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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON,
DIVISION ONE

PROFESSIONAL NETWORK, INC.,

Appellant,

v.

WASHINGTON DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Respondent.

APPELLANT'S REPLY BRIEF

Paul M. Crisalli, WSBA # 40681
THE LAWLESS PARTNERSHIP, LLP
6018 Seaview Ave., NW
Seattle, WA 98107-2657
(206) 782-9535

Randy Barnard, WSBA # 8382
O'SHEA BARNARD MARTIN
& OLSON, PS
1500 Skyline Tower
10900 NE Fourth Street
Bellevue, WA 98004-5844
(425) 454-4800

Attorneys for Appellant.

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- I. On review of a trial court's grant of summary judgment, this court views the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor

DSHS spends several pages addressing the appropriate standard of review on appeal, contending that PNI is relying on speculative assertions and conclusory allegations. *Br. of Resp't* at 13-16. There are several problems with DSHS's assertions.

In its discussion of the standard of review, DSHS neglects to point out that the facts must be viewed in the light most favorable to PNI. "Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Atherton Condominium Apartment-Owners Ass'n Board of Dirs. v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 520 (1990); see also *Vallandingham v. Clover Park School District No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). By neglecting to include these components of the applicable standard of review, DSHS implicitly places the burden on PNI to prove its case. The law requires that PNI must be given every reasonable benefit of the doubt.

Related to the standard of review, DSHS argues that PNI relies on “conclusory allegations, speculative statements, or argumentative assertions.” *Br. of Resp’t* at 14-15 (citing *Pagnotta v. Beall Trailers*, 99 Wn. App. 28, 36, 991 P.2d 728 (2000)). The problem with this argument is that every factual assertion, except for two sentences, in the Statement of Facts section of Appellant’s Brief, is supported by a citation to the evidence before the trial court. One sentence was used to introduce the fact that Region 4 took steps to terminate or eliminate PNI, *App’t’s Br.* at 7, and the other sentence stated that PNI was appealing the trial court’s decision, *App’t’s Brief* at 13. All of the other facts were submitted through declarations, both from PNI’s witnesses and from DSHS’s witnesses, deposition transcripts from DSHS’s employees, and various documents in DSHS’s possession.¹ The statements in those pieces of evidence are not mere conclusory statements of the

¹During discovery, PNI requested additional evidence from DSHS regarding the underlying facts of this case. *Plaintiff’s First Interrogatories and Requests for Production*. DSHS sought a protective order to prevent discovery of such evidence, but the trial court dismissed that motion as moot after it granted DSHS summary judgment. *Defendant’s Motion for Protective Order*. If this court were to reverse and remand, PNI could seek this discovery which might further assist PNI’s case.

law, but statements of facts by people who are qualified to testify to those facts.

DSHS also fails to explain exactly what statements constitute “speculative assertions and conclusory allegations.” *Br. of Resp’t* at 15. This is not a case where PNI is relying on its own president’s declaration to prove that Region 4 decided it wished to terminate PNI; Jackie Buchanan, DCFS’s Regional Administrator, testified that it was her intention to reduce, terminate, and/or eliminate PNI. CP at 496, 501-03; *Decl. of David T. Hasbrook (Hasbrook Dec.)*, Ex. 3, *Dep. of Jackie Buchanan*, at 9, 68-75. She then testified to having meetings with several DCFS and Region 4 employees to effect that goal. CP at 502; *Hasbrook Dec.*, Ex. 3, *Dep. of Jackie Buchanan*, at 70. PNI is not relying on speculation to show that Region 4 sent out an email falsely stating that PNI had been terminated; PNI submitted the email from Cris Jones and the correspondence between Jones, Byron Williams, and Priscilla Wolfe discussing the email. CP at 517-18, 524-25; *Hasbrook Dec.*, Ex. 7, 9. PNI is not relying on speculation to show that Region 4 management understood that the non-competitive contracts were to be renewed yearly, and that the sole grounds for not renewing a contract were either that information on file was not up to date or

that the provider was no longer in business; Jackie Buchanan testified to that effect. CP at 600; *Hasbrook Dec., Ex. 3, Dep. of Jackie Buchanan*, at 51-52. While DSHS may disagree with the credibility of these statements or provide a different interpretation of these facts, such arguments should be presented before the jury at trial.

