47681-9-II

No. 90584-3

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON TRUCKING ASSOCIATIONS, a Washington nonprofit corporation; EAGLE SYSTEMS, INC., a Washington corporation, GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; PSFL LEASING, INC., a Washington corporation, and SYSTEM-TWT TRANSPORTATION d/b/a SYSTEM-TWT, a Washington limited liability company,

Appellants,

v.

THE STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT; PAUL TRAUSE, individually and in his official capacity as the former Commissioner of the Employment Security Department, and JANE DOE TRAUSE, husband and wife and the marital community composed thereof; BILL WARD, individually and in his official capacity, and JANE DOE WARD, husband and wife and the marital community composed thereof; LAEL BYINGTON, individually and in his official capacity, and JANE DOE BYINGTON, husband and wife and the marital community composed thereof; JOY STEWART, a single individual, individually and in her official capacity; and MELISSA HARTUNG, a single individual, individually and in her official capacity; ALICIA SWANGWAN, a single individual, individually and in her official capacity,

Respondents.

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TABLE OF CONTENTS

Page

Table of Authorities ..... iii-vi

A. INTRODUCTION 1

B. ASSIGNMENT OF ERROR 3

(1) Assignment of Error 3

(2) Issues Pertaining to Assignment of Error 3

C. STATEMENT OF THE CASE 4

(1) What the Trial Court Considered and Its Decision 4

(2) The Carriers, Owner/Operators and the Trucking Industry 5

(3) Washington's Unemployment Compensation System 6

(4) The Trucking Industry and Unemployment Taxes 9

(5) ESD's Rigged Audits of the Carriers 10

(6) The Administrative Appeals of the Carriers' Improper Assessments 14

D. SUMMARY OF ARGUMENT 21

E. ARGUMENT 23

(1) Standard of Review 23

(2) The Carriers Stated 42 U.S.C. § 1983 Claims Against ESD 25

(a) ESD's Actions Were Politically Motivated and Designed to Restructure the Trucking Industry in Violation of the FAAAA 26

(b) ESD's Rigged Audits and Knowing Imposition of Illicit Taxes Violated the Carriers' Right to Due Process of Law and the Commerce Clause 28

(3) Carriers Stated a Tortious Interference Claim Against ESD 33

(4) The Carriers' Claims Are Not Foreclosed by the TIA 36

(5) WTA Has Standing 44

(6) The Carriers Are Entitled to an Award of Fees under 42 U.S.C. § 1988 49

F. CONCLUSION 49

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Anfinson v. FedEx Ground Package System, Inc.,
174 Wn.2d 851, 281 P.3d 289 (2012) 19
Arkison v. Ethan Allen, Inc., 160 Wn.2d 535,
160 P.3d 13 (2007) 19
Binkley v. City of Tacoma, 114 Wn.2d 373,
787 P.2d 1366 (1990) 31
Collier v. City of Tacoma, 121 Wn.2d 737,
854 P.2d 1046 (1993) 49
Cost Management Servs., Inc. v. City of Lakewood,
178 Wn.2d 635, 310 P.3d 804 (2013) 43
Eagle Systems, Inc. v. State Employment Sec. Dep't,
181 Wn. App 455, 326 P.3d 764 (2014) 18
Elcon Const., Inc. v. Eastern Wash. Univ., 174 Wn.2d 157,
273 P.3d 965 (2012) 33
Futureselect Portfolio Mgmt., Inc. v. Tremont Group
Holdings, Inc., 180 Wn.2d 954, 331 P.3d 29 (2014) 24
Halverson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978) 4
Hoffer v. State, 110 Wn.2d 415, 755 P.2d 781 (1988) 24
Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airport,
146 Wn.2d 207, 45 P.3d 186,
amended on denial of reconsideration,
50 P. 3d 618 (2002) 45, 46, 47
Johnson v. City of Seattle, __ Wn. App. __,
335 P.3d 1027 (2014) 25
Jones v. State, 170 Wn.2d 338, 242 P.3d 825 (2010) 2, 30, 50
Martin v. City of Seattle, 111 Wn.2d 727,
765 P.2d 257 (1988) 26
McCarthy Fin., Inc. v. Premera, 182 Wn. App. 1,
328 P.3d 940 (2014) 42
Penick v. Employment Sec. Dep't, 82 Wn. App 30,
917 P.2d 136, *review denied*, 130 Wn.2d 1004 (1996) 9
Pleas v. City of Seattle, 112 Wn.2d 794,
774 P.2d 1158 (1989) 3, 34, 50

Pugh v. Evergreen Hosp. Medical Center, 177 Wn. App. 363, 312 P.3d 665 (2013), *review denied*, 180 Wn.2d 1007 (2014) 48
Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 189 P.3d 168 (2008) 4
Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992) 25, 35
State ex rel. Shannon v. Sponburgh, 66 Wn.2d 135, 401 P.2d 635 (1965) 27
Wash. Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc., 113 Wn. App. 700, 54 P.3d 711 (2002) 9
Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wn.2d 245, 4 P.3d 808 (2000) 25, 49
Western Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash., 110 Wn. App. 440, 41 P.3d 510 (2002) 15
Teamsters Local Union No. 117 v. Dep't of Corrections, 145 Wn. App. 507, 187 P.3d 754 (2008) 48

Federal Cases

American Trucking Ass'n v. City of Los Angeles, __ U.S. __, 133 S. Ct. 2096, 186 L.Ed.2d 177 (2013) 26
American Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046 (9th Cir. 2009) 27
Arden v. Kastell, 553 Fed. Appx. 697, 2014 WL 265685 (9th Cir. 2014) 29
Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986) 40
California v. Grace Brethren Church, 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) 40
Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101 (9th Cir. 2010) 29
Dennis v. Higgins, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) 25, 36, 37
Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001) 29
Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed.2d 271 (1981) 32, 37, 44
Hibbs v. Winn, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed.2d 172 (2004) 38, 40

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed.2d 383 (1977) 44, 45
Lowe v. Washoe County, 627 F.3d 1151 (9th Cir. 2010) 40
Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11 (1st Cir. 2014) 26
McSherry v. City of Long Beach, 560 F.3d 125 (9th Cir. 2009) 29
Monell v. New York City Dep't of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) 25
Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993) 48
Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 115 S. Ct. 2351, L. Ed.2d 509 (1995) 37, 39, 44
Ortega v. J.B. Hunt Transport, Inc., 2014 WL 2884560 (C.D. Cal. 2014) 26
Patel v. City of San Bernardino, 310 F.3d 1138 (9th Cir. 2002) 39, 40
Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 128 S. Ct. 989, L.Ed.2d 933 (2008) 26
Sanchez v. Lasership, Inc., 937 F. Supp.2d 730 (E.D. Va. 2013) 27
Tarabochia v. Adkins, 766 F.3d 1115 (9th Cir. 2014) 30
United States v. La Salle Nat'l Bank, 437 U.S. 298, 98 S. Ct. 2357, 57 L.Ed.2d 221 (1978) 28
United States v. Powell, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed.2d 112 (1964) 28
Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed.2d 343 (1975) 44
Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L.Ed.2d 504 (1992) 25

Other Cases

Hernandez v. Triple Ell Transport, Inc., 175 P.3d 199 (Id. 2007) 15
In re Federal Preemption of Provisions of Motor Carrier Act, 566 NW.2d 299 (Mich. App. 1997), *review denied,* 587 N.W.2d 632 (1998), *cert. denied,* 525 U.S. 1018 (1998) 27
Universal Am-Can Ltd. v. Workers' Comp. Appeal Bd., 762 A.2d 328 (Pa. 1999) 15
Western Home Transport, Inc. v. Idaho Dep't of Labor, 318 P.3d 940 (Idaho 2014) 15

Statutes

RCW 34.05.570 8
RCW 50.01.010 7
RCW 50.04.072 7
RCW 50.04.090(2) 8
RCW 50.04.100 ..... 7, 28, 35
RCW 50.04.110 ..... 7, 35
RCW 50.04.140 ..... 7, 13
RCW 50.04.320 ..... 28, 35
RCW 50.04.320(1) 7
RCW 50.04.320(4)(a) 7
RCW 50.24.010 7
RCW 50.24.070 8
RCW 50.32.050 ..... 40, 41
RCW 50.32.080 8
RCW 50.32.090 8
RCW 50.32.130 9
RCW 50.32.180 ..... 9, 14
RCW 51.08.180 9
28 U.S.C. § 1341 ..... 21, 36
28 U.S.C. § 1983 25
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1988 ..... 42, 49
49 U.S.C. § 14501(c)(1) 3, 26

Rules and Regulations

49 C.F.R. § 376.12(c)(1) 6
49 C.F.R. § 376 12(c)(4) 6, 15
CR 11 43
CR 12(b)(6) 2, 24
CR 12(c) 4
RAP 18.1 49

Other Authorities

58 Am. Jur.2d *Notice* § 21 (1971) 27
Rep. Shellabarger, Cong.Globe, 42d Cong., 1st Sess.,
App. 68 (1871) 25

A. INTRODUCTION

This is a case about taxpayer abuse. The individual trucking carriers ("Carriers")[1] and the Washington Trucking Associations ("WTA") appeal the trial court's premature dismissal of their complaint, which sought relief under 42 U.S.C. § 1983 and various state common law theories[2] against the State, its Employment Security Department, and various officers (hereinafter "ESD") for their performance of rigged audits designed deliberately to impose unemployment taxes on the Carriers. Such taxes are not permitted by law. The imposition of such taxes will restructure the trucking industry in Washington by eliminating owner/operators (independent contractors who own their trucks and trailers and lease them to motor carriers). Owner/operators have been used in the industry for more than a century, and their utilization is recognized and regulated by federal law.

