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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000221-MR

STARS INTERACTIVE HOLDINGS (IOM) LTD.,
F/K/A AMAYA GROUP HOLDINGS (IOM) LTD.;
AND RATIONAL ENTERTAINMENT
ENTERPRISES LTD. APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00505

COMMONWEALTH OF KENTUCKY EX REL.
JOHN TILLEY, SECRETARY, JUSTICE AND
PUBLIC SAFETY CABINET APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JOHNSON,[1] AND JONES, JUDGES.

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[1] Judge Robert G. Johnson dissented in part and concurred in part in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

JONES, JUDGE: Appellee, the Commonwealth of Kentucky *ex rel.* John Tilley, Secretary, Justice and Public Safety Cabinet ("the Commonwealth"), initiated the underlying action in Franklin Circuit Court against numerous entities seeking to recover treble damages under Kentucky's Loss Recovery Act (the "LRA").[2] After extensive motion practice and a multitude of discovery issues, the Franklin Circuit Court entered an order finding Appellants, Stars Interactive Holdings (IOM) Limited f/k/a Amaya Group Holdings (IOM) Limited ("Amaya") and Rational Entertainment Enterprises Limited ("REEL"), liable to the Commonwealth in the amount of $870,690,233.82. Amaya and REEL now appeal. Following review of the record, applicable law, and oral arguments, we REVERSE and REMAND for the reasons more fully explained below.

I. BACKGROUND

The procedural history of this case is long and somewhat complicated. Accordingly, we recite only the facts and procedural history relevant to the parties to this appeal.

In March of 2010, the Commonwealth filed a complaint against Pocket Kings, Ltd. and "Unknown Defendants" seeking recovery for the Commonwealth under the LRA. The provisions of the LRA relied on by the Commonwealth state as follows:

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[2] Kentucky Revised Statutes ("KRS") 372.005-050.

> If any person loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more, or anything of that value, and pays, transfers, or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within five (5) years after the payment, transfer or delivery. . . .

KRS 372.020.

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

KRS 372.040.

Thereafter, the Commonwealth filed a number of amended complaints, each of which added various online poker playing forums and casinos, as well as some individuals, as party defendants. On November 2, 2011, the Commonwealth filed a third amended complaint adding, among others, PYR Software Ltd. ("PYR"), Oldford Group Ltd. ("Oldford"), and REEL (collectively referred to as the "PokerStars Defendants"). The third amended complaint alleged that the PokerStars Defendants were three of several entities used to conduct business for PokerStars, an Internet poker company that provided real-money gambling on Internet poker games to Kentucky residents. The Commonwealth alleged that when PokerStars hosted these online poker games, the PokerStars

Defendants took a percentage of the amount bet, won, or lost as the "rake" or "commission" for hosting the poker games. The Commonwealth contended that thousands of Kentucky residents had lost five dollars or more, either at one time or within 24 hours, while playing on the PokerStars websites. Therefore, those residents were considered "losers" under KRS 372.020. Additionally, the Commonwealth contended that receiving a "rake" from the games played qualified the PokerStars Defendants as "winners" under the statute. As the Commonwealth believed none of the Kentucky "losers" had brought a claim under KRS 372.020, it contended that it was entitled to collect trebled damages from the PokerStars Defendants pursuant to KRS 372.040. Like the prior complaints, the Commonwealth's third amended complaint was generic insomuch as it did not identify the specific transactions at issue, the names of any affected Kentucky residents, the specific locations the gambling took place within this Commonwealth, the amounts bet, or any specific information of the like.

On January 11, 2013, REEL filed a motion to dismiss the third amended complaint or in the alternative, a motion for a more definite statement.[3] In its memorandum accompanying the motion, REEL argued that the Secretary, acting as relator for the Commonwealth, lacked standing to pursue a claim against

[3] The Commonwealth had great difficulty obtaining service on the PokerStars Defendants as none were located or had agents within the United States. As a result, REEL and PYR were not served with the third amended complaint until November 27, 2012.

REEL under the LRA and that the third-amended complaint failed to satisfy the notice pleading requirements of CR[4] 8.01. On January 22, 2013, PYR filed a motion to dismiss the third amended complaint or, in the alternative, for a more definite statement. PYR's motion adopted and incorporated by reference the motion to dismiss filed by REEL.

In its response to the motions to dismiss, the Commonwealth noted that other defendants in the case had previously asserted standing and insufficiency of pleading arguments, which the circuit court had rejected. Accordingly, the Commonwealth incorporated by reference its earlier memoranda to the court. In those memoranda, the Commonwealth maintained that the allegations in its complaint were sufficient under CR 8.01, as KRS Chapter 372 does not require a heightened pleading standard, and that the Commonwealth had standing to bring the claims as "any other person" under KRS 372.040. Following a hearing, the circuit court denied both motions to dismiss by order entered April 17, 2013, and ordered the parties to proceed with discovery.[5]

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[4] Kentucky Rules of Civil Procedure.

[5] The vast majority of the proceedings below dealt with non-compliance with discovery requests and orders. While Appellants take issue with sanctions entered against them for their apparent non-compliance with discovery orders, we are ultimately able to resolve this appeal without reaching those issues. Accordingly, the procedural history of this case relating solely to discovery issues has been omitted from this opinion.

