

66279-1

66279-1

No. 66279-I

---

---

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

---

---

ROBERT S. MOORE,  
Appellant,

v.

COMMERCIAL AIRCRAFT INTERIORS, LLC, and JERRY WELCH,  
INDIVIDUALLY AND AS PRESIDENT AND CHIEF EXECUTIVE  
OFFICER OF COMMERCIAL AIRCRAFT INTERIORS, LLC,  
Respondent.

---

---

**BRIEF OF APPELLANT**

---

---

Kelby D. Fletcher  
STOKES LAWRENCE, P.S.  
800 Fifth Avenue, Suite 4000  
Seattle, Washington 98104-3099  
(206) 626-6000

Attorneys for Appellant Robert S. Moore

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	3
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	3
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT .....	13
A. Summary of Argument.....	13
B. Summary Judgments Are Reviewed <i>De Novo</i> .....	13
C. Seeking and Obtaining Employment Is Constitutionally Protected.....	13
D. CAI Improperly Interfered with Moore’s Employment Opportunity with IAI. ....	14
1. The Elements of Tortious Interference with a Business Expectancy.....	14
2. Interference with Employment Opportunities Is Encompassed Within Tortious Interference with a Business Expectancy.....	16
3. Threats of Litigation May Be Tortious. ....	16
4. CAI Failed to Establish any Protected Legal Interests. ....	16
5. The Inevitable Disclosure Doctrine Has Never Been Approved in this State.....	18
6. CAI Cannot Rely Upon the Inevitable Disclosure Doctrine.....	19

7.	CAI Should not Be Able to Rely Upon <i>Brown v. Safeway Stores, Inc.</i> .....	22
	a. CAI Did not Act in Good Faith. ....	23
	b. CAI Did not Have a Legally Protectable Interest.....	24
	c. Moore’s Employment by IAI Would not Impair an Interest of CAI. ....	25
E.	Moore Established a Claim for Blacklisting.....	25
V.	CONCLUSION.....	27

## TABLE OF AUTHORITIES

	Page
Washington Cases	
<i>Brown v. Safeway Stores, Inc.</i> , 94 Wn.2d 359, 617 P.2d 704 (1980).....	22
<i>Copier Specialists v. Gillen</i> , 76 Wn. App. 771, 887 P.2d 919 (1995).....	24
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	17
<i>Fitzpatrick v. Okanogan County</i> , 169 Wn.2d 598, 238 P.3d 1129 (2010).....	24
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	14
<i>Group Health Coop. of Puget Sound v. King County Med. Soc’y</i> , 39 Wn.2d 586, 237 P.2d 737 (1951).....	14
<i>McCallum v. Allstate Prop. &amp; Cas. Co.</i> , 149 Wn. App. 412, 204 P.2d 944, review denied, 166 Wn.2d 1037 (2009).....	17
<i>Newton Ins. Agency &amp; Brokerage v. Caledonian Ins. Group, Inc.</i> , 114 Wn. App. 151, 52 P.3d 30 (2002).....	27
<i>O’Brien v. Western Union Telegraph Co.</i> , 62 Wash. 598, 114 P. 441 (1911) .....	26
<i>Pac. Nw. Shooting Park Ass’n v. City of Sequim</i> , 158 Wn.2d 342, 44 P.3d 276 (2006).....	15
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	13
<i>Schooley v. Pinch’s Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	26
<i>Scymanski v. Dufault</i> , 80 Wn.2d 77, 491 P.2d 1050 (1971).....	16
<i>Sheppard v. Blackstock Lumber Co.</i> , 85 Wn.2d 929, 540 P.2d 1373 (1975).....	14

<i>State v. Vance</i> , 29 Wash. 435, 70 P. 34 (1902) .....	14
--	----

Additional Cases

<i>EarthWeb, Inc. v. Schlack</i> , 71 F. Supp. 2d 299 (S.D.N.Y. 1999) .....	21
<i>Foltz v. State Farm Mut. Auto. Ins. Co.</i> , 331 F.3d 1122 (9th Cir. 2003)..	17
<i>PepsiCo, Inc. v. Redmond</i> , 54 F.3d 1262 (7th Cir. 1995) .....	19, 20
<i>Strata Mktg., Inc., v. Murphy</i> , 317 Ill. App. 3d 1054, 740 N.E. 2d 1166 (2000) .....	21
<i>Supreme Court of New Hampshire v. Piper</i> , 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).....	14
<i>Teradyne, Inc. v. Clear Commc'ns Corp.</i> , 707 F. Supp. 353 (N.D. Ill. 1989).....	20

Statutes

RCW 49.44.010 .....	25
Uniform Trade Secrets Act, RCW 19.108.020(1).....	18
Washington Constitution, art. I, section 12.....	14
Washington Constitution, art. XII, section 22 .....	14

