

**FILED**

OCT 20 2014

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

No. 322041 - III

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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IRWIN-YAEGER, INC. d/b/a SUMMIT MECHANICAL, a  
Washington corporation,

Appellant,

v.

WASHINGTON STATE COMMUNITY COLLEGE DISTRICT 17,  
COMMUNITY COLLEGES OF SPOKANE, an administrative agency  
of the State of Washington,

Respondent.

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APPEALED FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 12-2-04816-3

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**APPELLANT SUMMIT MECHANICAL'S REPLY BRIEF**

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## TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT .....	4
A. CCS is a Public Body on a Public Works Construction Project, Not a Consumer Permitted to Pick-and-Choose Subcontractors it Prefers .....	4
B. The Trial Court Erred in Dismissing Summit's Tortious Interference Claim .....	7
1. CCS Acted with an Improper Objective of Harming Summit .....	8
2. CCS Acted By Improper Means .....	12
3. CCS Was Not Privileged to Interfere .....	17
C. The Trial Court Erred in Dismissing Summit's Defamation Claim .....	18
1. CCS' Statements are False .....	18
2. CCS Published False Statements .....	21
3. Factual Questions Exist Regarding Whether CCS' Defamatory Statements Were the Cause in Fact of Summit's Damages .....	21
4. The Common Interest Privilege Does Not Insulate CCS From Liability and Factual Questions Exists That CCS Acted with Malice .....	24
D. CCS Is Not Entitled to Attorney's Fees .....	27
II. CONCLUSION .....	28

## TABLE OF AUTHORITIES

**Page**

### **CASES**

<u>A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist. No. 303,</u> 5 Wn. App. 887, 491 P.2d 684 (1971) .....	6, 16
<u>Eastwood v. Horse Harbor Found., Inc.,</u> 170 Wn.2d 380, 241 P.3d 1256 (2010) .....	27
<u>Edwards v. City of Renton,</u> 67 Wn.2d 598, 409 P.2d 153 (1965) .....	16
<u>Elcon Construction, Inc. v. Eastern Washington University,</u> 174 Wn.2d 157, 273 P.3d 965 (2012) .....	11, 27
<u>Goodyear Tire &amp; Rubber Co. v. Whiteman Tire, Inc.,</u> 86 Wn. App. 732, 935 P.2d 628 (1997) .....	13, 14
<u>Gostovich v. City of West Richland,</u> 75 Wn.2d 583, 452 P.2d 737 (1969) .....	6, 15, 14
<u>Hartley v. State,</u> 103 Wn.2d 768, 698 P.2d 77 (1985) .....	22
<u>Herron v. KING Broad. Co.,</u> 109 Wn.2d 514, 746 P.2d 295 (1987) .....	24, 25
<u>Herron v. KING Broad. Co.,</u> 112 Wn.2d 762, 776 P.2d 98 (1989) .....	20-22
<u>Lawson v. Boeing Co.,</u> 58 Wn. App. 261, 792 P.2d 545 (1990) .....	17
<u>Moe v. Wise,</u> 97 Wn. App. 950, 989 P.2d 1148 (1999) .....	25
<u>Mohr v. Grant,</u> 153 Wn.2d 812, 108 P.3d 768 (2005) .....	18, 20

<u>Mottner v. Mercer Island.</u> 75 Wn.2d 575, 452 P.2d 750 (1969) .....	15
<u>Pac. Nw. Shooting Park Ass'n v. City of Sequim,</u> 158 Wn.2d 342, 144 P.3d 276 (2006) .....	7
<u>Pate v. Tye Motor Inn Inc.,</u> 77 Wn.2d 819, 467 P.2d 301 (1970) .....	21
<u>Peerless Food Products, Inc. v. State,</u> 119 Wn.2d 584, 835 P.2d 1012 (1992) .....	14
<u>Pleas v. City of Seattle,</u> 112 Wn.2d 794, 774 P.2d 1158 (1989) .....	8
<u>Schmalenberg v. Tacoma News, Inc.,</u> 87 Wn. App. 579, 943 P.2d 350 (1997) .....	19, 22
<u>Story v. Shelter Bay Co.,</u> 52 Wn. App. 334, 760 P.2d 368 (1988) .....	24, 25
<u>Valdez-Zontek v. Eastmont School Dist.,</u> 154 Wn. App. 147, 225 P.3d 339 (2010) .....	19

