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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON TRUST BANK, a Washington banking corporation,
Respondent.

vs.

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

BRIEF OF RESPONDENT

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I. INTRODUCTION

Washington Trust Bank's ("WTB") predecessor in interest, Jerry Hodges ("Mr. Hodges"), sold hay for consumption by animals owned by two partnerships. The hay was delivered to Dan Reynolds ("Mr. Reynolds"), who operated a dairy. Mr. Hodges did not get paid for the hay. The cattle were liquidated at an auction, and Mr. Reynolds subsequently filed a Chapter 12 bankruptcy case¹. This appeal is from the granting of a partial summary judgment determining that the partnerships and its partners are jointly and severally liable on the indebtedness owed to Mr. Hodges for the hay consumed by the partnership cattle.

II. STATEMENT OF THE CASE

In October of 1998, Mr. Reynolds and defendant Marvin Chamberlain ("Dr. Chamberlain") entered into a partnership (*CP, at p. 21*) called River Gorge Holsteins ("River Gorge"). (*CP, at p. 21*) Proceeds from this partnership were to be divided equally after payment of any liabilities incurred by the River Gorge partnership. (*CP, at p. 21*)

¹Although not pertinent to this appeal, but as further background, Mr. Hodges assigned his claim for the unpaid hay to WTB. WTB has received some funds from the bankruptcy proceeding under the assignment of Mr. Hodges's claim. The bankruptcy case is still pending, and Mr. Reynolds has not yet received his discharge.

In October of 1998, Mr. Reynolds, Dr. Chamberlain, and Dean Koesel (“Dr. Koesel”) entered into a partnership (CP, at p. 20) called TBM Syndicate (“TBM”)². (CP, at p. 20) Proceeds from this partnership were to be divided equally after payment of any liabilities incurred by the TBM Syndicate. (CP, at p. 20) The TBM herd began with the acquisition of three registered cows. (CP, at p. 58, l. 17 - p. 59, l. 2)

The purposes of River Gorge and TBM were: Investing in registered dairy cattle (CP, at p. 20-21), improving genetics of the herd (CP, at p. 29, l. 8-13; p. 30, l. 14-17; p. 38, l. 1-6), implanting embryos in dairy cows to increase the size of the herd (CP, at p. 53, l. 14-20), selling bulls for breeding purposes (CP, at p. 25, l. 23 - p. 27, l. 12; CP, at p. 58, l. 16-19), contracting sale of semen for artificial insemination purposes (CP, at p. 25, l. 23 - p. 27, l. 12), harvesting embryos (CP, at p. 31, l. 15-16), selling embryos (CP, at p. 58, l. 16-17), leasing cows in milk to Mr. Reynolds for his dairy operation (CP, at p. 21; 60, l. 14 - p. 61, l. 1), selling cull cows (CP, at p. 20-21), and liquidating the herd. (CP, at p. 46, l. 10-12)

²Hereinafter, River Gorge, TBM, and Dr. Chamberlain may be referred to collectively as the “Partnerships”.

Mr. Reynolds was the only partner who had facilities to milk the cows, so if they had to be milked, they would have had to be kept at his place. (CP, at p. 60, l. 3-5) He was required to make lease payments of one dollar per day to the Partnerships only on days when those cows were in milk (CP, at p. 61, l. 2-9; p. 33, l. 7-12) Each partner (including Mr. Reynolds) was to receive his proportionate share of rental proceeds from Mr. Reynolds's dairy operation. (CP, at p. 27, l. 23 - p. 28, l. 12) Mr. Reynolds's only interest was the right to use the partnership cows. (CP, at p. 28, l. 2-4)

Dr. Koesel did not have an investment in, was not a partner in, had no interest in milk proceeds of, was not asked to share in the losses of, was not asked to contribute to the expenses of, did not participate in the management of, was not asked advice about the operation of, and did not participate in the management of Mr. Reynolds's dairy operation. (CP, at p. 62, l. 20 - p. 64, l. 18) Mr. Reynolds never asked Dr. Chamberlain to contribute towards losses of the dairy operation. (CP, at p. 47, l. 1-4) Dr. Chamberlain was not entitled to the profits of the dairy operation. (CP, at p. 47, l. 17 - p. 48, l. 7) The milk sales checks were made payable to Mr. Reynolds, and not to Dr.

