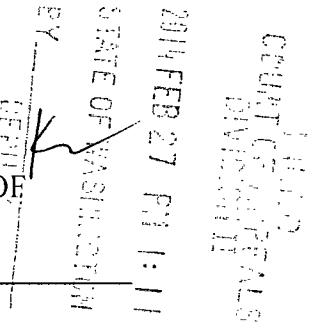
No. 45270-7-II

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 - Defendants.

REPLY BRIEF OF APPELLANT

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SUMMARY JUDGMENT STANDARD

Claims of qualified immunity under state law are subject to the summary judgment standard, which requires that all facts and reasonable inferences drawn therefrom be considered most favorably to the nonmoving party. Seaman v. Karr, 114 Wn.App. 665, 678-79, 59 P.3d 701 (2002). As the Court stated in Seaman, when reviewing a defendant's claims of qualified immunity the court assumes that all facts alleged in the complaint are true. Id. at 679. The inquiry is to determine whether a material issue of fact exists that requires a trial and whether reasonable minds can reach only one conclusion from all the evidence. Id. at 679.

QUALIFIED IMMUNITY

Defendants argue Fila failed to produce evidence that he had been deprived of a constitutional right, thereby arguing that summary judgment was properly granted. There is no dispute that a court when determining whether qualified immunity applies must first ask whether the alleged facts show the violation of a constitutional right. Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001).

In Schware v. Bd. Of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), the Court unequivocally held that a State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal

Protection Clause of the Fourteenth Amendment. Id. at 238-239. The constitutional right to pursue an occupation clearly exists.

If a constitutional violation can be demonstrated, the second question is whether that right is clearly established. Id. at 194. In Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2083, 179 L.Ed. 2d 1149 (2011), the Court noted that to determine whether a constitutional right was clearly established at the time of the conduct the court must ask whether its contours were sufficiently clear that "every reasonable official" would understand that what he is doing violates that right. Id. at 2083. This standard was not argued by the Defendants, but is the current standard on this question of law.

Defendants contend that Fila never specifically alleged that his liquor license was limited, restricted, suspended, revoked, or terminated, and therefore this Court is precluded from finding that his constitutional right was violated. Res. Br., Pg. 14. For this contention the Defendants cite to no authority. Contentions unsupported by argument or citation of authority will not be considered on appeal. RAP 10.3(a)(5). Camer v. Seattle Post Intelligencer, 45 Wn.App. 29, 36, 723 P.2d 1195 (1986). In fact, the record is replete with numerous instances in which his constitutional right to pursue an occupation as a bar owner was burdened by the improper conduct of the Defendants.

In their attempt to distinguish the facts of this case from Benigni v. City of Hemet, 879 F.2d 473 (9th Cir. 1988), the Defendants argue, "[t]here is no evidence that any of the defendants engaged in 'excessive or unreasonable police conduct intentionally directed' to force Fila out of business." "...The only evidence relevant to this claim is the evidence that Sgt. Stensatter issued two AVN's to Fila; one for allowing a minor on the premises, and the other for inadequate lighting." Res. Br. Pg. 16. This argument is made a second time when Defendants argue: "Mr. Fila has shown only that Sgt. Stensatter issued two civil violations, both of which were clearly within his statutory power." Res. Br. Pg. 18. These arguments simply ignore the substantial evidence submitted to the Trial Court in response to the Motion for Summary Judgment, all of which was previously set forth in Appellants Opening Brief.

The trial court itself flatly disagreed with Defendant's arguments. Judge Wickham specifically found that Benigni was very similar on the facts to the present case and "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. Based on these findings he initially denied summary judgment while determining that a material issue of fact existed. CP 477.

Defendants attempt to further distinguish Benigni by arguing the court revisited the constitutional right to pursue an occupation and narrowed this decision in FDIC v. Henderson, 940 F.2d 465 (9th Cir. 1991). Res. Br. Pg. 17. This case held that to demonstrate a violation of a substantive due process right a plaintiff must demonstrate (1) an inability to pursue a profession, and (2) that his inability is due to the actions that were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Id. at 474. As pointed out in Appellants' Opening Brief, this argument was modified in Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56 (1993), where the Court modified this language to require a demonstration of inability to pursue "any comparable" job. Id. at 44.

Both of these cases are factually distinguishable from the present facts. As outlined in Appellants' Opening Brief, the occupation which Fila lost was the ability to operate a Nightclub business in the State of Washington pursuant to the license issued him by the WSLCB pursuant to RCW 66.24.600. He is not seeking a job as a banker, highly specialized scientist, or bar manager. He is the owner of the business which is permitted to operate only because he holds a state issued license. It was this license and Club Level which was attacked by the Defendants, not his

job as a bar manager, and this is what factually distinguishes Mr. Fila and this case from the holdings in FDIC, and Wedges/Ledges.