**STATUTES**

RCW 39.04.240 .....	27
RCW 39.30.060 .....	6
RCW 39.30 <u>et seq.</u> .....	6, 14
RCW 39.10 <u>et seq.</u> .....	16
RCW 39.08 <u>et seq.</u> .....	27
RCW 60.28 <u>et seq.</u> .....	27, 28

**SECONDARY SOURCES**

Restatement (Second) of Torts § 767, cmt. d .....	8
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## I. ARGUMENT

The trial court erroneously found that Community Colleges of Spokane (“CCS”) acted reasonably when it removed Irwin-Yaeger, Inc. d/b/a Summit Mechanical (“Summit”) as the listed plumbing subcontractor of general contractor T.W. Clark Construction, LLC (“TWC”) from the Spokane Falls Community College Classroom Building Project (the “Classroom Project”) and the trial court erred when it summarily dismissed Summit’s tortious interference with a business expectancy and defamation claims. This Court should reverse and remand the trial court’s ruling for further proceedings below to resolve remaining factual issues.

### A. **CCS is a Public Body on a Public Works Construction Project, Not a Consumer Permitted to Pick-and-Choose Subcontractors it Prefers.**

CCS argued before the trial court and, again, before this Court that CCS cannot be held liable for tortious interference with a business expectancy or for defamation because it was simply a dissatisfied customer of Summit. CP 666; Verbatim Report at 9-10; Br. Resp’t. at 1, 26, 36. It repeated this argument, again, in its brief: “*CCS definitely was not a happy or satisfied customer.*” Br. Resp’t. at 36. CCS took the position before the trial court and, again, before this Court that a contract provision in the prime contract between it

and TWC providing that CCS may make a reasonable objection to subcontractors under certain circumstances is a de facto blank check paid for by the public purse that allows it to select subcontractors it desires or remove ones it does not prefer like a consumer purchasing items at a department store. This theory is untenable in the public works arena as a matter of law.

Nevertheless, the trial court agreed with CCS' argument, and erred in doing so. See Verbatim Report at 6 (*"The issue is whether or not the defendant in this case was unreasonable . . ."*); 31 (*"The rejection must be on a reasonable basis. That really is the only procedural issue."*). The trial court framed what it viewed to be the central issue as follows:

*This case is whether or not the sum total indicated the Colleges were acting reasonably in this dispute.*

Verbatim Report at 33. It erred when concluding as follows:

*The Community Colleges have indicated because of these prior disputes, and how they were resolved and all the issues that arose, it simply does not want to work with Summit any longer. That is not unreasonable.*

Id. The Court erred in relying on this same theory in its defamation analysis that CCS somehow acted reasonably, and, therefore, without malice, when CCS removed Summit, because it was simply selecting subcontractors it did or did not want to work with:

*Is that malice because the Community Colleges have made it clear they do not want to work with this particular contractor? The answer is no. **It is somewhat the same reason under the tortious interference claim.** The fact they do not want to work with a contractor does not mean they have malice, in a legal sense, toward the contractor. Because they do not believe the contractor has done as good a job as they would like does not mean they are full of malice.*

*. . . . **[W]hether they are right or wrong about the actual facts does not make them reasonable** and does not make them malicious.*

Id. at 40 (emphasis added).

CCS' theory that a public body is a consumer of subcontractors contravenes Washington's public bidding statutes RCW 39.30 et seq. and related public policy that bidders have a fair forum for the award of public contracts that results in the public body receiving the best work at the most reasonable price practicable. A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist. No. 303, 5 Wn. App. 887, 890, 491 P.2d 684 (1971); Gostovich v. City of West Richland, 75 Wn.2d 583, 587, 452 P.2d 737 (1969). This is particularly true where, as here, Summit was a responsible and responsive bidder, properly submitted the low bid to TWC, was listed as the plumbing subcontractor in TWC's bid to CCS pursuant to RCW 39.30.060, has never been prevented from bidding on public works projects in general or the Classroom Project in

particular, has never been red-tagged for code violations, and was otherwise experienced, qualified, and prepared to perform its scope of work at the Classroom Project. CP , 561-65, 589-592. Under the disputed factual circumstances, CCS' conduct in picking and choosing the subcontractor it did and did not prefer, in retaliation against Summit, not only violated its tort duties to Summit but also cost taxpayers \$68,877.56. CP 60. And, it cost Summit the job. Factual issues remain for resolution at the trial court.

