

FILED  
Court of Appeals  
Division II  
State of Washington  
12/11/2019 10:08 AM

NO. 53699-4

---

**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,

Appellants,

v.

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

Respondent.

---

**RESPONDENT'S BRIEF**

---

ROBERT W. FERGUSON  
Attorney General

EMILY C. NELSON  
Assistant Attorney General  
WSBA #48440  
P.O. Box 40117  
Olympia, WA 98504-0117  
360-586-4607  
OID #91024

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTER STATEMENT OF ISSUES.....	2
III.	COUNTER STATEMENT OF FACTS.....	3
	A. Wetland Mitigation in Washington State.....	3
	B. Ecology’s History of Enforcement Actions against Mr. Pavlina.....	4
	1. Mr. Pavlina fills wetlands without permission, and Ecology issues Administrative Order No. 5087 in response .....	4
	2. Ecology penalizes Mr. Pavlina after he violates the Order.....	6
	3. Mr. Pavlina asks Ecology to change its Order, and Ecology declines to do so .....	8
	C. Mr. Pavlina Records a Conservation Covenant on the Battle Ground Commerce Property to Try to Require the New Owners and Future Buyers to Reimburse Him for Mitigation.....	9
	D. The City of Battle Ground and Prospective Buyers Contact Ecology to Determine Who Is Responsible for Doing Wetland Mitigation for the Battle Ground Commerce Project.....	10
	E. Regents Bank and Other New Owners of Battle Ground Commerce Threaten Mr. Pavlina with Litigation.....	12
	F. Ecology Amends its Order to Include the New DP2 Mitigation Property, which Mr. Pavlina Appeals to the Pollution Control Hearings Board .....	13
	G. Mr. Pavlina Finally Complies with the Order.....	14

H.	Procedural History .....	15
IV.	ARGUMENT .....	16
A.	Standard of Review.....	16
B.	Mr. Pavlina Cannot Establish Multiple Elements of His Claim as a Matter of Law.....	16
1.	Mr. Pavlina could not reasonably expect new owners of Battle Ground Commerce to pay him for mitigation they did not need .....	18
2.	Mr. Pavlina has provided no evidence that Ecology acted with improper purpose or through improper means .....	20
C.	Ecology’s Actions Were Justified and Privileged .....	24
D.	Mr. Pavlina Released Ecology from Liability for Tort Claims When He Signed the 2005 Agreement .....	27
E.	Res Judicata Bars Mr. Pavlina from Claiming He Is Not Responsible for Complying with Order No. 5087 .....	29
V.	CONCLUSION .....	31

## TABLE OF AUTHORITIES

### Cases

<i>1515—1519 Lakeview Boulevard Condo. Ass’n v. Apartment Sales Corp.</i> , 146 Wn.2d 194, 43 P.3d 1233 (2002).....	28
<i>Bavand v. OneWest Bank</i> , 196 Wn. App. 813, 385 P.3d 233 (2016).....	16
<i>Boyce v. West</i> , 71 Wn. App. 657, 862 P.2d 592 (1993).....	28
<i>Cherberg v. Peoples Nat’l Bank of Wash.</i> , 88 Wn.2d 595, 564 P.2d 1137 (1977).....	25
<i>Dep’t of Ecology v. Lundgren</i> , 94 Wn. App. 236, 971 P.2d 948 (1999).....	6, 21
<i>Elcon Const., Inc. v. E. Washington Univ.</i> , 174 Wn.2d 157, 273 P.3d 965 (2012).....	16
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 135 Wn.2d 820, 959 P.2d 651 (1998).....	24
<i>Greensun Group, LLC v. City of Bellevue</i> , 7 Wn. App. 2d 754, 436 P.3d 397 (2019).....	17, 22, 23
<i>Hanson Indus. Inc. v. Kutschkau</i> , 158 Wn. App. 278, 239 P.3d 367 (2010).....	28
<i>Hudson v. City of Wenatchee</i> , 94 Wn. App. 990, 974 P.2d 342 (1999).....	18
<i>K.P. McNamara NW., Inc. v. Dep’t of Ecology</i> , 173 Wn. App. 104, 292 P.3d 812 (2013).....	6, 21
<i>Kane v. City of Bainbridge Island</i> , 866 F. Supp. 2d 1254 (W.D. Wash. 2011).....	24, 25
<i>Leingang v. Pierce Cty. Med. Bur., Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	17

<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995).....	30
<i>Newton Ins. Agency &amp; Brokerage, Inc. v. Caledonian Ins. Group, Inc.</i> , 114 Wn. App. 151, 52 P.3d 30 (2002).....	18
<i>Pac. Topsoils, Inc. v. Dep't of Ecology</i> , 157 Wn. App. 629, 238 P.3d 1201 (2010).....	3
<i>Pelly v. Panasyuk</i> , 2 Wn. App. 2d 848, 413 P.3d 619 (2018).....	28-29
<i>Pleas v. City of Seattle</i> , 112 Wn.2d 794, 774 P.2d 1158 (1989).....	20, 22
<i>Quadra Enter., Inc. v. R.A. Hanson Co., Inc.</i> , 35 Wn. App. 523, 667 P.2d 1120 (1983).....	26
<i>Sea-Pac Co., Inc. v. United Food &amp; Comm'l Workers Local 44</i> , 103 Wn.2d 800, 699 P.2d 217 (1985).....	18
<i>Seattle-First Nat'l Bank v. Kawachi</i> , 91 Wn.2d 223, 588 P.2d 725 (1978).....	30
<i>Sound Built Homes, Inc., v. Windermere Real Estate/South, Inc.</i> , 118 Wn. App. 617, 72 P.3d 788 (2003).....	30
<i>Woods View II, LLC v. Kitsap Cty.</i> , 188 Wn. App. 1, 352 P.3d 807 (2015).....	16, 29

