

NO. 63427-5

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

JKR, LLC, a Washington limited liability company,

Appellant,

v.

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

Respondents/Cross-Appellants.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Plaintiff JKR, LLC d/b/a Service Linen (“Service Linen”) commenced this action to restrain Defendants (collectively “Tomlinson”) from engaging in fair and legitimate business competition. Defendant Gary Tomlinson formerly owned New Richmond Laundries, Inc. (“New Richmond”). In 2000, Gary Tomlinson sold that business to Service Linen. At the same time, Service Linen and Gary Tomlinson entered into a two-year non-competition agreement. Gary Tomlinson complied with his obligations and did not re-enter the laundry and linen business until more than five years after the sale of the business. In 2005, Gary Tomlinson purchased Defendant Linen Rental Supply, Inc. d/b/a Tomlinson Linen Service with his brother, Timothy Tomlinson.

Service Linen, apparently displeased with the increased competition that it has faced since the Tomlinsons re-entered the market, brought this action to restrain Tomlinson from engaging in fair and legitimate competition. Plaintiff’s Complaint alleged the following causes of action: (1) trade name infringement, (2) passing off, (3) consumer protection act violations, (4) tortious interference with contractual relations, (5) conversion, (6) civil conspiracy, and (7) misappropriation of trade secrets. After months of expensive litigation and discovery, Service Linen finally conceded that there was no legal or factual basis for most of its claims, and it voluntarily dismissed all claims except its claim for tortious interference.

Service Linen's tortious interference claim, like the others, is not supported by the facts or law. Nevertheless, in connection with Tomlinson's first motion for summary judgment, Service Linen requested that it be permitted to conduct discovery as to 21 customers that it alleged Tomlinson interfered with. Service Linen took the depositions of most of these customers. The testimony of the customers establishes what Tomlinson has contended all along: Service Linen cannot establish the essential elements of a tortious interference claim.

A pattern emerged in the testimony of the customers. The vast majority of Service Linen's customers testified to significant service and quality issues with Service Linen. Fed up with bad service and quality, the customers decided to switch linen providers. These service issues were the moving force of their desire to change linen providers. Moreover, in the majority of cases, it was the customer who contacted Tomlinson. Additionally, not one of the customers recalls receiving the postcard that stated, "We used to be New Richmond," that Service Linen contends was improper. Because this postcard had no affect on the customers' decisions to change providers, the postcard is not competent evidence of improper means. For all of the foregoing reasons, Service Linen cannot establish all of the essential elements of its claim for each of the customers, and the trial court properly granted Tomlinson's motion for summary judgment.

Through this lawsuit, Service Linen seeks to erect significant barriers to legitimate business competition—barriers that go far beyond

normal commercial practices and beyond what the law requires. Service Linen's interpretation of the law of competition defies the open-market system our economy is based upon. No linen provider could compete with other providers. No customer, despite how dissatisfied it was with its current service, could switch providers without the threat of a lawsuit, and customers would be stuck with inferior, more expensive products. Service Linen's attempts at stifling fair competition through a change in the law must be rejected.

Service Linen's claims are not well-grounded in fact or warranted by existing law. Service Linen failed to conduct an adequate pre-suit investigation into the facts; choosing instead to file first and hope discovery revealed evidence to support its claims. It lost on this gamble. As the prevailing party on all claims, Tomlinson should have been awarded its reasonable attorneys' fees under RCW 4.84.185 or alternatively CR 11. Therefore, Tomlinson seeks reversal of the trial court's denial of its motion for attorneys' fees and further seeks fees on this appeal.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court did not err in ruling that Service Linen was required to prove improper purpose or improper means.
2. The trial court did not err in granting Tomlinson's motion for summary judgment.

3. The trial court erred in denying Tomlinson's motion for attorneys' fees and costs.

B. Issues Pertaining to Assignments of Error

1. Does Washington law require a plaintiff to prove improper purpose or improper means as an element of its tortious interference claim? (Assignment of Error 1.)

2. Is summary judgment in favor of Tomlinson warranted where Service Linen cannot demonstrate one or more essential elements of its tortious interference claim for each and every customer? (Assignment of Error 2.)

3. Is Tomlinson entitled to an award of reasonable attorneys' fees under RCW 4.84.185 and/or CR 11 where Service Linen's claims were not well grounded in fact or warranted by existing law? (Assignment of Error 3.)

III. STATEMENT OF FACTS

A. Procedural History

On February 9, 2007, Service Linen filed its Complaint alleging the following causes of action against Tomlinson: (1) trade name infringement, (2) passing off, (3) consumer protection act violations, (4) conversion, (5) civil conspiracy, (6) misappropriation of trade secrets, and (7) tortious interference. (CP 1058-73.)

On March 15, 2007, Tomlinson's counsel wrote to Service Linen's former counsel, Joseph Lawrence,

As I explained, we are aware of absolutely no conduct on the part of [Tomlinson] or any of its principals that would support the relief sought in the complaint filed by your office as counsel to [Service Linen]. The defendants have absolutely no confidential information belonging to your client; they have engaged in no unlawful or deceptive practices; and they have done nothing to interfere with your client's contractual relations. More to the point, aside from the (misplaced, in our view) references to the Phoenecia letter, the complaint does not even *allege* any facts that would constitute violations of [Service Linen]'s legal rights. The absence of a basis for claims is particularly acute with regard to the Tomlinsons individually; there is no reading of the complaint that would support a claim against Gary Tomlinson, Tim Tomlinson, or their respective marital communities.

We had initiated Tuesday's discussion in an effort to learn whether there was any factual support for your client's claims—and, if any misconduct was brought to our attention, to explore means of correcting the conduct without the acrimony and expense of litigation. You stated that there is more to the [Service Linen] claims than just the Phoenecia letter, but you were not able to identify what other support exists. Rather, you indicated that you would use the discovery process to determine whether misconduct had occurred. As I intimated previously, we consider that approach fundamentally backward: investigation of claims must take place prior to the time the complaint is filed. The discovery process is not to be used as a fishing expedition to determine whether there is a basis for your client's claims, particularly when the information you will seek is likely (ironically) to invoke [Tomlinson]'s trade secrets.

Because [Service Linen] is unable to demonstrate a factual basis for its claims, we formally demand that its complaint be immediately dismissed. Inasmuch as you indicated Tuesday that [Service Linen] would not voluntarily dismiss

the complaint, we intend to go forward with discovery, following which we expect to move to dismiss the complaint for failure to state a claim upon which relief may be granted. If, as we suspect, there is no substantiation for the claims, we will naturally seek sanctions and attorneys' fees (including pursuant to RCW 19.108.040) at least equal to the costs incurred by the defendants in the litigation.

(CP 1610-11.) (Emphasis added.)

