NO. 45270-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CLUB LEVEL AND RYAN FILA,

Appellants,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD, et al.,

Respondents.

RESPONDENTS' BRIEF

ROBERT W. FERGUSON
Attorney General

MARK C. JOBSON
Assistant Attorney General
WSBA No. 22171
PO Box 40126
Olympia WA 98504-0126
360-586-6300
OID #91023

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I. INTRODUCTION

Mr. Fila claims that the State Liquor Control Board (LCB) and three employees are liable to him because they enforced the Alcoholic Beverage Control Act at his nightclub.[1]

The Alcoholic Beverage Control Act, Title 66 RCW, "shall be deemed 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 all its provisions shall be liberally construed for the accomplishment of that purpose." RCW 66.08.010.

It is illegal to keep or allow to be kept any liquor or permit the consumption of liquor in any public place or club unless the sale is authorized by a valid license issued by the LCB. RCW 66.24.481. The sale of liquor is highly regulated.[2] A licensed liquor premise "shall at all times be open to inspection" by a liquor enforcement officer, inspector, or peace officer. RCW 66.28.090. A liquor enforcement officer has the power to enforce the penal provisions of the liquor control act. RCW 66.44.010(4). When the LCB issues a violation notice to a licensed

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[1] A "nightclub" is an "establishment that provides entertainment and has as its primary source of revenue (a) the sale of alcohol for consumption on the premises, (b) cover charges, or (c) both." RCW 66.04.010(28).

[2] *See, e.g., 'U' District Building Corp. v. O'Connell*, 63 Wn.2d 756, 757, 388 P.2d 922 (1964); *Derby Club, Inc. v. Becket*, 41 Wn.2d 869, 873, 252 P.2d 259 (1953); *Hi-Starr, Inc. v. Wash. St. Liquor Control Bd.*, 106 Wn.2d 455, 460, 722 P.2d 808 (1986).

premise, such notice is subject to administrative appeal and review under the Administrative Procedures Act. RCW 34.05.413; WAC 314-29-010.

Mr. Fila's lawsuit is not based on any licensing action – the LCB never suspended, revoked, or terminated the licensee.[3] Instead, his claims focus on the fact that LCB field officers communicated with the Wenatchee Police Department (WPD) about "Club Level," and LCB Sergeant Stensatter issued a total of two violations to the licensee. There are no remaining claims regarding LCB Officer Murphy. The only claim against the LCB Executive Director is based upon the fact that she did not personally respond to letters from Mr. Fila's lawyer. The trial court's order dismissing these meritless claims should be affirmed.

II. ASSIGNMENTS OF ERROR

Respondents assert no error below. The trial court should be affirmed in all respects.

III. STATEMENT OF THE CASE

Mr. Arturo Rodriguez is a licensed nightclub owner in Wenatchee. He owned and operated a club called "El Volcan."[4] The licensed premise known as "El Volcan" included three floors of the building.[5] In 2008,

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[3] CP at 205.
[4] Mr. Rodriguez and his business are not parties in the action.
[5] CP at 138-39, 141. Jobson Dec., Exhibit A, Fila Dep. 11:1-12:1, 16:3-7.

Mr. Rodriquez hired Ryan Fila as "bar manager."[6] In August 2010, Rodriguez applied for and received a nightclub/liquor license for the second floor of the building and changed the name of that floor to "Club Level."[7]

Mr. Fila leased the second floor from Mr. Rodriguez and became the operator of Club Level.[8] He obtained a business license in his own name. Mr. Fila applied for and obtained a liquor license in his own name for Club Level in May 2011.[9] His license has never been suspended, revoked, or lost.[10]

Sgt. Tom Stensatter is an Enforcement Officer for the Liquor Control Board. Stensatter took over liquor license enforcement for South Wenatchee, including Club Level, on August 2, 2011.[11] Club Level is restricted to persons under the age of 21; no one under the age of 21 is permitted within the premises. On August 14, 2011, Wenatchee police officers located a minor in the business. WPD charged the minor with minor in possession/consuming alcohol. Shortly thereafter, WPD sent the police report to LCB for follow up with the business. Sgt. Stensatter received a copy of the WPD report stating that the police officers had

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[6] CP at 139; Fila Dep. 12:11-18.
[7] CP at 140; Fila Dep. 15:11-17.
[8] CP at 141; Fila Dep. 16:23-25.
[9] CP at 142; Fila Dep. 21:15-16.
[10] CP at 142; Fila Dep. 21:17-22.
[11] CP at 181; Stensatter Dec. ¶6.

located a minor inside Club Level. The LCB determined that an Administrative Violation Notice (AVN) should be issued for allowing a minor to remain in an area classified by the board as off limits in violation of RCW 66.44.310(1)(a). Sgt. Stensatter issued the administrative violation notice to Mr. Fila. Mr. Fila, through his counsel, appealed the AVN.[12] Mr. Fila prevailed at the hearing before the administrative law judge and the AVN was dismissed.[13]

In June 2012, Fila decided to relocate Club Level to a new address in Wenatchee.[14] Fila filed a claim for damages with the state on or about June 4, 2012. Fila alleges that on July 28 Stensatter "threatened the plaintiff" and informed him that the WPD had designated Club Level as a DUI emphasis patrol.[15] During this conversation, Stensatter told Fila that LCB was starting a DUI reduction project, and that since WPD reported to LCB that Club Level had 10 DUIs in the past twelve months, most likely Club Level would be a location for an emphasis patrol to reduce DUIs.[16]

Sgt. Stensatter also told Mr. Fila that if he were named individually in a lawsuit, "I would no longer be able to assist him because his license

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[12] CP at 182; Stensatter Dec. ¶¶8-9.
[13] CP at 28-52; Amended Complaint ¶4.30.
[14] CP at 28-52; Amended Complaint ¶4.40.
[15] CP at 28-52; Amended Complaint ¶4.43.
[16] CP at 183; Stensatter Dec. ¶11.

would be assigned to a new officer."[17] This is exactly what occurred. In September 2012, when Fila filed this suit against Stensatter, LCB assigned the license to a new enforcement officer.[18]

Mr. Fila claims that on August 4, Stensatter told Fila that if he were named in a lawsuit (there was no suit at that time), the license relocation process would be "smooth and easy." Stensatter denies that he said anything like this.[19] Licensing decisions are made by licensing staff in Olympia.[20] Stensatter did not participate in a licensing decision or communicate with licensing staff concerning the relocation.[21] Stensatter did tell Fila that if he was named as a defendant in a suit, LCB would assign a new officer in order "to prevent potential conflicts between the licensee and the assigned enforcement officer."[22]

On August 25, 2012, Sgt. Stensatter conducted a walk-through of the new Club Level location at 0045 hours.[23] Because of dim lighting, Stensatter could not see patrons, read the servers' permits, or read the patrons' IDs.[24] He asked Fila to turn up the lighting.[25] Fila refused to do

