91278-5

No. 45270-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of

CLUB LEVEL, INC., and RYAN FILA

CLUB LEVEL, INC., and RYAN FILA, a single man,

Petitioners - Appellants,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD, et al.,

Defendants - Appellees.

PETITION FOR REVIEW

Rodney R. Moody, WSBA # 17416
Mark G. Olson, WSBA # 17846
Attorney for Appellants Club
Level, Inc., and Ryan Fila.

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RULES, STATUTES AND OTHER AUTHORITIES

A. Identity of Petitioner

COMES NOW the Petitioners, Club Level, Inc., and Ryan Fila, by and through their attorney, Rodney R. Moody, and hereby request this Court accept review of the decision designated in Part B of this motion.

B. Court of Appeals Decision

The Petitioners seek review of the Court of Appeal's ruling upholding the Trial Court's granting of summary judgment as to four causes of action including the Fourteenth Amendment Due Process violation pursuant to 42 U.S.C. § 1983, and the common law torts for negligent supervision, unlawful conspiracy, and tortious interference with a business expectancy, dated December 30, 2014.

C. Issues Presented for Review

1. Did the Court of Appeals apply the correct legal standard under CR 56(c).
2. When all evidence presented is considered in light of the correct CR 56(c) standard were the actions of the Appellees arbitrary, unreasonable, and unrelated to the public welfare.
3. Is a cause of action for negligent supervision redundant when no other cause of action requiring a finding of negligence has been alleged.

4. Is the legal standard of clear, cogent, and convincing evidence to be applied on a motion for summary judgment for the cause of action for civil conspiracy.

5. Was sufficient evidence presented demonstrating the officers and employees of the WSLCB had knowledge of the contractual relationship between Fila and his business landlord, Art Rodriguez.

D. Statement of the Case

CR 56(c) STANDARD

In ruling on a motion for summary judgment it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in the manner most favorable to the nonmoving party. Meissner v. Simpson Timber Co., 69 Wn.2d 949, 951, 421 P.2d 674 (1966). It is not the function of the trial court to weigh the evidence presented, and summary judgment must be denied if a right of recovery is indicated under any provable set of facts. Smith v. Acme Paving Co., 16 Wn.App. 389, 392, 559 P.2d 811 (1976); Fleming v. Smith, 61 Wn.2d 181, 390 P.2d 990 (1964). The court must also consider that the beneficial effect of summary judgments to dismiss unfounded claims must be employed with caution lest worthwhile causes be dismissed short of a determination of the true

merit. Smith, supra at 392; Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960).

42 U.S.C. §1983

In his Letter Opinion dated June 14, 2013, Judge Wickham initially denied the State's request for summary judgment on the §1983 action stating: "Taken in the light most favorable to the nonmoving parties, the plaintiffs, the evidence shows that law enforcement specifically targeted Club Level in an excessive and unreasonable manner because they wanted to put it out of business." CP 476

Judge Wickham found these facts similar to the facts of Benigni v. City of Hemet, 879 F.2d 473 (9th Cir. 1988). He noted that the Benigni Court did not specifically rule on the threshold of evidence required to sustain a Due Process loss of occupation claim. CP 476. No reported case in Washington State has addressed this question. Similar to Benigni, Judge Wickham found the present evidence established a material fact in dispute because it showed "excessive bar checks, "staking out" behavior, pursuing a violation for an adequate lighting that had no basis in fact and was retaliation for dismissal of a separate violation, conducting drive-bys of Fila's personal residence, expressing animosity towards Fila because of his homosexuality, running excessive checks on the personal vehicles of Fila and his staff, and intimidating nightclub patrons." CP 476 . Judge

Wickham noted that an expert in law enforcement had analyzed police reports and complaints, and concluded that there was disparate treatment between Club Level and similarly situated establishments. CP 477. The Court also determined that Fila had presented sufficient evidence that Club Level's revenues were substantially decreased and that Fila engaged in the expensive endeavor to relocate the nightclub to try and avoid the allegedly excessive law enforcement actions. CP 477.

Subsequent to this ruling, Judge Shea of the Federal District Court for Eastern Washington granted summary judgment in the companion case asserted against the Wenatchee Police Department (WPD). Judge Shea based his ruling upon holdings in FDIC v. Henderson, 940 F.2d 465 (9th Cir. 1991), Enqquist v Oregon Dept. of Agriculture, 478 F.3d 985 (9th Cir. 2007), and Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56 (9th Cir. 1993). These decisions were not argued by Counsel for the City of Wenatchee in their motion for summary judgment in that case or by Counsel in their initial motion for summary judgment in this case.

Based upon this ruling by Judge Shea, Judge Wickham reversed himself on June 14, 2013, granting the Defendant's summary judgment specifically because of the confusion created by the Benigni Court's failure to specifically rule on the threshold of evidence required to sustain

a Due Process loss of occupation claim as well as the apparent conflict with the FDIC, Enqquist, and Wedges/Ledges cases.

The Court of Appeals sustained Judge Wickham's summary judgment decision and relied on Wedges/Ledges to support its opinion finding the Ninth Circuit Court of Appeals more narrowly delineated the contours of a §1983 cause of action to require a Plaintiff to show that "clearly arbitrary and unreasonable" state action "having no substantial relation to the public health, safety, morals, or general welfare" prevented the plaintiff from pursuing comparable employment in the relevant industry. Court of Appeals Opinion, Pg. 15.

The Court of Appeals stated, "First, Fila did not submit evidence showing that the WSLCB employees conduct prevented him from operating Club Level, let alone from pursuing any comparable employment in the industry." Court of Appeals Opinion, Pg. 15. The Court noted that the plaintiff in Benigni had alleged that police "harassment eventually forced him to sell at a loss." Benigni at 879. The Court then states that the only evidence submitted by Fila demonstrating that harm had occurred to Club Level was statements by his Counsel at the reconsideration hearing. The submitted evidence demonstrates this holding was error.

A Declaration from Fila was submitted into evidence presenting direct testimony on this point. CP 430–443. While discussing the effect of the actions of the officers of the WPD Fila stated, "All of this had the effect of intimidating my patrons and has directly combined to the significant decrease in revenues which the business has been able to generate." CP 433. While discussing the basis for his relocation of Club Level, Fila stated, "I made this change because the level of police and the WSLCB attention at 27 S. Chelan was so dramatic that my business was clearly being negatively impacted." CP 436. "Revenues were decreasing markedly because of the negative attention of this unwarranted law enforcement activity." CP 436. While discussing the limitation of the Ballroom in August 2012, only two days before a scheduled event Fila stated, "The effect of this was that I was required to hire my attorney, and Mr. Rodriguez worked with Mr. Moody as well, to immediately obtain a special use permit from the WSLCB which permitted this event to occur." CP 438. "Even so the sudden change cost additional funds and altered the arrangements such that the event really did not generate much income for Breast Cancer Awareness." CP 438.

As noted by the Court Fila submitted a declaration from Rodriguez, his building landlord, in which Art Rodriguez stated:

Mr. Fila and I did have a contractual agreement where he would pay me four thousand dollars per month to lease the space within which he was operating Club Level on the second floor. Mr. Fila was not able to fully comply with this agreement because of declining sales which he had inside Club Level. At this time Mr. Fila still owes me monies which remain unpaid from the terms of this lease." CP 448.

The reasonable inference from this direct testimony supports a finding that the actions of the WSLCB negatively impacted Club Level and Fila's operation of this business. This evidence is more than sufficient to survive a summary judgment motion on this point.

The question of how one defines "any comparable" occupational position also remains unresolved in Washington State. The Court in Wedges/Ledges modified the earlier holding in FDIC by adding language to the statement that "a state banking official must show that the acts left him 'unable to pursue [any comparable] job *in the banking industry.*'" (Emphasis in original) Wedges/Ledges, Suprea at 65.

Arguably Fila's "any comparable" position in the entertainment industry would be as the owner/operator of a liquor establishment holding the state issued nightclub license. Fila is not a bartender or bar manager, he is the owner of Club Level and took the necessary steps to obtain the state issued "nightclub" license. If this license had been suspended or revoked as Stensatter attempted to do Fila clearly would not have been able to obtain any comparable position in the entertainment industry.

The quantum of evidence necessary to establish arbitrary and unreasonable conduct bearing no substantial relation to public health or safety remains unresolved in Washington State. The Court of Appeals stated: "Fila does not claim that Stensatter issued citations without probable cause to believe that the violations had occurred and points to no evidence, other than the somewhat suspicious timing of one of the citations, that the WSLCB's employees acted with a retaliatory motive." Court of Appeals Opinion, Pg. 16. The holdings in FDIC, Enqquist, and Wedges/Ledges do not require proof of a retaliatory motive.

Fila submitted substantial evidence to demonstrate that the actions of the WSLCB Officers were arbitrary and unrelated to the public welfare. On August 14, 2011, a minor was located by officers of the WPD inside Club Level. WSLCB Officer Stensatter investigated the matter. RCW 66.44.310(1)(a) requires that the business employees/management have knowledge that a minor is on the premises. Stensatter purposely failed to investigate this question. CP 258. He interviewed the individual who called law enforcement to report the minor's presence, but he refused to interview Fila or any other employee of Club Level to ascertain whether they had this knowledge. CP 259. Stensatter then issued an Administrative Violation Notice (AVN) to Fila, which was contested. At the administrative hearing conducted by ALJ Kim, Stensatter testified the

employees/management's knowledge of the presence of a minor was not required. CP 234. This testimony knowingly advocated an incorrect legal standard which was within Stensatter's sphere of expertise. ALJ Kim dismissed the AVN. CP 360-367.

The day immediately following Stensatter issued Fila an AVN for "inadequate lighting." CP 276-278. Stensatter's supervisor, Lt. Starkey, testified he had seen only one inadequate lighting AVN issued during his many years of employment with the WSLCB. CP 259. On August 30, 2012, Stensatter contacted a WSLCB employee in the licensing division by email and communicated that "Club Level was given a violation last Friday on the TTP." "He wants to talk to you about this and what can be done to pull the TTP 314–07–060 (4) is the WAC he is quoting to cancel the TTP." CP 280-283. TTP is the anachronism for the temporary permit that Club Level was operating under at the new location. The effect of WAC 314–07–060 (4) would have been to immediately suspend the permit under which Club Level was operating, thereby forcing it out of business, without the opportunity to have a contested hearing on the matter. This was considered by Alan Rathbun, who was the head of the licensing division for the WSLCB. The decision was made by Mr. Rathbun to not suspend Club Level's TTP. CP 248.

