NO. 40173-8
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HUGO ANTONIO CASTILLO MARTE,

Appellant,

vs.

JESSIKA HERNANDEZ, as personal representative of the Estate of FRANKLYN CASTILLO; and the ESTATE OF FRANKLYN CASTILLO,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN F. NICHOLS

BRIEF OF RESPONDENTS

BEN SHAFTON
Attorney for Defendant/Appellant
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

FILED
COURT OF APPEALS
DIVISION II
10 SEP -2 AM 9:24
STATE OF WASHINGTON
BY
DEPUTY

Table of Contents

RESPONSE TO PLAINTIFF'S ASSIGNMENTS OF ERROR AND ISSUES PRESENTED 1

I. Assignments of Error Nos. 1-3. 1

a. Response 1

b. Issues Presented. 1

II. Assignment of Error No. 4. 2

a. Response 2

b. Issue Presented. 2

ESTATE'S ASSIGNMENTS OF ERROR AND ISSUES PRESENTED .. 3

I. Assignments of Error. 3

II. Issues Presented. 5

STATEMENT OF THE CASE 5

I. Introduction. 5

II. Substantive Facts. 6

III. Procedural Facts. 11

ARGUMENT— RESPONSE TO TONY'S ASSIGNMENTS OF ERROR 17

Assignments of Error Nos. 1-3 17

I. The Absence of a Motion under CR 50(a) Is of No Consequence Given the Procedure the Trial Court Opted to Follow. 17

II. The Trial Court's Denial of the Estate's Summary Judgment Motion Is of No Consequence. 19

III. Any Partnership between Frank and Tony Was Unlawful..... 21

a. Standard of Review. 21

b. Plaintiff Cannot Claim that the Trial Court Erred by Making Finding of Fact No. 8. 22

c. Plaintiff Cannot Claim that the Trial Court Erred by Making Finding of Fact No. 24. 24

d. The Brothers' Partnership Was Unlawful. 26

e. The Court Should Reject Tony's Arguments That the Partnership Was Not Unlawful. 33

f. Tony Was Not Less Culpable Than Frank. 36

g. Tony Is Not Entitled to Relief on His Claim for Unjust Enrichment. 42

h. The Trial Court Did Not Err by Awarding Costs to the Estate. 44

Assignment of Error No. 4 — The Estate Did Not Waive The Protection Contained In RCW 5.60.030 44

ARGUMENT—ESTATE'S ASSIGNMENTS OF ERROR 48

The Trial Court Erred By Failing to Give the Estate's Proposed Instructions Relating to The Unlawful Partnership Issue. 48

CONCLUSION 50

APPENDIX 51

I. Findings of Fact. 51

a. Finding of Fact No. 8 (CP 465): 51

b. Finding of Fact No. 14 (CP 447): 51

c. Finding of Fact No. 24 (CP 449): 52

II. Statutes. 52

a. 815 ILSCS 705/1: 52

b. RCW 5.60.030: 53

c. RCW 19.100.170: 54

III. Restatement (Second) *Contracts* §198. 55

IV. Proposed Jury Instructions and Verdict Form. 55

a. *Bengston v. Shain* and *Eder v. Riddick* (CP 321): 55

b. 17 Am.Jur.2d Contracts 273 (CP 322): 55

c. Restatement (Second) *Contracts* §192 (CP 323): 55

d. *Black's Law Dictionary* (8th Edition) 2004—Definition of Fraud (CP 324): 56

e. *Black's Law Dictionary* (8th Edition) 2004—Definition of Tort (CP 325): 56

f. 815 ILSCS 705/1(CP 326): 56

g. *Golberg v. Sanglier* (CP 327): 56

h. Verdict Form (CP 337-39): 57

Table of Authorities

Cases

Adler v. Ryder Truck Rental, Inc., 53 Wn.App. 33, 38, 765 P.2d 910 (1988) 18

Bartle v. Nutt, 29 U.S. 184, 7 L.Ed.2d 1825, (1830) 27

Bengston v. Shain, 42 Wn.2d 404, 255 P.2d 892 (1953) 3, 26

Bentzen v. Demmons, 68 Wn.App. 339, 842 P.2d 1015 (1993) 45, 46

Brader v. Minute Muffler Installation, Ltd., 81 Wn.App. 532, 914 P.2d 1220 (1996) 43

Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 367, 617 P.2d 704 (1980) 17

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 864 P.2d 937 (1994) 18

Butler v. Agnew, 9 Cal.App. 327, 99 P. 395 (1908) 27

Casco Co. v. Public Utility District No. 1, 37 Wn.2d 777, 784, 226 P.2d 235 (1951) 25

Casper v. Esteb Enterprises, Inc., 119 Wn.App. 759, 772-73, 82 P.3d 1223 (2004) 42

Christiano v. Spokane County Health District, 93 Wn.App. 90, 93, 969 P.2d 1078 (1998) 48

Chunyk & Conley/Quad-C v. Bray, 156 Wn.App. 246, 252, 232 P.3d 564 (2010) 49

Cisna v. Sheibley, 88 Ill.App. 385 (1899) 28

Dioxin/Organochlorine Center v. Department of Ecology, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992) 25

Eder v. Riddick, 46 Wn.2d 41, 278 P.2d 361 (1955) 3, 26

Eggleston v. Pantages, 103 Wash. 458, 175 P. 34 (1918) 27

Ennis v. Ring, 56 Wn.2d 465, 473, 353 P.3d 950 (1960) 44

Erection Co. v. *Department of Labor and Industries,* 121 Wn.2d 513, 522, 852 P.2d 288 (1993) 25

Evans v. Luster, 84 Wn.App. 447, 458, 928 P.2d 455 (1996) 36, 38, 39

Fallahzadeh v. Ghorbanian, 119 Wn.App. 596, 82 P.3d 684 (2004)..... 28

Golberg v. Sanglier, 96 Wn.2d 874, 639 P.2d 1347 (1982)4, 29, 30, 34, 35, 36, 37, 40

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917, 32 P.3d 250 (2001) 42

Hederman v. George, 35 Wn.2d 357, 212 P.2d 841 (1949) 27

Holland v. Boeing Co., 90 Wn.2d 384, 583 P.2d 621 (1978)..... 21

Hugo Antonio Castillo Marte v. Jessika Hernandez as Personal Representative of the Estate of Franklyn Castillo, Court of Appeals No. 38167-1-II 13

*Ito International Corp. v. Prescott, Inc.,*83 Wn.App. 282, 921 P.2d 566 (1996) 33

Johnston v. Medina Improvement Club, Inc., 10 Wn.2d 44, 116 P.2d 272 (1941) 45

Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)..... 49

Kim v. Dean, 133 Wn.App. 338, 341-42, 135 P.3d 978 (2006) 17

McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899) 27

Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP, 110 Wn.App. 412, 428-30, 40 P.3d 1206 (2002) 43

Miles v. Miles, 128 Wn.App. 64, 69-70, 114 P.3d 671 (2005) 22

Morelli v. Ehsan, 110 Wn.2d 555, 561-2, 756 P.2d 129 (1988).... 28, 38, 41

Moritzky v. Heberlein, 40 Wn.App. 181, 697 P.2d 1023 (1985)..... 44

Morris v. Woodside, 101 Wn.2d 812, 815, 682 P.2d 905 (1984) 23

Mutual of Enumclaw v. Wiscomb, 95 Wn.2d 373, 622 P.2d 1234 (1980). 35

Olympic Fish Products v. Lloyd, 93 Wn.2d 596, 602, 611 P.2d 737 (1980) 48

Page-Dressler Co. v. Meader, 118 Or 359, 255 P. 308 (1926) 28

Pelusa v. Barton Auto Dealerships, Inc., 138 Wn.App. 65, 71, 155 P.3d 978 (2007) 18

Potter v. Boisbert, 117 Cal.App.2d 688, 256 P.2d 625 (1953)..... 28

Poulsbo Group, LLC, v. Talon Development, LLC, 155 Wn.App. 339, 229P.3d 906 (2010) 33

Ramsey v. Mading, 36 Wn.2d 303, 310-14, 217 P.2d 1041 (1950)..... 18

Roth v. Bell, 24 Wn.App. 92, 107, 600 P.2d 602 (1979)..... 20

Saviano v. Westport Amusement, Inc., 144 Wn.App. 72, 180 P.3d 874 (2008) 21

Scavenius v. Manchester Port District, 2 Wn.App. 126, 129, 467 P.2d 372 (1970) 17

Sea-Pac Co., Inc., v. United Food and Commercial Workers Local Union, 103 Wn.2d 800, 801-2, 699 P.2d 217 (1985) 20

Shannon v. State, 110 Wn.App. 366, 368, 40 P.3d 1200 (2002) 20

Sinnar v. LeRoy, 44 Wn.2d 728, 270 P.2d 800 (1954) 35

St. Hilaire v. Food Services of America, Inc., 82 Wn.App. 343, 351-52, 917 P.3d 1114 (1996) 23

State v. Alexander, 70 Wn.App. 608, 612, 854 P.2d 1105 (1993) 23

State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) 18

Stieneke v. Russi, 145 Wn.App. 544, 560, 190 P.3d 60 (2008) 21

Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003) 21

Talley v. Fournier, 3 Wn.app. 808,819, 479 P.2d 96 (1970) 18

Warshow v. A. Elwood & Sons, 83 Conn. 430, 76 A. 531 (1910) 28

Williams v. Burrus, 20 Wn.App. 494, 581 P.2d 164 (1978) 28

Wilman v. Taylor, 46 Wn.App. 546, 731 P.2d 541 (1987) 46

Yousoufian v. Office of Sims, 165 Wn.2d 439, 446, 200 P.3d 232 (2009) 21

Zimny v. Lovric, 59 Wn.App. 737, 801 P.2d 259 (1990) 19, 20

Statutes

815 ILSCS 705/1 5

RCW 21.20.010 ..... 36, 37

RCW 21.20.010(3) 33, 38

RCW 4.84.030 49

RCW 5.60.030 ..... 2, 12, 50, 52, 53, 54

RCW 9A.08.020(1) 44

RCW 9A.08.020(2)(c) 45

RCW 9A.08.020(3)(a)(i), (ii) 45

Other Authorities

17 Am.Jur.2d Contracts §273 ..... 3, 30

Black's Law Dictionary (8th Edition) 2004 ..... 4, 40

Restatement (Second) *Contracts* § 192 40

Restatement (Second) *Contracts* § 179 40

Restatement (Second) *Contracts* §192 ..... 4, 30

Williston on Contracts, §1614 30

Rules

CR 38 17

CR 39 17

CR 50(a) 17

CR 56 48

RAP 10.4(c) 22, 24

RAP 9.2(b) 23

RESPONSE TO PLAINTIFF'S ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

I. Assignments of Error Nos. 1-3.

a. Response.

The trial court did not err by issuing the Opinion Re: In Pari Delicto; by entering the Findings of Fact and Conclusions of Law; and by entering judgment.

b. Issues Presented.

1. Did the plaintiff and the decedent enter into an unlawful partnership whose aim was to defraud McDonald's (McDonald's)?

2. Was the plaintiff not less culpable than the decedent?

3. Was the trial court entitled to consider the unlawful partnership issue when it had initially denied summary judgment and when the Court of Appeals had denied discretionary review?

4. Can the plaintiff obtain an award for unjust enrichment when he was not less culpable than decedent in creating and advancing an unlawful partnership?

5. Can the plaintiff obtain relief based upon unjust enrichment when he did not except to the verdict form the Court utilized?

6. Did substantial evidence support the trial court's Finding of Fact No. 8?

7. Was the decedent's Estate entitled to statutory costs as the prevailing party?

II. Assignment of Error No. 4.

a. Response.

The trial court did not err by ruling that the Estate had not waived the protection of RCW 5.60.030.

b. Issue Presented.

Can the protection of RCW 5.60.030 be waived by the Estate's presentation of testimony from disinterested witnesses whose testimony plaintiff presented in response to the Estate's summary judgment motion and ultimately called by the plaintiff at trial?

///

ESTATE'S ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

I. Assignments of Error.

Assignment of Error No. 1: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction based on *Bengston v. Shain,* 42 Wn.2d 404, 255 P.2d 892 (1953) and *Eder v. Riddick,* 46 Wn.2d 41, 278 P.2d 361 (1955).

Assignment of Error No. 2: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction based on 17 Am.Jur.2d Contracts §273.

Assignment of Error No. 3: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction based on Restatement (Second) *Contracts* §192 and other authority.

Assignment of Error No. 4: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until

after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction based on the definition of fraud found in *Black's Law Dictionary* (8th Edition) 2004.

Assignment of Error No. 5: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction that a tort is a civil wrong. *Black's Law Dictionary* (8th Edition) 2004.

Assignment of Error No. 6: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction based on 815 ILSCS 705/1.

Assignment of Error No. 7: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed instruction based on *Golberg v. Sanglier,* 96 Wn.2d 874, 639 P.2d 1347 (1982).

Assignment of Error No. 8: If, and only if, the trial court erred by reserving decision on the unlawful partnership issue until

after the jury had rendered its verdict, then the trial court erred by not giving the Estate's proposed verdict form.

II. Issues Presented.

a. Should the trial court have allowed the Estate to put the theory of its case before the jury?

b. Do the instructions and verdict form accurately state the law?

STATEMENT OF THE CASE

I. Introduction.

This matter was tried before a jury and the trial court. The plaintiff, as the appealing party, chose not to order those portions of the Verbatim Report of Proceedings that include the testimony of the witnesses. The consequences of that failure will be discussed in more detail in connection with the Assignment of Error to Findings of Fact Nos. 8 and 24. Because there is no Verbatim Report of Proceedings, this factual statement will be taken from the Findings of Fact the trial court entered and documents that were admitted at the trial of this matter and have been ordered as part of the record. Reference will be made to the Clerk's Papers together with the relevant Finding of Fact designated as "FF."

II. Substantive Facts.

Plaintiff Hugo Antonio Castillo Marte and the decedent, Franklyn Antonio Castillo Marte, are brothers. (CP 444, FF 1) Throughout this litigation and without any disrespect, the trial court and counsel have referred to plaintiff as "Tony" and the decedent as "Frank" for simple convenience.[1]

McDonald's grants franchises to operators of its restaurants. It does not grant franchises to partnerships. It requires prospective franchisees to pay a fee to purchase the franchise, purchase equipment for the restaurant, and pay other costs associated with opening a restaurant. It requires that the money used to make these payments be the franchisee's own money and not money from some other source. McDonald's also requires prospective franchisees to complete a training program. (CP 445, FF 4-6) Tony and Frank were well aware of these requirements before June of 2003.

Frank and Tony agreed that Frank would apply for a franchise from McDonald's to operate one or more restaurants. They agreed that Tony would supply at least a portion of the money

[1] Both brothers are citizens of the United States. Their family comes from the Dominican Republic. In that culture, individuals have two surnames. The first — in this case, Castillo — is the father's surname. The second — in this case, Marte — is the mother's surname. In their everyday lives in the United States, both brothers have been known by their father's surname, Castillo.

required to purchase the franchise and pay other costs connected with opening restaurants. They agreed that they would lie to McDonald's about the existence of their partnership or that they would fail to disclose the existence of their partnership to McDonald's. Finally, they agreed that they would lie to McDonald's about the money that Tony would advance for the purchase of the restaurants or fail to disclose Tony's financial involvement to McDonald's. (CP 445, FF 8) Both Frank and Tony believed that McDonald's would not grant a franchise to Frank if it knew of the partnership and financial contribution. (CP 446, FF 9)

Tony was active in pursuing the acquisition of a franchise to operate a McDonald's restaurant. He obtained knowledge and information about the advisability of purchasing a McDonald's restaurant in different locations and provided this information to Frank. He also gave Frank information concerning the status of McDonald's generally. (CP 446, FF 10)

Between November 29, 2000, and April 28, 2003, Tony advanced $116,000.00 to Frank in nine separate checks. These monies were advanced as part of Tony's investment in the partnership. Tony misrepresented the purpose of some of the checks by his notations on their memo lines. On check 1055, dated

December 1, 2001, he wrote "debt repayment" on the memo line. On check 1056, also dated December 1, 2001, he wrote "credit card payment" on the memo line. These checks totaled $15,000.00. Tony executed two checks as opposed to one check to avoid the reporting requirements contained in 31 U.S.C. §5313. He took this step to conceal his involvement in the partnership with Frank. (CP 448, FF 16)

Tony wrote checks 1068, 1069, and 1070 on July 1, 2002. The memo line on the first of these checks is "house proceeds part 1;" on the second of these checks, "house proceeds part 2;" and on the third, "house proceeds part 3." These notations were also false. (CP 447, FF 15) These checks were related to a document that Tony executed on July 31, 2002, before a notary public. In that document, Tony certified that he and Frank had sold real property in the Dominican Republic for approximately $176,471.00 and that Frank was entitled to $80,000.00 of the proceeds. This certification was false. Tony signed the document to conceal his involvement in the partnership with Frank. (CP 448, FF 17) Finally, and on April 28, 2003, Tony advanced to Frank $30,000.00 in three separate checks of $10,000.00 each. He did so to avoid the reporting requirements of

31 U.S.C. §5313 and to conceal his involvement in the partnership with Frank. (CP 448, FF 18)[2]

CM Restaurant Management, LLC is an Oregon limited liability company. It was formed in May of 2003. On May 8, 2003, Frank executed its Operating Agreement. It provides that Frank was the company's sole member. (CP 446, FF 11)

McDonald's ultimately agreed to grant Frank a franchise to operate two McDonald's restaurants in Gresham, Oregon. Frank executed two franchise agreements — one for each restaurant — on or about June 10, 2003. Both contain the following language:

> Franchisee represents, warrants, and agrees that Franchisee actually owns the complete equity interest in this Franchise and the profits from the operation of the Restaurant, and that Franchisee shall maintain such interest during the term of this Franchise except only as otherwise permitted pursuant to the terms and conditions of this Franchise.

(CP 446-7, FF 12) With the consent of McDonald's, both franchises and all rights under the terms of both franchise agreements were assigned to CM Restaurant Management, LLC. (CP 447, FF 13) Frank's execution of the Franchise Agreements and the Assignment and Consent to Assignment of Franchise to a Limited Liability

[2] These checks can be found at CP 66-71.

Company amounted to misrepresentations because he did not disclose the existence of the partnership between himself and Tony. Both Frank and Tony agreed that these misrepresentations would be made. (CP 447, FF 14) Frank then began to operate the restaurants.

Tony began receiving money from the operation of the two McDonald's restaurants in the spring to summer of 2004. He prepared invoices showing that he provided services for consultation on computer related or information technology services for the restaurants' benefit. He was paid according to those invoices. In fact, Tony provided no such services. This served to further conceal his involvement in the partnership with Frank. (CP 448, FF 19) Also, in the spring of 2004, Tony received $15,000.00 from Frank. (CP 449, FF 20) Tony claims that these monies were his share of the profits from the operation of the two restaurants. However, he did not report any of this income on his federal income tax returns for 2003, 2004, or 2005. This served to conceal further his involvement in the partnership with Frank. (CP 449, FF 21)

Frank died on November 19, 2004. Prior to his death, neither Frank nor Tony disclosed to McDonald's the existence of a partnership between them. (CP 444, 449; FF 2, 22)

Jessika Hernandez is Frank's surviving spouse and the personal representative of his Estate. (CP 445, FF 3) McDonald's will allow a surviving spouse of a franchisee to become approved as a franchisee and operator in his or her own right upon completion of required training. After Frank's death, Ms. Hernandez completed the training and became approved as an operator in April of 2006. She has continued to operate the two restaurants under the auspices of CM Restaurant Management, LLC, since that time. (CP 449, FF 23)

III. Procedural Facts.

After Ms. Hernandez was appointed personal representative of Frank's Estate, Tony filed a creditor's claim asserting the existence of the partnership and seeking relief. (CP 8-12) It was rejected. (CP 14-15) Tony then sued. (CP 3-15)

In 2006, the Estate moved for summary judgment. In essence, the Estate alleged that any testimony that Tony might give to show the existence of a partnership would be inadmissible under the terms of Dead Man's Statute, RCW 5.60.030. In response, Tony produced two declarations. One came from the brothers' half-sister, Shirley Jeffrey. The other came from Jose Medina, who testified that he had been a friend of both brothers since childhood. (CP 80-82, 89-91) The trial court denied the motion summary judgment finding

that the two declarations raised a genuine issue of material fact as to the existence of a partnership. (CP 92-97)

In April of 2007, and in accordance with local practice and procedure, the Estate noted the matter for trial to the court. (CP 523-24) Tony then demanded a jury of twelve. (CP 525) The Estate contended that a jury was not warranted. (CP 526-31) Tony did not agree. (CP 532-4) The Court ultimately determined to set the matter for a jury trial. (CP 543; RP 199-200)

On March 28, 2008, the Estate moved for summary judgment. It argued that any alleged partnership between Frank and Tony amounted to an unlawful partnership and, for that reason, Tony was not entitled to any relief. (CP 170-83) In support of that motion, the Estate relied on the previously submitted declarations of Ms. Jeffrey and Mr. Medina together with their deposition testimony. (CP 172-75) The trial court initially denied that motion by letter opinion. (CP 42) The Estate moved for reconsideration. (CP 243-6) It also sought certification of the issue pursuant to RAP 2.3(b)(4). The trial court ultimately denied the motion for reconsideration and the motion for summary judgment. It also declined to provide the certification allowed by RAP 2.3(b)(4). (CP 254-55; CP 262-69) The Estate then sought discretionary review. (CP 261-69) As the

record of the Court of Appeals shows, Commissioner Schmidt entered a Ruling Granting Review in *Hugo Antonio Castillo Marte v. Jessika Hernandez as Personal Representative of the Estate of Franklyn Castillo,* Court of Appeals No. 38167-1-II. Tony moved for modification of this decision. The Court of Appeals modified the Commissioner's decision and terminated review. The Certificate of Finality remanding the matter back to the trial court was entered on February 18, 2009.

The matter then proceeded to trial in November of 2009. Prior to trial, the Estate submitted jury instructions. Included were instructions that would allow the jury to determine whether the brothers had formed an unlawful partnership and whether they were equally culpable. (CP 321-327) The Estate also submitted a verdict form requiring the jury to determine whether or not an unlawful partnership had been formed in connection with the restaurants in question. (CP 337-39)

The trial court recognized that it would have to determine a number of issues within the parties' motions in limine before any evidence could be presented to the jury. It decided to devote the first trial day to deciding those motions. (CP 544-45)

Toward the end of the day, the trial court considered whether the unlawful partnership issue would be presented to the jury. (RP 193-210) It ultimately determined that it would decide the unlawful partnership issue and be the trier of fact on the issues related to that aspect of the case. (RP 197-98; RP 210)

At the trial, Tony presented evidence from Maria Jeffrey, the brothers' mother; Shirley Jeffrey; and Ms. Hernandez. The jury was read portions of the depositions of Courtney Wilson, and Mr. Medina. Tony himself testified. (CP 549-50) The Estate presented testimony from Bryan Murphy, the attorney who assisted Frank with the formation of CM Restaurant Management, LLC. Ms. Hernandez also testified. (CP 549-51)

After the conclusion of all the evidence, the parties gave their exception to jury instructions. The Estate noted that the trial court was not giving any of its instructions relating to the unlawful partnership question because it had reserved that issue to itself. It also excepted to the trial court's failure to give the Estate's proposed instructions on that issue and a verdict form submitting the issue to the jury. (RP 218-19) The trial court formulated a verdict form that allowed the jury to answer two questions — whether the brothers had formed a partnership to include the two McDonald's restaurants

in Gresham, Oregon, and whether the Estate had been unjustly enriched by any monies Tony had advanced to Frank. The Verdict Form directed the jurors not to consider the unjust enrichment question if it determined that the brothers had indeed formed a partnership that included the two McDonald's restaurants in Gresham, Oregon. Tony did not except to the use of this verdict form. (VRP 214-16)[3]

The jury concluded that the brothers had in fact formed a partnership that included the restaurants in Gresham, Oregon. Per the direction on the Verdict Form, the jury did not reach the question of unjust enrichment. (CP 546-47)

After the jury reached its verdict, the trial court called for additional argument on the question of the unlawful partnership issue. (RP 225-32) During the course of those proceedings, Tony attached a letter his attorney had written to McDonald's USA, LLC dated June 2, 2006. The Estate objected to the trial court's consideration of this letter since it was not produced at trial. (CP 411)

---

[3] In the colloquy between the trial court and the parties, the trial court and Tony's attorney alluded to changes in the form and that the final version would be "forthcoming." (RP 216) At the time when exceptions were being taken, the trial court had announced what the form should contain, and the final document with those changes was being formulated.

On December 2, 2009, the trial court issued its Opinion Re: In Pari Delicto. The decision first discussed the procedure the trial court had opted to use. It stated:

> ...It should be noted that prior to trial this court agreed that evidence of the "legality" of the partnership would not be presented and this issued could be reserved for ruling in the event that the jury did find for the existence of the partnership.

(CP 421)

It concluded that the brothers had formed an unlawful partnership and that they were equally at fault. The trial court considered the June 2, 2006, letter and rejected Tony's argument that it amounted to sufficient evidence of ratification of the partnership by McDonald's. (CP 429-30) The trial court then entered its Findings of Fact and Conclusions of Law. It also entered judgment dismissing Tony's action and awarding taxable costs to the estate. Tony appealed and the Estate cross-appealed.

///

ARGUMENT— RESPONSE TO TONY'S ASSIGNMENTS OF ERROR

Assignments of Error Nos. 1-3

I. The Absence of a Motion under CR 50(a) Is of No Consequence Given the Procedure the Trial Court Opted to Follow.

Tony first argues that the trial court's decision amounted to error because the Estate never made a motion pursuant to CR 50(a) concerning the unlawful partnership issue. Tony's argument ignores how the trial court chose to order its proceedings.

Tony demanded a jury trial over the Estate's objection. The trial court decided to allow Tony a jury trial. However, under CR 38 and CR 39, the trial court was vested with wide discretion to allow a jury on some, none, or all issues presented. *Brown v. Safeway Stores, Inc.,* 94 Wn.2d 359, 367, 617 P.2d 704 (1980); *Scavenius v. Manchester Port District,* 2 Wn.App. 126, 129, 467 P.2d 372 (1970); *Kim v. Dean,* 133 Wn.App. 338, 341-42, 135 P.3d 978 (2006). The trial court opted to be the trier of fact on the unlawful partnership issue. It advised the parties that it would do so on the first day of trial. It confirmed its decision when the Estate excepted to its failure to give jury instructions on the unlawful partnership question. It then reiterated its decision in the Opinion Re: Pari Delicto.

A party is entitled to rely on a trial court's definitive ruling on a motion in limine and need not continually make objection. *State v. Powell,* 126 Wn.2d 244, 256, 893 P.2d 615 (1995); *Adler v. Ryder Truck Rental, Inc.,* 53 Wn.App. 33, 38, 765 P.2d 910 (1988), disapproved of on other grounds, *Burnside v. Simpson Paper Co.,* 123 Wn.2d 93, 864 P.2d 937 (1994) In the same way, the Estate was entitled to rely on the trial court's ruling that it would determine the unlawful partnership issue after the jury had returned its verdict. It was not required to make any further motions.

Tony appears to argue that the trial court should not have reserved decision on the unlawful partnership question until after the jury returned its verdict but should have insisted that the Estate make an explicit motion for judgment before the case went to the jury. The trial court, however, took the judicious tack of waiting to see whether the jury found that a partnership existed to see whether a decision on the lawfulness of the partnership was necessary. The trial court has broad discretion as to how to conduct the proceedings before it. *Ramsey v. Mading,* 36 Wn.2d 303, 310-14, 217 P.2d 1041 (1950); *Talley v. Fournier,* 3 Wn.app. 808,819, 479 P.2d 96 (1970); *Pelusa v. Barton Auto Dealerships, Inc.,* 138 Wn.App. 65, 71, 155 P.3d 978 (2007). Tony can point to no abuse of discretion or

prejudice in the way that the trial court chose to order the proceedings. There is no error here.

II. The Trial Court's Denial of the Estate's Summary Judgment Motion Is of No Consequence.

Tony appears to argue that the trial court was somehow bound by its denial of the Estate's summary judgment motion on the unlawful partnership issue and that the Estate was precluded from litigating the matter further. As the basis of his argument, he contends that the Estate could appeal from the trial court's denial of the summary judgment motion as a matter of right. Tony is not correct.

This precise question was decided adversely to Tony's position in *Zimny v. Lovric,* 59 Wn.App. 737, 801 P.2d 259 (1990). There, the plaintiff's minor suffered injuries as a result of the defendant's negligence and later died from unrelated causes. His personal representative sued and claimed damages for diminished earning capacity. The trial court denied defendant's partial summary judgment motion asking that the diminished earning capacity claim be limited to the period prior to the minor's death. The defendant later renewed that argument in a Motion in Limine, which was granted. When the matter was appealed, the minor's personal

representative contended that the Motion in Limine was a disguised Motion for Reconsideration of the Court's decision on the summary judgment motion. He also claimed that the denial of the motion for summary judgment had *res judicata* effect and became law of the case. The Court of Appeals held that the denial of the summary judgment motion was not a final order did not preclude any further consideration of the issue by the trial court. It also stated that the denial of the summary judgment motion was not appealable as a matter of right. Since the denial of the partial summary judgment motion was not appealable, it was not a final judgment. Therefore, the Court stated, it had no preclusive effect. 59 Wn.App. at 739.

Our case is no different from *Zimny v. Lovric, supra.* The trial court initially denied the motion for summary judgment, and the Estate had no appeal as a matter of right. *Sea-Pac Co., Inc., v. United Food and Commercial Workers Local Union,* 103 Wn.2d 800, 801-2, 699 P.2d 217 (1985); *Roth v. Bell,* 24 Wn.App. 92, 107, 600 P.2d 602 (1979); *Shannon v. State,* 110 Wn.App. 366, 368, 40 P.3d 1200 (2002). The Estate attempted to appeal the ruling by seeking discretionary review. Tony vigorously and successfully argued against the Court of Appeals granting discretionary review. Tony is hardly in a position to argue that the Estate had the right to appeal

the denial of summary judgment as a matter of law when he contended that it had no right to discretionary review.

III. Any Partnership between Frank and Tony Was Unlawful.

a. Standard of Review.

The trial court entered Findings of Fact and Conclusions of Law in support of its determination. Appellate review of Findings of Fact and Conclusions of Law following a decision by a trial court is limited to determining whether substantial evidence supports the findings and, if so, whether the findings support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.,* 90 Wn.2d 384, 583 P.2d 621 (1978); *Saviano v. Westport Amusement, Inc.,* 144 Wn.App. 72, 180 P.3d 874 (2008). Substantial evidence is that quantum of evidence sufficient to persuade a rational and fair-minded person that the state premise is true. If that standard is met, the appellate court cannot substitute its judgment for that of the trial court. *Sunnyside Valley Irrigation District v. Dickie,* 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Stieneke v. Russi*, 145 Wn.App. 544, 560, 190 P.3d 60 (2008). Unchallenged Findings of Fact are verities on appeal. *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 446, 200 P.3d 232 (2009), modified on other grounds, 168

Wn.2d 444, 229 P.3d 735 (2010); *Miles v. Miles,* 128 Wn.App. 64, 69-70, 114 P.3d 671 (2005).

Tony has effectively assigned error to Findings of Fact Nos. 8 and 24. His arguments are not well taken as will be discussed below. Nonetheless, the rest of the Findings of Fact are verities on appeal since they have not been challenged. Finally, and as will be discussed below, the Findings of Fact amply support the trial court's Conclusions of Law.

b. Plaintiff Cannot Claim that the Trial Court Erred by Making Finding of Fact No. 8.

Tony did not set out Finding of Fact No. 8 in his brief as required by RAP 10.4(c). The Estate has placed that finding in the Appendix. In essence, it states that the brothers agreed to lie to McDonald's about the existence of the partnership and about the money that Tony would advance.

Tony has not supplied a verbatim report of proceedings that includes the witnesses' testimony at trial. He has also not submitted all of the exhibits admitted at trial. Without a record of all testimony and all exhibits, the Court cannot determine whether this Finding of Fact is or is not supported by substantial evidence. It is Tony's responsibility to arrange for the transcription

of those portions of the verbatim report of proceedings necessary to present the issues raised on review. RAP 9.2(b). When a party fails to supply a verbatim report of proceedings that includes trial testimony, that party cannot challenge findings of fact, and those findings of fact become verities on appeal. *Morris v. Woodside,* 101 Wn.2d 812, 815, 682 P.2d 905 (1984); *State v. Alexander,* 70 Wn.App. 608, 612, 854 P.2d 1105 (1993), reversed on other grounds 125 Wn.2d 717, 888 P.2d 1169 (1995); *St. Hilaire v. Food Services of America, Inc.*, 82 Wn.App. 343, 351-52, 917 P.3d 1114 (1996). Since Tony has not provided an adequate record for review, he cannot challenge Finding of Fact No. 8, and it is a verity on appeal.

Tony contends that the trial court erred by finding that both he, along with Frank, intended to lie to McDonald's. (Opening Brief of Appellant, pps. 34-35) In Finding of Fact No. 14, the trial court found that Frank's execution of the Franchise Agreements and the Assignment of Franchise to Limited Liability Company amounted to misrepresentations because Frank did not disclose the existence of the partnership between the two brothers and that the brothers agreed that the misrepresentation would be made. Tony did not assign error to that finding and it is now a verity on appeal. Tony cannot successfully assign error to Finding of Fact No. 8 when he

has conceded that substantial evidence supports Finding of Fact No. 14 and when the latter finding states that he intended that a misrepresentation be made to McDonald's.

c. Plaintiff Cannot Claim that the Trial Court Erred by Making Finding of Fact No. 24.

Tony's Brief contains a section entitled "The Trial Court Erred by Dismissing Tony's Amended Complaint and Jury Verdict in His Favor because Evidence Exists to Show that McDonald's Ratified the Brothers' Partnership." (Opening Brief of Appellant, pps. 30-32) This section could conceivably be construed as a challenge to Finding of Fact No. 24. Once again, Tony has failed to set out that finding in full as required by RAP 10.4(c). That finding is also set out in the Appendix. There, the trial court found that McDonald's had not acknowledged that Tony was a franchisee of either of the two restaurants.

Once again, Tony has not provided a record that includes all trial testimony and all exhibits submitted. The record he has provided is not adequate to review this or any other finding of fact that trial court made. His challenge to this finding must be rejected for that reason.

The only evidence on which Tony relies to support his argument is a letter his attorney sent to McDonald's on June 2, 2006. As is relevant to our purposes, the letter does nothing more than state that Tony claims to be a partner in the two McDonald's restaurants in Gresham, Oregon, and that he has filed a creditor's claim. (CP 349-50) Tony did not attempt to introduce this letter at trial. He has not placed anything into the record in this case to suggest to the contrary.

First of all, the Court cannot consider this letter because the trial court never admitted it into evidence. *Casco Co. v. Public Utility District No. 1,* 37 Wn.2d 777, 784, 226 P.2d 235 (1951); *Dioxin/Organochlorine Center v. Department of Ecology,* 119 Wn.2d 761, 771, 837 P.2d 1007 (1992); *Erection Co.* v. *Department of Labor and Industries,* 121 Wn.2d 513, 522, 852 P.2d 288 (1993). Secondly, the trial court should not have considered this letter since it was not admitted at trial. All juries are instructed only to consider evidence that is admitted. WPI 1.02. The same rule must apply in bench trials.

Nonetheless, the trial court attributed no importance to it. As it stated in the Opinion Re: In Pari Delicto:

> (Tony) claims that McDonald's ratified the "misrepresentations" and thus absolves any violations of the brothers. Tony premises

> this theory on a letter issued by his attorney to McDonald's dated June 2, 2006. In this communication, Mr. Wheeler advises McDonald's of the pending claim against the Estate and raises his concern over the legality of Ms. Hernandez's marriage. There is no evidence that McDonald's responded to this letter or acknowledged that Tony was a "co-franchisee" with the defendant. The evidence produced at trial was that the franchisor accepted Ms. Hernandez as the owner of both stores upon her completion of the mandatory training.

(CP 429-430) Tony has produced nothing to refute that trial court's view of the facts was not supported by substantial evidence.

d. The Brothers' Partnership Was Unlawful.

The findings of fact the trial court made supported its conclusion that the brothers formed an unlawful partnership. Tony cannot contend to the contrary.

In order for a partnership to exist, there must be some meeting of the minds between the partners sufficient to form a partnership contract. *Bengston v. Shain, supra; Eder v. Riddick, supra.*

All contracts must pass normal tests for validity. Otherwise they are not enforceable. Contracts that envision perpetrating an illegal act, suppression of the truth, or the commission of a fraud or a tort against a third party are void as

against public policy and will not be enforced. The same statement can be made about contracts prohibiting one person from disclosing information to a third person that the third person would want to know. *Eggleston v. Pantages*, 103 Wash. 458, 175 P. 34 (1918); *Hederman v. George,* 35 Wn.2d 357, 212 P.2d 841 (1949); Restatement (Second) *Contracts* §192; *Williston on Contracts*, §1614; 17 Am.Jur.2d *Contracts* §273.

Since early in the nineteenth century, courts in the United States have applied these rules, and have refused to enforce alleged partnership obligations where the partnership involved perpetration of a fraud. *Bartle v. Nutt,* 29 U.S. 184, 7 L.Ed.2d 1825, (1830) — partnership accounting denied where partners committed fraud in connection with the construction of a government building; *McMullen v. Hoffman,* 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899) — partnership accounting denied between contractors who colluded on purportedly competitive bids for the construction of public works and thereby perpetrated fraud on the agency letting the contract; *Butler v. Agnew,* 9 Cal.App. 327, 99 P. 395 (1908) — real estate agent was denied any relief when he concealed from his principal his partnership with the purchaser of the real estate in question; *Potter v. Boisbert,* 117 Cal.App.2d 688, 256 P.2d 625

(1953) — declaration of equal ownership refused when partnership property was taken in the name of one partner for the purpose of defrauding the other partner's wife; *Warshow v. A. Elwood & Sons,* 83 Conn. 430, 76 A. 531 (1910) — where partners colluded to misrepresent the quality of inferior goods and thereby perpetrate a fraud on the public, neither was entitled to relief against the other; *Cisna v. Sheibley,* 88 Ill.App. 385 (1899) — relief denied where partners perpetrated a fraud on an insurance company where they procured a policy of life insurance and named the insured's wife as beneficiary, paid her a relatively small sum, and took the remainder of the proceeds of that policy for themselves; *Page-Dressler Co. v. Meader*, 118 Or 359, 255 P. 308 (1926) — a partner in an apartment building partnership was denied relief because it concealed its interest in the project from the lender thereby perpetrating a fraud on the lender.

Washington courts have come to the same conclusion. It is well recognized that rights among partners in connection with a partnership that is the subject of an illegal agreement will not be enforced. *Morelli v. Ehsan,* 110 Wn.2d 555, 561-2, 756 P.2d 129 (1988); *Williams v. Burrus,* 20 Wn.App. 494, 581 P.2d 164 (1978); *Fallahzadeh v. Ghorbanian,* 119 Wn.App. 596, 82 P.3d 684 (2004).

The case of *Golberg v. Sanglier, supra,* is conceptually close to ours and therefore instructive. In that case, Mr. Golberg, Ms. Pierce, Mr. Carras, and Mr. Sanglier formed a partnership to operate a Cadillac dealership. Motors Holding and Cadillac required him to provide $100,000.00 in unencumbered funds as part of the franchise capital requirements. Mr. Golberg, Ms. Pierce, and Mr. Carras agreed to provide those funds as part of the partnership agreement. The four agreed that Mr. Sanglier would tell Motors Holding and Cadillac that he had received the money as a gift from his mother-in-law. Their partnership agreement precluded any of them from disclosing the partnership. Motors Holding required that an Oldsmobile franchise be joined with the prospective Cadillac dealership. This called for an investment of an additional $25,000.00. It too was paid by Mr. Golberg, Ms. Pierce, and Mr. Carras. Sanglier then represented to Motors Holding and Cadillac that the $125,000.00 that he was contributed was his own money free and clear of any present or future right, claim, or interest of any kind. Later, Mr. Carras and Mr. Sanglier conspired to defraud Mr. Golberg and Ms. Pierce by persuading them to sell their partnership interests for significantly less than the reasonable value by misrepresenting how the dealership was fairing.

The Supreme Court ruled that the agreement to conceal the source of the funds amounted to a violation of RCW 21.20.010(3), the statute making it unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. On that basis, they found the partnership to be unlawful. 96 Wn.2d at 882. The Supreme Court then determined that Mr. Golberg and Ms. Pierce were not equally culpable, or *in pari delicto*, with Ms. Sanglier and Mr. Carras in the scheme.

Our case is no different from *Golberg v. Sanglier, supra*. As the trial court found, Tony and Frank both knew that McDonald's would not grant a franchise to a partnership. They also knew that McDonald's required that money used to pay a franchise fee and purchase equipment be the franchisee's own money and not be obtained from some other source. Nonetheless, they agreed that they would not disclose their partnership to McDonald's or affirmatively lie about its existence. They also agreed that they would not disclose Tony's financial contribution to the venture or affirmative lie about it as well. As the trial court further found, they

knew they had to make these misrepresentations or McDonald's would not grant a franchise.

It is clear that failure to disclose the partnership or to affirmatively lie about its existence was material to McDonald's. In that regard, the McDonald's franchise agreement provides as follows:

> 18. **Material Breach.** The parties agree that the happening of any of the following events shall constitute a material breach of this Franchise and violate the essence of Franchisee's obligations and, without prejudice to any of its other rights or remedies at law or in equity, McDonald's, at its election, may terminate this Franchise upon the happening of any of the following events:
>
> > (n) Franchisee makes any misrepresentations to McDonald's relating to the acquisition and/or ownership of this Franchise.

(Ex. 3, pps. 9-10; Ex. 4, pps. 9-10) Furthermore, the brothers' agreement also violated the Illinois Franchise Disclosure Act of 1987

///

and specifically 815 ILSCS 705/1, set out in full in the Appendix.[4] That statute prohibits any person, in connection with the sale of a franchise, to (a) employ any device, scheme, or artifice to defraud; (b) make any untrue statement of a material fact necessary in order to make the statements made not misleading; and (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. That statute applies to offers made or accepted in Illinois to buy or sell franchises. McDonald's is in Illinois. It contains similar language to RCW 19.100.170 set out in the Appendix. The brothers' failure to disclose the partnership to McDonald's amounted to clearly "an artifice to defraud" in violation of (a); a failure to disclose a material fact in violation of (b); and an act that would operate as deceit in violation of (c).

The brothers' partnership also amounted to a security, as the trial court noted, because most of the managerial duties fell to

---

[4] Paragraph 27 of each of the two Franchise Agreements provides as follows:

> **Governing laws.** The terms and provisions of this Franchise shall be interpreted in accordance with and governed by the laws of the State of Illinois.

(Ex. 3, p. 12; Ex. 4, p. 12) Since the parties agreed to be bound by Illinois law, resort to this statute is appropriate. As required by CR 9(k), the Estate advised in its answer to Tony's amended complaint that it would be relying on Illinois law. (CP 267-68)

Frank and because Frank applied for and obtained the franchise. (CP 422) *Ito International Corp. v. Prescott, Inc.*,83 Wn.App. 282, 921 P.2d 566 (1996) Therefore, RCW 21.20.010 is applicable. It is set out in the Appendix and contains provisions identical to those set out above in the Illinois Franchise Disclosure Act of 1987. Therefore, the brothers' action also violated each of the prohibitions set out in RCW 21.20.010.

The brothers' partnership agreement was clearly unlawful because it envisioned the perpetration of a fraud and was in direct violation of laws relating to grants of franchises. It is therefore not enforceable.

e. The Court Should Reject Tony's Arguments That the Partnership Was Not Unlawful.

Tony claims that the partnership was not unlawful. His arguments must be rejected.

Tony first claims that the economic loss rule bars tort claims for intentional misrepresentation when the parties have remedies under a contract. The Court so held in *Poulsbo Group, LLC, v. Talon Development, LLC,* 155 Wn.App. 339, 229P.3d 906 (2010). The rule is not applicable here because this case is not a suit

for damages based on intentional misrepresentation. Tony seeks an accounting for partnership profits. (CP 103)

Tony then states that he had no duty to McDonald's. In fact, he did. That duty is described in the Illinois Franchise Disclosure Act of 1987 as discussed above. As a member of a partnership with Frank, he would be liable if McDonald's sought to sue under that act. As the Supreme Court observed in *Golberg v. Sanglier, supra,* the entire partnership would have been liable had Motors Holding sought damages for violation of RCW 21.20.010(3).

Tony then argues that the Franchise Agreements are voidable rather than void on the basis of fraud. While that might be true, the Franchise Agreements are not the contracts at issue here. We are concerned with the validity of the partnership contract between Frank and Tony. If it is not valid, Tony can claim no rights under it.

Tony notes that the trial court did not make findings of fact that would support an award of damages based on fraud. The trial court made no such findings because Tony did not sue for fraud. Tony appears to claim that the partnership is not unlawful unless there is proof that the entity to be defrauded actually suffered damage. That is not the case, however. In *Golberg v. Sanglier,*

supra, the partners agreed to lie to Motors Holding. There was no proof that it had suffered any damage of any kind.

In making these arguments, Tony suggests that McDonald's is the only entity that can make claim based on the brothers' misrepresentations. That is not accurate. A party to an illegal contract—in our case, the brothers' partnership agreement—has standing to raise the defense and cannot waive it. *Sinnar v. LeRoy,* 44 Wn.2d 728, 270 P.2d 800 (1954). The Court of Appeals specifically rejected the argument that the defense of illegality was personal to Motors Holding in *Golberg v. Sanglier, supra*, and the Supreme Court took no issue with that portion of its decision.

Finally, Tony claims that the brothers' partnership agreement did not violate public policy even though the brothers agreed to lie to McDonald's about their partnership. That argument is at odds with the numerous cases cited at pps. 27-28. Public policy may be derived from legislation. *Mutual of Enumclaw v. Wiscomb,* 95 Wn.2d 373, 622 P.2d 1234 (1980). The public policy here is stated in the prohibition against fraud in the Illinois Franchise Disclosure Act of 1987. It can also stem from the need to foster certain policies. Restatement (Second) *Contracts* §179. One of those interests is the commission of a tort. Any promise to commit a

tort is void and unenforceable. Restatement (Second) *Contracts* §192. Fraud is a tort. *Black's Law Dictionary* (8th Ed. 2004).

f. Tony Was Not Less Culpable Than Frank.

The trial court concluded that Tony was not less culpable than Frank in connection with their unlawful partnership. The trial court's Findings of Fact amply support that conclusion.

Courts may nonetheless enforce an unlawful contract if the defendant is more culpable than the plaintiff. If the parties are equally culpable — *in pari delicto* — courts will afford no relief to the plaintiff. *Golberg v. Sanglier, supra*, 96 Wn.2d at 882-883. A decision as to whether parties are equally culpable is based on public policy considerations. Three considerations are germane — whether enforcement will discourage such transactions in the future; whether serious moral turpitude is involved; and whether the defendant would be unjustly enriched by non-enforcement of the contract. *Golberg v. Sanglier, supra*, 96 Wn.2d at 883-885; *Evans v. Luster*, 84 Wn.App. 447, 458, 928 P.2d 455 (1996). The critical issue, however, is whether the trial court's Findings of Fact support its Conclusions of Law. The Court made that clear in *Golberg v. Sanglier, supra*. The trial court found Mr. Golberg and Ms. Pierce to be less culpable than Mr. Sanglier and Mr. Carras. The Supreme Court affirmed on

the basis that the trial court's findings of fact justified this conclusion of law. *Golberg v. Sanglier, supra*, 96 Wn.2d at 885.

The first consideration, deterring similar conduct, applies here. As the trial court found, the brothers conspired to lie to McDonald's about the existence of their partnership and conceal its existence. Any act of fraud violates public policy. Their actions also violated both the law of Illinois and the law of Washington relating to the grant of franchises. Such actions should not be countenanced. Leaving Tony with no remedy in this case will discourage others from entering into such illegal transactions.

Tony's actions amount to serious moral turpitude. Both Frank and Tony knew that McDonald's would not grant a franchise to a partnership. Nonetheless, Tony agreed to conceal the existence of the partnership from McDonald's. Tony also took affirmative steps to conceal the existence of the partnership by preparing and signing false documents. The notations he placed on the memo lines of checks misstated their purpose. In one set of checks, Tony indicated he was simply repaying a debt to Frank. In another, he falsely stated that the checks were from the proceeds of a house that the brothers had sold in the Dominican Republic. In connection with those checks, Tony gave a notarized statement that

the brothers had in fact sold a house in the Dominican Republic and that Frank was entitled to $80,000.00 of the proceeds of that sale. Tony was also careful to write more than one check at one time. As the trial court found, he did this with the specific intent to avoid revealing his involvement in a partnership. Tony also prepared false invoices for provision of alleged information technology services. He did this so that he could receive money from the operation of the restaurants. Frank provided him with $15,000.00 in 2004. Tony did not report this sum — or any other money he received from the operation of the — as income on his federal tax return. He took these actions to further conceal the existence of a partnership. His acts amount to very serious and ongoing moral turpitude. No court should hesitate to deny Tony any relief because of his repeated acts designed to conceal the partnership.

In *Morelli v. Ehsan, supra*, the Court held that a non-physician and a physician were equally culpable in the formation of a partnership to operate a medical clinic in violation of a statute prohibiting physicians associating with non-physicians. In *Evans v. Luster*, *supra*, the Court held that a contractor and a land owner were equally culpable in contracting to do work that violated local permit requirements. It is submitted that the acts of the parties in these two

cases involve significantly less moral turpitude than Tony's actions here. Neither involved misrepresentation in the context of entering into a contract. If the parties were equally culpable in those two cases, then Tony cannot claim to be less culpable than Frank.

The final point of consideration is whether the defendant — Frank's Estate — will be unjustly enriched. Whether unjust enrichment occurs, however, does not prevent a court from determining that the parties are equally culpable. In *Evans v. Luster*, *supra*, the Court stated:

> Admittedly, Evans was enriched by the work that was done on the property, but one party frequently retains the benefit of an illegal contract. Unjust enrichment alone is an insufficient reason for the courts to assist in the enforcement of an illegal agreement.

84 Wn.App. at 458-59.

Tony contends that he was not equally culpable because he had no prior experience with McDonald's; did not make any affirmative misrepresentations to McDonald's; and may not have intended to commit an illegal act. (Appellant's Opening Brief, p. 29) The only relevant aspect of the operation of McDonald's that Tony learned from Frank was the fact that McDonald's would not grant a franchise to a partnership. It takes no great knowledge of the

internal operations of McDonald's for someone in Tony's position to conclude that any concealment or misrepresentation in any context should not occur. The fact that Frank may have carried the brothers' plan forward by signing his name to an application and not disclosing the existence of the partnership is also of no consequence. In this context, an analogy to criminal law is helpful. A person who solicits, commands, encourages, or requests another person to commit a crime or aides another person in planning or committing the crime, is legally accountable for the other person's conduct and is, himself or herself, guilty of the crime. RCW 9A.08.020(1); RCW 9A.08.020(2)(c); RCW 9A.08.020(3)(a)(i), (ii). Stated another way, if Tony accuses Frank of being the burglar, Tony helped him plan the burglary and is just as culpable.

Tony argues that he is not *in pari delicto* because, like Mr. Golberg and Ms. Pierce in *Golberg v. Sanglier, supra,* he did not have managerial control. Tony misreads *Golberg v. Sanglier, supra.* Mr. Golberg and Ms. Pierce were ruled less culpable because they were defrauded by Mr. Sanglier and Mr. Carras, not because they were not involved in management. The Court expressed concern that an *in pari delicto* finding would "encourage opportunists such as Sanglier to draw such unwary persons into questionable

investment schemes, return their initial investment under fraudulent pretenses, and dupe them out of their profits, all with full assurance that they will be insulated from legal recourse." 96 Wn.2d at 884. In other words, Ms. Pierce and Mr. Golberg were not less culpable; rather, Mr. Carras and Mr. Sanglier were more culpable because they had practiced fraud on Mr. Golberg and Ms. Pierce as well as on Cadillac and Motors Holding.

Finally, the fact that Tony may not have intended to enter into an illegal agreement is not relevant. Initially, Tony's assertion lacks believability. In this case, we are not discussing an obscure legal technicality. Rather, we are dealing with a basic concept — truthfulness in all dealings. Even if Tony's assertion could be believed, it is not germane. As the Court stated in *Morelli v. Ehsan, supra*:

> In the present case, undisputed evidence indicated neither party entered into the transaction with any knowledge the partnership agreement was illegal. Furthermore, neither party had an illegal intent to form or conduct an illegal business partnership. Nevertheless, the partnership was illegal; good faith intentions do not excuse either party from knowing the law.

110 Wn.2d at 562.

g. Tony Is Not Entitled to Relief on His Claim for Unjust Enrichment.

Tony claims that the trial court erred by not allowing him to recover the $116,000.00 he advanced to the unlawful partnership on the basis of unjust enrichment. The trial court's decision was proper.

Tony is precluded from making this argument by the Verdict Form that the trial court submitted to the jury. The jury was asked to determine whether or not a partnership existed concerning the two McDonald's restaurants in Gresham, Oregon. If the jury found that no such partnership existed, it was then asked to determine Tony's claim for unjust enrichment. Conversely, if it found there indeed was a partnership, it was directed to not to consider the unjust enrichment issue. The Verdict Form expresses a view of the law — if a partnership existed, Tony could make no claim for unjust enrichment. Tony took no exception to this Verdict Form. Instructions to which no exception is taken become the law of the case. *Guijosa v. Wal-Mart Stores, Inc.,* 144 Wn.2d 907, 917, 32 P.3d 250 (2001); *Casper v. Esteb Enterprises, Inc.,* 119 Wn.App. 759, 772-73, 82 P.3d 1223 (2004). This rule also applies to Special Verdict Forms. *Micro Enhancement International, Inc. v. Coopers &*

Lybrand, LLP, 110 Wn.App. 412, 428-30, 40 P.3d 1206 (2002). Tony's failure to except to the Verdict Form means that, as a matter of law, he is not entitled to relief based on unjust enrichment if a partnership existed between him and his brother. The jury found that a partnership existed. Therefore, it did not reach the question of unjust enrichment. Tony's unjust enrichment claim is foreclosed for that reason.

Tony's unjust enrichment claim must be denied on the basis of Restatement (Second) *Contracts* §198, adopted in *Brader v. Minute Muffler Installation, Ltd.*, 81 Wn.App. 532, 914 P.2d 1220 (1996).[5] That section of the Restatement is set out in the Appendix. It allows unjust enrichment when a contract is unenforceable on the grounds of public policy only if the person seeking relief is excusably ignorant of facts or is not equally in the wrong with the other party.

Tony was not ignorant of the facts. As the trial court found, he knew that McDonald's would not grant a franchise to a partnership. Furthermore, the anti-fraud provisions of RCW

[5] The Court adopted Restatement (Second) *Contracts* §599 in *St. James Farm, Inc. v. D.J. Irvin Co.*, 25 Wn.App. 802, 808, 609 P.2d 970 (1980). That Restatement section is similar to Restatement (Second) *Contracts* §198. The only significant difference is that it does not include part (b) — allowing a person unjust enrichment relief is he is not equally in the wrong with the promisor.

19.100.170 and the Illinois Franchise Disclosure Act of 1997 can hardly be termed "minor legislation." The second provision does not apply because, as the trial court found, Tony was not less culpable than Frank.

For all these reasons, Tony is not entitled to relief based on the doctrine of unjust enrichment.

h. The Trial Court Did Not Err by Awarding Costs to the Estate.

Tony argues that the trial court erred by awarding costs to the Estate because he prevailed at trial. Tony is wrong because he did not prevail. The Estate received statutory costs pursuant to RCW 4.84.030. For the purposes of that statute, the prevailing party is the party in whose favor an affirmative judgment is entered. *Ennis v. Ring*, 56 Wn.2d 465, 473, 353 P.3d 950 (1960); *Moritzky v. Heberlein*, 40 Wn.App. 181, 697 P.2d 1023 (1985). Since the Estate received a final judgment in its favor, it was the prevailing party and is entitled to costs.

Assignment of Error No. 4 — The Estate Did Not Waive the Protection Contained in RCW 5.60.030

Tony testified at trial. He has not, however, provided the record showing the testimony he gave. The Estate concedes, however, that the trial court limited his testimony under the terms of

Washington's Dead Man's Statute, RCW 5.60.030. Tony does not dispute that his testimony concerning his transactions with Frank would be subject to exclusion under RCW 5.60.030. He claims that the Estate waived the protection of the statute by presenting deposition testimony from Ms. Jeffrey and Mr. Medina in its motion for summary judgment on the unlawful partnership issue. There was no waiver here.

Under the terms of RCW 5.60.030, Ms. Hernandez is the adverse party since she was sued as the personal representative of Frank's estate. She could waive protection of the statute by testifying about the statements or transactions in question. *Johnston v. Medina Improvement Club, Inc.,* 10 Wn.2d 44, 116 P.2d 272 (1941) ; *Bentzen v. Demmons,* 68 Wn.App. 339, 842 P.2d 1015 (1993). In the former, the adverse party was a wife who claimed rights to property through her husband. That claim made her the adverse party. In the latter, the personal representative testified by giving an affidavit in a summary judgment proceeding in an action filed against the estate. The rule is specific—waiver occurs only when the adverse party offers the testimony concerning a transaction. *Bentzen v. Demmons, supra,* 68 Wn.App. at 346, fn.5. Tony has presented nothing to indicate that Ms. Hernandez gave any

trial testimony about any transaction with Frank or the absence of any transaction or agreement between the two brothers. Therefore, there is no waiver.

The Dead Man's Statute does not preclude admission of documents although it does restrict testimony about them. *Wildman v. Taylor,* 46 Wn.App. 546, 731 P.2d 541 (1987). Since documents are not within the prohibition of RCW 5.60.030, admission of documents does not waive the protection of that statute. *Erickson v. Robert F. Kerr, M.D., P.S., Inc., supra*; *Bentzen v. Demmons, supra,* 68 Wn.App. at 346 fn 6. The statute also does not preclude testimony from disinterested persons. *Erickson v. Robert F. Kerr, M.D., P.S., Inc., supra.* And, as Tony took pains to point out, Ms. Jeffrey and Mr. Medina were both disinterested. (CP 82; CP 91) Since the testimony of Ms. Jeffrey and Mr. Medina was not prohibited by RCW 5.60.030, admission of that testimony cannot amount to waiver.

Dictum from the Court in *Erickson v. Robert F. Kerr, M.D., P.S., Inc., supra,* supports this view. In that medical negligence and wrongful death action, the plaintiff introduced the doctor's medical records concerning the decedent as business records. The doctor contended that doing so amounted to waiver of the protection of

RCW 5.60.030. He complained that it was "fundamentally unfair for the estate to admit the medical records, draw factual inferences therefrom by use of expert witnesses, and then invoke the statutory bar to silence any reply." 125 Wn.2d at 189. The Court rejected the doctor's argument. It noted that either party was free to retain an expert to make inferences based on admitted medical records. In that context, it stated that, "Testimony by third parties is not excluded under the statute; only "part(ies) in interest" are precluded from testifying in their own behalf." 125 Wn.2d at 189. Significantly, the Court did not conclude that testimony from disinterested third parties—in this case, expert witnesses—waived the protection of RCW 5.60.030.

Tony has cited no authority — and counsel's research has disclosed none — where the Estate was held to have waived the protection of RCW 5.60.030 by presenting testimony at summary judgment of a witness proffered by the interested party where the witness claims no interest in the subject matter of the dispute. Such a rule would make no sense. It would require a decedent's estate to wait until trial to cross examine the disinterested witness to avoid waiving the protection of RCW 5.60.030 even if the disinterested witness' testimony would—as here—definitively show that the suit

brought by the interested party should be dismissed. In that way, such a rule would work at cross purposes with the summary judgment rule, CR 56—avoiding a useless trial when there is no genuine issue of material fact. *Olympic Fish Products v. Lloyd,* 93 Wn.2d 596, 602, 611 P.2d 737 (1980); *Christiano v. Spokane County Health District,* 93 Wn.App. 90, 93, 969 P.2d 1078 (1998).

Ms. Hernandez did not testify concerning a transaction with Frank. Therefore, there was no waiver of RCW 5.60.030.

ARGUMENT—ESTATE'S ASSIGNMENTS OF ERROR

The Trial Court Erred By Failing to Give the Estate's Proposed Instructions Relating to The Unlawful Partnership Issue.

The Estate has assigned error to the trial court's failure to submit the unlawful partnership issue to the jury and to give its proposed jury instructions on the unlawful partnership issue. The instructions and proposed verdict form are set out in the Appendix. These assignments of error are made conditionally and out of an abundance of caution. Tony has taken issue with the procedure the trial court adopted to resolve the unlawful partnership question. If the Court agrees with Tony, then the matter should be remanded so that the unlawful partnership question can be determined by the jury.

Jury instructions are sufficient when they allow counsel to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane,* 146 Wn.2d 237, 249, 44 P.3d 845 (2002); *Chunyk & Conley/Quad-C v. Bray*, 156 Wn.App. 246, 252, 232 P.3d 564 (2010). The jury instructions as given obviously did not allow the Estate to argue to the jury that the parties were engaged in an unlawful partnership and that Tony was not less culpable than Frank. If the issue should have been submitted to the jury, then the Estate's proposed instructions should have been given.

