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

DP2 PROPERTIES, LLC, a Washington limited liability
company; GOLD MEDAL GROUP, LLC, a Washington
limited liability company; DENNIS PAVLINA, an
individual,
Plaintiffs and Appellant,

v.

STATE OF WASHINGTON, acting by and through its
Department of Ecology, a state agency
Defendant and Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case involves the Appellants' reasonable business expectation to assign mitigation requirements for particular properties, including a right to reimbursement for mitigation costs, and the Department of Ecology's intentional interference with Appellants' expectations by communicating reimbursement and mitigation obligations to inquiring members of the public. The trial court summarily decided in favor of the Department, concluding that the Appellants did not have a reasonable business expectancy. Appellants have, however, presented extensive facts and testimony that demonstrate the existence and reasonableness of their business expectation. While the trial court failed to address any of the other elements of the tortious interference claim, the Appellants have also provided extensive evidence supporting the rest of the claim. The trial court's conclusion on the claim for tortious interference is not supported by the evidence presented in this case and is wrong as a matter of law.

The trial court elected to comment additionally on the Appellants' failure to address or challenge the prior agreement between the Department and the Appellants in 2005, or the Department order in 2007, and the Department's privilege in communicating with inquiring members of the public. Although these statements are dicta, the trial court's statements suggest alternative reasons to deny Appellants' claim for

tortious interference. These statements are similarly made in error and are wrong as a matter of law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in summarily deciding that Appellants did not have a reasonable business expectation to establish their claim of tortious interference with a prospective business expectancy.

2. The trial court erred in finding that Appellants' opportunity to address or challenge the prior agreement or order at issue has passed.

3. The trial court erred in finding that the Department of Ecology is privileged in communicating its enforcement authority and view of particular matters to inquiring members of the public.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellants presented extensive facts demonstrating that the Department of Ecology interfered with Appellants' reasonable business expectancy. These facts demonstrate that there is clearly a genuine dispute of the facts warranting the court's review of Appellants' claim. Further, Appellants have established all the elements for a tortious interference claim.

2. Following its decision to summarily decide that Appellants did not have a reasonable business expectancy, the trial court further stated that the Appellants' opportunity to address or challenge the prior

agreement or order at issue has passed. Although dicta, the trial court's statement suggests that exhaustion of administrative remedies or res judicata principles prohibit the Appellants from raising the issues presented in this case. The trial court's statement is wrong as a matter of law, as the issues presented in this action are wholly different from the facts, cause of action, and subject matter of the issue that could have been presented in a challenge on the prior agreement or order.

3. Following its decision to summarily decide that Appellants did not have a reasonable business expectancy, the trial court further stated that the Department of Ecology is privileged in communicating its enforcement authority and view of particular matters to inquiring members of the public. Although dicta, the trial court's statement suggests that notwithstanding its decision on the reasonableness of Appellants' business expectancy, the Department could assert privilege in defense of the tortious interference claim. The trial's court statement is wrong as a matter of law, as the Department did not and cannot establish the necessary elements for privilege.

IV. STATEMENT OF THE CASE

In early 2005, Appellants, after purchasing the property in the City of Battle Ground ("Battle Ground Commerce or the "BGC"), learned that

the Department of Ecology (“DOE” or the “Department”) claimed regulatory jurisdiction over the property. While the Department had informed the prior owner of its claims over wetlands, Appellants did not learn of DOE’s contention until after purchase, issuance of permits by the City of Battle Ground (“City”) for construction, and the start of development. CP 749, 751. The City informed the Department that the BGC was of economic importance to the City and wished for the project to proceed. CP 760. This started a multiple-month intensive negotiation between DOE on the one hand and Battle Ground Commerce, LLC (“BGC LLC”), The Gold Medal Group, LLC (“GMG LLC”) and Dennis Pavlina on the other hand. CP 751. The negotiation culminated in a written 2005 Agreement (the “Agreement”) between those parties. CP 751-59.

The stated purpose of the Agreement was to establish a process for moving forward with the projects and to identify and implement mitigation. CP 751. The parties agreed that they wished to enter the Agreement to allow the projects to proceed under the existing approvals. CP 751. An important term of the Agreement for BGC LLC, GMG LLC and Mr. Pavlina was found in Paragraph 10:

This Agreement is assignable and shall run with the land and be binding upon and inure to the benefit of the parties, their respective heirs, successors, assigns and transferees. This agreement shall be recorded.

CP 753 (emphasis added). Dennis Pavlina executed the Agreement on September 24, 2005, and DOE executed it on September 28, 2005. CP 754-55.

Mr. Perry Lund, then Unit Supervisor for DOE, participated in the 2005 Agreement. CP 782. Mr. Lund agrees that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees. CP 783. Rebecca Rothwell (fka Rebecca Schroeder) agrees that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees. CP 806-07. Sam Crummett, the City Planning Supervisor, agrees that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees.¹ CP 841.

On September 20, 2007, the Department issued Order 5087. CP 854-58. The Order defined the “Applicant” as GMG LLC, and required only GMG LLC to comply. CP 854. The Department referenced the 2005 Agreement in the Order. CP 854. Mr. Lund and Rebecca Rothwell agree that the Order is directed at only GMG LLC. CP 784, 808.

¹ Mr. Crummett understands “run with the land” to mean “[t]hat any legal agreement or legal covenant or restriction runs with the land as property transfers.” CP 842.

After GMG LLC went inactive, the Department began to threaten to issue penalties against GMG LLC. CP 859-60. Mr. Lund agrees that the warning letter was directed to GMG LLC, it was GMG LLC who was out of compliance, and that GMG LLC was threatened with penalties. CP 787. The Department was informed on multiple occasions that Mr. Pavlina (1) had limited financial resources (CP 863); (2) that the wetland consultants were not being paid (CP 866); and (3) that Mr. Pavlina lacked the ability to purchase mitigation credits (CP 867). The Department's response, after being informed of the financial challenges, was to threaten legal action against Mr. Pavlina. CP 869. Mr. Lund admits that he learned that things were financially tough for the Appellants. CP 785. Rebecca Rothwell admits that she was informed that Mr. Pavlina was having financial difficulties. CP 813.

In 2013, after GMG LLC went inactive and after being told multiple times that Mr. Pavlina was having financial troubles, Rebecca Rothwell proposed to issue a \$120,000 penalty against GMG LLC and Dennis Pavlina, despite the Order only being directed to GMG LLC. CP 869, 878-79. Internally, the Department identified that the DOE programs had no consistency on penalty recommendations. and became DOE was internally concerned about the "optics" of issuing such a big penalty with little to no warning. CP 882-84. A \$9,000 penalty was

eventually issued to GMG LLC and Mr. Dennis Pavlina, despite the Order having only been issued to GMG LLC. CP 814, 885-86. The Department internal talking points discussed that at the time of issuing the penalty, 92.3 percent of the mitigation had been performed and that “[i]ts time to hold Pavlina accountable.” CP 891 (emphasis added). Mr. Lund agrees that the mitigation was over 90% completed. CP 788. Mr. Lund also agrees that it was Mr. Pavlina that was going to be held accountable (not GMG LLC), that such was DOE’s position in its own internal documents that were not expected to be shared outside the Department. CP 790. This was a clear indication of DOE wanting to hold Mr. Pavlina individually liable despite the Order having been directed to GMG LLC only.² If the \$120,000 penalty had been issued, it would have been the second largest penalty ever issued by DOE for wetlands. CP 892; *see also* CP 789, 817. The \$9,000 penalty was paid. CP 893.

In response to an inquiry from a lender as to which parcel was involved for the penalty in BGC, the Department represented to the lender that the penalty did not pertain to a specific development parcel, but was for Mr. Pavlina having not completed his mitigation obligation. CP 894.

² The Department fails to recognize the distinction between legal entities, such as a limited liability company, and individual persons in their individual capacities. Mr. Lund believes that GMG LLC and Mr. Pavlina as an individual are the same thing. CP 791-94. Rebecca Rothwell viewed GMG LLC and Mr. Pavlina as one and the same. CP 814.

Rebecca Rothwell admits that she made no attempt to determine whether or not the parcel at issue had impacts requiring mitigation. CP 819-21. Rebecca Rothwell admits that she has access to maps to determine which of the parcels had been impacted, and which required mitigation or had transferred to other people. CP 818-19.

On April 29, 2014, a Settlement in Lieu of Deed Foreclosure (“Settlement”) was executed. CP 198. Excluding the bank, the following entities and persons were parties to all of the Settlement: (1) Battle Ground Corporate Center, LLC; (2) Battle Ground Village Development, LLC; (3) BGV Parcel 3, LLC; (4) Dennis Pavlina; and (5) Carmen Villama. CP 198. The three LLCs (#1-3) were defined as “Borrowers.” CP 200. Dennis Pavlina was defined as “Pavlina.” CP 198. The following parties agreed to Section 9.1 of the Settlement: (6) Battle Ground Village A, LLC; (7) Battle Ground Village B, LLC; and Battle Ground Village C, LLC. CP 198. The following parties agreed to Sections 4.6, 4.7, 4.8, 5.8 and 9.2 of the Settlement: (8) SOP Apartments 1, LLC; and (9) Battle Ground Village Live/Work, LLC. CP 198.

GMG LLC, DP2 Properties, LLC, and BGC LLC were not parties to the Settlement. CP 198. Only “Pavlina” transferred properties. CP 202. Only the “Borrowers and Pavlina” promised to undertake no action that could result in a lien or other encumbrance. CP 208. Only

“Pavlina” transferred rights to develop the properties. CP 277.

Mr. Pavlina understood the transfer of rights to be a reference to the Development Agreement that outlined the specific right for use of the land and included nothing about mitigation. CP 772-78. GMG LLC and BGC LLC did not transfer anything under the Settlement. CP 202, 227.

In 2014, the Department once again began the process to issue a penalty against GMG LLC and Mr. Pavlina, despite Mr. Pavlina not being included in the Order. The Department acknowledged that Mr. Pavlina had informed DOE that he did not have sufficient funds to purchase mitigation credits. CP 896, 900. The Department initially proposed a penalty of \$240,000. CP 906. Mr. Lund indicates that the \$240,000 penalty was intended to motivate Mr. Pavlina to action and admits that he told Mr. Pavlina that larger penalties were forthcoming. CP 795.

Rebecca Rothwell admits that the second penalty was an attempt to get Mr. Pavlina’s attention to get him to do mitigation. CP 820. On August 13, 2014, the Department met internally on the upcoming penalty and discussed using the penalty to force a settlement or to force the waiver of appeal rights for a lower penalty amount. CP 909, 912. Mr. Lund admits that penalties are issued by DOE to encourage persons to act in the manner that DOE wants them to act. CP 786.

In October 2014, the Department met with Mr. Pavlina at the existing mitigation site. During that meeting, Mr. Pavlina informed DOE that he did not think he was solely responsible for the mitigation as there were two others with ownership interests in the development site and that they should bear some responsibility for the mitigation based upon the language in the 2005 Agreement that the order “runs with the land.” CP 913. Mr. Lund confirms that Mr. Pavlina notified DOE regarding his belief, and he agrees that Mr. Pavlina’s belief is supported by the “runs with the land” and other language in the 2005 Agreement. CP 796-97. Rebecca Rothwell admits that, as of October 13, 2014, she was aware the Mr. Pavlina thought other people were responsible for mitigation, and she also agreed that under the Agreement’s language the authorization to develop was assignable and ran with the land. CP 821-23.

Faced with repeated threats of substantial penalties directed to him as an individual, Mr. Pavlina began the process of purchasing 10.69 acres of the Holsinger property for mitigation. The property was purchased by DP2 Properties, LLC (“DP2 LLC”).

On March 11, 2015, Mr. Pavlina informed the Department that the City had approved him to record a Covenant. CP 914. Mr. Lund admits that as of March 11, 2015, the Department had notice that Mr. Pavlina was recording a covenant upon the Battle Ground Commerce property.

CP 798. Mr. Pavlina informed DOE that he believed the site could also be used to satisfy the mitigation needs of others. CP 914. Rebecca Rothwell admits that mitigation has a cost component. CP 824. Mr. Lund admits that early on the Department made clear to Mr. Pavlina that Mr. Pavlina's business dealings (how he was to get reimbursed for the costs of mitigation) was not DOE's concern. CP 799-800. Rebecca Rothwell also admits that how Mr. Pavlina was to get reimbursed was not DOE's concern. CP 825-26. Mr. Lund admits that DOE knew even before the Covenant was recorded that Mr. Pavlina was going to seek reimbursement from third parties for some of the mitigation costs. CP 800. Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues. CP 800.

On or about March 16, 2015, Chris Wamsley from Robert Olson Construction wrote to the Department to confirm a verbal discussion with Mr. Lund. Ms. Wamsley confirmed that she was working with two groups that own or that are purchasing property in BGC. Mr. Lund admits that Ms. Wamsley called him to discuss potential liability for mitigation. CP 801. Ms. Wamsley confirmed that DOE represented to her that (1) DOE had no liens on the property, (2) the required mitigation was incomplete, (3) DOE was requiring Mr. Pavlina to resolve the required mitigation, and (4) any agreement with Mr. Pavlina for mitigation will not

affect any of the current or future landowners, and (5) it is completely
Mr. Pavlina's responsibility. CP 915-16. Mr. Lund admits that
Ms. Wamsley's recitation of the facts relayed by DOE is accurate.
CP 801. Mr. Lund admits that he knew of Mr. Pavlina's plan to seek
reimbursement before speaking to Ms. Wamsley. CP 802.

On March 18, 2015, DP2 recorded a covenant on BGC. CP 917-
25. The Covenant established a conservation covenant on the Holsinger
property purchased by DP2 LLC and contained a Latecomer's Rights
provision. The provision stated:

This covenant only benefits the "Vested Parcels" as shown
on Exhibit C, and any mitigation rights to the "Unvested
Parcels", also identified on Exhibit C, are subject to the
owners of those parcels reimbursing Owner for their pro
rata assessment (using market rates) of these mitigation
rights. Once owners of the Unvested Parcels have
reimbursed Owner for their pro rata assessment of these
mitigation rights, then such owner's parcels shall become
vested in the mitigation rights approved by the Department
of Ecology. If an owner of an Unvested Parcel acquires
mitigation rights elsewhere, then such owner waives any
mitigation rights as provided for herein.

CP 919. On April 2, 2015, Mr. Pavlina sent a copy of the recorded
Covenant to the City. Mr. Pavlina told the City that unvested parcels
would need to supply a letter indicating the parcel is clear of any
mitigation requirements and is vested. CP 926. The City responded that
the City would not enforce the Covenant but would further discuss how

the information was conveyed to potential buyers and those asking questions. CP 927. Mr. Pavlina told the City that the mitigation obligation runs with the land and they should inform the subsequent purchasers and owners if they were not going to enforce the Covenant. CP 765.

On April 7, 2015, Mr. Pavlina contacted Matt Olson regarding working out the wetland mitigation for Lot 13 in BGC so that a letter could be prepared and recorded. CP 928. Mr. Pavlina never heard back from Mr. Olson as he was eventually contacted by the City and told that Rebecca Rothwell said that nobody else had a responsibility and it was solely Mr. Pavlina that was responsible for the mitigation. CP 766-67.

Mr. Crummett admits that the City contacted DOE to get their opinion on the Covenant. CP 843-44. The City relies upon DOE for issues related to enforcement of mitigation. CP 845. On April 15, 2015, a conversation occurred between Sam Crummett from the City and Rebecca Rothwell of DOE to discuss the Covenant. Ms. Rothwell's notes of the call state:

4/15 Sam C. Battleground Re: Pavlina
Cons. Cov. for BG Village → need to
mitigate. Need ltr in writing from me
that property has been mitigated/responsibility is Pavlina's
360 342 5042

CP 929. The notes and testimony indicate that Rebecca Rothwell and Sam Crummett discussed the recorded Covenant. CP 929. Mr. Crummett does not recall Rebecca Rothwell advising him during the conversation that Mr. Pavlina believed that the 2005 Agreement made others responsible, did not advise him that it was assignable nor that it ran with the land. CP 845-47. Ms. Rothwell responded to the City on April 22, 2015, stating:

Thanks for your call last week about the Battle Ground Village wetland mitigation. Mr. Pavlina is required by Ecology to mitigate for the 37.1-acre impact to isolated wetlands that occurred circa 2004. Part of the mitigation requirement is being implemented, and we are currently working with Mr. Pavlina on resolving the remaining mitigation requirements. Per the attached Order (AO 5087), Mr. Pavlina is solely responsible for the mitigation. The mitigation responsibility does not transfer to owners or lessees of property where the wetland impacts took place.

CP 930-31 (emphasis added).³ Rebecca Rothwell knew before the conversation and email with Mr. Crummett that Mr. Pavlina believed others to be responsible. CP 828. Rebecca Rothwell did not review the Agreement to determine whether or not anything ran with the land before sending the email. CP 829. Rebecca Rothwell admits that compensating for wetland impacts also involves the responsibility to pay for the mitigation. CP 830. Rebecca Rothwell understood that her email would

³ Rebecca Rothwell defines the word “solely” to mean “by one’s self.” CP 827. Mr. Lund believes the use of “solely” means “singularly.” CP 803.

be shared with third parties. CP 831. Rebecca Rothwell admits that it is possible she discussed the latecomer's provision with Mr. Crummett prior to sending the email. CP 832. Rebecca Rothwell never contacted Mr. Pavlina prior to sending the email to clarify his position on reimbursement. CP 833. She simply told the City that Mr. Pavlina was solely responsible and the responsibility did not transfer to subsequent owners/lessees. CP 930-31. The City believes that it formulated its response to purchasers after getting DOE's email. CP 848. The City understood Rebecca Rothwell as conveying to the City that no one other than Mr. Pavlina would have any responsibilities for the mitigation, including payment for it or reimbursement for it. CP 849.

Rebecca Rothwell admits she voluntarily chose to answer questions that are admittedly outside of the Department's interest:

Q. So all you wanted was just the wetland mitigation done, period?

A. It's not what we wanted, it's what our requirements are. This is my job, to uphold the law. So my task in my capacity as an Ecology employee is to ensure compliance with the Order.

Q. Okay. I can understand that. But why did you feel it was necessary then to make comments upon whether or not subsequent owners and lessees would have any responsibility including reimbursement?

A. Because people were asking questions about it.

Q. And you chose to answer those questions?

A. Of course I did. When the public asks me questions or local government asks me questions about Ecology's work and requirements, I have to answer them. There's no reason I wouldn't.

CP 834.

The City immediately passed the Department's statements to Andy Beseda regarding BGC. CP 930. The City stated:

The covenant recorded on the subject property, on May (sic) 18, 2015 (see attached), by Mr. Pavlina, is his attempt for reimbursement for the costs associated with wetland mitigation. It is the opinion of City of Battle Ground as well as the opinion of the Department of Ecology (see correspondence below, and attachments), that any remaining "mitigation" requirements are solely the responsibility of the developer (Mr. Pavlina). These obligations cannot be transferred to owners or lessees of the property."

CP 930 (emphasis added). The City's position that obligations cannot be transferred was based upon the statement made by Rebecca Rothwell.

CP 850. Mr. Pavlina was shut down in his attempts to sell credits after Rebecca Rothwell made her statements to the City. CP 581-88.

