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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TILLMAN CARR, individually; CAL FARRER and JENELL
FARRER, a marital community; KUO-YING FRENZEL,
individually; JULIE GANAS, individually; WILLIAM B.
MINAGLIA, individually; DARRYL and ROSE HUDSON, a
marital community KEITH PETERSON, individually; KATHRYN
DEBERNARDI, individually; KATHERINE MEADE, individually;
ROB AND SHARA COFFMAN, a marital community, and
PAMELA SMITH, individually,

Appellants,

v.

THE STATE OF WASHINGTON by and through the
WASHINGTON STATE LIQUOR CONTROL BOARD, a board of
the State of Washington and the WASHINGTON STATE
DEPARTMENT OF REVENUE, a department of the State of
Washington

Respondents.

APPEALED FROM THURSTON COUNTY SUPERIOR COURT
CAUSE NO. 12-2-02279-5
THE HONORABLE CHRIS WICKHAM

REPLY BRIEF OF APPELLANTS

ORIGINAL

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION.....	1
II. ARGUMENT	2
A. The State Failed To Apply Revenue To Avert Harm.	2
B. The State Admits It Did Not Comply With Section 303 Of I-1183.....	8
C. If RCW 66.24.620 Does Not Create A Private Cause Of Action, Plaintiffs' Remaining Claims Present Questions Of Fact.....	9
1. I-1183 Made Payment To Prevent Harm A Condition Of The Termination Of The Contracts.	9
2. Without The Payments Required By RCW 66:24:620, I-1183 Is An Unconstitutional Impairment Of Contract.....	12
3. A Taking Occurred Without Payment Of Just Compensation.	13
III. CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

Bennett v. Hardy, 113 Wn.2d 912 (1990)..... 4
CKP, Inc. v. GRS Const. Co., 63 Wn. App. 601 (1991)..... 10
Rivard v. State, 168 Wn.2d 775 (2010) 3

Statutes

RCW 66.24.620..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 12

Appendices

Appendix A – RCW 66.24.620 (Appendix B to Appellants’ Opening Brief)

The government is merely a servant... it cannot be its prerogative to determine what is right and what is wrong.... Its function is to obey orders, not originate them.¹

I. INTRODUCTION

The State's response ignores the critical fact the Citizens of Washington drafted I-1183 to insure that the Contract Liquor Store Owners, small private businesses, would not suffer any harm. This was an absolute condition of the legislation! The State violated RCW 66.24.620 by refusing to follow that mandate.

Unable to dispute the plain language and intent of I-1183, the State claims the legislative directive was meaningless and could be violated with impunity. However, the plain language of I-1183 required the State to expend funds to prevent Contract Liquor Store Owners from suffering any harm, and the ability to enforce that directive is implied by the language of the statute. The State has taken the arrogant position that it can blatantly ignore the Citizens' directive and the Trial Court condoned that flaunting of power. Accordingly, this Court should implement the controls required by our Constitution and enforce the Citizens' directive requiring the

¹ Mark Twain.

State to apply “*operating and asset sales revenues of the board to just and reasonable measures to avert harm... taking into account present value of issuance of a spirits license....*” RCW 66.24.620(6).

II. ARGUMENT

A. The State Failed To Apply Revenue To Avert Harm.

It is telling the State buried its response to the primary issue in this appeal until page 30 of its brief. The plain language of I-1183 and the implementing statutes make it clear the intent of the legislation was to “get the State” out of the liquor business without harming the existing small private businesses. Thus, one of the “*transition costs*” recognized and specifically identified was the requirement that the State apply the “*operating and asset sale revenues*” to just and reasonable measures to avert harm to Contract Liquor Store Owners after “*taking into account present value of issuance of a spirits retail license...*” See RCW 66.24.620(5) and (6).

The State does not dispute that it did not use operating and asset sale revenues to avert harm. Instead, it claims that it did not have to spend money. However, this argument would render the

language in RCW 66.24.620(5) discussing “*transition costs*” meaningless. See Rivard v. State, 168 Wn.2d 775, 783 (2010) (Statutes are construed to give effect to all language so as to render no portion meaningless or superfluous). RCW 66.24.620 specifically speaks to the sales proceeds being “*net of direct sales expenses and other transition costs....*” Since it discusses “*net*” from the sales expenses, the only logical interpretation is that it is referring to money.

