

NO. 41711-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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GARY WOEMPNER and "JANE DOE" WOEMPNER, husband and  
wife, and the marital community composed thereof; and ALKI  
INTERNATIONAL, INC., a Washington corporation;  
Defendants/Appellants,

v.

GARY E. CHEVALIER,  
Plaintiff/Respondent,

and

RONALD BEQUETTE, a single man  
Defendant/Respondent.

FILED  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
TACOMA, WASHINGTON  
JUL 15 2011

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BRIEF OF APPELLANTS  
WOEMPNER and ALKI INTERNATIONAL, INC.

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## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES.....</b>	<b>-iv</b>
<b>I. ASSIGNMENTS OF ERROR.....</b>	<b>-1</b>
1. The Trial Court erred in denying Defendants Woempner’s and Alki’s motion for summary judgment of dismissal on September 5, 2000.	-1
2. The Trial Court erred in dismissing Defendant Bequette on July 27, 2004.	-1
3. The Trial Court erred in entering the following findings of fact and conclusions of law on July 27, 2004 after trial, in that they were not supported by the law or the evidence presented at trial:	-1
Finding of Fact 9.....	-1
Finding of Fact 10.....	-1
Finding of Fact 12.....	-2
Finding of Fact 14.....	-2
Finding of Fact 15.....	-3
Finding of Fact 16.....	-3
Finding of Fact 17.....	-3
Finding of Fact 18.....	-4
Finding of Fact 19.....	-4
Finding of Fact 21.....	-4
Finding of Fact 23.....	-5
Finding of Fact 25.....	-5
Conclusion of Law 2.....	-5
Conclusion of Law 3.....	-6
Conclusion of Law 4.....	-6
Conclusion of Law 5.....	-6
Conclusion of Law 6.....	-6
Conclusion of Law 7.....	-6
Conclusion of Law 8.....	-7

Conclusion of Law 10.....	-7
Conclusion of Law 13.....	-7
4. The Trial Court erred in entering the amended findings of fact and conclusions of law on November 5, 2004, in that they were not supported by the law or evidence presented at trial:	-4
Amended findings of fact: 9, 10, 12, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25 [all identical to the original findings of fact], plus the following amended finding of fact:	
Amended Finding of Fact 26.....	-7
Amended conclusions of law: 2, 3, 4, 5, 6, 7, 8, 10, [all identical to the original conclusions of law], plus the following amended conclusions:	
Amended Conclusion of Law 13.....	-8
Amended Conclusion of Law 14.....	-8
5. The Trial Court erred in entering the following findings of fact and conclusions of law and judgment on January 14, 2011, in that they were not supported by the evidence presented at trial/hearing:	-8
Conclusion of Law 2.....	-8
Conclusion of Law 3.....	-8
Conclusion of Law 5.....	-8
Conclusion of Law 6.....	-8
<b>Issues Pertaining to Assignments of Error.....</b>	<b>-9</b>
a. Can an oral agreement be established when there are substantial differences in testimony regarding the material terms of such an agreement [Assignments of Error 1 – 5]	-9
b. Can a business constitute an at will partnership when that business has been properly formed	-9

under Washington law as a corporation?  
[Assignments of Error 1-5].

- c. May a party dissociate himself from a partnership, forcing dissolution of the partnership and winding up of the business affairs under RCW 25.05.300, if the partnership was created for an illegal or immoral purpose or for a purpose against public policy?  
[Assignments of Error 1-5]. -9

<b>II. STATEMENT OF THE CASE.....</b>	<b>-10</b>
<b>III. ARGUMENT.....</b>	<b>-15</b>
a. Standard of Review.....	-15
b. The Evidence Presented at Trial Does Not Support..... the Finding that the Parties Ever Entered Into an Agreement to be Business Partners.	-16
i. Woempner’s Version of Events.....	-17
ii. Bequette’s Version of Events.....	-19
iii. Chevalier’s Version of Events.....	-21
c. The Creation of a Corporation Precludes the ..... Finding and Conclusion that Woempner and Bequette Created a Partnership at Will	-24
d. Because Bequette Never Owned a Partnership ..... Interest in Alki, he Could Not Have Transferred any Interest to Chevalier.	-32
e. Any Partnership At Will was Void Because it was..... Illegal or Formed for an Illegal Purpose.	-34
<b>IV. CONCLUSION.....</b>	<b>-40</b>

## TABLE OF AUTHORITIES

### CASES:

<i>Brower v. Johnson</i> , 56 Wn.2d 321, 325, 352 P.2d 814 (1960).....	-38
<i>Landmark Dev., Inc. v. City of Roy</i> , 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).....	-15,16
<i>Malnar v. Carlson</i> , 128 Wn.2d 521, 910 P.2d 455 (1996).....	-28,29,
<i>McCormick v. Dunn &amp; Black, PS</i> , 140 Wn. App. 873, 883, 167 P.3d 610 (2007).....	-26,30,31,32
<i>Morelli v. Ehsan</i> , 110 Wn.2d 555, 561-562, 756 P.2d 129 (1988).....	-38
<i>Red Devil Fireworks Co. v. Siddle</i> , 32 Wn. App. 521, 526, 648 P.2d 468 (1982).....	-38
<i>Sienkiewicz v. Smith</i> , 97 Wn.2d 711, 716 649 P.2d 112 (1982).....	-39
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 393, 730 P.2d 45 (1986).....	-16
<i>Williams v. Burrus</i> , 20 Wn.App 494, 581 P.2d 164 (1978).....	-36,37,

### COURT RULES:

<i>Washington Business Corporation Act, Title 23B RCW</i>	-26
RCW 23B.02.030(1).....	-26
<i>Revised Uniform Partnership Act, RCW 25.05 et seq...</i>	-25

RCW 19.36.010(1).....	-23
RCW 25.05.055.....	-25
RCW 25.05.055(1).....	-25
RCW 25.05.055(2).....	-26,28,30,31

## I. ASSIGNMENTS OF ERROR

1. The Trial Court erred in denying Defendants Woempner's and Alki's motion for summary judgment of dismissal on September 5, 2000.
2. The Trial Court erred in dismissing Defendant Bequette on July 27, 2004.
3. The Trial Court erred in entering the following findings of fact and conclusions of law on July 27, 2004 after trial, in that they were not supported by the law or the evidence presented at trial:

Finding of Fact 9: The parties met to discuss starting a new international freight forwarding business. Wompner's moving companies, Ace Van & Storage Company and Perry Moving and Storage, Inc., were located in Tacoma, Washington and had served since 1989 or 1990 as Admiral and Alderwood's moving agent for military traffic associated with McCord Air Force Base, Fort Lewis, and the Bangor Submarine Base near Bremerton. Bequette believed that Woempner would be a suitable business partner because he already had familiarity with the freight forwarding business and because Bequette believed Woempner had sufficient assets to qualify for the bond to be posted with MTMC.

Finding of Fact 10: In early 1994, Chevalier, Bequette and Woempner met at a restaurant in Bothell, Washington to discuss starting a business that would eventually be known as Alki. During that meeting, and in subsequent telephone conversations between them, Bequette and Woempner agreed that they would "be 50/50 partners" and split the profits of Alki; (No written document on the discussion of this meeting); that the business would be run out of the same offices as the other A-Team businesses; that Woempner would establish a corporation, obtain necessary business licenses, and open a company bank account; that Woempner would use a lawyer in Washington D.C. whose name was provided by Bequette to obtain the bond, Interstate Commerce Commission permit, and assist with other regulatory issues; that both Bequette and Woempner would advance funds to cover start-up costs; that Bequette's name would not appear on any of the "paperwork;" that Bequette would provide to Alki the list of

port agents and shipping agents developed and used by Admiral and Alderwood; that Chevalier would be responsible for contacting agents on Bequette's list to establish them as Alki agents; and that Chevalier would prepare and file the initial LOI's for Alki while remaining on Admiral's payroll until such time as Alki had revenues sufficient to pay Chevalier's salary. In subsequent telephone conversations, Bequette also informed Woempner that Bequette intended to sell, and Chevalier intended to buy, Bequette's one half interest in Alki at some time in the future. Woempner and Bequette did not agree to a specific term during which their agreement was to be performed.