The City forwarded a copy of the Covenant to Ms. Rothwell on April 23, 2015. CP 932. Rebecca Rothwell admits that the Covenant shows that Mr. Pavlina was seeking reimbursement from the unvested parcels. CP 825-26. On April 24, 2015, the Department admitted to the City that DOE did not have any interest in the Latecomer's provision of the Covenant: "The paragraph about fees, etc., doesn't affect Ecology's interest, so I'm not concerned about it." CP 942 (emphasis added).

On May 6, 2015, the City told attorney Aaron Laing of Schwabe, Williamson and Wyatt after a lengthy email chain regarding the Covenant that:

We have received clarification from Department of Ecology that the property is considered mitigated and any action for maintenance of the mitigation area will not fall back on a new owner or lessee of the property.

CP 943. The City then provided Mr. Laing with the same statement it had made to Mr. Beseda. The following day, May 7, 2015, the City provided Mr. Laing what had become its standard response letter on City letterhead to inquiries about the Covenant. CP 948. The City provided similar letters to every inquiry about the Covenant, including to Gary Elhrig of Northwest Equity holdings on May 26, 2015. CP 950; CP 851.

After learning about the statements made by DOE to the City and adopted by the City, Mr. Pavlina, through counsel, attempted to set up a meeting to discuss the issue. The Department, through counsel, refused to discuss the issue, simply stating that “Mr. Pavlina...is responsible for the mitigation required in the Order regardless of the ownership of the property.” CP 951.

In reliance on the DOE statements that Mr. Pavlina was solely responsible and that the responsibility did not transfer to subsequent owners and lessees, the Schwabe firm, on behalf of Regents Bank,

demanded the Covenant be discharged, arguing in part that: “[w]e note as before that the City of Battle Ground and the Department of ecology (sic) also see no basis for the Covenant.” CP 953. Faced with an angry owner armed with the DOE statement adopted by the City, DP2 LLC terminated the Covenant as regards the Regents property, specifically reserving any or all causes of action, claims, counterclaims, or defenses DP2 LLC may have relating to the DP2 LLC Parcels against any party. CP 955.

After making the statements regarding Mr. Pavlina being solely responsible and the responsibility not transferring, the Department decide it was time to seek another penalty against Mr. Pavlina. The Department began drafting the paperwork for a \$90,000 penalty against GMG LLC and Mr. Dennis Pavlina. J. Mot. to Supp. R., Appendix A, Exhibit 42.

On August 12, 2015, counsel for Mr. Pavlina wrote to counsel for DOE explaining that DOE had separated the mitigation requirements from the properties that were to be used to fund the mitigation. Counsel pointed out that the mitigation had not in fact been completed and requested that DOE acknowledge that the owners of the properties were responsible for completion of the mitigation. J. Mot. to Supp. R., Appendix A, Exhibit 43. Instead of acknowledging the 2005 Agreement’s clear language making the responsibility run with the land, the Department instead elected to amend the Order to unilaterally add the DP2 LLC

property into the Order. J. Mot. to Supp. R., Appendix A, Exhibit 44. On January 14, 2016, counsel from DP2 LLC wrote counsel for DOE objecting to the unilateral inclusion of the DP2 property into the Order. J. Mot. to Supp. R., Appendix A, Exhibit 45. An appeal ensued. When reviewing the section of DP2's briefing that states "the 2005 Agreement underlying the Order is assignable and runs with the land," Rebecca Rothwell wrote a note stating "Is this correct?" J. Mot. to Supp. R., Appendix A, Exhibit 46, at 2; CP 835. After making the note, Rebecca Rothwell went back and checked the Agreement and found it was assignable and ran with the land. CP 837. Why she did not make a similar check of the Agreement before sending her emails to the City is not clear.

On July 6, 2017, the Pollution Control Hearings Board issued its Findings of Fact, Conclusions of Law and Order, upholding the appeal and reversing the first amendment to the Order. After losing the appeal, the Department issued GMG LLC and Mr. Pavlina a notice of violation. J. Mot. to Supp. R., Appendix A, Exhibit 47. On December 13, 2017, DOE issued a \$17,000 penalty to "to Gold Medal Group, LLC, and to you in your individual capacity and in your capacity of Governor of Gold Medal Group, LLC..." Stip. Mot. to Supp. R., Appendix A, Exhibit 48. Rebecca Rothwell admits that the penalty is issued in part to Mr. Pavlina.

CP 838. Faced with a penalty directed at Mr. Pavlina as an individual, DP2 LLC rerecorded the Covenant with DOE's blessing. J. Mot. to Supp. R., Appendix A, Exhibit 49. Having received what it wanted, DOE rescinded the penalty against Mr. Pavlina. J. Mot. to Supp. R., Appendix A, Exhibit 50.

On January 11, 2018, counsel for GMG LLC and DP2 LLC wrote counsel for the Department. CP 970. Counsel stated:

The second issue revolves around Ms. Rothwell's prior written and/or oral statements to the City of Battle Ground. As we have discussed, Ecology's concern rests around whether or not the DP2 property is encumbered with a restrictive covenant, not whether DP2 properties can pursue reimbursement from third parties for the covenant. We hope that Ecology might clarify that with the City.

CP 970. On January 31, 2018, the Department responded, through counsel:

Second, Ecology is happy to inform the City of Battleground (sic) that all mitigation associated with Administrative Order #5087 has been secured. My client had planned on sharing the amendment with the City when it issues. You are correct the Ecology's main concern is whether the mitigation sites (Fairgrounds Ave and DP2) are adequately protected, maintained and monitored consistent with the terms of the Order. My client will clarify with the City of Battleground that it takes no position on whether DP2 can seek reimbursement from third parties for the covenant.

CP 984 (emphasis added). As of March 26, 2018, the Department had not contacted the City. CP 971. On March 26, 2018, Rebecca Rothwell

claims she contacted Sam Crummett via phone and told him that DOE wasn't taking a position on whether or not Appellants could pursue reimbursement from third parties. CP 837-38. Mr. Crummett cannot recall receiving such a call. CP 852.

Mr. Pavlina testifies that the costs of credits at the Remy site have ranged between \$75,000 and \$200,000 per credit over time. CP 584-85. Mr. Pavlina uses the worst case scenario from that range to compute his damages (i.e. \$75,000). CP 589. Even if he received \$1,000,000, he would not cover his costs of mitigation as he has \$1.6MM in just purchasing the two mitigation properties. CP 590. Mr. Pavlina has received \$0 in reimbursement to date. CP 590. Mr. Cornell Rotschy, the manager of multiple mitigation banks, charges \$190,000 per mitigation credit and that price has been consistent over time. CP 976-77. He states that it is common knowledge in the development industry in Clark County that his bank's credits cost \$190,000 each. CP 978. Donald Holsinger, a developer who has done 75 projects in Clark County, is purchasing credits for \$170,000 each. CP 981-82.

