

NO. 47983-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAY GEROW, ET AL.,

Appellant,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

**APPELLANT JAY GEROW and ZDI GAMING'S OPENING
BRIEF**

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I. INTRODUCTION

Mr. Gerow and his company, ZDI Gaming, Inc. prevailed in their past administrative actions related to ZDI's VIP pull tab equipment upgrade.¹ Despite winning repeatedly, the trial court in these proceedings erroneously dismissed all their damages claims, leaving them without a remedy to recoup their losses. The Gambling Commission, its officials, and staff have engaged in unconstitutional and tortious misconduct. Absolute immunity violates the state's waiver of sovereign immunity. A business owner may hold government accountable just like any other person or corporation in a civil action. The damages claims in this case should be reinstated so that a jury may properly compensate Mr. Gerow and his company.

II. ASSIGNMENTS OF ERROR - Issue Statements

A. The trial court erred when granting summary judgment against the commission and commissioners in an official capacity.

1. The Gambling Act limits personal liability but does not absolutely immunize the Gambling Commission and its members against official capacity claims.

B. The trial court erred when granting summary judgment dismissal of all damage remedies.

¹ The VIP upgrade is illustrated at CP 375 - 380.

1. Genuine issues of material fact preclude summary dismissal of the Section 1983 claims.

2. Genuine issues of material fact preclude summary dismissal of the tortious interference claims.

3. Genuine issues of material fact preclude summary dismissal of the negligence claims.

III. STATEMENT OF THE CASE

Mr. Gerow and ZDI Gaming, Inc. first filed for damages relief in 2008.² The Gambling Commission refused to provide them any respite for years despite the upgrade meeting regulatory requirements.³ This damages matter remained stayed while corollary administrative proceedings worked through the appellate system.⁴ One case proceeded all the way to the Supreme Court and back down again.⁵ That case was headed back up when the Gambling Commission finally relented after it

² CP 1

³ CP 1058: “Since cash cards qualify as either “cash” or “merchandise” as an authorized prize under WAC 230-30-070, ZDI’s request to upgrade pull tabs to include cash card acceptors is not prohibited by law.” “Since there is no statutory support for prohibiting cash card acceptors in pull tab vendors the Gambling Commission exceeded its authority by denying ZDI’s petition.” CP 1059.

⁴ *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com’n*, 173 Wn.2d 608, 268 P.3d 929 (2012)(ZDI’s VIP pull-tab equipment complies with regulations); *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Com’n*, 151 Wn. App. 788, 214 P.3d 938 (2009)(ZDI’s VIP cash card technology is a cash equivalent that complies with regulations); *Gerow v. WSGC*, 181 Wn. App. 229, 324 P.3d 800 (2014)(Affirmative vote of three members of the Gambling Commission required to adopt rules regarding electronic pull-tabs).

⁵ *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com’n*, 173 Wn.2d 608, 268 P.3d 929 (2012)(ZDI’s VIP pull-tab equipment complies with regulations).

lost a second time at the trial court level.⁶ Ultimately, ZDI prevailed in all administrative matters. Importantly, the administrative decisions include findings that the Gambling Commission acted outside the scope of its statutory authority.⁷ Additionally, the Gambling Commission acted arbitrarily and capriciously.⁸ Under new leadership in 2014, the Gambling Commission finally stopped appealing, admittedly in part to avoid further damages exposure.⁹

With the administrative matters finally resolved, the remaining issues concern the amount of money the government owes to Mr. Gerow and ZDI whom lost considerable revenues over a six year period.¹⁰ They have yet to recover on their investments.¹¹

⁶ CP 989 - 991. “The Commission did not comply with the Administrative Procedure Act (“APA”) RCW 34.05.464(4) and .570(3)(f) when it did not decide all issues requiring resolution by the agency upon ZDI’s petition for declaratory relief. Specifically, the Commission erred as a matter of law when it failed to decide the issue of whether ZDI’s VIP was a gambling device in its August 2006 Final Order... The Commission engaged in unlawful procedure or decision-making process under the APA, RCW 34.05.570(3)(c) when it considered the issue of whether ZDI’s VIP was a gambling device in 2012.... ZDI’s VIP is not a gambling device under RCW 9.46.0241. ZDI’s VIP is not prohibited under the Gambling Act, RCW 9.46, or the Commission’s regulations.” and CP 393 “In short, the ZDI VIP equipment does not meet the definition of illegal gambling device under the statute, and cannot be denied on that basis. The element of chance and prize stem solely from the paper pull-tabs, not the dispensing and reading equipment.”

