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Undead Dicta or Haunted Holdings? A Closer Look at the Zombie Subjective Intent Partnership Formation Cases

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Joseph K. Leahy

Undead Dicta or Haunted Holdings? A Closer Look at the Zombie Subjective Intent Partnership Formation Cases

21 U.N.H. L. Rev. 1 (2022)

ABSTRACT. Undead precedents haunt the partnership formation caselaw. But just how dangerous are they? It depends on what type of zombies they are—walking-dead dicta or haunted holdings. Asking a court to ignore bad dicta is nowhere near as difficult for litigants as asking a court to overrule an entire line of cases.

This article takes a closer look at the undead partnership formation cases that were previously identified in a companion article and concludes that nearly all such cases fall into the less-scary category of undead dicta, rather than truly dangerous category of zombie holdings.

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INTRODUCTION 5

I. A BRIEF INTRODUCTION TO PARTNERSHIP FORMATION 8

A. A Hypothetical Partnership: Peter and Francine at the Mall..... 8

 1. Applying the Test for Partnership Formation 8

 2. The Role of Intent: “Subjective” v. “Objective” 10

B. A Change to the Hypo: Peter and Francine Disclaim Partnership 10

C. Discovery of Zombies in Texas—and Elsewhere!..... 12

D. Destroying Zombie Precedents 15

II. REJECTING ZOMBIE CASES AS UNDEAD DICTA..... 15

A. A Brief Primer on Dicta..... 16

B. When Is A Statement of Law Unnecessary to a Judicial Decision? 18

C. When Statements That Subjective Intent Governs Inter Se Are Dicta 19

 1. Back to Our Hypo: Peter Sues Francine 19

 a. A Hypothetical Haunted Holding 19

 b. Two Hypothetical Examples of Undead Dicta 20

III. A CLOSER LOOK AT THE SUBJECTIVE INTENT-GOVERNS-INTER SE CASES..... 21

A. Definitely Undead Dicta: Cases That Squarely Turned on Objective Intent 22

 1. Objective Intent Cases Holding that the Parties Were Partners as a Factual Matter 23

 a. Alabama Case: Waters 23

 b. Connecticut Case: Greenhouse 25

 2. Objective Intent Cases Holding that No Partnership Existed As a Factual Matter 27

 a. Alabama Case: Adams 27

 b. Arizona Case: Mercer 29

 c. Florida Case: Myers 30

Undead Dicta or Haunted Holdings?

d. Maryland Case: Garner.....	32
e. Michigan Cases: Snell & LeZontier	44
f. North Carolina Case: Carefree Carolina Communities.....	53
g. Pennsylvania Cases: Rosenberger & Kingsley Clothing	56
h. Washington Case: Cusick	63
i. Texas Cases: Holman, Griffin & Claycomb.....	65
j. Vermont Cases: Cressy, Harman & Raymond S. Roberts, Inc.....	74
<i>B. Apparently Undead Dicta: Cases That Arguably Turned on Objective Intent</i>	<i>80</i>
1. Case That Probably Turned on Objective Intent.....	80
a. Georgia Case: Mabry.....	80
2. Cases That Plausibly Turned on Objective Intent	82
a. Kansas Case: Grimm.....	82
b. Massachusetts Case: Rosenblum	85
<i>C. Haunted Holding: One Case That Turned—Puzzlingly—on Subjective Intent.....</i>	<i>89</i>
1. Oregon Case: <i>Westerlund</i>	89
CONCLUSION.....	91

It is . . . possible for parties to intend no partnership and yet to form one. If they agree upon an agreement which is a partnership in fact, it is of no importance that they call it something else; or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable.

— Justice Thomas M. Cooley, Supreme Court of Michigan¹

INTRODUCTION

Partnership formation is governed essentially everywhere by one of the two uniform partnership acts.² Both acts state the same simple test for formation: a general partnership arises whenever two or more people associate as co-owners of a for-profit business (unless they have filed the forms necessary to create a corporation or other limited liability entity, such as an LLC).³

Under this test, the parties' intent to attain (or not attain) the legal status of "partners" may play some role, but it is not an essential element.⁴ Hence, a celebrated line of cases holds—and the newer uniform partnership act explicitly states—that the parties' intent to avoid becoming partners (i.e., their "subjective" intent not to be partners) is *not* dispositive.⁵ Rather, what matters is whether the parties intended to co-own a for-profit business (i.e., the "objective" intent to be partners).⁶

For this reason, most law professors teach their students that parties cannot contract around partnership as a matter of law.⁷ Two or more people who co-own a business are general partners even if they explicitly agree that they are not.⁸ Or so we tell our students.

Thing is, lurking behind this supposed black-letter law is an ancient line of cases which holds that the parties' intent *not* to form a partnership *is* dispositive as

¹ Beecher v. Bush, 7 N.W. 785, 785 (1881).

² See *infra* Part I.A.

³ See *infra* Part I.A.

⁴ See *infra* Part I.B.

⁵ See *infra* Part I.B.

⁶ See *infra* Part I.B.

⁷ See Joseph K. Leahy, *An LLC is the Key: the False Dichotomy Between Inadvertent Partnerships and the Freedom of Contract*, 52 TEX. TECH L. REV. 243, 294–95, 304–12 (2020) (reporting on a survey of Texas law professors).

⁸ See *infra* Part I.B.

between themselves (“inter se” or “inter sese”).⁹ These subjective-intent-controls-inter-se cases largely escaped scholarly attention until recently, when a companion article shined a light on them and deemed them abrogated by the uniform partnership acts.¹⁰ These cases are therefore zombies—killed by statute, but still roaming the reporters.¹¹ They lie in wait for unsuspecting lawyers to cite them to judges who are unaware of their demise; once cited, these precedents are reanimated for future use by unwitting courts and litigants. The only way to stop these walking-dead decisions is for the legal research databases to deem them overruled.¹²

Yet, until that happens, lawyers must fend off the undead line of cases by themselves. This article urges that they can do so if they read the cases carefully. A close reading of the zombie cases reveals that their moan is worse than their bite.¹³ Although the walking-dead precedents discussed in the companion article *state* that the parties’ intent to be partners governs as between them, few such cases *so hold*.¹⁴ Indeed, only one zombie case identified in the companion article actually allowed business co-owners to contact around partnership as a matter of law.¹⁵

Instead, the great bulk of undead cases which state that *subjective* intent controls as between the parties actually turned on the parties’ *objective* intent.¹⁶ That is to say, rather than holding that the parties’ agreement not to be partners was dispositive as to their legal status, most of the supposed zombie cases simply hold that the parties were or were not partners as a factual matter.¹⁷ As a result, these cases’ mindless repetition of the long-dead subjective-intent-governs-inter-se rule is mostly unnecessary overreach; these cases’ zombie statements of law may contravene the uniform acts, but their holdings do not.

In sum, the subjective-intent-governs-inter-se cases are almost entirely zombie dicta, not haunted holdings—undead in word but not in deed.¹⁸ Undead dicta are

⁹ See *infra* Part I.C.

¹⁰ See generally Joseph K. Leahy, *Zombies Attack Inadvertent Partnerships!—How Undead Precedents Killed By Uniform Statutes Still Roam the Reporters*, 57 U. RICHMOND L. REV. (forthcoming 2023) (on file with author).

¹¹ See *infra* Part I.C.

¹² See *infra* Part I.D.

¹³ See *infra* Part III.

¹⁴ See *infra* Part III.A & B.

¹⁵ See *infra* Part III.C.

¹⁶ See *infra* Part III.A & B.

¹⁷ See *infra* Part III.A & B.

¹⁸ See *infra* Part III.

far less dangerous than haunted holdings, because courts are not bound to follow dicta,¹⁹ especially when it squarely contradicts the governing statute.²⁰ Since the subjective-intent-governs-inter-se cases squarely conflict with the plain language of the modern partnership acts, it should not be particularly difficult for lawyers in most jurisdictions to convince courts to reject these zombie cases.²¹

* * * * *

The remainder of this article is organized into three parts and a brief conclusion.

Part I briefly describes the law of partnership formation,²² including the role of the parties' intent to be "partners" (or not).²³ In so doing, this article explains the longstanding rule that the parties' desire to attain the legal status of "partners" (or not) is not dispositive.²⁴ Next, this Part describes the older common law cases under which the parties' intent to be partners (or not) *was* dispositive as to their legal status *as between themselves*, but *not* as to third parties.²⁵ Finally, this Part briefly explains the companion article's conclusion that the uniform acts overthrew the common law rule.²⁶ Those cases should be long dead, but some continue to skulk quietly in the treatises. The companion article concludes that these zombies must be destroyed—deemed abrogated by a court—before they run amok in the partnership formation caselaw.²⁷

Until that happens, Part II offers another approach to dealing with zombie cases: convincing court to reject them as dicta—i.e., statements of law which are unnecessary to the holding of a case.²⁸ First, this Part provides a brief introduction to dicta.²⁹ Next, this Part explains how to distinguish dicta from holdings.³⁰ This Part then explains how zombie statements that the parties' subjective intent governs

¹⁹ See *infra* Part II.A.

²⁰ See *infra* Part II.C.2.

²¹ See *infra* Conclusion. Texas will be the exception. See *Infra* Part I.C (discussing Energy Transfer Partners, L.P., v. Enterprise Products Partners, L.P., 593 S.W.3d 732 (Tex. 2020)).

²² See *infra* Part I.A.1.

²³ See *infra* Part I.A.2.

²⁴ See *infra* Part I.B.

²⁵ See *infra* Part I.C.

²⁶ See *infra* Part I.C (discussing Leahy, *supra* note 10).

²⁷ See *infra* Part I.D (discussing Leahy, *supra* note 10).

²⁸ See *infra* Part II.A.

²⁹ See *infra* Part II.A.

³⁰ See *infra* Part II.B.

inter se might be unnecessary to the holdings of the cases described in the companion article.³¹ But to know for sure requires a close reading of those zombie cases.

Part III does just that. It takes a closer look at the undead cases cited in the companion article which assert that the parties' intent to be partners (or not) governs inter sese.³² This Part concludes that the great bulk of cases which so state clearly turned on objective rather than subjective intent;³³ other cases probably or possibly turned on objective rather than subjective intent.³⁴ Thus, although such cases cite precedents that were abrogated by the uniform acts, and state outdated law, their holdings largely comport with modern partnership statutes. In short, these cases' undead legal analysis is mostly walking-dead dicta—not zombie holdings.³⁵

Finally, the Conclusion contends that (at least in theory) it should be easier for lawyers to urge courts to reject undead dicta than to convince them that an entire line of cases was abrogated by statute a century ago.³⁶

I. A BRIEF INTRODUCTION TO PARTNERSHIP FORMATION

A. *A Hypothetical Partnership: Peter and Francine at the Mall*

To understand the basic law of partnership formation, a hypothetical will be helpful.³⁷

1. Applying the Test for Partnership Formation

Assume that Peter and Francine, non-zombie humans of sound mind, open a clothing store in a large, suburban mall.³⁸ Peter and Francine agree in writing that

³¹ See *infra* Part II.C.

³² See *infra* Part II.

³³ See *infra* Part II.A.

³⁴ See *infra* Parts II.B & C.

³⁵ See *infra* Parts II.B & C.

³⁶ See *infra* Conclusion.

³⁷ For a detailed discussion of the basic law of partnership formation, upon which this entire Part is based, see Leahy, *supra* note 10 (manuscript at 9–20).

³⁸ See DAWN OF THE DEAD (Laurel Group 1978). Thankfully for horror film fans, the “portrayal of zombies as slow moving, flesh-eating reanimated corpses” was never properly copyrighted by *Dawn of the Dead's* predecessor, *Night of the Living Dead*. Steve Andreadis, *Copyright Horror Stories*, COPYRIGHT: CREATIVITY AT WORK, Oct. 29, 2020,

they will both contribute money to fund the clothing store; that they will both have equal say in managing the business; and that they will share all profits from the store equally. They open the store and start to do business.

Have Peter and Francine formed a business entity simply by going into business together? And if so, what sort of entity have they formed? Assuming they have not filed with the state to create a corporation or unincorporated business entity,³⁹ the answer is simple: Peter and Francine have formed the statutory default co-owned business organization⁴⁰—a general partnership.

In almost every jurisdiction, Peter and Francine’s business will be governed by the partnership statute in effect in their state, either the Uniform Partnership Act (“UPA”)⁴¹ or some version of the more recent [“Revised”] Uniform Partnership Act (“RUPA”).⁴² Under both uniform acts, a partnership arises when two or more people associate as co-owners of a for-profit business.⁴³ This definition of partnership “is both long settled and nearly universal in the United States.”⁴⁴ Since Peter and Francine have agreed to share the profits and control⁴⁵ of their clothing store, they are unquestionably general partners under either UPA or the various RUPA-based statutes.

<https://blogs.loc.gov/copyright/2020/10/copyright-horror-stories/> [https://perma.cc/4KL9-7M43]. By this happy accident, a movie trope was born.

³⁹ Filing for such an entity negates the formation of a general partnership. See Leahy, *supra* note 7, at 247.

⁴⁰ See *id.* at 270–73 (explaining the default role of general partnerships).

⁴¹ UNIF. P’SHP ACT (UNIF. L. COMM’N 1914). Prior to RUPA’s promulgation, every state except Louisiana adopted UPA “in substantially identical form.” J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 113 (1997) (citing UNIF. P’SHP ACT (UNIF. L. COMM’N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125-26 (1995)).

⁴² Compare UNIF. P’SHP ACT (1997) (UNIF. L. COMM’N 1997) with UNIF. P’SHP ACT (1997) (UNIF. L. COMM’N amended 2013). Currently, either UPA or a version of RUPA is in force in every state except Louisiana. See Leahy, *supra* note 7, at 248–49 nn.21–23.

⁴³ See UNIF. P’SHP ACT § 6(1) (UNIF. L. COMM’N 1914) (“A partnership is an association of two or more persons to carry on as co-owners a business for profit.”); UNIF. P’SHP ACT (1997) § 202 (UNIF. L. COMM’N amended 2013) (“[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership.”).

⁴⁴ Leahy, *supra* note 10 (manuscript at 11).

⁴⁵ Sharing profits and control are two of the hallmarks of co-ownership. See *id.* (manuscript at 12).

2. The Role of Intent: “Subjective” v. “Objective”

In our hypothetical, Peter and Francine have expressed no opinion about whether they are partners. This does not prevent them from forming a general partnership, however. Rather, under both uniform acts, “parties may become partners even if they lack the ‘subjective intent’ to do so. All that matters is whether, as a factual matter, they satisfy the definition of partnership.”⁴⁶ This is because:

“[I]t is the intent to do the things which constitute a partnership,” not the intent to attain the legal status of “partners,” that controls. Or, to put it differently . . . the intent required to become partners is the intent to co-own a business—what some have called the “objective intent” to become partners—*not* the intent to enter into the legal arrangement known as “partnership.”⁴⁷

Accordingly, there is simply no doubt that Peter and Francine have formed a general partnership even if they have never considered whether they are partners.

B. A Change to the Hypo: Peter and Francine Disclaim Partnership

But what if Peter and Francine have decided that they *do not* wish to be general partners? Are they able to avoid forming a general partnership despite being co-owners of a for-profit business? Assume now that their written agreement contains the following language: “We agree that we are not general partners and that our clothing store is not a general partnership.” Does this language change anything?

Until recently, when a controversial Texas Supreme Court case held to the contrary,⁴⁸ the answer to this question seemed clear everywhere: No, Peter and Francine are still partners, regardless of their contrary contract. Cases interpreting UPA and RUPA-based statutes “universally held that, not only can people accidentally form a partnership without realizing it, they also could form a partnership even if they *explicitly* intended *not* to form a partnership.”⁴⁹ As then-Judge Benjamin Cardozo’s frequent foil, Judge William Andrews, famously explained in *Martin v. Peyton*⁵⁰:

⁴⁶ *Id.* (manuscript at 12–13).

⁴⁷ *Id.* (manuscript at 13) (internal citations omitted). One might call such partnerships “inadvertent or accidental partnerships.” *Id.* (manuscript at 13).

⁴⁸ See *infra* Part II.C; see also Leahy, *supra* note 10 (manuscript at 3–7 & 20–22) (discussing *Energy Transfer Partners, L.P., v. Enterprise Products Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020) (holding that parties can contract around formation of a general partnership in Texas as a matter of law by using conditions precedent)).

⁴⁹ Leahy, *supra* note 10 (manuscript at 14–15).

⁵⁰ 158 N.E. 77, 77–78 (N.Y. 1927). *Martin* involved a third party suing alleged partners. See *id.* at 78.

[The parties' agreement may] be a mere sham intended to hide the real relationship . . . Mere words will not blind us to realities. Statements that no partnership is intended are not conclusive. If as a whole a contract contemplates an association of two or more persons to carry on as co-owners a business for profit, a partnership there is.⁵¹

This frequently cited case appears in casebooks, purporting to be the black-letter law.⁵²

Moreover, although UPA did not expressly address this issue, both RUPA's initial drafters and its revisors added language and commentary to clarify that RUPA adopts the *Martin* rule. First, the original RUPA stated that the definition of partnership is satisfied "whether or not the persons intend to form a partnership"⁵³ and the official comment thereto stated that parties "may inadvertently create a partnership despite their expressed subjective intention not to do so."⁵⁴ Second, RUPA was revised in 2013 to add the following language to the commentary:

Subjective intent to create the legal relationship of "partnership" is irrelevant.^[55] What matters is the intent vel non to establish the business relationship that the law labels a "partnership." *Thus, a disclaimer of partnership status is ineffective to the extent the parties' intended arrangements [satisfy the definition of partnership set forth in RUPA].*⁵⁶

In short, "[i]f two or more people satisfy the statutory definition of partnership by associating as co-owners of a for-profit business, they are partners whether they wanted to be or not."⁵⁷ Thus, under either uniform act—and especially under RUPA—Peter and Francine's attempt to contract around partnership should fail.

⁵¹ *Id.* at 78.

⁵² *See, e.g.*, J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES—CASES, MATERIALS, PROBLEMS (8th ed. 2009).

⁵³ UNIF. P'SHIP ACT (1997) § 202 (UNIF. L. COMM'N 1997).

⁵⁴ UNIF. P'SHIP ACT (1997) § 202 cmt. 1 (UNIF. L. COMM'N 1997).

⁵⁵ This is probably a slight overstatement. The parties' subjective intent to be partners (or not) may be relevant at the margin in close cases where other facts and circumstances do not clearly show whether or not the parties associated as co-owners of a for-profit business. *See* Douglas K. Moll, *Contracting Out of Partnership*, 47 J. CORP. L. 753, 783 n.160 (2022) (explaining that evidence of the parties' intent to be partners or not "might tip the scales" in "a close case where the evidence for and against the existence of a partnership is mixed"). Indeed, some RUPA-based statutes explicitly deem the parties' "expression of an intent to be partners in the business" a "factor" to consider when deciding whether the definition of partnership is satisfied. *See, e.g.*, TEX. BUS. ORGS. CODE § 152.052(a)(2).

⁵⁶ UNIF. P'SHIP ACT (1997) § 202(a) cmt. (UNIF. L. COMM'N amended 2013).

⁵⁷ Leahy, *supra* note 10 (manuscript at 15) (internal citations omitted).

C. *Discovery of Zombies in Texas—and Elsewhere!*

Recently, however, the Texas Supreme Court upended the seemingly settled law in *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.*, (“*Enterprise Products*”).⁵⁸ Reasoning that “Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied,” the *Enterprise Products* court upheld an appellate court decision to overturn a jury finding that two sophisticated companies had formed a general partnership despite their contrary agreement.⁵⁹ The Texas high court limited its holding to the parties to the contract, however, concluding that “[s]uch an agreement would not . . . bind third parties.”⁶⁰

As a result, *Enterprise Products* effectively created two different tests for partnership formation in Texas: “(1) a test applicable only to the putative partners, wherein an agreement not to be partners is dispositive as between them; and (2) a test in which such an agreement is only one factor among others to be considered.”⁶¹

Although Texas’s version of RUPA is highly customized,⁶² the Texas Supreme Court’s holding was not based on any idiosyncratic portion of that state’s partnership statute⁶³—and hence, it could reasonably be cited as persuasive authority “in any jurisdiction.”⁶⁴ *Enterprise Products* is therefore ripe for citation as persuasive authority for the proposition that parties may contract around partnership as a matter of law. Yet, if *Enterprise Products* were the only case of its kind, perhaps it would be less likely for other courts to follow the Texas court’s lead.

Unfortunately, research for an amicus brief submitted in *Enterprise Products*⁶⁵ led this author to discover two scary things. First, the Texas Supreme Court’s

⁵⁸ 593 S.W.3d 732, 742 (Tex. 2020).

⁵⁹ *Id.* at 734.

⁶⁰ *Id.* at 742 & n.34.

⁶¹ Leahy, *supra* note 10 (manuscript at 21); *see also* Douglas K. Moll, *Contracting Out of a Partnership*, 22 *TRANSACTIONS: TENN. J. BUS. L.* 239, 249 (2021).

⁶² *See* Leahy, *supra* note 7, at 248 n.21 (explaining the differences between the original RUPA and Texas’s version thereof).

⁶³ Rather, the court relied heavily on the principle of freedom of contract. *See infra* note 72 and accompanying text.

⁶⁴ Leahy, *supra* note 10 (manuscript at 21); *see also* Moll, *supra* note 61, at 242.

⁶⁵ *See* Amicus Brief in Support of Petitioners, *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, No. 17-0862 (Tex. Apr. 11, 2019) (submitted by Joseph K. Leahy), *available at* <https://tinyurl.com/LeahyAmicusEPPvETP> [<https://perma.cc/F8JA-Z43G>]. *See also* *Enterprise Products*, 593 S.W.3d at 740 n.31 (describing amici filed by academics and energy industry sources).

decision is a zombie! Undead precedents are long-overruled cases that continue to be cited by courts as if they remain good law.⁶⁶ Just as zombies in the movies are not good people (after all, who lumbers around moaning for “brains”⁶⁷ and eating other people’s flesh?!⁶⁸), undead cases are not good law.⁶⁹ In particular, the Texas high court’s decision in *Enterprise Products* is bad law because the uniform acts were intended to eliminate its precise holding that the subjective intent to be partners controls as between the parties but not as to third persons.⁷⁰

But second, and even more frightening, there are *many* more undead partnership formation precedents lurking in legal treatises!⁷¹ Unlike *Enterprise Products*, which turned largely on the Texas Supreme Court’s devotion to “freedom of contract,”⁷² the great bulk of these undead cases rely upon ancient precedents that were good law prior to UPA’s promulgation over a century ago.⁷³

The aforementioned companion article examined cases from three national partnership law treatises: J. William Callison and Maureen Sullivan’s *Partnership Law and Practice*;⁷⁴ Christine Hurt and Gordon Smith’s *Bromberg and Ribstein on*

⁶⁶ See Leahy, *supra* note 10 (manuscript at 35) (citing, *inter alia*, Crowell v. Knowles, 483 F. Supp. 2d 925 (D. Ariz. 2007) (describing zombie cases as “rules definitively extinguished by statute” that “continue[] to prowl, repeatedly re-animated by mistaken citation and dicta”). The traditional term for such decisions is “per incurium.” See *id.* (manuscript at 35) (quoting *Per Incuriam*, BLACK’S LAW DICTIONARY (7th ed. 1999)).

⁶⁷ See THE RETURN OF THE LIVING DEAD (Orion Pictures 1985).

⁶⁸ See NIGHT OF THE LIVING DEAD (Laurel Group 1968); see also ZRS Staff, *Romero Invented Flesh Eaters*, ZOMBIE RESEARCH SOCIETY, Nov. 23, 2010, <https://zombieresearchsociety.com/archives/6863> [<https://perma.cc/S3SF-KY75>] (explaining that night of the living dead invented the concept of a flesh-eating zombie).

⁶⁹ See Leahy, *supra* note 10 (manuscript at 35) (citing Crowell v. Knowles, 483 F. Supp. 2d 925, 931 (D. Ariz. 2007)).

⁷⁰ See *id.* (manuscript at 29–36) (citing, *inter alia*, Howard P. Walthall, Sr., *What Do You Mean “We,” Kemo Sabe? Partnership Law and Client Responsibilities of Office Sharing Lawyers*, 28 CUMBERLAND L. REV. 601, 627–28 (1998)).

⁷¹ See *id.* (manuscript at 36–37) (identifying precedents in three national treatises which state that the subjective intent to be partners or not governs inter se).

⁷² See *id.* (manuscript at 21) (discussing *Enterprise Products*, 593 S.W.3d at 737–40).

⁷³ See *id.* (manuscript at 37–54) (walking through the walking-dead cases and explaining how all but one are based on overruled precedents).

⁷⁴ See J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE § 5:7 (2020); see Leahy, *supra* note 10 (manuscript at 38–44) (discussing cases cited in Callison and Sullivan’s treatise).

Partnership;⁷⁵ and Allan Donn, Robert Hillman and Donald Weidner's *The Revised Uniform Partnership Act*.⁷⁶ These treatises support, to varying degrees, the view that the subjective intent to be partners (or not) controls as between the parties themselves.⁷⁷ The three treatises cite cases from Alabama,⁷⁸ Arizona,⁷⁹ Connecticut,⁸⁰ Florida,⁸¹ Georgia,⁸² Kansas,⁸³ Michigan,⁸⁴ Maryland,⁸⁵ North

⁷⁵ See CHRISTINE HURT, D. GORDON SMITH, ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.01[C] at 2-10 & n.16; § 2.02[B], at 2-16-17 & n.14; & § 2.04[C], at 2-53 to 2-54 (2d ed. 2015, 2018-2 Supp.) [hereinafter HURT & SMITH]; see Leahy, *supra* note 10 (manuscript at 44-54) (discussing cases cited in Hurt and Smith's treatise).

⁷⁶ See ALLEN DONN ET AL., REVISED UNIFORM PARTNERSHIP ACT § 1202 (2019-2020 ed.); see Leahy, *supra* note 10 (manuscript at 55) (discussing the case cited in Donn, Hillman and Weidner's treatise).

⁷⁷ *Partnership Law and Practice* seems to treat the subjective-intent-governs-inter-se line of cases "as good law with a caveat that not all courts follow it." Leahy, *supra* note 10 (manuscript at 25). By contrast, *Bromberg and Ribstein on Partnership* seems to "reluctant[ly] recogni[ze] it as] . . . a doctrine the authors apparently view as ill-advised," *id.* (manuscript at 26), whereas *The Revised Uniform Partnership Act* "gives extremely short shrift" to the subjective intent line of cases, essentially criticizing it "while grudgingly admitting that it may exist on paper," *id.* (manuscript at 27).

