

FILED
 COURT OF APPEALS DIV. #1
 STATE OF WASHINGTON
 2010 JAN -6 PM 3:56
 NO. 63427-5

COURT OF APPEALS
 FOR THE STATE OF WASHINGTON
 DIVISION I

JKR, LLC, a Washington limited liability company,

Appellant,

v.

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

Respondents/Cross-Appellants.

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

Thomas F. Peterson, WSBA #16587
 Adam R. Asher, WSBA #35517
 SOCIUS LAW GROUP, PLLC
 Attorneys for Respondents

Two Union Square
 601 Union Street, Suite 4950
 Seattle, WA 98101.3951
 206.838.9100

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I. REPLY ARGUMENT

A. The Trial Court Erred in Denying Tomlinson's Motion for Attorneys' Fees Pursuant to RCW 4.84.185 and CR 11

Litigation is extraordinarily expensive; is time consuming for the respective litigants and their attorneys; is emotionally taxing; is disruptive to the businesses of the litigants; and is disruptive to third-parties who find themselves in the middle of the dispute (such as the 21 restaurant owners in this case). For these reasons, litigation should not be taken lightly. It is the last resort. RCW 4.84.185 and CR 11 are designed to make sure that when a party and its attorney makes the last-resort decision to file a lawsuit, that the party and its attorney have investigated the facts and the elements of its claims to make sure its claims are well grounded in fact and warranted by existing law. Only when the facts and law suggest that a party can meet all the elements of a claim may a party initiate suit. This threshold investigation was not done in this case. Had Service Linen done the proper inquiry at the outset, it should have realized that its claims were not cognizable.

After suit was initiated, Tomlinson notified Service Linen that its claims violated CR 11. (CP 1610-11.) Despite such notice, Service Linen continued to litigate this matter and to propound discovery. After 15 months of litigation and discovery, Service Linen then dismissed the following causes of action: (1) trade name infringement, (2) passing off, (3) Consumer Protection Act violations, (4) conversion, (5) civil conspiracy, and (6) misappropriation of trade secrets. (CP 1350, CP

1614.) Service Linen offered no support for these claims, nor could they. These claims should have simply never been filed.

Having dismissed the above claims, Service Linen then declared that this action was really a tortious interference claim. (CP 1350, CP 1614.) It then began discovery in earnest on this claim. Rather than first attempting to call its former customers and inquire about the reasons for changing providers, Service Linen chose the more expensive and disruptive approach and deposed scores of its former customers. (CP 1-125.) Following these depositions, it was plain that there was no evidence that Tomlinson improperly interfered with these customers, that there was no improper purpose or means, and that Tomlinson did not cause or induce the alleged interference. The vast majority of Service Linen's customers testified to significant service and quality issues with Service Linen. (CP 1-125.) These service issues were the moving force behind their desire to change linen providers. Moreover, in the majority of cases, it was the customer who contacted Tomlinson. (CP 1-125.) Additionally, not one of the 21 customers recalled receiving the postcard that stated, "We used to be New Richmond." (CP 1-125.)

On October 23, 2008, Tomlinson again wrote to Service Linen and requested that Service Linen dismiss its claims. (CP 1617-21.) Tomlinson set forth the factual and legal deficiencies for each and every customer. (*Id.*) Tomlinson warned that if Service Linen did not dismiss its claims, Tomlinson would seek attorneys' fees under RCW 4.84.185 and CR 11. (*Id.*) Though Tomlinson set forth the same authority and facts

that it relied upon for its second motion for summary judgment, Service Linen again refused to dismiss its claims. Tomlinson was forced to file a second motion for summary judgment. (CP 126-49.) Service Linen then “relinquished” claims for six customers. (CP 1623.) Then, following two hearings, the Court granted Tomlinson’s motion. (*Id.*)

Service Linen made the decision to file its claims without facts to support each element for each of its claims. Only after 15 months of discovery did Service Linen concede that six of its seven claims were without merit, a contention Tomlinson had made from the outset. Then Service Linen continued to litigate and engage in extensive discovery regarding its tortious interference claim after it was apparent that Tomlinson did not cause any of the 21 customers to switch providers, and that there was no evidence of improper purpose or improper means. As a result, Tomlinson has incurred over \$120,000 in legal fees and costs, lost countless hours of time, and suffered severe vexation and annoyance. Tomlinson’s customers have also paid a heavy price for this litigation in time and money. None of this should have happened, or would have happened if Service Linen had merely complied with the requirements of RCW 4.84.185 and CR 11.

