Rel: August 18, 2023

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2023

SC-2022-0850

Travis E. Whaley and Randall C. Lovvorn

v.

Department of Alabama Veterans of Foreign Wars of the United States

Appeal from Montgomery Circuit Court
(CV-18-900411)

SELLERS, Justice.

This appeal relates to "electronic-bingo" operations conducted by the Department of Alabama Veterans of Foreign Wars of the United

States ("the VFW") at some of its Alabama posts. Travis E. Whaley and Randall C. Lovvorn contracted with the VFW to superintend and promote its electronic-bingo operations. Whaley and Lovvorn were in prominent positions with the VFW both before and during the events of this case. Between 1997 and 2013, Whaley served the VFW as adjutant, commander, and quartermaster at different times. For his part, Lovvorn served as the VFW's accountant. After meeting at a local VFW post, Lovvorn and Whaley apparently began a friendship in the 1990s, which subsequently merged into a business relationship and leadership of the VFW's electronic-bingo operations.

Following a failed attempt by Whaley to establish electronic-bingo at a single VFW post, the VFW contracted with G2 Operations, Inc. ("G2"), to conduct its electronic-bingo operations.[1] Apparently, there were two agreements between the VFW and G2 at that time -- a statewide contract and a contract for a single VFW post. Under the statewide contract, the VFW was to retain 2% of gross revenue, and, under the local contract, it was to receive 2% of the net income.

[1]Although G2 was initially a defendant in the case, it was subsequently dismissed and is no longer a party.

Between 2007 and 2009, the VFW expanded its electronic-bingo operations, offering electronic bingo at additional posts and entering into a new contract with G2. Under the new contract, G2 agreed to conduct electronic-bingo operations at VFW posts throughout Alabama, and the VFW would receive 10% of the gross revenue. All the proceeds from electronic bingo were deposited into a VFW bank account, known as the Jasper account. During the years the VFW and G2 operated under the various contracts, $36,562,465.07 was deposited into the Jasper account; only proceeds from electronic bingo were deposited into that account. Under its contracts with G2, the VFW was entitled to receive $3,161,649.98 of that amount.

During that period, the VFW also entered into contracts with Whaley and Lovvorn, assigning them specific roles in its electronic-bingo operations. In 2008, Whaley entered a five-year office-manager contract with the VFW. In the same year, Lovvorn was retained by the VFW to "promote, market and consult the [VFW] on the operation of the VFW's Electronic Charity Bingo Operations." Those contracts underlie the VFW's breach-of-contract claims against Whaley and Lovvorn, which are discussed later in this opinion. However, in 2009 the VFW's electronic-

bingo operations began winding down in compliance with our holding in Barber v. Cornerstone Community Outreach, Inc., 42 So. 3d 65, 86 (Ala. 2009), recognizing the illegality of electronic bingo.

Several years later, after being notified of a tax penalty from the IRS, the VFW discovered a shortfall of $1,782,368.88 from what it should have received under its contracts with G2. The VFW filed a complaint in the Montgomery Circuit Court, asserting claims against G2 as well as additional claims against other parties, which were eventually whittled down throughout litigation until only claims against Whaley and Lovvorn remained. At trial, Whaley and Lovvorn moved for a judgment as a matter of law. The trial court denied that motion, and, after a trial, the jury reached a verdict against Whaley and Lovvorn on VFW's claims of breach of contract, fraudulent suppression, and conversion, awarding $1,782,368.88 in compensatory damages and $2,000,000 in punitive damages. The trial court entered a judgment on that verdict, and Whaley and Lovvorn filed a renewed motion for judgment as a matter of law or, alternatively, for a new trial or remittitur. That motion was denied as well, and this appeal followed. Because the VFW's claims rely upon its

own involvement in illegal transactions, we reverse the trial court's judgment and render a judgment in favor of Whaley and Lovvorn.

