STATE OF MICHIGAN

COURT OF APPEALS

OIL CAPITAL RACE VENTURE, INC,

Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,

and

WALTER G. BAY,

Third-Party Appellant/Cross-Appellee,

v

JOHN HUNTER,

Defendant/Counter-Plaintiff/Third-Party-Appellee/Cross-Appellant,

and

JON FREDERICK LUETH,

Defendant.

UNPUBLISHED
March 9, 2004

No. 244132
Isabella Circuit Court
LC No. 99-000787-NZ

Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiff and counter-defendant Oil Capital Race Venture, Inc., d/b/a Mt. Pleasant Meadows (the track), appeal as of right the order granting summary disposition of its claims against defendant and counter-plaintiff John Hunter, the order denying the track's motion to amend its complaint, the final judgment entered against it with regard to Hunter's counterclaim, and the order denying the track's motion for JNOV and/or for new trial. Third party Walter G. Bay, the principal shareholder of the track, appeals as of right the order denying his motion for mediation sanctions. On cross-appeal, Hunter appeals as of right the order granting the track's motion for summary disposition of Hunter's fraud claim as well as the judgment entered on his counterclaim.

This case arises out of a $545,000 loss incurred by the track in the operation of its racetrack in Mt. Pleasant from January through August 1997. The loss was apparently incurred by allowing Hunter to place wagers on the pari-mutuel betting system at the track without paying cash at the time of the wagers. Such betting is contrary to rules and regulations that require pari-mutuel tickets to be paid for when purchased (or at the latest when a race is declared official). Hunter was able to purchase tickets without paying for them because Jon Lueth, the pari-mutuel manager at the track and the supervisor of the tellers at the track, allowed Hunter to do so. Lueth instructed the tellers to provide Hunter with tickets on account. Some of those tickets were purchased with "vouchers." A voucher is like a debit card that has a balance that can be drawn against. Lueth apparently gave Hunter vouchers without requiring Hunter to pay for them. Hunter allegedly ran up an account of over $500,000 by August 1997 when auditors discovered what was going on.[1]

The track filed the present civil suit against Hunter and Lueth on January 7, 1999, in an attempt to collect the money that Hunter never paid.[2] The complaint alleged a scheme or conspiracy by Hunter and Lueth. The complaint as initially filed claimed that Hunter was able to place bets on account without paying for them. The track subsequently wanted to amend the complaint to develop a theory that Hunter illegally received vouchers.

After the complaint was filed, Hunter promptly moved for summary disposition on the ground that the track had failed to state a claim. Hunter argued that the track was attempting to collect on an illegal bet. The motion was denied, in part because discovery had not taken place. Hunter then filed an answer and a counterclaim and third-party complaint, seeking recovery, under several different theories, of $132,000 he paid to the track through Bay.

Following discovery, Hunter renewed his motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted Hunter's motion in an opinion and order dated June 19, 2000, reasoning that the track was bound by the acts of Lueth, the track's agent, and that since Lueth allowed an illegal gambling practice, the track could not sue to collect for the benefit of that gambling. The court concluded that the debt was incurred based on illegal gambling practices and was therefore unenforceable.

The track filed a motion to amend its complaint to add a count alleging buying, receiving, or aiding in the concealment of stolen, embezzled, or converted property contrary to MCL 600.2919a. The alleged converted property was vouchers. The track alleged that during Lueth's criminal trial information was revealed about the illegal use of vouchers, and the track argued that it should be allowed to amend its complaint to assert a claim based upon the voucher evidence. The trial court denied the motion to amend.

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[1] Lueth was criminally prosecuted in February 2000. He was convicted of embezzlement, obtaining money by false pretenses, and several gambling misdemeanors, and was ordered to pay restitution in the amount of $454,125. His convictions were affirmed by this Court. *People v Lueth*, 253 Mich App 670; 660 NW2d 322 (2002).

[2] Hunter voluntarily paid $132,000 before obtaining counsel.

The case proceeded to trial on Hunter's counterclaims of extortion and racketeering.[3] Walter Bay, the president of the track since 1995 and the principal investor in the track, testified that the track began conducting simulcast races in 1996. Lueth was the "mutual manager" in charge of pari-mutuel wagering and was in charge of the daily financial operations, arranging to receive the simulcast races from other tracks, and overseeing the tellers who took bets from pari-mutuel bettors. Michael Smith was the general manager of the track and handled the oversight of the actual racing facilities. Bonnie Klumpp, the bookkeeper and racing secretary, prepared weekly reports of operational expenditures based on information she received from others. Lueth handled the money and gave reports to Klumpp, who then gave reports to Bay and the Office of the Racing Commissioner (ORC).

