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NO. 680404

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

NICHOLAS G. JENKINS,

Appellant

v.

THE STATE OF WASHINGTON,

Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The arguments the State raised in its appellate brief simply lack merit.

II. ARGUMENT

A. This Case Does Not Involve a “Hypothetical Set of Facts.”

To its credit, the State does not insist that Plaintiff rebuild a company knowing the State would immediately shut it down in order to proceed with this case. Instead, the State contends this lawsuit is based upon a “hypothetical set of facts.” It isn’t. The facts are straightforward:

- Plaintiff started a business
- The State shut it down, insisting it violated the Gambling Act
- Thurston County Superior Court Judge Gary Tabor agreed
- A Washington State Court of Appeals disagreed – in fairly strong terms. 148 Wn. App 795, 808-09 (Div.2 2009)(holding, inter alia, that there was “no logical basis” to believe bettors on Betcha were “gambling” under either state- or common law).
- The Washington State Supreme Court (the “WSSC”) reversed (169 Wn.2d 687 (2010)), holding that Plaintiff and his business could (and did) engage in “professional gambling” even if *no one* – neither Plaintiff, his employees, nor Site users – were even *thinking* about gambling.¹ Not even the State had argued the law went that far.

¹ The WSSC caught a Hail Mary pass the State threw to reach this conclusion. [CP 376](misrepresenting .0213’s plain language -- “accepting bets ... in which the bettor is

- Plaintiff lost valuable property (CP 410-11) the State had seized in the aforementioned shutdown as per the forfeiture action it initiated against it
- Plaintiff now cannot operate his business because of this law, one which was passed via an omnibus bill that Plaintiff believes violates Article II, Section 19 [CP 537-45] given the rather remarkable life the WSSC breathed into it.²

That Plaintiff lost his property and cannot operate his business are actual, ongoing and existing injuries. There is nothing “hypothetical” about them.

(A sidenote: the federal Racketeering Influenced Corrupt Organizations Act (“RICO”) includes “bookmaking” as defined by state law as a predicate offense. 18 USC §1955(b)(2). Since the WSSC held that Plaintiff engaged in bookmaking as per .0213, Plaintiff is a sitting duck for a RICO prosecution. And since it eliminated his primary defense – that he didn’t “accept” bets as .0213’s plain language required [App’t Br. 12 fn.4, CP 543 fn.11] – he doesn’t have much in the way of wings. If this court shuts the door on Plaintiff and subsequently learns that a federal prosecutor has decided to make an example of him – the State has worked hard for Plaintiff’s

charged a fee,” – as the far different [CP 547 fn.25] “charging fees for the opportunity to place a bet” – quotes and all). If Plaintiff represented to this Court that a word was in a statute that wasn’t (in the State’s case, “charging”), this Court would rightly be entitled to sanction him for his duplicity.

Since its win, the State has never disputed that the statute that Plaintiff was held to have violated and the statute that *actually* exists in the Revised Code of Washington are very different.

² To be clear, Plaintiff is not seeking to have the entire Gambling Act struck down. CP 546 fn.14.

jailing before [CP 93, 144-45, 403-04, 422, 443]³ – we wonder if the court would feel this dispute is based on a “hypothetical set of facts” ...)

The State takes issue with the fact that Betcha.com is not currently live – and takes particular issue with Plaintiff’s description of the site he wishes to relaunch as “functionally identical” to the one the State shut down in 2007. The State cannot litigate on a website it cannot see – or so the argument goes. These arguments lack merit. That The Site is not live now is not surprising – the State shut it down and, after shuffling a few words around [CP 535, App. Br. at 12 fn.4], the WSSC declared it illegal.⁴ If Plaintiff were to re-launch Betcha.com now the State would shut it down faster than it did then, when it shut The Site down summarily and called in its buddies in Louisiana -- only for the same AAG who was working for Plaintiff’s extradition to Louisiana [CP 420] (Jerry Ackerman, the State’s counsel here) to subsequently insist the State did not understand either The Site or the law sufficiently to file a legal brief. [CP 86.]⁵ The prosecution the State sought in 2008 [443] and

³ The Commission’s hard work behind the scenes wasn’t limited to recruiting police and law enforcement to come after Plaintiff during the first litigation. It also lobbied the state legislature to change the law to cover Betcha.com – at one point via the state budget. [CP 462.]

⁴ Because it shuffled those words around the WSSC did not bother addressing what it meant to “accept” a bet, “accepting” being the only active (and hence necessary) verb in .0213. [CP 543 fn.17.] The closest it came was its observation that “accepting” bets may “include” charging fees (169 Wn.2d at 694), an obvious truism that begged the question of whether Plaintiff’s company “accept(ed)” bets in the first place!

⁵ One way to explain these seemingly inconsistent positions is that Mr. Ackerman requested a continuance in re: Betcha’s scheduled summary judgment motion on August 29, 2007 [CP 84-86] not because the State needed more time to understand Betcha.com and the Gambling Act (as he said [CP 86]) but because it needed more time for Louisiana’s then-governor to process Plaintiff’s extradition paperwork. Governor Kathleen Blanco had not yet signed that paperwork [416], and the Washington State Gambling Commission could not compel her to do so. Had Judge Tabor ruled that Betcha’s customers were *not* gambling (as the Court of Appeals subsequently did [148 Wn. App. at 809]) on the scheduled September 21, 2007

that Mr. Ackerman said might be forthcoming in 2009 [CP 474] would be back on the table. The State might even call in yet another Louisiana to come after Plaintiff (we doubt it would be Hawaii).

As to the phrase “functionally identical” – how else can Plaintiff describe it? It will not be the *identical* website: 2012 is not 2007 so the subject matters being bet on will be different. Plaintiff may even change the font and/or color scheme. Plaintiff cannot know *exactly* what The Site’s fee mix will look like until the courts rule on the merits of the individual fees at issue -- something the WSSC should have done but, in its haste to throw the book at Plaintiff lest he get away with “skirt(ing)” the law, didn’t.⁶ The State acts as though there is something wrong with Plaintiff seeking a judicial declaration as to what fees would violate the law, either as written in .0213 or as fortuitously⁷ amended by the WSSC after the Betcha case. [Pl. App. Br. 12 fn.4 (illustrating how WSSC amended, not interpreted, .0213).] “Settl(ing) and affording relief from uncertainty and insecurity with respect to rights” is the very reason the

summary judgment hearing, it would have been extremely difficult politically for Governor Gregoire to extradite one of her own citizens to Louisiana for allegedly violating the Bayou State’s online gambling law. That cannot be correct, of course: it would mean that Mr. Ackerman, the State’s counsel here, flat *lied* to Judge Tabor.

⁶ In its Appellate Brief, the State followed Chief Justice Madsen’s lead in accusing Plaintiff of trying to “skirt” the law (State App. Br. at 2), as if that was contemptible. It simply isn’t. [CP 543 fn. 10](explaining that the right to read the law and comply with it has been recognized by courts for decades and is the reason the vagueness doctrine exists.)

⁷ We say “fortuitously” because Betcha would have won on the question of whether it “accept(ed)” bets even under a reading of “accepting” *broader* than the one endorsed by the Court of Appeals. Recall that Division Two held that bookmakers provide that opposition by taking the opposite side of the bet. 148 Wn. App. at 809-10. Indeed, serving as the opposition is what bookmaking is. [CP 115 fn.13.] That definition leaves out pool-selling, where the opposition comes not from the pool seller but from the other participants in the pool. Betcha did not “accept” bets even under a definition of “bookmaking” that includes pool selling, either: the pool seller “accept(s)” a bet “placed” by serving as the guarantor on losses and by serving as the person with whom the bet is “place(d)” – hence “accepting.” By serving merely as a platform for others to connect with each other (compare Ebay), Betcha served neither of those roles.

Declaratory Judgment Act *exists*. RCW 7.24.190. (Of course, if .0213 is struck on constitutional grounds, all the fees will be permissible so there will be no need to analyze them individually.)

Finally, and to the extent that the State argues it cannot be expected to litigate on a website it cannot now see, the State's argument is simply absurd. The State is trying to play dumb – it isn't. The State understood The Site well enough to know it violated Louisiana law. (It didn't, but I digress.) It conducted extensive discovery in re: The Site, some of which is on the record here. The AAG who headed the State's team in the first Dec Action (Ackerman) is the same AAG representing the State here. What else does it need to know – Plaintiff's favorite color?

B. This Case Presents Important Questions of Public Policy.

The State insists *this case does not present important questions of public policy*. The State is wrong. One of Plaintiff's argument is that, given the amazing life the WSSC breathed into it (“professional gambling” even though no one's even *thinking* about gambling?), the legislature violated Article II, Section 19 of the Washington State Constitution when it passed the Gambling Act. [CP 537-42.] Specifically, the legislature banned activity where no one was gambling via “an act related to GAMBLING” -- it just defined that activity as “professional gambling.” If the legislature can do that, then the notice function that Article II, Section 19 is supposed to serve is meaningless. [542](illustrating argument with a hypothetical Running Act). If that's not a matter of public concern nothing is.

(It is no answer to say, as the State did [CP 18 fn.4], that the WSSC did not hold that a person can engage in “professional gambling” even though no one is even thinking about gambling. It implicitly and explicitly did. First, the WSSC held that “gambling” was irrelevant for purposes of “professional gambling.” 169 Wn.2d at 695. If “gambling” is irrelevant, then a person can be a “professional gambler” if someone is gambling or if someone is not gambling. In Betcha’s case, neither it nor its customers were gambling. 148 Wn. App. at 809, overruled on other grounds by the WSSC’s decision, 169 Wn.2d 687.) Second, the WSSC specifically held (albeit without the State’s invitation) that the term “bets” in .0213 referred to all bets rather than just those done in the context of gambling. 169 Wn.2d at 695. This was clearly erroneous (CP 540 fn.8) if not outright silly [CP 541 fn.9], but is about as explicit as it can get on the subject. See also App. Br. 20 fn.7.)

The State also insists that the questions relating to the interpretation of .0213 are not matters of public concern. The State argues that while the question of whether Betcha violated the Gambling Act was one of important public concern when it wanted the WSSC to accept review, it isn’t now because the WSSC has resolved the question. The State is incorrect for two reasons. The WSSC rewrote .0213, no doubt. [CP 535, App. Br. at 12 fn.4.] And it certainly ruled against Betcha.com. In its haste to throw the book at Plaintiff, however, the WSSC did not go the final step of determining which of Betcha’s fees constituted “charging fees for the opportunity to place a bet.” 169 Wn.2d at 694-95. It couldn’t have been all of them. [CP 552.] The WSSC specifically identified listing fees as the object of its ire (169 Wn.2d at 694 (agreeing with State position that bookmaking includes “simply charging a fee from

individuals posting offers to bet with anyone” – a description of Listing Fees) but did not speak to the rest. [CP 553.] It did not speak to Subscription Fees: those weren’t at issue in Betcha’s Dec Action. Regardless, if the questions presented in the first Dec Action presented substantial questions of public policy (as the State said they did), and the WSSC skimmed over some of them [CP 552-53], substantial questions of public policy must necessarily remain. And if Betcha prevails on his constitutional claims, .0213 will either no longer exist [CP 546-47] -- in which case “bookmaking” in .0269(1)(d) will be undefined and revert to its common and ordinary meaning -- or will read differently than it does now. If the question of whether Betcha violated the current .0213 was a question of substantial public concern, so too must be the question of whether Betcha would violate a new .0213. *(Query: if Plaintiff prevails here and gets clearance to re-open Betcha.com after a few more years of litigating, do you think the State will argue that there are no important questions of public policy at issue when it petitions the WSSC for review? I don’t.)*

C. Plaintiff’s Arguments Regarding “Extra-Legal Sentiments” Do Not Lack Merit.

The State insists that Plaintiff’s arguments in re: what he deemed “extra-legal sentiments” are not legal and have no bearing on justiciability. State App. Br. at 15-16. The State is right about one thing – these sentiments are not “legal” points, hence the description “extra-legal.” And *in theory* they should have no bearing on the legal question presented here. In fact, however, they may. To date neither the facts nor the law have mattered in the State’s war against Plaintiff – prosecutors and judges have *literally* made them up. [CP 413 (State prosecutor alleging that Plaintiff was “in”

Ascension Parish “on or about July 23, 2007” and thereafter “fled,” an allegation even Louisiana’s governor would unwittingly admit was untrue [386](explaining that Plaintiff was never in Louisiana, making his flight therefrom, and hence his “fugitive” status, impossible⁸); CP 535, Pl. App. Br. 8 (explaining how the WSSC *literally* shuffled words around in .0213 to make it “unambiguously” fit Betcha.com).] Plaintiff suspects The State knows these extra-legal sentiments may work in its favor here: why else would it describe him as a guy trying to – gasp (*supra* fn.6) -- “skirt the law” (State App. Br. 2) who seeks to “evade the effect” (*id.* at 1) of the WSSC’s decision?

The State is right about one thing – Plaintiff is none too pleased about the WSSC’s opinion. The Commission’s recruitment of Louisiana to come after Plaintiff after he stood up to it is remarkable but not surprising: Law enforcement officials have layers of immunity and can do pretty much whatever they want to Washingtonians, the Petition Clause of the First Amendment be damned. Former Attorney General and now Governor Gregoire’s decision to sign Plaintiff’s extradition papers to Louisiana over the public’s demand that he at least first have his day in court here [CP 424-35] was outrageous but not surprising: the governor’s office and the AG’s office work closely together, and governors can do pretty much whatever they want so long as they do it quietly. (Sorry Rod Blagojevich.)

But judges are supposed to be different. Judges are supposed to approach cases if not with their blindfolds *on* then at least somewhere in the room. The WSSC didn’t. It

⁸ In August 2007, Superior Court Judge Arthur Chapman nevertheless ordered Plaintiff jailed on \$50,000 bail based on that Complaint.

had to all but bend steel to rule against Plaintiff. [CP 535, 540 fn.8](explaining how it shuffled words around in .0213⁹, credited the State with a point it had conceded, and credited Betcha with an absurd position it not only didn't make but had *rejected*). A few of the justices didn't bother *pretending* to be objective [CP 534 lines 20-21] – Chief Justice Madsen's description of Betcha's customers as "gamblers" at oral argument was akin to her describing a death penalty appellant as a "murderer" in an appeal challenging the sufficiency of the evidence. All of this, mind you, cost Plaintiff his property, his business and has left the *literally* law-abiding [CP 131-32] father of two a sitting duck for multiple years in federal prison.

The State is quite right that Plaintiff seeks to "evade the effect" of the WSSC's decision. State App. Br. at 1. So what? Just because Plaintiff was wronged doesn't mean his *arguments* are wrong. In this case, the WSSC breathed on the statutory glass to reveal a Gambling Act that neither the State nor Plaintiff saw – one that does not require so much as *intended* gambling to be violated. That statute, which not even the State saw, violates the Washington State Constitution and is keeping him from operating The Site. If that means that the "effect" of the WSSC's head-scratching decision is "evade(d)," so be it.

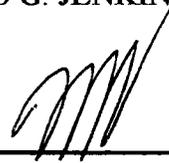
⁹ The only conceivable defense the WSSC has on this point is that Justice Chambers' clerk relied on the State's less-than-honest quotation of .0213 in its Supplemental Brief [CP 376 (quoting .0213 as containing the active verb "charging") and didn't catch the misquote. Given the other steps it took to rule against Betcha, however, Plaintiff seriously doubts that's the case.

III. CONCLUSION

For the reasons set forth above and in his Appellate Brief, Plaintiff respectfully requests that this Court reverse the trial court's decision and remand the case for a decision on the merits.

RESPECTFULLY SUBMITTED this 14 day of March 2012.

NICHOLAS G. JENKINS



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