As set forth in Tomlinson’s opening brief on its cross-appeal, RCW 4.84.185 provides for an award of fees if the action was frivolous. The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to

defend against meritless claims advanced for harassment, delay, nuisance, or spite. *See, Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). “A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.” *Id.*; *see also, Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004).

Similarly, CR 11 imposes upon parties or attorneys the responsibility to insure that assertions made and positions taken in litigation are done so in good faith and not for an improper purpose. It is intended to deter baseless filings and curb abuses of the judicial system. *Neigel v. Harrell*, 82 Wn. App. 782, 787, 919 P.2d 630 (1996). The rule permits a court to award sanctions, including expenses and attorneys’ fees, to a litigant whose opponent acts frivolously or in bad faith in instituting or conducting litigation. *See, e.g., Delay v. Canning*, 84 Wn. App. 498, 509, 929 P.2d 475 (1997).

The trial court erred in finding that Service Linen’s claims were supported by any rational argument on the law or the facts. Indeed, Service Linen failed to set forth any facts in its brief concerning its alleged investigation or that support that a rational argument can be made on the seven claims it filed in this action.

First, there is no rational argument that could support Service Linen’s claims for (1) trade name infringement, (2) passing off, (3)

Consumer Protection Act violations, (4) conversion, (5) civil conspiracy, and (6) misappropriation of trade secrets. In recognition of the lack of any support for these claims, Service Linen voluntarily dismissed them.

Service Linen takes a “better late than never” approach and asks that the Court ignore the fact that these claims were frivolous simply because they were voluntarily dismissed. However, such claims should have never been filed absent some basis for such claims. There is nothing in the record showing that these claims had any basis in fact or law.

Second, there is no rational argument on the facts or law to support Service Linen’s tortious interference claim. As previously briefed, Service Linen failed to present any facts that support an improper purpose or means by Tomlinson. Also, there is no support for Service Linen’s formulation of the tort of intentional interference with a contract (*i.e.*, no showing of improper purpose or means is required). Service Linen argues its formulation is justified because counsel had “knowledge that an unpublished case from this court used the standard proposed by appellant in affirming an award for intentional interference.” (Appellant’s Reply Br. at 9.) Unpublished opinions cannot be relied upon, and therefore cannot form the basis of a “rational argument.” *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701 (2001) (holding that

unpublished opinions have no precedential value and are not to be cited or relied upon); *see also*, GR 14.1.

Furthermore, contrary to Service Linen's contention, the unpublished case it relied upon, *Rissman v. Troupe*, 2001 WL 783742 (Wn. App. July 9, 2001), cited with approval the standard in *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989). (*See* CP 1775.) Nothing in this unpublished decision supports Service Linen's argument that improper purpose or means is not a required element of tortious interference with a contract.

Service Linen's reliance upon *Loc Thien Truoung v. Allstate Property and Cas. Ins. Co.*, 151 Wn. App. 195, 207, 211 P.3d 430 (2009) is similarly misplaced. There, the Court reversed the trial court's award of attorneys' fees under RCW 4.84.185. *Id.* at 208. Plaintiff's claim was inspired by the holding of a Court of Appeals decision that was a matter of first impression. *Id.* The plaintiff argued for an extension of that holding into a different context. *Id.* There had been no published appellate opinions addressing the precise question. *Id.* Under those circumstances, the Court found that plaintiff's claim was at least based on a rational argument.

