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No. 689461-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

v.

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

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN -9 PM 4: 26

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

TABLE OF CONTENTS

A. Introduction	5
B. Objection To Clarification Of Facts	6
C. Legal Argument	6
1. The McCords alleged breach of contract claims in their complaint	6
2. The equitable doctrine of Mutuality of Remedies binds even nonparties when they allege breach of a contract if the contract contains a valid bilateral attorney fee provision	10
3. McCords' tort claim is "On the Contract" because the RLS OA is the basis for plaintiffs' tort claim	11
D. McCords intentionally depleted all of Ryan & Wages' financial assets to avoid creditor claims	17
E. Conclusion	18

TABLE OF AUTHORITIES

Page

Cases

RTC Transportation v. Walton, 72 Wn. App. 386, 390, 864 p.2d (1994)6

Kaintz v. PLG, Inc., 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008) 11

Boguch v. Landover Corp., 153 Wn. App. 595, 616, 224 p.3d 795 (2009) 12

Edmonds v. John L Scott Real Estate, Inc., 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997) 13

Deep Water Brewing LLP v. Fairway Resources Limited, 152 Wn. App. 229, 279; 215 P.3d 990 (2009) 13

Western Stud Welding, Inc. v. Omark Industries, Inc., 43 Wn. App. 293, 299, 716 P.2d 959 (1986) 14,15,16

Hemenway v. Miller, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991)..... 15

TABLE OF STATUTES, CODES, AND CIVIL RULES

	Page
Statutes:	
RCW 4.84.330.....	10,19,21

A. Introduction

The trial court erred when it limited CMDG Investments, LLC's ("CMDG") ability to recover attorney fees to only one plaintiff, Ryan & Wages, LLC ("Ryan & Wages"), and not plaintiffs Julia McCord and Floyd Ryan, through CPSP (collectively "McCords"). (CP 1270-74). The McCords' complaint asserted breach of contract claims against CMDG. (CP 1262-67). The McCords do not contest the validity of the doctrine of mutuality of remedies, but following dismissal of their claims by the trial court, they are now trying to back away from the plain language of the allegations in their complaint.

Even if the complaint did not include breach of contract claims, the McCords are liable for CMDG's attorney fees and costs because the Redding Lake Stevens, LLC Operating Agreement ("RLS OA"), and the alleged actions of Tom Wages and CMDG in amending the RLS OA ("First Amendment") are central to and the basis of plaintiffs' tortious interference claim against CMDG. The McCords' attempts to avoid liability by asserting that their references to the RLS OA were for the purpose of establishing damages and not liability ignores and contradicts the plain language of their complaint.

B. Objection To Clarification Of Facts

The “Clarification of Facts” section in Appellants/Cross-Respondent’ Reply Brief on Appeal (“McCords Reply Brief”) is not a strict “Clarification of Facts.”¹ It does not add new facts or contest any of the facts asserted by CMDG. It argues that the trial court’s Findings of Fact in a case to which it was a party are not really facts. Like their appeal of the trial court’s award of summary judgment in favor of CMDG, this is another attempt to collaterally attack a prior trial court ruling that is contrary to their desired outcome. As such, that section is inappropriate.

C. Legal Argument

1. The McCords alleged breach of contract claims in their complaint.

The McCords and Ryan & Wages asserted breach of contract claims against CMDG. (CP 1262-67). Both parties agree, under CR 8(a) a complaint must set forth both a plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment. **CR 8(a)**. Both the facts and the prayer for relief are to place a defendant on notice as to the claims being asserted. **RTC Transportation v. Walton**, 72 Wn.

¹ See McCords Reply Brief at 2-4.

App. 386, 390, 864 p.2d 969 (1994) (current civil rules relating to pleadings were designed to accomplish the purpose of giving notice of a claim or defense).

In determining what claims are being asserted by a plaintiff, the entire complaint is to be read broadly. The notice pleading standard puts a defendant on notice of all possible claims that could be included as part of the plaintiff's complaint. **Id.**, at 392 (holding that the purpose of notice pleadings is to prevent plaintiffs from losing a claim because of a defective complaint).

There is no case law or support for the McCords' assertion that notice pleading standards allow a complaint to be read narrowly in favor of a plaintiff. To the contrary, the notice pleading standard is intentionally broad. If the McCords did not want the pleading to be read broadly, it was the McCords' obligation to draft a clear complaint. It is also the plaintiffs' obligation under CR 8(a) to include a short plain statement of the facts and the relief sought. **CR 8(a).**

Contrary to the McCord's assertion, the Civil Rules did not obligate CMDG to seek clarification under CR 9(a) (Capacity) or 12(e) (Motion for More Definitive Statement). **CR 9(a) & CR**

12(e). There was no basis for CMDG to file any motion under CR 9(a) or CR 12(e). CR 9(a) is limited to instances relating to capacity and specifically states that the issue can be contested with an affirmative defense. **CR 9(a)**. That issue was not contested or briefed as part of the attorney fees issue.² Similarly, CR 12(e) does not apply. Under CR 12(e), there are two grounds for filing a motion for a more definitive statement: (1) if the complaint is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or (2) if more particularity in that pleading will further the efficient economical disposition of the action. Neither applied to McCords' complaint. **CR 12(e)**. CMDG was able to answer and did in fact answer the complaint. And there was no indication from the complaint that filing a motion would have made the disposition of the case more efficient or economical. In addition, 12(e) motions are permissive not mandatory. Under the McCords' reasoning, the parties would be forced to continually seek clarification or potentially lose their rights. Such an outcome would dramatically

² That said, there is an issue as to whether the McCords have the capacity to act as managers of Ryan & Wages. The arbitrator ruled that Mr. Wages was the manager. The trial court removed Mr. Wages as manager but never appointed a new manager. The entity does not appear to currently have any active manager.

increase litigation costs and run counter to the rule's purpose of promoting economic efficiency in litigation.

Read as a whole, the complaint put CMDG on notice that the McCords were asserting breach of contract claims against CMDG.³ (CP 1262-67). The fact section is replete with references to obligations contained within the RLS OA.⁴ Section 4.6 of plaintiffs' complaint alleges breach of contract by CMDG. (CP 1265). According to Section 4.6, "Plaintiff" sought relief and damages resulting from CMDG's alleged breach of contract. (*Id.*). The citation to "Plaintiff" is also used in the first sentence in the Prayer for Relief. (CP 1266). In that section, the term is used to refer to all three plaintiffs. (*Id.*). In no other place is the term defined. As a result, the only fair reading of the complaint is that the term "Plaintiff" refers to all plaintiffs.

In addition, since CR 8(a) requires a plaintiff to assert both facts and relief in their complaint, the McCords' request for relief is central in determining which claims they were actually alleging. In the Prayer for Relief, there is no distinction as to which plaintiff

³ See McCords Reply Brief at 7-9. Plaintiffs quote sections of their complaint. However, the references are not properly identified with ellipse indicators rendering the quote incomplete with multiple, unsequenced sections that may mislead the reader. Ironically, the McCords excluded the sections that reference the RLS OA and its content.

⁴ See Complaint §§ 3.2, 3.3, 3.7-3.11, & 4.3-4.5.

might be seeking specific relief. (CP 1266). As written, all the plaintiffs are asserting a request for relief as to all claims. (*Id.*) In addition, the Prayer for Relief has a subsection entitled “On All Claims For Relief.” (*Id.*) That section specifically requests an award of attorney fees pursuant to RCW 4.84 for all “Plaintiffs” separate from statutory costs. (*Id.*)

The only basis for an award of fees as it pertains to the McCords and Ryan & Wages is the prevailing attorney fee provision in the RLS OA. (CP 860). Having sought to recover attorney fees under the RLS OA, the McCords cannot now avoid the consequences of that decision. This Court should reverse the trial court order and impose joint and several liability for attorney fees against all plaintiffs.

2. The equitable doctrine of Mutuality of Remedies binds even nonparties when they allege breach of a contract if the contract contains a valid bilateral attorney fee provision.

The fact that the McCords are not parties to the RLS OA is not dispositive given the equitable doctrine of mutuality of remedies. Mutuality of remedies specifically addresses the factual circumstance of an attorney fee award against a nonparty to a contract, and it applies to the McCords in this case. Since

all plaintiffs alleged breach of contract in their complaint, and there is a valid bilateral attorney fee provision in the disputed contract, the McCords are also liable for attorney fees under the RLS OA. **Kaintz v. PLG, Inc.**, 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008).

Mutuality of remedies is a two-way street with regard to an award of attorney fees in a breach of contract action. As in **Kaintz**, once a party raises the issue of breach of contract, the contract becomes at issue and an applicable bilateral attorney fee provision binds both parties to the dispute regardless of whether or not they are both parties to the contract. *Id.* at 789. Although the McCords are not parties to the RLS OA, they are liable for CMDG's attorney fees because they asserted breach of contract in their complaint and sought to recover their attorney fees under the RLS OA.

3. McCords' tort claim is "On the Contract" because the RLS OA is the basis for plaintiffs' tort claim.

McCords are also liable for CMDG's costs and attorney fees because their tort claim was "on the contract." The McCords admit that a claim is based "on the contract" and CMDG is entitled to recover its attorney fees if: (1) the action arose out of

the contract, and (2) if the contract is central to the dispute. **Boguch v. Landover Corp.**, 153 Wn. App. 595, 616, 224 P.3d 795 (2009).⁵

All of the allegations in the complaint, and as found by the trial court, revolve around the validity of the First Amendment. (CP 1270-74). If it is valid, then there is no breach of contract and there is no tortious interference with the contractual relationship.

Ignoring the arbitration decision, the McCords claim that Mr. Wages was not the manager of Ryan & Wages when he signed the First Amendment. (CP 1264). This is the central issue in both their breach of contract and tortious interference claims. This is best demonstrated by the fact that when the trial court ruled that the First Amendment was valid, that finding disposed of both plaintiffs' breach of contract and tortious interference claims. (CP 205-06).

The trial court correctly found that plaintiffs' tortious interference claim was inseparable from their breach of contract claim. (CP 1272-73). The trial court also found that plaintiffs' tort claims arose from the very same conduct as the breach of

⁵ See McCords Reply Brief at 13-14.

contract claim – that Mr. Wages was not the manager when he executed the First Amendment on behalf of Ryan & Wages with CMDG. (CP 205-06 & 1272-73).

Since it is the very same conduct that is central to the dispute in both the breach of contract and tortious interference claims, it is by definition “on the contract.” **Edmonds v. John L. Scott Real Estate, Inc.**, 87 Wn. App. 834, 855–56, 942 P.2d 1072 (1997). See also, **Deep Water Brewing, LLC v. Fairway Resources Limited**, 152 Wn. App. 229, 279; 215 P.3d 990 (2009).

The McCords assert that CMDG interfered with their agreement with Mr. Wages by allowing him to sign the First Amendment. (CP 1265-66). The McCords also assert that they would have the same claims for tortious interference if the RLS OA did not exist.⁶ This ignores the allegations in the complaint, the facts they assert, and is not supported by the record.⁷

⁶ See McCords Reply Brief at 15.

⁷ Similarly, the McCords’ assertions regarding “damages” versus “damage,” are inapplicable and not supported by the record. While they might like after-the-fact to revise their complaint such that the references to the RLS OA only are relevant to damages, such revisionist assertions regarding what is contained in the complaint are without foundation. The facts relating to the adoption of the First Amendment are central to and the basis from which both of plaintiffs’ claims arose. Whether the McCords were damaged or the extent of those damages was not discussed, briefed, addressed, at issue in the appeal, or before the trial court during the summary judgment hearing.

Without the RLS OA, the McCords would have no connection to CMDG, in as much as CMDG wishes that were the case, it is not the reality.

Where the contract forms the factual basis from which the tort claims arises (as is the case with the RLS OA), an award of attorney fees is appropriate. **Western Stud Welding, Inc. v. Omark Industries, Inc.**, 43 Wn. App. 293, 299, 716 P.2d 959 (1986). **Western Stud**, is illustrative.

In **Western Stud**, John Simonseth bought Joseph Quall's Western Stud Welding, Inc. shares via a stock purchase agreement. **Id.** at 294. Shortly thereafter, Omark Industries, Inc. ("Omark") terminated Western Stud as a distributor and subsequently opened an outlet in direct competition with Western Stud. **Id.** Simonseth and Western Stud sued Quall and Omark alleging among other claims that Quall tortiously interfered with the contract between Western Stud and Omark. **Id.** at 294-95. When Quall prevailed, the court awarded him attorney fees incurred in defending against the tortious interference claim. **Id.** at 295-300. The court based its award of attorney fees on the broad attorney fees language in the stock purchase agreement between Quall and Simonseth, and not on the distributor

agreement, which Simonseth had alleged Quall had tortiously interfered with. *Id.*⁸

Like the stock purchase agreement in **Western Stud**, the RLS OA contains a broad attorney fees clause that applies to “any legal proceeding” to “enforce or interpret” any part of the RLS OA. (CP 860). Both of the McCords’ claims, breach of contract and tortious interference, seek to obviate the First Amendment. To rebut the claims, CMDG successfully demonstrated to the trial court that the First Amendment was enforceable. (CP 203-06). Because the enforceability of the RLS OA was central to both the tort and contract claims, both claims fall squarely within the broad language of the attorney fees clause of the RLS OA.

And, like the tortious interference claims in **Western Stud**, the tort claim is directly related to the contract at issue, which is different from the contract that was alleged to have been interfered with. In **Western Stud**, the contract that was alleged to have been interfered with was the distributor agreement

⁸ The Washington Supreme Court approved of the holding in **Western Stud** but cautioned that courts should not expand the analysis into a proximate cause “but for” test. **Hemenway v. Miller**, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991). The Supreme Court stated that if, like in **Western Stud**, the contract containing an attorney fee clause is central to the controversy, an award of attorney fees is appropriate. *Id.*

between Western Stud and Omark. **Western Stud** 43 Wn. App. 295. Yet all the facts and the basis for the alleged interference arise from the stock purchase agreement between Simonseth and Quall. **Id.** As a result, when Quall successfully defeated the claims, the court awarded Quall his attorney fees for defeating the tortious interference claims based on the attorney fees provisions in the stock purchase agreement. **Id.** at 295-300.

In this case, just like the stock purchase agreement in **Western Stud**, all of plaintiffs' claims arise out of the RLS OA. It is the First Amendment that forms the factual basis for the McCords' assertions that CMDG interfered with its contract with Mr. Wages. (CP 1262-67). The RLS OA is the factual basis on which the McCords tortious interference claim was based. (*Id.*). When CMDG successfully defeated the tortious interference claims, it was entitled to recover its attorney fees from the McCords like Quall was entitled to receive his attorney fees from Simonseth in **Western Stud**.

Since the RLS OA is "on the contract" and central to plaintiffs tortious interference claim, the McCords and Ryan & Wages should be jointly and severally liable for CMDG's attorney fees.

D. McCords intentionally depleted all of Ryan & Wages' financial assets to avoid creditor claims

The issues raised with regard to attorney fees are not simply academic. The McCords have drained all of Ryan & Wages' financial assets from the company. This Court's ruling on this issue will significantly impact CMDG's ability to collect on its judgment.

