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Court of Appeals Cause No. 52498-8-II  
Superior Court Cause No. 15-2-02133-0

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

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PORT ORCHARD AIRPORT, INC.,

Plaintiff/Respondent

v.

SHANNON WAGNER dba NORTHWEST CABINETS & FURNITURE,  
and the MARITAL COMMUNITY OF SHANNON WAGNER AND  
CLAIRE MISENAR,

Defendant/Appellant

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**RESPONDENT'S OPENING BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. RESPONDENT'S ASSIGNMENT OF ERROR .....1

III. STATEMENT OF THE CASE.....1

    1. Claire Misenaar Bought Her Business from Shannon Wagner and Became its Owner .....2

    2. Wagner and Misenaar Change Tacts on Eve of Trial and Misenaar Disavows the Counterclaims in Open Court.....4

    3. Counsel for Defendants Expressly Acknowledges that Plaintiff Can Challenge Wagner's Standing to Sue After Jury Returns Verdict .....6

    4. The Court Correctly Rules that the Counterclaims Asserted by Wagner Belonged to Misenaar .....6

    5. The Court Correctly Rejected Ms. Misenaar's Post Trial Attempt to "Ratify" Claims Disavowed at Trial .....8

IV. ARGUMENT .....9

    A. Rules Applicable to Appeals ..... 9

    B. Standard of Review..... 11

    C. Wagner Lacked Standing to Assert the Counterclaims ..... 11

        1. Wagner has No Interest in, No Rights Under, and has No Standing to Enforce any Counterclaims at Issue .....12

2. A Jury Verdict Does Not Establish Standing and Cannot Cure the Court's Lack of Jurisdiction.....	14
D. Miselar Cannot Ratify Under CR 17 .....	16
E. Wagner Should Be Judicially Estopped .....	19
F. Port Orchard Airport is Entitled to Attorney's Fees and Costs .....	21
V. CONCLUSION.....	22
CERTIFICATE OF SERVICE .....	24

## TABLE OF AUTHORITIES

	<b>Page</b>
 <b>Cases</b>	
<i>American Legion Post 32 v. Walla Walla,</i> 116 Wn.2d 1 (1991) .....	10, 16
<i>American Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank,</i> 115 Wn.2d 307 (1990) .....	17
<i>Arkison v. Ethan Allen, Inc.,</i> 160 Wn.2d 535 (2007).....	19
<i>Beal for Martinez v. City of Seattle,</i> 134 Wn. 2d 769 (1998) .....	17, 18
<i>Bouten-Perkins Lumber Co. v. Huston,</i> 81 Wn. 678 (1914).....	1, 14
<i>City of Snoqualmie v. King Cnty. Executive Dow Constantine,</i> 187 Wn.2d 289 (2016) .....	12
<i>Clarkson Co. Ltd. v. Rockwell Int'l Corp.,</i> 441 F. Supp. 792 (N.D. Cal. 1977) .....	17
<i>Cooper v. City of Tacoma,</i> 47 Wn. App. 315 (1987).....	11
<i>Crosby v. City of Spokane,</i> 137 Wn.2d 296 (1999) .....	11, 14
<i>Denman v. Richardson,</i> 284 F. 592 (1921).....	15
<i>Escude ex rel. Escude v. King County Pub. Hosp. District No. 2,</i> 117 Wn. App. 183 (2003) .....	9
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.,</i> 106 Wn.2d 826 (1986) .....	21
<i>Gross v. Sunding,</i> 139 Wn. App. 54 (2007).....	14

<i>Hamilton v. State Farm Fire &amp; Cas. Co.</i> , 270 F.3d 778, (9 <sup>th</sup> Cir. 2001) .....	19
<i>In re Det. Of Ambers</i> , 160 Wn.2d 543 (2007) .....	11
<i>In re Estate of Alsup</i> , 181 Wn. App. 856 (2014) .....	13
<i>In re Marriage of Skarbek</i> , 100 Wn. App. 444 (2000) .....	13
<i>Johnson v. Allstate Ins. Co.</i> , 126 Wn. App. 510 (2005) .....	14
<i>Johnson v. Si-Cor, Inc.</i> , 107 Wn. App. 902 (2001) .....	19
<i>Kim v. Moffett</i> , 156 Wn. App. 689 (2010) .....	14, 15
<i>Louisiana-Pac. Corp. v. Asarco, Inc.</i> , 131 Wn.2d 587 (1997) .....	22
<i>Mitchell v. Doe</i> , 41 Wn. App. 846 (1985) .....	13, 14
<i>Mullen v. Alaska Packers' Ass'n.</i> 277 F. 967 (W.D. Wash. 1921).....	15
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	19
<i>Postema v. Snohomish County</i> , 83 Wn. App. 574 (1996).....	13
<i>Primark, Inc. v. Burien Gardens Assocs.</i> , 63 Wn. App. 900 (1992) .....	12
<i>Rinke v. Johns-Manville Corp.</i> , 47 Wn. App. 222 (1987) .....	17
<i>Riverview Community Group v. Spencer &amp; Livingston</i> , 181 Wn.2d 888 (2014) .....	12
<i>Roger Crane &amp; Associates, Inc. v. Felice</i> , 74 Wn. App. 769 (1994) .....	10, 16

