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**TROY BLACKFORD, Plaintiff-Appellant, vs. PRAIRIE MEADOWS
RACETRACK AND CASINO, INC., Defendant-Appellee.**

No. 8-932 / 08-0586

COURT OF APPEALS OF IOWA

2009 Iowa App. LEXIS 242

March 26, 2009, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at *Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 767 N.W.2d 420, 2009 Iowa App. LEXIS 868 (Iowa Ct. App., 2009)

PRIOR HISTORY: [*1]

Appeal from the Iowa District Court for Polk County, Robert B. Hanson (summary judgment) and Eliza J. Ovrorn (trial), Judges. Troy Blackford appeals from an adverse jury verdict and judgment dismissing his conversion claim against Prairie Meadows Racetrack and Casino, Inc. to recover confiscated gambling winnings.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: Ryan T. Beattie of Beattie Law Firm, P.C., Des Moines, for appellant.

Dennis P. Ogden and Margaret C. Callahan of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellee.

JUDGES: Heard by Sackett, C.J., Potterfield, J., and Huitink, S.J. * Potterfield, J., concurs; Sackett, C.J., concurs specially without opinion.

* Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

OPINION BY: HUITINK

OPINION**HUTTINK, S.J.**

Troy Blackford appeals from an adverse jury verdict and judgment dismissing his conversion claim against Prairie Meadows Racetrack and Casino, Inc. to recover confiscated gambling winnings.

I. Background Facts & Proceedings

The basic facts of this case indicate Blackford won \$ 9783 while gambling at Prairie Meadows on May 6, 2006. Prairie Meadows refused to pay Blackford because its records indicated Blackford was involuntarily and permanently banned [*2] from entering Prairie Meadows' facilities. Blackford disputed Prairie Meadows' version, claiming the ban had been lifted. He also cited his subsequently received invitations to gamble at Prairie Meadows and his admission to Prairie Meadows' slot club. Because the casino's records indicated Blackford's status remained unchanged, Blackford's winnings were confiscated and donated to a charitable organization.

Blackford thereafter sued Prairie Meadows to recover damages based on theories of conversion, libel, false imprisonment, and abuse of process. Prairie Meadows denied liability under any theory. Prairie Meadows affirmatively alleged that any contract underlying Blackford's conversion claim was void or unenforceable.

The trial court denied the parties' cross-motions for summary judgment on Blackford's conversion claim, citing the factual questions concerning the status of Blackford's involuntary ban from Prairie Meadows. The trial court expressly declined to resolve the legal question concerning Prairie Meadows' authority to confiscate winnings from a patron involuntarily banned from its facilities. The trial court granted Prairie Meadows' motions for summary judgment, dismissing Blackford's [*3] false imprisonment and abuse of process claims. Blackford voluntarily dismissed his libel claim, leaving only the conversion claim for trial.

In a subsequent ruling on pretrial motions, the trial court addressed the legal issue left unresolved by the court's earlier ruling on the parties' cross-motions for summary judgment. The court's ruling states:

Under *Section 99F.4(22)*, licensed gaming facilities are required to have a process where people can voluntarily request that they be excluded from the facility. If a voluntarily excluded person goes to the facility and wins money, the money is required to be paid to a gambling treatment fund and cannot be paid to the person. *Iowa Code § 99F.4(22)*. This code section is silent as to whether an involuntarily-excluded person who nevertheless enters a facility and gambles, is likewise barred from retaining any winnings and whether the winnings must be donated to the gambling treatment fund.

The court concludes that such winnings may not be retained by the involuntarily-excluded person. The legislative and regulatory scheme regulating gambling compels this result. The legislature expressed a clear wish that persons who voluntarily ban themselves [*4] from entering a gaming facility may not keep winnings if they violate the ban and gamble. It is implicit that the legislature would intend that involuntarily-banned persons who violate the ban not be allowed to gamble or to keep any winnings. The Racing and Gaming Commission regulates gambling in the State of Iowa. *See Iowa Code ch. 99F*. Under the Commission's rules, a gaming facility can eject or exclude any person from the premises. *Iowa Admin. Code r. 491-5.4(5)(d)*. Once a person is banned from a facility, it is not within the rules for the person to be present or to gamble at the facility. All promises, agreements, or contracts that arise from wagers or bets are void, unless the wager is authorized under chapter 99F (regulating gambling facilities in Iowa). *Iowa Code § 537A.4*. A person who is excluded from a facility under the rules of the Racing and Gaming Commission would not hold a legally binding agreement with a gaming facility for payment of the winnings. Therefore the facility would not be required to pay winnings to such person.

