No. 45270-7-II

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

In the Matter of

CLUB LEVEL, INC., and RYAN FILA

CLUB LEVEL, INC., and RYAN FILA, a single man,

Plaintiffs - Appellants,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD, et al.,

Defendants - Appellees.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The Court committed error by granting the motion for summary judgment as to four causes of action including the due process violation pursuant to 42U.S.C. § 1983, and the common law torts for negligent supervision, unlawful conspiracy, and tortious interference with a business relationship.

Issues pertaining to Assignments of error.

1. Does the constitutional right to pursue an occupation require the Appellant to demonstrate that he is incapable of finding any job in the liquor service industry when what is imperiled is the Appellants state issued nightclub license which is necessary for him to operate a nightclub business.
2. Is a cause of action for negligent supervision redundant when no underlying claim for negligence has been made.

3. Has sufficient evidence of an unlawful conspiracy been demonstrated to satisfy the standard on a motion for summary judgment.
4. Has sufficient evidence been submitted to demonstrate the cause of action for tortious interference with a business relationship when both parties to a contractual relationship have testified as to the existence of the contract and the effect of law enforcement.

II. STATEMENT OF THE CASE

The Appellant filed this Complaint alleging initially ten causes of action plus a request for injunctive relief. CP 4-27. Upon completion of discovery the Appellant voluntarily dismissed six of the causes of action. The remaining causes of action for due process, negligent supervision, unlawful conspiracy, and tortious interference with a business relationship were argued on a motion for summary judgment. By Letter Opinion dated June 14, 2013, Judge Wickham denied summary judgment on the due process claim and granted summary judgment on the remaining three causes of action. CP 474-480.

On August 1, 2013, Judge Edward Shea of the United States District Court for the E.D. of Washington granted summary judgment under similar facts in the related litigation brought by Fila against the City

of Wenatchee and its police department.[1] CP 622-640. Based upon Judge Shea's decision, Judge Wickham granted a motion for reconsideration on August 9, 2013, and dismissed the remaining due process claim.

The following facts support the four causes of action on appeal.

In November 2010, Ryan Fila opened a nightclub in Wenatchee called Club Level under his own nightclub license issued pursuant to RCW 66.24.600 by the Washington State Liquor Control Board (WSLCB).

From August, 2010 until the present, there has been significant communication between the Wenatchee Police Department (WPD) administration, its officers, and the local Wenatchee office of the WSLCB regarding Club Level. On November 16, 2010, Fila met with Chief Robbins and Capt. Dresker of the WPD and Off. Murphy of the WSLCB. CP 432. A second meeting involving all of these individuals with the addition of Sgt. Huson also of the WPD occurred on March 24, 2011. CP 433. Both of these meetings were initiated by Fila in a proactive step on his part to foster a positive relationship between him and the two law enforcement agencies with which he had to deal on a daily basis to successfully maintain his business. CP 432.

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[1] Separate legal action was required as the State was unwilling to consent to suit in federal court.

On January 2, 2011, Off. Drolet of the WPD forwarded an e-mail to Off. Murphy requesting that either he or Sgt. Stensatter come to a shift meeting to discuss clarification of RCW 66.44.200. CP 299. Off. Drolet was looking for ways to impact the business of Club Level. His email stated, "Basically, we are brainstorming how to help Club Level/Volcano from sucking up immense amounts of our time." "I figure a few expensive tickets will slow things down." CP 299. Off. Murphy responded stating that he would like to come down and help, and suggested an alternative date and time. CP 299.

Off. Murphy provided a copy of his Interview Notes including the Appellants personal financial information to Sgt. Huson on March 30, 2011. CP 348. Fila objected to this after he became aware this information had been shared. CP 433. Initially, the WSLCB denied sharing this financial information with Sgt. Huson. CP 433. Ultimately through public disclosure an e-mail dated March 30, 2011, from Off. Murphy to Sgt. Huson was provided which clearly indicated that the financial information in the Interview Notes was shared. CP 348.

On April 21, 2011, Off. Murphy communicated with Off. Miller of the WPD forwarding an e-mail in which he wrote, "I will continue to monitor the location and we have UC in the future that I will attempt to find violations." CP 301. UC stands for undercover operation. Another

undated e-mail was obtained through a public disclosure request in which Off. Matney of the WPD forwarded an e-mail to Off. Murphy. CP 297. Sgt. Stensatter purportedly told Off. Matney that the WSLCB was interested in enforcement at Club Level. He stated "[l]et me or Capt. Dresker know if there's anything we can do to help out." Further, "[w]e will be happy to do anything we can to assist in enforcement." CP 297.

During his deposition, Off. Murphy acknowledged receiving the "few expensive tickets" e-mail from Off. Drolet. CP 243. He recalled having conversations with other officers at the WPD to discuss in general terms how to assist them with doing their job. CP 244. He also acknowledged having discussions with officers from the WPD regarding "walk-throughs and premises checks." CP 245. Off. Murphy also acknowledged having conversations with Capt. Dresker specifically about Club Level. CP 246.

Sgt. Stensatter had also had discussions with the WPD administration concerning Club Level. During his deposition Sgt. Stensatter acknowledged discussing Club Level specifically with Chief Robbins. CP 297. He specifically recalled discussing Club Level with Capt. Dresker. CP 257. Sgt. Stensatter testified that he requested from the WPD administration that they forward their police reports "[t]o me and we

would follow them -- investigate them as complaints and follow up on them." CP 258.

Capt. Dresker has also drafted communications regarding Club Level. On February 28, 2011, Captain Dresker forwarded an e-mail to four officers of the WPD, including Sgt. Cheri Smith. CP 317. In this e-mail he specifically stated, "[i]t is my opinion that if these problems cannot be solved, we (WPD) need to work more proactively on our own solutions, up to and including pressing for Liquor Control to shut the business down." This same e-mail was forwarded on March 1, 2011, to many other officers of the WPD including Sgt. Huson. CP 319.