### Statutes

RCW 90.48 .....	2, 26, 27
RCW 90.48.020 .....	3
RCW 90.48.030 .....	3
RCW 90.48.080 .....	4
RCW 90.48.120 .....	4, 6
RCW 90.48.120(1).....	18

RCW 90.48.144 .....	4, 6, 21
RCW 90.48.144(3).....	4, 20
RCW 90.54.020(3)(b).....	3

**Regulations**

WAC 173-201A-020.....	3
WAC 173-201A-300 to -330 .....	3

**Rules**

CR 56(c).....	16
CR 56(e).....	16

## I. INTRODUCTION

Appellants Dennis Pavlina and his two single-member LLCs, Gold Medal Group and DP2 Properties (Pavlina) are required by Administrative Order No. 5087, issued in 2007 by Respondent Department of Ecology, to mitigate for wetland impacts caused by Mr. Pavlina's Battle Ground Commerce development project. Mr. Pavlina never appealed this Order, and does not dispute that it applies to him and his LLCs. The superior court correctly found that Mr. Pavlina's claim against Ecology for intentional interference with prospective business advantage or business expectancy failed as a matter of law because Mr. Pavlina cannot establish the very first element of his claim: that it was reasonable to assume people would pay him for mitigation they were under no legal obligation to perform.

Summary judgment should be affirmed for three primary reasons. First, Mr. Pavlina failed to provide prima facie evidence of at least two elements of his claim. Second, even if the Court determines that Mr. Pavlina has made a prima facie case of intentional interference, Ecology's actions were justified and privileged. Finally, Mr. Pavlina's claim is barred as a matter of law by a release he signed in 2005 that releases Ecology from liability for damages arising out the agency's regulatory actions regarding Battle Ground Commerce.

## II. COUNTER STATEMENT OF ISSUES

1. Under the state Water Pollution Control Act, RCW 90.48, Mr. Pavlina is required to mitigate for wetland impacts caused by his Battle Ground Commerce development project. Only Ecology can transfer the legal responsibility for completing this mitigation to other parties. After Ecology declined to transfer Mr. Pavlina's mitigation responsibilities to other parties, did Mr. Pavlina have a reasonable business expectation that those parties would reimburse him for mitigation costs, even though they were not legally required to do so?

2. In the course of their regulatory duties, Ecology staff provided true and accurate information regarding the mitigation requirements and enforceability of Administrative Order No. 5087 to subsequent buyers of Battle Ground Commerce and the City of Battle Ground. Were Ecology's actions justified and privileged as a matter of law?

3. In 2005, Mr. Pavlina agreed to release Ecology from any and all liability for future claims arising out of Ecology's decisions regarding the Battle Ground Commerce development project. Does that release bar Mr. Pavlina from bringing this claim for interference with prospective business advantage or business expectancy?

4. Mr. Pavlina did not challenge Administrative Order No. 5087 when Ecology issued it in 2007, nor did he appeal Ecology's most recent Amendment to the Order in February 2018. Is Mr. Pavlina therefore barred from challenging the mitigation requirements of the original Order, and the First Amendment?

### **III. COUNTER STATEMENT OF FACTS**

#### **A. Wetland Mitigation in Washington State**

The Legislature has vested Ecology with the authority to regulate activities that occur in waters of the state, such as wetlands. RCW 90.48.020; *Pac. Topsoils, Inc. v. Dep't of Ecology*, 157 Wn. App. 629, 644, 238 P.3d 1201 (2010). The state Water Pollution Control Act directs Ecology to control and prevent wetland pollution throughout Washington. RCW 90.48.030; *Pac. Topsoils*, 157 Wn. App. at 642. Consistent with the policies of the Act and its authority, Ecology has promulgated water quality standards for surface waters of the state that include an anti-degradation policy aimed at achieving no-overall-net loss in the amount of acreage and function of Washington's remaining wetlands. *See* RCW 90.54.020(3)(b); WAC 173-201A-020, -300 to -330.

Thus, a party that causes impacts to surface waters of the state, such as by filling wetlands for a development project, must compensate for those impacts through mitigation by restoring or preserving the ecological

functions of other wetlands. When appropriate, Ecology will issue an administrative order to enforce such mitigation requirements, either at the request of a regulated party seeking permission to cause impacts before they occur (as is preferable), or by ordering after-the-fact mitigation for, or restoration of, the impacted wetlands. RCW 90.48.120. Ecology can also issue penalties to “any person” who violates the Water Pollution Control Act. RCW 90.48.144.

**B. Ecology’s History of Enforcement Actions against Mr. Pavlina**

**1. Mr. Pavlina fills wetlands without permission, and Ecology issues Administrative Order No. 5087 in response**

In the early 2000’s, Ecology learned that Dennis Pavlina had illegally filled several acres of wetlands while constructing a mixed-use development project in Battle Ground, Washington, known as Battle Ground Commerce. CP 110, 179. Mr. Pavlina caused these impacts without prior authorization from Ecology. CP 179, 195; *see also* RCW 90.48.080, .120. A person who fills wetlands without authorization, as Mr. Pavlina did, can be subject to fines of up to \$10,000 per day, per violation. RCW 90.48.144(3).

However, rather than issue a penalty, Ecology took a cooperative approach to dealing with Mr. Pavlina’s violations. CP 195. In 2005, Ecology entered into an agreement with Mr. Pavlina and his single-member

LLC, Gold Medal Group (2005 Agreement). *See* CP 131-39. Under the 2005 Agreement, Mr. Pavlina could continue building Battle Ground Commerce while he prepared a wetland delineation report and mitigation plan identifying impacted wetlands on the property, and measures to compensate for those impacts. CP 131-33.

