IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HUGO ANTONIO CASTILLO MARTE, Appellant/Cross-Respondent, v. JESSIKA HERNANDEZ, as personal representative of the Estate of FRANKLYN CASTILLO, and the Estate of FRANK CASTILLO, Deceased, Respondents/Cross-Appellants.	)	No. 66664-9-I DIVISION ONE UNPUBLISHED OPINION FILED: May 16, 2011

GROSSE, J. — An agreement to form a partnership to purchase a franchise and to conceal from the franchisor the existence of that partnership, when the franchisor prohibits partnerships from purchasing its franchises, amounts to deceptive conduct in violation of RCW 21.20.010 and RCW 19.100.170 and renders the agreement unlawful. Thus, the parties to the agreement may not enforce it, when, as here, they were equally culpable in its illegal creation. Accordingly, we affirm.

FACTS[1]

Franklyn Castillo (Frank) and his brother, Hugo Antonio Castillo Marte (Tony),[2] decided to purchase two McDonald's restaurant franchises in Oregon. They agreed that Frank would apply for the franchise and Tony would supply at least a portion of the money necessary to buy the franchise and pay other costs of opening the restaurants.

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[1] The verbatim report of proceedings of the trial testimony was not designated as part of the appellate record. Thus, the facts are drawn from the trial court's findings of fact and the summary judgment pleadings, where applicable.

[2] For clarity, we refer to the brothers by first name, as in the briefing and proceedings below.

They were aware that McDonald's Corporation sells franchises only to individuals who own the entire equity interest of the franchise and would not grant a franchise to a partnership. Thus, they agreed to conceal from McDonald's the existence of their partnership and Tony's financial involvement in the purchase.

Between November 2000 and April 2003, Tony advanced to Frank $116,000 in nine separate checks as part of his investment in the partnership. Tony misrepresented the purpose of some of these checks by notations on the checks that they were for "debt repayment," "credit card payment," and "house proceeds." In April 2003, Tony also advanced to Frank three separate checks of $10,000 each and did so to avoid the reporting requirements of 32 U.S.C. § 5313 and to conceal his involvement in the partnership with Frank.

In June 2003, Frank executed franchise agreements with McDonald's Corporation, for two restaurants located in Gresham, Oregon. Both agreements contained the following language:

> Franchisee represents, warrants, and agrees that Franchisee actually owns the complete equity interest in this Franchise and the profits from the operation of the Restaurant, and that Franchisee shall maintain such interest during the term of its Franchise except only as otherwise permitted pursuant to the terms and conditions of this Franchise. . . .

With McDonald's approval, Frank assigned his interest in both franchises to CM Restaurant Management, LLC, an Oregon limited liability company owned entirely by Frank.

Once the restaurants were operational, Tony began receiving money from the two restaurants. Tony prepared invoices showing that he provided services for consultation on computer related or information technology, but in fact performed no such services for the restaurants. Tony also received $15,000 from Frank, which he claims was also part of his share of the restaurant profits. He did not report any of this income on his federal tax returns.

In November 2004, Frank died intestate and his wife, Jessika Hernandez, was appointed personal representative. As the surviving spouse, Hernandez was approved as a franchisee operator by McDonald's Corporation upon completing the required training. The estate was entered into probate and in November 2005, Tony filed a creditor's claim for his interest in the partnership. Hernandez rejected the claim.

In April 2006, Tony sued the estate, alleging that he held an ownership interest in the McDonald's franchise and that he was entitled to receive the amount of his partnership interest from the estate. Alternatively, he sought that the partnership be wound up and that he receive $171,000 in addition to 50 percent of any profits and increase in value.

The estate moved for summary judgment requesting dismissal based on a finding that no partnership was formed as a matter of law. The court denied the motion, finding that an issue of material fact existed about the existence of a partnership. In the meantime, Tony amended his complaint to add a claim for unjust enrichment, seeking the $171,000 he disbursed to Frank to make the down payment for the restaurants.