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[1] The individual company plaintiffs are all motor carriers who have been assessed unemployment taxes, and are referred to as "the Carriers" unless an individual reference is more appropriate. All are members of the WTA. The WTA is a trade association established to protect and promote the interests of all segments of the Washington trucking industry. CP 215, 218. Many of its members utilize independent owner/operators when needed to assist with the delivery of cargo. CP 215. WTA has a keen interest in how the trucking industry generally, and its members specifically, operate. CP 215. The stated mission of the WTA is to promote a favorable and profitable operating climate for the industry's members. CP 215. This mission includes protecting the industry's use of owner/operators and ensuring that its members are taxed only as allowed by Washington law. CP 215.

[2] The Carriers argued a number of common law tort remedies below. On review, they confine their argument to their constitutional claims and tortious interference with their business expectancies.

At issue is whether there is any legal remedy at all for ESD's abuse of its taxing powers, including under 42 U.S.C. § 1983 and for the state court claim of tortious interference.

Through sham audits with deliberately rigged results, ESD targeted Carriers and others in the trucking industry to tax them for their use of owner/operators as follows: The "auditors" were instructed to find liability and they were given quotas of taxes to collect. One auditor (Joy Stewart) even sought a cut of what she collected. Unemployment taxes were imposed on the Carriers when ESD *knew* such taxes were forbidden under Washington law. Even when ordered to correct the tax amounts in the administrative process, ESD refused to do so, causing WTA and the Carriers to incur more legal expense.

On a CR 12(b)(6) motion, the trial court dismissed the Carriers' complaint, essentially on the basis that the Carriers must exhaust their administrative remedies before being allowed to bring a claim under 42 U.S.C. § 1983. Such dismissal is contrary to this Court's decision in *Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010), and well-developed law that exhaustion is not required for a claim under § 1983. Moreover, exhaustion certainly would not be required for a tort claim where it would be futile. The administrative process could not afford the Carriers an adequate remedy for harm they have suffered. Indeed, that

"administrative process" was itself the reason the Carriers were deprived of their rights. Further, to require a complete exhaustion of administrative remedies would deprive the Carriers of their claims because the time required to exhaust would result in statues of limitations barring any such causes of action.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

The trial court erred in entering its order of dismissal and judgment on July 11, 2014.

(2) Issues Pertaining to Assignment of Error

1. Where ESD deliberately abused its authority by rigging the audits of the Carriers, illicitly imposing unemployment compensation taxes on them for their owner/operators for the purpose of restructuring Washington's trucking industry, did the Carriers state a claim against ESD under 42 U.S.C. § 1983 in light of *Jones* and the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14502(c)(1)? (Assignment of Error Number 1)

2. Did the trial court err in concluding that the Carriers were obligated to exhaust administrative remedies before pursuing their § 1983 and state tort claim relief when such action would be futile as no administrative remedies actually existed for the Carriers or WTA and pursuit of such remedies would time-bar such claims? (Assignment of Error Number 1)

3. Did the trial court err in dismissing the Carriers' common law tortious interference claim in light of this Court's decision in *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), where ESD used its audit power in bad faith and assessed taxes arbitrarily and capriciously to eliminate the Carriers'

relationship with their owner/operators, conduct that had the objective of harming the Carriers or was the product of wrongful means? (Assignment of Error Number 1)

4. Did the trial court err in dismissing WTA's §1983 claim when it has standing as a representative of the trucking industry and its members, and WTA expended attorney fees and costs to contest ESD's improper imposition of taxes? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

(1) What the Trial Court Considered and Its Decision

ESD brought its motion based upon CR 12(b)(6) (motion to dismiss) and CR 12(c) (judgment on the pleadings). CP 253. The ESD motion relied upon the pleadings filed in the trial court and records outside the pleadings attached to the declaration of Eric Peterson, asserting that the trial court was allowed to consider such matters on a CR 12 motion under *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008). CP 256. WTA and the Carriers responded to the motion relying upon the pleadings filed and the public records and court pleadings attached to the declaration of Philip Talmadge under the same theory as ESD. CP 427. In addition, WTA and the Carriers appended to their response (CP 479-502) a set of "hypothetical facts" which could be relied upon in opposition to the motion to dismiss as allowed under *Halverson v. Dahl,* 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). CP 427. No objections were raised by any party to the consideration by the trial court

of these materials outside the pleadings. The trial court order recites that it considered all the materials submitted, including the hypothetical facts. The motion was decided as a motion to dismiss. CP 692.

(2) The Carriers, Owner/Operators and the Trucking Industry

The Carriers are for-hire general freight carriers operating in a number of states under federal authority. Given the volatile and fluctuating demand for trucking services, the Carriers contract with owner/operators to lease trucking equipment on an as-needed basis. CP 218.

Owner/operators have been part of the American trucking industry for decades. CP 218. Owner/operators have their own businesses and own their trucking equipment, which consists of the truck tractor, and occasionally the trailer used to haul cargo. CP 218. These tractors and trailers are expensive pieces of equipment. CP 222. Federal law permits owner/operators to lease their trucking equipment to motor carriers. CP 219. The relationship between a motor carrier and an owner/operator is contractual: the carrier leases the equipment from the owner/operator in return for payment. CP 218. Owner/operators may operate the leased equipment personally or may hire their own employees to do so. CP 218.

The interstate trucking industry is extensively regulated by the federal government. Relevant statutes and regulations dictate the terms

and conditions by which motor carriers may perform authorized transportation in trucking equipment that they do not own. CP 218-19. Specifically, *federal laws and regulations specify the contractual terms and practices for owner/operators.* CP 219. For example, 49 C.F.R. § 376.12(c)(1) requires that any leased equipment must be operated under the federal "license" or operating authority of the motor carrier leasing the equipment; the motor carrier is required to maintain "exclusive possession, control, and use of the equipment for the duration of the lease." CP 219. The leasing contracts must contain provisions that specify which party is going to pay various expenses like vehicle taxes, fuel, or maintenance. CP 210-49; C.F.R. § 376 *et seq.*

The pervasive federal regulatory scheme *requires* that carriers and owner/operators have certain provisions in their contracts. CP 219. Neither contracting party has any choice about the inclusion of this language if they are to comply with federal law. Federal law also provides that nothing in those laws and regulations was intended to affect whether the owner/operator is an independent contractor or an employee. 49 C.F.R. § 376.12(c)(4). CP 219.

(3) Washington's Unemployment Compensation System

Washington, like all other states, has enacted a scheme to address the consequences of unemployment, contained in RCW Title 50, under

authority of the "Commissioner." RCW 50.01.010. The State enacted the "compulsory setting aside of unemployment reserves." RCW 50.01.010. Those paying the "compulsory reserves" are "employers" who make "contributions." RCW 50.24.010. "Contributions" are taxes due to the State. RCW 50.04.072.

In enacting Title 50, the Legislature only authorized taxation in specified areas. The statute creates a threshold test as to whether a purported employer has persons engaged in "employment." RCW 50:04.100. Its application in interstate commerce is limited by other provisions of Title 50. *Id.* One limitation is whether any of the activity associated with the service has a nexus to Washington, as defined in statute. RCW 50.04.110. This concept is known as "situs." The Legislature also provided an exemption from taxation for independent contractors in RCW 50.04.140. *See* Appendix.

The Legislature also limited what can be taxed. Unemployment taxes can be levied only on "wages." "Wages means the remuneration paid by one employer ...to an individual in its employment." RCW 50.04.320(1). "Remuneration means all compensation paid for personal services." RCW 50.04.320(4)(a). By definition, payment made for renting equipment is not "wages" subject to tax. The Legislature also excluded corporations as being an "employing unit" when all personal

services are performed by bona fide corporate officers. RCW 50.04.090(2).

To determine whether an employer is "delinquent," and, if so, the amount owed, the Commissioner has authorized "audits" of actual or putative employers. If the Commissioner finds that any taxes have are "delinquent," the Commissioner issues an "order and notice of assessment." RCW 50.24.070. Once the notice and order of assessment has been issued, if it is not paid, the Commissioner may use compulsory process, seizing property to obtain payment.

Washington law provides for an administrative law appeal when a tax assessment is imposed on a taxpayer; however, the appeals process is internal to ESD and is controlled by its Commissioner. Although administrative law judges ("ALJs") of the Office of Administrative Hearings conduct the administrative hearings, an appeal from an ALJ's ruling goes to the Commissioner pursuant to RCW 50.32.080, and the Commissioner makes the final decision pursuant to RCW 50.32.090.

Judicial review of a decision by the Commissioner is allowed under the Administrative Procedure Act, RCW 34.05.570 ("APA"), and is limited to the administrative record. If judicial review is sought by a taxpayer contesting an assessment, the taxpayer must first pay the disputed

amount to the Commissioner or into the registry of the court. RCW 50.32.130.

Washington law prohibits a court from enjoining an assessment, or requiring a refund or adjustment of it except as provided in Title 50. Declaratory relief is not available. RCW 50.32.180.

(4) The Trucking Industry and Unemployment Taxes

The Carriers here registered with the State and paid unemployment taxes on their employees, including company drivers. CP 221.

Historically, however, the trucking industry and these Carriers did not pay unemployment taxes on owner/operators because the Commissioner determined, and the Court of Appeals confirmed, that owner/operators were not employees for which unemployment taxes were required. *Penick v. Employment Sec. Dep't,* 82 Wn. App 30, 34-36, 39, 917 P.2d 136, *review denied,* 130 Wn.2d 1004 (1996) (drawing distinction between true owner/operators not covered by RCW Title 50 and contract drivers carrier actually controlled; ESD did not appeal ALJ decision that true owner/operators were exempt).[3] In addition, the State represented

[3] This was consistent with the treatment of owner/operators as to worker compensation. Carriers are statutorily exempted from covering owner/operators. RCW 51.08.180. *See Wash. Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.,* 113 Wn. App. 700, 706-10, 54 P.3d 711 (2002) (statutory exemption applied even though operators leased their trucks from the carrier and, in turn, leased them back to the carrier).

that if, as with owner/operators, substantial equipment is brought to the relationship, then unemployment taxes need not be paid. CP 222.

These Carriers and other WTA members do report amounts paid to owner/operators by issuing federal income tax form 1099. CP 223, 488. The 1099s identify total amounts paid. CP 488.

(5) ESD's Rigged Audits of the Carriers

Treating owner/operators as independent contractors was perfectly acceptable until ESD changed the rules. In the economic downturn, ESD, at the direction of Trause, Ward, and Byington, established an "underground economy" unit to collect additional taxes from certain industries. CP 221. "Underground economy" usually refers to businesses that customarily use cash, do not register with the State, and do not pay their taxes. Ward headed up the overall efforts and Byington was designated the head of a new unit for this purpose. CP 489. Special underground economy auditors, such as Stewart, were hired to conduct the auditing efforts. CP 222, 489. In addition, similar assignments were given to District Tax Offices where Hartung and Swangwan were employed. CP 222, 489.

Instead of pursuing the underground economy firms, ESD decided to target the trucking industry, including the Carriers, who are legitimate, tax-paying businesses and certainly are not underground economy entities.

They were all registered with the State and paid required taxes, including unemployment taxes on their employees. CP 221. Suddenly, after decades of treating owner/operators as independent contractors, judicially-approved in *Penick*, ESD decided to reclassify them as employees and motor carriers would be assessed taxes on payments to owner/operators. ESD subjected hundreds of trucking firms to audits and tax assessments. CP 490.

WTA, these Carriers, and generally all trucking firms which use owner/operators, noted that ESD's reclassification of owner/operators into employees would effectively mean the end of the trucking industry's ability to use owner/operators. CP 490. This would result in increased cost to the industry by requiring it to purchase additional trucks and trailers that would not always be used when the economy was slack, as well as the additional cost associated with having employees. In some instances, routing would be affected because firms and routes outside Washington might be used, or certain services discontinued. CP 490. All of this would effectively restructure the industry and affect "prices, routes, and services," triggering federal preemption. CP 472, 490.

In the case of the Carriers here, they were subjected to audits that resulted in notices and orders of assessment imposing added taxes, penalties, and interest against them. The Carriers appealed the improper

assessments administratively and the cases were initially assigned to the Office of Administrative Hearings. CP 223.[4] The cases were not consolidated for hearing, but were assigned to a single ALJ, Todd Gay, for prehearing matters. CP 491. It is presently unknown how many of the hundreds of firms audited received tax assessments. CP 491.[5]

Discovery then revealed that the audits were rigged, with an employment relationship and tax liability predetermined by ESD. CP 491. This is because Trause, Ward, and Byington required it. CP 222-23. Ward, Byington, and others imposed on auditors such as Stewart performance criteria that required the auditor to find against the taxpayer 98 to 100 percent of the time with minimum quotas of taxes to be collected and new employees to be "found" each quarter by the underground economy auditors. CP 222. Such employment "expectations," created an institutional imperative to auditors to betray

[4] WTA, as well as the individual Carriers, have incurred extensive costs and attorney fees in these administrative proceedings. CP 224.

[5] It is impossible to know because ESD keeps this information "confidential." What is known for sure is that there has been a multiplicity of audits and appeals, eleven revealed in pleadings before the court; ESD can do more audits whenever it chooses to do so for firms and different time periods; the appellate process is expensive and uncertain; and the amount involved may not make it economic to appeal even if the assessment is unwarranted.

principles of auditor objectivity. CP 222.[6] Stewart even wrote the Governor's office suggesting she get a cut of what she collected. CP 493.

The lack of objectivity is demonstrated by ESD's wholesale disregard of its own Tax Audit Manual which governs how an audit like those here must be conducted. The Manual dictates the factors that an auditor must consider when determining whether there is an employer/employee or an independent contractor relationship. CP 491. An auditor is required to look at a whole range of factors, and ESD even provides a form for the various factors to be considered. CP 491-92. ESD's separate Status Manual contains specific guidelines to determine if a truck driver is an employee or an independent trucker and, if an employment relationship exists, it specifies how to determine if the exceptions in RCW 50.04.140 are satisfied. CP 492.

The auditors here calculated taxes on the basis of the 1099s issued by the Carriers to owners/operators, which included payment for equipment which is not "wages" subject to taxation. CP 223-24. The auditors knew the owner/operators had supplied equipment because they had the contracts for the lease of equipment.

[6] Auditor objectivity is required by Generally Accepted Auditing Standards which the ESD Tax Manual required all of its auditors to follow. CP 220-21.

When the deliberate imposition of tax liability no matter the circumstances became known, WTA alerted the Governor's Office about the inadequacies in ESD's audits and the impact of the federal laws and regulations on those audits. CP 223. Commissioners Trause, Ward, and Byington were informed of WTA's concerns. CP 223, 493.[7] They took no remedial action.

(6) The Administrative Appeals of the Carriers' Improper Assessments

In their administrative appeals, the Carriers raised the issues of federal preemption,[8] and the rigged audits and their predetermined outcomes through consolidated motions for summary judgment; they sought to exclude the audits and orders of assessments. CP 224, 494.

The Carriers presented evidence that eliminating owner/operators would restructure the trucking industry and affect "prices, routes, and services," a predicate to establishing federal preemption. CP 494. ALJ

[7] Trause became involved with System's assessment and ordered ESD to attempt to enforce it, even though his Director of Tax Compliance could not discern the basis for Stewart's conclusions (as required by applicable standards) and even though the assessment was the product of an institutional framework created under his direction that precluded auditor objectivity and violated ESD's policies and procedures. CP 470. Trause, Byington, and Ward directed the Carriers' audits, which they knew or should have known violated ESD standards. CP 470, 493.

[8] Whether federal law preempts the reclassification of owner/operators from independent contractors to employees and the imposition of unemployment taxes would ordinarily be a subject to easy judicial resolution through a declaratory judgment action, but RCW 50.32.180 prohibits such relief, however, so this "plain, speedy, and efficient remedy" is not available. The Carriers were instead forced to submit this issue in the administrative appeals process.

Gay rejected the federal preemption claim, relying upon an old Washington case, *Western Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 41 P.3d 510 (2002), which held federally-mandated contract provisions could be considered, even though they were not relevant to the outcome of that case, ignoring more recent federal authority and that from other jurisdictions and *Penick*.[9] He also ruled on the subject of rigged audits that *he did not have the authority to address ESD's misconduct*: "I know of no legal authority for dismissing an Order and Notice of Assessment based on a kind of exclusionary rule, even if there were a finding that the audit was improper or inadequate." CP 295.[10]

While ALJ Gay did not grant the Carriers' motion for summary judgment, he did find the assessments to be incorrect as to the amount of taxes. CP 224. He remanded all of the cases to ESD to reconsider the assessments and to issue new assessments. CP 299-302, 514-15. The ALJ

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[9] 49 C.F.R. § 376 12(c)(4) specifically commands that terms in contracts between carriers and owner/operators mandated by federal law may not affect whether a carrier exerted control over an owner/operator in establishing whether the owner/operator is an independent contractor or employee under state law. Courts in other jurisdictions have complied with that federal direction, unlike the *Western Ports* court. The Idaho Supreme Court only recently in *Western Home Transport, Inc. v. Idaho Dep't of Labor*, 318 P.3d 940 (Idaho 2014) rejected the *Western Ports* approach. Other courts have held that federally-mandated requirements cannot be used to establish *carrier* control. *Universal Am-Can Ltd. v. Workers' Comp. Appeal Bd.*, 762 A.2d 328 (Pa. 1999); *Hernandez v. Triple Ell Transport, Inc.*, 175 P.3d 199 (Id. 2007). Indeed, federal law so provides.

[10] ALJ Schuh ruled similarly in two other appeals. CP 620-26.

directed that three specific areas needed to be addressed. First, corporate entities needed to be excluded. Second, an amount for the payment for equipment needed to be segregated out so that tax was not imposed on lease payments for equipment, known as the bifurcation issue. Third, out-of-state owner/operators who never drove in Washington had to be removed to comply with statutory situs requirements. CP 299-302. ALJ Gay's order was clear that only *after* new assessments were issued were the parties then to engage in settlement discussions "*in good faith.*" CP 515. The effort to have ESD revise the assessments in compliance with the ALJ's order *took 17 months*. CP 224, 336-42, 437. ESD never issued fully compliant assessments. CP 224.[11]

In September 2012 ESD made a formal settlement proposal to resolve all the appeals. CP 337-38. AAG Worthy made an offer that he represented was authorized by his client, which would fix the amount of the assessments at the final number arrived at by ESD and would allow the Carriers to pursue in court "whatever legal issues they want." CP 338. The Carriers accepted the proposal. Counsel for both parties then spent several weeks drafting and finalizing a formal agreement. CP 338.

[11] In April 2012, ESD issued revised assessments which it further revised until it made its settlement offer. Seventeen months is the period from remand until settlement offer.

