

NO. 47983-4

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

JAY GEROW and ZDI GAMING, INC.,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiff Jay Gerow owns and operates ZDI Gaming, Inc. (“Plaintiff or ZDI”). ZDI manufactures gambling devices for sale in Washington. Mr. Gerow developed a gaming product which he argues the Washington State Gambling Commission (“Commission”) should have approved in 2005 when he first sought authority to market the product. Gerow seeks tort damages for the initial refusal of the Commission to approve his device.

Gerow¹ claims that the Commission and its members and staff violated his civil rights protected by the equal protection and due process protection clauses of the Fourteenth Amendment to United States Constitution giving rise to damages under 42 U.S.C. § 1983. He made these identical claims in a federal lawsuit in 2008 which the federal district court dismissed based upon quasi-legislative immunity. CP at 304-14. In the present case the superior court held correctly that plaintiff’s federal tort claims were barred by collateral estopped. RP (July 12, 2013) at 61.

Gerow also pursued state tort claims of negligence and claims of tortious interference in the present lawsuit. The superior court held correctly that the negligence claims were barred by the absence of a duty between plaintiff and the defendants. RP (July 12, 2013) at 63. The

¹ This brief will use Mr. Gerow’s name in referring to the appellants.

superior court correctly dismissed Gerow's claim of tortious interference with contract because he did not have an enforceable business expectancy in the marketing of his gambling device. As a matter of state policy, all gambling and gambling devices are illegal in Washington unless the Gambling Commission approves the device for marketing. *See, e.g., Rousso v. State*, 170 Wn.2d 70, 82, 239 P.3d 1084 (2010). The superior court thus held correctly that the Commission's initial refusal to license plaintiff's device did not violate a valid business expectancy because of the Commission's regulatory authority. RP (August 14, 2015) at 55.

This lawsuit is the culmination of a long history of administrative and judicial battles between Gerow and the Commission.² *See* App. A. Gerow contends that he must now be compensated for his lost investment and lost revenue during the time the state regulations prevented him from marketing his gambling device. *See* Brief of Appellant at pg. 6.

The issue to be decided in this appeal is whether tort liability arises when an individual successfully challenges regulations adopted by the State Gambling Commission under the Administrative Procedure Act (APA), RCW 34.05. The answer to this question is "no" because the sole remedy available is to challenge the regulations under the APA, a remedy

² *See ZDI Gaming Inc., v. Wash. State Gambling Comm'n*, 173 Wn.2d 608, 268 P.3d 929 (2012); *Gerow v. Wash. State Gambling Comm'n*, 181 Wn. App. 229, 324 P.3d 800 (2014); and Order on Remand from the Thurston County Superior Court, Cause No. 06-2-02283-9 (October 18, 2013). CP at 1463-65.

Gerow has successfully pursued. Gerow cannot use a tort lawsuit as an additional remedy to challenge the regulatory actions of the Gambling Commission.

II. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court was correct in holding that the defendants were entitled to immunity for actions related to their regulatory activities.
- B. The trial court was correct when it dismissed plaintiff's claims for damages brought under 42 U.S.C. § 1983.
- C. The trial court was correct when it dismissed plaintiff's claims for tortious interference with contract.
- D. The trial court was correct in dismissing plaintiff's claims for negligence.

III. COUNTERSTATEMENT OF THE CASE

A. Identification of Parties

Jay Gerow owns and operates ZDI Gaming, Inc. ("Plaintiff"). ZDI Gaming, Inc. is a Washington corporation licensed by the Washington State Gambling Commission to manufacture gambling devices for sale in Washington. The defendants include the State of Washington and the Washington State Gambling Commission, the Office of former Governor Christine Gregoire, certain individual members of the Washington State Gambling Commission, and Rick Day, the Commission's Director at relevant times between 2005 and 2013.

B. ZDI Seeks To Market an Electronic Pull-Tab Machine that Uses a Cash Card and Credits Winnings on the Cash Card

In 2005 Gerow asked the Commission to approve a change in ZDI's previously licensed electronic pull tab dispensing machine. The proposed change would allow the user to purchase pull tabs with a "cash card" instead of currency. The Commission refused to license the modification to the device and continued to refuse to license the device until 2013 when plaintiffs were ultimately successful in a regulatory challenge brought under the APA. In the present lawsuit, Gerow seeks damages against the Commission, its members and its director under several tort theories. This litigation culminated in the dismissal of plaintiffs' tort claims by the superior court in this case. *See App. A.*

C. Legalization and Regulation of Gambling in Washington

Gambling activities in Washington are unlawful unless specifically authorized by state law. Wash. Const., art II, § 24. In 1973, the Legislature adopted legislation which legalized but strictly regulated gambling. RCW 9.46.010. The Act authorized the creation of a Commission consisting of five members appointed by the governor with the consent of the senate. RCW 9.46.040.

The Legislature granted the Gambling Commission the power and duty "to adopt such rules and regulations as are deemed necessary to carry

out the purposes and provisions of [the Act].” RCW 9.46.070(14). It went on to state that, “[a]ll rules and regulations [of the Commission] shall be adopted pursuant to the administrative procedure act, chapter 34.05 RCW.” Under RCW 9.46, the state strictly regulates gambling to protect “its citizens’ health, welfare, safety, and morals.” *Roussso*, 170 Wn.2d 70 at 82. Because of its historical ties to illicit activities “the regulation of gambling enterprises lies at the heart of the state’s police power.” *Id.*

The 1973 legislation authorized the game of pull-tabs provided that the activity is conducted in compliance with applicable rules and regulations adopted by the Commission. Laws of 1973 ch. 218 § 1 (codified as RCW 9.46.010 and RCW 9.46.0325.) The Legislature specified that the game must be “conducted pursuant to the provisions of [the Gambling Act] and *any rules and regulations adopted pursuant thereto.*” RCW 9.46.010 (emphasis added). It specified that the game of pull-tabs be given its “usual and ordinary meaning as of July 16, 1973, *except that such definition may be revised by the Commission*” pursuant to duly promulgated rules and regulations. RCW 9.46.0273 (emphasis added).

Manufacturers and distributors of gambling devices and related equipment must obtain licenses from the Commission under the provisions of the Act. *See* RCW 9.46.310; former WAC 230-12-316, WAC 230-14-

045 and WAC 230-16-001. Prior to the sale, lease or operation of gambling equipment, a licensee must submit the equipment to the Commission for review to verify compliance with state statutes and administrative regulations. *See* former WAC 230-12-316 (2005) (repealed 1/1/08, current version at WAC 230-06-050).

The Legislature specified that pull-tabs could only be used as a commercial stimulant to businesses engaged in the selling of food or drink for consumption only *and* only when operated pursuant to the Gambling Act and the rules and regulations of the Commission. RCW 9.46.0325. As with other gambling devices and equipment, pull-tab dispensers are subject to regulation by the Commission. RCW 9.46.0241.

Historically, and broadly in the context of games of chance, the Commission prohibited giving gifts or extending credit to players for purposes of gambling. *See* former WAC 230-12-050 (2005). Accordingly, players, including players of pull-tab games, were required to pay the consideration “required to participate in the gambling activity in full by cash, check or electronic point of sale bank transfer prior to participation” with limited exceptions. *See* former WAC 230-12-050(2) (2005). The Gambling Commission specifically required pull-tab players to receive winnings “in cash or in merchandise” from a cashier of the

business where the pull tab game was played. *See* former WAC 230-30-070(1) (2001).

D. Gerow Seeks Administrative Approval for an Electric Pull-Tab Dispenser (VIP) with Cash Card Option

In July 1997, the Commission approved an electronic pull-tab dispenser with a video interactive display (VIP) that loosely mimics the video display on an electronic slot machine. CP at 34, 37, 257. Although the video display had lights, spinning reels and audio sounds, the approved equipment still dispensed a paper pull-tab that is not affected by the electronics associated with the VIP. In June 2002 the Commission approved ZDI's electronic video pull-tab dispenser. CP at 34. The VIP dispenses a paper pull-tab that the player may elect to put back into the equipment to enjoy the sounds and lights of the machine.

In 2005, Gerow sought the Commission's approval of an upgrade to ZDI's VIP. CP at 36-37. The upgrade would have added a cash card feature that would permit the operator to buy a pull-tab from the dispenser using a cash card and would credit winnings under \$20 back onto the cash card instead of requiring the player to collect his or her winnings from an employee of the establishment where the machine is played. *Id.* In August 2005, the Commission staff denied approval of the equipment upgrade relying heavily on former WAC 230-30-070(1) (2001), which

stated that “[a]ll prizes from the operation of punch boards and pull-tabs shall be awarded in cash or merchandise.” CP at 37. *See also Gerow*, 181 Wn. App. at 233.

In September 2005, Gerow petitioned the Commission for declaratory relief and sought formal approval of the upgraded VIP. CP at 39. The Commission referred the matter to an Administrative Law Judge (ALJ) for fact finding and conclusions of law. CP at 39. Following a hearing, the ALJ upheld the Commission’s denial of the cash card upgrade. CP at 403-04. *See former WAC 230-30-070*. On August 10, 2006, the full Gambling Commission issued a final declaratory order upholding the decision of the ALJ after determining that ZDI’s technology failed to comply with former WAC 230.30.070 because the cash card was not the equivalent of “cash”. CP at 41-42, 416-17. *See App. A*. In the same timeframe, Gerow petitioned the Commission to amend former WAC 230-30-070 to authorize use of the gift card as a prize, but the Commission declined to do so. CP at 41.

E. Gerow Challenges the Ruling of Commission in Superior Court Under the APA

Gerow filed a petition for judicial review in Superior Court challenging the Commission’s declaratory order that use of the cash card violated then existing regulations because it allowed gambling without

prepayment by cash or the equivalent of cash. *See* Thurston County Superior Court Cause No. 06-2-02283-9; CP at 42; and App. A. By order dated August 17, 2007, Judge Christine Pomeroy of the Thurston County Superior Court reversed the decision of the Commission and ruled that the upgraded equipment complied with existing law because the use of the cash card was the equivalent of cash under regulations then in effect. CP at 408-18, 422-23. Judge Pomeroy ruled that the Commission's actions in denying plaintiff's petition to approve the upgrade under the existing regulations were arbitrary and capricious and remanded the matter back to the Commission for action consistent with the order. CP at 423.

The Commission sought appellate review of Judge Pomeroy's order to the Washington State Court of Appeals. In the meantime, Gerow advised the Commission of his intent to market the upgraded VIP equipment. CP at 45, 306. The Commission sought and was granted a stay of the Superior Court's ruling pending the appeal of Judge Pomeroy's order. CP at 45-46, 306-07.

The Washington State Court of Appeals, and later the Washington Supreme Court, affirmed the 2007 ruling of the Superior Court which directed the Commission to approve the upgraded VIP with the cash card option after holding that it complied with regulations then in force. *See ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wn. App.

788, 214 P.3d 938 (2009), *aff'd*, 173 Wn.2d 608, 268 P.3d 929 (2012). In its 2012 opinion, the Washington Supreme Court upheld Judge Pomeroy's 2007 ruling and remanded the APA challenge back to the Thurston County Superior Court. The court noted, however, that "the Commission has the inherent authority to revise rules to better comport with modern realities of the industry if it elects to do so . . . Since then many of [the Commission's] rules have been revised."³

F. Regulatory Changes 2008

In January 2008, the Commission adopted two new rules related to electronic gaming machines that accept cash which attempted to clarify whether or not a cash card was equivalent of a "cash" prize. Adoption of the new rules followed a publication of several versions of the proposed rules along with a notice and comment period to allow for public input.⁴ CP at 46. One new regulation defines "cash" as "currency in the form of coins or bills issued by the government of the United States or Canada only and does not include electronic, digital or other representations of money or other methods of payment." WAC 230-06-003. The

³ Current standards for pull-tabs are set forth in WAC 230-14.