**B. The Trial Court Erred in Dismissing Summit's Tortious Interference Claim.**

For purposes of summary judgment, CCS concedes that Summit had a business expectancy in performing the plumbing work for TWC on the Classroom Project, that CCS had knowledge of this business expectancy, and that CCS intentionally interfered with this business expectancy resulting in termination of the same. Br. Resp't. at 18-19. In conceding its conduct cost Summit the job, CCS cannot dispute the fact that Summit suffered damage. Accordingly, the only element at issue is whether CCS interfered with Summit's business expectancy for an improper purpose or by improper means. Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006). Additionally, CCS now takes the position that it was privileged to intentionally interfere with

Summit's business expectancy in performing the plumbing work at the Classroom Project. However, CCS was not privileged to interfere with Summit's business expectancy and CCS interfered for an improper purpose and used improper means.

**1. CCS Acted with an Improper Objective of Harming Summit.**

Summit need only show that “*the actor was motivated in whole or in part, by a desire to interfere.*” Pleas v. City of Seattle, 112 Wn.2d 794, 806, 774 P.2d 1158 (1989) (quoting Restatement (Second) of Torts § 767, cmt. d, at 32)). Here, the evidence creates genuine issues of material fact that CCS was motivated by “*an improper objective of harming*” Summit in its business. Id. at 803, 774 P.2d 1158. In its brief, CCS fails to address the evidence stacked up against it supporting a finding that CCS acted with the improper objective of harming Summit.

Most notably, CCS does not dispute that it knew Summit was listed by TWC as its subcontractor for the plumbing work at the Classroom Project. CP 453, 499; Br. Resp't. at 18. Having already concluded that it would orchestrate Summit's replacement, CCS nevertheless waited until contracting with TWC to direct Summit's replacement and at no time did CCS provide any notice to Summit that it took issue with Summit as subcontractor. CP 455, 500, 509.

Such improper objective is evident in a conversation between Dennis Dunham and Jim Collen that occurred on the day TWC submitted its bid. The deposition testimony of Mr. Dunham confirms a conversation he had with Mr. Collen, during which time they agreed to work together to compile reasons to remove Summit as subcontractor. CP 499. In that conversation, Mr. Collen articulated CCS' position: CCS "*would rather not use Summit.*" Mr. Dunham replied that he would "*need some reasons.*" CP 499. Mr. Collen agreed to assist: "*I'll get you some reasons.*" CP 500.

Also unaddressed by CCS is its ad hoc and misguided fishing expedition to compile "*reasons*" to justify its calculated tortious conduct of preventing Summit from performing the plumbing subcontract work at the Classroom Project. To this end, CCS elicited negative feedback regarding Summit from a select subset of people and gathered what it erroneously asserted to be a basis to form a reasonable objection to Summit as subcontractor. CP 53-58, 499-500, 504-07, 524-25. That CCS acted with an improper motive of harming Summit is further evidenced in the responses received including, without limitation, the comment that Summit lacked the financial wherewithal to obtain a bond. CP 53.

CCS relies on purported past issues with Summit on prior projects to support its contention that it did not act with an improper purpose, noting, for example, the so-called “*toilet saga*.” Br. Resp’t. at 23. However, the basis on which CCS relied to object to Summit further demonstrates CCS’ improper objective: namely, retaliation and animus stemming from prior projects. Its improper purpose is demonstrated in CCS preference for McClintock and Turk to replace Summit when ETCO, Inc. (“ETCO”) was, as CCS acknowledges, the next lowest bidder. CP 12, 60-61, 503.

CCS argues that it acted with the proper purpose of saving taxpayer dollars. Br. Resp’t. at 23. However, it cannot point to any evidence showing that Summit’s work cost CCS more on prior projects than had a different subcontractor performed the work or that Summit’s tortious conduct in removing Summit from the Classroom Project saved taxpayers dollars. The evidence, rather, demonstrates that CCS’ improper conduct cost taxpayers an additional \$68,877.56. CP 60-61. CCS was aware that the public purse would absorb this increased cost, not TWC: “*We realize that we will be responsible to compensate the General Contractor, T.W. Clark for the monetary difference between Summit’s bid price and the next lowest plumbing price.*” CP 57-58.