<i>Safe Acquisition, LLC v. GF Protection Inc.</i> , No. 77507-3-I, 2019 WL 1370430 at *3 (Washington Court of Appeals, Div. I, March 25, 2019) (Unpublished) .....	12
<i>Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n</i> , 116 Wn.2d 398 (1991) .....	22
<i>Sheets v. Benevolent &amp; Protective Order of Keglers</i> , 34 Wn.2d 851 (1949) .....	11
<i>Spokane Airports, Inc. v. RMA, Inc.</i> , 149 Wn. App. 930 (2009) .....	11, 14
<i>State v. Sims</i> , 171 Wn.2d 436 (2011).....	9
<i>Temple v. Feeney</i> , 7 Wn. App. 345 (1972) .....	11
<i>Use and Benefit of Wulff v. CMA, Inc.</i> , 890 F.2d 1070 (9th Cir., 1989) .....	17
<i>West v. Thurston County</i> , 144 Wn. App. 573 (2008).....	11, 12, 14

**Statutes**

RCW 26.16.010 .....	13
RCW 4.44.080 .....	1, 14

**Other Authorities**

6A Wright et al., Federal Practice and Procedure § 1555.....	17
--	----

**Rules**

CR 17 .....	1, 10, 16, 17, 18
CR 17(a).....	10, 12, 17
FRCP 17(a) .....	17
RAP 18.1.....	1, 22
RAP 2.5(a) .....	11
RAP 2.5(a)(2).....	13
RAP 3.1.....	1, 11, 16

## **I. INTRODUCTION**

Jurisdiction is a matter of law determined by the court. RCW 4.44.080; *Bouten-Perkins Lumber Co. v. Huston*, 81 Wn. 678 (1914). A jury verdict does not create jurisdiction where jurisdiction does not exist. The trial court properly dismissed the counterclaims because Shannon Wagner lacked standing, and therefore the court lacked jurisdiction.

Likewise, Claire Misenar cannot ratify her husband's attempt to prosecute counterclaims on his own behalf because she had disavowed the counterclaims in open court during the trial. There was no understandable mistake and it was never difficult determine who the proper counterclaimant should have been as required for ratification under CR 17. In addition, as to the ratification argument, Misenar is not a party to this appeal, and Wagner is not an aggrieved party within the meaning of RAP 3.1.

No error was committed and the trial court should be affirmed. Port Orchard Airport is entitled to its fees and costs under RAP 18.1, the Lease, Promissory Note and applicable case law.

## **II. RESPONDENT'S ASSIGNMENT OF ERROR**

1. Whether the trial court's decision to dismiss Wagner's counterclaims due to lack of standing and lack of jurisdiction should be affirmed?

## **III. STATEMENT OF THE CASE**

On October 1, 2006, Shannon Wagner, dba Northwest Cabinets & Furniture signed a Lease with Gig Harbor North Airport, Inc. (now

known as Port Orchard Airport, Inc. "Port Orchard Airport"). CP 892-924. On June 1, 2011, Wagner executed a Promissory Note whereby he promised to pay Port Orchard Airport \$46,619.00, plus interest. CP 887-891. Port Orchard obtained judgments against Shannon Wagner and Claire Misenar on the Lease and Promissory Note, which are not at issue in this appeal. CP 596-598, 777. Fees and costs were also awarded to Port Orchard Airport. CP 801-807.

*1. Claire Misenar Bought Her Business from Shannon Wagner and Became its Owner.*

On January 1, 2013, Wagner sold all of the assets, intellectual property and trade names of Northwest Cabinets & Furniture ("the Business") to Claire Misenar pursuant to a Simple Asset Purchase Agreement (the "Purchase Agreement"). CP 850-857. The Purchase Agreement provided that Misenar, in consideration for a single payment of \$20,000, would receive "all of the assets of [Wagner] used or useful in the operation of the Business," including, but not limited to: (i) its books and records; (ii) computers and software; (iii) fixtures and furniture; (iv) phone system; (v) the Business' trade name and all other intellectual property; (vi) telephone number; (vii) internet domain name; (viii) social media accounts; and (ix) all inventory of the Business. CP 855-856. Importantly, this transfer took place **before** Wagner and Misenar were married. CP 608.

