

NO. 37079-4

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

INTERNET COMMUNITY & ENTERTAINMENT CORP. *d/b/a*
BETCHA.COM,

Appellant,

v.

THE STATE OF WASHINGTON, and the WASHINGTON STATE
GAMBLING COMMISSION,

Respondents.

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BRIEF OF RESPONDENT

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I. INTRODUCTION

When the Legislature enacted the Gambling Act in 1973 and, for the first time, decriminalized certain highly regulated forms of gambling, it did so with the clearly stated intent that the nature and scope of state sanctioned gambling be strictly limited and controlled. RCW 9.46.010. One means of accomplishing this was by clearly and unambiguously defining the term “gambling” so that no resort to generalized, non-statutory or foreign jurisdiction source materials is necessary.

“Gambling,” as used in this chapter, means 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.**

RCW 9.46.0237

Appellant Internet Community and Entertainment Corp. d/b/a Betcha.com (Betcha.com) contends that it can decriminalize otherwise illegal gambling activity by informing gamblers on its internet gambling website that they are free to dishonor or “welch” on their wagers. Borrowing from contract law, Betcha.com argues that such an arrangement makes any “agreement or understanding” illusory and, therefore, any wagers made subject to these terms fall outside Washington’s definition of “gambling.” Gambling debts, however, have

long been *per se* unenforceable under the laws of Washington and, therefore, parties engaged in illegal gambling are never legally bound to pay a gambling debt. Consequently, Betcha.com's notice does nothing more than restate long-settled law that pre-dates the adoption of the Gambling Act.

The critical inquiry regarding the legality of Betcha.com's operation is whether the bettors have reached an "agreement or understanding" with an *expectation* of receiving something of value if they win their wager. Betcha.com's website attracted bettors from across the country, who willingly funded wagering accounts and paid Betcha.com fees to post and accept their wagers over the internet. Both the record below and common sense dictate that Betcha.com's customers, at the time they made their wagers, expected that they would get paid if they won. That they reserved the right to "welch" on a gambling debt at some point in the future has no bearing on whether the parties reached an agreement or understanding at the time the wager was made. Indeed, Betcha.com's entire argument is belied by the simple fact that the act of "welching" – choosing to dishonor a wager – necessarily presupposes that the parties have agreed or reached an understanding that a payment will be made upon the outcome of a future event. Without such an agreement or

understanding, there would be nothing the losing bettor could “welch” upon.

II. RESTATEMENT OF THE ISSUES

1. Whether bettors on Betcha.com’s internet gambling website engaged in “gambling” as that term is defined in RCW 9.46.0237.

2. Whether Betcha.com engaged in “bookmaking,” as that term is defined in RCW 9.46.0213, by accepting bets and charging bettors a fee or “vigorish”¹ that represented a percentage of the amount being wagered.

3. Whether Betcha.com, through its website, promotes and facilitates gambling, and in doing so, transmitted and received gambling information by means of the internet in violation of RCW 9.46.240.

4. Whether the services Betcha.com offered on its Internet gambling website constitute a form of “professional gambling” as defined under RCW 9.46.0269(1)(a), (c) and (d).

5. Whether Betcha.com created, possessed and used “gambling records” in violation of RCW 9.46.217.

¹ A “vigorish” is “a charge taken (as by a bookie or a gambling house) on bets.” *Webster’s Third New International Dictionary* 2551 (2002).

III. RESTATEMENT OF THE CASE

A. Factual Background.

1. The creation of Betcha.com's illegal internet gambling website.

Nick Jenkins is Betcha.com's founder and chief executive officer.² CP 175. In 2003 or 2004, Jenkins developed an idea for an "honor-based betting exchange," based upon what he believed to be a loophole in state gambling laws. CP 176, 330. His theory was that brokering bets between on-line gamblers for a fee does not violate criminal prohibitions against internet gambling if the gamblers enter into a wager with the understanding that they can refuse to pay, or "welch," if they lose the bet. CP 221, 230; 312-15. Jenkins subsequently drafted a "legal memorandum"³ describing his theory and, on July 18, 2005, filed Articles of Incorporation for Plaintiff internet Community & Entertainment Corporation.⁴ CP 30, 104, 310-27.

² Jenkins is also the sole member of Betch.com's board of directors and serves as its president, vice president, treasurer and secretary. CP 175-76. For all intents and purposes, Jenkins is Betcha.com.

³ Jenkins holds a law degree from Georgetown University, but has not been licensed to practice law in any state since the late 1990s. CP 43, 172-73. He was not licensed as an attorney at the time he drafted the "legal memorandum." CP 43-44, 171-73, 310-27.

⁴ Jenkins claims that Betcha.com has spent over \$800,000 to develop its Internet gambling website, which was based on the "legal theory" set forth in Jenkins' "legal memorandum." CP 14-15. During his deposition, Jenkins, however, admitted that he does not have any expertise in the area of gambling law. CP 222-23. Given this admission it is notable that, prior to the initiation of this lawsuit, Betcha.com never retained a licensed attorney to review and opine on the validity of the conclusions reached in Jenkins' "legal memorandum." CP 224-26.