CCS relies on Elcon Construction, Inc. v. Eastern Washington University, in arguing that CCS was merely exercising its legal interest. 174 Wn.2d 157, 273 P.3d 965 (2012); Br. Resp't. at 121-23. However, a careful reading of Elcon demonstrates that it is of no assistance to CCS. In that case, Elcon Construction, Inc. ("Elcon") sued Eastern Washington University ("Eastern") for tortious interference based upon a letter that Eastern sent to Elcon's bond surety providing it with notice of Eastern's potential claim arising from the work that Elcon performed pursuant to its contract with Eastern. Id. at 160-63, 168-170, 273 P.3d 965. The Court affirmed dismissal of the tortious interference claim as there was no evidence, except the notice itself, of improper purpose and Eastern had an interest in notifying the bond surety of a potential claim. Id. at 168-170, 273 P.3d 965.

Elcon is inapposite to the instant action. While Eastern's legal interest was based in its contract with Elcon and work Elcon performed, here, Summit did not contract with CCS and did not perform work at the Classroom Project. Summit did, however, have a business expectancy in performing the plumbing subcontract work at the Classroom Project. Unlike in Elcon, CCS had no claim against Summit and, ultimately, no legal interest in ousting Summit

from the project. Moreover, as explained above, the record is awash with evidence that CCS did not act in good faith but, rather, with an improper purpose. As such, genuine issues of material fact exist.

**2. CCS Acted By Improper Means.**

CCS argues that its intentional interference is reasonable in relation to its contract with TWC. CCS asserts that this contract somehow allowed it to remove Summit as subcontractor so long as, in its own improper and retaliatory estimation, its objection to Summit as subcontractor was reasonable. However, CCS' conduct in replacing Summit as subcontractor on the Classroom project is improper in relation to the prime contract.

CCS fails to dispute the fair reading of the plain contract language that an objection is reasonable only if based upon a subcontractor's lack of experience, qualification, or failure to meet requirements of contract documents. Summit, however, has identified evidence, that Summit was experienced and qualified to perform its scope of work and met contract document requirements. CP 561-97. Reasonableness is a classic jury question and should be decided by a jury in this case. While CCS can only point to purported prior problems as pretext to support a preference that Summit not have the job, the record contains ample

evidence that CCS' interference with Summit's business expectancy in the plumbing work was unreasonable and, consequently, wrongful in relation to the prime contract. CP 561-97.

CCS' reliance on Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc. is misplaced. 86 Wn. App. 732, 935 P.2d 628 (1997). There, a tire dealer, Whiteman Tire, Inc. ("Whiteman"), entered into a dealer contract with Goodyear Tire & Rubber Company ("Goodyear"), in which Whiteman, in unequivocal terms, agreed that Goodyear would retain the right to sell its products within Whiteman's trade area. Id. at 736, 935 P.2d 628. Whiteman's manager later resigned and went to work for Goodyear in violation of his noncompete agreement with Whiteman. Id. at 737, 935 P.2d 628. While the court on appeal concluded Goodyear's conduct in selling products within Whiteman's trade area was not improper, it held that the trial court erred in dismissing the tortious interference claim because evidence existed sufficient for a jury to find Goodyear knew of the noncompete agreement and permitted its employee to solicit customers in violation of it. Id. at 746-47, 935 P.2d 628.

Unlike in Goodyear, Summit did not sign a contract with CCS that would enable CCS to reject Summit as subcontractor, nor does the prime contract contain express and unequivocal terms

permitting CCS to replace Summit due to a preference that CCS had that Summit not have the job and a grudge stemming from past work. Like in Goodyear, CCS knew that TWC listed Summit as its subcontractor and, after waiting to contract with TWC, directed Summit's removal. As in Goodyear, here, the trial court erred in dismissing Summit's tortious interference claim as factual issues exist regarding whether CCS acted with improper means.

