

FILED

JAN 11 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289745

THE COURT OF APPEALS
STATE OF WASHINGTON, DIVISION III

KELLEY AG SERVICES, INC.,

Plaintiff/Respondent,

vs.

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

Defendants/Appellants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Kelley Ag Services (“Kelley Ag”) put eight months and approximately \$226,000 dollars into Ken Meldrum’s (“Meldrum”) apple orchard, and then just a week before harvest, CM Holtzinger Fruit Co. (“Holtzinger”) and Meldrum wrongfully ejected Kelley Ag from the orchard and took the crop for themselves. Kelley remains unpaid to this day. The jury did not believe Meldrum and Holtzinger’s self-serving testimony regarding what was discussed between them, and given the substantial evidence in support of the verdict, neither should this Court.

Additionally, Holtzinger waited until trial to disclose that two of its lay witnesses would be testifying as experts regarding the “gambler’s pool,” an industry term for fruit sold long after harvest. This was a clear violation of the Franklin County Local Rules, and therefore, the trial court properly restricted both witnesses’ testimony to what was disclosed prior to trial. Regardless, even if the trial court’s ruling was erroneous, the error was harmless as Holtzinger was still permitted to elicit substantial testimony on the issue.

The verdict of the jury and the rulings of the trial court should be

upheld.¹

II. COUNTER STATEMENT OF ISSUES ON APPEAL

1. Was there substantial evidence that Holtzinger intentionally induced Meldrum to breach his contract with Kelley Ag?
2. Was there substantial evidence that Kelley Ag was damaged by Holtzinger inducing Meldrum to breach his contract with Kelley Ag?
3. Did the trial court abuse its discretion by limiting the testimony of Holtzinger's witnesses in accordance with local rules, and if so, was the error harmless?

III. COUNTER STATEMENT OF THE CASE

Kelley Ag is a consulting and orchard property management company.

RP 112. Its president, Jim Kelley ("Kelley"), is a highly respected orchard consultant, RP 112, and has been in the tree fruit industry since 1979. RP 99, 101; Ex. 3 p. 1.²

In early 2007, Meldrum approached Kelley and asked for help with his orchard. RP 180. Meldrum was just emerging from bankruptcy and did not have enough capital to plant new varieties of apple trees, manage and care

¹ Holtzinger's first issue on appeal related to the trial court's denial of Holtzinger's Motion for Summary Judgment. This issue was withdrawn in footnote 1, page 1 of Holtzinger's Appellant's brief. Therefore, Respondent's Brief will not address the denial of summary judgment.

² See Kelley's numerous prestigious leadership positions in the agricultural industry. RP 99-108.

for his orchard, or pay workers to harvest the crop. RP 36-37, 179-80. Kelley had successfully managed Meldrum's orchard for a third party when it was under lease in prior years, and was, therefore, the logical choice. RP 177-78.

Kelley Ag developed a plan and drafted a proposal, signed by Jim Kelley and Meldrum (hereinafter referred to as the "Orchard Management Contract"). Ex 3, RP 183. The Orchard Management Contract stated: "By signing below Meldrum agrees with the terms and conditions outlined in the proceeding proposal and acknowledges Kelley Ag Services, Inc. as the management entity for this project." Ex. 3, p. 1.

The term of the orchard management contract was from crop year to crop year. RP 183; Ex. 3, p. 1. Kelley Ag would receive a management fee and be reimbursed for costs incurred plus interest. Ex 3, p. 3-4. The contract assumed it would last an entire year, and therefore, the Management fee and equipment costs were amortized over 12 months. Ex. 3, para. 5.2 and 5.3. Even if Meldrum received financing sufficient to pay Kelley Ag in full before the end of a crop year, Paragraph 5.2 provided that Kelley Ag was to receive the entire year's management fee. Ex. 3, para. 5.2.

Because Meldrum did not have the funds to pay Kelley Ag, Kelley Ag agreed to be paid out of the proceeds from each crop produced under the

Orchard Management Contract, Ex. 3, p. 4, and reserved the right to file liens. Ex. 3, para. 5.7. Most importantly, the Orchard Management Contract required that all bins harvested from Meldrum's crop be delivered in Kelley Ag's name, Ex. 3, para. 5.6, to the packing houses of Kelley Ag's choice, Ex 3, para 2.1 sec. 9, and that Kelley would be paid first from each year's proceeds. Ex 3, para. 5.6. RP 39-40, 67-68. These requirements helped secure Kelley Ag's investment and made the entire arrangement with Meldrum financially feasible. RP 183.

Competition between packing houses is fierce. RP 95. Because Kelley Ag was financing Meldrum's orchard, and was to be paid from the proceeds of the sale of apples, the exclusive right to select the packing houses for Meldrum's fruit was the only way Kelley Ag could ensure the best return on its investment. RP 183-84, 310, 727-28. This was especially true due to the fact the projected return for the 2007 crop was \$160,000, far less than the approximately \$246,000 Kelley budgeted for the 2007 crop year. RP 203-205.³

The plan was for Meldrum to obtain financing and eventually pay Kelley Ag back in full. RP 37, 180-81. There was no explicit language in the

³ Meldrum helped draft the budget and plan for the orchard, and Kelley incorporated Meldrum's comments and concerns. RP 182, 202, 212.

contract describing how the contract was to be terminated. *See* Ex. 3. Kelley testified that Meldrum could not unilaterally terminate Kelley Ag's right to control the crop without first paying Kelley Ag in full:

Q. Would you have entered into an agreement with Mr. Meldrum that would have called for you to put up all the money, pay all the bills, incur all the expenses, do all the work, and then Mr. Meldrum takes the crop?

A. No, I wouldn't even consider to put my whole business at risk.

RP 183.

Kelley Ag fully performed its obligations under the contract advancing over \$226,000⁴ in costs and services to do so. Ex. 8; RP 217. Kelley Ag even came in under budget. RP 202-205, 217, 238. In addition to planting 7.2 acres of new trees, Kelley Ag constructed a trellis support system, cared for the new and existing trees, and managed every aspect of Meldrum's orchard for the 2007 crop year, all at Kelley Ag's expense. RP 43, 185-87, 217.

On April 3, 2007, Kelley Ag signed a contract with Valley Fruit III, LLC ("Valley Fruit") to pack a portion of Meldrum's crop. Ex. 13. RP 222. On August 24, 2007, Kelley Ag signed a contract with Mountainland Apples, Inc. ("Mountainland"), a Utah corporation, to pack the remainder of

⁴ Number includes interest. RP 217.

Meldrum's crop. EX 14. RP 222.

On August 15, 2007, Kelley Ag filed a UCC lien on Meldrum's orchard stating: "Currently, debtor owes to secured party approximately \$160,000.00 and services are continuing." Ex.15. The same lien was refiled on September 5, 2007. Ex. 16.