Over Blackford's objections, the trial court submitted the following jury instruction:

In order for the winnings to be the property of Troy Blackford, [*5] he must prove by a preponderance of the evidence that the trespass ban against him had been lifted by Prairie Meadows prior to May 5, 2006.

You are further instructed that a casino licensed to do business in our state is permitted to eject or exclude any person from the premises of the casino's facility solely on the casino's own decision, and without any reason or excuse given provided that the ejection or exclusion is not founded on a constitutionally protected ground, such as race, creed, color, disability, or national origin. This is known as a "trespass." If a person has been trespassed from a casino's facility, but returns and gambles at the facility, the trespassed person is not gambling according to the rules applicable to that facility, and such activities do not give the trespassed person any property right in the money or other valuable thing won during such gambling.

Without conceding the merits of either the trial court's earlier-quoted ruling or instruction No. 9, Blackford requested the following instructions:

INSTRUCTION NO.

Trespassers do not have an ownership or possessory right in money or other valuable objects won during gambling. In order for the winnings to be the [*6] property of Troy Blackford, he must prove by a preponderance of the evidence that he was not a trespasser upon the premise of Prairie Meadows on May 5, 2006.

INSTRUCTION NO.

Trespasser -- Defined -- A trespasser is one who is not rightfully upon the land or property of another, but enters it without consent, either express or implied, of the owner or occupier thereof.

Express consent arises when the owner or occupier of the land informs one that they have permission to be upon the land.

Implied consent arises when one who has been invited to enter upon the land either by the owner or occupier of the same by some affirmative act done by such owner or occupant, or by appearances which justify persons generally in believing that such owner or occupant had given his consent to enter the premise and act within the scope of that consent.

The trial court's ruling rejecting Blackford's proposed instructions states:

I am very uncomfortable giving an instruction on implied consent to lift a trespass ban in the context of a gaming facility that's so heavily regulated and the authority to exclude people comes from that regulation.

I think this is not just your run-of-the-mill trespass case. This is a [*7] conversion case based on whether he had the right to be there under the Racing and Gaming statutes so I am not going to include the instruction on implied consent into the instructions.

Because the jury returned a verdict answering "No" to the question, "Had Troy Blackford's trespass ban at the Prairie Meadows facility been lifted before May 5, 2006?" the court entered judgment in favor of Prairie Meadows and dismissed Blackford's conversion claims.

On appeal, Blackford raises the following issues:

I. Did the District Court Err in Ruling that *Iowa Code Section 99F.4(22)*, Chapter 99 and other Code Sections provided Defendant Casino Privilege to withhold Gambling Winnings of Involuntary Trespassers and to Pay Said Winnings to the Gamblers' Treatment Fund?

II. Did the District Court Err in Denying Plaintiff's Partial Motion for Summary Judgment on Plaintiff's conversion claim?

III. Did the District Court Err in Submitting Jury Instructions Allowing Defendant Casino Privilege to Withhold Gambling Winnings of Involuntarily Trespassed persons, in Requiring Plaintiff to Prove that he was not a Trespasser rather Requiring Defendant to Prove Plaintiff was a Trespasser, and in not Allowing Instructions [*8] for a Trespass Ban to be Lifted by Means other than Express Letter?

II. Standard of Review

This case was tried at law, and our review is for the correction of errors at law. *See* Iowa R. App. P. 6.4. Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a).