Finding of Fact 12: Woempner filed articles of incorporation for Alki with the Secretary of State's office on March 25, 1994 and established himself as the sole shareholder of Alki. Over the next several months, Bequette and Woempner performed their agreement as described above in Finding of Fact 10. Chevalier, working out of Admiral's office in Bothell, completed as many as 150 LOI's for Alki and performed approximately 95% of the work necessary for Alki to begin making shipments when the new rate schedule started in October, 1994.

Finding of Fact 14: On November 11, 1995, Woempner and Alki made the first payment to or on behalf of Bequette through Alki's check number 1293 in the amount of \$17,147.88 made payable to Admiral Forwarders (Trial Exhibit 35). This check represented reimbursement of Alki expenses, including the cost of labor provided by Chevalier, paid by Bequette through Admiral. Approximately three months later, Woempner drew two checks from Alki's bank account payable to himself: check no. 1447, dated February 13, 1996 in the amount of \$20,000 and check no. 1448, dated February 16, 1996 in the amount of \$39,173.72. (Trial Exhibits 18 and 36, respectively). On February 14, 1996, the day following the date of check no. 1448, Woempner personally purchased a cashier's check made payable to Bequette in the same amount of \$20,000. (Trial Exhibit 31). This payment was an installment on Bequette's share of Alki profits. As of February 16, 1996, the net effect of these transactions was that Bequette and Admiral had received a total of \$37,147.88 from Alki and Woempner had received a total of \$39,173.72 from Alki.

Finding of Fact 15: In late 1995, Bequette introduced Woempner to his cousin Mike Fullaway, a Certified Public Accountant practicing in Federal Way (“Fullaway”). Alki was required to submit certified financial statements for regulatory purposes and since Roy Bequette, the company’s bookkeeper, was not qualified to certify financial statements, Woempner and Bequette sought the services of Fullaway. Woempner and Bequette met Fullaway at a restaurant near Fullaway’s office. Bequette and Woempner explained their desire to obtain a CPA for Alki. Fullaway was the CPA at that time for Admiral, Alderwood, and the other A-Team companies. Bequette and Woempner informed Fullaway that they were “50/50 partners,” but that Bequette was a “silent partner” and his name did not appear on any of the company’s paperwork. Bequette and Woempner engaged Fullaway’s services and directed him to make certain that Bequette’s name did not appear on any of the tax returns or other documentation prepared by Fullaway. Fullaway prepared Alki’s 1995 corporate income tax return in January, 1996 based upon the financial statements provided to him by Roy Bequette.

Finding of Fact 16: On April 22, 1996, Bequette and Chevalier entered into a written agreement prepared by Bequette entitled “49 Shares of Option for Alki Int’l” (the “Agreement”). Chevalier and Bequette each signed the Agreement (Trial Exhibit 24). The Agreement reflected the parties’ intent that Chevalier would purchase a 49% interest in Alki for the price of \$50,750, plus interest. The effective date of the transfer was agreed to be April 1, 1996, the date the new rate cycle went into effect for MTMC shipments. Chevalier paid Bequette \$25,000 down on April 22, 1996. At Bequette’s request, Chevalier paid the balance of the purchase price to a creditor of Bequette’s in two installments totaling approximately \$25,800 in January and February, 1996.

Finding of Fact 17: Bequette and Woempner discussed the sale of Bequette’s interest in Alki to Chevalier prior to the Agreement being executed. Woempner consented to the sale of Bequette’s interest to Chevalier “as long as I [Woempner] kept 51% control.” Chevalier also discussed his purchase of Bequette’s interest in Alki before execution of the Agreement. Woempner did not object to the transfer and commented to Chevalier “things would be different [for Chevalier] as an owner.”

Finding of Fact 18: During the weeks leading up to the execution of the Agreement, Bequette requested his father, Roy Bequette, Alki's bookkeeper, to prepare financial statements for Alki for the purpose of determining the value of Bequette's 50% share of the profits of Alki during 1995 and the first quarter of 1996. Roy Bequette prepared a series of financial statements itemizing income earned and expenses incurred by Alki during this period and a reconciliation detailing the amount of profits Woempner and Bequette were, according to Roy Bequette's calculations, entitled to (Trial Exhibits 15, 20, and 21). Roy Bequette made adjustments to his calculations after the Agreement was executed to reflect returns and refunds posted to shipments made before March 31, 1996.

Finding of Fact 19: Bequette and his father met with Woempner in May or early June, 1996 to review the reconciliation reports prepared by Roy Bequette. The meeting occurred in Admiral's office in the same building as Alki's office in Bothell. Roy Bequette reviewed with Woempner the reports he had prepared reflecting that Bequette was entitled to a share of profits in the approximate amount of \$63,000. Woempner did not express any objection to the reports or dispute the fact that Bequette was entitled to half of the profits of the business. Bequette and his father asked Woempner when Bequette would get his share and Woempner agreed to make a payment. The parties agreed that the payment would be made to Roy Bequette for "accounting services." On June 14, 1996, Woempner drew check no. 1555 in the amount of \$20,000 on Alki's account payable to R.E. Bequette and mailed it to Roy Bequette (Trial Exhibit 19), who cashed it and then paid the proceeds over to Bequette. The payment was booked in Alki's financial records as an accounting expense.

Finding of Fact 21: Chevalier periodically attempted to have Woempner confirm his interest in Alki in writing. In early 1997, Chevalier informed Edward Yee, C.P.A., the new accountant for Alki, that he owned 49% of Alki. As a result, Woempner's interest was listed as "51%" in Alki's 1996 corporate income tax return. Chevalier also requested that Woempner add him as a signator on the corporate checking account and on the corporate money market account at A.G. Edwards. Following Chevalier's purchase of

Bequette's interest in "Alki, Woempner on occasion referred to Chevalier as "partner."

Finding of Fact 23: In February, 1999, Chevalier learned through Ken Armstrong, the owner of Armstrong International, another freight forwarding company that was part of the A-Team, that Woempner had decided to move Alki to Tacoma. Woempner testified at trial that he did not inform Chevalier that he planned to move Alki to Tacoma "because it was none of his business." Chevalier then asked Woempner to buy him out so that Chevalier could purchase another A-Team company that was for sale, Alpine Forwarding. Woempner assured Chevalier that he would speak to Edward Yee about the value of Chevalier's interest. Nancy Kelly, who worked for Bequette at Alderwood, overheard Woempner on one occasion assuring that Woempner would talk to Mr. Yee regarding the amount of money Chevalier was entitled to for his interest in Alki. Chevalier assisted Woempner in moving Alki's business to Tacoma in reliance upon the promise that he would receive fair compensation for his interest in Alki. After the business was moved, Chevalier appeared at Woempner's Tacoma office and requested compensation for his interest in Alki. Woempner gave Chevalier a check for \$1,000 and denied that Chevalier had any interest in Alki, informed him that was all the money he would ever get, that he was going to "teach him a lesson in Business 101," that he should get a lawyer and get off his property. Mr. Chevalier cashed the check.

Finding of Fact 25: Woempner's testimony at trial was directly contrary to the testimony of Chevalier, Bequette, Fullaway, Kelly, and Roy Bequette on nearly every issue material to this case. The Court specifically finds that overall, the Plaintiff's version of facts are more credible. In particular, Woempner's testimony that he engaged Bequette as a "consultant" to assist him with the formation and start-up of Alki and that Bequette was to be paid a fee for his consulting work to be determined in Woempner's "sole discretion" was not credible.

Conclusion of Law 2: In 1994, Bequette and Woempner associated with one another for the purposes of starting and carrying on for profit an international freight forwarding business eventually known as Alki. Bequette's and Woempner's

association for this purpose constituted a partnership at will under Washington law regardless of their intent to create a partnership. The fact that partnership property was held by a corporation of which Woempner was the sole shareholder does not negate the fact that a partnership existed.

Conclusion of Law 3: As partners, Bequette and Woempner were entitled to an equal share of partnership profits and an equal right to participate in management and control of the partnership business.

