were held in the Freeman Welwood account, which was jointly titled to Decedent and Mrs. Benson. Ex 98; Ex 121A.

32. “Benson Venture” also appeared prior to the formation of the alleged partnership in the handwritten notes of the Decedent’s accountant for tax year 1996. Ex 194; RP 658. This was the only reference to “Benson Ventures” anywhere in the tax records. RP 661. The reference related to the calculation of the Decedent’s “1996 taxes” – the year before the partnership was allegedly formed. Ex 194; RP 664.

I. Decedent Did Not Report “Benson Ventures” or a Partnership in Divorce Papers or Estate Planning Documents.

33. In December 2006, Decedent retained an attorney to prepare a new will for him. The will was never executed. The unexecuted draft of the will did not mention Benson Ventures or any partnership.⁶⁴

34. As noted above, Mr. and Mrs. Benson filed for dissolution in December 2006 after 34 years of marriage. If the dissolution had

⁶⁴ Finding of Fact 41, CP 303 (not challenged on appeal).

proceeded, the court would have been called upon to make an equitable distribution of Mr. and Mrs. Benson's assets, including any partnership interests either one of them owned.⁶⁵ None of the dissolution pleadings mention Benson Ventures or any partnership between Decedent and Benson III.⁶⁶

35. Benson III filed a purported "will" of Decedent dated March 16, 2007 under King County Superior Court Cause Number 08-4-02622-9 SEA.⁶⁷ The "will" does not mention Benson Ventures or any partnership between Decedent and Benson III.⁶⁸

IV. ARGUMENT

A. No Partnership Was Formed.

The party asserting the existence of a partnership bears the burden of proof by a preponderance of the evidence. *Eder v. Reddick*, 46 Wn.2d 41, 49, 278 P.2d 361 (1955). In proving a partnership, the evidence must be stronger between alleged partners than when a third party asserts the existence of a partnership. *Id.* (citing *Cruickshank v. Lich*, 158 Wash. 523, 291 Pac. 485; *Bengston v. Shain*, 42 Wn.2d 404, 255 P.2d 892). Benson III failed to establish by a preponderance of the evidence that he and his

⁶⁵ See RCW 26.09.080; *Morris v. Morris*, 69 Wn.2d 506, 509, 419 P.2d 129 (1966); *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 864 n.3, 855 P.2d 1210 (1993).

⁶⁶ Finding of Fact 42, CP 303 (not challenged on appeal).

⁶⁷ The "will" has not been offered for probate and does not satisfy the requirements for a duly executed will.

⁶⁸ Finding of Fact 43, CP 303 (not challenged on appeal).

father formed a partnership. He now wants the Court of Appeals to reweigh the evidence, which would be improper.

1. A partnership requires a contract to share profits and losses.

In 1997 when the alleged partnership was formed, the legislature defined partnership as "an association of two or more persons to carry on as co-owners a business for profit."⁶⁹ Effective January 1, 1999, the Legislature enacted the Revised Uniform Partnership Act, which applied the same definition of partnership as the prior law. *See* RCW 25.05.005(6).⁷⁰ To create a partnership as defined by Washington law, "a contract of partnership, either expressed or implied, is essential" *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996). "Where, from all the competent evidence, it appears the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established." *Id.*

Washington courts have consistently required proof that the parties intended to share profits and losses in order to establish a partnership:⁷¹

⁶⁹ Former RCW 25.04.060 (1955), *repealed by* Laws of 1998, ch. 103, § 1308.

⁷⁰ Partnership is defined as an "association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055, predecessor law, or comparable law of another jurisdiction."

⁷¹ Benson III appears to concede this point. *See* Appellant's Brief at 48 ("A partnership must be formed for profit ...").

An express or implied contract is essential to a partnership relationship and must contemplate a common venture uniting labor, skill or property of the partners for the purpose of engaging in lawful commerce for the benefit of all the parties, *a sharing of profits and losses*, and joint right of control of its affairs.

Cusick v. Phillippi, 42 Wn. App. 147, 154, 709 P.2d 1226 (1985) (emphasis added); *accord Eder v. Reddick*, 46 Wn.2d 41, 49 (1955). See also *Malnar, supra* at 535 (citing *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189 (1915));⁷² *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wn. App. 533, 537, 468 P.2d 717 (1970) (holding that sharing of profits and losses is a required element of joint ventures); *Gottlieb Brothers, Inc. v. Culbertson's*, 152 Wash. 205, 277 P.447 (1929) (“One of the most important tests of a partnership or joint venture is whether there is a share in losses.”). The case relied on by Benson III, *Minder v. Gurley*, also required that the evidence establish “the purpose of joint profits.” See Appellant’s Brief at 32.

2. Substantial evidence supports the trial court’s findings.

Benson III assigns errors to the following findings which relate to whether a partnership was formed: 13, 15, 21, 22, 27, 29, 35, 39, and 40. The Court of Appeals will not reverse a trial court's findings of fact if substantial evidence supports them. *In re the Estate of Palmer*, 145 Wn. App. 249, 265, 187 P.3d 758 (2008). “Substantial evidence exists if a

⁷² This case was quoted by Benson III in his brief at 31.

rational, fair-minded person would be convinced by it.” *Id.* at 265-266. Where noted, Benson III did not support his assignments of error with argument or citation to the record. “Counsel is obligated to demonstrate why specific findings of the trial court are not supported by the evidence and to cite to the record in support of that argument.” *In re the Estate of Palmer*, 145 Wn. App. 249, 265, 187 P.3d 758 (2008) (citing *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)).

a. Finding of Fact 13 (Assignment of Error 1).

Benson III challenges Finding of Fact 13, which states:

The two Wedbush Morgan accounts were titled to Decedent in his individual capacity, not as partner. Petitioner [Benson III] never appeared on the title of these accounts. He was not identified on account applications or account statements as joint owner. Petitioner’s name does not appear on any of the Wedbush Morgan documents admitted in evidence. CP 298.

The “two Wedbush Morgan accounts” referred to in Finding of Fact 13 were the Wedbush Morgan account opened in 1997 (Finding of Fact 11 (CP 297)), and the Wedbush Morgan account opened in 2001 (Finding of Fact 12 (CP 298)). Finding 13 is supported by the following evidence:

(i) Account Agreements

Three documents were completed on August 18, 1997 when the Wedbush Morgan account was opened. *See* Ex 78, Ex 157 and Ex 158. Exhibit 78 is titled “Customer Account Information” (CAI). In response to the CAI Form question “FIRM OR EMPLOYER,” the Decedent answered

“self/Benson Ventures.” In response to the question “POSITION,” the Decedent answered “Owner.” On the top of the page, in response to the question “TYPE OF ACCOUNT,” Decedent checked the box indicating “INDIVIDUAL.” One of the options was “PARTNERSHIP.” The box next to “PARTNERSHIP” was not checked. Decedent signed the CAI form as “client.” Benson III did not sign the CAI Form; nor does his name appear on the document.

Exhibit 157 is titled “ACCOUNT AGREEMENT, TAXPAYER CERTIFICATION, AND BENEFICIAL OWNERSHIP ELECTION.” Decedent signed Exhibit 157 as “CUSTOMER.” Below the line for the “CUSTOMER SIGNATURE” is a line that reads “JOINT CUSTOMER SIGNATURE (IF JOINT ACCOUNT BOTH MUST SIGN). The signature line for “JOINT CUSTOMER” is blank. Benson III did not sign Exhibit 157 and his name does not appear on the document.

Exhibit 158 is titled “CUSTOMER MARGIN ACCOUNT AGREEMENT.” Decedent signed as “Customer.” The line for “Joint Customer” is blank. At the bottom of Exhibit 158 it states: “(If this is a Joint Account both Customer and Joint Customer must sign.)” Benson III did not sign Exhibit 158 and his name does not appear on the document.

Two additional account agreements signed by Decedent in 2001 and 2002 were admitted in evidence as Exhibit 159 and 160. Exhibit 159

is an “ACCOUNT AGREEMENT, TAXPAYER CERTIFICATION, AND BENEFICIAL OWNERSHIP ELECTION” completed for the second Wedbush Morgan account that Decedent opened in 2001. Like Exhibit 157, Exhibit 159 was signed by Decedent as “CUSTOMER” and does not identify a “JOINT CUSTOMER.” Also like Exhibit 157, Exhibit 159 states “(IF JOINT ACCOUNT BOTH MUST SIGN).” Benson III did not sign Exhibit 159 and his name does not appear on Exhibit 159. Exhibit 160 is a “CUSTOMER MARGIN ACCOUNT AGREEMENT” signed by the Decedent on January 10, 2002. Like Exhibit 158, Exhibit 160 was signed by Decedent as “Customer” and no “Joint Customer” is identified. Exhibit 160 also states: “(If this is a Joint Account both Customer and Joint Customer must sign.)” Benson III did not sign Exhibit 160 and his name does not appear on Exhibit 160.

(ii) Account Statements

All account statements for the Wedbush Morgan accounts identify Decedent as the sole owner and do not mention Benson III. Hundreds of pages of account statements from Wedbush Morgan were admitted in evidence as Exhibit 117 and Exhibit 35 for the 9-year period that the Wedbush Morgan accounts were open. The account statements for the Wedbush Morgan account list the Decedent as the sole account holder. Not a single account statement mentions Benson III.

(iii) Tax Records

Tax records identify Decedent as the sole owner of the Wedbush Morgan accounts. All gains, losses and income from the Wedbush Morgan accounts were reported on the individual income tax returns filed jointly by Decedent and Mrs. Benson from 1997 until Decedent's date of death.⁷³ IRS 1099 Forms for the Wedbush Morgan accounts list all income and gains under Decedent's social security number.⁷⁴ The 1099 Forms for the Wedbush Morgan accounts do not mention Benson III. CPA Ross McIvor testified that in his review of Decedent's tax records he found "no partnership information to report"⁷⁵ and no evidence that Benson III was a partner or co-owner of Decedent's securities. RP 616; 656. Benson III's expert also testified that there was no objective data in the tax records to indicate that Decedent and Benson III had formed a partnership. RP 893.

