

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**COLUMBIA PARK GOLF COURSE,
INC., a Washington corporation,**

Respondent,

v.

**CITY OF KENNEWICK, a municipal
corporation in and for the State of
Washington,**

Appellant.

No. 28357-7-III

Division Three

**OPINION PUBLISHED
IN PART**

Siddoway, J. — We are asked in this case to set aside a jury’s damage award to Columbia Park Golf Course Inc. (Columbia) following trial of its claims against the city of Kennewick (City) for breach of a development option agreement and the implied covenant of good faith and fair dealing. The City does not appeal the jury’s determination that it breached the agreement but contends that the damages awarded were not recoverable as a matter of law, principally because at the time of the breach Columbia

had not secured the permits, approvals, and agreements needed to succeed and because it characterizes the damages as future profits from a new business. The City also argues instructional error and that the trial judge should have ordered remittitur. We agree with the trial judge that Columbia presented substantial evidence in support of its claims and was entitled to submit its claim for presently measurable damages, not lost profits, to the jury. The trial court did not err in instructing the jury and substantial evidence supports the verdict. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The federal government owns Columbia Park, 363 acres of recreational property located along the Columbia River shoreline. Federal ownership arose with construction of the McNary Lock and Dam, which created a reservoir whose shorelines are administered by the Secretary of the Army and the Army Corps of Engineers (Corps). The Secretary leased the park and other shorelines to Benton County, mandating that they be used for park and recreational purposes. After property comprising the park was annexed by the City, the Corps terminated its lease to Benton County and entered into a 50-year lease to the City. The Corps' master lease agreements with local governments require the governments and their sublessees to administer Corps property for park and recreational purposes, guided by an annual plan proposed by the local government and agreed to by the Corps. Among uses for the park that have been deemed suitable by the

Corps for many years are as a golf course, as an overnight campground, and as a marina.

After the City acquired an interest in the park, it adopted development plans. A master development plan approved and adopted by the city council in February 2000 was controlling during all periods relevant to Columbia's claims. The master development plan was arrived at through a public process and was used as a guideline for decision-making about the park. The 2000 master development plan described a golf course and driving range that had long existed in the east end of the park, as well as plans for expanding and improving the course and course facilities.

Prior to 2000, city employees operated the golf course and driving range. In the late 1990s, the City issued a request for qualifications seeking a private "partner" to undertake improvements and privatize course operations. Columbia's controlling shareholder and president, Gary Long, Jr., submitted a proposal on its behalf. Mr. Long's background included management of retail golf stores, pro shops, driving ranges, and miniature golf courses. Mr. Long was also part owner of a software company that offered sales accounting and tracking software for golf course and food and beverage operations, including for golf course resorts offering recreational vehicle (RV) camping.

Columbia was selected by the City to be the developer and operator of improved golf course operations. In March 2000, the City and Columbia executed a 25-year sublease, which included an option to renew for 5 years. The property included in

Columbia's sublease included the golf course, driving range, other itemized buildings and facilities, and additional property east and west of existing operations. For the first five years of the sublease, the parties agreed that Columbia would make \$50,000 in capital improvements annually, in lieu of rent.

By September 2001, Columbia had constructed over \$300,000 worth of improvements and decided it wanted to construct a larger clubhouse and restaurant than originally envisioned. It approached the City with revised plans and a request for lease modifications in its favor, to compensate for its increased investment. The City agreed to extend the term of the sublease through September 2031 with options running to January 2050, and to extend the period for capital improvements in lieu of rent to 10 years. It also agreed that Columbia would own any new improvements and to revise the assignment clause to make Columbia's rights more freely assignable. An addendum reflecting these changes was executed in April 2003 and approved by the Corps.

Columbia then encountered problems designing the larger building, given site constraints and difficulties relocating the driving range. Mr. Long was working through the driving range problems with city staff when he became interested in a second development opportunity in the park.

West of the golf course in the park was an old campground. The Corps' 1982 plan for the park identified the campground location as a problem, since physical constraints

imposed by a levee resulted in a roundabout access route making the campground hard to find. By 2003 the amenities were outdated, the campground had lost money under city operation, and it had to be closed due to an inadequate septic system. The City's 2000 master development plan stated, with respect to the campground, that a "relocated recreational vehicle (RV) campground shall be designed, built and operated by a private owner on a long-term lease from the City" and in April 2004, the City published a request for qualifications seeking a qualified "partner" to design, construct, and operate a new RV campground. Ex. 1-M (Ex. C at 00038); Ex. 1-L. It received only one proposal, which was nonresponsive. At that point the City began exploring its own development of a campground, and favored finding a different location in the park.

In February 2005, Mr. Long, having heard of the lack of response, approached the City's director of parks and recreation, Cindy Cole, and expressed interest in submitting a proposal. He assumed the RV park would remain at the former campground location, but soon learned from Ms. Cole that the City preferred to move it. He was keenly interested in the potential of a resort-type RV park as part of the golf course redevelopment, if the City would agree to an RV park replacing the existing driving range. Columbia's leasehold was zoned open space and designated open space under the City's comprehensive plan, thereby allowing development of an RV park. Ms. Cole and other city staff believed the proposal had merit and city staff encouraged Mr. Long to include

moorage for overnight boater camping. City staff began working with Mr. Long on the concept and design of an RV park, shoreline improvements, and boat moorage at Columbia's existing leasehold.