In early 1997 Bay received correspondence from Nancy Jewell of the Harness Horse's Association (HHA) regarding the lateness of reports from the track concerning the "Horseman's Purse Pool Account," an account funded by a portion of track revenues that was then distributed by the HHA to the winners of the individual horse races. Bay indicated that Lueth was in charge of the reports. Bay first became aware of a problem with the pool account in July through Jack Martin, the track's secretary and treasurer.

In August 1997, Hunter contacted Bay and requested a meeting. At that meeting, Hunter informed Bay that he owed a lot of money – about "a quarter of a mil," as a result of placing wagers on account. Hunter stated "My friend Jon [Lueth] is in a lot of trouble. He allowed me to bet without paying for it." After the problem came to light, an audit was conducted of the track's finances and the ORC conducted an investigation. After the investigation, Bay was told that approximately $530,000 was missing. Hunter began paying the amount he owed, and tendered approximately $132,000 to Bay. Bay testified that he did not have knowledge of Lueth's action and did not receive reports of problems until the ORC informed him of them. He maintained that the track would not allow wagering on account.

Richard Jewell is a criminal investigator and regulations manager for the Office of the Racing Commissioner (ORC), which has jurisdiction over the licensed entity of horse racing. He was assigned by deputy commissioner Bowes to investigate a large shortage of money from the track. Jewell testified that the ORC requires weekly audit reports to be sent to the ORC by auditors contracted by the ORC. Alan Wazny was the auditor. Jewell obtained the information used to conduct his investigation from gathering weekly tote machine reports and reports from the track. His investigation revealed a lack of records of deposits to correlate with the amount of wagers placed at the track. Jewell stated that wagering on account violated the state's wagering or gaming laws.

Jewell explained that, of the money placed by bettors into the pari-mutuel pool, approximately 80% went back to the winners whose money had been pooled, with the remaining 20 % going to the track, which then had to pay various fees, such as the horseman's purse pool

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[3] The trial court granted the track's motion for summary disposition of the counterclaim for fraud.

account, the settlement account, and taxes of 3.5%. The remaining money would then be used to pay operating expenses and to provide a profit, if any.

Jewell interviewed Hunter in November 1997. Hunter explained that he obtained vouchers from Lueth and placed wagers with them. He would tell the tellers that Lueth would "take care of" the wager later. Hunter also placed bets over the telephone from other locations. If he won on a wager, he would place additional bets, but most of his wagers were placed with vouchers. Hunter explained that Lueth maintained a "tab" for him. Hunter believed that he owed approximately $235,000.

Nancy Jewell, the office manager of the Michigan Harness Horseman's Association and the keeper of the records, testified that it is her responsibility to insure that the organization receives what is due under the law. She oversees the horseman's simulcast purse pool and determines whether the appropriate deposits are made into the pool. In March 1997, she advised the track that it was delinquent in making the deposits. Lueth informed her that he would make a deposit "soon." Some deposits were returned for non-sufficient funds. Eventually, she advised the ORC that she was "not comfortable" with the responses received from Lueth. The ORC arranged a meeting with the track at the commission office on August 19.

The deposition testimony of Michael Smith was read into the record. He testified that he was hired by the track as the general manager in January 1997. He noted that the track had "very little bookkeeping." He began keeping a daily record of the amount of money wagered, what the commission should be, and what the deposit should be. He noticed that no deposits were being made, but that the records showed that the track should have had enough money to pay the bills. However, Bay's Trucking Company was paying all of the track's bills and payroll expenses.

In April 1997, Smith discovered a shortage in the accounts and talked to treasurer Jack Martin. However, "nothing happened," and in early May Smith informed Bay of his concerns about the deposits. Smith then approached Lueth, who gave "explanations" for the shortages. In May Smith met with the management committee of the track. At the June meeting of the board, Bay and Martin indicated that they would use a "friend" to do an audit of the track and help Bonnie Klumpp "with the records."

Smith continued to keep records and continued to express concern to Bay. Receiving no satisfactory response, Smith voluntarily resigned his employment in August 1997.

David Hunter, Hunter's brother, testified that he became aware in February 1997 that Hunter was gambling and spending a lot of time at the track. At that time, Hunter's wife estimated that he had lost $10,000-20,000 cash. In March 1997, David went to the track and informed Michael Smith of his concerns about Hunter. In late August, David learned that Hunter owed the track $235,000. David talked to Bay about the situation, and a meeting was scheduled for September 15 at the office of the track's attorney. At this point, Hunter had already paid $42,000 to the track. At the meeting, David and Hunter were told that Hunter needed to pay $90,000 "right away to keep the state out."