V. ARGUMENT

The trial court erred in summarily deciding that Appellants did not have a reasonable business expectation, and thus, that Appellants could not demonstrate the required elements for their tortious interference with business expectancy claim. The trial further erred in finding that the time to challenge or address the issues in this appeal were at the time of the 2007 Order and that the Department was privileged in communicating to members of the public the mitigation obligations regarding the property.

A. The trial court erred as a matter of fact and law in summarily deciding that Appellants did not have a reasonable business expectancy.

“Intentional and unjustified third-party interference with valid contractual relations or business expectancies constitutes a tort.” *Calbom v. Knudtson*, 65 Wn.2d 157, 161, 396 P.2d 148 (1964). The tort of interference with a business relationship has five elements, requiring the Plaintiff to prove:

- (1) a valid contractual relationship or business expectancy,
- (2) knowledge of that relationship by the defendants,
- (3) intentional interference by the defendants inducing or causing a breach or termination of the relationship or expectancy,
- (4) interference by the defendants based on an improper purpose or improper means, and
- (5) damages.

Citoli v. City of Seattle, 115 Wn. App. 459, 486, 61 P.3d 1165 (2002), quoting *Citoli v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992).

To establish a valid business expectancy, a “valid enforceable contract is not necessary” and “something less than an enforceable contract” is sufficient. *Greensun Group, LLC v. City of Bellevue*, 7 Wn. App. 2d 754, 768, 436 P.3d 397 (2019); *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977). A valid business expectancy includes “any prospective contractual or business relationship that would be of pecuniary value.” *Greensun Grp., LLC*, 7 Wn. App. 2d at 768(citations omitted). The court only requires the plaintiff to show that its “future business opportunities are a reasonable expectation and not merely wishful thinking.” *Id.*

Undoubtedly, in this case, Appellants have a valid business expectancy. Based on the written Agreement with the Department, the Appellants had a reasonable expectation that subsequent owners of the properties would be responsible for mitigation associated with the particular parcels at issue. The Agreement expressly stated that mitigation obligations under the Agreement are assignable and that these obligations run with the land. CP 753 (“This Agreement is assignable and shall run with the land and be binding upon and inure to the benefit of the parties, their respective heirs, successors, assigns and transferees.”) The stated purpose of the Agreement was to establish a process for moving forward with the projects and to identify and implement mitigation. CP 751. The

parties agreed that they wished to enter the Agreement to allow the projects to proceed under the existing approvals. CP 751.

Appellants are not alone in this reasonable expectation; all parties agree that the Agreement is assignment and runs with the land. Mr. Lund agrees that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees. CP 783, 796-97 (Mr. Lund agrees that Mr. Pavlina's belief that others were responsible to pay part of the mitigation is supported by the "runs with the land" and other language in the 2005 Agreement.) Rebecca Rothwell agrees that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees. CP 806-07. Sam Crummett, the City of Battle Ground Planning Supervisor, agrees that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees. CP 841-42 (Mr. Crummett understands "run with the land" to mean "[t]hat any legal agreement or legal covenant or restriction runs with the land as property transfers.") Rebecca Rothwell admits that mitigation has a cost component. CP 824. Thus, based upon the 2005 Agreement and its language regarding the obligations (both to do mitigation and to pay for

mitigation) being assignable and running with the land, and as admitted to by DOE employees during their depositions, Appellants had a reasonable expectation that subsequent owners of the properties would be responsible for the mitigation cost component through potential reimbursement associated with the particular parcel at issue.

B. Appellants have provided sufficient evidence to meet all elements of the claim for tortious interference with a reasonable business expectancy.

Not only have Appellants demonstrated a reasonable business expectancy that subsequent owners of the properties would be responsible for mitigation and possibly reimbursement, but the facts within the record demonstrate that the Appellants have met all elements of their tortious interference claim. The Department had actual knowledge of the Appellants' business expectancy; the Department intentionally interfered and employed improper means and purpose; and Appellants have demonstrated a reasonable estimate of damages.

1. The Department had actual knowledge of Appellants' business expectancy that subsequent owners of the properties would be responsible for mitigation and that Appellants may seek reimbursement for mitigation costs.

The knowledge element is satisfied when the defendant knows of the "facts giving rise to the existence of the relationship." *Woods View II, LLC v. Kitsap Cnty.*, 188 Wn. App. 1, 30-31, 352 P.3d 807 (2015).

Knowledge is sufficiently established if the “interferor has knowledge of facts giving rise to the existence of the relationship,” and “[i]t is not necessary that the interferor understand the legal significance of such facts.” *Id.* at 165. A plaintiff only needs to show that the defendant was aware of the facts giving rise to the business expectancy or has “awareness of ‘some kind of business arrangement.’” *Greensun Grp., LLC*, 7 Wn. App. 2d at 771 (citations omitted).

Before their interference with Appellants’ valid business expectancy, the Department had full knowledge, awareness, and ample notice that Appellants intended to seek to hold owners responsible and to seek reimbursement for the mitigation costs. In October 2014, long before making any statements, the Department met with Mr. Pavlina at an existing mitigation site. During that meeting, Mr. Pavlina informed DOE that he did not think he was solely responsible for the mitigation and that the two others with ownership interests in the development should bear some responsibility for the mitigation based upon the language in the 2005 Agreement that the Order “runs with the land.” CP 913. Rebecca Rothwell admits that, as of October 13, 2014, she was aware that Mr. Pavlina thought other people were responsible for mitigation. CP 821-24. On March 11, 2015, Mr. Pavlina informed DOE that he believed the site could also be used to satisfy the mitigation needs of others. CP

914. Mr. Lund admits that the Department knew even before the Covenant was recorded that Mr. Pavlina was going to seek reimbursement from third parties for some of the mitigation costs. CP 800, 802. On April 15, 2015, Rebecca Rothwell discussed the recorded Covenant (with its latecomer's term). CP 929. The Department possessed all of this "knowledge" prior to Rebecca Rothwell making her erroneous comment on April 22, 2015, and even before Mr. Lund's comments to Ms. Wamsley on March 16, 2015.

2. The Department intentionally interfered with Appellants' valid business expectancy.

"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.'" *Greensun Grp., LLC*, 7 Wn. App. 2d at 772 (citations omitted). Plaintiff only needs to show that the "actor was motivated...by a desire to interfere." *Pleas v. City of Seattle*, 112 Wn.2d 794, 806, 774 P.2d 1158 (1989). "[T]he analysis of intentional interference does not consider good faith." *Greensun Grp., LLC*, 7 Wn. App. 2d at 772.

