

63734-7

63734-7

NO. 63734-7

---

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

---

In re Estate of RODGER W. BENSON, JR, Deceased,

RODGER W. BENSON, III,

Appellant,

v.

JOAN BENSON,

Respondent.

---

APPELLANT'S REPLY BRIEF

---

Michael L. Olver, WSBA #7031  
Christopher C. Lee, WSBA #26516  
Attorney for Appellant  
Betts, Patterson & Mines, P.S.  
One Convention Place – Suite 1400  
701 Pike Street  
Seattle, Washington 98101-3927  
(206) 292-9988

2010 APR -5 PM 4:44  
FILED  
COURT OF APPEALS DIVISION 1  
SEATTLE, WASHINGTON

**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ARGUMENT ..... 1

A. The Preponderance Of The Evidence Does Not Support The Trial Court’s Finding That There Was No Partnership..... 1

1. Mr. Decker’s testimony shows that Rodger the Dad and Rodger the Son were not merely “spending time together.” ..... 2

2. Everyone close to Rodger the Dad say there was a “partnership.” ..... 8

3. The Red Herrings In Joan Benson’s Brief. .... 16

B. The Dead Man’s Statute Does Not Prevent Rodger The Son From Testifying About Documents And His Actions ..... 20

1. Rodger the Son’s testimony confirms the existence of a partnership and his contributions to the partnership. .... 20

2. Rodger the Son should have been permitted to testify to his own acts taken whether or not in the presence of Rodger the Dad and to offer testimony regarding his own impressions and feelings. .... 22

a. Rodger the son is permitted to testify regarding these acts he took “solely.” ..... 23

b. Actions taken must be those “solely” of the adverse party and does not require that the decedent not be physically present. .... 25

c. Rodger the Son should have been allowed to testify as to his impressions and feelings ..... 28

C. Whether Separate Or Community Property Rodger The Son’s Right To His Distribution Of Partnership Profits Is Not Altered..... 29

D. Joan Benson Should Not Be Awarded Attorneys’ Fees..... 32

III. CONCLUSION ..... 33

## TABLE OF AUTHORITIES

### Case Law

<i>Aetna Life Ins. Co. v. Bunt</i> , 110 Wn.2d 368, 754 P.2d 993 (1988) .....	31
<i>An how v. Furth</i> , 13 Wn. 550, 43 P. 639 (1896) .....	24-27
<i>Boettcher v. Busse</i> , 45 Wn.2d 179, 277 P.2d 368 (1954) .....	27
<i>Eder v. Reddick</i> , 46 Wn.2d 41, 278 P.2d 361 (1955) .....	1
<i>Estate of Lennon v. Lennon</i> , 108 Wn. App. 167, 29 P.3d 1258 (2001) .....	23
<i>Fields v. Andrus</i> , 20 Wn.2d 452, 148 P.2d 313 (1944) .....	29
<i>Gleason v. Metropolitan Mortgage Co.</i> , 15 Wn. App. 481, 551 P.2d 147 (1976) .....	18
<i>Hamlin v. Merlino</i> , 44 Wn.2d 851, 272 P.2d 125 (1954) .....	30
<i>Holmes v. Lerner</i> , 74 Cal. App. 4th 442, 88 Cal.Rptr.2d 130 (1999) .....	20
<i>Holyoke v. Jackson</i> , 3 Wash. Terr. 235 (1882) .....	29
<i>In re Fair Oaks, Ltd.</i> , 168 B.R. 397 (1994) .....	19
<i>In re Marriage of Bryant</i> , 125 Wn.2d 113, 882 P.2d 169 (1994) .....	29
<i>In re Marriage of Short</i> , 125 Wn.2d 865, 890 P.2d 12 (1995) .....	31
<i>Jacobs v. Brock</i> , 23 Wn.2d 234, 437 P.2d 920 (1968) .....	25, 26, 28
<i>King v. Clodfetter</i> , 10 Wn. App. 514, 518 P.2d 206 (1974) .....	26
<i>MacKenzie v. Sellner</i> , 58 Wn.2d 101, 361 P.2d 165 (1961) .....	32
<i>Malnar v. Carlson</i> , 128 Wn.2d 521, 910 P.2d 455 (1996) .....	18, 19
<i>Minder v. Gurley</i> , 37 Wn.2d 123, 222 P.2d 185 (1950) .....	1, 8
<i>Nicholson v. Kilbury</i> , 83 Wn. 196, 145 P. 189 (1915) .....	18
<i>Oil Heat Co. of Port Angeles, Inc. v. Sweeney</i> , 26 Wn. App. 351, 613 P.2d 169 (1980) .....	29
<i>Olver v. Fowler</i> , 161 Wn.2d 655, 168 P.3d 348 (2007) .....	18
<i>Potter v. Scheffsky</i> , 139 Wn. 238, 246 P. 576 (1926) .....	19
<i>Richard v. Pacific National Bank</i> , 10 Wn. App. 542, 330 P.2d 321 (1958) .....	27

<i>Rivas v. Overlake Hosp. Medical Center</i> , 164 Wn.2d 261, 189 P.3d 753 (2008) .....	15
<i>Vogt v. Hovadder</i> , 27 Wn. App 168, 616 P.2d 660 (1979) .....	27
<i>Woepfel v. Simanta</i> , 53 Wn.2d 21, 330 P.2d 321 (1958) .....	27

**Statutes**

RCW 11.44.035	
RCW 11.96A.150(1) .....	32
RCW 25.04.100 .....	19
RCW 25.05.055(1) .....	19
RCW 25.05.300 .....	19
RCW 25.05.330 .....	19
RCW 26.16.030(2) .....	29
RCW 26.16.140 .....	30

## I. INTRODUCTION

Petitioner Rodger W. Benson III (“Rodger the Son”) left a lucrative, senior management position to work with his father. It was not merely to spend time with his father. It was for the purpose of pursuing a partnership in the areas of minerals and mineral securities investment. The admitted evidence shows that there was a joint or common venture. The overwhelming and un-rebutted evidence should, in fairness, compel this Court to reverse the trial court’s decision that there was no partnership. The totality of the evidence is inconsistent with any other theory.

## II. ARGUMENT

### A. **The Preponderance Of The Evidence Does Not Support The Trial Court’s Finding That There Was No Partnership**

The Washington Supreme Court has consistently held that a reviewing court may set aside a trial court’s finding regarding the existence of a partnership if the preponderance of the evidence does not support the trial court’s finding. *Eder v. Reddick*, 46 Wn.2d 41, 48, 278 P.2d 361 (1955) citing *Minder v. Gurley*, 37 Wn.2d 123, 131, 222 P.2d 185 (1950).

The trial court, and Joan<sup>1</sup> in her brief, relied heavily upon the testimony of Brian Decker, Rodger the Dad’s stock broker, to find that there was no partnership between Rodger the Dad and Rodger the Son. Examining Mr. Decker’s testimony, the opposite finding is revealed.

1. Mr. Decker's testimony shows that Rodger the Dad and Rodger the Son were not merely "spending time together."

Mr. Decker characterized the work that Rodger the Dad and Rodger the Son did as "spending time together." RP 789. He, however, admitted that those were not the words that Rodger the Dad used: "I'm sure those weren't his exact words." Id. Mr. Decker's characterization of what Rodger the Dad and Rodger the Son were doing came about during pre-deposition preparation he had with Thompson & Howle, Joan's counsel. RP 784, 789. But Mr. Decker had no basis to opine whether Rodger the Dad and Rodger the Son were in a partnership, because he never expressly talked about whether they were in a partnership. RP 866. However, Mr. Decker's testimony regarding his own observations of the interaction between Rodger the Dad and Rodger the Son shows that there was, indeed, a partnership.

According to Mr. Decker, Rodger the Dad and Rodger the Son, two grown men, had a name for their "time together" – "Benson Ventures". RP 863. Benson Ventures was engaged in mineral research, and Mr. Decker was aware of this. Id. Not coincidentally, Benson Ventures was also the "firm or employer" of Rodger the Dad as identified on his application for the financial brokerage account with Mr. Decker used to accumulate the mineral securities portfolio. RP 800, Ex. 78. Mr. Decker testified that at the time he received

continued . . .

1 For convenience, first names will be used for those who share the same surname "Benson."

the information identifying Rodger the Dad's "firm or employer" as Benson Ventures, he was aware that "Benson Ventures" was "referring to the time that he [Rodger the Dad] and his son are [sic] having together." RP 800-801. His attempt to parse the concept at the suggestion of Joan's counsel is strained—except when one realizes that he and his partner are continuing to manage Joan's multimillion dollar portfolio. RP 820-21.

Mr. Decker saw that these two men had prepared letterhead with the name "Benson Ventures." RP 779, 787-88. Mr. Decker placed buy-sell orders on faxes from Rodger the Son with the words "Benson Ventures" on the fax coversheet. RP 784. According to Mr. Decker, Rodger the Dad had his answering machine greet all callers with "Benson Ventures" up until the time of his death. RP 791.

Rodger the Dad had given his son unlimited written authority in the mineral securities account, with an authorization drafted by Mr. Decker, to buy or sell stocks on the sole authority of the son. RP 769, 829-30. Unfortunately, Mr. Decker could not produce the written authority during discovery. RP 770. Under the authorization provided by Rodger the Dad, Mr. Decker was required under FCC rules to enact any trades as directed by the authorized party, Rodger the Son. RP 778. Rodger the Son did in fact enact numerous trades on the Benson Venture's mineral securities account. RP 778 (despite Mr. Decker's characterization of Rodger the Dad and Rodger

the Son's work as merely "spending time together"). If they were just "spending time together" and not in a joint venture or partnership, would either Mr. Decker or Rodger the Dad allow such unlimited authority?

Mr. Decker received from Rodger the Son a letter listing 17 trading positions and opinions regarding 11 other stocks. RP 797-98, Exhibit 81. The letter referred to "our portfolio" and contained the statement "stocks we want to own." Mr. Decker understood that "our portfolio" was the mineral portfolio as apposed to a non-mineral portfolio in the name of Rodger the Dad, and that the "we" referred to in the letter was Rodger the Dad and Rodger the Son. RP 798-99.

Mr. Decker testified that he knew that Rodger the Son had some interest ("skin in the game" as Mr. Decker called it), in the mineral securities account. RP 784-87. Mr. Decker, however, had no idea what was the extent of Rodger the Son's investment, or what Rodger the Son's "skin the game" was. RP 863.

Joan places significant emphasis on the argument that Rodger the Dad told Mr. Decker that it was all his money in the brokerage account. Even if Rodger the Dad was not just blowing off an intrusive question, it has no probative value. During that conversation, there was no mention of Benson Ventures. RP 862. This conversation was limited to how to title the account holding the mineral stocks should be titled. RP 861. Mr. Decker admitted

that Benson Ventures was the name Rodger the Dad gave to Mr. Decker describing the mineral securities investment activity, essentially Rodger the Dad and Rodger the Son's joint venture. RP 961-62. Mr. Decker never asked whether Rodger the Son had any money invested in Benson Ventures. RP 862. There is absolutely no other witness among all the family (and ex-wife) to contradict that Rodger the Son and his wife Karla invested all of their life savings in this mineral securities account. Mr. Decker, Wright Benson and Anthony Benson all testified that Karla and Rodger the Son were personally invested in the mineral securities account characterized in dozens of exhibits as "Benson Ventures." The fact of the investment is unrebutted.

