No. 31451-1-III)
(consolidated with No. 31789-7-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital community,

Plaintiffs/Appellants

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and GREGORY ASHLEY,

Defendants/Respondents,

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)
(Hon. Salvador Mendoza, Jr.)

Case No. 10-2-02357-4

BRIEF OF APPELLANTS

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I. INTRODUCTION

In 2013, for the first time in his long and distinguished career, Dr. Walter Tamosaitis was not given an annual bonus, allegedly because he was not assigned to a specific project and was billed out on "overhead." But this was a fabrication. Dr. Tamosaitis received bonuses after his removal from the WTP—even while he was languishing in a basement office with no work to do for sixteen months—billing to overhead the entire time. Moreover, other managers assigned to overhead routinely receive bonuses. This was just another act of retaliation for whistleblowing at the Hanford nuclear waste site. The denial of the bonus was timed to occur after the one-year filing limit under CR 60 for seeking a new trial—in the hope that respondents could evade review of that misconduct. The Court should not let the respondents benefit from this attempt to manipulate the facts while committing another act of retaliation. The 2013 bonus denial is an important fact that should be considered in the appeal of the trial court's summary judgment dismissal of Dr. Tamosaitis' tortious interference claim.

The Court Commissioner properly consolidated this case with Case No. 31451-1-III because the two appeals involve the same parties and the same underlying litigation. This appeal, Case No. 31789-7-III, concerns the denial of a CR 60(b)(11) motion to vacate the trial court's granting of

summary judgment to Defendants/Respondents Bechtel National, Inc., Frank Russo, and Gregory Ashley[1] on Plaintiff/Appellant Walter Tamosaitis' tortious interference with a business expectancy claim. The trial court previously granted summary judgment and denied reconsideration without stating its reasons for doing so on the record. Yet, one of the elements of the tortious interference claim that BNI strenuously argued Dr. Tamosaitis could not meet was a need to show "pecuniary" damages after BNI improperly directed its subcontractor, URS Energy & Construction, Inc., to remove Dr. Tamosaitis from his position in retaliation for raising safety and technical concerns at the Hanford nuclear facility's Waste Treatment Plant. BNI argued that Dr. Tamosaitis suffered no measurable "pecuniary" loss because he remained employed by URS at its office in downtown Richland and continued to receive his full salary and incentive pay/bonus. BNI and URS manipulated the facts so that Dr. Tamosaitis remained employed, albeit exiled to a basement office with two working copy machines and no meaningful work.

Just after the one year deadline had expired under CR 60(b)(3), when Dr. Tamosaitis could have raised the issue as newly discovered evidence, in March 2013 BNI and URS again manipulated the situation to

[1] BNI and individual defendants/respondents Frank Russo and Greg Ashley are referred to collectively as "BNI" unless otherwise indicated.

deny Dr. Tamosaitis his incentive pay for the first time in the past 33 years. Dr. Tamosaitis then brought a motion to vacate the judgment under CR 60(b)(11), alleging that extraordinary circumstances warranted relief from the Court's summary judgment ruling. His motion was denied, and this appeal followed. Then, in October 2013, Dr. Tamosaitis was terminated from URS after 44 years of service.[2]

This Court should find that the trial court abused its discretion in failing to grant Dr. Tamosaitis relief from its summary judgment ruling when Dr. Tamosaitis presented evidence of his additional economic losses, which was an extraordinary circumstance orchestrated by BNI after the case was dismissed and after the expiration of Dr. Tamosaitis' one-year deadline in CR 60(b)(3).

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[2] Appellant asks the Court to consider this additional fact – the fact of Dr. Tamosaitis' termination from URS – under RAP 9.11 because this fact is necessary to fairly resolve the issues on appeal, it would likely change the decision being reviewed, the event occurred in October 2013, thus Dr. Tamosaitis could not have brought it to the lower court's attention because the fact had not occurred at that time, and requiring Dr. Tamosaitis to file another CR 60(b)(11) motion and likely, another appeal, would be unnecessarily expensive and an inadequate way to remedy the issue. For these reasons, it would be inequitable for the Court to hear this appeal without consideration of this additional fact. RAP 9.11. In the alternative, appellant asks the Court to take judicial notice pursuant to ER 201 of the October 9, 2013 Seattle Times article, "Hanford Whistleblower Loses Job," located at http://seattletimes.com/html/localnew/2021997951_apwahanfordwhistleblower1stldwritethru.html (last visited November 4, 2013) (attached as Appendix 1).