⁷ CP 1058.

⁸ CP 1059. “Based on the record presented to the court it is clear that the Gambling Commission disregarded testimony and other evidence presented that cash card acceptor installation did not expand gambling in Washington. Therefore, the court finds that the decision of the commission was arbitrary and capricious and shall be reversed.”

⁹ CP 1504.

¹⁰ CP 1054.

¹¹ Id. 1504.

Certain Gambling Commissioners and the Governor blessed the expansion of non-tribal gambling technologies while accepting significant political contributions to advance their own careers.¹² All the while, they abused limited governmental powers to deny Mr. Gerow and his company any improved technology.¹³ The Gambling Commission created fictional barriers even though the Legislature long ago eliminated prohibitions on non-tribal gaming in favor of regulatory controls.¹⁴ Social past times like pull-tabs have special status as commercial stimulants, and as a revenue stream for non-profit and charitable organizations.¹⁵ The Legislature specifically defined pull tab gambling to allow a fluid interpretation of the meaning of the game over time as it develops through technological innovation like that developed at ZDI.¹⁶ Mr. Gerow's company could not fill its niche in the market due to the government's misconduct.¹⁷

¹² CP 710, 749 - 765; CP 981 - 1086 (Gerow Dec.12/23/13), CP 177 (Prentice "Moritorium" Ltr); CP 181 and 183 (Gregoire Ltrs) and CP 132 - 137 (Pic Charts showing market shift).

¹³ CP 382 - 398 (Gorrell Ruling); CP 1057 - 1072 (Pomeroy Ruling); CP 989 - 991 (Tabor Ruling), CP 698 - 710 (Gerow Dec. 6/11/13) and *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com'n*, 173 Wn.2d 608, 268 P.3d 929 (2012)(ZDI's VIP pull-tab equipment complies with regulations); *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Com'n*, 151 Wn. App. 788, 214 P.3d 938 (2009)(ZDI's VIP cash card technology is a cash equivalent that complies with regulations); *Gerow v. WSGC*, 181 Wn. App. 229, 324 P.3d 800 (2014)(Affirmative vote of three members of the Gambling Commission required to adopt rules regarding electronic pull-tabs). See also, CP 145 -146 (Day's Negotiated Compact Provisions on Exclusivity)

¹⁴ Id. and RCW 9.46.010; CP 169.

¹⁵ RCW 9.46.0217; RCW 9.46.0325; RCW 9.46.0209.

¹⁶ RCW 9.46.0273

¹⁷ See fn. 12

The misconduct set forth in the Amended Complaint describes various improprieties attributable to state actors.¹⁸ On summary judgment, Mr. Gerow and his company provided sufficient evidence to take the case to a jury.¹⁹ The ZDI VIP upgrade should have been in play from 2005 forward.²⁰ It complied with the rules, and improved regulatory controls.²¹ Unfortunately ZDI could not market its upgrade because the agency threatened customers with licensing action and Mr. Gerow with criminal penalties.²² ZDI was under intense scrutiny to include unauthorized audits; unreasonable demands for customer invoices; delays in equipment reviews; heightened scrutiny of approved equipment in the field; increased submittal fees; exclusion from meetings, input, and contact with commissioners; and dissemination of materials making false statements about ZDI's upgrade.²³ Mr. Gerow was treated with hostile animus in response to his speaking out in support of innovation of non-tribal technologies.²⁴

The jury never heard the case because the trial court misinterpreted a limited personal liability limitation in the Gambling Act and summarily

¹⁸ CP 29 - 58

¹⁹ CP 698 - 710; multiple supporting declarations itemized at 852.

²⁰ CP 699, 1071

²¹ CP 1068

²² CP 703, 707, 720 - 721, 1414, 1467 -1468.

²³ CP 703 - 710

²⁴ CP 701 - 703

dismissed various claims and parties early on.²⁵ The trial court mistakenly found absolute immunity where there is none.