By at least August of 2007, without Kelley Ag's knowledge or consent, Meldrum entered into negotiations with Holtzinger to terminate the Orchard Management Contract and have Holtzinger pack and sell all Meldrum's fruit. RP 76, 79-80, 421-422. At trial, Holtzinger's President David Lawrence testified that Holtzinger has a "hunting list" for certain varieties of apples. RP 741. Holtzinger employees had identified Meldrum's field as a target and wanted to "see if there is an opportunity." *Id.* Meldrum had seen Holtzinger's advertisements. RP 79. Meldrum stated at his deposition that he provided Holtzinger with a copy of the Orchard Management Contract "real soon after we first started talking" in August of 2007. RP 76-78.

On September 6, 2007, Meldrum signed a contract, promissory note and financing agreement with Holtzinger. Ex. 18, 32 and 33. The contract provided for Holtzinger immediately to issue a check to Meldrum in the amount of \$53,460. Ex. 18, p. 1; Ex. 19. It also guaranteed Meldrum an

advance to harvest his crop, and financing so that he could continue to operate the orchard after Kelley Ag was forced off the property. Ex. 18, p. 1. There was no mention of Kelley Ag in the contract, let alone any provision to pay the amount owed Kelley Ag, or to secure UCC lien releases for Kelley Ag's liens. *See* Exs. 18, 32, and 33.

Meldrum alleged that he told Holtzinger his contract with Kelley Ag was terminated. RP- 78-79. He provided Holtzinger with no documents to back up this claim. RP 556-57. Holtzinger never contacted Kelley Ag to verify Meldrum's alleged representation that the Orchard Management Contract had been terminated, RP 234 and 529, and Kelley testified that no such agreement to terminate was reached. RP 421-422.

Jim Kelley, Meldrum and Meldrum's neighbor, Earl Duke Diller, had a conversation in Diller's orchard several days after Meldrum and Holtzinger secretly signed their September 6, 2007 contract. RP 271. Diller testified that all present agreed it would be best for Kelley Ag to coordinate Meldrum's harvest with Diller's harvest to minimize cost. RP 272-73. There was no indication during that conversation that Meldrum had "terminated" the Orchard Management Contract or signed a contract with Holtzinger. RP 273. Diller's impression was that Meldrum was "quite happy" with Jim Kelley's performance, and he was "shocked" when he later learned that

Meldrum was under contract with Holtzinger the entire time. RP 274.

Shortly thereafter, Kelley Ag paid workers to harvest a portion of Meldrum's crop. RP 227-28. Holtzinger and Meldrum never contacted Kelley Ag to request it stop work, or ship the apples it was harvesting to Holtzinger. *See* RP 775. Holtzinger and Meldrum continued to act as if there was no agreement between them. *See* RP 775.

Meldrum testified that Holtzinger told him it knew of Kelley Ag's UCC liens at the time Meldrum signed his September 6, 2007 contract. RP 654-55. Meldrum further testified that Holtzinger required Meldrum to get Jim Kelley to sign a lien release and "sign" for the \$53,460 check from Holtzinger, which Kelley refused to do. RP 654-55. Meldrum stated:

I signed the, um, contract with Holtzinger on September 6th, and when I did that, they had done a lien search and said, "There is a crop lien on your farm by Kelley, by Jim Kelley." I wasn't aware of that. And so they said that, "You know, you need to, you know, in order to give him the check you need to sign it off for that amount." ... The reason I had him sign off on the lien release was to give him the check so he could have it and the liens would be released. Um, he refused....

RP 655.

In a letter to Jim Kelley dated September 13, 2007, Meldrum laid out two buy-out "options" which he claimed he had previously given Kelley to consider. Ex. 21. The letter mentioned Meldrum's desire to use Holtzinger

and stated, in part: "As of yesterday, you had not committed to either option."

Id.

In a letter to Kelley dated September 11, 2007, but postmarked September 17, 2007, RP 226, Meldrum stated, in part:

Pursuant to the terms and conditions of the Management Proposal, dated January 10, 2007 and executed February 6, 2007, please be advised that said Management Proposal is hereby terminated effective this date, September 11, 2007.

Please cease any work on the Meldrum property effective immediately. All apples on said property shall be harvested and marketed by owner, Ken Meldrum.

Ex. 20.

The "termination letter" did not mention Meldrum's September 6, 2007 contract with Holtzinger or any compensation to Kelley Ag as consideration for the termination. Ex. 20. Jim Kelley testified that he received the "termination letter" on or about September 18-19, 2007. RP 218.

Holtzinger Vice President David Lawrence testified that Holtzinger withheld performance under its contract with Meldrum until it received the termination letter. RP 777-78. Lawrence testified: "... we had signed our contract before September 11th, but we hadn't performed on it until after this cancellation, which in my experience in business a lot of contracts are done that way." RP 778.

Holtzinger never contacted Kelley Ag to ascertain why the lien releases were not signed. RP 530 and 775. Holtzinger never contacted Kelley Ag to discuss handing over the orchard, *see* RP 530 and 775, or to see if Kelley Ag had signed for the \$53,460 check. *See* RP 654-55, 530 and 775. Holtzinger sat back and waited to receive Meldrum's fruit and the approximately \$160,000 it grossed for Meldrum's apples. *See* RP 530, 547-48. Ex. 26.

On September 21, 2007, Kelley Ag, through its attorney Diehl Rettig, sent a letter to Meldrum and Holtzinger rejecting Meldrum's attempt to terminate the Orchard Management Contract and demanding that Holtzinger cease and desist interfering with the Orchard Management Contract. Ex. 22. The letter was received by Holtzinger prior to harvest and before any payment to Meldrum under the September 6, 2007 contract. RP 780-81.

Holtzinger Vice President Scott Hanses confirmed that Lawrence instructed Hanses to ignore Kelley Ag's cease and desist letter. RP 529-30. Lawrence testified that after receipt of the letter, "the prudent thing to do was to take the fruit, pack it in the appropriate time frame, get the revenue in, and then let the parties decide where the money goes," RP 781. Harvest of Meldrum's apples began after Kelley Ag was ejected on or about September 24, 2007. RP 756.

On October 2, 2007, Holtzinger issued a check to Ken Meldrum, without listing Kelley Ag as a payee, in the amount of \$25,080.00. Ex. 37, RP 533 and 579. Meldrum promptly endorsed the check to Bryon Pugh, who Meldrum had harvest his crop after Kelley Ag was ejected. RP 533. At trial, Pugh admitted to ghost writing Meldrum's September 13, 2007 letter to Kelley. RP 578. Moreover, Pugh had secretly listened to multiple telephone conversations between Meldrum and Kelley, RP 570, and was apparently advising Meldrum on how to breach his agreement with Kelley. RP 577. In fact, Pugh and Meldrum had gone to meet Holtzinger together before and during the meeting where the September 6, 2007 contract was signed. RP 598. Pugh admitted that getting him the \$25,080.00 check was "part and parcel" of Meldrum's deal to eject Kelley and hire Holtzinger. RP 586.

Only after the fruit was off the trees and in Holtzinger's possession did it start issuing checks listing Kelley Ag as a payee. Ex. 19 and 37-40. Per agreement between counsel, those checks were deposited in a blocked account held by Meldrum's attorney pending trial. RP 254-55. Holtzinger kept the over \$160,000 in fees it charged to pack, market and sell the crop. RP 547-48; Ex. 26. Lawrence confirmed at trial that Holtzinger "did make a profit off of that." RP 779.

