

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 REPLY
BRIEF**

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I. SUMMARY

The State has no right to sovereign immunity to shield its agencies and officials from liability as if government can do no wrong. When government engages in tortious conduct, the state is liable just like other private enterprise. Yet here the State insists Jay Gerow and ZDI must bear all costs associated with governmental actions that were erroneous, using various iterations of statutory and legislative immunity with the resulting effect of an absolute shield. ZDI proved the Gambling Commission through its officials acted outside the scope of the agency's statutory authority and engaged in arbitrary and capricious conduct. A business owner like Jay Gerow has the right to rely upon established regulations to develop and market innovative technologies to succeed in making pull-tabs, a social pastime of public interest, profitable. He also has the right to rely upon an agency's express representations that concern his business, and when such information is incorrect hold the agency accountable. Because the agency was incorrect and the ZDI VIP did not violated the rules and was not a gambling device, the involved state agency is liable for the negligence of its officials and employees. Further, when these same officials and employees improperly and for improper reasons restrained

Mr. Gerow's lawful business activities it must pay the associated damages. Finally the retaliatory enforcement activities that followed Mr. Gerow's successful petitioning activities violate his First Amendment rights. The trial court's rulings to the contrary should be reversed and this case remanded to Superior Court for trial.

II. FACTS ON REPLY

ZDI's VIP is gambling equipment. ZDI's VIP is NOT a gambling device.¹ Respondent Gambling Commission² erroneously refers to the ZDI VIP using this incorrect reference when ZDI has a binding court decision to the contrary. The regulatory restraints applicable to gambling devices do not and never did apply to the ZDI VIP, and the Gambling Commission misleads this court when referring to the ZDI VIP as something it is not, and never was.³ A pull tab dispenser like a poker table does not equate to a slot machine.

¹ App. A. CP 989-991: "ZDI's VIP is not a gambling device under RCW 9.46.0241." and see, *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Com'n*, 173 Wn. 2d 608, 268 P.3d 929 (2012)("electronic pull-tab machine")

² Petitioners refer to the respondents collectively as "Gambling Commission" in this Reply.

³ The Gambling Commission cites the *Roussio* case at page 82 to argue all gambling devices are illegal in Washington unless the Gambling Commission approves the device for marketing. Response at 2, *Roussio v. State*, 170 Wn. 2d 70, 239 P.3d 1084 (2010). *Roussio* is an internet gambling case that does not address gambling equipment or gambling devices.

The Gambling Commission further misstates in its introductory paragraph that Mr. Gerow and his company ZDI seek damages for the “initial refusal of the Commission to approve his device.” This statement is also factually incorrect because it too narrowly characterizes the grounds for the relief requested in the complaint. Mr. Gerow seeks damages for the Gambling Commissioners’ and Director’s violations of his civil rights, specifically First Amendment retaliation and due process violations that involve retaliatory misconduct such as abusive use of regulatory enforcement authority over the years, not just the failure to approve the technology in the first instance. Mr. Gerow and his company seek damages for respondents’ tortiously interfering with his business expectancies from the date his company first sought approval of the upgrade to the present date as he continues to suffer retaliation through unsupportable regulatory interferences with his business. And finally, Mr. Gerow and his business seeks damages for the basic negligence of the respondents for insisting he could not distribute the ZDI VIP, when such enforcement action was outside their authority because distribution of the ZDI VIP was and is a legitimate business activity that does not violate the Gambling Act or any legitimately promulgated under the Act. The conduct spans a period of time and concerns not just the approval process,

but the subsequent unjustifiable and retaliatory interferences with Gerow's ability to market the ZDI VIP when the upgrade complied with the rules.

The Gambling Commission further incorrectly states in its introduction that the APA provides the exclusive remedy for individuals and businesses harmed by agency rule making activities, but this statement conflicts with the express provisions of the APA that provide just the opposite.⁴ A person or business may seek damages or relief from constitutional violations as authorized by law. Mr. Gerow and his business state this damages case under the provisions of law that recognize the state "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."⁵ Mr. Gerow and his company also rely upon 42. U.S.C. § 1983. And the common law, in particular the recent discussion of tortious interference liability by this court involving a state agency abusing its regulatory authority.⁶

⁴ RCW 34.05.574(3): "The court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law." RCW 34.05.020: "Nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law."

⁵ RCW 4.92.090.

⁶ *Washington Trucking Assoc. v. State Employment Security Dept.*, 192 Wn. App. 621, 369 P.3d 170 (2016).

Important dates and documents from the record are attached at Appendix A that show the bad faith conduct that exposes the state to tort and civil rights liability.

