

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

MIKE OBRADOVICH,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-T-0096
ROBERT J. HORVATH, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 2917.

Judgment: Affirmed.

David D. Daugherty, Rieger, Spencer, Carpenter & Daugherty, 410 Mahoning Avenue, N.W., P.O. Box 1429, Warren, OH 44482 (For Plaintiff-Appellee).

Frank R. Bodor, 157 Porter Street, N.E., Warren, OH 44483 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Robert J. Horvath appeals from the judgment of the Trumbull County Court of Common Pleas which adopted a magistrate’s decision regarding a complaint filed by his half brother, Mike Obradovich, who sought accounting of a partnership they formed to operate a trailer park the brothers inherited from their parents. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} Mary Horvath had three sons: Mike Obradovich, Robert J. Horvath, and George Horvath.¹ In 1952, Mrs. Horvath and her husband began to operate a mobile home park, Horvath's Mobile Home Park ("Park"), located on North River Road in Warren Township. Throughout the years, all three brothers worked at the Park as needed. Beginning in the 1980's, Robert began working at the Park as his main employment. After initially working for room and board, he began to be paid as an employee of the Park. In the mid-1990's, he took over the primary responsibility for the management of the Park.

{¶4} Mrs. Horvath died in November of 1998. In her will, she left 50% of her estate, the principal asset of which being the mobile home business, to Robert, and 25% each to George and Mike. It appears a larger share was given to Robert in recognition of the work he had performed for the business. According to an Inventory and Appraisal of her estate filed with the probate court in April of 1999, the assets of the Park consisted of several parcels of real estate and 19 mobiles homes, as well as various bank accounts.

{¶5} In December of 1999, Robert, the executor of his mother's will, filed the Fiduciary's Account regarding his mother's estate. The total receipts of the estate were listed as \$590,962.59, which consisted of \$500,000 representing the Park business (\$413,083 for the real property and \$86,916 for the mobile homes) and cash of \$90,962.59 from the six bank accounts. After payment of debts and the administrative costs, Robert was to receive 50% of the estate (\$261,810.68), and George and Mr. Obradovich 25% each (\$130,905.34).

1. Mike filed the complaint against Robert only, but later joined George as a party. George is not a party in the instant appeal.

{¶6} In order to continue to operate the mobile home park and in connection with the settling of Mrs. Horvath's estate, the three brothers formed a partnership. The partnership agreement designated Robert as a 50% partner as well as the managing partner; the other two brothers were designated as 25% partners. An amount of \$36,000 was handwritten in the agreement as the annual salary to be paid to Robert as the managing partner. It listed the capital contributions of the partners as being the brothers' respective interests in all the real property and all the mobile homes conveyed from the estate, together with cash contributions of \$2,000 from Robert, and \$1,000 each from George and Mike.

{¶7} **Sale of the Park**

{¶8} The partnership operated for two years. During these years, Robert, for whatever reason, did not pay himself a salary as called for in the partnership agreement. On September 21, 2001, the Park was sold to a third party, Sokemo, LLC, for \$720,000, of which \$78,000 was in the form of a loan from the partnership. The sale was negotiated by Robert. The purchase price of \$720,000 was broken down into \$658,800 for the real estate owned by the Park business and \$61,800 for personal property, including all the mobile homes it owned. After closing costs and taxes, the partnership received a net cash amount of \$613,715.95. Although the purchase agreement referenced exhibits that were to specifically identify the parcels of real estate, mobile homes, and any personal property included in the sale, apparently no such exhibits existed. No one involved in the transaction had possession of a copy of the agreement with the exhibits attached. It is undisputed, however, that all of the

partnership's real estate was included in the sale, with the exception of a North River Road parcel and a North Park Avenue parcel.

{¶9} Furthermore, the Park had 52 rented lots; 14 trailers were owned by individuals and, of the remaining 38 trailers, apparently 18 were titled in Robert's name. However, these 18 mobile homes were sold as part of the sale of the Park business to Sokemo. There was no separate appraisal or purchase agreement for these 18 mobile homes.

{¶10} Shortly after the closing, Robert distributed \$50,000 to each partner. Later, he distributed another \$286,109.32 to himself.

{¶11} Subsequently, the brothers met at the Mocha House in Warren to discuss the final distributions of the sale proceeds. Robert proposed that \$20,000 apiece should be reserved from George and Mike's shares to cover the partnership's responsibility for the cost of the sewer hook-up as provided in the purchase agreement.