The estate moved again for summary judgment, contending that any alleged partnership between the brothers was unlawful and the partnership agreement was therefore unenforceable. The court denied the summary judgment motion and issued a letter to counsel, stating:

> In lieu of a Memorandum of Opinion, this letter will suffice. I find that as [sic] best the franchise agreement with McDonalds is voidable rather than void. The fact that Frank may have misrepresented his capacity or status gives the franchisor the option of negating the agreement. The statute RCW 19.100.170-180 would appear to allow such action. However, it would not render the agreement void ab initio.
>
> Further complicating the issue is the lack of privity between McDonalds and the plaintiff. Thus while the franchisor may negate the contract, the effect of such action on the parties hereto is uncertain. Consequently I deny defendant's motion for summary judgment. I further find that defendant did not waive the protection of the Dead Man's Statute. Please draft an order to reflect the above.

The estate moved for reconsideration, which was denied. The estate also sought certification of the issue to the Court of Appeals under RAP 2.3(b)(4), but the court declined to certify the issue and entered an order denying the summary judgment motion. The estate then sought discretionary review.

The commissioner issued a ruling granting discretionary review, concluding that the trial court committed obvious error that rendered future proceedings useless. The commissioner's ruling reasoned that the brothers' agreement was likely void against public policy and therefore unenforceable. Tony moved to modify the commissioner's ruling. A three judge panel of the court granted the motion and denied discretionary review. The matter then proceeded to trial.

Before trial, Tony moved in limine to prevent the estate from arguing at trial that the partnership was illegal. He contended that based on the court's denial of the estate's second summary judgment, the legal issue was decided and therefore a final order. The estate argued that the denial of summary judgment simply left all issues "in play," and that the estate would move for a directed verdict on the legality of the partnership at the close of the evidence. The trial court ruled that the only question that would go to the jury would be the existence of the partnership and that the court would reserve ruling on the legality of the partnership until after the jury made that determination.

At the close of the evidence, the estate moved to direct a verdict that a partnership was not formed and reserved the right to later argue the legality of the partnership. The trial court denied the motion to direct the verdict and sent the case to the jury. The verdict form instructed the jury to answer the following questions:

> **QUESTION 1: Did Plaintiff and Franklyn Castillo form a partnership?**
> **ANSWER**: ______ (Write "yes" or "no")
> *(INSTRUCTION: If you answered "yes" to Question 1, answer Question 2. If you answer "no" to question 1, answer Question 3.*
> **QUESTION 2: Does the Plaintiff's partnership include the two McDonald's restaurants?**
> **ANSWER**: ______ (Write "yes" or "no")
> *(INSTRUCTION: If you answered "yes" to Question 2, do not answer any further questions: sign this verdict. If you answered "no" to Question 2, answer Question 3.)*
> **QUESTION 3: Is Plaintiff entitled to recovery from Defendants for the value of money that the Plaintiff furnished to Defendants?**
> **ANSWER**: ______ (Write "yes" or "no")
> *(INSTRUCTION: If you answered "no" to Question 3, do not answer any further questions: sign this verdict. If you answered "yes" to Question 3, answer Question 4.)*
> **QUESTION 4: What do you find to be the amount of money that Plaintiff is entitled to receive from Defendants?**
> **ANSWER**: ______
> *(INSTRUCTION: Sign this verdict and notify the bailiff.)*

The jury found that a partnership existed and that it included both restaurants.

The court excused the jury and then addressed counsel about proceeding on the remaining issues of the legality of the partnership and partnership property. The court ordered a briefing schedule and set a date to rule on those issues. When the parties appeared before the court to address the issues, Tony objected on the basis that the estate failed to make a formal motion for post-trial relief, as required by the rules. He further argued that the legality of the partnership was an issue that had already been decided on summary judgment and was therefore a final order and could not be reconsidered.

The court rejected Tony's argument, concluding that it had the authority to raise the issue on its own to correct an earlier ruling, noting that it was an issue that had been raised without the benefit of having controlling case law. The court also agreed with the estate that a denial of a summary judgment is not necessarily a final decision and noted that this was consistent with this court's denial of discretionary review of its order denying summary judgment.

