

NO. 68253-9-1

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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RYAN AND WAGES, LLC, a Washington limited liability company,  
through its members, JULIA MCCORD and THE CONJUNCTIONAL  
PATRIOTIC SOVERIGN PATHWAY,

Appellant/Cross-Respondent,

v.

REDDING LAKE STEVENS, LLC, an Oregon limited liability company,

Respondent.

v.

TOM WAGES, an individual,

Respondent/Cross-Appellant.

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**RESPONDENT/CROSS-APPELLANT TOM WAGES' REPLY BRIEF**

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**I. REPLY**

**A. Wages did present evidence at trial.**

Ryan's claim that Wages did not present any evidence at trial is untrue. Ryan called four witnesses at trial, including the three members of R&W - Julia McCord, Floyd Ryan, and Tom Wages, and the company account, Michael Cunningham. These were the only witnesses with relevant factual information. After cross-examining these witnesses it was not necessary for Wages to recall them for his case in chief. The only additional witness Wages intended to call was expert Richard Toyer to testify regarding the character of the \$1,250,000 distribution from Redding to R&W. However, the trial court granted Ryan's Motion in Limine to exclude Toyer from offering this testimony.<sup>1</sup>

**B. The trial court erred in excluding evidence regarding the character of the \$1,250,000.00 distribution from Redding to R&W.**

Ryan's argument that the only claim Wages made was for dissolution under the R&W Operating Agreement is untrue. Wages' counterclaim asked for dissolution in accordance with RCW 25.15 *et. al.*, which treats a member who was entitled to an interim distribution as a creditor of the

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<sup>1</sup> RP Vol. 1, 18:8-23.

company at the time of dissolution.<sup>2</sup> Under RCW 25.15.215, “a member is entitled to receive from a limited liability company distributions before the member’s dissociation from the limited liability company and before the dissolution and winding up thereof.”<sup>3</sup> Under RCW 25.15.230, “at the time a member becomes entitled to receive a distribution he or she has the status of, and is entitled to all remedies available to, a creditor of a limited liability company with respect to the distribution.” Under RCW 25.15.300, upon winding up of the company “the assets shall be distributed . . . [t]o creditors, including members and managers who are creditors.”<sup>4</sup>

About one year into the litigation between R&W and Wages, Redding distributed the \$1,250,000 to R&W. At the time, Ryan was the manager of the company and Wages expected the \$1,250,000 would be distributed immediately to the members of the company in accordance with their membership interest. However, Ryan refused to distribute any of the \$1,250,000 to Wages, claiming it was a return of their capital contribution to R&W. Ryan filed several motions requesting the Court distribute the entire \$1,250,000 to them arguing it was a return of their

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<sup>2</sup> CP 466-470.

<sup>3</sup> RCW 25.15.215.

capital contribution to R&W. Wages opposed the motions arguing the funds were income and should be distributed according to their membership interest. The trial court denied Ryan's motions and ordered that the funds remain in trust pending trial.<sup>5</sup>

Ryan's claim that "[w]hether the \$1,250,000.00 was income or a return of capital was wholly irrelevant" is not true.<sup>6</sup> Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>7</sup> Toyer would have testified that the \$1,250,000 was income and should have been distributed to the members' as soon as the company received it from Redding. This evidence was relevant to establish that Wages was entitled to an interim distribution and was a creditor of the company at the time of dissolution and entitled to 51% of the \$1,250,000 under RCW 25.15.215 and RCW 25.15.230. The trial court should have at least considered Toyer's

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<sup>4</sup> RCW 25.15.300.

<sup>5</sup> CP 1038-1039; CP 1032-1037; CP 912-913.

<sup>6</sup> Cross-Respondents' Responsive Brief on Appeal, at 6.

<sup>7</sup> ER 401.

testimony and erred by excluding him as a witness.<sup>8</sup>

**C. The trial court erred in its interpretation of the Redding Operating Agreement and the First Amendment.**

Ryan's capital contribution to R&W was vacant land located in Lake Stevens, Washington. The trial court relied on the Redding Operating Agreement and the First Amendment (collectively "Agreements") to conclude that the value of the Lake Stevens Property (Ryan's capital contribution to R&W) was \$4,048,000.<sup>9</sup> The trial court erred in its interpretation of these Agreements.

Ryan contends the substantial evidence standard is the appropriate standard on appeal regarding the Agreements.<sup>10</sup> However, the trial court used the \$4,048,000 value to calculate Ryan's capital account balance as set forth in its Conclusions of Law.<sup>11</sup> The trial court also acknowledged that its interpretation of the Agreements presented a legal question and it is well settled that "the interpretation of an unambiguous contract is a question of law."<sup>12</sup> Accordingly, the standard of review is de novo and

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<sup>8</sup> Contrary to Ryan's argument, the trial court unequivocally granted the Motion in Limine to exclude Toyer as a witness at trial.

<sup>9</sup> CP 539.

<sup>10</sup> Cross-Respondents' Responsive Brief on Appeal, at 16-17

<sup>11</sup> CP 541-543

<sup>12</sup> *Paradise Orchards v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (2004); RP Vol. 2, at 227 (In reference to the Redding Operating Agreement and the First

this Court's inquiry is whether the trial court interpreted the Agreements correctly when it used \$4,048,000 as the value of the Lake Stevens Property in calculating Ryan's capital contribution to R&W.<sup>13</sup>

An appellate court's primary goal in interpreting a contract is to ascertain the parties' intent.<sup>14</sup> In determining the parties' intent, the court will 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 the respective interpretations advocated by the parties.<sup>15</sup> The Court strives "to ascertain the meaning of what is written in the contract, and not what the parties intended to be written."<sup>16</sup>

Here, R&W and CMDG formed Redding to construct an assisted living facility in California and an assisted living facility in Lake Stevens,

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Amendment to the Redding Operating Agreement, the trial court stated "I understand that ultimately I'll be making the determination as to what the legal effect of this document is."

<sup>13</sup> *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (2001); *Edmonson v. Popchoi*, 172 Wn.2d 272, 278, 256 P.3d 1223 (2011) (holding "Questions and conclusions of law are reviewed de novo.")

<sup>14</sup> *Paradise Orchards*, 122 Wn. App. at 516-17.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, at 516.

Washington. As set forth in the Redding Operating Agreement at Paragraph 1.3:

PURPOSE: The Company's purpose is to (i) acquire certain real property located in Redding, California described on Exhibit A attached hereto (the "Redding Real Property"), and to develop and operate an assisted living facility on the Redding Real Property; and (ii) develop and operate an assisted living facility on certain real property located in Lake Stevens, Washington described on Exhibit B attached hereto (the "Lake Stevens Real Property"). The Company shall not engage in any other business or activity without the unanimous consent of the Members.<sup>17</sup>

Consistent with this purpose, the Redding Operating Agreement states that R&W "shall contribute: (1) The Lake Stevens Real Property, which the Members deem for purposes of this Agreement to be valued at \$4,048,000."<sup>18</sup> Because the purpose of contributing the Lake Stevens Property was to build an assisted living facility on the property, the Redding Operating Agreement sets forth how the \$4,048,000 was calculated and how it should be adjusted if the actual number of units constructed is less than expected:

If the actual number of units on the Lake Stevens Facility is less than 176, the Contribution Amount shall be decreased by \$23,000 multiplied by the difference between 176 and the actual number of units.<sup>19</sup>

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<sup>17</sup> CP 145.

<sup>18</sup> CP 722.

<sup>19</sup> CP 746.

No units were ever constructed on the Lake Stevens Property.<sup>20</sup> Thus, under the above provision, the Lake Stevens Property should not have been valued at \$4,048,000. The trial court erred in ignoring this provision of the Redding Operating Agreement.

The trial court further erred in its interpretation of the First Amendment. The trial court found that “there was some evidence that Mr. Wages subsequently agreed to lower the value of the Lake Stevens Property.”<sup>21</sup> However, Wages was not a member of Redding. R&W and CMDG were the only members of Redding and after realizing it was not feasible to construct any units on the Lake Stevens Property, R&W and CMDG executed the First Amendment.<sup>22</sup> Under the First Amendment, the value of R&W’s capital contribution as set forth in the Redding Operating Agreement is deleted:

Certain assumptions contained in the [Redding] Operating Agreement are incorrect. As a result, the first sentence of Section 2.3(a)(1) of the [Redding] Operating Agreement is hereby deleted, as are Sections 2.5(b)(2) and 2.5(b)(3) of the [Redding] Operating Agreement.<sup>23</sup>

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<sup>20</sup> RP Vol. 1, at 48; CP 175.

<sup>21</sup> CP 539

<sup>22</sup> CP 722; Wages was the Manager of R&W and signed the First Amendment on its behalf. Ryan did not challenge the validity of the First Amendment.

<sup>23</sup> CP 177.