Location Strategic Interest (LSI)

In an Issue Paper prepared by the WSLCB a Location of Strategic Interest (LSI) was described as a small percentage of licensees which create a disproportional threat to the health and safety of communities throughout the state. CP 266-268. This Issue Paper went on to state "[t]hese licensees make a conscious choice to operate their premises in a manner that drains the safety resources of the communities, requires an inordinate amount of attention from regulatory agencies, diminishes the quality of life in the adjacent areas, and represents a physical threat to patrons and people living adjacent to the locations." "The lack of adequate control results in other crimes such as driving under the

influence, assault and disorderly conduct that spiral out into the surrounding communities and highways." CP 266-268. Starkey testified that the designation of an LSI is specifically driven by the police reports being received from local agencies. CP 392.

On March 9, 2011, Off. Murphy communicated with Lt. Kevin Starkey, his immediate supervisor, requesting that El Volcan (Club Level) be designated an LSI. CP 284. This designation was placed into effect on April 1, 2011, by Lt. Starkey. CP 286. Lt. Starkey was asked why there had not been a single Administrative Violation Notice (AVN) issued regarding over service at Club Level if there were so many complaints regarding this issue. He testified "[b]ecause the officers did not observe any violations." CP 252. Sgt. Stensatter was also questioned regarding the language described above within the Issue Paper and asked if he could point to any factual information demonstrating that Fila was making a conscious choice to operate Club Level during the relevant time period in a manner that would be consistent with this statement. He replied, "[n]o, I cannot." CP 393.

Club Level has not had a single sustained AVN issued against the business. CP 290-295. The Plan of Action under the LSI designation stated "[t]he Wenatchee Office will work with the Wenatchee Police Department on emphasis patrols at the premises." Further, "[t]he

Wenatchee Office will conduct an undercover operation at the premises to observe normal operations." CP 290-295.

Lt. Starkey testified that when an establishment is designated as an LSI the owner is notified of this designation and offered education and counseling. CP 393. He testified that the officer assigned to monitor the business would notify the owner without exception. CP 393. Neither Fila nor Art Rodrigues were notified that Club Level or El Volcan were designated an LSI. CP 434, 450.

AVN Standard

Sgt. Stensatter assumed supervision of the geographic area within which Club Level was located in August 2011. This was when he first met Fila to the best of his recollection. CP 256. At this time he was aware Club Level had received complaints, but that was the extent of his knowledge. CP 256. On August 14, 2011, an individual under 21 years of age was located inside Club Level in a restricted area by Sgt. Smith of the WPD. Sgt. Stensatter issued an AVN to Club Level on August 23, 2011, pursuant to RCW 66.44.310 (1)(b). CP 270. Lt. Starkey testified that he reviewed this AVN prior to its being issued and approved the AVN. CP 251. Ultimately he agreed that (1)(b) was the wrong citation because the AVN was issued to the business establishment, not the minor. CP 251.

RCW 66.44.310 (1)(a) makes it a misdemeanor to serve or allow to remain in an area classified by the board as off-limits to any person under the age of 21 years. The language of allowing a minor to remain in an off-limits area has been interpreted by the Court in Reeb, Inc. vs. Washington State Liquor Control Board, 24 Wn.App. 349, 353, 600 P.2d 578 (1979), as requiring a licensee to have "actual or constructive knowledge of the circumstances which would foreseeably lead to the prohibited activity."

Sgt. Stensatter acknowledged that he did not interview Mr. Fila regarding the question of whether he had actual or constructive knowledge that a minor was on the premises. CP 258. Sgt. Stensatter during his investigation did interview the minor in question as well as Josh Lowell, the individual who had called Rivercom (police dispatch agency) informing them that there was a minor inside Club Level. CP 394. Sgt. Stensatter did not make any effort to interview any staff member at Club Level. CP 232. Sgt. Stensatter was asked why he did not interview Fila regarding his knowledge of a minor inside Club Level. Sgt. Stensatter testified that he had no interest in interviewing Fila because he had no reason to believe that the reporting party would lie about the presence of a minor and Fila's alleged indifference, but he did have "[e]very reason to believe that Ryan might lie because he is looking at a licensee of the

business that would want to avoid a violation." "The minor had no reason to lie." CP 259.

Sgt. Stensatter himself is a Field Training Officer (FTO) for the WSLCB. CP 256. A new recruit is assigned to an FTO who has gone through a one-week program learning how to instruct new officers and they shadow the FTO for 14 to 16 weeks. CP 394.

This AVN proceeded to a contested hearing on June 7, 2012, before ALJ Mark Kim. During his testimony Sgt. Stensatter testified about all that was required to issue the AVN is that a minor be located within a restricted area. CP 394. ALJ Kim specifically asked Sgt. Stensatter "[w]hy did you not ask Mr. Fila about prior knowledge of this minor in his establishment?" CP 394. Sgt. Stensatter replied, "[b]ecause prior knowledge was irrelevant." CP 234. "The minor had been located on restricted premises and was cited." CP 234. Later during the testimony ALJ Kim asked; "[i]t sounds like to me like efforts by the licensee to try to remove a minor from the premises does not alleviate a liability on the statute, is what you are saying." CP 235. Sgt. Stensatter replied, "[t]hat could be what - what we would consider a mitigating factor, but the violation would still have occurred." CP 235. The AVN was subsequently dismissed by ALJ Kim. CP 360-367. Lt. Starkey during his deposition was asked if the mere fact a minor is on the premises in and of

itself is not the only factor for consideration. He was asked this question and replied, "yes." CP 250.

Ultimately this AVN was dismissed by a Final Order of the Board dated August 28, 2012. CP 272-275. The next day on August 29, 2012, Sgt. Stensatter issued a second AVN to Club Level for "inadequate lighting." CP 276-278.

Relocation

During the summer of 2012 Fila made a business decision to relocate Club Level to another location within the City of Wenatchee. CP 437. Fila discussed this with Sgt. Stensatter during a discussion inside Club Level. CP 439. Prior to this pursuant to RCW 4.92.100 Fila through counsel had served notice on the WSLCB of his intention to file this lawsuit regarding the conduct of the officers in the Wenatchee area. CP 369-372. Sgt. Stensatter told Fila that if he was not named in the lawsuit he could assist Fila with making sure that the obtaining of a new license would be "fast, smooth and easy." CP 437. If he was named in the lawsuit, however, he would not be able to assist and it would be more than 90 days for Fila to obtain the new license. CP 437.