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The trial court erred in denying Dr. Tamosaitis' CR 60(b)(11) motion to vacate the summary judgment dismissal of his tortious interference with a business expectancy claim when respondents manipulated his employment status so that Dr. Tamosaitis remained employed at his full salary until after the case was dismissed and the CR 60(b)(3) deadline expired in order to claim that Dr. Tamosaitis could not meet the "pecuniary" loss element of his claim. (CP 549, RP 1-19).

B. Issue Pertaining to Assignment of Error

1. Whether it was an abuse of discretion for the trial court to deny Dr. Tamosaitis' CR 60(b)(11) motion to vacate the summary judgment dismissal of his tortious interference with a business expectancy claim when respondents manipulated his employment status so that Dr. Tamosaitis remained employed at his full salary until after the case was dismissed and the CR 60(b)(3) deadline expired in order to claim that Dr. Tamosaitis could not meet the "pecuniary" loss element of his claim?

III. STATEMENT OF THE CASE

A. Procedural History

The procedural history of this case leading up to Dr. Tamosaitis' appeal under Case No. 31451-1-III is described in the Brief of Appellants, which has its own designated record on review. *Tamosaitis v. Bechtel National, Inc., et al.*, Brief of Appellants, Case No. 31451-1-III (previously designated as Supreme Court Case No. 87269-4 and Court of Appeals Case No. 30611-9-III) at 5-8. The Reply Brief of Appellants was

filed on October 15, 2012 with the Washington Supreme Court. On February 6, 2013, the Supreme Court transferred the case to this Court without ruling. CP 312.

On May 7, 2013, Dr. Tamosaitis filed a CR 60 Motion for Relief from the Court's Order in Benton County Superior Court. CP 1. Judge Craig Matheson, who presided over the case through the initial filing of the notice of appeal, retired and the case was assigned to Judge Salvador Mendoza, Jr. CP 318. Following oral argument on June 28, 2013, Judge Mendoza denied Dr. Tamosaitis' CR 60 Motion. CP 549, RP 18. Judge Mendoza stated that he found that the "extraordinary circumstances" to bring a motion based on newly discovered evidence after one year, under CR 60(b)(11), were not met. RP 18. This timely notice of appeal followed. CP 552.

B. At Summary Judgment, on Reconsideration, and on Appeal, a Major Point of Contention was Whether Dr. Tamosaitis Could Show "Pecuniary" Losses

The trial court granted BNI's motion for summary judgment on Dr. Tamosaitis' tortious interference with a business expectancy claim on January 9, 2012. CP 48. Judge Matheson denied Dr. Tamosaitis' motion for reconsideration of the court's summary judgment ruling on February 23, 2012. CP 51. The superior court did not state its reasons for granting summary judgment for BNI on the record during oral argument or in the court's orders. CP 48, 51, 54.

Although BNI challenged every prong of the claim, *except the "improper purpose" prong*, the element causing Dr. Tamosaitis the most difficulty was the damage element because Dr. Tamosaitis continued to work for URS at the time and receive his same salary and annual incentive pay. *See* CP 18-19. It is undisputed that BNI originated the decision to terminate Dr. Tamosaitis from his position at the WTP, which URS did not oppose,[3] but during summary judgment and on appeal, BNI argued

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[3] In his case federal case currently pending before the Ninth Circuit, *Tamosaitis v. URS Corp., et al.*, Case No. 12-35924, Dr. Tamosaitis argues that BNI and DOE are liable under the ERA for whistleblower retaliation. CP 321-94. In response, URS claims that BNI was behind everything:

> All witnesses and all parties have acknowledged that BNI made the decision to remove Dr. Tamosaitis from the WTP, unilaterally revoked his access to the WTP's computer systems, and repossessed the badge that permitted him access to the WTP's secure site. BNI ordered and orchestrated the entire process. *Id.* URS EC was completely unaware until the decision was made and the orders were given. *Id.* BNI's control was such that URS EC had to specifically ask permission to delay Dr. Tamosaitis' reassignment by one day, to avoid calling Dr. Tamosaitis into the office on a scheduled day off. More importantly, Dr. Tamosaitis cannot dispute that URS EC fought for his reinstatement.

CP 437-38. According to URS, BNI was behind the retaliation.

DOE claims that it is not a proper party to the federal lawsuit because it is not his employer. CP 509-22. Similarly, when BNI was joined in the Department of Labor proceeding under the ERA, BNI claimed that it could not be held liable under the ERA because it was not an employer and because Tamosaitis has suffered "zero damages." CP 541-43. Thus, had Dr. Tamosaitis not pursued BNI under the tortious interference theory, BNI would have escaped liability in federal court as did DOE.

that pecuniary loss equated solely to financial loss and that Dr. Tamosaitis could not show a single dollar of financial loss because he remained employed by URS and still received his full compensation package, including his annual bonus. CP 59-72, First Brief of Respondents at 40-47.

BNI argued:

> The conclusion that Tamosaitis cannot state a legally cognizable claim is reinforced by the fact that he can show no economic damage at all. *See, e.g.*, Rest. (2nd) Torts § 776: "The cause of action is for pecuniary loss resulting from the interference." Tamosaitis has admitted that he continues to be employed by URS at the same elevated pay grade-the highest non-executive pay grade in the company-that he enjoyed while assigned to WTP. His 2011 base pay is higher than ever, and when a $60,000 bonus [incentive pay] and a $90,000 annual "retirement check" in connection with his earlier work at the Savannah River facility is taken into account, his annual income (not counting benefits) is currently around $375,000. There is zero evidence that anything allegedly done by BNI has changed that. In fact, Tamosaitis admits he would be speculating were he to attempt to calculate a single dollar of monetary loss as a result of departure from WTP - an admission that conclusively demonstrates his inability to satisfy the legal requirement that an actionable business expectancy be something of "pecuniary value."

CP 60.

Dr. Tamosaitis argued at summary judgment that his employment relationship with URS was a valid business expectancy that had pecuniary value. CP 74-78. He argued that the damage to his reputation, his future

lost job prospects, and his emotional harm were "pecuniary" losses. CP 75-76, CP 80-82. Dr. Tamosaitis also argued nominal financial loss based on property that was never returned to him after BNI ordered URS to remove him from the WTP and would not allow him to collect his personal belongings. CP 81-82. In this consolidated appeal, Dr. Tamosaitis made these same arguments. First Brief of Appellant at 42-47, First Reply Brief of Appellant at 21-22.

C. After the One Year Deadline to Bring a CR 60(b)(3) Motion Expired, Dr. Tamosaitis was Denied his Incentive Pay for the First Time in 33 Years

Dr. Tamosaitis is a licensed professional engineer with a Ph.D. in systems engineering. CP 12. He has over 43 years of industrial experience in the chemical and nuclear industries, working for about 20 years with DuPont Corporation and 23 years with URS Corporation/URS Energy & Construction, Inc., or its predecessors, in DOE-associated work. *Id.* For about 14 years, Dr. Tamosaitis worked at the Savannah River National Laboratory, which was operated by Westinghouse, Washington Group International, and was later acquired by URS. *Id.* In 2003, while employed by Washington Group International at the Savannah River National Laboratory, Dr. Tamosaitis was asked to work at the Waste Treatment Plant at Hanford as Research and Technology Manager on a two-year temporary assignment, which he accepted. CP 13. In April 2006, Dr. Tamosaitis accepted a regular, full-time position at the WTP as the Technology Integration Manager. *Id.* Dr. Tamosaitis received two

offer letters from WGI, which explained his eligibility for incentive pay. CP 12, 25. The letters differed in their description of how incentive pay was calculated, but did not state any requirement that Tamosaitis work under a certain billing code. *Id.* In 2007, URS acquired WGI and plaintiff became an employee of URS maintaining the same job functions as he had performed under WGI. CP 13. When URS bought WGI, in essence, nothing changed in terms of positions, assignments, and workplace policies. *Id.*

BNI is the prime contractor with DOE at Hanford; URS is BNI's prime subcontractor. CP 14, 36. Despite being classified a subcontractor, URS and BNI split WTP profits 50/50. CP 14. At URS, incentives/ bonuses are paid out in a given year for the prior year's performance. CP 14, 37. Incentives are based on the corporate fiscal year (i.e., January 1 of each year to December 31 of each year). CP 37. Individuals eligible for incentives/bonuses are considered participants in the Performance Incentive Program (PIP). *Id.* The decision maker determines the portions of incentives/bonuses to be distributed to each PIP participant based on established criteria. *Id.* The corporate review to determine multipliers and distribution amounts is typically conducted in January and February of the following corporate fiscal year and distributed in late March or early April. *Id.* For example, incentive pay for corporate calendar year 2012 would be paid in March of 2013. CP 14, 37. The amount of incentive/bonus distributed is based on several factors (e.g., overall corporate earnings, project performance, safety goals, community

involvement). CP 37. The combination of the factors for most PIP participants determines a multiplier that is applied to their based target incentive. *Id.* Incentive pay for PIP participants was paid in 2013 for corporate calendar year 2012. *Id.*

Dr. Tamosaitis received incentive pay every year with URS, and the predecessor companies, for the past 33 years, until 2013. CP 14. Dr. Tamosaitis' incentive pay is not contingent on billing a certain client code or project code. CP 14, 25. Many URS senior managers, including Bob McQuinn, Dave Hollan, Rick Boyleston, Marty Riebold, Duane Schomker, and Eric Gerber, do not bill time to a specific client; they bill to a URS "overhead" account and still receive incentive pay. CP 14. Stated another way, anyone at URS who receives incentive pay and is not assigned directly to a project, bills to an overhead code, but they still received incentive pay. *Id.*

URS senior manager, and Dr. Tamosaitis' former supervisor, Bob McQuinn told Dr. Tamosaitis that he would not receive incentive pay for work done in 2012 because he was not assigned to a specific project and his work is billed to a URS "overhead" account. CP 15. On January 9, 2013, McQuinn wrote Dr. Tamosaitis an email stating: "The opportunity to re-enter an incentive program lies exclusively with winning a position on one of the Project Senior Teams." CP 27. This statement is inaccurate because many senior URS managers do not work on a Project Senior Team and still receive incentive pay. CP 15. Additionally, McQuinn's instruction ignores Dr. Tamosaitis' repeated attempts to "win" a position

on a team, which would enable him to bill a specific client rather than having URS pay Dr. Tamosaitis out of "overhead." *Id.* Dr. Tamosaitis made many attempts to return to positions at the WTP or tankfarm for which he is well-qualified. CP 15-16. The common denominator for these non-considerations by URS is the fact that the positions interface directly with the WTP and therefore BNI. *Id.* BNI is refusing to allow Dr. Tamosaitis to return to the WTP, thus further interfering with his employment relationship with URS. *Id.*

Between 2005 and 2011, Dr. Tamosaitis' incentive pay ranged from approximately $41,000 at its lowest to $88,000 at its highest. CP 17. On July 2, 2010, Dr. Tamosaitis was removed from the WTP and no longer billing to a direct code. *Id.* Stated another way, Dr. Tamosaitis was billing to an overhead code for at least half of the 2010 year but still received a typical bonus for the year. *Id.* In April and May of 2012, Dr. Tamosaitis had to inquire as to why he did not receive his incentive pay. *Id.* He was told via email by senior URS HR manager, Dave Hollan, that the failure to pay him was "an oversight." CP 17, 30.

In 2013, Dr. Tamosaitis was told by McQuinn that he would not receive incentive pay for work performed in 2012 because he was billing to an overhead code and not to a direct code. CP 18. In 2011, Dr. Tamosaitis did not bill to a direct code and was billing on a URS "overhead" account, but he still received a bonus for that year. *Id.* Nothing changed in the way Dr. Tamosaitis billed his work from mid-

2010 through May 2013. *Id.* Nothing changed in how he billed his work in 2011 and 2012. *Id.*

This denial of incentive pay resulted in a direct pecuniary loss of at least $40,000, which was the lowest amount Dr. Tamosaitis received for incentive pay in the past seven years. CP 19. The actual amount of loss is more likely around $70,000 based on past incentive pay. *Id.*

To the extent that the Court considers the additional fact proposed above, or accepts judicial notice of the news article at Appendix 1, Dr. Tamosaitis notes that in early October 2013, he was terminated from URS, resulting in additional "pecuniary" loss proximately caused by BNI's tortious interference.

IV. ARGUMENT

A. The Standard of Review is Abuse of Discretion

The standard of review on a CR 60 motion is abuse of discretion. *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003), *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 821, 225 P.3d 280 (2009). "A court abuses its discretion when its decision is based on untenable grounds or reasoning." *Barr*, 119 Wn. App. at 46.[4]

[4] However, if the Court finds that the ruling on the CR 60 motion was made in "conjunction" with the summary judgment ruling, a *de novo* standard of review is applied. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. The Trial Court Abused Its Discretion When It Refused to Grant Dr. Tamosaitis Relief from the Summary Judgment Ruling Based on BNI's Manipulation of the Facts and Circumstances of this Case

CR 60(b) states, in relevant part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for...(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);...or (11) [a]ny other reason justifying relief from the operation of the judgment." Motions made under CR 60(b)(1), (2), and (3) must be made within one year after the entry of judgment or the issuance of the court order. All other CR 60(b) motions must be made "within a reasonable time."

CR 60(b)(11) is a catch-all provision only to be used in situations involving extraordinary circumstances that are not addressed in any other section of the rule. *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) (*citing State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). The extraordinary circumstances are usually not within the control of the party. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). They are normally "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998) (citing *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985)), *Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003).

The reasonableness of the amount of time between the judgment or order and the CR 60 motion depends on the facts of the case. *In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998). In *In re Marriage of Thurston*, the court found that a 19 month gap between the entry of the dissolution order and the motion for relief under CR 60(b)(11) was reasonable given the facts of that case. In distinguishing the facts in *Thurston* from those in *Delzona Corp. v. Sacks*, 265 F.2d 157 (3rd Cir. 1959), cited by the nonmoving party, the court noted that:

> The court [in *Delzona*] concluded that, because the judgment debtors knew all of the facts that formed the basis of their Rule 60 motion a year and a half before moving for vacation, the motion was untimely. Here, in contrast, Mandel did not learn of Thurston's new statement of position regarding the transfer of the units until shortly before she brought her CR 60(b)(11) motion.

In re Marriage of Thurston, 92 Wn. App. 494, 501, 963 P.2d 947 (1998). In determining whether a CR 60(b)(11) motion is timely, courts look beyond simply the passage of time between the entry of the judgment and the motion, and consider whether some triggering event occurred giving rise to the motion. *Id.* at 500. Courts should also consider whether the nonmoving party is prejudiced by the delay and whether the moving party had a valid reason for failing to bring the motion sooner. *Id.*

The superior court granted BNI's motion for summary judgment on January 9, 2012. It then denied Dr. Tamosaitis' motion for reconsideration of the court's summary judgment ruling on February 23, 2012. The trial court did not state its reasons for granting summary

judgment for BNI on the record during oral argument or in the court's order.