{¶12} Furthermore, Robert claimed that 18 mobile homes that were sold as part of the Sokemo sale were titled in his name and that they had a value of over \$80,000. Therefore, he proposed \$80,000 be deducted from the sale proceeds before the proceeds were divided among the brothers. Robert thus proposed a subtraction of \$20,000 each from Mike and George's shares of the sale proceeds to compensate him for these mobile homes.

{¶13} In Robert's calculations, after the reservation of \$20,000 each for the sewer hookup and a deduction of \$20,000 for the 18 mobile homes, and taking into account of the previous distribution of \$50,000, Mike and George should each receive \$78,554.66 only. This amount would represent Robert's proposal of Mike and George's

shares after the sewer hookup cost and the deduction for the value of the 18 mobile homes titled in his name.

{¶14} Robert also made a proposal regarding the two parcels of land owned by the partnership but not included in the sale – the North River Road parcel and the North Park Avenue parcel. The trial testimony indicates that apparently it had been the parents' intention to have Mike inherit the North River Road parcel and George to inherit the North Park Avenue parcel. However, these parcels were included in Mrs. Horvath's estate as assets of the Park and therefore were conveyed from the estate to the partnership along with other parcels of real estate.

{¶15} Regarding these two parcels, Robert proposed a conveyance of the North River Road parcel from the partnership to Mike. He proposed that the North Park Avenue parcel be conveyed to himself, and, to compensate George for it, he proposed a cash payment of \$15,000 to George. In accordance with these proposals, he presented Mike a check of \$78,544.66 from the partnership account and George a check of \$95,554.66.

{¶16} As the magistrate noted, Robert's calculations for the proposed final distributions do not quite match the distributions made to the brothers documented in the partnership's 2002 tax return. Instead, the tax return reflected the sale of the Park to Sokemo and showed a distribution of \$304,609 to Robert and \$132,555 each to George and Mike; no explanations of the discrepancies were offered by Robert at trial. The magistrate noted that according to the distributions as reported in the partnership's 2002 tax return, Robert received \$39,499 more than his due share from the proceeds of the sale of the Park -- under a 50/25/25 distribution he should have only received

\$265,110, which was \$39,499 less than the \$304,609 shown in the tax return. This excess distribution, from what we can tell, roughly corresponded to the amount Robert believed Mike and George should compensate him for the 18 trailers titled in his name.

{¶17} Mike's son, an accountant, discovered the \$20,000 deduction from the two brothers' respective shares of the Sokemo sale proceeds. He requested financial records from Robert regarding the partnership without success. As a result, on December 9, 2003, Mike filed a complaint seeking an accounting from Robert. Mike later filed a motion for leave to file an amended complaint, seeking the judicial dissolution of the partnership and the addition of George as a necessary party.² He also requested that the court appoint a receiver to oversee the winding up of the partnership's affairs.

{¶18} Specifically, Mike claimed Robert breached his fiduciary duty in refusing access to the partnership's financial records; failed to keep accurate records of the partnership's business; wrongfully deducted \$20,000 from Mike's share of the sale proceeds and transferred the North Park Avenue parcel to himself; and misused the partnership funds to pay for his own attorney and accountant in the instant action.

{¶19} Robert filed a counterclaim asserting he should have been paid an annual salary of \$36,000 in 2000 and 2001. He also claimed he was entitled to be reimbursed for the rental income generated by the 18 mobiles homes titled in his name.

{¶20} On January 30, 2008, the matter was tried to a magistrate. Robert, Mike, George, and George's son testified, as well as Teddy Radtka, who offered an opinion of

2. George did not assert any affirmative claims at trial, requesting only that the court apply equitable principles in resolving the instant matter. He joined in Mike's request for a judicial resolution of the partnership and for an order requiring Robert to repay to the partnership any excessive distributions as well as the legal and accounting fees paid with partnership funds.

value on the 18 mobile homes titled in Robert's name. The record reflects a lengthy trial, as revealed by over 600 pages of trial transcript. The transcript reflects the magistrate actively participated in the trial and conducted his own independent examination of Robert.

{¶21} Following trial, the magistrate filed a lengthy and detailed decision setting forth his Findings of Facts and Conclusions of Law. The magistrate was apparently frustrated by the "extremely lax" financial record-keeping by Robert. No journal or ledgers were maintained for the business; the record of the Park's receipts and disbursements consisted only of bank account registers and a series of index cards for each trailer, none of which Robert produced during the trial proceedings. The magistrate also found Robert to be less than forthcoming throughout the proceedings in identifying and providing records to Mike and his counsel.

