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No. 65635-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NEW HORSESHOE SALOON ASSOCIATES, LLC, a Washington
Limited Liability Company,

Appellant,

v.

COMMERCE BUILDING LIMITED PARTNERSHIP,

Respondent.

RESPONDENT'S APPELLATE BRIEF

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December 10, 2010

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INTRODUCTION

Commerce Building Limited Partnership (“Commerce”), by and through its attorney of record, Kristi Favard of the Anderson Hunter Law Firm, P.S., hereby submits its appellate brief in this matter. The Court of Appeals should affirm the Trial Court’s decision dismissing New Horseshoe Saloon Associates, LLC’s (“NHSA’s) breach of contract claim against Commerce and reverse the decision of the Trial Court denying Commerce’s request for attorney’s fees and costs.

NHSA’s argument regarding “hypothetical facts” should be rejected, as “hypothetical facts” cannot be considered when the dismissal was based on the summary judgment standard set forth in CR 56. Further, NHSA did not meet its burden for “newly discovered evidence” under CR 59 and therefore, the Trial Court’s denial of NHSA’s Motion for Reconsideration was proper. Finally, NHSA’s claim for breach of contract (which it conceded at the Trial Court level) is without merit, as ruled by the Trial Court. The Court of Appeals should affirm the Trial Court’s dismissal of NHSA’s breach of contract claims and its denial of NHSA’s Motion for Reconsideration.¹

However, the Court of Appeals should reverse the Trial Court’s decision denying Commerce’s attorney’s fees under CR 65(c) and RCW 7.40.080 relating to the temporary restraining order (TRO) and motion for

¹ NHSA has not appealed its claims for adverse possession/prescriptive easement or implied easement. Therefore, those claims are not addressed here.

permanent injunction that was never held due to NHSA not confirming the motion and obtaining a baseless TRO.

FACTS

Commerce is the owner of property at 1803 Hewitt Avenue in Everett, which is located next door and adjoins NHSA's building at 1805 Hewitt Avenue. The Commerce Building houses Housing Hope, a non-profit organization dedicated to providing affordable housing to those in need in Snohomish County. CP 146. NHSA's property has been operated as a restaurant and bar off-and-on for several years.²

In October 1996, Commerce and the owners of 1805 Hewitt at that time, Dr. John and Mary Bennett of Horseshoe Saloon, LLC ("the Bennetts"), entered into a letter of understanding for the installation, use and compensation for an egress door from the upstairs bar area into The Commerce Building, as there was no emergency escape on the second floor of the bar, which was required under City, County, and State codes. The letter of understanding stated that an easement or other document would be recorded, but that never occurred.³ The letter did not state that the use would be permanent. The Bennetts paid Commerce \$50 per month for the egress. CP 147; 151-152.

² NHSA has owned the property since 2002.

³ The egress agreement is a license to use the egress and not an easement. Any agreement relating to the egress has been and would be called an "Emergency Egress License Agreement." CP 151-152; 162-165.

Commerce and the Bennetts operated under this agreement until May 1998, when the Bennetts indicated their intent to sell the property to Barb and Brian Zelmer, who would operate the Everett Fire House. At that time, the Bennetts paid all monies due for the egress through May 1998 and requested that the Zelmers be invoiced in the future. CP 147; 154-158. The Bennetts also requested an extension to the egress. Commerce extended the egress to the Zelmers, but by September 1998, the Everett Fire House closed. At that time, the Bennetts agreed to continue to pay for the egress, which they did through December 1998. The property was vacant from 1998 to 2000. CP 147.

A series of transactions ensued in the following years: in December 2000, the property was transferred to Craig Dieffenbach; in May and November 2001, the property was transferred to Peter and Helen Sikov ("Sikov"); and in 2002, a quit claim deed was recorded and transferred the property to NHSA, which is owned by Sikov. CP 176-182.

No one occupied the property from 2000 to 2006 and therefore, no one paid for the egress during that time. In July 2003, Commerce notified Sikov of the egress agreement and potential for future need. CP 147; 160. Sikov did not respond. CP 147. Tailgater Joe's, operated by Joel Starr ("Starr"), became a tenant to NHSA and operated a bar on the property beginning in early 2006. In May 2006, Starr was notified of the egress and ultimately agreed to an "Emergency Egress License Agreement,"

which he signed in March 2007. Starr made payments for the egress beginning in September 2006. CP 148. The parties agreed to a payment of \$150 per month for the first three years, \$175 per month in the fourth and fifth years, and \$250 per month in any renewal term. The agreement allowed Commerce to terminate the agreement based on failure to pay or other breaches of contract. CP 148; 162-165. The agreement also states that no rights or obligations may be assigned without prior written approval of the other party. *Id.* Starr paid for the egress through October 2008 when Tailgater Joe's went out of business. CP 148; 168. The agreement was then considered terminated. CP 148.

From November 2008 to approximately April 2010,⁴ the tenants and owners of 1805 Hewitt did not pay for the egress. On January 11, 2010, Housing Hope (on behalf of Commerce) wrote a letter to the attorney for NHSA regarding the egress at which time NHSA alleged it had a prescriptive easement to it. Thus, the parties failed to reach an agreement and on February 2, 2010, and again on February 22, 2010, Commerce notified NHSA and the City of Everett that it would be closing the egress on February 28, 2010. CP 148; 170-172.

On February 26, 2010, NHSA filed a Complaint for breach of contract and prescriptive easement, and sought and obtained a temporary restraining order to restrict Commerce from closing the egress until the

⁴ The current tenants of the property and Commerce entered into an agreement for the egress shortly after the Trial Court decided this matter.

March 10, 2010 show cause hearing regarding obtaining a permanent injunction. CP 120-130; 136-200. Commerce filed a response brief and then discovered that the show cause hearing was not confirmed and was stricken. CP 112. Commerce then noted its Motion to Dismiss on all counts, which was granted. CP 43-44; 45-61; 62-66; 108-119. The Trial Court also denied an award of attorney's fees to Commerce. CP 43-44. On appeal, NHSA disputes portions of the dismissal and the denial of its motion for reconsideration.⁵ Commerce appeals the Trial Court's denial of attorney's fees.

ASSIGNMENTS OF ERROR

NHSA assigns two errors to the Trial Court's ruling. First, NHSA argues that the Trial Court should not have granted Commerce's Motion to dismiss under CR 12(b)(6). Rather than argue that the Trial Court somehow ruled incorrectly, NHSA argues that the Court of Appeals should now consider "hypothetical" yet untrue facts to overrule the dismissal. NHSA fails to recognize that the Trial Court based its ruling on CR 56 and fails to advise the Court that it conceded its claim for breach of contract at the Trial Court level. The "hypothetical fact" theory can only be used under CR 12(b)(6). This is a case involving summary judgment under CR 56 and "hypothetical facts" cannot, therefore, be considered.

⁵ Commerce notes that NHSA's Notice of Appeal is not reflected in the Designation of Clerk's Papers.

Second, NHSA alleges that the Court should have granted its Motion for Reconsideration under CR 59 (on its breach of contract claim only) due to alleged “newly discovered evidence.” The “newly discovered evidence” was not new at all and does not meet the standards set forth under CR 59 for granting reconsideration. Therefore, the Trial Court properly denied NHSA’s Motion for Reconsideration.

Commerce assigns error to the Trial Court’s refusal to award its attorney’s fees and costs pursuant to CR 65(c) and RCW 7.40.080. The Court of Appeals should reverse the Trial Court’s ruling on this issue.

LEGAL ARGUMENT

A. **New “hypothetical facts” should not be considered by the Court of Appeals because the Motion to Dismiss was based on CR 56 and was not based solely on CR 12(b)(6).**

NHSA alleges that the Court of Appeals may consider “hypothetical facts” that were not alleged at the Trial Court level. However, the law does not support NHSA’s argument because this case involves summary judgment under CR 56 and the underlying motion was not based solely on CR 12(b)(6). CR 12(b)(6) addresses the defense of failure to state a claim upon which relief may be granted. Motions on such pleadings are treated as motions for summary judgment under CR 56 if matters outside the pleading are presented. Here, matters outside the pleadings were presented and the Trial Court ruled on the matter as a CR 56 motion. See CR 12(b); *see also Brown v. MacPhersons, Inc.*, 85

Wn.2d 17, 530 P.2d 277 (1975). Therefore, the alleged “hypothetical facts” should not be considered by the Court of Appeals and even if they are, NHSA’s claim for breach of contract should be outright rejected because the facts do not support a breach of contract claim against Commerce, as discussed more thoroughly below.