Additionally, CCS' interference is wrongful in relation to Washington's competitive bidding statutes, RCW 39.30 et seq. CCS argues, however, that RCW 39.30 et seq. does not provide Summit with a cause of action for damages as "*an aggrieved low bidder*" and that these statutes do not prohibit a public body from removing a subcontractor with whom it prefers not to work on a public works project. Br. Resp't. at 26-28. In doing so, CCS fails to appreciate that Summit was a successful bidder. See Peerless Food Products, Inc. v. State, 119 Wn.2d 584, 596, 835 P.2d 1012 (1992) (Bidders who are "*mistakenly or wrongfully denied contracts*" may seek an injunction.). Summit was a responsible and responsive low bidder, and was listed by TWC as plumbing subcontractor in the bid TWC submitted to CCS. Summit is not prevented from asserting an action in tort against CCS.

CCS, however, contends further that Summit's argument—that the interference by CCS with Summit's business expectancy is wrongful in relation to Washington's public bidding statutes—somehow circumvents Mottner v. Mercer Island and its progeny. 75 Wn.2d 575, 452 P.2d 750 (1969); Br. Resp't. at 29. However, these cases merely recognize that under the competitive bidding statutes damages are unavailable to a general contractor for a mistakenly or wrongfully denied bid. They do not stand for the proposition that a subcontractor cannot sue a public body for violation of its tort duty to not intentionally interfere with a subcontractor's reasonable business expectancies. Again, Summit was the listed subcontractor of TWC. It was not a disappointed bidder.

Furthermore, CCS' duty to not interfere with Summit's business expectancies traces to a tort duty owed to Summit independent of the competitive bidding statutes and the contract between CCS and TWC, notwithstanding that CCS' interference is wrongful in relation to the public policy reflective in these statutes. The parties agree that a purpose of the public bidding statutes is “*to insure the municipality receives the best work or supplies at the most reasonable prices practicable.*” Gostovich, 75 Wn.2d at 587,

452 P.2d 737, 740 (quoting Edwards v. City of Renton, 67 Wn.2d 598, 602, 409 P.2d 153, 157 (1965)).

CCS refuses to recognize, however, that another important policy in the context of public works construction projects is to create for bidders a fair forum for the award of public works contracts. A.A.B. Elec., Inc., 5 Wn. App. at 890, 491 P.2d 684. While CCS concedes that it did not utilize the alternative procedures provided for under RCW 39.10 et seq., the significance of these statutes is particularly pertinent in that they precisely articulate that the process of public works contracting must be fair, objective, and open and that project participants should be selected based on previously disclosed objective criteria. CCS' conduct in picking and choosing subcontractors flies in the face of this policy.

Indeed, CCS' argument that it can simply pick and choose subcontractors on a public works construction project based on its own subjective preference that it not have to work with a low-bidding listed subcontractor and based on retaliation stemming from prior work contravenes the very bedrock of the public works contracting arena. CCS is not a consumer of subcontractors entitled to select the subcontractor with whom it may or may not wish to work.

CCS cannot point to any evidence that working with Summit on prior projects cost taxpayers more than had Summit not had the job or that taxpayers have saved money as a result of CCS removing Summit from the Classroom Project. Conversely, the evidence shows that the public purse has absorbed the cost of CCS' conduct to the tune of \$68,877.56. CP 60-61. CCS' objection to Summit as subcontractor was not based on fair and objective criteria previously provided to Summit but, rather, preference and retaliation stemming from past projects. CCS' interference was wrongful in relation to Washington's public bidding statutes.

**3. CCS Was Not Privileged to Interfere.**

CCS now contends that it was privileged to intentionally interfere with Summit's business expectancies. "*Statements privileged under the law of defamation are also privileged under the law of interference with prospective economic advantage.*" Lawson v. Boeing Co., 58 Wn. App. 261, 269, 792 P.2d 545 (1990). However, "*if there is no conditional privilege for the defamation action, there is no conditional privilege for the tortious interference action.*" Id.

As explained below, the defamatory statements made by CCS are not privileged and, in any event, any privilege is defeated

because CCS acted with malice. Furthermore, even if CCS' defamatory statements were privileged, the evidence supporting Summit's tortious interference claim is not limited to Summit's defamatory statements. For instance, CCS admits that it requested a change order be prepared and executed changing the plumbing subcontractor from Summit to McClintock and Turk notwithstanding that ETCO was the next lowest bidder and that this change order was ultimately provided to TWC. CP 12, 61. Summit's interference is further evidenced by its payment of the increased cost of replacing Summit and by its own inaction in waiting until it contracted with TWC to replace Summit. CCS was not privileged to intentionally interfere with Summit's business expectancies.

