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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/CROSS-RESPONDENTS' REPLY BRIEF ON APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. CLARIFICATION OF FACTS	2
III. LEGAL ARGUMENT	4
A. CMDG's Cross-Appeal.	4
1. The Trial Court did not Err When it Determined that McCord and CPSP are not Liable for Attorney Fees Under the Redding Operating Agreement Because their Tort Claim Arose out of the Ryan & Wages Operating Agreement and not the Redding Operating Agreement.....	4
2. Mutuality of Remedy does not Support Joint and Several Liability for CMDG's Attorney Fees Because McCord and CPSP's Sole Claim was Tortious Interference with the Ryan & Wages Operating Agreement and not the Redding Operating Agreement.	6
3. CMDG Erroneously Asserted that McCord and CPSP's Claims Arose out of the Redding Operating Agreement When the Claim Rests on the Terms of the Ryan & Wages Operating Agreement.	11
4. The Redding Operating Agreement is Relevant to the Calculation of Monetary Damages Only to the Extent that the Ryan & Wages Operating Agreement Establishes When and How the Injury Occurred	13
a) The Redding Operating Agreement Establishes the Monetary Value of CMDG's Action but does not Serve to Establish the Contractual Relationship with Which CDMG	

	Tortiously Interfered.....	15
B.	Appellants' Claims	16
1.	Collateral Estoppel Does Not Bar Appellants' Claim Because Issues Central both to the Contract Claim and the Tort Claim were not Decided by the Private Arbitration	17
a)	The Trial Court Erred When it Dismissed McCord and CPSP's Claim for Tortious Interference with a Contractual Relationship Because Issues of Fact Exist Regarding CMDG's Interference with Wages' Relationship with CPSP and McCord.....	22
b)	The Trial Court Erred When it Dismissed Ryan & Wages Breach of Contract Claim Because Issues of Fact Exist Regarding Execution of the First Amendment by CMDG Without Ryan & Wages' Written Consent.....	24
IV.	CONCLUSION	24

TABLE OF AUTHORITY

	<u>Page</u>
Cases	
<i>RTC Transportation v. Walton</i> , 72 Wn. App. 386, 864 P.2d 969 (1994).....	7
<i>Evergreen Moneysource Mortg. Co. v. Shannon</i> , 167 Wn. App. 242, 274 P.3d 375 (2012).....	11,12,23
<i>Olympic Fish Prods. v. Lloyd</i> , 93 Wn.2d 596, 611 P.2d 737 (1980)	12
<i>Edmonds v. John L. Scott Real Estate, Inc.</i> , 87 Wn. App. 834, 942 P.2d 1072 (1997).....	13
<i>Tradewell Group, Inc. v Mavis</i> , 71 Wn. App. 120, 857 P.2d 1053 (1993)	14
<i>Thao v. Control Data Corp.</i> , 57 Wn. App. 802, 790 P.2d 1239 (1990).....	14
<i>Huff v. Roach</i> , 125 Wn. App. 724, 106 P.3d 268 (2005)	16
<i>Davis v. Nielson</i> , 9 Wn. App. 864, 515 P.2d 995 (1973)	17
<i>Mead v. Park Place Properties</i> , 37 Wn. App. 403, 681 P.2d 256 (1989).....	17
<i>State Farm Mutual Auto. Ins. Co. v. Avery</i> , 114 Wn. App. 299, 57 P.3d 300 (2002).....	17
<i>Diamond “B” Constructors, Inc. v. Granite Falls School Dist.</i> , 117 Wn. App. 157, 70 P.3d 966 (2003).....	28
<i>Black v. Nat’l Merit Ins. Co.</i> , 154 Wn. App. 674, 226 P.3d 175 (2010).....	28

TABLE OF AUTHORITIES (Continued)

	<u>Page</u>
Statutes, Codes, and Civil Rules	
RCW § 25.15.300.....	4
CR 9.....	6
CR 8.....	6,7
CR 12.....	7

I. INTRODUCTION

CMDG seeks appeal of the Trial Court's decision that limited the award of attorney fees against Ryan & Wages only. CMDG alleges that McCord and CPSP should also be liable for its fees because CMDG believes they asserted claims for breach of contract and because CMDG believes that McCord and CPSP's tort claim is based upon the Redding Operating Agreement. Both of CMDG's assertions fail. First, Appellants' Complaint clearly indicates that Ryan & Wages is the only party that asserted a breach of contract claim. Second, McCord and CPSP's tortious interference claim is not based upon the Redding Operating Agreement but rather the Ryan & Wages Operating Agreement. Wages was a member of Ryan & Wages and he exceeded his authority when he executed the First Amendment. Accordingly, the contract with which CMDG interfered was not the Redding Operating Agreement but rather the Ryan & Wages Operating Agreement. For these reasons, CMDG's appeal should be denied.

CMDG also asserts that the Trial Court did not err when it determined that the claims asserted by Appellants were collaterally estopped by the 2009 Arbitration Decision. As discussed below, the arbitrator specifically declined to determine the members' capital accounts and contributions. The result is that the arbitrator necessarily did not determine two factual issues that are material to this matter: the number of managers Ryan & Wages had in February 2009 and whether Wages had the authority to execute the First Amendment even if he was a manager in February 2009. Because the arbitrator specifically declined to address these issues and because they are material to Appellants' claims, the Trial Court erred when it dismissed Appellants' claims. Reversal and remand is therefore appropriate.

II. CLARIFICATION OF FACTS

Appellants submit this strict Clarification of Facts to address inaccurate statements made by CMDG regarding the Snohomish County Superior Court Case Ryan & Wages v. Wages, et al. 09-2-11962-5.¹ In that matter the issue that was decided at trial was the distribution of Ryan & Wages' assets pursuant to judicial dissolution.² None of the issues presented in this litigation were addressed in that matter. Importantly, the

¹ CMDG refers to the suit as the "Second Law Suit".

² CP 216-20

issue of the validity of the First Amendment to the Redding Lake Stevens LLC Operating Agreement³ was not at issue; what was at issue was the distribution of Ryan & Wages' assets.⁴ CMDG's citation to the Findings of Fact is simply inaccurate. Specifically, CMDG's citation beginning on page 27 states: "Wages was the managing member of Ryan & Wages and had a 51% interest in the company...Mr. Wages was removed as manager by court order on January 14, 2010"⁵. That citation is misleading; indeed, it skips over 1.5 pages of foundational facts in order for the Court to establish the allocation of assets upon dissolution of Ryan & Wages. When that portion of the Findings of Fact is read in its entirety what becomes evident is that the Trial Court was merely establishing a historical foundation for its ruling.⁶ The Ryan & Wages v. Wages lawsuit did not concern the factual issues addressed in the current matter and is wholly irrelevant to the issues on appeal. The sole issue in the Ryan & Wages v. Wages matter was the proper distribution of Ryan & Wages assets upon dissolution of the LLC and whether Wages had misappropriated funds. Both the February 2009 Arbitration Decision and

³ Hereinafter "Redding Operating Agreement"

⁴ CP 216-20

⁵ Respondent's Brief on Appeal, pp. 27-8

⁶ For example the Court made findings regarding testimony of Ryan & Wages' accountant, the valuation of McCord and CPSP's capital accounts, and an accounting of Wages' capital account which were relevant to the Trial Court's decision. (CP 212-14) However, discussions regarding the First Amendment and the 2009 Arbitration Decision were discussed for purposes of historical foundation and were not matters that were actually litigated in that matter.

the First Amendment were discussed only as background information. What was litigated and ultimately decided in that matter was: (1) the assets of Ryan & Wages, LLC; (2) the liabilities of Ryan & Wages, LLC; (3) the value of each member's capital account; and (4) distribution of the LLC's assets pursuant to RCW § 25.15.300.⁷ Accordingly, CMDG's references to that matter serve no meaningful purpose and only acts to obfuscate the legal issues in this Appeal.

III. LEGAL ARGUMENT

A. CMDG's Cross-Appeal⁸

1. The Trial Court did not Err When it Determined that McCord and CPSP are not Liable for Attorney Fees Under the Redding Operating Agreement Because their Tort Claim Arose out of the Ryan & Wages Operating Agreement and not the Redding Operating Agreement.

The Trial Court did not err when it awarded attorney fees to CMDG only against Ryan & Wages because it is the only Appellant that was a party to the Redding Operating Agreement. Further, McCord and CPSP's tortious interference claim is based upon the contractual relationship created by the Ryan & Wages Operating Agreement. To the

⁷ CP 216-220

⁸ CMDG's assignments of error are only relevant if this Court declines to reverse the dismissal of Appellants' claims for breach of contract and tortious interference. As discussed in Section B, Appellants' position is that CMDG has failed to establish that this Court should affirm the dismissal of Appellants' claims.

extent the Redding Operating Agreement has or had any relevance to the tort claim it was to help establish the monetary value of McCord and CPSP's damages. However, the establishment of injury rests soundly within the language of the Ryan & Wages Operating Agreement. As a basis for its position that McCord and CPSP are liable for its fees, CMDG asserts that the mutuality of remedy doctrine warrants imposition of joint and several liability for its fees because it argues that McCord and CPSP also asserted a breach of contract claims. However, the Trial Court correctly noted that Appellants' Complaint delineated which party had asserted the contract claim (Ryan & Wages) and who asserted the tortious interference claim (McCord and CPSP). Further, mutuality of remedy does not impose liability for CMDG's fees against McCord and CPSP because their claim arises out of the Ryan & Wages Operating Agreement and not the Redding Operating Agreement. Although reference to the existence of the Redding Operating Agreement helped to establish the monetary value of the damage that resulted from the tort claim, it was not a part of the claim itself. As discussed in detail below, because Ryan & Wages' claim was the only claim based upon the Redding Lake Stevens LLC Operating Agreement, CMDG's claim for expanding liability for its attorney's fees should be denied.

2. Mutuality of Remedy does not Support Joint and
Several Liability for CMDG's Attorney Fees Because
McCord and CPSP's Sole Claim was Tortious Interference
with the Ryan & Wages Operating Agreement and not the
Redding Operating Agreement.

CMDG's assertion that McCord and CPSP are jointly and severally liable for the attorney fees award against Ryan & Wages for its breach of contract claim fails because neither McCord nor CPSP asserted claims for breach of the Redding Lake Stevens LLC Operating Agreement. At oral argument regarding fees, much time was spent by CMDG arguing that McCord and CPSP asserted a breach of contract claim for breach of the Redding Operating Agreement.⁹ The Court noted that Washington is a notice pleading state and then found that McCord and CPSP did not allege a breach of contract claim.¹⁰ Because Washington is a notice pleading state, Appellants' Complaint need only provide a short and plain statement of the facts that support their claims and a demand for judgment. To the extent the defending party needs more clarification, it is the defending party's obligation to seek clarification either through CR 9(a) or the discovery process.

Under CR 8(a) a pleading which sets forth a claim for relief must contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to

⁹ For example VR 7:22-8-23; 9:2-11:24

¹⁰ VR 33

which the pleader deems himself entitled. The purpose of CR 8(a) is designed to accomplish the purpose of giving notice of a claim or defense. **RTC Transportation v. Walton**, 72 Wn. App. 386, 864 P.2d 969 (1994). To the extent the responding party needs clarification regarding the causes of action, he may file a motion for a more definite statement. *See* CR 12(e); **RTC Transportation**, 72 Wn. App. at 391. Importantly, the purpose of CR 12(e) is not simply to alleviate the hurdle of responding to pleadings that are exceedingly vague or ambiguous, but rather CR 12(e) can be used to seek more particularity in order to further the efficient economical disposition of the action. *See* CR 12(e). Importantly, if the answering party believes it needs a more definite statement of a cause of action or believes it is too vague to answer adequately, then the burden rests on the answering party to file a motion or use the discovery process to fill in the details. **RTC Transportation**, 72 Wn. App. at 391.

In support of Ryan & Wages' claim for breach of contract, the Complaint contained the following allegations:

3.1 CMDG and Ryan & Wages are, and were at all times pertinent to the subject matter of this action, members of Redding Lake Stevens, LLC (hereinafter "Redding Lake Stevens"), an Oregon Limited Liability Company that owns property in California and Washington through subsidiary companies.¹¹

¹¹ CP 1263

3.3 When Redding Lake Stevens was formed, Doris Ryan's estate and the George M Ryan Disclaimer Trust¹² contributed the property identified in "Exhibit A" to Redding Lake Stevens in exchange or consideration for 50 "Class A" Units for Ryan & Wages, LLC; CMDG received 50 "Class B" Units.¹³

3.6 On or about January 29, 2008, Ryan & Wages, LLC informed the manager of Redding Lake Stevens and CMDG that the management of Ryan & Wages had changed and that all communications should be forwarded to the two new managers. Importantly, Ryan & Wages, LLC informed the management of Redding Lake Stevens, LLC and CMDG that Thomas Wages was no longer the manager and lacked the authority to speak on behalf of the company.¹⁴

3.7 Despite receiving notice that Thomas Wages was no longer the manager of Ryan & Wages, LLC, CMDG provided an Amendment to the Redding Lake Stevens, LLC Operating Agreement to Thomas Wages to execute on behalf of Ryan & Wages. The document was signed on February 1, 2009 by Charles D. McGlade as the manager of CMDG. In addition, Thomas Wages signed alleging that he was the manager of Ryan & Wages, LLC.¹⁵

3.10 Upon notice of the purported Amendment, Ryan & Wages sent notice to CMDG and the managers of Redding Lake Stevens, LLC that the Amendment had not been properly executed and that Redding Lake Stevens, LLC could not act in accordance with the Amendment.¹⁶

¹² At the time the Lake Stevens property was transferred, both Doris Ryan and George Ryan were deceased.

¹³ CP 1263

¹⁴ CP 1264

¹⁵ *Id.*

¹⁶ *Id.*

4.2 When CMDG, LLC and Ryan & Wages, LLC formed Redding Lake Stevens, LLC, the parties entered into a contractual agreement.¹⁷

4.3 As set forth in the Operating Agreement, any amendment to the Operating Agreement must be in writing and signed by all members.¹⁸

4.4 When CMDG, LLC signed the purported Amendment in February 2009, it knew or should have known that Thomas Wages was not the manager of Ryan & Wages, LLC and could not sign on its behalf.¹⁹

4.5 When CMDG, LLC allowed for the purported Amendment to change the Redding Lake Stevens, LLC Operating Agreement and recognized the purported Amendment as valid, it breached the parties' contract.²⁰

4.6 As a result, Plaintiff has suffered pecuniary losses including but not limited to direct, indirect, and consequential damages, as a direct result of Defendant's breach, in such amounts as shall be established at the time of trial in this matter.²¹

CMDG alleges that from this language either it is evident that McCord and CPSP alleged a claim for breach of contract or that the pleadings are so vague that it is reasonable to interpret the contract claims as being asserted by all Appellants. CMDG's chief concern appears to be that Paragraph 4.6 merely states "Plaintiff" instead of specifically referring to "Ryan & Wages, LLC". However, the Complaint read as a whole clearly

¹⁷ CP 1265

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ CP 1265

²¹ *Id.*

establishes that the only Plaintiff that asserted a claim for breach of contract was Ryan & Wages, LLC. To the extent CMDG needed clarification as to which Plaintiff was a member of RLS and if that was the only Plaintiff that asserted a claim of breach of the Redding Operating Agreement, then CMDG should have sought clarification and/or engaged in discovery. However, CMDG's strained reading of the clear and plain language of the Complaint is unsupportable. Other than its allegation that the wording of Paragraph 4.6 shows that McCord and CPSP alleged a claim for breach of the Redding Operating Agreement, CMDG has conspicuously failed to point towards any other pleadings that imply McCord and CPSP had a contract claim. As the court noted, Washington is a notice pleading state and to the extent CMDG was confused as to which party asserted a claim for breach of the Redding Operating Agreement, it should have conducted discovery.²² Further, and most importantly, a reading of the document as a whole and other pleadings make evident that McCord and CPSP's claim was based solely in tort. Because CMDG bases its claim that McCord and CPSP should be jointly and severally liable for the attorney fee award upon the erroneous assertion that McCord and CPSP asserted a claim for breach of the Redding Operating Agreement, CMDG's appeal should be denied.

²² VR 38:5-8

McCord and CPSP's only claim is tortious interference of the Ryan & Wages Operating Agreement, not breach of contract.

3. CMDG Erroneously Asserted that McCord and CPSP's Claims Arose out of the Redding Operating Agreement When the Claim Rests on the Terms of the Ryan & Wages Operating Agreement.

At the core of CMDG's assertion that McCord and CPSP should be liable for its attorney fees and costs is its misplaced argument that the tortious interference claim arose out of the Redding Operating Agreement. Critically, however, neither CPSP nor McCord²³ executed the Redding Operating Agreement, did not allege so in the Complaint, nor were they parties to that contract. To the contrary, McCord and CPSP are clear that the basis of their claim for tortious interference was the Ryan & Wages Operating Agreement.

To allege tortious interference with a contractual relationship the party asserting the claim must establish that: (1) there exists a valid contractual relationship; (2) the defendant had knowledge of the same; (3) the defendant's intentional interference induced or caused a breach of the contractual relationship; (4) the defendant's interference was for an improper purpose or by improper means; and (5) the plaintiff suffered damage as a result. **Evergreen Moneysource Mortg. Co. v. Shannon,**

²³ McCord executed the Redding Operating Agreement as an agent and not in her personal capacity.

167 Wn. App. 242, 258, 274 P.3d 375 (2012). Therefore, a valid contract must exist between the plaintiff and a third party. An action for tortious interference with a contractual relationship lies only against a third party. A party to a contract cannot be liable in tort for inducing its own breach of a contract to which it is a party. **Olympic Fish Prods. v. Lloyd**, 93 Wn.2d 596, 598, 611 P.2d 737 (1980).

CMDG's argument ignores the allegations and the plain language set forth in the Complaint and the legal basis of McCord and CPSP's claim. In the Complaint, McCord and CPSP make the following allegations to establish their claim for tortious interference with a contractual relationship:

4.2 Julia McCord and CPSP have a contractual relationship with Thomas Wages through the Ryan & Wages, LLC Operating Agreement.

4.3 CMDG, LLC knew of the contractual relationship between the members of Ryan & Wages, LLC.

4.4 When CMDG, LLC treated Thomas Wages as the speaking agent of Ryan & Wages, LLC even though CMDG knew he was no longer a manager of the LLC, CMDG, LLC intentionally interfered with the parties' contractual relationship.

4.5 As a result of CMDG, LLC's actions there was a breach/disruption of the Ryan & Wages, LLC Operating Agreement.

4.6 As a direct result of Defendant's actions, Plaintiffs McCord and CPSP have suffered damages as outlined below.²⁴

Here, there can be no dispute that McCord and CPSP's claim is based upon the Ryan & Wages Operating Agreement. Further, there is no dispute that there is no legally-valid way for McCord and CPSP to base a tortious interference claim on the Redding Operating Agreement because neither McCord nor CPSP were parties to the Redding Operating Agreement and because CMDG cannot be sued in tort for breach of a contract to which it was a party.

4. The Redding Operating Agreement is Relevant to the Calculation of Monetary Damages Only to the Extent that the Ryan & Wages Operating Agreement Establishes When and How the Injury Occurred.

CMDG's assertion that McCord and CPSP's tortious interference claim will trigger the Redding Attorney Fees Clause fails because the tortious interference claim is grounded in the Ryan & Wages Operating Agreement and not the Redding Operating Agreement. In Washington, a party may rely on an attorney fee provision within a contract for an award for attorney in a tort action only if the tort claim is "on a contract."

Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997). "[A]n action is on a contract for purposes of a

²⁴ CP 1165

contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute." **Tradewell Group, Inc. v Mavis**, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993). Therefore, a contractual attorney fee provision can, under limited circumstances, apply to a claim in tort if –but only if– the action is based on interference with a contract that contains an attorney fees clause. **Id.** Therefore, the court will examine the evidence upon which the claim relies to determine if the claim sounds in contract. **Thao v. Control Data Corp.**, 57 Wn. App. 802, 806, 790 P.2d 1239 (1990).

McCord and CPSP asserted that CMDG tortiously interfered with the contractual relationship Tom Wages had with McCord and CPSP as a result of the Ryan & Wages Operating Agreement and not the Redding Operating Agreement. McCord and CPSP specifically asserted that:

4.7 Julia McCord and CPSP have a contractual relationship with Thomas Wages through the Ryan & Wages, LLC Operating Agreement.

4.8 CMDG, LLC knew of the contractual relationship between the members of Ryan & Wages, LLC.

4.9 When CMDG, LLC treated Thomas Wages as the speaking agent of Ryan & Wages, LLC even though CMDG knew he was no longer a manager of the LLC, CMDG, LLC intentionally interfered with the parties' contractual relationship.

4.10 As a result of CMDG, LLC's actions there was a breach/disruption of the Ryan & Wages, LLC Operating Agreement.

4.11 As a direct result of Defendant's actions, Plaintiffs McCord and CPSP have suffered damages as outlined below.²⁵

At no time did McCord or CPSP allege that CMDG interfered with a contractual relationship derived through the Redding Operating Agreement. To the contrary they specifically allege that the relationship was created through the Ryan & Wages Operating Agreement. Absent the Ryan & Wages Operating Agreement, the tortious claim could not exist. If the Redding Operating Agreement did not exist, McCord and CPSP's claim would still exist. Accordingly, McCord and CPSP's claims arose out of the contractual relationship created by the Ryan & Wages Operating Agreement and not the Redding Operating Agreement.

a. The Redding Operating Agreement Establishes the Monetary Value of CMDG's Action but does not Serve to Establish the Contractual Relationship with Which CDMG Tortiously Interfered.

