STATE OF MICHIGAN

COURT OF APPEALS

BAY MILLS RESORT & CASINO,

Plaintiff/Counter Defendant-Appellant,

v

DALE E. GERBIG,

Defendant/Counter Plaintiff-Appellee,

and

VALERIE GERBIG,

Defendant/Counter Plaintiff.

UNPUBLISHED
October 2, 2008

No. 281549
Gogebic Circuit Court
LC No. 05-000368-CZ

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment awarding it $4,000, plus interest and costs, as full payment on defendant's gambling debt. We vacate the damages award and remand for entry judgment in favor of plaintiff for the full amount sought in its complaint. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff owns and operates an Indian casino. Between November 17 and November 20, 2001, defendant presented plaintiff with 15 personal checks in exchange for cash. Plaintiff cashed the checks and remitted funds to defendant in the amount of $19,500.[1] Shortly thereafter, the checks were returned to plaintiff from defendant's bank for "non-sufficient funds" (NSF). Plaintiff filed a complaint against defendant in 2005 for damages in the amount of $23,000,

[1] Before filing this lawsuit, defendant repaid $5,000 of that debt to plaintiff.

which represents two times[2] the amount of dishonored personal checks endorsed by defendant and made payable to plaintiff for cash, plus costs.

At the end of a bench trial, the trial court ruled for plaintiff in the amount of $4,000, plus costs. The trial court discussed what it described as "the essential issue in the case," stating that "defendant maintains that the casino did not follow the proper credit and check cashing procedures within the administrative code." The trial court referenced Mich Admin Code R 432.11304(2), which obligates a state-licensed casino to determine that a patron's personal credit line is sufficient to cover the amount of a personal check. The trial court scrutinized plaintiff's compliance with Rule 432.11304(2), noting that "the state required, among other things, in Rule . . . 432.11304(2), that a casino license shall not extend credit to a patron who has exceeded an established credit line . . . ." On this basis, the trial court found that not all the dishonored checks could be enforced:

> [T]he administrative rule requiring a determination, in subsection (4)(b), of the patron's available credit, that his available [credit, sic] is sufficient to cover the amount of the personal check. For these reasons, it appears to this Court that Bay Mills did not follow its own procedures in November of 2001. And that might not be important, but for the fact that those procedures were approved by the State as being consistent with the administrative rules of the State. And therefore, for these reasons, it appears that some if not all of these checks—should not be enforceable as being taken in violation of Bay Mills [sic] own procedures.

The trial court also referenced plaintiff's procedure involving a $3,000-per-patron limit for cashing personal checks within a 24-hour period unless there was approval by the shift manager. The trial court stated, "[I]t does not appear from the direct evidence here that the shift manager did approve over $3,000.00 within the 24-hour period." The trial court reasoned that by applying the $3,000 limit to the three days defendant was at the casino, only $9,000 worth of checks was cashed appropriately.

---

[2] MCL 600.2952(4) states,

> [A] maker [of a dishonored check] who fails to make payment . . . and who is found responsible for payment in a civil action is liable to the payee for payment of all of the following:
>
> (a) The full amount of the check, draft, or order.
>
> (b) Civil damages of 2 times the amount of the dishonored check, draft, or order or $100.00, whichever is greater.
>
> (c) Costs of $250.00.

> Therefore, the amounts over that will not be enforced by the Court, but that $9,000.00 will. It appears to the Court that Mr. Gerbig has previously paid $5,000.00 toward that amount and therefore judgment may enter in favor of the Plaintiff against the Defendant Dale Gerbig in the amount of $4,000.00 plus the customary costs.

The trial court also refused to award civil damages pursuant to MCL 600.2952(4)(b) "given the nature of the situation here and that fact that the—neither the protocol for the personal check approval by Bay Mills or the statute for collecting, demanding payment on NSF checks were perfectly followed in either case."

First, plaintiff contends that the trial court erred when it applied the Michigan Administrative Rules regulating casino gambling in this case, since plaintiff is a federally recognized Indian tribe.[3] The parties do not dispute that plaintiff is a federally-recognized tribal entity. Through the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., Congress has permitted the states to negotiate with the tribes through the compacting process to shape the terms under which tribal gaming is conducted. "The states have no authority to regulate tribal gaming under the IGRA unless the tribe explicitly consents to the regulation in a compact." *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 319; 685 NW2d 221 (2004). The Court in *Taxpayers of Michigan, supra*, explained:

> "Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes." [471 Mich at 320, quoting *Gaming Corp of America v Dorsey & Whitney*, 88 F3d 536, 546 (CA 8, 1996).]

