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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0459

DA 20-0459

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 191

B.Y.O.B., INC., a Montana Corporation, JIM GLANTZ, Individually and as Personal Representative of the Estate of Donna Glantz, Deceased, ON BEHALF OF THE ESTATE OF DONNA GLANTZ, BARBARA RILEY, MEADOW LAKE REAL ESTATE, a/b/n CYA, INC., GILDO, LLC, a Montana Limited Liability Company, TERIN GILDEN, and NATHAN GILDEN,

Plaintiffs and Appellants,

v.

STATE OF MONTANA, a governmental entity, THE MONTANA DEPARTMENT OF REVENUE, a political subdivision of the State of Montana, and DOES A-Z,

Defendants and Appellees.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Lake, Cause No. DV-2015-020
Honorable Jon A. Oldenburg, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Lee C. Henning, Rebecca J. Henning-Rutz, Ashley C. McCormack, Henning, Rutz & McCormack, P.L.L.C., Kalispell, Montana

For Appellee:

Mikel L. Moore, Moore, Cockrell, Goicoechea & Johnson, P.C., Kalispell, Montana

Quinlan O'Connor, State of Montana, Helena, Montana

Submitted on Briefs: April 28, 2021

Decided: August 3, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 This litigation involves the Agency Franchise Agreement ("AFA") for liquor sales that B.Y.O.B., Inc., held with the Montana Department of Revenue ("the Department"). After the Department took action to terminate the AFA for alleged violations of the Montana liquor laws, B.Y.O.B., Inc., began efforts to sell its interest and transfer ownership of the AFA. Those efforts did not succeed. Appellants brought suit, claiming that the Department tortiously, unconstitutionally, and in breach of contract interfered with B.Y.O.B., Inc.'s, attempts to transfer its interest and wrongfully executed an audit of B.Y.O.B., Inc., causing damages. The District Court found Appellants' AFA transfer-related claims barred by quasi-judicial immunity or alternatively by the parties' Settlement Agreement and granted summary judgment to the Department on those claims. The court denied summary judgment on the audit claims but limited their reach, and Appellants later dismissed their last remaining claim voluntarily. They now appeal the District Court's grant of summary judgment to the Department as well as its denial of their motions to compel discovery and for M. R. Civ. P. 54(b) certification. We affirm the District Court's Order and conclude that the remaining issues Appellants raise are moot. We consider the following restated issues:

1. *Did the District Court err in its rulings related to BYOB's attempts to assign the AFA to third parties?*

2. *Did the District Court err in its rulings regarding alleged discrimination by the Department against Gildo?*

3. *Did the District Court abuse its discretion when it denied Appellants' Rule 54(b) motion for certification?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Department granted the AFA to B.Y.O.B., Inc., for its operation of Montana Agency Liquor Store Number 12, known as B.Y.O.B., Inc, in Kalispell. Beginning in April 1996, B.Y.O.B., Inc. was owned and operated by Donna Glantz. In 2008 the Department began auditing B.Y.O.B., Inc., and on May 1, 2009, the Department informed Donna that it intended to terminate the AFA because B.Y.O.B., Inc., had violated the Montana Alcoholic Beverage Code ("MABC"). After finding additional MABC violations, the Department initiated a second termination action against BYOB on February 16, 2010.[1]

¶3 Shortly after the Department informed Donna that B.Y.O.B., Inc.'s, AFA would be terminated, Donna began attempting to sell the company and its AFA. In the meantime, BYOB contested both revocations. After administrative proceedings, the Department issued Final Agency Decisions in both cases ordering the termination of BYOB's AFA. BYOB appealed both revocations to the district court before the Hon. Ted Lympus. Judge Lympus stayed the first termination on March 18, 2011; after BYOB appealed the second Final Agency Decision, on December 23, 2011, Judge Lympus consolidated both matters and issued a stay on the AFA's termination for the duration of the appeal process.

¶4 Donna died in mid-2011; Jim Glantz, her husband and personal representative of the Estate, continued efforts to sell BYOB while the termination appeals were pending but

[1] Hereafter, unless otherwise specified, "BYOB" refers to B.Y.O.B., Inc., and Jim Glantz, both individually and as Personal Representative of the Estate of Donna Glantz.

was unable to finalize a sale. Gildo, LLC, co-owned by Terin and Nathan Gilden (collectively "Gildo"), was one of these potential buyers.

¶5 On December 23, 2011, B.Y.O.B., Inc., through Jim Glantz, voluntarily filed for Chapter 11 bankruptcy. According to Jim's deposition testimony, cited by the District Court and undisputed by Appellants on appeal, the reason BYOB sought bankruptcy protection was because "[the Department] was gung-ho about . . . terminating [the AFA], and the only avenue that I and the attorneys and advisers could see was to put [B.Y.O.B., Inc.,] into bankruptcy to delay that and get the sale through to Gildo, Inc." The bankruptcy court, however, refused to order a stay of the district court proceedings.

¶6 BYOB eventually stipulated to the appointment of a bankruptcy trustee ("Trustee"). Through the Trustee, B.Y.O.B., Inc., entered into a Settlement Agreement with the Department regarding the litigation pending between them, converted the Chapter 11 bankruptcy into a Chapter 7 liquidation bankruptcy, and sold BYOB's interest in its AFA and its inventory at auction for $1,474,718. The Estate retained approximately $1,000,000 from the sale after creditors were paid. As B.Y.O.B., Inc., remained under audit by the Department, however, disbursement of the auction proceeds—initially held by the Department—was delayed until May 2014, when a court order approved a $750,000 distribution. The audit ended in June 2017, and Jim, as the Estate's personal representative, received a final refund check from the Department.