Koesel, Dr. Chamberlain, TBM, or River Gorge. (CP, at p. 49, l. 15 - p. 50, l. 5)

As between the partners, Mr. Reynolds was responsible for feeding the cattle (CP, at p. 65, l. 10-13), and was responsible for providing straw or other bedding materials for the cattle. (CP, at p. 65, l. 22-24) He provided the facilities for all of the animals. He provided all of the labor and expertise and the breeding of the River Gorge cattle, transporting the cattle, and the day-to-day care of the cattle. (CP, at p. 130, l. 22 - 131, l. 4) He cared for the calves after they were born. He fed River Gorge calves hay between the ages of 3 months to 10 months, where they gained two or three hundred pounds in weight. (CP, at p. 44, l. 5 - p. 45, l. 9) Dr. Chamberlain thereafter raised the heifers until they were approximately 25 months old. (CP, at p. 24, l. 9-15) Dr. Chamberlain claims he is owed \$114,597.00 in fees for raising these heifers. (CP, at p. 21)

Dr. Koesel claims that his company, DNA Embryo Transfers, Inc., is owed money by his partners for embryo-related work on River Gorge animals. (CP, at p. 69-70) He also claims DNA Embryo Transfers, Inc. is

owed money as a creditor's share of debt owed to the TBM Partnership. (CP, at p. 72-74)

Mr. Hodges delivered hay to Mr. Reynolds from spring of 2002 until April, 2005. (CP, at p. 77, l. 10-12; p. 78, l. 9 - p. 79, l. 5) The hay was consumed by all of the cattle, including the River Gorge and TBM cattle. (CP, at p. 51, l. 19 - p. 52, l. 5) These animals were fed this hay whether they were heifers, were in milk, or were dry. (CP, at p. 54, l. 17 - p. 55, l. 5) They consumed other food and supplies in addition to the hay. (CP, at p. 52, l. 6-17)

Mr. Hodges knew that Mr. Reynolds was doing business as Dan Reynolds Dairy. (CP, at p. 85, l. 4-11) All of the payments he received were written on Mr. Reynolds's account. (CP, at p. 83, l. 25 - p. 84, l. 5) Mr. Hodges understood that Dan Reynolds Dairy was renting cattle (CP, at p. 87, l. 3-17) and knew that River Gorge owned a portion of the herd maintained by Mr. Reynolds. (CP, at p. 83, l. 12-19; p. 85, l. 21-23) He was aware of the River Gorge partnership, and knew that Dr. Chamberlain was a partner with Mr. Reynolds. (CP, at p. 83, l. 12-19) He understood that Dr. Chamberlain and Mr. Reynolds worked together to produce the dairy cows from the existing herd. (CP, at p. 85, l. 24 - p. 86, l. 14) Although Mr.

Hodges does not recall speaking with Dr. Chamberlain about the unpaid hay account (CP, at p. 83, l. 20-21), Dr. Chamberlain was aware of the unpaid hay account in about April of 2005. (CP, at p. 181, l. 3-11)

Milk proceeds from the River Gorge cattle offset some of the costs of hay and other expenses of keeping those animals. (CP, at p. 52, l. 18 - p. 53, l. 2)

Embryos were produced by and harvested from River Gorge and TBM cows. (CP, at p. 53, l. 3-10) The harvested embryos were implanted into River Gorge cows and into cows belonging to Mr. Reynolds. (CP, at p. 53, l. 11-13) All of the calves born as a result of these implanted embryos were placed into the River Gorge herd, regardless of whether they were born of River Gorge cows or cows owned solely by Mr. Reynolds. (CP, at p. 53, l. 14 - p. 54, l. 5) All of the calves born as a result of the implanted embryos were sold at auction. (CP, at p.54, l. 1-9) The size of the River Gorge herd increased greatly as the result of this process. (CP, at p.53, l. 14-20)

A cow that is not in milk eats hay. (CP, at p. 66, l. 24-25) Cattle that are not adequately fed become less valuable. (CP, at p. 67, l. 16-25) Dr. Chamberlain was more concerned about feeding the cattle than he was about

collecting the amount that Mr. Reynolds owed to him. (CP, at p. 34, l. 12-21) Registered cattle are worth more than average dairy herd cattle. (CP, at p. 37, l. 11-20)

The River Gorge and TBM herds were sold at an auction conducted upon Mr. Reynolds's premises, held on June 3 and 4, 2005. (CP, at p. 20-21) Mr. Hodges learned just before the sale that he would not be paid the balance due to him for hay and straw consumed by these animals. (CP, at p. 81, l. 1-3)

