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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 31117-1-III

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

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10 NORTH WASHINGTON AVENUE, LLC, a Washington limited liability company,

Appellant,

vs.

CITY OF RICHLAND, a municipal corporation,

Respondent

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. Contrary to the City's claim, sufficient evidence exists in the record that creates genuine issues of material fact that City tortiously interfered with 10 NWA's business expectancies, thereby precluding summary judgment.

Business Expectancy with TCRY

As an initial matter, the City incorrectly contends that 10 NWA did not raise below the issue of tortious interference with its business relationship with TCRY. Br. of Respondent at 14-15. However, it is well-established that an issue raised in a motion for reconsideration is properly before this Court provided that the notice of appeal includes the motion for reconsideration. RAP 2.4. Moreover, as this Court recently stated, "new issues may be raised for the first time in a motion for reconsideration, thereby preserving them for review where … they are not dependent upon new facts and are closely related to and part of the original theory." *Schreiner Farms, Inc. v. American Tower, Inc.*, ___ Wn. App. ___, 293 P.3d 407, 410 (2013).

Here, it is manifest from the record that throughout the proceedings below, 10 NWA relied upon its relationship with TCRY in prosecuting its tortious interference claims against the City. Accordingly, since 10 NWA expressly raised the issue of tortious interference with its relationship with TCRY before the trial court in its motion for

reconsideration, since the contention did not depend on new facts, was closely related to, and a part of 10 NWA's original theory, it was preserved for appeal and is properly before this Court. *Id.*; CP at 634-637, 880. The City's contrary position is simply erroneous.

Business Expectancy with Gen-X

In its brief, the City argues that there was insufficient evidence in the record to demonstrate a business expectancy with Gen-X since, in City's view, it purports the only evidence thereof consisted of a letter of intent which it purports cannot establish a business relationship for purposes of tortious interference. Br. of Respondent at 15-17.[1] In support of its position, the City primarily relies upon *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (2008) *and* Raymond *v. Pacific Chemical*, 98 Wn. App. 739, 992 P.2d 517 (1999), *overruled on other grounds by Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 20 P.3d 921 (2001). However, as discussed below, neither case has any relevance to the case at Bar.

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[1] The City also argues that, by failing to produce the letter, such a letter 10 NWA somehow has an unsustainable argument. Br. of Respondent at 15. However, what the City overlooks is that production of the actual letter goes only to weight; Mr. Peterson's testimony regarding the letter's existence is sufficient to establish its existence for purposes of summary judgment. Accordingly the City's first argument on this point simply fails.

In *Woody*, this Court held that, for tortious interference purposes, an at-will employee did not have a business expectancy in continued employment. 146 Wn. App. at 24. In reaching this determination, the Court relied upon the prior holding in *Raymond*, 98 Wn. App. at 747. Thus, it is certainly an accurate statement of the law to say that an at-will employee cannot sue an employer for tortious interference merely for terminating his or her employment.

Here, unlike *Woody*, the tortious interference claim is not made by an at-will employee against a former employer. Rather, this case involves a claim of tortious interference against a third party for frustrating a business expectancy would have developed into a business. As discussed in Appellant's initial brief, this is one of the touchstones upon which tortious interference is based. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002). In a nutshell, once 10 NWA and Gen-X signed a letter of intent to create a business relationship that had pecuniary value, a business expectancy was created. *Id.* Thus, the City's position that a letter of intent cannot give rise to a business relationship for the purposes of tortious interference is simply without merit, and this Court should find the record sufficient to preclude summary judgment on this point.

Intent to Interfere

In its brief, the City argues, "Other than a misreading of an e-mail, 10 NWA presented no testimony that Richland intended to interfere in any of 10 NWA's business relationship." Br. of Respondent at 17. However, this argument goes only to weight. As the Court is aware, in a summary judgment review, all evidence is construed in a light most favorable to the non-moving party. *Gerken v. Mut. of Enumclaw Ins. Co.*, 74 Wn. App. 224-25, 872 P.2d 1108, *review denied*, 125 Wn.2d 1005 (1994). It is readily apparent then, the City's argument as to weight is simply misplaced, since that issue is well-settled in 10 NWA's favor. As discussed in 10 NWA's initial brief, interference is intentional "if the actor desires to bring it about or *if he knows that the interference is certain or substantially certain to occur as a result of his action.*" *Newton Ins. Agency & Brokerage, Inc.*, 114 Wn. App. at 158 (emphasis supplied). Accordingly, when properly viewed, the mere fact of the email's existence is sufficient to preclude summary judgment because it raises a genuine issue as to whether the interference was intentional.

