

No. COA-06-123

FOURTEENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

JOKER CLUB, L.L.C.,)
Plaintiff-Appellant,)

FROM DURHAM COUNTY
No: 04CVS 6034

vs.)

DISTRICT ATTORNEY,)
14TH JUDICIAL DISTRICT,)
Defendant-Appellee.)

BRIEF OF PLAINTIFF-APPELLANT

-12-

property or other thing of value is bet on the game, the betting element appears to be essential to a valid charge against an "operator" as well as against a player of a game of chance. See State v. Chase, 117 N.C. App. 686, 453 S.E2d 195 (1995) (statement of charges under G.S. 14-292 was sufficient where it was alleged that the defendant operated a game of chance, "a poker machine by paying a player money for said player's score.").

The leading case in North Carolina interpreting the phrase "game of chance" is State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953). There, the court held that "a game of chance is one in which the element of chance predominates over the element of skill, and the game of skill is one in which the element of skill predominates over the element of chance." *Id.* at 37. In Stroupe the Court reviewed a number of opinions that had attempted to define the term "game of chance." The Court cited State v. Gupton, 30 N.C. 271, which had previously held that "the universal acceptance of "a game of chance" is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." *Id.* at 36. The court cited cases where tenpins, (State v.

-13-

Gupton, 30 N.C. App. 271(1848) bowling, (State v. Abbott, 218 N.C. 470 shuffleboard, State v. Bishop, 30 N.C. 266, 30 N.C. 266 (1848) and shooting at beef and turkeys (State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895) were all held not to be games of chance. The Stroupe court went on to emphasize that the chief consideration in determining whether a game was one of skill or of chance is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular game. Stroupe at Id. 38.

In referencing games of chance, Stroupe cites State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895) in which the Court held that "if several parties each put up a piece of money, and then decide by throwing dice who shall have the aggregate sum or "pool", this is, unquestionable, a game of chance. Cases like these rest upon the basis that these games are decided not by judgment, practice, skill or adroitness, but by a turn of a card or a cast of the dice." Id. at 703.

It is important here to emphasize that, unlike DeBoy, the evidence offered by the Plaintiff at trial demonstrated the wide ranging skills necessary to become a successful poker player. There are a myriad of skills that can be acquired by a person as one attempts to learn to play the

-14-

game. It is difficult to imagine that chess, checkers, billiards, shuffleboard and turkey shooting are games of skill but poker is a game of chance.

Unlike the newly enacted North Carolina where a player merely purchases a ticket and hopes to win, a successful poker player must analyze not only the cards he has been dealt, but also the other players in the game, their histories and tendencies, and the mathematical and statistical consequences of each player's actions and reactions.

In Collins Coin Music v. North Carolina Alcohol Beverage Control, 117 N.C. App. 405, 451 S.E.2d 306 (1994), the Court, in dicta, indicated that draw poker might be a game of skill rather than of chance. There, the Plaintiff brought a declaratory judgment action to determine whether a video poker game was a game of chance and constituted an illegal slot machine under G.S. 14-306. In affirming the trial court's order granting partial summary judgment against the Plaintiff on this issue, the Court distinguished the skill elements associated with the ordinary game of draw poker from those in the video version. In holding that the video game version of poker was a game of chance, the court reasoned that:

...except for knowledge of the law of probabilities, all of the skill elements associated with the ordinary game of draw poker are absent in the video version. The game of draw poker, played against other individuals, permits a player to use psychology, bluffing, and knowledge of the law of probabilities

-15-

relative to the game of poker, to increase his potential win relative to the total number of games played. Psychology and bluffing has no effect on the final outcome of play when playing electronic video poker...

An additional and perhaps more important factor in our decision is that, although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot determine or influence the result since the cards are drawn at random. In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element. The machines have an internal record keeping system to track the number of games played and the number of points won, and allows only a set percentage of winning hands to be dealt. Therefore, over time, even the astute player cannot defeat the retention ratio.

Considering the overall operation of the video game, it is clear that a player's knowledge of statistical probabilities can maximize his winnings in the short term, but that he cannot determine or influence the result over the long haul. Hence, we conclude that the element of chance dominates the element of skill in the operation of the video card game. Id. at 409.

Thus, inasmuch as the elements of skill associated with ordinary poker are not thwarted by any mechanical limit on the number of hands that can be won, the Collins Coin Music court supports Appellant's argument that live poker, unlike the video version, is dominated by the element of skill.

In the instant matter the Plaintiff-Appellant would urge this Court to review the testimony offered at trial and to review the referenced case

-16-

law and conclude that the trial court erroneously found that poker is a game of chance under North Carolina law.

CONCLUSION

For the foregoing reasons, Plaintiff-appellant respectfully request the Court to grant it relief from the portion of the Order which deny injunctive relief and to reverse the trial court's conclusion that poker is a game of chance as that term is set forth in N.C.G.S. 14-292.

Respectfully submitted, this _____ day of February, 2006.

Allen W. Powell
Attorney for Plaintiff-Appellant
P.O. Box 702
Raleigh, NC 27602
N.C. State Bar #11057
Telephone: 919-829-1140

-17-

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served on the following individual by the undersigned counsel for Petitioner by depositing a copy of the same with the U.S. Postal Service in a properly addressed envelope with adequate postage, certified mail, return receipt requested, in the manner prescribed by Rule 5 of the Rules of Civil Procedure, to the address listed below:

Mr. David J. Adinolfi, II
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

This the _____ day of February, 2006.

Allen W. Powell
Attorney for Petitioner
P.O. Box 701
Raleigh, NC 27602
(919) 829-1140
State Bar No. 11057