IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KELLEY AG SERVICES, INC.,	)	**No. 28974-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
KEN and VICKIE MELDRUM, husband and wife, C.M. HOLTZINGER FRUIT CO., LLC, a Washington corporation; and THE UNITED STATES OF AMERICA, acting through the FARMERS HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, and any other person with the right, title or interest inferior to the Plaintiff's lien priority in the real property described herein,	)	**UNPUBLISHED OPINION**
	)	
Appellants.	)	

Brown, J. ─ C.M. Holtzinger Fruit Co. (Holtzinger) appeals the judgment for Kelley Ag Services, Inc. (Kelley) entered on a jury verdict finding that Holtzinger tortiously interfered with Kelley's apple-orchard management contract with Ken and

Vickie Meldrum. Holtzinger contends sufficient evidence does not support the verdict, and the trial court erred in refusing testimony from two of its employees. We disagree with Holtzinger's contentions, and affirm.

FACTS

In January 2007, after the Meldrums contacted Kelley to provide orchard management services similar to their leasehold predecessor, they signed a Management Proposal with Kelley to "continue from year to year until written cancellation is given to end the contract." Clerk's Papers (CP) at 114. Kelley agreed to provide orchard maintenance and preparation with harvest beginning in September. The agreement purpose was to "[p]rovide a working plan for the year 2007." CP at 115.

Under the agreement, Kelley would receive a management fee and be reimbursed for costs incurred plus interest. The agreement required all bins harvested from Meldrums' crop be delivered in Kelley's name to the packing houses of Kelley's choice, and Kelley would be paid first from the proceeds. The agreement states, "By signing below Meldrum agrees with the terms and conditions outlined in the proceeding proposal and acknowledges Kelley Ag Services, Inc. as the management entity for this project." CP at 117. Kelley advanced all costs associated with preparing the orchard, including planting 7.2 acres of new trees, constructing a trellis support system, and caring for the new and existing trees.

On April 3, 2007, Kelley contracted with Valley Fruit III, LLC to pack a portion of the Meldrums' crop. And, on August 24, 2007, Kelley contracted with Mountainland

Apples, Inc. to pack the remainder of the Meldrums' crop.

Unknown to Kelley, the Meldrums had begun negotiations with Holtzinger in August 2007. David Lawrence, Holtzinger's president, testified Holtzinger's sales department had a "hunting list" for certain varieties of apples needed for their buyers. Report of Proceedings (RP) at 741. Mr. Meldrum provided Holtzinger with a copy of its agreement with Kelley.

On September 6, 2007, just before harvest, the Meldrums signed a contract, promissory note and financing agreement with Holtzinger. The contract specified Holtzinger would handle, market, and account for all of Meldrums' fruit in Holtzinger's pools. Holtzinger agreed to advance $53,460 that was intended for Kelley for services rendered. And, Holtzinger agreed to advance $30 per bin for harvest financing.

About September 19, Kelley received an agreement termination letter from the Meldrums without mention of the Meldrums' new contract with Holtzinger or money owed to Kelley. The Meldrums then owed Kelley $212,183.95.

On September 21, 2007, Kelley, through counsel, sent a letter to the Meldrums and Holtzinger rejecting the Meldrums' attempt to terminate the agreement. The Meldrums, nevertheless, moved forward with Holtzinger.

Kelley sued the Meldrums, Holtzinger, and others. Kelley partly claimed Holtzinger was liable for tortious interference with a business expectancy. Holtzinger unsuccessfully requested summary judgment.

At trial, Kelley presented evidence suggesting had the Meldrums' fruit gone to

Mountainland and Valley Fruit per Kelley's agreement, an additional $48,137.99 would be owed to Kelley. This figure was based partly on whether the fruit could have survived long enough to reach the "gambler's pool," an industry term for fruit sold later after harvest in hopes of obtaining a higher price. RP at 285.

At the close of Kelley's case, Holtzinger moved to dismiss the tortious interference claim, arguing it did not induce the Meldrums to end their contract with Kelley. The court denied Holtzinger's request. Holtzinger then presented its defense.

Holtzinger disclosed during trial it wanted two of its employees, listed as lay witnesses, to testify that the Meldrums' fruit could not survive long enough to reach the gambler's pool. Kelley successfully objected, arguing the witnesses had to be identified as expert witnesses before trial to provide such testimony. The court found the two did not qualify as market experts. The employees did testify the apples were "softer" than what they had hoped and were "deteriorating." RP at 504, 764.

A jury found against the Meldrums for more than $250,000. But before Kelley could enter judgment, the Meldrums filed bankruptcy. Relevant here, the jury awarded and the court granted judgment for $48,137.99 damages to Kelley against Holtzinger for tortious interference with a business expectancy. Holtzinger appealed.

ANALYSIS

A. Tortious Interference with Business Expectancy

The issue is whether the trial court erred by denying Holtzinger's motion for judgment as a matter of law at the close of Kelley's case. Holtzinger contends Kelley

failed to establish a prima facie case of tortious interference with a business expectancy.

