

NO. 42158-5-II

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

JAMES L. BRUMMETT AND AT LEAST 10,000'S OF OTHER
LOTTERY 2010 RAFFLE PLAYERS SO SITUATED,

Appellants,

V.

WASHINGTON'S LOTTERY, WASHINGTON'S LOTTERY
COMMISSION AND COLE & WEBER UNITED, et al.

Respondents.

APPELLANT'S REPLY BRIEF

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B. TABLE OF AUTHORITIES

Young v. Key Pham. Inc. 112 Wn.2d 216, 225, 770 P.2d 182(1989) Page 13

C. ADDITIONAL ARGUMENT

On page 4 lines 3&4 of Defendant's brief by Cole & Weber, filed October 6, 2011 Washington's Lottery advertising contractor is in dispute. If the Lottery Commission approved the awarding of the 30 \$500 Early Bird prizes as stated by Cole & Weber, then the Commission had to change the Nth from 8000 to 1000, not the Lottery Director. Mr. Brummett argues that this a true statement but Washington's Lottery represented by the State, argues that the Lottery Director has the authority to authorize promotions and that the 30 \$500 EARLY BIRD prizes were promotional prizes and not a tier level prizes authorized by the Lottery Commission. This is a major genuine issue of material fact in dispute in this case and can only be resolved by depositions by plaintiff, Mr. Brummett and at trial. (CP201,246). No Lottery Raffle advertisements had any mention of the Early Bird prizes being promotional. (CP246,365&367), Also see the State's brief filed September 28, 2011 page 3 lines 2-6, " In order to encourage the sale of raffle tickets, the Lottery Director authorized what was advertised as an "Early Bird" promotion of 30 instant prizes paid at the point of sale. This

was done , and commonly done with lottery games, in order to call attention to the raffle and to promote the sale of all raffle tickets.” Also see State’s brief page 23, 8-12, “ RCW 67.70.050(6) and (11) and WAC- 315-06-095 grant the Lottery director authority to conduct promotions: The director has the authority to conduct promotion contests of chance for the enhancement of ticket sales.” Mr. Brummett contends that the awarding of any prize must be equitable and fair. A promotional prize or a tier prize should make no difference. All players must have the same odds to win any prize during an active game. Just because the State Lottery has gotten away with changing promotional prize odds ,in secret, during past games does not make it right!

In Cole & Weber’s brief on page 6, lines (CP 21-23). Mr. Brummett disagrees with C & W’s claim that I heard their radio advertisements about the raffle selling fast , weeks before the tickets went on sale. I seen placard advertisements weeks before the Raffle sales but did not hear radio advertisements until days before the raffle sales began. Mr. Brummett purchased his first two Raffle tickets on October 20, 2011. (CP231-233). (CP305-306) are not conclusive on when Mr. Brummett first heard C & W’s radio advertisements on the 2010 Thanksgiving Raffle.

On page 7 of C & W's brief lines 7-11 in that "The two radio ads which Mr. Brummett claims to have heard during the week before his October 14 hunting trip, and which he relied upon in traveling 70 miles to purchase two raffle tickets on October, 20 2010, were unrelated to the timing or methodology for awarding Early Bird prizes" is a false statement by C & W. Mr. Brummett never heard the radio ads before he left for the hunting trip. They were related to my trip to Republic to purchase Raffle tickets because they mentioned the tickets were going fast, on lines 15,16, 22 and 23 of page 7 of their brief and page 8, lines 4,5,12,13,20,21, 27 and 28.

On page 16 of C & W's brief lines 16-24 and page 17 lines 1-7 Mr. Brummett did believe that he needed to act fast to win a EARLY BIRD \$500 prize, because of the words used were early and fast and they have real meanings to Mr. Brummett and other players. Evidence to this is the Smoking Gun remarks by Lottery Deputy Director Julie Martin stating in my Exhibit 10 E-Mail dated November 29. 2010 " Raffle- Early Bird prizes using the Nth-ticket mechanism: Ideally this would be done as a draw from the first week's pool of sold tickets in fall 2010 we need to approximate it using the N-th ticket promotional mechanism" (CP291-293). Mr.

Brummett has recently learned that Lottery Deputy Director, Julie Martin has left Washington's Lottery and taken a Management Position with the Illinois State Lottery, Hmmm! Also Lottery Director of Marketing, Jim Warick E-Mail dated November 24, 2010, Exhibit 4 (CP 250-251) stating "The raffle started on October 17th and everyday there after radio and print advertising stated " Buy your tickets, for they are going fast". This shows C & W never changed their ads when they were not selling fast in accordance with Exhibit 11(CP294-296). That out of 39 days, there were 5 fast days, 3 average days and 31 slow days for an average of slow sales.