Initially, Jenkins created a prototype of the website and with the assistance of patent attorneys, wrote and submitted a patent application for an “honor based gambling website.” CP 180-81, 183-84. At the same time, Jenkins began raising money from investors.⁵ CP 186-87. In the summer of 2006, Jenkins began hiring software developers and copy editors to provide the technological know-how and content necessary to make the website an operational reality. CP 174, 181-83. Shortly thereafter, Betcha.com leased offices in Seattle and developed a “server farm,” located in Vancouver, Canada, to handle internet gambling transactions. CP 810. The servers were purposefully located in Canada to evade the jurisdiction of United States law enforcement agencies. *Id.*

2. How Betcha.com conducted, and profited from, its illegal gambling operation.

a. Placing an illegal gambling wager on the Betcha.com website.

To bet on Betcha.com’s website, a gambler registers as a user, creates a username, provides a mailing address, and funds a wagering account with a credit card payment made over the internet. CP 202. After a gambler has registered and funded an account, Betcha.com offers several ways to wager either as an individual or as part of a betting pool. A gambler

⁵ These investors include Russ Torrison, who is in charge of Absolutepoker.com, an off-shore Internet gambling website, located in Vancouver, B.C. CP 188-89.

commences the betting process by drafting a bet. This is accomplished with a “tool” that enables the gambler to write out a gambling proposition manually, or to draft a proposition using a series of drop down menus that offer bettors an up-to-date list of various events on which to place a wager. CP 204-05. In addition to assisting with the drafting of a proposition, the “tool” also contains fields for the gambler to enter the amount of the wager, the odds, the point spread, and the minimum “honor rating” that the “accepting” gambler must possess. CP 340, 399-432. Gamblers who do not want to draft their own propositions can select from lists of pre-drafted wagers on a variety of topics that Betcha.com prominently displays on the website. CP 340. The Betcha.com website also offers content in the form of blogs and articles that encourage gamblers to create their own wagers and/or “promote” pre-listed bets generated by Betcha.com’s editorial staff. CP 178-79, 217-20, 344-49, 351-52.

When a gambler either lists a wager or accepts a bet already posted on the website, Betcha.com places the funds being wagered in escrow so the owner of the previously funded account cannot withdraw or wager these funds on any other bet until the initial wager is settled. CP 203. If a gambler attempts to place or accept a wager without having sufficient funds in his account, the website directs the gambler to a webpage that facilitates adding additional funds to the account by means of a credit card. CP 207-08.

b. The operational characteristics of Betcha.com's "honor rating system."

Under Betcha.com's "honor rating" system, each gambler is assigned a "product page" that lists their username, their picture, feedback they have received from other bettors, and their "honor score." CP 101-103. As soon as a gambler funds a wagering account, he automatically receives 250 "honor points." CP 191. Betcha.com adds or deducts points depending on a variety of factors, including the amount of money wagered, the promptness with which the bettor settles a gambling debt, and whether the bettor has "welched" on losing bets. CP 190-91, 194, 196, 434-35.

When listing a bet, the gambler enters a time certain when the outcome of the event being wagered upon will have been determined and the winner of the bet can be established. CP 209-10. Once that time has passed, a gambler can signal to an opposing gambler a win, a loss, the outcome of the wager is ambiguous, or a "welch." CP 211-13, 214. Once a winning claim has been made, the opposing gambler has 72 hours in which to respond through the Betcha.com website. CP 209-10. If the opposing gambler does not respond within 72 hours, Betcha.com will declare the gambler claiming the win to be the winner, remove the funds from escrow, and transfer the winning wager from the loser's account to the winner's account. CP 104-05, 213. If the opposing gambler affirmatively admits a

loss, payment is made to the winner without any further delay. CP 213, 422. If the losing gambler opts to “welch” on the bet, no money is transferred and the wager is terminated.⁶ CP 422. If the “ambiguous button” is selected, the bet stays in limbo and the wagered money remains untouched until the dispute is resolved. CP 211-13.

If a gambler admits a loss or allows payment of a win without protest or “welching,” Betcha.com automatically assigns the gambler additional “honor points,” depending upon the size of the bet that was made. CP 191-92; 434-35. It is unclear from the evidence below whether “honor points” are also automatically deducted when a gambler withdraws or “welches” on a bet.⁷ CP 192-95.

A gambler’s “honor score” is also influenced by “feedback” from opposing bettors. CP 190-91. The theory underlying the system is that a loser who “welches” on a bet will receive negative feedback from the winning bettor that will lower the loser’s honor score. CP 434. The score, in turn, gives future gambling partners a means of gauging whether the person

⁶ While the website was open to the public, there was only one recorded instance of a bettor “welching.” CP 214-15. Upon further investigation, it turned out that this single instance resulted when a lone employee of Betcha.com, using two different user names, both listed and accepted the same bet, and then “welched” on it. CP 215-16, 384, 387.