The reasonable inference drawn from this litany of evidence is that Stensatter acted with the deliberate intent to force the closure of Club Level. The Court of Appeals assertion that the only evidence of a retaliatory motive being "the somewhat suspicious timing of one of its citations" is simply not supported when all of the evidence submitted is considered. Court of Appeals Opinion, Pg. 16. The Court of Appeals failed to apply the appropriate standard under CR 56 as required.

The Court of Appeals Opinion then addressed the question of whether the state action alleged by Fila has a substantial relationship to protecting public health and safety. The Court of Appeals focused on factual data submitted by Fila discussing the analysis of police incident logs and what was considered a disproportionate number of calls to Club Level. Simultaneously the Court of Appeals appears to have ignored the testimony of Fila's law enforcement expert, Van Blaricom, who opinioned that the actions directed at Club Level by the WPD were disproportionate. Fila is entitled when to responding to a motion for summary judgment to all positive inferences including the testimony of his expert witness. In effect the Court of Appeals weighed this evidence against Fila which as specifically stated in the Smith holding is not appropriate. Id. at 393.

In addition to the actions of Stensatter outlined above including his deliberate attempt to have Club Level's temporary permit suspended

pursuant to WAC 314–07–060 (4), the evidence shows that Club Level was designated as a Location of Strategic Interest (LSI) immediately after opening without a single regulatory violation found to have occurred which is directly contrary to the publically stated policy of the WSLCB. CP 266-268. The designation of Club Level as an LSI was at the specific request of the WPD. CP 284. Lt. Starkey testified that an LSI is clearly driven by reports from law enforcement. CP 392. During the relevant time period 26 reports were forwarded to the WSLCB officers by officers of the WPD. Twenty four of these were dismissed as unfounded and two resulted in a written warning. CP 416-417. During the same timeframe, for every other liquor establishment within Wenatchee combined there were only a total of four reports forwarded to the WSLCB. CP 416-417. The reasonable inference which can be drawn from this is that these reports were being forwarded for a nefarious purpose. Lt. Starkey when asked why Club Level ultimately had the LSI designation removed September 20, 2011, testified it was because his officers had not been able to find any violations. CP 252. A reasonable inference can be drawn that the actions of the WPD and the WSLCB directed toward Fila and Club Level had were done for the purpose of forcing the closure of Club Level and clearly unrelated to any legitimate public interest.

Additional uncontroverted evidence was presented that the WPD and the WSLCB jointly combined to draft a Good Neighbor Agreement (GNA), which would have permitted the City to immediately suspend the city business license of Club Level for any perceived violation of the GNA without the opportunity for hearing. CP 308-313. Officer Murphy of the WSLCB communicated to Officer Miller of the WPD that he would go to Club Level and "attempt to find violations." CP 301. Officer Stensatter came into Club Level upon its reopening at its new location at the busiest time of the evening to deliberately interfere with business operations. CP 438. Officer Murphy also shared personal financial information of Fila with the WPD officers and when confronted falsely stated that he had had not done so, only to have the email demonstrating this fact produced in discovery. CP 348, 433.

These actions demonstrate that for the purposes of a motion for summary judgment a reasonable trier of fact could determine that the actions of the WSLCB were arbitrary, unreasonable, and unrelated to any legitimate issue of public interest or safety. The officers of the WSLCB, in conjunction with the WPD, deliberately utilized available lawful processes to achieve an unlawful result; the forced closure of Club Level. Granting summary judgment on this cause of action is legal error.

Negligent Supervision

The Court of Appeals upheld Judge Wickham's granting of summary judgment on the negligent supervision claim finding that the holdings in Gilliam v. Department of Social and Health Services, Childcare Protective Services, 89 Wn.App. 569, 584-585, 950 P.2d, 20 (1998), and LaPlant v. Snohomish County, 162 Wn.App 476, 271 P.3d 254 (2011), control because Fila asserted other state claims for which the WSLCB would be vicariously liable. The Court determined that even though no negligence claim was asserted against Murphy or Stensatter, the WSLCB's liability for negligent supervision would depend on the establishment of other claims against Murphy and Stensatter and therefor the negligence supervision claim was redundant. Court of Appeals Opinion, Pg. 19.

In LaPlant the Court discussed the ruling by Judge Coughenour of the United States District Court, Western Division in Tubar, III, v. Clift, 2007 WL 214260. In Tubar Judge Coughenour distinguished the holding in Gilliam from the facts of Tubar specifically because there was no negligence claim for which the City would be vicarious libel. Judge Coughenour cited to Logan v City of Pullman, 392 F.Supp.2d 1246 (2005) decided in the Federal District Court for Eastern Washington, where that Court stated "the reason the Gilliam court held that the plaintiff's claim for

negligent supervision against the employer was redundant with the plaintiffs claim for vicarious liability is that both causes of action rested upon a determination that the employee was negligent....The same is true here." Id. at 7. Judge Coughenour stated, "because Plaintiff has not asserted a negligence claim against Officer Clift, no such risk of redundancy or irrelevance exists here." Tubar, Supra at 7

In LaPlant the Court stated, "we distinguish Tubar from LaPlant's case for the same reason." "As in Gilliam, LaPlant has asserted a negligence claim against the deputies for which the common County would be vicariously liable." "Tubar is inapposite." Id at 483.

Fila has asserted no negligence claim against either Murphy or Stensatter. The Court of Appeals has misinterpreted the holdings in Gilliam, Tubar, and LaPlant. The holdings in Gilliam and LaPlant found redundancy specifically because both causes of action were based on negligence. Dismissing the negligent supervision claim on summary judgment was legal error.

Civil Conspiracy

The Court of Appeals misapplied the holding in Herron v. KING Broadcasting Co., 112 Wn.2d 762, 768-69, 776 P.2d 98 (1989), when it stated that the trial court did not err in considering the clear, cogent, and convincing standard in its analysis. In Herron the Court stated, "while the

court must keep in mind that the jury must base its decision on clear and convincing evidence, the evidence is still considered in the light most favorable to the nonmoving party and the motion is denied if the jury could find in favor of the nonmoving party." Id at 768–769. Therefore summary judgment must be denied if a right of recovery is indicated under any provable set of facts regardless of the clear, cogent, convincing standard at trial. Smith, Id at 393. In additon, a finding that a conspiracy existed may be based on circumstantial evidence, Corbit v. J.I. Case Co. 70 Wn.2d 522, 424 P.2d 290 (1967).

Under the present facts it is undisputed that the designation of Club Level as an LSI immediately after its opening was based on the request of the WPD, (CP 284); 26 reports were submitted to the WSLCB by the WPD while during the same time only four were submitted for all other liquor establishments combined, 24 of these were unfounded, (CP 416-417); the WPD and WSLCB cooperated in developing the GNA which permitted the City to immediately suspend the business license of Club Level, (CP 303); Murphy communicated with Officer Drolet of the WPD that he would soon visit Club Level and "look for violations", (CP 301); and significantly, Capt. Dresker, the second-highest ranking member of the WPD at the time authored an email in which he stated "we (WPD) need to work more proactively on our own solutions, *up to and including*

pressing for Liquor Control to shut the business down." (Emphasis added). CP 319.

When every inference drawn from the evidence is considered in the light most favorable to the nonmoving party any reasonable trier of fact could determine that an agreement between these the WPD and WSLCB existed to achieve the unlawful purpose of forcing Club Level to close. The Court of Appeals failed to consider all evidence and misapplied the legal standard under CR 56(c) thereby committing legal error.

Tortious Interference with a Business Expectancy

The Court of Appeals upheld the dismissal of the tortious interference with a business expectancy claim based on a determination the only evidence Fila presented of a legitimate contractual relationship or business expectancy concerned his lease with Rodriguez. Court of Appeals Opinion, Pg. 21. The Court went on to state that Fila points to no evidence that the WSLCB employees knew of his relationship with Rodriguez and that Fila merely argued instead that Murphy must have known about the lease because they knew Rodriguez owned the building.

The GNA submitted to Fila by the City of Wenatchee was drafted by Capt. Dresker and submitted to the WSLCB for their review and approval. CP 305. In her responsive email, WSLCB employee Nicola

Reid wrote back to Capt. Dresker stating "during the licensing process you submitted a copy of the GNA you wanted us to help you hold the applicant accountable to." CP 305. The GNA itself states:

> This community good neighbor agreement ("Agreement") is entered into between Arturo Rodriguez and Ryan Fila, doing business as Ballroom LLC ("Ballroom"), located at 27 S. Chelan Ave., Wenatchee, Washington ("premises"), and the City of Wenatchee, a municipal Corporation ("City"), for the purpose of fostering improved public safety and to augment efforts by the City and the community to reduce crime, nuisance activity, and discrepant disruptive activity in and around Ballroom." CP 308.

This evidence clearly establishes the fact that the WSLCB was aware of the contractual relationship between Fila and Rodriguez.

Further, RCW 66.24.010 specifically addresses the licensure, issuance, conditions and restrictions, limitations, and temporary licenses regarding licenses to dispense alcohol. RCW 66.24.010 (2) states that for the purpose of considering any application for a license, or the renewal of the license, the board may cause an inspection of the premises to be made, and may inquire into all matters in connection with the construction and operation of the premises. In short, RCW 66.24.010 makes it the responsibility of the Board to be aware of all matters in connection with the operation of a liquor premises. Plaintiffs are entitled to rely upon the statute in response to the motion for summary judgment. Both RCW 66.24.010 and the evidence of the GNA demonstrate that Murphy and

Stensatter had knowledge of the contractual relationship between Fila and Rodriguez.

The Court of Appeals also states in its opinion that Fila failed to submit evidence that would raise a material issue of fact as to whether the WSLCB employees had an improper purpose or used improper means. Court of Appeals Opinion, Pg. 22. This statement appears to fail to consider the overwhelming evidence to the contrary produced in response to the motion for summary judgment outlined previously. There is clearly a "provable set of facts" from which a reasonable trier of fact could conclude the WSLCB employees had an improper purpose and used improper means to achieve an unlawful result; the closure of Club Level.

E. Argument

Acceptance of review is appropriate pursuant to RAP 13.4 for several of the indicated factors.

