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SUPREME COURT OF THE STATE OF WASHINGTON

ZDI GAMING, INC.,

Respondent,

v.

The State of Washington, by and through the
WASHINGTON STATE GAMBLING COMMISSION,

Petitioner.

**PETITIONERS' REPLY TO RESPONDENT'S ANSWER TO
PETITION FOR REVIEW**

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED FOR REVIEW.....1

III. STATEMENT OF THE CASE2

IV. ARGUMENT3

A. ZDI Did Not Devote A Portion Of The Argument In Its
Opening Appellate Brief To Its Request For Attorney
Fees On Appeal As Required By RAP 18.1(b).....3

B. This Court Should Decline To Consider Any Request For
Attorney Fees Under RAP 18.1(j).5

V. CONCLUSION9

TABLE OF AUTHORITIES

Cases

Dougherty v. Labor & Indus.,
150 Wn.2d 310, 76 P.3d 1183 (2003)..... 6

Wilson Court L.P. v. Tony Maroni's, Inc.,
134 Wn.2d 692, 952 P.2d 590 (1998)..... 4

Statutes

RCW 9.46.0241(1)..... 8

RCW 9.46.095 6, 7

RCW 9.46.215 8

RCW 9.46.231(1)(a) 8

RCW 9.46.310 7

RCW 34.05 7

Rules

RAP 13.4..... 9

RAP 13.4(b) 4

RAP 18.1(b) passim

RAP 18.1(j) passim

Regulations

WAC 230-16-001..... 7

Constitutional Provisions

Wash. Const. art. II, § 24 8

I. INTRODUCTION

In answer to the Petition For Review filed by the Washington State Gambling Commission (Commission), Respondent ZDI Gaming, Inc. (ZDI), seeks review of the Court of Appeals' denial of its request for attorney fees on appeal, and also requests an award of attorney fees "for both levels of appellate review." Answer To Petition For Review (Answer) at 10. These issues were not raised in the Petition For Review (Petition). The Rules Of Appellate Procedure (RAP) require parties seeking attorney fees on appeal to devote a portion of their opening appellate brief to argument on that issue. RAP 18.1(b). ZDI failed to include argument supporting an award of attorney fees in its opening brief to the Court of Appeals. Because it failed to comply with RAP 18.1(b)'s mandatory requirements, the Court of Appeals properly denied ZDI's request for attorney fees on appeal. Additionally, the content of the Answer filed by ZDI with this Court falls so far below acceptable standards of appellate practice that the Court should exercise its discretion and decline to consider awarding attorney fees under RAP 18.1(j).

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly denied ZDI's request for attorney fees on appeal based on ZDI's failure to include

argument supporting that request in its opening appellate brief, as required by RAP 18.1(b)?

2. Whether the content of ZDI's Answer is so deficient that this Court should exercise its discretion and decline any request for attorney fees pursuant to RAP 18.1(j)?

III. STATEMENT OF THE CASE

ZDI did not include an argument supporting an award of attorney fees in the opening brief that it filed with the Court of Appeals, Division II, on March 14, 2008. Brief of Respondent (Br. of Resp't). The Court of Appeals denied ZDI's request based on its failure to comply with RAP 18.1(b). Petition For Review Appendix A (App. A) at 26.

ZDI asked the Court of Appeals to reconsider its denial of attorney fees in a Motion for Reconsideration filed on September 1, 2009. On September 10, 2009, the Court of Appeals issued an Order denying the motion. *See* App. A. This Order provided:

In its opening brief, ZDI only made two passing references to attorney fees on appeal. First, it stated as an issue on review, "Should ZDI recover full attorney's fees and costs under the Equal Access to Justice Act and on appeal?" Br. of Resp't at 2. Next, in its argument section titled "ZDI's Fee Award Was Unfairly Limited by the Unconstitutional Legislative Caps," which argues that the trial court erred in calculating its attorney fees below, ZDI concluded, "A full award under the Act is further justified by the fees expended on appeal." Br. of Resp't at 48, 50. Thus, ZDI did not devote a separate section of its brief on

the issue of attorney fees on appeal. Instead, it only briefly mentions appellate attorney fees in the last line of its argument that the trial court miscalculated its attorneys fees below. This is not sufficient to meet the mandatory requirements under RAP 18.1(b).