⁷ During his deposition, Jenkins testified that he did not know whether a bettor’s “honor score” was automatically lowered if he “welched” on or withdrew from a bet. CP 192-94. The tutorial on Betcha.com’s website suggests otherwise. It states: “If you refuse to pay, you’ll get a welch on your record. Your Honor Rating will take a hit. Not good.” CP 434.

offering or accepting a bet is likely to honor that bet and is, therefore, worth gambling with. CP 190-91. Indeed, the website allows gamblers to specify that they will only accept wagers from bettors who possess a certain minimum “honor rating.” CP 129, 401, 434.

c. The operation of Betcha.com’s gambling website and its collection of “fees” or “vigorish” from illegal internet gambling.

Betcha.com makes money by automatically deducting non-refundable fees from a gambler’s account whenever he engages in any of the following activities: (1) listing a bet, (2) accepting a posted bet (also known as a “matching” fee because it is automatically charged against the accounts of both the listing and accepting bettors whenever a bet is accepted), (3) proposing a counteroffer to a posted bet, and (4) electing to “up-sell” a posted bet, which increases the visibility of the bet by posting it in a larger font size and in a more prominent location. CP 197-201, 395-97. None of these fees are refundable if a bet or counteroffer is not accepted or if a gambler “welches” on a bet. CP 198, 201.

3. Betcha.com’s suspension of illegal gambling activities.

On June 8, 2007, the Betcha.com gambling website opened to the public. CP 185. Over the next month, Betcha.com records indicate that it accepted wagers from 38 individual gamblers throughout the United States and deducted fees from their wagering accounts. CP 354-81, 389.

Betcha.com's records indicate that most of the bets made on the site during its month of operation related to sporting events. CP 354-81, 391-93.

On June 21, 2007, special agents from the Commission visited Betcha.com's offices in Seattle and met with Jenkins. CP 441-45. During the ensuing conversation, Jenkins acknowledged that he expected he might receive a visit from the Commission and opined that Betcha.com's operations did not constitute professional gambling because the bettors were not forced to pay their losing wagers. CP 443-44. The agents disagreed with Jenkins' assessment and asked Betcha.com to cease and desist its illegal operations. Jenkins refused. *Id.* During this meeting, the agents also mentioned that an administrative declaratory judgment process existed that Betcha.com could have used to determine whether its operations were legal. CP 444. Jenkins responded that, in hindsight, he should have used such a procedure, but that he chose not to because the Commission's response would have been "no." *Id.*

On July 6, 2007, Jenkins and his legal counsel met with Commission personnel at the Commission's headquarters in Lacey, Washington. CP 444-45. During this meeting, the Commission served Betcha.com with a formal cease and desist letter. *Id.* Jenkins and his counsel refused to shut

down the site and threatened to file a Complaint for Declaratory Judgment and Injunctive Relief in Thurston County Superior Court later that day.⁸ *Id.*

On July 7, 2007, the Commission secured a search warrant for Betcha.com's headquarters based on an affidavit establishing that Commission agents had probable cause to believe that Betcha.com was (1) engaged in professional gambling in violation of RCW 9.46.220; (2) transmitting and receiving gambling information by means of the internet in violation of RCW 9.46.240; and (3) causing a person to violate provisions of the Gambling Act, RCW 9.46.180. CP 449. The Commission executed the search warrant on July 9, 2007 and seized computer equipment and documents reasonably believed to be used in furtherance of the alleged criminal conduct. CP 454-55. After service of the warrant, Betcha.com notified the Commission that, for the time being at least, it was no longer brokering illegal gambling over its website. CP 6, ¶ 14.

B. Procedural History.

On July 10, 2007, Betcha.com served the Commission with a Complaint seeking a judgment pursuant to the Uniform Declaratory Judgments Act (UDJA), Chapter 7.24 RCW , declaring that Betcha.com's website complied with the Washington State Gambling Act (the Act),

⁸ Despite Betcha.com's threats of legal action, Betcha.com did not serve the Commission with a summons and complaint until July 10, 2007, the day of oral argument on the Betcha.com's unsuccessful Motion for a Temporary Restraining Order. CP 554-61, 612-14, 615-21.

Chapter 9.46 RCW, and its associated regulations. *See* CP 559-60, ¶¶ 20, 21. A First Amended Complaint was filed on July 23, 2007. CP 622-60.

On October 2, 2007, Betcha.com filed a Second Amended Complaint that dropped Jenkins as a named plaintiff and added the State of Washington as a defendant. *Compare* CP 3-10 and CP 622-60. On October 19, 2007, the State filed its Answer to Betcha.com's Second Amended Complaint. CP 546-51.

On October 10, 2007, Betcha.com filed the Second Amended Motion for Summary Judgment. CP 11-38. This Motion followed two earlier summary judgment motions, the first of which was filed on August 17, 2007, three days after the Commission (the State of Washington was not a named defendant at that time) filed its Answer to Betcha.com's First Amended Complaint. CP 661-66, 667-703, 704-40.

In the fall of 2007, the parties exchanged cross-motions for summary judgment. CP 11-38, 458-537. On November 9, 2007, the Honorable Gary Tabor heard oral argument on the cross-motions and granted summary judgment in favor of the State. RP 3-4; CP 540-42. On December 4, 2007, Betcha.com filed a timely Notice of Appeal. CP 538-39.