First, RAP 13.4 (2) indicates that acceptance is appropriate if a decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. As it relates to the negligent supervision claim the Court of Appeals has misinterpreted the holdings in Gilliam, Tubar, and LaPlant. These three cases clearly indicate that a cause of action for negligent supervision is redundant only when other state causes of action

based on negligence are alleged. Negligence is the key redundancy component, not whether the State is vicariously liable.

Fila asserted no negligence claim against Murphy or Stensatter. These causes of action are not redundant with the negligent supervision claim. The Court of Appeals has ruled in a manner inconsistent with established authority from Division One.

Second, acceptance for review by this Court is appropriate pursuant to RAP 13.4 (3). The question of law concerning the Fourteenth Amendment Due Process cause of action concerning Fila's right to pursue an occupation is undefined in the State of Washington. There is no authority within the State of Washington addressing this point of law. Indeed, in his Letter Opinion Judge Wickham clearly indicated that "The *Benigni* Court did not specifically rule on the threshold of evidence required to sustain a Due Process loss of occupation claim." CP 476. Judge Wickham reconsidered his original decision and granted summary judgment while expressing a desire for further clarity. The Court of Appeals failed to address these issues and then issued an unpublished opinion.

This is a case of first impression within the State of Washington. There is no authority addressing the question for example what is "any comparable" job in the entertainment industry. There is no authority

establishing what is arbitrary conduct that bears no relationship to the public welfare. This cause of action remains undefined in Washington State.

Finally, acceptance is appropriate pursuant to RAP 13.4 (4) because this issue addresses an issue of substantial public interest. Virtually every business owner in the State of Washington who sells or dispenses alcohol in any form, sells firearms, sells tobacco, or as recently allowed under State law sells marijuana potentially faces this exact issue. This issue extends beyond Fila and Club Level. No authority exists to address this circumstance and the trial courts are left in the quandary experienced by Judge Wickham.

F. Conclusion

Plaintiffs specifically request that the Court accept review of the decision of the Court of Appeals and reverse the decision to uphold the granting of summary judgment for the causes of action for the due process violation, negligent supervision, civil conspiracy, and tortious interference with a business expectancy.

RESPECTFULLY SUBMITTED this 28 day of January, 2015.

Rodney R. Moody, WSBA #17416
Attorney for Appellant

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

CLUB LEVEL, INC., and RYAN FILA, a single man, Plaintiffs - Appellants, vs. WASHINGTON STATE LIQUOR CONTROL BOARD, et al., Defendants - Appellees.	NO. 45270-7-II Case No.: 12-2-01803-8 Thurston County Superior Court, WA DECLARATION OF MAILING

DECLARATION OF MAILING and SERVICE

I certify that on the 29th day of January, 2015, I mailed a true and correct copy of the Petition for Review to the WA State Supreme Court of Appellant, by depositing the same in the United States mail, postage prepaid, to Mark Jobson Attorney at Law, and emailed to Mark Jobson Attorney at Law, and sent to Mark Jobson Attorney at Law by Personal Service addressed as follows:

Mark Jobson
7141 Cleanwater Drive SW
PO Box 40126
Olympia WA 98504-0126

Dated this 29th day of January, 2015 at Everett, Washington.

John Catanzaro, Paralegal to
Rodney R. Moody

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLUB LEVEL, INC., and RYAN FILA, a single man, Appellants, v. WASHINGTON STATE LIQUOR CONTROL BOARD; PAT KOHLER, in her individual capacity as Executive Director of the Washington State Liquor Control Board; SHARON FOSTER, in her individual capacity as a member of the Washington State Liquor Control Board; RUTHANN KUROSE, in her individual capacity as a member of the Washington State Liquor Control Board; CHRIS MARR, in his individual capacity as a member of the Washington State Liquor Control Board; SERGEANT TOM STENSATTER, in his individual capacity as a Sergeant employed by the Washington State Liquor Control Board; and MATT MURPHY, in his individual capacity as an officer employed by the Washington State Liquor Control Board, Respondents.	No. 45270-7-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — Ryan Fila and Club Level Inc. (collectively, Fila) appeal from the trial court's dismissal on summary judgment of Fila's suit against the Washington State Liquor Control Board (WSLCB) and certain of its employees. In his suit Fila challenged enforcement

actions taken by WSLCB employees involving Fila's nightclub, Club Level, claiming violation of his right to due process, negligent supervision, civil conspiracy, and tortious interference with a business expectancy. Fila argues on appeal that the trial court erred in granting summary judgment to the WSLCB because (1) the right to pursue the occupation of nightclub owner free from excessive police interference is clearly established under federal law, such that qualified immunity does not bar his cause of action under 42 U.S.C. section 1983; (2) his negligent supervision claim against the WSLCB is not redundant of his other claims; and (3) he submitted sufficient evidence to create a material issue of fact as to his claims of civil conspiracy and tortious interference with a business expectancy. We affirm the trial court.

FACTS

The parties' characterizations of the record differ in some respects. Because the trial court dismissed Fila's claims on the WSLCB's motion for summary judgment, we present the facts in the light most favorable to Fila, the nonmoving party.

FACTUAL BACKGROUND

Fila opened Club Level in August 2010, on the second floor of a downtown Wenatchee building owned by Arturo Rodriguez. Rodriguez operated a nightclub in the same building known as "Volcano" or "El Volcan," where Fila had served as bar manager. Clerk's Papers (CP) at 139-40.

Club Level quickly attracted the attention of local law enforcement officials. On January 2, 2011, Officer Kirk Drolet of the Wenatchee Police Department (WPD) sent an e-mail to WSLCB officer Matthew Murphy, stating that WPD officers "are brainstorming how to help Club Level/Volcano from sucking up immense amounts of our time," that Drolet "figure[d] a few expensive tickets [would] slow things down," and requesting "some info from you on things

we can do to help Club Level . . . and Fuel . . . and Sharx."[1] CP at 299. Murphy responded by offering some suggestions for how to write certain citations and stated, "If you write a citation for RCW 66.44.200[, prohibiting alcohol sales to persons apparently under the influence of liquor, p]lease let me know and I will also go and cite the bar and possibly the bartender." CP at 300.

On February 28, WPD Captain Kevin Dresker sent an e-mail to certain WPD officers who had made arrests following a fight at Club Level. Dresker noted that "Club Level is an issue," that WPD officers "had to deal with large and unruly crowds" the previous weekend, and that "[t]his not only presents an officer safety issue but also pulls officers away from other areas of the city." CP at 318.

Murphy requested that his supervisor, Lieutenant Kevin Starkey, designate "El Volcan (Club Level)" as a "location of strategic interest" on March 9, 2011, and Starkey agreed. CP at 284, 286. Under the location of strategic interest program, the WSLCB targeted for increased enforcement action "a small percentage of [liquor] licensees creating a disproportiona[te] threat to the health and safety of communities." CP at 266. Under this program, WSLCB officials cooperated "with any and all law enforcement and regulatory agencies available" to target licensees with

> multiple premises visits, compliance checks using operatives 20 year[s] of age and younger, extended and repeated undercover operations, extended surveillance and any other lawful practice deemed necessary.

CP at 267. WSLCB officials designated locations of strategic interest based on a variety of factors, including observations by liquor enforcement officers or police, complaints, violations,

[1] Fuel and Sharx were other Wenatchee nightclubs.

warnings, calls for emergency services, criminal activity, driving under the influence referrals, and input from local authorities and the community.

WSLCB employee Sergeant Tom Stensatter assumed responsibility for liquor enforcement in the downtown Wenatchee area on August 1, 2011. Stensatter issued a citation to Club Level on August 23, based on an incident in which WPD officers responded to a call on Saturday, August 14, and discovered and cited a person under age 21. The WSLCB subsequently issued a formal complaint against Fila based on the citation, alleging that Fila or his employees "allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits." CP at 272.

Fila challenged the citation and obtained a hearing before an administrative law judge (ALJ). At the hearing, Stensatter testified that neither a licensee's constructive knowledge that a minor has entered the premises nor efforts by bar staff to locate and remove the minor upon learning of the minor's presence were relevant to whether the violation had occurred. Stensatter's testimony misstated the relevant legal standard. *See Reeb, Inc. v. Wash. State Liquor Control Bd.*, 24 Wn. App. 349, 353, 600 P.2d 578 (1979) (holding that liability for a violation arises from inaction in the face of "the licensee's actual or constructive knowledge of the circumstances which would foreseeably lead to the prohibited activity").

The ALJ dismissed the complaint against Fila on July 19, 2012. The ALJ concluded that Club Level did not "allow" the minor to remain on the premises because "the Licensee immediately engaged in [a] search [for] the minor upon having knowledge that the minor was present" and "continued its efforts to locate the minor until the minor was located by the law enforcement officers." CP at 106. The WSLCB adopted the ALJ's findings and conclusions on August 28, 2012.

Meanwhile, in September 2011, Fila notified the City of Wenatchee of his intent to sue based on the conduct of WPD. Fila filed suit in federal court against the City in February 2012. *Club Level & Ryan Fila v. City of Wenatchee*, U.S.D.C. No. CV-12-00088-EFS.

On April 25, 2012, Stensatter informed Rodriguez by e-mail that, although Rodriguez's license had originally applied to all three floors of the building containing El Volcan, and each floor had separate access from the stairwell, when Fila obtained the Club Level license for the second floor, "it created a separation of [Rodriquez's] licensed premises." CP at 387. The e-mail stated that Rodriguez could no longer serve alcohol at special events on the third floor until he obtained a new license for that floor. Stensatter notified Rodriguez of this new interpretation of the licensing regulations only three days before an event involving alcohol service was scheduled to take place on the third floor. Shortly after this incident, Fila decided to move Club Level to a different location.

Fila's attorney sent the WSLCB's executive director, Pat Kohler, a letter, dated April 25, concerning Stensatter's refusal to allow alcohol service on the third floor of Rodriguez's building. In the letter, Fila's attorney expressed "concern[] that inappropriate and undue influence is being exerted through the enforcement arm of [WSLCB] against Mr. Fila personally and Club Level" based on "personal knowledge that Sgt. Stensatter is a personal friend of Chief Tom Robbins of the WPD." CP at 332. Fila's attorney sent Kohler a second letter, dated May 1, also concerning alcohol service on the third floor. Kohler did not respond to either letter.