III. ARGUMENT

A. Governor, Director Day, and Gambling Commissioners Liable for Constitutional Violations.

1. Conduct Post 2008 Not Addressed

The Gambling Commission admits that conduct at issue in these proceedings was never before the federal court when the federal court dismissed the case before it on legislative immunity grounds in 2008. The scope of the federal court order cannot apply to the post order conduct at issue here. In addition there was no final decision at that time that the agency acted outside the scope of its authority in denying approval of the technology. In fact the federal court never addressed the denial of the upgrade. Federal court only addressed the rule making, a legislative activity, not enforcement activity. The prior federal court order is not dispositive in this case, and should not be a basis to deny Mr. Gerow the right to enforce his civil rights against the individual involved state actors who enforced erroneous regulations when refusing to approve his upgrade, and when interfering with his business interests. Mr. Gerow and his company did not have the ability to assert the same arguments in 2008 as

it now has in this case since the Supreme Court and Court of Appeals and Superior Court ruled on the legitimacy of his upgrade, that it was not a gambling device, and that the rules adopted to stop the distribution were void. The erroneous enforcement activities and retaliatory misconduct claims were not yet ripe in 2008. Now they are and Mr. Gerow and his company are entitled to damages compensation for their losses.

2. Enforcement Activities Not Legislative Action

In response, the Gambling Commission attempts to narrowly construe the conduct at issue as rule making, while ignoring the true crux of the case involves enforcement activities by non-immune officials who are not acting in any legislative capacity. The entire argument distinguishing *CarePartners* misses the point.⁷ Mr. Gerow seeks damages for acts and omissions that were not rule making activities, but rather were enforcement activities and were abuses of the agency's regulatory and police powers.

3. *Mudarri* Court Never Addressed Due Process

The *Mudarri* case does not address the due process arguments raised here by Mr. Gerow.⁸ Mr. Gerow established a legitimate property interest in marketing his ZDI VIP upgrade. The technology complied with

⁷ Response at 27.

⁸ *Mudarri v. State*, 147 Wn. App. 590, 615, 196 P.3d 153 (2008)

the rules and he was denied the right to engage in a lawful activity without due process and for reasons that lacked any justification making the enforcement activities inherently unfair for purposes of substantive due process.

The trial court's dismissal of Mr. Gerow's constitutional claims should be reversed.

B. Trial Court Erred On Immunity Under RCW 9.46.095

In response, the Gambling Commission fails to address the trial court errors in its overly broad application of the limited personal immunity provisions of the Gambling Act, RCW 9.46.095. The response quickly misdirects this court to a legislative immunity analysis based on rule making activities that have nothing to do with denying approval of the upgrade and continuing to enforce its void rules when the upgrade should have been operating. The trial court expansively applied the limited immunity protections that do not immunize the agency as a whole from agency liability. The Commissioners as a collective whole are immune from personal liability, nothing more. The statute is equal to an indemnification protection. The trial court erred and the ruling should be reversed.

C. Agency's Representations Create Special Duty and Negligence Liability

The Gambling Commission's response with regard to the special duty doctrine contradicts the record that is replete with direct representations made by staff and the director and the commissioners to Mr. Gerow that his technology was a gambling device that violated the rules when the ZDI VIP upgrade was not a gambling device and did not violate the rules. Mr. Gerow did not market his technology in reliance upon these representations.⁹ His various lawsuits and requests for relief specific to his technology establish the requisite privity needed to establish a special duty to apply negligence liability to the Gambling Commission. When the courts finally determined the Gambling Commission was wrong in claiming the upgrade did not comply with the rules, the Gambling Commission was liable to Mr. Gerow and his business for making this error. Just like a zoning administrator who provides incorrect zoning information to a developer, the Gambling Commission is liable for its negligence when incorrect about the application of its rules to a specific question presented to it.¹⁰ The Gambling Commission is not a unique

⁹ The Gambling Commission does concede that Director Day told Mr. Gerow his upgrade did not comply with the rules. Response at 34 citing CP 787. Director Day was wrong. Mr. Gerow's upgrade did comply with the rules.

¹⁰ *Meaney v. Dodd*, 11 Wn.2d 174, 759 P.2d 455 (1988) ("Where direct inquiry is made by an individual and incorrect information is clearly set forth by government, government intends that it be relied upon, and it is relied upon to his detriment, the public duty doctrine applies").

agency, in fact it is precisely the kind of agency due to its strict regulations and controls that licensees must rely upon to provide them accurate and honest information. Director Day and his staff incorrectly told Jay Gerow that his upgrade did not comply with the rules when it did. The Gambling Commission attempted to fabricate new arguments with each success by Mr. Gerow in proving his technology was compliant, which shows the representations and enforcement actions were taken in bad faith. The courts repeatedly rejected the Gambling Commissions' arguments. Respondents made false representations that Mr. Gerow relied upon to his detriment; they were negligent and should be liable to Mr. Gerow who did not put the upgrade into play in reliance upon the misapplication of their rules and suffered substantial losses.

D. Evidence of Bad Faith Distinguishes *Leingang*

The Gambling Commission urges this court to assume the denial of ZDI's upgrade was made in good faith when the record shows otherwise. The Gambling Commission knew the VIP upgrade was not a gambling device because its own ALJ had so ruled, yet when Mr. Gerow prevailed in the Supreme Court, the Gambling Commission under the Director's leadership continued to threaten Mr. Gerow using its police powers to prohibit the his use of the VIP upgrade claiming disingenuously like it

does here in its briefing that the VIP was a “gambling device.”¹¹ In fact the WSGC has never provided Mr. Gerow an approval letter for his ZDI VIP upgrade. Judge Tabor discredited these actions promptly and entered an order that dispositively shows the Gambling Commission and its Director were not acting in good faith. The respondents improperly in violation of the APA interfered with Mr. Gerow’s legitimate business expectancies that were recognized and well known by the Director, his staff, and the Commission.

