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COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IRWIN-YAEGER, INC. d/b/a SUMMIT MECHANICAL, a
Washington corporation,

Appellant,

v.

WASHINGTON STATE COMMUNITY COLLEGE DISTRICT 17,
COMMUNITY COLLEGES OF SPOKANE, an administrative agency
of the State of Washington,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 12-2-04816-3

APPELLANT SUMMIT MECHANICAL'S BRIEF

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I. INTRODUCTION

This appeal involves tortious interference with business expectancy and defamation claims arising from a public works construction project in Spokane, Washington: the Spokane Falls Community College Classroom Building Project (the “Classroom Project”). CP 3-9. The plaintiff and appellant, Irwin-Yaeger, Inc. d/b/a Summit Mechanical (“Summit”) was a responsive and responsible bidder that submitted the low bid to T.W. Clark Construction, LLC (“TWC”) for the Classroom Project plumbing work. CP 11, 590. TWC identified Summit as the plumbing subcontractor in its bid to Defendant and Respondent Community Colleges of Spokane (“CCS”) for the prime contract. CP 11, 591. TWC was the low bidder on the project and Summit reasonably expected to be the plumbing subcontractor. CP 39-41, 589-91. Summit understood it was required to prepare for the work. CP 591.

However, what Summit did not know at the time was that CCS took immediate issue with Summit as TWC’s listed subcontractor. CP 40-41, 453, 499-500, 523. Believing that all that was required to replace Summit from the job was some basis to form a reasonable objection to Summit as subcontractor, CCS elicited from a narrow subset of people at CCS responses that

included complaints regarding Summit's work on prior projects, and attacks on Summit's honesty, professional integrity, and financial wherewithal. CP 40-41, 44-45, 53-54, 56-58, 499-501, 504-07, 523-24.

CCS compiled false and defamatory statements it elicited for a letter later sent to Engineering and Architectural Services ("E&AS"), a division of Washington State Department of Enterprise Services ("DES") CP 44-45, 53-54, 56-58. The purpose of the letter was clear: to order Summit's replacement. CP 44-45, 57-58. Accordingly, a change order was issued to TWC directing it to *"Change Plumbing sub-contractor from the low bid plumbing sub-contractor to McClintock and Turk."* CP 44-45, 60-61. This change order increased the contract price by \$68,877.56, an increased cost ultimately absorbed by the public purse. CP 44-45, 60-61. Notably, ETCO, Inc. ("ETCO") was the next lowest bidder, not McClintock and Turk. CP 12. Eventually, ETCO got the job.

To be sure, CCS was motivated by preference and favoritism for other subcontractors and animus toward Summit when it orchestrated Summit's replacement on the Classroom Project. CP 503. This animus stemmed from an issue involving Summit's installation of toilets on prior CCS projects. CP 39-41, 44-45, 57-58,

592-93. CCS held fast to its grudge until it was able to act upon it. And, when CCS did act upon it, it cost Summit the job.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error.

1. The trial court erred by granting Defendant CCS's Motion for Summary Judgment as to Summit's claim of tortious interference with a business expectancy; and
2. The trial court erred by granting Defendant CCS's Motion for Summary Judgment as to Summit's defamation claim.

B. Issues Presented.

1. Whether a genuine issue of material fact exists that CCS acted with an improper purpose in interfering with Summit's business expectancy.
2. Whether a genuine issue of material fact exists that CCS acted by improper means in interfering with Summit's business expectancy.
3. Whether a genuine issue of material fact exists that CCS's statements are provably false.

4. Whether a genuine issue of material fact exists that CCS published its defamatory statements.
5. Whether a genuine issue of material fact exists that CCS was negligent in publishing its statements.
6. Whether CCS's defamatory statements are privileged.
7. Whether a genuine issue of material fact exists that CCS's defamatory statements caused Summit damages.

III. STATEMENT OF THE CASE

A. Factual Background.

Summit is a plumbing contractor that has been in business in eastern Washington for twenty-two years. CP 590. It has completed work on over thirty jobs including public school projects. CP 590. In its twenty-two years of business, Summit has never been red tagged for code violations but has, rather, earned a reputation in the community for its quality work. CP 561-67, 590.

Summit had worked on three CCS projects prior to submitting the low bid to TWC as subcontractor on the Classroom Project, one of which was the Sn-w'ey'mn Project. CP 44-45, 57. Kearsley Construction, Inc. was the general contractor on the Sn-w'ey'mn Project. CP 562. Contrary to the defamatory statements of

CCS, and consistent with Summit's hard-earned reputation as a trusted and experienced plumbing contractor, Summit's work on the Sn-w'ey'mn Project conformed to the contract specifications, met contract requirements, and its project administration was superior to that of other subcontractors. CP 561-67.

On April 18, 2012, Summit submitted bids for the plumbing subcontracting work on the Classroom Project to numerous general contractors, including TWC. CP 590-91. Summit submitted the low bid to TWC, was qualified to perform the scope of work, and was a responsible and responsive bidder. CP 11, 561-67, 590. Summit was not prohibited from bidding on public works projects in general or the Classroom Project in particular. CP 11, 590. CCS took no action to prevent Summit from bidding on the Classroom Project. CP 501, 509.

On April 30, 2012, CCS awarded TWC the prime contract for the Classroom Project. TWC's contract with CCS provided:

- B. *Provide names of Subcontractors and use quality firms:* *Before submitting the first Application for Payment, Contractor shall furnish in writing to Owner the names, addresses, and telephone numbers of all Subcontractors, as well as suppliers providing materials in excess of \$2,500. Contractor shall utilize Subcontractors and suppliers which are **experienced and qualified and meet the requirements of the Contract***

Documents, if any. Contractor shall not utilize any Subcontractor or supplier to whom the Owner has a reasonable objection, and shall obtain Owner's written consent before making any substitutions or additions.

CP 44, 49-50 (emphasis added). Pursuant to RCW 39.30.060, TWC disclosed in its bid that Summit was its plumbing subcontractor. CP 40, 591.

Once CCS learned that Summit was listed as TWC's subcontractor, CCS immediately inquired into the action it believed would enable it to oust Summit from the project. CP 453, 500, 523-25. Dave Lohrengel of EA&S, a division of DES, informed Mr. Dunham of CCS that CCS would need to wait to take action until after CCS contracted with TWC. CP 499-500. Mr. Lohrengel informed CCS that what was required to remove Summit was a basis to support a reasonable objection to Summit as the subcontractor. CP 523-25.

On the day TWC submitted its bid, Mr. Dunham of SCC also spoke with Facilities Maintenance Director Jim Collen about Summit's status as the listed plumbing subcontractor. CP 499. Mr. Collen responded that he "*would rather not use Summit.*" CP 499. Mr. Dunham informed Mr. Collen: "*I need something from you*" and, specifically, "*I'd need some reasons*" CP 499. Mr. Collen

agreed: *"I'll get you some reasons."* CP 500. Similarly, when Cheryl Groth of CCS learned that Summit was a listed subcontractor, taking immediate issue with Summit, she wasted no time in addressing her *"concern"* with Mr. Dunham. CP 453, 500.

CCS was purportedly *"dissatisfied with Summit's work"* and with this dissatisfaction *"in mind"* CCS reached out to a narrow subset of CCS employees including HVAC Technician Jim Armor, Plumber Mark Connolley, and Mr. Collen to elicit their responses containing false, misleading, and defamatory statements. CP 40-41, 53-54. That is, acting on nothing more than preference toward different subcontractors, together with a pre-textual concern, CCS solicited responses to form some basis for its objection to Summit as subcontractor on the Classroom Project. CP 40-41, 44-45, 53-54, 499-501, 504-07.

The responses SCC elicited attacked Summit's quality of work, honesty, professional integrity, and financial wherewithal. CP 44-45, 53-54, 57-58. Seeking out past problems with Summit and expecting to find them, it comes as no surprise that CCS collected pre-textual bullet-point issues to construct its façade—an objection letter—behind which it attempted to hide its true motive for removing Summit from the project: unreasonable animus toward

Summit stemming from issues from prior SCC projects concerning toilet installation. CP 40-41, 44-45, 53-54, 56-58, 592-94, 643.

By letter dated April 25, 2012, transmitted by email, Mr. Dunham of CCS published to Mr. Lohrengel of E&AS, the following false and defamatory statements about Summit: (a) *“These problems extended from poor quality, code compliance issues, scheduling issues, to warranty response issues”*; (b) *“the worst problem was that of over-all substandard workmanship, resistance to resolving problems when they arose and generally skirting project specifications and code requirements when-ever possible.”* CP 44-45, 56-58. The latter statement was originally published by email dated April 24, 2012 from CCS HVAC technician Jim Armor to Rick Watkins (direct supervisor of CCS Plumber Mark Connolley (CP 441, 552)), Steve Goodman (HVAC Supervisor (CP 504)), and Mr. Dunham. CP 44, 54.

On April 25, 2012, Mr. Collen reported back to Mr. Dunham:

Mark also said, that he had heard, that Summit is so upside down that they could not afford to make bond that the general would have to for them. Doesn't make sense to me but.....

CP 44-45, 53. Mr. Connolley denied having made this statement. CP 441, 540. Conversely, Mr. Collen maintains that Mr. Connolley did make these statements. CP 441, 554-555.

Furthermore, CCS published the following statement in its letter to E&AS:

Summit Mechanical . . . did not install the toilet carriers per manufacturer's specs or per acceptable construction standards. Over the course of two years, I tried to get them to correct their shoddy workmanship, and I found them to be evasive, dishonest, and lacked professional integrity.

CP 44-45, 58. This statement was originally communicated by Ms. Groth to Mr. Dunham. CP 41. The objection letter also set forth a bullet-point list purporting to identify past issues with Summit's work, which list was first published by way of email from Mr. Connolley to Mr. Watkins and Mr. Collen dated April 24, 2012. CP 44-45, 53, 57-58. The objection letter amounts to this: CCS "*does not want to have Summit Mechanical on another one of our projects,*" citing as further false, misleading, and pre-textual justification that its decision was aimed at saving taxpayer dollars. CP 45-44, 57-58.

On or about May 1, 2012, TWC informed Summit that: CCS awarded TWC the prime contract; TWC would contract with Summit to perform the plumbing work; due to the fast-track nature of the project, Summit should not take on too much work; and that Summit would be required to begin work about the middle of June of 2012, thus instructing Summit to prepare for the work. CP 591.

Summit proceeded without any notice or knowledge that CCS objected to its participation on the project, CCS deliberately waited until after CCS contracted with TWC to direct TWC to replace Summit, all the while having actual knowledge that Summit was listed as TWC's subcontractor and, nevertheless, failing to provide Summit with any notice of its objection to Summit as plumbing subcontractor on the project. CP 441, 455, 500, 509.

On or about May 3, 2011, CCS demanded Summit's replacement. CP 12. By change order dated May 21, 2012, TWC was directed to "*[c]hange [the] Plumbing sub-contractor from the low bid plumbing sub-contractor to McClintock and Turk.*" CP 44-45, 60-61. Notably, ETCO was the next lowest bidder, not McClintock and Turk. CP 12. CCS favored McClintock and Turk. CP 503. The change order increased the contract price by \$68,877.56. CP 12. As directed, Summit was replaced and TWC ultimately subcontracted with ETCO rather than Summit. CP 12.

B. Procedural History.

Summit commenced this case on December 14, 2012 by filing a Summons and Complaint in Spokane County Superior Court. CP 1-9. In its Complaint, Summit asserted two causes of action: tortious interference with a business expectancy and defamation CP

3-9. On November 22, 2013, CCS filed a motion for summary judgment, supporting memorandum, Declaration of Dennis Dunham, and Declarations of Jarold P. Cartwright. CP 16-18, 24-38, 39-43, 44-419. In its motion for summary judgment, CCS requested dismissal of both of Summit's claims. CP 16-17, 24-37.

On November 26, 2013, the Court entered a Stipulation and Order Granting Extension of Deadline for Response to Defendant's Motion for Summary Judgment. CP 420-422. On December 16, 2013, Summit filed its Response Memorandum in Opposition to Summary Judgment Motion. CP 423-439. In support of its opposition, Summit filed the Declaration of Jason T. Piskel, the Affidavit of Douglas E. Kearsley, owner of Kearsley Construction, Inc. and general contractor on the Sn-w'ey'-mn Project, and the Affidavit of Robert Yaeger in Opposition to Defendant's Summary Judgment. CP 440-560, 561-588, 589-660.

On December 17, 2013, CCS filed its Reply to Summit's Response to Motion for Summary Judgment and Motion to Strike Inadmissible Averments, together with Declaration of Jarold P. Cartwright – Reply Exhibit 1. CP 669-704, 661-668. On December 18, 2013, Summit filed its Response in Opposition to Defendant's Motion to Strike Inadmissible Averments. CP 705-710. On

December 20, 2013, the Court heard argument on the matter, and ruled that Defendant was entitled to judgment as a matter of law on both claims and dismissed the claims with prejudice. CP 711-713.

IV. ARGUMENT

A. Standard Of Review.

“The standard of review on appeal of a summary judgment order is de novo.” Herron v. Tribune Publ’g. Co., Inc., 108 Wn.2d 162, 169, 255, 736 P.2d 249 (1987). The appellate court engages in the same inquiry as the trial court. *Id.* Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56. *“A material fact is one upon which the outcome of litigation depends.”* Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 223, 961 P.2d 358 (1998). *“The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party.”* Korslund v. Dyncorp Tri-Cities Serv’s, Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Genuine issues of material fact exist with respect to each element of Summit’s defamation and tortious interference claims. The trial court erred in dismissing Summit’s claims.

B. The Trial Court Erred in Dismissing Summit's Tortious Interference Claim.

A plaintiff must satisfy the following elements to prevail on a tortious interference claim:

"(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."

Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 114 P.3d 276 (2006) (quoting Leingang v. Pierce Cnty. Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997)).

