

68253-9

68253-9

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 MAY -8 PM 2: 21

E

CASE NO. 68253-9-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

RYAN AND WAGES, LLC, a Washington Limited Liability Company
through its Members, JULIA MCCORD and THE CONJUNCTIONAL
PATRIOTIC SOVEREIGN PATHWAY,

Appellants/Cross-Respondents,

vs.

TOM WAGES, an Individual, and REDDING LAKE STEVENS, LLC,
an Oregon Limited Liability Company,

Cross-Appellant/Respondent.

APPELLANTS' BRIEF ON APPEAL

Mark D. Kimball, WSBA No. 13146
Mark@mdklaw.com
James P. Ware, WSBA No. 36799
James@mdklaw.com
MDK Law Associates
10900 NE 4th St., Suite 2030
Bellevue, WA 98004
(425) 455-9610

Attorneys for Appellants/Cross-Respondents
Ryan and Wages, LLC, Julia McCord, and The Conjunctional Patriotic
Sovereign Pathway

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENT OF ERROR.....	1
II. ISSUE PRESENTED	1
III. STATEMENT OF THE CASE	1
IV. FACTUAL AND PROCEDURAL HISTORY	3
V. STANDARD OF REVIEW.....	6
VI. LEGAL ARGUMENT	7
A. The Trial Court Erred When It Awarded Attorney Fees and Costs to Redding Lake Stevens, LLC Based On the Redding Lake Stevens, LLC Operating Agreement Because Redding Lake Stevens, LLC Was Not a Party to the Operating Agreement.	7
B. Respondent Cannot Rely on RCW § 4.84.330 as the Basis for Fees and Costs Because the Attorney Fees Clause in the Subject Operating Agreement is Bilateral.	13
VII. CONCLUSION	14

TABLE OF AUTHORITY

	<u>Page</u>
Cases	
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wn. App. 120, 857 P.2d 1053 (1993)	6
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	6
<i>Dice v. City of Montesano</i> , 131 Wn. App. 675, 128 P.3d 1253 (2006).....	8
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	9
<i>Allstate Ins. Co. v. Hammonds</i> , 72 Wn. App. 664, 865 P.2d 560 (1994).....	9
<i>Eurick v. PEMCO Ins. Co.</i> , 108 Wn.2d 338, 738 P.2d 251 (1987).	9
<i>Martinez v. Miller Indus. Inc.</i> , 94 Wn. App. 935, 974 P.2d 1261 (1999).....	9
<i>Touchet Valley Grain Growers, Inc. v. Opp & Seibold</i> , 119 Wn.2d 334, 831 P.2d 724 (1992)	9,13
<i>Watkins v. Restorative Care Center, Inc.</i> , 66 Wn. App. 178, 831 P.2d 1085 (1992).	9,13
<i>Kaintz v. PLG, Inc.</i> , 147 Wn. App. 782, 197 P.3d 710 (2008).....	13

TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
Statutes, Codes, and Civil Rules	
RCW § 4.84.330	13,14

I. ASSIGNMENT OF ERROR

1. The Trial Court erred when it awarded attorney fees and costs to Respondent based upon an attorney fee clause in Respondent's LLC Operating Agreement.

II. ISSUE PRESENTED.

Is an award of attorney fees proper when the basis for such an award is an LLC Operating Agreement to which the Respondent is not a party? No.

III. STATEMENT OF THE CASE.

This Appeal arises from an award of attorney fees following the Trial Court's dismissal of Appellants' Claims against Respondent Redding Lake Stevens, LLC, with prejudice. The Trial Court's putative basis for the award of attorney fees was Paragraph 13.4 of the Redding Lake Stevens, LLC Operating Agreement ("LLC Operating Agreement"). Here, Appellants do not challenge the dismissal of their claims with prejudice; rather they seek review of the Court's award of attorney fees and costs based solely on the attorney fee provision in an LLC Operating Agreement to which Respondent was not a party.

More specifically, on June 15 2011, Redding Lake Stevens was named as a defendant to an action alleging that it breached a contract with Appellants. (CP 234-44) On August 16, 2011, Respondent Redding Lake Stevens, LLC moved for summary judgment arguing that it lacked contractual privity with Appellants and, additionally, to the extent that any contractual obligations existed, the Respondent had met its obligations. (CP 220-33) Critically, Respondent specifically conceded that it was not a party to the LLC Operating Agreement. (CP 231) In response, Appellants asserted a variety of reasons that Respondent's Motion should fail and why Respondent was not entitled to an award of attorney fees and costs. (CP 121-31)

The Trial Court ultimately granted Respondent's Motion. The Court also later awarded Respondent attorney fees and costs, purportedly based upon the terms of Respondent's LLC Operating Agreement. (CP 73)

Despite the fact that Respondent argued --and the Court agreed-- that Respondent had no contractual privity with Appellants and was not a party to the LLC Operating Agreement, the Trial Court relied upon the terms of Respondent's LLC Operating Agreement to award attorney fees. (CP 73) In fact, in its Motion Respondent openly admitted that it was not a party to the LLC Operating Agreement and had no direct contractual

privity with Appellants. (CP 231) The attorney fees clause in the subject LLC Operating Agreement states that “[i]f any legal proceeding is commenced to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to recover attorney fees...” (CP 164) Notably, throughout the LLC Operating Agreement the term “party” is used interchangeably with the term “Member”. (CP 145) At no time did Respondent explain how it could not be a party to the LLC Operating Agreement and still benefit from the attorney fees clause when the clause is limited to parties/members to the LLC Operating Agreement. Despite this factual vacuum, the Respondent was awarded attorney fees by the Trial Court pursuant to an LLC Operating Agreement to which it was not a party.

IV. FACTUAL AND PROCEDURAL HISTORY

In November 2005, Ryan & Wages, LLC and CMDG Investments, LLC created Redding Lake Stevens, LLC. (CP 145-75, 221-26) The purpose of Redding Lake Stevens, LLC was to develop certain properties in Redding California, and Lake Stevens, Washington. (CP 221-26)

Appellants originally filed suit against Thomas Wages, a member of Ryan & Wages, LLC, seeking to have Wages removed as manager and also seeking damages resulting from misappropriation of LLC funds. (CP

473-89) In response, Wages filed counterclaims for judicial dissolution of Ryan & Wages, LLC. (CP 466-70) Appellants joined Wages in his request to obtain judicial dissolution of Ryan & Wages, LLC. (CP 464-65)

In June 2011, Appellants amended their Complaint to add Redding Lake Stevens, LLC as a defendant and added a cause of action against that entity for “breach of contract”. (CP 242-43) The Amended Complaint alleged that Redding Lake Stevens, LLC breached its obligations to develop property in Lake Stevens, Washington. (CP 242-43) After brief discovery, Redding Lake Stevens, LLC filed a motion for summary judgment that was calendared for September 2011.

In its Motion for Summary Judgment, Redding Lake Stevens argued, inter alia, that it lacked contractual privity with Appellants and, to the extent any contractual obligation existed, it had met its obligations with respect to developing the Redding and Lake Stevens properties. (CP 227-31) Specifically, Respondent argued that the LLC Operating Agreement was between Ryan & Wages, LLC and CMDG Investments, LLC. (CP 231) As a result, Respondent argued, it was neither a party nor a member to the LLC Operating Agreement. (Id.) Respondent further argued that because it lacked contractual privity with Appellants, Appellants’ claim for breach of contract should be dismissed. (Id.)

Even though Respondent adamantly argued that it lacked contractual privity with Appellants and was not a party to the LLC Operating Agreement, Respondent requested an award of attorney fees and costs *pursuant to* Paragraph 13.4 of the LLC Operating Agreement. (CP 231) Paragraph 13.4 of the subject Agreement provided that “[i]f 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...” (CP 164) Critically, the term “party” was defined and used within the Agreement to be a synonym of “Member” (The parties are each a “Member” and are collectively referred to as the “Members.”) (CP 145)

In response to Respondent’s Motion, Appellants unsuccessfully argued that Respondent acted in bad faith and that the action was a derivative action. (CP 129-30) Additionally, Appellants argued that an award of attorney fees would be inappropriate. (CP 127)

The Trial Court ultimately granted Respondent’s Motion (CP 172-73), awarding attorney fees to Respondent based on Paragraph 13.4 of the LLC Operating Agreement. (*Id.*) Specifically, on October 17, 2011 the Trial Court awarded Respondent \$43,237.60. (CP 21-24)

Appellants brought this appeal without challenge to the calculation or amount of attorney fees and costs awarded. Rather, Appellants are

challenging the *legal basis* for the Trial Court's award of attorney fees and costs.