The 2005 Agreement contained additional terms and conditions providing that it was “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.” CP 133. The 2005 Agreement also provided that it “shall be recorded,” but it never was. CP 131, 133. In addition, Mr. Pavlina and Gold Medal Group, along with their “heirs, assigns, or other successors in interest,” agreed to

**release and discharge [Ecology] and its officers, agents, employees, agencies and departments from all existing and future claims, damages and causes of action of any nature arising out of any decisions made by Ecology regarding [Battle Ground Commerce], including all claims for personal injuries, attorneys fees and costs to Commerce, including those injuries and damages stated in the claims for damages previously filed (if any).**

CP 134 (emphasis added).

After finalizing the 2005 Agreement, Mr. Pavlina prepared, and Ecology approved, a wetland delineation report and mitigation plan. CP 150. Ecology then issued Administrative Order No. 5087 (Order) in

2007, authorizing impacts to 37.1 acres of wetlands on the Battle Ground Commerce property, and requiring 44.7 acres of wetland mitigation to compensate for those impacts. CP 150. Per the terms of the Order, Gold Medal Group was primarily responsible for completing the mitigation, which would occur on four different properties in Battle Ground. *Id.* Neither Gold Medal Group nor Mr. Pavlina appealed the Order.

Mr. Pavlina's use of his single-member LLC, Gold Medal Group, does not shield him from personal liability for the environmental damage he caused. A statute of strict liability, the Water Pollution Control Act authorizes Ecology to take enforcement action against "any person" it believes has violated, or has created a substantial penalty to violate, the provisions of the Act. *See* RCW 90.48.120, .144. Moreover, and as explained further below, under the responsible corporate officer doctrine, Ecology could have held Mr. Pavlina personally responsible for the environmental damage he caused. *See K.P. McNamara NW., Inc. v. Dep't of Ecology*, 173 Wn. App. 104, 142, 292 P.3d 812 (2013); *Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 244, 971 P.2d 948 (1999).

## **2. Ecology penalizes Mr. Pavlina after he violates the Order**

Over the next eight years, Mr. Pavlina was out of compliance with the Order. Among other things, Mr. Pavlina did not purchase eight of the 44.7 acres of mitigation required, and did not record a conservation

covenant on the mitigation properties to protect them from future development. CP 167-68.

In an effort to remedy these violations, Ecology sent Mr. Pavlina multiple warning and technical assistance letters to try to get him to comply with the Order voluntarily, without the need for enforcement action. CP 98, 112-13. Those attempts were unsuccessful and by 2013, Ecology began to consider issuing a penalty. CP 869, 878-79. Because Mr. Pavlina had been out of compliance with multiple conditions of the Order for several years, Ecology staff originally recommended a \$120,000 penalty. CP 115, 878-79. However, after internal agency deliberations, Ecology decided to issue a smaller, \$9,000 penalty, which Mr. Pavlina paid in full. CP 187-91, 115.

After Mr. Pavlina paid the penalty, Ecology continued its efforts to bring him into compliance. But after another year passed without confirmation from Mr. Pavlina that he had taken the necessary actions, the agency sent a letter warning of additional penalties. CP 116. Given the magnitude of Mr. Pavlina's violations, and after comparing his case to other cases of prolonged noncompliance, Ecology staff proposed issuing a \$240,000 penalty. CP 906.

Finally, in October 2014, Mr. Pavlina purchased the remaining eight acres of mitigation required by the Order. CP 117. Mr. Pavlina used DP2 Properties, LLC (of which Mr. Pavlina is also the sole owner and member)

to purchase the mitigation property. CP 118. In light of Mr. Pavlina's efforts to comply, Ecology did not issue the \$240,000 penalty. CP 117.

**3. Mr. Pavlina asks Ecology to change its Order, and Ecology declines to do so**

Around this same time, Mr. Pavlina tried to convince Ecology to direct its Order to other parties. Mr. Pavlina did not think he should have to complete the required mitigation because a few months prior, he had conveyed most of the Battle Ground Commerce properties back to his lender, Regents Bank, under a Settlement and Deed In Lieu of Foreclosure Agreement (Settlement Agreement). CP 198, 227.

The Settlement Agreement resolved a number of outstanding loans on which Mr. Pavlina and several of his LLCs had defaulted.<sup>1</sup> CP 198-203. In exchange for relief from those loans, Mr. Pavlina conveyed to Regents Bank "good, valid, indefeasible, and marketable fee simple title" to the majority of the parcels that comprised the Battle Ground Commerce project. CP 202 (Article 2.2). Relevant here, Mr. Pavlina expressly agreed that he would "undertake no action that could result in a lien or other encumbrance being imposed" on any of the parcels he conveyed to Regents Bank. CP 208 (Article 5.4). The Settlement Agreement is binding on Mr. Pavlina and his

---

<sup>1</sup> Those LLCs are not subject to Ecology's Order, nor are they parties to this appeal.

“heirs, administrators, executors, personal representatives, successors, designees, and assigns.” CP 223.

Mr. Pavlina told Ecology he believed that the 2005 Agreement “runs with the land,” and therefore the new owners of Battle Ground Commerce should be responsible for completing the mitigation instead of him. CP 116. Ecology explained that its Order, not the 2005 Agreement, controlled the mitigation requirements for Battle Ground Commerce, and the Order had only been issued to him and Gold Medal Group. CP 116. Because Mr. Pavlina’s development activities caused the wetland impacts, Ecology did not intend to direct the Order to any additional parties. CP 99.

**C. Mr. Pavlina Records a Conservation Covenant on the Battle Ground Commerce Property to Try to Require the New Owners and Future Buyers to Reimburse Him for Mitigation**

Displeased with Ecology’s unwillingness to relieve him of his mitigation responsibilities, Mr. Pavlina next tried to force the new owners of Battle Ground Commerce to reimburse him for his mitigation costs. In March 2015, Mr. Pavlina used DP2 Properties, LLC, to record a Conservation Covenant Running with the Land (Covenant) on the Battle Ground Commerce parcels Mr. Pavlina had just conveyed to Regents Bank.<sup>2</sup> See CP 917-25. Mr. Pavlina did this even though the Settlement

---

<sup>2</sup> Mr. Pavlina also recorded the Covenant on the mitigation properties to protect them from future development, as required by Ecology’s Order. CP 167.

Agreement with Regents Bank expressly forbade him from placing an encumbrance on the Battle Ground Commerce property. CP 208.

The Covenant purported to require new owners of Battle Ground Commerce (i.e., Regents Bank and anyone else to whom it sold the parcels) to reimburse Mr. Pavlina for the mitigation he was required to complete under Ecology's Order. The Covenant identified the Battle Ground Commerce parcels as either "vested" or "unvested," and stated that any buyers of the "unvested" parcels must pay Mr. Pavlina for "mitigation rights," or "[acquire] mitigation rights elsewhere," before the buyers built on the parcels. CP 381, 919, 924-25.

For its part, Ecology was not concerned with this language in the Covenant. CP 120. The agency's goal was to permanently protect the Battle Ground Commerce mitigation properties. *Id.* Ecology did not care that Mr. Pavlina was trying to get other people to help pay for his mitigation work. *Id.* Regardless, Mr. Pavlina did not provide Ecology with a copy of the Covenant or tell Ecology he had recorded it until two months later, giving the agency no chance to weigh in on the Covenant's language. CP 397.

**D. The City of Battle Ground and Prospective Buyers Contact Ecology to Determine Who Is Responsible for Doing Wetland Mitigation for the Battle Ground Commerce Project**

Mr. Pavlina's mitigation reimbursement scheme was immediately met with resistance from the new owners of Battle Ground Commerce, as

well as the City of Battle Ground. Around the time that Mr. Pavlina recorded the Covenant, Ecology's Section Manager for its Southwest Regional Office's Shoreland and Environmental Assistance Program, Perry Lund, received a call from Christine Wamsley, a representative of two groups interested in purchasing some of the Battle Ground Commerce parcels from Regents Bank. CP 99, 384-85. Mr. Lund confirmed that Ecology did not intend to hold Ms. Wamsley's clients responsible for the mitigation required by the Order, as the obligations remained Mr. Pavlina's responsibility. CP 99. Ms. Wamsley also made a public records request for documents related to Battle Ground Commerce, which Ecology provided. CP 374, 384.

Mr. Pavlina next tried to have the City of Battle Ground enforce the Covenant for him. He sent a copy of the Covenant to the City, and asked that before issuing development permits for the Battle Ground Commerce parcels, the City require any new owners of the "unvested" parcels to provide a letter indicating that the parcel had been cleared of mitigation requirements. CP 403. The City declined to do so. CP 405.

Instead, like Ms. Wamsley, the City contacted Ecology to clarify who was responsible for completing the mitigation required by the Order. CP 144-45, 408. Providing technical advice to local jurisdictions, such as how to interpret and enforce an administrative order, is part of Ecology's work regulating the state's wetlands. CP 98. Accordingly, Ecology

communicated the same message to the City as it had to Ms. Wamsley—per the terms of Ecology’s Order, Mr. Pavlina remained “solely responsible” for the mitigation, and that responsibility did not transfer to the new owners or lessees of Battle Ground Commerce. CP 408. The City agreed with Ecology’s position, and told prospective Battle Ground Commerce buyers that Mr. Pavlina remained responsible for completing the mitigation. CP 156-65.

**E. Regents Bank and Other New Owners of Battle Ground Commerce Threaten Mr. Pavlina with Litigation**

After confirming with the City and Ecology that they were not responsible for the mitigation required by Ecology’s Order, Regents Bank and other new owners of Battle Ground Commerce demanded Mr. Pavlina remove the Covenant from their properties. CP 412-13, 425-26, 428-29. Regents Bank threatened to sue for breach of the Settlement Agreement and to quiet title. CP 426. The bank viewed the Covenant as an illegitimate attempt to obtain after-the-fact reimbursement for mitigation costs that were solely Mr. Pavlina’s responsibility. CP 425. Another property owner threatened Mr. Pavlina with litigation after the Covenant prevented the owner from obtaining title insurance for a pending sale. CP 428-29, 440-43. Mr. Pavlina acceded to these demands, and removed the Covenant from to the Battle Ground Commerce parcels. CP 445-51.

**F. Ecology Amends its Order to Include the New DP2 Mitigation Property, which Mr. Pavlina Appeals to the Pollution Control Hearings Board**

In December 2015, Ecology issued a First Amendment to Administrative Order No. 5087 (Amendment). CP 478-93. The Amendment authorized Mr. Pavlina to use the eight acres of mitigation he purchased with DP2 Properties to complete the wetland mitigation required by the Order. CP 479. The Amendment also incorporated a new mitigation plan prepared by Mr. Pavlina, and added DP2 Properties and Dennis Pavlina as parties required to complete the mitigation. *Id.*

DP2 Properties and Gold Medal Group appealed the Amendment to the Pollution Control Hearings Board. CP 123. Among other things, Mr. Pavlina's LLCs argued that the Amendment's mitigation requirements should not apply to them, and Ecology should instead direct the Amendment to the new owners of Battle Ground Commerce. CP 460-61. The Board dismissed both of these issues on summary judgment, concluding (1) res judicata barred Mr. Pavlina from challenging the Amendment's mitigation requirements because neither he nor his LLCs appealed the original Order; and (2) the Board does not have authority to direct Ecology's enforcement actions. CP 464-67.

Although the Board concluded that the Order's mitigation requirements were still valid, it reversed the Amendment based on some

unresolved issues surrounding the implementation and protection of the DP2 mitigation property. CP 126. The Board noted that some of those unresolved issues resulted from Mr. Pavlina's lack of clarity in communicating the different roles and responsibilities of his various LLCs. CP 127. However, in reversing the Amendment, the Board took care to clarify that its decision "was not a ruling in favor of Mr. Pavlina or DP2 on any other issue." CP 127-28.

**G. Mr. Pavlina Finally Complies with the Order**

After the Board's decision, Mr. Pavlina took no action to remedy the unresolved issues with his mitigation, so Ecology issued him a Notice of Violation. CP 471-76. The Notice informed Mr. Pavlina that he remained out of compliance with the Order, and threatened additional penalties if he did not resolve the violations voluntarily. CP 474.

Mr. Pavlina ultimately complied, and Ecology issued a new First Amendment to Administrative Order No. 5087 (First Amendment) in February 2018, once again substituting the DP2 mitigation property, incorporating the new mitigation plan, and identifying Gold Medal Group and DP2 Properties as responsible for completing the mitigation. CP 478-93. Mr. Pavlina did not appeal the First Amendment, and it remains in effect today.

## **H. Procedural History**

Soon after Ecology issued the First Amendment, Mr. Pavlina sued the agency for interference with prospective business advantage or business expectancy, seeking approximately \$1 million dollars in damages, as well as costs and attorney fees. CP 3-12. Mr. Pavlina claimed Ecology intentionally interfered with his business expectancy when the agency told Ms. Wamsley and the City of Battle Ground that Order No. 5087 did not apply to them. CP 11-12. Mr. Pavlina alleged that this interference prevented him from “selling wetland mitigation credits to prospective buyers.” CP 11.

Ecology moved for summary judgment, which the superior court granted, dismissing Mr. Pavlina’s claim. CP 1066-68. The court ruled that Mr. Pavlina could not establish the first element of his tort claim—the existence of a valid business expectancy—as a matter of law. Report of Proceedings (RP) 60. The court found that Ecology’s Order prohibited Mr. Pavlina from assigning the mitigation requirements to any other parties, thereby “legally prohibit[ing] any reasonableness of an expectation.” RP 60. This appeal timely followed. CP 1070-71.

## IV. ARGUMENT

### A. Standard of Review

This Court reviews a grant of summary judgment de novo, and will affirm when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012); Civil Rule (CR) 56(c). Appellate courts perform the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 19, 352 P.3d 807 (2015). However, a party opposing summary judgment cannot rely on mere allegations or denials, and must instead “set forth specific facts showing that there is a genuine issue for trial.” CR 56(e). The Court can affirm on any basis supported by the record, whether or not the argument was made below. *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

### B. Mr. Pavlina Cannot Establish Multiple Elements of His Claim as a Matter of Law

At summary judgment, Mr. Pavlina must provide prima facie evidence of all five elements of his claim for intentional interference with business expectancy: (1) the existence of a valid business relationship or expectancy, (2) Ecology’s knowledge of the relationship or expectancy, (3)

intentional interference that causes termination of the relationship, (4) the interference was for an improper purpose or used improper means, and (5) resulting damages. *Leingang v. Pierce Cty. Med. Bur., Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

As the superior court correctly determined, Mr. Pavlina is unable to establish the first element of his claim as a matter of law. It is undisputed that Administrative Order No. 5087 only requires Mr. Pavlina's LLCs to mitigate for the wetland impacts caused by his Battle Ground Commerce development project. Therefore, it was unreasonable for Mr. Pavlina to expect his former lender and other new owners of Battle Ground Commerce to pay him for mitigation they were not legally required to complete.

Further, Mr. Pavlina has put forth no evidence to show that Ecology's communications with Christine Wamsley and the City of Battle Ground were motivated by an improper purpose, or occurred through improper means. Instead, Mr. Pavlina argues that this Court should evaluate his claim under the standard for negligent misrepresentation, rather than the standard this Court reiterated just last year in *Greensun Group, LLC v. City of Bellevue*, 7 Wn. App. 2d 754, 436 P.3d 397 (2019). The Court should affirm the superior court's grant of summary judgment to Ecology, and uphold the dismissal of Mr. Pavlina's claim.

**1. Mr. Pavlina could not reasonably expect new owners of Battle Ground Commerce to pay him for mitigation they did not need**

For his claim to survive summary judgment, Mr. Pavlina must show that Ecology interfered with a “valid business expectancy.” *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 998, 974 P.2d 342 (1999). A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002). However, Mr. Pavlina “must show that the future opportunities and profits are a reasonable expectation and not based on merely wishful thinking.” *Sea-Pac Co., Inc. v. United Food & Comm’l Workers Local 44*, 103 Wn.2d 800, 805, 699 P.2d 217 (1985).

In this case, Mr. Pavlina’s expectation is merely wishful thinking. It is undisputed that his LLCs alone are responsible for completing the mitigation required by Administrative Order No. 5087. CP 478-93. Mr. Pavlina has no ability to direct Ecology’s enforcement actions, and nothing in the 2005 Agreement required Ecology to change its Order upon Mr. Pavlina’s request. Indeed, Ecology only has authority to issue an administrative order to persons it believes have violated the state Water Pollution Control Act. *See* RCW 90.48.120(1). Accordingly, Ecology did

not direct its Order to the new owners of Battle Ground Commerce because the agency had no evidence that they filled or impacted wetlands.

Nevertheless, Mr. Pavlina insists that Regents Bank and other new owners of Battle Ground Commerce would have reimbursed him for his mitigation costs because the 2005 Agreement provides that it is “assignable and shall run with the land.” Appellants’ Opening Brief (Opening Br.) at 23. But this statement alone cannot create a reasonable expectation. It is undisputed that Mr. Pavlina never assigned the 2005 Agreement to anyone, nor did he record the 2005 Agreement with Clark County. CP 131-39. Mr. Pavlina fails to explain why Regents Bank or others would have paid him for mitigation in the absence of any legal requirement to do so.

Moreover, Regents Bank’s reaction upon discovering the Covenant Mr. Pavlina had recorded on Battle Ground Commerce only underscores the unreasonableness of Mr. Pavlina’s expectation. It was not reasonable for Mr. Pavlina to assume a property owner confronting such a document would simply pay up, rather than investigate to determine whether they were actually liable for the costs that the Covenant purported to impose. After completing its investigation and concluding Mr. Pavlina’s representations in the Covenant were false, Regents Bank and at least one other property owner threatened to sue Mr. Pavlina. CP 412-13, 425-26, 428-29. This is not evidence of parties attempting to embark on a new business venture—

it is evidence of parties with materially adverse interests in conflict with one another, and it cannot form the basis of a reasonable business expectancy.

The superior court correctly found that Ecology's Order rendered Mr. Pavlina's expectation unreasonable as a matter of law. RP 60. This Court should affirm that ruling.

**2. Mr. Pavlina has provided no evidence that Ecology acted with improper purpose or through improper means**

"[A] cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989). Mr. Pavlina has failed to show that Ecology's regulatory actions were motivated by an improper purpose, or that the agency used improper means in taking those actions.

First, Ecology's internal enforcement deliberations are not evidence that the agency acted for an improper purpose. It is undisputed that at the time of those deliberations, Gold Medal Group had been out of compliance with multiple provisions of the Order for nearly eight years, and Mr. Pavlina, the LLC's sole member and owner, had knowledge of these violations and failed to timely correct them. Ecology could have issued penalties of up to \$10,000 per day, per violation. RCW 90.48.144(3).

Although Ecology considered issuing six-figure penalties, the agency only issued one penalty for \$9,000, which Mr. Pavlina paid in full, and did not appeal. CP 115. This is the opposite of wanting “to cause harm to Mr. Pavlina.” Opening Br. at 30. Rather, it shows that Ecology took a measured approach with Mr. Pavlina, despite his continued noncompliance with the Order.

Second, Ecology had a valid legal basis to consider issuing a penalty to Mr. Pavlina as an individual. The state Water Pollution Control Act imposes strict liability on “every person” who violates the statute. RCW 90.48.144. And under the responsible corporate officer doctrine, Ecology could have held Mr. Pavlina personally liable for Gold Medal Group’s noncompliance with the Order because he was aware that he was in violation of the Order, had the authority to correct the violations, and failed to do so. *See K.P. McNamara*, 173 Wn. App. at 142; *Lundgren*, 94 Wn. App. at 244. Thus, potentially holding Mr. Pavlina personally liable for the environmental harms he caused was a lawful exercise of Ecology’s enforcement authority.

Regardless, all of Ecology’s enforcement actions show that the agency took a measured, restrained approach to Mr. Pavlina’s long history of noncompliance with the Order. Ecology’s actions were taken in furtherance of the agency’s statutory mandate to protect and preserve

Washington's wetlands, and therefore Mr. Pavlina is wrong to claim that this is evidence of an improper purpose.

Finally, Mr. Pavlina fails to provide any evidence that Ecology acted through improper means when responding to inquiries from Ms. Wamsley and the City of Battle Ground. In order to demonstrate that Ecology acted through improper means, Mr. Pavlina "must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a duty of non-interference...." *Pleas*, 112 Wn.2d at 804 (internal quotation marks omitted). "To establish such a duty, the plaintiff may point to a statute, regulation, recognized common law, or established standard of trade or profession." *Greensun*, 7 Wn. App. 2d at 773. No such duty exists in this case.

Mr. Pavlina contends that Ecology "took willful and unreasoning action that amounts to arbitrary and capricious conduct" when the agency told Ms. Wamsley and the City of Battle Ground that they were not responsible for completing the mitigation required by Order No. 5087. Opening Br. at 31. In support, Mr. Pavlina cites to *Greensun Group v. City of Bellevue*, but that case does not lend credence to his claim.

In *Greensun*, a recreational marijuana retailer sued the City of Bellevue for intentional interference with business expectancy. Greensun alleged the City acted arbitrarily and capriciously when it changed its rules

for issuing building permits for recreational marijuana shops after Greensun had submitted its application and been deemed a “first-in-time” applicant for a building permit. The City’s rule change prevented Greensun from obtaining its permit, and was also inconsistent with the state Liquor and Cannabis Board’s process for issuing recreational marijuana licenses. *Greensun*, 7 Wn. App. 2d at 408-09. On that evidence, the Court of Appeals found that Greensun made a prima facie showing of improper means.

Here, in contrast, Ecology’s actions did not deprive Mr. Pavlina of any permit or other benefit to which he is otherwise lawfully entitled, nor did it change its normal procedures to Mr. Pavlina’s detriment. It is undisputed that Ecology communicated publicly available and legally accurate information about its Order to Ms. Wamsley and the City of Battle Ground as part of the agency’s normal work answering inquiries from the general public and local jurisdictions. CP 99. “When determining whether a party acted with improper means, courts analyze the method by which the defendant interfered with the expectancy.” *Greensun*, 7 Wn. App. 2d at 773. Mr. Pavlina fails to show Ecology’s method of communication here amounts to arbitrary or capricious conduct.

In addition, Mr. Pavlina falsely claims, “[n]egligent misrepresentation can also form the basis for an improper means.” Opening Br. at 29, n.4. But the case he cites in support of that proposition says

nothing of the sort. In *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998), the Supreme Court addressed two issues: (1) whether Washington’s comparative fault statute applied to claims of negligent misrepresentation, and (2) whether the trial court had correctly found one of the parties could not have justifiably relied on a particular document to establish their negligent misrepresentation claim. The opinion does not even mention the tort of intentional interference with business expectancy, let alone examine the element of improper means. Thus, Mr. Pavlina’s reliance on negligent misrepresentation as a theory upon which to claim improper means is unfounded. The Court should reject Mr. Pavlina’s attempt to shoehorn the standard for negligent misrepresentation into his intentional interference claim, and affirm summary judgment.

**C. Ecology’s Actions Were Justified and Privileged**

Even if this Court concludes that Mr. Pavlina has made a prima facie showing of all of the essential elements of his claim, the Court could still affirm summary judgment because Ecology’s actions were justified and privileged.

“A privilege to interfere [with a business expectancy] may be established ‘if the interferor’s conduct is deemed justifiable.’” *Kane v. City of Bainbridge Island*, 866 F. Supp. 2d 1254, 1265 (W.D. Wash. 2011)

(quoting *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 604-05, 564 P.2d 1137 (1977)). “To determine whether conduct is justifiable, a court will consider the nature of the interferor’s conduct, the character of the expectancy, the relationship between the parties, the interest advanced by the interferor, and the social desirability of protecting the expectancy or the interferor’s freedom of action.” *Kane*, 866 F. Supp. 2d at 1265.

Ecology’s conduct is justifiable in this case, even when viewed in the light most favorable to Mr. Pavlina. Mr. Pavlina’s main complaint is that Ecology responded to Ms. Wamsley and the City’s inquiries regarding the effect of Order No. 5087. While it is true that Ecology staff had some knowledge that Mr. Pavlina intended to seek reimbursement for his mitigation costs, that knowledge does not prohibit Ecology from sharing true, accurate, and publicly available information, and Mr. Pavlina has failed to provide any authority that holds otherwise.

Moreover, Mr. Pavlina’s conduct towards the new owners of Battle Ground Commerce created a need for Ecology to weigh in on the mitigation requirements of its Order. Mr. Pavlina does not dispute that his mitigation reimbursement scheme entailed clandestinely recording a conservation covenant on property he no longer owned, and then sitting back and waiting for potential Battle Ground Commerce buyers to discover the covenant in their title reports. CP 380. The Covenant also purported to require those

buyers to complete mitigation, while Ecology's Order did not. Thus, Ecology's communications with Ms. Wamsley and the City of Battle Ground sought to clarify the confusion created by Mr. Pavlina's conduct.

Mr. Pavlina argues that Ecology cannot raise justification or privilege as a defense because Ecology "has no interest in whether or not [Mr. Pavlina] can collect reimbursement from third parties" and therefore "does not have a definite legal right to act without any qualification." Opening Br. at 43-44. But in making this argument, Mr. Pavlina misrepresents his relationship with Ecology. Ecology's actions in this case were not those of a private entity doing business in the same market as Mr. Pavlina, where each might have distinct but related financial interests. *See Quadra Enter., Inc. v. R.A. Hanson Co., Inc.*, 35 Wn. App. 523, 525, 667 P.2d 1120 (1983). Rather, Ecology regulates Mr. Pavlina and ensures he is complying with RCW 90.48. Ecology also has a duty to honestly answer public inquiries and technical advice requests from local government; it owes no duty to couch or modify those responses in order to protect Mr. Pavlina's speculative and highly questionable business expectancy.

Ecology agrees that it has no interest in Mr. Pavlina's financial dealings, but this does not preclude Ecology from raising justification as a defense. Indeed, the act of sharing Ecology's interpretation of its Order is

directly connected to the agency's interest in ensuring compliance with RCW 90.48. Mr. Pavlina argues that his speculative business interest should direct Ecology's actions, when in fact the opposite is true. Ecology cannot control the manner in which third parties use the true and accurate information the agency provides to them. Ecology's actions were privileged, and summary judgment was appropriate.

**D. Mr. Pavlina Released Ecology from Liability for Tort Claims When He Signed the 2005 Agreement**

This Court could also affirm summary judgment because Mr. Pavlina expressly waived his right to seek damages from Ecology when he signed the 2005 Agreement. In the 2005 Agreement, Mr. Pavlina and Gold Medal Group along with their "heirs, assigns, or other successors in interest," agreed to:

**release and discharge [Ecology] and its officers, agents, employees, agencies and departments from all existing and future claims, damages and causes of action of any nature arising out of any decisions made by Ecology regarding [Battle Ground Commerce], including all claims for personal injuries, attorneys fees and costs to Commerce, including those injuries and damages stated in the claims for damages previously filed (if any).**

CP 134 (emphasis added). Mr. Pavlina and his LLCs are bound by the 2005 Agreement's release clause: Mr. Pavlina and Gold Medal Group as original parties, and DP2 Properties as an assign used by Mr. Pavlina to complete part of the mitigation required by Order No. 5087.

The interpretation of unambiguous contract provisions is a question of law. *Hanson Indus. Inc. v. Kutschkau*, 158 Wn. App. 278, 288, 239 P.3d 367 (2010). Government may contract with a property owner in an arms-length, bargained-for agreement that includes a limited waiver of liability. *See 1515—1519 Lakeview Boulevard Condo. Ass’n v. Apartment Sales Corp.*, 146 Wn.2d 194, 201, 43 P.3d 1233 (2002).