IV. STANDARD OF REVIEW

Summary judgment is appropriate when the facts and all reasonable inferences from those facts, viewed in the light most favorable to the non-moving party, establish that there are no genuine issues of material fact and, therefore, the case can be decided as a matter of law. *Berrocal v. Fernandez*, 155 Wn.2d 585, 589, 121 P.3d 82 (2005); CR 56. An order granting summary judgment raises questions of law that are analyzed under the *de novo* standard of review. *Id.*

The interpretation of a statute involves questions of law that are reviewed *de novo*. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006). The purpose of statutory interpretation is to discern and implement the legislature's intent. *Id.* at 673. "Where the meaning of statutory language is plain on its face," courts "must give effect to that plain meaning as an expression of legislative intent." *Id.* A provision's plain meaning is discerned from the entire statutory scheme, as well as related statutes and other provisions within the same act that shed light upon the legislature's intent. *Id.* That there is more than one conceivable interpretation of statutory language does not necessarily make the language ambiguous. *State v. Ose*, 156 Wn.2d 140, 147, 124 P.3d 635 (2005).

V. DISCUSSION

A. The Evolution of Gambling and Gambling Regulations in the State of Washington.

Unauthorized gambling activities, including internet gambling, have always been illegal in the State of Washington. In fact, as initially adopted in 1889, the Const. art. II, § 24, banned *all* gambling by specifically providing, *in toto*, that: “The legislature shall never authorize any lottery or grant any divorce.” The Washington State Supreme Court has subsequently, and repeatedly, made clear that the term “lottery,” as used in the Constitution, encompasses all forms of gambling activities. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 247 P.2d 787 (1952). Moreover, the Court early on made unmistakably clear that the prohibition contained in the Constitution was absolute: “The language of the constitution is mandatory, and the provision is self-executing.” *City of Seattle v. Chin Let*, 19 Wash. 38, 40, 52 P. 324, (1898) (holding that even lotteries conducted for charitable purposes are forbidden).

It was not until 1972 that the electorate voted to amend Article II, Section 24 of the Constitution. As amended, Const. amend. II, § 24 now provides:

The legislature shall never grant any divorce. Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any

other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.

(Emphasis added). Shortly after passage of the amendment, the Legislature, in 1973, enacted the Gambling Act (the Act), Chapter 9.46 RCW, which permits some specifically limited forms of gambling activities under highly regulated circumstances.

Any analysis of the matter currently before the Court must begin by recognizing the two-fold policy concerns underlying the Legislature's adoption of the Act: (1) to keep the criminal element out of gambling; and, (2) to promote the social welfare by "limiting the nature and scope of gambling activities and by strict regulation and control." RCW 9.46.010. To these ends, the Legislature has further clarified its intent in the following manner:

It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling....

RCW 9.46.010 (emphasis added). To accomplish these purposes, the Legislature has also provided that "[a]ll factors incident to the activities authorized in [the Gambling Act] shall be closely controlled, and the

provisions of this chapter shall be liberally construed to achieve such end.”

RCW 9.46.010.

B. The Illegal Wagering Activities Promoted, Conducted, And Facilitated By Betcha.com Constitute “Gambling.”

“Gambling” is a specifically defined term in the State of Washington. RCW 9.46.0237. When the Legislature enacted the Gambling Act and made the decision to decriminalize some limited and highly regulated forms of gambling activities, it did so with the clearly stated intent to limit the nature and scope of gambling in the State.

RCW 9.46.010. One way in which it did so was by statutorily defining “gambling” so that no resort to generalized, non-statutory or foreign jurisdiction source materials is necessary, or legally appropriate, in order to ascertain the meaning of that term. In pertinent part, RCW 9.46.0237 clearly and unambiguously provides that:

“Gambling,” as used in this chapter, means 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.

(Emphasis added). Betcha.com’s solicitation and for-profit brokering of wagers between gamblers clearly falls within the scope of this definition.

Betcha.com attempts to evade this conclusion by asserting that the ability of a losing party to an illegally brokered wager to “welch” on the bet somehow removes that gambling activity from the Act’s coverage. Betcha.com, however, does not, and cannot, plausibly distinguish this possibility from the reality that in many, if not all, other illegal gambling activities in Washington State, the loser also has the option to “welch” on a bet. And, as Betcha.com concedes, debts arising from illegal gambling are not legally enforceable in most, if not all, states, and, therefore, the “winner” has no legal means to collect from the “loser.” RP 19; CP 491. *See Dodd v. Gregory*, 34 Wn. App. 638, 642-43, 663 P.2d 161, *review denied*, 100 Wn.2d 1007 (1983) (courts barred from enforcing illegal gambling obligations) 38 Am. Jur. 2d *Gambling* § 210 (“Contracts founded upon a gambling consideration are invalid”). As this has long been the law in Washington State, the Legislature had notice that this was the case when it adopted the Gambling Act in 1973, which explains why it chose to use the words “agreement or understanding” in its definition of gambling. *See Cooper v. Baer*, 59 Wn.2d 763, 763-64, 370 P.2d 871 (1962) (contract for gambling debt unenforceable as against public policy); *Ash v. Clark*, 32 Wash. 390, 396-97, 73 P. 351 (1903) (check issued for money advanced for gambling is void).