At that point, ESD renounced the agreement formed on the basis of its authorized offer. CP 339. In addition, ESD then claimed it never had issued any new assessments as required. CP 574. It then changed tactics again saying that the incorrect April 2012 assessments were never revised to correct its errors and that there would be no situs adjustment, as specifically ordered by ALJ Gay. CP 500-01, 585-92.[12]

The Carriers then brought a motion to enforce the agreement before the administrative tribunal. ALJ Gay ruled he did not have jurisdiction to enforce the agreement, CP 570-71, nor to sanction ESD for not complying with the remand order. CP 501, 570. The System case was then ordered to hearing in February 2013. CP 500. Thus, ESD sought to force System to incur the expense of a hearing to obtain a situs adjustment that ALJ had previously ordered ESD to make. ESD had no evidence, confirmed from tax records, that any of those owner/operators to be excluded had ever been in Washington during the audit period.

Since the ALJ ruled he lacked jurisdiction to enforce the agreement or his own orders, the Carriers filed suit in Pierce County Superior Court. ESD was given notice of a show cause proceeding to determine if the resolution agreed upon could be enforced. The Pierce County Superior

[12] The situs adjustment would have eliminated amounts paid to owner/operators who had never driven a mile in Washington or had their equipment in Washington.

Court ruled it had jurisdiction, enforced the agreement, and ruled that no further exhaustion of administrative remedies was required. CP 336-406. Pursuant to the court's order, the ALJ dismissed the appeals. ESD then appealed the decision of the Pierce County Superior Court to Division II. The Court of Appeals reversed the trial court on a procedural basis that a show cause proceeding was not the proper basis to resolve the matter. It did not disturb the trial court's substantive determination that ESD had breached a binding settlement agreement. *Eagle Systems, Inc. v. State Employment Sec. Dep't,* 181 Wn. App 455, 326 P.3d 764 (2014).

In subsequent administrative appeals by other trucking carriers and WTA members, ESD changed its position in regard to audit standards. It claimed it had *no standards or requirements in regard to how audits were conducted*, no quality assurance, and no requirement that auditors be objective. CP 620-26. In those other administrative cases, ESD even moved to exclude any evidence that the audits were improper, including expert testimony from an accountant, Steven Bishop, as to audit deficiencies, and testimony from former State Auditor Brian Sonntag that all audits by the State had to be conducted in good faith and that ESD's audits of trucking firms were not audits at all. CP 517-45, 571, 629-36. ALJ Terry Schuh found that evidence of sham audits and assessments which force taxpayers into litigation was "not apt," and all evidence of

audit impropriety and lack of standards was excluded from evidence. CP 629-36.[13] ALJ Schuh also excluded all evidence that "prices, routes, and services" would be affected by eliminating owner/operators while simultaneously rejecting federal preemption which is triggered by affecting "prices, routes, and services." *Id.*; CP 612-18.[14]

Thus, in ESD's eyes, federal regulation alone has removed any ability by a Washington motor carrier to obtain an exemption and any ability for such carrier and an owner/operator to enter into an independent contractor relationship by contract.[15] ALJ Schuh endorsed this view and

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[13] ALJ Schuh found that complying with federal regulation by having a mandatory contract provision was not the federal government's direction and control over the owner/operator but its direction and control over MacMillan-Piper to require it to have direction and control. Besides being a tautology, this ignores that federal regulation controls both contracting parties. CP 608.

[14] It is likely that ESD will file a similar motion to exclude all evidence of rigged audits and the evidentiary basis for federal preemption in the Carriers' case. CP 557-64. It had already filed one before the Pierce County Superior Court enforced the settlement agreement. CP 557-64. The administrative process will never allow the claims made here to be adjudicated.

Given ESD's repeated insistence that the administrative tribunal can grant no redress for the Carriers' complaints about abuses in the auditing and assessment process, it should be judicially estopped from asserting here that the Carriers must raise those complaints in the administrative process. *See Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)) (judicial estoppel "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position").

[15] Under ESD's approach, and sanctioned by ALJs, a motor carrier can never have an independent contractor relationship and be exempt from unemployment taxation, simply on the basis of compliance with federal law. Because owner/operators must operate under the Carrier's federal operating authority, ESD has determined that alone is sufficient for "direction and control." Because federal law requires a carrier to have "exclusive control" of the leased equipment, ESD has concluded that the

ruled that owner/operators are motor carriers' employees as a matter of law. CP 217, 225-26.

Moreover, Ward and Byington deliberately chose to impose taxes on other motor carriers and WTA members on lease payments for equipment, even after ALJ Gay ordered such lease payments should not be taxed. CP 495. MacMillan Piper and Hatfield Enterprizes, for example, were assessed taxes based upon amounts that included equipment *after* ALJ Gay ordered in these cases that such amounts had to be factored out. *Id.* Further administrative hearings, with attendant expense for those motor carriers, are necessary to have equipment removed as part of any ESD-ordered tax assessment.[16]

The Carriers filed the present action in the Spokane County Superior Court on May 3, 2013, CP 198, before the three-year-period had elapsed from the notice and order of assessment in System of May 4, 2010.[17] Upon ESD's motion, the case was then transferred from Spokane to the Thurston County Superior Court. CP 10-11. ESD filed its

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owner/operator's leased truck is now *the Carrier's* premises so any driving services by the owner/operator are conducted on the premises of the putative employer.

[16] ESD has an on-going practice of imposing impermissible taxes despite an ALJ's order to the contrary, forcing trucking carriers to incur unnecessary expense in the administrative process to address taxes ESD *knows* are illegal.

[17] ESD asserted a statute of limitations defense even though the complaint in this action was filed prior to three years before the issuance of any notice and order of assessment. CP 249.

CR 12(b)(6) motion to dismiss, CP 252-77, to which the Carriers responded. CP 424-502. The trial court granted ESD's motion. CP 690-93. This timely appeal followed. CP 694-700.

D. SUMMARY OF ARGUMENT

ESD's participation in rigged audits of the Carriers, along with their insistence on imposing taxes on the Carriers they knew were legally impermissible, was part of a politically-motivated pattern of conduct designed to end the use of owner-operators in the trucking industry. As such, ESD deprived the Carriers and WTA of their federal statutory rights and constitutional rights under the Due Process and Commerce Clauses of the United States Constitution under color of state law.

ESD's conduct was actionable under 42 U.S.C. § 1983 in a suit for damages and under the state law tort of tortious interference. There is no need to exhaust to finality any administrative remedies before a § 1983 or common law tort claim can be brought. The trial court erred when it imposed this exhaustion requirement as the basis for dismissing the complaint.

Federal and Washington recognize causes of action to remedy unconstitutional and illegal taxation. While the Federal Tax Injunction Act, 28 U.S.C. § 1341 and the doctrine of comity in relation to state taxation may limit the availability of certain remedies, they do not bar

entirely a cause of action to vindicate taxpayer rights that have been illegally and unconstitutionally infringed. The state must provide an adequate remedy ("plain, speedy, and efficient") to rectify impermissible state action.

Final exhaustion of administrative remedies here is not an adequate remedy. WTA has no administrative remedy. The Carriers spent *years* in the administrative process at extraordinary expense. Additional time in the administrative process results in the loss of their federal rights and common law remedies, as being time barred.

Moreover, the administrative process is not an adequate remedy here for other reasons. While an APA judicial appeal may theoretically address unconstitutional and illegal conduct by an agency, an APA appeal is limited to the agency record. The internal administrative appeal process provided does not allow the development of the record to address the deprivation of the Carriers' rights. AJLs have universally ruled that they lack the legal authority to examine and remedy the illegality of the respondents' conduct in conducting the rigged audits. Testimony of experts, including former State Auditor Brian Sonntag, that these "audits" were shams has been excluded as irrelevant. Evidence that the employment status of owner/operators will affect "prices, routes, and services," the predicate to federal preemption, has also been excluded.

Even if the Carriers' were ultimately successful in having such evidence allowed through further appeals, it would then trigger another round of administrative hearings with their attendant cost. This is not the required "plain, speedy, and efficient" adequate remedy.

Even when the administrative process tries to address some aspects of the violation of the Carriers' legal rights, it has failed because of its structural limitations and ESD's intransigence. After spending *seventeen months* supposedly working on ALJ-ordered corrections to inflated assessments, ESD refused to fully comply. The ALJ was powerless to sanction for non-compliance. This cannot be an adequate remedy.

Moreover, the trial court erred in ruling that WTA lacked standing. As a trade organization representing the trucking industry, the interests it is seeking to protect is clearly germane to its purposes. Its affected members have standing. WTA has paid attorney fees and expenses in defending against the incorrect assessments. Its damages are easily ascertainable. Participation by individual members as parties is not required. This is sufficient to confer WTA standing under Washington law.