The Gambling Commission incorrectly compares this case to cases where the court found no evidence of any “back-room deals.”¹² Here Mr. Gerow produced the uncontroverted actual contract terms and deposition testimony of the director and governor’s office staff showing exclusive machine gaming rights to tribes in exchange for revenue sharing.¹³ This was a back room deal, and when that back room deal did not come to fruition, the Governor simply agreed to a market advantage without revenue sharing. These negotiations imposed limitations on non-tribal competition, which is a distinct fact pattern from *Mudarri*. Both commitments harmed Mr. Gerow and his business. Respondents

¹¹ CP 989 - 991. App. A.

¹² Response at 43 citing to *Libera*, 178 Wn. App. at 679-80.

¹³ CP 145 at App. B., CP 143 - 144, 153.

contention that only four machines were in operation and that tribal venues are more attractive are disputed factual contentions, improperly resolved in the favor of the state on summary judgment. Mr. Gerow should be afforded the opportunity to prove damages on remand.

The logical consequences of the responsive arguments asserted under *Leingang* violate the very purposes of the APA, which is to make clear rules that businesses and the public can rely upon.¹⁴ The Gambling Commission argues it has discretionary authority to make up the rules as it goes along without following the APA and then apply them arbitrarily and capriciously without consequence. An agency's legitimate rule making authority may not be interpreted and enforced in a manner that impairs lawful business activities,¹⁵ and the rules specific to social pastimes like pull-tabs are not intended to restrict participation; instead pull-tabs are a social pastime that are in the public interest and serve legitimate purposes to include supporting non-profits, charities, and further act as a commercial stimulant to local restaurants, taverns, and bowling alleys.¹⁶

¹⁴ RCW 34.05.001, 34.05.310 "promote consensus among interested parties", 34.05.230 "agencies encouraged to advise the public of its current opinion, approaches, and likely courses of action.."

¹⁵ See small business economic impact statement requirements. RCW 34.05.320(j).

¹⁶ RCW 9.46.010, 9.46.0217, 9.46.0209.

III. CONCLUSION

The trial court erroneously denied Mr. Gerow and his company access to justice and a damage remedy for the losses suffered when the Gambling Commission and its officials acted inappropriately. The trial court broadly applied immunity arguments essentially granting the Gambling Commission sovereign immunity when the doctrine long ago was rejected by the Legislature and has been discouraged in the common law. The officials took improper enforcement action against Mr. Gerow and otherwise interfered with his business opportunities for political reasons. The officials incorrectly applied their rules, and must now compensate Mr. Gerow and his company for its erroneous actions that damaged him and his company.

Respectfully submitted this 10th day of June, 2016.

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CERTIFICATE OF SERVICE

I, Misty M. Carman certify that on the 10th day of June, 2016, I caused to be filed with the clerk of the court via online filing system and served via electronic mail true and correct copies of the above Appellant's Reply Brief, and this Certificate of Service; on all parties or their counsel of record, as follows:

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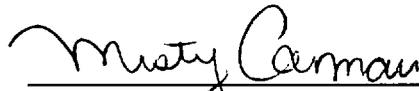
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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 10th day of June, 2016 at Fircrest, WA.



Misty M. Carman, Paralegal

APPENDIX A

IMPORTANT DATES AND DOCUMENTS

10/15/08: Order Dismissing Section 1983 case regarding rulemaking on legislative immunity grounds.(CP 304)

08/25/09: Division II decision affirming Pomeroy's Superior Court ruling that ZDI VIP complies with the rules. *ZDI Gaming, Inc. v. WSGC*, 151 Wn.App. 788 (2009)

01/12/12: Supreme Court decision affirming Division II decision that ZDI VIP complied with the rules. *ZDI Gaming, Inc. v. WSGC*, 173 Wn.2d 608 (2012)

10/18/13: Tabor's Superior Court ruling affirming the ALJ's ruling that the ZDI VIP was not a "gambling device."

05/13/14: Division II decision invalidating rules. *Gerow v. WSGC*, 181 Wn.App. 229 (2014).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAY GEROW, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

CASE NO. C08-5087BHS

ORDER GRANTING IN PART
DEFENDANTS' MOTION TO
DISMISS PURSUANT TO
FED. R. CIV. P. 12(c) AND TO
SHOW CAUSE

This matter comes before the Court on Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c) (Dkt. 21). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part the motion for the reasons stated herein.

I. PROCEDURAL BACKGROUND

On February 13, 2008, Plaintiffs Jay Gerow and ZDI Gaming, Inc., ("ZDI") filed a complaint against Defendants State of Washington, Rick Day, John Ellis, Janice Niemi, Peggy Bierbaum, Kevin Rojecki, and Margarita Prentice. Dkt. 1 ("Complaint"). Plaintiffs allege that Defendants' actions violated 42 U.S.C. § 1983, Washington tort laws, and the Washington State Constitution. *Id.*

On August 28, 2008, Defendants filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c). Dkt. 21. On September 22, 2008, Plaintiffs responded. Dkt. 35. On September 26, 2008, Defendants replied and moved to strike material that Plaintiffs had submitted in support of their response. Dkt. 38. On October 3, 2008, Plaintiffs filed a surreply requesting leave of Court to respond to Defendants' motion to strike and moved to strike material contained in Defendants' reply brief. Dkt. 42.