Additional Authorities

Restatement (Second) of Torts (Tent. Draft No. 14) § 766A (1969).....	16
Restatement (Second) of Torts, Ch. 37 (1979) .....	15
Restatement (Second) Torts § 766A (1979) .....	16
Restatement (Third) of Employment Law (Tent. Draft No. 3) § 8.05 (2010) .....	25
Restatement (Third) of Employment Law (Tent. Draft No. 3) § 8.05(b) (2010).....	21
Webster's New Int'l Dictionary (2d ed.) .....	14
WPI 352.01 (5th ed. 2005).....	15
WPI 352.02 (5th ed. 2005).....	15

## I. INTRODUCTION

Plaintiff/Appellant Robert Moore was employed on two occasions by Defendant/Respondent Commercial Aircraft Interiors (“CAI”). CAI chose not to obtain from Moore on either occasion any sort of post-employment restraint (“PER”) such as a non-competition agreement.

Moore resigned from CAI after his first hire and thereafter acted as a broker for the sale of the company to a competitor, International Aircraft Interiors, now known as Volant Aerospace, LLP (“IAI” or Volant). The parties signed non-disclosure agreements and exchanged trade secret information. The deal fell through. Moore was rehired by CAI. Five months later, CAI reduced its work force and Moore was laid off. It did not offer Moore severance and therefore did not obtain a release. Had it done so, it could have obtained a PER.

In September, 2009 Moore sought employment with IAI. The president of IAI wrote to CAI to learn whether Moore was subject to a PER. Counsel for CAI replied that employment of Moore in any capacity would be unlawful and that if IAI did employ him, CAI “would institute legal action to protect its confidential information...and to prohibit the unfair competition by Volant that would result from such employment...”

As a result of CAI’s threat of litigation, IAI chose not to employ Moore.

Moore brought suit for tortious interference with his employment expectancy and for blacklisting in violation of RCW 49.44.010. CAI brought in as a third party defendant IAI and asserted counterclaims against Moore.

Moore and IAI brought motions for summary judgment. The trial court determined that Moore's tortious interference claim failed because CAI was legally privileged to threaten IAI with litigation if it employed Moore. The trial court also dismissed the blacklisting claim. CAI obtained summary judgment of dismissal and it later dismissed IAI and its counterclaims against Moore. The trial court determined that CAI did not act improperly and was asserting a legally protectable interest in its conduct. The trial court referred to *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980) as authority for the proposition that CAI, as Moore's former employer, could threaten a potential employer with litigation if it hired him.

This appeal followed.

CAI had no legal interest to protect when it interfered with Moore's potential employment. CAI failed to present any evidence of any actual or threatened misconduct by Moore. There was evidence, through CAI's pleadings, of its bad faith.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting summary judgment in favor of CAI on Moore's claim that CAI tortiously interfered with his expectancy of employment by IAI.

2. The trial court erred in granting summary judgment in favor of CAI on Moore's claim that CAI blacklisted him in order to prevent his future employment.

### **Issues Pertaining to Assignments of Error**

A. What is the appropriate standard of review of a grant of summary judgment to one party and the denial of summary judgment to the appellant? (Assignments of Error 1 and 2).

B. Is there a Constitutional right to seek and obtain employment? (Assignments of Error 1 and 2).

C. Did CAI have any lawful interest in preventing Moore's future employment with IAI? (Assignment of Error 1).

D. Did CAI improperly interfere by improper means or for an improper motive with Moore's employment opportunity with IAI? (Assignments of Error 1 and 2).

E. Did Moore establish that he was blacklisted in violation of RCW 49.44.010? (Assignment of Error 2).

### **III. STATEMENT OF THE CASE**

Moore was employed on two occasions by CAI. He was initially hired by CAI in March 2004 in a sales job paying \$5,000 per month. CP 77, 81. Moore quit in August 2008 in order to assist in brokering a transaction in which IAI would acquire CAI. In that work, he was an independent contractor both to CAI and to IAI. CP 77.

After his resignation from CAI in 2008, Moore signed non-disclosure agreements (NDAs) with both CAI and IAI in order to facilitate IAI's acquisition of CAI. CP 91, 93. Both CAI and IAI compete for work in commercial aircraft interior refurbishment. Each entity was aware of Moore's involvement on behalf of the other entity during these negotiations. CP 77.

During their negotiations, CAI and IAI disclosed to each other trade secret information that would otherwise be subject to the protections of the Uniform Trade Secrets Act, RCW 19.108. CP 77. The president of CAI, Jerry Welch, maintained that certain, unspecified CAI trade secret information was not disclosed to IAI. CP 115.

The negotiations between CAI and IAI were not fruitful and the proposed deal fell through. CP 77. Moore was rehired by CAI as a vice president of sales and marketing on March 16, 2009. CP 77, 83, 115. He

was laid off by CAI five months later, on August 25, 2009, due to economic conditions. CP 77, 85, 115.

On the two occasions he was employed by CAI, Moore was not required to enter into any sort of non-competition agreement or other form of PER. Moore did, “agree to the Company’s policy of non-disclosure of any and all company policies, trade secrets, intellectual properties and customer contacts to outside entities or persons.” CP 87, 89.

