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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the central issue of whether the state, like any other dissatisfied customer, may refuse to hire a subcontractor that had provided substandard work and warranty service on previous state projects.

In April 2012, the state of Washington contracted with general contractor T.W. Clark Construction (Clark) for the construction of a ten million dollar classroom building on the campus of Spokane Falls Community College (SFCC) which, along with Spokane Community College (SCC) is part of Community Colleges of Spokane (CCS). In its bid documents, Clark listed Irwin Yeager, Inc. d/b/a Summit Mechanical (Summit) as plumbing subcontractor. CCS District Facilities Manager Dennis Dunham was aware that Summit had worked on three other CCS projects before. Mr. Dunham also knew that CCS was not satisfied with Summit because there had been deficiencies in Summit's earlier work that resulted in significant problems for CCS. In addition, Mr. Dunham knew that CCS had been very dissatisfied when it tried to get Summit to correct the substandard work -- the most notable problem being Summit's persistent refusal to fix 18 wall mounted toilets in the SCC science building, which were not installed in accordance with specifications, resulting in the toilets coming loose and pulling away from the walls.

When Summit was listed as the plumbing subcontractor on the 2012 SFCC Classroom Building project, CCS asked the state's contracting authority, the Department of Enterprise Services Engineering and Architectural Services (Enterprise) to exercise the state's contractual right to object to Summit and require the general contractor to use a different plumbing subcontractor. Facilities Manager Dunham provided Enterprise with specific, detailed information, provided by CCS plumbers, HVAC technicians and the Construction Manager, concerning Summit's substandard work and warranty service on the other projects. Based on this information, the state exercised its right to object and required Summit's replacement.

Summit sued CCS in Spokane County Superior Court claiming tortious interference with a business expectancy and defamation. After Summit completed its discovery, CCS sought summary judgment. Judge Kathleen O'Connor granted summary judgment dismissing the tortious interference claim. The court correctly found that CCS's interference was not for an improper purpose or by improper means, and therefore not tortious, because CCS was acting pursuant to the contract provision and was protecting CCS/the state's interest by objecting to Summit. Judge O'Connor dismissed the defamation claim because the allegedly defamatory statements were not published to any third party, were

privileged, and Summit was unable to show malice as required to establish fault. Summit timely appealed.

II. STATEMENT OF THE ISSUES

1. Whether summary judgment dismissing Summit's claim against CCS for tortious interference with business expectancy for an improper purpose should be affirmed where CCS objected to hiring Summit because of Summit's substandard work on three previous construction projects?
2. Whether summary judgment dismissing Summit's claim against CCS for tortious interference with business expectancy by improper means, based on CCS's objection to hiring Summit, should be affirmed where Summit performed substandard work on previous projects and the contract gave CCS the right to reasonably object to a subcontractor?
3. Whether summary judgment dismissing Summit's tortious interference with business expectancy claim should be affirmed because CCS's alleged interference was protected by the common interest privilege?
4. Whether summary judgment dismissing Summit's defamation claim should be affirmed because:
 - a. It cannot be shown by clear and convincing evidence that the allegedly defamatory statements were false; and/or
 - b. The allegedly defamatory statements/information are conditionally privileged because they were made and/or

provided by persons in one state agency to persons in another state agency for the purpose of determining whether the state has a reasonable objection to use of a subcontractor; and/or

c. The allegedly defamatory statements were subject to a conditional privilege and it cannot be established by clear and convincing evidence that the statements were false and/or that the person allegedly making the statements either knew the statements to be false or acted with reckless disregard for the truth or falsity of the allegedly defamatory statements?

III. STATEMENT OF THE CASE

A. State Awards SFCC Classroom Building Project To T.W. Clark Construction And Objects To Summit As Plumbing Subcontractor

In April 2012 the State of Washington awarded a ten million dollar contract to build a classroom building on the campus of Spokane Falls Community College (SFCC) to low bidder T.W. Clark Construction (Clark). CP at 5, 40. The contract required Clark to use experienced, qualified subcontractors for the project and specifically provided: “Contractor shall not utilize any Subcontractor or supplier to whom the Owner has a reasonable objection.” CP at 49. The state objected to Summit Mechanical, listed by Clark as plumbing subcontractor on the project because Summit had provided substandard work on three previous

community college projects. CP at 57-58. Summit was removed and replaced with the plumbing subcontractor who submitted the next lowest bid. CP at 60-61.

The state's objection to Summit was based on a memorandum dated April 25, 2012, seven days after bids were opened, prepared by Dennis Dunham, District Director of Facilities for Community College District 17, a.k.a. Community Colleges of Spokane (CCS), the state agency that includes Spokane Falls Community College (SFCC) and Spokane Community College (SCC). RCW 28B.050.040, WAC 132Q-01-006, CP at 57-58. Mr. Dunham's memo was directed to Dave Lohrengel, Construction Project Coordinator with The Department of Enterprise Services, Facilities Division, Engineering and Architectural Services (referred to as Enterprise), which is the state agency responsible for contract administration on state agency construction projects. CP at 57; *See* RCW 43.19.450. In the memorandum, Mr. Dunham advised Enterprise that CCS protested the use of Summit Mechanical as plumbing subcontractor on the SFCC Classroom Building project because:

“The colleges and the district have had numerous problems with Summit on three major capital projects . . . These problems extended from poor quality, code compliance issues, scheduling issues, to warranty response issues.”

CP at 57.

In support of the objection, Mr. Dunham provided Mr. Lohrengel with specific information he received from CCS personnel familiar with Summit's work on the three other projects, including:

- CCS HVAC technician Jim Armor advised that he was aware of many problems with work Summit Mechanical had done on district projects including overall substandard workmanship, resistance to resolving problems when they arose and generally skirting project specifications and code requirements whenever possible. CP at 54, 57.
- Concerning piping systems installed by Summit, HVAC technician Armor reported leaks in piping systems and deterioration of piping integrity due to the lack of adequate hangers, supports and piping. CP at 54, 57.
- Based on his experience and knowledge of Summit's work on other projects, HVAC technician Armor concluded "I strongly feel that it would be in the District's best interest to insist that a contractor with a better history be selected for the new Classroom building at the Falls as (sic) could offer no recommendation that Summit be given the opportunity to participate in the project." CP at 54, 57.
- In an April 24, 2012 e-mail, CCS plumber Mark Connolley noted several deficiencies in work done by Summit, including:

- Building 9 (Health Science) -- Single hole in Chicago faucets in dental lab installed with no anti-rotation washer or pin
 - Building 9 (Health Science) -- Brass extension tailpieces under sinks glued not soldered
 - Building 27 (Science) -- No anti rotation pins or washers on single hole faucets
 - Building 27 (Science) -- Most toilet carriers not installed to manufacturer's specs (missing mounting bolts, wrong size bolts)
 - Building 27 (Science) -- Wall hung toilets glued to wall making it almost impossible to remove
 - Building 27 (Science) -- Lack of proper hangers on piping above ceiling grid
 - Building 24 (Business & Social Science) -- Wall hung toilet carriers not installed to manufacturers specs
 - Building 24 (Business & Social Science) -- Most toilets glued to tile with too much calk
 - Building 24 (Business & Social Science) -- Water coolers not installed correctly (refer unit sitting on floor not the wall hung bracket it came with). Also, piping installed across the refer unit access making it impossible to service without major pipe relocation. CP at 53.
- Concerning her dealings with Summit, CCS District Construction

Manager Cheryl Groth stated:

I have always said that contractors all make mistakes, what really matters is what they do to fix those mistakes after they are made aware of them. Summit Mechanical did the plumbing installation at the SCC Science Building and they 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 found them to be evasive, dishonest, and lacked professional integrity. Not only didn't they fix the problem, they tried to cover it up by gluing the fixtures to the wall which we discovered when we had to remove one for maintenance and broke the wall tile in the process.

CP at 58.¹ Concluding the memo to Mr. Lohrengel, Mr. Dunham made

CCS's purpose in objecting to Summit clear:

The Community Colleges of Spokane does not want to have Summit Mechanical on another one of our projects because we cannot justify spending tax dollars to a company whose product and service may not just meet specs, but will fall far below the minimum quality standards. We realize we will be responsible to compensate General Contractor, T.W. Clark, for the monetary difference between Summit's bid price and the next lowest plumbing price.

CP at 58.

B. The Toilet Issue

As noted above, CCS employees provided several examples of poor workmanship by Summit on other projects. CP at 53-58.² The most notorious, most heavily documented and most illustrative of CCS's problems with Summit concerned the ongoing problems with the toilets in the SCC Science Building which Summit first installed in 2006. CP at 63-64, 134-301. Lydig Construction was the general contractor and Summit the plumbing subcontractor chosen by Lydig on the 2006 SCC Science Building Replacement project. CP at 63. Among other things, Summit installed 18

¹ Ms. Groth is a licensed engineer who came to CCS with experience as a design engineer, field engineer, and construction manager on major construction projects. CP at 88-117. She is now District Director of Capital Projects for CCS. CP at 98. Ms. Groth compiled documentation of the history of problems with Summit's work on the Health Sciences Building, Science Building and Business and Social Sciences building. CP at 118-27. The documentation, including correspondence, photographs and other documents relevant to the deficiencies in Summits work are compiled at CP 134-419.

² The deficiencies are listed here but are well documented by correspondence, memoranda, project specifications, photographs and other documents at CP 134-419.

wall mounted toilets in the building. CP at 63. Problems surfaced in early 2008 when it was discovered that several of the toilets appeared to be coming loose from restroom walls. CP at 221, 223. Investigation of the problem included using a small camera on flexible tubing called a “see snake,” that was inserted into an opening in the wall to visualize the “carriers”³ to which the toilets are mounted. CCS found that, in many cases the carriers were not bolted down with four 1/2 inch bolts as required by the carrier manufacturer’s specifications that were included in the contract documents. CP at 159-60, 213-14, 221, 223. The investigation showed that in many cases, only two 3/8 inch bolts were used, contrary to the specification which stated:

Note: Base support must be securely anchored to the floor
(with four 1/2” (13) bolts provided by contractor).

CP at 156.

In addition, it was observed in some locations that the bolts that Summit supplied were loose or pulling loose, and that the rear anchor foot of the carrier was placed over a steel stud and/or was loose and pulling up from the floor. CP at 194, 159-60. CCS, through Dennis Dunham, Cheryl Groth, and CCS’s architect for the project, Northwest Architectural

³ The wall mounted toilets were attached to the carrier which is also attached to the building plumbing system. Secure mounting and installation of the carrier is necessary to prevent the toilets from coming loose. The carrier is accurately depicted in the photograph at CP 143.

Company (NAC), brought the problem to the attention of Lydig and Summit and requested that they repair the deficiencies and install the carriers in accordance with specifications. CP at 213, 221.

At first, Lydig and Summit denied responsibility for any problems associated with the toilets, blaming everything on a design flaw in the carriers that were specified, ill- advised use of wall mounted instead of floor mounted toilets, abuse by students and use of the toilets by “heavier” persons in the handicapped stalls. CP at 210-20. After an April 2008 inspection of the toilets by representatives of CCS, Lydig and Summit, Lydig acknowledged that there were problems and that they were related to Summit’s installation, stating in an April 17, 2008 letter to Summit principal Robert Yeager:

We physically checked every toilet in the building and determined that the majority of the toilets have measurable movement when upwards and downwards pressure is applied to the bowl. This condition is unacceptable to the owner, and was acknowledged by Craig⁴ to be a problem that needs to be corrected. The owner paid a premium for wall hung toilets and they are justifiably concerned with the long-term performance of the toilets.

From what we have been able to ascertain so far, it seems clear that the problems are directly related to the installation of the carriers themselves, the installation of some of the attachment hardware on the carriers and/or the installation of

⁴ Craig Irwin, one of the owners of Irwin-Yeager, Inc. d/b/a Summit Mechanical

the bowl to the carriers. Under any of these scenarios, the responsibility appears to be with Summit.

CP at 209.

Based on the April survey, Summit agreed to inspect each toilet and undertake necessary repairs. CP at 205, 210-11. It was agreed that repair work would be coordinated with Ms. Groth so that she could be present during the inspection, visualize the problem(s) and see the work done to fix the problem(s). CP at 192, 195-97, 201. Unfortunately, Summit started the repairs without notifying Ms. Groth and scheduled repair work without coordinating with her and she was, in most cases, unable to see the problem(s) or the fix, as had been agreed. CP at 192, 195-97, 201. On the occasions she was present, Ms. Groth noted that very few of the carriers were anchored with four bolts as specified, and in the few cases where four bolts were used, they were 3/8" as opposed to the 1/2" bolts specified. CP at 195-97.

Summit completed the repairs and summarized what was done in a May 27, 2008 letter to Lydig. CP at 193-94. After reviewing the letter, Ms. Groth noted several misrepresentations by Summit, including misstatements about the number and size of anchor bolts used and that all the toilets in the building were removed, checked, replaced and tightened, when it was obvious that Summit had not done so. CP at 192. Given these

misrepresentations, together with Summit's failure to coordinate the scheduling of repairs so that Ms. Groth could observe, Ms. Groth and CCS were unable to trust that the toilets had been adequately repaired and reinstalled in accordance with specifications as requested. CP at 184-90, 192. Even though the toilets were no longer coming loose from the wall, CCS refused final acceptance of Summit's "fix" because of Summit's failure to abide by the agreement to schedule the work so it could be observed by Ms. Groth, together with the obvious inaccuracies in Summit's letter describing the repair work. CP at 185-86. Since CCS was unable to assure that carriers were secured properly and in accordance with manufacturer's specifications, and was unable to confirm what Summit did to stop the toilets from moving, CCS could not be assured that the repairs or the toilets would remain stable. CP at 185-86, 197.

A year and a half later, in October 2010, one of the repaired toilets began to leak and CCS plumbers had to remove it from the wall to fix the leak. CP at 184. When the plumbers removed the mounting bolts that would normally allow the toilet to come off the wall, they found that the fixture had been glued to the wall. CP at 183. The plumbers had to chisel the toilet off the wall in order to fix the leak, causing significant damage to the restroom wall. CP at 184. It was apparent, at that point, that in 2008, rather than reinstall the toilets and carriers in accordance with manufacturer's

specifications, including “provid[ing] bolts for all carrier bolt positions,” as they were directed to do in the May 1, 2008 letter from CCS’s architect (CP at 205), Summit simply glued the toilet fixtures to the wall so they would no longer move. CP at 168, 184. The connection of the carriers to the floor, hidden behind the restroom walls, remained substandard in most cases, with bolts that were too few and undersized. CP at 168, 184. To make matters worse, the gluing of the fixtures to the wall made it necessary to cut or chisel the toilets off the wall in order to perform maintenance or repairs, resulting in damage to the toilet fixture and the wall. CP at 184.

Lydig and Summit denied responsibility, stating there was an easy method for removing the toilets from the wall, and blamed the CCS plumbers for not knowing how to do this. CP at 170-71, 173. On November 15, 2010, Summit met with CCS, NAC and Lydig representatives to demonstrate “the proper method of toilet removal where the approved 3M sealant has been installed.” CP at 168-68, 173. The demonstration did not go well. After struggling to remove the “sealant” with a putty knife, then a chisel, Summit’s two men used a length of piano wire to saw the toilet off the wall. This took half an hour. CP at 141.

More problems occurred in 2011 and CCS again advised that it was dissatisfied with Summit’s work, noting that the problem all along had been Summit’s refusal to install the carriers in accordance with the manufacturer’s

specifications as required by the contract, and its attempt to cover up its failure to do so as directed in 2008. CP at 159-60. In addition, it was noted that Summit had apparently used the same sub-standard installation on all of the toilets in the SFCC Business and Social Science building it had worked on in 2007, and that those toilets were beginning to show signs of excessive movement. CP at 168-69, 300-12.

Summit continued to deny its obligation to anchor the carriers with four 1/2 inch bolts as required by the manufacturer's specifications or that their "glue on" method resulted in damage to walls and fixtures. CP at 166, 159-60. In September 2011, frustrated after nearly four years of arguing with Summit, and facing further Summit resistance after more damage caused by trying to remove a glued on toilet, CCS gave up the fight and declined the chance for another meeting with Lydig and Summit representatives. Cheryl Groth spoke for CCS, advising NAC architect Steve McNutt:

As we discussed on the phone this afternoon, I am declining Lydig's invitation to meet (Dennis left the decision up to me). I simply do not see how anything new will come out of this meeting. It's been nearly 4 years of exchange on this subject, and I think it's time to let it go.

Thanks Steve, for your efforts to resolve this matter. I'm sorry it did not end on a positive note.

CP at 158.

C. Summit Is Replaced As Plumbing Subcontractor On The SFCC Classroom Building

Based on this history, CCS voiced its objection when Summit was listed as plumbing sub on the 2012 Classroom Building project. The State, through Enterprise directed that Summit be replaced and on May 21, 2012, Change Order Number 1 was executed directing T.W. Clark to “change plumbing subcontractor from the low bidding plumbing subcontractor to McClintock and Turk.”⁵ CP at 60-61.

D. Summit Sues CCS

On December 14, 2012, Summit brought this action against Community Colleges of Spokane claiming Dunham’s April 25 memorandum constituted tortious interference with its business expectancy and that both information provided by CCS employees to Dunham and Dunham’s memo to Lohrengel, characterized in Summit’s complaint as an intra-office “protest letter” circulated within CCS, were false and defamatory and damaged its reputation in the community. CP at 3-9. Both parties responded to interrogatories and requests for production. CP at 26-28, 44-45. Summit took depositions of CCS Facilities Director Dennis Dunham, Director of Capital Projects Cheryl Groth, Plumber Mark Connolley and Facilities Maintenance Director Jim Collen. CP at 443-556. When

⁵ At the time McClintock and Turk was believed to be the next lowest bidder. This was later changed to ETCO when ETCO protested and it was determined that ETCO was the next lowest bidder. CP at 503.

