Case No. 97031-9

In the Supreme Court of the State of Washington

No. 77635-5-I
Court of Appeals, Division I of the State of Washington

GREENSUN GROUP LLC,

Respondent

vs.

CITY OF BELLEVUE,

Petitioner

RESPONDENT GREENSUN'S RESPONSE TO BRIEF OF AMICUS BY THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

EFILED ON JUNE 25, 2019, IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

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I. There is no substantial public interest which justify granting review under RAP 13.4(b)(4)

The Amicus Brief submitted on behalf of the Washington State Association of Municipal Attorneys (WSAMA) contrives "an issue of substantial public interest" under RAP 13.4(b)(4) by misrepresenting the decision of the Court of Appeals in this case. WSAMA falsely accuses the Court of Appeals of removing intent from the elements required to establish the intentional tort of interference with business expectancies. It repeats the formulation advanced by the petitioner that "intentional interference minus intent is simply negligence." Brief for WSAMA as Amicus Curiae, p. 3, *City of Bellevue v. Greensun Group, LLC*, No. 97031-9 (March 4, 2019). It argues that without the requirement of intent, municipalities can be found liable for tortious interference with business expectancies through mere inadvertence or simple negligence in processing a permit or license application.

However, the decision of the Court of Appeals, in this case, does not remove intent as a required element of tortious interference with business expectancies, nor does it depart in any way from the well-established standards for establishing the elements of the tort. In its decision the Court of Appeals set forth the five well-recognized elements of the tort which plaintiff must show, namely (1) existence of a valid business expectancy, (2) that the defendant had knowledge of the

expectancy, (3) an intentional interference inducing or causing termination of the expectancy, (4) that defendant interfered for an improper purpose or used improper means, and (5) resultant damage. *Greensun Group, LLC v. City of Bellevue*, 7 Wn.2d 754, 768, 436 P.3d 397 (2019)("*Greensun II*"). The Court of Appeals then reviewed each element of the tort to determine whether the plaintiff had presented material facts to prove that element. Concerning the third element of the tort, the Court of Appeals stated: "A party intentionally interferes with a business expectancy if it desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Id.* at 772.

In examining the facts presented, the Court of Appeals noted a letter dated July 29, 2014, from the City to Greensun stating that the City would not grant Greensun a business license to operate its retail marijuana store. *Id.* The City did not, does not, and has not disputed that it denied Greensun a business license or that intentionally withheld the business license. Nor does the City dispute that by withholding the license, that it interfered with Greensun's ability to open its retail marijuana store at its location. The City actions in denying a business license to Greensun were not the result of negligence or mere oversight, but rather were actions the City clearly intended to achieve the outcome of preventing Greensun from opening its retail marijuana store. From these facts, the Court of Appeals decided that "Greensun raises a genuine issue of material fact as to the element of intentional interference." *Id.*

In sum, this case does not involve any issue of substantial public interest justifying review under RAP 13.4(b)(4). This case only involves the Court of Appeals reversing a summary judgment after careful review of each element of tortious interference with an business expectancy and finding that the plaintiff has presented material facts in support of each element. The only parties affected by the decision are the plaintiff and defendant who will have their case decided in a trial on the facts upon remand.

II. The Court of Appeals decision is not in conflict with decisions of the Supreme Court or any other decision of the Court of Appeals.

In an attempt to win review under RAP 13.4(b)(1) and (2), WSAMA offers an inaccurate and misleading analysis of the case law. Contrary to WSAMA's assertions, the decision of the Court of Appeals is in line with the decisions of this Court and other decisions of the Court of Appeals.

a. The Court of Appeals properly found that there was a genuine issue of material fact as to whether or not the intent element was met.

Without citation, WSAMA asserts that "this Court has never allowed allegations of arbitrary and capricious conduct to subsume the necessary showing of wrongful intent." Brief for WSAMA as Amicus Curiae Supporting Petitioner, p. 5. That summary statement of the law is false. In *King v. City of Seattle,* 84 Wn.2d 239, 247-48, 525 P2d 228 (1974), this Court affirmed the trial court's finding that the City of Seattle

intentionally interfered with the plaintiff's known business expectancy in denying it a building permit. The court stated:

> The city was under a duty to act fairly and reasonably if its dealings with the plaintiffs. The findings of fact from the previous mandamus action, which the city is here collaterally estopped to deny, are to the effect that the city's act' were arbitrary and capricious and establish the city's patent breach of duty. *Id.*

