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NO. 34548-0-II

STATE OF WASHINGTON

BY CM

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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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.

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APPELLANTS ENSLEY AND AHR'S AMENDED OPENING BRIEF

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**A. ASSIGNMENTS OF ERROR**

**1. Assignments of error.**

Appellants/defendants Billy J. Ensley, “Jane Doe” Ensley, and Adams-Hodson & Robinson, Inc., P.S. d/b/a A.H.R. Engineers, Inc. (hereinafter “AHR”) assign error to:

- the trial court’s findings of fact no. 4, 6, 8, 9, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28;
- the trial court’s conclusions of law no. 1, 2, 3, and 5;
- the trial court’s admission of trial exhibit no. 59;
- the judgment entered in this case on March 6, 2006;
- the trial court’s failure to grant defendants’ first motion for summary judgment.

**2. Issues pertaining to assignments of error.**

Whether the trial court erred in admitting trial exhibit 59, where Respondent/Plaintiff New Horizon Christian Center (hereinafter “New Horizon”) failed to lay a proper foundation for the exhibit and where it is an inaccurate and improper summary;

Whether the trial court’s findings regarding New Horizon’s “lost membership profits” claim are supported by the record;

Whether the trial court’s findings regarding the alleged delay in church construction are supported by the record;

Whether the trial court's findings regarding the improper purpose element of tortious interference are supported by the record;

Whether the trial court's findings of fact are supported by substantial evidence;

Whether the trial court's conclusions of law are supported by its findings of fact;

Whether the trial court erred in entering the judgment in this case, where the judgment was based on the above described findings and conclusions; and

Whether the trial court erred in failing to grant defendants' motion for summary judgment dismissal of the surveyor malpractice claim, when it was undisputed that defendants were hired by a neighbor, not by plaintiff.

## **B. STATEMENT OF THE CASE**

### **1. Background.**

New Horizon owns real property in Fife, which was purchased to build a church. CP 30 (finding no. 1). Ms. Jane Longey owns real property adjacent to New Horizon's property. CP 30 (finding no. 2). Ms. Longey hired AHR to survey her property in May or June of 1999. *Id.* Mr. Ensley, the licensed surveyor at AHR, completed the survey and recorded it in July, 1999. *Id.* Mr. Ensley later recorded an amended

survey in December, 2000. CP 31 (finding no. 14).

**a. Status of construction at time survey initially recorded.**

New Horizon contracted with Lugo Construction to perform site preparation (i.e., “preload” soil work) in 1998 or early 1999. CP 30 (finding no. 3). Under that contract, Lugo was to load soil onto the area where the church foundation would eventually be constructed. *See* trial ex. 3; 7/14/2004 RP at 112-17. The purpose of the preload contract was to compact the pre-existing soil and prevent settling after the church foundation was constructed. *See* 7/14/2004 RP at 112-17. Lugo completed work on the preload contract by June 24, 1999, before AHR and Ensley recorded the survey in July 1999. *See* trial exhibit 84. After the preload was completed, New Horizon hired a geotechnical firm to monitor soil settlement. *See* trial exhibit 60. New Horizon could not begin construction of the church until the soil had stopped settling, and the soil did not stop settling until just before May 2000. *Id.*

Construction of the church could not begin until the City of Fife issued a Building Permit. *See generally* trial exhibit 109. Before the City of Fife would issue the Building Permit, however, all thirteen conditions specified in New Horizon’s 1998 Conditional Use Permit had to be satisfied. *Id.* Those conditions included recording a lot line adjustment;

submitting a lighting plan; submitting a landscaping, irrigation, and drainage plan; and submitting a traffic study. *Id.* Other than the conditional use permit and the preload grading permit, New Horizon had applied for **no** permits when AHR recorded their survey in July 1999. *See* trial exhibit no. 199.

**b. Actions taken by New Horizon after initial survey recorded.**

The survey did not keep New Horizon from complying with the requirements of the conditional use permit or from applying for other permits. In fact, New Horizons took numerous steps to comply with the conditional use permit and sought multiple additional permits after July 1999:

- 9/13/1999: New Horizon submits Water Service Improvement application to City of Fife. *See* trial ex. 65.
- 9/13/1999: New Horizon submits Sewer Service Permit application to City of Fife. *See* trial ex. 66.
- 9/13/1999: New Horizon submits Right of Way Service Permit application to City of Fife. *See* trial ex. 67.
- 9/28/1999: Pastor Wolfe signs required City of Fife lot line adjustment application. *See* trial ex. 26.
- 10/13/1999: New Horizon submits Grading, Paving, and Storm Drainage Permit Application to City of Fife. *See* trial ex. 111.
- Before 11/99: New Horizon submits Civil Permit Plans to City of Fife. *See* trial ex. 69.
- 6/2000: New Horizon submits Road and Storm Drainage Plan to City of Fife. *See* trial ex. 119.
- 8/2000: Pastor Wolfe visits Fife Director of Public Works to make sure church plans are being reviewed. *See* trial ex. 115.

- 10/2000: New Horizon submits Traffic Study Addendum to City of Fife. *See* trial ex. 73.
- 10/2000: New Horizon submits request for deferment of road upgrades to City of Fife. *See* trial ex. 74.

**c. Response by City of Fife to boundary line dispute.**

Additionally, the July 1999 survey did not result in the denial of any church permit, the City of Fife never “red-flagged” or “red-tagged” New Horizon’s church construction, and the City never issued any stop work order. *See* 2/13/2006 RP at 121-22.

As Ensley was preparing his survey for Ms. Longey in June 1999, New Horizon asked surveyor Dale Oaks to call Mr. Ensley. Mr. Ensley and Mr. Oaks exchanged several telephone calls and messages in June 1999. *See* 2/13/2006 RP at 161-62. Mr. Oaks and Mr. Ensley discussed the survey and exchanged information. *See id.*; *see also id.* at 164-65. When Mr. Oaks asked to see the survey, Mr. Ensley indicated that it was not complete, but that Mr. Oaks could see his data. *Id.*; *see also id.* at 166. Mr. Ensley shared whatever data, calculations, and documents Mr. Oaks asked to see. *Id.* at 165. At no time did Mr. Ensley refuse to speak with Mr. Oaks or share his data, calculations, or methodology. *Id.* At no time did Mr. Oaks ask Mr. Ensley to hold off recording the survey. *Id.*

Mr. Ensley heard nothing further about Mr. Oaks’ opinions until AHR received a letter from New Horizon pastor Dwain Wolfe at the end

of September 2000. Immediately after receiving the letter, AHR arranged a meeting between Mr. Ensley, Mr. Oaks, and Mr. Kenneth Van Cleave, a surveyor who drafted and recorded the short plat of the New Horizon property in 1981. *See* 2/13/2006 RP at 167-68. Mr. Oaks, Mr. Ensley, and Mr. Van Cleave met on October 7, 2000. *See* 7/14/2004 RP at 150-51. At that meeting, Mr. Ensley again shared his data, methods, and calculations with Mr. Oaks. *See* 2/13/2006 RP at 168; 7/14/2004 RP at 152.

Likewise, Mr. Oaks shared data he had recently generated (overlay drawings) that depicted the fence between the Longey property and New Horizon property in a different place than Mr. Ensley depicted on his survey. *See* 7/14/2004 RP at 151. Two days after the meeting, on October 9, 2000, Mr. Ensley called Mr. Oaks and told him he was going to draft and record an amended survey. *See* 7/14/2004 RP at 154; 2/13/2006 RP at 168. The amended survey was completed and recorded on December 7, 2000. *See* 7/14/2004 RP at 156-57.

New Horizon continued with its plan to build a church, and although it did not use Lugo Construction, church construction finished some time in 2004.

## **2. New Horizon files suit.**

Before construction was complete, New Horizon sued AHR,

initially alleging that they committed “negligence in their professional duties” and claiming damages arising from increased construction costs due to a delay. *See New Horizon Christian Ctr. v. Ensley*, Cause No. 31905-5-II (Sept. 13, 2005, Div. II). In December 2003, the court denied AHR’s first motion for summary judgment of the surveyor “professional negligence” claim. *Id.* Shortly thereafter New Horizon filed an amended complaint alleging an additional cause of action against AHR for tortious interference with a business expectancy. *Id.*

**3. Summary judgment of dismissal of tortious interference claim.**

AHR/Ensley filed a second motion for summary judgment, seeking dismissal of the tortious interference with a business expectancy claim. *Id.*<sup>1</sup> The motion was heard by Judge Culpepper, the assigned trial judge. Judge Culpepper granted the motion on June 18, 2004 on both issues. *See generally id.* New Horizon sought reconsideration of the dismissal. *Id.* The court denied the motion and upheld its prior ruling. *Id.* Thus, the sole remaining claim for trial was New Horizon’s “professional negligence” claim.

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<sup>1</sup> The motion also sought dismissal of New Horizon’s “volunteer labor” damages theory, wherein New Horizon was seeking to recover money for wages paid to the laborers who build the church, even though the church was constructed using unpaid volunteer labor.

#### 4. 2004 trial.

Trial commenced on July 12, 2004 before Judge Stone, pro tem.<sup>2</sup> In the middle of trial, Judge Stone announced that he intended to “look behind” the prior ruling dismissing the tortious interference claim. *See* 7/14/04 RP at 97-102. The trial court “reinstated” the previously dismissed tortious interference claim. *Id.* On July 15, at the close of plaintiff New Horizon’s case, AHR moved for a directed verdict as to both the reinstated tortious interference and professional malpractice. The court granted AHR’s motion as to the “professional negligence” claim, but denied the motion as to the reinstated “tortious interference” claim. *See* 7/15/04 RP at 101-21.

The next morning, on July 16, Judge Stone refused to consider AHR’s request for a continuance. *See* 7/16/04 RP at 4-11. AHR sought the continuance because it had prepared for trial expecting the trial to be about professional malpractice, not tortious interference, which was dismissed before trial. *Id.*

#### 5. First appeal.

AHR then filed an emergency motion for discretionary review and stay of trial court proceedings with this Court. *See New Horizon Christian Ctr. v. Ensley*, Cause No. 31905-5-II (Sept. 13, 2005, Div. II). A

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<sup>2</sup> The Parties stipulated to be part of Pierce County Superior Court’s pro tem program.

Commissioner of this Court stayed the proceedings below and granted review of Judge Stone's order. *Id.* For judicial economy, the Commissioner also granted review of Judge Culpepper's order granting AHR's motion for summary judgment. *Id.* This Court reversed summary judgment on the tortious interference, and remanded for continuation of the trial. *Id.*

**6. 2006 trial.**

Trial resumed in February 2006. The trial court found liability on the tortious interference claim, and awarded New Horizon \$419,900. *See* CP 33 (finding no. 28). The bulk of that award was \$377,778 for New Horizon's "lost church membership profits" claim. AHR and Mr. Ensley appeal.

**C. SUMMARY OF ARGUMENT**

First, 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. Second, the trial court erred in concluding AHR caused a delay in construction of the church. Third, the trial court failed to make a finding supporting the improper means element of New Horizon's tortious interference claim.

## **D. ARGUMENT**

### **1. Standard of review.**

#### **a. Findings of fact and conclusions of law.**

Where, as is the case here, “the trial court has weighed the evidence, the scope of review on appeal is limited to ascertaining whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and judgment.” *Jones v. Best*, 134 Wn.2d 232, 239-240, 950 P.2d 1 (1998). “A mere scintilla of evidence,” however, will not support the trial court’s findings; it requires “believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed.” *Hewitt v. Spokane, Portland & Seattle Railway Company*, 66 Wn.2d 285, 286, 402 P.2d 334 (1965).

#### **b. Elements of tortious interference.**

To prove tortious interference with a business expectancy, a plaintiff 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 v. Caledonian*, 114 Wn. App. 151, 157-58,

160, 52 P.3d 30 (2002). Here, AHR is challenging the sufficiency of the findings and conclusions which support the damages, causation, and improper purpose elements.

**2. 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.**

At trial, New Horizon claimed AHR's failure to timely correct a survey caused a delay in construction, which in turn allegedly caused a loss of church membership and a commensurate loss in church tithing profits. *See* CP 33 (finding no. 25). The trial court found liability and awarded damages for lost membership profits. *See* CP 34 (conclusion no. 5). Conclusion of law no. 5 reads: "Defendants interference resulted in damage to the plaintiff as stated in finding of fact number 19." CP 34. Finding of fact no. 19, however, says nothing whatsoever about damages. *See* CP 32. Instead, it is finding of fact no. 28 that specifies the amount of damages awarded by the trial court. CP 33. Additionally, findings no. 25, 26, and 27 address the method used by the trial court in calculating the lost membership profits award. CP 33.

For the reasons described herein, findings of fact no. 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 only evidence admitted at trial which specifies an amount for New Horizon's lost membership profits claim, and which supports findings no. 25, 27, and 28, is trial exhibit 59. Indeed, in calculating the lost membership profits award, the trial court took the membership, growth rate, and tithing contribution numbers from that exhibit and simply pro-rated them for 17 months. *Compare* trial exhibits 59 with CP 33 (findings no. 26, 27, 28). The trial court's admission of exhibit 59, however, was error for the reasons described below.

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

New Horizon failed to lay a proper foundation for entry of exhibit 59 into evidence. 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 proven or doesn't prove remains to be seen.

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

“Under ER 602, a witness must testify concerning facts within his

personal knowledge, that is, facts he has personally observed.” *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984) (citing 5 K. Tegland, Wash. Prac. § 218 (2d ed. 1982)). “The burden of laying a foundation that the witness had an adequate opportunity to observe the facts to which he testifies is upon the proponent of the testimony.” *Id.* Additionally, before a document can be admitted into evidence, it has to be identified as authentic. *See* ER 901. Here, Pastor Wolfe had no personal knowledge regarding exhibit 59, nor did he authenticate its contents. 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 (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:

MS. CARVER: All right. Your Honor, we move to admit Exhibit – is it 122?

MR. TAYLOR: Objection; foundation. We have no idea who made this, whether he made it; and I don’t think this is the proper witness to be introducing this.

...

THE COURT: I will allow further cross-examination before I rule on it.

...

BY MR. TAYLOR:

Q: Did you make this exhibit?

A: Actually, the Carver Law Firm prepared it; but I took a look at it. It supplies the actual numbers that were actually – the actual growth rates to those – oh, what do you call it? Let me go back here – to the actual attendance numbers; so had I prepared it, I would not have done it any other way. This is a valid calculation methodology.

MR. TAYLOR: Okay. I object to this being entered into evidence, substantive evidence – I know she's saying it's demonstrative; but she's moved to admit it – on grounds of foundation.

MS. CARVER: Well, Your Honor, he's testified that these – the total contributions are calculated from his audits and profit and loss statements. The attendance records are taken from – in fact, they're all the same numbers taken from the exhibit that was entered 18 months ago. It has just been updated to reflect actual figures that have been attained in the last 18 months.

THE COURT: I wonder how many exhibits I've admitted that have been prepared by Lee Smart or the Carver or Nelson Law Firm. The basic, thumbnail approach is something that's prepared by the law firm in preparation for litigation is not admissible. I will decline to admit 122 or whatever it was, but I did listen to the testimony, and I looked at the exhibit while he was testifying.

*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, and this Court should therefore 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. Regarding summaries of evidence, ER 1006 permits them 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.

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. In fact, trial exhibit 59 is replete with errors and misrepresentations of New Horizon's attendance and tithing figures. Those errors and misrepresentations are set forth in great detail in the following sections.

**(3) The growth rate of 20% 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.**

In estimating its alleged lost membership profits, New Horizon claimed its average weekly church attendance would have grown at a rate of 20% per year but for AHR's survey. *See* trial exhibit 59. New Horizon's claim, however, is not supported by the record. First, the

alleged percentage growth directly contradicts New Horizon's own attendance records, which show that from 1994-2004, the weekly attendance growth rate has varied wildly and reached 20% **only once**. *See* trial exhibit no. 51. Second, contrary to trial exhibit 59, which fails to use any attendance data before 1999, it is clear the July 1999 survey had nothing to do with any drop in weekly attendance growth. Indeed, attendance had already been dropping for **several years before** the survey was filed in July 1999, and the rate of decrease actually **slowed** from 1999 to 2000:

- 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: 14.26%

*See id.* Third, according to the trial testimony of Bryan Mangum, the church finance expert from whom New Horizon initially sought to obtain construction funding, a typical growth rate for a church the size of New Horizon would have been 7-8%. *See* 7/14/2004 RP at 70.

In short, the growth rate of 20% used in trial exhibit 59 has no support in actual church attendance data or anywhere else in the record.

As such, findings no. 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.**

Trial exhibit 59 also contains simple, but important arithmetic errors. Specifically, on page two, exhibit 59 contains two different sets of projected weekly attendance numbers. The first set reads as follows:

- 1999: 165
- 2000: 181
- 2001: 217
- 2002: 260
- 2003: 312
- 2004: 374

*See* trial exhibit no. 59. This first set of numbers is clearly a projected attendance of allegedly lost members, given that the numbers do not match the actual weekly attendance. *See, e.g.,* trial exhibit no. 51 *and* no. 59, page 1. Trial exhibit 59, however, also contains a second set of projected attendance numbers:

- 1999: 181
- 2000: 217
- 2001: 260
- 2002: 312
- 2003: 374
- 2004: 449

*See* trial exhibit no. 59. New Horizon uses this second, larger, set of estimates in calculating its alleged damages for lost membership profits. Thus, in attempting to estimate the number of allegedly lost members, counsel for New Horizon has either incorrectly shifted her 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, findings no. 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.**

Trial exhibit no. 59 also relies on a tithing rate of \$2000 per member. *See* trial exhibit 59. This tithing rate is not supported by the actual church record. First, in the 13 year existence of the church, the general fund tithing has **never once** reached \$2000 per member:

- 1993: \$585
- 1994: \$760
- 1995: \$898
- 1996: \$963
- 1997: \$1035
- 1998: \$1207
- 1999: \$1516
- 2000: \$1753
- 2001: \$1697

- 2002: \$1760
- 2003: \$1489
- 2004: \$1367
- 2005: \$1544

*See* trial exhibits no. 54-58 and 120 (Mueller & Partin sub ex. 12A). Even if building fund contributions are counted, New Horizon has reached \$2000 per member in only three out of the thirteen years of the New Horizon's existence. *Id.* Second, according to the trial testimony of church 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, findings no. 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.**

Trial exhibit no. 59 also completely omits expenses in its calculations. Our Supreme Court, however, has held that lost profits are normally calculated by "subtracting the estimated cost of running a

business from the estimated gross receipts.” *Dahl-Smyth v. City of Walla Walla*, 148 Wn.2d 835, 846 n.9, 64 P.3d 15 (2003) (citing 22 Am. Jur. 2d Damages § 642, at 704 (1988) and BLACK’S LAW DICTIONARY 1090 (5th ed. 1979) (defining profit as “excess of revenues over expenses for a transaction”)). The most recent version of American Jurisprudence states the rule as follows:

However, whether the action is in tort or contract, the expenses saved because of the wrongful act of the defendant **must** be subtracted from any recovery. Therefore, the plaintiff is entitled to his or her net profits, and **not to his or her expected gross profits**.