On December 2, 2009, the court issued its decision in a written opinion and dismissed Tony's complaint. The court concluded:

> Despite the jury's finding of a partnership, the plaintiff is barred from enforcement of same as the partnership was formed with the purpose of defrauding the franchisor. As such it violated statutory and public policy restrictions. Under the theory of pari delicto the plaintiff cannot maintain this action because both brothers were equally at fault in the illicit formation of the partnership. The same legal theory bars recovery under unjust enrichment which mandates that in such situations the courts must leave the parties as they find them. Consequently plaintiff's complaint must be dismissed.

The trial court also entered findings of fact and conclusions of law supporting the dismissal. Judgment was entered awarding the estate costs. Tony appeals.

ANALYSIS

I. Legality of the Partnership

Tony first contends that dismissal was improper because the estate did not properly request it by motion and the basis for the dismissal turned on an issue that had already been decided on summary judgment and was therefore a final order. But as the record makes clear, this issue was not raised as a request for post-trial relief requiring adherence to the procedures set forth in CR 50, as Tony contends. That rule applies when "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party."[3] Here, the parties had not been "fully heard" on the issue of the legality of the partnership nor was the estate challenging the jury's finding as legally insufficient. The jury verdict did not determine liability, but simply resolved a question of fact that was only part of that determination. As noted above, the court ruled that it would reserve ruling on the legality of the partnership until after the jury made a determination about the existence of the partnership.[4] Thus, the court was simply proceeding consistent with that ruling and a motion for post-trial relief was unwarranted.

Tony also contends that the trial court was precluded from ruling again on the issue of the legality of the partnership because the court already decided this issue when it denied summary judgment on the basis that the partnership was voidable but not void. He contends that this ruling was a final order that could not be revisited by the trial court, but was only subject to appellate review.[5] We disagree.

A similar argument was rejected in Zimny v. Lovric,[6] where the court held that

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[3] CR 50(a)(1).
[4] See Fallahzadeh v. Ghorbanian, 119 Wn. App. 596, 601, 82 P.3d 684 (2004) (the legality of an agreement is a question of law).
[5] As the estate points out, this is at odds with his position in the trial court when the estate sought review of the summary judgment order and Tony contended that it was not a final appealable order.
[6] 59 Wn. App. 737, 801 P.2d 259 (1990).

the denial of a summary judgment motion was not a final order and did not preclude further consideration of the issue by the trial court. The court rejected the argument that the denial of the motion became the law of the case that could not be reconsidered and concluded that the denial of the summary judgment was not appealable as of right and was therefore not a final judgment and had no preclusive effect.[7] We similarly reject the same argument made here.

Additionally, as the trial court pointed out, by denying discretionary review, a panel of this court acknowledged that the order denying summary judgment was not a final order. The panel did not reverse the commissioner's ruling or otherwise rule on the merits of the summary judgment order; it simply granted the motion to modify and terminated review at that point. Finally, as the trial court pointed out, it was not improper for the trial court to revisit the prior ruling, particularly if it believed that it may have been in error. Indeed, the court acknowledged on the record that one of the reasons the issue needed to be addressed again was because the court did not consider case law that appeared to be controlling on the issue but was not raised by either party during the summary judgment proceedings.[8] This was properly within the court's discretion.[9]

Tony next contends that even if the trial court properly reconsidered the issue, it

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[7] Zimny, 59 Wn. App. at 739.

[8] (Referring to the case of Goldberg v. Sanglier, 96 Wn.2d 874, 881, 639 P.2d 1347 (1982), that was cited in the commissioner's ruling but not raised in any of the parties' briefs on summary judgment).

[9] Because the trial court properly decided the legality issue following the verdict, we need not address the estate's cross-appeal, which requested relief "[i]f and only if the trial court erred by reserving decision on the unlawful partnership issue until after the jury had rendered its verdict."

erred as a matter of law by ruling that the partnership was unlawful and unenforceable. We disagree.

The trial court ruled that the partnership was illegal because it violated RCW 21.20.010 and RCW 19.100.170 and was based on common law fraud. RCW 21.20.010 provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
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> (1) To employ any device, scheme, or artifice to defraud;
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> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

The trial court concluded that the partnership was a security within the meaning of the statute,[10] and the brothers violated section (3) by setting out to deceive McDonald's and doing so with knowledge of the franchisor's requirements.

The trial court relied on Goldberg v. Sanglier, where the court held that a partnership's agreement to misrepresent the source of investment funds by failing to disclose the partnership's existence "did operate as a fraud or deceit."[11] There, four individuals formed a partnership to operate and fund the purchase of the dealership franchise, but agreed not to disclose the partnership to the car manufacturer franchisor.

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[10] RCW 21.20.005(12)(a) defines "Security," which includes, "investment contract," and "investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture."

[11] 96 Wn.2d 874, 881, 639 P.2d 1347 (1982) (internal quotation marks omitted).

Instead, only one of the partners entered into the franchise contract with the manufacturer and represented that he was purchasing the dealership franchise himself with his own funds. The facts here are analogous: Tony and Frank concealed their partnership and misrepresented to McDonald's that only Frank was purchasing the franchise with his own funds.[12]

Tony contends that Goldberg does not apply because the partnership does not qualify as a security and therefore does not violate RCW 21.20.010. He relies on Ito International Corp. v. Prescott, Inc.,[13] where the court recognized that a general partnership is not considered a security that falls within the statute unless the partner has limited actual control and depends largely on the other partners' managerial efforts. Tony contends that because he had control over the investment, the partnership was not a security.

But the trial court also relied on Ito, finding that the brothers' partnership agreement was one in which one party supplied the funding and depended on the other's managerial efforts to realize a profit and was therefore a security within the meaning of the statute. This is supported by the record and is consistent with Ito, where the court also recognized that to determine whether a general partnership interest is a security, courts look to whether the investors had a practical as well as a

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[12] Tony challenges the court's finding that he lied to McDonald's, finding of fact 8. But as the estate points out, he has not supplied a transcript of the trial testimony and the panel therefore has no basis from which to determine whether substantial evidence supports the finding. Additionally, as the estate points out, Tony's failure to challenge finding of fact 14—that he agreed that the brothers should make the misrepresentations to McDonald's—makes this finding a verity and supports the challenged finding that he lied to McDonald's.

[13] 83 Wn. App. 282, 291, 921 P.2d 566 (1966).

legal ability to control the investment.[14] While Tony supplied money and received proceeds from the restaurant operations, Frank received the necessary training to conduct the operations and managed the operations, paying Tony based on phony invoices for services he did not perform. Additionally, only Frank entered the contract with McDonald's and was legally entitled to ownership of the franchise.

Even if the partnership did not amount to a security, the brothers still violated RCW 19.100.170, as the trial court concluded. That statute applies specifically to the purchase of franchises and provides:

> It is unlawful for any person in connection with the offer, sale, or purchase of any franchise or subfranchise in this state directly or indirectly:
>
> (1) To make any untrue statement of a material fact in any application, notice, or report filed with the director under this law or willfully to omit to state in any application, notice or report, any material fact which is required to be stated therein or fails to notify the director of any material change as required by RCW 19.100.070(3).
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> (2) To sell or offer to sell by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading.
>
> (3) To employ any device, scheme, or artifice to defraud.
>
> (4) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
>
> (5) To violate any order of the director.

Thus, the partnership was in violation of the statute and the trial court correctly concluded it was unlawful on this basis.[15]

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[14] 83 Wn. App. at 291.

[15] There was some discussion in the trial court about whether this statute applied. Tony argued that it did not because the franchise was created and operated under Oregon law. The estate conceded that the Washington statute did not apply, but argued that a

Tony also contends that the trial court erred by concluding that the partnership was barred by common law fraud. He argues that the only actionable fraud that occurred was between Frank and McDonald's, making that transaction voidable by McDonald's, but not invalidating the partnership agreement between the brothers. But the issue is not the validity of the transaction between Frank and McDonald's; it is whether the trial court can enforce any partnership between Tony and Frank that served to defraud or deceive McDonald's. The statutes are clear that such conduct is prohibited by law, rendering the partnership agreement illegal. Tony further contends that the trial court did not make findings that the nine elements of fraud were met. But such a finding is not necessary, given that the trial court already found that the partnership agreement violated the securities and franchise statutes and was unlawful on that basis.[16] The trial court did not err by concluding that the partnership was unlawful.[17]

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comparable Illinois statute did, because McDonald's Corporation was based in Illinois and the franchise agreement contained a provision that Illinois would be the governing law. On appeal, Tony asserts that the trial court did not decide the matter under Illinois law, but does not appear to otherwise challenge the trial court's ruling that the Washington statute applies.