According to its Interrogatory answers, CAI did not require Moore to sign a PER because Moore, “had worked for CAI and with Jerry Welch [CAI’s president] for many years so a level of trust had been developed.” CP 150.

Moore and the presidents of CAI and IAI had worked together in a variety of ways in previous years. CAI stated in its Answer that Moore and Welch were both previously employed by IAI where they worked together. Answer at ¶ 3, CP 8. The president of IAI and Moore previously worked in sales and marketing at another aerospace company. *Id.* Welch, CAI’s president, was the founder of IAI and taught its employees the aircraft refurbishment business. CP 171. CAI’s counterclaim against Moore and its third-party complaint against IAI

alleged bad faith by Moore and IAI.<sup>1</sup> One of the claims made by CAI against IAI was for negligent misrepresentations made during the negotiations. CP 14-15.

When Moore was re-hired by CAI its management was aware that IAI was competing against it. CP 77.

After Moore was laid off by CAI in August 2009, he sought employment from IAI. CP 77. Moore was aware of his obligation not to disclose CAI trade secrets or proprietary information to IAI. CP 78. There is no evidence that Moore threatened to, or did, divulge such information.

In a September 25, 2009 letter, IAI's president, Ian Rollo, informed CAI that it intended to hire Moore, "only if said offer of employment does not violate any non-compete or other restrictive covenants existing between Mr. Moore and CAI." CP 54.

CAI's legal counsel responded to Mr. Rollo's letter on October 12, 2009. His letter stated, in part:

Employment of Mr. Moore by [IAI] in any capacity; as a consultant, employee, independent contractor or otherwise would necessarily result in his breach of his

---

<sup>1</sup> Paragraph 22 of the Counterclaim against Moore stated, "It is believed and therefore alleged that neither Rollo [owner of IAI] nor IAI had sufficient cash or available credit to purchase CAI's assets at market value." Putting aside whether this comports with CR 11, there was no evidence presented by CAI to substantiate this assertion. CAI chose to dismiss all of its claims against IAI. CP 221-222.

common law duty not to violate his position of trust and confidence with CAI in as much as the companies are competitors and Mr. Moore could not avoid the use of or disregard the infinite knowledge he possesses of CAI confidential information and trade secrets...If Mr. Moore is employed by [IAI], CAI will institute legal action... .

CP 56.

Moore engaged counsel, Mark Hutcheson of Davis Wright Tremaine, to persuade CAI to back off. CP 62-75. (Hutcheson declaration and attachments). Mr. Hutcheson, an experienced management-side labor and employment lawyer, wrote to CAI's counsel and related the negotiations between CAI and IAI over the course of previous year. CP 65-66. This included, among other things, disclosure of prospective customers, anticipated income and assumption by IAI of CAI's line of credit. CP 66.

Hutcheson proposed a settlement agreement which contained a mutual non-disparagement provision and mutual releases of claims CAI and Moore could have against the other. CP 69. The proposed agreement would not release future claim if CAI established that Moore, "knowingly and intentionally violated a statute or provided to [IAI] information that was not previously disclosed to and known by [IAI]." *Id.*

Counsel for CAI rejected Mr. Hutcheson's proposal. CP 71-72. Counsel for CAI wrote that the non-disparagement provision, "disclosed

for the first time that Bob Moore was contemplating making disparaging remarks to such entities.” CP 71. This statement by CAI’s agent had no evidentiary or other basis.

As a result of CAI’s threats, IAI would not hire Moore. Had those threats not been made, IAI would have hired Moore. As recently as January 19, 2010 IAI asserted it was willing to hire Moore “subject to CAI releasing both you and [IAI] of any potential liability related to your hiring...” CP 95 (Letter of Michael Guagenti, Senior Vice President and CFO of IAI/Volant).

Moore has sustained general and special damages as a result of CAI’s actions. CP 78 at ¶ 13. When he lost his job at CAI in August, 2009, Moore was earning \$70,000 in salary. IAI had offered to match that salary. *Id.*

Moore filed a civil action in Skagit County Superior Court in which he pleaded two claims: that CAI tortiously interfered with his employment expectancy with IAI and that CAI blacklisted him in violation of a Washington statute, RCW 49.44.010. CAI answered and denied the claims, asserted counterclaims against Moore for breach of contract, misappropriation of trade secrets, negligent misrepresentation and defamation. CP 11-13. CAI also made a third-party complaint against IAI with a number of claims.

CAI did not conduct any discovery. Moore propounded interrogatories seeking the factual bases for CAI's counterclaims and its refusal to allow Moore to become employed by IAI.

CAI pleaded in its Counterclaim at Paragraph 22 that, "Moore has or will disclose CAI's trade secret information to [IAI]." CP 10. At Paragraph 23, CAI pleaded, "If Moore is permitted to continue working [sic] at [IAI], disclosure of CAI's trade secret information described herein is inevitable." CP 11.