On June 1, Fila notified the state's Department of Risk Management of his intent to sue the state and various officials based on the conduct of the WSLCB's employees. On June 11, Fila's attorney sent Kohler a letter designated a "Formal Complaint." CP at 338. The letter described Stensatter's failure to adequately investigate the complaint concerning Club Level

allowing a minor to remain on the premises, his erroneous testimony and inappropriate laughter at the hearing concerning that complaint, and his denial of permission for alcohol service on the third floor of Rodriguez's building. The letter closed by advising Kohler that her "officers in the Chelan County area [were] dragging [her] agency into litigation" and expressing the hope that Kohler would resolve the matter short of litigation. CP at 341.

According to Fila, Stensatter subsequently told him that he "could make the relocation of this business fast, smooth and easy for [Fila] if [Stensatter] was not named in the lawsuit," but that "if he was named in the lawsuit the delay . . . could be as much as 90 days." CP at 438. Stensatter admitted that he talked to Fila about the impending lawsuit on August 4, 2012, but insisted that he merely informed Fila that, were Stensatter named in the suit, he could no longer "assist" Fila because the WSLCB, in order to prevent any conflict of interest, would assign a different officer to Club Level. CP at 183.

On August 17, Fila reopened Club Level in a new location. At 12:45 a.m. on Saturday, August 25, Stensatter conducted a premises check at the new location, demanding to see the identification and alcohol service permits for all Club Level staff, including Fila. Based on this visit, Stensatter issued Fila a citation for "inadequate lighting" on August 29, 2012, the day after the WSLCB adopted the ALJ's findings and conclusions dismissing the prior complaint involving a minor on the premises. CP at 276-77.

Stensatter called WSLCB licensing officials the next morning, informing them of the inadequate lighting citation and pointing out a regulation, WAC 314 -07.060(4), authorizing the cancellation of Fila's temporary permit based on the violation. Fila alleged that Stensatter conducted the check at the peak of Friday night service hours as "a deliberate retaliatory act on

his part which he knew [would] have a negative impact" on Fila's business. CP at 437. The WSLCB eventually issued a formal complaint based on the citation.[2]

Fila's attorney sent Kohler a fourth letter, dated August 31, 2012, informing her of Stensatter's conduct regarding the inadequate lighting citation. Kohler did not respond. Kohler later explained that she had initially assigned a captain to look into Fila's complaints "and brought in our HR director into this issue to see if we should investigate," but that "because the tort claim was filed everything was placed on hold." CP at 238-39.

In opposition to WSLCB's summary judgment motion, discussed below, Fila submitted an analysis of WPD incident logs, obtained through discovery, concerning police involvement with various Wenatchee bars from August 2010 through August 2012. The analysis showed that Club Level had 183 incidents involving police, more than twice as many as Fuel, the Wenatchee bar with the second greatest number of such incidents. Of these 183 incidents, Club Level staff or patrons initiated 139 of them by requesting police assistance. Club Level incidents generated 44 police reports, 8 for assaults, compared to 12 reports, including 6 for assaults, resulting from incidents at Fuel. Fila's analysis also revealed that WPD had forwarded 27 reports for Club Level to the WSLCB, compared to only 2 for Fuel and 6 for all other analyzed bars combined.

Fila also submitted an analysis to the superior court showing that WPD officers conducted 160 "walk-throughs" at Club Level during this same period, 16 of which involved more than two officers, compared to 113 walk-throughs at Fuel, only 2 of which involved more than two officers. Other Wenatchee bars analyzed had far fewer walk-throughs, and only one involved more than two officers. Fila also submitted an analysis purporting to show that WPD

[2] Fila appealed, but an ALJ affirmed the order.

officers conducted more walk-throughs and forwarded more reports to the WSLCB immediately following certain actions Fila had taken to protect his rights.

PROCEDURAL HISTORY

Fila filed this lawsuit in Thurston County Superior Court on August 30, 2012. The amended complaint named the WSLCB itself and three of its appointed members in their individual capacities, as well as Kohler, Stensatter, and Murphy. The complaint asserted various causes of action under federal and state law based on due process, equal protection, unreasonable search and seizure, negligent supervision, defamation of character, conspiracy, negligent infliction of emotional distress, outrage, tortious interference with a business expectancy, and the public disclosure act. Fila requested injunctive relief, compensatory and punitive damages, and costs and attorney fees, in part, under 42 U.S.C. section 1983.

The WSLCB moved for summary judgment as to all defendants on all claims, stipulating that Stensatter and Murphy acted within the scope of their employment at all relevant times. The WSLCB argued, among other things, that (1) its commissioners had statutory immunity, (2) the liquor control board itself was not a "person" subject to suit under 42 U.S.C. section 1983, (3) qualified immunity barred the federal claims against other WSLCB employees, and (4) the remaining claims failed because Fila had either failed to state a valid cause of action or failed to allege facts sufficient to support the cause of action asserted.

In response, Fila agreed to voluntarily dismiss the board member defendants and to dismiss all section 1983 claims against the WSLCB itself. Fila also agreed to dismiss all of his claims against individual defendants except for (1) violation of his right to due process, (2) negligent supervision, (3) civil conspiracy, and (4) tortious interference with a business expectancy.

The superior court granted in part the WSLCB's summary judgment motion, except as to Fila's due process claim. The WSLCB moved for reconsideration on the due process claim, and while its motion was pending, the United States District Court dismissed Fila's federal suit against the City of Wenatchee, the WPD, and its officers.

The trial court granted the WSLCB's motion for reconsideration, resulting in an order of summary judgment in the defendants' favor on all of Fila's claims. Fila appeals.

ANALYSIS

After discussing the standard of review for summary judgment, we first address Fila's section 1983 due process claim. We then turn to Fila's state law claims.

I. STANDARD OF REVIEW

We review a grant of summary judgment de novo, performing the same inquiry as the trial court. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407-08, 282 P.3d 1069 (2012); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). A court should grant summary judgment only if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516. "If the nonmoving party fails to

do so, then summary judgment is proper." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

In determining whether summary judgment was proper, we must consider all facts, and the reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Vallandigham*, 154 Wn.2d at 26; *Atherton*, 115 Wn.2d at 516. Under this standard, a trial court properly grants summary judgment only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26. Thus, we consider the record in the light most favorable to Fila.

II. Due Process Claim Under 42 U.S.C. Section 1983

Fila bases his due process claim on 42 U.S.C. section 1983, which provides in relevant part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . 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.

To state a cause of action under this provision, "a plaintiff need only allege that (1) defendant acted under color of state law, and (2) defendant's conduct deprived plaintiff of rights protected by the Constitution or laws of the United States." *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11-12, 829 P.2d 765 (1992). Washington courts have concurrent jurisdiction with the federal courts to hear such claims. *Sintra*, 119 Wn.2d at 11; *Haywood v. Drown*, 556 U.S. 729, 734-35, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009).

Fila contends that the trial court erred in dismissing his section 1983 claim against Kohler, Murphy, and Stensatter on summary judgment because the evidence submitted established that these employees, under color of state law, deprived him of the "right to pursue

an occupation" guaranteed by the United States' due process clause. Br. of Appellant at 24-34. The qualified immunity from suit enjoyed by law enforcement personnel performing their official duties does not bar his claim, Fila maintains, because "[t]he right to operate a liquor establishment with a state[-]issued nightclub license free of excessive and unreasonable police interference is clearly recognized" under federal court precedents, such that "any reasonable police officer" would have realized that the conduct Fila alleged violated that right. Br. of Appellant at 32-34.

A. Defendants Implicated by Fila's Section 1983 Claim

The WSLCB asserts that "Fila pled no [section] 1983 claim against Director Kohler" and makes "no claim that Murphy deprived Fila of any federal right" in this appeal, leaving "Stensatter as the only remaining individual defendant against whom the [section] 1983 claim was pled." Br. of Resp't at 14. These assertions, however, are not consistent with the record.

Under the heading "Due Process," Fila's complaint states, "This Cause of Action is brought by Plaintiff against *all Defendants* for deprivation of constitutional rights within the meaning of 42 U.S.C.A. § 1983." CP at 45 (emphasis added). The complaint names Kohler as a defendant, and alleges that she failed to investigate or take action against Stensatter despite actual notice of his allegedly unconstitutional actions. Fila submitted to the trial court copies of letters his counsel sent to Kohler notifying her of Stensatter's conduct.

Constitutional deprivations by a subordinate may subject a supervisor to liability under section 1983 if "a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation" exists. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). Federal courts have imposed such supervisory liability where an official knew or should have known of a subordinate's violations of federally protected rights and failed to act to prevent further

misconduct. *McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976); *Wright v. McMann*, 460 F.2d 126, 134-35 (2d Cir. 1972); *see also Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 680-81 (9th Cir. 1984).

As executive director of the WSLCB, Kohler arguably had supervisory authority over Stensatter. Kohler also had notice of the challenged conduct by Stensatter. Thus, assuming Stensatter's conduct violated a federal right, Fila sufficiently pled a section 1983 claim against Kohler.

The assertion that Fila makes no section 1983 claim against Murphy also is not supported by the record. As discussed, the complaint asserts a section 1983 claim against "all defendants," and it names Murphy as a defendant. CP at 28. The WSLCB points out that Fila's complaint alleged that Murphy violated Fila's Fourth Amendment rights and that Fila later dropped that claim. Fila's complaint, however, also alleged a due process violation against Murphy, and his brief argued that Murphy's conduct gave rise to a valid section 1983 claim. Further, as noted above, Fila's due process claims were not among those he dismissed in his response to the WSLCB's motion for summary judgment.

Thus, while no section 1983 claim remains against the state, the WSLCB as a government agency, or board members Foster, Kurose, and Marr, Fila did plead such a claim against Kohler and Murphy. The questions remain, however, whether Fila sufficiently pled a violation of a federal right, and whether qualified immunity bars his suit.

B. Qualified Immunity and the Right to Pursue an Occupation

The affirmative defense of qualified immunity protects government officials from suits for civil damages based on their performance of discretionary functions, as long as "their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether qualified immunity bars a suit generally presents a question of law for the trial court. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). The protections of qualified immunity apply regardless of whether the defendant official's alleged error of judgment is "'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting)).

The United States Supreme Court has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). To overcome the immunity, (1) the plaintiff must allege facts that, if proved, would "make out a violation of a constitutional right," and (2) the right must have been "clearly established at the time of defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (internal quotation marks omitted). We first consider whether Fila sufficiently alleged a violation of a protected right. Concluding that he did not, we do not reach the question of whether relevant precedent had "clearly established" the right articulated.

Fila alleges that the WSLCB's employees deprived him of a "liberty or property interest," specifically his "constitutional . . . right to pursue an occupation." Br. of Appellant at 25. Fila characterizes the right at issue as "[t]he constitutional right to operate a liquor establishment with a state[-]issued nightclub license free of excessive and unreasonable police interference." Br. of Appellant at 32-33.

Under well-established federal law, "[a] State cannot exclude a person from [an] occupation in a manner or for reasons that contravene the Due Process or Equal Protection

Clause of the Fourteenth Amendment." *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *see also Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) (noting that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" and citing cases). Fila directs our attention to *Benigni v. City of Hemet*, in which the Ninth Circuit Court of Appeals held that a trial court had properly submitted to the jury a section 1983 claim based on infringement of the right to pursue an occupation, where the evidence sufficed to show "excessive and unreasonable police conduct was intentionally directed toward Benigni's bar to force him out of business." 879 F.2d 473, 478 (9th Cir. 1988).

Benigni, however, helps Fila far less than he contends. First, Fila's allegations against the WSLCB's employees are much less egregious than the police conduct addressed in *Benigni*, 879 F.2d at 478:

> The testimony reveals that bar checks occurred nightly, up to five or six times per night, that customers were frequently followed from the [bar] and sometimes arrested, that staff and customers frequently received parking tickets, that officers parked at the old train depot across the street, and that there were usually three or four officers there at all times in the evening, and that cars were often stopped in the vicinity of the [bar] for traffic violations that had occurred elsewhere.

Furthermore, the defendants there failed to object to the trial court's instructions on Benigni's due process claim, and the reviewing court therefore declined to "address the adequacy of [those] instructions," instead considering only "whether there is evidence supporting the verdict sufficient to justify submitting the various theories of liability to the jury." *Benigni*, 879 F.2d at 476. The *Benigni* court therefore did not consider the precise nature or scope of the right identified.

Most importantly, subsequent precedents have more narrowly delineated the contours of the relevant right: the Ninth Circuit Court of Appeals later specified that, to successfully plead a substantive due process violation based on the right to pursue an occupation, the plaintiff must show that "'clearly arbitrary and unreasonable'" state action "'having no substantial relation to the public health, safety, morals, or general welfare'" prevented the plaintiff from pursuing comparable employment in the relevant industry. *Wedges/Ledges of Cal. Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (9th Cir. 1994) (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). Under this standard, Fila has raised no material issue of fact that would require reversal of the trial court's summary judgment order.

First, Fila did not submit evidence showing that the WSLCB employees' conduct prevented him from operating Club Level, let alone from pursuing any comparable employment in the industry. The plaintiff in *Benigni* had alleged that police "harassment eventually forced him to sell at a loss." *Benigni*, 879 F.2d at 475. Fila does allege in his brief, without citation to the record, that "significantly declining revenues caused by the undue attention" of the WSLCB and WPD "forced [Fila] to close Club Level in May 2013." Br. of Appellant at 27-28. The only support for the claim in the record consists of Fila's counsel's statement at the hearing on the WSLCB's motion for reconsideration that the "behavior and the pressure placed upon him by these various law enforcement agencies in Chelan County" had forced Fila to close Club Level. Verbatim Report of Proceedings (Aug. 9, 2013) at 24. Argument from counsel, however, is not evidence. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

Were we to overlook these deficiencies, Fila must still show that defendants' conduct was clearly arbitrary and unreasonable and bore no substantial relation to public health or safety to show a deprivation of the right to pursue an occupation under substantive due process.

Wedges/Ledges, 24 F.3d at 65. Fila does not claim that Stensatter issued citations without probable cause to believe that the violations had occurred and points to no evidence, other than the somewhat suspicious timing of one of the citations, that the WSLCB's employees acted with a retaliatory motive. Fila availed himself of state law procedures each time the employees took adverse action against him.

Further, the state action Fila alleges has a substantial relationship to protecting public health and safety. The legislature explicitly adopted the laws that the WSLCB enforces "for the protection of the welfare, health, peace, morals, and safety of the people of the state." RCW 66.08.010. According to unrebutted evidence in the record, in the period leading up to the challenged conduct, more persons arrested in Wenatchee for driving under the influence reported last obtaining alcohol from Club Level than from any other bar. The analysis of police incident logs that Fila submitted to the superior court, showing a much higher level of police activity at Club Level than at other Wenatchee bars, also showed that 139 of the 183 incidents of police involvement there between August 2010 and August 2012 originated with complaints from patrons or Club Level staff. This figure amounted to more than double the number of patron- and staff-initiated incidents for any other bar analyzed. In light of these numbers, the WSLCB's employees could quite reasonably have decided, in the interest of public safety, to target Club Level for heavier enforcement than other local bars.

Fila did not submit evidence showing either that the employees' conduct prevented him from operating a bar or that the challenged conduct bore no substantial relation to public health, safety, or welfare. Under the standard articulated in *Wedges/Ledges*, 24 F.3d at 65, the uncontroverted evidence fails to show any violation of the substantive due process right to pursue an occupation. With that, Fila has failed to show the most basic element of any claim

under 42 U.S.C. section 1983, the deprivation of a federal right. For the same reason, Fila's claim also founders on the first prong of the qualified immunity test, since Fila has not alleged facts that would "make out a violation of a constitutional right" under *Pearson*, 555 U.S. at 232. The trial court did not err in dismissing Fila's section 1983 claim on summary judgment.

III. NEGLIGENT SUPERVISION

Fila also contends the trial court erred in dismissing his claim that Kohler and the WSLCB negligently supervised Murphy and Stensatter. The WSLCB maintains that the court properly dismissed the claim because, "where the employer admits that the employee acted within the scope of employment[,] a cause of action for negligent supervision is redundant." Br. of Resp't at 25. The WSLCB also argues that Kohler cannot be liable for Murphy's or Stensatter's conduct under this theory because she was not their employer and that Fila's evidence at most shows only that Kohler decided not to respond to letters from Fila's attorney.

The doctrine of vicarious liability or respondeat superior "imposes liability on an employer for the torts of an employee who is acting on the employer's behalf." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). Under this doctrine, "the scope of employment limits the employer's vicarious liability . . . [for] the employee's negligence or intentional wrongdoing." *Niece*, 131 Wn.2d at 48. Thus, if "the employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable." *Niece*, 131 Wn.2d at 48. Whether an employee acted within the scope of employment ordinarily presents a question of fact for the jury. *Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 585, 950 P.2d 20 (1998).

"Even where an employee is acting outside the scope of employment," however, employers also owe a duty "to foreseeable victims[] to prevent the tasks, premises, or

instrumentalities entrusted to an employee from endangering others." *Niece*, 131 Wn.2d at 48. "This duty gives rise to causes of action for negligent hiring, retention and supervision," causes of action "based on the theory that such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior." *Niece*, 131 Wn.2d at 48 (internal quotation marks omitted). The theories are not entirely independent, however: we have held that "a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the course and scope of employment." *LaPlant v. Snohomish County*, 162 Wn. App. 476, 480, 271 P.3d 254 (2011).

The issue presented centers on the following holding from *Gilliam*:

> Here, the State acknowledged [the employee] was acting within the scope of her employment, and that the State would be vicariously liable for her conduct. Under these circumstances a cause of action for negligent supervision is redundant. If Gilliam proves [the employee's] liability, the State will also be liable. If Gilliam fails to prove [the employee's] liability, the State cannot be liable even if its supervision was negligent. We find no error in the trial court's dismissing the cause of action.

89 Wn. App. at 585. Fila points to the *LaPlant* court's discussion of a federal case, *Tubar v. Clift*, No. C05-1154-JCC, 2008 WL 5142932 (W.D. Wash. 2008), in which a federal district court distinguished *Gilliam*:

> In *Tubar*, Kent Police Officer Jason Clift discovered a stolen vehicle in the parking lot of Tubar's apartment building and waited in the bushes for the driver to return. When she did, accompanied by Tubar, Clift announced his presence, which was ignored. As Tubar and the driver drove out of the parking lot and toward Clift, Clift fired three shots, injuring Tubar. Tubar brought a lawsuit against the City of Kent and Officer Clift, alleging a 42 U.S.C. section 1983 claim and state law claims for negligent hiring, training, supervision, and retention.
>
> The City argued that Washington case law precluded Tubar's state law claims, relying on *Gilliam*. The court distinguished *Gilliam* on the basis that Tubar had not asserted a negligence claim against Clift individually:

> Here, there is no such redundancy because Plaintiff has not asserted a negligence claim against Officer Clift for which the City would be vicariously liable by admission. Instead, Plaintiff claims that the City itself is negligent for breaching its own standard of care with respect to the hiring, supervision, and training of Officer Clift. [*Tubar*, 2008 WL 5142932 at *7].
>
> We distinguish *Tubar* from LaPlant's case for the same reason. As in *Gilliam*, LaPlant has asserted a negligence claim against the deputies for which the County would be vicariously liable. *Tubar* is inapposite.

LaPlant, 162 Wn. App. at 482-83 (footnotes omitted). From this, Fila contends that, because he asserted no negligence claim against Murphy or Stensatter, his negligent supervision claim against Kohler was not redundant.

Fila's argument fails. Although he did not assert a *negligence* claim against Murphy or Stensatter, he did assert other state law claims for which the WSLCB or state would be vicariously liable. Because the WSLCB's liability for negligent supervision would depend on the establishment of claims against Murphy and Stensatter for which the liquor board admits it would be vicariously liable should Fila prevail, *Gilliam* and *LaPlant* control. The negligent supervision claim is redundant, and the trial court did not err in dismissing it.[3]

IV. Civil Conspiracy

Fila contends that the trial court erred in dismissing his civil conspiracy claim because it applied an incorrect legal standard. Specifically, Fila points out that the court's letter opinion stated that "the plaintiffs must provide clear, cogent, and convincing evidence" to sustain such a

[3] The WSLCB also presents strong arguments that (1) Kohler cannot be liable based on Murphy's and Stensatter's conduct because she is not their employer and that (2) Fila failed to allege facts giving rise to a negligent supervision claim because the only evidence in the record shows that, although Kohler did not respond to letters from Fila's attorney, she did assign an officer to investigate Stensatter. With our decision above, we need not resolve these issues.

claim and argues that this shows that the court failed to view the evidence in the light most favorable to the nonmoving party. We disagree.

As an initial matter, the substantive evidentiary standard at trial necessarily informs the court's inquiry on summary judgment as to whether a material issue of fact remains. *See Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68; 776 P.2d 98 (1989). Thus, the trial court did not err in considering the clear, cogent, and convincing standard in its analysis.

To prevail on a civil conspiracy claim, the plaintiff must prove by clear, cogent, and convincing evidence that (1) "two or more persons combine[d] to accomplish an unlawful purpose or . . . to accomplish some purpose not in itself unlawful by unlawful means," and that (2) "the alleged coconspirators entered into an *agreement* to accomplish the object of the conspiracy." *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967). "While a finding that a conspiracy existed may be based on circumstantial evidence, mere suspicion is not a sufficient ground upon which to base a finding of conspiracy." *Corbit*, 70 Wn.2d at 529.

The court dismissed the claim because Fila failed to produce evidence of an agreement to accomplish the unlawful purpose alleged. As the court pointed out,

> [t]he evidence in this file does not show an agreement to harm the plaintiff's business. It merely shows communications between officers and the Liquor Control Board. Those communications are a normal part of their working relationship. The plaintiff has completed discovery and has not demonstrated that the circumstances are reasonably consistent only with the existence of a conspiracy.

CP at 479.

The trial court was correct. The evidence submitted shows only discussions between two law enforcement agencies about attempts to strictly enforce the law against a bar that generated a disproportionate number of requests for police service. Fila failed to demonstrate any possibility

of showing by clear, cogent, and convincing evidence an agreement, an unlawful purpose, or the use of unlawful means. We affirm the trial court's dismissal of Fila's conspiracy claim.

V. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

Finally, Fila contends that the trial court erred in dismissing his tortious interference claim because he provided evidence of all the elements at issue in the case. Again, we disagree.

Our Supreme Court has articulated the elements of a claim for tortious interference with a contractual relationship or business expectancy as follows:

> (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 County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). To prevail on such a claim, a "plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a 'duty of non-interference; *i.e.*, that he interfered for an improper purpose . . . or . . . used improper means.'" *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (quoting *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979)).

The only evidence Fila presented of a legitimate contractual relationship or business expectancy concerned his lease with Rodriguez. Fila submitted a declaration in which Rodriguez averred that

> Mr. Fila and I did have a contractual agreement where he would pay me $4,000 per month to lease the space within which he was operating Club Level on the second floor. Mr. Fila was not able to fully comply with this agreement because of declining sales which he had inside Club Level. At this time Mr. Fila still owes me monies which remain unpaid from the terms of this lease.

CP at 448.

Fila, however, points to no evidence that the WSLCB employees knew of his arrangement with Rodriguez. Instead, Fila merely asserts that Murphy and Stensatter must have known about the lease because they knew Rodriguez owned the building. Fila also fails to submit evidence that would raise a material issue of fact as to whether the WSLCB employees had an improper purpose or used improper means. The trial court did not err in dismissing Fila's tortious interference claim on summary judgment.

CONCLUSION

We affirm the trial court's dismissal of Fila's claims on summary judgment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.
BJORGEN, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Melnick, J.
MELNICK, J.

APPENDIX B

Superior Court of the State of Washington
For Thurston County

Gary R. Tabor, *Judge*
Department No. 1
Chris Wickham, *Judge*
Department No. 2
Anne Hirsch, *Judge*
Department No. 3
Carol Murphy, *Judge*
Department No. 4

Lisa L. Sutton, *Judge*
Department No. 5
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Department No. 6
Christine Schaller, *Judge*
Department No. 7
Erik D. Price, *Judge*
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June 14, 2013

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Re: Club Level et al v State Liquor Control Bd, et al
Thurston County Cause No. 12-2-01803-8

LETTER OPINION

Dear Counsel,

The defendants in this case moved for full summary judgment dismissal. This court reviewed and considered the entire file and heard oral argument on the motion on May 3, 3013. The court took the matter under advisement, and grants in part and denies in part the motion for summary judgment. Specifically, the court denies the motion for summary judgment for the due process claim, and grants the motion for the remaining issues.

As a preliminary matter, the plaintiffs stated in their response brief that they are voluntarily dismissing several causes of action and defendants. They agree to dismiss the following causes of action: (VI) equal protection; (VII) unreasonable search and seizure; (IX) defamation of character; (XI) negligent infliction of emotional harm; (XII) outrage, and (XIV) public disclosure act violations. The plaintiffs also state that they are dismissing three defendants: Sharon Foster, Ruthann Kurose, and Chris Marr. Finally, the plaintiffs concede that two defendants, the State of Washington and the Washington State Liquor Control Board, are not "persons" for purposes of 42 U.S.C. § 1983. The court notes that

these voluntary dismissals have not been memorialized in a court order, and the plaintiff is directed to present an order consistent with the plaintiff's intentions.

The remaining defendants are the Washington State Liquor Control Board, Pat Kohler as executive director of the Liquor Control Board, Sergeant Tom Stensatter, and Matt Murphy. Sergeant Stensatter and Matt Murphy are employees of the Liquor Control Board.

There are four remaining causes of action: (1) violation of the plaintiffs' right to due process, under 42 U.S.C.A. § 1983, by all defendants; (2) negligent supervision of Stensatter and Officer Matt Murphy by Executive Director Kohler; (3) unlawful conspiracy by all defendants; and (4) tortuous interference with a business relationship by all defendants. The court will address each cause of action in turn.

1. **Due Process**

The plaintiffs assert that the defendants violated their Fourteenth Amendment right to due process of law. This is a § 1983 claim. The parties contest whether a constitutional right has been deprived. The plaintiffs argue that their right to "pursue an occupation" was deprived, while the defendants contend that there is no such right and, if there is such a right, it was not violated because Club Level is still licensed and operating.

The plaintiffs cite three cases for the proposition that there is a constitutional right to pursue an occupation. In *Schware v. New Mexico Bd. of Bar Examiners*, 353 U.S. 232, 238-39 (1957), the United States Supreme Court held that a State may not exclude a person from practicing an occupation "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." For example, the Court cited as improper denying entry to an occupation solely due to the applicant's race or religious affiliation. The Court held that the New Mexico Board of Bar Examiners improperly denied an applicant admission to the Bar on the basis that he was arrested many years before, used aliases, and was a member of the Communist Party 15 years previously. The Board determined that, based on these activities, the applicant was not morally fit to practice law. The Court held that these facts have no rational relationship to whether the applicant was morally fit to practice law.

Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985), involved a T-shirt street vendor. The City gave Julie Chalmers a permit to sell T-shirts, but then

police threatened her for doing so and the City eventually revoked her permit under an ordinance that prohibited street vending. However, another ordinance allowed street vending. The Court mentions the due process right to pursue an occupation, but that mention is merely dicta. The Court held that the city ordinances at issue were void for vagueness and, because two ordinances contradicted each other, invited arbitrary enforcement.

The plaintiff relies most heavily on *Benigni v. City of Hemet*, 879 F.2d 473 (9th Cir. 1988). In that case, there was substantial evidence that the police had engaged in "excessive and unreasonable police conduct [that] was intentionally directed toward [the plaintiff's] bar to force him out of business." Among other activities, the police had performed bar checks on a daily basis, followed customers leaving the bar and occasionally arrested them for drunk driving and other violations, issued parking tickets to staff and customers, and "staked out" customers and employees by parking across the street. The plaintiff lost a lot of business due to these police tactics, and was forced to sell his business at a loss.

The *Benigni* Court did not specifically rule on the threshold of evidence required to sustain a Due Process loss of occupation claim. The question was sent to the jury, and the Court merely assessed whether substantial evidence supported the verdict. However, this case is very similar on the facts to the present case. Further, *Benigni* seems to stand for the proposition that a loss of occupation claim can be based on excessive and unreasonably police conduct that is intentionally targeted to harm a business and which does harm the business.

The defendants argue that the present case is not similar to *Benigni*, apparently because the facts in that case are arguably more shocking than in the present case and because the procedural posture differs. However, the plaintiff has presented a material question of fact regarding this claim.

Taken in the light most favorable to the non-moving parties, the plaintiffs, the evidence shows that law enforcement specifically targeted Club Level in an excessive and unreasonable manner because they wanted to put it out of business. The declaration of Ryan Fila recounts excessive bar checks, "staking out" behavior, pursuing a violation for inadequate lighting that had no basis in fact and was retaliation for dismissal of a separate violation, conducting drive-bys of Fila's personal residence, expressing animosity toward Fila based on his homosexuality, running excessive checks on the personal vehicles of Fila and his staff, and intimidating night club patrons.

An expert in law enforcement also analyzed police reports and complaints, and concluded that there was disparate treatment between Club Level and similarly situated establishments. For instance, law enforcement forwarded reports regarding Club Level to the Liquor Control Board 13 percent of the time, forwarded reports from El Volcano 7 percent of the time, and forwarded reports from the six other local establishments 2 or less percent of the time. This evidence is sufficient to create a material issue of fact regarding a due process violation.

The defendants additionally argue that the damages in this case are not as severe as in *Benigni*. In that case, the plaintiff was forced to sell his business at a loss. In *Schware*, the plaintiff was denied admission to the Bar, and in *Chalmers* the plaintiff lost her permit to vend T-shirts. Although these cases are dissimilar to the present case, the defendants have not demonstrated that a due process claim cannot be maintained unless the plaintiff totally lost his occupation, was denied a license, or had his license revoked. Here, the plaintiffs present evidence that revenues were substantially decreased because of these acts and that Fila relocated the night club to try to avoid the allegedly excessive law enforcement actions, an expensive endeavor. At this stage in litigation, this is enough to demonstrate that a material fact exists concerning damages for this claim. The motion for summary judgment regarding the due process violation is denied.

2. **Negligent Supervision**

The defendants also move for dismissal of the negligent supervision claim against Executive Director Kohler. The defendants write:

> LCB stipulates that Stensatter and Murphy were acting within the scope of their employment at all times when they dealt with Mr. Fila or when they inspected Club Level.

Defendant's Motion for Summary Judgment, at 15, fn 56. A claim of negligent supervision cannot be maintained if the employees were acting within the scope of their employment. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48 (1997). Nevertheless, the plaintiffs argue that the court should deny summary judgment on this claim because the defendants have not *really* stipulated to this fact. They point out that this fact was contested in discovery.

The motion for summary judgment on this claim is granted. The court accepts the defendants' stipulation and requires that it be reduced to a court order. If that is

not done in a timely fashion, the court will entertain a motion to reconsider its decision on this issue.

3. **Unlawful Conspiracy**

Next, the court must analyze whether the evidence, taken in the light most favorable to the plaintiffs, supports a theory of civil conspiracy. It does not.

To demonstrate civil conspiracy, the plaintiffs must provide clear, cogent, and convincing evidence that (1) two or more people engaged in activity to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means and (2) those people entered into an agreement to accomplish the object of the conspiracy. *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 528-29 (1967); *Wilson v. State*, 84 Wn. App. 332, 350-51 (1996). As discussed in the due process analysis, the plaintiffs have submitted sufficient evidence to support the first element. The remaining question is whether there is evidence of an agreement.

The plaintiffs argue that there was an agreement between the WPD and the Liquor Control Board to harm their business. The plaintiffs' entire argument is:

> Multiple parties have testified in various depositions as well as demonstrated through the documentary evidence that a continual stream of communication existed between the WPD and the WSLCB officers regarding Club Level. Officer Drolet authored an e-mail to Officer Murphy stating that it was his perception a "few expensive tickets" would slow things down at Club Level. Issuing a few expensive tickets for the purpose of slowing down a business is not a lawful purpose pursuant to the 14th amendment due process clause. There also exists the clear and uncontested e-mails from Capt. Dresker clearly stating his desire to be more proactive in his own methods of impacting Club Level's business up to and including "pressing Liquor Control to close the business down."
>
> Lt. Starkey had testified during his deposition that the driving force behind the LSI designation is the reports forwarded from the WPD. Exhibit 1 shows that 26 reports were forwarded to the WSLCB from WPD officers regarding Club Level during this relevant two year time frame. For every other bar in Wenatchee combined there were only a total of four reports forwarded to the WSLCB. Of these 24 complaints were investigated and 22 were ultimately "unfounded" with two written warnings being issued to Club Level. Not one sustained AVN has been issued against this business

> despite the fact that it was designated as an LSI almost immediately after its creation.

Plaintiff's Response to Motion for Summary Judgment, at 21-22. In addition to the evidence raised in the brief, there is speculation that weekly meetings between Chief Robbins and Sergeant Stensatter at a coffee shop were somehow less than innocent. Declaration of Ryan Fila, at 11-12.

While circumstantial evidence can be sufficient to show a conspiracy, the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. *Harrington v. Hawthorne*, 111 Wn. App. 824, 840 (2002). The evidence in this file does not show an agreement to harm the plaintiffs business. It merely shows communications between officers and the Liquor Control Board. Those communications are a normal part of their working relationship. The plaintiff has completed discovery and has not demonstrated that the circumstances are reasonably consistent only with the existence of a conspiracy. There is no material question of fact to support this claim, and therefore the court dismisses it.

4. **Tortuous Interference with a Business Relationship**

The final issue is whether to grant summary judgment on the claim of tortuous interference with a business relationship. This claim requires proof of five elements. Relevant here are the elements that (1) there is a contractual relationship or business expectancy, (2) the defendants knew about it, and (3) the defendants' intentional interference induced or caused a breach or termination of the relationship or expectancy. *Leingang v. Pierce Co. Med. Bureau, Inc.*, 131 Wn.2d 133 (1997).

The plaintiffs explain that they had a contract and a business relationship with Art Rodriguez, the former owner of Club Level and the night club's landlord. The plaintiffs also say that the defendants knew about it. But they have not provided any evidence regarding the contract, and they have not provided any evidence that the defendants induced or caused a breach or termination of the relationship or business expectancy. There is simply no evidence to support this claim, and therefore it must be dismissed. The motion for summary judgment on this claim is granted.

The parties may present an agreed order consistent with this opinion on an ex parte basis, or may schedule presentation on the court's civil motion calendar. As

explained above, the court must also enter an order of voluntary dismissal for the claims and defendants that the plaintiffs seek to dismiss. Further, the defendants' stipulation that the officers were acting within the scope of employment must be reduced to a court order as well.

Sincerely,

Chris Wickham
Judge

c: Court File

APPENDIX C

RCW 66.44.310

Minors frequenting off-limits area — Misrepresentation of age — Penalty — Classification of licensees.

(1) Except as otherwise provided by RCW 66.44.316, 66.44.350, and 66.24.590, it shall be a misdemeanor:

(a) To serve or allow to remain in any area classified by the board as off-limits to any person under the age of twenty-one years;

(b) For any person under the age of twenty-one years to enter or remain in any area classified as off-limits to such a person, but persons under twenty-one years of age may pass through a restricted area in a facility holding a spirits, beer, and wine private club license;

(c) For any person under the age of twenty-one years to represent his or her age as being twenty-one or more years for the purpose of purchasing liquor or securing admission to, or remaining in any area classified by the board as off-limits to such a person.

(2) The Washington state liquor control board shall have the power and it shall be its duty to classify licensed premises or portions of licensed premises as off-limits to persons under the age of twenty-one years of age.

[2007 c 370 § 12; 1998 c 126 § 14; 1997 c 321 § 53; 1994 c 201 § 8; 1981 1st ex.s. c 5 § 24; 1943 c 245 § 1 (adding new section 36-A to 1933 ex.s. c 62); Rem. Supp. 1943 § 7306-36A. Formerly RCW 66.24.130 and 66.44.310.]

Notes:

Effective date -- 2007 c 370 §§ 10-20: See note following RCW 66.04.010.

Effective date -- 1998 c 126: See note following RCW 66.20.010.

Effective date -- 1997 c 321: See note following RCW 66.24.010.

Severability -- Effective date -- 1981 1st ex.s. c 5: See RCW 66.98.090 and 66.98.100.

Minors, access to tobacco, role of liquor control board: Chapter 70.155 RCW.

RCW 66.24.010

Licensure — Issuance — Conditions and restrictions — Limitations — Temporary licenses.

(1) Every license must be issued in the name of the applicant, and the holder thereof may not allow any other person to use the license.

(2) For the purpose of considering any application for a license, or the renewal of a license, the board may cause an inspection of the premises to be made, and may inquire into all matters in connection with the construction and operation of the premises. For the purpose of reviewing any application for a license and for considering the denial, suspension, revocation, or renewal or denial thereof, of any license, the liquor control board may consider any prior criminal conduct of the applicant including an administrative violation history record with the board and a criminal history record information check. The board may submit the criminal history record information check to the Washington state patrol and to the identification division of the federal bureau of investigation in order that these agencies may search their records for prior arrests and convictions of the individual or individuals who filled out the forms. The board must require fingerprinting of any applicant whose criminal history record information check is submitted to the federal bureau of investigation. The provisions of RCW 9.95.240 and of chapter 9.96A RCW do not apply to such cases. Subject to the provisions of this section, the board may, in its discretion, grant or deny the renewal or license applied for. Denial may be based on, without limitation, the existence of chronic illegal activity documented in objections submitted pursuant to subsections (8)(d) and (12) of this section. Authority to approve an uncontested or unopposed license may be granted by the board to any staff member the board designates in writing. Conditions for granting such authority must be adopted by rule. No retail license of any kind may be issued to:

(a) A person doing business as a sole proprietor who has not resided in the state for at least one month prior to receiving a license, except in cases of licenses issued to dining places on railroads, boats, or aircraft;

(b) A copartnership, unless all of the members thereof are qualified to obtain a license, as provided in this section;

(c) A person whose place of business is conducted by a manager or agent, unless such manager or agent possesses the same qualifications required of the licensee;

(d) A corporation or a limited liability company, unless it was created under the laws of the state of Washington or holds a certificate of authority to transact business in the state of Washington.

(3)(a) The board may, in its discretion, subject to the provisions of RCW 66.08.150, suspend or cancel any license; and all rights of the licensee to keep or sell liquor thereunder must be suspended or terminated, as the case may be.

(b) The board must immediately suspend the license or certificate of a person who has been certified pursuant to RCW 74.20A.320 by the department of social and health services as a person who is not in compliance with a support order. If the person has continued to meet all other requirements for reinstatement during the suspension, reissuance of the license or certificate is automatic upon the board's receipt of a release issued by the department of social and health services stating that the licensee is in compliance with the order.

(c) Upon written notification by the department of revenue in accordance with RCW 82.08.155 that a person is more than thirty days delinquent in reporting or remitting spirits taxes to the department, the board must suspend all spirits licenses held by that person. The board must also refuse to renew any existing spirits license of, or issue any new spirits license to, the person or any other applicant controlled directly or indirectly by that person. The board may not reinstate a person's spirits license or renew or issue a new spirits license to that person, or an applicant controlled directly or indirectly by that person, until such time as the department of revenue notifies the board that the person is current in reporting and remitting spirits taxes or

that the department consents to the reinstatement or renewal of the person's spirits license or the issuance of a new spirits license to the person. For purposes of this section: (i) "Spirits license" means any license issued by the board under the authority of this chapter that authorizes the licensee to sell spirits; and (ii) "spirits taxes" has the same meaning as in RCW 82.08.155.

(d) The board may request the appointment of administrative law judges under chapter 34.12 RCW who must have power to administer oaths, issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony, examine witnesses, and to receive testimony in any inquiry, investigation, hearing, or proceeding in any part of the state, under such rules and regulations as the board may adopt.

(e) Witnesses are allowed fees and mileage each way to and from any such inquiry, investigation, hearing, or proceeding at the rate authorized by RCW 34.05.446. Fees need not be paid in advance of appearance of witnesses to testify or to produce books, records, or other legal evidence.

(f) In case of disobedience of any person to comply with the order of the board or a subpoena issued by the board, or any of its members, or administrative law judges, or on the refusal of a witness to testify to any matter regarding which he or she may be lawfully interrogated, the judge of the superior court of the county in which the person resides, on application of any member of the board or administrative law judge, must compel obedience by contempt proceedings, as in the case of disobedience of the requirements of a subpoena issued from said court or a refusal to testify therein.

(4) Upon receipt of notice of the suspension or cancellation of a license, the licensee must forthwith deliver up the license to the board. Where the license has been suspended only, the board must return the license to the licensee at the expiration or termination of the period of suspension. The board must notify all vendors in the city or place where the licensee has its premises of the suspension or cancellation of the license; and no employee may allow or cause any liquor to be delivered to or for any person at the premises of that licensee.

(5)(a) At the time of the original issuance of a spirits, beer, and wine restaurant license, the board must prorate the license fee charged to the new licensee according to the number of calendar quarters, or portion thereof, remaining until the first renewal of that license is required.

(b) Unless sooner canceled, every license issued by the board must expire at midnight of the thirtieth day of June of the fiscal year for which it was issued. However, if the board deems it feasible and desirable to do so, it may establish, by rule pursuant to chapter 34.05 RCW, a system for staggering the annual renewal dates for any and all licenses authorized by this chapter. If such a system of staggered annual renewal dates is established by the board, the license fees provided by this chapter must be appropriately prorated during the first year that the system is in effect.

(6) Every license issued under this section is subject to all conditions and restrictions imposed by this title or by rules adopted by the board. All conditions and restrictions imposed by the board in the issuance of an individual license may be listed on the face of the individual license along with the trade name, address, and expiration date. Conditions and restrictions imposed by the board may also be included in official correspondence separate from the license. All spirits licenses are subject to the condition that the spirits license holder must report and remit to the department of revenue all spirits taxes by the date due.

(7) Every licensee must post and keep posted its license, or licenses, and any additional correspondence containing conditions and restrictions imposed by the board in a conspicuous place on the premises.

(8)(a) Unless (b) of this subsection applies, before the board issues a new or renewal license to an applicant it must give notice of such application to the chief executive officer of the incorporated city or town, if the application is for a license within an incorporated city or town, or to the county legislative authority, if the application is for a license outside the boundaries of incorporated cities or towns.

(b) If the application for a special occasion license is for an event held during a county, district, or area fair as defined by RCW 15.76.120, and the county, district, or area fair is located on property owned by the

county but located within an incorporated city or town, the county legislative authority must be the entity notified by the board under (a) of this subsection. The board must send a duplicate notice to the incorporated city or town within which the fair is located.

(c) The incorporated city or town through the official or employee selected by it, or the county legislative authority or the official or employee selected by it, has the right to file with the board within twenty days after the date of transmittal of such notice for applications, or at least thirty days prior to the expiration date for renewals, written objections against the applicant or against the premises for which the new or renewal license is asked. The board may extend the time period for submitting written objections.

(d) The written objections must include a statement of all facts upon which such objections are based, and in case written objections are filed, the city or town or county legislative authority may request and the liquor control board may in its discretion hold a hearing subject to the applicable provisions of Title 34 RCW. If the board makes an initial decision to deny a license or renewal based on the written objections of an incorporated city or town or county legislative authority, the applicant may request a hearing subject to the applicable provisions of Title 34 RCW. If such a hearing is held at the request of the applicant, liquor control board representatives must present and defend the board's initial decision to deny a license or renewal.

(e) Upon the granting of a license under this title the board must send written notification to the chief executive officer of the incorporated city or town in which the license is granted, or to the county legislative authority if the license is granted outside the boundaries of incorporated cities or towns. When the license is for a special occasion license for an event held during a county, district, or area fair as defined by RCW 15.76.120, and the county, district, or area fair is located on county-owned property but located within an incorporated city or town, the written notification must be sent to both the incorporated city or town and the county legislative authority.

(9)(a) Before the board issues any license to any applicant, it shall give (i) due consideration to the location of the business to be conducted under such license with respect to the proximity of churches, schools, and public institutions and (ii) written notice, with receipt verification, of the application to public institutions identified by the board as appropriate to receive such notice, churches, and schools within five hundred feet of the premises to be licensed. The board may not issue a liquor license for either on-premises or off-premises consumption covering any premises not now licensed, if such premises are within five hundred feet of the premises of any tax-supported public elementary or secondary school measured along the most direct route over or across established public walks, streets, or other public passageway from the main entrance of the school to the nearest public entrance of the premises proposed for license, and if, after receipt by the school of the notice as provided in this subsection, the board receives written objection, within twenty days after receiving such notice, from an official representative or representatives of the school within five hundred feet of said proposed licensed premises, indicating to the board that there is an objection to the issuance of such license because of proximity to a school. The board may extend the time period for submitting objections. For the purpose of this section, "church" means a building erected for and used exclusively for religious worship and schooling or other activity in connection therewith. For the purpose of this section, "public institution" means institutions of higher education, parks, community centers, libraries, and transit centers.

(b) No liquor license may be issued or reissued by the board to any motor sports facility or licensee operating within the motor sports facility unless the motor sports facility enforces a program reasonably calculated to prevent alcohol or alcoholic beverages not purchased within the facility from entering the facility and such program is approved by local law enforcement agencies.

(c) It is the intent under this subsection (9) that a retail license may not be issued by the board where doing so would, in the judgment of the board, adversely affect a private school meeting the requirements for private schools under Title 28A RCW, which school is within five hundred feet of the proposed licensee. The board must fully consider and give substantial weight to objections filed by private schools. If a license is issued despite the proximity of a private school, the board must state in a letter addressed to the private school the board's reasons for issuing the license.

(10) The restrictions set forth in subsection (9) of this section do not prohibit the board from authorizing

the assumption of existing licenses now located within the restricted area by other persons or licenses or relocations of existing licensed premises within the restricted area. In no case may the licensed premises be moved closer to a church or school than it was before the assumption or relocation.

(11)(a) Nothing in this section prohibits the board, in its discretion, from issuing a temporary retail or distributor license to an applicant to operate the retail or distributor premises during the period the application for the license is pending. The board may establish a fee for a temporary license by rule.

(b) A temporary license issued by the board under this section must be for a period not to exceed sixty days. A temporary license may be extended at the discretion of the board for additional periods of sixty days upon payment of an additional fee and upon compliance with all conditions required in this section.

(c) Refusal by the board to issue or extend a temporary license shall not entitle the applicant to request a hearing. A temporary license may be canceled or suspended summarily at any time if the board determines that good cause for cancellation or suspension exists. RCW 66.08.130 applies to temporary licenses.

(d) Application for a temporary license must be on such form as the board shall prescribe. If an application for a temporary license is withdrawn before issuance or is refused by the board, the fee which accompanied such application must be refunded in full.

(12) In determining whether to grant or deny a license or renewal of any license, the board must give substantial weight to objections from an incorporated city or town or county legislative authority based upon chronic illegal activity associated with the applicant's operations of the premises proposed to be licensed or the applicant's operation of any other licensed premises, or the conduct of the applicant's patrons inside or outside the licensed premises. "Chronic illegal activity" means (a) a pervasive pattern of activity that threatens the public health, safety, and welfare of the city, town, or county including, but not limited to, open container violations, assaults, disturbances, disorderly conduct, or other criminal law violations, or as documented in crime statistics, police reports, emergency medical response data, calls for service, field data, or similar records of a law enforcement agency for the city, town, county, or any other municipal corporation or any state agency; or (b) an unreasonably high number of citations for violations of RCW 46.61.502 associated with the applicant's or licensee's operation of any licensed premises as indicated by the reported statements given to law enforcement upon arrest.

[2012 c 39 § 4; 2011 c 195 § 1; 2009 c 271 § 6; 2007 c 473 § 1; 2006 c 359 § 1; 2004 c 133 § 1; 2002 c 119 § 3; 1998 c 126 § 2. Prior: 1997 c 321 § 1; 1997 c 58 § 873; 1995 c 232 § 1; 1988 c 200 § 1; 1987 c 217 § 1; 1983 c 160 § 3; 1982 c 85 § 2; 1981 1st ex.s. c 5 § 10; 1981 c 67 § 31; 1974 ex.s. c 66 § 1; 1973 1st ex.s. c 209 § 10; 1971 c 70 § 1; 1969 ex.s. c 178 § 3; 1947 c 144 § 1; 1935 c 174 § 3; 1933 ex.s. c 62 § 27; Rem. Supp. 1947 § 7306-27. Formerly RCW 66.24.010, part and 66.24.020 through 66.24.100. FORMER PART OF SECTION: 1937 c 217 § 1 (23U) now codified as RCW 66.24.025.]

Notes:

Construction -- Effective date -- 2012 c 39: See notes following RCW 82.08.155.

Effective date -- 1998 c 126: See note following RCW 66.20.010.

Effective date -- 1997 c 321: "This act takes effect July 1, 1998." [1997 c 321 § 64.]

Short title -- Part headings, captions, table of contents not law -- Exemptions and waivers from federal law -- Conflict with federal requirements -- Severability -- 1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Effective dates -- Intent -- 1997 c 58: See notes following RCW 74.20A.320.

Severability -- Effective date -- 1981 1st ex.s. c 5: See RCW 66.98.090 and 66.98.100.

Effective dates -- Severability -- 1981 c 67: See notes following RCW 34.12.010.

Severability -- Effective date -- 1973 1st ex.s. c 209: See notes following RCW 66.20.160.

Effective date -- 1971 c 70: "The effective date of this 1971 amendatory act is July 1, 1971." [1971 c 70 § 4.]

WAC 314-07-060

Agency filings affecting this section

Reasons for denial or cancellation of a temporary license.

Following is a list of reasons a temporary permit may not be issued or can be revoked. Per RCW 66.24.010, the board has broad discretionary authority to approve or deny a liquor license or permit application. Refusal by the board to issue or extend a temporary license shall not entitle the applicant to request a hearing.

(1) An applicant who has received a temporary license and their application is later administratively closed, and they reapply for a liquor license at the same location.

(2) The local authority objects for any reason.

(3) The applicant affirmatively refuses to submit documents requested by the board to conduct the application investigation.

(4) The applicant accrues or is involved in a violation committed while operating under a temporary license.

(5) The investigator is unable to determine the true party of interest.

(6) The applicant fails to meet the basic requirements of the license.

(7) Denial of the permanent license is recommended to the board.

[Statutory Authority: RCW 66.08.030 and 66.24.010. WSR 10-10-126, § 314-07-060, filed 5/5/10, effective 6/5/10.]