

NO. 35870-I-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES LEROY BRUMMETT

Appellant,

V.

WASHINGTON'S LOTTERY AND
LOTTERY COMMISSION

Respondent.

On Appeal from Superior Court

For Thurston County

The Honorable Anne Hirsch, Judge

BRIEF OF APPELLANT

MARK CONLIN JOBSON, WSBA 22171

Attorney For Respondents

James L. Brummett, ProSe, Appellant

P. O. Box 73442

Puyallup, Wash. 98373

206-380-2085

PROSE

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I. ASSIGNMENT OF ERROR

1. Applying Collateral Estoppel to this case.
2. Not Hearing Mr. Brummett's Motion to Amend Complaint.
3. Assistant Attorney General Representing Private Companies.

II. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did the Honorable Thurston County Superior Court Judge Anne Hirsch COMMIT ERROR by dismissing all six issues of Mr. Brummett's Thurston County Superior Court Case No. 06-2-01347-3 because Judge Anne Hirsch said, " Mr. Brummett couldn't have a second bite of the apple when only part of one issue was heard at an Administrative Hearing? (Collateral Estoppel).
2. Did the Honorable Thurston County Superior Court Judge Anne Hirsch COMMIT ERROR not hearing Mr. Brummett's MOTION TO AMMEND COMPLAINT to be heard the same date that was to add a seventh issue not heard at the prior Administrative Hearing and the adding of two new Defendants after Mr.

Brummett completed partial discovery?

3. Did the Honorable Thurston County Superior Court Judge Anne Hirsch COMMIT ERROR by not rejecting Assistant Attorney General Mark Jobson's assertion he was representing Safeway Inc And Publicis USA, two new Defendants Mr. Brummett was trying to add to case with a Motion to Amend Complaint, when Judge Anne Hirsch would not let Mr. Brummett speak on the issue.

STATEMENT OF THE CASE

James L. Brummett, a 63-year-old single man, retired USCG Chief Warrant Officer (CWO3) residing at 6247 54th Ave. S.E. Lacey, Washington retired on Social Security and retired USCG pay. The following is a statement on my False and misleading advertisement issue with the Washington's Lottery. CP267-274. On approximately February 7th, 2005 I went to my usual Lotto buying spot, a Safeway store on the Yelm Highway in East Lacey to shop. I noticed a special placard advertisement that said "3 Drawings-3 chances to win". Lotto and Quinto games were now going to 3 drawings a week now on Mondays along with the Wednesday and Saturday drawings,CP126-127. The placard also said "Between February 13th and March 5th 2005 when you buy \$5.00 Lotto ticket you will get a free \$1.00 Quinto ticket. I went over to the Lotto terminal and bought the next five (5) \$5.00 draws for Lotto and Quinto ,CP128-129 and the next ten (10) \$2.00 draws for the "Lucky for Life" game. I usually buy my Lotto game tickets every 10 days because I play the Lucky for Life game everyday and do not go to store everyday to save gas. Which means a lot of the time I purchase my game play tickets in advance. The tickets kicked out of the Lotto terminal and on the five (5)

advance tickets I purchased for the \$5.00 Lotto game tickets I only received one (1) \$1.00 free Quinto ticket, not the five (5) \$1.00 free Quinto tickets the advertisement said in front of me.

I was outraged and asked the Safeway clerk where was my other four (4) Free tickets were. She said “ I should have received them, there is nothing I can do, see the Lottery.” See CP128-129 for the tickets I purchased. I lost the first ticket for the first draw for February 14th 2005. All of the \$5.00 Lotto tickets I purchased were for during the Lotto promotion period and met all the requirements of the advertisement. There was no Disclaimer about advance purchase. On the Lotto tickets I purchased from February 16th 2005 and February 26th, 2005 it states “ Player receives a \$1.00 Free Quinto ticket when a \$5.00 Lotto ticket is purchased” The Same statement regarding the free \$1.00 ticket appears on both of the free Quinto tickets I received during the promotion. There is no disclaimer on any of the tickets above or any other tickets received during the promotion regarding advanced play. All of the first five (5) \$5.00 Lotto tickets purchased were for a period during the promotion period but I only received one free ticket not the five (5) I should have received.

Later on during the Lotto promotion period I purchased four (4) more \$5.00 Lotto tickets and only received one (1) free Quinto ticket (CP 130-

133) not the four (4) Mr. Brummett should have received after complying with the requirements of the posted advertisements at Safeway.

I purchased a total of nine (9) \$5.00 Lotto tickets for Lotto promotion period and only got two ((2) \$1.00 free Quinto tickets not in accordance with the advertisement posted in front of me a Safeway. This I thought at the time was fraud, bait & switch and false advertisement.

At first I called the Washington State Gambling Commission. They said they had "No jurisdiction over Washington's Lottery". They told me to call the Attorney General's Office. I later call the AG, and filed a complaint, CP-264-266, which the AG came back and said they could not help me because they had to represent the Lottery. I later called the Lottery Headquarters in Olympia and asked about my seven (7) free \$1.00 Quinto tickets I did not receive per the advertisement. An Asian woman answered the phone and told me she would get back to me but never did.

A few days later I went to the Lottery office to ask questions. I met with Mari Jo Nagel, Customer Relations Manager, on February 15, 2005. CP139 I asked her why I didn't get all my free Quinto tickets? She said, "I didn't have seven (7) qualifying tickets" see exhibit with over 600 pages of Public Disclosure requests on this subject, I never once found the word "Qualifying tickets". Also see CP139 where the Lottery's Customer Service Manager Mari Jo Nagel uses the words "Current Draw" to explain

why I did not get my free tickets. Again in over 600 pages of Public Disclosure documents on this subject, these words did not come up once. The words " Current Draw" and "Qualifying Tickets" was not on any of the advertisements, tickets, their Web site, placards, press release(CP135) or mentioned on their toll free number. CP134.

