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NO. 34548-0-II

STATE OF WASHINGTON
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WASHINGTON STATE COURT OF APPEALS
DIVISION II

NEW HORIZON CHRISTIAN CENTER, a Washington non-profit
corporation,

Respondent,

v.

BILLY J. ENSLEY and "JANE DOE" ENSLEY; ADAMS-HODSDON &
ROBINSON, INC., P.S. d/b/a A.H.R. ENGINEERS, INC., a Washington
corporation,

Appellants.

APPELLANTS ENSLEY AND AHR'S REPLY BRIEF

Steven G. Wraith, WSBA No. 17364
Matthew D. Taylor, WSBA No. 31938
Attorneys for Appellants

LEE, SMART, COOK, MARTIN &
PATTERSON, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

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A. REPLY ARGUMENT

- 1. The amount of damages awarded to New Horizon for its lost membership profits claim is not supported by the Trial Court's findings of fact and conclusions of law.**

For the reasons described in Appellants' Opening Brief and herein, Findings of Fact Nos. 25, 27, and 28 are not supported by substantial evidence, and Conclusion of Law No. 5 is therefore not supported by the Trial Court's Findings of Fact. Accordingly, AHR/Ensley respectfully request that this Court reverse the Trial Court.

- a. Trial Exhibit No. 59, which is the sole basis for New Horizon's lost membership profits claim, was erroneously admitted, as it was an inaccurate summary and New Horizon failed to lay a proper foundation for its entry into evidence.**

The Trial Court's admission of Exhibit 59 was error for the reasons described in Appellants' Opening Brief and below.

- (1) New Horizon failed to lay a proper foundation for admission of Trial Exhibit 59.**

In its response brief, New Horizon does not address AHR's argument that it failed to lay a proper foundation for entry of Exhibit 59 into evidence. Instead, New Horizon appears to argue that Exhibit 59 was admitted as only as "illustrative evidence," rather than substantive evidence. *See generally* Response Brief at 6-9.

This argument is surprising, given that Exhibit 59 is the **only** evidence in the record which supports an amount for New Horizon's lost

membership profits claim, and which supports Finding Nos. 25, 27, and 28. New Horizon's allegation that it lost \$1,356,000.00 in lost membership profits can be found nowhere else in the record. Indeed, in calculating the lost membership profits award, the Trial Court took the membership, growth rate, and tithing contribution numbers directly from Exhibit 59 and simply prorated them for 17 months. *Compare* Trial Exhibits 59 with CP 33 (Finding Nos. 26, 27, 28). In fact, New Horizon appears to concede this in its Response. *See* Response Brief at 21 ("the Court in its discretion reduced the amount of damages by using the average lost profit and applying it over 17 months").

More importantly, the record makes it clear that Exhibit 59 was used for substantive rather than illustrative purposes. The following is the exchange that occurred when New Horizon offered Exhibit 59 during the direct examination of Pastor Dwain Wolfe:

Q: I'm handing you what's been marked as Exhibit No. 59. Do you recognize this?

A: I do.

Q: What is it?

A: It's a summary of attendance since 1999, a summary of contributions and an overview of those and then a – on page two a summary of what we – of projected growth if we took a conservative view on growth.

...

Q: Where did you get the information to compile this report?

A: The attendance records, based on the cards and the material that we had available and had on the computer, the contributions from the audit statements and the profit and loss, and the projection of growth, just based on conservatively what we could have expected if we would have had the building built and been in the building project.

Q: This chart, this projected loss chart, helps you explain to the Court exactly what your projected loss is?

A: Yes.

MS. CARVER: Your Honor, we offer 59 into evidence.

MR. WRAITH: Objection, foundation. This witness lacks the expertise to prepare this document. It is not an accurate reflection of the church's situation. Pastor Wolfe is not a CPA and the content of this document is – contains information that only a CPA or other qualified witness could prepare.

THE COURT: 59 is admitted. What is proves or doesn't prove remains to be seen.

See 7/13/2004 RP at 73-74.