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[17] CP at 183; Stensatter Dec. ¶10.
[18] CP at 183; Stensatter Dec. ¶10.
[19] CP at 183-84; Stensatter Dec. ¶12.
[20] CP at 184; Stensatter Dec. ¶12.
[21] CP at 183-84; Stensatter Dec. ¶12.
[22] CP at 183-84; Stensatter Dec. ¶12.
[23] Late hour walk-throughs are common for nightclubs which tend to be busiest between 10 PM and 2 AM.
[24] CP at 185; Stensatter Dec. ¶13.
[25] CP at 185.

so.[26] Stensatter asked the manager, Kyle Delaney, to turn up the lighting. The manager said he was "too busy filming me to turn up the lighting."[27] Stensatter then asked Fila again to turn up the lighting. When Fila did not comply, Stensatter decided to issue an administrative violation notice for inadequate lighting.[28] Mr. Fila appealed the AVN to the LCB and it is currently under review. The APA provides the exclusive remedy for the appeal of an administrative order. RCW 34.05.510. Mr. Fila is not entitled to ask this court to review the AVN unless and until he has exhausted his administrative remedy. RCW 34.05.534.[29]

IV. PROCEDURAL HISTORY

A. The Federal Court Suit Against The City Of Wenatchee And Its Police Department

On or about February 8, 2012, Mr. Fila and Club Level filed a complaint for damages in United States District Court for the Eastern District of Washington.[30] The suit named the City of Wenatchee, the Wenatchee Police Department, and several of its employees as defendants. The suit alleged that the defendants violated Mr. Fila's civil rights and

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[26] CP at 186; Stensatter Dec. ¶14.

[27] CP at 185.

[28] "On all portions of the premises where alcohol is served or consumed, licensees must maintain sufficient lighting so that identification may be checked and patrons may be observed for the enforcement of liquor laws and rules." WAC 314-11-055.

[29] This is not an appeal of an administrative penalty or order. This is an appeal of civil damage action that was dismissed by the trial court.

[30] *Club Level and Ryan Fila v. City of Wenatchee*, U.S.D.C. No. CV-12-00088-EFS.

committed civil torts when they inspected Club Level and enforced state and local laws at the club. Amongst other claims the suit alleged that WPD officers deprived Fila of his due process right to "pursue his chosen occupation." The suit also alleged that the WPD conspired with the LCB to try to "force plaintiff to close his business."

On August 1, 2013, Judge Edward Shea granted the WPD's motion for summary judgment and dismissed the suit entirely.[31] Judge Shea's order states that "plaintiffs have failed to adduce sufficient evidence to support their constitutional claims," and "even if plaintiffs had shown a constitutional violation, defendants are entitled to qualified immunity because none of their actions amount to a clear constitutional violation of which every reasonable officer would have been aware."

B. The State Suit Against The LCB And Its Officers

On August 30, 2012, Fila filed suit against the Liquor Control Board, its commissioners, and several employees in state court. The amended complaint stated eleven different causes of action against the state defendants.[32] The defendants moved for summary judgment on all

[31] Judge Shea's order is attached as Appendix A. The order was provided to the trial court as part of Defendant's Reply Brief and Supplemental Authority in Support of Motion for Reconsideration. CP at 552-618. This court may take judicial notice of the federal court order. ER 201.

[32] CP at 28-52.

claims on April 3, 2013.[33] On July 12, 2013, the trial court dismissed all claims except the federal civil rights claim.[34] Defendants timely moved for reconsideration.[35] On August 9, 2013, the trial court granted the defendants' motion and dismissed the federal civil rights claim.[36]

Mr. Fila appeals the dismissal of four of the eleven claims stated in the complaint.[37]

V. ARGUMENT

A. Standard Of Review

On review of an order granting summary judgment, the appellate court engages in the same inquiry as the trial court under the rule governing when summary judgment is warranted. *Ducote v. State, Dep't Soc. & Health Servs.*, 167 Wn.2d 697, 701, 222 P.3d 785 (2009). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(e). The appellate court may affirm the trial court's ruling on any alternative ground that the record adequately supports. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153, *review denied,* 166 Wn.2d 1003 (2008).

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[33] CP at 150.
[34] CP at 513-15.
[35] CP at 531-36.
[36] CP at 647-48.
[37] Appellant's Br. at 4. The appellant failed to oppose dismissal of the other seven causes of action at the time of the summary judgment. CP at 384-85.

B. The Trial Court Correctly Dismissed The Federal Civil Rights Claim Because The Appellant Failed To Provide Any Evidence That He Had Been Deprived Of A Property Right

1. Introduction to Liability Under 42 U.S.C. § 1983 and Qualified Immunity

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress . . .

In enacting 42 U.S.C. § 1983, Congress created a federal cause of action for the deprivation of any rights, privileges, or immunities secured by the Federal Constitution and laws. *Town of Castle Rock, Colo. v. Gonzales,* 545 U.S. 748, 125 S. Ct. 2796, 2802-03, 162 L. Ed. 2d 658 (2005). For plaintiffs, § 1983 "serves as a vehicle to obtain damages for violations of both the Constitution and of federal statutes." *Communities for Equity v. Michigan High Sch. Athletic Ass'n,* 459 F.3d 676, 681 (6th Cir. 2006).

Section 1983 liability cannot be premised on respondeat superior. *Webb v. Sloan,* 330 F.3d 1158 (9th Cir. 2003); *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1560-61 (11th Cir. 1993). The liability of an

individual defendant must be premised on the defendant personally participating in the deprivation or setting into motion events that the defendant either knows or should have known would result in a deprivation. *Hydrick v. Hunter*, 466 F.3d 676, 689 (9th Cir. 2006). For example, a supervisor cannot be held liable under § 1983 for negligently supervising a subordinate. *Bd. of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

An action under 42 U.S.C. § 1983 cannot be maintained unless the plaintiff is able to demonstrate that the law during the time of the alleged misconduct was so clearly established that any reasonable official would have known that their conduct was unlawful. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The plaintiff bears the burden of proving that the constitutional right claimed to have been violated was clearly established at the time of the alleged violation. *Moran v. State*, 147 F.3d 839, 844 (9th Cir. 1998).

The three officials here who were sued under § 1983 asserted a qualified immunity defense. Qualified immunity protects state officers who carry out executive or administrative functions from personal liability so long as their actions do not violate "clearly established [federal] statutory or constitutional rights of which a reasonable person would have

known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This standard, which turns on the objective legal reasonableness of the official's conduct,[38] protects "all but the plainly incompetent or those who knowingly violate the law."[39]

"Qualified immunity balances two important interests, the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[40] Qualified immunity confers not only immunity from liability, but also an entitlement not to stand trial or face other burdens of litigation, so long as the official did not violate clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The "entitlement is an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* A trial court's denial of qualified immunity is immediately appealable to the court of appeals so long as the immunity defense presents solely a question of law.[41]

The heart of the qualified immunity defense involves a determination of whether the defendant officials violated clearly

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[38] *Harlow*, 457 U.S. at 819 (1982).
[39] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).
[40] *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).
[41] *Johnson v. Jones*, 515 U.S. 304 (1995); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

established federal law. An official may be found to have violated clearly established law only if the federal law was clearly established in such a relatively "particularized" sense that the unlawfulness of the conduct was "apparent" in the light of the pre-existing law. *Anderson v. Creighton*, 483 U.S. 635 (1987). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992); *cert denied* 506 U.S. 1080 (1993). The pertinent question is whether, under the particular circumstances facing the officers, they reasonably believed that their conduct was lawful. It is "vital" that the inquiry "be undertaken in the light of the specific context of the case, not as a broad proposition." *Saucier v. Katz*, 535 U.S. at 201-02.

