IN THE SUPREME COURT OF

THE STATE OF HUNT

TECHMONT PARK, Petitioner, vs. HUNTLOAN SERVICING, Respondents.	Case No.: CS-HB-SM-AMC2

***

WRIT OF CERTIORARI GRANTED

NOTICE is hereby given that the petition for writ of certiorari is hereby GRANTED, limited to the following two questions:

1. Whether under Hunt law, payment of an entry fee to participate in Daily Fantasy Horse Racing constitutes gambling?
2. If so, can a state-established loan servicer sue to recover an individual's gambling losses under Hunt's Loss Recovery Act?

Decision below: *HuntLoan Servicing vs. Techmont Park*, 58 Hunt Adv. Op. 18 (Hunt. Ct. App. 2023).

THE COURT OF APPEALS FOR

THE STATE OF HUNT

HUNTLOAN SERVICING,

Petitioner,

vs.

TECHMONT PARK,

Respondents.

Case No.: 24-CIV-123456

OPINION

Appeal from the Hunt District Court

County of Lanier

Argued: September 7, 2023

Decided: November 7, 2023

Before Gower, Bunn, and McCall, Appellate Court Judges.

Gower, Appellate Judge

I. Background and Procedural History

Making its first appearance over 4,000 years ago, horse racing is one of the oldest sporting events in the world. Horse racing found its way to the United States in the 17th century and Techmont Park, located in the state of Hunt, held its first race in 1813. In 1874, Techmont Park hosted the first Techmont Stakes—America's longest continually held sporting event. By the end of the 1800s, Techmont Park established itself as the preeminent horse racing facility in the United States. In its heyday, the event drew 150,000 patrons from all over the country to enjoy live horse racing and bet on the historic race.

Betting at Techmont Park is done through parimutuel wagering. Parimutuel wagering on horse races is defined as an exception to Hunt's general prohibition of gambling. The state of Hunt passed legislation in 1862 making gambling illegal in the state. However, because of the extensive history of parimutuel wagering at Techmont Park and the strong positive impact the annual Techmont Stakes has on the economy of Hunt, the state legislature allowed an exception for parimutuel wagering.

At the onset of the COVID-19 pandemic in March 2020, the Governor of Hunt implemented a stay-at-home order resulting in the closure of bars, restaurants, concert venues, and sports arenas. Techmont Park was included in this closure and was temporarily precluded from hosting patrons at its horse races. The restriction still allowed for the races to take place, but without patrons to purchase tickets to the event, spend money at the concession stand, and place bets on the races, Techmont Park began to struggle financially.

As betting was the primary source of revenue for the track, Techmont Park looked to creative solutions to increase engagement during the closure. Ultimately, the track decided to create Techmont+, a mobile phone application. Techmont+ offers "fantasy horse racing", as well as race live streams and much more. Like other fantasy sports, a user can create an account, pay a fee, and create a "team" of horses running in the live races at the track. Users can play from anywhere in the state of Hunt.

New users must first create an account and link a bank account. Upon creating the account, users can deposit money into their "purse" and begin playing. Users pay $25 per entry. Each entry is good for one race, and users get one horse per race. The entry fee is fixed and does not change, and each player pays the same entry fee per race. There are 10 races each day at Techmont Park and the users' team consists of one horse from each race. The prize money awarded depends on the total number of players per day. The player with the most points at the end of the day wins 40 percent of the total entry fee pool or $5,000 (depending on which is less), the second-place player wins 15 percent of the total entry fee pool or $2,500 (again, depending on which is less), and the third-place player wins 10 percent of the total entry fee pool or $1,000 (depending on which is less). The prizes are the same regardless of the number of points scored. Techmont+ takes a rake of 35% of the pool or the overage of the $8,500 in entry fees.

Players earn points based on how well their horses perform in each race. Based on standard on-track horse betting, players earn points based on if their horse wins, places, or shows for each race. If a player selects for a horse to "win" and the horse comes in first place, the player earns 5 points. If a player selects for a horse to "place" and the horse comes in either first or second, the player earns 3 points. If a player selects for a horse to "show" and the horse comes in first, second, or third, the player earns 1 point. The points allocated to each horse are based on actual results from races at Techmont Park.