This mistaken application of absolute immunity led to later erroneous rulings wherein the trial court focused attention narrowly on the bad acts of the Director only, when all the Commissioners and the entire agency was misbehaving under the Governor's leadership.²⁶

On the viable Sec. 1983 claims, the trial court failed to recognize the retaliatory regulatory misconduct that interfered with Mr. Gerow's First Amendment rights.²⁷ When he sought redress, the officials and staff retaliated. When he spoke out in support of improved pull tab technology the agency increased its regulatory scrutiny. The agency stopped all marketing and dissemination of the VIP upgrade even when it complied with the rules and improved regulatory controls. In addition to retaliatory First Amendment misconduct, the trial court failed to recognize the notable due process violations inherent in the arbitrary and capricious actions of the agency that were also outside the statutory authority of the agency.²⁸ Mr. Gerow properly plead and presented evidence that staff were not properly supervised, and the officials engaged in retaliatory

²⁵ CP 114-115, RP 11/16/12

²⁶ CP 88; CP 767; CP 853; CP 1467; ; and RPs 03/10/13; 07/12/13; 11/06/12; 02/14/14; 08/14/15

²⁷ 7/12/13 RP 62.

²⁸ Id.

regulatory interference. The respondents delayed approval of ZDI's upgraded technology, and in fact Director Day never approved the upgrade. There is no letter approving the ZDI VIP upgrade.

On the viable negligence claims, the trial court failed to recognize the duties owed to Mr. Gerow and ZDI.²⁹ A special relationship formed between the Commissioners, the Director, his staff and Mr. Gerow when negotiating approval of ZDI's upgrade. The record is replete with correspondence, administrative hearing materials, and orders confirming communications among them.

On the viable tortious interference claims, the trial court introduced a prerequisite element of "certainty" not previously recognized in the common law. The trial court misapplied the law when it found: "I don't think that there is a valid business expectancy that for certain it [ZDI's VIP upgrade] will be marketable."³⁰ This logic suggests gambling equipment manufacturers cannot reasonably expect the Gambling Commission to approve technology that complies with its regulations. Further, it suggests a gambling equipment manufacturer may not expect the Gambling Commission to comply with the Administrative Procedure Act ("APA"), but rather must tolerate government interference with its legitimate business activities with impunity even when the agency acts

²⁹ 7/12/13 RP 63.

³⁰ RP 08/14/15 at 55.

outside its statutory authority and arbitrarily and capriciously. Summary dismissal does not comport with the State’s waiver of sovereign immunity.

The trial court rulings are not just, and must be reversed.

IV. ARGUMENT

A. No Absolute Immunity

1. No Immunity for Official Capacity Claims

The Gambling Act contains a limited liability protection that indemnifies Gambling Commissioners separately and collectively as the Commission from personal liability to pay damages caused by their misconduct:

Neither the commission nor any member or members thereof shall be personally liable in any action at law for damages sustained by any person because of any acts performed or done, or omitted to be done by the commission or any member of the commission, or any employee of the commission, in the performance of his or her duties and in the administration of this title.³¹

This provision does not provide qualified nor absolute immunity from liability.³² When bestowing immunity from civil liability, the Legislature expressly states its intent: RCW 26.44.060 (“shall not be subject to civil liability arising out of his or her cooperation.”); RCW 4.24.510 (“is immune from civil liability for claims based upon the communication to

³¹ RCW 9.46.095.

³² The courts do not rely upon the caption of a statute to interpret the meaning of the statute. *State v. T.A.W.*, 144 Wn. App. 22, 186 P.3d 1076 (2008). The caption “immunity from liability” is misleading and not dispositive. The provision is really a limited indemnification from personal exposure to paying a damages judgment.

the agency...”); RCW 18.89.080 (“are immune from suit in any civil action...”); RCW 18.64.005 (“Be immune, collectively and individually, from suit in any action, civil or criminal,...”) The Legislature has not immunized Gambling Commissioners, separately nor collectively, from liability. The Legislature merely agreed to indemnify them from personal liability exposure. The Commissioners, separately and collectively, may be liable in an official capacity. If so, the state then covers the losses.

Gambling Commission Director Day and his employees rely upon similar indemnification set forth in the provisions that accompany the state’s waiver of sovereign immunity.³³ Any officer, employee, or volunteer who acts within the scope of his or her official duties and a judgment is entered against him or her then the judgment creditor may only seek satisfaction against the state.³⁴ This includes Sec. 1983 liabilities.³⁵ Like the Commissioners, the Director has no immunity for his official misconduct.³⁶ Neither does his staff.³⁷

A notable qualifier for indemnification concerns good faith conduct. Any action by a commissioner or by the director, or his staff, that occurs outside the scope of their authority precludes indemnification.