Here, the Department clearly intended to interfere with Appellants' valid business expectancy and caused the termination of Appellants' business expectancies. Again, as discussed above, the Department knew

that Appellants were attempting to seek reimbursement from third parties. When contacted by Ms. Wamsley, who was representing multiple groups that own or were purchasing portions of the property, Mr. Lund told her that any agreement with Mr. Pavlina for mitigation will not affect any of the current or future landowners, and it was completely Mr. Pavlina's responsibility. CP 915-16. Mr. Lund admits that he knew that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues and that Mr. Pavlina planned to seek reimbursement before speaking to Ms. Wamsley. CP 800, 802.

When contacted by the City, Rebecca Rothwell told the City that "Mr. Pavlina is solely responsible for the mitigation [and] [t]he mitigation responsibility does not transfer to owners or lessees of property where the wetland impacts took place." CP 930-31. Rebecca Rothwell knew before the conversation and email with Mr. Crummett that Mr. Pavlina believed others to be responsible. CP 828. As she testified, Rebecca Rothwell understood that her email would be shared with third parties. CP 831, 834. Rebecca Rothwell admits she voluntarily chose to answer questions that are admittedly outside of the Department's interest. The City understood Rebecca Rothwell as conveying to the City that no one other than Mr. Pavlina would have any responsibilities for the mitigation, including payment or reimbursement. CP 849. The Department

intentionally interfered with Appellants' valid business expectancy and caused the termination of Appellants' business expectancies.

3. The Department acted with improper purpose and means in interfering with Appellants' valid business expectancy.

Plaintiff must show that the defendant interfered for an "improper purpose" or "used improper means." *Pleas*, 112 Wn.2d at 803-804.

Plaintiff may prove improper purpose or means by showing that the defendant acted in an arbitrary and capricious manner, which is "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action . . . an action taken after due consideration is not arbitrary and capricious." *Id.* at 805; *Greensun Group, LLC*, 7 Wn. App. 2d at 773-74. Plaintiff may prove improper means⁴ by showing that the defendant has a duty not to interfere, which may be established by pointing to a statute, regulation, recognized common law, or established standard of trade or profession. *Greensun Group, LLC*, 7 Wn. App. 2d at 773. A court does not need to find that a

⁴ Negligent misrepresentation can also form the basis for an improper means. "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998).

defendant acted with “ill will, spite, defamation, fraud, force, or coercion” to find improper purpose or means. *Id.* (citations omitted).

Here, the Department acted with improper purpose and improper means. Order 5087 was only directed to GMG LLC. CP 854. Mr. Lund and Rebecca Rothwell agree that the Order is directed at GMG LLC and that only GMG LLC was required to comply with the order. CP 784, 808. Despite this fact, the DOE wanted to issue substantial penalties (\$90,000 to \$240,000) against Mr. Pavlina as an individual. CP 869, 896; J. Mot. to Supp. R., Appendix A, Exhibit 42. Penalties in these amounts would have been some of the largest ever issued by DOE for wetlands. CP 892. The Department’s internal talking points discussed that that “[i]ts time to hold Pavlina accountable.”⁵ CP 891 (emphasis added). Mr. Lund indicates that the \$240,000 penalty was intended to motivate Mr. Pavlina to action and told him that larger penalties were forthcoming. CP 795. Rebecca Rothwell admits that the second penalty was an attempt to get Mr. Pavlina’s attention to get him to do mitigation. CP 820.

As shown above, the Department wanted to cause harm to Mr. Pavlina—who was not even the subject of the Order—and to force

⁵ DOE discussed internally how if Mr. Pavlina did not comply the penalties would escalate against Mr. Pavlina accordingly and that DOE planned to make that clear to Mr. Pavlina without ambiguity. CP 909. The Department later met internally to discuss using the penalty to force a settlement or waiver of appeal rights for lower penalty amount. CP 912.

him to make concessions to the Department. Telling third parties that Mr. Pavlina was solely responsible and that no responsibility transferred to subsequent owners, when they knew the Agreement was assignable and ran with the land and that Mr. Pavlina was seeking reimbursement, was just a continuation of the Department's expressed, written desire to harm Mr. Pavlina and to hold Mr. Pavlina accountable.

Further, the Department clearly failed to exercise reasonable care or competence by failing to train its employees regarding business entities and failing to train them to refrain from responding to questions about responsibilities among and between various entities that are outside DOE's scope of responsibility. The Department acted arbitrarily and capriciously in making the statements to third parties when DOE was well aware of the Agreement's terms that provided the mitigations obligations run with the land. Mr. Lund and Rebecca Rothwell agree that the Agreement is assignable, runs with the land, and is binding upon and inures to the benefit of the parties, their respective heirs, successors, assigns and transferees. CP 783, 806-07. Mr. Lund and Rebecca Rothwell agree and admit that the Order is directed at GMG LLC, that it was GMG LLC who was required to comply with the Order, and that Mr. Pavlina is not mentioned anywhere in the Order. CP 784, 808. Mr. Lund admits that Mr. Pavlina notified DOE that he believed that

others were responsible to pay part of the mitigation. CP 796, 913-14 (Mr. Pavlina confirming discussion). Rebecca Rothwell admits that, as of October 13, 2014, she was aware the Mr. Pavlina thought other people were responsible for mitigation. CP 797-98 Mr. Lund also agrees that Mr. Pavlina's belief that others were responsible to pay part of the mitigation is supported by the "runs with the land" and other language in the 2005 Agreement. CP 796-97. Rebecca Rothwell also acknowledges that under the Agreement's language the authorization to develop was assignable and ran with the land. CP 821-23. Mr. Lund admits that early on DOE made clear to Mr. Pavlina that Mr. Pavlina's business dealings (how he was to get reimbursed for the costs of mitigation) was not DOE's concern. CP 799-800. Rebecca Rothwell also admits that how Mr. Pavlina was to get reimbursed was not DOE's concern. CP 825-26. Mr. Lund admits that DOE knew even before the Covenant was recorded that Mr. Pavlina was going to seek reimbursement from third parties for some of the mitigation costs. CP 800. Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement are separate issues. CP 800.

Despite knowing all of these facts, both Mr. Lund and Rebecca Rothwell made statements to third parties that Mr. Pavlina was solely responsible and that no obligations passed to owners of the

properties. The Department undoubtedly took willful and unreasoning action that amounts to arbitrary and capricious conduct. *See Greensun Group, LLC*, 7 Wn. App. 2d. at 773. The Department acted with improper means and purpose to harm Mr. Pavlina.