Fila proceeded with his plans to relocate Club Level and started the licensing process. CP 439. He went through the processes required of him to obtain a Temporary Permit to open Club Level. CP 440. He

obtained the necessary permits from the City and arranged for a final inspection of the premises. Off. Knowles of the WSLCB conducted this final inspection on August 15, 2012. CP 440. This final inspection was fully successful and Fila was told by Off. Knowles that he was "good to go." CP 440. Fila interpreted this as his being able to open Club Level that Friday, August 17. CP 440. Off. Knowles failed to communicate that this final inspection had been completed back to the licensing division in Olympia until August 23. CP 453. Mr. Eddie Cantu of the WSLCB during his deposition testified that following the final inspection on August 15, Fila had completed all necessary steps to receive the temporary permit permitting him to open for business. CP 453.

Sgt. Stensatter was on vacation the week of August 17 when Club Level re-opened for business. He returned from vacation the following week and had a telephone call with Fila during which time he threatened Fila with arrest for operating Club Level without a temporary permit. CP 438. Following this threat, Fila told Sgt. Stensatter he would need to contact him through his attorney and hung up the phone. CP 438.

During the evening of August 25 at approximately 12:30 AM, which was the busiest time for liquor service at Club Level, Sgt. Stensatter came into Club Level and demanded to see Filas driver's license and servers permit for not only Fila but all of his staff as well. CP 438. Sgt.

Stensatter testified during his deposition he knew that this would have an impact on the service staff requiring them to stop serving customers to obtain this documentation. Sgt. Stensatter demanded that Filas manager of the bar, Kyle Delaney, turn up the lighting. Due to the press of business Mr. Delaney attempted to comply with this, but was not able to turn up the lights as demanded. CP 260. Ultimately Sgt. Stensatter left Club Level and went outside. He stayed outside the premises for several hours during which time he spoke with Sgt. Huson of the WPD. CP 260.

The Final Order of the board dismissing the first AVN was signed on August 28, 2012. CP 272-275. On August 29, four days after the alleged failure of Club Level to turn up the lighting, Sgt. Stensatter issued the second AVN for inadequate lighting. CP 276-278. During his deposition Sgt. Stensatter testified that during his years of employment with the WSLCB this is the only citation he has issued for inadequate lighting. CP 259.

On August 30, 2012, Sgt. Stensatter called Elizabeth Lehman who was a customer service representative for WSLCB to notify her that Club Level had been given a violation the previous Friday while the club was operating under a temporary permit. CP 280-283. Ms. Lehman sent an e-mail at 8 AM to Sherry Carpenter, who is a subordinate of Eddie Cantu in the licensing division of the WSLCB. Ms. Lehman informed Ms.

Carpenter that Sgt. Stensatter wanted to know what could be done to "pull the TPP." He also cited to WAC 314-07-060 (4) as the authority for revoking the temporary permit. CP 280-283.

WAC 314-07-060 addresses the "reasons for denial or cancellation of a temporary license." WAC 314-07-060 (4) indicates that it is a basis for cancellation or revocation of a temporary license if the applicant commits a violation while operating under a temporary license. This regulation also states that "refusal by the board to issue or extend a temporary license shall not entitle the applicant to request a hearing."

Ultimately the director of licensing, Alan Rathbun, made the determination not to revoke the temporary license because there was no safety violation involved with inadequate lighting. CP 248. A discussion was held, however, between Mr. Rathbun, Justin Norton who is the director in charge of enforcement, and Mr. Cantu who was also part of the Licensing Department of the WSLCB. The discussion between these three individuals was whether to revoke the license of Club Level because of the AVN for inadequate lighting. Mr. Rathbun testified during his deposition that it was standard policy to consider revoking a temporary license granted to an applicant who received a violation notice during the period they were operating under a temporary license. CP 248. Sgt. Stensatter had full knowledge that the potential effect of his issuing this

AVN for inadequate lighting was to revoke the Plaintiff's temporary permit to operate Club Level without the opportunity for a hearing to contest the revocation.

WPD timeline

On September 16, 2011, three separate minor females were stopped by security for Club Level as they were attempting to gain entry into the Club. Two of these young women were together initially and a third was stopped shortly thereafter. One of these young women is an individual named Chelsea Cameron. She was with her friend in the Ballroom area after having been stopped by security waiting for officers of the WPD to arrive and issue them a citation. CP 354.

Sgt. Huson and Off. Kissel of the WPD arrived to address this unlawful behavior. Off. Kissel began to issue a citation to the young women when a staff member of Club Level began to record their actions on a video camera. Sgt. Huson indicated that they would not be issuing a citation because of this and directed Off. Kissel to stop writing the citation. Sgt. Huson and Off. Kissel escorted the two young women as well as a third minor out of the building. The two women were released outside of the building and no citation was issued. CP 394. Sgt. Huson testified during his deposition, "The two females we were processing and writing tickets to, we advised them that they would be cited by mail." CP

398. The minor in question, Chelsea Cameron, stated under oath that while the officers were writing them a ticket they seemed to receive another call, escorted them outside and told us "we were free to go, no tickets were issued." CP 445. She further stated that she received a citation in the mail three to four weeks later and was surprised. "I was not aware that I was receiving any kind of citation for this until I received one in the mail. CP 445.

On September 22, 2011, notification was served on the City of Wenatchee pursuant to RCW 4.96.020 of the Plaintiff's intention to file a lawsuit against the City. CP 439. Section 15 of this letter notifies the City that officers of the WPD were selectively engaging in enforcement behavior including the fact that these minors were stopped at the door by security staff and then released by Sgt. Huson without being issued a citation. CP 439. The effect of this was to encourage other minors in the local area to also attempt to gain entry which in turn imperiled the license of the Plaintiff. CP 399. Subsequent to receipt of this notification letter by the City, Off. Kissel did in fact issue a citation to the two minors in question on September 30, 2011. The citation issued was for a violation of RCW 66.40 4.310 (c), use of a fraudulent ID. CP 349-350.