Summit's discovery was complete, CCS successfully moved for summary judgment dismissing Summit's claims. CP at 711-13. Summit appealed.

IV. ARGUMENT

A. Standard of Review

Appellate review of summary judgment is de novo and the appellate court engages in the same inquiry as the trial court. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692 n. 17, 15 P.3d 115 (2000). "Summary judgment is appropriate 'if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Atherton Condo. Apart. Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (quoting CR 56(c)). A material fact is a fact upon which the "outcome of litigation depends in whole or in part." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). No genuine issue of material fact exists if the court, after considering the evidence in the light most favorable to the non-moving party, concludes that reasonable persons could reach only one conclusion. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982), *superseded by statute on other grounds*). To prevail in a summary judgment motion, a

defendant may either show that there are no material facts or that the plaintiff cannot meet the burden of proof to establish the required elements of a claim. *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993), *review denied*, 122 Wn.2d 1010, 863 P.2d 72. To show that the plaintiff cannot meet the burden of proof, the moving party need not support its position with affidavits and need only point out the lack of evidence in the record. *Id.* at 22. The party opposing summary judgment, on the other hand, must go beyond the pleadings to designate specific facts establishing a genuine issue of material fact for trial. CR 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-26, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Id.* at 32; *Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487 (2012) (citing *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). Speculation, argumentative assertions and conclusory statements are not sufficient to meet the non-moving party's burden. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997), *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 260, 11 P.3d 883 (2000).

In this case, summary judgment dismissing Summit's claim of tortious interference with a business expectancy is proper because the interference was privileged, and because Summit cannot establish the essential elements of improper purpose and improper means. Likewise, summary judgment dismissing the defamation claim is proper because Summit cannot establish the essential elements of falsity, publication of an unprivileged communication and fault (malice) by clear and convincing evidence.

B. The Alleged Interference Was Privileged And Summit Cannot Establish The Essential Elements Of Tortious Interference With A Business Expectancy.

In order to establish a valid claim for tortious interference with business expectancy, a plaintiff must be able to prove: (1) the existence of a valid contractual relationship or business expectancy; (2) defendant's knowledge of that relationship or business expectancy; (3) intentional interference resulting in termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965, 971 (2012); *Woody v. Stapp*, 146 Wn. App. 16, 23, 189 P.3d 807 (2008). For purposes of the motion for summary judgment, CCS admits that Summit had a business expectancy related to the plumbing subcontract, that CCS was aware of the expectancy and that CCS

objected to Summit as a subcontractor resulting in termination of the business expectancy. CCS's position is that its employees and Enterprise employees were privileged to discuss Summit's suitability as subcontractor, CCS objected to Summit for a proper purpose -- to protect CCS and the public from substandard work by Summit – and that the objection was made in accordance with the general conditions in the State's contract with T.W. Clark. Therefore, CCS's objections to Summit were conditionally privileged, Summit cannot establish interference for an improper purpose or that CCS interfered by improper means and the claim should be dismissed.

1. CCS's Interference Was Conditionally Privileged

Summit's tortious interference claim and defamation claim are both based on communications between CCS employees about Summit's work on previous CCS projects and whether Summit should be hired as subcontractor on the SFCC Classroom Building project. The conditional privilege defense is applicable where parties are communicating "freely and openly about subjects of common organizational or pecuniary interest." *Momah v. Bharti*, 144 Wn. App. 731, 747-48, 182 P.3d 455 (2008). In cases alleging both tortious interference and defamation, the claims are not truly distinct and the common interest conditional privilege, which is usually applied to the defamation claim, is also applicable to the

tortious interference claim. *Stidham v. State Dept. Of Licensing*, 30 Wn. App. 611, 616, 637 P.2d 970 (1981).

Here, as argued in the following sections, the trial court correctly granted summary judgment dismissing the tortious interference claims because CCS's purpose in objecting to Summit was proper because CCS was protecting its legal and pecuniary interests and the means of objection were proper and were provided for by contract. In addition, summary judgment dismissing the tortious interference claims was proper because the alleged interference was conditionally privileged. Since the conditional privilege is more commonly associated with defamation claims, the application of the common interest privilege is discussed in section C (2) *infra*.

2. Plaintiff Cannot Establish That Defendant Interfered With an Expectancy For an Improper Purpose

“Intentional interference requires an improper objective or the use of wrongful means that in fact cause injury to the person’s contractual relationship.” *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). In *Leingang*, the court held it was not improper interference with an insurance contract for a health care provider to give notice of a right to reimbursement to plaintiff’s Underinsured Motorist Carrier resulting in carrier depositing funds in court rather than paying them

to plaintiff even though it was later determined that provider had no right to UIM proceeds. “Asserting an arguable interpretation of existing law” is not an improper purpose. *Id.*

“To be improper, interference must be wrongful by some measure beyond the fact of the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession.” *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 510, 278 P.3d 197 (2012) (citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989)). In *Moore*, the court held that Plaintiff’s former employer’s objection to Plaintiff being hired by a competitor and threat of unfair competition suit, in the event Plaintiff was hired, on the grounds Plaintiff would necessarily share trade secrets and confidential information, was not interference for an improper purpose where the former employer had a good faith belief in the merits of the threatened suit. *Moore*, 168 Wn. App. at 510-511. Citing the Supreme Court’s decision in *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn. 2d 157, the court held that mere conclusory allegations of improper purpose or bad faith were not sufficient to show improper purpose and overcome summary judgment. *Moore*, 168 Wn. App. at 510-511.

“Exercising one’s legal interests in good faith is not improper interference.” *Elcon*, 174 Wn.2d at 168, *Tacoma Auto Mall, Inc.*, 169 Wn.

