

689461

689461 KN

No. 689461-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JULIA MCCORD, and THE CONJUNCTIONAL PATRIOTIC
SOVEREIGN PATHWAY, and RYAN & WAGES, LLC, a
Washington limited liability company,
Appellants/Cross-Respondents,

v.

CMDG INVESTMENTS, LLC, an Oregon limited liability
company,
Respondent/Cross-Appellant

RESPONDENT'S BRIEF

FILED
2024 SEP 16 10:45 AM
COURT OF APPEALS
DIVISION I
SEATTLE, WA
K

Wright A. Noel, WSBA No. 25264
Kellie Gronski, WSBA No. 38848
Attorneys for Respondent
CMDG Investments, LLC
CARSON & NOEL, PLLC
20 Sixth Avenue NE
Issaquah, WA 98027
Tel: 425.837.4717 | Fax: 425.837.5396

TABLE OF CONTENTS

	Page
A. Introduction.....	8
B. Assignment of Error.....	9
C. Statement of the Issues.....	9
D. Statement of the Case.....	10
1. Ryan & Wages.....	10
2. Redding Lake Stevens LLC.....	12
3. Development of the properties.....	14
4. Procedural History.....	16
a. Arbitration between Wages, and siblings McCord and Ryan.....	16
b. The McCords sue Redding Lake Stevens (“Second Lawsuit”).....	17
c. The McCords sue CMDG (“Third Lawsuit”).....	18
E. Argument.....	19
1. Standard of Review.....	19
2. The appeal by the McCords and Ryan & Wages should be denied.....	20
a. Collateral estoppel bars the breach of contract and tortious interference claims by the McCords and Ryan & Wages against CMDG.....	21
i. The Arbitration Order resolved the question of whether Wages was manager of Ryan & Wages when he signed the First Amendment, which is the precise question that forms the basis of the claims against CMDG.....	22
ii. Application of collateral estoppel is just, as it prevents further and continued litigation by the McCords.....	29
b. As manager of Ryan & Wages, Wages had express authority under the Ryan & Wages OA to sign the First Amendment.....	31

3.	The trial court erred in denying joint and several liability for the attorney fees and costs incurred by CMDG in defending against contract claims, all of which were based on the RLS OA and dismissed on summary judgment.....	34
a.	CMDG is entitled to attorney fees under the equitable doctrine of mutuality of remedy.....	35
i.	Mutuality of remedy is well-established law in Washington	35
ii.	Mutuality of remedy requires liability against the McCords for CMDG's attorney fees.....	38
b.	The McCords also are liable under Washington case law for attorney fees awarding for defending against tort claims that are based on a contract.....	39
i.	The trial court properly found that all of the claims against CMDG were based on the contract – the RLS OA.....	41
ii.	The Court should reverse the trial court and impose joint and several liability against the McCords.....	43
4.	CMDG is entitled to attorney fees and costs on appeal.....	44
F.	Conclusion.....	45

TABLE OF AUTHORITIES

	Page
Cases	
<i>Kaintz v. PLG, Inc.</i> , 147 Wn. App. 782, 197 P.3d 710 (2008).....	9,35,38,39,44
<i>Deep Water Brewing, LLC v. Fairway Resources Limited</i> , 152 Wn. App. 229, 215 P.3d 990 (2009).....	9,41,43
<i>Christensen v. Grant Co. Hospital Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	19,21,31
<i>State v. Vasquez</i> , 109 Wn.App. 210, 34 P.3d 1255 (2001) aff'd, 148 Wash. 2d 303 (2002).....	19,21
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 460, 20 P. 3d 958 (2001).....	19
<i>Nielson v. Spanaway General Medical Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1988).....	21,22
<i>State Farm Mut. Auto ins. Co. v. Avery</i> , 114 Wn.App. 299, 57 P.3d 300 (2002).....	21
<i>Pederson v. Potter</i> , 103 Wn.App. 62 (2000).....	21
<i>Robinson v. Hamed</i> , 62 Wn. App. 92, (1991).....	23,25,29
<i>Mallard v. State, Dept. of Retirement Systems</i> , 103 Wn.2d 484, 694 P.2d 16 (1985).....	23,26
<i>Diamond B. Constructors, Inc. v. Granite Falls School Dist.</i> , 117 Wn. App. 157, 70 P.3d 966 (2003).....	33

TABLE OF AUTHORITIES (Continued)

Page

Cases

Waste Mgmt. of Seattle, Inc. v. Transp. Comm'n,
123 Wn.2d 621, 896 P.2d 1034 (1994).....33

Herzog Aluminum, Inc. v. Gen. Am. Window Corp.,
39 Wn. App. 188, 692 P.2d 867 (1984).....36,44

Park v. Ross Edwards, Inc.,
41 Wn. App. 833, 706 P.2d 1097 (1985).....36

Mt. Hood Bev. Co. v. Constellation Brands, Inc.,
149 Wn.2d 98, 63 P.3d 779 (2003).....37

Labriola v. Pollard Group, Inc.,
152 Wn.2d 828, 100 P.3d 791 (2004).....37,44

Erwin v. Cotter Health Centers, Inc.,
133 Wn. App. 143, 135 P.3d 547 (2006).....37,44

Almanza v. Bowen,
155 Wn. App. 16, 230 P.3d 177 (2010).....37,44

Klass v. Haueter,
49 Wn. App. 697, 745 P.2d 870 (1987).....37,45

T.J. Meenach v. Triple "E" Meats, Inc.,
39 Wn. App. 635, 694 P.2d 1125 (1985).....37,45

Edmonds v. John L. Scott Real Estate, Inc.,
87 Wn. App. 834, 942 P.2d 1072 (1997).....40

Boguch v. Landover Corp.,
152 Wn. App. 595, 224 P.3d 795 (2009).....40

Stieneke v. Russi,
145 Wn. App. 544, 190 P.2d 60 (2008).....40

TABLE OF AUTHORITIES (Continued)

Page

Cases

G.W. Constr. Corp. v Prof'l. Serv. Indus., Inc.,
70 Wn. App. 360, 853 P.2d 484 (1993).....40

Yeager v. Dunnavan, 26 Wn.2d 559, 174 P.2d
755 (1946).....41

W. Stud Welding, Inc. v. Omark Indus., Inc.,
43 Wn. App. 293, 716 P.2d 959 (1986).....41,44

Hemenway v. Miller,
116 Wn.2d 725, 807 P.2d 863 (1991).....41

Seattle First Nat'l Bank v. Wash. Ins. Guar. Ass'n,
116 Wash.2d 398, 804 P.2d 1263 (1991).....41

