

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

MARK HOPKINS and GEORGIA  
HOPKINS, husband and wife,

Respondents,

v.

KIRK and JENNIFER BANKS, as  
assignees for MRS. BILLIE E.  
GETSCHMANN SKYLES,

Appellants.

No. 77218-0-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 22, 2019

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2019 JAN 22 AM 9:31

LEACH, J. — Kirk and Jennifer Banks<sup>1</sup> appeal the trial court's summary judgment in favor of Mark and Georgia Hopkins.<sup>2</sup> Because Banks never acquired part of the disputed claim and their assignor's contract with Hopkins bars the balance, we affirm.

BACKGROUND

Billie Getschmann Skyles owned 20 acres of land near Gold Bar, Washington. Banks lived on the land and helped Skyles. In February 2014, Skyles signed a purchase and sale agreement (PSA) to sell about 10 acres to Hopkins, her neighbors. The PSA included an addendum providing for the transfer of .75 acres of the parcel after the parties completed a boundary line

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<sup>1</sup> We refer to Kirk and Jennifer Banks collectively as Banks. Jennifer Banks also appears as Jennifer Wilson in the record.

<sup>2</sup> We refer to Mark and Georgia Hopkins collectively as Hopkins.

adjustment (BLA). It also stated that all personal property remaining on the 10 acres when Hopkins took possession at closing would be considered abandoned, with Hopkins free to retain or dispose of this property in their sole discretion.

Sale of 9.25 acres closed on May 8, 2014. After a surveyor completed the BLA paperwork in June 2014, Skyles refused to sign it. Hopkins filed a lawsuit to enforce the transfer of the .75 acres in November 2014. Skyles did not appear at the default judgment hearing, and the trial court entered a default judgment in favor of Hopkins. Skyles filed a motion to vacate the judgment, which the trial court denied. This court affirmed that decision in an earlier appeal.<sup>3</sup> Banks then filed a motion to vacate, which is the subject of a separate appeal.<sup>4</sup>

Skyles purportedly signed a document assigning certain rights and interests to Banks on August 20, 2015. This document assigns Skyles's interest in the PSA, all claims asserted in Snohomish County Superior Court No. 14-2-07395,<sup>5</sup> and all claims asserted or which could be asserted by Skyles against any law office owned by or related to B. Craig Gourley and Snohomish Escrow.

On August 26, 2015, Skyles filed a lawsuit under Snohomish County Superior Court No. 15-2-05719-5. Skyles asserted five claims for relief: (1) a declaration that the PSA was void because it was unconscionable and procured by duress, (2) reformation of the PSA sales price to a market rate, (3) unjust

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<sup>3</sup> Hopkins v. Banks, No. 74068-7-I, slip op. at 2 (Wash. Ct. App. Apr. 3, 2017) (unpublished), <http://www.courts.wa.gov/opinion/pdf/740687.pdf>.

<sup>4</sup> Hopkins v. Banks, No. 77214-7-I.

<sup>5</sup> The parties intended to describe Hopkins v. Banks, Snohomish County Superior Court No. 14-2-07395-8, but omitted the last digit of the cause number.

enrichment and estoppel, (4) breach of contract, and (5) conversion of and damage to Skyles's personal property. Skyles died on September 26, 2015. The trial court substituted Banks as plaintiffs.

On Hopkins's summary judgment request, the trial court dismissed all claims except the conversion claim because they were compulsory counterclaims required to be made in the earlier lawsuit started by Hopkins to enforce the PSA and thus precluded in a separate lawsuit. Hopkins did not ask for dismissal of the conversion/damage claim in this request.

Later, Hopkins asked the court to dismiss the remaining conversion/damage claim. Hopkins relied on the PSA provision that any personal property left on the transferred property was "deemed abandoned." Because this provision allowed Hopkins full discretion to dispose of any personal property on the land after closing, they claimed that their actions in 2015 were not conversion.

Banks responded by stating that Hopkins had ignored allegations in the complaint describing acts of conversion in 2014 before Hopkins took possession of the property. Hopkins replied with a new theory for relief, that any claim for conversion before they took possession had to be asserted as a compulsory counterclaim in their original lawsuit and was now barred by the doctrine of claim preclusion. They also reasserted their claim that the PSA barred any conversion/damage claim for actions after the PSA closing date.

The trial court granted Hopkins's request and dismissed the conversion/damage claim with prejudice.<sup>6</sup> Banks appeals dismissal of the conversion/damage claim only.

#### STANDARD OF REVIEW

We review a summary judgment decision de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>7</sup> We will affirm a summary judgment decision when the record demonstrates no issue about any material fact and the moving party is entitled to judgment as a matter of law.<sup>8</sup>

#### ANALYSIS

We may affirm a trial court decision on any grounds adequately supported by the record and do so, in part, here.<sup>9</sup> The conversion/damage claim can be divided into two parts, one for actions alleged to have occurred before Hopkins closed and took possession (in May 2014 for 9.25 acres and in January 2015 for .75 acres) and one for acts alleged to have occurred after closing. For the prepossession claims, Banks contend that the court should not have considered issue preclusion because Hopkins did not raise this issue in their initial request. They first raised it in their reply to Banks's answer. They also contend that the

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<sup>6</sup> The trial court also awarded Hopkins attorney fees and costs under the PSA.

<sup>7</sup> Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

<sup>8</sup> Elcon Const., 174 Wn.2d at 164.

<sup>9</sup> State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

doctrine of claim preclusion does not apply and that issues of fact prevent summary judgment.