Misenar claimed the Business's income and expenses on her 2013 and 2014 federal tax returns. CP 858-865; CP 866-872. In addition, in the spring of 2015, when corresponding with the Kitsap

County Assessor regarding a tax dispute, Misenaar repeatedly referred to the Business as hers, and referred to Mr. Wagner as the "former owner" of the Business. CP 950, 954, 955-956, 959. Curiously, she omitted that she was married to Mr. Wagner at the time she wrote the letters. Likewise, Misenaar made occasional rent payments to Port Orchard Airport under the Lease, as well as payments on the Promissory Note, even though she had not signed either document. CP 873-883.

Misenaar's trial testimony (in addition to the documentary evidence described above) makes her ownership of the Business and Wagner's lack of standing abundantly clear.

Q. And directing your attention to the upper left corner, it says North West Cabinets and Furniture, that's your business, correct?

...  
A. Yes.

...  
Q. And we established you are the owner of Northwest Cabinets and Furniture, yes?

A. Yes.

CP 633-634.

...

Q. But you owned the business?

A. The assets. Yes, the business.

CP 661.

She also testified affirmatively that Wagner no longer owned the Business:

Q. Who was the previous owner?

A. Shannon.

CP 680.

The evidence that Misenar was the owner of the Business, and the proper party to bring a counterclaim, was so overwhelming that on the second day of trial she personally stipulated to entry of judgment under the successor liability doctrine and was dismissed from the case. CP 597-598.

In discovery Misenar stated that she entered into an alleged oral lease with Port Orchard Airport, and that Misenar made payments on this alleged lease. CP 461-462. Likewise, her discovery responses stated **her business** had performed work which was not paid that formed the basis of an unjust enrichment or quantum meruit claim. CP 462.

Notably, as the trial court pointed out, there is no evidence of any community property agreement or similar agreement transferring the Business to the Wagner-Misenar marital community. CP 608.

*2. Wagner and Misenar Change Tacts on Eve of Trial and Misenar Disavows the Counterclaims in Open Court.*

Wagner and Misenar's counterclaims repeatedly allege the "**Defendants**" (plural) were asserting counterclaims for breach of an alleged oral lease with Port Orchard Airport, and for breach of contract and a quantum meruit and/or unjust enrichment claim arising from alleged failure to pay for work done on Port Orchard Airport, Inc.'s property. CP 54-59. Wagner and Misenar's discovery responses indicated that Wagner was acting as an agent for "**the Defendants**" (plural) in negotiating the alleged oral lease with Port Orchard Airport.

CP 460. However, on the eve of trial, Wagner and Misenar informed Port Orchard Airport that **Wagner alone** was pursuing the counterclaims. CP 456. The following business day, which was the first day of trial, Port Orchard Airport timely raised Wagner's lack of standing along with its motions in limine. CP 520-525.

In response to questions from the trial Court, Counsel for Wagner and Misenar described the party bringing the counterclaims as follows:

THE COURT: And okay, now, I characterize it as Defendant Shannon Wagner has made these counterclaims. Is it your position that those counterclaims are being made by both him and Claire Misenar or Claire Wagner, or just by him or just by her?

MR. JOHNSON: It's by Shannon. Because Shannon—

THE COURT: I'm sorry?

MR. JOHNSON: It is by Mr. Wagner....

CP 543-544.

Counsel for the defendants continued:

MR. JOHNSON: **Ms. Misenar never wanted anything to do with this case.** This was between Mr. Wagner and Mr. Schnitzer. And it has always been that way. Shannon – Mr. Wagner is the one pursuing his counterclaims.

CP 545 (emphasis added).

...

THE COURT: Is that accurate? Shannon Wagner is the counter-claimant?

MR. JOHNSON: Right.

CP 593.

3. *Counsel for Defendants Expressly Acknowledges that Plaintiff Can Challenge Wagner's Standing to Sue After Jury Returns Verdict.*

The parties and the court decided to proceed with the trial with the understanding that the standing issue could be raised in the future. CP 764. This understanding was stated by Wagner and Misenar's counsel as follows:

I thought that we had a deal. And the deal was these guys want to bring the standing issue. And I offered to let them bring the standing issue by a continuance and they declined. And I thought that meant that we were going to present this case to the jury and let them decide **and then they could attack the verdict if they didn't get a verdict to their liking on the standing issue, and that the standing issue would then be preserved until after trial.**

CP 617 (emphasis added).