The app has two modes of play. Users can ask the app to randomly generate a team of horses or they can read background information about each individual horse to create their own team based on prior statistics of both the horse and the jockey. If a player decides to create their own team, they can see prior results of the horse and the jockey at both Techmont Park and other tracks. This historical information is detailed and includes the race conditions for each prior race including weather, time of day, and condition of the track soil.

Larry Brine is a recent law school graduate from Central Lanier University in Northern Hunt. Faced with over $100,000 in student loan debt, Brine moved back home to his parents' house in Allison, Hunt. Behind on his student loan payments and desperate to move out, Brine turned to gambling to pay down his debt. While scrolling through social media in April 2020, Brine saw an advertisement for Techmont+, downloaded it, and began playing regularly.

Because Brine had never seen a live horse racing event and knew nothing about the sport, he initially opted for the randomly generated team of horses. Brine had some initial success with the app. One day, his roster including Lavender Hayes, Boba Latte, Anti-Hero, Rainy Days and Lundys, Blumin' Onion, Deus Alex Machina, Yash for Cash, Why the Long Chase, Don't Blow Your Lyd, and Tinker Taylor Soldier Spy won him third place for the day, securing a $1,000 prize. Filled with newfound confidence, Brine started researching statistics relating to horse and jockey performance and started creating his own teams based on his knowledge of the sport. This plan proved disastrous and Brine ultimately lost a significant amount of money through the app, in turn missing more student loan payments. Eventually, Brine stopped using the app altogether in October 2020.

Because of the missed payments, Brine's loan servicer, HuntLoan Servicing (HuntLoan), threatened to take him to collections.[1] HuntLoan is a nonprofit government corporation created by the state of Hunt to collect loan payments and provide customer service to borrowers. It receives an administrative fee for each loan serviced. Its Board consists of five members appointed by the Governor. HuntLoan provides annual financial reports to the Hunt Department of Education, detailing its income, expenditures, and assets.

Despite HuntLoan's efforts to collect, Brine proved elusive. Upon learning of Brine's gambling debts, HuntLoan turned to Hunt's Loss Recovery Act (LRA), an over-century-and-a-half-old statute that authorizes a loser in an illegal gambling transaction to recover his losses from the winner. HUNT REV. STAT. § 430.92 However, if the loser (i.e., Brine) does not sue to recover his losses within six months, the statute provides that any other person may bring suit to recover treble damages from the winner. *Id.*

Despite possessing a law degree, Brine failed to sue under the LRA. This opened the door for HuntLoan to step in. After sending Techmont Park a demand letter with no response, HuntLoan sued Techmont Park in state court under the LRA. At the trial court level, the Hunt District Court Judge—following a bench trial—agreed with Techmont Park in part and held: (1) that Techmont+ was an illegal game of chance; and (2) that HuntLoan Servicing was not a person under the LRA. This matter comes before us because of Techmont Parks' and HuntLoan's timely cross-appeal of that decision.

We affirm in part and reverse in part, finding that use of Tehcmont+ amounts to illegal gambling, but that HuntLoan Servicing is a person under Hunt's Loss Recovery Act and thus can bring an action to recover.

II. Discussion

A. Payment of an entry fee to participate in Techmont+ Daily Fantasy Horse Racing contests is illegal gambling.

This is a case of first impression for the Hunt Court of Appeals. We have not yet addressed the situation where an entry fee is paid unconditionally and prizes are guaranteed to be awarded. However,

[1] The state of Hunt was not included in any type of federal student loan repayment pause or hiatus.

neighboring jurisdictions have held that it would be "patently absurd to conclude that . . . the combination of an entry fee and a prize equals gambling." *State v. Am. Holiday Ass'n, Inc.*, 727 P.2d 807, 809 (Ariz. 1986) (*en banc*) (quotations omitted). To hold otherwise means that "spelling bees, . . . golf tournaments, bridge tournaments, local and state rodeos or fair contests, and even . . . essay competitions are all illegal gambling operations." *Id.*

Most states define gambling as an activity which has "(1) the opportunity to win a prize, (2) winning based on chance, and (3) consideration paid to take that chance."[2] If you remove one of these legs, the gambling table cannot stand and the activity will be considered lawful.[3] HUNT REV. STAT. § 12.29 is in alignment with this construction. The first element is clear—Brine only began using Techmont+ because of his ability to win a prize. Though less clear, elements two and three are likewise present.