*See* 22 Am. Jur. 2d Damages § 458, at 408-09 (2003) (emphasis added).

On this basis alone, this Court must reverse the trial court’s award of lost profits.

Again, New Horizon’s claim is AHR’s failure to timely correct a survey caused a delay in construction, which in turn caused a loss of church membership and a commensurate loss in church tithing profits. *See* CP 33 (finding no. 25). It is not surprising, however that New Horizon failed to use its actual profit history in calculating its lost profits. This is because New Horizon’s own data shows that 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 exhibits no. 120

(Mueller & Partin sub ex. 12A).

**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).

Here, 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). In short, it is undisputed that New Horizon's lost membership profits claim is speculative, and findings no. 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.**

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.

Here, New Horizon failed to produce the best evidence available to establish its lost membership profits claim. First, New Horizon did not use its actual profit history, part of which was admitted as trial exhibits no. 54-

58, and 120. Instead, counsel generated exhibit no. 59, which relies on a hypothetical and unfounded rate of membership growth, *see infra* section 2.a.(3); a baseless rate of tithing, *see infra* section 2.a.(5); and completely omits expenses in its calculations, *see infra* section 2.a.(6).

Second, 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, *see infra* section 2.a.(3), 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 findings no. 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.

**3. 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 (findings no. 4, 6, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28).

As is described above, New Horizon had the burden of proving that an intentional interference was the proximate cause of its business expectancy. *Newton*, 114 Wn. App. at 157-58. Proximate cause consists of two elements: cause in fact and legal causation. *City of Seattle v. Blume*, 134 Wn.2d 243, 251-52, 947 P.2d 223 (1997); *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Legal causation rests on policy considerations determining how far the consequences of a defendant's acts should extend. *Blume*, 134 Wn.2d at 252. Cause in fact refers to the "but for" consequences of an act, that is, the immediate connection between an act and an injury. *Id.* at 251-52.

To the extent the above listed findings imply AHR's survey was the "but for" cause of any delay in construction, those findings are not supported by substantial evidence, and conclusions of law no. 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.**

Contrary to the trial court's findings enumerated above, AHR's

survey never forced the church to stop construction. In fact, the record shows New Horizon never hesitated moving forward with the church construction. They took numerous steps to comply with the conditional use permit and sought multiple additional permits after July 1999, but before the correct survey was filed in December 2000:

- 9/13/1999: New Horizon submits Water Service Improvement application to City of Fife. *See* trial ex. 65.
- 9/13/1999: New Horizon submits Sewer Service Permit application to City of Fife. *See* trial ex. 66.
- 9/13/1999: New Horizon submits Right of Way Service Permit application to City of Fife. *See* trial ex. 67.
- 9/28/1999: Pastor Wolfe signs required City of Fife lot line adjustment application. *See* trial ex. 26.
- 10/13/1999: New Horizon submits Grading, Paving, and Storm Drainage Permit Application to City of Fife. *See* trial ex. 111.
- Before 11/99: New Horizon submits Civil Permit Plans to City of Fife. *See* trial ex. 69.
- 6/2000: New Horizon submits Road and Storm Drainage Plan to City of Fife. *See* trial ex. 119.
- 8/2000: Pastor Wolfe visits Fife Director of Public Works to make sure church plans are being reviewed. *See* trial ex. 115.
- 10/2000: New Horizon submits Traffic Study Addendum to City of Fife. *See* trial ex. 73.
- 10/2000: New Horizon submits request for deferment of road upgrades to City of Fife. *See* trial ex. 74.

Additionally, other permits that New Horizon obtained after the survey was filed include “the sprinkler permit, plumbing permit, mechanical permit and landscape plans.” *See* CP 32 (finding no. 20).

Further, it is clear that as of February 2, 2000, New Horizon was not prevented from moving forward with preparations to build the church, given that Pastor Wolfe signed a **\$140,618 supply contract for the steel** required to build the church, and he put \$5000 down on the contract. *See* trial exhibit no. 113. Indeed, shortly after November 22, 1999, 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. (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, sign 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.

Moreover, City of Fife Public Works Director Ron 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 pre-load, the work that was done pursuant to the pre-load permit?

A: I'm not aware of any stop on the pre-load 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.*

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; findings no. 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" their financing after the survey was filed.**

The trial court found New Horizon "lost" financing it had obtained from bonding company called Security Church Finance. *See* CP 31-32 (findings no. 4, 17). These findings are not supported by the record. According to the testimony of Security Church Finance consultant Bryan Mangum, the company **never** finalized the bonding for New Horizon, and **had not** completed its due diligence:

Q: Was the bond finalized?

A: No.

...

Q: So with respect to final approval, you don't actually provide the final approval for bonding, do you?

A: That's correct.

Q: And that approval for bonding can't occur until the final review occurs, during which the final due diligence is completed. Is that correct?

A: That's correct.

*See* 7/14/2004 RP at 63, 66. Thus, New Horizon never "lost" the bonding because it was never finalized.

Moreover, even if the bonding process had continued to move forward, New Horizon would not have qualified for the bond, because it used false attendance data in the prospectus application to the bonding company. Specifically, New Horizon claimed on the prospectus an upward trend in church membership from 1995-1998, when in fact, church attendance had decreased. *Compare* trial ex. 118 (prospectus, p. 5) with trial ex. 51. Likewise, when asked for average weekly attendance, New Horizon filled in an incorrect (and high) number for 1998, and falsely claimed that data for 1995-1997 (which would have revealed the downward trend) was “not available.” *See* trial ex. 118 (prospectus, p. 5). Mr. Mangum testified that if there had been a discrepancy between information he received in an application for bonding and information obtained during due diligence, the bonding process could be halted:

Q: If there had been a difference between the information that you received, for example in an application, and the information you received in the due diligence that you yourself conducted, would that have halted the bond program from your standpoint?

A: It made us look at it.

*See* 7/14/2004 RP at 62; *see also* CP 32 (finding no. 21) (“[t]he Church Bond prospectus, Exhibit 7, may have been optimistic and exaggerated growth”).

In short, the trial court's findings (no. 4 and 17) that New Horizon "lost" their financing after the survey was filed are not supported 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.

**c. Any delay in completion of actual church construction was not proximately caused by AHR.**

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 generally* CP 32-33 (findings no. 6, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28). To the extent these findings state or imply that AHR's survey, rather than New Horizon itself, was the "but for" cause of any delay in completion of church construction, the findings are not supported.

The evidence at trial undisputedly showed that AHR's survey had no effect on the course of construction of the church. This is because New Horizon was required by its Conditional Use Permit to record a boundary line adjustment before construction could begin, *see* trial exhibits 62 & 109 (condition no. 3), and New Horizon failed to do so until July 2002, *see* trial exhibit 28 (auditor's certificate section), nearly two years **after** AHR's corrected survey was filed in December 2000. According to City

of Fife Building Department official Carl Durham, Dwaine Pastor Wolfe simply forgot to have the boundary line adjustment (which was prepared by surveyor Dale Oaks on March 9, 2000, *see* trial exhibit 28) recorded with the auditor's office:

Q: And so are you talking about a lot line adjustment?

A: A change of lot lines for where he built his church.

Q: Can you describe what you're talking about when you say a "mylar copy"?

A: A mylar is the same as a paper copy but it's a plastic type of material so it stores better[.]

Q: Is a mylar copy required for the final copy? Is that why you're bringing –

A: It's required to record it with the county.

Q: And when Pastor Wolfe brought that in, did you have a conversation with him about the boundary line adjustment?

A: That it was one of the last things he needed to get his permit.

Q: What, if anything, did Pastor Wolfe say to you?

A: He said that when he got the copy, he had taken it home and kept it for a period of time before he got it – before he brought it and showed it to me, which was prior to recording it so he could get the permit.

Q: Did he say why he hadn't turned it in?

A: Not really. He mentioned that he apparently didn't know he had to get it recorded or forgotten or

something, but he had said that he had it at home for a period of time.

Q: So he said he had forgotten it?

A: Yes.

*See 2/14/2006 RP at 17-18.*

Additionally, New Horizon caused a further delay in its permitting process when it used an unlicensed engineer to draft the engineering plans for the church. *See trial exhibits 70 & 71.* As a result, the City of Fife rejected the plans submitted by New Horizon, and on December 17, 1999, the City asked New Horizon to correct the plans and resubmit them. *See trial exhibit 71.*

In short, to the extent findings no. 6, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28 state or imply that any that AHR's survey was the "but for" cause of any delay in the construction of the church, the findings are not supported 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.

- d. 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 actual delay in construction for at least 10 months. *See* trial exhibit 60. This point is wholly undisputed; New Horizon architect Bruce Dunn agreed that no construction could go forward until the preload was approved:

Q: Were you involved at all in monitoring the preload?

A: Yes.

Q: And you were involved in that process?

A: Yes. With Lugo Construction, met with the soil engineer and came up with the plans and basically just built the project, made a few changes.

Q: From your standpoint as an architect, you understand that in the City of Fife, that construction, actual construction of a building could not go forward until the preload was approved?

A: Oh, yes. Sure.

*See* 7/14/2004 RP at 23.

Likewise, City of Fife Director of Public Works Ron Garrow testified that the scope of the preload permit covered only preparatory work, that New Horizon was not prevented from completing the preload work, and that no further construction work was permitted without

additional permits:

Q: Right. Let me ask a general question or a couple of general questions about the scope of that permit. I understand you don't know exactly when that was filed, but in terms of the permit itself when the applicants, such as the church, applies for a permit for grading, filling and preload, what is the scope of work that is permitted by that permit, assuming it gets issued?

A: Just by the title that you've indicated, the developer is allowed to go on site, construct temporary erosion control facilities, clear the site, hauling the material away from the site, grade the site, bring material on that would be of a grading and filling nature such as suitable fill material, provide from some temporary hydroseeding to stabilize the area and, basically, monitor the site to make sure there is no erosion.

...

Q: What is a preload?

A: A preload is the introduction of an overburden on the existing soils to provide for settlement and compaction of the underlying soils in preparation for a construction of a building on top of it.

...

Q: To your knowledge, was the church permitted to complete that process?

A: Yes, they were.

Q: And then after that process was completed, then the mass of soil then is monitored by the applicant's geotechnical engineer?

A: That's correct.

Q: And that occurred in this case, as far as you know?

A: As far as I know.

...

Q: Are retention ponds – construction of retention ponds within the scope of work of this grad, fill and preload permit?

A: No, it's not.

Q: What permit would that fall under?

A: That would fall under the General Development Permit that would be issued later. That's associated with the construction of the parking lot, the rest of the building; basically, the site improvements.

Q: So what you're saying then is construction of retention ponds would not have been included within the scope of the permit issue[d] for the grade, fill and preload permit?

A: Not the retention pond itself.

Q: Can an owner applicant have work done on a site, like New Horizon, without being permitted?

A: That would be against the City's codes.

Q: So the scope of work on a project is defined by what permits have been issued. Is that fair to say?

A: That's correct.

*See 7/14/2004 RP at 112-17.*

In short, New Horizon could not have moved forward with

construction until May 2000, after the preload settlement was approved, and the July 1999 survey thus did not delay construction before the approval. To the extent findings no. 6, 14, 15, 16, 17, 18, 19, 22, 23, 25, 27, and 28 imply that any “delay period” was 17 months long, they are not supported 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’s award of damages.

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

As is described above, one of the elements New Horizon had the burden of proving at trial was that any interference was carried out with an improper purpose or by improper means. *Newton*, 114 Wn. App. at 157-58. The improper means element focuses on the method used by the defendant to interfere with the plaintiff’s contractual relationship, and requires that the interference be “wrongful by some measure beyond the interference itself[.]” *Id.* at 159. Regarding improper purpose, one of the factors to be considered is the actor’s motive. Restatement (Second) of Torts § 766B, cmt. d. As for improper means, a means of interference is improper if it is “innately wrongful [or] predatory in character[.]” *Id.*

Only three of the trial court’s findings purport to address the improper purpose element, findings no. 6, 8, and 9, which read as follows:

6. The defendants' conduct in recording the survey under Pierce County Auditor's file number 9907135004 was intentional, reckless, by improper means, arbitrary and capricious, because the defendants knew it would place a cloud on the title of the church's property by inaccurately depicting the common boundary between the church and the own to the west, Mrs. Longey.

...

8. After multiple written and verbal notices from Plaintiff and Plaintiff's surveyor, Dale Oaks, questioning the accuracy of the defendants' placement of survey stakes, defendants ignored the plaintiff's warnings and choose to record the survey anyway.

9. Defendants' intentionally recorded the erroneous survey knowing that it could cause harm to the church's construction project.

*See* CP 31. Regarding finding no. 6, given its contents (“conduct . . . was intentional, reckless, by improper means, arbitrary and capricious”), it is actually a mislabeled conclusion of law, and the Court can treat it as such. *See In re Discipline of Vanderbeek*, 153 Wn.2d 64, 73 n.5, 101 P.3d 88 (2004).

As for findings no. 8 & 9, neither support a legal conclusion that HR interfered for an improper purpose or by using improper means.<sup>3</sup> Although New Horizon argued otherwise at trial, they were required to

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<sup>3</sup> Additionally, neither finding is supported by substantial evidence in the record.

show that the interference was “wrongful by some measure beyond the interference itself[.]” *Newton*, 114 Wn. App. at 159. Although the actor’s motive in undertaking the interference is relevant in determining improper purpose or improper means, *see* Restatement (Second) of Torts § 767(b), the mere fact that he has engaged in an intentional act that he knows will interfere with an expectancy does not satisfy the improper purpose element:

Since interference with contractual relations is an intentional tort, it is required that in any action based upon §§ 766, 766A or 766B the injured party must show that the interference with his contractual relations was either desired by the actor or known by him to be a substantially certain result of his conduct. (See § 8A). Intent alone, however, may not be sufficient to make the interference improper, especially when it is supplied by the actor’s knowledge that the interference was a necessary consequence of his conduct rather than by his desire to bring it about. In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other’s contractual relations. If this was the sole motive the interference is almost certain to be held improper.

*See* Restatement (Second) of Torts § 767(b), cmt. d.