App. at 132. In *Elcon*, Eastern Washington University (Eastern) attempted to terminate a water well driller's (Elcon) contract for cause and notified Elcon's bonding company that Eastern may be pursuing the bond to cover the expense of decommissioning the failed well. The bonding company then reduced Elcon's bonding capacity, precluding Elcon from bidding on larger projects. When an arbitrator ruled that Eastern could not terminate for cause, Elcon sued for tortious interference with the expectancy/relationship with its bonding company. The Washington Supreme Court affirmed summary judgment dismissing the tortious interference claim holding that Eastern's good faith assertion of a legal right was not improper:

Believing Elcon may owe decommissioning costs, Eastern had an interest in notifying Elcon's bond surety of Eastern's potential claim. That the arbitrator ultimately ruled Eastern could not convert to a termination for cause does not somehow make Eastern's interest illegitimate.

Elcon, 174 Wn.2d at 169. The court also pointed out that plaintiff's mere conclusions that an alleged interferer's purpose was ill motivated or otherwise improper will not be sufficient to defeat summary judgment:

More importantly, by itself, the letter does not show improper purpose. And Elcon, by merely labeling the letter as "intentional and vindictive," has not met its burden of showing such a purpose. If Eastern was motivated by greed, retaliation, or hostility in sending a copy of the termination letter to Elcon's surety, Elcon failed to show such a motive. Conclusory statements and speculation will not preclude a grant of summary judgment.

Elcon, 174 Wn. 2d at 169.

Similarly, in this case CCS requested the change in plumbing subcontractors to protect both CCS and the public's legitimate interest in obtaining work that met applicable standards and in working with a plumbing subcontractor that would warrant their work. CCS had worked with Summit on at least three prior capital projects, and, as the toilet saga amply demonstrates, had experienced significant problems with Summit's workmanship, as well as Summit's responses to CCS's concerns about nonconforming work. Because of Summit's substandard work and recalcitrance in response to CCS's complaints about its work, CCS was required to expend substantial public resources to address issues caused by Summit's work. Understandably, when CCS learned that Summit was listed as the plumbing subcontractor for the Classroom Building Project, CCS requested that the state's contracting authority object and replace Summit. CCS's purpose in objecting to Summit as plumbing subcontractor was to save CCS and the taxpayers the risk and expense of dealing with issues raised by substandard work. That Summit now argues that CCS's toilet complaints or other complaints on previous projects were invalid or unreasonable "does not somehow make [CCS]'s interest illegitimate." *Elcon*, 174 Wn. 2d at 169.

3. Summit Cannot Establish Interference By Improper Means

“[A] cause of action for tortious interference arises from either the defendant’s pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff’s contractual or business relationships.” *Pleas v. City of Seattle*, 112 Wn. 2d 794, 803-804, 774 P.2d 1158 (1989) (City’s politically motivated arbitrary and capricious refusal to grant permits necessary for project to go forward was evidence of improper means). In this case CCS’s means of objecting to Summit as subcontractor were proper because they were provided for by contract and were conditionally privileged.⁶ The general conditions of the contract for construction of the Classroom Building were provided to all bidders, including Summit. Section 5.20(B) of the General Conditions provided as follows:

Provide names of Subcontractors and use qualified 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. (Emphasis supplied).

⁶ As discussed in Section C. 2., *infra.* and Section B. 1., *supra.*, communications between parties with a common organizational and/or pecuniary interest in the subject discussed are conditionally privileged.

CP at 49. The plain language of the contract provides reasonable objection as the proper means for the owner to seek removal of a subcontractor.

The issue of improper means was before the court in *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 746, 35 P.2d 628 (1997), where a tire dealer (Whiteman) sued Goodyear for intentionally interfering with its business expectancy by selling tires within its territory. In its contract with the dealer, Goodyear reserved the right to compete with Whiteman, although Goodyear had not done so in the past. *Id.* Goodyear eventually opened its own stores in the same territory as Whiteman's and sold its products at competitive prices. *Id.* at 737-38. As a result of the new competition, Whiteman lost customers and subsequently went bankrupt. *Id.* Whiteman claimed Goodyear's competition with him constituted tortious interference by improper means. The court held that Whiteman's tortious interference claim failed because Goodyear's alleged interference was allowed by contract and therefore the means of interference was not improper. *Id.* at 746.⁷ The court's holding turned on the fact that in its contract with the dealer, "Goodyear unequivocally reserved its right to compete with Whiteman." *Id.*

⁷ The court reversed summary judgment with respect to the dealer's claim that Goodyear tortiously interfered with a covenant not to compete executed by a former employee, when Goodyear hired the former employee and allowed him to sell in violation of the covenant.

Here as in *Goodyear*, CCS acted in furtherance of the State's contract when it reasonably objected to Summit, a sub-contractor with whom CCS had a long history of dissatisfaction, therefore the means of objecting to Summit were proper. Given the history of problems and issues CCS had to confront with regard to Summit's previous plumbing work on three major capital projects, CCS was obliged to rely on this contractual provision to object to Summit and request its replacement with another plumbing subcontractor. Because the means used by CCS to request replacement of Summit were proper, Summit cannot establish that CCS used improper means when objecting to Summit's use as subcontractor, and the claim for tortious interference should be dismissed.

4. Statutory Competitive Bidding Statutes Are Not Relevant Here

Summit argues, citing *McCandlish Elec, Inc. v. Will Const. Co., Inc.*, 107 Wn. App. 85, 97, 25 P.3d 1057 (2001), that CCS's objection to Summit was improper because Summit was the low bidder and under RCW 39.30.060 CCS was required to accept Summit as subcontractor. Neither *McCandlish* nor RCW 39.30.060 impose any such requirement and *McCandlish* and similar cases make it clear that an aggrieved "low bidder" is not entitled to seek monetary damages. RCW 39.30.060(1) requires the general contractor to identify the subcontractors it intends to use on a public

works contract, and RCW 39.30.060(2) allows the general contractor to substitute a different subcontractor if certain criteria are met.⁸ Nothing in the statute precludes the owner from objecting to the use of a contractor with a record of providing substandard work on previous projects. *McCandlish,*

⁸ RCW 39.30.060 provides: (1) 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 of the state or a state agency or municipality as defined under RCW 39.04.010 or an institution of higher education as defined under RCW 28B.10.016 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 performance of the work of: HVAC (heating, ventilation, and air conditioning); plumbing as described in chapter 18.106 RCW; and electrical as described in chapter 19.28 RCW, or to name itself for the work. The prime contract bidder shall not list more than one subcontractor for each category of work identified, unless subcontractors vary with bid alternates, in which case the prime contract bidder must indicate which subcontractor will be used for which alternate. Failure of the prime contract bidder to submit as part of the bid the names of such subcontractors or to name itself to perform such work or the naming of two or more subcontractors to perform the same work shall render the prime contract bidder's bid nonresponsive and, therefore, void.