{¶22} The magistrate concluded Robert breached his fiduciary duty to Mike by failing to provide him with prompt access to the records of the partnership and by failing to keep accurate financial records of the business. The magistrate also found Robert's conduct in making distributions to himself beyond what he was entitled did not meet the standards of "utmost good faith and honesty." The magistrate found, specifically, that Robert made \$42,000 in excess distributions to himself.

{¶23} The magistrate in addition found Robert to have breached his fiduciary duty by distributing \$15,000 in partnership funds to George, presumably to compensate him for the value of the North Park Avenue parcel, the title of which Robert later transferred to himself. The magistrate determined Robert wrongfully used \$16,572.70 of partnership funds to pay his own legal and accounting in the instant action.

{¶24} The magistrate concluded that Robert's lack of coherent business records and failure to produce evidence at trial regarding the affairs of the partnership made it impossible to render a definitive accounting sought by Mike, stating that a formal accounting in this case would be a "pointless exercise" and finding it necessary to deny Mike's request for an accounting.

{¶25} The magistrate noted, however, that accounting is not the sole remedy for Robert's breach of fiduciary duty and that Mike's specific claims can be resolved even with the court's inability to conduct a full inquiry into the affairs of the partnership. Based on the limited evidence, the magistrate determined that (1) Robert must return to the partnership the excessive distribution of \$42,000 to himself; (2) Mike is entitled to an additional distribution of \$15,000 in connection with the disposition of the two parcels of land; and (3) Robert must pay back the sum of \$16,572.70 in legal and accounting fees to the partnership.

{¶26} Robert filed timely objections to the magistrate's decision. After the hearing, the trial court overruled the objections and adopted the magistrate's decision. Robert now appeals from that decision, assigning the following errors for our review.

{¶27} "[1.]The court erred and abused its discretion in ordering appellant Robert Horvath to pay into the Horvath's Mobile Home Park Partnership bank account the sum of \$42,800 representing one-half of the value of eighteen mobile homes solely owned and titled in the individual name of Robert Horvath, which was sold with partnership assets to a third party.

{¶28} "[2.] The court erred and abused its discretion in failing to award appellant Robert Horvath the sum of \$72,000 on his counterclaim for a managing partner salary of

\$36,000 per year as provided under ¶(G) of the partnership agreement or alternatively render an award of quantum meruit.

{¶29} “[3.] The court erred and abused its discretion in ordering that \$15,000 distribution be paid from partnership assets to appellee Obradovich without also ordering a \$30,000 distribution to appellant Robert Horvath.

{¶30} [4.] The court abused its discretion and erred and [sic] failing to grant appellant Robert Horvath the net rental income for the years 2000 and 2001 due him from the eighteen mobile homes owned by him, which income was improperly deposited into the partnership account.

{¶31} “[5.] The court erred and abused its discretion in finding that no evidence was produced showing that a backhoe was an asset of the partnership and that the evidence did not establish that the item was a partnership asset required to be distributed as an asset to the partners.”

{¶32} **Standard of Review**

{¶33} Civ.R. 53(D)(4)(d) provides:

{¶34} “If one or more objections to a magistrate’s decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.”

{¶35} Furthermore, “[o]n appeal, a trial court’s adoption of a magistrate’s decision will not be overruled unless the trial court abused its discretion in adopting the decision.” *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullett* (July 29, 2001), 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6. See, also, *In the Matter of Gibbs* (Mar. 13, 1998), 11th Dist. No. 97-L-067, 1998 Ohio App. LEXIS 997, *12 (an appellate review of the trial court’s decision under Civ.R. 53 is limited to a determination of whether the court abused its discretion in adopting the magistrate’s decision).

{¶36} “An abuse of discretion is more than error of judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶37} “As the trier of fact, the magistrate was in the best position to hear and observe all of the witnesses, and to measure their credibility. In that capacity, the magistrate had the right to either believe or disbelieve the testimony that was given.” *Lovas* at *6, citing *Kerr v. Abacus Computer Services* (Dec. 29, 2000), 11th Dist. No. 2000-L-004, 2000 Ohio App. LEXIS 6213.

{¶38} Moreover, any claim of trial court error must be based on the actions of the trial court, not on the magistrate’s findings or proposed decision; the focus is on the trial court’s actions and not the actions of the magistrate. *W. R. Martin, Inc. v. Zukowski*, 11th Dist. Nos. 2006-L-028 and 2006-L-120, 2006-Ohio-6866, ¶32.

{¶39} In a civil proceeding, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a

reviewing court as being against the manifest weight of the evidence.” *C. E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280-281.

