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PARTNERSHIP LAW

I. PARTNERSHIP AGREEMENT MAY BE IMPLIED FROM CONDUCT OF THE PARTIES

In *Halbersberg v. Berry*¹ the South Carolina Court of Appeals found that two oral partnership agreements arose from the parties' conduct. The court's opinion sets forth three tests for determining whether a partnership can be implied from the parties' conduct.²

Halbersberg, a t-shirt wholesaler and retailer, sued Mr. and Mrs. Berry, the owners of a sewing operation that manufactures t-shirts and beachwear, for the alleged breach of two oral partnership agreements. The first agreement was an agreement to manufacture and sell certain t-shirts. The second agreement involved leasing land on which to build a retail outlet for selling the t-shirts. The Berrys argued that the agreements were not partnership agreements and that the first agreement was merely a contract sewing agreement and that Halbersberg had abandoned the second project.³ The court of appeals affirmed the lower court's finding that both agreements created partnerships.⁴

The court first considered the alleged partnership agreement to sell and manufacture t-shirts. The court stated the threshold requirement a litigant must meet to prove that a partnership exists: "To establish a partnership there must be an association of two or more persons to carry on as co-owners a business for profit."⁵ The court noted that under South Carolina law, "[a] partnership agreement may rest in parol. It may be implied and without express intention."⁶ Thus, when express intent to form a partnership does not exist, courts will look to the implied intention of the parties. The court stated that the following tests are appropriate in determining the existence of a partnership agreement because they establish intent: "(1) [T]he sharing of profits and losses; (2) community of interest in capital or property; and (3) community of interest in control and management."⁷ The court of ap-

1. 394 S.E.2d 7 (S.C. Ct. App. 1990), *cert. denied*, No. 1508, Advance Sheet 19 (S.C. Sept. 22, 1990).

2. *Id.* at 10.

3. *Id.* at 9.

4. *Id.* at 13.

5. *Id.* at 10 (citing *Buffkin v. Strickland*, 280 S.C. 343, 312 S.E.2d 579 (Ct. App. 1984)).

6. *Id.* (citing *Wyman v. Davis*, 223 S.C. 172, 74 S.E.2d 694 (1953)).

7. *Id.* (citing *Terry v. Brashier*, 262 S.C. 639, 207 S.E.2d 82 (1974)).

peals found that ample evidence supported Halbersberg's contention that the parties intended to create a partnership.⁸

The court found that Halbersberg's testimony established facts that proved the existence of the partnership. Halbersberg testified that the parties agreed that he would buy the material and the Berrys would manufacture the t-shirts and do the bookkeeping. The parties shared management decisions and were to sell the shirts jointly. Halbersberg further testified that the parties were to share profits and losses equally. The court held that these facts sustained the lower court's finding of a partnership.⁹ The court further relied on Halbersberg's testimony to establish the terms of the partnership agreement and found that the Berrys breached the agreement by keeping "woefully inadequate" records.¹⁰

The court next focused on the alleged partnership to lease land and to build a retail outlet. The court of appeals again agreed with the lower court, but noted that the evidence which established the second partnership was not as convincing as the evidence which established the first. The court stated that the evidence indicated that both parties discussed forming a partnership to lease land and construct a building and agreed that the parties would share the expenses and profits. The court further found that Halbersberg made the initial payment to the contractor and that Mr. Berry leased the land in his own name and paid the contractor the remainder of the construction contract price.¹¹ The Berrys argued that the building project was Halbersberg's "sole enterprise" because Halbersberg had negotiated the construction contract.¹² Mr. Berry further argued that Halbersberg had abandoned the project and that he did not become involved in controlling the project until after it was abandoned. The court ignored Mr. Berry's argument and found that because some evidence existed that "Berry was involved in this project from the beginning as a partner and there was no abandonment by Halbersberg," the lower court's ruling was correct.¹³ The court held that Mr. Berry breached a fiduciary duty owed to Halbersberg by leasing the building to himself.¹⁴ The court therefore imposed a constructive trust on the proceeds of the partnership for the

8. *Id.*

9. *Id.*

10. *Id.*; see also S.C. CODE ANN. § 33-41-520 (Law. Co-op. 1976) (stating that the books of the partnership shall be kept according to the agreement of the partners and that every partner shall have access to these books at all times).

11. *Halbersberg*, 394 S.E.2d at 12.

12. *Id.*

13. *Id.*

14. *Id.* at 13.

benefit of *Halbersberg*.¹⁵

Although the *Halbersberg* court correctly decided the case, the court's analysis ignored the relevant code section that deals with the existence of a partnership. Under South Carolina Code section 33-41-220(3), "[t]he sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived."¹⁶ However, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence" of the existence of a partnership.¹⁷ Therefore, once a person receives a share of the profits of a business, that person will have to show that the parties did not intend to create a partnership in order to avoid claims under South Carolina's Uniform Partnership Act.¹⁸

In *Wyman v. Davis*,¹⁹ however, the court noted that "[c]onsideration of the prior decisions of this court establishes that the Uniform [Partnership] Act has not changed our preexisting law on this phase of the subject."²⁰ Thus, when determining whether a particular agreement will or could be considered a partnership, courts should look to the Uniform Partnership Act and the common law.

When deciding whether to imply from the parties' conduct that a partnership exists, courts should follow a two-step approach. First, the courts should focus on section 33-41-220 of South Carolina's Uniform Partnership Act.²¹ If any of the elements in section 33-41-220 are present, the courts should look to the common law to find cases in which the courts have implied a partnership in similar circumstances. As this case indicates, the common law has an expansive view of the elements necessary to find intent to create a partnership. What may appear not to be a partnership under the statute alone may become one when the court looks to the common-law factors that determine the existence of a partnership. The common law supplements the code provisions by providing courts with interpretations of the intent requirement and therefore should not be ignored.

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15. *Id.*

16. S.C. CODE ANN. § 33-41-220(3) (Law. Co-op. 1976).

17. *Id.* § 33-41-220(4).

18. *Id.* §§ 33-41-10 to -1090.

19. 223 S.C. 172, 74 S.E.2d 694 (1953).

20. *Id.* at 174, 74 S.E.2d at 695.

21. S.C. CODE ANN. § 33-41-220 (Law. Co-op. 1976).