⁴ One version of the proposed rule, proposed by Commission staff, banned all VIP's. Another version, proposed by the Gambling Industry, re-defined "cash" to include gift cards, meaning the ZDI VIP with cash card option would qualify. A third version, the version ultimately adopted by the Commission, took a middle way and allowed VIP's but without the ability to credit winnings on the cash card. *See Gerow*, 181 Wn. App. at 233-37.

Commission also adopted a rule titled “Standards for electronic video-pull-tab dispensers” codified into WAC 230-14-047. This regulation required electronic video pull-tab dispensers to dispense a paper ticket. It allowed gift cards to be used in video pull-tab dispensers which were purchased with cash, check or electronic point of sale bank transfer before use in the dispenser but did not incorporate a feature to allow the crediting of winnings back onto the gift card. WAC 230-14-047.

G. Challenge to the Newly Adopted Regulations Under the APA

In January 2008, Gerow filed a lawsuit in superior court challenging WAC 230-06-003 and WAC 230-14-047 under the APA. *Gerow v. Wash. State Gambling Comm’n* (Thurston County No. 08-2-00319-9). On December 17, 2012, Judge Chris Wickham of the Thurston County Superior Court dismissed Gerow’s declaratory judgment action after finding that he failed to meet his burden under the APA (RCW 34.05.570) to demonstrate the invalidity of WAC 230-06-003 and WAC 230-14-047. CP at 320-21. *See* App. A. The superior court found that the Commission acted within its authority under the Gambling Act and the APA, and found that the rules adopted in 2008 were not arbitrary and capricious. CP at 321. Gerow appealed Judge Wickham’s order to the Washington State Court of Appeals and was ultimately successful in

that appeal. *Gerow v. Wash. State Gambling Comm'n*, 181 Wn. App. at 229.

H. Federal Lawsuit Seeking Damages Under 42 U.S.C. § 1983

Simultaneously with the filing of their action in state court challenging the newly adopted regulations of the Commission under the APA, Gerow filed a lawsuit in federal district court seeking damages under 42 U.S.C. § 1983 for violation of his constitutional rights. In that lawsuit, as in the present lawsuit, Gerow alleged that WAC 230-06-003 and WAC 230-14-047 were adopted in retaliation for his exercise of his right to seek judicial review of the 2005 order of the Commission and the ALJ. CP at 296.

Gerow alleged in the federal lawsuit that individual members of the Commission and Director Day took retaliatory action against him, including the doubling of his deposit fees for equipment submitted to the Commission for approval, and other retaliatory actions for exercising his First Amendment rights seeking approval of the VIP. He alleged that the new regulations were adopted to intentionally deny him licenses for gaming devices in order to favor tribal gambling. CP at 283-303. Gerow further alleged that his rights to equal protection under the Fourteenth Amendment to the United States Constitution were violated by the favoring of tribal gambling by former Governor Gregoire and the

Commissioners she appointed, who allegedly denied Gerow's application for his VIP as part of a plan to favor tribal gambling. The favoring of tribal gambling was evidenced by entry into the Spokane Compact in 2007 which allowed the tribes to use the identical cash card technology for which Gerow sought approval. CP at 287, 294. The crux of Gerow's lawsuit was that his rights to equal protection were violated because he was treated differently than Native American tribes who were allowed to use equipment with similar electronic features at tribal casinos located in Washington. This, he argued (as he does in the present case) means that he and the non-tribal pull-tab industry were unable to compete successfully with tribal casinos which offered more sophisticated equipment. CP at 42, 54-55.

In two orders issued in October 2008, United States Judge Benjamin Settle dismissed plaintiff's federal lawsuit. Judge Settle ruled that WAC 230-06-003 and WAC 230-14-047 were adopted pursuant to the Commission's quasi-legislative rule making authority and that the individual Commissioners and Director Day were immune from suit arising from the exercise of their rule making authority.⁵ CP at 304-16. Judge Settle held that "the exercise of legislative discretion [by the

⁵ No cause of action exists against the State of Washington or the Gambling Commission under 42 U.S.C. § 1983 because neither the state nor its agencies are "persons" for purposes of imposing liability for damages under 42 U.S.C. § 1983. See *supra* pg. 25.

Gambling Commissioners] should not be inhibited by judicial interference or distorted by the fear of personal liability.” CP at 312.⁶ The Ninth Circuit Court of Appeals affirmed the district court’s dismissal in 2010. CP at 317-19. *See* App. A.

I. Tort Lawsuit Filed in State Court

In October 2008, when his federal suit was dismissed, Mr. Gerow filed the present lawsuit in state court alleging essentially the same claims. He alleges that the regulations that took effect in 2008 were adopted in retaliation for his challenge to the Commission’s 2005 ruling that denied approval for ZDI’s VIP device with the cash card option. As in the federal lawsuit, Gerow alleged that the 2008 regulations were adopted by the Commission as part of an ongoing politically-motivated action to favor gambling in tribal casinos by denying ZDI its “right” to market its VIP device.

Gerow filed an amended complaint in the present lawsuit seeking damages under several legal theories including claims that his civil rights were violated under 42 U.S.C. § 1983, negligence (the same claim asserted in the federal lawsuit), and tortious interference with business interest. CP at 29-58.

⁶ Plaintiff also brought state law claims in his federal lawsuit including claims of negligence and tortious interference with contract and business expectancy. The federal district court declined to exercise jurisdiction over these state law claims. CP at 314.

J. Resolution of Gerow's Challenge to Regulations Under APA

While Gerow's tort lawsuit was pending, the Washington State Court of Appeals issued an opinion reversing the 2012 decision of Judge Wickham in the APA appeal. The Court of Appeals held that WAC 230-06-003 and WAC 230-06-047 were not adopted by affirmative vote of three or more Commissioners as required for rule making under APA. The appellate court reversed Judge Wickham's 2012 order and remanded the case back to superior court. *Gerow*, 181 Wn. App. 229.

In the meantime, sale of the device was allowed to proceed by an October 2013 order of the Thurston County Superior Court and has proceeded since November 2013. CP at 1340-43, 1463-65, 1504.

IV. ARGUMENT

A. Summary Judgment Standard

This court reviews a summary judgment de novo. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). The superior court should grant summary judgment if it determines, after viewing the entire record and drawing all reasonable inference in favor of the nonmoving party, that there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56(c); *Lyons v. US Bank Nat'l. Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

Once the moving party meets its burden to demonstrate the absence of a material issue of fact, the burden shifts to the nonmoving party to submit affidavits containing admissible evidence to refute the moving party's contention and show that a genuine issue of fact exists for trial. *E.g., Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party may not rely on speculation or argumentative asserts to defeat summary judgment. *Vacova v. Farrell*, 62 Wn. App. 386, 394, 814 P.2d 255 (1991). Conclusory facts and speculation do not rise to the level of material facts. *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 325, 182 P.3d 480 (2008) (citing *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988)). If the non-moving party "fails to make a showing sufficient to establish the existence of an element to that party's case, and on which the party bears the burden of proof at trial," then summary judgment should be granted. *Young*, 112 Wn.2d 225.

B. The Trial Court Correctly Dismissed Plaintiff's Claims That the Failure to Approve the VIP with the Cash Card Feature Violated Plaintiff's Constitutional Rights in Violation of 42 U.S.C. § 1983

In February 2008, Gerow filed suit against the Gambling Commission in United States District Court. Gerow alleged in the federal complaint that the state, through the Gambling Commission, its

Commissioners, and its director, Rick Day, violated his civil rights giving rise to damages under 42 U.S.C. § 1983. The factual allegations in the federal complaint are identical to the factual allegations in the present complaint. CP at 33-48, 286-303. Plaintiff's claim for relief under § 1983 in his 2008 federal lawsuit are identical to his claims in the present lawsuit. CP at 49-53, 298-301.

1. Allegations in the Federal Lawsuit and This Lawsuit Are the Same

Gerow alleges in both lawsuits that the defendants abused their regulatory powers by creating arbitrary restraints to prevent the marketing of ZDI's upgraded VIP. He alleges in both lawsuits that Director Day and the individual Commissioners abused their regulatory powers by doubling his submittal fees, delaying reviews he sought, and causing new regulations to be enacted to prohibit the use of cash cards even though he ultimately prevailed in his administrative challenge to the Commissioner's 2006 order which denied the approval of the cash card upgrade. Gerow alleges in both lawsuits that these acts of retaliation continued after the new regulations were adopted in early 2008 because Director Day, and individual members of the Commission appointed by former Governor Christine Gregoire, wished to repay political favors received from Native American tribes by taking action against non-Indian gambling entities,

such as ZDI Gaming, Inc., in order to favor tribal gambling establishments which allow the use of electronic pull-tab machines with cash card options. CP at 33-53, 286-303.

The favoring of Native American tribes, according to Gerow in both lawsuits, is evidenced by the entry into the Spokane Compact in April 2007, an agreement between the tribe and the state negotiated by the Office of then Governor Gregoire. He alleges that entry into the Spokane Compact allowed the use of thousands of VIP terminals utilizing gift cards at tribal gambling establishments. CP at 42, 266, 271-74. Gerow claims that favoring of tribal gambling interests violates his rights protected by the Fourteenth Amendment to the United States Constitution and give rise to damages under 42 U.S.C. § 1983. CP at 51-52, 298-99.

The same allegations are made in this lawsuit. The only difference is that Gerow alleges ongoing claims of so-called retaliation up to the time he filed his amended complaint in this action in May 2012. CP at 270-71.

2. The Federal Court Held That Individual Commissioners Are Entitled to Legislative Immunity

The same constitutional claims made by Gerow in the present case were considered and rejected by the federal district court in the federal lawsuit he commenced following adoption of the regulations in early 2008. CP at 307-14. In dismissing Gerow's federal civil rights lawsuit,

the federal district court ruled that the 2008 regulations and other regulatory actions by the Commission were adopted pursuant to the Commission's legislative rule making authority. The adoption of the administrative regulations, the federal district court held, were "more akin to the formulation of policy instead of ad hoc decision making." They were "applicable to the public at large" and were "legislative in character" as they "bore traditional hallmarks of legislation." CP at 313-14. Because the Commissioners in adopting the regulations were acting as legislators they are immune from damage claims under the doctrine of legislative immunity. CP at 314. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52, 118 S. Ct. 996, 140 L. Ed. 2d 79 (1998).

The United States Court of Appeals for the Ninth Circuit upheld the district court in a 2010 memorandum decision. Because the Commissioners were engaged in legislative rule making, "they have absolute immunity from their actions associated with the passage of the rules." CP at 318. (citing *Bogan*, 523 U.S. at 52). The claim of unworthy purpose, the Court of Appeals held, "does not destroy the privilege of legislative immunity." CP at 319. (citing *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). "Absolute legislative immunity attaches to all actions taken 'in the sphere of legislative activity.'" *Bogan*, 529 U.S. at 44 (quoting *Tenney*, 341 U.S. at 376).

The same principle applies in this case. The superior court correctly held that the federal district court's order of dismissal precludes Gerow's retaliation argument here. The individual defendants are entitled to immunity because they were acting in a quasi-legislative capacity. This is true regardless of their supposed motivations. CP at 312-14, 318-19 (citing *Tenney*, 341 U.S. at 377).