{¶40} “Partners in Ohio owe a fiduciary duty to one another.” *Dunn v. Zimmerman* (1994), 69 Ohio St.3d 304, 306, citing *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, paragraph two of the syllabus. Furthermore, the Supreme Court in Ohio recognized that “[t]his duty would be meaningless without the existence of a remedy for its breach.” *Dunn* at 306. In interpreting pertinent statutory provisions from R.C. Chapter 1775, Ohio’s Uniform Partnership Code, the Supreme Court of Ohio held that “[a] breach of fiduciary duty among partners is actionable at law. The usual and normal remedy for a breach of fiduciary duty or other legal conflict among partners is an accounting.” *Id.* at syllabus. “Once the accounting has been conducted, the trial court may enforce the collection of any amounts found owing.” *Id.* at 307.

{¶41} Typically, “[a] party seeking an accounting must introduce sufficient evidence to enable the court to make a definitive accounting that states the “true condition of [the] affairs” between the partners.” *Id.* at 307, quoting *Oglesby v. Thompson* (1898), 59 Ohio St. 60, 64. However, “in the universe of disputes that might arise among partners, there may be some for which a formal accounting would be a pointless exercise. Such cases would involve disputes over a very limited time or number of transactions, whose resolution would not require a searching inquiry into partnership affairs.” *Dunn* at 309.

{¶42} Here, as indicated by Robert’s testimony and found by the magistrate, the record keeping regarding the Park business and the partnership was so lax as to render a complete accounting impossible. However, the magistrate was able to resolve

specific claims raised by the parties based on the limited evidence available at trial without the benefit of a full accounting. We address the court's adoption of the magistrate's resolution of each of these claims in turn.

{¶43} Excess Distribution of \$42,800

{¶44} In his first assignment of error, Robert claims that the court abused its discretion in ordering him to return to the partnership the \$42,800 excess distribution he made to himself. He claims he was entitled to the excess distribution from the sale proceeds of the business because the amount represented half of the value of the mobile homes titled in his name but included as part of the sale.

{¶45} The magistrate decided there was an excess distribution to Robert based on the partnership's 2002 tax return. The return reflected the sale of the Park to Sokemo and showed a distribution of \$304,609 to Robert and \$132,555 each to Mike and George. The magistrate noted that, based on these distributions reported in the 2002 tax return, Robert received \$39,499 more than his due share from the proceeds of the sale; under a 50/25/25 distribution he should have only received \$265,110, which was \$39,499 less than \$304,609 reported in the tax return.

{¶46} The magistrate eventually decided to resolve the exact amount of overpayment by relying on the partners' 2006 Schedule K-1. The magistrate determined that Mr. Horvath made \$42,800 in excess distribution to himself, based on these K-1's, which show the most recent figures available regarding the balances of the partners' capital accounts. The K-1's show that Robert's capital account had a balance of \$15,816 while Mike's capital account had a balance of \$29,306 and George's account had a balance of \$29,305.

{¶47} Because under a 50/25/25 percent partnership, Robert should have a balance of \$58,611 in his capital account (= \$29,306 + \$29,305), the magistrate determined Robert overdrew his capital count by approximately \$42,800 (\$58,611- \$15,816 = \$42,795), which should be returned to the partnership. In light of the confusing evidence presented to the trial court, we cannot say that the court abused its discretion in relying on the partners' schedule K-1's, which were official documents filed with the government, in determining that Robert made \$42,800 of excess distribution to himself.

{¶48} Robert argues that the amount represents half of the value of the 18 mobiles titled in his own name, and therefore he is entitled to the excess distribution.

{¶49} Regarding how these 18 mobile homes became titled in his name, the magistrate found Robert did not offer a clear and satisfactory testimony. He testified that some of them were paid for through the Park account, for "money owed to me from work I had one." He also testified he purchased some of them with his own funds. He testified, however, that none of the purchases was documented. He also testified, somewhat contradictorily, that "it was just a gift *** from my parents." Other than his own testimony, no evidence was introduced to show which were purchased with the Park funds and which were purchased with his own funds. Mike testified these mobiles were acquired when their parents were still alive, but Robert titled them in his own name instead of their parents' names.

{¶50} No separate account was ever maintained for these 18 mobile homes. Rather, as Robert himself testified, the incomes and expenses generated by these mobile homes were comingled with other trailer homes in the Park – the rental incomes

were deposited into and the expenses were paid out of the Park's bank account. Moreover, no evidence was introduced by Robert to show he treated these trailer homes as his own property for tax purposes; instead, the incomes and expenses of these mobile homes were included in the partnership's tax returns for 2000 and 2001. Furthermore, when the Park business was sold to Sokemo in 2002, there was no separate contract for the 18 mobile homes in Robert's name; neither was there a separate appraisal. Even though Robert claimed these mobiles homes to be his individual property, his course of conduct reveals otherwise.

