

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

W.W. ROWLAND TRUCKING	)	
COMPANY, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. 17-662-BC
	)	
INTERMODAL CARTAGE	)	
COMPANY, LLC; IMC GLOBAL,	)	
SERVICES, LLC; and NICHOLAS	)	
PAYNE,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER DENYING DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT  
AND REFERRING CASE TO MEDIATION BY 11/6/18**

This lawsuit was filed by a carrier of storage containers against two companies: Intermodal Cartage Company, LLC, who operates a container yard used by the Plaintiff, and IMC Global Services, LLC (“IMCG”) a broker who arranges for goods to be loaded and shipped. Defendant Nicholas Payne is regional vice-president of IMCG. In addition to operating a container yard, Intermodal competes with the Plaintiff in providing hauling services. The Plaintiff’s claims are that the Defendants have engaged in misconduct and conspired to injure the Plaintiff’s business by making deceitful, disparaging statements about the Plaintiff to its customers and drivers, and by harassing Plaintiff’s drivers.

The *Amended Complaint* in this case was filed August 7, 2017, and asserts four causes of action:

- Count I—Tortious Interference (Drivers)
- Count II—Tortious Interference (Customers)
- Count III—Tennessee Consumer Protection Act
- Count IV—Conspiracy.

The status of the case is that Counsel have almost completed discovery, and the case is set for a pretrial conference on November 15, 2018, and a week-long 12-person jury trial scheduled to begin on December 3, 2018.

The case is presently before the Court on the Defendants' motion to dismiss all the causes of action of the *Amended Complaint* on summary judgment.

After studying the record, considering argument of Counsel and applying the law, it is ORDERED that the Defendants' *Motion for Summary Judgment* is denied. The authorities and reasoning for this ruling are stated below.

It is further ORDERED that this case is referred to mediation which shall be completed by November 6, 2018. If this deadline presents scheduling conflicts for Counsel, they shall notify the Docket Clerk Mrs. Smith (615-862-5719).

### **Applicable Law**

The law the Court has applied in this case is identified as follows.

#### **Summary Judgment Standard**

Tennessee Civil Procedure Rule 56.02 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Under Tennessee law when the motion for summary judgment is filed by the party who does not bear the burden of proof at trial, as in this case, the law requires that upon the moving party satisfying its burden of production, the nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. The analysis for summary judgment is the evidence the nonmoving party comes forward with at the summary judgment stage not hypothetical evidence at trial.

[I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. . . . '[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56], to survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,' but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.' Tenn. R. Civ. P. 56.06. The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.' *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. . . . [A]fter adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

*Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 264-65 (Tenn. 2015) (emphasis in original).

When competing inferences can be drawn from the facts of record, summary judgment must be denied. *Kraft v. Ezo-Goten, USA, Inc.*, No. M200103137COAR3CV, 2002 WL 31769242, at \*5 (Tenn. Ct. App. Dec. 11, 2002) (“The trial judge, on motion for summary judgment, does not weigh the strength of competing inferences.”).

#### Essential Elements of Tortious Interference

Counts I, II and IV of the *Amended Complaint* require the nonmovant/Plaintiff to demonstrate on summary judgment the existence of specific facts in the record to prove these essential elements of tortious interference with business relationships:

(1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant’s knowledge of that relationship and not a mere awareness of the plaintiff’s business dealings with others in general; (3) the defendant’s intent to cause the breach or termination of the business relationship; (4) the defendant’s improper motive or improper means; and finally, (5) damages resulting from the tortious interference.

*Trau-Med of Am, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002).

In addition, as to the fourth essential element identified in *Trau-Med* of improper motive and means, the evidence required to establish that element is proof that the defendant’s predominant purpose was to injure the plaintiff and improper means include misrepresentation, deceit and misuse of confidential information.

It is clear that a determination of whether a defendant acted “improperly” or possessed an “improper” motive is dependent on the particular facts and circumstances of a given case, and as a result, a precise, all-encompassing definition of the term “improper” is neither possible nor helpful. However, with regard to improper motive, we require that the plaintiff demonstrate that

the defendant's predominant purpose was to injure the plaintiff. *See Leigh Furniture & Carpet Co.*, 657 P.2d at 307-08.

Moreover, in the attempt to provide further guidance, we cite the following methods as some examples of improper interference: those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules, *see id.* at 308; violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship, *see Duggin*, 360 S.E.2d at 836 (citing *Top Serv. Body Shop, Inc.*, 582 P.2d at 1371 n. 11); and those methods that violate an established standard of a trade or profession, or otherwise involve unethical conduct, such as sharp dealing, overreaching, or unfair competition, *see id.* at 837.