3. Collateral Estoppel Bars Gerow's Tort Claims

"Collateral estoppel, or issue preclusion, bars re-litigation of an issue in a subsequent proceeding involving the same parties." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Four elements must be met for collateral estoppel to apply: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with, a party to the earlier proceeding; and (4) application of the doctrine does not work an injustice on the party against whom it is applied. *Id.*

All of the elements of the doctrine are present in this matter. The issues decided in the federal proceedings are identical to the issues in the present proceeding. The federal lawsuit included claims for damages for alleged constitutional violations arising under 42 U.S.C. § 1983 and

claims of negligence and tortious interference with contract arising under state law with regard to the regulatory actions taken by the Commission. CP at 298-300.

Gerow makes the same claims against the same parties in the present lawsuit satisfying the first element. CP at 49-54. The federal lawsuit ended in a judgment of dismissal on the merits which satisfies the second necessary element for applying collateral estoppel in this case. Both Gerow and ZDI, the parties against whom the doctrine is asserted, were the plaintiffs in the federal lawsuit satisfying the third element. CP at 283-85. Last, Gerow had an opportunity to make his arguments in his federal lawsuit in support of his contention that the rules adopted by the Commission in 2008 and other regulatory actions taken by the Commission violated his constitutional rights. The federal district court and Ninth Circuit Court of Appeals rejected his arguments that tort liability arose from the Commission's actions. Gerow pursued his administrative remedies under the APA and ultimately succeeded with his challenges to the regulations. *See Gerow*, 181 Wn. App. at 229. Therefore, dismissal of his constitutional claims under the doctrine of collateral estoppel does not result in an injustice thus satisfying the fourth necessary element.

In dismissing Gerow's complaint in the federal lawsuit, the federal district court reviewed, analyzed and rejected the identical constitutional arguments that Gerow makes in the present lawsuit. After considering the undisputed facts before it concerning the administrative proceedings, the federal district court held that in enacting the regulations that went into effect in 2008, and taking other regulatory actions, the Commissioners were engaging in legislative rule making because the rules were applicable not just to Gerow, but to the public at large. CP at 312-13. Therefore, the individual Commissioners are entitled to absolute immunity and are immune from claims for damage made by Gerow based on assertions that the regulatory actions were motivated by a desire to favor tribal gambling at the expense of Gerow's economic interests.

4. Legislative Immunity Applies Regardless of Other Immunities Available to the Individual Defendants Under RCW 9.46.095 and RCW 4.92.075

Gerow argues that the only immunity available to defendants is that provided under RCW 9.46.095 and RCW 4.92.075. That argument lacks merit. These statutory protections apply, but they are not the only immunity available to defendants. The fact that these statutes provide immunity from personal liability does not mean, as Gerow argues, that the individual defendants are not also entitled to quasi-legislative immunity for claims of liability which arise from the interpretation and enactment of

regulations adopted by the Commission. RCW 9.46.095 and RCW 4.92.075 simply provide additional immunities to the individual defendants.

RCW 9.46.095 specifically grants immunity to the Gambling Commission *and* its individual members and employees for damage claims arising from their official duties:

Neither the Commission nor any member or members thereof shall be personally liable in any action at law for damages sustained by any person because of any acts performed or done, or omitted to be done, by the commission, or any employee of the commission, in the performance of his or her duties and in the administration of this title. RCW 9.46.095.

RCW 4.92.075, enacted as part of the statutes which abolished sovereign immunity, states that judgments entered against state officers and employees arising from the performance of their official duties “shall not become a lien upon any property of such officer, employee, or volunteer” and may only be satisfied from the state. Commissioners acting in their legislative capacity – even if they err – are entitled to immunity under RCW 9.46.095 for all tort liability, whether damages are sought under federal or state claims as are the staff who assist them, including Director Day.

Early in the present case the superior court held that the individual defendants were entitled to immunity for all tort claims under

RCW 9.46.095. CP at 113-15. A year later the superior court ruled correctly that the individual defendants were also entitled to quasi-legislative immunity for the constitutional claims brought under 42 U.S.C. § 1983 on the basis of collateral estoppel. RP at 61-62. The superior court further ruled correctly that the federal claims were barred by principles of res judicata because they could have raised the same claims in the federal lawsuit. RP at 62. The fact that RCW 9.46.095 and RCW 4.92.075 grant personal immunity to state officers and the Commission members does not mean that Gerow's claims arising under 42 U.S.C § 1983 survive. The superior court ruled correctly that the constitutional claims against the individual defendants are barred by legislative immunity under principles of collateral estoppel.

In the present case, none of the individual defendants, including the individual Commissioners or Director Day, have liability for the acts alleged to give rise to liability under 42 U.S.C. § 1983. The federal courts have previously determined that those acts arose as part of their exercise of quasi-legislative power to enact regulations of general application. The fact that they may also have personal immunity from judgment under RCW 9.46.095 and RCW 4.92.075 is immaterial.

5. Gerow has Failed to State a Constitutional Claim Against the State of Washington and the Gambling Commission

Neither a state nor a state agency has liability under 42 U.S.C. § 1983 because states and state agencies are not “persons” for purposes of imposing liability under 42 U.S.C. § 1983. *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986); and *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013). Only individual state officers and state employees can have liability under 42 U.S.C. § 1983. Gerow’s claims against the Gambling Commission therefore fail as the superior court correctly ruled.

6. Gerow’s First Amendment Claims Lack Merit

The federal district court expressly rejected the argument Gerow made in the federal lawsuit and is now, again, alleging that the 2008 regulations were motivated by an ongoing political bias on the part of the individual Commission who allegedly adopted the rules because of an ongoing desire to favor tribal gambling interests. The federal district court’s ruling in October 2008, that the 2008 regulations were enacted pursuant to the Commission’s legislative rule making function thereby

making the motives of the individual Commissioners irrelevant, collaterally estops Gerow from making that same argument here.⁷

The dismissal of Gerow's remaining constitutional claims follows from this principle. He argues that the Commission can "be liable for First Amendment violations when it engages in "retaliatory regulatory enforcement" of regulations, citing *CarePartners LLC v. Lashway*, 545 F.3d 867 (9th Cir. 2008). This argument also lacks merit. In *CarePartners*, the plaintiff claimed that a regulatory agency (the Washington State Department of Social and Health Services) retaliated against him when it summarily suspended his boarding home license in response to the owner's protected free speech. *Id.* at 871. The appellate court determined that the plaintiff met its initial burden of showing that the exercise of its free speech in opposition to proposed regulations was a substantial or motivating factor behind the state employee's decision to suspend the individual license held by the plaintiff to operate his business. *Id.* at 878.

⁷ Plaintiffs' constitutional claims are also barred by res judicata because the subject matter, the causes of action and the parties in the federal lawsuit and the present tort lawsuit are identical. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Therefore, any claims that plaintiff could have risen in the 2008 federal lawsuit, including claims of negligence and tortious interference, are also barred by the claim preclusion doctrine of res judicata.

However, in *CarePartners*, the state agency was exercising its quasi-judicial, not quasi-legislative, powers when it suspended the plaintiff's individual license.

The plaintiff in that case alleged that the agency took action to suspend plaintiff's individual license based upon an improper motive to deny the individual licensee his property right in his license because of the exercise of his First Amendment rights.⁸

In the present case the federal courts have determined that the Gambling Commission was exercising its legislative function when it enacted rules of general application to all manufacturers of gambling devices who wished to market a similar product to Gerow's VIP pull-tab machine. Because the Commissioners were exercising legislative rulemaking functions, they are immune from suit in a tort lawsuit arising from such rulemaking and other related regulatory actions.

7. Gerow's Equal Protection Claims and Violations of Due Process Lack Merit Irrespective of Collateral Estoppel

Gerow's entire equal protection argument is based upon the erroneous premise that since sovereign Native American tribes are

⁸ After remand by the federal district court and completion of discovery, the State in *CarePartners* renewed its motion for summary judgment. The Ninth Circuit Court of Appeals held that plaintiff's case of retaliation was "entirely speculative" and there was no specific admissible evidence in the record "to support their claims that the defendants sought to enforce the law on account of retaliatory animus." *CarePartners v. Lashway*, 2011 WL 1522475, 428 Fed. Appx. 734 (9th Cir. Apr. 21, 2011) (unpublished).

allowed to use “tribal lottery terminals” at tribal casinos, he should be allowed to make and market his device which he claims is substantially similar. CP at 42. This argument ignores the fact that plaintiff does not stand in a similar position to the tribes which have rights guaranteed by federal law under the Indian Gaming Regulatory Act. *Muddari v. Wash. State Gambling Comm’n*, 147 Wn. App. 590 614, 196 P.3d 153 (2008) (holding that the Fourteenth Amendment does not confer on private individuals rights equal to governmental entities such as a state, city or sovereign nation like an Indian tribe).

In *Mudarri*, the plaintiff, a private casino operator, sought a declaratory judgment for authorization to operate electronic scratch ticket lottery games at his private casino. In the alternative, he asked the court to declare invalid the compact between the state and the Puyallup tribe under which the tribe had the exclusive right to operate electronic scratch ticket games at its nearby casino. Just as Gerow argues in this case, the plaintiff in *Mudarri* argued that his rights to equal protection under the Fourteenth Amendment were violated because he and other private casino operators were treated differently than Native American tribes that operated gambling casinos. In upholding the dismissal of the plaintiff’s lawsuit, the Court of Appeals held that American Indian tribes’ “have inherent sovereignty” [which] includes immunity from suit “absent a clear waiver

by the tribe.” *Muddari*, 147 Wn. App. at 602-03 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 5 Pet. 1, 8 L Ed. 25 (1831); *Matheson v. Gregoire*, 129 Wn. App. 624, 632, 161 P.3d 486 (2007)). Because the plaintiff and the tribe “were not similarly situated persons,” the plaintiff’s claims of violation of equal protection failed as a matter of law.

Mudarri’s equal protection argument fails because he is not comparing himself to similarly situated persons. On the contrary, the [Spokane] Tribe, to which he attempts a comparison, is not such a “person.” The plain language of amendment XIV, §1, of the United States Constitution does not confer on private individuals rights equal to governmental entities such as the state, a city, or a sovereign nation like the Tribe, which is a political entity that “engag[es] in government-to-government relationships with the United States.

Muddari, 147 Wn. App. at 614 (citing *Foxworthy v. Puyallup Tribe of Indians Ass’n*, 141 Wn. App. 221, 226, 169 P.3d 53 (2007)). The same principles apply in the present case.

In the present case, the superior court also correctly dismissed Gerow’s claims that his right to due process of law was violated by the actions of the Commission. In RCW 9.46 the Legislature provided that citizens dissatisfied with the actions of the Commission have a right to a hearing before an administrative law judge conducted under the APA. RCW 9.46.140(4) and RCW 9.46.140(5). The Legislature further provided for a right of judicial review also conducted under the APA. RCW 9.46.095. Gerow pursued his statutory rights to challenge the

actions of the Commission under the APA and ultimately prevailed. He was not denied his due process of law.

The trial court did not err when it dismissed Gerow's claims alleging violation of his civil rights in violation of 42 U.S.C. § 1983.

C. The Trial Court Correctly Dismissed Gerow's Negligence Claims

Gerow alleges that the trial court erred in dismissing his claims of negligence because it failed to recognize the "special duty" owed to him and his company as the exclusive applicant for the ZDI upgrade to its VIP. As a preliminary matter the superior court held correctly that Director Day and the individual Commissioners are immune from liability under RCW 9.46.095. CP at 113-15. The superior court also correctly ruled that Gerow and ZDI had no special relationship with Director Day and members of the Commission that gives rise to a duty sufficient to support a claim of negligence against the Gambling Commission. RP (July 12, 2013) at 63; CP at 851-53.