Good Neighbor Agreement

Following receipt of an e-mail from Sgt. Stensatter dated April 25, 2012, informing him that alcohol could no longer be served in the Ballroom; Art Rodriguez forwarded this e-mail to Fila. CP 382-388. This decision required a last-minute scramble to obtain a special use permit and the near cancellation of a charitable event benefiting Breast Cancer Awareness in the Wenatchee area. As a result Fila and Rodriguez made the decision to form Ballroom, LLC, and acquire a liquor license together for the third-floor area and its joint use.

When the WSLCB communicated the fact that this license had been applied for to the City, the response of the City was to draft a Community Good Neighbor Agreement (GNA). The City expressed a clear desire to have Fila and Rodriguez agree to this as a condition of obtaining a license. CP 308-313. Paragraph 16 of the GNA required Fila and Rodriguez to acknowledge that this was an enforceable agreement which constituted a condition to obtaining and keeping all City licenses associated with this business. The same paragraph indicated that if there was any violation of this "agreement" it could result in the immediate suspension or revocation of their business license. CP 313. This would leave the City with the ability to summarily suspend the business license granted by the City and, in effect, close the business with no due process.

Communications occurred between Capt. Dresker and Sgt. Stensatter regarding this GNA. Capt. Dresker in an e-mail dated June 7, 2012, to Sgt. Stensatter stated, "I think having any nightclub enter into this type of agreement and maybe making their liquor license have this as a condition, would be the way to go for the various reasons stated in the agreement." CP 303. Capt. Dresker then communicated with Chief Robbins regarding this GNA on July 2, 2012. CP 315. Within this e-mail Capt. Dresker acknowledged that Danielle Marchant, an Assistant City Attorney, drafted the original agreement; "I just modified it a little for Club L." CP 315. On June 26, 2012, communications occurred between Capt. Dresker and an employee of the WSLCB, Nicole R. Reid. Ms. Reid stated in an e-mail to Capt. Dresker the GNA would not be enforced by the Liquor Board; "it is however something you will have in writing that you can hold the applicant accountable to." CP 400.

Patricia Kohler

Fila through Counsel attempted to communicate with Ms. Kohler, the Executive Director of WSLCB on four separate occasions. On April 25, 2012, a letter was forwarded to Ms. Kohler regarding the e-mail from Sgt. Stensatter to Mr. Rodriguez informing him that he could no longer serve alcohol in the Ballroom which was sent on April 25, 2012. CP 330-332. A second letter on the same issue was forwarded May 1, 2012. CP

334-336. On June 11, 2012, a Formal Complaint was forwarded to Ms. Kohler regarding the actions of Sgt. Stensatter. CP 337-340. On August 31, 2012, after the inadequate lighting AVN was issued, a fourth letter was sent to Ms. Kohler demanding that the AVN be dismissed. Neither Ms. Kohler nor any representative from the WSLCB has ever responded in any form to any of these four letters. Ms. Kohler testified that she was unable to respond because the tort notification was served on the agency. CP 241.

Lt. Starkey testified that he never received a copy of the Formal Complaint against Sgt. Stensatter. CP 254. Sgt. Stensatter was questioned regarding the Formal Complaint during his deposition, and he testified that he had never received a copy of it. CP 252.

Factual Documentation

Between August 2010 and August 2012, 26 police reports were forwarded from the WPD to the WSLCB specifically regarding Club Level. CP 416-417. During this same time frame at other nightclubs in the Wenatchee area including Fuel, Hurricane, and Wallys a total of four reports combined were forwarded to WSLCB from WPD. CP 416-417. Of the 26 complaints investigated by WSLCB regarding Club Level during this timeframe 24 of them were "unfounded." There were two written warnings issued out of these 24 complaints.

The officers from the WPD conducted frequent premises checks or "walk-throughs" which on occasion included officers of the WSLCB. Between August 2010 and August 2012 at Club Level there were a total of 160 walk-throughs. Of these 160 walk-throughs, 16 of them involved more than two officers. During the same time frame at Fuel, the only comparable nightclub in Wenatchee, there were a total of 113 walk-throughs, with only two of them involving two or more officers. At Hurricane there were a total of 33 walk-throughs and on no occasion did more than two officers enter into the facility. At Wally's, 56 walk-throughs occurred and on only one occasion were there more than two officers. Finally, at another establishment called Igloo, 23 walk-throughs occurred and on no occasion were the more than two officers.

Attached as exhibit CP 429 is a breakdown correlating back to significant events taken by Fila and the resulting conduct of the officers of the WPD. This document demonstrates that each time Fila took some type of action such as filing a complaint with the mayor's office on May 17, 2011, for example, or providing notice of intent to file this lawsuit on September 12, 2011, against the city there was a corresponding spike in activity by the WPD including walk-throughs that occurred at Club Level.

Cooperation

During his testimony regarding the Interest Paper identified previously, Lt. Starkey was asked whether Club Level had been cooperative with his agency. Lt. Starkey testified "the level of cooperation has been acceptable." CP 253. Sgt. Stensatter testified that he personally requested that Club Level no longer be designated as an LSI. When asked why, Sgt. Stensatter testified, "[b]ecause we have not had any violations in spite of all the complaints." "It had been ongoing for almost 2 years." CP 402.

CP 321-328 reflects various Instant Message communications of various offices of the WPD regarding Club Level obtained in a public disclosure requested. These demonstrate a dislike for of Club Level including the comment, "I hate Level."

III. QUALIFIED IMMUNITY/ § 1983

A plaintiff must establish two essential elements in a § 1983 action: (1) that some person deprived him or her of a federal constitutional or statutory right; and (2) that the person must have acted under color of state law. Sintra, Inc. v. City of Seattle, 119 Wn.2d, 1, 829 P.2d 765 (1992). A claim of qualified immunity by a governmental official also presents two issues: (1) whether the facts make out a violation of the constitutional right and (2) whether the right at issue was "clearly

established" at the time of the defendant's alleged misconduct. Pearson v. Callahan, 555 U.S. 223,232, 129 S. CT. 808, 815-816, 172 L.Ed.2d 565 (2009).