Counsel for CAI stated in oral argument that his client was relying upon the inevitable disclosure doctrine to prevent Moore from working for IAI. *See, e.g.*, TR 19:1-9 (hearing of 10/2010).<sup>2</sup>

Moore propounded an Interrogatory to learn the facts pertaining to the claim that he would inevitably disclose information obtained from CAI. Interrogatory 14 sought the factual basis for the allegations in paragraph 23 of CAI's counterclaim. In its Response, CAI stated:

Defendants object to this interrogatory to the extent requiring them to set forth 'all' facts is overly broad and unduly burdensome. Without waiving any of the forgoing objections or any of the General Objections

---

<sup>2</sup> In its opposition to Moore's motion for summary judgment, CAI stated that whether it could have maintained a claim based on inevitable disclosure was, "entirely inapposite to this case. CAI could have proceeded with a potential suit under any number of different theories or even attempted to convince a court to adopt the inevitable disclosure doctrine..." CP 106. As will be seen *infra*, these assertions were inaccurate.

and incorporating the answer to interrogatory 13, **defendants state that Moore would be hired by IAI to do the same job as he was doing at CAI. He would inevitably use information and experience gained at CAI to perform his job at IAI. Defendants' investigation of this matter continues and defendants therefore reserve the right to supplement, revise, or amend their answers as additional facts are obtained.**<sup>3</sup>

CP 154. (Emphasis added).

This response merely stated a conclusion and did not provide facts.

In Paragraph 28 of its Counterclaim, CAI alleged, “Moore breached his contract or contracts with Defendants by disclosing proprietary trade secret information of CAI or [IAI] and/or Rollo [president of IAI].” CP 11. In response to Moore’s Interrogatory seeking facts pertaining to this assertion, CAI did not produce any evidence of disclosure. CP 155.

Moore and CAI each moved for summary judgment.

In opposition to Moore’s motion for Summary Judgment, the only substantive evidence presented by CAI was through the declaration of

---

<sup>3</sup> The Response to Interrogatory 13 (dealing with the factual basis for paragraph 22 of the counterclaim) CAI stated in pertinent part, only that, “Moore was a long time employee of CAI. Moore knew every aspect of CAI’s business and was entrusted with all of its trade secrets. CAI has been outperforming IAI in the market for refurbishing airplanes and therefore wanted Moore’s expertise and inside knowledge to remain competitive. It is believed that IAI wanted to hire Moore because the company lacks personnel with industry knowledge. IAI sought Moore’s knowledge of CAI’s business and the aircraft interior refurbishing industry.” CP 154 at lines 1-6.

Jerry Welch, the president of CAI and the founder of IAI. CP 113-115. Mr. Welch asserted that Moore, “had access to and knowledge of all or virtually all information considered by CAI to be trade secrets, including bidding formulas for the CAI machine and wire shops.” CP 114 at ¶ 7. IAI, however, does not maintain a ‘wire shop.’ CP. 170-171. He went on to state that Moore, “retain[ed] this information to this day.” CP 114 at ¶ 7. Moore objected to this assertion on the basis that it called for speculative knowledge of the state of mind of another. CP 135-136.<sup>4</sup> The trial court sustained this objection without opposition from CAI. TR 4-8 (10/4/2010 hearing on Moore’s motion to strike); CP 218 (minute entry), CP 219-220 (Order).<sup>5</sup>

Moore also had his objections sustained to Paragraph 11 of Welch’s declaration, CP 115 (declaration) and CP 136-136. This proposed evidence stated conclusions without foundation for them:

Volant Aerospace, LLC and other similarly-situated businesses would profit from knowledge of CAI’s current trade secrets, including CAI’s bidding formula, knowledge of CAI’s customer and supplier lists, and the process and methods by which

---

<sup>4</sup> This objection was contained in Plaintiff’s Reply in support of Motion for Summary Judgment Re: Liability, CP 134-143.

<sup>5</sup> CAI objected to entry of an order memorializing the Court’s evidentiary rulings and sought sanctions against Moore for making such a motion. CP 187-189 (Plaintiff’s motion) CP 194-197 (Defendant’s response and Motion For CR 11 Sanctions.) The Court entered the Order and denied the motion for sanctions. CP 218.

CAI obtains surplus interior parts from Boeing.”

Because of Moore’s objections, there was no admissible evidence of what Moore knew and whether any information of CAI would be of use to a competitor. There was no evidence regarding whether business partners of CAI were required to maintain confidentiality about the nature and details of their relationships. There was no evidence whether anything CAI did was unique. Likewise, there was no evidence of any specific harm to CAI if its supposed confidential information was disseminated. And there was no evidence as to the efforts taken by CAI to maintain confidentiality of its supposed trade secrets and other alleged proprietary information.