The parties dispute the appropriate standard of review. Holtzinger contends the standard is abuse of discretion and Kelley argues review is de novo. Our Supreme Court decided review of a decision to grant or deny a motion for judgment as a matter of law is de novo.[1] *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Granting judgment as a matter of law is not appropriate where substantial evidence exists to sustain a verdict for the nonmoving party. *Id.* at 491. Indeed, "[a]n order granting judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict." *Id.* at 493. Hence, judgment should be granted only where no evidence or reasonable inferences from the evidence could support a verdict for the nonmoving party. *Winkler v. Giddings*, 146 Wn. App. 387, 394, 190 P.3d 117 (2008) (citing *Bertsch v. Brewer*, 97 Wn.2d 83, 90, 640 P.2d 711 (1982)).

Holtzinger presented its defense after the court denied judgment as a matter of law. "Once the defendant puts on a case, any challenge to the sufficiency of the evidence before the court at that time is waived." *Hill v. Cox*, 110 Wn. App. 394, 403, 41 P.3d 495 (2002) (citing *Carle v. McChord Credit Union*, 65 Wn. App. 93, 97 n.3, 827 P.2d 1070 (1992); *Goodman v. Bethel Sch. Dist. No. 403*, 84 Wn.2d 120, 123, 524 P.2d

[1] Motions for a directed verdict were renamed "'motions for judgment as a matter of law'" in 1993. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 298 n.1, 991 P.2d 638 (1999)).

918 (1974)). By submitting evidence to defend against tortious interference, Holtzinger waived its challenge to the sufficiency of the evidence based solely upon Kelley's case in chief. We, thus, review Holtzinger's remaining challenges based on the entire record before us, including the evidence it presented at trial.

In ruling on a motion for judgment as a matter of law, the evidence presented and all reasonable inferences reasonably drawn from the evidence must be interpreted against the moving party and in the light most favorable to the nonmoving party. *Faust v. Albertson*, 167 Wn.2d 531, 537-38, 222 P.3d 1208 (2009). The court must defer to the trier of fact on issues involving conflicting testimony, the credibility of the witnesses, and the persuasiveness of the evidence. *Thompson v. Hanson*, 142 Wn. App. 53, 60, 174 P.3d 120 (2007).

To prove tortious interference, the plaintiff must produce evidence sufficient to support all the following findings: (1) the existence of a valid contractual relationship or business expectancy, (2) the defendant's knowledge of and intentional interference with that relationship or expectancy, (3) a breach or termination of that relationship or expectancy induced or caused by the interference, (4) an improper purpose or the use of improper means by the defendant that caused the interference, and (5) resultant damage. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). *See Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993) ("a complete failure of proof concerning an element necessarily renders all other facts immaterial").

First, a valid contractual relationship between Kelley and the Meldrums is uncontested. Holtzinger, however, contends the relationship was terminable at will and was, in fact, terminated by the time it contracted with the Meldrums. The evidence in our record shows Kelley and the Meldrums entered into a management proposal for management services in January 2007 to "continue from year to year until written cancellation is given to end the contract." CP at 114. But, Kelley would provide orchard maintenance and preparation "for the year 2007." CP at 115. In construing a contract, the intent of the parties, as expressed in the plain language of the instrument, is given controlling weight. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). Based on the plain language of the contract, the parties intended the contract to last through 2007, and then be from year to year. Thus, in August 2007, when Holtzinger began negotiating with the Meldrums, Kelley and the Meldrums still had a valid contractual relationship. Moreover, even if the contract was terminable at any time in 2007, Holtzinger began negotiations with the Meldrums before they attempted to terminate their contract with Kelley.

Second, we examine whether Holtzinger knew of the Meldrums' relationship with Kelley. Our record shows Mr. Meldrum provided Holtzinger with a copy of its agreement with Kelley. And, Holtzinger was aware Kelley provided services at its own expense, which Holtzinger attempted to advance payment for at the Meldrums' request. We defer to the trier of fact in regard to conflicting testimony. *Hanson*, 142 Wn. App. at 60.

Third, we explore the inducement element. In assessing whether Holtzinger's interference induced a termination of the Meldrums/Kelley relationship, we look to whether Holtzinger's involvement was the "moving force" in the breach. *Corinthian Corp. v. White & Bollard, Inc*., 74 Wn.2d 50, 62, 442 P.2d 950 (1968). At trial, testimony showed the Meldrums were satisfied with Kelley's performance. Kelley advanced considerable costs associated with preparing the orchard, including planting 7.2 acres of new trees, constructing a trellis support system, and caring for the new and existing trees. Kelley was not paid by the Meldrums and risked that the year's crop return would make up the balance owed.