**C. The Trial Court Erred in Dismissing Summit's Defamation Claim.**

Genuine issues of material fact exist as to each element of Summit's defamation claim and its communications are not privileged. The trial court erred when it dismissed this claim.

**1. CCS' Statements are False.**

*"Falsity in a classic defamation case is a false statement."*  
Mohr v. Grant, 153 Wn.2d 812, 823, 108 P.3d 768 (2005). A statement is false even where it is couched as an opinion if *"it expresses or implies provable facts, regardless of whether the*

*statement is, in form, a statement of fact or a statement of opinion.” Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 157, 225 P.3d 339 (2010). *“Falsity can be express or implied. It can also be total or partial.” Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 590, 943 P.2d 350 (1997). This element is satisfied whether a statement is false in part or in whole. *Id.* at 593 P.2d 350.

The statements communicated from Jim Armor, Mark Connolley, James Collen, and Cheryl Groth to, among other people, Mr. Dunham and the statements made by Mr. Dunham to David Lohrengel at EA&S are false. CP 40-42, 53-58. Specifically, and as set forth in Summit’s initial briefing, the statements made by Mr. Connolley are false, particularly, and without limitation, the issues identified regarding toilets. As Mr. Kearsley testified in his affidavit, *“the complaints from the Community Colleges were overstated and are the result of typical use”* and *“Summit’s installation meets the performance requirements of the specifications.”* CP 564-65. Furthermore, while some false statements may appear couched in terms of an opinion, they are false nonetheless. *See, e.g.,* CP 58 (*“I found them to be evasive, dishonest, and lacked professional integrity”*). CCS concedes that a

factual issue “*may*” exist as to the statement concerning Summit’s ability to obtain a bond. Br. Resp’t. at 31 n.9.

Instead of addressing the evidence before the Court that creates genuine issues of material fact regarding the falsity of the statements in these communications, CCS simply glosses over the evidence and sums it up as “*rhetoric*.” Br. Resp’t. at 36. But calling evidence rhetoric does not make it so. Rather, the record is replete with evidence that the statements in these communications are false. Such evidence includes, most notably, the Affidavit of Robert Yaeger and the Affidavit of Douglas E. Kearsley. CP 561-660.

The falsity of the communications is total, not partial. While CCS suggests, conversely, that the letter is partly true and partly false such that the Court should engage in an inquiry regarding the “*sting*” or the “*gist*” of the defamatory communications, this analysis is typically applied in defamation cases where a false statement is contained within a circulated or broadcasted publication. See, e.g., Mohr, 153 Wn.2d 812, 108 P.3d 768; Mark v. Seattle Times, 96 Wn.2d 473, 635 P.2d 1081 (1981); Herron v. KING Broad. Co., 112 Wn.2d 762, 776 P.2d 98 (1989). In any event, when applicable, the “*sting*” inquiry as addressed by CCS falls under the elements of causation and damages. See Herron, 112

Wn.2d at 771, 776 P.2d 98. In light of the evidence, even if the Court applied the “*sting*” analysis, factual questions remain regarding falsity of the statements in the communications.

**2. CCS Published False Statements.**

CCS conflates the issues of publication and privilege. See, e.g., Pate v. Tyee Motor Inn Inc., 77 Wn.2d 819, 822, 467 P.2d 301 (1970) (Neil, J. Concurring) (“*Clarity and effective analysis require that the term ‘publication’ . . . be restricted to the physical concept of publication in fact.*”). While CCS argues that its communications were conditionally privileged, it does not dispute that its statements were communicated to persons other than Summit and, consequently, published. Indeed, the communications were transferred by Mr. Armor, Mr. Connolley, Mr. Collen, and Ms. Groth to, among other people, Mr. Dunham and from Mr. Dunham to Mr. Lohrengel at EA&S. CP 40-42, 53-58.