The auctioneer calculated the gross proceeds from the sale of the River Gorge animals to be approximately \$460,300, with Dr. Chamberlain's share at approximately \$230,300. (CP, at p. 40; p. 35, l. 5 - p. 36, l. 14) The sale proceeds from the River Gorge animals were split equally (subject to adjustment) between Dr. Chamberlain and Mr. Reynolds. (CP, at p. 54, l. 10-13)

The gross proceeds from the sale of the TBM animals were approximately \$23,000.00. (CP, at p. 35, l. 5-24; p. 40) The sale proceeds from the TBM animals were split equally (subject to adjustment) between Dr. Chamberlain, Dr. Koesel, and Mr. Reynolds. (CP, at p. 54, l. 14-16)

None of the proceeds from the sale of the cattle were used to pay Mr. Hodges the amount he was still owed for the hay and straw consumed by the TBM and River Gorge cattle. (*CP, at p. 80, l. 18 - p. 82, l. 16*)

III. ARGUMENT

A. Standard of Review.

WTB concurs with the Partnerships' statement pertaining to the standard of review.

B. The Hodges hay obligation is a debt of the River Gorge and TBM Partnerships.

The Hodges hay obligation is a debt of the Partnerships if it was incurred as a result of a wrongful act or omission of a partner acting in the ordinary course of the Partnerships' business. RCW 25.05.120(1). A partner, Mr. Reynolds, wrongfully failed to pay Mr. Hodges for the hay and straw consumed by the Partnerships' animals.

The purposes of the Partnerships were tenfold: Investing in registered dairy cattle, improving genetics of the herd, implanting embryos in dairy cows to increase the size of the herd, selling bulls for breeding purposes, contracting sale of semen for artificial insemination purposes, harvesting embryos, selling embryos, leasing cows in milk to Mr. Reynolds for his dairy operation, selling cull cows, and liquidating the herd. Production of milk was

only a by-product of the Partnerships' activities.

Appellants correctly cite *Swanson v. Webb Tractor & Equipment Company*, 24 Wn.2d 631 (1946) as case law construing partnership and partner liability for claims of creditors:

It is a well-settled rule that the authority of a partner to act as agent for the partnership is limited to such transactions as are within the scope of the partnership business, and, conversely, that neither the partnership nor the other partners are bound by the unauthorized act of one partner in a matter not within the *apparent* scope of the business of the partnership. (Emphasis added; internal citations omitted.)

Swanson, 24 Wn. 2d at 648.

The *Swanson* Court cited the case of *Merrill v. O'Bryan*, 48 Wash. 415 (1908) in support of this decision. *Merrill* involved an attempt to avoid paying a debt incurred by the managing partner of a shipping company for the purchase of lumber for the purpose of building a warehouse³. The partnership defended on the theory that building the warehouse was beyond the scope of authority of the partner because the purpose of the partnership's business was limited to that of a transportation company, notwithstanding that the partnership used the warehouse facility in the operation of its business. The Court ruled:

³The purchase order was made in the name of the partnership, as contrasted with payments to Mr. Hodges made by Dan Reynolds Dairy.

So far as third persons who deal with a partner without notice are concerned, the copartners are bound if the transaction be such as the public may reasonably conclude is directly and necessarily embraced within the partnership business as being incident or appropriate to such business according to the course and usage of conducting it. (Internal citations omitted.)

Merrill, 48 Wash. at 417-418. 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. Mr. Reynolds failed to pay for the hay, therefore the Partnerships are liable for Mr. Hodges's loss arising from that failure.

1. The facts support a conclusion that Reynolds had actual and apparent authority to purchase hay for the Partnerships.

Mr. Reynolds had apparent (and actual⁴) authority to bind the partnerships to pay Mr. Hodges for the hay consumed by the cattle. R.C.W. 25.05.100 (providing that a partner is an agent of the partnership and binds the partnership) is identical to § 301 of the Revised Uniform Partnership Act of 1997 ("RUPA"). The Comments to § 301 of RUPA explain that, "... [A] partner's apparent authority includes acts for carrying on in the ordinary

⁴Under 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." (*CP*, at p. 180, l. 1-3)

course of ‘business of the kind carried on by the partnership,’ not just the business of the partnership in question.” Revised Uniform Partnership Act of 1997 § 301, 6 Pt. 1 U. L. A. 101 (2001). 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. The reason for this rule is explained further in the Comment to § 301: “Thus, RUPA does not expose persons dealing with a partner to the greater risk of being bound by a restriction based on their purported reason to know of the partner’s lack of authority from all the facts they did know.” *Id.*, at 102.