The Appellant does need to demonstrate pursuant to the holding in Lebbos v. Judges of the Superior Court, Santa Clara County, 883 F.2d 810 (9th Cir. 1989), that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. at 818. In the context of an administrative agency arbitrary and capricious action has been defined as "willful and unreasoning action, without consideration and in disregard of facts or circumstances." Jow Sin Quan v. Washington State Liquor Control Board, 68 Wn.2d 373, 378, 418 P.2d 424 (1966). A test for determining if an administrative decision is arbitrary was summarized by the Court as follows:

> Did the agency proceed in accordance with and pursuant to constitutional and statutory powers? Were the agency's motives honest and intended to benefit the public? Were they honestly arrived at-that is, free from influence of fraud and deceit? Were they free of any purpose to oppress or injure-even though injury and damage to some may be inherent in accomplishing the particular public benefit? Did the administrative agency give notice, where notice is due, and hear evidence where hearings are indicated? Did the agency make its decision on facts and evidence? Were its actions in the last analysis rational, that is, based upon a reasonable choice supported by facts and evidence? If the answers to all of these queries are in the affirmative, then the decision of an administrator, unless placed under

> complete judicial review by law, cannot be held arbitrary, capricious, unreasonable or oppressive by the courts.

Id. at 427-428.

The answer to these questions in the present case is most certainly negative. When Ofc. Murphy convinced Lt. Starkey to designate Club Level as an LSI immediately after its creation and without any supporting factual evidence in the form of a sustained AVN he knew that he was violating the stated policy of the WSLCB. CP 284. When he cooperated with the WPD to look for "a few expensive tickets" Ofc. Murphy knew that he was deliberately targeting Club Level even though no violations had ever been found. CP 299. He also knew he was violating the trust placed in him by his employer. When Sgt. Stensatter deliberately failed to interview Fila or any of his staff to determine the salient question of whether Fila had knowledge that a minor was inside Club Level he knew that he was not properly conducting this investigation. CP 259. He then compounded this more by testifying before Administrative Law Judge Mark Kim to a legal standard he knew was incorrect for the purpose of having ALJ Kim sustain the AVN against Club Level which in turn would imperil Fila's Nightclub license. CP 234, 394. When Sgt. Stensatter came into Club Level immediately after it reopened at its new location at its busiest hour and demanded to immediately see the servers permit and

driver's license of every employee serving liquor he knew that this would negatively impact their ability to serve the patrons and in turn negatively impact this business. CP 438. When Sgt. Stensatter issued an AVN for "inadequate lighting" almost a week after being inside Club Level and literally the day after the AVN for the minor inside Club Level was finally dismissed by the WSLCB he did this deliberately in an attempt to have Club Level's current temporary permit revoked. CP 276-278. He followed up on issuing this inadequate lighting AVN by calling the licensing division the next day and citing the licensing division WAC 314-07-0604(4) which would authorize the WSLCB to immediately revoke the temporary permit issued to Club Level. Club Level would have had no recourse or ability to challenge the revocation and this would have immediately forced the closure of this business. CP 280-283.

Every reasonable WSLCB officer who engaged in the above detailed behavior would know that this behavior was conducted for an improper purpose. Every reasonable officer would know that by engaging in this behavior they were exposing Club Level to potential closure. Every reasonable officer would know that these actions violated Mr. Fila's constitutional right to pursue an occupation. This is particularly true in light of the Benigni and Freeman cases both of which were decided some 24 and 17 years previously. As Judge Wickham wrote, Benigni "seems to

stand for the proposition that a loss of occupation claim can be based on excessive and unreasonably police conduct that is potentially targeted to harm a business and which does harm the business." CP 476.

As outlined in the Opening Brief and pursuant to the holdings of Schware, Benigni, and Freeman, Fila does not need to prove that he was incapable of finding a job as a bar manager. He has fully met his burden on every element and dismissal of this cause of action on summary judgment was legal error which should be reversed.

NEGLIGENT SUPERVISION

Defendants argue "Mr. Fila does not claim that Officer Murphy or Sgt. Stensatter were negligent." "Since the employees were not negligent, their employer was not either." Res. Br., Pg. 23. Once again there is virtually no citation to any authority for this contention. As outlined above arguments not supported by any citation to authority will not be considered on appeal. Camer, supra at 36. Defendants continue to argue summary judgment was appropriate because the negligent supervision cause of action is redundant.

Defendants in their memorandum fail to address the authority cited in Appellants' Opening Brief regarding LaPlant v. Snohomish County, 162 Wn.App 476, 271 P.3d 254 (2011), and Tubar, III v. Clift, 2007 WL 214260, No C051154JCC Washington. There is no attempt to distinguish

this authority from the present facts or argue these cases are not applicable. LaPlant or Tubar conclusively and directly address this argument and stand for the proposition that when negligence is not alleged there is no redundancy.

As outlined in Appellants' Opening Brief the actions of Ofc. Murphy and Sgt. Stensatter were not negligent; they were deliberate and calculated actions. There is no risk of redundancy and dismissal on summary judgment based on this argument is legal error.

TORTIOUS INTERFERENCE

Defendants argue that a cause of action for tortious interference cannot be established because Fila cannot establish; (1) the existence of a valid contract that was terminated or; (2) whether the Defendants knew of the contract and acted with an improper purpose or by improper means to interfere with it. Res. Br., Pg. 21.

In Appellants' Opening Brief the Declaration of Art Rodriguez was presented wherein he stated that he did have a contractual agreement with Mr. Fila from which he was paid $4,000 per month, that Mr. Fila was not able to fully comply with this agreement because of declining sales and that Mr. Fila still owed him money remaining to be paid according to the terms of his lease. CP 449. This Court is required as a matter of law to review all evidence in the light most favorable to the non-moving party.

The reasonable inference reached from the Declaration of Art Rodrigues can only be that a contractual agreement existed which was violated because Mr. Fila still owed him money under the terms of this lease. This is a clear, unequivocal statement of Art Rodriguez which this Court on a motion for summary judgment is not permitted to simply ignore. Similarly, this Court cannot ignore the direct evidence that the Defendants are officers of the WSLCB and their very job is to review every contract that is in place regarding liquor establishments within the State of Washington. It is incomprehensible that these Defendants would not know, particularly in light of the volume of evidence which has been pointed out in the Opening Brief, that this contractual relationship between Mr. Fila and Mr. Rodriguez existed. As pointed in the Opening Brief Judge Wickham found, "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.

The elements of tortious interference with a business relationship are fully established and summary judgment was improperly granted.

CONSPIRACY

Argument is made "the record is completely devoid of any evidence that any of the WSLCB employees conspired with the police department against Fila for the purpose of "shutting down" the Club as the

Appellant argues." Res.Br., Pg 22. Capt. Dresker of the Wenatchee Police Department wrote, "**we (WPD) need to work more proactively on our own solutions, up to and including pressing for Liquor Control to shut the business down.**" (Emphasis added) CP 319. Officer Drolet of the WPD forwarded an e-mail to Defendant Ofc. Murphy and 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.**" (Emphasis added). Defendant Ofc. Murphy responded stating that he would like to come down and help, and suggested alternative dates and times. CP 299. The evidence submitted is replete with references to contact between officers of the WPD, its administration, and officers of the WSLCB regarding Club Level and Fila.

Defendants argue the only evidence in the record that supports this claim are messages between members of the WPD, or messages from WPD to the WSLCB. Res.Br., Pg. 22-23. Defendants ignore the direct evidence that 26 reports were forwarded from the WPD to the WSLCB, 24 of which were determined to be "unfounded" and two resulted in written warnings. At the same time for every other bar and nightclub in Wenatchee combined a total of four reports were forwarded by the WPD to the WSLCB. Lt. Starkey testified that no sustained violations were ever found against Club Level "[b]ecause the officers did not observe any

violations." CP 252. Ofc. Murphy requested of Lt. Starkey that Club Level be designated an LSI at its inception in deliberate violation of the clear policy statement to the contrary because of these reports from the WPD. The clear reasonable inference which this Court is required as a matter of law to conclude from this direct evidence is that the officers of the WPD were sending over voluminous reports regardless of their lack of merit to the WSLCB in an attempt to use this agency to affect their desire as Capt. Dresker wrote: "**to shut this business down.**" CP 319.

Defendant's argument also ignores the creation of the Good Neighbor Agreement (GNA) which was created in collusion between the WPD and WSLCB. This GNA would permit the City of Wenatchee to immediately suspend Club Level's city business license without any provision for recourse if in the City's sole discretion Club Level were to violate any term of this GNA. As a WSLCB employee indicated, the GNA would give the City something which they could hold the applicant accountable. CP 400.

As stated earlier, this Court is required to view all of this evidence in the light most favorable to the nonmoving party. If there is any material issue of fact in dispute after considering the evidence and all reasonable inferences summary judgment must be denied. The evidence outlined above respectfully demonstrates clear collusion between the WPD, its

administration and personnel with the officers and administration of the WSLCB for the unlawful purpose of forcing Club Level to close. Summary judgment on this conspiracy claim is legal error.

CONCLUSION

The argument of Defendants marginalizes the overwhelming evidence submitted in response to the Motion for Summary Judgment. Further, the argument of Defendants consistently fails to cite to any authority in support of the arguments made while simultaneously ignoring direct authority previously cited in Appellants' Opening Brief that is directly contrary to the argument made.

When this evidence is viewed with every positive inference being extended to the nonmoving party, Fila and Club Level, as the Trial Court and this Court on appeal is required to do the factual evidence is overwhelming in its demonstration as Judge Wickham found "that law enforcement specifically targeted Club Level in an excessive and unreasonable manner because they wanted to put it out of business." CP 476. On this point Judge Wickham was entirely correct. The granting of summary judgment on these causes of action was legal error requiring reversal.

RESPECTFULLY SUBMITTED this 26th day of February, 2014.

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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 26th day of February, 2014, I mailed a true and correct copy of the Reply 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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