³³ RCW 4.92.070, .075 and .090.

³⁴ Id.

³⁵ Id.

³⁶ RCW 9.46.095. The Director is not a Commissioner, nor a member. RCW 9.46.040 and 9.46.080.

³⁷ Id.

The Gambling Commission acted outside the scope of its authority when refusing to approve ZDI's upgrade, and otherwise interfered with Mr. Gerow's business.³⁸

The trial court erred when it granted absolute immunity to the Commissioners, separately and collectively.³⁹ The decision should be reversed.

2. State Law Immunity Not Applicable to Sec. 1983 Liability

State laws may not pre-empt liability pursuant to federal statute.⁴⁰ Agency officials and employees may expose the state to liability for federal rights violations.⁴¹ The Commissioners are not immune from federal statutory liabilities for their misconduct. The trial court erroneously dismissed the civil rights claims against the Commissioners and the Commission. The Sec. 1983 claims should be reinstated.

B. Civil Rights Violated - First Amendment and Due Process

1. Retaliation Based on Gerow's First Amendment Activity

³⁸ See *ZDI Gaming, Inc. v. WSGC*, 173 Wn.2d 608, 268 P.2d 929 (2012); CP 713.

³⁹ The trial court expressly struggled with these concepts, and ultimately entered an order without findings or analysis. RP 12.28.15 at 30, and CP 1518.

⁴⁰ *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 1999)(State statutory immunities for child abuse investigations cannot protect city from federal constitutional claims); *Wyant v. City of Lynnwood*, 621 F. Supp. 2d 1108, 1111 (2008)(No pre-claim form filing required for Sec. 1983 claims).

⁴¹ *Washington Trucking Associations, et al v. Wash. State Empl. Sec. Dept. et al*, Case No. 47681-9-II, Div. II Court of Appeals (02.10.2016); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992); *Petcu v. State*, 121 Wn. App. 36, 86 P.3d 1234 (2004).

State action designed to retaliate against and chill political speech strikes at the heart of the First Amendment.⁴² Governmental officials may not use their regulatory powers to retaliate against a licensee who seeks redress or otherwise speaks out against agency action.⁴³ A cognizable Sec. 1983 claim may be based upon excessive governmental regulation.⁴⁴ Circumstantial evidence such as timing and express animus are sufficient to prove a First Amendment retaliation case.⁴⁵

While Gregoire, Prentice, and Day were in power, Mr. Gerow never received a letter approving the upgrade. Day initially approved the VIP without commissioner approval in 2002.⁴⁶ Later his staff wrote various letters repeatedly refusing approval of the upgrade.⁴⁷ Mr. Gerow filed for declaratory relief with the Commission and ultimately in court. Once he sought redress and prevailed, Director Day and the named Commissioners came up with new arbitrary restraints to stop the upgrade with each success. Director Day deliberately withheld approval and otherwise allowed his staff to interfere with Mr. Gerow's company every time Mr. Gerow sought redress and won. Director Day and Commissioner

⁴² *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (1989).

⁴³ *CarePartners LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008); *Mt Healthy City School Distr. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-284, 97 S. Ct. 568 (1977).

⁴⁴ *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987).

⁴⁵ *Keyser v. Sacramento City Unified School Dist.*, 265 F.3d 741 (9th Cir. 2001)

⁴⁶ CP 1351

⁴⁷ CP 1354 - 1361

Prentice were openly hostile towards Mr. Gerow.⁴⁸ They were along with the Governor actively working towards exclusivity, revenue sharing, and ultimately simply a market advantage at tribal venues. The Commissioners and Director Day never approved his upgrade even though ZDI prevailed, repeatedly. The officials and staff made it impossible for ZDI to market the VIP even though the cash card upgrade improved the regulatory control over approved pull-tab gambling.