Ecology anticipates that Mr. Pavlina will argue that releases of liability do not apply to intentional torts, or will argue that the phrase “arising out of any decisions made by Ecology” does not apply to future decisions “to be made by Ecology.” CP 552. Neither argument is persuasive. First, while a release can be invalidated if the party attacking it provides evidence of gross negligence, nuisance, or willful and wanton misconduct, Mr. Pavlina has failed to provide any such evidence in this case. *See Boyce v. West*, 71 Wn. App. 657, 663, n.6, 862 P.2d 592 (1993). Second, when it entered into the 2005 Agreement, Ecology had not yet made any regulatory decisions except to refrain from taking immediate enforcement action against Mr. Pavlina. Interpreting the release clause as not applying to future regulatory decisions would render that provision meaningless. “Interpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective.” *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 865,

413 P.3d 619 (2018). Therefore, this Court should give full effect to the 2005 Agreement's release provision, and could affirm summary judgment because Mr. Pavlina expressly waived his ability to seek damages against Ecology.

**E. Res Judicata Bars Mr. Pavlina from Claiming He Is Not Responsible for Complying with Order No. 5087**

Mr. Pavlina additionally claims that the superior court raised “questions regarding exhaustion of remedies and possibly res judicata” when it ruled that the time for Mr. Pavlina to address his issues with the 2005 Agreement, or Order No. 5087, “was back then.” RP 60. Mr. Pavlina admits that the superior court's remarks were “dicta,” but then goes on to argue that they “are incorrect, irrelevant, and non-dispositive as to whether Appellants have established sufficient facts for the tortious interference claim.” Opening Br. at 41. The superior court's oral ruling is not binding because this Court reviews the superior court's decision de novo. *Woods View II*, 188 Wn. App. at 19. However, to the extent the superior court's oral ruling is relevant to this Court's review, it only serves to underscore what the Pollution Control Hearings Board decided two years ago: Mr. Pavlina cannot use this lawsuit to avoid mitigating for the environmental damage he caused with Battle Ground Commerce.

Res judicata acts to prevent re-litigation of claims that were, or should have been, decided among the parties in an earlier proceeding. *Sound Built Homes, Inc., v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 627-28, 72 P.3d 788 (2003). Res judicata applies when the first and second proceedings are identical in four respects: 1) subject matter, 2) claim or cause of action, 3) persons and parties, and 4) the quality of the persons for or against whom the claim is made. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225, 588 P.2d 725 (1978).

Here, res judicata prevents Mr. Pavlina from claiming, as he did in his Complaint, that he did not impact the wetlands identified in Order No. 5087 such that Ecology could no longer hold him responsible for the required mitigation. *See* CP 7-8. First, the subject matter at issue in this case and in the prior Board hearing (i.e., the requirements of Order No. 5087) are identical. Second, Mr. Pavlina claims in this case, as he did before the Board, that he should not be held responsible for mitigation because he no longer owns Battle Ground Commerce. CP 464-65. Third, Gold Medal Group and DP2 Properties brought the prior appeal before the Board, also against Ecology. Although Mr. Pavlina was not a party to the Board appeal, he is in privity with his LLCs because he was in actual control of that litigation, and he is in actual control of this lawsuit as well. *See Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995). Finally, the

quality of the persons involved in the Board proceeding and this case are also the same. Mr. Pavlina is a regulated party once again maintaining he should not be held responsible, and Ecology is still enforcing the same underlying mitigation requirements as part of its responsibility to protect the state's wetlands from damage.

Even viewing the facts in the light most favorable to Mr. Pavlina, the Court should find that res judicata prevents him from arguing he is not responsible for complying with Order No. 5087.

#### V. CONCLUSION

The Court should affirm the superior court's grant of summary judgment to Ecology.

RESPECTFULLY SUBMITTED this 11th day of December, 2019.

ROBERT W. FERGUSON  
Attorney General

*s/ Emily C. Nelson*  
EMILY C. NELSON, WSBA #48440  
Assistant Attorney General  
Attorneys for Respondents  
State of Washington  
Department of Ecology  
Emily.Nelson@atg.wa.gov  
360-586-4607

## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on December 11, 2019, I caused Respondent's Brief to be served in the above-captioned matter upon the parties herein via the Appellate Court Portal filing system, which will send electronic notification of such filing to the following as indicated below:

JAMES D. HOWSLEY  
ARMAND RESTO-SPOTTS  
DAVID H. BOWSER  
JORDAN RAMIS PC  
1499 SE TECH CENTER PLACE, SUITE 380  
VANCOUVER, WA 98683

U.S. Mail  
 Overnight Express  
 Email:  
[Jamie.howsley@jordanramis.com](mailto:Jamie.howsley@jordanramis.com);  
[Armand.resto-spotts@jordanramis.com](mailto:Armand.resto-spotts@jordanramis.com);  
[David.bowser@jordanramis.com](mailto:David.bowser@jordanramis.com)

DATED this 11th day of December 2019 at Olympia, Washington.

*s/ Cynthia A. Meyer*  
CYNTHIA A. MEYER, Legal Assistant

**ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION**

**December 11, 2019 - 10:08 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53699-4  
**Appellate Court Case Title:** DP2 Properties, etal, Appellants v State of WA Dept of Ecology, Respondent  
**Superior Court Case Number:** 18-2-05376-9

**The following documents have been uploaded:**

- 536994\_Briefs\_20191211100429D2217273\_4016.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was RespondentsResponseBrief.pdf*

**A copy of the uploaded files will be sent to:**

- armand.resto-spotts@jordanramis.com
- cynthia.meyer@atg.wa.gov
- david.bowser@jordanramis.com
- jamie.howsley@jordanramis.com
- litparalegal@jordanramis.com

**Comments:**

---

Sender Name: Leslie Hummel - Email: leslie.hummel@atg.wa.gov

**Filing on Behalf of:** Emily Crystal Nelson - Email: EmilyN1@atg.wa.gov (Alternate Email: ECYolyEF@atg.wa.gov)

Address:  
PO Box 40117  
2425 Bristol Court SW  
Olympia, WA, 98504-0117  
Phone: (360) 586-6770

**Note: The Filing Id is 20191211100429D2217273**