Even during the start of the partnership between Rodger the Son and Rodger the Dad, Rodger the Son had knowledge regarding the ability to conduct fundamental analysis of esoteric mineral securities, which Mr. Decker agreed was a highly specialized and speculative area in which he had no expertise. RP 765, 814-15. (Please see RP 794-95 for an extensive discussion of a fundamental analysis by Rodger the Son that is NOT the province of a dilettante).

Mr. Decker's assumption (which should not have been admitted) that Rodger the Son had ceased being involved after 1998 was simply due to the fact that Mr. Decker never received any more trade orders from Rodger the Son after 1998, which would be understandable since Rodger the Son had

taken on full-time employment and was employed during the day at Mortenson Construction as its Director of Business Development working on multimillion dollar projects. RP 826-27. Mr. Decker never discussed with Rodger the Dad, Rodger the Son's involvement in Benson Ventures after Rodger the Son went to work at Mortenson in 1998. RP 818, 865-67.

Mr. Decker didn't understand the relationship between Benson Ventures and Rodger the Dad's mineral securities account, although he should have, if his testimony regarding check deposits was correct. Mr. Decker alleged that he was usually informed by Wedbush Morgan when clients sent in a check, so he could confirm where the funds came from. RP 802. Mr. Decker's alleged custom was to follow up with the client to ask about every check. Id. Mr. Decker allegedly talked to Rodger the Dad almost every time a check was sent. RP 803. It was also Wedbush's alleged practice to contact Mr. Decker if they received a check drawn on a joint account if it was being deposited into a single account. RP 810. But see below.

However, admitted at trial were the only four checks drawn from the "Benson Ventures" account that could be located that were sent to Wedbush Morgan from the Benson Ventures checking account at U.S. Bank: check no. 114 for \$5,000, no. 115 for \$16,315, no. 140 for \$38,000, and no. 141 for \$2,000, totaling \$61,315. RP 805-807; Ex. 29. All checks were signed by

Rodger the Son. Each check identified the payor as “Benson Ventures/Rodger Benson Jr./Rodger W. Benson III.” Ex. 7. Yet according to Mr. Decker, Morgan Wedbush never called him on any of these four checks! RP 809. Mr. Decker testified, however, that early in his work with Rodger the Dad, when Wedbush Morgan received checks from Rodger the Dad on joint accounts, Wedbush Morgan would ask why is a joint check going to a single account and Rodger the Dad would have to redo the checks. RP 809-10. Many of us have sent checks to our broker for deposit whether from gifts, third party sales, business transactions, other accounts in third party names (corporate, partnership, joint ventures) etc., without even having our broker call us regarding the payor on the account. It would be unacceptably intrusive.

So although Wedbush Morgan had an alleged history and custom of making calls to Mr. Decker to discuss checks from joint accounts being deposited into individual accounts, Mr. Decker testified he never received such calls for the only four checks from the Benson Ventures checking account that are extant.<sup>2</sup> RP 810.

---

<sup>2</sup> Mr. Decker also testified that he was aware of a letter sent to “Bryant” at Wedbush Morgan Securities directing disbursement of funds. The letter directed funds to be sent to the Benson Ventures’ bank account. RP 791-92; Ex. 80. It should be noted that the letter, which was on Benson Ventures letterhead, listed an email address, which is the email address listed on the business card of Rodger the Son, not Rodger the Dad. Please compare Exhibits 4 and 80.

Mr. Decker alleged that Rodger the Son never signed checks that were deposited into the mineral portfolio account, but Rodger the Son signed each of the four checks from the Benson Ventures account. RP 197-99 (not Rodger the Dad's handwriting), 812, 1110-22, 1125-27. Rodger the Son signed his name on checks as "Rodger W. Benson III." Ex. 7. Mr. Decker personally observed the two Rodgers working together in the Benson Venture's office at Rodger the Dad's condominium and called Rodger the Son at the same office when Rodger the Dad was out of town. RP 796, 816, 825-26.

The actions of Rodger the Dad and Rodger the Son even as seen by Mr. Decker prove the existence of a joint venture or partnership. It is not merely father and son "spending time together." When no other theory can explain the totality of facts and circumstances then the existence of a partnership must be found. *Minder v. Gurley*, 37 Wn.2d at 129-30. No other theory was even advanced.

2. Everyone close to Rodger the Dad say there was a "partnership."

There were eleven fact witnesses at trial: Joan Benson, Dennis Reed, Susan Reed, Brian Decker, Wright Benson, Anthony Benson, Carolyn Barclay, Jennifer Benson, Ryan Benson, Karla Benson and Rodger the Son. Rodger the Son and Karla could not testify to the existence of a partnership because of the Dead Man's Statute. (Addressed, *infra*, p. 20.)

On the one hand, Susan Reed, who is Joan's daughter, and Dennis Reed, Susan's husband, had not had any sort of relationship with Rodger the Dad since Rodger the Dad had stopped living with Joan in the 1980s. RP 1026. Susan and Dennis Reed had not heard of "Benson Ventures" until after Rodger the Dad's death. RP 554-55, 726. Brian Decker's belief that there was no partnership, as set forth above is not credible. Joan who ostensibly maintained a relationship with Rodger the Dad since his moving out in the 1980s testified that she not only had never heard of a partnership, but never even heard of Benson Ventures, until after Rodger the Dad's death. RP 176. She, however, did testify that she had been told by Rodger that Dad that Rodger the Son had quit his job to "work with his father." RP 161, 164-65, 180, 218, 1029. There are only so many relationships that fit her description ("work with his father")—boss—employee—partner. "Spending time together" is not consistent with quitting a job to "work with his father."

On the other hand, Carolyn Barclay, who is Rodger the Dad's second ex-wife; Anthony, and Wright, who are Rodger the Dad's brothers; and Jennifer, and Ryan, who are Rodger the Dad's grandchildren all kept close and frequent contact with Rodger the Dad during the ten years that Rodger the Dad and Rodger the Son worked together in the mineral securities business. All these witnesses testified to knowing that there was a

partnership or joint venture between Rodger the Son and Rodger the Dad, based upon conversations (direct and overheard), too numerous to count.

Rodger the Dad helped rehabilitate Anthony from a severe brain injury he sustained while working at Boeing. In Anthony's own words, after Anthony's accident Rodger the Dad taught Anthony how to regain his life from dressing himself to enjoying the arts. RP 506-07. They drove all over the country together—burning through 4 new Lincoln Town cars. RP 535.

Wright may be Rodger the Dad's closest relationship during his life except for Karla and Rodger the Son. Wright spoke with Rodger the Dad multiple times on a daily basis and was frequently visited by Rodger the Dad. RP 451-52. Rodger the Dad would drive to San Diego numerous times to visit his brother because Rodger the Dad did not like to fly. Id. Carolyn Barclay developed a closer relationship with Rodger the Dad following their divorce based on their shared daughter and grandchildren. Rodger the Dad visited Ms. Barclay several times. Jennifer and Ryan had a very frequent and close relationship with Rodger the Dad. RP 967, 991-93. These five people whose lives were intimately involved with Rodger the Dad's life between 1997 and 2007 testified that there was a partnership between Rodger the Dad and Rodger the Son, based upon a decade of observations of actions and conversations with both participants, saying those words: "partner" and "partnership." No witness testified to the contrary. Joan said Rodger the Son

“worked” with his father; Mr. Decker saw him working and knew he had “skin” in the game—both testimonies support the partnership relationship rather than contradict it.

The trial court did not find Anthony and Wright to be objective or credible witnesses. To address any lack of credibility or objectivity, we will focus on the testimony of Anthony and Wright that can be corroborated by other witnesses.

Ex-wife Carolyn Barclay testified that in 1997, at a graduation dinner for their daughter, Rodger the Dad talked excitedly about gold conventions and meetings that he would be attending with Rodger the Son. RP 413. In late 1997, Ms. Barclay had several conversations with Rodger the Dad regarding what he and Rodger the Son were doing, such as “annual meetings of the business that he was investing in, the partnership was investing in, or he and Rodger [the Son] went someplace, and it had to do with gold stocks or gold mines or minerals.” RP 416.

Ms. Barclay moved to Provo, Utah in 2000 and she would see Rodger the Dad about three times a year. RP 419. During his visits, Rodger the Dad would continue to discuss the same business and on at least one occasion gave Ms. Barclay a card for Benson Ventures. RP 420-21, Ex. 93. When Ms. Barclay would call Rodger the Dad, up to 2004 when she last called Rodger the Dad, she would be greeted by Rodger the Dad or the answering

machine stating “Benson Ventures.” The answering machine was in Rodger the Son’s voice. RP 417. And from 1997 through 2004, during several conversations, when Rodger the Dad discussed his business, Rodger the Dad told his ex-wife that Rodger the Son was his “partner.” RP 433. From an ex-wife who went through a nasty divorce with decedent, the testimony during “several conversations” that Rodger the Son was his “partner” is compelling testimony corroborating Anthony and Wright’s thousands of conversations. (Please see opening brief, pages 30 to 40).

Jennifer was 16 in 1997. RP 965. In 1997, there was a family meeting where she was informed that her dad, Rodger the Son, would be leaving his senior position at Turner Construction. RP 966. After the meeting in 1997, Jennifer saw her grandfather much more frequently. RP 967. In 1997 and 1998, Jennifer knew that her father was working with her grandfather. RP 969. When she watched television in the basement she saw Rodger the Dad and Rodger the Son on the computer a lot working together, and talking about gold and stocks. RP 969-70. During 1997-98, Jennifer knew her father and grandfather went almost monthly on trips related to mining. RP 970-71. After 1998, after going to work at Mortenson Construction, Jennifer observed her father in their home office. He worked there daily for about two to three hours in the evenings, often in discussions with her grandfather, talking about “Benson Ventures.” RP 974. Her

grandfather was physically present in the family's basement with her father about four to five times a month in that downstairs office. Id. She observed them talk to third-parties about Benson Ventures and they would refer to each other as "partners." RP 975. That routine and practice was the same from 1998 to 2000, and again in 2000 and 2002; Jennifer moved out during 2000 to 2002 and could not testify to that period. RP 976-77.

In 1997, Ryan was 13 years old. RP 982. Ryan also testified about the family meeting and that he was told that his father and grandfather were forming a partnership and that his father was leaving Turner Construction. RP 984. Ryan testified to the trips that Rodger the Dad and Rodger the Son took together regarding mining. RP 989-90. Ryan also testified to conversations he heard in the basement while watching television between his father, grandfather and third parties where his father and grandfather referred to each other as "partners." RP 988, 994-95. When Ryan's family got together with his grandfather, Rodger the Son and Rodger the Dad would talk exclusively about gold and mineral stocks. RP 997.

As confirmed by the above testimony, Wright Benson testified that Rodger the Dad would answer his office phone, "Benson Ventures." RP 453. Wright confirmed that Rodger the Son attended gold conferences with Rodger the Dad. RP 457, 459-60. Wright also testified that Rodger the Dad mentioned Benson Ventures; Benson Ventures was a partnership between

Rodger the Dad and Rodger the Son; that the two had offices in Rodger the Dad's condominium and at Rodger the Son's home; and Rodger the Dad had Benson Ventures business cards. RP 465-66. Wright knew that Rodger the Son had made contributions of about 1/6th of the dad's contribution to the partnership based on discussions with Rodger the Dad. RP 477.

(Corroborating Mr. Decker's testimony that he understood Rodger the Son to have some "skin in the game.") Wright personally saw Rodger the Dad and Rodger the Son working together on minerals and mineral securities in the office. RP 491-92.

As confirmed by third parties, Anthony also testified that Rodger the Dad and Rodger the Son worked together. RP 510, 511-12. Anthony testified that his brother, Rodger the Dad, stated he and Rodger the Son were "partners." RP 511.

Six witnesses knew of Benson Ventures during the life of Rodger the Dad (Joan Benson, Susan Reed and Dennis Reed did not). Of the six, all except Mr. Decker testified that it was a partnership between Rodger the Dad and Rodger the Son. All testified that Rodger the Dad and Rodger the Son worked together in investing in minerals and mineral securities past 1998 to 2002 (Jennifer); to 2004 (Ms. Barclay) and to death in 2007 (Wright, Anthony, Ryan, Karla and Rodger the Son). All, including Mr. Decker testified that Karla and Rodger the Son were invested in the project.

Relying upon Rodger the Son's amended petition, Joan argues that Rodger the Son stated he departed the partnership, and hoped to return later as evidence that the partnership ceased in 1998. However, the full text of the referenced petition states: "Petitioner's departure did not alter his equal share in the partnership, nor his daily participation in the evaluating and decision making process." CP 51, l. 6-8. The "return", discussed later on the page of the amended petition, refers to Rodger the Son's return to full-time engagement in Benson Ventures, which is confirmed by the rest of the amended petition. Joan is using sleight of hand with words, just as the creation of the phrase "spending time together" in a witness's pre-deposition meeting is ju jitsu with words—imprecise to an extreme.

Rodger the Son did not attempt to memorialize his partnership rights before his father's death because everyone knew it was a partnership; he was continuing in the work with his father; and he had no way of knowing his father would die suddenly from a bicycle accident.

In light of all the testimony by every knowledgeable witness, most of which is ignored by Joan in her brief, and the incredible amount of work put in by Rodger the Son from 1997-2007 in the mineral industry, *infra*, Joan could not satisfy her burden to show that Rodger the Son disassociated from the Benson Ventures partnership in 1998. *Rivas v. Overlake Hosp. Medical Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008).

3. The Red Herrings In Joan Benson's Brief.

Joan points to Rodger the Son's personal investments in mineral securities as the basis for his work in mineral securities. Rodger the Son had \$5,000 personally invested in mineral securities. A \$5,000 investment does not comport with the time and effort that Rodger the Son put in over ten years. Also, it is unrealistic to argue that because Rodger the Son didn't share his profits in his personal investment of \$5,000 that Rodger the Son could not have been partners with his father investing in the mineral securities account described in binders, stock projections and historical records as belonging to Benson Ventures. Please see, Ex.46 (binder); Ex.14 (Growth Projections); and Ex.16, 98 (list of stocks purchased or transferred into the Benson Ventures portfolio over time).

Joan also argues that Benson Ventures could not be a partnership because it was not mentioned in Rodger the Dad's divorce pleadings or his putative 2007 will. Rodger the Dad's Response in the divorce stated there was no marital community and that property had been divided with Joan when they separated. There was no need to mention any of Rodger the Dad's assets. Ex. 2. Apart from pointing out that Rodger the Dad's 2007 will did not mention Benson Ventures, Joan does not argue why Benson Ventures should have been mentioned. Ex. 161. It is simply misleading to imply that people describe their assets in notice pleading Responses in divorce or in

wills where the residue is left to a charity. Any attorney practicing in these fields would dismiss the probative value of such “evidence” as nonsense.

A partnership dissolves at the death of a partner and Rodger the Dad’s partnership percentage would have passed to his Estate. Rodger the Son’s share of Benson Ventures would not have become part of Rodger the Dad’s Estate, which was the basis for Rodger the Son’s contradiction of inventory claim under RCW 11.44.035 seeking to have his partnership share of the assets determined and returned to him.

Joan implies that the U.S. Bank Benson Ventures checking account was Rodger the Dad’s. Yet there was never any evidence of where the money came from for the Benson Ventures checking account. Rodger the Son was prohibited from testifying because of the Dead Man’s Statute. The money could have just as probably been Rodger the Son’s money as it was Rodger the Dad’s money.

In fact, Joan testified that as far as she knew Rodger the Dad had no money and was surviving on his Social Security. RP 182. Joan argues that because Rodger the Dad’s Social Security number is associated with the U.S. Bank account, the money must be his. There was no testimony from anyone at U.S. Bank regarding how Social Security numbers for individual, joint or partnership accounts are recorded. This Court should look to the evidence that was admitted. The U.S. Bank records show a checking account with

three names: “Benson Ventures, Rodger Benson, Jr., and Rodger W. Benson III.” Ex. 5. The checks and the statements are in accord. (Compare Ex. 5 with Ex. 29, check nos. 114, 115, 140, 141-all signed by Rodger the Son.

The fact that the name “Benson Ventures” was mentioned prior to the formation of a partnership does not preclude a finding that Benson Ventures became a functioning partnership. And while the existence or non-existence of partnership tax documents may be considered, as Michael Gillespie testified, family partnerships tend to operate with less formality. RP 910-13. See *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 481, 495, 551 P.2d 147 (1976) (trial court attached little significance to fact that no partnership tax forms were filed).

It does not matter that Rodger the Dad’s stock portfolio was held in his name. A partnership can still be found where title was only held in one name. *Malnar v. Carlson*, 128 Wn.2d 521, 530-31, 910 P.2d 455 (1996); *Nicholson v. Kilbury*, 83 Wn. 196, 204, 145 P. 189 (1915) (in light of all evidence little weight given to fact all property titled to deceased partner); *see also Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007) (allowing for equitable distribution of property in intimate committed relationship even if property held in one name).

When Benson Ventures became a partnership in 1997, RCW 25.04.100 was the applicable law. Under RCW 25.04.100, there was no

presumption that property held in the name of one or more, but not all partners, and not in the name of the partnership was separate property. But, similar to determining the existence of a partnership, whether property is “partnership property is determined by the understanding and intention of the partners.” *In re Fair Oaks, Ltd.*, 168 B.R. 397, 402 (1994); *Malnar*, 128 Wn.2d at 530-31; *Nicholson*, 83 Wn. at 204. Rodger the Son had “skin in the game.” Focusing on the possible absence of financial contribution by Rodger the Son does not mean a partnership cannot exist. *Malnar*, 128 Wn.2d at 535 (parties can contribute property, labor, skill and experience, some elements on one side and some on the other).

Finally, a partnership must be formed “for the purpose of joint profits.” *Malnar*, 128 Wn.2d at 535; RCW 25.05.055(1). Joan conflates this rule to argue that a partnership must distribute profit and loss during the partnership. A partnership has no such requirement to distribute profits currently. The distribution of profits or losses can wait until dissolution of the partnership. RCW 25.05.300 and .330. While an agreement to distribute profits and losses can be an indicator of the existence of a partnership, the details as to the manner in which partners were to divide profits and losses are not an essential component for finding the existence of a partnership. See *Potter v. Scheffsky*, 139 Wn. 238, 240, 246 P. 576 (1926).

Although the specific issue has not been analyzed in Washington, a California case has analyzed whether there must be an agreement to distribute profit and loss. *Holmes v. Lerner*, 74 Cal. App. 4th 442, 88 Cal.Rptr.2d 130 (1999). (Attached as Appendix.) In *Holmes*, the Court noted that California had adopted the Uniform Partnership Act, and under the UPA the distribution of profit was not an element of a partnership, but was only evidence of a partnership. *Id.* at 453-54. Washington adopted the same language analyzed in *Holmes*. *Holmes*, 74 Cal. App. 4th at 453-54 compare RCW 25.05.005(6).

**B. The Dead Man's Statute Does Not Prevent Rodger The Son From Testifying About Documents And His Actions**

1. Rodger the Son's testimony confirms the existence of a partnership and his contributions to the partnership.

There was admitted testimony that Rodger the Son left his 18 year career at Turner Construction to work with his dad. RP 1046, 1055, 1067-68, 1136, Ex. 90 (letter of resignation). At the time he left Turner, Rodger the Son was earning \$120,000 annually plus perks. RP 1050-51. He had a mortgage, three kids and family expenses. RP 1054. Upon his departure he liquidated his 401k, and paid penalties and taxes. RP 258, 1131.

There was admitted testimony that when Rodger the Son left Turner Construction he went into the mineral stock investment business. RP 1072. Rodger the Son bought office furniture, computer equipment, fax machine,

telephone answering machine, designed and printed business card, designed and printed expense reports, designed forms, designed and printed stationary, set up certain financial books, tracking devices, created spreadsheets, and the like. RP 1073; 1090-91 (prepared Benson Ventures binder, please see Ex. 46); 1103; 1153-54 (describing relationship of certain documents), 1158. See RP 1099-100 (describing function of Benson Ventures binder). Rodger the Son wrote half the checks and made half the entries into the Benson Ventures checkbook. RP 1092-93; Ex. 29.

There was admitted testimony at trial that Rodger the Son created and maintained two Yahoo! computer accounts that daily traced the Benson Ventures portfolio. RP 1143, 1172-75, 1180. He was the only one to update the Yahoo! accounts between 1998 to 2007, except for a couple of days when one of Rodger the Dad's girlfriends tried to help but misspelled "Rodger" as "Roger," in the data entry. RP 1181-83, 1191, 1194, 1198-99, 1204-1206, Ex. 48A. The Yahoo! computer account made the handwritten lists of Benson Venture stocks done by dad in the Benson Ventures Binder (Ex. 46) obsolete. Each page of the Yahoo! accounts admitted at trial have a "BV" or similar designation on them somewhere.

At trial, Rodger the Son demonstrated he was well-versed in the sources of information, players, and facts and history of international gold mining and mineral securities. RP 1120-21, 1134-35 (describing Almaden, a

junior mining company), 1137-41 (brief tutorial on mining industry); 1179-80 (knowledge of mineral company stock ticker symbols); 1186-87 (describing Strongbow and Kalahari); RP 1215-24 (describing technical and fundamental analysis of the mining industry); RP 1225-26 (describing early learning); RP 1235-37 (describing Bre-X scandal); RP 1275 (knowledge of Canadian and U.S. claim staking procedures). Rodger the Son not only went to mining conferences, he visited mining companies, kept technical records, charted stocks, did technical analysis of stocks, read news releases and promotional materials and annual reports, and talked to company executives and surveyors. RP 1122-23, 1214. These were the exact activities and skills that according to Mr. Decker made Rodger the Dad an expert in the mineral industry. RP 817. Rodger the Son is not a dilettante “spending time with his father”—he is clearly an expert in the field of investing in the gold industry portfolio listed in the Benson Ventures Binder, Ex. 46 in the office.

For all the activities related to mineral resource activity, where Rodger the Dad was not present (addressing Dead Man’s Statute), Rodger the Son put in excess of 5,000 hours from 1997 to 2007. RP 136.