1. The Techmont+ entry fee constitutes consideration.

Consideration exists for gambling purposes if the participant has suffered a detriment or the promoter has received a benefit. *See generally Dorman v. Publix-Saenger-Sparks Theatres*, 135 Fla. 284, 292, 184 So. 886, 890 (1938). The inconvenience or detriment to the participant can be slight. In *Lucky Calendar Co. v. Cohen*, the court found sufficient consideration when a patron simply had to complete and drop off an entry form. *Lucky Calendar Co. v. Cohen*, 19 N.J. 399, 415 (1955). The court also found that the store received a benefit from increased foot traffic and business in the store. *Id.*

Here, Brine paid $25 for each race he entered Techmont+. Even if this is considered a nominal fee, Brine suffered a detriment, and Techmont Park received a benefit in exchange for Brine's chance to win. There was sufficient consideration to establish a simple (albeit illegal) contract and therefore, the gambling consideration is present.

2. The Techmont+ entry fee is a wager.

Having decided that Brine's entry fee established consideration, we must now determine whether the entry fee constituted a wager. Courts have distinguished a "bet" or "wager" from a "prize" holding "a

[2] Anthony N. Cabot et. al., *Economic Value, Equal Dignity and the Future of Sweepstakes*, 1 UNLV GAMING L. J. 1, 2 (2010); *Morrow v. State*, 511 P.2d 127, 128 (Alaska 1973).
[3] *Id.*

bet is a situation in which the money or prize belongs to the persons posting it, each of whom has a chance to win it. Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant." *State v. Am. Holiday Ass'n, Inc.*, 151 Ariz. 312, 315 (1986) (citing *Toomey v. Penwell*, 76 Mont. 166, 173 (1926)); *see also Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 29 (Nev. 1961) ("The fact that each contestant is required to pay an entrance fee where the entrance fee does not specifically make up the purse or premium contested for does not convert the contest into a wager.") In *Humphrey v. Viacom, Inc.*, the court held that entry fees for fantasy sports leagues are not wagers if "(1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) Defendants do not compete for the prizes." *Humphrey v. Viacom, Inc.,* No. 06 2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007).

Here, prizes offered to contestants of Techmont+'s Daily Fantasy Horse Racing contests are for variable amounts, the second element is not met. The dissent attempts to distort the facts present in this case to satisfy the *Humphrey* test. We remain unconvinced. We do not argue that a prize is not guaranteed to be awarded, just that the prize amount is not certain. Per the rules of Techmont+, the top three players are awarded prizes of either a set amount ($5000, $2500, or $1000) or a percentage of the total entry fee pool depending on which is less. The plain language of the rules indicates that the prize pool is variable depending on the total number of players for each day.

Because the prizes offered are not certain, we need not consider the other two factors. The $25 entry fee is considered a wager.

3. <u>The Techmont+ Daily Fantasy Horse Racing contest is a game of chance, not skill.</u>

Hunt state law defines gambling as "staking or risking something of consideration upon the outcome of a contest of chance for the opportunity to win a prize." HUNT REV. STAT § 12.29. The Hunt legislature did not establish how this Court should balance chance compared with skill or what weight to give to either. Other courts have employed various tests including the predominant purposes test, the material element test, and the any chance test.

