No. 97031-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
No. 77635-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF BELLEVUE,

Petitioner,

v.

GREENSUN GROUP LLC,

Respondent.

CITY OF BELLEVUE'S PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONER

For many decades, this Court has struck a careful balance regarding tort liability for public servants carrying out their duties. While municipal actors are not liable in tort for good faith mistakes made in the course of doing their jobs, tort liability applies when there is an exception to the public duty doctrine or an official commits an intentional tort. The Court of Appeals decision in this case substantially disrupts this balance.

The Court of Appeals reformulated the tort of intentional interference to create substantial potential liability for the City of Bellevue ("City") arising from its implementation of a new zoning ordinance, a valid 1,000 foot separation between marijuana retailers. Despite the absence of any evidence that the City intended to interfere with Greensun Group LLC's ("Greensun's") unopened marijuana business, the Court of Appeals reversed the trial court's grant of summary judgment to the City and held that the mere intent to commit an act (i.e., to enforce the zoning ordinance) coupled with the effect of interfering was sufficient for an intentional interference claim. Although true intentional torts constitute an exception to the public duty doctrine, by greatly relaxing the "intent" component of an intentional interference claim, the Court of Appeals has grossly expanded potential liability for public entities across the state. This Court should review this important public issue.

Additionally, by holding that a plaintiff need not establish a specific intent to interfere, the Court of Appeals' decision conflicts with this Court's authority that a plaintiff must establish "purposely improper interference."[1] The Court of Appeals' decision further conflicts with this Court's precedent by shifting the burden to the City to prove that it acted in good faith, by holding that conduct that is not wrongful can be improper means, and by holding that unidentified prospective customers can constitute a business expectancy. The City therefore respectfully requests that the Court accept review under RAP 13.4(b)(1) and (b)(4).

II. COURT OF APPEALS DECISION

The Court of Appeals issued its Published Opinion on March 4, 2019. Appendix A. The opinion reverses the trial court's grant of summary judgment to the City dismissing Greensun's intentional interference claim, affirms the trial court's denial of Greensun's motion for partial summary judgment, and remands for trial on this claim.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals err in reversing the dismissal of Greensun's intentional interference with a business expectancy claim where Greensun failed to establish the required elements of that claim, the City's actions were justified, and the City is immune from such liability?

[1] *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

B. Did the Court of Appeals err in formulating the tort of intentional interference in such a way that the City could be held strictly liable or liable in negligence contrary to the public duty doctrine?

C. Did the Court of Appeals err in failing to require a showing of "purposely improper interference"?

D. Did the Court of Appeals err in holding that the good faith conduct of the City was relevant only as an affirmative defense on which the City bore the burden of proof?

E. Did the Court of Appeals err in holding that the City's conduct could amount to "improper means" without requiring any showing that the conduct was wrongful?

F. Did the Court of Appeals err in holding that unidentified prospective customers constitute an actionable business expectancy?

IV. STATEMENT OF THE CASE

A. The City Adopts Valid Zoning Restrictions on Retail Marijuana Stores and Notifies All Retail Store Applicants.

In 2012, shortly after Initiative Measure No. 502 established a licensing program for retail marijuana businesses, one of Greensun's principals, Seth Simpson, leased premises in Bellevue. CP 823-44. At that time, the State Liquor and Cannabis Board ("LCB") had not determined how many and by what means marijuana licenses would be issued, nor had the City determined whether or how it would allow such

stores to locate within Bellevue.[2] Simpson formed a separate entity, Greentree Medical, intending to use the leased premises for a medical marijuana dispensary, began making improvements, and submitted a building permit application to the City for that purpose. CP 85-86, 94-95, 502. The building permit application was not approved because medical marijuana uses were not allowed in that land use district. CP 502.

In March 2014, the City passed interim zoning controls including a 1000 foot separation between marijuana retailers (the "1,000 Foot Separation"). CP 101-04. The LCB allocated four licenses for marijuana retail stores in Bellevue. CP 87. Because there were significantly more than four applicants for those licenses, the LCB established a lottery system for determining which four applications could be finalized. *See id.* The City notified all lottery applicants about the zoning controls, including the 1,000 Foot Separation. CP 87, 127.

On May 2, 2014, the LCB announced four lottery winners including applicant Par 4 LLC ("Par 4"), but not Greensun. CP 87. On May 21, Par 4 submitted a completed building permit application for its proposed retail marijuana use at a location within 1,000 feet of the premises leased by Simpson. CP 502-03. On June 5, the LCB notified the City that Greensun was selected as a lottery winner after the LCB

[2] *See* Op. Wash. Att'y General 2014 No. 2 at 8 (opining that municipalities may ban marijuana retailers outright).

disqualified one of the original winners. *See* CP 89-90, 133. On June 23, Greensun changed the Greentree Medical building permit application to cover Greensun's proposed retail marijuana use at the premises. CP 502.

B. The City Selects a Neutral Method to Enforce Its Zoning.

The City was faced with making zoning decisions about retail marijuana store locations for the very first time, including how to enforce the 1,000 Foot Separation where one applicant sought to locate within 1,000 feet of another applicant. The City initially considered applying the 1,000 Foot Separation based on completed building permits, as city staff explained in response to questions from Par 4, Greensun, and others in and around May 2014. *See* CP 847-48. Ultimately, however, the City decided not to use building permits because, among other reasons, doing so would force retail applicants to incur significant expenses before they knew whether the LCB would issue them a retail marijuana license. CP 848-49.

Instead, on June 24, 2014, the City notified all lottery participants that "the City shall consider the entity that is licensed first by the LCB to be the 'first-in-time' applicant" and the "issuance date for the letter serving as your 30-day marijuana license will determine which entity is" licensed first ("First in Time Determination"). CP 89-90, 139-40. The City selected this method, in part, because an LCB license was a necessary condition to locate in the City. *See, e.g.*, CP 762 (defining "marijuana

retailer" as "a person licensed by the state liquor and cannabis board"). The method also provided objective, neutral criteria that the City could apply equally to all applicants. *See* CP 89-90, 139-40, 849.[3]

On July 7, the LCB issued Par 4 a temporary license dated July 3, which was valid and never withdrawn. CP 473-75, 488. The LCB then published a list of issued licenses that included Par 4, but not Greensun. CP 91, 152-54. The LCB later issued two "corrected" temporary licenses to Par 4 dated July 7, both of which were issued before Greensun's license was issued later that afternoon. CP 476-85; *see also* CP 90-91, 145-47, 149-50, 165, 204-08, 417-22.

When the City notified Greensun that the LCB had issued Par 4's license first, Greensun asserted that Par 4's license was issued in error and notified the City that it had received its license at 3:04 pm on July 7. CP 91, 157-58, 160-62, 165, 193-202. To confirm precisely when the LCB issued the licenses, the City requested additional information. CP 164-66, 169-208. On July 29, the City sent Greensun a letter summarizing its finding that Par 4's letters were issued before Greensun's letter and LCB

[3] Importantly, there is no evidence in the record that the City selected the method to enforce the 1,000 Foot Separation in an attempt to deny Greensun a license. *See id.*; CP 430-31. When the City selected the method, the City did not know, and could not have known, whether Par 4 or Greensun would be first in time because both were among the four lottery winners selected by the LCB. *See* CP 89-90, 133, 139-40. Further, and contrary to Greensun's claims in this case, even if the City relied on completed building permits as initially contemplated, Par 4 would still have been first. *See* CP 849.

records indicated that Par 4's license was approved prior to Greensun's license.[4] CP 165-66, 210-13, 215. Based on the evidence provided by Greensun, Par 4, and the LCB, the City had no basis to overturn its original determination that Par 4, not Greensun, was first in time. *Id.*

C. Two Trial Courts Dismiss Greensun's Claims on Summary Judgment, But the Court of Appeals Reverses on Appeal.

In November 2014, Greensun sued the City for alleged violation of the Due Process and Privileges and Immunities Clauses, seeking declaratory and injunctive relief, which claims the trial court dismissed on summary judgment. CP 7-11, 1022-28. In an unpublished opinion, the Court of Appeals reversed on the ground that the First in Time Determination was adopted without formal rulemaking and remanded for further proceedings. *City of Bellevue v. Greensun Group, LLC*, 194 Wn. App. 1029, 2016 WL 3338073, at *8-9 (Div. I June 13, 2016) ("*Greensun* I"), *review denied*, 187 Wn.2d 1005, 386 P.3d 1083 (2017).

While Greensun's first appeal was pending, the City addressed the rulemaking issue by legislatively adopting the First in Time Determination as the method the City applies "[i]f two or more marijuana retail applicants seek licensing from the state and propose to locate within 1,000

[4] Although time of issuance may not make a difference for the LCB's purposes because the LCB uses the date for purposes of license renewal (the LCB considers licenses to be issued in "batches" for LCB purposes), the LCB confirmed that the licenses were issued at different times, that Par 4's license was issued first, and Greensun's own attorney agreed with that determination. *See* CP 489-92, 494.

feet of each other[.]" CP 763. This is the same method the City applied in determining that Par 4, not Greensun, was first in time. *See* CP 741-42.