The trial court granted Summary Judgment of dismissal of the Complaint to CAI. In a letter decision following oral argument, the trial court maintained that because of *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980), the tort of tortious interference could not be maintained. CP 186. And, because there was no evidence of malice, the claim for blacklisting had to be denied. *Id.* An order was filed. CP 190-192.

Moore timely sought reconsideration. CP 232-275. The trial court denied that motion. CP 223 (Court’s letter of November 12, 2010). The trial court explained that because Washington courts had not “explicitly

rejected” the inevitable disclosure doctrine, invocation of that doctrine was available to CAI. *Id.*

#### **IV. ARGUMENT**

##### **A. Summary of Argument.**

A former employer which chooses not to obtain a PER and which has no evidence of actual or threatened misappropriation of trade secrets or other misconduct cannot lawfully interfere with future employment of its former employee.

The right to seek and hold employment is protected by both the Washington and United States constitutions. Threats of litigation in the circumstances of this case were improper and allow Moore to maintain tort claims for damages.

##### **B. Summary Judgments Are Reviewed *De Novo*.**

The trial court grant of summary judgment to CAI on Moore’s claims of tortious interference with his employment expectancy and blacklisting are reviewed by this court *de novo*. *Sanders v. State*, 169 Wn.2d 827, 844-45, 240 P.3d 120 (2010).

##### **C. Seeking and Obtaining Employment Is Constitutionally Protected.**

“[O]ne of the most fundamental of those privileges protected by the [privileges and immunities] Clause” is the pursuit of a common calling.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280,

n.9, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985). Under the Washington Constitution, art. I, section 12, a “fundamental right” is to “carry on business” in the state. *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) (cited with approval in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004)).

Indeed, so fundamental is the right to seek and obtain employment that in this state, analysis of a PER such as a non-compete agreement is based on art. XII, section 22 of the Washington Constitution, a provision which prohibits monopolies and limiting any product or commodity. *Sheppard v. Blackstock Lumber Co.*, 85 Wn.2d 929, 931, 540 P.2d 1373 (1975).<sup>6</sup>

**D. CAI Improperly Interfered with Moore’s Employment Opportunity with IAI.**

**1. The Elements of Tortious Interference with a Business Expectancy.**

There are five elements to this claim:

1. That Moore had a business expectancy with the probability of future economic benefit;

---

<sup>6</sup> The decision in *Sheppard v. Blackstock* affirmed that the term “commodity or product” in Const. art. XII section 22 is broad and encompasses, for example, services. *See, Group Health Coop. of Puget Sound v. King County Med. Soc’y*, 39 Wn.2d 586, 637, 237 P.2d 737 (1951). (“Product” includes, “Anything produced, as by generation, growth, labor or thought” including, “the products of the brain.” (quoting Webster’s New Int’l Dictionary (2d ed.)).

2. That CAI knew of the of the existence of that expectancy;
3. That CAI induced or caused the termination of the expectancy;
4. That CAI's interference was for an improper purpose or by improper means;
5. That CAI's conduct proximately caused damages to plaintiff.

*See, generally, Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006); WPI 352.02 (5th ed. 2005).

The only element in dispute in this matter is the fourth: whether CAI interfered for an improper purpose or by improper means.<sup>7</sup>

Whether this is an affirmative defense to be established by a defendant or an element of the claim to be established by a plaintiff is unclear. This lack of clarity is noted in the Restatement (Second) of Torts, Ch. 37, Introductory Note (1979).<sup>8</sup> The Washington cases and the Restatement (Second) of Torts use the term "improper" to describe the conduct - whether it is unjustified (to be established by a plaintiff) or unprivileged (failure of a defendant's affirmative defense).

---

<sup>7</sup> *See*, CP 103-108 (CAI's Response to Moore's Motion for Summary Judgment) and CP 136 (Moore's Reply).

<sup>8</sup> The Washington Pattern Instructions are in accord. *See*, WPI 352.01, Note on Use.

**2. Interference with Employment Opportunities Is Encompassed Within Tortious Interference with a Business Expectancy.**

Our Supreme Court specifically approved a Comment in the Restatement (Second) of Torts that states that included within the tort “are interferences with the prospect of obtaining employment....” *Scymanski v. Dufault*, 80 Wn.2d 77, 84, 491 P.2d 1050 (1971) (quoting with approval Restatement (Second) of Torts (Tent. Draft No. 14) § 766A (1969) and Comment ‘c’ thereto.)

**3. Threats of Litigation May Be Tortious.**

A threat to “vex with suits” those who worked for or purchased from a merchant was recognized in 1621 to provide the basis for the tort of wrongful interference with a business expectancy. *See*, Restatement (Second) Torts § 766A, Comment *b*, and *see, id.* at § 767 Comment *c*.

**4. CAI Failed to Establish any Protected Legal Interests.**

CAI’s evidence was conclusory. To a great extent, it was inadmissible, as the trial court determined. It had no factual basis upon which to bring a suit to enjoin either Moore or IAI or both had Moore been hired.