**3. Factual Questions Exist Regarding Whether CCS’ Defamatory Statements Were the Cause in Fact of Summit’s Damages.**

CCS cannot dispute the fact of Summit’s damages. CCS concedes that it directed the replacement of Summit as plumbing subcontractor on the Classroom Project and that, as a result, Summit lost the job. Nevertheless, it now takes the position that

some of the statements that Summit asserts to be false are true and that the Court must, consequently, determine whether the “*sting*” of the false statements caused Summit damages.

As the Washington Supreme Court has explained:

*The “sting” of a report is defined as the “gist” or substance of a report when considered as a whole. Where a report contains a mixture of true and false statements, a false statement (or statements) affects the “sting” of a report only when ‘significantly greater opprobrium’ results from the report containing the falsehood than would result from the report without the falsehood.*

Herron, 112 Wn.2d at 769, 776 P.2d 98. The question becomes one of factual (but for) causation. Schmalenberg, 87 Wn. App. at 593, 943 P.2d 350. “*The question is whether the false statement has resulted in damage which is distinct from that caused by true negative statements also contained in the same report.*” Id. at 771, 776 P.2d 98 (quoting Herron, 112 Wn.2d at 771-72, 776 P.2d 98). Factual causation is a classic jury question. Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (“*[C]ause in fact is generally left to the jury*” and “*such questions of fact are not appropriately determined on summary judgment.*”).

Here, CCS attempts to define the “*sting*” in innocuous terms: that it “*was not a happy or satisfied customer*” due to past “*problems with Summit’s workmanship and responsiveness.*” Br.

Resp't. at 35-36. The sting, however, is much harsher. For example, and without limitation, the statements convey that Summit's performance on past projects fell far below acceptable industry standards, that it intentionally and actively avoided complying with project specifications and code requirements, that it failed to perform specific work as required, and that it has acted with deceit on prior projects. Notably, Mr. Dunham received the communication regarding Summit's financial wherewithal as one of many statements compiled in the process of gathering justification to support CCS' action and it is further evidence that CCS caused Summit damages in replacing Summit as subcontractor.

Genuine issues of material fact exist regarding falsity and the record contains evidence more than sufficient to create genuine issues of material fact that, but for CCS' false statements, Summit would not have been replaced from the Classroom Project. As such, even if the Court were to find before it a mixture of true and false statements, and even if it were to apply the "*sting*" analysis, factual questions remain as to whether Summit's damages—namely, its loss of the plumbing subcontract—were attributable to the false communications or to false statements' sting.

**4. The Common Interest Privilege Does Not Insulate CCS From Liability and Factual Questions Exists That CCS Acted with Malice.**

CCS contends that its false communications are privileged because they were made between state employees acting within the course and scope of their employment. The letter from CCS to EA&S is not conditionally privileged because EA&S is a separate agency. In any event, CCS abused the privilege<sup>1</sup>.

A qualified privilege is abused and, thus, lost if published with malice. *“To prove actual malice a party must establish that the speaker knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement’s truth.”* Story v. Shelter Bay Co., 52 Wn. App. 334, 343, 760 P.2d 368 (1988); see also Herron, 109 Wn.2d at 523, 746 P.2d 295 (defining malice to include a a statement made *“with reckless disregard of its truth or falsity.”*).

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<sup>1</sup> If the Court finds that CCS cannot carry its burden of showing that the conditional common interest privilege applies, the standard of fault is negligence as Summit is a private, not public, figure. However, if the Court concludes CCS satisfied its burden for summary judgment purposes, the factual question for purposes of determining fault and abuse becomes whether CCS acted with malice. However, CCS does not dispute that Summit is a private figure or that the corresponding standard of fault is negligence, nor does it argue that CCS did not act negligently in publishing false statements.

*“The standard for finding actual malice is subjective and focuses on the declarant’s belief in or attitude toward the truth of the statement at issue.”* *Id.* at 343, 760 P.2d 368. “[M]alice . . . can be inferred from circumstantial evidence.” Herron v. KING Broad. Co., 109 Wn.2d 514, 524, 746 P.2d 295 (1987). Whether a speaker abused the privilege is generally a jury question. Moe v. Wise, 97 Wn. App. 950, 962, 989 P.2d 1148 (1999).

