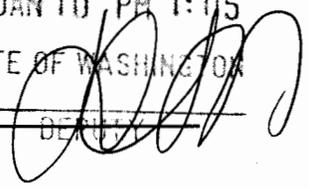


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COURT OF APPEALS
DIVISION II

NO. 37079-4

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STATE OF WASHINGTON
BY 

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

INTERNET COMMUNITY & ENTERTAINMENT CORP., dba
BETCHA.COM.,

Petitioner

v.

THE STATE OF WASHINGTON, and WASHINGTON STATE
GAMBLING COMMISSION,

Respondent.

APPELLATE BRIEF

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INTRODUCTION

Appellant Internet Community & Entertainment Corp., dba Betcha.com (“Betcha”) appeals the November 9, 2007 order of the Thurston County Superior Court, the Honorable Gary R. Tabor presiding, granting defendants’ cross-motion for summary judgment and denying plaintiff’s motion for summary judgment.

Betcha brought the underlying action pursuant to RCW 7.24 *et seq.*, The Uniform Declaratory Judgments Act, seeking a declaration that its honor-based, person-to-person internet betting platform (“The Site”) does not violate RCW 9.46 *et seq.*, The Gambling Act of 1973. The “person-to-person” feature of The Site refers to the fact that bettors on The Site bet directly against each other, not against Betcha itself. The Site serves as a meeting platform, similar to the auction web site eBay. The “honor-based” descriptor refers to two features. One: bettors have the right to withdraw their wagers at any time, up to three days after they lose the bet (and in some cases, even after). When a bettor does this, the other party’s only recourse is to leave negative feedback, as on eBay. Two: bettors bet by gauging a would-be opponent’s feedback history, called his “*Honor Rating*,” to determine the likelihood of the other party paying in the event of a loss.

The Site was operational from June 8, 2007, to July 11, 2007, when Betcha closed the betting section of The Site pending the outcome of this litigation. On November 9, the trial court granted the State's motion for summary judgment. As a preliminary matter, the trial court held that the principle of strict construction, which applies to the interpretation of criminal statutes, did not apply to this case because a declaratory judgment is a civil, rather than criminal, matter. The trial court's decision to eschew strict construction was an error that infected the remainder of the trial court's ruling. Specifically, the application of the incorrect rule of statutory construction led the trial court to conclude that Betcha's customers are engaged in "gambling" as defined by RCW 9.46.0237. From this conclusion, the trial court naturally and inevitably concluded that Betcha was violating several different provisions of the Gambling Act. Separately, the transcript of the trial court's ruling shows that the court misconstrued the definition of the term "bookmaking" by reading the word "accept" out of the statute.

This Court should apply the proper rule of statutory construction, adhere to the language and intent of the statute, and conclude that Betcha's customers do not "gamble" within the meaning of RCW 9.46 *et seq.*

ASSIGNMENTS OF ERROR

Appellant assigns error as follows:

1. The trial court erred by applying the wrong rules of statutory construction to the proceeding below. Specifically, while RCW 9.46 is a criminal statute, the lower court incorrectly ruled that the rule of strict construction does not apply because this declaratory judgment action is a civil matter.
2. Having rejected strict construction, the trial court further erred by ignoring the language of RCW 9.46.0237, which defines “gambling,” as “staking or risking something of value...upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome...” Specifically, the trial court erred by finding that bettors bet “upon an agreement or understanding” that bettors “will” be paid when they win, when Betcha’s Terms of Service and numerous other warnings on The Site make it clear that bettors are not obligated to pay their losses.
3. As a result of applying the incorrect rule of statutory construction, and by committing the other errors described in the previous paragraph, the trial court incorrectly concluded that Betcha’s customers are engaged in “gambling” as defined at RCW 9.46.0237.

4. As a result of its erroneous finding that Betcha's customers are engaged in gambling as defined at RCW 9.46.0237, the trial court committed the subsequent error of finding that Betcha is engaged in professional gambling under RCW 9.46.0269(a) and (c).

5. As a result of its erroneous finding that Betcha's customers are engaged in gambling, the trial court committed subsequent error by finding that Betcha transmits gambling information as prohibited by RCW 9.46.240.

6. As a result of its erroneous finding that Betcha's customers are engaged in gambling under RCW 9.46.0237, the trial court committed the subsequent error of finding that Betcha has created, possessed and used gambling records in violation of RCW 9.46.217.

7. The trial court erred in finding that a bettor's right to withdraw or "welch" does not distinguish him from an illegal gambler. . Specifically, the lower court failed to recognize the difference between having the *ability* to default and having the *right* to do so.

8. The trial court erred in finding that Betcha "accepts" bets when its customers transact directly with each other: some bettors "accept" bets offered by others while, like eBay, Betcha merely provides the forum for the transaction. As a result of this error, the trial court erred in

concluding that Betcha is engaged in “bookmaking” as defined at RCW 9.46.0213 and “professional gambling” under RCW 9.46.0269(1)(d).

9. The trial court erred in finding that bets made on Betcha are “bets” within the meaning of RCW 9.46.0213, the definition of “bookmaking.” Specifically, RCW 9.46.0213 speaks to gambling bets only, not bets of any kind, and because bets made on Betcha are not “gambling” bets, they are not “bets” within the meaning of RCW 9.46.0213.

STATEMENT OF FACTS

Seattle-based Betcha.com owns and, until it closed last summer, operated a patent-pending (CP 45:23-24¹), person-to-person betting platform called Betcha.com (“The Site”). The Site is akin to an eBay for bets, except that instead of buying and selling golf clubs and model trains, Betcha’s customers offer and accept betting propositions. (CP 15:9-10, 47:3-48:2, 499:4-500:7.)

The Site differs from gambling websites in several respects. First, The Site serves as a meeting place for bettors – Betcha does not take actual positions in bets. (*See Id.*) Second, The Site gives bettors the right to withdraw their bets at any time, even after the conclusion of the event on which the bet is made. (CP 47:8, 498:24-499:10.) When a bettor withdraws or “welches” on a bet, the other party’s only recourse is to

¹ “CP 45:23-24” refers to page 45, lines 23-24 of the Clerk’s Papers, currently on file with this Court. Similar references are made herein.

leave negative feedback, much like on eBay. (CP 44:24-45:1, 47:16-17.)

