

**FILED**

SEP 30 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 289745  
Franklin County Superior Court Cause No. 07-2-50943-0

COURT OF APPEALS  
DIVISION III, STATE OF WASHINGTON

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KELLEY AG SERVICES, INC.

Respondent

vs.

KEN and VICKI MELDRUM, husband and wife; *Defendants*  
C.M. HOLTZINGER FRUIT CO., LLC; *Appellant*  
SAGE HILL NORTHWEST, INC., a Washington corporation;  
THE UNITED STATES OF AMERICA, acting through the  
FARMERS HOME ADMINISTRATION,  
UNITED STATES DEPARTMENT OF AGRICULTURE,  
and any other person with the right, title or interest inferior to  
the Respondent's lien priority in the real property described herein,

*Defendants.*

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**BRIEF OF APPELLANT, C.M. HOLTZINGER FRUIT CO., LLC**

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## I. INTRODUCTION

COMES NOW the Appellant, C.M. Holtzinger Fruit Co., LLC ("Holtzinger"), and hereby files its Brief of Appellant.

## II. ASSIGNMENT OF ERROR

Holtzinger asserts the following assignments of error:<sup>1</sup>

1. That the Trial Court committed error by not dismissing the claim of tortious interference of a business expectancy brought by Kelley Ag Services ("Kelley") against Holtzinger;

2. Alternatively, that the Trial Court committed error when limiting the testimony of Holtzinger management, David Lawrence and Scott Hanses and not allowing them to refute evidence related to Kelley's asserted damages and the probability of the crop making the "gambler's pool."

## III. STATEMENT OF CASE

Ken and Vickie Meldrum (collectively referred to as "Meldrum") own a farm in Franklin County, State of Washington. RP 27. Approximately 72 acres of the Meldrum farm is planted in several varieties of apples. CP 114-117. In 2007, Meldrum entered into a

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<sup>1</sup> In its Notice of Appeal, Holtzinger raised, as an appeal issue, the failure of the Court to grant Holtzinger's Motion for Summary Judgment to dismiss the claim of tortious interference. However, when a Trial Court denies summary judgment, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of the summary judgment. *Adcox v. Children's Orthopedic Hospital Medical Center*, 123 Wn.2d 15, 35 N.9, 864 P.2d 921 (1993). As such, Holtzinger withdraws that particular issue as an assignment of error in its Notice of Appeal.

Management Proposal ("Proposal") with Kelley for purposes of managing the Meldrum farm. CP 114-117. The Proposal included the raising of the 2007 existing apple crop and planting approximately seven acres of additional apple varieties. CP 114-117.

During the summer of 2007, the relationship between Meldrum and Kelley began to deteriorate. RP 43-44. By August, 2007, Meldrum was dissatisfied with Kelley's performance of the Proposal. RP 43-44; 561. In August, 2007, Meldrum, dissatisfied with the performance of Kelley, decided to terminate the Proposal. Meldrum had discussions with Jim Kelley about terminating the Proposal. RP 43-44.

The apple varieties planted on the Meldrum farm require a September harvest. Harvesting includes picking, processing and packing the crop. Holtzinger provides packing and processing services to apple orchardists within the Columbia Basin. Meldrum made contact with Holtzinger regarding the 2007 crop. RP 636; 639; 641-42; 653-54. In August, Meldrum advised Kelley that Meldrum had decided to take the fruit to Holtzinger. RP 636-639.

Having decided to terminate the relationship with Kelley, Meldrum made contact with Holtzinger for purposes of packing and processing the Meldrum fruit. RP 636; 639; 641-42; 653-54. During those discussions, Meldrum represented to Holtzinger that he had previously had a Proposal with Kelley, but that he had terminated the agreement. *Id.* Holtzinger

accepted the offer from Meldrum to process and pack the Meldrum apple crop. CP 153-54. After the fact, Kelley asserted, without evidence, that the Holtzinger tortuously interfered with the Proposal and made the demand that Holtzinger abandon the fruit.

#### IV. ARGUMENT

A. The Trial Court should have granted a direct verdict in favor of Holtzinger as there was insufficient evidence to support a claim for tortuous interference.