The Commonwealth obtained service on Oldford on March 17, 2014. Thereafter, Oldford filed a notice of removal to federal district court. As grounds for removal, Oldford contended that the Secretary, in his individual capacity, was the actual real party in interest in this case, not the Commonwealth. Accordingly, Oldford alleged that diversity of citizenship existed, giving the federal court jurisdiction under 28 U.S.C.[6] § 1332(a)(2). Once the case had been removed to federal court, REEL filed a motion to stay discovery, the Commonwealth filed a motion to remand to state court and a motion to stay the proceedings, and Oldford filed a motion to dismiss the third-amended complaint. By opinion and order dated March 31, 2015, the federal district court remanded the case to state court. *Commonwealth v. Pocket Kings, Ltd.*, No. 14-27-GFVT, 2015 WL 1480311 (E.D. Ky. Mar. 31, 2015). In its opinion, the federal district court noted the question of who was the proper real party in interest was "difficult"; however, it ultimately concluded that the proper party was the Commonwealth, thereby divesting the federal district court of jurisdiction. *Id.* The pending motions were therefore dismissed as moot. *Id.* During the pendency of the case's removal to federal court, all PokerStars Defendants were sold to Amaya.

On May 14, 2015, the Commonwealth moved for partial summary judgment against REEL and Oldford. The Commonwealth stated that in Oldford's

[6] United States Code.

objections and answers to the Commonwealth's first request for admissions, Oldford had admitted that, between October 12, 2006, and April 15, 2011, residents of Kentucky had played and lost money on PokerStars' sites and that Oldford and REEL had received part, or all, of a "rake" charged as a fee for hosting the games. The Commonwealth contended that Kentucky law on the LRA was clear: one who receives any part of a losing bet, including a "rake" charged in a game of poker, was liable for the full amount of the lost bet. Accordingly, the Commonwealth stated that the only remaining issue to be decided was the amount of damages owed, and that it was entitled to judgment as a matter of law on the issue of liability.

Oldford and REEL filed a joint motion in opposition to the Commonwealth's motion for partial summary judgment. Therein, they contended that the Commonwealth's motion had obscured the numerous remaining genuine disputes of material fact. Specifically, Oldford and REEL contended that: while Oldford had admitted that there were individuals living in Kentucky who had lost money playing on a PokerStars site, the Commonwealth had yet to identify any specific "loser" under the statute; there was still an issue as to whether poker was a game of skill, as opposed to a game of chance as used in KRS 528.010(3); and there was still a genuine issue of fact as to whether the Secretary was legally authorized to bring claims under the LRA. The parties further argued that the

Commonwealth could not rely on admissions made by Oldford to prevail on summary judgment against REEL. REEL and Oldford additionally disputed the Commonwealth's contention that Kentucky law was clear on their liability under the LRA.

On June 22, 2015, the circuit court heard the Commonwealth's motion for partial summary judgment, as well as its motion for sanctions against the PokerStars Defendants for alleged violations of discovery orders. In support of its motion for partial summary judgment, the Commonwealth pointed to the admissions Oldford had made and again stated that Kentucky law on liability under the LRA was clear. The Commonwealth reminded the circuit court that it had previously granted partial summary judgment against another defendant in the action, Party Gaming, under substantially similar facts. REEL and Oldford argued that Oldford's admissions could not be used to support partial summary judgment against REEL. Further, REEL and Oldford disagreed with the Commonwealth that the law was in the Commonwealth's favor. REEL and Oldford distinguished cases relied on by the Commonwealth, noted that there was no precedent for the Commonwealth bringing an action under the LRA, and contended that there was still a factual issue of whether poker was a game of chance or a game of skill.

On August 12, 2015, the circuit court entered an order granting the Commonwealth's motion for partial summary judgment on liability, granting the

Commonwealth's motion for sanctions in part, and entering default judgment against the PokerStars Defendants as a sanction. In its order granting partial summary judgment in the Commonwealth's favor, the circuit court first addressed REEL and Amaya's[7] liability under the LRA. The circuit court found that, under Kentucky law, any party who takes a portion of money lost in gambling is a "winner" under the LRA; this includes one who takes a rake from a poker game. As Amaya had admitted that it and REEL received a "rake" from games played on the PokerStars sites, the circuit court concluded that they were "winners" under KRS 372.020, despite the fact that they stood no chance of losing. The circuit court found that the Commonwealth had the ability to bring its claims against Amaya and REEL as "any other person" under KRS 372.040 and that Amaya had admitted that Kentucky residents had played poker on the PokerStars sites thereby making the Commonwealth's failure to identify any specific residents irrelevant. The circuit court also noted that Amaya and REEL had offered no persuasive legal authority for their contention that playing poker could not be considered gambling because skill predominated over chance. Accordingly, the circuit court concluded as a matter of law that the Commonwealth was entitled to partial summary judgment on the issue of liability.

[7] In July of 2015, the style of the case was changed to reflect Amaya's acquisition of the PokerStars Defendants. Oldford's name was changed to Amaya. REEL's name went unchanged.