V. STANDARD OF REVIEW.

Whether a specific statute, contractual provision, or recognized ground in equity authorizes an award of attorney fees is a question of law that is reviewed de novo. **Tradewell Group, Inc. v. Mavis**, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). The determination of whether a legal right to attorney fees and costs exists is a matter of law and is different from a review of the amount of fees awarded. *Id.* at 127. Because the issue before the Court is the legal basis for the award of attorney fees, de novo review is the proper standard. De Novo review requires that the Court perform the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. **Hisle v. Todd Pac. Shipyards Corp.**, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Here, Appellants do not challenge the amount of fees awarded; rather, Appellants seek review of the Trial Court's legal determination that it could rely on the attorney fees clause in the LLC Operating Agreement even though the recipient and Respondent Redding Lake Stevens established that it was not a party to the LLC Operating Agreement. To

clarify: Redding Lake Stevens, LLC is not and was not a party to the subject LLC Operating Agreement. Rather the only parties to the LLC Operating Agreement are and were the Members: Ryan & Wages, LLC and CMDG Investments, LLC. Redding Lake Stevens, LLC had no obligations or rights under the Operating Agreement; it did not negotiate the terms of the Agreement; and it was not an intended beneficiary of the Agreement. Accordingly, Redding Lake Stevens, LLC cannot reap and should have reaped the benefit of the attorney fees clause. Therefore, the Trial Court erred when it based its award of attorney fees and costs to Respondent upon the Attorney Fees clause in the LLC Operating Agreement.

VI. LEGAL ARGUMENT.

A. The Trial Court Erred When It Awarded Attorney Fees and Costs to Redding Lake Stevens, LLC Based on the Redding Lake Stevens, LLC Operating Agreement Because Redding Lake Stevens, LLC was Not a Party to the Operating Agreement.

Respondent was not entitled to an award of attorney fees because the Redding Lake Stevens, LLC Operating Agreement allowed for an award of fees and costs to parties to the Operating Agreement and Redding Lake Stevens, LLC was not a party to the Agreement. In Washington, courts may award attorney fees and costs only if the award is

authorized by contract, statute, or in equity. Courts will construe the terms of an agreement by reading the contract as a whole and will not read ambiguity into an agreement where it does not exist. Generally, a non-party to a contract cannot reap the benefits of the terms of that agreement. Here, Respondent based its claim to an award of attorney fees and costs on Paragraph 13.4 of the Redding Lake Stevens, LLC Operating Agreement. (CP 164) Critically, however, the subject clause clearly limits an award of fees and costs to the parties to the LLC Operating Agreement (e.g. Redding Lake Stevens, LLC and CMDG Investments, LLC) and Respondent conceded that it was not a party to the Agreement. Because the attorney fees clause in the Operating Agreement was limited to member of the LLC, and because Redding Lake Stevens, LLC successfully argued it was not a party to the Agreement, it is a non-party to the LLC Operating Agreement and cannot claim benefits under it.

In construing a written contract, such as the LLC Operating Agreement, courts have consistently applied the following rules: (1) The parties' intent controls; (2) The Court will ascertain that intent from reading a contract as a whole; and (3) The Court will not read ambiguity into a contract that is otherwise clear and unambiguous. **Dice v. City of Montesano**, 131 Wn. App. 675, 683-84, 128 P.3d 1253 (2006). In determining the parties' intent, courts also consider “the contract as a

whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.” **Berg v. Hudesman**, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Further, the Court will read a contract as an average person would read it, giving it a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results. **Allstate Ins. Co. v. Hammonds**, 72 Wn. App. 664, 667, 865 P.2d 560 (1994)(*citing* **Eurick v. PEMCO Ins. Co.**, 108 Wn.2d 338, 341, 738 P.2d 251 (1987)). If only one reasonable meaning can be attributed to the contract when viewed in context, that meaning necessarily reflects the parties' intent. **Martinez v. Miller Indus. Inc.**, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999). Therefore, the Court will adopt a consistent definition of a term used within the contract to avoid convoluted and absurd results. Finally, a non-party to a contract generally cannot claim benefits under the contract's terms. **Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.**, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992); **Watkins v. Restorative Care Center, Inc.**, 66 Wn. App. 178, 194-95, 831 P.2d 1085 (1992).

In its motion for an award of attorney fees, Respondent relied upon Paragraph 13.4 “Attorney Fees” (CP 164) of the Redding Lake Stevens,

LLC Operating Agreement as the legal basis for its request for attorney fees and costs. Again, that clause stated that “[i]f 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...” (CP 164) Viewing the LLC Operating Agreement as a whole, the term “party” referred to the parties –and only the parties-- that signed the LLC Operating Agreement: “This Operating Agreement (this “Agreement”) is made effective as of December 13, 2005, by and among RYAN & WAGES, LLC, a Washington limited liability company, and CMDG INVESTMENTS, LLC, an Oregon limited liability company. The parties are each a “Member” and are collectively referred to as the “Members”. (CP 145) (Emphasis Added) Therefore, the term “Members” is synonymous with parties and “Member” is synonymous with party.

Throughout the LLC Operating Agreement the terms “member(s)” and “party(s)” were used interchangeably. For example, under 13.5 the Agreement states that “Any notices required or permitted under this Agreement shall be in writing and shall be deemed defectively given (a) when personally delivered to the party notified...Any party from time to time may change its address for the purpose of notices to that party...” (CP 164) The parties referred to are the Members of Redding Lake Stevens, LLC. In addition, Paragraph 13.3 states “This Agreement shall

be binding on and inure to the benefit of the parties and their respective successors...” (CP 164) Therefore, it is clear that the parties intended that the terms party and member be used interchangeably because it was the members of Redding Lake Stevens, LLC that became contractually bound by the Operating Agreement.

The language used in the LLC Operating Agreement was clear: the term party(s) is and was synonymous with the term member(s). Ryan & Wages, LLC and CMDG Investments, LLC intended that the benefits created by the LLC Operating Agreement would inure to Ryan & Wages, LLC and CMDG Investments, LLC and their beneficiaries *only*. Accordingly, the only parties under Paragraph 13.4 that were entitled to attorney fees and costs were Ryan & Wages, LLC and CMDG Investments, LLC. Under the clear language of the LLC Operating Agreement they --and they alone-- can be the “prevailing party” that could be entitled to an award of attorney fees and costs.

Here, the Respondent was not a party to the LLC Operating Agreement. As Respondent previously argued, it lacked contractual privity with Appellants. It stated:

“The Operating Agreement is between Ryan & Wages and CMDG, the only two members of Redding. Redding was the

entity formed¹ as a result of the business transaction contemplated by the Operating Agreement, but Redding is not a party to the Operating Agreement or a member of Redding. Ryan & Wages' claims against Redding should be dismissed as a matter of law because Redding owes no direct contractual or special duties to Ryan & Wages under the Operating Agreement." (CP 231, ¶¶ 10-16)

Respondent did not challenge the factual assertion that it was "not a party to the Operating Agreement or a member of Redding." While Redding Lake Stevens did correctly note that Paragraph 13.4 awarded attorney fees and costs to the prevailing party, it failed to show why it should be awarded fees pursuant to Paragraph 13.4 when it clearly admitted that it was not a "party" to or a "member" of the subject LLC Operating Agreement.

Because the Trial Court awarded attorney fees and costs to Respondent even though Paragraph 13.4 of the subject Agreement limited such awards to a party or member of Redding Lake Stevens, LLC, and because the Respondent conceded that it was neither a party to nor a member of the LLC under the subject Operating Agreement, the Trial

¹ Respondent's statement is technically incorrect. Redding Lake Stevens, LLC was formed when Oregon's Secretary of State accepted the Articles of Organization that were filed on November 7, 2005. The members' obligations as members of Redding Lake Stevens, LLC were defined on December 13, 2005 when the Members executed the LLC Operating Agreement.