¶7 On January 29, 2015, Appellants filed the complaint in the present matter. The Fourth Amended Complaint contained claims relating both to the method by which the Department handled BYOB's attempts to sell the AFA and to how the Department

conducted its audit. The four causes of action listed were Count I: Negligence; Count II: Tortious Interference; Count III: Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing; and Count IV: Montana Constitutional Rights [sic]. Appellants filed a motion for partial summary judgment claiming that

> 1) [The Department] violated . . . B.Y.O.B.'s constitutional rights to protection, and negligently interfered with the transfer and sale of the B.Y.O.B. [AFA] . . ., and is thus liable for damages to . . . Jim Glantz and the Estate . . . in an amount to be determined at trial; 2) [the Department] violated . . . Gildo's and Nathan and Terin Gilden's rights to equal protection and negligently interfered with their acquisition of the AFA and is thus liable for damages to Gildo and the Gildens in an amount to be determined at trial; and 3) [the Department] violated the constitution and Montana laws in its treatment of B.Y.O.B. as a taxpayer and is thus liable for damages to B.Y.O.B.

¶8 The Department likewise filed a motion for summary judgment seeking judgment in its favor on all counts because:

1. All of [the Department's] actions which form the basis of the Complaint are protected by quasi-judicial immunity . . . a complete defense . . . .
2. Counts I, II, and IV of the Complaint fail as a matter of law pursuant to the public duty doctrine. . . .
3. All AFA transfer-related claims, Counts I, II, III, and IV, ¶ 42.b, of the Complaint fail because the transfers alleged rely on illegal seller financing terms. This argument provides a complete defense to these Counts except as to the audit-related claim of Count IV, ¶ 42.a.
4. All Counts of Plaintiff's Complaint are time barred, in whole or in part. . . .
5. Count II of Plaintiffs' Complaint fails as a matter of law because [the Department] is not a stranger to BYOB's AFA—a requirement for a tortious interference claim. . . .
6. Count III of Plaintiffs' Complaint fails as a matter of law because oral contracts with the State are void pursuant to statute. . . .
7. Count IV of Plaintiffs' Complaint fails as a matter of law because Plaintiffs cannot identify similarly situated classes and any disparate treatment is rationally related to legitimate government interests. . . .

8. Any claim for damages arising from Counts I, II, III, and IV, ¶ 42.b, of Plaintiffs' Complaint fails as a result of BYOB being judicially estopped from asserting any claims in this matter. . . .

¶9 The District Court issued a lengthy Order on Cross Motions for Summary Judgment ("Order") in which it carefully addressed Appellants' claims. Regarding the claims relating to BYOB's attempts to transfer its AFA, the District Court concluded that the Department's actions relating to BYOB's efforts to sell the AFA were quasi-judicial in nature, entitling the Department to immunity, and that any discussion, negotiations, or alleged oral contracts between the Department and BYOB were akin to "plea-bargain type negotiations," also warranting immunity. The District Court also concluded that, even if BYOB's claims survived quasi-judicial immunity, the claims failed because the Settlement Agreement entered into between B.Y.O.B., Inc., and the Department superseded all earlier agreements. The District Court declined to further analyze Appellants' AFA transfer-related claims or any of the Department's asserted defenses, concluding they were moot. The District Court therefore granted the portions of the Department's motion for summary judgment relating to Appellants' AFA transfer-related claims and denied the portions of the Appellants' motion for partial summary judgment relating to the same.

¶10 On Appellants' claims relating to the Department's audit of B.Y.O.B., Inc., the District Court concluded that unlike the transfer-related claims, quasi-judicial immunity did not provide the Department immunity. The District Court also rejected the Department's public duty doctrine defense. The court concluded, however, that the doctrines of collateral estoppel, judicial estoppel, and res judicata limited the majority of the audit claims. The District Court stated that many of the Appellants' audit-related claims

had been addressed either in the Estate's probate proceedings, the bankruptcy court proceedings, or the various stipulations and agreements that the parties signed over the course of all litigation. After considering these facts, what remained of Appellants' audit-related claims was only a constitutional equal protection claim, with damages on that claim limited to one day of emotional distress damages. Because the surviving constitutional claim involved issues of material fact, the District Court denied both parties' motions for summary judgment as to the equal protection claim.

¶11 Appellants thereafter moved the District Court to certify its Order as a final appealable order pursuant to M. R. Civ. P. 54(b) and M. R. App. P. 6(6), and they additionally requested the court to dismiss without prejudice the remaining audit-related claim. The District Court entered an Order on Motion for Certification ("Certification Order") denying Appellants' request. It noted that Appellants admitted in their briefing that their constitutional audit-related claim survived and remained subject to continuing litigation. The District Court concluded that the Appellants' approach would "only lead to piecemeal litigation of part of the multiple claims set forth by [Appellants]" in violation of the relevant caselaw, and additionally that the matter was not the "infrequent harsh case" warranting immediate certification. Appellants then filed an unopposed motion to dismiss this remaining claim, which the District Court granted.[2]

[2] Unrelated to the other issues on appeal, Appellants in March 2019 filed a Motion to Compel Discovery, alleging that the Department failed to produce certain materials it provided to one of its experts. The District Court reviewed *in camera* the contested discovery materials and ultimately issued a Corrected Order Following *In Camera* Inspection ("Discovery Order"), which denied the Appellants' motion to compel. In that order, the District Court discussed its *in camera* review of the contested discovery material and concluded that the Department validly asserted

STANDARD OF REVIEW

¶12 "This Court reviews de novo a district court's grant or denial of summary judgment, applying the criteria of M. R. Civ. P. 56(c)." *Nunez v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 2020 MT 3, ¶ 9, 398 Mont. 261, 455 P.3d 829 (citing *Stipe v. First Interstate Bank — Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063). "Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Speer v. State*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016 (citing M. R. Civ. P. 56(c)(3)). Once the moving party meets this burden, the nonmoving party must present material and substantial evidence to raise a genuine issue of material fact. *Sullivan v. Cherewick*, 2017 MT 38, ¶ 9, 386 Mont. 350, 391 P.3d 62 (citing *Bird v. Cascade County*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602). We draw all reasonable inferences from the evidence offered in favor of the party opposing summary judgment; but "conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment." *Sullivan*, ¶ 9 (citing *Bird*, ¶ 9). We review a district court's conclusions of law for correctness. *Sullivan*, ¶ 9 (citing *Bird*, ¶ 9).