Conclusion of Law 4: On April 22, 1996, Bequette sold to Chevalier a 49% partnership interest in Alki for the total sum of \$50,750 pursuant to a written agreement. All of the terms and conditions of the written agreement between Bequette and Chevalier were fully performed. The effective date of Chevalier's purchase of Bequette's interest in the partnership was April 1, 1996. Bequette's remaining one-percent interest in Alki was effectively transferred to Woempner.

Conclusion of Law 5: Beginning April 1, 1996, Chevalier has been entitled to 49% of the profits of Alki. During the conduct of the partnership, Woempner has been obligated by a duty to account to Chevalier and the partnership and to hold as a trustee any property, profit, or benefit derived from the operation of Alki. Woempner has breached his duty to account to Chevalier and the partnership and has breached his duty to hold partnership property and profits in trust.

Conclusion of Law 6: In February 1999, Woempner exercised his right to dissociate himself from the partnership when he told Chevalier for the first time that Chevalier did not have an interest in Alki and to get off of Alki's business premises. Pursuant to RCW 25.05.225(1), Woempner provided to Chevalier "notice of the partner's [Woempner's] express will to withdraw as a partner.

Conclusion of Law 7: Womepner's notice to Chevalier of his express will to withdraw from the partnership required dissolution of the partnership and winding up of its business affairs pursuant to RCW 25.05.300. Though dissolved, the parties' partnership has not been terminated. The parties' partnership will only be

terminated under law upon conclusion of the winding up process consistent with RCW 25.05.310 *et seq.*

Conclusion of Law 8: Chevlier and Woempner are each entitled to settlement of their partnership accounts and their respective share of the profits of Alki generated since April 1, 1996. Woempner, having retained all partnership assets and books and records, shall immediately initiate winding up of the partnership, shall settle all partnership accounts, and shall complete the same as required by law as expeditiously as possible.

Conclusion of Law 10: Woempner has failed to meet the burden of proof applicable to the affirmative defense of illegality of contract. Woempner failed to prove that Woempner's and Bequette's partnership agreement was "illegal" or that it violated the Department of Defense policies and procedures relating to Common financial and/or Administrative Control of freight forwarding companies doing business in the same rate channels.

Conclusion of Law 13: Chevalier is entitled to have judgment entered against Woempner in accordance with these Findings of Fact and Conclusions of Law upon subsequent application to the court. Bequette shall be entitled to entry of an order of dismissal with prejudice of all claims asserted against him by the parties herein without costs or fees to any party. This order shall be a final judgment as to all claims asserted herein against Bequette pursuant to CR 54(b).

4. The Trial Court erred in entering the amended findings of fact and conclusions of law on November 5, 2004, in that they were not supported by the law or the evidence presented at trial:

Amended findings of fact: 9, 10, 12, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25 [all identical to the original findings of fact], plus the following amended finding of fact:

Amended Finding of Fact 26: The issues remaining to be resolved between Chevalier and Woempner involve the winding up of the partnership. These issues do not in any way involve Bequette. No future decision of the Court regarding the winding up process can have any effect on or otherwise alter the Court's findings that

Bequette sold his interest in the partnership to Chevalier and that Woempner knew of and consented to the sale. While the winding up of the partnership may take some time to accomplish, there is no just reason for delaying entry of judgment dismissing the claims asserted by the parties against Bequette herein.

Amended conclusions of law: 2, 3, 4, 5, 6, 7, 8, 10, [all identical to the original conclusions of law], plus the following amended conclusions of law:

Amended Conclusion of Law 13: Chevalier is entitled to have judgment entered against Woempner in accordance with these Findings of Fact and Conclusions of Law upon subsequent application to the court.

Amended Conclusion of Law 14: Bequette shall be entitled to immediate entry of an order of dismissal with prejudice of all claims asserted against him by the parties herein without costs or fees to any party. The order shall be a final judgment as to all claims asserted herein against Bequette pursuant to CR 54(b).

5. The Trial Court erred in entering the following findings of fact and conclusions of law and the judgment on January 14, 2011, in that they were not supported by the evidence presented at trial/hearing:

Conclusion of Law 2: The Plaintiff is entitled to Judgment against the Defendant in the principal amount of \$96,122.75

Conclusion of Law 3: The plaintiff is entitled to interest n the principal amount from February 28, 1999 until the date of entry of Judgment herein pursuant to RCW 25.05.250(2).

Conclusion of Law 5: Interest on the Principal amount to date is \$137,089.48.

Conclusion of Law 6: Therefore, the amount of the Judgment herein, principal and interest, is \$233,212.23.

### Issues Pertaining to Assignments of Error

- a. Can an oral agreement be established when there are substantial differences in testimony regarding the material terms of such an agreement? [Assignments of Error 1 – 5]
- b. Can a business constitute an at will partnership when that business has been properly formed under Washington law as a corporation? [Assignments of Error 1-5].
- c. May a party dissociate himself from a partnership, forcing dissolution of the partnership and winding up of the business affairs under RCW 25.05.300, if the partnership was created for an illegal or immoral purpose or for a purpose against public policy? [Assignments of Error 1-5].

### **II. STATEMENT OF THE CASE**

This matter involves the ownership of Alki International, Inc., a Washington for-profit corporation, that operates as a freight forwarding company. (CP 4) Defendant/Appellant Gary Woempner formed Alki International, Inc., (hereinafter, “Alki”), on March 25, 1994. (RP 10/23/03, p. 34, l. 8 – p. 35, l. 7) Mr. Woempner was the sole incorporator and sole shareholder of Alki. As discussed in detail in Section III(b) below, the parties have substantially different stories regarding how the formation of the business came about and who was to have an ownership interest.

Respondent Ron Bequette owns and has operated several freight forwarding companies, including Admiral Freight Forwarders and Alderwood Freight Forwarders, in Seattle. (RP 10/21/03, p. 26, l. 16 – p.

27, l. 10) These freight forwarding companies work exclusively for the United States Armed Forces, arranging for shipment of the household goods and belongings of service members when they are transferred from one duty station to another throughout the world. (RP 10/21/03, p. 27, l. 14 – p. 28, l. 1) The freight forwarding companies do not ship the goods themselves; rather, they arrange with movers to transport the goods and then prepare the necessary paperwork for the military. (RP 10/21/03, p. 28 ll. 6 – 18) Respondent Gary Chevalier was an employee of Ron Bequette’s freight forwarding company Admiral Freight Forwarders. (RP 10/21/03, p. 36, l. 22 – p. 38, l. 10)

Prior to forming Alki International, Inc., Gary Woempner owned and operated two moving and storage companies, Perry Moving and Storage Company, Inc. and Ace Van and Storage Co., Inc. (RP 10/23/03, p. 3, l. 23 – p. 4, l. 8) They did the actual transport for Mr. Bequette’s freight forwarding businesses involving Pierce County military members. (RP 10/21/03, p. 45, ll. 1 – 20)

Gary Woempner had at times expressed an interest to Mr. Bequette in entering the freight forwarding business. (RP 10/23/03, p. 13, ll. 6 - 19) Federal regulation precludes a person or entity from owning more than one freight forwarding company competing for business in the same geographical area (RP 10/21/03, p. 34, l. 16 – p. 35, l. 14), so Mr. Bequette

could not start another company himself. Mr. Bequette's employee, Gary Chevalier, who also was interested in owning a freight forwarding company, could not do so himself at that point because he had not worked in the business long enough, and Mr. Bequette did not think he could get the necessary bonding. (RP 10/21/03, p. 39, l. 12 – p. 41, l. 4) Therefore, Mr. Bequette contacted Mr. Woempner and discussed starting a freight forwarding company. (RP 10/21/03, p. 40, ll. 12-14; p. 46, ll. 8 – 16) Mr. Bequette testified that the business would be in Mr. Woempner's name, and Mr. Bequette would be a silent partner. (RP 10/21/03, p. 56, ll. 5-6; p. 61, ll. 5 - 17) Mr. Bequette would also advise Mr. Woempner who to contact about setting up a freight forwarding business and how to comply with the license requirements. (RP 10/21/03, p. 59, l. 3 – p. 60, l. 9; p. 33, ll. 13 – 23).