The Site references this right no fewer than eight times. In its Terms of Service, for example, The Site provides as follows:

Bets made on Betcha are made on the honor system -- that is, *bettors are not obligated to pay when they lose*. We hope they will, of course, not because they have to, but because they should. In any case, *bets made on Betcha carry no term, express or implied, that winning bettors will be paid when they win*.

(CP 86, emphasis added.) Other references are as follows:

- In the “Is this legal?” FAQ: “*Betcha bettors always retain the right to withdraw their bets* and, for up to three days, not pay their losses. (Try that at a casino.)” (CP 92.)
- On the “What if the person I’m betting against doesn’t pay?” FAQ: “*(A) losing bettor can decide that, for whatever reason, he just doesn't want to pay*. If that happens, you are basically out of luck.” (CP 87.)
- On the “About Us” section: “For legal reasons, *betting on Betcha is done on the honor system*.” (CP 89.)
- On the “Social Mission” page: “(O)ur social mission is to make doing right by others cool again. That's the gist of our revolutionary, honor-based betting platform. *You pay when you lose not because you have to, but because you should*.” (Emphasis added, CP 90.)

- On the “Settling Bets” tutorial page: “If you know you lost but just don’t want to pay, click “I’m gonna welch.”” (CP 91.)

The Site includes “I’m gonna welch” buttons on the bet pages themselves. (CP 91.) It even has a “Why Not Betcha” page, which explains the perils of honor-based, person-to-person betting. (CP 88.) Bettors choose their betting opponents by evaluating a bettor’s betting history (called his “Honor Rating”) to determine the likelihood that a person will pay if he loses. (CP 15:16-17, 47:6-7, 498:11-19.)

Offsetting the competitive disadvantage of bets where bettors are not required to pay is a substantial competitive advantage. That is, there is no limit to what people can bet on. Betcha’s customers may bet on any subject, with any odds, and on any terms. (See CP 15:12-15, CP 89.) As on eBay, all that is required is one person to offer a bet and another person to accept it.

Betcha’s founder, a former lawyer (CP 43:21-44:2) who consulted with the country’s leading gambling law expert when building The Site (CP 45:6-11) and designed it specifically with Washington law in mind (CP 44:16-45:17, CP 64-72), launched it on June 8, 2007. While some bettors were highly complimentary (e.g., CP 96-98), other would-be customers were critical of its honor-based system – so critical, in fact, that it kept them from becoming customers:

As a prospective customer, I'm concerned about the "honor system" thing. That really doesn't sound good. It sounds like, if I risk my money and win, there's a chance I won't get paid. The bet itself should be the risk. Adding another level of risk would be unacceptable to most bettors.

(CP 100.)

On June 21, thirteen days after Betcha launched The Site, the Washington State Gambling Commission (the "WSGC") ordered it shut down. (CP 49:22-50:4.) Betcha filed this declaratory judgment action on July 6, approximately one hour after unsuccessfully pleading its case to the WSGC. (CP 502:11-24, CR 508) On July 10, the WSGC raided Betcha's offices and seized its business records and most of its computer equipment. (CP 515-16) It initiated a forfeiture action against the property soon thereafter. (CP 503:4-6.)

ARGUMENT

This Court should reverse the lower court's decision and enter a judgment in favor of Betcha. The question is whether a person "gambles" as defined by RCW 9.46.0237 when he has both the ability and *the right* to withdraw his bet, even after he loses, and when he bets knowing his opponent has the right to do the same. Betcha thinks the answer is axiomatically "no." The lower court concluded otherwise, reasoning that bettors on Betcha are no different than common gamblers,

who can welch or renege on their bets at any time. The lower court made several fundamental errors in arriving at that conclusion. First, it erred in concluding, without even the State's suggestion, that the rule of strict construction that applies to the interpretation of criminal statutes did not apply here because the case is (for now) a civil matter. That was clearly erroneous and, if correct, would undermine the rule's very reason for being. Without the foundation of strict construction to guide its analysis, the lower court made several subsequent errors analyzing the meaning of the statute generally and its application to the facts of this case specifically. Even if this Court concludes that the breed of bets indigenous to Betcha falls within the letter of Washington's definition of "gambling," it should still find in Betcha's favor because it is less than clear that the legislature would have meant for the definition to include Betcha bets.

A. STANDARD OF REVIEW

A summary judgment is reviewed *de novo*, with the appellate court engaging in the same inquiry as the lower court. *City of Tacoma v. Price*, 137 Wn.App. 187, 190, 152 P.3d 357 (Court of Appeals, Division Two 2007). Summary judgment is only appropriate where reasonable persons could only reach one conclusion from the record as a whole. *Id.* Questions of statutory construction are also reviewed *de novo*, *City of*

Montesano v. Wells, 79 Wn. App. 529 531, 902 P.2d 1266 (Division Two 1995).

B. CRIMINAL STATUTES MUST BE STRICTLY CONSTRUED AGAINST THE STATE, REGARDLESS OF THE NATURE OF THE PROCEEDING.

The focal point of this case is the meaning of RCW 9.46.0237 and, to a lesser extent, RCW 9.46.0213, which define “gambling” and “bookmaking,” respectively. Because those definitions have applications in criminal statutes that Betcha is alleged to have violated, a court must read them strictly, and in favor of the individual. *E.g.*, *State v. Russell*, 84 Wn. App. 1, 4, 925 P.2d 633 (1996); *State v. Lundell*, 7 Wn. App. 779, 781, 503 P.2d 784 (1972). This “rule of strict construction” applies to definitions in statutes, *e.g.*, *State v. Shipp*, 93 Wn.2d 510, 513-16 (1980), and applies even where the State offers an alternative, reasonable interpretation of the statute(s) in question. *Russell*, 84 Wn. App. at 4. The rule of strict construction is a matter of due process and “is not subject to abrogation by statute.” *State v. Enloe*, 47 Wn.App. 165, 170-71 (1987)(quoting 3 N. Singer, *Statutory Construction Sec. 59.03* at 12-13 (1986)). The rule is on a sliding scale: “the more severe the penalty, and the more disastrous the consequences to the person subjected to the provisions of the statute, the more rigid will be the construction of its

provisions in favor of such person and against the enforcement of the law.” *Enloe*, 47 Wn. App. at 170, fn 1.