Had Meldrum's fruit gone to Mountainland and Valley Fruit per

Kelley Ag's contracts with those companies, the evidence at trial established the fruit would have returned an additional \$48,137.99 to Kelley Ag. Ex. 31. *See* section IV B 2, *infra*. The figures were based partly on whether the fruit could have survived long enough to reach the "gambler's pool", which is an industry term for fruit sold later after harvest. RP 257.

Following a verdict in favor of Kelley Ag, CP 235-36, a motion to enter the judgment on the verdict was filed, but entry was delayed at defendant's attorney's request due to matters unrelated to the case. *See* CP 231-33. In the interim, Meldrum sought bankruptcy protection for a second time. *In Re Meldrum*, Eastern District of Washington cause number 10-01973. CP 223-24. Accordingly, when the hearing took place, judgment was entered solely against Holtzinger. CP 225-30. Meldrum's proposed Chapter 12 Bankruptcy plan proposes to use the crop proceeds due Kelley Ag as "cash collateral" to fund his Orchard. To date, Meldrum has paid Kelley Ag absolutely nothing.

Holtzinger returned \$142,230.26 to Meldrum for his fruit (\$25,080.00 of which was paid from Meldrum to Byron Pugh, leaving \$117,150.26 in the blocked account referenced above). RP 253-555. The jury found that Meldrum owed Kelley Ag \$226,678.64 per the Orchard Management Contract, and awarded an additional \$24,583.00 in damages against Meldrum

for lost profits Kelley Ag sustained on returns for Kelley Ag's own fruit caused by Kelley Ag's inability to perform the Mountainland contract. CP 235-36. In addition, the jury awarded Kelley Ag \$48,137.99 in damages against Holtzinger for the difference in returns between Holtzinger and Mountainland/Valley Fruit. Id.

At trial, Holtzinger sought to have two lay witnesses provide expert testimony that the Meldrum fruit could not survive long enough to reach the gambler's pool. RP 490, 759. Kelley Ag's counsel objected, but the trial court permitted extensive testimony on the topic by Holtzinger's witnesses, and no offer of proof was made by Holtzinger as to what additional testimony would have been elicited.

IV. ARGUMENT

A. The Trial Court Properly Denied Holtzinger's Motion for a Judgment as a Matter of Law on Kelley Ag's Tortious Interference Claim

There are five elements necessary to prove a claim for tortious interference with a contract or business expectancy: (1) the existence of a valid contractual relationship or business expectancy; (2) the defendant's knowledge of that relationship or business expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) the defendant interfered for an improper purpose or

improper means; and (5) damages. Westmark Development Co. v. City of Burien, 140 Wn.App. 540, 557, 166 P.3d 813 (2007).⁵

Holtzinger challenges the denial of its motions for judgment as a matter of law brought after Kelley Ag rested, and at the close of Holtzinger's case. By making the strategic decision to present its own case, however, Holtzinger waived any right to challenge the sufficiency of the evidence presented solely during Kelley Ag's case in chief. Hill v. Cox, 110 Wn.App. 394, 403, 41 P.3d 495, 501 (2002) ("Once a defendant puts on a case, any challenge to the sufficiency of evidence before the court at that time is waived.").

1. Standard of Review

"Judgement as a matter of law under CR 50 is appropriate only when no competent and substantial evidence exists to support a verdict." Faust v. Albertson, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009). "The substantial evidence test is met where there is sufficient evidence to persuade a rational, fair-minded person of the truth of the premise." Westmark Development Co.,

⁵ Holtzinger's Brief does not offer argument on the forth element: "improper purpose or improper means." Therefore, Respondent's brief will not address this element. See Mackey v. Maurer, 153 Wn.App. 107, 114, 220 P.3d 1235, 1238 (2009) ("This Court does not review issues inadequately briefed or mentioned in passing."); See also Westar Funding, Inc. v. Sorrels, 157 Wn.App. 777, 787, 239 P.3d 1109, 1114 (2010) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.")

140 Wn.App. at. 557. “If any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury.” Mega v. Whitworth College, 138 Wn.App. 661, 668, 158 P.3d 1211, 1215 (2007).

The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937, 945 (1994).

2. **The Orchard Management Contract Could Not Be Unilaterally Terminated by Meldrum Prior to the Fruit Being Delivered in Kelley Ag’s Name to the Packing Houses of Kelley Ag’s Choice, and Kelley Ag Being Paid in Full**

Hotzinger’s assertion that Meldrum could unilaterally terminate the Orchard Management Contract is demonstrably false. Page one of the Orchard Management Contract states, in part: “This management would be considered a long term proposal and would continue from year to year until written cancellation is given to end the contract.” EX 3, p. 1. The phrase “year to year” in an orchard contract is reasonably interpreted as “crop year to crop year.” RP 183. Kelley testified the contract “was intended to be an ongoing project of year to year, ‘crop to crop’ as we refer to it in the tree fruit

industry.” Id.

The contract included the following terms regarding Kelley Ag’s post harvest rights:

2.1 STRUCTURE

The planned structure would be an orchard management contract with Kelley Ag Services, Inc to provide the following services:

- ...
- 9) Select packer/marketer for fruit harvest

Ex 3, p. 2.

5.6) Crop Proceeds: 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.

5.7) Liens: Meldrum gives permission for Kelley to file appropriate liens for amounts owed to Kelley Ag Services, Inc.

Ex 3, p. 3.

The above terms called for Meldrum’s fruit to be delivered in Kelley Ag’s name to the packing houses of Kelley Ag’s choice: Valley Fruit and Mountainland. Kelley Ag was to be paid first from the proceeds, and had lien rights to secure the balance. Nothing in the contract provided that these post-harvest contractual rights could be unilaterally terminated by Meldrum.

Contrary to Holtzinger’s claim, paragraph 5.2 (Ex. 3, p. 3) does not

alter the clear language in the contract.⁶ Paragraph 5.2 is part of the section addressing “the costs and fees associated with the orchard management contract.” Ex. 3, pg. 3, para. 5.1. The paragraph grants Kelley Ag an entire year’s management fee, regardless of whether it was wrongfully removed from the property. It was included for Kelley Ag’s protection, not to provide Meldrum with a means to unilaterally deprive Kelley Ag of its rights in Meldrum’s fruit. RP 436.

The applicable law was set forth by this Court in Cromwell v. Gruber, 7 Wn.App. 363, 499 P.2d 1285 (1972). In that case, plaintiff had a contract to sell automatic typewriters in eastern Washington. Id. at 364. The contract did not specify its duration. Id. at 366. After plaintiff spent six months developing a market for the typewriters, defendant terminated his contract unilaterally without cause. Id. at 366. In rejecting the defendant’s terminable-at-will argument, this Court held: “If a reasonable period of duration can be implied from the circumstances, the contract is not terminable at will until the lapse of such reasonable time and then only upon reasonable notice.” Id. at 366-67. This Court upheld the trial court’s ruling that the defendant’s early termination constituted a wrongful breach, in part because the plaintiff would

⁶ Holtzinger cites paragraph 5.1, but the quote cited is actually from paragraph 5.2.

not have entered into the contract, and spent the time and resources to develop a market, had the contract been terminable at will. Id. at 367-68.