Thereafter, the parties litigated the issue of damages before the circuit court. The parties disputed how damages should be calculated, the reliability of the Commonwealth's damages calculation, as well as whether treble damages should be awarded in this instance. During this same time period, Amaya and REEL moved the circuit to reconsider its decision on liability. On November 20, 2015, the circuit court entered an opinion and order denying Amaya and REEL's motion to reconsider, granting partial summary judgment in favor of the Commonwealth, and awarding the Commonwealth $290,230,077.94 in damages. The circuit court reserved the issue of whether the Commonwealth was entitled to receive treble damages for a later date. Following additional motion practice and briefing, on December 23, 2015, the circuit court entered an opinion and order. Therein, the circuit court clarified its position as to whether damages recovered under the LRA should reflect "net" or "gross" losses and concluded that, under the facts of this case, the Commonwealth was not required to "net" the losses incurred by Kentucky poker players. The circuit court ultimately concluded that Amaya and REEL were liable for the full amount of losses incurred by Kentucky players because they shared a "community of interest" with the actual winners. Accordingly, the circuit court concluded that the Commonwealth was not required to "net" the winnings it sought to recover and confirmed its original award of $290,230,077.94. The circuit court then concluded that treble damages were

mandatory. The circuit court entered a judgment in favor of the Commonwealth in the amount of $870,690,233.82, plus post-judgment interest calculated at a rate of 12% per annum.

Amaya and REEL filed a motion to alter, amend, or vacate the final judgment and requested the circuit court make detailed findings of fact. Following a hearing, the circuit court denied the motion to alter, amend, or vacate in substance. It did, however, amend its prior judgment to properly reflect the names of the judgment debtors.

This appeal followed.

II. ANALYSIS

Appellants raise numerous assignments of error as part of this appeal. The primary argument put forth by Appellants, and the one we conclude is ultimately dispositive, is that the circuit court erred as a matter of law when it denied their motions to dismiss. Appellants argue that the circuit court should have dismissed the complaints against them because the Commonwealth/Secretary does not have standing to sue under the LRA. Alternatively, Appellants argue that even if the Commonwealth has standing to sue, its complaint should have been dismissed because it lacked sufficient detail to state a valid cause of action against them.

A. The Commonwealth's Ability to Bring Suit under the LRA

Much of Appellants' reasoning as to why the Commonwealth is not the proper party to bring a suit under the LRA is based on the text of KRS 372.040, the purpose of the LRA, its legislative history, and its interplay with other statutory authority. Before delving into those arguments, however, we must address and dispose of Appellants' argument that the Secretary lacks authority to bring a claim on behalf of the Commonwealth as a sovereign.

As grounds for the case's removal to federal court, the PokerStars Defendants contended that the proper real party in interest was the Secretary in his personal capacity—not the Commonwealth—based on the fact that the Secretary had retained private counsel and initiated this action without the authority of the Attorney General. The federal district court determined that the proper real party in interest was the Commonwealth because any sum recovered as a result of this suit would go to Commonwealth's treasury, not to the Secretary. *Pocket Kings, Ltd.*, 2015 WL 1480311 at *7. Following remand, Amaya and REEL argued that the Secretary cannot bring this action on the Commonwealth's behalf. They point out that no statute gives the Secretary the authority to file suit on the Commonwealth's behalf. Instead, the Secretary relies on an Executive Order issued by the Governor, which Appellants maintain is insufficient.

Appellants contend that the Governor's Executive Order is invalid because it impermissibly expanded the Secretary's power. They note that KRS 15A.040 sets out the duties of the Secretary of the Justice and Public Safety Cabinet, and bringing suit on behalf of the Commonwealth is not one of those enumerated duties. Appellants maintain that bringing suit on behalf of the Commonwealth is vested exclusively in the Attorney General.

It is, of course, true that the Attorney General "is the chief law officer of the Commonwealth of Kentucky and all of its departments[.]" KRS 15.020. "[N]evertheless, the General Assembly may withdraw those powers [of the Attorney General] and assign them to others or may authorize the employment of other counsel for the departments and officers of the state to perform them." *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 829 (1942). KRS 12.210 gives the Governor, or any department with the Governor's approval, the authority to employ private counsel "to render legal services for one (1) or more departments, boards, program cabinets, offices or commissions." KRS 12.210(2). The Governor, as the chief executive of the Commonwealth, has the duty and authority to enforce Kentucky's laws. KY. CONST. § 81. As the Secretary is a member of the executive cabinet, KRS 11.065(1), he is authorized and required to assist the Governor in his duties. Accordingly, the Governor has the authority to order the Secretary to bring a suit to enforce the laws of Kentucky

and, under KRS 12.210, the Secretary has the right to retain private counsel to assist him in so doing.

Having determined that the Secretary has the authority to bring an action on behalf of the Commonwealth, we now address Appellants' claim that the Commonwealth cannot bring suit under the LRA. The text of KRS 372.040, the specific provision of the LRA on which the Commonwealth relies as authority for it to bring this action, states as follows:

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, **any other person may sue the winner**, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

(Emphasis added). The Commonwealth contends that it easily fits within the class encompassed by the phrase "any other person." Appellants posit that, while "any other person" does indeed cover a broad range of "people" with the ability to sue under the statute, it is limited to the common meaning of the word "person" – *i.e.*, a natural person.[8] Of course, KRS Chapter 372 does not define "person"; if it did, the question would be easily resolved.

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[8] *See Person*, BLACK'S LAW DICTIONARY (10th ed. 2014): "1. A human being.—Also termed *natural person*; *Person*, OXFORD LIVING DICTIONARIES, http://en.oxforddictionaries.com/definition/person (last visited Mar. 3, 2018): "1. A human being regarded as an individual."