Hill v. Cox,
110 Wash. App. 394, 41 P.3d 495 (2002).....41

TABLE OF STATUTES, CODES, AND CIVIL RULES

	Page
Statutes:	
RCW 4.84.330.....	36,41,44,46,48
RCW 4.84.010.....	48
Civil Rules:	
RAP 18.1.....	45,49

A. Introduction

The key fact at issue in this case was previously decided in two prior judicial proceedings. The underlying case really is nothing more than a collateral attack on those decisions. Julia McCord (“McCord”), The Conjunctional Patriotic Sovereign Pathway (“CPSP”), and Ryan & Wages, LLC (“Ryan & Wages”), asserted two claims against CMDG Investments, LLC (“CMDG”): breach of contract and tortious interference with a contract. Both claims rest on the assertion that Tom Wages (“Wages”) was not manager of Ryan & Wages when he signed the First Amendment to the Redding Lake Stevens, LLC Operating Agreement (“First Amendment”). Two different judicial proceedings weighed the evidence and ruled that Wages was the manager. The trial court’s decision to apply the doctrine collateral estoppel and dismiss the claims on summary judgment should be affirmed.

As to the attorney fees issue, the trial court incorrectly limited CMDG’s ability to recover the attorney fees and costs. The contract claims against CMDG were based on alleged violations of the Redding Lake Stevens, LLC Operating Agreement (“RLS OA”), which contains a bilateral attorney fees clause. The trial court erred when ruling that McCord, CPSP,

and Ryan & Wages are not joint and severally liable for the attorney fees and costs incurred by CMDG. That ruling is contrary to the equitable principle of mutuality of remedy (**Kaintz v. PLG, Inc.**, 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008)), and case law awarding fees and costs for tort claims brought “on the contract.” **Deep Water Brewing, LLC v. Fairway Resources Limited**, 152 Wn. App. 229, 279; 215 P.3d 990 (2009).

B. Assignment of Error

The trial erred when denying joint and several liability against McCord and CPSP, along with Ryan & Wages, for the attorney fees and costs incurred by CMDG when successfully defeating all claims on summary judgment.

C. Statement of the Issues

1. Whether the trial court properly dismissed on summary judgment breach of contract and tortious interference claims when both claims were based on the assertion that Wages was not manager of Ryan & Wages when he signed the First Amendment and three rulings in two different legal proceedings directly contradict that assertion.

2. Whether McCord and CPSP are joint and severally liable with Ryan & Wages for the attorney fees and costs

awarded when the court found that the RLS OA was central to all claims, the RLS OA contains a bilateral prevailing-party attorney fee provision, and CMDG is the prevailing party.

3. Whether CMDG is entitled to recover attorney fees and costs incurred in this appeal, when the RLS OA expressly provides for the prevailing party to recover fees and costs at trial and on appeal.

D. Statement of the Case

McCord and CPSP have filed two different appeals and three different lawsuits, all involving the same factual issues and essentially the same parties.¹ While the issues on appeal are limited and straightforward, they are best understood with a brief background of events leading up to this lawsuit and appeal.

1. Ryan & Wages, LLC

Ryan & Wages originally was formed by Wages and Doris Ryan as a real estate investment venture. (CP 119; 1232-36). McCord and Floyd Ryan inherited their mother's (Doris Ryan) interest in Ryan & Wages upon her death in 2005. (CP 119; 780-

¹ McCord v. Wages (Snohomish County Sup. Ct. No. 09-2-03925-7) (CP 750); Ryan & Wages v. Wages et al (Snohomish County Super. Ct. No. 09-2-11962-5 (CP 810) and App. No. 68253-9-I); and McCord v. CMDG (Snohomish County Super. Ct. No. 12-2-03124-8 (CP 1262) and App. No. 68946-1-I).

81). (Floyd Ryan's interest is held by CPSP, although it is unclear whether it is a separate legal entity.) (CP 781). Ryan & Wages is a member-managed LLC with Wages appointed as the original manager. (CP 1233). The Ryan & Wages Operating Agreement ("Ryan & Wages OA") governs the entity's activities and authority of its manager. (CP 1232-52).

Article 6.1 of the Ryan & Wages OA gives the manager full and complete authority, power, and discretion to make any and all decisions for the company:

[T]he Manager shall have full and complete authority, power, and discretion to make any and all decisions and to do any and all things that he or she shall deem to be reasonably necessary or advisable in light of the Company's business and objectives.

(CP 1240).

Article 6.2c of the Ryan & Wages OA governs removal of managers, and states:

a. The Managing Member is removed by a unanimous vote of the Members owning sixty (60%) percent of the profit interests **and** sixty (60%) percent of the capital interests in the company.

(*Id.*) (emphasis added).

Wages holds 51% of the profit interests of Ryan & Wages, and McCord and CPSP together hold 49%. (CP 119; 781; 1237).

As minority owners, McCord and CPSP lack sufficient ownership interest to unilaterally remove Wages as manager.

As outlined below, Ryan & Wages eventually teamed with CDMG to develop assisted living facilities in two different locations. (CP 119; 831; 837-63). Prior to forming, CMDG required the members of Ryan & Wages to adopt an addendum to the Ryan & Wages OA, outlining the authority of Ryan & Wages' manager relative to the new entity, Redding Lake Stevens, LLC ("Redding Lake Stevens"). (CP 961-63). The Third Addendum to the Ryan & Wages OA was adopted in 2005 by its members (at the time it was Wages, and Julia McCord as representative of Doris Ryan's estate) and expressly granted Ryan & Wages' manager the authority to execute all documents pertaining to Ryan & Wages' membership in Redding Lake Stevens:

The Members hereby authorize the Manager to perform all acts and to execute all necessary documents on behalf of the LLC's membership interest in Redding Lake Stevens, LLC.

(CP 963).

2. Redding Lake Stevens, LLC

In approximately 2005, Wages, as manager of Ryan & Wages, approached the owners of CMDG about entering into a business relationship to develop two assisted-living facilities, one in Redding, California; and another in Lake Stevens, Washington. (CP 785-86). CMDG brought expertise regarding building and managing assisted-living facilities and the financial capabilities to complete the anticipated developments. (CP 831). Ryan & Wages had the land or rights to purchase the land in the two locations. (*Id.*)

Ryan & Wages and CMDG, as the only members, agreed to form Redding Lake Stevens to develop the properties. (CP 119; 831; 837-63). Ryan & Wages contributed the Lake Stevens land and the right to purchase the Redding property. (*Id.*; CP 831; 842-44). Under the RLS OA, CMDG agreed to contribute money to purchase the property in Redding, provide financing to develop the properties, and provide expertise to make the venture possible. (*Id.*) Due to the differing roles and contributions of the parties, the parties' ownership interests were structured in a manner that provided CMDG with management control and voting rights (Class B Units) while Ryan & Wages'

interests (Class A Units) had no management control and very limited voting rights. (CP 119-20; 842; 848).