Section 2.3(a)(1) of the Redding Operating Agreement refers to the \$4,048,000 value assigned to the Lake Stevens Property and Sections 2.5(b)(2) and 2.5(b)(3) refer to the calculation utilized to arrive at the \$4,048,000 value for the Lake Stevens Property.<sup>24</sup>

The Agreements are unambiguous and establish that the \$4,048,000 value was dependent on the construction of a 176 unit assisted living facility on the Lake Stevens Property. Redding never constructed an assisted living facility on the Property and therefore, the trial court erred in finding that Ryan's contribution of the Lake Stevens Property was \$4,048,000.

**D. Cunningham's testimony regarding the capital accounts.**

In addition to the Agreements, the trial court relied on Cunningham's testimony regarding the members' capital account balances. Ryan argues that Cunningham offered "competent" testimony as to the value of the Lake Stevens Property and that Wages did not offer any evidence to contradict Cunningham's testimony.<sup>25</sup> However, Ryan ignores Cunningham's testimony on cross-examination, when he admitted that the language in the Agreements provided for an adjustment to the \$4,048,000

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<sup>24</sup> CP 146 and CP 148.

<sup>25</sup> Cross-Respondents' Responsive Brief on Appeal, at 20.

value assigned to the Lake Stevens Property if less than 176 units were constructed on the property:

Q. It says, "If the actual number units of the Lake Stevens facility is less than 176, the Contribution Amount shall be decreased by \$23,000 multiplied by the difference between 176 and the actual number of units."

A. Um-hmm.

Q. And \$23,000 times 176 is the \$4,048,000?

A. Yeah.

Q. So this provides for an adjustment to the value of that contribution; isn't that correct?

A. That's what it appears to do.<sup>26</sup>

On re-direct, Ryan's counsel asked Cunningham if there were any outstanding issues regarding the members' capital account balances. Cunningham testified that there was an issue regarding the \$4,048,000 value he used for Ryan's contribution of the Lake Stevens Property and testified that he would "like some direction on how to handle that matter."

Q. But that is the only outstanding issue with respect to the capital accounts?

A. In my mind right now, that item and then [Wages' counsel] brought up the issues that there may be that \$4,048,000 value for the Redding – for the Lake Stevens property. Maybe there's an adjustment there.

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<sup>26</sup> RP Vol. 2, at 225.

Q. Okay.

A. I would like to have some direction on that matter, also.<sup>27</sup>

Contrary to Ryan's claim, Cunningham acknowledged that the language in the Redding Operating Agreement provided for an adjustment to the \$4,048,000 value of the Lake Stevens Property.

Once the Redding Members determined that an assisted living facility could not be constructed on the Lake Stevens Property, they executed the First Amendment. Under the First Amendment, the value of R&W's contribution of the Lake Stevens Property was deleted and no new value was assigned to the Lake Stevens Property.<sup>28</sup> Cunningham testified that if the members agreed to delete the provisions in the Redding Operating Agreement related to the value of the Lake Stevens Property, that he would consider that in adjusting the amount of Ryan's capital contribution:

Q. So if the parties had agreed to the \$4 million value – and that was the book value that you had used, right?

A. Yes.

Q. And they subsequently agree to delete that value, potentially it's an incorrect value?

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<sup>27</sup> RP Vol. 2, at 240.

<sup>28</sup> CP 423.

[By Ryan's Counsel]: Objection; mischaracterization. The document speaks for itself.

The Court: Correct. I think you need to be careful on how you phrase this, Counsel.

Q. Okay. Is that something that you would consider in adjusting capital accounts of the Ryans?

A. If all parties agree, yes, I would.<sup>29</sup>

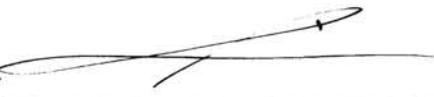
Cunningham's testimony did not establish that the \$4,048,000 was the correct value. In fact, his testimony supports the conclusion that the \$4,048,000 value for the Lake Stevens Property should not have been used as a basis for Ryan's Capital Contribution.

## II. CONCLUSION

The trial court erred in excluding Toyer's testimony and in its interpretation of the Agreements.

DATED this 24<sup>th</sup> day of August, 2012 at Seattle, Washington.

YOUNG deNORMANDIE, P.C.

By 

\_\_\_\_\_  
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<sup>29</sup> RP Vol. 2, at 228.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 24<sup>th</sup>, 2012, a copy of the foregoing **Respondent/Cross-Appellant Tom Wages' Reply Brief** was delivered at the following addresses via the method indicated:

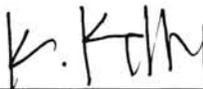
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