Again, New Horizon failed to lay a proper foundation for admission of Exhibit 59. Pastor Wolfe had no personal knowledge regarding Exhibit 59, nor did he authenticate its contents, as is required by ER 602 and ER 901. This is because it was **plaintiff's counsel**, not Pastor Wolfe, who drafted the exhibit. In fact, when trial resumed after the first appeal, counsel attempted to admit an updated version of Exhibit 59 (Proposed Exhibit 122, in which the alleged damages for lost membership profits had increased from \$1,356,000 to more than \$2,000,000) through New Horizon's CPA expert. In that case, however,

the Trial Court sustained AHR's objections and denied admission of the updated exhibit. *See* 2/15/2006 RP at 95-97.

In short, Exhibit 59 was a document made by New Horizon's attorney, and Pastor Wolfe had no personal knowledge about the exhibit, nor could he authenticate it. As was the case with Proposed Exhibit 122, New Horizon failed to lay a proper foundation for Exhibit 59. New Horizon failed to address this argument in its response brief, and instead claimed Exhibit 59 was admitted for "illustrative purposes" only. This Court should reject New Horizon's argument and conclude the Trial Court erred in admitting Exhibit 59.

(2) Trial Exhibit 59 is not a proper summary under ER 1006.

Trial Exhibit 59 does not contain any original material supporting the claim for lost membership profits; rather, it is an inaccurate attempt to summarize other evidence of church attendance and tithing, and it does not comport with ER 1006. In its response, New Horizon claims AHR failed to preserve this argument for appellate review. *See* Response Brief at 9-11. New Horizon is mistaken. When New Horizon counsel offered Exhibit 59 into evidence, defense counsel objected on grounds that the exhibit was not "an accurate reflection" of the church's actual financial records:

MS. CARVER: Your Honor, we offer 59 into evidence.

MR. WRAITH: Objection, foundation. This witness lacks the expertise to prepare this document. **It is not an accurate reflection of the church's situation.** Pastor Wolfe is not a CPA and the content of this document is – contains information that only a CPA or other qualified witness could prepare.

THE COURT: 59 is admitted. What it proves or doesn't prove remains to be seen.

See 7/13/2004 RP at 73-74 (emphasis added).

ER 1006 permits summaries only when “[t]he contents of voluminous writings ... cannot conveniently be examined in court.” Only when that foundation has been laid, can ER 1006 summaries be admitted as substantive evidence. *State v. Lord*, 117 Wn.2d 829, 856 n.5, 822 P.2d 177 (1991). The proponent of the summary must show that: (1) the original materials are voluminous and an in-court examination would be inconvenient, *see* ER 1006; *State v. Barnes*, 85 Wn. App. 638, 662, 932 P.2d 669 (1997); (2) the originals are authentic and the summary accurate, 5C Karl B. Tegland, Wash. Prac.: Evid. Law and Prac. § 1006.3, at 271 (4th Ed. 1999); (3) the underlying materials would be admissible as evidence, 5C Tegland D., *supra* § 1006.3, at 273 (citing *State v. Kane*, 23 Wn. App. 107, 594 P.2d 1357 (1979); *Pollock v. Pollock*, 7 Wn. App. 394, 499 P.2d 231 (1972)); and (4) the originals or duplicates have been made available for examination and copying by the other parties. *See* ER 1006; *Barnes*, 85 Wn. App. at 662-63.

New Horizon claims this case is like *Matsushita Elec. Corp. of America v. Salopek*, 57 Wn. App. 242, 787 P.2d 963, (1990), where the Court determined that although the above-described elements were not satisfied, a summary was properly admitted as demonstrative evidence. *See* Response Brief at 10-11. For the reasons described above, however, Exhibit 59 was not merely demonstrative or illustrative. Again, New Horizon's allegation that it lost \$1,356,000.00 in lost membership profits can be found nowhere else in the record, and the Trial Court relied on that number in calculating the lost membership profits claim. This case

is therefore unlike *Matsushita*. Here, New Horizon failed to make any showing that the original church attendance and tithing records were voluminous or that an in-court examination of those original materials would be inconvenient. Indeed, it is clear that New Horizon cannot make this showing given that the original materials were, in fact, admitted at trial. *See, e.g.*, Trial Exhibit No. 51 (attendance records). Likewise, New Horizon failed to make any showing that the summary was accurate.