On May 14, 2008, after significant written discovery, including several sets of interrogatories and requests for production, and the depositions of Gary Tomlinson, Tim Tomlinson, Reginald Knox, Kenneth Bowman, and Richard Bryant, Tomlinson moved for summary judgment, as no evidence had been discovered that could support Service Linen's claims. (See CP 1102-17.) In that motion, Tomlinson set forth the factual and legal deficiencies of Service Linen's claims for (1) trade name infringement, (2) passing off, (3) consumer protection act violations, (4) conversion, (5) civil conspiracy, and (6) misappropriation of trade secrets. (*Id.*) Without offering any evidence or argument in support of these claims, and after months of expensive litigation and discovery, Service Linen conceded that there was no support for the above claims, and it voluntarily dismissed all of its claims, except its claim for tortious interference. (CP 1350; *see also* CP 1614.)

As for the tortious interference claim, the trial court did not find any evidence of improper means, save for one possible exception. The trial court indicated that the postcard that was sent to various restaurants which stated "We used to be New Richmond" could potentially be

improper for the purpose of a tortious interference claim, without finding that it was actually improper on the facts of this case. The trial court denied Tomlinson's first motion for summary judgment and ruled that Service Linen could continue discovery regarding the 21 customers listed in Exhibit K to the Robert Raphael Declaration.¹ (CP 1047.)

Subsequently, Service Linen deposed all the above customers, except for Al Boccalino, Canlis, Guido Pizza, Firenze Ristorante Italiano, and Vino's Ristorante. (*See* CP 1-125.) Service Linen also took the deposition of Greg Horn, a former sales person for Tomlinson. (*Id.* At 3, 100-05) Following these depositions, it was plain that there was no evidence that Tomlinson improperly interfered with these customers, and, in any event, Service Linen could not establish all the essential elements of a tortious interference claim for each and every customer. Accordingly, on October 23, 2008, Tomlinson again requested that Service Linen dismiss its claims. (CP 1617-21.) Tomlinson set forth the factual and legal deficiencies of Service Linen's claims for each and every customer. (*Id.*) The letter concluded,

In sum, the testimony of all of these customers and Greg Horn makes clear that at least one—and in most cases more—essential element(s) of your client's tortious interference claim is missing for each of these customers.

¹ Those customers include (1) Classic Catering, (2) Al Boccalino, (3) Kells, (4) The Palace Kitchen, (5) Dahlia Lounge, (6) Etta's Seafood, (7) JAK's Grill, (8) JAK's Grill-West Seattle, (9) Thirteen Coins-Sea-Tac, (10) Thirteen Coins-Downtown, (11) Canlis, (12) Le Pichet, (13) Celebrations Catering, (14) Guido Pizza, (15) Firenze Ristorante Italiano, (16) The Pink Door, (17) JAK's Sandpoint, (18) Tom Douglas Group, (19) Lola, (20) Vino's Ristorante, and (21) Touchdowns.

We urge you to promptly dismiss the complaint. In light of the recent testimony, we do not believe that your client's claim is well-grounded in fact, or warranted by existing law or the good faith argument for extension, modification, or reversal of existing law. If you refuse to voluntarily dismiss the complaint and we are forced to file a second motion for summary judgment, we will seek sanctions under RCW 4.84.185 and CR 11 and an award of reasonable expenses, including attorneys' fees.

(*Id.*) (Emphasis added.)

On November 14, 2008, Tomlinson filed its second motion for summary judgment on Service Linen's tortious interference claim. (*See* CP 126-49.) Tomlinson cited the same legal authority and deposition pages as it cited in its October 23, 2008 letter. In its opposition, Service Linen offered no facts or arguments to support its claims against Al Bocalino, Canlis, Guido Pizza, Firenze Ristorante Italiano, or Vino's Ristorante, and it relinquished claims as to those customers. (CP 1623.) Service Linen also withdrew its claim as to Kells. (*Id.*)

Following two hearings, the Court issued its ruling on January 6, 2009. (*Id.*) The Court granted Tomlinson's second motion for summary judgment and dismissed Service Linen's tortious interference claim—its only remaining claim. (*Id.*) For each remaining customer, the Court found that there was no evidence that Tomlinson's interfered with improper means or purpose. (*Id.*)

On February 5, 2009, Tomlinson filed a motion for attorneys' fees pursuant to RCW 4.84.185 and/or CR 11. (CP 1716-28.) Following briefing of the parties, the Court denied Tomlinson's motion without stating a basis for its decision. (CP 1837-38.)

B. Service Linen's Tortious Interference Claim

Service Linen identified the following customers that Tomlinson allegedly interfered with: (1) Classic Catering, (2) The Palace Kitchen, (3) Dahlia Lounge, (4) Etta's Seafood, (5) JAK's Grill, (6) JAK's Grill-West Seattle, (7) Thirteen Coins-Sea-Tac, (8) Thirteen Coins-Downtown, (9) Le Pichet, (10) Celebrations Catering, (11) The Pink Door, (12) JAK's Sandpoint, (13) Tom Douglas Group, (14) Lola, and (15) Touchdowns. Several of these customers are under common ownership and will therefore be treated together.

1. Tom Douglas Restaurants (The Place Kitchen, Dahlia Lounge, Etta's Seafood, Lola, and Tom Douglas Group)

Pam Leydon testified as the corporate representative of the Tom Douglas Restaurants ("TDR"). (CP 6.) Ms. Leydon testified that TDR had decided to switch providers because Tom Douglas and Eric Tanaka, the executive chef, were not satisfied with Service Linen's service. (CP 7.) She further testified that TDR terminated its contracts with Service Linen before Tomlinson Linen began service. (CP 9.) TDR believed it had terminated the contract pursuant to its terms by providing a 60-day written notice of termination. (CP 7, 9). Moreover, TDR did not receive the postcard or any other marketing materials from Tomlinson. (CP 8.)

2. Celebrations Catering

Jerry Lewis testified as the corporate representative of Celebrations Catering. (CP 20.) He testified that he was offered a “renewal contract” from Service Linen by its driver. (CP 21-22.) He was unhappy with the quality of Service Linen’s linens; among other things, he stated that linens would arrive with black marks or burn holes. (CP 22-23, 25.) Dissatisfied with the service, Mr. Lewis did not sign the renewal contract. (CP 22.) Instead, Mr. Lewis’ wife contacted Tomlinson through a business network, Seattle Executives. (*Id.*) Upon notifying Service Linen of the change, David Leggett called Mr. Lewis and said that they were under contract. (CP 24.) Mr. Lewis informed him that he did not sign the contract, and Mr. Leggett stated that he would look into the matter. (*Id.*) Several days later, Mr. Leggett called and told Mr. Lewis that he was permitted to go ahead and switch providers. (*Id.*) Mr. Lewis further testified that they received no marketing materials from Tomlinson, nor was he familiar with the history of New Richmond. (CP 26.)

3. 13 Coins (two locations)

Mark Nesheim testified as the corporate representative of 13 Coins. (CP 28.) He testified that 13 Coins did not feel that they had a valid contract with Service Linen because the person who signed the contract did not have signing authority on behalf of 13 Coins. (CP 31-33.)