III. Conversion

A. The sole claim remaining at the time of trial was that of conversion. Conversion is the wrongful control or dominion over another's property contrary to that person's possessory right to the property. *Whalen v. Connelly*, 621 N.W.2d 681, 687 (Iowa 2000). "The wrongful control must amount to a serious interference with the other person's right to control the property." *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999). We consider the following factors to determine whether one person's interference with another person's property right would give rise to a claim of conversion:

- (a) the extent and duration of the actor's exercise of dominion and control;
- (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
- (c) the actor's good faith;
- (d) the extent and duration of the resulting interference [*9] with the other's right of control;
- (e) the harm done to the chattel; and
- (f) the inconvenience and expense caused to the other.

Larson v. Great West Cas. Co., 482 N.W.2d 170, 174 (Iowa Ct. App. 1992); *Restatement (Second) of Torts* § 222A at 431 (1964).

There is no conversion where the exercise of control was not wrongful, that is where the person taking control of the property does so rightfully. *Larson*, 482 N.W.2d at 173. In order to establish a claim of conversion, a plaintiff must establish a possessory interest in the property. *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 247 (Iowa 1988); 18 *Am. Jur. 2d. Conversion* § 2, at 155 (2004). Thus, in order to prove his claim of conversion, Blackford is required to show he had a possessory interest in his winnings at Prairie Meadows on May 5, 2006.

B. The trial court first found that like a person voluntarily banned from a casino, an involuntarily banned person

like Blackford may not keep any winnings from gambling. The trial court considered *Iowa Code section 99F.4(22)* (2005), regarding voluntary trespassers, to determine Blackford's rights as an involuntary trespasser. *Section 99F.4(22)* requires gambling facilities to "establish a process to [*10] allow a person to be voluntarily excluded for life from an excursion gambling boat" and other licensed facilities.¹ If a person violates the voluntary ban, no money is paid to the person by the gambling facility, but any amounts won by the person are deposited into a gambling treatment fund. *Iowa Code § 99F.4(22)*. Blackford correctly points out that he was not a voluntary trespasser under *section 99F.4(22)*, and that section does not apply to him. We determine the trial court improperly relied upon *section 99F.4(22)* in determining whether Prairie Meadows had a right to confiscate the winnings of a person who had been involuntarily banned from the casino.

¹ *Iowa Code section 99D.7(22)* contains a similar provision to establish a process to allow a person to voluntarily request to be banned from facilities with pari-mutual gambling. These provisions permit problem gamblers to voluntarily ask to be banned from gambling facilities.

C. The other basis for the trial court's ruling was a finding that there was no legally binding contract with Prairie Meadows for payment of winnings. It is clear that a bet or wager with a casino creates a contract. *See Romanski v. Detroit Entertainment, L.L.C.*, 265 F. Supp. 2d 835, 845 (E.D. Mich. 2003) [*11] (noting that when a person places money into a gambling game at a casino the parties enter into an aleatory contract); *Ledoux v. Grand Casino-Coushatta*, 954 So. 2d 902, 907 (La. Ct. App. 2007) (finding the law of contracts was determinative in an action by a patron against a casino for payment of a jackpot); *Decker v. Bally's Grand Hotel Casino*, 280 N.J. Super. 217, 655 A.2d 73, 76 (N.J. Super. Ct. App. Div. 1994) ("[P]laintiff's only contract with any defendant is the obligation of the defendants to pay the posted machine jackpot to the plaintiff immediately after the plaintiff has inserted the requisite coinage if the deposit of coinage registers a jackpot on the particular machine then in use."); 38 C.J.S. *Gaming* § 3, at 97 (1996) (noting a bet or wager generally operates like a contract). *But see Logan v. Ameristar Casino Council Bluffs*, 185 F. Supp. 2d 1012, 1026 (S.D. Iowa 2002) ("[T]he highly regulated nature of the gambling industry drastically reduces the parties' freedom to contract and thereby precludes the mutuality necessary to form a 'gambling contract.'").