The predominant purpose test considers whether the contest requires more chance than skill. *See O'Brien v. Scott*, 89 A.2d 280, 283 (N.J. Super. Ct. Ch. Div. 1952) (explaining that "[t]he test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment"); *see also In re Allen*, 377 P.2d. 280, 281 (Cal. 1962); *see also Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1223 (Kan. Ct. App. 2011). The any chance test is even more strict and the states which have adopted it find that contests are illegal if they involve any chance whatsoever, even the smallest degree of chance. *See State v. Torres*, 831 S.W.2d 903, 905 (Ark. 1992) (stating that under Arkansas law, gambling means "the risking of money, between two or more persons, on a contest or chance of any kind, where one must be loser and the other gainer"); *see also ParkerGordon Importing Co. v. Benakis*, 238 N.W. 611, 613 (Iowa 1931). Striking an important balance between the predominant purpose and the any chance test, the material element test considers the skill-to-chance ratio, but also "whether the contest is entered into among novices or experts [and] whether the amount of information provided to the contestants negates the skill-based advantages that true experts may have obtained." *See* Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports*, 2016 ILL L. REV. 117, 134 (2016); *see also Ellison v. Lavin*, 71 N.E. 753, 755–56 (N.Y. 1904); *See, e.g., Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984) (explaining "chance must be a material element in determining the outcome of a gambling game. It need not be the dominant element").

This court has not previously adopted any of these three tests. We find the material element test to be the most appropriate. Techmont+ offers two modes of play to patrons. If a user decides to use the randomly generated team, they have zero control over their roster beyond the initial choice to randomize the team. It is clear that when played in random mode, the skill of the player is not dominant or predominant over other factors.

A more difficult question before this court is whether the calculus changes when the player chooses their own lineup of horses. The dissent attempts to argue that a player's skill predominates over the other

factors present in horse racing. This framing of the argument is unconvincing. Though users of Techmont+ have at their disposal historical data, weather information, and ground conditions, the sport of horse racing relies on a jockey controlling a 1200-pound animal. Weather reports can be wrong, and a bet placed based on a forecast of sunny conditions can quickly turn sour at the sight of rain.

Once a player selects their lineup for their simulated team of horses, the player has no ability to control how well the horse and jockey duo perform. The actual horse and jockey in the actual race control their own performance. After selecting their team, all the player has left to do is sit and wait for the post times at Techmont Park. A player could choose their team based on the horse's clever name or based on their coat pattern or silk colors. Given that the players' own skills do not determine the outcome of the simulated races, there could be as little as zero skill involved.

Because we find that the $25 entry fee is a wager and because there is little to no skill involved, the Techmont+ Daily Fantasy Horse Racing contest constitutes illegal gambling.

B. HuntLoan can recover Brine's losses from Techmont Park under Hunt's Loss Recovery Act.

Having determined that Techmont+ is illegal gambling, the court must now address whether HuntLoan can recover the losses incurred by Brine under the Loss Recovery Act. To do so, we must answer two questions. First, is Techmont Park a "winner" under the statute? Second, does HuntLoan count as a "person" as contemplated by the LRA? We answer both questions in the affirmative. Techmont Park is a winner because it takes a "rake" or percentage of the pot, receiving directly or indirectly some of the money lost by the gamblers. *Commonwealth ex rel. Brown v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 807 (Ky. 2020). HuntLoan is a person under the LRA because no tool of statutory interpretation leads us to the conclusion that the Hunt legislature meant "person" to apply only to natural persons and HuntLoan is an official state instrumentality.

1. Techmont Park is a "winner" in an illegal gambling transaction, thus exposing it to liability under the Loss Recovery Act.

It is axiomatic that "the house always wins." *United States v. Hill*, 818 F.3d 289, 291 (7th Cir. 2016). In fact, casinos, horse tracks, and online gaming sites would not be able to exist if they were not

"winners." *Stars Interactive Holdings*, 617 S.W.3d at 806. Over 130 years ago, the Kentucky Supreme Court recognized this truth in holding that the owner and operator of a poker room was a winner under Kentucky's LRA:

> We do not understand that the winner, in the sense of said statutes, must be one of the players with cards in his hands; but if he is to receive a per cent of the winnings by the actual player, he is, in the sense of the statute, a winner. According to an arrangement with the players and himself, he is to receive a part of the winnings as his profits. Why should he not be regarded as a winner in the sense of the statute?