Analysis

"'Electronic bingo is illegal in Alabama.'" Dream, Inc. v. Samuels, [Ms. SC-2022-0808, June 23, 2023] ___ So. 3d ___, ___ (Ala. 2023) (quoting State v. Epic Tech, LLC, [Ms. 1200798, Sept. 30, 2022] ___ So. 3d ___, (Ala. 2022)). We have stated that "'[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act or transaction to which he is a party.'" Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So. 2d 953, 954-55 (Ala. 1993) (quoting Hinkle v. Railway Express Agency, 242 Ala. 374, 378, 6 So. 2d 417, 421 (1942)). That rule derives "'from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.'" Oden, 621 So. 2d at 955 (quoting Bonnier v. Chicago, Burlington & Quincy R.R., 351 Ill. App. 34, 51, 113 N.E. 2d 615, 622 (1923)). Indeed, "illegality is such a 'fundamental' defect 'that we may raise the issue ex mero motu.'" Dream, Inc., ___ So. 3d at ___ (quoting Rape v. Poarch Band of Creek Indians, 250 So. 3d 547, 563 (Ala. 2017)). Accordingly, the VFW's arguments that Whaley and Lovvorn

waived or failed to preserve the illegality issue are unavailing. Instead, because the VFW's breach-of-contract, fraudulent-suppression, and conversion claims necessarily rely upon its involvement in illegal electronic bingo, the trial court's judgment is due to be reversed.

I. The Breach-of-Contract Claims

The VFW asserted breach-of-contract claims against Whaley and Lovvorn based upon two distinct contracts. In its claim against Whaley, the VFW alleged that, "[o]n or about May 17, 2009, the [VFW] entered into a written contract with the Defendant Whaley for a five-year term of employment as Office Manager of the [VFW]." The breach-of-contract claim against Lovvorn alleges that, "[o]n or about May 14, 2009, the [VFW] entered into a written contract with Defendant Lovvorn in which said Defendant agreed and promised to promote, market and consult with the [VFW] on the operation of the [VFW's] Charity Bingo operations." When "'"a party requires the aid of an illegal transaction to support his case, he cannot recover."'" Lucky Jacks Ent. Ctr., LLC v. Jopat Bldg. Corp., 32 So. 3d 565, 569 n.3 (Ala. 2009) (citations omitted). Accordingly, if its contracts with Whaley and Lovvorn are illegal, then the VFW cannot recover for any breach of those contracts.

The office-manager contract with Whaley provided that

> "[h]is additional responsibility will be to keep up with the current and future involvement of the VFW in the 21st Century Electronic Bingo Operations. He will be required to work with the Vendor to insure that we are always in compliance with all rules and regulations as well as ma[k]e necessary decisions based on past and future requirements to continue to receive the Charity income for the VFW. He will be required to report to the Council on a regular bas[is] to keep all members of the Council abreast of the operations in progress or planned."

Despite the word "additional," the contract sets forth only the duties listed above. Similarly, the only duties outlined in Lovvorn's contract are "to promote, market and consult the [VFW] on the operation of the VFW's Electronic Charity Bingo Operations." On their face, both contracts seek to use Whaley's and Lovvorn's labor, knowledge, and expertise to further the VFW's illegal electronic-bingo operations. As noted above, when "'"a party requires the aid of an illegal transaction to support his case, he cannot recover."'" Lucky Jacks, 32 So. 3d at 569 n.3 (citations omitted). Thus, the VFW is entitled to no relief based on the breach of these facially illegal contracts.

The VFW argues that a case decided by the United States District Court for the Northern District of Alabama, Papa Air LLC v. Cal-Mid Properties, LP, No. 2:19-CV-01713-RDP, Mar. 15, 2022 (N.D. Ala. 2022)

(not published in Federal Supplement), demonstrates that the contracts in question are not void ab initio. Papa Air is not binding on this Court, nor is it apposite to the case at bar. In Papa Air, the federal district court found that a lease relating to premises used to conduct an illegal video-sweepstakes operation was not void ab initio for two reasons. First, the lease in Papa Air permitted the lessee to use the premises for any commercially reasonable operation, so long as it obtained the written approval of the lessor, and prevented the lessor from unreasonably withholding its approval. As a result, the lease expressly allowed for the premises to be used for alternative, legal purposes. Second, the lease provided that if a provision was discovered to be unenforceable the rest of the lease would remain in effect. Essentially, the court found that that clause functioned as a severance clause regarding unenforceable provisions.