2. Rodger the Son should have been permitted to testify to his own acts taken whether or not in the presence of Rodger the Dad and to offer testimony regarding his own impressions and feelings.

The trial court made two errors in excluding the testimony by Rodger the Son to acts taken by him “solely.” The first error was that the trial court

conflated relevance and inferences of a transaction, thus barring relevant testimony if it tended to imply a partnership. Second, the trial court erred by finding that Rodger the Son could only testify to acts that he had taken while “alone,” referring to the presence of Rodger the Dad, as opposed to “solely,” which indicated acts taken by Rodger the Son himself.

a. Rodger the son is permitted to testify regarding these acts he took “solely.”

It is essential for purposes of the Dead Man’s Statute that “the decedent was both present and directly involved in the matter at hand.” *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 178, 29 P.3d 1258 (2001) (emphasis added). In reviewing Appendix C of Appellant’s Opening Brief, the Court can see that the trial court used relevance as an element of whether the Dead Man’s Statute applied. Fundamentally, the trial court asked even if Rodger the Dad was not present wouldn’t the relevance of testimony of Rodger the Son’s acts be to prove a partnership, which is exactly the point. But the trial court went further and found that if the relevance of the evidence being offered was to prove a partnership then it would be excluded as a transaction with the decedent. (For example, counsel argued that Rodger the Dad was not present during certain acts. The Court responded, “It still seems to me, though, that he could contradict that those have any relevance at all to the enterprise.” RP 301 (Emphasis added.)) This latter addition is wholly unsupported and contrary to the existing case law on the Dead Man’s Statute.

The trial court erroneously held that relevance of the evidence, in other words if offered to prove the existence of a partnership, could not be admitted because the Decedent could ultimately dispute the existence of a partnership. The trial court relied on the limited definition of a “transaction” as any matter that the decedent, if alive, could contradict the testimony based upon his or her knowledge.”

If a person were unable to testify to acts done, not in the presence of the Decedent, because such actions would be relevant to prove a transaction with the Decedent then there would be nothing for the person to testify about. In *An how v. Furth*, 13 Wn. 550, 43 P. 639 (1896) a domestic was allowed to testify that he cooked, washed and ironed at the home of the decedent, but did not detail any conversations with himself and the deceased. *Id.* at 553. Such acts were absolutely relevant since the claim was based on a contract for services. Nevertheless the Washington Supreme Court held that such testimony “was not testimony in relation to a transaction had by him with, or any statement made to him, by such intestate.” *Id.* 554.

The trial court sustained numerous objections preventing Rodger the Son from testifying about his acts because testimony “related to a transaction” although it was not in the presence of Rodger the Dad. See RP 1066 (prohibited from testifying to actions taken by Rodger the Son because it related to a transaction with Rodger the Dad); RP 1316-17 (prohibited from

testifying with what Rodger the Son did with mail even when no one else physically present); RP 1332, 1340-41 (prohibited from testifying whether certain computer records matched account statements); see also RP 252 (Karla prohibited from testifying about her observations of her husband's routine).

b. Actions taken must be those "solely" of the adverse party and does not require that the decedent not be physically present.

While it is necessary that the decedent must be present for there to be a transaction, the converse is not necessarily true: that the presence of the decedent makes all events occurring in his presence—a transaction.

In *An How*, the domestic performed services for the decedent for over 9 years, providing cooking, washing and ironing at the home of the decedent. *An How*, 13 Wn. at 552. While the case does not mention if any work was performed in the presence of the decedent, such an inference can be made when considering that the Washington Supreme Court distinguished that the testimony did not detail any conversations between the domestic and the deceased. *Id.* at 553. In *An How*, the Washington Supreme Court used the word "solely," which later cases confirm meant those acts taken by the adversely interested party by his or herself, as opposed to actions taken only outside the presence of the decedent, or as Joan characterizes "alone".

In *Jacobs v. Brock*, 66 Wn.2d 878, 406 P.2d 17 (1965), the Washington Supreme Court made clear that the mere presence of the

decendent does not automatically turn the situation into a “transaction” with the decedent. Mrs. Jacobs took care of Dr. Brock, tending to his house, cats, domestic chores, and general well-being. Mrs. Jacobs’ care was so intimate that she provided daily enemas to Dr. Brock. *Id.* at 880. This evidence was presented by plaintiffs. *Id.* at 881-82.

Cases since have upheld that an adversely interested party can testify to their own acts, solely taken, even if in the presence of the decedent. In *King v. Clodfelter*, 10 Wn. App. 514, 518 P.2d 206 (1974), the estate objected to the testimony by the plaintiff of his work for the deceased. Citing to *An How* with approval, the court stated:

Since *An How* ... the rules has been that testimony of a party as to work performed for a decedent and about any payments received from the decedent for the work does not constitute proof of a transaction as forbidden by the statute. Such testimony relates solely to the acts of the witness and does not tend to prove the existence of an express contract. The testimony presented may not involve the statements and acts of the decedent. Within these guidelines, a claimant may testify about the work and service he performed which benefited a decedent without thereby testifying about a contract which may have existed between himself and the decedent for the performance of these services.

*Id.* at 516-17 (emphasis added) (internal citations omitted).

*King* retains the term “solely” as used in *An How*. Further *King* clarifies that the testimony of the adversely interested party may not include

conversations of the decedent or the decedents acts. *Within these guidelines*, Rodger the Son should have been permitted to testify to acts taken in Rodger the Dad's presence. See *Boettcher v. Busse*, 45 Wn.2d 579, 277 P.2d 368 (1954) (citing with approval to *An How* regarding testimony of one's own acts); *Woepfel v. Simanton*, 53 Wn.2d 21, 330 P.2d 321 (1958).

Joan cites *Vogt v. Hovadder*, 27 Wn. App. 168, 172, 616 P.2d 660 (1979) as authority that an adversely interested person can only testify to acts taken "alone," not in the presence of the decedent. The *Vogt* ruling actually supports Rodger the Son's position. First, the appellate court in *Vogt* twice inserted the word "alone" into quotes taken from the Washington Supreme Court's decision in *An How*. See *Vogt*, 27 Wn. App. at 662, 663. However, the Washington Supreme Court never used the word "alone" in *An How*, nor does it imply the concept that Henry Yesler was never physically present during the 11 years period that An How cooked, washed and ironed at Mr. Yesler's residence.

Secondly, *Vogt* cites to *Richard v. Pacific Nat'l Bank*, 10 Wn. App. 542, 330 P.2d 321 (1958). In *Richards*, the services rendered consisted of taking "... photographs of Mr. Cheney's life on a continuing basis ...". The photographer was allowed to testify that (a) he expected the account to be paid (*id.* at 548), and (b) that the services "were rendered under circumstances indicating an expectation of payment." Certainly, Mr. Cheney

was present when \$96,986 worth of photographs were taken and neither the Richard's court nor the Vogt court suggests otherwise.

Joan's misleading use of "alone" to suggest no one else could be present when the work was performed is just as misleading as suggesting to their one and only witness (Mr. Decker) that he should characterize the work of father and son as "spending time together."

c. *Rodger the Son should have been allowed to testify as to his impressions and feelings*

Case law allows testimony of a person's own impressions and opinions because it does not inherently relate to a transaction with decedent. *Jacobs v. Brock*, 23 Wn.2d 234, 237, 437 P.2d 920 (1968) (holding that opinion testimony of a person's own feelings and impressions did not violate Dead Man's Statute). In this regard, Rodger the Son should have been allowed to testify as to why he created certain documents. RP 1285-86.

The trial court erred in prohibiting testimony regarding Rodger the Son's own acts, and his own impressions and opinions. That error was an extra stone that weighed against the totality of evidence that could have been presented. Because a partnership is determined based on all the facts and circumstances, exclusion of admissible, probative evidence by the trial court's numerous rulings set new limitations on admissibility not hereto for seen in case law which prejudiced Rodger the Son and created reversible error.

**C. Whether Separate Or Community Property Rodger The Son's Right To His Distribution Of Partnership Profits Is Not Altered**

Joan Benson's claim that Rodger the Dad could not commit assets, assuming the mineral securities account was community property, to the partnership without her consent is incorrect. The authority cited by Joan, RCW 26.16.030(2), *In re Marriage of Bryant*, 125 Wn.2d 113, 882 P.2d 169 (1994), and *Holyoke v. Jackson*, 3 Wash. Terr. 235 (1882) deal with gifts of community property or the sale of community property. Community property (continuing with the assumption of community property) was neither given nor sold. Rodger the Dad invested community property into Benson Ventures, which was his absolute right to do. *Fields v. Andrus*, 20 Wn.2d 452, 148 P.2d 313 (1944) does not stand for the proposition that investment of community property is impermissible unless the investment benefits the community, as Joan claims. As the Washington Supreme Court succinctly stated: "While the husband may not give the community property away without the consent of the wife, he may, as the statutory agent of the community and manager of the community personal property, enter into a partnership without the wife's consent." *Id.* at 454 (also holding that husband's contribution to partnership was not a gift but consideration for his interest in the partnership with his son). Rodger the Dad had the statutory authority to bind the community for use of that property in a business in which he was involved. *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26

Wn. App. 351, 353, 613 P.2d 169 (1980) (“A debt incurred by either spouse during marriage is presumed to be a community debt. It is well settled that this presumption may be overcome only by clear and convincing evidence.”) (internal citations omitted). It should be noted that Michael Gillespie, Rodger the Son’s expert accountant, calculated Rodger the Son’s distribution of profits after the return of Rodger the Dad’s investment, even the \$400,000 transferred from his second Wedbush account. RP 879-90, 883. In other words, the community would have received the return of its property and its distributive share of the partnership profits.

The trial record supports, however, that the mineral securities account held at Charles Schwab was separate property. As the Washington Supreme Court quoted:

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and, when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear.*

*Hamlin v. Merlino*, 44 Wn.2d 851, 857, 272 P.2d 125 (1954) (emphasis in original).

Rodger the Dad and Joan separated in 1986, and lived apart without the intention of moving back in together. See RCW 26.16.140 (In pertinent part: “When spouses or domestic partners are living separate and apart, their

respective earnings and accumulations shall be the separate property of each.”); see also *In re Marriage of Short*, 125 Wn.2d 865, 871, 890 P.2d 12 (1995) (defunct marriage where “deserted spouse accepts the futility of hope for restoration of a normal marital relationship, or just acquiesces in the separation”).

Mr. Decker had managed a joint account for them in the early or late 80s, around the time Rodger the Dad and Joan separated, but after that only managed an account solely titled to Rodger the Dad. RP 853, 868-69. Rodger the Dad stated that it was all his money in the account. Mr. Decker even filled in Rodger the Dad’s account application for with “N/A” under information for “spouse’s name.” RP 801. Joan Benson was never aware of the Charles Schwab account or its predecessors prior to Rodger the Dad’s death. They did not share expenses, financial support, or financial information except once a year for the preparation of a joint tax return where Joan, not Rodger the Dad, provided financial information. While Rodger the Dad and Joan continued to be married, there was no community. *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372, 754 P.2d 993 (1988) (distinguishing between “marital” and “community” relationship, when “community” is absent there is no “community property”) Joan never submitted any evidence that those items titled in Rodger the Dad’s name, positively affirmed as his own money, and totally unknown to Joan was anything other than Rodger the

Dad's separate property. Joan never benefited from the work of Rodger the Dad after their separation. *MacKenzie v. Sellner*, 58 Wn.2d 101, 105, 361 P.2d 165 (1961) (theory of community property is that it is obtained by the efforts of the husband or wife for the benefit of the community).