Following remand, Greensun received leave to amend its complaint to add a claim against the City for millions of dollars in damages based on intentional interference with a business expectancy. *See* CP 1136-37, 663 (claiming net profits of about $2.6 million in 2015 and $3.8 million in 2016 at allegedly "similar" store in Des Moines). The City moved for summary judgment, as it had remedied the procedural error identified in *Greensun* I and Greensun did not establish any of the elements of a tortious interference claim, namely, (1) the existence of a valid contractual relationship or business expectancy; (2) that defendant had knowledge of the relationship or expectancy; (3) intentional interference by defendant with the relationship or expectancy; (4) an improper motive or use of improper means by defendant that causes breach or termination of the relationship or expectancy; and (5) resultant damage, *see Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006).[5] CP 685-716. Greensun filed a cross motion for partial summary judgment on liability. CP 629-55.

The trial court granted the City's summary judgment motion and denied Greensun's partial summary judgment motion. CP 912. The trial

[5] Washington courts have combined the elements of an intentional interference claim in different ways. *See* 16A Wash. Prac., Tort Law & Prac. § 23:2 (4th ed.).

court dismissed Greensun's intentional interference claim and entered a declaratory judgment that the City had remedied any prior failure to engage in rulemaking by legislatively adopting the First in Time Determination. *Id*. Greensun appealed dismissal of the tort claim, but did not assign error to the declaratory judgment on appeal. CP 913; Appendix A at *12 n.11.

The Court of Appeals affirmed in part, reversed in part, and remanded for trial on Greensun's intentional interference claim. *City of Bellevue v. Greensun Group, LLC*, __ Wn. App. __, 2019 WL 1010781, *12 (Div. I Mar. 4, 2019) ("*Greensun* II"). With regard to the intent element, the Court of Appeals held that Greensun only needed to show that the City "had the intent to do the interfering act"; no showing of wrongful intent was required. *Id*. at *8-9. The Court of Appeals further opined that evidence of good faith by the City was relevant only as an affirmative defense on which the City bore the burden of proof. *Id*. at *9 n.9. The Court of Appeals further held that evidence Greensun claimed showed arbitrary and capricious conduct by the City could be sufficient to show "improper means," again, regardless of motive or intent, and that unidentified prospective customers could constitute a business expectancy. *See id.* at *9-10, *6-7. The City now seeks review by this Court.

V. ARGUMENT

The Court of Appeals' formulation of intentional interference with a business expectancy improperly equates intentional tort liability with mistakes made in good faith. This exposes public entities to substantial damages claims simply because they make a decision later determined to be incorrect. *Greensun* II also contravenes the public duty doctrine, by subjecting public entities to liability even absent an individual duty.[6] For these reasons, *Greensun* II raises issues of substantial public importance and conflicts with this Court's precedent. On either or both of these independent grounds, this Court should grant review.

A. *Greensun* II Raises Significant Issues of Public Import.

Review should be granted under RAP 13.4(b)(4) because the Court of Appeals' published decision will greatly expand public entities' exposure to tort liability across the state. In turn, this subjects limited government resources to substantial damages awards, and compromises the ability of public employees to carry out their duties.[7]

Under the public duty doctrine, courts presume the government owes only an obligation "to the public in general (i.e., a duty to all is a

[6] For this reason, the impact of the decision is most significant when applied to public entities, although the expansion of the tort also would apply to private parties.

[7] This Court has noted both of these concerns as policy reasons underlying the public duty doctrine. *See* Jenifer Kay Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401, 403 (1989).

duty to no one)." *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (internal quotations and emphasis omitted). The doctrine shields the government from liability in negligence unless "the duty breached was owed to the injured person as an individual[.]" *Id.* (internal quotations omitted). Notably, Greensun did not attempt to assert a negligence claim in this case, much less establish that any of the exceptions to the public duty doctrine applied.

Intentional torts are exempt from the public duty doctrine, but that is because the intent component essentially substitutes for the showing of a duty owed to the individual plaintiff. *See, e.g., Vergeson v. Kitsap Cty.*, 145 Wn. App. 526, 544, 186 P.3d 1140 (2008) ("[I]f the facts here established a more egregious, willful action or inaction, such as a County employee having *intentionally* failed to remove a quashed warrant or having *intentionally* entered false information into a database, an injured plaintiff would not need to prove a duty specific to her." (emphasis in original)). Thus, an intentional interference claim requires, among other things, "purposely improper interference," as opposed to a good faith error. *Leingang*, 131 Wn.2d at 157.

The net result of *Greensun* II is to allow recovery for an alleged "intentional tort" without a showing of actual intent, upsetting the equilibrium this Court has established that allows government actors to

make necessary but difficult decisions, while still protecting against wrongdoing directed at a particular member of the public. *Greensun* II held that Greensun only was required to prove that the City intended to commit its actions, which had the effect of interfering with Greensun's business, and was not required to prove intentional and purposely improper interference. *Greensun* II, at *8-9. This formulation of the tort renders it akin to strict liability or, when coupled with the claim that the City's conduct was erroneous, to mere negligence. The Court of Appeals essentially absolved Greensun of proving the intent component of its intentional tort claim and shifted the burden to the City to prove that its actions were in good faith and justified.[8] *Greensun* II's relaxation of the requirement to prove intent and burden-shifting with respect to good faith will significantly impact the exposure of public entities to tort liability.

B. *Greensun* II Conflicts with Supreme Court Precedent.

Review is also warranted under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with multiple decisions of this Court

[8] By ruling that evidence of good faith is relevant only to an affirmative defense, the Court of Appeals created a state law tort modeled after heightened scrutiny, where the burden shifts to the government to prove its actions were legitimate. *See, e.g.*, *First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 246, 916 P.2d 374 (1996). Importantly, all constitutional claims in this case were dismissed, primarily because they were subject only to rational basis review. *Cf.* CP 1023, 1026-28. Good faith conduct is critical to determining whether a government actor intended an improper result, or was simply discharging duties in a manner that is later determined to have been incorrect. *See Pleas v. City of Seattle*, 112 Wn.2d 794, 802, 774 P.2d 1158 (1989).

regarding claims for tortious interference. Most significantly, the Court of Appeals erred in holding that "purposely improper" intent is not required; that good faith is relevant only as an affirmative defense; that conduct that is not wrongful could amount to "improper means"; and that unidentified customer relationships constitute an actionable business expectancy.

1. *Greensun* II conflicts with this Court's precedent regarding the "intent" element of tortious interference.

First and foremost, the Court of Appeals allowed an intentional tort claim to proceed without the requisite "intent." As this Court has held, an intentional interference claim requires "purposely improper interference." *Leingang*, 131 Wn.2d at 157; *see also Certification from the U.S. Court of Appeals for the Ninth Circuit in Centurion Props. III, LLC v. Chicago Title Ins. Co.*, 186 Wn.2d 58, 81, 375 P.3d 651 (2016) (holding that tortious interference is not "satisfied by simple negligence").

Because *Leingang* requires "purposefully improper interference," the mere intent to take neutral actions later determined to impact a plaintiff's contract or expectancy is not sufficient to create liability. 131 Wn.2d at 157. In *Leingang*, a motorist claimed his health care provider improperly interfered with his underinsured motorist ("UIM") policy by giving notice of a right to reimbursement to the UIM carrier, which resulted in the carrier depositing funds in court rather than paying them to

the motorist. *Id*. at 156-57. The Court rejected this tort claim, even though it was later determined that the provider had no right to the UIM proceeds. *See id*. The Court explained that the provider "was merely asserting an arguable interpretation of existing law." *Id*. at 157. That the provider intended the act at issue was not sufficient to give rise to liability.

In contrast, *Greensun* II eliminates the requirement that the intentional act at issue be "purposely improper," requiring only that a defendant "had the intent to do the interfering act." 2019 WL 1010781, at *9. Like the provider in *Leingang*, the City was merely applying a good faith interpretation of a newly enacted law, i.e., enforcement of a valid zoning restriction. Again, there is no evidence that the City intentionally (or even negligently) sought to interfere with Greensun's proposed retail store. *See supra* at n.3. *Greensun* II's refusal to consider the City's intent—as opposed to solely whether the City deliberately acted in some manner that affected Greensun—cannot be reconciled with *Leingang*.

Greensun II's analysis also effectively collapses the "intent" element with the separate "improper purpose or means" element where, as here, the plaintiff alleges only improper means. *See Greensun* II, 2019 WL 1010781, at *9. The "improper means" element is directed to the method by which the defendant acted, while the "intent" element is directed to why the defendant acted. *See Pleas*, 112 Wn.2d at 803-04.

The plaintiff must separately demonstrate intent, i.e., purposefully improper interference. *See Leingang*, 131 Wn.2d at 157. Otherwise, liability would arise any time a party intends to take some action that later turns out to be incorrect. Tortious interference does not sweep so broadly under this Court's precedent. *See, e.g.*, *Pleas*, 112 Wn.2d at 806 (noting that intentional tort liability deters public officials from "exercising their official powers in a blatantly biased manner to gain favor with a certain community group").

2. *Greensun* II conflicts with this Court's precedent by shifting the burden to demonstrate "good faith" to the defendant as an affirmative defense.

Greensun II also conflicts with this Court's decision in *Pleas* by improperly shifting the burden to prove "good faith" to the defendant as an affirmative defense. *See Greensun* II, 2019 WL 1010781, at *8-9 and n.9 ("[T]he analysis of intentional interference does not consider good faith. … However, … good faith conduct can support an affirmative defense.").