Cromwell is directly on point. Kelley Ag would not have invested approximately \$226,000 into the orchard, negotiated contracts with packing houses, or spent approximately eight months raising a crop, if its rights in the fruit could be terminated unilaterally by Meldrum without cause. The only reasonable interpretation of the contract's duration is that it cannot be terminated until *after* the fruit was delivered in Kelley Ag's name to the packing houses of Kelley Ag's choice, and Kelley Ag was paid in full.

The case cited by Holtzinger, Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 135 Wn.App. 760, 145 P.3d 1253 (2006), is not on point. In Cascade Auto Glass, an auto glass company contracted with an insurer to provide certain prices to insureds. Id. at 762. The contract was simply one for continuing performance, not something from which a reasonable duration can be implied. Here, like in Cromwell, the contract's term can be implied from its language and the circumstances.

A similar situation occurred in Burke & Farrar, Inc., v. Campbell, 128 Wash. 646, 224 P. 9 (1924). In that case, a contract called for a contractor to be paid out of rents. Id. at 652. The defendant claimed the since the contract was silent as to duration, it could be unilaterally terminated prior to the

contractor being paid in full. The Burke court, however, held the contract could not be unilaterally terminated until its terms were fully carried out:

While the agreement is an unusual one, it is not uncertain in its terms, and we must enforce it as we find it. Manifestly, it was the intention of the parties that the appellant should be repaid out of the rents, and, if so, then it has a right thereto until it has been fully paid, regardless of the lapse of time;

Id.

Like the contractor's right to rents in Burke, Kelley Ag had a right to be paid first out of each year's crop, and to have Meldrum's fruit sent in Kelley Ag's name to the packing houses of Kelley Ag's choice. Meldrum cannot accept the benefits of Kelley Ag's services for an entire crop year, and then unilaterally terminate his post-harvest obligations. The terms agreed to by the parties must be honored.

Moreover, even if, as Holtzinger suggests, the Orchard Management Contract was terminable at will, "the fact that a party's terminable at will contract is ended in accordance with its terms does not defeat that party's claim for damages caused by unjustifiable interference, for the wrong for which the courts may give redress includes also the procurement of the termination of a contract which otherwise would have continued in effect." Island Air, Inc. v. Labar, 18 Wn.App. 129, 140, 566 P.2d 972 (1977). There is substantial evidence that Meldrum would not have terminated the contract

absent Holtzinger's inducement. *See* Section 3, *infra*.

Simply put, Kelley Ag had a valid contractual right and business expectancy on September 6, 2007 (the date the Meldrum/Holtzinger contract was signed), on September 24, 2007 (the date Meldrum's fruit was harvested), on September 25, 2007 (the date Holtzinger accepted Meldrum's fruit), and on each and every date thereafter, until paid in full. Ex. 18 and 756.

3. **There was Substantial Evidence that Holtzinger Knowingly Induced Meldrum to Breach the Orchard Management Contract**

The jury determined that Meldrum's, Pugh's and Holtzinger's self-serving testimony was not credible. "[T]he court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." Faust v. Albertson, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009). "A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact. Credibility determinations cannot be reviewed on appeal." Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003).

For the reasons set forth below, there was substantial evidence to support the verdict.

a. **Holtzinger Knew the Kelley Ag Contract was Valid and Enforceable**

“It is not necessary that the interferor understand the precise legal nature of the relationship with which he is interfering.” Topline Equipment, Inc. v. Stan Witty Land, Inc., 31 Wn.App. 86, 93, 639 P.2d 825 (1982).

“Interference with a business expectancy is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.” Newton Ins. Agency. & Brokerage, Inc. v. Caledonian Ins. Grop, Inc., 114 Wn.App. 151, 158, 52 P.2d 30 (2002), *review granted*, 148 Wn.2d 1021, 66 P.3d 638 (2003).

The testimony proffered by Meldrum and Holtzinger regarding their contract negotiations was not supported by the evidence. In Calbom v. Knudtson, 65 Wn.2d 157, 396 P.2d 148 (1964), attorney Calbom was retained to file a probate by Henderson, who was the executor of her husband’s will. Id. at 159. The attorney prepared and filed the necessary documents. Id. Henderson then went to see accountant Knudtson, who told her Calbom was unsatisfactory and she should retain one of his hand picked attorneys, which she did. Id. at 160. Calbom brought suit against Knudtson’s firm for tortiously interfering with his business expectancy, and after a trial, obtained a judgment against the firm. Id. at 160-61. At trial, Henderson, the

deceased's office manager, and Knudtson all testified that Henderson intended only to employ Calbom on a temporary basis. Id. at 163. Therefore, defendants claimed, there was insufficient evidence to support Calbom's claim that they had knowingly interfered with Calbom's business expectancy in maintaining the probate action. Id. at 163-65. The Washington State Supreme Court, however, held the conduct of the parties raised issues regarding the credibility of the witnesses' testimony, and therefore, there was substantial evidence to support the judgment. Id.

Here, there was substantial evidence at trial that either Meldrum did not tell Holtzinger the contract had been terminated, or if he did, that Holtzinger knew the statement was false. Holtzinger President David Lawrence admitted that it had a "hunting list" and specifically targeted Meldrum's orchard. RP 741. He testified:

- Q. Ok, and for the purposes of the first prong of that for purposes of assessing what the Meldrum's had to see to go forward, what was done?
- A. Well, we have - - in this particular case we went out and took at look at their orchard. Our field people assess what's on the trees, what condition they're in, come back to our sales people. They come back, put their heads together and try to get an idea of the value of what's hanging on the trees. We do that a lot, and just like any good salesmen that's looking for new customers. Our guys are constantly out driving around going to growers and looking for new opportunities. So our sales department at the beginning of the season we're already

planning right now, couple months ago, for this coming year when we're going to pack. So our field guys right now have a hunting list for what apples we need for next year to balance the customers that we have, people like Costco and all the rest. And they go out and look for these. And they'll identify orchards, and then they identify who the grower is and see if there's an opportunity...

Despite Lawrence's claim to the contrary, there is substantial evidence that Holtzinger worked with Meldrum to breach the Orchard Management Contract. The first contact between Meldrum and Holtzinger was in August 2007. RP 529. Very early during their negotiations, Meldrum gave Holtzinger a copy of his contract with Kelley Ag (RP 76-78), the only reasonable interpretation of which gave Kelley Ag rights in Meldrum's fruit that could not be unilaterally terminated by Meldrum. Holtzinger discovered Kelley Ag had at least one crop lien for \$160,000 (RP 654-55), but Meldrum allegedly claimed Kelley Ag agreed to take the much smaller amount of \$53,460 (RP 742). Holtzinger did not contact Kelley Ag to confirm Meldrum's alleged representation. RP 775.