{¶51} To establish the value of these mobile homes, Robert offered testimony of Teddy Radtka, an individual in the mobile home business but not a certified appraiser. He testified he did a drive-by inspection of the mobile homes and assigned their value based on the NADA Appraisal Guide and information given to him by Robert. He opined that the 18 mobile homes had a value of \$81,487.56. The magistrate found this evidence of value for the mobile homes "greatly lacking in credibility," and "was not established to any degree of reliability."

{¶52} We note that the only pieces of evidence of value relating to the Park's mobile homes were: (1) the 2002 partnership tax return, which reported a sale of *all* 38 of the mobile homes which were assigned a total value of \$61,200, and (2) the closing statement for the sale of the Park which broke down the purchase price of \$720,000 to \$658,800 for the real property, and \$61,800 for personal property, including *all* the mobile homes. In light of the valuation of all 38 mobiles homes in the Park assigned in the tax return and the purchase agreement, the court did not abuse its discretion in

deferring to the magistrate for the finding that the valuation of the 18 mobile homes offered by Robert was not credible.

{¶53} Consequently, the court did not abuse its discretion in adopting the magistrate's conclusion that Robert wrongfully distributed \$42,800 in excess of his shares based on evidence from the partners' 2006 Schedule K-1's. Although Robert claims the amount represented the mobile homes titled in his name, the testimony purportedly showing these mobile homes were his individual property was found to be not credible by the trial court, and we decline to second-guess this finding.

{¶54} Finally, Robert maintains that his brothers' acceptance and subsequent negotiation of the checks he presented to them at the Mocha House constituted accord and satisfaction. "A common element for either [accord and satisfaction or novation] to exist is that there must be consent on both parties' part or a meeting of the minds." *Ashville Bank v. Higley* (Jan. 27, 1987), 4th Dist. No. 85CA43, 1987 Ohio App. LEXIS 5683, *15, citing 15 Ohio Jur.3d (1979), Compromise, Accord, and Release Sec. 21, 18 Ohio Jur.3d (1980), Contracts Sec. 285. Here, there was no testimony establishing all three brothers agreed that the checks represented the final distribution of the partnership's assets. Robert himself testified that after he handed the sheet containing his proposal to Mike, Mike said to him "this is bullshit." Because the evidence did not establish Mike agreed that the checks represented the final distribution of the partnership's assets, accord and satisfaction is not applicable here. The first assignment of error is overruled.

{¶55} **Rental Income of the 18 Mobile Homes**

{¶56} Robert's fourth assignment of error also relates to the 18 mobile homes titled in his name. He maintains that the rental income for these mobile homes in the years 2000 and 2001 had been improperly deposited into the partnership account, and therefore he is entitled to a reimbursement from the partnership. At trial, he offered exhibits containing his calculations of these mobile homes' net rentals, after deductions for lot rent, taxes, and supplies. His calculations showed the net rentals amounted to \$10,335 in 2000 and \$10,765 in 2001, totaling \$21,100 for these two years. The magistrate found the evidence "utterly unreliable" because the calculations were based on unsupported assumptions.

{¶57} Furthermore, Robert was the party who managed the Park's business. His own testimony shows that in his bookkeeping he treated the mobile homes titled in his name no differently than those owned by the Park. He did not distinguish the rental income or expenses of the 18 mobile homes from the income or expenses of the Park-owned mobile homes. He was the one responsible for depositing rental income generated by the mobile homes he claimed to own into the partnership account, and therefore he cannot now be heard to complain about his own conduct. His fourth assignment of error is without merit.

{¶58} The North Park Avenue and North River Road Parcels

{¶59} Robert's third assignment of error relates to the North Park Avenue parcel, one of the two parcels that were assets of the Park but not part of the Sokemo sale. All three brothers testified at trial that it had been their parents' intention for George to inherit the North Park Avenue parcel and Mike to inherit the North River Road parcel. However, these parcels were included in Mrs. Horvath's estate as part of the assets of

the Park and were subsequently conveyed from her estate to the partnership. At the Mocha House meeting, Robert proposed that the North River Road parcel be conveyed to Mike. He also proposed that the North Park Avenue parcel be conveyed to himself; in exchange, he offered George a cash payment of \$15,000 from the partnership funds.

{¶60} The title of the North River Road parcel was never transferred to Mike as Robert had proposed. As to the North Park Avenue parcel, the record shows that Robert, acting on behalf of the partnership, executed a quitclaim deed transferring the North Park Avenue parcel from the partnership, and received a consideration of \$15,000. No evidence, however, shows Robert paid \$15,000 from his personal funds to the partnership. The parcel was later sold by Robert for \$15,000, which apparently went to Robert's own account.

{¶61} The magistrate found Robert breached his fiduciary duty in disposing the North Park Avenue parcel and concluded that Mike is entitled to receive an additional distribution of \$15,000 prior to any final distribution of the remaining partnership assets.

{¶62} Robert's self-dealing clearly breached his fiduciary duty. Because George received a distribution of \$15,000 from the partnership in connection with these two parcels of land owned by the partnership, the court was not unreasonable in ordering that Mike, a partner with an equal share as George, be paid a corresponding distribution from the partnership.

{¶63} Robert claims on appeal that if Mike is to receive \$15,000 of distribution from the partnership in connection with these parcels, he should be entitled to \$30,000 pursuant to his 50% interest in the partnership. He neglects to mention that he already received \$15,000 when he sold the North Park Avenue parcel to a third party.

Furthermore, the court could have based its determination on the brothers' testimony that these parcels were intended by their parents to be given to Mike and George, whose interests in Mrs. Horvath's estate were transferred to the partnership when the latter was formed. Based on the evidence before the court, we do not find the court's decision regarding these parcels to be unreasonable, arbitrary, or unconscionable. Robert's third assignment of error is overruled.

{¶64} Robert's Counterclaim for Salary

{¶65} The partnership agreement contained a provision regarding a yearly salary to be paid to Robert as the managing partner and the amount of \$36,000 was hand-written in the provision. Despite this provision, however, Robert did not pay himself a salary during the operation of the Park in 2000 and 2001. The magistrate found that Robert could not offer a coherent explanation for not paying himself a salary despite the written provision.

{¶66} Our review of the trial transcript shows that Robert's own testimony indicates there was no discussion among the brothers as to the amount of salary to be paid to him. George testified that he was not aware of the provision regarding Robert's salary when he signed the partnership agreement and did not know how the amount of \$36,000 found its way into the document. Robert testified he did not pay himself the salary because at the time the partnership agreement was signed, Mike threatened to sue him if he were to pay himself a salary out of the partnership funds. This testimony calls into question whether there was indeed a meeting of the minds regarding the salary provision in the agreement. Robert's own act of not paying himself compensations would appear to be consistent with a lack of agreement among the

brothers regarding this provision. Therefore, the court did not abuse its discretion in not awarding him \$72,000 on his counterclaim. See *Episcopal Retirement Homes, Inc. v. Ohio Dep't. of Industrial Relations* (1991), 61 Ohio St.3d 366, 369 (a meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract). The second assignment is without merit.

{¶67} The Backhoe

{¶68} The fifth assignment of error concerns the proper ownership of a backhoe. Among its findings of facts, the magistrate found that prior to the closing of the sale of the Park business, the brothers agreed to split various items of personal property at the premises among themselves. Among the items retained by Mike was a 1973 dump truck and a backhoe.³ Robert claimed the backhoe was property of the partnership and should be sold with the proceeds split among the partners. The magistrate found no evidence was produced at trial to show that the backhoe was an asset of the partnership and noted specifically that the backhoe was not listed as an asset of Mrs. Horvath's estate nor formally transferred to the partnership.

{¶69} Robert challenges the court's finding of a lack of evidence for the partnership's ownership of the backhoe. He points us to his own testimony at trial that the backhoe was an asset of the partnership. Our review of the transcript reflects he testified that he did know under whose name the backhole was titled and that "[i]t was partnership assets as far as me and George were concerned for sure, and we were going to divide it as far as I knew, sell it." The magistrate found this testimony fell short

3. After the magistrate issued his decision, in which he denied Robert's claim that both the dump truck and the backhoe were partnership property, Robert filed a copy of the Certificate of Title showing the dump truck was titled to Horvath's Mobile Home Park Partnership. Accordingly, the court in its judgment

of proof that the partnership retained ownership of the backhoe after the brothers divided up items of personal property at the premises after the sale of the Park business. As the magistrate was in the best position to measure the credibility of the witnesses' testimony, the court did not abuse its discretion in adopting the magistrate's finding regarding the ownership of the backhoe. The fifth assignment of error is overruled.