Indeed, he testified that Service Linen was helpful in making the transition and did not allege that there was a valid contract. (CP 34.) 13 Coins was in the process of interviewing new linen providers and it contacted Tomlinson. (CP 29.) 13 Coins had already contacted American Linen and New Systems Laundry. (CP 30.) 13 Coins was disappointed in Service Linen's quality of chef coats because 13 Coins had exhibition style kitchens and needed linens that were of show quality, without stains or holes. (CP 29.) Tomlinson asked for assurance that there was no existing contract and 13 Coins assured Tomlinson of that fact. (CP 31-32.) Mr. Nesheim does not recall receiving the marketing postcard or any other marketing materials from Tomlinson. (CP 35.)

4. Le Pichet

James Drohman testified as the corporate representative of Le Pichet. (CP 38.) Mr. Drohman testified that Le Pichet had service issues with Service Linen. (CP 39.) Issues would arise, Service Linen would fix them temporarily, but the problem would resurface shortly thereafter. (CP 39-40.) He testified that he believed his contract with Service Linen had expired, that they were operating without a contract, and they could make whatever decision they wanted. (CP 42.) After Service Linen informed them of the auto-renewal clause in the contract, Le Pichet sent a letter outlining the defects in Service Linen's performance and gave Service

Linen an opportunity to cure the defects, a procedure called for in the contract. (CP 43-44.) Mr. Drohman stated that 30 days had passed and Service Linen had not cured the defects, so Le Pichet terminated the contract. (*Id.*) Only after this termination did Tomlinson install service to Le Pichet. (CP 44-45.) Tomlinson never advised Le Pichet that it could walk away from its contract with Service Linen, how to terminate, or otherwise how to handle the contract. (CP 46-47, 49.) Le Pichet initiated contact with Tomlinson after receiving a referral from other restaurant owners. (CP 41.) Mr. Drohman did not recall receiving the marketing postcard or any other marketing materials from Tomlinson. (CP 48.)

5. The Pink Door

Jackie Roberts testified as the corporate representative for The Pink Door. (CP 51.) She testified that she was not aware of a contract with Service Linen until after she terminated their relationship. (CP 54-55.) She further testified that she did not discuss the Service Linen contract with anyone at Tomlinson. (CP 53-54.) She stated that her reason for changing linen providers came about because she had a meal at Chinooks restaurant and liked the napkins. (CP 52.) She called Chinooks and learned that Tomlinson supplied the napkins. (*Id.*) Service Linen did not have that blend of napkin available. (CP 56-57.) She then contacted

Tomlinson for service. (CP 52.) She testified that she did not receive the postcard or other marketing materials from Tomlinson. (CP 58.)

6. JAK's Grill (three locations)

Ken Hughes testified as the corporate representative for JAK's Grill (all three locations). (CP 61.) He testified that Chef O'day, JAK's Grill's executive chef, had service and communication problems with Service Linen. (CP 63.) As a result of these problems, they made the decision to find a new linen provider. (*Id.*) Chef O'day was familiar with Tomlinson and he initiated contact with Tomlinson for service. (*Id.*) Mr. Hughes testified that Tomlinson made sure that JAK's Grill terminated their agreement with Service Linen before they installed service. (CP 62, 64.) Mr. Hughes testified that Tomlinson did not cause or induce JAK's Grill to switch providers, and JAK's Grill had decided to go with another provider regardless of whether it was Tomlinson. (CP 64-65.) JAK's Grill did not receive any marketing materials from Tomlinson, nor did the history of New Richmond's ownership play a role in JAK's Grill's decision to switch linen providers. (CP 63-64.)

7. Touchdowns

Andrew Alberts testified as the corporate representative for Touchdowns. (CP 67.) He testified that he had no knowledge of an existing contract with Service Linen until after he informed Service Linen

he was switching providers. (CP 68, 70.) He also testified that Tomlinson asked if Touchdowns had a contract before a contract was finalized and Mr. Alberts told them that Touchdowns was not under contract. (CP 70.) Mr. Alberts initiated contact with Tomlinson through a contact at Indoor Billboards. (CP 69.) Touchdowns did not receive the postcard or other marketing materials from Tomlinson. (CP 71.) At the time Touchdowns entered into the contract with Tomlinson, Mr. Alberts expressly stated to Tomlinson that they were not under contract. (CP 70.) When Service Linen subsequently filed a claim in Small Claims Court to enforce the agreement, Tomlinson agreed to remove its linens and to stop service. (CP 72.) Mr. Alberts testified that the reason he decided to change linen providers resulted from an incident whereby a Service Linen sales person walked into the restaurant and asked him who currently provided Touchdowns their linens. (CP 68-69.) He was upset that the sales person did not know that Touchdowns was an existing customer of Service Linen. (Id.)

8. Classic Catering

Ken Moriarty testified as the corporate representative of Classic Catering. (CP 75.) Ken Moriarty testified that he thought he could terminate their relationship with Service Linen with a couple weeks notice, and that he felt he could switch companies if he needed to. (CP

77.) He testified that he had no discussions with Tomlinson about Service Linen or whether they had a contract in place. (CP 76.) He testified, “we didn’t talk contract. I never talked contract with [Ken]” in regards to Service Linen. (CP 80.) He also did not receive the postcard or any other marketing materials from Tomlinson. (CP 78-79.)

IV. SUMMARY OF ARGUMENT

Washington law is clear on the essential elements of a tortious interference claim. Service Linen must demonstrate as part of its claim that Tomlinson’s interference was done for an improper purpose or through improper means. The Washington Supreme Court adopted this requirement in *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), and there is no basis for overturning this long-standing precedent. The trial court’s ruling that Service Linen was required to demonstrate this element should be affirmed.

Additionally, the trial court properly granted Tomlinson’s motion for summary judgment. Service Linen failed to demonstrate improper purpose or improper means. After the expiration of the two-year non-competition agreement, Tomlinson was free to compete with Service Linen just as any other competitor. Further, while Tomlinson used the “New Richmond” name in some marketing materials, none of the customers at issue recalled receiving such materials. Therefore, the use of

that trade name has no effect on the customers' decision to change providers, and is not competent evidence of improper means. Additional grounds for affirming the trial court's decision exist because the evidence establishes that Tomlinson did not have knowledge of any existing contracts, and Tomlinson was not the moving force behind the customers' desire to change providers. For instance, the majority of the customers testified that they had service and quality issues with Service Linen and that these issues were the reason the customers changed providers. When looking at each essential element for each customer, it is apparent that Service Linen cannot establish at least one essential element for each customer. Therefore, the trial court's grant of summary judgment in Tomlinson's favor should be affirmed.

Lastly, the trial court erred in denying Tomlinson's request for attorneys' fees pursuant to RCW 4.84.185 or CR 11. Service Linen's claims were not well grounded in fact or warranted by existing law. Rather than conducting due diligence before commencing this action, Service Linen filed suit first hoping discovery would uncover facts to support its claims. No such facts emerged. Despite warnings by Tomlinson that set forth the shortfalls of Service Linen's claims, Service Linen persisted in its prosecution of its claims. Service Linen should now pay for its gamble, not Tomlinson.