Moreover, the three cases cited⁶ by NHSA stating that “hypothetical facts” can be reviewed by the Appellate Court for the first time, can all be distinguished from the present case because they all involved motions made pursuant to CR 12(b)(6) and because even if the “hypothetical facts” alleged by NHSA were considered, their use would not support a claim against Commerce.

In *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 888 P.2d 147 (1995), the Court acknowledged that on appeal of a CR 12(b)(6) motion, a “hypothetical” situation conceivably raised by the Complaint could defeat a CR 12(b)(6) motion if it is legally sufficient to support Plaintiff’s claim. “Hypothetical facts” are only allowed to assist the Court in establishing a “conceptual backdrop” against which the challenge to the legal sufficiency of the claim is considered. *Id.* at 750 (emphasis added). However, in *Bravo*, the Court did not reach the “hypothetical” issue because it found that the CR 12(b)(6) motion was improperly dismissed at the trial court

⁶ The *Parmelee v. O’Neel*, 145 Wn. App. 223, 186 P.3d 1094 (2008) case cited by NHSA has been overruled by *Parmelee v. O’Neel*, 168 Wn.2d 515, 229 P.3d 723 (2010). It also does not provide an analysis of the “hypothetical fact” rule.

level for other reasons and provided no further analysis of the issue. In this case, the motion to dismiss was brought primarily under CR 56; it was not a 12(b)(6) motion. Further, the newly alleged “hypothetical facts” do not help establish a “conceptual backdrop” for a breach of contract claim because they are not raised in the Complaint or any other pleading (nor do they actually exist). Therefore, *Bravo* is inapplicable to this case.

In *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978), the City, a defendant in the matter, argued that the Court of Appeals could only consider the plaintiff’s amended complaint and no other allegations of fact. The Court rejected that argument. *Id.* In this case, neither Commerce nor the Trial Court ever asserted that only NHSA’s Complaint could be considered. In fact, the Trial Court considered a multitude of NHSA’s arguments that were not supported by the facts and were not plead. Further, as discussed below, NHSA conceded its claim for breach of contract at the hearing. Therefore, the “hypothetical facts” should not be considered. Further, the *Halvorson* Court acknowledged that its holding was limited to cases of CR 12(b)(6), not cases of summary judgment under CR 56. *Halvorson*, 89 Wn.2d at 675. As previously discussed, the Trial Court ruled on the matter pursuant to summary judgment standards and, therefore, this case is distinguishable from *Halvorson*.

In *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975), the Court acknowledged that the appellant's claim was explained to them informally and "hypothetically" by their counsel in argument, but never said the facts were "made up" or untrue, as is the case here. The Court used the term "hypothetical," to mean that it was taking appellant's side of the story as true. *Id.* at 297. The Court stated, "[a]ll we need decide is whether the facts described, if established, would entitle appellants to relief under the allegations in their complaint." *Id.* In *Brown*, the "hypothetical" factual basis of the claim lay within a series of actual communications between people involved with the transaction. In this case, the "hypothetical" allegations are that Mr. Sikov somehow believed that he was entitled to a permanent easement and had a contract with Commerce or could have had a contract with Commerce if he had made monthly payments to Commerce (which he never did). These facts, or beliefs, do not support a claim against Commerce. The facts alleged by NHSA simply do not exist. Just because NHSA believed at the time it bought the property that it was entitled to the egress, does not mean that Commerce is liable to NHSA. That dispute is between NHSA and the seller of the property.

In the above cases, the "hypothetical facts" were facts alleged to have actually occurred in the transaction. The "hypothetical facts" alleged by NHSA are not. There is no dispute that NHSA never paid Commerce

for the egress and never had any agreement relating to it. Therefore, this “hypothetical fact” could not be true. Thus, even under the “hypothetical fact,” NHSA would not be able to recover for breach of contract against Commerce.

B. The Trial Court did not abuse its discretion by denying the Motion for Reconsideration.

1. *NHSA conceded its Breach of Contract claim at the summary judgment hearing.*

At the hearing on summary judgment, NHSA conceded its Breach of Contract claim. When the Court inquired regarding privity of contract between NHSA and Commerce, NHSA withdrew its breach of contract claim and focused on its prescriptive easement arguments. NHSA should not be allowed to argue on appeal an issue it conceded at the Trial Court level. RAP 2.5(a); *Savage v. State*, 72 Wn. App. 483, 495 n.9, 864 P.2d 1009 (1994), *reversed in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995).

2. *The “newly discovered evidence” claimed in NHSA’s Motion for Reconsideration was not “newly discovered.”*

Civil Rule 59(a)(4) allows a trial court to vacate its order and grant a new trial based on “newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial.” CR 59(a)(4); *Wagner Dev., Inc. v. Fidelity & Deposit Co.*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). A

trial court's ruling on a motion for reconsideration based on newly discovered evidence is within the trial court's sound discretion and will not be reversed on appeal absent a showing of abuse of discretion.

Perry v. Hamilton, 51 Wn. App. 936, 938, 756 P.2d 150, *rev. denied*, 111 Wn.2d 1017 (1998) (emphasis added). “A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). When a party moves for reconsideration of a trial court decision based on newly discovered evidence, it must prove “(1) that the new evidence will probably change the result if any trial is granted; (2) that the evidence must have been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching.” *Nelson v. Mueller*, 85 Wn.2d 234, 239, 533 P.2d 383 (1975).

In this case, the “newly discovered evidence” does not meet the elements for granting reconsideration. The Trial Court properly exercised its discretion when it denied NHSA’s Motion for Reconsideration.

NHSA submitted the following “newly discovered” documents to the Trial Court on reconsideration:

- A January 10, 1995 letter from Mr. Bennett to City of Everett officials stating that the Commerce Building was willing to develop the egress corridor. CP 8-9.

- A January 12, 1995 letter from the City of Everett to Mr. Bennett approving the layout of the Egress Agreement. CP 11.
- An August 10, 1995 letter from the City of Everett to Mr. Bennett regarding City of Everett requirements for the egress. CP 13-14.
- A September 11, 1996 letter from Mr. Bennett to the City of Everett regarding plans for the exit and evidence of Commerce's willingness to allow the exit. CP 16.
- A September 10, 1996 letter from Housing Hope (Commerce) to Mr. Bennett regarding the architectural drawings and draft easement agreement, in which Commerce asked that the issues of assignability and revocability be discussed.⁷ CP 18.
- A draft Easement for Emergency Ingress and Egress between Bennett and Commerce.⁸ CP 20-21.
- A City of Everett application creating the egress, dated September 30, 1996. CP 23.
- A September 30, 1996 letter from Mr. Bennett to the City of Everett regarding his application for the building permit for the egress. CP 25.
- An October 4, 1996 letter from Commerce to Mr. Bennett regarding the Letter of Understanding. CP 27-28.
- A May 8, 1998 letter from Mr. Bennett to Housing Hope (Commerce) regarding the business being taken over by the Zelmers and asking if Commerce would consider extending the emergency exit rental. CP 30.

⁷ This indicates that Commerce was not willing to allow the easement to be permanent or assignable.

⁸ It is not indicated who drafted the document, but it was never signed.

- A May 19, 1998 letter from Housing Hope (Commerce) to Mr. Bennett regarding approval of his above request. CP 32.

None of these documents evidence any agreement, whether assigned, transferred, or executed, that would constitute an agreement between Commerce and NHSA.

Moreover, NHSA cannot meet the five required elements under CR 59(a). With respect to element one, the “new evidence” would not change the result of the Motion to Dismiss, as none of the “new evidence” shows that Commerce and NHSA had any agreement or contract. There is no proof that a contract ever existed between the parties or that one exists between other parties that would extend to NHSA. Therefore, there can be no breach and NHSA cannot sustain a breach of contract claim.

Under elements two and three, NHSA is also required to prove that the evidence was discovered since the hearing and could not have been discovered before the hearing with due diligence. “A mere allegation of diligence is not sufficient; the moving party must state facts that explain why the evidence was not available for trial.” *Vance v. Offices of Thurston Co. Com’rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003). Trial and summary judgment proceedings provide an opportunity for parties to present evidence and if evidence was available but not offered until after that opportunity passes, the parties are not allowed another opportunity to present such evidence. *Wagner Dev.*, 95 Wn. App. 896, 907, 977 P.2d

639 (1999); *see also Adams v. W. Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989). Commerce does not dispute that some⁹ of the evidence was discovered by NHSA after the hearing. However, the evidence was in existence for many years prior to the hearing and could have been discovered before the hearing through the exercise of due diligence, as NHSA knew where to look for them and had possession of them within 10 days of the hearing. CP 43-44; CP 6. These documents were not hidden and, in fact, are public record and are repetitive of many of the documents previously provided by Commerce prior to the hearing. CP 151-155. NHSA could have discovered them prior to the hearing if it had exercised due diligence. Further, NHSA's argument that it could not have discovered the evidence before the hearing because the hearing was noted shortly after the Complaint was filed is without merit. If NHSA thought that it needed to perform additional discovery or obtain documents prior to the hearing, it could have requested a continuance of the hearing pursuant to CR 56(f). It failed to do so and cannot now allege that failure entitles it to relief under CR 59.

NHSA must also prove under element four that the "newly discovered evidence" is material to the issue at hand. In other words, that the documents show that a breach of contract claim is supportable. Here, while the documents relate to the emergency egress provided to the

⁹ Commerce provided documents CP 151-155 in its Motion to Dismiss.

Bennetts, they are not relevant to the existence of any contractual obligations between NHSA and Commerce. NHSA has not met its burden under element four.

Finally, NHSA must prove that the documents are not merely cumulative or impeaching pursuant to element five. As previously mentioned, many of the documents that NHSA has described as “newly discovered” are documents previously provided to the Trial Court and NHSA by Commerce. Therefore, element five has not been met either.

In conclusion, NHSA’s “newly discovered evidence” failed to satisfy the five elements required to vacate the dismissal and grant the Motion for Reconsideration. Therefore, the Trial Court did not abuse its discretion; its ruling was proper and should stand.

C. The Trial Court’s dismissal of the breach of contract claim on Summary Judgment was proper.

NHSA argues that the Trial Court’s ruling on the 12(b)(6) Motion to Dismiss should be reviewed *de novo* and was improper. It then cites the standards for consideration of a CR 12(b)(6) motion; that the Court may not dismiss a claim unless “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Appellant’s Brief*, p.7. The Trial Court’s ruling was proper under this standard. There was no basis for any of NHSA’s claims, which included prescriptive easement and breach of contract. The

breach of contract claim was conceded by NHSA at the hearing and is the only claim on appeal. There is no set of facts that NHSA could provide that would establish a contract between NHSA and Commerce, let alone a breach of contract claim, as discussed below. Therefore, the Trial Court's ruling should stand.

Additionally, and as previously noted, Commerce's Motion to Dismiss was brought under both CR 56 and CR 12(b)(6). CP 108-119. An appellate court should review a trial court's decision on summary judgment *de novo*. The Court places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). The standard for entry of summary judgment is that it will be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

Here, though not addressed in NHSA's brief, there was no genuine issue of material fact on the breach of contract claim. NHSA's claim for breach of contract failed (and was conceded) because there is no proof that any contract exists between the parties. The elements of a valid contract are a proper offer, acceptance, competent parties, legal subject matter, and

valuable consideration. *Lager v. Berggren*, 187 Wash. 462, 467, 60 P.2d 99 (1936).

As mentioned above, an offer and acceptance, often referred to collectively as mutual assent, must exist in order for a contract to be valid. *McEachren v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266 (1984); *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388-389, 858 P.2d 245 (1993). The acceptance of the offer must be identical to the offer or there is no contract. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 127-128, 881 P.2d 1035 (1994). Moreover, a contract is not binding unless it is supported by consideration. *Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971). Consideration is any bargained for act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 572, 161 P.3d 473 (2007)(citing *Adams v. Univ. of Wash.*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986)); *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). Once the existence of a contract has been established, which has not been done here, a party asserting a breach of contract claim must show a breach of the contract and resultant damage. *St. John Med. Ctr. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 51, 64, 38 P.3d 383 (2002).

In this case, there is no proof of mutual assent between NHSA and Commerce.¹⁰ Thus, there is no contract between NHSA and Commerce. The October 4, 1996 letter of understanding between Commerce and the Bennetts indicated that the parties would execute “a recordable easement or similar evidence of right of access and use...” The parties did not indicate that such access was of a permanent nature. CP 151-152. The Bennetts’ May 8, 1998 letter to the Housing Hope Board of Directors wherein the Bennetts requested the “purchase of a conditional easement” further evidences this. CP 154. In response to that letter, on May 19, 1998, Housing Hope advised the Bennetts that the Board was “not interested in selling a conditional easement.” CP 155. Further, the fact that the Bennetts requested a one-year extension of the egress for the Zelmers shows that the Bennetts did not believe their agreement was permanent or transferable. CP 30. These facts prove that there was never an agreement for a permanent easement or egress, that extensions were sought, and there was certainly no agreement between NHSA and Commerce relating to the egress.

Further, there was no consideration between NHSA and Commerce. In fact, NHSA has refused to pay Commerce for the egress.

¹⁰ This is true whether the Court considers the “hypothetical facts” and/or “newly discovered evidence” or not.

Therefore, there was no consideration or bargaining between the parties in this case.¹¹

Likewise, there was no breach of contract. In this case, there is no contract, oral or written, between NHSA and Commerce. NHSA attempts to assert that the 1996 letter of understanding constitutes a contract between NHSA and Commerce simply because the parties (Commerce and the Bennetts) intended to file some sort of a temporary license or easement agreement in the future. There was no indication whatsoever that the license was permanent or transferable. Moreover, no license or easement was ever filed. Further, the letter of understanding is not a contract; it is more akin to an agreement to agree.¹² And even if it were a contract, it is not assignable or transferable. In fact, the Emergency Egress License Agreement provided to Starr, which NHSA has not alleged extends to it, requires that an assignment be approved by Commerce in writing. No such assignment exists. All other documents evidence a similar intent. There is no contractual relationship between Commerce and NHSA and therefore, no breach. CP 146-149; 162-165. The Court should affirm the Trial Court's decision.

¹¹ NHSA may argue that the Bennetts and Mr. Starr, as well as the new tenants, have bargained for consideration of the agreements. However, those agreements are with prior owners and tenants only and not with NHSA.

¹² NHSA has agreed with this characterization of the letter of understanding. CP 123.

D. The Court of Appeals should reverse the Trial Court's denial of attorney's fees to Commerce.

The Trial Court should have awarded Commerce its attorney's fees and costs, incurred in response to the temporary restraining order and motion for injunction. CR 65(c) allows damages "for the payment of such costs and damages as may be incurred ... by any party who is found to have been wrongfully enjoined or restrained." Generally, a wrongful temporary restraining order is one dissolved at the conclusion of a full hearing. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997) ("on equitable grounds, party may recover attorneys' fees reasonably incurred in dissolving wrongfully issued injunction or restraining order."). "The amount of a reasonable attorneys' fee is within the trial court's discretion." *Id.* RCW 7.40.080 further provides for the bond as security against the damaged parties' "damages and costs which may accrue by reason of the injunction or restraining order," which includes attorney's fees.

The Trial Court properly ruled that the temporary restraining order be dissolved because there was no basis for NHSA's claims or for an injunction. However, Commerce should have been awarded its attorney's fees and costs incurred relating to the restraining order and injunction.

Through the date of the summary judgment hearing, Commerce incurred \$5,400 in attorney's fees and costs. CP 173-174; 189.¹³

E. Commerce should be awarded its attorney's fees and costs on appeal.

Commerce should also be awarded its attorney's fees for NHSA's frivolous appeal under RAP 18.9(a) and its costs pursuant to RAP 14. Neither the underlying suit nor the appeal have any basis in fact or law for the relief NHSA requests. Rather, both were designed as a way to harass Commerce and prolong the egress issue. Supplemental briefing will be provided should the Court grant this request.

CONCLUSION

There is no basis for NHSA's appeal. The Trial Court did not abuse its discretion in denying NHSA's Motion for Reconsideration. NHSA cannot, under any circumstances, prove that its renewed claim for breach of contract is supportable under CR 59 or that Commerce's summary judgment motion should not have been granted at the Trial Court level. The Trial Court's rulings dismissing NHSA's claims were correct as a matter of law and should be affirmed. The Court of Appeals should also reverse the Trial Court's denial of Commerce's attorney's fees and costs and should also grant Commerce its attorney's fees and costs on appeal.

¹³ In the alternative, Commerce is entitled to its attorney's fees and costs under CR 11 or RCW 4.84.185.

Dated this 10th day of December, 2010.

Respectfully submitted,

ANDERSON HUNTER LAW FIRM, P.S.

Handwritten signature of Kristi Favard in cursive script.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served a copy of the foregoing document directed to the following individuals in the manner indicated below:

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DATED this 10th day of December, 2010.



Teresa Epley, Legal Assistant