Several sections of the RLS OA are relevant to issues in this appeal. Section 13.4 contains a bilateral prevailing party attorney fees clause:

If any legal proceeding is commenced to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees at trial and on appeal (including but not limited to expert witness fees, transcript costs and other similar expenses), in addition to the costs and disbursements allowed by law.

(CP 860).

Section 13.7 governs amendments, and states: "Any amendment to this Agreement must be in a writing signed by all Members." (CP 861).

3. Development of the properties

After formation, Redding Lake Stevens began developing the properties. The California property was developed as planned, operated successfully, and ultimately sold in December 2010 for a profit. (CP 832). Unfortunately, the Lake Stevens property was not as represented by Wages. (*Id.*). As a result, Redding Lake Stevens was unable to develop the Lake Stevens property as

planned, dramatically changing the financial outlook for Redding Lake Stevens. (CP 879-83).

As a result of the changed conditions, the two members agreed to amend the RLS OA. (*Id.*) In March 2009, both members of Redding Lake Stevens signed the First Amendment. One of CMDG's two managers, Charles McGlade, signed on its behalf, and Wages signed as manager of Ryan & Wages. (CP 120; 872-76).

Prior to the First Amendment being executed, McCord and CPSP tried to remove Wages as manager. (Appellants' Brief on Appeal, 7-8). Their attempts were unsuccessful because removing a manager required at least 60% profit ownership interest and McCord and CPSP lacked sufficient ownership interest. (CP 1240).

Ryan & Wages received substantial sums of money following the Redding property sale as a result of the First Amendment. (CP 120; 872-74). Ryan & Wages received \$11,000 per month from February 2009 through December 2010 (*Id.*) and a lump sum of \$1.25 million in December 2010. (*Id.*, CP 834). However, the internal power struggle among the members of Ryan & Wages, which began not long after Doris Ryan's death, was

compounded by execution of the First Amendment. (CP 747-48; 781-82; 796; 817).

4. Procedural History

a. Arbitration between Wages, and siblings McCord and Ryan

The first of what has become a lengthy litigious battle by McCord and her brother Floyd Ryan, through CPSP, (hereinafter, collectively the "McCords"), began in 2009 with cross complaints filed by Wages and the McCords. (CP 743-55). Wages filed a lawsuit asserting among other things that the McCords were acting without authority for Ryan & Wages when they unilaterally attempted to remove him as manager and started acting as managers. (CP 747). The McCords commenced a separate lawsuit against Wages ("First Lawsuit") (CP 752-55). The two suits were consolidated and ordered to binding arbitration. (CP 782).

The two-day arbitration hearing occurred November 17-18, 2009. (CP 772). One of the issues before the arbitrator was to resolve management conflicts among Ryan & Wages' members. (CP 773). The arbitrator found: "The managing member is Tom

Wages.” (*Id.*). It is important to note the singular nature of the term used by the arbitrator: “managing member.” The arbitrator also found that the “efforts of [the McCords] to remove Mr. Wages as managing member are contrary to the LLC Operating Agreement and the amendments thereto.” (*Id.*). In his written order, the arbitrator specifically ruled that removal of a manager is governed by Section 6.2c of the Ryan & Wages OA. (*Id.*)

**b. The McCords sue Redding Lake Stevens
 (“Second Lawsuit”)**

On December 28, 2009, just one month after the Arbitration Order was entered, the McCords filed a second lawsuit, only this time adding Redding Lake Stevens as a defendant (“Second Lawsuit”). (CP 810-18). The McCords petitioned the trial court to remove Wages as manager of Ryan & Wages (an act that would be unnecessary if he was not the manager at that time). (CP 816-17). The trial court granted the McCords’ motion on January 14, 2010 (“January 14 Order”). (CP 730-32). Of significance, the court did not appoint another manager in place of Wages. (*Id.*). All claims against Redding Lake Stevens were dismissed on summary judgment and

Redding Lake Stevens was awarded its attorney fees.² (CP 828-29).

The McCords' claims against Wages proceeded to trial. (CP 211-220). The main issue involved allocation of \$1.25 million previously distributed to Ryan & Wages from Redding Lake Stevens pursuant to the First Amendment. (*Id.*). The trial court found that Wages was manager of Ryan & Wages until his removal via the January 14 Order (CP 214), and upheld and allocated the \$1.25 million payment Ryan & Wages received from Redding Lake Stevens pursuant to the First Amendment. (CP 218-20).³

c. The McCords sue CMDG ("Third Lawsuit")

The McCords filed a third lawsuit in February 2012 ("Third Lawsuit"), less than two months after conclusion of the Second Lawsuit. (CP1262-67). The Third Lawsuit underlies this appeal.

All of the claims in the McCords' Third Lawsuit are based on the allegation that Wages was not the manager of Ryan &

² McCords have appealed the award of attorney fees. That issue has been fully briefed and the parties are waiting for the Court to schedule oral argument.

³ On December 16, 2011, the trial court determined distribution of the \$1.25 million, of which the McCords were to receive about \$1.07 million. (CP 217-20). The trial court had previously ordered that Wages be removed as managing member of Ryan & Wages as of January 14, 2010. (CP 731).

Wages in February 2009 when he executed the First Amendment on behalf of Ryan & Wages. (CP1264-66). All of the McCords' claims against CMDG were dismissed on summary judgment. (CP 203-06). As part of its ruling, the court found that assertions regarding whether Wages was manager of Ryan & Wages were central to both the contract and tort claims asserted in the complaint. (CP 1272-73). In addition the Court awarded CMDG its attorney fees pursuant to the terms of the RLS OA prevailing party attorney fees clause, but declined to hold the McCords liable for those fees and costs. (CP 1272).