If Rodger the Dad's contribution in Benson Ventures and the resulting profit were separate property, Joan Benson would receive Rodger the Dad's separate property as her inheritance. Joan was the sole beneficiary under Rodger the Dad's 1977 will. Thus the Court's decision that Rodger the Dad's estate was entirely community property was merely advisory. It did not adjudicate any dispute between Rodger the Son and the Estate of Rodger the Dad.

**D. Joan Benson Should Not Be Awarded Attorneys' Fees**

As Joan points out, the Court should consider equity in determining whether fees should be awarded. RCW 11.96A.150(1). The failure to follow procedural rules is not a basis in equity to award attorneys' fees. Rodger the Son brought his appeal in good faith, supported by the law and facts. It does not appear that any procedural errors increased any costs to Joan Benson. Under the overwhelming evidence that Joan Benson had been separated for 23 years; they were divorcing each other; and that she is taking advantage of a will he forgot about in 1977, it would be inequitable to punish Rodger the Son for pursuing his rights on appeal, and equally inequitable to punish

Rodger the Son with attorneys' fees when Joan will have received all of Rodger the Dad's \$3 million estate.

### III. CONCLUSION

Rodger the Son worked for 10 years with his father and invested his life savings in building up the gold mining securities account they called Benson Ventures. All documents and all witnesses confirm it. No witnesses and no documents rebut it. In law and in equity, Rodger the Son should receive his statutory distributive share of the profits from Benson Ventures, \$724,477 (RP 1259) and his financial contribution of \$158,000 for a total of \$882,477. Joan Benson will still receive approximately \$1,700,000 remaining from the Charles Schwab account, and decedent's real estate holdings from the \$3 million dollar estate.

The trial court should be reversed and judgment granted to appellant.

DATED this 5 day of April, 2010.

BETTS, PATTERSON & MINES, P.S.

By 

Michael L. Olver, WSBA No. 7031  
Christopher C. Lee, WSBA No. 26516  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I, Michelle Wimmer, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Betts, Patterson & Mines, P.S. One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927; and did on April 5, 2010 (1) cause to be filed with this court; and (2) cause to be delivered via hand delivery to respondent's counsel, Suzanne Howle, Thompson & Howle, 701 Pike Street, Suite 1400, Seattle, Washington 98101-3927, the Appellant's Reply Brief.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: April 5, 2010.

  
\_\_\_\_\_  
Michelle Wimmer

## APPENDIX A

Westlaw.

Page 1

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
 (Cite as: 74 Cal.App.4th 442)

▷  
 PATRICIA HOLMES, Plaintiff and Respondent,  
 v.  
 SANDRA KRUGER LERNER et al., Defendants  
 and Appellants.  
 PATRICIA HOLMES, Plaintiff and Appellant,  
 v.  
 SANDRA KRUGER LERNER et al., Defendants  
 and Respondents.  
 No. A081440., No. A081435.

Court of Appeal, First District, Division 1, California.  
 Aug 20, 1999.

[Opinion certified for partial publication. <sup>FN\*</sup> ]

FN\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III. through VIII.

#### SUMMARY

An individual brought an action alleging that another individual breached an oral partnership agreement with plaintiff concerning the creation of a cosmetics company and that a third individual interfered with the contract, resulting in plaintiff's ouster from the business. The trial court entered judgment finding defendants liable to plaintiff for compensatory and punitive damages and granted a nonsuit on various causes of action against the second defendant. (Superior Court of the City and County of San Francisco, No. 980645, Mary C. Morgan, Judge. <sup>FN†</sup> )

FN† Retired judge of the former Municipal Court for the San Francisco Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Court of Appeal, for reasons stated in the unpublished portion of the opinion, reversed the judg-

ment against the second defendant for interference with the contract and the order granting a nonsuit, and in all other respects, affirmed the judgment and a postjudgment order. The court held that the trial court properly determined that a partnership had been formed, notwithstanding the absence of an express agreement to share profits. The applicable version of the Uniform Partnership Act (UPA) (Corp. Code, former § 15001 et seq.) omitted prior language regarding division of profits and defined a partnership as an association of two or more persons to carry on as co-owners a business for profit (Corp. Code, former § 15006). When the Legislature enacts a new statute, replacing an existing one, and omits express language, it indicates an intent to change the original act. The UPA relocated the provision regarding profits to Corp. Code, former § 15007, which indicated that profit sharing is prima facie evidence of being a partner, rather than a required element of the definition of a partnership. The court further held that the agreement was sufficiently definite for enforcement. (Opinion by Marchiano, J., with Strankman, P. J., and Stein, J., concurring.)

#### HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 148--Scope of Review--Substantial Evidence Standard.

In reviewing a jury verdict, the appellate court applies the substantial evidence standard of review. All conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict.

(2) Partnership § 6--Creation and Existence--Sharing Profits--Formation of Partnership Without Express Agreement to Share Profits.

In an individual's action alleging that defendant breached an oral partnership agreement with

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

plaintiff concerning the creation of a cosmetics company, the trial court properly determined that a partnership had been formed, notwithstanding the absence of an express agreement to share profits. The applicable version of the Uniform Partnership Act (UPA) (Corp. Code, former § 15001 et seq.) omitted prior language regarding division of profits and defined a partnership as an association of two or more persons to carry on as co-owners a business for profit (Corp. Code, former § 15006). When the Legislature enacts a new statute, replacing an existing one, and omits express language, it indicates an intent to change the original act. The UPA relocated the provision regarding profits to Corp. Code, former § 15007, which indicated that profit sharing is prima facie evidence of being a partner, rather than a required element of the definition of a partnership. The rules to establish a partnership in Corp. Code, former § 15007, should be viewed in light of the intent of the parties revealed in the terms of their agreement, conduct, and the surrounding circumstances. The trial court refused to add additional elements to the statutory definition and properly instructed the jury in the language of Corp. Code, former § 15006. Once the elements of the partnership definition are established under that statute, other provisions of the UPA and the conduct of the parties supply the details of the agreement.

[See 9 Witkin, Summary of Cal. law (9th ed. 1989) Partnership, § 23.]

(3) Partnership § 5--Creation and Existence--Formation--Agreement-- Requisite Degree of Definiteness.

In an individual's action alleging that defendant breached an oral partnership agreement with plaintiff concerning the creation of a cosmetics company, the evidence showed that the agreement was sufficiently definite to be enforced. In determining the degree of certainty necessary to enforce a contract, the parties' outward manifestations must show that the parties agreed upon the same thing in the same sense. If there is no evidence establishing a manifestation of assent to the same thing by both parties, then there is no mutual consent to contract

and no contract formation. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. The evidence at trial in this case supplied the requisite degree of certainty. There was no requirement that the parties had to agree upon the postacquisition management and operation of partnership property. Rather, the agreement was to take plaintiff's idea and reduce it to concrete form. Plaintiff and defendant decided to do it together, to form a company, to hire employees, and to engage in the entire process together. The additional terms were filled in as the parties immediately began work on the multitude of details necessary to bring their idea to fruition. The fact that plaintiff worked for almost a year, without expectation of pay, was further confirmation of the agreement.

#### COUNSEL

Cotchett, Pitre & Simon, Frank M. Pitre, Nancy L. Fineman and Mark C. Molumphy for Plaintiff and Appellant and for Plaintiff and Respondent.

McCutchen, Doyle, Brown & Enersen, William Bates III, Geoffrey M. Howard and Russ K. Yoshinaka for Defendants and Appellants and for Defendants and Respondents.

#### MARCHIANO, J.

This case involves an oral partnership agreement to start a cosmetics company known as "Urban Decay." Patricia Holmes prevailed on her claim that Sandra Kruger Lerner breached her partnership agreement and that David Soward interfered with the Holmes-Lerner contract, resulting in Holmes's ouster from the business. Lerner and Soward appeal from the judgment finding them liable to Holmes for compensatory and punitive damages of over \$1 million. Holmes appeals from the portion \*445 of the judgment imposing joint and several liability for the award of compensatory damages, and the court's order granting a nonsuit on various causes of

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

action against Soward.

We affirm the judgment against Lerner, primarily because we determine that an express agreement to divide profits is not a prerequisite to prove the existence of a partnership. We also determine that the oral partnership agreement between Lerner and Holmes was sufficiently definite to allow enforcement. We reverse the judgment as to Soward because the finding that he interfered with the contract between Holmes and Lerner is precluded by the jury's express finding that Lerner never intended to perform the contract. We also reverse an order granting a nonsuit on claims against Soward for aiding and abetting and conspiracy related to fraud, breach of fiduciary duty, and constructive fraud. We affirm the trial court's determination that the damages awarded were joint and several, because, although based on different theories and breach of obligations, only a single item of damages was sought and proven.

#### Background

(1) When we review a jury verdict, we apply the substantial evidence standard of review. All conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict. (*Great-house v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 836-837 [ 41 Cal.Rptr.2d 561], citing *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [ 45 P.2d 183].) The parties agree that in this case of sharply conflicting evidence, all conflicting evidence and reasonable inferences supporting Holmes's version of the facts are to be accepted as true. Because the existence of a partnership requires a fact-intensive analysis in this case, we detail the following facts presented at trial.

Sandra Lerner is a successful entrepreneur and an experienced business person. She and her husband were the original founders of Cisco Systems. When she sold her interest in that company, she received a substantial amount of money, which she invested,

in part, in a venture capital limited partnership called "& Capital Partners." By the time of trial in this matter, Lerner was extremely wealthy. Patricia Holmes met Lerner in late 1993, when Lerner visited Holmes's horse training facility to arrange for training and boarding of two horses that Lerner was importing from England. Holmes and Lerner became friends, and after an initial six-month training contract expired, Holmes continued to train Lerner's horses without a contract and without cost.

In 1995, Lerner and Holmes traveled to England to a horse show and to make arrangements to ship the horses that Lerner had purchased. On this \*446 trip, Lerner decided that she wanted to celebrate her 40th birthday by going pub crawling in Dublin. Lerner was wearing what Holmes termed "alternative clothes" and black nail polish, and encouraged Holmes to do the same. FN1 Holmes, however, did not like black nail polish, and was unable to find a suitable color in the English stores. At Lerner's mansion outside of London, Lerner gave Holmes a manicuring kit, telling her to see if she could find a color she would wear. Holmes looked through the kit, tried different colors, and eventually developed her own color by layering a raspberry color over black nail polish. This produced a purple color that Holmes liked. Holmes showed the new color to Lerner, who also liked it.