Skyles filed this lawsuit on August 26, 2015. She died on September 26, 2015. If, as the Banks assert, the actions supporting the conversion/damage claim happened in 2014, Skyles did not assign that claim to Banks. So they cannot pursue it. And the PSA bars claims based on actions that occurred after Hopkins took possession. So the trial court properly dismissed the entire conversion/damage claim.

Actions Before Hopkins Took Possession at Closing

Banks assert that Hopkins converted and damaged Skyles' property before the Hopkins took possession at closing.

In Washington state, only a "real party in interest" may prosecute a lawsuit.<sup>10</sup> This reflects a core requirement of the adversarial system, that cases should only be "brought and defended by the parties whose rights and interests are at stake."<sup>11</sup> If the plaintiff dies, a personal representative or an assignee may step into the shoes of the deceased plaintiff.<sup>12</sup>

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<sup>10</sup> CR 17(a).

<sup>11</sup> Riverview Cmty. Grp. v. Spencer & Livingston, 181 Wn.2d 888, 893, 337 P.3d 1076 (2014).

<sup>12</sup> CR 17(a); Cooper v. Runnels, 48 Wn.2d 108, 109-10, 291 P.2d 657 (1955).

Banks rely on Skyles's putative<sup>13</sup> assignment to establish their right to pursue this claim. But the assignment does not assign any preclosing conversion/damage.

We interpret the words of a contract based on their “ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.”<sup>14</sup> Here, the assignment applied only to claims arising under the PSA or against the attorney and escrow company involved in closing the sale to Hopkins. It assigned “any and all . . . rights, title and/or interest in the February 27, 2014 Purchase and Sale Agreement and Boundary Lot [sic] Adjustment.” It also assigned

any and all claims which are now asserted or which could be asserted by Assignors against Snohomish Escrow and any law offices owned by or related to lawyer B. Craig Gourley. . . . This assignment also includes, but is not limited to, any and all claims asserted in or as a result of [Hopkins v. Skyles] Snohomish County Superior Court No. 14-2-07395 (the ‘Lawsuit’).<sup>15</sup>

It states that the

Assignor’s intent [wa]s to vacate the Default Judgment and to have the Hopkins pay for any damages related to or resulting from the wrongly taken Default Judgment, to have the Hopkins pay a market price for the real property and for all converted, taken or damaged personal property related to the PSA transaction

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<sup>13</sup> We characterize the assignment as “putative” because Banks question Skyles’s competency when she signed the PSA and make no claim that it was restored before they claim she later signed the assignment.

<sup>14</sup> Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005) (citing Universal/Land Constr. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987)).

<sup>15</sup> “The Lawsuit” refers to the suit Hopkins originally filed to enforce the PSA. It includes the default judgment, the motions to vacate, and the appeals related to that suit.

and “to hold Snohomish Escrow and B. Craig Gourley responsible for their role in exploiting an elder, vulnerable Washington Citizen.” The document does not assign any tort claims not arising out of the PSA or the closing. It did not assign to Banks conversion/damage claims asserted in this lawsuit based on alleged actions by Hopkins before closing.

Banks’s argument against claim preclusion supports this conclusion. Banks contend that the conversion claim and the PSA litigation do not share an identity of cause of action, so claim preclusion does not apply. If, as Banks claim, the conversion claim is sufficiently different from actions based on the PSA to avoid claim preclusion, the language of the assignment is not sufficient to assign it.

Banks are not real parties in interest for prepossession conversion/damage claims.

#### Actions After Closing/Possession

Banks’s briefing does not make clear whether they continue to pursue postpossession conversion/damage claims. If they do, the PSA bars those claims.

Paragraph 14 of the PSA addresses personal property on the property sold to Hopkins:

14. Personal Property: Transferred with this sale is the following personal property: Mobile home; refrigerator, stove, water heater; installed electrical fixtures, lights and light bulbs; and all bathroom and other fixtures. Any other personal property left on or in the Subject Property at the time of possession by Purchaser shall

be deemed abandoned by Seller and Purchaser shall have the right to retain or dispose of such property in Purchaser's solo discretion.

This means that once the sale to Hopkins closed, Skyles had no right to any personal property left on it and thus no right to claim conversion or damage after the closing on May 8, 2014. Banks have no greater right than Skyles and thus no right either.

#### Additional Issues Raised

In view of our disposition of this case, we do not need to address the remaining issues raised by Banks.

#### Attorney Fees

Both parties request attorney fees and costs based on the PSA. The PSA states,

In the event that any suit or other proceeding is instituted by either party to this [PSA] or that any costs, expenses or attorney fees are incurred or paid by either party in enforcing this [PSA], the substantially prevailing party, as determined by the court or in the proceeding, shall be entitled to recover its reasonable attorneys fees and all costs and expenses incurred relative to such suit or proceeding from the substantially non-prevailing party, in addition to such other relief as may be awarded.

Hopkins have prevailed. Any conversion claims raised for acts after May 2014 directly related to enforcement of the PSA. Provided they comply with RAP 18.1, Hopkins are entitled to attorney fees for this appeal related to enforcement of the PSA.

#### CONCLUSION

We affirm. Skyles did not assign her rights in a conversion/damage claim for her personal property to Banks. Banks are not real parties in interest to any

claims for actions before closing. Skyles transferred her rights in the personal property to Hopkins on closing and had no postclosing claim to assign.

Leach, J.

WE CONCUR:

[Signature]

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