V. ARGUMENT

A. Standard of Review

Appellate courts review summary judgment decisions de novo, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Summary judgment should be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56; *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The trial court's denial of Tomlinson's motion for attorneys' fees, pursuant to RCW 4.84.185 or CR 11, is reviewed for abuse of discretion. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). The Court's inquiry is "whether the court's conclusion was the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons." *Id.*

B. The Trial Court Properly Ruled that Service Linen Must Demonstrate Improper Purpose or Improper Means

For each customer, Service Linen is required to prove each of the following five elements of its tortious interference claim: (1) the existence of a valid contractual relationship; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of that relationship or expectancy; (4) that

defendants interfered for an improper purpose or used improper means; and (5) resultant damages. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992); *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992).

Service Linen disputes that it was required to demonstrate the fourth element of improper purpose or improper means. Service Linen contends that the Washington Supreme Court has not addressed the issue of this element for existing contracts. However, for the reasons set forth below, the trial court properly ruled that Service Linen was required to prove improper purpose or improper means as an element of its claim.

In *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), the Washington Supreme Court thoroughly examined the improper purpose and means element for both existing contracts and business expectancies. The Court began by explaining the history of these torts. The tort of intentional interference with contractual relations or business expectancies was defined by the Court in *Calbom v. Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964). *Pleas*, 112 Wn.2d at 800. Relying on the first Restatement of Torts § 766 (1939), the Court in *Calbom* identified the following four elements for a prima facie case: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional

interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damages to the party whose relationship or expectancy has been disrupted. *Id.* Once these elements were established, the defendant had the burden of justifying the interference or showing that his actions were privileged. *Id.*

The Court noted that, under *Calbom*, liability was based simply on the intentional interference with a known business relationship, and any justification or privilege the defendant might have was treated as an affirmative defense which the defendant must prove. *Id.* at 802. This was the general approach of the first Restatement and many of the courts at the time. *Id.*

The authors of the second Restatement of Torts modified this approach in favor of one that defines the tort as involving “improper” as well as intentional interference. *Id.* (citing Restatement (Second) of Torts §§766, 766B (1979)). The Court explained,

This change was made in response to a concern articulated by many courts and commentators that the prima facie tort approach in which every intentional infliction of harm is prima facie tortious unless justified. This approach required too little of the plaintiff insofar as it left the major issue in the controversy—the wrongfulness of the defendant’s conduct—to be resolved by asserting an affirmative defense.

Id.

The Court recognized that there was a debate over who had the burden of persuasion on the improper purpose or means element. *Id.* at 803. The authors of § 766 and § 766B took no clear position on the matter. Attempting to reconcile this debate, the Court stated,

We believe that the right balance has been struck by our colleagues on the Oregon Supreme Court. Rejecting the prima facie tort approach of the first Restatement and declining to adopt in toto the implication of the second Restatement that a plaintiff prove that the interference was “improper” under the factors listed in § 767, that court, . . . redefined the tort as “wrongful interference with the economic relationships.” *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1368 (1978). Thus, a cause of action for tortious interference arises from either the defendant’s pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff’s contractual or business relationships. *Top Serv.*, 582 P.2d 1368. A claim for tortious interference is established

when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant’s liability may arise from improper motives or from the use of improper means. . . .

Top Serv., 582 P.2d at 1371. Interference can be “wrongful” by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a “duty of non-interference; *i.e.*, that he interfered for an improper purpose . . . or . . . used improper means . . .

Id. at 803-04.

The Court adopted the Oregon formulation and noted that it followed other courts in doing so. *Id.* at 804 (citing *Leigh Furniture &*

Carpet Co. v. Isom, 657 P.2d 293, 303 (Utah 1982); *Anderson v. Dairyland Ins. Co.*, 637 P.2d 837, 840-41 (1981)). The Court explained that this formulation, “is one that best comports with our previous opinions on the subject and best reflects the underlying spirit of the modifications made in the second Restatement.” *Id.* “Implicit in our previous cases dealing with tortious interference has been some showing that the interference complained of be ‘wrongful’ in some way . . .” *Id.*

The Court in *Pleas* made no distinction between an existing contract and business expectancy. Further, the Oregon Supreme Court made no such distinction in *Top Serv.*, which our Court adopted. The Oregon Supreme Court stated, “We conclude that the approach of *Nees v. Hocks* [a prior decision] is equally appropriate for intentional interference with contractual or other economic relations” *Top Serv.*, 582 P.2d at 1371. Additionally, the decision of the Utah Supreme Court, which was cited in *Pleas*, similarly made no such distinction. There, the court held,

We recognize a common-law cause of action for intentional interference with prospective economic relations, and adopt the Oregon definition of this tort. Under this definition, in order to recover damages, the plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff.

Leigh Furniture, 657 P.2d at 304. (Emphasis added.)

Indeed, the Restatement provisions, which the above courts adopted in part, make no such distinction. While the Restatement discusses existing contracts separately from prospective contracts, both § 766 and § 766B require a showing of “improper” conduct by the defendant. Restatement (Second) Torts § 766 provides:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Section 766(B) similarly provides,

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Thus, while treated separately, the second Restatement requires the showing of improper means or purpose for both existing contracts and business expectancies.

Following its decision in *Pleas*, the Court announced the required elements of tortious interference in *Commodore v. University Medical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992) as follows:

This court has identified five elements necessary to make a claim for tortious interference with contractual relations or business expectancy:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

Id. at 137. *See also, Sintra v. Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992).

Contrary to Service Linen's contention, there is no reasonable debate that the Washington Supreme Court has decided that the improper means or purpose element is required for existing contracts. The trial court properly held that Service Linen must prove this element in its prima facie case.

Service Linen cites several California cases and seemingly urges our courts to adopt the California approach. However, there is no reason to resort to the consideration of California law. As discussed above, there is no open question under Washington law whether interference with an existing contract requires a plaintiff to prove improper purpose or means. Our Supreme Court decided the issue in *Pleas*, and there is no basis for upsetting this established precedent.

Furthermore, California case law demonstrates that its Supreme Court, like our Court, was faced with whether to redefine the elements of tortious interference following the change in the second Restatement away

from the prima facie approach of the first Restatement. *See, e.g., Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740 (Cal. 1995). In *Della Penna*, similar to *Pleas* and *Top Serv.*, the California Supreme Court recited the history of the tort, the criticisms of the first Restatement approach, and the change in direction by many courts. *Id.* at 743-47. The court adopted the *Top Serv.* approach, which it noted had been adopted in some variation by the majority of courts, for business expectancies. The court declined, however, to adopt this approach for existing contracts, thus leaving unchanged the antiquated approach of the first Restatement for existing contracts. The court implicitly weighed the criticisms of the first Restatement approach against the policy of protecting existing contracts more than expectancies. The court resolved this balancing in favor of greater protections for existing contracts. In essence, the court adopted § 766B of the second Restatement, but declined to adopt the changes in § 766, opting instead to continue to follow the previous version of § 766 in the first Restatement.

Our Court, in *Pleas*, already made this policy choice. While not expressly considering whether additional protection should be afforded to existing contracts, the Court agreed with the criticisms of the first Restatement approach and found that it required too little of a plaintiff because it left the major issue in controversy—the wrongfulness of the

defendant's conduct—to be resolved by asserting an affirmative defense. *Pleas*, 112 Wn.2d at 804. The Court then adopted both § 766 and § 766B as interpreted in *Top Serv.* It would be a mistake to go backwards and adopt the antiquated, and now minority, approach of the first Restatement that our Court abandoned 20 years ago.