With its argument that the Redding Operating Agreement serves as the basis of the tort claim, CMDG appears to confuse the difference between the "injury" suffered by McCord and CPSP and the monetary value of the injury (i.e. "damages). Damage refers to an "injury" which is

²⁵ CP 1266

distinguishable from “damages” which refers to the monetary value of the injury. **Huff v. Roach**, 125 Wn. App. 724, 729, 106 P.3d 268 (2005). To determine whether McCord and CPSP suffered an injury, the Court must examine the language of the Ryan & Wages Operating Agreement. To establish the monetary value of the injury, the Court may have to refer to the Redding Operating Agreement. However, if the Redding Agreement did not exist, McCord and CPSP could still suffer injury but the monetary value of the injury would be established through examination of other evidence.

McCord and CPSP asserted one claim in this action: tortious interference with the Ryan & Wages Operating Agreement. McCord and CPSP do not allege that CMDG interfered with some contractual relationship created by the Redding Operating Agreement but rather reference the Redding Operating Agreement as evidence that can be used to establish the monetary value of the injury they suffered. Because McCord and CPSP did not allege a claim of breach of contract and because their tortious claim was based upon the Ryan & Wages Operating Agreement, this Court should not find that the Trial Court erred when it found that McCord and CPSP are not liable for CMDG’s attorney fee award.

B. Appellants’ Claims.

1. Collateral Estoppel Does Not Bar Appellants' Claim Because Issues Central both to the Contract Claim and the Tort Claim were not Decided by the Private Arbitration.

CMDG incorrectly asserts that the 2009 Arbitration Award collaterally estopped Appellants' claim because the arbitrator specifically declined to establish the members' capital interest and therefore could not determine whether Wages had the authority to execute the First Amendment or who were the managers in February 2009. Collateral Estoppel applies to issues that were actually litigated and not merely to issues that could have been decided but were not. **Davis v. Nielson**, 9 Wn. App. 864, 874, 515 P.2d 995 (1973). Additionally, collateral estoppel will not apply when there is any ambiguity or question as to whether the issue was decided in the first action. **Mead v. Park Place Properties**, 37 Wn. App. 403, 407, 681 P.2d 256 (1989). Finally, collateral estoppel applies only to issues that were essential to resolution of the previous litigation. **State Farm Mutual Auto. Ins. Co. v. Avery**, 114 Wn. App. 299, 305, 57 P.3d 300 (2002).

Here, the 2009 Arbitration Decision did not decide two issues that are key both to the contract claim and tort claim: (1) Who were the managers in February 2009; (2) If Wages was a manager in February 2009, did he have authority to execute the First Amendment without the consent of McCord and CPSP? Under Paragraph 6.2 of the Ryan &

Wages Operating Agreement, the number of managers was to be fixed from time to time by members holding at least two-thirds of all capital interests.²⁶ In the same paragraph, members holding at least a majority interest in the company's capital can vote on who is appointed to fill the additional management positions.²⁷ Therefore in order to determine the number of managers in February 2009, the arbitrator necessarily had to decide the members' respective capital interest. However, the arbitrator declined to establish the members' capital interests.²⁸ Specifically, the arbitrator stated that "there is insufficient testimony and evidence provided to calculate the capital accounts of the members, nor is such a determination necessary to this decision."²⁹ Therefore by its own terms, the Arbitration Decision did not decide whether McCord and CPSP correctly increased the number of managers from 1 to 3. McCord and CPSP delineated authority among the managers³⁰ and eventually notified CPSP that Wages did not have the authority to execute the First Amendment.³¹ The arbitrator did not decide whether the addition of McCord and Ryan as managers was proper because the arbitrator did not determine the members' capital interests. Accordingly, the arbitrator

²⁶ CP 935

²⁷ *Id.*

²⁸ CP 773

²⁹ *Id.*

³⁰ CP 431-5

³¹ CP 437-53

necessarily did not decide whether Wages had the authority in February 2009 to execute the First Amendment and collateral estoppel should not apply.

Even if the arbitrator determined that Wages was the manager in February 2009, he did not decide whether Wages had obtained the proper approval under the Ryan & Wages Operating Agreement to execute the First Amendment. Paragraph 8.3 states that members holding at least two-thirds of all capital interest may approve the “sale, exchange, or other disposition of all or substantially all of the Company’s assets...”³² CMDG asserts that the Third Addendum to the Ryan & Wages Operating Agreement—which was authored by CMDG’s counsel³³—removed the member voting requirement with respect to RLS matters.³⁴ This assertion, though simply ignores the clear language of the Third Addendum and Paragraph 8.3. The Third Addendum clarifies who has the authority to execute matters on behalf of Ryan & Wages given that, at the time of the Third Addendum’s execution, Ryan & Wages was partially owned by the Doris Ryan Estate and the GMR Living Trust.