4. *The Court Correctly Rules that the Counterclaims Asserted by Wagner Belonged to Misenar.*

Objections on standing were made continuously throughout the trial. This culminated in an evidentiary ruling from the trial court as follows:

Actually, I'm reconsidering my ruling. And I think Mr. Lawlor is right. The defendants can't have their cake and eat it too. **And this business was sold, and it's been treated as her business.** And so if a contract with the

business was not executed or performed, **the business would have the claim on that, which is Ms. Misenar.** It's not Mr. Wagner. He's simply been basically an employee of the business and not the owner of it. **And it's a sole proprietorship.** So anyway, I'm going to reverse my decision and I'll grant the objection. The objection is sustained. Okay.

CP 607-608 (emphasis added).

The trial court continued and found:

**She bought the business before they were married,** and so she owned it before they were married. And that would have been her separate property. And nobody has shown any document saying she signed over any kind of bill of sale or other document to Mr. Wagner after the marriage to convert that to community property. . . . That's what I think. In fact, that's what I know. That's the evidence that I've seen or not seen and given that, that's the law.

CP 608 (emphasis added).

Defendants' counsel continued to try and submit evidence that Wagner owned the business. After objection, the Court found that any claims of the business were Misenar's claims:

Okay. I'm just going to say this once and clear the air. The -  
- **my ruling is, is that this business is her separate property** from all the evidence that's been shown and nothing has been shown to the contrary. **If there's any claims that business has, they would be her claims.** Now, he can be an agent. And – she could have authorized him to do anything, but does not make him an owner. He can sign checks. He can work in the shop. He can make contracts. He can do all these things. Fine. **But that does not make him the owner of that business.** She is; based on the evidence that's been presented. . . .

But him having that authority and stuff **does not make him the owner** of that business or give him the standing to

make -- make the claim -- make the claims as a business owner. He's simply acting as her agent. . . . (emphasis added).

All I'm ruling is -- **the objection was the evidence is not relevant because this business' claim is not his to assert.**

CP 610-613 (emphasis added).

After further argument, counsel for the defendants asked directly if the Court was making a ruling on standing and the Court responded:

I guess so. I already outlined how **I did not see how he had standing in connection with these contract claims.**

CP 619 (emphasis added).

*5. The Court Correctly Rejected Ms. Misenar's Post Trial Attempt to "Ratify" Claims Disavowed at Trial.*

Following the jury verdict in favor of Wagner, Port Orchard Airport filed an Objection and Motion to Dismiss for Lack of Standing (the "Motion"). CP 431-443. Wagner and only Wagner objected to the Motion. CP 472. However, Misenar submitted a declaration whereby she attempted to ratify Wagner's pursuit of her counterclaims. CP 513-514. Her declaration states that she is the owner of the Business. CP 513.

The trial court granted the Motion and dismissed the counterclaims with prejudice based on Wagner's lack of standing. In doing so, the trial court found:

1. Ms. Misenar was the owner and sole proprietor of Northwest Cabinets and Furniture from January 1, 2013 forward, and, as such, was the real party in interest for the counterclaims asserted against Port Orchard Airport, which were based on contract and *quantum meruit*.

2. Mr. Wagner was not the real party in interest.

3. Mr. Wagner did not have standing as a third party beneficiary.

4. Ms. Misenaar disavowed her counterclaims before and during trial.

5. Ms. Misenaar's counsel agreed on the record that Mr. Wagner was only asserting his counterclaims.

6. The Motion was brought in a timely manner and the issue was properly preserved to be ruled upon after trial.

7. The Plaintiff did not invite error, where the standing issue was raised before, during and after trial, and where defense counsel agreed the issue could be raised post-verdict.

CP 775.

Notably, Wagner, and only Wagner, appeals the trial court's decision granting the Motion. CP 793; Brief of Appellant Shannon Wagner. Misenaar has not appealed.

#### **IV. ARGUMENT**

##### **A. Rules Applicable to Appeals.**

Before discussing the merits, it is necessary to reiterate the basic ground rules for appeals. Where an appellant fails to set forth assignments of error and brief issues, such issues are waived. *State v. Sims*, 171 Wn.2d 436, 441-42 (2011); *Escude ex rel. Escude v. King County Pub. Hosp. District No. 2*, 117 Wn. App. 183, 190 n. 4 (2003).

The only assignments of error and issues raised in Wagner's brief are whether the trial court erred in determining that Wagner lacked standing to pursue the counterclaims based on the jury's verdict, and whether the trial court erred in determining that Misenar, after disavowing the counterclaims in open court, could not ratify her husband's pursuit of the counterclaims under CR 17(a). No argument regarding the timeliness of the Motion is raised. Nor is any issue regarding invited error raised. Thus, these issues are waived. Also, no assignment of error or issue was raised regarding the award of fees and costs to Port Orchard Airport. Wagner's notice of appeal regarding attorney's fees and costs was untimely and no motion to allow a late appeal was ever filed. Port Orchard Airport anticipates that Wagner may attempt to cure deficiencies or omissions in his opening brief by raising issues in his reply or at oral argument. He cannot. Any such issues are waived.

Furthermore, contentions not supported by citations to the record and legal authority should not be considered. *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 779 (1994) (citing *American Legion Post 32 v. Walla Walla*, 116 Wn.2d 1, 7 (1991)). Over half of Wagner's Statement of the Case contains no citation to the factual record (Opening Brief, pages 2-3), and should be disregarded. Likewise, very few of the contentions set forth in the appellants' Argument for Reversal are supported by citations to legal authority. In particular, no authority other than CR 17 is cited to support Ms. Misenar's argument that she ratified her husband's pursuit of the counterclaims.

The Court of Appeals should decline to review any issue raised for the first time on appeal. RAP 2.5(a); *In re Det. Of Ambers*, 160 Wn.2d 543, 557 n. 6 (2007). Port Orchard Airport anticipates that Wagner may attempt to overcome deficiencies or omissions in his opening brief by raising new issues not considered at trial. This Court must decline to consider such arguments.

Lastly, Wagner is not the proper party to appeal the trial court's decision that Misenaar could not ratify Wagner's pursuit of the counterclaims. RAP 3.1 provides that only an aggrieved party, whose pecuniary or personal rights are substantially affected may appeal. *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316 (1987) (citing *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855 (1949) and *Temple v. Feeney*, 7 Wn. App. 345 (1972)). By arguing that Misenaar ratified his pursuit of her counterclaims, Wagner acknowledges that Misenaar is the aggrieved party. Yet, Misenaar is not a party to this appeal. Wagner cannot appeal the trial court's decision. This appeal should be dismissed.

**B. Standard of Review.**

Whether a party has standing to sue and whether the court has jurisdiction are questions of law reviewed de novo. *Spokane Airports, Inc. v. RMA, Inc.*, 149 Wn. App. 930, 939 (2009); *West v. Thurston County*, 144 Wn. App. 573, 578 (2008); *Crosby v. City of Spokane*, 137 Wn.2d 296, 301 (1999).

**C. Wagner Lacked Standing to Assert the Counterclaims.**

Under Washington law, a party has standing to raise an issue if

that party has a distinct and personal interest in the issue. CR 17(a) provides “[e]very action shall be prosecuted in the name of the real party in interest”). *See also Riverview Community Group v. Spencer & Livingston*, 181 Wn.2d 888, 893 (2014) (“cases should be brought and defended by the party whose interests and rights are at stake”); *West v. Thurston Cnty.*, 144 Wn. App. 573, 578 (2008) (“[T]he standing doctrine prohibits a litigant from asserting another’s legal right.”).

*I. Wagner has No Interest in, No Rights Under, and has No Standing to Enforce any Counterclaims at Issue.*

To support standing, the interest must be present and substantial rather than expectant or contingent. *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907 (1992). In other words, under the standing doctrine, a party must have suffered an “injury in fact” to have standing because such injury in fact is neither expectant nor contingent. *City of Snoqualmie v. King Cnty. Executive Dow Constantine*, 187 Wn.2d 289, 296 (2016) (stating “injury in fact” is necessary element to establish standing). *See also Primark*, 63 Wn. App. at 907. “Dismissal of a contract action is proper when the litigant is not a party to the contract and thus lacks standing.” *Safe Acquisition, LLC v. GF Protection Inc.*, No. 77507-3-I, 2019 WL 1370430 at \*3 (Washington Court of Appeals, Div. I, March 25, 2019) (Unpublished) (*citing West*, 144 Wn. App. at 576).

Standing is inexorably tied to the jurisdiction of the court. Where a party lacks standing to make a legal claim or counterclaim, a Washington court will lack jurisdiction to consider the merits. *In re*

*Estate of Alsup*, 181 Wn. App. 856, 875 (2014) (citing *Postema v. Snohomish County*, 83 Wn. App. 574, 579 (1996)). Lack of standing and jurisdiction may be raised at any time in a proceeding. “Facts establishing standing are as essential to a successful claim for relief as is the jurisdiction of a court to grant it. Thus, we hold that the insufficiency of a factual basis to support standing may also be raised for the first time on appeal in accordance with RAP 2.5(a)(2).” *Mitchell v. Doe*, 41 Wn. App. 846, 848 (1985).