Holtzinger required Meldrum to obtain lien releases and get Jim Kelley to sign an agreement to accept the \$53,460 check, which Kelley refused to do. RP 654-55. Meanwhile, Holtzinger withheld performance under its September 6, 2007 contract with Meldrum while it waited for confirmation that Meldrum's contract with Kelley Ag was actually

terminated. RP 777-78. Instead of a signed agreement from Kelley, however, confirmation came in the form of a letter from Meldrum postmarked September 17, 2007, stating the following:

Pursuant to the terms and conditions of the Management Proposal, dated January 10, 2007 and executed February 6, 2007, please be advised that said Management Proposal is hereby terminated effective this date, September 11, 2007.

Please cease any and all work on the Meldrum property effective immediately. All apples on said property shall be harvested and marked by owner, Ken Meldrum.

Ex. 20.

The language in the “termination letter” makes clear that the letter is not the result of a settlement between Meldrum and Kelley Ag, but is instead Meldrum’s attempt to unilaterally terminate the contract. Holtzinger Vice President Scott Hanes testified that the letter was the only documentation Holtzinger received of the alleged termination. RP 556-57. Holtzinger President David Lawrence testified regarding the letter as follows:

- Q. Then sir, I would direct your attention to exhibit number 20. This is the letter that you said you got copy of shortly after it was issued.
- A. I think again, Mr. Rettig, I said that I got a copy of the letter after it was issued. I did not say shortly.
- Q. And when you got this letter, surely, surely Mr. Lawrence, you must have read that the letter does not record a earlier termination. In fact, what it states is the contract or

management proposal is, quote, "Hereby terminated, effective September 11, 2007." Do you see that in the letter?

A. I do.

Q. Did you not see that in the letter when you got it and read it?

A. Sure. The letter hasn't changed.

Q. Did you not think that maybe you'd been bamboozled because it had been represented to you that it had been terminated in August of 2007 and now you find out it hadn't been terminated and wasn't terminated until seven days after Holtzinger contracted for this fruit?

A. What do you mean by Bamboozled?

Q. Defrauded, misrepresented, told a lie, told an untruth, defrauded.

A. I had been told that the contract had been orally terminated, and as also was pointed out here, we had signed our contract before September 11th, but we hadn't performed on it until after this cancellation, which in my experience in business a lot of contracts are done that way.

RP 777-78.

Lawrence further testified that he did not care about Kelley Ag's UCC liens because of his interpretation of federal law. RP 751. Therefore, the only reason Holtzinger would withhold performance and request lien releases was that Holtzinger knew the contract was not terminated on September 6, 2007. Holtzinger was waiting to see if Kelley Ag would agree to be bought out, and when Kelley Ag refused, Holtzinger abandoned its

original plan in total disregard of Kelley Ag's rights in the fruit.

Furthermore, Meldrum's neighbor, Earl Diller, testified that several days after September 6, 2007, Meldrum, Kelley and Diller discussed jointly harvesting a portion of Diller's and Meldrum's crops. RP 271-73. During that conversation Meldrum acknowledged that Jim Kelley was doing a good job, and that Jim Kelley would be harvesting his apples. RP 274. When Diller later discovered that Meldrum had entered into a September 6, 2007 contract with Holtzinger, he was "pretty shocked" because "there was nothing bad said at all about Jim [Kelley] ... [i]n fact I was under the impression that Ken was quite happy with him." RP 274. Meldrum and Holtzinger were keeping their arrangement a secret.

Additional evidence that Meldrum never told Holtzinger his contract with Kelley Ag was terminated is found in the correspondence between the parties. The September 13, 2007 letter from Meldrum to Kelley stated that while Meldrum had made "several offers regarding payment" and set forth two "options" for Kelley to consider, "[a]s of yesterday, you had not committed to either option." Ex. 21. Meldrum then sent his "termination letter" postmarked September 17, 2007.

Lest there be any doubt regarding the evidence in Kelley Ag's favor, Kelley Ag's attorney, Diehl Rettig, served Holtzinger and Meldrum with a

cease and desist letter dated September 21, 2007. The letter rejected Meldrum's attempt to terminate the Orchard Management Contract and stated:

Furthermore, by copy of this letter to Holtzinger Fruit, Holtzinger is put on notice that there is an existing contract for your 2007 apple crop and Holtzinger is to immediately cease and desist interfering, in any way, with that contract.

The September 21, 2007 letter was received by Holtzinger prior to harvest, but Lawrence instructed his employees to ignore it. RP 529-30. Lawrence testified that it was more important to harvest the crop and "get the revenue in" than to respect the cease and desist letter. RP 781. Holtzinger employee Scott Hanses testified:

Q. Did you yourself receive or were you provided copies of correspondence that I [Diehl Rettig] had delivered to Holtzinger in September of 2007 telling Holtzinger in effect to butt out?

A. I was aware of them.

Q. And is it not a fact that your employer instructed you to continue with the contract that you folks had entered into with Mr. Meldrum?

A. I was told that that contract had been voided?

Q. In effect you were told to continue to proceed?

A. I was told that the contract was voided and we should continue, yes, sir.

Q. Who told you that?

A. Mr. Lawrence.

RP 529-30.

Holtzinger did not respond to the September 21, 2007 cease and desist letter. *See* RP 780-81. It's representatives did not act surprised by the letter. It did not seek clarification from Kelley Ag or its attorney. *Id* Holtzinger just proceeded, without any regard for Kelley Ag's contractual rights, in advancing funds for harvest, and accepting, packing, marketing and selling the disputed fruit. RP 781. It grossed approximately \$160,000 from its contract with Meldrum. RP 547-48. Holtzinger waited until Kelley Ag was ejected from the property, and the apples were in Holtzinger's possession, before even acknowledging Kelley Ag's interest in the proceeds or including Kelley Ag as a co-payee on checks to Meldrum. Exs. 19, 37-40. Holtzinger's conduct evidences guilty knowledge.

Assuming for the sake of argument that Meldrum actually told Holtzinger his contract with Kelley was terminated, Holtzinger assumed the risk that Meldrum was being deceptive and acted at its own peril by contracting with Meldrum on September 6, 2007. A similar situation occurred in Newton Ins. Ag, supra. In Newton, an insurance agency brought a tortious interference claim against a competitor for hiring a former

employee bound by a non-competition agreement. Id. at 156. The competitor hired the employee after the employee's attorney wrongly advised the competitor that the non-competition agreement was potentially discharged in bankruptcy. Id. at 159. In upholding the trial court's grant of summary judgment for the plaintiff on its tortious interference claim, the Newton court found the competitor's reliance on counsel could not shield it from liability. Id. at 159.

If reliance on counsel was insufficient to shield the competitor in Newton from a tortious interference claim, then Holtzinger's blind reliance on Meldrum's self-serving "termination" claim clearly cannot form the basis for a judgment as matter of law.