The Lottery sent out the false placard advertisements to all there retailers on January 13th 2005. See CP136-137. Text of advertisements, CP134 shows what messages the Lottery sent to retailers with the "07's". It also shows the false advertising message they sent to the retailers regarding the promotion running from February 13th, 2005 through March 5th, 2005, to receive a free \$1.00 Quinto ticket when a single \$5.00 Lotto ticket is purchased.

This CP134 also shows their toll free message text that was heard by hundreds of thousands of Lotto players to get the drawing numbers to check their tickets for winning numbers. The text states " Starting Monday, February 14th 2005 Lotto and Quinto draws days will be Monday, Wednesday and Saturday. February 13th, 2005 through March 5th 2005-Receive a \$1.00 Quinto ticket when a single \$5.00 Lotto ticket is purchased. There was no Disclaimer Period! The false advertisement started on January 28th, 2005 through February 14th 2005 until the Lottery stopped some after my complaints. See CP139 the statement by Mari Jo Nagel, in E-mail to the Director's office, that Mr. Brummett was offered a

few coupons (but he would not bite), which shows admission of guilt and or a concern something was wrong. I asked them to reprogram their computer so all advance players get there free tickets as the advertising states, but Mari Jo Nagel Said “They would not it was too risky”. She also told me that in the past advance play tickets never got into promotions. I have missed promotional chances in the past as I always purchase advance tickets and I have been mad as heck! Because I play for the same date on the calendar as other players. She also stated advance players were only one (1) percent of all players but papers shows that advance players are seven (7) percent of all players. Mari Jo Nagel’s comments mean that the Lottery knew that advanced players would not get their free tickets- so the Lottery acted with intent and malice to deceive. I did not take the free coupons as offered because I told the Lottery that there were 10,000’s of other players across the state that was also cheated out of their free tickets. Giving me some free coupons does nothing for others that were cheated.

Through Public Disclosure, you will see from CP174-176 that there was 274,002 \$5.00 Lotto tickets sold during the three (3) week promotion period worth \$1,370.010.00. There were 254,336 free Quinto tickets given out but 19,666 free Quinto tickets were not given out by the Lottery intentionally (seven (7) being mine). The Lottery has said in the past “ You need to play to win” and I missed seven (7) changes to win. On March 7th, 2005 a lady won over four (4) million dollars on a \$1.00

Quinto ticket that could have been mine! See CP172. One of my seven (7) Missing tickets! We will never know.

After I had a meeting with the Lottery on February 15, 2005 the Lottery added a disclaimer to there web site, removed the free ticket offer from their 1-800-545-7510 phone number and sent a message to there retailers that free tickets were not applicable for advanced ticket sales (the Public never got this information). The Lottery neglected to do the following: They did not remove the two false placard advertisements at any their retailer places, they left the false promotion advertisement on all their Lotto and Quinto tickets because they said (to remove it would have been too risky “ in the words of Mari Jo Nagel.

During my public disclosure requests I also found issues with how the Lottery Commission passed the “Emergency Wac’s to get to the Monday night draws for Lottery starting on February 15, 2005. The permanent rule for Lotto drawings prior to January 21, 2005 was WAC-315-34-060 which reads as follows CP437-439 “ **DRAWINGS**”. (1) The Lotto drawings shall be held each week on Wednesdays and Saturday’s beginning on October 24, 1990, except that the Director may change the schedule if Wednesday or Saturday falls on a holiday. The Lottery asked the Lottery Commission to change this on an Emergency basis under RCW 34.50.350 ,CP199-211, on January 21, 2005. This RCW 34.50.350 states as following when an Agency can use the Emergency Rule,

“Declaring that immediate adoption , amendment, or repeal of a rule is necessary for preservation of public health, safety, or general welfare, and that observing the time requirement of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.” The Lottery’s reason was for “Increased sales and contributions to the Lottery Commission”. Mr. Brummett did not find out about this Emergency rule(CP156-171) until about three weeks after the time, you were able to challenge the rule with a Petition to the Governor, which had to be done within seven (7) days in accordance with RCW 34.05.350 (3). However Mr. Brummett did write a letter to the Governor on May 17, 2005 (CP259-263) but after many calls to her office she declined to respond. The same thing happened for the new Monday draw for the Quinto game, During Public Disclosure Mr.Brummett found an E-Mail from Paralegal Candace Martin(CP138) to her boss in house Attorney Ceil Buddeke that said” Ceil and I have spoken and if we challenged on the third draw before the rule is in place, we will be ready with our best defense”. Sounds like something guilty going on to Mr. Brummett, the legal staff at the Lottery have both been Changed!!HmMMM. Emergency Rule versus Permanent Rule, which is an issue in this case. (CP140-155).

I also found out through Public Disclosure the Lottery sold Monday Lotto tickets before the Lottery Commission authorized them to do, which is a Violation WAC-315-34-60. The Lottery sold tickets as early

as January 14, 2005, although they did not have jurisdiction from the Lottery Commission until January 21, 2005. CP-173-176. This is also an issue in this case.

A violation of the correct odds on the associated advertisements is at issue in my Lawsuit. The Lottery only had "Odds vary by Game" on there two points of sale placards at my Safeway store and through out the State, which is a violation of WAC-315-06-040 (1b). This is at issue in this lawsuit. CP126-127.

Again a 5th issue is that all Lottery players are not treated equally for a \$1.00 they spend gambling on some Lottery games; this issue will be addressed during legal argument.

