

Court of Appeals No. 347729

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION THREE

DEBORAH BURKSFIELD, an individual,

Appellant

vs.

LSL PROPERTIES, LLC, a Washington Limited Liability Company,
and LARRY SALI and STEVEN SALI, individuals.

Respondents

On Appeal from the Yakima County Superior Court
Case No. 15-2-01847-6

REPLY BRIEF

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I. INTRODUCTION

Respondents essentially argue that the decision in *derivative*¹ *Burksfield I* regarding breach of lease contract forever insulates LSL Properties, LLC (LSL) and its majority members (the Salis) from having to abide by the Operating Agreement or Washington law. This is clearly illogical.

Plaintiffs and Appellants brought a legitimate legal action to adjudicate the following issues: (1) Contractual indemnity rights under the Operating Agreement; (2) whether the majority members abused their power by granting themselves indemnification under the same order they *now* contend was *Res Judicata*; and, (3) whether Appellant Burksfield had equitable remedies for ongoing acts of misconduct by her brothers, and did any of the Salis acts or omissions during the underlying case or thereafter rise to a level constituting either gross negligence, intentional misconduct, or a knowing violation of law that interferes with Burksfield's business

¹ In a derivative suit, a stockholder asserts rights or remedies belonging to the corporation for the corporation's benefit. 12B W. Fletcher, Private Corporations § 5907 (1984). Such suits arise in equity to enforce a corporate right which the corporation fails, is unable, or refuses to assert by court action. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 777, 496 P.2d 343 (1972); *Goodwin v. Castleton*, 19 Wn.2d 748, 761-62, 144 P.2d 725 (1944). Derivative suits are disfavored and may be brought only in exceptional circumstances. See *LaHue*, at 777. Moreover, a shareholder may only bring a derivative action if he can show that he has exhausted his means to obtain corporate action and the officers and directors have failed to assert the corporation's rights or have done so improperly. *In re F5 Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 236, 207 P.3d 433 (2009). Clearly the 2000 lease contract was intended to protect LSL and its members from incurring any legal fees caused as a result of the "Tenant Risks" associated with Lessee CRM, LSL's Limited Liability Agreement was intended to equitably protect the members from fraud, bad faith, misconduct, and gross negligence by other members and managers, and RCW 25.15.155 was intended to protect an LLC's financial position and assets from unlawful misconduct and dishonesty by members or managers.

expectancy from her LSL relationship and her expectancy of a probability of future economic benefit therefrom. Under the former RCW 25.15.155

Liability of managers and members stating:

Unless otherwise provided in the limited liability company agreement:

(1) A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.

(2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as

manager or member.²

Nothing in Respondents' briefing, or the record below, supports the Respondents' position (adopted by the lower court) that the final judgment in *Burksfield I* dispensed with future contractual or equitable claims of Burksfield. Nor did the lower court correctly find that Burksfield's claims were barred by *res judicata*, but that the Sali members could freely ignore that same judgment and award themselves \$144,136 of LSL's funds.

Lastly, other than Judge Hahn believing Burksfield's claims were "meritless" there is nothing in the record that supports such a harsh punishment of dismissing a case filed in 2015 (prior to the effective date of the January 1, 2016 and repeal of RCW 25.15.155) be inflicted on Burksfield or awarding sanctions against Appellant under CR 11 or RCW 4.84.185, nor is this appeal "frivolous".

II. ARGUMENT

A. THE LOWER COURT PROCEDURALLY ERRED BY ALLOWING LSL AND THE SALIS TO PREVAIL ON A NON-NOTICED MOTION FOR SUMMARY JUDGMENT

As argued in Appellants' Opening Brief, *Burksfield* filed a noticed motion for partial summary judgment seeking relief. The Sali defendants

² RCW 25.15.155 repealed by request of Washington State Bar Association; effective January 1, 2016 - see RCW 10.01.040 Statutes—Repeal or amendment—Saving clause presumed.)

filed a responsive brief, containing a “cross motion” for dismissal. LSL Properties filed *no pleadings* and *no joinder* in opposition to the motion for partial summary judgment or in support of a cross motion to dismiss, and only filed the Declaration of Steven Sali. Over the objection of Burksfield, the trial court awarded affirmative relief to both the Salis and LSL Properties, and dismissed plaintiffs’ claims and case.

