Case No. 217979

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Court of Appeal Nos. F066645/F066646
v.	)	
KAMAL KENNY NASSER and GHASSAN ELMALIH,	)	Kern County Superior Court Nos. CV-276603/CV-276962
Defendants and Appellants.	)	

PETITIONERS' REPLY TO ANSWER TO PETITION FOR REVIEW

After Decision by the Court of Appeal
Fifth Appellate District
Filed March 10, 2014

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TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Introduction

On May 12, 2014, the Kern County District Attorney's Office filed its "Answer to Petition for Review" (the Answer), which purports to rebut a few of the arguments advanced in the *Nasser* Petition for Review. The Answer it filed in *Nasser* is identical to the Answer it filed in *People v. Grewal* (2014) 224 Cal.App.4th 527 (S217896) on May 8, 2014.

The Answer serves to highlight the need for the Court's intervention, as the Answer misleads the Court when it claims (1) there is no conflict between *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401 (*Trinkle II*) and *Grewal*; and (2) that the only entities that will be affected by the *Grewal* decision are Internet cafes using gambling themed games. These claims are untrue.

In addition, the Answer fails to address many of the arguments advanced by petitioner, including (1) the Legislature amended Penal Code section 330b three times after *Trinkle II* was decided but left its holding intact, signaling its acceptance of the *Trinkle II* holding; and (2) where the player does not risk or hazard something of value, a slot machine cannot be found as a matter of law.

Discussion

1. The Answer Intentionally Ignores the *Grewal* Holding

The Answer claims that petitioner speaks in "hyperbole" when claiming that "legitimate" promotional sweepstakes are threatened, as *Grewal* "merely applied the established precedent of *People ex rel. Bill Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699 (*Lockyer*), which dealt with a very similar sweepstakes gambling scheme, and held that the scheme was illegal under Penal Code section 330b." (Answer 2.) Then, in its "in depth" discussion, the Answer states that *Grewal* simply "set forth the reasons why *Trinkle II* did not apply to Petitioner's illegal operations," (Answer 4) and "simply distinguished *Trinkle II*, and found *Lockyer* to be the more applicable precedent to follow in relation to Petitioner's gambling schemes." (Answer 5.) In further support of this claim, the Answer heavily relies on *Lucky Bob's Internet Café, LLC v. California Dept. of Justice* (S.D. Cal. (2013) U.S. Dist. Lexis 62470 (*Lucky Bob's*)) (Answer 4-5), an unpublished federal district court decision construing state law. Thereafter, the Answer relies on several out-of-state cases construing gambling statutes with very different elements than Penal Code section 330b. (Answer 5-6.) The Answer intentionally ignores the *Grewal* holding.

As pointed out in the *Nasser* Petition for Review, and which was NOT addressed or even mentioned in the Answer, *Grewal* did not "simply" distinguish *Trinkle II* on the grounds that it involved a passive vending machine and, unlike *Trinkle II*, involved an "integrated" system; instead, it specifically OVERRULED *Trinkle II*, holding that *Trinkle II's* test for determining what constitutes a slot machine, i.e., that the machine *itself* must determine the element of chance, was "in error." (224 Cal.App.4th at p. 541.)[1] It is unclear why the Answer intentionally chose to ignore the actual *Grewal* holding, which directly conflicts with *Trinkle II*; but its silence on this issue only serves to underscore the need for the Court's review.

2. The Answer's Heavy Reliance on a Single Unpublished Federal Case Construing State Law is Misplaced

In addition to ignoring *Grewal's* actual holding and the published conflict it created, the Answer places great weight on the unpublished federal case of *Lucky Bob's*, *supra*, U.S. Dist. Lexis 62470, but its reliance is misplaced. There, purchasers received 100 sweepstakes entries for every $1.00 of Internet time purchased (*2) and less than 3% of the Internet time

[1] While *Grewal* and *Lucky Bob's* claimed that the California State Lottery (CSL) in *Trinkle II* did not use an "integrated" system, that conclusion is in error. *Trinkle II* held that the machine *itself* must determine the element of chance; thus a lottery machine that simply dispensed a preset winning ticket was NOT a slot machine. But once the element of chance is determined from the player's perspective, as held in *Grewal,* the CSL vending machine is a slot machine as it uses a fully integrated system that dispenses tickets where prize winning is unpredictable to the ticket buyer. Specifically, the CSL creates the lottery tickets, it creates the odds, it prints the tickets, it delivers the tickets to the CSL-only vending machines, it loads them into the machines, it collects the proceeds, and it pays off all the winning tickets – which, from the perspective of the players, is random and unpredictable. Under *Grewal*, a CSL vending machine, as it is an essential part of a closed, fully integrated system, and it dispenses random tickets where winning is unpredictable to the user, is necessarily a slot machine under the *Grewal* holding.

purchased was used (*3). The Answer's claim that petitioner's operation is "almost identical" to *Lucky Bob's* (Answer 6) is patently false. As fully explained in the Petition for Review, petitioner's phone cards are quite valuable and the phone cards' sweepstakes feature conforms to California law. (Pet. Rev. 8-13.) The *Lucky Bob's* court issued an order granting summary judgment for defendant on a complaint filed by *plaintiff*, Lucky Bob's Internet Cafe. *Lucky Bob's* was resolved in a very different posture than *Nasser,* where the *District Attorney* has brought an action under Business and Professions Code section 17200, and the Court of Appeal has significantly expanded the criminal reach of Penal Code section 330b by holding that the element of chance is now determined from the *user's* perspective.