(iv) Stock Certificates

All stock certificates were titled to Decedent individually. *See* Ex 138, 139, 142, 143. They do not mention Benson III or a partnership. *Id.*

(v) Stock Broker Testimony

Brian Decker testified that Decedent denied that Benson III had any ownership interest in his stock portfolio. RP 785-786; 861-2.

⁷³ Finding of Fact 19, CP 299 (not challenged); Ex 109-116; Ex 122, 123.

⁷⁴ Finding of Fact 20, CP 299 (not challenged); Ex 146-155.

⁷⁵ Finding of Fact 17 CP 299 (not challenged); RP 600 l. 5-16; RP 601 l. 8-12; RP 611, l. 1-5.

(vi) Benson III's Evidence

Letterhead (Ex. 80), business cards (Ex. 4), a magazine mailing label (Ex. 103), bank checks (Ex. 7), bank statements (Ex. 5, Ex. 45), a checkbook register (Ex. 29), fax sheet letterhead, and a binder with a title (Ex. 46) were offered in evidence by Benson III. These items did not identify Benson Ventures as a partnership or refer to Benson III as a partner. The trial court found that these items had limited probative value in unchallenged Finding of Fact 34. CP 302. Likewise, the trial court found that conflicting testimony about the Decedent's voicemail greeting had limited probative value in an unchallenged finding of fact. *Id.*

b. Finding of Fact 15 (Assignment of Error 1).

Benson III challenges Finding of Fact 15, which states:

The Charles Schwab accounts were titled to Decedent in his individual capacity, not as partner. Petitioner [Benson III] never appeared on the title of these accounts. He was not identified on account applications or account statements as joint owner. Petitioner's name does not appear on any of the Charles Schwab documents admitted in evidence. CP 298.

Substantial evidence supports Finding 15. First, account applications filed out when the Schwab accounts were opened in 2006 identify the Decedent as the sole owner and do not mention Benson III, "Benson Ventures" or any partnership. Ex 77; Ex 118 at 129-140; Ex 136.

Second, all account statements for the Schwab accounts identify Decedent as the sole owner and never mentioned Benson III, Benson

Ventures or a partnership. Ex 118 at 169-280.

Third, the IRS 1099 Forms for the Schwab accounts list all income and gains under Decedent's social security number. Finding of Fact 20, CP 299 (unchallenged). The accountant who prepared Decedent's 2007 income tax return testified that in so doing he looked for any evidence of a partnership but could find "no partnership information to report." Finding of Fact 17, CP 298-299 (unchallenged).

Fourth, the individual stocks transferred to Charles Schwab show Decedent as the sole owner. All of the correspondence and stock certificates identify Decedent as sole owner of the securities, both before and after the transfer to Schwab. None of the documents relating to the transfer of the certificated stocks to Schwab refers to "Benson Ventures," Benson III or any partnership. Decedent did not refer to Benson Ventures or use Benson Ventures letterhead in correspondence requesting transfer of the stocks to Schwab. *See* Ex 118 at 142-157; Ex 137-145.

c. Finding of Fact 21 (Assignment of Error 7)

Benson III assigns error to Finding of Fact 21 (Appellant's Brief at 4), which states:

Petitioner's [Benson III's] expert witness, Michael Gillespie, also testified that the Wedbush Morgan account statements and the Charles Schwab account statements do not contain independent data that would support the conclusion that Petitioner and Decedent had a partnership. Mr. Gillespie Petitioner's expert witness also testified that Decedent's tax records, the Wedbush

Morgan account statements and the Charles Schwab account statements do not contain any data that would support the conclusion that Petitioner and Decedent were equal partners. Mr. Gillespie was unable to attribute contributions to petitioner. The expert witness further testified that Decedent's tax records, the Wedbush Morgan account statements and the Charles Schwab account statements do not contain data that would support the conclusion that the Charles Schwab accounts owned by Decedent on his date of death were partnership property. CP 299.

Benson III does not provide any argument as to why the finding is in error or address the finding in the argument section of his brief. Finding of Fact 21 is supported by the testimony of Michael Gillespie. RP 893-894.

d. Finding of Fact 22 (Assignment of Error 8).

Benson III challenges part of Finding of Fact 22, which states:

*Decedent's stock broker, Mr. Brian Decker, knew decedent well. Mr. Decker handled decedent's investments and knew decedent was 'passionate about minerals.' Decker testified that Decedent specifically denied that Petitioner had an ownership interest in his stock portfolio. Mr. Decker testified that 'Benson Ventures' was the name that he and decedent had given to the 'time they spent together' and that **decedent never said they were partners.** Decedent made clear to Mr. Decker that 'this was all my money.' Decker testified that **petitioner did not have unilateral power of investment.** The Court finds Mr. Decker's testimony credible. CP 299-300. (Emphasis added.)*

Benson III assigns error to the highlighted portions. Appellant's Brief at 4.

Substantial evidence supports Finding 22. Mr. Decker did in fact testify that Decedent never said to him that they [Benson III and Decedent] were partners: RP 838; 866. Mr. Decker also testified that he did not consider Benson III to have unilateral authority over the

Decedent's investments. For example, Decker testified that Benson III did not have authority to change title to the investments and had no authority to make trades after he returned to other work in 1998. RP 776-7; 841.

e. Finding of Fact 27 (Assignment of Error 8).

Benson III challenges part of Finding of Fact 27, which states:

*During the March 1997 to July 1998 period, Decedent authorized Petitioner to make stock trades for him on the Wedbush Morgan account. **Petitioner was never authorized to change title to any of Decedent's securities accounts.** The last time Petitioner made a stock trade on Decedent's account was prior to July 1998. Decedent's stock broker testified that he did not consider Petitioner [Benson III] to have ongoing authority to make trades on his father's account after Petitioner returned to construction work in 1998. **Decedent made it clear to Mr. Decker that the ownership information was to stay the same and show only decedent's name, and not petitioner's name nor "Benson Ventures."** CP 301. (Emphasis added.)*

Benson III assigns error to the highlighted portion. Appellant's Brief at 4.

Substantial evidence supports Finding 27. *See supra* at §III.E.

Benson III produced no documentary evidence indicating that he had the authority to change title to Decedent's securities. To the contrary, Exhibits 35, 77, 78, 117, 118, 136, 138, 139, 142, 143, and 157-160 list Decedent as the sole owner of the securities accounts and the certificated stocks. Benson III was not mentioned in any of the account records or statements, much less authorized to change title. The stock broker testified that Benson III did not have authority to change title to the accounts and that

the ownership information on the account documents was to reflect Decedent as sole owner. RP 785-787; 841.

f. Finding of Fact 29 (Assignment of Error 8).

Benson III challenges Finding of Fact 29, which states:

Petitioner did not establish that he deposited any funds into the joint bank account or that he made any financial contributions to the alleged partnership. CP 301.

Benson III assigns error to the entire finding, except he misquotes it by omitting the word “financial.” Appellant’s Brief at 5.

Substantial evidence supports Finding 29. *See supra* at §III.G. Benson III produced no admissible evidence showing that he contributed funds to the joint U.S. Bank account, the Wedbush Morgan accounts, or the Charles Schwab account. The documentary evidence that Benson III offered to establish his alleged contributions was found insufficient by the trial court. *See* Finding of Fact 31, 301 (unchallenged); Finding of Fact 32, CP 301-302 (unchallenged). Brian Decker testified that he saw no indication that Benson III had deposited his own funds into the Wedbush Morgan or the Charles Schwab accounts. RP 836-7; 841-2.

Moreover, a trial court’s finding that the evidence fails to establish a fact is treated as a weighing of the evidence that cannot be redone on appeal. Division 3 of the Court of Appeals recently reiterated this rule in *Quinn v. Cherry Lane Auto Plaza, Inc., et al*, No. 27418-7-III, 2009 Wash.

App. LEXIS 3158 (Dec. 22, 2009).⁷⁶

It is one thing for an appellate court to review whether sufficient evidence supports a trial court's factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Appendix p. 7.

g. Finding of Fact 35 (Assignment of Error 8).

Benson III challenges Finding of Fact 35, which states:

*Several of Petitioner's family members testified that they formed an impression from what Decedent said that he had an equal partnership with his son. **None of these witnesses had specific personal knowledge regarding Decedent's investments.** Decedent's brothers, Wright Benson and Anthony Benson, had, like Petitioner, accompanied decedent to convention(s) on mining. (Karla Benson had also accompanied her husband to such a convention). They recalled decedent as 'always teaching' and considered him a national expert in gold ventures. Mining investments ('treasure hunters') was/is clearly a family interest. Wright Benson testified to 'a lot of money invested in gold ventures' and his belief that he has a financial stake on the estate. Anthony Benson also invested his own money in gold and silver stocks and testified to his desire for compensation from the estate and certain artwork. Wright Benson and Anthony Benson did not present as objective or credible witnesses. CP 302-3 (emphasis added).*

Benson III assigns error to the highlighted portion. Appellant's Brief at 5.

However, Benson III again misquotes the trial court's finding by omitting the word "personal" in his assignment of error.

⁷⁶ This is a reported decision that has not yet been published. A copy is included in the attached appendix.

Finding 35 is supported by substantial evidence. Benson III's family did not have "specific personal knowledge regarding Decedent's investments."

- Decedent's former wife, Caroline Barclay, testified that Decedent would talk about the "general subject" of "gold stocks or gold mines or minerals." RP 416. This was not specific personal knowledge.
- Wright Benson, who was found not credible by the trial court,⁷⁷ testified that the Decedent identified the stocks he was investing in, but that he could not list the stocks because "there were so many of them." RP 495. He analogized the stocks to "a big bag of peanuts." *Id.* Wright Benson admitted that he did not have personal knowledge because "there's many, many, many, many thousands of stocks that are a gray area because I never saw them." RP 496.
- Anthony Benson, who was found not credible by the trial court,⁷⁸ could not recall whether he had seen any stock certificates titled to Benson Ventures. RP 548. He did not see any tax returns or account statements relating to Decedent's investments. RP 549.
- Ryan Benson and Jennifer Benson did not have any specific personal knowledge of Decedent's investments. Both testified that their father

⁷⁷ Finding of Fact 35, CP 303.

⁷⁸ Finding of Fact 35, CP 303.

and Decedent talked “a lot” about gold stock, but did not have detailed knowledge about the investments. RP 975, 997.

h. Finding of Fact 39 (Assignment of Error 1).

Benson III challenges Finding of Fact 39, which states:

The evidence does not establish that Petitioner [Benson III] co-owned any of Decedent’s mining or natural resources securities or that Petitioner and the Decedent had an agreement to co-own any securities. CP 303.

Finding 39 is supported by substantial evidence. *See supra* at §III.C. p.8.

i. Finding of Fact 40 (Assignment of Error 1).

Benson III challenges Finding of Fact 40, which states:

The evidence does not establish that the decedent and the petitioner had an agreement to share profits or losses from Decedent’s mining and natural resources securities. The evidence shows that the decedent claimed all gains and losses from the securities as his own on his joint tax returns with Respondent Mrs. Benson. CP 303.

Finding 40 is supported by substantial evidence. *See supra* at §III.F.

Benson III produced no direct evidence of an agreement to share profits or losses. The documentary evidence was uncontested that Decedent reported all gains and losses from the securities on his tax returns. *See* Finding of Fact 19, CP 299 (unchallenged). Likewise, Benson III did not share with Decedent the profits and losses from the mining securities he owned. *See* Finding of Fact 24, CP 300 (unchallenged). When the value of Decedent’s

securities plummeted in 1997 – 1999, Benson III did not share in any of this loss. Rather, he returned to work in the construction industry. Finally, this is another instance where the trial court’s finding that the evidence fails to establish a fact should be treated as a weighing of the evidence that cannot be redone on appeal. *See also infra* at 32-37.

3. No partnership can be formed without an agreement to share profits and losses; no such agreement was shown in this case.

Benson III assigns error to Conclusion of Law 6, which states “The preponderance of the evidence does not establish a partnership between Petitioner and his father Rodger Benson Jr.” The trial court was correct. Benson III failed to establish a necessary element of a partnership agreement, which is the intent to share profits and losses. Benson III wants this Court to reach a different result than the trial court by reweighing the evidence and giving more weight to the evidence that he alleges favors his position.⁷⁹ However, weighing the evidence is the role of the trial court; not the Court of Appeals. *See Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). “Appellate courts do

⁷⁹ For example, Benson III relies on the testimony of Anthony Benson and Wright Benson (Appellant’s Brief at 16-17, 22, 33, 38-40, 50), which the trial court found not credible (Finding of Fact 35 CP 303); challenges the testimony of Brian Decker (Appellant’s Brief at 13-14, 19, 24-30), which the trial court found credible (Finding of Fact 22 CP 300); relies upon documentary evidence such as business cards and letterhead (Appellant’s Brief at 9-10, 43, 45, 47), which the trial court found not probative (Finding of Fact 34 CP 302); and argues that the failure to report the partnership or partnership gains and losses to the IRS, which the trial court found probative (Findings of Fact 19, 20, 23; CP 299, 300), should be given “little if any weight” (Appellant’s Brief at 30).

not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, *supra* at Appendix p.6 (holding that the intent of the parties was a factual question not to be retried on appeal).

If the Court of Appeals does reweigh the evidence relating to partnership formation, it should find like the trial court that Benson III’s evidence fell short of his burden of proof. Under general contract principals, the Court must look to “the objectively manifested intention of the parties,” *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990), and may not “create a contract for the parties that they did not make themselves.” *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980). “[C]ircumstantial evidence does not tend to prove the existence of a partnership, unless it is inconsistent with any other theory. For the most part, the facts are to be gleaned from the acts and conduct of the parties, rather than from the spoken word.” *Eder v. Reddick*, 46 Wn.2d at 49.⁸⁰

In the present case, the evidence predominated against finding that Decedent and his son intended to share profits and losses from the

⁸⁰ For example, in *Chlopeck v. Chlopeck*, 47 Wash. 256, 259-260 (1907), a mother failed to establish a partnership with her son where the testimony showed that the mother advanced money for the original purchase of the fish business, took a general interest in the conduct of the business, superintended the smoking of fish, and was authorized to withdraw funds from the business account for household expenses. These facts were found just as consistent with the relation of mother and son as with that of copartnership. The general statements of witnesses to the effect that the mother had an interest in the business, or at least appeared to have, were given little weight in view of all the circumstances and the mother-son relationship.

Decedent's investments in natural resource securities:

- There was no written partnership agreement or agreement to share profits or losses.
- The securities were all titled to Decedent and Benson III's name does not appear on title to the brokerage accounts. *See supra* at §III.C.
- All gains and losses from the securities were reported on the individual tax returns filed by Decedent and Mrs. Benson. None of the gains and losses from the securities was reported to the IRS as having been generated by a partnership. *See* Finding of Fact 19, CP 299 (unchallenged).
- Benson III withdrew funds from the joint checking account during the period that the securities were declining in value.
- Benson III returned to full-time construction-related work in 1998 and did not continue to trade securities for his father after that date.
- Benson III never had authority to change title to his father's accounts. *See supra* at §III.E.
- Benson III did not establish that he deposited any of his own funds into the U.S. Bank checking account, the Wedbush Morgan accounts, or the Charles Schwab accounts. *See supra* at §III.G.
- Benson III did not establish that he had anything to do with the large deposits Decedent made between 2000 and 2002. *See supra* at §III.B.

- Both accountants testified that there was no evidence in the tax records or the account statements to indicate the existence of a partnership.
- Decedent's stock broker testified that Decedent denied any intent to co-own his securities or share profits with Benson III. According to Decedent, it was "all my money." Finding of Fact 22, CP 6.
- Benson III maintained his own individually titled mining securities, and did not share profits or losses from these securities with Decedent. Benson III testified that mining securities titled to him were not partnership property, but his individual assets.
- Benson III did nothing to enforce his claim to shared profits until after his father died. This fact was important in *Kelly v. Moss*, 120 Wash. 1, 2-3 (1922), where the court held that a father failed to establish that he had formed a partnership with his son:

Of course, the lips of the son being sealed by death, the lips of appellant are sealed by statute. But it is more than passing strange that appellant could not or did not take some steps in the presence of or through the intervention of a third person to assert his claim against his son while he was yet alive, knowing his condition, and under all the circumstances and having no writings between them.⁸¹

⁸¹ The passage of time without assertion of any partnership claim between mother and son was also found relevant in *Chlopeck v. Chlopeck*, 47 Wash. at 260 ("Had this partnership existed for a period of twenty years we cannot escape the conclusion that some more definite trace of its existence could be found than is disclosed by this record.") In the present case, the partnership allegedly existed for 10 years prior to the lawsuit.

Benson III's evidence was not sufficient to establish that he and his father intended to share profits from his father's securities when considered together with the evidence described above. His case rested on a U.S. Bank checking account used from 1997 to 1998 in the name of Benson Ventures, Rodger Benson and Rodger Benson III and several checks written on the account to Wedbush Morgan. However, Benson III failed to establish that he deposited any of his funds into the account. Title does not determine ownership. Tax records show that the U.S. Bank account was reported to the IRS as an income-generating asset of Decedent. Nor does the account evidence any intent to share profits or losses from Decedent's securities, as Benson III was taking withdrawals from the U.S. Bank account while the value of the Wedbush Morgan account was plummeting. In *Cruickshank v. Lich*, 158 Wash. 523 527 (1930), the party alleging a partnership was in charge of the accounts of the business and its two bank accounts, but nevertheless did not meet its burden of proving that a partnership existed.

The fact that Benson III had authority to trade securities for his father also does not establish an agreement to share profits and losses from these trades. *In re Estate of Thornton*, 14 Wn. App. 397, 401 (1975), found no partnership existed where the alleged partner had authority to incur financial obligations involving the buying and selling of the business

property. There is an obvious distinction between the authority to make trades and ownership of the assets. In the present case, Mr. Decker testified that Benson III had no authority to retitle the securities. RP 841.

The testimony by Benson III's children and ex-wife Caroline Barclay⁸² does not establish that Decedent intended to share profits and losses from his securities with his son. These witnesses testified that Benson III and Decedent talked about a partnership. However, "[t]he fact that the parties to a business arrangement may call it a partnership, does not make it such." *State v. Bartley*, 18 Wn.2d 477, 481 (1943). If the rights of a third party were involved, then testimony concerning representations as to the existence of a partnership would be entitled to more weight. However, such testimony was held insufficient to find a partnership between the alleged partners themselves in *Eder v. Reddick*, 46 Wn.2d 41 at 51. *See also Douglas v. Jepson*, 88 Wn. App. 342, 945 P.2d 244 (1997) (reversed summary judgment granted in favor of the party alleging a partnership, even though the defendant had admitted in correspondence to the existence of the partnership and the parties had engaged in an advertising campaign to publicize the joint venture.)

⁸² Caroline Barclay is the mother of Decedent's daughter Stacey Benson. RP 403. Stacey Benson filed a joinder in Benson III's action, which Caroline Barclay was aware of. RP 438 l. 7-10. Caroline Barclay testified that she believed her daughter was entitled to some of the Decedent's estate. RP 439 l. 6-8. *Cf.* Appellant's Brief at 37 (Ms. Barclay had "no motive to fabricate.")

Benson III's expert witness Michael Gillespie, CPA, testified that the Wedbush Morgan account statements and the Charles Schwab account statements do not contain data that would support the conclusion that Decedent and Benson III had a partnership or that they were equal partners.⁸³ He found no data in the tax records or account statements to support the assumption that Decedent and his son formed a partnership or that they were equal partners. RP 893-894.