Under the rule of strict construction, the legislature’s intent must be clear before a court may deem conduct criminal. In *Wells v. City of Montesano*, 79 Wn. App. 529, 902 P.2d 1266 (1995), for example, Division Two overturned the DUI conviction of a person convicted of driving a bicycle while intoxicated. The Court concluded that, although the definition at issue in that case included bicycles, 79 Wn. App. at 532, the spirit and intent of the law overcame a literal reading. *Id.* at 536. The *Wells* holding was consistent with the oft-cited principle that doubts as to whether conduct is criminal must be resolved in favor of the individual. *E.g.*, *State v. Bell*, 8 Wn.App. 670, 674, 508 P.2d 1398 (1973).

In the trial court proceeding, Betcha argued that the statutes at issue must be strictly construed against the State. (This was a principle upon which Betcha’s founder relied before starting the business. [CR 63-64]) Conversely, the State argued that the “liberal construction” clause of the Gambling Act, RCW, 9.46.010, required that any ambiguity with respect to gambling be resolved in favor of prohibition.² While the trial

² Although the trial court did not address the State’s argument, it is clearly incorrect. RCW 9.46.010 provides that “(a)ll factors incident to the activities authorized in this chapter shall be closely controlled, and the provisions of this chapter shall be liberally construed to achieve such end.” The State insists, however, that Betcha’s activities are *not* “authorized in this chapter” (RCW 9.46), so that provision does not apply on its

court did not specifically address these competing viewpoints, it seemed to accept that criminal statutes must be construed against the State in criminal proceedings.³ It *then* concluded, however, without the State's suggestion, that strict construction (which it referred to mistakenly as the "rule of lenity," RP 7:11) did not apply to this case because it is (for now) a civil matter:⁴

I've been told the rule of lenity should apply, and that is, because this is a criminal statute, all inferences should be given in favor of the person who is accused of violating the statutes.

I do wish to point out that this Court in ruling today is not ruling on a criminal basis...

I'm dealing on a civil basis, and the issue is whether or not the Court would have declared that the Betcha.com business had a

face. RCW 9.46.010's liberal construction provision simply gives the WSGC the authority to liberally construe RCW 9.46's provisions so it can "closely control" (read: regulate) authorized gambling in Washington. It does not give the WSGC the authority to expand the statutory definition of "gambling." See *ZDI Gaming v. State of Washington*, Thurston County Cause No. 06-2-02283-9 (June 27, 2007).

³ The trial court did not say this directly. But it can be inferred: if it did not agree with this general proposition, it would have had no reason to draw a distinction, albeit an incorrect one, between criminal and civil proceedings.

⁴ Although closely related, the rule of strict construction and the rule of lenity are not the same. 3 Singer, *Statutes and Statutory Construction* Sect. 59.3 (1986)(describing the rule of lenity as a "corollary" to the rule of strict construction). The rule of strict construction is designed to operate in the first instance to preclude a broad reading of the language of a criminal statute. The rule of lenity, by contrast, is applied at the end of the inquiry and serves as a tiebreaker in the event a court cannot determine the meaning of a criminal statute. *Gore*, 101 Wn.2d at 485-86. The rule of lenity also applies in civil settings. *Infra*.

right to proceed according to their business plan, their requests for a unique procedure, or whether or not I would find that they were not authorized to do so according to the statutes.

(RP 7:11-8:10.⁵) In other words, the trial court concluded that it is the *nature of the proceedings* rather than the *nature of the statute* that controls the question of which rule of statutory construction to apply. As will be set forth more fully below, the court's conclusion is inconsistent with case law on the subject and defeats the rule's principle reason for being – namely, to give notice and warning to citizens as to which actions are permitted and which are not. This notice function is only served when the same rules of statutory construction are applied to *all* proceedings and, indeed, when there are no proceedings at all.

The issue of whether the rule of strict construction applies to criminal statutes in a civil setting appears to be one of first impression in Washington. Other jurisdictions that have considered the issue, however, have concluded that criminal statutes must be construed against the State, even in civil settings. In *Graves v. Meland*, 264 N.W. 2d 401 (Minn. 1978), for example, the Supreme Court of Minnesota held that in a civil action contesting an election result based on an alleged criminal violation by the plaintiff's opponent, "the rule of strict construction of penal

⁵ "RP 7:11-8:10" refers to page 7, line 11 through page 8, line 10 of the report of the trial court's proceeding on file with this court. Similar references are made herein.

statutes must be applied notwithstanding the civil nature of the proceeding.” *Graves*, 264 N.W. 2d at 403.

This Court should also consider the rationale employed by the Court of Appeals of Virginia in *Hoye v. Commonwealth*, 405 S.E. 2d 621 (Va. App. 1991). In Virginia, habitual offenders (three offenses) face civil proceedings to revoke their driver’s licenses. The *Hoye* court held that “(a)lthough this is a civil proceeding, its effect is to impose a forfeiture. Therefore the operative statute *must be strictly construed against the Commonwealth.*” *Hoye*, 405 S.E. 2d at 629.⁶

The trial court’s conclusion that strict construction does not apply is also at odds with one of the rule’s very reasons for being – namely, its *notice/warning* function. That function was recognized by the Washington State Supreme Court in *State v. Shipp*, 93 Wn.2d 510 (1980):

Statutes which define criminal crimes must be strictly construed according to the plain meaning of their words *to assure that citizens have adequate notice of the terms of the law, as required by due process.* “Men of common

⁶ *Hoye* is especially instructive because The Gambling Act includes a civil forfeiture provision, RCW 9.46.231, in addition to its criminal provisions. Indeed, there is currently a forfeiture proceeding pending before the Office of Administrative Hearings, *In the Matter of Claim of Ownership/ Right to Possession by: Nicholas G. Jenkins*, OAH Docket No. 2007-GMB-0079, the outcome of which hinges on whether Betcha’s business model violates The Gambling Act. Because forfeiture statutes should be strictly construed against the State, it follows *a fortiori* that the related criminal statutes must also be construed against the State, regardless of the setting. Otherwise, there is a very real possibility that the declaratory judgment action and the forfeiture action will produce contradictory results.

intelligence cannot be required to guess at the meaning of the enactment.”

