

No. 63427-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JKR, LLC, a Washington domestic limited liability company,

Appellant,

vs.

LINEN RENTAL SUPPLY, INC., a Washington domestic corporation, d/b/a Tomlinson Linen, d/b/a Tomlinson Linen Services; GARY TOMLINSON and JANE DOE TOMLINSON, and the marital community composed thereof; and TIMOTHY TOMLINSON and JANE DOE TOMLINSON, and the marital community composed thereof,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE ROBERT EADIE

REPLY BRIEF OF APPELLANT/
BRIEF OF CROSS-RESPONDENT

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I. REPLY ARGUMENT

A. **Tortious Interference With An Existing Contract Does Not Require Additional Evidence Of Improper Motive or Improper Means.**

This appeal raises a legal issue that remains unresolved in Washington state: whether the tort of tortious interference with existing contact requires additional evidence of improper motive or improper means. As set out in the opening brief (App. Br. 10-14), given the strong social policy in support of the enforcement of contractual obligations, appellant argues that intentional interference with an existing contract supplies the requisite impropriety that must be independently established when the claimed interference is only with a business expectancy. Affirmatively adopting such a rule is wholly consistent with the law of this state, including *Calbom v. Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964) (App. Br. 10) and *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 566 P.2d 972 (1977) (App. Br. 11-12).¹

¹ The quote from *Island Air* in the opening brief at 11 contains a typographical error: this court in *Island Air* concluded that “a claim of *competition alone* does not justify interference by a stranger to a contract.” *Island Air*, 18 Wn. App. at 142 (italicized emphasis in original). Appellant’s counsel apologizes for this error.

Respondents do not address the policy reasons for such a rule at all, claiming only that this issue has been resolved by the recital of the elements of a tortious interference claim in ***Commodore v. University Mechanical Contractors, Inc.***, 120 Wn.2d 120, 839 P.2d 314 (1992), ***Sintra, Inc. v. City of Seattle***, 119 Wn.2d 1, 829 P.2d 765, *cert. denied*, 506 U.S. 1028 (1992), and ***Pleas v. City of Seattle***, 112 Wn.2d 794, 774 P.2d 1158 (1989) (Resp. Br. 18). But each of these cases is a business expectancy case. To the extent they purport to recite the elements of the tort of tortious interference with an existing contract, that language is only dicta and not controlling. See ***Estate of Hansen***, 128 Wn.2d 605, 609-10, 910 P.2d 1281 (1996) (holding that language in a case that only "implicitly" accepts a position and does not directly rule on the specific issue is dicta and not controlling).

Division Three's recent decision in ***Deep Water Brewing, LLC v. Fairway Resources Ltd.***, 152 Wn. App. 229, 215 P.3d 990 (2009), which was decided after the opening brief was filed, also does not support respondent's position. In ***Deep Water***, the court without analysis again recites the standard for tortious interference, citing ***Commodore***, ***Sintra*** and ***Pleas***, and as in those cases lumps

together “contractual relations or business expectancy” in considering the elements of the torts. *Deep Water*, 215 P.3d at 1008, ¶ 78. Unlike *Commodore/Sintra/Pleas*, which considered tortious interference with business expectancy (see App. Br. 12), *Deep Water* is a contractual interference case. But it does not appear that the legal argument made in this case, concerning the necessary motive or means for tortious interference with an existing contract, was made or considered in *Deep Water*.

Further, the defendant was found *liable* for tortious interference with contract in *Deep Water*. Division Three, relying upon *Calbom*, 65 Wn.2d at 162, affirmed the trial court’s determination after trial that a corporate officer could be liable for tortious interference with easement and right-of-way agreements despite his claim that he was only protecting his corporation’s interests in enhancing the value of lots that otherwise would be affected by these contracts. *Deep Water*, 215 P.3d at 1009, ¶ 84. In doing so, the *Deep Water* court quoted with approval the principle relied upon by appellant here, that contrary to respondents’ claims and the trial court’s ruling, a third party “is not free, under this rule, to induce a contract breach merely to obtain

customers or other prospective economic advantage; but he may do so to protect what he perceives to be existing interests . . .”. W. Keeton, Prosser and Keeton on Torts, § 129, at 986 (5th ed.); *quoted at Deep Water*, ¶ 215 P.3d at 1009, ¶ 82.

The public policy encouraging the enforcement of contractual obligations fulfills any requirement that improper means or motive be shown in a claim for tortious interference with an existing contract. For the reasons set out in the opening brief and the out-of-state cases cited there (App. Br. 13-14) this court should reverse and remand for trial on Service Linen’s claims based on Tomlinson’s intentional interference with valid existing contractual relationships.