In *King,* a condition precedent to the granting of a building permit for plaintiff's office building was the issuance of a street use permit. *Id.* at 241. The Board of Public Works denied plaintiff's application for a street use permit based on their judgment that it might conflict with a pending local improvement district. *Id.* In a mandamus action, the trial court that the city's refusal to issue permits to the plaintiff was "arbitrary and capricious and without justification of law." *Id.* There was no evidence that the city personnel were not acting in good faith or had improper motives. The relevant finding was that their actions were arbitrary and capricious and, thereby, formed the basis for liability for intentional interference with business expectancies. *Id.* at 247-48.

In *Pleas v. City of Seattle,* reformulated the tort of intentional interference with business expectancies and held that a cause of action "arises from **either** the defendant's pursuit of an improper objective of harming the plaintiff **or** the use of wrongful means that in fact cause injury to the plaintiff's contractual or business relationships." 112 Wn.2d 794,803-04, 774 P.2d 1158 (1989) [emphasis added]. In *Pleas*, this Court

affirmed the trial court's ruling on liability by holding that the evidence supported a finding that the city's personnel had acted with improper motives and alternatively that they had acted by improper means. *Id.* at 805-07. In its brief, WSAMA only references that portion of the decision in *Pleas* addressing the improper motives in its actions on plaintiff's building permit, thereby creating an incomplete and misleading analysis of the decision. In this case, Greensun has not alleged that the City of Bellevue acted with improper motives, but rather that it used wrongful means in denying it a business license. Thus, the relevant portion of the decision in *Pleas* is this Court's discussion of the use of wrongful means which give rise to liability. In that portion of the decision, this Court held:

> The improper means arise from the City's actions in refusing to grant necessary permits and arbitrarily delaying the project. As we stated in *King*, the City's arbitrary and capricious actions can be considered evidence of tortious interference with a business. *Id.* at 805

Consistent with *Pleas*, the Court of Appeals in this case held: "Courts can consider a city's arbitrary and capricious actions as evidence of improper means." *Greensun II*, 7 Wn.2d at 773. Therefore, the decision of the Court of Appeals in remanding the case on the grounds that the plaintiff has shown material facts of use of improper means of interference with its business expectancies by reason of the City of Bellevue's arbitrary and capricious actions is entirely consistent with this Court's decisions in *King* and *Pleas.See id.* at 779-80.

Similarly, WSAMA only references that portion of *Westmark Dev. Corp v. City of Burien,* which addressed the improper motives of the City of Burien in acting on Westmark's permits. 140 Wn. App. 540, 546, 166 P.3d 813 (2017). In affirming the jury's verdict, the Court of Appeals alternatively found evidence to support a finding that the defendant used improper means to interfere with Westmark's business expectancies. *Id.* at 556. The Court of Appeals found the inordinate delays in the environmental review process to be the improper means on which the jury could base its verdict. *Id*. The delays by themselves, regardless of the motives of city personnel, was sufficient to support liability.

While *King*, *Pleas*, and *Westmark* are the cases most directly on point, other cases cited in the amicus brief are not inconsistent with the decision of the Court of Appeals and are also misconstrued by WSAMA. WSAMA incorrectly suggests that *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn.App. 502, 278 P.3d 197 (2012), is contrary to the Court of Appeals conclusion that with respect to the third element of the tortious interference with business expectancies "the analysis of intentional interference does not consider good faith." *Greensun II*, 7 Wn.2d at 772. In *Moore,* the plaintiff sued his former employer for sending a letter to a prospective employer stating that he would be violating his nondisclosure agreement if he became employed by that employer and threatening legal action if he was hired. 168 Wn.App. at 506-07. In the particular circumstance of threatened litigation, the Court held in *Moore* that the threats of a lawsuit may only constitute interference

by improper means where the defendant does not believe in the merits of the litigation or threatens it only to harass a third party and not to bring its claims to adjudication. *Id.* at 509-510. *Moore* is distinguishable because the plaintiff, in that case, offered no evidence in response to a motion for summary judgment to establish the threatened litigation was believed to be without merit or only to harass a third party. *Id.* at 510. *Moore* does not stand for the proposition suggested by WSAMA that the plaintiff is burdened with "addressing good faith, head-on" in all cases of tortious interference with business expectancies. Brief for WSAMA as Amicus Curiae, p. 9.