In *Pleas*, the Supreme Court rejected the premise that the issue of impropriety was solely an affirmative defense. *Id*. at 806. This was the rule under the Restatement (First) of Torts, which Washington courts had previously followed. *Id*. at 800-02. The Restatement (Second), however, shifted the burden to the plaintiff to demonstrate impropriety based on a multi-factor test, including the actor's conduct and intent and the social

utility of the conduct. *See id.* at 802 (citing Restatement (Second) of Torts §§ 766, 766B, 767 (1979)). This Court adopted a hybrid approach based on Oregon law, in which a plaintiff must establish that the inference is "'wrongful by some measure beyond the fact of the interference itself.'" *Pleas*, 112 Wn.2d at 804 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 209, 582 P.2d 1365 (1978)).

The Court of Appeals here retreated to the First Restatement test, "in which every intentional infliction of harm is prima facie tortious unless justified." *Pleas*, 112 Wn.2d at 802. *Pleas* held that "[t]his approach required too little of the plaintiff insofar as it left the major issue in the controversy—the wrongfulness of the defendant's conduct—to be resolved by asserting an affirmative defense." *Id.* Even under Oregon law, the genesis of the test in *Pleas*, "[t]he burden of proof rests with a plaintiff to show both that a defendant intentionally interfered with the plaintiff's economic relationship and that the defendant had no privilege to do so." *Nw. Nat. Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 498-99, 982 P.2d 1117 (1999).[9]

[9] "Most contemporary cases put the burden of proof [to demonstrate wrongfulness] where it normally is—on the plaintiff." Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, The Law of Torts § 620 (2d ed.) (compiling cases).

In sum, there was no basis for the Court of Appeals to shift the burden of proof to the City to prove that it acted in good faith, and doing so improperly relieved Greensun of the burden to prove wrongful conduct.

3. *Greensun* II conflicts with this Court's precedent regarding the type of conduct that constitutes improper means.

Greensun II also incorrectly determined that conduct that is not wrongful can constitute improper means. 2019 WL 1010781, at *9-10.

In *Pleas*, this Court defined the type of wrongful conduct that constitutes improper means. This Court held that a city used improper means when it "singled out Parkridge's project and applied its land use regulations in such a manner to block [the project]." *Id*. at 805-06 (noting that city "arbitrarily delayed this project"); *see also Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 560-61, 166 P.3d 813 (2007) (finding that arbitrary singling out and delay of project was improper means). The cities in *Pleas* and *Westmark* had duties to process pending permit applications, but singled out applicants and arbitrarily refused to do so to block their projects. *See Libera v. City of Port Angeles*, 178 Wn. App. 669, 677, 316 P.3d 1064 (2013) ("[I]n government delay cases [*Pleas* and *Westmark*] … proving improper means requires showing that the defendant arbitrarily singled out for delay a particular plaintiff or type of plaintiff."). In *Pleas*, the city's conduct was "wrongful" because the

city had a duty not to interfere. *Pleas*, 112 Wn.2d at 804 ("plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a duty of non-interference" (internal quotation omitted)).

Here, the Court of Appeals failed to identify an equivalent wrongful component to the City's conduct, much less the breach of a duty not to interfere with Greensun's proposed store. The City had foremost a duty to enforce its valid zoning ordinance equally as to all applicants. There is no evidence that the City arbitrarily singled out Greensun to prevent it from opening. Rather, the City sought to enforce the 1,000 Foot Separation as between two applicants, meaning only one applicant could open in its chosen location. The only actions labeled potentially arbitrary and capricious in *Greensun* II are that the City changed its mind about how it would enforce the 1,000 Foot Separation and that the City may not have chosen the best method for enforcing the separation. 2019 WL 1010781, at *9-10.[10] Such conduct does not and cannot rise to the level of

[10] While *Greensun* II suggests that Greensun presented evidence of potentially arbitrary and capricious conduct by the City, it fails to identify why the conduct was "willful and unreasoning, taken without regard to or consideration of the attending facts and circumstances surrounding the action." *Greensun* II, 2019 WL 1010781, at *9-10 (internal quotation omitted); *see also Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997) ("[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."). As this Court has held, failure to engage in formal rulemaking does not by itself rise to the level of arbitrary and capricious conduct. *See Hillis*, 131 Wn.2d at 297-99. The City selected a neutral method consistent with state law

improper means under *Pleas* where the City selected and followed a neutral method to enforce its zoning. 112 Wn.2d at 806 (improper means is "public officials exercising their official powers in a blatantly biased manner to gain favor with a certain community group" or "flagrant abuse of power").

4. *Greensun* II conflicts with this Court's precedent that a business expectancy requires identifiable third parties.

Finally, *Greensun* II expands the tort of intentional interference by holding that unidentified prospective customers create an actionable business expectancy. Under this premise, any time a city attempts to implement an ordinance, even in a new area of regulation, it can be liable in tort based on undefined future interests. This conflicts with this Court's (appropriate) rule that a plaintiff must identify existing relationships with identifiable third parties. *Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 352-53 and n.2 ("To show a relationship between parties contemplating a contract, it follows that we must know the parties' identities. [Plaintiff] must show a specific relationship between it and identifiable third parties."). In ruling otherwise, *Greensun* II relies solely on a Division III

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and the City's zoning ordinance, *see* RCW 69.50.354; CP 131, 89-90, 139-40, 463; gave advanced notice to all applicants of the method, *see* CP 89-90, 139-40; and fairly applied the neutral criteria based on the undisputed times when the LCB issued licenses to Par 4 and Greensun, *see* CP 473-85, 417-22. Although the City initially considered relying on building permit applications, the City had valid reasons for rejecting that approach and, given that Par 4 filed a complete building permit application for a retail marijuana store before Greensun, the change in methodology did not prejudice Greensun in any way. *See supra* at n.3.

case (since reversed on other grounds) that both predates *Pacific Northwest Shooting Park Association*, and does not identify any other Washington case specifically holding that unidentified prospective customers are an actionable business expectancy. 2019 WL 1010781, at *6 (citing *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 33 Wn. App. 201, 207, 653 P.2d 638 (1982), *rev'd*, 100 Wn.2d 343, 670 P.2d 240 (1983)).[11]

VI. CONCLUSION

The Court of Appeals' decision improperly expands intentional tort liability particularly for municipalities, in conflict with this Court's precedent, and raises an issue of substantial public importance. The City respectfully requests that this Court accept review, reverse the Court of Appeals, and affirm the correct decision of the trial court.

RESPECTFULLY SUBMITTED this 2nd day of April, 2019.

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[11] *Greensun* II also erred in its attempt to distinguish *Pacific Northwest Shooting Park Association* on the basis that it was limited to tortious interference with a contract. 2019 WL 1010781, at *7; *Pac. Nw. Shooting Park Ass'n*, 158 Wn.2d at 353 and n.2 (discussing "claim of tortious interference with a business expectancy"). In any event, the elements of the torts are the same, except a business expectancy can be established by identified "parties contemplating a contract, with at least a reasonable expectancy of fruition." *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971).

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 2nd day of April, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document (and Appendix A) upon the parties listed below:

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APPENDIX A

436 P.3d 397
Court of Appeals of Washington, Division 1.

GREENSUN GROUP, LLC, Appellant,
v.
CITY OF BELLEVUE, Respondent.

No. 77635-5-I
|
FILED: March 4, 2019

Synopsis

Background: Business brought action against city after it denied business a license to operate retail marijuana shop, claiming violations of the due process and privileges and immunities clauses of the state constitution and sought declaratory and injunctive relief. After the initial dismissal on summary judgment was reversed on appeal, 194 Wash.App. 1029, 2016 WL 3338073, and after business amended its complaint to claim tortious interference with business expectancy, the Superior Court, King County, No. 14-2-29863-3, Timothy A. Bradshaw, J., granted city's motion for summary judgment. Business appealed.

Holdings: The Court of Appeals, Chun, J., held that:

[1] issues of material fact as to elements of tortious interference claim precluded summary judgment, and

[2] issues of material fact as to whether city's conduct was privileged precluded summary judgment.

Affirmed in part, reversed in part, and remanded.

West Headnotes (43)

[1] Appeal and Error
De novo review

Appellate courts review de novo a trial court's grant of summary judgment.

Cases that cite this headnote

[2] Appeal and Error
Summary Judgment

A summary judgment order will be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Cases that cite this headnote

[3] Appeal and Error
Review using standard applied below

Appeal and Error
Summary Judgment

Reviewing courts conduct the same inquiry as the trial court on a motion for summary judgment and view all facts and their reasonable inferences in the light most favorable to the nonmoving party.

Cases that cite this headnote

[4] Torts
Prospective advantage, contract or relations;expectancy

A plaintiff must prove the following five elements to establish a prima facie case of tortious interference with a business expectancy: (1) the existence of a valid business expectancy, (2) that the defendant had knowledge of that expectancy, (3) an intentional interference inducing or causing termination of the expectancy, (4) that the defendant interfered for an improper purpose or used improper means, and (5) resultant damage.

Cases that cite this headnote

[5] Torts
Defense, justification or privilege in general

If a plaintiff establishes a prima facie case of tortious interference with a business expectancy, the defendant may demonstrate a privilege protecting its actions.