The threshold determination in any claim of negligence is whether a duty is owed to the plaintiff. *Taylor v. Stevens Cnty.*, 111 Wn.2d 159, 163, 168, 759 P.2d 447 (1988). This determination is a question of law. *Donohoe v. State*, 135 Wn. App. 824, 833, 142 P.3d 654, 658 (2006) (citing *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128,

875 P.2d 621 (1994). *Accord, Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940, *review denied*, 131 Wn.2d 1016 (1997). The action fails if no duty exists to the plaintiff on the part of the defendant.

1. The Public Duty Doctrine Applies

Whether a government entity owes a duty to plaintiff turns on whether the defendant owes a duty to the plaintiff himself as opposed to the public at large. *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). “No liability may be imposed for a public official’s negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.* a duty to all is a duty to no one).” *Taylor*, 111 Wn.2d at 163 (quoting *J & B Dev. Co. v. King Cnty.*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)).⁹ The public duty doctrine “is simply a tool . . . [used] to ensure that governments are not saddled with greater liability than private actors as they conduct the people’s business.” *Munich v. Skagit Emergency Commc’n Ctr.*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012).

2. The “Special Relationship” Exception Does Not Apply

⁹ *Taylor* overruled the specific conclusion in *J & B Dev. Co.* that the issuance of a building permit created a special duty to a person alleging negligent issuance. *Taylor*, 111 Wn.2d at 166-72. *Taylor* did not change the legal analysis for determining whether there is a special relationship.

Liability for government agencies such as the Gambling Commission is precluded under the public duty doctrine unless the plaintiff can show one of the recognized exceptions to the public duty doctrine. *Donohoe*, 135 Wn. App. at 834 (and cases cited therein). One recognized exception is that a “special relationship” existed between the plaintiff and the government official. *Id.* at 835. In the present case, the superior court held correctly that the special relationship doctrine did not apply to the relationship between Gerow, the owner of a gambling business, and the Gambling Commission, the state agency charged by statute with the duty to regulate gambling in the state.

A special relationship between a government’s agents and a plaintiff exists sufficient to give rise to an actionable duty only if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public; (2) an express assurance given by the public official to the plaintiff; and (3) justifiable reliance on the assurance by the plaintiff. *E.g.*, *Munich*, 175 Wn.2d at 871. *See also Taylor*, 111 Wn.2d at 163; *Chambers-Castanes v. King Cnty.*, 100 Wn.2d 275, 285, 669 P.2d 451 (1983). For purposes of determining if the exception applies, an “express assurance” occurs only where an individual makes a direct inquiry and the government clearly sets forth incorrect information, the government

intends for the individual to rely on this information, and the individual does rely on it ‘to his detriment.’” *Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 854, 133 P.2d 458 (2006).

Gerow provided no evidence to support any of the three elements of the special relationship exception. First, there is no evidence that Mr. Day, other Commission staff, or the Office of the Governor had any direct contact or privity with Gerow or ZDI Gaming, Inc. that set them apart from any member of the public seeking approval to market a gambling device. Second, there is no evidence that Director Day, any Commission staff, or the Office of the Governor made any express assurance to the plaintiff. Third, Gerow could not justifiably rely upon any assurances made to him by a person not authorized to speak for the Commission and not authorized to adopt a rule. Only the Commission has rulemaking authority. Director Day and the Commission staff do not.

Even if Commission staff had told Gerow that his device complied with the applicable regulations and defendants do not concede that any such assurance was ever made, this is a statement of legal opinion which Gerow could not justifiably rely upon. Likewise, Governor Gregoire had authority to appoint members of the Commission under RCW 46.040, but she and her staff did not have authority to adopt rules on behalf of the Commission or to approve gambling devices for sale. There is no

evidence that any member of the Commission gave express assurances to Gerow. To the contrary, Gerow admitted that “the Director [Mr. Day] told him his upgrade did not comply with the rules.” CP at 787. The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a government entity to unlimited liability. *Taylor*, 111 Wn.2d at 170-171 (and cases cited therein). Subjecting the state Gambling Commission, its members and director to potential tort liability each time it takes regulatory action would do just that.

The superior court did not err in holding that the special relationship exception to the public duty doctrine did not apply. It properly dismissed plaintiff’s claim of negligence because no duty exists between the Commission and Gerow to support a claim of negligence.

D. The Trial Court Acted Correctly in Dismissing the Tortious Interference Claim Because Gerow Did Not Have a Valid Business Expectancy That the Commission Would Approve His Device

In his amended complaint, Gerow alleges that Director Day and Governor Gregoire intentionally interfered with ZDI’s license and limited its ability to produce new gambling device products. CP at 54. Gerow alleges that Director Day and Governor Gregoire interfered with ZDI’s business in order to benefit tribal casinos because tribal casinos made

large campaign contributions to Governor Gregoire, to the economic detriment of ZDI. CP at 981-86. The superior court dismissed the claim for tortious interference after determining that Gerow failed to satisfy the necessary elements of the claim because he did not have an enforceable business expectancy in the marketing of its device. RP at 54-55. In addition, Director Day and Commission staff are personally immune from any such claims under RCW 9.46.095.

The trial court's dismissal was correct. Gerow did not have a valid business expectancy that the Commission would adopt a particular rule or take a particular action as part of its regulation of gambling. Further, neither Director Day nor former Governor Gregoire had the authority to enact regulations concerning the approval or disapproval of his gambling device. Governor Gregoire and her staff took no part in the adoption of regulations or regulatory action that Gerow claims affected him adversely. CP at 116-17.

By statute the Gambling Commission employs a director "who shall be the administrator for the Commission in carrying out its powers and duties and who shall issue rules and regulations adopted by the Commission governing the activities that the Commission authorizes." RCW 9.46.080. The director employs a deputy director and assistant directors to assist him in carrying out the purposes and provision of the

Gambling Act. RCW 9.46.080. Director Day was involved in the decision not to approve ZDI's requested modification to its gambling device. The modification was not approved because, at the time, Director Day and the Commission staff determined that the upgrade did not comply with gambling regulations then in effect. As director, however, Mr. Day did not adopt any regulation that Gerow alleges affected ZDI's business. By statute, the Commissioners adopt all regulations. RCW 9.46.070(14). Also by statute the Commission "may deny an application, or suspend or revoke any license or permit issued by it, for any reason or reasons, it deems to be in the public interest." RCW 9.46.075. Persons aggrieved by the regulatory activity of the Commission have the option to pursue remedies available under the APA. RCW 9.46.140(4) and RCW 9.46.140(5).

The Governor does not adopt or approve gambling regulations nor did she approve or reject any manufacturer's proposed gambling device or equipment. Rather, the Governor appoints Commissioners with the consent of the Senate. RCW 9.46.040. There is no evidence that Governor Gregoire made any decision regarding Gerow's proposed

gambling device, nor did she issue any regulation, edict, or order affecting Gerow or ZDI.¹⁰

A claim for tortious interference with a contractual relationship or business expectancy requires proof of five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *Leingang v. Pierce Cnty. Medical Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997). In a tortious interference claim, “[a] complete failure of proof concerning any element necessarily renders all other facts immaterial.” *Janaszak*, 173 Wn. App. at 727. Intentional interference requires an improper objective or use of wrongful means that in fact causes injury to the plaintiff’s contractual relationship or business expectancy. Exercising in good faith one’s legal interest is not improper interference. *Leingang*, 131 Wn.2d at 157.

¹⁰ See Declaration of Christine Gregoire. CP at 116-17. After reviewing documents requested by Gerow from the former Governor’s office related to the tribal compacts in camera, the superior court ruled that the documents contained information gathered to help inform the Governor concerning policy choices and were protected by executive privilege. CP at 1313-14.

Gerow bases his claim for tortious interference against Director Day on the theory that he wrongfully interfered with a business expectancy by refusing to approve ZDI's equipment modification and prevented the development of gambling equipment technology by adopting gambling regulations in 2007-2008. Those regulations made it clear that the VIP with cash card option could not be approved.

As a preliminary matter, there is no evidence that Director Day knew of the existence of a valid business expectancy on the part of ZDI when the Commission refused to approve ZDI's equipment modification. The claim against Director Day fails on this basis alone. Even if Gerow demonstrated that Director Day had knowledge that he had a particular business expectation for ZDI, Gerow has no evidence that Director Day intentionally interfered with ZDI's business expectancy for an improper purpose or by improper means.

Gerow has presented no evidence to support his claim that Director Day acted outside the scope of his job duties and tortiously interfered with a business expectancy. Rather, the undisputed evidence establishes that Director Day was carrying out his job duties in good faith at the time ZDI's license application for the upgrade was denied. CP at 318. Further, this claim fails because Director Day does not adopt regulations; the Gambling Commission does. *Libera v. City of Port Angeles*, 178 Wn.

App. 669, 679, 316 P.3d 1064 (2013), (dismissing tortious interference claim where the plaintiff failed to show that a defendant “personally made the decision” to deny or delay the plaintiff’s permit application).

To establish tortious interference a plaintiff must allege more than an administrative agency decision negatively affected one’s business. All government regulation of business by its nature can negatively affect one’s business. Government regulation of business, by its nature, balances societal interests with individual economic interests and often has the potential of impacting an entity’s business expectancies. *See generally Nguyen v. State*, 144 Wn.2d 516, 29 P.3d 689 (2001).

Regulation of gambling is unique because, as the Washington Supreme Court recognized, regulation of gambling “lies at the heart of the state’s police power,” and all gambling is outlawed in the state unless expressly permitted by the Commission. *See Rousso*, 170 Wn.2d at 82. To that end, the Legislature expressly authorizes the Gambling Commission to regulate gambling in order to promote the “social welfare of the people by limiting the nature and scope of gambling activities by *strict regulation and control*.” RCW 9.46.010 (emphasis added). The Legislature expressly granted the Gambling Commission authority to deny any license or permit “for any reason, or reasons, it deems to be in the public interest.” RCW 9.46.075. In other words, the Gambling

Commission is authorized to take actions that may negatively impact those who promote and profit from gambling activities. Those impacted negatively by the actions of the Commission may seek review under the APA. RCW 9.46.140(4) and RCW 9.46.140(5). But they do not have a valid business expectancy sufficient to support a tort claim for intentional interference with business expectancy.

Gerow has the burden to establish not only intentional interference on the part of a governmental agency but also that the agency had a “duty of non-interference.” *Libera*, 178 Wn. App. at 676 (citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989)).

Intentional interference may be wrongful by reason of a statute or common law. *Id.* Here, Gerow cannot show that Director Day’s actions were wrongful by reason of any statute or common law. Instead, the evidence shows that Director Day was simply carrying out his duties as the director of the Gambling Commission. *Leingang*, 131 Wn.2d at 157 (“exercising in good faith one’s legal interest is not improper interference.”). By statute, the Commission has authority to deny an application or suspend or revoke any license or permit previously issued by it “for any reason . . . it deems to be in the public interest.”

RCW 9.46.075. The remedy available to a disappointed applicant is an appeal under the APA.¹¹

Gerow's citation to *Washington State Truckers Ass'n*, No. 47681-9-II, 2016 WL 555392, -- P.3d -- (Div. II., Feb. 6, 2016) in support of its position is misplaced. The business expectancies at issue in *Washington Trucking* were specific contracts between owner/operators of trucks and trucking equipment and three individual carriers who were subject to regulation by the State of Washington's Employment Security Division. The carriers filed suit after the agency audited the contracts and determined that the drivers were "employees" of the carriers, requiring the carriers to pay taxes on the owner/operator's behalf into the state's unemployment insurance fund. Statutes governing the assessment of unemployment insurance taxes provided for judicial review of the agency's decision in assessing taxes. The Court of Appeals held that statutes providing for administrative review of the agency's assessments "bars the carriers' tortious interference claims to the extent that the claims "are based on an allegation that the reclassification of the owner/operators

¹¹ Gerow has already received a remedy for what he claims were wrongful acts on the part of the Gambling Commission through his judicial appeal of the Commission's administrative actions. That appeal resulted in the vacation of the Commission's decision in 2005 to deny the marketing of his device and the invalidation of the regulations the Commission adopted in 2008. It also resulted in an award of attorney's fees since he was the prevailing party in an APA challenge. *See* RCW 4.84.350; CP at 1465. *See also Gerow*, 181 Wn. App. at 229. No law entitles Gerow to also obtain tort damages as an additional remedy.

as employees was improper” but held that dismissal on the pleadings was improper in that case in regard to potential evidence of improper motive. *Washington Trucking*, 2016 WL 555392 at *13.

