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CASE NO. 689461-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

JULIA MCCORD, a Washington Resident, and THE CONJUNCTIONAL PATRIOTIC SOVEREIGN PATHWAY, and RYAN & WAGES, LLC, a Washington Limited Liability Company,
Appellants/Cross-Respondents,

vs.

CMDG INVESTMENTS, LLC, an Oregon Limited Liability Company,
Respondent/Cross Appellant.

APPELLANTS' BRIEF ON APPEAL

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INTRODUCTION

With this Appeal, Appellants[1] seek review of the trial court's ruling that a 2009 private arbitration decision collaterally estopped Appellants from asserting their claims for breach of contract and tortious interference with a contractual relationship. Appellants' claims arose from a joint venture agreement—evidenced through the formation of an LLC named Redding Lake Stevens, LLC[2]—between Ryan & Wages and CMDG Investments, LLC[3] to develop certain properties in Washington and California. While the projects were being developed, a dispute arose between McCord and CPSP on one hand, and Tom Wages (the third Member of Ryan & Wages), on the other. As a result of the dispute, McCord and CPSP notified CMDG that they had voted to add two additional managers and voted to limit Wages' authority as a manager. Ultimately, CPSP and McCord voted to remove Wages as manager and informed CMDG that Wages no longer had the authority to act on behalf of the LLC.

Despite that notice, CMDG recruited Wages to execute an amendment to the RLS Operating Agreement. The amendment

[1] Each individual Appellant will be referred to as follows: Julia McCord as "McCord", Conjunctional Patriotic Sovereign Pathway as "CPSP" and Ryan & Wages, LLC as "Ryan & Wages". When used, the term "Appellants" will refer to the parties collectively.
[2] Hereinafter referred to as "RLS".
[3] Hereinafter referred to as "CMDG".

substantially diminished Ryan & Wages' monetary interest in the joint venture. Because the RLS Operating Agreement could only be amended by a unanimous vote by Ryan & Wages and CMDG, Ryan & Wages filed suit alleging that CMDG breached the RLS Operating Agreement when it amended the agreement without the consent of Ryan & Wages. McCord and CPSP also alleged that CMDG tortiously interfered with the contractual relationship they had with Wages because CMDG knew Wages lacked the authority to execute the amendment and therefore knowingly contributed to Wages' breach of the Ryan & Wages Operating Agreement.

Shortly after suit was filed, CMDG filed summary judgment alleging that a November 2009 arbitration decision from litigation between Ryan & Wages, McCord, CPSP, and Wages collaterally estopped Appellants from asserting their claims in the new Superior Court case. CMDG alleged that the arbitrator's statement that "Wages is the managing member" meant that its unilateral determination in February 2009 that Wages had the authority to execute the amendment was justified. CMDG asserted this despite the fact that the arbitrator failed to resolve key issues that are highly relevant to the litigation from which this appeal comes.

To dismiss Appellants' claims, the Court relied on the arbitrator's statement that Wages was the managing member and a third addendum to the Ryan & Wages Operating Agreement. The court also determined that the November 2009 statement resolved who had been manager in February 2009. Further, the court determined that an addendum to the Ryan & Wages Operating Agreement gave Wages unfettered authority to enter into any agreement that concerned Ryan & Wages' membership interest in RLS. Appellants appeal dismissal of both claims.

ASSIGNMENT OF ERROR

1. The Trial Court erred when it dismissed Appellant Ryan & Wages LLC's claim for breach of contract because issues of fact existed regarding CMDG Investment, LLC's actions and collateral estoppel does not bar Ryan & Wages, LLC's claim for breach of contract as the prior proceeding did not address and/or actually litigate the issues presented by this matter.
2. The Trial Court erred when it dismissed Appellants Julia McCord and CPSP's claim for tortious interference with a contractual expectancy as issues of material fact exist as to whether Wages had the authority to serve as the agent for Ryan & Wages, LLC regardless of his status as a manager and these issues were not actually litigated in the November 2009 Arbitration Decision.

3. The Trial Court erred when it dismissed Appellants' claims because even if Wages was the sole manager, he did not have the authority to execute the First Amendment because he failed to obtain the consent of members holding at least two-thirds of the LLC's capital interest as required by the Ryan & Wages Operating Agreement.

FACTUAL AND PROCEDURAL HISTORY

This case arises from the agreement between two entities—Ryan & Wages, LLC and CMDG Investments, LLC—to develop two retirement communities in Redding, California and Lake Stevens, Washington. To develop the properties, the entities formed RLS and then two entities to hold the properties: Redding Assisted Living, LLC and Lake Stevens Assisted Living, LLC. (CP 358-84) As part of the agreement, Ryan & Wages, LLC contributed property in Lake Stevens, Washington and an option to purchase property in Redding, California. (CP 363) CMDG's capital contribution consisted of proceeds from a loan secured by the Redding and Lake Stevens Property. (CP 364) The RLS Operating Agreement provided a schedule of guaranteed payments to Ryan & Wages, established the value of the Redding Option and the Lake Stevens Property, established the division of the capital upon sale of one or all of the properties, and established that the Operating Agreement could be amended only by the unanimous consent of CMDG and Ryan & Wages.

After the Redding project was complete and generating revenue, CMDG[4] approached McCord, Ryan, and Wages to discuss what it perceived as concerns regarding the economic feasibility of development of the Lake Stevens property. (CP 508-13) At the meeting, CMDG proposed that the parties amend the RLS Operating Agreement. (Id.) McCord and CPSP expressed hesitation to any changes to the RLS Operating Agreement because the proposed changes would devalue Ryan & Wages interest in RLS. (CP 342-9) Despite CPSP and McCord's concerns, CMDG conferred with Wages and requested he execute the First Amendment to the Operating Agreement as manager of Ryan & Wages without notifying McCord and CPSP. (CP 492-3) After some brief negotiations between Wages' counsel and Will Forsythe, Wages executed the First Amendment in early March 2009. (CP 514-53) McCord and CPSP learned of the First Amendment only after Wages had signed it and CMDG began to execute its terms. (CP 440-58)

A. Ryan & Wages, LLC

[4] The letterhead designates that the sender of the letter is Ridgeline. Ridgeline is a company owned by the mangers of CMDG Investments, LLC and, apparently, Will Forsythe.

Ryan & Wages, LLC was formed in 2005 by Doris Ryan and Tom Wages. (CP 393-424) When the company was formed, Wages was the manager of Ryan & Wages. (CP 401) Shortly after its formation, Doris Ryan passed away and her daughter, Julia McCord, served as the Personal Representative of the Doris Ryan Estate and as the successor trustee for the GMR Living Trust. On December 13, 2005, Ryan & Wages executed the Redding Lake Stevens, LLC Operating Agreement with CMDG. (CP 358-384)

Concurrent with the execution of the RLS Operating Agreement, McCord (as personal representative and trustee) and Wages executed a Third Addendum to the Ryan & Wages Operating Agreement which was drafted by the counsel for CMDG. (CP 418; CP 961-4) The purpose of the Third Addendum was to clarify the interest of the Doris Ryan Estate and the GMR Family Trust. (CP 961-4) Additionally, the Third Addendum clarified that the manager of Ryan & Wages had agency authority to execute all necessary documents that related to its interest in RLS. (Id.) Importantly, the Third Addendum did not alter or diminish any of the requirements that the manager seek approval of members holding at least two-thirds of all capital interest in Ryan & Wages before he divests or sells a substantial portion of Ryan & Wages' assets.

Shortly after the parties formed Redding Lake Stevens, LLC and Ryan & Wages executed the Third Addendum, tension between McCord, CPSP, and Wages escalated because Wages refused to provide an accurate accounting of the Ryan & Wages assets. (CP 342-3) In particular, Wages appeared to be commingling his personal funds with the funds of Ryan & Wages. Wages also failed to maintain an accurate accounting of LLC funds and a meaningful accounting of business-related transactions. (CP 791-6) From approximately 2007 through early 2009, McCord and CPSP attempted, without any success, to resolve the accounting issues with Wages. (CP 791-2) Because CPSP and McCord were concerned about the management of Ryan & Wages' assets, they voted to add McCord and Floyd Ryan as managers. (CPSP 431-5) To add McCord and Ryan as managers, McCord and CPSP relied on Paragraph 6.2 of the Ryan & Wages Operating Agreement. Paragraph 6.2 states that members holding at least two-thirds of the LLC's capital interest may increase or decrease the number of managers by vote. (CP 408) Because McCord and CPSP contributed the Lake Stevens Property (which was valued at $4,035,000.00) they owned approximately 95% of Ryan & Wages' capital interest. Therefore, as of November 2007, the managers of Ryan & Wages were McCord, Ryan, and Wages. (Id.)

Despite the addition of Ryan and McCord as managers, Wages' mismanagement of the LLC's assets escalated to the point that CPSP and McCord elected to remove Wages as a manager. (CP 437-8) To remove Wages as manager, McCord and CPSP relied on Paragraph 6.4 of the Operating Agreement which states members controlling at least two-thirds of all capital interest may call a meeting to remove a manager regardless of cause. (CP 408) After Ryan and McCord removed Wages as manager, they informed CMDG of the action. (Id.) Wages disputed the action and in April 2009, Wages filed suit against all potential heirs of Doris Ryan. CPSP and McCord returned the action by filing suit against Wages and moved to have the matter resolved by private arbitration.

B. 2009 Arbitration Between Wages, McCord, Ryan & Wages, and CPSP

In April 2009, Wages filed suit against McCord, Ryan, and all other potential heirs to the Doris Ryan Estate. (CP 1012-17) In response, McCord and Ryan filed an action for damages that resulted from Wages' conversion and mismanagement of LLC funds. (CP 778-806) To resolve the matter, the parties entered into private arbitration.

In his decision, the arbitrator concluded that Julia McCord, CPSP, and Tom Wages were members of the LLC. (CP 352-3) The arbitrator also determined that McCord possessed a 20% Membership Interest in

Ryan & Wages, CPSP possessed a 29% Membership Interest, and Wages possessed a 51% Membership Interest in Ryan & Wages. (CP 353) The arbitrator also stated that "[t]he managing member is Tom Wages." (Id.) The arbitrator did not explain, nor even address for that matter, whether McCord and Ryan were still managers and if they were not, what was defective about the actions they took to become managers. (CP 353) Critical to the issues presented in this Appeal, the arbitrator specifically declined to establish the members' capital interests and therefore, could not determine the validity of McCord and CPSP's action to increase the number of managers from one to three. (CP 353) Therefore, the Arbitration Decision determined the members' membership interest but failed to establish the members' capital interest.

To establish that Wages was the managing member, the arbitrator stated that there existed an internal conflict between Paragraph 6.2(c)(a) and 6.4 of the Ryan & Wages Operating Agreement. Paragraph 6.2(c)(a) allows for removal of a manager by the affirmative vote of members owning sixty percent (60%) of both membership interests and capital interests while Paragraph 6.4 allows for members owning at least two-thirds of all capital interest to vote to remove managers when they call a meeting for that purpose. (CP 353) The arbitrator did not elaborate exactly what was contained within the two sections that conflicted as

Paragraph 6.4 required a super majority of the total capital interest and Paragraph 6.2(c)(a) required a lesser capital interest with the addition of membership interest requirement. Critical to the issues in this action, the arbitrator did not comment about whether Wages had the authority in February 2009 to execute the First Amendment on behalf of Ryan & Wages. Because the arbitrator found a conflict between Paragraph 6.4 and Paragraph 6.2(c)(a) he did not deem it necessary to determine the members' capital interest. (Id.) Finally, the arbitrator determined that Wages had withdrawn LLC funds to which he was not entitled and outlined how he could repay them through a deferment of revenue stream from RLS. (CP 354-5)

C. Current Litigation

In early 2012, CPSP, Julia McCord, and Ryan & Wages filed this action against CMDG Investments, LLC asserting two causes of action. Ryan & Wages alleged that CMDG breached the RLS Operating Agreement when it executed the First Amendment because it amended the operating agreement without the consent of Ryan & Wages. (CP 1260-9) In fact, Wages either was not the manager or lacked the authority to execute the First Amendment, and because CMDG knew or reasonably should have known that Wages lacked the authority to execute the First

Amendment as Ryan & Wages' agent, CMDG amended the RLS Operating Agreement without Ryan & Wages' consent. (CP 1265) In addition, McCord and CPSP asserted claims separate from those brought on behalf of Ryan & Wages' claim that CMDG tortiously interfered with their contractual relationship with Wages because it allowed Wages to exceed his authority as a Member of Ryan & Wages, LLC. (CP 1265-6)

The legal theory behind Appellants' claims was relatively straightforward: the arbitrator did not make any finding determination regarding the validity of the execution of the First Amendment and whether Wages had the authority in February 2009 to execute the Amendment when CPSP and McCord had voiced their disapproval of the Amendment. The arbitrator specifically declined to establish the parties' respective capital accounts and capital interest. Therefore, Wages' authority to execute the First Amendment was neither addressed nor a consideration in the Arbitration Decision. The arbitrator did not address McCord and CPSP's action to increase the number of managers of one to three and did not discuss what authority, if any, Wages had in February 2009 when he executed the First Amendment. Therefore, Appellants' claims were different than the claims and issues actually decided in the November 2009 Arbitration Decision.

Shortly after Appellants filed this action in Superior Court, CMDG began proceedings to have this matter dismissed. First, CMDG filed a CR 12(b)(6) Motion to Dismiss (CP 1146-57) which was denied. (CP 972-3) After CMDG's CR 12(b) motion was denied, it filed a Motion for Summary Judgment that was effectively its 12(b) Motion repackaged to conform to the pleading requirements of CR 56 motion. (CR 710-25) In its Motion, CMDG argued that the Arbitration Decision collaterally estopped Appellants' claims because the arbitrator decided that Wages was the managing member. (CP 720-4)

In response Appellants pointed out that the Arbitration Decision fell silent to Wages' authority to execute the First Amendment and who were the managers in February 2009. (CP 228-30) Further, Appellants pointed out that even if Wages was the sole manager in February 2009, he lacked the authority to execute the First Amendment because he failed to obtain the written consent of members holding at least two-thirds of interest in Ryan & Wages' capital. (CP 238-46) Appellants stressed that the central –really the only-- issue resolved in the November 2009 Arbitration Decision was the misappropriation of Funds by Wages, who were the members of the LLC, and management of the LLC moving forward. (Id.) The arbitrator, however, specifically declined to establish the members' capital account interests (and therefore did not establish the members' capital interests). Because of this, the arbitrator could not have determined Wages' authority in February 2009.

Accordingly, Appellants argument that collateral estoppel applied is incorrect.

The foregoing notwithstanding, the trial court granted CMDG's Motion stating that the February 2009 arbitration decision did find that Wages was the manager in February 2009. (CP 203-6) Further, the Trial Court determined that the Third Addendum provided Wages with absolute authority to execute any agreement related to RLS. (Id.) Appellants appeal this Order.

LEGAL ARGUMENT

A. Summary Judgment Generally.

This Appeal seeks review of a dismissal of Appellants' claims on a motion for summary judgment. When reviewing an order granting summary judgment, an appellate court engages in the same inquiry as the trial court. **Richard C. Gossett, et. al., v. Farmers Ins. Co. of Washington**, 82 Wn. App. 375, 381, 917 P.2d 1124 (1996) (reversed on other grounds, 133 Wn.2d 954, 948 P.2d 1264 (1997)). "Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. "The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." Id. (emphasis ours) Review is de novo, requiring the court to step into the shoes of the trial court by engaging in the same inquiry as the trial court. Id.

Here the lower court erred when it granted summary judgment because the November 2009 Arbitration Decision did not collaterally estop Appellants' claims. Whether Wages was the manager of Ryan & Wages in February 2009 was not at issue at the arbitration, Wages' authority in February 2009 was not decided in the Arbitration Decision, and who were the managers in February 2009 was not material to the Arbitration Decision. The arbitrator simply stated that Wages was the managing member without consideration of CPSP and McCord's capital interest or their vote to add two additional managers. The arbitrator specifically declined to establish the members' capital accounts. Therefore, the arbitrator could not determine the validity or effect of Appellants' efforts to establish themselves as managers.

Finally, even if Wages was the sole manager in February 2009, Appellants are not collaterally estopped from asserting their claims because the arbitrator did not determine that as manager Wages had the authority to execute the First Amendment. In order to divest, affect, and/or sell property of Ryan & Wages, the manager was required to obtain a vote of members holding at least two-thirds of all capital interests. Therefore, in order for the Arbitration Decision to have a preclusive effect on Appellants' claims, the arbitrator would have been required to establish the value of the capital contribution of the members and the value of their capital interests. However, the arbitrator specifically declined to do so. None of the addenda to the Ryan & Wages Operating Agreement, specifically the Third Addendum, affected the requirement that a manager obtain consent of members holding two-thirds of the capital interests before divesting of the LLC's assets. CMDG was clearly aware of this requirement and, in fact, attempted to assert that the vote requirement was not applicable because the Third Addendum (which its own counsel drafted) removed the requirement. Because the arbitrator did not determine the capital interest of each Ryan & Wages member and because CMDG knew that Wages could not execute the without Appellants' approval, CMDG breached the RLS Operating Agreement and tortiously interfered with the contractual relationship between Wages, McCord and CPSP.

B. Collateral Estoppel and its Applicability.

Under the doctrine of issue preclusion, also called collateral estoppel, a judgment on the merits in a first suit precludes relitigation in a second suit of issues actually litigated and determined in the previous action. **Lawlor v. National Screen Serv. Corp.**, 349 U.S. 322, 326, 99 L. Ed. 1122, 75 S. Ct. 865 (1955). Issue preclusion, as distinguished from claim preclusion, does not include any requirement that the claims (or causes of action) in the first and second actions be identical. Id. Rather, issue preclusion applies when a factual issue was actually decided in the previous litigation regardless of the similarity of the legal claims asserted in each action. **Luisi v. Washington Utils. Transp. Comm'n**, 72 Wn. 2d 887, 435 P.2d 654 (1967). The party asserting that issue preclusion serves as a bar to a plaintiff's claims must establish the doctrine's applicability. To determine if issue preclusion bars litigation of a specific matter, courts will consider: (1) was the issue decided in the prior action identical with the one presented in the present litigation; (2) was there a final judgment on the merits; (3) was the party against whom the affirmative action is asserted a party, or in privity with a party, to the prior adjudication; and (4) will the application of Issue Preclusion work an injustice on the party against whom the doctrine is to be applied. **Rains v. State**, 100 Wn. 2d 660, 665, 674 P.2d 165 (1983).

While the resolution of questions two and three, above, are often straightforward, determination of whether the same issue was actually litigated in the previous action and whether issue preclusion will work injustice require a more nuanced analysis.

Here the arbitrator decided that Wages was the managing member of Ryan & Wages in November 2009. However, the arbitrator did not decide whether Wages was a manager in February 2009, the validity of CPSP and McCord's vote to increase the number of managers from one to three, or whether Wages --even if he was the manager-- had the authority to execute the First Amendment in February 2009. Issue preclusion cannot apply with respect to these factual issues because the arbitrator specifically declined to establish the value of the members' capital interests. Given that members holding at least two-thirds of the LLC's capital interest can vote to increase the number of managers, the issues presented in this action were not central or necessary to the Arbitration Decision. Further, even if for purposes of argument the arbitrator had decided that Wages was the sole manager in February 2009, the Arbitration Decision did not establish Wages had the authority to execute the First Amendment. Again, Paragraph 6.6(g) requires that members holding two-thirds of all capital interests approve any action that serves to divest, sell, or assign all or a substantial portion of the LLC's assets.

There is no question that Wages did not seek the approval of McCord and CPSP before he executed the First Amendment and the arbitrator necessarily could not have determined otherwise. Summarized: the arbitrator did not decide the facts that are material to this action.

Finally, application of issue preclusion here will cause injustice because the arbitrator's decision is, at best, vague, ambiguous, and inconclusive. The issue in this matter is whether CMDG acted appropriately when it divested Ryan & Wages of its interest in RLS to increase CMDG's profit base. Execution of the First Amendment was not central to the arbitrator's decision and was, at best, a secondary issue. Accordingly, application of collateral estoppel in this action is unwarranted and will cause injustice.

1. The Arbitrator did not Actually Decide the Factual Basis of this Matter Because the Arbitrator did not Address who had Authority in February 2009 to Execute the First Amendment and Who Were the Managers in February 2009.

In order for issue preclusion to serve as a bar to a litigant's claims, the factual issue at question must have been actually litigated in the previous action. **Davis v. Nielson**, 9 Wn. App. 864, 515 P.2d 995 (1973). Therefore, issue preclusion will not apply simply because the factual issue was discussed in the previous litigation. Id. at 874. As put by the Davis

Court, "[c]ollateral estoppel applies only to issues which are actually decided in the prior litigation and does not operate as a bar to matters which could have then been raised but were not." Id. In addition, determination of a non-essential issue in the previous litigation will not evoke issue preclusion because issue preclusion only applies to facts that were material and essential to the previous adjudication. **East v. Fields**, 42 Wn. 2d 924, 259 P.2d 639 (1995). Therefore, issue preclusion serves to prevent the relitigation of "ultimate facts" but does not extend to "evidentiary facts". **Seattle-First National Bank v. Kawachi**, 91 Wn. 2d 223, 588 P.2d 725 (1978).

Ultimate facts are distinguished from evidentiary facts in that ultimate facts are the facts upon which the claims in the first controversy rest. **Beagles v. Seattle-First National Bank**, 25 Wn. App. 925, 931, 610 P.2d 962 (1980). In contrast, evidentiary facts are facts that may be disputed in the first action but are not the central focus of the litigation because they are secondary or tangential to the claims asserted. Id. Therefore, in order for collateral estoppel to apply, a showing that the factual issue was disputed in the first controversy is not enough. Instead, the issue must have been so essential to the first controversy that the court's decision rested on the resolution of that issue. Since issue preclusion is limited to issues that were actually litigated and essential to resolution of the first controversy, if a judgment is ambiguous or indefinite, or there is uncertainty as to whether an issue was litigated in the first controversy, collateral estoppel will not be applied to that issue. **Mead v. Park Place Properties**, 37 Wn. App. 403, 407, 681 P.2d 256 (1989).

The issues presented in this litigation are two-fold: was Wages a manager in February 2009 and if he was, what authority did Wages have given that in February 2009 he was but one of three managers. The Arbitration Decision simply fails to resolve these factual issues. First, the Arbitration Decision is wholly silent to the fact that McCord and Ryan were voted in as Managers in 2008. (CP 352-3) As noted both in Appellants' Arbitration Memo and in Ryan & Wages' company documents, in 2008, McCord and CPSP voted to add McCord and Ryan as managers in addition to Wages. (CP 431-5) Appellants increased the number of managers from one to three independent of their action to remove Wages as manager and increased the number of managers pursuant to Paragraph 6.2. As noted above, Paragraph 6.2 states that members with at least two-thirds of all capital interest may increase or decrease the number of managers from time to time. (CP 408) Therefore, even if the arbitrator was correct in that Appellants' attempt to remove Wages as manager was defective, two critical questions still remain: how many managers did Ryan & Wages have in February 2009; and what authority did each manager have? Given that the arbitrator specifically declined to establish the members' capital interests, the Arbitration Decision did not actually decide these issues, could not have decided these issues, and cannot serve to estop litigation of these issues.

McCord and Ryan provided CMDG with documentation that they were voted in as managers. The validity of McCord and CPSP's action to increase the number of managers was not addressed in the Arbitration Decision. Further, McCord and Ryan made it explicitly clear that Wages' power as one of the three managers was limited and, eventually, they gave notice to CMDG that Wages no longer had the authority to execute agreements on behalf of the LLC. Again, the arbitrator did not decide the validity of McCord and Ryan's attempts to restrict Wages authority. Instead of addressing these issues, both of which are critical to Appellants' claims, the arbitrator cursorily stated in November 2009 only that Wages was the managing member.

Additionally, the arbitrator fails to explain how he found an inconsistency between Paragraphs 6.2(c)(a) and 6.4 when he declined to establish the capital interest of each member. Paragraph 6.4 would allow Appellants to remove Wages as manager if they had a combined capital interest of at least two-thirds of the total capital interest. The arbitrator specifically declined to establish the members' capital interest. (CP 409) In fact, he specifically stated that the parties' capital interests were not necessary for him to render his decision. (CP 353) Therefore, the arbitrator decided that Wages was the manager as of November 2009 but necessarily could not have decided who was manager in February 2009. The arbitrator's conscious decision to avoid the capital account issue inserts additional ambiguity into his decision because the relationship between the parties is unclear as is the factual basis of the Arbitration Decision.

Again, while the arbitrator determined that Wages was the manager as of November 2009, the ambiguity and failure to resolve key factual issues regarding who the manager was in February 2009 and what authority Wages had in February 2009 (if in fact he had any), negates any preclusive nature the Arbitration Decision may have. How many managers Ryan & Wages had in February 2009 and the authority of each of those managers remains unresolved. Because the Arbitration Decision failed to resolve key factual issues regarding who was manager in February 2009 and Wages' authority when he executed the First Amendment and because the Arbitration Decision is, at best, ambiguous and inconclusive, collateral estoppel cannot serve to estop Appellants' claims in this action.

C. The Arbitration Decision Did Not Preclude Litigation of McCord and CPSP's Claim for Tortious Interference With a Contractual Relationship Because the Arbitrator Did Not Decide Wages Had the Authority to Execute the First Amendment and CMDG Knew That McCord and CPSP Did Not Acquiesce to the Amendment.

The Arbitration decision does not serve to estop McCord and CPSP's claim for tortious interference with a contractual relationship because the arbitrator did not decide who were managers of Ryan & Wages in February 2009 and, even if Wages was a manger, whether McCord and Ryan had eliminated any authority Wages could have to execute the First Amendment. CMDG knew, or should have known, that Wages lacked the managerial authority to execute the First Amendment, knew that if he executed the First Amendment he would breach the Ryan & Wages Operating Agreement and because CMDG knowingly assisted in Wages' breach of the Ryan & Wages Operating Agreement. To establish tortious interference with a contractual relationship, a party must show: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. **Leingang v. Pierce County Medical Bureau**, 131 Wn. 2d 133, 157, 930 P.2d 288

(1997). Here, CMDG unilaterally determined that Wages was the sole manager in February 2009 and had the authority to execute the First Amendment. CMDG did this despite the communications from McCord and Ryan that, at the very least, provided actual notice that Wages did not have the authority to execute the First Amendment. As discussed above, the arbitrator's decision simply determined that in November 2009 Wages "was the manager". The Arbitration Decision is silent as to the issue of the addition of McCord and Ryan as managers and their subsequent actions to limit Wages' authority as a manager. As noted above, when the court cannot make a determination because of some ambiguity or uncertainty in the previous litigation whether an issue was actually litigated, collateral estoppel will not apply. **Mead**, 37 Wn. App. at 407.

Here, the arbitration decision is, at best, unclear and ambiguous with respect to who had a managerial role in February 2009 and that person's authority. As a result, the Arbitration decision cannot collaterally estop McCord and CPSP's tortious claim.

CMDG had actual knowledge from McCord and Ryan that Wages did not have the authority to execute the First Amendment and, in fact, that Wages had limited if any managerial authority. Further, CMDG knew that if Wages executed the contract he would breach the Ryan & Wages Operating Agreement. Despite this knowledge, CMDG insisted that

Wages execute the First Amendment in derogation of McCord and CPSP's protests. Because the Arbitration Decision did not decide the factual issue of who were the managers of Ryan & Wages in February 2009, and if Wages was a manager what authority he had to execute the First Amendment, it does not collaterally estop McCord and CPSP's claim. Accordingly, the trial court erred when it dismissed their claim for tortious interference with a contractual relationship. Accordingly, reversal of the trial court's decision is proper.

D. The Arbitration Decision does not Preclude Litigation of Ryan & Wages' Claim for Breach of Contract Because the Identities of the Ryan & Wages' Managers and Their Respective Authority in February 2009 was Not Decided by the Arbitrator.

The trial court similarly erred when it determined that Ryan & Wages' claim for breach of contract be dismissed because CMDG knew, or should have known, that when it executed the First Amendment, CMDG amended the RLS Operating Agreement without the requisite consent of all members. The RLS Operating Agreement explicitly requires that "must be in a writing and signed by all the members." (CP 382) Particularly in light of the communications between McCord, Ryan, and CPSP, CMDG knew that Wages could not sign the First Amendment on behalf of Ryan & Wages. First, if Wages was not a manager in February

2009, then CMDG knew that Wages could not act as the agent of the LLC. RCW § 25.15.150(3). However, even if Wages was one of three managers in February 2009, then Wages' rights and duties were determined by a vote of members holding at least two-thirds of all capital interests in the LLC, as set forth in Paragraph 6.2 in the Ryan & Wages Operating Agreement. (CP 408) Here, it is evident that McCord and CPSP had removed virtually all of Wages' authority and gave specific notice that Wages lacked the authority to execute the First Amendment. The Arbitrator's Decision did not resolve how many managers Ryan & Wages had in February 2009 and therefore, could not determine if Wages was a manager in February 2009 and if he was, if he had authority to execute the First Amendment.

E. Even if the Arbitration Decision Did Determine That Wages Was the Sole Manager in February 2009, Summary Judgment Was Improper Because Wages Failed to Obtain the Consent of Members With Two-Thirds of Ryan & Wages Capital Interest and CMDG Knew Wages had Failed to Obtain their Consent.

Even if this Court concludes that the Arbitration Decision determined that Wages was the sole manager of Ryan & Wages in February 2009, collateral estoppel still does not apply because the arbitrator did not determine that, as manager, Wages obtained the consent of members holding two-thirds of Ryan & Wages' capital interests and, in fact, the arbitrator specifically declined to address the capital account issue. As noted above, collateral estoppel applies to issues that were actually litigated and which were material in the previous litigation. Even if the arbitrator determined that Wages "was the manager", whether the manager, had the authority to execute the First Amendment was not decided in the arbitration. Under the terms of the Ryan & Wages Operating Agreement, even if Wages was the manager in February 2009, he had to obtain the consent of members owning at least two-thirds of the capital interests in Ryan & Wages to execute the First Amendment because it significantly affected the value of Ryan & Wages' property. (CP 413) In his decision the arbitrator specifically stated that he could not establish the members' capital accounts (which would have been necessary to establish their capital interests) because he lacked enough information and because he did not to establish the capital accounts to render his decision. (CP 353) Paragraph 8.3 provides that Members holding at least two-thirds of the capital interests in the LLC must vote to sell or dispose of all or a substantial portion of the LLC's assets. (CP 413) By executing the First Amendment, Wages disposed of a portion of the LLC's assets because the First Amendment limited the return of capital Ryan & Wages would receive upon sale of the Redding and Lake Stevens properties. Although not clearly articulated in its pleadings, CMDG appears to assert that the Third Addendum acts to supersede Paragraph

8.3. However, the plain language of the Ryan & Wages Operating Agreement and its addenda show that the third addendum merely stated that the manager had the authority to execute all necessary documents related to Ryan & Wages' interest in Redding Lake Stevens. This language did not alter the powers and limitations of the members and manager or managers with respect to the liquidation or disposal of LLC assets.

Interpretation of a contract, including an LLC operating agreement, is a matter of law if the contract's language is clear and unambiguous. **Lynott v. Nat'l Union Fire Ins. Co.**, 123 Wn. 2d 678, 684, 871 P.2d 146 (1994). To interpret an LLC Operating Agreement, the court will examine the document as a whole and avoid interpretation of certain provisions in isolation. **Black v. Nat'l Merit Ins. Co.**, 154 Wn. App. 674, 681, 226 P.3d 175 (2010). Here, the LLC's language is clear: the Third Addendum established that the manager has the right to execute all necessary documents related to Ryan &Wages' membership in RLS. (CP 963) The Third Addendum <u>does not</u> diminish or eliminate the voting requirement set forth in Paragraph 8.3 of the Operating Agreement. Paragraph 8.3 states that the members approve the sale, exchange, or transfer or all or substantially all of its assets upon the affirmative vote of members holding at least two-thirds of the LLC's capital interests. (CP 413) Rather, the

Third Addendum reiterates that the Manager has the authority only to execute necessary documents related to Ryan & Wages' interest in RLS, subject to the limitations and restrictions set forth in the Ryan & Wages Operating Agreement.

Even if Wages was the sole manager, he lacked the authority to vote for the First Amendment because McCord and CPSP, combined, owned over ninety percent (90%) of the capital interests and because neither approved of the First Amendment. Importantly, CMDG admitted that was familiar with the Ryan & Wages Operating Agreement (CP 554-56) and, in fact, the speaking agent for CMDG, Willard Forsyth, drafted the Third Addendum. (CP 616) CMDG communicated with Appellants that it had, through Forsyth, conducted an independent examination of Ryan & Wages' documents and determined that Wages was the manager and that he had the authority to execute the First Amendment.

CMDG either knew or should have known that Wages lacked the authority to execute the First Amendment. Therefore CMDG breached the RLS Operating Agreement because it amended the RLS Operating Agreement without the approval of all members, i.e. Ryan & Wages. Further, CMDG tortiously interfered with Appellants' contractual relationship with Wages because CMDG knew Wages lacked authority to execute the First Amendment. Further, CMDG had intimate knowledge of the Ryan & Wages Operating Agreement and therefore knew that when it recruited Wages to execute the First Amendment CMDG was aiding Wages in the breach of his agreement with Appellants.

Therefore, even if the Arbitration Decision collaterally estops Appellants from asserting that Wages was not the manager, or at the very least one of three managers with no authority, the trial court erred when it dismissed Appellants' claims. As manager, Wages was bound by the limitations and restrictions of the LLC Operating Agreement. The Operating Agreement clearly stated that before all or substantially all of the LLC's assets can be transferred, sold, or exchanged, members owning at least two-thirds of the capital interests must approve the action. (CP 413) The Arbitrator declined to determine the members' capital accounts and therefore, the arbitrator could not have determined Wages had the authority to execute the First Amendment. Further, the Ryan & Wages Operating Agreement clearly states that Wages lacked the authority and when CMDG enlisted to execute the First Amendment CMDG breached the RLS Operating Agreement and caused and/or aided Wages in breaching the Ryan & Wages Operating Agreement. Because the Arbitration Decision does not collaterally estop Appellants from asserting their claims based upon Wages' lack of authority to execute the First Amendment, the Trial court erred when it dismissed Appellants' claims.

CONCLUSION

The trial court erred when it employed collateral estoppel to dismiss Appellants' claims. First, collateral estoppel only applies to issues that were actually and necessarily litigated in the previous action. If a court cannot determine whether the matter was actually litigated because of some inconsistency or ambiguity in the previous litigation, then collateral estoppel does not apply. Here, the arbitrator specifically declined to establish the members' capital accounts. Therefore he rendered his decision with no knowledge of the members' respective capital interests. Determination of the capital interests of the members of Ryan & Wages would have been critical to this litigation because members with two-thirds of all capital interests can increase the number of managers and because those members collectively had to approve execution of the First Amendment. McCord and CPSP have over ninety-five percent (95%) of all of the capital interests in Ryan & Wages. Their action to increase the number of managers from one to three was valid. Their action to limit Wages' managerial authority was valid. And their approval of the First Amendment was required and crucial issue. The arbitrator declined to render any findings with respect to these issues and settled for the statement that Wages was the managing member in

November 2009. As a result, the Arbitration Decision by its very language cannot serve to collaterally estop Appellants' claims.

Because the Arbitration Decision does not collaterally estop Appellants claims, the trial court erred when it dismissed this action and reversal of the June 6, 2012 Order is required.

Respectfully submitted this 8th day of October, 2012.

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APPENDIX

Lawlor v. National Screen Service Corp.

Supreme Court of the United States
February 9-10, 1955, Argued ; June 6, 1955, Decided
No. 163

Reporter: 349 U.S. 322; 75 S. Ct. 865; 99 L. Ed. 1122; 1955 U.S. LEXIS 1547

LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, v. NATIONAL SCREEN SERVICE CORP. ET AL.

Notice:

Prior History: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Disposition: 211 F.2d 934, reversed.

Core Terms

res judicata, accessories, doctrine, same cause of action, exclusive license, treble damages, monopoly, cause of action, motion picture, advertising, collateral estoppel, conspiracy, settlement, joined, injunctive relief, antitrust, prior suit, anti trust law, posters, privies, former suit, illegal act, deliberately, manufacture, collateral, exhibitors, sublicense, estoppel, lessors, anti-trust

Case Summary

Procedural Posture

Petitioners, lessors of advertising posters to movie exhibitors, filed an antitrust action against respondents, a manufacturer and distributor of posters and movie producers. The lessors appealed a decision from the United States Court of Appeals for the Third Circuit, which dismissed their action on the grounds that an earlier settlement constituted res judicata.

Overview

The lessors sought treble damages and injunctive relief in their action alleging that respondents committed antitrust violations in perpetuating a conspiracy and monopoly. The lessors had previously settled a similar suit against the manufacturer and some of the producers where the producers had granted the exclusive right to manufacture advertising posters to the manufacturer. Reversing the lower court's dismissal of the lessors' suit on the ground of res judicata, the Court found that the lessors were not suing upon the same cause of action as that which they had previously settled. While both suits involved the same wrongful conduct, the Court held that because the current suit was based on conduct that occurred after the settlement, it alleged new antitrust violations, and it involved a change in respondents' alleged monopoly. Thus, the action was not barred and the Court remanded the case for further proceedings.

Outcome
The Court reversed the judgment dismissing the lessors' antitrust action and remanded the case.

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview
Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata
Civil Procedure > Judgments > Preclusion of Judgments > General Overview
Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion of Judgments > General Overview
Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview
Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN1 Under the doctrine of res judicata, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties
Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties
Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN2 There is no obligation to join all tortfeasors as defendants in a single lawsuit where they are not indispensable parties.

Lawyers' Edition Display

Summary

Plaintiffs, who were engaged in the business of leasing advertising posters, known in the trade as standard accessories, to motion picture exhibitors, commenced a treble damage anti-trust action against a corporation to which producers had granted the exclusive right to manufacture and distribute such standard accessories, and against three producers who had already granted exclusive licenses to the corporation. The complaint alleged that the defendants had conspired to establish a monopoly in the distribution of standard accessories by means of the exclusive licenses. In addition to damages, an injunction was sought against the defendants' illegal acts and practices. Pursuant to a settlement, the suit was dismissed "with prejudice" in 1943. Thereafter the same plaintiffs sued again for treble damages under the anti-trust laws alleging that five other producers had joined the conspiracy since 1943 and basing the complaint upon conduct of the defendants subsequent to the 1943 judgment.

The issue was whether the present suit was barred under the doctrine of res judicata by the former judgment of dismissal. This question was answered in the negative in an opinion by Warren, Ch. J., speaking for a unanimous court. The decision was rested on the ground that under the facts stated above the second suit involved a different cause of action and that the result was not affected by the circumstance that the complaint in the former suit, in addition to treble damages, sought injunctive relief which, if granted, would have prevented the illegal acts complained of in the second suit. With respect to five defendants who were not parties to the former suit, the decision was also rested on the ground that these defendants were not privies of the defendants in the former suit.

Harlan, J., did not participate.

Headnotes

JUDGMENT §79 > res judicata. --
LEdHN[1] [1]

Under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action.

JUDGMENT §89 > collateral estoppel. --
LEdHN[2] [2]

Under the doctrine of collateral estoppel, a judgment in a prior suit involving the same parties or their privies precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

JUDGMENT §100 > bar -- dismissal. --
LEdHN[3] [3]

A judgment dismissing a previous suit "with prejudice" bars a later suit on the same cause of action.

JUDGMENT §100 > bar -- dismissal. --
LEdHN[4] [4]

A judgment dismissing a previous suit "with prejudice," unaccompanied by findings, does not bind the parties on any issue which might arise in connection with another cause of action.

JUDGMENT §100 > bar -- dismissal -- different cause of action. --
LEdHN[5] [5]

In determining whether two suits between the same parties are based on the same cause of action so that a judgment dismissing one with prejudice bars the other, it is not decisive that both suits involve essentially the same course of wrongful conduct, since such a course of conduct, for example, an abatable nuisance, may frequently give rise to more than a single cause of action.

JUDGMENT §141 > bar -- dismissal -- anti-trust suit. --
LEdHN[6] [6]

A judgment dismissing with prejudice a suit for treble damages under the antitrust laws, while precluding recovery on claims arising prior to its entry, does not have the effect of extinguishing claims which did not then exist and which could not possibly have been sued upon in the prior case.

JUDGMENT §141 > bar -- dismissal -- anti-trust suit. --
LEdHN[7] [7]

Whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, a judgment dismissing with prejudice a suit for treble damages under the anti -trust laws, in which suit it was alleged that the defendants had conspired to establish a monopoly in the distribution of advertising posters by means of exclusive licenses, does not bar a later suit for like relief, where the conduct complained of in the later suit was all subsequent to the former judgment, and, in addition, there were alleged new anti-trust violations, such as deliberately slow deliveries and tie-in sales, not present in the former action, and, moreover, since the entry of the former judgment there was a substantial change in the scope of the defendants' alleged monopoly, in that five other producers had granted exclusive licenses, with the result that the defendants' control over the market for these posters had increased to nearly 100 per cent.

JUDGMENT §141 > bar -- dismissal -- anti-trust suit. --
LEdHN[8] [8]

A judgment dismissing with prejudice a suit for treble damages under the antitrust laws does not bar a later suit for such damages based on conduct subsequent to the former judgment, even though the complaint in the former suit sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts complained of in the second suit; particularly is this so in view of the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble damage action.

ACTION OR SUIT §2 > single cause of action. --
LEdHN[9] [9]

A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought.

JUDGMENT §208 > bar -- dismissal -- persons not parties -- anti-trust suit. --
LEdHN[10] [10]

A judgment dismissing with prejudice a suit for treble damages based on a conspiracy in violation of the anti-trust laws does not bar a subsequent suit for such damages against defendants who were not parties to the former suit, and who do not fall within the orthodox categories of privies since they could not have been joined in the former suit, not having entered the alleged conspiracy until after the former judgment, and the plaintiffs were under no obligation to join them in the former suit and their liability was not altogether dependent upon the culpability of the defendants in the former suit.

PARTIES §82 > joint tortfeasors. --
LEdHN[11] [11]

A joint tortfeasor is not an indispensable party in a suit against his cotortfeasor.

Syllabus

In 1942, alleging that the defendants had conspired to establish a monopoly in the distribution of motion picture advertising material, petitioners and others brought an antitrust action for treble damages and injunctive relief against National Screen and three motion picture producers who had granted exclusive licenses to National Screen to manufacture and lease such material. In 1943, pursuant to a settlement made before trial and without any findings of fact or law having been made, that action was dismissed "with prejudice" and sublicenses were granted by National Screen to the plaintiffs. In 1949, petitioners brought a similar action against the same defendants, plus five additional motion picture producers, alleging that settlement of the 1942 suit was merely a device used to perpetuate the conspiracy and monopoly, that the five additional producers had since joined the conspiracy, and that National Screen had deliberately made slow and erratic deliveries under the sublicense in an effort to destroy petitioners' business and had used tie-in sales and other means of exploiting its monopoly power. Petitioners sought damages for only those injuries sustained after the 1943 judgment. *Held*: The 1949 action was not barred by the 1943 judgment under the doctrine of *res judicata*. Pp. 323-330.

(a) Since the 1943 judgment was not accompanied by findings, it did not bind the parties on any issue -- such as the legality of the exclusive license agreements or their effect on petitioners' business -- which might arise in connection with another cause of action. Pp. 326-327.

(b) Whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the two suits were not based on the same cause of action, and the 1943 judgment does not bar the 1949 suit. Pp. 327-328.

(c) A different result is not required by the fact that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of. Pp. 328-329.

(d) With respect to the five defendants who were not parties to the 1942 suit, moreover, their relationship to the other defendants was not close enough to bring them within the scope of the doctrine of *res judicata*. Pp. 329-330.

Counsel: Francis Anderson argued the cause and filed a brief for petitioners.

Louis Nizer argued the cause and filed a brief for the National Screen Service Corporation, respondent.

Earl G. Harrison argued the cause for the Columbia Pictures Corporation et al., respondents. With him on the brief were Wm. A. Schnader and Edward W. Mullinix for Loew's Incorporated et al., and Louis J. Goffman for Warner Bros. Pictures Distributing Corporation, respondents.

Judges: Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton; Harlan took no part in the consideration or decision of this case.

Opinion by: WARREN

Opinion

[*323] **[**866]** **[***1125]** MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is an action to recover treble damages for alleged violation of the federal antitrust laws. The only question presented is whether the action is barred, in the circumstances of the case, under the doctrine of *res judicata*.

Petitioners are engaged in the business of leasing advertising posters to motion picture exhibitors in the Philadelphia area. Such posters, known in the trade as standard accessories, embody copyrighted matter from the motion pictures being advertised. Until recent years, standard accessories could be purchased directly from the motion picture companies themselves. Beginning with Paramount in 1939, however, the eight major producers granted to National Screen Service Corporation the exclusive right to manufacture and distribute various advertising **[*324]** materials, including standard accessories as well as specialty accessories and film trailers, for their motion pictures. RKO followed in 1940, Loew's in 1942, Universal in 1944, Columbia in 1945, United Artists and Warner Brothers in 1946, and 20th Century Fox in 1947.

In 1942, together with a number of others in similar businesses, petitioners commenced a treble-damage antitrust action against National Screen and the three producers who had already granted exclusive licenses to National Screen. The complaint alleged that the defendants had conspired to establish a monopoly in the distribution of standard accessories by means of the exclusive licenses and that the plaintiffs' businesses had been injured as a consequence. The complaint also alleged that National Screen was then negotiating with the other major producers to procure similar licenses. In addition to damages, an injunction was sought against the defendants' "illegal acts and practices."

In 1943, prior to any trial, the **[***1126]** suit was settled. The basis of the settlement was an agreement by National Screen to furnish the plaintiffs with all standard accessories distributed by National Screen pursuant to its exclusive license agreements with producers, including exclusive license agreements which **[**867]** might be executed in the future. In exchange, the plaintiffs agreed that they would withdraw the suit and that they would pay National Screen for the materials at specified prices. Pursuant to the settlement, the suit was dismissed "with prejudice" by court order. No findings of fact or law were made.

The sublicense was to run three years. In 1946 it was renewed for another five-year term. In 1949, while the sublicense was still in force, petitioners brought the instant action, again seeking treble damages and injunctive relief. Named as defendants -- respondents here -- were **[*325]** National Screen, the three producers who were parties to the 1942 suit, and the five producers who licensed National Screen subsequent to the dismissal of the 1942 suit.

In their present complaint, petitioners allege that the settlement of the 1942 suit was merely a device used by the defendants in that case to perpetuate their conspiracy and monopoly. They also allege: that five other producers have joined the conspiracy since 1943; that National Screen has deliberately made slow and erratic deliveries of advertising materials under the sublicense in an effort to destroy petitioners' business; and that for the same purpose National Screen has used tie-in sales and other means of exploiting its monopoly power. [1] Petitioners seek damages for resulting injuries suffered from August 16, 1943 -- in other words, for a period beginning several months after the dismissal of the 1942 complaint.

In 1951, on petitioners' motion for summary judgment, the District Court held that petitioners were entitled to injunctive relief against National Screen because the undisputed facts supported petitioners' claim of unlawful monopoly. [2] As to the producers, however, the District Court held that conflicting evidence on the issue of conspiracy made a trial necessary. [3] But in 1953, before any trial was held and before a decree against National Screen could be framed, the defendants moved to dismiss the action on the ground that the 1943 judgment was *res judicata*. The District Court, another judge then sitting, granted the motion and the Court of Appeals **[*326]** for the Third Circuit affirmed. [4] We granted certiorari because of the importance of the question thus presented in the enforcement of the federal antitrust laws. [5]

LEdHN[1] [1]***LEdHN[2]*** [2]The basic distinction between the doctrines of *res judicata* and collateral estoppel, as those terms are used in this case, has frequently been emphasized. [6]***HN1*** Thus, under the doctrine of *res judicata*, a judgment "on the merits" in a prior

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[1] "Defendant NATIONAL, illegally and with intent to destroy plaintiff's business, deliberately reduces the rental price of said motion picture talking trailers to exhibitors if said exhibitors, including plaintiff's customers, agree beforehand to purchase or lease for the exploitation of all of their films exhibited, standard accessories and advertising materials directly from the defendant NATIONAL."

[2] 99 F.Supp. 180, 188.

[3] *Ibid.*

[4] 211 F.2d 934.

[5] 348 U.S. 810.

[6] *E. g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353; *United States* v. *Moser*, 266 U.S. 236, 241. See also Restatement, Judgments, §§ 47, 48, 68. The term *res judicata* is used broadly in the Restatement to cover merger, bar, collateral estoppel, and direct estoppel. *Id.*, c. 3, Introductory Note.

suit involving the same parties or their privies bars a second suit based on the same cause of action. **[***1127]** Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Recognizing this distinction, the court below concluded that "No question of collateral estoppel **[**868]** by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter." [7] Turning then to the doctrine of *res judicata*, the court correctly stated the question before it as "whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942 and lost." [8] The court answered the question in the affirmative on the ground that the two suits were based on "essentially the same course of wrongful conduct." [9] The court **[*327]** acknowledged that "there are some additional allegations, some new acts which the plaintiffs say the defendants have done since the earlier suit" and that "Additional defendants were joined in the 1949 suit," but concluded that "in substance the complaint is the same. . . ." [10]

LEdHN[3] [3]***LEdHN[4]*** [4]It is of course true that the 1943 judgment dismissing the previous suit "with prejudice" bars a later suit on the same cause of action. [11] It is likewise true that the judgment was unaccompanied by findings and hence did not bind the parties on any issue -- such as the legality of the exclusive license agreements or their effect on petitioners' business -- which might arise in connection with another cause of action. [12] To this extent we are in accord with the decision below. We believe, however, that the court erred in concluding that the 1942 and 1949 suits were based on the same cause of action.

LEdHN[5] [5]***LEdHN[6]*** [6]***LEdHN[7]*** [7]That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct -- for example, an abatable nuisance -- may frequently **[*328]** give rise to more than a single cause of action. [13] And so it is here. The conduct presently complained of was all subsequent to

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[7] 211 F.2d 934, 935.

[8] *Ibid.*

[9] *Id.*, at 936.

[10] *Id.*, at 936-937.

[11] *United States* v. *Parker*, 120 U.S. 89, 95; *United States* v. *International Building Co.*, 345 U.S. 502, 506.

[12] See *United States* v. *International Building Co., supra*, at 505:

"We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see *Russell* v. *Place*, 94 U.S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration."

[13] Restatement, Judgments, § 62, Comment g. Antitrust violations are expressly made abatable. 15 U. S. C. § 26.

the 1943 judgment. [14] In addition, there are new antitrust violations alleged here -- deliberately slow deliveries and tie-in sales, among others -- not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing **[***1128]** claims which did not even then exist and which could not possibly have been sued upon in the previous case. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly; five other producers had granted exclusive licenses to National Screen, with the result that the defendants' control over the market for standard accessories **[**869]** had increased to nearly 100%. [15] Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment does not constitute a bar to the instant suit.

LEdHN[8] [8]***LEdHN[9]*** [9]This conclusion is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of. A combination of **[*329]** facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is *res judicata* only as to suits involving the same cause of action. [16] There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.

LEdHN[10] [10]***LEdHN[11]*** [11]With respect to the five defendants who were not parties to the 1942 suit, there is yet a second ground for our decision. The court below held that their relationship to the other defendants was "close enough to bring them all within the scope of the doctrine of res judicata." [17] With this conclusion, we cannot agree. We need not stop to consider the outer bounds of the rule of privity and allied concepts. [18] It is sufficient here to point out that the five defendants do not fall within the orthodox categories of privies; [19] that they could not have been joined in the 1942 case since they did not even enter the alleged conspiracy until after the judgment on which they

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[14] Restatement, Judgments, § 62, Comment g. Compare *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 150-151.

[15] 99 F.Supp. 180, 183-184. The complaint in the 1942 suit alleged that 40% of National Screen's business in standard accessories consisted of standard accessories for the motion pictures of two (Paramount and RKO) of the three defendant producers. The complaint also alleged that 20% to 33% of the plaintiffs' business consisted of standard accessories for the motion pictures of the third defendant producer (Loew's). As to the pertinence of "the percentage of business controlled," see *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-528.

[16] That the same rule is applicable in equity, see Restatement, Judgments, § 46, Comment b; *id.*, § 53, Comment c.

[17] 211 F.2d 934, 937.

[18] See Restatement, Judgments, c. 4.

[19] Restatement, Judgments, § 83, Comment a:

"those who control an action although not parties to it . . . ; those whose interests are represented by a party to the action . . . ; successors in interest . . . ."

now **[*330]** rely; [20] that in any event there was ***HN2*** no obligation to join them in the 1942 case since as **[***1129]** joint tortfeasors they were not indispensable parties; [21] and that their liability was not "altogether dependent upon the culpability" of the defendants in the 1942 suit. [22]

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

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[20] Compare *Bruszewski* v. *United States*, 181 F.2d 419 (C. A. 3d Cir.), on which both courts below relied. It should also be noted that the *Bruszewski* decision was an application of collateral estoppel and not *res judicata* as that term is used here.

[21] Restatement, Judgments, § 94. See *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111, 132.

[22] *Id.*, at 127.

DECLARATION OF SERVICE

I certify that on October 8, 2012 I caused a true and correct copy of the Appellants' Brief on Appeal to be served on the following in the manner indicated below:

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