By August 2005, Columbia had prepared and provided the City with an initial development plan, and Columbia and the City entered into a development option agreement (DOA) "for the purpose of granting an exclusive option for the development of a recreational vehicle park, shoreline improvements and boat moorage within Columbia Park." Ex. 1-AA at 1. The agreement recognized Columbia's desire to "protect its substantial investment in the feasibility plan" and promised that during the term of the agreement the City would not "entertain or negotiate any alternate proposals for development of a recreational vehicle park, shoreline improvements, and boat moorage within Columbia Park." *Id.* at 1, 2. The DOA required Columbia to provide a project site plan, pursue site plan approval, and, upon final site plan approval, construct the development. The term of the DOA was six months, with options to extend. Through later exercise of the options, the agreement remained in effect through February 15, 2007.

The Corps indicated support for the revised development plan. Mr. Long and Ms. Cole had a predevelopment meeting with representatives of the Corps in September 2005 and Corps representatives confirmed that they considered campgrounds a normal shoreline use and even agreed to consider the RV park for a pilot program that would

allow greater-than-30-day stays. A city staff report thereafter prepared for the planning commission stated that “the Corps of Engineers have expressed support of this project as a recreational use.” Ex. 2-GG at 10684.

City staff and officials indicated support for the project. Columbia engaged engineers and submitted an application under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, to the City in September 2005 and an application for a shoreline substantial development permit and attached site plan in October 2005. City staff found that the RV park proposal met the intents and goals of the City’s master development plan and the criteria established in the plan for an RV park, and recommended that the City’s parks and recreation commission approve it with identified conditions. The parks and recreation commission voted to recommend approval of the permit application on March 9, 2006.

Notice of the application and the City’s likely issuance of a mitigated determination of nonsignificance under SEPA was mailed to involved agencies and affected property owners on March 29, 2006. Only one letter of concern—from a competing RV park owner—was received by the end of the comment period.

The planning commission considered the permit application and City recommendation on April 17. The competing RV park owner who had submitted written opposition was the only citizen who spoke in opposition, objecting to lengths of stay

longer than 30 days. Members of the planning commission nonetheless voted to recommend denial of the shoreline application.

The city council rejected the planning commission's recommendation and approved the shoreline permit at a May 2, 2006 meeting. Although the competing RV park owner and six other individuals spoke against the project, the council's Resolution 06-14, to approve the shoreline permit, passed 5-2. The permit issued by the City authorized Columbia "[t]o undertake the following development: . . . Renovations to the existing Columbia Park Golf Course, which includes removal of the existing driving range, and an expansion within the current lease area that will include an RV Park/Campground." Ex. 2-NN at 10655.

Opponents of the shoreline permit had 30 days within which to appeal approval of the permit to the Department of Ecology, during which time Mr. Long was notified Columbia could take no action on construction. Mr. Long's intended next step (following the appeal period) was to seek a building permit. No one appealed approval of the shoreline permit.

In the meantime, and during the eight months between Columbia's filing of its SEPA application and shoreline application approval, another development proposal was presented to the City. In November 2005, city representatives met with Aaron Beasley, representing Tri-River Sports Facilities Inc. (Tri-River Sports), who proposed to develop

portions of the park located in the cities of Kennewick and Richland as a multipurpose community center, to include an RV park and boat docks. At the time of Mr. Beasley's December 2005 meeting with officials of the City and Richland, he projected revenues for the first year of \$22 million, increasing to \$25.5 million by 2008.

Tri-River Sports and the City entered into their own development option agreement (Tri-River Sports DOA) in February 2006. By the terms of that DOA, Tri-River Sports agreed to develop a site plan for a multipurpose community center in the west end of the park and the City agreed not to entertain alternate proposals for a multipurpose community center in that area.

Evidence at trial revealed that the City recognized as early as November 2005 that its dealings with Tri-River Sports were or might be inconsistent with the promises made in the Columbia DOA. In early May 2006, about a week after the council approved Columbia's shoreline management permit, city attorney John Ziobro sent a memo to city manager Bob Hammond addressing the City's obligations under the DOA. While the memo can be, and was, characterized by the City as a good faith assessment of the City's legal obligations to Columbia, it can also be, and was, characterized by Columbia as a veiled road map to actions which, if taken, could prevent Columbia's proposed development from coming to fruition. Among actions identified by the memo that would prevent completion of an RV park by Columbia were to (1) refuse to extend the

development option agreement, which would open the door to competition from another developer (arguably referring to Tri-River Sports); (2) give Columbia notice before sublease negotiations that the City is concerned about the project; or (3) propose new lease terms.