Mr. Woempner's testimony, however, was that he had been considering the idea of forming his own freight forwarding company for at least three or four years before Alki was created. (RP 10/23/03, p. 13, ll. 6-7) When he discussed this with Mr. Bequette, whom he knew through his other businesses, Mr. Bequette offered to assist him and help get his company started. (RP 10/23/03, p. 13, ll. 4-17) Mr. Bequette suggested that Mr. Chevalier run the company for Mr. Woempner. (RP 10/23/03, p. 25, ll. 2 – 6). There was no discussion ever that Mr. Bequette would own

any part of the business, (RP 10/23/03, p. 26, ll. 4 – 6), nor was there any discussion of Mr. Chevalier ever owning any part of the business. (RP 10/23/03, p. 26, l. 7 – 9). Mr. Woempner was to be the sole owner of Alki. (RP 10/23/03, p. 33, ll. 1 – 4)

Following a meeting at a restaurant between all three men to discuss forming the business, Gary Woempner incorporated Alki International, Inc., and also retained legal counsel in Washington DC with expertise to help him set up the freight forwarding business, purchase the federal license, and comply with all of the federal license requirements. (RP 10/21/03, p. 59, l. 3 – p. 60, l. 9; RP 10/23/03, p. 17, l. 23 – p. 28, l. 10) Mr. Woempner paid \$7,500 for the license. (RP 10/23/03, p. 40, ll. 4 – 11) All of this was undertaken by Mr. Woempner individually. (RP 10/21/03, p. 33, ll. 13 – 23)

Alki was incorporated in 1994 with a Tacoma, Washington, address. (RP 10/23/03 Dir. Of Woempner, p. 36, ll. 19 – 25) It then rented space in the same Bothell, Washington building that also housed Mr. Bequette's two freight forwarding companies. (RP 10/23/03 Dir. Of Woempner, p. 42, l. 17 – p. 43, l. 6)

When Alki first began operations out of the Bothell location, Respondent Gary Chevalier was still an employee of Mr. Bequette. (RP 10/23/03 In either 1994 or 1995, Mr. Bequette offered to share Mr.

Chevalier as an employee with Alki for the purpose of having Mr. Chevalier process the paperwork necessary so that Alki could commence operations as a freight forwarder. (RP 10/21/03, p. 29, l.l. 10 – 23; RP 10/22/03, p. 149, l. 13 – p. 150, l. 4) Mr. Chevalier ultimately became employed solely by Alki. (RP 10/22/03, p. 160, ll. 2 – 16) Mr. Chevalier and Mr. Bequette were in regular contact, since they worked in the same building. (RP 10/21/03, p. 74, ll. 4-7) Mr. Woempner had less direct contact with Mr. Chevalier, since Mr. Woempner continued to operate his moving and storage companies out of Tacoma, Washington. (RP 10/21/03, p. 73, l. 23-25; RP 10/22/03, p. 156, l. 3 – p. 157, l. 15) In 1996, Mr. Chevalier began to work exclusively for Alki, running the day to day operations until Mr. Woempner decided to relocate the business to Tacoma in 1999.

Respondents allege that on April 22, 1996, Mr. Bequette and Mr. Chevalier entered into a written contract entitled “49 shares of Option for Alki Int’l” (the “Sales Agreement”), under which Mr. Chevalier would purchase 49% of the shares of Alki for the price of \$50,750 plus interest. (RP 10/21/03, p. 78, l. 20 – p. 79, l. 18, RP 10/22/03, p. 161, ll. 1 - 20) The effective date of the transfer was to be April 1, 1996 (RP 10/21/03, p. 82, ll. 17 – 21), with Mr. Chevalier paying \$25,000 directly to Mr. Bequette and a total of \$25,800 to Mr. Bequette’s creditors on his behalf.

(RP 10/21/03, p. 80, l. 4 – p. 82, l. 8) Mr. Bequette and Mr. Chevalier testified that Mr. Woempner was aware of this sale, and Mr. Woempner had no objection. (RP 10/21/03, p. 80, l. 15 – p. 82, l. 18; RP 10/22/03, p. 165, ll. 1 - 11) Mr. Woempner denies that Mr. Bequette had any interest to transfer or that he ever approved such a transfer. (RP 10/23/03, p. 32, ll. 22 – 25; p. 84, ll. 6 - 12)

In approximately February 1999, Mr. Woempner decided in his capacity as sole owner to move the operating location of Alki International, Inc., from Bothell to Tacoma, WA. (RP 10/22/03, p. 177, l. 22 – p. 178, l. 5; p. 182, ll. 18 – 23) Mr. Chevalier helped move the business to Tacoma and then claims he requested to be compensated for what he believed was his share of the business. (RP 10/22/03, p. 178, ll. 12 – 23) Mr. Woempner denied Mr. Chevalier held any ownership interest in the business, and Mr. Chevalier testified that Mr. Woempner gave him a check for \$1,000 and told him he would never receive any additional funds from him. (RP 10/22/03, p. 184, ll. 9 – 13). Mr. Chevalier cashed this check. (RP 10/22/03, p. 231, l. 7 – p. 232, l. 1)

Mr. Chevalier instituted the present litigation in Pierce County Superior Court, seeking payment and interest for what he believed he was owed for his ownership of Alki. Petitioner Woempner moved for summary judgment in August of 2000 on the issue of illegality of contract,

but this motion was denied. The matter ultimately went to trial in front of Judge Sergio Armijo in May of 2003. In brief, Judge Armijo found that in 1994, Mr. Bequette's and Mr. Woempner's association created a partnership at will; that Mr. Bequette sold a 49% in that partnership to Mr. Chevalier effective April 1, 1996; and that beginning April 1, 1996 through February 1999, Mr. Chevalier was entitled to 49% of the profits of Alki. Judge Armijo further found that dissolution of the partnership and winding up of its business affairs pursuant to RCW 25.05.300 was required. He also dismissed all claims against Mr. Bequette.

For various reasons, it took several years for the winding up to occur. On August 9, 2010, trial was held before Judge Edmund Murphy on the issues of partnership value and post-dissolution relief. Findings of Fact and Conclusions of Law, along with a judgment in favor of Mr. Chevalier and against Mr. Woempner, were entered on January 14, 2011. Mr. Chevalier was awarded \$96,122.75 for his share of the Alki partnership, along with \$137,089.48 pre-judgment interest. Mr. Woempner then filed the present appeal.

### **III. ARGUMENT**

#### **a. Standard of Review**

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported

by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

*Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

**b. The Evidence Presented at Trial Does Not Support the Finding that the Parties Ever Entered Into an Agreement to be Business Partners.**

In Finding of Fact 10/Amended Finding of Fact 10, the trial court found that in early 1994, Chevalier, Bequette and Woempner met at a restaurant in Bothell, Washington (“the restaurant meeting”) to discuss starting a business that would eventually be known as Alki, and during that meeting and in subsequent telephone conversations between them, Bequette and Woempner agreed that they would “be 50/50 partners” and split the profits of Alki. Findings of fact and conclusions of law must be supported by substantial evidence. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d at 573. No substantial evidence was presented at trial to demonstrate that such an agreement was ever made. In fact, the testimony varied by witness and showed that there was never any sort of meeting of the minds between the parties regarding sharing ownership or splitting the profits. Therefore there was no agreement for the court to enforce, and its rulings finding such an agreement and awarding damages based upon it should be reversed.

There is no written documentation whatsoever regarding the formation of any business relationship between Mr. Woempner and Mr. Bequette. The trial testimony given by each of the main parties at trial differs materially as to what they discussed at the restaurant meeting and what, if anything, was agreed to.

i. Woempner's Version of Events

Mr. Woempner testified that he had been considering the idea of forming his own freight forwarding company for at least three or four years before Alki was created. (RP 10/23/03, p. 13, ll. 6-7) When he discussed this with Mr. Bequette, whom he knew through his other businesses, Mr. Bequette offered to assist him and help get his company started. (RP 10/23/03, p. 13, ll. 4-17) Mr. Bequette arranged the restaurant meeting, (RP 10/23/03, p. 23, ll. 15 – 17), to discuss formulating a freight forwarding company, and to suggest that Mr. Chevalier run it for Mr. Woempner. (RP 10/23/03, p. 25, ll. 2 – 6).

There was no discussion at all at the restaurant meeting that Mr. Bequette would own any part of the business, (RP 10/23/03, p. 26, ll. 4 – 6), nor was there any discussion of Mr. Chevalier ever owning any part of the business. (RP 10/23/03, p. 26, l. 7 – 9). Mr. Woempner was to be the sole owner of Alki. (RP 10/23/03, p. 33, ll. 1 – 4) Mr. Woempner would not have entertained the notion of sharing ownership of the new freight

forwarding business with anyone, as he had always operated his various businesses without partners. (RP 10/23/03, 26, ll. 10 – 22) <sup>1</sup>

Mr. Woempner further testified that at the restaurant meeting, they discussed Mr. Bequette having a supervisory role in getting the business started, and that Mr. Woempner would pay for Mr. Bequette's port agent lists, necessary contacts to operate the business, as well as his lists of international and domestic agents. (RP 10/23/03, p. 27, l. 23 – p. 28, l. 15; p. 31, ll. 15 – 21) No set amount was agreed to for these services, and this issue was left open until Mr. Woempner got Alki up and running and was sure it would be successful. (RP 10/23/03; p. 32, ll. 3 – 12).

They also discussed Mr. Chevalier's role of being the office person, helping with the basic setup, writing letters of intent, establishing the phone system. (RP 10/23/03, p. 28, l. 25 – p. 29, l. 6) No compensation was discussed at that time. (Id.)

No writing of any kind, not even a note, was created to document the conversation held at the restaurant meeting, nor was any writing ever created at any later time reflecting anything discussed at that meeting. (RP 10/23/03, p. 33, ll. 5 – 19).

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<sup>1</sup> Of significance, no shares or stock certificates for Alki International, Inc. were issued to Mr. Bequette or Mr. Woempner when it was incorporated or at any later time. Mr. Woempner held all the shares, as sole owner. (RP 10/23/09, p. 59, l. 3 – p. 62, l. 15) This was the same practice he used with his other two privately owned companies. (RP 10/23/09, p. 61, ll. 22 – p. 62, l. 4).

Mr. Woempner further testified that he was aware of the Department of Defense regulations that prohibited anyone from having two freight forwarding businesses that competed in the same rate channel and the same code of business; he was aware Alki would be in direct competition with Mr. Bequette's other freight forwarding businesses; and he was aware that if Mr. Bequette held an interest in Alki, it would violate the federal regulations, which Mr. Woempner had no intention of doing. (RP 10/23/03, p. 56, l. 16 – p. 57, l. 22) In light of this, he did not take on Mr. Bequette as a "silent partner". (RP 10/23/03, p. 58, l. 4 – p. 59, l. 1)

ii. Bequette's Version of Events:

Mr. Bequette's testimony, on the other hand, was that he and Mr. Chevalier had gone to meet with Mr. Woempner at his business in Tacoma, ostensibly so that Mr. Chevalier could see how that business operated. Afterwards, the trio went out for drinks. (RP 10/21/03, P. 46, ll. 8 – 16) Mr. Bequette had previously spoken with Mr. Chevalier about Mr. Chevalier's interest in someday opening his own freight forwarding business, and Mr. Chevalier was receptive to becoming involved in this even though he would not have an immediate ownership interest. (RP 10/21/03, p. 50, ll. 3 – 10) Mr. Chevalier never stated how soon he wanted to own a business, but Mr. Bequette talked about him getting one in a couple of years. (RP 10/21/02, p. 50, ll. 11 – 15) At the meeting,

when Mr. Chevalier stepped away, Mr. Bequette suggested that he and Mr. Woempner start a freight forwarding business and have Mr. Chevalier operate it and eventually buy out Mr. Bequette's interest. (RP 10/21/03, p. 47, ll. 2 -4; p 51, l. 20 – p. 52, l. 2) Mr. Woempner reportedly had no objection to this, as long as it was clear that he would keep his 50% interest. (RP 10/21/03, p. 52, ll. 3 – 10)

Mr. Bequette further testified that the restaurant meeting took place later between him, Mr. Woempner, and Mr. Chevalier. At that time the parties started talking about forming the company. (RP 10/21/03, p. 55, ll. 4 – 17) However, no specific agreement or details were reached at that restaurant meeting. (RP 10/21/03, p. 32, ll. 2 – 24). The specific details were worked out later, mainly in telephone calls. (RP 10/21/03, p. 32, l. 25 – p. 33, l. 12). These details included that the business would be in Mr. Woempner's name, Mr. Bequette would be a silent partner, and at some later time he would sell his 50% interest to Mr. Chevalier. (RP 10/21/03, p. 56, ll. 1 – 8) The parties had no discussion regarding distribution or division of profits. (RP 10/21/03, p. 58, ll. 15 – 21) Mr. Chevalier would remain working for Admiral (Mr. Bequette's company) until Alki was up and running and could pay him directly. (RP 10/21/03, p. 59, ll. 11 – 19) Mr. Woempner would form a corporation (RP 10/21/03, p. 60, ll. 10 – 19) Mr. Bequette had no concerns about running afoul of the federal common

ownership regulations, because he was not involved with the finances of the business and was only advising Mr. Chevalier and Mr. Woempner on what they had to do. (RP 10/21/03, p. 60, l. 20 – p. 61, l. 4)

Mr. Bequette stated that he made no capital contribution to Alki, but once it started operating, he paid bills for operating costs. He claims that he and Mr. Woempner each paid about half of the operating costs, but there was no written agreement on this anywhere. (RP 10/21/03, p. 67, l. 19 – p. 68, l. 25) Mr. Bequette did not use any of his personal funds to operate Alki but instead had the bills paid through his own company. (RP 10/21/03, p. 69, ll. 15 – 17) Mr. Bequette testified that he was ultimately personally reimbursed for the operating costs he (through his other businesses) advanced to Alki. (RP 10/21/03, p. 71, ll. 11 – 20; p. 52, ll. 6 – 22) Mr. Bequette further testified that he had an agreement with Mr. Woempner that Mr. Bequette was to receive 50% of Alki's profits, (RP 10/21/03, p. 77, ll. 8 – 17), but he never received any profits.

iii. Chevalier's Version of Events:

Mr. Chevalier's testimony was that after he began working for Mr. Bequette's company, he developed an interest in someday owning his own freight forwarding company, and discussed this with Mr. Bequette. Mr. Bequette expressed an interest in being an owner of a company with Mr. Chevalier. (RP 10/22/03, p. 141, l. 18 – p. 142, l. 25). Mr. Chevalier then

went with Mr. Bequette to a meeting with Mr. Woempner at Mr. Woempner's warehouse. On the ride home from that visit, Mr. Bequette first mentioned that Mr. Woempner was a person who he might be interested in doing business with. (RP 10/22/03, p. 144, ll. 4 – 14). Mr. Chevalier was aware that he probably could not get his own bond to start a new company himself, (RP 10/22/03, p. 144, l. 15 – p. 145, l. 24), so he would have to go into business with someone else.

Mr. Chevalier then said he attended the restaurant meeting with Mr. Bequette and Mr. Woempner, and he testified that they discussed forming a new freight forwarding company; that Mr. Bequette would guide Mr. Woempner to the "right people, MTMC contacts"; and that Mr. Bequette would do some insurance work. Mr. Bequette and Mr. Woempner were going to be partners, and Mr. Chevalier would eventually buy Mr. Bequette's shares. (RP 10/22/03, p. 147, ll. 1 – 15) Mr. Chevalier's role would be to run the company, including drafting the LOIs, billing, tracking shipments, etc. (RP 10/22/03, p. 148, ll. 11 – 24)

At his deposition, Mr. Chevalier had testified that during the restaurant meeting, the parties discussed and decided that Mr. Woempner and Mr. Bequette would be 50/50 partners, that Mr. Chevalier would run the company, and that he would eventually buy Mr. Bequette out.

“Everybody was in agreement to that.” (RP 10/22/03, p. 236, l. 17 – p. 237, l. 12)

Mr. Chevalier further testified that he first expressed to Mr. Bequette in 1994 that he was actually ready to buy out Mr. Bequette’s interest in the company, but he did not actually do this until 1996. (RP 10/22/03, p. 159, ll. 11 – 20) The delay was because they were waiting for the company to “be on its own, on its own two feet, running and making money. That was our agreement from the start.” (RP 10/22/03, p. 159, ll. 21 – 25). He also testified that from his first conversations with Mr. Bequette about buying his shares, the sale price was always to be \$50,000. (RP 10/22/03, p. 161, l. 21 – p. 162, l. 3)

From the various testimonies, it is impossible that an agreement was reached at the restaurant meeting.<sup>2</sup> Mr. Woempner stated they discussed his opening of a business, with Mr. Bequette to consult and assist him, and Mr. Chevalier to help run the business. Mr. Bequette testified that they discussed opening a business together, but no details were worked out at that lunch meeting. Only later did they agree that Mr. Bequette would be a silent partner, that he would own 50% of the business and be entitled to 50% of the profits, Mr. Chevalier would help run the

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<sup>2</sup> While Petitioner Woempner denies that any agreement was ever formed, his position is that even if one had been, it would have been void because it did not comply with the Statute of Frauds. RCW 19.36.010(1).

company, and Mr. Bequette would eventually sell his interest to Mr. Chevalier for some undetermined amount. Mr. Chevalier testified that that even before the restaurant meeting, he had already decided with Mr. Bequette that he would someday buy a business from him for the price of \$50,000. He also testified that all of the business details regarding Alki were worked out at the restaurant meeting. Mr. Woempner would open the business, Mr. Bequette would be his silent partner, and they would share ownership and profits 50/50 until Mr. Bequette sold his interest to Mr. Chevalier.

There is no way, from this divergent testimony, that the trial court could have found substantial evidence existed to support Mr. Bequette and Mr. Woempner forming a business partnership and agreeing to share profits 50/50. Without the existence of an actual agreement, there could be no finding of breach. All damages awarded based upon such a breach, therefore, must be reversed and vacated.

**c. The Creation of a Corporation Precludes the Finding and Conclusion that Woempner and Bequette Created a Partnership at Will.**

Even if some sort of an agreement had been reached between Mr. Bequette and Mr. Woempner, in the present action, the main question is whether Mr. Bequette ever held a partnership interest in the freight forwarding business Alki International, Inc., which he then sold to Mr.

Chevalier. The trial court erroneously concluded that Mr. Bequette and Mr. Woempner created a partnership at will:

In 1994, Bequette and Woempner associated with one another for the purposes of starting and carrying on for profit a international freight forwarding business eventually known as Alki. Bequette's and Woempner's association for this purpose constituted a partnership at will under Washington law regardless of their intent to create a partnership. The fact that partnership property was held by a corporation of which Woempner was the sole shareholder does not negate the fact that a partnership existed.

*Amended Conclusion of Law 2.*

This conclusion is clearly erroneous, since the express wording of the Revised Uniform Partnership Act, RCW 25.05 *et seq.*, precludes the existence of a partnership where a business entity has been formed under another statute, such as Washington Business Corporations Act.

RCW 25.05.055 provides for the formation of a partnership:

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

RCW 25.05.055(1).

This section of the Revised Uniform Partnership Act ("RUPA") appears to be what the trial court relied upon when it found a partnership was formed between Mr. Bequette and Mr. Woempner. However, the court failed to consider subsection (2) of the statute, which expressly

states that another business entity, such as a corporation, **is not** a partnership:

(2) An association **formed under a statute other than this chapter, a predecessor statute**, or a comparable statute of another jurisdiction is not a partnership under this chapter.

RCW 25.05.055(2)(emphasis added).

A “corporation” is an association formed under a statute other than the RUPA. See *Washington Business Corporation Act, Title 23B RCW*. “A corporation begins to exist the day it files the articles of incorporation.” RCW 23B.02.030(1).” *McCormick v. Dunn & Black, PS*, 140 Wn. App. 873, 883, 167 P.3d 610 (2007). The articles of incorporation for Alki International, Inc., were filed by Mr. Woempner on March 25, 1994. (RP 10/23/03, p. 34, l. 8 – p. 35, l. 7) The business existed as a corporation from that point forward and **could not** be a partnership. Therefore, Mr. Bequette could not have held any partnership interest.

In its oral ruling, the trial court actually pointed out that the parties intended to form a corporation so that Mr. Woempner could do business, to get around the federal government’s regulations about dual business ownership:

In this case, there’s no writing. In this case we have the relationship of Mr. Chevalier with Mr. Bequette

that goes back 15 or plus years socially; they hang out together.

In their discussions they discussed what type of business Mr. Chevalier could go into. And Mr. Bequette, being into freight forwarding companies, discusses that thought with him.

So being the big friend of Mr. Chevalier, he says, “well, let’s just – let’s go – I want you to meet someone.”

They go to Tacoma; they meet Mr. Woempner.

He doesn’t discuss too much with Mr. Chevalier as to what he has in mind, but he does – might have indicated to some degree.

And at some point after that meeting in Tacoma, Mr. – I’m going to mispronounce it. Bequette? -- Bequette says “This is the plan,” and sits Mr. Woempner and Mr. Chevalier together, says “This is the plan. **We’ll start a corporation.** Keep me out of it. I’m going to help you out, but keep me out of it. I have two other corporations,” or at least, for sure, one, “and that will be a conflict.”

So – you know, someone keeps saying that he did wrong, the other person did wrong. It think that, you know it’s very close to all of them being wrong. But anyway, they go ahead and do it.

“You set up a place. You have a place, you have five other companies doing the same thing. You have the office. Let’s get the furniture. You get the phones. You got the lists. Let’s get going.”

I’m very much impressed with the fact that within two years that Alki is making \$832,000 gross. So that list, or that help that Bequette did put together, was substantial.

(RP 11/04/03, 2003, p. 3, line 10 – p. 4, line 22)(emphasis added).

There is no dispute that Mr. Woempner intended to and did form a corporation. There is nothing in the trial court record to refute that the other parties also knew that a corporation would be formed. This corporation's purpose was to operate as a freight forwarding company. Under RCW 25.05.055(2), then Alki International, Inc., could not be a partnership.

Nonetheless, the trial court cited to the case of *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1996), in discussing why he felt a partnership had been formed:

Now, defense has argued substantially that a lot of it – the documentation names Mr. Woempner as the sole owner, and I understand that: They didn't want to get in trouble with the Federal Government. So they did it that way.

And I'm going to read something here, Malnar v. Carlson, 128 Wn.2d 521. "A partnership may be found to exist, even though title to the alleged partnership property is held in the name of but one alleged partner." Okay? And I think that's what we have here, where trying to shield the corporation from getting in trouble with the Federal Government, with MTMC, or whatever.

*RP* November 4, 2003, p. 4, line 23 – p. 5, line 9.

Even though the trial court found that the subject freight forwarding business, Alki International, Inc., was specifically formed as a

corporation, the court somehow felt that it could *also* be a partnership. This is not what *Malnar* and other caselaw stands for, however.

In *Malnar*, plaintiff Malnar brought an action for an accounting of partnership assets against respondent Carlson, a real estate broker. He alleged that a partnership existed between them to purchase and develop certain real estate, and to share in the profits. However, Carlson later bought and developed that property himself, through a corporation that he formed and which he solely owned. Malnar claimed he was entitled to profits from the property, even though it was held and developed in the name of the corporation. Defendant Carlson argued that the fact the Malnar had no legal ownership in the corporation which held the property proved there was no partnership. The appellate court disagreed, holding that a “partnership may be found to exist even though title to the alleged partnership property is held in the name of only one of the alleged partners.” *Malnar v. Carlson*, 128 Wn.2d. at 531-532.

*Malner* is distinguishable because there was no dispute that the parties initially intended to (and did) form a partnership, even though there was no separate writing. The corporation formed by Carlson was not incorporated until sometime later and was not intended to replace or stand in place of the original business partnership. It was a separate entity. That is very different from the present matter, where a corporation was always

intended, and where the business that was allegedly the partnership (Alki freight forwarding) was the corporation itself (Alki International, Inc freight forwarding). There is no separate property being held by a corporation. The entity alleged to be the partnership was, in fact, a corporation.

The case of *McCormick v. Dunn & Black*, PS, 140 Wn. App. 873, 167 P.3d 610 (2007) is much more on point. In that case, Plaintiff McCormick was a shareholder of a law firm that had been incorporated. He sued the firm and the other shareholders alleging, among other things, dissolution of partnership. He argued that a partnership had been formed prior to the corporation being formed. The trial court granted the summary judgment dismissing the claims, and Plaintiff appealed.