2. Disregard of Due Process

Irrational or arbitrary enforcement activity may support a substantive due process violation under Sec. 1983.⁴⁹ A trial court errs when dismissing a Sec. 1983 claim where the complaint alleges an agency failed to properly conduct its regulatory activities.⁵⁰ Abusing auditing authority may expose agency officials to liability for violating constitutionally protected interests.⁵¹

Director Day and his staff abused their regulatory powers when doubling lab submittal fees, delaying review, conducting unauthorized

⁴⁸ CP 702, 1503

⁴⁹ *Robinson v. City of Seattle*, 119 Wn. 2d 34, 830 P.2d 318 (1992)(Continued enforcement of land use controls after court ruled the regulation invalid actionable under Sec. 1983 as a due process violation.)

⁵⁰ *Washington Trucking Associations, et al v. Wash. State Empl. Sec. Dept. et al.*, Case No. 47681-9-II, Div. II Court of Appeals (02.10.2016)(Viable Sec. 1983 case stated in complaint wherein plaintiff trucking companies alleged Employment Security Department conducted “rigged audits” for purposes of assessing additional unemployment taxes.)

⁵¹ *Id.*

audits, and disseminating threatening correspondence to customers. Additionally, Day and the commissioners deliberately ignored the procedural protections of the Administrative Procedure Act (“APA”).⁵² After the matter proceeded to the Supreme Court and back again, Director Day and the Commissioners prohibited the upgrade claiming the upgrade an illegal gambling device.⁵³ The agency knew the argument was unfounded when coming up with this decision because its Administrative Law Judge had already found the upgrade was not a gambling device.⁵⁴

To date, Mr. Gerow has suffered ongoing civil rights violations not yet remedied. He has protected free speech and due process rights that he may enforce in his Sec. 1983 claims.⁵⁵ The trial court erred when dismissing his claims.⁵⁶

3. Actionable Non-Legislative Misconduct Post 2008

On or about October 15th, 2008, federal district court dismissed on the complaint Mr. Gerow’s first attempt to enforce his civil rights.⁵⁷ On or about July 14, 2010, the Ninth Circuit affirmed the district court’s

⁵² See fnnt. 6.

⁵³ Id.

⁵⁴ CP 390 - 393

⁵⁵ CP 769

⁵⁶ “Mr. Gerow has not asserted how his two claims, which are claims of a violation of his First Amendment free speech rights or his Fourteenth Amendment due process rights, have, in fact been violated.” RP 07/12/13 at 62.

⁵⁷ *Gerow v. WA*, 2008 WL 4610324 (Tacoma Dist. Crt. 2008)

dismissal.⁵⁸ The initial case was understood to be a limited challenge to the newly adopted rules prohibiting ZDI's upgrade.⁵⁹ At the time, the administrative proceedings had yet to be finally decided.

This initial federal case had no effect on conduct occurring after October 15th, 2008. The decision was not based upon the later revealed documents and testimony from Director Day who negotiated exclusivity provisions that Governor Gregoire rejected in favor of a preferential market advantage in tribal venues.⁶⁰

Post October 2008, the Governor, the Gambling Commissioners, the Gambling Commission Director and his staff repeatedly interfered with Mr. Gerow's civil rights. In short, they actively supported exclusive machine gaming rights for tribes while prohibiting and otherwise interfering with Mr. Gerow improving his company's dated equipment. Presumably this was for political favor with the tribes and to sustain a potential bargaining position in support of sharing gaming revenues with tribes not otherwise obligated to pay gambling or other taxes.⁶¹ More directly, the officials made it clear they did not appreciate Mr. Gerow's

⁵⁸ *Gerow v. WA*, 383 Fed. Appx. 677 (9th Cir. 2010).

⁵⁹ *Id.*

⁶⁰ CP 896 CP 924 - 926

⁶¹ CP 903, 919 - 920, 924 - 926, 953 (unredacted version scaled) 983, 979

challenges to their authority.⁶² These post 2008 interferences do not relate to any legislative activity subject to legislative immunity.

Mr. Gerow's amended complaint describes specifically the retaliatory misconduct, lack of supervision, and disregard of procedural due process guarantees described in the Administrative Procedures Act he experienced.⁶³ Mr. Gerow further described the misconduct in his brief opposing summary judgment.⁶⁴

In error, the trial court failed to assume all facts in Mr. Gerow's favor. The trial court erroneously required Mr. Gerow to explain how "in fact" defendants violated his free speech and due process rights.⁶⁵ In cases of retaliation, Mr. Gerow must merely make a prima facie showing of retaliation, which may be based on purely circumstantial evidence.⁶⁶ On summary judgment, he has no obligation to convince the court his claims are factually correct. The trial court must assume the "truth of the plaintiffs allegation of retaliation."⁶⁷

Mr. Gerow met his burden. Every time Mr. Gerow prevailed, the agency imposed more regulatory barriers to his success. Prentice and Day were openly hostile, and restricted his access to and participation in

⁶² CP 1388, 1504

⁶³ CP 20-21.