FN1 There were references throughout the trial to Lerner's "alternative" look and to "alternative" culture. Lerner, who referred to herself as an "edgy cosmetics queen," described "alternative culture" as "not really mainstream," "edgy," and "fashion forward." As an example, she noted her own purple hair. She defined "edgy" as not trying to be cute, and being unconvention-

On July 31, 1995, the two women returned from England and stayed at Lerner's West Hollywood condominium while they waited for the horses to clear quarantine. While sitting at the kitchen table, they discussed nail polish, and colors. Len Bosack,

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

Lerner's husband, was in and out of the room during the conversations. For approximately an hour and a half, Lerner and Holmes worked with the colors in a nail kit to try to recreate the purple color Holmes had made in England so they could have the color in a liquid form, rather than layering two colors. Lerner made a different shade of purple, and Holmes commented that it looked just like a bruise. Holmes then said that she wanted to call the purple color she had made "Plague." Holmes had been reading about 16th-century England, and how people with the plague developed purple sores, and she thought the color looked like the plague sores. <sup>FN2</sup> Lerner and Holmes discussed the fact that the names they were creating had an urban theme, and tried to think of other names to fit the theme. Starting with "Bruise" and "Plague," they also discussed the names "Mildew," "Smog," "Uzi," and "Oil Slick." Len Bosack walked into the kitchen at that point, heard the conversation about the urban theme, and said "What about decay?" The two women liked the idea, and decided that "Urban Decay" was a good name for their concept. <sup>FN3</sup>

FN2 Plague is described as "rich violet with a blue sheen."

FN3 At the trial, Lerner testified that she had an idea prior to July of 1995 that there might be a market for unusual nail colors, but was missing a "unifying theme" to identify the concept.

Lerner said to Holmes: "This seems like a good [thing], it's something that we both like, and isn't out there. Do you think we should start a company?" Holmes responded: "Yes, I think it's a great idea." Lerner told Holmes that they would have to do market research and determine how to have the polishes produced, and that there were many things they would \*447 have to do. Lerner said: "We will hire people to work for us. We will do everything we can to get the company going, and then we'll be creative, and other people will do the work, so we'll have time to continue riding the horses." Holmes agreed that they would do those things. They did

not separate out which tasks each of them would do, but planned to do it all together.

Lerner went to the telephone and called David Soward, the general partner of & Capital, and her business consultant. Holmes heard her say "Please check Urban, for the name, Urban Decay, to see if it's available and if it is, get it for us." Holmes knew that Lerner did not joke about business, and was certain, from the tone of her voice, that Lerner was serious about the new business. The telephone call to secure the trademark for Urban Decay confirmed in Holmes's mind that they were forming a business based on the concepts they had originated in England and at the kitchen table that day. Holmes knew that she would be taking the risk of sharing in losses as well as potential success, but the two friends did not discuss the details at that time. Lerner's housekeeper heard Lerner tell Holmes: "It's going to be our baby, and we're going to work on it together." After Holmes left, the housekeeper asked what gave Lerner the idea to go into the cosmetics business, since her background was computers. Lerner replied: "It was all Pat's idea over in England, but I've got the money to make it work." Lerner told her housekeeper that she hoped to sell Urban Decay to Estee Lauder for \$50 million.

Although neither of the two women had any experience in the cosmetics business, they began work on their idea immediately. Holmes and Lerner did market research by going to stores, talking with people about nail polish, seeing what nail polishes were available, and buying samples to bring back to discuss with each other. They met frequently in August and September at Lerner's home, and experimented with nail colors. They took pictures of various color mixing sessions. In early August, they met with a graphic artist, Andrea Kelly, and discussed putting together a logo and future advertising work for Urban Decay.

Prior to the first scheduled August meeting, Holmes told Lerner she was concerned about financing the venture. Lerner told her not to worry about it be-

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

cause Lerner thought they could convince Soward that the nail polish business would be a good investment. She told Holmes that Soward took care of Lerner's investment money. Holmes and Lerner discussed their plans for the company, and agreed that they would attempt to build it up and then sell it. Lerner and Holmes discussed the need to visit chemical companies and hire people to handle the daily operations of the company. However, the creative aspect, ideas, inspiration, and impetus for the company came from Holmes and Lerner. \*448

Lerner, Holmes, Soward, and Kelly attended the first scheduled meeting. The participants in these meetings referred to them as "board meetings," even though there was no formal organizational structure, and technically, no board. They discussed financing, and Soward reluctantly agreed to commit \$500,000 towards the project. Urban Decay was financed entirely by & Capital, the venture capital partnership composed of Soward as general partner, and Lerner and her husband as the only limited partners. Neither Lerner nor Holmes invested any of their individual funds.

Lerner and Soward went to Kirker Chemical Company later in August of 1995 and learned about mixing and manufacturing nail polish colors. Lerner discouraged Holmes from accompanying them. Although Lerner returned to Kirker, she never took Holmes with her. At the second board meeting, in late August, Soward introduced Wendy Zomnir, a friend of Soward's former fiancée, as an advertising and marketing specialist. After Zomnir and Kelly left the meeting, Holmes, Lerner and Soward discussed her presentation. Holmes was enthusiastic about Zomnir and they decided to hire her. At the conclusion of the September board meeting, after Holmes had left, Lerner and Soward secretly made Zomnir an offer of employment, which included a percentage ownership interest in Urban Decay. It wasn't until a couple of meetings later, when Lerner or Soward referred to Zomnir as the "Chief Operating Officer" of Urban Decay, that Holmes learned of the terms of the offer.

In early October, after Holmes learned of the secret offer to Zomnir, she asked Lerner to define her role at Urban Decay. Lerner responded: "Your role is anything you want it to be." When Holmes asked to discuss the issue in more detail, Lerner turned and walked away. Holmes believed that Lerner was nervous about an upcoming photo session, and decided to discuss it with Lerner at a later date. At their regular board meetings, Holmes participated with Soward, Lerner, Zomnir, Kelly and another person in discussing new colors, and deciding which ones they wanted to sell, and which names would be used.

In September of 1995, Soward signed an application for trademark registration as president of Urban Decay. In December of 1995, Urban Decay was incorporated. Holmes asked for a copy of the articles of incorporation, but was given only two pages showing the name and address of the company. On December 31, Holmes sent a fax to Lerner stating that it had been difficult to discuss her position in Urban Decay with Lerner. Holmes asked Lerner: "What are my responsibilities and obligations, and what are my rights or entitlements?" Holmes also asked: "What are my current and potential liabilities and assets?" She requested that Lerner provide the \*449 information in writing. At this point, Holmes wanted to memorialize the agreement she and Lerner had made on July 31.

Soward intercepted the fax and called Holmes, asking: "What's going on?" Holmes explained that she wanted a written agreement, and Soward apologized, telling her that Lerner had asked him to get "something ... in writing" to Holmes. Soward told Holmes that no one in the company had a written statement of their percentage interest in the company yet. Soward asked: "What do you want, one percent, two percent?" When Holmes did not respond, he told her that 5 percent was high for an idea. Holmes told him: "I'm not selling an idea. I'm a founder of this company." Soward exclaimed: "Surely you don't think you have fifty percent of this company?" Holmes told him that it was a mat-

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

ter between herself and Lerner, and that Soward should speak to Lerner. Soward agreed to talk to Lerner.

On January 11, 1996, Lerner and Holmes met at a coffee shop to discuss the fax. Holmes explained that she wanted "something in writing" and an explanation of her interest and position in the company. Lerner responded that a start-up business is "like a freight train ... you can either run and catch up, and get on, and take a piece of this company and make it your own, or get out of the way." As a result of this conversation, Holmes decided to double her efforts on behalf of Urban Decay. Because she was most comfortable working at the warehouse, she focused on that aspect of the business. <sup>FN4</sup> Holmes was reimbursed for mileage, but received no pay for her work.

FN4 Holmes testified that her work at the warehouse included responding to requests for brochures, developing a system for handling increased telephone inquiries, and negotiating a contract with a skills center to assist with the mail order business. She had authority to hire and fire employees and to sign checks on the Urban Decay account. Only Holmes, Soward, Lerner, Zomnir and the warehouse manager were authorized to sign on the account. Only the manager's authority was limited to \$1,500. Holmes was spending four to five days a week at the warehouse. Urban Decay accountant Sharon Land testified that Holmes "contributed a great deal" to Urban Decay and directed the retail business. Soward, Lerner and Zomnir seldom came to the office. Soward told Land that Holmes was on the board of directors.

During January and February, Urban Decay was launching its new nail polish product. Publicity included press releases, brochures, and newspaper interviews with Lerner. An early press release stated: "The idea for Urban Decay was born after Lerner and her horse trainer, Pat Holmes, were sitting

around in the English countryside." Lerner approved the press release. In February of 1996, an article was printed in the San Francisco Examiner containing the following quotes from Lerner. "Since we couldn't find good nail polish, in cool colors there must be a business opportunity here. Pat had the original idea. Urban Decay was my spin." The Examiner reporter testified at trial that the quote attributed to Lerner was accurate. Lerner was <sup>\*450</sup> also interviewed in April by CNN. In that interview she told the story of herself and Holmes looking for unusual colors, mixing their own colors at the kitchen table, and that "we came up with the colors, and it just sort of suggested the urban thing." <sup>FN5</sup>

FN5 When asked at trial why she used the word "we," Lerner responded that she was stressed. Lerner testified that almost every statement she made in the CNN interview was false and a result of stress.

Lerner had always notified Holmes whenever there was a board meeting, and she sent Holmes an agenda for the February 20, 1996, meeting. Lerner also sent a memo stating that she thought they should have an "operations meeting" with the warehouse supervisor first. <sup>FN6</sup> Lerner's memo continued: "and then have a regular board meeting, including [Zomnir], me, David, and Pat, and no one else." Holmes understood that the regular board meeting would be for the purpose of discussing general Urban Decay business. At the operations meeting, Holmes made a presentation regarding the warehouse operations. The financial report showed \$205,000 in revenues and \$431,000 in expenses. <sup>FN7</sup> The "directors" thought this early sales figure was "terrific." Soward handed out an organizational chart, which showed Lerner, with the title "CEO" at the top; Soward, as "President" beneath her; and Zomnir, as "COO" beneath Soward. Holmes asked "Where am I?" Lerner responded by pointing to the top of the chart and telling Holmes that she was a director, and was at the top of the chart, above all the other names. <sup>FN8</sup>

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

FN6 The parties were able to reconstruct the time of various meetings through the use of memos and their personal calendars. Lerner, however, who testified that she had a bad memory in general, had destroyed her calendars from 1995 for every month except December.

FN7 Urban Decay was involved in a lawsuit with Revlon, over Revlon's use of similar colors and names for its new line of "Streetwear" nail colors. Lerner believed that Revlon's actions had potentially impacted sales.

FN8 An organization chart which was presented at a board meeting in June of 1996 showed a box labeled "Board of Directors" at the top, and did not specifically name Lerner or Holmes.

In March of 1996, Holmes received a document from Soward offering her a 1 percent ownership interest in Urban Decay. Soward explained that Urban Decay had been formed as a limited liability company, which was owned by its members. <sup>FN9</sup> For the first time, Holmes realized that Lerner and Soward had produced an organizational document that did not include her, and she was now being asked to become a minor partner. When she studied the document, she discovered that it referred to an exhibit A, which was purported to show the distribution of ownership interests in Urban Decay. \*451 Soward had given Zomnir a copy of exhibit A when he offered her an ownership interest in Urban Decay. However, when Holmes asked Soward for a copy of exhibit A, he told her it did not exist. <sup>FN10</sup> By this time, Holmes was planning to consult an attorney about the document.