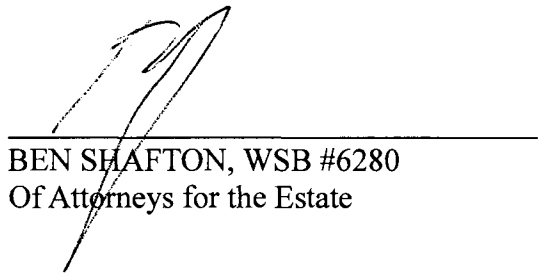
The Estate's proposed instructions accurately set out the law. They advised the jury that a partnership requires a partnership contract; that a contract will not be enforced where its object is to perpetrate a fraud on a third person; that a partnership involving the perpetration of a fraud on a third person is an unlawful partnership; that a fraud is a misrepresentation of the truth or the concealment of a material fact; that a tort is a civil wrong; and that a violation of the Illinois Franchise Disclosure Act of 1987 is a civil wrong. The law related to these proposed instructions has been discussed in detail above.

If the Court believes that the trial court employed the wrong procedure to resolve the unlawful partnership question, then the trial court necessarily committed error by failing to give the Estate's proposed jury instructions relating to the unlawful partnership issue and by failing to allow the jury to consider the matter through an appropriate verdict form.

CONCLUSION

The trial court's decision was proper in all respects and should be affirmed.

RESPECTFULLY SUBMITTED this 1 day of Sept 2010.



BEN SHAFTON, WSB #6280
Of Attorneys for the Estate

APPENDIX

I. Findings of Fact.

a. Finding of Fact No. 8 (CP 465):

In connection with the partnership the jury found to exist between the plaintiff and the decedent, the two agreed that decedent would apply for a franchise from McDonald's Corporation; that plaintiff would supply at least a portion of the money required to purchase the franchise and pay other costs connected with operating the restaurants; that they would lie to McDonald's Corporation about the existence of their partnership and/or fail to disclose the existence of their partnership to McDonald's Corporation; and that they would lie to McDonald's Corporation about the money that plaintiff would advance to the venture and/or fail to disclose to McDonald's Corporation the fact that plaintiff had advanced money for the venture.

b. Finding of Fact No. 14 (CP 447):

Decedent's execution of the Franchise Agreements and the Assignment and Consent to Assignment of Franchise to a Limited Liability Company amounted to misrepresentations because he did not disclose the existence of the partnership between himself

and plaintiff. Also, plaintiff and the decedent agreed that these misrepresentations would be made.

c. Finding of Fact No. 24 (CP 449):

McDonald's Corporation has not acknowledged that plaintiff is a franchisee in connection with either of the two restaurants in Gresham, Oregon.

II. Statutes.

a. 815 ILSCS 705/1:

In connection with the offer or sale of any franchise made in this state, it is unlawful for any person, directly or indirectly, to:

> (a) employ any device, scheme, or artifice to defraud;
>
> (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of circumstances under which they are made, not misleading; or
>
> (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

For the purposes of this Section 6, a sale of a franchise is made in this state when:

> (i) an offer to sell or buy a franchise is made in this State and accepted within or outside of this State, or
>
> (ii) an offer to sell or buy a franchise is made outside of this State and accepted in this State. . .

b. RCW 5.60.030:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That 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, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, 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, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall

not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

c. RCW 19.100.170:

It is unlawful for any person in connection with the offer, sale, or purchase of any franchise or subfranchise in this state directly or indirectly:

> (1) To make any untrue statement of a material fact in any application, notice, or report filed with the director under this law or willfully to omit to state in any application, notice or report, any material fact which is required to be stated therein or fails to notify the director of any material change as required by RCW 19.100.070(3).
>
> (2) To sell or offer to sell by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading.
>
> (3) To employ any device, scheme, or artifice to defraud.
>
> (4) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
>
> (5) To violate any order of the director.

III. Restatement (Second) *Contracts* §198.

A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if:

> (a) he was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, or
>
> (b) he was not equally in the wrong with the promisor.

IV. Proposed Jury Instructions and Verdict Form.

a. *Bengston v. Shain* and *Eder v. Riddick* (CP 321):

In order for there to be a partnership, there must be a partnership contract.

b. 17 Am.Jur.2d Contracts 273 (CP 322):

A contract will not be enforced where the object of the party is to perpetrate a fraud upon a third person.

c. Restatement (Second) *Contracts* §192 (CP 323):

A partnership involving the perpetration of a fraud or a tort on a third person is an unlawful partnership.

///

d. *Black's Law Dictionary* (8th Edition) 2004—Definition of Fraud (CP 324):

A fraud is a knowing misrepresentation of the truth or the concealment of a material fact to induce another to act to his or her detriment.

e. *Black's Law Dictionary* (8th Edition) 2004—Definition of Tort (CP 325):

A tort is a civil wrong.

f. 815 ILSCS 705/1(CP 326):

It is unlawful and a civil wrong for any person, in connection with the offer of sale of any franchise, to employ any device, scheme, or artifice to defraud; to make any untrue statement of material fact or omit to state material fact necessary in order to make the statements made, in light of the circumstances under which they are made not misleading; or to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon a person.

g. *Golberg v. Sanglier* (CP 327):

If you find the existence of an unlawful partnership between the plaintiff and the decedent, you must determine which of the two was the more culpable or if they were equally culpable. The plaintiff will be entitled to relief only if you find that the decedent

was the one more morally culpable and that he will be unjustly enriched if he is not found to be more culpable.

h. Verdict Form (CP 337-39):

Question 1: Did the plaintiff and the decedent form a partnership to operate two McDonald's restaurants in Gresham, Oregon?

Answer: _____ (yes or no)

If your answer is "no," go to Question 8. If your answer is "yes," answer Question 2.

Question 2: Was the partnership between the plaintiff and the decedent an unlawful partnership?

Answer: _____ (yes or no)

If your answer is "yes," answer Question 3. If your answer is "no," answer Questions 5, 6, and 7.

Question 3: Were the plaintiff and the decedent equally culpable in the formation and operation of the unlawful partnership?

Answer: _____ (yes or no)

If your answer is "yes," sign this verdict form. If your answer is "no," answer Question 4.

Question 4: Of the plaintiff and the decedent, who was the more culpable?

Answer: _____ (Plaintiff or Decedent)

If your answer is "Plaintiff," sign this verdict form. If your answer is "Decedent," answer Questions 5, 6, and 7 but do not answer Questions 7-9.

Question 5: Is the franchise granted by McDonald's Corporation to operate the store located 2231 NE 181st Street, Gresham, Oregon, property of the partnership between the plaintiff and the decedent?

Answer: _____ (yes or no)

Question 6: Is the franchise granted by McDonald's Corporation to operate the store located 1567 NE Burnside Road, Gresham, Oregon, property of the partnership between the plaintiff and the decedent?

Answer: _____ (yes or no)

Question 7: Is the property or equipment at the restaurants located at 2281 NE 181st St., Gresham, Oregon, and 1567 NE Burnside Road, Gresham, Oregon, property of the partnership between the plaintiff and the decedent?

Answer: _____ (yes or no)

If you have answered Questions 5, 6, and 7, sign this verdict form.

Question 8: Is the plaintiff entitled to recover on the basis of unjust enrichment?

Answer: _____ (yes or no)

If your answer is "yes," answer Question 9. If your answer is "no," sign this verdict form.

Question 9: State the amount that the plaintiff is entitled to recover on the basis of unjust enrichment.

Answer: $_____

Sign and date this verdict form and notify the bailiff.

Date: Presiding Juror:_____

NO. 40173-8
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HUGO ANTONIO CASTILLO MARTE,

Appellant,

vs.

JESSIKA HERNANDEZ, as personal representative of the Estate of FRANKLYN CASTILLO; and the ESTATE OF FRANKLYN CASTILLO,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN F. NICHOLS

AFFIDAVIT OF SERVICE

BEN SHAFTON
Attorney for Defendant/Appellant
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

FILED
COURT OF APPEALS
DIVISION II
10 SEP -2 AM 9:24
STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON)
) ss.
County of Clark)

THE UNDERSIGNED, being first duly sworn, does hereby depose and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On September 1, 2010, I hand delivered a copy of the BRIEF OF RESPONDENTS to the following person(s):

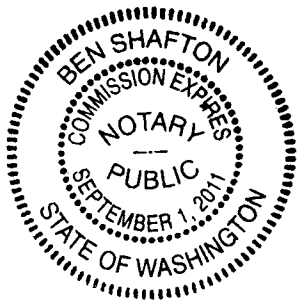
Mr. Mark Wheeler
Duggan Schlotfeldt & Welch
900 Washington Street, Suite 1020
Vancouver, WA 98660

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 1 day of September, 2010.

Lorrie Vaughn
LORRIE VAUGHN

SIGNED AND SWORN to before me this 1st day of September, 2010.



NOTARY PUBLIC FOR WASHINGTON
My appointment expires: 9.1.2011