DISCUSSION

¶13 The State strictly controls and regulates the sale of alcohol in Montana through the MABC. Title 16, Ch. 1–4, 6, MCA. Section 16-1-101(2), MCA, states that "[i]t is the

privilege. Because we affirm the District Court's Summary Judgment Order, and because Appellants voluntarily dismissed with prejudice the remainder of their claims, the Discovery Order is now moot, and we do not consider Appellants' arguments regarding it.

policy of the state of Montana to effectuate and ensure the entire control of the manufacture, sale, importation, and distribution of alcoholic beverages within the state." The statute makes explicit that the MABC:

> is an exercise of the police power of the state for the protection of the welfare, health, peace, morals, and safety of the people of the state and of the state's power under the 21st amendment to the United States constitution to control the transportation and importation of alcoholic beverages into the state. The overall purposes of this code under the 21st amendment to the United States constitution are to promote temperance, create orderly markets, and aid in the collection of taxes. The provisions of this code must be broadly construed to accomplish these purposes.

Section 16-1-101(3), MCA. To that end, the Legislature has empowered the Department with "complete regulatory control of the sale of liquor" in Montana. Section 16-1-103, MCA. This includes the "general control, management, and supervision of all agency liquor stores," and the power or authority "to do all things necessary to administer [the MABC] or rules." Sections 16-1-301, -302(10), MCA.

¶14 An AFA is defined by statute as "an agreement between the [D]epartment and a person appointed to sell liquor and table wine as a commission merchant rather than as an employee." Section 16-1-106(1), MCA. "'Agency liquor store' means a store operated under an [AFA] in accordance with this code for the purpose of selling liquor at either the posted or the retail price for off-premises consumption." Section 16-1-106(2), MCA. The Department may terminate an AFA for numerous reasons, including for an agent's failure to comply with the AFA's express terms. Section 16-2-101(7)(a)(v), MCA. An agent may contest the termination and request a hearing, in which case the Department must suspend

the termination until a final decision has been made pursuant to the Montana Administrative Procedure Act ("MAPA"). Section 16-2-101(7)(b), MCA.

¶15 Finally, the MABC allows for AFA assignments with the Department's approval.

> An agent may assign an [AFA] to a person who, upon approval of the [D]epartment, is named agent in the [AFA], with the rights, privileges, and responsibilities of the original agent for the remaining term of the [AFA]. The agent shall notify the [D]epartment of an intent to assign the [AFA] 60 days before the intended effective date of the assignment. The [D]epartment may not unreasonably withhold approval of an assignment request.

Section 16-2-101(10), MCA (2011).

¶16 Appellants first contend that this section of law[3] requires that the Department approve an AFA assignment request within sixty days of receiving notice of an agent's intent to assign it. Because the Department is the only party that can approve an AFA assignment, Appellants contend that the sixty-day provision has no meaning if applied to an agent. Thus, according to Appellants, the only interpretation of the statute that gives its language full effect is that the Department must accept or reject AFA transfers within sixty days of receiving notice of an agent's intent to assign its AFA. The District Court rejected this interpretation, as do we.

¶17 "If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls, and this Court need go no further nor apply any other means of interpretation." *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 12, 404 Mont. 80, 485 P.3d 741 (quoting *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1,

[3] Now § 16-2-101(9), MCA (2021). The provision's language is unchanged.

78 P.3d 499) (internal quotation marks omitted). We agree with the District Court that the statute's meaning is clear—an agent seeking to assign an AFA must give the Department notice of its intent to assign the AFA sixty days before the assignment's intended effective date. This is a simple notice requirement, the mandate of which falls solely and squarely on the agent seeking to assign an AFA. Rather than "giv[ing] meaning to the full language of the statute," Appellants' proffered construction requires this Court to "insert what has been omitted," § 1-2-101, MCA—specifically, an unstated affirmative duty on the Department to approve AFA assignment requests within sixty days. *See Mont. Republican Party*, ¶ 12. The District Court did not err in refusing to credit such an interpretation of the statute.

¶18 Appellants next contend that the District Court erred by adopting the Department's characterization of B.Y.O.B., Inc.'s, AFA as "twice revoked," or that the AFA otherwise was suspended or terminated. Appellants argue that because BYOB appealed the Department's attempts to revoke the AFA but no final court order was ever issued on those appeals, and because B.Y.O.B., Inc., remained in operation as a liquor store "from the entirety of the first revocation to the ultimate sale of the AFA," its AFA was never truly revoked or suspended. Appellants do not support this assertion with any statutory language or citation to Department rules, instead referencing only non-legal dictionary definitions of "revoke," "suspend," and "terminate."

¶19 By the plain statutory language, the Department twice terminated BYOB's AFA. BYOB appealed the Department's terminations pursuant to MAPA, and the AFA terminations were suspended pending the appeal process. *See* § 16-2-101(7)(b), MCA

(allowing an agent to request a hearing and requiring the Department to "suspend its termination order until after a final decision has been made pursuant to [MAPA]"). The Final Agency Decisions, however, affirmed the terminations. BYOB sought judicial review. At that point, not only was the AFA termination affirmed by the Department, but the proceedings pursuant to MAPA had ended, along with any statutory mandate that the Department suspend its termination. To that end, BYOB moved for orders staying termination of the AFA in the district court, which orders the district court granted. Neither the grant of these stays nor the settlement authorizing the AFA's auction while judicial review was pending changes the fact that the Final Agency Decision(s) terminated BYOB's AFA. The District Court did not err when it characterized BYOB's AFA as "twice revoked."