The evidence proffered by CAI would have been insufficient to obtain a protective order even for discovery purposes. *See, e.g., McCallum v. Allstate Prop. & Cas. Co.*, 149 Wn. App. 412, 204 P.2d 944,

*review denied*, 166 Wn.2d 1037 (2009). The moving party for a protective order, even in discovery, “must use affidavits and **concrete examples to demonstrate specific facts showing harm**; broad or conclusory allegations of potential harm may not be enough.” 149 Wn. App. at 423 (Emphasis supplied).<sup>9</sup>

CAI did not present any evidence that Moore possessed or maintained any of its supposed confidential information or trade secrets.<sup>10</sup> Likewise, CAI was unable to present any admissible evidence that any of its information had any value to a competitor.

That CAI did not believe it had protectable interests sufficient to interfere with future employment by one of its former employees is demonstrated by its choice not to obtain a PER from Moore on either of the two occasions when it hired him or when it laid him off.<sup>11</sup> Moore was obligated under various non-disclosure agreements to maintain confidentiality regarding CAI “policies, trade secrets, intellectual

---

<sup>9</sup> The decision in *McCallum* relied upon Federal appellate cases relied upon by the Washington Supreme Court decision in *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004) including the decision of the Ninth Circuit in *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003). 149 Wn. App. at 420-24.

<sup>10</sup> The trial court determined that a statement in a declaration of CAI’s president to the effect that Moore did have certain knowledge was inadmissible. *See*, CP 219-220 and TR 4-8 (Hearing of October 4, 2010).

<sup>11</sup> At the time CAI terminated Moore in August, 2009 “due to current economic conditions,” CP 85, it could have offered him severance in return for a release of claims and a PER.

properties and customer contacts to outside entities...” CP 87. There is no evidence that Moore breached, attempted to breach or threatened to breach those obligations.

There was no evidence that Moore deceived or lied to CAI about his potential future employment nor is there any evidence that Moore committed any other sort of misconduct.

If CAI initiated litigation against either Moore or IAI if Moore had been hired, CAI would have to confront issues under CR 11.

**5. The Inevitable Disclosure Doctrine Has Never Been Approved in this State.**

In its Answer to the Complaint, in responses to discovery and in oral argument on the cross motions for summary judgment, CAI relied upon the “inevitable disclosure” doctrine as the basis for its interference in Moore’s future employment.<sup>12</sup> There is no reported decision from a court in this state approving use of this doctrine.

Under the Uniform Trade Secrets Act, RCW 19.108.020(1), a court may enjoin, “[a]ctual or threatened misappropriation [of trade secrets].” That statute is not a license for use of the inevitable disclosure doctrine.

---

<sup>12</sup> See Answer at ¶ 23 of Counterclaim, CP 11: (“If Moore is permitted to continue working [sic] at [IAI], disclosure of CAI’s trade secret information described herein is inevitable.” And, see, TR 19:1-9 (October 4, 2010).

Here, there is no evidence of either actual or threatened misappropriation in any event.

**6. CAI Cannot Rely Upon the Inevitable Disclosure Doctrine.**

Assuming the doctrine of inevitable disclosure could have currency in this state, CAI's cannot in good faith rely upon it to defeat a claim of tortious interference.

Inevitable disclosure was best described in *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). Redmond was a ten year former employee of PepsiCo. He had not signed a PER. He sought work at Quaker Oats Co. At the time, both companies marketed sports hydration beverages. There was substantial evidence of deceitful and mendacious conduct by the employee, Redmond. 54 F.3d at 1270-71. His "lack of forthrightness on some occasions, and out and out lies on others" resulted in a finding that he "could not be trusted to act with the necessary sensitivity and good faith" regarding PepsiCo's trade secrets. *Id.* at 1270. Because of those facts, it was likely that the former employer, PepsiCo, would prevail in its claims for misappropriation of trade secrets and breach of a confidentiality agreement with its former employee.

Here, CAI conceded in an answer to an interrogatory that it trusted Moore.<sup>13</sup> Beyond that trust, there was a complete lack of evidence of any

---

<sup>13</sup> CP 150 and p. 5, *supra*.

misconduct by Moore. Therefore, CAI cannot in good faith assert the inevitable disclosure doctrine in this case.

The Court of Appeals in *PepsiCo*, upheld a trial court injunction which prohibited Redmond from working for Quaker Oats for six months. Here, the effect of the trial court's ruling is that Moore will never work for a competitor of CAI.

This case is like *Teradyne, Inc. v. Clear Commc'ns Corp.*, 707 F. Supp. 353 (N.D. Ill. 1989), cited with approval in *PepsiCo*, 54 F.3d at 1268-69. The employer's Complaint alleged that its former employees were, "in a position to misappropriate trade secrets because they know them and are in the same kind of business...." 707 F. Supp at 356. As in this case, there was no allegation, much less evidence, that the former employees threatened to use, or had used trade secrets of the former employer to its detriment. *Id.* Under those circumstances,

[t]he defendants' claimed acts, working for Teradyne, knowing its business, leaving its business, hiring employees from Teradyne and entering the same field (though in a market not yet serviced by Teradyne) do not state a claim of threatened misappropriation. All that is alleged, at bottom, is that defendants could misuse plaintiff's secrets and plaintiffs fear they will. This is not enough. It may be that little more is needed, but falling a little short is still falling short.