Approximately a month after the council approved Columbia's shoreline permit and several weeks after Mr. Ziobro's memo, Mr. Hammond requested a meeting with Mr. Long, at which he, the mayor, and other city officials told Mr. Long and two of his investors that the RV park was "just not going to happen" in Columbia's existing leasehold. Report of Proceedings (RP) at 184. Mr. Long later testified that the announcement left him "numb." RP at 186. He asked Mr. Hammond whether the City's position had anything to do with Tri-River Sports. According to Mr. Long, Mr. Hammond deflected the question but at the same time insisted that "we're pretty good at solving problems." *Id.* At a city council meeting that night, the council voted to discontinue consideration of an RV park in Columbia's existing leasehold, but indicated the City's willingness to explore Columbia's development of an RV park at another location.

On June 13, Tri-River Sports presented its park development proposal to the joint city councils of the City and Richland, including a scale model and a video showing an RV park and boat moorage. Following the meeting, the scale model of the proposed Tri-

River Sports development was placed on display in the lobby of the Kennewick City Hall.

For a number of months thereafter, Columbia and the City attempted to negotiate development of an RV park and restaurant at locations west of the golf course, including locations Mr. Long viewed as desirable. But siting the RV park at a location other than Columbia's existing leasehold required entry into a new lease—and terms could never be reached, for reasons that were disputed. At trial, Mr. Hammond could not recall any particular disagreements that prevented lease of another location to Columbia, other than to say that upon consulting with Mr. Ziobro and other city staff, he believed lease terms expected by Columbia were “too sweet” for the City to consider legal. RP at 581.

Columbia contended that city staff intentionally held out for onerous lease terms in an effort to avoid a conflict with Tri-River Sports by killing any deal with Columbia.

During the period Columbia attempted to negotiate for a location west of the golf course, the City continued to correspond internally over its legal exposure. Among exhibits admitted at trial was an October 2006 memo from Mr. Ziobro to Mr. Hammond and Russ Burtner, the City's executive director of municipal services, addressing Tri-River Sports' legal demands and threats, in which Mr. Ziobro observed that Tri-River Sports appeared unwilling to engage in a resolution that would allow Columbia to locate an RV park or restaurant in the west end of the park. Mr. Ziobro opined in the memo that

“[i]n some respects, the [Columbia] Agreement is the stronger of the two Agreements,” and stated that “[i]t very well could be that the City breached [Columbia’s] Agreement by entering into the Tri-River Agreement.” Ex. 3-S at 7, 2. But he also noted that, as compared to the threats being made by Tri-River Sports, “there does not appear to be the same imminent threat of litigation with the [Columbia] group.” *Id.* at 7.

In January 2007, city staff recommended that the city council deny Columbia’s next request for extension of its DOA. In response, Columbia withdrew its request for an extension of the agreement and filed suit against the City in February 2007.

In its complaint filed in Benton County, Columbia alleged that the City breached the DOA and its duties to Columbia in two ways: by entertaining the Tri-River Sports project in violation of the exclusivity provision, and by revoking its agreement that Columbia could construct an RV park within its existing leasehold. It asserted contract, tort, and restitution theories, as well as a claim under 42 U.S.C. § 1983. The City removed the action to federal court. In March 2008, the federal court dismissed Columbia’s tort claims, without prejudice, for failing to comply with the notice requirements of chapter 4.96 RCW. The parties later filed cross-motions for summary judgment on the remaining claims and the federal court granted the City’s motion to dismiss Columbia’s federal and restitution claims. It refused to dismiss Columbia’s contract claims, finding that issues of fact required trial. After dismissing the federal

claims, the federal court declined to exercise continuing supplemental jurisdiction and remanded the contract claims to state court.

Following remand the City again moved for summary judgment dismissing Columbia's complaint, and the state court, like the federal court, refused to dismiss the contract claims.

The contract claims were tried to a jury over 10 days in June 2009. By special verdict, the jury found that the City breached the DOA and the covenant of good faith and fair dealing. The jury awarded Columbia damages of \$3 million. The City's motion for judgment as a matter of law, a new trial, or remittitur of the damages amount was denied, and this appeal timely followed.

ANALYSIS

The pivotal issue on appeal is damages. While the City contested Columbia's claim that it breached the DOA and its duty of good faith and fair dealing, it confines its appellate challenge to issues bearing on the substantial damage award.

As the federal court first noted in its November 2008 order, it is undisputed that the DOA is an enforceable contract. Clerk's Papers (CP) at 4196. Cities often enter such agreements with potential developers of public land to help the project proponents gather financial resources for environmental and technical studies, seek grants or permits, and

test interest among prospective commercial tenants. *City of Santee v. County of San Diego*, 186 Cal. App. 4th 55, 63, 111 Cal. Rptr. 3d 47 (2010). The agreement is an objective manifestation of mutual assent to definite terms, supported by mutual promises as consideration. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004); *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). The evidence supports the jury's conclusion that the City breached the DOA and the covenant of good faith and fair dealing.