[16] See Go2Net, Inc. v. Freeyellow.com, Inc., 126 Wn. App. 769, 109 P.3d 875 (2005), aff'd, 158 Wn.2d 247, 143 P.3d 590 (2006) (recognizing that the anti-fraud provision of the Securities Act of Washington, chapter 21.20 RCW, protects investors by relieving them of the burden of proving the seller possessed the intent to defraud, as would be necessary in a common law action for fraud); Kirkham v. Smith, 106 Wn. App. 177, 23 P.3d 10 (2001) (recognizing that a misrepresentation claim under the Franchise Investment Protection Act (FIPA), chapter 19.100 RCW, should be evaluated under a preponderance of the evidence standard as opposed to the more stringent clear, cogent, and convincing evidence standard required for proof of common law fraud).

[17] Tony also contends that the estate's illegality defense is barred by the economic loss rule, which prevents actions for economic loss based on intentional misrepresentation. But as the estate correctly notes, the economic loss rule does not apply here because this was not a suit for damages caused by intentional misrepresentation; it was an action to enforce a contract.

Tony further contends that the trial court erred by failing to enforce the partnership agreement based on a finding that it was in violation of public policy. If a partnership is illegal, the court will not entertain an action for accounting and distribution of assets, particularly if the unlawful agreement is contrary to public policy.[18] When a court determines that an agreement is void against public policy, the court will adhere to the rule that it will leave the parties in the position where the court finds them, even if they acted in good faith.[19] Public policy may be derived from legislation.[20] Here, the public policy that was violated is expressly stated in the securities and franchise statutes prohibiting transactions perpetuated by fraud or deceit. The trial court did not err by finding that the partnership was void against public policy and unenforceable on that basis.

II. In Pari Delicto

Tony further contends that the trial court erred by finding that he was in pari delicto and could not enforce the contract on that basis. The trial court concluded:

> [T]he brothers acted in concert in the scheme to have their partnership fraudulently obtain a franchise from McDonald's. Both brothers were equally aware of their actions and the constraints contained in the franchise agreement. The testimony of the witnesses confirmed the brother's intent to deceive and the subsequent action to keep the relationship secret from McDonald's was obvious from the various e-mails, check memos and subterfuges employed.

Our courts recognize that if the parties to an illegal contract are not in pari delicto, or equally at fault, the less culpable party may bring an action based on an illegal contract.[21] If the party seeking enforcement is found to be less culpable, the

[18] Morelli v. Ehsan, 110 Wn.2d 555, 561-62, 756 P.2d 129 (1988).
[19] Morelli, 110 Wn.2d at 562.
[20] Mutual of Enumclaw Ins. Co. v. Wiscomb, 95 Wn.2d 373, 622 P.2d 1234 (1980).
[21] Goldberg, 96 Wn.2d at 882.

court then determines whether enforcement enhances the public good.[22] In making this determination, the court considers whether its decision will likely prevent such illegal transactions in the future. If the public cannot be protected because the transaction has been completed, no serious moral turpitude is involved, the defendant is the one guilty of the greatest moral fault, and the defendant will be unjustly enriched at the expense of the plaintiff, the in pari delicto rule should not be applied to deny the plaintiff relief.[23]

In Goldberg, the court determined that the parties violated RCW 21.20.010 by failing to disclose the existence of the partnership and misrepresenting the source of the investment funds, but also concluded that the parties were not in pari delicto and permitted the plaintiff partners to seek relief.[24] The court noted that the plaintiffs did not enter an illegal contract with the car manufacturer, had no prior experience in the automobile business, and relied on the defendants' experience and knowledge.[25]

Tony contends that the facts here are analogous to Goldberg, noting that he did not enter into the illegal contract with McDonald's, lacked experience in the industry, and relied on Frank's experience and knowledge. But as the trial court found, Tony was equally active in pursuing the franchise purchase and provided Frank with knowledge and information concerning the advisability of purchasing a McDonald's franchise in different locations and the status of McDonald's Corporation generally. This finding is unchallenged and is therefore a verity.