Betcha.com's erroneous arguments confuse the essential elements of the definition set forth in RCW 9.46.0237 with those of a legally binding contract. However, as the Washington State Supreme Court has repeatedly made clear, in both civil and criminal contexts, "agreement" is a much broader term than "contract" and the former term does not incorporate or require the formal requisites of the latter.⁹ *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 531-32, 424 P.2d 290 (1967) (an agreement "is a manifestation of mutual assent by two or more persons to one another,"

⁹ Betcha.com also contends that its "system" does not meet the definition of "gambling" because gamblers who may "welch" never place "a thing of value" at risk. Setting aside the erroneous illusory promise argument addressed above, this contention also fails to acknowledge the fact that there are at least two other "things of value" that gamblers immediately place at risk when they list or accept a bet on Betcha.com's website. First, there is the non-refundable fee, or "vigorish" they pay to Betcha.com in order to list or accept a bet. Gamblers must pay Betcha.com a percentage of the wager in the form of a listing or matching fee regardless of whether they win, or lose, or "welch." Accordingly, a bet on Betcha.com, assuming there is a ten percent matching fee, may be characterized as betting \$110 (\$100 plus the \$10 matching fee) to win \$90 (\$100 win, minus the \$10 matching fee). In other words, if a gambler loses the bet (and pays off) he is out \$110. If he wins the bet, he must still pay the \$10 matching fee so his net winnings are \$90. In the event of a "welch," gamblers risk the now unrecoverable \$10 fee or "vigorish" on an event beyond their control (i.e. their opponent's decision to "welch").

The second thing of value placed at risk is the "good will" that is reflected in a gambler's "honor score." Under Washington law, good will is an intangible property interest commonly defined as the expectation of continued public patronage. *In re Marriage of Lukens*, 16 Wn. App. 481, 483-84, 558 P.2d 279 (1976). Gamblers on Betcha.com's website automatically receive 250 "honor points" upon funding an account. When a gambler honors a gambling debt, that gambler's "honor score" goes up and this higher score increases the likelihood that other gamblers will want to wager with this person in the future. "Welching" gamblers on Betcha.com's website receive negative feedback that lowers their "honor score," which, in turn, makes it less likely that other bettors will wager with the "welching" gambler in the future. CP 192, 434. The only way to enhance one's "honor score" by honoring debts incurred by gambling on Betcha.com's website, which necessarily requires payment of Betcha.com's fees. Accordingly, there is a cost associated at maintaining and enhancing one's "honor score" or "good will." Gamblers who "welch" suffer a reduction in both the monetary and "good will" value of their "honor score."

and “has a wider meaning than contract, bargain or promise”) (quoting *Restatement (Second) of Contract*, § 3 and comment a.); *State v. Yancy*, 92 Wn.2d 153, 156-57, 594 P.2d 1342 (1979) (holding that the term “agreement or understanding” in criminal statute prohibiting promotion of prostitution means “informal agreement” and that it is not unconstitutionally vague). The logic of the Court’s analysis of the meaning of “understanding” is equally applicable to the use in RCW 9.46.0237 of the term “understanding.” *Yancey*, at 156-57; *State v. Kees*, 48 Wn. App. 76, 80, 737 P.2d 1038 (1987).

Since contracts to engage in unauthorized gambling activities are *per se* illegal and unenforceable, it would be an “absurd result” indeed to hold that the Legislature intended to incorporate into RCW 9.46.0237 a requirement that a “gambling” agreement must meet all the formalities of a binding legal contract. “[S]tatutes should be construed to effect the legislative purpose and to avoid unlikely, strained or absurd results.” *State v. Landrum*, 66 Wn. App. 791, 797, 832 P.2d 1359 (1992).

Betcha.com’s legally flawed arguments depend entirely upon somehow convincing this Court to import and incorporate into the statutory definition of gambling an unstated requirement that any such agreement or understanding be unconditional in nature. However, RCW 9.46.0237, by the plain and unambiguous meaning of its terms, as well as

by the clear legislative intent expressed in RCW 9.46.010, is not so self-limited and courts should not read language into a statute which the Legislature did not place there.¹⁰ See *Vita Foods Products v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

In addition to ignoring the Legislature's intent, Betcha.com's arguments contain an internal inconsistency that makes them fall of their own accord. On its website, Betcha.com repeatedly reminds gamblers that they can "welch" at any time and even offers a button signifying a "welch" as one of the options for settling a wager. Betcha.com incorrectly contends that these reminders and this "welching" mechanism negate the third element in the definition of gambling, which requires that parties

¹⁰ Betcha.com's attempts before the superior court to characterize the term "will" as ambiguous are equally unpersuasive. CP 25-28. As discussed earlier, in order to consummate a wager on Betcha.com, the parties must necessarily reach an agreement or understanding, otherwise, there would be no reason to participate. That one of the participants might renege on this agreement or understanding at some later date is immaterial to the parties' understanding at the time they reached the initial agreement that they would pay any resulting gambling debt. Betcha.com argues that "will" is the equivalent of "shall" and that, as used in the context of RCW 9.46.0237 requires that not only the wagering parties agree that one of them will receive something in the future based on the outcome of a particular event, but that the winnings must actually be distributed before the crime is committed. This strained and unlikely interpretation is contrary to the plain meaning of the statute and common sense, and must be rejected.