Respondents claim that this was entirely proper, and cite to *In Re Estate of Toland*, 180 Wash.2d 836 (2014), for support. *Toland*, however, does not stand for the proposition that the non-moving party can obtain affirmative relief without following the procedure of CR 56, but rather where a *reviewing* court can direct summary judgment on remand. In *Toland* the wife was seeking the enforcement of a Japanese divorce decree against her husband, Peter Paul Toland. The lower court granted summary judgment that denied registration of the Japanese divorce decree awarding Etsuko Toland a monetary award against her former husband, Peter Paul Toland, because Paul was not given notice of a Japanese guardianship proceeding involving the couple's daughter. *Id at 840*. After the Court of Appeals affirmed, the Supreme Court found that the trial court erroneously considered the guardianship proceeding. The Supreme Court then went on to hold that “we *may* direct summary judgment in favor of the nonmoving party if there are no disputed material facts and as a matter of law the nonmoving party is entitled to summary judgment.” (Emphasis added) *Id.*

at 853. In addressing the dissent’s comments about lack of notice, the majority in *Toland* argued that “this will often be the case *when a reviewing court concludes that summary judgment should be granted in favor of the nonmoving party.*” (Emphasis added). See *Leland v. Frogge*, 71 Wash. 2d 197, 201, 427 P.2d 724, 727 (1967), holding that: “While there is authority for granting summary judgment for a nonmoving party (*Rubenser v. Felice*, 58 Wash.2d 862, 365 P.2d 320 (1961); 4 Orland, Wash.Prac. 66 (1966)), it would be expected that such judgment would be either one of dismissal, or for relief sought by or uncontestedly due that second party.”

As noted in the Opening Brief, there was a brief colloquy between Judge Hahn and Appellants’ counsel whether a cross-motion for summary judgment could be ruled upon if the matter was strictly a question of law.³ However, in their opposition, respondents went beyond just an issue of law, as did the trial court in rendering its oral ruling. Unlike the case in *Toland*, where the issue was strictly a matter of law (i.e. whether the Court should enforce, under the doctrine of Comity, a foreign judgment), here the trial court made specific findings of undisputed fact in favor of the respondents in granting them affirmative relief on a motion—they did not bring. This is exactly what was rejected in *Leland*, supra, where the Court held that affirmative relief beyond simply dismissal as a matter of law

3 RT page 5, line 10 to page 9, line 12

could not be made in favor of a non-moving party.

Finally, Respondents' argument that it "didn't matter" if LSL joined the motion or not is simply untrue. LSL Properties did not offer any factual argument or legal argument in either opposition to the motion for partial summary judgment of Burksfield, or formally join or make a cross-motion for a dismissal. Plaintiff had *no* ability to respond to LSL Properties' arguments separately, as the relief sought from LSL Properties was completely distinct and separate than any relief sought from the Salis (contractual indemnity for the former, and equitable relief related to the latter). Burksfield was seeking contractual indemnity *not* from the Salis, but her co-plaintiff LSL. LSL was not adjudicated liable in the *Burksfield I*, and had a separate contractual obligation to Burksfield. As such, simply allowing LSL to be dismissed without it even filing a pleading (beyond the declaration of Steven Sali) was simply improper.

B. IN *BURKSFIELD I*, JUDGE MCCARTHY DID NOT ADJUDICATE THE LIABILITY OF LSL TO BURKSFIELD OR THE SALI MEMBER'S DISHONEST CONDUCT DURING THE UNDERLYING ACTION AND SUBSEQUENTLY THEREAFTER

Respondents argue that the trial court correctly dismissed Burksfield's claims based upon the doctrine of *res judicata*, or alternatively, under the theory of collateral estoppel. However, the elements of either *res judicata* or collateral estoppel do not apply here.

As noted in their brief, *res judicata*, or claim preclusion, "bars the

relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” *Pederson v. Potter*, 103 Wn.App. 62, 69, 11 P.3d 833 (2000). The doctrine generally applies where the subsequent action is identical with a prior action in *four* respects: (1) *persons and parties*, (2) *cause of action*, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 858, 726 P.2d 1 (1986).