Finally, Benson III's subjective expectation is not sufficient to establish an agreement to share profits from his father's investments. *See* Appellant's Brief at 50. The Court must be guided by the objectively manifested intent of both parties to the alleged contract. *See Berg v. Hudesman*, 115 Wn.2d at 663. The objective evidence recounted above – account applications, tax records, account statements, unilateral investment of large sums by Decedent – does not indicate an agreement to share profits and losses. The subjective expectation of Benson III is irrelevant. *See City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981).

4. Benson III improperly assigns error to Conclusion 5.

Benson III challenges Conclusion of Law 5, which states “A contract of partnership is essential to the creation of the partnership

⁸³ Finding of Fact 21, CP 299 (challenged on appeal).

relationship.” CP 305. Benson III’s assignment of error is premised on construing the conclusion to mean that a written contract is essential to the creation of a partnership relationship. *See* Appellant’s Brief at 23. Court orders are to be reasonably interpreted. *State v. O’Neill*, 103 Wn.2d 853, 874 (1985). It is not reasonable to impute words not used in the original text when the result would be an error of law by the trial court. “[F]indings will be given that meaning which sustains the judgment, rather than one which would defeat it.” *In re Marriage of Caven*, 136 Wn.2d 800, 810 (1998).

B. Any Partnership Formed in 1997 was Dissolved in 1998 Making Benson III’s Claims Time-Barred.

Benson III challenged Conclusion of Law 13, which states “Petitioner’s claim is time-barred because the evidence preponderates that Petitioner ceased to be associated in the carrying on of the alleged partnership in 1998.” CP 306. The trial court’s conclusion was correct.

1. Prior law applies.

The parties agree that this issue is governed by RCW 25.04.290 which was repealed January 1, 1999. *See* Appellant’s Brief at 51. RCW 25.04.290 provided in its entirety: “The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from winding up of the business.” The operative terms are “ceasing to be associated in the

carrying on ... of the business.” (Emphasis supplied.) RCW 25.04.020 defined “business” as “every trade, occupation, or profession.” The remaining terms were not defined by the statute; therefore, they should be given their ordinary dictionary meaning. *Washington State Coalition for the Homeless v. Dept. of Social and Health Services*, 133 Wn.2d 894, 905 (1997) (citations omitted). “Cease” means “to stop, forfeit, suspend, or bring to an end.” BLACK’S LAW DICTIONARY at 253 (9th ed. 2009). “Associated” when used as an adjective means “Joined with another or others and having equal or nearly equal status.”⁸⁴ The common meaning of “carry on” is to “conduct or manage.”⁸⁵

2. The trial court correctly held that Benson III disassociated himself from the alleged partnership in 1998.

The evidence was substantial and one-sided on the issue of disassociation:

- It was uncontested that Benson III returned to full-time salaried work in the construction industry in July 1998. *See* Finding of Fact 25 (unchallenged) CP 300.
- The last activity in the checking account titled to Benson Ventures, Decedent and Benson III also occurred in July 1998. Finding of Fact

⁸⁴ Dictionary.com unabridged, Random House, Inc., available at <http://dictionary.reference.com/browse/associated> (last visited January 31, 2010).

⁸⁵ Dictionary.com unabridged, Random House, Inc., available at [http://dictionary.reference.com/browse/carry on](http://dictionary.reference.com/browse/carry%20on) (last visited January 31, 2010).

30 (unchallenged) CP 301.

- Mr. Benson made investments of over \$790,000 between 2000 and 2006, and there was no evidence that Benson III was involved in these investments.
- The securities accounts that Decedent opened in 2000, 2001 and 2006 were not titled to Benson Ventures or co-owned with Benson III.
- Benson III made no further trades on his father's account after he returned to construction-related work. Benson III had no further contact with the stockbroker after he returned to construction work.
- Mr. Decker testified that he did not consider Benson III to have ongoing authority to make trades on his father's account after Benson III returned to work in the construction industry in 1998. Finding of Fact 27 (challenged) CP 301.
- Mr. Decker also testified that he saw nothing to indicate that Benson III and his father continued to work together researching natural resource investments after Benson III returned to unrelated work in 1998. RP 838.
- Tax records continued to report all gains and losses from the securities on the joint tax returns that Decedent filed with Mrs. Benson.
- Benson III's amended complaint referred to his return to construction work as a "departure" from the alleged partnership and referred to the

possibility of “return” in 2007. CP 51, l. 6, 18.

- Benson III’s continued interest in natural resources was explained by the fact that he had investments in the same stocks as his father.

3. The partnership claim is time-barred.

Benson III does not disagree that if the alleged partnership dissolved in 1998 his claim is time-barred. Claims relating to an oral partnership agreement are governed by the three year statute of limitations applying to oral contracts. *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1996). Accrual of the statute of limitations occurs at dissolution of the partnership. *Id.*; *Taplett v. Khela*, 60 Wn. App. 751, 755 (1991). See Conclusions of Law 10, 11, 12 (all unchallenged). CP 306.

Even if Benson III could still assert his claim to ½ of the profits, his claim would have negative value. An outgoing partner would be entitled to his share of the profits of the business up to the date of the severance of the partnership relations. *Peabody v. Pioneer Sand & Gravel Co.*, 172 Wash. 313, 317 (1933). At the time Benson III returned to construction work in July 1998, the natural resource securities that allegedly comprised “Benson Ventures” had plummeted in value. As Benson III alleges in his brief, “the mineral securities portfolio decreased from approximately \$360,000 to approximately \$110,000 in that time period [August 1997 through July 1998].” Appellant’s Brief at 14. There

were no profits to divide at the time Benson III ceased his involvement with the alleged business.⁸⁶ The large profit that Benson III seeks to share was all made after he returned to work in the construction industry.

C. Decedent's Assets Were Not Partnership Property.

Benson III assigns error to Conclusions of Law 7 and 8, which held that the Decedent's Charles Schwab accounts were not partnership property. There was no error.

1. RCW 25.05 governs whether property is owned by a partnership.

Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate (non partnership) property, even if used for partnership purposes. RCW 25.05.065(4). This statutory provision applies to all partnerships in existence after January 1, 1999. *See* RCW 25.05.901. Therefore, Benson III erroneously assigns error to Conclusion of Law 7, which paraphrases RCW 25.05.065(4) (CP 306) and mistakenly relies on RCW 25.04.080 and RCW 25.04.100 to support his arguments concerning whether the Charles Schwab accounts that were acquired in 2006 constitute

⁸⁶ Furthermore, if this truly were an equal "partnership" as Benson III alleges, he would be responsible for ½ of the losses sustained during the period of his involvement, or ½ of \$250,000 (\$360,000 minus \$110,000).

partnership property. *See* Appellant's Brief at 47.

2. Benson III failed to rebut the presumption created by title.

Under the plain meaning of RCW 25.05.065(4), the Charles Schwab accounts are presumed to be Decedent's separate property. The Schwab accounts were acquired in the Decedent's name "without indication on the instrument ... of the person's capacity as a partner or of the existence of a partnership." *See* Ex 77, 118, 136. Benson III did not establish that the Schwab accounts were acquired with partnership assets, and in fact, the evidence indicates that the Charles Schwab accounts derived from the large deposits Decedent made to the Wedbush Morgan accounts between 2000 and 2002. Significantly, Benson III's own expert testified that the tax records and account statements contained no data to support the assumption that either the Wedbush Morgan account or the Charles Schwab account was a partnership asset. RP 893.

Without citing any authority, Benson III asserts that the determining factor in deciding whether the Schwab accounts are partnership property is whether Benson III had equal control over the securities. *See* Appellant's Brief at 47-48. Even if this were the "critical factor" as Benson III contends, the record does not establish that Benson III had any control over the Schwab accounts. They were titled solely to Decedent. Benson III was not listed as co-owner. Mr. Decker testified

that Benson III did not even have authority to trade Decedent's stocks after July 1998 and that he never had authority to change title to the Decedent's investment accounts. RP 841. There was no evidence linking Benson III to the large investments Decedent made between 2000 and 2002 or to the Schwab accounts. Therefore, even under the unsupported standard urged by Benson III, he fails to sustain his burden of proof.

D. Decedent's Assets Were Community Property.

Benson III asserts that the trial court should not have decided whether the alleged partnership property was Mrs. Benson's community property because the issue was not "justiciable." This argument lacks merit. Mrs. Benson raised the issue as a counterclaim filed pursuant to CR 13 (CP 252), in response to Benson III's petition which alleged that he was entitled to an unspecified share of the alleged partnership Benson Ventures and requested that Mrs. Benson be removed as the Personal Representative of the Benson Venture assets. CP 245. Mrs. Benson alleged that Decedent's investment portfolio "was acquired and accumulated value during their marriage; therefore, it was community property." CP 248. As surviving spouse, Mrs. Benson would have the right to administer all community property, even if a partnership were found to exist. *See* RCW 11.28.030. Benson III did not file a reply to the counterclaim as required by CR 7(a), but waited until the conclusion of the

evidence to argue that the claim was not “justiciable.” The trial court properly ruled on the issue.

1. The issue of community property was justiciable.

The community property nature of alleged partnership property is relevant in determining whether a partnership was formed and if a partnership is found how much Benson III is entitled to receive.

First, the Decedent could not commit community assets to the alleged partnership without Mrs. Benson’s consent unless the investment was for the benefit of the community. If he did, the partnership agreement was void. Transfers of community real property to a third party are *void ab initio* and *in toto* without the express or implied consent of both spouses. RCW 26.16.030(2); *In re Marriage of Bryant*, 125 Wn.2d 113, 117, 882 P.2d 169 (1994); *Holyoke v. Jackson*, 3 Wash. Terr. 235 (1882) (emphasis supplied). Likewise, commitment of community property to a partnership or joint venture is impermissible unless the investment benefits the community or the community interest. *Fields v. Andrus*, 20 Wn.2d 452 (1944) (contribution of community property to partnership found permissible because it benefited the community).