In other words, IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. The Legislature is prohibited from unilaterally imposing its will on the tribes; rather, under IGRA, it must negotiate with the tribes to reach a mutual agreement. *Id.* Again, this is done by way of compact.

In addition to case law, our Legislature has recognized that the state's regulatory authority cannot extend to tribal gaming. MCL 432.203(5) provides that state regulation of tribal casinos can only occur "[i]f a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land . . . ." Absent such federal authorization, MCL 432.203(2)(d) acknowledges that the state's gambling regulatory requirements do not apply to "[g]ambling on Native American land and land held in trust by the

---

[3] We review a trial court's findings of fact in a bench trial for clear error and its legal conclusions de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. *Id.*

United States for a federally recognized Indian tribe on which gaming may be conducted under the [IGRA]."

Plaintiff entered into a compact with the state in 1993 with regard to tribal gaming. Nowhere in the compact does plaintiff adopt the administrative rules cited by the trial court. In fact, the compact expressly states that plaintiff is not regulated by the state and that nothing in the compact shall be deemed a waiver of the tribe's sovereign immunity. According to Section 1 of the compact, a purpose and objective of the compact is "[t]o establish procedures to notify the patrons of the Tribe's Class III gaming establishment(s) that the establishment(s) are not regulated by the State of Michigan . . . ." In addition, the compact requires that the following notice be posted in the casino:

> THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE BAY MILLS INDIAN COMMUNITY.
>
> THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

Accordingly, plaintiff is not subject to the Michigan legislation or administrative rules controlling gambling. Therefore, the trial court erred when it applied the administrative rules to its analysis and determined that plaintiff failed to follow the credit and check-cashing procedures set forth in the administrative rules.

In addition, the trial court determined that plaintiff did not adequately check defendant's credit and failed to follow its policy when it cashed over $3,000 worth of defendant's personal checks a 24-hour period. However, the trial court acknowledged that this might not be important but for the administrative rules, which, as we have previously held, do not apply.

First, the policy in effect when defendant wrote the checks did not require that a patron have sufficient available credit to cover the amount of a personal check at the time it is cashed. Moreover, although there was a policy in place limiting the value of personal checks cashed by a patron in a 24-hour period to $3,000, this policy was discretionary. That is, the policy expressly allowed the casino to cash checks valued at more than $3,000 upon review and approval by the shift manager.[4] Furthermore, the casino did not have a policy in place requiring the shift manager to initial or otherwise document an override. As such, there is no evidence indicating that there was no override of the $3,000 limit in this case. In the alternative, the very fact that

---

[4] The policy stated:

> Requests to cash a check for over the customer's check cashing limit must be reviewed and approved by the shift manager. It is the Shift Manger's responsibility to review the customer's history and make a determination to approve an override or not.

checks in excess of $3,000 were cashed within a 24-hour period suggests such an override occurred. Unfortunately, defendant claims he does not remember anything about the three days he spent in the casino, let alone the check-cashing process at the time.

Moreover, even if we agreed with the trial court's conclusion that a valid override did not occur, as a general rule we distinguish between internal policies and external rules promulgated pursuant to law. Unless compliance with internal policies or rules relates to an underlying law or regulation, no duty attaches for a violation of an internal policy. *Buczkowski v McKay*, 441 Mich 96, 98; 490 NW2d 330 (1992); *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 767–768; 431 NW2d 90 (1988); see also *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002). Although traditionally analyzed in the context of negligence claims, the rationale for the rule is equally applicable here: imposing legal liability on companies that undertake to protect their employees or customers by means of work rules or policies if these rules or policies are not followed would simply encourage companies to abandon all efforts to implement rules to protect employees and customers in order to avoid future liability. *Premo v Gen Motors Corp*, 210 Mich App 121, 124; 533 NW2d 332 (1995); see also *Buczkowski*, *supra* at 99 n 1.

Here, plaintiff adopted its check-cashing policy to avoid injury to its patrons, not pursuant to a mandatory regulation. The policy imposes no legal duty on plaintiff to protect its patron, defendant, from cashing more than $3,000 in personal checks every 24 hours.

We vacate the damages award and remand for judgment in favor of plaintiff for the full amount sought in its complaint. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher