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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON**

**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

RESPONDENT'S BRIEF

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A. STATEMENT OF THE CASE

1. Procedural History

This appeal marks the second time this case has been before the Court of Appeals. There was an interlocutory review by this court last year and the case was remanded to resume the trial.

On December 5, 2003, Judge Lisa Worswick denied the defendants' motion for summary judgment. CP 206-208. Then on June 18, 2004, Judge Ronald E. Culpepper granted summary judgment motion dismissing plaintiff's claim for tortious interference with a contract. Trial began on July 12, 2004 before the Honorable Waldo Stone on the claim of professional negligence. On the third day of trial, Judge Stone informed the parties that he would consider the evidence on the cause of action for tortious interference with a contract. (RP 7/14/04 at 95, lines 23-25 and p. 96, line 1) On July 15, 2004, defendants brought a motion for directed verdict on both causes of action. Judge Stone dismissed the plaintiff's cause of action for professional negligence based on a lack of justifiable reliance but did not dismiss the interference claim. (RP 7/14/04 at 101-121)

Mid-trial, AHR sought discretionary review of Judge Stone's order denying defendants' motion for a directed verdict on the tortious

interference with a contract. On July 16, 2004, the Court of Appeals granted a stay of trial and accepted discretionary review.

At the same time, this Court accepted discretionary review of Respondent's/ Plaintiff's review of Judge Culpepper's earlier order granting summary judgment to AHR on the issue of tortious interference with a contract.

This Court reversed Judge Culpepper's ruling on summary judgment and affirmed Judge Stone's ruling. The case was remanded to Superior Court to resume and finish the trial. (COA 31905-5-II).

The trial resumed with Judge Stone on February 13, 2006. Judge Stone found AHR liable for tortious interference of New Horizon's construction project to build a church and awarded a total of \$419,900.00 in damages. CP 33. AHR filed a notice of appeal seeking review of this judgment.

2. Factual History

Plaintiff New Horizon Christian Church Center purchased real property in Fife, with plans to build a church. CP 30, FOF 1. New Horizon had a contract and/or a business expectancy to build a church with LUGO Construction, Inc. and, the pre-load phase of construction was started by June 1999. CP 30, FOF 3. Adrian Lugo, of LUGO Construction, testified that he collected a \$6,000.00 non-refundable construction fee, and that he

was prepared to build the church at the price of the fixed bid. RP 7/14/04 at 105-107. In June 1999, New Horizon planned to finance the church construction from the sale of a bonds to be issued by Security Church Finance, Inc. CP 30, FOF 4.

Ms. Longey owns real property adjacent to New Horizon's property. Ms. Longey hired defendant AHR Engineering to survey her property in April of 1999. Defendant Billy Joe Ensley, a surveyor at AHR, completed the survey and recorded it in July 1999. CP 30, FOF 2. It was undisputed at trial that the defendants were aware of the New Horizon's construction project before they recorded their survey of the Longey property. CP 30, FOF 5.

AHR inaccurately placed survey stakes along the common boundary between Longey and New Horizon properties, which were at least 15 feet away from the true boundary, and created a false boundary dispute. RP 7/12/04 at 90-91. Pastor Wolfe, the pastor and president of New Horizon, immediately hired a surveyor, Dale Oaks, to investigate. It soon became apparent that AHR's placement of the stakes was in error. RP 7/12/04 at 87.

The true boundary line had been established by a boundary line agreement in 1959 along a then existing fence line. RP 7/12/04 at 62; Exhibit 8. In 1981, Kenneth VanCleave also surveyed the same fence

line. AHR's boundary line conflicted with both of these previous surveys. RP 7/12/04 at 86; Exhibit 11. Pastor Wolfe and Dale Oaks each repeatedly attempted to stop AHR from recording the inaccurate survey. RP 7/12/04 at 87-93; Exhibit 13 and 14. AHR refused to even share their findings or survey drawing with Dale Oaks before recording it. RP 7/14/04 at 134-140; Exhibit 85 phone log. AHR recorded its survey on July 13, 1999, knowing that it would create a cloud on the title. CP 31 FOF 6; Exhibits 13 and 14. The president of AHR, Michael Robinson, then went to the City of Fife and asked the public works director, Ron Garrow, to shut down the church construction. RP 7/14/04 at 32; CP 31, FOF 10, 12, 13.

Once the inaccurate survey was recorded, Security Church Finance was unable to go forward with the planned sale of the bonds. RP 7/14/04 at 53-54. Ron Garrow informed Pastor Wolfe that he could not issue a building permit until the boundary dispute was resolved. RP 7/12/04 at 104-108; RP 7/14/04 at 32-35. The inaccurate survey stopped the church construction. RP 7/12/04 at 98-99; CP 32, FOF 16, 17, 18.

Pastor Wolfe tried unsuccessfully to convince AHR to correct its inaccurate survey. The City allowed the church to finish the pre-load phase of the construction and some site development, but would not allow it to proceed with the building. Pastor Wolfe testified regarding his

timeline on the project. RP 7/13/04 Vol. I at 6-24¹. However, because New Horizon had lost their financing, LUGO construction had to move onto other projects. RP 7/14/04 at 112-113. New Horizon was left with no money to hire anyone else to build the church. RP 7/12/04 at 99.

The result was a domino effect: no money, no construction contract, loss of members, loss of income, unable to re-qualify for financing.

New Horizon had been operating out of rented and temporary facilities for years. RP 7/12/04 at 33-35. Although the church had a strong following, over 30 families left discouraged after the survey was recorded and construction stopped. It appeared that the project was doomed. These families had made substantial building contributions and pledges. RP 7/13/04 Vol. I at 60-61; Exhibit 52.

Seventeen months after the recording of the inaccurate survey, AHR finally recorded a corrected survey in November of 2001. Exhibit 20. New Horizon was then given clearance from the City of Fife to proceed. Because New Horizon had lost so many members (and their income), it no longer qualified for a loan large enough to finance the new construction. The church was turned down by fourteen different lenders. RP 7/12/04 at 116-119; Exhibit 21 and 22.

¹ For clarification, the RP for 7/13/06 is in two volumes but they are not marked as Vol I and II. However, Vol I begins with exhibit 25 and has pages 2-105, and Vol II begins with exhibit 51 and has pages 1-85.

Unable to give up on his mission, Pastor Wolfe convinced a private financier to lend the church \$850,000.00. The elders of the church lent an additional \$437,000.00. RP 7/12/04 at 119-121. Pastor Wolfe has a background in construction and acted as the general contractor on the project. Members of the church volunteered over 18,000 hours of their time to help build the church within the new budget. RP 7/12/04 123-126. The church opened for business in January of 2004, over three years later than expected. RP 7/12/04 at 127. The church grew enormously the first three years of having a permanent home. RP 2/13/06 at 91.

Based on the evidence produced at trial, the court found that AHR had intentionally interfered with New Horizon's contracts and awarded \$419,900.00 in damages for the following. CP 33; FOF 28

B. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT 59.

An appellate court reviews the admission of evidence under an abuse of discretion standard. Matushita Elec. Corp. of Am., v. Salopek, 57 Wn. App. 242, 787 P.2d 963 (1990), rev denied 114 Wn.2d 1029, 793 P.2d 975 (1990).

The Washington Supreme Court favors the use of illustrative evidence and gives the trial court wide latitude in determining whether to

admit illustrative evidence. State v. Lord, 117 Wn.2d 829, 855, 822 P.2d 177 (1991), recon. denied (Mar 17, 1992), cert. denied by Lord v. Washington, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112, 61 USLW 3259 (U.S.Wash. Oct 05, 1992) (NO. 91-8690), and Post-Conviction Relief Denied by Matter of Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (Wash. Feb 24, 1994) (NO. 60000-7). An illustrative piece of evidence aids the fact finder in understanding other evidence regarding the accuracy of the evidence. Id. at 855. A chart or diagram offered in evidence for illustrative purposes must be relevant and material in character to the ultimate fact the presenting party seeks to demonstrate and, additionally, must have the support of proof showing such evidence to be substantially similar to the real thing. State v. Gray, 64 Wn.2d 979, 983, 395 P.2d 490 (1964), rehearing denied (Nov. 5 1964). “The foundation requirement for illustrative material is less onerous than the foundation requirement for other exhibits.” See Matsushita Elec. Corp. of Am. v. Salopek, 57 Wn. App. at 248-49. The decision to admit illustrative evidence is within the trial court's discretion, and will not be disturbed absent a showing of an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

It is appropriate to provide illustrative evidence prepared for trial which demonstrates the facts established by testimony. Matsushita Elec.

Corp. of America v. Salopek 57 Wn. App. at 248-249; See also Department of Fisheries v. Gillette, 27 Wn. App.. 815, 826, 621 P.2d 764 (1980) (illustrative exhibit admitted and jury instructed on its limited purpose); 5 K. Tegland, Wash.Prac., Evidence § 95(8), at 314-316 (1989); but see Owens v. Seattle, 49 Wn.2d 187, 299 P.2d 560 (1956) (Washington Supreme Court held that a graph and map which had been prepared for trial had been improperly admitted as substantive evidence because of a lack of preliminary testimony as to the accuracy of the data upon which the exhibits were based).

In McCartney v. Old Line Life Ins. Co. of America, 3 Wn. App. 92, 472 P.2d 581 (1970), rev denied 78 Wn.2d 995 (1970), the Court of Appeals held the trial court did not abuse its discretion by admitting an exhibit which summarized various items of medical information and assisted the jury in better understanding the evidence. Since the exhibit accurately demonstrated the facts established by testimony the trial court did not abuse its discretion in admitting the exhibit for illustrative purposes. Id. at 93-94.

In this case, Exhibit 59 accurately depicts the actual data contained in previous exhibits and testimony regarding attendance and financial audit statements. See Exhibits 51, 53-58. Pastor Wolfe testified in detail how he calculated the amount of lost income from the church's attendance

and financial audit records. RP 7/13/04 Vol. I at 58-78. Pastor Wolfe was competent to present his own business records (attendance and financial statements of the church) under RCW 5.45.020. Exhibits 51, 53-58. Moreover, the financial audits were prepared by a CPA who also testified and corroborated the accuracy of data and the calculations shown in Exhibit 59. Exhibit 59 was properly admitted as an illustration of prior testimony and business records already in evidence. The trial court did not abuse its discretion in admitting the exhibit.

a. AHR did not preserve for appellate review the claim that Exhibit 59 was improperly admitted under ER 1006.

AHR argues that Exhibit 59 should have been admitted as a summary under ER 1006 and that it did not meet the requirements of that evidence rule. However, at trial, AHR only objected to the admittance of Exhibit 59 under a general foundation objection, stating that Pastor Wolfe did not have the expertise to prepare it. RP 7/13/04 Vol. I at 74.

“A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence.” State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), rev denied 129 Wn2d 1007, 917 P.2d 129 (1996). An objection claiming a lack of foundation is a general objection that does not preserve an issue for appeal. City of Seattle v. Carnell, 79 Wn. App. 400, 403, 902 P.2d 186

(1995), rev. denied 128 Wn2d 1020, 913 P.2d 815 (1996) (defendant's general objection to "foundation" regarding admissibility of BAC results did not preserve issue of objection to chain of custody). Further, See also State v. Hubbard, 37 Wn. App. 137, 148, 679 P.2d 391 (1984), rev'd on other grounds 103 Wn.2d 570, 693 P.2d 718 (1985) (objection to exhibit being impermissibly suggestive was waived for purposes of appeal when only objection at trial was to foundation); State v. Christian, 44 Wn. App. 764, 723 P.2d 508 (1986) (appellate court refused to consider defendant's argument based on the best evidence rule when only objection at trial had been lack of foundation).

Although not a preserved issue, it is apparent that the exhibit did meet the requirements of ER 1006, which provides in pertinent part: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."

In a very similar case, the court in Matsushita Elec. Corp. of America v. Salopek, admitted an exhibit under ER 1006. Matsushita 57 Wn. App. at 248. The appellate court determined that although the summarized materials were not necessarily voluminous and in-court examination would not have been inconvenient, the exhibit was properly admitted, not so much as a summary, which takes the place of the

information summarized, but as a piece of demonstrative evidence in the nature of a graph. Here the Exhibit summarized data already admitted into evidence. See Exhibits 51-58.

Even if it was error to admit Exhibit 59, it was harmless error because the court had properly admitted all of the business records, attendance and financial statements necessary to do its own calculation of damages. Exhibit 59 simply assisted Pastor Wolfe in explaining his testimony and the data contained in Exhibits 51-58. It assisted the Court in understanding the figures on which the damage calculation was based.

b. AHR did not preserve for appellate review a claim that Exhibit 59 did not constitute the best evidence.

AHR objected to Exhibit 59 for lack of foundation and that Pastor Wolfe did not have the expertise to prepare the document. On appeal they argue on the basis that it is not the best evidence. RP 7/13/04 Vol. I at 74. An objection of lack of foundation is a general objection. An appellate court will not consider an argument for a different basis than that which was objected at trial. As argued above, AHR is precluded from now arguing a different basis of objection. State v. Christian, 44 Wn. App. 764, 723 P.2d 508 (1986) (appellate court refused to consider defendant's argument based on the best evidence rule when objection at trial had been

lack of foundation). This claim has not been preserved for appellate review.

Although not preserved for appeal, New Horizon did use the “best evidence” when it presented its financial and attendance records as its basis for calculating lost profits. This is the usual method for calculating such damages. Larsen v. Walton Plywood Co., 65 Wn.2d 1, 16, 390 P.2d 677 (1964).

2. THERE WAS SUBSTANTIAL EVIDENCE OF NEW HORIZON’S DAMAGES FOR LOST INCOME. (FOF 25, 27, 28)

a. Standard of Review.

The standard of review for findings of fact is whether there is substantial evidence in the record to support the findings. The test for substantial evidence is modest. There must be more than “a mere scintilla” of evidence. It is sufficient if it “...would convince an unprejudiced thinking mind of the truth of the fact” to which the evidence is directed. Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003) (emphasis omitted) (quoting Thomson v. Virginia Mason Hosp., 152 Wash. 297, 300-01, 277 P. 691 (1929)).

However the appellate court is only concerned with the burden of production in its analysis of the substantial evidence test. Whether the burden of persuasion has been met is for the finder of fact. The application

of the substantial evidence test is not influenced by the burden of persuasion, and the appellate court will affirm if it finds substantial evidence in the record from which the trial court could reasonably have found lost income. Northwest Pipeline Corporation, v. Adams County, 132 Wn. App. 470, 131 P.3d 958, 960 (2006).

b. Other than lost profits, New Horizons other damages awarded are unchallenged and are therefore verities.

AHR assigns error to Finding of Fact 28 which lists six different monetary awards. But the only argument in the appellant's brief pertains to the award for lost profits, which was \$377,778.00. As there is no argument as to the award for the construction fee of \$6,000.00; survey fees in the amount of \$5,438.00; aerial photo fees of \$260.00; audit fees of \$2,500.00 and pre-load loan interest of \$27,924.00, these amounts should be upheld on appeal.

c. The evidence provided for a reasonably certain estimation of damages.

“Lost profits are a recoverable element of damages to the extent the evidence permits their estimation with reasonable certainty.” Lundgren v. Whitney's, Inc. 94 Wn.2d 91, 97-98, 614 P.2d 1272,1276 (1980) The Supreme Court has stated: “A measuring stick, whereby damages may be

assessed within the demarcation of reasonable certainty, is sometimes difficult to find. Plaintiff must produce the best evidence available” and “... if it is sufficient to afford a reasonable basis for estimating his loss, he is not to be denied a substantial recovery because the amount of the damage is incapable of exact ascertainment...” Dunseath v. Hallauer, 41 Wn.2d 895, 902, 253 P.2d 408 (1953)). See also Buchanan v. Hammond, 54 Wn.2d 354, 340 P.2d 556 ((1959)). Larsen v. Walton Plywood Co., 65 Wn.2d 1, 16, 390 P.2d 677, 687 (1964). “If a plaintiff has produced the best evidence available, and if the evidence affords a reasonable basis for estimating the loss, courts will not permit a wrongdoer to benefit from the difficulty of determining the dollar amount of loss”. Reefer Queen Co. v. Marine Constr. & Design Co., 73 Wn.2d 774, 781, 440 P.2d 448 (1968).

The damages were calculated from the Church’s attendance and income records of past years. These records were kept in the ordinary course of business and authenticated by the pastor of the church. RP 7/13/04 Vol I at 60-69; Exhibits 51, 53-58. The congregation existed for many years and there were attendance and financial records to document a past history of income. A new building enhanced the Church’s ability to attract new members and increase growth and income. Both the percentage rate of growth and the calculation of the amount were verified by two experts, Hunt and Kasper. RP 7/15/04 at 84-85; RP 2/15/06 at 60-

90. As stated above, after occupying the new facility, New Horizon did achieve actual growth rates in excess of the projected 20% rates (Exhibit 59 was drafted in 2004) by the time trial was remanded by this court in 2006. RP 2/13/06 at 91. Therefore there is no argument that the damages were speculative.

d. The Court's findings of damages are supported by substantial evidence and by expert testimony. (FOF 25, 27, 28)

Pastor Wolfe testified that each week two people would count every person in attendance, fill out a record card of the weekly attendance and then enter the figures on a computer. RP 7/13/04 Vol I at 58-59. Pastor Wolfe testified that these records were produced under his supervision as the leader of the church and in the operation of the church as a non-profit corporation. RP 7/13/04 Vol I at 58-59. Exhibit 51 shows these records of attendance for the years 1992 through 2004. Pastor Wolfe also testified that he evaluated the records to compile Exhibit 52 which shows 30 families who left the church in 1999 and 2000, despite having made financial pledges to the building. These families left in discouragement after the construction project stopped due to the boundary dispute. RP 7/13/04 Vol I at 60-61; Exhibit 52. See also Exhibit 53 which shows a graph form of the attendance records.

Pastor Wolfe gave detailed testimony as to how he calculated the average annual contribution per person. He based this on the attendance records, the financial audit statements and the profit and loss statement. RP 7/13/04 Vol I at 69-70. He based the projected growth rate of the Church on these figures, and then calculated the lost income due to the halted construction. RP 7/13/04 Vol I at 70-80. This delay in construction of the church caused over \$1,356,000.00 in lost income over a five year projection. RP 7/13/04 Vol I at 80.

In addition, expert testimony was given by Pastor Art Hunt that a 25% growth rate for an existing church that builds a new building is a reasonable expectation, and that a church can expect a steady increase in membership growth for 2 to 5 years before the membership levels off. RP 7/15/04 at 81-85. New Horizon used a conservative growth rate of 20% in its calculation of lost income. Exhibit 59.

The whole basis of New Horizon's lost profit calculation was that a new church building would attract new members and accommodate a larger congregation. RP 7/15/04 at 81. The building took nearly three years longer to build because of the interference of AHR whose inaccurate survey shut down the construction project.

During the beginning of trial in July 2004, Exhibit 59 reflected the attendance and income figures from 1999-June 2004. At that time the

church had been completed but had only been open for six months. The new building was finished in January 2004. RP 7/13/04 Vol I at 78. The 2004 Exhibit 59 reflected a projected income loss based on past attendance and income records. When trial resumed in February 2006, Pastor Wolfe testified that attendance had significantly increased since opening the new church. There was an actual increase in growth of 21% in 2003; 25.91% in 2004 and 19.4% in 2005. RP 2/13/06 at 91. This evidence alone shows that the projected 20% income growth as the basis for establishing the lost income in Exhibit 59 was an underestimation of the losses. While the effect of having a permanent Church on income may have been speculative in 2004, it was no longer speculative by the end of the trial in 2006. AHR's interlocutory appeal gave New Horizon time to gather an additional two years of data providing solid evidence that the projected 20% growth rate was an accurate and even conservative estimate of lost income. During the first three years of opening, the Church sustained growth in excess of 20%. New Horizon presented compelling evidence of the effect of a new permanent home on its growth rate. Therefore the argument that the lost income damages were speculative and inaccurate lacks all merit.

New Horizon's lost income calculation was based on previous years of income coupled with the anticipated increase in membership that

a new building would generate. RP 7/13/04 Vol. I at 60-80. The income figures were based on actual church financial audits performed by CPA Hans Kasper from 1998-2002 and a profit and loss statement for 2003. Exhibits 51, 53-58. Kasper conducted these audits because they were required by Security Church Finance, Inc. in order to approve New Horizon for the bond program. RP 2/15/06 at 9-11. New Horizon was approved for a \$1.325M bond based on these income statements. RP 7/14/04 at 51. The Church would not have been approved for such a large monetary bond if it did not have financial health. RP 2/15/06 at 9-11.

Hans Kasper, CPA, testified that he conducted these audits and that the information regarding income was accurate. RP 2/15/06 at 9-11. Exhibits 51, 53-58. Kasper testified that the projection of 20% loss of income in Exhibit 59 was very reasonable in light of the fact that the church sustained even higher actual growth rates for several years after the church was opened in 2004. RP 2/15/06 at 89-95.

Kasper also testified that the average annual contribution amount of \$2000.00 per church member was on the low end because the church used the average of all members, including children, in its calculation. RP 2/15/06 at 60-61. This calculation was confirmed by Pastor Wolfe. RP 7/13/04 Vol I at 70.

Expert testimony is sufficient to prove lost income. Bogart v. Pitchless Lumber Co., 72 Wash. 417, 130 P. 490 (1913). Therefore, New Horizon met its burden of proof. See also, Eagle Group, Inc. v. Pullen and Ras builders. Inc., 114 Wn. App. 409, 58 P.3d 292 (2003), rev. denied 149 Wn2d 1034, 75 P.3d 968 (2003). The record shows substantial evidence of the lost profits awarded.

e. Expenses were not taken into account because an increase in membership did not correlate to an increase in expenses.

In computing loss of income, fixed expenses which are not affected by a breach of contract, should not be deducted in calculating the lost income attributable to the breach. Thus fixed expenses were properly excluded in computation of lost income. Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc., 388 F.Supp. 1362, 1371, D.C. Miss. (1975); See also, Farm Crop Energy, Inc. v. Old Nat. Bank of Washington 109 Wn.2d 923, 940, 750 P.2d 231, 240 (1988); Restatement (First) of Contracts § 329 (1932).

Exhibit 59 calculates the projected loss of membership multiplied by the average of \$2000 per person annually to project total lost income. There was testimony from Hans Kasper, CPA that an increase in membership would have only minimally increased their expenses. RP 2/15/06 at 44-45. In other words, if the church had an increase in

membership they would not have increased the number of staff, and other operating expenses such as utilities would have been minimal. For example, the church's expense for a mortgage would not have increased with more membership. Therefore a reduction of expenses from the lost profit was not appropriate in calculating the projected lost profit based on the loss of membership.

The lost income calculation only takes into account the loss of new membership. New Horizon never stopped operating and would have paid the same amount of operating expenses regardless of the interference by AHR. However, AHR did cause a drastic loss in the growth rate of membership after the inaccurate survey clouded the title and shut down the construction.

Hans Kasper, CPA, testified that expenses did not increase with more members but future revenue was lost, which would never be recovered. He stated that only if the church had gone out of business completely or if expenses had exceeded revenues would you need to subtract operating expenses from the additional revenues lost which were attributable to the halted construction. RP 2/15/06 at 44-51.

But for the interference of AHR which halted construction of the church, New Horizon would have acquired additional income in the first 3-5 years of opening its new building. There was substantial evidence to

support a larger amount of lost profits over a five-year period, but the Court in its discretion reduced the amount of damages by using the average lost profit and applying it over 17 months, which was the time it took AHR to record the corrected survey and the time the court found was the delay period. The court awarded of \$377,778.00 for lost income. FOF 23, 25, 27, 28. There is substantial evidence in the record to support the award of damages and this Court should affirm it.

f. Exhibit 59 accurately reflects the attendance records shown in Exhibit 51.

AHR argues that Exhibit 59 shows 2 sets of numbers that do not reflect the data in Exhibit 51. However, a careful reading of Exhibit 51 shows the same attendance records as shown on Exhibit 59. For example, the attendance average for 1999 is 154.92 and Exhibit 59 states 1999 at 154; the year 2000 attendance in Exhibit 51 is 136.75 and Exhibit 59 states 137 and so on. The figures in Exhibit 59 are rounded off but not completely different as appellant argues.

AHR argues that Exhibit 59 incorrectly calculates the lost income on the second page. However, the first set of data shows what the attendance would have been if the church had been built with no delay. For example, in the year 2000, the church should have had 20% more members than the actual 137 members. 181 members reflects 20% growth

added to 137. (1999 was only increased by 10% because the delay started mid-year). The second page of numbers shows the projected number of members minus the actual, and then multiplied by the average contribution of \$2,000.00. These calculations were verified to be accurate by the expert Hans Kasper, CPA, and, as such, are sufficient to prove lost income. RP 2/15/06 at 89-95.

Even if Exhibit 59 is inaccurate, the court had the actual attendance and income figures from which to calculate its own award. In fact, the court did reduce the damages from what New Horizon argued and therefore no error was made.

g. The \$2,000.00 average contribution per member was accurate.

AHR argues that the calculation of the average contribution per member of \$2,000.00 is not based on the records provided. However, AHR's figures in its appellant's brief are inaccurate. For example, AHR states that the 1999 average is \$1,516.00. However, if one takes the total revenues from 1999 at \$311,526.00 (Exhibit 55) and divides by the average attendance for 1999 which was 154, (Exhibit 51) one obtains a figure of \$2,022.90. If one calculates all of the averages for each year the figure is more than \$2,000.00 per person.

Moreover, Hans Kasper, CPA, testified that the average annual contribution amount of \$2,000.00 was on the low end because the church used the average of all members, including children, in its calculation. RP 2/15/06 at 60-61. Children do not generally make any monetary contributions to their church. This calculation was also confirmed by Pastor Wolfe. RP 7/13/04 Vol I at 70. Therefore the church produced very reasonable and prudent figures to calculate its damages.

3. THE TRIAL COURT PROPERLY DETERMINED THAT AHR TORTIOUSLY INTERFERED WITH AND DELAYED THE CHURCH'S CONSTRUCTION PROJECT.

a. The Church was forced to stop construction for more than 17 months. (FOF 14, 19, 22, 23)

AHR argues that Exhibit 69, a letter from Pastor Wolfe to the elders of the church, shows that they were not forced to stop construction of the church. This was written in November 1999, shortly after the inaccurate survey was recorded. RP 7/13/04 Vol. II at 25. In his letter to the elders of the church, Pastor Wolfe informs them of the boundary line dispute and advises that the City engineer wants the boundary line dispute resolved before he will issue permits. Exhibit 69. In fact, the city did stop construction and would not issue the building permits. RP 7/14/04 at 32; RP 7/12/04 at 81-82; Exhibits 17, 18.

The first AHR survey was recorded on July 13, 1999. Exhibit 15. Pastor Wolfe tried to resolve the boundary dispute quickly, but AHR would not agree to correct their survey for 17 months. Exhibit 12, 13, 14, 20. Pastor Wolfe testified that he continued to go forward with the construction as far as he could but eventually he was shut down. One must remember that the church had acquired a loan in the amount of approximately \$173,000.00 to do the pre-load contract, which also included the site clearing and development. RP 7/13/04 Vol. I at 31. It had also gone through the Conditional Use Permit phase of the project where the hearing examiner determined the requirements for the project. RP 7/13/04 Vol. I at 7. A project of this magnitude involves many different phases, but it only took one inaccurate survey to bring the project to a halt.

Ron Garrow, the public works director for the City of Fife, testified that Michael Robinson of AHR informed him of the boundary line dispute. RP 7/14/04 at 32. Garrow then shut down the project. Garrow stated that nothing other than the survey delayed the project. RP 2/13/06 at 130.