⁷⁸ *Waters v. Cochran*, 285 So. 2d 474 (Ala. 1973); *Adams v. State*, 189 So. 2d 354 (Ala. 1966).

⁷⁹ *Mercer v. Vinson*, 336 P.2d 854 (Ariz. 1959).

⁸⁰ *Greenhouse v. Zempsky*, 218 A.2d 533 (Conn. 1966); *R4 Properties v. Riffice*, No. 3:09-cv-00400, 2014 WL 4724860 (D. Conn. Sept. 23, 2014).

⁸¹ *Myers v. Brown*, 296 So. 2d 121 (Fla. Dist. Ct. App. 1974).

⁸² *Mabry v. Pelton*, 432 S.E.2d 588 (Ga. Ct. App. 1993).

⁸³ *Grimm v. Pallesen*, 527 P.2d 978 (Kan. 1974).

⁸⁴ *LeZontier v. Shock*, 260 N.W.2d 85 (Mich. Ct. App. 1977); *Snell v. Meyers*, No. 226068, 2001 WL 732082 (Jun. 12, 2001).

⁸⁵ *Garner v. Garner*, 358 A.2d 583 (Md. Ct. Spec. App. 1976).

Carolina,⁸⁶ Oregon,⁸⁷ Pennsylvania,⁸⁸ Texas,⁸⁹ Vermont,⁹⁰ and Washington⁹¹ as supporting, in varying ways, the subjective-intent-governs-inter-se rule.

D. Destroying Zombie Precedents

The proper way to dispatch the walking dead in the movies is to blow their brains out.⁹² In the companion article, this author urges that courts do the legal equivalent to undead partnership formation cases: red-flag them in legal research databases.⁹³ But until that happens, these zombies will continue to roam the reporters, potentially wreaking havoc on inadvertent partnership law. If a lawyer encounters one of these flesh-eating cases in the wild, what is she to do?

The next part addresses that question.

II. REJECTING ZOMBIE CASES AS UNDEAD DICTA

As it turns out, there is another way to escape these marauding zombies even before a court red-flags their statements of law. If the zombie law stated in cases identified in the above-described companion article is mere dicta, future courts might be convinced to ignore it. That is to say, if the undead cases *state* but do not *hold* that the parties' subject intent to be partners (or not) governs, litigants may be able to neutralize the undead cases by urging courts to ignore their lifeless moans.

This Part will describe this approach by reviewing the subject of dicta,⁹⁴ describing how to distinguish dicta from holdings,⁹⁵ and explaining when it would

⁸⁶ *Carefree Carolina Cmty., Inc. v. Cilley*, 340 S.E.2d 529 (N.C. Ct. App. 1986).

⁸⁷ *Westerlund v. Murphy Overseas USA Astoria Forest Prods., LLC*, 2018 WL 614710 (D. Or. 2018).

⁸⁸ *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315 (Pa. 1942); *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967).

⁸⁹ *Holman v. Dow*, 467 S.W.2d 547 (Tex. Civ. App. 1971); *FDIC v. Claycomb*, 945 F.2d 853 (5th Cir. 1991); *FSLIC v. Griffin*, 945 F.2d 691 (5th Cir. 1991).

⁹⁰ *Cressy v. Proctor*, 22 F. Supp. 3d 353 (D. Vt. 2014); *Harman v. Rogers*, 510 A.2d 161 (Vt. 1986); *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245 (Vt. 1953).

⁹¹ *Cusick v. Phillippi*, 709 P.2d 1226 (Wash. Ct. App. 1985).

⁹² *See Leahy, supra* note 10 (manuscript at 8).

⁹³ *See id.* (manuscript at 8).

⁹⁴ *See infra* Part II.A.

⁹⁵ *See infra* Part II.B.

be dicta for a court to state that the subjective intent to be partners (or not) governs as between the parties.⁹⁶

A. *A Brief Primer on Dicta*

Although every lawyer is familiar with the term dicta, there may be some confusion about the terminology and mechanics.⁹⁷ A review of the basics may therefore be helpful.

It is a “basic principle of justice” that “like cases should be decided alike.”⁹⁸ The judicial doctrine of stare decisis “attempts to secure this principle by ensuring that all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.”⁹⁹

Stare decisis demands that courts decide cases based on precedent.¹⁰⁰ However, even if a precedent is binding upon a court because it was decided by a higher court in that jurisdiction, only certain aspects of that precedent are binding. Generally, only the holding of each case is “binding upon future courts”—“dicta are not.”¹⁰¹

For this reason, “isolating a case holding from its dicta is critical” to any lawyer or judge.¹⁰² Traditionally, dicta are statements of law “not necessary to the decision of [a] case,”¹⁰³ whereas holdings—the “ratio decidendi”¹⁰⁴—are statements of law

⁹⁶ See *infra* Part II.C.

⁹⁷ See *Dictum Revisited*, 4 STAN. L. REV. 509, 511 (1952) (“Dictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it. Nonthinking and overuse combine to make for fuzziness.”); accord Robert G. Scofield, *The Distinction Between Judicial Dicta and Obiter Dicta*, L.A. LAWYER 17 (Oct. 25, 2002) (“The failure of some judges to understand the distinction between judicial dicta and obiter dicta has led to some confusion in case law.”).

⁹⁸ *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005).

⁹⁹ William Lindsley et al., 16 CAL. JUR. 3D COURTS § 275 (West, Westlaw updated Aug. 2022).

¹⁰⁰ See Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258 (2006) (“The Latin phrase ‘stare decisis’ (meaning ‘to remain decided’) . . . requires that once a court has decided a case based on a proposition of law, the court must thereafter adhere to that proposition . . . , deciding like cases in like manner (unless it takes the rare step of . . . overruling the proposition).”).

¹⁰¹ Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 165–66 (2011).

¹⁰² *Id.* at 166.

¹⁰³ *Id.* (quoting *Dictum Revisited*, *supra* note 97, at 509).

¹⁰⁴ Scofield, *supra* note 97, at 17 (“The ratio decidendi is that part of a court’s opinion that judges deciding later cases are required to follow, and the dicta generally are the statements from the court that do not have to be followed.”).

“actually necessary to decide the issue between the parties.”¹⁰⁵ The two are “mutually exclusive.”¹⁰⁶

Some courts and commentators go further, distinguishing between different types of dicta—most commonly, “judicial dicta” versus “obiter dicta.”¹⁰⁷ As one professor has explained:

“Obiter dicta” involve points neither argued by the parties nor deliberately passed upon by the court; these statements often originate with the writing judge. Obiter dicta generally have no persuasive influence. “Judicial dicta,” on the other hand, are the product of a more comprehensive discussion of legal issues, and usually involve points briefed and argued by the parties. Judicial dicta are often treated more persuasively than obiter dicta, although neither type of statement is controlling.¹⁰⁸

Although not all courts follow this traditional distinction¹⁰⁹ (and some have criticized it as insufficiently nuanced¹¹⁰), this distinction is sufficiently well-established for purposes of this article.

Another important question in distinguishing dicta from holdings is to determine just how much of an opinion constitutes its “holding.” This article will adopt the most conservative approach, which defines holdings more broadly and

¹⁰⁵ McAllister, *supra* note 101, at 166; *see also* Leval, *supra* note 100, at 1256 (“A dictum is an assertion in a court’s opinion of a proposition of law which does not explain why the court’s judgment goes in favor of the winner.”).

¹⁰⁶ Leval, *supra* note 100, at 1257. It also has been argued that dicta and holdings are merely the endpoints on a spectrum rather than a binary distinction. *See generally* Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 676 (2018). Even if so, the difference should have no effect here because of the conservative (narrow) definition of dicta adopted below.

¹⁰⁷ *See, e.g.*, McAllister, *supra* note 101, at 167; *accord* Scofield, *supra* note 97, at 18.

¹⁰⁸ McAllister, *supra* note 101, at 167–68; *accord* Scofield, *supra* note 97, at 18 (“There are two types of dicta . . . judicial dicta and obiter dicta. The former carry greater authority than what are commonly referred to as mere dicta; the latter are mere dicta. The failure of some judges to understand the distinction between judicial dicta and obiter dicta has led to some confusion in case law. Obiter dicta are ‘by the way’ statements. Since courts usually do not give as serious consideration to the statements, they make in passing as they do to the ratio decidendi, the statements do not constitute the binding part of a judicial precedent. Therefore obiter dicta are viewed as those statements by a court that can be safely ignored. But judicial dicta are the product of a comprehensive discussion of legal issues and therefore should be granted greater weight than obiter dicta. Judicial dicta should be followed unless they are erroneous or there are particularly strong reasons for not doing so.”).

¹⁰⁹ *See* McAllister, *supra* note 101, at 167 (citing Scofield, *supra* note 97).

¹¹⁰ *See generally id.*

dicta more narrowly. Under this approach, the holding is the entire rationale for the court's decision, not just the specific facts and outcome of the case.¹¹¹

B. When Is A Statement of Law Unnecessary to a Judicial Decision?

Recall that dicta are statements of law that are unnecessary to a court's decision. What does this mean, exactly? In his 2006 Madison Lecture at New York University School of Law, Judge Pierre Leval provided an excellent summary. After defining dictum as "an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner," Judge Leval explained:

If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum. The dictum consists essentially of a comment on how the court would decide some other, different case, and has no effect on its decision of the case before it.¹¹²

Judge Leval also offered a seemingly easy way to distinguish dicta from holdings. First, "turn the questioned proposition around to assert its opposite."¹¹³ Then ask yourself whether replacing the court's reasoning "with the opposite proposition" would "change either the court's reasoning or judgment."¹¹⁴ If not, "the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment."¹¹⁵

¹¹¹ See *id.* at 169.

¹¹² Leval, *supra* note 100, at 1256.

¹¹³ *Id.* at 1257.

¹¹⁴ *Id.*

¹¹⁵ *Id.* Judge Leval also offered a helpful example. Assume that a judge is developing the rules of Poker through a common law decision-making process. Each "case" calls for the judge to decide which player wins a particular hand of poker. In one case, one party holds three Jacks; the other holds two Queens. Who wins? The judge "rules for three Jacks—opining '[w]hen held in equal numbers, Queens beat Jacks. But three-of-a-kind always beats a pair.'" *Id.* Here, "[t]he statement that Queens beat Jacks is superfluous to the court's reasoning," because "[w]ere the statement turned around to state the opposite . . . the court's grant of judgment and reasoning would 'stand unaltered.'" *Id.* The statement of priorities between Jacks and Queens plays no role in the decision and is "accordingly dictum." *Id.*

Yet, despite this “one neat trick” for distinguishing dicta from holdings, making this seemingly simple distinction has often “proven difficult in practice.”¹¹⁶ It requires a close reading of the case.¹¹⁷ That is precisely what the next Part does.

C. *When Statements That Subjective Intent Governs Inter Se Are Dicta*

1. Back to Our Hypo: Peter Sues Francine

a. *A Hypothetical Haunted Holding*

Before proceeding to analyze the cases in the companion article, let us establish when statements of zombie law might be dicta, using the approach described by Judge Leval—and returning to Peter and Francine’s clothing shop at the mall.

Assume now that, after years in business, Francine decides to open a second clothing store in the same mall under her own name, without Peter. When Peter finds out, he sues Francine.¹¹⁸ Peter’s lawsuit alleges that (1) he and Francine are

¹¹⁶ McAllister, *supra* note 101, at 166; accord Leval, *supra* note 100, at 1257 (“[I]t is not always immediately apparent at a glance whether a pronouncement of law is holding or dictum.”); *id.* at 1258 (“[I] do not mean to imply that in all cases it is easy, or even possible, to reach a confident conclusion whether a statement should be considered dictum or holding.”).

¹¹⁷ See Leval, *supra* note 100, at 1257 (“One cannot tell [whether a statement is dictum] by reading [it] in isolation, without reference to the overall discussion. The distinction requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.”).

¹¹⁸ Here, since the lawsuit is for an alleged breach of the Duty of Loyalty, Peter can sue without first dissolving the partnership under either uniform partnership act. Under UPA, absent an exception, a partner must obtain an equitable accounting of the partnership’s assets before suing her co-partners at law for damages. See ELIZABETH S. MILLER & ROBERT A. RAGAZZO, 19 TEX. PRAC., BUS. ORGS. § 7:18 (3d ed. 2022) (discussing the accounting rule and traditional exceptions); see, e.g., *Smith v. Manchester Mgmt. Corp.*, 373 A.2d 361, 364 (N.H. 1977) (“It is well-settled law that: In the absence of statutory permission an action at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership transactions, unless there has been an accounting or settlement of the partnership affairs.”) (quoting 60 AM. JUR. 2d *Partnership* § 350, at 237 (1972)). Moreover, under UPA, absent an agreement, a partner generally must dissolve the partnership in order to obtain an accounting. See UNIF. P’SHP ACT § 43 (UNIF. L. COMM’N 1914). However, UPA allows a partner to obtain an accounting *without* first dissolving the partnership when another partner breaches her Duty of Loyalty by converting a partnership opportunity. See *id.* §§ 21 & 22(c). Alternatively, some courts applying UPA simply ignore the accounting rule in such cases. See, e.g., *Fulton v. Baxter*, 596 P.2d 540, 542 (Okla. 1979). Under RUPA, no accounting is required in order for one partner to sue another for damages. See UNIF. P’SHP ACT (1997) § 405(b) (UNIF. L. COMM’N 1997) (“A partner may maintain an action against the partnership or another

partners, despite their written disclaimer of partnership and that (2) she breached her Duty of Loyalty to the partnership by taking an opportunity (the new clothing store) that belonged to the partnership.¹¹⁹

Francine denies that she breached the Duty of Loyalty to the partnership. She argues that she owed no such duty because, due to their contractual disclaimer, the two are *not* partners.

After a bench trial, the court issues a brief opinion, as follows: “The parties’ subjective intent to be partners or not governs *inter se*. I therefore conclude that Peter and Francine are not partners. Thus, Francine owes no Duty of Loyalty to Peter. Case dismissed.”

Here, the court’s statement of zombie law is necessary to its decision because it is the sole basis for the court’s conclusion that Peter and Francine are partners; substituting the opposite proposition—that the parties’ subjective intent is not conclusive—would change the court’s decision. This hypothetical opinion would be a haunted holding.

b. Two Hypothetical Examples of Undead Dicta

(1) No Partnership Exists

Now assume instead that the hypothetical *Peter v. Francine* court issued the following opinion:

The parties’ subjective intent to be partners is dispositive and governs whether they are partners *inter se*. Having reviewed the business records for Peter and Francine’s clothing store, I conclude that the two never became co-owners of a business because Francine treated Peter as an employee in every respect. Since an employer owes her employees no Duty of Loyalty, Francine breached no such duty here. Case dismissed.

Aside from the fact that the court might be reversed for clear error (since Peter and Francine shared profits and there was no indication that Peter was treated as an employee in any way), here the court’s statement that the parties’ subjective intent to be partners governs as between them is unnecessary and therefore dicta. Substituting the opposite conclusion—that the parties’ subjective intent to be partners *does not* govern as between them—would not affect the court’s decision

partner for legal or equitable relief, with or without an accounting of partnership business.”). Hence, under RUPA-based statutes, partners may sue each other for damages prior to dissolution. See MILLER & RAGAZZO, *supra* (discussing Texas’s RUPA-based statute).

¹¹⁹ As relief, Peter’s complaint would presumably demand that the court grant him half ownership in the second store. This is the typical remedy when a partner violates the Duty of Loyalty by usurping a partnership opportunity. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545, 549 (N.Y. 1928) (when one co-venturer stole an opportunity belonging to the partnership, the court granted the other co-venturer part ownership in the new venture).

since it *did not* turn on the parties' subjective intent. Rather, the *Peter v. Francine* court's decision turned entirely on its assessment of Peter and Francine's objective intent not to co-own a for-profit business.

(2) Partnership Exists

Finally, assume that the court opined as follows:

The parties' subjective intent to be partners is dispositive and governs whether they are partners *inter se*. Having reviewed the business records for Peter and Francine's clothing store, I conclude that the two became co-owners of a business because they shared profits and control of the clothing store. Since they were partners, Francine owes a Duty of Loyalty to Peter, and she breached that duty by excluding him from the opportunity to participate in the second clothing store. The court hereby grants Peter all the relief that he seeks.

Once again, the court's statement that the parties' subjective intent to be partners governs is unnecessary and, therefore, undead dicta. The opposite conclusion would not change the court's decision, which turns entirely on the court's assessment that Peter and Francine were co-owners of the clothing store. The court stated the subjective intent rule and then proceeded to ignore it!

In sum, a court could render its statement of the subjective-intent-governs-*inter-se* rule dicta in (at least) two ways. First, the court could state that subjective intent governs but hold that the parties *are* partners based on their objective intent. Second, the court could state that subjective intent governs but hold that the parties are *not* partners based on their objective intent. In either case, the zombie statement of law is not the rationale for the court's decision.

* * * * *

We now proceed to a close reading of the cases identified in the companion article to ascertain the extent to which their statements of law are undead dicta or haunted holdings.

III. A CLOSER LOOK AT THE SUBJECTIVE-INTENT-GOVERNS-INTER-SE CASES

The companion article described above makes a binary distinction in each case it analyzes: is the case a zombie or not?¹²⁰ To categorize each case, that article asks a simple question: does the case state law that pre- or post-dates the relevant jurisdiction's adoption of the UPA?¹²¹ Since UPA eliminated the common law distinction between partnership *inter sese* and partnership as to third parties, the

¹²⁰ See Leahy, *supra* note 10 (manuscript at 7, 37–38).

¹²¹ See *id.* (manuscript at 7, 37–38).

companion article deems any case stating that the test for formation depends on the plaintiff's identity (i.e., purported partner or third party) a zombie.¹²²

This article attempts to make a finer distinction among these zombie cases: does the case actually *apply* the zombie law or merely *state* that law (and hold something different)? That is to say, do cases stating that the parties' agreement (or intent) to be partners (or not) is dispositive between them actually *turn* on the parties' *subjective* intent to be partners (or not)—or do such cases instead look to the parties' *objective* intent to co-own a for-profit business (or not)?

As it turns out, other than *Enterprise Products*, only one case identified in the companion article as stating (or suggesting) that the parties' agreement (or intent) not to be partners controls inter se actually *holds* that people who co-owned a for-profit business avoided forming a partnership *as a matter of law* simply by agreeing (or intending) not to be partners.¹²³

By contrast, every other case stating zombie law holds (some clearly, some less so) that the relevant parties were either partners or not as a *factual* matter.¹²⁴ Both groups of zombie cases are undead dicta because they did not apply the subjective-intent-governs-inter-se rule.

This Part marks each of the walking-dead cases as undead dicta or a haunted holding, broken down by the level of certainty with which they can be categorized as undead dicta.

A. Definitely Undead Dicta: Cases That Squarely Turned on Objective Intent

The great bulk of cases described as zombies in the companion article undoubtedly treated the parties' agreement (or intent) as just one fact among many

¹²² These zombies fall into three different categories. Some pre-date and are therefore directly abrogated by the relevant jurisdiction's adoption of UPA. *See id.* (manuscript at 7). Others post-date UPA but "cite[] only cases that predate the [relevant] jurisdiction's uniform act adoption, without recognizing that such adoption abrogated the common law rule." *Id.* (manuscript at 7). Still others "give[] effect to the parties' agreement solely as a matter of contract law . . . ignoring both the governing partnership law statute and any controlling partnership law cases." *Id.* (manuscript at 7). However, no case described in the companion article actually *addresses* the contention that UPA abrogated the subjective-intent-governs-inter-se rule. Any case that did so would not properly be deemed a zombie. *See id.* (manuscript at 7). Such cases would represent differences of judicial opinion, not failures to notice statutory abrogation.

¹²³ *See infra* Part III.C (describing the sole haunted holding case identified in three national treatises).

¹²⁴ *See infra* Part III.A (describing cases that definitely state undead dicta) & B (describing cases that probably or plausibly state undead dicta).

showing that the parties did or did not co-own a business. That is to say, these cases actually turned on the parties' objective intent to be partners (or not), not their subjective intent to be partners (or not). The holdings in these cases are therefore consistent with the approach required by the uniform acts.

Cases that clearly state as undead dicta that parties' subjective intent to be partners (or not) governs as between them can be divided into two categories. First, two cases definitely hold that the parties were partners as a factual matter—i.e., that, based on the facts, the parties associated as co-owners of a for-profit business.¹²⁵ Second, fifteen other cases clearly hold that the parties were *not* partners as a factual matter—i.e., that, based on the applicable facts, the parties did not associate as co-owners of a for-profit business.¹²⁶ Neither type of case turns on the parties' subjective intent.

This Subpart describes all the definitely undead dicta cases, broken down by jurisdiction.

1. Objective Intent Cases Holding that the Parties Were Partners as a Factual Matter

- a. *Alabama Case: Waters*

One zombie case from Alabama, *Waters v. Cochran*,¹²⁷ was decided in 1973,¹²⁸ but involved an alleged partnership that purportedly existed between 1958 and 1967.¹²⁹ Alabama adopted UPA in 1971,¹³⁰ so *Waters* necessarily applied pre-UPA law.

¹²⁵ See *infra* Part III.A.1. The cases meeting this description are: (1) *Waters v. Cochran*, 285 So. 2d 474 (Ala. 1973) and (2) *Greenhouse v. Zempsky*, 218 A.2d 533 (Conn. 1966).

¹²⁶ See *infra* Part III.A.2. The cases fitting this description are: (1) *Adams v. State*, 189 So. 2d 354 (Ala. 1966); (2) *Myers v. Brown*, 296 So. 2d 121 (Fla. Dist. Ct. App. 1974); (3) *Snell v. Meyers*, No. 226068, 2001 WL 732082 (Mich. Ct. App. Jun. 12, 2001); (4) *LeZontier v. Shock*, 260 N.W.2d 85 (Mich. Ct. App. 1977); (5) *Garner v. Garner*, 358 A.2d 583 (Md. Ct. Spec. App. 1976); (6) *Carefree Carolina Communities, Inc. v. Cilley*, 340 S.E.2d 529 (N.C. Ct. App. 1986); (7) *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967); (8) *Kingsley Clothing Manufacturing Co. v. Jacobs*, 26 A.2d 315, 317 (Pa. 1942); (9) *Holman v. Dow*, 467 S.W.2d 547 (Tex. Civ. App. 1971); (10) *FDIC v. Claycomb*, 945 F.2d 853 (5th Cir. 1991); (11) *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991); (12) *Cressy v. Proctor*, 22 F. Supp. 3d 353 (D. Vt. 2014); (13) *Harman v. Rogers*, 510 A.2d 161 (Vt. 1986); (14) *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245 (Vt. 1953); and (15) *Cusick v. Phillippi*, 709 P.2d 1226 (Wash. Ct. App. 1985).

¹²⁷ 285 So. 2d 474 (Ala. 1973).

¹²⁸ See *id.* at 474.

¹²⁹ See *id.* at 476, 479–81.

¹³⁰ See RICHARD THIGPEN, ALA. CORP. L. § 1:3 (4th ed. 2021).

In *Waters*, Cochran sued his alleged partner Waters for an accounting.¹³¹ Cochran and Waters had operated a real estate and construction business together under both of their names; both men received a salary and their expenses, and they agreed to split the profits of the business equally.¹³² However, the two men never discussed losses.¹³³ They also never signed a partnership agreement.¹³⁴

Unfortunately, the business resulted in a large loss.¹³⁵ After winding up the business, Cochran sought to hold Waters responsible for half of the firm's debts.¹³⁶ Waters claimed that he was simply an employee of the business who had never agreed to share its losses.¹³⁷ There was evidence on both sides of the question: they both repeatedly signed agreements with others as "partners" or as co-owners of the business—but Cochran deducted the business's losses on his personal tax return as a sole proprietorship.¹³⁸

The trial court applied a pre-UPA Alabama statute under which "an agreement to divide the profits of a business implies an agreement for a corresponding division of the losses, unless it is otherwise expressly stipulated."¹³⁹ In light of the statute, the lower court held that Waters and Cochran were partners.¹⁴⁰ The Alabama Supreme Court agreed with the lower court's interpretation of the statute, concluded that its findings were not plain error, and upheld the judgment.¹⁴¹

Accordingly, although the *Waters* court quoted older cases which stated that partnership only arises "as between the parties . . . when such is their actual intention,"¹⁴² the case did not turn on this issue. Since *Waters* did not uphold the

¹³¹ See 285 So. 2d at 476.

¹³² See *id.* at 477, 482.

¹³³ See *id.* at 482.

¹³⁴ See *id.*

¹³⁵ See *id.* at 476.

¹³⁶ See *id.*

¹³⁷ See *id.* at 476, 482.

¹³⁸ See *id.* at 478, 482.

¹³⁹ *Id.* at 483.

¹⁴⁰ See *id.* at 478.

¹⁴¹ See *id.* at 484–85.

¹⁴² *Id.* 481 ("On the question whether the parties are partners inter se . . . , stronger proof is required . . . than when the question arises as between the alleged partners and third persons. A partnership as to third persons may arise by mere operation of law against the parties by way of estoppel, etc.; but as between the parties themselves it only exists when such is their actual intention.") (quoting *Watson v. Hamilton*, 60 So. 63, 63 (Ala. 1912) (citing *Chisholm v. Cowles*, 42 Ala. 179. (1868)).

parties' agreement (or intent) not to be partners—indeed, it held that they *were* partners—its language about the parties' intent was merely undead dicta.

b. Connecticut Case: Greenhouse

The Connecticut zombie case,¹⁴³ *Greenhouse v. Zempsky*,¹⁴⁴ was decided in 1966¹⁴⁵—soon after Connecticut adopted UPA in 1961.¹⁴⁶ However, the alleged partnership in *Greenhouse* supposedly existed between 1955 and 1959.¹⁴⁷ Presumably for this reason, the *Greenhouse* court did not apply UPA.

Greenhouse arose out of an action for an accounting between plaintiff Greenhouse and his brother-in-law, defendant Zempsky.¹⁴⁸ Greenhouse initially worked for 21 years as an employee of Zempsky's public accounting business.¹⁴⁹ Zempsky then discharged Greenhouse—but, soon thereafter, agreed to take him back “as a partner” “to keep peace in the family.”¹⁵⁰

The two men then operated as a partnership, “Zempsky & Co.,” for five years.¹⁵¹ During that time, each partner received a set portion (Zempsky 73%, Greenhouse 27%) of the firm's first \$27,500 in net income and they split any net income (75% for Zempsky, 25% for Greenhouse) above that amount.¹⁵² However, “all decisions were to be made” by Zempsky, who “was the sole ‘boss.’”¹⁵³ After five years, Zempsky terminated the partnership and cashed Greenhouse out with what was purportedly owed to him; after that time, Greenhouse worked “as an employee” for Zempsky for nearly two more years (during which time Zempsky repeatedly asked him to leave) until being fired.¹⁵⁴ At that time, Greenhouse took with him clients (some with

¹⁴³ One of the treatises cites a second Connecticut case, *R4 Properties v. Riffice*, No. 3:09-cv-00400, 2014 WL 4724860 (D. Conn. Sept. 23, 2014), as supporting the subjective-intent-governs-inter-se rule. However, this case deals with partnership property, not formation, and therefore is not a zombie partnership formation case at all. See Leahy, *supra* note 10 (manuscript at 47 n.377).