The sole foreseeable means for the Meldrums to breach their contract with Kelley, days before harvest, was to have a third party willing to advance significant money with the capability to immediately pack, market and sell the Meldrums' fruit. Holtzinger was that third party. Holtzinger had a hunting list for farmers with certain varieties of apples they needed for their buyers. In ruling on a motion for judgment as a matter of law, the evidence presented and all reasonable inferences reasonably drawn from the evidence must be interpreted against the moving party and in the light most favorable to the nonmoving party. *Faust*, 167 Wn.2d at 537-38. Viewing this evidence in the light most favorable to Kelley, as we must, Holtzinger was the moving force behind the Meldrums' termination of their contract with Kelley. Thus, Holtzinger induced the breach.

Fourth, we consider the improper purpose element. Kelley notes in its response

brief that Holtzinger did not discuss this element in its opening brief. Holtzinger makes no reference to the omission in its reply brief. Thus, it appears Holtzinger concedes the existence of this factor. Even so, we note, "Where . . . one does not act for the purpose of interference with a business relationship or with knowledge that such interference will result, but merely interferes with a business relationship in an incidental or indirect manner, no liability exists." *Burke & Thomas*, *Inc. v. Int'l Org. of Masters*, *Notes & Pilots*, 21 Wn. App. 313, 316, 585 P.2d 152 (1978) (citing *Titus v. Smeltermen's Union Local 25*, 62 Wn.2d 461, 465, 383 P.2d 504 (1963)). Given Holtzinger's hunting list, knowledge of Kelley's relationship with the Meldrums, and advancement of funds, it is unlikely Holtzinger's involvement was incidental or indirect.

Fifth, we examine damages, the last element in a tortious interference with a business expectancy claim. Kelley must have suffered a loss as the result of Holtzinger's actions. *Sintra*, *Inc. v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992). Kelley had contracted with Mountainland and Valley Fruit to pack, market, and sell the Meldrums' apples. Evidence in the record shows that if the Meldrums' fruit had been delivered to Valley Fruit, Kelley would have made approximately $56,000. This number is offset by approximately $7,900 in transportation costs Kelley would have incurred if the fruit had been shipped to Mountainland, which is located in Utah. Based on this evidence, Kelley lost approximately $48,000 because it could not honor its contracts with Valley fruit and Mountainland based on Holtzinger's interference. This resulting damage satisfies the last element of a tortious interference claim.

Because Kelley has demonstrated all elements of a tortious interference claim, the trial court did not err in denying Holtzinger's motion for judgment as a matter of law.

B. Witness Rulings

The next issue is whether the trial court erred by abusing its discretion in sustaining Kelley's objection to testimony from Holtzinger's lay witnesses that fruit would have made it to the gambler's pool. Holtzinger contends two of its employees should have been permitted to testify to the longevity of the apples.

We review a trial court's evidentiary rulings under an abuse of discretion standard. *Univ. of Wash. Med. Ctr. v. Wash. Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). A trial court abuses its discretion when the ruling is "'manifestly unreasonable or based upon untenable grounds or reasons.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). An error is harmless if it is "'trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *Mackay v. Acorn Custom Cabinetry*, *Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

Under Benton/Franklin County's Local Civil Rule 4(h)(1)(A), "Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party believes are reasonably likely to be called at trial." If an individual is being called as an expert, the party must

provide, "A summary of the expert's opinions and the basis therefor and a brief description of the expert's qualifications." LCR 4(h)(1)(C)(iii). "Any person not disclosed in compliance with this rule may not be called to testify at trial." LCR 4(h)(1)(D).

"[I]t is an abuse of discretion to exclude testimony as a sanction for discovery violations absent a showing of [a] willful violation of a court order." *In re Estate of Foster*, 55 Wn. App. 545, 548, 779 P.2d 272 (1989). "A 'willful' violation means a violation without a reasonable excuse." *Id.* Inadvertent error in failing to disclose an expert may be deemed willful, justifying the exclusion of testimony. *Id.* "[T]he particular sanction imposed should at least insure that the wrongdoer does not profit from his wrong." *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984).

Here, the employees were listed and called as lay witnesses. The question is whether testimony regarding whether the fruit would make the gambler's pool would require an expert's opinion, necessitating the employees be designated as expert witnesses. ER 701 is instructive. ER 701 provides if a witness is not an expert, "[t]he witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness [and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." While both employees appear to have experience in the fruit industry, the gambler's pool appears to be an unpredictable practice that would require more than just opinion based on observation to predict feasibility. "ER 701 is a rule of discretion

and is intended to emphasize what a witness knows." *Ashley v. Hall*, 138 Wn.2d 151, 155, 978 P.2d 1055 (1999). Based on the pool's volatility, the testimony would not be based on what the employees knew, but what they speculated. Thus, the trial court had tenable grounds to exclude the testimony under LCR 4(h)(1)(D) because the witnesses were not disclosed as expert witnesses.

Moreover, any error is harmless. The employees testified the apples were "softer" than what they hoped and "deteriorating." RP at 504, 764. A jury could infer from this testimony the longevity of the apples. It was then up to the trier of fact to weigh the evidence and assess the credibility of the witnesses. *Thompson*, 142 Wn. App. at 60. Accordingly, Holtzinger has failed to establish reversible error.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

_____ _____
Korsmo, A.C.J. Siddoway, J.