⁶⁴ CP 777, 788 -790

⁶⁵ CP 07/12/13 at 62.

⁶⁶ *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000)(Employers rarely will reveal they are motivated by retaliation.)

⁶⁷ *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (1989).

gambling commission meetings. His customers were contacted and threatened. The agency compromised his business and stopped any innovation. Every interference they imposed he proved violated the APA, and was otherwise outside the agency's regulatory authority. Yet the agency never approved his upgrade during Gregoire, Prentice, and Day's entire tenure. Mr. Gerow met his burden on summary judgment. His Sec. 1983 claims should be reinstated.

C. Tortious Interference - Reasonable Business Expectancy That Commission Approve Gambling Equipment

A recent Division II opinion found a tortious interference claim sufficient against a state agency where improper purpose and improper means were alleged in the complaint.⁶⁸ The case should be similarly dispositive here to support reversal of the trial court.

Improper means and improper purpose may exist even where an agency correctly applies its regulations.⁶⁹ In this case the agency used improper means and improper purposes to stop Mr. Gerow and his company from competing in the pull tab industry.

With regard to improper means, Mr. Gerow and his company proved in the corollary administrative proceedings that the agency

⁶⁸ *Washington Trucking Associations, et al v. Wash. State Empl. Sec. Dept. et al*, Case No. 47681-9-II, Div. II Court of Appeals (02.10.2016).

⁶⁹ *Id.*

improperly denied approval of its VIP upgrade.⁷⁰ The agency reached the wrong conclusion, and it did so by acting outside its authority, and by acting arbitrarily and capriciously.⁷¹ Arbitrary and capricious action or the threat of a lawsuit for purposes of harassment (continuing administrative appeals) is improper.⁷² Arbitrary delays are another means of improper means of interference.⁷³ Without doubt the agency used improper means to tortiously interfere with Mr. Gerow's business expectancies.

With regard to improper purpose, improper purpose examines the motive for the interference.⁷⁴ Where there is evidence like there is here of greed, retaliation, and hostility, the improper purpose element is met.⁷⁵ The record before the trial court in this case is replete with evidence of greed, retaliation, and hostility.⁷⁶ Tribes paid serious money to keep their exclusivity. The agency accommodated tribal interests while suppressing innovation by ZDI. The trial court erred when it found no evidence of improper purpose or means. The tortious interference claims should be reinstated.

⁷⁰ See fnt. 13.

⁷¹ Id.

⁷² *Washington Trucking Associations, et al v. Wash. State Empl. Sec. Dept. et al*, Case No. 47681-9-II, Div. II Court of Appeals at 26 (02.10.2016).

⁷³ *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 295 P.3d 1197 (2013)

⁷⁴ Id.

⁷⁵ *Washington Trucking* at 26.

⁷⁶ CP 981 - 1086; 1503, 1424 -1425,

Tortious interference of a business expectancy does not require the prerequisite certainty in investment that the trial court burdened Mr. Gerow and his business with when dismissing their theory. Business expectancies may be purely prospective, and without guarantees or certainty.⁷⁷ An insurance company has a business expectancy in its clients even though non-compete agreements are potentially unenforceable.⁷⁸ ZDI's VIP had been approved for years. There was nothing speculative about adding a gift card feature that improved the regulatory control. Gift card technology was a well recognized business activity unrelated to gambling, and not prohibited for use in gambling. In fact other cash equivalents were expressly authorized.⁷⁹

The courts can find per se interference where “identifiable standards of business ethics or recognized community customs as to acceptable conduct” have developed.⁸⁰ Based upon past practices, gambling equipment manufacturers could reliably expect approval of equipment that complied with the rules and improved the regulatory control of the approved activity.⁸¹ The ZDI upgrade complied with the rules and improved the regulatory control of pull-tabs.

⁷⁷ *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 52 P.3d 30 (2002).

⁷⁸ *Id.* at 159

⁷⁹ CP 1059

⁸⁰ *Newton* at 158 - 159.