¶20 *1. Did the District Court err in its rulings related to BYOB's attempts to assign the AFA to third parties?*

¶21 The District Court concluded that "quasi-judicial immunity protects [the Department] from all [the Appellants'] AFA transfer-related claims, specifically Count I: Negligence, Count II: Tortious Interference, Count III: Breach of Contract and ¶ 42(b) of Count IV: Montana Constitutional Rights." The District Court also concluded, however, that even if BYOB's claims were not rejected on quasi-judicial immunity grounds, the terms of the Settlement Agreement would "supersede any alleged earlier oral agreement." Appellants argue that the District Court misapplied the quasi-judicial immunity doctrine. They claim that BYOB entered into two oral contracts with the Department regarding the AFA sale and that the Department's alleged tortious breach of

these contracts is not covered by quasi-judicial immunity. They argue additionally that the Department's duty to investigate and "not unreasonably withhold approval" of AFA assignments under § 16-2-101, MCA, is ministerial in nature, rather than adjudicatory.

¶22 The context of this argument arises from two courses of events in the underlying proceedings. The first involves a purported oral contract allegedly formed during BYOB's appeal of the Final Agency Decisions to the district court before Judge Lympus.[4] At that time, BYOB was attempting to transfer its interest in the AFA to several third parties, despite the Department's continued representations that it would not allow any AFA transfer until the litigation was complete. Appellants allege that during a hearing before the district court—a hearing specifically for the purpose of addressing whether to stay the Department's Final Agency Decision terminating BYOB's AFA—Judge Lympus mandated or urged that the AFA be transferred to a third party. The alleged first oral contract was made immediately after this hearing. Jim Glantz attested by affidavit that:

[4] Appellants do not identify in their briefing the terms of the first alleged oral contract. The Department responds that the terms and circumstances of the first alleged oral contract are found in ¶ 18(b) of the Appellants' Fourth Amended Complaint, which Appellants did not contest in their reply. Paragraph 18(b) of the Fourth Amended Complaint states:

> On or about February 23, 2011, Joel Silverman [attorney for the Department at the time], agreed that BYOB could transfer the [AFA] to moot an ongoing dispute between [the Department] and BYOB/the Glantz's [sic]. The [Department] later violated and interfered with that agreement when [Department] representative(s) informed the Robinsons that the State would not approve the transfer, as well as conveying the [Department's] sour attitudes and bad opinions about BYOB and the Glantzes. As a result of their contact with the State, the Robinsons backed out of the sale.

Because Appellants do not dispute in their reply that these are the terms of the first oral contract they allege, we assume here that they are.

> After the hearing ended, David Stufft [attorney for BYOB] and Joel Silverman discussed the particulars of [the Department's] review of the Robinson sale. Silverman agreed [the Department] would approve the transfer to the Robinsons, provided they were legitimate, third-party purchasers. In exchange, BYOB promised to consummate the sale, dismiss the state district court proceeding, and no longer have any role in the AFA. This agreement was a 3-way deal, which would moot the ongoing dispute between [the Department] and BYOB.

¶23 Even assuming this statement is true and constituted an agreement between the parties, the subsequent written Settlement Agreement between BYOB and the Department that ended this dispute extinguishes any claims arising from this exchange. The Settlement Agreement states in Section Three, Scope of Agreement, that:

> This Agreement constitutes the final agreement between the Agent [B.Y.O.B., Inc.,] and the Department *and supersedes any and all previous written or oral agreements with the Department*. This Agreement is in settlement of the violations listed above, and is not intended to cover any other disputes, known or unknown, between the parties.

(Emphasis added.)

¶24 Jim Glantz's affidavit is clear that the alleged oral contract was made in consideration of BYOB's dismissal of the state court proceedings before Judge Lympus—the proceedings BYOB initiated to adjudicate the parties' disputes regarding the Final Agency Decision.[5] These are the same disputes referenced in and covered by the Settlement Agreement. Further, despite Jim Glantz's assertion that this was a three-way deal, his affidavit's plain language and a review of the transcript of the hearing immediately preceding the alleged oral contract indicate that neither the Robinsons nor any

[5] At the time of the referenced hearing, only the first Final Agency Decision was before Judge Lympus.

representative on their behalf was present for this discussion; this agreement could only be between BYOB and the Department. Finally, Jim Glantz's affidavit states the purpose of the agreement was to "moot the ongoing dispute" through BYOB's dismissal of the action upon assigning the AFA—essentially the same purpose as the final Settlement Agreement resulting in the AFA's auction. Regardless of, and aside from, any quasi-judicial immunity defense the Department has, the Settlement Agreement between B.Y.O.B., Inc., and the Department supersedes the alleged first oral contract between BYOB and the Department. It therefore extinguishes Counts I–IV of Appellants' Fourth Amended Complaint relative to that alleged oral agreement.

¶25 Appellants argue that the District Court relied solely on its interpretation of the hearing before Judge Lympus—who Appellants allege voiced support for a three-way deal—and ignored deposition testimony that Appellants claim establishes the Department understood Judge Lympus to want such a three-way deal. Appellants rely, however, on an edited and out-of-context section of the hearing transcript. The sole reason for the hearing was to determine whether to order a stay on the Department's termination of the AFA. Judge Lympus entered no order, either written or from the bench, mandating some sort of three-way deal. Additionally, Judge Lympus's passing references to a possible settlement were couched in hypothetical terms: "And *if* there is a potential sale, and *that can be finalized*, obviously that would be in everyone's best interest"; "*If* there's a possibility of a sale . . . that, you know, might be a benefit, but it's not an issue before the Court today as to whether or not there should be a stay"; "*If* a sale can be arrived at or whatever, that's fine, but *that's not what we're here for today*." (Emphasis added.) The hearing transcript

is manifest that Judge Lympus did not push for, let alone mandate, any sort of three-way deal. The Appellants' references to the deposition testimony are their own interpretation of what they believe the Department believed about Judge Lympus's desire regarding a possible resolution to the litigation. The cited testimony does not call Judge Lympus's statements into dispute. *See Sullivan*, ¶ 9. The District Court's judgment regarding the first alleged oral contract is affirmed.