Issue number six is about the Lottery and the Lottery Commission had the duty to stop the promotion "Buy five and get one free" after I alerted them to problems with the promotion, they did not correct all the problems about fairness to me and 10,000 of other State players. CP139.

Sometime in mid-March 2005 Brummett met with the Lottery in house Attorney Ceil Buddke and was advised if I didn't feel the Lottery was right in not giving me seven (7) free \$1.00 Quinto tickets per the placard advertisements at point of sale that I could request an Administrative Hearing on the subject or go to Civil Court, she suggested she thought the Administrative Hearing was my best option and gave me a form, which I left with. CP420. The form did not fit my needs for my complaint but I

made the best of it and submitted the completed form and a 3-hole white binder full of evidence with it to the Lottery Legal Department for a Administrative Hearing on March 30, 2005. CP420. On the form on March 30, 2005 with some partial discovery I had only listed four issues for appeal that were: (1) A Promotion to correct False Advertisement so all players have an equal chance to win (2) Misleading advertisement (3) Drawings-3 chances to win. (3) Abuse of Power in that they submitted Emergency Wac's when no emergency existed. (4) To get a Temporary Restraining Order (TRO) on new promotion for Zip before April 25th 2005 unless advanced ticket sales apply. The form was really made to appeal a prize claim. At this time I had no written denial of my request for Seven (7) free \$1.00 Quinto tickets except for the verbal comments of Lottery's Customer Services Manager Mari Jo Nagel on February 15, 2005. On April 27, 2005 and May 25, 2005 (CP027) Senior Administrative Law Judge Stephanie Croom Williams held pre-hearing telephone conferences with the Lottery, the Lottery's Attorney Assistant Attorney General John Lane and Mr. Brummett, we did not want the Hearings by phone but the Judge Insisted! On June 17, 2005 a hearing (CP-027) was held by telephone on the issue of whether the Office of Administrative Hearings has subject matter jurisdiction over the claims asserted by Mr. Brummett. Mr. Brummett's claims had morphed into the following claims: (1) That Mr. Brummett (CP028-039) should have gotten nine free \$1.00 Quinto

tickets per the Lottery advertisements not the two (2) free \$1.00 Quinto tickets he received. (2) Mr. Brummett asserts the Lottery engaged in false advertising, misrepresentation and “ bait and switch” tactics when it failed to fully disclose the terms and conditions surrounding the Lotto tickets purchased during the promotion. (3) The Lottery abused its authority and powers when it passed emergency rules, allowing for a third draw date. (4) That all lottery players should be treated the same, whether purchasing tickets for current or advance drawings, (5) the Lottery’s actions in this promotion offended the dignity of the State of Washington. (6) The lottery did not properly publicize the odds as required by regulation.

The Lottery did not memorialize the Lottery’s oral denial decision (CP173) to Mr. Brummett until June 2, 2005 with a letter to Mr. Brummett after much prodding by Judge Williams so Mr. Brummett had something in writing he could appeal. On June 17, 2005 a hearing was held on the issue of whether the Office of Administrative Hearings has subject matter jurisdiction over the claims asserted by Mr. Brummett. The Administrative Hearing was heard by telephone on June 28, 2005.

The only issue heard by Judge Williams was whether Mr. Brummett is entitled to 9 free Quinto Tickets after purchasing 9 \$5 Lotto tickets during the Lottery Promotion, which ran from February 13 to March 5, 2005. Judge Williams decided she had jurisdiction under Chapter 67.70 RCW. Chapter 34.05 and WAC 10-18. Judge Williams also said she

lacks jurisdiction (CP-035) to decide Mr. Brummett's monetary damages. Judge Williams also stated that Mr. Brummett raised several issues during the course of the hearing as set forth above. Those issues raise questions of whether the Lottery is liable to Mr. Brummett for damages based upon those actions. Judge Williams states these issues are beyond the jurisdiction of the Office of Administrative hearings and more appropriately addressed within the Court system. On August 22, 2005 Senior Administrative Law Judge Stephanie Croom Williams sided with the Lottery and said Mr. Brummett did not have seven more free \$1.00 Quinto tickets coming because the tickets were for advance draws during the promotion period and one ticket was bought before the promotion period started.

Mr. Brummett then filed a Petition for Review with the Director of Washington's Lottery, Mr. Christopher Liu on September 19, 2005 in a timely fashion. Some five months later this appeal was denied on February 6, 2006. (CP-041-050). Mr. Brummett had to take his Patriotic Corvette, an American flag to the doorsteps of the Lottery's main office in Olympia and picket to get this denial from the Director of the Lottery. The next day after picketing the Lottery for the answer for my Petition for Review I received the response. The Lottery called the Olympia Police Department to have me removed from their premises but the Police Department said I had the right to be there as long as I did not block

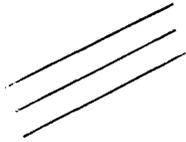
access for people to enter or leave the Lottery.

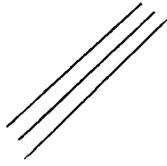
Mr. Brummett filed a Petition for Reconsideration to the Director of Washington's Lottery, Mr. Christopher Liu on February 13, 2006 and it also was denied on February 28, 2006.

Upon Senior Assistant Attorney General Mary Tennyson telling Mr. Brummett he could not raise his other five issues in Superior Court on appeal. Mr. Brummett decided it would just be best not appeal any further, and file a new case and take the issues to Thurston County Superior Court where all the issues could be heard together and have the advantage of more discovery.