"When interpreting statutes, our utmost duty is to 'effectuate the intent of the legislature.'" *Brewer v. Commonwealth*, 478 S.W.3d 363, 371 (Ky. 2015) (quoting *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002)). "That intent is perhaps no better expressed than through the actual text of the statute, so we look first to the words chosen by the legislature . . . ." *Id.* When examining the text, "a court should 'use the plain meaning of the words used in the statute.'" *Rhodes v. Commonwealth*, 417 S.W.3d 762, 765 (Ky. 2013) (quoting *Monumental Life Ins. Co. v. Dep't of Revenue*, 294 S.W.3d 10, 9 (Ky. App. 2008)). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Hall v. Hosp. Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (quoting *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005)). Additionally, we "must consider 'the intended purpose of the statute—the reason and spirit of the statute—and the mischief intended to be remedied.'" *Commonwealth v. Kash*, 967 S.W.2d 37, 43 (Ky. App. 1997) (quoting *City of Louisville v. Helman*, 253 S.W.2d 598, 600 (Ky. 1952)). "The courts should reject a construction that is 'unreasonable and absurd' in preference for one that is 'reasonable, rational, sensible, and intelligent.'" *Id.* at 44 (quoting *Johnson v. Frankfort & C.R.R.*, 303 Ky. 256, 197 S.W.2d 432, 434 (1946)). "The interpretation of a statute is a matter of law." *Commonwealth v. Garnett*, 8 S.W.3d 573, 575 (Ky. App. 1999).

Accordingly, we review the circuit court's interpretation *de novo*, in that we owe no deference to it. *Id.*

In finding that the phrase "any other person" as used in KRS 372.040 includes the Commonwealth, the circuit court relied on the Court's application of KRS 446.010(33) in *Commonwealth ex rel. Keck v. Shouse*, 245 S.W.2d 441 (Ky. 1952). KRS 446.010 gives general definitions for words in Kentucky statutes to aid the courts in construing statutes where the words are not otherwise defined. Under the statute, the word "person" "may extend and be applied to bodies-politic and corporate, societies, communities, the public generally, individuals, partnerships, joint stock companies, and limited liability companies[.]" KRS 446.010(33).

In *Shouse*, the Commonwealth brought a civil suit against Shouse alleging that he had violated KRS 433.750 by cutting down trees located on property owned by the Commonwealth. The circuit court dismissed the complaint for failure to state a cause of action. On appeal, however, the Court found that while KRS 433.750 was a penal statute, the Commonwealth had a cognizable claim under Kentucky's negligence *per se* statute, KRS 446.070, which provides that "a person" who has sustained damages because of an offender's violation of a statute may recover. The *Shouse* court noted that KRS 446.010(33) provided that

"person" may extend to bodies politic and concluded that, therefore, the Commonwealth had a cognizable claim.

We recognize that *Shouse* represents an instance where the Commonwealth was permitted to bring a statutory claim as a "person" and we do not disagree with the Court's holding in that instance. However, nothing in *Shouse* indicates that it was meant to create a steadfast rule that the Commonwealth will *always* be considered a "person" in whichever statute the word may be used. Citing to two other cases that relied on *Shouse* in conjunction with KRS 446.010(33), the Commonwealth asserts that "courts have uniformly held that the Commonwealth – and even the U.S. Government – may sue as a 'person' under Kentucky statutes." Appellee Br. 6. As in *Shouse*, both cases cited by the Commonwealth were determining whether a sovereign entity could be considered a "person" that can maintain an action through KRS 446.070. Neither case cited *Shouse* as supporting a general proposition that the Commonwealth is always considered a "person." *See U.S. v. Kentucky Nat. Ins. Co.*, No. 89-6246, 1990 WL 78173 (6th Cir. June 11, 1990); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d. Cir. 2013). Rather, both cases cited *Shouse* for the limited conclusion that a sovereign had the ability to maintain an action through KRS 446.070, which carries the additional requirement that a person bringing an action under it fall "within the class of persons the [penal] statute intended to be protected." *Hargis v.*

Baize, 168 S.W.3d 36, 40 (Ky. 2005) (citation omitted). In *Shouse*, it was not difficult to make that determination because the Commonwealth owned the property where the felled trees were located. We cannot necessarily make the same conclusion with respect to the LRA.

KRS 446.010(33) does not dictate that "bodies politic or corporate" are always considered persons. It indicates that "unless context requires otherwise" the word "person" "*may* extend to bodies politic and corporate . . . ." KRS 446.010(33) (emphasis added). "It is elementary that 'may' is permissive . . . ." *Hardin Cty. Fiscal Court v. Hardin. Cty. Bd. of Health*, 899 S.W.2d 859, 861 (Ky. App. 1995). A court has the discretion whether to incorporate KRS 446.010's definition of person into the statute it is interpreting. *Commonwealth v. Illinois Cent. R. Co.*, 152 Ky. 320, 153 S.W. 459, 461-62 (1913).