In order to establish a *prima facie* claim for tortious interference with a business expectancy, Dr. Tamosaitis must show: "(1) the existence of a valid contractual relationship or business expectancy, (2) that the defendant had knowledge of that expectancy, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that the defendant interfered for an improper purpose or used improper means, and (5) resulting damage." *Newton Ins. Agency v. Caledonian Ins. Group*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002). BNI argued extensively at summary judgment that Dr. Tamosaitis could not satisfy the elements of his tortious interference claim because BNI had direct control over the placement of all management level employees as the prime contractor with DOE at the WTP. BNI argued that URS was an at-will subcontractor who BNI could terminate at any time for any reason. BNI argued that pecuniary loss equated solely to financial loss and that Dr. Tamosaitis could not show a single dollar of financial loss because he remained employed by URS and still received his full compensation package, including his annual bonus.

Dr. Tamosaitis argued that his employment relationship with URS was a valid business expectancy that had pecuniary value. He argued that the damage to his reputation, his future lost job prospects, and his emotional harm were "pecuniary" losses. Dr. Tamosaitis also argued nominal financial loss based on property that was never returned to him

after BNI ordered URS to remove him from the WTP and would not allow him to collect his personal belongings. However, at the time of summary judgment, it was clear that BNI and URS manipulated the situation by not terminating Dr. Tamosaitis outright, thus creating financial loss, but instead placed him in a basement office in URS headquarters with little to no meaningful work. This fact was also brought to the trial court's attention at summary judgment. BNI and URS kept Dr. Tamosaitis employed to reduce his financial losses so that BNI could argue that Dr. Tamosaitis had not met this element of his *prima facie* case at summary judgment.

CR 60(b)(3) motions based on newly discovered evidence can only be brought within one year of the judgment or order. Based on the date of the trial court's denial of Dr. Tamosaitis' motion for reconsideration, February 23, 2012, this deadline expired on February 23, 2013. In 2012, for Dr. Tamosaitis' 2011 incentive pay, URS initially did not award Dr. Tamosaitis his annual bonus. When plaintiff inquired into the issue in April 2012, URS manager Dave Hollan told Dr. Tamosaitis it was an "oversight" and Tamosaitis was later paid in May 2012. Then, in March 2013, for the first time, URS manager Bob McQuinn stated that Dr. Tamosaitis would not receive incentive pay for work performed in 2012. BNI and URS have again manipulated the facts of this case to cause Dr. Tamosaitis financial loss only after the one-year deadline for bringing a CR 60(b)(3) motion expired. This Court should not allow BNI, who claimed at summary judgment that it had complete control over

Dr. Tamosaitis and URS as a subcontractor, to alter the facts of this case to escape liability for tortiously interfering with Dr. Tamosaitis' employment relationship with URS. The trial court abused its discretion when it refused to reopen the case to consider the new evidence of Dr. Tamosaitis' additional pecuniary losses.

URS's stated reasons for denying Dr. Tamosaitis his 2012 incentive pay are fictional because the rules do not apply to other URS managers. Additionally, even if the reasons given were valid, BNI refuses to allow Dr. Tamosaitis to return to the WTP where he could bill on a direct code, thus qualifying for incentive pay based on the reasons given by URS. This is further interference by BNI for an improper purpose. This case involves the kind of extraordinary circumstances that called for relief from the trial court's order granting summary judgment. The decision to deny Dr. Tamosaitis his incentive pay for the first time after the CR 60(b)(3) deadline expired was not within Dr. Tamosaitis' control. Dr. Tamosaitis brought his CR 60(b)(11) motion soon after the triggering event – the denial in March 2013 of his 2012 incentive pay. Any prejudice to BNI as a result of reopening the case should have been weighed against BNI's manipulation of the facts in order to serve its summary judgment argument on pecuniary losses.

C. The Denial of Dr. Tamosaitis' Annual Incentive Pay is a "Financial" Loss, as BNI Argued Was Necessary at Summary Judgment, Which Justified Reopening this Case

At summary judgment, and now on appeal, Dr. Tamosaitis cited case law to support the fact that damage to his reputation, his lost career opportunities, and his emotional harm damages had "pecuniary" value, and that they were the "resulting damages" of BNI's improper interference. He also presented evidence of nominal financial losses based on property that BNI retained when he was removed from the WTP and not permitted to collect his personal belongings. However, BNI argued that Dr. Tamosaitis could prove no financial loss and that direct, measurable financial loss was necessary at summary judgment in order to establish a *prima facie* claim for tortious interference. BNI orchestrated the events so that Dr. Tamosaitis only experienced direct, measurable financial losses after the one-year CR 60(b)(3) deadline for newly discovered evidence expired. Dr. Tamosaitis' lost incentive pay resulted in a direct "pecuniary" loss of at least $40,000 this year. If the Court considers the additional evidence, Dr. Tamosaitis' termination, after this appeal was filed, also resulted in direct economic losses.

V. ATTORNEY FEES AND COSTS

Recognizing that the case will have to be tried assuming remand, appellant respectfully requests that attorney fees for this appeal be

awarded at that time, and that costs of this appeal be awarded in accordance with the Rules of Appeal.

VI. CONCLUSION

Dr. Tamosaitis respectfully requests that this Court find that it was an abuse of discretion for the trial court to deny plaintiff's CR 60(b)(11) motion to vacate the summary judgment dismissal because "extraordinary circumstances" – BNI's manipulation of Dr. Tamosaitis' economic losses – existed to warrant reopening of the case.

Respectfully submitted this 4th day of November, 2013.

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DECLARATION OF SERVICE

Windy Walker states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by MacDonald Hoague & Bayless, and I make this declaration based on my personal knowledge and belief.

2. On November 4, 2013, I caused to be delivered via email addressed to:

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a copy of BRIEF OF APPELLANTS.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of November, 2013 at Seattle, King County, Washington.

Windy Walker
Legal Assistant

Appendix 1

The Seattle Times
Winner of Nine Pulitzer Prizes

Local News

Originally published October 9, 2013 at 2:53 PM | Page modified October 10, 2013 at 12:39 AM

Hanford whistleblower loses job

Oregon Senator Ron Wyden on Wednesday demanded to know why a Hanford Nuclear Reservation whistleblower has lost his job.

By NICHOLAS K. GERANIOS

Associated Press

SPOKANE, Wash. —

Oregon Senator Ron Wyden on Wednesday demanded to know why a Hanford Nuclear Reservation whistleblower has lost his job.

Walter Tamosaitis last week was laid off by URS Corp. after 44 years of employment.

Wyden, a Democrat, sent a letter to Energy Secretary Ernest Moniz saying that little appears to have changed in the protection of whistleblowers at Hanford. He says this incident shows that people who raise safety concerns continue to face retaliation.

"It is hard to see how his termination could do anything but discourage employees at Hanford and throughout the (nuclear weapons) complex from coming forward with health or safety concerns," Wyden wrote.

URS, a private contractor, said in a news release that the layoff was prompted by its budget.

"While we will not comment on specific matters, in recent months URS has reduced employment levels in our federal sector business due to budgetary constraints," the company said. "URS encourages its employees to raise any concerns about safety, which remains the company's highest priority."

Tamosaitis in 2010 was removed from his job as a manager at the construction of the $12.3 billion Waste Treatment Plant after raising safety concerns, and later sued over the demotion. But he continued to work at URS, in a job which Wyden described as "a basement cubicle in Richland with no meaningful work."

Tamosaitis contended he was dismissed from the treatment plant project for raising numerous concerns about the future safe operations of the plant.

Wyden also complained that in order to receive severance pay from URS after being laid off, Tamosaitis must sign a document releasing URS from any liability. But he has appeals pending after lawsuits against URS and the U.S. Department of Energy were dismissed before going to trial.

His case before the 9th U.S. Circuit Court of Appeals is scheduled to be heard Nov. 7, Wyden

wrote.

Hanford is located near the Tri-Cities of Richland, Kennewick and Pasco in southcentral Washington. The site for decades made plutonium for nuclear weapons, and now contains the nation's largest volume of radioactive waste. The troubled Waste Treatment Plant is intended to convert some of those wastes into glass for long-term storage.