¹⁴⁴ 218 A.2d 533 (Conn. 1966).

¹⁴⁵ See *id.* at 533.

¹⁴⁶ See *Guillemette v. Gaffney*, No. CV 930343428S, 1996 WL 512630, at *10 (Conn. Super. Ct. 1996).

¹⁴⁷ See *Greenhouse*, 218 A.2d at 534.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 534–35.

¹⁵² See *id.* at 534.

¹⁵³ *Id.*

¹⁵⁴ See *id.* at 534–35.

Zempsky's consent and others that Greenhouse solicited himself) constituting less than ten percent of the firm's gross revenues.¹⁵⁵ He also sued for damages and "an equitable division of the firm's . . . business."¹⁵⁶

The *Greenhouse* trial court found that Greenhouse was Zempsky's partner when the latter brought the former back into the firm.¹⁵⁷ The Connecticut Supreme Court upheld this finding.¹⁵⁸ Applying a test for partnership that it described as "[t]he sharing of profits as principals,"¹⁵⁹ the appellate court reasoned that "the intent of the parties . . . to be . . . partners . . . and the profit sharing are sufficient to sustain" the lower court's conclusion.¹⁶⁰

That said, the higher court deemed it "significant" that plaintiff Greenhouse "was not a general partner and therefore not a partner in the usual sense" because "he enjoyed the title" of partner but "lacked any say in the management or operation of the business."¹⁶¹ In light of this—and considering both (1) Greenhouse's failure to seek an accounting within a reasonable time of his termination and (2) his acceptance of employment with Zempsky for two years thereafter along with the settlement of their accounts—the appellate court upheld the existing division of the firm's clients as "not inequitable."¹⁶² In sum, although the Connecticut Supreme Court rejected Greenhouse's claim for an equitable division of the partnership, it did not do so on the grounds that no partnership existed.

Nor did the Connecticut high court hold that the parties' affirmative intent to be partners was dispositive inter se. Rather, *Greenhouse* stands for the proposition that two people who call themselves partners *and* share profits of a business may be held to be partners even if (as the *Greenhouse* dissent objected¹⁶³) one "partner" appears to function as "no more than an employee" because he has no right to manage the business. In sum, *Greenhouse* supports the view that the parties' intent is sufficient to render an ambiguous relationship a partnership when a court might otherwise (in the absence of the parties' expressed intent) conclude that the relationship is one of employer and employee. This is consistent with the UPA rule

¹⁵⁵ *See id.* at 534.

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *Id.* at 535.

¹⁶⁰ *Id.* (emphasis added) (citing *Morgan v. Farrel*, 20 A. 614 (Conn. 1890)).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* at 536 (Alcorn, J, concurring).

that objective intent governs—i.e., that a court must consider all the surrounding facts and circumstances, *including* the parties’ expression of the intent to be partners (or not).¹⁶⁴

Since *Greenhouse* did not turn on subjective intent one way or another, any language in the case suggesting that subjective intent is dispositive is merely dicta—undead dicta.

2. Objective Intent Cases Holding that No Partnership Existed As a Factual Matter

a. *Alabama Case: Adams*

A second zombie case from Alabama, *Adams v. State*,¹⁶⁵ was decided in 1966,¹⁶⁶ before Alabama adopted UPA in 1971.¹⁶⁷ *Adams* therefore applied the common law of partnership.¹⁶⁸

In *Adams*, defendant Adams appealed his conviction for embezzlement.¹⁶⁹ Adams argued that he could not have stolen money from his alleged victim, the elderly widow Thorpe, because she was his partner and had invested her money in his business.¹⁷⁰ The appellate court rejected this claim of error because, although Thorpe had testified that she agreed to share profits with Adams, he had failed to adduce evidence of her intent to be partners and failed to seek a jury charge on this issue.¹⁷¹ A partnership, the *Adams* court reasoned, “is not . . . presumed from the mere division of profits”; rather, “joint liability” and “some joint ownership of property” is required.¹⁷²

In holding that Adams failed to establish a partnership with Thorpe, the *Adams* court reasoned that, “as between the parties”—but not “when the controversy involves third parties”—the parties’ “intention in going to a business relationship is the single most critical criterion.”¹⁷³ According to the *Adams* court, “an actual

¹⁶⁴ See *supra* note 55 (explaining that the parties’ expressed intent to be partners or not is relevant when determining whether they associated as co-owners of a for-profit business).

¹⁶⁵ 189 So. 2d 354 (Ala. 1966).

¹⁶⁶ See *id.* at 354.

¹⁶⁷ See THIGPEN, *supra* note 126, at § 1:3.

¹⁶⁸ See *Adams*, 189 So. 2d at 360.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² *Id.* at 359.

¹⁷³ *Id.* at 359–60.

partnership . . . does not arise by operation of law” as between the parties; persons cannot become partners inter se “except by agreement, expressed or implied.”¹⁷⁴ However, the *Adams* court did not specify whether the required assent was an agreement to be “partners” (i.e., subjective intent) or an agreement to co-own a business (i.e., objective intent).

Yet, even if *Adams* referred here to the subjective intent to be partners, it did not hold that the lack of such intent was sufficient to negate partnership as a matter of law. To the contrary, the court reasoned that whether Adams and Thorpe were partners “was a question, part law and part fact.”¹⁷⁵ Further, the court ultimately rejected Adams’s defense not because Thorpe denied that they were partners, but because her testimony—in which she both referred to herself as a partner and said that she lent him money that he was to repay—was too “ambivalent” to establish a partnership.¹⁷⁶ That is to say, the court concluded that the evidence at trial was ambiguous as to whether Thorpe was Adams’s lender or his partner; as a result, the court held that Adams failed to satisfy his burden of establishing that the parties satisfied Alabama’s common law definition of partnership.¹⁷⁷

In sum, although *Adams* states that the parties’ intent to be partners is the key criterion, nowhere does it hold that this criterion trumps all others. Although Thorpe’s testimony was too ambiguous to establish the intent to be partners, the court would have allowed Adams to produce evidence to establish that he and Thorpe had formed a partnership as a factual matter. To the extent *Adams* implies that the subjective intent not to be partners is dispositive, the case is undead dicta.

¹⁷⁴ See *id.* at 360 (quoting *Taylor v. Bush*, 75 Ala. 432, 436 (1883)). Here, *Taylor* states the zombie rule that the intent to be partners is dispositive inter se but not as to third parties. See Leahy, *supra* note 10 (manuscript at 28 n.212) (discussing *Taylor*).

¹⁷⁵ *Adams*, 189 So. 2d at 359.

¹⁷⁶ *Id.* at 360.

¹⁷⁷ *Id.* (reasoning that Adams had “the right to bring in evidence to show a community of interest in profits and losses” between the parties, but that he had failed to ask the trial court to instruct the jury to “consider the legal implications of [his] facts further”).

b. Arizona Case: Mercer

The Arizona zombie, *Mercer v. Vinson*,¹⁷⁸ was decided in 1959.¹⁷⁹ Although *Mercer* post-dates Arizona's 1954 adoption of UPA,¹⁸⁰ the case arose out of facts occurring in 1952.¹⁸¹ Thus, the *Mercer* court did not apply UPA.

Mercer involved a wrongful death action against two men: defendant Vinson, who "owned the trailer rented to the decedents which was occupied by them at the time of their deaths," and defendant Rima, "the owner of a trailer park in which the trailer" was located.¹⁸² The deaths were attributed to carbon monoxide poisoning resulting from the unvented "liquefied petroleum gas space heater" in the victims' trailer,¹⁸³ which the court concluded was "negligence per se" in violation of a statute that required venting.¹⁸⁴ The victims' executor alleged that the defendants "were jointly and severally liable"¹⁸⁵ for this tort, presumably on the ground that Rima and Vinson were joint adventurers.¹⁸⁶

In *Mercer*, the trial court entered a directed verdict for defendants.¹⁸⁷ On appeal, the Supreme Court of Arizona began its analysis by pointing out that the alleged joint adventure between the defendants "is in the nature of a partnership," and further, that each partnership case "must be decided upon its own facts."¹⁸⁸ The appellate court held that there was sufficient factual conflict in the record to warrant submission of the matter to the jury and remanded the case for trial.¹⁸⁹

In evaluating plaintiff's partnership claim, the *Mercer* court opined that:

The intent of the contracting parties to form a partnership is always an essential element of a partnership relation *as between the parties themselves*, but as to third parties, the

¹⁷⁸ 336 P.2d 854 (Ariz. 1959).

¹⁷⁹ *See id.* at 854.

¹⁸⁰ *See* UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

¹⁸¹ *See Mercer*, 336 P.2d at 856.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 857.

¹⁸⁵ *Id.* at 858.

¹⁸⁶ *See id.* (describing Rima's argument that there was no joint venture).

¹⁸⁷ *See id.* at 856.

¹⁸⁸ *Id.* at 858.

¹⁸⁹ *See id.*

relation will be determined from the facts rather than the conclusions of the co-partners as to the nature of their business relationship.¹⁹⁰

This is a direct statement of the zombie, pre-UPA law that the parties' subjective intent not to be partners is dispositive as between them.¹⁹¹

However, since the partnership claim in *Mercer* was being asserted by a third party, the court did not hold that the existence of a partnership turned on Rima's and Vinson's subjective intent. Rather, the court reasoned that "the jury was entitled to consider the actual facts of what occurred and to draw from that the inference as to the nature of the business relationship."¹⁹² The court then reviewed Vinson's testimony and concluded that reasonable jurors could have "come to an honest conclusion that the facts . . . establish a joint enterprise."¹⁹³

Mercer's reference to the subjective intent rule is therefore a classic example of obiter dicta—a "by the way" statement that plays no role in the case.¹⁹⁴ Following Judge Leval's approach, even if the *Mercer* court had stated precisely the opposite rule—that parties' intent to form a partnership is not an essential element as between the parties themselves—it would have had no effect on the holding, which dealt with partnership as to third parties.¹⁹⁵

In sum, *Mercer's* statement of zombie law is merely walking-dead dicta.

c. Florida Case: Myers

The undead Florida case *Myers v. Brown*¹⁹⁶ deals with an alleged partnership that supposedly formed prior to 1969 and continued through about 1972.¹⁹⁷ Since Florida did not adopt UPA until 1972,¹⁹⁸ Florida's UPA did not strictly apply in *Myers*.

¹⁹⁰ *Id.* at 859 (emphasis in original) (citing *May v. Sexton*, 206 P.2d 573, 575 (Ariz. 1949)).

¹⁹¹ *See supra* Part I.C (discussing the zombie subjective-intent-governs-inter-se line of cases).

¹⁹² *Mercer*, 336 P.2d at 859.

¹⁹³ *Id.*

¹⁹⁴ *See supra* text accompanying notes 107 to 108.

¹⁹⁵ *See supra* text accompanying notes 113 to 115. Indeed, *Mercer* almost precisely follows the pattern of Judge Leval's example in which the court states one rule then another rule, separated by a "but." *See supra* note 115.

¹⁹⁶ 296 So. 2d 121 (Fla. Dist. Ct. App. 1974).

¹⁹⁷ *See id.* at 122 (describing dates of appellant's contributions to rent of the operators' shared premises and dates of appellant's payment towards workman's compensation for the operators' shared cab dispatchers).

¹⁹⁸ UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

That said, the *Myers* court mentioned that Florida “has adopted” UPA and purported to apply it, presumably for its persuasive effect.¹⁹⁹

Myers arose out an action by plaintiff, a taxi “operator,” for dissolution of an alleged partnership between himself and other taxi drivers²⁰⁰ who shared the same headquarters and company name.²⁰¹ The cabbies’ agreement provided (to quote the court, which described the agreement “in substance” rather than recite its express terms) that they each were “independent operators of taxi cabs operating . . . under their own right.”²⁰² Further, the agreement explicitly stated that each cabbie “in nowise . . . bind[s] himself as a partner but solely as a contributing member.”²⁰³

In evaluating whether the cab operators had formed a partnership, the *Myers* court stated that “[t]he true test [for partnership] as between the parties themselves seems to be their intention when making the agreement under consideration.”²⁰⁴ However, the *Myers* court did not hold that this written disclaimer of partnership was dispositive of partnership formation. Rather, the court reviewed the parties’ entire joint operation agreement and concluded that, by its terms, “the parties [we]re not carrying on a business for profit as co-owners”²⁰⁵—UPA’s definition of partnership.

Under the agreement, the *Myers* court explained, the parties “d[id] not share profits”²⁰⁶ with each other (which would have presumptively rendered them co-owners of the taxi cab business under UPA²⁰⁷). Nor did the cab drivers “share their individual revenues.”²⁰⁸ Nor did they share any “expenses of their respective taxi cab operations other than the expenses of operating the dispatcher service.”²⁰⁹ As a result, the court concluded that each man “operate[d] his taxi cabs individually” and the men merely “operat[ed] a joint dispatcher service using a common name.”²¹⁰

¹⁹⁹ 296 So. 2d at 123.

²⁰⁰ *Id.* at 122. It is assumed herein that “operator,” as used in *Myers*, was meant to be synonymous with “driver.”

²⁰¹ *See id.*

²⁰² *Id.*

²⁰³ *Id.* at 123.

²⁰⁴ *Id.* (quoting *Uhrig v. Redding*, 8 So. 2d 4, 6 (Fla. 1954)).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See* UNIF. P’SHP ACT § 7(4) (UNIF. L. COMM’N 1914).

²⁰⁸ *Myers*, 296 So. 2d at 123.

²⁰⁹ *Id.*

²¹⁰ *Id.*

By analyzing the specific terms of the contract in this way, the *Myers* court was not reasoning that the cabbies' denial of partnership (i.e., their subjective intent not to be partners) automatically negated formation. Rather, the court was deciding whether the parties had agreed, as a factual matter, to be co-owners of a for-profit business (i.e., their objective intent).²¹¹ By pointing out that the taxi drivers did not share revenues, much less profits, the court essentially concluded that they owned two separate businesses that simply shared the same cab dispatch service.²¹²

Although the *Myers* court reviewed only the parties' agreement, it did so solely because there was no other evidence in the record as to how the partnership operated.²¹³ Indeed, the majority opinion expressed frustration that appellant had "argued that *evidence* will show that the operation is that of a partnership" but then "presented no affidavit on the motion for summary judgment . . . to refute the operation as outlined in the agreement."²¹⁴ Hence, *Myers* clearly indicates that the parties' agreement was not dispositive as to whether they had formed a partnership. Rather, *Myers* is a straightforward application of the UPA rule that a court must consider all the circumstances—including the parties' agreement—in determining whether they are co-owners of a for-profit business.

In short, although the *Myers* court stated zombie law, it did not follow that law. Instead, it followed the UPA. *Myers's* riff about the parties' intent to be partners is therefore undead dicta.

d. Maryland Case: Garner

(1) *Garner's* Apparently Factual Holding

Garner v. Garner,²¹⁵ a Maryland case, was decided in 1976,²¹⁶ long after Maryland adopted UPA in 1916.²¹⁷ Accordingly, the *Garner* court applied UPA.²¹⁸

²¹¹ *See id.* ("Under the . . . agreement, the parties are not carrying on a business for profit as co-owners.").

²¹² *See id.*

²¹³ *See id.* at 122. Appellee provided an affidavit, but it apparently was limited in scope to a description of appellant's financial contributions. *See id.*

²¹⁴ *Id.* at 123.

²¹⁵ 358 A.2d 583 (Md. Ct. Spec. App. 1976).

²¹⁶ *See id.* at 583.

²¹⁷ *See id.* at 587 n.2 ("The Uniform Act was originally adopted in this State . . . [in] . . . 1916 . . ."). *Accord* UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995); 17 NOAH J. GORDON, MARYLAND LAW ENCYCLOPEDIA *Partnership* § 2 (2022) ("The Uniform Partnership Act . . . was adopted in Maryland in 1916 . . .").

²¹⁸ *See* 358 A.2d at 587 (citing MD. CODE. ANN. ART. 73A).

In *Garner*, the plaintiff—Jon—sued in assumpsit to collect money allegedly owed by the defendant—his brother, James—who claimed that he could not be sued at law by a partner unless Jon first obtained an accounting.²¹⁹ Hence, the issue was whether Jon and James were partners *inter se*.

In *Garner*, the alleged debt arose when Jon, a plumber, advanced money to James, an established electrical contractor, to fund a business that shared their names—“Garner and Garner Electrical and Plumbing Contractors.”²²⁰ The lower court found that the brothers had agreed to go into business as partners, but with a condition precedent: that the two “work together for a while” first “in order to see how the two would get along.”²²¹ Jon and James did in fact work together for a while, but not unambiguously as partners: although the business listing in the phone book and on insurance policies listed both brothers’ names and both brothers signed as guarantors for a backhoe that James purchased, all the trade licenses were in James’s name, he carried Jon on the business’s books as an employee or independent contractor, and he paid Jon wages.²²² Eventually, the brothers asked a lawyer to draft a partnership agreement, which Jon signed—but James never did.²²³

Based on Jon’s testimony that he felt that he could “always demand and get return of his money at any time before the actual creation of the partnership,” the trial court found that the condition precedent was never satisfied and that “a partnership never existed.”²²⁴ Thus, the monies that Jon had advanced were a loan “predicated on the future formation of a partnership which was not consummated” due to James’s conduct—presumably, his refusal to sign the agreement.²²⁵

On appeal, James pointed to the brothers’ listing in the phone book as “Garner and Garner” and argued that this was evidence that they “conducted themselves as if they were a partnership and that was their intention.”²²⁶ The *Garner* court rejected this argument, treating it as a claim for partnership by estoppel, which did not apply because the lawsuit was “not between third persons and a purported partnership,

²¹⁹ See *id.* at 585. Traditionally, courts applying UPA followed the common law rule that partners could not sue each other at law about partnership transactions without first obtaining an equitable accounting of all partnership transactions. See *supra* note 118 (discussing the accounting rule under UPA).

²²⁰ See 358 A.2d at 585.

²²¹ *Id.*

²²² See *id.* at 585–86.

²²³ See *id.* at 586.

²²⁴ *Id.* at 585–86.

²²⁵ *Id.* at 586.

²²⁶ *Id.*

but rather between two parties advancing opposite views as to whether a partnership between them existed.”²²⁷ In a case between two parties alleged to be partners, the court reasoned, the existence of “a partnership is a matter of intention proven by their expressed agreement or inferred from either person’s actions or conduct.”²²⁸ The court then quoted UPA § 6(1)’s definition of partnership and UPA § 7’s rules for determining whether a partnership exists.²²⁹

However, after doing so, the *Garner* court did not immediately ask whether the four elements of partnership were satisfied. Rather, the Court of Special Appeals again stressed the importance of the parties’ intent in determining whether or not a partnership exists.²³⁰ Citing *Southern Can Co. of Baltimore City v. Hartlove*,²³¹ the *Garner* appellate court opined that “[a] partnership inter sese cannot exist against the consent and intention of the parties.”²³² Further, the *Garner* court explained (also citing *Southern Can*) that the partnership test “most often applied in Maryland in cases arising out of a dispute between parties alleged to be partners is the intention of the parties.”²³³ Hence, the *Garner* court opined (quoting *Southern Can*) that the intention-of-the-parties test “should be given great weight.”²³⁴

Having again stressed the importance of the parties’ intent, the *Garner* appeals court next quoted the trial court’s analysis at length. First, the *Garner* appellate court repeated the trial court’s conclusion that the brothers’ written agreement was “in itself too vague and too inconclusive to form a partnership.”²³⁵ Second, the court of appeals quoted the lower court’s finding that, although the two brothers “no doubt . . . intended to form a partnership, and they worked together towards that end,” this partnership “was [n]ever consummated,” due to James’s refusal to sign the partnership agreement.²³⁶ Third, the appeals court quoted the trial court’s description of the two brothers’ conduct as “totally inconsistent with the formation of a partnership, . . . because of the conduct of the defendant [James].”²³⁷

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *See id.* at 587 (quoting MD. ANN. CODE. ART. 73A, §§ 6(1) & 7).

²³⁰ *See id.* at 588.

²³¹ 136 A. 624, 647 (Md. 1927).

²³² *Garner*, 358 A.2d at 588 (citing *Southern Can*, 136 A. at 628).

²³³ *Id.* (citing *Southern Can*, 136 A. at 628).

²³⁴ *Id.* (quoting *Southern Can*, 136 A. at 628).

²³⁵ *Id.* (quoting the trial court).

²³⁶ *Id.* (quoting the trial court).

²³⁷ *Id.* (quoting the trial court).

Here, numerous facts suggested that no partnership ever existed: (1) that “James kept control” of the business; (2) that he “took title to both real and personal property [and trade licenses] in his own individual name”; (3) that he never filed any “partnership income tax returns”; (4) that “no land, buildings, equipment, tools or personal property of any sort [were] ever purchased in the partnership name”; (5) that there were never any “bank accounts in the partnership name”; and (6) that, Jon was “considered an employee and received a W-2 form showing his wages that he received as an employee.”²³⁸ According to the appellate court, these facts—along with James’s refusal to sign the partnership agreement—led the trial court to conclude that there was no partnership notwithstanding their prior intent to become partners because “James apparently had a change of mind.”²³⁹ As a result, the appellate court was “unable to state that [t]his judgment on the evidence was clearly erroneous.”²⁴⁰

In sum, *Garner* did not hold that Jon and James’s contract rendered a business arrangement that otherwise satisfied the elements of partnership a non-partnership as a matter of law. Although the trial court stated that Jon and James failed to satisfy the condition precedent to partnership, that failure was not the basis for the trial court’s holding that no partnership existed. Rather, the lower court concluded that the failure to satisfy the condition precedent was just one of many facts tending to show that the Garner brothers never intended to form a partnership—specifically because James, who owned the business, never stopped treating Jon as an employee.²⁴¹ That is to say, the trial court concluded that the parties’ failure to satisfy a condition precedent meant that, as a factual matter, the parties never satisfied a key required element of a partnership: Jon never became a co-owner of his brother’s business.²⁴² Further, by stating “the intention test” was to be “given great weight,”²⁴³ the *Garner* appellate court clearly opined that the parties’ intention to be partners (or not) was an important but non-dispositive element of partnership formation.

²³⁸ *Id.* at 588–89 (quoting the trial court).

²³⁹ *Id.*

²⁴⁰ *Id.* at 589.

²⁴¹ *See id.*

²⁴² Hence, *Garner* stands in stark contrast to *Enterprise Products*, which held that a business arrangement that otherwise satisfied the elements of partnership was nonetheless not a partnership *as a matter of law* simply due to the failure to satisfy a condition precedent. *See Leahy, supra* note 10 (manuscript at 3–6 & 20–22) (discussing *Enterprise Products*, 593 S.W.3d 732 (Tex. 2020)).

²⁴³ *Garner*, 358 A.2d at 588 (quoting *Southern Can*, 136 A. at 628).

Finally, any uncertainty about whether *Garner* turned solely on the Garner brothers' failure to sign a partnership agreement is eliminated by a close review of the principal case upon which the *Garner* appellate court relied, *Southern Can*.²⁴⁴

(2) *Southern Can* Turns On Objective Intent

Southern Can, decided in 1927,²⁴⁵ is the only post-UPA case that *Garner* cites in support of the rule that “[a] partnership inter sese cannot exist against the consent and intention of the parties.”²⁴⁶

Southern Can provides no support for the view that parties can contract around partnership inter sese as a matter of law. First, *Southern Can* is not even on point because, although the case involved a claim between purported partners, the only issue on appeal was whether a partnership existed with respect to a claim by a third party.²⁴⁷ Second, while the *Southern Can* court stressed, in passing, that no partnership exists “inter sese” if the partners intend otherwise, the court was referring here to *objective* rather than *subjective* intent.²⁴⁸ Indeed, *Southern Can* squarely rejects the view that co-owners of a business for profit can escape partnership by declaring themselves non-partners, and instead explicitly states that actual factual intent trumps contrary contractual language.²⁴⁹

In *Southern Can*, Southern Can Co. (“Southern”), a manufacturer of tin cans, appealed from a trial court’s finding that Hartlove, the recently deceased owner of

²⁴⁴ 136 A. 624 (Md. 1927).

²⁴⁵ See *id.* at 624.

²⁴⁶ *Garner*, 358 A.2d at 588. The other case *Garner* cites is *Waring v. National Marine Bank of Baltimore*, 22 A. 140 (Md. 1891), which was decided before the UPA was even drafted. *Waring* concluded that two people can be partners as to themselves but not as to third parties—the precise approach to partnership formation that the UPA’s drafters intended to eliminate with sections 7(1) and 16(1). See 22 A. at 140 (“[T]here is . . . a well-recognized distinction between a partnership as between the parties themselves, and a partnership as to third parties, which arises by operation of law. Persons by their conduct and course of dealing may be held liable as partners to third parties dealing with them, even though there was in fact no agreement of partnership.”). Yet, the *Waring* court did not involve a situation even remotely like *Enterprise Products*, in which two parties expressed the intent not to become partners in the first place, see *Enterprise Products*, 593 S.W.3d at 735. Rather, *Waring* involved two admitted partners who incorporated their business and therefore contended that they no longer operated as a partnership. See 22 A. at 141. The current uniform partnership act, RUPA, explicitly provides for this as an exception to the formation of a partnership. See Leahy, *supra* note 7, at 262. Hence, *Waring* was more than just abrogated by the UPA; it was rendered unnecessary by RUPA.

²⁴⁷ S. Can Co. of Balt. City v. Hartlove, 136 A. 624, 627–28 (Md. 1927).

²⁴⁸ *Id.* at 628.

²⁴⁹ See *id.*

Hartlove Packing Co. (“Hartlove Packing”) and operator of several canneries throughout Maryland, “was not a copartner”²⁵⁰ of P.D. Gradman & Bro. (“Gradman”) in the operation of a cannery in Melrose, Maryland (“the Melrose cannery”).²⁵¹ Both Southern and Gradman were creditors of the Hartlove estate, which was insolvent.²⁵² Presumably, Southern sought a finding of partnership so that any money Gradman obtained from the estate after an accounting between Gradman and Hartlove would be deemed partnership funds, to which Southern would have first claim as a creditor of the (presumably insolvent) partnership.²⁵³ By contrast, if the trial court had concluded that Hartlove and Gradman were *not* partners, Southern would have had a claim only to the money that Hartlove owed it directly, and no claim to the money that Hartlove owed Gradman under a separate contact.