On the other hand, the act of a patron placing a bet or wager at a casino does not create a traditional contract. "While it is possible [*12] to conceive of the relationship between patron and casino in contractual terms, it is a contract in which the terms are not left to the parties, but rather are completely determined by legislative enactment." *Marcangelo v. Boardwalk Regency Corp.* 847 F. Supp. 1222, 1229 (D.N.J. 1994) (footnote omitted); *see also Tose v. Grete Bay Hotel & Casino, Inc.*, 819 F. Supp. 1312, 1316 n.8 (D.N.J. 1993) ("[B]ecause every aspect of the relationship between the gambler and the casino is minutely regulated and there is little freedom of contract in the usual sense, there seems to be at least significant doubt that the New Jersey Supreme Court would recognize obligations not specifically called for by statute or regulations.").

In determining whether there was an enforceable contract, we look to the legislative enactments in Iowa. *See Marcangelo*, 847 F. Supp. at 1229. Under *Iowa Code section 537A.4*, in general, gambling contracts are "absolutely void and of no effect." The statute creates exceptions for gambling occurring in compliance with chapters 99B, 99D, 99F, and 99G. *Iowa Code § 537A.4*. The applicable section in this case would be chapter 99F, "wagering under the excursion boat gambling method [*13] of wagering . . ." *See id.*

The trial court found Blackford did not come within the exception found in *section 537A.4* for gambling in accordance with chapter 99F, because Blackford had been banned from the casino. The court cited *Iowa Administrative Code rule 491-5.4(5)(d)*, which provides as follows:

A licensee may eject or exclude any person, licensed or unlicensed, from the premises or a part thereof of the licensee's facility, solely of the licensee's own volition and without any reason or excuse given, provided ejection or exclusion is not founded on constitutionally protected grounds such as race, creed, color, disability, or national origin.

....

The commission may exclude any person ejected by a licensee from any and all pari-mutual facilities, gambling structures, or excursion gambling boats controlled by any licensee upon a finding that attendance of the person would be adverse to the public interest.

While rule 491-5.4(5)(d) provides that a casino may eject and exclude a patron from the premises, there is no provision for what happens to the patron's winnings if the person fails to honor the ban and returns to the premises. Furthermore, there is no provision in *section 99F.4* [*14] authorizing the casino to confiscate the winnings of a patron who, although banned under rule 491-5.4(5)(d), returns to the casino.² Because the relative rights of the parties are determined by legislative enactment, we determine that because there is no statutory or regulatory provision authorizing Prairie Meadows to confiscate Blackford's winnings, it could not legally do so.

² *Section 99F.4(22)* permits only the confiscation of winnings from a voluntarily banned person. As noted above, this provision does not apply to Blackford, who was involuntarily banned from Prairie Meadows.

We conclude the trial court erred in its pretrial legal ruling that Prairie Meadows would not be required to pay winnings to a person involuntarily excluded from the casino. We conclude Blackford has shown the first element of his claim of conversion, that he had a possessory interest in the property.

IV. Partial Summary Judgment

Blackford asserts the trial court erred by denying his motion for partial summary judgment on the ground that he had established a claim of conversion as a matter of law. The Iowa Supreme Court has held "determinations made in advance of trial concerning a genuine issue of material fact [*15] will not constitute grounds for reversal where a full trial is subsequently held and sufficient evidence is produced to sustain the claim." *Klooster v. N. Iowa State Bank*, 404 N.W.2d 564, 567 (Iowa 1987). This is because "the denial of the motion for summary judgment merges with the trial on the merits where the trier of fact reviewed the exhibits and listened to the testimony of witnesses." *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). After a trial on the merits of a case, a previous court order denying a motion for summary judgment is not subject to appeal or review. *Id.* We therefore decline to address Blackford's claims regarding the trial court's denial of his motion for summary judgment.

V. Jury Instructions

Blackford claims the trial court erred in the submission of several jury instructions because the instructions did not contain a correct statement of the law. We have already determined that the trial court erred in its legal conclusions in this case.

We have carefully considered all of the remaining issues raised by the parties and find that they either without merit or controlled by the foregoing. We reverse the decision of the trial court and remand for further proceedings [*16] in accordance with this decision.

REVERSED AND REMANDED.

Potterfield, J., concurs; Sackett, C.J., concurs specially without opinion.