⁸¹ CP 170

The courts may also find per se interference where a statute or regulation is violated.⁸² Here the agency violated the APA repeatedly causing Mr. Gerow and ZDI to pursue protracted litigation for years over the administrative errors. These errors included deliberately ignoring statutory voting requirements and other basic principles regarding notice and opportunities to be heard.⁸³ In addition, the agency targeted ZDI clients specifically advising them to avoid purchasing or leasing ZDI's upgrade. The agency's interference harmed a specific non-speculative business interest in improved equipment for its customers.

Mr. Gerow and ZDI have stated per se tortious interference claims that should be reinstated.

D. Negligence - Special Duties Owed to Mr. Gerow and His Company

The trial court erroneously dismissed the negligence claims because it failed to recognize the special duty owed to Mr. Gerow and his company as the exclusive applicant for the ZDI upgrade.⁸⁴ The Commissioners, Director Day and gambling commission staff expressly rejected approval of ZDI's upgrade without lawful authority from 2005 to

⁸² *Newton* at 158 - 159.

⁸³ CP 989 - 991. *Gerow v. WSGC*, 181 Wn. App. 229, 324 P.3d 800 (2014)(Affirmative vote of three members of the Gambling Commission required to adopt rules regarding electronic pull-tabs).

⁸⁴ RP 07/12/13 at 63: "Rick Day, as the director, was an employee acting within the scope of his employment as director of the Gambling Commission, and there was no special relationship exception, there was no legal duty. I grant summary judgment on that claim as well, and it shall be dismissed."

November 2013 when Director Trujillo finally took over after Day left.⁸⁵ The erroneous denial of the upgrade was negligent.⁸⁶ The Director and his staff were duty bound to properly interpret and apply its regulations.⁸⁷ They failed to do so. Mr. Gerow and his company relied to their detriment on the erroneously denied approval of his upgrade and did not market the equipment that met all regulatory requirements.⁸⁸

The administrative proceedings and approval processes were sufficient to establish a special relationship and duty owed to Mr. Gerow and ZDI, the licensed gambling equipment operator.⁸⁹ There was privity among them.⁹⁰ The parties were no longer merely engaging at arms

⁸⁵ CP 1504.

⁸⁶ CP 1302-1303.

⁸⁷ The agency as the entity empowered to approve or reject the VIP technology held all the expertise. Mr. Gerow had virtually no bargaining power and risked loss of his license and potential criminal penalties. These factors weigh in favor of finding a special relationship. *Melxner v. Wells Fargo Bank, N.A.*, 101 F.Supp. 3d 938 (E.D. Cal. 2015)(Special relationship between lender and borrower when reviewing loan for modification)

⁸⁸ *Babcock v. Mason County Fire Distr. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001)(Where a direct inquiry is made and incorrect information is clearly set forth by the government, the government intends the person asking to rely upon the representations, and the individual does to his detriment, then government may be bound).

⁸⁹ CP

⁹⁰ *Fabre v. Town of Ruston*, 180 Wn. App. 150, 321 P.3d 1208 (2014)(Gambling licensee could not rely upon Mayor's representations regarding gambling taxes or any ban on gambling because exclusive authority rested with Council) Here, the Director approved the VIP without Commission approval and could have done so with the upgrade. Additionally, Mr. Gerow had direct contact with the Commissioners over approval of his technology. Staff, the Director, and the Commissioners had privity with Mr. Gerow and ZDI. And, they all were negligent in denying the upgrade. They were wrong and he was right the upgrade did comply with regulations.

length, but rather were specifically acting on ZDI's application for approval of its upgrade.⁹¹

The negligence claims should be reinstated.

V. CONCLUSION

The trial court erred when dismissing Mr. Gerow and ZDI's damages case. They have a right to relief. The trial court orders should be reversed and the claims reinstated.

Respectfully submitted,

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⁹¹ *Bailey v. Town of Forks*, 108 Wn. 2d 262, 737 P.2d 1257 (1987).

CERTIFICATE OF SERVICE

I, Misty M. Carman certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 11th day of February, 2016, I caused to be filed and served true and correct copies of the above Appellant's Opening Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

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

Dated this 11th day of February, 2016 at Fircrest, WA.



Misty M. Carman, Paralegal

III BRANCHES LAW

February 11, 2016 - 2:49 PM

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