The alleged Hartlove-Gradman partnership was premised on four contracts signed in April and May 1925.²⁵⁴ First, Southern agreed to sell Gradman, at designated prices, all cans that it should use to pack fruit at “all factories [it] owned or controlled.”²⁵⁵ Second, Southern agreed to lease Gradman a machine to close the lids of such cans.²⁵⁶ Third, Hartlove Packing guaranteed payment of all Gradman’s bills under its can contract with Southern, in exchange for a brokerage fee to be paid to Hartlove Packing by Southern after the end of the 1925 canning season.²⁵⁷

The fourth contact, between Hartlove Packing and Gradman, stated that Gradman would “employ” Hartlove Packing as the exclusive seller, under its own name, of “all canned goods packed at” the Melrose cannery.²⁵⁸ Under this agreement, Hartlove Packing promised to provide (if requested) “all necessary cans, cases and labels” for such packing, and “to advance sufficient sums . . . to pay for all” the vegetables used by that cannery.²⁵⁹ The agreement also provided that Hartlove Packing would “endeavor to sell, bill and make collections for” the cans it sold; earn

²⁵⁰ *Id.* at 625–26.

²⁵¹ *Id.* at 626.

²⁵² *See id.* at 625, 629.

²⁵³ *See* UNIF. P’SHIP ACT. § 40(h) & (i) (UNIF. L. COMM’N 1914) (the “jingle rule,” giving partnership creditors priority for partnership property and separate creditors priority for separate property). RUPA abolished this rule. *See* UNIF. P’SHIP ACT (1997) § 807(a) (UNIF. L. COMM’N 1997).

²⁵⁴ *See Southern Can*, 136 A. at 625.

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

a 5% commission on gross sales; and receive a 1.5% credit on such sales.²⁶⁰ Finally, the Hartlove Packing-Gradman agreement provided that, at the end of the 1925 canning season, after an accounting between the two parties, Gradman would pay Hartlove Packing “extra compensation” of “one-half of the net profit resulting from the operation of” the Melrose cannery, subtracting the abovementioned brokerage, discount and other charges.²⁶¹

Although the Hartlove Packing-Gradman agreement explicitly did “not in any manner affect the ownership of” the Melrose cannery—which the court describes the Gradmans alternatively as having “owned”²⁶² and “rented”²⁶³—that agreement nonetheless provided Hartlove Packing with complete control over the payroll at that cannery.²⁶⁴ Despite this, the contract deemed Gradman “fully responsible for the management and control” of the Melrose cannery; stated that Gradman would be “liable for all losses” in connection with operations of that cannery; and stated further that Hartlove Packing would be repaid all money it had advanced for supplies “regardless of whether the goods sold for said reason . . . realize[d] a profit.”²⁶⁵

Upon Hartlove’s death in November 1925, Gradman (or a successor) filed a petition in the orphans’ court overseeing the Hartlove estate.²⁶⁶ The petition asserted that the canning for that year had finished, that an accounting by the estate executor revealed that the estate owed Gradman about \$2900, and that this money was owned by the partnership between Hartlove and Gradman. The court overseeing the estate permitted this claim.²⁶⁷ Subsequently, a creditor of Gradman’s filed a claim against the Hartlove estate in the same court, seeking direct payment out of the funds owed to Gradman, which the orphans’ court also allowed.²⁶⁸ A creditor of Hartlove Packing then moved to appoint a receiver for the entirety of

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 626. The rent was treated as an expense of the partnership in the accounting, however.

²⁶⁴ *See id.* at 625 (stating that Hartlove Packing could “determine the salary and wages to be paid at” the Melrose cannery, and further, that if such payroll did not meet with its satisfaction, Hartlove Packing was not required to make further advances of funds unless the payroll met with its “entire approval and satisfaction”).

²⁶⁵ *Id.* at 625–26.

²⁶⁶ *See id.* at 626.

²⁶⁷ *See id.*

²⁶⁸ *See id.*

Hartlove's property in the circuit court (the trial court), presumably on the basis that Hartlove and his business were insolvent.²⁶⁹

The sole issue on appeal in *Southern Can* was the validity of the lower court's holding that Hartlove and Gradman were *not* partners in the conduct of the Melrose cannery.²⁷⁰ In addressing the issue, the Court of Appeals of Maryland (the state's highest court) looked to Maryland's UPA, which was adopted in 1916.²⁷¹ In particular, the court quoted Maryland's verbatim adoption of three key UPA definitional provisions: the definition of partnership, section 6(1);²⁷² the provision establishing that this definition applied both as between the partners and as to third parties, section 7(1);²⁷³ and the provision intended to distinguish bona fide lenders to a business from partners therein, section 7(4)(d).²⁷⁴

However, the *Southern Can* court did not stop with UPA's definition of a partnership. Rather, the court opined that UPA's definition was "one of many definitions adopted by courts of last resort prior to the enactment of the statute," and proceeded to quote two of its own pre-UPA tests for partnership²⁷⁵—both of which were consistent with the UPA provisions it had just quoted.

²⁶⁹ See *id.*

²⁷⁰ See *id.* at 626–27.

²⁷¹ See *supra* note 217 (discussing Maryland's adoption of UPA).

²⁷² See *Southern Can*, 136 A. at 627 (quoting MD. CODE PUB. GEN. LAWS ART. 73a, § 6 (1924) ("A partnership is an association of two or more persons to carry on as co-owners a business for profit.")).

²⁷³ See *id.* at 627 (quoting MD. CODE PUB. GEN. LAWS art. 73a, § 7, para. 1 (1924) ("[P]ersons who are not partners as to each other are not partners as to third persons.")).

²⁷⁴ See *id.* (quoting MD. CODE PUB. GEN. LAWS art. 73a, § 7, para. 4(d) (1924) ("The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment . . . [a]s interest on a loan, though the amount of payment vary with the profits of the business.")).

²⁷⁵ *Id.* First, the *Southern Can* court quoted *Rowland v. Long*, 45 Md. 439 (1876). See *Southern Can*, 136 A. at 627 (quoting *Rowland*, 45 Md. at 446 ("[I]t is well settled . . . that where two persons agree to carry on a . . . business for their mutual benefit . . . and each [agree] to share the profits to be derived from such . . . business, they become liable as partners to third persons, although no partnership was contemplated by the parties themselves. In such a case, each party has an interest or property in the profits as profits, and is entitled to an account for the same.")). Second, the *Southern Can* court quoted *Thillman v. Benton*, 33 A. 485 (Md. 1895). See *Southern Can*, 136 A. at 627 (quoting *Thillman*, 33 A. at 486 ("We take it then to be well settled that a partnership is a contract . . . involving mutual consent of the parties, and when such a contract is entered into between two or more persons for the purpose of carrying on a . . . business, with the right to participate in the profits of such trade or business, then such a contract constitutes a partnership

Based on all this, the *Southern Can* court synthesized the following definition:

It seems well settled that the association of two or more persons to conduct a business in which the parties have an interest and where the parties share in the profits, *unexplained*, constitutes a partnership; but if it is clear from the agreement, and acts of the alleged partners, together with the facts and circumstances surrounding the conduct of the business, that *the parties themselves did not intend* to create a partnership, none will be held to exist.²⁷⁶

The specific situation that the court had in mind in which “the parties themselves did not intend to create a partnership” was a genuine debtor-creditor relationship.²⁷⁷ On its face, this language seems to suggest that the subjective intent of the partners controls as to whether they are partners.

However, the *Southern Can* court’s subsequent analysis makes crystal clear that the court used the word “intend” objectively rather than subjectively. As the court explained:

The declared intentions of the parties in the agreement as to whether they intend to form a partnership, is [sic] not controlling, for even if the parties deny an intention . . . to form a partnership, if what they have done creates the legal relation or status of a partnership, courts will so interpret the agreement and declare the rights and liabilities of partners to exist.²⁷⁸

unless there be other facts and circumstances which show that some other relation existed.”)). The *Southern Can* court also quoted *Thillman* distinguishing itself from *Rowland*: “There being no other facts in that case to rebut the presumption arising from a participation in the profits of the trade or business, or to show that any other relation existed between the parties.” See *Southern Can*, 136 A. at 627 (quoting *Thillman*, 33 A. at 487).

²⁷⁶ 136 A. at 627 (emphasis added).

²⁷⁷ See *id.* (referring to an agency relationship that functions in the “guise” of a lending arrangement). Perhaps for this reason, secondary sources have sometimes described *Southern Can* (erroneously, this author thinks) as holding that a “lender” who exercises too much control over a business will be liable as a partner in the business. See, e.g., Jerome Siegman & Richard C. Linqanti, *The Convertible, Participating Mortgage: Planning Opportunities and Legal Pitfalls in Structuring the Transaction*, 54 U. COLO. L. REV. 295, 308 (1983); Comment, *The Limited Partnership*, 45 YALE L.J. 895, 903 n.42 (1936). *Southern Can* is probably better described as a manufacturer-distributor situation in which the distributor took on the nominal role of lender. The court never described Hartlove as a “lender” and instead concluded that Hartlove and Gradman were partners in part because the two were “engaged in the same line of business,” such that it was “logical that they should form a partnership for the conduct of a similar business.” *Southern Can*, 136 A. at 629. Indeed, *Southern Can* distinguished *Thillman*, in which “the agreement and all attendant circumstances showed the existence of the relationship of debtor and creditor,” from the situation at hand, in which the “agreement and surrounding facts show[ed] the creation of . . . a partnership.” *Id.* at 630 (distinguishing *Thillman*, 33 A. 485).

²⁷⁸ *Southern Can*, 136 A. at 627.

Thus, the court explained, if the parties “under the guise of . . . creditor and debtor, are really . . . principals” the law “will look at the . . . substance of the arrangement, and fasten responsibility . . . according to their true and real character.’ It is a question of substance, not of form.”²⁷⁹

Next, the *Southern Can* court evaluated the facts of the case at bar using several “tests” for partnership (which, as we shall see, might be better described as “approaches to assess whether the parties *intended* to form a partnership”): the “test of sharing profits,” the test of “whether the supposed partner acquired . . . any control, as owner, over the profits while they remained undivided,” and the test of “community of interest.”²⁸⁰ In so doing, the Court of Appeals again repeatedly referred to the parties’ “intent” to be partners.

As to the “community of interest” test, which looks to whether a “supposed partner has a community of interest in the profits and in the capital employed and a voice and authority in the conduct of the business,”²⁸¹ the *Southern Can* court explained, quoting a widely used treatise, that:

“The . . . test . . . which is applicable especially as between the parties themselves, irrespective of the rights of third persons, is that a partnership is formed and exists only when it is the intention of the parties that they should be partners. Partnership contracts, like other contracts, are governed by the intention of the parties . . . This intent may be manifest by the terms of their agreement, the conduct of the parties to each other under it, or by the circumstances generally surrounding the transaction.”²⁸²

The Court of Appeals delved further into this test by quoting an old Maryland case, *Waring v. National Marine Bank of Baltimore*,²⁸³ to explain that parties “may be held liable as partners to third parties dealing with them, even though there was in fact no agreement of partnership,” based on “their conduct and course of dealing.”²⁸⁴ By contrast, “[t]he question of partnership inter sese is one of intention,” so “no such partnership can exist against the consent and intention of the parties.”²⁸⁵

On their face, these quotations seem to indicate that the parties’ expression of their *subjective* intent not to be partners in a contract would be controlling as

²⁷⁹ *Id.* (quoting *Thillman*, 33 A. at 487).

²⁸⁰ *Id.* at 627–28.

²⁸¹ *Id.* at 628.

²⁸² *Id.* (quoting 20 RULING CASE LAW 831 (William M. McKinney & Burdett A. Rich eds., 1918)).

²⁸³ 22 A. 140 (Md. 1891).

²⁸⁴ *Southern Can*, 136 A. at 628 (quoting *Waring*, 22 A. at 140).

²⁸⁵ *Id.* (quoting *Waring*, 22 A. at 140); *see also id.* (quoting *Bull v. Schuberth*, 2 Md. 38, 55 (1852) (“The fact of the existence or nonexistence of a partnership, as between the partners themselves, must be gathered from the intention of the parties.”)).

between themselves, even if other elements of partnership were satisfied. Yet, the *Southern Can* court's further exploration of the meaning of "intent" shows that the court used that term in an objective rather than subjective manner. Immediately after quoting *Waring*, the *Southern Can* court stated:

"As between the parties partnership is a matter of intention to be proved by their express agreement *or inferred from their acts and conduct*. If they intend to and do enter into such a contract as in the eye of the law constitutes a partnership they thereby become partners *whether they are designated as such or not* in the contract."²⁸⁶

Further, the *Southern Can* court took pains to distinguish between the intent as stated in the parties contact and their "honest" intent:

[A]s between the parties alleged to be partners, the test of intention of the parties has more often been applied as the controlling element . . . [T]he test of the intention of the parties, as between themselves, logically should be given great weight. In this respect contracts of partnership do not differ from other contracts, and, *if the real and honest intention of the parties can be clearly ascertained*, it should be given force and effect.²⁸⁷

Moreover, *Southern Can's* holding itself underlines this subjective/objective distinction: the Maryland Court of Appeals held that Hartlove and the Gradmans had intended to share the profits of the Melrose cannery as partners *despite* that the contract between them stated that Hartlove Packing would be paid its share of the profits as "extra compensation" for its advancing of Gradman money and materials.²⁸⁸ Rejecting the applicability of UPA § 7(4) to this situation, the Court of Appeals declared itself "unwilling to consider" the "extra compensation" language "as conclusive of absence of partnership."²⁸⁹ Rather, the *Southern Can* court concluded that, in light of "the whole agreement and the circumstances," this was merely "language inserted in the agreement for the purpose of escaping liability as a partner even though all other elements of a partnership existed."²⁹⁰ The court so concluded because, in the absence of this language, "there would be little room left for the contention that there was no partnership in fact."²⁹¹ This could not stand, the *Southern Can* court reasoned, because it had surveyed numerous approaches for divining whether the parties intended to be partners, and "if we are to conclude against a partnership, we would do so upon the single ground that Hartlove's share

²⁸⁶ *Id.* (emphasis added) (quoting *Morgart v. Smouse*, 63 A. 1070, 1071 (Md. 1906)).

²⁸⁷ *Id.* (emphasis added).

²⁸⁸ *See id.* at 629.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

of the profits was to be paid to him as extra compensation for services or money loaned—in other words, making this the conclusive test.”²⁹²

The *Southern Can* court did not stop there, however. Rather, the Court of Appeals explained precisely why, as a factual matter, it found that Hartlove and Gradman had objectively intended to be partners: the parties’ agreements showed that Hartlove could exercise a great deal of “control over the output of the cannery and the operation of the business.”²⁹³ First, “Hartlove had complete authority to dispose of all of the output; it was to be labeled as if it were his own product, stored in his name, and the Gradmans could not remove any of [it] without his written consent.”²⁹⁴ Second, “Hartlove had the right to determine how much . . . output there should be from the Melrose Cannery,” because he “could determine the salary and wages to be paid.”²⁹⁵ The effect of this provision was to give him “control of who should or should not be employed at the cannery, what salary or wage they should be paid, and therefore gave him control of the amount of the output.”²⁹⁶ Based on this combination of sharing the profits and substantial control over operation of the Melrose cannery, the Court of Appeals “[could] not escape . . . the conclusion that the intention of the parties was to create a partnership” in that cannery.²⁹⁷

Accordingly, if *Southern Can* stands for anything, it is the proposition that the parties’ “intent” to be considered is their objective rather than subjective intent (at least with respect to third parties). Surely *Southern Can*’s strong statement that

²⁹² *Id.* This is precisely what happens whenever a court holds that parties may contract around partnership formation as a matter of law: such a court is holding, in effect, that the contractual language overrides all of the other facts bearing on intent to become co-owners of a business.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*; see also *id.* at 630 (explaining that the business involved two steps—canning and selling cans—and that Hartlove shared control over the former and exercised exclusive control over the latter; and then quoting FLOYD R. MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* 70 n.12 (2d ed. 1920) (“Care must therefore be taken to discriminate between the cases of an alleged loan, with a share of the profits by way of interest, and a real partnership disguised as a loan; for if it appears that the transaction is a mere device to obtain the advantages of a partnership, without the responsibilities, it will be held to be a partnership, whatever the parties may have called it. The interest is usually to be found, according to later cases, in the powers of control of the alleged lender. Has he any voice or part in controlling the management of the business as a principal therein? Has he, by virtue of the arrangement, such an interest in the business that he can be regarded both as principal and agent for the others?”)).

objective intent controls as to third parties does nothing whatsoever to suggest that the opposite is true as between the parties themselves.

* * * * *

Southern Car's clear use of objective intent should remove all doubt that *Garner* itself turned on objective intent—i.e., all the facts of the Garners' business relationship. Hence, the *Garner* court's statements to the effect that subjective intent governs inter se are simply zombie dicta.

e. Michigan Cases: Snell & LeZontier

Two Michigan walking-dead decisions—*Snell v. Meyers*²⁹⁸ and *LeZontier v. Shock*²⁹⁹—make statements which suggest that the subjective intent to be partners is controlling as to partnership formation as between the parties. Both cases post-date Michigan's 1917 adoption of UPA.³⁰⁰

(1) Snell

Snell arose out of a dispute between Snell and Meyers—"who never married" but "cohabitated for approximately fourteen years"—over the ownership of a café.³⁰¹ Plaintiff Snell alleged "that the business was a partnership to which he contributed time, money and labor," and in which he therefore was a partner; defendant Meyers contended that "the business was a sole proprietorship . . . and that plaintiff was simply her live-in boyfriend and trusted employee."³⁰² Both the trial and appellate courts rejected Snell's claim that a partnership should be implied based on conduct.³⁰³

Snell supports the subjective-intent-governs-inter-se rule in two ways. First, it quotes *LeZontier* (described below) as stating that a partnership both requires an agreement between the parties and turns on the parties' intention.³⁰⁴ Second, despite invoking the UPA definition of partnership, *Snell* repeatedly uses the ambiguous language of "agreement" and "intention" when describing its conclusion

²⁹⁸ No. 226068, 2001 WL 732082 (Mich. Ct. App. June 12, 2001).

²⁹⁹ 260 N.W.2d 85 (Mich. Ct. App. 1977).

³⁰⁰ See UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 3 U.L.A. 1 (2015).

³⁰¹ 2001 WL 732082, at *1.

³⁰² *Id.*

³⁰³ *See id.*

³⁰⁴ *See id.* (quoting *LeZontier*, 260 N.W.2d at 89 ("For a partnership to exist, it must be shown by an agreement, since it is the intention of the parties that is of prime importance in ascertaining the existence of a partnership.")).

that no partnership was formed.³⁰⁵ On its face, the quotes from *LeZontier* and use of the ambiguous language of intention could be interpreted as indicating that *Snell* turned entirely on Snell and Meyers's failure to agree that their legal relationship was a partnership (i.e., subjective intent).

However, a close review of the facts makes clear that *Snell* instead turned on Snell and Meyers's objective intent not to be partners—i.e., that sole proprietor Meyers did not form a partnership with her live-in boyfriend/employee Snell because she did not agree to allow him to co-own her business. *Snell* involved neither an agreement *not* to be partners nor any expression that the parties' relationship was something other than a partnership. Indeed, there is no reason to believe that Snell and Meyers ever discussed or even considered whether they were partners. As a result, nowhere does *Snell* hold, state or even imply that parties can (or cannot) contract around partnership as a matter of law simply by agreeing that they are not partners. Rather, in *Snell* the trial court simply “found, as a factual matter, that the business . . . was not a partnership” because Snell “had failed to carry his burden of proving the parties' intent to create a legal partnership”³⁰⁶—a finding that the Michigan Court of Appeals determined was not clear error, “given the parties meretricious relationship.”³⁰⁷

The trial court so concluded based on the application of Michigan's version of UPA's partnership definition and interpretation provisions, UPA §§ 6 & 7.³⁰⁸ The lower court considered Snell's evidence about the efforts that he made on behalf of the business, which he contended “exceeded those of a typical restaurant manager and . . . necessitate[d] a finding that he was an owner rather than an employee.”³⁰⁹ Further, the court considered that Snell had access to a bank account into which Meyers deposited the profits of the business that “served as a common fund for shared living expenses.”³¹⁰ The court also considered Meyers's contentions that she held all the assets and debts of the business “in her sole name”; that “she provided the majority of the funds used to purchase the business”; that *only* she “reported profits from the business on her income tax returns”;³¹¹ and that the restaurant's

³⁰⁵ *See id. passim.*

³⁰⁶ *Id.* at *2.

³⁰⁷ *Id.* at *3.

³⁰⁸ *See id.* at *1–2 (first quoting MICH. COMP. LAWS § 449.7 (1979); and then quoting *Miller v. City Bank & Trust Co., N.A.*, 266 N.W.2d 687, 690 (Mich. Ct. App. 1978) (referencing MICH. COMP. LAWS § 449.6(1)); *see also* UNIF. P'SHIP ACT §§ 6–7 (UNIF. L. COMM'N 1914).

³⁰⁹ *Snell*, 2001 WL 732082, at *1.

³¹⁰ *Id.* at *2.

³¹¹ *Id.*

other employees understood that Snell was the sole owner of the business.³¹² Based on all this evidence, the trial court found “that plaintiff failed to prove the existence of a partnership.”³¹³

Hence, *Snell* is simply a pedestrian case where the courts held that plaintiff Snell failed to establish, as a factual matter, that he co-owned defendant Meyers’s business. To the extent that *Snell* appears to speak in terms of subjective intent, that language is (at worst) zombie dicta.

(2) LeZontier

(a) *LeZontier’s Ambiguous Language*

The second Michigan zombie, *LeZontier v. Shock*,³¹⁴ involved a nascent business to produce wood chips.³¹⁵ In 1968, plaintiff LeZontier and the defendant Shock brothers discussed forming a wood-chipping business, to be conducted via a corporation for which the Shocks would be the promoters.³¹⁶ The parties located land “on which to construct the wood processing facility” and LeZontier paid the Shocks to subscribe to shares in the yet-to-be-formed corporation; the money was used “to make a down payment on the real estate” for the building that would house the business.³¹⁷ Next, LeZontier and the Shocks entered into an oral contract under which LeZontier would construct that building.³¹⁸ Unfortunately, soon thereafter the business’s economic prospects went south and no corporation was formed.³¹⁹ Then, before the building was completed, the Shocks took possession, changed the locks and “prohibited [LeZontier] from gaining access.”³²⁰ He sued, alleging *inter alia* the existence of an oral construction contract and seeking a constructive trust over the real estate on the theory that a “partnership resulted from failure to form the corporation.”³²¹ The trial court dismissed based on the statute of frauds.³²²

³¹² *See id.*

³¹³ *Id.* at *3.

³¹⁴ 260 N.W.2d 85 (Mich. Ct. App. 1977).

³¹⁵ *See id.* at 87.

³¹⁶ *See id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *See id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *See id.* at 86–87.

The Michigan Court of Appeals reversed the lower court's decision, holding that "the oral construction contract [wa]s enforceable"³²³ and that "the statute of frauds [wa]s not a bar to recovery of the [money] paid for stock in the corporation" that the Shocks were supposed to form.³²⁴ However, the appellate court "rejected the plaintiffs' contention that failure to form the corporation ipso facto created a partnership" between LeZontier and the Shocks.³²⁵

The *LeZontier* court so held based on its analysis of old Michigan cases addressing the relationship of promoters and stock subscribers in a never-formed corporation.³²⁶ Despite contrary caselaw (the precedential value of which the court deemed dubious), the *LeZontier* court adopted a rule in which both promoters and subscribers "are liable as partners to the creditors of the business" but "do not sustain the relationship of partners inter se."³²⁷ The appellate court adopted this rule based on reasoning from a 1943 Michigan Supreme Court case—*Lobato v. Paulino*³²⁸—that "[f]or a partnership to exist, it must be shown by an agreement, since it is the intention of the parties that is of prime importance in ascertaining" whether a partnership exists.³²⁹ However, the *LeZontier* court made no attempt to explain whether *Lobato* was referring to subjective or objective intent.³³⁰

(b) A Brief Look at LeZontier's Predecessors: Lobato, Block & Morrison

In light of *LeZontier's* ambiguity as between subjective and objective intent, the case could be read as supporting the view that parties can contract around partnership as a matter of law. The best way to understand *LeZontier's* quotation from *Lobato* is to understand how *Lobato* used, and where it obtained, that same rule. This requires a review of *Lobato* and the cases that it cites.

³²³ *Id.* at 88.

³²⁴ *Id.* at 89.

³²⁵ *Id.*

³²⁶ *See id.* at 87.

³²⁷ *Id.* at 89 (citing *Campbell v. Rukamp*, 244 N.W. 222, 223 (Mich. 1932)).

³²⁸ 8 N.W.2d 873 (Mich. 1943).

³²⁹ *LeZontier*, 260 N.W.2d at 89 (citing *Lobato*, 8 N.W.2d at 876).

³³⁰ The remainder of the *LeZontier* opinion strongly suggests that the court was referring to objective intent, however. Despite holding that Shocks and LeZontier were not automatically *partners* simply because they were promoters and subscribers of stock in an unformed corporation, the court of appeals nevertheless concluded that they were *in a fiduciary relationship* based on those same roles. *See id.* at 90. For *LeZontier*, this was a distinction without a difference.

As it turns out, nowhere in *Lobato* did the Michigan Supreme Court require proof of “an agreement” to establish the existence of a partnership. However, the *Lobato* court did opine, based on a 1941 case—*Block v. Schmidt*³³¹—that “the intention of the parties is of prime importance in considering whether a partnership exists.”³³² But again, as in *LeZontier*, the *Lobato* court did not expressly state whether it was referring to the subjective intent to have the legal relationship of partners or the objective intent to co-own a for-profit business. Further edification about whether *Lobato* meant subjective or objective intent therefore requires a close review of *Block*.³³³

Unfortunately, the *Block* court similarly failed to explain whether it referred to subjective or objective intent. However, *Block* did add a critical detail: that “the intention of the parties” is only “of prime importance” where “the rights of third

³³¹ 296 N.W. 698 (Mich. 1941). The *Block* court applied UPA. *See id.* at 702.

³³² *Lobato*, 8 N.W.2d at 876.

³³³ That said, as the Supreme Court of Michigan recently confirmed in its masterful *Byker v. Mannes* decision, *Lobato* actually turned on objective intent. *See* 641 N.W.2d 210, 217 (Mich. 2002) (“Plainly stated, *Lobato* turned on the fact that the business arrangements of the parties, as well as their intent, afforded no evidence that they wished to jointly carry on as co-owners a business for profit.”).