Id.

In addition to seeking review of the Court of Appeals' ruling, ZDI, in its Answer To Petition For Review, asks this Court to award it attorney fees and costs incurred "for both levels of appellate review." Answer at 10. ZDI's Answer, however, is replete with misstatements of fact and law, including inexplicable citations to statutory "authorities" that directly contradict the propositions for which they are cited. Accordingly, the Answer falls so far below any appropriate standard of appellate practice, that any consideration of ZDI's request for attorney fees and costs related to its preparation should be denied.

IV. ARGUMENT

A. **ZDI Did Not Devote A Portion Of The Argument In Its Opening Appellate Brief To Its Request For Attorney Fees On Appeal As Required By RAP 18.1(b).**

The Court of Appeals properly denied ZDI's request for attorney fees because ZDI did not dedicate a portion of its opening brief to the issue of attorney fees on appeal. RAP 18.1(b) provides: "**Argument in Brief.** The party *must* devote a section of its opening brief to the request for the fees or expenses." (Italics added). Compliance with this rule is

“mandatory” and cannot be satisfied with bald assertions of entitlement. *Wilson Court L.P. v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). Argument and citations to authority are required. *Id.*

ZDI did not devote a section of its opening appellate brief to argument and citation to authority supporting an award of attorney fees on appeal as required under RAP 18.1(b). The only references to an award of fees on appeal appear in an issue statement regarding the *trial court’s* award of attorney fees and as part of the rhetoric in an argument addressing the *trial court’s* attorney fee award. Neither of these references appear in a section devoted to this issue as required by RAP 18.1(b). Further, neither of these references are supported by the required argument and citation to legal authority. *See Wilson Court*, 134 Wn.2d at 710 n.4. The Court of Appeals ruling is based on an unambiguous procedural rule and well-established case law. It does not implicate any state or federal constitutional issues, but rather concerns only a private dispute between individual parties. Accordingly, it does not satisfy the requirements of RAP 13.4(b) and the Court should decline ZDI’s request to review this issue.

ZDI contends that it *did* request attorney fees on appeal in its argument regarding the trial court’s award of attorney fees. Answer at 11. The passage ZDI cites, however, is taken out of context. While ZDI

contends that it expressly requested fees on appeal, ZDI actually argued that the cost of defending the ruling on appeal justified a full award of attorney fees incurred *at the trial level*. Br. of Resp't. at 50. Moreover, this passage does not appear in a separate section devoted to an award of attorney fees on appeal and is entirely devoid of citations to legal authority or argument supporting an award of attorney fees on appeal. As the Court of Appeals correctly determined, ZDI wholly failed to comply with RAP 18.1(b) and, accordingly, this Court should not revisit that issue.

B. This Court Should Decline To Consider Any Request For Attorney Fees Under RAP 18.1(j).

ZDI's Answer is replete with factual misrepresentations and erroneous statements of law. Accordingly, this Court should exercise its discretion and decline any request to consider an award of attorney fees under RAP 18.1(j). While inaccurate citations to "authority" are found throughout the Answer, the following examples are illustrative of the scope of the misrepresentations.

Without citation to authority, ZDI analogizes to articles of clothing and apparently concludes that a court is free to choose what it wishes to include or exclude from the definition of jurisdiction. Answer at 4. ZDI then further concludes that "venue" is merely a type of "jurisdiction," similar to "subject matter jurisdiction," but controlling location rather than

the type of controversy. *Id.* This conclusion, however, is contrary to well-settled precedent, including the very case law upon which ZDI bases its arguments. “Venue and jurisdiction are distinct concepts.” *Dougherty v. Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003).

The term venue denotes locality, referring to the county in which an action should be brought

Venue is distinguished from jurisdiction in that jurisdiction connotes the power to decide a case on its merits while venue connotes locality. Venue is a procedural, rather than jurisdictional, issue.