*Id.* at 357. The Court dismissed the Complaint.

As in *Teradyne*, CAI's allegation that Moore would inevitably misuse its secrets and its fear that he will do so 'falls short' of establishing any basis for asserting a privilege to interfere with Mr. Moore's future employment.<sup>14</sup>

Another court observed that, "[a]bsent evidence of actual misappropriation by an employee, the doctrine [of inevitable disclosure] should be applied in only the rarest of cases." *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999).

Restatement (Third) of Employment Law Tentative Draft No. 3, observes that the inevitable disclosure doctrine is only available in "exceptional circumstances," if at all. § 8.05(b) (2010). Among those circumstances that could warrant invocation of the doctrine would be where,

the employee's conduct demonstrates a pattern of deceit or misappropriation of confidential information indicating that ethical constraints and a court injunction barring the disclosure or use of confidential information would be insufficient to protect the former employer's legitimate interests.

---

<sup>14</sup> A later decision of the Illinois Court of Appeals distinguished *Teradyne* on the basis that in the case before it, Plaintiff alleged that the competitor "could not operate or function without relying on [Plaintiff's] alleged trade secrets." *Strata Mktg., Inc., v. Murphy*, 317 Ill. App. 3d 1054, 1071, 740 N.E. 2d 1166 (2000). That has not been alleged by CAI nor could it be: IAI/Volant is a going concern that is functioning without any proprietary information of CAI. There is no evidence that it is in distress or in need of CAI's proprietary information.

*Id.*, cmt. *b.*

According to this Restatement, “most states are extremely reluctant to apply the doctrine because doing so effectively enforces a do-not-compete clause that was not bargained by the employer.” *Id.*, Reporter’s Note *b.*

**7. CAI Should not Be Able to Rely Upon *Brown v. Safeway Stores, Inc.***

In its opposition to Moore’s motion for Summary Judgment and in support of its motion, CAI relied upon *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980). There, the court observed, “it [is] well established that one who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference.” *Id.* at 375-76 (citation and internal quotes omitted).

The trial court relied upon *Brown v. Safeway Stores, supra*, in its decision to grant summary judgment to CAI and to deny reconsideration to Moore.<sup>15</sup>

What *Brown* requires, however, is:

- A good faith assertion of
- a legally protectable interest

---

<sup>15</sup> CP 186, 223 (letters of October 6, 2010 and November 12, 2010, respectively).

- which may be impaired by performance of a transaction.

CAI cannot establish all of these elements as a matter of law due to its lack of evidence.

**Brown** should also be examined on its facts before it is applied in this case. There, Safeway was a lessee which abandoned its leasehold and moved a half mile away. Safeway negotiated with a potential sub-tenant for its space. The lessor contended that Safeway had a duty to find a comparable tenant and sued Safeway for breach of the lease. This apparently chilled Safeway's negotiations with the proposed sub-tenant.

Safeway counterclaimed against its lessor for interference with its expected sub-tenancy. 94 Wn.2d at 363. The Court determined, "[t]he initiation of litigation to determine the rights of the respective parties to a lease cannot, without more, be characterized as malicious conduct." *Id.* at 375. From that flowed the further observation of the court quoted at p. 21, *supra*. Therefore, **Brown** involved an express contract and a dispute over the past objectively verifiable conduct of a tenant. Here, CAI was speculatively alleging future conduct by Moore without any factual basis for doing so. These distinctions are profound.

**a. CAI Did not Act in Good Faith.**

It is more than evident that Welch, the president of CAI, has crossed paths with IAI. He was the founder of IAI and worked at IAI with

Moore.<sup>16</sup> IAI proposed to acquire CAI in late 2008 and early 2009 after Moore first left CAI. Moore was an intermediary in an attempt to effect the transaction.<sup>17</sup> The deal fell through for reasons Welch attributes, without evidence, to the bad faith of IAI.<sup>18</sup> At the very least, there is an inference of bad faith by CAI in opposing Moore's employment by IAI. That inference is a fact issue which must be made in favor of Moore as the non-moving party with respect to the summary judgment obtained by CAI against Moore's claim of tortious interference. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (order granting summary judgment reviewed *de novo* "taking all facts and inferences in light most favorable to non-moving party").

**b. CAI Did not Have a Legally Protectable Interest.**

CAI has not presented evidence of any legally protectable interest. Certainly, it has no interest whatever in preventing a Moore from using his skills and training to compete against it. *See, e.g., Copier Specialists v. Gillen*, 76 Wn. App. 771, 774, 887 P.2d 919 (1995). It has presented no evidence that Moore misappropriated or threatened to misappropriate a

---

<sup>16</sup> Moore testified to this in his declaration of October 2010. CP 170-171 at ¶ 2.