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[22] Goldberg, 96 Wn.2d at 883.
[23] Goldberg, 96 Wn.2d at 884 (citations omitted).
[24] Goldberg, 96 Wn.2d at 881-82.
[25] Goldberg, 96 Wn.2d at 885.

Additionally, unlike here, in Goldberg, the defendant partners ended up cheating the plaintiff partners out of their profits and the plaintiff partners sought to recover the profits of which they had been deprived. Thus, the defendant partners were more culpable than the plaintiffs and the court concluded that deterrence of that conduct was necessary to prevent the defendants from benefiting from it and escaping legal recourse:

> [Defendants'] entire scheme to defraud their partners was based on returning plaintiffs' initial consideration so as to deprive them of profits. [Defendant] Sanglier was unjustly enriched with profits and it is that inequity the trial court sought to rectify in providing its remedy.
> . . . .
> Public policy is better served by upholding the trial court in this case. The policy implications of our holding are twofold: first, [plaintiffs] will be adequately deterred from entering questionable transactions by the scars of this regrettable experience; and second, [defendants], who were the primary transgressors of the law with respect to this transaction, will be justly required to disgorge profits accruing to them from their improper behavior.[26]

Here, there was no evidence that Frank cheated Tony out of any profits or otherwise attempted to defraud him; the evidence simply showed that he shared in the profits. Tony only ceased to receive profits when Frank died and it was the estate, not Frank, that refused to recognize the partnership and share the profits. We therefore uphold the trial court's finding that the brothers were equally culpable.[27]

III. Ratification of the Partnership

[26] Goldberg, 96 Wn.2d at 887-88.

[27] Tony also argues that a finding that he was equally at fault is at odds with the conclusion that the partnership was a security because he was not equally in control of the investment. But he confuses fault with control of the investment. It does not necessarily follow that if Frank had more control over the management and operation of the business he is more at fault in creating the illegal partnership. Rather, both brothers equally participated in forming the illegal partnership, which consisted of Tony supplying the funds and Frank acquiring the franchise.

When the court considered the issue of the legality of the partnership after the verdict, Tony claimed that McDonald's ratified the brothers' partnership and thereby absolved any fraud they perpetrated. The only evidence in support of this claim of "ratification" was a letter Tony produced that was sent to McDonald's by his attorney on June 2, 2006, notifying McDonald's of his pending claim against the estate. This letter was not produced to the jury. The trial court found:

> There is no further evidence that McDonald's responded to this letter or acknowledged that Tony was a "co-franchisee" with the defendant. The evidence produced at trial was that the franchisor accepted Ms. Hernandez as the owner of both stores upon her completion of the mandatory training.

This finding is supported by the record. The letter simply indicates that Tony is a partner in the restaurants and has filed a creditor's claim. There is nothing in the record that indicates that McDonald's even acknowledged the letter, much less "ratified" the partnership. Thus, the claim is without basis and was properly rejected by the court.

IV. Unjust Enrichment Claim

Tony next contends that the trial court erred by dismissing his claim for unjust enrichment, which sought recovery of the funds he supplied to Frank. The trial court concluded that because the parties were in pari delicto in the formation of the partnership, Tony cannot recover these funds. The court reiterated "'the settled rule that property delivered under an illegal contract cannot be recovered back by any party in pari delicto.'"[28]

Our courts have recognized that while one party frequently retains the benefit of

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[28] (quoting Miller v. Meyers, 158 Wash. 643, 645, 291 P. 1115 (1930) (internal citation omitted)).

an illegal contract, "[u]njust enrichment alone is an insufficient reason for the courts to assist in the enforcement of an illegal agreement."[29] But there are exceptions to the general rule of denial of recovery by either party to an illegal contract and a court may grant relief if the illegality of the contract is due to:

> (a) facts of which one party is justifiably ignorant and the other party is not, or
> (b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law.[30]

The brothers' partnership does not meet either exception. Tony was not justifiably ignorant; the evidence established that Tony knew that he and Frank could not acquire a McDonald's franchise as partners, that he was aware of the scheme to deceive McDonald's, and that he was a willing participant in it. Nor did the parties violate a minor statutory or executive regulation; they violated a major statute. Thus, Tony fails to show he is entitled to recovery on an unjust enrichment claim.

V. Deadman's Statute

Tony further argues that the estate improperly used the deadman's statute to Tony's detriment and therefore waived the protection of the statute at trial. The deadman's statute, RCW 5.60.030, applies when a legal representative of a deceased person is an adverse party in a lawsuit and prohibits an interested party to testify about his or her involvement in any transactions with the deceased or any statements the deceased made to him or her.[31] A person is a party in interest when he or she stands

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[29] Evans v. Luster, 84 Wn. App. 447, 453, 928 P.2d 455 (1996) (citing Red Devil Fireworks Co. v. Siddle, 32 Wn. App. 521, 526, 648 P.2d 468 (1982)).
[30] St. John Farms v. D.J. Irvin Co., 25 Wn. App. 802, 808, 609 P.2d 970 (1980).
[31] The statute provides:

> No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or

to gain or lose in the action in question.[32] "Testimony by third parties is not excluded under the statute; only 'part[ies] in interest' are precluded."[33] The statute may be waived if the adverse party introduces testimony regarding the transaction in question.[34]

Tony contends that the estate's reliance on statements made by Jose Medina and Shirley Jeffrey in support of its summary judgment motion waived the estate's right to assert the deadman's statute to bar evidence at trial. Jeffrey is Tony's half sister and Medina knew the brothers growing up and described Tony as his "best friend." The statements pertained to the brothers' involvement in the franchise purchase. Tony initially submitted these statements in support of his response to the estate's first summary judgment motion.

The estate argues that there is no waiver because these statements do not fall within the prohibition in RCW 5.60.030, citing McLean v. Archer.[35] We agree. In that case, the decedent's estate extensively cross-examined one of the plaintiff's witnesses who was not an interested party and the court held that her testimony was not barred

> otherwise, but such interest may be shown to affect his or her credibility: **PROVIDED, HOWEVER,** That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased. . . person, . . . **PROVIDED FURTHER,** That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

[32] In re Estate of Shaughnessy, 97 Wn.2d 652, 656, 648 P.2d 427 (1982).
[33] Erickson v. Robert F. Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 189, 883 P.2d 313 (1994) (citation omitted).
[34] Erickson, 125 Wn.2d at 187-88.
[35] 32 Wn.2d 234, 201 P.2d 184 (1948).

by RCW 5.60.030. Likewise here, as the trial court concluded, there was no waiver. Both Medina and Jeffrey stated that they did not have any interest in the alleged partnership or any financial interest in the litigation and were called by Tony, not the estate.

VI. Costs

The estate was awarded statutory costs under RCW 4.84.030. For purposes of this statute, the prevailing party is the party in whose favor an affirmative judgment is entered.[36] Contrary to his contention, Tony did not prevail at trial. Throughout his briefing, he mistakenly equates the jury's verdict with a judgment in his favor, requesting that this court "reinstate the jury's verdict." In fact, the trial court never reversed or vacated the verdict.[37] The verdict was simply a finding of fact that was only part of the liability determination and did not result in a judgment for Tony, as he suggests. Rather, the final determination of liability was made when the court ruled that the partnership agreement was unenforceable and Tony could not recover on an unjust enrichment claim. Thus, while the jury returned a verdict with a finding of fact favorable to Tony, he obviously did not prevail in the trial court when his complaint was ultimately dismissed. Accordingly, the trial court properly awarded costs to the estate

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[36] Ennis v. Ring, 56 Wn.2d 465, 473, 353 P.3d 950 (1959); Moritzky v. Herberlein, 40 Wn. App. 181, 697 P.2d 1023 (1985).

[37] The court's findings and conclusions state:

> THIS MATTER having come on regularly for trial; the jury having found that a partnership existed between the plaintiff and decedent concerning two McDonald's restaurants in Gresham, Oregon; the Court exercising its discretion to make findings of fact and conclusions of law concerning the lawfulness of any partnership between the plaintiff and the decedent and the issue of relative culpability; and good cause appearing therefor; the Court now enters the following . . . .

as the prevailing party.

We affirm.

Grosse, J

WE CONCUR:

Dwyer, C.J.

Cox, J.