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DIVISION III  
STATE OF WASHINGTON  
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No. 268802-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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WASHINGTON TRUST BANK, a Washington  
banking corporation,  
Respondents/Plaintiff

v.

RIVER GORGE, a partnership; TBM SYNDICATE, a  
partnership, MARVIN CHAMBERLAIN and  
MRS. MARVIN CHAMBERLAIN, and the marital  
community comprised thereof,  
Appellants/Defendants

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**APPELLANTS' / DEFENDANTS' REPLY BRIEF**

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RIES LAW FIRM  
Christopher F. Ries, WSBA# 23584  
Post Office. Box 2119  
Moses Lake, WA 98837  
(509) 765-4437  
Attorney for Appellants

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## **INTRODUCTION**

This Respondents'/Defendants' Reply Brief is offered in reply to the Brief of Respondent. The issue before the Court of Appeals is whether Trial Court erred in ruling, at summary judgment, that the Partnerships, River Gorge Holsteins and TBM Syndicate (hereinafter the "Partnerships") and Dr. Marvin Chamberlain ("Chamberlain") were liable for the sales price of 4 million pounds of hay sold by Jerry Hodges ("Hodges") to Russell Dan Reynolds ("Reynolds"). The answer to this question rests on whether Reynolds bought the hay on behalf of Partnerships and Chamberlain with either actual or apparent authority and, if he did not, whether the Partnerships and Chamberlain were unjustly enriched.

## **LEGAL ARGUMENT**

The Respondent, Washington Trust Bank ("WTB"), contends that the Partnerships and Chamberlain (hereinafter sometimes referred to as "Appellants") are liable for the purchase price of the hay Hodges delivered to Reynolds. WTB's claim is predicated on three different legal theories:

1. Reynolds purchased the hay for and on behalf of the Appellants with actual authority; and

2. If Reynolds did not have actual authority to purchase the hay on behalf of Appellants, he had apparent authority; and

3. If Reynolds did not have either actual authority or apparent authority to purchase the hay on behalf of Appellants, it is nevertheless appropriate that Appellants be held liable for the price of such hay under the doctrine of unjust enrichment.

Reynolds did not have actual authority to buy hay on behalf of the Appellants as is apparent by the dairy cattle lease between the Reynolds Dairy and Appellants which placed the burden of paying for feed upon the Reynolds Dairy. Likewise, Reynolds did not have apparent authority to bind the Appellants to the purchase of hay for reason that Hodges knew of the existence of the Partnerships but understood that it was selling hay exclusively to Reynolds as the sole proprietor of the Reynolds Dairy and not to the Appellants. Finally, the doctrine of unjust enrichment is inapplicable for reason that although the Appellants received an incidental and indirect benefit from Hodges hay, Appellants were not *unjustly* enriched thereby.

A. Reynolds did not have authority to purchase hay for and on behalf of the Appellants.

Both WTB and the Appellants agree as to how a partner may incur liability for the partnership.<sup>1</sup> A partner can bind a partnership to a contract if: (1) the partner has actual authority to act for and on behalf of the partnership; or (2) the partner acts within the ordinary course of the partnership business so that it appears, to the other party to the contract, that the party has apparent authority. In short, did the partner have actual authority or was the partner acting with apparent authority.

1. Reynolds did not have actual authority.

Reynolds did not have actual authority to bind the Appellants to the purchase of hay from Hodges. Actual authority arises only from agreement amongst the partners. Swanson v. Webb Tractor & Equip. Co., 24 Wn.2d 631, 648 (1946). WTB would have this Court believe that Reynolds had actual authority to purchase hay for and on behalf of the Partnerships, although it does not and cannot point to any basis in the record to support this conclusion. To the contrary, by contract the burden to feed the cattle rested with a third-party, Reynolds Dairy, the sole proprietorship in which the

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<sup>1</sup> WTB concurs with the law respecting the liability of a partnership for the acts of a partner throughout its Brief of Respondent and, in particular, at page 9 of the Brief of Respondent.

Appellants had no interest. (CP 130, 137, 144, 145, 179).