Triplett v. Seelbach, 14 S.W. 948, 949 (Ky. 1890).

In *White v. Wilson's Adm'rs*, 38 S.W. 495 (Ky. 1897), the Kentucky Supreme Court confronted a scenario where a manager acted in concert with a gambler. The court, in holding that the losing gambler could recover from the manager, emphasized that the manager was a "joint wrongdoer" with the winning gamblers and thus had an interest in the winnings. *Id*. at 496–97. Here, Techmont Park is clearly a joint wrongdoer with the winning gamblers, as we have already affirmed the District Court's holding that Techmont+ constitutes illegal gambling. While there is nothing in the record to suggest that Techmont Park acts "in concert" with any of the gamblers, that is immaterial. What matters is that Techmont Park retains a portion of the pot, i.e., a percentage of the winnings of the winning gamblers. Stated differently, Techmont Park takes a portion of the money lost by Huntians in illegal gambling. This makes Techmont Park a winner under the LRA.

Arguing that Techmont Park is not a winner, the dissent cites dicta from *Humphrey* implying that operators of fantasy sports leagues are merely parties to an enforceable contract. *Humphrey*, 2007 WL 179764 at *9. This argument is irrelevant to our analysis for two reasons. First, because we have already determined Techmont+ is illegal gambling, any contract between Techmont Park and the individual gamblers is unenforceable as a matter of law. Illegal contracts are void and cannot be enforced, and a party to an illegal contract cannot ask the court to have its illegal objects carried out, as the law will not aid either party to an illegal agreement. *Zollinger v. Carroll*, 49 P.3d 402, 405 (Idaho 2002). Second, the *Humphrey* court was analyzing LRAs that required the winner to "be a participant in the card, dice, or other game at issue." *Humphrey*, 2007 WL 1797648 at *9. There is no such requirement in Hunt's LRA.

Therefore, we choose to follow the rule from over a century of Kentucky jurisprudence and hold that Techmont Park is a winner under the LRA.

2. HuntLoan is a person for purposes of the Loss Recovery Act because it is an official instrumentality of the state of Hunt.

The text of HUNT REV. STAT. § 430.92 refers to "any other person" in describing who may recover gambling losses from the winner in a situation where the loser does not bring an action to recover his losses within six months of the loss. We must now consider whether "person" refers merely to natural persons or whether the Hunt Legislature intended for a wider definition of "person" to apply. If we determine that the legislature did intend for "person" to apply to bodies-politic like the state of Hunt, we must then decide whether HuntLoan is an official instrumentality of the state of Hunt. In other words, can HuntLoan fairly say that it stands in the shoes of the State and therefore bring an action to recover gambling losses on behalf of the state?

Kentucky is the only jurisdiction to analyze the question of whether the use of the term "person" in the context of a LRA applies to a body-politic, like a state or commonwealth. *Stars Interactive Holdings*, 617 S.W.3d at 798–803. The Kentucky Supreme Court's analysis is particularly helpful because, like Hunt's, Kentucky's LRA includes the precise language "any other person" in describing which third parties can sue to recover a loser's gambling losses once the statutory period for first-party recovery has passed. KY. REV. STAT. § 372.040. The Kentucky Supreme Court was aided in its task by another statute, KY. REV. STAT. § 446.010(33), which states "unless the context requires otherwise ... 'person' may extend and be applied to bodies-politic…." The court reasoned that the LRA was not a situation where the context required a reading other than the one described in the statute and concluded that the legislature meant for "person" to encompass the Commonwealth of Kentucky in addition to natural persons. *Stars Interactive Holdings*, 617 S.W.3d at 798. This meant that the Commonwealth had statutory standing to bring suit to recover a gambler's losses to an illegal online poker room. *Id*. at 805.