Cases that cite this headnote

[6] **Judgment**
Tort cases in general

Genuine issue of material fact as to whether business had valid business expectancy in operating retail marijuana store precluded summary judgment for city in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[7] **Torts**
Existence of valid or identifiable contract, relationship or expectancy

To establish a valid business expectancy, as required for a claim of tortious interference with business expectancy, courts require something less than an enforceable contract.

Cases that cite this headnote

[8] **Torts**
Existence of valid or identifiable contract, relationship or expectancy

A valid business expectancy, as required for a claim of tortious interference with business expectancy, includes any prospective contractual or business relationship that would be of pecuniary value.

Cases that cite this headnote

[9] **Torts**
Prospective advantage, contract or relations;expectancy

Courts allow tortious interference with business expectancy claims where a defendant's acts destroy a plaintiff's opportunity to obtain prospective customers.

Cases that cite this headnote

[10] **Torts**
Existence of valid or identifiable contract, relationship or expectancy

To show a valid business expectancy, as required for a claim of tortious interference with business expectancy, courts require a plaintiff to show only that its future business opportunities are a reasonable expectation and not merely wishful thinking.

Cases that cite this headnote

[11] **Judgment**
Tort cases in general

Genuine issue of material fact as to whether city had knowledge of business's expectancy in operating retail marijuana store precluded summary judgment for city in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[12] **Torts**
Knowledge and intent;malice

The defendant's knowledge of a business expectancy, as an element of a claim for tortious interference with business expectancy, requires only that the defendant knew of facts giving rise to the presence of the business expectancy.

Cases that cite this headnote

[13] **Torts**
Knowledge and intent;malice

The facts need merely show the defendant had awareness of some kind of business arrangement, to satisfy the knowledge element of a claim for tortious interference with business expectancy.

Cases that cite this headnote

[14] **Torts**
Knowledge and intent;malice

A defendant needs only to be aware of facts that suggest an expectancy existed, to satisfy the knowledge element of a claim for tortious interference with business expectancy; it is not necessary that the defendant understand the legal significance of such facts.

Cases that cite this headnote

[15] **Judgment**
Tort cases in general

Genuine issue of material fact as to whether city intentionally interfered and caused a breach of business's expectancy in operating retail marijuana store precluded summary judgment for city in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[16] **Torts**
Knowledge and intent;malice

A party intentionally interferes with a business expectancy if it desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.

Cases that cite this headnote

[17] **Judgment**
Tort cases in general

Genuine issue of material fact as to whether city used improper means to interfere with business's expectancy in operating retail marijuana store precluded summary judgment for city in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[18] **Torts**
Knowledge and intent;malice
Torts
Improper means;wrongful, tortious or illegal conduct

A claim for tortious interference with business expectancy can be established by demonstrating the defendant acted with improper motive, improper means, or both.

Cases that cite this headnote

[19] **Torts**
Improper means;wrongful, tortious or illegal conduct

Tortious interference through improper means arises from the defendant's use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships.

Cases that cite this headnote

[20] **Torts**
Improper means;wrongful, tortious or illegal conduct

To show improper means, as an element of a claim for tortious interference with business expectancy, the plaintiff must demonstrate the defendant had a duty not to interfere; to establish such a duty, the plaintiff may point to a statute, regulation, recognized common law, or established standard of trade or profession.

Cases that cite this headnote

[21] **Torts**
Improper means;wrongful, tortious or illegal conduct

When determining whether a party acted with improper means, in a claim for tortious interference with business expectancy, courts analyze the method by which the defendant interfered with the expectancy.

Cases that cite this headnote

[22] **Torts**
Improper means;wrongful, tortious or illegal conduct

Courts can consider a city's arbitrary and capricious actions as evidence of improper means, as an element of a claim for tortious interference with business expectancy.

Cases that cite this headnote

[23] **Torts**

Knowledge and intent;malice

Torts

Improper means;wrongful, tortious or illegal conduct

A court need not find that a defendant acted with ill will, spite, defamation, fraud, force, or coercion in order to find improper purpose or means, as an element of a claim for tortious interference with business expectancy.

Cases that cite this headnote

[24] Torts

Improper means;wrongful, tortious or illegal conduct

"Arbitrary and capricious," with respect to improper means element of tortious interference with business expectancy, refers to willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.

Cases that cite this headnote

[25] Torts

Improper means;wrongful, tortious or illegal conduct

Where there is room for two opinions, an action taken after due consideration is not "arbitrary and capricious," in context of examining improper means element of tortious interference, even though a reviewing court may believe it to be erroneous.

Cases that cite this headnote

[26] Judgment

Tort cases in general

Genuine issue of material fact as to whether business suffered damages by city's conduct in preventing it from operating retail marijuana store precluded summary judgment for city in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[27] Damages

Weight and Sufficiency

A party must prove a claim of damages with reasonable certainty.

Cases that cite this headnote

[28] Damages

Weight and Sufficiency

A party must produce evidence sufficient to support its claim of damages.

Cases that cite this headnote

[29] Damages

Weight and Sufficiency

Evidence of damages is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.

Cases that cite this headnote

[30] Judgment

Tort cases in general

Genuine issue of material fact as to whether city acted in good faith in preventing business from operating retail marijuana store precluded summary judgment for city and for business in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[31] Torts

Defense, justification or privilege in general

Good faith may privilege an interferor's actions and thereby serve as an affirmative defense to a claim for tortious interference with business expectancy.

Cases that cite this headnote

[32] Torts

Defense, justification or privilege in general

One who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference with business expectancy.

Cases that cite this headnote

[33] **Torts**

Burden of proof

The burden of proving privilege to protect against a claim of tortious interference with business expectancy rests with the defendant.

Cases that cite this headnote

[34] **Torts**

Defense, justification or privilege in general

That the interferor is reasonably mistaken about the law does not defeat the good faith privilege defense to tortious interference with business expectancy. Restatement (Second) of Torts § 773.

Cases that cite this headnote

[35] **Torts**

Defense, justification or privilege in general

An interferor may assert the good faith privilege defense to tortious interference with business expectancy based on an honest but incorrect belief.

Cases that cite this headnote

[36] **Torts**

Business relations or economic advantage, in general

In tortious interference with business expectancy cases, when there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the trier of fact.

Cases that cite this headnote

[37] **Judgment**

Tort cases in general

Genuine issue of material fact as to whether city acted in an arbitrary and capricious manner in preventing business from operating retail marijuana store precluded summary judgment for city, which was claiming discretionary immunity, in business's action for tortious interference with business expectancy.

Cases that cite this headnote

[38] **Municipal Corporations**

Discretionary powers and duties

After the abolition of sovereign immunity, courts still provide a narrow exception that immunizes high level discretionary acts exercised at a truly executive level. Wash. Rev. Code Ann. § 4.92.090.

Cases that cite this headnote

[39] **Municipal Corporations**

Duties absolutely imposed

Municipal Corporations

Discretionary powers and duties

Immunity for high level discretionary acts does not privilege ministerial or operational government acts.

Cases that cite this headnote

[40] **Municipal Corporations**

Discretionary powers and duties

States

Acts or Omissions of Officers, Agents, or Employees

A state or city is immune for high level discretionary acts only if it can show that the decision was the outcome of a conscious balancing of risks and advantages.

Cases that cite this headnote

[41] Municipal Corporations
Discretionary powers and duties

Immunity for high level discretionary acts does not protect a city from liability for their arbitrary and capricious acts.

Cases that cite this headnote

[42] Declaratory Judgment
Scope and extent of review in general

Plaintiff abandoned for appeal its argument that trial court erroneously granted defendant's request for declaratory relief, even though issue was raised in first assignment of error, where plaintiff did not provide argument challenging trial court's declaratory relief award in its briefing.

Cases that cite this headnote

[43] Appeal and Error
Points and arguments

A party abandons the assignments of error that it does not discuss in its appellate brief.

Cases that cite this headnote

Appeal from King County Superior Court, 14-2-29863-3, Honorable Timothy A. Bradshaw, J.

Attorneys and Law Firms

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PUBLISHED OPINION

Chun, J.

***1** ¶1 Greensun Group LLC (Greensun)[1] brought a claim against the City of Bellevue (the City) for tortious interference with business expectancy. We address whether the trial court properly dismissed the claim on summary judgment. In doing so, we discuss each element of the tort. And we discuss the affirmative defense of privilege.

[1] For clarity, this opinion refers to appellant as "Greensun" although the business also used its trade names in the events leading up to this case.

¶2 Upon passage of Initiative 502 (I-502) in 2012, the City issued a regulation prohibiting marijuana retail shops from being located within 1,000 feet of each other (the 1,000 Foot Separation). In 2014, the City denied Greensun a license to operate such a shop after determining the business planned to locate too close to another shop deemed "first-in-time."

¶3 Greensun then filed this action against the City, claiming violations of the due process and privileges and immunities clauses of the Washington State Constitution. The trial court dismissed the case on summary judgment. Greensun appealed. Because the City adopted its first-in-time rule without engaging in formal rule-making, this court invalidated it.

¶4 On remand, Greensun amended its complaint to claim tortious interference with business expectancy. On cross-motions for summary judgment, the trial court dismissed Greensun's claim and declared the City had remedied the rule-making issue identified in the first appeal.

¶5 Because genuine issues of fact exist as to the tortious interference claim, we affirm in part and reverse in part the trial court's order denying Greensun's motion for partial summary judgment and granting the City's summary judgment motion. We remand the case for trial.