The Partnerships were formed for the sole purpose of investing in registered dairy cattle. (CP 179). Likewise, Dr. Marvin Chamberlain, individually, acquired dairy cattle for the purpose of investing in registered dairy cattle. (CP 136, 143, 179). The Partnerships and Chamberlain did not own the facilities necessary to milk the cattle and did not intend to operate a dairy. (CP 60).

Reynolds, individually and in his own behalf, owned and operated a dairy with all of the facilities necessary to milk cattle. (CP 130, 137, 144, 145, 179). The Appellants leased all of the cattle owned by the Partnerships and Chamberlain to the Reynolds Dairy. (CP 60-61, 179-180). Under the terms of the rental agreement, the Reynolds Dairy was to pay One Dollar (\$1.00) per day for each cow in milk and the Reynolds Dairy was solely responsible to provide and pay for the cost of all feed, veterinary care and other expenses of maintaining the herds while the cattle were at the Reynolds Dairy. (CP 136, 155-156, 179-180).

As is evident, the obligation to feed the cattle rested solely and exclusively with Reynolds, in his individual capacity as owner of the Reynolds Dairy and as lessee of the cattle. Under such circumstances, how is

it that Reynolds could be said to have actual authority from the Partnerships and Chamberlain to purchase hay for the cattle on behalf and as an obligation of the partnerships? The unavoidable conclusion is that he did not. That obligation was his and his alone.

WTB's contention that Reynolds had actual authority has no support in the record. In its Statement of the Case, WTB states, "[a]s between the partners, Mr. Reynolds was responsible for feeding the cattle."<sup>2</sup> The only reference WTB makes to the record to support this alleged fact is CP 65, lines 10 through 13. The cited Clerk's Papers consist of a portion of the deposition of Dr. Dean Koesel consisting of the following:

Q. You testified about Mr. Reynold's contribution to the TBM cattle and, I think, two-year-old cattle. Was one of the things he contributed providing feed to the animals?

A. He fed the animals.

As is apparent, Dr. Koesel testified that Mr. Reynolds fed the cattle but he did not testify that Mr. Reynolds fed the cattle on behalf of the Partnerships or that he had actual authority to purchase feed on behalf of the corporation. That this is an unjustified stretching of Dr. Koesel's testimony is revealed by looking to the construction WTB placed upon that same testimony in its

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<sup>2</sup> Brief of Respondent, page 4.

pleadings submitted in support of WTB's motion for summary judgment. In the pleading entitled "Facts in Support of Plaintiff's Motion for Partial Summary Judgment," WTB construed that same testimony to mean merely that "Mr. Reynolds was responsible for feeding the cattle." (CP 103).

WTB's effort to remold the testimony of Dr. Koesel to support its argument of actual authority directly contradicts the clear and unequivocal testimony of every single other party to this transaction including Mr. Reynolds himself. In deposition, Mr. Reynolds testified that he was responsible under the lease to feed the cattle.

Q. While you were renting cattle and they were milking, whose responsibility was it to provide the labor to feed them?

A. I did.

Q. Okay. And whose responsibility was it to purchase feed for them during that period?

A. That period, I was.

(CP 155-156).

The foregoing is not the only instance in which WTB misleads this Court as to the facts. In the Brief of Respondent, WTB inaccurately paraphrases Chamberlain's testimony to suit its purposes. At footnote 4 on page 10, WTB states:

**Under the terms of the agreements between the partners,** “ . . . Reynolds was solely responsible to pay for the cost of all feed, veterinary care, and other expenses of maintaining the cattle while the cattle were on the Reynolds Dairy, including the bull calves and cull cows until such animals were removed from the dairy.” *(C.P. at p. 180, l. 1-3)*

(Emphasis added). The actual testimony from Chamberlain’s declaration is as follows:

. . . **Under the terms of this lease arrangement,** Reynolds Dairy was required to pay to the Lessors rent of \$1.00 per day for each cow that was in milk. In addition, Reynolds was solely responsible to provide and pay for the cost of all feed, veterinary care, and other expenses of maintaining the cattle while the cattle were on the Reynolds Dairy, . . .

(CP 179-180)(Emphasis added).