Garrow told Pastor Wolfe that he could keep building if he was willing to lose the approximate 15 feet that the survey showed in dispute. Id. Exhibit 18. However that would have meant losing an entire row of

parking stalls. The number of parking stalls is directly linked to the size of the sanctuary and building capacity. RP 2/13/06 at 128. So Pastor Wolfe was faced with either having to redesign the whole building at a much smaller size or get the boundary dispute resolved in his favor. He chose to keep working on the pre-load and site development while trying to convince AHR to correct their survey. Eventually, after the project was halted, Pastor Wolfe was bale to get it back on track.

b. Witte's timeline, Exhibit 119, was rebutted by expert testimony and the trial court did not find the Witte testimony to be credible.

AHR argues, despite the interference by AHR, that the Church would not have been able to obtain building permits. They argue that because the church did take some action toward the construction project after the first survey was recorded that the survey did not stop the project.

There was conflicting evidence presented by both parties' construction experts regarding whether New Horizon would have been able to complete the project even if the survey had never been recorded. However, an appellate court must defer to the trial court on the credibility of expert witnesses and the persuasiveness of the evidence. Premera v. Kreidler, 133 Wn. App. 23, 131 P.3d 930 (2006). The trial court found that the expert for New Horizon was more credible than the defense expert and, as such, this Court cannot reverse on this issue.

Defendants presented the testimony of Richard Witte, an expert on construction. He produced a timeline of events, which he argued proved that LUGO construction could not have obtained a building permit until 2002, and that therefore the construction would have been delayed even with the AHR survey being recorded in 1999 and corrected in 2001. Exhibit 119. Appellant's brief at 26-27.

Adrian Lugo was the owner of LUGO Construction Inc., which had a contract to build the church in 1999. LUGO had started the pre-load phase of the project when the survey was recorded in July 1999.

RP 7/14/04 at 103-115; RP 2/14/06 at 80-104. Lugo specialized in "design build" jobs which meant that he worked on projects from the very beginning and on a fast-track timeline. He had done very large projects and had a rapport with the City of Fife because he had built their justice center. RP 7/14/04 at 104. RP 2/14/06 at 81. He foresaw no impediments like site or permit problems. RP 7/14/04 at 114. He considered this project to be rather small and would have completed the building in 4-6 months. RP 7/14/04 at 105; RP 2/14/06 at 95.

He testified that a representative of AHR told his workers to stop working. RP 2/14/06 at 83. At that time (summer of 1999) the civil plans were almost ready and approved, the building permit was being reviewed. He stated that there would have been no problem with approval because a

building with a metal roof presents less structural issues for the building department to review. RP 7/14/04 at 112-114.

Lugo disagreed with Witte's testimony that permits could not have been obtained until 2002. RP 2/14/06 at 84. He stated that it was the survey that shut down this project and that he would have built it in 4-6 months after the pre-load was finished. RP 2/14/06 at 83; RP 7/14/04 at 105-107. Lugo, having 160 employees at his disposal, would not have performed this construction in a linear fashion. He would have numerous things being done simultaneously because he was an experienced design-build contractor. RP 2/14/06 at 89-93; 103.

Lugo also disagreed with Witte's testimony that the loss of financing was a moot issue. Obviously the loss of money in a project directly affects the progress of the project. In this case, the loss of financing caused the cancellation of the project. RP line 25. Lugo also testified that Ron Garrow, at the city, told him to stop construction due to the boundary dispute. RP 7/14/04 at 112.

Lugo's testimony constituted substantial evidence that the church would have been built by LUGO Construction but for the interference of AHR. There was conflicting testimony regarding whether the building could have been built in less than three years, and the trial court found that

the testimony of Witte was not credible. Therefore this court must defer to the trial court's determination of credibility.

c. The Church did lose its financing. (FOF 4, 14, 16, 17)

AHR argues that New Horizon did not "lose" the bond financing because it was not yet finalized when the survey was recorded in July 1999. They argue that because the bond prospectus (Exhibit 118) had incorrect income information, the church would not have received final approval for the bond.

New Horizon applied for a bond with Security Church Finance, Inc., to finance its building construction. Bryan Magnum of Security Church Finance, Inc., testified that New Horizon had been growing and had solid financial strength in 1999. He stated, "They have a growth trend. Actually growing pretty amazingly for where they were." RP 7/14/04 at 52. He stated that the church had a solid and balanced elder core and pastor. RP 7/14/04 at 52-53. Magnum also testified that the survey put a cloud on the title and stopped the bond process. He stated, "But the minute we saw the adverse claim we knew we weren't going to go any place because we have a cloud on the title that was going to prohibit any kind of deal." RP 7/14/04 at 54, lines 1-4. He stated the survey stopped the bond. Id at line 18. He testified that New Horizon qualified for a \$1.325 million bond on graduated interest payment scale. Id at 56. In fact, one reason why

New Horizon could not re-qualify for a new bond 17 months later (after the corrected survey was recorded) was because this graduated payment bond was no longer available and because their income had declined after the first survey was recorded. Id at 55.

AHR argues that a pamphlet prepared by the church in preparation of selling the bond proves that the bond would not have been approved. This argument is another red herring. Why would the church have paid to have this investment pamphlet printed if it was not preparing to sell the bonds? Hence, the bond was well in place before the prospectus was printed. Moreover, Security Church Finance required that the church be audited by a CPA in order to prove their financial strength and it approved the bond based on the audits. RP 7/14/04 at 61; RP 2/15/06 at 9. Exhibit 52-58.

New Horizon had qualified for the bond financing program and the only reason it did not go forward was because AHR recorded an inaccurate survey which placed a cloud on the title. AHR intentionally interfered with both the bond financing and the construction contract with LUGO, Inc. to build the church. Without financing they could not pay the contractor to build the church. The record supports the trial court's findings of fact no. 4, 15, 16 and 17.

**d. AHR did proximately cause the delay in construction.
(FOF 15, 18)**

AHR argues twofold that the record does not support proximate cause. One, that because Pastor Wolfe did not record the boundary line adjustment and two because New Horizon used an unlicensed engineer to draw its plans. Both arguments lack merit.

Boundary Line Adjustment:

Pastor Wolfe testified that the conditional use permit required that the church do a lot line adjustment. The church owned four parcels and the lot line adjustment combined lots so they would have one larger parcel to build on and two commercial lots which they could either sell or utilize themselves. RP 7/13/04 Vol. I at 10-11. Surveyor Dale Oaks prepared the boundary line adjustment survey. RP 7/14/04 at 124. He did the work and staking in April 1999. Exhibit 28. RP 7/14/04 at 123. Once recorded, the lots would then total three instead of four. Pastor Wolfe decided to wait to record the boundary line adjustment after the project had been shut down. He was uncertain if he would be able to obtain financing to build the church. It was a prudent decision to wait to record the boundary line adjustment survey because if the project could not go forward, the church would have four lots to sell rather than three. The only reason to record the adjustment was if they could obtain the building permit. In fact, once they

did obtain the permit, Pastor Wolfe recorded the lot line adjustment. RP 7/13/04 Vol. I at 10-17.