Moreover, their statements to third parties also constitute negligent misrepresentations. The statements were made during the course of their employment. They supplied false information to the third parties because the Agreement was admittedly assignable and ran with the land. *See, e.g., CP 783, 806-07*. The record demonstrates that the Department supplied information to provide guidance to others (Ms. Wamsley and Mr. Crummett, with the City), it was foreseeable that the guidance would be relied on, and it was in fact relied upon by others. *CP 801, 843-45, 848-49, 915*. The Department's guidance was contradictory to the plain language of the 2005 Agreement. *CP 843-45, 848-49*. They failed to exercise reasonable care and competence in communicating information about Mr. Pavlina being solely liable and that obligations did not transfer to subsequent owners. This constitutes negligent misrepresentation and improper means. *ESCA Corp.*, 135 Wn.2d at 826.

4. Appellants have a demonstrated claim of damages arising from the Department's tortious interference and have provided a reasonable basis for estimating their loss.

Plaintiff only needs to show a claim of damages with reasonable certainty. *Greensun Group LLC*, 7 Wn. App. 2d. at 776. Evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture. *Id.* A party need not prove damages with mathematical certainty where the fact of damage is well established. *Topline Equip., Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 94, 639 P.2d 825 (1982).

Appellants loosely refer to what they would have charged third parties for reimbursement as “mitigation credits.” CP 987. This is defined by Appellants as payment of the amount necessary to Appellants by the subsequent owner of a non-vested parcel to change the parcels status from non-vested to vested. CP 987; CP 924-25. Plaintiff had 22.41 acres of "mitigation credits" they intended to sell starting in 2015. CP 987. Appellants anticipated using the amount that Remy bank was charging per credit, which at the time, ranged between \$75,000 and \$200,000. CP 987. CP 769-70. Mr. Pavlina uses the worst case scenario from that range to compute his damages as $\$75,000 \times 22.41 = \$1,680,750$. Exhibit 5, p. 13; CP 987. Even if \$1,000,000 was received it would not cover the costs of mitigation because it cost \$1.6MM to just purchase the two mitigation properties. CP 775. Mr. Pavlina has received \$0 in reimbursement to date. CP 775. To demonstrate the reasonableness of the \$75,000 figure

used by Appellants, Mr. Connell Rotschy, the manager of multiple mitigation banks, charges \$190,000 per mitigation credit and that price has been consistent over time. CP 976-77. He states that it is common knowledge in the development industry in Clark County that his banks credits cost \$190,000 each. CP 978. Donald Holsinger, a developer who has done 75 projects in Clark County, is purchasing credits for \$170,000 each. CP 981-82.

Appellants' claim of damages is shown with more than reasonable certainty, and provides more than a sufficient basis for estimating the loss resulting from the Department's tortious interference.

C. Failure to appeal the 2005 Order does not affect Appellants' tort claim.

Although not directly relevant to the trial court's conclusion on summary judgment, the trial court further erred in stating that the "time for addressing the [Agreement] and the [Order] was back then," suggesting that Appellants' failure to appeal the 2007 Order is additionally dispositive to Appellants' tortious interference claim. Effectively, the trial court raises questions regarding exhaustion of remedies and possibly res judicata question.

1. Appellants did not fail to exhaust their administrative remedies.

The trial court suggests that the time to address the 2005 Agreement or 2007 Order was at that time—that is, not in this present case. But Appellants are not challenging the 2005 Agreement or 2007 Order in this case. Appellants raise a tortious interference claim based on the Department’s actions following any attendant appeal rights under the 2007 Order.

The doctrine of exhaustion of administrative remedies provides that agency action “cannot be challenged in court until administrative avenues of appeal are exhausted.” *Phillips v. King Cnty.*, 87 Wn. App. 468, 479, 943 P.2d 306 (1997) (citations omitted). “Exhaustion of administrative remedies is required when (1) a claim is cognizable in the first instance by an agency alone, (2) the agency’s authority establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties, and (3) the relief sought can be obtained by resort to an exclusive or adequate administrative remedy.” *Id.*

None of these elements are applicable in this case. This case involves an intentional interference claim arising from statements made by the Department to third parties regarding Mr. Pavlina being solely liable and obligations not transferring to subsequent owners that interfered with Appellants’ ability to collect reimbursement from third parties. This case is not a challenge to any Order (original or amended) issued by the

Department. It is not about doing the mitigation. This case is solely about the Department's interference in the collection of reimbursement for mitigation, for which Appellants were authorized to do. Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues. CP 800. Since the Orders do not address reimbursement, this is not a claim that could or should have been litigated in any appeal of an Order. It is simply not about the Order, it is about the interference with reimbursement.

Appellants' claim for tortious interference arises from Department actions following the 2005 Agreement and 2007 Order. Certainly, the Department has represented to members of the public information contrary to and in conflict with the terms of the 2005 Agreement, but Appellants had no cognizable claim before the agency at the time of the 2007 Order, since there was no interference at that point. The tortious interference claim became cognizable when the Department began intentionally interfering with the Appellants' reasonable business expectancy that mitigation obligations can be assigned or reimbursed.

2. Appellants claim for tortious interference is not barred by res judicata principles for failure to appeal the 2007 Order.

Even assuming that the Appellants could have raised the issues raised in this case—which, as discussed above, Appellants could not have

done so—any possible challenge of the 2007 Order would not bar a lawsuit today concerning the Department’s tortious interference with Appellants’ business expectancy. This case is not barred by res judicata.

“Under [res judicata] a plaintiff is not allowed to recast his claim under a different theory and sue again. *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 40, 914 P.2d 737 (1996). “In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded.” *Id.* “And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated.” *Seattle-First Nat. Bank v. Kawachi*, 91 Wn.2d 223, 226, 588 P.2d 725 (1978) (citations omitted) (emphasis added). “A judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.” *Id.* (emphasis added).

The “threshold requirement of res judicata is a final judgment on the merits in the prior suit.” *Gourde v. Gannam*, 3 Wn. App.2d 520, 526, 417 P.3d 650 (2018) (citations omitted). The doctrine applies “where a prior final judgment is identical to the challenged action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” *Id.* (citations omitted). The doctrine applies to “every point which property belonged to

the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” *Id.*

Here, the asserted theories of recovery, causes of action, and nucleus of facts are wholly different from any potential challenge to the 2007 Order. Any appeal or challenge of the Order would have focused on the mitigation requirements of the Order. However, the Order is silent on *reimbursement* for that mitigation. Therefore, the appeal would only focus on the obligation to perform the mitigation. Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues. CP 800. Here, the focus is on the separate and distinct issue of Appellants’ ability to get reimbursement from third parties. Thus, the theories of recovery would be completely different (mitigation is not required as compared with which parties and property owners are contractually obligated to pay the mitigation cost).