The Court of Appeals agreed that because the law firm had been incorporated, it could not be a partnership under Wash. Rev. Code § 25.05.055(2). Moreover, the written documents clearly showed that the parties intended to form a corporation.

McCormick does not cite to, nor could we find, any case law that an incorporated business can actually be a partnership based on the parties' conduct. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” In light of RCW 25.05.055(2), McCormick's partnership argument is not persuasive.

McCormick argues that the parties formed a partnership before they incorporated the firm. The trial court found that at the very outset, the three promoters wanted a corporation, not a partnership. The record indicates that the parties met in December 1992 to form a business. On December 30, 1992, they filed a certificate of incorporation for the firm. The written documents in the record clearly show that McCormick and the other parties intended to form a corporation and not a partnership.

*McCormick v. Dunn & Black, PS*, 140 Wn. App. 873, 883-884, 167 P.3d 610 (2007)(internal citations omitted).

As in *McCormick*, the current parties intended that a corporation would be formed. The fact that they may have wanted to do it as a method to avoid federal regulation does not change the freight forwarding business into anything other than a corporation.

McCormick also argued that the parties' agreement to share their profits and losses equally demonstrated an intent to form a partnership. But the Court of Appeals has held the agreement to share profits and losses equally does not change the corporation into another business form:

How the parties shared their losses and profits is irrelevant to whether a corporation was formed. In closely held corporations, shareholders sometimes agree to share profits and losses equally. This does not change a corporation into another business form. Under RCW 25.05.055(2), an incorporated business **cannot** be a partnership. The evidence in the record does not support McCormick's claim that the parties initially formed a partnership. McCormick

is not entitled to partnership dissolution. Thus, Dunn and Black are entitled to summary judgment on McCormick's partnership claims as a matter of law.

*Id* (emphasis added)(internal citations omitted).

Since March 25, 1994, Alki International, Inc. has been a Washington corporation operating as a freight forwarding company. The trial court pointed out that even Mr. Bequette expected a corporation to be formed. (RP 10/21/03, p. 60, l. 10-14; RP 11/04/03, p. 4) There is no way that Mr. Bequette (or subsequently, Mr. Chevalier) could have had a partnership interest in Alki International, Inc. after March 25, 1994, because there was no partnership. The trial court erred in concluding that a partnership existed and also erred in concluding that “As partners, Bequette and Woempner were entitled to an equal share of partnership profits and an equal right to participate in management and control of the partnership business.” (*Amended Conclusion of Law 3*).

**d. Because Bequette Never Owned a Partnership Interest in Alki, he Could Not Have Transferred any Interest to Chevalier.**

The trial court held that on April 22, 1996, Mr. Bequette sold a 49% interest in Alki International, Inc., to Mr. Chevalier for the total sum of \$50,750 pursuant to a written agreement, and that the effective date of the sale was April 1, 1996. (*Amended Conclusion of Law 4*). It then also concluded that, “Beginning April 1, 1996, Chevalier has been entitled to

49% of the profits of Alki.” (*Amended Conclusion of Law 5*). But as discussed above, no partnership was ever formed. Mr. Bequette never had any partnership interest that he could transfer to Mr. Chevalier. Mr. Cheavlier never obtained any interest in Alki.

It goes without saying that since Mr. Chevalier never held any interest in Alki International, Inc., he was not entitled to 49% of the Partnership Profits from April 1, 1996 through February, 1999. Mr. Woempner never had any duty to Mr. Chevalier, and Mr. Chevalier was never owed any profits. The findings of fact and conclusions of law to the contrary should be reversed, and the declaratory judgment entered on November 4, 2004 and the judgment entered on January 14, 2011 against Mr. Woempner should both be vacated.

Mr. Chevalier may very well have a claim against Mr. Bequette related to the alleged “sale” of the partnership shares. But that does not involve Mr. Woempner, who had no connection to that transaction. The trial court’s dismissal of Mr. Bequette as a defendant was in error, since any damages incurred by Mr. Chevalier were proximately caused by Mr. Bequette and not Mr. Woempner. Therefore, the trial court’s dismissal of Mr. Bequette as a defendant should be reversed.

**e. Any Partnership At Will was Void Because it was Illegal or Formed for an Illegal Purpose.**

Even if an at will partnership had been formed between Mr. Bequette and Mr. Woempner, the whole purpose and intent behind the purported partnership was illegal and against public policy. Mr. Bequette himself testified that he needed to be a silent partner with Mr. Woempner because Mr. Bequette was precluded under MTMC (Department of Defense, Military Traffic Management Command) regulations from owning two freight forwarding companies making shipments in the same freight channels. Alki International, Inc., would have operated in the same freight channels as one of Mr. Bequette's other companies. (RP 10/21/03, p. 47, l. 3 – p. 48, l. 9) The regulations, later cited by Judge Armijo in his *Amended Findings of Fact and Conclusions of Law*, ¶ 11, include that an individual may not own two freight forwarding companies making shipments in the same freight channels. The MTMC "Tender of Service Signature Sheet" requires carriers such as Alki to certify that they are not under "Common Financial or Administrative Control (CFAC)" of another carrier. (Trial Ex. 60) CFAC is defined as "the power, actual, as well as legal, to influence the management, direction, or functioning of a business organization. *Id.* Factors affecting CFAC include majority and minority ownership and familial relationships as "circumstances . . . which may, but

do not always, result in a common financial and administration control relationship.” Further circumstances include associated companies, as well as contract or debt relationships. In short, Mr. Bequette was fully aware that he could not be openly involved in Alki’s ownership or business operations.

If Mr. Bequette’s own trial testimony is to be believed, it showed that Mr. Bequette was involved in the “management, direction, and functioning” of Alki International, Inc., despite the regulations. The trial court found that Mr. Bequette provided the name of an attorney in Washington DC to obtain the license, bonds, ICC permits, and assist with other regulatory issues (RP 10/21/03, p. 28, ll. 13-22); provided space from which Alki operated (RP 10/23/03, p. 42, l. 17 – p. 43, l. 16); provided Alki with the list of port agents and shipping agents developed and used by Mr. Bequette’s other businesses (RP 10/21/03, p. 38, ll. 3-9); loaned Mr. Chevalier’s services to prepare and file letters of intent (RP 10/21/03, p. 28, l. 23 – p. 29, l. 23); provided him access to his cousin to provide CPA services and keep Mr. Bequette’s name off any business and tax documents (RP 10/23/03; p. 278, p. 6 – p. 279, p. 20); and had his father prepare financial statements for Alki (RP 10/21/03; p. 39, ll. 3-19). Mr. Bequette had all of the knowledge of how to operate a freight forwarding business and all of the contacts. Mr. Woempner simply relied

on Mr. Bequette's expertise and that of his employee Chevalier to keep Alki operating. This was a clear violation of DOD regulations on Mr. Bequette's part.

Despite all of these findings, the trial court concluded the alleged contract was not illegal:

Woempner has failed to meet the burden of proof applicable to the affirmative defense of illegality of contract. Woempner failed to prove that Woempner's and Bequette's partnership agreement was "illegal" or that it violated the Department of Defense policies and procedures relating to Common financial and/or Administrative Control of freight forwarding companies doing business in the same rate channels.

*Conclusion of Law 10.*

The facts, as found by the trial court, clearly do not support this conclusion of law.

A case with very similar facts is *Williams v. Burrus*, 20 Wn.App 494, 581 P.2d 164 (1978). In that case, Williams and Burrus entered into a written agreement to purchase a restaurant that had a class H liquor license. Williams put up property as collateral for a bank loan to assist Burrus in purchasing the business. The business was to be in Burrus' name only, and Burrus alone would apply for a transfer of the liquor license without revealing Williams' interest in the business. This was because, at the time, Williams was known to be unacceptable to the Washington State Liquor Control Board as a licensee.

