Supreme Court No. 90368-9

Court of Appeals No. 70064-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE McNAUGHTON GROUP, LLC, a Washington Limited Liability Company,

Respondent,

v.

HAN ZIN PARK AND REGINA KYUNG PARK, Husband and Wife, and the Marital Community Property Comprised Thereof,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The responding party is The McNaughton Group, L.L.C. ("TMG").

II. CITATION TO COURT OF APPEALS DECISION

Because the Petitioners, Han Zin Park and Regina Kyung Park (the "Parks"), fail to satisfy any of the grounds on which this Court grants reviews, this Court should not review the decision in The McNaughton Group, LLC v. Han Zin Park and Regina Kyung Park, Case No. 70064-2-I, filed on March 31, 2014, by Division I of the Court of Appeals ("McNaughton"). A copy of Division I's decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should deny the Parks' petition for discretionary review because the Parks fail to satisfy any of the grounds for acceptance of review under RAP 13.4 (b)?

2. Whether the trial court's denial of the Parks' summary judgment was proper given that TMG successfully proved that the contract properly incorporated a legal description of the property by reference?

3. Whether the Parks waived the statute of frauds defense by failing to affirmatively assert the defense in any of its responsive pleadings?

4. Whether the Parks' parol evidence claim should be denied given that the parol evidence rule is irrelevant to this case and was never raised below?

5. Whether the court properly allowed TMG to offer evidence for impeaching a witness whose credibility was at issue, demonstrating a common scheme or plan, and gaining more information about communications for which a witness waived his privilege?

IV. STATEMENT OF THE CASE

This case involves TMG's attempt to purchase property from the Parks. In 2004, the parties tried to negotiate a deal, but were not able to agree on terms and negotiations fell apart. In 2005, the parties renegotiated the terms and entered into an agreement. However, the Parks refused to perform under the contract, and TMG brought this action.

A. Factual Background

1. 2004 Agreement and Addendum

On August 6, 2004, TMG presented the Parks with a proposed Vacant Land Purchase and Sale Agreement ("2004 PSA"). RP 41:2-43:3. The Parks countered with a five-page, 18 paragraph addendum written by their attorney ("Park Addendum"). RP 46:15-47:20. TMG and the Parks almost finalized the deal,

including the purchase price of $2,425,000, but the parties could not agree on the terms. RP 50:5-51:7; 60:12-14.

2. 2005 Agreement Executed by Parties

On February 19, 2005, TMG presented an offer to the Parks ("2/19 TMG Offer") with a purchase price of $2,400,000. RP 60:24-61. The Parks rejected the 2/19 TMG Offer, and submitted a counter offer with a purchase price of $2,425,000 and the "Counter Addendum + 3 pages" added to page 1 of the proposed purchase and sale agreement. RP 63:8-74:13. As Mark McNaughton testified, the term "Counter Addendum + 3 pages" referred to a document titled "Addendum B to Purchase and Sale Agreement Dated 2/19/05" and the three pages that followed. RP 63:8-74:13. The parties executed the agreement ("2005 PSA"). RP 77:22-78:7; 85:5-87:16.

3. TMG's Payments and the Parks' Demand for More Money

TMG paid the Parks a total of $294,000, which included earnest money, before closing. Respondent's Appellate Br., Exs. 52-61. The Parks asked TMG in 2006 for more money under the 2005 PSA. RP 91:22-93:17; 210:13-212:21; Respondent's

Appellate Br., Ex. 22. TMG declined the Parks' request by noting that the 2005 PSA does not require TMG to pay $180,000 for the Park residence unless needed for development. RP 212:22-219:2; Respondent's Appellate Br., Ex. 23.

4. Contrary to the Parks' Claims, the 2005 PSA Includes a Legal Description

The Counter Addendum + 3 Pages added by the Parks contain the following:

> In the event, if there arise any dispute over the scope of the applicable clause(s) on Specific terms of Addendum 1 through 14, (dated 2/19/05)., (sic) Precious (sic) agreement executed on September 8, 2004, page 1 through 13, supercedes (sic) and replaces any provision on the topics contained in purchase and sale agreement proposed and executed on February 19, 2005.