Neither Dr. Koesel’s testimony or Chamberlain’s testimony support WTB’s contention that Reynolds’ responsibility *as a partner* was to buy feed for the cattle. How can it be argued that the Partnerships expressly or impliedly authorized Reynolds to buy hay on behalf of the Partnerships where the Partnerships by contract (the lease of the cattle) delegated that obligation to the Reynolds Dairy?<sup>3</sup> The responsibility to feed the cattle fell solely and exclusively upon Reynolds in his individual capacity as the sole proprietor of

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<sup>3</sup> In *King v. Riveland*, 125 Wn.2d 500, 507 (1994), the Washington Supreme Court stated, “Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess.”

the Reynolds Dairy. The only conclusion supported by the record is that Reynolds did not have the actual authority of the Partnership or Chamberlain to buy feed. Assuming, for purposes of argument only, that the Court believes that Dr. Koesel's testimony does somehow support WTB's contention, at a minimum there is a genuine issue of material fact which must be resolved at trial. In particular, as Dr. Koesel's testimony relates only to TBM Syndicate and Dr. Koesel had no interest or involvement in River Gorge or the cattle owned by Chamberlain.

Since there existed no agreement amongst the partners bestowing actual authority upon Mr. Reynolds, WTB resorts to blurring the line between the Partnerships and the dairy. WTB acknowledges that "Mr. Reynolds's [sic] dairy operation was not part of the Partnerships' business enterprise,"<sup>4</sup> yet it contends that since Mr. Reynolds was a partner as well as the owner of the dairy, Mr. Reynolds purchase of the hay should be attributed to both entities. This contention contradicts the accepted principles that a partner may pursue his own individual business interest separate and apart from the partnership, may contract on his own behalf, binding only himself and not the partnership, and may transact business with a partnership in which he is a

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<sup>4</sup> Brief of Respondent, page 14.

partner, for which such purposes he shall be treated as though he is not a partner. RCW 25.05.165(6); Alaska Pac. Salmon Co. v. Matthewson, 3 Wn.2d 560, 563 (1940); 59A Am. Jur. 2d Partnership § 303.<sup>5</sup> The fact that Reynolds was both a partner and the sole proprietor of Reynolds Dairy does not make the hay obligation he incurred a debt of the Partnerships unless he had actual or apparent authority.

As its final effort to establish that Mr. Reynolds had the actual authority of the Partnerships to buy the hay from Hodges, WTB points out that the cattle had to be fed in order to maintain their health and value and, therefore, the feed served to benefit the partnership. Once again, actual authority arises only from the expressed or implied agreement amongst the partners. The only conclusion that is supported by the record is that Reynolds did not have actual authority to buy hay for and on behalf of the Appellants where that obligation was placed upon his separate and solely owned dairy in which the Appellants had no interest.

2. Reynolds did not have apparent authority.

In the absence of actual authority, the conduct of a partner may still bind the Partnership if the partner is acting with apparent authority. “Apparent authority” exists only if a third-party has a reasonable belief that

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<sup>5</sup> This issue was briefed in detail in the Appellants’/Defendants’ Brief at pages 20 through 24.

the partner has authority to act for the partnership. This point was recently addressed by the Washington Supreme Court in its September 18, 2008, ruling in Ranger Ins. Co. v. Pierce County, 2008 Wash. LEXIS 943, 12-13, wherein the Supreme Court stated:

An agent has apparent authority to act for a principal only when the principal makes objective manifestations of the agent's authority "to a third person." King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). To create apparent authority, a principal's objective manifestations "must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for a principal [and] be such that the claimant's actual, subjective belief is objectively reasonable." Id. (citing Smith v. Hansen, Hansen, & Johnson, Inc., 63 Wn. App. 355, 363, 818 P.2d 1127 (1991)). Manifestations of authority by the purported agent do not establish apparent authority to act. Lamb v. Gen. Assocs., Inc., 60 Wn.2d 623, 627, 374 P.2d 677 (1962).

In King v. Riveland, 125 Wn.2d 500, 507 (1994), the Supreme Court stated that "apparent authority" is based, amongst other things, upon the subjective belief of the affected third-party:

With actual authority, the principal's objective manifestations are made to the agent; with apparent authority, they are made to a third person. Smith, at 363. Such manifestations will support a finding of apparent authority only if they have two effects. First, they must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant's actual, subjective belief is objectively reasonable. Smith, at 364.