In RCW 66.24.620(6)(b), the legislature identified that one of the required “*transition costs*” was to apply “*operating and asset sale revenues*” to avert harm to the Contract Liquor Store Owners after taking into account “*present value.*” Again, all of the language used indicates that money is to be used and the value of the issuance of a retail license considered in determining amount to be paid to avert harm. In addition, the “*present value*” would only need to be considered if the Citizens envisioned a payment to the Contract Liquor Stores as the means to avert harm. Thus, it is clear that there was a directive that the operating and sales revenue would be used to pay transition costs, including the payment of funds to alleviate

harm. Notably, the directive is not discretionary. Instead, it uses mandatory language - "*must be deposited;*" "*must complete;*" and "*must include.*" There simply is no indication the State was intended to have discretion to ignore the direction with regard to paying the funds in the manner required by RCW 66.24.620 and keep all of the money for itself.

The State cannot, and has not, addressed this very specific language that must be read as a whole. Instead, it suggests that the directive for it to apply revenues should be stricken from the statute. In this case, if a private cause of action is not implied, the entire directive will be rendered meaningless. As this Court did in Bennett v. Hardy, there should be an assumption that the Citizens here did not enact this provision, that provides rights to an identifiable class, without enabling those rights to be enforced. Bennett, 113 Wn.2d 912, 920-921 (1990). The State fails to offer any explanation as to why it should be allowed to thumb its nose at the Citizens of this state and ignore their directive. Indeed, if the Citizens did not intend their directive to be enforceable, why would they have included those directives in the statute?

The State argues that RCW 66.24.620 should be read to merely provide that the State did not have to pay or use any money to avert harm. Instead, it claims the statute merely required it provide non-monetary “assistance” with “phasing out” the Contracts. However, this argument again reads mandatory language out of the Contract and cannot be reconciled with the directive that revenues be applied and that the “present value” of the retail liquor license be taken into account. Supra. Indeed, the Contracts did not need “phased out.” The Contracts ended as a matter of law the day I-1183 was passed into law!

Despite this directive of how the money was to be used, the State did not utilize any of the revenue to “avert harm.” Instead, it claims this mandatory statute should be interpreted as “leaving that up to the Board.” Response Brief, p. 35. However, setting aside the fact that the State did not produce any evidence it applied operating and asset sale revenues to avert harm in any form, if the State’s position were accepted, genuine issues of material fact were presented with regard to whether the State did in fact apply revenues “to just and reasonable measures to avert harm.” Consequently,

summary dismissal of Plaintiffs' claims that harm was not averted was error and should be reversed.

In addition, in discussing the statutory interpretation, the State incorrectly claims I-1183 contained "goals." I-1183 did not contain 15 "goals." A review of the initiative confirms that it provided a directive to the State that was intended to get the government out of the liquor business. The directive the Citizens provided to the State included specific direction on how the operating and revenue funds would be spent, including directing how the transition would be handled. This included a directive that while the State was being put out of business, the Contract Liquor Store Owners were not to be harmed as a result of the transition to a new system. Supra. This was accomplished by making the expense of averting harm to the Contract Liquor Store Owners a "transition cost." Thus, the purpose of I-1183 was to get the government out of the liquor business but not at the expense of or by harming small private businesses. RCW 66.24.620.

Plaintiffs do not believe that RCW 66.24.620 is ambiguous. Instead, the Trial Court adopted an interpretation that ignored the

plain language of the statute, especially in context of I-1183 as a whole. However, if the Court were to accept the interpretation of RCW 66.24.620 offered by the State, then the statute would be ambiguous and should be interpreted to effectuate the intent of I-1183 which was to take the government out of the liquor business without causing harm to the private businesses that existed in the prior system.

While a voters' pamphlet "*may*" be used to establish voter intent, the portion relied upon by the State is not indicative of legislative intent with regard to I-1183. That is because the fiscal impact and arguments set forth in the pamphlet were drafted by the Attorney General's Office. The Attorney General's Office cannot ask the Court to ignore the plain language of the statute based upon the fact the Attorney General's Office previously ignored the plain language of the statute in drafting the voters' pamphlet information. Such boot-strapping defies logic.