On page 19 of C & W's brief lines 1-6 , Mr. Brummett disagrees with the comments, because if all 30 \$500 Early Bird prizes had been awarded as should have been in the first week in accordance with Lottery Deputy Julie Martin as to early, then C & W's radio ads that the tickets were selling fast was relevant to Mr. Brummett and other so situated raffle ticket purchasers. The same comments above apply to C & W's argument, page 19 lines 20 & 21, that the pace of ticket sales was simply irrelevant to a purchase decision. Mr. Brummett disputes that for the Early Bird prizes. Had they been front loaded, timing was everything.

C & W's brief page 20, lines 15-16, page 23 lines 13-14, page 25 lines 19-21 and page 26 lines 15-16 are false in that Mr. Brummett did not hear the radio ads until a few days before he went to Republic to purchase his first two Raffle tickets.

C & W misses one of my key points in this lawsuit in that on page 21, 22 and 23 that Mr. Brummett deserved not only a chance to win a Early Bird prize that should have been front loaded as to early but that all players must have the same odds to win any prize, a tier prize or a promotional prize. That did not happen with the 30 \$500 so called Early Bird prizes.

Mr. Brummett has said throughout this case he has no evidence that C & W initiated the 2010 Raffle advertisements to the Lottery that they are "going fast", only because Mr. Brummett did not receive any Public Disclosure documents on this subject. C & W may have been the instigator in this "Going fast" theme but until Mr. Brummett can take depositions from key Lottery and Cole & Weber employees the truth is presently unknown.

On page 1 of the State's brief, filed September 28, 2011, line 13 the State says "a game of chance". Yes all gambling is a game of chance, but all gambling must be fair and equitable, that is, the operator or organizer can't

chance the odds during an active game, even for promotional prizes. That is what happened to \$15,000 worth of promotional prizes during the 2010 Thanksgiving Raffle. (CP-505-519). This is a major genuine issue of material fact in dispute in this case.

On page 2 of the State's brief, pages 16-19, I quote " The published prize structure for the raffle included 20-\$50,000; 200-\$250 prizes and 2600-\$50 prizes for total cash raffle prizes of \$1,175,000. Odds of winning a raffle prize, assuming all 250,000 tickets were sold, was 1 in 92. CP at 188." Mr. Brummett contends this statement is false because they left out 30-\$500 prizes, (CP246) (CP367) posted at some 4000 statewide outlets shows the Early Bird prizes as tier prizes, no where in any of the State's Thanksgiving Raffle advertisements does it show to the public, these were promotional prizes only. This is a major genuine issue of material fact in dispute in this case. The State references CP at 188, is a declaration of Dr. Stephen Wade, Lottery Research & Development Manager, who Mr. Brummett claims designed the " Early Bird" prizes with negligence & unreasonableness,. Offering them every 8000 tickets sold in lieu of every 1000 sold at the beginning of Raffle ticket sale start. Which made the illegal

changing of the odds when the Nth was reversed to every 1000 tickets sold during the middle of an active Lottery game. Mr. Brummett has been denied the opportunity to take a deposition of Dr. Wade to cross-examine his testimony. This is not justice.

In the State's brief page 3, lines 7-9, I quote " The promotional or Early Bird prizes were funded separately from the raffle drawing prizes and did not diminish the raffle prizes. CP at 188, 221-22." The fact the Early Bird prizes were funded separately is a mute point, because no one in the public purchasing Raffle tickets knew that. (CP246)(CP367).

In the State's brief page 4 lines 12-17 and I quote, Conversely, if a smaller number of raffle tickets are sold than originally anticipated, the " nth ticket" number is lowered. In this situation, the same number of promotional prizes was awarded on a smaller number of transactions. This was done to assure that all 30 promotional prizes will be awarded. CP at 188-89. This was not announced to the public. CP at 198". This action by Washington's Lottery was negligent & unreasonable. What they are saying here it was okay to change the Nth from 8000 to 1000 in order to give all the

30-\$500 Early Bird prizes away. It should have never come to that had they had any correct gambling knowledge at all! The Nth should have been originally set at every 1000 tickets sold to comply with the word EARLYBIRD and then there would have been no need for changing of the odds depending upon the time a player purchased his tickets. One can not change any prize odds during an active game, that's common gambling law. CP at 198 is a declaration of Lottery Marketing Director, James Warick who Mr. Brummett claims was negligent & unreasonable also in helping Dr. Wade design the Early Bird prize package. Mr. Brummett was not allowed to cross-examine him also to get the true facts by Thurston County Superior Court.