In *Saucier*, the Supreme Court emphasized that the first step in a qualified immunity analysis is to determine whether a constitutional right is implicated by the facts of the case. *Saucier*, 121 S. Ct. at 2156. If the answer is no, then further inquiry is unnecessary. *Id.* If a violation could be established, then the court is to "survey the legal landscape" at the time of the violation to determine whether the right was clearly established. *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996).

2. Mr. Fila Has Not Been Deprived Of Any Federal Right

Mr. Fila's first claim is that Officers Murphy and Stensatter deprived him of his right "to pursue an occupation" as protected by the Fourteenth Amendment of the U.S. Constitution in violation of 42 U.S.C. § 1983.[42] Mr. Fila has never been deprived of his right to pursue an occupation and there is no clearly established federal case law that would inform a law enforcement officer of such a right.

In his complaint, Mr. Fila alleged that Officer Murphy violated his right to be free from an unreasonable search.[43] Mr. Fila dropped this claim in his response to the motion for summary judgment.[44] On appeal there is no claim that Murphy deprived Fila of any federal right. Mr. Fila pled no § 1983 claim against Director Kohler. That leaves Sgt. Stensatter as the only remaining individual defendant against whom the § 1983 claim was pled.[45]

As stated above, the first step in analyzing Fila's § 1983 claim is to determine whether he was deprived of any federally-protected right. He alleges that he was deprived of his right "to pursue an occupation."[46] But there are no facts in the record to support the claim that he was deprived of

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[42] Appellant's Br. at 25.
[43] CP at 487-507.
[44] CP at 389.
[45] Mr. Fila dropped his § 1983 claim against the state and the LCB in response to the motion for summary judgment. CP at 390.
[46] Appellant's Br. at 25.

this vague right. Mr. Fila argues that "the Defendants acted to impact his license issued by the WSLCB to operate a nightclub business."[47] Fila's liquor license was never limited, restricted, suspended, revoked, or terminated and he does not allege or argue that it was.[48] Since, Mr. Fila has never been deprived of a property right, in this instance his liquor license, his § 1983 claim fails and no further analysis is needed.

3. Sergeant Stensatter Has Qualified Immunity Because The So-Called Property Right That Fila Alleges Is Not "Clearly Established"

Even if Mr. Fila had been deprived of his license, there is no federal case that clearly establishes that a liquor control officer acting as he did in this case to enforce state liquor laws may be subject to liability under § 1983.

Mr. Fila argues that *Benigni v. City of Hemet,* 879 F.2d 473, 478 (9th Cir. 1988) "clearly establishes the constitutional right of a liquor establishment owner to pursue this occupation free of excessive police

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[47] Appellant's Br. at 28.

[48] CP at 205. In his deposition Mr. Fila testified as follows:
"Q: How long have you personally held a liquor license?
A: It was approved May 6, 2011.
Q: Has your license even been suspended?
A: No.
Q: Has it ever been revoked?
A: No.
Q: Have you ever lost your license?
A: No."

interference."[49] The preceding sentence is not a quotation from *Benigni*, but Mr. Fila's characterization of the holding in *Benigni*. Mr. Fila grossly overstates the holding in *Benigni*. As explained below, the case does not hold that a liquor licensee has a constitutional right to pursue his occupation free from excessive police regulation.

In *Benigni,* the plaintiff proved at trial that "city police 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 had occurred elsewhere." *Benigni v. City of Hemet*, 879 F.2d at 478. Based on this evidence, the court held that "the evidence before the jury was sufficient to support a conclusion that excessive and unreasonable police conduct was intentionally directed toward *Benigni's* bar to force him out of business." *Id.* In *Benigni*, the city failed to preserve the legal argument that the licensee had not been deprived of any constitutional right. Instead the city allowed the case to go to trial, and the appellate court was only reviewing the sufficiency of the evidence at trial.

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[49] Appellant's Br. at 25.

The present case has nothing in common with *Benigni*. There 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 AVNs to Fila; one for allowing a minor on the premises, and the other for inadequate lighting. Fila appealed both of these AVNs, and prevailed on the first one while the second is still pending.

Fila makes much out of the fact that Stensatter testified that he had never issued a citation for inadequate lighting before this one.[50] Sgt. Stensatter testified that on that night he asked Fila four times to increase the lighting so that he could read the servers' permits.[51] Fila admits that he failed to comply.[52] Stensatter said that in every prior instance in which he asked the licensee/owner or manager to increase the lighting, the licensee had immediately complied.[53] Before this night, Stensatter never needed to issue this citation because licensees increased the lighting at his request.

After the Ninth Circuit decided the *Benigni* case, the court revisited the issue and significantly narrowed its decision. In order to

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[50] Appellant's Br. at 16, CP at 259.

[51] CP at 184.

[52] Appellant's Br. at 16. "Due to the press of business Mr. Delaney [the bar manager] attempted to comply with this, but was unable to turn up the lights as demanded." CP at 260.

[53] CP at 185.

"demonstrate a violation of [the substantive due process right], a plaintiff must show 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." *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991). Under this test, Fila must show that he is unable to pursue employment in the bar or nightclub industry. He produced no such evidence. Secondly, he needed to produce evidence that Stensatter's actions were "clearly arbitrary and unreasonable having no relation to public health, safety, morals, or general welfare." Of course, the violations are directly related to "public health, safety, morals, or general welfare." Fila produced no such evidence. He cited no authority that would put a reasonable liquor control officer on notice that issuing two violations might deprive the licensee of his constitutional right to due process.

In fact, more recent authority directly contradicts Fila's argument. In *Freeman v. City of Santa Ana*, a bar owner sued the local police department and alleged that "defendants maliciously prosecuted her, thereby violating her due process rights." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). Freeman listed "the series of citations that were issued against her and notes that they were dismissed. However, the mere fact a prosecution was unsuccessful does not mean it was not

supported by probable cause. She does not point to any evidence indicating that probable cause was lacking. Thus, even if the defendants acted with the purpose of denying Freeman's constitutional rights, the district court did not err by directing a verdict on Freeman's malicious prosecution claims." *Freeman*, 68 F.3d at 1189.

Mr. Fila has shown only that Sgt. Stensatter issued two civil citations, both of which were clearly within his statutory power. This is a significant factor in showing that a reasonable officer would consider his actions to have been well within the constitutional limitations of his power. When a statute or regulation authorizes particular conduct, the court should consider that a factor in favor of concluding that a reasonable officer would consider the conduct constitutional. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994).