Hunter testified that he met Lueth in August 1996, and that Lueth allowed him to wager on account from January 1997 through August 1997. His credit level increased over this period of time. Defendant provided "vouchers" to him and he would bet with the vouchers instead of

cash. He and Lueth kept a running total of the extended credit. When all of this came to light, he believed that he owed approximately $235,000. Hunter claimed that he asked Lueth whether anyone else knew that Hunter was betting on account and Lueth replied that no one else knew and that Lueth "had it covered." He also stated that he saw Lueth place bets for someone else and at first thought Lueth was betting as a way to encourage others to do so until the amount became larger. Lueth also told the tellers to extend credit to Hunter and they did so. When Hunter called Lueth on the phone from other locations, Lueth would also place wagers for him. Lueth told Hunter that he was letting Hunter bet on credit because it was helping the business out.

After Hunter paid $42,000 toward the debt, Bay told Hunter that Hunter needed to come up with $90,000 more to cover the horseman's pool and taxes or else "this will hit the papers." When Hunter brought $90,000 to Bay, Bay said that it was "not enough" and that it would "get rougher on you." Hunter indicated that he believed that Bay was "surprised" when he informed Bay of his debt.

On a special verdict form, the jury responded "no" to the questions of whether Bay was liable for extortion or racketeering and to the question whether the track was liable for extortion. The jury found the track guilty of racketeering, with the predicate act being the collection of an unlawful debt. The jury awarded Hunter damages of $100,000, and a verdict in the amount of $300,000, representing treble damages, was entered.

The track first argues that the trial court misapplied the law of agency when ruling on Hunter's motion for summary disposition of the track's complaint. The track asserts that a principal is not bound by the illegal acts of its agent and a third party who acted to injure the principal, and contends that Hunter was or should have been aware that Lueth was acting illegally and that Lueth acted beyond the scope of his authority in acting illegally.

Although the track discusses a multitude of rules about agency relationships, this is a summary disposition review. The trial court was correct that, as a general proposition, illegal gambling contracts are not enforceable and loans made for gambling purposes cannot be recovered. *International Recovery Systems, Inc v Gabler*, 208 Mich App 49, 51; 527 NW2d 20 (1994), reversed on rehearing on other grounds 210 Mich App 422; 527 NW2d 22 (1995). There is no dispute that Hunter's bets "on account" were illegal. That would be true whether or not Hunter bet at a teller window on account or received a voucher on account. The track cannot collect on the bets because the track's agent, Lueth, authorized them. Even though Lueth was acting contrary to the track's interests that does not mean that Lueth's wrongdoing must be attributed to Hunter. Hunter argued, and the track presented no meaningful evidence to the contrary, that Hunter was a compulsive gambler and that Lueth's conduct enabled Hunter to continue betting, apparently in an attempt to show increasing revenues based upon the seventeen percent "handle" the race track received for bets placed. There was no showing that Hunter gained anything or kept any money. The track's pari-mutuel manager allowed Hunter's illegal betting. There is no showing that Hunter intended to steal or embezzle; Hunter just wanted to win his bets. Even if Hunter had conspired with Lueth, that would not be a reason to allow the track to collect on an illegal bet (although it might provide the track with a defense if Hunter sought to collect on his illegal bet). The track did not show any evidence indicating there was a question of fact that might lead to an outcome favorable to the track. Thus, summary disposition was properly granted.

It made no difference whether the track based its claim upon the placing of illegal bets or the illegal use of vouchers. In either instance the evidence indicated that Lueth was a wrongdoer and was the track's agent. Amendment of the complaint to develop a theory based upon the use of vouchers would therefore have been futile. The trial court did not abuse its discretion by denying the motion to amend the complaint.

The track also argues that Hunter did not plead a violation of 18 USC 1962(c) – "collection of an unlawful debt" – as a predicate act for the RICO violation and, therefore, the trial court's jury instruction regarding the RICO elements was erroneous because it referred to the collection of an unlawful debt. The track provides no citation to the record, no meaningful legal analysis, and no authority in support of its argument. To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Argument must be supportedby citation to appropriate authority or policy. MCR 7.212(C)(7); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). The track's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).[4]

Next, the track argues that the evidence did not support a cause of action under 18 USC 1962(c). Without any argument or citation to authority, the track merely summarizes testimony favorable to its contention. Because the track provides no legal analysis or legal citation to support the argument that the trial court should not have instructed the jury regarding collection of an unlawful debt because Hunter had to first prove a "contract" with the track for the debt, this issue is abandoned. *Jones, supra; Wilson, supra.*

The track also argues that a jury instruction regarding the definition of "unlawful debt' was not warranted because the track was engaged in a lawful form of gambling – pari-mutuel betting on simulcast races. However, it was undisputed at trial that allowing a patron to have credit so as to increase the amount and level of simulcast racing wagers is illegal gambling. Thus, this argument is without merit.

The track argues that the denial of its requested "agency instructions" constitutes reversible error. The track does not identify the instructions, and provides little analysis and no authority in support of its argument. This issue is therefore abandoned. *Jones, supra; Wilson, supra*.

Last, Bay argues that the trial court abused its discretion by denying Bay's motion for mediation sanctions. This Court reviews a trial court's decision regarding mediation sanctions

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[4] Nonetheless, a review of Hunter's counterclaim/third-party complaint reveals that Hunter alleged that the track and Bay violated RICO, specifically, 18 USC 1962(a) and (c).

for an abuse of discretion. *Put v FKI Industries, Inc*, 222 Mich App 565, 572; 564 NW2d 184 (1997).

The May 16, 2000, mediation evaluation in this case resulted in a recommended award "for plaintiff as to Hunter $75,000, as to Lueth $310,000, -0- as to countcl." Bay accepted the mediation evaluation and Hunter rejected the mediation evaluation. The jury returned verdicts of no liability regarding Hunter's claims against Bay for racketeering and extortion.

On May 17, 2002, counsel submitted a motion seeking $50,000 in mediation sanctions for Bay. Hunter opposed the motion, contending in part that the mediation evaluation did not address the third-party complaint.

At the hearing on the motion on May 22, 2002, the court determined that "there was no mediation award on the third-party complaint." The court noted that the mediation evaluation awarded "zero" on the counterclaim, but did not make any reference to the third-party complaint against Bay. The court stated in part:

> Now I think that your [Bay's] claim is fatally defective because, as I started to say, we've got three lawyer mediators. We've got the two of you reviewing the evaluations; and nowhere in there is – and by "in there" I mean on the notice of the mediation evaluation – is there any reference to counter claim – I'm sorry, a third-party complaint. It might've been briefed, it might've been argued, but for some reason I have to presume the mediators didn't address it because they didn't say they addressed it. They said that addressed counter claims of which there were five, but they didn't address this. Therefore, I find that that's a fatal defect. I also am somewhat concerned, although I don't think it's dispositive, that there was only the $75 fee paid for Oil Capital Race Venture according to our court records, and that's set forth on the alternative dispute resolution. . . . --- if the mediation evaluation discussed the third-party complaint I would award you attorney fees, Mr. Lynch, even though one fee was paid. . . . Without that reference in there, I have to assume that it was not – presume that it was not an issue addressed at mediation. Therefore, I'm going to deny your request for attorney fees.

In response to Bay's counsel's comment that the counterclaim and third-party complaint were one pleading, the court stated:

> We are trained professionals, and language and terminology are the backbone of our profession. The two issues should've been – counter claims and third-party complaint should've been addressed separately; and five attorneys reviewed the mediation evaluation, and it says what it says. Now if you can persuade a higher court, more power to you. I'd love to see you get those fees.

Bay argues that the trial court erred in its finding that the mediation evaluation included the counterclaims but not the third-party complaint. This Court reviews this argument de novo, since it involves the interpretation of a court rule. *Merit Mfg & Die, Inc v ITT Higbie Mfg Co*, 204 Mich App 16, 19; 514 NW2d 192 (1994).

MCR 2.403(K)(2) states, in relevant part, as follows:

> The evaluation must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action.

MCR 2.403(K)(2) indicates that a mediation panel must rule on claims "filed in the action." Thus, the panel was obligated to rule on all filed claims. See also *Cam Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 556; 640 NW2d 256 (2002) (a party may not except claims from mediation). Hunter filed one pleading entitled "Counterclaim and Third-Party Complaint." Thus, the mediators were obligated to rule on both the counterclaim and third-party complaint. The mediation evaluation refers to "countercl." The inclusion of both "counterclaim" and "third-party complaint" in the title of the pleading was apparently made only because Bay was not a party to the original action. The "factual background" in the document pertains to both the counterclaim and the third-party complaint. Count I pertains only to the track, Count II pertains to both the track and Bay, Count III pertains to Bay, and Count IV pertains to both the track and Bay. It is not logical to conclude that the mediation panel considered only the claims against the track and failed to consider the claims against Bay. In light of the language of MCR 2.403(K)(2), as well as the fact that the mediation panel found no liability on the counterclaim while finding liability on the part of Hunter, it is clear that the mediation evaluation encompassed both the claims against the track (the counterclaims) and against Bay (the third-party complaint). The trial court erred by denying Bay's motion for mediation sanctions. Thus, we remand this matter to the trial court for a hearing to determine the appropriate amount of mediation sanctions pursuant to MCR 2.403.[5]

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

[5] In light of our affirmance of the judgment in favor of Hunter, we need not address Hunter's counterclaim, which was brought "in the alternative" in the event this Court reversed the judgment in favor of Hunter. We note, however, that we find no merit in the issues raised in the counterclaim.