Decedent did not undertake the alleged partnership for the benefit of the community. Neither Decedent nor Benson III informed Mrs. Benson about the alleged partnership. Finding of Fact 36, CP 303. The

Wedbush Morgan account was opened in 1997, during the marriage, and is therefore presumptively community property. *See, e.g., In re Marriage of Griswold*, 112 Wn. App. 333, 339 (2002). The substantial purchases of additional securities occurring between 2000 and 2002 (in excess of \$790,000) also occurred during the marriage and coincided with the sale of the McDermott Partnership, which was an asset that was acquired during the marriage.⁸⁷ Because the commitment of community funds to the alleged partnership occurred without Mrs. Benson's knowledge or consent and was not undertaken to benefit the marital community, the alleged partnership agreement, if proven, would be void.

Second, the community property claim also affects the amount Benson III would be entitled to recover if he prevails. Benson III claims he should receive judgment for \$882,477 (Appellant's Brief at 52-3), which is based on the assumption that he is entitled to receive 50% of profits from Decedent's purchase of natural resource securities, which Mrs. Benson alleges are community property. If the investments are community property, then Decedent had no right to enter into a contract that would give 50% of the profits to his son. The profits, like the securities themselves, were community property. Any increase in value in

⁸⁷ *See* Exhibit 178. The McDermott Group operated as a partnership until 2001. *See* Exhibits 110, 111. In 2001, Decedent and Mrs. Benson received \$946,371 from sale of property owned by the McDermott Group. Exhibit 110.

community property occurring during the marriage belongs to the community. *See Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954).

2. Substantial evidence supports the trial court's findings.

Benson III assigns error to Finding of Fact 7, which reads in its entirety:

The assets owned by Decedent on his date of death were acquired during his marriage to Mrs. Benson. None of Decedent's assets were traced to separate (non-community) assets or funds.

CP 297. Finding of Fact 7 is supported by substantial evidence. The trial court found that Mr. and Mrs. Benson were married in 1974.⁸⁸ They were married at the time Decedent died.⁸⁹ The assets titled to Mr. Benson on his date of death included two condominiums, a “stock portfolio account at Charles Schwab valued at approximately \$2.3 million”⁹⁰ “a money market account at Schwab valued at \$156,808.98,”⁹¹ a vehicle, an art collection, and a checking/savings account at U.S. Bank.⁹² Mrs. Benson testified that Decedent brought no assets into the marriage. RP 108. Regarding the Decedent's Schwab accounts, unchallenged findings of fact establish that they were acquired in March 2006 prior to the dissolution

⁸⁸ Finding of Fact 2 (CP 296) (unchallenged on appeal). In fact, they married in 1972. RP 83.

⁸⁹ RP82; Finding of Fact 4, CP 297 (unchallenged on appeal).

⁹⁰ Finding of Fact 10, CP 297 (unchallenged on appeal).

⁹¹ Finding of Fact 10, CP 297 (unchallenged on appeal).

⁹² These assets were identified in the Decedent's 2007 income tax return (Ex 116) and the Estate's 2007 income tax return (Ex 186).

petition that was filed in December 2006.⁹³ The Schwab Accounts were traced to the Wedbush Morgan accounts that were opened in 1997 and 2001 according to unchallenged findings of fact.⁹⁴

3. The marriage was not defunct.

Property acquired during a marriage is presumed to be community property regardless of title, unless it can be traced by clear, cogent and convincing evidence to separate property. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). Benson III relies on RCW 26.16.140 and one 1948 case to support his argument that assets acquired in the name of Mr. Benson during marriage were not community property.⁹⁵ Appellant's Brief at 62. However, RCW 26.16.140 only applies if the marriage is shown to be defunct. "The statute contemplates permanent separation of the parties--a defunct marriage." *Aetna Life Ins. Co. v. Bunt*, 110 Wn. 2d 368, 372, 754 P.2d 993 (1988); *Seizer v. Sessions*, 132 Wn.2d 642, 649 (1997). Washington courts have found a marriage defunct under RCW 26.16.140 only when the facts involved situations

⁹³ Finding of Fact 10, CP 297 (unchallenged on appeal); Ex 118; Finding of Fact 4 (CP 297).

⁹⁴ Finding of Fact 10, CP 297; Finding of Fact 11, CP 297; Finding of Fact 12, CP 298.

⁹⁵ RCW 26.16.140 provides: "When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse or domestic partner who has their custody or, if no custody award has been made, then the separate property of the spouse or domestic partner with whom said children are living."

where “both parties demonstrated the marriage was over.” *Seizer v. Sessions*, 132 Wn.2d at 657 (holding marriage not defunct where married couple had lived apart and in different states for 20 years and husband had remarried twice). *See also In re Estate of Thornton*, 14 Wn. App. 397, 399 (1975) (holding that assets of alleged partnership were community property and the marital couple was not “estranged” even though the decedent husband had taken up residence with another women).

In the case Benson III cites (*Togliatti*), the court relied upon much more than the physical separation of the parties to find that their marriage was “defunct” at the time the property at issue was acquired. There was an interlocutory divorce decree, a remarriage, and complete financial independence. The only way in which the Bensons are similar to the parties in *Togliatti* is that there was a lengthy physical separation. But the case law is clear that physical separation is not enough to find a defunct marriage. Benson III must prove that both Mr. and Mrs. Benson had “renounced the marriage relationship” at the time the property at issue was acquired. *Rustad v. Rustad*, 61 Wn.2d 176, 180 (1963) (distinguishing *Togliatti*). Unlike the spouses in *Togliatti*, Mr. and Mrs. Benson did not petition for dissolution until December 2006. Until then, the integrity of their marital community must be presumed:

Plainly, spouses can best judge the viability of their marriage. When they have not yet chosen to institute dissolution proceedings,

the continued integrity of their marriage should be presumed except under the most unusual circumstances.

Aetna Life Ins. Co. v. Boober, 56 Wn. App. 567, 572 (1990) (holding that separation was not established where the parties lived apart and during the physical separation the wife gave birth to a child from another man and the husband had relationships with other women, because the wife's affidavit alleged that they continued to provide emotional support to each other, and the couple had not initiated dissolution proceedings.) Mrs. Benson, described as a "sweetheart" by Karla Benson, was sincerely committed to the marriage and was unaware of her husband's infidelity until November 2006. Thus, *Togliatti v. Robertson*, 29 Wn.2d 844, 849 (1948) actually supports Mrs. Benson's claim in this regard: "[o]ne who stands ready and willing to discharge one's marital obligations in full, will not have one's rights extinguished by the acts of the other."⁹⁶

4. The trial court correctly applied the presumption in favor of community property.

Benson III does not cite to any evidence in the record that traces the assets acquired during marriage, and in particular the Schwab accounts, to Mr. Benson's separate (non-community) assets or funds. As

⁹⁶ In addition, unlike the spouses in *Togliatti*, Mr. and Mrs. Benson did not manage their finances without reference to each other. Mrs. Benson collected her tax data every year and gave it to Mr. Benson, who then forwarded it to the accountant to prepare the joint returns. RP 116, 121. In addition to filing joint tax returns, which gave rise to joint tax liability, Mr. and Mrs. Benson jointly insured their vehicles. Ex 176. Mr. and Mrs. Benson also had the joint accounts at Freeman Welwood (Ex. 121A) and Harris Direct E-Trade (Ex. 39).

shown, uncontested Finding of Fact 10 (CP 297) traced the Schwab accounts to the Wedbush Morgan account, which was opened in 1997, during the marriage.⁹⁷ There is no evidence that the Wedbush Morgan account derived from Decedent's separate property or that the Decedent ever had any separate property.⁹⁸ There also is no evidence that the large cash infusions into the Wedbush Morgan accounts from 2000 – 2002 came from Decedent's separate property.

E. Testimony was Properly Excluded under the Dead Man's Statute, RCW 5.60.030.

Benson III had fundamental proof problems with his case because it was dependent upon proving an implied partnership contract with a deceased person. Washington's Dead Man Statute, RCW 5.60.030, prevented Benson III from testifying about alleged conversations and transactions with his father. The present case followed the 100-year old holding of *Chlopeck v. Chlopeck*, 47 Wash. 256, 258 (1907), where a mother sought to prove a partnership agreement against her son:

The partnership relation could only be created through some contract or transaction with the respondent Edward Chlopeck, and he being insane, testimony in relation to such contract or transaction by the appellant in her own behalf was properly excluded.

⁹⁷ Finding of Fact 11, CP 297 (unchallenged on appeal).

⁹⁸ Mrs. Benson testified that the Decedent did not have any assets at the time of their marriage. RP 108.

1. The trial court properly defined the scope of the Dead Man Statute.

The Dead Man's Statute, RCW 5.60.030, provides:

In an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person...then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent, or disabled person.

RCW 5.60.030. The Dead Man's Statute prohibits parties with a pecuniary interest in the outcome of civil litigation from testifying about transactions or conversations with the deceased. *See, e.g., In re the Estate of Miller*, 134 Wn. App. 885, 890-891, 143 P.3d 315 (2006).

The Dead Man's Statute not only bars testimony by an interested party about statements by the decedent, but also testimony regarding any "transaction" with the decedent. The generally accepted test for determining whether testimony concerns a transaction with the decedent is whether the decedent, if alive, could contradict that testimony based upon his or her own knowledge. *Id.* A transaction has been found to include the "doing or performing of any business ... or the management of any affair." *See Estate of Shaughnessy*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982). The transaction test has been applied to bar interested parties from testifying about alleged partnerships with deceased persons. For example,

in *Carter v. Curlew Creamery Company, Inc.*, 16 Wn.2d 476, 488-489, 134 P.2d 66 (1943), testimony by an interested party in a partnership about whether the decedent had asserted an interest in a partnership was barred under the Dead Man's Statute. *See also Chlopeck v. Chlopeck*, 47 Wash. 256 (holding mother could not testify about alleged partnership with son); *Kelly v. Moss*, 120 Wash. 1, 2-3 (1922) (holding father could not testify about alleged partnership with son).

The trial court's application of the Dead Man's Statute was consistent with the case law discussed above. The trial court, relying on *Estate of Lennon*, 108 Wn. App. 167 (2001), barred testimony by interested parties that could be refuted by the decedent, holding "to constitute a transaction, the testimony must indicate that the decedent was both present and directly involved in the matter at hand." RP 1087. The trial court held that documents executed by Decedent were admissible, but prohibited testimony by interested parties about the documents. RP 1310.