The contracts between the VFW and Whaley and Lovvorn are easily distinguished from the lease in Papa Air. The duties relating to electronic bingo contained in Whaley's and Lovvorn's contracts are fundamental to both contracts. There is no provision in either contract relating to alternative, legal job duties; rather, both contracts exclusively involve

illegal electronic-bingo operations and contain no severance or savings clause regarding unenforceable provisions. In short, there is no clause providing for the severance of any provisions relating to the illegal electronic-bingo operations. Indeed, even if the contracts contained such a clause, a severance of those unenforceable provisions would make the contracts ambiguous because the only job responsibilities referenced within the contracts were solely related to the illegal electronic-bingo operations. Accordingly, Papa Air is inapposite.

The VFW also argues that our 2009 holding that electronic bingo is illegal was not "clearly foreshadowed" and should thus be treated as nonretroactive. See Lucky Jacks, 32 So. 3d at 570; see also Barber v. Cornerstone, 42 So. 3d at 86. Our decision in Lucky Jacks is instructive. In Lucky Jacks we held that "the resolution of a question of first impression as to the meaning of a statute … does not excuse the parties from compliance with the statute so as to render void contracts enforceable." 32 So. 3d at 569. Applying that principle to our earlier decision in Barber v. Jefferson County Racing Ass'n, 960 So. 2d 599 (Ala. 2006), we reasoned that, in deciding that video sweepstakes were unlawful under § 13A-12-27, Ala. Code 1975, we had not "establish[ed] a

new principle of law, justifying nonretroactivity." Lucky Jacks, 32 So. 3d at 570.

That reasoning compels the same conclusion with respect to our holding on the illegality of electronic bingo. The decision in Barber v. Cornerstone did not establish a new principle of law -- it merely recognized that "the term 'bingo' as used in Amendment No. 674 [(now § 43-2.00, Ala. Const. 2022)] was intended to reference the game commonly or traditionally known as bingo." 42 So. 3d at 86. The holding of Barber that "bingo" means "bingo" was clearly foreshadowed. Assigning words their common meaning and interpreting them within the context of confirmed legal precedent is far from establishing a new principle of law. Accordingly, there is no basis for treating our holding in Barber v. Cornerstone as nonretroactive.

II. The Fraudulent-Suppression Claims

To establish its fraudulent-suppression claims, the VFW needed to prove that it had suffered actual damage as a proximate result of Whaley's and Lovvorn's conduct. State Farm Fire & Cas. Co. v. Owen, 729 So. 2d 834, 837 (Ala. 1998). The VFW alleged that it had been injured by "failing to receive funds due it under the Charity Bingo operation."

However, the VFW's right to receive those funds was premised on its contracts with G2, which entitled it to a portion of proceeds derived from illegal electronic bingo. As noted, "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or in part on an illegal or immoral act or transaction to which he is a party." Hinkle, 242 Ala. at 378, 6 So. 2d at 421; see also Dream, Inc., ___ So. 3d at ___ (holding that "Alabama courts will not enforce claims, whether in contract or in tort, which require the aid of an illegal agreement"). Simply put, the VFW cannot demonstrate damage without relying on its right to the proceeds of an illegal activity. As a result, it cannot maintain this cause of action.

III. The Conversion Claims

In a count titled "Conversion of Bingo Funds," the VFW alleged that "the Defendants converted proceeds due the [VFW] from the Charity Bingo operation." The VFW cannot maintain its conversion claims for the same reason it cannot maintain its fraudulent-suppression claims -- it is impossible to describe its right to the funds or the damage that it sustained except by reference to its own illegal acts. Accordingly, the VFW can receive no relief on its conversion claims.

Conclusion

To carry on its illegal electronic-bingo operations, the VFW entered into numerous related, unenforceable contracts. Those contracts entitled the VFW to a portion of funds generated from its illegal activity, which were deposited into an account containing only the proceeds of the illegal electronic-bingo operations. The VFW's frustration at losing such a large sum is understandable, and, as an organization aimed at the support of veterans, the VFW is highly sympathetic. But Alabama law is and was clear even before the contracts among these parties were executed that we cannot provide the relief of returning illegally gotten gains to the doer of the original misdeed.

REVERSED AND JUDGMENT RENDERED.

Parker, C.J., and Wise, Stewart, and Cook, JJ., concur.