Here, AHR’ knowledge of the expectancy with Lugo Construction was not disputed. Their knowledge that filing a survey might interfere with that expectancy, however, does not show they acted with an improper purpose or by improper means. *Newton*, 114 Wn. App. at 159;

Restatement (Second) of Torts § 767(b) & cmt. d. Indeed, this is in line with the trial court's oral ruling, wherein the court found that Mr. Ensley was a "good guy" who made a simple mistake, rather than someone who acted with an improper purpose or by improper means:

When I said everybody was good guys, Mr. Ensley is a good guy, very pleasant too; but good guys make mistakes.

*See* 2/15/2006 RP at 198-99.

In short, to the extent findings no. 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 should reverse the trial court.

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

On December 5, 2003, the trial court denied defendant AHR's first motion for summary judgment dismissal of plaintiff's surveyor "professional negligence" claim. *See* CP 54-56. This ruling was error. Generally, plaintiff who did not hire a surveyor and who is not in privity with the surveyor may not sustain a surveyor malpractice claim:

To sustain a negligence action against an individual, "the duty must be one owed to the injured plaintiff, and not one

owed to the public in general.” *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The statute and regulations cited by appellants indicate that professional engineers owe duties to the public, to their clients and to their employers. Except for Burg, appellants were not clients or employers of S&W. Appellants offer no other evidence of a special relationship that would invoke a duty under the statute or regulations. The broad pronouncements that engineers owe a general duty to the public welfare alone do not establish that engineers owe a duty to any identifiable group or individual.

*Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 807, 43 P.3d 526 (2002).

Here, it is undisputed that defendant AHR was hired by Ms. Jane Longie, who was plaintiff New Horizon’s neighbor. CP 30 (finding no. 2). Thus, like the surveyor in *Burg*, defendant AHR was never hired by New Horizon and owed New Horizon no duties of care. *See Burg*, 110 Wn. App. at 807; *see also generally* AHR’s first motion for summary judgment, CP 57-128. In fact, at the close of plaintiff’s case, the trial judge granted defendants’ motion for a directed verdict as to the malpractice claim. *See* 7/15/04 RP at 101-21; *see also* CP 16-17.

Significantly, the trial court’s error in failing to grant the motion for summary judgment was not harmless. Indeed, when the trial court denied defendants’ motion for summary judgment on December 5, 2003, the professional malpractice claim was the **only** cause of action alleged in plaintiff’s complaint. It was not until **after** the trial court denied

defendants' motion for summary judgment that the court permitted plaintiff to amend and add tortious interference as a cause of action. *See* CP 223-23 (order granting leave to amend dated 12/12/2003) *and* CP 217-22 (amended complaint filed on 12/12/2003). As such, had the trial court followed the clear mandate of *Burg*, the case would have been dismissed in its entirety.<sup>4</sup>

**E. 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 5<sup>th</sup> day of October, 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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<sup>4</sup> Nor could plaintiff have filed a new lawsuit based on tortious interference. This is because the offending survey was filed in July 1999, and the three year statute of limitations on any tortious interference claim had run as of the trial court's 12/05/2003 order denying summary judgment.

FILED  
COURT OF APPEALS

06 OCT 10 PM 1:3

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

No. 34548-0-II

COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

<p>BILLY J. ENSLEY and "JANE DOE" ENSLEY; ADAMS-HODSON &amp; ROBINSON, INC., P.S. d/b/a A.H.R. ENGINEERS, INC., a Washington corporation,</p> <p style="text-align: right;">Appellants/Defendants,</p> <p style="text-align: center;">vs.</p> <p>NEW HORIZON CHRISTIAN CENTER, a Washington non-profit corporation,,</p> <p style="text-align: right;">Respondents/Plaintiffs.</p>
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PROOF OF SERVICE

BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON

06 OCT 10 PM 1:55

FILED  
COURT OF APPEALS

I, Jennifer A. Riley, do declare that on October 9, 2006, I caused the Appellant's Motion for Leave to File Amended Notice of Appeal and to File Amended Opening Brief, Amended Notice of Appeal to Division II, Court of Appeals and Appellants Ensley and AHR's Amended Opening Brief to be delivered to the following:

Court of Appeals, Division II  
Clerk  
950 Broadway  
Ste 300 MS TB-06  
Tacoma, WA 98402-4454

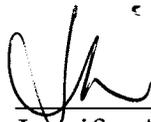
Via:  
 Legal Messenger  
 Facsimile  
 First Class Mail  
 Overnight Mail

Ms. Mary Gail Carver  
Mr. Lawrence E. Nelson  
Nelson & Carver, P.S.  
102 North Meridian  
P.O. Box 217  
Puyallup, WA 98371

Via:  
 Legal Messenger  
 Facsimile  
 First Class Mail  
 Overnight Mail

DATED this 9<sup>th</sup> day of October, 2006.

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



\_\_\_\_\_  
Jennifer A. Riley, Legal Assistant