Even if Holtzinger reasonably believed that the contract was terminated on September 6, 2007, it was required to cease and desist interfering once it received the cease and desist letter. Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 935 P.2d 628 (1997). In that case, a former Whiteman employee bound by a covenant not to compete with Whiteman was hired by Goodyear. Id. at 746. Whiteman's owner discovered the employee was working in areas prohibited by the covenant not to compete and notified Goodyear. Id. Goodyear, however, continued to permit the employee to violate his covenant. Id. In reversing

the trial court's dismissal of Whiteman's tortious interference claim, this Court held: "The forgoing facts would support a trial court's conclusion or a jury's verdict that Goodyear tortiously interfered in the performance of Whiteman's noncompete agreement." *Id.* at 746. Like Goodyear, Holtzinger decided to ignore a demand to cease and desist, and now must face the consequences.

In summary, there was substantial evidence that either Holtzinger was never told the contract was terminated, or at the very least, Holtzinger knew Meldrum and Pugh were being untruthful. There was also substantial evidence that Meldrum was fully satisfied with Kelley Ag's performance, but Holtzinger made him an offer he could not refuse. Even if Holtzinger reasonably believed the Orchard Management Contract was terminated by September 6, 2007, it received the September 21, 2007 cease and desist letter before harvest and before making any payment under its September 6, 2007 contract. Holtzinger chose to abandon its original request for lien releases and ignored the cease and desist letter at its peril.

b. Holtzinger Induced Meldrum to Breach the Orchard Management Contract

But for Holtzinger, Meldrum would not have breached his contract with Kelley Ag. There was substantial evidence at trial that Meldrum was

pleased and satisfied with Kelley Ag's performance. RP 274. Also, there was substantial evidence that Meldrum could not afford to care for his orchard, or harvest and sell a crop on his own. RP 36-37, 179-80. Meldrum testified:

Q. Now when the lease was up and you took the orchard back in 2006, did you and Mr. Kelley talk to each other about Mr. Kelley taking over management of the orchard under some arrangement other than a lease, under a management contract?

A. Um, yes, we did.

Q. And at that particular time in your life was it not a fact that you did not have the financial ability yourself to purchase the inputs necessary to both produce a crop and to also plant additional trees necessary to take advantage of the apple market and the land you had available for more trees?

A. That's correct.

Q. And Mr. Kelley on the other hand had that access to capital as far as you knew?

A. I assume he did.

Q. And with those limited resources did you ask Mr. Kelley then to manage that ground for you in 2007 with the understanding that you were going to try and get some financing so as to pay him, pay him back what he was going to invest in your orchard?

A. Yes.

RP36-37

Kelley Ag had funded Meldrum's entire crop, contracted to advance

the costs of harvest, and had all the contracts to pack, market and sell the fruit in its name. Ex. 3, p. 2, Ex. 13 & 14. Kelley Ag was never paid by Meldrum and rested all its hopes on a good return from that year's crop to make up some of the balance owed. RP 41, 204-05.

The only foreseeable way Meldrum could breach his contract with Kelley Ag, just days before harvest, was to have a partner willing to advance significant sums of money, and have the means to immediately pack, market and sell Meldrum's fruit. Regardless of who approached who first, but for Holtzinger, the breach would not have occurred.

Viewing the evidence in a light most favorable to Kelley Ag, Holtzinger targeted Meldrum's fruit in August 2007 and made Meldrum an offer he could not refuse. With the help of Byron Pugh, Holtzinger convinced Meldrum that he could breach his contract with Kelley Ag, take control of the fruit, get advanced funds, and then convince Jim Kelley to settle for less than what Kelley Ag was owed.

This explains why the "options letter" and the "termination letter" were both sent after Meldrum's September 6, 2007 contract with Holtzinger was signed. It also explains why Holtzinger withheld performance while it waited for confirmation that Meldrum's contract with Kelley Ag was terminated. Holtzinger was waiting to see if Kelley Ag would agree to be

bought out. Likewise, Holtzinger and Meldrum kept Kelley Ag in the dark about their secret agreement. When Kelley Ag refused to be bought out and sent a cease and desist letter, Holtzinger ignored the legal ramifications and arrogantly proceed forward. The evidence supports that Holtzinger and Meldrum worked together to breach the Orchard Management Contract, and leave Kelley Ag out in the cold, uncompensated, while they benefitted from Kelley Ag's investment and hard work.

The conduct of Meldrum and Holtzinger, their conflicting testimony, and the written correspondence in this case distinguish it from the cases cited in Holtzinger's brief. For example, Holtzinger cites Valley Land Office v. O'Grady, 72 Wn.2d 247, 432 P.2d 850 (1967). In that case, the only evidence offered on inducement was the breaching party's testimony that he made the decision to breach before the offer was made. Likewise in Burkheimer v. Thrifty Investment Co., Inc., 12 Wn.App. 924, 926, 533 P.2d 449, 450 (1975). Here, there was substantial evidence that Meldrum and Holtzinger signed a contract *before* Meldrum breached his contract with Kelley Ag.

In another case cited by Holtzinger, Corinthian Co. v. White & Bollard, Inc., 74 Wn.2d 50, 442 P.2d 950 (1968), the alleged interferor merely accepted an offer to buy real property. Id. at 62. In that case, the

seller was bound to an agreement with plaintiff to develop real property and split the profits 50/50. Id. Because the property was sold undeveloped, it went for a lower price, and thus reduced plaintiff's profit margin. Id. The court found that while the sale constituted a breach of plaintiff's contract with the seller, the buyer did not "induce" the breach. Id. The breach was simply an incidental consequence of buying property at a low price. On the other hand, the breach by Meldrum was a necessary element of the agreement between Meldrum and Holtzinger.

The Corinthian court based its decision, in part, on Restatement, Torts s 766. Comment D of Section 766 defines "inducement" as "A caus[ing] B to choose one course of conduct over another." The comment goes on to state: "[i]t is sufficient that [A] designs this result ... because he regards it as a necessary, even if regrettable, means to some other end." Id. Here, Meldrum's breach was purposely obtained by Holtzinger as a means to the end of securing Meldrum's fruit.

Regardless, Holtzinger failed to cease and desist after receipt of the September 21, 2007 letter. Therefore, under GoodYear Tire & Rubber Co., supra, (substantial evidence for tortious interference existed when Goodyear failed to cease interference after notification that its employee was violating covenant not to compete with former employer), *See Id.* at 746, Holtzinger's

continued performance of its contract with Meldrum serves as the necessary “inducement” for a tortious interference claim. (see *also* argument in section A(3)(a), pg 24).

B. There Is Substantial Evidence Kelley Ag Was Damaged by Holtzinger’s Tortious Interference

1. Kelley Ag’s Damages Were Clearly Supported By Substantial Evidence

Kelley Ag had contracts with Mountainland and Valley Fruit to pack, market and sell Meldrum’s apples. Had Meldrum’s fruit been delivered per Kelley Ag’s contracts with those companies, the fruit would have returned an additional \$48,137.99. Ex. 31; RP 266.

Mountainland manager Douglas Rowley testified that Mountainland’s returns on Red Delicious would have been 10% higher had it received Meldrum’s fruit. RP 141-42. This is because demand for 2007 apples increased with the passage of time. Due to Holtzinger’s tortious interference, Mountainland ran out of Red Delicious and was unable to capitalize on the strong market. RP 138-39, 141-142. Factoring in the cost to transport Meldrum’s apples to Mountainland, the apples would have returned \$7,930.98 less than Holtzinger obtained. Ex. 31, RP 260.