Dale Oaks testified that the boundary line adjustment could be recorded once it was approved by the city. RP 7/14/04 at 124. Both Oaks and Wolfe signed the survey on 3/9/00. The adjustment had been approved by the city on January 25, 2001 and it was recorded in July of 2002. Exhibit 28. The adjustment was a requirement of the conditional use permit. There was no reason to delay its recording other than the fact that the project had been stopped by AHR. Once the church was able to obtain new financing to build the church, Pastor Wolfe took it to the recording office and recorded it. RP 7/13/04 Vol. I at 10-13; RP 2/13/06 at 83.

Unlicensed engineer:

Pastor Wolfe testified that the first time the civil plans were submitted (November of 1999) to the city for approval the city engineer sent them back because the person who signed off on them was unlicensed. The unlicensed engineer was supervised by a licensed engineer who eventually signed them in April of 2001. However, in the mean time, the project had been shut down. Pastor Wolfe stated that there was no hurry to pay extra money to expedite the plans because they could not move forward anyway. RP 7/13/04 Vol. I at 13-17.

AHR's intentional interference with New Horizon's construction contract and bond program proximately caused the damages awarded by the trial court. There is ample evidence that the incorrect survey created a false boundary dispute and effectively took 15 feet of the church's land. The city then shut down the project and the bond sale was cancelled. AHR refused to listen to reason and did not record its corrected survey until November of 2001, seventeen months later. By that time, the church had lost the LUGO construction contract and its bond. They experienced a large income decline because many members left in discouragement, which precluded them from obtaining new financing. They were turned down by 14 different lenders. RP 7/12/04 at 116-119. It took until October of 2002 to obtain financing in the amount of \$850,000.00 from a private source. RP 7/12/04 at 119-120. They were forced to borrow an additional \$437,000.00 from church members and Pastor Wolfe acted as the general contractor to build the church but, it was still not enough money to hire a contractor to do all of the work. RP 7/12/04 at 121. They started actual construction of the building in May of 2002 with Pastor acting as the general contractor and hired subs to do much of the structural work. RP 7/12/04 at 123. The church members volunteered their time to help with construction and they logged over 18,000 hours of volunteer labor to build the church. RP 7/12/04 at 125-126.

But for the interference of AHR, it would have been built in a much more timely manner and on a fast track with LUGO construction. It was originally scheduled to be finished by LUGO in four to six months. RP 7/14/04 at 105. The delay was directly caused by AHR's interference.

e. The Court did not err in determining that the delay period was 17 months. (FOF 14, 22, 23)

New Horizon presented evidence that they would experience lost profits for years after opening the new building, due to the delay in construction caused by AHR's survey. Pastor Hunt testified that a new church creates an opportunity to grow the number of the congregation for many years after building a new church. RP 7/15/04 at 81-85. Even where the congregation grows past the capacity of the sanctuary, the church has the option of doing dual services. In fact, this church did grow more than 20% for the first three years, which proves its case for lost income. The years of delay caused by the survey caused a decline in membership and income, which can never be recovered.

Damages began to flow as a direct result of the recording of the survey. People left in discouragement almost right away and they lost many members in 1999 and 2000 who had contributed and pledged to the building fund. Twenty three families left in 1999 alone and another 10 families in 2000. Exhibit 52. RP 7/13/04 Vol. I at 61-63. New Horizon

presented evidence that even though the survey was corrected after 17 months, it took an additional year for the church to recover and obtain financing to start construction. And then they experienced more delays because they had to rely on volunteer labor for much of the building. RP 7/12/04 at 123-126. Exhibit 20 corrected survey.

The trial court found that awarding up to five years of lost profits was too much. In its discretion the court found that the relevant damages for lost profits should be calculated only during the delay period of 17 months, which was the time period between the first AHR survey and its corrected survey. The trial court judge reasoned that although the damages could technically go on forever, as in many tort injury cases, that there had to be a cutoff and that the time period that the survey actually clouded the title was a good cutoff for damages. RP 2/15/06 at 202. The trial court found that New Horizon's argument that it lost \$800,000.00 in lost profits over three years was credible and used that figure to reduce it to 17 months by first dividing that number by 36 months and then multiplying it by 17 months. RP 2/15/06 at 202-203.

A trial court's award of damages is reviewed for abuse of discretion, and will be reversed only if the damages amount is outside the range of relevant evidence, shocks the conscience, or results from passion

or prejudice. Mason v. Mortgage Am., Inc., 114 Wash.2d 842, 850, 792 P.2d 142 (1990).

Although New Horizon argued that the court should have awarded more lost profits, it defers to the trial court's ruling. Although disappointing, it was not an abuse of discretion for the court to limit the award of damages to the time period that the survey was actually recorded and a cloud on the title.

4. THERE WAS SUBSTANTIAL EVIDENCE OF THE USE OF IMPROPER MEANS BY AHR WHEN IT TORTIOUSLY INTERFERED WITH THE CHURCH'S CONSTRUCTION PROJECT AND FINANCING PROGRAM. (FOF 6, 7, 8)

AHR argues that finding of fact 6 states a conclusion of law and that the court therefore failed to make a finding of fact regarding the use of improper means of intentional interference. However, FOF 6 states ultimate findings of fact, which the record supports. FOF 6 states:

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 owner to the west, Mrs. Longey. The survey was recorded on July 13, 1999.

A trial court is not obligated to find every probative fact necessary to establish the ultimate facts, but is only required to make findings that enable an appellate court to determine the basis for trial court's decision.

Glen Park Associates, LLC v. State, Dept. of Revenue, 119 Wn. App. 481, 487, 82 P.3d 664 (2003), rev denied 152 Wn.2d 1016, 101 P.3d 107 (2004).

An appellate court may supply a missing finding of fact where there is ample evidence to support the finding and where the remaining findings, viewed as a whole, establish support in the record for such an omitted finding. The failure to make a finding which is supported by substantial evidence is harmless error. Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., 64 Wn. App. 661, 682, 828 P.2d 565 (1992).

The Supreme Court in Commodore v. University Mechanical Contractors, 120 Wn.2d 120, 137, 839 P.2d 314 (1992) identified five elements necessary to make a claim for tortious interference with contractual relations or business expectancy:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

An existing enforceable contract is not necessary to support an action for interference with business relationships. Scymanski v. Dufault, 80 Wn.2d 77, 84, 491 P.2d 1050 (1971). All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectancy of a contract arising from the relationship. And this relationship must be known, or reasonably apparent, to the interferor. Id.

The Supreme Court in Pleas v. City of Seattle, 112 Wn.2d 794, 774 P.2d 1158 (1989) adopted the reasoning of the Oregon Supreme Court in Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365, 1368 (1978) which stated the following:

“A cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact causes injury to plaintiff's contractual or business relationships.” Top Serv., 582 P.2d at 1368. “A claim for tortious interference is established when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means ... No question of privilege arises unless the interference would be wrongful but for the privilege ... Even a recognized privilege [however] may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege ...” Top Serv. 582 P.2d at 1371.

Furthermore, interference can be "wrongful" by reason of a statute or other regulation, or an established standard of trade or profession. Pleas v. City of Seattle, 112 Wn.2d at 804.

In Pleas, the Supreme Court found the city employees' desire to gain political favor by refusing to grant necessary building permits and arbitrarily delaying the plaintiff's construction project to be the use of improper means, despite a lack of finding that interference was their primary motive. Id. at 804-805.