In the State's brief on page 5 lines 10-16, and I quote " On or about November 15, 2010, less than two weeks prior to the raffle drawing date, it was brought to the attention of Lottery Director Harold Hanson that, rather than being sold out and all 30 promotional " Early Bird" prizes having been awarded by this date as originally anticipated, 11 out of the authorized 30 promotional prizes remained because the sale of the raffle tickets was much

slower than anticipated. CP at 189, 216.” This was brought to Lottery Director Harold Hanson by Mr. Brummett, Plaintiff in this case, the only Lottery watch dog in the state. The Lottery didn’t have a clue what was happening and didn’t realize they were going to have to change the odds during an active gambling game. Odds were changed for the 30 \$500 Early Bird prizes and they were not awarded early. (CP503-521). CP216 is a declaration from Lottery Director. Harold W. Hanson that has stated in a letter to Mr. Brummett no Raffle odds were changed. This is not a true statement. The odds were changed for the Early Bird prize structure during an active game. Again Mr. Brummett was not allowed to cross-examine, Director Hanson by a deposition by Thurston County Superior Court. This was an injustice. (CP383-385).

State’s brief page 5, lines 19-21 and page 6 lines 1-3, and I quote, “ If this had not occurred(the changing of the Nth, which changed the odds to win an Early Bird prize), it would have not been possible to have awarded all 30 promotional prizes. CP at 189; 199; 216-17. After this change was made, all promotional prizes were awarded. The final promotional prize went to ticket no. 179,000. An additional 32,755 raffle tickets were sold after the

promotional prize period ended. CP at 190”. This is proof that all 30 \$500 Early Bird prizes were not awarded early as to the term to the public “Early Bird”. When ticket 179,000 out of 250,000 tickets offered won the 30th Early Bird prize, the game was flawed and had negligent design by Lottery staff.

In the State’s brief page 6 footnote 1, and I quote “ The fact that not all 250,000 raffle tickets were sold actually increased the odds of winning one of the 2,720 prizes in the final drawing from 1 in 92 to 1 in 78. CP at 190”. This statement is meaningless because those 2,720 tier prizes are not part of the complaint in this lawsuit. Mr. Brummett has no problem with the awarding of those 2,720 prizes. Their odds were not changed by the changing of the Nth. The State is just trying to sugar-coat that to the court to gloss over the deficiencies with the proper awarding of the Early Bird prizes and the changing of their odds depending when a player purchased their raffle ticket.

State’s brief on page 7-8 lines 20-21, 1-4, I quote “ In a summary judgment motion the moving party bears the initial burden of showing the

absence of an issue of material fact. *Young v. Key Pham. Inc.* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A moving party defendant may meet this initial burden by pointing out to the court that there is an absence of evidence to support the plaintiff's case. *Young*, 112 Wn.2d at 225". Mr. Brummett has done that all the way throughout this case. Issues of material facts in dispute in this case against the State representing Washington's Lottery all along have been: (1) Did they use misleading advertisements stating raffle tickets were selling fast when they were not, (CP369,371-372); (2) Did the Lottery Commission approve the 30-\$500 Early Bird prizes as tier prizes?; (3) Did the Lottery Director have the power to change the Nth spacing of those prizes without Commission authority?; (4) Should the Early Bird prizes been front loaded as to the word "early"? (CP374-75); (4) Were the odds changed for Early Bird prizes during an active game? (CP503-520). Evidence above was presented at the State's summary judgment motion hearing.(CP325-545).

State's brief page 10 & 11 Lines 18-22, 1-19 is pure bunk, the term "early" is specific when used in the conjunction with "bird". Such as

with the word “Early Bird.” Early Bird is specific to all shoppers, including the shopping of lottery tickets. Come on give lottery players a break... here again the government is trying to pull a President Bill Clinton, in that it is about what “is” means. This court should see above, the State’s spin.

State’s brief page 17 lines 3-6 and I Quote “ Lottery schemes are “presented to the public as a general offer” to purchasers of a ticket who have a “chance of winning a prize according to the advertised rules and procedures of the lottery”. What the State is forgetting to tell the Court here is that every player must have the same odds to win that prize. This did not happen with the 30-\$500 Early Bird prizes when the Lottery Director changed the Nth from 8000 to 1000 spacing for every raffle ticket sold during an active game. This was not equitable.