I.

BACKGROUND

A. Facts

¶6 On November 6, 2012, Washington passed I-502. Laws of 2013, ch. 3 § 41. I-502, in part, legalized the possession of limited amounts of marijuana and directed

the Washington State Liquor Control Board (the LCB) to develop and implement rules to regulate and tax recreational marijuana retailers by December 31, 2013.

¶7 Greensun's managing members, Seth Simpson and David Ahl, leased a retail space at 10600 Main Street, Bellevue, Washington on November 29, 2012. They planned to open a retail marijuana shop there. As such, Greensun made several upgrades to the building. It intended to operate a medical marijuana business at the space until the LCB implemented the regulations for recreational marijuana. Greensun applied to the City for a building permit on January 8, 2013.

¶8 The City opposed Greensun's attempt to open a medical marijuana operation, claiming the proposed use violated Bellevue's Land Use Code (LUC). The City obtained injunctive relief prohibiting the opening of a medical marijuana facility at the location. Greensun then abandoned its plan to open a medical marijuana store. However, because it still planned to use the space for recreational marijuana, it extended its lease through June 30, 2016.

¶9 The LCB then opened the application process for retail marijuana licenses. Greensun applied. By March 1, 2014, the LCB had screened Greensun's application and listed it as one of 19 qualified applicants for licenses in Bellevue.

***2** ¶10 On March 17, 2014, the City adopted Ordinance 6156, which extended Ordinance 6133 B-1[2] for an additional six months and implemented a new restriction —the 1,000 Foot Separation. Under the restriction, no marijuana retailer could be located within 1,000 feet of any other marijuana retailer.

[2] Ordinance 6133 B-1 constituted the first ordinance to include interim zoning controls to regulate recreational marijuana. It did not contain a 1,000 foot separation requirement between retailers.

¶11 On April 2, 2014, the LCB announced it would process license applications "with geographic distribution and population density in mind." To this end, the LCB allocated a predetermined number of initial licenses for recreational marijuana stores to each jurisdiction. If the number of applicants in a jurisdiction exceeded its number of licenses, the LCB would use a lottery system to determine which applicants it would license. The LCB stated it expected to issue the initial retail licenses in "batches" during the first week of July 2014.

¶12 The LCB initially allocated four such licenses for Bellevue. Because 19 qualified applicants sought to open shops in Bellevue, the LCB held a lottery on May 2, 2014. Greensun ranked fifth. Two other applicants, Par 4 Investments LLC (Par 4)[3] and High Society, ranked in the top four.

[3] For clarity, this opinion refers to this retailer as "Par 4" although the company also used trade names in the events leading up to this case.

¶13 On May 7, 2014, the City e-mailed High Society about the 1,000 Foot Separation. It explained that "[a] retailer will 'lock down' their location upon submittal of a complete building permit application. This means that once we determine a building permit application complete for review that [sic] we will apply the 1,000 foot separation from that property."

¶14 On May 16, 2014, Par 4 applied for its building permit.

¶15 Greensun met with the City on May 19, 2014. At the meeting, it told the City the LCB would likely disqualify High Society's application because the business listed the wrong address. It asked how the 1,000 Foot Separation would be applied if Greensun became one of the four lottery winners. The City advised Greensun it would give priority to the applicant who first submitted a complete building permit application. Greensun mentioned it had submitted a complete application for 10600 Main Street in 2013. The City responded that the LCB had to have designated an applicant as a lottery winner to establish priority.

¶16 On May 21, 2014, the City made the determination that Par 4's building permit application was complete.

¶17 On May 27, 2014, a reporter from The Seattle Times asked the City about how it would enforce the 1,000 Foot Separation. The City responded that it "will consider the first retail applicant who submits a complete building permit as the 'first in,' against which the other applicants will be compared for conformance with the requirement."

¶18 Around the end of May 2014, Greensun applied to the City for a business license to operate a retail marijuana shop at 10600 Main Street. On June 3, 2014,

the City sent a letter to Greensun stating that it "can only approve a business license application for the four selected retailers." [4] The City denied the application.

[4] The "four selected retailers" refers to the four winners of the LCB lottery.

***3** ¶19 The City received Par 4's marijuana license application from the LCB on June 4, 2014. The City approved Par 4's proposed location at 10697 Main Street, but stated it "reserves all rights accorded under law to enforce violations of city ordinances and codes as exist now or as hereafter amended."

¶20 On June 5, 2014, the LCB notified Greensun that it became one of the four lottery winners because of High Society's disqualification. The LCB told the City about Greensun's new status on June 9, 2015.

¶21 In an email to High Society on June 11, 2014, the City stated that Par 4 had "locked down" their location for purposes of the 1,000 Foot Separation.

¶22 The City then determined it would not use the timing of building permit applications for the first-in-time test. The City deemed the method inequitable because the "[v]esting of a building permit had no connection to the Washington State Liquor Control Board's program." Instead, the City decided to tie the first-in-time determinations to when the LCB issued its licenses. The City did so without engaging in formal rule-making.

¶23 On June 24, 2014, the City informed applicants that "[i]n the event two or more retail marijuana applicants seek licensing from the LCB and are located within 1000 feet of another potential retail applicant, the City shall consider the entity that is licensed first by the LCB to be the 'first-in-time' applicant." The City detailed the application process, explaining that if the LCB approves an application, the applicant will receive a payment request for a $1,000 license fee. The City said, once the LCB receives the fee, it will send a conditional approval letter that acts as a 30-day marijuana license until the applicant receives a business license with the marijuana endorsement from the Washington State Department of Revenue Business Licensing Service. The City indicated the issuance date for the 30-day license would determine which applicant had priority for the purposes of the 1,000 Foot Separation.

¶24 The City approved Greensun's marijuana license application on June 25, 2014. The application listed 10600 Main Street as Greensun's address. As with Par 4, the approval notice provided that the City "reserves all rights accorded under law to enforce violations of city ordinances and codes as exist now or as hereafter amended."

¶25 On July 1, 2014, Greensun tendered payment of its license fee to the LCB.

¶26 On July 2, 2014, High Society obtained a temporary restraining order (TRO) against the LCB. The TRO prohibited the LCB from licensing retail marijuana applicants except for the four original lottery winners. The LCB then told Greensun it could not accept its license fee payment.

¶27 The same day, an LCB employee emailed the City a copy of High Society's complaint. The City responded, "[I]t sounds like if [the LCB] issue[s] a license for a Bellevue retail store on Monday, it likely would be to Par 4 Investments (based on the status of Novelty Tree, Happy Highway, and High Society)? Can you please confirm?" The LCB indicated that the City had assumed correctly.

¶28 Par 4 paid the license fee to the LCB on July 3, 2014.

¶29 The LCB issued the first batch of marijuana retailer licenses on July 7, 2014. Par 4 received its conditional approval letter from the LCB via email at 9:17 a.m. that day. The letter sent to Par 4 was misdated July 3, 2014. Upon receiving the letter from the LCB, Par 4's attorney e-mailed it to the City. The City replied, "Consistent with my letter to your client dated June 24, 2014, [Par 4] is first in time for purposes of application of the 1,000 foot separation requirement between retail marijuana outlets." At 1:08 p.m. that same day, the LCB issued Par 4 a corrected letter with the date changed to July 7, 2014.

***4** ¶30 The initial batch of licensed applicants omitted Greensun. However, later in the day on July 7, a court lifted High Society's TRO. The LCB emailed Greensun its conditional approval letter at 3:04 p.m. on July 7. The LCB then issued an updated list of the retail marijuana licenses to include Greensun. After the LCB

added Greensun to the list, counsel for Par 4 emailed the City asking if this affected its first-in-time status. The City responded it did not.

¶31 At 4:19 p.m. on July 7, Greensun received an email with a letter from the City attached. The letter provided that the City had deemed Par 4 first-in-time. Accordingly, the City told Greensun it may not open a marijuana retail store at 10600 Main Street. Greensun claimed the City incorrectly deemed Par 4 to be first-in-time because the LCB issued the conditional license dated July 3, 2014 in error.

¶32 The City then engaged in the following inquiries: Chad Barnes, an Assistant City Attorney for the City, contacted Assistant Attorney General Kim O'Neal, who represented the LCB. He did so "to better understand the timing of the conditional approval letters issued by the LCB." O'Neal informed the City "that the LCB currently takes the position that the July 3, 2014 letter received by [Par 4] was not the actual marijuana retail license." O'Neal clarified that "that the actual licenses were issued following the July 7, 2014 online notice." When asked if the LCB could determine which applicant it had licensed first, O'Neal "indicated that their system was not set up for such a query."

¶33 On July 11, 2014, the City sent letters to Par 4 and Greensun asking them to provide any information that may indicate whom the LCB had licensed first.

¶34 Counsel for Par 4 responded on July 14, 2014. Par 4 noted it placed first in the LCB lottery. It said it paid the license fee on July 3, 2014 and the LCB issued its conditional approval letter the same day. Par 4 also asserted it had received its initial conditional approval letter on the morning of July 7, 2014, and Greensun did not receive its letter until after the court lifted the TRO later in the day. Lastly, Par 4 stated it should be licensed because the City confirmed Par 4's status as first-in-time on July 7, 2014.