Although the state of Hunt does not have a statute like § 446.010(33), our analysis of the term "person" remains straightforward. The fundamental role of statutory interpretation is to ascertain and

effectuate legislative intent. *League of Women Voters v. Renfro,* 290 So.2d 167, 169 (Ala. 1974). When statutory language is clear and unambiguous, the court must recognize the statute's plain meaning and not employ any further methods of statutory interpretation. *Westpark Pres. Homeowners Ass'n, Inc. v. Pulte Home Corp.*, 365 So. 3d 391, 395 (Fla. Dist. Ct. App. 2023). The court must presume that the legislature says what it means and means what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). When the words of a statute are unambiguous, judicial inquiry is complete. *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Like the Kentucky Supreme Court in *Stars Interactive Holdings*, we find the Hunt Legislature's use of the word "any" to be unambiguous evidence that it intended a broad reading of the word "person." "Any" means "one or some, no matter which." *Any*, AMERICAN HERITAGE DICTIONARY (5th ed. 2018). Applying this definition, if it does "no[t] matter which" persons are included, then it follows that a state falls within the ambit of "any other person." When interpreting a statute, a court must attempt to give effect to every word and phrase, and may not omit or gloss over verbiage. *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 36 (Tex. 2016) (citing *Abrams v. Jones,* 35 S.W.3d 620, 625 (Tex. 2000)). Giving effect to the Hunt Legislature's use of "any," it becomes clear that it intended for the state of Hunt to have standing to Hunt under the LRA.

While the *state* of Hunt clearly has standing to bring action under the LRA, the issue of whether an entity like HuntLoan has standing must still be resolved. This question turns on whether HuntLoan is an official state instrumentality, i.e., whether it "stands in the shoes of the State." *State of Ark. v. State of Tex.*, 346 U.S. 368, 370 (1953). The Supreme Court first articulated the idea of an official state instrumentality in *State of Arkansas. v. State of Texas*. In assessing whether it had original jurisdiction over the case, the Court had to determine whether the University of Arkansas was an official state instrumentality that represented the State of Arkansas. *Id*. at 370. Finding that the University of Arkansas was an official state instrumentality, the Court noted that the University was governed by a Board of Trustees appointed by the Governor with consent of the Senate. *Id*. Although the Board of Trustees had the power to issue bonds which did not pledge credit to the State, it still had to report all of its expenditures

to the legislature. *Id*. Most importantly, the Court emphasized that the Arkansas Supreme Court referred to the University as "an instrument of the state in the performance of a governmental work" and a suit against the University is therefore a suit against the State. *Id*.

We find that a loan servicer established by a state, such as HuntLoan, is sufficiently similar to a public university to be considered an official state instrumentality. Like the University of Arkansas, HuntLoan has a Board that is appointed by the Governor. Like the University of Arkansas, HuntLoan must report its expenditures to the state legislature. And like the University of Arkansas, HuntLoan is an instrument of the state performing governmental work—collecting on government-insured loans used by students at public universities. Under this analysis, we think it clear that HuntLoan stands in the shoes of the state of Hunt. An injury to HuntLoan is an injury to the state of Hunt. Therefore, HuntLoan has standing to bring suit under the LRA and demand treble damages from Techmont Park.

III. Conclusion

We affirm in part and reverse in part.

Bunn, J., dissenting:

A. Techmont+ is a game of skill, not chance.

I am unpersuaded that the entry fee to participate in Techmont+ is a wager.

The majority declares with little reasoning or support that the appropriate test for this Court to apply is the material element test. However, this test is too subjective. The majority fails to define "materiality" and instead focuses on the other contributing factors that might lead to a certain horse's success or failure on any particular day. This Court should instead adopt the predominant purpose test as it provides a workable framework providing more consistency in its interpretation. Adopting the predominant purpose test puts this Court in alignment with the majority of states.

Under the predominant purpose test, "contests in which the outcome is mathematically more likely to be determined by skill than chance are not considered gambling." *Dew-Becker v. Wu*, 2020 IL 124472, ¶ 22, 178 N.E.3d 1034, 1039 (2020). As other courts have established "[t]he test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating

element that determines the result of the game, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment." *O'Brien v. Scott*, 20 N.J.Super. 132, 89 A.2d 280, 283 (N.J. Super. Ct. Ch. Div. 1952).