The 14th Amendment Due Process claim being pursued by the Plaintiffs in this particular case is the constitutional right to pursue an occupation. The due process clause protects a liberty or property interest in pursuing the "common occupations or professions of life." Schware v. Bd. Of Bar Examiners, 353 U.S. 232, 238-239, L.Ed.2d 796, (1957); Chalmers v. City of Los Angeles, 762 F.2d 753, 757 (9thCir.1985).

In a factually similar case, Benigni v. City of Hemet, 879 F2d 473, (9th Cir. 1988), the Court stated that the constitutional right infringed in this case was the right to pursue an occupation. Id at 478. The case clearly establishes the constitutional right of a liquor establishment owner to pursue this occupation free of excessive police interference.

Benigni dealt with a plaintiff/bar owner who alleged police officers for the City of Hemet were trying to force him from business. The evidence in that case revealed that "bar checks occurred nightly, up to five or six times per night, that customers were frequently followed from the Silver Fox and sometimes arrested, that staff and customers frequently received parking tickets, that officers parked at the old train depot across

the street, and that there were usually three or four officers there at all times in the evening, and that cars were often stopped in the vicinity of the Silver Fox for traffic violations that have occurred elsewhere." These actions are remarkably similar to the conduct of the WPD acting in coordination with Off. Murphy and Sgt. Stensatter of the WSLCB.

In the Letter Opinion dated June 14, 2013, Judge Wickham agreed that Benigni was similar and stated, "this case is very similar on the facts to the present case." CP 476. He also stated, " Further, Benigini seems to stand for the proposition that a loss of occupation claim can be based on excessive and unreasonably police conduct that is intentionally targeted to harm a business which does harm the business." CP 476. The initial ruling of Judge Wickham on June 14th was that when taken in the light most favorable to the Plaintiff, the evidence showed that law enforcement specifically targeted Club Level in an excessive and unreasonable manner because they wanted to put it out of business. CP 476. Based on this the Court determined that a material fact existed and summary judgment was initially denied. CP 477.

On August 9, 2013, Judge Wickham reconsidered and reversed his decision and granted summary judgment. His reconsideration was based on the decision of August 1, 2013, decision of Judge Shea of the United States District Court for the Eastern District of Washington granting summary judgment under similar facts in the Plaintiff's case against the City of Wenatchee Police Department. CP 622-640. Judge Shea found

the holding in Benigni unpersuasive because it was decided before the Ninth Circuit established what he mistakenly concluded was a two-part test for right to pursue occupation cases established by the Ninth Circuit in FDIC v. Henderson, 940 F.2d 465 (9th Cir. 1991). Henderson is distinguishable, however, because the plaintiff in that case was seeking a particular job in the banking industry which did not require the holding of a state regulated license.

The language in Henderson upon which Judge Shea relied was modified two years later by the Ninth Circuit in Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56 (9th Cir. 1993). In Henderson the Court stated that the plaintiff must show that the acts left him "unable to pursue a job in the banking industry." Id. at 474. In Wedges/Ledges the Court quoted this language from Henderson and clarified it by stating, "(holding that a former bank president who alleged that he was wrongfully discharged as a result of the actions of a state banking official must show that the acts left him "unable to pursue [any comparable] job *in the banking industry*")" (emphasis in original). Id at 65. The term "a job" became "any comparable job."

Judge Shea stated, "Fila alleges that the Defendants acted with the intent to shut down Club Level; the complaint does not indicate that Club Level has ceased operating, Plaintiffs have produced no evidence that Fila has been unable to find other work in the industry." CP 630. Because of this Judge Shea determined that Fila was unable to demonstrate that a constitutional right belonging to Fila was violated. CP 630.

Fila was forced to close Club Level in May 2013 because of significantly declining revenues caused by the undue attention from the WSLCB and the WPD.

Both Henderson and Wedges/Ledges are distinguishable from the present facts. This critical distinction is represented by Schware, and Jones v. City of Modesto, 408 F.Supp.2d 935 (E.D.Cal.2005). In Schware the Court noted that a liberty interest was found when a state denied a plaintiff due process by refusing to allow him to qualify to practice law in New Mexico. Schware, Supra at 238-39. In Jones, the Court upheld summary judgment when the plaintiff failed to demonstrate that he was completely prohibited from pursuing his career as a massage therapist. There was no indication that the Plaintiff had attempted to acquire an available license in Modesto or any other county in California or was denied a license because of the Defendant's actions. Id. at 952.

It is conceded that a plaintiff does not have a liberty interest in a specific employer or employment, but as noted in Schware a plaintiff does have a liberty interest when a state denies the plaintiff due process by refusing to allow the individual to qualify to obtain the necessary statewide license to pursue an occupation. Schware, supra at 238-239. That is exactly what occurred here when the Defendants acted to impact Fila's license issued by the WSLCB to operate a nightclub business. Sgt. Stensatter issued Fila an AVN for "inadequate lighting" when he knew that Fila was operating Club Level on a temporary permit. He then contacted the licensing department of the WSLCB and specifically pointed

out the provisions of WAC 314-07-060(4) which potentially had the effect of revoking the temporary permit issued to Club Level. Because this AVN was issued while Fila was operating Club Level under a temporary permit WAC 314-07-060(4) would act to revoke the permit. This in turn would force Club Level out of business because Fila would not possess the required state license. All of this would occur without even affording Fila the opportunity to request a hearing to contest the revocation of his temporary permit.

The actions of Sgt. Stensatter and these Defendants were intended to have the effect of preventing Fila from operating a nightclub anywhere within the State of Washington. This is exactly what occurred in Schware where a liberty interest was recognized.

Fila is not a banker as in Henderson who was denied a job as a banker. He is not a highly specialized scientist denied one of the few available jobs in a scientific specialty as in Enqquist. He is also not operating a business in an illegal manner as in Wedges/Ledges. He is not a bar manager. He is the holder of a State issued and regulated nightclub license granted pursuant to RCW 66.24.600 that permitted him to operate this business. When the Defendants acted to negatively impact this license they acted to impact his constitutional right to pursue an occupation exactly as in Schware. Judge Shea's ruling, which Judge Wickham adopted, that Fila did not have a constitutionally protected right impacted by the Defendants is legal error.