CP 800, 836. This language refers to the Park Addendum attached to the 2004 PSA. See Id.; Respondent's Appellate Brief, Ex. 4; RP 110:6-112:20. The legal descriptions for each parcel are located in the Park Addendum. See Respondent's Appellate Br., Ex. 4.

5. The Parks are Sophisticated

Contrary to the Parks' claim there is negotiating disparity, the Parks have experience in purchasing real estate. See RP 374:6-375:12. Similar to this case, in 1980, the Parks attempted to purchase commercial property and add terms to the agreement. See Respondent's Appellate Br., Exs. 117, 174; RP 548:14-550:5; 555:1-11.

B. Procedural Background

TMG filed its complaint on September 28, 2006. Respondent's Appellate Br., p. 18. The Parks filed an answer in December 2006, and later amended it. CP 734-812. TMG amended its complaint seeking damages instead of specific performance. CP 608-50; RP 315:15-317:19. The Parks responded to the complaint and asserted a counterclaim, alleging TMG had breached the 2005 PSA by failing to pay $2,590,000. CP 562-605.

After discovery closed on May 11, 2012, the Parks moved for summary judgment, arguing for the first time that the 2005 PSA was void under the statute of frauds because of inadequate legal descriptions. SCLR 26; CP 182-84, 446-48, 524-33. The trial court denied the motion, holding that the Parks were precluded from raising the statute of frauds defense because they failed to

plead it as a defense and discovery had closed. CP 446-48; see also CP 182-84. Trial had been set to start on June 25, 2012. Respondent's Appellate Br., p. 21. The Parks moved for reconsideration, which was denied on July 26, 2012. CP 182-84.

The trial took place on January 22, 2013. RP 31. The trial judge denied the Parks' multiple attempts to reargue the trial court's summary judgment order. RP 8:20-14:2, 356:8-359:8; CP 6-7, 74-90. After Dr. Park testified on direct examination, the jury asked Mr. Home: (1) Whether he provided "a letter to Mr. Park stating a legal opinion that the $180,000 was in addition to the purchase price and was indeed part of the contract? And did this event, this opinion, occur in 2004, 2005, or 2006?"; and (2) Did TMG retain you as the Parks attorney? RP 476:2-6; 598:20-24; RP 599:8-10. Mr. Home's answers were "I don't recall" and "no". RP 599:2-6; 11.

The trial court also admitted a purchase and sale agreement and a judgment involving a failed real estate transaction between the Parks and a developer. RP 380:6-23; RP 536:10-13; Respondent's Appellate Br., Exs. 117, 173. The jury found in favor of TMG. The Parks appealed, arguing that the 2005 PSA was void

for lack of a legal description. In McNaughton, Division I affirmed the trial court's decision, finding that the Parks had waived the statute of frauds defense, the 2005 PSA complied with the statute of frauds, and all of the evidence was properly admitted.

V. ARGUMENT

Review of the McNaughton case should be denied because the Parks do not demonstrate that the decision satisfies any ground on which review can be granted. RAP 13.4(b). In fact, the Parks fail to offer any argument related to the grounds for review by the Supreme Court. Even if review is granted, the McNaughton decision should be upheld because the Parks have asserted the same meritless claims that have been repeatedly dismissed in the lower courts and have asserted a new claim for the first time on appeal.

A. Review Should Not be Granted Because the Parks Fail to Establish a Ground on Which Review Can be Granted

The Parks did not meet their burden of proving that this case is appropriate for review. Review will be granted only if the petitioner demonstrates that at least one of the following grounds for review is met: (1) the decision conflicts with a Supreme Court

decision; (2) the decision conflicts with another Court of Appeals decision; (3) the decision involves a significant question of constitutional law; or (4) the decision raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b) (emphasis added).

Here, the Parks did not demonstrate that review should be granted based on one of the grounds for review. Rather, the Parks requested review on the basis of a "pillars of law" theory, which claims that the Supreme Court "jealously defends" cases that come before it to maintain its "desired position" on certain pillars of law, including legal description for real property and the parol evidence rule. Park Petition, p. 9-10. Although the Parks correctly state real estate contracts must have legal descriptions, this "pillar of the law" does not satisfy a ground for review. Review should not be granted on the basis of the parol evidence rule pillar because it is unfounded in this case and it is raised for the first time on appeal. Accordingly, the Parks' "pillars of law" theory does not satisfy any of the grounds for review.