The City accepts these factual determinations but nonetheless assigns error to rulings by the trial court falling into three categories: it argues first, that Columbia's claims for breach of the DOA and resulting damages should have been dismissed by summary judgment, by directed verdict, or by posttrial motion on grounds that damages were not recoverable as a matter of law; second, that the trial court failed to instruct the jury on the "new business rule" and improperly denied the City's motion for directed verdict and new trial based on "new business rule" issues; and third, that the court erred in denying the City's motion for remittitur.

I. Recovery of Damages, Including Expectation Damages

The City contends that damages based on the development contemplated by the DOA were not recoverable as a matter of law because Columbia never secured, and the Corps therefore never approved, a modified sublease substituting a right to operate an RV

park for Columbia's original obligation to operate a driving range. The City moved on this basis for summary judgment dismissal of Columbia's contract claims, later for a directed verdict and, following the jury's verdict, for judgment as a matter of law.

Ordinarily we will not review an order denying summary judgment after a trial on the merits, but "we will review such an order if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law." *Univ. Vill. Ltd. Partners v. King County*, 106 Wn. App. 321, 324, 23 P.3d 1090, review denied, 145 Wn.2d 1002 (2001). The City's challenge on appeal is only to the trial court's decision on this issue of law. Reply Br. of Appellant at 6.

We review issues of law de novo. In reviewing denial of a CR 50(a) motion for judgment as a matter of law, we apply the same standard as the trial court, considering the evidence in the light most favorable to the nonmoving party. *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995). If the basis relied upon for a motion for new trial under CR 59 is a disputed issue of law, the standard of review is de novo. *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992).

Evidence of City and Corps Agreement to Substitute Operation of an RV Park for the Driving Range

Columbia's principal response to the City's argument is that the City and Corps had, by words and action, already approved modification of its sublease to allow development of an RV park. We agree there was evidence from which the jury could

find that while further design and construction approvals would be needed from the City and the Corps, no further modification of the sublease was required.

As of 2005, Columbia held a 50-year sublease to the golf course and environs, so it had possession of the land, on terms that had already been agreed. Its property was zoned for development as an RV park and development of an RV park was an established objective of the Corps and the City's comprehensive plan and 2000 master development plan. The parties' only dispute was whether Columbia was strictly obliged by its sublease to operate a driving range or had secured agreement that it could substitute operation of an RV park, subject to compliance with the DOA. The trial judge, and before him, the federal court, viewed this as an issue for the jury.

The City presented evidence that in the spring of 2006 a number of city officials and staff expressed their belief or assumption that the sublease would have to be renegotiated before Columbia replaced the driving range with an RV park, but Columbia presented countervailing evidence. First was the DOA itself, which acknowledged Columbia's development plan substituting an RV park for the driving range, granted exclusive rights to Columbia to develop an RV park, and even required Columbia to develop the RV park once the permitting and approval process was completed. Next was the city council's adoption of Resolution 06-14, approving Columbia's site plan and granting a shoreline substantial development permit that allowed Columbia to undertake

renovation “which includes removal of the existing driving range, and an expansion within the current lease area that will include an RV Park/Campground.” Ex. 2-NN at 10655; Ex. 2-II; RP at 175, 1395. The DOA and Resolution 06-14 made no mention of any need to modify Columbia’s sublease, even though both appear to have called out other required applications, requests, approvals, and conditions.

The City argued that city officials might have expected additional rent in exchange for allowing development of an RV park but this, too, was contradicted by Columbia’s evidence. The city campground operation shut down in 2003 had been a losing venture and the City’s 2004 request for qualifications for an RV park developer had no qualified takers. Columbia would be giving up driving range revenue and incurring an additional \$1 million capital investment in order to develop the desired RV park. Mr. Long testified that the only change of sublease terms that was ever raised in connection with the RV park substitution was when he spoke to Ms. Cole and Mr. Burtner in the spring of 2005 about revising the sublease in Columbia’s favor, by extending the rent-free period for Columbia’s projected \$1 million capital investment in the RV park; Mr. Long testified he later dropped that request. Mr. Long testified that by May 2005 he agreed with Ms. Cole and Mr. Burtner that no lease modification would be required, an understanding he believed he had confirmed by his transmittal of the proposed DOA, stating “I believe that it covers all of the points discussed in our prior meeting.” Ex. 1-T at 06362; RP at 154,

158-60. When examined, Mr. Hammond admitted that the City never identified to Mr. Long what any new lease terms might be. RP at 463-64.

Finally, in May 2006, city staff included the planned substitution of the RV park for the driving range in its annual management plan submitted to the Corps, thereby arguably incorporating the change into Columbia's sublease since the sublease was expressly subject to the annual management plan agreed between the City and the Corps.

The City does not challenge this evidence supporting Columbia's position that agreement had been reached to substitute an RV park for the driving range, but argues that because the sublease contains an integration clause Columbia could not make the substitution without securing written modification of the sublease, signed by the City. Br. of Appellant at 7.