(3) The growth rate of 20 percent per year for average weekly church attendance, used in Trial Exhibit 59, has no support in actual church attendance data or anywhere else in the record.

New Horizon claimed its average weekly church attendance would have grown at a rate of 20 percent per year, but for AHR's survey. *See* Trial Exhibit 59. In its Response Brief, New Horizon acknowledges that the 20 percent growth rate used in Exhibit 59, which was admitted into evidence in July 2004, "may have been speculative in 2004[.]" *See* Response Brief at 17. It argues, however, that the growth rate is now justified by additional attendance data from 2005 and 2006. *See Id.* at 14-15, 17. The Court should reject this argument. Even if the new data is used, the weekly attendance growth rate has still varied wildly over the years and has reached 20 percent **only 2 times** in 12 years:

- 1994: 13.81%
- 1995: 10.09%
- 1996: 15.28%
- 1997: -9.76%
- 1998: -12.50%
- 1999: -16.43%
- 2000: -11.73%
- 2001: 11.73%

- 2002: 6.39%
- 2003: 21.00%
- 2004: 25.91%
- 2005: 19.4%

See Trial Exhibit No. 51 *and* Response Brief at 14-15. Additionally, it is clear the July 1999 survey had nothing to do with any drop in weekly attendance growth, given that it had already been dropping for **several years before** the survey was filed in July 1999, and given that the rate of decrease actually **slowed** from 1999 to 2000, after the survey was filed. *See* Trial Exhibit No. 51.

In short, the growth rate of 20 percent used in Trial Exhibit 59 has no support in actual church attendance data or anywhere else in the record. As such, Finding Nos. 25, 27, and 28 are unsupported by the record, and accordingly, this Court should reverse the Trial Court's award of lost membership profits damages.

(4) Trial Exhibit 59 erroneously contains two different sets of projected attendance numbers, but relies on the larger numbers to predict lost membership profits.

New Horizon has failed to address AHR's argument that Trial Exhibit 59 contains important arithmetic errors. Instead, New Horizon implies that AHR has objected to rounding discrepancies between Exhibits 51 and 59. *See* Response Brief at 21. AHR, however, made no such argument in its opening brief.

Rather, AHR argued that on page 2 of Exhibit 59, there are two different sets of projected weekly attendance numbers. *See generally* Opening Brief at 19. New Horizon used the larger set of estimates in

calculating its alleged damages for lost membership profits. Thus, in attempting to estimate the number of allegedly lost members, New Horizon has either incorrectly shifted the numbers or has applied a growth rate multiplier twice. Either way, Trial Exhibit 59 erroneously contains two different sets of projected attendance numbers. As such, Finding Nos. 25, 27, and 28 are unsupported by the record, and accordingly, this Court should reverse the Trial Court's award of lost membership profits damages.

(5) The annual tithing rate of \$2000 per member, used in Trial Exhibit 59, has no support in actual church tithing data, or anywhere else in the record.

New Horizon claims the figures regarding tithing rate in AHR's opening brief are "inaccurate." *See* Response Brief at 22. Specifically, New Horizon claims that in 1999, the actual tithing rate was "\$2,022.90" per member, rather than \$1516. *See* Opening Brief at 20-21; Trial Exhibit 120 (Sub Exhibits 14 & 16); *and* Response Brief at 22. New Horizon, however, is incorrect. The figures in AHR's opening brief were **general fund** tithing rates. *See* Opening Brief at 20 ("general fund tithing has **never once** reached \$2000 per member"); *see also* Trial Exhibit 120 (Sub Exhibits 14 & 16).

New Horizon's entire claim is based on the following assumptions: (1) there are church members who regularly tithe a certain amount of money or a certain percentage of their income to the church; (2) numerous members became "discouraged" after the survey was filed and left the church; and (3) those members who left tithed regularly. Thus the key measure of the lost membership profits claim is regular

tithing revenue to the general fund. New Horizon attempts to pad the regular annual tithing amount per member by including both general fund revenues and building construction fund drive donations. *Compare* Response Brief at 22 *with* Trial Exhibit 120 (Sub Exhibits 14 & 16). Those contributions, however were not part of any regular tithing, but were instead part of various coordinated building construction fund drives initiated by the church over the years. *See generally* Trial Exhibit 120 (Sub Exhibits 14 & 16); *see also* 2/13/06 RP at 43-44 *and* 7/13/04 RP at 61-62. Moreover, even if the building fund drive donations are included, New Horizon has reached \$2000 per member in only 3 out of the 13 years of New Horizon's existence. *See* Trial Exhibit 120 (Sub Exhibits 14 & 16).¹ Additionally, according to the trial testimony of New Horizon's own church finance expert, Bryan Mangum, the typical tithing rate for a church in Pierce County is only "slightly higher 1,000 per person." *See* 7/14/2004 RP at 68. A rate of \$2000 per person is more in line with Bellevue. *Id.*

In short, the annual tithing rate of \$2000 per member used in Trial Exhibit 59 has no support in actual church tithing data, or anywhere else in the record. As such, Finding Nos. 25, 27, and 28 are unsupported by the record, and accordingly, this Court should reverse the Trial Court's award of lost membership profits damages.

(6) The lost membership profits analysis used in Trial Exhibit 59 fails to take any expenses into account.

New Horizon cites *Farm Crop Energy, Inc. v. Old Nat. Bank of*

¹ In the section of AHR's Opening Brief regarding this issue, where AHR cited to Trial Exhibit 120 (Sub Exhibit 12A), AHR meant to cite Trial Exhibit 120 (Sub Exhibits 14 & 16).

Washington, 109 Wn.2d 923, 750 P.2d 231 (1988), *Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc.*, 388 F. Supp. 1362 (D. Miss. 1975), and the Restatement (First) of Contracts § 329 (1932) for the proposition that it was not required to take expenses into account in its lost membership profits claim. See Response Brief at 19. As New Horizon acknowledges, however, these cases stand for the rather unremarkable proposition that “fixed expenses which are not affected by a breach of contract should not be deducted in calculating the lost income attributable to the breach.” See *Id.* Here, there is no breach of contract, and New Horizon’s own data shows that, unsurprisingly, **church expenses increase as membership increases**. In fact, New Horizon’s data shows that from 1995-2002, for every year except 1997, church expenses have actually been **greater** than general fund revenue. See Trial Exhibit No. 120 (Mueller & Partin Sub Ex. 12A). On this basis alone, this Court should reverse the Trial Court’s award of lost profits.

b. New Horizon’s claim for lost membership profits is speculative.

The amount of lost profits must be established with reasonable certainty, and the evidence in support of such a claim must afford a reasonable basis for estimating the loss. *Tiegs v. Watts*, 135 Wn.2d 1, 17-18, 954 P.2d 877 (1998); *Lundgren v. Whitney’s, Inc.*, 94 Wn.2d 91, 97-98, 614 P.2d 1272 (1980); *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677, *modified*, 396 P.2d 879 (1964); *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 418, 58 P.3d 292 (2002). Lost profits cannot be recovered where they are speculative, uncertain, conjectural, or remote. *Tiegs*, 135 Wn.2d at 17-18; *Larsen*, 65 Wn.2d at 16; *Harper & Assocs. v. Printers, Inc.*, 46 Wn. App. 417, 425, 730 P.2d 733 (1986);

O'Brien v. Larson, 11 Wn. App. 52, 54, 521 P.2d 228 (1974).

New Horizon has failed to address AHR's argument on this issue. Again, it is undisputed that New Horizon's claim for lost membership profits is speculative. In fact, the Trial Court actually entered a finding of fact so stating:

Plaintiff has alleged \$1,356,000.00 in damages for loss of membership income. Plaintiff's amount is based on three factors: (1) actual church attendance; (2) an estimated church attendance growth rate that allegedly would have occurred, but for the survey; and (3) an estimated \$2,000.00 per member annual contribution. **The Court finds plaintiff's loss of membership income claims to be somewhat speculative.**

See CP 33 (Finding No. 26) (emphasis added). New Horizon's lost membership profits claim is speculative, and Findings Nos. 25, 27, and 28 are therefore unsupported by the record. Accordingly, this Court should reverse the Trial Court's award of lost membership profits damages.

c. New Horizon's claim for lost membership profits was not established using the best evidence available to it.