In the present case the administrative proceedings which ultimately resulted in the setting aside of the Gambling Commissions regulations were not individual adjudications of specific contracts as were at issue in the *Washington Trucking* case. As the federal court held in its order dismissing Gerow’s tort claims in the federal lawsuit, the regulatory actions of the Gambling Commission in the present case were “akin “to the formulation of policy instead of ad hoc decision making” because the regulations were applicable to the public at large, even though the plaintiffs argued that they only affected them.” CP at 312-13. Unlike the adjudications that resulted in the tax assessments in *Washington Trucking*, the regulatory actions of the Gambling Commission “bore traditional hallmarks of legislation” because the Commission “exercised powers delegated to it by the State Legislature.” In adopted regulations that became part of the Washington Administrative Code. CP at 314.

Gerow argues that Director Day acted with an improper purpose because he allegedly entered into a behind-the-scenes agreement with the Spokane Tribe to prevent ZDI from marketing its gambling machines. However, Washington courts have consistently rejected similar claims of

“back-room deals” when, as here, the plaintiff fails to support such allegations with any evidence. *E.g., Libera*, 178 Wn. App. at 679-80 (dismissing tortious interference claim where plaintiff assumed, with no supporting evidence, that there was a behind-closed doors agreement to deny him a permit); *Cornish College of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 225, 242 P.3d 1 (2010) (dismissing tortious interference claim where plaintiff failed to support allegation that there had been “some kind of deal brewing behind the scenes.”)

Finally, even if Gerow could establish the first four *Leingang* elements, which it cannot, the claim still fails because there is no evidence of damages. Mr. Gerow and ZDI Gaming, Inc. carry the burden of making a threshold showing of pecuniary damages resulting from an alleged tortious interference with a business expectancy. *Tamosaitis v. Bechtel Nat’l. Inc.*, 182 Wn. App. 241, 248-253, 327 P.3d 1309 (2014) (affirming dismissal of summary judgment where plaintiff failed to establish a pecuniary loss).

By the end of 2014, only four ZDI machines were in operation in the state, and there may not be any machines currently in operation. CP at 1340-44. Plaintiff makes numerous allegations that revenue for his business and similarly situated non-tribal gambling businesses have declined in the recent past while business at tribal casinos has greatly

increased. CP at 981-95. It is speculation to suggest that the success of tribal gambling establishments in the same period that non-tribal slot machine businesses have had declining revenues is because Gerow was unable to market his VIP with the cash card option between 2008 and 2014. Any number of factors can cause consumers to favor tribal gambling establishments including more attractive surroundings, the presence of better quality restaurants and entertainment, or the ability of the patrons to use tobacco at tribal establishments. Gerow provides nothing more than mere speculation to suggest that a decline of non-tribal revenue from pull-tabs in recent years is due to his inability to market his VIP with a cash card option.

Gerow's tortious interference claim against former Governor Gregoire fails because the undisputed evidence shows that she had no involvement in the Gambling Commission decisions related to Gerow's gambling devices. CP at 116-18. *See Libera*, 178 Wn. App. at 679 (a bare assertion without evidence is not sufficient to establish an issue of material fact to preclude summary judgment). Similar to his allegations against Director Day, Gerow also argues that former Governor Gregoire held "secret negotiations" with Gambling Commissioners and pressured them to prevent approval of Gerow's gambling device. This claim should be dismissed because it is unsupported by any evidence. *Cornish College*,

158 Wn. App. at 225 (belief that some “behind the scenes” deal, without any evidence, is not sufficient to raise a genuine issue of material fact to defeat summary judgment).

Finally, Gerow bases his tortious interference claim against Director Day and former Governor Gregoire on a challenge to the validity of the Spokane Compact, a state-tribal agreement concerning tribal gambling which he alleges negatively impacted ZDI’s business (alleging that since sovereign Native American tribes are allowed to use “tribal lottery terminals” at tribal casinos, he should have been allowed to make and market his device which he claims is substantially similar). CP at 34, 699. This claim fails because, as explained above, Gerow does not stand in a similar position to the tribes which have rights guaranteed by federal law under the United States Constitution and the Indian Gaming Regulatory Act. *See Muddari*, 147 Wn. App. at 614. Further, it ignores the authority of the state to enter into compacts with the tribes. *Id.*

The superior court did not err when it dismissed Gerow’s claim of tortious interference with business expectancy.

V. CONCLUSION

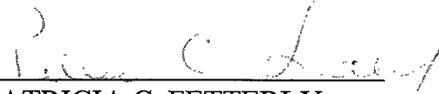
The superior court correctly dismissed Gerow’s federal claims based upon quasi-legislative immunity and collateral estoppel. The superior court correctly dismissed his state claims based upon statutory

immunity and res judicata, as well as a failure of proof of the elements of negligence and tortious interference.

This court should affirm the orders of the superior court that dismissed all claims in this lawsuit.

RESPECTFULLY SUBMITTED this 13 day of April, 2016.

ROBERT W. FERGUSON
Attorney General



PATRICIA C. FETTERLY
WSBA No. 8425
Assistant Attorney General
Attorneys for Respondents

PROOF OF SERVICE

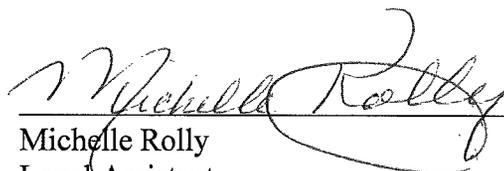
I declare that I caused to be served a copy of this document, which has been electronically filed with the Court of Appeals Division II, on all parties or their counsel of record on the date below as follows:

Joan K. Mell
III Branches Law PLLC
1033 Regents Boulevard, Suite 101
Fircrest, Washington 98466-6089

- US Mail Postage Prepaid via Consolidate Services
- ABC/Legal Messenger

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

DATED this 13th day of April, 2016, at Tumwater, WA.



Michelle Rolly
Legal Assistant

APPENDIX

42 U.S.C. § 1983 – pgs. 1, 3, 12 13 14 16 18 21 24 25 30

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wash. Const., art II, § 24 – pg. 4

LOTTERIES AND DIVORCE

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.

Laws of 1973, ch 218, § 1 – RCW 9.46.010 and 9.46.0325

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; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.

The legislature further declares that the raising of funds for the promotion of bona fide charitable or nonprofit organizations is in the public interest as is participation in such activities and social pastimes as are hereinafter in this chapter authorized.

The legislature further declares that the conducting of bingo, raffles, and amusement games and the operation of punch boards, pull tabs, card rooms, Mah Jongg, social card games, and other social pastimes, when conducted pursuant to the

provisions of this chapter and any rules and regulations adopted pursuant thereto, are hereby authorized, as are only such lotteries for which no valuable consideration has been paid or agreed to be paid as hereinafter in this chapter provided.

All 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.

RCW 4.84.350 – pg. 41

JUDICIAL REVIEW OF AGENCY ACTION—AWARD OF FEES AND EXPENSES

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars. Subsection (1) of this section shall not apply unless all parties challenging the agency action are qualified parties. If two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars. The court, in its discretion, may reduce the amount to be awarded pursuant to subsection (1) of this section, or deny any award, to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy.

RCW 9.46.0241 – pg. 6

"GAMBLING DEVICE"

"Gambling device," as used in this chapter, means: (1) Any device or mechanism the operation of which a right to money, credits, deposits or other things of value may be created, in return for a consideration, as the result of the operation of an element of chance, including, but not limited to slot machines, video pull-tabs, video poker, and other electronic games of chance; (2) any device or mechanism which, when operated for a consideration, does not return the same value or thing of value for the same consideration upon each operation thereof; (3) any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; and (4) any subassembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation. In the application of this definition, a pinball machine or similar mechanical amusement device which confers only an immediate and unrecorded right of replay on players thereof, which does not contain any mechanism which varies the chance of winning free games or the number of free games which may be won or a mechanism or a chute for dispensing coins or a facsimile thereof, and which prohibits multiple winnings depending upon the number of coins inserted and requires the playing of five balls individually upon the insertion of a

nickel or dime, as the case may be, to complete any one operation thereof, shall not be deemed a gambling device: PROVIDED, That owning, possessing, buying, selling, renting, leasing, financing, holding a security interest in, storing, repairing and transporting such pinball machines or similar mechanical amusement devices shall not be deemed engaging in professional gambling for the purposes of this chapter and shall not be a violation of this chapter: PROVIDED FURTHER, That any fee for the purchase or rental of any such pinball machines or similar amusement devices shall have no relation to the use to which such machines are put but be based only upon the market value of any such machine, regardless of the location of or type of premises where used, and any fee for the storing, repairing and transporting thereof shall have no relation to the use to which such machines are put, but be commensurate with the cost of labor and other expenses incurred in any such storing, repairing and transporting.

RCW 9.46.0273 – pg. 5

"PUNCHBOARDS," "PULL-TABS"

"Punchboards" and "pull-tabs," as used in this chapter, shall be given their usual and ordinary meaning as of July 16, 1973, except that such definition may be revised by the commission pursuant to rules and regulations promulgated pursuant to this chapter.

RCW 9.46.0325 – pg. 5, 6

SOCIAL CARD GAMES, PUNCHBOARDS, PULL-TABS AUTHORIZED

The legislature hereby authorizes any person, association or organization operating an established business primarily engaged in the selling of food or drink for consumption on the premises to conduct social card games and to utilize punchboards and pull-tabs as a commercial stimulant to such business when licensed and utilized or operated pursuant to the provisions of this chapter and rules and regulations adopted pursuant thereto.

RCW 9.46.010 pg. 4, 5, 39

LEGISLATIVE DECLARATION

The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.

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; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement

rather than for profit, do not maliciously affect the public, and do not breach the peace.

The legislature further declares that the raising of funds for the promotion of bona fide charitable or nonprofit organizations is in the public interest as is participation in such activities and social pastimes as are hereinafter in this chapter authorized.

The legislature further declares that the conducting of bingo, raffles, and amusement games and the operation of punchboards, pull-tabs, card games and other social pastimes, when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto, are hereby authorized, as are only such lotteries for which no valuable consideration has been paid or agreed to be paid as hereinafter in this chapter provided.

The legislature further declares that fishing derbies shall not constitute any form of gambling and shall not be considered as a lottery, a raffle, or an amusement game and shall not be subject to the provisions of this chapter or any rules and regulations adopted hereunder.

The legislature further declares that raffles authorized by the fish and wildlife commission involving hunting big game animals or wild turkeys shall not be subject to the provisions of this chapter or any rules and regulations adopted hereunder, with the exception of this section and RCW 9.46.400.

All 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.

