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DISTRICT IV

April 16, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2011AP2453 Stansfield Vending, Inc. v. Zack Jusufi d/b/a Red Apple Social Club (L.C. # 2008CV475)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Zack Jusufi appeals from a judgment in favor of Stansfield Vending, Inc. for Jusufi's breach of a lease and an unpaid loan. He argues that he is entitled to have his lease with Stansfield declared void as against public policy prohibiting gambling and that the evidence does not support the jury's determination that the lease and loan were not for gambling purposes. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgment.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Stansfield leased to Jusufi several video poker machines for use at the Red Apple Social Club at a flat rate of \$50 per week, per machine. When a customer won a \$2700 jackpot that Jusufi could not pay, Stansfield loaned Jusufi the money and a letter agreement was signed that the machine would remain at the Red Apple until the entire \$2700 was repaid. Before expiration of the lease term and repayment of the entire loan, Jusufi had Stansfield remove the machines from the Red Apple.

Before the jury trial, Jusufi's motions to dismiss and for summary judgment on the ground that the contracts with Stanfield were void under WIS. STAT. § 895.055(1) were denied.² Jusufi's motions for a directed verdict during the jury trial were denied. The jury found that neither the lease nor the loan were for the purpose of or related to gambling and that Jusufi had been unjustly enriched by his arrangement with Stansfield.

Stansfield contends Jusufi waived his appellate issues because he did not file a motion after verdict. Stansfield overstates the forfeiture rule.³ The origin of the rule can be traced back

² WISCONSIN STAT. § 895.055(1) provides in part:

All ... contracts ... where the whole or any part of the consideration ... shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be void.

³ "Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts." *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (quoted source omitted). When the right to make an objection or assert a right on appeal is lost because of failure to do so in the circuit court, the proper term is "forfeiture." *Id.* The present case raises the question of forfeiture, not waiver. See *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177.

to *Wells v. Dairyland Mut. Ins. Co.*, 274 Wis. 505, 518, 80 N.W.2d 380 (1957),⁴ where the court stated:

We deem the correct rule to be that no error of the court should be reviewable *as a matter of right* on appeal without first moving in the trial court for a new trial bottomed on such error, if the error is of a category that a trial court could correct by granting a new trial.

Improperly denying a motion for a directed verdict is not the type of error corrected by granting a new trial but is error corrected by granting judgment in the moving party's favor. Thus, a motion after verdict is not necessary to garner appellate review of the ruling on the motion for a directed verdict. *See McNamer v. American Ins. Co.*, 267 Wis. 494, 497, 66 N.W.2d 342 (1954). *See also* WIS. STAT. § 805.14(4) (authorizing a motion challenging the sufficiency of the evidence or for directed verdict at the close of all evidence).

The issue before us is whether the circuit court erred in denying Jusufi's motion for a directed verdict at the close of the evidence.⁵ "The standard of review upon the denial of a motion for directed verdict is whether, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party." *Warren v. American*

⁴ The chain of cases begins with Stansfield's citation to *Suchomel v. University of Wisc. Hosps. & Clinics*, 2005 WI App 234, ¶10, 288 Wis. 2d 188, 708 N.W.2d 13 (pertaining to alleged error in jury instruction), quoting *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987) (pertaining to trial court's refusal to allow certain causes of action and certain trial court procedures, rulings and verdict formation), quoting *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 497, 228 N.W.2d 737 (1975) (pertaining to error in jury instruction), quoting *Kobelinski v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d 504, 517, 202 N.W.2d 415 (1972) (pertaining to error in jury instructions), citing to *Wells v. Dairyland Mut. Ins. Co.*, 274 Wis. 505, 518, 80 N.W.2d 380 (1957) (pertaining to claim of duplicitous verdict).

⁵ Resolution of the issue essentially tests the sufficiency of the evidence because the same standard of review applies. *See* WIS. STAT. § 805.14(1) (setting forth the sufficiency of evidence test).

Family Mut. Ins. Co., 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984). A circuit court “is better positioned to decide the weight and relevancy of the testimony.” *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). For that reason, we must give substantial deference to the circuit court’s assessment of the evidence. *See id.* at 389.

Jusufi focuses on evidence that Stansfield knew the machines would be utilized for gambling: information Stansfield provided to answer Jusufi’s questions about the operation and legality of the machines and how to make cash payouts, the inclusion of a printer to show winnings in cash, and advancement of the loan for the known purpose of covering the cash payout to a customer. He argues that Stansfield was benefitted by use of the machines for gambling purposes.

Stansfield’s knowledge about the use of the machines was not at issue. The jury was asked whether consideration for the lease was “in whole or in part for money won or lost by gambling.” The evidence was that the lease was for a flat rate for each machine and lease payments were not affected by how the machines were used or how much they were used. Jusufi could have set the machines to allow customers for free play. Jusufi was given the cashbox keys and all money deposited into the machines was his. From this evidence, the jury could conclude that there was no benefit conferred on Stansfield for the use of the machines for gambling and that consideration for the lease was money paid for the rental of equipment, not for money won by gambling.

With respect to the loan, the jury was asked to determine whether the loan agreement was “for the repayment of money lent or advanced at the time of and for the purpose of gambling.” The evidence was that Stansfield did not pay any money directly to customers for winnings.

Stansfield lent the money to Jusufi a couple days after his customer won the big jackpot. Stansfield gave Jusufi a check, which Jusufi deposited into his bank account and then withdrew money to pay his customer. The jury could conclude that the money Stansfield advanced was money Jusufi needed to pay his obligation to another person and not given at the time of and for the purpose of gambling.

We need not address Jusufi's contention that the contracts violate public policy embodied in WIS. STAT. § 895.055, prohibiting gambling contracts. The jury's determination that the contracts were not for gambling purposes is supported by the evidence and controls.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals