

No. 93079-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON TRUCKING ASSOCIATIONS, 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,

Respondents,

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,

Petitioners.

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A. INTRODUCTION

The respondents Washington Trucking Associations (“WTA”) and various trucking companies (the “Carriers”) brought this lawsuit seeking redress for deliberate misconduct by ESD that included conducting rigged audits and deliberately assessing unlawful taxes, as part of an illegal interagency task force formed for political reasons in an improper effort to restructure the trucking industry.

The assessment of taxes in excess of ESD’s statutory authority was not simply an oversight. Rather, it was a calculated scheme premised on the assumption that the cost of challenging the inflated assessments would far exceed any eventual reduction. ESD thus foisted an impossible dilemma on the carriers: either pay unlawful taxes or pay even more in having those taxes set aside. As such, ESD could increase its revenues unlawfully, with any legal challenge rendered cost-prohibitive and therefore extremely unlikely. And, even if a Carrier undertook such a challenge, ESD presumed that it faced no downside because the administrative process provides no deterrence to illegal agency conduct.

WTA and the Carriers stated claims under 42 U.S.C. § 1983 and tortious interference with a business expectancy under the Washington common law. The Court of Appeals properly held that WTA and the Carriers could maintain an action for damages caused by ESD’s

assessments or audit procedures that are unrelated to the amount of the challenged assessment. The central result of this holding is simple: the law provides a remedy for taxpayers whose rights are deliberately trampled on by an administrative agency, and an agency has no immunity from § 1983 or state law liability merely because it is a taxing agency. A taxing authority may not use the comity doctrine to thwart judicial oversight.

B. STATEMENT OF THE CASE

The essential facts are appropriately outlined in the Court of Appeals' opinion. *See Washington Trucking Ass'ns v. State*, 192 Wn. App. 621, 369 P.3d 170 (2016). Because this case was dismissed by the trial court on ESD's CR 12(b)(6) motion, this Court reviews that dismissal *de novo*.¹ For purposes of review, the following core facts, pleaded in the second amended complaint and the provided hypothetical facts must be accepted as *true*:

¹ For purposes of such review, ESD was required to show, "beyond a reasonable doubt," that WTA and the Carriers could not "prove 'any set of facts which would justify recovery.'" *Futureselect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 962–63, 331 P.3d 29 (2014) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)). The Court must assume the truth of all factual allegations in the complaint and also to take into account hypothetical facts supporting the claim. *Id.* In addition to the complaint allegations, CP 461-76, WTA and the Carriers submitted to the trial court a 23-page set of "hypothetical facts" which could be relied upon in considering the motion to dismiss. *See* CP 479–502.

- ESD's audits² 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" in order to strong-arm the industry into submission, knowing that the cost of challenging the assessments would invariably exceed the assessment amounts;
- 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;
- 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 461-502.³

² ESD targeted the trucking industry, subjecting hundreds of trucking firms to such "audits." CP 490.

³ These allegations were not simply invented. The facts alleged in the complaint were largely revealed during discovery in the Carriers' administrative appeals. ESD obstructed more in-depth discovery into this issue, however, claiming that its methods and motives behind the audits were irrelevant in the administrative process. The improprieties uncovered in this process were so egregious that expert witnesses, including the former State Auditor, Brian Sonntag, opined that ESD failed to conform to even the most basic standards expected of state agencies. *See* CP 517-45, 571, 629-36.

C. SUMMARY OF ARGUMENT

When the factual allegations in the WTA/Carriers' complaint and the attendant statement of hypothetical facts are taken as true, as this Court must do on review of a CR 12(b)(6) dismissal, the trial court erred in dismissing the WTA/Carriers' 42 U.S.C. § 1983 and state law tortious interference claims.

WTA/Carriers stated claims against ESD under § 1983 in light of well-recognized authorities of this Court and the Ninth Circuit. Neither the federal Tax Injunction Act, 28 U.S.C. § 1341, nor principles of comity foreclose WTA/Carriers' federal law claims because ESD's administrative process does not afford them a remedy for the violations of their constitutional rights occasioned by ESD's misconduct.

WTA/Carriers also stated claims against ESD, unaffected by either the TIA or comity, under Washington's well-established common law tort of interference with business relationships.

WTA had associational standing to raise both § 1983 and tortious interference claims here.

D. ARGUMENT

Sonntag described the administrative appeal available in such cases as "cold comfort" to the taxpayer. He explained that taxing authorities have a duty to perform audits in good faith with the goal of obtaining the correct result at the audit stage. According to Sonntag, no taxpayer should be required to go through the expense and burden of an appeal because the agency did not conduct a proper audit.

(1) WTA/Carriers Stated a Claim Against ESD under 42 U.S.C. § 1983

(a) § 1983 Jurisprudence

The Court of Appeals' decision correctly holds that there are repercussions for abusive, bad faith actions by a taxing authority. It is well-established that agencies like ESD must exercise their expansive taxing and auditing authority in *good faith*. *Dep't of Revenue v. March*, 25 Wn. App. 314, 319, 610 P.2d 916 (1979); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 313-14, 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).

Well-developed law from this Court and other jurisdictions holds that the courts will remedy abusive or arbitrary conduct by government officials under 42 U.S.C. § 1983. Section 1983 is a broadly remedial statute. *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991). In *Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010), this Court allowed claims for due process violations and tortious interference where Board of Pharmacy officials allegedly conducted improper investigations resulting in suspension of a pharmacist's license.

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. *Id.* at 344. This resulted in the Board 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 354.⁴

A pattern of illicit enforcement activity by a public agency also constitutes an 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, the culmination of which was a 2007 warrantless stop of the Tarabochias' car on a state highway by

⁴ Parties have a constitutional right not to be subjected to criminal charges on the basis of false evidence fabricated by the government. *Deveraux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001); *McSherry v. City of Long Beach*, 584 F.3d 1129 (9th Cir. 2009), *cert denied*, 562 U.S. 829 (2010); *Arden v. Kastell*, 553 Fed. Appx. 697, 2014 WL 265685 (9th Cir. 2014); *Bradford v. Scherschligt*, 803 F.3d 382 (9th Cir. 2015). 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).

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 the Tarabochias' Fourth Amendment rights, and the defendants were not entitled to qualified immunity.

These cases illustrate the breadth of § 1983 protection to citizen rights against government agency abuses.

(b) The TIA and/or Comity Does Not Preclude WTA/Carriers' Claims

In holding that the Carriers can maintain a claim under 42 U.S.C. § 1983, the Court of Appeals relied on established precedent from this Court and the U.S. Supreme Court, rejecting ESD's contention that the TIA or comity preclude the availability of § 1983's broad remedies to WTA/Carriers. Rather, the rule is well-settled that the TIA and comity apply *only* when state law provides an adequate remedy. *See WTA*, 192 Wn. App. at 645 (citing *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 589, 592, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995)).⁵

⁵ Moreover, the TIA is not designed to prevent state court jurisdiction over claims for wrongful conduct by state taxing authorities. *Dennis, supra*. There, 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 Court rejected any effort to confine federal rights, privileges, or

The Court of Appeals carefully analyzed the complaint and concluded that the Carriers raised some claims which could be remedied in the state administrative process and others for which the state process provides no remedy. *Id.* at 646-50. The court concluded that the § 1983 claim is barred as to those claims for which there is a remedy, but not for those that the administrative process cannot address. *Id.*

The opinion is firmly rooted in the case law, which holds—unsurprisingly—that where state law cannot address a claim’s merits, the remedy is not adequate. *See Hillsborough v. Cromwell*, 326 U.S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946). In a case cited by ESD, *Carrier Corp. v. Perez*, 677 F.2d 162, 165 (1st Cir. 1982), the First Circuit held that an adequate remedy must include “an opportunity to raise the desired legal objections with the eventual possibility of Supreme Court review of that claim.” *Carrier*, 677 F.2d at 165. While finding the remedy adequate in the case before it, the court distinguished *Hillsborough*, in which the procedural criteria were not adequate. The remedy in *Hillsborough* was inadequate because: (1) “the state board of tax appeals could not pass upon constitutional questions”; and (2) the state law in question “apparently would not allow a taxpayer to raise a federal ‘equal protection’ claim in a

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 actions.

suit to lower his own taxes.” *Carrier*, 677 F.2d at 166.⁶

Here, the Court of Appeals observed that the administrative process under state law has authority only to correct the amount of the assessment. *WTA*, 192 Wn. App. at 648-49. The court noted further that the complaint allegations here involve conduct that violated the taxpayers’ rights regardless of whether the assessments were valid. *Id.* Because correction of the assessment amount would not provide any redress for these violations, the court properly concluded that the remedy at state law, as to those claims, is not adequate. Moreover, at ESD’s urging, the administrative process can be manipulated to exclude evidence of wrongdoing as “not relevant,” limiting appellate review to the record or at best, more proceedings, when the aim is to litigate ad infinitum in the administrative process to financially exhaust taxpayers so ESD can have its way with them.

ESD *grossly* mischaracterizes the Court of Appeals’ opinion when it claims that “Washington now stands alone in finding a state law remedy inadequate because it does not afford the same type of relief as § 1983.” Pet. at 10-11. The Court of Appeals did not base its decision on the lack of § 1983 relief. It based its decision on the fact that the administrative

⁶ ESD offers a red herring when it argued in its petition at 10-12 that other courts have found APA-type remedies adequate. That such a remedy might have been adequate for some other party’s claim in some other context is not material to whether the administrative remedy is adequate for the particular claims raised here.

process provides *no relief* for the type of impropriety alleged here, as the Court of Appeals documented. *See WTA*, 192 Wn. App. at 184.

This conclusion is well supported by the case law, both in Washington and around the country.⁷ In *Patel v. City of San Bernardino*, 310 F.3d 1138 (9th Cir. 2002), for example, the city continued to collect a tax pending appellate review of a trial court decision declaring the tax unconstitutional. The Ninth Circuit allowed the taxpayer to pursue a § 1983 claim for damages caused by the knowing imposition of unlawful taxes. *Id.* at 1142. The court relied on U.S. Supreme Court authority holding that “uncertainty regarding a State’s remedy may make it less than ‘plain.’” *Id.* (quoting *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 516–17, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981)). *See also, Hibbs v. Winn*, 542 U.S. 88, 107–08, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004) (an adequate remedy is one that is plain, speedy, and efficient). This Court, likewise, has allowed a plaintiff to proceed under § 1983 against a taxing authority that enforced a tax it knew to be invalid. *See Sintra*, 119 Wn.2d at 24.

More recently, in *Johnson*, the Court of Appeals held that an administrative process that prevents a party from asserting a valid defense

⁷ *See, e.g., Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765 (1992); *Hillsborough*, 326 U.S. at 624; *Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2014).

violates that party's procedural due process rights. In the underlying case, the hearing examiner refused to consider a homeowner's "legal nonconforming use" defense to a land-use violation because, under the city code, only the Department could make this determination. *Johnson*, 184 Wn. App. at 21. Citing *Sintra*, the Court of Appeals therefore allowed the homeowner to maintain a § 1983 claim against the city. *Id.* at 22. These cases provide ample authority for the Court of Appeals' decision here that there is no adequate remedy in an administrative process that cannot address the merits of a claim.

ESD attempted in its petition to fabricate a broad-sweeping rule that the "adequate remedy" analysis is limited solely to a review of the procedures available. According to ESD, as long as the procedure is adequate, the remedy is as well, *regardless of whether the process can address the claim's merits*—in other words, its ends justify egregiously unconstitutional means.

ESD's argument is absurd on its face. A federal court recently described it as an "extreme position" that is "based on a vast misreading of the case law." *Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez*, 174 F. Supp. 3d 585, 635 (D. P.R. 2016), *aff'd*, 834 F.3d 110 (1st Cir. 2016). This argument, the district court explained, "might seem plausible at first blush" only by "reading certain excerpts of case law out of

context.” *Id.* The court concluded that “procedures are sufficient only insofar as they lead to their desired effect.” *Id.* (citing *Rosewell*, 450 U.S. 503).⁸

That “extreme position” is the foundation for ESD’s petition: an imaginary rule that in analyzing the adequacy of a state’s remedy the courts cannot consider whether the remedy allows a claim to be considered on its merits. The Court of Appeals’ rejection of this absurd argument is consistent with the U.S. Supreme Court’s pronouncement that 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*, 498 U.S. at 443.

(2) WTA/Carriers State Claims Against ESD for Its Improper Motive and Means in Interfering with the Carriers’ Business Expectancies

The Court of Appeals allowed the Carriers to proceed with their claim for tortious interference. Again, the court’s thorough analysis was

⁸ Consistent with this analysis, *every* case cited by ESD on this point recognized that the “adequate remedy” could at least address, on the merits, the allegation that the plaintiffs’ federal rights had been violated. *See, e.g., Francis v. City of Columbus*, 676 N.W.2d 346, 352 (Neb. 2004) (“a claim that a special tax assessment violates the federal Constitution can be raised *and adjudicated*” under Nebraska’s tax refund statute (emphasis added)); *Gen. Motors Corp. v. City of Linden*, 671 A.2d 560, 566 (N.J. 1996) (“New Jersey law provides several opportunities for taxpayers to raise constitutional objections to an added assessment”); *California v. Grace Brethren Church*, 457 U.S. 393, 415–16, 102 S. Ct. 2498, 2511, 73 L. Ed. 2d 93 (1982) (taxpayer could “seek a judicial determination of the constitutionality of the tax,” with the state taxing authorities being expected to respect the court’s holding in future proceedings if the taxpayer prevails); *Rosewell*, 450 U.S. at 514–15 (respondent had not alleged any procedural defect “that would preclude preservation *and consideration* of her federal rights” (emphasis added)).

grounded in this Court's jurisprudence. The elements for tortious interference are well-settled and permit a plaintiff to seek redress for tortious interference where the defendant interferes with a business expectancy for an improper purpose or by improper means. *WTA*, 192 Wn. App. at 650-56 (citing *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965 (2012)).

ESD offered two arguments in its petition in opposition. The first is barred by judicial estoppel. The second improperly asks the courts to adjudge facts on a Rule 12 motion.

(a) ESD's Means or Purpose Could Not Be Reviewed in the Administrative Process

ESD's first argument is based on the Employment Security Act's exclusive-remedy provision, which states that its remedies "for determining the justness or correctness of assessments" are exclusive. RCW 50.32.180. According to ESD, this provides a remedy for tortious interference because any improper purpose or means would be included in a challenge to the "justness" of the assessment.

This argument is remarkable for its brazen conflict with ESD's insistence, throughout years of litigation, that its means and purposes are irrelevant. For example, ESD argued as follows in respondent System-TWT Transport's administrative appeal:

In essence, System-TWT attempts to attack the investigation rather than the assessment, but the purpose of this de novo review is to determine the correctness of the assessment. . . . Courts cannot, and should not, undertake a probe of the mental processes utilized by an administrative officer in performing his or her function of decision. . . . Under RCW 50.32.050, in an appeal from a tax assessment, the appeal tribunal “shall affirm, modify or set aside the notice of assessment.” It is the assessment, and not the audit, that is on review here.

Department’s Response to Appellant’s Hearing Brief upon Stipulated Facts, filed in *In the Matter of System-TWT Transport*, OAH Dkt. No. 122014-00336 at 6.⁹

Subsequently, ESD’s attorney argued at respondent Haney Truck Line, Inc.’s administrative hearing that the ALJ could not provide a remedy *even for arbitrary and capricious conduct*:

MR. PETERSON: *I don’t think that whether the audit was done in an arbitrary and capricious is really the issue for this tribunal to be deciding.* This tribunal is deciding whether the assessment is correct. So not every perceived legal wrong has a remedy.

And the carrier seems to be complaining about the way in which the department conducted its audit. I don’t believe that this relates to the correctness of the assessment, based on the reasons described in the department’s briefing and in argument today.

Transcript of Oral Argument on Stipulated Facts before Juliana K. Weber, ALJ, June 30, 2015, *In re Haney Truck Line, Inc.*, OSH Dkt. No. 122014-

⁹ The excerpts cited in this section from ESD’s arguments in the administrative process were attached as appendixes to WTA/Carriers’ March 18, 2016 response to ESD’s Motion for Reconsideration at the Court of Appeals.

00340 at 91–92 (emphasis added).

On March 10, 2016, twelve days *after* raising the present argument in its Motion for Reconsideration at the Court of Appeals, ESD restated these arguments in detail in Spokane County Superior Court:

The issue here is whether the assessment is in accord with the Employment Security Act, not whether the Department complied with the audit procedures Hatfield would have preferred. . . . In the proceeding below, Hatfield was afforded the opportunity to challenge the correctness of the assessment *The audit conduct and auditor’s compliance with the Department’s audit standards does not bear on whether the assessment is correct, nor whether the Commissioner properly considered its correctness.*

...

Furthermore, under RCW 50.32.050, in an appeal from a tax assessment, the appeal tribunal “shall affirm, *modify or set aside the notice of assessment.*” *The purpose of this de novo review is to determine the correctness of the assessment. . . . Courts cannot, and should not, undertake a probe of the mental processes utilized by an administrative officer in performing his or her function of decision. . . . Hatfield’s attempt to focus on the conduct of the audit, rather than on the correctness of the assessment, is misguided.*

...

*The Court should ignore Hatfield’s misguided effort to focus on the investigation rather than the correctness of the assessment.*¹⁰

Respondent’s Brief, filed in *Hatfield Enterprizes, Inc. v. State of Washington Employment Security Department*, Spokane County Superior

¹⁰ The Hatfield case is a graphic example of ESD misconduct in that the auditor testified that he was ordered by his superiors to assess taxes on payments for equipment not allowed by Title 50.

Court, March 10, 2016 at 41–47 (emphasis added).

Having so insisted, ESD is judicially estopped from arguing that the administrative process provides a remedy for improper means or motive. See *In re Estate of Hambleton*, 181 Wn.2d 802, 833, 335 P.3d 398 (2014) (judicial estoppel “precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position”) (quoting *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861 n.5, 281 P.3d 289 (2012)).

In the alternative, the Court could not accept ESD’s new argument without also holding that the administrative process provides a remedy for any improper means or motive by ESD in issuing the assessments. The Employment Security Act’s remedies are limited to affirming, modifying, or setting aside the assessment. RCW 50.32.050. As such, if the Court agrees with ESD it must hold that administrative tribunals have authority to set aside any assessments that they find were tainted by improper means or motive.

(b) The Carriers Had a Valid Claim for Tortious Interference

ESD’s second argument on tortious interference essentially faults the Court of Appeals for not deciding issues of fact on a CR 12(b)(6) motion. ESD argues that the court should have decided as a matter of law

that there was no interference with the Carriers' business expectancies and nothing improper in ESD's actions. The Court of Appeals properly declined the invitation to act as the fact finder. 192 Wn. App. at 655-56.

Under WTA/Carriers' allegations, which must be taken as true, ESD did not discharge its duties properly. Those allegations were that ESD *deliberately* assessed unlawful taxes, *knowing* that the cost to challenge them would exceed the amount saved by correcting them. ESD thus gambled that economics would force the Carriers to pay the unlawful taxes and that, even if they challenged the taxes, the administrative process could impose no negative repercussions for ESD's illegal activity.

The complaint also alleges that ESD engaged in unauthorized interagency action and that its motive in targeting trucking was to restructure the industry, a purpose that is directly prohibited by federal law. *See* 49 U.S.C. § 14501(c).

This case resembles *Pleas v. City of Seattle*, 112 Wn.2d 794, 744 P.2d 1158 (1989) in addressing the second element of the claim. This 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 a defendant is a public entity, improper means can be established with evidence that it 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.

Similarly, in *Sintra*, this Court specifically determined that a government's improper use of its taxing power can amount to tortious interference. 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. 119 Wn.2d 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.

The Court of Appeals correctly held that dismissal of the case, before WTA and the Carriers have been able to explore ESD's misconduct through discovery, was premature.

(3) WTA Has Associational Standing

Likewise, the Court of Appeals' holding as to associational standing is well grounded in this Court's precedent, as set forth in *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 215–16, 45 P.3d 186 (2002). There, this Court held that an association can seek damages on behalf of its members that are “certain, easily ascertainable, and within the knowledge of the defendant.” *Id.* Here, the Court of Appeals explained that, at this nascent stage, where the precise remedies sought under § 1983 are not clear from the complaint, it was premature to decide that the remedies do not meet the *Int'l Ass'n of Firefighters* standard. *WTA*, 192 Wn. App. at 639-41.

ESD attempted in its petition to fabricate an error by pointing to the Court of Appeals' denial of associational standing to assert tortious interference. According to ESD's logic, this result somehow compels the same result as to § 1983. ESD's argument ignores the obvious point that the two types of claims provide different types of remedies.

A claim for punitive damages under § 1983, for example, would focus on the reprehensibility of ESD's conduct and its financial condition. *See Morgan v. Woessner*, 997 F.2d 1244, 1256–57 (9th Cir. 1993). Because these two factors are within ESD's knowledge, this type of damage claim can be calculated without extensive participation by WTA's individual members. The Court of Appeals thus correctly held that it was

premature to deny WTA associational standing on this claim.¹¹

(4) WTA/Carriers Are Entitled to Fees under 42 U.S.C. § 1983

WTA/Carriers are entitled to an award of fees under 42 U.S.C. § 1983 if they prevail on their § 1983 claims. *WTA*, 192 Wn. App. at 656; RAP 18.1.

E. CONCLUSION

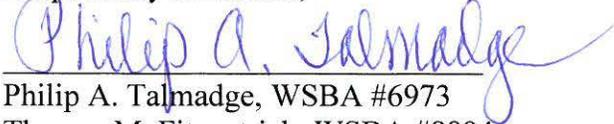
In this review of the trial court's CR 12(b)(6) decision, it is clear that ESD engaged in illegal conduct by deliberately misusing its taxing power against the Carriers for bad faith motives and deliberately imposed illegal taxes. The Court of Appeals' decision properly rejected ESD's attempt to remove its misconduct from any sort of judicial scrutiny. This common-sense holding is amply supported by controlling decisions of this Court.

This Court should affirm the Court of Appeals decision and award costs on appeal, including reasonable attorney fees, against ESD.

¹¹ Although ESD's standing arguments below were based on the difficulty of calculating damages, it listed (in a footnote in its petition at 15) several ways in which member participation might be required to prove liability. But the mere fact that members may need to participate as witnesses is not fatal to associational standing. See *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 312 P.3d 665 (2013), *review denied*, 180 Wn.2d 1007, 320 P.3d 718 (2014).

DATED this 2d day of December, 2016.

Respectfully submitted,



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APPENDIX

WESTLAW

Review Granted by Washington Trucking Associations v. State, Wash., September 29, 2016

Original Image of 369 P.3d 170 (PDF)

Washington Trucking Ass'ns v. State 192 Wash.App. 621
 Court of Appeals of Washington, Division 2. ~~Courtesy of Westlaw~~ 369 P.3d 170 Unempl.Ins.Rep. (CCH) P 9060 (Appellate) 20160929

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; Melissa Hartung, a single individual, individually and in her official capacity; Alicia Swangwan, a single individual, individually and in her official capacity; Respondents.

No. 47681-9-II.
 Feb. 9, 2016.

Synopsis

Background: Trade association and six trucking carriers brought action against Employment Security Department (ESD) and various ESD employees, asserting several causes of action based on the process by which ESD had allegedly targeted carriers for audits and reclassified owners and operators as carrier employees warranting imposition of additional unemployment tax assessments upon carriers. The Superior Court, Thurston County, *Carol A. Murphy, J.*, dismissed action. Plaintiffs appealed.

Holdings: The Court of Appeals, *Maxa, J.*, held that:

- 1 association lacked individual standing to assert civil rights claims under § 1983 or tortious interference claims;
- 2 association lacked associational standing to assert tortious interference claims;
- 3 § 1983 claim was barred by the principle of comity to the extent plaintiffs sought damages in the amount of the tax assessments;
- 4 principle of comity did not bar § 1983 claim to the extent plaintiffs sought damages unrelated to the assessment amounts;
- 5 exclusive remedy provision in Employment Security Act (ESA) barred tortious interference claim to extent the claim was based on an allegation that ESD's reclassification of owners and operators was simply incorrect;
- 6 ESA did not bar tortious interference claim to extent it was based on allegations of improper motive or means; and

SELECTED TOPICS

- Torts
- Business or Contractual Relations
 Defendant Intentional Breach of the Contract
- Taxation
- Employment Taxes and Withholding
 Unemployment Compensation Taxes
 Commissions
- State Courts and United States Courts
 Principles of Cooperative Federalism and Federal State Comity

Secondary Sources

- APPENDIX II: FAIR LABOR STANDARDS ACT REGULATIONS TITLE 29 CODE OF FEDERAL REGULATIONS**
 Fair Labor Stds. Hdbk. for States, Local Govs. and Schools Appendix II
 ...The U.S. Department of Labor published rule changes in October 2013 that will modify the companionship and live-in domestic services exemptions (but not the babysitting exemption) effective on Jan. 1, ...
- APPENDIX C ADMINISTRATIVE RULINGS**
 The 401(k) Hdbk. Appendix C
 ...Federal agencies issue several different types of guidance to explain and interpret the application of statutes to particular situations. All these different forms of guidance are binding on employers,...
- Salesman on commission as within unemployment compensation or social security acts**
 29 A.L.R.2d 751 (Originally published in 1953)
 ...This annotation supplements the annotation in 138 A.L.R. 1413, and supersedes that in 160 A.L.R. 713. The courts continue to be faced with the problem whether a salesman on commission is covered by fed..

[See More Secondary Sources](#)

Briefs

- Brief of Appellees, The Lutheran Church-Missouri Synod, St. John's Lutheran Church, and Vivadell Keiser**
 1982 WL 608409
 GRACE BRETHERN CHURCH and Reverend David L. Hocking, etc., et al., Appellees, v. STATE OF CALIFORNIA, et al., Appellants. The Lutheran Church-Missouri Synod, etc., et al., Appellees, v. State of California Employment Development Department, et al., Appellants. Supreme Court of the United States Feb. 05, 1982
 ...Brief of Appellees, The Lutheran Church-Missouri Synod, St. John's Lutheran Church, and Vivadell Keiser. Appellee The Lutheran Church-Missouri Synod ("the Synod") is a non-profit membership corporation...
- Brief of Appellees**
 1971 WL 147067
 CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al., Appellants, v. Judith JAVA, et al., Appellees.

7 carriers' complaint stated a claim for tortious interference with a contract or business expectancy.

Affirmed in part, reversed in part, and remanded.

West Headnotes (35)

[Change View](#)

- 1 **Appeal and Error**  **Cases Triable in Appellate Court**
Whether an action is dismissed for failure to state a claim upon which relief can be granted or by judgment on the pleadings, the appellate court reviews the dismissal de novo.
- 2 **Pleading**  **Insufficient Cause of Action or Defense**
Pretrial Procedure  **Availability of relief under any state of facts provable**
Dismissal for failure to state a claim upon which relief can be granted or by judgment on the pleadings is appropriate only if the court concludes beyond a doubt that the plaintiff cannot prove any set of facts that would justify recovery. CR 12(b)(6), (c).
- 3 **Appeal and Error**  **Striking out or dismissal**
On review of order dismissing action for failure to state a claim upon which relief can be granted or by judgment on the pleadings, the appellate court presumes that the allegations in the plaintiff's complaint are true, and the appellate court also may consider any hypothetical facts the plaintiff offers. CR 12(b)(6), (c).
- 4 **Judgment**  **Motion or Other Application**
Generally, submission of evidence not contained in the original complaint converts a motion to dismiss for failure to state a claim upon which relief can be granted into a summary judgment motion. CR 12(b)(6).
- 5 **Civil Rights**  **Third Party Rights; Decedents**
Corporations and Business Organizations  **Persons entitled to sue; standing**
Torts  **Persons entitled to sue**
Trade association that represented interests of its member trucking carriers throughout administrative proceedings to contest imposition of additional unemployment tax assessments lacked individual standing to assert civil rights claims under § 1983 or tortious interference claims against Employment Security Department (ESD) and various ESD employees based on the process by which ESD had allegedly targeted carriers for audits and reclassified owners and operators as carrier employees, as there was no allegation that ESD employees violated association's constitutional rights, ESD never audited or assessed unemployment taxes against association, association incurred attorney fees but only because of alleged violations of the constitutional rights of its members, and association did not allege that ESD interfered with its own contracts or business expectancies. 42 U.S.C.A. § 1983.
- 6 **Action**  **Persons entitled to sue**
To establish individual standing, a party must satisfy both prongs of a two-pronged test: first, the party's claim must fall within the zone of interests protected by the statute or constitutional provision at issue; second, the party must show some personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief.
- 7 **Action**  **Persons entitled to sue**
To establish individual standing, the party must have suffered from an injury in fact, economic or otherwise.

Supreme Court of the United States
Jan. 15, 1971

...The opinion of the United States District Court for the Northern District of California is reported at 317 F. Supp. 875 (1970). It is also included in the Joint Appendix at 133. The Fourteenth Amendmen...

Brief of Appellees

1971 WL 133375
CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al., Appellants, v. Judith JAVA, et al., Appellees.
Supreme Court of the United States
Jan. 15, 1971

...The opinion of the United States District Court for the Northern District of California is reported at 317 F. Supp. 875 (1970). It is also included in the Joint Appendix at 133. The Fourteenth Amendmen...

[See More Briefs](#)

Trial Court Documents

In re Schwab Industries, Inc.

2010 WL 6982545
In re: SCHWAB INDUSTRIES, INC., et al., Debtors.
United States Bankruptcy Court, N.D. Ohio.
Feb. 28, 2010

...FN1. The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number are: Schwab Industries, Inc. (2467); Medina Cartage Co. (9373); Medina Supply Comp...

In re Kid Brands, Inc.

2014 WL 5419123
In Re: KID BRANDS, INC., et al., Debtors.
United States Bankruptcy Court, D. New Jersey.
Sep. 08, 2014

...The relief set forth on the following pages, numbered 2 through 35, is hereby ORDERED. September 8, 2014
<<signature>> USBJ Upon the Motion of the Debtors for Entry of an Order (I) Authorizing the Sale...

In re Duratek Precast Technologies, Inc.

2012 WL 530989
In re: DURATEK PRECAST TECHNOLOGIES, INC., Duratek Precast Structures, LLC, Debtors.
United States Bankruptcy Court, M.D. Florida.
Feb. 15, 2012

...Chapter 11 This matter comes before the Court on March 31, 2010 at 3:30 p.m. on Debtors' Motion for Order Authorizing the Sale of Some or All of Debtors' Assets at an Auction Sale Pursuant to 11 U.S.C....

[See More Trial Court Documents](#)

- 8 **Associations**  **Actions by or Against Associations**
An association that otherwise does not have individual standing, may have standing on behalf of its members.
- 9 **Associations**  **Actions by or Against Associations**
Associational standing is established when: (1) the members of the organization otherwise would 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 the claim nor the relief requires the participation of the organization's individual members.
- 10 **Associations**  **Actions by or Against Associations**
Associational standing may exist when the association seeks monetary damages on behalf of individual members, as well as with other remedies.
- 11 **Associations**  **Actions by or Against Associations**
In a suit in which an association seeks monetary damages on behalf of its individual members, participation of the members is not necessary if the amount of monetary relief requested on behalf of each member is certain, easily ascertainable, and within the knowledge of the defendant.
- 12 **Associations**  **Actions by or Against Associations**
The fact that individual members may be required to testify does not automatically defeat associational standing.
- 13 **Corporations and Business Organizations**  **Right or capacity to sue or be sued**
Trade association that represented interests of its member trucking carriers throughout administrative proceedings to contest imposition of additional unemployment tax assessments lacked associational standing to assert tortious interference claims against Employment Security Department (ESD) and various ESD employees based on the process by which ESD had allegedly targeted carriers for audits and reclassified owners and operators as carrier employees; the claim sought monetary damages, resolution of each member's claim would have involved a fact-specific inquiry regarding the nature of the member's business expectancy with individual owners and operators, the extent of interference with that expectancy, and the amount of damages, and each carrier would have needed to provide individualized evidence and testimony regarding these issues.
- 14 **Labor and Employment**  **Parties; standing**
Monetary damages are distinguishable from injunctive relief for purposes of determining whether an employee association has associational standing to pursue claims on behalf of employees, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee.
- 15 **Civil Rights**  **States and territories and their agencies and instrumentalities, in general**
When a state's conduct is at issue, individual state employees are subject to liability under § 1983, but the state and state agencies are not. 42 U.S.C.A. § 1983.
- 16 **Courts**  **Comity in general**
Federal Courts  **Federal-state relations, questions of state law, and parallel state proceedings**

The "principle of comity" recognizes that the federal government, and particularly federal courts, must show a proper respect for state functions and must decline to unduly interfere with the legitimate activities of the States.

- 17 **Courts**  Comity in general
Federal Courts  Federal-state relations, questions of state law, and parallel state proceedings
Principle of comity, recognizing that the federal government, and particularly federal courts, must show a proper respect for state functions and decline to unduly interfere with the legitimate activities of the States, is particularly important in cases involving state taxation because of the important and sensitive nature of state tax systems.
- 18 **Courts**  Comity in general
Regardless of the type of relief sought, the principle of comity requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states, bars a § 1983 claim challenging a state tax system filed in state court if state law provides an adequate remedy. 42 U.S.C.A. § 1983.
- 19 **Courts**  Comity in general
Obtaining a court declaration under federal law regarding the validity of a state tax violates the principle of comity requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states as long as the state remedy is plain, adequate, and complete; at a minimum, such a state remedy must provide a hearing at which the taxpayer may raise constitutional objections to the tax.
- 20 **Federal Courts**  Federal-state relations, questions of state law, and parallel state proceedings
For purposes of determining applicability of principle of comity requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states, the speediness of a remedy available under state law must be judged against the usual time for similar litigation.
- 21 **Federal Courts**  Federal-state relations, questions of state law, and parallel state proceedings
For purposes of determining applicability of principle of comity requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states, a remedy available under state law is efficient if it imposes no unusual hardship that requires ineffectual activity or unnecessary expenditure of time or energy.
- 22 **Federal Courts**  Federal-state relations, questions of state law, and parallel state proceedings
For a state remedy to be adequate, for purposes of applying principle of comity requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states, it need not necessarily be the best remedy available or even equal to or better than the remedy which might be available in the federal courts.
- 23 **Courts**  Comity in general
To the extent trade association and its member trucking carriers sought damages in the amount of additional state unemployment tax assessments, state law provided an adequate remedy for damages based on the amount of the assessment such that the principle of comity, requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states, barred civil rights claim under § 1983 against Employment Security Department (ESD) and various ESD employees based on the process by which ESD had allegedly targeted carriers for audits and reclassified owners and operators as

carrier employee; Employment Security Act (ESA) and Administrative Procedure Act (APA) provided for complete administrative and judicial review of ESD's processes and decisions. [42 U.S.C.A. § 1983](#); [West's RCWA 34.05.570\(3\)\(d\), 50.32.050](#).

24 Courts  [Comity in general](#)

To the extent trade association and its member trucking carriers sought damages unrelated to the imposition of additional state unemployment tax assessments, state law did not provide plaintiffs an adequate remedy for such damages such that the principle of comity, requiring deference to state functions so as not to unduly interfere with the legitimate activities of the states, did not operate to bar civil rights claim under [§ 1983](#) against Employment Security Department (ESD) and various ESD employees based on the process by which ESD had allegedly targeted carriers for audits and reclassified owners and operators as carrier employees; under existing state law, plaintiffs were unable to seek administrative or judicial review of claims for damages unrelated to the validity of the assessments, and the ALJ could only modify or set aside the assessment, which would result in a tax refund rather than an award for damages. [42 U.S.C.A. § 1983](#); [West's RCWA 34.05.570\(3\)\(d\), 50.32.050](#).

25 Torts  [Contracts](#)

Torts  [Prospective advantage, contract or relations; expectancy](#)

A claim of tortious interference with a contract or business expectancy 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.

26 Torts  [Knowledge and intent; malice](#)

An examination of improper purpose, an element of claim of tortious interference with a contract or business expectancy, focuses on the motive for the defendant's interference with the contract, such as greed, retaliation, or hostility.

27 Torts  [Improper means; wrongful, tortious or illegal conduct](#)

When examining improper means, an element of claim of tortious interference with a contract or business expectancy, courts look to the method by which a defendant interferes with the contractual relationship, such as taking arbitrary and capricious action or using the threat of a lawsuit to harass.

28 Taxation  [Proceedings](#)

Torts  [Grounds and conditions precedent](#)

To the extent that claim alleging tortious interference with a contract or business expectancy was based on an allegation that Employment Security Department's (ESD) reclassification of trucking equipment owners and operators as employees of trucking carriers was simply incorrect, exclusive remedy provision in Employment Security Act (ESA) and, in turn, exhaustion of administrative remedies doctrine barred that particular claim, in action brought by trade association and six trucking carriers that were assessed additional state unemployment tax; language in ESA was clear that it served as the exclusive remedy for challenges made to the "justness or correctness" of assessments, refunds, adjustments, or claims. [West's RCWA 50.32.180](#).

29 Taxation  [Proceedings](#)

Torts  [Grounds and conditions precedent](#)

To the extent that claim alleging tortious interference with a contract or business expectancy was based on allegations that Employment Security Department (ESD) had acted with an improper motive or used improper means in reclassifying trucking equipment owners and operators as employees of trucking carriers, neither the exclusive remedy provision in Employment Security Act (ESA) nor the exhaustion of administrative remedies doctrine operated to bar that particular

claim, in action brought by trade association and six trucking carriers that were assessed additional state unemployment tax; the ESA was the exclusive remedy only for determining the justness or correctness of assessments, and it did not apply to determining whether ESD had an improper purpose or used improper means in imposing those assessments. [West's RCWA 50.32.180](#).

- 30** [Administrative Law and Procedure](#)  Exhaustion of administrative remedies
The "exhaustion of administrative remedies doctrine" applies in cases where a claim is originally cognizable by an agency that has clearly defined mechanisms for resolving complaints by aggrieved parties, and the administrative remedies can provide the relief sought.
- 31** [Administrative Law and Procedure](#)  Exhaustion of administrative remedies
If an administrative proceeding can alleviate the harmful consequences of a governmental activity at issue, a litigant must first pursue that remedy before the courts will intervene.
- 32** [Administrative Law and Procedure](#)  Exhaustion of administrative remedies
Administrative remedies must be exhausted if the relief sought can be obtained through an exclusive or adequate administrative remedy.
- 33** [Administrative Law and Procedure](#)  Exhaustion of administrative remedies
An administrative remedy may be adequate for purposes of requiring exhaustion even if it does not provide the precise relief sought or provide complete relief; however, if there is no administrative remedy available, exhaustion is not required.
- 34** [Torts](#)  Business relations or economic advantage, in general
[Torts](#)  Contracts in general
Allegation that Employment Security Department's (ESD) reclassification of trucking equipment owners and operators as employees of trucking carriers prevented carriers from contracting with independent owners and operators and deprived carriers of their ability to choose to contract with independent owners and operators was sufficient to state a claim for tortious interference with a contract or business expectancy.
- 35** [Torts](#)  Business relations or economic advantage, in general
[Torts](#)  Existence of valid or identifiable contract, relationship or expectancy
Courts do not require the existence of an enforceable contract or the breach of one to support an action for tortious interference with a business relationship.

Attorneys and Law Firms

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Opinion

MAXA, J.

*629 ¶ 1 The Washington Trucking Association (WTA) and six Washington based trucking carriers (the Carriers) appeal the trial court's dismissal under [CR 12\(b\)\(6\)](#) or [CR 12\(c\)](#) of

their lawsuit against the Washington Employment Security Department (ESD) and various ESD employees. The lawsuit arose from a series of audits of the Carriers (and other WTA members) that ESD conducted, after which ESD determined that "owner/operators" of trucking equipment leased by the Carriers were the Carriers' employees. This determination resulted in additional unemployment tax assessments. WTA and the Carriers allege that ESD targeted **175 the trucking industry and conducted rigged audits in which ESD required the auditors find an employment relationship and liability for unemployment taxes. WTA and the Carriers asserted claims (1) against ESD employees under 42 U.S.C. § 1983 for violation of the Carriers' due process and other constitutional rights based on the failure to properly conduct the audits; and (2) against ESD for tortious interference with the Carriers' contracts and business expectancies based on ESD's decision to classify owner/operators as employees.¹

¶ 2 We hold that (1) WTA does not have individual standing to assert § 1983 or tortious interference claims and does not have associational standing to assert tortious interference claims, but whether WTA has associational standing to assert a § 1983 claim cannot be determined based on the complaint allegations; (2) WTA's and the *630 Carriers' § 1983 claim is barred by the principle of comity to the extent that they seek damages in the amount of the tax assessments, but not to the extent that they seek damages unrelated to the assessment amounts; (3) RCW 50.32.180 and the doctrine of exhaustion of administrative remedies bar the Carriers' claim of tortious interference with a contract or business expectancy to the extent that claim is based on an allegation that the reclassification of owner/operators as employees was incorrect, but not to the extent that the claim is based on allegations that ESD had an improper motive or used improper means in making that reclassification; and (4) the Carriers' complaint allegations were sufficient to state a claim for tortious interference with a contract or business expectancy.

¶ 3 Accordingly, we affirm in part and reverse in part, and remand to the trial court for proceedings consistent with this opinion.

FACTS

The Parties

¶ 4 WTA is a trade association that seeks to protect and promote the interests of the Washington trucking industry. WTA's mission is to promote a favorable and profitable operating environment for the industry's members, which includes protecting the industry's use of owner/operators and ensuring that members are taxed only as allowed by Washington law.

¶ 5 The six plaintiff trucking carriers are Eagle Systems, Inc.; Gordon Trucking, Inc.; Haney Truck Line, Inc.; Jasper Trucking, Inc.; PSFL Leasing, Inc.; and System-TWT Transport. All of the Carriers have been assessed state unemployment taxes based on their lease contracts with owner/operators of trucking equipment. The Carriers are members of WTA.

¶ 6 ESD is a state agency that administers Washington's unemployment compensation system under the authority *631 granted to its commissioner by the Employment Security Act (ESA), Title 50 RCW. ESD employees named as defendants are (1) Paul Trause, former commissioner; (2) Bill Ward, director of unemployment insurance audits and collections; (3) Lael Byington, former manager of the tax investigations and specialized collections unit; (4) Joy Stewart, auditor; (5) Melissa Hartung, auditor; and (6) Alicia Swangwan, auditor.

Carriers and Owner/Operators

¶ 7 The Carriers are for-hire general freight carriers that operate in a number of states. The Carriers meet fluctuating demand for their services by contracting with owner/operators to lease trucking equipment from them on an as-needed basis.

¶ 8 Owner/operators own their own trucking equipment (the truck tractor and sometimes also the trailer). General freight carriers contract with the owner/operator to lease their trucking equipment. The contracts also include truck operating services, which can be provided either by the owner/operator personally or by employees hired by the owner/operator. Federal regulations dictate many terms of these contracts.

***176 Procedural History*

¶ 9 In 2010, ESD audited and assessed additional unemployment taxes on three of the Carriers: Gordon Trucking, Haney Truck Line, and System-TWT Transport. Each carrier timely appealed to the Office of Administrative Hearings pursuant to RCW 50.32.030. The appeals were assigned to an administrative law judge (ALJ).

¶ 10 The three carriers filed a consolidated motion for summary judgment before the ALJ. They argued for dismissal of the ESD tax assessments on various grounds, including federal preemption and the violation of auditing standards. In March 2011, the ALJ denied the motion for summary judgment, finding that there were genuine disputes *632 of material fact regarding the relationships between carriers and owner/operators and the conduct of the auditors.

¶ 11 The ALJ then remanded System–TWT Transport's assessment to ESD for reconsideration and new audits. The order instructed ESD to review whether owner/operators who contracted with the carrier were "in employment" under [RCW 50.04.100](#), if so whether the services the owner/operators provided actually took place in Washington, and whether the assessment was properly limited to services provided and not equipment. The ALJ's remand order also instructed the parties to engage in settlement negotiations after the new audits were performed. The ALJ remanded the assessments of Eagle Systems, Gordon Trucking, Haney Truck Line, Jasper Trucking, and PSFL Leasing under the same terms as the System–TWT Transport remand.

Alleged Settlement Agreement

¶ 12 After the ALJ's remand order, the Carriers and ESD engaged in settlement negotiations. The Carriers believed a settlement had been reached, but ESD disagreed.

¶ 13 In 2013 the Carriers obtained an ex parte show cause order from the Pierce County Superior Court directing ESD to show cause why the court should not enforce the settlement agreement. After a show cause hearing, the superior court concluded that a settlement had been reached and entered an order enforcing the agreement. The terms of the settlement included that the appeals be dismissed from the administrative hearing and that "[n]o further exhaustion of administrative remedies shall be required in order to permit the judicial appeals by the respective Carriers." Clerk's Papers (CP) at 341.

¶ 14 ESD appealed the superior court's order enforcing the settlement agreement. This court reversed the order, holding that the superior court lacked personal jurisdiction because the show cause procedure was inappropriate to *633 start an action. *Eagle Sys., Inc. v. State Emp't Sec. Dept.*, 181 Wash.App. 455, 457, 326 P.3d 764 (2014). This court did not address whether or not a valid settlement agreement had been reached. *Id.* at 461, 326 P.3d 764.

Damages Lawsuit against ESD

¶ 15 In May 2013, WTA and the Carriers filed suit against ESD and certain named ESD employees. In February 2014, WTA and the Carriers filed a second amended complaint. WTA's and the Carriers' allegations in that complaint are summarized as follows:

1. Pursuant to the ESD commissioner's authority under [RCW 50.12.010](#), ESD audits employers to determine whether the employer owes additional sums for unemployment taxes and may assess the employer for any sums owed, including interest and penalties.
2. All ESD auditors are required to comply with the Generally Accepted Auditing Standards. They also must comply with ESD's own tax audit manual and status manual, which explain how to determine if an owner/operator is an employee or independent contractor.
3. The Carriers and other WTA members traditionally have not paid unemployment taxes for the owner/operators with whom they contract, because they view the owner/operators as independent contractors rather than employees. The Carriers based that view on previous representations from ESD that if the owner/operators brought substantial equipment to the **177 relationship, unemployment taxes need not be paid.
4. Without statutory or regulatory authority, Trause, Ward, and Byington directed ESD to establish an underground economy unit designed to collect additional taxes from certain industries. Stewart, who lacked a background in auditing, urged ESD to target the trucking industry as part of the underground economy initiative.
5. ESD required Stewart's underground economy audits to net 98 percent to 100 percent changes to payroll and to *634 discover a minimum amount of taxes and new employees per quarter.
6. Stewart conducted the majority of the audits at issue in this case. Hartung and Swangwan each conducted one audit. The audit outcomes were predetermined, because the auditors were required to find an employment relationship between motor carriers and owner/operators resulting in additional unemployment tax liability. All three auditors

determined that owner/operators were employees of the Carriers and assessed the Carriers additional unemployment taxes for the owner/operators.

7. The auditors assessed unemployment tax liability based on total amounts paid to the owner/operators. They made no effort to segregate the value of the owner/operator's equipment from the value of driving services when calculating tax liability.

8. Trause, Ward, and Byington directed the audits of the Carriers, knowing that the audits violated Department standards. Trause, Ward, and Byington directed ESD and the Attorney General's Office to defend the audits with predetermined outcomes.

¶ 16 WTA and the Carriers asserted a § 1983 claim against Trause, Ward, Byington, Stewart, Hartung, and Swangwan in their personal capacities for their part in the audits and assessments. WTA and the Carriers alleged that (1) Stewart's, Hartung's and Swangwan's failure to properly conduct audits violated the Carriers' due process rights; (2) Trause's and Ward's failure to ensure that the audits were properly conducted pursuant to the general accounting standards and ESD's standards violated the Carriers' due process rights; (3) Byington's insertion of a quota system into Stewart's performance expectations deprived Stewart of impartiality and objectivity and violated the Carriers' due process rights; (4) the named ESD employees' determination that owner/operators were the Carriers' employees created a relationship that neither the owner/operators nor the Carriers wanted with terms that neither was free to *635 negotiate, which violated the Carriers' freedom to contract; (5) the named ESD employees' actions were arbitrary or capricious and violated the Carriers' rights to substantive due process and equal protection; (6) federal law preempted the named ESD employees' application of the ESA, which violated WTA's and the Carriers' due process rights; and (7) ESD's improper assessments indirectly infringed on the Carriers' right under the commerce clause to engage in interstate commerce free of discriminatory taxes. WTA and the Carriers requested an award of damages and punitive damages under § 1983.

¶ 17 WTA and the Carriers also asserted a claim against ESD for tortious interference with contracts and business expectancies based on ESD's reclassification of owner/operators as employees subject to unemployment taxes. WTA and the Carriers alleged that ESD's actions inflicted severe damages on them. They requested an award of damages under this claim.

Trial Court Dismissal

¶ 18 ESD filed a motion to dismiss WTA's and the Carriers' claims under CR 12(b)(6) and/or CR 12(c). The trial court granted the motion. In its oral ruling, the trial court stated that (1) WTA lacked standing regarding the § 1983 claim, (2) the plaintiffs could not challenge specific unemployment tax assessments without first exhausting administrative remedies, and (3) all the elements of the tortious interference claim were not met as a matter of law. Because the trial court ruled that the § 1983 claim required exhaustion, it did not address the merits of that claim.

¶ 19 WTA and the Carriers appeal.

****178 ANALYSIS**

A. THE ADMINISTRATIVE PROCESS

¶ 20 Chapter 50.32 RCW outlines the process for appealing unemployment taxes. After ESD issues an order and *636 notice of assessment pursuant to RCW 50.24.070, the employer has 30 days to file an initial appeal to the "appeal tribunal." RCW 50.32.030. The filing of an appeal stays the accrual of interest and penalties on the disputed assessment until a final decision is made. RCW 50.32.030. The "appeal tribunal" is a disinterested ALJ from the Office of Administrative Hearings. RCW 50.32.010. After a hearing, the ALJ must provide a ruling in which the assessment may be affirmed, modified, or set aside. RCW 50.32.050.

¶ 21 Either party may appeal the ALJ's decision by making a petition for review to the ESD commissioner within 30 days of the ALJ's decision. RCW 50.32.070. After reviewing the proceedings that took place before the ALJ, the commissioner issues a decision in writing that affirms, modifies, or sets aside the ALJ's decision. RCW 50.32.080. Alternatively, the commissioner can order further proceedings before the ALJ. RCW 50.32.080.

¶ 22 RCW 50.32.120 grants either party the right to appeal the commissioner's ruling pursuant to RCW 34.05.570, the Administrative Procedure Act (APA)² provision for judicial review. Judicial review permits various challenges to the agency's order. RCW 34.05.570(3)(a)-(i). For example, the employer may challenge the commissioner's decision on grounds

that the decision violated constitutional provisions or erroneously interpreted or applied the law. RCW 34.05.570(3)(a), (d).

¶ 23 RCW 50.32.180 provides that the remedies provided in the ESA for determining the "justness or correctness of assessments ... shall be exclusive and no court shall entertain any action to enjoin an assessment or require a refund or adjustment except in accordance with the provisions of this title."

B. STANDARD OF REVIEW

1 ¶ 24 ESD moved for dismissal under both CR 12(b)(6) and CR 12(c), and the trial court did not specify the basis for *637 its dismissal order. Under CR 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. CR 12(c) allows parties to move for judgment on the pleadings.

2 3 4 ¶ 25 Under either subsection, we review the dismissal de novo. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wash.App. 201, 208 & n. 4, 304 P.3d 914 (2013). Dismissal under CR 12(b)(6) or CR 12(c) is appropriate only if the court concludes beyond a doubt that the plaintiff cannot prove any set of facts that would justify recovery. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash.2d 954, 962, 331 P.3d 29 (2014) (CR 12(b)(6) dismissal); *Ent v. Wash. State Criminal Justice Training Comm'n*, 174 Wash.App. 615, 622, 301 P.3d 468 (2013) (CR 12(c) dismissal). On review, we presume that the allegations in the plaintiff's complaint are true, and we also may consider any hypothetical facts the plaintiff offers. *FutureSelect*, 180 Wash.2d at 962, 331 P.3d 29; *Ent*, 174 Wash.App. at 622, 301 P.3d 468.³

C. WTA'S STANDING TO ASSERT § 1983 AND TORTIOUS INTERFERENCE CLAIMS

¶ 26 WTA argues that the trial court erred in dismissing WTA's § 1983 claim based on lack of standing to assert that claim. In addition, standing potentially is an issue regarding the tortious interference with a contract or business expectancy claim.⁴ We hold that WTA does not have individual **179 standing to assert § 1983 or tortious interference claims and does not have associational standing to assert a tortious interference claim, but that whether WTA has *638 associational standing to assert a § 1983 claim cannot be determined based on the complaint allegations.

1. Individual Standing

5 6 7 ¶ 27 To establish individual standing, a party must satisfy both prongs of a two-pronged test. *Branson v. Port of Seattle*, 152 Wash.2d 862, 875–76, 101 P.3d 67 (2004). First, the party's claim must fall within the "zone of interests" protected by the statute or constitutional provision at issue. *Id.* at 875, 101 P.3d 67. Second, the party must show some "personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief." *High Tide Seafoods v. State*, 106 Wash.2d 695, 702, 725 P.2d 411 (1986). In other words, the party must have "suffered from an injury in fact, economic or otherwise." *Branson*, 152 Wash.2d at 876, 101 P.3d 67.

¶ 28 WTA argues that it has standing on its own behalf because it suffered injury in the form of attorney fees and costs that it incurred regarding the Carriers' administrative appeals and litigation over the assessments. WTA and the Carriers alleged in their second amended complaint that they had incurred costs and attorney fees in "defending the assessments." CP 224. For purposes of CR 12(b)(6) and CR 12(c), this allegation satisfies the second prong of the individual standing test.

¶ 29 But WTA cannot satisfy the first prong of the individual standing test—that its claims fall within the zone of interests protected by § 1983 or the tort of tortious interference with a contract or business expectancy. There is no allegation that ESD employees violated WTA's constitutional rights. ESD never audited or assessed unemployment taxes against WTA. WTA incurred attorney fees only because of alleged violations of the constitutional rights of its members. In the examination of individual standing, those rights are not necessarily the rights of the organization. Similarly, WTA does not allege that ESD interfered with its own contracts or business expectancies.

*639 ¶ 30 Accordingly, we hold that WTA does not have individual standing to pursue a § 1983 claim or a tortious interference with a contract or business expectancy claim.

2. Associational Standing

8 9 ¶ 31 An association that otherwise does not have individual standing, may have standing on behalf of its members. Associational standing is established when (1) the members of the organization otherwise would 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

the claim nor the relief requires the participation of the organization's individual members. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wash.2d 888, 894, 337 P.3d 1076 (2014). The first two prongs are constitutional, but the third prong is judicially created for administrative convenience and efficiency. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wash.2d 207, 215, 45 P.3d 186 (2002).

10 11 12 ¶ 32 Associational standing may exist when the association seeks monetary damages on behalf of individual members, as well as with other remedies. See *Firefighters*, 146 Wash.2d at 214–16, 45 P.3d 186. In a suit seeking monetary damages, the third prong will be satisfied if the amount of monetary relief requested on behalf of each member is “certain, easily ascertainable, and within the knowledge of the defendant.” *Id.* at 215–16, 45 P.3d 186; see also *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wash.App. 363, 366, 312 P.3d 665 (2013), review denied, 180 Wash.2d 1007, 320 P.3d 718 (2014). The fact that individual members may be required to testify does not automatically defeat associational standing. *Riverview*, 181 Wash.2d at 894 n. 1, 337 P.3d 1076; *Teamsters Local Union No. 117 v. Dep't of Corr.*, 145 Wash.App. 507, 513–14, 187 P.3d 754 (2008).

¶ 33 ESD does not dispute that WTA meets the first and second prongs of the three-part test for associational standing. The Carriers have standing in their own right and the issues are germane to WTA's **180 purpose. ESD challenges the *640 third prong—whether the claim or the relief requires the participation of the WTA's individual members.

13 14 ¶ 34 The tortious interference claim clearly does not meet the third prong because it involves a request for monetary damages and would require extensive member participation to resolve it.⁵ Resolution of each member's claim would involve a fact-specific inquiry regarding the nature of the member's business expectancy with individual owner/operators, the extent of interference with that expectancy, and the amount of damages. Each carrier would need to provide individualized evidence and testimony regarding these issues. As a result, we hold that WTA does not have associational standing regarding the tortious interference claim.⁶

¶ 35 Regarding the § 1983 claim, WTA argues that the damages here are easily ascertainable because they consist of concrete amounts, such as the Carriers' litigation costs and attorney fees. It also argues that the punitive damages under § 1983 are determined by ESD's conduct, and therefore the participation of WTA members would not be necessary for those calculations.

¶ 36 However, at this stage in the litigation we cannot properly evaluate the third element of the associational standing test for the § 1983 claim. In WTA's and the Carriers' complaint, the requested relief is “[a]n award of damages under 42 U.S.C. § 1983 ..., including punitive damages, in an amount to be proven at the time of trial.” CP 229. This request for relief does not specify the type of damages WTA and the Carriers are claiming, and does not indicate the type of proof that will be required to *641 establish the claimed damages. As a result, whether WTA has associational standing in this case to assert a § 1983 claim cannot be decided based on the complaint allegations and will depend on further development of the facts.

¶ 37 Accordingly, we hold that the trial court erred in ruling on a CR 12(b)(6) or CR 12(c) motion that WTA has no associational standing to assert a § 1983 claim.⁷

D. SECTION 1983 CLAIM

¶ 38 WTA and the Carriers argue that the trial court erred in dismissing their § 1983 claim because their complaint alleged multiple violations of their constitutional rights, and those allegations must be presumed to be true. ESD responds that the principle of comity bars § 1983 challenges to state taxes when an adequate state law remedy exists and that the ESA and the APA provide an adequate remedy here.⁸ We hold that comity bars the § 1983 claim to the extent that WTA and the Carriers seek damages based on the amounts of the assessments, but not to the extent that they seek damages independent of the assessment amounts.

1. Alleged Violation of Constitutional Rights

15 ¶ 39 42 U.S.C. § 1983 seeks to protect citizens who have been deprived of their rights under the Constitution by someone acting under the color of state law. It states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, **181 of any State or Territory or the *642 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.

42 U.S.C. § 1983. When a state's conduct is at issue, individual state employees are subject to liability under § 1983, but the state and state agencies are not. *Hontz v. State*, 105 Wash.2d 302, 309, 714 P.2d 1176 (1986).

¶ 40 WTA and the Carriers allege that the named ESD employees violated their constitutional rights in a number of ways. As stated above, for purposes of a CR 12(b)(6) or CR 12(c) motion we are required to presume that these allegations are true. Therefore, there is no question that WTA and the Carriers stated a claim under § 1983 in their complaint. The issue here is whether the principle of comity bars that claim.

2. Principle of Comity

16 17 ¶ 41 The principle of comity recognizes that the federal government, and particularly federal courts, must show "a proper respect for state functions" and must decline to "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Comity is particularly important in cases involving state taxation because of the "important and sensitive nature of state tax systems." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). "We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

¶ 42 Because of comity, the United States Supreme Court "repeatedly [has] shown an aversion to federal interference *643 with state tax administration." *Id.* For example, the Court held that federal courts could not render declaratory judgments as to the constitutionality of state tax laws. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298–302, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Congress also has shown such an aversion. *Nat'l Private Truck*, 515 U.S. at 586, 115 S.Ct. 2351. Congress enacted the Tax Injunction Act (TIA) in 1937, which prevents federal courts from enjoining the assessment, levy, or collection of any state tax where a plain, speedy, and efficient remedy exists in state court. 28 U.S.C. § 1341.⁹

¶ 43 The United States Supreme Court has decided two cases that address application of the comity principle to § 1983 actions involving state taxation. In *Fair Assessment*, the plaintiffs filed a § 1983 action in federal court, alleging the unconstitutional administration of a local property tax system. 454 U.S. at 101, 105–06, 102 S.Ct. 177. Specifically, the plaintiffs alleged that administration of the property tax system violated equal protection and due process in that (1) properties with new improvements were assessed at a higher percentage of their current market value than properties without new improvements, and (2) property owners who successfully appealed their property assessments were targeted for reassessment the next year. *Id.* at 106, 102 S.Ct. 177. The plaintiffs sought damages in the amount of property tax overassessments over a four-year period and punitive damages. *Id.*

¶ 44 The Court reaffirmed the vitality of the common law comity principle apart from the TIA and the applicability of comity to actions seeking a remedy other than injunctive relief. *Id.* at 110–11, 102 S.Ct. 177. And it refused to limit the application of comity to declaratory judgment actions, stating that damages actions would require a declaration that a state tax scheme was unconstitutional and would be *644 just as disruptive to the collection of taxes. *Id.* at 113–15, 102 S.Ct. 177. As a result, the Court held that the principle of comity bars § 1983 actions in **182 federal court that seek damages based on the alleged invalidity of state tax systems. *Id.* at 116, 102 S.Ct. 177. The Court stated that taxpayers must pursue state remedies to protect their federal rights, "provided of course that those remedies are plain, adequate, and complete." *Id.*

¶ 45 In *National Private Truck*, the plaintiffs filed a § 1983 action in state court, alleging that certain Oklahoma taxes imposed against trucks registered in any of 25 states were unconstitutional. 515 U.S. at 584, 115 S.Ct. 2351. The plaintiffs claimed that the taxes were discriminatory in violation of the dormant commerce clause and the privileges and immunities clause of the United States Constitution. *Id.* The plaintiffs sought declaratory and injunctive relief, and a refund of taxes paid. *Id.* The Oklahoma Supreme Court awarded tax refunds under state law, but declined to award relief under § 1983. *Id.* at 585, 115 S.Ct. 2351.

¶ 46 The United States Supreme Court again emphasized the “background presumption that federal law generally will not interfere with administration of state taxes.” *Id.* at 588, 115 S.Ct. 2351. The Court held that the comity-based rule adopted in *Fair Assessment* for federal court actions applied equally to state court § 1983 actions. *Nat'l Private Truck*, 515 U.S. at 589–92, 115 S.Ct. 2351. The Court concluded that state courts must refrain from granting declaratory or injunctive relief under § 1983 when state law provides an adequate legal remedy. *Id.* at 589, 592, 115 S.Ct. 2351.

¶ 47 *National Private Truck* only addressed § 1983 claims that sought injunctive or declaratory relief against state taxes in state court. *Id.* at 592, 115 S.Ct. 2351. But several lower courts have extended the *National Private Truck* holding to preclude damages claims under § 1983 in state court. See, e.g., *Patel v. City of San Bernardino*, 310 F.3d 1138, 1141 (9th Cir.2002) (“Read together, *Fair Assessment* and *National Private Truck* bar use of § 1983 to litigate state tax disputes in either state or federal court.”); *645 *Kowenhoven v. County of Allegheny*, 587 Pa. 545, 901 A.2d 1003, 1014 (2006) (“although Section 1983 injunctive and declaratory relief were at issue in *National Private Truck Council*, its reasoning applies equally to a Section 1983 request for money damages, particularly in view of the Court’s earlier pronouncement, in *Fair Assessment*”).

18 ¶ 48 *National Private Truck* and *Fair Assessment* establish that regardless of the type of relief sought, the principle of comity bars a § 1983 claim challenging a state tax system filed in state court if state law provides an adequate remedy.

3. Adequacy of State Law Remedy

¶ 49 Under *National Private Truck* and *Fair Assessment*, whether the comity principle bars WTA’s and the Carriers’ § 1983 claim relating to the ESD assessments and audits depends on whether state law—the ESA and the APA—provides WTA and the Carriers with an adequate remedy.¹⁰ We hold that state law provides an adequate remedy for damages based on the amount of the assessment, but not for damages independent of the amount of the assessment.

a. Legal Principles

19 ¶ 50 In *Fair Assessment*, the United States Supreme Court held that obtaining a court declaration regarding the validity of a state tax violates the principle of comity as long as the state remedy is “plain, adequate, and complete.” 454 U.S. at 116, 102 S.Ct. 177. At a minimum, such a state remedy must provide a hearing at which the taxpayer may raise constitutional objections to the tax. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512–14, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981).

20 ¶ 51 The Court in *Fair Assessment* stated that there was no significant difference between the “plain, adequate, and complete” standard and the “plain, speedy and efficient” standard used in the TIA. 454 U.S. at 116 & n. 8, 102 S.Ct. 177. In *Rosewell*, the Court considered the meaning of “plain, speedy and efficient” under the TIA. 450 U.S. at 512–19, 101 S.Ct. 1221. Breaking the standard down into its individual parts, the Court noted that remedies that are uncertain or unclear are not “plain.” *Id.* at 517, 101 S.Ct. 1221. The speediness of a remedy must be judged against the usual time for similar litigation. *Id.* at 518, 101 S.Ct. 1221. Finally, a remedy is efficient if it imposes no unusual hardship that requires ineffectual activity or unnecessary expenditure of time or energy. *Id.* at 517–18, 101 S.Ct. 1221. The Court ultimately held that the remedy at issue—refunding the challenged taxes without interest after two years—was plain, speedy, and efficient. *Id.* at 528, 101 S.Ct. 1221.

22 ¶ 52 For a state remedy to be adequate, “it need not necessarily be ‘the best remedy available or even equal to or better than the remedy which might be available in the federal courts.’” *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir.1974) (quoting *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir.1972)) (addressing standard under the TIA).

b. Adequate Remedy for Invalidating Assessments

23 ¶ 53 RCW 50.32.050 authorizes the ALJ to “affirm, modify or set aside the notice of assessment.” Therefore, to the extent that WTA and the Carriers are seeking damages under § 1983 for the amount of the challenged assessments, the ESA’s administrative process affords an adequate remedy.

¶ 54 WTA and the Carriers have the ability to argue before the ALJ, as they alleged in their complaint, that (1) the unemployment tax assessments are invalid because ESD misclassified owner/operators as employees, (2) federal law preempts ESD’s decision to classify owner/operators as employees, (3) the unemployment tax assessments violate the

commerce clause of the United States Constitution, *647 and (4) the assessments are invalid because they resulted from an improper audit process that violated ESD's own standards. The ALJ has the authority to address these arguments in deciding whether to affirm, modify, or set aside the assessment under [RCW 50.32.050](#). In fact, the ALJ addressed the classification of owner/operators when it remanded the assessments to ESD for reconsideration. In its remand order, the ALJ specifically ordered that ESD "review, reconsider and re-write" its findings regarding the classification of employees. CP 299. Similarly, the ALJ considered preemption when it addressed the Carriers' summary judgment motion.

¶ 55 If WTA and the Carriers disagree with the ALJ's ruling and the subsequent decision of the commissioner on the classification of owner/operators, preemption, or the commerce clause, they can seek a ruling that the assessments are invalid on judicial review under the APA. They will be able to invalidate the assessments if they can show that the commissioner "erroneously interpreted or applied the law," [RCW 34.05.570\(3\)\(d\)](#), that the assessments violated due process, equal protection, or the commerce clause, [RCW 34.05.570\(3\)\(a\)](#), or that imposing the assessments based on ESD's audit procedures violated the constitution. [RCW 34.05.570\(3\)\(a\)](#).

¶ 56 Because there is an adequate state law remedy, barring a § 1983 action for damages based on the amount of the challenged assessments is required under *Fair Assessment*. Before WTA and the Carriers could recover damages based on the amount of the assessments, they would have to obtain a declaration from the court that the assessments were in fact invalid. The Court in *Fair Assessment* held that obtaining such a court declaration regarding a state tax violates the principle of comity. [454 U.S. at 113–15, 102 S.Ct. 177](#).

¶ 57 WTA and the Carriers appear to argue that they do not have an adequate remedy regarding damages under § 1983 in the amount of the challenged assessments for two reasons. First, they argue that WTA, as opposed to *648 the Carriers, has no adequate state remedy because it has no administrative or appeal rights. WTA points out that it is not seeking to avoid taxes and none were imposed on it. However, as discussed above, to the extent WTA has standing to seek damages in the amount of the challenged assessments, that standing is representative only. WTA cannot have greater rights than **184 the members it is representing. See *Five Corners Family Farmers v. State*, [173 Wash.2d 296, 304, 268 P.3d 892 \(2011\)](#) (stating that "[o]rganizations have standing to assert the interests of their members").

¶ 58 Second, WTA and the Carriers argue that they do not have an adequate state law remedy because the ALJ excluded evidence regarding the allegedly improper audits and evidence relevant to their preemption argument. However, on judicial review under the APA, the superior court can determine whether such evidence is relevant to the validity of the assessment. [RCW 34.05.562](#) (authorizing the court to receive necessary evidence not contained in the agency record). And the superior court has authority under [RCW 34.05.574](#) to remand the matter for further proceedings.

¶ 59 We hold that the ESA's administrative process affords an adequate remedy to the extent that WTA and the Carriers are seeking damages under § 1983 for the amount of the challenged unemployment tax assessments. Accordingly, we hold that the principle of comity bars all § 1983 claims asserting such damages.

c. Inadequate Remedy for Damages Independent of Assessments

24 ¶ 60 Under the ESA, the ALJ's authority is limited. As noted above, [RCW 50.32.050](#) authorizes the ALJ only to "affirm, modify or set aside the notice of assessment." On review, the superior court's authority similarly is limited to issues relating to the assessment. Therefore, to the extent that WTA and the Carriers are seeking damages *649 under § 1983 that are independent of the amount of the challenged assessments, the ESA's administrative process does not afford an adequate remedy.

¶ 61 WTA and the Carriers allege in their complaint that the ESD employees' failure to properly conduct the audits resulting in the assessments violated their due process rights and that the employees' arbitrary and capricious conduct violated their due process and equal protection rights. These allegations can be interpreted as not depending on the invalidity of the assessments. WTA and the Carriers arguably are alleging that the named employees' conduct violated due process regardless of whether the assessments were valid.

¶ 62 WTA and the Carriers request damages under § 1983, but the complaint does not specify the type of damages claimed. As discussed above, the principle of comity bars all § 1983 claims asserting damages for the amount of the challenged assessments. However, the complaint could be interpreted as seeking damages independent of the validity of the assessments. For example, a carrier could allege that it lost income and incurred other financial losses apart from the amount of the assessment because the assessments and/or audits disrupted its relationship with owner/operators.

¶ 63 WTA and the Carriers have no ability to argue before the ALJ that they are entitled to damages that are unrelated to the amount of the challenged assessment. RCW 50.32.050 simply does not authorize the ALJ to award such damages. The ALJ can only modify or set aside the assessment, which would result in a tax refund. Nor does the APA authorize the award of such damages on judicial review. RCW 34.05.574. Therefore, the ESA's and APA's administrative process does not afford an adequate remedy for these types of § 1983 damages.

¶ 64 WTA and the Carriers specifically allege two types of damages that are unrelated to the amount of the challenged assessment. First, they allege that they *650 incurred costs and attorney fees in defending against the incorrect assessments. RCW 50.32.050 does not authorize the ALJ to award reasonable attorney fees. Second, WTA and the Carriers seek an award of punitive damages under § 1983. Again, RCW 50.32.050 does not authorize the ALJ to award punitive damages.

¶ 65 We hold that WTA and the Carriers do not have an adequate state law remedy for damages that are caused by ESD's assessments or audit procedures that are unrelated to the amount of the challenged assessment. Accordingly, we hold that the principle of comity does not bar a § 1983 claim asserting such damages.

**185 E. TORTIOUS INTERFERENCE WITH CONTRACTS AND BUSINESS EXPECTANCIES

¶ 66 The Carriers allege in their complaint that by reclassifying owner/operators as employees, ESD engaged in tortious interference with their contractual relationships and business expectancies with owner/operators.¹¹ ESD argues that (1) the Carriers' tortious interference claim is barred by the exclusive remedy provision of the ESA and/or the doctrine of exhaustion of administrative remedies; and (2) even if the claim is not barred, the Carriers did not allege the elements of tortious interference.

¶ 67 We hold that (1) the exclusive remedy provision of the ESA and the doctrine of exhaustion of administrative remedies bar the tortious interference claim to the extent that the claim is based on an allegation that the reclassification of owner/operators as employees was improper, but not to the extent that the claim is based on allegations that ESD had an improper motive or used improper means in making that reclassification; and (2) the Carriers' complaint allegations were sufficient to state a claim for tortious interference.

*651 1. Legal Principles

25 ¶ 68 A claim of tortious interference with a contract or business expectancy requires (1) the existence of a valid contractual relationship or business expectancy, (2) the defendant's knowledge of that relationship, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) the defendant's interference for an improper purpose or use of improper means, and (5) resultant damages. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wash.2d 342, 351, 144 P.3d 276 (2006). More recently, the Supreme Court consolidated this definition into three elements: "(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." *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wash.2d 157, 168, 273 P.3d 965 (2012).

26 27 ¶ 69 An examination of improper purpose focuses on the *motive* for the defendant's interference with the contract, such as greed, retaliation, or hostility. See *Elcon*, 174 Wash.2d at 169, 273 P.3d 965; *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wash.App. 502, 509, 278 P.3d 197 (2012). When examining improper means, we look to the *method* by which a defendant interferes with the contractual relationship, such as taking arbitrary and capricious action or using the threat of a lawsuit to harass. See *Pleas v. City of Seattle*, 112 Wash.2d 794, 805, 774 P.2d 1158 (1989); *Moore*, 168 Wash.App. at 509, 278 P.3d 197.

2. The ESA's Exclusive Remedy Provision

28 ¶ 70 RCW 50.32.180, the ESA's exclusive remedy provision, provides:

The remedies provided in this title for determining the justness or correctness of assessments, refunds, adjustments, or claims shall be exclusive and no court shall entertain any action to enjoin an assessment or require a refund or adjustment except in accordance with the provisions of this title.

*652 The language is clear that the ESA is the exclusive remedy only for challenges made to the "justness or correctness" of assessments, refunds, adjustments, or claims.

¶ 71 RCW 50.32.180 bars the Carriers' tortious interference claims to the extent that the claims depend on a finding that ESD's assessments based on the reclassification of owner/operators as employees were unjust or incorrect. Under the statute's plain language, that determination must be made under the ESA's appeal procedures. RCW 50.32.180 also would bar the recovery of the amount of the assessments as tortious interference damages.

29 **186 ¶ 72 However, in this context the Carriers do not necessarily argue that the assessments were incorrect. They argue that ESD had an improper purpose or used improper means in making the reclassification of owner/operators that led to the assessments. The Carriers' complaint alleged that ESD's improper purpose was to "target the trucking industry" in order to collect additional taxes. CP 221 (paragraphs 34–35). In a different cause of action, the Carriers also alleged that (1) ESD had a "malevolent purpose—to restructure Washington's trucking industry and to increase the State's revenues," CP 227 (paragraph 56), and (2) ESD's actions "constitute a bad faith application of Washington law and manipulation of same for an improper purpose." CP 227 (paragraph 57). In addition, the complaint alleged that ESD used improper means—predetermining the audit outcomes and requiring auditors to find that owner/operators were employees.

¶ 73 Because RCW 50.32.180 provides that the ESA is the exclusive remedy only for determining the justness or correctness of assessments, that statute does not apply to determining whether ESD had an improper purpose or used improper means in imposing those assessments.¹² *653 Therefore, we hold that RCW 50.32.180 does not bar the Carriers' tortious interference claim to the extent that the claim is based on allegations that ESD had an improper purpose or used improper means in making the reclassification of owner/operators.

3. Exhaustion of Administrative Remedies

30 31 ¶ 74 The doctrine of exhaustion of administrative remedies applies in cases where a claim is originally cognizable by an agency that has clearly defined mechanisms for resolving complaints by aggrieved parties, and the administrative remedies can provide the relief sought. *Jones v. State*, 170 Wash.2d 338, 356, 242 P.3d 825 (2010). Therefore, "if an administrative proceeding can alleviate the harmful consequences of a governmental activity at issue, a litigant must first pursue that remedy before the courts will intervene." *Smoke v. City of Seattle*, 132 Wash.2d 214, 223–24, 937 P.2d 186 (1997).

32 33 ¶ 75 Administrative remedies must be exhausted if the relief sought can be obtained through an exclusive or adequate administrative remedy. *Evergreen Wash. Healthcare Frontier, LLC v. Dep't of Soc. & Health Servs.*, 171 Wash.App. 431, 446, 287 P.3d 40 (2012), review denied, 176 Wash.2d 1028, 301 P.3d 1048 (2013). An administrative remedy may be adequate for purposes of requiring exhaustion even if it does not provide the precise relief sought or provide complete relief. *Id.* However, if there is no administrative remedy available, exhaustion is not required. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash.2d 635, 645, 310 P.3d 804 (2013).

¶ 76 Here, as discussed above, the administrative process provides an adequate remedy to the extent that the Carriers' tortious interference claim is based on an allegation that the reclassification of owner/operators as employees was improper, but no administrative remedy is available to the extent that the claim is based on allegations that *654 ESD had an improper purpose or used improper means in making that reclassification. Therefore, we hold that the exhaustion of remedies doctrine does not bar the Carriers' tortious interference claims to the extent that the claims are based on allegations that ESD had an improper purpose or used improper means in making the reclassification of owner/operators.

4. Sufficiency of Complaint Allegations

34 ¶ 77 The Carriers allege in their complaint that (1) they have ongoing contractual relationships and business expectancies with owner/operators; (2) ESD was aware of these relationships and expectancies; (3) ESD interfered with the business relationship **187 between the Carriers and owner/operators and deprived the Carriers of their ability to

contract with owner/operators as independent contractors; (4) ESD interfered by reclassifying owner/operators as employees; and (5) the Carriers suffered damages as a result.

¶ 78 ESD argues that even if the Carriers' claims are not barred, their complaint failed to state a claim because (1) Washington law establishes that owner/operators should be classified as employees, and (2) the alleged interference must cause a breach or termination of the contractual relationship. We disagree.

¶ 79 First, ESD argues that the Carriers' claim that ESD erroneously reclassified owner/operators as employees was rejected in *Western Ports Transportation, Inc. v. Employment Security Department*, 110 Wash.App. 440, 454, 41 P.3d 510 (2002). As a result, ESD argues that WTA and the Carriers cannot prove their tortious interference claim. However, as discussed above, the Carriers potentially can recover for tortious interference even if ESD's reclassification decision was correct. Therefore, we reject this argument.

¶ 80 Second, ESD relies on *Elcon* to argue that WTA and the Carriers were required to allege that ESD's alleged *655 interference resulted in a breach of contract. The court in *Elcon* stated that a tortious interference claim requires, as the second element, intentional interference "that causes breach or termination of the contractual relationship." 174 Wash.2d at 168, 273 P.3d 965. This statement seems to require that the plaintiff allege a breach or termination of a contract. WTA and the Carriers made no such allegation.

¶ 81 However, in *Elcon* the tortious interference claim was based on the termination of an existing contract. *Id.* at 162–63, 273 P.3d 965. Therefore, in stating its three-element test, the court only needed to address whether a contract had been terminated and not the interference with some business expectancy. Other than in *Elcon*, the Supreme Court exclusively has relied on the longer five element test for tortious interference since it was established in *Pleas v. City of Seattle*, 112 Wash.2d 794, 800, 803–04, 774 P.2d 1158 (1989). See *Pac. Nw. Shooting Park*, 158 Wash.2d 342, 351, 144 P.3d 276 (2006); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash.2d 133, 157, 930 P.2d 288 (1997); *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wash.2d 120, 137, 839 P.2d 314 (1992). Element three of that test requires "an intentional interference inducing or causing a breach or termination of the relationship or expectancy." *Pac. Nw. Shooting Park*, 158 Wash.2d at 351, 144 P.3d 276 (emphasis added).

35 ¶ 82 In *Commodore*, the court explicitly stated that, "Washington ... does not require the existence of an enforceable contract or the breach of one to support an action for tortious interference with a business relationship." 120 Wash.2d at 138, 839 P.2d 314. In that case, the court held that the plaintiff had a valid tortious interference claim even though he did not allege that his contract was breached or terminated. *Id.* at 137–38, 839 P.2d 314. Given this clear law, we do not interpret *Elcon* as eliminating the business expectancy aspect of the tortious interference claim.

¶ 83 The question here is whether the Carriers alleged breach or termination of a business expectancy. The complaint alleges that ESD's reclassification of owner/operators *656 "precludes the Carriers from contracting with independent owner/operators" and "deprived the Carriers of their ability to choose to contract with independent owner/operators." We hold that these allegations are sufficient to allege the breach or termination of a business expectancy.

¶ 84 We hold that the Carriers' complaint states a valid claim for tortious interference of a contract or business expectancy.

F. ATTORNEY FEES

¶ 85 WTA and the Carriers request an award of attorney fees under 42 U.S.C. § 1988 and RAP 18.1.

¶ 86 42 U.S.C. § 1988(b) provides that in an action to enforce a provision of § 1983, "the court, in its discretion, may allow the prevailing party, other than the United **188 States, a reasonable attorney's fee as part of the costs." RAP 18.1 permits an award of attorney fees on appeal if applicable law permits such award.

¶ 87 Because § 1988 only authorizes attorney fees for the prevailing party and we remand the § 1983 claim for further proceedings, we decline to award attorney fees until the case is resolved. See *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 28–29, 829 P.2d 765 (1992).

CONCLUSION

¶ 88 We hold that (1) WTA may have associational standing only regarding a § 1983 claim, but here this determination cannot be made on a CR 12(b)(6) or CR 12(c) motion; (2) WTA and the Carriers can assert a § 1983 claim despite the comity principle only to the extent that they seek damages unrelated to the assessment amounts; (3) the Carriers can assert claims for tortious interference with contracts or business expectancies despite the exclusive remedy provision of RCW 50.32.180 and the failure to exhaust administrative remedies only to the extent that the claims are based on allegations that ESD had an improper purpose or *657 used improper means in imposing the unemployment tax assessments and not on the incorrectness of those assessments; and (4) the complaint allegations are sufficient to state a claim for tortious interference with contracts or business expectancies.

¶ 89 We affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

We concur: JOHANSON, C.J., and BJORGEN, J.

All Citations

192 Wash.App. 621, 369 P.3d 170, Unempl.Ins.Rep. (CCH) P 9060

Footnotes

- 1 WTA and the Carriers also asserted claims for bad faith, conversion, and unjust enrichment. However, on review they confine their argument to the dismissal of their § 1983 and tortious interference with contract and business expectancy claims. Therefore, we do not address these claims.
- 2 Ch. 34.05 RCW.
- 3 Generally, submission of evidence not contained in the original complaint converts a CR 12(b)(6) motion to a summary judgment motion. *Bavand v. OneWest Bank, FSB*, 176 Wash.App. 475, 485, 309 P.3d 636 (2013). Here, it appears that the parties submitted additional materials not contained in the complaint. However, neither party argues that the summary judgment standard should be applied here.
- 4 It is unclear whether WTA argues that it has standing to assert claims for tortious interference with contractual relationships and business expectancies on behalf of the Carriers. We address this standing issue in case WTA does make this argument.
- 5 In *Firefighters*, the Supreme Court explained that “[m]onetary damages are distinguishable from injunctive relief, in that injunctive relief generally benefits every member of an employee association equally whereas the amount of monetary damages an employee suffers may vary from employee to employee.” 146 Wash.2d at 214, 45 P.3d 186.
- 6 WTA does not allege that it has received an assignment of its members’ damages claims. See *Firefighters*, 146 Wash.2d at 214, 45 P.3d 186.
- 7 If the only claimed damages were the amount of the assessments, there is no question that WTA would have associational standing because those damages are certain, easily ascertainable, and within ESD’s knowledge. *Firefighters*, 146 Wash.2d at 215–16, 45 P.3d 186. However, as discussed below, we hold that claims for those damages are barred under the principle of comity.
- 8 The trial court ruled that WTA and the Carriers could not pursue their § 1983 claims because they had not exhausted their administrative remedies. ESD concedes that exhaustion is not required to file a § 1983 claim, and argues only that comity bars the § 1983 claim here. Therefore, we do not address exhaustion of administrative remedies in this context.
- 9 Both parties refer to the TIA in their briefs. However, the TIA is inapplicable here because WTA and the Carriers filed suit in state court and not in federal court, and the TIA does not limit state courts. *Nat’l Private Truck*, 515 U.S. at 588, 115 S.Ct. 2351.

10

ESD argues only that the ESA and the APA provide an adequate remedy. Because ESD does not offer any other potential adequate remedies, we will not expand our analysis to consider whether other alternative remedies exist.

11 As discussed above, to the extent that WTA is asserting tortious interference claims on behalf of its members, it would not have associational standing because determining tortious interference damages would require the involvement of individual carriers.

12 It could be argued that [RCW 50.32.180](#) would apply if the Carriers were required to prove that the assessments were incorrect in order to recover for tortious interference. The elements of tortious interference do not expressly include proving that a defendant's interference *itself* is improper or incorrect, but Washington cases have not discussed this issue. However, we do not address this issue because neither party raises it.

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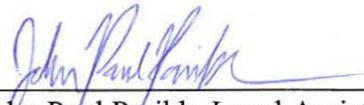
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 2, 2016 at Seattle, Washington.



John Paul Parikh, Legal Assistant
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