It is an undisputed fact that Misenar was the owner of the Business from January 1, 2013 forward. The evidence was so overwhelming that Misenar conceded entry of judgment against her based on successor liability despite the fact she did not sign the Lease or the Promissory Note. CP 597-598. There is no question that Misenar, and not Wagner, was the proper party to bring any breach of contract or quantum meruit or unjust enrichment claim.<sup>1</sup>

Importantly, Misenar acquired the Business before she and Wagner were married. CP 608, 610-613. Therefore, the Business was her separate property. RCW 26.16.010; *In re Marriage of Skarbek*, 100 Wn. App. 444, 447 (2000). As stated by the trial court, there was nothing in the record to indicate that the Business was transferred to the marital community. CP 608. There are no facts that support Wagner's standing to assert any counterclaim against Port Orchard Airport. As

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<sup>1</sup> Wagner's argument on page 5 of his opening brief that "In his Answer **Shannon Wagner made two counterclaims** arising out of oral agreements with Danny Schnitzer, the owner of the corporation." is patently false. (Emphasis added). The answer **repeatedly** states that the counterclaims are brought by the **defendants**. CP 54-59.

stated above, jurisdictional facts supporting standing are an essential element to any successful claim. *Mitchell v. Doe*, 41 Wn. App. at 848.

2. *A Jury Verdict Does Not Establish Standing and Cannot Cure the Court's Lack of Jurisdiction.*

Wagner's argument that the jury's verdict somehow creates jurisdiction contradicts the law. Jurisdiction and standing are questions of law, determined by the court, not the jury. *Spokane Airports, Inc.*, 149 Wn. App. at 939; *West*, 144 Wn. App. at 578; *Crosby*, 137 Wn.2d at 301. The Court, not the jury, determines matters of law. RCW 4.44.080; *Bouten-Perkins Lumber Co. v. Huston*, 81 Wn. 678, (1914). See also *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 515 (2005) ("And the court, not the jury, decides questions of law...."); *Gross v. Sunding*, 139 Wn. App. 54, 67 (2007) (jurisdiction is a matter of law, and there is no right to a jury trial on matters of jurisdiction such as valid service of process). The jury's verdict provides no basis whatsoever to argue that somehow Wagner had standing.

Wagner's reliance on *Kim v. Moffett*, 156 Wn. App. 689 (2010) is seriously misplaced. *Kim* deals with the standing of third-party beneficiaries to a contract. *Id.* at 699. The plaintiff in *Kim* was not a real party in interest to the contract but was alleged to be a third-party beneficiary. In order to have standing as a third-party beneficiary under a contract, the party seeking standing must prove that the benefits of the contract flowed directly from the contract to that party. *Id.* at 699. If the benefits were "merely incidental, indirect, or consequential" the third party does not have standing. *Id.* "It is not sufficient that the

performance of the promise may benefit a third person but that it must have been entered into for his benefit or at least such benefit must be the direct result of performance and so within the contemplation of the parties." *Id. Kim's* holding, with its focus on third party beneficiaries, is not applicable here.

There is no argument in Wagner's opening brief that he is a third-party beneficiary of any contract, nor was any evidence presented at trial that Wagner was a third-party beneficiary. As the trial court determined, Wagner was not a third-party beneficiary. CP 775. Rather, Wagner was simply an employee, or agent, acting on behalf of the Business. CP 610-611. An agent does not have standing to sue on behalf of the principal. *Denman v. Richardson*, 284 F. 592 (1921) ("[P]laintiff Denman has no capacity to sue as agent for his principal, he not being the real party in interest."). *See also Mullen v. Alaska Packers' Ass'n*. 277 F. 967, 968 (W.D. Wash. 1921). Notably, *Kim* reiterates that an agent cannot maintain an action on behalf of the principal in the agent's own name. 156 Wn. App. at 698.

The trial court correctly held that Wagner lacked standing to pursue the counterclaims, and therefore the court lacked jurisdiction. As stated above, these are issues of law are determined by the court, not the jury. No other issue has been raised in Wagner's opening brief, so any other asserted error has been waived.<sup>2</sup> This Court should affirm.

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<sup>2</sup> In particular, before the trial court Wagner argued (and the trial court properly rejected) that the Motion was untimely and that the invited error doctrine precluded dismissal of the counterclaims. CP 472-476. Wagner has not sought review of those issues, and therefore has waived review.

**D. Misenaar Cannot Ratify Under CR 17.**

At the outset, Misenaar cannot ratify the counterclaims because she unequivocally disavowed them on the eve of trial and in open court at trial, and was dismissed from the case following her stipulation to entry of judgment against her. CP 543-545, 593, 597. Her counsel expressly asked that she be dismissed as a party following her stipulation to entry of judgment against her. CP 597. As the trial court found, Misenaar disavowed the counterclaims before and during the trial. CP 775. There was nothing for her to ratify, and the trial court should be affirmed.