At the close of Kelley's case, Holtzinger brought a Motion for Directive Verdict. The Honorable Judge Craig Matheson denied the Motion on the basis that Holtzinger "induced" Meldrum into terminating the Kelley Proposal by offering Meldrum a "\$53,000.00" advance on the apple crop. RP 475-76. During the Meldrum and Holtzinger presentation of the case, the testimony was clear that Meldrum was not aware that Holtzinger had prepared the advanced check until long after the Proposal between Kelley and Meldrum had been terminated. RP 654; 749-50. There was no inducement. At the end of the case, Holtzinger renewed its Motion for Directive Verdict. The Court denied Holtzinger's Motion. CP 13-14. The jury then found that Holtzinger tortuously interfered with Kelley's business expectancy and awarded damages.

1. *Standard of Review.*

The standard of review on challenging a Trial Court's refusal to grant directed verdict is the sufficiency of the evidence. *Bott v. Rockwell International*, 80 Wn. App. 326, 332, 908 P.2d 909 (1996). Such challenge to the sufficiency of the evidence admits the truth of the evidence and requires that any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to Kelley. *Id.* The standard requires a conclusion by the Appellate Court, that there is no evidence or inference derived therefrom by which the verdict can be sustained. *Holland v. Columbia Irrigation District*, 75 Wn.2d 302, 304, 450 P.2d 488 (1969). In this case, Kelley presented no evidence which, when considered in the light most favorable to Kelley, creates a tortious interference claim by Holtzinger. Directive verdict should have been granted.

2. *Kelley does not present sufficient evidence to support its claim for tortious interference with a business expectancy by Holtzinger.*

In order to establish a prima facie claim of tortious interference with a business expectancy, Kelley must prove the following elements: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy by the alleged interfering party; (3) intentional interference inducing or causing a

breach or termination of the relationship or expectancy; (4) interference for an improper purpose or by improper means; and (5) resultant damage. *Leingang v. Pierce County*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

a) **Kelley had no valid contractual right to handle the Meldrum crop post harvest, as Meldrum had terminated the contract.**

In order to establish its claim that Holtzinger tortuously interfered with Kelley's business expectancy, Kelley must first prove the existence of a valid contractual relationship or business expectancy. It cannot do so because its agreement with Meldrum was terminable at will and was in fact terminated by Meldrum.

Kelley's February 6, 2007 Management Proposal with Meldrum fails to specify a duration. CP 116-117. The closest the agreement comes to setting a duration is in the fifth paragraph on page one, which states:

The following proposal is structured to provide the temporary management of the described property is [sic] a sound husband-like manner through a design plan to maintain the property's current valuation and/or improve it. It is intended that this plan will be constructed so as to meet the needs of the day-to-day operations with a heavy focus on minimizing costs. This management proposal would be considered a long term proposal and would continue from year to year until written cancellation is given to end the contract.

CP 114.

The contract does contemplate termination, however, stating at paragraph 5.1 that "[o]nce a contract your has begun (by January 31 of each year) the full year management fee will be owed regardless of changes in ownership or other issues that may remove Kelley from the management of this property. CP 116-117.

There are no other terms addressing the duration of the agreement or termination. Without a specified term, the agreement, which was drafted by Kelley, was terminable upon written cancellation by its own language, *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn.App. 760, 145 P.(5th) 1253 (2006). Meldrum advised Kelley of his desire to terminate orally in August, 2007. Meldrum terminated in writing on September 11, 2007. RP 51.

Since Meldrum could terminate the contract at any time, Kelley's business expectancy was very limited. The verbal termination of the Kelley Agreement, memorialized by letter dated September 11, ended any right Kelley had to designate the facility for the post harvest handling of the Meldrum crop. At best, Kelley had a right to compensation for legitimate services rendered for the year, as called for in the Proposal - against Meldrum. Kelley cannot maintain a claim for tortuous interference against Holtzinger as Kelley had no rights that were

affected by the Holtzinger/Meldrum contract. CP 153-154.

b) **Holtzinger had no knowledge of any ongoing relationship between Kelley and Meldrum.**

Kelley must prove as the second element of its tortious interference claim that Holtzinger was aware of a valid contract between Kelley and Meldrum when Holtzinger entered into its contract with Meldrum.