1 **II. FACTUAL BACKGROUND**

2 **A. Washington Statutes**

3 In 1973, the Washington legislature adopted the Gambling Act (“the Act”) “to
4 keep the criminal element out of gambling and to promote the social welfare of the people
5 by limiting the nature and scope of gambling activities and by strict regulation and
6 control.” RCW 9.46.010. The Act authorized the creation of a commission “known as
7 the ‘Washington state gambling commission,’ consisting of five members appointed by
8 the governor with the consent of the senate.” RCW 9.46.040. The commission was given
9 the power and duty “to adopt such rules and regulations as are deemed necessary to carry
10 out the purposes and provisions of [the Act].” RCW 9.46.070(14). “All rules and
11 regulations shall be adopted pursuant to the administrative procedure act, chapter 34.05
12 RCW.” *Id.*

13 The Act authorizes the game of pull-tabs provided that the activity is conducted in
14 compliance with the applicable rules and regulations. *See* RCW 9.46.010 and 9.46.0325.
15 The game of pull-tabs is given its “usual and ordinary meaning as of July 16, 1973,
16 except that such definition may be revised by the [gambling] commission pursuant to [the
17 Act].” RCW 9.46.0273.

18 Manufacturers and distributors of gambling devices and related equipment must
19 obtain licenses from the Commission under the provisions of the Act. *See* RCW
20 9.46.310; WAC 230-14-045 and 230-16-001. Prior to the sale, lease or operation of
21 gambling equipment, a licensee must submit the equipment to the Commission for review
22 to verify compliance with state statutes and administrative regulations. *See* WAC
23 230-12-316 (repealed 1/1/08, current version at WAC 230-06-050). As with other
24 gambling devices and equipment, video pull-tab dispensers are subject to regulation by
25 the Commission. *See* RCW 9.46.0241; WAC 230-16-001. The standards for pull-tab
26 dispensers in effect during the relevant period were set forth in WAC 230-30-097
27 (repealed 1/1/08).

1 **B. Plaintiff ZDI's VIP Machine**

2 In July 1997, the Commission approved an electronic pull-tab dispenser with a
3 video display that "looks like a slot machine." *See* Complaint, ¶ 5.1. Although the
4 video display "has lights, spinning reels and audio sounds," the machine dispenses
5 a paper pull-tab with a "predetermined win" that is not affected by the electronic
6 equipment. *Id.* In June 2002, the Commission approved ZDI's electronic video pull-tab
7 dispenser, commonly referred to as the "VIP." *Id.* ¶ 5.6. "The VIP dispenses a paper
8 pull-tab, which the player may elect to put back into the equipment to enjoy the sounds
9 and lights. It is similar to the equipment initially approved in 1997." *Id.*

10 In March 2005, Plaintiffs sought the Commission's approval of an upgrade to the
11 VIP. *Id.* ¶ 5.14. Plaintiffs claim that "[t]he upgrade was the attachment of a cash card
12 acceptor" permitting the "operator to buy a paper pull-tab from the equipment with the
13 [cash] card, rather than cash." *Id.* "When the player is finished, the value of any winning
14 paper pull-tab under \$20.00 is transferred to the cash card." *Id.* In August 2005, the
15 Commission staff denied approval of the equipment upgrade. *Id.* ¶ 5.15.

16 In September 2005, Plaintiffs petitioned the Commission for declaratory relief and
17 sought approval of the upgraded VIP. *Id.* ¶ 5.16. Following an administrative hearing on
18 Plaintiffs' petition, the Commission issued a Final Order that denied the petition and
19 upheld the denial of the upgraded VIP. *Id.* ¶¶ 5.20, 5.21, and 5.27. In September 2006,
20 Plaintiffs sought judicial review of the Commission's Final Order. *Id.* ¶ 5.28. The
21 Thurston County Superior Court ruled that the upgraded VIP complied with the law and
22 that it was not an "expansion of gambling." *Id.* ¶ 5.30.

23 On September 15, 2007, the Commission appealed the Superior Court's ruling, and
24 Plaintiffs cross-appealed. *Id.* Shortly thereafter, Plaintiffs "advised the Gambling
25 Commission that ZDI was putting its upgraded equipment out into the marketplace
26 consistent with the trial court's declaration that the upgrade was legal." *Id.* ¶ 5.37. The
27 Commission then sought and received a stay of the Superior Court's ruling pending the
28

1 appeal. *Id.* ¶ 5.39. The appellate case is currently pending in the Washington State Court
2 of Appeals. *Id.* ¶ 5.30.