In applying this test to the facts before this Court, skill is the predominant factor over chance for Techmont+ contests. Comparing daily fantasy horse racing to traditional games of chance highlights the absurdity of the majority's decision. For example, in poker, players are presented with randomly drawn hands of cards. A professional poker player may have more skill in their ability to bluff or knowledge of when to bet and when to fold. But at the end of the day, "[n]o amount of skill can change a deuce into an ace." *Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 99, 643 S.E.2d 626, 630 (2007). Conversely, a game like golf is predominated by skill. In *Joker Club*, the court provided dicta that a novice golf player might occasionally get lucky enough to beat Tiger Woods on a single hole, but over the span of an entire round of 18 holes, skill would prevail and Tiger Woods would win. *Id.*

The same is true here. Techmont+ has made a considerable amount of data and information available to players. This information, in the hands of a novice, might allow them to beat an expert in one race, but the expert, armed with the same robust information, would prevail over the span of an entire days' worth of racing. Like golf, bowling, or chess, Techmont+ "players are presented with an equal challenge, with each determining his fortune by his own skill." *Id.* This is also in alignment with expert opinions on other daily fantasy sports games. *Dew-Becker*, 2020 IL 124472 at ¶ 26 ("[I]t has been shown that skill is always the dominant factor in head-to-head DFS contests involving NBA games.") (internal quotations omitted).

Even applying the material element test, the result is the same. The majority did not engage in the requisite level of analysis to sufficiently determine that the level of chance present in Techmont+ contests is considered material in the game. If they had, they would find that though chance is present (a horse may slip coming out of the gate or there might be a freak rainstorm altering the ground conditions unexpectedly) an expert in horse racing would account for these variables in their betting. A true expert is able to rely on and lean upon their years of experience and skill compared to that of a novice. Because

there remains considerable opportunity for skill to overcome chance in daily fantasy horse racing, the modicum of chance present is not material.

Thus, under either the material element test or the appropriate predominant purpose test, Techmont+'s contest for daily fantasy horse racing is a game of skill and should not be deemed illegal gambling.

B. HuntLoan does not have standing to sue under the Loss Recovery Act.

I am also not persuaded that Techmont Park is a winner for purposes of the Loss Recovery Act nor do I believe that HuntLoan is an official state instrumentality.

Despite the majority's assertions to the contrary, merely retaining a percentage of the proceeds of a gambling transaction does not make one a winner. Techmont Park does not risk anything by holding daily fantasy horse races. Regardless of the outcome, Techmont Park retains at least thirty-five percent of the pool of money wagered. Because there can be no possibility of being a winner without some prospect of being a loser, the majority's conclusion that Techmont Park is a "winner" has no basis in law. *Humphrey v. Viacom, Inc.*, No. 06 2768 DMC, 2007 WL 1797648, at *9 (D.N.J. June 20, 2007).

Techmont Park, through Techmont+, operates daily fantasy horse races in the same manner as other daily fantasy sports services. Techmont Park administers the races and provides statistics on the participating horses in exchange for entry fees paid for participation in the fantasy races. Techmont Park does not place bets at any time during the transaction. After the races conclude, Techmont Park awards prizes (in predetermined amounts) to the most successful players. It simply cannot be said that respondents "play" in the fantasy horse races or have any interest in the outcome of these races. Again, there is no support for the proposition that Techmont Park is a "winner" for purposes of liability under the LRA.

States that have LRAs similar to Hunt's clearly define "winner." For example, Mass. Gen. Law ch. 137 § 1 defines a winner as one "so playing" at "cards, dice, or other game, or by betting on the sides or hands of those gaming." D.C. Code § 16-1702 and S.C. Code § 32-1-10 employ almost identical language. These states have made clear that a winner is one who actually bets on some type of game or

contest. Because Techmont Park does not risk anything by "playing" or placing bets on the races it holds, it cannot be called a winner under Hunt's LRA.

I also disagree with the majority's assertion that the Hunt Legislature meant "person" to apply to bodies-politic when enacting § 430.92. Unlike Kentucky, Hunt does not have a statute that expressly tells courts how to define "person." When, as in our case, a word lacks an express statutory definition, the word should be construed according to its common and approved usage. *State v. Diedrich*, 410 N.W.2d 20, 23 (Minn. Ct. App. 1987). Applying this tool of statutory interpretation to the case at bar, the definition of person is clear. A "person" is a natural person. *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019). The mere fact that the word "any" precedes "person" does not command the court to depart from the common and accepted usage of the word "person."

Other statutory schema are explicit in excluding the state as a person. Many courts have held that the state is not a person that can be sued under 42 U.S.C. § 1983. *See*, *e.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Omosegbon v. Wells,* 335 F.3d 668, 673 (7th Cir. 2003); *Hamilton v. Knight,* 1:17-CV-04714-TWP-TAB, 2018 WL 928287, at *4 (S.D. Ind. Feb. 16, 2018). These cases all held that § 1983 does not clearly and specifically waive states' sovereign immunity, so the context in those cases required a determination that the word "state" not be interpreted as "person" for purposes of the statute. Although the state was the putative defendant in those cases, there is no reason to change the analysis when the state (or an "instrumentality" of it) is the plaintiff.

But even if the majority were correct in deciding that the legislature meant to include the state of Hunt in its definition of "person," a party to a lawsuit must still have some real, justiciable interest in the subject matter of the suit. *Werths v. Dir., Div. of Child Support Enf't*, 95 S.W.3d 136, 143 (Mo. Ct. App. 2003) (citing *Garrison v. Schmicke,* 193 S.W.2d 614, 615 (Mo. 1946)). This is known as standing. Standing requires that the plaintiff has suffered a "concrete and particularized" injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Stated differently, the plaintiff must have some personal stake in the outcome of the case. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Taking as true the majority's conclusion that HuntLoan "stands in the shoes" of the state of Hunt, we must assess what personal stake HuntLoan, and by extension, the state of Hunt has in collecting an individual's gambling debts. One might argue that by collecting treble the amount of Brine's losses the state could use the money for higher education—paying professors, financing campus construction, etc. Very well. But to argue that the state of Hunt is injured if it does not have the right to use its nonprofit loan servicer to collect personal gambling losses to finance higher education is just too attenuated to count as a "concrete and particularized" injury. The majority's claim that an injury to HuntLoan is an injury to the state of Hunt, although pithy, is false.

I am also compelled to remind my colleagues that when interpreting statutes, courts should do everything possible to avoid a construction that leads to an absurd result. *See*, *e.g.*, *Thomas v. Peterson*, 948 N.W. 698, 705 (Neb. 2020). Courts should not read language literally if that would lead to an absurd result or a result completely at odds with the overall statutory scheme. *State v. Crawley*, 901 A.2d 924, 931 (N.J. 2006) (citations omitted).

Reading § 430.92 to give the broadest possible effect to the words "any other person" would lead to people engaging in illegal gambling knowing that at worst they could recover their losses and at best enlist a family member or friend to sue the winner to recover triple their losses. While I certainly understand the state of Hunt's interest in deterring illegal gambling as rationale for enacting § 430.92, rewarding those who engage in illegal gambling does little to accomplish this goal. Nor should the government (or its "instrumentalities") be permitted to sue horse tracks and the like as an end-run around legitimate debt collection. I have no doubt that this is far from what the Hunt Legislature imagined in 1864.

For these reasons, I respectfully dissent.

Appendix

HUNT REV. STAT. § 430.92 (1864)

Any person who by illegal gambling loses a sum of fifty dollars or more may recover it, or its value, from the winner by civil action against the winner brought within six months of the date of the loss. If the loser does not within six months bring a civil action to recover his losses, any other person may sue the winner, and recover from the winner treble the value of the money or thing lost.

HUNT REV. STAT. § 12.29 (1862)

(1) "Gambling," as used in this chapter, means staking or risking something of value upon the outcome of a contest of chance for the opportunity to win a prize.

(2) “Skill” is the knowledge, dexterity, or any other ability of natural persons;

In the interest of uniformity, whether a particular activity constitutes “gambling” is subject to de novo review.