Betcha.com attempts to bolster its argument in this regard by citing to an outdated definition from *Black's Law Dictionary* 1771 (4th ed. 1951) that defines "will" as "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must.'" This, and other variants of this definition, however, is the only one that Betcha.com brought to the superior court's attention. What Betcha.com fails to disclose is that another common meaning for "will" is "simple futurity." *Webster's Third New International Dictionary* 2616-17. That there is more than one conceivable interpretation of statutory language does not necessarily make the language ambiguous. *State v. Ose*, 156 Wn.2d 140, 147, 124 P.3d 635 (2005). Interestingly, the current edition of Black's Law Dictionary, no longer includes the entry for "will" that appeared in the 1951 edition. See *Black's Law Dictionary* 1628 (8th Ed. 2004).

reach an agreement or understanding that they will receive something of value based on the outcome of some future contingent event.

The definition of “welch,” however, necessarily presupposes that the parties *have* reached an agreement that one party will win something of value based on the outcome of a future contingent event. *Webster’s Third New International Dictionary* at 2596 defines “welch” as follows: “1: to cheat by avoiding payment of bets . . . 2: to avoid dishonorably the fulfillment of an obligation.” In short, a “welch” is a means of cheating an opponent out of gambling winnings they otherwise should have received under the terms of the wager, i.e., the terms of the parties’ agreement and understanding. A party to a wager cannot “welch” without first having reached an agreement or understanding with the opposing gambler that winnings will be paid based on the outcome of a particular event. If the parties never reach an agreement or understanding, there is nothing to terminate or avoid, and resorting to the “welch” button would serve no purpose.

Finally, the record below and common sense dictate that Betcha.com’s customers funded their accounts and paid Betcha.com’s fees with the expectation and understanding that they would be paid if they won their bets. As the superior court properly noted:

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, has been told they can welch on that if they choose to do so. But there's nevertheless an agreement and understanding that if a person wins a bet, they're going to be provided something of value. That's the only reason this business can operate. If indeed no one ever paid off on any bet that they lost, this would not be something that would prevail. It is clear to me that there's an agreement or understanding that the person winning a bet will receive something of value, even though there is this little side statement that a person can renege, if they want to.

RP 56, ln.1–57, ln.1.

The logic underlying the superior court's rationale for ruling against Betcha.com is sound and its conclusions are consistent with the Legislature's intent as expressed through the plain-meaning of RCW 9.46.0237. Accordingly, this Court should reject Betcha.com's strained attempts to create an ambiguity where none exists and affirm the trial court's ruling below.¹¹

¹¹ Betcha.com attempts to distinguish itself from other illegal betting operations by arguing that its patrons have an explicit "right" to "welch" on their bets, while other patrons in other illegal betting operations merely have the "ability" to "welch." App. Br. at 29-30. This is a distinction without a difference. As discussed earlier, gambling debts arising from illegal gambling activities are not enforceable because they are the product of criminal activity. That Betcha.com notifies its customers that they are free to renege is simply restating the obvious: Betcha.com's patrons are engaging in criminal activity and, therefore, their gambling debts are unenforceable.

Betcha.com then contends that betting with the right to "welch" makes gambling "benign." App. Br. at 30-32. Betcha.com, however, fails to address the fact that its patrons pay fees to gamble on its website regardless of whether they are paid their winnings. Nor does Betcha.com address the monetary investment necessary to develop

C. Betcha.Com’s Illegal Gambling Activities Violate Gambling Act Provisions Outlawing Bookmaking And Professional Gambling.

In addition to the provisions of the Gambling Act quoted and discussed above, Betcha.com’s illegal gambling activities also implicate other definitional and prohibitory sections of the Act. Included among those is the definition of “professional gambling” contained in RCW 9.46.0269. “Professional gambling” is defined in that section, in pertinent part, as follows:

1) A person is engaged in "professional gambling" for the purposes of this chapter when:

(a) Acting other than as a player or in the manner authorized by this chapter, **the person knowingly engages in conduct which materially aids any form of gambling activity; or**

(b) Acting other than in a manner authorized by this chapter, the person pays a fee to participate in a card game, contest of chance, lottery, or other gambling activity; or

(c) Acting other than as a player or in the manner

an acceptable “honor score” and the loss of “good-will” that results if a patron chooses to “welch” on a wager. Betcha.com’s use of the term “benign” also suggests that its “honor based” system somehow removes the well-recognized social problems associated with professional gambling, yet the record below lacks any evidence supporting such a claim.

In this same section, Betcha.com, without any citation to the record or any legal authority, baldly asserts that “[t]o their knowledge, ‘the criminal element’ and ‘organized crime’ have never been interested in gaming activity where person are required to do anything less than pay their losses.” App. Br. at 32. This empty assertion, however, is belied by the fact that, Betcha.com is already associated with at least one person with possible criminal connections. Russ Torrison, one of Betcha.com’s investors, is an executive at Absolutepoker.com, an off-shore Internet gambling website, located in Vancouver, B.C., that offers illegal Internet gambling to residents of the United States. CP 188-89.

authorized by this chapter, **the person knowingly accepts or receives money or other property pursuant to an agreement or understanding with any other person whereby he or she participates or is to participate in the proceeds of gambling activity;**

or

(d) **The person engages in bookmaking; or**

...

(2) **Conduct under subsection (1)(a) of this section, except as exempted under this chapter, includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation.** If a person having substantial proprietary or other authoritative control over any premises shall permit the premises to be used with the person's knowledge for the purpose of conducting gambling activity other than gambling activities authorized by this chapter, and acting other than as a player, and the person permits such to occur or continue or makes no effort to prevent its occurrence or continuation, the person shall be considered as being engaged in professional gambling. . . .

(Emphasis added).

Further, RCW 9.46.0213 also specifically defines what constitutes

“bookmaking,” as follows:

“Bookmaking,” as used in this chapter, means 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). Once again, resort to generalized, non-statutory or foreign jurisdiction source materials is unnecessary and legally inappropriate. *See State v. Postema*, 46 Wn. App. 512, 515-17, 731 P.2d 13, *review denied*, 108 Wn.2d 1014 (1987) (holding that definition of “bookmaking” is not void for vagueness).

When the facts relating to the manner in which Betcha.com’s illegal internet wager brokering activities are conducted, which are described in detail above, are compared to the language in RCW 9.46.0269 and RCW 9.46.0213, it becomes readily apparent that Betcha.com has engaged in both “professional gambling” and “bookmaking.” For example, a comparison of the terms of those statutory provisions to the facts referenced above indicates that Betcha.com’s gambling operation and website: (1) knowingly engages in conduct that materially aids a form of gambling activity (RCW 9.46.0269(1)(a) & (2)); (2) knowingly receives money pursuant to an agreement(s) with others whereby it participates in the proceeds of gambling activities (RCW 9.46.0269(1)(c) & (2)); and, (3) engages in “bookmaking” by accepting bets on future contingent events as a business and charges a fee or

“vigorish” for accepting the bet (RCW 9.46.0269 (1)(d) & (2) and RCW 9.46.0213).¹² Engaging in “professional gambling,” which includes “bookmaking,” is prohibited under the Act and is a criminal offense subject to punishments ranging from a Gross Misdemeanor to a Class B Felony, depending on the nature and circumstances of the violation. RCW 9.46.220, RCW 9.46.221, and RCW 9.46.222.

D. Betcha.com’s Gambling Activities Violate Washington Criminal Prohibition Against “Transmitting And Receiving” Gambling Information.

Betcha.com completely fails to address the express terms and structure of the definition of “gambling information,” found at RCW 9.46.0245, and the statutory prohibition against “transmitting or receiving” such information contained in RCW 9.46.240.¹³ The relationship between

¹² Betcha.com, once again looking to contract principles, argues that “accept” means “to agree to do something,” as in the “offer and acceptance” necessary to create a contract. *See* App. Br. at 35-37. It contends that it is not engaged in bookmaking because it does not actively wager with its customers. This reasoning is flawed. As discussed in the facts section, Betcha.com’s entire business model is built upon Betcha.com receiving fees in exchange for accepting and posting wagers on its website. One need only review the steps required to access the site -- register on the website, fund an account, agree to having wagered funds placed in escrow pending the outcome of the bet, and pay fees for the “opportunity of placing a bet” – to understand that Betcha.com affirmatively, and only, accepts wagers under certain specific conditions. Betcha’s active facilitation of the gambling process constitutes bookmaking. Whether it actually shares in its customer’s winnings is irrelevant to this analysis, except to the extent that Betcha.com’s fee or “vigorish” for posting the bet is impacted by the amount bet.

¹³ Betcha.com assigned error to the superior court’s ruling that Betcha.com transmitted gambling information in violation of RCW 9.46.240. *See* App. Br. at 4 ¶ 5. Betcha.com, however, has not supported this assignment of error with argument or legal authority. An assignment of error unsupported by argument or authority to support it is deemed waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). Appellate courts need not consider arguments that are not developed in the briefs and for which a

those two sections, and their complete lack of reliance on the definition of “gambling” contained in RCW 9.46.0237, is particularly significant to any analysis of the matter before the Court. In that regard, RCW 9.46.0245 defines “gambling information” in the following manner:

“Gambling information,” as used in this chapter, means any wager made in the course of and any information intended to be used for professional gambling. In the application of this definition, information as to wagers, betting odds and changes in betting odds shall be presumed to be intended for use in professional gambling. This section shall not apply to newspapers of general circulation or commercial radio and television stations licensed by the federal communications commission.

(Emphasis added.) The above quoted provision is an unambiguous and completely self contained definition that is intentionally independent of the Act’s previously cited definition of “gambling.” That conclusion is reinforced by the statute’s mandate that “information” as to wagers, betting odds and changes in betting odds **shall be presumed** to be intended for use in professional gambling. The stand-alone term “information,” as used in the statute’s second sentence regarding activities that are presumptively regarded as being intended for use in professional gambling, has obviously been uncoupled from the word “gambling” by the

party has not cited authority. *State v. Dennison* , 115 Wn.2d 609, 629, 801 P.2d 193 (1990). Because Betcha.com has failed to offer legal citation or argument supporting this assignment of error they are deemed waived, and this Court should refrain from reviewing these issues on appeal.

Legislature. That choice of usage is similar to the specific reference to “any information” that is contained in the first sentence of the statute, which further unambiguously demonstrates the Legislature’s conscious design not to incorporate the elements of the definition of “gambling” into RCW 9.46.0245.

RCW 9.46.0245 is intended to reach and define activities that do not necessarily contain all three of the elements of gambling found in RCW 9.46.0237. It is also designed to work in conjunction with RCW 9.46.240 to flatly prohibit any attempt to provide or supply “gambling information,” as specifically defined by RCW 9.46.0245, even if a completed act of “gambling” is prevented or otherwise does not occur. In that regard, RCW 9.46.240 provides that:

Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, the internet, a telecommunications transmission system, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony subject to the penalty set forth in RCW 9A.20.021. However, this section shall not apply to such information transmitted or received or equipment installed or maintained relating to activities authorized by this chapter or to any act or acts in furtherance thereof when conducted in compliance with the provisions of this chapter and in accordance with the rules adopted under this chapter.

(Emphasis added). The prohibited conduct described by this statute is the knowing transmission or receipt of gambling information. As indicated in

factual summary above, that prohibited conduct is the very essence of Betcha.com's business. Additionally, RCW 9.46.0245 and RCW 9.46.240, when read together, also perform a preventative function similar to that of the attempt, solicitation, and conspiracy prohibitions contained in the Criminal Code, none of which require successful completion of a separately defined offense. *See RCW 9A.28 et seq.*

Betcha.com, through its internet website, transmits and receives gambling information in violation of RCW 9.46.0245 and RCW 9.46.240. The superior court's ruling to that effect is correct and should, accordingly, be affirmed.

E. Betcha.com Has Created, Possessed, And Used Gambling Records In Violation of RCW 9.46.217.

Betcha.com maintains various written, digital and other electronic records relating to such matters as the identity and addresses of its gambling "customers," amounts bet, odds offered, outcomes of wagers, amounts paid to winners, accounting and bank records, and so forth.¹⁴

¹⁴ Betcha.com has assigned error to the superior court's ruling that Betcha.com created, possessed, and used gambling records in violation of RCW 9.46.217, *see App. Br. at 4 ¶ 6*, but has not supported this assignment of error with argument or legal authority. An assignment of error unsupported by argument or authority to support it is deemed waived. *Smith*, 106 Wn.2d at 451-52. Appellate courts need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *Dennison*, 115 Wn.2d at 629. Because Betcha.com has failed to offer legal citation or argument supporting this assignment of error it is deemed waived, and this Court should refrain from reviewing this issue on appeal.

See Section III.A.2. The production and maintenance of such gambling records is specifically prohibited by the Act.

RCW 9.46.0253 defines “gambling record” in the following manner:

“Gambling record,” as used in this chapter, means any record, receipt, ticket, certificate, token, slip or notation given, made, used or intended to be used in connection with professional gambling.

(Emphasis added.) This definition relates to and references the above quoted provisions of RCW 9.46.0269 that define the conduct that constitutes engaging in “professional gambling.” *See* Section V.A.2. Having defined the term “gambling records,” the Act continues by specifying various criminal prohibitions relating to the making, use, possession, storage and transportation of such records.

Whoever knowingly prints, makes, possesses, stores, or transports any gambling record, or buys, sells, offers, or solicits any interest therein, whether through an agent or employee or otherwise, is guilty of a gross misdemeanor. In the enforcement of this section direct possession of any such a gambling record is presumed to be knowing possession thereof.

RCW 9.46.217 (Emphasis added).

As discussed above, Betcha.com has engaged in a variety of criminal gambling activities that are expressly prohibited under Washington law. In doing so, Betcha.com has admitted that it has

knowingly created, possessed, and used a variety of written and electronic documents that satisfy RCW 9.46.0253's definition of "gambling records." The record below contains numerous examples of illegal gambling records that Betcha.com disclosed during the course of discovery or that Commission agents seized during execution of the search warrant. *See e.g.*, CP 354-82, 384-85, 391-93. Based on this unchallenged evidence and the provisions of the Gambling Act discussed above, reasonable minds can reach only one conclusion: Betcha.com created, possessed, and used gambling records in violation of RCW 9.46.217. The superior court's ruling to this effect should be affirmed.

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VI. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm the superior court's order granting summary judgment in favor of the State.

RESPECTFULLY SUBMITTED this 14th day of March, 2008.

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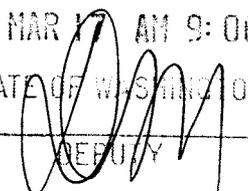
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

INTERNET COMMUNITY &
ENTERTAINMENT CORP., d/b/a
BETCHA.COM,

Appellant,

v.

THE STATE OF WASHINGTON and
the WASHINGTON STATE
GAMBLING COMMISSION,

Respondent.

**CERTIFICATE OF
SERVICE**

I certify that on March 14, 2008, I caused the Brief of Respondent and this Certificate of Service, in the above-captioned matter to be served upon the parties herein, as 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 this 14th day of March, 2008.



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