(2) Substitution of a listed subcontractor in furtherance of bid shopping or bid peddling before or after the award of the prime contract is prohibited and the originally listed subcontractor is entitled to recover monetary damages from the prime contract bidder who executed a contract with the public entity and the substituted subcontractor but not from the public entity inviting the bid. It is the original subcontractor's burden to prove by a preponderance of the evidence that bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the prime contractor for the following reasons:

(a) Refusal of the listed subcontractor to sign a contract with the prime contractor;

(b) Bankruptcy or insolvency of the listed subcontractor;

(c) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;

(d) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract; or

(e) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.

(3) The requirement of this section to name the prime contract bidder's proposed HVAC, plumbing, and electrical subcontractors applies only to proposed HVAC, plumbing, and electrical subcontractors who will contract directly with the prime contract bidder submitting the bid to the public entity.

(4) This section does not apply to job order contract requests for proposals under *RCW 39.10.130.

where the court rejected a listed subcontractor's claim for damages based on the general contractor's substitution of another subcontractor after the project was awarded, is of no assistance to Summit. The court in *McCandlish* emphasized that the purpose of RCW 39.30.060 is to protect the public interest, not to create an actionable remedy for aggrieved subcontractors:

Competitive bidding statutes exist to safeguard the public treasury from the high costs of fraud and/or collusion. As such, Washington courts have found that a bidder's interest in a fair forum is secondary. It follows then, that even where the wrongful award of a contract violates a bidder's interest in a fair forum, the bidder may not sue for damages. To allow damages would violate the public interest by subjecting taxpayers to further penalties when they are already injured by paying too high a price under an illegal contract. The aggrieved bidder may instead sue to enjoin the award of an illegal contract, because the public benefits from preventing a contract for an excessive amount.

McCandlish, 107 Wn. App. at 97 (internal citations omitted).

Here, as in *McCandlish*, the competitive bidding statute was available to protect the public interest from any "arbitrary, capricious, fraudulent conduct on the part of public officials who would favor, without legitimate cause, someone other than the low bidder," *Mottner v. Mercer Island*, 75 Wn.2d 575, 578, 452 P.2d 750 (1969), not to provide a remedy in monetary damages to Summit. *Id.* It is well settled in Washington that an aggrieved bidder's remedy is not in an action for damages against the general contractor or owner, but in an action for injunctive relief. *Id.* at 580.

Summit's action here is merely an attempt to circumvent *Mottner* and similar decisions. See *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 835 P.2d 1012 (1992), *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 204-05, 289 P.3d 690, 696 (2012) ("It has long been the generally accepted rule that, presented with a claim by a 'bidder on a public work contract who feels aggrieved by the action of the government, the courts will only interfere with the governmental body by injunction; the remedy of monetary damages is not available.")

Summit argues, without citation to authority, that RCW 39.10 et. seq's permissive procedures for establishing alternative public works contracting procedures in specified cases, that include procedures for determining subcontractor qualifications, somehow establishes that exercising a contractual right to object to a subcontractor with a history of providing poor workmanship and follow up service is improper. RCW 39.10 allows public agencies to implement alternative procedures, in lieu of awarding a lump sum contract to the lowest responsible bidder, that allow Design-Build, Construction Manager-General Contractor or Job Order forms of contracting. RCW 39.10.200. The statute specifies which agencies may use alternative procedures and includes the requirements and procedures to be followed if one of these alternative forms is selected. RCW 39.10.300, 39.10.340 and 39.10.420. RCW 39.10 is not relevant here because the

Classroom Building – Spokane Falls Community College project was a State of Washington Public Works Contract based on a lump sum bid and alternative procedures authorized in RCW 39.10 were not utilized. Nevertheless, nothing in RCW 39.10 or RCW 39.04 precludes a contract provision that allows the state to reasonably object to a subcontractor, and the provision is consistent with and advances the public interest protected by the competitive bidding statutes. As discussed previously, competitive bidding statutes exist to protect the taxpaying public, not subcontractors and as noted in *Gostovich v. City of W. Richland*, 75 Wn.2d 583, 587, 452 P.2d 737, 740 (1969), this protection also exists “to ensure the municipality receives the best work or supplies at the most reasonable prices practicable.” The contract provision involved here allowed the state to object to Summit based on CCS’s expensive, unfavorable experience with Summit’s substandard work on earlier projects. The contractual objection advances the same public interests as the competitive bidding statutes, and exercising that contractual right cannot constitute tortious interference with a business expectancy for an improper purpose or by improper means.

C. Summit Cannot Establish the Essential Elements of Defamation

In order to state a valid claim for defamation, a plaintiff must establish the following elements: (1) falsity; (2) an unprivileged

communication; (3) defendant's fault; and (4) damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981); *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 537, 826 P.2d 217 (1991). "[A] defamation plaintiff resisting a defense motion for summary judgment must establish a prima facie case by evidence of convincing clarity." *Mark*, 96 Wn.2d at 487. Summit cannot establish that the alleged defamatory communications were false because there is no specific evidence showing falsity.⁹ Summit cannot establish publication of unprivileged defamatory statements because the allegedly defamatory statements were about a matter of common interest communicated exclusively among state employees acting within the course and scope of their employment. Summit cannot establish fault because even if the statements were false, Summit cannot establish actual malice. Summit cannot establish that it was damaged by the statement "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. . ." because this statement was not included in Dennis Dunham's memo to Enterprise and there is no evidence that the statement played any

⁹ For purposes of the motion for summary judgment, CCS concedes that there may be a question of fact concerning the falsity of the statement, "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. . ." This makes no difference, however, because that statement, while included in an e-mail from James Collen, CCS Director of Facilities Maintenance to Dennis Dunham, CCS District Director of Facilities, was not included in Dunham's memo to Enterprise objecting to Summit, was not a basis for the objection to Summit and therefore could not have damaged Summit. CP at 52-58.

part in the objection to Summit. In addition, even if the CCS employees were acting outside the course and scope of their employment, as a matter of law, CCS cannot be held liable for the intentional torts of its employees.

1. Summit Cannot Establish Falsity

Summit must put forward specific evidence to establish falsity -- general denials of the truth of defamatory statements are not sufficient to defeat summary judgment in defamation action. *Mark*, 96 Wn.2d at 489-490, *Lambert v. Morehouse*, 68 Wn. App. 500, 507-08, 843 P.2d 1116 (1993). In its brief on appeal, pages 25-27, Summit claims the following statements are provably false:

1. Portions of an e-mail from CCS HVAC Technician Jim Armor to District Facilities Manager Dennis Dunham including:
 - a. “These problems extended from poor quality, code compliance issues, scheduling issues, to warranty issues”; and
 - 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 whenever possible.”
2. Portions of a statement CCS Construction Manager Cheryl Groth made to District Facilities Manager Dunham including:

- a. "Summit. . .did not install the toilet carriers per manufacturer's specs or per acceptable construction standards;" and
 - b. "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."
3. The statement attributable to CCS plumber Mark Connolley, in an e-mail from District Facilities Maintenance Director Jim Collen: "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. . ."

Plumber Connolley also supplied Director Dunham with an e-mail containing nine examples of sub-standard work by Summit on three projects. CP at 53. Dunham did not include the "upside down" statement, attributed to Connolley, in his written objection to Summit but did include Connolley's nine examples in CCS's written objection to Summit. CP at 57-58.

Significantly, in its brief on appeal, Summit does not claim that Connolley's statements containing the nine examples of deficient work were defamatory. This is significant because, even if Summit could convince the court that there are questions of fact pertaining to the allegedly false statements by Armor and Groth and the "upside down"

comment attributed to Connolley, Summit still cannot go forward unless it can show that it would have gotten the subcontract despite the nine deficiencies Connolley pointed out. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 598, 943 P.2d 350, 361 (1997).

In *Schmalenberg*, after discussing three significant cases involving statements that were provably false in part but not in whole, the court explained:

Together, *Mark*, *Herron*, and *Caruso* teach that when a defamation defendant's statement is partly true in substance and partly false in substance, the defamation plaintiff may not recover for damage that would have occurred even without the false part. He or she may, however, recover for damage that would not have occurred but for the false part. This is the same as saying, in somewhat idiomatic terms, that a defamation plaintiff may not recover without showing that the false part of the statement increased its "sting." If the false part of a statement increased its "sting," a rational trier could find that at least some of the plaintiff's damage would not have occurred but for the false part. But if the false part of a statement did not increase its "sting," a rational trier would be compelled to find that the plaintiff's damage would have occurred due to the true part, or, in equivalent but alternative terms, that the plaintiff's damage would have occurred even in the absence of the statement's false part.

Id. Here, the statements from Connolley about deficiencies in Summit's work on three previous projects that Dunham included in the objection to Summit, were materially the same as the statements from Armor and Groth. Therefore, while the statements by Groth and Armor corroborated

Connolley's criticisms of Summit's work, the "sting" of the objection was the same with or without the statements by Groth and Armor.

The "sting" of CCS's statement in this case is that CCS had problems with Summit's workmanship and responsiveness to requests to correct deficiencies on other projects and therefore did not want Summit to work on the SFCC Classroom Building project. Ample evidence establishes CCS's history of problems with Summit, particularly with respect to the SCC Science Building toilets and Summit has provided no evidence that this history is provably false. CCS need not prove "the literal truth" or validity of every complaint it had with Summit's work, but must only show that the allegedly defamatory statement is substantially true or that the gist of the story, the portion that carries the "sting," is true." *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 87-88, 321 P.3d 276 (2014), *review denied*, 180 Wn.2d 1024, 328 P.3d 903. Even if it could be shown that some of CCS's complaints about Summit were not literally true, it would not be sufficient to show that CCS's objection to Summit was "provably false":

The "sting" of a report is defined as the gist or substance of a report when considered as a whole. In applying this test, [the court] require[s] plaintiffs to show that the false statements caused harm distinct from the harm caused by the true portions of a communication[.]

“Where a report contains a mixture of true and false statements, a false statement (or statements) affects the ‘sting’ of a report only when ‘significantly greater opprobrium’ results from the report containing the falsehood than would result from the report without the falsehood.” The mere omission of facts favorable to the plaintiff or facts the plaintiff thinks should have been included in a publication does not make that publication false. As recently noted by this court in *Sisley v. Seattle School District No. 1*, “the question is not whether the statement is literally true but, rather, whether ‘the statement is substantially true’ or ‘the gist of the story, the portion that carries the “sting,” is true.’

Sisley, 180 Wn. App. at 87-88. Here, the declarations offered by Summit’s owner and expert, indicating that Summit has a good reputation as a subcontractor and that they disagree with CCS’s appraisal of Summit’s work on previous projects, are mere rhetoric and not proof that CCS’s contention that it had problems with Summit, its work and warranty service on previous projects was false. As demonstrated by CCS’s longstanding complaints about the SCC Science Building toilets, CCS definitely was not a happy or satisfied customer. Summit cannot prove that CCS was satisfied with Summit’s work and Summit’s protestation that CCS should have been satisfied is not sufficient to prove falsity. *Id.* at 89-90.

2. The Allegedly Defamatory Statements Were Protected by A Qualified Privilege

An unprivileged communication or publication is an essential element of a claim for defamation. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). “An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.” Restatement (Second) of Torts §596 (1977). The common interest privilege “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 v. Bharti*, 144 Wn. App. 731, 747-48, 182 P.3d 455 (2008) (quoting *Moe v. Wise*, 97 Wn. App. 950, 958-59, 989 P.2d 1148 (1999)). A qualified privilege exists when a communication is made between co-employees acting within the course and scope of employment. *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 703, 24 P.3d 390 (2001) *rev’d on other grounds*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); *Woody v. Stapp*, 146 Wn. App. 16, 21, 189 P.3d 807 (2008). “When a qualified privilege applies, a plaintiff cannot establish a prima facie case of defamation unless the plaintiff can show by clear and convincing evidence the declarant had knowledge of the statement’s falsity

and he or she recklessly disregarded this knowledge.” *Woody*, 146 Wn. App. at 21-22. If a qualified privilege exists, “the burden then shifts to the plaintiff to show that the publisher abused the privilege.” *Alpine Industries Computers, Inc. v. Cowles Pub. Co.*, 114 Wn. App. 371, 382, 57 P.3d 1178 (2002).

Here, the qualified privilege applies because the allegedly defamatory statements Summit complains of were made by state employees and communicated only to other state employees. The communications concerned the employees’ knowledge of deficiencies in Summit’s work on previous state projects and consisted of a recitation of observations of some of the problems with Summit’s work on other state projects. It was the job of CCS plumber Mark Connolley to be familiar with the plumbing components in CCS buildings and the workmanship of plumbers who worked on CCS plumbing, the job of HVAC Technician Jim Armor to be familiar with HVAC components in CCS buildings and the workmanship of contractors who worked on those components and the job of Construction Manager Cheryl Groth to be familiar with the quality of contractor’s work on CCS buildings and facilities. It cannot be disputed that it was within the scope of their state employment for Connolley, Armor and Groth to provide input to Facilities Director Dunham, when asked, concerning Summit’s previous work and their opinions of Summit’s fitness as a plumbing

subcontractor. It was within the scope of Dunham's state employment to provide the information to Enterprise, the contract administrators for the SFCC Classroom Building, and within the scope of Mr. Lohrengel's state employment as Construction Project Coordinator with Enterprise to receive the information and act on it.

The record unequivocally establishes that the CCS employees alleged to have made defamatory statements were acting within the course and scope of employment and that the allegedly defamatory statements were made "in house." Furthermore, if, as Summit now claims in an attempt to avoid the conditional privilege, these employees were acting outside the scope of their employment, CCS cannot be vicariously liable for their conduct. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53, 59 P.3d 611 (2002). The communications between Connolley, Groth, and Armor and Dunham, as well as the communication between Dunham and Lohrengel were protected by the common interest qualified privilege and Summit cannot establish a prima facie case of defamation unless falsity and malice can be established.

3. Summit Cannot Show Malice

A qualified privilege may be abused, and its protection lost, if the publication is made with malice. *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 742, 973 P.2d 1074 (1999) (citing *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 657-58, 717 P.2d 1371 (1986)). Actual

malice exists when a statement is made “with knowledge of its falsity or with reckless disregard of its truth or falsity.” *Doe*, 143 Wn.2d at 703 (quoting *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 Wn. App. 334, 343, 760 P.2d 368 (1988). In order to avoid summary judgment in cases such as this, where a conditional privilege applies, the plaintiff must come forward with evidence “sufficient to permit a reasonable trier of fact to find clear and convincing proof of actual malice.” *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). Here there is no evidence that the “sting” of District Facilities Director Dunham’s letter or the e-mail content that supported the letter was false. On the contrary, CCS can point to substantial documentary evidence that confirms a history of issues with Summit and its workmanship. On the other hand, Summit can provide no evidence at all, much less clear and convincing evidence, to establish that Dunham, Armor, Connolley or Groth knew they were providing false information or recklessly disregarded the truth. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 591, 943 P.2d 350 (1997).

D. Summit Is Not Entitled To Attorney Fees On Appeal – CCS Requests Attorney Fees On Appeal

In its brief on appeal, Summit requests attorney fees, pursuant to RAP 18.1 if it prevails, under RCW 39.04.240 in conjunction with RCW 4.84.250. Appellant’s Brief, p. 33. RCW 39.04.240 provides, in pertinent part:

The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

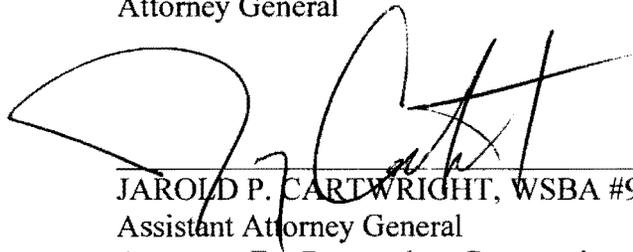
Even if Summit were to prevail on appeal, it would not be entitled to attorney fees because Summit did not serve an offer of judgment as required by RCW 4.84.260 and therefore cannot be deemed the prevailing party. On the other hand, if CCS prevails on appeal, it will be deemed the prevailing party, under RCW 4.84.270 because Summit “recovers nothing,” and judgment of dismissal will be entered in favor of the State/CCS. RCW 4.84.270; *Alliance One Receivables Management v. Lewis*, 180 Wn.2d 389, 394-95, 325 P.3d 904, 907 (2014). Therefore, as prevailing party, CCS is entitled to an award of attorney fees. *Id.*

V. CONCLUSION

Having endured Summit's substandard work and poor customer service on previous construction projects, CCS was entitled to protect the public interest and object to Summit as plumbing subcontractor on the SFCC Classroom Building project. Neither tortious interference with a business expectancy nor defamation can be established. Therefore, based on the arguments and authorities cited, CCS requests that the court affirm the order of the trial court and award CCS's costs and attorney fees on appeal.

Respectfully submitted this 19th day of September, 2014

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PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19 day of September, 2014, at Spokane, Washington.



NIKKI GAMON