RCW 9.46.040 – pg. 4, 36

GAMBLING COMMISSION-MEMBERS-APPOINTMENT-VACANCIES, FILLING

There shall be a commission, known as the "Washington state gambling commission", consisting of five members appointed by the governor with the consent of the senate. The members of the commission shall be appointed within thirty days of July 16, 1973 for terms beginning July 1, 1973, and expiring as follows: One member of the commission for a term expiring July 1, 1975; one member of the commission for a term expiring July 1, 1976; one member of the commission for a term expiring July 1, 1977; one member of the commission for a term expiring July 1, 1978; and one member of the commission for a term expiring July 1, 1979; each as the governor so determines. Their successors, all of whom shall be citizen members appointed by the governor with the consent of the senate, upon being appointed and qualified, shall serve six year terms: PROVIDED, That no member of the commission who has served a full six year term shall be eligible for reappointment. In case of a vacancy, it shall be filled by appointment by the governor for the unexpired portion of the term in which said vacancy occurs. No vacancy in the membership of the commission shall impair the right of the remaining member or members to act, except as in RCW 9.46.050(2) provided.

In addition to the members of the commission there shall be four ex officio members without vote from the legislature consisting of: (1) Two members of the senate, one from the majority political party and one from the minority political party, both to be appointed by the president of the senate; (2) two members of the house of representatives, one from the

majority political party and one from the minority political party, both to be appointed by the speaker of the house of representatives; such appointments shall be for the term of two years or for the period in which the appointee serves as a legislator, whichever expires first; members may be reappointed; vacancies shall be filled in the same manner as original appointments are made. Such ex officio members who shall collect data deemed essential to future legislative proposals and exchange information with the board shall be deemed engaged in legislative business while in attendance upon the business of the board and shall be limited to such allowances therefor as otherwise provided in RCW 44.04.120, the same to be paid from the "gambling revolving fund" as being expenses relative to commission business.

RCW 9.46.070(14) – pg. 5, 36

GAMBLING COMMISSION—POWERS AND DUTIES

The commission shall have the following powers and duties:

(1) To authorize and issue licenses for a period not to exceed one year to bona fide charitable or nonprofit organizations approved by the commission meeting the requirements of this chapter and any rules and regulations adopted pursuant thereto permitting said organizations to conduct bingo games, raffles, amusement games, and social card games, to utilize punchboards and pull-tabs in accordance with the provisions of this chapter and any rules and regulations adopted pursuant thereto and to revoke or suspend said licenses for violation of any provisions of this chapter or any rules and regulations adopted pursuant thereto: PROVIDED, That the commission shall not deny a license to an otherwise qualified applicant in an effort to limit the number of licenses to be issued: PROVIDED FURTHER, That the commission or director shall not issue, deny, suspend, or revoke any license because of considerations of race, sex, creed, color, or national origin: AND PROVIDED FURTHER, That the commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission;

(2) To authorize and issue licenses for a period not to exceed one year to any person, association, or organization operating a business primarily engaged in the selling of items of food or drink for consumption on the premises, approved by the commission meeting the requirements of this chapter and any rules and regulations adopted pursuant thereto permitting said person, association, or organization to utilize punchboards and pull-tabs and to conduct social card games as a commercial stimulant in accordance with the provisions of this chapter and any rules and regulations adopted pursuant thereto and to revoke or suspend said licenses for violation of any provisions of this chapter and any rules and regulations adopted pursuant thereto: PROVIDED, That the commission shall not deny a license to an otherwise qualified applicant in an effort to limit the number of licenses to be issued: PROVIDED FURTHER, That the commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission;

(3) To authorize and issue licenses for a period not to exceed one year to any person, association, or organization approved by the commission meeting the requirements of this chapter and meeting the requirements of any rules and regulations adopted by the commission pursuant to this chapter

as now or hereafter amended, permitting said person, association, or organization to conduct or operate amusement games in such manner and at such locations as the commission may determine. The commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission;

(4) To authorize, require, and issue, for a period not to exceed one year, such licenses as the commission may by rule provide, to any person, association, or organization to engage in the selling, distributing, or otherwise supplying or in the manufacturing of devices for use within this state for those activities authorized by this chapter. The commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission;

(5) To establish a schedule of annual license fees for carrying on specific gambling activities upon the premises, and for such other activities as may be licensed by the commission, which fees shall provide to the commission not less than an amount of money adequate to cover all costs incurred by the commission relative to licensing under this chapter and the enforcement by the commission of the provisions of this chapter and rules and regulations adopted pursuant thereto: PROVIDED, That all licensing fees shall be submitted with an application therefor and such portion of said fee as the commission may determine, based upon its cost of processing and investigation, shall be retained by the commission upon the withdrawal or denial of any such license application as its reasonable expense for processing the application and investigation into the granting thereof: PROVIDED FURTHER, That if in a particular case the basic license fee established by the commission for a particular class of license is less than the commission's actual expenses to investigate that particular application, the commission may at any time charge to that applicant such additional fees as are necessary to pay the commission for those costs. The commission may decline to proceed with its investigation and no license shall be issued until the commission has been fully paid therefor by the applicant: AND PROVIDED FURTHER, That the commission may establish fees for the furnishing by it to licensees of identification stamps to be affixed to such devices and equipment as required by the commission and for such other special services or programs required or offered by the commission, the amount of each of these fees to be not less than is adequate to offset the cost to the commission of the stamps and of administering their dispersal to licensees or the cost of administering such other special services, requirements or programs;

(6) To prescribe the manner and method of payment of taxes, fees and penalties to be paid to or collected by the commission;

(7) To require that applications for all licenses contain such information as may be required by the commission: PROVIDED, That all persons (a) having a managerial or ownership interest in any gambling activity, or the building in which any gambling activity occurs, or the equipment to be used for any gambling activity, or (b) participating as an employee in the operation of any gambling activity, shall be listed on the application for the license and the applicant shall certify on the application, under oath, that the persons named on the application are all of the persons known to have an interest in any gambling activity, building, or equipment by the person making such application: PROVIDED FURTHER, That the commission shall require fingerprinting and national criminal history background checks on any persons seeking licenses, certifications, or

permits under this chapter or of any person holding an interest in any gambling activity, building, or equipment to be used therefor, or of any person participating as an employee in the operation of any gambling activity. All national criminal history background checks shall be conducted using fingerprints submitted to the United States department of justice-federal bureau of investigation. The commission must establish rules to delineate which persons named on the application are subject to national criminal history background checks. In identifying these persons, the commission must take into consideration the nature, character, size, and scope of the gambling activities requested by the persons making such applications;

(8) To require that any license holder maintain records as directed by the commission and submit such reports as the commission may deem necessary;

(9) To require that all income from bingo games, raffles, and amusement games be recorded and reported as established by rule or regulation of the commission to the extent deemed necessary by considering the scope and character of the gambling activity in such a manner that will disclose gross income from any gambling activity, amounts received from each player, the nature and value of prizes, and the fact of distributions of such prizes to the winners thereof;

(10) To regulate and establish maximum limitations on income derived from bingo. In establishing limitations pursuant to this subsection the commission shall take into account (a) the nature, character, and scope of the activities of the licensee; (b) the source of all other income of the licensee; and (c) the percentage or extent to which income derived from bingo is used for charitable, as distinguished from nonprofit, purposes. However, the commission's powers and duties granted by this subsection are discretionary and not mandatory;

(11) To regulate and establish the type and scope of and manner of conducting the gambling activities authorized by this chapter, including but not limited to, the extent of wager, money, or other thing of value which may be wagered or contributed or won by a player in any such activities;

(12) To regulate the collection of and the accounting for the fee which may be imposed by an organization, corporation, or person licensed to conduct a social card game on a person desiring to become a player in a social card game in accordance with RCW 9.46.0282;

(13) To cooperate with and secure the cooperation of county, city, and other local or state agencies in investigating any matter within the scope of its duties and responsibilities;

(14) In accordance with RCW 9.46.080, to adopt such rules and regulations as are deemed necessary to carry out the purposes and provisions of this chapter. All rules and regulations shall be adopted pursuant to the administrative procedure act, chapter 34.05 RCW;

(15) To set forth for the perusal of counties, city-counties, cities and towns, model ordinances by which any legislative authority thereof may enter into the taxing of any gambling activity authorized by this chapter;

(16)(a) To establish and regulate a maximum limit on salaries or wages which may be paid to persons employed in connection with activities conducted by bona fide charitable or nonprofit organizations and authorized by this chapter, where payment of such persons is allowed, and to regulate and establish maximum limits for other expenses in connection with such authorized activities, including but not limited to rent or lease payments.

However, the commissioner's powers and duties granted by this subsection are discretionary and not mandatory.

(b) In establishing these maximum limits the commission shall take into account the amount of income received, or expected to be received, from the class of activities to which the limits will apply and the amount of money the games could generate for authorized charitable or nonprofit purposes absent such expenses. The commission may also take into account, in its discretion, other factors, including but not limited to, the local prevailing wage scale and whether charitable purposes are benefited by the activities;

(17) To authorize, require, and issue for a period not to exceed one year such licenses or permits, for which the commission may by rule provide, to any person to work for any operator of any gambling activity authorized by this chapter in connection with that activity, or any manufacturer, supplier, or distributor of devices for those activities in connection with such business. The commission may authorize the director to temporarily issue or suspend licenses subject to final action by the commission. The commission shall not require that persons working solely as volunteers in an authorized activity conducted by a bona fide charitable or bona fide nonprofit organization, who receive no compensation of any kind for any purpose from that organization, and who have no managerial or supervisory responsibility in connection with that activity, be licensed to do such work. The commission may require that licensees employing such unlicensed volunteers submit to the commission periodically a list of the names, addresses, and dates of birth of the volunteers. If any volunteer is not approved by the commission, the commission may require that the licensee not allow that person to work in connection with the licensed activity;

(18) To publish and make available at the office of the commission or elsewhere to anyone requesting it a list of the commission licensees, including the name, address, type of license, and license number of each licensee;

(19) To establish guidelines for determining what constitutes active membership in bona fide nonprofit or charitable organizations for the purposes of this chapter;

(20) To renew the license of every person who applies for renewal within six months after being honorably discharged, removed, or released from active military service in the armed forces of the United States upon payment of the renewal fee applicable to the license period, if there is no cause for denial, suspension, or revocation of the license;

(21) To issue licenses under subsections (1) through (4) of this section that are valid for a period of up to eighteen months, if it chooses to do so, in order to transition to the use of the business licensing services program through the department of revenue; and

(22) To perform all other matters and things necessary to carry out the purposes and provisions of this chapter.