Id. at 316. ZDI’s erroneous assertion that venue is just another type of jurisdiction is made even more egregious by the fact that the Court of Appeals, citing *Dougherty*, expressly held that “[v]enue and jurisdiction are distinct concepts” and included an extensive discussion of *Dougherty* in its opinion. App. A at 8-10. Even more inexplicably, ZDI actually cites to *Dougherty* to support the remainder of its jurisdiction argument. Answer at 4-5.

ZDI’s contention that the venue provisions of the APA apply to this case is equally misleading. Answer at 4. RCW 9.46.095 expressly provides that Thurston County Superior Court shall have exclusive *jurisdiction* over all actions against the Commission, except “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.” (Emphasis added).

The matter before the Court is an administrative declaratory judgment action that ZDI filed seeking a declaration regarding the meaning of the term “cash,” as formerly used in a prior regulation. App. A at 5. And, while the Commission licenses gambling machine *manufacturers and distributors*, it does not, contrary to ZDI’s erroneous assertions and incorrect statutory citations, license ZDI’s proposed device or any slot machine, “faux” or otherwise. *Compare* RCW 9.46.310 (requiring gambling equipment manufacturers and distributors to hold a license) and WAC 230-16-001 (burden is upon manufacturers and distributors to ensure that gambling equipment complies with Washington’s gambling laws and regulations). Simply put, this case involves the proper interpretation of regulatory language. It does not involve the denial, suspension, or revocation of any *license*. Accordingly, it does not fall within the exception contained in RCW 9.46.095 and the APA venue provisions are not applicable.

As a final example, ZDI, also inexplicably, makes the amazingly incorrect assertion that “slot machines” are legal in the state of Washington. Answer at 5. The Legislature, however, has made it absolutely clear that slot machines are illegal gambling devices by

expressly outlawing them by name. RCW 9.46.0241(1) defines “gambling device” to mean:

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 consideration, as the result of the operation of an element of chance including, but not limited to **slot machines**....

(Emphasis added.) Washington’s Gambling Act then goes on to expressly criminalize the knowing ownership, possession or manufacture of those same “gambling devices.” RCW 9.46.215. Further, RCW 9.46.231(1)(a) also expressly provides that no property rights exist in “gambling devices” and, accordingly, subjects them to forfeiture to the State. ZDI’s assertion that slot machines are legal in the State of Washington is simply wrong and, upon actual examination, the statutory citations it provides in its Answer stand for exactly the opposite of the proposition for which they are cited. Answer at 5.

ZDI’s incorrect assertion also demonstrates an apparent disregard of the constitutional underpinnings of Washington’s gambling laws and regulations. Article II, section 24 of the State Constitution provides that all gambling activities are illegal, unless they have received approval by a super-majority of the State legislature or electorate. The Gambling Act, which was adopted by a supermajority of the legislature, specifically criminalizes the possession and use of slot machines in Washington. The

Commission is constitutionally and statutorily bound to follow and enforce these prohibitions and has no latitude to deviate from them.

In short, slot machines are illegal in the State of Washington. ZDI's contention that the Gambling Commission and the Lottery Commission have authority to ignore the constitutional and legislative prohibitions against possession, use, or sale of slot machines is a gross misstatement of the law. Answer at 5. That misstatement is made even more egregious by ZDI's citations to statutory authorities that, upon actual review, make clear that they are part of the statutory structure that in fact *prohibits*, rather than authorizes, slot machines in Washington. Answer at 5.

The above are but a few examples of the numerous inaccuracies, misstatements, and misrepresentations contained in ZDI's Answer. Given the foregoing, the Commission requests that this Court exercise its discretion and decline to consider any request for attorney fees and costs under RAP 18.1(j).

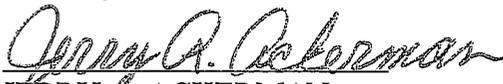
V. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court deny, pursuant to RAP 13.4, review of the Court of Appeals' refusal to award attorney fees on appeal. The Commission further, for the reasons stated above, respectfully requests that the Court deny

consideration of any request for an award of attorney fees and costs under RAP 18.1(j). Finally, for the reasons stated in the Petition, the Commission also requests that the Court grant review of this matter and, specifically, of the issues set forth in its Petition For Review.

RESPECTFULLY SUBMITTED this 30th day of November, 2009.

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