State’s brief page 17 & 18, lines 18-20, 1-2, I quote “ No specific representations were made concerning the method of awarding the promotional prizes. CP at 198. Plaintiff purchased only a “chance” to win one of 30 promotional prizes, along with a “chance” to win a prize in the raffle drawing. As a matter of law, this does not establish either cause in

fact or legal cause”. Nowhere in any of the Lottery advertisements did they use the term “promotional prizes”. This is a genuine issue of material fact in dispute. The chance to win one of the 30-\$500 Early Bird prizes was not front loaded as to the term “early” and the odds were changed depending upon when a player made a raffle ticket purchase from ticket number 1 to ticket number 179001. This is illegal in accordance with common law gambling rules that all prize awarding must be fair and equitable.

In State’s brief page 18 lines 9-13, I quote “ Even assuming that Washington’s Lottery falsely advertised plaintiff’s chances of winning a promotional prize, which it did not, plaintiff’s sole remedy is the issuance of replacements for the 12 raffle tickets which he purchased with tickets for another raffle game at a future date”. Mr. Brummett disagrees with this statement in it’s entirety because if I get to proceed to trial, there is 10,000 of other 2010 Thanksgiving Raffle players so situated and a percentage of them will be so situated to the tee in their purchase of tickets between number 1 and 179,000 for Class Action . Also if Washington’s Lottery acted with negligence and purposely avoided front loading the Early Bird

prizes to sell more tickets, which they admit and that the odds were illegally chanced for different players during the same active game, Mr. Brummett believes damages are in order.

The same applies for the State's response in their brief on page 19 lines 1-12.

In the State's brief page 26 lines 1-5 under CONCLUSION, that their use of the words the "tickets were selling fast" was in good faith, because other Lottery Raffle games sold fast is pure bunk. That would allow every advertiser in Washington State to say an item was selling fast, so you better hurry and purchase now!, once any item sold fast 20-50 years before. This reasoning is garbage. It's funny how government will never admit wrong doing, because they have the people's money to fight the people and a house full of attorneys always on the clock anyway.

Mr. Brummett was denied by the Honorable Thurston County Superior Court Judge Carol Murphy to take depositions of Washington's Lottery Director, William Hanson, Lottery Director of Marketing, James Warick and Lottery Manager of Research and Development. This was unfair and unjust

that the State can use them in their legal briefs, stating what they say is fact when I was not allowed to take their depositions, thus to cross-examine them to get them to admit wrong doing.

Mr. Brummett also finds it very interesting to the fact that his star witness to be ,would be, what Deputy Director Julie Martin said in the SMOKING GUN E-Mail I discovered under public disclosure and I Quote once more “Raffle- Early Bird Prizes using the Nth-ticket mechanism , Ideally, this would be done as a draw from the first week’s pool of sold tickets in Fall 2010 we need to approximate it using the N-th ticket promotional mechanism” then she recommends using the Nth at every 8333 tickets sold . (CP291-293). What I find interesting is that I have recently learned she has left Washington’s Lottery and taken a Management position at the Illinois State Lottery. If this case moves back to Thurston County Superior Court, which it should, Mr. Brummett will be anxious to spend some money and travel to Illinois and take her deposition for the sake of justice for all 2010 Lottery Thanksgiving Day Raffle ticket players.

Mr. Brummett hopes this Court of Appeals will allow him to give oral

argument in this case and answer any questions the Honorable Appeal Court's Judges may have.

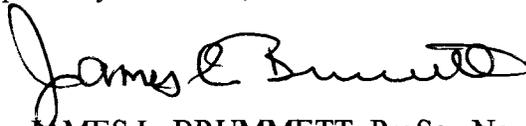
D. CONCLUSION

CONCLUSION REMAINS THE SAME:

The Court of Appeals should reverse Thurston County Superior Court Judge Carol Murphy's decision approving Cole & Weber United motion to dismiss and remand the case back to Thurston County Superior Court for trial. Mr. Brummett should be granting permission to continue discovery requested in March 2011 and after that is complete and depositions taken, then let C&W file a summary judgment motion if they wish.

The Court of Appeals should overturn Thurston County Superior Court Judge Carol Murphy's decision approving the State's Motion for summary judgment and remand the case back to Thurston County Superior Court for trial, for there were many disputed issues of material fact. Mr. Brummett should be allowed to take depositions he previously requested and a few more to get all pertinent material facts.

Respectfully submitted,

A handwritten signature in black ink that reads "James L. Brummett". The signature is written in a cursive, flowing style.

JAMES L. BRUMMETT. ProSe November 2, 2011

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DECLARATION OF SERVICE

The undersigned, James L. Brummett, hereby declares under penalty of perjury of the laws of the State of Washington, that on November 3, 2011, that I Served by depositing in the United States Mail, First Class postage prepaid, a copy of Appellant's Reply Brief, together with a copy of Declaration of Service,

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