2. The trial court properly excluded testimony about actions taken in the Decedent's presence that were offered to create impermissible inferences.

Benson III assigns error to the trial court's ruling that he could not testify about his "own acts" and "Benson Ventures" if offered to show a partnership with his father. Assignments of Error 2(b)(c); 5(b)(c). The Estate argued that any testimony by Benson III or his wife that was in

furtherance of the alleged partnership was testimony concerning a transaction with the Decedent, which was barred under the Dead Man Statute, basing this argument on cases like *Chlopek*. The trial court declined to apply the Dead Man Statute as broadly as the Estate requested, and barred only testimony about actions performed by the interested parties in the presence of the Decedent. RP 1087. This was not an expansion of the Dead Man Statute as Benson III argues, but a very limited application of the rule that arguably violated the prohibition that “a party cannot testify indirectly to create an inference as to what did or did not transpire between the party and the deceased.” *In re Estate of Miller*, 134 Wn. App. at 891.

The cases Benson III cites, *Lennon*, *Boettcher*, *An How*, and *King*, do not support his assignment of error. *An How* and Roger Lennon were only allowed to testify to acts which the decedents could not have contradicted had they been alive. *See Lennon*, 108 Wn. App. at 178; *Vogt v. Hovander*, 27 Wn. App. 168, 172, 616 P.2d 660 (1979) (explaining that *An How*’s acts were only admissible because they were “acts of the witness alone.”). In *Boettcher*, 45 Wn.2d 579, 583 (1954), an interested party could testify about his labor because the testimony “did not tend to prove that a contract had been made.” Similarly, *King v. Clodfelter*, 10 Wn. App. 514, 518 P.2d 206 (1974) follows the traditional test for

determining whether testimony relates to a transaction (whether the deceased, if living, could contradict the testimony based on his own knowledge) and recognizes that a witness cannot testify indirectly about a transaction, creating an inference as to what transpired between the witness and decedent. The witness in *King* was allowed to testify about his acts because they were “the acts of the witness alone” and did not create an inference that there was an oral contract. *Id.* at 516-7.

Here Benson III wanted to testify about work that he allegedly performed in his father’s presence in order to prove that he and his father had entered into a partnership agreement. Significantly, Benson was permitted to testify about work that he allegedly performed for the partnership that did not occur in his father’s presence, over the objections of the Estate. The only relevance of the proffered testimony regarding Benson III’s “own acts” was to establish that Benson III and his father had formed a partnership agreement (i.e., had engaged in a transaction). Thus, it was indirect testimony offered to create an inference regarding a transaction between the interested party and the Decedent. As such, it violated the Dead Man Statute and was properly excluded.

3. There is no exception for benign actions, circumstantial evidence or foundational bits.

Benson III argues the trial court erred by excluding evidence concerning “benign acts,” “foundational bits,” and “circumstantial

evidence.” Appellant’s Brief at 54 (discussing Assignment of Error 2(a)). He cites no authority for this exception, which contradicts standard Dead Man Statute analysis. The fundamental question under the Dead Man’s Statute is whether the testimony concerns a conversation or transaction with the decedent. *See Estate of Miller*, 134 Wn. App. at 890-91. If the testimony does, it is barred. There is no exception for testimony that the interested party characterizes as “benign,” “circumstantial,” or “foundational.”

4. The trial court properly excluded testimony about documentary exhibits.

Benson III argues that he should have been allowed to testify about the meaning of exhibits, such as portfolio updates from a Yahoo account, business cards, and cancelled checks. *See* Appellant’s Brief at 59 (discussing Assignment of Error 5(a)). It is well settled that a document executed by the decedent does not run afoul of the dead man’s statute. *See Wildman v. Taylor*, 46 Wn. App. 546, 553, 731 P.2d 541 (1987). But it is equally clear that testimony by an interested party about the meaning of such documents is barred. *Id.*

Furthermore, testimony about documents, whether executed by the decedent or not, is also subject to the normal “transaction” test: if the testimony relates to a transaction with the decedent, it is not admissible. For example, testimony about the portfolio updates on Yahoo was not

excluded because it related to documents, but rather because it related to a transaction with the decedent. RP 1333.

5. Any errors made in applying the Dead Man Statute were harmless.

Improper exclusion of evidence under the Dead Man's Statute may be harmless error. *See, e.g., Henderson v. Tagg*, 68 Wn.2d 188, 190, 412 P.2d 112 (1966) (holding that admission of evidence subject to a dead man's statute objection was harmless because there was ample evidence to sustain the trial court's decision). Even if the trial court erred in excluding evidence under the Dead Man's Statute, in the present case, the error was similarly harmless. The "benign," "circumstantial," and "foundational" testimony that Benson III asserts should have been admitted had little probative value and Benson III fails to show how it would have affected the outcome of the case if the trial court had permitted the testimony. Significantly, the trial court found that Benson III worked with the Decedent researching natural resource and mining securities. Finding of Fact 26 (CP 300-301).

Furthermore, although Benson III was not permitted to testify about documentary exhibits (e.g. business cards, cancelled checks, and letterhead), the documents were admitted, and they spoke for themselves. For example, Benson III complains that he was not allowed to testify about the date he wrote a letter (Exhibit 80). *See* Appellant's Opening

Brief at 58. However, the letter is dated; therefore, testimony about the date it was created would have been cumulative.

F. Evidence Was Properly Excluded for Hearsay, Lack of Foundation, and Failure to Disclose Pretrial.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *See Lewis v. Timber Co.*, 145 Wn. App. 302, 328, 189 P.3d 178 (2008). Benson III failed to establish that the challenged evidentiary rulings were "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Mayer v. Sto Indus. Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

1. The trial court properly excluded hearsay.

Benson III claims that the trial court erred when it did not allow Carolyn Barclay to testify that Decedent intended to go into business with his son. Assignment of Error 3. Benson III's citation to the record, however, relates to proffered testimony about *Benson III's* statements regarding his intent to go into business with his father.⁹⁹ The trial court's exclusion of this testimony was proper. RP 406-411.

Benson III argues that the hearsay is admissible under ER 803(a)(3) because it is a statement of intent or plan. Evidence of a

⁹⁹ At one point, in response to a question about Benson III, Ms. Barclay began to testify about statements by Decedent, but the trial court interrupted her and noted that such testimony was not responsive to the question. RP 410. Counsel for Benson III acknowledged this, and noted he would ask her later about statements by the Decedent. RP 411. Counsel for Benson III, however, did not do so.

statement of intent or plan, however, is only admissible where the statement is “made in a natural manner and not under circumstances of suspicion.” *State v. Bernson*, 40 Wn. App. 729, 738-39, 700 P.2d 758 (1985). Here, as the trial court noted, this statement was clearly self-serving and lacking in reliability. RP 411. Furthermore, state of mind evidence is only relevant if the declarant’s state of mind is at issue in the case. *See CHG International, Inc., v. Robin Lee Inc.*, 35 Wn. App. 512, 667 P.2d 1127 (1983). Benson III’s subjective state of mind is not relevant to the question of whether an oral partnership existed, as courts must apply an objective test to determine whether a contract exists. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

Benson III also claims that the trial court improperly excluded testimony by Wright Benson concerning this witness’s belief that Benson III and his father were equal partners. Benson III’s assignment of error is without merit. First, such testimony was never offered. Counsel for Benson III asked: “I believe you testified that it was your understanding that your brother and his son were equal partners; did you testify to that?” RP 485. Wright Benson responded, “Yes,” over an objection by counsel. RP 485. But Wright Benson was incorrect; he had not previously testified that Decedent and his son were equal partners. Second, even if the testimony is deemed to have been offered, to the extent it is based on

statements by Decedent, it is not admissible as a statement against interest. *See Allen v. Dillard*, 15 Wn.2d 35, 129 P.2d 813 (1942) (testimony about a mutually enforceable agreement is not a statement against interest because both benefits and obligations flow from such an agreement). Third, proper foundation for this testimony was lacking¹⁰⁰ and it was highly leading; therefore, the answer was properly excluded on other grounds.

2. The trial court properly excluded Exhibits 8 and 202.

Petitioner argues the trial court erred when it refused to admit exhibits 8 and 202. *See* Assignment of Error 4. Exhibit 8, three handwritten pages allegedly listing financial transactions, was offered as a “business record” by Benson III. RP 1352-53. Counsel for the Personal Representative objected, and the trial court sustained the objection. RP 1352. Exhibit 8 was correctly excluded because proper foundation was not laid for its admissibility as a business record. *See* ER 803(a)(6); RCW 5.45.020. Benson III was unable to convincingly testify about how this purported business record was created and maintained. RP 1349-52. Without this foundation, the document was inadmissible hearsay, and also violated the dead man’s statute. *See Erickson v. Kerr*, 125 Wn.2d 183,

¹⁰⁰ Counsel for Benson III unsuccessfully tried to admit testimony from Wright Benson regarding the alleged relative contributions of Benson III and Decedent to Benson Ventures. Ultimately, the only testimony admitted was that the ratio of Decedent’s contributions to Benson III’s was “5 or 6 to 1,” but even this was not admitted for the truth of the matter asserted. RP 489.

189, 883 P.2d 313 (1994) (the business records exception to the dead man's statute requires that records be kept in the usual course of business).

Exhibit 202 was also properly excluded. First, the document was not disclosed by Benson III on his witness and exhibit list or in the joint statement of evidence. RP 1331-32; CP 135. A court may properly exclude an exhibit if it was not disclosed pretrial in violation of local rules of practice. *See* King County Local Rule 4(j) (“any witness or exhibit not listed may not be used at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires.”). Second, Exhibit 202 violated the Dead Man's Statute. RCW 5.60.030. The information in Exhibit 202 was allegedly provided by Decedent to Benson III. The document was not created by Decedent. Nor did it fall within the business records exception to the Dead Man Statute.