{¶70} Our review of the record in this case indicates Robert breached his fiduciary duty as a partner by failing to keep accurate records of the partnership's business and refusing full access to the records he kept. He was less than forthcoming in identifying and providing records throughout the trial proceedings. His lack of coherent business records made it impossible for the trial court to render a definitive accounting of the partnership. He claimed 18 mobile homes sold as part of the sale of the trailer park business were his individual property, but could not show that he had used his own funds to purchase them. Throughout his management of the business, he treated these mobile homes as partnership property in both bookkeeping and tax reporting. Most crucially, he merged them with those titled in the partnership's name when the trailer park business was sold. There was no separate negotiation, appraisal, or contract for these mobile homes.

{¶71} We are reminded of the maxim that "he who seeks equity must do equity, and that he must come into court with clean hands." *Christman v. Christman* (1960), 171 Ohio St. 152, 154. Under this rule, equitable relief is not available to a person who "has violated good faith by his prior-related conduct." *Greer-Burger v. Temesi*, 116 Ohio

entry found the dump truck belonged to the partnership. Consequently, this assignment of error concerns only the backhoe.

St.3d 324, 2007-Ohio-6442, fn.5, citing *Marinero v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45.

{¶72} Robert's inability to establish his claim of entitlement to (1) the 18 mobile homes titled in his name, (2) the rental income produced by these homes, and (3) a salary for the two years he served as a managing partner, is entirely attributable to his commingling of the partnership's assets and assets he claimed to be his own, and to his failure in properly conducting the partnership's business, for which he was solely responsible. He cannot now be heard to complain. After reviewing the evidence presented at trial, we cannot conclude the trial court abused its discretion in adopting the magistrate's findings in favor of the appellee.

{¶73} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶74} I respectfully dissent and would reverse the judgment of the lower court.

{¶75} I disagree with the majority's conclusion that the trial court "did not abuse its discretion in adopting the magistrate's conclusion that Robert wrongfully distributed \$42,800 in excess of his shares." Robert was entitled to the value of his individually owned mobile homes which were included in the sale of the partnership property.

{¶76} Testimony from both George Horvath and Mike Obradovich indicated that all of the partners were aware that there were various mobile homes titled in Robert's name and that those mobile homes were sold to Sokemo with the partnership property. Additionally, the magistrate, in his findings of fact, recognized that "it appears undisputed that Robert's mobile homes, although not partnership property, were included in the sale."

{¶77} The majority asserts that no evidence, other than Robert's own testimony, was introduced to show which of Robert's mobile homes were purchased with his own funds as opposed to the Park's funds. However, it is equally important to note that the record, aside from Mike's unsubstantiated assertions, is void of evidence that Robert acquired the mobile homes titled in his name dishonestly or in bad faith. Furthermore, testimony indicated that most, if not all, of Robert's mobile homes were titled in Robert's name prior to the existence of the partnership between the brothers.

{¶78} The majority contends that Robert's "course of conduct" revealed that the mobile homes were not his individual property, specifically that "the incomes and expenses generated by these mobile homes were comingled with other trailer homes in the Park" and not in a separate account for Robert. However, Robert offered an explanation for his conduct, testifying that during the operation of the partnership, he made a "gift of the income from the trailers titled in [his] name to [his] brothers." This action by Robert was not contrary to the terms of the partnership agreement, he merely contributed more to the partnership at the time then required by the agreement. Further, Robert testified that prior to the sale of the partnership property, he had discussions with both George and Mike concerning adjustments against the amounts

being distributed from the sale of the mobile home park for the mobile homes he owned. Moreover, the fact remains that 18 mobile homes were titled in Robert's name, not in the name of the partnership.

{¶79} The majority further asserts that the magistrate did not abuse his discretion based on the finding that there was no credible evidence for Robert's valuation of the mobile homes. This finding was based largely on the allocation of the mobile homes at \$61,200 in the purchase agreement. However, the fact that all the mobile homes on the partnership property, including Robert's 18, were valued at \$61,200 is meaningless; the partners did not have any concern about or input in the allocation of the price of the mobile homes in the purchase agreement; their primary concern was the overall price of the sale. Testimony from Mike, George, and Robert revealed that the partners were more concerned about the bottom line price than the allocation. Mike unambiguously testified that the partners were "just concerned what the [bottom line] price was" and they didn't have any discussions or input about the allocation. Robert testified that he "barely" knew what the allocation in the purchase agreement meant: "the attorney's came up with [the numbers]". The allocation of \$61,200 for the mobile homes in the purchase agreement cannot be used to discredit the valuation performed by Robert.