Holtzinger had no knowledge that Meldrum's agreement with Kelley might still be in effect. Ken Meldrum testified that he told Holtzinger that the Kelley Agreement had been terminated. RP 76-81; 84-85. This was confirmed by the testimony of Byron Pugh. Jim Kelley testified that he authorized his attorney to send a September 21, 2007, letter to Meldrum, with a copy to Holtzinger, which purported to put Holtzinger "on notice that there is an existing contract for [Meldrum's] 2007 apple crop and Holtzinger is to immediately cease and desist interfering, in any way, with that contract." RP 67-71. However, Kelley put on no evidence that it knew of communications to Holtzinger about the Meldrum-Kelley Proposal prior to the September 21, 2007, letter. Holtzinger had already entered into the fruit handling arrangement with Meldrum, having signed its agreement to handle the Meldrum crop on September 6, 2007, fifteen days prior to Kelley's notice to Holtzinger. CP 153-154.

Absent Holtzinger's knowledge of an existing contract between Kelley and Meldrum, Holtzinger cannot be liable on a tortious interference claim.

c) **Holtzinger's action did not "induce" Meldrum.**

The third element of a tortious interference claim requires proof that the interfering defendant has "induced" or "solicited" the breach or termination of a valid and existing contract. *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wn.App. 1, 10-11, 776 P.2d 721 (1989). That element is lacking in this case.

The Washington State Supreme Court in *Valley Land Office, Inc. v. O'Grady*, 72 Wn.2d 247, 432 P.2d 850 (1967) dismissed a tortious interference claim against a defendant when there was no evidence of inducement. The Plaintiff in *O'Grady*, a real estate brokerage firm, had an exclusive listing agreement with Mr. O'Grady. During the term of that exclusive listing agreement, Mr. O'Grady signed an option agreement for the purchase of his property. After signing that agreement, Mr. O'Grady had second thoughts, and had concerns about the manner in which the option agreement had been signed. Mr. O'Grady decided that he wanted to terminate the agreement and consulted with an attorney for that purpose. Thereafter, Mr. O'Grady contacted another brokerage firm, Fisher Realty, to assist in the sale of his property.

The plaintiff in *O'Grady* sued Mr. O'Grady and Fisher Realty, alleging tortious interference against Fisher Realty. The trial court dismissed the tortious interference claim, and the Supreme Court upheld that dismissal on review. In doing so, the court held that Mr. O'Grady intended to terminate the agreement, and had consulted an attorney to do so, before he ever contacted Fisher Realty. The court stated:

The only evidence in the record touching on the element of inducement is the testimony of Mr. O'Grady when called by the plaintiff and this testimony shows that Mr. O'Grady had already determined in his own mind that he had a bad deal and was going to see a lawyer before Fisher Realty's men first discussed the Fiori option with him. To find that these defendants induced or purposely caused a breach of contract by Mr. O'Grady, we must find that they were a moving cause of his action in attempting to rescind the sale contract. We cannot so find, and agree with the trial court's analysis of the evidence in this cross-appeal and affirm the dismissal of these defendants.

*O'Grady*, 72 Wn.2d at page 258.

The *O'Grady* decision was cited with approval by a Missouri court that likewise dismissed a tortious interference claim when no evidence existed of inducement to cause the breach or termination of an existing contract. *Tri-Continental Leasing Co., v. Neidhardt*, 540 S.W. 2d 210 (1976). The *Tri Continental Court* stated:

Webster's Third New International Dictionary Unabridged defines 'induce': 'to move and lead (as by persuasion or influence), to inspire, call forth or bring about by influence or stimulation.' We find from the following cases from other jurisdictions that the concept of causation is inherent within the meaning of inducement; therefore, to establish liability in a tortious interference with contract case, the plaintiff must show that the defendant's acts caused the breach. Prosser, Law of Torts, 4th ed., 1971 at 934. And we find that other jurisdictions have characterized the causation element as requiring a showing that the defendant was 'a moving cause' in the breach

*Tri-Continental Leasing Co.*, 540 S.W. 2d q5 page 215.

In *Tri-Continental Leasing*, the court dismissed the claims against the defendants accused of tortious interference when the evidence revealed the breaching party had already decided to end his relationship with Tri-Continental before any discussions occurred with the allegedly interfering defendants:

[T]he jury question was removed in this case, for the only evidence presented was that Rayfield had positively determined to repudiate the contract with Tri-Continental prior to any action taken by defendants. The record is barren of evidence to link defendants with any enticement of Rayfield to abrogate his contractual obligations with Tri-Continental.