The fourth element is the only element at issue, as CCS concedes or has failed to dispute the remaining elements for summary judgment purposes. CR 30. The fourth element "*requires an improper objective or the use of wrongful means that in fact cause injury to the person's contractual relationship.*" Leingang, 131 Wn.2d at 157, 930 P.2d 288.

1. A Genuine Issue of Material Fact Exists That CCS Acted with Improper Purpose in Interfering with Summit's Business Expectancy.

Interference for an improper purpose may be demonstrated by showing "*an improper objective of harming the plaintiff.*" Pleas

v. City of Seattle, 112 Wn.2d 794, 803, 774 P.2d 1158 (1989). Interference need not be the defendant's primary motive; rather, the plaintiff need only demonstrate that "*the actor was motivated, in whole or in part, by a desire to interfere.*" Id. at 806, 774 P.2d 1158 (quoting Restatement (Second) of Torts § 767, cmt. d, at 32).

Here, CCS interfered with the improper objective of harming Summit. CCS had knowledge that Summit was the listed subcontractor for plumbing work on the day TWC submitted its bid CP 441, 453, 499-500 and, notwithstanding CCS's objection, it waited until after TWC subcontracted with CCS to direct CCS to replace Summit. CP 441, 499-502. At no time did CCS provide Summit with any notice of its concern with or objection to Summit as subcontractor on the Classroom Project. CP 441, 455, 500, 509. Nor did CCS take any steps to prevent Summit from bidding on subcontracting work on the Classroom Project. CP 441, 501.

CCS was motivated by its own animosity toward Summit stemming from Summit's work on prior projects and, specifically, associated with issues involving the installation of toilets. CP 39-40, 41, 44-45, 57-58, 65-66, 589-97. As Ms. Groth wrote in an email regarding the toilet fixture issue: "*I think it's time to let it go*" and "*I'm sorry it did not end on a positive note.*" CP 594, 643. However,

CCS did not “*let it go*” but, rather, held on to this grudge until presented with the opportunity to act on it.

The manifestation of this animosity is also evident in the false statement made regarding Summit’s financial wherewithal relative to its ability to obtain a bond. CP 44, 53, 441, 540, 554, 596. Moreover, CCS’s conduct in its change order attempting to replace Summit with McClintock and Turk reeks of collusion, as McClintock and Turk was not the lowest bidder, nor was it the next lowest bidder. CP 12.

Improper purpose is also evident in CCS’s ad hoc crusade to gather statements to use in support of its objection. CP 441, 499-501, 504-07. For example, Mr. Dunham asked Mr. Lohrengel of E&AS regarding what it would take to stop Summit from being on the project and Mr. Dunham was informed that a reasonable objection was required. CP 441, 523-25. To gather support for the objection, CCS sought out instances of past problems from a narrow subset of CCS employees. CP 40-41, 44-45, 53-54, 441, 499-501, 504-507. Genuine issue of material facts exists regarding whether CCS acted with improper purpose when it interfered with Summit’s business expectancy of being plumbing subcontractor on the Classroom Project.

2. A Genuine Issue of Material Fact Exists That CCS Acted by Improper Means in Interfering with Summit's Business Expectancy.

"Interference can be 'wrongful' by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." Pleas, 112 Wn.2d at 804, 774 P.2d 1158.

i. CCS's Interference is Wrongful in Relation to the Prime Contract.

The contract between TWC and CCS set forth the precise procedure for substituting subcontractors on the project. The contract provided that a contractor may object to a subcontractor based only upon a "*reasonable objection*." CP 44, 49-50. Therefore, CCS was constrained by the contractually imposed standard of reasonableness when objecting. Furthermore, the contract contains precise criteria necessary to form a basis for a reasonable objection CP 44, 49-50. By the plain contract terms, a particular subcontractor may be subject to objection by only for lack of (1) experience or (2) qualification or for (3) failing to meet the requirements of the contract documents. CP 44, 49-50.

Here, CCS cannot contend that Summit is inexperienced or not qualified to perform the subcontracting work at the Classroom Project. Indeed, Summit has substantial experience and is

exceptionally qualified to perform work as a plumbing contractor. Summit has decades of experience as a plumbing subcontractor and has completed in excess of thirty jobs including public school projects. CP 590. It has never been red tagged for code violations, nor has it ever been prohibited from bidding on public works projects. CP 590. Rather, Summit has earned a reputation in the community for its quality work. CP 561-67.

Furthermore, CCS cannot contend that Summit failed to meet any contractual requirement, as CCS admits "*that Summit was entitled to submit a bid.*" CP 11. Summit was experienced, qualified, and met the requirements of the contract documents. Therefore, CCS's objection to Summit was not reasonable. CP 561-67. Genuine issues of material fact exist regarding whether CCS acted reasonably in relation to the prime contract such that its interference with Summit's business expectancy in the plumbing subcontract work at the Classroom Project is wrongful.

ii. CCS's Interference is Wrongful in Relation to Washington's Competitive Bidding Statutes and Related Public Policy.

CCS's interference with Summit's contract with TWC is wrongful in relation to Washington's competitive bidding statutes

and corresponding public policy. See RCW 39.30 et seq. RCW 39.30.060 provides:

Every invitation to bid on a prime contract that is expected to cost one million dollars or more for the construction, alteration, or repair of any public building or public work . . . shall require each prime contract bidder to submit as part of the bid, or within one hour after the published bid submittal time, the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract for the performance of the work

RCW 39.30.060 was enacted “to standardize and regulate the competitive bidding process in public works contracts.” McCandlish Elec., Inc. v. Will Const. Co., Inc., 107 Wn. App. 85, 97, 25 P.3d 1057 (2001) (explaining that “[c]ompetitive bidding statutes exist to safeguard the public treasury from the high cost of fraud and/or collusion”). While RCW 39.30.060 does not expressly prohibit substitution of an unlisted subcontractor with a listed one in the absence of bid shopping, it nevertheless “*certainly implies that a successful prime contractor is expected to utilize the subcontractor listed on its bid proposal.*” Id. at 95, 25 P.3d 1057.

CCS’s replacement of Summit from the project contravenes the public policy behind competitive bidding requirements on public works projects. The competitive bidding statutes exist “to provide bidders with a fair forum for the award of public

contacts.” A.A.B. Elec., Inc. v. Stevenson Public Sch. Dist. No. 303, 5 Wn. App. 887, 890, 491 P.2d 684 (1971); see Gostovich v. City of West Richland, 75 Wn.2d 583, 587, 452 P.2d 737 (1969) (competitive bidding statutes “*provide a fair forum for those interest in undertaking public projects*”). Furthermore, the Washington legislature has found “*that the traditional process of awarding public works contracts in lump sum to the lowest responsible bidder is a fair and objective method of selecting a contractor.*” RCW 39.10.200. Objectives promoted by these statutes are to prevent fraud, collusion, favoritism, or improvidence and to enable the State to obtain the best work or supplier at the most reasonable price. Gostovich, 75 Wn.2d at 587, 452 P.2d 737.

Here, Summit was experience and qualified to perform the plumbing work as subcontractor, was a responsive and responsible bidder, submitted the low bid, was listed by the prime contractor, and, consequently, was expected to perform the plumbing work on the Classroom Project. CP 11, 561-67, 590. CCS failed to establish—and follow—fair and objective criteria against which to measure the acceptability of subcontractors bidding the project and, necessarily, failed to provide Summit with any notice of such criteria. CP 455, 441, 501, 509, 590. Rather, CSS simply decided after it heard that

Summit was a listed subcontractor that it favored that TWC not contract with Summit. CP 471, 441, 503. CCS's objection to Summit as plumbing subcontractor thus contravenes the policy behind Washington's competitive bidding statutes to conduct bidding in a manner that is fair, objective, and without favoritism or improvidence.

Washington statutory code, together with the common law, demonstrates that a subcontractor listed by a general contractor who submits the low bid for a project can expect to be the subcontractor on the project. The action of CCS in interfering with Summit's business expectancy of contracting with TWC for Summit to provide the plumbing subcontract work on the Classroom Project flies in the face of this established standard of the construction industry under applicable Washington law.

Additionally, replacing Summit cost taxpayer's substantially more than had Summit—a qualified, experienced, responsive, and responsible low bidder—been the plumbing subcontractor on the Classroom Project. CP 12, 44-45, 60-61. The change order replacing Summit directed TWC to contract with McClintock and Turk, which was neither the lowest bidder nor the next lowest bidder for the plumbing subcontract with TWC. CP 12, 44-45, 60-61. CCS's

replacement of Summit as subcontractor increased the contract price by \$68,877.56, a cost taken from the public purse. CP 12, 44-45, 60-61. Replacing Summit thus contravenes the policy behind Washington's public bidding statutes to safeguard the public treasury from collusion.

iii. CCS Failed to Use Statutory Procedures that Ensure Public Works Contracting is an Open and Fair Process Based on Objective, Uniform, and Equitable Criteria.

RCW 39.04.350 sets forth criteria subcontractors must meet to be a responsible bidder. RCW 39.06.020 requires a public works contractor to verify subcontractors meet bidder responsibility criteria and this criteria must be included in every public works contract and subcontract.