3 In January 2008, the Commission adopted two new rules related to electronic
4 gaming machines that accept cash. Plaintiffs claim the Commission adopted the new
5 rules “deliberately and intentionally . . . in retaliation for [Plaintiff Gerow] exercising his
6 right to judicial relief.” *Id.* ¶ 5.41. One new rule defines “cash” as “currency in the form
7 of coins or bills issued by the government of the United States or Canada only and does
8 not include electronic, digital or other representations of money or other methods of
9 payment.” WAC 230-06-003. The Commission also adopted a rule titled “Standards for
10 electronic video pull-tab dispensers,” which reads as follows:

11 Electronic video pull-tab dispensers must be approved by us prior to
12 use, meet the requirements below, and may incorporate only the features
below and not perform additional functions.

13 (1) Electronic video pull-tab dispensers must dispense a paper
14 pull-tab as defined in WAC 230-14-010 and follow the rules for:

- 15 (a) Pull-tabs; and
16 (b) Flares; and
17 (c) Authorized pull-tab dispensers.

18 (2) Electronic video pull-tab dispensers that use a reading and
displaying function must:

- 19 (a) Use a video monitor for entertainment purposes only; and
20 (b) Open all, or a portion of, the pull-tab in order to read encoded
21 data that indicates the win or loss of the pull-tab if the dispenser is equipped
to automatically open pull-tabs; and
22 (c) Dispense the pull-tab to the player and not retain any portion of
the pull-tab; and
23 (d) Read the correct cash award from the pull-tab either when it is
24 dispensed or when the pull-tab is reinserted into the dispenser; and
25 (e) Display the cash award from the pull-tab, one pull-tab at a time;
26 and
(f) Provide:

1 documentation.” *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).
2 While the Court recognizes that rule applies to summary judgment motions, it seems even
3 more appropriate in regard to voluminous evidence submitted in opposition to a motion
4 for judgment on the *pleadings*.

5 In this case, Plaintiffs have submitted 1121 pages of supplemental material in
6 support of its opposition. Dkts. 36 and 37. Defendants describe that evidence as follows:

7 In addition to the declarations of counsel and Mr. Gerow, the supplemental
8 materials contain approximately [245] pages of deposition transcripts, and
9 464 pages of deposition exhibits. See Docket Nos. 36 and 37. The
10 materials also contain correspondence, transcripts of Washington State
11 Gambling Commission public meetings, and approximately 155 pages of
12 documents filed in the administrative declaratory judgment proceedings
currently on appeal before the Washington State Court of Appeals. See
Docket Nos. 36 and 37. With minor exceptions, the documents do not
qualify as public records or records of an administrative body of which the
Court may properly take judicial notice without converting the Motion to
Dismiss to a motion for summary judgment.

13 Dkt. 38 at 3-4. It is important to note that Plaintiffs rarely cite to any of this material in
14 their arguments in opposition to Defendants’ motion. See generally Dkt. 35. Regardless,
15 Plaintiffs filed a surreply and claimed that “equity suggests they should have an
16 opportunity to respond” to Defendants’ motion to strike. Dkt. 42, ¶ 1.4. Plaintiffs argue
17 as follows:

18 In the event the Court is inclined to strike the factual submissions, and is
19 also inclined to dismiss the case because of a *defect in the evidence offered*,
20 then plaintiffs respectfully request the opportunity to cure any defect by
way of response to avoid unfair prejudice to the rights of Mr. Gerow and his
business.

21 *Id.* (emphasis added). Plaintiffs misapprehend the current procedural posture of this case.
22 Defendants have moved for a judgment on the pleadings in which the “factual allegations
23 contained *in the complaint* are accepted as true.” See *supra* (emphasis added). The Court
24 would most likely commit reversible error by granting a motion to dismiss based on a
25 defect in the evidence submitted in support of an opposing brief.

26 Therefore, Defendants’ motion is granted as to the majority of the material
27 submitted by Plaintiffs. In the event that the Court does review material outside of the
28

1 pleadings, the Court will specifically state that it is taking judicial notice of certain
2 material.

3 **B. Plaintiffs' Motion to Strike**

4 Plaintiffs move to strike an apparent conflict between a representation Defendants'
5 counsel Jerry Ackerman made to the Court and one that he made at a Gambling
6 Commission meeting. Dkt. 42, ¶¶ 1.6-1.7. Whatever conflict there may be, if any, is
7 irrelevant to the determination of this motion. Therefore, the Court denies Plaintiffs'
8 motion to strike.

9 **C. Motion to Dismiss Federal Claim**

10 Defendants request that the Court dismiss Plaintiffs' claim under 42 U.S.C. § 1983
11 because (1) Defendants are immune from suit under the Eleventh Amendment; (2)
12 Plaintiffs have failed to state a claim under 42 U.S.C. § 1983; and (3) Defendants are
13 entitled to legislative immunity from suit. Dkt. 21 at 8-24.

14 **1. Standard of Review**

15 In reviewing a motion to dismiss under Fed. R. Civ. P. 12(c), the court applies the
16 same standard of review applicable to a motion under Fed. R. Civ. P. 12(b). *Dworkin v.*
17 *Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). The Court may dismiss a
18 complaint for "lack of a cognizable legal theory or the absence of sufficient facts alleged
19 under a cognizable legal theory." *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,
20 533-34 (9th Cir.1984). On a motion to dismiss, the court accepts the facts alleged in the
21 complaint as true. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990).
22 Finally, the plaintiff bears the burden of pleading facts sufficient to state a claim.
23 *Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988).