¶26 The second oral contract Appellants allege concerns BYOB's agreement to stipulate to the appointment of a bankruptcy trustee in its bankruptcy proceeding. According to the nearly identical affidavits of Barb Riley, Jim Glantz, and Terin Gilden, after a February 10, 2012 Section 341 Creditors meeting in the bankruptcy case, the parties formed the oral contract in the following manner:

> 4. After Jim was questioned at the meeting, Mr. Jensen [attorney with the Office of the United States Trustee ("UST")] went "off the record." A conversation took place between Mr. Jensen, Mr. Dye [attorney for BYOB] and Mr. Silverman . . . . As I recall, Christy Brandon [who would later be appointed B.Y.O.B., Inc.'s, Trustee] was not in the room during this discussion.
>
> 5. The outcome of the discussion was that, if BYOB agreed to stipulate to appoint a bankruptcy trustee, then the [Department] would allow the Gildo sale. The trustee would act as a neutral third-party and work with the [Department] to shepherd BYOB through the sale. [The Department] would verify the legitimacy of the Gildo buy-sell agreement for the AFA, specifically that Gildo was a bona fide purchaser and had financing in place for the purchase. If those requirements were met, [the Department] would approve the transfer. In exchange, BYOB promised to consummate the sale, dismiss the state district court proceeding and no longer have any role in the AFA. This agreement was a 3-way deal, which would moot the ongoing dispute between [the Department] and BYOB.

According to Appellants, the Department subsequently breached this agreement when, after BYOB had stipulated to a bankruptcy trustee, the Department rejected Gildo's application for assignment of the AFA and stated it would not even consider processing it.

¶27 Appellants did not attach a copy of the stipulation to their briefs before this Court, nor can we locate a copy of it in the record before us. The District Court, however, included a full transcription of the stipulation in its Order, and Appellants do not dispute its contents on appeal. The stipulation appointing a Trustee reads in full:

> The . . . [UST] and the above-named debtor, B.Y.O.B., Inc., through their respective attorneys, stipulate and agree that the best interests of the Debtor's creditors and this bankruptcy estate will be met if a Chapter 11 Trustee is appointed immediately in this case, and the Debtor affirmatively consents to the appointment of a trustee pursuant to 11 U.S.C. § 1104(a). It is the Debtor's express desire and commitment to assist and cooperate with the appointment of a Chapter 11 Trustee, and the fulfillment of the duties specified for a Chapter 11 Trustee, as provided in 11 U.S.C. § 1106(a).

The District Court found that the stipulation was dated February 15, 2012, and signed only by UST attorney Jensen and BYOB attorney Dye; it lacks any signature from the Department or the Department's counsel. BYOB does not challenge these District Court findings on appeal.

¶28 The District Court found that the stipulation "does not require BYOB to dismiss any court proceedings or give up its AFA," "does not mention [the Department], Gildo, or the AFA," and "does not impose a duty on the Trustee to shepherd a sale to Gildo or on BYOB to consummate any sale." It additionally noted that the terms of such an oral agreement, as alleged in the affidavits, "would have so significantly impacted the parties' litigation positions that this [c]ourt does not find it credible to believe they would have been omitted

from the written Stipulation." The District Court concluded that the stipulation "was a succinct written contract between Mr. Jensen on behalf of the UST and Mr. Dye on behalf of BYOB." The District Court further noted that in order to grant Appellants' motion for partial summary judgment, it would have to find "a franchisee in active bankruptcy proceedings while facing a third revocation of an already-twice-revoked AFA to have the same freedom to assign that AFA as a fiscally and legally healthy franchisee holding an AFA in good standing." These findings are supported by the stipulation's terms and by the record and lead us to conclude that the Department was not a party to the stipulation or some unstated additional term of it, nor did the stipulation place any duties upon the Trustee other than those found in 11 U.S.C. § 1106(a), which does not include any duty to "act as a neutral third party," "shepherd BYOB through the sale," or "consummate the sale" to Gildo. The District Court did not err when it concluded that BYOB did not demonstrate a genuine issue of material fact.

¶29 Appellants next argue that the District Court erred when it granted the Department quasi-judicial immunity for its actions in investigating and eventually denying BYOB's attempt to assign the AFA to Gildo. They contend that the Department's duty to investigate applications for AFA assignments is ministerial rather than adversarial—AFA assignments are not covered by MAPA and therefore do not take place in the course of an adversarial proceeding. Appellants assert that they have colorable claims as to Counts I–IV of their Fourth Amended Complaint. Whatever merit Appellants' argument may have when applied to an AFA assignment by a non-terminated agent in good standing with the

Department, the undisputed factual circumstances surrounding the attempted BYOB-Gildo assignment are markedly different.

¶30 Gildo entered into a buy-sell agreement with BYOB on October 25, 2011, well after BYOB appealed the first Final Agency Decision and about two weeks after BYOB appealed the second Final Agency Decision. At this point, the Department had terminated BYOB's AFA, although the court had stayed the Department's ability to execute that termination. Barb Riley, both a real estate agent hired by BYOB to find a purchaser for its AFA and B.Y.O.B., Inc.'s, former bookkeeper, was managing the store at this time due to Donna Glantz's death. Terin Gilden, part owner of Gildo, LLC, with her husband Nathan, is Barb Riley's daughter. The buy-sell agreement is explicit that Gildo is aware BYOB "has pending litigation settlement actions" with the Department, that the agreement is contingent upon the Department approving the AFA assignment, and that closing must occur by December 1, 2011, though Gildo retained a right to extend that deadline to April 1, 2012. On November 10, 2011, Gildo/BYOB submitted an assignment request to the Department. In response, the Department represented that it would not review or process any assignment request while litigation remained pending. On November 18, the Department requested additional financing-related documents from Gildo. Barb Riley, on Gildo's behalf, refused to provide this information. On December 23, 2011, BYOB filed for Chapter 11 bankruptcy—by Jim Glantz's own admission as an attempt to stall the district court proceedings and allow time for the sale to go through. On February 10, 2012, the creditors' meeting and alleged second oral contract occurred. On February 15 and 16,

BYOB and the UST stipulated to, and the bankruptcy court appointed, the Trustee.[6] On February 28, the Department rejected Gildo's assignment application because Gildo had not provided the requested additional information. Gildo requested that the Department "refresh" its application; the Department told Gildo it would need to submit a new one. On March 2, before Gildo submitted a new application, B.Y.O.B., Inc., acting through the Trustee, rejected the buy-sell agreement. On May 8, BYOB and the Department entered into the Settlement Agreement. On May 10, the bankruptcy court held a hearing on the buy-sell agreement's rejection. The bankruptcy court concluded that because the buy-sell agreement's provisions stated it would terminate upon the Department's rejection of Gildo's application, the agreement "doesn't exist" and that the Trustee correctly rejected it.

¶31 This lengthy, if dry, recitation of the facts surrounding the Department's rejection of Gildo's application makes clear that BYOB's AFA was terminated throughout the entirety of its attempts to assign the AFA to Gildo. Gildo knew BYOB's AFA was the subject of litigation regarding its termination. As evidenced by the Settlement Agreement and the AFA's eventual auction, the Department was not dead set on refusing any attempt by BYOB to assign its AFA as part of a settlement deal. Even assuming that the second oral contract regarding the stipulation to appoint a trustee is valid, and even assuming as true that the Department previously represented it would not begin review of the application until litigation concluded, the terms of the second oral contract, as asserted by

[6] The Trustee assumed B.Y.O.B., Inc.'s, management upon her appointment.

Appellants, included that: "[The Department] would verify the legitimacy of the Gildo buy-sell agreement for the AFA, specifically that Gildo was a bona fide purchaser and had financing in place for the purchase. If those requirements were met, [the Department] would approve the transfer." This is a clear indication to both Gildo and BYOB that the Department would review the application, but that its approval of the assignment—even if a trustee was stipulated to—was conditioned upon a review of Gildo's financing. Yet Gildo, as Appellants admit, still did not provide the financing information the Department needed. Without the financing information to review, the Department could not verify Gildo as a bona fide purchaser that had financing in place. And as the bankruptcy court noted, on February 28, 2012, the buy-sell agreement between BYOB and Gildo ceased to exist. Assuming the existence of the alleged oral contract, at that point BYOB had no sale to consummate, nor did the Department have any remaining duty relative to either BYOB or Gildo.

¶32 Appellants raise several arguments as justification for Gildo's failure to provide the Department the requested financing information: 1) that Gildo relied on the Department's previous representations that it would not even start processing Gildo's application while litigation was still pending; 2) that the Department had never requested this type of information before; 3) that Barb Riley objected on Gildo's behalf, believing the information was confidential; and 4) that BYOB believed previous sales failed due to the Department's contacts with lenders. Regarding the first justification, the terms of the second alleged oral contract, as stated in Appellants' affidavits, make clear that the Department agreed at that point to process Gildo's application as part of a settlement

agreement to end litigation. The second and third justifications fail in two ways. First, regardless whether the Department had ever requested this information before or if it was confidential, by entering into the second oral contract the Appellants acknowledged that the Department needed the information pursuant to its agreement to "verify the legitimacy of the Gildo buy-sell agreement for the AFA, specifically that Gildo was a bona fide purchaser and had financing in place for the purchase." Second, any arguments regarding the propriety of the Department requesting the financing information or regarding the information's allegedly confidential nature are mooted by Appellants' admission that Gildo would have provided it in a second assignment application. Finally, regarding BYOB's beliefs that previous sales failed due to the Department's contact with lenders, this is a "speculative assertion" not sufficient to raise a genuine issue of fact defeating summary judgment. *Sullivan*, ¶ 9. Because they did not provide the Department with the financing information the Department required to process Gildo's application, Gildo cannot now validly assert the claims contained in Counts I–IV of the Fourth Amended Complaint insofar as the Counts pertain to the Department's alleged breach of the second oral agreement.

¶33 Regarding BYOB's claims relative to the alleged second oral contract, even if the agreement did exist, it was both by its own terms and in light of the AFA's terminated status a settlement agreement. As noted, BYOB's AFA already was terminated; it had no interest in it to sell or assign. The only way for an assignment to take place would be if the parties stipulated to dismissing the district court litigation and the Department allowed an assignment. The terms of the second alleged agreement, as attested to by Appellants, make

clear that it is: "a 3-way deal, which would moot the ongoing dispute between [the Department] and BYOB" through BYOB "dismiss[ing] the state district court proceeding[s]." As discussed above, the Settlement Agreement subsumed any previous oral agreements between BYOB and the Department. Even taking these representations as true and viewing them in the light most favorable to BYOB, any claim based upon a breach of this oral agreement thus was extinguished on the date B.Y.O.B., Inc., signed the Settlement Agreement. The judgment of the District Court regarding the alleged second oral contract is therefore affirmed.

¶34 Appellants finally argue that the Department tortiously or negligently interfered with an attempted assignment to another third party, the Fishes, a husband and wife. While they point to no contract—oral or otherwise—regarding those attempts, they claim the Fishes made a cash offer but after interactions with the Department refused to reduce the cash offer to writing and backed out of negotiations. According to BYOB, and supported by the Fishes' affidavits, in March 2011 the Fishes entered into discussions with BYOB to "purchase its business, or '[AFA].'" To that end they attempted to get financing from a bank; though they were qualified for the loan, the bank stated it would provide the financing only upon some guarantee from the Department that it would approve the assignment. The Fishes state the Department told them it would "not allow the transfer."

¶35 As the Fishes are not parties here, BYOB asserts the negligent and intentional interference claims on its own behalf only. BYOB claims that "[the Department] acted negligently by telling potential purchasers there was litigation and nothing would be approved until the litigation was complete and telling the Fishes to simply 'back away.'"

It contends that the Department did not want BYOB to "benefit too much; it intended to hurt [BYOB]; spoke to potential purchasers with the intent to hurt [BYOB]; and ultimately did hurt [BYOB]." Other than citing the elements of a prima facie claim, BYOB develops no analysis of the law governing tortious or negligent interference with contracts or its application to the facts alleged. Moreover, the Fishes' affidavits are clear that they never reduced any cash offer to writing, and they make no claim that they submitted an assignment request to the Department. In March 2011, BYOB's AFA already was terminated pursuant to the first Final Agency Decision, and BYOB was engaged in litigation with the Department before Judge Lympus. Appellants have not established that the Department has any duty, statutory or otherwise, to approve the assignment of a terminated AFA. Without any such duty, they cannot demonstrate that the Department acted negligently or that its actions "were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor," an essential element of an interference with contractual or business relations claim. *Grenfell v. Anderson*, 2002 MT 225, ¶ 64, 311 Mont. 385, 56 P.3d 326. The District Court's judgment relative to those claims is therefore affirmed.

¶36 *2. Did the District Court err in its rulings regarding alleged discrimination by the Department against Gildo?*

¶37 Relatedly, but somewhat separately, Appellants argue that the Department discriminated against Gildo by unreasonably withholding approval of BYOB's assignment request and drafting the Settlement Agreement to specifically exclude Gildo, LLC, Terin Gilden, and (presumably) Nathan Gilden. Appellants' argument is that the Department

intentionally treated Gildo differently from others similarly situated without a rational basis by: 1) denying Gildo's transfer request more than sixty days after Gildo applied, in violation of § 16-2-101(10), MCA; and 2) drafting the Settlement Agreement to specifically exclude Gildo or the Gildens as potential purchasers of the AFA. Appellants argue this establishes a "'class of one' (selective enforcement)" claim and that the District Court erred by holding the Department's actions against Gildo were not discriminatory.

¶38 Briefly stated, when "state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a class of one equal protection claim by demonstrating that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Totem Bevs., Inc. v. Great Falls-Cascade Cty. City-Cty. Bd. of Health*, 2019 MT 273, ¶ 29, 397 Mont. 527, 452 P.3d 923 (quoting *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004)) (internal quotation marks omitted). The District Court, however, did not rely on a "class of one" analysis to support its conclusion granting summary judgment in favor of the Department on all the Appellants' AFA transfer-related claims, including Gildo's.[7] Rather, it relied on the Department's quasi-judicial immunity, the terms of the Settlement Agreement, and the stipulation that BYOB voluntarily entered.

¶39 Further, in their briefing before this Court, Appellants do not state clearly whether they are arguing that the District Court erred by not concluding that the Department's

[7] The District Court did employ a "class of one" analysis regarding BYOB's audit-related equal protection claim. As mentioned above, however, Appellants voluntarily dismissed that claim.

actions towards Gildo establish a valid "class of one" claim, or a valid "selective enforcement" claim. Though similar, the two claims are distinct. *See Totem*, ¶ 28 (citation omitted) ("Equal protection theories based on selective enforcement are different than, but similar to, 'class of one' equal protection claims."). Regardless, beyond a bare-bones outline of a "class of one" claim's elements, Appellants do not present any case law before this Court supporting their argument that a "class of one" analysis applies here. Appellants do not explain how the District Court failed to apply or misapplied the law. We already have determined that the Department has no statutory duty to approve AFA assignment requests within sixty days of an application; denying Gildo's application ninety-eight days after they applied was neither illegal nor, on the undisputed facts before us, negligent.

¶40 As for the Settlement Agreement, it does not "specifically exclude Terin" or by extension Gildo, LLC, as Appellants claim. Section One, F, 2 of the Settlement Agreement states that: "[BYOB agrees that BYOB will not assign the AFA to:] any person, or a related party, as described in 26 U.S.C. §§ 267(b) or 707(b)(1), who has performed work, as an employee or independent contractor, for [BYOB]." Terin Gilden, as Barb Riley's daughter, and by extension Gildo, LLC, is a "related party" pursuant to this provision—but the provision in no way "specifically" excludes her any more than it excludes any other person or party who falls into those parameters.[8] Because of this, Gildo is similarly situated

[8] Additionally, when this provision was brought up in hearings before the bankruptcy court as potentially unfair, the bankruptcy court noted that since Gildo, LLC, was only excluded by virtue of Terin's relationship to Barb Riley, the company could restructure itself to be eligible to participate in the auction. Gildo, LLC, apparently did not do this.

to other persons or parties who have performed work or contracted with BYOB and are excluded from participating in the auction; their "class of one" argument as it pertains to that section of the Settlement Agreement fails on those grounds.

¶41 Appellants also take issue with an earlier provision of the Settlement Agreement they claim gives the Department "unfettered" discretion, allegedly in violation of § 16-2-101(10), MCA, to reject the application of any entity that purchased the AFA at auction. The Settlement Agreement states in Section One, C, pertaining to the administration of the BYOB bankruptcy auction, that:

> If the Department, during its review of an application to assign the [AFA after there has been an auction with a successful bidder], determines that the application or assignee is not suitable in any way, in the Department's sole and unfettered discretion, the Department may reject the application for assignment, and, upon direction by the Chapter 11 Trustee, the next successful bidder will be allowed to apply for the assignment.

¶42 It is undisputed, however, that the Department rejected Gildo's application for assignment of the AFA on February 28, 2012—*before* the Department and BYOB entered into the Settlement Agreement, and before any auction took place. The rejection, therefore, was based on considerations other than any "unfettered" ability to reject applications that BYOB and the Department may have agreed upon in the Settlement Agreement. Regardless, by the Settlement Agreement's plain language, this section cannot apply to Gildo or Terin. Section One, F, 2 already makes clear that BYOB will not even *attempt* to assign the AFA to "a related party . . . who has performed work, as an employee or independent contractor, for [BYOB]." As discussed above, Gildo, LLC, through Terin's position at the company, was a "related party" and took no steps to cure this defect. Unless

the company restructured as the bankruptcy court suggested, therefore, no Gildo assignment application could, pursuant to Section One, C, come before the Department for review, and thus be subject to the Department's—bargained for and agreed upon by B.Y.O.B., Inc.—"unfettered discretion."