Mr. Brummett then filed a Civil Case in Thurston County Superior Court No. 06-2-00441-5 on March 6, 2006 and Mr. Brummett voluntarily withdrew the lawsuit because he did not file a Tort Claim as required by Law, first on May 24, 2006. Mr. Brummett filed a Petition for Review (CP252-258) with the Joint Administrative Rules Review Committee on April 27, 2005 and heard from JARRC on May 31, 2005 and July 22, 2005 to no avail. Mr. Brummett then filed a Tort claim (CP-55-63)(CP-419) DRM No. 11650074 against the Lottery on May 15, 2006 with Risk Management. There was no reply so after 60 days passed Mr. Brummett filed civil action against the Lottery with this Thurston County Superior Court case now on appeal 06-201347-3 on July 21, 2006. CP04-11, CP64-74.

A seventh issue I have which is part of my motion to amend the complaint to be heard in front of the Honorable Judge Anne Hirsch, which was not heard was the Lottery had no definitions of the terms "Advanced draws versus Current draws" in any of their Wac's. This is the point I should have won under in my original Administrative Hearing. Nothing has been approved by the Lottery Commission to date on these terms, they are made up terms by the Lottery with no specific detail to me or the rest of Lottery players in this State and Border States. CP512.





III. ARGUMENT

ISSUE NO. 1

Mr. Brummett believes Thurston County Superior Court Judge Anne Hirsch committed Error by dismissing my Civil case because I (RP23-24) couldn't have a second bite of the apple. The Judge states the Doctrine of Collateral Estoppel applies. Mr. Brummett believes the Laws were not properly applied. As Mr. Brummett stated in his Amended (CP480- 502) Motion In Opposition to Defendants Motion to Dismiss for failure to state a claim, CR12 (B) (6) filed December 19, 2006. Mr. Brummett says the Administrative Hearing procedure was not issued by an order or decision that was in itself not with the notice of with or without prejudice. Separate from that, the claims do have legal merit and the Administrative Hearing did not answer all Mr.

Brummett's claims, really only half of the issue that I should have received nine (9) free \$1.00 Quinto tickets not the two (2) Mr. Brummett received due to advanced ticket play and false advertisement. False advertisement is the key issue here, not adjudicated during the Administrative Hearing. CP27-39.

If one looks at the issues on the first document you see the quasi form (CP420) Mr. Brummett filled out on March 30, 2005 that the issues really did not fit the form, but the issues were (1) a promotion to Correct False Advertisement so all players had a chance to win (2) Misleading advertisement "3 drawings 3 chances to win" (3) Abuse of Power in that they submitted Emergency Wac's, when no Emergency existed (4) to get a Temporary Restraining Order (TRO) on new ZIP promotion before it when into effect on April 25th 2005 unless advance ticket sales apply. The form was really made to appeal a prize claim. After two telephone Administrative Hearings with Senior Administrative Law Judge Stephanie Croom Williams on April 27, 2005 and May 25, 2005 the issues morphed in different issues that were: (1) That Mr. Brummett should have gotten nine free \$1.00 Quinto tickets per the Lottery's advertisements not the two free \$1.00 Quinto tickets he received. (2) Mr. Brummett asserts the Lottery engaged in false advertising, misrepresentation and "bait and Switch" tactics when it failed to fully disclose the terms and conditions

surrounding the Lotto tickets purchased during the promotion. (3) The Lottery abused its authority and powers when it passed Emergency Rules, allowing for a third draw date. (4) That all Lottery players should be treated the same, whether purchasing tickets for current draw or advance drawings (5) The Lottery's actions in this promotion offended the dignity of the State (6) The Lottery did not properly publicize the odds as required by regulation. CP27-39.

My argument are these six issues the same in the Administrative Hearing as they are in my current Civil Lawsuit under appeal here and have all the issues been litigated in the Administrative Appeal or on Appeal to the Superior Court for Review. I, Mr. Brummett say absolutely not. The Lottery did not memorialize the Lottery's oral denial of Mr. Brummett's tickets on February 15, 2005 until June 2, 2005 with a letter(CP173) to Mr. Brummett after much prodding by Judge Williams so she had something in writing to proceed with Mr. Brummett Administrative hearing. Administrative Law Judge Williams held a third hearing on June 17, 2005 on the issue of whether the Office of Administrative Hearings has subject matter jurisdiction over the claims asserted by Mr. Brummett. Judge Williams decided she did not have authority to hear all issues.

Under her document "**CONCLUSION OF LAW**" she states

,CP34-37)“ there is jurisdiction to hear part of Mr. Brummett’s appeal pursuant to Chapter 67.70 RCW, Chapter 315 WAC, Chapter 34.05 RCW (Administrative Procedure Act) and WAC 10-08. Initially, there were questions about whether the Office of Administrative Hearings had jurisdiction over the issues raised by the appeal. After review of the evidence presented, the Administrative Law Judge concluded the Office of Administrative Hearings had jurisdiction over the issue of whether Mr. Brummett is entitled to receive free Quinto tickets based upon his Lotto ticket purchases. The Office of Administrative Hearings lacked jurisdiction to decide Mr. Brummett’s claim for monetary damages, and this issue is not before the Director at this time. This Conclusion of Law shows if Mr. Brummett had filed an appeal to Superior Court this would not have satisfied Mr. Brummett’s case and filing a new Superior Case was good reasoning and was the proper thing for Mr. Brummett to do.

On the one issue whether Mr. Brummett should have gotten the free Quinto tickets, Judge Williams only used one theory why Mr. Brummett should not have gotten the free Quinto tickets, when in reality Mr. Brummett presented two theories on why he should have gotten the free tickets, that was “false advertising” ,Judge Williams made her basis of Law only on the promotion dates and current draw versus advanced draw. If the two placard advertisements were false

and had no disclaimer on advanced play versus current play for the same date during the promotion period her point is mute and Mr. Brummett and 10,000's of other State players should have received their free tickets. Public players can't be expected to read intentions in the mind of Lottery Managers.