Here, unlike in *Loc Thien*, we are not dealing with a new standard of law or the extension of that new law to other factual contexts. Nor are

we dealing with a matter of first impression where there have been no published appellate decisions on the issue. To the contrary, the elements of a tortious interference claim, and specifically that improper means or purpose is a required element, have been established since 1989 when the Washington Supreme Court, in *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), adopted the Oregon Supreme Court's formulation of the tort, as set forth in *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1368 (1978). While courts may not wish to stifle the creativity of advocates, CR 11 and RCW 4.84.185 are intended to curb parties from filing claims that go against well-established precedent. That is precisely what we have in this case. Therefore, the trial court erred in denying Tomlinson's request for fees under RCW 4.84.185 and/or CR 11.

B. Tomlinson is Entitled to Attorneys' Fees on Appeal

RAP 18.9(a) permits an award of attorney fees as a sanction for filing a frivolous appeal. Washington courts recognize that "an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (quoting *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-

43, 730 P.2d 653 (1986)). Here, Service Linen's claims on appeal are frivolous for the same reasons its claims were frivolous when presented to the trial court.

Service Linen cites *Olson v. City of Bellevue*, 93 Wn. App. 154, 165-66, 968 P.2d 894 (1998) for the proposition that "Cases of first impression are not frivolous if they present debatable issues of substantial public importance." (Appellant's Reply Br. at 11.) However, as discussed above, this is not a case of first impression. The elements of a tortious interference claim have been established in this state since 1989—over 20 years. Service Linen has set forth no basis for upsetting the long-standing precedent in this state. The Court should grant Tomlinson's request for fees on appeal.¹

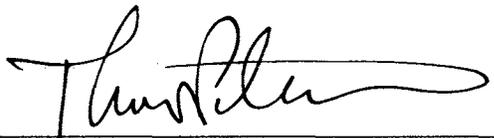
II. CONCLUSION

This Court should reverse the trial court's denial of fees under RCW 4.84.185 or CR 11, and grant Tomlinson's request for fees on appeal.

¹ Service Linen alleges that Tomlinson has failed to comply with the Rules of Appellate Procedure by not properly citing to the record. Tomlinson denies this assertion. Further, to the extent non-compliance is an issue, Tomlinson notes that Service Linen missed every one of its briefing deadlines and asked for three extensions of time, including one for its opening brief and two for its reply. The last time it failed to file its brief timely, it did so in disregard of the Court Administrator/Clerk of the Court's prior October 28, 2009 Order that granted the request for extension, but provided, "However, no further extension."

Respectfully submitted, this 6th day of January, 2010.

SOCIUS LAW GROUP, PLLC

By 

Thomas F. Peterson, WSBA #16587
Adam R. Asher, WSBA #35517
Attorneys for Respondents/Cross-Appellants

III. CERTIFICATE OF SERVICE

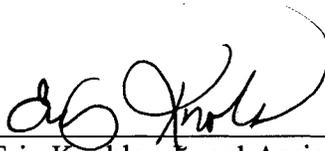
I certify that on the 6th day of January, 2010, I caused a true and correct copy of this RESPONDENTS/CROSS-APPELLANT'S REPLY BRIEF to be served on the following in the manner indicated below:

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Eisenhower & Carlson, PLLC	<input type="checkbox"/>	Facsimile
Washington Mutual Tower	<input type="checkbox"/>	Legal Messenger
1201 Third Avenue, Suite 1650	<input type="checkbox"/>	Hand Delivery
Seattle, WA 98101		
(206) 382-1830		
Facsimile: (206) 382-1920		

Counsel for Appellants

Catherine W. Smith	<input checked="" type="checkbox"/>	U.S. Mail
Edwards, Sieh, Smith & Goodfriend, P.S.	<input type="checkbox"/>	Facsimile
500 Watermark Tower	<input type="checkbox"/>	Legal Messenger
1109 First Avenue	<input type="checkbox"/>	Hand Delivery
Seattle, WA 98101		
(206) 624-0974		
Facsimile: (206) 624-0809		

Counsel for Appellants

By: 
Erin Knobler, Legal Assistant