For the foregoing reasons, the trial court properly held that Service Linen was required to demonstrate improper purpose or means. Having failed to make that showing, the trial court properly granted Tomlinson's motion for summary judgment.

C. The Trial Court Properly Granted Tomlinson's Motion for Summary Judgment

1. Tomlinson Did Not Have Knowledge of Existing Contracts

The trial court's ruling did not focus on this element of the tort, and Service Linen has ignored it in its briefing. However, the trial court was independently justified in granting summary judgment on this element for all of the customers at issue.

Service Linen has made the following general arguments to show that Tomlinson had knowledge that Service Linen had existing contracts with its customers:

- Tomlinson hired Ken Bowman who worked for Service Linen for a number of years and knew many of its customers.

- Robert Raphael sent a letter in 2005 that generically stated, “We want you to be aware that Service Linen has current contracts with virtually all of our customers.”
- Tomlinson installed service to the Pink Door, 13 Coins and Le Pichet allegedly after Plaintiff sent a letter regarding an existing contract.

(Appellant’s Br. at 3-4.)

This evidence is insufficient to prove that Tomlinson had knowledge of existing contracts. First, the fact that Ken Bowman used to work for Service Linen does not evidence Tomlinson’s knowledge of any existing contracts. Service Linen attempts to imply that Ken Bowman’s move from Service Linen’s employment to Tomlinson’s after an 18-month break was improper. However, Service Linen fails to assert any evidence of wrongful conduct by Mr. Bowman. Indeed, when Mr. Bowman left Service Linen, he was under an 18-month non-competition agreement. He complied with the obligations of this agreement and started working for Tomlinson only after it expired. (CP 113.) Further, that Mr. Bowman knew certain customers were under contract when he left Service Linen, does not equate to him having knowledge 18 months later that a particular customer was still under contract. Everyone in the industry knows that contracts expire and restaurants regularly change providers.

Second, Raphael’s generic 2005 letter did not attach a list of specific customers under contract with Service Linen and the expiration

dates of those contracts. It was impossible for Tomlinson to know which customers were current customers of Service Linen.

Lastly, Service Linen cites three examples of customers leaving Service Linen to go to Tomlinson in which Tomlinson allegedly knew that the customers were under contract: the Pink Door, Le Pichet, and 13 Coins. In all three instances, Tomlinson had entered into contracts with these customers before their receipt of Plaintiff's letters regarding existing contracts. The contract with the Pink Door was entered on or about October 30, 2007, before Plaintiff sent its November 5, 2007 letter. (CP 115.) Similarly, both Le Pichet and 13 Coins entered into contracts on October 12, 2006 and August 23, 2007, respectively, before Plaintiff sent its December 12, 2006 and September 4, 2007 letters. (CP 117-121, 123-25.)

Service Linen cites no competent evidence that Tomlinson knew of Service Linen's existing contracts. Additionally, the more proper inquiry is to look at the facts of each particular customer, as Tomlinson does below. Upon this inquiry, it is apparent that the customer's testimony establishes that Tomlinson had no knowledge of existing contracts with Service Linen.

2. Tomlinson Did Not Induce or Cause Any Customer to Breach Its Contract With Service Linen

The third element of the tort of interference requires Service Linen

to prove that Tomlinson intentionally interfered and such interference induced or caused a breach or termination of the relationship. This element includes a causal requirement. In *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 144, 566 P.2d 972 (1977), the court stated, “Improper actions by a defendant must be found to have been the ‘moving force’ behind the termination of a plaintiff’s contract before liability can attach.” In applying this test, the court indicated that a “moving force” can be established with a “but for” causation analysis. *Id.* In *Daniels-Head & Associates v. William M. Mercer, Inc.*, 819 F.2d 914 (9th Cir. 1987), the Ninth Circuit cited *Island Air* for the above proposition. In applying the above rule, the court found that the termination was caused independently of the interference (failure to remit payment of premium), and thus the interference claim failed. *Id.* at 921. In reaching that decision, the court considered the fact that the party terminating the contract had solicited proposals from numerous insurance agents before selecting the alleged interferor. *Id.*

Here, the relevant customers terminated their relationships with Service Linen for independent reasons not related to Tomlinson’s contact with them. In the majority of cases, the customers that Tomlinson allegedly interfered with decided to terminate their relationship with Service Linen because of service or quality issues on the part of Service

Linen, and the decision to terminate was made in advance of the alleged interference by Tomlinson. The following customers testified that they had service, quality, or communication issues with Service Linen: TDR, Celebrations Catering, 13 Coins, Le Pichet, The Pink Door, JAK's Grill, and Touchdowns. (*See* CP 1050-54.) Moreover, in the majority of cases, the customer initiated contact with Tomlinson for service. This occurred with the following customers: Celebrations Catering, 13 Coins, The Pink Door, JAK's Grill, and Touchdowns. (*Id.*) Further, in some cases, the customer had contacted other linen providers before selecting Tomlinson. Under such circumstances, Service Linen cannot establish the necessary causation because its own service and quality issues were the cause of its former customers' desire to switch linen providers. Service Linen failed to present any evidence that Tomlinson's alleged interference was the "moving force" behind the customer's termination of their contracts with Service Linen. Thus, the trial court was independently justified in granting summary judgment on this basis.

3. Service Linen Failed to Present Evidence That Tomlinson's Motive Was Improper or That it Employed Improper Means

The trial court properly ruled that Service Linen failed to demonstrate improper purpose or improper means. Service Linen must prove that Tomlinson's alleged interference was wrongful by some

measure beyond the fact of the interference itself, such as improper purpose or means. Interference can be “wrongful” by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. *Pleas*, 112 Wn.2d at 803-04. The trial court acknowledged in its order that Service Linen “conceded that there was no evidence of improper motive,” and therefore the trial court only considered whether Service Linen could show improper means. (CP 516.)

On appeal, Service Linen asserts two bases for finding improper means. First, Tomlinson competed with Service Linen for New Richmond’s former customers, which were sold to Service Linen. Service Linen argues that this competition, in itself, is improper. Second, Service Linen alleges that Tomlinson’s use of the “New Richmond” name in its marketing materials was improper.

First, competing for former New Richmond business was not improper as a matter of law. It is undisputed that the sale agreement by which Service Linen purchased its business prohibited Tomlinson from competing for a period of two years. (CP 952.) Service Linen does not allege that Tomlinson violated the non-compete agreement. Indeed, Tomlinson did not re-enter the market until five years after the sale of the business, and nearly three years after the expiration of the non-competition agreement. Therefore, the trial court properly concluded as a matter of

law that since there are no contractual limitations on Tomlinson's competition with Service Linen, Tomlinson was entitled to compete in the same manner as any other competitor of Service Linen. Thus, for our purposes, the fact that Tomlinson sold Service Linen the New Richmond customer lists is irrelevant, and competition by itself cannot amount to improper means.