Mr. Brummett does not feel that this past Administrative Hearing by telephone served justice in this case because from the get go he wanted eventually to make this into a "Class Action" lawsuit (CP274) for all those players who were cheated out of free tickets and loss the chance to win millions of dollars. CP172. A class Action lawsuit lacks jurisdiction in the scope of an Administrative Hearing, Mr. Brummett knows.

Lets now discuss the issue of Collateral Estoppel or Issue Preclusion as previously discussed in Mr. Brummett's amended Plaintiff's Response In Opposition to Defendants Motion to Dismiss for Failure to State a Claim (CR12 B-6). CP 480-502 . Collateral Estoppel does not apply in this case according to many State Law cases such as *Clark v. Baines, 150 Wn.2d 905, 913, 84 P.3d 245 (2004)*. Collateral Estoppel will only apply in a subsequent litigation if the party asserting the defense proves

(1) The issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits (3) the party against whom collateral estoppel is asserted was a party on in privity with a party to

the prior adjudication, and (4) precluding re-litigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. *Clark v. Baines*, 150 Wn.2d at 913.

The issues in the Administrative Hearing are not the same as in Mr. Brummett's Superior Court Civil case under appeal here, Senior Administrative Law Judge Williams has stated above she did not have jurisdiction to here all Mr. Brummett's issues, this alone makes the issues not identical in accordance with *Clark v. Baines*. Mr. Brummett had six (6) issues under appeal to the final order of Judge Williams and she only acted on part of one issue, thus again the issues in this Superior Court case are not identical. Thus the criteria in number One (1) of *Clark v. Baines* has not been met.

The Administrative Hearing did not result in a final judgment on the merits because all of Mr. Brummett's issues were not heard and the five other issues had merit and there was no adjudication in the Administrative Hearing to prove or not to prove otherwise. Thus the criteria in two (2) *Clark v. Baines* has not been met.

The parties in the Administrative Hearing would not be the same as in Mr. Brummett's Civil Superior Court Case on appeal here had the Honorable Superior Court Judge Anne Hirsch of Thurston County heard my Motion to Amend my original complaint (CP507-519) to add two new litigates to the case after some partial discovery. This was

very unfair to Mr. Brummett, (RP9) when Judge Hirsch would not let me speak on the motion in front of her, while letting Assistant Attorney Mark Jobson say he was representing Safeway Inc. and Publicis USA, (RP3), Thus the criteria in number three (3) in *Clark v. Baines* has not been met.

Precluding re-litigation will work an injustice to Mr. Brummett because all of issues were not heard in a prior Administrative Hearing, facts were not determined by a Court of Law on all Mr. Brummett issues, damages could not be awarded in the Administrative Hearing and Mr. Brummett, desire for a Class Action Lawsuit could not be accomplished at an Administrative Hearing. Thus criteria number four (4) has not been met in accordance with *Clark v. Baines*.

Many other Court cases discuss the Law on the four criteria of *Clark v. Baines* such as in *Alishio v. Dept. of Social and Health Services, 122 Wn. App. 1, 91 P.3d 893, (2004)* Collateral Estoppel does not prohibit a party from asserting an issue that was not decided in an earlier procedure. If an Issue is merely raised in the pleadings in the earlier proceeding, but not actually litigated or decided by the Court, collateral estoppel does not bar litigation of the issue in a later proceeding.

Furthermore collateral estoppel does not apply when an ambiguous or indefinite decision makes it unclear whether the issue was previously

litigated.

In *Larsen v. Farmers Ins Co.* 80Wn. App. 259, 909 P.2d 935 (1996) again it states all four (4) elements of *Clark v. Baines* must be met or collateral estoppel does not apply.

In *City of Demoinés v. \$81,231* 87 Wn. App. 689, 943 P.2d 669 (1997) all four(4) elements of collateral estoppel must be met or it does not apply. *Estate of Tolson*, 89 Wn. App. 21, 947 P.2d 1242 (1997) Four (4) elements must be met. Also in *Ludeman v. Dept. of Health* 89 Wn app. 751, 951 P.2d 266 (1997) (four (4) elements must be met. Also in *Lee v. Ferryman* 88 Wn. App., 613, 945, P.2d 1159(1997) all four issues must be met once again. Also see *Hadley v. Maxwell* 144 Wn. 2d 306, 27 P.3d 600 (2001). *Nielson v. Spanaway Gen. Medical Clinic* 135 Wn. 2d 255, 956, P.2d 312 (1998) In General a Tort Claim in Superior Court is entitled under the Constitution Article 1 section 21 to have a jury decide the factual question of the claimants compensatory damages.

In *Mc Daniels v. Carlson* 108 Wn. 2d 299, 738 P.2d 254 (1987) the doctrine of collateral estoppel applies only to the resolution of factual issues upon which the outcome of the previous claim depended.

Generally in collateral estoppel the party asserting it bears the burden of persuading the Court that the issue decided in the prior action was identical to the issue presented in the second action, and thus should not be Re-litigated . Collateral estoppel restricts the re-litigation of an issue only

if the issue was actually litigated and resolved in the earlier case. This did not happen in Mr. Brummett case to the Administrative Hearing process thus the Civil Suit in Thurston County Superior Court is just and proper. The Administrative Hearing had no authority to award damages. See *Mead v. Park Place Properties*, 37 Wn. App. 403, 681 P.2d 256 (1984).