The Washington Legislature has authorized the use of supplemental alternative public works contracting procedures set forth in RCW 39.10 *et seq.*, which prescribe appropriate requirements "*to ensure that such contracting procedures serve the public interest.*" RCW 39.10.200. These procedures specifically ensure that public works contracting "*is an open and fair process based on objective and equitable criteria.*" *Id.*

Under these alternative procedures, all subcontract work must be competitively bid and subcontract bid packages must be

awarded to “*the responsible bidder submitting the lowest responsive bid.*” RCW 39.10.380(1). Furthermore, RCW 39.10.400 provides a process to determine subcontractor eligibility prior to seeking bids under which “*the public body may determine subcontractor eligibility to bid.*” RCW 39.10.400(1). The process requires precise notice, hearing, and comment procedures regarding the determination of bidder eligibility. *Id.*

Under these alternative procedures, if bidder eligibility is not determined in advance, all subcontract bid packages must set forth specific objective criteria that the public body will use to evaluate bidder responsibility. RCW 39.10.380(2). If the public body determines that the lowest bidder is not responsible, it must provide the bidder with written documentation explaining the intent to reject the bidder as not responsible and must afford the bidder the opportunity to establish that it is a responsible bidder. RCW 39.10.380(2). The bidder is entitled to protest if it is determined the bidder is not responsible. RCW 39.10.380(2), (4).

The foregoing statutory procedures were available to CCS as the appropriate process to establish objective criteria to measure bidder responsibility. These processes ensure that public works contracting is transparent, fair, objective, and equitable. Notably,

CCS cannot contend that Summit was not a responsible bidder. Summit was entitled to bid on the Classroom Project. CP 11.

Rather than basing its objection to Summit as subcontractor on objective criteria previously disclosed to Summit, CCS based its decision to replace Summit on preference, concern, and favoritism CP 441, 453, 503. Washington statutory procedures for bidding on a public works project demonstrate that a public body cannot simply pick and choose the subcontractor on a public project like a consumer selects a favored item at a department store but must, rather, base any determination of bidder eligibility and responsibility on objective criteria and must make such criteria available to the subcontractor. CCS did not utilize a fair and objective procedure but, instead, waited until after bidding procedure had concluded to replace Summit. CP 441, 500-502. Questions of material fact exist regarding whether TWC acted with improper means in unilaterally rejecting Summit as subcontractor on the Classroom Project.

C. The Trial Court Erred in Dismissing Summit's Defamation Claim.

A defamation action has four elements: “(1) a false statement, (2) publication, (3) fault, and (4) damages.” Duc Tan v. Le, 177 Wn.2d 649, 662, 300 P.3d 356 (2013). These elements

must be established by “*evidence of convincing clarity.*” Mark v. Seattle Times, 96 Wn.2d 473, 487, 635 P.2d 1081 (1981). A defense motion for summary judgment on a defamation action must be denied if a genuine issue of material fact exists with respect to each element. Alpine Indus., Computers, Inc. v. Cowles Publ’g Co., 114 Wn. App. 371, 378, 57 P.3d 1178 (2003) (explaining “[a] defamation claim implicates highly complex issues.”); Lee v. Columbian, Inc., 64 Wn. App. 534, 537, 826 P.2d 217 (1991) (summary judgment motion fails if a reasonable jury could find in plaintiff’s favor). The trial court erred in dismissing Summit’s defamation claim.

1. Genuine Issues of Material Fact Exist Regarding the Falsity of CCS’s Statements.

The offensive statement must be provably false. Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 157, 225 P.3d 339 (2010). A statement may be false in whole or in part. Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 592-93, 943 P.2d 350 (1997). A statement is provably false if “*it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or opinion.*” Id. at 590-91, 943 P.2d 350.

A plaintiff may show a statement is provably false in the following ways:

because it falsely represents the state of mind of the person making it, because it is falsely attributed to a person who did not make it, or because it falsely describes the act, condition or event that comprises its subject matter.

Id. at 591, 943 P.2d 350. Whether a statement is capable of defamatory meaning is a question of law; whether a statement is in fact defamatory is a question of fact. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 572, 27 P.3d 1208 (2001).

Here, the following statements are provably false because they express and imply provable facts: (a) *“These problems extended from poor quality, code compliance issues, scheduling issues, to warranty response issues”*; (b) *“the worst problem was that of over-all substandard workmanship, resistance to resolving problems when they arose and generally skirting project specifications and code requirements when-ever possible”*; (c) *“Summit . . . did not install the toilet carriers per manufacturer’s specs or per acceptable construction standards”*; (d) *“Over the course of two years, I tried to get them to correct their shoddy workmanship, and I found them to be evasive, dishonest, and lacked professional integrity.”* (e) *“Mark [Connolley] also said, that he had heard, that Summit is so upside down that they could not afford to make bond that the general would have to for them.”*

The statement that Summit “*skirt[ed] project specifications and code requirements whenever possible*” implies the provably false facts that Summit did not comply with code requirements and that its purported noncompliance was intentional. The reference to “*shoddy workmanship*” implies the provably false fact that Summit’s work did not meet industry standards. The reference to Summit as “*evasive, dishonest, and lack[ing] professional integrity*” implies the provably false fact that Summit lied to and intentionally deceived CCS or other persons. The statement regarding Summit’s financial wherewithal as being “*upside down*” implies the provably false fact that Summit had insufficient financial stability to obtain a bond.

These statements and the facts they imply are provably false. Summit has successfully completed work on over thirty public works projects during the last twenty-two years. CP 590. It has never had any significant code issues with work it performed, with the exceptions of routine corrections customary in construction projects. CP 590. Summit has never been red tagged for a code violation and Summit’s financial position is not “*upside down.*” CP 590, 596.

Furthermore, CCS's issue with the toilets arose from the particular use of the toilet rather than Summit's work. CP 592-93. CCS's purported complaints regarding the toilets was overstated and any issues with them were the result of typical use. CP 564. Indeed, Summit's performance on the Sn-w'ey'-mn Project met the requirements of the plans and specifications and its project administration was superior to other subcontractors. CP 562. Summit properly installed the toilets on the past projects. CP 561-67, 591-96, 599-600, 602-41. And, contrary to the complaints conjured by CCS, Summit is not "*evasive*," is not "*dishonest*," and does not "*lack professional integrity*." In fact, Summit has earned a reputation for its quality performance as a plumbing subcontractor in eastern Washington.

2. Genuine Issues of Material Fact Exist Regarding whether the Statements were Published.

All the defamatory statements of CCS were published as they were communicated to persons other than Summit. CP 44-45, 54, 56-58); see Doe v. Gonzaga University, 143 Wn.2d 687, 701, 24 P.3d 390 (2001) ("*Liability for defamation requires that the defamation be communicated to someone other than the person defamed . . .*"), judgment reversed on other grounds by Gonzaga University v.

Doe, 536 U.S. 273 (2002); See also Pate v. Tyee Motor Inn Inc., 77 Wn.2d 819, 822, 467 P.2d 301 (1970) (Neil, J. Concurring) (“*Clarity and effective analysis require that the term ‘publication’ . . . be restricted to the physical concept of publication in fact.*”).

3. Genuine Issues of Material Fact Exist Regarding whether CCS’s False Statements were Published Negligently.

Summit is a private, not a public, figure. See Momah v. Bharti, 144 Wn. App. 731, 741 n.6, 182 P.3d 455 (2008) (“*A public figure is one who willingly enters the public sphere either by occupying positions of persuasive power and influence or by thrusting themselves to the forefront of a particular controversy.*”). A negligence standard applies to a private figure. Demopolis v. Peoples Nat’l Bank of Wash., 59 Wn. App. 105, 108 n.1, 796 P.2d 426 (1990). “*The negligence standard is that the defendant knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression in some material respect.*” Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675, 680, 713 P.2d 736 (1986). The preponderance of the evidence standard applies. Wood, 107 Wn. App. at 568, 27 P.3d 1208 (2001).

Here, CCS acted negligently in publishing provably false statements regarding Summit. CCS knew or should have known that the statements it elicited and published were false. Instead of conducting a broad, thorough and objective investigation into whether Summit was experienced, qualified, and met the requirement of the contract documents, CCS elicited complaints regarding Summit's work on prior projects to support the reasonableness of its objection. CP 40-41, 441, 499-501, 504-07. CCS sought responses from a select and narrow subset of people expected to provide the sought for statements attacking Summit. Its investigation of the veracity of the statements was likewise insufficient. CP 504. Furthermore, that CCS has sufficient financial wherewithal to obtain a bond was easily verifiable with the Washington State Department of Labor and Industries. CCS was negligent in publishing the false statements.

4. The Defamatory Statements Fall Outside the Scope of the Common Interest Privilege, and CCS Abused this Privilege.

After the plaintiff has established a prima facie defamation case, the defendant has the burden of proof to establish a privilege. Valdez-Zontek, 154 Wn. App. at 162, 225 P.3d 339. While the determination of whether a privilege applies is a

question of law, factual disputes on which the issue of privilege turn must first be resolved by a jury. Caruso v. Local Union No. 690, 107 Wn.2d 524, 539, 730 P.2d 1299 (1987). If a statement falls within the scope of a qualified privilege, the burden shifts to the plaintiff to show the privilege was abused. Id.

