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What duty did the Casino have to disclose to the company that an employee of the company was gambling at the casino?

Background

Plaintiff is company that does business with defendant Casino. Casino knew that an employee of the company was a high stakes gambler at the casino. Casino should have also been suspicious as to where the employee was getting her money from because the employee was only a bookkeeper at the company. The Casino said nothing for years to the company and it was later discovered that the employee has stolen over one million dollars from the company.

Question Presented

What duty did the Casino have to disclose to the company that an employee of the company was gambling at the casino?

Answer

No duty of care or to disclosure could be found that would obligate the casino to notify the company under these circumstances.

Discussion

A. Common Law Duty

Whether a duty exists is a question of law for the court to decide. *Murdock v. Higgins*, 454 Mich. 46, 54 (Mich. 1997). In determining whether to impose a duty, the Court evaluates factors such as: the relationship of the parties, the foreseeability of the

harm, the burden on the defendant, and the nature of the risk presented. *Id.* Generally, an individual has no duty to protect another who is endangered by a third person's conduct.

Id. Where there is a duty to protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a “special relationship” either between the defendant and the victim, or the defendant and the third party who caused the injury. *Id.* Such a special relationship must be sufficiently strong to require a defendant take action to benefit the injured party. *Id.*

Generally recognized “special relationships” include invitor-invitee, common carrier-passenger, innkeeper-guest, landlord-tenant, employer-employee and doctor-patient. *Murdock*, 454 Mich. at 55. The duty to protect arising from a “special relationship” is based on control; where one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself, the duty to protect is imposed upon the person in control because he is best able to provide a place of safety. *Kendrick v. Ritz-Carlton Hotel Co.*, 2006 Mich. App. LEXIS 2393 (Mich. 2006).

We could find no cases where a casino was found to have had a “special relationship” with an employer of one its patrons. In this regard, there are no cases in Michigan that create a duty to disclose or a duty to protect an employer of one of its patrons, where the patron was gambling with the employer’s money.

A claim based on silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. *Saurman v. Bossardet*, 2007 Mich. App. LEXIS 1708 (Mich. Ct. App. 2007). Further, there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud. *Id.* Mere nondisclosure is insufficient to support an allegation of silent fraud. *Sal-*

Mar Bldg. Co. v. Formspec, Singh of Quailcrest, 2007 Mich. App. LEXIS 1596 (Mich. Ct. App. 2007). Instead, there must be circumstances that establish a legal duty to make a disclosure. *Id.* A legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information. *Id.*

Here, there appears to be no facts that will support a silent fraud cause of action because the casino had no duty to make a disclosure to the company, and the company made no inquiries to the casino regarding the employee.

B. Statutory Duty

31 CFR 103.21 requires casinos to report suspicious transactions. That section reads as follows:

§ 103.21 Reports by casinos of suspicious transactions.

(a) General. (1) Every casino shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. A casino may also file with FinCEN, by using the form specified in paragraph (b)(1) of this section, or otherwise, a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by this section.

(2) A transaction requires reporting under the terms of this section if it is conducted or attempted by, at, or through a casino, and involves or aggregates at least \$ 5,000 in funds or other assets, and the casino knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this part or of any other regulations promulgated under the

Bank Secrecy Act, Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5332;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the casino knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the casino to facilitate criminal activity.

(b) Filing procedures -- (1) What to file. A suspicious transaction shall be reported by completing a Suspicious Activity Report by Casinos ("SARC"), and collecting and maintaining supporting documentation as required by paragraph (d) of this section.

(2) Where to file. The SARC shall be filed with FinCEN in a central location, to be determined by FinCEN, as indicated in the instructions to the SARC.

(3) When to file. A SARC shall be filed no later than 30 calendar days after the date of the initial detection by the casino of facts that may constitute a basis for filing a SARC under this section. If no suspect is identified on the date of such initial detection, a casino may delay filing a SARC for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection. In situations involving violations that require immediate attention, such as ongoing money laundering schemes, the casino shall immediately notify by telephone an appropriate law enforcement authority in addition to filing timely a SARC. Casinos wishing voluntarily to report suspicious transactions that may relate to terrorist activity may call FinCEN's Financial Institutions Hotline at 1-866-556-3974 in addition to filing timely a SARC if required by this section.

(c) Exceptions. A casino is not required to file a SARC for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities.

(d) Retention of records. A casino shall maintain a copy of any SARC filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SARC. Supporting documentation shall be identified as such and maintained by the casino, and shall be deemed to have been filed with the SARC. A casino shall make all supporting documentation available to FinCEN, any

other appropriate law enforcement agencies or federal, state, local, or tribal gaming regulators upon request.

(e) Confidentiality of reports; limitation of liability. No casino, and no director, officer, employee, or agent of any casino, who reports a suspicious transaction under this part, may notify any person involved in the transaction that the transaction has been reported. Thus, any person subpoenaed or otherwise requested to disclose a SARC or the information contained in a SARC, except where such disclosure is requested by FinCEN or another appropriate law enforcement or regulatory agency, shall decline to produce the SARC or to provide any information that would disclose that a SARC has been prepared or filed, citing this paragraph (e) and 31 U.S.C. 5318(g)(2), and shall notify FinCEN of any such request and its response thereto. A casino, and any director, officer, employee, or agent of such casino, that makes a report pursuant to this section (whether such report is required by this section or made voluntarily) shall be protected from liability for any disclosure contained in, or for failure to disclose the fact of, such report, or both, to the extent provided by 31 U.S.C. 5318(g)(3).

(f) Compliance. Compliance with this section shall be audited by the Department of the Treasury, through FinCEN or its delegees, under the terms of the Bank Secrecy Act. Failure to satisfy the requirements of this section may constitute a violation of the reporting rules of the Bank Secrecy Act and of this part.

(g) Effective date. This section applies to transactions occurring after March 25, 2003.

The reporting required under 31 CFR 103.21 must be made to FinCEN and not to a private entity such as the company in the present case. We could find no federal law which creates a duty on the casino to report suspicious activity of a gambler to a private third party other than a government agency.

Under Michigan Law, a casino license holder has an obligation to report certain events including suspicious activity reports. Mich. Admin. Code r. 432.1224 reads in relevant part:

R 432.1224 General reporting requirements; obligation to report certain events.

Rule 224. A person who holds or applies for a casino license or supplier license shall provide an immediate oral report, followed by a written report, of suspected criminal activity related to the person's proposed or existing gambling operation or casino operation or supplier operations in Michigan. The person shall provide the reports to the Michigan state police, gaming section, as soon as practicable after the person becomes aware of the activity. Additionally, a person who applies for or holds a casino license or supplier license shall provide written notice to the board at the time the person becomes aware of any of the following:

(i) A suspicious activity report or a casino suspicious activity report, or both. Copies of the reports shall also be filed with the Michigan state police gaming section and the board at the time the reports are filed with the federal government.

Accordingly, under both Federal and State Law, a casino license holder has a duty to report suspicious activity. However, the reporting requirements must be made to the appropriate governmental agency and not to a private third party. Therefore, there is no duty to disclose imposed by statute.