The City overstates the importance of the sublease clause requiring written modification. It is well settled in Washington that "a contract may be modified or abrogated by the parties thereto in any manner they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner." *Pac. Nw. Group A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 278, 951 P.2d 826 (1998) (quoting *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 555, 71 P.2d 382 (1937)); and see *Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 702 P.2d 459 (1985) (writings short of formal amendment or modification of a long-term lease, taken

together with the original lease, satisfy the statute of frauds).

When viewed in the light most favorable to Columbia, there was substantial evidence from which the jury could find that until the council announced in June 2006 that it would no longer allow the RV park to be located within Columbia's existing leasehold, the City and the Corps had agreed to the substitution, subject to Columbia's satisfaction of terms and conditions in the DOA.

Availability of Damages for Breach of a "Contract to Negotiate"

Because Columbia sued for breach of the DOA, not the sublease, the status of agreement on the sublease was not a basis for foreclosing damages entirely—even if it might be relevant to the nature and extent of damages caused by the City's breach of the DOA. Generally, a party injured by breach of contract is entitled (1) to recovery of all damages that accrue naturally from the breach and (2) to be put into as good a pecuniary position as he would have had if the contract had been performed. *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 39, 686 P.2d 465 (1984) (citing *Diedrick v. Sch. Dist. No. 81*, 87 Wn.2d 598, 610, 555 P.2d 825 (1976)). To recover, the plaintiff has the burden of proving that the defendant breached the contract, that the plaintiff incurred actual economic damages as a result of the breach, and the amount of the damages. CP at 5185 (Instruction 25); *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 165 n.7, 43 P.3d 1223 (2002) (Chambers, J., dissenting). Damages are not recoverable for loss beyond an

amount that the evidence permits to be established with reasonable certainty. *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 167, 422 P.2d 496 (1967).

Preliminarily, we note that the trial judge found the DOA to be a “contract to negotiate,” as that term is used in *Keystone*, 152 Wn.2d at 171. CP at 4895-96. The damages recoverable for breach of a contract to negotiate is an undecided issue in Washington. In *Keystone*, our Supreme Court answered certified questions whether Washington contract law recognized and would enforce an agreement to negotiate a future contract and, if so, what would be the proper measure of damages for breach. The court provided an answer only to the first question, specific to the facts of the *Keystone* case.¹ The court declined to reach the question of damages, which it and the Ninth Circuit Court of Appeals (the federal appellate court had certified the questions) implicitly recognized as an open one. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1093, 1098 (9th Cir. 2003).

The City cites no authority for its position that ordinary contract damage principles do not apply and that the trial judge should have denied damages entirely and dismissed Columbia’s claim. While some jurisdictions have limited damages recoverable for breach

¹ In doing so, it stated that “[o]ur holding in *Badgett [v. Sec. State Bank]*, 116 Wn.2d 563, 807 P.2d 356 (1991)] supports a conclusion that, under Washington contract law, a specific course of conduct agreed upon for future negotiations is enforceable when it is contained in an existing substantive contract.” *Keystone*, 152 Wn.2d at 177. It offered as examples of a “specific course of conduct,” “negotiating in good faith, exclusively with each other, or for a specific period of time.” *Id.* at 176.

of a contract to negotiate, we have identified none that have foreclosed damages entirely where a breach has been established.

Those jurisdictions that limit damages for breach of a contract to negotiate restrict a plaintiff to reliance damages, on the basis that there can be problems of proof as to the fact or amount of expectation damages. *Cf.* Restatement (Second) of Contracts § 352, cmt. *a*, § 349, illus. 1, 2, and 3 (1981) (when a plaintiff is unable to prove expectation damages with reasonable certainty, it may recover loss based on its reliance interest). But we find no basis in Washington law to adopt a special rule that always forecloses the usual expectation measure of damages—essentially a conclusive presumption that expectation damages can never be proved with reasonable certainty—when a longstanding “reasonable certainty” requirement already guards against speculative awards. *Kadiak Fisheries*, 70 Wn.2d 153; *and cf. Seattle-First Nat’l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 408, 824 P.2d 1252, *review denied*, 119 Wn.2d 1010 (1992); *Farm Crop Energy, Inc. v. Old Nat’l Bank of Wash.*, 109 Wn.2d 923, 941, 750 P.2d 231 (1988) (Callow, J., dissenting) (rejecting a strict limitation of recovery to reliance damages in promissory estoppel cases and allowing expectation damages where established).

Better reasoned authority from other jurisdictions supports applying usual contract principles, recognizing that where there is not reliable evidence of a final agreement (or,

as in this case, the final project) a plaintiff might be unable to prove expectation damages with the required certainty and be left to reliance damages. In *Venture Associates Corp. v. Zenith Data Systems Corp.*, 96 F.3d 275, 278-79 (7th Cir. 1996), Judge Posner explained why a plaintiff should—depending on the evidence—be entitled to recover damages measured by the final agreement contemplated by the parties:

Damages for breach of an agreement to negotiate may be, although they are unlikely to be, the same as the damages for breach of the final contract that the parties would have signed had it not been for the defendant's bad faith. If, quite apart from any bad faith, the negotiations would have broken down, the party led on by the other party's bad faith to persist in futile negotiations can recover only his reliance damages—the expenses he incurred by being misled, in violation of the parties' agreement to negotiate in good faith, into continuing to negotiate futilely. But if the plaintiff can prove that had it not been for the defendant's bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant's bad faith, and, provided that it is a foreseeable consequence, the defendant is liable for that loss—liable, that is, for the plaintiff's consequential damages. The difficulty, which may well be insuperable, is that since by hypothesis the parties had not agreed on *any* of the terms of their contract, it may be impossible to determine what those terms would have been and hence what profit the victim of bad faith would have had. But this goes to the practicality of the remedy, not the principle of it.

(Citations omitted.) The weight of authority from other jurisdictions is in accord. *See Logan v. D.W. Sivers Co.*, 343 Or. 339, 169 P.3d 1255, 1265-66 (2007) (Kistler, J., concurring in part and dissenting in part) and cases cited therein. Even more so is the trend of authority. Professor E. Allan Farnsworth, whose treatise on contracts and other publications were once relied upon as authority for rejecting expectation damages in

cases such as this, later changed his position. *Logan*, 169 P.3d at 1266 nn.5, 6.²; *and see Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 429 (8th Cir. 2008) (questioning whether expectation damages would be foreclosed in a jurisdiction generally foreclosing expectation damages “if it can be discerned what agreement would have been reached”).

Under Judge Posner’s analysis, the alternative reliance damage measure would be used only “[i]f, quite apart from [the breach], the negotiations would have broken down.” *Venture Assocs.*, 96 F.3d at 278. In the trial below, however, the City staked its defense on nothing more than the theoretical possibility that agreement on development would have broken down, while Columbia presented substantial evidence that until the Tri-River Sports opportunity became a distraction, the path to its project completion appeared clear and problem-free. It has been argued that if a party wants to avoid paying expectation damages on the basis that final agreement was unlikely, it should offer evidence of that unlikelihood. Professor Eisenberg, discussing an explicit contract to negotiate in good faith, states:

Where such a commitment is part of a bargain, the injured party should be awarded expectation damages. Of course the deal might have broken down even if the other party had negotiated in good faith. However, because that party’s wrongful acts made it impossible to determine what would have

² Among cases that relied on Farnsworth’s former position are *Goodstein Construction Corp. v. City of New York*, 80 N.Y.2d 366, 604 N.E.2d 1356, 1361, 590 N.Y.S.2d 425 (1992) and *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 1261 n.26, 117 Cal. Rptr. 2d 875 (2002).

happened if she had acted in good faith, she should bear the burden of proving the deal would have broken down even if she had so acted.

Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 Cal. L. Rev. 1743, 1809 (2000).

A rule depriving parties like Columbia of the customary measure of damages ignores the reasonable motivation of contracting parties and is likely to discourage qualified parties from entering into development agreements with local governments in Washington. The purpose of damages in a breach of contract action is “not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled.” *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949) (emphasis omitted) (quoting McCormik on Damages 560, § 137). It is hard to conceive of a talented developer who would agree to invest meaningful capital and effort into an 18-month or longer project knowing that the local government had a right to breach with impunity at any time and compensate the developer with nothing more than reliance damages. A development partner willing to do business on those terms is probably not a development partner worth having. A local government concerned about unpredictable liability can negotiate a cancellation fee of the sort often agreed in the private sector, ensuring the developer some premium if the project is abandoned but capping the local government’s exposure should there later be good

reasons to terminate a project or relationship. *See Sierra Club v. Franklin County Power of Ill., LLC*, 546 F.3d 918, 934 (7th Cir. 2008) (quoting *Venture Assocs.*, 96 F.3d at 278).

Damages in this case were properly determined by the jury. The constitution consigns to the jury the ultimate power to weigh the evidence and determine the facts, and the amount of damages in a particular case is an ultimate fact. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). Whether a plaintiff has proved his loss with sufficient certainty is likewise generally a question of fact. In the context of a contract to purchase, the Washington Supreme Court has held, “‘It is often said that, once the buyer establishes the *fact* of loss with certainty (by a preponderance of the evidence), uncertainty regarding the *amount* of loss will not prevent recovery. Thus, a buyer will not be required to prove an exact amount of damages, and recovery will not be denied because damages are difficult to ascertain.’” *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717-18, 845 P.2d 987 (1993) (quoting *Anderson, Incidental and Consequential Damages*, 7 J.L. & Com. 327, 395-96 (1987) for this “accepted rule of law”).

The trial judge properly denied the City’s several motions to dismiss Columbia’s claims.

II. Reasonable Certainty and the “New Business Rule”

The real issue that loomed for Columbia in this case, particularly where the RV

park and restaurant could be characterized as a new business, was whether damages from hoped-for future operations were too speculative. The “new business rule” ordinarily prevents an unestablished business from recovering lost profits as damages for breach. *Kaech v. Lewis County Pub. Util. Dist. No. 1*, 106 Wn. App. 260, 276, 23 P.3d 529 (2001), *review denied*, 145 Wn.2d 1020 (2002). Profits for a new business are generally “too speculative, uncertain, and conjectural to become a basis for the recovery of damages.” *Id.* (quoting *No Ka Oi Corp. v. Nat’l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 849, 863 P.2d 79 (1993), *review denied*, 124 Wn.2d 1002 (1994)). Such damages may be recovered, however, if a reasonable estimate can be made by analyzing market conditions and profits of substantially similar businesses. *Farm Crop Energy*, 109 Wn.2d at 928.

Nature of Columbia’s Damage Claim

Evidently recognizing a risk, Columbia elected to forego any claim for lost profits. Instead, it contended that the bundle of rights it had acquired by the time of the City’s breach (its 50-year lease, its shoreline permit, its approved site plan, and its exclusivity agreement, all associated with an exceptional recreational property) was assignable and that a market existed for such development rights. Columbia asked the jury to award it the market value of this asset it claimed was destroyed. The 2003 addendum to the sublease supported Columbia’s position, since it reflected a modification making it easier

for Columbia to sell and assign its rights, and even required a substantial payment to the City in the event Columbia assigned those rights prior to 2013.

The way Columbia valued the asset—by applying a discount rate to its projected profits and arriving at a price that an investor would pay—parallels the method by which it would have proved lost profits, to be sure.³ But while a “lost asset” measure may still be challenged as insufficiently certain to be submitted to the jury, it is more likely to survive the challenge because it is more susceptible to cross-examination and reliable countervailing evidence: it exists in a market, at a known point in time. With a lost asset damage claim, the City was not required to challenge facts hypothesized to exist decades after the 2009 trial; it could challenge whether the alleged market for golf course opportunities existed at the time of the alleged breach in 2006 and, if it did, whether investors in that market would accept Columbia’s projections as sufficiently reasonable and reliable, and whether they would arrive at a proposed price using the discount rate that Mr. Long testified was market.⁴ Under the lost asset theory of damage, it is

³ Washington cases accept capitalized net operating income using a market-derived discount rate as a measure of market value of an asset. *See, e.g., Folsom v. County of Spokane*, 106 Wn.2d 760, 725 P.2d 987 (1986).

⁴ The financial projections relied upon by Mr. Long for his damage figure were not created for the litigation, they had been prepared prior to entry into the DOA and had been requested by the City to assess whether Columbia’s proposed RV golf resort project was viable. Mr. Long’s projected earnings supporting his \$2.5 to \$3 million damage figure were far less than the revenue that the jury heard was projected by Tri-River Sports for the Tri-River project.

irrelevant whether Mr. Long’s pro forma financial projections would have proved correct; what matters is only whether a market existed and whether a \$2.5 to \$3 million price would have been paid for the bundle of rights in that market. This is a distinction with a difference, and one that enables an injured party who holds a bundle of rights for which a market exists to avoid a “lost profits” problem by subjecting its damage measure to measurement, cross-examination, and countervailing evidence available at the time of trial. *See, e.g., Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000); *First Fed. Lincoln Bank v. United States*, 518 F.3d 1308 (Fed. Cir. 2008); *and cf.* Restatement, *supra*, § 348(3) & cmt. *d* (If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of the breach. The value of that right must itself be proved with reasonable certainty, as it may be if there is a market for such rights.).

Alleged Instructional Error

The City nonetheless assigns error to the trial court’s refusal to instruct on the “new business rule” as a limitation on the recovery of lost profits. The City proposed three instructions: its originally proposed instructions D-14 and D-15 and an unnumbered alternative later submitted with a pocket brief. CP at 4985-86, 5141. However, the City’s proposed instruction D-14 foreclosed any award of net profits, even

if reasonably certain. Its proposed D-15 and the alternative submitted with its bench brief both required testimony by an expert witness as a condition to recovery—testimony that Columbia did not present and that is not required by Washington law. *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998) (testimony and exhibits offered by and through the plaintiffs, experienced operators, provided a reasonably certain basis for a lost profits damage claim).

A court is not required to give an instruction that is erroneous in any respect or where it is reasonably possible to misstate the law. *Tennant v. Roys*, 44 Wn. App. 305, 310, 722 P.2d 848 (1986). And where Columbia was not seeking lost profits, the giving of any instruction on profits as damages would indicate to the jury that the trial judge thought there was evidence on the issue and that limitations applicable to lost profits claimed by a new business should apply. Washington cases consistently hold that it is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it. *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962).

The trial judge's proper instructions allowed the City to argue that Columbia was not entitled to recover speculative or conjectural damages. His instruction on the measure of damages limited recovery to "actual damages," defined as "those losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a

breach,” and he instructed that in calculating damages, the jury “should determine the sum of money that will put [Columbia] in as good a position as it would have been in if both [parties] had performed all of their promises under the contract.” CP at 5185-86 (Instruction 25). The trial judge did not abuse his discretion in rejecting the City’s erroneous and prejudicial proposed instructions.

The judgment is affirmed.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

III. Additional Assignments of Error

Allegation That Columbia Has No Lease Rights At All

The City also argues on appeal that Columbia lost whatever lease rights it had in 2004, when the Corps terminated its lease to Benton County and leased the park directly to the City. In 2005, city staff wrote to Mr. Long informing him that Columbia’s sublease required updating to reflect the new master lease agreement directly to the City and forwarded him a proposed substitute, but it was never finalized or signed by either party. Ms. Cole characterized the sublease forwarded to Mr. Long as nothing more than “a compilation of the two previous leases[,] with the Corps stuff updated.” Ex. 4-KK. Elsewhere, she described the need to update subleases for park property for the new

master lease as an “update,” “cleanup work,” and a “housekeeping item.” RP at 715-17.

At trial the City presented evidence of the 2004 termination of the Corps/Benton County master lease and implied that thereafter, the agreement under which Columbia operated was of dubious validity for failure to incorporate a current master lease. On appeal, it argues from this evidence that “[Columbia] has no sublease at all, and has no basis to assert a contractual right.” Br. of Appellant at 32. Columbia points out that this argument was not raised in connection with the City’s motions for summary judgment, directed verdict, or judgment as a matter of law.

Overwhelming evidence was presented at trial that there was no disagreement about continuing Columbia’s sublease following the City’s substitution for Benton County as the Corps’ lessee, and we agree that this argument was not raised in connection with any of the motions below. If it had been, not only would Columbia and the trial judge have had the opportunity to address it but Columbia might well have secured the “housekeeping” agreement from the City and the Corps—or, if the City balked, might have amended its claim for breach of the covenant of good faith and fair dealing. We will not address this argument for the first time on appeal. RAP 2.5(a).

Additional Instructional Error

The City assigns additional instructional error to the trial judge’s refusal to give its proposed instructions D-34 and D-35, which it contends were particularly necessary to

instruct the jury that good faith and fair dealing cannot require parties to agree to execute a future contract. But the trial judge did give a *Keystone*-type instruction in number 14, which states that “Washington law does not allow one contract to create an obligation to enter into another contract.” CP at 5174. This instruction allowed the City to argue that the DOA could not require the City to enter into a future agreement with Columbia to build the RV project. The City fails to show that additional instructions on this issue were necessary or that it was hindered in its arguments to the jury. *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955 (2006).

Collateral Estoppel and Res Judicata

The City argues that principles of collateral estoppel or res judicata prevent Columbia from claiming it had a contractual right to develop the RV project, based on nonfinal findings made by the federal court prior to remand. In ruling on the City’s motion for summary judgment, the federal court found as a matter of law that the city council’s passing Resolution 06-14 did not constitute “final approval” of the RV project under the DOA and thereby rejected one of Columbia’s two arguments for a direct breach of the DOA. CP at 4202. The federal court did not reject Columbia’s other argument for a direct breach of the DOA (violation of the exclusivity clause) and did not reject any part of its claim for breach of the covenant of good faith and fair dealing. It therefore denied the City’s motion for summary judgment dismissing the contract claims.

Once the federal court declined to exercise continuing supplemental jurisdiction, it ceded jurisdiction to the superior court. The federal court's findings were not final for collateral estoppel or res judicata purposes and the trial judge thereafter instructed the jury, through its instruction 9, that Columbia's claims included breach of contract both for negotiating in violation of the exclusivity provision and stopping the project. CP at 5168. The City did not object to this instruction. Instructions to which no objection is taken become the law of the case. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

Remittitur

The City's posttrial motions asked the trial judge to reduce the damage award from \$3 million to \$1 million, based on its presentation of testimony from Larry Dixon and Mike Lundgren that they had agreed with Mr. Long to become one-third investors in the development contemplated by the DOA and they were not individually seeking damages. But the City never established how Mr. Lundgren or Mr. Dixon were going to pay for their one-third investments or in what amount (although Mr. Dixon testified that Mr. Long had already done quite a bit of work on the project and the figure of \$800,000 for his investment was a figure that "sticks in my mind," RP at 1429). What is clear from the gentlemen's testimony is that they had not yet made any investment, so at the time of trial the value of the opportunity, on which Columbia based its claim for damages, belonged

solely to Columbia. The evidence pointed to by the City did not justify or support any reduction in the jury's damage award.

IV. Attorney Fees

In a separate section of its response brief, Columbia requests attorney fees and costs under RAP 18.1 based on "fundamental principles of equity." Br. of Resp't at 49. Attorney fees may be recovered on appeal if a contract, statute, or recognized ground in equity permits recovery of fees and the party substantially prevails on appeal. *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983). Argument and citation to authority are required under RAP 18.1 to advise the court of the appropriate grounds for an award of attorney fees. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). Columbia fails to demonstrate why "fundamental principles of equity" justify an award of fees on appeal, so its request for fees is denied.

The judgment is affirmed.

Siddoway, J.

I CONCUR:

Sweeney, J.