Judge Shea also found that summary judgment was appropriate because Fila could not demonstrate arbitrary and capricious behavior on the part of the WPD which he felt was required by Henderson. CP 630.

In response to the motion for summary judgment Fila presented substantial evidence demonstrating that the actions of all Defendants were not only arbitrary and capricious, they were specifically intended to impact the Plaintiff's nightclub license and as a result unlawful. A non-exhaustive list includes:

1. Off. Murphy communicated with the WPD and said he would engage in an undercover operation and "look for violations." CP 301.

2. Off. Murphy and Lt. Starkey completely disregarded the Location of Strategic Interest policy statement and designated Club Level an LSI early in 2011 with virtually no evidence to support this designation. CP 266-268. In fact, no issued AVN against Club Level or Fila has ever been sustained. Sgt. Stensatter testified that ultimately the LSI designation was dropped because they never found any violations at Club Level. CP 252.

3. Off. Murphy shared personal financial information of Fila with Sgt. Huson of the WPD without prior authorization from Mr. Fila. CP 348-351.

4. Sgt. Stensatter within one months' time of assuming responsibility for Club Level issued an AVN after failing to properly investigate the complaint. He deliberately failed to interview Fila regarding the salient fact of this incident whether Fila or his staff had actual or constructive notice that a minor was on the premise. CP 270

5. Sgt. Stensatter then knowingly testified to an incorrect legal standard under oath before ALJ Kim in an attempt to achieve a sustained finding for the AVN regarding the minor located inside Club Level. CP 231.

6. Sgt. Stensatter purposely issued an AVN for inadequate lighting to Club Level on virtually the first time he entered into the new location knowing the business was operating under a temporary permit. He did this while knowing the effect potential was to have Club Level's TPP revoked without the opportunity to even request a hearing to contest the revocation. CP 276-278.

7. Lt. Starkey testified that during his entire career he may have seen one prior AVN issued for inadequate lighting. CP 234.

8. After issuing the AVN for inadequate lighting Sgt. Stensatter deliberately called the licensing division of the WSLCB referring the employees to WAC 314-07-060(4) seeking to have the

temporary license under which Club Level was operating revoked. CP 280-283.

9. Four separate letters were sent directly to Defendant Kohler including an Official Complaint dated June 11, 2012, against Sgt. Stensatter bringing to her attention the unconstitutional behavior in which her agents were engaging. Defendant Kohler refused to respond or even acknowledge receipt of these four letters thereby permitting this unconstitutional behavior to continue. CP 337-342. She compounded this error by failing to even notify Lt. Starkey that this Official Complaint had even been filed. CP 254

10. Lt. Starkey, Sgt. Stensatter's direct supervisor, testified that he had no knowledge that an official complaint had been issued against Sgt. Stensatter. CP 254.

As stated above, this is representative of the evidence submitted in response to the Motion for Summary Judgment and is not intended to be an exhaustive list of the evidence supporting this claim. These actions are not only arbitrary and capricious; they are arguably lawful actions seeking to achieve an unlawful purpose. These actions therefore are not only arbitrary and capricious, they are unlawful.

These Defendants are also not entitled to qualified immunity. The constitutional right to operate a liquor establishment with a state issued

nightclub license free of excessive and unreasonable police interference is clearly recognized in both Benigni and Freeman and also supported in Schware. In his order granting summary judgment Judge Shea, upon which Judge Wickham relied, cited to the Freeman case as authority that a reasonable police officer would not be on notice that excessive police conduct directed toward a particular liquor establishment violated a constitutional right held by the liquor establishment owner. Judge Wickham relied on Judge Shea's reasoning yet on this point Judge Shea is simply wrong. In fact, both the Benigini and Freeman decisions recognize this constitutional right.

Judge Shea failed to recognize that the Freeman case was dismissed only after 22 days of testimony failed to prove beyond mere speculation that the conduct of the police officers was a retaliatory response to a filed complaint by the bar owner. This case did not stand for the proposition that a liquor establishment owner did not enjoy a constitutional right to be free of excessive police enforcement action. It simply stands for the proposition that Freeman failed to factually prove the case.

It is also important to note that as argued before Judge Wickham both Patrick McMahon as counsel for the City of Wenatchee Police Department and Counsel in this case both failed to argue or even mention

the authority of Henderson, Wedges/Ledges, or Enqquist in support of their arguments that summary judgment should be granted on the Plaintiff's §1983 due process claim. These two experienced attorneys were not negligent in their argument. They both failed to argue this line of authority because they recognized it simply does not apply to the facts of the present case.

Judge Wickham has already found that material facts in dispute exist to support this cause of action. Both Benigini and Freeman demonstrate that a constitutional right applicable to these facts has been recognized and any reasonable police officer should be aware of this. These government officials do not enjoy qualified immunity under the facts present. Summary judgment was error and it is respectfully submitted the Trial Court should be reversed.

IV. NEGLIGENT SUPERVISION

When an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising the employee. Gilliam v. Department of Social and Health Services, Childcare Protective Services, 89 Wn.App. 569, 584-585, 950 P.2d, 20 (1998). Under Washington law an employer is not liable for the negligent supervision of an employee unless the employer knew, or in the exercise of reasonable care should have known, that the employee presented a risk

of danger to others. Niece v. Bellevue Group Home, 131 Wn.2d 39, 48-49, 929 P.2d 420 (1997). Whether conduct is inside or outside the scope of employment is a question for the jury. Gilliam, Supra at 585. The Plaintiff does not stipulate that the actions of Sgt. Stensatter and Off. Murphy was within the scope of their employment.

Defendants argue based upon Gilliam that if the Defendants stipulate the actions of Off. Murphy and Sgt. Stensatter are within the scope of employment that a cause of action for negligent supervision cannot be maintained. Respectfully, the Defendants cannot have the negligent supervision claim against Defendant Kohler and the State of Washington dismissed by simply stipulating that the actions of Off. Murphy and Sgt. Stensatter were within the scope of employment. This is because no underlying negligence claim against these individuals was pled.