In order for the doctrine of collateral estoppel to apply, four requirements must be met: 1) the issue decided in the prior adjudication *must be identical* with the one presented in the second; 2) the prior adjudication must have *ended in a final judgment on the merits*; 3) the party against whom the plea is asserted *was a party or in privity with a party to the prior adjudication*; and 4) *application of the doctrine must not work an injustice*. *Barr v. Day*, 124 Wn.2d 318, 325 (1994). Each requirement must be met in order for collateral estoppel to apply and the burden of proof is on the party seeking estoppel. *George v. Farmers Ins. Co. of Washington*, 106 Wn.App. 430, 443 (2001); *McDaniels v. Carlson*, 108 Wn.2d 299, 303 (1987).

While LSL was a party in *Burksfield I*, it was a co-plaintiff and a derivative plaintiff. LSL was not adverse to Burksfield exercising her fiduciary duty she owed to the LLC and she properly filed a derivative

claim.⁴ As a result of *only* Burksfield's efforts, LSL was able to collect \$535,674.62 "single damages, but no interest on the largest portion" of the multiple breaches of 2006 leases. The Sali members as of March 18, 2015 still refused take any action in regards to fix or remedy obvious problems with the 2006 leases as discussed by Burksfield (item 5) and any prudent business person would find it was necessary and desirable to protect LSL against future dishonest conduct by a "extremely high risk tenant" such as CRM and take actions for the purpose of preventing and deterring continuation of a tenant improperly profiting from wrong doings and unlawful taking of LSL's valuable resources without payment.

In this case, LSL is the defendant, and Burksfield is seeking repayment under a contractual indemnification theory. Burksfield also sought remedies related to enforcement of the Operating Agreement. The parties are not identical. Second, the causes of action are not identical. In this case, Burksfield sought remedies directly from LSL (her co-plaintiff) in the underlying suit, through mandatory indemnification under the LLC operating agreement for actual litigation costs she suffered as a result of a tenant's wrongdoing and losses caused by the Sali member's tort breaches of fiduciary duty that were not recovered in the final judgment of the underlying suit.

⁴ See *Burksfield I*, Unpublished opinion No 33037-1-III, Burksfield vs Sali 34772-9 page 406 states: "We conclude Burksfield properly brought a derivative claim on behalf of LSL."

See *Snohomish Cnty Pub Transp. Benefit Area Corp. v. Firstgroup America, Inc.* 271 P.3d 850,853 (2012) ¶ 10 Generally speaking, indemnity agreements to indemnify against claims and losses resulting from the indemnitee's own negligence are enforceable contracts, and we have “long preferred to enforce indemnity agreements as executed by the parties.” *McDowell v. Austin Co.*, 105 Wash.2d 48, 53–54,710 P.2d 192 (1985). “Contracts of indemnity ... must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms.” *Id.* (quoting *Union Pac. R.R. v. Ross Transfer Co.*, 64 Wash.2d 486, 488, 392 P.2d 450 (1964) (quoting 27 Am.Jur. Indemnity § 13, at 462 (1940))). Courts may not adopt a contract interpretation that renders a term absurd or meaningless. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985).

Finally there was no “final” adjudication of Burksfield’s contractual claims against LSL. While Judge Hahn, below, disregarded Judge Michael McCarthy’s oral statements, those comments and the written record of jury verdict establish that neither the jury, nor Judge McCarthy *ever* reached the merits of Burksfield’s contractual claims for

indemnification against LSL. Judge McCarthy specifically stated in his oral ruling that he was *not* awarding any fees or costs under an independent theory of indemnification *from* LSL Properties to either Burksfield, or the Sali defendants who had lost.⁵ When the final order was submitted for signature, it did not say that Judge McCarthy was (inconsistent with his oral ruling) foreclosing and finding that the parties could seek indemnification under 3.2 of the LLC agreement, to do otherwise would be interfering in the freedom to contract. Nor was the final, written Judgment signed by Judge McCarthy inconsistent with his oral comments; in his oral rulings, he said that he was not going to permit (at that time) the Salis or Burksfield from *separately* seeking costs *against* LSL Properties (the co-plaintiff) for indemnity under the LLC Operating Agreement.