Determining that neither the common usage of the word "person" nor *Shouse* and KRS 446.010(33) dictate that the phrase "any other person" necessarily includes the Commonwealth, we turn to the background and purpose of the LRA. The LRA derives from England's 1710 Statute of Queen Anne, which "prohibited the enforcement of gambling debts and provided for a recovery action by the losing gambler, or any other person on the gambler's behalf, for gambling debts already paid." Joseph Kelly, *Caught in the Intersection Between Public Policy and*

Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States, 5 CHAP. L. REV. 87, 87-88 (2002). As it is in effect today, Kentucky's LRA retains all three tenets found in the Statute of Queen Anne: it declares all gambling contracts void (KRS 372.010); it allows the loser to recover the amount lost from the winner (KRS 372.020); and, if the loser does not file suit within a prescribed time-period, it allows a third-party to recover damages in the loser's stead (KRS 372.040).

In its present state, the LRA does not require that a claimant under KRS 372.040 split his recovery with the Commonwealth; however, that was not always the case. Earlier versions of the LRA mandated that a third-party claimant turn over half of the treble damage recovery to the Commonwealth. *See* Act of 1851, Rev. Stat., Ch. 42, § 4 (Stanton 1860); *Conner v. Ragland*, 54 Ky. 634, 634 (1855) ("[W]hen another sues after six months, and treble the amount is recovered, one-half the amount belongs to the commonwealth."). The LRA was amended in 1873 and the requirement that one-half of a third-party's recovery be given to the Commonwealth was removed. *See* Act of 1873, Gen. Stat., Ch. 47, Art. 1, § 4 (Bullitt & Feland 1877). That same year, the gambling forfeiture statute was amended to eliminate a provision that allowed a private seizor to retain half of the seized property. Instead, the amended statute mandated that all seized property be retained by the Commonwealth. *Compare* Act of 1799, Vol. 1, Digest Stat. Laws

of Ky., Title 87, § 1 (Morehead & Brown 1834),[9] *with* Act of 1873, Gen. Stat., Ch. 47, Art. 1, § 6 (Bullitt & Feland 1877).[10] One could chalk up the fact that these amendments were made in the same year as mere coincidence; however, the more probable theory is that these amendments were made with intention—the LRA was to be used to provide recovery exclusively to private citizens, while the forfeiture statute was to provide recovery exclusively to the Commonwealth.

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[9] Providing in pertinent part as follows:

> *Be it enacted by the General Assembly,* That all moneys or other property, exhibited for the purpose of alluring persons to bet at any game, or horse-race, or to make any bet whatsoever, and all moneys actually staked or betted, shall be liable to seizure by any magistrate or magistrates, or by any other person or persons, under a warrant from a magistrate, wheresoever the same may be found; and all such moneys, so seized, shall be accounted for and paid by the person or persons making the seizure to the court of the county, or corporation, wherein the seizure shall be made, and applied by the court, in aid of the county levy, **deducting thereout one half, to be paid to the person or persons making the seizure.**

(Emphasis added).

[10] Providing in pertinent part as follows:

> Any such bank, table, or machine, or articles used for carrying on [a game of chance], together with all money or other thing staked or exhibited to allure persons to bet, may be seized by any magistrate, sheriff, constable, or police officer of a city or town, with or without a warrant, and upon conviction of the person setting up or keeping the game, **such money or other thing shall be forfeited for the use of the Commonwealth**, and such table, machine, and articles shall be burnt or destroyed.

(Emphasis added).

We gain further confidence in this interpretation by looking to the purpose of the LRA. Over the years, jurisprudence dealing with the LRA has opined on the reasons for its existence. The LRA has a dual purpose as a "means of suppressing an enormous public mischief, and of restoring to an individual that of which he has been illegally, if not fraudulently deprived . . . ." *McKinney v. Pope's Adm'r*, 42 Ky. 93, 99 (Ky. 1842). The purpose of suppressing illegal gambling was greater affected by allowing third parties to sue and receive treble damages. "Without that incentive [of treble damages], few men would encounter all the responsibilities incident to a service so unwelcome and perilous." *Perrit v. Crouch*, 68 Ky. 199, 204 (Ky. 1868). It is of relevance that the Statute of Queen Anne and its progeny were enacted in a time "where the absence of an organized police authority to enforce criminal statutes made necessary the use of such rewards for informers." *Salamon v. Taft Broad. Co.*, 475 N.E.2d 1292, 1298 (Ohio Ct. App. 1984) (in discussing third-party recovery of gambling losses under Ohio's Loss Recovery Act[11]). Further, allowing recovery of treble damages "is in the nature of punitive damages but from which the state derives nothing except the

[11] R.C. § 3763.04 states that:

> If a person losing money or thing of value, as provided in section 3763.02 of the Revised Code, within the time therein specified, and without collusion or deceit, does not sue, and effectively prosecute, for such money or thing of value, any person may sue for and recover it, with costs of suit, against such winner, for the use of such person prosecuting the suit.

hope that it will deter a violation of one of its criminal laws." *Salonen v. Farley*, 82 F.Supp. 25, 27 (E.D. Ky. 1949).