Even if the Parks had argued one of the grounds, review should still be denied because the McNaughton decision does not

fall within the grounds for review. The McNaughton decision does not conflict with a decision of the Supreme Court or another Appellate Court because it adheres to the statutes and case law relevant to this case. Second, this case does not involve a significant question of constitutional law; it involves a contract dispute between the Parks and TMG. Additionally, the McNaughton decision does not raise an issue of substantial public interest because the case turns on the specific facts related to: the Parks' breach of the 2005 PSA and failure to plead affirmative defenses and the 2005 PSA's satisfaction of the statute of frauds. Therefore, the Court should deny review of the McNaughton decision. Even if review is granted, the McNaughton decision should be upheld.

B. The Denial of Summary Judgment was Proper Because the 2005 PSA is Valid and Satisfies the Statute of Frauds by Properly Referencing a Legal Description

The Court of Appeals properly affirmed the trial court's dismissal of the Parks' motion for summary judgment. The statute of frauds requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010.

Washington law requires "a description of the land sufficiently definite to locate it without recourse to oral testimony" or "a reference to another instrument which does contain a sufficient legal description". Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960) (citing Bingham v. Sherfey, 38 Wn.2d 886, 234 P.2d 489 (1951)). The legal description of property in a contract can be ascertained by incorporating other documents by reference into that contract. Wash. State Major League Baseball Stadium Pub. Facilities v. Huber, 176 Wn.2d 502, 517, 296 P.3d 821 (2013) ("In general, '[i]f the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.'") (quoting Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 801, 225 P.3d 213 (2009); W. Wash. Corp. of Seventh Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494, 7 P.3d 861 (2000) ("Incorporation by reference allows the parties to 'incorporate contractual terms by reference to a separate... document which is unsigned.'") (quoting 11 Willston on Contracts § 30:25, at 233-34 (4th ed. 1999)). The document that is incorporated by reference does not need to physically be attached

to the contract. Knight v. Am. Nat'l Bank, 52 Wn. App. 1, 4-6, 756 P.2d 757 (1988) (finding that lease complied with statute of frauds even though the exhibits to which it referred, and which contained the legal description, were not physically attached to the lease).

Here, the 2005 PSA clearly and unequivocally incorporated the Park Addendum by reference:

> In any event, if there arise any dispute over the scope of the applicable clause(s) on Specific terms of Addendum, 1 through 14, (dated 2/19/2005)[] Pre[v]ious agreement executed on September 8, 2004, page 1 through 13, super[s]edes and replaces any provision on the topics contained in purchase and sale agreement proposed and executed on February 19, 2005.

CP 800, 836. In contrast to the Parks' claim, Addendum B is part of the 2005 PSA, despite the 2005 PSA not referring to Addendum B on its face, because it corresponds with a description of one of the documents that the 2005 PSA expressly references as an attachment to the 2005 PSA. Park Petition, p. 12; CP 827. Thus, Addendum B properly references the Park Addendum. Respondent's Appellate Br., Ex. 4.

Contrary to the Parks' claims, the Parks and TMG knew the term "previous agreement" referred to the Park Addendum and all

parties were aware of the relationships of the documents and the effect of signing Addendum B. In fact, Dr. Park insisted that the Park Addendum be incorporated into the 2005 PSA. RP 175:18-178:19; 195:16. The Parks' claim that the agreements were not executed on certain dates or attached to the contract fails because parties can incorporate contractual terms by referencing an unsigned document that is not physically attached to the contract. Park Petition, p. 12; W. Wash. Corp., 102 Wn. App. at 494; Knight, 52 Wn. App. at 4-6. Therefore, the 2005 PSA complied with the statute of frauds because the 2005 PSA properly incorporated the Park Addendum that contains legal descriptions for each of the Parks' parcels. Thus, the Parks' summary judgment motion was properly dismissed.

C. The Parks Waived the Statute of Frauds Defense by Failing to Affirmatively Assert It in Any of Their Responsive Pleadings

The Court of Appeals appropriately held that the Parks waived the statute of frauds defense. A defendant must affirmatively allege the statute of frauds in a pleading to a preceding pleading. Civ. R. 8(c). Affirmative defenses are generally waived unless the defense is: (1) affirmatively pleaded;

(2) asserted in a CR 12(b) motion; or (3) tried with the parties' express or implied consent. Henderson v. Tyrrell, 80 Wn. App. 592, 624, 910 P.2d 522 (1996) (holding it was not an abuse of discretion to deny jury instructions on a defense defendant failed to raise in responsive pleadings because it would require parties to engage in substantial new discovery right before trial).

Here, the Parks did not affirmatively plead, assert in a 12(b) motion, or agree with TMG to try the statute of frauds defense. CP 734-812. Rather, the Parks actually confirmed the 2005 PSA's validity in its answer by claiming that TMG had repudiated and breached the contract. CP 744 (¶6.2), 786 (¶6.2). Division I confirmed the Parks' waiver of this defense by comparing the Parks to the Defendant in Henderson. McNaughton at 4. Similar to the Defendant in Henderson, the Parks had ample time to assert the statute of frauds defense in its responsive pleadings, but chose not to until shortly before trial and after discovery had concluded. Henderson, 80 Wn. App. at 625. Thus, the Parks waived the statute of frauds defense by not raising it until they moved for summary judgment.

D. The Parks' Parol Evidence Argument is Unfounded

For the first time, the Parks argue that the parol evidence rule bars the legal descriptions in the Park Addendum from being incorporated into the 2005 PSA. The Parks may not raise this argument for the first time in their petition for review, and the court should not consider it. RAP 2.5(a); Bankston v. Pierce County, 174 Wn. App. 932, 941, 301 P.3d 495 (2013).

Regardless, the Parks' argument fails on the merits. The parol evidence rule is inapplicable to incorporating the legal descriptions in the Park Addendum by reference in the 2005 PSA because the Park Addendum is part of the agreement incorporated by reference. "Parol evidence is admissible...for the purpose of ascertaining the intention of the parties and properly construing the writing." DePhillips v. Zolt Const. Co., Inc., 136 Wn.2d 26, 32, 959 P.2d 1104 (1998) (en banc) (quoting Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-89, 147 P.2d 310 (1944))). Parol evidence cannot be used to add to, subtract from, modify, or contradict the terms of a fully integrated written contract. DePhillips, 136 Wn.2d at 33. If a contract is unenforceable under

the statute of frauds, a buyer in a land sale cannot recover restitution if the vendor is ready, willing, and able to perform the contract. Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 587, 305 P.3d 230 (2013) (en banc).

Here, the parol evidence rule does not apply. The McNaughton decision makes it clear that the intentions of the Parks and TMG were not at issue by stating, "The parties signed Addendum B, demonstrating that they knew of and assented to its terms." McNaughton at 7. Additionally, parol evidence is not necessary to properly construe the 2005 PSA or any other agreements between the Parks and TMG. As Division I states, "The language of Addendum B clearly and unequivocally incorporates a previous agreement." Id.

Further, the parol evidence rule is not implicated because the parties did not add, subtract, modify, or contradict any terms relating to the legal descriptions of the property. Rather, the effect of the incorporation by reference is that the legal descriptions of the property are part of the contract and do not change or contradict the terms of the 2005 PSA. Accordingly, the Parks' parol evidence argument is unfounded because TMG properly

incorporated the legal descriptions of the properties by referencing the Park Addendum. Because the 2005 PSA satisfies the statute of frauds and the Parks were not ready, able, and willing to perform under the 2005 PSA, the Parks' parol evidence and restitution arguments fail. Park Petition, p. 16; See Kofmehl, 177 Wn.2d at 587.

E. TMG's Evidence Was Properly Admitted Because TMG Proved the Purpose for Which Each Piece Was Offered

1. The Testimony of the Parks' Former Attorney was Properly Admitted Because Dr. Parks Opened the Door to the Testimony During his Direct Examination

The Court of Appeals correctly held that Han Park waived the attorney client privilege when he testified about communications with his former attorney, Mr. Home. An attorney must not testify about communications between the attorney and the client or the advice given to the client without the client's consent. RCW 5.60.060(2)(a). If a client testifies about the communication with the attorney, the client waives the privilege of confidentiality relating to the communications. State v. Vandenberg, 19 Wn. App. 182, 186, 575 P.2d 254 (1978).