Mr. Hodges had no actual knowledge of the agreements between the partners; his knowledge was grounded in common sense. (*CP, at p. 168, l. 1-12*) He assumed that when the cattle were at his property, Mr. Reynolds would be responsible for paying for the feed, and that Dr. Chamberlain would be responsible for paying for the feed while at his facility. (*CP, at p. 168, l. -10*) Mr. Hodges, however, was not acquainted with the law of partnership at that time (*CP, at p. 171, l. 14-15*), and did not understand that, as to third party creditors, all of the partners are liable to pay debts of the partnership. R.C.W. 25.05.100 and R.C.W. 25.05.125 protect his right to payment even though he may not have had knowledge of the law at the time he delivered

the hay for consumption by the partnership animals.

Even if Mr. Hodges did have actual knowledge of this arrangement between the partners, it would not be binding upon him as provided by R.C.W. 25.05.125(1), and because there was no written Statement of Partnership Authority as provided by R.C.W. 25.05.110. *(CP, at p. 19-21)* Further, even if the Partnerships had filed statements limiting Mr. Reynolds's authority to purchase hay to feed the cattle, Mr. Hodges would not have been bound by those limitations unless he had specific knowledge of those limitations in the filed statements. R.C.W. 25.05.110(4). Mr. Reynolds was operating under no such limitation, and there is no evidence that any such statements were ever drafted or filed.

Mr. Hodges did know that some of the cattle upon Mr. Reynolds's premises belonged to the River Gorge Partnership. *(CP, at p. 162, l. 12-19)* Providing feed for these animals furthered the Partnership business interest of protecting its investment in the cattle. Dr. Chamberlain was so concerned that the animals be fed that he forbore collecting lease payments from Mr. Reynolds. *(CP, at p. 34, l. 12-21)* Mr. Hodges reasonably concluded that Mr. Reynolds's purchase of the hay and straw was "incident" and "appropriate" to the conduct of the business of the Partnerships.

Mr. Hodges had no “specific understanding” of the arrangements between the partners regarding payment for the hay the Partnership animals consumed, nor did he have an “understanding and belief that it was Mr. Reynolds’ sole and exclusive responsibility” to pay for that food:

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.

Q. So just a common-sense approach?

A. Right.

(CP, at p. 168, l. 1-12) He merely assumed that the person who had physical possession was responsible to feed the animals.

Mr. Hodges’s knowledge (or lack thereof) of the details of the Partnership agreements is immaterial. The Partnerships have cited no authority which excuses partnership liability for an obligation based upon the mistaken belief of a vendor selling goods to be used in carrying out the

business of the partnership. The Partnerships would be liable to him for payment even if he had no knowledge of their existence. For examples, see *O'Neill v. Dunning*, 132 Wash. 138, 141 (1924) (undisclosed partner of undisclosed partnership liable for goods, including food consumed by the partnership's employees); *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 489 (2006) (plaintiff did not know the existence of the partnership until after her lawsuit was filed).

Mr. Reynolds had specific authority from his partners to feed the cattle while they were in his possession, regardless of the use to which the partnership cattle were put. As such, he bound the Partnerships to payment for the hay consumed by the Partnerships' animals.

2. A partner who pursues partnership business interests incurs liability on behalf of the partnership and the partners.

WTB agrees with the Partnerships' analysis of partnership law to the extent that a partner is a separate legal entity from the partnership, and that a partner can pursue his own business interests separate from the partnership, and that Mr. Reynolds's dairy operation was not part of the Partnerships' business enterprises. WTB is not seeking to recover from the Partnerships for the hay consumed by cattle owned solely by Mr. Reynolds, Dr. Chamberlain, or Dr. Koesel. As previously discussed, the Partnerships'

business consisted of ten different activities⁵. Feeding the cattle was essential to the success of all of these enterprises. The hay Mr. Reynolds purchased from Mr. Hodges enabled the Partnerships to continue their pursuit of the various enterprises, which required healthy cattle to ensure success.