GAMBLING COMMISSION—DENIAL, SUSPENSION, OR
REVOCATION OF LICENSE, PERMIT—OTHER
PROVISIONS NOT APPLICABLE

The commission may deny an application, or suspend or revoke any license or permit issued by it, for any reason or reasons, it deems to be in the public interest. These reasons shall include, but not be limited to, cases wherein the applicant or licensee, or any person with any interest therein:

(1) Has violated, failed or refused to comply with the provisions, requirements, conditions, limitations or duties imposed by chapter 9.46 RCW and any amendments thereto, or any rules adopted by the commission pursuant thereto, or when a violation of any provision of chapter 9.46 RCW, or any commission rule, has occurred upon any premises occupied or operated by any such person or over which he or she has substantial control;

(2) Knowingly causes, aids, abets, or conspires with another to cause, any person to violate any of the laws of this state or the rules of the commission;

(3) Has obtained a license or permit by fraud, misrepresentation, concealment, or through inadvertence or mistake;

(4) Has been convicted of, or forfeited bond upon a charge of, or pleaded guilty to, forgery, larceny, extortion, conspiracy to defraud, willful failure to make required payments or reports to a governmental agency at any level, or filing false reports therewith, or of any similar offense or offenses, or of bribing or otherwise unlawfully influencing a public official or employee of any state or the United States, or of any crime, whether a felony or misdemeanor involving any gambling activity or physical harm to individuals or involving moral turpitude;

(5) Denies the commission or its authorized representatives, including authorized local law enforcement agencies, access to any place where a licensed activity is conducted or who fails promptly to produce for inspection or audit any book, record, document or item required by law or commission rule;

(6) Shall fail to display its license on the premises where the licensed activity is conducted at all times during the operation of the licensed activity;

(7) Makes a misrepresentation of, or fails to disclose, a material fact to the commission;

(8) Fails to prove, by clear and convincing evidence, that he, she or it is qualified in accordance with the provisions of this chapter;

(9) Is subject to current prosecution or pending charges, or a conviction which is under appeal, for any of the offenses included under subsection (4) of this section: PROVIDED, That at the request of an applicant for an original license, the commission may defer decision upon the application during the pendency of such prosecution or appeal;

(10) Has pursued or is pursuing economic gain in an occupational manner or context which is in violation of the criminal or civil public policy of this state if such pursuit creates probable cause to believe that the participation of such person in gambling or related activities would be inimical to the proper operation of an authorized gambling or related activity in this state. For the purposes of this section, occupational manner or context

shall be defined as the systematic planning, administration, management or execution of an activity for financial gain;

(11) Is a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates probable cause to believe that the association is of such a nature as to be inimical to the policy of this chapter or to the proper operation of the authorized gambling or related activities in this state. For the purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain utilizing such methods as are deemed criminal violations of the public policy of this state. A career offender cartel shall be defined as any group of persons who operate together as career offenders.

For the purpose of reviewing any application for a license and for considering the denial, suspension or revocation of any license the gambling commission may consider any prior criminal conduct of the applicant or licensee and the provisions of RCW 9.95.240 and of chapter 9.96A RCW shall not apply to such cases.

RCW 9.46.080 – pg. 35, 36

**GAMBLING COMMISSION—ADMINISTRATOR—STAFF—
RULES AND REGULATIONS—SERVICE CONTRACTS**

The commission shall employ a full time director, who shall be the administrator for the commission in carrying out its powers and duties and who shall issue rules and regulations adopted by the commission governing the activities authorized hereunder and shall supervise commission employees in carrying out the purposes and provisions of this chapter. In addition, the director shall employ a deputy director, not more than three assistant directors, together with such investigators and enforcement officers and such staff as the commission determines is necessary to carry out the purposes and provisions of this chapter. The director, the deputy director, the assistant directors, and personnel occupying positions requiring the performing of undercover investigative work shall be exempt from the provisions of chapter 41.06 RCW, as now law or hereafter amended. Neither the director nor any commission employee working therefor shall be an officer or manager of any bona fide charitable or bona fide nonprofit organization, or of any organization which conducts gambling activity in this state.

The director, subject to the approval of the commission, is authorized to enter into agreements on behalf of the commission for mutual assistance and services, based upon actual costs, with any state or federal agency or with any city, town, or county, and such state or local agency is authorized to enter into such an agreement with the commission. If a needed service is not available from another agency of state government within a reasonable time, the director may obtain that service from private industry.

RCW 9.46.095 – pg. 22, 23, 24, 25, 29, 35

**GAMBLING COMMISSION—PROCEEDINGS AGAINST,
JURISDICTION—IMMUNITY FROM LIABILITY**

No court of the state of Washington other than the superior court of Thurston county shall have jurisdiction over any action or proceeding against the commission or any member thereof for anything done or omitted to be done in or arising out of the performance of his or her duties under this title: PROVIDED, That an appeal from an adjudicative proceeding involving a final decision of the commission to deny, suspend, or revoke a license shall be governed by chapter 34.05 RCW, the Administrative Procedure Act.

Neither the commission nor any member or members thereof shall be personally liable in any action at law for damages sustained by any person because of any acts performed or done, or omitted to be done, by the commission or any member of the commission, or any employee of the commission, in the performance of his or her duties and in the administration of this title.

RCW 9.46.140(4)(5) – pg. 29, 36, 40

**GAMBLING COMMISSION—INVESTIGATIONS—
INSPECTIONS—HEARING AND SUBPOENA POWER—
ADMINISTRATIVE LAW JUDGES**

(1) The commission or its authorized representative may:

(a) Make necessary public or private investigations within or outside of this state to determine whether any person has violated or is about to violate this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder; and

(b) Inspect the books, documents, and records of any person lending money to or in any manner financing any license holder or applicant for a license or receiving any income or profits from the use of such license for the purpose of determining compliance or noncompliance with the provisions of this chapter or the rules and regulations adopted pursuant thereto.

(2) For the purpose of any investigation or proceeding under this chapter, the commission or an administrative law judge appointed under chapter 34.12 RCW may conduct hearings, administer oaths or affirmations, or upon the commission's or administrative law judge's motion or upon request of any party may subpoena witnesses, compel attendance, take depositions, take evidence, or require the production of any matter which is relevant to the investigation or proceeding, including but not limited to the existence, description, nature, custody, condition, or location of any books, documents, or other tangible things, or the identity or location of persons having knowledge or relevant facts, or any other matter reasonably calculated to lead to the discovery of material evidence.

(3) Upon failure to obey a subpoena or to answer questions propounded by the administrative law judge and upon reasonable notice to

all persons affected thereby, the director may apply to the superior court for an order compelling compliance.

(4) The administrative law judges appointed under chapter 34.12 RCW may conduct hearings respecting the suspension, revocation, or denial of licenses, who may administer oaths, admit or deny admission of evidence, compel the attendance of witnesses, issue subpoenas, issue orders, and exercise all other powers and perform all other functions set out in RCW 34.05.446, 34.05.449, and 34.05.452.

(5) Except as otherwise provided in this chapter, all proceedings under this chapter shall be in accordance with the Administrative Procedure Act, chapter 34.05 RCW.

RCW 9.46.310 – pg. 6

LICENSES FOR MANUFACTURE, SALE, DISTRIBUTION, OR SUPPLY OF GAMBLING DEVICES

No person shall manufacture, and no person shall sell, distribute, furnish or supply to any other person, any gambling device, including but not limited to punchboards and pull-tabs, in this state, or for use within this state, without first obtaining a license to do so from the commission under the provisions of this chapter.

Such licenses shall not be issued by the commission except respecting devices which are designed and permitted for use in connection with activities authorized under this chapter: PROVIDED, That this requirement for licensure shall apply only insofar as the commission has adopted, or may adopt, rules implementing it as to particular categories of gambling devices and related equipment.

RCW 34.05.570 – pg. 11

JUDICIAL REVIEW

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights

or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

- (i) Unconstitutional;
- (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
- (iii) Arbitrary or capricious; or
- (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

WAC 230-06-003 – pg. 11, 12, 13, 15

DEFINING "CASH"

"Cash," when used as a noun in this title, means currency in the form of coins or bills issued by the government of the United States or Canada only and does not include electronic, digital or other representations of money or other methods of payment.

WAC 230-06-050 – pg. 6

REVIEW OF ELECTRONIC OR MECHANICAL GAMBLING EQUIPMENT

(1) Persons who wish to submit gambling equipment, supplies, services, or games for our review to verify compliance with chapter 9.46 RCW and Title 230

WAC must pay the application deposit before we perform the review. They must also reimburse us for any additional costs of the review.

(2) We may require manufacturers to submit certain electronic or mechanical gambling equipment for review. The equipment must meet technical standards for compliance, accuracy, security, and integrity. To allow for continued testing and training, staff may keep any equipment submitted for review for as long as the equipment remains in play in Washington. The manufacturers must reimburse us for any costs of the review. The commissioners and commission staff are not liable for any damage to equipment while in our possession.

(3) Licensees must operate equipment identical to the version the director or director's designee approved.

(4) If persons submitting equipment do not agree with the director or director's designee's decision, they may file a petition for declaratory order with the commission to be heard as a full review (*de novo*) by an administrative law judge, according to RCW 34.05.240 and chapter 230-17 WAC.

WAC 230-12-050(2) (repealed 2008) – pg. 6

EXTENSION OF CREDIT, LOANS, OR GIFTS PROHIBITED— LIMITED EXCEPTION

No licensee, member or employee thereof shall extend credit, make a loan, or grant a gift to any person playing in an authorized gambling

activity, or which enables a person to play in an authorized gambling activity.

Credit and loans prohibited—Exceptions.

(2) The consideration required to participate in the gambling activity shall be collected in full, by cash, check, or electronic point-of-sale bank transfer, prior to participation, with the following exceptions:

Punch boards/pull-tabs.

(a) The consideration paid for the opportunity to play a punch board or pull-tab series may be collected immediately after the play is completed only when such consideration is ten dollars or less;

Charitable/nonprofit organization's billing system for members.

(b) When a bona fide charitable or bona fide nonprofit organization conducting any of the activities authorized by chapter 9.46 RCW or commission rules has a regular billing system for all of the activities of its members with such organization, such billing system may be utilized in connection with the playing of any of the activities authorized hereunder if:

(i) The playing of such activity is limited to regular members of such organization who have become regular members prior to the commencement of such activity and whose qualifications for membership were not dependent upon, or in any way related to, the playing of such activity; and

(ii) The director has given prior written consent to the use of such billing system in connection with the conduct of activities authorized under these rules.

Raffle tickets purchased with credit cards.

(c) Charitable or nonprofit organizations utilizing credit cards, issued by a state and/or federally regulated financial institution, for payment to participate in raffles.

WAC 230-12-316 (repealed 2008) – pg. 6

**ELECTRONIC OR MECHANICAL EQUIPMENT
REVIEW**

A licensee must submit electronic or mechanical gambling equipment to the director for review to verify compliance with chapter 9.46 RCW and Title 230 WAC prior to the sale, lease or operation of such equipment. The equipment shall meet technical standards for compliance, accuracy, security and integrity. Persons not licensed by the commission may also request equipment review to verify compliance with state laws and rules.

(1) Manufacturers may be required to submit electronic or mechanical gambling equipment for review.

(a) To allow for continued testing and training, any equipment that is submitted for review under this section may be kept by the director for as long as the equipment remains out for play in the state of Washington.

(b) The gambling commission and staff are not liable for any damage to equipment while in their possession.

(2) Fees for review shall be as set forth in WAC 230-12-315.

(3) Equipment operated in Washington state must be identical to the version reviewed by the director.

(4) Equipment in operation on July 1, 2003, may continue in operation pending review by the director.

(5) If the person submitting such equipment does not agree with the director's decision, a petition for declaratory order may be filed with the commission to be heard de novo by an administrative law judge designated by the commission, pursuant to RCW 34.05.240 and WAC 230-50-850.

WAC 230-14-045 – pg. 6

AUTHORIZED PULL-TAB DISPENSERS

- (1) Authorized pull-tab dispensers must:
 - (a) Be made by a licensed manufacturer; and
 - (b) Conspicuously display a stamp, seal, or label identifying the manufacturer, city, and state where manufactured; and
 - (c) Be stamped with a serial number on the case.
- (2) Perforated window type pull-tab dispensers must:
 - (a) Have a resettable counter visible to the customer indicating the number of pull-tabs left in the dispenser; or
 - (b) Be made so that players can:
 - (i) Clearly see each pull-tab in the dispenser, except for that area at the bottom, not more than one inch in height, covered for security or mechanical reasons; and
 - (ii) Estimate how many pull-tabs remain within the dispenser using permanent markings which divide the pull-tabs remaining into divisions of approximately twenty-five tabs.
- (3) "Jar" or "banded" type pull-tab dispensers must:
 - (a) Have a resettable counter visible to the player indicating the number of jar or banded tabs left in the dispenser; or
 - (b) Be made so that players can clearly see all jar or banded tabs or jar tab bundles within the dispenser.
- (4) Dispensers with bill acceptors or similar mechanisms must inform the player if they do not return change.