The purpose of the Third Addendum was threefold: (1) Clarify the ownership of Ryan & Wages; (2) clarify or amend certain terms and

³² CP 940

³³ CP 616:7-13

³⁴ Respondent’s Resp. B. on Appeal, pp. 31-4

conditions of the Ryan & Wages Operating Agreement; and (3) authorize Ryan & Wages' membership in RLS.³⁵ The paragraph at issue is Paragraph 8 which states that “[t]he Members hereby authorize the Manager to perform all acts and to execute all necessary documents on behalf of [Ryan & Wages] related to [Ryan & Wages'] membership interest in Redding Lake Stevens, LLC.”³⁶ This language simply clarifies who has the authority to execute necessary documents related to Ryan & Wages' interest in RLS. It does nothing to alter the requirement in Paragraph 8.3 that before any action is taken to dispose or otherwise divest Ryan & Wages of its assets members holding at least two-thirds of all capital interest must approve the action.

Importantly, the First Amendment purports to delete the first sentence of Paragraph 2.3(a)(1) and paragraphs 2.5(b)(2) and 2.5(b)(3) of the Redding Operating Agreement which, in turn, purports to divest Ryan & Wages of a substantial portion of its capital account in RLS.³⁷ Paragraph 2.3(a)(1) established the value of the Lake Stevens Property in order to establish Ryan & Wages' initial capital contribution.³⁸ Paragraph 2.5(b)(1) required CMDG to contribute capital to construct a retirement

³⁵ CP 961, Paragraph C

³⁶ CP 963

³⁷ CP 874

³⁸ CP 842

community on the Lake Stevens property.³⁹ Paragraph 2.5(b)(3) required that CMDG pay certain guaranteed payments to Ryan & Wages.⁴⁰ By deleting the first sentence of Paragraph 2.3(a)(1), the First Amendment purported to divest Ryan & Wages of a portion of its initial capital contribution thus diminishing the value of its capital account. Further, deletion of Paragraph 2.5(b)(3) divested Ryan & Wages of its guaranteed revenue stream from the two properties. Deletion of Paragraph 2.5(b)(1) ensured that CMDG would not contribute capital to develop the Lake Stevens property. Finally, the First Amendment completely restructured Ryan & Wages' guaranteed payments and the distributions to which it would be entitled upon the sale of the Redding and Lake Stevens properties.⁴¹ The result of the First Amendment was to dispose of a substantial portion of Ryan & Wages' initial capital contribution and its Redding Lake Stevens capital account. As a result, upon the sale of the Redding and Lake Stevens properties, the percentage of Ryan & Wages' capital contribution was diminished greatly. Accordingly, pursuant to the

³⁹ CP 844

⁴⁰ *Id.* Section 6 of the Redding Operating Agreement sets forth the calculation of guaranteed payments of revenues from both the Redding Property and the Lake Stevens Property. Section 6 also outlines the distribution amount to which Ryan & Wages would be entitled upon the sale of either the Redding Property or the Lake Stevens Property. (CP 850-2) It is Appellants' position that the First Amendment divested Ryan & Wages of its initial capital contribution to RLS.

⁴¹ CP 872-3. Importantly, the First Amendment restructured the distributions to Ryan & Wages upon the sale of the Lake Stevens property such that only a fraction of its initial capital contribution would be returned upon the sale of the property.

terms of Paragraph 8.3, even if Wages was the sole manager in February 2009, he lacked the authority to execute the First Amendment. Critically, CMDG had actual knowledge of Wages' lack of authority.

Finally, CMDG's interpretation of the Third Addendum ignores the use of the word "necessary". Paragraph 8 allows a manager to execute "all necessary documents on behalf of [Ryan & Wages] related to [Ryan & Wages'] interest in Redding Lake Stevens, LLC."⁴² The goal of contract interpretation is to give meaning to every term found within a contract.

Diamond "B" Constructors, Inc. v. Granite Falls School Dist., 117 Wn. App. 157, 165, 70 P.3d 966 (2003). Accordingly, the manager's authority is limited to documents that are "necessary". There is nothing in the record to indicate that the First Amendment was necessary and CMDG provided no proof to indicate otherwise. CMDG's interpretation of the Third Addendum is overly expansive because it does not limit the documents which the manager can execute to those that are necessary. Accordingly, its argument fails.

a. The Trial Court Erred When it Dismissed McCord and CPSP's Claim for Tortious Interference with a Contractual Relationship Because Issues of Fact Exist Regarding CMDG's Interference with Wages' Relationship with CPSP and McCord.