Termination of Business Relationship: *TCRY*

The City argues that the "undisputed facts" show that its revocation of the TSA did not end TCRY's business with 10 NWA simply because TCRY still conducts business with 10 NWA and still utilizes the spur, and facility. Br. of Respondent at 18. However, this argument

overlooks the rudimentary fact that what is required is not a *complete* loss of a business relationship, but merely interference that causes *some* loss. As discussed in 10 NWA's initial brief, it is undisputed that TCRY still conducts limited business with 10 NWA. However, the issue is that TCRY is conducting business with 10 NWA as an agent of the Union Pacific Railroad *because* its right to interface with 10 NWA in its own capacity was severed by the City. Accordingly, the loss incurred by 10 NWA was a decrease in the use of its Horn Rapids facility, thereby creating a loss in revenue. This was testified to by Rydel Peterson, where he stated that if TCRY had not lost its rights to utilize the Horn Rapids Spur, that 10 NWA's facility would definitely see more use. CP at 181. Thus, the City's argument fails because there is sufficient evidence in the record to demonstrate the termination of a business relationship when viewed in the light most favorable to 10 NWA.

Termination of Expectancy: Gen-X

Next, the City argues that the absence of testimony from a Gen-X representative as to the *reason* for its relocation to Moses Lake is fatal to 10 NWA's argument. Br. of Respondent at 18-19. Once again, the City's argument goes to the weight to be given its position rather than the actual question regarding the existence of a genuine issue of material fact. Nonetheless, it is manifest that, taking the press release regarding the

prospective relationship, Mr. Peterson's testimony regarding the termination of the relationship, and the fact of the relocation in a light most favorable to 10 NWA, the record easily demonstrates the creation and termination of an expectancy under the summary judgment standard. CP at 165, 421, 540-41.

Improper Purpose or Means

The City argues that its attempts to coerce TCRY into relinquishing its rights at Richland Junction were not improper despite the subsequent injury to 10 NWA. Br. of Respondent at 19-25. The primary basis for this assertion appears to be an overly narrow statement of the applicable law, in that that it omits the crucial point that improper motivation is sufficient to satisfy the improper purpose or means element of tortious interference. *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 606, 564 P.2d 1137 (1977). Although the City takes great pains to attempt to distinguish *Cherberg* factually, as discussed above, the essential point to be gleaned from *Cherberg* is that a wrongfully motivated action that negatively impacts a business is sufficient to satisfy the improper means or purpose element of a tortious interference action. *Id.*

Here, as discussed in Appellant's initial brief, the City's action against TCRY placed an undue amount of pressure on the Peterson family by threatening both the rail carrier and the end user over a section of track

that was wholly unrelated to 10 NWA's interests in the Horn Spur facility. The City acknowledged this was understood at the time it took action. CP at 537. Accordingly, when taking the facts of this case, including the email, into consideration in a light most favorable to 10 NWA, sufficient evidence exists to create a genuine issue as to whether the city acted with an improper motive, thereby injuring 10 NWA.

The City also argues that 10 NWA raises, for the first time on appeal, the argument that it acted in bad faith by terminating the TSA. This statement is simply untrue. In its motion for reconsideration, 10 NWA expressly argued that the City's termination of the TSA between itself and TCRY constituted bad faith.[2] CP at 627-30. As discussed above, it is well-established that this Court will review the decision or parts of the decision designated in the notice of appeal and raised in a motion for reconsideration. RAP 2.4(a); *Schreiner Farms, Inc.*, 293 P.3d at 410. Accordingly, the argument as to the bad faith nature of the City's

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[2] It is noteworthy that 10 NWA also argued before the trial court that the City's bad faith actions also violated those implied good-faith provisions required in creating the RMP and the Agreement. The Agreement itself expressly adopted the RMP, which itself expressly adopted and utilized the TSA. Thus, by arguing repeatedly that the City's bad faith breached those agreement, the issue of bad faith as it related to the TSA was not only expressly argued by 10 NWA in the motion for reconsideration, but it was raised in other contexts as well. The issue was clearly before the trial court, and is therefore properly before this Court as well.

termination of the TSA is properly before this court for consideration, and easily demonstrates a genuine issue as to whether the City acted through an improper means in interfering with 10 NWA's business relationships.

Finally, the City argues that 10 NWA's argument as to the arbitrary and capricious nature of its actions was not raised before the trial court, and should not be heard on appeal. Br. of Respondent at 23-25. While it is admittedly true that the exact words "arbitrary and capricious" were not used below, the *argument* that the City's actions were arbitrary and capricious was certainly made on multiple occasions. CP at 627-29, 634-36. Therefore, the City's overly technical construction of the civil rules should be rejected on both legal and public policy grounds.