The cases cited by Benson III do not support his position. *Sanborn v. Dentler*, 97 Wash. 149, 166 P. 62 (1917) and *McDonald v. McDonald*, 119 Wash. 396, 403 (1922) are distinguishable because proper foundation was laid in those cases to establish that the documents were business records. Neither case would allow a party to admit an exhibit that violated pretrial disclosure requirements.

3. Any evidentiary errors were harmless.

Erroneous exclusion of hearsay does not warrant reversal unless

there is prejudice. *Panorama Village v. Golden Rule Roof*, 102 Wn. App. 422, 427, 10 P.3d 417 (2000). Any evidentiary errors by the trial court were harmless. Caroline Barclay's proffered testimony regarding a plan to go into business was cumulative. The trial court found Decedent and Benson III worked together researching natural resource and mining securities and spent mutually rewarding time together. Finding of Fact 26 CP 300-01. The excluded testimony also would have had little or no probative value. Referring to an activity as a "partnership" does not make it one. *See State v. Bartley*, 18 Wn.2d 477, 481 (1943). For the same reason, Wright Benson's proffered testimony about how Decedent and Benson III characterized the alleged partnership would have been given little if any weight, particularly since the trial court found that he was not a credible witness. Finding of Fact 35, CP 303.

G. The Estate Should Be Awarded Its Reasonable Attorney Fees And Costs.

The Estate requests its reasonable attorney fees and expenses on appeal pursuant to RAP 18.1 and RCW 11.96A.150. RCW 11.96A.150(1) provides for the award of reasonable attorneys' fees and costs on appeal in trust and estate matters as deemed "equitable." This action was filed under Title 11 of the Revised Code of Washington (CP 48-55); therefore, RCW 11.96A.150 applies. Benson III's failure to abide by the Rules of Appellate Procedure justify an award of attorneys' fees on appeal under

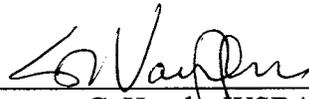
RCW 11.96A.150. Benson III did not support his assignments of error to Findings of Fact 7, 21, 22, 27, 29 and 35 with argument or citation to the record, and he failed to include a statement of issues in his brief as required by RAP 10.3(a)(4). These deficiencies increased the amount of time and attorneys' fees spent responding to the brief. It would also be equitable to impose terms against Benson III because he filed his brief 11 days late.¹⁰¹

V. CONCLUSION

The Personal Representative respectfully requests that this Court affirm the trial court and award the Personal Representative reasonable attorneys' fees and costs for this appeal.

Dated this 5th day of February, 2010.

THOMPSON & HOWLE



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Attorneys for Joan Benson, Personal
Representative

¹⁰¹ Appellant's opening brief was due December 3, 2009 after the extension for filing the statement of arrangements and designation of clerk papers. Appellant requested a 21 day extension on December 1, 2009. The request was granted over Respondent's objection and the new due date was December 24, 2009. The notation ruling stated that there would be no further extensions. Appellant's brief was filed 11 days late on January 4, 2010. RAP 10.2(i) states that sanctions will ordinarily be imposed for tardy filing or service of briefs.

DECLARATION OF SERVICE

CHRISTINE JAMES certifies as follows:

I am a legal assistant for the law firm of Thompson & Howle. I am over eighteen (18) years of age and make this declaration based on personal knowledge.

On February 5, 2010, I hand delivered the following documents to the law offices of the Appellant's attorneys Michael Olver and Christopher Lee, located at 701 Pike Street, Suite 1400, Seattle, WA 98101:

Corrected Brief of Respondent; and this Declaration of Service.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on February 5, 2010.


Christine James
Legal Assistant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 FEB - 5 PM 4: 14

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROB QUINN,)
)
) Appellant,)
)
) v.)
)
) CHERRY LANE AUTO PLAZA, INC.,)
) a Washington Corporation; TIM)
) McKENNA AND JANE DOE McKENNA,)
) husband and wife; MICHAEL D.)
) LILLEY AND SONIA M. LILLEY,)
) husband and wife; and WESTERN)
) SURETY COMPANY, a foreign)
) Corporation,)
)
) Respondents.)

No. 27418-7-III

Division Three

PUBLISHED OPINION

RECEIVED
COURT OF APPEALS
DIVISION ONE
11/12/2010

Korsmo, J. — The trier-of-fact did not find Rob Quinn’s evidence compelling and entered a judgment for the defendants. Mr. Quinn appeals. This court does not reweigh evidence and make its own factual determinations. Accordingly, the judgment is affirmed.

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Quinn v. Cherry Lane Auto Plaza, Inc.

FACTS

This case revolves around Mr. Quinn's efforts to purchase a used 2003 Chevrolet Silverado truck from respondent Cherry Lane Auto Plaza, Inc. (Cherry Lane). Michael Lilley purchased the vehicle at auction for Cherry Lane. The odometer cluster did not properly illuminate, so a replacement cluster was ordered from a used parts dealer on December 21, 2006. Mr. Lilley planned to have the replacement cluster substituted and the odometer reset by an outside business to reflect the correct mileage. Ten days later Mr. Lilley suffered a heart attack and was hospitalized until January 17, 2007.

While Mr. Lilley was out, the replacement part arrived and was installed by Discount Auto, a business owned by Cherry Lane, instead of by the outside firm. The odometer was not reset and reflected 26,814 miles instead of the vehicle's actual 84,901 miles. Discount Auto returned the Silverado to Cherry Lane, where it was parked on a section of the lot not normally used for selling vehicles. The vehicle was marked "for sale."

Mr. Quinn visited the dealership on January 25, 2007, and saw the Silverado. He wanted to buy it, but could not reach a deal that included acceptable monthly payment terms. He left the lot. Shortly after he returned home, Mr. Quinn received a phone call from Tim McKenna, finance manager and acting general manager of Cherry Lane. Mr.

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the transaction.

Mr. McKenna attempted to contact Mr. Quinn by telephone, but was unable to reach him until January 29. He apologized to Mr. Quinn and offered to cancel the transaction and renegotiate. He also asked Mr. Quinn to bring the Silverado in so that the odometer could be reset. Mr. Quinn was offered the use of any vehicle on the lot while the work was done. Further negotiations ensued at the dealership that day, but no agreement was reached. Mr. Quinn departed without leaving the Silverado.²

Mr. McKenna was unable to reach him the following day. On the evening of January 31, Cherry Lane repossessed the Silverado by use of a towing company. The dealership stored Mr. Quinn's personal belongings, but he declined to retrieve them or his traded-in vehicles. At the time of the repossession, Mr. Quinn had turned over two of the four trade-in vehicles. He also had not provided title to one of them.

Mr. Quinn filed suit March 12, 2007. A five-day bench trial was held in June, 2008. The following month the court issued a memorandum opinion ruling in favor of the defendants and dismissing all causes of action. The court reasoned that Cherry Lane's actions showed no intent to deceive or defraud Mr. Quinn under the state and federal odometer laws and there was no completion of the vehicle sale due to the failure

² Mr. Quinn testified in his deposition that he was not going to turn the Silverado over to the dealership and "I told him that the ball was in their court, make me, you know, make me happy." Clerk's Papers (CP) 48.

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to turn over four working vehicles with valid titles. The court expressly found Mr. McKenna's testimony about the dealings was more credible than Mr. Quinn's version. Written findings of fact and conclusions of law were entered August 22. Mr. Quinn then timely appealed to this court.

ANALYSIS

The appellant raises several statutory claims relating to odometers and dealer practices, including a claim for conversion of personal property. The bench verdict disposes of most claims, and the court's legal determination that the sale was never completed resolves the others.

Federal Odometer Statute

Federal law requires one who transfers a vehicle to another to disclose known irregularities in the odometer reading. 49 U.S.C. § 32705. A private right of action is created in 49 U.S.C. § 32710:

(a) Violation and amount of damages. A person that violates this chapter or a regulation prescribed or order issued under this chapter, *with intent to defraud*, is liable for 3 times the actual damages or \$1,500, whichever is greater.

(b) Civil actions. A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.

(Emphasis added.)

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Case law confirms the plain meaning of the statute. A civil action is available only if the purchaser establishes that the transferor acted with intent to defraud. *E.g., Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1282 (10th Cir. 1998).

The trial court found that Cherry Lane did not act with intent to defraud and, thus, denied recovery under the statute. Mr. Quinn argues that the dealership's actual knowledge of the correct odometer reading should be imputed to its sales staff and that intent to defraud should then be found as a matter of law. While we agree that knowledge can be imputed to the sales staff, we disagree that this court can find fraudulent intent as a matter of law. The basic problem with appellant's argument is that it is directed to the wrong court.

Intent is a factual determination. "Whether one intended, at a specified time, to defraud another of his property is a question of fact to be resolved by the trier of the facts." *State v. Konop*, 62 Wn.2d 715, 718, 384 P.2d 385 (1963); *accord, State v. Etheridge*, 74 Wn.2d 102, 109, 443 P.2d 536 (1968); *State v. Bryant*, 73 Wn.2d 168, 171, 437 P.2d 398 (1968); *State v. Smithers*, 67 Wn.2d 666, 669, 409 P.2d 463 (1965).

The trial court's verdict here brings into play very well-settled law. The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-

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fact. Instead, they must defer to the factual findings made by the trier-of-fact. *See, e.g., Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959).

“Judgment as to the credibility of witnesses and the weight of the evidence is the exclusive function of the jury.” *State v. Smith*, 31 Wn. App. 226, 228, 640 P.2d 25 (1982).

It is one thing for an appellate court to review whether sufficient evidence supports a trial court’s factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

The testimony at trial with respect to intent to defraud illustrates the matter. There was testimony that sales personnel did not have access to internal dealer information about a vehicle. Coupled with evidence that the dealership disclosed an incorrect reading, a trier-of-fact justifiably could infer that Cherry Lane management intended to

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defraud a purchaser by keeping its own sales staff in the dark about the correct mileage.

There was also evidence to the contrary. Immediately upon discovering the error, Cherry Lane attempted to contact Mr. Quinn and the bank handling the financing. Its actions in disclosing the problem and offering alternatives to Mr. Quinn could easily convince a trier-of-fact that only an innocent error occurred and that Cherry Lane was not trying to benefit from the incorrect mileage reading.