On the other hand, using Holtzinger’s returns and comparing those to Valley Fruit’s returns on fruit Jim Kelley had raised on another similar

orchard, Kelley mathematically determined that Valley Fruit would have returned \$56,068.91 more than Holtzinger on Meldrum's apples. The total net additional return from Mountainland and Valley Fruit to Kelley Ag would have been \$48,137.99. See Ex. 31 for a summary of Jim Kelley's calculations, Ex. 27-28, 30-31 for the raw numbers, and RP 256-268 and 399-406 for Kelley's extensive testimony explaining his calculations.

Kelley Ag's contract gave it the first right to all proceeds, Ex. 3, p 4, and consequently, the additional \$48,137.99 that the crop would have returned absent Holtzinger's wrongful interference, would have been payable to Kelley Ag directly.

2. **The Trial Court Did Not Abuse its Discretion by Limiting the Testimony of Holtzinger's Lay Witnesses, or in the Alternative, There Was No Offer of Proof regarding the excluded Testimony and Any Error by the Trial Court Was Harmless**

Kelley Ag's damages claim is clearly established. Holtzinger's only substantive argument on the issue is that two of its lay witnesses should have been permitted to rebut Jim Kelley's and Doug Rawly's testimony regarding damages. Holtzinger's argument is without merit.

a. **Standard of Review**

The trial court has broad discretion as to choice of sanctions for discovery violations. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494,

P.2d 1036 (1997). “The decision to exclude witnesses who are not properly disclosed in discovery is within the trial court’s discretion.” Southwick v. Seattle Police Officer John Doe #s 1-5, 145 Wn.App. 292, 297, 186 P.3d 1089 (2008). The determination to exclude a witness “shall not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Lancaster v. Perry, 127 Wn.App. 826, 830, 113 P.3d 1, 3 (2005).

b. Holtzinger’s Witnesses were Properly Excluded in Accordance with Local Rules

Holtzinger waited until trial to disclose that Scott Hanses and David Lawrence would offer expert testimony. Holtzinger’s pretrial witness disclosure stated the following regarding both lay witnesses: “He has knowledge of the transaction between Ken Meldrum and CM Holtzinger and is expected to testify regarding the same.” RP 489-90, 759. Kelley Ag sent interrogatories to Holtzinger requesting all expert witnesses be identified, and Holtzinger responded, in part: “No experts identified at this time.” RP 490, 759. Those interrogatories were never supplemented. Id. In fact, there is no record of Holtzinger disclosing any expert witness until trial. RP 490, 759.

Franklin County Local Rule 4(h)(1) requires that the subject matter of witness testimony must be disclosed by the date set forth in the scheduling

order. Rule set forth in Appendix. According to the 2nd Amended Scheduling Order, the last date for disclosure of defendant's lay and expert witnesses was January 15, 2009. CP 237. Pursuant to FCLR 4(h)(1)(C), an expert witness disclosure must include: "[a] summary of the expert's opinions and the basis therefor, and a brief description of the expert's qualifications." According to FCLR 4(h)(1)(D):

Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires, including the payment of terms.

In Southwick, a witnesses' declaration was struck because the witness was not properly disclosed pursuant to a King County local rule virtually identical to the Franklin County local rule cited above. Southwick, 145 Wn.App. at 301. The King County Local Rule in Southwick provided that any witness not timely disclosed pursuant to a scheduling order "may not be used at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." KCLR 16(a)(4) *as quoted by Southwick*, 145 Wn.App. at 301. The Court of Appeals upheld the trial court's decision to strike the declaration, and held an improperly disclosed witness's testimony can be excluded even in the absence of prejudice. Id.

Here, there was prejudice. Given the limited disclosure of Hanses and

Lawrence's knowledge, neither were deposed by plaintiff. It took approximately three years for this case to go to trial. The attorney who represented Kelley Ag is now deceased, but from the Record of Proceedings it is apparent that the witnesses were not disclosed as experts until trial had started, a jury had been selected and witnesses had testified in open court. *See* oral argument starting RP 489-90 and 759. This was trial by ambush and highly prejudicial. Therefore, the trial court did not abuse its discretion in limiting the witnesses testimony.

Jim Kelley, on the other hand, was disclosed as a witness with knowledge regarding all issues, and was deposed on no less than three separate occasions. RP 760. Kelley's opinions regarding his damages were further disclosed prior to trial through the production of numerous documents, many of which were used as exhibits at trial. Ex. 31. Holtzinger did not object at trial to Kelley's or Rowley's testimony regarding damages, so it cannot now in good faith assert either's testimony as a basis to admit undisclosed expert opinion.

Blair v. Ta-Seattle East #176, includes similar facts. 150 Wn.App. 904, 210 P.3d 326 (2009). In that case, Blair failed to timely disclose her witnesses pursuant to the King County local rules. *Id.* at 907. The trial court denied her motion to call as experts two physicians that were previously

disclosed as lay witness by the defense, and the case was dismissed on summary judgment due to the lack of expert testimony. Id. In affirming the trial court, the Court of Appeals ruled: “Violation of a court order without reasonable excuse will be deemed willful.” Id. Holtzinger’s violations here were made without reasonable excuse.

Holtzinger twists the record. There is no indication in the record that Holtzinger’s witnesses were excluded because they were not qualified to testify regarding the amount the fruit would have returned at Valley Fruit or Mountainland. The citation made by Holtzinger for this point, RP 492-93, reveals the witnesses were excluded solely because Holtzinger failed to timely disclose them. As the trial court ruled: “Well, the problem with the expert is that he can testify as to what he observed like any other lay witness. If he goes on and gives opinions about that, he has to be disclosed as an expert. That’s the problem.” RP 493.

c. **Hanses and Lawrence Gave Extensive Testimony in Every Area Identified in Holtzinger’s Offer of Proof and in its Appellate Brief**

Despite its ruling, the trial court did not limit Hanses’ testimony. To the contrary, at the end of oral argument on the issue, the trial court permitted Holtzinger’s attorney to question Hanses and see how his testimony developed:

Mr. Telquist: Your Honor, he can testify, and he should be allowed to testify whether or not the fruit was in - - what kind of condition the fruit was in and whether or not it was going to make it to the gambler's pool.

The Court: Well, we'll see. See how it goes through. I'm just trying to give you an advance as best I can. But it does sound like expert testimony.

RP 494.

Regarding Lawrence, the only questions he was prohibited from answering were the following:

Q. Is the apple - - is the market that sensitive to 800 bins they're going to skew profit 10%?

And

Q. Now you understand that exhibit 31 is basically the bill that Mr. Kelley's presenting to Holtzinger?

A. Yeah. To me it's an invoice for, "Hey, this is what I have been damaged. Holtzinger, you owe it." And this is how I - - he's providing some calculation here, and this is how I come to the total.