Here, Dr. Park waived the attorney client privilege by testifying on direct examination that Mr. Home had told him that the Parks were entitled to a higher purchase price and that TMG had paid Mr. Home to represent the Parks. RP 476:1-6. The Parks' argument that the trial court violated their rights by ordering Mr. Home to testify is meritless: Dr. Parks voluntarily waived his right. Park Petition, p. 17. Even if Mr. Home had not waived his right, the trial court phrased the questions in such a way that Mr. Homes did not disclose any confidential substantive information in his answers. RP 476:2-6; 598:20-24; 599:2-6, 8-11.

2. The Court Properly Admitted Evidence of the Parks' Prior Real Estate Transaction with Michelle Construction

The Court of Appeals correctly held that the trial court did not abuse its discretion in admitting evidence of the real estate transaction between the Parks and Michelle Construction. Trial courts have broad discretion in ruling on evidentiary matters. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 791 (2000). A trial court's ruling on evidentiary matters will not be overturned on appeal absent a showing of abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert denied, 528 U.S. 922 (1999).

If a witness puts its own credibility at issue, the other party may offer evidence to impeach the witness's testimony. Tamburello v. Dep't of Labor & Indus., 14 Wn. App. 827, 828, 545 P.2d 570 (1976).

Here, Dr. Park put his credibility at issue by testifying during direct examination that he did not have the intent to: (1) list or sell the property in 2004; or (2) sell the property in 2001 because TMG had a copy of the purchase and sale agreement between the Parks and Michelle Construction in 2001. RP 380:6-23; 525:3-6. Thus, contrary to the Parks' argument that TMG offered the evidence to show other acts or character traits, TMG offered the 2001 agreement solely for the purpose of impeaching Dr. Park because the agreement directly contradicted Dr. Park's testimony. Therefore, the trial court properly admitted the 2001 agreement between the Parks and Michelle Construction.

3. The Prior Case Was Admissible Because It Was Offered for the Purpose of Showing a Common Plan or Scheme

The Parks object to the trial court's admission of an appellate decision relating to a prior real estate transaction between the Parks and another plaintiff on the basis that it is irrelevant. Park

Petition, p. 18. Character evidence is inadmissible to prove conformity therewith. See ER 404(a). However, evidence of prior bad acts may be admissible for proving motive, intent, common scheme, plan, or knowledge. ER 404(b); Saldivar v. Momah, 145 Wn. App. 365, 395, 186 P.3d 1117 (2008) (finding that a common scheme or plan can be established using evidence that the defendant committed similar bad acts against similar victims under similar circumstances). For the admissibility of prior bad acts, a trial court first considers the purpose for which the evidence is offered and then balances, on the record, the probative value of the evidence against its potential for prejudice. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

Here, TMG did not offer the appellate opinion to prove conformity, but rather to prove the Parks use a common scheme or plan for entering into real estate contracts with developers and subsequently attempting to enforce new terms. The Parks committed similar bad acts (breaching contracts) against similar victims (TMG and other developers) and under similar circumstances (parties have agreement and new terms are introduced at the last minute as a prerequisite for the Parks to

perform under the agreement). See Saldivar, 145 Wn. App. at 395. The appellate decision clearly illustrates this common scheme or plan that the Parks utilize in real estate transactions with developers. The probative value of the appellate decision greatly outweighs its prejudicial effect because it was offered for the limited purpose of proving common scheme or plan.

VI. CONCLUSION

The Court should not accept review of the McNaughton decision because none of the grounds upon which review can be granted under RAP 13.4(b) are met. However, even if the Court does accept review, the McNaughton decision should be upheld because the Parks had waived the statute of frauds defense, the 2005 PSA complied with the statute of frauds, and all of the evidence was properly admitted.

DATED this 30 day of June, 2014.

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CERTIFICATE OF SERVICE

I, Jane A. Mrozek, hereby certify that on the 1st day of July, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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- [x] U.S. Mail, postage prepaid
- [ ] Hand Delivered
- [ ] Overnight Courier
- [ ] Facsimile
- [x] Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 1st day of July, 2014, at Seattle, Washington.

Jane A. Mrozek