<sup>17</sup> See pp. 4-5, *supra*.

<sup>18</sup> See pp. 5-6, *supra*.

trade secret. It has not presented admissible evidence that Moore was in possession of a trade secret.

CAI only has the conclusion that Moore will inevitably disclose confidential information. And as seen *supra*, that doctrine is limited to where a former employee has committed some affirmative misconduct warranting an injunction for a short period of time. To the contrary, here we know that Moore was trusted by CAI; there was no evidence of misconduct or threatened misconduct.

**c. Moore's Employment by IAI Would not Impair an Interest of CAI.**

Under the totality of these circumstances, CAI did not have an interest which would be impaired. Instead, CAI attempted to defeat the interests of Moore and the public, "in competition and in employee mobility..." Restatement (Third) of Employment Law, Tentative Draft No. 3, § 8.05 cmt. *a*.

**E. Moore Established a Claim for Blacklisting.**

The Washington Anti-Blacklisting statute is found at RCW 49.44.010. In pertinent part, the statute provides:

Every person...who shall wilfully and maliciously, send...any paper, letter or writing, with or without name signed thereto,...for the purpose of preventing any other person from obtaining employment in this state or elsewhere,...or who shall wilfully and maliciously make or issue any statement or paper that will tend to influence

or prejudice the mind of any employer against the person of such person seeking employment,...shall, on conviction thereof, be adjudged guilty of misdemeanor....

While this is a criminal statute first enacted in 1899, it was recognized to provide a private right of action in *O'Brien v. Western Union Telegraph Co.*, 62 Wash. 598, 114 P. 441 (1911) (dismissing civil claim on grounds that statute did not apply to activity in question; no discussion of basis for private right of action).<sup>19</sup>

The element of 'wilfulness' is easily established: CAI's agent, its lawyer, wrote a letter advising IAI that CAI would institute suit against it if IAI hired Moore. At the very least, there is a fact issue as to malice. This is seen from the allegations made by CAI in its counterclaims against IAI, see CP 4-16, and the lack of any evidence that Moore would harm CAI. Obviously, CAI sent this letter to IAI for the express purpose "of preventing any other person from obtaining employment..."

This statute also provides a standard for determining whether acts by a former employer amount to an "improper purpose," the disputed element of tortious interference in this case. *Newton Ins. Agency & Brokerage v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 159,

---

<sup>19</sup> This comports with more recent decisions finding tort causes of action arising from the violation of a criminal statute. *See, e.g., Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 473-78, 951 P.2d 749 (1998) (negligently selling alcohol to minors in violation of RCW 66.44.270, a criminal statute).

52 P.3d 30 (2002). There, this court determined that, “[i]nterference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law or an established standard of trade or profession.” *Id.*

What could more clearly communicate a ‘community standard’ regarding attempts to prevent employment than a criminal statute which prohibits that activity?

## V. CONCLUSION

Summary judgment was improperly granted to CAI. Moore established that CAI had no legally protectable interest which could supersede Moore’s constitutionally protected right to seek and obtain employment - even with a competitor of CAI. Moore established that CAI used improper means - the threat of litigation - or had an improper motive - preventing Moore from having employment with a competitor - to interfere with Moore’s expected employment by IAI.

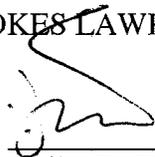
CAI could have obtained a PER from Moore on any of three occasions. It chose not to do so. Instead, CAI chose to threaten Moore’s potential employer with litigation if it hired Moore. The consequences of that allow Moore to pursue relief through tort actions for interference with his expectancy of employment and blacklisting.

Summary judgment in favor of CAI should be reversed and judgment entered for Moore with respect to liability on his claims and the matter should be remanded to the Superior Court for trial as to appropriate damages.

The effect of the trial court's decision is a permanent injunction against Moore's employment by a competitor of CAI. This is contrary to the Washington and United States constitutions, the common law and the cases decided under trade secret statutes and with respect to "inevitable disclosure."

Respectfully submitted on March 14, 2011.

STOKES LAWRENCE, PS

By: 

Kelby D. Fletcher

STOKES LAWRENCE, P.S.  
800 Fifth Avenue, Suite 4000  
Seattle, WA 98104  
(206) 626-6000

Attorneys for Appellant Robert S. Moore

627996.doc

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 14th day of March, 2011, I caused a true and correct copy of the foregoing document, "Brief of Appellant," to be delivered by messenger to the following counsel of record:

Counsel for Respondent:

Don P. Badgley  
Jacob D.C. Humphreys  
Badgley-Mullins Law Group PLLC  
701 Fifth Avenue, Suite 4750  
Seattle, WA 98104

Dated this 14th day of March, 2011, at Seattle, Washington.

  
Sarah Callahan, Practice Assistant

2011 MAR 14 PM 6:25