However, *Moore* is instructive on the topic of good faith in its discussion of the defendant's affirmative defense of privilege. In *Moore,* the Court notes that even if the plaintiff had responded with material facts in support of its claim that the threats of litigation constituted improper means of interference, the plaintiff failed to respond to defendant's affirmative defense that its action was taken in good faith in defense of its contractual rights. 168 Wn.App. at 509-510. The Court cited the formulation laid down in *Pleas* that when the plaintiff has established the elements of tortious interference with a business expectancy, the defendant they has the right to prove that its conduct is excused as privileged conduct. *Id.* at 509. The "good faith" of the defendant in enforcing its rights is an element of the affirmative defense of privilege. It is not the burden of the plaintiff to show lack of good faith in showing that there was interference by improper means, but rather the burden of the defendant to

show it as part of the affirmative defense of privilege. In this case, the Court of Appeals affirmed the denial of Greensun's cross-motion for summary judgment on the grounds that Bellevue had presented material facts of its good faith pursuit of its rights to support its affirmative defense of privilege. Here is where both WSAMA and the City of Bellevue are confused. Rather than recognizing that good faith in pursuit of its rights is to be shown by the defendant in the affirmative defense of privilege, WSAMA and the City of Bellevue urge that proof of lack of good faith should be a burden of the plaintiff in establishing use of improper means to interfere with a business expectancy.

Libera v. City of Port Angeles, cited by WSAMA is distinguishable as an affirmation of summary judgment dismissing plaintiff's complaint where the plaintiff failed to produce any evidence of interference for an improper purpose or even to allege use of improper means to interfere with plaintiff's business. *See* 178 Wn.App. 669, 316 P.3d 1064 (2013). Similarly, *Dunstan v. City of Seattle* is distinguishable as a case in which the plaintiff failed to present any showing of intentional interference with a business relation and also as a case pre-dating *Pleas. See* 24 Wn. App. 265, 600 P.2d 674 (1979). WSAMA's quotation from that case is misleading.

b. The Court of Appeals properly applied good faith as an affirmative defense.

The WSAMA makes the sweeping claim that asserting a claim in good faith constitutes a postscript to the Plaintiff's case in chief. Contrary

to the assertions of the WSAMA, Good Faith has always, consistently been applied as an affirmative defense. In *Liengang v. Pierce Cty. Med. Buereau, Inc*., this court cited the long-standing affirmative defense of asserting a legally protected interest—and finding that an arguable interpretation of case law falls within this principle. 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Although it went unstated, the assertion of the interest in Leingang was a letter from an insurance carrier reserving rights. Implicit in the Court's findings in Leingang was that by paying out the funds, and asserting a claim in an appropriate manner, this constituted an appropriate means. *Id.* After the alleged tortious events occurred, this court overruled prior precedent which supported the carrier's actions in asserting their rights.

In fact, rather than serving as an adoption of a new principal, the court in *Leingang* simply applied the long-standing affirmative defense standard to the facts in the case. The affirmative defense is articulated in the Restatement (Second) of Torts § 773 (1977), which was subsequently adopted by the court in *Schermer v. Darcy*, 80 Wn.App. 499, 505-06, 910 P.2d 498 (1996), and then cited by the court in *Liengang. Id.* at *158. Restatement (Second) of Torts* § 773 comment (a) recites the defense and three elements which must be established to take advantage of the defense: (1) the existence of a legally protected interest, (2) whether the acts were performed in good faith, and (2) whether the means were appropriate. This formulation was included in the Washington Pattern Jury Instructions which include the instruction as an affirmative defense in tortious

interference with a contractual expectancy cases. *Washington Pattern Jury Instructions* - Civil 6th WPI, No. 352.04. The WSAMA disregards this case law, and the development of the tort and seeks to subsume an affirmative defense into the plaintiff's case in chief. In doing so, it represents a radical departure from this courts clear development of the case law surrounding this tort.

The Court of Appeals carefully applied this court's precedent and the weight of case law on this question and found that both parties raised sufficient issues of material fact to warrant a trial on these questions. WSAMA's arguments are akin to questions and arguments that should be left to a jury to decide, then after weighing the testimony and evidence in the records—the fact-finder can determine whether or not Greensun met its burden, and likewise, whether the City's acts fall within the tort or are otherwise privileged.

Respectfully submitted this 25th day of June, 2019

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