B. Even If Improper Motive or Improper Means Is a Necessary Element of Tortious Interference With an Existing Contract, Genuine Issues of Fact Precluded Summary Judgment.

As set out in the opening brief, the trial court improperly weighed the evidence and failed to take all inferences in the light most favorable to the non-moving party Service Linen in granting Tomlinson summary judgment of dismissal even if improper motive or improper means is a necessary element of tortious interference with an existing contract. On appeal, respondents continue to rely

on the favorable resolution of disputed facts to support the trial court's dismissal of the claims against them.

Pages 25-32 of respondents' brief summarize the disputed evidence supporting defendants' claims that they had no knowledge of existing Service Linen contracts and did not improperly induce the breach of the service contracts at issue. There was evidence to the contrary, however (see App. Br. at 3-6, Appendix B) and on summary judgment appellant was entitled to all inferences from the evidence. See, e.g. **Sintra**, 119 Wn.2d at 28 (reversing trial court's award of summary judgment for defendant on claim of wrongful interference with business expectancy: "there are many areas of disputed fact: . . . [including] the extent of the economic interference [and] the causal relationship between the . . . interference and damages); **Olympic Fish Products, Inc. v. Lloyd**, 93 Wn.2d 596, 602, 611 P.2d 737 (1980) (reversing trial court's award of summary judgment for defendant on claim of wrongful interference with output contract; corporate officer could be liable for tortious interference with corporation's contract for advising breach of contract).

Respondents' reliance on ***Daniels-Head & Associates v. William M. Mercer, Inc.***, 819 F.2d 914 (9th Cir. 1987) (Resp. Br. 28) is especially misplaced. There, a bankruptcy court *after trial* found that an insurance brokerage's loss of a client's business was not because of a competitor's interference, but because plaintiff had failed to forward the client's paid premiums to an insurer. The client had thereafter "solicited proposals from numerous insurance agents before selecting" the competitor as its broker. ***Daniels-Head***, 819 F.2d at 921. Here, to the contrary, the evidence on summary judgment was that several of Service Linen's restaurant clients entered into contracts with Tomlinson before or shortly after they purported to terminate their contracts with Service Linen, and that in each instance they acted because Tomlinson had solicited their business knowing they had an existing contract with Service Linen. (App. Br. 5-7, Appendix B: CP 31, 226, 233, 255-56, 259, 271, 289, 299, 309-311, 339, 444-45, 460-61, 479-88, 845-63)

Pages 33-41 of respondents' brief are a recital of some of the excuses made on behalf of each of eight Service Linen's customers for breaching their contracts with Service Linen after being solicited by Tomlinson. In violation of RAP 10.3(a)(6),

respondents do not provide a single reference “to relevant parts of the record” for these claimed “facts.” As explained in the opening brief, properly supported by references to the record (App. Br. 5-7, Appendix B), the excuses proffered for breaching Service Linen’s contracts raised disputed issues of material fact that the trial court improperly decided by weighing the evidence on summary judgment. (App. Br. 14-18)

Our courts require adherence to RAP 10.3. The rule “is not merely a technical nicety,” ***Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998), and it is not the court’s job to “comb the record with a view toward constructing arguments for counsel . . .” ***Lint***, 135 Wn.2d at 532. See ***Kirk v. Moe***, 114 Wn.2d 550, 789 P.2d 84 (1990) (reversing summary judgment in favor of employee on equitable estoppel grounds; respondent employee failed to cite to the record in his brief to support his claim of detrimental reliance); ***Newton v. Pacific Highway Transport Co.***, 18 Wn.2d 507, 508, 139 P.2d 725 (1943) (reversing on issue whether trial court erred in ruling as a matter of law that plaintiff was contributorily negligent; reprimanding respondent for failing to cite to the record to support its factual statements in its brief); ***Hurlbert v. Gordon***, 64 Wn. App.

386, 399-400, 824 P.2d 1238, *rev. denied*, 119 Wn.2d 1015 (1992) (reversing partial summary judgment and sanctioning respondent for failure to adequately cite to the record). Even if improper motive or improper means is a necessary element of tortious interference with an existing contract, genuine issues of fact precluded summary judgment.

II. RESPONSE TO CROSS-APPEAL

A. The Trial Court Did Not Abuse Its Discretion In Denying Respondents Fees Below.

There was no contractual basis for an award of fees to either party. After the trial court granted summary judgment of dismissal, respondents sought fees under RCW 4.84.185 and CR 11. (CP 1716-28) The trial court denied their motion. (CP 1837-38) Respondents cross appeal.

This court reviews a trial court's award or denial of fees under RCW 4.84.185 or CR 11 for abuse of discretion. ***Snohomish County v. Citybank***, 100 Wn. App. 35, 43, 995 P.2d 119 (2000). On appeal, and without acknowledging this deferential standard of review, see ***Snohomish County***, 100 Wn. App. at 43, respondents claim this action was brought without sufficient factual investigation or legal basis.

As in their response to the appeal, respondents' cross-appeal argument is made wholly without citation to the record (Resp. Br. 41-47), and should be disregarded. In any event, the trial court denied fees after considering plaintiffs' counsels' declarations setting out both their careful investigation of the facts and their exhaustive review of the law before proceeding. (CP 1741-47; 1757-68) Counsel properly limited plaintiff's factual claims as discovery progressed. (CP 1746-47, 1767) Counsel advocated for the formulation of the tort of intentional interference with contract that is argued below and in this appeal, with the knowledge that an unpublished case from this court used the standard proposed by appellant in affirming an award for intentional interference with contract. (CP 1768; 1770-76)

In ***Loc Thien Truong v. Allstate Property and Cas. Ins. Co.***, 151 Wn. App. 195, 207, ¶¶ 31-32, 211 P.3d 430, 436 (2009), this court reversed an award of attorney fees under RCW 4.84.185 and CR 11 when the lawsuit aimed to extend existing law and there had been no published appellate opinions addressing the question raised. This court noted that "CR 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal

theories.” **Loc Thien Truong**, 151 Wn. App. at 207, ¶ 32 (citing **Bryant v. Joseph Tree, Inc.**, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992)).

“The decision of whether to award attorney fees for a frivolous lawsuit is within the trial court's discretion and we will not disturb the court's decision absent a clear showing of abuse. **Rhinehart v. Seattle Times**, 59 Wn. App. 332, 339-40, 798 P.2d 1155 (1990). . . . The purpose of RCW 4.84.185 is to discourage frivolous lawsuits and to compensate the targets of frivolous lawsuits for their fees and costs incurred in defending meritless cases. **Kearney v. Kearney**, 95 Wn. App. 405, 416, 974 P.2d 872, *rev. denied*, 138 Wn.2d 1022 (1999). If an action can be supported by *any rational argument*, then the trial court properly exercised its discretion in not finding an action to be frivolous. **Rhinehart**, 59 Wn. App. at 340, 798 P.2d 1155 (emphasis added).” **Timson v. Pierce County Fire Dist. No. 15**, 136 Wn. App. 376, 149 P.3d 427 (2006) (denying fee award). The trial court in this case did not abuse its discretion in declining to award respondents fees below.

B. Respondents Are Not Entitled To Fees On Appeal.

Just as fees were not justified below, this appeal is not frivolous, and respondents are not entitled to fees on appeal. “An appeal is frivolous when, considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ, i.e., ‘it is devoid of merit that no reasonable possibility of reversal exists.’” *Brin v. Stutzman*, 89 Wn. App. 809, 828, 951 P.2d 291, *rev. denied*, 136 Wn.2d 1004 (1998) (citation omitted). “Cases of first impression are not frivolous if they present debatable issues of substantial public importance.” *Olson v. City of Bellevue*, 93 Wn. App. 154, 165-66, 968 P.2d 894 (1998), *rev. denied*, 137 Wn.2d 1034 (1999), *quoting Cary v. Allstate Ins. Co.*, 78 Wn. App. 434, 440-41, 897 P.2d 409 (1995), *aff’d*, 130 Wn.2d 335, 922 P.2d 1335 (1996). In this case, the argument for fees on appeal is particularly unfounded given respondents’ own failure to properly cite to the record in either their response or their cross-appeal. This court should deny respondents’ request for fees on appeal.

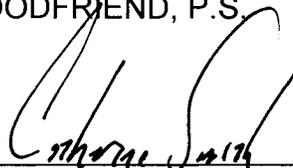
III. CONCLUSION

This court should reverse and remand for trial on Service Linen's claims for tortious interference with existing Service Linen contracts. This court should affirm the trial court's denial of fees under RCW 4.84.185 or CR 11, and deny respondents' request for fees on appeal.

Dated this 4th day of December, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: _____


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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 4, 2009, I arranged for service of the foregoing Reply Brief of Appellant/Brief of Cross-Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 4th day of December, 2009.



Tara D. Friesen