The principal of res judicada (claim preclusion) that all matters that could have been presented in the first litigation, is not applicable when a party relies on collateral estoppel in subsequent litigation. If an issue is not decided in the first litigation, even though it could have been, that issue maybe litigated in subsequent action. *Hansen v. Seattle*, 45 Wn. App. 214, 724 P.2d 371 (1986) (first action presented solely on Constitutional grounds; second action presented on contract grounds). Here in Brummett v. Lottery, Administrative Hearing on one of the six issues heard only dealt with current versus advance play on the free ticket issue and not the false advertisement part of the issue that would have given automatically the free tickets to Mr. Brummett and 10,000 of others.

For collateral estoppel to be available in the subsequent action, it must be clear that the same issue was litigated in the prior action. *Ropper v. Malbry*, 15 Wn. App. 819, 551 P.2d 1381 (1976) First action established fraud an breach of fiduciary duty; subsequent action was for slander. Court said that the wrongful words imported a criminal act, that civil fraud issue was not the same issue and denied preclusion. In Brummett's case this fits

because the issues are the issue.

When the Court in the first action refuses to rule on an issue, collateral estoppel does not arise as to that issue. *City of Pasco v. Mapler*, 46 Wn. App. 896, 733 P.2d 994 (1984).

The doctrine of collateral estoppel will not be applied against a party who did not have a full and fair opportunity to litigate the issue in the earlier proceeding. This fits Mr. Brummett case to a tee. In many cases, it will obvious whether the issue in earlier proceeding is the same as the issue in the later proceeding. Borderline cases can arise, however the “same issue” requirement has often proved troublesome. It has been said that if there is an uncertainty as to whether a matter was previously litigated, collateral estoppel is inappropriate. *Davis v. Nielson* 9 Wn. App. 864, 515 P.2d 995 (1973). When, because of the ambiguity or indefiniteness of the verdict or judgment, Appellant Court cannot say that the issue was determined on the prior action, collateral estoppel will not be applied as to that issue. *Mead v. Park Place properties*, 37 Wn. App. 403, 681 P.2d 256 (1984), *Ham v. Camerota*, 48 Wn. 2d 34, 290 P.2d 713 (1955); *Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 1253 (1955) *Braley Motor Co. v. Northwest Gas Co.* 184 Wash. 47, 49 P.2d 911 (1935); *Henderson v. Bardahl Intern Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967).

“Collateral estoppel operates without regard to whether the first determination of a particular issue was correct. The court does not

concern itself with the rightness of the findings. Its only inquiry is whether particular issue is one that clearly was decided in prior proceedings and whether the issue was necessary to the determination of that proceeding.” This fits Mr. Brummett appeal here because had the Office of Administrative Hearings heard my issue of “false advertisements” I would have surely received the seven (7) free tickets.

Friedententhal , Kane, and Miller, Civil Procedure 14.9 (2nd ed. West Hornbook) See also Trautman, P., Claim and issue Preclusion in Civil Litigation in Washington, 60 Wash.L.Rev. 805 (1985).

ISSUE NO. 2

Mr. Brummett filed a “Motion to Amend Complaint” on January 10, 2006 (CP507-519) to Thurston County Superior Court. The Motion was properly served to Assistant Attorney Mark Jobson representing the Lottery. Mr. Brummett also properly served Safeway Inc. through their registered Agent in Mukilteo, Washington. Mr. Brummett also properly served Publicis, USA at their office in downtown Seattle. Mr. Brummett also received a phone call from a Safeway Attorney in Southern California, about maybe wanting to settle their part of the case out of Court. Mr. Brummett also served a bench copy to the Honorable Superior Court Judge Anne Hirsch. All servings were done on January 10, 2006 and was put on the Motion Calendar for 9AM January 26, 2007. CP505-

506.

Mr. Brummett on January 10, 2007 filed the Motion to Amend Complaint along with a Declaration from Mr. Brummett and Exhibits 44-51. Minor changes were done to Mr. Brummett's six issues he had in his original complaint. One purpose was to add a seventh (7) issue about the Lottery having no written definitions for the words; Current play and Advance play in any rules and WAC's; Washington Administrative Codes.

The main reason for the amended complaint was to add defendant Safeway Inc., because that is where Mr. Brummett purchased his questionable Lottery tickets and where the false and misleading advertisements were in front of Mr. Brummett. Also Mr. Brummett was adding Defendant Publicis USA who was a contractor hired by the Lottery to design and make the false advertisement placards. These defendants were needed to be added because of partial discovery.

Lets now take a look at parts of the Defendants Motion hearing to Dismiss by Assistant Attorney Mark Jobson for the Lottery (CP503-504) and Mr. Brummett Motion in Opposition and Mr. Brummett Motion to Amend Complaint to be heard at the same time; 9:30 A.M. January 26, 2007. Mr. Brummett will be quoting word for word from the RP3 provided by Court reporter Aurora Shackell of Olympia.

The Court honors the existence of my motion to amend on page 3

line10 by saying “ There’s two matters before the Court today. There’s your motion to amend, and there’s the State’s motion to dismiss. And the Court is going to hear the State’s motion first, because the motion to Dismiss speaks to the case that already was hear prior to your filing the Motion to amend. So I’m going to hear it in that order.”

Mr. Jobson starts out on page RP3 line 19 “ Mark Jobson for the State Lottery Commission and other named defendants. The State has filed a Motion to dismiss pursuant to rule 12 (b) (6).”

Later at the hearing on January 26, 2007 Mr. Brummett is given the opportunity to address the Court on page RP9 of the transcript starting on line 14 “ Mr. Brummett: Your Honor, I’d like to ask the Court first if you would ask if there’s anybody here from Publicis or Safeway? The Court Why? Mr.Brummett: Because that was one of my amended complaints. The Court: We’re not dealing with your amended complaint yet. We’re dealing with the motion to dismiss.