FN9 "A limited liability company is a hybrid business entity that combines aspects of both a partnership and a corporation. It is formed under the Corporations Code and consists of 'members' who own membership interests. " (9 Witkin, Summary of

Cal. Law (9th ed. 1999 Supp.) Partnership, § 120, p. 245.)

FN10 Holmes was never given exhibit A, and did not see it until trial. It showed & Capital Partners, L.P. with a 92 percent interest, having contributed \$489,900. It also showed Lerner and her husband with contributions of \$5,050 each, and 1 percent apiece. Zomnir's contribution was listed as \$5,050, but she had a 5 percent interest. None of the individuals actually paid in the listed contributions.

Despite the deterioration of her friendship with Lerner, and her strained relationship with Soward, Holmes continued to attend the scheduled board meetings, hoping that her differences with Lerner could be resolved. She also continued to work at the warehouse on various administrative projects and on direct mail order sales. As late as the April board meeting, Holmes was still actively engaged in Urban Decay business. She made a presentation on a direct mail project she had been asked to undertake. As a result of Holmes's attendance at a sales presentation when she referred to herself as a cofounder of Urban Decay, Lerner instructed Zomnir to draft a dress code and an official history of Urban Decay. Lerner told Zomnir that it was a "real error in judgment" to allow Holmes to attend the sales presentation because she did not project the appropriate image. The official history, proposed in the memo, omitted any reference to Holmes. Finally, matters deteriorated to the point that Soward told Holmes not to attend the July board meeting because she was no longer welcome at Urban Decay.

On August 27, 1996, Holmes filed a complaint against Lerner and Soward, alleging 10 causes of action, including breach of an oral contract, intentional interference with contractual relations, fraud, breach of fiduciary duty, and constructive fraud. Holmes eventually dismissed some of her claims and the court dismissed others, sending the case to the jury on the causes of action noted above. At the

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

trial, cosmetics industry expert Gabriella Zuckerman testified that Urban Decay was not just a fad. In her opinion, Urban Decay had discovered and capitalized on a trend that was just beginning. She reviewed projected sales figures of \$19.9 million in 1997, going up to \$52 million in 2003, and found them definitely obtainable. Arthur Clark, Holmes's expert at valuing start-up businesses, valued Urban Decay under different risk scenarios. In Clark's opinion, the value of Urban Decay to a potential buyer was between \$4,672,000 and \$6,270,000. Lerner's expert, who had never valued a cosmetics company, testified that Urban Decay had \$2.7 million in sales in 1996. He estimated the value of Urban \*452 Decay as approximately \$2 million, but concluded that it was not marketable. <sup>FN11</sup>

FN11 Soward testified that & Capital had invested a total of \$2 million in Urban Decay by the time of trial. The investment at the time of the breach of contract was just under \$800,000.

Lerner and Soward claimed that Holmes was never a director, officer, or even an employee of Urban Decay. According to Lerner, she was just being nice to Holmes by letting her be present during Urban Decay business. Lerner denied Holmes had any role in creating the colors, names, or concepts for Urban Decay. When Holmes asked Lerner about her assets and liabilities in Urban Decay, Lerner thought she was asking for a job. She explained her statements to the press regarding Urban Decay being Holmes's idea as misquotes or the product of her stress.

The jury found in favor of Holmes on every cause of action. The jury assessed \$480,000 in damages against Lerner, and \$320,000 against Soward. Following presentation of evidence as to net worth, the jury awarded punitive damages of \$500,000 against Lerner and \$130,000 against Soward. In the judgment, the court declined to add the two amounts together, but stated that the verdict of \$320,000 was against Lerner and Soward, jointly and severally, and that the additional \$160,000 verdict was against

Lerner individually. Lerner and Soward moved for a judgment notwithstanding the verdict, which was denied on December 16, 1997. They appealed, in No. A081440, from the judgment and the order denying their postverdict motion. Holmes appealed in No. A081435, from that portion of the judgment finding that Lerner and Soward are jointly and severally liable for the \$320,000 award, and the court's granting of Lerner and Soward's motion for nonsuit on various causes of action. We have consolidated the two appeals for purposes of oral argument and decision.

#### Discussion

##### *The Appeal in No. A081440 - Lerner and Soward*

Lerner and Soward argue that there was no partnership agreement as a matter of law, that the evidence was insufficient to support the fraud judgment against Lerner, that damages were incorrectly calculated, that the evidence does not support the judgment against Soward and that the judgment for punitive damages must be reversed. In the consolidated appeal, Holmes argues that the trial court erred in granting a nonsuit on various causes of action and in awarding a lesser amount of damages than was reflected in the jury verdict. We address these contentions in the order presented by the parties. \*453

##### *I. There Was No Error in the Determination That a Partnership Was Formed*

(2) Holmes testified that she and Lerner did not discuss sharing profits of the business during the July 31, "kitchen table" conversation. Throughout the case, Lerner and Soward have contended that without an agreement to share profits, there can be no partnership. Lerner and Soward begin their argument on appeal by quoting a statement from *Westcott v. Gilman* (1915) 170 Cal. 562, 568 [150 P. 777], that profit sharing is "an essential element of

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

every partnership ....“ They argue that nothing has changed since the “ancient truth “ regarding profit sharing was expressed in *Westcott*. However, an important element supporting the *Westcott* decision has changed, because *Westcott* relied on the language of former section 2395 of the Civil Code. ( 170 Cal. at p. 569.) That statutory predecessor of the Uniform Partnership Act (UPA, Corp. Code § 16100 et seq.) defined a partnership as: ” ‘ “... the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.” ’ “ ( *Black v. Brundige* (1932) 125 Cal.App. 641, 645, [ 13 P.2d 999], italics added.) Civil Code former section 2395 was repealed and replaced with the UPA in 1949. ( 125 Cal.App. at p. 645.)

The applicable version of the UPA, located at Corporations Code former section 15001 et seq., omitted the language regarding division of profits and defined a partnership as: “an association of two or more persons to carry on as coowners a business for profit.” (former § 15006.) <sup>FN12</sup> When the Legislature enacts a new statute, replacing an existing one, and omits express language, it indicates an intent to change the original act. ( *Dubins v. Regents of University of California* (1994) 25 Cal.App.4th 77, 85 [ 30 Cal.Rptr.2d 336].) We can only conclude that the omission of the language regarding dividing profits from the definition of a partnership was an intentional change in the law. <sup>FN13</sup> The UPA relocated the provision regarding profits to former section 15007, subdivision (4), which provided that in determining whether a partnership exists, “[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner ....“ This relocation of the element of sharing the profits indicates that the Legislature intends \*454 profit sharing to be evidence of a partnership, rather than a required element of the definition of a partnership. <sup>FN14</sup> (See, e.g., *Auditorium Co. v. Barsotti* (1919) 40 Cal.App. 592, 596 [ 181 P. 413] [the distinguishing feature of partnership is association to carry on business together, not agreement to share profits]; *Universal Sales Corp. v.*

*Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 764 [ 128 P.2d 665] [mode of participating in profits may be left to the agreement of the parties].) The presence or absence of any of the various elements set forth in former section 15007, including sharing of profits and losses, is not necessarily dispositive. As explained in *Cochran v. Board of Supervisors* (1978) 85 Cal.App.3d 75, 80 [ 149 Cal.Rptr. 304], the rules to establish the existence of a partnership in former section 15007 should be viewed in the light of the crucial factor of the intent of the parties revealed in the terms of their agreement, conduct, and the surrounding circumstances when determining whether a partnership exists.

FN12 Unless otherwise indicated, all statutory references are to the Corporations Code. The provisions of former section 15001 et seq., were repealed and replaced with the UPA of 1994 (§ 16100 et seq.), which is applicable to partnerships formed on or after January 1, 1999. (§ 16111.)

FN13 (The significance of the change in the definition of a partnership is noted in the article by Professor Wright, *California Partnership Law and the Uniform Partnership Act* (1921) 9 Cal.L.Rev. 117, 127-128, criticizing the Civil Code provision because it “emphasizes the division of profits unduly,” and noting that deletion of the ” ‘dividing the profit between them’ “ language of the Civil Code would theoretically allow a partnership to be formed in which all profits went to one partner, or all profits were reinvested.)

FN14 Under the provisions of the UPA of 1994, effective, January 1, 1999, the sharing of profits is recharacterized as an evidentiary presumption, rather than prima facie evidence. (§ 16202, subd. (c)(3).)

The UPA provides for the situation in which the partners have not expressly stated an agreement regarding sharing of profits. Former section 15018

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

provided in relevant part: "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: [¶] (a) Each partner shall ... share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied." This provision states, subject to an agreement between the parties, partners "shall" share equally in the profits. Lerner and Soward argue that using former section 15018 to supply a missing term regarding profit sharing ignores the provision of former section 15007, subdivision (2). That section, headed "rules for determining existence of partnership," provided that mere joint ownership of common property "does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." Lerner and Soward are mistaken. The definition in former section 15006 provides that the association with the intent to carry on a business for profit is the essential requirement for a partnership.<sup>FN15</sup> Following that definition does not transform mere joint ownership into the essence of a partnership. \*455

FN15 Contrary to Lerner and Soward's contention, *Myers v. Gager* (1959) 175 Cal.App.2d 314 [ 346 P.2d 251] is not dispositive. Lerner and Soward quote a sentence out of context to the effect that an agreement to "go into business" does not establish a partnership. The agreement in *Myers* was an agreement to sell real property between a property owner and a real estate broker, and was never intended to be a partnership. The "go into business" quotation was from *Mindenberg v. Carmel Film Productions* (1955) 132 Cal.App.2d 598, 601-602 [ 282 P.2d 1024], which involved an express agreement to go into business as a corporation. The court rejected an argument that the statement that the parties "agreed to go into business" somehow implied a joint venture. Neither case is applicable here.

The cases relied upon by Lerner and Soward do not compel a different conclusion. *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284 [ 6 Cal.Rptr.2d 386] and *Holtz v. United Plumbing & Heating Co.* (1957) 49 Cal.2d 501 [ 319 P.2d 617], are wrongful death cases, in which plaintiffs sought to impose liability on a third party on the theory of membership in a joint venture with the wrongdoer. Dicta in *Cislaw* stated that " 'the essential elements of both a joint venture and partnership are a sharing of profits as well as losses ....' " (*Cislaw v. Southland Corp.*, *supra*, 4 Cal.App.4th at p. 1297.) The court in *Holtz* stated that: "It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have ... an understanding as to the sharing of profits and losses, and a right of joint control." ( 49 Cal.2d at pp. 506-507.) The *Holtz* court also explained that the agreement did not have to be "definite in every detail" but that terms could be implied from the acts of the parties. (*Id.* at p. 507.) We do not find the tort cases persuasive. It may be a fair policy to require a defendant to have a specified share in the benefits of a venture before imposing tort liability based solely on participation in the venture. Nevertheless, the policy emphasizing sharing in the profits is not compelling in the business context of determining whether parties have orally contracted to do business as partners.