C. The Trial Court Correctly Dismissed The Tortious Interference Claim Because The Appellant Failed To Submit Evidence To Support Several Elements Of The Claim

To establish intentional interference with a contract or business expectancy, a plaintiff must prove five elements: (1) that a valid contractual relationship or business expectancy existed; (2) that the defendant knew of that relationship or expectancy; (3) that the defendant intentionally interfered by inducing or causing a breach or termination of that relationship; (4) that the defendant interfered with an improper

purpose or by improper means; and (5) that damage to the plaintiff resulted from the interference. *Pacific Northwest Shooting Park Ass'n. v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006); *Libera v. City of Port Angeles*, ___ Wn. App. ____ (2013), No. 43807-1-II (published December 31, 2013) 2013 WL 5861786.

Mr. Fila must show not only that the respondents intentionally interfered with his business expectancy or contract, but also that they interfered with an improper purpose or by improper means. *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989).

During his deposition, Mr. Fila could not describe the contractual relationship or business expectancy that he claimed was interfered with.[54] In response to the summary judgment motion, Mr. Fila did not provide evidence on several of the elements of the claim. The only evidence of a valid contract relationship is a declaration from his landlord, Mr. Rodriquez, saying that Fila "was not able to fully comply" with his commercial lease.[55] He submitted no evidence that the respondents knew of the lease between himself and Rodriquez. He submitted no evidence that Mr. Rodriquez terminated the contract for any reason including third

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[54] CP at 222. Q: "Do you have a written contract with somebody else that's been breached or interfered with by my clients?" A: "Not that I can recall." Fila Dep. 120:11-13.

[55] Appellant's Br. at 42, CP at 449.

party interference.[56] He submitted no evidence that any respondent intentionally interfered with an existing relationship for an unlawful or improper purpose. Finally, he submitted no evidence that if such a relationship was breached or terminated, he suffered damages as a result.

This claim is supported only by the argument that he leased commercial space from Rodriquez for $4,000 per month.[57] According to Mr. Rodriquez "Fila was not able to fully comply with this agreement because of declining sales," and Fila apparently defaulted on the lease.[58] Other than this statement from his landlord, the record is devoid of any evidence supporting the elements of the claim. There is no suggestion or even any hint that Mr. Rodriquez terminated the lease, or that the respondents interfered with the lease. In fact, Mr. Fila's brief admits that Sgt. Stensatter requested that Club Level be removed from the list of "locations of strategic interest."[59] This contradicts Fila's suggestion that Stensatter wanted to shut the business down. As he did in the trial court, Mr. Fila's brief continues to deliberately confuse the city police

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[56] In fact, in his response brief to the trial court, Mr. Fila stated that "a contractual relationship continues to exist between the plaintiff and Art Rodriquez." CP at 410. Fila apparently claims that he fell behind on the rent because of police "interference" and that he defaulted on the lease. There is utterly no evidence that Mr. Fila fell behind on the rent because of the conduct of the LCB employees. Mr. Fila cannot breach his own contract with his landlord and then blame his failure to pay rent on the respondents.

[57] Appellant's Br. at 42, citing CP at 449.

[58] *Id.*

[59] Appellant's Br. at 24, citing CP at 402.

department's alleged "dislike for Club Level," with the motives of the respondents herein.[60]

The only other citations to the record in this section of his brief are to the letter opinion of the trial court. The trial court's letter opinion is not "evidence" in the record.

Even taking the facts in the record in the light most favorable to Mr. Fila, he did not establish an issue of material fact as to: (1) the existence of a valid contract that was terminated or; (2) whether the LCB (and its employees) knew about the contract and acted with an improper purpose or by improper means to interfere with it.

D. The Trial Court Correctly Dismissed The Unlawful Conspiracy Claim Because Law Enforcement Agencies Commonly Communicate With Each Other And There Is Utterly No Evidence Of Unlawful Or Improper Purpose Or Method

While there may a cause of action for civil conspiracy, there is no recent reported case upholding such a claim.

> In several decisions this court has held that an actionable civil conspiracy exists if two or more persons combine to accomplish an unlawful purpose or combine to accomplish some purpose not in itself unlawful by unlawful means. *Lewis Pac. Dairymen's Ass'n. v. Turner*, 50 Wash.2d 762, 314 P.2d 625 (1957); *Harrington v. Richeson*, 40 Wash.2d 557, 245 P.2d 191 (1952); *Kietz v. Gold Point Mines, Inc.*, 5 Wash.2d 224, 105 P.2d 71 (1940). In order to establish a conspiracy the plaintiff must show that the alleged

[60] Appellant's Br. at 24, lines11-15.

> coconspirators entered into an agreement to accomplish the object of the conspiracy. *Lewis Pac. Dairymen's Ass'n. v. Turner*, supra. Even more important, the plaintiff has the burden of preponderating the evidence; and furthermore, the existence of an alleged civil conspiracy must be established by clear, cogent, and convincing evidence. *Harrington v. Richeson*, supra.

Corbit v. J. I. Case Co., 70 Wn.2d 522, 528-29, 424 P.2d 290, 295 (1967).

Club Level was a focal point for police activity in Wenatchee. In two years, the local police department forwarded 26 police reports to the LCB.[61] Mr. Fila's conspiracy claim is based purely on his claim that the Wenatchee Police Department and the LCB local enforcement officers communicated with each other regarding Club Level.[62] The record includes evidence of these communications. None of the communications supports an "unlawful purpose" or the use of "unlawful means." In fact, the record is completely devoid of any evidence that any of the LCB employees conspired with the police department against Fila for the purpose of "shutting down" the Club as the appellant argues.[63] The only evidence in the record that supports this claim are messages between members of the Wenatchee Police Department,[64] or messages from WPD

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[61] Appellant's Br. at 22, CP at 416-17.
[62] Appellant's Br. at 39.
[63] *See* Appellant's Br. at 40.
[64] CP at 319.

to the LCB.[65] There is nothing in the record supporting Fila's claim that any LCB employee ever tried to "shut down" or close the business.

E. The Trial Court Correctly Dismissed The Negligent Supervision Claim Because Only An Employer, Not A Supervisor, Is Vicariously Liable For The Conduct Of Its Employees

Mr. Fila argues that the LCB Executive Director Pat Kohler, is liable to him because she "negligently supervised" Stensatter and Murphy.[66] The only facts in the appellant's brief arguing that Kohler is liable allege that she did not respond to Fila's attorney's letters to her.[67] Ms. Kohler is not Stensatter or Murphy's employer, she is the agency director.

Mr. Fila does not claim that Officer Murphy or Sgt. Stensatter were negligent.[68] Since the employees were not negligent, their employer was not either.

Mr. Fila states correctly that "when an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising the employee."[69]

> [A]n employer may be liable for its employee's negligence in causing injuries to third persons if the employee was

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[65] *See* Appellant's Br. at 39; CP at 299.
[66] *See* Appellant's. Br. at 34-37.
[67] *See* Appellant's Br. at 21-22.
[68] Appellant's Br. at 37, "the complaint does not assert any claim of negligence against Off. Murphy or Sgt. Stensatter."
[69] Appellant's Br. at 34, citing *Gilliam*, 89 Wn. App. at 584-85.

> within the "scope of employment" at the time of the occurrence.

Rahman v. State, 150 Wn. App. 345, 350, 208 P.3d 566, 569 (2009) *aff'd,* 170 Wn.2d 810, 246 P.3d 182 (2011).