In addition to the deterrence of illegal gambling, the LRA "is meant to protect the homes of those who cannot afford to be enticed into gambling establishments to dissipate their earnings or property to the distress of their families." *Hartlieb v. Carr*, 94 F.Supp. 279, 280 (E.D. Ky. 1950). A gambler who is a "loser" under KRS 372.020 often will not wish to pursue legal action against his winner. All too often, however, a gambler's losses affect not only the "loser" but also his dependents. The solution is to allow the dependent to sue to recover those losses. We recognize that KRS 372.040 uses the broad language of "any other person" rather than defining a specific class of those who may recover on the "loser's" behalf. Broad language, however, seems necessary to ensure that this purpose is adequately achieved:

> The makers of the statute were confronted with the proposition to enable defendants to recover money lost by their breadwinner at gambling and to deter gambling by allowing the recovery of treble damages. Under Kentucky statutes various relationships create a legal obligation of support and maintenance. By new enactment, amendments or judicial constructions the persons included as dependents might be enlarged. Consequently rather than have one of the purposes of the statute (that of protecting dependents) defeated by possibly omitting one later named to be a dependent it gave the right to all persons. For instance, there may be cases wherein a step-father acting in loco parentis would

> be held to be within the class of dependents contemplated by statutes requiring support.

Salonen, 82 F.Supp. at 28. Other courts interpreting the purpose of the LRA in their states have concluded similarly. *See, e.g., Berkebile v. Outen*, 426 S.E.2d 760, 763 (S.C. 1993) (The statute "indicates that the General Assembly contemplated a policy which prevents a gambler from allowing his vice to overcome his ability to pay [and] to protect a citizen and his family from the gambler's uncontrollable impulses.").

While certainly not dispositive, it is not insignificant that the Commonwealth has never brought a claim under the LRA. *See U.S. v. Cooper Corp.*, 312 U.S. 600, 613-14, 61 S.Ct. 742, 748, 85 L.Ed. 1071 (1941), *superseded by statute*, 15 U.S.C. § 15a. In fact, in our research, we have failed to uncover any case in any sister jurisdiction with similarly-worded statutes where the state has brought a claim under its own version of LRA as a third-party.[12] Perhaps more

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[12] In *U.S. v. Resnick*, 594 F.3d 562 (7th Cir. 2010), the United States sought to recover money Resnick had paid to a bookie, Poeta, to satisfy illegal gambling debts because Resnick was insolvent. The United States recovered this money using theories of fraudulent transfer under the Federal Debt Collection Procedure Act and common-law unjust enrichment. It was successful on those claims. When discussing whether Poeta was entitled to set-off the judgment against him by subtracting payments he had made to Resnick on winning bets, Judge Hamilton noted that 720 Ill. Comp. Stat. 5/28-8 provided a cause of action by which anyone could sue on behalf of an illegal gambling loser and allowed for recovery of all losses, not the net of gambling exchanges over some extended period of time. *Id.* at 570-71. We read the reference to Illinois' LRA, in dicta, as being used as support for why Poeta was not entitled to set-off his damages, not as stating that the United States could have successfully brought suit against Poeta under the LRA. No cases have cited *Resnick* for this proposition.

significantly, our research shows that since 1949, there are no reported cases of a complete stranger bringing an action under KRS 372.040 to recover losses for himself. *Craig v. Curd*, 309 Ky. 549, 218 S.W.2d 395, 396 (1949) ("This is an equitable action, instituted by the appellant as an informer under KRS 372.020 and 372.040."). Of course, the plaintiff bringing suit under KRS 372.040 is a "stranger" to the gambling transaction, but in all cases has some relationship to the "loser" for whom they are bringing the action.[13]

Allowing the Commonwealth to bring this claim as "any other person" may well serve the purpose of suppressing illegal gambling. The large judgment the Commonwealth received in the circuit court would certainly deter similar Internet gaming/betting services from conducting business with residents of Kentucky. The Commonwealth undoubtedly has an interest in the public policy behind suppressing illegal and unregulated gambling. Thus, there is a strong argument that reading KRS 372.040 to embrace claims brought by the Commonwealth would serve to better effectuate the policy purposes behind the LRA. However, allowing the Commonwealth to recover the losses in the stead of

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[13] *See Akers v. Fuller*, 312 Ky. 502, 228 S.W.2d 29 (1950) (Plaintiff recovering husband's losses); *Kindt v. Murphy*, 312 Ky. 395, 227 S.W.2d 895 (1950) (Plaintiff recovering son's losses); *Hartlieb v. Carr*, 94 F.Supp. 279 (E.D. Ky. 1950) (Plaintiff recovering husband's losses); *Scott v. Curd*, 101 F.Supp. 396 (E.D. Ky. 1951) (Plaintiff recovering husband's losses); *Veterans Serv. Club v. Sweeney*, 252 S.W.2d 25 (Ky. 1952) (Plaintiff recovering wife's losses); *Tabet v. Morris*, 285 S.W.2d 143 (Ky. 1955) (Plaintiff recovering son's losses); *Gumer v. Sailor*, 286 S.W.2d 515 (Ky. 1956) (Plaintiff recovering son's losses).

the actual "losers," or the family members and other dependents of those "losers," would completely contravene the other purpose of the LRA—to allow those "losers" to recover their losses and avoid becoming destitute as a result of a gambling problem. The Commonwealth is not bringing this action to collect the money and then return losses to the "losers." It is bringing this action to collect treble damages for its own benefit.