Finally, a review of the State's response confirms that it has not, and cannot, explain why the portion of the legislation directing payment would have been included if the Citizens did not intend for

it to create any enforceable obligation. Consequently, a private cause of action should be implied and the State held accountable for refusing to follow the directive of its Citizens.

B. The State Admits It Did Not Comply With Section 303 Of I-1183.

The State's response with regard to Section 303 of I-1183 concedes that it did not develop rules and procedures to address claims that I-1183 impairs contracts.² Instead, it argues that it is entitled to ignore the directive by unilaterally deciding the directive was "unconstitutional." Notably, the State fails to provide any legal authority that would provide it with the right to unilaterally decide whether or not Section 303 was constitutional. The State's argument also ignores the fact that Section 303 did not direct the State to adjudicate the constitutionality of I-1183. Instead, it directed the State to develop rules and procedures to provide reasonable compensation for contracts impaired by the act. The Plaintiffs' prayer for relief included a request for equitable relief to effectuate the protections the Contract Liquor Stores had based upon the Constitution and the laws passed by the Citizens of the State of

² Plaintiffs fall within the larger class that is described in Section 303 of I-1183 as well as the smaller, more specific class protected by RCW 66.24.620.

Washington. See CP 52 – “*For such further relief as this Court deems just and equitable.*” As a result, the Court had the power to order the State to comply with Section 303.

C. **If RCW 66.24.620 Does Not Create A Private Cause Of Action, Plaintiffs’ Remaining Claims Present Questions Of Fact.**

Not surprisingly, the State fails to recognize that the viability of the remaining claims turn in part on whether or not RCW 66.24.620 is enforced. If RCW 66.24.620 is interpreted to be meaningless, as proposed by the State, then genuine issues of material fact exist with regard Plaintiffs’ remaining claims.

1. **I-1183 Made Payment To Prevent Harm A Condition Of The Termination Of The Contracts.**

The State continues to ask the Court to read the underlying Contracts at issue in a vacuum and ignore material facts. In order to properly analyze the viability of Plaintiffs’ breach of contract claim, the facts surrounding I-1183 need to be considered. The State did not perform under the Contracts because of I-1183. A crucial fact in that regard is that I-1183 was specifically conditioned upon the revenues being applied to prevent harm to the Contract Liquor Store Owners. In other words, the statute had built into it a mechanism

and directive to pay the Contract Liquor Store Owners for the damages they would suffer by having their Contracts ripped out from under them. If in fact the State's argument that this directive was meaningless is accepted, then there remain genuine issues of material fact with regard to whether there was a breach of contract by the State in order to allow the Contract Liquor Store Owners to recover the damages the Citizens recognized would occur.

The Contracts at issue were for a 5-year term. When I-1183 took effect on December 8, 2011, by law the Contracts were terminated effective May 31, 2012. As a result, the breach occurred on December 8, 2011, and everyone understood that the State would not be performing the Contract. See CKP, Inc. v. GRS Const. Co., 63 Wn. App. 601, 620 (1991) (An anticipatory breach occurs when one of the parties expressly or impliedly repudiates the contract prior to the time for performance). Consequently, there was no agreement to "*mutually accelerate the termination date*" nor was there a "*mutual amendment*" to the Contracts for any valid consideration. Indeed, the State merely points to actions it had to take under I-1183 to transition and attempt to act like that somehow benefitted these

small businesses that had just had their Contracts ripped out from underneath them. The fact is, these Contracts died the day the State of Washington passed I-1183. Unfortunately for the Contract Liquor Store Owners, the State refused to provide payment for the harm suffered as it was directed to do by the Citizens.

The State's response discloses exactly how disingenuous the State has been in dealing with the Contract Liquor Store Owners. The State now claims that the Contract Liquor Store Owners should not be relieved from the harm they suffered because the owners should have anticipated I-1183 would pass. However, at the time these Contracts were entered into, the State had taken a very different position and induced the Contract Liquor Store Owners into entering into these 5-year Contracts by telling them "*they (the People) try this every few years, but they never succeed.*" CP 751-762. It is clear that the State is willing to ignore the actual facts and say anything necessary to avoid implementing the will of the Citizens of this State that directed the State to make sure these small private businesses were not harmed by I-1183. The record is replete with evidence confirming that the Contract Liquor Store Owners

have been harmed and have been asked to carry the expense of I-1183 while the State keeps all of the Asset and Operating Revenues while continuing to reap the increased revenues created by I-1183.

2. Without The Payments Required By RCW 66.24.620, I-1183 Is An Unconstitutional Impairment Of Contract.

If I-1183 is interpreted in the way proposed by the State, then I-1183 would result in either an impairment of the Contracts at issue or an unconstitutional taking of those Contracts. The Contracts were not "*lawfully terminated under their own terms.*" Instead, the Contracts were terminated by I-1183 which required payment to prevent harm. If that payment is read out of the statute, then the elements for impairment of contract are met.

The Contracts at issue are not licenses like those at issue in the cases cited by the State. Instead, they were service Contracts for a set term. Indeed, if the State wanted an at-will arrangement, why would it have included a term in the Contract? The answer is readily apparent; the term was needed to induce these small business owners to perform the work which would require necessary investments. A term was necessary so the small business owners would have time to

recoup those investments. Here, those Contracts ended because of I-1183. There is no question that I-1183 impaired these existing contracts. As indicated above, Plaintiffs' prayer for relief included a request for equitable relief which would include addressing this unconstitutional impairment.

3. A Taking Occurred Without Payment Of Just Compensation.

If I-1183 is for a public purpose, then the taking of the Contracts constituted the taking of private property without payment of just compensation. A review of the Contracts at issue confirms that these Contracts were not terminable at-will. As a result, they constituted a protected property interest. I-1183 required payment of compensation for the harm arising from the taking of these Contracts. The State breached that provision and took the Contracts without payment. As a result, if I-1183 was for a public purpose, it would be unconstitutional to allow them to be taken without the payment of just compensation. As private citizens, the Contract Liquor Store Owners should not have to carry the burden of the expense of I-1183.

III. CONCLUSION

For the foregoing reasons, the Trial Court committed reversible error in granting the State's Motion for Summary Judgment and by denying Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs respectfully request that the Court reverse the Trial Court's rulings and enforce the intent of the People pursuant to I-1183 by remanding this matter for certain factual determinations and a trial on damages.

DATED this 3rd day of July, 2014.


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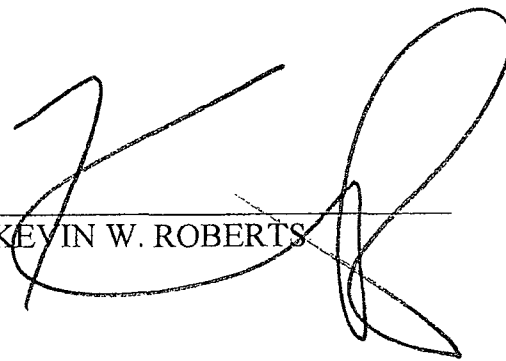
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of July, 2014, I caused to be served a true and correct copy of the foregoing document to the following:

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KEVIN W. ROBERTS

RCW 66.24.620

Sale of spirits by a holder of a spirits distributor or spirits retail license — State liquor store closure.

(1) The holder of a spirits distributor license or spirits retail license issued under this title may commence sale of spirits upon issuance thereof, but in no event earlier than March 1, 2012, for distributors, or June 1, 2012, for retailers. The board must complete application processing by those dates of all complete applications for spirits licenses on file with the board on or before sixty days from December 8, 2011.

(2) The board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by chapter 2, Laws of 2012.

(3) The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other assets of the state over which the board has power of disposition, including without limitation goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(4)(a) Disposition of any state liquor store or distribution center assets remaining after June 1, 2013, must be managed by the department of revenue.

(b) The board must obtain the maximum reasonable value for all asset sales made under this section.

(c) The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

(5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.

(6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

(b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing

APPENDIX A

contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

(c) Purchases by the federal government from any licensee of the board of spirits for resale through commissaries at military installations are exempt from sales tax based on selling price levied by RCW 82.08.150.

[2012 c 2 § 102 (Initiative Measure No. 1183, approved November 8, 2011).]

Notes:

Finding -- 2012 c 2 (Initiative Measure No. 1183): "(1) The people of the state of Washington, in enacting this initiative measure, find that the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers. Therefore, the people wish to privatize and modernize both wholesale distribution and retail sales of liquor and remove outdated restrictions on the wholesale distribution of wine by enacting this initiative.

(2) This initiative will:

(a) Privatize and modernize wholesale distribution and retail sales of liquor in Washington state in a manner that will reduce state government costs and provide increased funding for state and local government services, while continuing to strictly regulate the distribution and sale of liquor;

(b) Get the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the state to focus on the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages;

(c) Authorize the state to auction off its existing state liquor distribution and state liquor store facilities and equipment;

(d) Allow a private distributor of alcohol to get a license to distribute liquor if that distributor meets the requirements set by the Washington state liquor control board and is approved for a license by the board and create provisions to promote investments by private distributors;

(e) Require private distributors who get licenses to distribute liquor to pay ten percent of their gross spirits revenues to the state during the first two years and five percent of their gross spirits revenues to the state after the first two years;

(f) Allow for a limited number of retail stores to sell liquor if they meet public safety requirements set by this initiative and the liquor control board;

(g) Require that a retail store must have ten thousand square feet or more of fully

enclosed retail space within a single structure in order to get a license to sell liquor, with limited exceptions;

(h) Require a retail store to demonstrate to state regulators that it can effectively prevent sales of alcohol to minors in order to get a license to sell liquor;

(i) Ensure that local communities have input before a liquor license can be issued to a local retailer or distributor and maintain all local zoning requirements and authority related to the location of liquor stores;

(j) Require private retailers who get licenses to sell liquor to pay seventeen percent of their gross spirits revenues to the state;

(k) Maintain the current distribution of liquor revenues to local governments and dedicate a portion of the new revenues raised from liquor license fees to increase funding for local public safety programs, including police, fire, and emergency services in communities throughout the state;

(l) Make the standard fines and license suspension penalties for selling liquor to minors twice as strong as the existing fines and penalties for selling beer or wine to minors;

(m) Make requirements for training and supervision of employees selling spirits at retail more stringent than what is now required for sales of beer and wine;

(n) Update the current law on wine distribution to allow wine distributors and wineries to give volume discounts on the wholesale price of wine to retail stores and restaurants; and

(o) Allow retailers and restaurants to distribute wine to their own stores from a central warehouse." [2012 c 2 § 101 (Initiative Measure No. 1183, approved November 8, 2011).]

Application -- 2012 c 2 (Initiative Measure No. 1183): "This act does not increase any tax, create any new tax, or eliminate any tax. Section 106 of this act applies to spirits licensees upon December 8, 2011, but all taxes presently imposed by RCW 82.08.150 on sales of spirits by or on behalf of the liquor control board continue to apply so long as the liquor control board makes any such sales." [2012 c 2 § 301 (Initiative Measure No. 1183, approved November 8, 2011).]

Rules -- 2012 c 2 (Initiative Measure No. 1183): "The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act." [2012 c 2 § 303 (Initiative Measure No. 1183, approved November 8, 2011).]

Effective date -- Contingent effective date -- 2012 c 2 (Initiative Measure No. 1183): "This act takes effect upon approval by the voters. Section 216, subsections (1) and (2) of this act take effect if Engrossed Substitute House Bill No. 5942 is enacted by the legislature in 2011 and the bill, or any portion of it, becomes law. Section 216, subsection (3) of this act takes effect if any act or part of an act relating to the warehousing and

distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, is adopted subsequent to May 25, 2011, in any 2011 special session." [2012 c 2 § 305 (Initiative Measure No. 1183, approved November 8, 2011).]

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Subject: RE: Supreme Court Case No. 89609-7, Tillman Carr, et al. v. State of Washington

Good morning,

Attached for filing in the matter of Carr, et al. v. State of Washington, Supreme Court Case No. 89609-7, please find the Reply Brief of Appellants.

This Brief is being filed by Kevin W. Roberts, 509-455-8711, WSBA No. 29473, email address: kroberts@dunnandblack.com.

Thank you.

Shellie Garrett on behalf of Maureen E. Cox-O'Brien
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