In *Alaska Pacific Salmon Co. v. Matthewson*, 3 Wn.2d 560 (1940) cited by the Partnerships, the Court held that a partner acting on his own behalf does not bind the partnership. The *Alaska Pacific* ruling does not apply to the facts of the instant case. In *Alaska Pacific*, one partner had purchased the partnership interest of another partner. The *Alaska Pacific* Court ruled that the purchase of a partnership interest by one partner from another is not a transaction of the partnership interest, and therefore no partnership liability arises as a result of that transaction. 3 Wn.2d at 563-564. Here, the purchase of the hay and straw was the acquisition of property from outside the Partnerships' assets, rather than the transfer of an existing interest in the partnership from one partner to another.

The *Alaska Pacific* case was distinguished by *Costanzo v. Harris*, 64

⁵Investing in registered dairy cattle, improving genetics of the herd, implanting embryos in dairy cows to increase the size of the herd, selling bulls for breeding purposes, contracting sale of semen for artificial insemination purposes, harvesting embryos, selling embryos, leasing cows in milk to Mr. Reynolds for his dairy operation, selling cull cows, and liquidating the herd.

Wn.2d 901, 903 (1964):

We have no quarrel with this rule but do not find it apposite. In Alaska⁶ no benefit was shown to have accrued to the noncontracting partner nor was the doctrine of unjust enrichment involved.

Here, the transaction at issue is not the sale of an interest in TBM or River Gorge by one partner to another, but the sale by a third party of goods used by the Partnerships. As the noncontracting partner, Dr. Chamberlain did receive numerous benefits flowing from the operation of the Partnerships' business enterprises, culminating with a quarter million dollars in gross proceeds from the cattle sale.

The animals had to be fed regardless of which of the partnership purposes were being served. The Partnerships are obligated to pay Mr. Hodges for the hay consumed by their cattle.

C. **River Gorge, TBM, and their partners would be unjustly enriched if not required to pay for the hay and straw consumed by the Partnership animals.**

Washington case law applies the doctrine of unjust enrichment to permit one who deals with a partnership to recover from the partnership and its partners. *Costanzo v. Harris*, 64 Wn.2d at 903. There, Lawrence and Harris were partners in a cattle operation. The agreement between the

⁶Referring to *Alaska Pacific Salmon Company, supra*.

partners was that Lawrence would purchase the cattle and Harris would do the work and pay the expenses of caring for the cattle. Costanzo contracted with Harris for the sale of hay. Costanzo was not paid, so he sued Lawrence and Harris. In the *Costanzo* decision, the Court affirmed the judgment against Lawrence because the hay sold by Costanzo to Harris was consumed by partnership cattle, the partnership was benefitted, and to hold otherwise would result in an unjust enrichment of the partnership⁷. *Id.*, at 903-904.

The facts of *Costanzo* are not distinguishable from instant case. Mr. Reynolds (like Mr. Harris) was, as between the partners, required to feed the Partnerships' animals. Dr. Chamberlain (like Mr. Lawrence) and the Partnerships would be unjustly enriched if they were not required to pay Mr. Hodges for providing product used by the Partnerships, which, in return, received a significant direct benefit from the hay.

The cases which the Partnerships cited are not applicable to Mr. Hodges's claims against the Partnerships. In the *Farwest Steel*⁸ case, Farwest contracted with Mainline to supply steel; Mainline fabricated the steel and

⁷The *Costanzo* Court noted that *Alaska Pacific* Court did not find a benefit to the noncontracting partner.

⁸*Farwest Steel Corporation v. Mainline Metal Works, Inc.*, 48 Wn.App. 719 (1987).

delivered the product to Hensel under a contract between Mainline and Hensel. Hensel and Mainline were not partners, and Mainline was not Hensel's agent. Mainline went bankrupt. Farwest sued Hensel to recover the amount owed to it by Mainline.

In the *Chandler*⁹ case, Chandler, a builder, contracted with a franchise to make, at no charge, surveys, maps, and other written materials related to the construction of the Tacoma Narrows Bridge. The contract provided that, if the bridge construction work was not begun by a predetermined deadline, Chandler would turn over his work product to the franchise. Because the construction of the bridge was not begun within the required time limitations, the contract was canceled. Thereafter, Chandler entered into an agreement with Pierce County to provide the same services. He would be paid a contingent fee for these services in the amount of 10% of the cost of the bridge. If funding for constructing the bridge was not obtained, then no fee would be due. Pierce County was unable to procure funding, and the bridge was not built under its auspices. Thereafter, an agency of Washington State undertook the project, and used Chandler's work product to aid in the

⁹*Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591 (1943).

construction of the bridge¹⁰. Chandler sued the State to recover the value of his work product. As in *Farwest Steel*, there was no partnership or agency relationship between the franchise and the State or between Pierce County and the State.