*Cislaw* cited *People v. Park* (1978) 87 Cal.App.3d 550, 564 [ 151 Cal.Rptr. 146] in support of the statement regarding profits. *Park* was a criminal prosecution for sale of unregistered securities in which the defendant misappropriated the investor's funds. (*Id.* at pp. 563-564.) In dicta, the court addressed the defendant's claim that his victims were actually his partners or joint venturers. The court found that there was "not a shred of evidence" of any of the indicia of a partnership or joint venture. (*Id.* at p. 564.) It stated that the "essential elements" of a joint venture or partnership included "a sharing of profits." (*Ibid.*) It then incorrectly concluded that although the victims had agreed to share the profits from the investments, their failure to expressly

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

make provision for distribution of losses was fatal to the claim of a partnership. (*Ibid.*; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 819 [ 195 Cal.Rptr. 421] [intention to share losses inferred from provision to share profits].) The real deficiency of the ill-fated defense in *Park* was the absence of evidence that the defendant's victims intended to carry on a business with him as co-owners. Like the tort cases, *Park* is not persuasive in this case.

Aside from the cases relied on by Lerner and Soward which involve attempts to impose tort liability on alleged joint venturers, two more recent cases that arise in a business context are also dependent on the joint venture theory, and do not discuss the provisions of the UPA. *April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d 805, involved the liability of a television station for erasing videotapes, in violation of the plaintiff's contractual syndication rights. The court, relying on a medical malpractice case and *Holtz v. United Plumbing & Heating Co.*, *supra*, 49 Cal.2d 501, stated that an understanding regarding sharing of profits and losses was one element necessary for the creation of a joint venture. (*April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d 805, 819.) Similarly, in *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 15-16 [ 272 Cal.Rptr. 227], the court quoted the definition of a joint venture from *April Enterprises*, which had been agreed to by the parties. These cases are not based on the UPA, do not discuss the statutory definitions, and are not, therefore, authority for Lerner and Soward's interpretation of the definitional statute. <sup>FN16</sup>

FN16 *Sandberg v. Jacobson* (1967) 253 Cal.App.2d 663 [ 61 Cal.Rptr. 436], also cited by Lerner and Soward, inexplicably ignores the statutory definition of a partnership, and cites section 15018 as authority that an agreement to share in the profits and losses is essential to the existence of a partnership. Former section 15018 con-

cerned the rights and duties of partners and provided that in the absence of an agreement, partners share the profits equally. *Sandberg* upheld a lower court's determination that the failure to spell out a computable measure of profit sharing was fatal to a claim of partnership, in a case which appeared to involve mere joint ownership of property. ( 253 Cal.App.2d at p. 669.) Although the result in *Sandberg* appears correct, we disagree with its definition of a partnership.

Two of the cases relied on in *Park* were partnership cases that actually characterized the sharing of profits as evidence, rather than as a required element of a partnership. The court in *Kersch v. Taber* (1945) 67 Cal.App.2d 499, 504 [ 154 P.2d 934], relying on the same definition of partnership as is applicable in this case, stated: "Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in profits and losses and in the management and control of the business." The court concluded that none of the indicia of a partnership were present in that case. In *Constans v. Ross* (1951) 106 Cal.App.2d 381, 386 [ 235 P.2d 113] the court cited the same definition, and stated: "Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business." <sup>FN17</sup> Both cases refer to profit sharing as evidence. Neither case holds that profit sharing is an indispensable element of a partnership. \*457

FN17 *Constans* and *Kersch* rely on *Black v. Brundige*, *supra*, 125 Cal.App. 641 and *Martin v. Sharp & Fellows C. Co.* (1917) 34 Cal.App. 584 [ 168 P. 373], the latter being a pre-UPA case. Both of those cases contain language to the effect that jointly carrying on a business, and not profit sharing, is the true test of partnership. When the authorities underlying the cases cited by appellant are analyzed, they often can

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

be traced back to the pre-UPA cases, in which profit sharing was specified in the statute as part of the definition of a partnership. Even in some of those cases, courts recognized that profit sharing is only one indicia of the existence of a partnership. ( 34 Cal.App. 584, and cases cited therein.)

The trial court in this case refused to add additional elements to the statutory definition and properly instructed the jury in the language of former section 15006. We agree with the trial court's interpretation of the law. The actual sharing of profits (with exceptions which do not apply here) is prima facie evidence, which is to be considered, in light of any other evidence, when determining if a partnership exists. (Former § 15007, subd. (4).) In this case, there were no profits to share at the time Holmes was expelled from the business, so the evidentiary provision of former section 15007, subdivision (4) is not applicable. According to former section 15006, parties who expressly agree to associate as co-owners with the intent to carry on a business for profit, have established a partnership. Once the elements of that definition are established, other provisions of the UPA and the conduct of the parties supply the details of the agreement. <sup>FN18</sup> Certainly implicit in the Holmes-Lerner agreement to operate Urban Decay together was an understanding to share in profits and losses as any business owners would. The evidence supported the jury's implicit finding that Holmes birthed an idea which was incubated jointly by Lerner and Holmes, from which they intended to profit once it was fully matured in their company.

FN18 "The parties [to a partnership] need only possess the general intent to engage in the acts that constitute a partnership rather than the specific intent to be partners .... [Under the UPA] Parties who act as partners in conducting their business will likely be treated as partners for legal purposes." (Selecting & Forming Business

Entities (Cont.Ed.Bar 1998) § 6.2, p. 137.)

## II. The Agreement Was Sufficiently Definite

(3) Lerner and Soward argue that the agreement between Lerner and Holmes was too indefinite to be enforced. The cases they rely on do not support the argument. For example, in *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793 [ 71 Cal.Rptr.2d 265], the court reversed an order enforcing a settlement agreement imposed by a mediator against the will of one of the parties. The issue was the lack of a meeting of the minds as to settlement. The court described the degree of certainty that is necessary to enforce a contract. "The parties' outward manifestations must show that the parties all agreed 'upon the same thing in the same sense.' ( Civ. Code, § 1580.) If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation. (Civ. Code, §§ 1550, 1565 & 1580.)" ( 60 Cal.App.4th at p. 811.) " ' "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." ' [Citation.]" (*Ibid.*) The evidence produced at trial in this case supplied the requisite degree of certainty described in *Weddington*.

In *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201 [ 23 Cal.Rptr.2d 793], disapproved on other grounds in \*458*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [ 32 Cal.Rptr.2d 223, 876 P.2d 1022], a former employee was attempting to enforce various vague promises made during negotiations with the employer. The court merely stated that commitments such as: "promises to pay salary increases or bonuses which are 'appropriate' to [plaintiff's] responsibilities and performance ..." are not sufficiently certain to be enforced in a court of law. ( 19 Cal.App.4th at pp. 213-214.)

*Western Homes v. Herbert Ketell, Inc.* (1965) 236 Cal.App.2d 142 [ 45 Cal.Rptr. 856] is similar. In that case plaintiff sought enforcement of a promise that the parties "contemplate" that plaintiff would

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
(Cite as: 74 Cal.App.4th 442)

handle "leasing, rental collection and management of the entire project." (*Id.* at p. 144.) The court held that absent any terms to show certainty of agreement, the word "contemplate" indicated only an expectation. Unlike the parties in the foregoing cases, Holmes produced substantial evidence of an agreement as well as evidence of actions of the parties in conformance with their agreement.

"Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it." (*Universal Sales Corp. v. Cal. etc. Mfg. Co.*, *supra*, 20 Cal.2d 751, 762.) "There is no requirement, the intention to form a joint venture being otherwise present, that the parties must agree upon the post-acquisition management and operation of the property." (*Franco Western Oil Co. v. Fariss* (1968) 259 Cal.App.2d 325, 344-345 [ 66 Cal.Rptr. 458].) In addition, there is nothing unusual about a partnership in which one party supplies an idea which the other party brings into a substantive form. "Many businesses and great industrial organizations have sprouted from the germ of an idea in the mind of some man. When the idea is reduced to concrete form and put into action in the form of a business enterprise, an invention, a book, an opera or a theatrical production, the results of the idea are subject to private ownership." (*Lyon v. MacQuarrie* (1941) 46 Cal.App.2d 119, 125 [ 115 P.2d 594], disapproved on other grounds in *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 485-486 [ 286 Cal.Rptr. 40, 816 P.2d 892].)

The agreement between Holmes and Lerner was to take Holmes's idea and reduce it to concrete form. They decided to do it together, to form a company, to hire employees, and to engage in the entire process together. The agreement here, as presented to the jury, was that Holmes and Lerner would start a cosmetics company based on the unusual colors de-

veloped by Holmes, identified by the urban theme and the exotic names. The agreement is evidenced by Lerner's statements: "We will do ... everything," "[i]t's \*459 going to be our baby, and we're going to work on it together." Their agreement is reflected in Lerner's words: "We will hire people to work for us." "We will do ... everything we can to get the company going, and then we'll be creative, and other people will do the work, so we'll have time to continue riding the horses." The additional terms were filled in as the two women immediately began work on the multitude of details necessary to bring their idea to fruition. The fact that Holmes worked for almost a year, without expectation of pay, is further confirmation of the agreement. Lerner and Soward never objected to her work, her participation in board meetings and decisionmaking, or her exercise of authority over the retail warehouse operation. Even as late as the trial in this matter, when Lerner was claiming that everything Holmes said was a lie, Lerner admitted: "It was not only my intention to give Pat every opportunity to be a part of this, but I had hoped that she would." In the words of the court in *Weddington*, the parties agreed on the " 'same thing in the same sense.' " (*Weddington Productions, Inc. v. Flick*, *supra*, 60 Cal.App.4th at p. 811.) Holmes was not seeking specific enforcement of a single vague term of the agreement. She was frozen out of the business altogether, and her agreement with Lerner was completely renounced. The agreement that was made and the subsequent acts of the parties supply sufficient certainty to determine the existence of a breach and a remedy. <sup>FN19</sup>

FN19 Our determination that the judgment on the partnership issue may be affirmed disposes of Lerner and Soward's contentions regarding the breach of fiduciary duty and constructive fraud claims, which were based solely on the absence of a partnership.

As the court stated in *Lyon v. MacQuarrie*, *supra*, 46 Cal.App.2d 119, 126: "... the evidence is flatly

74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal. Daily Op. Serv. 6839, 1999 Daily Journal D.A.R. 8634  
**(Cite as: 74 Cal.App.4th 442)**

and irreconcilably conflicting. A finding that no partnership had been formed, had one been made, would have had considerable evidentiary support. As the finding which was made of the formation and the existence of the partnership has ample support in evidence which was accepted by the trial judge as substantial and which was taken as true by him, we cannot disturb the judgment here.”

III. -VIII. <sup>FN\*</sup>

FN\* See footnote, *ante*, page 442.

.....

Disposition

The judgment against Soward for interference with contract is reversed. The order granting a nonsuit to Soward on Holmes's aiding and abetting and \*460 civil conspiracy causes of action relating to fraud, breach of fiduciary duty and constructive fraud is reversed. In all other respects, the judgment and postjudgment order are affirmed. The parties are to bear their own costs on appeal.

Strankman, P. J., and Stein, J., concurred.  
 Petitions for a rehearing were denied September 7, 1999, and the opinion was modified to read as printed above. \*461

Cal.App.1.Dist.  
 Holmes v. Lerner  
 74 Cal.App.4th 442, 88 Cal.Rptr.2d 130, 99 Cal.  
 Daily Op. Serv. 6839, 1999 Daily Journal D.A.R.  
 8634

END OF DOCUMENT