The *Burrus* trial court found that the parties would in all probability have not received a Class H license if disclosure had been made of the partnership agreement or financial interest of Mr. Williams. The trial court also found that the parties entered into the partnership agreement for an illegal purpose to conceal the interest of the Plaintiff Williams in the purchase of the business, “knowing at the time that the identity of Plaintiff Paul Williams as a partner, co-owner, or investor would in all probability cause a rejection by the liquor board” of the application for the Class H liquor license. *Williams v. Burrus*, 20 Wn.App 495-496. The court further found that

[T]his concealment was a joint effort on the part of Plaintiff and Defendants to enter into an illegal relationship for an illegal purpose and accordingly finds the partnership of Plaintiff and Defendants to be an illegal partnership.

*Id.*, at 496.

The Court of Appeals affirmed the trial court, pointing out the general rule that courts will not aid either party to an illegal agreement “where a partnership is formed to carry out an illegal business **or to conduct a lawful business in an illegal manner**”, *Id.*, at 497(emphasis added); and that courts will refuse to aid either of the parties in an action against the other. *Id.*

If the business of a partnership is illegal, we will not entertain an action for an accounting and distribution of the

assets, *Brower v. Johnson*, 56 Wn.2d 321, 325, 352 P.2d 814 (1960), especially when the unlawful agreement is contrary to public policy. *Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 526, 648 P.2d 468 (1982).

*Morelli v. Ehsan*, 110 Wn.2d 555, 561-562, 756 P.2d 129 (1988).

The facts in the present case as alleged by Mr. Chevalier and Mr. Bequette are almost identical to those in *Burrus*. The parties intentionally hid the involvement of one party in order to obtain a license that would have been denied if the silent partner's involvement had been known to the licensor. The MTMC would not have granted operational approval to Alki if it had known of Mr. Bequette's involvement. Even if the freight forwarding business itself was a lawful business, it was obtained/conducted in an illegal manner. Therefore, any partnership contract is illegal and unenforceable. Under this theory, the rulings of the trial court should be reversed.

Petitioner Woempner raised this argument early in the litigation via a motion for summary judgment, relying on the deposition testimony of Mr. Bequette. In opposition to that motion, Mr. Chevalier argued that Mr. Woempner failed to meet his burden to show that the contract was illegal, since Mr. Bequette's testimony was only that he "thought" that his participation in Alki would be in violation of MCMT regulations, and

there was no proof of actual illegality. Mr. Chevalier never disputes that the actions of Mr. Bequette were in violation of the regulations, however.

In *Defendant's Rebuttal to Plaintiff's response to Defendant's Motion for Summary Judgment* (CP 57-82), Mr. Woempner identified the testimony which showed that Mr. Bequette owned other freight forwarding companies and was aware that Alki would be in direct competition with them, competing for the same pool of shipments. (CP 59) He further pointed out that the federal government viewed co-ownership of related freight forwarding companies that compete for the same work to be illegal and in violation of DOD regulations and policies. (CP 59) These regulations, discussed above, were later cited by Judge Armijo in his *Amended Findings of Fact and Conclusions of Law*, ¶ 11, and their application to the present matter were never disputed. It is clear that, had a partnership been formed here, it was for an illegal purpose, fully against public policy. Mr. Bequette, and by extension Mr. Chevalier, are not allowed to benefit from it.

Mr. Chevalier further argued at summary judgment that illegal contracts are not necessarily void where "the agreement is neither immoral nor criminal in nature and the statute or ordinance subjects violators merely to a penalty without more." *Sienkiewicz v. Smith*, 97 Wn.2d 711, 716 649 P.2d 112 (1982). This narrow exception does not apply to the present

case. As Mr. Woempner pointed out in his rebuttal, either Mr. Woempner or Mr. Bequette would have had to file a false declaration under oath in order to comply with the MTMC requirements. Doing so would have subjected Mr. Woempner, Mr. Bequette, and/or Alki to disqualification from DOD transportation programs, debarment from federal contracting, criminal prosecution for false statements, and civil prosecution. (CP 59, 61). This is much more than a mere penalty, and the *Sienkiewicz* exception does not apply.

Mr. Bequette's testimony was that he wanted to be a silent partner specifically to avoid the MTMC regulations. Not only was it illegal for Mr. Bequette to be involved with Alki, but it was also immoral and a fraud. The alleged partnership was illegal, and the motion for summary judgment should not have been denied.

### **CONCLUSION**

For the reasons set forth above, Defendant/Petitioner Gary Woempner respectfully requests that this court 1) reverse the trial court's order of September 5, 2000 denying summary judgment of dismissal; 2) reverse the trial court's order of July 27, 2004 dismissing Ronald Bequette as a defendant; and 3) reverse and vacate the judgment entered against Gary Woempner on January 14, 2011, including interest.

RESPECTFULLY SUBMITTED this 16<sup>TH</sup> day of June, 2011.



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Mon 6/20/2011  
2:34 PM

NO. 41711-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

GARY WOEMPNER and "JANE DOE" WOEMPNER, husband and  
wife, and the marital community composed thereof; and ALKI  
INTERNATIONAL, INC., a Washington corporation;  
Defendants/Appellants,

v.

GARY E. CHEVALIER,  
Plaintiff/Respondent,

and

RONALD BEQUETTE, a single man  
Defendant/Respondent.

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AFFIDAVIT OF JODY M. WATERMAN  
REGARDING SERVICE OF APPELLANT'S BRIEF

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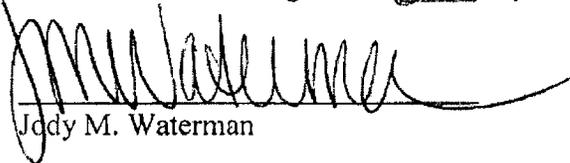
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Under penalty of perjury under the laws of the State of Washington I, JODY M. WATERMAN, being first duly sworn, upon oath deposes and says:

1. On June 16, 2011, I emailed a true and electronic copy of Appellant's Brief to Timothy Reid, Charles Talbot and Michael Johns (*See Exhibit 1 attached*).
2. On June 16, 2011, via Legal Messenger service, I filed Appellant's Brief with the Court of Appeals, Division II, of the State of Washington (*See Exhibit 2 attached*).
3. On June 17, 2011, via Legal Messenger service, I delivered a true and correct copy of Appellant's Brief to Timothy Reid, Charles Talbot, and Michael Johns (*See Exhibit 3 attached*).

SIGNED at Tacoma, Washington this 17<sup>th</sup> day of June, 2011.

  
Jody M. Waterman

# **Exhibit 1**

## Jody Waterman

---

**From:** Jody Waterman  
**Sent:** Thursday, June 16, 2011 11:35 AM  
**To:** 'tim@reidlegal.com'  
**Cc:** 'talbot-law@comcast.net'; 'mike@drj-law.com'; Peter T. Petrich; Rebecca M. Larson  
**Subject:** Brief of Appellants Woempner and Alki International, Inc.  
**Attachments:** 20110616 Brief of Appellants Woempner and Alki Int..pdf

Tracking:	Recipient	Read
	'tim@reidlegal.com'	
	'talbot-law@comcast.net'	
	'mike@drj-law.com'	
	Peter T. Petrich	
	Rebecca M. Larson	Read: 6/16/2011 11:35 AM

Hello, Mr. Reid:

Attached please find an electronic copy of Appellants Brief. Hard copy to follow via Legal Messenger.

Thank you and should you have any questions, please do not hesitate to contact me.

Warm Regards,

Jody Waterman  
Legal Assistant to Peter T. Petrich and Michael G. Sanders  
Direct 253-238-5103 - [jwaterman@dpearson.com](mailto:jwaterman@dpearson.com)

### **Davies Pearson, P.C.**

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# **Exhibit 2**

NO. 41711-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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GARY WOEMPNER and "JANE DOE" WOEMPNER, husband and  
wife, and the marital community composed thereof; and ALKI  
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Defendants/Appellants,

v.

GARY E. CHEVALIER,  
Plaintiff/Respondent,

and

RONALD BEQUETTE, a single man  
Defendant/Respondent.

---

BRIEF OF APPELLANTS  
WOEMPNER and ALKI INTERNATIONAL, INC.

---

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# **Exhibit 3**

NO. 41711-1-II

COURT OF APPEALS, DIVISION II  
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TIMOTHY REID  
JUN 17 2011  
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