In both of these cases, the Courts found that the third parties received no unjust enrichment. In the *Farwest* case, Hensel, while enriched, was not enriched unjustly 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. In addition, Hensel's enrichment was not at Farwest's expense since Hensel is in debt exclusively to Mainline and there is no reason to believe that Farwest would benefit if Mainline were paid, in light of Mainline's bankruptcy and past conduct toward Farwest.

Farwest 48 Wn.App. at 732-733. In the *Chandler* case, there was no unjust enrichment because he received that to which he was entitled under the contracts, and merely because a third party received an incidental benefit did not give rise to a claim for recovery under the doctrine of unjust enrichment. 17 Wn.2d at 605.

¹⁰Nicknamed "Gallopig Gertie". The bridge collapsed in November of 1940. The Washington Toll Bridge Authority received \$4,000,000 in insurance proceeds nine months later.

In instant case, however, the beneficiaries were not third parties, but were direct beneficiaries consisting of the partnerships and Dr. Chamberlain. The benefits to the Partnerships were direct, not incidental. Mr. Hodges contracted with one of the partners to provide goods used to carry out the Partnerships' business, and he expected to be paid for the goods he sold for use by the Partnerships. The Partnerships would be unjustly enriched if they did not pay for the feed that kept these animals alive and able to produce revenue for the Partnerships.

The Partnerships argue for application of Section 112 of the Restatement of the Law of Restitution:

A person who without mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit has been conferred under the circumstances making such action necessary for the protection of the interests of the other or third persons.

This Restatement section does not accurately describe the transactions between Mr. Hodges and the partnerships. Here, Mr. Hodges supplied the hay at the request of a partner, the sale was made on condition of payment, payment was promised (*CP, at p. 81, l. 13-16*), and the interests of the partnerships were protected through the nourishment of the cattle.

In summary, neither of these cases cited by defendants nor

Restatement Section 112 are applicable because those creditors were seeking restitution from a third party, and not against a partnership which, through its agent had purchased goods on behalf of a partnership. Further, Dr. Chamberlain knew that Mr. Hodges was owed money for feeding the Partnerships' cattle before the sale occurred (*CP, at p. 181, l. 3-11*), yet he took no steps to ensure that Mr. Hodges was paid from the sale proceeds. His conduct was in bad faith.

D. WTB is not seeking to assert any lien remedies as they pertain to the Partnerships or to the partners.

WTB is merely seeking a money judgment against the Partnerships and one of their partners. It understands that the only lien to which it may be entitled is a judgment lien.

E. The dairy cattle lease arrangement was only one component of the Partnerships' purposes.

While it is true that a lessor-lessee arrangement, even where there is an agreement to share the profits but not the losses, does not create a partnership, that was not the arrangement between Mr. Reynolds, Dr. Chamberlain, and Dr. Koesel. There is no dispute that the cattle were owned by the Partnerships for purposes other than operating a dairy. Only one of those purposes was leasing the partnership cows while they were in milk to

Mr. Reynolds for his dairy operation.

The cases of *Ratliff*¹¹ and *Z.C. Miles*¹² cited by the Partnerships also are distinguishable from case at bar. Each of those cases involved a lease of land for a term; the lessee paid rent for the use of the property, the property was used exclusively for operating the business of the lessee, and the property reverted to the lessor at the end of the term. Here, while the cattle were consuming the hay sold by Mr. Hodges, in addition to giving milk, they were generating income for the Partnerships through the production of embryos and semen, getting pregnant, increasing in number, and becoming and staying in a condition to generate substantial sales proceeds.

The arrangement between these partners can be readily distinguished from a typical dairy cattle leasing agreement by comparing it with the lease agreements described in Mr. Stott's Declaration. (*CP, at p. 182-183*) There, in both of Mr. Stott's leases, animals are returned to Mr. Stott, and the lessee loses all interest in them. If the lease between the Partnerships and Mr. Reynolds had been a typical lessor-lessee arrangement, the lessors (the

¹¹*State ex rel. Ratliffe et al. v. Superior Court for Whitman County*, 108 Wash. 443 (1919).