The Supreme Court in Pleas gave a lengthy analysis of this issue and ultimately determined to adopt the reasoning of the Oregon Supreme Court in finding that tortious interference arises from **either** the defendant's pursuit of an improper objective (motive) of harming the plaintiff **or** the use of wrongful means that in fact causes harm. Pleas 112 Wn.2d at 804-804. It is not necessary that the defendants' primary motive be the interference itself. Id. at 806. Moreover, a privilege is defeated by continuing an unjustified course of action. Id. at 804.²

There was substantial evidence to support FOF 6, 7 and 8.

In this case, plaintiff had a contract to build its church with LUGO Construction Company. LUGO had already started working on the pre-load phase of construction and plaintiff had a firm contract with LUGO to build the church. Defendants were at least aware of this relationship because it was obvious that LUGO Construction Company was working on the site. In fact, defendants admitted at trial that they were aware of the construction

² AHR does not assign error to conclusion of law number 4, which states that defendants failed to prove a legal privilege to record the Longey survey.

project. CP 30; FOF 5. (no error assigned). Defendant Robinson told Pastor Wolfe that he was trespassing on Longey's Property. Robinson then went to the City of Fife and asked Ron Garrow, the Public Works Director, to shut down New Horizon's project due to the encroachment on the Longey property. RP 7/12/04 at 61-63; RP 7/14/04 at 32-33.

Pastor Wolfe then sent several letters to AHR asking them to review their work because he felt that they were wrong and his letters stated that AHR was harming New Horizon by stopping the construction project. These letters were sent well before AHR recorded its survey in July of 1999. Exhibit 13 and 14. Pastor Wolfe had his surveyor, Dale Oaks, investigate and Oaks found that indeed AHR was wrong. Oaks located the old fence posts lying on the ground that indicated that the AHR stakes were in the wrong place, well away from the established fence line boundary. RP 7/14/04 at 126. Oaks called AHR numerous times to request that they meet with him to go over the erroneous placement of the AHR survey stakes. He kept a log of his phone calls. RP 7/14/04 at 133-141; Exhibit 85. All of these actions were taken before AHR even recorded their survey. Exhibits 14, 15.

AHR repeatedly ignored all of Pastor Wolfe's and Oaks' requests to meet. RP 7/12/04 at 90-95. AHR stubbornly refused to even review their work and then went ahead and recorded the inaccurate survey in July of

1999, all in violation of their ethical code of conduct. RP 7/14/04 at 134. Two expert surveyors (Jerry Broadus and Kenneth VanCleave) testified at trial that this conduct was below the standard of ethical conduct of their profession. RP 7/15/04 at 60-62; RP 7/14/04 at 192 (lines 18-20); RP 7/15/04 at 8, 16-18. It then took nearly 17 months before AHR finally admitted that they were wrong and recorded a corrected survey. RP 7/14/04 at 150-157; Exhibit 20. In the mean time, New Horizon's project was halted, the LUGO contract expired, New Horizon lost its financial bond, New Horizon lost income, and many church members left in discouragement.

Once Ensley and Robinson were made aware that their work was inaccurate and causing damage to New Horizon, they had an ethical duty to respond to the inquiries of Dale Oaks, a professional surveyor. The surveyors who testified at trial for Plaintiff in this case stated that it is below the standard of the profession to refuse to review one's work with another surveyor who questions it. Defendants violated several ethical rules of their own profession by refusing to cooperate with Oaks to review their work before they even recorded the survey. RP 7/15/04 at 60-62; RP 7/14/04 at 192 (line 18-20); RP 7/15/04 at 8, 16-18.

Therefore, AHR's refusal to review their work with Dale Oaks, a professional surveyor, was an act of misconduct. The Defendants

intentionally interfered with New Horizon's construction by trespassing on the Church Property first to place survey stakes, then later to inform the construction workers to stop, and finally by going to the City to request that the project be stopped. The defendants waived any perceived privilege when they violated their own ethical standards of their profession, and knowing that they were harming New Horizon, they went ahead and recorded an inaccurate survey that created a false boundary dispute. (Appellant did not assign error to the Court's conclusion that they failed to prove a privilege) CP 34. COL. 4.

Moreover, when AHR did record the survey (over the protests by Pastor Wolfe and Oaks) it failed to depict the alleged boundary dispute. Defendants violated WAC 332-130-050(1)(f)(vi) & (vii) which requires surveyors to depict all encroachments, overlapping and conflicting boundaries. They were required by law to show the discrepancy between their line and the VanCleave line. RP 7/14/04 at 192; CP 31, FOF 13. The very fact that they created this perceived encroachment and then did not depict it on the survey is another example of improper means of interference. Pursuant to Pleas, a violation of a statute, regulation or standard of a profession is evidence of improper means. The AHR surveyor violated several standards of his profession as well as WAC 332-130-050.

Moreover, pursuant to Pleas, plaintiff is not required to show that the defendants' interference was their primary motive. It is sufficient to show that they interfered and that they used improper means to do so. Pleas at 806. As a direct result of AHR's interference and the surveyor's acts of misconduct, New Horizon's construction project was halted, it lost the contract with LUGO, the bond for financing, and church membership and income declined drastically. This Court should affirm the trial court's finding of improper means.

There is substantial evidence in the record to support all of the trial court's findings of fact. These findings in turn support the trial court's conclusions of law pursuant to the elements of tortious interference with contractual relations or business expectancy as defined in Commodore v. University Mechanical Contractors, 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

5. THE TRIAL COURT DID NOT ERR IN DENYING AHR'S MOTION FOR SUMMARY JUDGMENT.

There were five issues argued by the defendants on summary judgment in 2003. However, on appeal they only cite error to the issue of privity. As such, the other issues decided on summary judgment are not before this court for review and should be upheld.

An order denying summary judgment, based upon the presence of material, disputed facts, will not be reviewed when raised after a trial on the merits. Johnson v. Rothstein 52 Wn. App. 303, 306, 759 P.2d 471, 473 (1988). Here, the trial court specifically stated in its order denying summary judgment that its decision was based on a finding of disputed issues of fact. CP 207. There were disputed issues of fact regarding the reliance element of professional negligence. At trial, Judge Stone heard the disputed evidence and made a final decision that there was not sufficient evidence of reliance to find liability.

a. AHR owed a duty to New Horizon pursuant to the Restatement (Second) of Torts § 552.

New Horizon brought a claim of negligent misrepresentation, sometimes referred to as “professional negligence”. The claim was based on the negligent survey performed by AHR for Mrs. Longey. New Horizon was not a party to that contract, and therefore had no contractual privity with AHR upon which to base a claim. Having no privity with AHR, New Horizon brought a claim under the Restatement (Second) of Torts § 552, where privity is not required. The argument that the whole case should be dismissed due to lack of privity is without merit.

The Washington Supreme Court reaffirmed its adoption of negligent misrepresentation as a cause of action as set forth in the

Restatement (Second) of Torts § 552. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 55 P.3d 619 (2002). The elements of negligent misrepresentation set forth in the Restatement (Second) of Torts § 552 are as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care of competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552.