The rights involved in this proceeding are wholly different from any rights asserted or involved in a prior appeal of the 2007 Order regarding performance of the mitigation. CP 800 (Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues). As admitted by DOE, whether or not Appellants can get reimbursement is not of DOE concern. On April 24, 2015, Rebecca Rothwell wrote: “The paragraph about fees, etc, doesn’t

affect Ecology's interest, so I'm not concerned about it." CP 942 (emphasis added). A judgment in this case that DOE interfered with reimbursement from third parties would not affect the obligation to mitigate in any Order. As the DOE freely admits, the issue is both separate and of no concern to the Department. CP 800, 825-26. Very different evidence has (and would have) been put forth in this case. This case centers around the 2005 Agreement running with the land, the Department's to third parties that Mr. Pavlina was solely responsible and that no obligation transferred to subsequent owners (contrary to that Agreement's terms), and that position foreseeably and reasonably being adopted by the City and republished to interested third parties who reasonably relied on those statements and then refused to participate in reimbursement. Effectively, this case regards the Department's interference with Appellants' business expectancy to assign and seek reimbursement for the mitigation requirements, pursuant to that Agreement. Any challenge to an Order would have dealt with the requirement to perform mitigation. Again, those are admittedly different issues. CP 800 (Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues).

Finally, the nucleus of facts underlying the two potential suits are different. Any challenge to an Order would involve facts relevant to the

whether or not one was in fact required to perform mitigation—that is, whether regulated wetlands were adversely impacted by construction. The nucleus of facts in this case will involve facts relevant to the right to reimbursement and statements made to third parties about reimbursement—that is, the differing understandings of the parties regarding the meaning of the terms of the Agreement and the terms of the property ownership transfers, the Latecomer covenant, the Settlement, and related instruments. Again, these are wholly different questions and issues from actually performing the mitigation required by the Order. CP 800.

Because interests are not destroyed or impaired, different evidence will be presented, the infringement of the different rights are involved, and a different transactional nucleus of facts is involved, *res judicata* does not apply. Although *dicta*, as it may be relevant for this court's review of the issues and the trial court's ultimate conclusion, the trial court's statement that the time for Appellants to raise these issues was in 2005 or following the 2007 Order are incorrect, irrelevant, and non-dispositive as to whether Appellants have established sufficient facts for the tortious interference claim.

D. Department of Ecology does not have privilege to communicate its enforcement authority and specifics of mitigation reimbursement to members of the public.

Similar to the trial court's statement related to res judicata principles, although dicta, the trial court's statement relating to the Department's privilege in communicating its enforcement authority and specifics of mitigation requirements to members of the public is erroneous. While the trial court is incorrect in this view, even if it were true, the Department's "privilege" does not absolve it of a claim of tortious interference, especially given the facts of this case.

"The burden of showing privilege for interference with the expectancy involved rests upon the interferor." *Calbom*, 65 Wn.2d at 163. The threshold element of the defense is whether, under the circumstances of the particular case, the interferor's conduct is justifiable, considering such factors as the nature of the interferor's conduct, the character of the expectancy, the relationship between the parties, the interest sought to be advanced by the interferor, and the social desirability of protecting the expectancy or the interferor's freedom of action. *Id.* "[I]nterference is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded." *Plumbers & Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 906, 920, 724 P.2d 1030 (1986) (citations

omitted). “An absolute right exists only where a person has a definite legal right to act, without any qualification.” *Id.* (emphasis added).

Good faith may privilege an interferor’s actions and thereby serve as an affirmative defense to a tortious interference claim. *Greensun Grp., LLC*, 7 Wn. App. 2d at 776-77. If one in good faith asserts a legally protected interest of its own in which they believe may be impaired by the performance of the proposed transaction, then one is not guilty of tortious interference.” *Id.* at 777. The actor must “believe that [its] interest may otherwise be impaired or destroyed by the performance of the contract or transaction” at issue. *Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc.*, 35 Wn. App. 523, 527, 667 P.2d 1120 (1983) (quoting Restatement (Second) of Torts). This rule giving the actor a defense is of “narrow scope and protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means.” *Id.* (quoting Restatement (Second) of Torts) (emphasis added). The burden of proving privilege rests on the defendant. *Greensun Grp. LLC*, 7 Wn. App. 2d at 777.

The Department’s claims of justification and good faith fail because DOE has no interest in whether or not Plaintiff can collect reimbursement from third parties. Mr. Lund and Rebecca Rothwell admit that DOE made clear to Mr. Pavlina that Mr. Pavlina’s business dealings

(how he was to get reimbursed for the costs of mitigation) was not DOE's concern. CP 799-800, 825-26. Mr. Lund admits that the satisfaction of mitigation and collecting reimbursement from third parties are separate issues. CP 800. Rebecca Rothwell's testimony confirms that DOE only wanted the mitigation done. CP 834. Rebecca Rothwell admits she voluntarily chose to answer questions that are admittedly outside of the Department's interest. CP 834. On April 24, 2015, the Department admitted to the City that DOE did not have any interest in the Latecomer's provision of the Covenant. CP 942. Ms. Rothwell wrote: "The paragraph about fees, etc, doesn't affect Ecology's interest, so I'm not concerned about it." CP 942 (emphasis added). On January 31, 2018, DOE stated, through counsel:

You are correct the Ecology's main concern is whether the mitigation sites (Fairgrounds Ave and DP2) are adequately protected, maintained and monitored consistent with the terms of the Order. My client will clarify with the City of Battleground that it takes no position on whether DP2 can seek reimbursement from third parties for the covenant.

CP 984-85 (emphasis added). Because the Department admits they have no interest and reimbursement would not affect their interests, DOE cannot believe that its interest may be impaired or destroyed by the performance of any reimbursement transaction. The Department does not have a definite legal right to act without any qualification. That precludes

a claim of justification or privilege. Further, the Department admits that the obligation to mitigate is separate from getting reimbursement (they are separate issues). That prevents a claim of good faith. The Department cannot meet its burden to demonstrate that they have privilege in communicating the reimbursement obligations for mitigation with members of the public.

CONCLUSION

For the foregoing reasons, this court should reverse the trial court's order and remand for a review of the claims on the record.

DATED: October 17, 2019 JORDAN RAMIS PC

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I hereby certify that on the date shown below, I served a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF on:

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