In short there is a two part test for apparent authority: (1) did the third-party subjectively believe that the agent/partner had authority, and, if so; (2) was such belief reasonable?

WTB alleges facts which it contends gave Reynolds' apparent authority. Some of those facts are as follows:

- “Keeping the cattle fed was a necessary requirement of the ordinary course of the Partnerships’ business purpose, was essential to the success of all of the Partnerships’ business purposes.” [Brief of Respondent, page 10];
- “It was apparent that Mr. Reynolds was conducting a cattle operation on his premises. Feeding cattle is an apparent component of conducting a cattle operation.” [Brief of Respondent, page 11];

In addition to the foregoing, WTB also states, “Mr. Hodges reasonably concluded that Mr. Reynolds’ purchase of the hay and straw was “incident” and “appropriate” to the conduct of the business of the Partnerships,”<sup>6</sup> although WTB gives absolutely no reference to the record to support this assertion.

WTB seemingly misses the point. While these facts might, in other circumstances, support a finding of apparent authority, they do not in this case because Hodges did not subjectively believe that Reynolds was acting

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<sup>6</sup> Brief of Respondent, page 13.

for the partnership.

In the present case, Hodges knew of the existence of the Partnerships and knew that he was selling hay to Mr. Reynolds, in his individual capacity.

During the time Hodges was delivering hay to Reynolds Dairy, Hodges knew the following facts:

- a. Chamberlain and Reynolds were partners in River Gorge (CP 83, 85-86, 162, 164, 165);
- b. That River Gorge produced dairy cows (CP 86, 164, 165);
- c. That River Gorge owned a portion of the herd on the Reynolds Dairy (CP 85, 164, 165);
- d. That Reynolds was obligated to pay rent on the River Gorge cattle (CP 87, 166, 167);
- e. That the proceeds of the milk were being paid by the purchasers of the milk directly to Reynolds and not to Chamberlain, River Gorge or TBM (CP 86, 165);

It was Hodges' specific understanding that Reynolds, not River Gorge or any of the Appellants, was obligated to pay for the hay Hodges delivered to Reynolds. In this respect, Hodges testified as follows:

- Q. In your -- over the course of obviously this three-year period we're talking about and your conversations with Mr. Reynolds, was it ever discussed or did you discuss with Mr. Reynolds whose obligation it was to feed the River Gorge cattle?

- A. Specifically I don't think we discussed it, because I guess it's obvious. It depends on where the cattle are. If they are at Reynolds' facility, of course, he is responsible. If they are at Marvin's facility, then he would be responsible. But, specifically, we didn't discuss that.

(CP 168).

All payments Hodges received were by check written on Reynolds' account. (CP 83-84, 162, 163). No payment to Hodges ever originated from Chamberlain (CP 8, 1623). Hodges never spoke with Chamberlain about the unpaid hay account. (CP 83, 162). Hodges never made an effort to contact Chamberlain about getting payment on the unpaid hay account. (CP 170). On the financial statements Hodges prepared for his bank, Washington Trust Bank, he identified the unpaid hay account receivable under the name "Dan Reynolds" and never identified an account receivable under the name of Chamberlain or River Gorge. (CP 170).

Hodges was aware of both the existence and purpose of the Partnerships. It was his understanding and belief that it was Mr. Reynolds' sole and exclusive responsibility to feed the cattle, that he was selling hay to Mr. Reynolds, not the Partnerships, and that Reynolds, not the Partnerships, were responsible to pay him. It had not been made to appear that Mr. Reynolds was acting for the Partnerships. Mr. Reynolds was not acting on

behalf of the Partnerships with “apparent” authority or any authority, for that matter. Neither Mr. Hodges nor anyone else ever believed or claimed that the Partnerships had any responsibility for the bill until Washington Trust Bank, which was not a party to any of these events, took an assignment from Mr. Hodges. Simply put, there exists not one scintilla of evidence to support a conclusion that Mr. Reynolds had actual or apparent authority to purchase hay for and on behalf of the Partnerships. *All of those involved, including the seller, Mr. Hodges, understood he was acting for himself.*

B. The Appellants were not unjustly enriched by Hodges hay.

In the absence of both actual authority and apparent authority, the only manner in which WTB can extend liability to the Partnerships and Chamberlain is by means of the doctrine of unjust enrichment. The doctrine of unjust enrichment is not applicable for reason that while the Appellants may have been enriched, such enrichment was not unjustified.

