

No. 52498-8-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

GIG HARBOR NORTH AIRPORT, INC., a Washington Corporation,
Respondent,

vs.

SHANNON WAGNER dba NORTHWEST CABINET & FURNITURE
AND THE MARITAL COMMUNITY OF SHANNON WAGNER AND
CLAIRE WAGNER

Appellant.

BRIEF OF APPELLANT SHANNON WAGNER

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I. INTRODUCTION

This case was tried before a jury. Mr. Wagner and his wife, Ms. Misener, were defendants. Port Orchard Airport, Inc. was the Plaintiff. Mr. Wagner brought counterclaims against the corporation for breach of two contracts. One was an oral lease and the other was a contract for Mr. Wagner to do some construction work for the corporation. During the trial, the corporation's attorneys argued that Ms. Misener was the actual owner of the couple's business, a sole proprietorship and that, therefore, Mr. Wagner had no standing to sue for breach of contract or for any damages. Ms. Misener testified that she authorized Mr. Wagner to do so. The Jury, in instructions which were submitted jointly by the parties, were asked to determine whether Mr. Wagner, personally, and Port Orchard, Airport, Inc. had entered into the contracts. They found that this was the case, determined that there had been a breach of each contract, and awarded damages to Mr. Wagner in the amount of \$329,700.00 on the breach of lease, and \$2,300.00 on the breach of contract regarding the renovation work. After the trial, the Plaintiff's attorneys argued, in a post-trial motion, that the verdict should be vacated because Mr. Wagner lacked standing. As part of the response, Ms. Misener submitted a declaration, citing to Civil Rule 17's indication that standing could be cured by ratification, and ratifying the counterclaims. The Court decided that Mr. Wagner did not have standing, rejected Ms. Misener's ratification, and vacated the verdict. This appeal challenges that decision.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in finding that Mr. Wagner did not have standing to bring his counterclaims for breach of contract when the Jury had found, as a matter of fact that Mr. Wagner was a party to the contracts he sought to enforce.
2. The Superior Court erred in finding that Ms. Misenar, the person who the Court found was the real party in interest as to Mr. Wagner's successful breach of contract claims, could not cure the defect by ratifying Mr. Wagner's actions in trial and post-trial in a declaration submitted for that purpose.

III. APPELLANT'S STATEMENT OF THE ISSUES

1. Where a jury finds that an individual was a party to a contract, does that individual have standing to sue the other party to the contract for a breach of the contract?
2. Where a party raises the issue of standing Pursuant to Civil Rule 17 after a verdict is rendered, does the rule allow the real party in interest to ratify the action and cure any defect as to standing?

IV. APPELLANT'S STATEMENT OF THE CASE

Port Orchard Airport, Inc. (its name was later changed to Gig Harbor North Airport, Inc.) is owned by Danny Schnitzer. The corporation sued Mr. Wagner and his wife, Ms. Misenar, to collect on a note and to

collect back rent on a lease. Mr. Wagner counterclaimed, alleging that he entered into two contracts with Mr. Schnitzer and his corporation which the corporation breached. The first was for a lease of some commercial space. The second was for Wagner to perform some renovation work on a commercial space owned by Mr. Schnitzer's corporation. Mr. Wagner sued the Port Orchard Airport, Inc. in counterclaim, alleging that it breached the lease and that it had not paid him for the work that he did on the property.

During the trial, Port Orchard Airport Inc.'s lawyers argued that the sole proprietorship technically belonged to Ms. Misenaar and not Mr. Wagner. Mr. Wagner and Ms. Misenaar had created a document prior to their marriage, transferring the assets of Mr. Wagner's sole proprietorship to Ms. Misenaar. After their marriage, Ms. Misenaar obtained a UBI number and asserted that she was the sole owner of the business, a sole proprietorship, so she could deal with tax issues on behalf of the business. As a result, the Corporation's lawyers argued, Mr. Wagner, himself, had no right to make a contract or to sue for damages if one were breached. Immediately prior to the trial, the Plaintiff's attorneys produced a brief challenging standing, but then chose not to pursue the motion. During the trial, after both parties had rested, the Plaintiff's attorneys again, told the Court that they wanted to raise the standing issue, but then changed their minds and chose not to do so, arguing the issue to the jury during closing instead.

The question of whether Mr. Wagner had actually entered into an oral lease and an oral contract regarding the work he did on the building was put to the jury via instructions that both parties submitted to the Court, jointly. (CP 375-405, Court's Jury Instructions) Specifically, the jury was asked to determine whether Mr. Wagner had proven, by a preponderance of the evidence, that he entered into a contract with Port Orchard Airport, Inc. and whether that contract was breached. (See Instructions 5 and 13 at CP 385 and 393-394) The Jury was asked to determine whether the breach resulted in damages to Mr. Wagner, and the amount of those damages. The Jury found that Mr. Wagner had entered into a contract with Port Orchard Airport, Inc., that Port Orchard Airport, Inc. had breached the contract, and that Mr. Wagner had suffered damages. The Jury awarded \$329,700.00 on the breach of lease claim and \$2,300.00 on the breach of contract claim regarding the work that Mr. Wagner had performed on a building. (CP 407)

After the verdict was rendered, the Plaintiff brought a post-trial motion, arguing that Mr. Wagner did not have standing to pursue the breach of contract claims. In response, Ms. Misenar submitted a declaration, specifically ratifying Mr. Wagner's pursuit of the counterclaims. (CP 513-514). The Court found that Mr. Wagner did not have standing to bring the breach of contract claims on behalf the business and vacated the jury verdict as to both causes of action. (CP 160)

V. STANDARD OF REVIEW

The issue before the Court in this appeal is whether Mr. Wagner had standing to sue Port Orchard Airport, Inc. for breach of two contracts. The issue of standing is reviewed de novo by appellate courts. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011).

VI. ARGUMENT FOR REVERSAL

C. The Jury found that Shannon Wagner entered into a contracts with Port Orchard Airport, Inc. Therefore Shannon Wagner, as a party to the contracts had standing to do enforce them.

It is well settled that "[a] party to a contract is entitled to enforce it and to sue in his own name." *Kim v. Moffett*, 156 Wn. App. 689, 700, 234 P.3d 279 (2010). Standing refers to the demonstrated existence of "an injury to a legally protected right." *Sprague v. Sysco Corp.*, 97 Wash.App. 169, 176 n. 2, 982 P.2d 1202 (1999). "The real party in interest is the person who possesses the right sought to be enforced." *Id. Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wash.App. 568, 295 P.3d 258 (Wash. App., 2013) In his Answer Shannon Wagner made two counterclaims arising out of oral agreements with Danny Schnitzer, the owner of the Plaintiff corporation. The first was an oral lease. The second was an oral agreement whereby Wagner was to perform work on one of the Plaintiff's buildings to prepare it for a new tenant. (CP 55-60) Wagner was suing the Plaintiff for breaching the oral agreement he made with Mr. Schnitzer. The Plaintiff offered joint jury instructions with the Defendant.

The joint jury instructions as to the breach of lease and breach of contract claim stated, in relevant part:

INSTRUCTION 5

Mr. Wagner has the burden of proving each of the following propositions on his claims for breach of contract:

- 1) That Port Orchard Airport, Inc. entered into a contract with Mr. Wagner.
(CP 385)

The jury, answering on a special verdict form, found in favor of Mr.

Wagner on the breach of lease claim and on the breach of contract claim.

(CP407-409) Therefore, the Jury found that Port Orchard Airport, Inc.

entered into a contract with Mr. Wagner. There is no standing issue here

because the jury was instructed to consider whether Mr. Wagner was party

to a contract and whether that contract was breached. It found that he was

party to the contract and that the contract was, in fact breached by Port

Orchard Airport, Inc.

Likewise, the Jury was instructed to consider whether Mr. Wagner suffered damages as a result of the breach of the contract to which he was a party. Here is the relevant portion of Instruction 13 that was given to the jury in this case:

INSTRUCTION 13

In order to recover actual damages, the Defendant, Shannon Wagner had the burden of proving that Plaintiff Port Orchard Airport, Inc. breached a contract with him, that the Defendant incurred actual damages as a result of the breach, and the amount of those damages.

(CP 393-394)

The jury not only found that Shannon Wagner was party to a contract with Port Orchard Airport, Inc. which had been breached, but, when instructed to determine whether Shannon Wagner, individually, suffered damages as a result of the breach, found that he had, returning a verdict for \$329,700.00 as to the breach of lease and \$2,300.00 on the breach of contract claim, as well as attorney's fees.

Where the Jury was specifically asked to determine whether one party entered into a contract with another party and finds in the affirmative, the question as to who the parties to the contract were is settled and so is the issue of who has standing to enforce the contract. In this case, the Jury found that Mr. Wagner established "That Port Orchard Airport, Inc. entered into a contract with Mr. Wagner," thus settling the issue of whether Mr. Wagner had standing. If he and the Plaintiff entered into a contract, then he had standing to enforce it. *Kim v. Moffett*, 156 Wn. App. 689, 700, 234 P.3d 279 (2010). (It is well settled that "[a] party to a contract is entitled to enforce it and to sue in his own name.") In this case, the jury found that Shannon Wagner suffered injury as a result of the breach of the contract by the Plaintiff and awarded him those damages. If the Jury found that Plaintiff breached a contract it had entered into with Shannon Wagner, and that Shannon Wagner suffered damage as a result, then Shannon Wagner has the right to collect those damages.

It is important to note that the Court was not presented with a motion for JNOV and therefore was not asked to consider whether the jury

verdict should be overturned. The Plaintiff basically attacked jurisdiction through standing. If the Court found that Mr. Wagner did not have standing to pursue the interests of the sole proprietorship that Ms. Misenar “owned,” there would be no impact on the verdict in this case. Such a finding would be completely moot as applied to the verdict. The jury did not find that Northwest Cabinet & Furniture entered into the contracts. It did not find that Claire Misenar entered into the contracts. The Jury found that Shannon Wagner entered into the contracts with the Plaintiff and that Shannon Wagner was injured when the Plaintiff breached them. The Court was in error to vacate the Jury’s verdict when there was no finding that the verdict’s finding that Shannon Wagner was a party to the contracts was unsupported by the record.

D. The Rule on Standing, Civil Rule 17, allows for ratification, which was done in this case.

Standing is addressed in the Washington Civil Rules. CR 17(a) provides in relevant part: “Every action shall be prosecuted in the name of the real party in interest.... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” At the trial of this case, Ms. Misenar appeared and testified that she was clearly ratifying Mr. Wagner’s pursuit of his claims

for breach of contract against the Plaintiff. When Plaintiff, in its post-verdict motion, raised the issue of standing, she submitted a declaration, specifically ratifying his actions, again. It was even titled “Declaration of Claire Misener Ratifying Counterclaims” just so that there could not possibly be any misinterpretation of its intent. (CP 513-514) Ms. Misener declared:

“As I testified at trial, Shannon Wagner had my permission to run the business and make contracts on behalf of the business even after it was transferred to me. He had my permission to do anything he deemed necessary for the business. The decisions we make for the business are made jointly. We are a team. After our marriage, we invested most of the money we “made” in the business back into it. I thought It was clear to the Plaintiff that I fully agreed with Shannon bringing the counterclaims that he did against the Plaintiff. But in light of the Plaintiff’s motion, I am submitting this declaration to make it even clearer that I fully ratify and agree with Shannon Wagner’s counterclaims against the Plaintiff. Further, I ratify and agree with the lawsuit and the trial in this matter. I ratify and agree with the jury’s verdict and that the all of the prties, including the plaintiff, NORTHWEST CABINET & FURNITURE and myself should be bound by this decision.

(CP ___ Declaration of Misener)

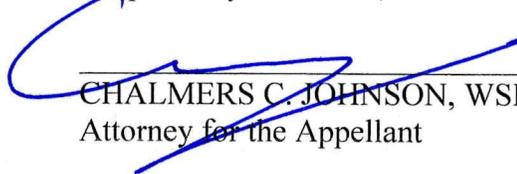
As argued above, the Jury found that Mr. Wagner, himself, entered into two contacts with the Plaintiff which were breached and that Mr. Wagner suffered damages. Therefore, the issue of standing was settled by verdict in Mr. Wagner's favor. However, even if the Court found that Mr. Wagner's wife was actually the owner of a sole proprietorship and this raised some issue as to standing, that issue was fully and finally addressed and determined, per the plain language of Civil Rule 17, when Ms. Misenar ratified the counterclaims brought by Mr. Wagner.

VII. CONCLUSION

Overturing a jury verdict is something that the Courts are, and should be, loathe to do. In this case, the jury was well educated during the trial on the issues. Port Orchard Airport's attorneys argued vehemently to the jury over and over again that Shannon Wagner was not the technical owner of the sole proprietorship and that, as a result he could not have entered into a contact with Mr. Schnitzer, the owner of Port Orchard Airport, Inc. and he could not, personally, have suffered any damage by any breach thereof. The Judge, during the trial, instructed the jury that he found that Mr. Wagner was not the actual owner of the sole proprietorship and that Ms. Misenar was. There can be no doubt that the jury understood this. There can also be no doubt that the Jury was given instructions, joint instructions, submitted by both parties, in which they were asked to determine whether Shannon Wagner entered into two contacts with Port Orchard Airport, Inc. They found that he had. As a result, Mr. Wagner had

the right to enforce the contracts to which he was a party. Even if the Judge found, after the fact, that he did not, the Civil Rule which governs standing allows ratification after the fact to cure the issue, which was done. Based on the argument set forth in this brief, and the record presented to the Court, he Appellant respectfully requests that the Appellate Court reverse the Order of the Trial Court, reinstate the Jury's verdict, and remand this case to the Superior Court.

Respectfully submitted,



CHALMERS C. JOHNSON, WSBA # 40180
Attorney for the Appellant

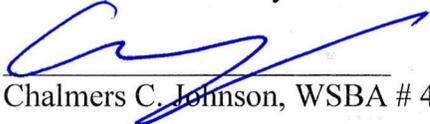
CERTIFICATE OF MAILING

SIGNED at Port Orchard, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 11th day of March, 2019, the document to which this certificate is attached, Initial Brief of Appellant, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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And was concurrently emailed to counsel at DJG@witherspoonkelley.com


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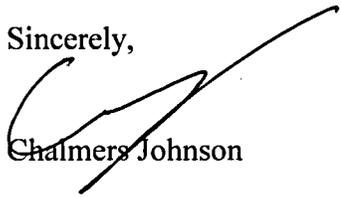
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RE: *Gig Harbor North Airport, Inc. v. Shannon Wagner*
No. 52498-8-II

Dear Clerk of Court,

Please find enclosed the original Brief of Appellant Shannon Wagner. Thank you.

Sincerely,



Chalmers Johnson

Encl.: Appellant's Brief
Cc: Daniel Gibbons, Timothy Lawlor
CJ: gj

RECEIVED

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