Q. Using your fishy analysis, did it pass?

RP 759. There was no offer of proof made as to what Lawrence's answers would have been, had Kelley Ag's objections been overruled. RP 759-62. Holtzinger's arguments regarding Lawrence were based on Lawrence being Holtzinger's 30(b)(6) designee (RP 759), an argument Holtzinger abandoned

on appeal by not raising it in its brief, and Jim Kelley having testified regarding Kelley Ag's damages (RP 760).⁷

Likewise, there was no objection sustained limiting the scope of Hanses's testimony, and even if his testimony was limited, there was no offer of proof as to what his testimony would have been. RP 489-94.

An offer of proof regarding the excluded testimony is necessary to preserve the issue for appeal. ER 103(a)(2). If an adequate offer of proof is not made, the issue will not be considered on appeal. Miller v. Peterson, 42 Wn.App. 822, 829, 714 P.2d 695, 700 (1986)(failure to enter excluded evidence into record rendered harmless trial court's error in excluding the evidence); Estate of Bordon v. State, 122 Wn.App. 227, 245-46, 95 P.3d 764, 773-74 (2004) (failure to enter factual basis for expert opinion into record was grounds to uphold trial court's exclusion of expert testimony).

Hanses testified at length regarding Meldrum's actual pack outs. RP 506-17, 520-25. The actual pack out records were exhibits 34, 60 and 61 at trial (RP 506-507), and Hanses went through each day's bin count and cullage rate. RP 506-17, 520-25. The risk associated with the gambler's pool was testified to by Kelley (RP 97-98) and Diller (RP 285-87). Hanses (RP

⁷ See Previous section regarding Jim Kelley's testimony.

501-04 , 510-12), Pugh (RP 580-81), and Lawrence (RP 763-764) testified that Meldrum's fruit was deteriorating fast and could not have survived long enough to reach the gambler's pool. Hanses (RP 515, 525-26, 546) and Lawrence (RP 763-765) testified that Holtzinger held the fruit as long as it could and made as much money on the fruit as possible. Hanses testified that in his opinion, Kelley did not properly care for the orchard (RP 499-500). Holtzinger elicited substantial evidence to critique Kelley Ag's damage claim. The jury weighed the evidence, determined the credibility of all the witnesses, and found for Kelley Ag.

There was no prejudice to Holtzinger from the limitation, if any, of Hanses's and Lawrence's testimony. The jury heard Holtzinger's claims in full, but did not find those claims credible. Furthermore, without an offer of proof, one has no way of determining what more the witnesses would have said. Therefore, even if the trial court is found to have abused its discretion, which it did not, the error was harmless.

d. Opinions by Hanses and Lawrence as to What They Believed Meldrum's Fruit Would Have Returned at Mountainland and Valley Fruit Are Expert in Nature, and Not Within the Permissible Scope of Lay Testimony

Assuming for the sake of argument that Hanses and Lawrence would have offered a more specific critique of Kelley Ag's damage claim, such a

critique would have been expert testimony.⁸

For example, in Blair v. Ta-Seattle East #176, *supra*, plaintiff was not permitted to call two of defendant's lay witnesses as experts, in part, because those witnesses were not disclosed as experts. Blair, 150 Wn.App. at 911. Likewise, in Pagnotta v. Beall Trailers of OR, Inc., 99 Wn.App. 28, 991 P.2d 728, (2000), the court distinguished between the lay opinions and expert opinions of police officers. Id. at 34-35. Lay testimony and expert testimony are separate regardless of whether a lay witness happens to also be an expert.

Evidence Rule 701 limits lay opinion testimony to that which is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." ER 701. An opinion regarding what apples of a certain variety, quantity, and quality would sell for in a specific market during a specific time frame certainly requires "technical, or other specialized knowledge."

Washington's ER 701 is identical to Federal Rule of Evidence 701. Like Franklin County, the federal system provides for expert witnesses to be disclosed prior to a certain date. Fed.R.Civ.P. 26. The advisory committee

⁸ Holtzinger alleges Kelley Ag claimed approximately \$70,000.00 in damages due to Holtzinger's interference. Kelley Ag was awarded \$48,137.99 by the jury, the remaining amount in the approximately \$70,000.00 number was awarded against Meldrum, and therefore, is not relevant to Holtzinger's appeal. *See* CP 235-36.

notes to the federal rule state the reference to Rule 702 in Rule 701: “ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a lay person.” This is exactly what occurred here.

Both Hanses (RP 501-04, 510-12) and Lawrence (RP 763-64) testified that Meldrum’s fruit would not have made it to the Gambler’s pool. What else they would have said we will never know because no offer of proof was provided. Assuming they would have given specific numbers for what, in their expert opinion, the fruit would have returned at Mountainland and Valley Fruit, that testimony would be based on their “technical, or other specialized knowledge.” Therefore, the purported testimony would have been expert in nature, and properly excluded by the trial court in accordance with local rule.

V. CONCLUSION

Over the week long trial, the jury had ample opportunity to weigh the credibility of the witnesses. The verdict left no doubt that the jury rejected Meldrum’s and Holtzinger’s claims of innocence. The verdict should be upheld, and the decisions of the trial court affirmed.

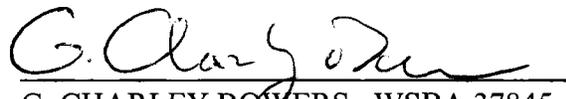
There was substantial evidence that Meldrum, with the assistance of an officious intermeddler Byron Pugh, conspired with Holtzinger to deprive

Kelley Ag of the benefit of its contract. Holtzinger was either never told Meldrum's contract with Kelley Ag was mutually terminated, or disbelieved Meldrum's story and required further proof. When the proof never materialized it acted at its own peril by accepting Meldrum's termination letter and ignoring Kelley Ag's cease and desist letter. Holtzinger's inducement left Meldrum bankrupt, and Kelley unpaid to this day.

Respondent respectfully requests that the trial court be affirmed and the verdict of the jury be upheld.

RESPECTFULLY SUBMITTED this 10th day January, 2010.

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Appendix

Franklin County Superior Court Rules

LCR 4. Civil Case Schedule

- (a) Case Schedule. Except as otherwise provided in these rules or ordered by the Court, when an initial pleading is filed and a new case file is opened, the Court Administrator or Superior Court Clerk will prepare and file a scheduling order (referred to in these rules as a “Case Schedule”) and will provide one copy to the party filing the initial pleading.

...

- (h) Enforcement; Sanctions; Dismissal; Terms.

- (1) *Disclosure of Possible Lay and Expert Witnesses.*

(A) Disclosure of Primary Witnesses. Each party shall no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party believes are reasonably likely to be called at trial.

(B) Disclosure of Rebuttal Witnesses. Each party shall no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.

(C) Scope of Disclosure. Disclosure of witnesses under this rule shall include the following information:

- i. All Witnesses. Name, address, and phone number.
- ii. Lay Witnesses. A brief description of the anticipated subject matter of the witness’ testimony.
- iii. Experts. A summary of the expert’s opinions and the basis therefor and a brief description of the expert’s qualifications.

(D) Exclusion of Testimony. Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires, including the payment of terms.

(E) Discovery Not Limited. This rule does not modify a party’s responsibility under court rules to seasonably supplement responses to discovery or otherwise to comply with discovery before the deadlines set by this rule.