II. Region 4's budget issues in 2004 through 2005 do not have legal significance in these proceedings

For the first time, DSHS contends that budget problems between 2004 and 2005 warranted termination of PNI's contract. *Br. of Resp't* at 10. The facts of the contract's termination do not support this conclusion. Paragraph 33 of the service provider contracts allow for modification or termination of the contract because of DSHS funding changes. CP at 149; *App't's Brief*, App B at 9. Region 4 never relied on that paragraph as justification for its actions towards PNI. Further, PNI agreed to set a maximum payment amount of \$10,000 for the time period from July 1 to September 30, 2005 to address DSHS's budget needs. Despite this cap on payments to PNI, Region 4 took action that both eliminated PNI and entirely failed the parents and children who needed the supervised visitations. By choosing that option, Region

4 demonstrated that its actions towards PNI were not out of a concern for its budgetary problem, but rather were based on personal animosity.

At the very least, there is a question of fact about Region 4's motivations in terminating the contract. As that type of question is reserved for the jury, DSHS's argument does not support the summary judgment decision. It only serves to demonstrate the existence of a disputable fact.

III. PNI's status as an independent contractor demonstrates it had a business expectancy with its clients

DSHS reiterates that a party cannot tortiously interfere with its own contract, relying on *Reninger v. State*, 134 Wn.2d 437, 448, 951 P.2d 782 (1998). *Br. of Resp't* at 17. *Reninger*, however, adds support for PNI's argument. In that case, Department of Corrections (DOC) officers sued DOC based upon actions of its other employees. *Reninger*, 134 Wn.2d at 448. The business expectancy was the plaintiffs' employment with DOC. *Id.* The plaintiffs did not ask for damages from the employees. *Id.* As a result, as the employees were acting within the scope of their employment, the plaintiffs were suing DOC for actions by its

employees, with the business expectation of their employment. *Id.*
A claim for tortious interference was not appropriate. *Id.*

Here, as DSHS has repeatedly pointed out and in stark contrast to the facts of *Reninger*, PNI was an independent contractor. As a result, it never acted under a scope of DSHS's employment for purposes of its dealings with the clients. The contract specifically provided that PNI was not DSHS's employee and that DSHS would not be liable for PNI's actions. The result of PNI's status as an independent contractor is that PNI had the same duties and potential liabilities to the clients as if the clients were paying PNI directly for the services. As a result, PNI had a valid business expectancy with a third party, the clients.

IV. DSHS was obligated to do more than simply pay PNI for the services DSHS authorized

At the outset, DSHS recognizes that if a court rejects a tortious interference claim because there was no interfering third party, the appropriate remedy for wrongful acts by a party to a contract is a breach of contract claim. *Br. of Resp't* at 18. PNI has alleged both a tortious interference and a breach of contract claim. While either claim is viable, if the only reason for dismissal of the tortious interference claim was the absence of a valid business

expectancy with a third party, the appropriate remedy for wrongful acts by a party to a contract is an action for breach of that contract. See *Br. of Resp't* at 18; *Reninger*, 134 Wn.2d at 448; *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978).

DSHS nonetheless argues that Region 4 had no obligation to PNI except to pay for the authorized work PNI performed. *Br. of Resp't* at 22. Both the contract at issue and case law contradict DSHS's assertions in the following ways.

A. Region 4 violated the provisions of the contract governing termination

Region 4 violated the explicit contractual provisions of paragraphs 33 through 35 dealing with termination of the contract when it sent an email to all employees and social workers of DSHS falsely stating that PNI's contract had been terminated. Paragraphs 33 through 35 lay out the processes by which Region 4 could terminate the contract, and they included providing adequate notice to PNI. By sending the email to all employees and social workers, Region 4 did not follow those provisions. As far as the employees and social workers knew, however, PNI's contract was terminated. The result of sending this email was that PNI's reputation was harmed, causing it to lose its source of referrals because of a false

and baseless statement by Region 4. All of this was done without Region 4 telling PNI about how Region 4 interpreted the status of the contract. PNI only learned about Region 4's email and actions through a security services employee. CP at 368; *Coy-Monahan Dec.*, at ¶ 12. By the time PNI could try to clarify the status of the contract with the social workers, PNI had already suffered harm to its reputation, upon which it relied to get its referrals.

B. Region 4 breached its obligation to act in good faith²

DSHS argues that under *Badgett v. Security State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991), a party cannot breach a duty of good faith by "simply stand[ing] on its rights to require performance of a contract according to its terms." See *Br. of Resp't* at 23-24. DSHS essentially argues that because there was no explicit terms in the contract precluding Region 4 from soliciting detrimental information from PNI employees, from convincing PNI employees to quit and become independent contractors, from falsely telling PNI's sources of referrals and authorizations of

²DSHS suggests that this court should not consider this argument. First, DSHS never explains how the "evidence and issue[]" was never brought to the attention of the trial court. RAP 9.12. Second, PNI's first amended complaint alleged a breach of contract and PNI's Appellant's Brief relied exclusively upon the evidence of the trial court. The issue is properly before this court.

services that PNI's contract had been terminated, and from eliminating PNI from existence, all out of personal animosity, Region 4 was free to do so. Under DSHS's theory, so long as Region 4 paid PNI for all authorized services, there could be no breach of contract.

The problem with DSHS's argument is that Region 4's actions undermined the entire contractual relationship between Region 4 and PNI. In *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d (1997), this court explained that an implied covenant of good faith and fair dealing will be read into a contract "when the contract gives one party discretionary authority to determine a contract term." Here, Region 4 had all discretionary authority. It was the one that was given authority to "authorize" work, to pay for the services, and to decide whether there are "overpayments or erroneous payments." See CP at 143-46, ¶¶ 3-4, 7, 9. In the definition of "authorized," no standard is provided to decide which provider should be authorized and which provider should not be authorized. As DSHS points out, the reason is to give Region 4 flexibility to best provide services. With

the flexibility to define when and what services to authorize comes an implied duty that Region 4 act in good faith and fair dealing.³

- C. Under the agency rules, statutes, and course of conduct between the parties, Region 4 was obligated to renew the contract so long as PNI met all the requirements to be a parent child visitation services provider

DSHS's analysis regarding the statutory and Office of Financial Management Guidelines does not withstand scrutiny.

DSHS contends that RCW 39.29.040(4) does not apply to the parent-child visitation contracts because subsection (4) deals with standard fee contracts where the fee is established by the agency, while the service contract here "is fee for services at a standard rate." *Br. of Resp't* at 25. DSHS makes a distinction without a difference. It also does not provide any legal or factual

³Aside from the disturbing implications such analysis has in the context of governmental agencies and governmental contracts, such analysis flies in the face of how ordinary contracts between two businesses work. Under DSHS's analysis, in a contract between two businesses, Business A could convince the employees of Business B to use the information they had learned and compete against Business A. Under DSHS's analysis, Business A could then falsely tell Business B's suppliers that Business B would no longer need supplies because it was no longer producing its goods. According to DSHS, all of these acts would be permissible simply because there is no specific contractual provision precluding such acts. That analysis makes no sense, particularly when a party acts to destroy a party with which it has a contractual relationship.

support for their argument. Region 4 pays the same amount of money for an hour's worth of services to all its contractors. The contract contemplates that PNI would be paid based on the total number of hours "in accordance with the regional rate(s) in effect at the time the services are provided per that region's current regional published rate schedules." CP at 143, ¶ 4. Under the terms of the contract, the governmental agency sets forth a standard amount of money it pays for various services. That hourly fee or rate applies uniformly to all contracting service providers in the region.

Looking at the dictionary definitions, a "fee" is defined as "1. A charge for labor or services, esp. professional services." BLACK'S LAW DICTIONARY 647 (8th ed. 2004). As applicable here, "rate" is defined as "2. An amount paid or charged for a good or service <the rate for a business-class fare is \$550>." *Id.* at 1289. Using the dictionary definitions, the meaning of "rate" and "fee" cannot be logically distinguished. DSHS's attempt to distinguish the contract here from the contract contemplated in RCW 39.29.040(4) is unconvincing.

DSHS also posits that since subsection (6) applies to "contracts for services" and this was a contract for service, subsection (6) controls. *Br. of Resp't* at 25. Subsection (6) itself,

however, limits its applicability. It applies to “contracts for client services except as otherwise indicated in this chapter.” RCW 39.29.040(6). Subsection (4) is one of those provisions that are “otherwise indicated in this chapter.” Moreover, DSHS’s reading of subsection (6) would make subsections (4) and (10) superfluous. It would make no sense for the legislature to include subsections (4) and (10), both of which deal with client services, if subsection (6) applies to all client service contracts.

DSHS argues that the OFM guidelines support its position because they mandate flexibility and support periodic review of contracts. *Br. of Resp’t* at 25. This interpretation of the guidelines is flawed in several respects.

First, by signing a contract allowing PNI to undertake parent child visitation services, Region 4 maintained flexibility in its allocation of resources because it could select when and how PNI would provide services. Such a move also might have prevented Region 4’s wholesale failure to fulfill its obligation to ensure that children and their parents received the court ordered visitation services.

Second, the guidelines state that the contracts should be reviewed periodically “to determine whether competition is

warranted.” *General Policies for Client Service Contracting Washington State Office of Financial Management Guidelines* (OFM Guidelines), § 16.10.25.c. When the contracts are reviewed, the purpose is to determine whether the agency should continue to use the noncompetitive method or to change to a competitive award system under chapter 39.29 RCW. The purpose of review is not to eliminate one qualified provider, but rather to ascertain whether all contractors should be changed from noncompetitive awards (or sole source awards for that matter) to using competition in awarding its contracts in order to fit the needs of the agency. Review of PNI’s contract and PNI’s subsequent elimination as a service provider did nothing to change whether contracts were or were not awarded on a competitive basis. Even after PNI’s contract was not renewed, Region 4 continued to use noncompetitive awards as their method of providing parent-child visitation services.

Third, the OFM guidelines make clear that non-competitive awards are continually renewed. PNI’s contract had in fact been continually renewed for the previous several years. Moreover, it is unrefuted that DCFS’s management understood that noncompetitive contracts were to be renewed year after year. See

CP at 500; *Hasbrook Dec.*, Ex. 3, *Dep. of Jackie Buchanan*, at 51-52. Notwithstanding DSHS's arguments before this court, the managers who signed the contracts understood that the contracts would be renewed unless the files were not up to date or the provider was no longer in business, which is consistent with PNI's reading of RCW 39.29.040(4), OFM's guidelines, and the earlier renewals of the contracts between PNI and Region 4. While Region 4 was in no way obligated to pay unlimited monies to PNI, it was at least obligated to renew the contract with PNI. Region 4 breached that obligation.

Finally, DSHS points out that OFM's guidelines stress effectiveness and efficiency. PNI welcomes an examination of whether Region 4's treatment of PNI was focused on such qualities. Before December 2004, with PNI's work, Region 4 was reliably able to handle the parent child visitation needs of its area. The reason that so many visits were supervised by PNI is that social workers who selected from among available contractors consistently selected PNI. When Region 4 was over budget and contemplated reducing PNI's amount of work, PNI was willing to sign a contract maximum of \$10,000 for three months. Instead, Region 4 refused to renew the contract. The results of its decision was that there

was a crisis in providing parent child visitations and resulting contempt of court proceedings against social workers, costing Region 4 both time and more money, and more importantly, completely failing in its mission to serve these children and their parents. Region 4's decision clearly reflects a willingness to sacrifice its efficiency and its principal mission in order to act on the personal animosities of the bureaucratic functionaries controlling the Region.

V. This court should allow the tort against public policy claim to proceed

DSHS claims PNI could not allege that Region 4 committed a tort against public policy because that tort can only occur in the employer/employee context and because PNI was not entitled to an automatic renewal of the contract. *Br. of Resp't* at 26. While PNI's Appellant's Brief refutes DSHS's analysis, three of DSHS's arguments warrant further response.

First, DSHS cites *Awana v. Port of Seattle*, 121 Wn. App. 429, 433, 89 P.3d 291 (2004), to support its argument. *Br. of Resp't* at 28. In *Awana*, the court discusses and relies on a law review article entitled *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May*

Bring a Claim for Violation of Public Policy, which argues that the tort against public policy should be extended to the independent contractor context. *Awana*, 121 Wn.2d at 433; see Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 YALE L. & POL'Y REV. 39 (2000). The *Awana* court did not reach the merits of that argument because the appellants in that case were not independent contractors. Here, there is no dispute PNI was an independent contractor. Thus, this case presents an opportunity to address the question left unanswered in *Awana*. For the reasons already stated and as explained in *Wrongful Discharge of Independent Contractors*, the tort against public policy should apply in the independent contractor context.

Moreover, PNI's status as an independent contractor to DSHS is unique compared to other forms of independent contractors. Under its terms, the contract provided Region 4 could terminate PNI for any reason, including if PNI successfully challenged an attempt by Region 4 to terminate PNI for failing to follow the contract or applicable rules. CP at 149, ¶¶ 33-35. OFM's guidelines governing the contract, particularly in light of Region 4

management's understanding of those guidelines, suggested that it should be renewed. Unlike in *Awana*, the facts in this case squarely present the issue and provide further support for recognition of the tort against public policy.

Second, DSHS submits that no tort against public policy occurred because PNI was not entitled to automatic renewal of its contract. *Br. of Resp't* at 29. For the same reasons mentioned in the breach of contract claim, PNI had an expectation that the only reasons that Region 4 would not renew its contract was if there was something wrong with the paperwork, PNI no longer did business, or if Region 4 decided to use competition rather than noncompetitive contracts. None of those justifications occurred here. Moreover, the underlying rationale of the tort against public policy is that the tort applies when a termination violates public policy despite the fact that the termination was otherwise authorized by common law.

This leads to the third and final point. DSHS never disputes that PNI has at least presented a sufficient factual showing that the reason Region 4 refused to renew the contract was out of retaliation for PNI challenging Region 4's claim that PNI had been overpaid. As courts have held that firing an employee for

exercising their rights constitutes a sufficient public policy, *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 707-08, 50 P.3d 602 (2002), so should this court hold that PNI's claim is legally and factually sufficient to be presented to a jury.

VI. Conclusion

As articulated in both Appellant's Brief and this Reply, the trial court erred when it dismissed PNI's claims for tortious interference with a business expectancy, breach of contract, and tort against public policy. Accordingly, this court should reverse and remand for a jury trial on those claims.

Respectfully submitted this 22nd day of April, 2010.


Paul M. Crisalli, WSBA # 40681
The Lawless Partnership, LLP
Attorney for Appellant

Proof of Service

On April 22, 2010, I caused to be served via legal messenger service, true and correct copies of this Appellant's Brief herein addressed to:

Richard A. Fraser, III
Assistant Attorney General
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

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

EXECUTED at Seattle, this 22nd day of April, 2010.

A handwritten signature in cursive script, appearing to read "Paul M. Crisalli", is written over a horizontal line.

The Lawless Partnership, LLP
Paul M. Crisalli, WSBA # 40681
Attorney for Appellants