The trial court accepted the second scenario. It was entitled to do so. More importantly, this court is not entitled to second-guess that determination. *Hesperian Orchards*, 54 Wn.2d at 572.

State Odometer Statutes

Several sections of the motor vehicle code prohibit actions taken to alter odometer readings or sell a car without disclosing that an odometer has been replaced. RCW 46.37.540-.570. A private right of action is created by RCW 46.37.590. The trial court decided that Mr. Quinn had not shown that Cherry Lane violated the statutes because it did not act with knowledge of the odometer error and did not intend to defraud him. The court also concluded that the statutes were not violated because no sale of the vehicle took place. CP 84.

Mr. Quinn challenges these conclusions, arguing first that no intent to defraud

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element exists in the state odometer statutes. We agree.

RCW 46.37.540(2) states: “It shall be unlawful for any person to disconnect, turn back, turn forward, or reset the odometer of any motor vehicle with the intent to change the number of miles indicated on the odometer gauge.” On its face, the statute requires proof of the intent to change numbers; it does not require proof of intent to defraud.

RCW 46.37.550 provides:

It shall be unlawful for any person to sell a motor vehicle in this state if such person has knowledge that the odometer on such motor vehicle has been turned back and if such person fails to notify the buyer, prior to the time of sale, that the odometer has been turned back or that he has reason to believe that the odometer has been turned back.

This court has previously concluded, in a criminal prosecution, that there is no intent to defraud element in this statute. *State v. Waldenburg*, 9 Wn. App. 529, 531-532, 513 P.2d 577, *review denied*, 83 Wn.2d 1002 (1973); *State v. Rentfrow*, 15 Wn. App. 837, 841, 552 P.2d 202 (1976), *review denied*, 88 Wn.2d 1007 (1977).

RCW 46.37.560 appears to be the most directly applicable statute to this case.

It shall be unlawful for any person to sell a motor vehicle in this state if such person has knowledge that the odometer on such motor vehicle has been replaced with another odometer and if such person fails to notify the buyer, prior to the time of sale, that the odometer has been replaced or that he believes the odometer to have been replaced.

Id. This statute, like § .550, only requires that a person act knowingly. As with that statute, we see no basis for reading an implicit intent to defraud element into this section.

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To the extent that it required such proof, the trial court erred. However, the trial court also based its determination on the failure to prove the knowledge element required by the statutes.

RCW 46.37.590 provides a civil cause of action against a seller of a vehicle:

In any suit brought by the purchaser of a motor vehicle against the seller of such vehicle, the purchaser shall be entitled to recover his court costs and a reasonable attorney's fee fixed by the court, if: (1) The suit or claim is based substantially upon the purchaser's allegation that the odometer on such vehicle has been tampered with contrary to RCW 46.37.540 and 46.37.550 or replaced contrary to RCW 46.37.560; and (2) it is found in such suit that the seller of such vehicle or any of his employees or agents knew or had reason to know that the odometer on such vehicle had been so tampered with or replaced and failed to disclose such knowledge to the purchaser prior to the time of the sale.

This statute in essence requires proof of a violation of §§ .540, .550, or .560, and a knowing failure to disclose information about the odometer change. In addition to finding that Cherry Lane did not intend to defraud Mr. Quinn, the court also concluded that it "did not have either actual or constructive knowledge of the odometer discrepancy" when it offered the vehicle for sale. CP 84.

Mr. Quinn argues vigorously that Cherry Lane had in its possession evidence of the vehicle's actual mileage and, thus, was in violation of the statute. We agree that the evidence would have permitted the trier-of-fact to reach such a conclusion. Some personnel at Cherry Lane knew that the Silverado had a new odometer with a different mileage figure. The sales personnel, however, did not.

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As with the previous issue, the question here is not what this court believes. The actual question is what the trier-of-fact believed. Whether or not someone acted knowingly is a factual question for the trier-of-fact. *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d 356, 371, 950 P.2d 451 (1998); *Everest v. Levenson*, 15 Wn. App. 645, 648, 551 P.2d 159, *review denied*, 87 Wn.2d 1011 (1976). The trial judge was not persuaded that Cherry Lane acted knowingly when it sold the Silverado with significantly understated mileage. As with the factual question of intent, that factual determination cannot be reweighed in this forum. *Hesperian Orchards*, 54 Wn.2d at 572; *Smith*, 31 Wn. App. at 228. Mr. Quinn's failure to prove this point at trial is binding in this appeal. He did not establish a violation of RCW 46.37.590.

The trial court also concluded that the statute was not violated because the "sale" was not completed.³ The court determined that Mr. Quinn had not lived up to his bargain because he failed to produce four operable vehicles with clear titles and failed to obtain financing. In essence, he did not pay for the Silverado because he did not complete his down payment (the four cars constituted two-thirds of the down payment) and was not able to finance the balance when the odometer problem came to light.⁴

³ The trial court also concluded that the parties mutually rescinded the contract due to the odometer mistake. We need not address that issue in light of our resolution of the other issues.

⁴ In fairness to Mr. Quinn, it is understandable that he put his payment obligations on hold once the original deal fell apart. Nonetheless, he is the one arguing that there

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Failure to perform a condition precedent will discharge the duties of the parties to a contract. *Salvo v. Thatcher*, 128 Wn. App. 579, 586, 116 P.3d 1019 (2005); *CHG Int'l, Inc. v. Robin Lee, Inc.*, 35 Wn. App. 512, 514-515, 667 P.2d 1127, *review denied*, 100 Wn.2d 1029 (1983); *Local 112, I.B.E.W. Building Ass'n v. Tomlinson Dari-Mart, Inc.*, 30 Wn. App. 139, 142-143, 632 P.2d 911, *review denied*, 96 Wn.2d 1017 (1981). Here, one of the conditions precedent to completing the sale involved Mr. Quinn making his down payment and financing the balance. That did not occur for very understandable reasons. Nonetheless, the failure to perform these conditions meant that this sale was not completed. The trial court did not err in so concluding.

For the additional reason that there was no sale, there also was no violation of RCW 46.37.590.

Auto Dealer Practices Act

Mr. Quinn also argues that Cherry Lane violated RCW 46.70.180, a statute that outlaws numerous improper practices by car dealers, in four different ways. Once again, the basic problem in this appeal is that the trial court did not find his claims persuasive.

RCW 46.70.027 provides a right of action to any retail vehicle purchaser who has “suffered a loss or damage” because of a violation of chapter 46.70 RCW.⁵ RCW

was a completed sale, so his performance under the contract must be reviewed.

⁵ In light of the trial court’s ruling on the persuasiveness of the evidence, we do not address whether or not Mr. Quinn also showed that he suffered damage or loss.

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46.70.180(5) essentially repeats RCW 46.37.590 by making it unlawful to commit offenses relating to odometers under RCW 46.37.540-.570.⁶ Mr. Quinn's claim under this statute fails for the same reasons the RCW 46.37.590 claim failed in the trial court — he did not prove that Cherry Lane acted knowingly and he did not prove that a sale took place.

Mr. Quinn also alleges that Cherry Lane violated RCW 46.70.180(1) and (2) by not including all financing information in one document and by including the false odometer reading in the sales paperwork. The trial court's sole conclusion on these claims simply states that Mr. Quinn "failed to prove a violation by preponderance of the evidence." CP 86.⁷ As we stated previously, this court cannot reweigh the evidence and reach a different conclusion than the trial court. *Hesperian Orchards*, 54 Wn.2d at 572.

Finally, Mr. Quinn alleges that Cherry Lane converted his personal property when it repossessed the Silverado and did not return the personal property therein to him. RCW 46.70.101 provides that a dealer's license may be suspended or revoked for various improper practices, including conversion of a customer's personal property. Mr. Quinn also pleaded a common law conversion claim.

⁶ This subsection also makes it a class C felony to tamper with odometers.

⁷ Mr. Quinn also argues that the trial court ruled as a matter of law that financing statements could be in multiple documents, citing to CP 53. That is not correct. CP 53 references the trial court's discussion of whether the sales agreement was a fully integrated agreement or not. It does not discuss the financing paperwork claim.

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The trial court also found this claim unproven. CP 85-86. That was understandable. Mr. Quinn refused to claim the property at the dealership once it was inventoried and removed from the Silverado. Cherry Lane made no efforts to do anything with the property other than preserve and return it. The fact that Mr. Quinn declined to retrieve it did not show that Cherry Lane made the property its own.

The auto dealer practices act claims were not proven. This court cannot reweigh the evidence and conclude otherwise.

Consumer Protection Act

The trial court concluded that because the odometer statutes were not violated, there also was no deceptive practice under the Consumer Protection Act (CPA), chapter 19.86 RCW. We agree.

“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.020. A person injured by a violation of RCW 19.86.020 or other sections of chapter 19.86 may bring a civil action for damages. RCW 19.86.090.

The elements of a CPA violation under that section are (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) which affects the public interest, (4) injury to the plaintiff, and (5) a causal link between the unfair or deceptive act and the injury.

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Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 784-785, 719 P.2d 531 (1986). A violation of chapter 46.70 RCW constitutes a violation of the CPA. RCW 46.70.310.

Finding no violation of chapter 46.70 RCW, the trial court concluded that no violation of the CPA was established. That is correct. In the absence of a proven deceptive act in violation of the chapter, elements one and three of the *Hangman Ridge* test are not satisfied. In view of that, there is no need to discuss whether elements four and five were proven or not.

The trial court correctly concluded that the CPA was not violated.

CONCLUSION

The trier-of-fact concluded it was not satisfied with the evidence supporting the claim that Cherry Lane knowingly violated state and federal statutes governing odometers and/or financing statements. While there was competing evidence that would have permitted contrary results, this court does not reweigh evidence and substitute its

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judgment for that of the trier-of-fact. Accordingly, the judgment of the trial court is affirmed.

Korsmo, J.

I CONCUR:

Brown, J.