In *Lobato*, plaintiff Lobato sued his alleged partners, the Paulinos, for dissolution of an alleged oral pig-farming partnership; the trial court dismissed his suit and he appealed. *See* 8 N.W.2d at 874. The Paulinos provided all the capital for the farm, which Lobato worked for a weekly salary. *See id.* at 874–75. Lobato testified that Paulino agreed to be partners and that they would split the farm’s profits 50/50 after he recouped his investment; Paulino, by contrast, testified in effect that he told Lobato that the two would go into business together *after* he recouped his money. *See id.* at 875.

On appeal, the Michigan Supreme Court affirmed the lower court’s dismissal, holding that the two men’s testimony “might be construed as an agreement to enter into a partnership at some future time, but falls short of admitting an agreement for the present existence of a partnership.” *Id.* Yet, in so opining, the *Lobato* court did not simply look to the parties’ intent to label themselves as partners or not. Rather, the court reasoned that, taken “as a whole,” Lobato “fail[ed] to convince [the court] that he was ‘co-owner’ of the business” *Id.* at 876. This was true, the *Lobato* court reasoned, because—just as in *Morrison*—“[v]ery few of the indicia of partnerships were present” *Id.* (quoting *Morrison v. Meister*, 180 N.W. 395, 396 (Mich. 1920)).

persons . . . are not involved.”³³⁴ *Block* cited *Morrison v. Meister*,³³⁵ a case arising out of transactions in 1919,³³⁶ for this proposition.³³⁷ *Morrison*, which also did not

³³⁴ 296 N.W. at 700 (citing *Morrison v. Meister*, 180 N.W. 395, 396 (Mich. 1920)). The *Block* court did not clarify whether it was referring to subjective or objective intent, presumably because it did not focus on partnership formation; rather, the case turned principally on whether certain property belonged to the partnership or the partners.

In *Block*, George and Henry, two bachelor brothers, lived and farmed together for over 40 years. *See id.* at 699. Henry died intestate; two years later, George died testate. *See id.* at 699–700. Upon George’s death, Henry’s heirs sought an accounting on the theory that the brothers had been partners. *See id.* at 699. On this view, the brothers’ partnership dissolved upon Henry’s death, *see* UNIF. P’SHIP ACT § 31(4) (UNIF. L. COMM’N 1914), and half of the brothers’ co-owned property belonged to Henry’s heirs as successors to his partnership interest, *see id.* §§ 18(a), 41(a), rather than all of it going to the heirs of surviving brother George. *See Block*, 296 N.W. at 699. The trial court concluded that George and Henry were partners as to their farming implements but not as to their investments, which all carried a right of survivorship. *See id.* at 700. Hence, Henry and George’s farm-related chattel were shared by Henry’s heirs, but the brothers’ bank accounts, securities and real estate passed to George upon Henry’s death and to the beneficiaries of George’s will upon his death. *See id.*

On appeal, the Supreme Court of Michigan summarily affirmed the trial court’s finding that the brothers were partners and instead focused its appellate inquiry on whether the George-Henry partnership “was broader than decreed by” the lower court. *Id.* In addressing that question, the appeals court remarked that “the intention of the parties is of prime importance” to the partnership inquiry. *Id.* (quoting *Morrison*, 180 N.W. at 396). Surveying the brothers’ capital investments, the *Block* court found that each was made with an explicit right of survivorship. *See id.* at 701. Further, the supreme court held that UPA permitted George and Henry to designate funds earned from their farming partnership—and real property purchased with such funds—as personal property, not partnership property. *See id.* at 702 (applying MICH. COMP. LAWS § 9848 (1929), Michigan’s adoption of UPA § 8(1)). The high court therefore held that the plaintiff-appellants failed to establish that the partnership owned the investments the brothers had made with their farming profits. *See id.* at 700. The appellate court therefore dismissed the appeal. *See id.* at 702.

In short, in *Block*, the Michigan Supreme Court essentially accepted the trial court’s finding that a partnership existed and had no cause to address the issue of which type of intent—subjective or objective—governs partnership formation.

³³⁵ 180 N.W. 395 (Mich. 1920).

³³⁶ *See id.* at 395. Although UPA was in effect in Michigan, the *Morrison* court did purport to apply it.

³³⁷ *See supra* note 334.

state whether it was referring to subjective or objective intent,³³⁸ cited the 1881 *Beecher v. Bush*³³⁹ for the same proposition.³⁴⁰

³³⁸ However, as the Supreme Court of Michigan recently explained, the *Morrison* court was referring to objective intent. See *Byker v. Mannes*, 641 N.W.2d 210, 217 (Mich. Sup. Ct. 2002) (citing *Morrison*, 180 N.W. at 395) (opining that *Morrison's* language, if “read out of context,” could “lead one to the conclusion that the intent referred to was not the intent to carry on as co-owners a business for profit, but the intent to form a legal partnership per se”; and clarifying that the *Morrison* court “considered far more than merely whether the parties subjectively labeled themselves partners” and instead “surveyed generally the parties’ actions and intentions to essentially conclude that they . . . [did not] carry on as co-owners a business for profit”).

Morrison involved an agreement between Meister, the purchaser of an unimproved lot, and Satovsky, a builder. See 180 N.W. at 395. The two men—who took title to the empty lot as tenants in common—agreed that Satovsky would erect a house on the lot; upon sale thereof, Satovsky and Meister would be repaid their expenses and any profits would be “equally divided” between the men. *Id.* However, before construction was completed, Satovsky contracted to sell the house to the Morrisons without Meister’s knowledge; upon learning of the contract for sale, Meister disavowed it. See *id.* The Morrisons sued for specific performance, alleging that Meister and Satovsky were partners. See *id.* at 396.

On appeal, the Michigan Supreme Court held that “no partnership in fact existed between” Meister and Satovsky. *Id.* Though deeming the sharing of profits some “evidence” of partnership, the *Morrison* court reasoned that such evidence was “not conclusive.” *Id.* Rather, the court opined that “the intention of the parties is of prime importance” to the partnership inquiry. *Id.* (citing *Beecher v. Bush*, 7 N.W. 785 (Mich. 1881)). However, the high court immediately qualified this language by admonishing that an “express . . . disavowal of . . . partnership” is ineffective if is inconsistent with the substance of the parties’ agreement. *Id.* (explaining that, “[i]f the actual engagements are incompatible with the expression of intention, the latter must yield to the former; . . .” (quoting *Canton Bridge Co. v. City of Eaton Rapids*, 65 N.W. 761, 761 (Mich. 1895)). The appellate court then surveyed the Meister-Satovsky arrangement and found “no intention . . . to form a partnership” because “[v]ery few of the indicia of partnerships were present, and most of them were absent.” *Id.* (explaining that Meister and Satovsky co-owned only one property, and had “no firm name, no firm funds, no firm accounts, no firm letter heads, no firm bank account, no commingling of funds or property, no certificate of partnership filed, no agreement as to losses, [and] no time fixed when it would expire”).

In short, *Morrison* appears to turn on the view that an agreement to co-own, develop and sell a single piece of property together does not render the parties partners because they do not co-own an ongoing real estate business. The Supreme Court might have found it easier to so hold if it had simply applied UPA and concluded that co-owning, developing and selling a single parcel of land did not constitute a “business.” See UNIF. P’SHP ACT § 6(1) (UNIF. L. COMM’N 1914) (defining a partnership as “an association of two or more persons to carry on as co-owners a business for profit”); *id.* § 7(2) (stating that co-ownership of land—including by “tenancy in common”—“does not of itself establish a partnership, whether such co-owners . . . share any profits” from its use); *id.* § 2 (defining “business” to include “every trade, occupation, or profession”); but see *id.* § 6(1),

(c) *LeZontier's Ultimate Forbear: Beecher Turns on Objective Intent*

With *Beecher*, the chain of Michigan citations comes to rest in a pre-UPA case that the drafters of UPA intended to abrogate. Having reached the bottom of the citation chain, it becomes clear that the law stated in *LeZontier*—traced back through *Lobato*, *Block* and *Morrison* to *Beecher*—is walking-dead precedent.³⁴¹ It would therefore be easy to dismiss *Beecher* as a zombie and move on.

Yet, upon a closer look, a funny thing happened on the way to *Beecher*: in one of the most well-reasoned and thorough partnership decisions one will ever find (written by the esteemed Justice Thomas Cooley³⁴²), the *Beecher* court endorsed an *objective* approach to evaluating the owners' intent.

Beecher, decided in 1881, arose out of a lawsuit against Beecher for supplies that Williams had purchased from the plaintiffs.³⁴³ Beecher owned Biddle House, a luxury property in Detroit³⁴⁴ and Williams had proposed to “hire the use’ of it from day to day” to “keep it as a hotel.”³⁴⁵ Beecher accepted, Williams ran the hotel, and the plaintiffs alleged that the two were partners.³⁴⁶

However, the plaintiffs did not contend that Beecher and Williams “intended to form a partnership or supposed that they had done so.”³⁴⁷ Nor did the plaintiffs argue that Beecher “underst[oo]d that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies . . . or any legal control

cmf. (explaining that a business means “a series of acts directed toward an end”).

³³⁹ 7 N.W. 785 (Mich. 1881).

³⁴⁰ See *Morrison*, 180 N.W. at 396 (“[W]here rights of third persons . . . are not involved, the intention of the parties is of prime importance”) (citing *Beecher v. Bush*, 7 N.W. 785 (Mich. 1881)).

³⁴¹ See Leahy, *supra* note 10 (manuscript at 50–51).

³⁴² See Justice Thomas M. Cooley, COOLEY LAW SCHOOL, <https://www.cooley.edu/about/mission-history/justice-cooley> [<https://perma.cc/7MAG-FDZA>] (describing Cooley as having “compiled the most distinguished legal record of any man whose name has been associated with the jurisprudence of Michigan”).

³⁴³ See 7 N.W. at 785.

³⁴⁴ See Dan Austin, *Biddle House*, HISTORICDETROIT.ORG, <https://historicdetroit.org/buildings/biddle-house> [<https://perma.cc/H7AF-8GJD>].

³⁴⁵ *Beecher*, 7 N.W. at 785.

³⁴⁶ See *id.* Williams never held Beecher out as a partner, and therefore, the case “was not embarrassed by any questions of estoppel.” *Id.* The only question was whether Beecher was a partner. See *id.*

³⁴⁷ *Id.*

whatever until proceeds were to be divided, or any liability for losses.”³⁴⁸ The absence of all these “common incidents to a partnership,” the *Beecher* court held, was “conclusive that the parties had no purpose whatever to form a partnership.”³⁴⁹

Writing for the Michigan Supreme Court, Justice Thomas Cooley explained:

If the parties intend no partnership the courts should give effect to their intent unless somebody has been deceived by their acting or assuming to act as partners It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an agreement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should “carry the doctrine of constructive partnership so far as to render it a trap to the unwary.”³⁵⁰

In sum, Justice Cooley concluded that *Beecher* “was not . . . a partner by estoppel nor by intent,” and therefore, “if he [was a partner] at all, it must be by construction of law.”³⁵¹

To decide the question, Justice Cooley evaluated *Beecher*’s stake in the business. First, the Justice found that *Beecher* was being paid “one third of the gross receipts and gross earnings”—which is “not the profits” because “it may be large when there are no profits.”³⁵² Next, Justice Cooley stated the following test for partnership: “Community of interest in some lawful commerce or business, for the conduct of which the parties eventually are principals of and agents for each other, with general powers within the scope of the business.”³⁵³

To assess whether that definition was satisfied, the *Beecher* court then inquired whether *Beecher* had any power to operate the business, and concluded that he had none.³⁵⁴ He was not “to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of the contract,” and he “had reserved no right to correct the mistakes of Williams, supply his deficiencies or overrule his

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 785-86 (quoting *Post v. Kimberly*, 9 Johns. 470, 504 (N.Y. 1812) (Kent, C.J.)).

³⁵¹ *Id.* at 786.

³⁵² *Id.* This analysis is consistent with UPA, which distinguishes between the sharing of profits and the sharing of gross returns. Compare UNIF. P’SHIP ACT § 7(3) (UNIF. L. COMM’N 1914) (“The sharing of gross returns does not of itself establish a partnership”) with *id.* § 7(4) (“A person who receives a share of the profits of a business is presumed to be a partner in the business, unless [certain exceptions apply].”).

³⁵³ *Beecher*, 7 N.W. at 789.

³⁵⁴ *See id.*

judgments.”³⁵⁵ Further, Beecher had no intent to put his credit on the line to Williams’s creditors.³⁵⁶ Based on this, Justice Cooley concluded that “Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners.”³⁵⁷ Moreover, in a rejection of the “partners as to third parties” rule, the court held that “there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled.”³⁵⁸

Beecher therefore offers a revelation: perhaps none of the Michigan apparent-zombie cases refer to the parties’ subjective intent to be partners in the first place. All the post-*Beecher* Michigan zombies use “intent” ambiguously, so it is unclear whether they refer to subjective or objective intent; further, they all trace back to *Beecher*, which explicitly endorses an objective intent standard.³⁵⁹

In any event, to the extent it is unclear whether *LeZontier* turned on objective or subjective intent, the fact that *Beecher* clearly turned on objective intent suggests that *LeZontier* did so as well. Therefore, to the extent that *LeZontier* can be read to support the subjective-intent-governs-inter-se rule, that language is zombie dicta.

f. North Carolina Case: Carefree Carolina Communities

The North Carolina zombie, *Carefree Carolina Communities, Inc. v. Cilley*,³⁶⁰ was decided in 1986.³⁶¹ Since North Carolina adopted the UPA in 1941,³⁶² that state’s Court of Appeals applied the state’s UPA in *Carefree Carolina Communities*.³⁶³ In so doing, the appellate court upheld the trial court’s finding that two parties to a contract were not partners, but rather mortgagor and mortgagee.³⁶⁴

In *Carefree Carolina Communities*, the plaintiffs—who apparently owned and intended to develop property that was subject to a mortgage held by a savings and loan association (“the S&L”)—sued the S&L and its officers to enjoin foreclosure on

³⁵⁵ *Id.* at 790.

³⁵⁶ *See id.* at 789.

³⁵⁷ *Id.* at 791.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 790.

³⁶⁰ 340 S.E.2d 529 (N.C. Ct. App. 1986).

³⁶¹ *See id.* at 529.

³⁶² *See* UNIF. P’SHIP ACT (UNIF. L. COMM’N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

³⁶³ *See* 340 S.E.2d at 531 (applying N.C. GEN. STAT. § 59-36, North Carolina’s UPA §6, and N.C. GEN. STAT. § 59-37(4), North Carolina’s UPA § 7(4)).

³⁶⁴ *See id.* at 530–31.

that property.³⁶⁵ The plaintiffs sought injunctive relief on the ground that the parties' agreements created a partnership, thereby preventing defendants from foreclosing.³⁶⁶ The trial court denied the plaintiffs' motion for a preliminary injunction and they took an interlocutory appeal, which the appellate court addressed "on the merits."³⁶⁷ After reviewing the parties' agreement, the appellate court concluded that the plaintiffs failed to satisfy the first prong of the preliminary injunction test, that they could "show probable cause to believe" that "they could establish the partnership rights they assert."³⁶⁸

The agreement between plaintiffs and the S&L related to (what the court described as) a "loan," apparently for the period of ten years.³⁶⁹ The plaintiffs argued that this agreement created a partnership because, in addition to paying the S&L a set "interest" rate on the loan,³⁷⁰ the contract required them to pay the S&L a share of the profits "as 'additional interest.'"³⁷¹ The *Carefree Carolina Communities* court concluded that this arrangement did not establish a prima facie case of partnership because the "profit sharing provisions . . . fit squarely within" UPA § 7(4), which provides that the sharing of profits of a business is prima facie evidence of partnership unless the profits are received "as interest on a loan, though the amount of payment vary with the profits of the business."³⁷²

Implicit in this holding was a finding that the S&L's mortgage contract reflected a bona fide loan between the parties, rather than a capital contribution masquerading as a loan.³⁷³ The *Carefree Carolina Communities* did not say as much,

³⁶⁵ See *id.* at 530.

³⁶⁶ See *id.* Presumably the plaintiffs' basis for doing this was the rule under UPA that partners cannot sue each other concerning partnership transactions absent an accounting, which does not normally accrue until the partnership dissolves. See *supra* note 118 (discussing the accounting rule under UPA).

³⁶⁷ See *Carefree Carolina Communities*, 340 S.E.2d at 530.

³⁶⁸ See *id.* at 531.

³⁶⁹ *Id. passim*. It is unclear whether the parties used that term, although they did enter into a note.

³⁷⁰ *Id.* The agreed-upon "interest" rates were 11% for five years and then 12½% for five years. See *id.*

³⁷¹ *Id.* at 531. The agreed-upon "additional interest," as a percentage of the net profit from sales, was 15% for five years and then 10% for five years.

³⁷² *Id.* at 531 (quoting N.C. GEN. STAT. § 59-37(4)(d), North Carolina's UPA § 7(4)(d)).

³⁷³ By contrast, if the *Carefree Carolina Communities* court had concluded that the loan was *not* bona fide, it presumably would have concluded that the parties *were* partners. See, e.g., *Lupien v. Malsbenden*, 477 A.2d 746, 748–49 (Me. 1984) (holding that defendant, a purported lender to an

but it did address what it characterized as “other unusual contract provisions” as intended “merely to help secure defendants’ . . . loan exposure”—language clearly intended to rebut any claim that the parties’ “loan” was a fraud.³⁷⁴

After addressing the interest issue, the *Carefree Carolina Communities* court added that:

Furthermore, the [parties’ contract] explicitly states that [it] “does not constitute a partnership between the Parties, . . . and [defendants] are acting only as financiers and lenders and [the plaintiffs] are acting as purchasers and developers[,] and any phraseology and terminology in [this] contract which might tend to indicate to the contrary is not intended nor shall it be interpreted as such as no partnership was ever contemplated and will ever exist within the law or in equity.”³⁷⁵

The appellate court also reasoned that “[a] contract[,] express or implied, is essential to the formation of a partnership.”³⁷⁶ On its face, this language could be taken to mean that the court rejected the plaintiffs’ partnership claim based solely on the parties’ agreement.³⁷⁷

insolvent business, was a partner in the business because the banker’s supposed loan to the business resembled a partner’s capital contribution rather than a traditional bank loan).

³⁷⁴ The “other unusual” provisions to which the *Carefree Carolina Communities* court referred included the defendants’ “right to approve all work and construction on the real property until the loan is paid”; the defendants’ agreement to “do everything in their power subject to good business practices to assist the successful development by [plaintiffs] of the tract of land”; the provision of “a sales promotion office for plaintiffs free of charge”; and the defendants’ agreement “to pay plaintiffs’ attorney fees for closing and . . . costs of accounting until the loan was paid.” See 340 S.E.2d at 530. Notably, like in *Martin v. Peyton*, discussed *supra*, these provisions provided land and capital, and provided some restrictions on plaintiffs—like veto power over unwanted development—but did not provide the defendants with the ability to initiate any business activity. The difference between mere veto power and the ability to initiate transactions is a key distinction courts make when distinguishing between creditor-borrower and partner relationships. See Dennis J. Hynes, *Lender Liability: The Dilemma of the Controlling Creditor*, 58 TENN. L. REV. 635, 643–46 (1991) (discussing *Martin v. Peyton*, 158 N.E. 77, 80 (N.Y. 1927)); William O. Douglas, *Vicarious Liability and Administration of Risk II*, 38 YALE L.J. 720, 730–31 (1929) (citing *Martin and Mollwo, March & Co. v. Court of Wards*, L.R. 4 P.C. 419, 435 (1872)).

³⁷⁵ *Carefree Carolina Communities*, 340 S.E.2d at 531.

³⁷⁶ *Id.* (quoting *Eggleston v. Eggleston*, 47 S.E.2d 243, 247 (N.C. 1948) (“A contract, express or implied, is essential to the formation of a partnership.” 40 Am. Jur., Partnership, p. 135, sec. 20, see notes 14, 15. [sic]”); accord 40 AM. JUR. Partnership § 20, at 139–40 (1942) (“A contract, express or implied, is essential to the formation of a partnership. . . .”)).

³⁷⁷ Of course, the mere fact that a contract “is essential to the formation of a partnership” does not necessarily mean that the parties’ intent to form a partnership (or not) is dispositive as between them, because the courts could imply a partnership in law when the parties agree to be co-owners

However, the remainder of the *Carefree Carolina Communities* opinion shows that the court did *not* hold that the parties' characterization of themselves in their contract was dispositive as to whether they were partners. First, the appellate court opined that "the determination of the existence . . . of a partnership . . . involves inferences drawn from an analysis of *all the circumstances* attendant on its creation and operation [I]t may be created by the agreement *or conduct* of the parties, either express or implied."³⁷⁸ Second, the court never opined that a contractual provision denying partnership defeated (as a matter of law) a factual determination that the parties were partners. Rather, the *Carefree Carolina Communities* court surveyed the parties' contractual relationship and found that the parties were not partners as a factual matter.³⁷⁹ Based on its analysis of the entire contract, the Court of Appeals concluded that plaintiffs failed to meet their burden of proving a partnership because the parties' relationship was that of debtor-creditor, not partners.³⁸⁰

In sum, although *Carefree Carolina Communities* involved a contractual disclaimer of partnership, the court did not uphold that disclaimer as a matter of law. Rather, the court upheld the trial court's initial finding that no partnership existed after considering *all* the circumstances of the parties' relationship—including their characterization of themselves as not partners. *Carefree Carolina Communities*'s statement of the subjective-intent-governs-inter-se rule is therefore undead dicta.

g. Pennsylvania Cases: Rosenberger & Kingsley Clothing

The two Pennsylvania zombies—*Rosenberger v. Herbst*³⁸¹ and *Kingsley Clothing Manufacturing Company v. Jacobs*³⁸²—both definitely state that the parties' intent to be partners or not is dispositive inter se. They represent the most forceful statement to that effect among all the zombie cases addressed in the companion article. Yet, neither case ultimately turned on subjective intent.

of a business but disclaim the legal status of "partners." However, other language in the *American Jurisprudence* treatise cited in *Eggleston* provides some support for the subjective-intent-governs-inter-se rule. See, e.g., 40 AM. JUR. *Partnership* § 25, at 141 (1942) ("Intention of the parties is also a primary consideration in determining whether or not a particular agreement constitutes a partnership relation or some other legal relation.").

³⁷⁸ *Carefree Carolina Communities*, 340 S.E.2d at 531 (quoting *Eggleston v. Eggleston*, 47 S.E.2d 243, 247 (N.C. 1948) (emphasis added)).

³⁷⁹ See *id.*

³⁸⁰ See *id.*

³⁸¹ 232 A.2d 634 (Pa. Super. Ct. 1967).

³⁸² 26 A.2d 315 (Pa. 1942).

(1) Rosenberger

Rosenberger was decided in 1967,³⁸³ long after Pennsylvania adopted UPA in 1915.³⁸⁴ The *Rosenberger* court therefore applied UPA.³⁸⁵

The case involved an agreement between defendant Herbst, who owned a farm, and Parzych, who took “full control” of the “farming operation.”³⁸⁶ The agreement provided that Parzych owed Herbst a debt of \$6000, “repayable with interest of five per cent per annum.”³⁸⁷ Under the agreement, Herbst was “entitled to receive one half of the net profits” from the farm as repayment but was required “to indemnify Parzych for one half of any losses sustained.”³⁸⁸

The “key provision” of the Herbst-Parzych contract characterized all remuneration to Herbst under the agreement as payments “in return for his investment in the business and his capital contribution thereto,”³⁸⁹ and “for his leasing [his farm] to Parzych without further rental payments.”³⁹⁰ Based on these assertions, the contract stated further that “the parties do not intend by this agreement to establish a partnership of any kind.”³⁹¹ Instead, the contract deemed Herbst and Parzych “Debtor and Creditor and Landlord and Tenant.”³⁹²

Despite this disclaimer, when a creditor of Parzych sued Herbst, the trial court found that Parzych and Herbst were partners and held Herbst liable for Parzych’s debt.³⁹³

³⁸³ See 232 A.2d at 634. The underlying events in *Rosenberger* took place between 1957 and 1961. See *id.* at 635.

³⁸⁴ See UNIF. P’SHP ACT (UNIF. L. COMM’N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 3 U.L.A. 1 (2015). Pennsylvania was the first state to adopt UPA. See SCOTT ROWLEY, ROWLEY ON PARTNERSHIP § 7.0(H), at 120 (Bobbs Merrill, 2d ed. 1960).

³⁸⁵ See 232 A.2d at 635.

³⁸⁶ *Id.* Apparently, Parzych had filed for bankruptcy. See *id.* at 635 n.1.

³⁸⁷ *Id.* at 635.

³⁸⁸ See *id.*

³⁸⁹ *Id.* The contract’s use of the term “capital contribution” is unfortunate because that term is often used to describe amounts that partners contribute to fund their partnership. See *Capital Contribution*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/legal/capital%20contribution> [<https://perma.cc/4QDQ-QZEZ>]. However, this is best viewed as loose language because the remainder of Herbst and Parzych’s agreement makes crystal clear that they did not intend to be partners.

³⁹⁰ *Rosenberger*, 232 A.2d at 635.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ See *id.*

In reversing the lower court decision, the Superior Court—quoting *Kingsley Clothing*—stated the law of Pennsylvania as follows:

The construction of this contract must, ultimately, be determined by reference to the intent of the parties. [T]he agreement clearly states that “* * * the parties do not intend to establish a partnership of any kind. . . . * * *” Our Supreme Court has held: “(W)here (the parties) expressly declare that they are not partners this settles the question, for, whatever their obligations may be as to third persons, the law permits them to agree upon their legal status and relations (as between themselves).”³⁹⁴

Yet, this quotation from *Kingsley Clothing* was beside the point because the *Rosenberger* court’s holding did not turn solely on how the parties labeled themselves in their agreement. Rather, the *Rosenberger* court’s decision turned on the court’s evaluation of the parties’ entire economic arrangement.

In *Rosenberger*, the appellate court held that the trial court incorrectly considered Herbst and Parzych’s sharing of profits as prima facie evidence of partnership contrary to UPA § 7(4).³⁹⁵ That provision provides that “receipt . . . of a share of the profits of a business is prima facie evidence that [one] is a partner in the business” *except that* “no such inference shall be drawn if such profits were received in payment” as “a debt” or “rent to a landlord” or “interest on a loan, though the amount of payment vary with the profits of the business.”³⁹⁶ This exception clearly applied to Parzych and Herbst, the *Rosenberger* court reasoned, because “Parzych’s indebtedness to Herbst was to be repaid from the proceeds of the farming operation” and “Herbst’s remuneration was . . . a payment . . . in return for his leasing the . . . Farm to Parzych without further rental payments.”³⁹⁷ As a result, the appellate court held that the trial court improperly inferred a partnership based on Herbst’s receipt of the profits of the farming operation.³⁹⁸

Having so concluded, the *Rosenberger* court held that, in light of “the parties’ express statement of intention, coupled with the inconclusive nature of the remainder of the agreement,” Herbst and Parzych were “not partners [i]nter se.”³⁹⁹ In so doing, the court also noted that the parties’ agreement “vested ‘full control’ of the farming operation in Parzych, whereas ordinarily, [a]ll partners have equal right in the conduct and management of the business.”⁴⁰⁰

³⁹⁴ *Id.* at 636.

³⁹⁵ *Id.* (quoting 59 PA. STAT. § 12(4), which adopted UPA § 7(4) verbatim).

³⁹⁶ UNIF. P’SHP ACT § 7(4) (UNIF. L. COMM’N 1914).

³⁹⁷ 232 A.2d at 636.

³⁹⁸ *See id.* at 636–37.

³⁹⁹ *Id.* at 636.

⁴⁰⁰ *Id.* (quoting 59 PA. STAT. § 51(e), which adopted UPA § 18(e) verbatim).

Accordingly, the *Rosenberger* court did not actually hold that the parties' agreement not to be partners was dispositive of their legal status. Rather, the court found—as a factual matter—that the parties did not satisfy the definition of partnership because they were not co-owners of the farm business; Herbst merely shared in Parzych's profits as re-payment of a—seemingly legitimate⁴⁰¹—loan and as rent from a lessee of his farm.

Here, the Parzych-Herbst agreement had one characteristic that was unusual for a loan: the lender, Herbst, split the farm's losses with Parzych, the borrower. However, the parties' agreement also had some indicia of a typical loan, like a specified amount due and specific interest payments; further, the lender did not participate in control of the business.⁴⁰² In the absence of such indicia—and particularly if Herbst had some control over the farm—the court might have smelled a rat.⁴⁰³ When a supposed lender is being repaid out of the firm's profits, the question of control over the business will be particularly important.⁴⁰⁴ Although a different fact-finder might conclude that the loan was a fraud and Herbst was a passive partner in the farm, the *Rosenberger* court did not so find.

In sum, despite the court's quote of *Kingsley Clothing* for the pre-UPA common law rule, the *Rosenberger* court actually followed the UPA approach under which the parties' intent carries some weight but is not dispositive as to their legal status as partners (or not).⁴⁰⁵ In short, *Rosenberger* stated the subjective-intent-controls-inter-se rule but instead took the objective intent approach prescribed by UPA. *Rosenberger's* statement of zombie law is therefore undead dicta.

⁴⁰¹ Despite the contract's unfortunate wording, the *Rosenberger* court expressed no doubt that the loan was legitimate, rather than a partner's capital contribution masquerading as a loan. If it were the latter, the parties' characterization of their payments would not control and UPA § 7(4) would not apply. See *Lupien v. Malsbenden*, 477 A.2d 746, 748–49 (Me. 1984) (holding that defendant, who claimed to be a lender to an insolvent enterprise, was liable as a partner to a creditor of that corporation because the lender's cash infusion resembled a capital contribution, not a traditional loan).

⁴⁰² See *Rosenberger*, 232 A.2d at 635 (describing Parzych's debt to Herbst as \$6000 and the interest due as 5% per year; and stating further that the farm was “under the full control of Parzych”).

⁴⁰³ Cf. *Lupien*, 477 A.2d at 748–49 (rejecting defendant's argument that he was “only a banker” to a business because his alleged “loan” had none of the typical indicia of a loan—it carried no interest, had no specified repayment dates, and he operated the business).

⁴⁰⁴ See Christine Hurt, *Startup Partnerships*, 61 B.C. L. REV. 2487, 2504 (2020) (when there is uncertainty whether money put into a business was a loan or a partner's capital contribution, courts will consider “how much control the purported lender has over the venture and whether it constitutes more daily control than a normal lending relationship”).

⁴⁰⁵ See generally HURT & SMITH, *supra* note 75, § 2.04[B] at 32, 34.

(2) Kingsley Clothing

Kingsley Clothing,⁴⁰⁶ which was decided in 1942,⁴⁰⁷ also post-dates Pennsylvania's adoption of UPA.⁴⁰⁸ However, the *Kingsley Clothing* court neither discussed nor even cited Pennsylvania's partnership statute.

In *Kingsley Clothing*, plaintiff Kingsley Clothing Manufacturing Co., Inc. ("Kingsley") first agreed to make coats at a set price to satisfy a government contract held by defendant Progressive Clothing Manufacturing Co. ("Progressive"); that transaction was essentially completed to the parties' satisfaction.⁴⁰⁹ Several months later, the parties agreed to a second, slightly different transaction in which Kingsley would "lease its entire plant to" Progressive, which in turn would manufacture, "under the supervision of two [Kingsley] employees" more coats that Progressive had contracted to make for the government.⁴¹⁰ Upon being paid by the government, Progressive was to "determine the profit, if any . . . on said contract and . . . pay one-half . . . to Kingsley."⁴¹¹ Progressive completed its contract with the government but never paid Kingsley;⁴¹² Kingsley brought an action for assumpsit and Progressive defended by arguing that Kingsley should have instead proceeded in equity by seeking an accounting.⁴¹³ The court took this as an argument that the parties were partners.⁴¹⁴

The *Kingsley Clothing* court rejected Progressive's argument that the parties were partners, calling it "devoid of merit."⁴¹⁵ In so doing, the court quoted the parties' contract, which stated that they were "not partners," and that Kingsley would "receive one-half . . . of the profits" of the business "for the use of its factory, machinery, furniture, fixtures, equipment and office."⁴¹⁶

After considering this contractual language, the *Kingsley Clothing* court asserted that the parties' intent to be partners or not governs as between themselves:

⁴⁰⁶ 26 A.2d 315 (Pa. 1942).

⁴⁰⁷ *See id.* at 315.

⁴⁰⁸ Pennsylvania adopted UPA in 1915. *See supra* note 384.

⁴⁰⁹ *See* 26 A.2d at 316.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *See id.* at 316–17.

⁴¹³ *See id.* at 317.

⁴¹⁴ *See supra* note 118 (discussing UPA's accounting rule).

⁴¹⁵ 26 A.2d at 317.

⁴¹⁶ *Id.*

As between the parties themselves partnership is a matter of intention, and where they expressly declare that they are not partners this settles the question, for, whatever their obligations may be as to third persons, the law permits them to agree upon their legal status and relationship *inter se*.⁴¹⁷

This assertion is an undeniable statement of the zombie, pre-UPA law⁴¹⁸

⁴¹⁷ *Id.* In so stating, the *Kingsley Clothing* court did not cite or even reference UPA. Rather, *Kingsley Clothing* cites *Kaufmann v. Kaufmann*, 70 A. 956 (Pa. 1908), a pre-UPA case that sets forth different tests for partnership *inter se* and as to third parties. See Leahy, *supra* note 10 (manuscript at 28). *Kaufmann* is therefore the exact sort of case that UPA was intended to overthrow. See *id.* (manuscript at 39–41).

Kaufmann involved the Kaufmann Brothers partnership that operated Kaufmann's department store in Pittsburgh, Pennsylvania. See *Kaufmann*, 70 A. at 956–57; see also Mary Lynne Pitz, *The Kaufmann Legacy*, PITTSBURGH POST-GAZETTE, <https://newsinteractive.post-gazette.com/kaufmann/> [<https://perma.cc/Y6PC-NLHE>] (discussing the Kaufmann brothers and their family business). The case arose when one Kaufmann Brother partner, Jacob, died and his estate sued the remaining three brothers, Isaac, Morris and Henry. See *Kaufmann*, 70 A. at 957. Jacob's heirs contested the buyout provision of the Kaufmann Brothers' 1897 partnership agreement, arguing *inter alia* that the admission of new partners in 1903 and 1905 dissolved the old partnership and negated the 1897 buyout provision. See *id.* at 958. The court concluded that the 1903 and 1905 agreements did not admit new partners or dissolve the partnership, but simply were profit-sharing agreements with Kaufmann Brothers employees, all of whom were Kaufmann cousins. See *id.* at 959–60. (Some of those cousins would later form the competing department store Kaufmann & Baer, which later became the Pittsburgh Gimbels Department Store. See Pitz, *supra*.)

Yet, although the *Kaufmann* court stated that subjective intent governs *inter se*, see *id.* at 959, it is not clear the court applied that rule. The contracts in question did not involve any agreement not to be partners; rather, the 1903 and 1905 agreements simply referred to Morris, Isaac, Henry and Jacob together as one contracting party—"the Kaufmann Brothers"—and to each employee as the other contracting party. See *id.* While these characterizations certainly could have the intended effect of declaring that the two groups did not intend to be partners, they did not unambiguously do so. Further, the *Kaufmann* court did not simply take these assertions as dispositive as to the parties' status. Rather, the court analyzed the 1903 and 1905 agreements to determine whether the employees contributed capital to the firm or had the right to share in the goodwill of the firm; it concluded that they did not. See *id.* at 960. Hence, contrary to the *Kaufmann* court's exhortation that "it is unnecessary to inquire further" once the parties have declared themselves not to be partners, the court in fact inquired further and concluded that the 1903 and 1905 agreements did not make the employees partners in the Kaufmann Brothers partnership as a factual matter. See *id.*

In short, while *Kaufmann* undoubtedly states the zombie subjective-intent-governs-inter-se rule, the case may have turned on objective intent. If so, then even *Kingsley Clothing's* prime predecessor may reflect undead dicta.

⁴¹⁸ See *supra* Part I.C (discussing the zombie subjective-intent-governs-inter-se line of cases).

Yet, immediately after this pronouncement, the *Kingsley Clothing* court reasoned that: “[W]hat we have here is . . . but a single transaction conducted by joint adventurers and now completed; in such a case the party entitled may proceed by action of assumpsit to recover his share of the profits.”⁴¹⁹ Unfortunately, the juxtaposition of these two quotes muddies the *Kingsley Clothing* court’s intent, making it unclear whether the court actually followed the pre-UPA common law rule.

Traditionally, courts use the term “joint venture” to mean a partnership for a limited time or objective.⁴²⁰ If this is what the *Kingsley Clothing* meant by its use of the term, then the court may have rejected the claim for an accounting not because Jacobs and Kingsley were *never* partners, but because they were only briefly partners (i.e., joint venturers) and their venture had ended. Alternatively, if the *Kingsley Clothing* court viewed a joint venture as something completely distinct from a partnership, then its holding that Jacobs and Kingsley were not partners because they were joint venturers is supported both by the parties’ contract and the surrounding facts the court cited. Either way, the *Kingsley Clothing* court did not give effect to the parties’ agreement as a matter of law. Rather, it simply concluded that, as a factual matter, Jacobs and Kingsley were not partners.⁴²¹

Moreover, even if *Kingsley Clothing* did not mean what it plainly said about the parties being joint venturers but not partners, the disclaimer in the Kingsley-Progressive contract was nonetheless not the sole basis for the court’s holding that Kingsley and Progressive were not partners. Rather, the court also reasoned that one being “entitled by agreement to a share of the profits of an enterprise does not necessarily constitute him a partner,”⁴²² citing two cases where the parties who shared profits were not deemed partners. The first, *In re De Haven's Estate*,⁴²³ held that an agent who receives the profits of a business as compensation for services

⁴¹⁹ 26 A.2d at 317.

⁴²⁰ See *Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531, 540 (Tex. App. 2017), *aff'd*, 593 S.W.3d 732 (Tex. 2020) (opining that joint ventures are governed by the same rules as partnerships); G.V.I., Annotation, *What Amounts to Joint Adventure*, 138 A.L.R. 968 (2022) (citing *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 218 (Mo. Ct. App. 1987) (“A joint venture is a type of partnership and as such is governed by state Uniform Partnership Act.”). *But see* MILLER & RAGAZZO, *supra* note 118, § 6:7 n.19 (explaining that, in Texas, although the current Texas partnership act “removed any doubt as to the status of joint ventures, equating them to partnerships and placing them squarely within the coverage of the statute . . . [S]ome courts continue to discuss joint ventures and partnerships as if they are distinct forms of business . . .”).

⁴²¹ *Kingsley Clothing*, 26 A.2d at 317.

⁴²² *Id.*

⁴²³ 93 A. 1013 (Pa. 1915).

rendered is not a partner.⁴²⁴ The second, *Comstock v. Thompson*,⁴²⁵ held that a partnership did not arise simply because the plaintiff and defendant who co-owned land as joint tenants shared the profits therefrom.⁴²⁶ These citations suggest that *Kingsley Clothing* held, as a factual matter, the parties did not co-own a joint business.

Thus, like *Rosenberger*, *Kingsley Clothing* states zombie law but apparently does not apply it. The law being unnecessary to the decision, it is dicta—walking-dead dicta.

h. Washington Case: Cusick

The zombie Washington case, *Cusick v. Phillippi*,⁴²⁷ was decided in 1985⁴²⁸—decades after Washington adopted UPA §6(1)⁴²⁹ verbatim in 1945.⁴³⁰ *Cusick* therefore applied UPA.

In *Cusick*, plaintiffs the Cusicks purchased an apple orchard in Washington as tenants in common with a larger group of investors (“the Brayland investors”).⁴³¹ The Brayland investors hired a “consulting agent,” the Phillippi Fruit Company (“Phillippi”), to operate the orchard (and distribute its profits) in return for a monthly fee.⁴³² The Phillippis eventually bought out many of the non-Cusick Brayland investors, becoming the largest co-owner of the apple orchard.⁴³³

One year, some apples were damaged while in storage, reducing the price for which they could be sold.⁴³⁴ The remaining Brayland investors sued the Phillippis, alleging *inter alia* that they breached their fiduciary duty to the investors by allowing

⁴²⁴ See *id.* at 1013–14. This is also the UPA rule. See UNIF. P'SHIP ACT § 7(4)(b) (UNIF. L. COMM'N 1914).

⁴²⁵ 133 A. 638 (Pa. 1926).

⁴²⁶ See *id.* at 639 (citing UNIF. P'SHIP ACT § 7(2) (UNIF. L. COMM'N 1914)).

⁴²⁷ 709 P.2d 1226 (Wash. Ct. App. 1985).

⁴²⁸ See *id.* at 1226.

⁴²⁹ See 1945 WASH. SESS. LAWS 350.

⁴³⁰ *Horne v. Aune*, 121 P.3d 1227, 1231 (Wash. Ct. App. 2005) (explaining that Washington adopted UPA in 1945); accord UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 126 (1995).

⁴³¹ See 709 P. 2d at 1228.

⁴³² *Id.*

⁴³³ See *id.*

⁴³⁴ See *id.* at 1229.

the apples to become damaged.⁴³⁵ The trial court rejected the investors' claim that the Phillippis were fiduciaries, and the Cusicks appealed.⁴³⁶

On appeal, the Court of Appeals of Washington addressed whether the Phillippis were fiduciaries under various theories, including general partnership.⁴³⁷ In addressing the partnership question, one would expect the *Cusick* court to apply UPA's definition, which requires an agreement to be co-owners of a for-profit business.⁴³⁸ Indeed, the *Cusick* appellate court cited an older Washington case, *Eder v. Reddick*,⁴³⁹ which quoted UPA's definition of partnership.⁴⁴⁰

Yet rather than employ UPA's general definition of partnership, the *Cusick* court instead cited *Eder*—which in turn relied upon a 1915 case, *Nicholson v. Kilbury*⁴⁴¹—for the proposition that a partnership requires the existence of a contract, rather than an agreement to be co-owners. According to the *Cusick* court:

An express or implied contract is essential to a partnership relationship and must contemplate a common venture uniting labor, skill or property of the partners for the purpose of engaging in lawful commerce for the benefit of all the parties, a sharing of profits and losses, and joint right of control of its affairs.⁴⁴²

The Brayland investors and the Phillippis did have a contract.⁴⁴³ But that document expressly stated that it “did not create a Partnership” between the parties.⁴⁴⁴ For this reason, *Cusick* might have been the perfect vehicle to address the same question that arose in *Enterprise Products*: is the parties' attempt to disclaim a contract as a matter of law effective even if the facts as a whole support a finding of partnership?

The *Cusick* appeals court never encountered that question, however, because the trial court apparently concluded, based on the totality of circumstances, that the

⁴³⁵ See *id.* at 1228.

⁴³⁶ *Id.* at 1229.

⁴³⁷ See *id.*

⁴³⁸ See UNIF. P'SHIP ACT § 6(1) (UNIF. L. COMM'N 1914).

⁴³⁹ 278 P.2d 361 (Wash. 1955).

⁴⁴⁰ See *Cusick*, 709 P. 2d at 1230–31 (citing *Eder*, 278 P.2d at 365 (citing Washington's enactment of UPA § 6(1)) (“By statute, a partnership is defined as an association of two or more persons to carry on as co-owners a business for profit.”)).

⁴⁴¹ 145 P. 189 (1915).

⁴⁴² 709 P.2d at 1230–31 (citing *Eder*, 278 P.2d at 365–66). This “common venture” (or “community of interest”) in “lawful commerce” language was a common pre-UPA formulation. See, e.g., *Beecher v. Bush*, 7 N.W. 785, 789 (Mich. 1881).

⁴⁴³ See *Cusick*, 709 P. 2d at 1231.

⁴⁴⁴ *Id.* at 1228.

parties were not partners. That is to say, the lower court held—as a factual matter—that “although some indicia of partnership were present, the parties intended a tenancy in common.”⁴⁴⁵ Hence, the *Cusick* court simply applied the UPA rule that the parties’ contract not to be partners is one factor among many to consider when deciding whether they objectively intended to be co-owners of a for-profit business.⁴⁴⁶

Indeed, *Cusick’s* reasoning underlines the fact that it viewed the parties’ intent as objective rather than subjective. First, the appellate court explained that “[t]he relationship is not controlled by the name of the arrangement or by certain terms and labels, but in substance is derived from all the circumstances surrounding their relationship.”⁴⁴⁷ Second, the appeals court opined that “the essential test of the existence of a partnership is whether the parties intended such a relation as manifested by their express agreement or inferred from their acts and statements.”⁴⁴⁸ Both statements clearly refer to objective rather than subjective intent.

Accordingly, although it states zombie law, *Cusick* follows an approach that is consistent with UPA. Its moan may be that of the zombie, but it does not act like one. It is undead dicta.

i. Texas Cases: Holman, Griffin & Claycomb

(1) Holman

Texas zombie *Holman v. Dow*⁴⁴⁹ was decided in 1971,⁴⁵⁰ long after Texas adopted UPA in May, 1961.⁴⁵¹ However, the agreements at issue dated to 1958 and 1959,⁴⁵² and the parties’ business relationship ended in June, 1961.⁴⁵³ Further, although Texas’s UPA went into effect immediately upon its enactment and applied to all existing

⁴⁴⁵ *Id.* at 1231.

⁴⁴⁶ *See id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ 467 S.W.2d 547 (Tex. Civ. App. 1971).

⁴⁵⁰ *See id.* at 547.

⁴⁵¹ *See Leahy, supra* note 7, at 250 n.23 (quoting *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2009)).

⁴⁵² *See Holman*, 467 S.W.2d at 548–49.

⁴⁵³ *See id.* at 552.

partnerships, it did not impair any contract already in force or affect any vested right.⁴⁵⁴ Presumably for these reasons, *Holman* does not apply UPA.

Holman, an action for a breach of contract and an accounting between purported partners, arose out of a series of agreements between plaintiff Holman and defendants relating to the production of natural gas.⁴⁵⁵ Defendant Woodside, who had been negotiating with certain West Texas gas producers to “gather, compress and process gas” in the Mertzson Field in West Texas, agreed with defendants Dow and Parks that they would “construct and operate” the processing plant “that would be required if Woodside completed his negotiations with the producer[s],” and that Woodson would “construct and operate the gathering and compression system.”⁴⁵⁶ Separately, Woodson wrote Holman a letter with “the terms of the proposed agreement for the two to incorporate for the purpose of gathering, compressing and processing gas.”⁴⁵⁷ Woodson and Holman formed Gas Enterprises, Inc. (“Gas”), which was half-owned by each;⁴⁵⁸ Dow and Parks formed defendant Mertzson Corporation (“Mertzson”), which was half-owned by each.⁴⁵⁹ Gas then enlisted another firm to “install and operate the gathering and compressing system for the Mertzson Field,” for which that firm “was to be paid a charge based upon the volume of gas handled.”⁴⁶⁰ Gas and Mertzson then entered into the contract that gave rise to the lawsuit, under which Gas “assigned its processing contracts to Mertzson,” which agreed to perform the contract.⁴⁶¹

Under the terms of the Gas-Mertzson contract, Mertzson agreed to pay Gas 40% “of the net profit derived from the operation of the processing plant owned by Mertzson,” as “diminished by the net loss or increased by the net profit of the gathering and compressing facilities.”⁴⁶² Mertzson also agreed to own the processing plant for five years, after which time Mertzson would “convey title to a 40 percent interest in the processing facilities to Gas” and then Mertzson could continue to use the plant thereafter, “without having to pay rent.”⁴⁶³ There were further provisions

⁴⁵⁴ See Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 SW. L.J. 437, 465 (1960) (citing UPA §§ 44 & 4(5)).

⁴⁵⁵ See 467 S.W.2d at 548–49 (describing the underlying agreements).

⁴⁵⁶ *Id.* at 548.

⁴⁵⁷ *Id.*

⁴⁵⁸ See *id.* at 549.

⁴⁵⁹ See *id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.* at 550.

providing for expansion of the business and the sale of the equipment after termination of the contract.⁴⁶⁴

Finally, the Gas-Mertzon agreement stated that “it was not the purpose . . . of this contract to create a partnership” and instead designated the parties as “independent contractors.”⁴⁶⁵ Despite this language, plaintiff Holman alleged that he and Gas were partners with the various defendants.⁴⁶⁶ The trial court disagreed, finding that the parties were merely independent contractors.⁴⁶⁷

In reviewing the trial court’s finding for evidentiary sufficiency⁴⁶⁸—and upholding that finding⁴⁶⁹—the Texas Civil Court of Appeals made no mention of the ancient rule that the subjective intent to be partners governs *inter se*. Nor did the appellate court purport to base its entire holding on the parties’ disclaimer of the intent to be partners. Rather, the *Holman* court purported to “study . . . the contract as a whole” before concluding that “the plaintiff did not establish . . . a partnership between the parties.”⁴⁷⁰

In analyzing the parties’ contract, the *Holman* court first reasoned that the fact that Gas shared net profits with the defendants “d[id] not alone determine the question of partnership.”⁴⁷¹ The appellate court then looked to two other aspects of the parties’ relationship: that Gas “was to share the losses only in an indirect manner” and “a suit against it would not lie by a creditor” of Mertzon; and that Gas had no “authority to exercise control over the operation of any phase of the business being carried on.”⁴⁷² In so doing, the *Holman* court considered four of the five factors—(1) the sharing profits, (2) the exercise of control, (3) the sharing of losses, (4) the expression of intent to be partners, and (5) the contribution of money—that Texas courts traditionally look to when determining whether parties have formed a partnership.⁴⁷³

⁴⁶⁴ *See id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *See id.* (plaintiff sued, *inter alia*, for an accounting).

⁴⁶⁷ *See id.* at 551.

⁴⁶⁸ *See id.* at 550.

⁴⁶⁹ *See id.* at 551.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *See Leahy, supra* note 10 (manuscript at 12) (discussing five factors set forth in TEX. BUS. ORGS. CODE § 152.052(a)(1)-(5), which previously were applied by Texas courts under the common law) (citing, *inter alia*, *Ingram v. Deere*, 288 S.W.3d 886, 891, 895 (Tex. 2009)).

In sum, the *Holman* court held that the parties did not agree to become co-owners of a business, based on the court's review of all the applicable facts. *Holman* is therefore a dubious example of a zombie because it does not state the ancient, now-abrogated law. But to the extent *Holman* provides any support for the zombie law, that support is merely dicta.

(2) Griffin & Claycomb

The United States Court of Appeals for the Fifth Circuit decided two Texas zombies, *FSLIC v. Griffin*⁴⁷⁴ and *FDIC v. Claycomb*,⁴⁷⁵ in 1991⁴⁷⁶—long after Texas's 1961 adoption of UPA.⁴⁷⁷ The Fifth Circuit therefore applied Texas's UPA in both *Griffin* and *Claycomb*.⁴⁷⁸

(a) *Griffin*

Griffin arose out of a real estate joint venture between Griffin and Williams that borrowed money from First Texas Savings Association ("First Texas"); both men personally guaranteed the loan, which was secured by a note on certain real property.⁴⁷⁹ Griffin and Williams sought financing from First Texas in three stages: (1) purchase and planning, (2) construction, and (3) permanent financing; First Texas agreed to fund the first phase and loaned the joint venture \$5.6 million.⁴⁸⁰ However, after the joint venture "fell upon hard times," First Texas "added to [its] troubles by refusing to exercise its option to supply construction financing."⁴⁸¹ The joint venture subsequently defaulted on the loan and filed for bankruptcy; First Texas then sued Griffin and Williams as guarantors of the loan.⁴⁸² After the bankruptcy court permitted a foreclosure sale, First Texas purchased the property for \$3.8 million and

⁴⁷⁴ 935 F.2d 691 (5th Cir. 1991).

⁴⁷⁵ 945 F.2d 853 (5th Cir. 1991).

⁴⁷⁶ See *Griffin*, 935 F.2d at 691; *Claycomb*, 945 F.2d at 853.

⁴⁷⁷ See *supra* note 451 and accompanying text.

⁴⁷⁸ See *Griffin*, 935 F.2d at 699 (applying TEX. REV. CIV. STAT. ANN. art. 6132b, § 7(4) (West 1970) (expired), Texas's adoption of UPA § 7(4)); *Claycomb*, 945 F.2d at 858 & n.13 (applying TEX. REV. CIV. STAT. ANN. art. 6132b, § 6(1) (West 1970) (expired), Texas's adoption of UPA § 6(1)).

⁴⁷⁹ See 935 F.2d at 694.

⁴⁸⁰ See *id.*

⁴⁸¹ *Id.*

⁴⁸² See *id.*

continued its suit against Williams and Griffin for the remainder of the principal.⁴⁸³ Williams was subsequently dismissed from the case after he filed for bankruptcy.⁴⁸⁴

Later, “First Texas itself fell into financial difficulties” and was placed into receivership.⁴⁸⁵ The receiver, the Federal Savings and Loan Insurance Corporation (“FSLIC”)—a predecessor to the Federal Deposit Insurance Corporation (“FDIC”)—“entered into a purchase and assumption agreement with First Gibraltar,” a federal savings and loan, which purchased substantially all of First Texas’s assets and assumed all of its deposit and secured liabilities.⁴⁸⁶ First Gibraltar intervened in the action against Griffin and, having transferred the property to First Gibraltar, the receiver (now the FDIC) dropped its claims against Griffin.⁴⁸⁷ The only remaining parties in the action were therefore Griffin and First Gibraltar.⁴⁸⁸

Griffin raised several defenses to First Gibraltar’s guarantee claim, including breach of partnership duties.⁴⁸⁹ His partnership claim—which was based on a reading of the loan documents that the court described as “highly imaginative”—was that “the loan documents establish[ed] that First Texas formed a partnership with him, Williams, and the joint venture.”⁴⁹⁰

First, “as proof that the bank agreed to share 75% of the joint venture’s losses,” Griffin “cite[d] the provision in the guaranty which limit[ed] the liability of the guarantors to 25% of the principal plus interest.”⁴⁹¹ The court rejected this contention, reasoning that “[l]imiting the liability of the guarantors does not entail an agreement to share in the business losses of the joint venture.”⁴⁹² Second, Griffin argued that, under the contract’s Assignment of Net Profits Interest clause, the joint venture agreed to give 40% of its profits to the bank.⁴⁹³ The Griffin court held that this could “not be evidence of a partnership” under UPA § 7(4)(d).⁴⁹⁴ Further, the

⁴⁸³ *See id.*

⁴⁸⁴ *See id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *See id.*

⁴⁸⁷ *See id.*

⁴⁸⁸ *See id.*

⁴⁸⁹ *See id.* at 694–95.

⁴⁹⁰ *Id.* at 699.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *See id.*

⁴⁹⁴ *Id.* (quoting Texas’s enactment of UPA § 7(4)(d)) (“The receipt by a person of a share of the

court held that there was no agreement to share losses, which was “not conclusive” but nonetheless “indicative” that the parties did not intend to be partners.⁴⁹⁵

In addition, the loan documents for the loan between First Texas and the joint venture “stated that they formed no partnership.”⁴⁹⁶ After noting this, the *Griffin* court reasoned—citing *Holman*—that “the parties’ intent is the most important test in determining whether a partnership was formed.”⁴⁹⁷ Had the court’s reasoning ended there, it might appear to support the rule that the parties’ subjective intent governed inter se. However, the *Griffin* court explained further that: “a statement that no partnership is formed cannot be conclusive proof that no partnership was formed.”⁴⁹⁸ Rather, the Fifth Circuit opined, “intent is clearly the major focus when deciding whether a partnership exists.”⁴⁹⁹ This is the UPA rule, that the parties’ subjective intent plays a role but is not dispositive.

The *Griffin* court then proceeded to describe its holding in terms of this rule, concluding that: “no partnership was formed” between the joint venture and First Texas because “the written documents reflect[ed] an intention not to form a partnership”; because “the parties agreed not to share profits”; and because “the assignment of profits is not evidence of an intent to form a partnership.”⁵⁰⁰ While this reasoning may have double counted intent, the court undoubtedly looked to objective factors—such as the sharing of profits⁵⁰¹—and not simply the parties’ subjective intent.

Hence, even to the (weak) extent that *Griffin’s* statements of law support the subjective-intent-governs-inter-se rule, its holding does not. The case is therefore, at worst, undead dicta.

profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment . . . (d) As interest on a loan, though the amount of payment vary with the profits of the business.”)

⁴⁹⁵ *Id.* at 699–700 (citing *Gutierrez v. Yancey*, 650 S.W.2d 169, 172 (Tex. App. 1983)).

⁴⁹⁶ *Id.* at 700.

⁴⁹⁷ *Id.* (citing *Holman v. Dow*, 467 S.W.2d 547, 550 (Tex. Civ. App. 1971)).

⁴⁹⁸ *Id.* (citing *Howard Gault & Son, Inc. v. First Nat’l Bank of Hereford*, 541 S.W.2d 235, 237 (Tex. Civ. App. 1976)).

⁴⁹⁹ *Id.* (citing *Voudouris v. Walter E. Heller & Co.*, 560 S.W.2d 202, 206 (Tex. Civ. App. 1977)).

⁵⁰⁰ *Id.*

⁵⁰¹ *See id.* at 699.

(b) Claycomb

*Claycomb*⁵⁰² involved a loan by Vernon Savings and Loan Association (“Old Vernon”) to defendant SHWC, Inc. (“SHWC”) that was personally guaranteed by the individual defendants.⁵⁰³ The loan was obtained to develop certain real property in Dallas and was secured by a deed of trust on that property.⁵⁰⁴ Both the loan documents and the guarantees contained a limitation of liability under which borrower SHWC and the individual guarantors accepted “no personal or corporate liability for the payment of principal, interest or other amounts . . . which exceeds, in the aggregate, one-half the total of all such amounts which [we]re outstanding from time to time.”⁵⁰⁵ In short, “the guarantors [and borrower] were, from the outset, personally liable for 50% of the loan.”⁵⁰⁶

In connection with the loan, “SHWC granted to Old Vernon a 50% profits interest in the Dallas property” that was securing the loan.⁵⁰⁷ However, none of the loan documents “contained any express language reflecting an agreement between SHWC and Old Vernon either to share in the losses . . . or that Old Vernon assume any liability on account of SHWC.”⁵⁰⁸ Indeed, “such sharing of losses and borrower's liability was expressly disavowed.”⁵⁰⁹

In addition, the assignment of profits contained disclaimers that, according to the *Claycomb* court, “expressly disavow[ed] the existence of any partnership between the parties thereto, as well as any sharing of losses or liability of the SHWC or its partners” and unambiguously stated that “Old Vernon undertook no obligation, liability or responsibility, whatsoever, with respect to the Dallas property which SHWC borrowed funds to develop.”⁵¹⁰ Accordingly, the *Claycomb* court opined that the overall tenor of the parties’ agreement “evidenc[e]d a debtor-creditor relationship as between SHWC and Old Vernon” under which the guarantors “unconditionally and irrevocably and absolutely, jointly and severally, guarantee[d] payment to Old Vernon.”⁵¹¹

⁵⁰² *FDIC v. Claycomb*, 945 F.2d 853 (5th Cir. 1991).

⁵⁰³ *See id.* at 854–55.

⁵⁰⁴ *See id.* at 855.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at 856.

⁵⁰⁷ *Id.* at 855.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.* at 855–56.

When SHWC defaulted on both notes, Old Vernon sued the guarantors; when Old Vernon became insolvent itself, a receiver stepped in; later, the FDIC succeeded to Old Vernon's claims.⁵¹² In the trial court, the defendants raised various defenses, including an argument that Old Vernon and SHWC were partners in the development of the Dallas property.⁵¹³ The district court rejected this argument and rejected the defendants "assertion that the 50% limitation of liability cap evidence[d] an agreement [between Old Vernon and SHWC] to share in the losses."⁵¹⁴

Upon the defendants' appeal, the Fifth Circuit Court of Appeals began its analysis by defining, and stating the (then-⁵¹⁵)elements, of a partnership or joint venture under Texas law:

[A] partnership is an association of two or more persons to carry on as co-owners of a business for profit. The essential elements of either a joint venture or a partnership agreement, whether implied or express, are: (1) a community of interest in the venture/partnership; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise. Where any one of these elements is absent, no joint venture or partnership exists.⁵¹⁶

The *Claycomb* court then explained that the parties' agreement "expressly disavows any intent on the part of [Old Vernon] to become a partner with SHWC" and that the district court had rejected SHWC's contention that Old Vernon had agreed to share the losses of the Dallas property with SHWC.⁵¹⁷ The federal appellate court reasoned further that "the parties intent was that Old Vernon undertook no obligation liability or responsibility with respect to the Dallas property which SHWC borrowed funds to develop."⁵¹⁸

Yet, despite its repeated reference to the parties' intent, at no point did the *Claycomb* court state that this intent was dispositive. Nor did the Fifth Circuit suggest it was referring to subjective, as opposed to objective, intent. Rather, the court opined that, since the sharing of losses was required, "an express provision

⁵¹² See *id.* at 856.

⁵¹³ See *id.*

⁵¹⁴ See *id.* at 858.

⁵¹⁵ These are no longer the elements of partnership in Texas. See Leahy, *supra* note 10 (manuscript at 52). Since a joint venture is a form of partnership, it makes no sense that these elements would still govern the formation of joint ventures under Texas law. See sources cited *supra* note 420. However, some Texas courts nonetheless continue to cite these elements. See *supra* note 420 (quoting MILLER & RAGAZZO, *supra* note 118, § 6:7 n.19).

⁵¹⁶ *Claycomb*, 945 F. 2d at 858.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 859.

disavowing the sharing of losses and liability precludes a finding of either partnership or joint venture, as a matter of law.”⁵¹⁹

Finally, in light of this “express provision to the contrary in the profit assignment,” the *Claycomb* court rejected as “specious” SHWC’s argument that “the 50% cap on borrower’s liability [wa]s tantamount to an agreement to share losses.”⁵²⁰ In so holding, the federal appellate court “agree[d] with the reasoning of the district court that, ‘the 50% cap represent[ed] a bargained for limitation of losses to [SHWC], not an agreement that Old Vernon would share in any losses.’”⁵²¹ As a result, the Fifth Circuit court concluded that “under well-settled Texas law there was no joint venture or partnership in existence between Old Vernon and SHWC” because the defendants “failed to establish one of the essential elements of joint venture/partnership as a matter of law.”⁵²²

Hence, nowhere does *Claycomb* state or even imply that the subjective intent of the parties is controlling as to their formation of a partnership, either inter sese or as to third parties. Rather, the court’s holding turned solely on its (dubious then and subsequently overruled⁵²³) reasoning that no partnership could be formed in Texas as a matter of law unless the purported partners agreed to share losses between them.⁵²⁴ That is to say, the Fifth Circuit held that Old Vernon and the SHWC did not form a partnership because they failed to satisfy the required elements for forming a partnership—not because the parties’ intent to avoid partnership trumped their satisfaction of the required elements.⁵²⁵ In short, *Claycomb* appears to endorse an objective approach to the intent to form a partnership.

Accordingly, any language in *Claycomb* which suggests that the parties’ subject intent to be partners governs as between themselves is, at worst, undead dicta.

⁵¹⁹ *Id.* (citing *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978)).

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ It is not clear that the sharing of losses of losses was required in Texas even in 1961, much less in 1991. *See Leahy, supra* note 10 (manuscript at 52).

⁵²⁴ Whether or not this was the law of Texas when *Claycomb* was decided, it is no longer the law of Texas today. *See id.* (manuscript at 52).

⁵²⁵ *See Claycomb*, 945 F. 2d at 858–59.

j. Vermont Cases: Cressy, Harman & Raymond S. Roberts, Inc.

The three Vermont zombies—*Cressy v. Proctor*,⁵²⁶ decided in 2014;⁵²⁷ *Harman v. Rogers*,⁵²⁸ decided in 1986;⁵²⁹ and *Raymond S. Roberts, Inc. v. White*,⁵³⁰ decided in 1953⁵³¹—all post-date Vermont’s 1941 adoption of UPA.⁵³² Hence, as described below, each Vermont case applied one of the uniform acts.

(1) Cressy

*Cressy*⁵³³ arose out of a romantic and business relationship between Cressy and Proctor, who “never married, obtained a civil union, or registered as a domestic partnership,” but “regularly used the term ‘partner’ and ‘partnership’ to describe their personal relationship.”⁵³⁴ Before meeting Cressy, Proctor had operated an advertising company as a sole proprietorship.⁵³⁵ Sometime after the two moved in together, Cressy quit his job and began to work in this business; he “never received formal compensation” for his work and Proctor supported him financially.⁵³⁶

The litigants disputed exactly how much Cressy worked in the business: Proctor testified that Cressy worked only “part-time” as an “unnecessary” “helper” who did “mostly clerical” work and did so in “gratitude” for the “roof over his head.”⁵³⁷ Cressy, by contrast, testified that his work “evolved into a full-time job” after another employee left the firm and that he eventually “worked more hours than Proctor.”⁵³⁸ As a result, Cressy “argue[d] that he ultimately became a ‘partner’” in the business and testified that Proctor referred to him as such “in a business context.”⁵³⁹ Proctor also purchased a number of properties during their relationship but did not put

⁵²⁶ 22 F. Supp. 3d 353 (D. Vt. 2014).

⁵²⁷ See *id.* at 353.

⁵²⁸ 510 A.2d 161 (Vt. 1986).

⁵²⁹ See *id.* at 161.

⁵³⁰ 97 A.2d 245 (Vt. 1953).

⁵³¹ See *id.* at 245.

⁵³² See UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

⁵³³ *Cressy v. Proctor*, 22 F. Supp. 3d 353 (D. Vt. 2014).

⁵³⁴ *Id.* at 356-57.

⁵³⁵ See *id.* at 357.

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 358.

Cressy's name on the title.⁵⁴⁰ After their romantic relationship ended, Cressy sued Proctor, claiming that they had been business partners in addition to being intimate partners.⁵⁴¹

To evaluate Cressy's partnership claim, the District Court for the District of Vermont quoted the definition of partnership set forth in Vermont's RUPA, which contains the explicit limitation that a partnership may be formed "whether or not the persons intend to form a partnership."⁵⁴² Next, the court reasoned—citing *Roberts*—that "an agreement to share the profits and losses of an adventure is an essential element of a partnership."⁵⁴³ The *Cressy* court then added—quoting *Harman*—that "[w]here the rights in question are between the alleged partners only, 'there must be a manifestation of an intent to be so bound.'"⁵⁴⁴

At first glance, this language from *Harman* appears to invoke the abrogated, pre-UPA rule that subjective intent to be partners (or not) governs as between the parties. However, the *Cressy* court's other reasoning casts doubt on this conclusion. First, the district court opined—citing *Roberts*—that the aforementioned "manifestation may be demonstrated by an express agreement between the parties or inferred from their conduct and dealings with one another."⁵⁴⁵ Second, the *Cressy* court explained—quoting *Harman*—that "in deciding whether a partnership has been created by a tacit agreement, courts must examine the facts to determine whether the parties carried on as co-owners of a business for profit."⁵⁴⁶ Thus, while the *Cressy* court's characterization of *Harman* seems to evoke the zombie rule that the parties' intent governs partnership formation inter se, the remainder of the court's reasoning suggests that the court was referring to objective intent.

Cressy's holding confirms that the court was referring to objective intent. Although the *Cressy* court considered the parties' expression of intent—Cressy's claim that "Proctor . . . [stated] on multiple occasions that Cressy was his business partner"—the court did not ultimately hold based solely on the parties' subjective intent.⁵⁴⁷ Rather, the court looked to all the surrounding facts to assess whether Cressy and Proctor co-owned a business.

⁵⁴⁰ *See id.*

⁵⁴¹ *See id.* at 359.

⁵⁴² *Id.* (quoting VT. STAT. ANN. tit. 11, § 3212(a)).

⁵⁴³ *Id.* at 360 (quoting *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245, 248 (Vt. 1953)).

⁵⁴⁴ *Id.* (quoting *Harman v. Rogers*, 510 A.2d 161, 164 (Vt. 1986)).

⁵⁴⁵ *Id.* (citing *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245, 248 (Vt. 1953)).

⁵⁴⁶ *Id.* at 359–60 (quoting *Harman v. Rogers*, 510 A.2d 161, 164 (Vt. 1986)).

⁵⁴⁷ *Id.* at 360.

First, the district court considered Cressy's claim that his working for no pay while Proctor paid his living expenses demonstrated that he and Proctor "were sharing in the profits and losses of the business."⁵⁴⁸ The court rejected this contention, concluding that there was no evidence that Cressy and Proctor agreed to share profits, and further, that Cressy neither "invested in or lent his own money to" the business nor "undertook any financial obligations on behalf of the business nor was he liable for any of its debts."⁵⁴⁹ Second, the district court analyzed whether Cressy had "authority and control over the business," which the court deemed essential to a finding that he was a partner.⁵⁵⁰ The court concluded that, no matter how hard Cressy worked in the business, he never acted as a principal and "never represented himself as a principal," nor did he have "the power to authorize payments" on behalf of the business.⁵⁵¹ In sum, the *Cressy* court concluded that there was no "agreement to split [the advertising firm's] proceeds and . . . no evidence that the two men ever agreed to share their losses, thereby failing two 'essential elements' of a partnership."⁵⁵²

As a result, the *Cressy* court concluded that—even if it credited Cressy's testimony that Proctor called him a "partner" "in the business"—the remaining "facts . . . [did] not support a finding that the parties entered into a partnership" because Cressy did not have the economic investment in or control over the business typical of a partner.⁵⁵³ In so doing, the court disregarded the only evidence of the parties' subjective intent to be business partners and looked to the objective evidence that two romantic partners co-owned the business.⁵⁵⁴

Since *Cressy* turned solely on objective intent, its dubious linguistic support for the subjective-intent-governs-inter-se rule is nothing more than zombie dicta.

(2) Harman

Like *Cressy*, *Harman*⁵⁵⁵ involved an unmarried couple, Harman and Rogers, who lived together for years before breaking up.⁵⁵⁶ During their relationship, the couple "operated various business interests owned either jointly [as express partner]

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ *See id.*

⁵⁵⁵ *Harman v. Rogers*, 510 A.2d 161 (Vt. 1986).

⁵⁵⁶ *See id.* at 163.

or by defendant alone.”⁵⁵⁷ After the breakup, Harman sued Rogers to recover her interest in these businesses based on various theories, including both “express” and “implied partnership.”⁵⁵⁸ The trial court ordered dissolution of the parties’ express partnership (which was limited to the renovation and leasing of a particular apartment building) and rejected Harman’s remaining claims, including the implied partnership claim.⁵⁵⁹

The alleged implied partnership involved Harman and Rogers’s business activities in a wide range of businesses—“a contracting business, a campground, a store and other real estate all owned by the defendant and carried on in defendant’s name only.”⁵⁶⁰ In support of her claim, Harman alleged that, despite the absence of an express partnership agreement, “the nature of the services she performed for [Rogers’s] businesses indicate[d] an intention by the parties to be . . . partners.”⁵⁶¹

To evaluate the *Harman* trial court’s finding that no partnership existed, the Vermont Supreme Court first opined that UPA directs courts to “examine the facts to determine whether the parties carried on as co-owners of a business for profit.”⁵⁶² The high court reasoned further that: “[a]s against third persons, such a finding is determinative regardless of the parties’ knowledge that their association created a partnership,” but “[w]here the issue hinges on the rights of the parties inter se only . . . there must be a manifestation of an intent to be so bound.”⁵⁶³ While the former language speaks in terms of objective intent, the latter language states the pre-UPA zombie rule that subjective intent governs partnership formation as between the parties.

Ultimately, though, the *Harman* court’s holding did not turn on Harman and Rogers’s subjective intent to become “partners” (or not). Rather, just as it said, the Vermont Supreme Court considered whether the factual record established that Harman and Rogers were co-owners of the businesses in question. First, the court pointed out that Harman had “repeatedly attempted to convince [Rogers] to put real estate . . . in both of their names and that [Rogers] consistently refused to do so,”⁵⁶⁴ which suggested that Rogers was the sole owner of the business. Second, the *Harman* court concluded that Harman and Rogers did not view themselves as co-

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *See id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.* (citing *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245, 248 (Vt. 1953)).

⁵⁶⁴ *Id.*

owners because Harman had the right to sign Rogers's name, but not her own, on the construction company's checks.⁵⁶⁵ Finally, the court noted that, when Harman applied for another job after her relationship with Rogers ended, she listed him as her employer and supervisor, and labeled him the "Owner" of the contracting business.⁵⁶⁶ All of these conclusions are consistent with the objective approach to intent under which the only intent that matters is the parties' intention, based on the court's evaluation of all the pertinent facts, to co-own the business in question.

Accordingly, to the extent that *Harman* evoked the zombie rule that distinguishes between formation inter sese and as to third parties, the court's statements to that effect were undead dicta.

(3) Roberts

The final Vermont zombie, *Roberts*,⁵⁶⁷ arose out of repair bills for an automobile used by the married defendants, Annette and Enos White, who co-owned land on which they operated a farm.⁵⁶⁸ The automobiles were registered solely in Annette's name but the repair bills from plaintiff Raymond E. Roberts, Inc. ("Roberts") were solely in Enos's name.⁵⁶⁹ The trial court entered judgment in favor of Roberts against both Whites.⁵⁷⁰ The sole question before the Vermont Supreme Court was whether the trial court's findings "supported a judgment against Annette" in addition to Enos.⁵⁷¹

In holding that the trial court's findings supported a conclusion that Annette was liable for Enos's repair bills, the appellate court concluded that the lower court could have inferred that the two "were partners as between themselves" in the farming business.⁵⁷²

In reaching this conclusion, the Supreme Court began by noting that Annette and Enos "shared in the profits and losses" of the farm "by way of their joint estate."⁵⁷³ Under UPA as adopted in Vermont, the *Roberts* court explained, this sharing of profits between Annette and Enos was "prima facie evidence" that

⁵⁶⁵ See *id.* at 163-64.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245 (Vt. 1953).

⁵⁶⁸ See *id.* at 246-47.

⁵⁶⁹ See *id.* at 247.

⁵⁷⁰ See *id.* at 246.

⁵⁷¹ *Id.* at 247-48.

⁵⁷² *Id.* at 248.

⁵⁷³ *Id.* at 247.

Annette was a partner in their farming business.⁵⁷⁴ Thus, the court continued the sharing of profits—and losses—“is an essential element of a partnership, and, ordinarily, is sufficient to constitute the parties to such agreement partners.”⁵⁷⁵

Although all of this language is consistent with UPA, the court added the following statement of apparent zombie law:

Where the rights of the parties *inter se* merely are concerned, and no question as to third parties is involved, the criterion to determine whether the contract is one of partnership or not must be: what did the parties intend by the contract which they made as between themselves?⁵⁷⁶

This statement that the test for formation depends on whether the plaintiff alleging partnership is a purported partner or a third party was clearly abrogated by UPA.⁵⁷⁷

Yet, the *Roberts* court did not stop with its seeming invocation of the UPA-abrogated subjective-intent-governs-inter-se rule. Rather, the court added that the necessary intention “may be shown by [the parties’] express agreement or inferred from their conduct and dealings with one another.”⁵⁷⁸ Further, the court reasoned that “it is not of the essence of a partnership that the parties to it should have known that their contract in law created a partnership.”⁵⁷⁹ Finally, the *Roberts* court opined that, “[i]f the parties intend to and do enter into such a contract as in the eye of the law constitutes a partnership, they thereby become partners whether” or not the contract designates them as such.⁵⁸⁰ These statements all speak in terms of objective intent. They address not the parties’ desire to attain the legal status of “partners” but rather their intent (as judged by all the facts) to co-own a business.

Ultimately, the *Roberts* court upheld the trial court’s findings not because of the Whites’ expression of intent about whether they were partners, but because of Enos and Annette’s “agreement . . . to hold title to their property as they did, to conduct business as they did, and to share in the profits and losses as they did.”⁵⁸¹ Hence, after stating law that could be interpreted either way, the *Roberts* court based its holding firmly on objective rather than subjective intent. The court’s ambiguous turn into zombie subjective intent law is therefore just dicta—undead dicta.

⁵⁷⁴ *Id.* at 248 (quoting V.S. 47, § 6068, § 7(4)—Vermont’s adoption of UPA § 7(4)).

⁵⁷⁵ *Id.* (citing C.E. Johnson & Co. v. Marsh, 15 A.2d 577, 580 (Vt. 1940)).

⁵⁷⁶ *Id.*

⁵⁷⁷ See Leahy, *supra* note 10 (manuscript at 29–35).

⁵⁷⁸ *Roberts*, 97 A.2d at 248 (citing Sheldon v. Little, 15 A.2d 574, 575 (Vt. 1940)).

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

B. Apparently Undead Dicta: Cases That Arguably Turned on Objective Intent

Not every zombie partnership formation case's statement of law is undoubtedly undead dicta. For a few such cases, their holdings are either probably⁵⁸²—or at least plausibly⁵⁸³—dicta. That is to say, these cases either probably or plausibly held that, based on the applicable facts, the parties did not associate as co-owners of a for-profit business. This Subpart describes those cases.

1. Case That Probably Turned on Objective Intent

a. Georgia Case: Mabry

Mabry v. Pelton,⁵⁸⁴ the Georgia zombie, was decided in 1993.⁵⁸⁵ Yet, although Georgia adopted UPA in 1985,⁵⁸⁶ *Mabry* cites neither Georgia's partnership statute nor any case that applies it. Perhaps the facts underlying *Mabry* predated Georgia's 1985 enactment of UPA, but it is unclear.

In *Mabry*, the Mabrys sued Pelton, alleging that he had (among other things) breached an oral partnership agreement to purchase property suitable for breeding cattle.⁵⁸⁷ The trial court granted summary judgment for Pelton on the question of partnership and the Mabrys appealed.⁵⁸⁸ On appeal, they claimed that a separate, written contract for the purchase of a one-half interest in a cow embryo was the first act of the parties' partnership.⁵⁸⁹

The *Mabry* court held that this written contract did not result in a partnership, based on language in their agreement stating that “[n]othing herein shall be construed as constituting . . . a partnership.”⁵⁹⁰ The court reasoned that the Mabrys could “not now vary the plain, unambiguous language of the written contract by their parol claims that it constitutes evidence of a partnership.”⁵⁹¹ Read in isolation,

⁵⁸² The case that fits this description is *Mabry v. Pelton*, 432 S.E.2d 588 (Ga. Ct. App. 1993).

⁵⁸³ The cases fitting this description are: (1) *Grimm v. Pallesen*, 527 P.2d 978 (Kan. 1974) and (2) *Rosenblum v. Springfield Produce Brokerage Co.*, 137 N.E. 357 (Mass. 1922).

⁵⁸⁴ 432 S.E.2d 588.

⁵⁸⁵ *See id.* at 588.

⁵⁸⁶ *See* UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

⁵⁸⁷ *See* 432 S.E.2d at 589.

⁵⁸⁸ *See id.*

⁵⁸⁹ *See id.*

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.* (citing *Paige v. Jurgenson*, 419 S.E.2d 722, 723 (Ga. Ct. App. 1992)).

this language strongly suggests a holding that the Mabrys and Pelton contracted around partnership as a matter of law.

However, the *Mabry* court also reasoned that: “The evidence in the record, construed most strongly in favor of the Mabrys, shows that the parties discussed forming a partnership and purchasing property suitable for breeding cattle, but they never actually reached a final partnership agreement.”⁵⁹² The appellate court explained further that the problem was that “[a] promise, to be enforceable, must be sufficiently definite” and the parties’ oral partnership agreement to purchase property suitable for breeding cattle simply was “not sufficiently definite as to any of its terms.”⁵⁹³

Taken together, all this language probably suggests that the *Mabry* court in fact rejected the Mabrys’ partnership claim as a *factual* matter, based on the totality of the evidence, *including* the written agreement—not as a *legal* matter, based *solely* on the written agreement. Although the court looked to the parties’ contract to define their relationship, it did not look at that writing as its sole reference, nor did it reason that the written language controlled over contrary evidence of partnership formation outside of the contract.⁵⁹⁴ Rather, the court seems to have concluded that the parties’ discussions never resulted in a definitive agreement to co-own a cattle breeding business.⁵⁹⁵

⁵⁹² *Id.*

⁵⁹³ *Id.* at 590 (citing *Farmer v. Argenta*, 331 S.E.2d 60, 61 (Ga. Ct. App. 1985)) (explaining that “[t]he Mabrys have not stated and the evidence does not show what property was to be bought, when it was to be bought, the size of the property to be bought, how the purchase was to be financed, the respective monetary or service contributions of the parties or the number of cattle to be bred on the property”).

⁵⁹⁴ Unlike in *Enterprise Products*—in which the appellate court held that the parties’ agreement negated a jury finding of partnership as a matter of law—here the facts *and* law *both* supported a conclusion of no partnership.

⁵⁹⁵ *Cf.* HURT & SMITH, *supra* note 75, § 2.04[D], at 2-56 & n.58 (explaining that “a court may refuse to find partnership where the parties have failed to agree on important details,” and citing cases so holding). Here, the fact that the business never came into existence provides further support for this reading of *Mabry*. However, if *Mabry* is read to hold that no partnership existed because the Mabry and Pelton’s oral agreement did not constitute a binding contract, *Mabry* is simply wrong. People may become partners by associating as co-owners of a business without entering into an agreement that satisfies all the legal requirements of a binding contract. *See id.* at 2-56 to 2-58 & nn. 59-60 (explaining that courts may conclude that a partnership exists even when the parties’ agreement is insufficiently definite to form a binding contract, and citing cases); *see, e.g.*, *Sewing v. Bowman*, 371 S.W.3d 321, 332 (Tex. App. 2012) (holding that the existence of a binding contract is not necessary for partnership formation because a partnership “may be implied from the facts and circumstances of a case”).

In sum, even if *Mabry's* reasoning implies that the parties' subjective intent governs formation inter se, it probably did not actually so hold. *Mabry* is therefore likely undead dicta.

2. Cases That Plausibly Turned on Objective Intent

a. *Kansas Case: Grimm*

The undead Kansas case, *Grimm v. Pallesen*,⁵⁹⁶ was decided in 1974,⁵⁹⁷ but it involved an alleged partnership that supposedly existed between 1970 and 1971.⁵⁹⁸ Since Kansas adopted UPA in 1972,⁵⁹⁹ the *Grimm* court did not apply Kansas's adoption of UPA.

Grimm involved an alleged partnership to operate a dairy business between Grimm, his (former) brother-in-law James, and Grimm's (former) father-in-law Pete.⁶⁰⁰ Each of the three men contributed at least \$10,000 to a bank account for the dairy (with Pete contributing \$5,500 more); the money was used to build a dairy barn on Pete's land.⁶⁰¹ Grimm and James then each took \$2,400 out of the account to purchase dairy cows, using that money as a deposit and borrowing the rest in their own names.⁶⁰² Both Grimm and James then took "an undivided one-half interest in the total number of cows."⁶⁰³ Once they milked the cows and sold the milk, Grimm and James also split the revenue evenly, and each paid separately for the cost of feeding the cows.⁶⁰⁴

Unfortunately, "friction developed" between the parties, and Grimm was asked to leave.⁶⁰⁵ He sued his in-laws for dissolution and liquidation of the alleged partnership; James and Pete denied that they were Grimm's partners.⁶⁰⁶ Although the parties had not initially discussed whether to be partners, "[w]hen it came to set up the books" the Pallesens "specifically . . . object[ed]" to the idea that they were

⁵⁹⁶ 527 P.2d 978 (Kan. 1974).

⁵⁹⁷ See *id.* at 978.

⁵⁹⁸ See *id.* at 979–81.

⁵⁹⁹ See UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

⁶⁰⁰ See 527 P.2d at 979.

⁶⁰¹ See *id.* at 980.

⁶⁰² See *id.*

⁶⁰³ *Id.*

⁶⁰⁴ See *id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ See *id.*

partners.⁶⁰⁷ Pete’s intent was merely trying to provide Grimm with “financial backing,” as he had with his son James,⁶⁰⁸ while there “never was any agreement as to what interest, if any [Pete] had in the milk operation” and “what he was to receive from use of his land,” it was “clear . . . that [Pete] was not to receive any of the milk money.”⁶⁰⁹ Further, Pete did not “intend that [Grimm] would have any interest whatsoever in the land other than . . . for the dairy purposes.”⁶¹⁰ Pete was simply setting up Grimm and James in business, sharing revenues 50/50—just as he had done separately, as between himself and James, in the farming business.⁶¹¹

The lower court rejected Grimm’s claim of partnership.⁶¹² In so doing, the trial court repeatedly emphasized that the key element in determining whether the parties were partners was their intent.⁶¹³ Further, the trial court deemed it “axiomatic that one may not be made a partner (as between the parties, and not involving third parties) against his will or by accident . . . for . . . a partnership is the result of contract.”⁶¹⁴

On appeal, the *Grimm* court acknowledged that both parties contributed capital and labor to the enterprise and that each participated (presumably on an equal basis) in decision making.⁶¹⁵ Yet, this was insufficient to overcome the trial court’s finding that “neither of the Pallesens ever intended to become” Grimm’s partner, and that

⁶⁰⁷ *Id.* Instead, they set up separate books. *See id.*

⁶⁰⁸ *Id.* at 981.

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.* Of course, even if Grimm and James—or even all three—were partners, there is no certainty that Grimm would have any claim to Pete’s property. Pete’s land would belong to the partnership only if the *Grimm* court found that Pete had contributed his land to the partnership. By contrast, if the court found that Pete simply allowed the partnership to use his land free of charge, then the land would not belong to the partnership. In that case, neither Grimm nor James would have any claim to Pete’s property upon dissolution of the partnership.

⁶¹¹ *See id.* at 980-81. Pete and James had a separate arrangement where Pete “furnished the land and . . . farming equipment, while . . . James did most of the work.” *Id.* at 979. The court described this as *not* a partnership, despite that James and Pete “each received one-half of the gross income, each paid one-half of the expenses.” *Id.* (The court contrasted this to a jointly owned grain elevator where James and Pete admitted they were partners. *See id.*) It is not clear why the court concluded that sharing of revenue and expenses did not make James and Pete partners. *See infra* note 618.

⁶¹² *See Grimm*, 527 P.2d at 979.

⁶¹³ *See id.* at 981.

⁶¹⁴ *Id.*

⁶¹⁵ *See id.* at 982.

Pete “flatly and specifically refused” to become Grimm’s partner.⁶¹⁶ Reasoning that it has “been repeatedly declared that a man cannot be made a partner against his will” or “by accident,”⁶¹⁷ and further, that the Pallesens understood the difference between partnership and “non-partnership sharing of receipts and expenses,”⁶¹⁸ the *Grimm* court upheld the trial court’s refusal to hold the Pallesens “partners against their will.”⁶¹⁹

In so deciding, the *Grimm* court refused to adopt any particular common law definition of partnership and instead focused on the parties’ intent.⁶²⁰ However, the court failed to explain what status Grimm held in the dairy business if he was not a co-owner thereof. The case therefore seems—at least with regard to Grimm and James—to be a classic example of parties who agree to co-own a business but wish to avoid the label of partners. By splitting both expenses of the business and the gross revenues of the business,⁶²¹ Grimm and James effectively split the profits of the business; although the court did not address whether they split or agreed to split losses, Grimm’s taking out a loan in his own name for the cattle (which were foreclosed upon) implies that he agreed to share, and did share, losses.⁶²² In short, Grimm had all the hallmarks of an co-owner of the dairy business (with James), except one: the Pallesens refused to call him a “partner” in the business.

This is precisely the sort of case that would turn out differently under UPA and RUPA, both of which (1) specify a definition of partnership that focuses on co-ownership of the business; and (2) emphasize that the parties’ intent to be co-owners, rather than the parties’ intent to enter into the legal relationship as “partners,” is controlling.⁶²³ In short, *Grimm* is surely a zombie.⁶²⁴

⁶¹⁶ *Id.*

⁶¹⁷ *Id.* (quoting *Wade v. Hornaday*, 140 P. 870, 871 (Kan. 1914) and citing *Whan v. Smith*, 285 P. 589 (Kan. 1930)). This is squarely contrary to the longstanding, established law of partnership. See Leahy, *supra* note 7, at 250–51 & n.13 (describing “accidental” or “inadvertent” partnerships).

⁶¹⁸ 527 P.2d at 982. It is not clear that “non-partnership sharing of receipts and expenses” is, as they say, “a thing.” If the parties share profits—which is receipts less expenses—they are presumptively partners. See UNIF. P’SHIP ACT (1997) § 202(c) (UNIF. L. COMM’N 1997); UNIF. P’SHIP ACT § 7(4) (UNIF. L. COMM’N 1914).

⁶¹⁹ *Grimm*, 527 P.2d at 982.

⁶²⁰ See *id.* at 981

⁶²¹ See *id.*

⁶²² See *id.* at 980, 982.

⁶²³ See *supra* Parts I.A.2 & B (discussing the objective intent approach of UPA and RUPA).

⁶²⁴ See *supra* Part I.C (discussing the zombie subjective-intent-governs-inter-se line of cases).

That said, the *Grimm* court did not explicitly hold that the parties' agreement not to be partners was dispositive as a matter of law. Thus, it is possible to read the court as simply weighing all the facts and concluding that the Pallezens' desire not to be partners trumped the other facts—i.e., that the three simply did not agree that Grimm co-owned the dairy business. (What status he had, other than co-owner, is unclear.) Moreover, the court's view that parties sharing all expenses and revenues is a distinct business model from a partnership suggests that the court simply did not grasp the ramifications of partnership being the default co-owned business form.⁶²⁵ If a business in which two people split all revenues and expenses from common property is not a partnership, what *is* it?

b. Massachusetts Case: Rosenblum

The Massachusetts zombie, *Rosenblum v. Springfield Produce Brokerage Co.*,⁶²⁶ was decided in 1922⁶²⁷—the same year Massachusetts adopted UPA.⁶²⁸ Accordingly, *Rosenblum* did not apply UPA.⁶²⁹

Rosenblum arose out of agreements to “buy and sell onions in the Connecticut Valley [for a] season” between (1) plaintiff Abraham Rosenblum; (2) plaintiff Joseph Rosenblum, who was doing business as South Deerfield Onion Produce Co. (“Deerfield”); and (3) the defendant Springfield Produce Brokerage Co. (“Springfield”).⁶³⁰ At season's end, when it was time to settle up, Springfield denied the Rosenblums access to its books; they then sought an accounting on suspicion that Springfield had engaged in various financial shenanigans in violation of their contract.⁶³¹

The parties' agreements provided that Deerfield and Springfield would “be the active operators” under the contract; by contrast, the contract described Abraham as “a silent partner” who was to “furnish the necessary capital for the conduct of this business, without charging interest.”⁶³² Deerfield and Springfield were to “keep an accurate item of all of its purchases and sales” under the parties' agreements; all expenses would be “chargeable at the end of the season to . . . a joint expense

⁶²⁵ See Leahy, *supra* note 7, at 247.

⁶²⁶ 137 N.E. 357 (Mass. 1922).

⁶²⁷ See *id.* at 357.

⁶²⁸ See UNIF. P'SHIP ACT (UNIF. L. COMM'N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

⁶²⁹ However, the court referenced a draft version of UPA. See *Rosenblum*, 137 N.E. at 359.

⁶³⁰ See *id.* at 358.

⁶³¹ See *id.*

⁶³² *Id.* at 359.

account.”⁶³³ These expenses would be “deducted from the profits if there [we]re any”—but “if not, each party . . . [would] bear an equal share of said expenses.”⁶³⁴

In *Rosenblum*, the Supreme Judicial Court of Massachusetts’s evaluation of the parties’ legal status was limited to the parties’ contract—but not because the court refused to consider other surrounding facts and circumstances.⁶³⁵ Rather, the high court so limited its inquiry because the complaint had been rejected on a demurrer (a motion to dismiss on the pleadings) and there was no other evidence of the parties’ business relationship in the record. Indeed, the *Rosenblum* court explicitly opined that it could consider facts outside of the parties’ agreement: “One term of the contract or one aspect of the relationship cannot be fastened upon to the exclusion of other parts. The whole scope of the arrangement must be examined . . . to ascertain the real intent of the parties and the genuine meaning of the contracts.”⁶³⁶

Turning to the *Rosenblum*-Deerfield-Springfield agreement, the *Rosenblum* court began by refusing to adopt a single “comprehensive and precise definition of partnership.”⁶³⁷ One such definition, the court remarked, was the “sharing in the profits and losses of a business”—but, the court added, this was “not an unfailing rule because there are numerous instances of joint owners who have a common interest in the profits and losses of an adventure and who are not partners.”⁶³⁸

Based on its review of “the entire arrangement,” the Supreme Judicial Court held that “a co-partnership was not intended by the parties and was not the intended result of the[ir] contracts.”⁶³⁹ In reaching this conclusion, the *Rosenblum* court noted that the case was “a suit between the parties, not involving the rights of third persons.”⁶⁴⁰ In such cases, the court opined, “a partnership commonly is held to exist only when such is the intent of the parties.”⁶⁴¹

It is not entirely clear whether this language referred to the subjective intent to form a general partnership or the objective intent to co-own a for-profit business. The *Rosenblum* court’s reasoning seems to neatly straddle both positions.

⁶³³ *Id.*

⁶³⁴ *Id.* The *Rosenblum*-Deerfield-Springfield contract also prohibited either company from engaging “in any speculative transaction in onions” without the consent of the three parties to this contract. *Id.*

⁶³⁵ *See id.*

⁶³⁶ *Id.* at 360.

⁶³⁷ *Id.* at 359.

⁶³⁸ *Id.*

⁶³⁹ *Id.* at 360.

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

On the one hand, the Supreme Judicial Court did not look solely to a disclaimer of partnership or how the parties characterized themselves. Indeed, the court even rejected the parties' characterization of Abraham, holding that "the use of the words 'silent partner' in the main contract as descriptive" of his relationship to Joseph and Springfield was "not decisive."⁶⁴² Instead, the court reasoned that the question before it was "whether the essentials of the arrangements constitute the parties to its partners."⁶⁴³ This language seems to invoke the concept of objective intent, in which the court looks to the parties' entire business arrangement to determine whether they are co-owners rather than simply considering whether they wanted to attain the legal status of "partners."

Much of the *Rosenblum* court's other reasoning similarly echoes objective intent. The court noted that the parties' agreements were "drawn with some degree of care and business sagacity" in mostly (other than its reference to Abraham as a "silent partner") avoiding using the term, or terms which suggested, "partnership."⁶⁴⁴ (Rather, the parties described the relationship as "a 'co-operative agreement.'"⁶⁴⁵). Yet, the court's point here appeared to be that the parties had fashioned their contract to avoid becoming co-owners of a for-profit business (as in the famed *Martin v. Peyton*⁶⁴⁶), not that the parties had agreed that they did not want their co-owned business to be deemed a partnership (as in *Enterprise Products*⁶⁴⁷).

Further, the *Rosenblum* court held that "[t]he fair import" of the parties' contracts was that Springfield and Deerfield were *independent* businesses which had no control over each other⁶⁴⁸ (except to limit the ability to engage in extraordinary transactions⁶⁴⁹). Further, Abraham was "given . . . no power over the

⁶⁴² *Id.*

⁶⁴³ *Id.* (citing *Brotherton v. Gilchrist*, 107 N.W. 890 (Mich. 1906)).

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.*

⁶⁴⁶ 158 N.E. 77 (N.Y. 1927). See Leahy, *supra* note 10 (manuscript at 15–18 & 32–33) (discussing *Martin*).

⁶⁴⁷ *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020). See Leahy, *supra* note 10 (manuscript at 3–6 & 20–22) (discussing *Enterprise Products*).

⁶⁴⁸ 137 N.E. at 360 (reasoning that each business was "detached and independent from the other," operated independently with "no community of management" and "no sharing of responsibility"; and that neither business "acknowledges or is subject as to . . . the rights of a copartner in the other"); see *id.* at 361 (opining that the contracts between the parties "taken as a whole indicate" that Deerfield and Springfield "carried on [their] own business in [their] own way and was not required to aid the other"; and that, at season's end, they split profits and losses).

⁶⁴⁹ See *id.* (reasoning that the only limitation on each party's authority was that he could not

conduct of the business of either of the other two except that his consent must be given before either could engage in a ‘speculative transaction.’”⁶⁵⁰ This arrangement did not give rise to a partnership, the *Rosenblum* court opined, because the parties did not “share ‘in the profits *as profits*’”—meaning that they did not share in the profits *as owners thereof*.⁶⁵¹ Each party did not have “an ownership of an interest in the business that produces the profits.”⁶⁵²

Finally, looking to another definition of partnership, the *Rosenblum* court opined that a partnership is sometimes defined as an “implied community of property, community of interest, and community of profits.”⁶⁵³ Here, the court opined, only the last element was satisfied.⁶⁵⁴ Effectively, two independent businesses banded together for a common purpose, but neither business gave up control to the other, so they never became a single co-owned business.⁶⁵⁵

On the other hand, it is possible that the *Rosenblum* court’s wide-ranging analysis of the parties’ agreements focused on determining whether the parties *subjectively* intended to be partners, regardless of whether they co-owned a business.⁶⁵⁶ After reviewing the contract, the Supreme Judicial Court reiterated that “[n]o question of the rights of third persons is here involved,” and therefore “presumed that in all honesty and good faith . . . [the parties] meant what was said in the contracts.”⁶⁵⁷ The appellate court therefore refused to assume that the contracts “were ingenious contrivances or subtle expedients for securing the

engage in speculative transactions “outside the range of ordinary . . . promising large returns if fortunate and involving considerable losses if disastrous”) (quoting *Estabrook v. Woods*, 78 N.E. 538, 539 (Mass. 1906)).

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.* (quoting *Estabrook v. Woods*, 78 N.E. 538, 539 (Mass. 1906)) (reasoning that sharing profits “with the true meaning of the cases is” is that the profits “are in his ownership as they accrue”—i.e., each must have “a proprietary interest in each dollar of profits as it is earned, so that he then has a right of possession or control of it for the purpose of retaining his share”).

⁶⁵² *Id.* (quoting *Estabrook v. Woods*, 78 N.E. 538, 538 (Mass. 1906)).

⁶⁵³ *Id.* at 361.

⁶⁵⁴ *See id.*

⁶⁵⁵ An important—perhaps decisive—aspect to the *Rosenblum* decision was that, at the time, corporations were “not authorized to enter into ordinary partnerships,” thereby rendering any partnership involving Springfield ultra vires. *See id.* at 359. The *Rosenblum* court therefore reasoned that “a corporation in the absence of evidence cannot be presumed to have intended to have made an ultra vires contract” and that, “[i]f reasonably possible, the contract ought to be construed to have established a lawful relation.” *Id.* at 361.

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.*

benefits of” partnership “while veiling the genuine purpose under a specious invention, designed by dexterous craftsmen in the scrivener’s art, to evade the responsibilities” thereof.⁶⁵⁸ Thus, the *Rosenblum* court concluded, that “the parties did not intend on the face of the contracts to become partners. Mere participation in profits is not enough.”⁶⁵⁹ The court so held based on a quote from the zombie case *London Assurance Co. v. Drennen*,⁶⁶⁰ which reasoned that “[p]ersons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist.”⁶⁶¹

In sum, it is possible to read *Rosenblum* to hold that either the parties did not have the objective intent to be co-owners of a single business or that they did not have the subjective intent to be partners. Thus, while the zombie law the case states may be mere dicta, perhaps it is not. Lawyers must be extremely careful with this case lest it eat their brains and leave new zombies in its wake.

C. *Haunted Holding: One Case That Turned—Puzzlingly—on Subjective Intent*

This Subpart describes the sole haunted holding described in the companion article.

Only one case identified in the companion article, *Westerlund v. Murphy Overseas USA Astoria Forest Products, LLC*,⁶⁶² did not state the subjective-intent-governs-inter-se rule as dicta. Like *Enterprise Products*, this walking-dead precedent is truly a haunted holding. It cannot be avoided as undead dicta; the only solution is to take it head on and destroy its brains. Be wary, lest it eat your flesh!

1. Oregon Case: *Westerlund*

Westerlund arose out of a dispute between two timber businesses. Plaintiff *Westerlund* co-owned *Westerlund Log Handlers, LLC* (“WLH”), which was “in the business of procuring, processing, and selling logs for export”; defendant *Murphy* and his company *Murphy Overseas USA Astoria Forest Products, LLC* (“AFP”), bought and resold logs “on the international market.”⁶⁶³ The parties’ relationship was ostensibly governed by a written contract (the “Log Handling Agreement”) under which “WLH agreed to provide log handling and processing services to

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.*

⁶⁶⁰ 116 U.S. 461, 472 (1886).

⁶⁶¹ *Rosenblum*, 137 N.E. at 361. (quoting *Drennen*, 116 U.S. at 472).

⁶⁶² No. 15-cv-1296, 2018 WL 614710 (D. Or. Jan. 29, 2018).

⁶⁶³ *Id.* at *1.

AFP.”⁶⁶⁴ That written agreement expressly stated that the parties did not intend to be partners.⁶⁶⁵

However, Westerlund alleged that he (along with WLH and related parties) had previously “entered into an oral joint venture partnership with” Murphy (along with AFP and related parties).⁶⁶⁶ Westerlund claimed further that the Log Handling Agreement was signed to “create the false appearance of an arms-length transaction” between the Westerlund plaintiffs and the Murphy defendants in order to prevent another party with whom Westerlund was under contract (“China National”) from successfully suing the Murphy defendants for tortious interference with contract.⁶⁶⁷ In short, the case involved an alleged secret oral partnership that supposedly trumped the parties’ written agreement.

The *Westerlund* court addressed this question as straightforward matter of contract law, holding that the parol evidence rule prevented the Westerlund plaintiffs from seeking to prove that the parties’ relationship was governed by the alleged oral partnership agreement rather than the Log Handling Agreement.⁶⁶⁸ The court therefore dismissed the plaintiffs’ partnership-based claims.⁶⁶⁹

In so doing, the district court consulted neither Oregon’s partnership law statute nor any case addressing partnership law formation.⁶⁷⁰ Accordingly, the *Westerlund* court never considered whether partnership formation is a factual question governed by statute rather than a legal question to be decided by the parties’ contractual agreements.

Having completely ignored partnership law, *Westerlund* offers weak precedential support for the proposition that parties can contract around partnership as a matter of law. Moreover, a footnote in the case further muddies that support. Apparently, plaintiffs had argued that “under Oregon law, two parties may form a partnership without an express intent to do so, and even while

⁶⁶⁴ *Id.*

⁶⁶⁵ *See id.* at *4 (The Log Handling Agreement provided that “it is not the intent of the parties to create a partnership or joint venture hereunder.”).

⁶⁶⁶ *Id.* at *1.

⁶⁶⁷ *Id.*

⁶⁶⁸ *See id.* at *6.

⁶⁶⁹ *See id.*

⁶⁷⁰ Oregon adopted UPA in 1939, *see* UNIF. P’SHP ACT (UNIF. L. COMM’N 1914), Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969), and replaced it with a version of RUPA in 1998, *see* UNIF. P’SHP ACT (1997) (UNIF. L. COMM’N 1997), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 2 U.L.A. 223 (2015).

disclaiming any intent to do so.”⁶⁷¹ As a result, plaintiffs contended further, the *Westerlund* court should have “look[ed] to all the surrounding circumstances in determining whether an oral partnership was formed.”⁶⁷² The court neither accepted nor rejected this argument; rather, it concluded that it was not yet ripe: “That is not the question, however, at this juncture; the question is simply whether the alleged oral agreement contradicts the explicit terms of the written Log Handling Agreement.”⁶⁷³ However, the court never returned to the question, and ultimately dismissed the plaintiffs’ partnership claims.⁶⁷⁴

The effect of this footnote is puzzling. If the court’s language is taken at face value, then it understood that, before dismissing the plaintiffs’ partnership claims, , as a matter of partnership law, it was required to consider “all the surrounding circumstances in determining whether an oral partnership was formed.”⁶⁷⁵ Yet the court never addressed this partnership question, either explicitly or implicitly. It simply dismissed the plaintiffs’ partnership law claims based on the parol evidence rule.⁶⁷⁶ In essence, the court explicitly left the question of whether it had properly applied partnership law undecided, for later determination.⁶⁷⁷

Whether intentional or accidental, the *Westerlund* court’s explicit decision not to apply partnership law means that, although it is a zombie, it is a weak one.

CONCLUSION

Having established that all but one of the zombie cases state (or probably or possibly state) undead dicta, the question remains: why should a court reject that dicta? After all, some dicta are potentially persuasive judicial dicta while other dicta are the safe-to-ignore obiter dicta. The answer is that, regardless of how they are characterized, the zombie statements of law in the cases identified in the companion article squarely contradict the plain language of the uniform partnership act in force in most jurisdictions.⁶⁷⁸ Dicta carries particularly little weight when it is so obviously wrong.

⁶⁷¹ *Westerlund*, 2018 WL 614710, at *3 n.5.

⁶⁷² *Id.*

⁶⁷³ *Id.*

⁶⁷⁴ *See id.* at *6.

⁶⁷⁵ *Id.*

⁶⁷⁶ *See id.*

⁶⁷⁷ The case settled shortly afterwards, possibly the reason the plaintiffs never sought a correction.

⁶⁷⁸ *See Leahy, supra* note 10 (manuscript at 55–56).

It is one thing to convince a court that an entire line of cases was abrogated by statute when online legal research databases make no mention of their overruling. It is another thing entirely to ask a court not to follow language in a case because it is dicta. While it may be tough to convince a court that a case the legal research databases deem good law was overruled by statute a century ago, it should not be that difficult to ask a judge to reject obiter dicta. Lawyers do that all the time.⁶⁷⁹

⁶⁷⁹ See David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2035 (2013). Admittedly, however, lawyers who so argue are not always successful even when they should be—particularly since lower courts seem wary of deeming binding appellate court precedents as dicta. See generally *id.* (arguing that lower courts tend not to avoid higher court precedents by deeming them dicta). Hence, the argument referenced above may be easier to make to an appellate court, or the court that originally spawned the dicta.