¹²*Z.C. Miles Company, of Seattle, Washington v. Gordon et al.*, 8 Wash. 442 (1894).

Partnerships) would have taken possession of the property (all proceeds from the sale of the partnership animals) from the lessee (Mr. Reynolds), and he would have had no further interest in it. In this case, however, the animals were sold at an auction held on Mr. Reynolds's premises (*CP, at p. 20-21*), and Mr. Reynolds shared in the proceeds from that sale with the other partners - something that never would have occurred under a typical lease arrangement.

The lessor-lessee relationship between the Partnerships and Mr. Reynolds was limited to only one of multiple business purposes of the Partnerships. The agreement between the partners was that Mr. Reynolds was to feed the animals so long as they were on his premises; and when they were on Dr. Chamberlain's property, he was responsible for all of their expenses, including feeding them (*CP, at p. 180, l. 6-8*), subject to payment from Mr. Reynolds. (*CP, at p. 21*) Just as the Partnerships would be liable to the purveyors if Dr. Chamberlain did not pay the feed bills while the partnership animals were in his possession, the Partnerships are responsible to pay the hay and straw debt owed to Mr. Hodges.

F. The Partnerships and Dr. Chamberlain are jointly and severally liable on the debt owed to Mr. Hodges.

The Partnerships' Brief ignores the case law and statutory law

governing Mr. Hodges's claims against the Partnerships. The Partnerships contend that they are not responsible to pay the amounts owed to Mr. Hodges because Mr. Reynolds leased the cattle from the Partnerships, and that the Partnerships had no interest in the dairy or its operations.

The lease of the cattle to Mr. Reynolds was only one of the ten business purposes of the Partnerships. As a result of that Partnerships' function, the Partnerships earned revenues and receivables. The hay and straw consumed by the Partnerships' animals enabled the Partnerships to generate value from this particular activity of the Partnerships.

A partnership is "an association of two or more persons to carry on as owners of a business" R.C.W. 25.05.005(6). A partnership is formed when two or more persons associate to carry on as co-owners of a business for profit. R.C.W. 25.05.055(1).

There is no dispute that Dr. Chamberlain is a partner in TBM and River Gorge - he so stated under penalty of perjury in the Proof of Claim he filed in his bankruptcy case (*CP, at p. 19-21*), and in his Declaration. (*CP, at p. 179, l. 15-18*) He acknowledges that, "The profit to the [Partnerships] came in the form of the \$1.00 per day per head in milk rent, the value of the culls and bulls, which could be sold, and any increase in the size of the herd."

(CP, at p. 180, l. 10-11) All of these activities took place on Mr. Reynolds's premises. He also acknowledges that proceeds from the Partnerships were to be divided after payment of liabilities incurred by the partnership. (CP, at p. 20-21) He also acknowledges that he is responsible to pay his share of the costs of semen, heifer raising, registration fees, and recipient usage fees. (CP, at p. 20-21)

The primary purpose of the Partnerships was investing in cattle. The partners agreed that, "Proceeds from this partnership [syndicate] were to be divided equally after payment of any liabilities incurred by the partnership [syndicate]." (CP, at p. 20-21) In other words the partners agreed to share both the profits and the losses.

R.C.W. 25.05.125(1) provides that all partners are jointly and severally liable for all obligations of the partnership. This even applies to partners with only a nominal interest in the partnership property. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d at 500¹³.

¹³The *Gildon* defendant argued that plaintiff's case should be dismissed because she did not name the partnership as a defendant. The *Gildon* Court ruled that dismissal was not appropriate because the partnership was not an indispensable party as the plaintiff could recover directly from the partner, *even if its liability had been vicarious* instead of direct. 158 Wn.2d at 504, ¶33. (Emphasis added.)

In the *Gildon* case, the plaintiff sustained an injury and sued the property manager of a shopping mall. The defendant held a 0.01% partnership interest¹⁴ in that mall. 158 Wn.2d at 490. The *Gildon* Court first analyzed the relationship between the partners and the partnership:

It is black letter law that when a partner acts within the scope of the partnership business, the partner *expands* liability. *See, e.g.,* J. William Callison & Maureen A. Sullivan, Partnership Law and Practice: General and Limited Partnerships § 8:1 (1992) (the agency power is implied in the partnership relationship, and as long as the relationship continues, every partner may act within the scope of the partnership business and thereby risk the partnership's assets and create liability for his or her copartners). (Footnote omitted.)