In both the Niece and Gilliam cases the respective Plaintiffs alleged a cause of action for negligence against the individual employee. In both cases because this cause of action for negligence was present the two Courts determined that a second cause of action for negligent supervision was redundant. Both Niece and Gilliam are factually distinguishable from the present case, however, because as stated above no underlying cause of negligence has been alleged against Off. Murphy or Sgt. Stensatter.

In LaPlant v. Snohomish County, 162 Wn.App 476, 271 P.3d 254 (2011), this issue was squarely addressed. The Court referred to the unpublished decision of Judge Coughenour in Tubar, III, v. Clift, 2007 WL 214260, No. C051154JCC Washington. In the January 25, 2007, Tubar decision, Judge Coughenour ruled that because the Plaintiff had not asserted a negligence claim against the individual officer, no such risk of redundancy or irrelevance existed. Tubar, Supra at 7. Judge Coughenour stated, "There (the) mere fact that the City admitted that Clift was acting within the scope of his employment does not prevent Plaintiff from asserting state law negligence claims against the City."

In LaPlant the Court distinguished Tubar from Gilliam because Tubar did not assert a negligence claim against the employee individually. The LaPlant Court quoted Judge Coughenour:

> Here, there is no such redundancy because Plaintiff has not asserted a negligence claim against Officer Clift for which the City would be vicariously libel by admission. Instead, Plaintiff claims that the City itself is negligent for breaching its own standard of care with respect to the hiring, supervision, and training of Off. Clift. LaPlant, Supra at 483.

The LaPlant Court distinguished Tubar from LaPlant for the same reason. The Court noted that LaPlant asserted a negligence claim against the deputies for which the County would be vicariously liable. Therefore, "Tubar is inopposite." Id at 483.

The authority of LaPlant and Tubar hold that redundancy is not present when the Plaintiff does not assert a negligence claim against the individual officer. In the present case the Complaint does not assert any claim of negligence against Off. Murphy or Sgt. Stensatter. The actions of Off. Murphy and Sgt. Stensatter were not negligent, they were deliberately calculated actions. Because of this there is no risk of redundancy. Dismissal on summary judgment under a claim that the cause of action is redundant is error.

V. CONSPIRACY

In Washington the elements of civil conspiracy are: (1) two or more people engaged in activity to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means; and (2) an agreement among such people to accomplish the object of the conspiracy. Wilson v. State, 84 Wn.App. 332, 350-351, 929 P.2d 448 (1996). A finding that a conspiracy exists may be based on circumstantial evidence; however the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. Harrington v. David D. Hawthorne, CPA, PS, 111 Wn.App. 824, 840- 47 P.3d 567 (2002). Mere suspicion is insufficient ground upon which to base a finding of conspiracy. Id at 840.

Judge Wickham held that to demonstrate civil conspiracy the plaintiffs must provide clear, cogent, and convincing evidence of the elements of this cause of action. CP 478. Judge Wickham held the Plaintiff's to the wrong legal standard.

Notwithstanding the clear and convincing evidence standard involved in civil conspiracy cases the evidence at issue on a motion for summary judgment must still be construed in light most favorable to the nonmoving party. Sterling Business Forms, Inc. v. Thorpe, 82 Wn.App. 446, 451, 918 P.2d 531 (1996). This Court cited to the holding in Herron v. KING Broadcasting Co., 112 Wn.2d 762, 768-69, 776 P.2d 98 (1989), wherein the Court stated:

> While the issue turns on what the jury could find, and while the court must keep in mind that the jury must base its decision on clear and convincing evidence, the evidence is still construed in the light most favorable to the non-moving party and the motion is denied if the jury could find in favor of the nonmoving party.

The factual evidence as outlined previously in this memorandum demonstrates a significant amount of circumstantial evidence which supports the finding that a conspiracy exists between the WPD and the WSLCB to force the closure of Club Level, even by the clear, cogent, and convincing standard applicable at trial. Indeed, Judge Wickham in his Letter Opinion specifically found that the first element; two or more people engaged in activity to accomplish an unlawful purpose or to

accomplish a lawful purpose by unlawful means, was supported by sufficient evidence to support a finding that a material issue of fact existed. CP 478. The sole question remaining in the Court's mind was whether evidence of an agreement to accomplish the object of the conspiracy existed. CP 478.

Multiple parties have testified in various depositions as well as demonstrated through the documentary evidence that continual communication existed between the WPD and the WSLCB officers regarding Club Level. Respectfully, the recitation by Judge Wickham that the "plaintiff's entire argument" was contained in his Letter Opinion at CP 478-479, ignores the additional and substantial factual evidence submitted by the Fila in the Memorandum in Response to Motion for Summary Judgment.

Several communications prove this conspiracy. Off. Drolet of the WPD sent an e-mail to Off. Murphy stating that it was his perception a "few expensive tickets" would slow things down at Club Level. CP 299. Capt. Dresker of the WPD sent an email to his subordinates stating his desire to be more proactive in his own methods of impacting Club Level's business up to and including "pressing Liquor Control to close the business down." CP 319.

Lt. Starkey testified during his deposition that the driving force behind the LSI designation was the reports forwarded from the WPD. In the Motion for Summary Judgment CP 416-417 proves that 26 reports were forwarded to the WSLCB from WPD officers regarding Club Level during this relevant two year time frame. For every other bar located in Wenatchee combined there were a total of four reports forwarded to the WSLCB. Of the 26 complaints regarding Club Level all 26 were investigated and 24 were ultimately determined to be "unfounded." Two written warnings were issued to Club Level.

Not one sustained AVN has been issued against this business during the relevant two year period. Despite this Club Level was designated as an LSI almost immediately after its creation which is directly contrary to the policy statement issued by the WSLCB. CP 266-268. This evidence clearly demonstrates the desire of the WPD to correlate their actions with the WSLCB to achieve the goal of seeking the assistance of "Liquor Control to close the business down."

Additional evidence of this correlation between the WPD and the WSLCB is the creation of the GNA. This document would have allowed the City of Wenatchee to immediately suspend the City business license without any provision for recourse if in the City's sole perception Club Level were to violate any term of the GNA. As WSLCB employee Ms.

Reid indicated, this GNA would give the City something to which they could hold the applicant accountable. CP 400.