"[T]he Loss Recovery Act should not be interpreted to yield an unjust or absurd result contrary to its purpose." *Vinson v. Casino Queen, Inc.*, 123 F.3d 655, 657 (7th Cir. 1997). In common parlance, the word "person" does not encompass the Commonwealth; without a modifier (such as juristic or artificial), the word "person" is limited to human beings. While KRS 446.010(33) permits the Commonwealth, as a body-politic, to be included as a "person" when the word is used in a statute, it does not mandate it. Here, allowing the Commonwealth to recover under KRS 372.040 contravenes one of the stated purposes—ensuring that a losing gambler and his family are not left impoverished as a result of the gambler's vice—by allowing the Commonwealth to take what could, absent the Commonwealth's suit, be recovered by a suit of the gambler's own representative. The purpose of suppressing illegal gambling is not thwarted by the Commonwealth's inability to sue under the LRA. Other, natural persons still have the ability to sue under the LRA and collect treble damages from the "winner." In

so doing, the treble damages that person collects will still work as a deterrent against illegal gambling.

Had the General Assembly intended to confer on the Commonwealth an ability to recover under KRS 372.040, it knew how to do so. Earlier versions of the LRA provided that one-half of the recovery received by a third party went to the Commonwealth. Under those versions, it can be assumed that the "person" suing under the statute is someone other than the Commonwealth itself. The provision dictating that one-half of the recovery be given to the Commonwealth was later removed by amendment; however, no language was added indicating that the Commonwealth could sue on its own behalf to receive treble damages.

Moreover, it is abundantly clear that treble damages were made available to incentivize private persons to bring LRA actions. *See Perrit*, 68 Ky. at 204. A private individual who knows of illegal gambling activity is not under any obligation to report it to authorities. The LRA sought to encourage private persons to bring LRA actions by increasing the judgment available to them. The hope was that the provision for treble damages would incentivize private individuals to undergo the burdens associated with enforcing the LRA. The Commonwealth, in this case the Secretary acting on the Governor's order, is already under an obligation to enforce the laws of the Commonwealth. We cannot accept that the

Commonwealth must be incentivized with the promise of treble damages before it can be expected to bring suit to enforce its own laws.

In fact, no such incentive is necessary because the General Assembly has provided the Commonwealth with its own mechanism to deter illegal gambling. KRS 528.100 provides that gambling devices or records used in illegal gambling shall be forfeited to the Commonwealth. "Money may be subject to seizure along with gambling devices, when the circumstances make it clearly apparent the money formed an integral part of the illegal gambling operation." *Gilley v. Commonwealth*, 312 Ky. 584, 229 S.W.2d 60, 63 (1950). KRS 500.090(2) states that "[m]oney which has been obtained or conferred in violation of any section of this code shall, upon conviction, be forfeited for use of the state." KRS 528.020-.030 make it illegal to knowingly advance or promote illegal gambling.

In light of the foregoing, we conclude that the term "person" as used in LRA does not authorize suit on behalf of the Commonwealth. Neither the purpose nor history of the statute support the Commonwealth's inclusion as a "person" authorized to bring suit and recover treble damages under the LRA. Accordingly, we hold that the phrase "any other person," as it is used in KRS 372.040, is limited to natural persons. Accordingly, the circuit court erred in denying the PokerStars Defendants' motions to dismiss this action.

B. Pleading Requirements under KRS 372.040

Even if the Commonwealth were a proper person to bring suit under the LRA, we do not believe that the Commonwealth's third amended complaint stated a valid claim in this particular instance. In its third amended complaint, the Commonwealth alleged that: during the five years preceding the filing of the action, "thousands of Kentucky residents" lost five dollars or more in gambling games hosted by PokerStars; the PokerStars Defendants received a rake of the amounts lost; and, "on information and belief" no "loser" located in Kentucky, or any creditor, had sued under KRS 372.020.

Appellants sought dismissal of the third amended complaint on the basis that it contained only generalized allegations that were too vague to support a valid cause of action under the LRA. The circuit court denied the motions to dismiss. It concluded that the Commonwealth's third amended complaint: "satisfied[d] the notice pleading requirements of CR 8.01 and state[d] a valid claim for relief." R. 2001. Appellants again raised the fact that the Commonwealth had failed to identify any specific "loser" in their opposition to the Commonwealth's motion for partial summary judgment on liability. The circuit court found that the Commonwealth's failure to identify a "loser" was irrelevant in light of Oldford's admission that Kentucky residents had lost money while playing poker on the PokerStars platform. R. 4239.

CR 8.01 requires only that that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Kentucky has long adhered to the notice pleading theory: "All that is necessary is that a claim for relief be stated with brevity, conciseness and clarity." *Nat. Res. and Envtl. Prot. Cabinet v. Williams*, 768 S.W.2d 47, 51 (Ky. 1989) (citation omitted); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 293 (Ky. App. 2009); CR 8.01(1). "The true objective of a pleading stating a claim is to give the opposing party fair notice of its essential nature." *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962).

The Commonwealth's complaint informed Appellants that the Commonwealth was bringing an LRA action against them. It did not provide Appellants with even the most basic notice of what gambling transactions were at issue. The reason for this is that the Commonwealth never identified any particular transactions prior to filing its complaint. Instead, the Commonwealth sought to hold Appellants collectively liable for thousands of different as-of-yet unidentified acts of illegal gambling occurring during the widest time frame the LRA allowed. Specifically, the Commonwealth's complaint alleged that it had the right to bring suit based on the losses of "thousands of Kentucky residents," yet it failed to identify even one Kentucky resident who had lost wagers on the PokerStars cite. It indicated that alleged losses had occurred within the past five years—*i.e.*, within

the statutory period—but failed to identify a specific date on which these alleged losses had occurred. The Commonwealth believed that these losses were in amounts of five dollars or more, but failed to even place an approximate dollar figure on the amount of the losses.