This is the familiar doctrine of respondeat superior. Normally, an employer is not liable for the conduct of its employees who are acting outside of the scope of their employment. However, "entirely independent of respondeat superior," in certain limited circumstances an employer may be liable for its employees conduct even when they act outside of the scope of their employment. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48 (1997).[70] When this occurs, the employer is not vicariously liable, but is liable because of an independent claim for "negligent supervision" of the employee.

A cause of action for negligent supervision requires the plaintiff to show that the employee acted outside the scope of their employment.[71] *Niece*, 131 Wn.2d at 48.[72] A claim against an employer for negligent

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[70] "The theory of negligent supervision creates a limited duty to control an employee for the protection of third parties, even where the employee is acting outside the scope of employment." *Niece*, 131 Wn.2d at 51.

[71] The vicarious liability of an employer arises from actions taken by an employee within the scope of employment (as occurred here). Sometimes, vicarious liability can be defeated by an employer when the employee's conduct was criminal and outside the scope of employment (not alleged here). *Robel v. Roundup Corp.*, 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002).

[72] "Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities

supervision of an employee is only possible when an employee has committed an intentional wrongful act. *Gilliam v. Dep't of Soc. Health Servs.*, 89 Wn. App. 569, 950 P.2d 20 (1998). Mr. Fila wrongly argues that the plaintiff in *Niece* alleged a cause of action for negligence against the employee.[73] In *Niece*, the employee feloniously assaulted a helpless victim. *Niece*, 131 Wn.2d at 42. The employer was found liable for the assault not because of vicarious liability but because *Elmview* owed *Niece* a duty to protect her from all foreseeable harms, including the harm of sexual assault by an employee. *Niece*, 131 Wn.2d at 48.

In the circumstances where the employer admits that the employee acted within the scope of employment a cause of action for negligent supervision is redundant. *Gilliam*, 89 Wn. App. at 585. In the present case there is no dispute that LCB's employees were at all times acting on behalf of LCB and within the scope of their employment.[74] Just as in *Gilliam*, the State acknowledged that the state employees were acting

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entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention, and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior." *Niece*, 131 Wn.2d at 48.

[73] Appellant's Br. at 35. He incorrectly claims that since he did not allege negligence on the part of the employees, he is entitled to allege negligent supervision by the employer.

[74] LCB stipulated that Stensatter, Murphy, and Kohler all were acting within the scope of their employment when they dealt with Mr. Fila or when they inspected Club Level. CP at 164, Fn. 56.

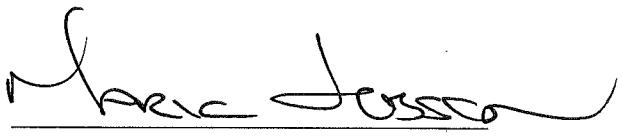
within the scope of their employment and "under these circumstances a cause of action for negligent supervision is redundant." *Id.*

VI. CONCLUSION

Mr. Fila was not deprived of a property right protected by the United States Constitution. Even if he had been, there is no U.S. Supreme Court or Ninth Circuit case that would inform a liquor control officer that issuing a citation that is authorized by statute might subject him to personal liability. Mr. Fila failed to provide any evidence that the defendants intentionally interfered with a contract with Mr. Rodriguez. Mr. Fila failed to provide any evidence that any of the defendants conspired with the Wenatchee Police Department for an unlawful purpose. Finally, while the LCB may be liable for the conduct of its employees, the director, Ms. Kohler is not. Therefore, the negligent supervision claim is without any support in the law and was improperly pled.

The trial court's order dismissing all claims should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of January, 2014.



MARK C. JOBSON, WSBA No. 22171
Assistant Attorney General

PROOF OF SERVICE

I certify that I caused service of a copy of Respondents' Brief on all parties or their counsel of record on the date below as follows:

☑ US Mail via Consolidated Mail Services

Rodney Moody
Attorney at Law
2820 Oakes Ave Ste D
Everett WA 98201

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of January, 2014, at Tumwater, Washington.

DEBBIE BATES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

CITY OF WENATCHEE, a municipal corporation; WENATCHEE POLICE DEPARTMENT, an agency of the City of Wenatchee; CHIEF TOM ROBBINS in his individual capacity as Chief of the Wenatchee Police Department; CAPTAIN KEVIN DRESKER in his individual capacity as a Captain of the Wenatchee Police Department; SERGEANT CHERI SMITH in her individual capacity as a Sergeant of the Wenatchee Police Department; and SERGEANT MARK HUSON in his individual capacity as a Sergeant of the Wenatchee Police Department,

Defendants.

No. CV-12-0088-EFS

ORDER GRANTING IN PART AND DENYING AS MOOT IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DISMISSING PLAINTIFFS' STATE-LAW CLAIMS WITHOUT PREJUDICE, AND CLOSING FILE

I. INTRODUCTION

Before the Court, without oral argument, is Defendants City of Wenatchee, Wenatchee Police Department, Chief Tom Robbins, Captain Kevin Dresker, Sergeant Cherie Smith, and Sergeant Mark Huson's (collectively, "Defendants") Motion for Judgment on the Pleadings, ECF No. 86,[1] and Motion for Summary Judgment, ECF No. 103. Defendants ask

[1] Defendants' motion, ECF No. 86, was originally captioned as a Partial Motion to Dismiss for Failure to State a Claim. By separate Order dated

APPENDIX A

the Court to grant summary judgment on Plaintiffs Club Level, Inc. and Ryan Fila's Due Process, Equal Protection, Fourth Amendment, and First Amendment claims (the "federal claims"), as well as their negligent supervision, defamation, false light, unlawful conspiracy, negligent infliction of emotional distress, and outrage claims (the "state-law claims"). ECF No. 103. Defendants also move for judgment on the pleadings on Plaintiffs' state-law claims. ECF No. 86. Plaintiffs oppose both motions. Having reviewed the pleadings and the record in this matter, the Court is fully informed. For the reasons set forth below, the Court grants in part and denies as moot in part Defendants' motion for summary judgment, and dismisses Plaintiffs' state-law claims action without prejudice for lack of subject matter jurisdiction.

II. BACKGROUND

Plaintiffs bring several claims against Defendants arising out of interactions between Plaintiffs and various Wenatchee Police Department ("WPD") officers; in particular, Plaintiff Fila objects to the manner in which the WPD officers have policed his nightclub establishment and their conduct toward him and others with whom he associates. Plaintiffs seek monetary damages and injunctive relief.

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February 26, 2013, ECF No. 89, the Court construed the motion as a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), as Defendants had already answered the Complaint.

A. Factual History[2]

Plaintiff Club Level, Inc. ("Club Level") is a Wenatchee-area business, owned by Fila, which operates a nightclub establishment by the same name. Club Level is licensed to sell liquor by the Washington State Liquor Control Board ("WSLCB"). Since Fila assumed control of Club Level in August 2010, Club Level's employees and its patrons have, on many occasions, required police assistance with disruptive patrons and other disturbances.

Police have repeatedly conducted "walk-throughs" of the business, ECF No. 115, at 4, which Plaintiffs believe were efforts to impact the nightclub's license to sell alcohol. *Id.* During one walk-through, Defendant Huson entered a private employee area. ECF No. 116, at 12. Additionally, after Club Level moved to a new location and began operating under a temporary liquor license, WSLCB Sergeant Stensatter cited the establishment for inadequate lighting and sought to "pull" the temporary liquor license as a result. ECF No. 116, at 11.

Plaintiffs allege that on numerous occasions, WPD officers have refused to remove disruptive individuals from Club Level after being

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[2] In considering Defendants' summary judgment motion and reciting the relevant factual history, the Court 1) believed the undisputed facts and the non-moving party's evidence, 2) drew all justifiable inferences therefrom in the non-moving party's favor, 3) did not weigh the evidence or assess credibility, and 4) did not accept assertions made by the non-moving party that were flatly contradicted by the record. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 255 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007).

asked to do so by employees, and that police have engaged in an ongoing effort to deprive Club Level of its liquor license. Plaintiffs contend Defendants have intentionally increased the police presence at Club Level as a form of harassment and to deter patrons from frequenting the nightclub. Plaintiffs allege that Sergeant Huson is largely responsible for WPD's enforcement actions towards Club Level. Fila, a gay male, alleges that Sergeant Huson is openly hostile towards gays and lesbians, and that his enforcement efforts arise from discriminatory animus.

In sum, Plaintiffs allege that WPD's treatment of Club Level varies significantly from the treatment accorded to other bars and nightclubs in Club Level's immediate vicinity. Fila alleges that police officers have conducted excessive records searches concerning him and his vehicles, have engaged in repeated and invasive surveillance of his residence, have targeted him for issuance of numerous parking tickets, and have refused to investigate acts of vandalism directed at his property. When Club Level employees have sought to videotape WPD officers engaged in law enforcement activity on the property, Plaintiffs allege that the WPD officers have threatened to arrest the employees for no cause. According to Plaintiffs, WPD has forwarded twenty-six police reports directly to WSLCB, ECF No. 116, at 15. Defendant Dresker indicated in internal department communications that WPD might need to pressure WSLCB to shut the business down. ECF No. 116, at 4.

Throughout much of Fila's strained interactions with WPD, he maintained a personal friendship with WPD Sergeant Stephyne Silvestre.

In late 2010 and early 2011, Sergeant Silvestre was the subject of an internal WPD investigation over allegations of improper off-duty employment at Club Level. Defendant Dresker allegedly told Sergeant Silvestre that Fila was "the beginning and end of all [her] problems." ECF No. 166, at 19. During the same investigation, WPD Detective Sergeant Kruse interviewed several people, including those who had business relationships with Fila. In particular, Detective Kruse interviewed Ms. Gillian Bebruyn, the personal friend of Ms. Jan Thompson. Ms. Thompson is the daughter of Ileen Geddis, an elderly woman with whom Fila was residing in a professional caretaking role. Ms. Bebruyn stated to Detective Kruse "that it was her impression that [Fila] was a manipulative individual who was financially exploiting Ms. Thompson." Several statements to this effect were included in Detective Kruse's investigative report of Sergeant Silvestre, which was placed in her employment file and ultimately disclosed to the Wenatchee World newspaper following a Public Records Act request. Fila alleges these statements were defamatory and harmed his reputation and business.

B. Procedural History

On February 8, 2012, Plaintiffs filed the instant Complaint. On February 23, 2013, Plaintiffs moved for a temporary restraining order prohibiting WPD officers from entering Club Level unless directly called for service by a Club Level employee or patron. ECF No. 4. On April 4, 2013, the Court orally denied Plaintiffs' motion, ECF No. 43, and supplemented the ruling with a written order the following day, ECF No. 44. Defendants answered the complaint on May 24, 2012. ECF

No. 45. Since that time, the parties have engaged in several discovery-related disputes. *See, e.g.*, ECF Nos. 53, 78, & 92. On February 22, 2013, Defendants filed a motion for judgment on the pleadings with respect to Plaintiffs' state law claims. ECF No. 86. On April 12, 2013, Defendants moved for summary judgment on all of Plaintiffs' claims. ECF No. 103.

III. DISCUSSION

Although Defendants have filed motions for judgment on the pleadings and for summary judgment, for reasons of judicial economy, the Court only addresses the summary judgment motion as it pertains to Plaintiffs' § 1983 claims.

A. Legal Standard for Summary Judgment

Summary judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Id.* at 322. "When the moving party has carried its burden . . . [showing that it is entitled to judgment as a matter of law], its opponent must do more than show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-

87 (1986). "In the language of the Rule [56], the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (emphasis in original) (quoting Fed. R. Civ. P. 56(e)). When considering a motion for summary judgment, the Court does not weigh the evidence or assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Analysis

Plaintiffs assert four claims under § 1983, which provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. To establish a prima facie case under § 1983, the plaintiff must first show that the wrongful conduct was committed under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Here, Defendants do not dispute their actions occurred under color of state law. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 999 (1982) (defining color of state law as "[m]isuses of power possessed by the virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.").

The second element of a § 1983 claim is that the wrongful conduct violated a constitutional right. *West*, 487 U.S. at 48. Defendants assert that Plaintiffs' § 1983 claims fail as a matter of law because Plaintiffs cannot show Defendants violated a

constitutional right. Alternatively, Defendants assert they are entitled to qualified immunity on each of Plaintiffs' § 1983 claims.

1. Due Process Claim

Plaintiffs assert a due process violation based on Fila's right to pursue an occupation. ECF No. 115, at 3-5. Defendants argue summary judgment is appropriate because Plaintiffs cannot prove the elements of the claim.

The Fourteenth Amendment's Due Process clause has been interpreted to protect "a liberty or property interest in pursuing the 'common occupations or professions of life.'" *Lebbos v. Judges of Super. Ct., Santa Clara Cnty.*, 883 F.2d 810, 818 (9th Cir. 1989) (quoting *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988)). To demonstrate a violation of this right, a plaintiff must show 1) an inability to pursue a profession and 2) "that this 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." *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991) (citing *Lebbos*, 883 F.2d at 818). The right to pursue an occupation is highly generalized, encompassing "the right to pursue an entire profession, and not the right to pursue a particular job." *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 998 (9th Cir. 2007).

In *Engquist*, the court held that substantive due process does not protect a person's entitlement to a specific job. *Id.* at 999. In that case, the plaintiff Engquist worked in a laboratory for the Oregon Department of Agriculture but lost her position during a reorganization. *Id.* at 991. Enguist's supervisors made defamatory

statements about Engquist to two or three people in the industry, and Engquist was subsequently unable to find work in her field of "microbiology, food technology, and food science." *Id.* The court found that Engquist's inability to find work was a result of her highly specialized field, and not the defamatory statements. *Id.* at 999. The court determined that Enquist had offered no evidence correlating the defamatory statements with her inability to find work. *Id.; see also DiMartini v. Ferrin*, 889 F.2d 922, 927 (9th Cir. 1989) (finding no due process violation when casino employee was allegedly fired for not cooperating in an investigation because no evidence showed former employee could not find work in the industry).