E. ARGUMENT

(1) Standard of Review

This Court reviews CR 12(b)(6) orders of dismissal de novo. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988). For purposes of a CR 12(b)(6) motion, the Court must accept the facts as alleged in the Carriers' second amended complaint and recitation of hypothetical facts as true. *Futureselect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 331 P.3d 29, 34 (2014).[18]

Under this Court's standard, the following core facts, pleaded in the second amended complaint and the provided hypothetical facts must be accepted:

- ESD's audits of the Carriers (which resulted in assessments of additional taxes, penalties, and interest) did not comply with the requirement that audits be conducted in good faith, and they were not fairly and objectively conducted;
- the results of the so-called audits were deliberately rigged, i.e., their outcomes were determined before they were conducted, to invariably result in taxes being owed by the Carriers for the owner/operators;
- ESD intentionally sought the payment of unemployment compensation taxes for items which are statutorily excluded from such taxation, including payments made for the owner/operators' trucks and trailers, i.e. equipment, knowing unemployment taxes can only be assessed for "wages";
- ESD misused the audit process for their political purpose of restructuring the trucking industry, to make owner/operators invariably the employees of the Carriers, thereby eliminating use of owner/operators in the industry;

[18] It is only if a court concludes beyond a reasonable doubt that a plaintiff cannot allege *any* facts justifying recovery that dismissal is warranted. *Id.* at 962. A CR 12(b)(6) motion is a drastic remedy that must be sparingly *applied*. *Hoffer, supra.*

- The administrative law process cannot address and remedy the injuries sustained and the violation of the legal and constitutional rights of the Carriers and WTA as demonstrated by years of delay, extraordinary expense, and the structural limitations of the process. It is not an adequate remedy. Federal rights would be lost if further exhaustion is required.

CP 461-502.

(2) The Carriers Stated 42 U.S.C. § 1983 Claims Against ESD

42 U.S.C. § 1983 affords a remedy to parties like the Carriers to vindicate their federal statutory and constitutional rights when those rights have been deprived under color of state law. *Johnson v. City of Seattle*, __ Wn. App. __, 335 P.3d 1027 (2014) (citing *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765 (1992)). It is a remedial statute to be broadly construed.[19] Here, ESD violated the Carriers' federal rights when it, *inter alia*, conducted sham audits and imposed illegal inflated tax assessments intended to restructure the trucking industry in violation of federal law and the Carriers' right to contract.

[19] "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 288, 4 P.3d 808 (2000) (quoting *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S. Ct. 1827, 118 L.Ed.2d 504 (1992)). "A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of 'any rights, privileges, or immunities secured by the Constitution and laws.'" *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S. Ct. 865, 112 L.Ed.2d 969 (1991) (quoting 28 U.S.C. § 1983). The legislative history also stresses that as a remedial statute, it should be "'liberally and beneficently construed.'" *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 684, 98 S. Ct. 2018, 2032, 56 L.Ed.2d 611 (1978) (quoting Rep. Shellabarger, Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871)).

(a) ESD's Actions Were Politically Motivated and Designed to Restructure the Trucking Industry in Violation of the FAAAA

Congress has preempted efforts by state and local governments to regulate interstate trucking. Federal law *preempts* all local ordinances or statutes that purport to affect routes, prices, and services of trucking carriers. 49 U.S.C. § 14501(c)(1). This preemption is broadly interpreted by federal courts, *Rowe v. New Hampshire Motor Transport Ass'n,* 552 U.S. 364, 128 S. Ct. 989, L.Ed.2d 933 (2008), and extends to efforts by state and local authorities to eliminate owners/operators. *E.g., American Trucking Ass'n v. City of Los Angeles*, 133 S. Ct. 2096, 186 L.Ed.2d 177 (2013) (culmination of case in which courts ruled Port of Los Angeles/Port of Long Beach regulations forbidding use of owner/operators were an illicit effort to restructure the trucking industry and were preempted); *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11 (1st Cir. 2014) (reinstating trucking association's claim that Massachusetts' definition of "independent contractor" was preempted by the FAAAA); *Ortega v. J.B. Hunt Transport, Inc.,* 2014 WL 2884560 (C.D. Cal. 2014) (minimum wage claims of drivers preempted by FAAAA).

ESD is charged with knowledge of applicable law. *Martin v. City of Seattle,* 111 Wn.2d 727, 735, 765 P.2d 257 (1988) ("All persons are charged with knowledge of provisions of statutes and must take notice

thereof....," quoting 58 Am. Jur.2d *Notice* § 21 (1971)). This is particularly true for state officers who must be "scrupulously just" in dealing with citizens. *State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143, 401 P.2d 635 (1965).

ESD proceeded with their rigged audits designed to eliminate owner/operators in the trucking industry despite federal law, called to their attention, CP 470, that forbids state or local efforts to eliminate owner/operators. ESD knew that the efforts of the Port of Los Angeles and Long Beach to expressly ban owner/operators in drayage agreements at those ports were federally-preempted. *See, e.g., American Trucking Assns., Inc. v. City of Los Angeles,* 559 F.3d 1046, 1055-56 (9th Cir. 2009). It was also aware that a Michigan statute banning owner/operators in trucking was federally preempted. *In re Federal Preemption of Provisions of Motor Carrier Act,* 566 NW.2d 299, 309-10 (Mich. App. 1997), *review denied,* 587 N.W.2d 632 (1998), *cert. denied,* 525 U.S. 1018 (1998). Other cases involving owner/operator bans, tacit or explicit, have confirmed such preemption. *See, e.g., Sanchez v. Lasership, Inc.,* 937 F. Supp.2d 730 (E.D. Va. 2013) (statute defining independent contractors preempted).

A deliberate effort by ESD to reshape the trucking industry in defiance of the FAAAA violated the Carriers' federal rights, and the Carriers were thus entitled to seek redress under 42 U.S.C. § 1983.

(b) ESD's Rigged Audits and Knowing Imposition of Illicit Taxes Violated the Carriers' Right to Due Process of Law and the Commerce Clause

In this case, the Carriers face a deprivation of their property rights and their right to freely contract with owner/operators, under the color of state law by the respondents, who rigged audits and imposed unemployment compensation taxes pursuant to those rigged audits designed to eliminate owner/operators in Washington. Moreover, ESD was complicit in the imposition of unemployment compensation taxes on the Carriers for equipment, when taxes at most could only apply to "wages" for "personal services" (driving) under Washington law. RCW 50.04.100, .320.

The Carriers have a due process right not to be subject to taxation based on audits rigged to achieve a pre-determined outcome. This constitutional right is founded in the requirement that government agencies must wield their vast enforcement powers in good faith. *United States v. La Salle Nat'l Bank*, 437 U.S. 298, 98 S. Ct. 2357, 57 L.Ed.2d 221 (1978) (IRS may only issue a civil investigative summons in good faith); *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L.

Ed.2d 112 (1964) (barring use of IRS summons power in bad faith to harass or to pressure settlement of collateral disputes). The Carriers have a Commerce Clause right to pursue their businesses without impermissible State interference discussed herein.

Parties have a constitutional right not to be subjected to criminal charges on the basis of false evidence fabricated by the government. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001); *McSherry v. City of Long Beach*, 560 F.3d 125 (9th Cir. 2009); *Arden v. Kastell*, 553 Fed. Appx. 697, 2014 WL 265685 (9th Cir. 2014). Similarly, parties have a constitutional right not to be subject to the use of fabricated evidence in a civil proceeding. *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1113-14 (9th Cir. 2010). This Court also explicitly recognized in *Jones* that a party's right to procedural due process may be infringed, thereby giving rise to a § 1983 claim, where state actors deliberately fabricate evidence in the administrative process.

There, Department of Health inspectors fabricated an emergency to justify a summary suspension of a pharmacist's license. The pharmacist plaintiff alleged that the inspectors graded his pharmacy's deficiencies in an arbitrary and capricious manner and fabricated lower-than-deserved scores. 170 Wn.2d at 344. This resulted in the Board of Pharmacy's suspending the pharmacist's license without notice or the opportunity to be

heard. *Id.* at 347. This Court held that the fabrication of false evidence violated the pharmacist's due process rights and that the inspectors could be liable for the injuries caused by the suspension, because the inspectors knew or should have known that the Board would summarily suspend the pharmacist's license based on their fabricated evidence. *Id.* at 354.

A recent Ninth Circuit case further illustrates the point, addressed by this Court in *Jones*, that a pattern of illicit enforcement activity by a public agency will constitute the appropriate predicate for a § 1983 claim. In *Tarabochia v. Adkins,* 766 F.3d 1115 (9th Cir. 2014), the Tarabochias, who were commercial fishers, alleged that the Washington Department of Fish and Wildlife had a personal vendetta against them,[20] the culmination of which was a 2007 warrantless stop of the Tarabochias' car

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[20] The Tarabochias alleged:

> From 2000 until the date of the stop at issue, Capitan Cenci and other WDFW officers have, among other things: followed the Tarabochias in their automobile on multiple occasions; detained Joseph and Matthew, including Joseph on one occasion for an hour and a half only to let him leave without citation; confronted the Tarabochias abroad their fishing vessel with a knife in hand and accompanied by at least six other WDFW officers; intentionally swerved into their automobile while both cars were driving on a public road; followed Alex and Bryan to school on an almost daily basis; verbally threatened to "get" Joseph and Alex on unspecified charges; and charged the Tarabochias with at least twenty-seven "criminal counts, in at least [eleven] court cases, in four [different] jurisdictions," many of which charges were dismissed prior to trial, none resulting in conviction.

Id. at 1118-19. After a 2006 incident that resulted in charges that were dropped, WDFW officers spread rumors that the plaintiffs' father was a risk to officer safety, and a WDFW frisked one of the Tarabochias at a 2006 meeting in the Wahkiakum County Prosecutor's Office, conduct the prosecutor described as "outrageous." *Id.* at 1119.

on a state highway by WDFW agents and sheriff's deputies, and the Tarabochias' arrest. The Tarabochias sued the agents under § 1983. The district court dismissed their complaint, but the Ninth Circuit reversed because the defendants' conduct violated their Fourth Amendment rights, and the defendants were not entitled to qualified immunity.