The mere fact that a third person benefits from a contract between two other persons does not make such third person liable under implied contract, unjust enrichment, or restitution. Enrichment alone will not suffice to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the circumstances and as between the two

parties to the transaction. Farwest Steel Corporation v. Mainline Metal Works, Inc., 48 Wn. App. 719, 731-732 (Div. I, 1987). There must be a clear act of bad faith by the defendant resulting in such person's unjust enrichment before the court will exercise its equitable powers. For instance, in Farwest Steel Corporation v. Mainline Metal Works, Inc., 48 Wn. App. 719, 732-733 (Div. I, 1987), although Division One acknowledged that Hensel was enriched by the efforts of Farwest, such enrichment was not unjust because:

Hensel was a mere incidental beneficiary of the contract between Farwest and Mainline. Hensel did not acquiesce in or encourage the contract with Farwest. Hensel did not mislead Farwest in any fashion. In short, Hensel did not contribute in any fashion to Farwest's loss.

WTB does not point to a single fact justifying the exercise of the court's equity powers against the Appellants. None of the Appellants coerced Hodges to sell hay to Reynolds or even requested that Hodges do so. The Appellants did receive an indirect benefit from the sale of the hay. They were not, however, direct beneficiaries, as WTB urges, insofar as they were not parties to the hay purchase agreement with Hodges and did not have the contractual obligation to feed the cattle--which was the sole burden of the Reynolds Dairy under the lease. The Appellants were mere incidental

beneficiaries who did not coerce, mislead or ever request that Hodges sell hay to the Reynolds Dairy. If the Appellants had ever coerced, misled or even encouraged Hodges to sell to Reynolds, certainly Hodges would have approached them for payment during some point in the two and one-half year period during which Hodges delivered 4 million pounds of hay to Reynolds Dairy without payment. The fact that Hodges never asked the Appellants for payment is a clear indicator that the Appellants were never involved in that transaction in any manner.

In light of the utter lack of evidence to support the exercise of equity powers against the Appellants, the doctrine of unjust enrichment is not available to WTB. Assuming, for purposes of argument only, that there is some portion of the record, of which this counsel is unaware, that supports a finding of unjust enrichment, there is at a minimum a genuine issue of material fact for which trial is warranted.

### **CONCLUSION**

Reynolds did not have actual authority to buy hay on the account of the Partnerships as is evident from the lease which placed the obligation and cost of feed solely upon the Reynolds Dairy. Likewise, Reynolds did not have apparent authority to bind the Appellants insofar as Hodges and every

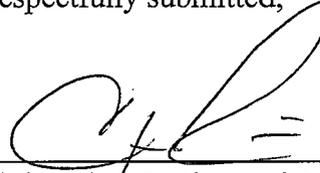
other party believed and understood that Reynolds was buying the hay for his own account and not that of the Partnership. Finally, the Appellants were not unjustly enriched by the hay for reason that the Appellants did not coerce, mislead or even encourage Hodges to sell hay to Reynolds.

No party to these transactions, including Mr. Hodges, claimed or even believed that the Appellants had any responsibility for the purchase price of the hay until WTB took an assignment of the claim from Hodges and then sought to fabricate a means by which to hold someone responsible for the debt. Although WTB claims the Appellants are liable, WTB was never a party to the transactions. Of those who actually were privy to the transactions, not one of them asserts that they thought the Hodges hay bill was a Partnership debt or that the Appellants were the ones purchasing the hay.

In the absence of any evidence to support WTB's claim, the trial court's grant of partial summary judgment to WTB must be overturned and the Appellants' motion for summary judgment of dismissal must be granted. In the alternative, there are genuine issues of fact warranting trial for which the trial court's ruling must be overturned.

DATED this 9<sup>th</sup> day of October, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. F. Ries', written over a horizontal line.

Christopher F. Ries, WSBA #23584  
Attorney for Appellants / Defendants