*Tri-Continental Leasing Co.*, 540 S.W. 2d at page 219.

The same result occurred in *Corinthian Corporation v. White and Bollard, Inc.*, 74 Wn.2d 50, 442 P.2d 950 (1968), where the court affirmed dismissal of a tortious interference claim:

In the instant case, at least one of the elements is missing. W & B first approached Corley's parent corporation regarding the sale of the land. The parent corporation was not interested unless the transaction carried with it a purchase of W & B's mortgage-servicing accounts. Corley's action did not have the requisite quality of inducement. Its participation was merely an acceptance of an offer. Corley's participation was not the 'moving force' in the breach and therefore did not amount to a tortious interference.

*Corinthian Corporation*, 74 Wn.2d at page 62 (citations omitted).

Finally, The Washington Appellate Court dismissed a tortious interference claim against a landlord who did nothing more than lease property to a tenant who breached an existing lease with the Plaintiff. *Burkheimer v. Thrifty Investment Co., Inc.*, 12 Wn.App. 924, 533 P.2d 449 (1975). The Court in *Burkheimer* made the following factual findings:

...Thrifty made a decision to vacate and abandon its drugstore location at the Burkheimer location. After his decision had been made, Thrifty talked with brokers, explored other possible locations in the Burien area with other persons and finally

talked with representatives of Grandmore Investors, Inc., a limited partnership, who were then organizing a new shopping center in Burien known as Burien Plaza. Thrifty's decision to vacate the subject property was made before any representative of Thrifty talked with any defendant or third party defendant in this litigation about leasing space at Burien Plaza.

*Burkheimer*, 12 Wn.App. at page 926.

Like Fisher Realty in *O'Grady*, like Corley in *Corinthian Corporation*, like Grandmore Investors in *Burkheimer* and like Neidhardt in *Tri-Continental Leasing*, Holtzinger did not induce any contract breach or contract termination. The evidence was undisputed that Mr. Meldrum was unhappy with Kelley's performance under the Proposal and had already decided to terminate the Proposal before any discussions with Holtzinger occurred. Furthermore, it was Mr. Meldrum who approached Holtzinger and asked Holtzinger to provide post harvest storage, packing and sales services.

Holtzinger did not induce or solicit Meldrum's business. Holtzinger did not induce a breach of the Kelley Agreement. Holtzinger did nothing more than accept an offer by Meldrum and then honor the commitments that it made. This is the same situation as existed in *Corinthian Corporation*, and *Burkheimer*, where the defendants accused of tortuous interference did nothing more than accept and perform under an offer presented to them, and where the court dismissed the

tortious interference claims against those defendants as a matter of law.

d) **Kelley was not damaged as a result of the Holtzinger contract.**

Kelley must prove it was damaged as a result of the alleged interference in order to maintain its claim. It cannot do so here because it was not damaged.

The Kelley Agreement states: “All apple crop bins harvested from this orchard will be delivered in the name of Kelley Ag Services, Inc. and all proceeds from those apples will be applied to interest first, then to outstanding billed amounts before any distribution to Meldrum.” CP 117. In other words, Kelley would not be profiting from the post harvest handling of the apples. Rather, any entity handling the Meldrum crop post harvest would be entitled to be paid for the storage, packing and sale of the fruit just as Holtzinger was paid. Kelley would just apply the net proceeds toward outstanding amounts already owed by Meldrum before distributions to Kelley or Meldrum. CP 117.

Jim Kelley testified that it was his intention to send Meldrum’s apples to Valley Fruit and Mountainland Apples in Utah. Had Mr. Kelley done so, the evidence will show that the return on the crop would have been less than the return achieved by Holtzinger. See Section IV.B. Kelley suffered no damages as a result of Holtzinger’s performance under the Agreement.

B. Alternatively, the Trial Court committed error by limiting the testimony of Scott Hanses and David Lawrence and as such, Holtzinger should be granted a new trial.

