

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.

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COURT OF APPEALS  
DIVISION II  
BY  
STATE OF WASHINGTON  
INFRITY

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REPLY BRIEF OF APPELLANTS  
WOEMPNER and ALKI INTERNATIONAL, INC.

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	-ii
I. ARGUMENT.....	-1
a.     Respondent’s Arguments Ignore the Specific, Unambiguous Statutory Language of RCW 25.05.055(2) that Precludes a Washington Corporation from Being a Partnership.	-1
b.     Any Alleged Partnership At Will Was Void From the Beginning	-7
II. CONCLUSION.....	-9

**TABLE OF AUTHORITIES**

**WASHINGTON CASES:**

*McCormick v. Dunn & Black, PS*,  
140 Wn. App. 873, 883, 167 P.3d 610 (2007)..... -4,5,6,7

*Morelli v. Ehsan*,  
110 Wn.2d 555, 561-562, 756 P.2d 129 (1988)..... -9

*State v. Keller*,  
143 Wn.2d 267, 276, 19 P.3d 1030 (1001), *cert denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L.Ed.2d 972 (2002) ..... -2

*Williams v. Burrus*,  
20 Wn.App 494, 581 P.2d 164 (1978)..... -8

**NON-WASHINGTON CASES:**

*Koestner v. Wease & Koestner Jewelers, Inc.*,  
63 Ill.App.3d 1047, 381 NE 2<sup>nd</sup> 11 (1978)..... -4

**WASHINGTON COURT RULES:**

RCW 25.05.005(6)..... -3

RCW 25.05.005(10)..... -3

RCW 25.05.055..... -3

RCW 25.05.055(1)..... -2

RCW 25.05.055(2)..... -1,2, 3,4,7

## I. ARGUMENT

a. **Respondent's Arguments Ignore the Specific, Unambiguous Statutory Language of RCW 25.05.055(2) that Precludes a Washington Corporation from Being a Partnership.**

Contrary to respondent's arguments, petitioner Gary Woempner is not asking this court to substitute its judgment for that of the trial court judge or to evaluate the credibility of the witnesses. Rather, Mr. Woempner is requesting that this court apply the law as written by the legislature.

RCW 25.05.055(2) unambiguously states that “[a]n 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.” (emphasis added). Period. There is no qualifier included anywhere for this statement. The other portions of the statute discuss the factors that may be taken into consideration in deciding whether a partnership is formed, including the intent of the parties. However, this is all subject to the limitation that another formal business entity such as a corporation cannot be a partnership under Washington law. The very first line of the statute points out this limitation:

**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) (emphasis added).

The language of RCW 25.05.055(2) is plain. As such, it should be followed.

Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.

*State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). *Cert. denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002).

Alki International, Inc. was created as a corporation. It is not now and never was a partnership. Testimony shows that Mr. Bequette knew that the business would be set up and run as a corporation. (RP 10/21/03, p. 60, ll. 10 – 19) Since the corporation could not be a partnership, Ron Bequette never held any partnership interest that he could have transferred to respondent Chevalier. Clearly, the judgment in favor of Mr. Chevalier must be reversed.

Respondent Chevalier argues that the court should completely disregard this statute. He relies on the Definitions section of the Revised Uniform Partnership Act which includes “corporation” within the

definition of “person”. RCW 25.05.005(10). “Partnership” is defined as “an association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055...” RCW 25.05.005(6). Based upon this, respondent argues that a corporation can be a partnership. But Respondent fails to mention a relevant additional portion of the statute. At the very beginning of the definitions section, the legislature states, “The definitions in this section apply throughout this chapter **unless the context clearly requires otherwise[.]**” RCW 25.05.005 (emphasis added). The context of RCW 25.05.055(2) is a direct and unambiguous rebuttal of Mr. Chevalier’s argument that a corporation can be a partnership. There is only one way that it can be read – a corporation *is not* a partnership.<sup>1</sup>

Mr. Chevalier’s brief states, “Ultimately, the court should not have to rely on a technical interpretation of the definitional sections of our partnership statute.” *Respondent’s Brief*, p. 20. But that is the whole reason definitions are included in statutes; to guide people and the courts. Mr. Chevalier believes that “under the circumstances”, the court can completely disregard the corporate form and find that a partnership existed

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<sup>1</sup>While it cannot be cited for any precedential value, it is of note that, in the unpublished case of *Anderson v. Hanlon, et. al.*, 158 Wn. App. 1056 (2010) Wash. App. LEXIS 2779, Division III in a similar fact situation held that RCW 25.05.055(2) as a matter of law prevents a corporation from being a partnership.

between Mr. Woempner and Mr. Bequette. There is no authority for the courts to ignore such a clear statutory mandate, however.