{¶80} On the contrary, there was credible evidence for Robert's valuation of the mobile homes titled in his name. Teddy Radtka, who has been involved in the buying and selling of mobile homes since 1965, helped Robert determine the proper price for each mobile home using the NADA Appraisal Guide to evaluate each mobile home. With the use of the guidebook, Radtka arrived at the amount of \$117,556.38 for the

value of Robert's 18 mobile homes. Although Radtka did not go inside of the mobile homes, when asked what the value of the mobile homes would be if they were stripped of internal additive values, like carpet, bathtub, accessories and other components, he opined that the value of the 18 mobile homes would be \$81,487.66.

{¶81} Unjust enrichment occurs “when a party retains money or benefits which in justice and equity belong to another.” *Liberty Mut. Ins. Co. v. Indus. Comm. of Ohio* (1988), 40 Ohio St.3d 109, 111 (citations omitted). In order to prevail on an unjust enrichment theory, the plaintiff must establish three elements: “(1) he conferred a benefit on the defendant; (2) the defendant knew of the benefit; and (3) the defendant retained the benefit under circumstances where it would be unjust for him to retain that benefit without payment.” *Pine v. Price*, 7th Dist. No. 01-CO-46, 2002-Ohio-5223, at ¶19 (citations omitted).

{¶82} It is obvious that Mike and George would be unjustly enriched by receiving the proceeds from the sale of Robert's 18 mobile homes. They were aware Robert had mobile homes titled in his name, not in the name of the partnership. Robert testified that he had conversations prior to the sale with both George and Mike about compensation for the sale of his mobile homes when they were sold with the partnership assets and property. The trial court abused its discretion in ordering Robert to pay back the partnership account the \$42,800 distribution for the value of the mobile homes owned by Robert.

{¶83} Additionally, I respectfully disagree with the majority's conclusion that “the trial court did not abuse its discretion in not awarding [Robert] \$72,000 on his

counterclaim.” Robert should have been awarded the agreed upon salary in the partnership agreement or the value of his services under the theory of quantum meruit.

{¶84} The partnership agreement explicitly stated that “Robert J. Horvath shall be managing partner and shall devote his entire time and attention to the business of the partnership and as managing partner, shall receive a salary of \$36,000 per year.”

{¶85} Robert devoted a great deal of his time to the mobile home park. As managing partner, Robert, among other responsibilities, plowed snow; maintained all the mobile homes; maintained the furnaces, fan motors, and gas supply; managed safety concerns like fixing steps and winterizing the park; wrote expense checks; and completed the paperwork for taxes, receipts, expenses, etc. Robert testified that he was never paid a salary for the years he worked for the partnership. Further, he was the only partner authorized to write checks, thus the only person that could have paid his salary.

{¶86} The majority concluded that there was a “lack of agreement among the brothers regarding [the salary] provision” in the partnership agreement. However, the testimony presented warrants a different conclusion. George testified that, although he did not know “what figure” Robert was to be paid under the contract, he “figured he had something coming.” George further testified that he “essentially just sign[ed] the document without reading it.” Additionally, Mike admitted that the partners had discussions regarding Robert’s salary prior to signing the partnership agreement. Most importantly, both Mike and George had an opportunity to read the contract, with the salary provision included, and chose to sign it without making amendments.

{¶87} Even if there was “a lack of agreement” between the brothers regarding Robert’s salary, he still would be entitled to quantum meruit recovery. “*Quantum meruit* is generally awarded when one party confers some benefit upon another without receiving just compensation for the reasonable value of services rendered.” *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 55. “Obligations imposed under a theory of *quantum meruit* are imposed by law without regard to the intent or assent of the parties to be bound, and as a consequence are not truly contractual in nature. *** [I]n order to demonstrate a prima facie case[,] a claimant must show that he conferred a benefit upon another and that the circumstances render it unjust and inequitable to permit the other to retain the benefit without making payment[.] *** Moreover, a claimant must demonstrate the reasonable value of the benefit conferred.” *Natl. City Bank v. Fleming* (1981), 2 Ohio App.3d at 50, 57.

{¶88} It is obvious that Robert’s time and attention to the partnership conferred a benefit on Mike and George. Mike and George were aware of the benefit, and it would be inequitable for them to retain the benefit of Robert’s diligent work without payment to him. The trial court abused its discretion by failing to award Robert payment for his work at the partnership.

{¶89} Accordingly, I would reverse the decision of the trial court and allow Robert to retain the value of the 18 mobile homes he owned and award him payment for the duties completed during his position as managing partner.