The trial court here did not deny that the Carriers state a legitimate claim for the deprivation of their due process rights. RP 39. Instead, the trial court concluded that such a claim was "premature" and it could not be brought until the Carriers had exhausted all administrative remedies. RP 39. The trial court's belief that exhaustion is a condition precedent required before a plaintiff can bring a § 1983 claim is *flatly wrong*. This Court has long held that exhaustion is inapplicable in the § 1983 context. *Binkley v. City of Tacoma,* 114 Wn.2d 373, 388, 787 P.2d 1366 (1990).

The rule that exhaustion is not required is particularly important here because now almost *three years* ago the Carriers were told by the federal court to pursue in state court their § 1983 remedies on the basis that the Carriers "have a plain, speedy, and efficient remedy in the state courts to address all of their complaints." CP 332. Yet the trial court's imposition of an exhaustion requirement not only means there is no "plain, speedy, and efficient" remedy, it means the state courts will provide *no remedy* at all for the Carriers' complaints. Exhaustion here means federal

rights will be lost as time-barred when the administrative process is finally exhausted. When the statute of limitations issue was raised below, the trial court was indifferent, even refusing to say whether the dismissal was without prejudice. RP 40.

The United States Supreme Court in *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981) held that taxpayers or their associational representative could be required to take their § 1983 claims alleging unconstitutional administration of a state tax system to state courts only if those federal rights would not be "lost:"

> We discern no significant difference, for purposes of the principles recognized in this case, between remedies which are "plain, adequate, and complete," as that phrase has been used in articulating the doctrine of equitable restraint, and those which are "plain, adequate, and complete," within the meaning of § 1341. [cited cases] Both phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state court remedies *if their federal rights will thereby not be lost.*

Id. at 116 fn.8 (emphasis added).

ESD here rigged audits to impose taxes against the Carriers in violation of due process principles. ESD's agents did not exert their significant power fairly or objectively, as their own agency standards required. They instead had a foregone, politically-motivated conclusion in mind. They wanted to tax the Carriers for their use of owner/operators to

force the Carriers to restructure the trucking industry. They were somewhat more subtle than the Ports of Los Angeles and Long Beach, but their intended result was the same – end the use of owner/operators in the trucking industry. ESD even directed that employment taxes be imposed on equipment, *knowing* this was illegal under Washington law, to leverage their intended result of changing the trucking industry. In sum, the Carriers and WTA stated claims under § 1983 for the violation of federal statutory and constitutional rights. The exhaustion will cause the loss of those federal and constitutional rights.

(3) Carriers Stated a Tortious Interference Claim Against ESD

The trial court also erred in determining that the Carriers failed to state a tortious interference claim. A claim for tortious interference has three elements, as this Court explained in *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965 (2012). Those elements are (1) the existence of a valid contractual relationship known to the defendant; (2) intentional interference with an improper motive or intent by the defendant that causes a breach of contract or termination of the contractual relationship; and (3) damage. *Id.* Only the second element is at issue here.[21]

[21] ESD challenged only the second element in their motion to dismiss, apparently conceding that the Carriers can raise a claim on the first and third elements,

The second element is met by "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*, 112 Wn.2d at 803-04. The *Pleas* court noted that impropriety may be "found if the means of interference was wrongful, even if the actor had no specific purpose to interfere." *Id.* at 806. Where defendant is a public entity, improper means can be established with evidence that the defendant acted arbitrarily or capriciously in failing to follow appropriate procedures or delaying resolution of a matter. *Id.* at 805. Proof of either meets the second element. *Id.* In *Pleas*, for example, this Court held that the plaintiffs submitted sufficient evidence of improper means where they alleged that Seattle had bypassed normal procedures and arbitrarily delayed processing of building permits. *Id.* at 796-97. This Court thus allowed the plaintiffs to maintain an intentional interference action for such damages as lost profits, loss of favorable financing, increased costs due to inflation, the costs incurred in an initial environmental impact statement which the city discarded, and attorney fees. *Id.* at 799.

Here, as described in detail above, ESD had an improper motive and used wrongful means to impose taxes on the Carriers. This Court has specifically determined that a government's improper use of the taxing

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i.e. that the respondents had knowledge of the Carriers' valid contractual relationships and caused damage to those relationships.

power can amount to tortious interference. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992). In *Sintra*, Seattle imposed a fee on a property developer, even after a court found that the fee was an invalid tax. Seattle insisted on payment of this tax until this Court confirmed that it was invalid. *Id.* at 8-9. This Court held that the enforcement of an invalid ordinance was an improper means within the contemplation of a tortious interference claim. *Id.* at 28.

Likewise, ESD here used its extensive auditing and taxing power improperly. It knowingly assessed taxes on remuneration paid for equipment and other non-services costs, indisputably in violation of the statutes that limit ESD's authority strictly to the taxation of *wages*. *See* RCW 50.04.100, .320. It also knowingly assessed taxes on payments made to owner/operators who never drove any miles in Washington, again in violation of ESD's own jurisdictional limits. *See* RCW 50.04.110. Further, it ignored established standards in the auditing profession—indeed, it disregarded its own auditing standards—in deliberately depriving the Carriers of the protections of RCW 50.04.140. Each one of these violations is evidence of wrongful interference. ESD engaged in this misconduct for an illegal politically-inspired purpose—to restructure Washington's trucking industry to eliminate owner/operators. The

Carriers stated a claim for tortious interference, and the trial court erred in dismissing the Carriers' complaint.

(4) The Carriers' Claims Are Not Foreclosed by the TIA or Comity

ESD argued below that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and the coordinate doctrine of comity provides it an absolute defense to § 1983 or tortious interference claims. This position represents a vast overreading of the TIA's scope. While certain types of remedies (injunction) may not be available, the doctrine of comity (equitable restraint) and the TIA did not repeal § 1983 in its entirety.

At its core, the TIA is intended to limit *federal court* jurisdiction over actions to enjoin the enforcement of state taxes. *See* 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain . . ."). It is not designed to prevent state court jurisdiction over claims based on federal and state causes of action for wrongful conduct by state taxing authorities where state law allows such claims. *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991).[22]

[22] In *Dennis*, a trucking firm filed a § 1983 action in state court in Nebraska, asserting that certain taxes imposed on trucking firms that licensed vehicles in other states were retaliatory and violated the Commerce Clause. The carrier sought declaratory and injunctive relief, refund of taxes improperly paid, and fees. The trial court agreed with the carrier in part, but dismissed its § 1983 claim; the Nebraska Supreme Court affirmed, but the United States Supreme Court reversed, holding that the carrier stated a § 1983 claim. The Court rejected any effort to confine federal rights, privileges, or immunities to the Fourteenth Amendment. *Id.* at 445. The Court upheld the availability of § 1983 to vindicate key federal statutory and constitutional rights, even in state court

The rights violations for which the Carriers seek redress through their § 1983 claim are not within the contemplation of either the TIA or the comity principles discussed in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed.2d 509 (1995), and *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed.2d 271 (1981). The TIA applies only to suits to "enjoin, suspend or restrain the assessment, levy or collection of any tax . . . ." 28 U.S.C. § 1983. *Fair Assessment* held that comity precludes a § 1983 action "against the *validity* of state tax systems in federal courts." *Fair Assessment*, 454 U.S. at 116 (emphasis added). *National Private Truck* extended this holding to § 1983 claims in state court, but the case was limited to injunctive and declaratory relief, not damages. The parties agreed, and the Court found, there was an adequate legal remedy in the state *judicial* process (where the Oklahoma Supreme Court found unconstitutionality) and refunds based upon that decision had been issued. *Nat'l Private Truck* at 588-89. The availability of an adequate state remedy (not present here) was the keystone of the holding in *National Private Truck*, yet the Court made clear that even when there is a state remedy, injunctive or declaratory relief is available when there

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actions. *Dennis* has never been overruled. The result should be no different here, where a violation of the Contract Clause by the respondents is at issue.

are extraordinary circumstances. *Id.* at 591, fn.6. More recently, the Court explained that it "interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.,* cases in which state taxpayers seek federal-court orders enabling them *to avoid paying state taxes.*" *Hibbs v. Winn*, 542 U.S. 88, 107-08, 124 S. Ct. 2276, 159 L. Ed.2d 172 (2004) (emphasis added). In *Hibbs,* the Court held that the TIA did not bar an Arizona taxpayer action challenging that state's tax credits for parochial schools under the First Amendment's Establishment Clause. Such an action did not involve the avoidance of payment of taxes.

Here, WTA and the Carriers are in state court, not federal court. In *Hibbs*, the plaintiffs sued in federal court. Since the TIA directly involves federal jurisdiction, its applicability is stronger than for state court proceedings, yet it did not bar the constitutional challenge in *Hibbs.* The avoiding the payment of state taxes analysis in *Hibbs* was in the context of suing in federal, not state court.

The *Hibbs* analysis relating to avoiding taxes, if applicable, does not bar the complaint here. WTA is not trying to avoid taxes; none were imposed on it. The Carriers are not seeking to avoid paying unemployment taxes; they pay them for their employee drivers and other staff. They will for owner/operators if there is an ultimate judicial determination that federal preemption does not bar the payment of these

taxes or that federally imposed requirements, like contract provisions, results in the inability of ever being able to obtain a tax exemption because of independent contractor status. While those are important issues, they are not the gravamen of the complaint. This action seeks redress for the abusive tactics that ESD has employed against the Carriers, including deliberately inflating tax assessments, forcing Carriers into an administrative process get a determination of the proper amount of the tax to be paid, then foiling that process in a deliberate effort to increase the Carriers' costs of having the proper amount of taxes to be paid determined. Requiring ESD to charge only the amount of taxes it is legally able to levy is *not tax avoidance.*

Neither the TIA nor *National Private Truck* and its progeny prohibit a § 1983 claim based on bad faith or other wrongful conduct by a state agency. *See Patel v. City of San Bernardino*, 310 F.3d 1138, 1142 (9th Cir. 2002). In *Patel*, for example, the Ninth Circuit held—seven years after *National Private Truck*—that the plaintiff could maintain a § 1983 claim where the city continued to collect a tax after it was declared unconstitutional. *Patel*, 310 F.3d at 1142.

In any event, most critically, the TIA and comity are inapplicable because the Carriers do not have an adequate remedy under state law to obtain redress for the respondents' actions. *See National Private Truck,*

515 U.S. at 592 (holding that "state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 *when there is an adequate legal remedy*") (emphasis added). To be adequate, a remedy must be "plain, speedy and efficient." *Patel*, 310 F.3d at 1142.[23]

WTA incurred attorney fees as a result of ESD's bad faith tactics, but has *no appeal rights* for any administrative action. For the individual Carriers who do, the administrative process is limited by RCW 50.32.050 which allows the appeal tribunal only to "affirm, modify, or set aside" a particular assessment. Under ESD's interpretation of RCW 50.32.050, only witnesses with personal knowledge related to that one particular assessment, have "relevant" testimony. Thus, the ALJs in the administrative hearings on the Carriers' assessments excluded testimony on the assessments' effect on the industry and how "prices, routes, and services" will be affected, the predicate to a federal preemption claim.[24]

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[23] "'[A] state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax.'" *Hibbs*, 542 U.S. at 107-08 (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 411, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982)) (internal quotations omitted; alteration in original). A remedy is not "plain" if there is "uncertainty regarding its availability or effect." *Ashton v. Cory*, 780 F.2d 816, 819 (9th Cir. 1986). "[S]peedy is a relative concept, intended to be evaluated against the time normally required for litigation." *Id.* at 821. A remedy is not "efficient" if it "imposes an 'unusual hardship . . . requiring ineffectual activity or an unnecessary expenditure of time or energy." *Lowe v. Washoe County*, 627 F.3d 1151, 1156 (9th Cir. 2010).

[24] Even if it was eventually found that such evidence was improperly excluded, such a ruling would simply force the Carries to go through levels of appeal only to retry their cases. And, if the courts ultimately agree with ESD that the ALJs lack

Similarly, the ALJs found that evidence of rigged audits is not a basis to exclude the audits and resulting assessments in the administrative process. Even the testimony of former State Auditor Brian Sonntag on the lack of auditor objectivity was excluded in administrative cases, as not "relevant" under RCW 50.32.050. Thus, there is a very limited or no meaningful ability to create a record which can be used to address the deprivation of legal and constitutional rights of the Carriers. Even when the administrative process tried to address inflated assessments which resulted from basing not following the provision of Title 50, the result was a slow (seventeen months), expensive, and inadequate process. The end result was ESD thumbing its nose at the ALJ and the Carriers, refusing to make ordered adjustments, no power by the ALJ to sanction such conduct, and redress to be obtained only through more Carrier expense and legal proceedings.

An administrative process that prevents a party from asserting a valid defense violates that party's procedural due process rights. In its recent *Johnson* decision, for example, the Court of Appeals addressed the City of Seattle's citations issued to a homeowner with more than three vehicles parked on a single-family lot. 335 P.3d at 1029-30. The City's

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jurisdiction to address these claims, the statute of limitations will have run on § 1983 and tortious interference claims leaving the Carriers without remedy whatsoever.

Department of Planning and Development issued the citations, and the homeowner's administrative appeal rights were to a hearing examiner. *Id.* Although the homeowner's claimed "legal nonconforming use" was a complete defense to the citations, the hearing examiner refused to consider this defense because, under the Seattle Municipal Code, only the Department could make this determination. *Id.*

The homeowner brought a separate action against the City under § 1983, alleging violations of his right to procedural due process. *Id.* The trial court dismissed these claims on summary judgment, but the Court of Appeals reversed. *Id.* That court held that the City's administrative process, by preventing the homeowner from presenting a valid defense, denied him a meaningful opportunity to be heard. *Id.* As such, this process violated his right to procedural due process and entitled him to seek damages under § 1983, as well as reasonable attorney's fees under 42 U.S.C. § 1988. *Id.*

It is *unambiguous* that the administrative process does not provide the Carriers an adequate legal remedy for the respondents' pattern of rigging audits and attempts to restructure the trucking industry, or for their deliberate, bad faith actions in imposing legally groundless or inflated taxes. *The ALJs below specifically indicated that they would not address these issues. Cf. McCarthy Fin., Inc. v. Premera*, 182 Wn. App. 1, 20, 328

P.3d 940 (2014) (exhaustion of administrative remedies under the Insurance Code not required where Insurance Commissioner made public comments that he lacked jurisdiction to address the violation at issue). Moreover, ESD can point to no authority allowing the Carriers to recover their legal expenses in the administrative process for ESD's improper actions; CR 11, equitable bad faith principles, and the Equal Access to Justice Act are inapplicable in the administrative process. The Carriers are left with no viable means of recovering their legal expenses forced on them by the respondents' actions.[25]

Ultimately, ESD's exhaustion requirement adopted by the trial court is both illogical and pernicious. The essence of what was before the trial court was that there is no adequate legal remedy through the administrative process and that ESD has manipulated the administrative process to harm the Carriers' interests. The trial court's answer: You [Carriers] go back to that administrative process, even though you have spent years and hundreds of thousands of dollars in it, and it does not afford you adequate relief. You may very well have suffered illegal and

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[25] With regard to exhaustion generally, this Court recently addressed that question in *Cost Management Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013), emphasizing that "[t]he primary question in exhaustion cases, however, is whether the relief sought can be obtained through an available administrative remedy; if so, the party seeking relief must first seek relief through the administrative process." *Id.* at 642. The question is the ability of the administrative process to confer a remedy upon a party. Here, the administrative process offered no viable remedy to the Carriers.

unconstitutional violations and the right to seek redress for those abuses of state power will be lost, but that is of no concern in imposing this exhaustion requirement and dismissing your complaint.

(5) WTA Has Standing

The trial court dismissed WTA because it lacked standing without articulating any basis for that conclusion. RP 39. WTA has standing to assert the claims here on its own behalf and for its members even though it was not assessed directly. "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 342, 97 S. Ct. 2434, 53 L. Ed.2d 383 (1977) (quoting *Warth v. Seldin,* 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed.2d 343 (1975). The U.S. Supreme Court accepted the standing of an association to challenge unconstitutional taxation in both *National Private Truck, supra* and *Fair Assessment in Real Estate Association, Inc.* In *Fair Assessment,* the association was a nonprofit corporation formed by taxpayers to promote equitable enforcement of property tax laws in Missouri. 454 U.S. at 105-06.

This Court has recognized the United States Supreme Court's three-prong test to establish a right to associational standing:

> (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members.

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airport, 146 Wn.2d 207, 213-14, 45 P.3d 186, *amended on denial of reconsideration,* 50 P. 3d 618 (2002) (citing *Hunt, supra*). Below, ESD challenged only the third prong of this test and conceded that the first two prongs are met. CP 261.

While the first two prongs are constitutional, the third is not. *Id.* at 215. Rather, the third prong is "judicially self-imposed for 'administrative convenience and efficiency.'" The "ultimate question" in analyzing this prong "is 'whether the circumstances of the case and the relief requested make individual participation of the association's members indispensable.'" *Id.*

Below ESD's only argument on this point was that WTA's request for "money damages, including punitive damages," is not a request for damages that are "'certain, easily ascertainable' monetary damages 'within the knowledge of the defendant,'" citing to *id.* at 215-16. CP 261-62. However, ESD ignored that *Int'l Ass'n of Firefighters* specifically noted federal courts limited standing of an association to seek monetary damages on behalf of its members only "if it has not alleged an injury to itself or received an assignment of its' members damages claim." *Id.* at

214 (citing the federal cases). Here WTA specifically alleged that it "had incurred costs and attorney fees in defending the assessments, which are now recognized as incorrect when issued." CP 224. Thus, WTA alleged it suffered injury and has standing.

But even if WTA's claim is viewed only as advancing its members claims, its standing should be recognized under *Int'l Ass'n of Firefighters.* Although the third prong (required participation of the individual members) is more easily established in a claim for injunctive relief, *id.* at 214-16, expressly established that an association is not precluded from bringing a lawsuit on behalf of its members solely because it seeks monetary relief. This Court there conferred associational standing when the requirement of individual participation would likely burden individual members economically "and would almost certainly burden our courts with an increased number of lawsuits arising out of identical facts." *Id.* In rejecting the argument that the pursuit of money damages should preclude associational standing, this Court stated that it saw "little sense in an ironclad rule that has the effect of denying relief to members of an association based upon an overly technical application of the standing rules." *Id.*

The same factors that led this Court to find standing in *Int'l Ass'n of Firefighters* are present here. Five carriers are present here on the same

facts. More cases are still in the administrative process on the same facts. CP 495. Hundreds of trucking firms were audited (CP 490) and potentially there could be a multiplicity of suits based upon past, present, and future ESD conduct implicating the same facts and legal issues until authoritatively resolved by the courts. For instance, the issue of whether federal preemption precludes the designation of owner/operators as employees will continually arise until ultimately resolved by the courts. Similarly, the issue of whether there can never be an independent contractor exception to unemployment taxation because carriers and owner/operators complied with federal laws and regulations will arise again and again in case after case. Allowing WTA to have standing to assert these types of issues would be a far more economical way to proceed, which is exactly the same rationale this Court relied upon in finding standing in *Int'l Ass'n of Firefighters.*

The other rationale, potential burden to individual members, is also present. There is a tremendous cost in attorney fees and costs here where ESD trampled on the legal and constitutional rights of the Carriers and ESD can endlessly defend (now almost five years of litigation) with its bevy of legal counsel. Even though the tax assessment may be illegal, fighting it may not make economic sense for many individual members

because of the reality that litigation costs would be overwhelming for those with smaller claims.

Moreover, the fact that the amount of damages is disputed or will require participation of individual members as witnesses does not preclude an association from establishing the third prong. *Pugh v. Evergreen Hosp. Medical Center,* 177 Wn. App. 363, 368, 312 P.3d 665 (2013), *review denied,* 180 Wn.2d 1007 (2014). ESD's argument below confuses "participation as witnesses with participation as necessary parties to ascertain damages." *Id.* at 366 (quoting *Teamsters Local Union No. 117 v. Dep't of Corrections,* 145 Wn. App. 507, 513-14, 187 P.3d 754 (2008). In *Pugh*, it was reversible error to deny associational standing merely because it may be necessary to call individual members as witnesses.

The damages alleged here are easily ascertainable. The majority of the Carriers' damages consist of such concrete harm as litigation expenses and attorney fees, which can be easily established through billing records. Any claim for punitive damages under § 1983 focuses on the *defendant's* conduct. *See Morgan v. Woessner,* 997 F.2d 1244, 1256-57 (9th Cir. 1993) (punitive damages under § 1983 should be assessed on the reprehensibility of *the defendant's* conduct and the amount which will have a deterrent effect in light of *the defendant's* financial condition).

Thus, no participation by WTA's members should be necessary to ascertain the necessary amount of punitive damages.

(6) The Carriers Are Entitled to an Award of Fees under 42 U.S.C. § 1988

42 U.S.C. § 1988 authorizes an award of attorney fees in cases in which a party seeks to enforce a provision in 42 U.S.C. § 1983, as here. Washington courts have routinely applied § 1988 in cases arising under § 1983. *See, e.g., Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 289, 4 P.3d 808, 832 (2000) (trial court abused its discretion in not awarding fees under § 1988 on the ground that the defendants' actions were not unreasonable and contrived); *Collier v. City of Tacoma*, 121 Wn.2d 737, 762, 854 P.2d 1046 (1993) (plaintiff was prevailing party in § 1983 action, and trial court therefore abused its discretion in declining to award fees).

This Court should award the Carriers and WTA their attorney fees and costs at trial and on appeal. *See* RAP 18.1.

F. CONCLUSION

This case involves a troubling example of government officials running amok, violating the Carriers' federal constitutional and statutory rights for the political purpose of restructuring Washington's trucking industry. If the trial court's decision is allowed to stand, the protections

afforded taxpayers from deliberate government actor misconduct as articulated by this Court in *Jones* and *Pleas* will be undercut.

This Court should reverse the trial court's decision and remand the case for trial on the merits. Costs on appeal, including reasonable attorney fees should be awarded to the Carriers.

DATED this 17th day of December, 2014.

Respectfully submitted,

Philip A. Talmadge

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APPENDIX

RCW 50.04.140:

The term "employment" shall include an individual's entire service performed within or without or both within and without this state, if

(1) The service is localized in this state; or

(2) The service is not localized in any state, but some of the service is performed in this state, and

(a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or

(b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state; or

(3) The service is performed within the United States, the Virgin Islands or Canada, if

(a) such service is not covered under the unemployment compensation law of any other state, the Virgin Islands or Canada, and

(b) the place from which the service is directed or controlled is in this state.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively

to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

49 C.F.R. § 376.12(c)(4):

(c) Exclusive possession and responsibilities.

(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Secretary, the parties may provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

4

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2014 JUL 11 PM 4:04

BETTY J. GOULD, CLERK

☐ EXPEDITE
✓ No Hearing Set
☐ Hearing is Set
Date:
Time:

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

EX PARTE

WASHINGTON TRUCKING ASSOCIATION, a Washington non-profit corporation; EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., A Washington corporation, HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORTATION d/b/a SYSTEM-TWT, a Washington limited liability company, Plaintiffs, v. THE STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT; PAUL TRAUSE, individually and in his official capacity as the former Commissioner of the Employment Security Department, and JANE DOE TRAUSE, husband and wife and the marital community composed thereof; BILL WARD, individually and in his official capacity, and JANE DOE WARD, husband and wife and the marital community composed thereof; LAEL BYINGTON, individually and in his official capacity, and JANE DOE BYINGTON, husband and wife and the marital community composed thereof; JOY STEWART, a single individual, individually and in her official capacity; and MELISSA HARTUNG, a single individual, individually and in her official capacity; ALICIA SWANGWAN, a single individual, individually and in her official capacity, Defendants.	NO. 13-2-01655-6 ~~[PROPOSED]~~ ORDER OF DISMISSAL; JUDGMENT; AND, JUDGMENT SUMMARY

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7676

tlc

ORIGINAL

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditors:	State of Washington Employment Security Department; Paul Trause; Bill Ward; Lael Byington; Joy Stewart; Melissa Hartung; Alicia Swangwan
2. Judgment Debtors:	Washington Trucking Association; Eagle Systems, Inc.; Gordon Trucking, Inc.; Haney Truck Line, Inc.; Jasper Trucking, Inc.; PSFL Leasing, Inc.; System-TWT Transportation
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Attorney Fees:	$200
6. Costs:	$260
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorneys for Judgment Creditors:	Eric D. Peterson, Assistant Attorney General Dionne Padilla-Huddleston, AAG Office of the Attorney General 800 Fifth Ave., Ste. 2000 Seattle, WA 98104-3188 (206) 464-7676
11. Attorneys for Judgment Debtors:	Philip A. Talmadge, Thomas M. Fitzpatrick Talmadge/Fitzpatrick 2775 Harbor Ave. SW, 3rd Flr., Ste. C Seattle, WA 98126 (206) 574-6661 Aaron P. Riensche Ogden Murphy Wallace 901 Fifth Ave., Ste. 3500 Seattle, WA 98164 (206) 447-7000

This matter came before the Court on June 13, 2014, for hearing on the motion to dismiss filed by Defendants. The Court heard oral argument of counsel for the Plaintiffs and

Defendants, and considered all written materials filed and the pleadings on record, including:

- Plaintiffs' original, amended, and second amended Complaints for Damages Under 42 U.S.C. § 1983 and Under State Law;
- Defendants' Motion to Dismiss;
- Declaration of Eric D. Peterson and its attachments;
- Plaintiffs' Response to Motion to Dismiss, including the Hypothetical Facts for Consideration in Response to Defendants' Motion to Dismiss;
- Declaration of Philip A. Talmadge in Opposition to Defendants' Motion to Dismiss and its attachments;
- Defendants' Reply in Support of Motion to Dismiss;
- Plaintiffs' statement of additional authority by letter dated June 9, 2014; and,
- All pleadings and orders filed in the above-captioned cause number, and all pleadings and orders filed in Spokane County Superior Court in Cause No. 13-2-01779-7 before transfer of venue to this Court.

Based on the argument of counsel and the evidence presented, and having construed all facts in favor of the Plaintiffs and assumed hypothetical facts in support of the Plaintiffs' complaint, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Defendants' motion to dismiss is hereby GRANTED, and Plaintiffs' complaint is hereby DISMISSED with prejudice.
2. Judgment is hereby entered in favor of Defendants and against Plaintiffs. Defendants are awarded, and Plaintiffs are ordered to pay, statutory attorney fees in the amount of $200.00, and costs in the amount of $260.00 (for a $240

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filing fee and $20 processing charge upon transfer of venue from Spokane County to Thurston County Superior Court), for a total award of $460.00, as provided by Chapter 4.84 RCW.

DATED this 11th day of July, 2014.

carol murphy

Hon. Carol A. Murphy

Presented by:

ROBERT W. FERGUSON
Attorney General

Date: 6/26/14

ERIC D. PETERSON, WSBA #35555
DIONNE PADILLA-HUDDLESTON, WSBA #38356
Assistant Attorneys General for Defendants

Copy received, approved as to form, notice of presentation waived:

Philip A. Talmadge

Date: 6/26/14

Philip A. Talmadge, WSBA #6973
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DECLARATION OF SERVICE

On said day below, I emailed a copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Appellants in Supreme Court Cause No. 90584-3 to the following parties:

Eric D. Peterson, Assistant Attorneys General
Office of the Attorney General
Licensing & Administrative Law Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188

Copy also emailed to: lalseaef@atg.wa.gov

Aaron P. Riensche
Ogden Murphy Wallace, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, WA 98164

Original E-filed with:
Washington Supreme Court
Clerk's Office

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

DATED: December 17, 2014 at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Roya Kolahi
Cc: Aaron Riensche; ericp@atg.wa.gov; lalseaef@atg.wa.gov
Subject: RE: Washington Trucking Ass'ns v. Employment Security Dept. No. 90584-3

Received 12-17-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Roya Kolahi [mailto:Roya@tal-fitzlaw.com]
Sent: Wednesday, December 17, 2014 1:24 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Aaron Riensche; ericp@atg.wa.gov; lalseaef@atg.wa.gov
Subject: Washington Trucking Ass'ns v. Employment Security Dept. No. 90584-3

Good Afternoon:

Attached please find the Brief of Appellants in Supreme Court Cause No. 90584-3 for today's filing. Thank you.

Sincerely,

Roya Kolahi
Legal Assistant
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