This behavior by the WPD and officers of the WSLCB is inconsistent with a lawful purpose and is reasonably consistent only with the existence of a conspiracy to force the closure of Club Level. When this evidence is viewed in the light most favorable to the Plaintiff's a jury could find the existence of an unlawful conspiracy even by a clear, cogent, and convincing standard. The evidence of collusion between the WPD and WSLCB is overwhelming and certainly more than enough to meet the requirements of defending against a motion for summary judgment.

VI. TORTIOUS INTERFERENCE

A claim for tortious interference with a business relationship requires proof of five elements. These five elements are: (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

In his Letter Opinion Judge Wickham focused on the elements requiring a contractual relationship or business expectancy, defendant's knowledge of the relationship, and the defendant's intentional interference with the relationship. CP 479. The Court found that Plaintiff's had not provided any evidence of the contractual relationship existing between Fila and Rodriguez. CP 479. In fact Fila did provide evidence of this contractual relationship. The uncontested Declaration of Art Rodriguez who is the partial owner of the building within which Club Level was located was provided wherein he stated:

> Mr. Fila and I did have a contractual agreement where he would pay me $4,000 per month to lease the space within which he was operating Club Level on the second floor. Mr. Fila was not able to fully comply with this agreement because of declining sales which he had inside Club Level. At this time Mr. Fila still owes me monies which remain unpaid from the terms of this lease. CP 449.

This statement alone demonstrates that a contractual relationship existed sufficient for the purposes of defeating a motion for summary judgment. Off. Murphy, Sgt. Spencer, and Lt. Starkey do not contest the fact that they were aware Rodriguez was the owner of the building in which El Volcan and Club Level was situated. There is no serious contest to the element that the Defendants had full knowledge of the business relationship between Rodriguez and Fila.

The only element of the five required that is seriously contested is whether the Defendants engaged in the intentional interference with the business relationship between Rodriguez and Fila inducing or causing a breach or termination of the relationship or expectancy. Judge Wickham also stated in his Letter Opinion "they have not provided any evidence that the defendants induced or caused a breach or termination of the relationship or business expectancy." CP 479. At the same time, however, Judge Wickham also found that, "the evidence shows that law enforcement specifically targeted Club Level in an excessive and unreasonable manner because they wanted to put it out of business." CP 476.

It is respectably submitted that if "law enforcement", which includes these Defendants, targeted Club Level in an excessive and unreasonable manner because they wanted to put this nightclub out of business, this evidence is certainly sufficient to defeat a motion for summary judgment on this question. These Defendants interfered with the business relationship between Fila and Rodriguez for an improper purpose because the effect of their actions was to force Fila to relocate the business in a failed attempt to remain viable.

VII. SUMMARY

The Plaintiffs have put forth substantial evidence demonstrating the deliberate intention of these Defendants to impact the Plaintiff's state issued nightclub license to operate this business. Judge Wickham has already, correctly, determined that a material issue of fact in dispute exists as to whether these Defendants specifically targeted Club Level in an excessive and unreasonable manner because they wanted to put Club Level out of business.

Judge Wickham reversed his decision only because he decided to adopt the legally incorrect decision of Judge Shea. The Benigini, Freeman, and Schware decisions clearly support Fila's claims that his constitutional right to pursue his occupation based upon the state issued nightclub license which was under attack by law enforcement in Wenatchee. The conclusion reached by both Judge Wickham and Judge Shea that no such constitutional right existed is legal error.

Judge Wickham also committed legal error in dismissing the three common law causes of action for negligent supervision, unlawful conspiracy, and tortious interference with a business relationship.

As far as the negligent supervision claim is considered, because no underlying negligence claim was asserted against the individual officers there is no risk of redundancy. The Courts ruling that the holding in

Gilliam provides support is mistaken. As the Court in LaPlant recognized, when there is no underlying negligence claim there is no redundancy and the cause of action for negligent supervision stands independently.

Substantial evidence has been submitted demonstrating the conspiracy agreement between the officers and administration of the WPD and the WSLCB. The Court erred in holding Fila in a motion for summary judgment to a level of proof of clear, cogent, and convincing evidence. This is legal error that is reversible.

Fila has been able to put forth evidence demonstrating direct and continuing communications between the administration and officers of the WPD and the WSLCB. Capt. Dresker specifically stated in an e-mail that he would press Liquor Control to close this business down. Not only that Capt. Dresker authored these two emails, he acted upon them seeking the cooperation of the WSLCB through its officers and administrative processes to force the closure of Club Level.

Substantial and compelling evidence has been presented from which a jury could determine that an unlawful conspiracy existed between the administration and officers of the WPD and these Defendants.

Judge Wickham incorrectly stated that no evidence of a contractual relationship between Rodriguez and Fila was presented. It is without question that Off. Murphy, Sgt. Stensatter, and Lt. Starkey all had

knowledge of this business relationship between Rodriguez and Fila. As officers representing the WSLCB indeed they are required to have this knowledge regarding liquor establishments under their jurisdiction. Judge Wickham has already determined that a material issue of fact in dispute exists showing that these Defendants specifically targeted Club Level in an excessive and unreasonable manner. Fila has presented more than sufficient evidence to support the claim that Defendants acted with the intent and purpose of impairing this business relationship.

The Trial Court's decision to grant summary judgment on these four causes of action was error and should be reversed.

RESPECTFULLY SUBMITTED this 12th day of November, 2013.

Rodney R. Moody, WSBA #17416
Attorney for Appellant

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

CLUB LEVEL, INC., and RYAN FILA, a single man, Plaintiffs - Appellants, vs. WASHINGTON STATE LIQUOR CONTROL BOARD, et al., Defendants - Appellees.	NO. 45270-7-II Case No.: 12-2-01803-8 Thurston County Superior Court, WA DECLARATION OF MAILING

DECLARATION OF SERVICE

I certify that on the 12th day of November, 2013, I mailed a true and correct copy of Brief of Appellant, by depositing the same in the United States mail, postage prepaid, to Washington State Court of Appeals Division II, and Mark Jobson Attorney at Law, and emailed to Mark Jobson Attorney at Law, and faxed to Washington State Court of Appeals Division II addressed as follows:

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Dated this 12th day of November, 2013 at Everett, Washington.

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