Judge Hirsch never let me speak to the amended complaint Motion in the rest of the hearing on January 26, 2007 thus this was error causing Mr.Brummett a great loss because if Mr. Brummett could have got his amended complaint on the record, two more defendants would have and should have been defendants in this case after some discovery and that would have changed the Privity element in *Clark v. Baines*. And added a seventh issue that was not heard correctly by

Senior Administrative Law Judge Williams that would detail the current versus advance play issue was a made up scam of the Lottery.

ISSUE NO. 3

The Honorable Thurston County Superior Court Judge Anne Hirsch committed error in that she allowed Assistant Attorney General RP3 to litigate on behalf of Safeway Inc. and Publicis USA. In Mr. Brummett's Motion To Amend Complaint when Mr. Brummett was never allowed an opportunity to speak on the subject but the issue is how could an Assistant Attorney General gets to represent two (2) private companies?

According to Washington State Court Rule 4 (a 3) A Notice of Appearance, if made shall be signed by the defendants or his Attorney, and shall be served upon the person whose name is on the summons and filed with the Court.

This was error committed by Judge Anne Hirsch for not catching this and Error by Assistant Attorney General Mark Jobson to get this over Pro Se, Plaintiff Mr. Brummett. The record will show there was No Notice of Appearance filed in this case by Publicis USA and Safeway Inc. after being properly served by Mr. Brummett on January 10, 2007; 16 days before the Hearing date.

IV. AMENDED COMPLAINT SEVEN ISSUES

At this time Mr. Brummett would like to discuss the merits of this total Case using his Amended Complaint stating the seven (7) issues.

ISSUE ONE

Washington's Lottery did violate Chapter RCW 34.05 on passing Emergency Rules WSR-05-04-10 (CP156-165) and WSR-05-04-19 (CP140-149) on an Emergency basis when no emergency existed, under RCW 34.05.350. This is a violation of RCW 67.70.040 (1) not acting within the dignity of the State.

This is a violation of my Due Process under the 14th Amendment to the U.S. Constitution under 42 U.S. 1983. And a violation of General Tort Claim Rules; Outrage-Intentionally causing severe emotional distress by conduct that is outrageous and extreme. Such conduct must result in severe, emotional distress to Plaintiff, who is either directly subjected to such conduct or an immediate family member who is present at the time of such conduct. Physical injury is not required. These emergency Rules went into effect January 21, 2005 for the Lotto Game and January 24, 2005 for the Quinto Game. This issue/claim is for the Lottery and Lottery Commission. CP507-508.

ISSUE NUMBER TWO

That the Lottery broke every rule under RCW 34.05 and Lottery Commission rules, and State Laws in that it sold many Monday night Lotto and Quinto tickets as early as January 12, 2005 for the 14th Day of February 2005. CP174-176 (The date on the new Lotto-Quinto Monday night first draw). When the Lottery Commission had not authorized those Monday night draws until January 21, 2005 for Lotto and January 24, 2005 for Quinto. CP199-211. This hurt my chance to win on Feb14-Mar5 2005. This is a violation of RCW 67.70.040 (1) and my due process under the 14th Amendment to the U.S. Constitution under 42 U.S. 1983. This is also illegal and relief is provided under General Tort Claim Rules under outrage and recklessly causing severe Emotional Distress. This was also an intentional act by the Lottery to break Lottery Commission Rule, WAC-315-34-060. This is also a violation of the Consumer Protection Act of Washington State, RCW 19.86.020 unfair competition, practices declared unlawful. Unfair Deceptive acts or Practices in conduct of any trade or commerce is hereby declared unlawful. This issue/claim is for the Lottery and Lottery Commission. CP508-509.

ISSUE NUMBER THREE

False and misleading advertising- in that the Lottery had visual placard advertising(CP126-127) the new February Monday draws for Lotto and Quinto (made by Publicis USA, Seattle) and placed at Safeway store No. 543 also placed at about 2300 Lottery Franchises across the State in January 2005.

The Placards said, "Buy a \$5 Lotto ticket and receive a free \$1 Quinto ticket between February 14-March 5, 2005." There was no disclaimer! Mr. Brummett purchased nine \$5 Lotto tickets and only got two (2) free \$1 Quinto tickets. Not the nine (9) free \$1 Quinto tickets Mr.Brummett should have gotten per the placard advertisements. Nine of my nine \$5 Lotto tickets were purchased for dates during the promotion period as advertised, (CP128-133) February 14th to March 5th 2005. This is false advertisement, fraud, bait & switch and misleading advertising in accordance with the Attorney General's guidelines for advertising, "write it right" CP177-198. The Lottery also had false and misleading (CP134) advertising on their internet web site, the ticket themselves, on their 1-800-545-7510 phone number. This is a violation of 16CFR251, RCW67.70.050 (8), a violation of Consumer Protection Act of Washington RCW 19.86.020 and RCW 67.70.040 (1). This subjected Mr. Brummett to outrage under general Tort Law;

recklessly causing Mr. Brummett severe emotional distress, for a \$1.00 Quinto ticket won on March 6, 2005... \$\$4,860,000. (CP172) Could that have been one of the seven (7) free \$1 Quinto tickets Mr. Brummett did not receive that he (and 10,000 of other players so situated had coming because of the false advertisements,? Are we was supposed to be a mind readers about advance play did not count for dates during the promotion period, when no disclaimers appeared on subject advertisements? This issue/ claim falls to the Lottery, Publicis USA, and Safeway Inc. CP509-510.

ISSUE NUMBER FOUR

A violation of RCW 19.170.030 in that the Lottery only had odds on their placards, CP126-127, made by Publicis and posted at Safeway store number 543 plus another 2300 locations across the State in Mid January 2005 through March 5, 2005, that said " Odds vary by Game" this did not help Mr. Brummett or any other 10,000 of players at all and is against the Law. The odds should have said, " Quinto odds are 1:15 for \$1.00 Quinto ticket and odds for Lotto are 1:27 for \$1.00 Lotto play. This is a violation of WAC-315-06-040 and RCW 67.70. 040 (1). This has caused Mr. Brummett Outrage and recklessly caused Mr.Brummett severe emotional distress. That's why I'm fighting these issues 22 months later, bad

Government at it's worse. This was intentional by the Lottery as Mr. Brummett advised the Lottery of the problem on February 15, 2005 (CP139) or earlier. This issue/claim is for the Lottery, Publicis USA and Safeway INC. CP510.

ISSUE NUMBER FIVE

That all Lottery players are not treated equally for \$1 they spend during promotional drawings with current draws versus advance draws. I was not treated equally for a chance to win another ticket or prize by the same Drawing date, current draw, Lottery term not mine versus buying the same ticket as little as fifteen (15) minutes earlier, called by the Lottery, advance draw. This is a violation of the spirit of the Law, RCW 67.70 .040 (1) play should be within the dignity of the State. This is also a violation of Mr. Brummett's Due Process rights under the 14th Amendment to the U.S. Constitution, 42 U.S. 1983. Also a violation of The Consumer Protection Act, RCW 19.86.020 and a violation of General Tort Law for Outrage under recklessly causing Mr. Brummett severe Emotional Distress that is outrageous and extreme. This was an intentional act by the Lottery and Lottery Commission. This issue/claim only applies to the Lottery and Lottery Commission. CP510-511.

ISSUE NUMBER SIX

That the Lottery and the Lottery Commission had the duty under Department Rules (WAC's) and State Laws (RCW's) to stop the promotion during the period February 14 to March 5, 2005 after Mr. Brummett alerted them to problems with the promotion on February 11, 2005 by phone and in person at the Lottery Headquarters in Olympia, on February 15, 2005. CP139. Mr. Brummett told them about unfairness, and false and misleading advertisements, etc. They removed most false and misleading advertisements but not the two Placards at Safeway in Lacey or Statewide nor the false advertisements on the tickets themselves. This was an intentional act by the Lottery. A violation of the Consumer Protection Act RCW 19.86.20. They did not stop the new Monday night draws for Quinto and Lotto because money won out over the Dignity of the State, RCW 67.70.040 (1) that effected Mr. Brummett a player at the time and 10,000's of other players. Ms. Nagel's E-Mail of February 15, 2005 says " The ticket stock message cannot be changed unless we stop and restart the promotion, which is risky." This is also a violation of 16CFR 251. The game and promotion should have been stopped Period! Until all problems were corrected. This issue is for the Lottery

and Lottery Commission. CP511-512.

ISSUE NUMBER SEVEN

The Lottery broke Lottery Commission Rule RCW 67.70.040 (1h) the method to be used in selling tickets or shares, except as limited by (a) of this subsection. In that the Lottery has no jurisdiction from the Lottery Commission to use the terms Current versus Advance Draws in the selling of Lottery tickets. The Lottery has violated RCW 67.70.040 (1h). This cost Mr. Brummett seven (7) free \$1.00 free Quinto tickets and a chance to win up to 4.86 Million dollars. This was an intentional act by the Lottery over the years? Monetary damages are in order under General Tort Claim Law, Outrage and severe recklessly and intentionally causing Mr. Brummett emotional distress. There is also a violation of RCW 67.70.040 (1). This Issue/claim is for Washington's Lottery. CP512.

V. CONCLUSION

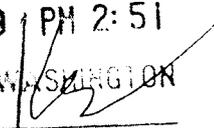
That the Honorable Judges at the Court of Appeals Division II in Tacoma, Washington reverse the Honorable Thurston County Superior Court Judge Anne Hirsch affirmative ruling for the State to Dismiss Mr. Brummett's Civil lawsuit for Collateral Estoppel and remand the case back to Superior Court for further discovery and trial because the State did not meet all four (4) elements in Collateral Estoppel Law. The case is on it's way to class action and punitive damages, this criteria could not have been met at the Administrative Hearing nor at it's review to Superior Court.

That Mr. Brummett's Motion to Amend Complaint go back to Thurston County Superior Court for action on the merits.

That Assistant Attorney General Mark Jobson be admonished for stating to the Superior Court that he was representing two private Companies that Mr. Brummett was trying to get into the Civil Case for defendants, when Mr. Jobson did not enter any Notice of Appearances into the record or serve Mr. Brummett. Plus Mr. Brummett cannot understand how the State can litigate for private Companies?

FILED
COURT OF APPEALS
DIVISION II

07 MAY 29 PM 2:51

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**PROOF OF SERVICE
COURT OF APPEALS DIVISION II
CASE No. 35870-1-II**

I certify that I served a copy of Plaintiff's Appeal brief from James L. Brummett on May 29, 2007 to:

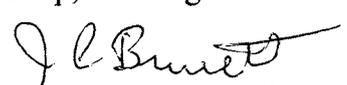
Mark Jobson, AAG (1 copy)
Office of the Attorney General
Tort Claims Division
7141 Cleanwater Drive SW
Olympia, Wash. 98504

Clerk, Court of Appeals, Division II (Orig + 1 copy)
950 Broadway, Suite 300
Tacoma, Wash. 98402-4454

XXXX Hand Delivered

I certify under penalty of perjury under the laws of Washington State that the foregoing is true and correct.

Dated this 29 Day of May, 2007 at Puyallup, Washington.


James L. Brummett, Appellant, Pro SE

P.O. Box 73442
Puyallup, Wash. 98373
206-380-2085