⁴² CP 963

To establish a claim for Tortious Interference with a Contractual Relationship, McCord and CPSP must establish: (1) that there exists a valid contractual relationship; (2) that CMDG had knowledge of the same; (3) that CMDG's intentional interference induced or caused a breach of the contractual relationship; (4) that CMDG's interference was for an improper purpose or by improper means, and (5) that McCord and CPSP suffered damage as a result. **Evergreen Moneysource Mortg. Co. v. Shannon**, 167 Wn. App. 242, 258, 274 P.3d 375 (2012). Here, there is no question that Wages had a contractual relationship with McCord and CPSP. Further, there is no dispute that CMDG was aware of the relationship and, in fact, had intimate knowledge of the nature and limitations of the relationship. As set forth in the Complaint, McCord and CPSP allege that CMDG intentionally induced Wages to exceed his authority (to the extent he had any authority). McCord and CPSP also allege that CMDG induced Wages to breach the Ryan & Wages Operating Agreement because it allowed CMDG to receive more distributions from the sale of the Redding and Lake Stevens properties. Because the 2009 Arbitration Decision did not resolve any of these issues and because McCord and CPSP's claims allege the elements necessary to assert a tortious interference claim, the Trial Court erred when it dismissed their tortious interference claim; accordingly, reversal and remand is proper.

*b. The Trial Court Erred When it Dismissed
Ryan & Wages Breach of Contract Claim
Because Issues of Fact Exist Regarding
Execution of the First Amendment by
CMDG Without Ryan & Wages' Written
Consent.*

The only way that CMDG could have amended the Redding Operating Agreement was through the unanimous consent of all members.⁴³ Ryan & Wages alleges that Wages did not have the authority to execute the First Amendment and CMDG knew that any action by Wages was not as the agent of Ryan & Wages. Ryan & Wages also alleges that when CMDG executed the First Amendment with Wages it knowingly breached the Redding Operating Agreement because Ryan & Wages did not consent in writing to the First Amendment. Because the 2009 Arbitration Decision does not collaterally estop Ryan & Wages' breach of contract claim and because Ryan & Wages has alleged the elements necessary to support its claim, the Trial Court erred when it dismissed Ryan & Wages' contract as collaterally estopped by the 2009 Arbitration Award. Accordingly, reversal and remand is warranted.

IV. CONCLUSION

This Court should reverse the Trial Court's dismissal of Appellants' claims because the 2009 Arbitration Award does not

⁴³ CP 848. Paragraph 4.1(a)(2) states that an amendment to the Redding Operating Agreement can be amended only through the unanimous consent of all Redding members.

collaterally estop Appellants' claims because the arbitrator specifically declined to determine the members' capital account values. Without the balance of the members' capital accounts, the arbitrator could not decide whether McCord and CPSP increased the number of managers from 1 to 3. Further, the arbitrator could not determine if Wages had the authority to execute the First Amendment without McCord and CPSP's consent. As a result, the arbitrator's decision cannot serve to collaterally estop Appellants' claims. Importantly, if there is any ambiguity regarding whether a prior decision collaterally estops subsequent litigation, then courts will decline to apply collateral estoppel. Here, the arbitrator did not decide key factual issues and therefore collateral estoppel does not apply.

Finally, CMDG's appeal on the issue of attorney fees should be denied because McCord and CPSP are not liable under the Redding Operating Agreement for CPSP's fees. Neither McCord nor CPSP made a claim for breach of the Redding Operating Agreement. Further, their tort claim was based upon the contractual relationship created by the Ryan & Wages Operating Agreement, not the Redding Operating Agreement. CMDG misrepresents the relationship of the Redding Operating Agreement and McCord and CPSP's tort claim. The only purpose the Redding Operating Agreement would serve is to establish the monetary value of their injury. However, McCord and CPSP's injury rests in the

breach of the Ryan & Wages Operating Agreement. Accordingly, their claim sounds in the Ryan & Wages Operating Agreement and not the Redding Operating Agreement. For these reasons and for the reasons stated above, CMDG's appeal should be denied.

Respectfully submitted this 7th day of December, 2012.

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Proof of Service

The undersigned certifies that on December 10, 2012 arrangements were made for service of a true and correct copy of the within and foregoing Appellants' Reply Brief on Appeal upon the Appellee and necessary parties via counsel as follows:

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