*Id.* at 701, FN 5.

#### Tennessee Consumer Protection Act

At paragraph 48 of the *Amended Complaint*, the Plaintiff asserts that the Defendant has violated specifically Tennessee Code Annotated section 47-18-104(b)(8). It provides as follows.

(b) The following unfair or deceptive acts or practices affecting the conduct of any trade or commerce are declared to be unlawful and in violation of this part:

\* \* \*

(8) Disparaging the goods, services or business of another by false or misleading representations of fact . . . .

#### Injunctive Relief

The Plaintiff seeks in part (c) of its Prayer for Relief, issuance of a permanent injunction. In this respect the Tennessee Consumer Protection Act at Tennessee Code Annotated section 47-18-109(b) provides, "Without regard to any other remedy or relief to which a person is entitled, anyone affected by a violation of this part may bring an action

to obtain a declaratory judgment that the act or practice violates this part and to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part; provided, that such action shall not be filed once the division has commenced a proceeding pursuant to § 47-18-107 or § 47-18-108.”

The other legal source for Plaintiff’s prayer for relief for an injunction is Tennessee Civil Procedure Rule 65.01. It provides, “Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment. A restraining order shall only restrict the doing of an act. An injunction may restrict or mandatorily direct the doing of an act.”

Tennessee Rule of Evidence 803(1.2) and (3)

Tennessee Civil Procedure Rule 56.01 requires that, to be considered in support of or opposition to a motion for summary judgment, testimony must be based upon personal knowledge and be admissible in evidence, “(1) the affidavit must be made on the affiant’s personal knowledge, (2) the affiant’s statements must otherwise be admissible in evidence, and (3) the affiant is competent to testify regarding the substance of the affidavit.” *Church v. Perales*, 39 S.W.3d 149, 166 (Tenn. Ct. App. 2000).

Pertinent to the admissibility of testimony in the summary judgment record in this case is the following quoted Tennessee Rule of Evidence, 803(1.2) and (3).

(1.2) **Admission by Party-Opponent.** A statement offered against a party that is (A) the party’s own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under

circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.

TENN. R. EVID. 803(1.2)

\* \* \*

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

### **Application of Law to Summary Judgment Record**

#### **Counts I and II—Liability**

Applying the law identified above to the record, the Court finds that as to Counts I and II the Plaintiff has identified specific facts in the summary judgment record which could lead a rational trier of fact to find the Defendants had an improper motive whose predominant purpose was to injure the Plaintiff based upon statements made by Defendant Nicholas Payne in emails filed as exhibits 2, 3, 11, 15, 16, 17 and 18 to Plaintiff's September 17, 2018 Notice of Filing.

An inexhaustive sampling of Plaintiff's evidence of improper motive is quoted as follows from Plaintiff's *Response* on September 17, 2018 with quotations from the Nicholas Payne emails.

On June 7, 2013, when IMCG needed to direct intermodal freight to other carriers because of its limited capacity, Payne told his staff, “Unless the dang ceiling is falling in give [Rowland] as little as humanly possible.” (Payne Ex. 2.) On June 19, 2013, in describing his feelings toward Rowland to IMCG’s president, Joel Henry, Payne stated, “Rowland I barely would piss on if on fire...” (*Id.* at Ex. 3.) On April 26, 2017, just two months prior to the filing of this action, when speaking of Rowland’s drivers to his staff, Payne wrote, “How many of them can we get? . . . I may want all of their guys.” (Payne Ex. 17.) According to Payne, “if they are good workers and English-speaking get them on.” (*Id.*) When one of his employees asked, “Are we leaving Rowland with any drivers? :),” Payne responded, “Hopefully not.” (*Id.* at Ex. 16.) Just two weeks prior to the filing of this action, Payne wrote to Mark George, the founder and owner of IMCG, “I still want that Famous Footwear business they took from us!” (*Id.* at Ex. 18.) According to Payne, “. . . If we got [Famous Footwear] it would be lights out for [Rowland.]” (*Id.* at Ex. 11.)

Because competing inferences can be drawn and credibility determinations are required as to whether the foregoing evidence shows the Defendants had an improper motive whose predominant purpose was to injure the Plaintiff’s business or, alternatively, constituted remarks whose purpose was fair, zealous competition, there exist genuine issues of material fact which preclude summary judgment.

In addition to the issue of fact of Defendant’s improper motive the Plaintiff has identified in the summary judgment record facts of improper means.