New Horizon claims AHR failed to preserve for appeal its argument regarding the nature of evidence New Horizon was required to use in proving its lost membership profits claim. *See* Response Brief at 11-12. The Court should reject this argument. AHR's argument is based on well-established case law which sets forth the nature of evidence required in a lost profits claim. *See generally* Opening Brief at 24-25. This line of cases holds that, in addition to the requirement that lost profits cannot be speculative, the proponent of a lost profits claim must

produce “the best evidence available” to establish the lost profits. *Lundgren*, 94 Wn.2d at 98; *No Ka Oi Corp. v. Nat’l 60 Minute Tune*, 71 Wn. App. 844, 853, 863 P.2d 79 (1993); *Reefer Queen Co. v. Marine Construction and Design Co.*, 73 Wn.2d 774, 781-82, 440 P.2d 448 (1968); *Eagle Group*, 114 Wn. App. at 418; *Harper*, 46 Wn. App. at 425. The usual method for proving lost profits is to establish profit history. *Tiegs*, 135 Wn.2d at 17-18; *No Ka Oi*, 71 Wn. App. at 853; *Farm Crop Energy, Inc. v. Old Nat’l Bank*, 109 Wn.2d 923, 927, 750 P.2d 231 (1988); *Eagle Group*, 114 Wn. App. at 418; *Harper*, 46 Wn. App. at 425. Thus, AHR’s argument is not a typical “best evidence” objection. Rather, it is based on clear case law outlining requirements that must be followed for a plaintiff to prove a lost profits claim. Moreover, AHR did preserve the issue for appellate review. As is described in detail above, counsel objected to the use of Exhibit 59 as a method of proving the church’s financial history and to Pastor Wolfe’s ability to establish the lost profits claim. *See* 7/13/2004 RP at 73-74.

Again, New Horizon failed to produce the best evidence available to establish its lost membership profits claim. Instead of using its actual profit history, counsel generated Exhibit No. 59, which relies on a hypothetical and unfounded rate of membership growth, a baseless rate of tithing, and completely omits expenses in its calculations. Additionally, New Horizon failed to produce the best evidence of its claim that tithing members became discouraged and left after the survey was filed in July 1999. It is undisputed that at trial, New Horizon failed to call, or even identify, a single church member who left after allegedly hearing about AHR’s survey and becoming discouraged. Instead, New Horizon selectively characterized the weekly attendance data as showing

a drop after the survey was filed in July 1999, ignored that attendance had already been on a downward trend for two years prior to the survey, and simply blamed any drop on the survey. This is not “the best evidence available” to establish New Horizon’s claim for lost membership profits, *Lundgren*, 94 Wn.2d at 98, and Finding Nos. 25, 27, and 28 are therefore unsupported by the record. Accordingly, this Court should reverse the Trial Court’s award of lost membership profits damages.

2. The Trial Court erred in concluding AHR caused a delay in construction of the church.

In calculating the award of damages for New Horizon’s lost membership profits claim, the Trial Court found that AHR caused a delay in construction of 17 months, from the date the original survey was filed in July 1999 to December 2000, when the corrected survey was filed. *See* CP 32-33 (Finding Nos. 4, 6, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28). To the extent these findings imply AHR’s survey was the “but for” cause of any delay in construction, they are not supported by substantial evidence, and Conclusions of Law Nos. 1, 2, 3, and 5 are not supported by the findings.

a. New Horizon was never forced to stop construction of the church, and in fact, continued to move forward with the project after the survey was filed in July 1999.