In its claim, Kelley asserts that Kelley would have received a higher yield for the apple crop than the one obtained by Holtzinger. To refute the evidence, Holtzinger attempted to present the testimony of Scott Hanses, the Vice President of Holtzinger Fruit. RP 496. The scope of the testimony provided by Mr. Hanses was based upon his experience in the industry since 1974. RP 496. He was going to testify about the daily pack outs as it related to the Meldrum fruit. RP 490. He was going to testify as to the quality of the fruit for Meldrum that was delivered to Holtzinger. RP 490. He was going to talk about whether the Meldrum fruit would have made the gambler's pool, the riskiest of the pools with the highest yield for which Kelley asserted that the fruit would have made and obtained the highest yield. RP 490. Mr. Hanses, in his experience, going to refute that the crop would have been sold in the gambler's pool as that occurs about once every ten years on the Meldrum orchard. RP 491. He was going to be called to testify that the gambler's pool numbers for which Kelley was attempting to collect damages was an inaccurate sum for the jury to consider given that the cold rate of the fruit was almost 25% and that Jim Kelley did a horrible job raising the crop. RP 491. Mr. Hanses was going to be asked to testify as to whether, in his opinion, the fruit

would have made the gambler's pool which, if believed, added approximately \$70,000.00 to the Kelley damages claim. RP 491. In addition, Holtzinger attempted to address the damages number by Kelley through its CEO, David Lawrence. RP 759-762.

The Court ruled that Mr. Hanses could only discuss what he saw, the size and the grade of the fruit. RP 492. The Court further reasoned that Mr. Hanses was not qualified to give an opinion as to what it would have sold for in the market. RP 492-93. The Court took the position that in order to give such opinion, Mr. Hanses had to be disclosed as an expert witness rather than a lay witness for which he was disclosed. RP 493.

The Court, applying the same logic, ruled David Lawrence could not discuss the Kelley damages claim. RP 759-762.

In contrast, during the Plaintiff's case, the Court allowed Jim Kelley, a lay witness, to testify at length regarding what the gambler pool was and the damages that Kelley suffered as a result of the alleged tortuous interference. RP 97-98; 258-267. In short, the Court allowed Kelley to introduce the concept of the gambler's pool to the jury and allowed Jim Kelley, a lay witness, to testify as to the damages that Kelley Ag Services, Inc. suffered as a result of the crop not being placed in the gambler's pool. However, the Court refused to allow Mr. Hanses or Mr. Lawrence to testify as to the actual returns of the gambler's pool and the likelihood of the Meldrum fruit reaching the gambler's pool.

1. *Even as a lay witness, Scott Hanses and David Lawrence could give an opinion as to the ability of the fruit to reach the gambler's pool and the damages asserted by Kelley.*

Kelley increased its damages claim by asserting that the Meldrum fruit would make the gambler's pool. By taking this position, Kelley claimed approximately \$70,000.00 in additional damages as a result of the alleged Holtzinger interference. ER 701 controls opinions by lay witnesses. It reads:

"If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) rationally based upon the perception of the witness; (b) helpful to a clearer understanding of the witness's testimony or the determination of a fact and issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

In Evidence Rule 701, a witness may testify to opinions or inferences when they are rationally based on the perception of the witness and helpful to the jury. *State v. Fallentine*, 149 Wn. App. 614, 215 P.3d 945 (2009). The Court completely limited Scott Hanses to testify of opinion based upon his personal knowledge given his long career in the apple industry. The Court did not allow David Lawrence to testify about damages. By being unable to attack the position of Kelley that the fruit would have been gambler pool fruit, the jury was unable to understand the

scope of the error of the damages claim against Holtzinger. There is no question that Scott Hanses, based upon personal knowledge and rational perceptions, could have provided testimony regarding the allegation of gambler pool fruit to the jury. See *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 34, 991 P.2d 728 (2000).

While this Court generally defers to the Trial Court for purposes of scope of a witness testimony, this Court must find an abuse of discretion when one party is allowed to offer testimony through a lay witness but the other is limited to presentation of its case.

#### V. CONCLUSION

Based upon Holtzinger's Brief and the argument of counsel, Holtzinger respectfully requests that the Court remand this matter to the Benton County Superior Court for an order dismissing the tortious interference claim against Holtzinger. Alternatively, Holtzinger respectfully requests a new trial to allow the full and complete testimony of Scott Hanses and Dave Lawrence.

Respectfully submitted,

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