93 Wn.2d at 515-516 (emphasis added, *quoting Winters v. New York*, 333 U.S. 507, 515 (1947])). Seven years later in *State v. Enloe*, 47 Wn.App. 165, 170-71 (1987), Division Three described strict construction as a “warning” mechanism designed to prevent arbitrary discretion by judges and law enforcement officials:

Strict construction is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions (that) would expose them to liability for penalties and what the penalties would be. A number of courts have said: ‘. . . the rule that penal statutes are to be strictly construed . . . is a fundamental principle which in our judgment will never be altered. Why? Because the lawmaking body owes the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen may lose his life or liberty. . . (T)he burden lies on the lawmakers, and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts’ . . .

Another reason for strict construction is to protect the individual against arbitrary discretion by officials and judges . . . A related argument is to the effect that since the power to declare what conduct is subject to penal sanction is legislative rather than judicial, it would risk the judicial usurpation of the legislative function for a court to enforce a penalty where the legislature has not clearly and unequivocally prescribed it. In other words, before a person can be punished his case must be plainly and unmistakably within the statute sought to be applied. Thus one court has stated that the reason for the rule was ‘to guard against the creation, by judicial construction, of

criminal offenses not within the contemplation of the legislature.’ It has also been asserted that since the state makes the laws, they should be most strongly construed against it.

The canon of interpretation has also been accorded the status of a constitutional rule under principles of due process, not subject to abrogation by statute.

47 Wn. App. at 170-71 (quoting 3 N. Singer, *Statutory Construction* Sec. 59.03 at 12-13 (1986)(emphasis added) The *Enloe* court’s discussion echoed the words of Justice Oliver Wendell Holmes, who years earlier discussed the principle of strict construction as a matter of “warning”:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a *fair warning should be given to the world in language that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931). Applying the rule of strict construction in holding that an airplane was not a “motor vehicle” for purposes of the National Motor Vehicle Theft Act, Justice Holmes held, in language particularly appropriate here, that “close enough” or “they would have included it had they thought of it” wasn’t good enough in criminal statutes:

When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft

simply because it may seem to us that a similar policy applies or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

283 U.S. at 27; *see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820)(Marshall, C.J. opining it would be “dangerous” to hold that matter is covered by statute simply because it is of “kindred character.”)

Strict construction can only serve a “warning” function, and can only provide “notice,” if the rule attaches to the statute, regardless of context. Indeed, as Justice Holmes and the *Enloe* and *Shipp* courts implied, one of the rule’s purposes is to enable citizens to avoid conduct that would give rise to legal proceedings in the first place.

Given strict construction’s *raison d’etre*, the lower court’s refusal to apply it was clearly erroneous. This case involves the interpretation of a statute that, in one application at issue here, carries with it up to a ten-year prison sentence. See RCW 9.46.220(3). In total, there are four statutes implicated by RCW 9.46.0237 which carry with them a possibility of up to twenty-five years in prison. The idea that strict construction should not apply to interpreting the statutes in question because Betcha’s founder, owners and employees are not *yet* facing multiple felony charges and multiple prison sentences is inexplicable given the “notice” and “warning” functions it is supposed to further and

the “arbitrary discretion” by government officials and judges it is supposed to protect against. The Court essentially held that the meaning of this state’s criminal law generally, and the meaning of “gambling” specifically, differs depending on whether a person is in court in a gray flannel suit or orange jail garb. That is not the law.

C. THE LOWER COURT DID NOT STRICTLY CONSTRUE RCW 9.46.0237. IF IT HAD, IT WOULD HAVE CONCLUDED THAT THERE IS A LEGAL DIFFERENCE BETWEEN BETTING WHERE THE BETTORS ARE REQUIRED TO PAY, AND BETTING ON BETCHA.COM, WHERE BETTORS ARE *NOT* REQUIRED TO PAY.

The central issue before the trial court was the definition of “gambling” as defined by RCW 9.46.0237. That provision defines “gambling” as:

staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.

In its briefing and at oral argument below, Betcha asserted that the nature of its honor-based betting platform, which gives bettors the right to opt out of paying their lost wagers on pain only of possible negative feedback, and the numerous warning signs on The Site about the shortcomings of honor-based betting, means that bettors bet “upon an

“understanding that they “may” receive something of value when they win. “May” is not “will.” See CP 25-28.

The trial court dismissed the “honor-based” nature of the betting platform as a “little side statement.” RP 10:8-9. Instead, it concluded that RCW 9.46.0237’s requirement that something of value be risked or staked “upon an agreement or understanding that one will receive something of value...” is satisfied because people “expect” to be paid if they win:

In this particular circumstance, as I understand from all the briefing and arguments that have been presented to me, that the person placing a bet, if they win the bet, *expects* they’re going to collect. The person placing the bet, if they lose the bet, has been told they can welch if they choose to do so. But there’s nevertheless an agreement or understanding that if a person wins a bet, they’re going to be provided something of value. That’s the only reason this business could operate. If indeed no one ever paid off on any bet they lose, this would not be something that would prevail. It is clear to me that there’s an agreement or understanding that the person winning the bet will receive something of value, even though there is this little side statement that a person can renege, if they want to.

RP 9:17-10:10. As will be set forth more fully below, the trial court’s reasoning that bettors bet “upon an agreement or understanding” was flawed for a variety of reasons.

- i. **Betcha bettors do not bet “upon” an “agreement or understanding” that they “will” receive something of value if/when they win. Given the numerous warnings on The Site, the worst that can be said is that they bet “upon an understanding” that they “may” be paid if they win.**

Bettors on Betcha do not meet to make verbal “agreements.” The only written agreement on The Site, the Terms of Service, expressly say that “bets made on Betcha carry no term, express or implied, that winning bettors will be paid when they win.” Thus, we assume that the lower court concluded that because some bettors “expect” to be paid, they bet “upon *an understanding*” that they “will” be paid. As will be set forth more fully below, that reasoning was incorrect.

The legislature did not define “understanding,” so the court may look to its ordinary dictionary definition to ascertain its meaning. *In re: Farina*, 972 P.2d 531, 540 fn. 10 (Wa. App. Div. 3 1999) (citation omitted); *State v. Bernard*, 78 Wn. App. 764, 767, 899 P.2d 21, 23 (1995). *Webster’s New World College Dictionary* defines “understanding” as something arrived at by more than one party: “a *mutual* comprehension, as of ideas, intentions, etc.” (Emphasis added.) *Black’s Law Dictionary* is similar: “an implied agreement *resulting from the express terms of another agreement*, whether written or oral.” (Emphasis added.)

That an “understanding” in RCW 9.46.0237 is more than a unilateral feeling is supported by statute’s use of the word “upon” -- “*upon* an agreement or understanding.” While the statute does not define “upon,” *Webster’s New World College Dictionary* says that “upon” is “generally interchangeable” with “on.” When a person engages in activity with a unilateral understanding, we say he does so *with* an understanding -- as in, “I jump off this roof with the understanding that I may get injured.” “Upon” implies that the understanding exists, at least in part, outside the person. If the legislature had intended otherwise, they would have written “*with or upon* an agreement or understanding.”

A court may also look to the word’s subject matter and context to ascertain its meaning. *State v. Ritts*, 94 Wn.App. 784, 787-88 (1999). In the context of “gambling,” one reading of “understanding” is that which happens when the setting precludes the possibility of an “agreement.” A person who sits down at a blackjack table does not reach an “agreement” on the terms of the game with the house. But there is an “understanding” formed by the house’s rules and the rules of blackjack, that the house’s agent/dealer “will” pay him if/when he wins. Under that reading, a person arrives at an understanding through the intentional representations of another party, as required by the dictionary definitions.

Applying the definitions of “understanding” to the phrase “upon an understanding” and the Betcha platform, there is no basis to conclude that bettors on The Site bets “upon” an “understanding” that they “will” receive something of value if/when they win. As between bettors, a person offering a bet has no idea who, if anyone, will *consider* it, let alone accept it, so it defies logic to suggest he lists his bet “upon” an “understanding” that an unknown person who may never exist “will” pay him if he wins. As to people accepting bets, they accept the bet knowing both they and their opponents have the right to opt out of it, even after they lose. (This is markedly different than a gambling contract, where both parties have the ability, but not *the right*, to opt out of their losses. *Infra.*) The Terms of Service incorporated in the bets say bettors are not obligated to pay. Bettors meet anonymously via a web-based platform, so there is no avenue to contradict those terms.

As between bettors and Betcha, the latter goes to great lengths to ensure bettors understand their opponents *may not* pay them if they win. The Site includes no fewer than seven references to bettors’ rights to pull their bets back – even after they lose. Betcha is not guarded about this right: it includes “I wanna welch” buttons on its bet “product” pages, and it even has a page called “Why Not Betcha” in which it explains the shortcomings of *caveat emptor* betting. This is different than casinos and

online gambling sites, which go to great lengths to create an understanding among customers that they “will” be paid if they win. In any case, they are hardly “little side statement(s).” Indeed, the extent to which Betcha goes to explain the *caveat emptor* nature of betting on The Site may ultimately be its commercial demise. (At least one friend of Betcha has already said he would not be a customer given the added risk of not being paid. [CP 100].) But that is a market question, not a legal one, and given Betcha’s other competitive advantages, it is a risk its founders, investors and employees are willing to take.

ii. The trial court erred in reasoning that, because bettors “expect” to be paid, they bet “upon an agreement or understanding” that they “will” be paid.

The lower court disagreed with Betcha’s analysis, and made several mistakes in so doing. First, the lower court erred in reasoning that because people may “expect” to be paid, they bet “upon an understanding” that they “will” be paid. “Expectations” can, but do not necessarily, arise from “understandings,” and on Betcha, the fact that people may *expect* to be paid does not mean they risked their money “upon an understanding” that they “will” be paid. To illustrate, consider the hypothetical bet in which Oliver Offeror lists the following bet: “BETCHA: The Seattle Seahawks will beat the Washington Redskins by

six or more points in their October 22, 2007 game.” Oliver lists the bet as \$100 with 1:1 odds. Al Acceptor, knowing that most Las Vegas bookmakers are offering this as a five-point spread, is attracted by the additional point Oliver is offering. After reviewing Oliver’s solid if unspectacular betting history (Oliver’s opponents have accused him of welching twice in 24 bets), Al decides the extra point is worth the chance of not being paid, and accepts the bet. Al may hope and even *expect* Oliver to pay him if he wins: the higher Oliver’s Honor Rating as compared to the amount bet, the greater Al’s expectation is likely to be. But it can hardly be said that he bet “upon an agreement or understanding” that he “will” be paid if he wins: Al and Oliver never communicated to reach an “agreement,” the platform upon which they bet makes it clear to Al that Oliver has the right not to pay if he loses. Al simply decided that the additional point Oliver was offering outweighed the risk of not being paid.

The court’s err in concluding that what a person “expects” is proof that betting is done “upon an understanding” can be illustrated further by extending the Oliver-Al hypothetical. Suppose that Al had been accused of welching four times in his last ten bets and, as such, had a less-than-stellar Honor Rating. Oliver may be disappointed that Al accepted his bet, and may very well *not* expect Al to pay if he loses. If

the lower court's reasoning is correct, and betting with *an expectation* of payment evidences betting "upon an understanding" of payment, then Al is gambling, but Oliver is not. That cannot be correct.

Second, the trial court simply ignored the no fewer than seven references on The Site to a bettors' right to opt out of his bet. The court's characterization of the right to withdraw as a "little side statement" suggests it may not have noticed the "I wanna welch" button on the "product" page (hardly a "side" placement) and the several references on The Site to the right to welch – including on the About Us- and on the "Why Not Betcha" pages. "Little side statement" or not, the right proved enough to keep some would-be customers away. As such, the court should have given the references more than short shrift, especially where, as here, strict construction required that "all doubts about whether conduct was criminal should be resolved" against the State. *Bell*, 8 Wn.App. at 674.

Finally, the trial court erred insofar as it inferred "upon an understanding" of "will" from the existence of the bets themselves. It is a well-accepted canon of statutory interpretation that statutes must be interpreted to give effect to all language used, rendering no portion meaningless or superfluous. *E.g.*, *City of Seattle v. Dep't of Labor & Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998). The trial court's

reasoning did exactly that. In effect, the court said people would not “risk” or “stake” their money, and therefore the business “would not prevail” (RP 10:2-5), unless they bet “upon an understanding” that they “will” be paid. That cannot be correct. If all that were required to show “upon an agreement or understanding” were the existence of a bet, then everything from “upon an agreement” to “certain outcome” in RCW 9.46.0237 would be superfluous. A prosecutor could show the existence of a bet (“staking something of value on the outcome of a future contingent event”) and there would be no need to bother with the rest of the statute.

The trial court’s conclusion also ignores the reality that there are many reasons why people would bet on Betcha without betting “upon an agreement or understanding” that their opponent(s) “will” pay them if they win. They may bet because, as in the Oliver/Al hypothetical, the preferred odds and terms they can find in Betcha’s open marketplace of ideas outweigh the risk of not being paid.⁷ They may bet because they find a bet’s subject matter interesting. They may bet because they can bet on anything that comes to mind – not just the subject matters offered in traditional gambling venues. Or they may bet because, given the choice

⁷ For example, a person may take the Seahawks to beat the Bears by four or more points because Las Vegas bookmakers require seven points, and the three-point differential is worth the chance of not being paid.

between a sports book that requires them to pay when they lose and a website that doesn't, they prefer the safety valve provided by the latter. Betcha's business will succeed so long enough people are willing to accept "may" instead of "will" – and given the numerous competitive advantages The Site offers, bet anyway.

iii. The trial court erred in reasoning that Betcha's business success has any bearing on whether bettors are "gambling."

The court reasoned that Betcha's business "will not prevail" if "no one ever paid their losses." (RP 10:2-5). That point is a nonstarter. First, as a matter of law, a business's overall commercial success is immaterial in determining whether a transaction is "gambling." *Cf. State v. American Holiday Ass'n*, 727 P.2d 807, 810 (Ariz.1986)(holding there is no reason why profitability of business should impact analysis of whether activity constitutes gambling). By analogy, the success of a retailer's new product launch may depend on there being a low rate of returns. But that does not mean that product purchasers buy it "upon an understanding" that they are not permitted to return it.

Second, it is hardly reasonable to hold that past business transactions trump a business's disclaimer, much less an entire business model. By analogy, a used car dealer who sells cars without warranties will be better off in the marketplace if the cars it sells end up serving their

buyers without incident. But it cannot be said that the dealer's warranty disclaimers are trumped because it has a history of selling what ended up being reliable cars. The argument is even more compelling here: unlike the user car dealer who, at worst, may find himself having to take back a used car, holding that bets the ended up being paid off trump Betcha's opt-out right, as the trial court did, subjects its founders to the possibility of criminal prosecution.

Third, the Court's reasoning is backwards, if not circular. It may be that most people *end up* paying their lost bets on The Site. But that does not change the fact that they *were not obligated* to pay them. It is the latter point – whether people are “gambling” when they reserve the right to opt out of their bets, even after they lose them – that is the legal question at issue here.

Finally, RCW 9.46.0237 does not say that “gambling” is all betting except that which is done pursuant to agreements or understandings that bettors will *not* be paid. It defines “gambling” only as activity done “upon an agreement or understanding” that persons *will* be paid. The absence of “will” is not necessarily “will *not*.” It is “probably,” “may,” “may not,” and various other points along the continuum. Any activity done at any point on the continuum other than “will” is not “gambling.” Put another way, Betcha is not required to

make sure its customers understand their opponents *will* not pay them if they win. Rather, it needs only ensure they understand their opponents *may* not pay them if they win. With no fewer than seven references and a “Why Not Betcha” page, Betcha respectfully submits it has met that burden.

iv. There is a fundamental difference between betting where you *are* required to pay and betting where you *are not* required to pay.

The trial court reasoned that a bettor’s right to welch on The Site did not distinguish him from the illegal gambler, who also “could welch or renege.” (RP 8:18-19.) The court missed the fundamental distinction upon which Betcha’s business model is based: there is a difference between having the *ability* to do something and having the *right* to do it. People who gamble have *the ability* to breach their contracts by welching or renegeing. In the case of a bettor and his bookmaker, the bettor, like a party to any contract, may breach his agreement and refuse to pay. At a casino, a person can grab his chips and run for the door. On Betcha, welching and renegeing are an inextricable part of the honor-based platform. Both are *permitted* by the rules of The Site. When a person withdraws or welches, he may receive negative feedback. And it is that negative feedback that future would-be betting partners use to evaluate his trustworthiness and select him (or not) over other would-be partners.

That is why the patent-pending platform is called an “*honor-based*” system.

To illustrate the difference further, consider what would happen if the legislature made gambling contracts enforceable by repealing RCW 4.24.090. In that event, winners in gambling bets would be able to seek judicial enforcement of their unpaid wins on a breach of contract theory. The change would *not* benefit Betcha winners, however, who bet pursuant to a Terms of Service that says “bettors are not obligated to pay when they lose” and that “bets made on Betcha carry no term, express or implied, that winning bettors will be paid when they win.” That makes Betcha bets illusory promises – precisely what contracts are not. *See Restatement 2d (Contracts) Sec. 77* (promise or apparent promise is illusory – and thus not enforceable – if by its terms the promisor or purported promisor reserves a choice). Indeed, because bets are made pursuant to this disclaimer, a debt does not arise when a person wins a Betcha bet.

- v. **Given the nature of Betcha bets and the benign nature of betting with a right to withdraw, it is not clear that the legislature would have meant for RCW 9.46.0237 to reach Betcha.com.**

Even if this Court construes the language of RCW 9.46.0237 to reach the breed of bets indigenous to Betcha, it should still rule in

Betcha's favor because, given the harms the legislature sought to address with the Gambling Act, it is not clear that the it would have meant the definition of "gambling" to cover this new, patent-pending breed of betting.

Under the rule of strict construction, conduct must be "plainly and unmistakably within the statute sought to be applied" before a court may deem it criminal. *Enloe*, 47 Wn. App. at 170-71. Close enough, or "of a kindred character," is not sufficient. *McBoyle*, 283 U.S. at 27 (Holmes, J.); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). In making such a determination, Washington courts frequently look at the harms that the legislature sought to address in a criminal statute. In *Wells*, for example, Division Two refused to extend the state's DUI laws to bicycles, in part, because of the substantial difference in harm done by drunken drivers versus drunken bicycle riders. 79 Wn. App. at 535-36. The *Wells* court reached that conclusion even though the statute at issue expressly mentioned bicycles. *Id.*

In this case, the definition of "gambling" was passed as part of the 1973 Gambling Act. Acknowledging "the close relationship between professional gambling and organized crime," the legislature passed the Act in an effort "to keep the criminal element out of gambling" and to

“safeguard the public against the evils induced by common gamblers.”

RCW 9.46.010.

These declarations provide evidence that the legislature would not have intended RCW 9.46.0237 to reach Betcha-type wagers – that is, person-to-person wagers where the bettors have both the ability and *the right* not to pay. To our knowledge, “the criminal element” and “organized crime” have never been interested in gaming activity where persons are required to do anything less than pay their losses. Indeed, the adage about Vinnie breaking a nonpaying bettor’s kneecaps only makes sense if the bettor is required to pay if he loses (on Betcha, he is not). As for the “evils” caused by “common gamblers,” it is difficult to imagine what they might be on Betcha. As a facilitator of non-binding, person-to-person bets, Betcha does not take positions in bets, so unlike the common bookmaker, it has no reason to chase down nonpaying bettors. Welch victims have no means of contacting welching bettors, who they meet anonymously on the Internet. All bettors have a safeguard if they lose more than they can afford – they can opt out of their losses. The only “evil” on The Site is the possibility of receiving negative feedback. As fond as we are of the feedback mechanism, the possibility of receiving negative feedback does not rise to the kneecap level.

vi. The definition of “gambling” is, at best, ambiguous. Therefore the rule of lenity applies.

Where a criminal statute can be reasonably interpreted more than one way, the statute must be construed against the State under the rule of lenity – in effect, “tie goes against the State.” *State v. Gore*, 101 Wn. 2d 481, 485-86, 681 P.2d 227 (1984); *State v. Lilyblad*, 134 Wn. App. 462, 468, 140 P.3d 614 (Div II, 2006); *Russell*, 84 Wn. App. at 4. The rule’s rationale – “notice” – is identical to the rationale for strict construction. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) (stating that the rule of lenity "serves to ensure that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability"); *Dixson v. United States*, 465 U.S. 482, 511 (1983) (O'Connor, J., dissenting). While Washington courts have not yet considered the issue, courts regularly apply the rule of lenity to criminal statutes in civil settings generally, *Leocal v. Ashcroft*, 543 U.S. 1, 11 fn.8 (2004)(citing *Thompson/Center Arms v. United States*, 504 U.S. 505, 517-18 (1992), *Crandon*, 494 U.S. at 168, and declaratory judgment actions specifically. *E.g., Bingham, Ltd. v. United States*, 724 F.2d 921, 924-925 (11th Cir.1984)(numerous citations omitted); *see Singer, Statutes and Statutory Construction* Sec. 59.3 (rule of lenity “will apply even though the court is

construing the statute in a declaratory judgment action (civil)"). In *Leocal*, the Supreme Court explained its rationale: criminal laws "must" be interpreted "consistently," regardless of the nature of the proceeding or statutory application. 543 U.S. at 11 n8.

Given the language of the statute and motivation behind the gambling laws, Betcha does not believe RCW 9.46.0237 can reasonably be read to reach the species of bets indigenous to The Site. There is a common sense and legal difference between betting activity where the terms of the bet require the parties to pay, and betting activity where the terms of the bet do *not* require the parties to pay. There is also a fundamental difference between betting pursuant to an agreement or understanding, and betting purely by evaluating the trustworthiness of one's opponent. The State feels otherwise. Even assuming its statutory interpretation is reasonable, the Court must resolve this case against the State under the rule of lenity *unless* it finds that, in passing a law in 1973 to combat the influence of organized crime in the gambling industry, the state legislature intended for RCW 9.46.0237 to reach *even* bets where bettors have *the right* to opt out of their bets even after they lose, and where they bet pursuant to a Terms of Service that does not require them to pay. As explained above, the legislature had no such intention.

D. IN ORDER TO ENGAGE IN BOOKMAKING UNDER RCW 9.46.0213, A PERSON MUST “ACCEPT” BETS. BETCHA DOES NOT “ACCEPT” BETS AND, THEREFORE, IS NOT ENGAGED IN BOOKMAKING.

The trial court’s final error was in concluding that Betcha engaged in “bookmaking” as defined by RCW 9.46.0213. That section defines “bookmaking” as “*accepting* bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or “vigorish” for the opportunity to place a bet.” (Emphasis added.)

RCW 9.46 *et seq* does not define “accepting,” so the court must look to other sources to ascertain its meaning. Betcha explained in its summary judgment motion that all other authority that speaks to the meaning of “accept” in the context of “bookmaking” requires that a person take an actual position in a bet to “accept” it. (RP 31:20-33:24.) Other authority is similar. *Black’s Law Dictionary*, for example, defines “accept” as “to agree to something.” An “acceptance” is a “manifestation of assent” or “notification or expression to the offeror that he or she agrees to be bound by the terms of the offeror’s proposal.” *Id.* at p.13.

As Betcha explained in its summary judgment motion, Betcha is not engaged in “bookmaking” because: (1) bets made on Betcha are not “bets” within the meaning of RCW 9.46.0213 because they are not “gambling” bets (RP:28:18-31:18); and (2) in any case, Betcha does not

“accept” them because it does not take positions in them. (RP 31:19-33:17.) The State, with no factual analysis, asserted it was “readily apparent” that Betcha was engaged in bookmaking. The trial court accepted the State’s assertion because, like eBay, Betcha charges fees for others to offer and accept bets:

Yet the definition of 9.46.213 says it means accepting bets upon the outcome of future contingent events as a business. I think that was occurring here; although, I understand as plaintiff alleged they weren’t accepting bets. *The statute goes on to say, as a business or in which the bettor is charged a vigorish for the opportunity to place a bet.* That’s clearly the situation in this set of circumstances, in this Court’s opinion.

(RP 11:19-12:4, emphasis added.) The trial court’s reasoning was incorrect. The structure of RCW 9.46.0213 clearly requires that a party must “accept” bets in order to meet the definition of “bookmaking,” fees or not. Here, Betcha does not accept bets, so the fact that it charges fees for other people to list and accept bets is irrelevant.⁸ In truth, Betcha no more “accepts” bets than eBay accepts offers to purchase every item offered for sale on eBay.com.

⁸ Betcha argued in its reply brief that the fact that other persons “accept” “bets” does not make them guilty of “bookmaking,” both because bets made on Betcha are not “bets” for purposes of RCW 9.46.0213 and because concluding that Betcha’s customers are themselves bookmakers would be a nonsensical result. (CP 491:20-27.) The trial court did not reach that argument. Nevertheless, Betcha reiterates its position that Betcha bets are not “bets” as per RCW 9.46.0213, and has listed it as an assignment of error.

The trial court's dismissal of the word "accept" is the very sort of "arbitrary discretion" that the rule of strict construction is supposed to protect against. *Enloe*, 47 Wn. App. at 170-71. Accordingly, this Court should reverse the trial court's ruling on "bookmaking."

CONCLUSION

The issues before the trial court were strictly issues of statutory construction, specifically with respect to the term "gambling" and, to a lesser extent, "bookmaking." The task of statutory construction calls upon the Court to consider the meaning of words and the legislature's intent and ask whether the definition of "gambling" includes transactions where both parties bet pursuant to rules that allow them to opt out of their bets, even after they lose them, subject to the possibility of receiving negative feedback. The trial court did not do this. Instead, it dismissed Betcha's entire business model as a "little side statement" and ruled accordingly. That was highly inappropriate in a jurisdiction where all doubts as to whether conduct is criminal must be resolved in favor of the individual.

Betcha merely asks that this Court conduct the proper inquiry: is it "gambling" when bettors have both the ability and the right to opt out of their bets, even after they lose them? The language of the statute, the

harms the legislature sought to address when it wrote the definition of “gambling,” and common understandings of what it means to “gamble” all compel a conclusion that it is not. At the very least, the statute is ambiguous when it comes to honor-based betting, so under the rule of lenity, the Court should decide this case in Betcha’s favor and leave it to the legislature to rewrite the law to cover Betcha’s patent-pending product.

Betcha admits that betting on The Site is somewhat like gambling. There is betting and money involved. But as Chief Justice Marshall and Justice Holmes said, and several Washington courts have said since then, close enough is not good enough when it comes to determining whether conduct is criminal. The worst that can be said about the betting activity on Betcha is that they are transactions in which individual bettors bet upon an understanding that they “may” be paid if they win. “May” may not be enough to keep Betcha in business in a marketplace where the gambling competitors guarantee payment (read: “will”). Betcha is betting that the market will find this shortcoming is outweighed by its competitive advantages. As a legal matter, however, “may” is not currently written in RCW 9.46.0237.

For these reasons, Betcha respectfully asks this Court to reverse the trial court and enter summary judgment in favor of Betcha.

Respectfully submitted this the ^{6th} ___ day of January, 2008.

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DEPUTY

**NO. 37079-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**INTERNET COMMUNITY &
ENTERTAINMENT CORP., dba
BETCHA.COM, Appellant,**

v.

**THE STATE OF WASHINGTON, a
government entity, and the
WASHINGTON STATE
GAMBLING COMMISSION, a
Commission of the State of
Washington, Respondent.**

CERTIFICATE OF SERVICE

Joni M. Vague states as follows:

I am over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness therein.

I certify that on the 9th day of January, 2008, I caused a true and correct copy of Petitioner's Appellate Brief to be served on the following in the manner indicated below:

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() U.S. Mail
() Hand Delivery
(X) Legal Messenger

I certify that on the 9th day of January, 2008, I caused three true and correct copies of the Petitioner's Appellate Brief to be served on the following in the manner indicated below:

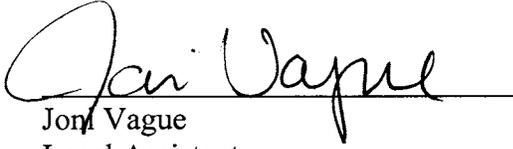
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 9 January 2008, at Renton, King County, Washington.

Hadley Green Rousso, PLLC


Jon Vague
Legal Assistant