New Horizon claims it “was forced to stop construction for more than 17 months.” *See* Response Brief at 22. This is simply not true. New Horizon ignores that church permits and construction continued to move forward after the survey was filed in July 1999. *See* Opening Brief

at 31-32. New Horizon also continues to claim construction was “stopped” even though Pastor Wolfe signed a **\$140,618 contract for the steel** required to build the church on February 2, 2000. *See* Trial Exhibit No. 113. Likewise, New Horizon ignores the fact that Pastor Wolfe himself wrote a letter to church members telling them that the permitting process and construction preparation would continue to move forward:

We received our first review on our Civil permit plans just recently on November 22nd [1999]. (Civil plans include the engineering for sewer, storm, water [r]etention, streets, parking lots, fire water and all utilities.) I’ve applied lots of pressure and prayer to this whole issue and yet it has continued to take much time. Once these plans are corrected they will be resubmitted for approval. This approval could take another 4 weeks. **During this time we are planning on ordering the building and preparing to submit permit applications for the mechanical permit, electrical permit, plumbing permit, building permit, landscape design, sing permit, etc.** It is also during this manufacturing period that we will offer a bond issue for the money needed to construct the building. You can see that during the 12-week period while the building is being manufactured, we will have much to do. Our goal is to start construction by April 1st, by the tender mercies of our God.

See Trial Exhibit 69 (emphasis added); *see also* 7/13/2004 RP at 25.

Most importantly, New Horizon ignores the testimony of City of Fife Public Works Director Ron Garrow. New Horizon flatly states, “[i]n fact, the city did stop construction and would not issue the building permits.” *See* Response Brief at 23. This statement is patently false, and the evidence actually shows the opposite is true. New Horizon cites Exhibits 17 & 18 in support of their proposition. Neither of those letters, however, make any mention whatsoever of the City stopping

construction. New Horizon also cites 7/14/04 RP at 32. Again, nowhere on that page is there any mention of the City stopping construction. In fact, the opposite is true. When asked what he did when altered of the potential boundary line issue, Mr. Garrow testified, “I took no action[.]” See 7/14/04 RP at 32. Moreover, New Horizon fails to point the Court to Mr. Garrow’s clear refutation of the central premise of their case, *i.e.*, Garrow testified that the City never “red-flagged” or “red-tagged” the potential church construction, and that the City never issued any stop work order:

Q: As you sit here today, do you have a recollection of ever denying the City of – ever denying New Horizon Christian Center a permit because of the boundary line dispute, solely because of the boundary line dispute?

A: I don’t recall.

Q: As you sit here today, do you ever recall ever telling New Horizon Christian Center to stop work on the preload, the work that was done pursuant to the preload permit?

A: I’m not aware of any stop on the preload work, other than if it had to deal with some erosion control measures.

Q: Other than the possible some erosion control, you don’t recall any stop work orders?

A: I don’t recall.

Q: And you didn’t issue any red tags or red flags of any construction work that was ongoing by New Horizon?

A: No.

See 2/13/2006 RP at 121-22.

Contrary to New Horizon's characterization of AHR's argument, nowhere in the briefing did AHR argue that Rick Witte's testimony was credible and should be adopted. In fact, the name Rick Witte is not mentioned once in AHR's opening brief. Likewise, the Court should reject New Horizon's argument regarding Adrian Lugo's testimony. Mr. Lugo's opinion of whether the City halted construction is irrelevant. He was not substantively involved in the process past the Spring of 1999, when the soil pre-load was complete, he does not work at the City of Fife, and he certainly does not know more about the survey than Ron Garrow, the Public Works Director who would have ordered construction to stop if it had been warranted. Mr. Lugo's fundamental lack of personal knowledge and understanding of anything other than the preload soil is further revealed, given that he believes he personally could have obtained all permits and completed construction of the 15,000 square foot church in fourth months. Unfortunately for Mr. Lugo, his timeline is literally an impossibility given that it is undisputed the preload soil was not approved by the geotechnical engineer to be removed until May 2000.

In short, all of the evidence at trial shows AHR's survey never forced New Horizon to stop construction of the church, and in fact, New Horizon continued to move forward with the project after the survey was filed in July 1999. As such, AHR's survey was not the "but for" cause of any delay in construction, *see Newton*, 114 Wn. App. at 157-58; *Blume*, 134 Wn.2d at 251-52; Finding Nos. 6, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28 are unsupported by the record; and Conclusions of Law 1, 2,

3, and 5 are not supported by the Court's findings. Accordingly, this Court should reverse the Trial Court.

b. New Horizon did not “lose” its financing after the survey was filed.

New Horizon cites the testimony of Bryan Mangum in support of its argument that it “lost” its financing. *See generally* Response Brief at 28. It ignores, however, Mr. Mangum's testimony, indicating that the company **never** finalized the bonding for New Horizon, and **had not** completed its due diligence. *See* Opening Brief at 30-31. Instead, New Horizon cites Mr. Mangum's testimony indicating that he believed New Horizon's growth trend was “pretty amazing.” *See* Response Brief at 28. This testimony, however, only serves to strengthen AHR's argument that any preliminary approval was based on falsified data, given that in reality, New Horizon did not have “amazing” growth from 1995-1998, or any growth at all, for that matter. In fact, New Horizon's attendance actually **declined** during that period. *See* Exhibit 51.

New Horizon calls Exhibit 118 its “prospectus” and suggests that the bond was “well in place before the prospectus was printed.” *See* Response Brief at 29. Exhibit 118, however, is not a printed prospectus to be used for distribution to potential investors. Rather, Exhibit 118 is a form to be filled out by the church for the use of Security Church Finance in preparing a prospectus. *See generally* Exhibit 118. For that reason, Exhibit 118 contains a “certification” that the information in the form is “truthful and accurate. *Id.* at 1. Additionally, this information for was filled out in May 1999, long before any preliminary bond program was approved or before any bonds were to be issued. *Id.*

- c. **Even if this Court affirms the Trial Court's finding that AHR caused a construction delay, the Trial Court erred in concluding the "delay period" was 17 months.**

Even if this Court affirms that AHR caused a delay in construction, the delay period of 17 months is not supported by substantial evidence. This is because New Horizon did not receive approval from its geotechnical engineer to remove the "preload" soil (used to ensure the site is fully settled before a foundation is poured) until May 2000, and as such, the July 1999 survey could not have caused any delay in construction for at least 10 months. *See* Trial Exhibit 60. New Horizon does not even attempt to address this argument in its Response Brief, and it actually admits that its damages are speculative, stating they "could technically go on forever." *See* Response Brief at 34.

3. **The trial court's findings and conclusion fail to address the improper means element of New Horizon's tortious interference claim.**

In the previous appeal in this case, the Court reversed summary judgment dismissal of the tortious interference claim in part because the Court found New Horizon presented evidence that AHR interfered using improper means. *See New Horizon Christian Ctr. v. Ensley*, Cause No. 31905-5-II (Sept. 13, 2005, Div. II), p. 9-10 (question of fact as to whether Ensley failed to return Oaks phone calls in violation of WAC 196-27A-030(6)).

As to this element, New Horizon claims that Mr. Ensley "repeatedly ignored all of Pastor Wolfe's and Oaks' requests to meet." *See* Response Brief at 39; *see also Id.* at 40 ("refusing to cooperate with Oaks"). Once again, New Horizon's description of the facts does not

comport with the testimony and evidence presented at trial. First, Mr. Ensley was never under any regulatory obligation to meet with Pastor Wolf, and New Horizon has cited no such regulation.² Second, and more importantly, New Horizon's description of events regarding surveyor Dale Oaks is simply false and is not supported by any testimony or other evidence. New Horizon cites 7/12/04 RP at 90-95 in support of its very bold pronouncements of Mr. Ensley's poor behavior, but nowhere in those six pages is there any evidence that Mr. Ensley "repeatedly ignored all" requests to meet, or even that Mr. Ensley ignored a single request to meet. Additionally, New Horizon cites 7/14/04 at 192 in support of its proposition that Mr. Ensley refused to cooperate with Mr. Oaks. But this statement does not appear anywhere on the page. Likewise, 7/15/04 RP at 8, 60-62 makes no mention of Mr. Ensley refusing to cooperate with Mr. Oaks.