¶35 Greensun's attorney responded on July 21, 2014. Greensun pointed out it first applied for a building permit 18 months prior and thus had first-in-time status under the City's original method. It further contended the LCB had issued the July 3, 2014 letter to Par 4 in error because it had intended to issue all of the licenses simultaneously. Greensun argued the LCB issued both Par 4's and Greensun's licenses on July 7, 2014. Additionally, Greensun noted it "passed [its] final inspection first and [was] invoiced on July 1st prior to [Par 4]."

¶36 On July 29, 2014, the City informed Greensun via letter that it had "determined that [Par 4] was licensed by the LCB before [Greensun]. Consequently, [Par 4] is 'first-in-time' for the purposes of applying the separation requirements established in Ordinance No. 6156." The letter further explained the City's decision as follows:

> The City's decision is based on the fact that on July 3, 2014, the LCB sent [Par 4] a letter indicating it was approving [Par 4]'s marijuana retailer license and directed that the letter be posted as [Par 4]'s temporary permit. The LCB subsequently sent [Par 4] a revised temporary operating permit on July 7, 2014 at 1:08 pm.
>
> ...
>
> The City's decision is further supported by the LCB's records that indicated [Par 4's] license was approved on July 6, 2014. [Greensun's] license was not approved until July 7, 2014.
>
> ***5** ...
>
> The City will not grant [Greensun] a business license to operate a retail marijuana outlet at 10600 Main Street based on the separation requirement in Ordinance 6156.

¶37 The next day, July 30, 2014, the City's legal planner and assistant attorney emailed other city employees and directed them not to approve Greensun's license.

¶38 Par 4 opened its retail marijuana store on October 7, 2014.

B. Procedural History

¶39 Greensun filed a complaint against the City on November 3, 2014. The complaint alleged the City had violated the due process and privileges and immunities clauses of the Washington State Constitution and sought declaratory and injunctive relief. In the complaint, Greensun claimed it "would have been able to open its retail store in less than a week of [the LCB's] issuance of its license on July 7, if the City of Bellevue had issued its requested business license."

¶40 On May 20, 2015, the trial court granted summary judgment in favor of the City and dismissed Greensun's suit. The trial court ruled the City did not act in an arbitrary and capricious manner in denying Greensun a business license. Greensun appealed to this court.

¶41 On August 3, 2015, during the pendency of the first appeal, the Bellevue City Council engaged in formal rulemaking and passed Ordinance 6253 to legislatively adopt its first-in-time rule. The ordinance specified as follows:

> If two or more marijuana retail applicants seek licensing from the state and propose to locate within 1,000 feet of each other, the City shall consider the entity who is licensed first by the state liquor and cannabis board to be the "first-in-time" applicant who is entitled to site the retail use. First-in-time determinations will be based on the date and time of the state-issued license or conditional license, whichever is issued first.

¶42 On June 13, 2016, this court reversed the trial court's summary judgment order. City of Bellevue v. Greensun Group, LLC, No. 73646-9-I, 2016 WL 3338073 (Wash. Ct. App. June 13, 2016) (unpublished) https://www.courts.wa.gov/opinions/pdf/736469.pdf (Greensun I). The decision invalidated the first-in-time rule and related decisions because the City adopted the rule without engaging in rule-making procedures. Greensun I, No. 73646-9-I, slip op. at 15-17. This court remanded "for further proceedings consistent with" the opinion from the first appeal. Greensun I, No. 73646-9-I, slip op. at 18. Our Supreme Court denied the City's petition for review.

¶43 On February 14, 2017, Greensun moved for leave to amend its complaint. Greensun sought to "add a claim for monetary damages caused by the City of Bellevue's tortious interference with its business expectancy." The trial court granted Greensun's motion. Greensun filed its amended complaint on February 28, 2017.

¶44 The parties filed cross-motions for summary judgment. Greensun sought partial summary judgment on the issue of liability with respect to its claim for tortious interference. The City asked the court to dismiss Greensun's suit and to grant declaratory relief confirming it remedied the rule-making issue. On November 2, 2017, the court denied Greensun's motion, granted the City's motion, and dismissed Greensun's claims [5] with prejudice.

[5] Though the summary judgment motions and order focused on Greensun's tortious interference claim, the City also asked the court to dismiss any remaining constitutional claims and Greensun's request for declaratory relief if the court chose to revisit those claims after the first appeal. Greensun's current appeal concerns only its claim for tortious interference.

***6** ¶45 Greensun appeals.

II.

ANALYSIS

¶46 Greensun claims the trial court erred by entering summary judgment for the City and denying its motion for partial summary judgment. Greensun asserts that, as a matter of law, it establishes liability for its tortious interference with business expectancy claim. The City counters that Greensun fails to raise a material issue of fact as to any of the claim's elements.

[1] [2] [3] ¶47 Appellate courts review de novo a trial court's grant of summary judgment. Woods View II, LLC v. Kitsap County, 188 Wash. App. 1, 18, 352 P.3d 807 (2015). We will affirm a summary judgment order only "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Woods View II, LLC, 188 Wash. App. at 18, 352 P.3d 807. Reviewing courts conduct the same inquiry as the trial court and view all facts and their reasonable inferences in the light most favorable to the nonmoving party. Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wash.2d 342, 350, 144 P.3d 276 (2006).

[4] [5] ¶48 A plaintiff must prove five elements [6] to establish a prima facie case of tortious interference with a business expectancy. Pac. Nw. Shooting Park Ass'n,

158 Wash.2d at 351, 144 P.3d 276. Specifically, a plaintiff must show "(1) the existence of a ... [valid] business expectancy; (2) that [the defendant] had knowledge of that [expectancy]; (3) an intentional interference inducing or causing ... termination of the ... expectancy; (4) that [the defendant] interfered for an improper purpose or used improper means; and (5) resultant damage." Pac. Nw. Shooting Park Ass'n, 158 Wash.2d at 351, 144 P.3d 276. If a plaintiff establishes all five elements, the defendant may demonstrate a privilege protecting its actions. Commodore v. Univ. Mech. Contractors, Inc., 120 Wash.2d 120, 137, 839 P.2d 314 (1992). We address each element in turn.

6 More recently, our Supreme Court listed three elements for a prima facie case of tortious interference. See Elcon Const., Inc. v. E. Wash. Univ., 174 Wash.2d 157, 168, 273 P.3d 965 (2012) ("A claim of intentional interference requires (1) the existence of a valid contractual relationship of which the defendant has knowledge, (2) intentional interference with an improper motive or by improper means that causes breach or termination of the contractual relationship, and (3) resultant damage."). Because the tests contain essentially the same elements, we apply the five-element test, as do the parties.

A. Existence of a Business Expectancy

[6] ¶49 Greensun claims it "had a valid business expectancy in operating a retail marijuana store." The City asserts Greensun fails to prove this element because (1) the company did not identify a third party with which it would have had a business relationship had it opened its store; and (2) it did not have a right to open its store in violation of the City's LUC. We conclude Greensun raises a genuine issue of material fact as to this element.

[7] **[8]** **[9]** **[10]** ¶50 To establish a valid business expectancy, courts require something less than an enforceable contract. Scymanski v. Dufault, 80 Wash.2d 77, 83, 491 P.2d 1050 (1971). Instead, a "valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value." Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group. Inc., 114 Wash. App. 151, 158, 52 P.3d 30 (2002). Courts allow tortious Interference claims "where a defendant's acts destroy a plaintiff's opportunity to obtain *prospective* customers." Caruso v. Local Union No. 690, 33 Wash. App. 201, 207, 653 P.2d 638 (1982), rev'd on other grounds, 100 Wash.2d 343, 670 P.2d 240 (1983). Washington courts require a plaintiff to show only that its "future business opportunities are a reasonable expectation and not merely wishful thinking." Life Designs Ranch, Inc. v. Sommer, 191 Wash. App. 320, 337, 364 P.3d 129 (2015) (internal quotations and citations omitted); Woods View II, LLC, 188 Wash. App. at 30, 352 P.3d 807 (determining the plaintiff had an expectancy in a business development project that ultimately failed).

***7** ¶51 Greensun established that after Washington passed I-502, it leased a retail space in Bellevue in order to open a recreational marijuana store. Greensun made improvements to the store to prepare it for such use. Furthermore, the LCB issued Greensun a marijuana retailer license. The company made arrangements to acquire inventory and had staff available to begin operations. Greensun's plan to open a marijuana retail shop was not merely wishful thinking. It demonstrated a material issue as to its valid business expectancy.

¶52 The City's arguments to the contrary do not persuade us. The City cites Pac. Nw. Shooting Park Ass'n to argue a claim of tortious interference with a business expectancy requires the plaintiff to show a relationship with identifiable third parties. [7] But this argument appears to conflate the claim at issue with the closely related tort of interference with a contractual relationship. The Pac. Nw. Shooting Park Ass'n case concerned whether the plaintiff had a valid contractual relationship, rather than a valid business expectancy. Pac. Nw. Shooting Park Ass'n, 158 Wash.2d at 352-53, 144 P.3d 276. As Greensun alleges interference with a valid business expectancy, the case is inapposite here.