E. Argument

1. Standard of Review

The standard for reviewing both the trial court's dismissal of all claims on summary judgment and its refusal to hold the McCords jointly and severally liable for CMDG's attorney fees and costs is *de novo*. **Christensen v. Grant Co. Hospital Dist. No. 1**, 152 Wn.2d 299, 305, 96 P.3d 957 (2004) *citing* **State v. Vasquez**, 109 Wn.App. 210, 314, 34 P.3d 1255 (2001) *aff'd*, 148 Wash. 2d 303 (2002) (collateral estoppel applies to bar re-litigation of an issue and is reviewed *de novo*); **Ethridge v.**

Hwang, 105 Wn. App. 447, 460, 20 P. 3d 958 (2001) (an award, or refusal to award, attorney fees is reviewed de novo).

2. The appeal by the McCords and Ryan & Wages should be denied.

The claims against CMDG by the McCords and Ryan & Wages are based on the assertion that Wages was not the manager when he signed the First Amendment on behalf of Ryan & Wages. The specific issue was previously decided numerous times in several judicial proceedings – and all of those decisions are contrary to the position asserted by the McCords and Ryan & Wages in their complaint. (CP 731; 214; 773). As a result, the claims were properly dismissed by the trial Court under the doctrine of collateral estoppel.

In an effort to avoid summary judgment, the McCords and Ryan & Wages also argued that Wages as the manager lacked authority to sign the First Amendment because doing so violated the terms of the Ryan & Wages OA. This assertion directly contradicts the terms of the Third Addendum to the Ryan & Wages OA.

a. Collateral estoppel bars the breach of contract and tortious interference claims by the McCords and Ryan & Wages against CMDG.

Collateral estoppel promotes judicial economy, prevents harassment of parties, and provides finality in adjudications. **Christensen**, 152 Wn.2d at 306-307. See also **Nielson v. Spanaway General Medical Clinic, Inc.**, 135 Wn.2d 255, 315, 956 P.2d 312 (1988).⁴ CMDG met its burden of establishing the four elements of collateral estoppel. **State Farm Mut. Auto. Ins. Co. v. Avery**, 114 Wn.App. 299, 304, 57 P.3d 300 (2002).

Collateral estoppel applies when: (1) an issue decided in the prior action was identical to the issue presented in the second action; (2) the prior action ended in a final judgment on the merits; (3) the party to be estopped was a party or in privity to a party in the prior action; and (4) the application of the doctrine would not work an injustice. **Vasquez**, 148 Wn. 2d 303; see also **Pederson v. Potter**, 103 Wn.App. 62 (2000).

The McCords and Ryan & Wages challenge the first and fourth elements.

⁴ Collateral estoppel "limits the vexation and harassment of other parties; lessens the overcrowding of court calendars, thereby freeing the courts for use by others; and, by providing for finality in adjudications, encourages respect for judicial decisions" citing Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 806 (1985).

- i. **The Arbitration Order resolved the question of whether Wages was manager of Ryan & Wages when he signed the First Amendment, which is the precise question that forms the basis of the claims against CMDG.**

The same factual issue that forms the basis of the McCords' and Ryan & Wages' claims against CMDG was litigated and decided by a prior court. That question is whether Wages was manager of Ryan & Wages in February 2009.

Contrary to the assertions in the appeal brief by the McCords and Ryan & Wages, the correct standard as to whether an issue was already litigated is found in the Restatement (Second) of Judgments § 27 (1982).⁵ The test is whether the issue as it relates to the first judgment was recognized by the parties as important and by the judge as necessary. **Avery**, 114 Wn.App. at 305 (“[I]f the issue was essential to the first judgment, it most likely received the attention of the parties and the court. This justifies giving it preclusive effect.”); **Nielson v. Spanaway General Medical Clinic, Inc.**, 135 Wn.2d 255, 315, 956 P.2d

⁵ The standard put forth by the McCords and Ryan & Wages is no longer good law. Their attempt to distinguish between “evidentiary facts” and “ultimate facts” relies on the original Restatement of Judgments § 68 adopted in 1942, which is replaced by the standard set forth in the Restatement (Second) of Judgments § 27 (1982). *Id.* at 834-35.

312 (1998). The fact at issue in the subsequent proceeding need not be identical, but rather the fact must be central to the claims being asserted and already decided in a prior court proceeding. **Robinson v. Hamed**, 62 Wn. App. 92, (1991) (defamation claims dismissed based on collateral estoppel because employment arbitration ruling already decided the issue as to credibility of the defendant); **Mallard v. State, Dept. of Retirement Systems**, 103 Wn.2d 484, 490, 694 P.2d 16 (1985) *citing* Restatement (Second) of Judgments § 27, comment c, (even if events took place at different times, “. . . [I]n absence of a showing of changed circumstances, a determination that, for example, a person was disabled . . . in one year will be conclusive with respect to the next as well.”).

The issue of whether Wages was manager of Ryan & Wages was decided by the arbitrator. (CP 773). The arbitration pleadings, briefs, and Arbitration Order confirm that the dispute over management and Wages’ authority to act as manager were central to the dispute before the arbitrator, actually litigated, and resolved via the Arbitration Order. (*Id.*). Wages’ complaint, filed on April 21, 2009, demanded the McCords submit to binding arbitration in accordance with the Ryan & Wages OA to resolve,

among other things, disputes over management. (CP 747). The McCords' own arbitration brief states that the issue of management is in dispute and demands the parties submit to binding arbitration: "Floyd and Julia filed a complaint in the Snohomish County Superior Court for the sole purpose of having an arbitrator appointed to resolve the management issues" (CP 782).

After being presented with the evidence, the arbitrator unambiguously ruled on the issue of management. The arbitrator ruled that "[t]he managing member is Tom Wages." (CP 773). The language is singular. After being presented with all the information, the arbitrator did not find that there were several managers and Wages was one of them. To the contrary, he found that Wages was "the" managing member. The arbitrator then went further. He reviewed the Ryan & Wages OA, compared specific sections, and ruled that section 6.2c controlled. (*Id.*). He then specifically ruled that the McCords' unilateral attempts to remove Wages were contrary to the Ryan & Wages OA: "The efforts of McCord and Ryan to remove Mr. Wages as managing member are contrary to the LLC Operating Agreement and the amendment thereto." (*Id.*).

The issue was central to the arbitration and decided by the arbitrator. The McCords were represented by counsel at the November 2009 arbitration. They briefed the issue, presented evidence, and the arbitrator ruled against them. Collateral estoppel now bars them from attempting to retry that issue. **Robinson**, 62 Wn. App. at 96-97 (arbitration decision precluded re-litigation of issue decided by arbitrator).

The issues in **Robinson** are similar to the issues in this case. **Robinson** involved an altercation between two parties, one of which, Hamed, was a Boeing employee. Boeing disciplined Hamed for his involvement in the altercation. *Id.* at 94. Hamed contested Boeing's determination in an arbitration hearing. Hamed lost when the arbitrator found that Robinson (and not Hamed) was telling the truth. (*Id.*). In a subsequent action, Robinson sued Hamed for assault, and Hamed filed counterclaims alleging defamation and tortious interference. (*Id.* at 95. The trial court dismissed Hamed's claims based on collateral estoppel because Hamed's candor was central to the arbitrator's decision in the earlier proceeding. *Id.* at 98-99. Like in **Robinson**, the issue of whether Wages was the manager of Ryan & Wages was a central issue decided in the arbitration,

and collateral estoppel bars the McCords and Ryan & Wages from re-litigating that issue in their Third Lawsuit.

Contrary arguments by the McCords and Ryan & Wages are unpersuasive. They claim that because the Arbitration Order does not expressly state that Wages was manager in February 2009, nine months before the Arbitration Order was entered, he therefore was not manager⁶ — that a fact must be true because it cannot be proven false — is contrary to law and the established facts. The case law follows sound logical reasoning in holding that in absence of a showing of changed circumstances, a determination that at one point in time will be conclusive with respect prior point in time. **Mallard**, 103 Wn.2d 484, 490, 694 P.2d 16 (even if events took place at different times, “. . . [I]n absence of a showing of changed circumstances, a determination that, for example, a person was disabled . . . in one year will be conclusive with respect to the next as well.”).

The undisputed facts are that (1) Wages was appointed manager when Ryan & Wages was formed in 2004; (2) the

⁶ Richard H. Underwood, Logic and the Common Law Trial, 18 Am. J. Trial Advoc. 151, 172 (1994) (Appeal to Ignorance - The argumentum ad ignorantiam that something is false because it has not been proved true.).

Arbitration Order confirmed that Wages was manager on November 25, 2009, and that the McCords failed to remove him despite their efforts; and (3) Wages was ultimately removed as manager via the January 14 Order in 2010. The only logical conclusion is that Wages was manager in February 2009 when he signed the First Amendment.

Three trial court orders subsequent to the Arbitration Order confirmed this conclusion. The January 14 Order ruled that “Tom Wages is relieved of all management authority of Ryan & Wages, LLC, effective immediately.” (CP 731). There was no reason to remove him if he had already been removed. In three separate references, the trial court in the Second Lawsuit ruled that Wages was managing member through January 14, 2010. In fact, that court went even further when confirming validity of the First Amendment:

Wages was the managing member of Ryan & Wages and has a 51% interest in the company. . . . Mr. Wages was removed as manager by court order on January 14, 2010.

(CP 212; 214).

On February 1, 2009, R&W and CMDG executed the First Amendment to the Operating Agreement for Redding Lake Stevens, LLC (“First

Amendment”).

(CP 213).

Under the First Amendment, Ryan & Wages and CMDG agreed that the Lake Stevens Property could not be developed in the manner or on the timeline assumed in the Redding Operating Agreement.”

(*Id.*).

The trial court in this Third Lawsuit also found that Wages was the manager when he signed the First Amendment:

[T]he arbitrator ruled that the efforts to remove Wages were contrary to the LLC Operating Agreement and the amendments thereto. Therefore, this issue was arbitrated and resolved against the current position of McCord and Ryan. Furthermore, the record before the court establishes that Wages was the managing member continuously from the time Ryan & Wages was formed until he was removed as the manager by court order dated January 14, 2012 [sic].

(CP 204-05).

With this appeal, the McCords and Ryan & Wages attempt to overturn rulings in this Third Lawsuit as well as the First Lawsuit and Second Lawsuit. There is no basis for their collateral attacks on prior court rulings that Wages was the manager when he signed the First Amendment.

ii. Application of collateral estoppel is just, as it prevents further and continued litigation by the McCords.

Justice is served by confirming the trial court's ruling. The issue of justice focuses on whether the party opposing the application of collateral estoppel was given a full and fair opportunity to litigate the issue at the prior proceeding.⁷ **Robinson**, 62 Wn. App. 92, 100. In evaluating this element, the court does not look at the issue of whether the prior issue was decided correctly. Such an examination defeats the very purposes behind the doctrine of collateral estoppel. In **Robinson**, Hamed asserts many reasons why applying the arbitration order would be unjust: poor representation by counsel, lack of discovery, defects on the face of the arbitration order, different claims involved. 62 Wn. App. at 100-103. The court rejected all of these arguments because Hamed was represented at the two-day arbitration hearing by counsel and had a full and fair opportunity to litigate the issue at arbitration.

The McCords had ample opportunity to present their case at arbitration. The arbitration was a two-day hearing during which

⁷ Although the McCords assert that they are challenging the trial court's ruling under the fourth element of whether justice will be served, they fail to put forward the standard by which that element is determined.

the McCords had a full and fair opportunity to present evidence as to why Wages was not manager of Ryan & Wages, why they were also managers, and how the Ryan & Wages OA should be interpreted. They had the opportunity to explain why their claimed equity interest gave them alleged authority beyond the terms of the Ryan & Wages OA as they argue repeatedly in their appeals brief.⁸ After hearing all of the evidence, the arbitrator concluded that Wages was “the” manager and that the McCords’ attempts to remove him were unsuccessful.

The McCords obviously disagree with the Arbitration Order, but the validity of that ruling is not before the Court. Their efforts are nothing more than collateral attacks on the Arbitration Order. Not only are they irrelevant to the issue, the arguments contradict the arbitrator’s ruling and the plain language of the Ryan & Wages OA. While they may not like the arbitrator’s ruling, they had a full and fair opportunity.

⁸ This issue is really a red hearing. The McCords could have had 100% of the equity interest and still not have been able to remove Wages as manager because it took a majority of both the profit and equity interest to remove the manager. (CP 932; 935). It is undisputed that Wages had 51% of the profit interest. (CP 932). In fact, under Section 6.2c, unless the McCords had a majority “of all Interests,” both capital and profit, they could not remove a manager or appoint additional managers. (CP 935).

Collateral estoppel was specifically adopted to promote judicial economy, prevent harassment of parties, and provide finality in adjudications **Christensen**, 152 Wn.2d at 306-307. Granting the appeal by the McCords and Ryan & Wages would violate all of those tenets and three prior rulings made by the trial court.

b. As manager of Ryan & Wages, Wages had express authority under the Ryan & Wages OA to sign the First Amendment.

The fallback position of the McCords and Ryan & Wages is that even if Wages was the manager of Ryan & Wages, he lacked authority to sign the First Amendment. Though absent from their complaint, this position is contrary to the express language of the Ryan & Wages OA and well established rules of contract interpretation.

Article 6.1 gave Wages as manager full and complete authority, power, and discretion to make any and all decisions regarding Ryan & Wages:

[t]he Manager shall have full and complete authority, power, and discretion to make any and all decisions and to do any and all things that he or she shall deem to be reasonably necessary or advisable in light of the Company's business and objectives.

(CP 935). The Third Addendum to the Ryan & Wages OA grants the manager express authority to sign agreements impacting Ryan & Wages' interest in Redding Lake Stevens, including signing an amendment to the RLS OA:

The Members hereby authorize the Manager to perform all acts and to execute all necessary documents on behalf of the LLC's membership interest in Redding Lake Stevens, LLC.

(CP 963).

Wages acted well within his authority as manager pursuant to the Ryan & Wages OA, when he executed the First Amendment.

The argument by the McCords and Ryan & Wages that summary judgment should be reversed pursuant to Section 8.3 of the Ryan & Wages OA ignores its express language as outlined above and violates well established tenets of contract law interpretation.

Section 8.3 limits the manager's ability to sell or dispose of all or substantially all of Ryan & Wages assets. Section 8.3 does not apply to a situation where the manager was signing an amendment to the RLS OA. The First Amendment did not dispose of any of Ryan & Wages assets. Ryan & Wages' ownership interest in Redding Lake Stevens is 50 Class A Units. After

adoption of the First Amendment and even today, Ryan & Wages still holds the same ownership interest in Redding Lake Stevens: 50 Class A Units. The First Amendment did not result in a sale or disposition of “all or substantially all of the assets.”

By applying Section 8.3, the McCords are asking the Court to ignore specific language of a contract in favor of general language. Under basic contract law, specific contract language controls over general contract language. **Diamond B Constructors, Inc. v. Granite Falls School Dist.**, 117 Wn.App. 157, 165, 70 P.3d 966 (2003) *citing* **Waste Mgmt. of Seattle, Inc. v. Transp. Comm’n**, 123 Wn.2d 621, 629-630, 896 P.2d 1034 (1994). The Third Addendum to the Ryan & Wages OA specifically grants authority to the manager to sign amendments to the RLS OA. Section 8.3 of the Ryan & Wages OA expresses general language about membership rights. Since the Third Addendum to the Ryan & Wages OA contains specific language addressing the issue of the manager’s authority to sign amendments to the RLS OA, it controls over Section 8.3, even if that section did apply.

The factual assertions underlying the appeal by the McCords and Ryan & Wages were previously decided against

them in prior litigation. The doctrine of collateral estoppel bars their claims. Attempts by the McCords and Ryan & Wages to avoid the consequences of those prior rulings by pointing to strained interpretations of the Ryan & Wages OA ignore its plain language and contradict well-established doctrines of contract interpretation. The appeal by the McCords and Ryan & Wages should be denied.

3. The trial court erred in denying joint and several liability for the attorney fees and costs incurred by CMDG in defending against contract claims, all of which were based on the RLS OA and dismissed on summary judgment.

The McCords and Ryan & Wages commenced a lawsuit alleging breach of contract and tortious interference against CMDG. (CP 1262-67). The Complaint defines "Plaintiff" as both Ryan & Wages and the McCords. (CP 1262). The complaint states that the "Plaintiff" is asserting breach of contract claims: "... Plaintiff has suffered ... damages, as a direct result of Defendant's breach" (CP 1265).

In granting summary judgment, the trial court found that both the contract and tort claim arose out of the RLS OA and that the RLS OA was central to both claims. (CP 1272-73). The trial

court also found that the fees incurred by CMDG in defending the two claims were inseparable. (CP 1273).

The court awarded attorney fees against Ryan & Wages based on the prevailing party attorney fees clause in the RLS OA but committed reversible error when it declined to also hold the McCords liable for the fees. As the prevailing party against claims based on breach of a contract with a mandatory attorney fees provision, CMDG is entitled to recover its attorney fees against all of the plaintiffs under the well established equitable doctrine of mutuality of remedy. In addition, since the tort claims were based “on the contract,” CMDG is entitled to recover its attorney fees even if the McCords had asserted only tort claims.

a. CMDG is entitled to attorney fees under the equitable doctrine of mutuality of remedy.

Since at least 1984, this Court has applied the equitable doctrine mutuality of remedy to award attorney fees to a party who successfully defeats a contract action where the contract at issue contains a prevailing party attorney fees clause. **Kaintz v. PLG, Inc.**, 147 Wn. App. at 789, 197 P.3d 710 (2008). This is true even if the plaintiff is not a party to the contract. *Id.*

i. Mutuality of remedy is well-established law in Washington.

The phrase “mutuality of remedy” as applied to an award of attorney fees was first used by this Court in 1984. **Herzog Aluminum, Inc. v. Gen. Am. Window Corp.**, 39 Wn. App. 188, 196, 692 P.2d 867 (1984). In **Herzog**, the Court stated that RCW 4.84.330 was “enacted to establish mutuality of remedy.” *Id.*

The principle subsequently was applied in **Park v. Ross Edwards, Inc.**, 41 Wn. App. 833, 706 P.2d 1097 (1985). In **Park**, this Court upheld the trial court’s ruling that the contract at issue was unenforceable because there was no meeting of the minds. *Id.* at 836-37. Nonetheless, this Court upheld the award of attorney fees to the party that successfully argued the invalidity of the contract, reasoning that had there been a unilateral attorney fee clause rather than a bilateral clause in the agreement, RCW 4.84.330 would have allowed the party establishing the invalidity of the contract to recover its attorney fees:

Certainly it makes little sense to allow a [party] who successfully defends a suit for specific performance by proving the absence of a contract to collect attorney fees only if the purported contract included a unilateral attorney fee provision but not if it included bilateral provision.

Id., at 839.

The Supreme Court confirmed and expanded the doctrine in 2003 when awarding attorney fees to a party that prevailed in having a statute containing a prevailing party attorney fees clause declared void. **Mt. Hood Bev. Co. v. Constellation Brands, Inc.**, 149 Wn.2d 98, 63 P.3d 779 (2003). The next year, in **Labriola v. Pollard Group, Inc.** 152 Wn.2d 828, 100 P.3d 791 (2004), the Supreme Court expanded the rule to apply to cases where a contract containing a prevailing party attorney fees clauses was declared void. The Supreme Court stated: “[A]ttorney fees and costs are awarded to the prevailing party even when the contract containing the attorney fee provision is invalidated.” *Id.* **See also Erwin v. Cotter Health Ctrs., Inc.**, 133 Wn. App. 143, 155, 135 P.3d 547 (2006) (upholding an award of attorney fees based on a contract the Court found unenforceable); **Almanza v. Bowen**, 155 Wn. App. 16, 23-24, 230 P.3d 177 (2010) (prospective home purchasers entitled to an award of attorney fees after establishing that the agreement had been rescinded); **Klass v. Haueter**, 49 Wn. App. 697, 745 P.2d 870 (1987) (attorney fees awarded to individual under attorney fee contract clause even though the individual prevailed by asserting they were not a party to the contract); **T.J. Meenach v.**

Triple “E” Meats, Inc., 39 Wn. App. 635, 694 P.2d 1125 (1985) (attorney fees properly awarded even though there was no contract between the parties).

ii. Mutuality of remedy requires liability against the McCords for CMDG’s attorney fees.

When the McCords elected to assert breach of contract claims against CMDG, even though the McCords were not parties to the contract, they also elected to be liable for CMDG’s attorney fees when their claims were defeated. **Kaintz** is directly on point. In **Kaintz**, a non-party to a lease brought breach of contract claims against the landlord. The Court ordered the non-party to pay the landlord’s attorney fees under mutuality of remedy. **Kaintz**, 147 Wn. App. at 789.

Kaintz leased commercial space to Draper Enterprise, Inc. *Id.* at 784. The lease contained a bilateral attorney fees clause. *Id.* Draper subsequently assigned the lease to PLG, Inc., without obtaining Kaintz’s consent to the assignment, despite an express lease requirement that no assignment was valid without the approval of Kaintz. *Id.* Kaintz filed an unlawful detainer action against PLG. *Id.* PLG filed counterclaims asserting breach of the lease to which it was not a party. *Id.* at 784-85. The trial

court dismissed PLG's claims on summary judgment. *Id.* The trial court awarded Kaintz attorney fees and costs under the prevailing-party fee clause in the lease. *Id.* PLG objected on the basis that there was no contract between Kaintz and PLG. *Id.* at 786. The trial court denied PLG's motion for reconsideration and PLG appealed. *Id.* at 785-86. This Court in **Kaintz** held that mutuality of remedy supports an award of fees even when the prevailing party is a non-party to the contract. *Id.*, at 784.

Here, just like PLG in **Kaintz**, the McCords and Ryan & Wages filed suit against CMDG alleging breach of contract. (CP at 1265-66). Also like PLG, the McCords were not a party to the contract on which the claims were based. In **Kaintz** it was a lease; here it is the RLS OA. Kaintz prevailed on summary judgment. Like Kaintz, all claims against CMDG were dismissed with prejudice on summary judgment. As **Kaintz** makes clear, mutuality of remedy requires the award of attorney fees to CMDG against all parties bringing the breach of contract claims – regardless of whether they were parties to the contract at issue.

b. The McCords also are liable under Washington case law for attorney fees awarding for defending against tort claims that are based on a contract.

Washington case law awarding fees on similar equitable grounds compel the same result. In cases where the plaintiff's claims are founded in tort or another legal theory, courts recognize that an award of attorney fees is appropriate when the claims asserted are "on a contract" containing an attorney fees clause. **Edmonds v. John L. Scott Real Estate, Inc.**, 87 Wn. App. 834, 855–56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence claim when duty breached was created by parties' agreement).

An action is "on a contract" if the action arose out of a contract and if the contract is central to the dispute. **Boguch v. Landover Corp.**, 153 Wn. App. 595, 616, 224 P.3d 795 (2009); **Stieneke v. Russi**, 145 Wn. App. 544, 190 P.3d 60 (2008), review denied, 165 Wash. 2d 1026, 203 P.3d 381 (2009) (purchaser's action against vendor and broker for fraudulent concealment was "on the contract" for purposes of an award of attorney's fees).

Stated differently, an action "sounds in contract when the act complained of is a breach of a specific term of the contract, without reference to the legal duties imposed by law on that relationship." **G.W. Constr. Corp. v. Prof'l. Serv. Indus., Inc.**, 70

Wn. App. 360, 364, 853 P.2d 484 (1993) (citing **Yeager v. Dunnavan**, 26 Wn.2d 559, 562, 174 P.2d 755 (1946)). RCW 4.84.330 dictates that “on the contract” be interpreted broadly. **W. Stud Welding, Inc., v Omark Indus., Inc.**, 43 Wn. App. 293, 299, 716 P.2d 959 (1986) (contract-related tortious interference claim justified awarding of contract-based fees). **See also, Deep Water Brewing**, 152 Wn. App. at 279-80; 215 P.3d 990; **Hemenway v. Miller**, 116 Wn.2d 725, 742–43, 807 P.2d 863 (1991); **Seattle–First Nat’l Bank v. Wash. Ins. Guar. Ass’n**, 116 Wash.2d 398, 413, 804 P.2d 1263 (1991); **Hill v. Cox**, 110 Wash.App. 394, 411–12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract).

i. The trial court properly found that all of the claims against CMDG were based on the contract – the RLS OA.

In this case, as the trial court found, the tort claims brought by the McCords were contractual in nature and based on the same underlying contract – the RLS OA. (CP 1272-73). The McCords and Ryan & Wages brought two claims against CMDG – breach of the RLS OA and tortious interference with the Ryan & Wages OA. (CP 1265-66). The tortious interference claim

was based on the same facts as the breach of contract claim—that Wages was not the manager of Ryan & Wages when he signed the First Amendment. (CP 1266). As the trial court correctly found, the tortious interference claim arose out of the claimed breach of the RLS OA, and the breach of the RLS OA was central to the dispute:

The assertion that Mr. Wages was not the manager of Ryan & Wages when he signed the First Amendment to the [RLS OA] was central to both the contract claim and the tortious interference claim asserted by plaintiffs.

(CP 1272).

Plaintiffs' tortious interference claim arose out of the claimed breach of the [RLS OA] and the breach of the [RLS OA] was central to that dispute.

(CP 1273).

The fees incurred by CMDG would not have been any different if only the breach of contract claim had been asserted.

(*Id.*).

The central issue for the McCords' tort claim was whether CMDG violated the RLS OA by allowing Wages to execute the First Amendment. Indeed, the McCords specifically assert that CMDG tortiously interfered with the Ryan & Wages OA by breaching the RLS OA. (CP 1266). Only after concluding that

Wages was the manager and thus authorized to sign the First Amendment did the court dismiss the McCords' tort claims against CMDG. (CP 205).

ii. The Court should reverse the trial court and impose joint and several liability against the McCords.

Because the McCords' tort claims were based on the contract and inseparable from the McCords' breach of contract claim, CMDG is entitled to recover its attorney fees against the McCords.

The **Deep Water Brewing** case is illustrative. In **Deep Water Brewing**, the trial court found a homeowners association and its president liable in tort for interfering with agreements to preserve a view corridor and awarded attorney fees. The prevailing party was not a party to the agreements, which were a never-recorded easement and right-of-way dedication. *Id.* at 240. The president of the homeowners association argued on appeal that he was not liable for the fees for two related reasons. The first was because the breach of contract claims against him had been dismissed on summary judgment. Second, the conclusion that he tortiously interfered effectively meant he was

not a party to the agreements because such claims do not arise out of the underlying contract. *Id.* at 278. The court rejected the arguments and affirmed the president's liability for the fees based on the contractual nature of the claims. **See also W. Stud Welding**, 43 Wn. App. at 299, 716 P.2d 959 (prevailing party entitled to recover fees including for tortious interference claims as they were based on the contract).

Even if the McCords had only asserted a tortious interference claim, they would be liable for CMDG's costs and attorney fees. The alleged tortious inference claim was based on breach of the RLS OA. The RLS OA contains a bilateral attorney fees provision. Since the tort claims are "on the contract," the McCords are liable for CMDG's costs and attorney fees under RCW 4.84.330.

4. CMDG is entitled to attorney fees and costs on appeal.

For the reasons outlined in Section 2 of this brief, CMDG is entitled to its attorney fees incurred on appeal against the McCords and Ryan & Wages jointly and severally. **Kaintz**, 147 Wn. App. at 79-91. *See also Labriola*, 152 Wn.2d at 839; **Erwin**, 133 Wn. App. at 155; **Herzog**, 39 Wn. App. at 197; **Almanza**,

155 Wn. App. at 24; **Klass**, 49 Wn. App at 708; **T.J. Meenach**, 39 Wn. App. at 641. Pursuant to RAP 18.1, CMDG requests that it be awarded its fees and costs incurred in this appeal.

F. Conclusion

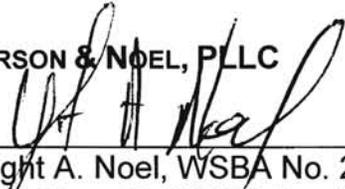
The appeal by the McCords and Ryan & Wages should be denied. All of their claims are based on an assertion that Wages was not the manager or did not have authority as the manager to sign the First Amendment. The Arbitration Order specifically found that Wages was the manager during that time. Three subsequent court rulings correspondingly held the same. Collateral estoppel bars any assertion that Wages was not the manager. As the manager, the Ryan & Wages OA gave Wages express authority to sign the First Amendment.

CMDG is entitled to recover the attorney fees and costs it incurred in defending against the claims alleged by the McCords and Ryan & Wages. Both the contract and tort claims were based on the RLS OA, which contains a bilateral attorney fees clause. Under the mutuality of remedy doctrine, CMDG is entitled to recover its attorney fees against the McCords even though they were not a party to the RLS OA. In addition, since McCords' tort claims were based "on the contract," CMDG is

entitled to recover its attorney fees and costs from the McCords under the equitable grounds based in RCW 4.84.330. CMDG further requests that it be awarded its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 7th day of November, 2012.

CARSON & NOEL, PLLC



Wright A. Noel, WSBA No. 25264
Kelle Gronski, WSBA No. 38848
Attorneys for Respondent
CMDG Investments, LLC
CARSON & NOEL, PLLC
20 6th Avenue, Issaquah, WA 98027
Tel: 425.837.4717
Fax: 425.837.5396

APPENDIX

Clerk's Papers

Final Judgment Dismissing Plaintiff's Claims and Awarding Attorney Fees and Costs to Defendant	1270-74
Findings of Fact and Conclusions of Law	119-20
LLC Operating Agreement and Articles of Organization for Ryan & Wages, LLC	1232-36
Defendants' Arbitration Brief	780-82, 785, 796
Declaration of Willard L. Forsyth	831-32, 834, 961-63
Redding Lake Stevens, LLC Operating Agreement	837-63
Letter from Ridgeline to David Carson and Gary Krohn, dated Dec. 17, 2008	879-83
First Amendment to the Operating Agreement of Redding Lake Stevens, LLC	872-76
Summons and Complaint	743-48
Summons and Complaint	750-55
Complaint	810-18
Arbitration Decision	771-75
Order Granting Defendant Redding Lake Stevens, LLC's Motion for Summary Judgment	828-29
Findings of Fact and Conclusions of Law	211-20
Complaint for Breach of Contract; Breach of Fiduciary Duty; Tortious Interference with a Contractual Relationship; Civil Conspiracy; Conversion	1262-67
Order Granting Defendant's Motion for Summary Judgment	203-06
Order Re Show Cause Hearing	730-32

RCW 4.84.010. COSTS ALLOWED TO PREVAILING PARTY – DEFINED – COMPENSATION TO ATTORNEYS. The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

- (1) Filing fees;
- (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
 - (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.
 - (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
- (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
- (6) Statutory attorney and witness fees; and
- (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.330. ACTIONS ON CONTRACT OR LEASE WHICH PROVIDES THAT ATTORNEYS' FEES AND COSTS INCURRED TO ENFORCE PROVISIONS BE AWARDED TO ONE OF PARTIES – PREVAILING PARTY ENTITLED TO ATTORNEYS'

FEES – WAIVER PROHIBITED. Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties — Prevailing party entitled to attorneys' fees — Waiver prohibited.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RAP 18.1 ATTORNEY FEES AND EXPENSES (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law

mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

DECLARATION OF SERVICE

The undersigned hereby declare that on this 7th day of November, 2012, I caused the foregoing Respondent's Brief to be served via the methods listed below on the following parties:

Via Email and U.S. Mail to:

Mark D. Kimball
James P. Ware
MDK Associates
The Law Offices of Mark Douglas Kimball, P.S.
10900 NE 4th Street, Suite 2030
Bellevue, WA 98004
mark@mdklaw.com
james@mdklaw.com

Attorney for Appellants/Cross-Respondents

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on November 7, 2012, at Issaquah, Washington.


Dana Carrothers