Plaintiffs rely heavily on *Benigni* in opposing summary judgment. ECF No. 115, at 3-5. In *Benigni*, a bar owner claimed that the City of Hemet's police officers violated his due process, equal protection, free association, and Fourth Amendment rights by, *inter alia*, performing bar checks on a daily basis, following bar customers as they left, issuing parking tickets to bar staff and patrons, and parking across the street to "stake out" the bar. *Benigni*, 879 F.2d at 475. A jury awarded the bar owner nearly $300,000 in compensatory and punitive damages. *Id.* On appeal, the Ninth Circuit found the evidence in the case was sufficient to support the verdict for the plaintiff. *Id.* at 476. However, the court in *Benigni* did not address whether the bar owner had demonstrated sufficient deprivation of his right to pursue a profession; instead, the Ninth Circuit's sufficiency-of-the-evidence review was "extraordinarily deferential" to the ultimate verdict. *Id.* Moreover, *Benigni* is unpersuasive

because it was decided before the Ninth Circuit established the two-part test for right-to-pursue-occupation due process claims. *See, e.g., Henderson*, 940 F.2d at 474 (citing *Lebbos*, 883 F.2d at 818).

Under this two-prong test, Plaintiffs must first show that Fila is no longer able to pursue employment in the bar or nightclub industry. Fila alleges that Defendants acted with the intent to shut down Club Level; however, the Complaint does not indicate that Club Level has ceased operating, and even if it had, Plaintiffs have adduced no evidence that Fila has been unable to find other work in the industry.

As to the second prong, Plaintiffs offer no evidence that Defendants' actions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Lebbos*, 883 F.2d at 818. Even when viewed in the light most favorable to Plaintiffs, the evidence demonstrates that the officers were concerned about ongoing public disturbances being caused by Club Level's patrons, and that they began issuing citations for violations of statutes designed to protect the general welfare, health, and safety of the community. Plaintiff has provided no evidence to show that Defendants' actions were arbitrary or unreasonable.

In sum, even when viewed in the light most favorable to Plaintiffs, the record before the Court is insufficient as a matter of law to establish the elements of a substantive due process violation.

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2. Equal Protection Claim

Plaintiffs also allege an Equal Protection claim based on the amount of law enforcement activity at Club Level as compared to similar businesses in Wenatchee. Compl. ¶ 6.4, ECF No. 1, at 17. In response to Defendants' summary judgment motion, Plaintiffs voluntarily withdraw their Equal Protection claim. ECF No. 115, at 14. Therefore, summary judgment on this claim is moot.

3. Search and Seizure Claim

Plaintiffs assert a Fourth Amendment claim based Defendant Huson's entry into an employee area inside Club Level. ECF No. 116, at 18. Defendants do not dispute Plaintiffs' account of this incident but instead move for summary judgment as a matter of law. Defendants cite RCW 66.28.090(1) and WAC 314-01-005, which explicitly require business with liquor licenses to make available for inspection at all times any area of the business that is available or open to customers or employees.

The Fourth Amendment gives all persons the right to be secure "against unreasonable searches and seizures." U.S. Const. amend. IV. To be a "search" under the Fourth Amendment, there are two requirements: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Supreme Court has recognized that an expectation of privacy exists in a commercial setting, albeit a lesser expectation than exists in an individual's home. *New York v. Burger*, 482 U.S. 691, 699 (1987). The

expectation of privacy is "particularly attenuated" in "closely regulated" industries. *Id.* The liquor industry has long been subject to "close supervision and inspection." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970); *see also* RCW 66.28.090-66.28.340.

Even assuming Plaintiffs had a subjective expectation of privacy in the employee area, Plaintiffs' claim fails as a matter of law because society does not recognize that expectation as reasonable. Washington has chosen to closely regulate the liquor industry and to authorize the inspection of liquor-licensed premises, and in particular, any areas of those premises which are open to customers or employees.[3]

Plaintiffs rely on a recent Washington case where a compliance check was not considered a search under the Fourth Amendment because the officers only entered public areas. *Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn. App. 388, 398 (2012). In essence, Plaintiffs distinguish *Dodge City* by suggesting that entry into a non-public area *would* constitute a search. Plaintiffs are correct that dicta from *Dodge City* suggests that an intrusion into areas not open to the public ordinarily requires a search warrant. *See id.* (citing *See v. City of Seattle*, 387 U.S. 541, 545 (1967)).

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[3] The Revised Code of Washington requires all premises with a liquor to be open for inspection at all times by any liquor enforcement officer, inspector, or peace officer. RCW 66.28.090(1). Licensed premises are defined as all areas "under legal control of the licensee [which are] available to or used by customers and/or employees in the conduct of business operations . . . ." WAC 314-01-005.

This dicta, however, predates the two-part reasonable-expectation-of-privacy standard set forth by the U.S. Supreme Court in *Katz*. And the *See* case, on which *Dodge City* relies, is inapposite; commercial warehouses are not a closely regulated industry in the way that the liquor industry is.

Even construing the facts in a light most favorable to Plaintiffs, they offer nothing to show that any subjective expectation of privacy they may have had in the employee area was reasonable.

4. First Amendment Claim

Plaintiffs assert a First Amendment claim based on Defendants' alleged interference in the personal relationship between Fila and Sergeant Silvestre. ECF No. 1, at 17. Defendants seek summary judgment because Plaintiffs have not produced evidence showing Fila's relationship with Sergeant Silvestre[4] has ceased since the alleged interference.

Plaintiffs' claim fails for two reasons. First, it is an impermissible derivative claim because it asserts the constitutional rights of a third party; and second, Plaintiffs have not adduced sufficient evidence of a First Amendment violation.

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[4] Fila also alleges First Amendment claims relating to his relationship with Sergeant West and Officer Shaw. However, he offers no evidence with respect to the nature of his relationship – or the termination thereof – with respect to these officers. Moreover, he has not shown that his relationship with these officers is materially different from the relationship he maintains with Sergeant Silvestre. Accordingly, the Court declines to address Fila's claim with respect to Sergeant West and Officer Shaw.

a. *Derivative Claim*

Constitutional rights are personal and cannot be enforced by third parties. *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994); see also *Safouane v. Fleck*, 226 Fed. Appx. 753 (9th Cir. 2007). Courts generally do not entertain claims where a plaintiff asserts violation of another person's constitutional rights. *McCollum v. Cal. Dept. of Corr. & Rehab.*, 647 F.3d 870, 878 (9th Cir. 2011). That said, a plaintiff can establish third-party standing by showing "his own injury, a close relationship between himself and the parties whose rights he asserts, and the inability of the parties to assert their own rights." *Id.* (citing *Powers v. Ohio*, 499 U.S. 400, 408-09 (1990)).

In this case, Defendants' alleged act of pressuring Sergeant Silvestre to limit or terminate her contact with Fila was directed at Sergeant Silvestre, not Fila. Fila has not shown that his right to seek out and form relationships was affected, or that any of Defendants' conduct was intended to affect such rights. He also has failed to establish at least two of the three requirements of third-party standing: 1) harm to his relationship with Silvestre, and 2) Silvestre's inability to assert her own rights. To the extent Defendants' actions may have violated the rights of Sergeant Silvestre, she can pursue her own claim and vindicate her own rights.

b. *First Amendment Violation*

Even if Defendants' actions could be construed as interfering with Fila's First Amendment right of association, Fila has failed to state an actionable claim. Fila must show that 1) the association was

protected, and 2) the governmental restriction on the relationship survives strict scrutiny. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984).

Freedom of association has two forms: intimate association and expressive association. *Id.* at 617. There is no protected "generalized right of social association." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Expressive associations can form "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Jaycees*, 468 U.S. at 622. Intimate associations are the "choices to enter into and maintain certain intimate human relationships." *Id.* at 617. To determine if a relationship is intimate, the court looks to "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987); *see also Jaycees*, 468 U.S. at 620.

For example, the relationship between roommates was recently found to qualify as an intimate association. *Fair Hous. Council of San Fernando Valley v. Roommate.com*, LLC, 666 F.3d 1216, 1220 (9th Cir. 2012). *In Roommate.com*, the court reasoned that people only have a few roommates, and they are selective in who they choose as roommates. *Id.* Additionally, as the court explained, there are few relationships more intimate than that of a roommate, who learns deeply personal information by virtue of cohabitation. *Id.*

In this case, Fila has offered no evidence that his relationship with Sergeant Silvestre was a protected association, There is no indication that the relationship shares any of the characteristics of

expressive association, such as pursuit of political or cultural goals. Likewise, there is no evidence the parties share an intimate association. Plaintiffs provide no facts showing the purpose or selectivity of the relationship, or whether others are excluded from its critical aspects. In the absence of such evidence, Plaintiffs have failed to raise a genuine issue of material fact about whether Fila's relationship with Sergeant Silvestre qualifies as a protected association. Summary judgment is therefore proper.

5. Qualified Immunity

Although the Court has concluded that Defendants are entitled to summary judgment on each of Plaintiffs' § 1983 claims for failure to state a claim, the Court also finds that Defendants are entitled to qualified immunity on each claim. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To avoid dismissal of claims on qualified immunity grounds, a plaintiff must show that 1) the defendants violated a constitutional right; and 2) the right was "clearly established" at the time of the alleged violation. *Id.* at 236.

"A [g]overnment official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right."

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The "existence of a statute or ordinance authorizing particular conduct is a factor" weighing in favor of concluding that a reasonable officer would consider the conduct constitutional. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994).

Here, as to Plaintiffs' Due Process claim, Plaintiffs have not shown that every reasonable officer would have known that targeting a nightclub with lawfully issued citations, with the intent of forwarding them to the WSLCB, violated Plaintiffs' constitutional right to due process. Plaintiffs have cited no authority that would put a reasonable officer on notice of the wrongfulness of this conduct. In fact, there is authority to the contrary on this point. *See, e.g., Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188-89 (9th Cir. 1995). At best, Plaintiffs have demonstrated that officers issued lawful citations and acted within the statutory power given to them, which is a significant factor in showing that a reasonable officer would consider the action constitutional. *Grossman*, 33 F.3d at 1209.

As to the Fourth Amendment claim, Plaintiffs again fail to show that every reasonable officer would have known that entering into the employee area would be a violation of a constitutional right. Washington's liquor enforcement laws require licensed premises to "at all times be open to inspection." RCW 66.28.090(1). This statutory authority strongly indicates that a reasonable officer would find

entry into the employee area to be constitutional. *Grossman*, 33 F.3d at 1209.

Finally, as to Plaintiffs' First Amendment claim, they have not demonstrated that every reasonable officer would have known that discouraging a fellow officer from having a social relationship with Fila amounted to a constitutional violation. Plaintiffs have not shown that every reasonable officer would have been aware that 1) the relationship between Silvestre and Fila was protected under the First Amendment as an intimate or expressive association, or 2) mere comments to Silvestre about her relationship with Fila violated Fila's rights.

Accordingly, even if Plaintiffs had stated viable claims under § 1983, the Court finds the individual Defendants are entitled to qualified immunity on all of Plaintiffs' constitutional claims.[5]

6. Dismissal Without Prejudice of State Law Claims

When the Complaint was initially filed with this Court, the Court exercised original jurisdiction over Plaintiffs' § 1983 claims pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); the Court also exercised supplemental jurisdiction over Plaintiffs' state-law claims, pursuant to § 1367. *See* Compl. ¶ 2.3, ECF No. 1, at 2. Having now concluded that summary judgment is warranted on all of

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[5] Plaintiffs' claims against the City of Wenatchee, which is premised on *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), also fails. A required element of a *Monell* claim is a showing of a constitutional violation. *Long v. Cnty. Of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006). Here, no constitutional violation has been shown.

Plaintiffs' federal claims, the only claims remaining are Plaintiffs' state-law claims.

The Court may decline to exercise supplemental jurisdiction when it has dismissed the claims for which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). The relevant considerations when deciding whether to continue to exercise supplemental jurisdiction following dismissal of all federal claims are "judicial economy, convenience and fairness to litigants," and comity with state courts. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). These factors usually lead to dismissing the case without prejudice when no federal claims remain. *See Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1046 (9th Cir. 1994). Having carefully considered these factors, the Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state-law claims. As this matter was originally filed with this Court and not removed from state court, remand is unavailable. *Pac. Gas & Elec. Co. v. Fibreboard Prods., Inc.*, 116 F. Supp. 377 (N.D. Cal. 1953) (citing § 1447(c)). Accordingly, the Court dismisses Plaintiffs' remaining state-law claims without prejudice. **Plaintiffs remain free to re-file these claims in state court; and pursuant to § 1367(d), the statute of limitations with respect to these claims shall be tolled while this suit has been pending and for thirty (30) days following entry of this Order, unless Washington law provides for a longer tolling period.**

IV. CONCLUSION

Plaintiffs have failed to adduce sufficient evidence to support their constitutional claims. Even if Plaintiffs had shown a

constitutional violation, Defendants are entitled to qualified immunity because none of their actions amount to a clear constitutional violation of which every reasonable officer would have been aware. And having found no further basis for federal subject matter jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state-law claims.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment, **ECF No. 103**, is **GRANTED IN PART** (Plaintiffs' Due Process, Fourth Amendment, and First Amendment claims) and **DENIED AS MOOT IN PART** (Plaintiffs' Equal Protection and state-law claims).
2. The Clerk's Office is directed to **ENTER JUDGMENT** for Defendants on Plaintiffs' Due Process, Fourth Amendment and First Amendment claims.
3. Defendants' Motion for Judgment on the Pleadings, **ECF No. 86**, is **DENIED AS MOOT.**
4. Plaintiffs' remaining state-law claims are **DISMISSED WITHOUT PREJUDICE.**
5. All other pending motions, deadlines, and hearings are **STRICKEN.**
6. The Clerk's Office is directed to **CLOSE** this file.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 1st day of August 2013.

s/ Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge

WASHINGTON STATE ATTORNEY GENERAL

January 13, 2014 - 3:20 PM

Transmittal Letter

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