¶43 Finally, BYOB's claims related to any provisions of the Settlement Agreement are extinguished through quasi-judicial immunity. Quasi-judicial immunity is a common law immunity afforded state agencies or departments when exercising a quasi-judicial function. *See Koppen v. Bd. of Med. Exam'rs*, 233 Mont. 214, 218–19, 759 P.2d 173, 175–76 (1988) (citing *Butz v. Economou*, 438 U.S. 478, 511–13, 515, 98 S. Ct. 2894, 2913, 2915 (1978)); *Nelson v. State*, 2008 MT 336, ¶¶ 16–17, 346 Mont. 206, 195 P.3d 293. Section 2-15-102(10), MCA, defines a quasi-judicial function as "an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies." This includes "interpreting, applying, and enforcing existing rules and laws"; "granting or denying privileges, rights, or benefits"; "issuing, suspending, or revoking licenses, permits, and certificates"; and "any other act necessary to the performance of a quasi-judicial function." Section 2-15-102(10)(a)–(c), (k), MCA. There must be a controversy or dispute in an adversarial proceeding between the state agency and a non-state actor in order for the privilege to apply: a controversy is "[a] disagreement or a dispute, esp. in public"; to "controvert" means to "dispute or contest; esp. to deny"; and an "adversar[ial] proceeding" is "[a] hearing involving a dispute between opposing parties." *Nelson*, ¶ 29 (quoting *Black's Law Dictionary*, 8th ed., 354, 58, internal quotation marks omitted). "Initiating, investigating, and presenting a case pursuant to the

[MAPA] involves precisely the types of decisions for which we have granted [state agencies] quasi-judicial immunity." *Rahrer v. Bd. of Psychologists, DOC*, 2000 MT 9, ¶ 20, 298 Mont. 28, 993 P.2d 680; *see also Koppen*, 233 Mont. at 218–20, 759 P.2d at 175–76.

¶44 The District Court found from the undisputed record that BYOB began its attempts to sell its AFA only after the Department began its investigation into BYOB's alleged AFA violations, deemed the violations well-founded, and informed BYOB that its AFA was being terminated. Additionally, BYOB challenged this termination, requested and participated in hearings on the matter, availed itself of the MAPA process, and eventually sought judicial review of the Department's Final Agency Decision(s) affirming the termination(s). The Department's actions in these proceedings are protected by quasi-judicial immunity. *See Koppen*, 233 Mont. at 219, 759 P.2d at 176. BYOB then continued the controversy by seeking judicial review of the Final Agency Decisions. At that point, the Department was in the position of respondent, defending the Final Agency Decisions. BYOB extended or expanded the controversy again by initiating bankruptcy proceedings for the admitted purpose of delaying the district court proceedings—proceedings they initiated—in order to sell the AFA before the Department executed its termination. And, importantly, it was B.Y.O.B., Inc.—albeit acting through the Trustee—that agreed to and signed the Settlement Agreement.

¶45 Despite this tangled process, the Department is protected by quasi-judicial immunity for its actions regarding a settlement that would permit BYOB to assign or sell its AFA. Throughout the course of the litigation before Judge Lympus, BYOB's AFA was in

terminated status, with only a stay preventing the Department from executing that termination. BYOB therefore had nothing to assign on its own terms. Any settlement agreement authorizing an assignment would mean that the Department agreed to withdraw or otherwise declined to act upon the Final Agency Decisions terminating the AFA. Regardless of the pending litigation, the Department's "complete regulatory control of the sale of liquor," "broadly construed" as the MABC requires, bestows the Department with discretion in how best to "effectuate and ensure the entire control of the manufacture, sale, importation, and distribution of alcoholic beverages within the state." Sections 16-1-101(2)–(3), -103, MCA; *see also* § 16-1-302, MCA. The Department's actions required it to "exercise [its] judgment and discretion in making determinations [in a] controvers[y]." Section 2-15-102(10)(a)–(c), (k), MCA; *Nelson*, ¶ 29.

¶46 The Department had no obligation, statutory or otherwise, to settle the district court litigation; it would have been justified in continuing to pursue a full termination of the AFA. And not only did the bankruptcy court and Trustee believe the Department would in that regard be successful before the district court, but BYOB, as clearly implied by Jim Glantz's justification for declaring bankruptcy, did as well. The result of that termination would leave BYOB with nothing. Instead, in an exercise of its own discretion and judgment, the Department decided that it would be more beneficial on the whole to not execute the termination of BYOB's AFA but to allow its assignment—pursuant to certain conditions. The Department then negotiated the Settlement Agreement with B.Y.O.B., Inc., to that end. This decision was made pursuant to the Department's authority under the MABC to determine how best to effectuate the sale of alcohol in

Montana and its authority in the MAPA proceedings to decline to act upon Final Agency Decision(s) in its favor. As a result of the Settlement Agreement, BYOB obtained a substantial amount of money, even after creditors were paid, for its AFA. We agree with the District Court that the Department's actions are protected by quasi-judicial immunity.[9] *See* § 2-15-102(10)(a)–(c), (k), MCA; *Nelson*, ¶¶ 17–18. The District Court's judgment relating to Counts I–IV of Appellants' Fourth Amended Complaint, insofar as those counts pertain to the Settlement Agreement and to any alleged discrimination against Gildo, is therefore affirmed.

¶47 *3. Did the District Court abuse its discretion when it denied Appellants' Rule 54(b) motion for certification?*

¶48 Appellants also argue that the District Court abused its discretion in its Certification Order by denying their motion for certification under M. R. Civ. P. 54(b) after concluding this is not an "infrequent harsh case" suitable for immediate certification. Because we are affirming the District Court's Order, and because Appellants voluntarily dismissed their remaining constitutional audit-related claim, the issue is moot.

CONCLUSION

¶49 For the foregoing reasons, the District Court's February 24, 2020, Order on Cross Motions for Summary Judgment is affirmed.

/S/ BETH BAKER

[9] Appellants make a passing argument in their briefing that "[i]mmunities should not be available to the state and are unconstitutional." They offer no support for this argument, and we do not address it on appeal.

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE