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DIVISION II

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STATE OF WASHINGTON

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NO. 40173-8

**COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON**

HUGO ANTONIO CASTILLO MARTE, Appellant,

vs.

**JESSIKA HERNANDEZ, as Personal Representative of the Estate of
FRANKLYN CASTILLO, and the Estate of FRANKLYN
CASTILLO, Respondents.**

RESPONSE TO CROSS-APPEAL/REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff Hugo Antonio Castillo Marte (hereinafter “Tony”) submits the following Response to the Cross Appeal and Reply to his appeal and respectfully requests that the Appellate Court reverse the Trial Court’s dismissal of Tony’s Amended Complaint against Defendants the Estate of Franklyn Castillo Marte (hereinafter “Frank”) and Jessika Hernandez (hereinafter “Hernandez”), as Personal Representative of the Estate, post-trial, after the jury returned a verdict in Tony’s favor.

II. RESPONSE TO DEFENDANTS’ ASSIGNMENT OF ERROR

Tony submits the following Response to Defendants’ Assignments of Error. The Trial Court did not err by not giving the instructions proposed by Hernandez as identified in her Assignments of Error.

Hernandez’s jury instructions requested that the jury decide legal questions. See *Brief of Respondents*, pp. 3-5. By statute, all questions of law are to be decided by the Trial Court.

All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussion of law addressed to it.

RCW 4.44.080

Daugert v. Pappas, 104 Wn.2d 254, 704 P.2d 600 (1985), and *Mega v. Whitworth College*, 138 Wn. App. 661, 158 P.3d 1211 (2007),

review denied, 163 Wn.2d 1008 (2008), also reject Hernandez’s argument. In *Daugert*, the matter involved a legal malpractice claim for an attorney’s failure to perfect an appeal. The Supreme Court of Washington concluded that whether review would have been granted and whether the client would have received a more favorable decision on appeal was an issue of law solely for the court to decide. *Daugert*, 104 Wn.2d at 258-59.

In *Mega*, a professor brought action against a university for breach of contract, wrongful discharge and wage withholding. The Trial Court gave an instruction, instruction 16, which the Trial Court later determined was error. The instruction allowed the jury to interpret and apply insubordination terms as a modification to the parties’ contract. Based on the error, the Trial Court ordered a new trial. Division III, Court of Appeals upheld the Trial Court’s decision. Specifically, the *Mega* Court held the issue of contract interpretation “is a question of law for the court’s decision” and that “the trial court incorrectly assigned to the jury ‘the additional duty of resolving the questions of law inherent in the factual situation’”. *Mega*, 138 Wn. App. at 672 (quoting *State v. Chambers*, 81 Wn.2d 929, 932, 506 P.2d 311 (1973)).

In this matter, the Trial Court determined the legal issues raised by Hernandez upon her motions for summary judgment. CP 92-95, 242.

Accordingly, the Trial Court did not err by denying Hernandez's proposed jury instructions.

III. ARGUMENT IN REPLY

Tony submits the following reply in support of his appeal.

A. **The Trial Court's Decision should be Reversed because the relief Defendants requested was not properly before the Trial Court.**

Hernandez argues that her failure to request post-trial relief under CR 50 was excused by CR 38 and CR 39. Application of a Court Rule to a specific set of facts is an issue of law the Appellate Court reviews de novo. *State v. Hamilton*, 121 Wn. App. 623, 637, 90 P.3d 69 (2004) (citation omitted). Tony objected to Hernandez's post-trial request for relief in the absence of a motion. CP 243-246, 340-350, RP 236-244.

Hernandez argues without any authority that the "trial court opted to be the trier of fact on the unlawful partnership issue." *Brief of Respondents*, p. 17. Five pages before in Hernandez's brief, she acknowledges, over her objection, that the "[Trial] Court ultimately determined to set the matter for a jury trial. *Id* at p. 12 (citing CP 523-24, 526-34, RP 199-200). The jury was the only trier of fact in this matter.

The Trial Court erred because Hernandez moved for relief during trial under CR 50 for a directed verdict that no partnership was formed, or that the partnership did not include the restaurants, which she did not

renew. She never requested relief under CR 50 regarding the legality of the brothers' partnership. Post-trial, Hernandez did not move for relief under CR 50 within ten (10) days after entry of judgment. Accordingly, the matter was submitted to the jury. CR 50(b). The Trial Court erred by disturbing the jury's verdict in the absence of a motion.

B. The Trial Court's Decisions of Law on Summary Judgment should not have been Reversed.

Denial of a summary judgment is appealable if the issue turns solely on a substantive issue of law. *Kaplan v. v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 803-04, 65 P.3d 16 (2003) (citations omitted). Hernandez cites *Zimny v. Lovric*, 59 Wn. App. 737, 801 P.2d 259 (1990), *review denied*, 116 Wn.2d 1013 (1991), for the proposition that she could not appeal the Trial Court's decisions denying summary judgment. Hernandez is incorrect because *Zimny* is distinguishable.

In *Zimny*, the issue decided on summary judgment was diminished earning capacity. *Id* at 739. Diminished earning capacity is an issue of fact. See *Bartlett v. Hantover*, 9 Wn. App. 614, 619-20, 513 P.2d 844 (1973), *overruled on other grounds*, 84 Wn.2d 426, 526 P.2d 1217 (1974). Thus, the authority in *Zimny* is inapplicable here because the issues decided by the Trial Court in this matter turned solely on substantive

issues of law. The Trial Court erred by reversing its decisions on summary judgment in this matter.

C. Tony sufficiently assigned error to Finding of Fact No. 8.

Hernandez complains that Tony did not type out Finding of Fact No. 8. Tony cited to the Clerk's Papers (CP 445) in his opening brief to this Finding of Fact. *Brief of Appellant*, p. 35. Hernandez next complains that Tony did not designate trial testimony in his verbatim report of proceedings. This appears to be a request by Hernandez for Tony to argue evidence against himself.

Tony was precluded from testifying at trial under the deadman's statute about any transactions with his brother. Hernandez also raised this bar for any such testimony between her and Frank. Jose Medina testified at trial through the reading of his deposition. The portion of his transcript submitted by Hernandez on summary judgment was designated in the Clerk's Papers. CP 160-63. Likewise, the excerpts of Shirley Jeffrey's deposition transcript submitted by Hernandez during summary judgment were also designated as Clerk's Papers. CP 158-159.

Hernandez does not argue that summary judgment materials deviated from the parties' testimony at trial. Thus, her argument is an incorrect argument of form over substance. See RAP 1.2(a).

D. The Ratification by McDonalds regarded the Brothers' Partnership, not Tony's Franchisee status.

A partnership may be found to exist even though title to the alleged partnership property is held in the name of but one of the alleged partners. *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996). A limited liability company purchased with partnership assets is partnership property even if the title to the limited liability company is in the name of only one of the partners. *Id*; see also, *In re Fair Oaks, Ltd.*, 168 B.R. 397, 402 (9th Cir. BAP 1994) (“The fact that the property was acquired in the name of the general partner ... does not change the presumption that the property was acquired for the benefit of the partnership”) (interpreting Washington law).

Hernandez's argument against McDonalds' ratification of the brothers' partnership misunderstands the basis for the relief afforded to Tony because of McDonalds' failure to act. Tony is not challenging Finding of Fact No. 24 because a partnership can exist to share in the profits of a franchise even though only one of the partners was a franchisee of McDonalds. The evidence of McDonalds' ratification is contained in the notice to McDonalds, which the Trial Court considered. Hernandez complains because this letter was not submitted at trial. Tony

is not appealing the jury's verdict. Tony is appealing the Trial Court's post-trial decision to dismiss Tony's Amended Complaint in the absence of a motion. Tony moved to supplement the record before this Court to include the notice, which was denied. See Motion to Supplement Record and Ruling, 06/28/10. However, as the Trial Court considered this evidence before entering its decision, this evidence is part of the record on appeal. See Ruling, 06/28/10.

E. The Brothers' Partnership was not unlawful.

The Supreme Court of Washington's decision in *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996), is dispositive of this issue in favor of Tony. In that case, the plaintiff sued the defendant claiming, in part, an interest in assets of a limited liability company pursuant to an alleged partnership. The defendant challenged that claim under the defense that, in writing, the limited liability company was only in the defendant's name. In reversing the trial court's dismissal on summary judgment and the appellate court's decision upholding that ruling, the Supreme Court of Washington held that:

A partnership may be found to exist even though title to the alleged partnership property is held in the name of but one of the alleged partners.

Malnar, 128 Wn.2d at 535.

Hernandez relies on *Williams v. Burrus*, 20 Wn. App. 494, 581 P.2d 164 (1978), *Fallahzadeh v. Ghorbanian*, 119 Wn. App. 596, 82 P.3d 684 (2004), and *Morelli v. Ehsan*, 110 Wn.2d 555, 756 P.2d 129 (1988), for the proposition that Frank's and Tony's partnership was unlawful. *Brief of Respondents*, pp. 28-29. Those cases are distinguishable from the present facts.

In the *Williams* case, *supra*, specific statutes and a regulation, RCW 66.24.010(1), RCW 66.24.010(2)(d), and WAC 314-12-010, collectively required all members of a partnership to be eligible to obtain a retail license to sell liquor. One of the partners in that case was not eligible in that respect. Similarly in *Fallahzadeh*, the Court found that both partners in the practice of dentistry must be licensed dentists. *Fallahzadeh*, 119 Wn. App at 601-02. In *Morelli*, *supra*, the issue regarded the Professional Service Corporation Act for the practice of medicine, and the statutes pursuant to RCW 18.100, et seq. specifically mandated that any partner of a professional service corporation must be licensed to practice medicine. One of the partners in *Morelli* was not licensed to practice medicine. In this matter, the brother's partnership was not voided by statute.

1. The Securities Act does not apply.

The Trial Court held that the brothers' partnership was a security. RP 422. General partnerships are usually not considered securities and are not subject to the Securities Act unless a partner has limited actual contract. *Ito International Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 291, 921 P.2d 566 (1996). In order for the Court to find that Tony was at equal fault with Frank regarding the formation and control of the brothers' partnership, each brother was required to exert sufficient control, which would invalidate the application of the Securities Act to the brothers' partnership. Accordingly, the Trial Court erred by invalidating the brothers' partnership under the Securities Act.

2. If the Securities Act applies, then Tony was not in pari delicto with Frank.

The Trial Court incorrectly determined that Tony was in pari delicto with Frank under *Golberg v. Sanglier*, 96 Wn.2d 874, 639 P.2d 1347 (1982). CP 420-32. In *Golberg*, four partners agreed to silently fund a partnership and one partner, Sanglier, represented that he solely contributed the money for the purchase of the franchise.

Three partners besides Sanglier initially contributed to the purchase of the franchise. The partners also executed a nondisclosure agreement to disguise the source of the funds. *Golberg*, 96 Wn.2d at 876.

One of the partners misrepresented the status of the partnership to two other partners and returned their initial contribution. The partners discovered that the partnership was successful and sued for lost profits.

The Supreme Court of Washington found that the parties were not in *pari delicto*. Even though the suing partners had received the return of their capital contributions, the *Golberg* Court found that they were entitled to the profits from the sale of the partnership under theory of constructive trust. *Golberg*, 96 Wn.2d at 882-83, 886-87. If parties are not in *pari delicto*, the less culpable party may maintain an action based on an illegal contract. *Morelli v. Ehsan*, 110 Wn.2d 555, 562, 756 P.2d 129 (1988).

Comparable to the facts in *Golberg*, Tony had no prior experience with McDonalds and relied on Frank's relationship with McDonalds to form the partnership. CP 426. Tony did not make any representations to McDonalds. CP 107-141. The only representations in this matter to McDonalds were made by Frank to McDonalds. *Id.* Lastly, there was evidence in the *Golberg* case that the suing partners did not intend to enter into an illegal contract. *Golberg*, 96 Wn.2d at 885. Here, there is no evidence to show that Tony ever thought that his partnership with Frank was illegal. CP 427. The Trial Court erred by dismissing Tony's Amended Complaint.

3. Illinois law does not apply.

Hernandez argues that Illinois statutory law should apply to the appeal of this matter. *Brief of Respondents*, pp. 31-32, and at n. 4. The Trial Court did not decide this matter under Illinois law. CP 420-32. Further, Tony objected to Hernandez's attempt to invoke foreign law because Hernandez did not properly plead foreign law when this matter was before the Trial Court on summary judgment. CP 233. Accordingly, Illinois law does not apply.

F. Hernandez's defense to the brother's Partnership is barred by the Economic Loss Rule.

In one part of her brief, Hernandez asks, "Did the plaintiff and the decedent enter into an unlawful partnership whose aim was to defraud McDonald's." *Brief of Respondents*, p. 1. At another part of her brief, Hernandez argues "The [economic loss] rule is not applicable here because this case is not a suit for damages on intentional misrepresentation." *Id* at 34. If this case is not about damages based on intentional misrepresentation, then the entire theory of Hernandez's defense to the brothers' partnership claim is void.

The economic loss rule bars claims for fraud based on intentional misrepresentation. *Poulsbro Group, LLC v. Talon Development*, 155 Wn. App. 339, 229 P.3d 906 (2010). Further, fraud requires proof of nine

elements by clear and convincing evidence. *Pederson v. Bibioff*, 64 Wn. App. 710, 722-23, 828 P.2d 1113 (1992). The Trial Court erred by dismissing Tony's Amended Complaint and the jury's verdict.

G. The brothers' Partnership did not violate Public Policy.

The question of what constitutes clear public policy is one of law. *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989). Courts must find, not create public policy, and the existence of such public policy must be clear. *Selix v. Boeing Co.*, 82 Wn. App. 736, 741, 919 P.2d 620 (1996), *review denied*, 130 Wn.2d 1024 (1997). This Court's recent decision in *Poulsbro Group* indicates that Courts should not create public policy when contractual remedies exist. *Poulsbro Group, supra*. In this matter, if McDonalds wanted to invalidate the partnership, McDonalds enjoyed every right under the contract with Frank to do so.

In dismissing Tony's Amended Complaint, the Trial Court did not find public policy, but created it. The Trial Court mistakenly relied on language from the 1933 case of *Goodier v. Hamilton*, 172 Wash. 60, 19 P.2d 392 (1933), in creating inapposite public policy. CP 425. In the *Goodier* case, the *Goodier* Court found that upholding the contract at issue would tend to "destroy the public confidence and purity of the administration of the law." *Goodier*, 172 Wash. at 72. In this matter, no such public policy concern exists.

McDonalds is a global, sophisticated business and its rights are set forth and protected by contract. CP 107-141. Tony respectfully requests that the Court reverse the decision of the Trial Court and reinstate the jury's verdict in this matter.

H. Tony is entitled to the Alternative Relief of Unjust Enrichment.

The thrust of Hernandez's argument is based upon her misstatement of what the jury's verdict in this matter provides. First, it is important to note that Tony is not appealing the jury's verdict. Tony agrees with the jury's verdict. Tony is appealing the Trial Court's dismissal of the jury's verdict and his claim for unjust enrichment.

Hernandez argues that because the special verdict form provided for alternative relief, Tony is now not entitled to any relief. Hernandez's argument is misplaced. To the extent that Hernandez did not designate the Special Verdict Form in the Clerk's Papers, then her argument is self-defeating. Moreover, the verdict form provides for alternative relief. If a partnership existed, which the jury found, there was no need for the jury to consider whether Tony was entitled to quantum meruit. In other words, the jury's finding of a partnership was not a finding that Tony was not entitled to unjust enrichment. The jury was not asked to find for or against Tony on that claim because the jury found for Tony on the partnership

claim, which was acknowledged by the Trial Court. RP 315-16. Hernandez's argument that the jury's verdict precludes Tony's appeal of the dismissal of his unjust enrichment claim is without merit.

I. Hernandez is not entitled to Costs as the prevailing party.

Tony objected to Hernandez's cost bill. CP 434-35. RCW 4.84.010 provides that costs shall be awarded for the prevailing party's costs in an action. In this matter, Tony prevailed at trial and was entitled to costs, but for the Trial Court's post-trial decision. Tony respectfully requests that the Appellate Court vacate the judgment awarding Hernandez her costs, or, in the alternative, limit Hernandez's costs to the post-trial litigation, if any.

J. Hernandez waived the bar under the Deadman's Statute.

When a party asserting protection of the deadman's statute submits evidence regarding testimony with the decedent, that party waives the right to rely on the deadman's statute to bar all evidence regarding that transaction. *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941). "[T]he party who invokes the protection of the statute must himself respect it." *Id* at 60. A waiver of the deadman's statute upon summary judgment can be a waiver of the deadman's statute

at the time of trial. *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P.2d 1015 (1993).

Based upon Hernandez's affirmative argument against Tony during summary judgment regarding the brothers' transactions and Hernandez's negative argument asserted against Tony by inference at trial regarding McDonalds, Tony submits that Hernandez has waived her ability to bar Tony from testifying to his transactions with Frank under the deadman's statute. CP 80-82, 89-91, 106, 158-164, 444-450.

IV. CONCLUSION

Based on the foregoing, Tony respectfully requests that the Appellate Court reverse the Trial Court's Opinion Re: In Pari Delicto, Findings of Fact and Conclusions of Law and Judgment that dismissed Tony's Amended Complaint. Tony respectfully requests that the Appellate Court reinstate the jury's verdict. In the alternative, Tony respectfully requests that the Court reverse the decision of the Trial Court dismissing Tony's unjust enrichment claim and remand this matter to determine the amount Tony is entitled to receive in unjust enrichment.

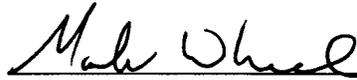
If a remand is ordered by the Appellate Court, Tony respectfully requests that the Appellate Court enter a decision amending Finding of Fact No. 8 striking the language that Tony intended to lie to McDonalds

and ruling that Hernandez waived Tony's bar from testifying under the deadman's statute.

Lastly, Tony respectfully requests that the Appellate Court vacate the judgment awarding Hernandez her costs, or, in the alternative, to limit Hernandez's costs to the post-trial litigation, if any.

Respectfully submitted this 4th day of October, 2010.

DUGGAN SCHLOTFELDT & WELCH PLLC



MARK A. WHEELER, WSBA# 31492
Of Attorneys for Appellant

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MARK A. WHEELER, being first duly sworn upon oath, hereby deposes and says:

1. I am one of Appellant's attorneys, I am competent to testify herein, and I base the following on my own, personal knowledge.

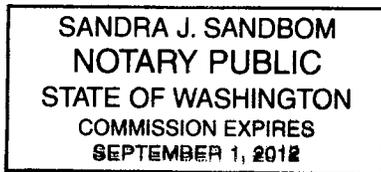
2. On October 4, 2010, I personally served by hand-delivery a copy of Response to Cross-Appeal/Reply Brief of Appellant and this Affidavit of Service to the following:

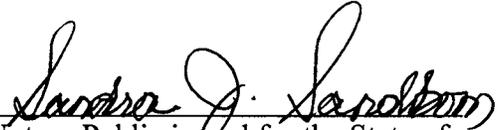
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MARK A. WHEELER, WSBA# 31492

SUBSCRIBED AND SWORN to before me this 4th day of
October, 2010.





Notary Public in and for the State of
Washington, residing at Vancouver
Commission expires: 9-1-2012