Service Linen's reliance on *J.L. Cooper & Co. v. Anchor Securities, Co.*, 9 Wn.2d 45, 53-54, 113 P.2d 845 (1941) is misplaced. In that case, there was no restrictive covenant regarding competition, for or against. Therefore, the Court supplied an implied covenant that the seller will not solicit the customers for which the purchasers paid. The Court supplied this implied covenant even though there was no restrictive covenant precluding competition. This is what the Court meant when it said the implied covenant exists even though "[t]here is no question of restrictive covenants." In other words, if the parties are silent on whether competition is allowed or disallowed, there is an implied covenant against competition.

This implied covenant does not apply in this case. Here, unlike in *J.L. Cooper*, the parties explicitly included a restrictive covenant in the agreement. The express agreement of the parties controls. Under that agreement, Tomlinson was permitted to compete for business after two-

years. To hold that the implied covenant applies to extend that term would require the Court to ignore the intent of the parties and would render the two-year non-competition agreement superfluous. This the Court cannot do. “Generally, the courts function to enforce contracts as drafted by the parties and not to change the obligations of the contract the parties saw fit to make.” *In re Estate of Bachmeier*, 147 Wn.2d 60, 52 P.3d 22 (2002) (The Court of Appeals erred in implying a term to a written contract.).

Second, Service Linen argues that inclusion of the “New Richmond” name in its marketing flyers was improper because Tomlinson sold that trade name to Service Linen. While the use of a trade name could be improper, in this case, it had no effect on the customers’ decision to switch providers. The uncontroverted testimony of all the customers at issue is that they did not recall receiving any marketing materials from Tomlinson. Therefore, the use of the New Richmond name in the marketing materials had absolutely no effect on the customers’ decision to switch providers.

Service Linen states that at least one customer, Classic Catering, received the New Richmond postcard, called Tomlinson as a result, and became a Tomlinson customer. (Appellant’s Br. at 16.) Service Linen cites the testimony of Tim Tomlinson. However, Tim Tomlinson testified that he thought Classic Catering responded to the marketing postcard. This

belief was refuted by Classic Catering's owner, Ken Moriarty, who testified that he did not recall ever receiving any marketing materials from Tomlinson. (CP 78-79.) Rather, he testified that his first contact with Tomlinson was a call from Ken Bowman:

Q. Any recollection of responding to an advertisement from Tomlinson that caused you to call in to their company?

A. No. The first contact that I had that I knew anything about Tomlinson was the contact from Ken. So it was initiated from him, not—I didn't call them because I saw a flyer, so, yeah.

(CP 78.) Based on this unrefuted testimony of Ken Moriarty, and the other customers, there is no evidence that the use of the name "New Richmond" had any affect on the customers at issue. Accordingly, Tomlinson's use of that name cannot be a basis for finding improper means. For the foregoing reasons, the trial court properly ruled that Service Linen failed to show improper means.

4. Service Linen Cannot Demonstrate the Essential Elements for Each Customer

As to each customer Service Linen alleges that Tomlinson interfered with, Service Linen cannot establish one or more essential elements of its claim.

a. Tom Douglas Restaurants

Service Linen cannot establish several necessary elements of its claim as it relates to TDR. First, Service Linen cannot establish the

existence of a valid contract or that Tomlinson knew of an existing contract. The corporate representative of TDR, Pam Leydon, testified that it terminated its contract with Service Linen before Tomlinson began service. Second, Ms. Leydon testified that TDR decided to switch providers because Tom Douglas and Eric Tanaka had trust issues with Service Linen. Accordingly, Service Linen cannot establish that Tomlinson induced or caused a breach of TDR and Service Linen's relationship.

Lastly, Service Linen cannot establish improper purpose or means. Ms. Leydon testified that TDR did not receive the postcard or any other marketing materials from Tomlinson. Therefore, regardless of whether the postcard had the potential to be improper, it cannot constitute improper means as it relates to TDR. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

b. Celebrations Catering

Service Linen cannot establish that Tomlinson had knowledge of an existing contract. Jerry Lewis testified that when presented with a "renewal contract," he declined to sign it, and instead Celebrations Catering initiated contact with Tomlinson for service. David Leggett of Service Linen indicated to Mr. Lewis that Celebrations Catering had a contract with Service Linen, but after checking on the alleged contract, David Leggett was unable to find a contract, and told Celebrations Catering that they were free to switch providers. Therefore, Service Linen cannot establish that Tomlinson had knowledge of such a contract.

Second, Service Linen cannot establish that Tomlinson induced or caused a breach of the alleged contract. Mr. Lewis testified that Celebrations Catering contacted Tomlinson because it was dissatisfied with Service Linen's quality of linens. He testified that linens would arrive with black marks or burn holes. Because of these issues, Mr. Lewis' wife contacted Tomlinson. Based on these facts, Service Linen's quality, not anything Tomlinson did, caused Celebrations Catering to switch linen providers.

Lastly, Service Linen cannot establish improper purpose or means. Classic Catering did not receive the postcard or other marketing materials from Tomlinson. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

c. 13 Coins

Service Linen cannot establish that Tomlinson had knowledge of an existing contract, that Tomlinson interfered with that contract, that Tomlinson caused or induced a breach of that contract, or that Tomlinson used improper means or had an improper purpose. First, Mark Nesheim testified that 13 Coins did not feel they had a valid contract with Service Linen because the person who signed the contract did not have authority to do so. He testified that Service Linen did not challenge the invalidity of the contract. Moreover, he testified that Tomlinson asked for assurance that there was no contract in place and 13 Coins assured Tomlinson of that fact. Therefore, even if there was a valid contract, there is no evidence that Tomlinson had knowledge of it.

Second, Service Linen cannot establish that Tomlinson induced or caused 13 Coins to breach the alleged contract. Mr. Nesheim testified that 13 Coins was unhappy with Service Linen's quality of chef coats because 13 Coins had exhibition style kitchens and needed linens that were show quality and without stains or holes. 13 Coins was in the process of interviewing new linen providers and it contacted Tomlinson for service; it had already contacted two other linen providers. In other words, 13 Coins had already made the decision to switch providers when it called Tomlinson. Therefore, Tomlinson did not induce or cause a breach of the alleged contract.

Lastly, Service Linen cannot establish improper purpose or means. 13 Coins did not receive the postcard or other marketing materials from Tomlinson. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

d. Le Pichet

Service Linen cannot establish that there was a valid existing contract at the time Tomlinson installed service at Le Pichet. James Drohman testified that he believed his contract with Service Linen had expired, that they were operating without a contract, and they were free to switch providers at the time he contacted Tomlinson for service. After Service Linen informed them of the auto-renewal clause in the contract, Le Pichet sent a letter outlining the defects in Service Linen's performance and gave Service Linen an opportunity to cure the defects, a procedure called for in the contract. Mr. Drohman stated that 30 days had passed and

Service Linen had not cured the defects, so Le Pichet terminated the contract. Only after this termination did Tomlinson install service to Le Pichet. Accordingly, Service Linen cannot establish a valid, existing contract at the time Tomlinson installed service.