CCS simply recapitulates its prior argument that the statements it made were not false. Br. Resp’t. at 40. In doing so, it fails to address the evidence before the Court creating genuine factual issues that CCS published defamatory statements with knowledge of falsity, a high degree of awareness of probable falsity, that it entertained serious doubts as to the statements’ truth, and that it acted in reckless disregard as to the truth or falsity.

Notably, CCS’ immediate response to learning that TWC listed Summit as its plumbing subcontractor was this: “[w]e may have a problem.” CP 500. CCS immediately inquired into steps it could take to remove Summit from the Classroom Project. CP 453, 499-500, 523-25. Equipped with what it erroneously believed to be the proper means of achieving its desired outcome of banishing Summit from the Classroom Project—namely, a “reasonable

*objection*”—CCS went on a campaign to gather grievances from a select subset of people who, with this end in mind, capitulated to providing and publishing the false and damaging content. CP 40, 53-58, 499-500, 504-07, 524-25. Again, these statements were provided with the end in mind: to compile a basis to make an objection appear reasonable. Their purported basis for removing Summit is no basis at all. It is false pretext based on animus.

Its reckless disregard for the truth or falsity of these statements is evidenced in a prior conversation between Mr. Collen and Mr. Dunham at which time Mr. Collen explained that he “*would rather not use Summit*” and Mr. Dunham responded that he would “*need some reasons.*” CP 499. Mr. Collen agreed: “*I’ll get you some reasons.*” CP 500. CCS failed to adequately inquire into the veracity of the statements obtained. CP 40-41, 499-501, 504-09.

Malice is further evident from the statement concerning Summit’s financial wherewithal:

*Mark also said, that he had heard, that Summit is so upside down that they could not afford to make bond that the general would have for them. Doesn’t make sense to me but .....*

CP 53. Again, CCS concedes that factual issues “*may*” exist concerning the falsity of this statement. Br. Resp’t. at 31 n.9.

The very objective of CCS in communicating the statements was retaliation against and animus toward Summit stemming from prior projects. CCS had no concern for the truth, but was enraptured by its purpose—to fabricate a basis to remove Summit from the Classroom Project. Genuine issues of material fact remain that CCS published false statements with malice.

**D. CCS Is Not Entitled to Attorney’s Fees.**

Attorney’s fees are not awardable under RCW 39.04.240 because Summit’s claims are based on the violations by CCS of tort duties CCS owed to Summit, independent of any contract, such that this action does not arise out of a public works contract. RCW 39.04.240(1); see Elcon Constr., Inc., 174 Wn.2d at 165, 273 P.3d 965 (“*An injury*’ . . . ‘*is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.*” (quoting Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 389, 241 P.3d 1256 (2010))); see also 39.04.240(2) (referring to “*the parties to a public works contract*”). Summit did not contract with CCS. It, therefore, did not provide services or materials. Nor is this an action on a bond or a retainage claim, where the existence of a public works contract is necessary for relief. See RCW 39.08 et seq. (contractor’s bond); RCW 60.28 et

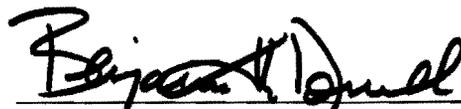
seq. (retained percentage). Furthermore, CCS did not seek attorney's fees on summary judgment at the trial court level and, in any event, is not a prevailing party on appeal should the Court reverse and remand for further proceedings<sup>2</sup>.

## II. CONCLUSION

The trial court erred in dismissing Summit's claims of tortious interference with a business expectancy and defamation as genuine issues of material fact exist with respect to each element of these claims and CCS' tortious conduct is not privileged. Summit respectfully requests that this Court reverse the trial court's summary dismissal of these claims and remand to the trial court for further proceedings.

DATED this 20<sup>th</sup> day of October, 2014.

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<sup>2</sup> As this statute is inapplicable to the parties in this action, Summit is mindful that it, like CCS, cannot recover thereunder.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of October, 2014, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

<input checked="" type="checkbox"/>	HAND DELIVERY	Jarold P. Cartwright
<input type="checkbox"/>	U.S. MAIL	Attorney General's Office
<input type="checkbox"/>	OVERNIGHT MAIL	Tort Division
<input type="checkbox"/>	FAX TRANSMISSION	1116 W. Riverside Ave.
<input type="checkbox"/>	EMAIL	Spokane, WA 99201-1106

  
BENJAMIN J. MCDONNELL