7 The City also cites two Division III cases, Hudson v. City of Wenatchee, 94 Wash. App. 990, 974 P.2d 342 (1999) and Evergreen Moneysource Mortg. Co v. Shannon, 167 Wash. App. 242, 274 P.3d 375 (2012), to support this proposition. We do not read Hudson to go so far as to require a plaintiff to prove it would have had a relationship with a specific prospective customer but for the defendant's interference. To be sure, such a requirement would conflict with well-established case law, which allows tortious interference claims for interference with *prospective* contractual or business relationships. See Scymanski, 80 Wash.2d at 83, 491 P.2d 1050; Life Designs Ranch, Inc., 191 Wash. App. 320 at 337, 364 P.3d 129; Caruso, 33 Wn. App. at 207, 653 P.2d 638. Likewise. Evergreen does not apply. In that

case, the plaintiff claimed the defendants improperly diverted its customers. 167 Wash. App. at 259, 274 P.3d 375. The court found the plaintiff did not have an expectancy because it could not demonstrate the defendant took any customers from it. 167 Wash. App. at 259, 274 P.3d 375.

¶53 The City also argues Greensun did not have a valid business expectancy because opening its store would have violated the LUC. But this argument dodges the underlying question of whether the City engaged in actionable conduct, which led to the first-in-time determinations at issue; and these determinations led to the City's denial of a license to Greensun based on the LUC. [8]

8 Also, the parties dispute whether Greensun's store would have violated the LUC's 1,000 Foot Separation requirement. While neither party disputes that the store locations were within 1,000 feet of one another, they dispute when a violation of the 1,000 Foot Separation requirement would occur: (1) when the City licensed two applicants with proposed locations within 1,000 feet of each other; or (2) when two marijuana shops actually opened within 1,000 feet.

¶54 Furthermore, the City does not cite legal authority to support its claim that a plaintiff must demonstrate an enforceable legal right to meet the first element. And case law runs contrary to such a claim. See, e.g., Scymanski, 80 Wash.2d 77 at 82-83, 491 P.2d 1050 (allowing a tort action for wrongful interference where the contract interfered with was not enforceable because it violated the statute of frauds).

¶55 In light of the foregoing, Greensun has presented sufficient evidence to raise a genuine issue as to whether it had a reasonable expectation of opening a recreational marijuana business at 10600 Main Street.

B. Knowledge of the Expectancy

***8** **[11]** ¶56 The parties next dispute whether the City had knowledge of Greensun's business expectancy. We determine Greensun raises a genuine issue of material fact as to this element.

[12] **[13]** ¶57 The second element of a tortious interference claim requires the defendant to have known of the plaintiff's business expectancy. Pac. Nw. Shooting Park Ass'n, 158 Wash.2d at 351, 144 P.3d 276. This element requires only that the defendant knew of facts giving rise to the presence of the business expectancy. Calbom v. Knudtzon, 65 Wash.2d 157, 165, 396 P.2d 148 (1964). The facts need merely show the defendant had "awareness of 'some kind of business arrangement.' " Woods View II, LLC, 188 Wash. App. at 30-31, 352 P.3d 807 (citing Topline Equip., Inc. v. Stan Witty Land, Inc., 31 Wash. App. 86, 93, 639 P.2d 825 (1982)) (finding the second element satisfied where the county knew of the plaintiffs business plans despite the later failing of those plans).

¶58 The City knew Greensun hoped to open a recreational marijuana shop in Bellevue. Greensun applied to the City for a building permit. The City knew the LCB lottery selected Greensun as one of the four lottery winners and it approved the intended location in the company's business license application. Greensun spoke with the City about the 1,000 Foot Separation on several occasions and the City asked it to submit evidence regarding which applicant was first-in-time.

[14] ¶59 The City asserts Greensun did not allege sufficient facts "as a matter of law to establish that the City knew its actions would terminate any identifiable relationship Greensun may have had." This, however, misstates the test. A defendant needs only to be aware of facts that suggest an expectancy existed, and "[i]t is not necessary that the [defendant] understand the legal significance of such facts." Calbom, 65 Wash.2d at 165, 396 P.2d 148. That the City knew of Greensun's plans to open a store suffices to raise a genuine issue of material fact as to whether the City knew of Greensun's expectancy.

C. Intentional Interference Inducing or Causing a Breach or Termination of the Expectancy

[15] ¶60 Greensun asserts it meets the third element because the City intentionally denied its business license. The City responds by contending the "good faith effort to enforce its LUC does not constitute intentional and improper interference." But the analysis of intentional interference does not consider good faith. We decide that Greensun raises a genuine issue of material fact as to the element of intentional interference.

[16] ¶61 A party intentionally interferes with a business expectancy if it "desires to bring it about or if he knows that the interference is certain or substantially certain to

occur as a result of his action." Newton Ins. Agency & Brokerage, Inc., 114 Wash. App. at 158, 52 P.3d 30.

¶62 On July 7, 2014, the City notified Greensun that Par 4 had first-in-time status and that Greensun could not open its retail marijuana store at 10600 Main Street. In a letter dated July 29, 2014, the City told Greensun, "The City will not grant [Greensun] a business license to operate a retail marijuana outlet at 10600 Main Street based on the separation requirement in Ordinance 6156." After the City determined it would not grant Greensun a license, the City's legal planner and assistant attorney emailed other City employees, telling them not to approve Greensun's license.

***9** ¶63 The City does not dispute that its actions interfered with Greensun's ability to open a retail marijuana store. Rather, the City argues it did not intentionally interfere because it acted in good faith. Whether the City acted in good faith, however, does not matter under this element, [9] which concerns only whether the defendant had the intent to do the interfering act. Accordingly, viewing the facts in a light most favorable to the Greensun, a genuine issue exists as to the third element.

9 However, as discussed below, good faith conduct can support an affirmative defense.

D. Interfered with Improper Means

[17] ¶64 Greensun claims the City acted with improper means by acting in an arbitrary and capricious manner. The City denies this. In Greensun I, we "decline[d] to address the more troubling claim by Greensun that the questionable first in time decision here constitutes arbitrary and capricious action by the City." No. 73646-9-I, slip op. at 17, n.13. We reach the question here. We conclude Greensun has presented sufficient evidence of arbitrary and capricious conduct to raise a genuine issue of material fact as to improper means. [10]

10 In light of this conclusion, we do not reach the question whether the City's failure to engage in formal rule-making constituted improper means.

[18] ¶65 A claim for tortious interference can be established by demonstrating the defendant acted with improper motive, improper means, or both. Pleas v. City of Seattle, 112 Wash.2d 794, 804-05, 774 P.2d 1158 (1989). Here, Greensun alleges only improper means.

[19] **[20]** ¶66 Tortious interference through improper means "arises from ... the defendant's ... use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." Pleas, 112 Wash.2d at 803-04, 774 P.2d 1158. To show improper means, the plaintiff must demonstrate the defendant had a duty not to interfere. Pleas, 112 Wash.2d at 804, 774 P.2d 1158. To establish such a duty, the plaintiff may point to a statute, regulation, recognized common law, or established standard of trade or profession. Libera v. City of Port Angeles, 178 Wash. App. 669, 676-77, 316 P.3d 1064 (2013) (citing Pleas, 112 Wash.2d at 804, 774 P.2d 1158).

[21] **[22]** **[23]** ¶67 When determining whether a party acted with improper means, courts analyze the method by which the defendant interfered with the expectancy. Wash. Trucking Ass'n v. Emp't Sec. Dep't, 192 Wash. App. 621, 651, 369 P.3d 170 (2016), rev'd on other grounds, 188 Wash.2d 198, 393 P.3d 761 (2017). Courts can consider a city's arbitrary and capricious actions as evidence of improper means. Pleas, 112 Wash.2d at 805, 774 P.2d 1158. "A court need not find that a defendant acted with ill will, spite, defamation, fraud, force, or coercion in order to find improper purpose or means." Libera, 178 Wash. App. at 677, 316 P.3d 1064.

[24] **[25]** ¶68 The City does not dispute that arbitrary and capricious conduct can serve as evidence of improper means. Instead, it argues it did not act in such a manner. Such conduct is defined as follows:

> Arbitrary and capricious refers to willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.

Singh v. Covington Water Dist., 190 Wash. App. 416, 424, 359 P.3d 947 (2015) (internal quotations and citations omitted).

¶69 In March 2014, the City decided to implement the 1,000 Foot Separation by creating a first-in-time rule. Throughout May, the City told applicants it would make the first-in-time determination based on which applicant first applied for a building permit. When Greensun informed the City it had submitted a complete application, a City employee stated the applicant first had to be designated as a lottery winner by the LCB. As early as June 11, 2014, the City stated Par 4 was first-in-time.

***10** ¶70 Roughly two weeks before the LCB issued the licenses, the City changed course and defined the first-in-time applicant as the one who first received a license from the LCB. The City decided on this method even though the LCB stated in April that it expected to issue licenses in batches. The City adhered to this method despite the inability of the LCB system to determine which applicant it had licensed first. As this court noted in Greensun I:

> The City's failure to notice the LCB's public announcement that "initial retail licenses will issued [sic] in batches (10-20) in most populous areas" (included Par 4 and Greensun) triggered a series of ad hoc City decisions intended to implement its unworkable first in time rule. As Drews later described it, "we did not issue a written policy about [the "lock down" rule]. We didn't publish it. We had to make decisions on the fly and—Well, that's probably not a good way to say it." The City's assistant attorney acknowledged licenses were issued in batches and the LCB's system was not set up to "determine which entity was actually first in time." Even the ultimate first in time winner, Par 4, complained to the City about its "illogical first in time rule":
>
> > The City's pursuit and reliance on the State's actual license 'issuance order' is illogical and a waste of time for all parties involved where those records likely do not exist.