In the McCords Reply Brief, the plaintiffs admit that in the Ryan & Wages v. Wages lawsuit the trial court determined how the assets of Ryan & Wages should be distributed upon dissolution.⁹ Unfortunately, upon receiving the approximately \$1,200,000 monetary award following trial with Mr. Wages, and paying some minor company debts per the trial court order, the McCords paid themselves through a distribution of member's capital accounts effectively all the remaining assets of Ryan & Wages. (CP 1389-91).¹⁰ To fund its multiple appeals, Mrs. McCord and CPSP periodically personally loan money to Ryan & Wages directly to pay the company's legal fees. (CP 1392-93). This method ensures that Ryan & Wages' accounts will never

⁹ See McCords Reply Brief at 3.

¹⁰ Following the deposition, in October 2012, Ryan & Wages did release to CMDG its small cash reserves kept at Mrs. McCord's residence of approximately \$8,000.

have a reasonable amount of assets commensurate with its existing debt obligations in the event of any adverse judgment. In reality, creditors of Ryan & Wages are left in perpetuity holding Ryan & Wages debts, despite the fact that Ryan & Wages received substantial assets in 2012 just a month before filing the lawsuit that is the basis for this appeal.

Not only are the McCords legally obligated to pay CMDG's attorney fees and costs under the mutuality of remedy doctrine and under equitable grounds because their tort claim is "on the contract," paying CMDG's attorney fees is the only just and equitable result in this case.

E. Conclusion

CMDG is entitled to recover the attorney fees and costs it incurred in defending against the claims alleged by the McCords and Ryan & Wages. Both the contract and tort claims were based on the RLS OA, which contains a bilateral attorney fees clause. Under the mutuality of remedy doctrine, CMDG is entitled to recover its attorney fees against the McCords because they asserted breach of contract claims in their complaint and sought to recover their attorney fees if they prevailed. In addition, since the tortious interference claim was based on the RLS OA

and arose from alleged breaches of that agreement, CMDG is entitled to recover its attorney fees and costs from the McCords under equitable "on the contract" grounds based in RCW 4.84.330. CMDG further requests that it be awarded its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 9th day of January, 2013.

CARSON & NOEL, PLLC



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

APPENDIX

Clerk's Papers

Final Judgment Dismissing Plaintiff's Clams and Awarding Attorney Fees and Costs to Defendant	1270-74
Redding Lake Stevens, LLC Operating Agreement	837-63
Complaint for Breach of Contract; Breach of Fiduciary Duty; Tortious Interference with a Contractual Relationship; Civil Conspiracy; Conversion	1262-67
Order Granting Defendant's Motion for Summary Judgment	203-06
Seventh Declaration of Wright A. Noel	1378-1488

TABLE OF STATUTES, CODES, AND CIVIL RULES

RCW 4.84.330. ACTIONS ON CONTRACT OR LEASE WHICH PROVIDES THAT ATTORNEYS' FEES AND COSTS INCURRED TO ENFORCE PROVISIONS BE AWARDED TO ONE OF PARTIES – PREVAILING PARTY ENTITLED TO ATTORNEYS' FEES – WAIVER PROHIBITED. Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties — Prevailing party entitled to attorneys' fees — Waiver prohibited.

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

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

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

CR 8(a)

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall 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 which he deems himself entitled. Relief in the alternative or of several. . . .

CR 9(a)

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleaders knowledge. . . .

CR 12(e)

. . . (e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. . . .

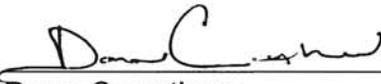
DECLARATION OF SERVICE

The undersigned hereby declare that on this 9th day of January, 2013, I caused the foregoing RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF to be served via the methods listed below on the following parties:

Via Email and U.S. Mail to:

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

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on January 9, 2013, at Issaquah, Washington.



Dana Carrothers

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