Also as stated above, this Court should decline to consider Wagner's ratification argument. Contentions made without citation to the record or legal authority should be disregarded.<sup>3</sup> *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 779 (1994) (citing *American Legion Post 32 v. Walla Walla*, 116 Wn.2d 1, 7 (1991)). Wagner does not cite or even discuss the legal barriers that preclude Misenaar from ratifying Wagner's efforts to pursue the counterclaims. As a result, the Court cannot consider this argument. As pointed out above, Misenaar has not appealed and Wagner is not an aggrieved party within the meaning of RAP 3.1 and the applicable case law. The trial court should be affirmed on these bases alone.

Nonetheless, Misenaar was precluded from ratifying Wagner's pursuit of her counterclaims under CR 17 and the applicable case law.

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<sup>3</sup> The argument that Misenaar ratified Wagner's pursuit of the counterclaims **during the trial** (Opening Brief, p. 8-9) is false, and there is no citation to the record supporting this proposition.

CR 17 permits a party to ratify a previously filed suit when the suit was improperly brought by a person who was not the real party in interest. However, "this portion of the rule is not intended to validate claims filed with no real basis in the hope that a proper party will eventually materialize, but merely 'to prevent forfeiture when determination of the proper party is difficult or when an understandable mistake has been made.'" *Clarkson Co. Ltd. v. Rockwell Int'l Corp.*, 441 F. Supp. 792, 797–98 (N.D. Cal. 1977) (emphasis added); *see also Use and Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir., 1989).<sup>4</sup> "[W]hen the determination of the right party to bring the action was not difficult and when no excusable mistake has been made, then the last sentence of Rule 17(a) was not applicable and the action should be dismissed." *Beal for Martinez v. City of Seattle*, 134 Wn. 2d 769, 778 (1998) (citing 6A Wright et al., Federal Practice and Procedure § 1555; *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 238 (1987)).

Here, no "understandable mistake" was made. As the trial court determined, Wagner and Misenaar were attempting to have their cake and eat it too. CP 607-608. Wagner and Misenaar knew Misenaar owned the Business and knew or should have known that the counterclaims were hers to assert. It was not "difficult to determine" that Misenaar was the proper party to pursue the counterclaims when she was sitting in the courtroom and had been a party to this litigation for years. She had

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<sup>4</sup> Where a Washington rule parallels a federal rule, analysis of the federal rule may be looked to for guidance. *American Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313 (1990). CR 17(a) is identical to FRCP 17(a). *Beal for Martinez*, 134 Wn. App. 777.

claimed the Business's income and expenses on her 2013 and 2014 federal tax returns, which resulted in offsetting her wages and no taxable income. CP 858-872. Moreover, she repeatedly told the Kitsap County Assessor that she was the owner of the Business and stated that Wagner was the former owner. CP 950-959.

It would be an abuse of Court Rule 17 to allow a party, who was the real party in interest, a party to the case, and sitting in the courtroom for the entire trial, to dismiss her counterclaims and then, after a motion to dismiss for lack of standing, seek to ratify the counterclaims that were improperly brought. The ratification provision of CR 17 should not be permitted to allow parties to play a "shell game" that would leave litigants guessing as to who the real party in interest is. The purpose of the rule is to cure "understandable mistakes." No such mistake was made.

Finally, ratification under Court Rule 17 should only be permitted when there would be "no prejudice" to the opposing party. *Beal for Martinez*, 134 Wn.2d at 782-83. Here, there would be significant prejudice to the Plaintiff if the Court permits ratification. Trial ended nearly a year ago. Misenaar stated that she was not bringing any counterclaims. Wagner asserted the counterclaims were his. Based on these representations, Port Orchard Airport conducted the trial assuming Misenaar did not have counterclaims and Wagner did. Misenaar was not questioned as to her damages or as to the value of her counterclaims. Now, Wagner and Misenaar have flipped yet again, and assert that the counterclaims were actually *hers* and that *she* is ratifying

*her* claims, which were brought by *him*. This is a direct contradiction of what was represented to the trial court at the beginning of trial. Port Orchard Airport conducted trial with the belief that Misenaar had no counterclaims, and she was dismissed from the case following her stipulation to enter judgment against her. CP 597. No error was committed and the trial court should be affirmed.

**E. Wagner Should Be Judicially Estopped.**

Judicial estoppel is an equitable doctrine that precludes a party from taking incompatible positions in court proceedings. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906-09 (2001). It seeks "to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes ... and to avoid inconsistency, duplicity and the waste of time." *Id.* at 906. In short, judicial estoppel prevents a litigant from "playing fast and loose with the courts." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9<sup>th</sup> Cir. 2001). Three non-exhaustive factors are considered in analyzing judicial estoppel: (1) whether a party's position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position would create the perception that the court was misled; and (3) whether the party seeking to assert an inconsistent position would obtain an unfair advantage. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39 (2007). Additional considerations may guide the court's decision. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).