There is not a case in Washington where this duty has been determined regarding surveyors and the limited class of adjoining property owners who share a common boundary with the owner who contracted with the surveyor to survey the common boundary. However, Washington has imposed this duty upon other professions, and other states have imposed a duty of reasonable care on surveyors to specific third parties.

Washington courts recognize a similar duty of real estate appraisers to third parties who are not in contractual privity with the appraiser. Schaaf v. Highfield, 127 Wn.2d 17, 27, 896 P.2d 665 (1995). A lack of privity is no defense to a claim of negligent misrepresentation. Id. at 26. However, the Court limited the liability to the foreseeable persons

involved in the transaction but not necessarily only to the buyer and seller.
Id. at 27.

The Schaaf Court recognized a duty of reasonable care where the class of persons liable is limited. The policy reasons for limiting the class of potential plaintiffs is to avoid indeterminate liability to third persons not in privity. Id. In Bolsner v. Clark, 110 Wn. App. 895, 43 P.3d 62 (2002), the Court found that an appraiser is liable for negligence to the limited class for whose benefit he supplies the appraisal, or those to whom he knows the intended beneficiary intends to supply it. In that case the appraiser knew of a partnership's reliance on his appraisal after he agreed to testify in support of the appraisal in the partnership dissolution proceedings without indicating a need for a new or updated appraisal. Id. at 902. The Court found that the defendant knew of and acquiesced in the Plaintiff's reliance on the appraisal. Id.

The Court in Haberman v. Washington Public Power Supply, 109 Wn.2d 107, 744 P.2d 1032 (1987), addressed the duty in the Restatement §552 as it applied to the sellers of securities to bondholders. The Court stated the following:

“...it is not required that the person who is to become plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or

class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.” Id. at 162-163.

(See also Hoffer v. State of Washington, 110 Wn.2d 415, 429, 755 P.2d 791 (1988), where the Court found the fact that the State Auditor wrote a letter and certification of bonds knowing that the Supply System intended for it to reach investors who were deciding whether to purchase bonds would not bar a claim for negligent misrepresentation).

In general, it is inconceivable to describe a more foreseeable class under §552 of the Restatement than a property adjoiner whose property lines must necessarily be affected by a survey of the common boundary between the also adjoiner’s property and the property being surveyed. Surveyors are aware or should be aware that the inaccurate placement of a boundary line will affect not only the owner of the property being surveyed but the adjoiner who shares the common boundary, especially where there is obviously construction going on the adjoiner’s property. (CP 191-192; CP 182 line 12-16)

Other States have adopted the duty defined in the Restatement (Second) of Torts § 552 to apply to surveyors. In Rozny v. Marnul, 43 Ill.2d 54, 250 N.E.2d 656 (1969) the Court determined that a surveyor did owe a duty to a subsequent purchaser after he negligently described the lot

boundaries on a plat. In Tartera v. Palumbo, 224 Tenn. 262, 453 S.W.2d 780 (1970), the Court found a duty where the Plaintiffs were owners of land surveyed in accordance with a contract between a negligent surveyor and an option contract purchaser of a portion of the plaintiff's property. The Court in Hutchinson v. Dubeau, 161 Ga. App. 65, 289 S.E.2d 4 (1982), found that pursuant to a state statute requiring surveyors to be responsible for the accuracy of their work, a negligent surveyor could be held liable to purchasers damaged by their reasonable reliance upon the work. All of the above cases abrogated the requirement of privity of contract and found liability under the Restatement to those plaintiffs who are foreseeable and ordinarily suffer loss from a surveyor's inaccuracy.

In the case at hand, the Plaintiff was forced to rely upon AHR's inaccurate survey once it was recorded and when the City of Fife shut down their construction project. The survey created a cloud on title and directly caused damages to the plaintiff by changing its purported boundary with the Longey property. It is interesting to note that as in the State of Georgia, Washington law imposes a duty on surveyors to the public to "safeguard life, health, property and to promote the public welfare". RCW 18.43.010; See also WAC 196-27A. The Georgia Court in Hutchison determined that a plaintiff can sustain an action against a surveyor based in tort due to the statutory duty imposed upon a surveyor

to the public for accuracy. In Washington the legislature has also found that surveyors owe the public a duty of accuracy by demonstrating that their final documents and work products conform to accepted standards. WAC 196-27A-020(1)(b). Therefore, in this case, the plaintiff is part of the limited class of adjoining who have no choice but to be affected by an inaccurate survey which involves a common boundary, and therefore the Defendants owe a duty to Plaintiff for damages sustained due to Defendants' negligent misrepresentations.

Defendants argue that Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 806, 43 P.3d 526 (2002) shows that there is no duty to an adjoining. Burg is distinguishable because the duty in question was whether an engineer had a duty to warn residents of possible impending mud slides. In Burg the claim was based on third party beneficiary and not professional negligence under the Restatement. In contrast, in this case New Horizon based its claim on a duty to an adjoining based on a negligent survey.

At summary judgment, the surveyor experts were emphatic regarding the duty to an adjoining and even Defendants' expert acknowledged that he would certainly not ignore an adjoining whose property would be affected by a change of boundary line. (CP 187 lines 1-6; CP 182-183; CP 191-192; CP 161, lines 2-11). Surveyors owe a duty to

an adjoiner when a survey will affect the boundary line of that adjoiner. An adjoiner is within the limited scope of foreseeable plaintiffs who are affected by an inaccurate survey and, as such, should be entitled to recover damages incurred as a direct result of their reliance on an inaccurate survey. The trial court did not err in denying summary judgment.

AHR argues on appeal that if the trial court had granted summary judgment, it would have been too late for New Horizon to amend its complaint to add the claim for tortious interference because the statute of limitations had run. However, under the discovery rule, New Horizon would have been permitted to file a new claim based on tortious interference. The “facts” that give rise to that cause of action must be known to start the running of the statute. Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C. 109 Wn. App. 655, 659, 37 P.3d 309, 312 (2001), rev. den. 146 Wn.2d 1019 (2002).

In this case, all of the facts regarding defendants’ intentional conduct were not revealed until the depositions of the defendants and of Ron Garrow, the public works director, were taken. It was then that new Horizon discovered that AHR had intentionally tried to stop the construction by informing Ron Garrow of the property line dispute. CP 171-172. Therefore, the discovery rule would have applied and the statute

of limitations would not have started until after the lawsuit was filed on June 27, 2002.

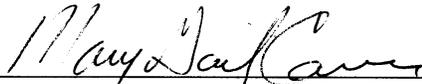
6. CONCLUSION

There was substantial evidence in the record to support the trial court's findings of facts, conclusions of law and award of damages. The trial court did not err in denying defendants' first summary judgment in 2003. Respondent respectfully requests this Court to affirm the trial court's ruling.

DATED this 25th day of October, 2006.

Respectfully Submitted,

NELSON & CARVER, P.S.



MARY GAIL CARVER, WSBA#28460
Of Attorneys for Respondent

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 25, 2006, I caused service, via legal messenger, of one original and one copy of the foregoing pleading to the clerk of the Court of Appeals Division II.


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