In short, New Horizon's central argument regarding the improper means element, that Mr. Ensley violated a WAC by refusing to cooperate with another surveyor, Mr. Dale Oaks, has no support in the record. Thus to the extent Findings Nos. 6, 8, and 9 imply that AHR interfered for an improper purpose or by improper means, those Findings are not supported. Additionally, to the extent Conclusions of Law 1, 2, 3, and 5 hold that AHR interfered for an improper purpose or by improper means, those Conclusions are not supported by the findings. As such, this Court

² New Horizon claims Pastor Wolfe sent several letters which stated, "AHR was harming New Horizon by stopping the construction project." See Response Brief at 39. New Horizon is mischaracterizing the facts to the Court. New Horizon cites Exhibits 13 & 14, which are two letters. Only one of those letters is even addressed to AHR, however, and it makes no mention whatsoever about stopping construction (likely because construction was never stopped). See Exhibits 13 & 14. Moreover, there is no WAC that requires surveyors to talk with or respond to non-surveyors.

should reverse the Trial Court.

4. The trial court erred in failing to grant defendants' motion for summary judgment dismissal of plaintiff's surveyor malpractice claim.

AHR argued that the Trial Court's December 5, 2003 ruling denying summary judgment dismissal of New Horizon's surveyor "professional negligence" claim was in error, given that it was a neighbor, rather than New Horizon, who hired AHR. *See* Opening Brief at 41-43. Although there has been a trial in this case on New Horizon's tortious interference claim, the erroneous summary judgment ruling described above is nevertheless important because at the time the Trial Court denied the motion, it was New Horizon's only cause of action. New Horizon did not amend its Complaint to add tortious interference until after the Trial Court denied summary judgment. *See* Opening Brief at 41-43.

New Horizon does not respond to this argument. Instead, New Horizon now attempts to characterize its professional negligence claim as one for negligent misrepresentation. *See* Response Brief at 42-50. Negligent misrepresentation, however, is not the same as professional negligence; rather, it is a wholly different tort. In fact, negligent misrepresentation has entirely different elements, and requires proof of: (1) false statements; (2) made to induce a sale; (3) which are relied upon by the person asserting damages; (4) which that person justifiably may rely upon; and (5) resulting damages. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); *J&J Food Centers, Inc. v. Selig*, 76 Wn.2d 304, 310-11, 456 P.2d 691 (1969); *Hoel v. Rose*, 125 Wn. App. 14, 20, 22, 105 P.3d 395 (2004). Additionally, proof of

negligent misrepresentation must be by clear, cogent and convincing evidence. *Hoel*, 125 Wn. App. at 20. *See* CP 54-56.

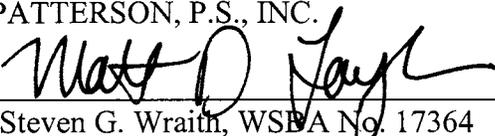
More importantly, New Horizon has **never** alleged negligent misrepresentation as a cause of action at any time during this litigation. Negligent misrepresentation was not pled in the first Complaint, nor was it pled in the Amended Complaint. *See* CP 217-22. Additionally, negligent misrepresentation was not argued in any fashion during trial. New Horizon offered no evidence to support negligent misrepresentation, and did not prove by clear and convincing evidence each element of that tort. Finally, the Trial Court made no findings or conclusions as to misrepresentation. New Horizon's argument on this issue is without merit, and the Court should reverse the Trial Court's denial of summary judgment.

B. CONCLUSION

In sum, the amount of damages awarded to New Horizon for its lost membership profits claim is not supported by the Trial Court's Findings of Fact and Conclusions of Law. Additionally, the Trial Court erred in concluding AHR caused a delay in construction of the church. Finally, the Trial Court's Findings and Conclusion failed to address the improper means element of New Horizon's tortious interference claim.

RESPECTFULLY SUBMITTED this 21st day of November, 2006.

LEE, SMART, COOK, MARTIN &
PATTERSON, P.S., INC.

By: 

Steven G. Wraith, WSBA No. 17364
Matthew D. Taylor, WSBA No. 31938
Attorneys for Appellants.

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2006, I caused to be served

a true and correct copy of:

APPELLANTS ENSLEY AND AHR'S REPLY BRIEF

on the parties listed below via:

Mr. Lawrence E. Nelson
Ms. Mary Gail Carver
Nelson & Carver, PS
P.O. Box 217
Puyallup, WA 98371

Via:

[] U.S. Mail
[] Facsimile
[XX] Legal Messenger

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

Dated at Seattle, Washington this 27th day of November, 2006.



Jennifer A. Riley, Legal Assistant