Second, Service Linen cannot establish that Tomlinson induced or caused Le Pichet to breach the alleged contract. Mr. Drohman testified that he had service and quality issues with Service Linen. He reported that issues would arise, Service Linen would fix them temporarily, but problems would resurface shortly thereafter. As a result of these problems, Mr. Drohman began looking for a new linen provider and he contacted Tomlinson. He testified that he contacted other restaurants seeking a referral and was referred to Tomlinson. Based on this testimony, Le Pichet had already decided to switch providers before it contacted Tomlinson, and there is no evidence that Tomlinson induced or caused a breach of the alleged agreement with Service Linen.

Lastly, Service Linen cannot establish improper purpose or means. Le Pichet did not receive the postcard or other marketing materials from Tomlinson. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

e. The Pink Door

Service Linen cannot establish that Tomlinson had knowledge of an existing contract when The Pink Door contacted Tomlinson for service. Jackie Roberts testified that she was not aware of a contract with Service Linen until after she terminated that relationship. More importantly, she

testified that she did not discuss the Service Linen contract with anyone at Tomlinson. Based on this testimony, Service Linen cannot establish that Tomlinson knew of an existing contract.

Second, Service Linen cannot establish that Tomlinson induced or caused The Pink Door to breach the alleged contract with Service Linen. Ms. Roberts testified that her decision to change providers came about as a result of a meal she had at Chinooks restaurant. She liked the napkins they had so much that she subsequently called Chinooks and asked which linen provider was providing that blend of napkin. She learned that it was Tomlinson. She testified that Service Linen did not have that blend of napkin available. Accordingly, she called Tomlinson for service. Based on these facts, Service Linen cannot establish that Tomlinson induced or caused The Pink Door to breach its alleged contract with Service Linen.

Lastly, Service Linen cannot establish improper purpose or means. The Pink Door did not receive the postcard or other marketing materials from Tomlinson. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

f. JAK's Grill

Service Linen cannot establish that Tomlinson knew of an existing contract at the time it installed service. Ken Hughes testified that Tomlinson made sure that JAK's Grill terminated their agreement with Service Linen before Tomlinson installed service. Further, Service Linen cannot establish that Tomlinson caused or induced JAK's Grill to breach its agreement with Service Linen. Ken Hughes testified that Chef O'day,

JAK's Grill's executive chef, had service and communication problems with Service Linen. As a result of these problems, they made the decision to find a new linen provider. Chef O'day was familiar with Tomlinson, so he initiated contact with Tomlinson regarding service. Mr. Hughes testified that Tomlinson did not cause or induce JAK's Grill to switch providers, and JAK's Grill had decided to go with another provider, regardless of whether it was Tomlinson. In other words, JAK's Grill had decided to switch providers before it contacted Tomlinson for service. Based on these facts, Service Linen cannot establish that Tomlinson induced or caused JAK's Grill to breach its contract with Service Linen. Lastly, Service Linen cannot establish improper purpose or means. JAK's Grill did not receive the postcard or other marketing materials from Tomlinson. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

g. Touchdowns

Service Linen cannot establish that Tomlinson had knowledge of an existing contract. Andrew Alberts testified that he had no knowledge of an existing contract with Service Linen at the time he contacted Tomlinson for service. He also testified that Tomlinson asked if Touchdowns had an existing contract before a contract with Tomlinson was finalized, and Mr. Alberts told Tomlinson that Touchdowns was not under contract. Based on these facts, Service Linen cannot establish that Tomlinson had knowledge of an existing contract at the time it agreed to provide service to Touchdowns.

Further, Service Linen cannot establish that Tomlinson induced or caused Touchdowns to breach its agreement with Service Linen. Mr. Alberts testified that the reason Touchdowns switched providers was that a Service Linen sales person had walked into the restaurant and asked who their current linen provider was, apparently not knowing that Touchdowns was an existing customer. Mr. Alberts then initiated contact with Tomlinson through a contact at Indoor Billboards. Based on these facts, Service Linen cannot establish that Tomlinson induced or caused Touchdowns to breach its agreement with Service Linen.

Lastly, Service Linen cannot establish improper purpose or means. Touchdowns did not receive the postcard or other marketing materials from Tomlinson. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

h. Classic Catering

Service Linen cannot establish that Tomlinson had knowledge of an existing contract. Ken Moriarty testified that he had no discussions with Tomlinson about Service Linen or whether they had a contract in place: “[W]e didn’t talk contract. I never talked contract with Ken.” Based on this testimony, Service Linen cannot establish that Tomlinson knew of an existing contract.

Furthermore, Service Linen cannot establish that Tomlinson contacted Classic Catering for an improper purpose or with improper means. As discussed above, Service Linen has argued that this element is fulfilled because of the “we used to be New Richmond” language in the

postcard. However, Mr. Moriarty testified that he did not receive the postcard or any other marketing materials from Tomlinson. Therefore, Service Linen cannot establish the improper means element. Under these facts, Service Linen cannot establish a claim as it relates to this customer.

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

Service's Linen's claims were not well grounded in fact or law.

Service linen brought this action without any evidence of wrongdoing, just a hope that the discovery process would reveal some evidence to support its claims. After a year of litigation, substantial discovery, and a motion for summary judgment by Tomlinson, Service Linen withdrew 7 of its 8 claims, leaving only its tortious interference claim. Following direction from the trial court, Service Linen narrowed its claim to 21 customers with which Tomlinson allegedly interfered. After additional written discovery and 15 depositions, Service Linen abandoned claims for 5 of those 21 customers; and, following Tomlinson's second motion for summary judgment, the trial court dismissed the claims as to the remaining customers.

Throughout the course of this action, Tomlinson cautioned Service Linen that its claims were not supported by the law or evidence. Despite several warnings, and the threat to seek attorneys' fees under RCW 4.84.185 and CR 11, Service Linen continued on its expensive fishing

expedition in the hopes of finding some support for its claims. At the end of its search, however, no such evidence emerged. Service Linen should now compensate Tomlinson for filing this action without evidence to support its claims. Tomlinson respectfully requests that the Court reverse the trial court's denial of its motion for fees and award it the reasonable attorneys' fees and costs it has expended in defending this action, pursuant to RCW 4.84.185 and/or CR 11.

1. RCW 4.84.185

In Washington, the prevailing party may be entitled to recover reasonable attorneys' fees if the parties have so agreed by contract, or if a special statute so provides, or if the fee can be awarded on a recognized basis in equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997) (emphasis added). RCW 4.84.185 provides,

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action. . . . This determination shall be made upon motion by the prevailing party after . . . order on summary judgment . . . or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause.

The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to

defend against meritless claims advanced for harassment, delay, nuisance, or spite. *See, Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). “A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.” *Id.*; *see also, Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004). In general, a prevailing party is one who receives an affirmative judgment in his or her favor. *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000); *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997).