WAC 230-14-047 – pg. 11, 12, 13

STANDARDS FOR ELECTRONIC VIDEO PULL-TAB DISPENSERS

Electronic video pull-tab dispensers must be approved by us prior to use, meet the requirements below, and may incorporate only the features below and not perform additional functions.

- (1) Electronic video pull-tab dispensers must dispense a paper pull-tab as defined in WAC 230-14-010 and follow the rules for:
 - (a) Pull-tabs; and
 - (b) Flares; and
 - (c) Authorized pull-tab dispensers.
- (2) Electronic video pull-tab dispensers that use a reading and displaying function must:
 - (a) Use a video monitor for entertainment purposes only; and

(b) Open all, or a portion of, the pull-tab in order to read encoded data that indicates the win or loss of the pull-tab if the dispenser is equipped to automatically open pull-tabs; and

(c) Dispense the pull-tab to the player and not retain any portion of the pull-tab; and

(d) Read the correct cash award from the pull-tab either when it is dispensed or when the pull-tab is reinserted into the dispenser; and

(e) Display the cash award from the pull-tab, one pull-tab at a time; and

(f) Provide:

(i) An electronic accounting of the number of pull-tabs dispensed; and

(ii) A way to identify the software version and name; and

(iii) A way to access and verify approved components; and

(iv) Security on the dispenser to prevent unauthorized access to graphic and prize amount displays.

(3) Gift certificates or gift cards used in electronic video pull-tab dispensers must:

(a) Be purchased with cash, check or electronic point-of sale bank transfer before use in the dispenser; and

(b) Be convertible to cash at any time during business hours; and

(c) Subtract the cash value for the purchase of the pull-tab one pull-tab at a time.

(4) Electronic video pull-tab dispensers that accept cash cards may award any pull-tab cash prize of twenty dollars or less onto the cash card.

WAC 230-16-001 – pg. 6

MANUFACTURERS, DISTRIBUTORS, AND GAMBLING SERVICE SUPPLIERS MUST ENSURE REPRESENTATIVES ARE LICENSED

(1) A licensed manufacturer, distributor, or gambling service supplier must not allow an unlicensed person to sell, promote, or provide its gambling equipment, or supplies, or to supervise those who do, and must take all measures necessary to prevent an unlicensed person from doing so.

(2) A licensed manufacturer must notify us in writing before a manufacturer representative begins representing them.

WAC 230-30-070 (repealed 2008) – pg. 8

CONTROL OF PRIZES—RESTRICTIONS—BONUS PRIZES— DISPLAYING—PROCEDURES FOR AWARDING

Punch board and pull-tab prizes shall be closely controlled to ensure players are not defrauded.

(1) All prizes from the operation of punch boards and pull-tabs shall be awarded in cash or in merchandise. No licensee shall offer to pay cash in lieu of merchandise prizes which may be won.

(2) Additional chances on a punch board or pull-tab game may not be awarded as a prize. Provided, That prizes may involve the opportunity to

advance and win a larger prize on the same punch board or pull-tab game as set forth in subsection (4) of this section.

(3) A bonus prize is a prize offered in a bonus pull-tab game, defined in WAC 230-30-040(1). A step-up prize is a prize offered on a punch board. The awarding of these prizes involves an immediate, additional opportunity to advance to a section of the game to determine the prize.

(4) On games where players advance, the bonus or step-up prizes may not be less than the highest prize available, which might otherwise have been won by the punch or pull-tab for which the opportunity was awarded. Each punch board or pull-tab game offering bonus or step-up prizes must clearly indicate on its flare the terms and conditions under which the bonus or step-up prize may be won, including the amount of the bonus or step-up prize.

(5) The licensee shall display prizes so that a customer can easily determine which prizes are available from any particular punch board or pull-tab series or device operated or located upon the premises. In addition, the following requirements apply.

(a) Merchandise prizes shall be displayed as follows:

(i) In the immediate vicinity of the punch board or pull-tab series and in plain view: Provided, That games that offer merchandise prizes that are "surprises" may be wrapped in some way so players are unable to identify what the prize is until opened;

(ii) If size or space constraints do not allow the prize to be displayed as provided in (a)(i) of this subsection, the merchandise prize may be displayed elsewhere on the premises provided that a specific reference to that actual prize is noted on the flare; or

(iii) If the merchandise prize cannot be displayed on the premises, an accurate description and/or photograph of the prize must be displayed in plain view on or immediately adjacent to the flare.

(b) Cash prizes shall be clearly represented on the prize flare;

(c) Combination cash and merchandise prizes must meet the requirements of both (a) and (b) of this subsection;

(6) The following procedures apply to the removal of prizes from the game flare and the presentation of prizes to winning players:

(a) Upon determination of a winner of a merchandise prize, the licensee shall immediately remove that prize from the flare and present the prize to the winner upon demand;

(b) Upon determination of a winner of any cash prize over twenty dollars, or of any merchandise prize with a retail value over twenty dollars, the licensee shall permanently and conspicuously delete all references to that prize from any flare, punch board, or pull-tab dispensing device upon which such reference may appear, and from any other list, sign, or notice which may be posted, in such a manner that all future customers will know the prize is no longer available. On step-up punch boards and bonus pull-tab games, once all opportunities in a section of the flare have been won, all references to prizes no longer available to be won must be deleted on the flare. Operators may correct an inadvertently deleted prize by noting on the flare that such prize is still available. Such reference shall be permanently and conspicuously deleted when the prize is actually awarded. Failure to permanently and conspicuously delete a prize from the flare may result in the director initiating actions to revoke a license for violation of RCW 9.46.190 (defrauding a participant). The prize shall be paid or delivered to

the winner only after all reference to such prize has been deleted from the flare.

(7) Payment of prizes. The licensee must pay or award to the customer or player playing the punch board or pull-tab series all such prizes that are required to be, but have not been, deleted from the flare when the punch board or pull-tab series is completely played out.

(8) Record of winners. When any person wins a cash prize of over twenty dollars or wins a merchandise prize with a retail value of more than twenty dollars from the play of any punch board or pull-tab series, the licensee or licensee's representative shall make a record of the win. The record of the win shall be made in the following manner:

(a) The winners shall be required to print their name and date of birth, in ink, upon the side of the winning punch or tab opposite the winning symbol(s);

(b) The licensee or their representative shall then verify the winner's identity and record the date and initial the winning punch or tab; and

(c) If the pull-tab or punch is constructed or printed in such a manner as to preclude recording the information required in (a) and (b) of this subsection in a legible manner, the licensee may record the required information on a sheet of paper not less than three inches by five inches and staple the winning tab or punch thereto.

(9) Defacing winning punches or tabs. The licensee shall, within twenty-four hours after a winning pull-tab or punch worth more than twenty dollars has been presented for payment, mark or perforate the winning symbols in such a manner that the pull-tab or punch cannot be presented again for payment.

(10) Spindle, banded, or "jar" type pull-tabs played in a manner which awards merchandise prizes only. Pull-tab series which award only merchandise prizes valued at no more than twenty dollars, are hereby permitted to employ schemes whereby certain predesignated pull-tabs are free or the player is otherwise reimbursed the actual cost of said pull tabs. Flares for spindle-type pull-tabs operated in this manner shall designate the total number of pull-tabs in the series and the total number of pull-tabs designated as free or reimbursable. Free or reimbursable pull-tabs in these types of pull-tab series shall not constitute a prize or prizes nor shall moneys collected and later reimbursed constitute revenue for the purposes of determining gross gambling receipts.

A P P E N D I X

A

GEROW/ZDI GAMING

CHRONOLOGY OF

RELEVANT FACTS

- March 2005** ZDI seeks approval of an upgrade to its VIP to include a gift card option to buy a paper pull tab rather than inserting currency. Winnings under \$20 can be transferred back to the gift card instead of collecting prize from cashier.
- September 15, 2005** ZDI petitions the Gambling Commission for authority to market VIP with gift card option. Commission refers matter to Administrative Law Judge (ALJ).
- December 1, 2005** Administrative Law Judge (ALJ) conducts hearings on ZDI's petition and rules that the gift card is not the equivalent of "cash". Therefore, ZDI's VIP is a gambling device and ZDI's VIP with gift card option cannot be marketed.
- August 10, 2006** Gambling Commission issues final order affirming the ALJ decision and denying ZDI's petition.
- September 11, 2006** ZDI seeks judicial review of Commission's order affirming the ALJ's order in a declaratory judgment action brought under the Administrative Procedure Act (APA) (Thurston County Superior Court Cause No. 06-2-02283-9).
- April 4, 2007** Spokane Compact signed which allows tribe over 4700 terminals using gift card technology.
- August 17, 2007** Judge Pomeroy of Thurston County Superior Court (Cause No. 06-2-02283-9) enters Findings of Fact & Conclusions of Law reversing the ALJ's ruling and holding that gift card option is the equivalent of cash. Commission's failure to approve VIP with gift card option found to be arbitrary and capricious. Commission seeks judicial review to Washington State Court of Appeals and then to Washington Supreme Court. Appellate review affirms Judge Pomeroy's order. *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 214 P.3d 938 (2009); 173 Wn.2d 608, 268 P.3d 929 (2012). Appellate review completed in January 2012 when Supreme Court opinion issued. Case remanded back to Thurston County Superior Court. By this time, applicable regulations have changed.
- August 17, 2007** Commission announces notice and comment for proposed rule change.
- February 11, 2008** Effective date for revision to WAC 230-06-003 and WAC 230-06-047.

January 12, 2008 ZDI files lawsuit challenging regulations under Administrative Procedure Act (Thurston County Superior Court Cause No. 08-2-00319-9).

January 13, 2008 ZDI files federal court lawsuit challenging rules and seeking damages under 42 U.S.C. § 1983 (Cause No. 08-CV-05087-BHS).

October 15/27, 2008 Judge Settle dismisses federal district court lawsuit. Ninth Circuit Court of Appeals affirms dismissal on June 14, 2010.

October 31, 2008 Present tort lawsuit filed in Thurston County Superior Court (No. 08-2-02518-4).

May 31, 2012 First amended complaint filed in tort lawsuit (No. 08-2-02528-4).

November 19, 2012 Order in tort lawsuit (No. 08-2-02528-4) dismissing individual Gambling Commissioners.

December 7, 2012 Judge Wickham of Thurston County Superior Court (Cause No. 08-2-00319-9) dismisses APA rule challenge to WAC 230-06-003 and WAC 230-14-047, Washington State Court of Appeals later invalidates the regulations due to failure to have affirmative vote of three members of the Commission.
Gerow v. Wash. State Gambling Comm'n, 181 Wn. App. 229, 324 P.3d 800 (2014).

October 18, 2013 On remand per decision of Washington Supreme Court in *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, *aff'd*. 173 Wn.2d 608 (2012). Thurston County Superior Court in Cause No. 06-2-02289-9 vacates the 2005 ruling of the ALJ holding that ZDI's VIP is a gambling device. This order allows the manufacture, distribution, and sale of the device.

December 13, 2013 Order in tort lawsuit (No. 08-2-02528-4) dismissing constitutional claims, negligence claims, and other claims. The court reserves ruling on tortious interference to resolve discovery issues regarding Governor Gregoire.

August 14, 2015 Final order of dismissal in tort lawsuit (No. 08-2-02528-4) dismissing remaining claim of tortious interference.

WASHINGTON STATE ATTORNEY GENERAL

April 13, 2016 - 4:40 PM

Transmittal Letter

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Case Name: Gerow/ZDI Gaming v. State

Court of Appeals Case Number: 47983-4

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Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

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Copy of Verbatim Report of Proceedings - No. of Volumes: _____

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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