The common interest privilege applies when the declarant and the recipient have a common interest in the “*subject matter of the communication.*” Moe v. Wise, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (2008). “*This privilege generally applies to organizations, partnerships and associations and ‘arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest.’*” Momah, 144 Wn. App. at 747-48, 182 P.3d 455 (quoting Moe, 97 Wn.2d at 958-59, 989 P.2d 1148); see, e.g., Valdez-Zontek, 154 Wn. App. at 164-65, 225 P.3d 339 (school district officials abused privilege by knowingly spreading rumor of affair with a high degree of awareness that the rumor was probably false).

A showing of actual malice will defeat a qualified privilege. Tribune Publ’g. Co., Inc., 108 Wn.2d at 183, 736 P.2d 249. Actual malice exists when a statement is made “*with knowledge of its falsity or with reckless disregarding of its truth or falsity.*” Herron

v. KING Broad Co., 109 Wn.2d 514, 523, 746 P.2d 295 (1987). “*To prove actual malice a party must establish that the speaker knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement’s truth.*” Story v. Shelter Bay Co., 52 Wash. App. 334, 343, 760 P.2d 368 (1988). Proof of an abuse of a qualified privilege is established by clear and convincing evidence. Lillig v. Becton-Dickinson, 105 Wn.2d 653, 658, 717 P.2d 1371 (1986). “*Actual malice is a subjective standard that can be inferred from circumstantial evidence.*” KING Broad. Co., 109 Wn.2d at 524, 746 P.2d 295.

Here, CCS’s defamatory statements do not fall within the common interest privilege. The defamatory statements in the objection letter were published outside the organizational structure of CCS. Specifically, the letter was published by Mr. Dunham of CCS to: (1) Mr. Lohrengel of E&AS; and (2) to Laura J. Haima of DES. CP 44-45, 56-58. CCS and E&AS are different agencies. CCS is the client agency; E&AS is the contracting agency. CP 44, 48.

Furthermore, the subject matter of the defamatory statements concerns Summit’s past work, honesty, professional integrity, and financial wherewithal, not any pecuniary interest of

CCS and E&AS. CP 44-45, 53-54, 56-58. Indeed, the statements were asserted in an effort to remove Summit, and removing Summit increased the contract price by \$68,877.56. CP 12, 44-45, 60-61.

In any event, CCS abused the privilege because it acted with malice. The record contains evidence sufficient to create a genuine issue of material fact that CCS knew the defamatory statements were false and that CCS acted with a high degree of awareness of its probable falsity, and in fact entertained serious doubts as to the statements truth. For example, when Mr. Dunham first learned that Summit was the listed subcontractor, he said to Mr. Lohrengel, “[w]e may have a problem.” CP 441, 500. Mr. Dunham was advised that CCS should delay objecting to Summit as subcontractor until after CCS contracted with TWC. CP 441, 500.

When Mr. Dunham understood that he needed a basis to support a reasonable objection to accomplish CCS’s objective of interfering with Summit’s business expectancy in performing the plumbing subcontracting work on the Classroom Project, he solicited grievances about Summit from a select subset of persons and failed to adequately inquire into the veracity of the provably false attacks on Summit that were obtained. CP 40-41, 499-501, 504-07. This process was not an impartial investigation into the

quality of Summit's work but was, rather, an ad hoc search among a narrow subset of people for written statements attacking Summit upon which CCS could eclipse its retaliatory motive.

5. Summit has Been Damaged.

CCS cannot dispute the fact that its defamatory statements resulted in damage to Summit. These statements resulted in the substitution of Summit as plumbing contractor on the Classroom Project with ETCO, notwithstanding that Summit was the low bidding responsive and responsible bidder and was experience and qualified to perform its scope of work on the project. CP 11-12, 44-45, 60-61, 561-67, 589-596.

V. RAP 18.1 MOTION FOR ATTORNEY'S FEES AND COSTS

Summit respectfully requests an award of reasonable attorney's fees and costs incurred below and on appeal pursuant to RAP 18.1, RCW 39.04.240 in conjunction with RCW 4.84.250, and equity.

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VI. CONCLUSION

Genuine issues of material fact exist with respect to all elements of Summit's claims for tortious interference with a business expectancy and defamation. Summit respectfully requests that this Court reverse the trial court's summary dismissal of these claims and remand to the trial court for further proceedings.

DATED this 23rd day of July, 2014.

PISKEL YAHNE KOVARIK, PLLC

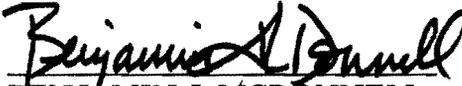


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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2014, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

<input checked="" type="checkbox"/>	HAND DELIVERY	Jarold P. Cartwright
<input type="checkbox"/>	U.S. MAIL	Attorney General's Office
<input type="checkbox"/>	OVERNIGHT MAIL	Tort Division
<input type="checkbox"/>	FAX TRANSMISSION	1116 W. Riverside Ave.
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