158 Wn.2d at 498, ¶24. Next, it discussed a goal of the Revised Uniform Partnership Act as adopted by the State of Washington:

In reforming RUPA's liability provisions, the drafters intended to enable creditors to more easily enforce their claims against a partnership by eliminating the procedural complexities arising from joint liability

158 Wn.2d at 499, footnote 17 to ¶25. The Court then ruled that:

Under RUPA, partners are jointly and severally liable for *all* partnership obligations, without exceptions for “mere” or small partners. *RCW 25.05.125(1)* (“all partners are liable jointly and severally for all obligations of the partnership”). Furthermore, while partners are permitted to modify many of the statutory provisions in their partnership agreement, partners are not permitted to modify joint and several liability

¹⁴The defendant's subsidiary owned the remaining 99.99% interest.

to third persons. *RCW 25.05.015(2)(j)* (a partnership agreement may not restrict the rights of third parties under this chapter). (Footnotes omitted.)

158 Wn.2d at 500, ¶27. In summary, the *Gildon* Court ruled that partners are jointly and severally liable for all partnership obligations incurred in the conduct of partnership business regardless of the amount of their partnership interest, and that partners cannot modify the rights of third parties.

Here, as in *Gildon*, Mr. Reynolds was using partnership assets for the business purposes of the Partnerships, which included, among many other things, leasing the cattle to his dairy operation. As the result of Mr. Reynolds's failure to pay Mr. Hodges for all of the hay and straw these animals consumed, he directly incurred an indebtedness to Mr. Hodges, and he also obligated the Partnerships and its partners to payment of the debt because, as stated in the statute and in *Gildon*, joint and several liability is created when a debt is incurred during the conduct of partnership business. Although the partners agreed among themselves that Mr. Reynolds should pay for feeding the animals while they were in milk, this agreement was not binding on Mr. Hodges.

The lease of the Partnerships' cattle terminated when those animals were sold. A lessor retains a residual interest in the property it leases. A

“Lessor’s residual interest’ means the lessor’s interest in the goods after expiration, termination, or cancellation of the lease contract.” R.C.W. 62A.2A-103(q). The Partnerships’ cattle leased to Mr. Reynolds retained a residual interest of significant value: For River Gorge, the value of the partnership’s residual interest in the cattle was \$460,000.00; and for TBM, it was \$23,050.00. *(CP, at p. 40)*

The sale of the Partnerships’ animals effectively terminated the Partnerships. R.C.W. 25.05.300. When a partnership is terminated, its assets must be first applied to discharge the obligations of creditors. R.C.W. 25.05.330(1). The \$483,000.00 residual interest value of the cattle derived from the sale should have been applied to pay Partnership debts, including Mr. Hodges’s claim. If there are insufficient assets from the proceeds to pay the partnership debts when a partnership is dissolved, the partners are required to contribute sufficient funds to pay those debts in full, even if one or more partner fails to make the required contribution. R.C.W. 25.05.330(3) and (4). The Partnerships did not follow the procedures to settle accounts as required by R.C.W. 25.05.330, and the partners remain jointly and severally liable to pay the debt owed to Mr. Hodges. R.C.W. 25.05.125(1)¹⁵.

¹⁵Actions may be brought jointly or separately against the partners and the Partnerships. R.C.W. 25.05.130(2).

The cattle consumed the hay while the herd increased in size, produced embryos, semen, and bull calves, etc. The hay consumed by the cattle conferred a great benefit upon the Partnerships, and the Partnerships are liable to pay for that hay.

IV. CONCLUSION

The Partnerships claim that they have no liability on Mr. Hodges's claim because Mr. Reynolds fed the hay to the animals in the course of operating his dairy. The size of the Partnerships' herds did not increase just because the cows got milked. This hay kept the animals healthy and enabled the Partnerships to successfully engage in its businesses of investing in registered dairy cattle, improving genetics of the herd, implanting embryos in dairy cows to increase the size of the herd, selling bulls for breeding purposes, contracting sale of semen for artificial insemination purposes, harvesting embryos, selling embryos, leasing milk cows, selling cull cows, and ultimately liquidating the herd for an appreciable sum of money. The summary judgment ruling that River Gorge, TBM, and Dr. Chamberlain are jointly and severally liable on the indebtedness owed to Mr. Hodges incurred

by sale of the hay and straw consumed by Partnership cattle should be affirmed.

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Respectfully submitted,

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