In this regard, as to Count I concerning tortious interference allegedly committed by Defendants with Plaintiff’s drivers, there is the Declaration of Abraham Umazor, a driver for Plaintiff, testifying that a representative of one of the Defendants stated to him, in connection with soliciting Mr. Umazor to work for one of the Defendants, that the Plaintiff’s business was closing. There are also declarations from two of Plaintiff’s drivers that they were harassed by being made to wait excessively on loading/unloading which



creates a genuine issue of material fact based upon the testimony of Nicholas Payne, Defendant's employee, who denies Plaintiff's drivers were treated disparately. These instances are sufficient evidence to preclude summary judgment on liability as to Count I.

Lastly, as to Count I interference with drivers, there is the use by Plaintiff's former employee, Ms. Joyner, now working for one of the Defendants, of telephone numbers that she obtained while working for Plaintiff of its drivers to solicit them to work for a Defendant. As to this matter, there are genuine issues of material fact on liability on whether the confidentiality of the driver contact information was waived because the Plaintiff did not take efforts to preserve and maintain its confidentiality. Accordingly, on this evidence as well, Count I withstands summary judgment.

As to Count II, tortious interference with customers, the specific evidence of tortious interference identified by the Plaintiff relates to its clients: Famous Footwear, Yang Ming, and Lasko.

As to Famous Footwear there is the Declaration of customer representative Karen Smithson that Defendant told her in 2016 the Plaintiff was going out of business.

On Yang Ming, there is the state of mind testimony of the customer (Tennessee Rule of Evidence 803) that it offered at least \$650 of business to the Defendant when it told Yang Ming the Plaintiff was going out of business.

There is also the testimony from Plaintiff's employee that an agent/employee of Plaintiff's customer Lasko expressed the customer's state of mind plan (Tennessee Rule of Evidence 803) to leave the Plaintiff and move business to the Defendant because the Defendant represented it would not charge a chassis split fee the Plaintiff charges. There

are disputed issues of fact on whether the Defendant in fact charges the chassis split fee under another charge which in turn informs whether the Defendant used deceit in the chassis split discussions with Lasko. There are, then, at the summary judgment stage disputed issues of fact on liability on whether the Defendant used improper means of misrepresentation and deceit to interfere with Plaintiff's customer, Lasko.

Based upon these communications of Defendant with Plaintiff's customers, Count II withstands dismissal on summary judgment.

### Count III—Liability

The foregoing evidence and genuine issues of material fact also provide a basis to withstand summary judgment on liability on Count III—violation of the Tennessee Consumer Protection Act.

### Counts I, II, III—Damages and Remedies

In addition to their position that there are insufficient facts of liability in the record to withstand summary judgment, the Defendants further assert that summary judgment is appropriate because the Plaintiff is unable to prove damages. In particular, the Defendant asserts that the Plaintiff's only damages are the \$900,000 damages calculations derived from its claim of loss of the Lasko business and that the summary judgment record does not establish deceit concerning the split chassis fee. Above, however, the Court has ruled that there are genuine issues of material fact concerning deceit on the Lasko business to preclude summary judgment.

Nevertheless, even if liability is not established as to the Lasko business, the summary judgment record contains facts and pleadings for other damages and remedies.

The record shows that it is not only damages the Plaintiff is seeking but injunctive relief. That remedy, independently, provides a sufficient legal basis to deny summary judgment under Tennessee Civil Procedure Rule 65 and section 47-18-109(b) of the Consumer Protection Act, quoted above. In addition, as to monetary damages, there is the \$650 lost business of Yang Ming and damages from the loss of three of Plaintiff's drivers—Arnold, Gerardo and Medina. These drivers told their state of mind plan to Plaintiff's employee, Ms. Shinault, that they were leaving their employment at Plaintiff because an employee of one of the Defendants said the Plaintiff was closing its business.

Thus, lack of a remedy or of evidence of damages is not a basis on this record to deny summary judgment.

#### Count IV—Conspiracy

The Defendants' sole basis for summary judgment on Count IV is that the Plaintiff cannot establish its claim for civil conspiracy because it cannot show the Defendants committed any underlying tort, "Accordingly, if IMCG is successful in its request for the dismissal of Counts I-III, then Rowland's civil conspiracy claim must also be dismissed as a matter of law." In the rulings above, the Court has found that there are genuine issues of material fact and sufficient evidence to withstand dismissal as to Counts I-III. Thus, summary judgment having been denied as to Counts I-III, it is also denied as to Count IV.

Based upon the disputed issues of material fact identified above and the sufficiency of evidence in the record identified above on the essential elements of the causes of action in issue, summary judgment is denied.

*s/ Ellen Hobbs Lyle*  
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ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efileing as applicable to:

Eugene Bulso, Jr.  
Paul Krog  
William O'Bryan, Jr.  
Kevin Baltz