No. 73646-9-I, slip op. at 15, n. 11 (internal citations omitted).

¶71 Moreover, although the LCB first issued Par 4 a license dated July 3, 2014, it told the City the license was not the actual marijuana retail license. The LCB confirmed it issued all of the licenses on July 7, 2014. Notwithstanding this information from the LCB, the City justified its determination that Par 4 was first-in-time "based on the fact that on July 3, 2014, the LCB sent [Par 4] a letter indicated it was approving [Par 4]'s marijuana retailer license." The City went on to say its "decision is further supported by the LCB's records that indicated [Par 4]'s license was approved on July 6, 2014." Both of these dates were incorrect as the LCB told the City it did not issue any licenses before July 7, 2014.

¶72 Viewing the evidence in the light most favorable to Greensun, there remains a genuine issue of material fact as to whether the City acted with improper means through arbitrary and capricious conduct.

E. Resultant Damage

[26] ¶73 The parties dispute whether the City's actions caused Greensun damages. The City argues Greensun cannot demonstrate it suffered damages and cannot prove the City proximately caused any such damages. We disagree.

[27] **[28]** **[29]** ¶74 A party must prove a claim of damages with reasonable certainty. Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wash. App. 702, 315 P.3d 1143 (2013). Thus, the party must produce evidence sufficient to support its claim. Mut. of Enumclaw Ins. Co., 178 Wash. App. at 715-16, 315 P.3d 1143. "Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." Mut. of Enumclaw Ins. Co., 178 Wash. App. at 716, 315 P.3d 1143.

¶75 Though Greensun asks to have a trial to determine the exact amount of its damages, it has produced sufficient evidence that it suffered damages when it could not open a recreational marijuana store. Greensun alleged it would have opened its store but for the City's refusal to issue it a business license. It submitted evidence that it would have been able to open its store within a week of receiving its license, and therefore lost profits from that time forward. To support this claim, Greensun points to the net profits of $2,577,614 in 2015, and $3,760,535 in 2016, generated by its licensed retail store in Des Moines. Simpson contends the Des Moines store is very similar to the store Greensun would have opened in Bellevue. Both spaces, he contends, are around 3,000 square feet, located on a major arterial, and have convenient customer parking. In another declaration, Simpson points to the LCB's published gross sales reported by each of its licensees. According to the LCB website, Par 4 reported $300,000 in gross sales for its first month of operation. Viewed in the light most favorable to Greensun, this evidence raises

a material issue of fact as to whether the company suffered damages as a result of the City's conduct.

F. Privilege

***11** ¶76 Once a plaintiff establishes all five elements of a tortious interference claim, the burden shifts to the defendant to demonstrate the interference was justified or the actions were privileged. Pleas, 112 Wash.2d at 805, 774 P.2d 1158. The City contends it established its actions were privileged as a matter of law. We disagree. We conclude the evidence presented raises material issues of fact.

1. Good Faith

[30] **[31]** **[32]** **[33]** ¶77 The City first claims its actions were privileged because it based its conduct on a good faith interpretation of the zoning ordinance. Good faith may privilege an interferor's actions and thereby serve as an affirmative defense to a tortious interference claim. Moore v. Commercial Aircraft Interiors, LLC, 168 Wash. App. 502, 511-12, 278 P.3d 197 (2012) (describing good faith as an affirmative defense); see, also, Singer Credit Corp. v. Mercer Island Masonry Inc., 13 Wash. App. 877, 884, 538 P.2d 544, 549 (1975) (describing good faith as a privilege). "It [is] well established that '[o]ne who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference.' " Brown v. Safeway Stores, Inc., 94 Wash.2d 359, 375, 617 P.2d 704 (1980) (quoting Singer Credit Corp., 13 Wash. App. at 884, 538 P.2d 544). The burden of proving privilege rests with the defendant. Pleas, 112 Wash.2d at 800, 774 P.2d 1158.

[34] **[35]** ¶78 That the interferor is reasonably mistaken about the law does not defeat the privilege. See Leingang v. Pierce County Med. Bureau, Inc., 131 Wash.2d 133, 930 P.2d 288 (1997); see, also, Restatement (Second) of Torts § 773 (1979). An interferor may assert the good faith privilege based on an honest but incorrect belief. See Restatement (Second) of Torts § 773 (1979).

¶79 As to the claim that it acted arbitrarily and capriciously, the City contends it acted in good faith because it sought to enforce its zoning laws by applying the 1,000 Foot Separation through a neutral method and offered to help Greensun find another location after it denied its license. It offers the following interpretation of the 1,000 Foot Separation requirement:

> Under the City's zoning ordinances, Greensun and Par 4 became "marijuana" retailers subject to the 1,000 [sic] Separation rule at the time the LCB issued them licenses. Thus, at the time Greensun received its marijuana license from the LCB, it was in violation of the 1,000 Foot Separation because the LCB had already issued a license [sic] Par 4 for a location within 1,000 feet of the Greensun's Premises.

¶80 However, as discussed above, the City's decision to use the timing of the LCB licensing for the first-in-time determinations was questionable. The City originally implemented a system where applicants would "lock down" a location based on building permit applications. It then abandoned that to instead link the first-in-time determinations to which applicant the LCB licensed first, even though the LCB stated it would issue the licenses in "batches." After the LCB informed the City that its system could not determine which applicant had been licensed first, the City asked the applicants to submit evidence as to who the LCB licensed first. This prompted even Par 4 to complain about the City's "illogical first in time rule." In Greensun I, we described the City's actions as "ad hoc" and "troubling." No. 73646-9-I, slip op. at 15, n. 11, and 17, n.13.

***12** **[36]** ¶81 Viewing the evidence in the light most favorable to Greensun, there is a material issue of fact as to whether the City acted in good faith. Likewise, when the evidence is viewed in the light most favorable to the City, there is a material issue of fact as to good faith. Accordingly, Greensun was not entitled to summary judgment as to liability. See C.L. v. Dep't of Soc. & Health Servs., 200 Wash. App. 189, 203-04, 402 P.3d 346 (2017). In tortious interference cases, "when there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the [trier of fact]." Quadra Enters., Inc. v. R. A. Hanson Co., Inc., 35 Wash. App. 523, 527, 667 P.2d 1120 (1983) (internal quotations and citations omitted) (addressing the good faith privilege in a tortious interference claim).

2. Discretionary Immunity

[37] **[38]** **[39]** **[40]** **[41]** ¶82 Second, the City argues its actions were privileged based on discretionary immunity. When the legislature passed RCW 4.92.090, it abolished sovereign immunity. Evangelical United Brethren Church of Adna v. State, 67 Wash.2d 246, 252, 407 P.2d 440 (1965). However, courts still provide a narrow exception that immunizes "high level discretionary acts exercised at a truly executive level." Chambers-Castanes v. King County, 100 Wash.2d 275, 281, 669 P.2d 451 (1983); Avellaneda v. State, 167 Wash. App. 474, 480, 273 P.3d 477 (2012). The immunity does not privilege ministerial or operational government acts. Taggart v. State, 118 Wash.2d 195, 214, 822 P.2d 243 (1992). Moreover, a "State [or City] is immune only if it can show that the decision was the outcome of a conscious balancing of risks and advantages." Taggart, 118 Wash.2d at 215, 822 P.2d 243; see, also, King v. City of Seattle, 84 Wash.2d 239, 246, 525 P.2d 228 (1974), overruled on other grounds by City of Seattle v. Blume, 134 Wash.2d 243, 947 P.2d 223 (1997) ("The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."). Put another way, the immunity does not protect a city from liability for their arbitrary and capricious acts. King, 84 Wash.2d at 247, 525 P.2d 228. As discussed above, Greensun raises an issue of material fact as to whether the City acted in an arbitrary and capricious manner. Accordingly, the City is not entitled to summary judgment on discretionary immunity grounds.

III.

CONCLUSION

[42] **[43]** ¶83 The trial court properly denied Greensun's summary judgment motion because issues of fact remain as to the City's liability. The trial court erred in granting the City's motion for summary judgment because Greensun has submitted evidence to raise genuine issues of fact as to the elements of a claim for tortious interference with business expectancy. We affirm in part and reverse in part the order denying Greensun's motion for partial summary judgment and granting the City's summary judgment motion. [11] We remand the case for trial.

11 Greensun's first assignment of error provides, "The King County Superior Court erred in granting the City of Bellevue's Cross-Motion for Summary Judgment, granting the City's request for declaratory relief, and dismissing all Greensun's claims for relief." However, Greensun does not make any argument regarding the trial court's declaratory relief award in its briefing. Greensun only states the formal rule-making conducted by the City after Greensun I does not retroactively cure its tortious interference. A party abandons the assignments of error that it does not discuss in its brief. Zabka v. Bank of Am. Corp., 131 Wash. App. 167, 174, 127 P.3d 722 (2005). Because Greensun does not provide argument challenging the trial court's declaratory relief award, it abandons the issue on appeal.

WE CONCUR:

Andrus, J.

Mann, J.

All Citations

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