Here, Tomlinson is unquestionably the prevailing party in this litigation. Service Linen commenced this action with eight causes of action against Tomlinson. After Tomlinson filed its first motion for summary judgment, Service Linen withdrew 7 of its 8 claims. Its remaining claim for tortious interference was dismissed pursuant to the Court’s January 6, 2009 Order on Summary Judgment. By virtue of its voluntary withdrawal and the Court’s Order, all of Service Linen’s claims have been dismissed.

Furthermore, Service Linen advanced its claims for the improper purpose of “harassment, delay, nuisance or spite” of a competitor that was successfully increasing its market share through legitimate means. It did so without evidence of any wrong doing. Rather than grounding its claims in existing facts or law, Service Linen advanced this action hoping that the discovery process would reveal some evidence that might support its claims. Service Linen then dismissed its claims in a piecemeal fashion.

Turning to the merits of Service Linen’s claims, Service Linen

conceded by its withdrawal of 7 of its 8 claims that the claims could not be supported by any rational argument on the law or facts. Similarly, with its tortious interference claim, Service Linen could not demonstrate improper purpose or improper means. Service Linen attempted to argue that this element of a tortious interference claim was not required for existing contracts. However, this position was not supported by Washington precedent. *See Commodore*, 120 Wn.2d at 137; *Pleas*, 112 Wn.2d at 804. If the Washington Supreme Court sought to make a distinction between existing contracts and expectancies on this element, it had every opportunity to do so in *Commodore*. Nevertheless, the Court stated that the improper purpose or means element was required for tortious interference with “contractual relations or business expectancy.” *Id.* This plainly encompasses both existing contracts and expectancies. Furthermore, Service Linen’s claim was not factually supported. The trial court found that there was no evidence to support a finding of any wrongdoing or improper conduct by Tomlinson. Therefore, Service Linen’s claims were frivolous, under RCW 4.84.185, and the trial court should have awarded Tomlinson its reasonable attorneys’ fees and expenses.

2. CR 11

CR 11 establishes the standards parties or attorneys must meet when filing pleadings, motions, and legal memoranda. CR 11. The rule imposes upon parties or attorneys the responsibility to insure that

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

CR 11 provides that the signature of a party or an attorney on a pleading, motion, or memorandum constitutes a certification by the party or attorney that after reasonable inquiry:

- (1) its is well grounded in fact;
- (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .

CR 11(a). The appropriate level of pre-filing investigation depends on what was reasonable to believe at the time the pleading, motion, or legal memorandum was submitted. *Briggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 1099 (1992); *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 537 (1990).

An attorney or a party are also under a continuing duty to review and examine positions taken as the facts of the case are developed. If an attorney or party becomes aware of information that would lead a reasonable attorney or person to conclude that a claim is baseless or

frivolous, the attorney or party is obligated to reevaluate an earlier CR 11 certification. *See, e.g., MacDonald v. Korum Ford*, 80 Wn. App. 877, 890, 912 P.2d 1052 (1996) (lack of factual basis became apparent at plaintiff's deposition); *Manteufel v. Safeco Ins. Co. of America*, 117 Wn. App. 168, 176-77, 68 P.3d 1093 (2003) (Court of Appeals noted that plaintiff had ignored defendant's warnings, accompanied by copies of relevant authority, that his arguments lacked legal or factual basis).

As discussed above, Service Linen filed this action without factual support for its claims. Service Linen could have investigated the facts surrounding the decision of the 21 customers to leave Service Linen before filing this action. Had it done so, Service Linen would have learned very early on that there were no facts to support claims against Tomlinson. Rather than conducting an adequate investigation of the facts before asserting its claim, Service Linen chose to file suit, and to then use the discovery process to obtain evidence to support its claims. This approach is contrary to the intent of CR 11, which requires parties to conduct due diligence before filing suit, not after. Then, after written discovery and depositions revealed that Service Linen's claims were not well grounded in fact, Service Linen refused to reevaluate its claims. Service Linen did so, despite warnings from Tomlinson's counsel. The last warning, Tomlinson's October 23, 2008 letter, set forth a summary of the deposition testimony of each customer and the legal standard for a tortious interference claim. The letter set forth the deficiencies of Service Linen's claim for each and every customer. Had Service Linen reviewed

the citations provided, it would have seen that its claims were not well grounded. Yet, Service Linen persisted and necessitated Tomlinson's filing of a second motion for summary judgment.

Further, Service Linen's claims were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. As discussed above, Service Linen attempted to argue that the improper means/improper purpose element of a tortious interference claim was not required for existing contracts. However, this position was not support by Washington precedent. *See Commodore*, 120 Wn.2d at 137; *Pleas*, 112 Wn.2d at 804. Lastly, Service Linen's complaint was interposed for the improper purpose of harassment of a competitor that was successfully increasing its market share through legitimate means. Based on the foregoing, Service Linen's claims violated CR 11, and the trial court erred in not awarding Tomlinson its reasonable attorneys' fees and expenses as sanctions.

E. Tomlinson is Entitled to Attorneys' Fees on Appeal

Pursuant to RAP 18.1(b), a party requesting fees must devote a section of its opening brief to the request for fees or expenses.

RAP 18.9(a) permits an award of attorney fees as a sanction for filing a frivolous appeal:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the

delay or the failure to comply or to pay sanctions to the court.

Washington courts recognize that “an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (quoting *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986)). Here, Service Linen’s claims on appeal are frivolous for the same reasons its claims were frivolous when presented to the trial court.

VI. CONCLUSION

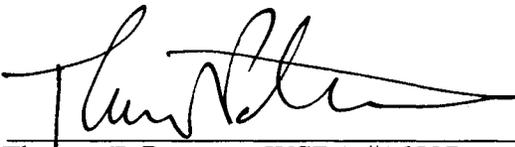
Tomlinson did not cause Service Linen to lose customers. It lost customers because of its own poor service and quality. That Tomlinson was able to offer better service, higher quality, and lower prices, is not improper. It is such competition that our open-market economy is based upon, a system that is designed to provide the consumer with better products and lower prices. The Court should reject Service Linen’s attempt to restrain competition in the linen business. Service Linen cannot meet its burden to prove each and every element for each and every customer, and the trial court properly granted summary judgment in Tomlinson’s favor.

Tomlinson prevailed as a consequence of Service Linen’s voluntary withdrawal of 7 of its 8 claims and as a result of the Court’s

dismissal of its remaining tortious interference claim. On the later claim, Service Linen failed to set forth any facts to support the allegation that Tomlinson engaged in improper competition. Further, instead of conducting due diligence before filing this action, as required by CR 11 and RCW 4.84.185, Service Linen chose to file first and then hope discovery resulted in evidence to support its claims. Tomlinson should not suffer the consequences of this mistake. For these reasons, Service Linen's claims were frivolous under RCW 4.84.185 and CR 11, and Tomlinson is entitled to an award of reasonable attorneys' fees and costs. Tomlinson respectfully requests that the Court reverse the trial court's denial of fees and award Tomlinson its fees on appeal.

Respectfully submitted, this 24th day of September, 2009.

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VII. CERTIFICATE OF SERVICE

I certify that on the 24th day of September, 2009, I caused a true and correct copy of this RESPONDENTS' BRIEF to be served on the following in the manner indicated below:

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