STATE OF MICHIGAN

COURT OF APPEALS

DAVID G. BYKER, Plaintiff-Appellee,	UNPUBLISHED February 25, 2003
v	No. 205266 Kent Circuit Court
THOMAS J. MANNES, Defendant-Appellant.	LC No. 96-000256-CB ON REMAND

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

In a previous opinion, we vacated the judgment against defendant and held that the trial court erred in its determinations that a super partnership existed between the parties and that there was a monetary partnership obligation owing from defendant to plaintiff. *Byker v Mannes*, unpublished per curiam opinion of the Court of Appeals, issued February 1, 2000 (Docket No. 205266), slip op p 1. Thereafter, the Supreme Court reversed and remanded this case to us for further proceedings in conformity with its opinion. *Byker v Mannes*, 465 Mich 637; 641 NW2d 210 (2002). As our Supreme Court has instructed, we have again reviewed this case to ensure our compliance with the Court's opinion. After carefully reading the Supreme Court's opinion and our original opinion, we reaffirm our original decision.

In its opinion, the Supreme Court defined how one should determine the existence of a partnership under Michigan partnership law, MCL 449.6(1). The Supreme Court clarified that "[i]n determining whether a partnership exists, the focus is not on whether individuals subjectively intended to form a partnership, that is, it is unimportant whether the parties would have labeled themselves 'partners.'" 465 Mich 638-639. Instead, the Court clarified that "the focus is on whether individuals intended to jointly carry on a business for profit within the meaning of the Michigan Uniform Partnership Act, MCL 449.1 *et seq.*, regardless of whether they subjectively intended to form a partnership." 465 Mich 639. With that specific explanation in mind, we have carefully reviewed the facts of this case and our original analysis.

In our original opinion, we stated:

> We agree that, in the absence of an express agreement, the court appropriately looked to the acts and conduct of the parties in relation to the businesses in ascertaining the existence or nonexistence of a partnership, *Van Stee v Ransford*, 346 Mich 116, 133; 77 NW2d 346 (1956); *Moore v [DuBard*, 318 Mich 578, 595;

> 29 NW2d 94 (1947)]; *Miller [v City Bank & Trust Co*, 82 Mich App 120, 124-126; 266 NW2d 687 (1978).] [*Byker, supra* slip op pp 2-3.]

In our original opinion, we further stated that "[o]bjective indicia of a super partnership are absent in this case." *Byker, supra* slip op p 3. We then carefully identified each specific, objective fact that led to this conclusion. *Id.*

The only portion of our original opinion that discusses the intent of the parties is as follows:

> The absence of intent to form a partnership contradicts the established law in this state that the *mutual* intent of the parties is of *prime* importance in ascertaining whether a partnership exists. . . . As noted by the trial court, plaintiff conceded that he did not realize that his relationship with defendant was a general or super partnership until nine years after the parties entered into their informal business relationship – specifically, when the Pier 1000 corporation collapsed and plaintiff's attorney determined that plaintiff and defendant had formed a super partnership whether or not it was their intent to do so. [*Id*. at 2 (citations omitted; emphasis in original)].

In our original opinion, however, we went further and specifically examined the "acts and conduct of the parties" and all of the other *objective* evidence to ascertain the existence of a "super partnership." *Id*. at 2-3. Upon this second review, we did not anywhere in our opinion, nor do we now, base our analysis or decision on the parties' subjective intent. Again, when discussing the parties' intentions as to creating a partnership, we concluded that "[o]bjective indicia of a super partnership are absent in this case." *Id*. at 3.

In conclusion, we have followed the Supreme Court's directive that "to the extent the Court of Appeals regarded the absence of subjective intent to create a partnership as dispositive regarding whether the parties carried on as co-owners a business for profit, it incorrectly interpreted the statutory (and the common) law of partnership in Michigan." 465 Mich 653. Nonetheless, we did not regard the absence of a subjective intent to create a partnership as dispositive in our original opinion, nor do we now. Instead, we thoroughly analyzed the parties' actions, conduct, and all of the other objective data available to us in ascertaining that no super partnership existed. We therefore reaffirm our original opinion.

/s/ Hilda R. Gage
/s/ Jane E. Markey

STATE OF MICHIGAN

COURT OF APPEALS

DAVID G. BYKER, Plaintiff-Appellee,	UNPUBLISHED February 25, 2003
v	No. 205266 Kent Circuit Court
THOMAS J. MANNES, Defendant-Appellant.	LC No. 96-000256 CB ON REMAND

Before: Gage, P.J., and White and Markey, JJ.

WHITE, J. (*dissenting*).

In our previous opinion, *Byker v Mannes,* unpublished opinion per curiam of the Court of Appeals, issued 2/1/00 (Docket No. 205266), I dissented from the majority's reversal of the judgment in favor of plaintiff, concluding, inter alia, that the trial court correctly interpreted and applied the law in determining whether a partnership existed under the Michigan Uniform Partnership Act. On remand, I adhere to my earlier position. Pertinent portions of my earlier partial dissent are quoted below:

> The parties stipulated that:
>
> > . . . the Plaintiff . . .and Defendant . . . agreed to engage in an ongoing business enterprise, to each furnish capital, labor and/or skill to such enterprise, to raise investment funds and to share equally in the profits, losses and expenses of such enterprise. . . . In order to facilitate investment of limited partners, Byker and Mannes created separate entities wherein they were general partners or shareholders for the purposes of operating each separate entity.
>
> There was considerable evidence that the parties acted in a manner consistent with the existence of an overall partnership between them. Throughout the relationship, the parties equalized receipts, regardless of their source, and regardless of whether covered by the individual partnership agreements, and initially provided needed additional capital on an equal basis.

Further, defendant testified at deposition:

> *Q:* If there were to be a difference between the amount that Mr. Byker paid and the amount of monies you either loaned or paid such that Mr. Byker had more monies paid in, do you believe you would be responsible to make up the difference so that the payments were equal between you and Mr. Byker?
>
> *A*: [Mr. Mannes] I would have to be convinced that these monies came directly from Mr. Byker and not from other entities other than himself.

The trial court concluded:

> Having weighed the credibility of the witnesses, particularly plaintiff and defendant, we conclude that they began their relationship with a general agreement that they were partners and would share profits and losses equally. Whether they understood or not they had a general or super partnership. The evidence supports that both understood it. Defendant Mannes' comment on deposition is an example of that understanding. The amount of the losses sustained by plaintiff Byker are not controverted by any substantial or credible evidence. We conclude that there is a partnership obligation owing from defendant Mannes to plaintiff David G. Byker.

The stipulation of the parties and the evidence presented at trial, evaluated in light of the trial court's assessment of the witnesses' credibility, support the court's findings and conclusions.

The fact that the parties created a series of separate business entities to facilitate the investment of limited partners and to limit their liability to outside creditors does not negate the existence of an agreement between the parties that, as between the two of them, they would equally share overall profits and losses. Nor is plaintiff's allegation of an overall partnership inconsistent with the parties' decision to create limited liability entities to implement their investments. The existence of an overall partnership does not increase the party's liability to third parties or demonstrate an intent to be personally liable for the debts of the separate entities as general partners of a super partnership. All that is at issue here is the parties' obligations to each other.

* * *

The trial court did not depart from the necessary focus on the parties' subjective intent regarding their business relationship. The court found that both parties actually agreed that they were partners and would share profits and losses.

> The court looked to their conduct and their subjective understandings and found that both parties subjectively understood their agreement to be one of partners sharing in profits and losses. The court found that understanding dispositive without regard to the subjective intent that the label "super partnership" be applied to the relationship at the time. By focusing on the parties' intent, mutual agreement and understanding, the court conducted the proper inquiry. *LeZontier v Shock*, 78 Mich App 324, 333; 260 NW2d 85 (1977). There is no necessity that the parties attach the label "partnership" to their relationship as long as they in fact both mutually agree to assume a relationship that falls within the definition of a partnership. [1] In many cases, no *formal* partnership is formed, and the focus is then on the acts and conduct in relation to the business. *Van Stee v Ransford*, 346 Mich 116, 133; 77 NW2d 346 (1956). Recognizing that plaintiff, the party seeking to establish the partnership, had the burden of proof, I conclude that the trial court's findings in plaintiff's favor were not clearly erroneous, and that the court properly applied the law. [*Byker, supra* (WHITE, J., concurring in part and dissenting in part) slip op at pp 1-4.]

On remand, I would affirm the trial court's determination that a super partnership existed.

/s/ Helene N. White

[1] 19 Callaghan's Mich Civ Jur, Partnership, § 10, p 479, states, in part:

> § 10. Tests and indicia of partnership.
>
> The existence of a partnership is not dependent upon the members calling themselves partners. However, in the absence of formal articles of partnership, the question as to the existence or nonexistence of a partnership should be determined from the acts, declarations and conduct of the parties, and from the nature and scope of the business in which the acts are committed. As has been seen, intention and consent of the parties are requisites of a valid partnership, and the filing of a certificate of partnership is among the important indicia of such an entity. Other indicia of a partnership are a community of interest, and a sharing in profits and losses. [Footnotes omitted.]