As respondent Chevalier argued, in *McCormick v. Dunn & Black*, P.S., 140 Wn. App. 873, 883, 167 P.3d 610 (2007), this Division was troubled by the lack of authority that an incorporated business can actually be a partnership based upon the parties' conduct. Mr. Chevalier relies upon a 1978 Illinois decision, *Koestner v. Wease & Koestner Jewelers, Inc.*, 63 Ill.App.3d 1047, 381 NE 2<sup>nd</sup> 11 (1978) as authority for his position that the parties' intent should outweigh the business form. *Koestner*, however, did not discuss the specific language of Illinois' partnership statutes and whether it was similar to the current Washington statute. As such, the two cannot be compared. The *Koestner* court also pointed out that there was a split in the various states' authorities regarding whether the existence of a corporation would preclude any finding that a partnership was formed.

Mr. Chevalier attempts to argue that *McCormick v. Dunn & Black* is distinguishable on the basis that the court found there that the parties intended from the beginning to form a corporation. But this was not the true basis for the *McCormick* holding. Rather, the court relied on the language of RCW 25.05.055(2) that a business that is a corporation cannot also be partnership. It discussed its reasoning in detail:

McCormick argues that the parties created a de facto partnership. While conceding that the firm was incorporated, McCormick argues that “incorporation does not defeat the existence of a partnership.” Relying on *Stipcich*, McCormick asserts that an entity may be a partnership based on the parties' intent and conduct even though it is incorporated.

McCormick asserts that the parties formed a partnership at their initial meeting in December 1992 when they decided to enter into business together. McCormick points to the equal capital contribution and their oral agreement to share profits and losses equally as evidence of an intention to form a partnership. McCormick asserts that the firm neglected corporate requirements, including not: (1) issuing stock certificates, (2) providing notice for meetings, and (3) holding meetings. McCormick argues that because a partnership has a statutory obligation under RCW 25.05.300(1) to dissolve and wind up its affairs upon dissociation, the firm must be dissolved.

McCormick's reliance on *Stipcich* is misplaced. In *Stipcich*, the court found that the parties intended to form a partnership when they entered into a contract for a business relationship. The contract did not specify the nature of the business relationship. One of the parties owned a corporation, which was mentioned in the contract. However, the court did not find that the corporation was actually a partnership. Rather, the court found that the corporation was distinct from a separate partnership between the parties. In the other cases McCormick cited, the courts found a partnership where there was no written or express agreement between the parties. See *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1996); *Goeres v. Ortquist*, 34 Wn. App. 19, 658 P.2d 1277 (1983). In neither of these two cases was the business incorporated.

*McCormick v. Dunn & Black, PS*, 140 Wn. App. At 882-883(some internal citations omitted).

Here, the business for which profits are being sought is the corporation, Alki International, Inc. There is no other separate business.<sup>2</sup> Mr. Bequette testified that he expected to receive 50% of the profits as owner of “Alki International”, not some other side business. (RP 10/21/23, p.m. session, p. 77, ll. 8-11). Mr. Chevalier also testified that he believed he was purchasing an interest in Alki. (RP 10/22/03, p.m. session, p. 234, ll. 1 – 16). But from the moment Alki International, Inc. was incorporated (as the parties concede was to be done), it could not be a partnership:

Under the Washington Revised Uniform Partnership Act (RUPA), chapter 25.05 RCW, “[a]n 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). 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 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

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<sup>2</sup> As noted in petitioner’s opening brief, there was conflicting testimony regarding what was discussed at the initial “lunch meeting” between Mr. Bequette, Mr. Chevalier, and Mr. Woempner. There was no substantial evidence presented at trial to conclude that a specific agreement was ever reached between Mr. Bequette and Mr. Woempner as to sharing ownership or splitting the profits of a business. As there was no meeting of the minds, there was never an agreement of any kind that the court could enforce, even absent the corporation.

RCW 25.05.055(2), McCormick's partnership argument is not persuasive.

*McCormick v. Dunn & Black, PS*, 140 Wn. App. At 882-883(some internal citations omitted).

Mr. Chevalier cites extensively in his brief to testimony regarding the intent of the parties. The intent of the parties does not come into play under RCW 25.05.055(2). It is only addressed in subsection (1), which is itself limited by subsection (2). Thus, whether the trial court judge found the testimony of witnesses to be credible on this issue is irrelevant. Even if it were relevant, however, respondent Chevalier points out that Mr. Bequette felt that “the use of the corporate form for Alki International, Inc. was simply a vehicle to accommodate [his] request that he be a ‘silent partner’”. *Reply Brief*, p. 14. This concedes that the parties always intended for the business itself to be a corporation. It cannot subsequently be treated as a partnership.

**b. Any Alleged Partnership At Will Was Void From the Beginning**

Respondent Chevalier argues that any agreement between Mr. Woempner and Mr. Bequette could not have been void based upon illegality because there is no criminal liability, administrative penalty, or other consequence for a person having Common Financial and Administrative Control (CFAC) over two freight forwarding companies

working in the same channels. *Respondent's Brief*, p. 21. But as Petitioner discussed in his opening brief, there most certainly are consequences. Either Mr. Bequette or Mr. Woempner would have had to file a false declaration under oath in order to comply with MTMC requirements. This could subject them to disqualification from any DOD transportation programs or federal contracting, to criminal prosecutions for false statements, and to civil prosecutions.

Mr. Bequette's testimony was that he wanted to be a "silent partner". He knew that his name appearing would be treated as a violation of the MTMC regulations. (RP 10/21/03, p.m. session, p. 47, l. 3 – p. 48, l. 9; p. 55, ll. 5-6; RP 10/23/03 a.m. session, p. 61, ll. 5 – 17.) He was aware that what he was trying to do, as well as the steps he was taking to achieve that end, was clearly illegal, just as in *Williams v. Burrus*, 20 Wn.App. 494, 581 P.2d 164 (1978), discussed in petitioner's opening brief. And there is no way that lying as to identities of parties participating in a business in order to obtain a government contract can be in compliance with any public policy.<sup>3</sup>

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<sup>3</sup> Testimony also shows Mr. Bequette's intent to commit tax fraud by having Mr. Chevalier make the so-called stock purchase by paying off one or more of Mr. Bequette's creditors rather than purchasing an interest in Alki International, Inc. directly from Mr. Bequette: RP 10/23/03, p. 279, ll. 4 - 18; RP 10/21/03 p.m. session, p. 73, l. 9 – p. 75, l. 21; RP 10/23/03, pp. 326 – 340; RP 10/22/03, p. 227, l. 11 – p. 228, l. 4.

Respondent Chevalier also concedes that “the parties anticipated a potential problem with the MTMC regulations”, *Respondent’s Brief*, p. 23, but argues that they anticipated “purging the partnership of any such burden when Mr. Chevalier bought in.” *Id.* However, such an agreement would be both illegal and void as against public policy from the very beginning. As such, Mr. Bequette never had any enforceable interest in the business that he could have transferred to Mr. Chevalier.

If the business of a partnership is illegal, we will not entertain an action for an accounting and distribution of the assets, especially when the unlawful agreement is contrary to public policy. This is consistent with the general rule that illegal agreements are void, and courts will not enforce them. The parties are left where the courts find them regardless of whether the situation is unequal as to the parties.

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

Mr. Bequette had no right to force an accounting or distribution of profits from Alki International, Inc., so he could not transfer such a right to Mr. Chevalier. The trial court decision to the contrary should be overturned.

## **II. CONCLUSION**

For the reasons set forth above, defendants/petitioners Gary Woempner and Alki Incorporated, Inc., again respectfully request that this court 1) reverse the trial court’s order of September 5, 2000 denying

summary judgment of dismissal; and 2) reverse and vacate the judgment entered on January 14, 2011, including interest.

RESPECTFULLY SUBMITTED this 17 day of October, 2011.



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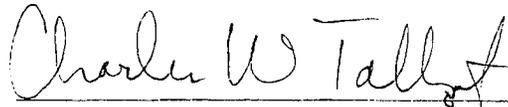
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RESPECTFULLY SUBMITTED this \_\_\_\_ day of October, 2011.



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

v.

GARY E. CHEVALIER,  
Plaintiff/Respondent,

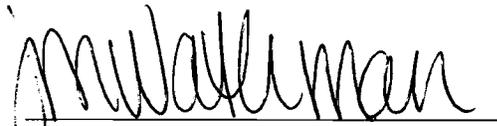
and

RONALD BEQUETTE, a single man  
Defendant/Respondent.

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I, Jody M. Waterman, declare under penalty of perjury under the laws of the State of Washington, that the foregoing electronic document(s) attached to this declaration, which consist of 2 pages including this declaration page, is a complete and legible image that I have examined personally and that was received by me via email at the following address: [jwaterman@dpearson.com](mailto:jwaterman@dpearson.com).

Dated this 17<sup>th</sup> day of October, 2011 at Tacoma, Washington.

  
\_\_\_\_\_  
Jody M. Waterman

11 OCT 17 PM 1:22  
STATE OF WASHINGTON  
DEPT. OF JUSTICE  
COURT OF APPEALS