Court erred when it awarded Respondent fees, and the Order granting attorney fees and costs should be reversed.

B. Respondent Cannot Rely on RCW § 4.84.330 as the Basis for Fees and Costs Because the Attorney Fees Clause in the Subject Operating Agreement is Bilateral.

Respondent cannot rely upon RCW § 4.84.330 for an award of attorney fees and costs because the attorney fee clause was bilateral. RCW § 4.84.330 is limited to contracts that contain a unilateral attorney fees clause. (*See, e.g.*: RCW § 4.84.330; see also: **Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.**, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992); **Watkins v. Restorative Care Center, Inc.**, 66 Wn. App. 178, 194-95, 831 P.2d 1085 (1992) Generally, a non-party to a contract cannot claim benefits under it. **Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.**, 119 Wn.2d 334, 342-43, 831 P.2d 724 (1992); **Watkins v. Restorative Care Center, Inc.**, 66 Wn. App. 178, 194-95, 831 P.2d 1085 (1992); **Kaintz v. PLG, Inc.**, 147 Wn. App. 782, 197 P.3d 710 (2008)(holding RCW 4.48.330 did not apply to a landlord's unlawful detainer action dispute because the leases at issue contained bilateral attorney fee clauses.)

In the present case, the subject clause does not limit an award of attorney fees to a specific party to the LLC Operating Agreement. Rather, it simply awards attorney fees and costs to the prevailing party regardless

of which party prevails. Because the LLC Operating Agreement contains a bilateral attorney fees clause, Respondent cannot rely on RCW § 4.84.330 as a statutory basis for an award of fees because the statute does not apply.

VII. CONCLUSION.

Respondent is not and was not a party to the LLC Operating Agreement and cannot reap the benefits found in its terms. The LLC Operating Agreement limits the award of attorney fees to members of the subject Operating Agreement. The members are—and were—Ryan & Wages, LLC and CMDG Investments, LLC.

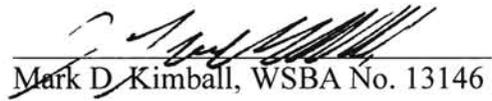
Because Redding Lake Stevens, LLC was not a party to the subject LLC Operating Agreement and because the subject LLC Operating Agreement limited an award of attorney fees and costs to parties to the Agreement, the Trial Court erred when it awarded Respondent \$43,237.60 based solely upon Paragraph 13.4 of the LLC Operating Agreement.

Respectfully submitted this 8th May 2012.

MDK Law Associates
MARK DOUGLAS KIMBALL, P.S.
Attorneys for Appellants



James P. Ware, WSBA No. 36799



Mark D. Kimball, WSBA No. 13146

Proof of Service

The undersigned certifies that on May 8, 2012 arrangements were made for service of a true and correct copy of the within and foregoing Appellants' Brief on Appeal upon Respondent and Cross-Appellant as set forth Below:

Attorney for Cross-Appellant Tom Wages

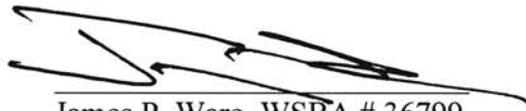
Luke LaRiviere WSBA # 32039
Young deNormandie
Second & Seneca Building
1191 Second Ave., Suite 1901
Seattle, WA 98101
(206) 224-9818
llariviere@ydnlaw.com

Attorneys for Respondent Redding Lake Stevens, LLC

Kellie Gronski, WSBA # 38848
Carson & Noel PLLC
20 Sixth Ave NE
Issaquah, WA 98027
(425) 837-4717
kellie@carsonnoel.com

Via ABC legal Messenger on May 8, 2012 with a courtesy copy via counsel's email addresses of record on May 8, 2012.

Dated: May 8, 2012



James P. Ware, WSBA # 36799
(425) 455-9610