The bottom line is that neither, the jury or Judge McCarthy reached the merits of the issues before this court. Simply because the written judgment contained a superfluous reference to the indemnity clause in the Operating Agreement, does not change the fact it was *not* adjudicated in the first action. And it was equally inconsistent for Judge Hahn to find that Judge McCarthy's written judgment precluded Burksfield from obtaining indemnification, but allowed the Salis to obtain the same type of relief even though Judge McCarthy made the exact same statement to the

5 See CP 91 to 99

Salis' counsel.

C. THERE IS NO BASIS TO “STRIKE” THE OPENING BRIEF

Respondents make the unsupported argument that appellants' brief should be stricken because it doesn't have proper citations, or a sufficient amount of “citations” to support compliance with RAP 10.3.

Appellants have adequately cited to the evidence that supports the appeal. More importantly, the decision of Judge Hahn rested upon the conclusion that appellants' claims were barred by just one document—the final judgment in derivative *Burksfield I*. This was a factually intensive case, and based primarily on the Operating Agreement. Respondents do not cite any facts in appellants' Opening Brief that were not supported by the record. As such, this argument is without merit.

D. THERE IS NO GROUNDS FOR ATTORNEY'S FEES TO BE AWARDED RESPONDENTS ON APPEAL

Respondents request that they be awarded fees on appeal pursuant to RAP 18.9. RAP 18.9(a) provides that

(t)he appellate court on its own initiative . . . may order a party or counsel who uses these rules for the purpose of delay . . . to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

In determining whether an appeal is brought for delay under this rule the Court looks to whether, when considering the record as a whole,

the appeal is frivolous, i. e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages. In adjudicating this issue the court is “guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. See *Streater v. White*, 26 Wash.App. 430, 435 (1980).

As argued in both their Opening and this Reply Brief, Appellants have a valid claim to pursue against LSL, based upon the terms of the operating agreement. Burksfield relied on Washington State Statutes to protect her LLC interests from dishonest acts and omission in litigation, as well as her right to be reimbursed legal fees and costs under the LSL agreement that she suffered as a result of her proper derivative action against tenant lessee CRM and for protection from her brother’s subsequent retaliatory breaches of fiduciary duty. However, even if this court were to affirm the ruling by Judge Hahn that only the Sali members’

were entitled to LSL indemnification on the “cross-motion” for summary judgment, it is not unequivocal that appellants’ claims were groundless or advanced for an improper purpose. As noted in the Opening Brief, the trial court entertained 90 minutes of argument, permitted Mr. Simpson to argue when LSL had not even filed a joinder or opposition, and then took the matter under submission. This certainly suggests that there were “debatable” issues before the court below, and therefore on this appeal. As noted above, appellants have a “right” to appeal. This does not mean that every case, and every appeal, is frivolous simply because one party ultimately prevails.

III. CONCLUSION

Appellants respectfully request that the trial court erred by summarily finding that Judge McCarthy’s written order foreclosed any right by Appellant Burksfield to seek separate contractual indemnity rights against LSL, her nominal co-plaintiff in the derivative action. Worse, Judge Hahn erred by finding that the lawsuit was “frivolous” and effectively handing over to the Sali brothers, Ms. Burksfield’s interest in LSL.⁶ Certainly, out of abundance of caution, the trial court could have prevented or postponed the Sali member’s forcing such a demeaning and disparate treatment on their elderly sister, pending this appeal.

⁶ The Sali Brothers foreclosed on Burksfield’s remaining LLC membership units after entry of the sanction judgment.

Appellants ask this Court to “right the wrong” done by Judge Hahn, and reverse the order of summary judgment, as well as find that Judge Hahn abused her discretion in finding the underlying matter was without merit, and sanctioning appellant Burksfield.

Dated: July 26, 2017

LAW OFFICES OF BRIAN H. KRIKORIAN

A handwritten signature in black ink, appearing to read "Brian H. Krikorian". The signature is fluid and cursive, with a large initial "B" and "K".

By _____
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