As discussed in Appellant's initial brief, a municipality acts in an arbitrary and capricious fashion if its actions are willful and unreasonable, and without consideration and regard for facts or circumstances. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 908 P.2d 1234 (1999). Below, 10 NWA expressly stated that it believed the City's actions were a willful and unreasonable attempt to extort the rights to Richland Junction from TCRY, and that its actions were taken in disregard for 10 NWA's obligations to third parties. CP at 407-408. Moreover, in its motion for reconsideration, 10 NWA again raised this argument, noting that the City's actions were taken with blatant disregard for 10 NWA's

dependence upon rail service. CP at 627-29, 634-36. Accordingly, it is manifest that, despite the use of synonymous terms, the argument involving the city's actions was indeed raised before the trial court on multiple occasions, and in multiple fashions. It would simply work an injustice for this Court to utilize the rules in order to exclude an argument raised below based merely upon the omission of the technical term in light of the record. Since 10 NWA asserted the unreasonable and illegitimate nature of the City's actions below, it may likewise assert them on appeal.

Damages

The City argues that no damage has occurred as a result of its actions. Br. of Respondent at 25. In support of its position, it points to the fact that 10 NWA's agents could not precisely answer the amount of damages that occurred. *Id.* However, it is axiomatic that the amount of damages is a question of fact to be determined at trial; accordingly, it is only the existence thereof that needs to be established for summary judgment purposes. *Womack v. Von Rardon*, 133 Wn. App. 254, 262-63, 135 P.3d 542 (2006)

Here, there exists more than sufficient evidence in the record that creates genuine issues of material fact as to both business relationships. As discussed previously, when viewed in a light most favorable to 10 NWA, the mere fact that 10 NWA is unable to realize the anticipated

volume of rail cars at its facility due to the termination of TCRY's TSA is sufficient to demonstrate the existence of damages as to the TCRY relationship. Similarly, that same termination of TCRY's rail access is itself sufficient to demonstrate damages as to the Gen-X relationship since it fundamentally prevented 10 NWA from being able to complete the agreement in principle outlined in the letter of intent.

B. Contrary to the City's assertion, genuine issues of material fact as to whether it inversely condemned 10 NWA's property precluded summary judgment.

Taking

A taking occurs when: (1) the government invades or interferes with the use or enjoyment of property, and (2) the market value declines as a result. *Gaines v. Pierce County*, 66 Wn. App. 715, 725, 834 P.2d 631 (1992). A taking does not occur unless the governmental invasion causes damage which is permanent, recurring, or chronic and unreasonable. *Id.* Here, the City argues that no taking has occurred because it revoked TCRY's TSA, and, since there is no property right to access property, no taking could have occurred. Br. of Respondent at 27-29. However, as discussed below, this argument misses the mark.

As discussed in Appellant's initial brief, the taking alleged is not of a property right to access 10 NWA's property. As correctly pointed out by the Respondent, there exists no such right. *Granite Beach Holdings, LLC*

v. State Dep't of Nat. Resources, 103 Wn. App. 186, 206, 11 P.3d 847 (2000). However, the gravamen of this claim is not an "implied" right to access. On the contrary, the gravamen is the loss of *use* of 10 NWA's property due to the severing of TCRY's access rights. Put simply, when the City decided to terminate TCRY's access to the Horn Rapids Spur, it injured 10 NWA by decreasing the volume of cars that the property would be handling. CP at 26-37, 49-59, 151-52. The decrease in use amounts to a taking since 10 NWA is not able to utilize its property to its full potential – a potential expressly understood by the City at the time it agreed to sell the Horn Rapids property to 10 NWA and underscored by the RMP which the City mandated as a part of the Agreement.

Damages

It is unclear precisely what the City's argument is as to damages. Br. of Respondent at 29. First, although it complains about discovery, such issues are for the trial court, not this Court. This is particularly true since the City did not cross-appeal any discovery rulings by the trial court; accordingly, to the extent the discussion is even relevant, it is not properly before this Court. RAP 2.4(a).

Second, the City's argument as to Mr. Peterson's testimony again goes only to the weight to be given the evidence. Accordingly, its argument completely misses the mark since the only question before this

Court is whether, taking the record in a light most favorable to 10 NWA, sufficient evidence exists to create a genuine issue of material fact. Here, as discussed in 10 NWA's initial brief, Mr. Peterson's testimony as to the value of the property is sufficient to establish a genuine issue of material fact as to damages. Accordingly, to the extent the City argues a contrary position, its argument is without merit and this Court should reverse and remand for further proceedings.

II. CONCLUSION

A review of the record leads invariably to the conclusion that the trial court erred in granting summary judgment as to 10 NWA's tortious interference and inverse condemnation claims because at a minimum, there exist genuine issues of material fact as to each element of the torts. The appropriate remedy is for this Court to reverse and remand for further proceedings.

DATED this 13th day of March 2013.

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