24 **2. Eleventh Amendment**

25 Defendants claim that the State of Washington and the individual Defendants
26 acting in their official capacities are immune from suit. Dkt. 21 at 8. The Eleventh
27 Amendment to the United States Constitution reads as follows:
28

1 The Judicial power of the United States shall not be construed to
2 extend to any suit in law or equity, commenced or prosecuted against one of
3 the United States by Citizens of another State, or by Citizens or Subjects of
4 any Foreign State.

5 U.S. Const. amend XI. The Eleventh Amendment of the United States Constitution
6 prohibits federal courts from hearing suits brought by private citizens against state
7 governments, without the state's consent. *Natural Res. Defense Council v.*
8 *Cal. Dep't of Transp.*, 96 F.3d 420, 421 (9th Cir. 1996) (citing *Hans v. Louisiana*, 134
9 U.S. 1, 15 (1890)). Moreover, state immunity extends to state agencies and to state
10 officers who act on behalf of the state and can therefore assert the state's sovereign
11 immunity. *Cal. Dep't of Transp.*, 96 F.3d at 421 (citing *Puerto Rico Aqueduct and Sewer*
12 *Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-46 (1993)).

13 Plaintiffs argue that the "State's consent to federal court jurisdiction estops
14 Defendants from asserting the 11th Amendment to bar litigation against the State and its
15 officials in federal court." Dkt. 35 at 12. The state has consented to suits as follows:

16 The state consents to the jurisdiction of the federal courts in actions
17 brought by a tribe pursuant to the Indian gaming regulatory act of 1988 or
18 seeking enforcement of a state/tribal compact adopted under the Indian
19 gaming regulatory act, conditioned upon the tribe entering into such a
20 compact and providing similar consent. This limited waiver of sovereign
21 immunity shall not extend to actions other than those expressly set forth
22 herein.

23 RCW 9.46.36001. Plaintiffs contend that the state's express "waiver is not limited to
24 actions brought by a tribe" and that "[t]his case concerns Defendants' enforcement of
25 exclusive machine gaming rights as promised in compact negotiations." Dkt. 35 at 12.

26 Defendants assert that the statute expressly identifies two types of actions that the
27 state of Washington has consented to: (1) actions brought by a tribe pursuant to the Indian
28 Gaming Regulatory Act ("Gaming Act"); and (2) actions in which a party seeks
enforcement of a compact adopted under the Gaming Act, provided that the tribe that
entered into the compact has also consented to waive sovereign immunity for such an
action. Dkt. 38 at 5. Defendants claim that "[i]n their complaint, Plaintiffs fail to allege
being a part to or having any legal rights under any identified state and tribal gaming

1 compact negotiated under the [Gaming Act].” *Id.* Defendants conclude that “[c]ontrary
2 to Plaintiffs’ assertions, RCW 9.46.36001 is not applicable to this lawsuit and neither the
3 State of Washington nor its officers in their official capacities have waived their right to
4 sovereign immunity under the Eleventh Amendment.” *Id.* at 6.

5 Plaintiffs’ arguments that the state’s waiver under RCW 9.46.36001 applies to the
6 claims in this Complaint are without merit. Plaintiffs cite no legal authority for their
7 proposition that “Defendants have consented to federal court jurisdiction” under the facts
8 alleged in the Complaint. *See* Dkt. 35 at 12. Therefore, Defendants’ motion to dismiss
9 Plaintiffs’ claim under 42 U.S.C. § 1983 is granted because Defendant State of
10 Washington and Defendants Rick Day, John Ellis, Janice Niemi, Peggy Bierbaum, Kevin
11 Rojecki, and Margarita Prentice acting in their official capacity are immune from
12 Plaintiffs’ suit under the Eleventh Amendment.

13 3. Legislative Immunity

14 Defendants claim that the doctrine of legislative immunity shields the individual
15 Defendants from both official capacity liability and individual liability in this action.
16 Dkt. 21 at 18-23. In support of their contention, Defendants cite the Supreme Court’s
17 decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). In *Bogan*, the Court held that
18 “legislators are entitled to absolute immunity from § 1983 liability for their legislative
19 activities.” *Id.* at 53. The Court stated that the rationale underlying legislative immunity
20 was that “the exercise of legislative discretion should not be inhibited by judicial
21 interference or distorted by the fear of personal liability.” *Id.* at 52. Moreover,
22 “[a]bsolute legislative immunity attaches to all actions taken ‘in the sphere of legitimate
23 legislative activity.’” *Id.* at 54 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 388 (1951)).

24 Plaintiffs argue that legislative immunity is not applicable to the individual
25 Defendants because this “case concerns a state entity appointed by the executive branch
26 of government without authority to adopt rules in strict compliance with the
27 Administrative Procedures Act.” Dkt. 35 at 36. “Whether an act is legislative turns on
28

1 the nature of the act, rather than on the motive or intent of the official performing it.”
2 *Bogan v. Scott-Harris*, 523 U.S. at 54. Thus, an administrative agency may perform
3 legislative functions and, when it does, it may be entitled to legislative immunity. The
4 Ninth Circuit has developed a four-part test to determine whether an act was legislative;
5 “(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2)
6 whether the act applies to a few individuals or the public at large; (3) whether the act is
7 formally legislative in character; and (4) whether it bears all the hallmarks of traditional
8 legislation.” *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir.2003)
9 (internal quotation marks omitted).

10 The adoption of the WACs in question meet all four of these factors. First, the
11 adoption of administrative regulations is more akin to the formulation of policy instead of
12 ad hoc decisionmaking. Even Plaintiffs admit that the rules were adopted months after
13 they were proposed and the Commission considered at least two other alternative rules.
14 Complaint, ¶¶ 5.32-5.41. Plaintiffs cite *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th
15 Cir.2003), for the proposition that “[a]dministrative functions are not subject to legislative
16 immunity.” Dkt. 35 at 37. Plaintiffs’ authority is not on point as the *Gaspard* court stated
17 that “employment and personnel decisions [are] administrative, rather than legislative.”
18 *Gaspard*, 97 F.3d at 1220-21. The issue before this Court is not an employment or
19 personnel decision.

20 Second, the regulations at issue are applicable to the public at large. Although
21 Plaintiffs repeatedly allege that the rule was adopted to only affect them, it can hardly be
22 argued that the Washington Administrative Code only applies to Plaintiffs.

23 Third, the adoption of the regulation was formally legislative. The Washington
24 Administrative Procedures Act states that rule making hearings “are legislative in
25 character.” RCW 34.05.325(5). The Court is unaware of any reason to hold otherwise.
26
27
28

1 Fourth, the regulations bore traditional hallmarks of legislation. The Commission
2 itself exercised powers delegated to it by the State Legislature. *See supra*. Moreover, the
3 regulations became part of the Washington Administrative Code.

4 **4. Conclusion**

5 Defendants have shown that Plaintiffs' Complaint fails to state a federal claim
6 upon which relief may be granted. Defendant State of Washington is immune from suit
7 under the Eleventh Amendment. The individual Defendants are immune from suit in both
8 their official and individual capacities under the doctrine of legislative immunity.
9 Therefore, Defendants' motion to dismiss Plaintiffs' claim under 42 U.S.C. § 1983 is
10 granted.

11 **D. State Law Claims**

12 By this order, the Court dismisses Plaintiffs' claim that provided the basis for
13 federal jurisdiction, and does not reach the merits of Defendants' motion to dismiss
14 Plaintiffs' remaining claims for violations of state law. The parties are ordered to show
15 cause, no later than October 24, 2008, why Plaintiffs' remaining state law claims should
16 not be remanded to state court.

17 **IV. ORDER**

18 Therefore, it is hereby

19 **ORDERED** that Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c)
20 (Dkt. 21) is **GRANTED in part** and Plaintiffs' claim under 42 U.S.C. § 1983 is
21 **DISMISSED**.

22 It is further **ORDERED** that Plaintiffs and Defendants are directed to show cause,
23 no later than October 24, 2008, why Plaintiffs' remaining state law claims should not be
24 remanded to state court.

25 DATED this 15th day of October, 2008.

26 
27 **BENJAMIN H. SETTLE**
28 United States District Judge

B

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2013 OCT 18 AM 8:49

BETTY J. GOULD, CLERK

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set
4 The Honorable Gary Tabor

7 STATE OF WASHINGTON
8 THURSTON COUNTY SUPERIOR COURT

9 ZDI GAMING, INC.,

10 Petitioner,

11 v.

12 THE STATE OF WASHINGTON, by
13 and through the WASHINGTON
14 STATE GAMBLING COMMISSION,

Respondent.

NO. 06-2-02283-9

ORDER ON ZDI'S SECOND
PETITION FOR JUDICIAL REVIEW

15 On August 16th, 2013, the above captioned matter came before the Court for hearing
16 on ZDI Gaming, Inc.'s Second Petition for Judicial Review. ZDI Gaming, Inc. appeared by
17 and through its attorney of record Joan K. Mell of III Branches Law, PLLC. The State of
18 Washington, by and through the Washington State Gambling Commission (the "Commission")
19 appeared by and through its attorneys of record the Attorney General of Washington Robert W.
20 Ferguson, and Assistant Attorney General Callie A. Castillo. The Court heard oral argument
21 and considered the administrative record, the opening and reply briefs of ZDI Gaming, Inc.,
22 and the responsive brief of the Commission.
23

24 The Court deeming itself fully advised enters the following order:

25 1.1 ZDI Gaming, Inc.'s second petition for judicial review is granted.
26

ORDER ON ZDI'S SECOND PETITION
FOR JUDICIAL REVIEW

1

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 654-9006

1 1.2 ZDI's electronic video pull-tab dispenser upgraded with cash card features that (1)
2 permit the purchase of a pull-tab at the dispenser and (2) allow for any pull-tab prize of \$20 or
3 less to be added to the cash card at the dispenser is allowed (hereinafter "ZDI's VIP").

4 1.3 The Commission did not comply with the Administrative Procedure Act ("APA"),
5 RCW 34.05.464(4) and .570(3)(f) when it did not decide all issues requiring resolution by the
6 agency upon ZDI's petition for declaratory relief. Specifically, the Commission erred as a
7 matter of law when it failed to decide the issue of whether ZDI's VIP was a gambling device in
8 its August 2006 Final Order.
9

10 1.4 The Commission engaged in unlawful procedure or decision-making process under the
11 APA, RCW 34.05.570(3)(c), when it considered the issue of whether ZDI's VIP was a
12 gambling device in 2012.

13 1.5 The Commission's determination in its 2012 Final Order on Remand that ZDI's VIP is
14 a gambling device under RCW 9.46.0241 is vacated as outside the statutory authority of the
15 agency under the APA, RCW 34.05.570(3)(b), and as an erroneous interpretation or
16 application of the law under the APA, RCW 34.05.570(3)(d). The portion of the
17 Administrative Law Judge's Initial Declaratory Order determining that ZDI's VIP is not a
18 gambling device is reinstated as the correct application of the law. ZDI's VIP is not a
19 gambling device under RCW 9.46.0241. ZDI's VIP is not prohibited under the Gambling Act,
20 RCW 9.46, or the Commission's regulations.
21

22 1.6 The Commission is ordered to allow ZDI's VIP for manufacturing, distribution, and use
23 in the State.
24

25 ///

26 ///

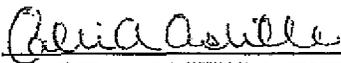
1 1.7 ZDI Gaming, Inc. shall be awarded its fees and costs incurred from the date of filing its
2 petition under the Equal Access to Justice Act in the amount of \$8,316.60.

3 Dated this 18 day of Oct, 2013.

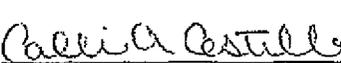
5
6 
7 THE HONORABLE GARY TABOR

8 Presented by:

9 ROBERT W. FERGUSON
10 Attorney General

11 
12 CALLIE A. CASTILLO, WSBA #38214
13 Assistant Attorney General
14 Attorneys for Respondent

15 Approved as to form:

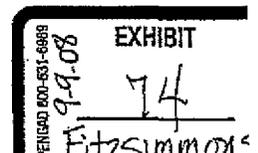
16  with electronic
17 JOANN K. MELL, WSBA #21319 approval for
18 III Branches Law, PLLC
19 Attorney for ZDI Gaming, Inc.
20
21
22
23
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26

APPENDIX B

**SUMMARY OF THE PROPOSED
SPOKANE TRIBE-STATE OF WASHINGTON
CLASS III GAMING COMPACT**

The Tribe and the State have reached a tentative agreement regarding a Class III gaming compact, which includes the following provisions:

1. The Tribe will make revenue sharing payments to the State, based on a percentage of net win (gross receipts less prizes paid) received from all Class III gaming activities. The percentage paid shall be determined according to a sliding scale, ranging between 3% - 35%.
2. One quarter (1/4) of the revenue sharing payments shall go to local governments and may include Spokane County.
3. In addition to the revenue sharing payments, the Tribe shall contribute .26% of the net win from all Class III gaming activities to problem gambling support services. At least half of the payments shall be made to the Department of Social and Health Services' Division of Alcohol and Substance Abuse, to fund its problem gambling treatment program. The Tribe has the option to make other payments directly for services that help to reduce problem gambling.
4. The Tribe is authorized to operate up to five gaming facilities on trust land within or contiguous to the reservation, provided, that one facility may be established on trust land located near Airway Heights. In addition to the Governor's concurrence, the Department of Interior and Spokane County must take certain steps to demonstrate their approval.
5. The Tribe is authorized to operate an aggregate of 7,500 Tribal Lottery System (TLS) machines, with no more than 4,000 machines located at any one facility.
6. The Tribe shall determine the number of gaming tables it operates. The Tribe may offer unlimited wagering and credit for approved, pre-screened patrons at a limited number of tables. Wagers at all other tables shall be limited to \$500.
7. The Tribe shall determine the hours of operation for each gaming facility.
8. If the legislature authorizes any expansion of electronic gaming device activities, the revenue sharing payments will terminate. Instead, the Tribe will begin making the standard 2% Community Impact (from table games) and 1% Charitable Donation (from TLS machines) payments. All other provisions of the Compact (increased machines, hours, wager limits, etc.) shall remain the same.
9. In addition to standard mediation and arbitration provisions for dispute resolution; a new feature allows for expedited arbitration; this option provides for a temporary resolution to a dispute pending a decision from the formal arbitration process.
10. The Compact includes a transition date, which is the date that the Tribal Chairman must certify to the State that the Tribe's gaming locations do not include non-compliant machines. Additionally, the State must certify that all gaming locations are compliant. The Tribe will use its best efforts to have the gaming facilities compliant with the Compact within twelve months from the signature date. The Compact will take effect on the date the Department of the Interior publishes it in the federal register.



III BRANCHES LAW

June 10, 2016 - 11:53 AM

Transmittal Letter

Document Uploaded: 4-479834-Reply Brief.pdf

Case Name: Jay Gerow and ZDI v State of Washington, et al

Court of Appeals Case Number: 47983-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Appendix A & B

Sender Name: Tess M Hernandez - Email: misty@3brancheslaw.com

A copy of this document has been emailed to the following addresses:

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