While the LRA may not be subject to a heightened pleading, the statute itself contemplates that the plaintiff will be able to identify a particular (specific) act of illegal gambling prior to receiving a judgment. A prerequisite for bringing a claim under the statute is that the "loser" or his creditor has not brought a claim under KRS 372.020 within six months of delivering payment to the winner. KRS 372.040. Thus, before there can be a cause of action in a third party, there must be a specific, definite person who failed to bring suit. The specific "loser" is a necessary part of the statute. The Commonwealth cannot allege that those six months have passed, or that it has timely brought its claim, without alleging a specific "loser" and the date on which that "loser" lost. Without that information the Commonwealth—and indeed, no plaintiff—can demonstrate a valid cause of action under KRS 372.040. *See Hartlieb v. Carr*, 94 F. Supp. 279, 281 (E.D. Ky. 1950) (holding that without alleging the date the losses were sustained wife's cause of action under KRS 372.040 was too vague and indefinite to support a cause of action).

In *Humphrey v. Viacom, Inc.*, No. 06 2768 DMC, 2007 WL 1797648, at *6 (D.N.J. June 20, 2007), a New Jersey federal district court considered whether a plaintiff could maintain a cause of action under New Jersey's LRA statute in light of the state's liberal notice pleading requirement. Ultimately, the court determined that the plaintiff could not do so. It reasoned as follows:

> Plaintiff does not identify any individual who paid an entry fee to play one of the Defendants' fantasy sports games; he does not identify the nature of the "wager" or "bet" made between such an individual and either of the Defendants; he does not allege when the loss occurred; and, . . . he does not allege that such an individual lost such a "wager" or "bet" to either of the Defendants.
>
> Plaintiff fails to identify even one individual who participated in even one of the subject leagues, much less one who allegedly lost money to Defendants in those leagues, and concedes that he has done neither himself. (Compl.¶¶ 9, 71). In short, Plaintiff asks this Court to indulge a gambling qui tam suit seeking a "recover[y] for his own use, unknown amount of money lost by unnamed and unknowable persons." *Salamon*, 475 N.E.2d at 1298.
>
> New Jersey's adoption of more modern notice pleading rules has not changed the strict requirement that a plaintiff seeking to pursue a claim under the gambling loss-recovery statute "must, in his pleading, allege all the facts necessary to bring him within the statute." *Zabady v. Frame*, 22 N.J.Super. 68, 70 (App. Div. 1952).

Id. at *4-6. The New Jersey federal court is not alone in holding that a plaintiff seeking to recover under a gambling loss recovery statute, like Kentucky's statute, must allege certain foundational facts to state a prima facie claim. *See*

Fahrner v. Tiltware LLC, 13-0227-DRH, 2015 WL 1379347, at *6 (S.D. Ill. Mar. 24, 2015), aff'd sub nom. *Sonnenberg v. Amaya Group Holdings (IOM) Ltd.*, 810 F.3d 509 (7th Cir. 2016) ("The allegations of Daniel Fahrner's losses are devoid of detail, failing to allege the exact amounts he purportedly lost gambling, when he lost the sum, to whom he lost the sum, and what type of game he was playing. Thus, plaintiffs have failed to allege the "who," "what," and "when" to sustain a cause of action, individually and on behalf of others, under the LRA."); *Langone v. Kaiser,* 12 C 2073, 2013 WL 5567587, at *4 (N.D. Ill. Oct. 9, 2013) ("[I]n order to allege a ripe claim under the Loss Recovery Act, Langone must allege that a specific loser lost a certain amount and failed to bring a claim for that amount within six months. He has failed to do that here.").

We agree with the rationale of the above-cited opinions. Kentucky's LRA contemplates that the third-party bringing suit to recover for another's losses will have some knowledge of the illegal gambling he seeks to redress. A third-party cannot state a valid claim under the LRA without identifying the basic facts necessary to give rise to a statutory cause of action. In other words, a third party must do more than assert that the defendant fostered illegal gambling in the state that caused unidentified Kentuckians unspecified amounts of damages as the Commonwealth did in this case.

Allowing a complaint, like the one put forth by the Commonwealth, to move forward would lead to an absurd, unjust result. It would mean that any private person with knowledge of the general nature of Appellants' electronic gaming format could allege an LRA claim in a wholly conclusory and generic fashion and walk away a billionaire without ever having identified a single gaming transaction with specificity. The LRA was never intended to be used in this fashion. It was intended to promote natural persons who had knowledge of specific instances of illegal gambling to file suit to assist the Commonwealth in enforcing its anti-gambling regulations. To that end, we hold that even under our liberal notice requirements, a third-party LRA complaint must set forth basic facts such as the identity of the parties, date of the conduct, and nature of the gambling losses at issue. This conclusion does not eviscerate or do violence to our liberal pleading requirements. To the contrary, it is in conformity with their purpose of supplying the defendant with a concise statement of the general nature of allegations at issue.

III. CONCLUSION

In light of the foregoing, we reverse the judgment of the Franklin Circuit Court. On remand, an order shall be entered dismissing the action.

ACREE, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS IN PART AS TO LIABILITY AND CONCURS IN PART AS TO DAMAGES, WITHOUT FILING A SEPARATE OPINION.

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