Moreover, unlike *Grewal*, which **actually overruled** the *Trinkle II* test for determining chance, *Lucky Bob's* simply distinguished *Trinkle II* on the basis that Lucky Bob's used an integrative system, and the lottery vending machine did not.[2] *Lucky Bob's* did not take the dramatic step of creating a published conflict in the California Court of Appeal and, by its holding, significantly broaden the criminal reach of Penal Code section 330b.

Finally, unpublished lower federal court decisions, while they are citable in state court, "such authority is not binding." (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 190; *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 541, fn. 10.) Accordingly, while California Courts of Appeal have referenced unpublished federal decisions construing *federal* law (see, e.g., *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 38), where lower federal court precedent is lacking, state courts must necessarily make an

[2] As noted, this conclusion is in error. See discussion in footnote 1, *supra*.

independent determination of federal law. (*Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1352.) It follows that a single lower federal court opinion construing *state* law, and brought in the context of a plaintiff's summary judgment motion, is entitled to very little weight.

3. The *Grewal* Court Never Addressed the Sweepstakes Issue

The Answer claims that review is unnecessary because the *Grewal* decision will not criminalize business sweepstakes offered by McDonald's and Coca-Cola because "courts have consistently rebuffed other sweepstakes gambling schemes' efforts to compare themselves with legitimate retail sweepstakes promotions." (Answer 6.) This argument is without merit. The *Grewal* court NEVER indicated, in any fashion, that petitioner's sweepstakes feature was not legitimate. Instead, it completely bypassed the sweepstakes issue, signaling its acceptance that petitioner's phone card sweepstakes feature was valid under California law. (See Pet. Rev. 8-13.) *Grewal* focused only on the issue of whether revealing cash prizes on a computer turned that computer into an illegal slot machine under Penal Code section 330b; and to reach THAT issue, it overruled *Trinkle II*'s holding that chance must be determined by the machine itself.

4. *Grewal* is Bad For Business in California

While the Answer is correct in stating that District Attorneys throughout the state will not prosecute McDonald's and Coca-Cola for their sweepstakes promotions (Answer 6-7), petitioner *never* made that point. Instead, petitioner pointed out that individual plaintiffs and their lawyers will use *Grewal* to bring Business and Professions section 17200 actions against deep pocket corporations, arguing that as *Grewal* criminally broadened Penal Code section 330b to include sweepstakes where prizes are

revealed on computers and smart phones, lawful sweepstakes under *Trinkle II* now constitute unfair business practices under *Grewal*.[3]

5. The Answer "Responds" to Arguments Not Advanced by Petitioner and Ignores Arguments Advanced by Petitioner

The Answer spends two pages arguing that the rule of lenity does not apply in the *Nasser* case (Answer 7-8), but petitioner never made such an argument. The Answer argues that there is no evidence that discriminatory prosecution by law enforcement will result (Answer 6), but petitioner never made that claim.

Yet petitioner made several important arguments the Answer ignored: (1) *Grewal* created a published conflict; (2) the Legislature amended Penal Code section 330b three times since *Trinkle II* was decided, signaling its acceptance of the *Trinkle II* holding; (3) slot machines are part of the gaming statutes, which require stakes to be hazarded by the player; as the player here hazards nothing of value, a slot machine cannot be found as a matter of law; (4) *Grewal* significantly and unfairly broadened the criminal reach of section 330b by holding that the element of chance is to be determined from the user's perspective; and (5) individual plaintiffs will now use Business and Professions Code section 17200 to bring unfair business practice actions against corporations running sweepstakes where the result is revealed on a computer or smart phone. As noted, the Answer's silence on these important issues underscores the need for the Court's review.

[3] For example, a man named Tom McVeigh, as an individual, has brought Business and Professions Code section 17200 actions against General Mills, Burger King, and Ryker Amusements under the old law.

Conclusion

For all of the reasons set forth in the *Nasser* Petition for Review and in this Reply to the Answer, it is urged that the Court grant review to resolve the published conflict *Grewal* created in upending the *Trinkle II* holding, and because the *Grewal* opinion was wrongly decided and is bad for business in California.

Respectfully Submitted,

LAW OFFICES OF STEVEN GRAFF LEVINE

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Steven Graff Levine
Attorney for Appellants

WORD COUNT CERTIFICATE

Counsel of record hereby certifies, pursuant to rule 8.504, subdivision (d)(1) and rule 8.204 of the California Rules of Court, that the enclosed brief has been produced using 13-point Times Roman type including footnotes, the margins are 1 ½ inches on the left and right and 1 inch on the top and bottom, and the brief contains 7 pages and 1,606 words. Counsel relies on the word count feature of the computer program used to prepare this brief.

Dated: May 19, 2014

SGL

STEVEN GRAFF LEVINE

PROOF OF SERVICE

I, the undersigned, declare under the penalty of perjury under the laws of the State of California:

I am a resident of the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action; my business address is 1112 Montana Avenue, #309, Santa Monica, CA 90403. On May 19, 2014, I served copies of the foregoing letter entitled **REPLY TO ANSWER** on the interested parties in this action by delivering a true copy thereof, by U.S. Mail, addressed as follows:

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Executed this 19th day of May 2014, at Los Angeles, California.

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STEVEN GRAFF LEVINE