The elements of judicial estoppel are all present in this case. First, Wagner's position regarding the jury verdict and standing is clearly

inconsistent with his position before the trial court. In his own words, there was a "deal": Port Orchard could challenge standing *after* the jury verdict if it did not like the result. Because of this statement, the parties and the trial court moved forward with trial. The jury verdict came back for Wagner. Port Orchard challenged the verdict based on standing. Wagner now opposes the dismissal and asserts that the verdict itself confers standing and jurisdiction. His position is clearly inconsistent.

Second, Wagner's conduct, if accepted, would constitute a blatant misleading of the trial court. Wagner avoided a motion regarding standing and proceeded with trial on his assertion that standing could be raised after a jury verdict. He now argues that the verdict precludes a standing challenge. This is misleading to the trial court and, if true, would "trap" the trial court into a ruling it never intended.

Third, if Wagner is allowed to argue that the verdict confers jurisdiction, he will gain an unfair advantage. He successfully avoided a challenge to standing by agreeing that standing could be challenged after the verdict. To now argue that the verdict is dispositive as to the issue of standing, would allow Wagner to avoid the issue of standing, and the court's lack of jurisdiction all together. As stated above, the courts determine standing and the courts determine jurisdiction, the jury does not.

Wagner and Misenar's ever changing positions have now come full circle, if not more than full circle. The counterclaims themselves state that the "Defendants" are pursuing them. CP 54-59. On the eve of

trial, Wagner informed Port Orchard Airport that he was the sole counterclaimant. CP 456. Misenaar and Wagner confirmed and reiterated this position at trial. CP 543-545 & 593. Wagner chose to proceed with the trial with the standing issue preserved in the event of a jury verdict in his favor. CP 617. Misenaar stipulated to judgment, and was dismissed from the case at the request of her counsel in open court. CP 597. Then, in response to the Motion, Misenaar "switched" her position again and asserted that she was the holder the counterclaims in order for her to ratify them, despite being dismissed from the trial and disavowing the counterclaims. CP 513-514. To top it off, Misenaar is not even a party to this appeal. Wagner and Misenaar have been playing fast and loose with the courts and, if they are allowed to continue to do so, Port Orchard Airport will be prejudiced. As stated above, dismissal was required by law because Wagner lacked standing and the trial court lacked jurisdiction. In addition, judicial estoppel precludes Wagner from raising issues regarding lack of standing and lack of jurisdiction because he expressly stated that such issues could be raised post-trial. CP 617.

**F. Port Orchard Airport is Entitled to Attorney's Fees and Costs.**

Pursuant to the applicable case law and the Promissory Note and Lease, Port Orchard Airport is entitled to attorney's fees and costs on appeal and requests this Court award them pursuant to RAP 18.1. Attorney fees are awarded when authorized by a contract, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50 (1986). Under Washington law, an action is "on

a contract" for purposes of attorney fees and costs if the action arose out of the contract and if the contract is central to the dispute. *Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n*, 116 Wn.2d 398, 413 (1991). This action arose out of the Lease and Promissory Note, and those contracts were central to the dispute. Reasonable attorney's fees and costs include full recovery of the prevailing party's litigation expenses. *Louisiana-Pac. Corp. v. Asarco, Inc.*, 131 Wn.2d 587, 601 (1997). Attorney's fees and costs were awarded by the trial court. CP 801-807.

Paragraph 7 of the Promissory Note and Article 29 of the Lease provide that the prevailing party is entitled to attorney's fees and costs. CP 888-889, 914-915. Therefore, Port Orchard Airport is entitled to its fees and costs for this appeal.

## V. CONCLUSION

The trial court correctly dismissed the counterclaims. Wagner lacked standing to assert them. Likewise, the trial court correctly concluded that Misenar could not ratify her husband's pursuit of the counterclaims. Port Orchard Airport is entitled to fees and costs on appeal under RAP 18.1. The trial court should be affirmed.

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Dated: April 12, 2019.

Respectfully submitted,

WITHERSPOON • KELLEY

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**CERTIFICATE OF SERVICE**

I declare that I sent a true and correct copy of the foregoing Respondent's Opening Brief by the method indicated below and addressed to the following:

Chalmers Johnson Attorney of Counsel GSJONES LAW GROUP, P.S. 1155 Bethel Ave. Port Orchard, WA 98366 Phone: (360) 876-9221 <i>Attorney for Appellant</i>	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail chalmers@gsjoneslaw.com
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED, this 12<sup>th</sup> day of April, 2019.

/s/ Lee Reams  
Lee Reams, Legal Assistant

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# WITHERSPOON KELLEY

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